THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable Jean H. Toal
Acting Circuit Court Judge

Appellate Case No. 2024-001997
Circuit Court Case No. 2022-CP-40-01265

Sarah J. Plant and Parker Plant, ... Plaintiffs,

v.

Avon Products, Inc.; Amaco, LLC; American Art Clay Co. Inc.; The Bargain Barn, LLC; Beacon CMP Corporation; Belk, Inc.; Block Drug Company, Inc.; Brenntag North America, Inc.; Brenntag Specialties, LLC; Bristol-Myers Squibb Company; Chattem, Inc.; Colgate-Palmolive Company; Color Techniques, Inc.; Conopco, Inc.; Coty Inc.; Dana Classic Fragrances, Inc.; Dillard's, Inc.; Dollar General Corporation; Elizabeth Arden, Inc.; Estee Lauder Inc.; Estee Lauder International, Inc.; The Estee Lauder Companies Inc.; Hamrick's Incorporated; Highwater Clays, Inc.; Houbigant, Inc.; IMI Fabi (Diana) LLC; IMI Fabi (USA) Inc.; IMI Fabi, LLC; Ingles Markets, Incorporated; L'Oreal USA, Inc.; L'Oreal USA Products, Inc.; Lowcountry Grocers LLC; Martin Himmel Inc.; May Kay Inc.; Maybelline LLC; Noxell Corporation; Pfizer Inc.; R.T. Vanderbilt Holding Company, Inc.; Revlon Consumer Products Corporation; Revlon, Inc.; Rite Aid of South Carolina, Inc.; Southeastern Grocers, Inc.; Topco Associates, LLC; Vanderbilt Minerals, LLC; Variety Wholesalers, Inc.; Variety Wholesalers, Inc.; Vi-Jon, LLC; Walgreen Co.; Walmart, Inc.; Whittaker, Clark & Daniels, Inc.; Winn-Dixie Stores, Inc.; Yves Saint Laurent America, Inc. ..... Defendants,

of which

IMI Fabi (Diana) LLC; IMI Fabi (USA) Inc.; and IMI Fabi, LLC are the ..... Appellants.

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STATEMENT OF ISSUES

This appeal presents two primary issues for this Court's consideration:

1. **Personal Jurisdiction Over Foreign Companies.** The Appellants are not South Carolina companies. Nothing in the record suggests that they have any contacts with South Carolina or ever purposefully availed themselves of this state with respect to anything associated with the subject matter of this case. Despite the absence of minimum contacts and purposeful availment, the circuit court held that they are subject to specific jurisdiction here based on a theory that a defendant is subject to personal jurisdiction wherever its products happen to end up after it places them in the "stream of commerce." Was that ruling in error?

2. **New Trial Based on Discovery on Irrelevant Issues.** Nearly a year after the jury rendered a defense verdict in favor of the Appellants, the Plaintiffs requested a new trial on grounds that allegedly-responsive materials weren't produced in discovery. The South Carolina Supreme Court has held that a new trial cannot be based on supposedly defective discovery responses, but the circuit court granted the new trial motion anyway. Did the circuit court err when it ordered a new trial against the Appellants?

STATEMENT OF THE CASE

This is an appeal of both oral rulings finding personal jurisdiction over foreign companies and a written order that vacated a defense verdict following a jury trial and ordered a new trial well over a year after the trial concluded.

Pretrial

I. The plaintiffs alleged that cosmetic talc caused Mrs. Plant's mesothelioma.

The plaintiffs, Mr. and Mrs. Plant, are a husband and wife from Tennessee. (R. p. 104; Am. Compl. ¶ 24.) Mrs. Plant has been diagnosed with mesothelioma, and she alleges that asbestos-containing talc in various makeup products, body-powder products, and ceramic art materials that she used through the years caused her illness. (*E.g.*, R. pp. 98–101; Am. Compl. ¶¶ 6–16.)

The case was filed on March 10, 2022; amended on April 11, 2022; and sued 51 defendants. Mrs. Plant asserted claims of negligence, products liability, negligence per se, breach of implied warranties, fraudulent misrepresentation, and conspiracy. Mr. Plant asserted a claim of loss of consortium. The Plants generically pled all of their claims against all defendants.

II. Three IMI Fabi entities were named as defendants, and each promptly moved for dismissal and then for summary judgment due to a lack of personal jurisdiction.

Among the dozens of defendants included in this case, the Plants included IMI Fabi (Diana) LLC; IMI Fabi (USA) Inc.; and IMI Fabi, LLC. IMI Fabi (USA) is a holding company, and the other two entities are or were in the business of mining, processing, and selling talc. The IMI Fabi entities' business involves two basic types of talc: (1) industrial-grade talc, which other companies use for industrial applications like manufacturing plastic and rubber, and which is not at issue in this case; and (2) cosmetic-grade talc, which other companies can ultimately use in the manufacture of make-up and body-powder products.

There are no allegations in the Plants' pleadings about any IMI Fabi entity other than statements regarding where each is formed (not in South Carolina) and operates (also not in South Carolina):

- Paragraph 51 alleges that IMI Fabi (Diana) LLC "was and is a North Carolina limited liability company with its principal place of business in West Virginia." (R. p. 113; Am. Compl. ¶ 51.)

- The next paragraph alleges that IMI Fabi (USA) Inc. "was and is a Delaware corporation with its principal place of business in West Virginia." (*Id.* ¶ 52.)

- The next paragraph alleges that IMI Fabi, LLC "was and is a West Virginia limited liability company with its principal place of business in West Virginia." (R. p. 114; Am. Compl. ¶ 53.)

Other than these allegations, the pleadings are silent regarding the IMI Fabi entities.

On May 13, 2022, each IMI Fabi entity moved to dismiss based on lack of personal jurisdiction in South Carolina. (R. pp. 806, 811, 816; IMI Fabi (Diana) Motion to Dismiss; IMI Fabi, LLC Motion to Dismiss; and IMI Fabi (USA) Motion to Dismiss.) In those filings, each explained that it has nothing to do with South Carolina regarding the cosmetic talc at issue, as well as corrected the Plants' incorrect allegations regarding the corporate locales for each: IMI Fabi (Diana)'s principal place of business was New York, IMI Fabi (USA)'s principal place of business is Delaware, and IMI Fabi, LLC's place of organization was previously North Carolina. (R. pp. 807, 812, 817; IMI Fabi (Diana) Motion to Dismiss at 2 n.4; IMI Fabi, LLC Motion to Dismiss at 2 n.4; and IMI Fabi (USA) Motion to Dismiss at 2 n.4.)

On July 13, 2022, each IMI Fabi entity supplemented its motion to dismiss for lack of personal jurisdiction with a supporting memorandum and accompanying affidavit that laid out in exacting detail how detached each company is from South Carolina. (R. pp. 821–884; IMI Fabi (Diana) Supporting Memo; IMI Fabi, LLC Supporting Memo; and IMI Fabi (USA) Supporting Memo.)

As detailed in those filings, no IMI Fabi entity has or ever had any property, office, employee, business operations, contracts, insurance, agent, license, tax payments, tax credits or deductions, mailing address, advertisements, marketing efforts, deliveries, vehicles (including boats), shipments, or anything else directed to South Carolina that relates to selling cosmetic talc. (R. pp. 839, 861, 881; Aff. Brown *passim*; Aff. Woods *passim*; and Aff. Zuppini *passim*.)

Those filings also clarified several points about each IMI Fabi entity:

- IMI Fabi (Diana) "closed its operations" on December 31, 2004. (R. p. 839; Aff. Brown ¶ 4.)
- IMI Fabi (USA) is strictly a holding company for the membership interests in IMI Fabi, LLC, and it has "no business or operations, and it holds no other property or assets." (R. p. 881; Aff. Zuppini ¶ 3.)
- While IMI Fabi, LLC has occasionally shipped industrial-grade talc to South Carolina in the past, it has never directed—whether via shipment, sale, delivery, or contract—any cosmetic-grade talc here. (R. pp. 862–864; Aff. Woods ¶¶ 18–20, 32, 35, 37.)

The Plants did not respond to these motions to dismiss. Accordingly, the IMI Fabi entities moved for summary judgment on January 13, 2023. In those motions, the IMI Fabi entities reiterated their same personal jurisdiction arguments, and they also argued (1) the Plants from Tennessee are barred from suing other foreigners like the IMI Fabi entities in South Carolina due to the door-closing statute, and (2) the Plants' claims fail due to the absence of any proof of causation related to the IMI Fabi entities. (R. pp. 885, 919, 949; IMI Fabi (Diana) Motion for Summary Judgment; IMI Fabi (USA) Motion for Summary Judgment; and IMI Fabi, LLC Motion for Summary Judgment.)

