THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

The Honorable Jean H. Toal, Circuit Court Judge

Appellate Case No. 2019-002126

Jerry Howard Crawford, individually and as Personal Representative of the Estate of Evelyn Kay Crawford, Respondent,

v.

Celanese Corporation; Aurora Pump Company; Carrier Corporation; CNA Holdings, LLC f/k/a Hoechst Celanese Corporation; Covil Corporation; Crane Co.; Daniel International Corporation f/k/a/ Daniel Construction Company, Inc.; Flowserve Corporation, individually and as successor-in-interest to Anchor/Darling Valve Company, and individually as successor-in-interest to Durco Pumps; Flowserve, US Inc.; Fluor Constructors International, f/k/a Fluor Corporation; Fluor Constructors, International, Inc.; Fluor Daniel Services Corporation; Fluor Enterprises, Inc.; Ford Motor Company; Genuine Parts Company, d/b/a Rayloc (a/k/a NAPA); The Goodyear Tire & Rubber Company; Goulds Pumps, Inc.; Grinnell, LLC f/k/a Grinnell Corp., f/k/a ITT Grinnell Corp.; Honeywell International, Inc., f/k/a Allied-Products Liability Signal, Inc., sued as successor-in-interest to Bendix Corporation; Ingersoll-Rand Company; John Crane, Inc.; Metropolitan Life Insurance Company, a wholly owned subsidiary of MetLife Inc.; National Automotive Parts Association (NAPA); Parker-Hannifin Corporation; Pneumo Abex, LLC, successor-in-interest to Abex Corporation; Spirax Sarco, Inc.; SPX Cooling Technologies, Inc., individually and as successor-in-interest to Marley Cooling Towers, Co.; Standard Motor Products, Inc., sued as successor-in-interest to EIS Automotive; United States Fidelity & Guaranty Company; and The William Powell Company, Defendants,

Of which, Covil Corporation is the Appellant.

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CONTENTS

TABLE OF AUTHORITIES iii

STATEMENT OF ISSUES ON APPEAL 1

INTRODUCTION 2

STATEMENT OF THE CASE 3

A. Procedural Background and Trial 3

B. Covil's Record Production 7

C. The Data Tape and Crawford's Rule 60(b) Motion 8

STATEMENT OF JURISDICTION 10

SUMMARY OF ARGUMENT 11

STANDARD OF REVIEW 12

ARGUMENT 12

I. The Circuit Court Abused Its Discretion in Granting a New Trial Under Rule 60(b)(2) 12

A. The Circuit Court Erred by Failing to Address Whether the Contents of the Tape Will Probably Change the Result or Are Material to Any Issue 14

B. The Circuit Court's Conclusion That Relief Was Warranted Under Rule 60(b)(2) Is Not Supported by the Record Evidence 17

i. Probability That Newly Discovered Evidence Will Change the Result if a New Trial Is Granted and Materiality 17

ii. Cumulative or Impeaching 20

iii. Could Not Have Been Discovered Before the Trial 22

II. The Circuit Court Abused Its Discretion in Granting A New Trial, in the Alternative, Under Rule 60(b)(3) 24

CONCLUSION 27

TABLE OF AUTHORITIES

Cases | Page

Bailey v. Peacock, 318 S.C. 13, 455 S.E.2d 690 (1995)....10

BB & T v. Taylor, 369 S.C. 548, 633 S.E.2d 501 (2006)....12

Bohus v. Beloff, 950 F.2d 919 (3d Cir. 1991)....18

Bowers v. Bowers, 304 S.C. 65, 403 S.E.2d 127 (1991)....25

Bowman v. Bowman, 357 S.C. 146, 591 S.E.2d 654 (Ct. App. 2004)....22

Burke v. Republic Parking Sys., Inc., 421 S.C. 553, 808 S.E.2d 626 (Ct. App. 2017)....14

Burton v. York Cty. Sheriff's Dep't, 358 S.C. 339, 594 S.E.2d 888 (Ct. App. 2004)....15

Chewning v. Ford Motor Co., 354 S.C. 72, 579 S.E.2d 605 (2003)....24, 25, 26

Cole Vision Corp. v. Hobbs, 394 S.C. 144, 714 S.E.2d 537 (2011)....16

Compton v. Alton S.S. Co., 608 F.2d 96 (4th Cir. 1979)....13

Corbin v. Kohler Co., 351 S.C. 613, 571 S.E.2d 92 (Ct. App. 2002)....16

Ex parte Wilson, 367 S.C. 7, 625 S.E.2d 205 (2005)....10

Glasscock, Inc. v. U.S. Fid. & Guar. Co., 348 S.C. 76, 557 S.E.2d 689 (Ct. App. 2001)....25

Haigh v. Gelita USA, Inc., 632 F.3d 464 (8th Cir. 2011)....19

Halliburton Energy Servs., Inc. v. NL Indus., 618 F. Supp. 2d 614 (S.D. Tex. 2009)....21

In re Hope 7 Monroe Street Partnership, 743 F.3d 867 (D.C. Cir. 2014)....22

In re Keeley & Grabanski Land P'ship, 832 F.3d 853 (8th Cir. 2016)....13

Jamison v. Ford Motor Co., 373 S.C. 248, 644 S.E.2d 755 (Ct. App. 2007)....22

Kriti Ripley, LLC v. Emerald Invs., LLC, 404 S.C. 367, 746 S.E.2d 26 (2013)....14, 15, 26

Lanier v. Lanier, 364 S.C. 211, 612 S.E.2d 456 (Ct. App. 2005)....13, 14, 17, 20, 22

LiButti v. United States, 178 F.3d 114 (2d Cir. 1999)....19

Maybank v. BB&T Corp., 416 S.C. 541, 787 S.E.2d 498 (2016)....13, 18

McCabe v. Sloan, 184 S.C. 158, 191 S.E. 905 (1937)....12

Mid-State Distribs., Inc. v. Century Imps., Inc., 310 S.C. 330, 426 S.E.2d 777 (1993) 10

Miller v. Baker Implement Co., 439 F.3d 407 (8th Cir. 2006) 23

Morin v. Innegrity, LLC, 424 S.C. 559, 819 S.E.2d 131 (Ct. App. 2018) 13, 15, 16

N.H. Ins. Co. v. Martech USA, Inc., 993 F.2d 1195 (5th Cir. 1993) 18, 19

Parag v. Baby Boy Lovin, 333 S.C. 221, 508 S.E.2d 590 (Ct. App. 1998) 16

Parsons v. Ryan, 912 F.3d 486 (9th Cir. 2018) 16

Perry v. Heirs at Law of Gadsden, 357 S.C. 42, 590 S.E.2d 502 (Ct. App. 2003) 24, 25, 27

Raby Constr., L.L.P. v. Orr, 358 S.C. 10, 594 S.E.2d 478 (2004) 24, 25, 26

Ray v. Ray, 374 S.C. 79, 647 S.E.2d 237 (2007) 25

Rivenbark v. Rivenbark, 301 S.C. 175, 391 S.E.2d 232 (1990) 14

Rozier v. Ford Motor Co., 573 F.2d 1332 (5th Cir. 1978) 25

S.C. State Highway Department v. Clarkson, 267 S.C. 121, 226 S.E.2d 696 (1976) 10

S.C. Dep't of Highways & Pub. Transp. v. Mooneyham, 275 S.C. 205, 269 S.E.2d 329 (1980) 10, 11

