STATE OF SOUTH CAROLINA COUNTY OF RICHLAND **SARAH J. PLANT** and **PARKER PLANT,** Plaintiffs, v. **AVON PRODUCTS, INC.,** *et al.*, Defendants.	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT **C/A NO. 2022-CP-40-01265** *In Re:* Asbestos Personal Injury Litigation Coordinated Docket

AMENDED[1] ORDER GRANTING PLAINTIFFS' MOTION FOR RELIEF FROM JUDGMENT UNDER SCRCP 60(b) AND MOTION FOR NEW TRIAL

Before this Court are motions by the Plaintiffs in the above-captioned case requesting the grant of relief from judgment pursuant to South Carolina Rule of Civil Procedure 60(b) and a new trial against the IMI Fabi Defendants.[2] After extensive briefing and three separate hearings on the matter, this court finds that the Plaintiffs' Motion for Relief from Judgment under SCRCP Rule 60(b) and Motion for New Trial, should be, and hereby is GRANTED. Although South Carolina has adhered to a "strong policy towards finality of judgments," where this Court, upon just terms, finds that under SCRCP 60(b)(2) there is newly discovered evidence in this case that could not have been discovered by Plaintiffs through due diligence in time to move for a new trial under Rule 59(b), relief may be granted. Moreover, where this Court finds there to be extrinsic fraud upon the Court, the only relief is to grant a new trial.[3] Pursuant to SCRCP 60(b), Plaintiffs Sarah

[1] The following Order is substituted for the original order in this matter, filed October 23, 2024, to correct the first name of Ms. Elizabeth O'Neill, counsel for Defendants IMI Fabi.
[2] IMI Fabi entities include IMI Fabi USA, LLC, IMI Fabi (Diana), LLC, and IMI Fabi, LLC. They are collectively referred to herein as "IMI Fabi" or "Defendants."
[3] *Bowman v. Bowman*, 357 S.C. 146, 152, 591 S.E.2d 654, 657 (Ct. App. 2004).

J. Plant and Parker Plant are granted relief from judgment and a new trial against IMI Fabi Defendants.

I. Background

A. The Complaint

On March 10, 2022, the Plants filed a lawsuit against many defendants including IMI Fabi, a global talc supplier to the personal care products and cosmetics industry. [4] Plaintiffs claimed that Plaintiff Sarah J. Plant was a user from childhood of many talc containing cosmetic and personal care products which were tainted by asbestos, and that the asbestos contained in these products caused for Plaintiff Sarah J. Plant to contract mesothelioma, a cancer of the mesothelial lining of the lungs. Many of the defendants were: (1) product manufacturers, while others were (2) broker distributors of talc products, and still others were (3) global talc suppliers of cosmetic talc products. The third category of companies created talc products using talc mined from various sources, made to manufacturer specifications and sold these products through broker distributors. Defendant IMI Fabi was in the third category, a global distributor, through brokers, of talc products which it produced using talc sourced from mines in China. Plaintiffs' causes of action that were submitted to jury against IMI Fabi included negligence, strict liability, and implied warranty.[5] Plaintiffs, through their interrogatories and other discovery, requested information from the IMI Fabi Defendants that was not produced. This unproduced information linked some of the talc manufactured by IMI Fabi to the talc products used by Plaintiff Sarah Plant. Defendants' responses to discovery requests were often a statement that documents such as correspondence between IMI Fabi and product manufacturers did not exist. IMI Fabi did not provide any correspondence

[4] *See* Plaintiffs' Original Complaint. Trial Testimony of Corrado Fabi ("Fabi TT"), in this case, 2/23/23, at 1179:23-1180:8, 1220:21-24.
[5] *See* Jury Verdict Form, dated 3/3/23.

between it and any of the fifteen (15) product manufacturers Plaintiffs named in their discovery requests. IMI Fabi stated that it had no idea who its talc was sold to other than broker Cosmetic Specialties, Inc. These assertions by IMI Fabi were false, and IMI Fabi knew that it had these records in boxes located in its National Counsel's law office.

A key element of Plaintiffs' proof of Defendants' liability was Plaintiffs' ability to show that the end products in which Defendants' talc had been used contained asbestos, and that the product was actually supplied to cosmetic manufacturers whose products Plaintiff Sarah J. Plant used.