III. With their personal jurisdiction-based motions languishing and trial rapidly approaching, the IMI Fabi entities engaged in discovery.

The Plants did not respond to or oppose the IMI Fabi entities' motions for summary judgment, either. But with a trial date looming, the IMI Fabi entities agreed with the Plants' counsel to withdraw the non-personal jurisdiction aspects of their motions for summary judgment and to present Corrado Fabi—an Italian resident who is the owner of the IMI Fabi group and the president of IMI Fabi (USA) and IMI Fabi, LLC—as the Rule 30(b)(6) designee for each of the IMI Fabi entities for an "all issues," rather than strictly jurisdictional, deposition. (R. p. 1849; 4th Am. Notice of Deposition to IMI Fabi Entities (Feb. 8, 2023).)

Prior to the deposition, the IMI Fabi entities produced over 1,000 pages of responsive, non-privileged documents to the Plants. The deposition took place on February 15, 2023—just one week after the notice was served—and it lasted four hours. During that deposition, Mr. Fabi told the Plants that Michael Sommerville, a Boston attorney who had represented the IMI Fabi entities in other matters, maintained all of the hard copy records for IMI Fabi (Diana), as it hasn't been operational since 2004. (R. pp. 494–495; Fabi Dep. 25:14–26:3.)

On February 17, 2023, the IMI Fabi entities supplemented their prior dispositive motions with further proof that they have nothing to do with South Carolina with respect to the cosmetic talc at issue in this matter, rendering South Carolina without personal jurisdiction over any of them. (R. pp. 989, 1004, 1027; IMI Fabi (Diana) Supplemental Filing; IMI Fabi, LLC Supplemental Filing; and IMI Fabi (USA) Supplemental Filing.)

The next day, the Plants filed their first written opposition to any of the IMI Fabi entities' personal jurisdiction arguments. In it, they conceded there is no "general" jurisdiction over the IMI Fabi entities, but they argued that a "stream of commerce" theory supported finding specific jurisdiction over the IMI Fabi entities. The "evidence" they cited in support of this argument

keyed on: (1) IMI Fabi, LLC's sales of industrial-grade talc in South Carolina—which has nothing to do with this case; and (2) IMI Fabi (Diana)'s sales of cosmetic talc (manufactured with ore imported from China by a Texas company) to a New Jersey company called Cosmetic Specialties, Inc. (R. p. 1037; Plants' Opposition to IMI Fabi Entities' Personal Jurisdiction Motions.)

Trial

I. The circuit court denied the IMI Fabi entities' motions on the first day of trial without any meaningful explanation.

Trial began on February 23, 2023. That morning, the circuit court heard argument on the IMI Fabi entities' personal jurisdiction objections. It denied those motions without a written order or meaningful explanation, stating only: "The motion to dismiss is denied on the basis of the averments made and the pleadings in issue." (R. p. 318; Trial Tr. 110:22–24.)

Although the Plants alleged that 51 entities were responsible for Mrs. Plant's illness, only a small handful remained for trial. Even more defendants dropped out during trial, including IMI Fabi (USA), which the Plants voluntarily dismissed. (R. pp. 464–465; Trial Tr. 1833:24–1834:7.)[1] The Plants ultimately asked the jury to assess their claims against three defendants: IMI Fabi (Diana) LLC; IMI Fabi, LLC; and Whittaker, Clark & Daniels ("WCD").

II. The IMI Fabi entities reiterated the absence of personal jurisdiction throughout trial, and the Plants also fail to prove that IMI Fabi ever supplied cosmetic talc to anyone that contains asbestos.

Trial proceeded from February 23 through March 3, 2023. The Plants called Mr. Fabi as a witness in their case in chief, and his testimony confirmed several dispositive points.

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[1] The new-trial order on appeal includes IMI Fabi (USA), which is why IMI Fabi (USA) is designated as an appellant. (R. p. 1; Am. New Trial Order at 1 n.2.) But IMI Fabi (USA)—a holding company that has no operations and no contact with South Carolina—is no longer a party to this case, and its inclusion in the new-trial order can only be a scrivener's error, as the Plants themselves dismissed IMI Fabi (USA) from this case.

First, Mr. Fabi explained that all of the cosmetic talc the IMI Fabi entities source and sell comes only from certain mines in the Guangxi province in China, a region that is approximately 90,000 square miles large. Mr. Fabi testified that his companies selected the specific mines after inspecting them and testing talc mined from them to confirm ore from those mines contains no asbestos. He testified that his companies test the talc after it is received to re-confirm the absence of asbestos in it. And Mr. Fabi testified that the IMI Fabi entities test their talc for asbestos using "an international standard" and "go the extra mile" with additional testing—both through internal labs and external, independent labs—to ensure the cosmetic talc the IMI Fabi entities sell is asbestos-free. (R. pp. 372–373, 400, 406–414; Trial Tr. 1190:24–1191:19, 1218:4–24, 1224:8–1232:14.)

Second, Mr. Fabi confirmed that Cosmetic Specialties, Inc.—a talc distributor that is not a party to this case—was the IMI Fabi entities' exclusive customer for its cosmetic talc. (R. pp. 373–374, 376–377, 379; Trial Tr. 1191:25–1192:13, 1194:16–1195:3, 1197:4–6.) And while Cosmetic Specialties would occasionally disclose one of its own customers to an IMI Fabi entity, Mr. Fabi explained that his companies had "very limited knowledge" of to whom Cosmetic Specialties would sell talc "because Cosmetic Specialties has always been very protective of its customer list." (R. pp, 376–377, 391, 416; Trial Tr. 1194:25–1195:3, 1209:1–19, 1234:11–:16.)

Finally, Mr. Fabi testified about the absence of any connection—no direct contact, no indirect contact, nothing at all—between his companies and South Carolina with respect to sales of cosmetic talc. (R. pp. 405–406, 416–418; Trial Tr. 1223:1–1224:1, 1234:17–1236:14.)

III. The IMI Fabi entities renewed their personal jurisdiction and merits-based objections throughout the trial, and they then argued to the jury during closing that there was no evidence in the record to link them to anything that could have harmed Mrs. Plant.

The only evidence presented regarding any contacts the IMI Fabi entities have with South Carolina regarding the cosmetic talc at issue confirmed, unambiguously and indisputably, that there are no such contacts. Accordingly, after the Plants rested their case on March 1, 2023, the IMI Fabi entities moved for a directed verdict on "all of the plaintiffs' theories and on the lack of personal jurisdiction." (R. p. 444; Trial Tr. 1333:11–14.)

The circuit court heard argument on that motion the following morning. The IMI Fabi entities argued, first, that there is nothing in the record that could possibly support a finding of personal jurisdiction in South Carolina, as there is no evidence at all that any IMI Fabi entity directed anything related to cosmetic talc to this state. They also argued that the Plants "failed to put any evidence in the record that Mrs. Plant used a product that had IMI Fabi talc in it. They have failed to put any linking evidence to show that there is asbestos contamination in the talc from IMI Fabi, and that is fatal to their claims—all of their claims, so we would ask for directed verdict." (R. pp. 447–453; Trial Tr. 1550:2–1552:24 (absence of personal jurisdiction), 1553:3–1556:15 (absence of causation).)

The circuit court orally denied the personal-jurisdiction portion of the directed verdict motion based on factual assertions that are nowhere in the record and, respectfully, appear to have been made with WCD or some other entity in mind, rather than an IMI Fabi entity. (*See, e.g.*, R. p. 459; Trial Tr. 1562:3–19 (stating that South Carolina has personal jurisdiction over the IMI Fabi entities because of "a long relationship with the Cosmetic, Toiletries, and Fragrance Association and with countless cosmetic manufacturers and distributors around the world," and because "[i]t bought additional mines or sought out additional mines to service this burgeoning

and growing United States market").) None of these statements have any evidentiary support in the record, nor are they true about any IMI Fabi entity. IMI Fabi urged the circuit court to tender the issue of personal jurisdiction to the jury, but the circuit court rejected that suggestion because of its view that these were "jurisdictional facts" to be found by the court. (R. pp. 461–463; Trial Tr. 1623:1–1625:12.)

Regarding the merits of the case, the circuit court denied a directed verdict because, in the judge's view, the IMI Fabi entities "knew or should have known about the presence of asbestos, the kind of testing limitations that there are, depending on what kind of testing is done. Anyone in this business knew a good deal about that, including IMI Fabi." (R. p. 460; Trial Tr. 1563:1–9.) This statement ignores the indisputable point that there is no evidence in the record indicating there is any asbestos in IMI Fabi's talc; in fact, all of the evidence indicated exactly the opposite.