Staubes v. City of Folly Beach, 339 S.C. 406, 529 S.E.2d 543 (2000) 18

Trowell v. Trowell, 287 S.C. 614, 340 S.E.2d 553 (Ct. App. 1986) 15

United States v. Welsh, 879 F.3d 530 (4th Cir. 2018) 12, 13

Rules

Rule 59(b), SCRCP 12

Rule 60, SCRCP 24

Rule 60(b)(2), SCRCP .... *passim*

Rule 60(b)(3), SCRCP 2, 3, 11, 12, 24

Rule 201(a), SCARC. 10

Secondary Sources

Black's Law Dictionary 468 (7th ed. 1999)..22

Black's Law Dictionary 660 (6th ed. 1990)..25

STATEMENT OF ISSUES ON APPEAL

I. DID THE CIRCUIT COURT ABUSE ITS DISCRETION BY GRANTING A NEW TRIAL UNDER RULE 60(B)(2)?

II. DID THE CIRCUIT COURT ABUSE ITS DISCRETION BY GRANTING A NEW TRIAL UNDER RULE 60(B)(3)?

INTRODUCTION

After a four-day trial on Plaintiff Jerry Crawford's claims that Covil Corporation ("Covil") was responsible for causing his mesothelioma, the jury unanimously found in favor of Covil on all claims. Despite this unanimous verdict, the Circuit Court has now twice granted a new trial. It first did so by setting aside the jury's verdict under the Thirteenth-Juror Doctrine, an erroneous ruling that Covil has appealed to this Court in a separate proceeding. *See Crawford v. Covil Corp.*, No. 2018-001965 (S.C. Ct. App.). After briefing was completed in that appeal, and even though the Circuit Court had already granted Crawford full relief from judgment, the Circuit Court again granted a new trial on the separate grounds of newly discovered evidence under South Carolina Rule of Civil Procedure 60(b)(2) and fraud under South Carolina Rule of Civil Procedure 60(b)(3). That decision, which is the subject of this appeal, is also erroneous and should be reversed.

The Circuit Court's most recent new-trial order arises from a Covil data tape dating back to 1991 that Covil's trial counsel first learned of in August 2018, after the July verdict in this case. The parties have not yet been able to access the tape's contents because it employs obsolete technology. The available evidence, however, indicates that the tape contains accounting information from between 1988 and 1991. Thus, although no one yet knows what information the data tape contains, there is no reason to think that it contains any information relevant to Crawford's claim that he was exposed to Covil-supplied asbestos-containing insulation between 1970 and 1974. The data tape is currently in the custody of a forensic computer expert—retained by Covil in consultation with Crawford's counsel pursuant to an order of the Circuit Court—who is attempting to download the tape's data. (Covil Opp'n Ex. F; R. pp. 1661–62). But rather than wait for the completion of that process, the Circuit Court granted a new trial based on nothing more than speculation about the data tape's possible contents.

That ruling was a clear abuse of discretion. It is impossible at this point to conclude that the information on the data tape will probably change the outcome of the trial, will be material to Crawford's claims, and will not be merely cumulative—all of which are mandatory factors that must be satisfied before granting relief under Rule 60(b)(2). Indeed, the Circuit Court did not even purport to find that the contents of the data tape will be outcome-changing or material, which is a sufficient reason, standing alone, to reverse the Rule 60(b)(2) ruling.

The Circuit Court's alternative ground for granting a new trial—fraud under Rule 60(b)(3)—was equally flawed. The Circuit Court did not find, as is required by Rule 60(b)(3), that Covil or Covil's counsel acted with the intent to deceive Crawford or the Circuit Court. Nor is there any record evidence that could have enabled Crawford to carry his burden of proving fraudulent intent by clear and convincing evidence.

The order should be reversed in full.

STATEMENT OF THE CASE

A. Procedural Background and Trial

On December 4, 2017, soon after being diagnosed with mesothelioma, Jerry Howard Crawford brought this products-liability lawsuit against thirty separate defendants.[1] Crawford alleged that, between 1970 and 1974, he had worked for Hoechst Celanese ("Celanese"),[2] a polyester fiber plant in Spartanburg, South Carolina, and was exposed to asbestos fibers when a company called Daniel Construction replaced insulation covering hot-water pipes in the plant. (Crawford Dep. 13:10–15; R. p. 2757); *see also* (Crawford Dep. 338:16–25; R. p. 3082) (similar).

[1] Crawford passed away on December 15, 2018. *See* Final Br. of Resp. at 1 n.1, *Crawford v. Covil Corp.*, No. 2018-001965 (S.C. Ct. App. May 21, 2019).

[2] Because the Circuit Court refers to the facility as Hoechst Celanese, Covil does so here as well for ease of reference, though "Celanese" would not have been associated with the plant until 1987 or 1988 at the earliest.

Crawford also alleged that "throughout his life" he had "perform[ed] automotive repair in his brother-in-law's auto garage," working in close proximity to "asbestos-containing products including, but not limited to, brake replacements, brake shoe relining and grinding, rebuilding brake systems, clutch facing replacement, engine overhauls, exhaust, gasket replacement, and other general automotive maintenance." (Crawford Compl. 3 ¶ 3; R. p. 28). And Crawford alleged that he also "worked around other trades" that involved exposure to "asbestos-containing products and equipment." (*Id.* at 4 ¶ 4; R. p. 29). According to his complaint, Crawford's "cumulative exposure to asbestos" over his life—the "result of the acts and omissions of" all thirty defendants—"was a substantial factor in causing Crawford's mesothelioma." (*Id.*)

At the time of trial, however, Covil was the only remaining defendant. (Verdict Form; R. pp. 1–2). Covil is a defunct insulation-supply company that operated from the 1940s until it ceased operations in 1991. (Trial Tr. 339:24–340:4; R. pp.2069–70). It was dissolved in 1993 and has had no active employees or officers since then. (Covil's Opp'n Ex. H (Def. Covil Corp.'s Suppl. Resps. Pl.'s Req. Produc. p. 1, *Finch v. BASF Catalysts, LLC*, No. 1:16-cv-1077 (M.D.N.C. Mar. 14, 2018)); R. p. 1677). Crawford alleged that Covil had supplied, and occasionally installed, asbestos-containing insulation to which he had been exposed while working at the Celanese plant. (Trial Tr. 120:7–9; R. p. 1849).

The bulk of Covil's records from between 1970 and 1974—the period most relevant to Crawford's claims—is missing because the company suffered a major fire on May 14, 1973. (Trial Tr. 346:12–347:6; R. pp. 2076–77). Palmer Covil, the company's founder, testified in a 1977 deposition that most of Covil's purchase records and invoices from before 1973 were destroyed by the fire. (Trial Tr. 66:14–23; R. p. 1795) ("We had a fire in May of 1973 and it burned up a lot of our records."); (Covil Dep. 143:7–17; R. p. 2550); (Covil Dep. 152:23–25; R. p. 2559). More

records were destroyed in a flood several years later. (Covil's Opp'n Ex. I (Def. Covil Corp.'s Answers to Pl.'s Interrogs. Gen. Objs., *Finch* (Aug. 29, 2017)); R. p. 1700).

