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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

The Honorable Jean H. Toal, Circuit Court Judge

Case No. 2019-002126

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JAN 13 2020

SC Court of Appeals

Jerry Howard Crawford, individually and as Personal Representative of the Estate of Evelyn Kay Crawford, Respondent

v.

Celanese Corporation, Aurora Pump Company; Carrier Corporation, CNA Holdings, LLC, f/k/a Hoechst Celanese Corporation; Covil Corporation; Crane Co., Daniel International Corporation f/k/a Daniel Construction Company, Inc.; Flowserve Corporation, individually and as successor-in-interest to Anchor/Darling Valve Company, and individually as successor-in-interest to Durco Pumps; Flowserve, US Inc.; Fluor Constructors International, f/k/a Fluor Corporation; Fluor Constructors, International, Inc.; Fluor Daniel Services Corporation, Fluor Enterprises, Inc.; Ford Motor Company; Genuine Parts Company, d/b/a Rayloc (a/k/a NAPA); The Goodyear Tire & Rubber Company; Goulds Pumps, Inc.; Grinnell, LLC f/k/a Grinnell Corp., f/k/a ITT Grinnell Corp.; Honeywell International, Inc., f/k/a Allied-Products Liability Signal, Inc., sued as successor-in-interest to Bendix Corporation; Ingersoll-Rand Company; John Crane, Inc., Metropolitan Life Insurance Company, a wholly owned subsidiary of Metlife Inc.; National Automotive Parts Association, (NAPA); Parker-Hannifin Corporation, Pneumo Abex, LLC, successor-in-interest to Abex Corporation; Spirax Sarco, Inc.; SPX Cooling Technologies, Inc., individually and as successor-in-interest to Marley Cooling Towers, Co.; Standard Motor Products, Inc.; sued as successor-in-interest to EIS Automotive, United States Fidelity & Guaranty Company; and The William Powell Company, Defendants,

Of Which, Covil Corporation is the Appellant.

MOTION TO DISMISS NOTICE OF APPEAL

Theile B. McVey (SC Bar 16682)
tmcvey@kassellaw.com
John D. Kassel (SC Bar 3286)
jkassel@kassellaw.com
KASSEL McVEY ATTORNEYS AT LAW
1330 Laure Street
Post Office Box 1476
Columbia, South Carolina 29202-1476
803-256-4242
803-256-1952 (Facsimile)
Other email: emoultrie@kassellaw.com

Johnathan M. Holder (SC Bar 77935)
Ka'Leya Harkin (*Pro hac vice*)
Dean Omar Branham Shirley LLP
302 N. Market Street; Suite 300
Dallas, Texas 75202

Attorneys for Respondents

Ashley K. Bratwaite (S.C. Bar 76952)
ELLIS & WINTERS LLP
4131 Parklake Avenue, Suite 400
Raleigh, NC 27612
Telephone: (919) 573-1297
ashley.brathwaite@elliswinters.com

Attorneys for Covil Corporation

This motion is made pursuant to Rule 240 of the South Carolina Appellate Court Rules, which governs motions and petitions generally. Respondent Jerry Howard Crawford, individually, and as Personal Representative of the Estate of Evelyn Kay Crawford (“Respondent”) respectfully move the Court of Appeals of South Carolina to dismiss the instant appeal of Appellant Covil Corporation on the grounds that the order that it seeks to appeal is not a final and appealable order from the Court of Common Pleas.

Covil’s instant appeal involves an interlocutory order that is not immediately appealable. Under the well-settled law of this state, Judge Toal’s Order granting Respondent a relief from judgment pursuant to SCRCP 60(b)(2) and 60(b)(3), given that the grant of a new trial was based upon questions of fact or upon mixed questions of law and fact, is not immediately appealable. As such, Covil’s instant appeal should be dismissed. The grounds for this motion are more fully set forth herein.

BACKGROUND AND PROCEDURAL POSTURE

Jerry Crawford was diagnosed with mesothelioma, a universally fatal disease caused by exposure to asbestos, on or about November of 2017. Mr. Crawford alleged that he was exposed to asbestos, including asbestos-containing thermal insulation supplied by Appellant Covil Corporation, while working at the Hoechst Celanese facility in Spartanburg, South Carolina from 1970 to 1974. Against Covil, Mr. Crawford had three discrete causes of action: negligence, strict liability, and breach of implied warranty.

