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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Jean Hoefer 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 Jerry Howard Crawford, Individually and as Personal Representative of the Estate of Evelyn Kay Crawford, Respondent,

v.

Celanese Corporation; Aurora Pump Company; Carrier Corporation; CAN 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.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES

Did the trial court abuse its discretion in granting a new trial pursuant to the Thirteenth Juror Doctrine when there was conflicting evidence regarding Covil's liability and the trial court's order is not wholly unsupported by the evidence?

STATEMENT OF FACTS

Jerry Crawford[1] commenced this action on December 4, 2017, via a Summons and Complaint filed in the Spartanburg County Court of Common Pleas. [Summons & Complaint, R. at 16]. Mr. Crawford was diagnosed with mesothelioma and sought recovery as a result. [*Id.*, R. at 21]. Mr. Crawford alleged that he was exposed to asbestos, including asbestos-containing thermal insulation supplied by Appellant Covil Corporation, while working at the Hoechst Celanese facility in Spartanburg, South Carolina from 1970 to 1974. [*Id.*, R. at 21]. At the time of trial before Jean Hoefer Toal, Chief Justice of the Supreme Court of South Carolina (Retired), acting as Circuit Court Judge, Covil was the only remaining defendant in this matter. Against Covil, Mr. Crawford had three discrete causes of action: negligence, strict liability, and breach of implied warranty. [*Id.*, R. at 25-42].

[1] Jerry Crawford died on December 15, 2018. His family is in the process of having his daughter, Patty Giles, appointed as the representative of his estate. Because Jerry Crawford was the Personal Representative of his wife's estate, a new representative will be appointed to oversee her estate as well. Once the personal representatives are appointed by the probate court, a substitution of parties will be made in this Court.

I. Evidence Offered at Trial[2]

A. Mr. Crawford was exposed to asbestos-containing insulation at the Spartanburg Celanese plant.

Mr. Crawford testified, via video deposition, how he was exposed to asbestos-containing insulation dust. [Deposition of Jerry Crawford, p. 14-36; R. at 1976-1998]. Mr. Crawford worked at the Hoechst Fiber (Celanese) plant in Spartanburg, South Carolina from 1970 to 1974. [*Id.* at 12:20-13:5; R. at 1974:20-1975:5]. During that time, he worked at three locations within the plant: the poly building, the continuous line building, and the warehouse. [*Id.* at 18:19-20:14; R. at 1980:19-1982:14] Daniel Construction (Daniel) built an addition to the continuous line building during the period Mr. Crawford worked at Celanese. [*Id.* at 23:10-24:6; R. at 1985:10-1986:6.] Daniel installed insulation on the new lines in this area. [*Id.* at 21:14-16, 21:18-22:5; R. at 1983:14-1984:5.] Mr. Crawford testified that throughout this period, he saw Daniel cut insulation for steam pipes, which created "a good bit of dust." [*Id.* at 20:23-25, 21:2-6, 21:7-10; 24:25-25:2, 25:7-9; 25:14-16; R. at 1982:23-1983:10; 1986:25-1987:16.] Mr. Crawford testified that this work caused him to breathe that dust. [*Id.* at 24:25-25:2, 25:7-9, 25:12; R. at 1986:25-1987:12.] After construction was completed, the dust created from such work remained in his workspace. [*Id.* at

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[2] Prior to Respondent calling his first witness, the trial court instructed the jury as follows:

> Ladies and gentlemen of the jury, as the result of rulings that I have made, I am instructing you now that Jerry Crawford, the plaintiff in this matter, was exposed to asbestos insulation supplied by and installed by Covil Corporation at Celanese between 1970 and 1974.

[R. at 1179:8-12]. This instruction was given as the result of sanctions levied against Covil for its failure to cooperate during the discovery phase of this matter. Covil's counsel noted that if this instruction was followed by the jury, Mr. Crawford was essentially being granted a directed verdict on the issue on liability. [R. at 1140:2-1141:7]. Respondent disagreed, as he would still have to prove causation. [R. at 1141:14-16]. The court agreed with Respondent and the jury was instructed as stated. Respondent argued for directed verdict at the end of Covil's case-in-chief and requested that the trial court not give consideration to this presumption. Moreover, in granting Respondent's motion for a new trial, the court gave no consideration to the presumption.

29:10-12, 29:14-16; R. at 1991:10-16.] Daniel also repaired the insulation in the poly building. [*Id.* at 28:20-29:3; R. at 1990:20-1991:3.]

Mr. Crawford was never warned about the dangers of working with or around asbestos. [*Id.* at 51:8-52:12.; R. at 2013:8-2014:12.] Mr. Crawford stated that if he had known that asbestos was dangerous, he would have "found another job away from asbestos." [R. at 2014:13-17.]