Despite the fire and flood, Covil was able to retain approximately 25,000 pages of documents, none of which supports Crawford's claims. (Rule 60(b) Mot. Hr'g Tr. 7:9–11; R. p. 2528). After Covil ceased operations in 1991, its law firm at the time, Gallivan, White & Boyd P.A. ("Gallivan White"), took possession of the company's remaining records, maintaining them first in boxes and then in file cabinets. (Covil's Opp'n Ex. C (White Aff. ¶ 3); R. p. 1639). No documents from Covil's remaining records indicate that Covil supplied products for use at the Celanese facility in Spartanburg before or during the time that Crawford worked there. (Trial Tr. 374:16–24; R. p. 2104).

Days before trial, Crawford moved for sanctions against Covil for spoliation of evidence. Crawford alleged that not all of Covil's pre-1973 documents had been destroyed in the fire, but that "at least some of the documents were destroyed pursuant to a document retention policy." (Pl.'s Mot. Sanctions Against Def. Covil Corp. pp. 1–4; R. pp. 91–94). Covil responded that depositions by Covil employees as well as newspaper articles confirm the fire's occurrence, that Covil had delivered the remaining documents (consisting of employment records and approximately 25,000 pages of other records) to Gallivan White, and that the 25,000 pages had been produced to Crawford. (Covil Corp.'s Reply to Pl.'s Mot. Sanctions p. 2; R. p. 527).

The Circuit Court granted the motion for sanctions. It found that "spoliation has taken place by Covil of some of its corporate records that are pertinent to these proceedings." (Trial Tr. 68:4–16; R. p. 1797). And it sanctioned Covil by instructing the jury that Crawford "was exposed to asbestos insulation supplied by and installed by Covil Corporation at Celanese between 1970 and 1974." (Trial Tr. 117:8–12; R. p. 1846); *see also* (Trial Tr. 75:23–25; R. p. 1804).

The jury trial began on July 16, 2018. The focus of the evidence was whether Covil was responsible for the insulation installed at the Celanese plant when Crawford worked there. Crawford introduced deposition testimony from a former Daniel Construction employee that the company insulated pipe at the Celanese facility with Covil-supplied insulation. (Neelands Dep. 134:6–11; R. p. 3440). In addition, a former Covil employee said in deposition testimony introduced at trial that if Daniel Construction had a maintenance contract, "Covil was doing the insulation work." (Waters Dep. 402:3–5; R. p. 3738). But a Daniel Construction corporate representative testified that Covil was not a subcontractor or vendor for Daniel Construction's work at the Celanese facility between 1971 and 1975. (Buck Dep. 108:24–109:16; R. p. 3203). Additionally, the corporate representative for CNA Holdings (Celanese's successor company) testified that he had searched his company's records regarding construction of the Celanese facility in Spartanburg and had found nothing to suggest that Covil supplied or installed insulation at the facility. (Bowyer Dep. 134:8–138:14; R. pp. 3286–87). And Covil's corporate representative testified that none of Covil's remaining records reflected that Covil did work at the Celanese facility between 1970 and 1974, or that Covil did any work for Daniel Construction during that time. (Trial Tr. 374:22–375:8; R. pp. 2104–05).

After hearing this conflicting evidence, the jury returned a verdict in favor of Covil on all claims on July 19, 2018. (Trial Tr. 629:23–630:11; R. pp. 2364–65); (Verdict; R. pp. 1–2). The Circuit Court, however, granted Crawford a new trial under the Thirteenth-Juror Doctrine, concluding that the jury's verdict was unsupported by the evidence at trial. (Order Denying in Part and Granting in Part Pl.'s Mot. for Judgment Notwithstanding the Verdict & for a New Trial Absolute; R. pp. 3–10). Covil appealed to this Court, and that appeal has been fully briefed. *See Crawford v. Covil Corp.*, No. 2018-001965 (S.C. Ct. App.).

B. Covil's Record Production

Over the years, the law firms that represent Crawford have received and been given access to all the Covil documents that were in Gallivan White's custody. As noted above, during this case, Covil produced approximately 25,000 pages of documents to Crawford. (Covil Corp.'s Reply to Pl.'s Mot. Sanctions p. 2; R. p. 527); (Rule 60(b) Mot. Hr'g Tr. 7:9–11; R. p. 2528). But even prior to that, the law firms that represent Crawford have been afforded access to and given the opportunity to review the Covil documents by Gallivan White multiple times over the past two decades.

In 1999 or 2000, two attorneys from the law firm of Wallace & Graham, P.A.—which serves as local counsel to Crawford's attorneys at Dean Omar Branham & Shirley, LLP ("Dean Omar") in many other asbestos-related cases—visited Gallivan White's office. The attorneys were given access to all of the Covil records in Gallivan White's possession. (Covil's Opp'n Ex. C (White Aff. ¶ 5) ; R. p. 1639). During that visit, the Wallace & Graham attorneys scanned and copied any materials that the attorneys deemed relevant and provided Gallivan White with a CD of the materials that were copied. (*Id.* ¶ 6; R. p. 1640).

Then in the fall of 2017, an attorney from Dean Omar contacted Gallivan White seeking to review the Covil records in connection with another asbestos claim pending against Covil. (*Id.* ¶ 7). Gallivan White retrieved those records from offsite storage to facilitate the review, but the Dean Omar attorney never followed through on the request. (*Id.*).

Similar access was offered in 2018. In connection with another Covil case, a Gallivan White attorney showed a second Dean Omar attorney where the Covil records were being stored and offered the Dean Omar attorney the opportunity to review them during a deposition being held at Gallivan White's offices. (*Id.* ¶ 8). Like her colleague the prior year, the Dean Omar attorney chose not to review the files. *See* (*id.*).

C. The Data Tape and Crawford's Rule 60(b) Motion

After this litigation began, Covil changed counsel. Wall Templeton & Haldrup ("Wall Templeton") took over Covil's representation in April 2018. (*Id.* ¶ 9). In August 2018, after the trial in this case, Wall Templeton first learned of a "data tape" present among Covil's paper records. (Covil Opp'n Ex. J (Wall Aff. ¶ 5–6); R. p. 1710–11). Covil changed counsel again in March 2019.

On July 11, 2019, during a hearing in another case, a lawyer representing Wall Templeton informed the Circuit Court that the firm was in possession of a data tape obtained from Gallivan White. (Covil's Opp'n Ex. E (Hr'g Tr. 70:18–71:6, *Falls v. CBS Corp.*, No. 2015-CP-46-02155 (S.C. Ct. C.P., York Cty. July 11, 2019)); R. pp. 1657–58). Counsel stated that the tape's contents were unclear because the tape employed an obsolete technology. (*Id.*). The Circuit Court ordered that a forensic specialist examine the tape to determine whether it contains data and, if so, how to retrieve the data. (Covil's Opp'n Ex. F (Order on Handling of Data Tape Produced by Mark Wall, *Hopper v. Air & Liquid Sys. Corp.*, No. 2019-CP-40-00076 (S.C. Ct. C.P., Richland Cty., Aug. 22, 2019); R. pp. 1661–62).

In accordance with the court's order, a forensic specialist retained by Covil in consultation with Dean Omar is currently attempting to recover the tape's contents. The tape's label indicates that its contents date from 1990 and 1991, with a "final back up" date of October 18, 1991, just before Covil ceased operations. (Covil's Opp'n Ex. E (Hr'g Tr. 95:1–4, *Falls*, No. 2015-CP-46-02155 (S.C. Ct. C.P., York Cty. July 11, 2019)); R. p. 1659). The specialist has identified a software called "NCR" as necessary to extract the data. Consistent with that determination and the tape's label, Covil's records show that it purchased accounting software referred to as an NCR system in August 1988, nearly fifteen years after Crawford stopped working at Celanese. (Covil's

Opp'n Ex. G; R. pp. 1664–75). To date, the third-party vendor has been unable to extract information from the data tape in a useable format.

