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

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

Appellant Covil Corporation (Covil) submits this response to Respondent's Supplemental Brief on the Appealability of the Circuit Court's Order. Respondent's assertion that the underlying order is not appealable has been squarely rejected by the Supreme Court.

ARGUMENT

The trial court's order is immediately appealable because it granted 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); *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). Respondent herself describes the order as "granting Respondent a new trial." Resp't's Suppl. Br. p. 1.

Repeating arguments already made in its motion to dismiss, which this Court denied, Respondent argues that the trial court's order is not appealable because the order "was not based solely on an error of law." *Id.* at 2. For this argument, Respondent relies exclusively 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.* at 1–2 (quoting *Robinson v. Fuller*, 249 S.C. 342, 344, 154 S.E.2d 431, 431 (1967)). She cites three other cases, all of which turn on that same statement. *Id.* at 2 (citing *Taylor v. Devore*, 253 S.C. 393, 171 S.E. 2d 158 (1969); *Sellers v. Sears Roebuck & Co.*, 252 S.C. 271, 166 S.E.2d 1 (1969);

But the Supreme Court has since clarified that *all orders granting a new trial are immediately appealable*. *S.C. State Highway Dep't v. Clarkson*, 267 S.C. 121, 126, 226 S.E.2d 696, 697 (1976). In *Clarkson*, the Supreme Court 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, requiring that the order be affirmed unless "there was an abuse of discretion amounting to an error of law." *Id.* at 127, 226 S.E.2d at 698. As the Supreme Court later reiterated, "[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). Such abuse of discretion "has been found in our prior decisions where the order granting a new trial is without evidentiary support or founded upon a fundamental legal error." *Id.* (citations omitted).

It does not matter that *Clarkson* declined to "overrule" Respondent's cases. Resp't's Suppl. Br. p. 3. *Clarkson* explained that there was no need to overrule those cases because they were used only to limit the standard of appellate review, not to prevent review altogether. 267 S.C. at 127, 226 S.E.2d at 698 (explaining that the respondent's cases had been "uniformly used in the sense set forth in *Mims v. Coleman*, [248 S.C. 235, 149 S.E.2d 623 (1966)]," and "to limit review . . . to a determination of whether there was an abuse of discretion amounting to an error

of law"). The Supreme Court has consistently recognized that new-trial orders are appealable even on the legal "question of existence or nonexistence of evidence." *Id.* (quoting *Mims*, 248 S.C. at 237, 149 S.E.2d at 624); *see also Mooneyham*, 275 S.C. at 206, 269 S.E.2d at 330 (same). All that Respondent's cases "meant in saying [such an order] is not appealable" is that the "inquiry is . . . delimited." *Mooneyham*, 275 S.C. at 206, 269 S.E.2d at 330. Because these cases were consistent with *Clarkson*, there was no need to "overrule" them.

Because *all* new-trial orders are immediately appealable, the precise nature of *this* new-trial order is irrelevant. *See* Resp't's Suppl. Br. p. 2. The nature of this order may affect the *standard* of review, but the *availability* of review is conclusively established by *Clarkson* and its progeny.

Even if the nature of the appeal were relevant, Respondent's argument is misplaced because it concerns the Circuit Court's order granting a new trial under Rule 60(b), which is not the subject of this appeal. Resp't's Suppl. Br. p. 2 (citing Rule 60(b), SCRCP).[1] In any event, there is no question that Covil has raised arguments that, if correct, would require reversal on the merits. Covil contends, among other things, 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 (Ct. App. 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).

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[1] Covil's appeal of the order granting a new trial under Rule 60(b) is pending before this Court in case number 2019-002126. Even if the nature of the appeal is relevant, Covil argues that the trial court's grant of a new trial amounts to an error of law because, among other things, it failed to make the required finding that the newly discovered evidence will probably change the result if a new trial is granted. Appellant's Br. (No. 2019-002126) at pp. 14–17.

CONCLUSION

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

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Of Which, Covil Corporation is the Appellant.

PROOF OF SERVICE

I, Ashley K. Brathwaite of Ellis & Winters LLP, do hereby certify that I have served Appellant's Response to Respondent's Supplemental Brief on Appealability of the Circuit

Court's Order via electronic mail, on the 22nd day of June, 2020, addressed as follows to counsel of record:

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