

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

**RECEIVED**

APPEAL FROM SPARTANBURG COUNTY  
Court of Common Pleas

FEB 03 2020  
SC Court of Appeals

The Honorable Jean H. Toal, Circuit Court Judge

Appellate 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.

APPELLANT'S RETURN TO RESPONDENT'S  
MOTION TO DISMISS APPEAL

Appellant Covil Corporation (Covil) submits this return in opposition to Respondent's motion to dismiss Covil's appeal. Respondent's assertion that this appeal is moot is, at best, premature. And her assertion that the underlying order is not appealable has been squarely rejected by the Supreme Court.

### **STATEMENT OF THE CASE**

A jury rejected Respondent's claim that Jerry Crawford was exposed to asbestos-containing materials that Covil supplied to a facility at which Mr. Crawford worked in the early 1970s. (*See* R. p. 1). The case went to trial in July 2018, and the jury returned a defense verdict for Covil. (R. p. 1).

This appeal follows from the trial court's invalidation of the jury's verdict. Having failed to persuade the jury, Respondent filed a motion for judgment notwithstanding the verdict or, in the alternative, a new trial under the thirteenth juror doctrine. (R. pp. 522–29). The trial court granted Respondent's request for a new trial, and Covil appealed. (R. pp. 3–10).

After this appeal was fully briefed, Respondent requested leave from the trial court and from this Court to file a motion for relief under Rule 60(b) based on allegedly newly discovered evidence. *See* Mot. for Leave to File Mot. for Relief from J. Under SCRCP 60(B). The evidence at issue is a data tape that Covil's previous counsel obtained from another law firm that previously had represented Covil. The label on the data tape suggests that it contains accounting system backups performed from 1990 to 1991—almost 20 years after the alleged asbestos exposures in this case. The exact contents of the data tape are presently unknown because the data is not accessible; a third-party vendor is still attempting to procure the legacy software needed to recover the contents of the tape.

This appeal was held in abeyance until the trial court ruled on Respondent's Rule 60(b) motion in November 2019. The trial court granted Respondent's motion for a new trial under

Rule 60(b), concluding that the data tape “is an additional basis for granting a new trial.” Rule 60(b) Order p. 7 (attached as Ex. A to Covil’s notice of appeal in Appellate Case No. 2019-002126). Covil appealed, and that separate appeal is pending as Appellate Case No. 2019-002126. Covil intends to request consolidation of the appeals under Rule 214, SCACR.

Respondent now seeks to dismiss this appeal on two alternative grounds. She contends that the trial court’s most recent order renders this appeal moot. Mot. to Dismiss Appeal pp. 3–4. She also argues that the order at issue in this appeal is “not immediately appealable.” Mot. to Dismiss Appeal p. 5. Both arguments are wrong as a matter of law.

### ARGUMENT

#### I. This Appeal Is Not Moot.

Respondent either misunderstands or misapplies the doctrine of mootness. “[M]oot appeals result when intervening events render a case nonjusticiable.” *Curtis v. State*, 345 S.C. 557, 567, 549 S.E.2d 591, 596 (2001). “A case becomes moot when judgment, if rendered, will have no practical legal effect upon [the] existing controversy.” *Mathis v. S.C. State Highway Dep’t*, 260 S.C. 344, 346, 195 S.E.2d 713, 715 (1973). “This is true when some event occurs making it impossible for [the] reviewing Court to grant effectual relief.” *Id.* Respondent asserts that the trial court’s order granting a new trial under Rule 60(b)—which postdates the filing of this appeal—makes this appeal moot. Mot. to Dismiss Appeal pp. 3–4. Not so. That order does not, standing alone, make it *impossible* for this Court to grant relief in this appeal.

There is at least one circumstance in which a decision in this appeal would be meaningful. By its own terms, the trial court’s order granting a new trial under Rule 60(b) is merely an *alternative ground* for the same relief on appeal here. Rule 60(b) Order p. 7. The trial court’s Rule 60(b) ruling did not purport to vacate its order granting a new trial on the thirteenth juror doctrine, but rather specifically states that the “data tape is an additional basis for granting a

new trial.” Rule 60(b) Order p. 7. If that order is overturned in the separately pending appeal, the trial court’s thirteenth-juror ruling in this appeal would be left as the *only remaining ground* supporting the grant of a new trial. A decision in this appeal would then be necessary to determine whether a new trial should go forward.

It is simply not true, as Respondent argues, that “a decision from this Court [in this appeal] would have no effect on the parties” because “Respondent would still be entitled to a new trial.” Mot. to Dismiss Appeal p. 4. This argument assumes that this Court has upheld the alternative ground for a new trial in the Rule 60(b) order. But that has not happened yet, and it may never happen. This Court could reverse the trial court’s grant of a new trial under Rule 60(b), as Covil believes it should, in which case the thirteenth juror ruling would remain very much at issue. At best, Respondent’s mootness argument is fatally premature.

