THE STATE OF SOUTH CAROLINA
In th e Co urt of A pp e al s

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

The Honorable Jean H. Toal, Circuit Court Judge

Case No. 2018-001965

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

v.

Celanese Corporation; Aurora Pump Company; Carrier Corporation; CNA Holdings LLC, f/k/a 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 APPELLANT

Ashley K. Brathwaite
ELLIS & WINTERS LLP
4131 Parklake Avenue, Suite 400
Raleigh, NC 27612
Telephone: (919) 573-1297
ashley.brathwaite@elliswinters.com

WALL TEMPLETON & HALDRUP, P.A.

Mark H. Wall (Former)
Morgan S. Templeton (Former)
Graham P. Powell (Former)
Thomas B. Boger (Former)
145 King Street, Suite 300
Charleston, SC 29401
Tel: 843-329-9500
Mark.Wall@WallTempleton.com
Morgan.Templeton@WallTempleton.com
Graham.Powell@WallTempleton.com
Tommy.Boger@WallTempleton.com
Attorneys for the Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATEMENT OF ISSUES ON APPEAL

I. **Whether the trial court abused its discretion by granting Plaintiffs' motion for a new trial pursuant to the Thirteenth Juror Doctrine?**

STATEMENT OF THE CASE

On December 4, 2017, Jerry Howard Crawford and Evelyn Kay Crawford (collectively "Crawford"), filed a Summons and Complaint in the Court of Common Pleas for the Seventh Judicial Circuit in the County of Spartanburg. [R. p. 16]. This products liability lawsuit sought unspecified damages arising out of alleged exposure to asbestos which caused mesothelioma in Mr. Crawford. [Id.; R. p. 22]. Mrs. Crawford asserted a loss of consortium claim. [Id.; R. p. 63].

Mr. Crawford alleged that his exposure to asbestos occurred between "approximately 1960 until 1970 . . . worked, or was in close proximity to those who worked, performing automotive repair . . . involving asbestos containing products." [R. p. 21]. Additionally, Mr. Crawford is alleged to have been an employee at the Hoercst-Celanese facility in Spartanburg, South Carolina. [R. p. 1182, lines 16-19]. It is alleged that during his employment at the Hoercst-Celanese facility he was exposed to asbestos containing insulation products provided by Covil Corporation ("Covil"). [R. p. 1182, lines 7-9].

Covil was one of the Defendants named in the Crawford lawsuit. [R. p. 16]. Covil filed a timely Answer to the Complaint on January 5, 2018. [R. p. 65]. Covil's Answer denied the allegations of the Complaint that it was liable to Crawford and asserted numerous affirmative defenses. [R. p. 72]. One of the defenses was if Crawford was damaged or injured, it was not caused by Covil. [R. p. 76-77].

On July 16, 2018, a trial began in Spartanburg, South Carolina with Judge Jean H. Toal presiding (hereinafter "trial judge and/or court"). [R. p. 1063]. The sole defendant proceeding to trial was Covil. [R. p. 1; p. 1063]. On July 19, 2018, the jury found for Covil.

[R. p. 1].

Crawford filed a motion for Judgment Notwithstanding the Verdict ("JNOV") on July 30, 2018, which also included the alternative relief for a new trial based upon the Thirteenth Juror Doctrine. [R. p. 522]. Covil opposed that motion by filing a memorandum in opposition on August 3, 2018. [R. p. 530]. Crawford thereafter filed a supplemental memorandum in support of the JNOV motion on September 25, 2018. [R. p. 535]. Covil filed a response to the supplemental brief on October 5, 2018. [R. p. 1034]. On October 9, 2018, Crawford filed another supplemental brief notifying the Court that Covil had recently been found liable in United States District Court for the Middle District of North Carolina. [R. p. 1041].

On October 10, 2018, the trial judge heard oral argument on the JNOV motion. [R. p. 1703]. The court ruled from the bench that she was granting the motion for a new trial based upon the Thirteenth Juror Doctrine and requested Crawford's counsel to prepare an Order. [R. p. 1753]. An Order granting a new trial was entered October 22, 2018. [R. p. 3]. Covil filed a timely appeal on October 31, 2018, of the Order granting a new trial.

