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.

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July 17, 2020

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INTRODUCTION

Nothing in Crawford's response rebuts the core, irremediable error in the Circuit Court's decision to grant a new trial under Rule 60(b)(2) based on the newly discovered data tape: No one—not Crawford, Covil, the Circuit Court, or the expert hired to review the tape—knows precisely what is on or has even accessed usable data from that tape. In his brief, Crawford merely doubles down on speculation—presenting to this Court, as if it were undisputed fact, his sheer conjecture that "the evidence on the data tape" is "direct evidence from Covil that it supplied asbestos-containing materials to Jerry Crawford's work site." Resp. Br. at 21. Even the Circuit Court acknowledged that "what is contained on this tape is unknown to the parties and the Court." (Order p. 5; R. p. ___). And ultimately, Crawford concedes this point, as he must, admitting that "neither [he] nor Covil can definitively identify what documents are stored on the data tape." Resp. Br. at 15. This concession is fatal: The post-trial discovery of a data tape containing unknown information cannot satisfy the requirements for granting a new trial based on newly discovered evidence under Rule 60(b)(2).

Crawford also cannot satisfy Rule 60(b)(3) because there is no allegation, no evidence, and no finding by the Circuit Court that Covil deliberately concealed the tape with fraudulent intent. Rather than confront this fundamental failure, Crawford attempts to introduce new and inapplicable legal standards, including by shifting the burden to Covil to *disprove* fraudulent intent. But Supreme Court precedent makes clear that it is Crawford's burden to show fraudulent intent by clear and convincing evidence. Crawford has failed, and still fails, to meet that burden.

This Court should reverse the Circuit Court's order granting a new trial.

STATEMENT OF JURISDICTION

In the face of controlling Supreme Court precedent, Crawford continues to argue that this Court lacks jurisdiction to decide this case. As Covil explained in its Opening Brief and its

opposition to Crawford's motion to dismiss, this Court plainly has jurisdiction over all appeals, like this one, that challenge an order granting a new trial. Indeed, Crawford's claim to the contrary (at 10–13) has been rejected by the Supreme Court as "meritless." *Bailey v. Peacock*, 318 S.C. 13, 15 n.2, 455 S.E.2d 690, 692 n.2 (1995).

The Circuit Court's order granting a new trial is an "appealable order" under Rule 201(a), SCARC, because it falls squarely within the plain language of S.C. Code § 14-3-330, which specifically authorizes an appeal of an interlocutory order that "grants or refuses a new trial." Crawford's response (at 12–13) is to read Supreme Court case law in a manner expressly rejected by the Supreme Court in *South Carolina State Highway Department v. Clarkson*, 267 S.C. 121, 126, 226 S.E.2d 696, 697 (1976). There, the Supreme Court acknowledged apparent inconsistencies in its prior decisions (including ones on which Crawford relies) regarding the appealability of orders granting a new trial. 267 S.C. at 126, 226 S.E.2d at 697. The court confronted these inconsistencies directly, explaining that "the statement in [its prior] 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, such orders *are* appealable and are reviewed for "abuse of discretion [and] error of law committed in granting a new trial." *Id.* at 127, 226 S.E.2d at 698.

Crawford ignores this plain statement on the ground that *Clarkson* "does not overrule any of the cases cited by [him]." Resp. Br. at 12; *see also id.* at 11 (citing *Robinson v. Fuller*, 249 S.C. 342, 344, 154 S.E.2d 431 (1967); *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 this is a blatant misreading of *Clarkson*. The Supreme Court explained in *Clarkson* that it saw no need to overrule its prior cases because, even though they are not correct

in the overbroad way that Crawford reads them, they are correct if read merely to define the standard of review in an appeal of an order granting a new trial. 267 S.C. at 126–27, 226 S.E.2d at 697–98. Specifically, the prior statements are "not correct in the sense that an appeal will not lie" (as Crawford contends), but they are "correct in the sense that such an order based upon conflicting testimony will not be disturbed on appeal" (as Covil has argued). *Id.* Though the cases were not overruled, the Supreme Court clearly rejected Crawford's reading of those cases, instructing that they be understood only to articulate the standard of review that "the decision by the trial judge will not be disturbed *unless his finding is wholly unsupported by the evidence, or the conclusion reached has been controlled by error of law*." *Id*. at 126, 226 S.E.2d at 697 (emphasis added).