The issue of whether IMI Fabi products contained asbestos was hotly contested. Plaintiffs provided scientific evidence supporting their contention that the Chinese talc IMI Fabi used contained asbestos. Defendant contended that IMI Fabi extensively tested its Chinese talc, and that the tests did not reveal the presence of asbestos. Plaintiffs presented expert testimony that supported their claim that the testing methods used were insufficient to detect the true asbestos content and that the cosmetic talc industry intentionally used testing which would not reveal the true talc content. This very contested issue was properly placed before the jury.

The principal focus of IMI Fabi's defense was product identification which is most commonly proven through use of a defendant's business records showing supply of its products directly to manufacturers or to brokers who supply product manufacturers. As detailed below, almost one (1) year after the verdict for IMI Fabi Defendants was rendered, Plaintiffs' attorneys discovered business records of IMI Fabi which had been withheld during discovery. These records, and the further records disclosed after this Court ordered production, form the bases for Plaintiffs' motion for new trial.

B. Pre-trial Discovery

Prior to the trial, on February 15, 2023, the deposition was taken of IMI Fabi's Chief Executive Officer and designated SCRCP 30(b)(6) corporate representative, Corrado Fabi. During the deposition, Plaintiffs' counsel inquired as to whether all responsive documents had been produced. Defendants' attorney, Elizabeth O'Neill, confirmed that "all the documents responsive to the duces tecum" and "all of the responsive documents that we were able to get from [Mr. Fabi] or any source," were provided, but that there were "other document sources," and that Mr. Fabi had knowledge of where the documents were maintained. During the deposition, Mr. Fabi identified Cosmetic Specialties, Inc., as a distributor of IMI Fabi products, and testified that IMI Fabi had corresponding distribution agreements. Plaintiffs, hearing this information for the first time, requested the production of these records and distributor agreements. These agreements and records were never produced.

C. The Trial

It is undisputed that Plaintiffs tried their entire case regarding product identification on the then produced small number of records: (1) seven months of sales in 2001, and (2) one sale in 2007, identifying the talc sold as IMI Fabi 141. During trial, Mr. Fabi stated, under oath, that IMI Fabi's customer was broker Cosmetic Specialties, Inc., and that IMI Fabi had little knowledge of what happened with its talc once in possession of cosmetic Specialties, Inc.

During the well-executed closing argument, Defendants' counsel Ms. O'Neill stated to the jury "[y]ou're going to have to decide if Mr. Corrado Fabi flew all the way here from Italy to lie to you," as alleged by Plaintiffs. Additionally, the same closing argument emphasized the Plaintiffs' failure to produce evidence tracing talc from IMI Fabi to any products used by Plaintiff

Sarah Plant, and suggested that without such evidence Plaintiffs would have failed to meet their burden of proof in the case, and thus fault could not be connected to IMI Fabi.

At the time of the verdict, Whittaker, Clark & Daniels and IMI Fabi were the only remaining defendants. On March 3, 2023, the jury returned a verdict finding Whittaker, Clark & Daniels liable to Plaintiffs in the amount of approximately $29 million.[6] The jury found in favor of IMI Fabi and against Plaintiffs.

D. Post-Trial Discovery of Evidence

On November 14, 2023, eight months after the trial verdict was rendered, Plaintiffs' attorneys became aware of a transcript from a previous deposition of a corporate representative for IMI Fabi, Mr. Michael Brown, in the case of *Pamela Debora Hemmings-Russell as Administrator of the Estate of Daphne Hemmings vs. Cyprus Amex Minerals Company, et al.*.[7] It is this Court's understanding that attorney Michael Sommerville and the Cetrulo firm, who have previously been counsel for IMI Fabi, are the only known attorneys who were involved in both the *Plant* and *Hemmings* cases. During Mr. Brown's deposition he revealed and discussed discoverable information that was provided by Mr. Brown in the *Hemmings* case.[8] The information that Mr. Brown provided in the *Hemmings* deposition was also requested by Plaintiffs in this case, but the *Plant* discovery responses provided that no such documents or information existed.

[6] *See* Jury Verdict Form, dated 3/3/23.
[7] State of New York, Index No. 1090196/2018, "Remote Deposition of Michael Brown as corporate representative of IMI Fabi (Diana) LLC". *See* page 2 of the deposition transcript where attorney Sommerville is listed as appearing on behalf of IMI Fabi (Diana) LLC.
[8] *Id. See also Hemmings v. Cyprus Amex, et al.*, NYSCEF Document No. 66, "IMI Fabi (Diana) LLC's Responses to Plaintiff's Demand for discovery and Inspection," page 10 (attorney Sommerville is listed in the signature block as an attorney for Defendant).