ARGUMENT & ANALYSIS

I. Whether the trial court abused its discretion by granting Plaintiffs' motion for a new trial pursuant to the Thirteenth Juror Doctrine?

A. STANDARD OF REVIEW.

To be sure, South Carolina law recognizes the Thirteenth Juror Doctrine, and has so for the better part of a century. Worrell v. S.C. Power. Co., 195 S.E. 638, 641 (S.C. 1938). When acting as the thirteenth juror, the trial court "possess[es] the veto power to the nth degree, and, it must be presumed, recognizes and appreciates his responsibility, and exercises the

discretion vested in him with fairness and impartiality."[1] Id. The Supreme Court when it created the thirteenth juror doctrine stated, "[t]his court has no jurisdiction to review matters of fact in an action at law; except to determine if a verdict is wholly unsupported by evidence." Id. 195 S.E. at 641 (emphasis added).

"The thirteenth juror doctrine is a vehicle by which the trial court may grant a new trial absolute when he finds that the evidence does not justify the verdict." Curtis v. Blake, 392 S.C. 494, 505, 709 S.E.2d 79, 85 (S.C. Ct. App. 2011)(citations omitted). "Review by an appellate court of the grant or denial of a new trial is 'limited to consideration of whether evidence exists to support the trial court's order.'" Id. Historically, however, when considering whether to set aside a verdict, the Supreme Court has said, "[t]his court has no jurisdiction to review matters of fact in an action at law; and therefore, unless a verdict is wholly unsupported by evidence, or is so excessive as to justify the inference that it was capricious, or influenced by passion, prejudice, or other considerations not found in the evidence, if it is excessive, the responsibility for failure to reduce it must rest upon the trial judge." Blackmon v. Kirven, 170 S.E. 157 (S.C. 1933). It is, thus, with the back drop of "fairness and impartiality" and whether the defense verdict was wholly unsupported by evidence that this Court should consider whether the thirteenth juror doctrine was exercised properly, or if it was guided by cumulative errors of law which led to a result, other than what the jury clearly and unequivocally intended. See, Johnson v. Parker, 303 S.E.2d 95 (S.C. 1983)(new trial appropriate where verdict is inconsistent and reflects juror confusion);

[1] [T]he sitting judge must conduct all adversarial proceedings with fairness and impartiality. The wide discretion accorded presiding judges, embedded in the law of South Carolina, is essential to the orderly administration of justice." State v. Hawkins, 387 S.E.2d 251 (S.C. 1989).

Johnson v. Hoechst Celanese Corp.453 S.E.2d 908 (S.C. Ct. App. 1995)(under thirteen juror doctrine trial court may grant new trial if the verdict is unsupported by evidence). In a case such as this, the burden of proof was upon Crawford to prove the liability of Covil, on negligence, strict liability, and warranty. Ott v. Pittman, 463 S.E.2d. 101 (S.C. Ct. App. 1995)(negligence); Burns v. Wannamaker, 343 S.E.2d 27 (S.C. 1986)(warranty); Brag v. Hi-Ranger, Inc., 462 S.E.2d 321 (S.C. Ct. App. 1995)(products liability/strict liability). The burden of proof was not upon Covil to show it *did not* do the things complained of by Crawford. O'Neal v. Carolina Farm Supply of Johnston, Inc., 309 S.E.2d 776 (S.C. Ct. App. 1983).