At trial, Covil did not deny that it generally sold and installed asbestos insulation but maintained that it lost its sales invoices in a fire in 1973. In addition, Covil’s corporate representative, Robert Glenn, testified that he had reviewed available records and found no documents reflecting that Covil supplied to Celanese from 1970 to 1974 or did work at that facility

during that time frame, or that Covil and Daniel Construction worked together between 1970 and 1974. Despite the overwhelming evidence that Jerry Crawford was exposed to asbestos insulation supplied and installed by Covil when he worked at the Celanese plant in Spartanburg in the 1970s, that this exposure was a substantial factor in causing his mesothelioma, and that Covil had knowingly sold asbestos products without a warning, the jury returned a defense verdict.

Respondent filed a post-trial motion, requesting a New Trial Absolute pursuant to Rules 50 and 59(e) of the South Carolina Rules of Civil Procedure or, in the alternative, a New Trial pursuant to the Thirteenth Juror Doctrine. After considering Respondent's motion and Covil's response thereto, Circuit Court Judge Jean H. Toal entered an Order granting Respondent a new trial pursuant to the Thirteenth Juror Doctrine and denying Respondent's request for a new trial pursuant to South Carolina Rules of Civil Procedure 50 and 59. As a result, Covil filed its initial Notice of Appeal, directed at the trial court's grant of a new trial pursuant to the Thirteenth Juror Doctrine, on October 31, 2018. The issues raised in Covil's initial appeal to this Court have been fully briefed and the appeal is pending before this Court.¹

Soon after briefing as to Covil's initial appeal was completed, Respondent sought and received permission from this Court to file a SCRCP 60(b) motion in the circuit court based on newly discovered evidence. Respondent filed the subject Rule 60(b) motion, requesting relief from the circuit court's order granting a new trial pursuant to the Thirteenth Juror Doctrine and, instead, sought an Order granting a new trial pursuant to SCRCP 59. On November 25, 2019, after reviewing Respondent's motion for a new trial pursuant to Rule 60(b)(2) and 60(b)(3), Covil's response thereto, and arguments from the parties, Judge Toal entered an Order granting

¹ Plaintiff is separately moving to dismiss Covil's original appeal on grounds of mootness and lack of subject matter jurisdiction.

Respondent a new trial under Rule 60(b)(2) and 60(b)(3) and finding that Covil's concealment of a data tape, potentially containing documents relevant to Mr. Crawford's case against Covil and discovered nearly a year after the trial in this matter, constituted fraud against the trial court and Respondent and was "an additional ground for relief from the jury's verdict and granting a new trial."

Covil's second Notice of Appeal, filed on December 31, 2019, stems from Judge Toal's November 25, 2019 Order.

ARGUMENT

Covil's attempt to appeal to this Court is improper because Judge Toal's November 25, 2019 Order granting Respondent a new trial pursuant to SCRCF 60 is not immediately appealable. Appeals from the Circuit Court are governed by South Carolina Appellate Court Rule 201 which is clear that "[a]ppel[s] may be taken . . . from any final judgment, appealable order or decision." SCACR 201(a). Thus, only "final" orders are appealable. *Brunson v. American Koyo Bearings*, 367 S.C. 161, 165, 623 S.E.2d 870, 872 (Ct. App. 2005) (holding that South Carolina adheres to the final judgment rule, which provides that, with certain exceptions, an appeal lies only from a final judgment) *abrogated in part on other grounds by Hilton v. Flakeboard America Limited*, 418 S.C. 245, 791 S.C.2d 719 (2016)); *Mid-State Distribs., Inc. v. Century Imps., Inc.*, 310 S.C. 330, 335, 426 S.E.2d 777, 780 (1993) (explaining that an order is interlocutory if some further act must be done by the court prior to the determination of the rights of the parties).