Harley Neelands corroborated Mr. Crawford's testimony about the quantity of dust created from the insulation work performed at the Celanese plant. Mr. Neelands worked for Daniel at the Celanese plant in Spartanburg. [Deposition of Harley Neelands, 124:6-11; R. at 2819:6-11.] According to Mr. Neelands, Daniel insulated pipe at the Celanese plant. [*Id.* at 124:22-25; R. at 2819:22-25.] Mr. Neelands testified that they used Kaylo-brand half-moon insulation, "mud" insulation and Kaylo block insulation. [*Id.* at 125:23-126:4, 126:19-21, 126:19-21, 126:23-127:2; R. at 2820:23-2822:2.] He described how dust was created from cutting the Kaylo insulation, mixing the mud insulation, and cleaning up afterwards. [*Id.* at 126:5-12; 127:5-11; 130:18-22, 130:24-25; R. at 2821:5-12; 2822:5-11; 2825:18-25.] Their clothes were covered with white chalky dust at the end of each day. [*Id.* at 131:9-13, 131:16-18; R. at 2826:9-18.]

Mr. Crawford also offered evidence that the insulation used in his presence, contained asbestos. Bruce Bowyer testified on behalf of Celanese and agreed that the additions to the plant described by Mr. Crawford and Mr. Neelands occurred in the early 1970s. [Deposition of Bruce Bowyer, 12:18-20; 91:4-12; R. at 3038:18-20; 3117:4-12.] Mr. Bowyer agreed that plant specifications called for amosite asbestos-containing insulation. [*Id.* at 86:3-13; R. at 3112:3-13.] During his testimony, Mr. Bowyer referred to a plant survey conducted in 1995, admitted as Plaintiff's Exhibit No. 822.1, which showed the quantity of asbestos-containing insulation removed from various areas of the plant. [*Id.* at 91:4-12; R. at 3117:4-12.] In the area where Mr.

Crawford worked, 90% of the thermal insulation removed from that area contained asbestos. [*Id.* at 173:7-12, 174:12-22; R. at 3199:7-3200:22.]

Covil, through its corporate representative Robert Glenn, admitted that Kaylo-brand insulation contained asbestos during the time period when Daniel was installing Kaylo-brand half-moon and block insulation. [R. at 1406:12-17; 1412:17-1413:1.] Covil admitted that such Kaylo insulation contained asbestos through until 1973. [R. at 1406:3-11.]

B. Covil supplied and installed the asbestos-containing insulation at Spartanburg Celanese.

During trial, Respondent presented evidence that the asbestos-containing insulation to which Jerry Crawford was exposed was supplied and occasionally installed by Covil. Mr. Neelands testified that Covil supplied the insulation that Daniel installed at the Celanese plant. [Neelands Depo., R. at 2829:6-17; 2830:22-25.] Covil admitted that it sold Kaylo brand asbestos-containing insulation, the same brand that Mr. Neelands identified as being installed at the Spartanburg Celanese plant. [R. at 1406:15-17.]

Mr. Neelands' testimony was corroborated by testimony and evidence that Covil supplied insulation to Daniel and Covil acted as Daniel's insulation subcontractor. Covil admitted at trial that it sold insulation to industrial contractors. [R. at 1403:8-13.] In fact, according to Covil, it was the second largest insulation contractor in the southeast United States in the 1960s and 1970s, and Daniel was one of its largest customers. [R. at 1405:11-14; 1410:23-25.] Covil's relationship with Daniel began in the early 1960s. [R. at 1411:1-4.] Covil agreed that Daniel constructed the Spartanburg Celanese plant. [R. at 348:1-9.]

During direct examination, Covil asked Mr. Glenn about his search for documents reflecting Covil's sales to the Spartanburg Celanese plant. He testified that he performed a word search of Covil's documents and found nothing regarding the Spartanburg Celanese plant. [R. at

1437:7-24.] He stated that a fire occurred in 1973, thereby causing Covil to lose all sales information from 1973 and beforehand. [R. at 1439:8-11.] Additionally, although Mr. Glenn performed a word search, he only actually read about 100 of the 24,000 pages of documents available to him. [R. 1427:19-22.] Mr. Glenn reviewed documents and testimony from prior corporate representatives which confirmed that Covil was an approved insulation vendor at the Celanese Spartanburg plant. [R. at 1438:12-18.]

In contrast to the testimony from Covil regarding the destruction of relevant documents in the 1973 fire, Machen Carpenter testified that Covil's office complex was protected by a fire wall and the office complex was not destroyed by the 1973 fire. [Deposition of Machen Carpenter, at R. at 2615:16-21.] Moreover, Covil's documentation was kept in a vault which would not have been destroyed by the 1973 fire either. [R. at 2615:21-22.] Mr. Carpenter testified that the missing sales records and/or invoices were likely destroyed by means other than the fire. [R. at 2615:22-25.] Similarly, Mr. Carpenter testified that Covil and Daniel worked closely together. [R. at 2522:24-2523:16; 2565:18-2566:14.]

Daniel, through its representative, confirmed that it did business with Covil as an insulation supplier and insulation subcontractor. [Deposition of Don Buck, at 11:14-17; 102:7-18, 103:2-6; R. 2645:14-17; 2667:7-2668:6.] Similarly, Dwaine Waters, a former Covil employee, testified that if Daniel had the maintenance contract, Covil did the insulation work. [Deposition of Dwaine Waters, 402:3-5; R. 2450:3-5.] Mr. Waters also testified that Covil sold and installed asbestos-containing insulation in boxes labeled "asbestos free." [R. at 630-631.] He informed his supervisors of this conduct, but they continued to use the asbestos-containing insulation because Covil needed to get rid of the asbestos-containing insulation in its warehouse. [*Id.*]

C. Mr. Crawford's exposure to asbestos-containing insulation supplied by Covil was a substantial factor in the development of his mesothelioma.