After the defendants closed their case, the IMI Fabi entities again renewed their directed verdict motions, and they again noted the lack of personal jurisdiction and the absence of evidence to support the merits of the Plants' claims. The circuit court again denied the motion. (R. p. 467; Trial Tr. 1894:5–20.)

IV. The jury returned a verdict in favor of the two remaining IMI Fabi entities, and it awarded the Plants approximately $29 million against Whittaker, Clark & Daniels.

Trial concluded on March 3, 2023. The jury returned a defense verdict with respect to both IMI Fabi (Diana) and IMI Fabi, LLC. The jury also found WCD liable in both tort and implied contract to the Plants, and it awarded the Plants over $29 million in actual damages against WCD. (R. p. 709; Verdict Form.)

Post-Trial

I. The circuit court appointed a receiver over Whittaker, Clark & Daniels, but the company's actual directors declared bankruptcy in New Jersey, prompting a jurisdictional fight that is playing out in federal court.

A week after the jury returned its verdict, the Plants requested, and the circuit court appointed, a receiver over WCD even though it is a New Jersey company. For its part, WCD filed for bankruptcy protection in New Jersey, where it is located.

That bankruptcy filing has prompted litigation before federal courts regarding the validity and scope of a receivership appointment by a South Carolina state court over an active, out-of-state company. *See In re Whittaker, Clark & Daniels, Inc.*, Case No. 23-13575 (MBK), 2023 Bankr. LEXIS 1600, at *14–25 (Bankr. D.N.J. June 20, 2023) (rejecting the receiver's arguments that the South Carolina circuit court authorized him to block a New Jersey company's board of directors from making a bankruptcy filing), *ruling affirmed and Receiver's appeal dismissed by Protopapas v. Whittaker, Clark & Daniels, Inc.*, Case No. 23-4151 (ZNQ), 2024 U.S. Dist. LEXIS 97270 (D.N.J. May 31, 2024), *further appeal pending at* Case No. 24-2210 (3d Cir.).

The details of that fight do not matter to this appeal, but the very existence of the WCD bankruptcy provides key context because it casts doubt on the Plants' ability to collect on their judgment, other than the $8.65 million they have already collected from settling defendants. (R. p. 1433; Plants' Opposition to Setoff at 4.)

II. 364 days after the verdict, the Plants moved for a new trial against the IMI Fabi entities based on allegedly deficient discovery responses.

In the face of such uncertainty regarding the collectability of their judgment against WCD, the Plants sought a do-over against the remaining IMI Fabi entities through a contrived motion for a new trial, which they filed on March 1, 2024.

The Plants based their motion on the IMI Fabi entities' alleged failure to produce materials in discovery. (R. p. 1539; Motion for New Trial.) This is not a legitimate basis for seeking a new trial. *E.g.*, *Raby Constr., LLP v. Orr*, 358 S.C. 10, 20–21 n.5, 594 S.E.2d 478, 483 n.5 (2004). Nevertheless, the Plants argued the unproduced materials would have shown the jury a greater connectivity between IMI Fabi talc and some manufacturers of cosmetics Mrs. Plant used.

The circuit court held three hearings on the motion: April 26, 2024; June 26, 2024; and August 21, 2024. During the first, the circuit court seemingly recognized the futility of the Plants' position and instructed the Plants to revisit the basis for their motion and to do a better job of explaining how the unproduced materials could have impacted the outcome of the trial. (R. pp. 525–526; Hr'g Tr. 71:13–72:15 (Apr. 26, 2024).)

During the second, the circuit court declared—incorrectly—that the IMI Fabi entities only defended the case based on the Plants' failure to tie a product that Mrs. Plant had used to any IMI Fabi talc. (R. p. 549; Hr'g Tr. 7:1–14 (June 26, 2024).) It then demanded that the IMI Fabi entities present for examination in Columbia one of their outside counsel who participated in the document review and production in this case: Mr. Sommerville, who Mr. Fabi identified during his deposition as a custodian for IMI Fabi (Diana) records. (R. pp. 615–617; Hr'g Tr. 73:4–75:10 (June 26, 2024).)

III. Mr. Sommerville testified that he did not intentionally withhold any IMI Fabi (Diana) materials when reviewing documents, but instead used his professional judgment to assess their responsiveness to the Plants' discovery requests.

Mr. Sommerville is a now-retired lawyer in Massachusetts who was in private practice with the Cetrulo, LLP, law firm. He is not a member of the South Carolina Bar, he was not counsel of record in this case, and he was not admitted *pro hac vice* in this case. Mr.

Sommerville previously represented the IMI Fabi entities in litigation elsewhere and maintained custody of seven bankers' boxes of no-longer-operational IMI Fabi (Diana)'s records in conjunction with his retention as an outside counsel for the IMI Fabi entities. (R. pp. 637–638; Hr'g Tr. 32:6–33:22 (Aug. 21, 2024.).) Mr. Sommerville observed various proceedings in this case, though he never appeared, argued, or represented any IMI Fabi entity in it.

Despite being beyond the court's jurisdictional reach, Mr. Sommerville voluntarily traveled to Columbia for examination in the circuit court on August 21, 2024. During that third hearing, Mr. Sommerville testified—repeatedly—that he and two of his associates used their professional judgment to compare the Plants' document requests to the IMI Fabi (Diana) materials, identified those records that appeared responsive, and prepared them for production. (R. pp. 638, 645–647; Hr'g Tr. 34:4–15, 61:1–15, 63:20–64:12, 65:8–66:10, 70:16–22 (Aug. 21, 2024).) As he testified:

> Q: Mr. Sommerville, in your representation of the IMI Fabi entities, in your participation in locating documents for the *Plant* case, and to the best of your knowledge, did you ever mislead or lie to the plaintiffs in any way?
>
> A: Never once.
>
> Q: To your best knowledge, did you ever mislead or lie to the Court in any way?
>
> A: Never once.
>
> Q: Did you ever intentionally hide, destroy, or withhold any documents so that they would not be produced to the plaintiff in the *Plant* case or any other case?
>
> A: I've never done that for any case ever in my life. Ever.
>
> Q: In your review or oversight of the review of the documents at issue, did you use your professional judgment in making decisions?
>
> A: Of course I did.

Q: Was there ever a time that you consciously decided to conceal documents or withhold documents that you believe were responsive to a discovery request or the *duces tecum* for the deposition issued by the plaintiff in the *Plant* case?

A: I would never do that because it's useless.

Q: And you didn't, did you, sir?

A: Never.

(R. p. 648; Hr'g Tr. 73:13–74:14 (Aug. 21, 2024).)

IV. The circuit court granted the Plants' motion for a new trial.

On October 23, 2024, the circuit court granted the Plants' motion for a new trial. On October 28, 2024, the court amended its order to correct the names of the IMI Fabi entities' counsel of record. (R. p. 1; Am. Order Granting New Trial.) The circuit court filled its ruling with *ad hominem* attacks on Mr. Sommerville, an out-of-state attorney with whom the judge interacted for fewer than two hours, and the order often reads as if it is describing an entirely different case than the one at bar.

The order begins by taking issue with how a different IMI Fabi (Diana) witness—Michael Brown, who provided an affidavit in support of IMI Fabi (Diana)'s jurisdictional motions, but from whom the Plants never sought any deposition or trial testimony in this case—testified in a different case in New York state court in 2022. Puzzlingly, the order declared *sua sponte* that Mr. Sommerville "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 what documents remained at the IMI Fabi plant." (R. pp. 9–10; Am. Order Granting Motion for New Trial at 9–10.) Of course, how Mr. Brown testified in a New York case was never at issue in and has nothing to do with these proceedings, and the IMI Fabi entities are at a loss as to why the circuit court included this irrelevant passage.

The circuit court also declared: "Attorney Sommerville clearly has no issue with not complying with court rules of procedure and concealing information." (R. p. 10; Am. Order Granting New Trial at 10.) But it cited only Mr. Brown's unimpeached and entirely proper testimony from New York as the basis for this gratuitous—and baseless—remark.

For its actual Rule 60(b) analysis, the court found fault with Mr. Sommerville's review of IMI Fabi (Diana)'s documents for production in response to the Plants' February 8th request in advance of the February 15th deposition. The court explained it was granting the Plants' Rule 60(b)(2) motion because of how Mr. Sommerville reviewed those records: "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." (R. p. 13; Am. Order Granting New Trial at 13.)