II. Post-Trial Hearings before this Court

This Court reviewed extensive briefing from both parties and heard oral arguments from the parties over the course of three separate hearings. On April 26, 2024, the first post-trial motions hearing occurred, in which this Court ordered Defendants to fully produce the documents stored at the IMI Fabi Diana office.[9] This Court also directed the Plaintiffs to supplement their original Motion for Relief from Judgment with representations made by the IMI Fabi Defendants before and during trial, as well as discovery responses, that were then to be compared to the discovery obtained and the testimony from IMI Fabi via its corporate representative in this case following the trial to determine how the production of the evidence would have changed the trial verdict in the *Plant* case.[10] On June 13, 2024, this Court notified all counsel, including attorney Michael Sommerville, that they were to appear in person for the second post-trial motions hearing on June 26, 2024, scheduled in Charleston County at 9:30 AM. On June 25, 2024, this Court received communication from attorney Sommerville, for the first time, *ex parte*, that he had a "conflict" and would not be appearing at the hearing.

During the second hearing, on June 26, 2024, this Court was made aware that the Defendants had not fully complied with this Court's previous order of production. Therefore, on June 28, 2024, this Court ordered the Defendants to provide full electronic discovery of all of the documents contained at the IMI Fabi Diana office by July 1, 2024, and set a third hearing on the matter. As result of the second order for production Plaintiff received information that had been in possession of Michael Sommerville, National Counsel for IMI Fabi, since at least 2018. These documents directly connected the talc distributed by IMI Fabi to products that Plaintiff Sarah J.

[9] Attorney Sommerville testified, under oath, that sometime between 2017 and 2019, he an associate retrieved seven (7) Banker's boxes of documents from the IMI Fabi Diana plant, and stored the boxes in a file room at the Cetrulo firm.

[10] *See* Court's Order Following 2nd Hearing regarding Plaintiffs' Motion for a New Trial, filed June 28, 2024.

Plant used. Additionally, contrary to testimony provided at trial and in his deposition, the information produced unequivocally proved that Mr. Fabi was aware of where and to whom IMI Fabi talc was distributed, as there was direct correspondence between Mr. Fabi and cosmetic manufacturers that received IMI Fabi product from Cosmetic Specialties.

On August 21, 2024, at the third hearing on these motions, this Court heard the ordered testimony from attorney Michael Sommerville, who stated he was legal counsel for IMI Fabi in previous cases. Attorney Sommerville's previous scope of counsel included being the sole attorney to sign off on discovery responses for the *Hemmings* case to the Supreme Court of the State of New York in 2019, which he affirmatively served under penalty of perjury;[11] assisting in preparing a designated corporate witness for a deposition in 2022;[12] and the responsibility of reviewing and then deciding which documents were produced to the *Plant* Plaintiffs.

Following the third post-trial motions hearing, it became evident to this Court that Defendants had intentionally concealed documents naming the cosmetic manufacturers of products which Plaintiff Sarah J. Plant had used for years. Specifically, attorney Sommerville knew the extent of allegations in the complaint. Attorney Sommerville knew that IMI Fabi sourced talc from China that Plaintiffs' contended contained asbestos. Attorney Sommerville knew that IMI Fabi supplied tons of materials over many years to product manufacturers whose products Plaintiff Sarah J. Plant used for many years. From at least 2019,[13] attorney Sommerville had all existing records of IMI Fabi Diana in seven (7) boxes in his law office Cetrulo, LLP, at 2 Seaport Lane,

[11] *See IN RE. NEW YORK CITY ASBESTOS LITIGATION, v. ALL DEFENDANTS IN RE. NEW YORK CITY ASBESTOS LITIGATION,* NYCAL Index No. 782000/2017, NYSCEF Doc. No. 964, filed January 2, 2019.

[12] The *Hemmings* case is a New York Supreme Court case. As such, the Uniform Rules for N.Y. State Trial Courts provides guidelines for designated corporate representatives as witnesses under §202.20-d Deposition of Entities; Identification of Matters. Subparts (b) and (f) provide, respectively, that particular matters to be discussed may be enumerated, and that the designated individual "must testify about information known or reasonably available to the entity."