Respondent introduced causation testimony from two expert witnesses: Dr. Arnold Brody and Dr. John Maddox. Dr. Brody, an expert qualified in the areas of cell biology and experimental pathology, testified about how asbestos gets into the body and how it causes disease. [R. at 1218:1-6; 1207-1259:11-2.] Specifically, Dr. Brody testified that there was only one way for an asbestos product to get into the lymph nodes in the body and that is through inhalation. [R. at 1241:11-18.] According to Dr. Brody, because lymph "is a circulation," if there are lymph nodes around the lung where the mesothelial cells are, the asbestos fibers could be deposited there. [R. 1241:11-22.] Dr. Brody went on to explain that asbestos causes cancer in that it either displaces genes necessary for the normal distribution of chromosomes or it produces "reactive oxygen species" which damage DNA. [R. at 1241:23-1242:4; 1250:5-1251:8.] Dr. Brody was not cross-examined by Covil.

Dr. Maddox was qualified to testify as an expert in the diagnosis and causation of asbestos-related diseases from various asbestos-containing products. [R. at 1288:22-1289:12.] He offered all of his opinions to a reasonable degree of medical and scientific certainty. [R. at 1289:24-1290:2.] Dr. Maddox testified that removing asbestos-containing thermal insulation creates "very high levels of [asbestos] exposure." [R. at 1312:22-1313:1.] The exposure, as Dr. Maddox informed the jury, could reach levels of 100 fibers per cubic centimeter. [*Id.*] Additionally, the asbestos dust remains in the air for some afterwards and can be carried to adjacent spaces, even other rooms. [R. at 1313:2-8.]

Dr. Maddox reviewed Mr. Crawford's pathology records and opined that Mr. Crawford has "a malignant mesothelioma of the biphasic type of his right pleura." [R. at 1291:4-11.] Importantly, Dr. Maddox opined that Mr. Crawford's mesothelioma was asbestos related because

he "did not see . . . any other type of exposure that had contributed to his mesothelioma." [R. at 1292:14-19.] He also testified that, based on the medical and epidemiological literature available, asbestos causes mesothelioma and that it did not take a lot of asbestos to cause mesothelioma. [R. at 1293:18-1295:18.] Dr. Maddox informed the jury that, as of the Selikoff conference in 1967, it was known that some pipe insulation contained asbestos, including amosite and chrysotile, and, if it contained asbestos, it was hazardous. [R. at 1311:19-1312:16.] Dr. Maddox stated that "almost all cases of mesothelioma are caused by asbestos exposure." [R. at 1314:4-10.] Indeed, Covil admitted that, based on the science, there is a relationship between asbestos exposure and mesothelioma. [R. at 1418:11-14.]

Dr. Maddox was given a hypothetical which assumed the following: (1) that Mr. Crawford worked at the Celanese Spartanburg facility from 1970 to 1974 where thermal system insulation, containing amosite asbestos, was being worked on and installed, (2) that he was close enough to the dust from the thermal insulation that he breathed that dust, (3) that he also swept up after the work that was being done on the thermal systems insulation, (4) the work that he performed at Celanese around thermal system insulation occurred regularly throughout 1970 through 1974, and (5) that he was diagnosed with mesothelioma. [R. at 1345:13-1346:9.] With those facts in mind, Dr. Maddox opined that Mr. Crawford's exposure to asbestos-containing thermal insulation at Celanese from 1970 through 1974 was a substantial contributing cause to the development of his mesothelioma. [R. at 1346:11-16.] Additionally, Dr. Maddox testified that Mr. Crawford's mesothelioma will cause his death. [R. at 1346:17-21.]

Covil asked Dr. Maddox questions about how he attributes causation. When cross-examined about the source of his clinical history, Dr. Maddox explained that he relied on an exposure history as a basis for attribution. [R. at 1358:12-25.] Dr. Maddox clarified that each

"significant" exposure to asbestos contributed to Mr. Crawford's mesothelioma, not merely every exposure. [R. at 1361:12-1362:2.] Dr. Maddox was asked about whether Mr. Crawford's exposures to any asbestos-containing brakes constituted a substantial contributing factor in the development of his mesothelioma. [R. at 1362:3-11.] He could not and did not render such an opinion. [R. at 1362:12-1363:5.] While he agreed that there may be an asbestos exposure that occurred, he never stated that this component exposure, if any, was a substantial factor. [R. at 1363:6-15.]

Covil posed a hypothetical to Dr. Maddox which asked Dr. Maddox to assume that Mr. Crawford was exposed on a daily basis to asbestos-containing insulation at Celanese installed by Daniel and manufactured, essentially the same hypothetical asked in direct but without including the assumption that Covil supplied the insulation. [R. at 1363:16-30; 1364:16-21.] Dr. Maddox responded that the "asbestos involved in those exposure contributed to Mr. Crawford's cumulative dose" of asbestos which caused his mesothelioma. [R. at 1364:22-1365:1.]