B. STATEMENT OF FACTS THAT SUPPORT A DEFENSE VERDICT.

From Covil's perspective, this case was tried on the issue of whether it supplied asbestos containing products to Celanese at the Spartanburg facility. Crawford was exposed to asbestos from sources other than Covil. [R. pp. 1361-1364]. The sales records for Covil prior to 1973 were destroyed in a fire. [R. p. 1410, lines 4-5]. Covil's representative testified that in reviewing the available records, none reflected work by Covil at Celanese from 1970 to 1974, nor did any records reflect work performed for Daniel Corporation. [R. p. 375, lines 7-8; p. 1437, lines 22-25]. The corporate representative of Celanese (Spartanburg) clearly established that he had reviewed the records of Celanese, that Celanese would have had to approve any contract with any subcontractor, supplier or vendor. [R. p. 1196, lines 15-16; pp. 3085-3089; p. 3160; pp. 3162-3163]. The corporate representative of Daniel Corporation, Dan Buck, testified that he went through the forty (40) boxes of documents that made up the Celanese project for Daniel Corporation and found no reference to any work done or

provided by Covil other than three employees of Covil providing fire retardant materials for the structural steel. [R. p. 2651; p. 2654; p. 2656; p. 2658]. Additionally, the records of Daniel Corporation establish that its own employees provided the insulation for the project. [R. pp. 2669-2670; p. 2675]. Finally, the documents of Daniel Corporation established that Covil was neither a subcontractor nor a vendor to Daniel Corporation on the Celanese project. [R. pp. 2669-2670; p. 3245; p. 3446; p. 3467].

C. THE TRIAL.

During the course of the trial, the court sanctioned Covil for alleged discovery abuse[2], which resulted in the following charge to the jury at the outset of the trial: "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. 1179, lines 8-10]. The court equally noted that she was "unhappy with Covil." [R. p. 1123, line 10]. The court denied a mistrial motion made on behalf of Covil arguing this charge was tantamount to a directed verdict. [R. p. 1141, lines 9-13, p. 1377, line 12]. The court denied every evidentiary objection lodged by Covil during the trial; save one. [R. p. 1184; p. 1392-p. 1392; pp. 1431-1432; pp. 1464-1466; p. 1603; p. 1608]. The court denied all motions for JNOV by the parties, and at one point said, "I wonder if I do the plaintiff any real favors if I grant these motions, because I would certainly have the opportunity at [JNOV] stage to deal with this, if in the unlikely event the jury did not return a verdict of liability in this matter."

---

[2] There are presently three other appeals before this Court on Orders striking the Answers of Covil in other matters. SC Ct. App Docket: 2018-000385, 2018-000386; 2018-000388. The Court may take judicial notice of matters of public record in court filings. Colonial Penn Ins. Co. v. Coil, 887 F.2d 1236, 1239 (4th Cir. 1989) (common and appropriate use of judicial notice is for contents of court records).

[R. p. 1552, lines 7-8]. Respectfully, such a statement evidences a lack of objectivity with regard to the trial of the case and where a lack of objectivity exists, fundamental principles of "fairness and impartiality" are compromised. Worrell, 195 S.E.2d at 641.

Simply put, this trial could not have gone more favorably for Crawford, except for the verdict itself. That said, there is nothing inconsistent with the verdict itself to justify a new trial. There was nothing to suggest passion, prejudice, or caprice by the jury. The verdict itself is supported by the evidence. The premise of the thirteenth juror doctrine is where the result is "wholly unsupported by the evidence". Blackmon, 170 S.E. 157; Johnson, 453 S.E.2d 908.

In Johnson, the Court of Appeals said, a "trial court may grant a new trial if the judge believes the verdict is unsupported by the evidence." 453 S.E.2d at 421. Under Johnson, the Court makes clear that if there is a basis for the verdict, the trial judge is correct to refuse to order a new trial based upon the thirteenth juror doctrine. Id. at 422. Here, the trial court has turned that concept on its head by focusing on the notion that "Covil failed to present any evidence to contradict any of the testimony that Covil was one of Daniel Corporation's primary insulation suppliers . . ." [R. pp. 9-10]. This premise attempts to shift the burden of proof from Crawford to Covil, and it fundamentally ignores the notion of the burden of persuasion to the jury. Despite the fact that all evidentiary issues went Crawford's way, the court rejecting all but one objection by Covil, the jury, nonetheless, did not find for Crawford, because they were not convinced that Covil did what Crawford alleged. "The resolution of evidentiary conflicts is within the province of the jury, not this court." Id. (citing JJ. Lawter Plumbing, v. Wen Chow Int'l Trade & Inv., Inc., 331 S.E.2d 789 (S.C. Ct. App. 1985).