[13] Viewing the facts in the light most favorable to Defendants, the non-moving party, 2019 will be used as the date of retrieval.

Tenth Floor, Boston Massachusetts, 02110. Attorney Sommerville had exclusive and personal control over all of these documents.[14]

Attorney Sommerville knew that the Diana documents contained extensive records that indicate IMI Fabi supplied to cosmetic manufacturers through a broker, Cosmetic Specialties, but that IMI Fabi also had detailed records and information tracing which product went to which Cosmetic Specialties' customers. Attorney Sommerville knew the IMI Fabi records in his possession contained talc samples of actual product supplied over time to various manufacturer customers of Cosmetic Specialties. Attorney Sommerville knew the Diana records contained extensive and direct correspondence by IMI Fabi officers and its employees with cosmetic talc manufacturers who received products through Cosmetic Specialties.

Finally, attorney Sommerville knew the Diana records that were under his exclusive control contained direct correspondence between Corrado Fabi and manufacturers of products that were supplied by IMI Fabi through Cosmetic Specialties. Attorney Sommerville handled all of IMI Fabi's discovery responses to suits brought against it prior to the *Plant* suit. Attorney Sommerville personally handled the discovery responses in this suit, interacting with attorneys for IMI Fabi and with Corrado Fabi. Attorney Sommerville personally attended Mr. Fabi's deposition. Attorney Sommerville attended every day of the two-week *Plant* trial, including the opening and closing arguments.

Attorney Sommerville has stated to this Court, under oath, that he personally went through the Diana documents that were kept in a file room within his firm's office, and decided which documents to produce and which documents to withhold from the Plaintiffs in response to their discovery requests. Moreover, attorney Sommerville was counsel for IMI Fabi in 2022, and was

[14] The documents are collectively referred to herein as "Diana documents" or "Diana records."

responsible for the preparation of a corporate representative, Michael Brown, for the New York Supreme Court equivalent of a SCRCP 30(b)(6) deposition, in a New York case also centering around IMI Fabi's talc production and distribution, which was based in part on the same documents in attorney Sommerville's office.[15]

On June 28, 2022, attorney Sommerville was present and noted as counsel of record for the deposition of corporate representative, Mr. Michael Brown in the *Hemmings* lawsuit. In the deposition, Mr. Brown stated that actual samples of IMI Fabi's talc were left in records maintained at the Diana plant office, and that he could have looked for them the day before, but attorney Sommerville had not mentioned to Mr. Brown that the information was requested from Mr. Brown included a direction explicitly to check for talc samples in the office. Mr. Brown also stated that he was not informed by his counsel, attorney Sommerville, that in preparation for the deposition the Plaintiff's counsel had requested for Mr. Brown to check for documents testing records, photographs of products, documents relating to the selling of IMI Fabi's talc, documents regarding the transfer of ownership and operation of the Diana facility, or documents regarding sales to distributors. Per the New York *Uniform Rules for the Supreme Court & The County Court* §202.20(d), "(b) Notices and subpoenas directed to an entity may enumerate the matters upon which the person is to be examined, and if so enumerated, the matters must be described with reasonable particularity," and "(d) The individual(s) designated must testify about information known or reasonably available to the entity." Therefore, attorney Sommerville had a duty to inform and prepare Mr. Brown based on the Plaintiff's requests.

[15] *See Pamela Debora Hemmings-Russell as Administrator of the Estate of Daphne Hemmings vs. Cyprus Amex Minerals Company, et al. State of New York, Index No. 1090196/2018.*

Mr. Brown himself could have accessed the documents and information requested as, by his own recollection, Mr. Brown was the only person with keys to the Diana plant, but he believed there was no reason to check what documents may be at the facility. Therefore, attorney Sommerville was aware of the contents of the Diana documents and intentionally failed to prepare Mr. Brown to testify on behalf of IMI Fabi, as its corporate representative, by not instructing or even informing Mr. Brown of the request to see what documents remained at the IMI Fabi plant. Attorney Sommerville clearly has no issue with not complying with court rules of procedure and concealing information.