The circuit court explained it was granting the Plants' Rule 60(b)(3) motion and ordering a new trial because Mr. Fabi testified at trial that Cosmetic Specialties was the IMI Fabi entities' only customer for cosmetic talc; the circuit court disagreed with this characterization of who IMI Fabi's customer was; and it then accused Mr. Sommerville of "knowingly induc[ing] and permitt[ing] perjured testimony to be given by Mr. Fabi on behalf of IMI Fabi." (R. p. 18; Am. Order Granting New Trial at 18.)

The IMI Fabi entities timely noticed this appeal on November 22, 2024.

ARGUMENT

The IMI Fabi entities are not subject to personal jurisdiction in South Carolina. There wasn't a single fact placed into evidence to support a finding that either of the remaining IMI Fabi entities ever purposefully availed itself of this State with respect to the cosmetic talc at issue in this case. The circuit court cited none, and neither did the Plants.

Even if jurisdiction could somehow attach to either IMI Fabi entity, neither should have to endure another trial in this case. Cries that an adverse party's discovery responses were incomplete or inadequate are never sufficient to force another trial. That established point of law should be especially enforced here, as nothing the Plants or the circuit court identified as "new" evidence could possibly have moved the needle with the jury to reach a different conclusion than the one it reached in March 2023: neither IMI Fabi entity is liable for Mrs. Plant's illness. Both grounds for reversing and vacating the circuit court's rulings are discussed below.

I. Neither IMI Fabi (Diana) nor IMI Fabi, LLC, is subject to personal jurisdiction in South Carolina under any formulation of the law.

None of the IMI Fabi entities should have been forced to trial because none is subject to personal jurisdiction in South Carolina. By forcing them to endure trial without having personal jurisdiction over either of them, the circuit court committed a constitutional error that requires reversal.

Standard of Review. Questions of personal jurisdiction over nonresidents "must be resolved upon the facts of each particular case." *Cockrell v. Hillerich & Bradsby Co.*, 363 S.C. 485, 491, 611 S.E.2d 505, 508 (2005). The plaintiff has the burden of proving each individual defendant is subject to the court's jurisdiction. *Id.* On appellate review, the circuit court's ruling "should be affirmed unless unsupported by the evidence or influenced by an error of law." *Id.*

The circuit court declared its rulings regarding the IMI Fabi entities' contacts with South Carolina to be "jurisdictional facts" within the circuit court's, rather than the jury's, purview. (R. pp. 461–463; Trial Tr. 1623:1–1625:12.) When reviewing the circuit court's assessment of jurisdictional facts, the appellate court reviews the evidence *de novo* and can take its own view of the facts. *See, e.g.*, *Paschal v. Price*, 392 S.C. 128, 131–32, 708 S.E.2d 771, 773 (2011) ("Because the question presented is one of jurisdiction, this Court may take its own view of the

facts upon which jurisdiction is dependent."); Jean Hoefer Toal *et al.*, *Appellate Practice in South Carolina* 276 (3d ed. 2016) ("When deciding a jurisdictional question based on facts, a reviewing court has the power and the duty to review the entire record, find the jurisdictional facts within the record, and decide the jurisdictional question in accord with the preponderance of evidence.").

Legal Framework. Personal jurisdiction addresses whether a court has authority over a particular litigant. *Cribb v. Spatholt*, 382 S.C. 490, 496, 676 S.E.2d 714, 718 (Ct. App. 2009). It is rooted in the Due Process Clause. *See Cockrell*, 363 S.C. at 491, 611 S.E.2d at 508 ("Because South Carolina treats its long-arm statute [S.C. Code Ann. § 36-2-803] as coextensive with the due process clause, the sole question becomes whether the exercise of personal jurisdiction would violate due process."). And it is a function of "the territorial limitations on the power of the respective States." *Bristol-Myers Squibb Co. v. Superior Court*, 582 U.S. 255, 263 (2017) (quoting *Hanson v. Denckla*, 357 U.S. 235, 251 (1958)).

Due Process is met, and personal jurisdiction can attach, only when there are sufficient "minimum contacts with the State such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *BNSF Ry. v. Tyrrell*, 581 U.S. 402, 413 (2017) (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)). A court without personal jurisdiction over a defendant "does not have the 'power' to adjudicate the action" against that defendant. *Cockrell*, 363 S.C. at 492, 611 S.E.2d at 508.

Personal jurisdiction takes two forms: general jurisdiction, and specific jurisdiction. General jurisdiction vests a forum with authority over a defendant for any litigation, and it attaches only when a defendant is "at home" in a forum, either through overwhelmingly systematic and continuous operations in the forum, or because the forum is a business's place of

organization or its principal place of business. *BNSF*, 581 U.S. at 413. No one contends that either of the remaining IMI Fabi entities is "at home" in South Carolina, rendering the only dispute as to whether either is subject to specific personal jurisdiction here. (*See* R. p. 1046; Plants' Opposition to IMI Fabi Entities' Personal Jurisdiction Motions at 10 ("This case involves the stream-of-commerce theory of specific personal jurisdiction.").)

Specific jurisdiction, by contrast, allows a forum to exercise authority over a defendant only for the limited purpose of the particular case. *See, e.g.*, *Coggeshall v. Reproduc. Endocrine Assocs.*, 376 S.C. 12, 16, 655 S.E.2d 476, 478 (2007) (explaining that "[s]pecific jurisdiction is the State's right to exercise personal jurisdiction because the cause of action arises specifically from a defendant's contacts with the forum"). It can only arise when "the defendant purposefully avails itself of the privilege of conducting activities within the forum state." *Id.* The only acts that can possibly give rise to specific jurisdiction are those that are attributable to the defendant itself, not activities of a third party. *See, e.g.*, *S. Plastics Co. v. S. Commerce Bank*, 310 S.C. 256, 261, 423 S.E.2d 128, 131 (1992) ("In addition, the defendant's activities directed to a resident of this State must be its own and not the unilateral activities of some other entity.").

In addition to having "minimum contacts" with the forum state, specific jurisdiction can only attach if it would be "fair" to hale the defendant into that forum. *Cockrell*, 363 S.C. at 492, 611 S.E.2d at 508. "Under the fairness prong, the court must consider: (1) the duration of the activity of the nonresident within the state; (2) the character and circumstances of the commission of the nonresident's acts; (3) the inconvenience resulting to the parties by conferring or refusing to confer jurisdiction of the nonresident defendants; and (4) the State's interest in exercising jurisdiction." *Id.*

Under no circumstances can a South Carolina court exercise jurisdiction over either of the remaining IMI Fabi entities consistent with Due Process, as neither has any connection at all with this state regarding the cosmetic talc at issue in this case, as explained below.

A. IMI Fabi (Diana) has no contacts with South Carolina and never purposefully availed itself of this forum with respect sales of cosmetic talc.

The evidence in this case is unrebutted and unambiguous: there is no evidence IMI Fabi (Diana) had contacts with South Carolina related to the sale of the cosmetic talc in dispute.

An affidavit from IMI Fabi (Diana)'s former general manager, Mr. Brown, testified that:

- IMI Fabi (Diana) was organized under the laws of North Carolina and had its "principal and only place of business" in Diana Township, New York. (R. p. 839; Aff. Brown ¶¶ 3–5.)
- IMI Fabi (Diana) never owned or operated any facilities in South Carolina. (*Id.* ¶ 9.)
- IMI Fabi (Diana) never had any employees in South Carolina, nor did it ever recruit employees from South Carolina. (*Id.* ¶¶ 10–11.)
- IMI Fabi (Diana) never had any licenses, agents, offices, mailing addresses, Post Office boxes, affiliates, subsidiaries, bank accounts, insurance, business investments, liens, contracts, real property, motor vehicles, boats, sales, shipments, deliveries, solicitations, or marketing efforts in or directed to South Carolina. (*Id. passim.*)
- IMI Fabi (Diana) never paid any taxes—sales, corporate, real estate, nothing—or received any tax credits or incentives in South Carolina. (*Id.* ¶¶ 13, 15, 20–21, 28.)
- And IMI Fabi (Diana) never had an expectation that its products would be distributed or used in South Carolina. (*Id.* ¶ 46.)

At trial, Mr. Fabi testified that IMI Fabi (Diana) sold cosmetic talc from 2001 to 2004. (R. p. 368; Trial Tr. 1186:8–11.) He reiterated the complete detachment the company has from South Carolina, including never buying or selling anything here, never having any employees here, never directing any marketing here, never having a bank account here, never owning any property here, never manufacturing any products here, and never selling or manufacturing

anything "with the expectation or intent that it would get to South Carolina." (R. pp. 405, 416–419; Trial Tr. 1223:11–18, 1234:17–1237:6.)