Despite the continuing work of the specialist, and even though the Circuit Court had already granted a new trial under the Thirteenth-Juror Doctrine, Crawford filed a motion for relief from judgment, requesting a new trial under Rule 60(b)(2) and Rule 60(b)(3) based on the data tape. (Pl.'s Rule 60(b) Mot. p. 1; R. p. 1597). This Court gave Crawford leave to file such motion. (Order of Sept. 20, 2019). And though the Thirteenth-Juror ruling meant that there was no judgment from which to grant Crawford relief, the Circuit Court granted a new trial under both Rule 60(b)(2) and Rule 60(b)(3).

With respect to Rule 60(b)(2), the Circuit Court concluded that the data tape constitutes newly discovered evidence warranting a new trial. The Circuit Court found that the tape was "in existence at the time of the jury's verdict," that Crawford "could not have discovered this evidence with due diligence," and that—although "what is contained on this tape is unknown"—it is "probable that the evidence contained on the tape is not likely to be merely cumulative or impeaching." (Order p. 5; R. p. 19). The Circuit Court did not make any findings as to the materiality of the unknown information on the data tape or whether that unknown information would probably change the result in a new trial.

As to Rule 60(b)(3), the Circuit Court concluded that "Covil's concealment of the data tape, which may very well contain the documents that Covil claimed were destroyed, constitutes fraud against Plaintiff and fraud on this Court." (*Id.* at 7; R. p. 21). The Circuit Court did not find, however, that Covil intended to deceive either Crawford or the court about the existence of the data tape.

Covil filed and served its notice of appeal on December 23, 2019. Several weeks later, Crawford filed a motion to dismiss, which Covil opposed as squarely foreclosed by precedent of the Supreme Court of South Carolina. This Court denied Crawford's motion in an order issued on February 28, 2020, noting that the parties could address the issue of jurisdiction in their briefs.

STATEMENT OF JURISDICTION

South Carolina Appellate Court Rule 201 provides that appeals may be taken from any "appealable order," Rule 201(a), SCARC, and the Supreme Court of South Carolina has held that any order granting a new trial qualifies. As the Supreme Court has explained, interlocutory orders that "discontinue an action, prevent an appeal, or grant or refuse a new trial, or strike out an action or defense" affect a substantial right and are thus immediately appealable orders under Section 14-3-330 of the South Carolina Code of Laws. *Ex parte Wilson*, 367 S.C. 7, 13, 625 S.E.2d 205, 208 (2005); *Mid-State Distribs., Inc. v. Century Imps., Inc.*, 310 S.C. 330, 335 n.4, 426 S.E.2d 777, 780 n.4 (1993). There is no question that the Circuit Court's order grants a new trial, and for that reason, it is immediately appealable. *See Bailey v. Peacock*, 318 S.C. 13, 15 n.2, 455 S.E.2d 690, 692 n.2 (1995) (rejecting as "meritless" the argument that "the granting of a new trial is not immediately appealable").

The Supreme Court has squarely rejected the assertion in Crawford's motion to dismiss that an exception exists for orders granting a new trial based on facts or new evidence. Crawford's argument is based on language from a 1967 decision that the Supreme Court has since clarified. Nine years later, in *South Carolina State Highway Department v. Clarkson*, the Supreme Court explained unequivocally that "the statement in [prior] decisions, that an order granting a new trial based upon the facts is not appealable, *is not correct in the sense that an appeal will not lie*." 267 S.C. 121, 126, 226 S.E.2d 696, 697 (1976). Rather, this statement merely reflects the standard of review on appeal of such an order, requiring that the order be affirmed unless "there was an abuse

of discretion amounting to an error of law." *Id*. Such an abuse of discretion "has been found in our prior decisions where the order granting a new trial is without evidentiary support or founded upon a fundamental legal error." *S.C. Dep't of Highways & Pub. Transp. v. Mooneyham*, 275 S.C. 205, 206, 269 S.E.2d 329, 330 (1980) (citations omitted).

SUMMARY OF ARGUMENT

I. The Circuit Court abused its discretion by committing a fundamental legal error in granting a new trial under Rule 60(b)(2). To obtain a new trial based on newly discovered evidence under Rule 60(b)(2), a movant must establish that the evidence: (1) will probably change the result if a new trial is granted; (2) has been discovered since the trial; (3) could not have been discovered before the trial; (4) is material; and (5) is not merely cumulative or impeaching. All five factors must be met. But in granting relief to Crawford, the Circuit Court did not find that the information on the data tape will probably change the result in a new trial or that the information is material to any issue. That is reversible error.

The Circuit Court's decision to grant a new trial under Rule 60(b)(2) is reversible for the additional reason that it lacks support in the record evidence. As of now, no one knows what information the data tape contains because the forensic computer expert has been unable to obtain useable data from the tape. The Circuit Court's assertions about the data tape's contents were nothing but speculation. And this sort of guesswork cannot satisfy Rule 60(b)(2)'s requirements that the newly discovered evidence will probably change the result in a new trial, will be material, and will not be merely cumulative. The record evidence also does not support the Circuit Court's conclusion that the data tape could not have been discovered before trial. On multiple occasions over the past two decades, Covil's counsel gave attorneys from two law firms (one now representing Crawford and a second frequently associated with the first) access to the file cabinets in which the tape was stored.

II. The Circuit Court also abused its discretion in granting a new trial under Rule 60(b)(3). To obtain a new trial based on fraud under Rule 60(b)(3), the movant must demonstrate by clear and convincing evidence that a party acted with the intent to perpetrate an "extrinsic fraud" against another party or the court. Crawford failed to meet that exacting burden for four reasons that each independently require reversal. *First*, Crawford offered nothing more than conclusory assertions that Covil intended to deceive either Crawford or the Circuit Court regarding the data tape. *Second*, Crawford's allegations that Covil failed to disclose the tape support, at most, a finding of intrinsic fraud. *Third*, the Circuit Court did not find, in any event, that Covil acted with fraudulent intent when it granted Rule 60(b)(3) relief. *Fourth*, there is no record evidence that could support a finding that Covil or its attorneys intentionally concealed the tape.

STANDARD OF REVIEW

A circuit court's grant of a Rule 60(b) motion is reviewed for "abuse of discretion," which occurs where the court's order "was controlled by an error of law or where the order is based on factual conclusions that are without evidentiary support." *BB & T v. Taylor*, 369 S.C. 548, 551, 633 S.E.2d 501, 503 (2006).

ARGUMENT

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

South Carolina Rule of Civil Procedure 60(b)(2) permits a court to "relieve a party" from a "final judgment, order, or proceeding" because of "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)," meaning before or soon after trial. Rule 60(b)(2), SCRCP; *see also* Rule 59(b), SCRCP (requiring any motion for new trial to be filed no later than ten days after discharge of jury). Relief under Rule 60(b)(2) is "not as a rule favored by the court." *McCabe v. Sloan*, 184 S.C. 158, 191 S.E.

