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. 2019-002126
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.

---

# FINAL BRIEF OF RESPONDENT

---

Ka'Leya Q. Hardin (admitted *pro hac vice*)
Jonathan M. Holder
DEAN OMAR BRANHAM SHIRLEY, LLP
302 N. Market Street, Suite 300
Dallas, TX 75202
Telephone: (214) 722-5990

Theile B. McVey
John D. Kassel
KASSEL MCVEY ATTORNEYS AT LAW
P.O. Box 1476
1330 Laurel Street
Columbia, SC 29201

*Counsel for Respondents*

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

*Page(s)*

Cases

**Rules**

## STATEMENT OF ISSUES

1. Did the trial court abuse its discretion in granting a new trial pursuant South Carolina Rule of Civil Procedure 60(b)(2) when newly discovered evidence, withheld by Appellant Covil Corporation, came to light after the verdict?
2. Did the trial court abuse its discretion in granting Respondent a new trial pursuant to South Carolina Rule of Covil Procedure 60(b)(3) based upon a finding that Covil committed fraud in withholding relevant evidence from Respondent Jerry Crawford and from the court?

## STATEMENT OF FACTS[1]

Jerry Crawford[2] commenced this action on December 4, 2017, via a Summons and Complaint filed in the Spartanburg County Court of Common Pleas. [Summons & Complaint, R. p. 23-71]. Mr. Crawford was diagnosed with mesothelioma and sought recovery as a result. [R. p. 28-30]. 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 ("Celanese Spartanburg") in the 1970s. [R. p. 28, ¶ 2]. 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. [R. p. 32, ¶ 14- p. 41, ¶ 46; p. 50, ¶¶ 81-84].

---

[1] Respondent incorporates by reference the facts as stated in Respondent's Final Brief in *Crawford v. Celanese Corporation*, Case No. 2018-001965. The issues addressed in this appeal and Case No. 2018-001965 arise from the same facts and circumstances.

[2] 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[3]

### 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, R. p. 2758, line 1- p. 2778, line 20]. Mr. Crawford worked at the Celanese Spartanburg plant from 1970 to 1974. [R. p. 2756, line 20- p. 2757, line 5]. During that time, he worked at three locations within the plant: the poly building, the continuous line building, and the warehouse. [R. p. 2762, line 19- p. 2764, line 15]. Daniel Construction (Daniel) built an addition to the continuous line building during the period Mr. Crawford worked at Celanese. [R. p. 2767, line 10- p. 2768, line 6]. Daniel installed insulation on the new lines in this area. [R. p. 2765, lines 14-16; R. p. 2765, line 18- p. 2766, line 5]. Mr. Crawford testified that throughout this period, he saw Daniel cut insulation for steam pipes, which created "a good bit of dust." [R. p. 2764, lines 23-25; R. p. 2765, lines 2-6; R. p. 2765, lines 7-10; R. p. 2768, line 25-p. 2769, line 2; R. p. 2769, line 7-9; R. p. 2769, lines 14-16]. Mr. Crawford testified that this work caused him to breathe that dust. [R. p. 2768, line 25- R. p. 2769, line 2; R. p. 2769, lines 7-9; R. p.

---

[3] 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. p. 1846, lines 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. p. 1807, line 2- p. 1808, line 7]. Respondent disagreed, as he would still have to prove causation. [R. p. 1807, lines 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.

2769, line 12]. After construction was completed, the dust created from such work remained in his workspace. [R. p. 2773, lines 10-12; R. p. 2773, lines 14-16]. Daniel also repaired the insulation in the poly building. [R. p. 2772, line 20- p. 2773, line 3].

Mr. Crawford was never warned about the dangers of working with or around asbestos. [R. p. 2795, line 8- p. 2796, line 12]. Mr. Crawford stated that if he had known that asbestos was dangerous, he would have "found another job away from asbestos." [R. p. 2796, lines 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, R. p. 3430, lines 6-11]. According to Mr. Neelands, Daniel insulated pipe at the Celanese plant. [R. p. 3430, lines 22-25]. Mr. Neelands testified that they used Kaylo-brand half-moon insulation, "mud" insulation and Kaylo block insulation. [R. p. 3431, lines 23- p. 3432, line 4; p. 3432, lines 19-21; p. 3432, line 23-p. 3433, line 2]. He described how dust was created from cutting the Kaylo insulation, mixing the mud insulation, and cleaning up afterwards. [R. p. 3432, lines 5-12; p. 3433, lines 5-11; p. 3435, lines 18-22; p. 3435, lines 24-25]. Their clothes were covered with white chalky dust at the end of each day. [R. p. 3437, lines 9-13; p. 3437, lines 16-18].

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, R. p. 3255(12), lines 18-20; p. 3275(91), lines 4-12]. Mr. Bowyer agreed that plant specifications called for amosite asbestos-containing insulation. [R. p. 3274(86), lines 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. [R. p. 3275(91), lines 4-12]. In the area where Mr. Crawford worked, 90% of the thermal insulation removed from that area contained asbestos. [R. p. 3296(173), lines 7-12; p. 3296(174), lines 12-22].

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. [Trial Transcript, R. p. 2071, lines 12-17; p. 2079, line 17- p. 2080, line 1]. Covil admitted that such Kaylo insulation contained asbestos through until 1973. [R. p. 2071, lines 3-11].

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

Mr. Neelands testified that Covil supplied the insulation that Daniel installed at the Celanese plant. [Neelands Depo., R. p. 3440, lines 6-17; p. 3441, lines 22-25]. Covil admitted that it sold Kaylo brand asbestos-containing insulation, the same brand that Mr. Neelands identified as being installed at the Celanese Spartanburg plant. [Trial Transcript, R. p. 3679, lines 15-17].