Under *Clarkson*, this Court plainly has jurisdiction to hear this appeal and to reverse the Circuit Court's decision based on Covil's arguments. *Clarkson*'s holding is clear and straightforward: This Court has jurisdiction to review any orders granting a new trial, and it may reverse such an order where it (1) is wholly unsupported by the evidence or (2) is based on a legal error. On the merits, those are the very arguments Covil raises here on appeal. The order granting a new trial is based on an error of law because the Circuit Court failed to apply the correct standard under Rule 60(b), and the court's findings also are wholly unsupported by the evidence.

ARGUMENT

I. The Circuit Court Abused Its Discretion In Granting A New Trial Under Rule 60(b)(2).

The Circuit Court's ruling under Rule 60(b)(2) both rests on an error of law and is unsupported by the record evidence. As Crawford agrees, a court may grant a new trial under that rule only if the new evidence meets all five factors: The evidence "(1) will probably change the result if a new trial is granted; (2) has been discovered since the trial; (3) could not have been

discovered before the trial; (4) is material to the issue; and (5) is not merely cumulative or impeaching." *Lanier v. Lanier*, 364 S.C. 211, 217, 612 S.E.2d 456, 459 (Ct. App. 2005). The Circuit Court's decision did not even address two of the five factors, and the record was devoid of evidence that could support findings on four of the factors. In short, the Circuit Court's grant of a new trial under Rule 60(b)(2) was deficient in multiple respects, each of which independently requires reversal.

In defense of the Circuit Court's decision, Crawford merely speculates about the tape's contents. Though he concedes (at 15) that "neither [he] nor Covil can definitively identify what documents are stored on the data tape," he boldly justifies the Circuit Court's decision with the unsubstantiated hypothesis (at 21) that the tape contains "direct evidence from Covil that it supplied asbestos-containing materials to Jerry Crawford's work site." Crawford's speculation cannot fix the fundamental flaw in the Circuit Court's ruling: It is simply impossible to satisfy Rule 60(b)(2)'s requirements for granting a new trial based on unknown evidence.

A. The Circuit Court Did Not Find And Could Not Have Found That The Tape's Contents Will Probably Change The Result Or Are Material To Any Issue.

As Covil explained in its Opening Brief (at 14–20), the Circuit Court's order founders in two independent ways on Rule 60(b)(2)'s change-in-result and materiality factors. *First*, the written order entirely failed to address those two factors. *See* Opening Br. at 14–17. *Second*, there is no evidentiary basis, in any event, for finding that the data tape will probably change the result of the trial or that its contents are material. *See id.* at 17–20.

i. The Circuit Court's Oral Ruling Does Not Salvage Its Deficient Written Order.

Crawford does not even attempt to defend the Circuit Court's deficient written order. He does not contest that the written order was silent as to whether the contents of the data tape will probably change the result or are material to any issue. Nor does he dispute that this utter failure

is sufficient reason, standing alone, to reverse the court's Rule 60(b)(2) ruling. Instead, Crawford points to the Circuit Court's cursory recitation of those factors in its oral ruling and contends (at 14) that the court's written order is not controlling because there is supposedly no "conflict" between the oral ruling and the written ruling.

But this Court cannot rely on the Circuit Court's oral ruling. "It is well settled" that the written order controls whenever there is a "*discrepancy* between an oral ruling of the court and its written order"—not just when there is a *conflict*. *Cole Vision Corp. v. Hobbs*, 394 S.C. 144, 149, 714 S.E.2d 537, 540 (2011) (emphasis added). That is why the Supreme Court in *Cole Vision* held that a claim of negligence was "unpreserved" when the Circuit Court failed to mention the claim in its written order, despite the court having discussed the claim in its oral ruling. *Id.* at 149, 714 S.E.2d at 539–40. There was not a strict conflict, but rather a discrepancy where the oral ruling discussed a claim and the written order did not. So, too, here. Just as in *Cole Vision*, the court here made statements in its oral ruling that it did not include in its written order. And just as in *Cole Vision*, the written order here controls. Crawford cannot rectify the defects in the Circuit Court's written order by relying on the court's statements from the bench.