905, 907 (1937). Like its counterpart in federal law, to which the Supreme Court looks for guidance, Rule 60(b)(2) is an "extraordinary" remedy that "is only to be invoked upon a showing of exceptional circumstances." *United States v. Welsh*, 879 F.3d 530, 536 (4th Cir. 2018) (quoting *Compton v. Alton S.S. Co.*, 608 F.2d 96, 102 (4th Cir. 1979)); *see also Maybank v. BB&T Corp.*, 416 S.C. 541, 565, 787 S.E.2d 498, 510 (2016) ("In construing the South Carolina Rules of Civil Procedure, [the South Carolina Supreme] Court looks for guidance to cases interpreting the federal rules.").

Reflecting the extraordinary nature of this relief, a court may grant a new trial under Rule 60(b)(2) only if the movant meets five requirements. She 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). The strict burden of satisfying all five conditions ensures that the alleged "newly discovered" facts were "previously unknown" and are "outcome-changing"—the fundamental basis on which "[r]elief under the rule depends." *Morin v. Innegrity, LLC*, 424 S.C. 559, 578, 819 S.E.2d 131, 141 (Ct. App. 2018); *see also In re Keeley & Grabanski Land P'ship*, 832 F.3d 853, 858 (8th Cir. 2016) ("The movant under Rule 60(b)(2) bears a heavy burden.").

Far from holding Crawford to this exacting standard, the Circuit Court failed even to *address* two of the required elements under Rule 60(b)(2): whether the contents of the data tape will probably change the result of the trial and whether the contents are material. That error of law requires reversal.

What is more, there is no record evidence to support a finding in Crawford's favor on either of those two elements or two others: whether Crawford could have discovered the data tape before

trial and whether the data tape is merely cumulative evidence. The main reason that no evidence exists, of course, is that no one yet knows what information the data tape contains. Crawford filed his motion despite knowing that the court-ordered forensic computer expert was still working to unearth the tape's contents. It was (and still is) literally impossible to determine whether the tape's contents could affect the result of a new trial, will turn out to be material, or will be merely cumulative. The Circuit Court's grant of a new trial under Rule 60(b)(2) should therefore be reversed for the independent reason that it relies on nothing but speculation and conjecture.

A. The Circuit Court Erred by Failing to Address Whether the Contents of the Tape Will Probably Change the Result or Are Material to Any Issue.

The Circuit Court's order granting a new trial under Rule 60(b)(2) failed to address whether, much less find that, Crawford satisfied two of the five required elements for Rule 60(b)(2) relief. That deficiency alone requires reversal.

As in many other contexts in South Carolina law, a court commits reversible error if it grants a new trial under Rule 60(b)(2) without considering and making a finding on each of the five required elements. South Carolina courts have held frequently that it is a reversible error of law for a circuit court to "fail[] to consider [a] relevant factor" of a binding multi-factor test. *Kriti Ripley, LLC v. Emerald Invs., LLC*, 404 S.C. 367, 370, 746 S.E.2d 26, 27 (2013); *see also Rivenbark v. Rivenbark*, 301 S.C. 175, 179, 391 S.E.2d 232, 234 (1990) (reversing because "the trial court did not give adequate consideration to the [relevant] factors"); *Burke v. Republic Parking Sys., Inc.*, 421 S.C. 553, 560–61, 808 S.E.2d 626, 629 (Ct. App. 2017) ("The trial court failed to consider the [relevant] factors, and . . . such a failure is an abuse of discretion under our case law."). That is true, as well, in the Rule 60(b)(2) context. To prevail on a Rule 60(b)(2) motion, the movant "*must* establish that the newly discovered evidence" satisfies each of the five

factors specified by South Carolina case law. *Lanier*, 364 S.C. at 217, 612 S.E.2d at 459 (emphasis added).

In granting Rule 60(b)(2) relief to Crawford, however, the Circuit Court did not even mention two of the five factors: whether the information on the data tape will probably change the result in a new trial and whether the information is material to any issue. The Circuit Court determined only that the data tape had been discovered after trial, that it could not have been discovered before trial, and that, according to the court, it is "probable that the evidence contained on the tape is not likely to be merely cumulative or impeaching." (Order p. 5; R. p. 19). The Circuit Court's failure to consider two of the requirements for Rule 60(b)(2) relief, much less decide whether Crawford had met his burden of proof on those factors, warrants reversal. *See Burton v. York Cty. Sheriff's Dep't*, 358 S.C. 339, 358, 594 S.E.2d 888, 898 (Ct. App. 2004) (reversing trial court based on failure to "consider or enter findings for the factors . . . as mandated by our Supreme Court"); *Trowell v. Trowell*, 287 S.C. 614, 615, 340 S.E.2d 553, 554 (Ct. App. 1986) ("The trial judge in this case failed to make findings of fact pertaining to these factors; this is error.").

Though arising in a different context, the Supreme Court of South Carolina's decision in *Kriti Ripley* is particularly instructive. In *Kriti Ripley*, the Supreme Court reversed a circuit court's denial of foreclosure because the circuit court "failed to consider the relevant factor of the likelihood of satisfaction of the judgment through distributions," which the Supreme Court identified as "the primary, and usually determinative, factor" in making a foreclosure determination. 404 S.C. at 370, 382, 746 S.E.2d at 27, 34. Similar concerns are present here. The Circuit Court failed to assess or make findings regarding both the likelihood that the data tape will change the result if a new trial is granted and the materiality of the data tape's contents. These are

not only required elements of the Rule 60(b)(2) inquiry, but the elements that speak most directly to the critical question on which "[r]elief under the rule depends"—whether the newly discovered evidence is "outcome-changing." *Morin*, 424 S.C. at 578, 819 S.E.2d at 141.

The circuit court's cursory reference to the two factors at its hearing on the Rule 60(b) motion cannot remedy this critical deficiency in its written order. (Nov. 12, 2019 Rule 60 Hearing pp. 15–16; R. pp. 2536–37) ("I find that the material from that timeframe [the period of time ending in 1991] is relevant to this case and has the high possibility of changing the result of the trial. . . . I find that any Covil records for the period of time during which this data tape covers are material to the issues of – that are raised about Mr. Crawford's exposure . . .").

South Carolina law is clear that a circuit court judge's written order controls over anything that the judge said at a previous hearing. It is well settled that 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 (2011); *see also Parsons v. Ryan*, 912 F.3d 486, 498–99 (9th Cir. 2018) ("We do not review oral statements from the bench on a matter later committed to writing; we review instead the written order by the district court," and when the written order "makes no mention" of oral statements, "we will not treat the district court's earlier remarks as a basis for its later written decision."). In *Cole Vision*, the Supreme Court held that a claim for general negligence was "unpreserved" because, although the circuit court had discussed negligence in its oral ruling, the court's written order did not mention that claim. 394 S.C. at 149, 714 S.E.2d 537, 539–40. This Court, too, has recognized that a circuit court's "written order controls" over "the prior oral ruling." *Parag v. Baby Boy Lovin*, 333 S.C. 221, 226, 508 S.E.2d 590, 592 (Ct. App. 1998); *see also Corbin v. Kohler Co*., 351 S.C. 613, 620, 571 S.E.2d 92, 96 (Ct. App. 2002) ("No order is final until it is written and entered."). Because the Circuit Court's written order controls, and that order did not

address two of the five required factors for relief under Rule 60(b)(2), the Circuit Court's decision is an abuse of discretion and should be reversed.