Mr. Neelands' testimony was corroborated by testimony and evidence that Covil supplied insulation to Daniel and that Covil acted as Daniel's insulation subcontractor. Covil admitted at trial that it sold insulation to industrial contractors. [Trial Transcript, R. p. 3676, lines 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. p. 3678, lines 11-14; p. 3683, lines 23-25]. Covil's relationship with Daniel began in the early 1960s. [R. p. 3684, lines 1-4]. Covil agreed that Daniel constructed the Celanese Spartanburg plant. [R. p. 3684, lines 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. [Trial Transcript, R. p. 3710, lines 7-24]. He stated that a fire occurred in 1973, thereby causing Covil to lose all sales information from 1973 and beforehand. [R. p. 3712, lines 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. p. 3700, lines 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. p. 3711, lines 12-18].

As mentioned in Respondent's Final Brief addressing the trial court's grant of a new trial pursuant to the Thirteenth Juror Doctrine, Machen Carpenter's testimony contradicted testimony from Covil regarding the destruction of relevant documents in the 1973 fire. Mr. Carpenter testified that Covil's office complex was protected by a fire wall and the office complex was not destroyed by the 1973 fire. [See Respondent's Final Brief, *Crawford v. Celanese Corporation*, Case No. 2018-001965, p. 5.] Moreover, Covil's documentation was kept in a vault which would not have been destroyed by the 1973 fire either. [*Id.*] Mr. Carpenter testified that the missing sales records and/or invoices were likely destroyed by means other than the fire. [*Id.*] Similarly, Mr. Carpenter testified that Covil and Daniel worked closely together. [*Id.*]

Daniel, through its representative, confirmed that it did business with Covil as an insulation supplier and insulation subcontractor. [Deposition of Don Buck, R. p. 3179(11), lines 14-17; p. 3202(102), lines 7-18; p. 3202(103), lines 2-6]. Similarly, Dwaine Waters, a former Covil employee, testified that if Daniel had the maintenance contract, Covil did the insulation work. [Deposition of Dwaine Waters, R. p. 3738, lines 3-5]. Mr. Waters also testified that Covil sold and installed asbestos-containing insulation in boxes labeled "asbestos free." [R. at 550]. 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.*]

## II. Jury Verdict and New Trial

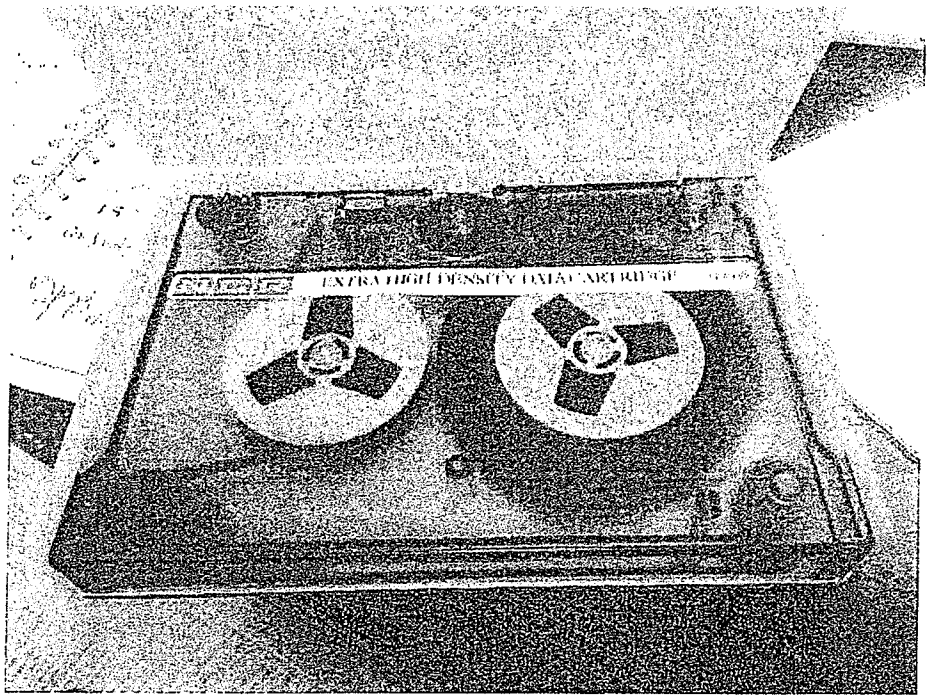
### A. New Trial Pursuant to the Thirteenth Juror Doctrine

On July 19, 2018, after a 4-day jury trial, the jury returned a verdict in favor of Covil. [See Verdict Form [R. p. 1; Trial Transcript, R. p. 2364, line 2- p. 2365, line 13]. Mr. Crawford 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. p. 529]. Mr. Crawford filed his memorandum in support of his motion on September 25, 2018, after receiving copies of the trial transcript. Therein, Mr. Crawford 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. p 537]. Mr. Crawford 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. [R. p. 554].

The trial court held a hearing on Mr. Crawford's motion on October 10, 2018. [JNOV Transcript, R. pp. 2370-2383]. During the hearing, the trial court gave the parties an opportunity to explain why Mr. Crawford was or was not entitled to a new trial. The trial court ultimately denied Mr. Crawford's request for a JNOV but granted Mr. Crawford a new trial pursuant to the Thirteenth Juror Doctrine. [R. p. 2382(51); lines 7-15]. Covil appealed and the matter is currently pending before this Court. [*Crawford v. Covil Corporation*, Case No. 2017-CP-42-04429; Appellate Case No. 2018-001965.]

