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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

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SC Court of Appeals

Case No. 2018-001965

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 APPEAL

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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 moves this Court to dismiss Covil’s appeal. The appeal should be dismissed as the issues raised by Covil have been made moot as a result of the circuit court’s order of November 25, 2019, granting a new trial pursuant to South Carolina Rule of Civil Procedure 60(b)(2) and 60(b)(3).¹ Given this subsequent circuit court order, the issues raised in the appeal are now moot and the appeal should be dismissed.

Additionally, the appeal should be dismissed on the grounds that the circuit court’s order of October 22, 2018 that Covil seeks to appeal is not a final and appealable order from the Court of Common Pleas. Under the well-settled law of this state, the circuit court’s order granting Respondent a new trial pursuant to the Thirteenth Juror Doctrine, given that the grant of a new trial was based on the circuit court’s discretion and upon questions of fact or upon mixed questions of law and fact, is not immediately appealable.

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.

¹ Covil has filed a second Notice of Appeal, purportedly to challenge the circuit court’s grant of a new trial pursuant to Rule 60(b)(2) and 60(b)(3). Respondent is also moving, in a separate motion, to have that appeal dismissed as improper.

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. Dissatisfied, Covil appealed on October 31, 2018. The issues raised in this appeal have been fully briefed and the appeal is pending before this Court.

In granting Respondent a new trial pursuant to the Thirteenth Juror Doctrine, Judge Toal considered and analyzed mixed questions of law and fact by weighing the evidence that Respondent presented to the jury and the circuit court in support of his claim against Covil. Judge Toal, using her discretion, found that the jury's verdict in Covil's favor was contrary to the fair preponderance of the evidence.

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 Respondent a new trial under Rule 60(b)(2) and 60(b)(3), 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 constituted "an additional ground for relief from the jury's verdict and granting a new trial."

Judge Toal's November 25, 2019 Order granting Respondent a new trial effectively relieved Respondent of the burden of abiding by the October 22, 2018 Order denying Respondent's motion for a new trial pursuant to SCRCP 59.

ARGUMENT

1. The issues raised by Covil in this appeal are moot.

The issues that Covil has raised in this appeal have been rendered moot by the circuit court's November 25, 2019 Order granting Respondent a new trial pursuant to SCRCP 60(b)(2) and 60(b)(3), relieving Respondent of the judgment entered on October 22, 2018. As such, Covil's instant appeal as to the grant of a new trial based on the Thirteenth Juror Doctrine must be dismissed.

The Supreme Court of South Carolina has recognized that before any action can be maintained, there must exist a justiciable controversy. *Midland Guardian Co. v. Thacker*, 280 S.C. 563, 314 S.E.2d 26 (Ct.App.), cert. denied, (1984). A justiciable controversy is a real and substantial controversy which is appropriate for judicial determination, as distinguished from a dispute or difference of a contingent, hypothetical or abstract character. *Guimarin & Doan, Inc. v. Georgetown Textile & Mfg. Co.*, 249 S.C. 561, 155 S.E.2d 618 (1967). This Court will not pass on moot and academic questions or make an adjudication where there remains no actual controversy. *Jones v. Dillon–Marion Human Resources Dev. Comm'n*, 277 S.C. 533, 291 S.E.2d 195 (1982). Mootness has been defined as follows: “A case becomes moot when judgment, if rendered, will have no practical legal effect upon existing controversy. This is true when some event occurs making it impossible for [the] reviewing Court to grant effectual relief.” *Mathis v. South Carolina State Highway Dep’t*, 260 S.C. 344, 346, 195 S.E.2d 713, 715 (1973). “[M]oot appeals result when intervening events prevent a decision on appeal from having an immediate impact on the parties.” 15 S.C. Jur. Appeal and Error § 19 (Supp. 2014).