By any measure of minimum contacts, IMI Fabi (Diana) has none with South Carolina. Accordingly, not only does IMI Fabi (Diana) fail the "contacts" prong of the Due Process analysis, there is no way that it could be considered "fair" to hale it into a South Carolina court. It has done nothing here, so there is no way any of the "fairness" factors can tilt in favor of finding that it would be "reasonable" or "fair" for IMI Fabi (Diana) to have to litigate anything at all in South Carolina—especially when the plaintiffs themselves are Tennesseans.

In fact, IMI Fabi (Diana) took steps to ensure that it wouldn't be considered having acted beyond the end of its own shipping dock in New York by requiring its lone customer for cosmetic talc, Cosmetic Specialties, to accept the talc F.O.B. at IMI Fabi (Diana)'s dock. (R. p. 374; Trial Tr. 1192:9–13.) The presence of that F.O.B. arrangement creates an even wider chasm between IMI Fabi (Diana) and South Carolina. *See, e.g.*, *Digital Ally, Inc. v. Light-N-Up, LLC*, 408 S.C. 101, 108–09, 757 S.E.2d 732, 736–37 (Ct. App. 2014) (considering an F.O.B. arrangement to be part of the minimum-contacts analysis, as it demonstrates a party's intent to enter into or stay cabined within a certain forum).

Because there are no contacts at all, much less any "minimum contacts" required by the Due Process Clause, between IMI Fabi (Diana) and South Carolina, and because it would be patently "unfair" for it to be haled into a South Carolina court, the circuit court erred when it concluded that it has specific jurisdiction over IMI Fabi (Diana).

B. IMI Fabi, LLC, has no contacts with South Carolina and never purposefully availed itself of this forum with respect to sales of cosmetic talc.

The same hold true for IMI Fabi, LLC. The evidence is also unrebutted and unambiguous: there is no evidence IMI Fabi, LLC, had contacts with South Carolina related to the sale of the cosmetic talc in dispute.

An affidavit from James Woods, a manager of IMI Fabi, LLC, testified that:

- IMI Fabi, LLC, was organized under the laws of West Virginia and that it has ever only operated in West Virginia and North Carolina. (R. p. 861; Aff. Woods ¶¶ 5, 7.)
- IMI Fabi, LLC, never owned or operated any facilities in South Carolina. (*Id.* ¶ 9.)
- IMI Fabi, LLC, never had any employees in South Carolina, nor did it ever recruit employees from South Carolina. (*Id.* ¶¶ 10–11.)
- IMI Fabi, LLC, never had any licenses, agents, offices, mailing addresses, Post Office boxes, affiliates, subsidiaries, bank accounts, insurance, business investments, liens, contracts, real property, motor vehicles, boats, sales, shipments, deliveries, solicitations, or marketing efforts in or directed to South Carolina regarding cosmetic talc. (*Id. passim.*)
- IMI Fabi, LLC, never paid any taxes—sales, corporate, real estate, nothing—or received any tax credits or incentives in South Carolina. (*Id.* ¶¶ 13, 15, 20–21, 28.)
- And IMI Fabi, LLC, never had an expectation that its products would be distributed or used in South Carolina. (*Id.* ¶ 44.)

Mr. Fabi's in-trial testimony was clear that the detachment that IMI Fabi (Diana) has from South Carolina applies equally to IMI Fabi, LLC: no employees, no offices, no bank accounts, no property ownership, no manufacturing, and no marketing or shipping of cosmetic talc "with the expectation or intent that it would get to South Carolina." (R. pp. 405–406, 416–419; Trial Tr. 1223:19–1224:1, 1234:17–1237:6.)

In fact, the only material difference between IMI Fabi (Diana) and IMI Fabi, LLC, regarding their respective connections with South Carolina is that IMI Fabi, LLC, has shipped industrial talc directly to customers in South Carolina "for incorporation in the manufacture of

plastic and rubber products." (R. p. 862; Aff. Woods ¶ 19.) But that has nothing to do with Mrs. Plant or the cosmetic talc at issue in this case, rendering this "contact" entirely irrelevant to the specific-jurisdiction analysis. *See, e.g.*, *Bristol-Myers Squibb*, 582 U.S. at 264 ("When there is no such connection, specific jurisdiction is lacking regardless of the extent of a defendant's unconnected activities in the State."); *Coggeshall*, 376 S.C. at 20, 655 S.E.2d at 480 (explaining that the long-arm statute didn't apply to the defendants because "the business activities of REACH and Dr. Crain that occurred in South Carolina, which included billing patients and doing business with vendors, did not give rise to the alleged tort in this case").

Just as it would be—and has been—completely "unfair" to assert jurisdiction over IMI Fabi (Diana), it is likewise "unfair" for IMI Fabi, LLC, to be brought before a South Carolina court to defend against the Plants' claims arising out of cosmetic talc. It has not purposefully availed itself of this State for anything at all related to the issues presented by Mrs. Plant's illness, and not a single "fairness" factor weighs in favor of South Carolina having specific jurisdiction over IMI Fabi, LLC. Accordingly, the circuit court violated the Due Process Clause when it determined it had personal jurisdiction over IMI Fabi, LLC.

C. The so-called "steam of commerce" theory cannot override basic Due Process.

At the trial level, the Plants appeared to concede, and the circuit court appeared to recognize, that there are no "minimum contacts" between either of the remaining IMI Fabi entities and South Carolina. Instead of following the long-established Due Process analysis for specific jurisdiction, the Plants baldly stated without meaningful explanation: "This case involves the stream-of-commerce theory of specific personal jurisdiction." (R. p. 1046; Plants' Opposition to IMI Fabi Entities' Personal Jurisdiction Motions at 10.) The circuit court agreed: "This is a stream-of-commerce case." (R. p. 457; Trial Tr. 1560:1.)

But neither the Plants nor the circuit court could ever articulate what this "theory" even is—and that's because the United States Supreme Court has rejected such a haphazard and happenstance view of personal jurisdiction. Instead, what matters—as it has always been—is what did the actual defendant itself do to engage with the specific forum.

In *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873, 877 (2011), the United States Supreme Court reviewed and reversed a decision from the New Jersey Supreme Court that held "New Jersey's courts can exercise jurisdiction over a foreign manufacturer of a product so long as the manufacturer 'knows or reasonably should know that its product are distributed through a nationwide distribution system that might lead to those products being sold in any of the fifty states.'" The United States Supreme Court explained across two separate opinions (a four-justice plurality and a two-justice concurrence) that the "so-called stream-of-commerce doctrine cannot displace" the settled constitutional rule that personal jurisdiction only attaches when a defendant has purposefully availed itself of a forum. *Id.* at 878.

The plurality was direct: "The defendant's transmission of goods permits the exercise of jurisdiction only where the defendant can be said to have targeted the forum; as a general rule, it is not enough that the defendant might have predicted that its goods will reach the forum state." *Id.* at 882. "[T]he stream-of-commerce metaphor cannot supersede either the mandate of the Due Process Clause or the limits on judicial authority that Clause ensures." *Id.* at 886.

The concurrence was similarly direct: "Here, the relevant facts found by the New Jersey Supreme Court show no 'regular . . . flow' or 'regular course' of sales in New Jersey; and there is no 'something more,' such as special state-related design, advertising, advice, marketing, or anything else." *Id.* at 889 (quoting *Asahi Metal Ind. Co. v. Sup. Ct. of Cal.*, 480 U.S. 102 (1987)).

The concurrence specifically rejected the notion that "a producer is subject to jurisdiction for a products-liability action so long as it knows or reasonably should know that its products are distributed through a nationwide distribution system that ***might*** lead to those products being sold in any of the fifty states." *Id.* at 891 (cleaned up and emphasis supplied by the Court). It did so because this "stream of commerce" notion disregards the settled point that what matters for personal jurisdiction is "the defendant's contacts ***with that forum***." *Id.* (emphasis supplied by the Court); *see also Bristol-Myers Squibb*, 582 U.S. at 262 ("The primary focus of our personal jurisdiction inquiry is the defendant's relationship to the forum State.").

Following *J. McIntyre*, courts have agreed that a defendant must have done something more than simply put a product into the stream of commerce for jurisdiction to potentially attach wherever the product ends up. *See, e.g.*, *ESAB Group, Inc. v. Zurich Ins. PLC*, 685 F.3d 376, 392 (4th Cir. 2012) ("Thus, the Supreme Court has rejected the exercise of jurisdiction where a defendant has merely placed a product into the stream of commerce foreseeing that it might ultimately reach the forum state." (citing *J. McIntyre*)); *Sutton v. Motor Wheel Corp., LLC*, Case No. 3:17-01161-MGL, 2018 U.S. Dist. LEXIS 80484, at *18 (D.S.C. May 14, 2018) ("HZR's manufacturing of tires for distribution in the United States, using Leopard to distribute the tires nationwide, and co-advertising with Leopard in the United States does not constitute contact with South Carolina." (citing *J. McIntyre*)).