**B. New Trial Pursuant to SCRCP 60(b)(2) and 60(b)(3).**

While Covil's appeal of the trial court's grant of a new trial pursuant to the Thirteenth Juror Doctrine was pending, Mr. Crawford's counsel discovered that Covil had a data tape dating back to the early 1990s in its possession, likely containing documents relevant to this case, that it never disclosed to Mr. Crawford in this litigation. An image of the data tape is reproduced below:



The existence of this new evidence was revealed after the case of the trial in this matter. It came to light at a hearing against Covil in another asbestos case pending before Judge Toal. When Mr. Crawford's counsel learned about the tape, and bought the issue before the trial court, the court ordered that the data tape be disclosed to Respondent's counsel. As of the date of Mr. Crawford's Motion for New Trial pursuant to Rule 60(b)(2) and 60(b)(3), Mr. Crawford's counsel had not received the data tape, or the documents or information contained thereon. [See *Plaintiff's Motion for Relief from Judgment Under SCRCP 60(b)*, 7/16/19.]

At the hearing on Mr. Crawford's motion, his counsel reminded the trial court that, during the trial in this matter, Covil took the position that it did not have any documents to support any

claim that it performed work at Mr. Crawford's work sites or that it sold and/or shipped products and materials to Mr. Crawford's work sites. [Hearing Transcript, R. p. 3, lines 12-18.] Mr. Crawford was clear that the relief sought by his motion, if granted, would recognize that Covil's failure to disclose the data tape to Mr. Crawford during the discovery period before trial serves as an additional basis for a new trial. [R. p. 2525, lines 13-19.] In response, Covil argued that Mr. Crawford's motion could not be granted because, until the information on the data tape was recovered, Mr. Crawford could not demonstrate "by clear and convincing evidence that this data tape has evidence relevant to this case, that it couldn't have been discovered by the Plaintiff, that it's material to the issues, and it's not merely cumulative and impeaching." [R. p. 2530, lines 5-9]. Covil did inform the trial court, however, that it had some evidence of what could be contained on the tape, which was, as Covil contended, accounts payable invoices. [R. p. 2530, lines 10-14.] Such invoices would be key to showing sales of Covil insulation to Daniel for installation at Celanesze Spartanburg during the years Mr. Crawford worked there. Covil could not give a timeline as to when the information on the data tape could even be recovered, however. [R. p. 2535, lines 23-25].

Additionally, Covil contended that Mr. Crawford was not entitled to relief pursuant to Rule 60(b)(2) because he did not exercise due diligence in attempting to discover the data tape. In support of this position, Covil submitted affidavits from Covil's former attorneys regarding their discovery of the data tape. [R. p. 2534, lines 10-13.] The trial court noted that after reading the affidavits, they did not support Covil's position:

> THE COURT: Well, I don't read either the Wall or White affidavits to do anything more than to say we got a bunch of materials from Covil and we put them in some file cabinets, and we made those file cabinets available. That's what I read these affidavits to say.
>
> * * * *

> THE COURT: What is does not say is, we went through those things and scrutinized them, and we produced all of that material to Plaintiff, because if they had done that they would have taken that tape and they would have translated it and gotten real Covil documents in front of the Plaintiff, but that wasn't done.
>
> It doesn't even say when they got the documents or how they got the documents or anything like that, how long they have been with the insurers before they were actually given to the lawyers. It doesn't give you much information at all about what the—what was in those documents at the time the Wallace & Graham firm came up there or they offered for Ms. Dean to come up there or anything else, very sketchy from that point of view, but what we do know with absolute certainty is there is a physical data tape that was in my safe for many months that contains writings on it that indicate very clearly that it's Covil documents up until 1991.

[R. p. 2534, line 14- p. 2535, line 7].

Mr. Crawford also sought relief pursuant to SCRCP 60(b)(3), on the ground that Covil had committed fraud on the trial court and on Mr. Crawford through its repeated representations that all relevant documents had been destroyed in a fire. [See *Plaintiff's Motion for Relief from Judgment Under SCRCP 60(b)*, R. p. 1601]. Mr. Crawford additionally noted that when Covil and its counsel became aware of the data tape in 1991, they made "a decision . . . not to do anything with that tape." [R. p. 2536, lines 4-7.] Covil contended, not that it had not committed extrinsic fraud and, as such, Mr. Crawford could not demonstrate the necessary elements for relief pursuant to Rule 60(b)(3).

The trial court found that Mr. Crawford was entitled to a new trial pursuant to Rule 60(b)(2) and 60(b)(3). [*Order Granting Plaintiff's Motion for New Trial Pursuant to Rule 60(b)(2) and 60(b)(3)*, R. p. 15]. Although the data tape was in existence prior to the trial in this matter, Mr. Crawford could not have discovered the data tape or its contents with due diligence because Covil intentionally withheld this information in violation of its discovery obligations. [R. p. 19]. The trial court also found that the evidence contained on the tape, although unknown, was not likely to be merely cumulative or impeaching. [R. p. 19]. Significantly, one of the reasons that Covil prevailed in the trial of this matter "was because of the lack of information about what went on

with Covil's supply of insulating materials to boilers and other companies when Crawford was exposed." [See Hearing Transcript, R. p. 2533, lines 4-7]. Indeed, Mr. Crawford had no other documentary evidence from Covil and the invoices on the tape likely would have shown whether there were sales of insulation to Daniel and/or Celanese Spartanburg during the relevant time period.