B. The Circuit Court's Conclusion That Relief Was Warranted Under Rule 60(b)(2) Is Not Supported by the Record Evidence.

The Circuit Court's decision to grant a new trial under Rule 60(b)(2) should also be reversed for the separate reason that it is not supported by the record evidence. As of now, the information contained on the data tape remains unknown, and any attempt to divine the data tape's contents is pure speculation. Until the tape's contents have been recovered in a useable format, it is simply not possible for Crawford to prove or the Circuit Court to find that the tape would change the result if a new trial is granted, is material to any issue before the court, and is not merely cumulative or impeaching. The record evidence also fails to support the Circuit Court's finding that Crawford could not have discovered the data tape before trial. Because all five factors must be satisfied, any one of these failures of supporting evidence independently requires reversal.

i. Probability That Newly Discovered Evidence Will Change the Result if a New Trial Is Granted and Materiality.

Even if the Circuit Court had addressed whether the information on the data tape will change the result of the trial and whether the information was material, it would still have erred in granting Crawford's Rule 60(b)(2) motion because Crawford presented no argument on these two issues and offered, at most, speculation as to what the data tape might contain. Crawford premised his request for a new trial under Rule 60(b)(2) on his "*anticipation* that the data tape will contain evidence favorable to [his] case" and contended that the data tape might "*possibly* contain[ ] documents relevant to this case." (Pl.'s Rule 60(b) Mot. pp. 2–3; R. pp. 1598–99) (emphasis added). These vague and equivocal statements hardly contend that the data tape "*will probably change the result* if a new trial is granted" and "*is material* to the issue[s]" in this case. *Lanier*, 364 S.C. at 217, 612 S.E.2d at 459 (emphasis added). Crawford is thus barred from addressing

those issues at all in this Court. *See Staubes v. City of Folly Beach*, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000) ("It is well-settled that an issue cannot be raised for the first time on appeal . . . .").

At most, these statements offer sheer conjecture. No one—including Crawford—has any idea whether the tape contains useable data, let alone admissible evidence relevant to Crawford's claims against Covil. The Circuit Court itself acknowledged that "what is contained on this tape is unknown to the parties and the Court." (Order p. 5; R. p. 19).

And it is well-settled, in a long and consistent line of cases addressing the federal equivalent of Rule 60(b)(2), that speculation is insufficient to support relief. *See Maybank*, 416 S.C. at 565, 787 S.E.2d at 510 (looking "for guidance to cases interpreting the federal rules"). The rule "requires more than a showing of the *potential* significance of the new evidence." *Bohus v. Beloff*, 950 F.2d 919, 930 (3d Cir. 1991) (emphasis added). When a plaintiff proffers "merely speculative" evidence "consist[ing] primarily of accounts of documents" that "*might* provide answers, if only they were available," the evidence is insufficient to support relief under Rule 60(b)(2). *N.H. Ins. Co. v. Martech USA, Inc.*, 993 F.2d 1195, 1201 (5th Cir. 1993) (emphasis added). In *Martech*, the Fifth Circuit held that a movant was not entitled to relief under Rule 60(b)(2) of the Federal Rules of Civil Procedure based on its discovery of potential witnesses who were "said to have personal knowledge" and documents relevant to the movant's claim. *Id.* Because the potential witnesses had "refuse[d] to furnish this information unless [they were] paid an extortionate 'bonus,'" the court of appeals concluded that this "new evidence [was] neither competent nor likely to have produced a different result." *Id.* The court acknowledged that "if [the witnesses] opted to cooperate," their documents and testimony "conceivably could demonstrate" what the movant hoped. The court nevertheless determined that such possibility was insufficient to justify Rule

60(b) relief because, as things currently stood, the movant's "new evidence" was nothing more than "speculation about what evidence" the witnesses "might produce." *Id.*

Other courts have reached similar conclusions. In *Haigh v. Gelita USA, Inc.*, 632 F.3d 464 (8th Cir. 2011), the plaintiff moved for a new trial so that he could present additional documentation "once it was all found." *Id.* at 471. The court held that Rule 60(b) relief was not appropriate because the plaintiff "failed to present any of the alleged newly discovered evidence to the district court, and thus the court could not make a determination on whether the evidence was material and not merely cumulative, or whether it was probable that a new trial would produce a different result." *Id.* at 472. And in *LiButti v. United States*, 178 F.3d 114 (2d Cir. 1999), the court rejected a request for Rule 60(b) relief where the plaintiff represented that her father had agreed to testify but "failed to specify what subjects his testimony would cover or how such proposed testimony would change the result the trial court had previously reached." *Id.* at 119. Although the plaintiff had asserted that she had "every reason to believe that the testimony will show" what she hoped it would, the court concluded that "this declaration, without more, made the proposed testimony of only speculative value." *Id.*

Like the unsuccessful Rule 60(b) movants in those cases, Crawford cannot point to anything other than speculation to support his contention that the information on the data tape will be outcome-changing and material. In fact, Crawford relies on speculation to an even greater degree than the plaintiffs in those cases. In all of those cases, there was at least some circumstantial evidence suggesting that the newly discovered evidence might ultimately support the movant and change the outcome of the trial. Here, however, there is *no* indication that the data tape contains any information that is relevant to Crawford's claim of exposure to Covil-supplied asbestos between 1970 and 1974.

All of the available evidence points *away* from a finding that the tape's contents would change the outcome of the trial or be material. That evidence suggests instead that the data tape has no relevance to Crawford's claims. The tape's case contains a description indicating that the information on the tape is from 1990 and 1991, with a "final back up" date of October 18, 1991, more than fifteen years *after* Crawford's alleged exposure to Covil-supplied asbestos-containing insulation between 1970 and 1974. *See* (Covil's Opp'n Ex. E, at 95:1–4 (Tr. of July 11, 2019 hearing); R. p. 1659). Consistent with that description, Covil also introduced documents showing that it purchased the accounting software used to create the tape in August 1988. *See* (Covil Opp'n Ex. G; R. pp. 1664–75 (including a compilation of Covil historical records)). To date, it is not clear that it is even possible for the data tape to contain documents or data created prior to Covil's purchase of the software in 1988, still more than a dozen years after Crawford's alleged exposure. The only conclusion supported by the available evidence, rather than speculation, is that the tape contains accounting information from no earlier than the late 1980s and more likely the early 1990s, which would have absolutely no bearing on Crawford's claims.

Until the data tape's contents are recovered, only counterfactual speculation supports the notion that the tape contains evidence that would be outcome-changing or material. That is not enough to support extraordinary relief and is reason alone to reverse the Circuit Court's grant of a new trial under Rule 60(b)(2).

ii. Cumulative or Impeaching

There is also no evidence to support Crawford's claim or the Circuit Court's finding that the information on the data tape is "not merely cumulative or impeaching." *Lanier*, 364 S.C. at 217, 612 S.E.2d at 459. The Circuit Court's conclusion that it is "probable that the evidence contained on the tape is not likely to be merely cumulative or impeaching," (Order p. 5; R. p. 19), is bereft of any supporting explanation. And the reason why is plain—as discussed above, it is

literally impossible to say at this time what information the tape contains, much less whether that information is "cumulative or impeaching." Crawford's claim and the Circuit Court's determination are based solely on conjecture and guesswork. *See* (Pl.'s Rule 60(b) Mot. p. 5; R. p. 1601) (speculating that the data tape apparently reflecting computer system backups in 1990 and 1991 "may very well contain the very documents that Covil claimed were destroyed" in the May 1973 fire).