D. Covil knew that inhaling asbestos dust from asbestos-containing insulation caused fatal disease by 1965 yet knowingly failed to act to reduce the risk to end users.

Dr. Maddox testified about what was knowable and known in the scientific community about the hazards of exposure to asbestos. He testified that the first case reports regarding the lethality of asbestos dated to the 1890s among asbestos textile workers. [R. at 1304:9-17.] By the 1930, there was a published study which concluded a significant hazard for asbestos textile workers, along with other asbestos-containing materials like gaskets and brake linings. [R. at 1304:18-1305:4.] In the 1940s and 1950s, the scientific community gradually gained awareness of the malignant diseases caused by asbestos exposure. [R. 1305:15-19.] An epidemiologic study showed a statistically significant association between asbestos exposure and lung cancer by 1955. [R. at 1305:17-22.] In the 1960s, articles began appearing that associated asbestos exposure with

mesothelioma. [R. at 1305:23-1306:21.]

Covil admitted that it received information about the hazards of asbestos from numerous sources beginning in the 1960s. Covil was aware that various insulation unions raised concerns about the hazards of asbestos in the mid-1960s. [R. at 1418:23-24.] Covil was also a member of the Southeast Insulation Contractors Association since the 1960s and was a member of the National Insulation Contractors Association. [R. at 1419:15-23; 1420:4-8.] Covil's founder, Palmer Covil, served as a director and president of that organization. [R. at 1419:24-1420:3.] Palmer Covil attended trade organization conferences and conventions. [R. at 1420:12-15.] He received and read trade organization magazines. [R. at 1420:16-23.] Mr. Covil generally understood what was going on in the industry in the 1960s. [R. at 1420:24-1421:1.] Additionally, Mr. Palmer Covil attended a conference in the mid-1960s in which Dr. Irving Selikoff spoke. [R. at 1422:5-17.] Covil agreed that Dr. Selikoff is a reliable source about asbestos hazards. [R. at 1422:18-21.]

Covil knew that asbestos was hazardous. Covil has known that asbestos could cause fatal asbestosis since 1965. [R. at 1418:18-24.] Covil possessed actual knowledge of OSHA regulations regarding asbestos in 1971. [R. at 1423:10-16.] Also, Covil's own records demonstrated that, by 1972, one of its own employees had developed asbestosis. [R. at 1423:5-9.]

Covil was aware of methods to warn and protect consumers and end users like Mr. Crawford. Covil first saw warning labels on asbestos-containing products in 1968. [R. at 1423:1-3.] It provided respirators to its own employees in the 1950s. [R. at 1424:19-22.] Covil began implementing its own measures to protect its own employees from asbestos, such as the use of industrial vacuums and exhaust ventilation, in 1972. [R. 1424:12-1425:8.]

Despite such knowledge, Covil did nothing to protect others. It admitted that it never had

a research department. [R. at 1426:6-9.] Covil never had a medical director as part of its staff. [R. at 1426:15-19.] Covil never hired an industrial hygienist to investigate the hazards of asbestos. [R. at 1426:20-1427:5.] Nevertheless, Covil continued to sell asbestos-containing insulation until at least 1973 and an invoice admitted into evidence shows that it sold asbestos-containing Thermobestos until at least 1974. [R. at 1429:23-1430:3; 3754 (Plaintiff's Exhibit No. 825.1).] Covil sold other asbestos-containing products like asbestos cloth until 1977. [R. at 1426:2-5.] Covil failed to warn of the dangers associated with the use of the asbestos-containing products that it was distributing. Covil never placed a warning on its boxes of asbestos-containing products. [R. at 1425:9-13; 1427:23-1428:11.] After 1965 when Covil learned that exposure to asbestos could cause death, Covil never took it upon itself to place that information on boxes of asbestos-containing products that it sold. [R. at 1429:7-14.] Even though Covil suggested respirators to its own employees beginning in the 1950s, it never suggested respirators to the end users of its products. [R. at 1430:15-1431:3.] Covil, in its contracting work, never warned others it worked around about the hazards of asbestos. [R. at 1430:4-8.] According to Covil, it decided not to add any warnings to the asbestos-containing products that it sold because, according to Covil, it was the manufacturers' responsibility to pass on information downstream to the users. [R. at 1425:9-13; 1430:21-24.]

E. The Crawfords suffered substantial damages as a result of Mr. Crawford's mesothelioma.

Mr. Crawford suspected that his health was failing in August of 2017 when he began experiencing shortness of breath. [Deposition of Jerry Crawford; R. at 1114:21-1115:6.] He went to the emergency room where he had fluid drained from his right lung. [R. at 1114:25-1115:10.] He was later informed that he had developed mesothelioma. [R. at 1973:9-17.]

Mr. Crawford took chemotherapy for his mesothelioma. [R. at 2018:14-18.] The doctors

put in a port on the left side of his chest for him to receive his chemotherapy treatments. [R. at 2018:19-2019:5.] He noted that the chemotherapy made him nauseous. [R. at 2019:6-10.] Mr. Crawford testified that the chemotherapy treatments did not make him feel better and he takes had them every three weeks. [R. at 2020:16-2021:4.]