Judge Toal's November 25, 2019 Order is not a final order as contemplated by SCACR 201. The Supreme Court of South Carolina has long held that "an order granting or refusing a new trial when based solely on an error of law is subject to review by [appellate courts], but when the order is based upon questions of fact, or upon both questions of law and fact, it is **not** appealable."

Robinson v. Fuller, 249 S.C. 342, 344, 154 S.E.2d 431 (1967). *See also, Rowe v. Frick*, 250 S.C. 499, 159 S.E.2d 47 (1968); *Sellers v. Sears Roebuck & Co.*, 252 S.C. 271, 166 S.E.2d 1 (1969); *Taylor v. Devore*, 253 S.C. 393, 171 S.E.2d 158 (1969).

It is clear from Judge Toal's Order that the decision to grant Respondent a new trial was not based solely on an error of law. In fact, "error of law" was not a ground cited by Respondent in its 60(b) motion. In granting Respondent a new trial pursuant to Rule 60, Judge Toal, as noted in the Order which is the subject of Covil's instant appeal, cited to the evidence presented at trial regarding Covil's provision of asbestos-containing insulation to Mr. Crawford's work site. Also, as made clear in the Order, the reason that the circuit court granted Respondent's request for a new trial was because of the discovery of new evidence—a data tape which held potentially relevant information. The court analyzed the evidence that was presented at the first trial in this matter, the absence of the data tape from the first trial, and the potential effect that the information on the data tape could have had on the presentation of Respondent's case against Covil. The court's Order granting Respondent a new trial was based **solely** on the discovery of new evidence, the facts surrounding the discovery of that new evidence, and the potential effect that evidence could have had on the outcome of the first trial.

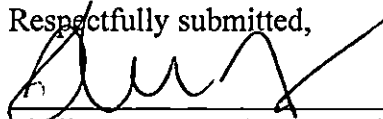
The Order entered on November 25, 2019 was not an appealable order because the decision to grant Respondent's request for a new trial was not based solely on an error of law.

CONCLUSION

For the above reasons, Respondent respectfully requests that this Court dismiss Appellant Covil Corporation's Notice of Appeal. The circuit court's Order granting Respondent a new trial pursuant to SCRCP 60(b)(2) and 60(b)(3) is not immediately appealable as the Order was not

based solely on an error of law. Consequently, Respondent requests that this matter be remanded to the circuit court for further proceedings.

Respectfully submitted,



Theile B. McVey (SC Bar 16682)

tmcvey@kassellaw.com

KASSEL MCVEY, ATTORNEYS AT LAW

1330 Laurel Street

Post Office Box 1476

Columbia, South Carolina 29202

803-256-4242

803-256-1952(Facsimile)

Other email: emoultrie@kassellaw.com

Aaron Chapman

DEAN OMAR BRANHAM, LLP

302 N. Market Street, Suite 300

Dallas, Texas 75202

214-722-5990

214-722-5991 (Facsimile)

COUNSEL FOR RESPONDENT

January 13, 2020

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM SPARTANBURG 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. 2019-002126
Case No. 2017-CP-42-04429

Jerry Howard Crawford, Individually and as Personal Representative of the Estate of Evelyn Kay Crawford, Respondent,

v.

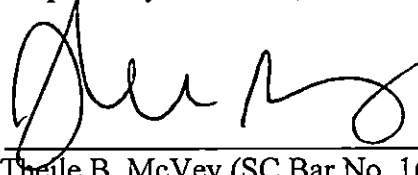
Celanese Corporation; Aurora Pump Company; Carrier Corporation; CAN Holdings LLC, f/k/a Celanese Corporation f/k/a Hoechst Celanese Corporation; Covil Corporation; Crane Co.; Daniel International Corporation f/k/a Daniel Construction Company, Inc.; Flowserve Corporation, individually and as successor-in-interest to Anchor/Darling Valve Company and individually and as successor-in-interest to Durco Pumps; Flowserve US Inc.; Fluor Constructors International, f/k/a Fluor Corporation; Fluor Constructors International, Inc.; Fluor Daniel Services Corporation; Fluor Enterprises, Inc.; Ford Motor Company; Genuine Parts Company, d/b/a Rayloc (a/k/a NAPA); The Goodyear Tire & Rubber Company; Goulds Pumps, Inc.; Grinnell, LLC, f/k/a Grinnell Corp, f/k/a ITT Grinnell Corp.; Honeywell International, Inc., f/k/a Allied-Products Liability Signal, Inc., sued as successor-in-interest to Bendix Corporation; Ingersoll Rand Company; John Crane, Inc.; Metropolitan Life Insurance Company, a wholly-owned subsidiary of Metlife Inc.; National Automotive Parts Association (NAPA); Parker-Hannifin Corporation; Pneumo Abex, LLC, successor in interest to Abex Corporation; Spirax Sarco, Inc.; SPX Cooling Technologies, Inc., individually and successor in interest to Marley Cooling Towers Co.; Standard Motor Products, Inc., sued as successor-in-interest to EIS Automotive; United States Fidelity & Guaranty Company; The William Powell Company, Defendants,