These companion appeals, which Covil requests that this Court consolidate under SCACR 214, are like any other garden-variety appeal in which a decision on one issue *might* make it unnecessary for the appellate court to reach another. For example, in *Collins Holding Corp. v. Wausau Underwriters Insurance Co.*, the Supreme Court confronted two issues on appeal and, *after deciding the first on the merits*, refused to reach the second as “moot.” 379 S.C. 573, 579, 666 S.E.2d 897, 900 (2008). Specifically, the Court determined that the trial court erred in ruling that an insurance company had a duty to defend and, as a result, did not need to decide whether the trial court erred in determining that the company waived any defense. *Id.* These sorts of multi-issue appeals are legion. *See, e.g., Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (“In light of our disposition of the case, it is not necessary to address [the plaintiff’s] remaining issues.”); *Whiteside v. Cherokee Cty. Sch. Dist. No. One*, 311 S.C. 335, 340, 428 S.E.2d 886, 889 (1993) (“In view of our disposition of this issue, we need not address appellants’ remaining exceptions.”).

Under Respondent's logic, the other issues in each of these cases should have been dismissed as moot *at the outset of the appeals*. That is not the law, for the simple reason that it is not known at the beginning of an appeal whether an issue might be moot at the end of an appeal. To accept Respondent's argument would rewrite mootness doctrine in a way that is unprecedented, contrary to law, and utterly unworkable.

This appeal is not moot. While a decision on the 60(b) order *might* make it unnecessary to decide the thirteenth-juror appeal (and vice versa), it is not known yet whether this Court will affirm or reverse either order. Respondent's pending motion to dismiss the Rule 60(b) appeal, which argues that the order is not appealable at all, does not change the analysis. Like Respondent's similar argument in this appeal (addressed below), Respondent's assertion that Covil cannot appeal at all fails to acknowledge controlling precedent and is therefore borderline frivolous. *See* Appellant's Return to Respondent's Mot. to Dismiss, No. 2019-002126.

II. The Trial Court's Order Granting a New Trial Based on the Thirteenth Juror Doctrine Is Immediately Appealable.

The trial court's order is immediately appealable because it is an order granting a new trial. South Carolina Appellate Court Rule 201 provides that "[a]ppel may be taken, as provided by law, from any final judgment, *appealable order* or decision." Rule 201(a), SCARC (emphasis added). In turn, Section 14-3-330 of the South Carolina Code of Laws provides for appellate review of "[a]n order affecting a substantial right made in an action when such order . . . grants or refuses a new trial." S.C. Code Ann. § 14-3-330(2). Applying that plain language, the Supreme Court has recognized that orders which "discontinue an action, prevent an appeal, or grant or refuse a new trial, or strike out an action or defense" affect a substantial right and are thus immediately appealable. *Mid-State Distribs., Inc. v. Century Importers, Inc.*, 310 S.C. 330, 335 n.4, 426 S.E.2d 777, 780 n.4 (1993); *see also Bailey v. Peacock*, 318 S.C. 13, 15

n.2, 455 S.E.2d 690, 692 n.2 (1995) (rejecting as “meritless” the argument that “the granting of a new trial is not immediately appealable”).

There is no question that the order grants a new trial and thus falls squarely within the scope of section 14-3-330(2). The trial court labeled its order as an order “granting plaintiff’s motion for a new trial.” Rule 60(b) Order p. 1. And Respondent herself describes the order as “granting Respondent a new trial pursuant to the Thirteenth Juror Doctrine.” Mot. to Dismiss Appeal p. 2.

Respondent argues that the trial court’s order is not appealable because the order “was not based solely on an error of law.” Mot. to Dismiss Appeal p. 5. For this argument, Respondent relies solely on the Supreme Court’s statement 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.” *Id.* (quoting *Robinson v. Fuller*, 249 S.C. 342, 344, 154 S.E.2d 431, 431 (1967)). She cites and discusses four other cases, all of which turn on that same statement. Mot. to Dismiss Appeal pp. 5–6 (discussing *Able v. Young*, 259 S.C. 362, 191 S.E.2d 781 (1972), and citing *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)).