He noted that because of his mesothelioma, he could no longer work in his yard, could no longer go to the gym for exercise, could no longer attend certain church meetings, and could no longer take his grandchildren out. [R. at 2021:11-2024:22.] According to Mr. Crawford, he did not know what to expect moving forward. He had been informed by his doctors that the chances of his cancer being cured were "about 20 percent." [R. at 2014:23-2025:2.] He testified this news was devastating because would not be alive to see his grandchildren or great-grandchildren grow up; but the 20 percent chance was "better than zero." [R. at 2025:5-16.]

Dr. Maddox testified that patients with mesothelioma usually consult a doctor because of shortness of breath resulting from the accumulation of fluid in the lungs. [R. at 2246:2-4.] The individual could also be experiencing chest wall pain, weight loss, and loss of appetite. [R. at 2246:5-10.] Dr. Maddox also explained that if a patient has a pleural effusion, the doctors can drain the fluid in the chest. [R. at 2246:13-16.] Draining the fluid, according to Dr. Maddox, is a somewhat painful process because sometimes there is a sharp stabbing and, occasionally, a temporary feeling of nausea. [R. at 2247:14-2248:16.] He explained that chemotherapy is a treatment option that will usually extend the life of the mesothelioma patient if the tumor is sensitive to the type of chemotherapy administered. [R. at 2249:14-18.] Chemotherapy causes various side effects including fatigue and loss of appetite. [R. at 2249:23-2251:14.] Regarding the end of Mr. Crawford's life and the progression of his cancer, Dr. Maddox testified:

> What I'm trying to say is in the end stages, whatever the cause of death may be, it's going to be extremely unpleasant. Air hunger is usually very prominent. Air hunger

> is when you are smothering. You are unable to catch a breath because you don't have lung tissue sufficient to breathe anymore. That's generally treated by morphine. Morphine reduces air hunger, but then it also reduces the -- the impulse to [breathe], so it becomes . . . a downward spiral.

[R. at 1354:9-17.]

According to Dr. Maddox, Jerry Crawford would incur future medical expenses as a result of his mesothelioma depending on his response to chemotherapy and, eventually, hospice. [R. at 1354:18-25.] Lastly, Dr. Maddox testified that, according to the Department of Social Security's actuarial tables, Mr. Crawford's life expectancy, at age 72, would have been an additional 13 years. [R. at 1355:4-10.] However, the mesothelioma shortened his life expectancy significantly, to, on average, approximately 14 months post-diagnosis. [R. at 1355:11-20.]

Mr. Crawford's daughter, Patty Giles, also testified at trial. Patty testified that her parents were married for 48 years and that they were devoted to each other. [R. at 1479:5-6; 1480:7.] They liked to work in the yard together, raking leaves, cutting grass, and taking care of the flower beds. [R. at 1480:10-24] Mr. Crawford also drove his wife everywhere because she never learned to drive. [R. at 1480:1-8.] Patty testified that her parents liked to take day trips to the beach or to the mountains or to the lake. [R. at 1481:12-20.]

Patty testified about finding out that her father had cancer. She stated that throughout the summer, Mr. Crawford had been getting more and more short of breath until "finally he couldn't—really couldn't breathe at all[.]" [R. at 1483:3-10.] He went to the emergency room and admitted to the hospital after an x-ray revealed that he had fluid on his lungs. [R. at 1483:10-12.] The doctors drained the fluid from Mr. Crawford's lungs and referred him to a lung specialist. [R. at 1483:16-19.] Mr. Crawford had to have the fluid drained from his lungs at least four more times. [R. at 1483:23-1484:12.] Mr. Crawford was having fluid drained from his lungs approximately every two weeks, when his chest became tight and painful for him to breathe. [R. at 1484:21-1485:4.]

Eventually, the lung specialist recommended the use of a catheter to drain the fluid from Mr. Crawford's lungs at home. [R. at 1485:5-14.] Patty testified that she went to her parents' home every three days to drain the fluid from her father's lungs. [R. at 1485:15-24.] Before the catheter was inserted, the doctors performed a biopsy and informed Mr. Crawford and his family that he had cancer. [R. at 1485:25-1486:12.] A week after the biopsy, Mr. Crawford and his family learned that he had mesothelioma, and he started chemotherapy shortly thereafter. [R. at 1489:3-14.]

Mr. Crawford had surgery to remove 95% of the lining of his lung, leaving only the lining that was near his heart. [R. at 1496:20-23.] Doctors also removed part of his right lung. [R. at 1497:8-9.] Since the surgery, Mr. Crawford was still in pain and he was still having trouble breathing. [R. at 1498:7-16.] He had developed a cough and it was difficult for him to talk and he got tired easily. [R. at 1498:15-25.]