During the third post-trial motions hearing on August 21, 2024, attorney Sommerville expressed to this Court that in producing discovery responses for the deposition of Mr. Fabi, on November 15, 2023, attorney Sommerville was under an extreme time crunch and needed assistance as he had not previously gone through the documents, which had been in his possession since at least 2018. Instead, attorney Sommerville told this Court that with the help of two associates he was able to provide discovery in a short turn around. Furthermore, during Mr. Fabi's deposition, Mr. Fabi stated that he had to rely on attorney Sommerville for the information kept regarding IMI Fabi Diana, as, at that point, the information was only kept in hard copy form in Somerville's office. Therefore, it was attorney Sommerville's responsibility, as the sole possessor of the Diana documents, to inform Mr. Fabi of the contents. However, contrary to the testimony attorney Sommerville gave to this Court, as evidenced by a discovery verification form signed February 28, 2022, in the *Hemmings* case, attorney Sommerville had in fact previously and extensively reviewed the documents in question.

III. APPLICABLE LAW

Rule 60(b), SCRCP, provides in part that a party may obtain relief from a judgment or order on grounds 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)," or where the Court finds "fraud, misrepresentation, or other misconduct of an adverse party." A SCRCP 60(b) motion must be "made within a reasonable time." Motions based on any combination of mistake, newly discovered evidence, or fraud or misconduct must be made "not more than one year after the judgment, order or proceeding was entered or taken."[16] Whether to grant or deny a motion under Rule 60(b) lies within the sound discretion of the judge.[17]

Rule 60(b), SCRCP, vests the trial court with discretion to grant a new trial under limited circumstances. Rule 60(b)(2) permits a new trial when a movant has "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)." The movant must show that the alleged 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.[18] Rule 60(b)(3) permits a new trial when there is "fraud, misrepresentation, or other misconduct of an adverse party." In all instances the Court considers all reasonable inferences in the light most favorable to the nonmoving party—here, the remaining IMI Fabi entities.[19]

Relief for fraud under Rule 60(b)(3) can be granted only for extrinsic fraud.[20] Extrinsic fraud is "fraud that induces a person not to present a case or deprives a person of the opportunity

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[16] *Id.*
[17] *Id.* (citing *Coleman v. Dunlap*, 306 S.C. 491, 494, 413 S.E.2d 15, 17 (1992)).
[18] *Lanier v. Lanier*, 364 S.C. 211, 217, 612 S.E.2d 456, 459 (Ct. App. 2005).
[19] *Vinson v. Hartley*, 324 S.C. 389, 405, 477 S.E.2d 715, 723 (Ct. App. 1996).
[20] *Chewning v. Ford Motor Co.*, 354 S.C. 72, 81, 579 S.E.2d 605 (2003).

to be heard."[21] Concealment of documents by an attorney is extrinsic fraud because it involves an attorney, who is an officer of the court, "prevent[ing] the opposing party from presenting his case."[22] Attorney concealment of documents is also fraud upon the court.[23] The subornation of perjury by an attorney and the intentional concealment of documents by an attorney are both actions which individually constitute extrinsic fraud.[24] Unlike perjury by a witness or a party's failure to disclose requested materials, both which constitute intrinsic fraud, if an attorney—an officer of the court—suborns perjury or intentionally conceals documents, he or she effectively precludes the opposing party from having his day in court.[25] These actions by an attorney constitute extrinsic fraud.

Attorney fraud calls into question the integrity of the judiciary and erodes public confidence in the fairness of our system of justice. Accordingly, where an attorney embarks on a scheme to either suborn perjury or intentionally conceal documents, extrinsic fraud constituting a fraud upon the court occurs and is cause for relief.

IV. LEGAL ANALYSIS

On March 1, 2024, almost one (1) year after the verdict was entered in this case, the Plaintiffs filed a Motion for New Trial. The Motion alleges that Defendants IMI Fabi intentionally concealed documents that would have changed the outcome of the trial. Plaintiffs allege that IMI Fabi and its attorneys concealed documents and committed perjury in the discovery process. They further allege that due to the concealment and perjury, they were deprived of critical evidence

[21] *Id.* (internal citations omitted).
[22] *Id.*
[23] *Ray v. Ray*, 374 S.C. 79, 85, 647 S.E.2d 237 (2007) (reiterating "fraud upon the court" means "that species of fraud which does, or attempts to, subvert the integrity of the Court itself, or is a fraud perpetuated 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.").
[24] *Chewning* at 82, 579 S.E.2d 605, 610.
[25] *Id.*

including that IMI Fabi supplied the talc used in multiple products used by Plaintiff Sarah J. Plant, and that despite diligent efforts, the same evidence could not have been discovered before trial. Plaintiffs allege that such deprivation prevented them from fully exhibiting and trying their case. Plaintiffs have submitted charts in support of their motion detailing thousands of pages of documents that have been produced since the trial of this matter, and they contend that this intentionally withheld evidence would have changed the jury's verdict.

