

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

SC Court of Appeals

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; CNA 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.

**RESPONDENT'S SUPPLEMENTAL BRIEF ON APPEALABILITY OF THE CIRCUIT
COURT'S ORDER**

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STATEMENT OF ISSUE BRIEFED HEREIN

Respondent files this supplemental brief to address the appealability of the Circuit Court's Order which forms the basis for this appeal.

STATEMENT OF THE CASE

Respondent incorporates herein his STATEMENT OF THE CASE from the FINAL BRIEF OF RESPONDENT.

FACTS OF THE CASE

Respondent incorporates herein his FACTS OF THE CASE from the FINAL BRIEF OF RESPONDENT.

ARGUMENT

Although erroneously omitted from Respondent's final brief, the Order from which Covil appeal is not a final and appealable order. Judge Toal's November 25, 2019 Order granting Respondent a new trial pursuant to South Carolina Rule of Civil Procedure 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.

Respondent anticipates that Covil will argue that *South Carolina State Highway Dept. v. Clarkson*, 267 S.C. 121, 226 S.E.2d 696 (1976), a case which does not overrule any of the cases cited by Respondent in support of his position that Covil’s appeal should be dismissed. In fact, the

Clarkson Court approvingly cited a number of cases supporting Respondent's position that Covil's appeal must be dismissed. In *Sellers v. Collins*, 212 S.C. 26, 46 S.E.2d 176 (1948), the Court wrote, as acknowledged by the *Clarkson Court*, that

'It is well settled in this State that an order granting or refusing a new trial when based solely on an error of law is subject to review by this Court. But when the order is based upon questions of fact, or upon both questions of law and fact, it is not appealable.'

Clarkson, 267 S.C. at 125-26. In fact, the Court, citing *Mims v. Coleman*, 248 S.C. 235, 149 S.E.2d 623 (1966), went on to restate the rule:

'An order granting a new trial on factual grounds is not appealable. But the question of existence or nonexistence of evidence is one of law; and to that extent such an order is subject to our review. . . . Our inquiry here must, therefore, be limited to the question of whether there was any evidence from which the jury might reasonably have inferred that respondent's injuries were proximately caused by negligence of the appellant. If that question is answered in the affirmative the appeal must be dismissed, for this court has no power to weigh conflicting evidence in a law case. But if there was no evidence of actionable negligence on the part of the appellant, there was no conflicting evidence to be weighed, and the order granting a new trial on the ground stated by the trial judge would be erroneous as a matter of law.'

Id. at 127. Importantly, the *Clarkson* Court specifically refused to "overrule our prior decisions in which the statement is made that an order granting a new trial upon the facts is not appealable[.]"

Id. Further, the Court went on to state that the rule had been "soundly applied to limit review . . . to a determination of whether there was an abuse of discretion amounting to an error of law." *Id.*

Judge Toal's order granting Respondent a new trial based on the facts and new evidence presented to her is not a question of whether there has been an error of law. The decision was based solely on the facts. This Court should hold that Covil's appeal challenging that order is not appealable pursuant to precedent from this state.

CONCLUSION

For the reasons expressed herein, Respondent respectfully requests that this Court dismiss

Appellant Covil Corporation's appeal as the Circuit Court's Order granting Respondent a new trial pursuant to SCRCP 60(b)(2) and 60((b)(3) is not appealable. Alternatively, for the reasons expressed in Respondent's Initial Brief, this Court should hold that the trial court did not abuse its discretion in granting Respondent a new trial pursuant to the Thirteenth Juror Doctrine—based not on an error of law but based solely on the evidence presented during trial.

Respectfully submitted,



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Of Which Covil Corporation is the Appellant.

PROOF OF SERVICE

I certify that I have served **Respondent's Supplemental Brief on Appealability of the Circuit Court's Order** on Appellant Covil Corporation by depositing a copy of it in the United States Mail, postage prepaid, on 03/18/2020, addressed to its attorneys of record, Ashley K. Brathwaite of Ellis & Winters; 4131 Parklake Avenue, Suite 400; Raleigh, NC27612.

Date: 03/18/2020

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July 16, 2019

VIA HAND DELIVERY

V. Claire Allen, Deputy Clerk
The South Carolina Court of Appeals
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Re: *Jerry Howard Crawford v. Celanese Corporation*
Appeal No.: 2018-001965

Dear Ms. Allen:

Enclosed herewith please find the original and eighth (8) copies of Respondents' Motion for Leave to File Supplement Final Brief and its attachment, Respondents' Supplemental Final Brief in connection with the above-entitled Appeal. Please file the enclosed and return two clocked copies to me via the envelope provided.

Thank you for your kind assistance in this matter. By copy of this letter, I am providing Appellant's counsel with a copy of the enclosed.

Yours truly,



Elizabeth C. Moultrie
Senior Paralegal to John D. Kassel,
Theile B. McVey and Jamie Rae Rutkoski

ECM:bmh

Enclosures

cc: Ashley K. Brathwaite, Esquire (w/enclosures)
Graham Pollock Powell, Esquire (w/enclosures)

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