As to Rule 60(b)(3), the trial court found that Covil committed fraud upon the court by representing to its counsel, "this Court, and to the jury that every document had been produced and any missing documents had been lost in a fire." [R. p. 20]. According to the trial court, the jury favorably credited Covil and faulted Mr. Crawford for the lack of documentary evidence showing Covil's presence at Mr. Crawford's work sites. [R. pp. 20-21]. Covil's concealment of the data tape constituted fraud upon the court. In issuing this ruling, the trial court noted that the affidavits from Covil's counsel did nothing to demonstrate that the data tape and the documents thereon were not deliberately concealed. [Hearing Transcript, R. p. 2534, lines 6-17]. The court specifically noted that the affidavits do nothing "more than . . . say we got a bunch of materials from Covil and we put them in some file cabinets, and we made those file cabinets available." [R. p. 2534, lines 14-17].

Based on this information, the trial court found that Mr. Crawford was entitled to a new trial pursuant to South Carolina Rule of Civil Procedure 60(b)(2) and 60(b)(3). Covil has appealed.

## RESPONSE TO APPELLANT'S STATEMENT OF JURISDICTION

Covil's instant appeal involves an interlocutory order that is not immediately appealable. Under the well-settled law of this state, Judge Toal's Order granting Mr. Crawford a relief from judgment pursuant to SCRCP 60(b)(2) and 60(b)(3), given that the grant of a new trial was based upon questions of fact or upon mixed questions of law and fact, is not immediately appealable

because the grant of a new trial was based upon questions of fact or upon mixed questions of law and fact. As such, Covil's instant appeal should be dismissed.

Appeals from the Circuit Court are governed by South Carolina Appellate Court Rule 201 which is clear that "[a]ppeal[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 Mr. Crawford a new trial was not based solely on an error of law. In fact, "error of law" was not a ground cited by Mr. Crawford in his 60(b) motion. In granting Mr. Crawford, a new trial pursuant to Rule 60, Judge Toal cited to the evidence presented at trial regarding Covil's provision of asbestos-containing insulation to Mr. Crawford's work site. [See *Order Granting Plaintiff's Motion for New Trial Pursuant to Rule*

*60(b)(2) and 60(b)(3)*, R. pp. 1-3]. The reason that the circuit court granted Mr. Crawford's request for a new trial was because of the discovery of new evidence—a data tape which likely contained relevant documentary information about Covil's insulation sales to Daniel and/or Celanese Spartanburg. 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 Mr. Crawford's case against Covil. The court's order granting Mr. Crawford 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 facts stated herein and in Covil's opening brief highlight the factual intricacies in this appeal and that this appeal presents mixed questions of law and fact.

In support of its opposition, Covil cites *South Carolina State Highway Dept. v. Clarkson*, 267 S.C. 121 (1976), a case which does not overrule any of the cases cited by Mr. Crawford in support of his position that Covil's appeal should be dismissed. In fact, the *Clarkson* Court cited approvingly a number of cases supporting Mr. Crawford's position that Covil's appeal must be dismissed. In *Sellers v. Collins*, 212 S.C. 26, 46 S.E.2d 176, the Court wrote, as acknowledged in *Clarkson*, 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, 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 a new trial based on newly discovered evidence, and Covil's fraudulent concealment of this evidence, does not involve any question of law. The court's decision was based solely on the facts, and Covil's appeal challenging that order is not appealable under controlling precedent. As such, the appeal should be dismissed.

## 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).

## ARGUMENT

### I. The trial court properly granted a new trial pursuant to Rule 60(b)(2) based on newly discovered evidence.

The trial court granted a new trial pursuant to Rule 60(b)(2), which provides that the court may relieve a party ". . . from a final judgment, order, or proceeding for the following reasons . . . (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)[.]" Rule 60(b)(2), SCRCP. This Court has adopted the following test for this rule:

> To obtain a new trial based on newly discovered evidence, a movant must establish that the newly discovered 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) (citing James F. Flanagan, South Carolina Civil Procedure 484 (2nd ed. 1996)).

Covil implies that this Court should disregard the trial court's ruling from the bench on Mr. Crawford's Rule 60(b) motion. Such would be the case only when the written order and the trial court's oral ruling conflict. *See First Union National Bank of South Carolina v. Hitman, Inc.*, 306 S.C. 327, 411 S.E.2d 681 (Ct. App. 1991), *aff'd,* 308 S.C. 421, 418 S.E.2d 545 (1992) (no order is final until it is written and entered and the trial judge retains discretion to change his mind and amend his oral ruling accordingly); *First Union National Bank of South Carolina v. Hitman, Inc.*, 308 S.C. 421, 418 S.E.2d 545 (1992) (a judge is not bound by a prior oral ruling and may issue a written order which conflicts with the prior oral ruling). Covil has failed to demonstrate that the trial court's ruling from the bench differs in any material respect from the court's written order. Additionally, Covil failed to object on the record to the trial court's written decision. It also

failed to request that the trial judge reconsider her ruling or alter or amend the judgment. The South Carolina Supreme Court has held that

> The losing party must first try to convince the lower court it is [sic] has ruled wrongly and then, if that effort fails, convince the appellate court that the lower court erred. This principle underlies the long-established preservation requirement that the losing party generally *must* both present his issues and arguments to the lower court and obtain a ruling *before* an appellate court will review those issues and arguments.

*I'ON L.L.C. v. Town of Mt Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) (emphasis added). As such, the written order granting Mr. Crawford's Rule 60(b) motion should be read in conjunction with the trial court's oral rulings.

The record reveals, contrary to Covil's position, that Judge Toal addressed all of the necessary elements in her written order granting Respondent a new trial on November 25, 2019, and from the bench during the hearing on Respondent's Motion on November 12, 2019. The evidence supports the trial court's rulings.