IMI Fabi argues that there is no "newly discovered" evidence that could have impacted the outcome of the case with sufficient probability as required under SCRCP 60(b). Defendants further allege that the Plaintiffs' burden is too high and that they cannot prove by clear and convincing evidence what is required under SCRCP 60 for relief from a judgment. IMI Fabi does not appear to dispute that relevant and discoverable documents were withheld from Plaintiffs. Instead, the Defendants argue the evidence was not intentionally concealed and that even if provided the evidence would not have changed the evidentiary holes in Plaintiffs case; this Court disagrees.

A. SCRCP 60(b)(2)

It is readily apparent to this Court that there was relevant and crucial evidence in the Diana documents, which were solely in the possession of attorney Michael Sommerville in a file room at his office building. The *Plant* case was not attorney Sommerville's first time reviewing and deciding what information in his possession to produce. He had previously reviewed the documents in regard to discovery responses in *Hemmings*. Attorney Sommerville testified to this Court on August 21, 2024, that he inspected the Diana documents alongside the Plaintiffs discovery requests, and then intentionally decided what to produce, and by implication what not to produce. Attorney Sommerville was the only person with knowledge of what the Diana documents contained, as they were continuously at his office throughout the trial of this case.

Attorney Sommerville testified that he had reviewed the Diana documents on many previous occasions to the review for *Plant* in order to respond to discovery propounded to IMI Fabi in other cases in which it was a defendant. The information provided to Plaintiffs, under oath, regarding whether Plaintiffs had all responsive documents was undoubtedly given in reliance on attorney Sommerville's inspection and decision as to what evidence to produce.

This Court in no way faults Defendants' counsel, Ms. O'Neill, as it is this Court's conclusion that neither Ms. O'Neill, nor any of her team, were aware of the intentional concealment of documents by attorney Sommerville on behalf of IMI Fabi. Ms. O'Neill's closing argument asked the jury to consider and thereby determine whether Mr. Corrado Fabi traveled from Italy to lie as a witness, and suggested that Plaintiffs' lack of evidence tracing talc produced by IMI Fabi to products used by Plaintiff Sarah J. Plant was a failure by the Plaintiffs to meet their burden in the case. The tracing of products used by Plaintiff Sarah J. Plant is not only material to the issue, and is by no means cumulative or a tool simply to impeach. Rather the documents produced after the trial unquestionably address the closing arguments made by Defendants' counsel; to wit that Mr. Fabi did not lie, and that there was no evidence that connected IMI Fabi's talc to Plaintiff Sarah J. Plant. Plaintiffs' inability to produce such evidence at trial was the direct result of IMI Fabi's deliberate concealment of requested discovery evidence. It took three post-trial Orders from this Court to finally produce this key evidence. The full production of documents completely supports Plaintiffs' contention that both attorney Sommerville and Mr. Fabi were dishonest with this Court, and intentionally concealed evidence from the jury. This Court is now aware of the untrue testimony given under oath by IMI Fabi via Mr. Fabi. This court is now aware of the knowledge that attorney Sommerville had when he responded to discovery and when he

attended the two-week *Plant* trial. This Court cannot ignore the fact that the jury did not have crucial evidence on which to base its decision.

Further, this newly discovered evidence is exactly the kind of evidence that Plaintiffs actually had against Whittaker, Clark & Daniel, where the jury found in favor of the Plaintiffs. In other words, the missing evidence provides a link from IMI Fabi talc to the products that Plaintiff Sarah J. Plant testified that she used repeatedly and for many years. This talc was IMI Fabi 141. The withheld evidence shows there were millions of pounds of IMI Fabi 141 sold to Procter & Gamble for Cover Girl between 2001 and 2018. The withheld evidence further shows that additional grades of IMI Fabi talc were sold to Procter & Gamble for use in Cover Girl talc powder products – such as IMI Fabi 3355. Neither the millions of pounds of 141 nor the 3355 records were disclosed to Plaintiffs before trial.

Although the Defendants argue in briefs that what the jury may have decided if provided this additional information is speculative, and without knowledge of what the jury would find, the Plaintiffs cannot meet their burden, this Court disagrees. Under *Lanier*, a Court must decide whether if a new trial is granted the result would **probably** change.[26] If this Court was meant to decide exactly what a jury ought to have found, this motion would need to be for a directed verdict, or otherwise for a judgment non obstante veredicto; but that is not the case here.