While the issue raised in this appeal has been fully briefed, because the Court granted Respondent a new trial on a different basis, a decision from this Court would have no effect on the parties. Even if this Court were to hold that the circuit court’s grant of a new trial pursuant to the Thirteenth Juror Doctrine was an abuse of discretion, a position that Respondent has argued against in his briefing on this appeal to this Court, the circuit court’s order granting Respondent relief from the previous judgment pursuant to SCRCP 60(b)(2) and 60(b)(3) and granting Respondent a new trial based on newly discovered evidence would render a decision from this Court on any additional basis for a new trial ineffective; *i.e.*, Respondent would still be entitled to a new trial. As such, the issue raised in the instant appeal are moot and this appeal should be dismissed.

2. The October 22, 2018 Order is not appealable.

Additionally, Covil's attempt to appeal to this Court is improper because Judge Toal's October 22, 2018 Order granting Respondent a new trial pursuant to the Thirteenth Juror Doctrine is not immediately appealable. Appeals from the Circuit Court are governed by South Carolina Appellate Court Rule 201 which is clear that "[a]pp[ea]l[s] may be taken . . . from any final judgment, appealable order or decision." SCACR 201(a). Likewise, S.C. Code Ann. § 14-3-330 provides for appellate review over "final judgments" on the merits (with limited exceptions not applicable here). *Watson v. Underwood*, 407 S.C. 443, 457–58, 756 S.E.2d 155, 163 (Ct. App. 2014). 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 October 22, 2018 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).

In *Able v. Young*, 259 S.C. 362, 191 S.E.2d 781 (1972), the plaintiff sought recovery for injuries sustained in an automobile accident with the defendant. *Id.* at 259 S.C. 363. At trial, the jury returned a verdict in favor of the defendant. *Id.* The trial court granted a new trial, finding:

‘on the ground that the verdict is contrary to the greater weight of the evidence and on the basis that justice was not accomplished in this case and that it should be tried again before another jury. . . . I hesitate to set aside the verdict of the jury, but I am convinced that this is one of the rare cases in which I, as the Trial Judge, should exercise my authority as the thirteenth juror. To allow the jury’s verdict to stand in this case would be a miscarriage of justice.’

Id. The defendant appealed. *Id.*

On appeal, the Supreme Court of South Carolina held that:

it clearly appears therefrom that relief was granted in the exercise of the court’s authority and responsibility to grant a new trial when the jury’s verdict is, in his judgment, contrary to the fair preponderance of the evidence.

Id.

It is clear from Judge Toal’s Order that the decision to grant Respondent a new trial pursuant to the Thirteenth Juror Doctrine was not based solely on an error of law. In fact, “error of law” was not a ground cited by Respondent in its motion for a new trial absolute. In granting Respondent a new trial pursuant to the Thirteenth Juror Doctrine, as noted in the Order which is the subject of Covil’s instant appeal, Judge Toal cited to the evidence presented at trial regarding Covil’s provision of asbestos-containing insulation to Mr. Crawford’s work site. The Judge noted that Covil had admitted, through its corporate representative, that Covil sold asbestos-containing insulation to industrial contractors and that Covil was aware of the hazards associated with exposure to asbestos. While Covil contended that there was a lack of evidence demonstrating that it had provided asbestos-containing insulation to the Celanese facility where Mr. Crawford worked, Judge Toal pointed to the inconsistencies between the testimony presented regarding Covil’s alleged loss of sales documents in fire and the testimony presented suggesting that the fire was not as destructive as Covil implied and that sales documents would not have been lost in the

fire. The circuit court also cited to the testimony establishing that Covil did not warn end users and bystanders of the hazards associated with repeated exposures to asbestos. Additionally, Judge Toal cited causation evidence supporting Respondent's position that Mr. Crawford's exposures to asbestos-containing insulation were a substantial factor in the development of Mr. Crawford's mesothelioma. Ultimately, Judge Toal, in the exercise of her discretion to act as the thirteenth juror, found that the jury's verdict in Covil's favor was contrary to the fair preponderance of the evidence.