### A. The trial court properly concluded that the new evidence will likely change the result in a new trial.

In determining whether to grant a motion for a new trial, the judge is given great discretion. *See State v. Smith*, 316 S.C. 53, 55, 447 S.E.2d 175, 176 (1994) (citing *State v. Simmons*, 279 S.C. 165, 303 S.E.2d 857 (1983)) ("It is well settled that the grant or refusal of a new trial is within the discretion of the trial judge and will not be disturbed on appeal absent a clear abuse of that discretion."). There are many possible reasons for this broad discretion, not the least of which is the fact that trial judges have the best vantage point to assess witness credibility and the weight to be assigned to the evidence presented. *See Williams v. Moore*, 400 S.C. 90, 102, 733 S.E.2d 224, 230 (Ct. App. 2012) (quoting *Madren v. Bradford*, 378 S.C. 187, 191-92, 661 S.E.2d 390, 393 (Ct. App. 2008)) (stating in a property case that "[q]uestions regarding credibility and weight of evidence are exclusively for the trial judge").

Contrary to Covil's assertions, the trial court considered whether the evidence on the data tape would likely change the result if that evidence was presented in a new trial. To be clear, as a result of Covil's failure to have the data tape transcribed earlier, neither Mr. Crawford nor Covil can definitively identify what documents are stored on the data tape. Covil's best guess was that the data tape contained sales invoices. This admission supports the trial court's finding that the evidence on the data tape would change the result in a new trial. Covil's position as this matter moved toward trial was that **all** of its sales invoices were destroyed in a fire. Discovery of the data tape throws a rather large wrench in Covil's narrative. It means that, apparently, some of Covil's documents survived the fire and the story that encouraged the jury in this matter to return a verdict in Covil's favor is untrue.[4] Likewise, the discovery of the data tape reveals that Covil failed to produce information responsive to Mr. Crawford's discovery requests. Covil, through its repeated representations to Mr. Crawford and the trial court, deceived Mr. Crawford and the trial court into thinking that Covil had no documents in its possession to demonstrate that sold products to Mr. Crawford's work sites. This was likely untrue.

There is no question that acceptance of the data tape and the information thereon would change the result of the trial in this matter or that the information on the data tape, in whole or in part, would be material to the issues in this case. The trial court noted that one of the reasons that Covil was successful at trial was because of the lack of information about Covil's supply of materials. Covil testified at trial that all of its documents regarding the supply of materials had been destroyed in a fire. The documents that Mr. Crawford used to support his case against Covil at trial were gathered from other companies because Covil repeatedly represented that it had no

[4] Respondent has detailed the inconsistencies in Covil's "fire" story in the brief filed with this Court regarding the trial court's grant of a new trial pursuant to the Thirteenth Juror Doctrine. [See *Crawford v. Covil Corporation*, Case No. 2017-CP-42-04429; Appellate Case No. 2018-001965.]

documents demonstrating that it even sold materials or performed work at Jerry Crawford's work sites. It is difficult to discern how information directly related to Covil's provision of materials to Mr. Crawford's work sites could not have affected the outcome of the first trial. With direct evidence that Covil worked at Mr. Crawford's work sites or sold asbestos-containing materials to his work sites, it is highly likely that the result of the first trial would have been different. The trial court's finding on this issue should be affirmed.

### B. The trial court properly found that the data tape was new evidence that could not have been discovered before trial.

On its face, Rule 60(b)(2) requires that evidence relied upon to grant relief must be "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)." Rule 60(b)(2), SCRCP (emphasis added). Courts and commentators have concluded that "the only evidence that qualifies as 'newly-discovered' evidence within the meaning of the rule justifying setting the judgment aside is evidence of facts that were in existence at the time of the original trial or that relate directly to the facts that were tried." 12 James Wm. Moore, et al., *Moore's Federal Practice* § 60.42[3] (3d ed. 1999). However, the District of Columbia Circuit has noted that the focus of the court's inquiry is not necessarily when the evidence was created, but rather whether the newly discovered evidence "pertain[s] to facts in existence at the time of the trial, and not to facts that have occurred subsequently." *Nat'l Anti–Hunger Coalition v. Executive Comm. of the President's Private Sector Survey on Cost Control,* 229 U.S. App. D.C. 143, 147, 711 F.2d 1071, 1075 (1983) (footnote 3). Further, South Carolina Appellate Courts have held that due diligence is the "diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or to discharge an obligation." *Lanier,* 364 S.C. at 220, 612 S.E.2d at 460. "Diligence looks not to what the litigant actually discovered, but what he or she *could* have discovered." *Id.* Accordingly, when parties

could have discovered the new evidence prior to trial, they are not entitled to relief under Rule 60(b)(2). *See Raby Constr., L.L.P. v. Orr,* 358 S.C. 10, 21, 594 S.E.2d 478, 484 (S.C. 2004) (citing *Bowman v. Bowman,* 357 S.C. 146, 152, 591 S.E.2d 654, 657 (Ct. App. 2004)).