Here, this Court is tasked with deciding if newly discovered evidence would more likely than not change the result of trial if a new trial is granted. *Id*. Here, the evidence is clear that attorney Sommerville knowingly and intentionally concealed documents from Plaintiffs during the course of discovery and during the trial of this case. Attorney Sommerville also concealed talc samples which could have been tested by Plaintiffs and test results which could have been

[26] *Lanier* at 217, 612 S.E.2d 456, 459 *(emphasis added).*

evaluated by Plaintiffs. This concealed evidence would have buttressed the evidence Plaintiffs presented through scientific testimony. The evidence is also clear that Plaintiffs had no means to know or even expect that this concealed evidence existed until learning about its existence through other cases that involve the same counsel for Plaintiffs. This discovery by Plaintiffs was not until eight months after the trial. Thus, the evidence could not have been discovered within the timeframe to move for a new trial under Rule 59(b), is material to the issues of the case and those argued at trial, and is not merely cumulative, nor is the evidence meant to be an impeachment device. All of this, in conjunction with this Court's knowledge that the jury returned a verdict in favor of the Plaintiffs against another Defendant in this case, Whittaker, Clark & Daniels, based on evidence submitted to the jury that is substantively similar to the newly discovered IMI Fabi evidence, leads this Court to believe that if the Plaintiffs were granted a new trial and presented the newly discovered evidence, the newly discovered evidence would more than likely, or probably, change the result. Moreover, the IMI Fabi Defendants would not have been able to argue an absence of evidence supporting product identification, as it did in closing arguments.

Therefore, this Court finds that had such evidence been properly disclosed and produced, this newly discovered evidence would probably change the result if a new trial is granted.

B. SCRCP 60(b)(3)

The South Carolina Supreme Court addressed extrinsic fraud in *Chewning*, stating: [27]

> Extrinsic fraud is "fraud that induces a person not to present a case or deprives a person of the opportunity to be heard. 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." *Hilton Head Ctr. of South Carolina v. Public Serv. Comm'n*, 294 S.C. 9, 11, 362 S.E.2d 176, 177 (1987). "Relief is granted for extrinsic but not intrinsic fraud on the theory that the latter deceptions should be discovered during the litigation

[27] *Chewning*, at 81-82, 579 S.E.2d 605, 610-611.

> itself, and to permit such relief undermines the stability of all judgments." *Mr. G. v. Mrs. G.*, 320 S.C. 305, 308, 465 S.E.2d 101, 103 (Ct. App. 1995) . . . .
>
> Ford claims the subornation of perjury by an attorney and/or the intentional concealment of documents by an attorney do not constitute extrinsic fraud because they do not defeat the opposing party's opportunity to litigate the matter. Ford further asserts, because perjury and discovery abuse should be ferreted out during the course of litigation, disappointed parties should not be permitted to reopen final judgments on this basis. We disagree.
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> The subornation of perjury by an attorney and/or the intentional concealment of documents by an attorney are actions which constitute extrinsic fraud. Contrary to perjury by a witness or a party's failure to disclose requested materials, conduct which constitutes intrinsic fraud, where an attorney - an officer of the court - suborns perjury or intentionally conceals documents, he or she effectively precludes the opposing party from having his day in court. These actions by an attorney constitute extrinsic fraud.

In this case, the Plaintiffs have alleged that attorney Michael Sommerville, who has acted as counsel for IMI Fabi in many cases, and has admitted he answered the discovery requests in this case, has committed a fraud upon this Court.

Attorney Sommerville's failure to properly prepare Mr. Fabi as a SCRCP 30(b)(6) witness to speak on behalf of the IMI Fabi entities induced, or suborned, Mr. Fabi to perjure himself on the stand during the *Plant* trial. Although Mr. Fabi testified at trial that Cosmetic Specialties was IMI Fabi's only customer, as the newly discovered evidence shows, Mr. Fabi's testimony was not true, and the documents in attorney Sommerville's possession mention at least five (5) of the customers listed in Plaintiffs discovery requests as manufacturers of products used by Plaintiff Sarah J. Plant, including Avon, Estee Lauder, L'Oréal, Revlon, and Procter & Gamble. Moreover, the Diana documents have direct correspondence between Mr. Fabi and companies that received talc supplied by Cosmetic Specialties. Under *Chewning*, "where an attorney - an officer of the

court - suborns perjury or intentionally conceals documents, he or she effectively precludes the opposing party from having his day in court."[28]

