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

Appellate Case No. 2019-002126

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 NOTICE OF APPEAL

Appellant Covil Corporation (Covil) submits this return in opposition to Respondent's motion to dismiss Covil's notice of appeal. Her assertion that the underlying order is unappealable 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, Appellate Case No. 2018-001965). The case went to trial in July 2018, and the jury returned a defense verdict for Covil. (R. p. 1, Appellate Case No. 2018-001965).

The trial court then granted Respondent's request for a new trial under the thirteenth juror doctrine. (R. pp. 522–29, Appellate Case No. 2018-001965). Covil appealed that order. That appeal has been fully briefed and is currently pending in this Court under case number 2018-001965.

After that appeal was briefed, Respondent asked this Court and the trial court for leave 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), Appellate Case No. 2018-001965. The evidence at issue is a data tape that Covil's previous counsel obtained from another law firm that previously 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 concerns the trial court's determination that the data tape provided additional grounds, beyond the thirteenth juror doctrine, for a new trial. *See* Rule 60(b) Order p. 7 (attached as Ex. A to Covil's notice of appeal). After receiving leave, Respondent filed in July

2019 a motion for relief under Rule 60(b), arguing that she was entitled to a new trial. The trial court granted Respondent's motion for a new trial in November 2019, and Covil appealed. *See id.*

Respondent now seeks dismissal on the ground that the trial court's order granting a new trial is not appealable. She is wrong as a matter of law.

ARGUMENT

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]ppeal 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 Imps., Inc.*, 310 S.C. 330, 335 n.4, 426 S.E.2d 777, 780 n.4 (1993) ("It should be noted that § 14-3-330 also allows appeal from an order affecting a substantial right."); *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 under Rule 60(b)(2) and 60(b)(3)." Mot. to Dismiss Not. of Appeal p. 2. In any event, an order that grants a new trial is immediately appealable under

section 14-3-330(2)(b), regardless of how the underlying motion is styled. *Thornton v. S.C. Elec. & Gas Corp.*, 391 S.C. 297, 303 n.6, 705 S.E.2d 475, 478 n.6 (2011) ("When interpreting whether an order is immediately appealable under section 14-3-330, this court will "look[] beyond the labels on motions and orders to discern their actual effect for purposes of appealability.").

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 Not. of Appeal p. 3. 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), 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 means "that such an order based upon conflicting testimony will not be disturbed on appeal." *Id.* at 127, 226 S.E.2d at 697.

To put it succinctly, Respondent's assertion that certain new trial orders cannot be appealed—namely, those based on facts or new evidence, Mot. to Dismiss Not. of Appeal p. 4—has been squarely rejected by the Supreme Court. "The 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). 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 Not. of Appeal pp. 6–7, are irrelevant at this juncture. As discussed, 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.

To the extent that the nature of the appeal is relevant (though it is not), Covil intends to raise arguments that, if correct, would require reversal on the merits. Covil will argue on appeal that the trial court's grant of a new trial is an abuse of discretion that amounts to an error of law. For instance, the trial court found that relief was warranted under Rule 60(b)(2), but failed to make the required finding that the newly discovered evidence will probably change the result if a

new trial is granted. *See Lanier v. Lanier*, 364 S.C. 211, 217, 612 S.E.2d 456, 459 (2005). Nor was there any evidence to support such a finding—another error of law.

CONCLUSION

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

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February 3, 2020

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PROOF OF SERVICE

I, Ashley K. Brathwaite of Ellis & Winters LLP, do hereby certify that I have served Appellant's Return to Respondent's Motion to Dismiss Notice of 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:

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February 3, 2020

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