Covil's position on this issue is interesting because essentially Covil wants this Court to punish Mr. Crawford for **believing Covil** when it said, repeatedly, that all of its documents were destroyed in a fire. Missing from Covil's argument that Mr. Crawford could have discovered this data tape prior to trial is the 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. Additionally, as the trial court noted, the affidavits offered by Covil in support of its position that Mr. Crawford could have discovered the data tape in time to move for a new trial under South Carolina Rule of Procedure 59 offer no support. The affidavits do not suggest that the data tape was clearly marked in such a fashion to suggest to Mr. Crawford's counsel that the information contained thereon was responsive to discovery requests or was relevant to the issues to be presented to the jury at trial. In fact, the affidavits suggest that Covil's counsel either did not know the tape existed or made no effort to determine if it contained discoverable information in the asbestos litigations against the company. So then, how was Mr. Crawford to know that in the recesses of the documents in Covil's counsel's possession, there was a data tape containing information relevant to the issues before the jury in this matter? Even in the face of Covil's repeated representations that it had no such documents because they had all been destroyed in a fire? Telepathy perhaps. But the law does not require Mr. Crawford or his counsel to take extraordinary measures to ensure the validity of opposing counsel's representations. The diligence that satisfies this prong of the test is that "reasonably expected from, and ordinarily exercised by,

a person who seeks to satisfy a legal requirement or to discharge an obligation." *Black's Law Dictionary*, at 468 (7th ed. 1999). Mr. Crawford, though his counsel, exercised the requisite diligence and the trial court's ruling on this issue recognized this. Mr. Crawford could scarcely be expected to have made a search for materials, the very existence of which was unknown to him or his counsel.

Covil's references to federal cases in support of its position are of no moment here. The trial court's finding that the data tape and the information thereon—especially given Covil's own admission that it suspects that the data tape holds account payable information and sales invoices—would likely have changed the outcome of the trial was supported by the record. That requirement remains unchanged under federal precedent and the Federal Rules of Civil Procedure—and Covil cannot deny that Mr. Crawford was unaware of the data tape's existence prior to trial, during trial, or prior to Mr. Crawford's first motion for a new trial. Covil's position is that Mr. Crawford and the trial court have acted prematurely in determining that the data tape is newly discovered evidence because no one can, with certainty, identify all of the documents on the withheld data tape. Therefore, according to Covil, any finding that the data tape is newly discovered evidence is based on mere speculation. The record in this matter belies this argument and is more than sufficient to demonstrate that the trial court's finding was based on "more than a mere showing of potential significance." *Bohus v. Beloff*, 950 F.2d 919, 930 (3d Cir. 1991). Contrary to Covil's implications, the *Bohus* Court reversed the district court's grant of a new trial because the newly discovered evidence would not have changed the outcome of the trial. *Bohus*, 950 F.2d at 931.

Similarly, in *New Hampshire Ins. Co. v. Martech USA, Inc.*, 993 F.2d 1195, 1201 (5th Cir. 1993), a nonbinding case from the Fifth Circuit Court of Appeal, the Court held that the district court did not abuse its discretion in denying the request for Rule 60(b) relief. *Martech*, however,

is factually distinguishable from the instant matter. In *Martech*, the newly discovered evidence was solely an allegation that uncooperative, potential witnesses were in possession of evidence relevant to an issue in the case. As support for that position, Martech provided only its own affirmations regarding what the witnesses might produce. *Id.* at 1201. Unlike *Martech*, Mr. Crawford's request for a new trial is based on more than just speculation. By Covil's own admission, the data tape likely contains sales information—the very type of information requested by Mr. Crawford prior to trial and the very type of direct evidence missing from the presentation of Mr. Crawford's case against Covil at trial.

### C. The trial court properly found that the data tape and the information thereon would not be merely cumulative or merely impeaching.

Covil also contends that the trial court erred in granting Mr. Crawford's motion because the evidence on the data tape would be merely cumulative or impeaching. A thorough review of the record, however, reveals that this argument is without merit. While the general rule is that newly discovered evidence which merely impeaches or contradicts the testimony at trial is not a sufficient ground for a new trial, there may be exceptional cases warranting a new trial on merely cumulative or impeaching evidence. *State v. Strickland*, 201 S.C. 170, 170, 22 S.E.2d 417, 418 (1942). 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," the general rule against merely cumulative or impeaching evidence does not apply. *Id.*

Critically, Covil's defense to Mr. Crawford's claims was that there was no evidence that Covil supplied materials or performed work at Jerry Crawford's work sites. Throughout discovery, Covil failed to produce any records—no sales invoices, no receipts, no contracts—reflecting its work at Mr. Crawford's work sites. According to Covil, all of its relevant documents were destroyed in a fire. This was the story presented to Mr. Crawford, his counsel, the trial court, and

the jury. As such, Mr. Crawford was forced to rely on circumstantial evidence that Covil supplied the insulation he was exposed to at Celanese Spartanburg. He had no direct evidence from Covil.

Covil did not argue that its materials could not have caused Mr. Crawford's mesothelioma. And it admitted that the type of insulation that Mr. Crawford described being exposed to would have contained asbestos and that it did indeed sell that type of insulation. Its defense at trial was entirely that it did not sell materials to Mr. Crawford's work sites during the time of his exposure and that there was a lack of documentary evidence of that fact. Evidence on the data tape to disprove these assertions was thus key to Mr. Crawford's case.

To be clear, Mr. Crawford does not seek to have the information on the data tape admitted as impeachment of Covil's story that all of the documents relevant to this litigation were destroyed in a fire. The very existence of the data tape disproves that narrative. Moreover, Covil failed to present any evidence during the first trial, offering only the loss of its corporate charter as a defense to Mr. Crawford's claims. As noted, Mr. Crawford had no documentary evidence from Covil regarding its supply of asbestos-containing materials to Mr. Crawford's work site. He had to rely on circumstantial evidence presented via testimony from a co-worker, from Daniel's corporate representative, and from Covil's corporate representative. The evidence on the data tape fills the void in Mr. Crawford's case—direct evidence from Covil that it supplied asbestos-containing materials to Jerry Crawford's work site.