Despite the Supreme Court's rejection, or at least substantial cabining, of the "stream of commerce" theory in *J. McIntyre*, the circuit court relied on that theory exclusively to claim jurisdiction over both IMI Fabi entities:

> I deny the motion for summary judgment [*sic* directed verdict]. With regard to the first point, the difference between this company and *McIntyre Machinery* is that it had a long relationship with the Cosmetic, Toiletries, and Fragrance Association and with countless cosmetic

> manufacturers and distributors around the world, and it was well aware—very specifically aware that its product would go right into the stream of commerce in—for use by women all over the world. It was very well aware of that.
>
> In its own advertising materials or websites or other things that it puts up demonstrates an awareness of the international nature of distribution of cosmetic products to women. It knew that women would use products in this state, just like every other state in the United States. It had a big market for its products. It bought additional mines or sought out additional mines to service this burgeoning and growing United States market.
>
> So this is an entirely different situation from *McIntyre*, that had a distributor and was in shows in several states and that was kind of about it. This is a—IMI Fabi is a very different animal from that.
>
> So on that basis, I will deny the motion to direct on personal jurisdiction.

(R. p. 459; Trial Tr. 1562:3–25.)

The circuit court's ruling is ***precisely*** the analysis that the New Jersey Supreme Court adopted but that the United States Supreme Court considered and rejected in *J. McIntyre*. As the concurrence outlined:

> A rule like the New Jersey Supreme Court's would permit every State to assert jurisdiction in a products-liability suit against any domestic manufacturer who sells its products (made anywhere in the United States) to a national distributor, no matter how large or small the manufacturer, no matter how distant the forum, and no matter how few the number of items that end up in the particular forum at issue. . . .
>
> And a rule like the New Jersey Supreme Court suggests would require every product manufacturer, large or small, selling to American distributors to understand not only the tort law of every State, but also the wide variance in the way courts within different States apply that law.

564 U.S. at 891–92.

Not only is the circuit court's recitation of the "jurisdictional facts" supporting its ruling simply wrong—there is nothing in the record regarding either IMI Fabi entity (1) being a member of the Cosmetic, Toiletries, and Fragrance Association; (2) working with "countless

cosmetic manufacturers and distributors around the world," as these entities had a single customer for cosmetic talc for sale or use in the United States and Canada: Cosmetic Specialties; or (3) buying and seeking out additional mines for cosmetic talc[2]—its legal analysis has been considered and directly rejected by the United States Supreme Court. This Court should reverse the circuit court accordingly.

* * * * *

Neither of the remaining IMI Fabi entities has any connection to South Carolina with respect to the subject matter of this case. The Due Process Clause protects them from being sued here—by Tennesseans, no less—because a customer of theirs may have sold their cosmetic talc to its own customers, who in turn may have processed and used some of that talc (along with the talc of other suppliers) to make cosmetics they sold to their own customers, who in turn may have put a product on a shelf in South Carolina that Mrs. Plant purchased and used. Without more, simply being anywhere within a supply chain is no basis for personal jurisdiction.

This Court should vacate the circuit court's jurisdictional finding against the IMI Fabi entities, which is based solely on a daisy chain involving numerous third parties and entirely lacks any evidence that an IMI Fabi entity directed any cosmetic talc sales to South Carolina, because it runs directly contrary to United States Supreme Court precedent.

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[2] When reviewing the circuit court's ruling, this Court is obviously not bound by these incorrect and unsupported factual statements. *See* Toal, *Appellate Practice in South Carolina* 276 ("When deciding a jurisdictional question based on facts, a reviewing court has the power and the duty to review the entire record, find the jurisdictional facts within the record, and decide the jurisdictional question in accord with the preponderance of evidence."). That no evidence in the record supports any of the three "factual" grounds for the circuit court's personal jurisdiction decision further demonstrates that ruling to have been in error.

II. A new trial cannot be based on alleged discovery deficiencies that do not reveal any new information and that do not address evidentiary gaps the Plants failed to close during trial.

Despite not belonging in a South Carolina court in the first place, the IMI Fabi entities won at trial. After a multiweek trial, a jury determined that neither IMI Fabi entity was liable to the Plants for their injuries. (R. p. 709; Verdict Form.)

The circuit court should have left that verdict untouched. But instead, when the Plants encountered collectability issues with WCD, the circuit court decided to let them take another run at the IMI Fabi entities even though the law absolutely upholds the sanctity of jury verdicts and absolutely rejects efforts to seek a new trial based on alleged discovery defects. This Court should vacate the new-trial order and restore the integrity of the jury process accordingly.

Standard of Review. Rule 60(b), SCRCP, vests the trial court with authority to grant a new trial only under limited circumstances. "Disappointment" is not one of them. Neither is "difficulty in collecting the prior judgment against a different defendant."

Orders granting motions under Rule 60(b) are reviewed for an abuse of discretion. *Raby Construction*, 358 S.C. at 17–18, 594 S.E.2d at 482. The circuit court abuses its discretion when its ruling "is unsupported by the evidence or controlled by an error of law." *Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 37, 691 S.E.2d 135, 143 (2010).

Questions of law—such as whether allegedly-deficient discovery can serve as a basis for a new trial—are reviewed on appeal *de novo*. *Aiken v. S.C. DOR*, 429 S.C. 414, 419, 839 S.E.2d 96, 98 (2020). The Court must consider all reasonable inferences in the light most favorable to the nonmoving party—here, the remaining IMI Fabi entities. *See Vinson v. Hartley*, 324 S.C. 389, 405, 477 S.E.2d 715, 723 (Ct. App. 1996) ("In deciding whether to assess error to a court's

denial of a motion for a new trial, we must consider the testimony and reasonable inferences to be drawn therefrom in the light most favorable to the nonmoving party.").

A. There is no "newly discovered" evidence that could possibly impact the outcome of this case.

The circuit court granted the Plants a new trial under Rule 60(b)(2) because Mr. Sommerville reviewed IMI Fabi (Diana) records against the Plants' document requests; decided over 1,000 pages were responsive but others were not; and, in the circuit court's view, the unproduced material "provides a link from IMI Fabi talc to the products that Plaintiff Sarah J. Plant testified that she used repeatedly and for many years"—CoverGirl products, made by Procter & Gamble. (R. p. 15; Am. Order Granting New Trial at 15.) This decision is riddled with legal errors, but a threshold point is critical: nothing in the circuit court's ruling has anything to do with IMI Fabi, LLC. Accordingly, the new-trial order should be vacated as to IMI Fabi, LLC, accordingly, and it also fails on its merits as to IMI Fabi (Diana).

Rule 60(b)(2), SCRCP, does not grant a new trial to a party who lost before the jury but then later finds out something new about its adversary. Instead, the movant must be able to show that the "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)": (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).

This standard is impossible for the Plants to meet here for several reasons, particularly in light of that fact that unlike pretrial motions, here it is the IMI Fabi entities who are entitled to every reasonable inference—just as the jury is entitled to have its verdict remain untouched. *See*

Bowman v. Bowman, 357 S.C. 146, 152, 591 S.E.2d 654, 657 (Ct. App. 2004) (reiterating South Carolina's "strong policy towards finality of judgments").

1. Supposedly defective discovery cannot create a new trial.

First, the entire theory underlying the circuit court's new-trial ruling has been explicitly rejected by the South Carolina Supreme Court. The circuit court determined that by evaluating IMI Fabi (Diana)'s records against the Plants' document requests and exercising his professional judgment to identify those records that were responsive and those that were not, Mr. Sommerville "intentionally decided what to produce, and by implication what not to produce." (R. p. 13; Am. Order Granting New Trial at 13.) This exercise, in the circuit court's view, rendered the unproduced records "newly discovered" evidence on which to base a new trial. But Rule 60(b) directly rejects such a broad view of the circuit court's ability to grant a new trial.

The rule permits a new trial only if the information "by due diligence could not have been discovered" previously. Rule 60(b)(2), SCRCP. And South Carolina's appellate courts have repeatedly held that allegedly-deficient discovery responses cannot give the loser another trial. *See, e.g.*, *Raby Construction*, 358 S.C. at 21–23, 594 S.E.2d at 484 (rejecting a Rule 60(b)(2) motion when the adverse party had been put on notice of the information it claimed was "newly discovered" but failed to follow up with additional questions or discovery requests); *Bowman*, 357 S.C. at 152, 591 S.E.2d at 657 ("We consider it unnecessary to explore the differing standards between Rule 60 (b)(2) and (3) as advanced by Husband, for we conclude that South Carolina's strong policy towards finality of judgments trumps a party's ability to set aside a judgment where, as here, the party could have discovered the evidence prior to trial.").