Consequently, the circuit court's Order granting Respondent a new trial pursuant to the Thirteenth Juror Doctrine was entered in an exercise of the court's discretion and based on a weighing of the facts and evidence presented by the parties during trial. As such, the Order entered on October 22, 2018 is not an appealable order, according to the Supreme Court's holding in *Able v. Young*, because the decision to grant Respondent's request for a new trial was not based solely on an error of law.

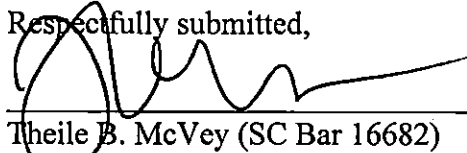
Although briefing has already been completed in this case, the Court must dismiss the appeal. "[I]ssues relating to subject matter jurisdiction may be raised at any time, cannot be waived even by consent, and should be taken notice of by this court on our own motion." *Bunkum v. Manor Properties*, 321 S.C. 95, 99–100, 467 S.E.2d 758, 761 (Ct. App. 1996). "Where an order is interlocutory, and thus not appealable, the notice of intent to appeal does not transfer jurisdiction to the [appellate] [c]ourt . . ." *Brown v. Greenwood Sch. Dist. 50 Bd. of Trustees*, 344 S.C. 522, 524–25, 544 S.E.2d 642, 643 (Ct. App. 2001) (quoting *South Carolina Pub. Serv. Auth. v. Arnold*, 287 S.C. 584, 586, 340 S.E.2d 535, 536 (1986)). When an appellate court mistakenly considers an appeal of an order that is not final and appealable, the appeal can be dismissed at any time. *See Johnson v. Paraplane Corp.*, 321 S.C. 316, 317, 468 S.E.2d 620, 620 (1996) (vacating the opinion

of the Court of Appeals and dismissing the appeal when it was determined that the circuit court's summary judgment order was not directly appealable); *see also Gore v. Beneficial Mortg. Co. of S.C.*, No. 2008-MO-036, 2008 WL 9881745, at *1 (S.C. Aug. 11, 2008) ("Because the order was not immediately appealable, the Court of Appeals should not have addressed the merits.").

CONCLUSION

For the above reasons, Respondent respectfully requests that this Court dismiss Appellant Covil Corporation's appeal. The circuit court's order granting a new trial pursuant to the Thirteenth Juror doctrine is now moot given the circuit court's more recent order of November 25, 2019. Further, the circuit court's October 2018 order is not immediately appealable as the order was not based solely on an error of law. Consequently, Respondent requests that this matter be dismissed and remanded to the circuit court for further proceedings.

Respectfully submitted,



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January 13, 2020

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Jean Hoefler Toal, Chief Justice of the Supreme Court of South Carolina (Retired)
Acting as Circuit Court Judge

Appellate Case No. 2018-001965
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 for Leave to File 60(b) Motion on Appellants by depositing a true and correct copy of it in the United States Mail, postage prepaid, on July 16, 2019, addressed to its attorneys of record, Ashley K. Brathwaite of Ellis & Winters, LLP; 4131 Parklake Avenue; Suite 400; Raleigh, North Carolina 27612.

Respectfully submitted,



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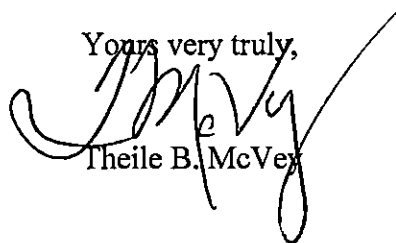
Re: *Jerry Howard Crawford, etc., et al. v. Celanese Corporation, et al.; of whom Covil Corporation is the Appellant.*
Appellate Case No.: 2019-001965

Dear Ms. Kitchings:

Enclosed herewith please find the original and seven (7) copies of Respondents' Motion to Dismiss 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