Mr. Crawford's case against Covil was significantly hampered by Covil's failure to produce sales documents reflecting its sale of materials and its failure to produce other documents demonstrating the services completed at the identified work sites. The existence of direct evidence reflecting Covil's sale of asbestos-containing materials is "so directly applicable to the main point" of this matter that it would be a denial of justice for Mr. Crawford and his family (now his heirs

and assigns) to find that Mr. Crawford is not entitled to a new trial based on the discovery of the data tape, which admittedly holds direct evidence from Covil. *Strickland*, 201 S.C. at 170, 22 S.E.2d at 418. The trial court's finding on this issue should be affirmed.

## II. Covil has failed to meet its burden of establishing that the trial court abused its discretion in granting Respondent a new trial pursuant to Rule 60(b)(3).

In addition to the authority to grant a new trial based on newly discovered evidence, SCRCP 60(b) also permits the trial court to grant a new trial based on fraud of an adverse party. Rule 60(b)(3) states, in part, that

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: . . . (3) fraud, misrepresentation, or other misconduct of an adverse party.

Fraud, as mentioned in Rule 60(b)(3), includes fraud upon the court and, separately, fraud upon an adverse party. *See e.g., Raby Constr., L.L.P. v. Orr*, 358 S.C. 10, 594 S.E.2d 478 (2004); *Chewning v. Ford Motor Co.*, 354 S.C. 72, 579 S.E.2d 605 (2003). Appellate courts in this state, however, have held that relief pursuant to Rule 60(b)(3) is only available for extrinsic fraud as opposed to intrinsic fraud. *Raby, supra*, 358 S.C. at 18. The trial court in this matter held that Covil's conduct constituted extrinsic fraud against Mr. Crawford and fraud upon the court. [*Order Granting Plaintiff's Motion for New Trial Pursuant to Rule 60(b)(2) and 60(b)(3)*; R. pp. 15-21; Hearing Transcript, R. p. 2537, lines 14-20]. Covil argues that this finding was in error because, according to Covil, there was no evidence of intent to deceive sufficient to find fraud on the court and Mr. Crawford has only alleged intrinsic fraud which cannot be the basis for a new trial pursuant to Rule 60(b)(3). These arguments are without merit and do not demonstrate that the trial court abused its discretion in granting Mr. Crawford a new trial.

### A. Fraud on the Court

"Fraud upon the court is a narrow and invidious species of fraud that 'subvert[s] the integrity of the Court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases that are presented for adjudication." *Perry v. Heirs at Law of Gadsden,* 357 S.C. 42, 47, 590 S.E.2d 502, 504-05 (Ct. App. 2003) (citing *Chewning,* 354 S.C. at 78, 579 S.E.2d at 608). It "requires a showing that one has acted with an intent to deceive or defraud the court," and "must be accompanied by particularized allegations." *Chewning,* 354 S.C. at 78, 86; 579 S.E.2d 605 at 609, 613. In determining whether relief from a final judgment is appropriate, a court must balance "the interest of finality against the need to provide a fair and just resolution of the dispute." *Raby Const., L.L.P.,* 358 S.C. at 20, 594 S.E.2d at 483 (Ct. App. 2004) (citing *Chewning* to reiterate the appellate court's "policy towards final judgments" and stating that there are "important benefits achieved by the preservation of final judgments").

In response to Mr. Crawford's 60(b)(3) motion, Covil argued that there was no evidence that Covil's attorneys intentionally concealed the data tape.[5] In support of its position, Covil pointed to the affidavits from Covil's former attorneys, Daniel B. White and Mark Wall, wherein they both state that they did not intentionally conceal the data tape from the Court. The trial court found that the affidavits were insufficient to establish that Covil and its attorneys had not acted with intent to deceive the trial court. However, Covil and its attorneys failed to offer any plausible explanation for their failure to disclose the data tape and the attorneys repeated misrepresentations to the trial court. "Under South Carolina law, an intent to deceive may be inferred when there is

[5] Notably, the United States District Court for the District of South Carolina recently held that Covil's attorneys—Wall Templeton & Haldrup, P.A., of which Attorney Mark Wall is member—and its insurers exercised total domination and control over Covil since it ceased to exist in 1993. See Order and Opinion, *Finch v. U.S. Fidelity and Guaranty Company*, Civil Action No. 3:19-cv-01827, 6/4/2020.

no other reasonable or plausible explanation for the . . . false representation." *Floyd v. Ohio General Ins. Co.*, 701 F.Supp. 1177 (D.S.C. 1988).

Here, despite arguing that its attorneys had no knowledge of the data tape, Covil's former attorneys, including the attorney that represented Covil at the trial, offered no explanation as to why they made no effort to review the materials given to them by Covil. Although they knew that they had not thoroughly scrutinized those materials for documents and/or evidence relevant to asbestos litigation, they repeatedly made affirmative representations to the trial court that Covil had no documents relevant to the issues before the jury in this matter. These misrepresentations deprived both the trial court and the jury of this relevant evidence, evidence that was critically important to Mr. Crawford's case at trial as well as to numerous motions before the trial court, including Mr. Crawford's spoliation motion and motion for new trial under the Thirteenth Juror Doctrine. All the while, Covil's attorneys knew that these representations to the trial court were not true because they did not know what materials were in their possession.[6]

Given the record in this matter and the revelations regarding the data tape, including the fact that the data tape has been in Covil's attorneys' possession since at least 1991, it cannot be said that the trial court abused its discretion in granting Mr. Crawford a new trial pursuant to Rule 60(b)(3). The trial court's finding on this issue should be affirmed.