Rather than attempt to distinguish *Cole Vision*, Crawford faults Covil (at 14–15) for failing to object to or move to reconsider the inconsistency between the oral ruling and written order. But this misses the point. Covil does not contend that the inconsistency itself is a reason for reversal. Rather, Covil's contention is that Crawford must, but did not, meet all five requirements of Rule 60(b)(2). There is no dispute that *that* argument was "both presented to . . . the lower court" and "ruled" on by that court. *I'ON L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000). The Circuit Court was given ample notice and opportunity to properly address all five

factors. Even Crawford does not contend that Covil need have done anything more to preserve for appeal its argument that the Circuit Court erred in simply failing to address two of the factors.

The discrepancy between the written order and oral ruling, however, need not have been preserved for appeal because it is not advanced as an independent ground for reversal. The *Cole Vision* rule is not an alleged error for which Covil seeks relief. It is simply the rule that guides this Court's review of a lower court decision. And that rule is: The written order controls notwithstanding anything the Circuit Court said differently in its oral ruling.

ii. There Is No Basis For Finding That The Data Tape Will Probably Change The Result Of The Trial Or That Its Contents Are Material.

Even if this Court could look to the oral ruling, the Circuit Court's conclusory statements are unsupported by record evidence and thus insufficient to support relief under Rule 60(b)(2). The court simply asserted, without substantiation, that the data tape "is relevant to this case and has the high possibility of changing the result of the trial," and "that any Covil records for the period of time during which this data tape covers are material to the issues . . . that are raised about Mr. Crawford's exposure." (Nov. 12, 2019 Rule 60 Hearing pp. 15–16; R. p. ___). But as Covil has explained, there is no evidentiary basis for finding that the data tape will probably change the result of the trial or that its contents are material because, as the Circuit Court itself acknowledged in its written order, "what is contained on this tape is unknown to the parties and the Court." (Order p. 5; R. p. ___).

In response, Crawford offers sheer speculation. Crawford argues that the data tape will change the result because it undercuts Covil's position at trial that "all of its sales invoices were destroyed in a fire." Resp. Br. at 16 (emphasis omitted). In support, Crawford baldly asserts (at 21) that the tape contains "direct evidence from Covil that it supplied asbestos-containing materials to Jerry Crawford's work site." But this is utter conjecture, as evidenced by his concession (at 15)

that "neither [he] nor Covil can definitively identify what documents are stored on the data tape." And conjecture and speculation are not enough for relief under Rule 60(b)(2)—a principle that Crawford does not contest.

Crawford also suggests that Covil's own statements somehow show that the tape would undermine Covil's position at trial about the fire in 1973. He asserts that "Covil's best guess was that the data tape contained sales invoices." *Id.* at 15. And "[t]his admission," he goes on to claim, "supports the trial court's finding that the evidence on the data tape would change the result in a new trial." *Id.* at 15–16.

But this grossly misstates what Covil said. Crawford builds into this argument his *own* unsupported assumption that the data tape contains evidence that predates the 1973 fire. That is something Covil has never suggested; indeed, it is the *opposite* of everything Covil has said.

As Covil has consistently explained, all available evidence indicates that the data tape contains accounting information from between 1988 and 1991—*long after both the 1973 fire and Crawford's employment at the Celanese plant*. The tape's label indicates that its contents date from 1990 and 1991, with a "final back up" date of October 18, 1991, just before Covil ceased operations. (Covil's Opp'n Ex. E (Hr'g Tr. 95:1–4, *Falls v. CBS Corp.*, No. 2015-CP-46-02155 (S.C. Ct. C.P., York Cty. July 11, 2019)); R. p. ___). And consistent with that label, the specialist hired by Covil to examine the tape identified a software called "NCR" as necessary to extract the data, and Covil's records show that it purchased accounting software referred to as an NCR system in August 1988. (Covil's Opp'n Ex. G; R. p. ___).

Thus, contrary to Crawford's suggestion, Covil's "best guess" is and has been that the data tape contains accounting information from the late 1980s and early 1990s, which would make it irrelevant to this case. Obviously, accounts-payable information dating to the late 1980s and early

1990s has no bearing on whether a fire in 1973 destroyed Covil's then-existing sales invoices or whether Covil supplied asbestos-containing insulation to the Celanese plant in the early 1970s when Crawford was working there. Covil's position at trial—that all sales invoices relevant to Crawford's period of employment at the Celanese plant were destroyed in the 1973 fire—thus is unaffected by anything Covil guessed from the available evidence about the data tape's possible contents.