Of Which Covil Corporation is the Appellant.

PROOF OF SERVICE

I certify that I have served Respondents' Motion to Dismiss Civil Appeal (2019-002126) on Appellants by depositing a true and correct copy of it in the United States Mail, postage prepaid, on January 13, 2020, addressed to its attorneys of record, Ashley K. Brathwaite of Ellis & Winters, LLP; 4131 Parklake Avenue; Suite 400; Raleigh, North Carolina 27612.

Respectfully submitted,



Theile B. McVey (SC Bar No. 16682)

tmcvey@kassellaw.com

John D. Kassel (SC Bar No. 03286)

jkassel@kassellaw.com

KASSEL MCVEY, ATTORNEYS AT LAW

1330 Laurel Street

P.O. Box 1476

Columbia, South Carolina 29202-1476

803-256-4242

803-256-1952 (Facsimile)

Other email: emoultrie@kassellaw.com

Jonathan Holder (SC Bar No. 77935)

jholder@dobslegal.com

Ka'Leya Hardin (pending *pro hac vice*)

khardin@dobslegal.com

DEAN OMAR BRANHAM SHIRLEY, LLP

302 N. Market Street, Suite 300

Dallas, Texas 75202

Telephone: (214) 722-5990

Attorneys for Respondents

January 13, 2020

JOHN D. KASSEL
ATTORNEY AT LAW
JKASSEL@KASSELLAW.COM

KASSEL  McVEY

1330 LAUREL STREET
POST OFFICE BOX 1476
COLUMBIA, SC 29202

THEILE B. McVEY
ATTORNEY AT LAW
TMCVEY@KASSELLAW.COM

TEL. 803-256-4242
FAX 803-256-1952
WWW.KASSELLAW.COM

JAMIE R. RUTKOSKI
ATTORNEY AT LAW
JRUTKOSKI@KASSELLAW.COM

January 13, 2020

The Honorable Jenny A. Kitchings
South Carolina Court of Appeals
1015 Sumter Street
Post Office Box 11629
Columbia, South Carolina 29211-1629

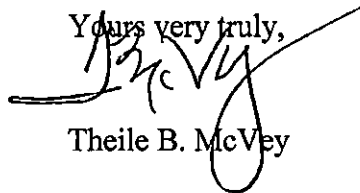
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SC Court of Appeals

Re: *Jerry Howard Crawford, etc., et al. v. Celanese Corporation, et al.; of whom Covil Corporation is the Appellant.*
Appellate Case No.: 2019-002126

Dear Ms. Kitchings:

Enclosed herewith please find the original and seven (7) copies of Respondents' Motion to Dismiss Notice of Appeal of Covil Corporation in connection with the above-entitled matter, along with our Proof of Service of same. Please file the original and appropriate number of copies and a clocked copy me to me via the courier delivering this letter.

My firm's check in the amount of \$50.00 is enclosed to cover the required filing fee. Thank you for your consideration of this request. By copy of this letter, I am serving a copy of the enclosed on counsel of the appellant.

Yours very truly,

Theile B. McVey

TBM:ecm

Enclosures

cc: Ashley M. Braithwaite, Esquire (w/enclosures)
ACOR as appropriate