But Respondent fails even to acknowledge the Supreme Court’s more recent decision in *South Carolina State Highway Department v. Clarkson*, which directly addresses that statement and clarifies that *all orders granting a new trial are immediately appealable*. 267 S.C. 121, 126, 226 S.E.2d 696, 697 (1976). In *Clarkson*, the Supreme Court recognized apparent inconsistencies in its decisions regarding the appealability of orders granting a new trial. *Id.* It then explained unequivocally that “the statement in [its] decisions, that an order granting a new trial based upon the facts is not appealable, is *not correct in the sense that an appeal will not lie.*”

*Id.* (emphasis added). Rather, this statement merely reflects the *standard of review* in any appeal of an order granting a new trial, and “that such an order based upon conflicting testimony will not be disturbed on appeal.” *Id.* at 127, 226 S.E.2d at 697. As the Supreme Court reiterated in a case following *Clarkson*, “[t]he axiom that an order granting a new trial upon the facts is not appealable ‘has been soundly applied to limit review in these cases to a determination of whether there was an abuse of discretion amounting to an error of law.’” *S.C. Dep’t of Highways & Pub. Transp. v. Mooneyham*, 275 S.C. 205, 206, 269 S.E.2d 329, 330 (1980) (quoting *Clarkson*, 267 S.C. at 127, 226 S.E.2d at 698).

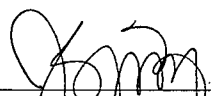
To put it succinctly, Respondent’s assertion that certain new trial orders cannot be appealed—namely, those “weighing the facts and evidence,” Mot. to Dismiss Appeal p. 7—has been squarely rejected by the Supreme Court. An order granting a new trial is appealable even “[w]hen the question is . . . the existence or absence of supportive evidence.” *Mooneyham*, 275 S.C. at 206, 269 S.E.2d at 330. The appeal will lie, though the “inquiry is . . . delimited.” *Id.* That is all that is “meant in saying an order granting a new trial upon the facts is not appealable.” *Id.*

Because *all* orders granting a new trial are immediately appealable, Respondent’s arguments about the precise nature of this appeal and the order below, *see* Mot. to Dismiss Appeal pp. 6–7, are irrelevant at this juncture. As discussed above, those arguments may be relevant to Covil’s ability to succeed on the merits. To prevail, Covil will need to show that the trial court committed an error of law or an abuse of discretion that amounts to an error of law. But for purposes of Respondent’s motion to dismiss, a review of *Clarkson* and its progeny, none of which is even mentioned in the motion, is sufficient to determine that Respondent’s attempt to insulate certain new trial orders from appeal lacks merit.

Of course, because this appeal is fully briefed, Covil's arguments on the merits are known. And there is no question that Covil has raised arguments that, if correct, would require reversal on the merits. Among other arguments, Covil contends that the trial court erred by improperly shifting the burden of proof to Covil. *See* Appellant's Br. p. 11. A trial court's improper burden shifting is an abuse of discretion that amounts to an error of law. *See O'Neal v. Carolina Farm Supply of Johnston, Inc.*, 279 S.C. 490, 493, 309 S.E.2d 776, 778 (1983); *see also Lane v. Gilbert Constr. Co.*, 383 S.C. 590, 598, 681 S.E.2d 879, 883 (2009) (deciding on the merits appellant's argument that the trial court abused its discretion in shifting the burden of proof by requiring appellant to present witnesses to contest the claim of damages).

**CONCLUSION**

Appellant Covil Corporation respectfully requests that this Court deny Respondent's motion to dismiss.

 w/ permission for  
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Ashley K. Brathwaite, Esquire  
Ellis & Winters LLP  
4131 Parklake Avenue, Suite 400  
Raleigh, North Carolina 29612  
(919) 573-1297  
[ashley.brathwaite@elliswinters.com](mailto:ashley.brathwaite@elliswinters.com)

Attorney for Appellant Covil Corporation

February 3, 2020

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Of Which, Covil Corporation is the Appellant.

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PROOF OF SERVICE

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I, Ashley K. Brathwaite of Ellis & Winters LLP, do hereby certify that I have served Appellant's Return to Respondent's Motion to Dismiss Appeal via electronic mail and by

depositing the same in the United States Mail, properly posted, on the 3rd day of February, 2020,

addressed as follows to counsel of record:

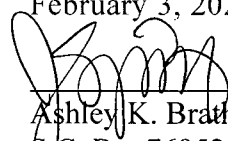
Theile B. McVey  
John D. Kassel  
KASSEL McVEY ATTORNEYS AT  
LAW  
1330 Laurel Street  
Columbia, South Carolina 29202  
[tmcvey@kassellaw.com](mailto:tmcvey@kassellaw.com)  
[jkassel@kassellaw.com](mailto:jkassel@kassellaw.com)

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

Jonathan M. Holder  
Ka'Leya Hardin  
DEAN OMAR BRANHAM SHIRLEY,  
LLP  
302 N. Market Street, Ste. 300  
Dallas, Texas 75202  
[jholder@dobslegal.com](mailto:jholder@dobslegal.com)  
[khardin@dobslegal.com](mailto:khardin@dobslegal.com)

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

February 3, 2020

 by permission for

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

**Counsel for Appellant Covil Corporation**