Crawford also asserts (at 15) that this Court should give the Circuit Court "great discretion" in its Rule 60(b)(2) ruling, in part, because it had "the best vantage point to assess witness credibility and the weight to be assigned to the evidence presented." But the Circuit Court's decision was not based on any weighing of evidence at all. The Circuit Court refused to allow witnesses at its hearing on the Rule 60(b) motion and thus never assessed witness credibility. Covil brought a proposed witness to the Rule 60(b) hearing who was prepared to discuss "data tape forensics." (Hearing Tr. at 7; R. p. ___). But the court declined to hear his testimony. *Id.* The Circuit Court also never grappled with the affidavits submitted by Covil from Daniel White, an attorney at Gallivan White & Boyd, P.A. who represented Covil from the mid-1970s until April 2018, and Mark Wall, Covil's trial counsel from Wall Templeton & Haldrup, P.A. *See infra* Part II (detailing contents of the affidavits). The Circuit Court did not even acknowledge the existence of those affidavits in its written decision, let alone "assess witness credibility and the weight to be assigned" to that evidence. (*See generally* Order; R. p. ___).

In all events, everything comes back to the undisputed fact that no one—not Crawford, Covil, the Circuit Court, or the expert examining the tape—knows precisely what is on the tape or has even accessed usable data from it. Crawford has admitted as much, including in his Response Brief. Resp. Br. at 15. And the Circuit Court has acknowledged the same. (Order p. 5; R. p. ___).

At bottom, that is the insurmountable problem for Crawford and the Circuit Court's order. No matter what anyone has guessed or might guess is on the data tape, it is just that: a guess. And as Covil laid out at length in its Opening Brief (at 18–19), it is well-settled in cases unrebutted by Crawford that speculation is categorically insufficient to support relief under Rule 60(b)(2).

B. The Data Tape Could Have Been Discovered Before Trial.

A second and independent basis for reversing the Circuit Court is that Crawford could have discovered the data tape before trial with due diligence. The record shows that Crawford's counsel had numerous opportunities to discover the data tape before trial. *See* Opening Br. at 22–23. And Crawford never denies that his lawyers had access to the data tape on multiple occasions spanning more than a decade.

Crawford's primary response (at 18) only confirms the overall impropriety of the Circuit Court's order. Crawford contends that he could not have discovered the data tape before trial because there was no "identification of markings or labels on the face of the data tape that would have even suggested to Mr. Crawford or his counsel that the information contained on the data tape was responsive to discovery requests or was relevant to Mr. Crawford's case against Covil." Resp. Br. at 18. But even if this excused his counsel's failure to find the data tape before trial, it only bolsters Covil's position above, *see supra* Part I.A., that there is no available evidence suggesting that the data tape will probably change the result of the trial or that its contents are material. And it only validates Covil's explanation below, *see infra* Part II, that its previous attorneys had no reason to know about this tape and did not intentionally conceal it.

Crawford also challenges (at 19–20) Covil's reliance on several federal cases, contending that they do not support Covil's claim that Crawford failed to act with diligence. But Covil did not rely on those cases to show an absence of diligence. Rather, Covil cited *Bohus v. Beloff*, 950 F.2d 919, 930 (3d Cir. 1991), and *New Hampshire Insurance Co. v. Martech USA, Inc.*, 993 F.2d

1195, 1201 (5th Cir. 1993), for the proposition that "merely speculative" evidence cannot support a grant of a new trial under Rule 60(b)(2). Opening Br. at 18.

Those cases—and others that Crawford does not address[1]— prove Covil's *earlier* argument that speculation about the contents of the data tape is not sufficient to meet Rule 60(b)(2)'s change-in-result and materiality factors. The fact that *Bohus*, in Crawford's words (at 19), "reversed the district court's grant of a new trial because the newly discovered evidence would not have changed the outcome of the trial" is precisely the point. The new evidence in *Bohus* would not have changed the outcome because the moving party had made nothing "more than a showing of the *potential* significance of the new evidence." 950 F.2d at 930 (emphasis added; internal quotation marks and citation omitted). Similarly, the movant in *Martech* "provided only its own affirmation regarding what the witness might produce." Resp. Br. at 19–20. The same is true here. As discussed above, Crawford has provided only his own speculation and conjecture about what the data tape may contain. That is not enough for a new trial under Rule 60(b)(2).