Here, Mr. Sommerville, an attorney and thereby officer of the court, by not fully providing Mr. Fabi with the information in attorney Sommerville's possession, not only failed to prepare and inform Mr. Fabi as the designated deponent on behalf of the IMI Fabi entities, but also knowingly induced and permitted perjured testimony to be given by Mr. Fabi on behalf of IMI Fabi. Allowing Mr. Fabi to falsely testify and not be informed of critical evidence and information stripped Plaintiffs of their opportunity to have their day in court. Attorney Sommerville prevented the Plaintiffs having their day in court by allowing perjured testimony to remain uncorrected. This conduct by IMI Fabi's attorney constitutes extrinsic fraud.

Moreover, attorney Sommerville further committed a fraud on the Court by intentionally, repeatedly, knowingly and willfully not producing relevant and material documents and talc samples. Although attorney Sommerville stated at the hearing on August 21, 2024, that he had no intention of concealing documents, throughout the trial, attorney Sommerville was the sole possessor of the newly discovered evidence. He personally decided on behalf of IMI Fabi whether to provide this evidence to the Plaintiffs or to intentionally conceal it. The intentional withholding of documents, whose contents were not known to anyone else, including the CEO of IMI Fabi, nor the Defendants' own counsel in this case, but were explicitly requested by Plaintiffs, and were material to this case, cannot be seen as anything other than continuous intentional concealment.

This Court finds it hard to believe, and refuses to accept, that attorney Sommerville was entirely oblivious to the inconsistencies between what was in his possession, and what he heard testified to under oath as he observed the *Plant* trial. At any point during the discovery or trial for

[28] *Chewning* at 82, 579 S.E.2d 605, 610.

this case, attorney Sommerville, as an officer of the court, should have made and had a duty to make this Court aware of the inconsistencies he allowed and perpetuated. Attorney Sommerville knew that there were documents that he alone had access to, which provided factual and pertinent information. Attorney Sommerville willfully failed and refused to correct this Court's record in this case. This demonstrates unequivocally that attorney Sommerville had no intent to share this information. Instead attorney Sommerville continued to conceal the documents from this Court and the Plaintiffs, thus depriving the Plaintiffs of their opportunity to be fully heard. Furthermore, in withholding information from this Court, and allowing this Court's record to be inaccurate, attorney Sommerville actively allowed a fraud on the Court, that was created by his actions or lack thereof alone. Attorney Sommerville's conduct undoubtedly "calls into question the integrity of the judiciary" and allows for the erosion of public confidence in the fairness of our judicial system, thus amounts to extrinsic fraud.[29]

Therefore, this Court finds there has been fraud upon this Court by an officer of the court, by attorney Sommerville on the behalf of the Defendants, and therefore, the Plaintiffs are entitled to relief in the form of a new trial.

V. CONCLUSION

As the South Carolina Supreme Court stated in *Chewning*, a decision that is well known to this Court, the longstanding policy toward final judgments is not one to be taken lightly, nor can the benefits achieved by the preservation of final judgments be overlooked. However, at a certain point a court cannot allow a judgments finality to outweigh the importance of a fair and just adjudication. Therefore, I find that under SCRCP 60(b)(2) had the newly discovered evidence been properly disclosed and produced, this evidence would have more than likely changed the result of

[29] *Chewning* at 83, 579 S.E.2d 605, 611.

the jury verdict. I further find and conclude that under SCRCP 60(b)(3) this newly discovered evidence was intentionally concealed by attorney Sommerville, National Counsel for the IMI Fabi Defendants. This Court further finds that had the evidence been presented at trial, it more than likely would have changed the result of the jury verdict. For those reasons, Plaintiffs' Motion for Relief from Judgment under SCRCP 60(b) and Motion for a New Trial are GRANTED.

IT IS SO ORDERED.

[JUDGE'S ELECTRONIC SIGNATURE PAGE TO FOLLOW]

Richland Common Pleas

Case Caption: Sarah J Plant , plaintiff, et al vs Avon Products Inc , defendant, et al

Case Number: 2022CP4001265

Type: Amended/Other

So Ordered

Jean H. Toal