II. Jury Verdict and New Trial

On July 19, 2018, the jury returned a verdict in favor of Covil. [See Verdict Form; TT 7/19/18, at R. at 1:2-2:13]. Respondent requested a Judgment Notwithstanding the Verdict (JNOV) and a New Trial Absolute. [*See Plaintiff's Motion for Judgment Notwithstanding the Verdict and For New Trial Absolute*; R. at 535]. Respondent filed his memorandum in support of his motion on September 25, 2018, after receiving copies of the trial transcript. Therein, Respondent recounted the evidence presented to the jury in support of his claims against Covil. [*See Plaintiff's Memorandum in Support of Plaintiff's Motion for Judgment Notwithstanding the Verdict and For New Trial Absolute*; R. 535]. Respondent also noted his failed attempt to get copies of the depositions which Covil presented as evidence during its case-in-chief in order to fairly and accurately relay the presentation of evidence to the jury during trial. [*Id.* at pg. 18, ftn. 3; R. at 552.]

The trial court held a hearing on Respondent's motion on October 10, 2018. [JNOV Transcript; R. 1703]. During the hearing, the trial court gave the parties an opportunity to explain why Respondent was or was not entitled to a new trial. The trial court ultimately denied Respondent's request for a JNOV but granted Respondent a new trial pursuant to the Thirteenth Juror Doctrine. [*Id.* at 51:7-15; R. at 1753:7-15.]

STANDARD OF REVIEW

The decision to grant or deny a motion for a new trial rests within the sound discretion of the trial court, and that decision will not be disturbed absent an abuse of discretion. *S.C. State Highway Dep't v. Clarkson*, 267 S.C. 121, 126, 226 S.E.2d 696, 697 (1976). The standard of review of the grant or denial of a motion for a new trial extends substantial deference to the trial court, and the trial court's decision will not be disturbed on appeal unless the ruling is wholly unsupported by the evidence or based on an error of law. *Limehouse v. Hulsey,* 397 S.C. 49, 72, 723 S.E.2d 211, 223 (Ct. App. 2011) (citing *Stevens v. Allen,* 336 S.C. 439, 446, 520 S.E.2d 625, 628-29 (Ct. App. 1999)); *rev'd on other grounds* by *Limehouse v. Hulsey*, 404 S.C. 93, 744 S.E.2d 566 (S.C. 2013). An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion that is without evidentiary support. *Carlyle v. Tuomey Hosp.*, 305 S.C. 187, 193, 407 S.E. 2d 630, 633 (1991).

Likewise, the trial court's grant of a new trial pursuant to the thirteenth juror doctrine should not be disturbed unless the court's findings are wholly unsupported by evidence. *Vinson v. Hartley*, 324 S.C. 389, 477 S.E. 2d 715 (Ct. App. 1996); *Morris v. Jensen*, 309 S.C. 153, 420 S.E.2d 710 (Ct. App. 1992); *Umhoefer v. Bollinger*, 298 S.C. 221, 379 S.E.2d 296 (Ct. App. 1989). "If the testimony and evidence are in conflict, this Court has consistently held that the trial judge's granting of a new trial upon the facts has support and will not be disturbed." *Folkens v. Hunt*, 300

S.C. 251, 255, 387 S.E.2d 265, 267 (1990). As such, the appellate court's review of a trial court's grant of a new trial is limited to consideration of whether evidence exists to support the trial court's order. *Lane v. Gilbert Constr. Co.*, 383 S.C. 590, 597, 681 S.E.2d 879, 883 (2009).

ARGUMENT

I. The trial court did not abuse its discretion in granting a new trial.

"In South Carolina, a trial judge may grant a new trial following a jury verdict under the Thirteenth Juror Doctrine. The doctrine entitles the judge to sit, in essence, as the thirteenth juror when he finds the evidence does not justify the verdict, and then to grant a new trial based solely upon the facts." *Lane*, 383 S.C. at 597, 681 S.E.2d at 883 (internal quotation marks and citations omitted). As explained by this state's Supreme Court:

> The thirteenth juror doctrine is a vehicle by which the trial court may grant a new trial absolute when he finds that the evidence does not justify the verdict. This ruling has also been termed granting a new trial upon the facts. The effect is the same as if the jury failed to reach a verdict. The judge as the thirteenth juror "hangs" the jury. When a jury fails to reach a verdict, a new trial is ordered. Neither judge nor the jury is required to give reasons for this outcome. Similarly, because the result of the "thirteenth juror" vote by the judge is a new trial rather than an adjustment to the verdict, no purpose would be served by requiring the trial judge to make factual findings.

Folkens, 300 S.C. at 254, 387 S.E.2d at 267 (internal citation omitted); *see also Worrell v. South Carolina Power Co.*, 186 S.C. 306, 313-314, 195 S.E. 638, 641 (1938) ("the trial judge is the thirteenth juror, possessing the veto power to the Nth degree").

Respondent's claims against Covil at trial were negligence, strict liability, and breach of implied warranty. [See Verdict Form; R. at 1-2.] There was conflicting evidence on each of these claims, with the fair preponderance of the evidence, as Justice Toal found, supporting a verdict in Respondent's favor. It cannot be said that the trial court's decision to grant Respondent a new trial

pursuant to the Thirteenth Juror Doctrine was an abuse of discretion or wholly unsupported by the evidence.

As mentioned above and in the trial court's order granting Respondent's motion for a new trial, Respondent presented substantial evidence to demonstrate that Mr. Crawford was exposed to asbestos-containing thermal insulation supplied and installed by Covil during his work at the Celanese Spartanburg plant from 1970 to 1974. Mr. Crawford testified that he worked in three sections of the Celanese Spartanburg plant and that he observed other workers installing, removing, and repairing thermal insulation. He testified that when the insulation was cut and replaced, visible dust would be generated, which he breathed.