Further, even if Crawford's unsubstantiated conjecture became reality and the data tape turned out to contain evidence that Covil supplied asbestos-containing insulation to the Celanese plant during Crawford's employment there, that evidence would be cumulative in several ways. It would be cumulative of evidence presented by Crawford at trial. *See supra* pp. 5–6 (discussing testimony offered by Crawford that Covil insulation was used at the Celanese plant). Though Covil disputed the credibility of that evidence, Rule 60(b)(2) does not permit granting a new trial where allegedly new evidence merely "add[s] to the list of conflicting evidence" already in the record. *Halliburton Energy Servs., Inc. v. NL Indus.*, 618 F. Supp. 2d 614, 648–49 (S.D. Tex. 2009). The hypothetical evidence on the data tape would also be cumulative of the Circuit Court's jury instructions. At the beginning of the trial, the Circuit Court gave the following instruction to the jury: "I am instructing you now that Jerry Crawford, the plaintiff in this matter, was exposed to asbestos and insulation supplied by and installed by Covil Corporation at Celanese between 1970 and 1974." (Trial Tr. 117:8–12; R. p. 1846). Thus, even if the data tape contains everything that Crawford *hopes* it does—evidence showing that Covil supplied asbestos to the Celanese plant between 1970 and 1974—that evidence would actually preclude relief under Rule 60(b)(2).

The inevitable futility of Crawford's conjecture is evident in internal inconsistencies in the Circuit Court's order. The Circuit Court concluded that the information on the data tape "is not

likely to be merely cumulative" and that the tape may include "documentary evidence showing Covil's presence at Celanese Spartanburg." (Order pp. 5, 7; R. pp. 19, 21). But at the same time, the Circuit Court stated that there was "significant evidence" presented at trial "that Jerry Crawford was exposed to asbestos insulation supplied and installed by Covil when he worked at the Celanese plant in Spartanburg in the 1970s." (*Id.* at 1–2; R. pp. 15–16). The Circuit Court never attempted to reconcile the tension between these statements, which confirms how far astray its reliance on Crawford's conjecture led it.

iii. Could Not Have Been Discovered Before the Trial

Finally, Crawford's request for Rule 60(b)(2) relief fails for the additional and independent reason that the record fails to show that he could not have discovered the data tape before trial.

"Rule 60(b)(2) allows the court to grant a new trial only if the newly discovered evidence could not have been discovered *by due diligence* prior to trial." *Jamison v. Ford Motor Co.*, 373 S.C. 248, 272, 644 S.E.2d 755, 767 (Ct. App. 2007) (emphasis added). 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." *Id.* at 272, 644 S.E.2d at 768 (citing Black's Law Dictionary 468 (7th ed. 1999)). "Diligence looks not to what the litigant actually discovered, but what he or she *could* have discovered." *Lanier*, 364 S.C. at 220, 612 S.E.2d at 460; *see also Bowman v. Bowman*, 357 S.C. 146, 152, 591 S.E.2d 654, 657 (Ct. App. 2004) ("South Carolina's strong policy towards finality of judgments trumps a party's ability to set aside a judgment where . . . the party could have discovered the evidence prior to trial.").

When litigants failed to use available means to uncover evidence, courts have concluded that their lack of diligence foreclosed relief under the federal equivalent of Rule 60(b)(2). In *In re Hope 7 Monroe Street Partnership*, 743 F.3d 867 (D.C. Cir. 2014), for example, the D.C. Circuit upheld the district court's finding that the movant failed to exercise reasonable diligence when

there was "nothing in the record to suggest [the movant] ever sought discovery" to obtain the supposedly new evidence. *Id.* at 874. And in *Miller v. Baker Implement Co.*, 439 F.3d 407 (8th Cir. 2006), the Eighth Circuit upheld a finding that a Rule 60(b)(2) movant did not exercise due diligence when he waited months after receiving objections to his discovery requests before filing a motion to compel. *Id.* at 414–15. The court reasoned that the movant "d[id] not explain why he failed to avail himself of the available discovery remedies before the district court issued its order." *Id.* at 414.

Here, despite the Circuit Court's bald assertion that Crawford "could not have discovered" the data tape "with due diligence," (Order p. 5; R. p. 19), the record does not support the conclusion that Crawford's counsel "availed" themselves "of the available" means to obtain the data tape, *Miller*, 439 F.3d at 414. Until very recently, the data tape was stored in a file cabinet of Covil documents under the custody of Gallivan White. Between 1999 and 2018, Covil's lawyers at Gallivan White made multiple attempts to disclose the contents of this cabinet both to the law firm now representing Crawford and to Wallace & Graham, but those attorneys declined that invitation. These efforts included: (1) granting two attorneys from the law firm of Wallace & Graham access for a week in 1999 or 2000 to the file cabinet containing the data tape and permitting them to scan or copy all of the materials that they deemed relevant, (Covil Opp'n Ex. C (White Aff. ¶¶ 5–6); R. pp.1639–40); (2) transferring all of these files in 2017 from off-site storage back to the offices of Gallivan White for a Dean Omar attorney to review, (*id.* ¶ 7; R. p. 1640); and (3) taking a Dean Omar attorney in 2018 to the storage location of the file cabinets and giving her the opportunity to review them, (*id.* ¶ 8). Crawford's counsel could have discovered the data tape before trial through these numerous available means. Their failure to do so bars Crawford from obtaining a new trial under Rule 60(b)(2) based on newly discovered evidence.

II. The Circuit Court Abused Its Discretion in Granting A New Trial, in the Alternative, Under Rule 60(b)(3).

South Carolina courts have the power to grant a new trial because of fraud. They have the independent power to grant a new trial "for fraud upon the court," Rule 60, SCRCP, and also the specifically enumerated power under Rule 60(b)(3) to "relieve a party" from a "final judgment, order, or proceeding" because of "fraud, misrepresentation, or other misconduct of an adverse party," Rule 60(b)(3), SCRCP.

For a claim of fraud to qualify for relief under Rule 60, "the fraud must be extrinsic" rather than "intrinsic." *Chewning v. Ford Motor Co.*, 354 S.C. 72, 80-81, 579 S.E.2d 605, 610 (2003). "Extrinsic fraud is 'fraud that induces a person not to present a case or deprives a person of the opportunity to be heard,'" whereas intrinsic fraud "is fraud which was presented and considered in the trial" and "which misleads a court in determining issues and induces the court to find for the party perpetrating the fraud." *Id.* at 81, 579 S.E.2d at 610–11 (citations omitted). The "failure to disclose to an adversary or court matters which would defeat one's own claim is intrinsic fraud." *Id.* at 81–82, 579 S.E.2d at 610; *see also Raby Constr., L.L.P. v. Orr*, 358 S.C. 10, 19, 594 S.E.2d 478, 483 (2004) ("Allegations that a party failed to disclose documents also generally amount to intrinsic, rather than extrinsic, fraud.").