D. THE JNOV MOTION AND HEARING.

The majority of the hearing on October 10, 2018, was spent debating whether the court should grant a JNOV and enter a verdict in favor of Plaintiff. [R. pp. 1705-1755]. The focal point of the argument surrounded alleged improper statements by counsel during opening and closing regarding the fact that Covil was out of business. [R. pp. 1714-1715; p. 1724]. During the hearing on October 10, 2018, Crawford's counsel acknowledged that the trial court did not "want to do us [Plaintiff] any harm" in ruling on the motions for directed verdict. [R. p. 1716].

The court, during the questioning of Covil's counsel, made clear that the burden of proof was being shifted to Covil. [R. p. 9, pp. 1731-1733]. "The only issue was, were Covil products used at Celanese? You offered no proof about any of this. . . " [R. p. 1731]. Covil did not have the burden of proof in this matter. O'Neal, 309 S.E.2d 776. The court's insistence for Covil to prove it did not supply asbestos containing products is an impermissible shifting of the burden of proof from Crawford to Covil. Id. Notwithstanding such a shift, during the hearing, counsel directed the court to the proof that was presented at trial that, in fact, would lead a reasonable juror to conclude exactly what twelve jurors concluded. [R. pp. 1732-1742].

The court denied the motion for JNOV during the hearing but granted the motion for new trial pursuant to the thirteenth juror doctrine. [R. pp. 7-10; pp. 1748-1755]. The fact remains, however, that there was evidence presented that Covil did not supply asbestos containing products to Celanese and the jury believed it. See *supra* § B.

E. ERRORS OF LAW.

Crawford argued to the trial court that the "overwhelming" evidence supported a conclusion that Covil supplied asbestos at Celanese. [R. pp. 9-10]. The evidence on this issue, however, was anything but "overwhelming." In fact, the court's entire premise for the "overwhelming" evidence is that Covil "failed to present any evidence to contradict Plaintiff's evidence that Covil was the supplier of the asbestos-containing thermal insulation installed at Celanese. Moreover Covil failed to present any evidence to contradict any of the testimony that Covil was one of Daniel Corporation's primary insulation suppliers, including from 1970 to 1974 when Daniel installed insulation at Celanese." [R. pp. 9-10]. This is improper burden shifting and an error of law. O'Neal, 309 S.E.2d 776. Regardless, it's not true. See, *supra,* § B. Further, Covil never contested that it was a insulation supplier to Daniel – it was. Covil, rather, contested that there was insufficient evidence to support the conclusion that Covil supplied insulation to Daniel at Celanese. The only other "overwhelming" evidence cited by the court is the admission of a Daniel vendor list that has Covil's name on it as bolstering a witness's testimony that he saw that Daniel "brought it in there." [R. p. 9; p. 2829, line 11]. This is not "overwhelming" evidence of anything except that a witness said he "think[s]" he saw that Daniel "brought it in there." [R. p. 1189].

The Supreme Court has said, "[t]his court has no jurisdiction to review matters of fact in an action at law; and therefore, unless a verdict is wholly unsupported by evidence, or is so excessive as to justify the inference that it was capricious, or influenced by passion, prejudice, or other considerations not found in the evidence, if it is excessive, the responsibility for failure to reduce it must rest upon the trial judge." Blackmon, 170 S.E. 157