This Court established the standard in *Lanier*:

> 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. *Black's Law Dictionary* defines "due diligence" as "the diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or to discharge an obligation." "Diligence looks not to what the litigant actually discovered, but what he or she ***could*** have discovered." . . . Where a litigant could have discovered the new evidence prior to trial, he or she is not entitled to relief under Rule 60(b)(2).

364 S.C. at 220, 612 S.E.2d at 460–61 (quoting *Black's Law Dictionary* 468 (7th ed. 1999), and 12 *Moore's Federal Practice* § 60.42[5] (3d ed.), and emphasis supplied by the Court).

The circuit court's order ruling ignores this standard. The details of the circuit court's "newly-discovered evidence" ruling matter, and they demonstrate why the order cannot stand.

Cosmetic Specialties. First, the circuit court stated that the distribution agreements between IMI Fabi (Diana) and Cosmetic Specialties "were never produced." (R. p. 4; Am. Order Granting New Trial at 4.) But the Plants knew about these contracts; they were specifically discussed during Mr. Fabi's deposition, and the Plants went so far as to make placeholder exhibits in his deposition for those contracts. (R. pp. 497–498; Fabi Dep. 41:7–43:19.) If the Plants truly cared about those documents and believed them to be relevant, they would have pursued the contracts' production, including with a follow-up email, letter, text, phone call, or—if all else failed—a motion to compel. But no such follow up ever happened, and this is the exact same factual sequence that the *Raby Construction* Court held was insufficient for a Rule 60 motion. *See* 358 S.C. at 21–23, 594 S.E.2d at 484 (denying motion for new trial based on "newly discovered" evidence when the adverse party testified about the information during a deposition but the movant never followed up).

Relatedly, Mr. Fabi testified during his deposition that the IMI Fabi entities' single customer for cosmetic talc for sale and use in the United States and Canada is Cosmetic Specialties, and he even identified for the Plants who owns Cosmetic Specialties: Ron Grexa. (R.

p. 504; Dep. Fabi, 100:5–16.) But the Plants did not undertake any discovery of Cosmetic Specialties or Mr. Grexa: no subpoenas, no depositions, no attempt to get any information whatsoever from Cosmetic Specialties or Mr. Grexa. Without ***any*** discovery efforts from the Plants, information regarding Cosmetic Specialties is not "newly discovered evidence which by due diligence could not have been discovered" earlier in the case.

Procter & Gamble. Second, the circuit court stated that the "new" evidence would have linked IMI Fabi cosmetic talc to "Procter & Gamble for use in CoverGirl talc powder products," which Mrs. Plant stated she has previously used. (R. p. 15; Am. Order Granting New Trial at 15.) But this was never a disputed issue.

Mr. Fabi testified at length about Procter & Gamble during his deposition. (R. pp. 496; 499–503; Fabi Dep. 36:14–24, 57:15–70:3.) He didn't equivocate: "We are aware that Cosmetic Specialties sold our products to Procter & Gamble." (*Id*. 63:7–9)

The Plants also presented documents to the circuit court before the trial showing that some CoverGirl products use talc from the IMI Fabi entities. (R. pp. 1137–1157; Exhibits to Plants' Opposition to IMI Fabi Entities' Personal Jurisdiction Motions.) And, also before the trial, they filed "correspondence" between IMI Fabi (Diana) and Procter & Gamble regarding shipments of cosmetic talc pursuant to purchase orders that Procter & Gamble placed with Cosmetic Specialties. (*Id.*)[3]

The "link" between the IMI Fabi entities and Procter & Gamble using their talc was so unremarkable, counsel for the IMI Fabi entities told the jury during opening statements that "there's no dispute" that Procter & Gamble used IMI Fabi talc. (R. p. 319; Trial Tr. 280:13–17.)

[3] The circuit court's order states that IMI Fabi (Diana) did not produce correspondence between IMI Fabi (Diana) and "companies that received talc supplied by Cosmetic Specialties." (R. p. 17; Order Granting New Trial at 17.) This is simply not true, as demonstrated by the Plants' own exhibits to motions filed before trial.

Mr. Fabi then confirmed it at trial in front of the jury. (*See* R. p. 379; Trial Tr. 1197:19–21 ("Q: You are aware that IMI Fabi (Diana) and LLC sold talc that ended up going to Procter & Gamble; correct? A: Yes.").) And counsel for the IMI Fabi entities again conceded in closing: "So, did we sell some talc that got shipped to Procter & Gamble? Oh, absolutely." (R. p. 490; Trial Tr. 2026:11–12.)

Despite these concessions, the Plants spent a considerable portion of their examination of Mr. Fabi showing the jury evidence that the IMI Fabi entities had knowledge that some cosmetic talc they sold to Cosmetic Specialties ended up with Procter & Gamble at facilities in New Jersey and Maryland, as the Plants wanted to draw a connection between a cosmetics manufacturer that allegedly contributed to Mrs. Plant's illness and talc sold by an IMI Fabi entity. (R. pp. 378–391; Trial Tr. 1196:5–1209:20.)

What was missing then, ***and what's still missing now***, is anything from Procter & Gamble that demonstrates any IMI Fabi talc was ever included as an ingredient in any actual product line that Mrs. Plant ever used. Without any Procter & Gamble formula demonstrating that an IMI Fabi entity's talc was used in a product with which Mrs. Plant had any contact, there remains an enormous evidentiary hole in the Plants' case—a hole that could have only been filled by records at Procter & Gamble, not from IMI Fabi. (R. pp. 490–491; Trial Tr. 2026:11–2027:3.) Nor is there any evidence that there was asbestos in any of those products.

There is simply nothing "new" with respect to Procter & Gamble that the Plants didn't already know in advance of trial, nor is there anything "new" that fills a fatal evidentiary gap in the Plants' proof of causation. At bottom, the "new" link that the circuit court thought it was creating between IMI Fabi (Diana) and Procter & Gamble for Rule 60(b)(2) purposes has been known and conceded throughout, and it is legal error to cite it as a basis for a new trial.

Talc Samples. Third, the circuit court stated that "Attorney Sommerville also concealed talc samples which could have been tested by Plaintiffs and test results which could have been evaluated by Plaintiffs." (R. p. 15; Am. Order Granting New Trial at 15.) This overlooks an obvious "due diligence" problem: the Plants never sought production of talc samples that IMI Fabi (Diana) sold to its sole customer, Cosmetic Specialties.

A litigant isn't entitled to a new trial for an adversary's failure to produce something that was never the subject of a discovery request. No judgment would ever truly be final if the trial-loser could dream up some additional piece of evidence it wished it had pursued before the jury returned its verdict. *See Lanier*, 364 S.C. at 220, 612 S.E.2d at 460–61 ("Where a litigant could have discovered the new evidence prior to trial, he or she is not entitled to relief under Rule 60(b)(2).").

The Entirety of IMI Fabi (Diana)'s Materials. The only materials the circuit court explicitly identified as part of its Rule 60(b)(2) ruling were the Cosmetic Specialties contracts, links to Procter & Gamble, and talc samples. But underlying its order is the general position that IMI Fabi (Diana) should have produced the entirety of its materials. The company has not been operational since 2004, and the circuit court—***after*** the *Plant* trial, but ***not*** in this case—ordered IMI Fabi (Diana) to produce the entirety of its records, which was approximately seven bankers' boxes worth of materials. And IMI Fabi (Diana) has indeed done so.

But the Plants did not serve such a "give us everything" production request. Instead, they served targeted requests to which Mr. Sommerville—as the custodian of the IMI Fabi (Diana) records—and his associates exercised their professional judgment when reviewing documents for their potential responsiveness. (R. pp. 638, 645–647; Hr'g Tr. 34:4–15, 61:1–15, 63:20–64:12, 65:8–66:10, 70:16–22 (Aug. 21, 2024).)

Key to the Rule 60(b) motion, though, is that Mr. Fabi testified during his deposition that Mr. Sommerville maintains the IMI Fabi (Diana) documents. (R. p. 494; Fabi Dep. 25:14–24.) Just as they ignored Cosmetic Specialties, the Plants did nothing to secure the totality of IMI Fabi (Diana)'s records until after the jury returned a verdict in the IMI Fabi entities' favor. The Plants could have served a follow-up document request after Mr. Fabi's Rule 30(b)(6) deposition for the complete set of the IMI Fabi (Diana) materials. But they did no such thing, and that failure necessarily voids their Rule 60(b) motion. *See, e.g.*, *Raby Construction*, 358 S.C. at 21–23, 594 S.E.2d at 484 (denying motion for new trial based on "newly discovered" evidence when the adverse party testified about the information during a deposition but the movant never followed up).