Evidence presented by Respondent suggested that, while Daniel performed the original construction of the Celanese Spartanburg plant, Daniel was one of Covil's largest customers in the 1970s, and Covil was an approved insulation vendor for the Celanese Spartanburg plant. Additionally, testimony from Daniel and others confirmed the relationship between Daniel and Covil and that if Daniel was the contractor on site, Covil was the insulation contractor on site. In fact, according to documents presented to the jury by Respondent, Covil was selling and distributing asbestos-containing thermal insulation as late as Mr. Crawford's last year at the Celanese Spartanburg plant. Mr. Neelands confirmed that Covil supplied the insulation used by Covil and Daniel at the Celanese Spartanburg plant.

Based on an inability to find and produce sales invoices as a result of a fire in 1973, Covil argued that there was no evidence that it sold and/or supplied asbestos-containing insulation to the Celanese Spartanburg plant from 1970 to 1973. Respondent presented evidence suggesting that those missing sales invoices were destroyed by means other than an unintentional fire. Mr. Carpenter testified that the relevant sales documents, which would have either confirmed or refuted

Covil's presence or supply of asbestos-containing materials to the Celanese Spartanburg plant during the years that Mr. Crawford worker there, were maintained in Covil's office complex inside a vault. Neither the office complex nor the vault was destroyed in the 1973 fire. Thus, Covil could have sold asbestos-containing insulation to the plant in the 1970 to 1973 period and but relied on the fire to explain its failure to produce sales invoices.

Importantly, Covil, throughout the time period that Mr. Crawford was working at the Celanese Spartanburg plant and well before, knew of the hazardous nature of the products that it was distributing—specifically, that exposure to and inhalation of asbestos-containing dust was harmful and, in some cases, fatal. Covil, through testimony from its corporate representative, admitted that it received information regarding nature of the hazardousness of asbestos from multiple sources in the 1960s. Covil, however, as Respondent pointed out, had access to information regarding asbestos prior to the 1960s. The first case reports regarding the lethality of asbestos were released in the 1890s. Mr. Covil served as president of the Southeast Insulation Contractors Association and was a member of the National Insulation Contractors Association. Moreover, Mr. Covil attended multiple trade organization conferences and conventions, including conventions led by well-respected sources on the hazards of asbestos.

In spite of the knowledge gained by Covil prior to the years when Mr. Crawford was exposed to the asbestos-containing products it distributed, Covil failed to warn the end users of the products that it distributed of the dangerous of the products. It never placed any warning on the boxes of the products that it distributed, not even after learning that exposure to asbestos could be fatal and not after its own employee developed asbestosis. Covil continued to sell and distribute asbestos containing products until 1973 and, in some circumstances, such as with asbestos-containing blankets, until 1977.

Causation and Mr. Crawford's damages as a result of his mesothelioma was not seriously disputed by Covil at trial. Nevertheless, Respondent presented evidence that Mr. Crawford's life has significantly changed as a result of his mesothelioma. He could no longer perform activities that he enjoyed like exercising, working in his yard, or playing with his grandchildren. He was given only a 20% chance of survival even though he was having chemotherapy treatments every three weeks. Dr. Maddox confirmed that Mr. Crawford would require future medical treatment for his mesothelioma and, due to the nature of and progression of the cancer, the end of his life would be painful.

It was this evidence, in its entirety, that the trial court had in mind when it granted Respondent's motion for a new trial pursuant to the thirteenth juror doctrine. The trial court was present when this evidence was presented to the jury, was in the best position to evaluate the conflicts in the evidence, and, in its Order, took note of the conflicting evidence presented. While Covil pointed to a lack of documentary evidence that it was at Celanese Spartanburg, Respondent presented evidence showing that Covil was an approved vendor for thermal insulation at Celanese during the years that Mr. Crawford worked there and former Covil employees testified that Covil was the insulation contractor at Celanese Spartanburg during the time that Mr. Crawford worked on the premises. [See *Order Granting New Trial*; R. at 3.] The court also briefly discussed the conflicting testimony regarding the reason for the absence of sales documents. [See *Order Granting New Trial*, pgs. 2-3; R. at 4-5.] The trial court properly recognized that, given the conflicts in the testimony and evidence presented, the evidence did not justify a verdict for Covil. Covil has failed to show that this determination is wholly unsupported by the evidence.

II. The trial court did not shift the burden to Covil but instead relied on conflicts in the evidence.

In support of its position that the trial court abused its discretion in granting Respondent's

motion for a new trial, Covil heavily relies on a 1938 opinion from the Supreme Court of South Carolina and points to statements made outside of the presence of the jury. As the Supreme Court of South Carolina has recently recognized, "[a]n 'abuse of discretion' occurs when the trial court's order is controlled by an error of law or when there is no evidentiary support for the trial court's factual conclusions." *Stokes-Craven Holding Corp. v. Robinson*, 416 S.C. 517, 537, 787 S.E.2d 485, 495 (S.C. 2016). Neither has occurred here.