C. Even If Crawford Were Correct About The Data Tape's Contents, The Newly Discovered Evidence Would Be Merely Cumulative.

This Court also should reverse the Circuit Court's award of relief under Rule 60(b)(2) because Crawford cannot establish that the data tape would *not* be merely cumulative. Primarily, he cannot do so, of course, because the tape's contents are "unknown." (Order p. 5; R. p. ___). But even accepting Crawford's speculation about the tape's contents, Rule 60(b)(2) relief would still be improper because the evidence would be merely cumulative. *See* Opening Br. at 21; *Lanier*, 364 S.C. at 217, 612 S.E.2d at 459.

[1] *See* Opening Br. at 19 (citing *Haigh v. Gelita USA, Inc.*, 632 F.3d 464 (8th Cir. 2011), and *LiButti v. United States*, 178 F.3d 114 (2d Cir. 1999), for the proposition that speculation is insufficient to sustain a new trial under Rule 60(b)(2)).

In fact, Crawford concedes this critical point. Crawford never contests that if he is correct that the data tape contains evidence that Covil supplied asbestos-containing insulation to the Celanese plant during the relevant time period, it would be cumulative of evidence presented at trial and the jury instruction on the issue. Instead, his only argument in response is that this matter presents an "exceptional case[] warranting a new trial on merely cumulative or impeaching evidence." Resp. Br. at 20.

Unable to dispute that his desired data-tape content would be cumulative, Crawford urges this Court to apply an *exception* to the general rule barring cumulative evidence under Rule 60(b)(2). According to Crawford, this exception applies when the newly discovered evidence is "'so directly applicable to the main point involved that it would be a denial of justice to refuse the motion.'" *Id.* at 20 (quoting *State v. Strickland*, 201 S.C. 170, 170, 22 S.E.2d 417, 418 (1942)).

But that exception is not the law in South Carolina. In relying on the Supreme Court's decision in *Strickland*, Crawford quotes not from the opinion of the court but from the recitation of the trial court's decision. The Supreme Court did not then, or at any other time, adopt an exception like the one Crawford requests. In fact, no case has ever cited *Strickland* to support the existence of such an exception. And for good reason; the trial court based its exception on *Durant v. Philpot*, 16 S.C. 116, 125 (1881), which was decided at a time when there was no cumulative-evidence limitation on granting a new trial. *Compare Durant*, 16 S.C. at 125 ("We know of no case in which a new trial or a rehearing has been refused simply because the alleged newly-discovered evidence was merely cumulative."), *with Lanier*, 364 S.C. at 217, 612 S.E.2d at 459 (holding that new evidence under Rule 60(b)(2) cannot be "merely cumulative or impeaching").

II. The Circuit Court Abused Its Discretion In Granting A New Trial Under Rule 60(b)(3).

As Covil demonstrated in its Opening Brief (at 25), the Circuit Court also erred for numerous reasons in granting a new trial, in the alternative, under Rule 60(b)(3). None of Crawford's responses satisfies the fundamental principle that a new trial cannot be granted under Rule 60(b)(3) unless the movant proves fraudulent intent by "clear and convincing evidence." *Chewning v. Ford Motor Co.*, 354 S.C. 72, 86, 579 S.E.2d 605, 612 (2003).[2]

Crawford fails to meet his burden to prove that Covil acted with the intent to fraudulently conceal the data tape. *See Chewning*, 354 S.C. at 86, 579 S.E.2d at 612. Nowhere in his response does Crawford point to any record evidence that establishes Covil acted intentionally (because none exists). Instead, Crawford attempts to shift the burden to Covil to prove that it did *not* act intentionally. He claims (at 23) that Covil's affidavits were "insufficient to establish" that Covil did not act intentionally to deceive the court, and that Covil "failed to offer any plausible explanation for their failure to disclose the data tape." But it is not Covil's burden to *disprove* fraudulent intent. It is *Crawford's* burden to prove as much, and he has not done so.