**B. Extrinsic and Intrinsic Fraud**

The trial court also properly found that Covil had committed fraud against Mr. Crawford. Covil argues that the decision was improper because there was no evidence of extrinsic fraud. Covil is mistaken. Extrinsic fraud is "fraud that induces a person not to present a case or deprives

[6] As U.S. District Judge Catherine Eagles recently found, Covil's counsel and its insurers controlled Covil's defenses in "any underlying asbestos litigation." Memorandum Opinion and Order, *Zurich American Insurance Company v. Covil Corporation, et al.*, 1:18-CV-00932-CCE-JLW (July 16, 2019). This control would have likewise extended to Covil's defense of Mr. Crawford's claims.

a person of the opportunity to be heard." *Hilton Head Ctr. of S.C. v. Public Serv. Commn.*, 294 S.C. 9, 11, 362 S.E.2d 176, 177 (1987). "Relief is granted for extrinsic fraud on the theory that because the fraud prevented a party from fully exhibiting and trying his case, there has never been a real contest before the court on the subject matter of the action." *Id.* On the other hand, intrinsic fraud is fraud which was presented and considered at trial. *Hagy v. Pruitt*, 339 S.C. 425, 431-32, 529 S.E.2d 714, 718 (2000) (citing *Evans v. Gunter*, 294 S.C. 525, 529, 366 S.E.2d 44, 46 (Ct. App. 1988)). It is fraud which misleads and induces the court to find in favor of the party perpetrating the fraud. *Hilton Head Ctr.*, 294 S.C. at 11, 362 S.E.2d at 177.

A thorough review of the record supports the trial court's finding that Covil committed extrinsic fraud sufficient to warrant a new trial. To be clear, Covil's failure to disclose the data tape was not and could have been discovered prior to trial or prior to Mr. Crawford's motion for a new trial. It was not addressed and could not have been addressed by the trial court during the trial of this matter. As such, this is not a case of intrinsic fraud.

The record supports a finding of extrinsic fraud. Just as with the finding that Covil's attorneys had committed fraud upon the court, those same facts and circumstances support the finding that Mr. Crawford is entitled to a new trial. Although Covil contends that there is no evidence that Covil and its attorneys intended to deceive the trial court or Mr. Crawford, it is undisputed that Covil, as a corporation, can only act through its agents and representatives, including its attorneys. *See, e.g., Riverwoods Chappaqua Corp. v. Marine Midland Bank, N.A.*, 30 F.3f 339, 344 (2d Cir. 1994); *see also* Order and Opinion, *Finch v. U.S. Fidelity and Guaranty Company*, Civil Action No. 3:19-cv-01827, 6/4/2020; Memorandum Opinion and Order, *Zurich American Insurance Company v. Covil Corporation, et al.*, 1:18-CV-00932-CCE-JLW (July 16, 2019); Order Denying Covil's Motion to Lift Entry of Default, *James Michael Hill v. Covil*

*Corporation*, 2018-CP-40-04680, March 20, 2019. Covil's attorneys became instrumentalities of an ongoing fraud—fraud upon the court, as argued above, and fraud against Mr. Crawford. *See In re Sealed Case*, 754 F.2d 395 (D.C. Cir. 1985). The attorneys submitted written pleadings wherein they stated that the universe of existing documents relevant to asbestos litigation had been produced. Covil and its attorneys continued to perpetrate this fraud throughout trial. The data tape that was the subject of Mr. Crawford's Rule 60(b) motion was unknown to him until well after the conclusion of the trial in this matter and, just as importantly, months after the trial court ruled on his initial motion for a new trial. Despite Mr. Crawford's request for documents and information regarding Covil's sale of materials to his worksites, Covil and its attorneys repeatedly represented that they had no responsive documents their possession. These representations were also made to the trial court for its consideration when ruling on pre-trial motions, like motions for summary judgment and motions for spoliation sanctions, and Mr. Crawford's initial motion for a new trial. These representations were also made to the jury during trial. Covil almost succeeded in its deception. Until the discovery of the data tape post trial, neither Mr. Crawford nor the trial court had any reason to believe that Covil's attorneys' representations that they had no relevant documents were false. Mr. Crawford believed Covil and, as such, was prevented from fully presenting his case against Covil. This is a case of extrinsic fraud and the trial court properly granted Mr. Crawford a new trial on this basis.

## CONCLUSION

Covil has failed to demonstrate that the trial court abused its discretion in granting Mr. Crawford's request for a new trial pursuant to Rule 60(b)(2) and 60(b)(3). Mr. Crawford therefore respectfully requests that this Court affirm the circuit court's ruling and remand this matter to the circuit court for a new trial.

RECEIVED
Sep 29 2020
SC Court of Appeals

**ATTORNEY CERTIFICATION**

I hereby certify that this brief is identical to Respondent's Brief previously served except that it may contain corrections of obvious typographical errors and misspellings which were contained in the Initial Brief, and the reference in the Initial Brief have been revised to indicate where in the Record on Appeal materials appear. No other changes have been made.

Dated: September 30, 2020

Respectfully submitted,

Theile B. McVey (SC Bar No. 16682)
tmcvey@kasselllaw.com
John D. Kassel (SC Bar No. 03286)
jkassel@kassellaw.com
KASSEL MCVEY, ATTORNEYS AT LAW
1330 Laurel Street
P.O. Box 1476
Columbia, South Carolina 29202-1476
803-256-4242
803-256-1952 (Facsimile)
Other email: emoultrie@kassellaw.com

Ka'Leya Q. Hardin (admitted *pro hac vice*)
Jonathan M. Holder
Dean Omar Branham Shirley, LLP
302 N. Market Street, Suite 300
Dallas, TX 75202
Telephone: (214) 722-5990

Attorneys for Respondent

Columbia, South Carolina.