First, the Supreme Court's opinion in *Worrell v. South Carolina Power Co.*, 186 S.C. 306, 195 S.E. 638 (S.C. 1938) does not support the position taken by Covil that, in order to grant Respondent's motion for a new trial pursuant to the thirteenth juror doctrine, a defense verdict must be wholly unsupported by the evidence. To the contrary, this is the standard by which *this* Court reviews the trial court's grant of a new trial, not the standard used by the trial court in granting a new trial. The *Worrell* holding makes it clear that, on appeal, the appellate court's role is to not to "review matters of fact" but to determine if the trial court's decision is "wholly unsupported by evidence." *Id.* at 642. As discussed, the trial court's grant of Respondent's motion for a new trial was not "wholly unsupported by the evidence" and should not be reversed.

Moreover, this Court should not be swayed by Covil's contention that certain statements reflect negatively on the trial court's fairness and impartiality. The statements were not made in the presence of the jury and reflect nothing more than the trial court's expectation to have parties comply with their obligations throughout discovery and at trial and to reach a resolution supported by the evidence. In any event, the statements have no bearing on the issue at hand—whether the trial court's grant of Respondent's motion for a new trial pursuant to the thirteenth juror doctrine was an abuse of discretion. And, despite whatever unfairness Covil feels it experienced during trial, the grant of a new trial was not unsupported by the evidence and these statements do not

change the evidence presented to the jury and heard by the trial court.

Also, Covil contends that the trial court committed an error of law when it granted Respondent's motion for a new trial and found that the jury's verdict was "contrary to the clear preponderance of the evidence." [JNOV Trial Transcript; R. at 1748:13-24.] The trial court's written order, entered on October 19, 2018, states that the court may grant a new trial pursuant to the thirteenth juror doctrine if the judge determines that the verdict "is contrary to the fair preponderance of the evidence." [Order, 10/22/18; pg. 5; R. at 7.] Consequently, Covil's argument on this point is without merit as "[i]t is well settled that when there is a discrepancy between an oral ruling of the court and its written order, the written order controls." *Cole Vision Corp. v. Hobbs*, 394 S.C. 144, 149, 714 S.E.2d 537, 540 (S.C. 2011).

Finally, there was no error of law committed by the trial court by granting Respondent's motion for a new trial pursuant to the thirteenth juror doctrine, and the trial court did not attempt to shift the burden to Covil by stating that it failed to present evidence regarding the use of Covil's products at Celanese Spartanburg. Covil attempts to manufacture error by giving this Court snippets of statements made at trial or at the hearing on Respondent's motion for a new trial. The challenged statements, when considered in the proper context and in terms of what the trial court and counsel for Covil were discussing at the time, were made in response to Covil's failure to present evidence to rebut Respondent's evidence that Covil supplied asbestos-containing products to the Celanese Spartanburg plant. In fact, after making this statement, the trial court gave Covil the opportunity to tell the court what evidence was presented in defense of the claim that Covil supplied asbestos-containing materials to Celanese Spartanburg. [JNOV Trial Transcript; R. at 1731:7-1734:19.] Covil's "evidence" was that it had no records showing that it provided materials to Celanese Spartanburg even though, according to Covil's own defense, it would not have had

those records anyway because the records were all lost in a fire in 1973.

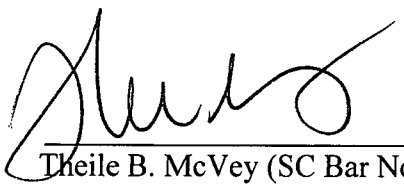
Requesting that Covil identify the evidence it presented to defeat Respondent's claims is not error and fails to support the reversal of the trial court's grant of a new trial. It was a mark of thoroughness, fairness, and evenhandedness in assuring that both parties were given a fair opportunity to argue their positions on the motions before the court. The court gave proper consideration to the parties' conflicting evidence, and its conclusion that the trial record did not justify the verdict finds substantial support in the evidence.

CONCLUSION

For the reasons set forth herein, Covil has failed to demonstrate that the trial court abused its discretion in granting Respondent's request for a new trial pursuant to the thirteenth juror doctrine. Covil has failed to show that the trial court's order granting a new trial was wholly unsupported by the evidence. Respondent therefore respectfully requests that this Court affirm the circuit court's ruling.

Dated: May 20, 2019

Respectfully submitted,



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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Jean Hoefer 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 Jerry Howard Crawford, Individually and as Personal Representative of the Estate of Evelyn Kay Crawford, Respondent,

v.

Celanese Corporation; Aurora Pump Company; Carrier Corporation; CAN 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,

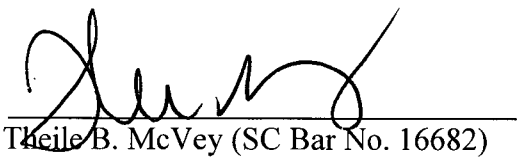
Of Which Covil Corporation is the Appellant.

CERTIFICATE OF COUNSEL

As counsel for Respondents, I hereby certify that Respondents' Final Brief complies with Rule 211(b) of the South Carolina Appellate Court Rules.

Dated: June 4, 2019

Respectfully submitted,



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