(emphasis added). Here, the verdict for Covil was not "wholly unsupported by the evidence." The trial court misapprehends the thirteenth juror standard, instead, imparting the will of one over the twelve jurors deciding the facts. When the Supreme Court created the thirteenth juror doctrine, it used almost the same language in Blackmon, stating, "[t]his court has no jurisdiction to review matters of fact in an action at law; except to determine if a verdict is wholly unsupported by evidence. Worrell, 195 S.E. at 641 (emphasis added). Here, the verdict was supported by admissible evidence and the jury accepted it. The analysis should not be, in light of Worrell, whether there is evidence to support a verdict for Crawford, but rather, whether a defense verdict for Covil was "wholly unsupported by the evidence." Id. It was not "wholly unsupported by the evidence." The trial court stated during the JNOV hearing that the verdict "is contrary to the clear preponderance of the evidence." [R. p. 1748, lines 23-24]. That is not the correct standard as espoused in Worrell. When acting as the thirteenth juror, the trial court "possess[es] the veto power to the nth degree, and, it must be presumed, recognizes and appreciates his responsibility, and exercises the discretion vested in him with fairness and impartiality." Id. Covil suggests that a fair reading of the entirety of the trial transcript yields only one reasonable conclusion: except for the verdict, the trial went entirely the way Crawford wanted. During the trial, the trial court noted that she was "unhappy with Covil." [R. p. 1123, line 10]. In another instance, the trial court stated, "I wonder if I do the plaintiff any real favors if I grant these motions, because I would certainly have the opportunity at [JNOV] stage to deal with this, if in the unlikely event the jury did not return a verdict of liability in this matter." [R. p. 1552, lines 1-5]. These expressions are not of fairness and impartiality.

Finally, the trial court's efforts to shift the burden of proof to Covil constitutes an abuse of discretion as that is an error of law. O'Neal, 309 S.E.2d 776. From the outset of the trial, the court allowed improper arguments surrounding Crawford's theme of the case "value of life". [R. pp. 1183, lines 24-25-p. 1184, lines 1-6]. Welch v. Epstein, 536 S.E.2d 408, 421 (S.C. Ct. App. 2000)("In a wrongful death case, the issue of damages is not directed toward the value of the human life that was lost. . ."). This same theory was also allowed during the closing which was improper. [R. p. 1603]. Id. While Mr. Crawford was not dead at the time of the trial, evidence presented during the trial was that his death would be caused by the exposure to asbestos. [R. p. 1356, lines 9-11]. Later in the trial, Crawford interjected the notion of a "moral obligation" to warn of the hazards of asbestos, and despite the objection, the trial court allowed the question. [R. p. 1430, line 25-p. 1431, lines 1-6]. No such duty exists under the facts of this case. Madison ex rel. Bryant v. Babcock Center, Inc., 638 S.E.2d 650, 656 (S.C. 2006)(recognizing there is no general duty to warn a third person or potential victim of danger). Certainly, there is no authority for a "moral obligation." Singularly, each of these abuses of discretion might be overlooked, but when applied against the backdrop of "fairness and impartiality" and the standard of whether a defense verdict was "wholly unsupported by the evidence" they collectively show an intent for a desired outcome. Clearly, a defense verdict was not the result sought by Crawford, nor was it expected by the trial court. The verdict, however, was not "wholly unsupported by the evidence" and it should be reinstated." See, Blackmon, 170 S.E. 157; Worrell, 195 S.E. at 641; Johnson.453 S.E.2d 908; JJ. Lawter, 331 S.E.2d 789.

F. CONCLUSION.

Covil respectfully submits that the trial judge abused her discretion by exercising the thirteenth juror doctrine and vacating the jury verdict. This Court should reverse that decision and reinstate the jury verdict.

Dated this 9th day of May, 2019.

Respectfully submitted,

WALL Ttempleton & HALDRUP, P.A.

Mark H. Wall (SC Bar #5798)
Morgan S. Templeton (SC Bar 15456)
Thomas B. Boger (SC Bar #81228)
145 King Street, Ste. 300
Charleston, South Carolina 29401
Tel: 843.329.9500
Mark.Wall@WallTempleton.com
Morgan.Templeton@WallTempleton.com
Tommy.Boger@WallTempleton.com
ATTORNEYS FOR APPELLANT COVIL CORPORATION

Theile B. McVey
KASSEL McVEY ATTORNEYS AT LAW
1330 Laurel Street
Columbia, South Carolina 29202
tmcvey@kassellaw.com

Jonathan M. Holder
DEAN OMAR BRANHAM, LLP
302 N. Market Street, Ste. 300
Dallas, Texas 75202
jholder@dobllp.com
Attorneys for Respondent Jerry Howard Crawford and Evelyn Kay Crawford