In fact, Crawford "failed to even allege the existence of fraudulent intent" in the Circuit Court, *Perry v. Heirs at Law of Gadsden*, 357 S.C. 42, 47, 590 S.E.2d 502, 504–05 (Ct. App. 2003), which is reason enough to reverse the grant of Rule 60(b)(3) relief, *see id.* at 48, 590 S.E.2d at 505 (holding that the movant's allegations were "so deficient that we would be compelled to find the trial court abused its discretion had it granted his motion"). And Crawford fails to allege

[2] For example, it is entirely irrelevant to the question of fraudulent intent whether, as Crawford asserts, the U.S. District Court for the District of South Carolina held that Covil's attorneys and insurers were the alter ego of Covil. Resp. Br. at 23 n.4. It is also wrong. In that case, the court granted a motion to remand the alter ego claim to state court and accordingly denied as moot the pending motions to dismiss. Order and Opinion (ECF No. 55), *Finch v. U.S. Fidelity & Guaranty Co.*, No. 3:19-cv-01827.

fraudulent intent even on appeal, offering only the bald assertion that "Covil's attorneys knew that [their] representations to the trial court were not true because they did not know what materials were in their possession." Resp. Br. at 24. That is not enough. Indeed, the alleged *lack* of knowledge by Covil's counsel about the materials in their possession is the opposite mental state from the *intentional* withholding that Crawford must establish under Rule 60(b)(3).

But even had Crawford adequately alleged fraudulent intent, the unrebutted affidavits submitted by Covil are more than sufficient to establish that Covil did not intentionally conceal the data tape. Daniel White, an attorney at Gallivan White & Boyd, P.A. who represented Covil from the mid-1970s until April 2018, swore in an affidavit that "Gallivan White did not intentionally conceal the data tape from Plaintiff or the Court." (Covil Opp., Ex. C, White Affidavit ¶ 10; R. p. ___). Additionally, Mark Wall, Covil's trial counsel from Wall Templeton & Haldrup, P.A., who began representing Covil in May 2018, swore in an affidavit that "Wall Templeton & Haldrup first learned of the data tape present among Covil's paper records on or about August 2018," which is after the verdict in this case. (Covil Opp., Ex. J Wall Affidavit ¶ 6; R. p.___). Crawford submitted absolutely no evidence to refute these statements or to otherwise cast doubt on the affiants' credibility. There was thus no evidence that could support a finding, much less by clear and convincing evidence, that Covil acted with fraudulent intent. And there was thus no basis for granting a new trial under Rule 60(b)(3).

Having failed to meet his burden under the applicable Rule 60(b)(3) standard and attempted to shift that burden improperly to Covil, Crawford also seeks to import an altogether new legal standard. Citing a 32-year-old federal district court case, Crawford claims that "an intent to deceive may be inferred when there is no other reasonable or plausible explanation for the . . . false representation." Resp. Br. at 23 (quoting *Floyd v. Ohio Gen. Ins. Co.*, 701 F. Supp. 1177, 1190

(D.S.C. 1988)). But that case concerned whether an insurer could avoid coverage because its insured acted with an intent to deceive. It did not involve application of Rule 60(b)(3), or its federal analogue, under which it is well-established that a movant must show fraudulent intent by clear and convincing evidence. *Chewning*, 354 S.C. at 86, 579 S.E.2d at 612.

In any event, Crawford cannot meet even his preferred, yet incorrect, standard because he himself offers a reasonable explanation for why the data tape was not produced. According to Crawford, there was no "identification of markings or labels on the face of the data tape that would have even suggested to Mr. Crawford or his counsel that the information contained on the data tape was responsive to discovery requests or was relevant to Mr. Crawford's case against Covil." Resp. Br. at 18. That reasoning must apply equally to Covil's counsel, who had possession of the tape among 25,000 files. They would likewise have seen no "markings or labels" that "would even have suggested" that the tape's contents were responsive or relevant. Instead they would have seen a label suggesting the opposite—that its contents date from 1990 and 1991, well after the relevant time period.

CONCLUSION

The Court should reverse the judgment of the Circuit Court.

Respectfully submitted,

July 17, 2020

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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 the Reply Brief of Appellant via electronic mail on the 17th day of July, 2020, addressed as follows to counsel of record:

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