To qualify as "fraud"—whether "fraud upon the court" or fraud under Rule 60(b)(3)—the deceptive conduct also must be intentional and proven by clear and convincing evidence. As the Supreme Court explained in *Chewning*, fraud on the court "requires a showing that one has acted with an intent to deceive or defraud the court," which necessitates "a showing of conscious wrongdoing"; in contrast, "when there is no intent to deceive," there is no "basis for setting aside a judgment for fraud on the court." 354 S.C. at 78–79, 579 S.E.2d at 608–09. Indeed, "*all*" types of fraud "require[ ] showing that the perpetrator acted with the intent to defraud, for there is no

such thing as accidental fraud." *Perry v. Heirs at Law of Gadsden*, 357 S.C. 42, 47, 590 S.E.2d 502, 504–05 (Ct. App. 2003).[3] The movant must make this showing of fraudulent intent by "clear and convincing evidence." *Chewning*, 354 S.C. at 86, 579 S.E.2d at 612; *see also Bowers v. Bowers*, 304 S.C. 65, 67, 403 S.E.2d 127, 129 (1991).

The Circuit Court abused its discretion when it granted a new trial, in the alternative, because of fraud. Crawford failed, in several ways, to meet his burden of proving "by clear and convincing evidence" that Covil's conduct with respect to the data tape constituted extrinsic fraud undertaken with the intent to deceive Crawford and the Circuit Court. *Chewning*, 354 S.C. at 86, 579 S.E.2d at 612. *First*, Crawford "failed to even allege the existence of fraudulent intent." *Perry*, 357 S.C. at 47, 590 S.E.2d at 505. The closest he came was his unsupported reference to "Covil's concealment of the data tape," (Pl.'s Rule 60(b) Mot. p. 5; R. p. 1601), and his bare assertion in the Rule 60(b)(2) portion of his Motion that the data tape was "intentionally withheld by Covil in violation of its discovery obligations," (*id.* at 4; R. p. 1600). But Crawford did not offer any evidence or argument to support those conclusory statements, which is reason enough to reverse the Circuit Court's grant of Rule 60(b)(3) relief. *See Glasscock, Inc. v. U.S. Fid. & Guar. Co.*, 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct. App. 2001) ("South Carolina law clearly states that short, conclusory statements made without supporting authority are deemed abandoned on appeal.").

[3] *See also id.* at 47, 590 S.E.2d at 505 (noting that "fraud is always positive, intentional" (brackets omitted) (quoting Black's Law Dictionary 660 (6th ed. 1990)); *Ray v. Ray*, 374 S.C. 79, 86, 647 S.E.2d 237, 241 (2007) ("In order to set aside a judgment or order because of fraud upon the court under Rule 60(b) it is necessary to show an unconscionable *plan or scheme* which is designed to improperly influence the court in its decision." (emphasis added; ellipses omitted) (quoting *Rozier v. Ford Motor Co.*, 573 F.2d 1332, 1338 (5th Cir. 1978)).

Second, at most, Crawford alleged only intrinsic fraud. The Supreme Court of South Carolina has made clear that "[a]llegations that a *party* failed to disclose documents . . . generally amount to intrinsic, rather than extrinsic, fraud." *Raby Constr.*, 358 S.C. at 19, 594 S.E.2d at 483. That differs markedly from allegations of "intentional concealment of documents by an *attorney*[,] . . . which constitute extrinsic fraud." *Chewning*, 354 S.C. at 82, 579 S.E.2d at 610 (emphasis added). Crawford alleged only that Covil withheld the tape "in violation of its discovery obligations." (Pl.'s Rule 60(b) Mot. p. 5; R. p. 1601).

Third, in any event, the Circuit Court made no finding that Covil acted with the intent to deceive either Crawford or the court with respect to the existence of the data tape. *See* (Order pp. 5–7; R. pp. 19–21). As explained earlier, a court commits reversible error if it "fails to consider [a] relevant factor" of a binding multi-factor test. *Kriti Ripley*, 404 S.C. at 370, 746 S.E.2d at 27. The Circuit Court's failure to find intent—a core requirement for fraud—is precisely such an error. It is therefore another independent basis for reversing the Circuit Court's Rule 60(b)(3) ruling.

Fourth, even if Crawford had alleged that Covil's attorneys intentionally concealed documents, and even if the Circuit Court had found such intentional concealment, the record would not support such a finding—and certainly not by clear and convincing evidence. *Chewning*, 354 S.C. at 86, 579 S.E.2d at 612. The only evidence in the record points *away* from a finding of intent by Covil's lawyers to conceal the existence of the data tape. The undisputed affidavits of Covil's lawyers since the 1970s disavow any intentional fraud. Daniel White, a Gallivan White attorney who represented Covil from the mid-1970s until April 2018, swore in an affidavit that "Gallivan White did not intentionally conceal the data tape from Plaintiff or the Court." (Covil Opp'n Ex. C (White Aff. ¶ 10); R. p. 1640). Mr. White's statement is confirmed by Gallivan White's repeated attempts to provide Wallace & Graham and Dean Omar with access to all of Covil's files, including

the data tape. (*Id.* ¶¶ 5–8; R. p. 1639–40). Mark Wall, Covil's trial counsel beginning in May 2018, swore in a separate affidavit that "Wall Templeton & Haldrup first learned of the data tape present among Covil's paper records on or about August 2018," after the verdict in this case. (Covil Opp'n Ex. J (Wall Aff. ¶ 6); R. p. 1711).

The absence of allegations, findings, and evidence regarding intent to commit any type of fraud—let alone the extrinsic fraud required to justify relief under Rule 60(b)(3)—"compel[s]" the conclusion that "the trial court abused its discretion" in granting a new trial under Rule 60(b)(3). *Perry*, 357 S.C. at 48, 590 S.E.2d at 505.

CONCLUSION

The judgment of the Circuit Court should be reversed.

Respectfully submitted,

September 30, 2020

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

The Honorable Jean H. Toal, Circuit Court Judge

Appellate Case No. 2019-002126

Jerry Howard Crawford, individually and as Personal Representative of the Estate of Evelyn Kay Crawford, Respondent,

v.

Celanese Corporation; Aurora Pump Company; Carrier Corporation; CNA Holdings, LLC f/k/a Hoechst Celanese Corporation; Covil Corporation; Crane Co.; Daniel International Corporation f/k/a/ Daniel Construction Company, Inc.; Flowserve Corporation, individually and as successor-in-interest to Anchor/Darling Valve Company, and individually as successor-in-interest to Durco Pumps; Flowserve, US Inc.; Fluor Constructors International, f/k/a Fluor Corporation; Fluor Constructors, International, Inc.; Fluor Daniel Services Corporation; Fluor Enterprises, Inc.; Ford Motor Company; Genuine Parts Company, d/b/a Rayloc (a/k/a NAPA); The Goodyear Tire & Rubber Company; Goulds Pumps, Inc.; Grinnell, LLC f/k/a Grinnell Corp., f/k/a ITT Grinnell Corp.; Honeywell International, Inc., f/k/a Allied-Products Liability Signal, Inc., sued as successor-in-interest to Bendix Corporation; Ingersoll-Rand Company; John Crane, Inc.; Metropolitan Life Insurance Company, a wholly owned subsidiary of MetLife Inc.; National Automotive Parts Association (NAPA); Parker-Hannifin Corporation; Pneumo Abex, LLC, successor-in-interest to Abex Corporation; Spirax Sarco, Inc.; SPX Cooling Technologies, Inc., individually and as successor-in-interest to Marley Cooling Towers, Co.; Standard Motor Products, Inc., sued as successor-in-interest to EIS Automotive; United States Fidelity & Guaranty Company; and The William Powell Company, Defendants,

Of which, Covil Corporation is the Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that Appellant's Opening Brief complies with South Carolina Rule of Appellate Procedure 211(b).

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