* * * * *

In summary, nothing that the circuit court identified as "newly discovered evidence" to support its Rule 60(b)(2) ruling is actually "new" or something that the Plants could not have discovered in advance of trial with a modicum of due diligence. This is why alleged discovery defects do not provide a basis for a new trial, and the circuit court's ruling is wrong as a matter of law and should be reversed. *Raby Construction*, 358 S.C. at 21–23, 594 S.E.2d at 484; *Lanier*, 364 S.C. at 220, 612 S.E.2d at 460–61; *Bowman*, 357 S.C. at 152, 591 S.E.2d at 657.

2. Nothing in the "new" evidence could possibly affect the verdict.

All of the noise created by Plants' post-trial filings is meaningless unless they can show that the "new" information would likely prompt a jury to reach a different outcome. *Lanier*, 364 S.C. at 217, 612 S.E.2d at 459. Otherwise, the "new" evidence is either merely cumulative or irrelevant. *See, e.g.*, *Jamison v. Ford Motor Co.*, 373 S.C. 248, 272–73, 644 S.E.2d 755, 768 (Ct. App. 2007) (affirming denial of a Rule 60 motion based on the plaintiff's post-trial discovery of

a Ford brochure regarding a car model because the brochure still would not have proven the "feasible alternative design" element of the plaintiff's claim).

The circuit court declared that the "newly-discovered" information—which, as discussed above, is not "newly-discovered" and was either already presented to the jury or never requested in discovery—would "more than likely, or probably, change the result" because the jury returned a verdict against WCD "based on evidence submitted to the jury that is substantively similar to the newly discovered IMI Fabi evidence." (R. p. 16; Am. Order Granting New Trial at 16.) This is simply not true, and the reason is obvious: this information was ***already presented to the jury***, and the jury returned a verdict in favor of the IMI Fabi entities anyway.

The jury was already told that the IMI Fabi entities sell their cosmetic talc to Cosmetic Specialties. (R. pp. 373–374, 376–377, 379, 391, 416; Trial Tr. 1191:25–1192:13, 1194:16–1195:3, 1197:4–6, 1209:1–19, 1234:11–16.) And the jury was also already told that Procter & Gamble used IMI Fabi cosmetic talc in its products; the IMI Fabi entities themselves even made this point in both their opening statement and closing argument. (R. p. 319, 379, 378–391, 490; Trial Tr. 280:13–17, 1197:19–21, 1196:5–1209:20, 2026:11–12.)[4] Neither of these facts prompted the jury to find the IMI Fabi entities liable.

[4] Elsewhere in the new-trial order, the circuit court stated in passing that the IMI Fabi (Diana) materials also revealed that other manufacturers ultimately used IMI Fabi cosmetic talc, though there is nothing in the record showing whether those manufacturers used IMI Fabi cosmetic talc in the particular product lines that Mrs. Plant used. (R. p. 17; Am. Order Granting New Trial at 17.) But that stray statement is just as irrelevant to the Rule 60(b) analysis as are the Procter & Gamble references, as the Plants already had information about these manufacturers using IMI Fabi talc in advance of trial. (*See, e.g.*, R. p. 1544; Plants' Motion for New Trial at 6 (conceding that the IMI Fabi entities produced documents involving Revlon); R. pp. 2573–2600 Exhibits to IMI Fabi's Supplemental Memorandum in Opposition to Motion for New Trial (demonstrating that Avon itself told the Plants that it used IMI Fabi cosmetic talc, information the Plants chose not to reveal to the jury, and IMI Fabi (Diana) produced a "certification" from IMI Fabi (Diana) to Cosmetic Specialties regarding Talc 141 specifically in response to Revlon orders).) "New"

Not only was the "new" evidence already presented to and rejected by the jury, the Plants' own theory of the case neuters any argument that larding additional information regarding Cosmetic Specialties, Procter & Gamble, or any other manufacturer that ultimately used IMI Fabi cosmetic talc into the record could change the outcome. And that's because the testimony at trial was unrebutted that IMI Fabi talc doesn't contain asbestos. This was a fundamental shortcoming of the Plants' claims against the IMI Fabi entities, and not a shred of "new" evidence touches that point.

The trial was about whether the IMI Fabi entities' talc contained asbestos. The Plants insisted that it did, but offered no true proof on the point, and the jury ultimately rejected the Plants' argument. The circuit court's new-trial order tried to reframe the trial as one involving "an absence of evidence supporting product identification," but the transcript and serial testimony offered by the Plants' experts belie the circuit court's reasoning and expose the irrelevancy of additional information about other manufacturers. (R. p. 16; Am. Order Granting New Trial at 16.)

To be clear: the Plants argued throughout trial that the source of the talc, not the ultimate end manufacturer, is all that mattered for their case. The Plants' expert Dr. Longo testified:

> We used Chinese talc. I'm very familiar with Chinese talc. I've analyzed it. ***It doesn't matter what the brand or manufacturer it is.***
>
> And I like to cook, so I'll go back to cooking. You can make how many different cakes with the same kind of flour? Doesn't matter what the cake is. You use this type of flour—if we're talking about that particular flour, it could be, you know, a carrot cake, it could be a chocolate cake, the vanilla icing on a cake. It doesn't matter. They're using the same source from the different manufacturers and you know what that source is, then you can talk about it.

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evidence that is "merely cumulative" is meaningless under Rule 60(b)(2). *Lanier*, 364 S.C. at 217, 612 S.E.2d at 459.

(R. p. 334; Trial Tr. 470:3–14 (emphasis added).) Then the Plants' expert Dr. Haber testified:

> Q: I want to take a moment. When you try to figure out if there is a routine problem with a powder product being used on babies and children in their home, does it matter whether it comes in a pink bottle or a white bottle or a jar or if it has a label that says J&J or Chanel or Mary Kay, or does it matter what source the talc came from?
>
> [Objection]
>
> A: No. ***It doesn't matter to me what the label says, what the name says, what the—the flavor.*** If you have got a powder product, I need to know where the source is. And if the source is problematic, then I've got a concern.

(R. p. 334; Trial Tr. 708:4–15 (emphasis added).) Then the Plants' expert Mr. Bailey testified:

> Q: And, so, I think the first thing I wanted to ask, because I think this has come up a bit in this trial, is, if you're asked to offer an opinion about whether a talc product contains asbestos, do you only consider testing of the particular product in question, or do you also consider testing of other talcs that contained—other products that contained talc from the same source?
>
> A: Yes. You may have a couple of different types of products that one has been tested a lot, one has not been tested very much or at all, but if you can tell that those—the talc is from the same mine, then you can make the connection and say that the other material or talc product that has not been tested much will contain asbestos.
>
> Q: ***Does it matter to you as a scientist whether the talc came in certain packaging or was a certain brand, or is it the talc source that matters?***
>
> A: ***It's the talc source.***

(R. pp. 354–355; Trial Tr. 1060:10–1061:4 (emphasis added).)

Then the Plants' counsel relied on this exact line of testimony and trial theme to avoid a directed verdict at the close of proof:

> So, the recitation of the facts by counsel for IMI Fabi is incomplete and inaccurate. Dr. Longo, on the 27th, on page 131, indicated that his lab has done extensive testifying of Chinese talc; that they found, in 106 of 112

> samples, the presence of asbestos; and then subsequently talked about reproducibility.
>
> A theme of the defendants, not just IMI Fabi, but our forgotten friends of Mary Kay and others, have always been you need to have testing that was specific of CoverGirl or Mary Kay, which is why we had an actual testing expert and not a lawyer say that's—he said it more politely than I am, but that's nonsense. It's not the brand. It's whether it's plastic. It's what's inside of it, and it's being from the same source. Both Dr. Longo and Dr. Haber indicated that the source of the talc testing and overwhelming finding asbestos was the same.

(R. pp. 453–454; Trial Tr. 1556:20–1557:11 (arguments of Plants' counsel).)

Then the Plants' counsel reinforced this exact theme and theory in closing:

> There is no dispute that, in the years that IMI Fabi was selling this to the public, it was Chinese talc. IMI Fabi's lawyers did not ask a single question challenging or even asking Dr. Haber about this connection. Not one.

(R. p. 471; Trial Tr. 1912:5–8 (arguments of Plants' counsel).)

The IMI Fabi entities addressed this theme head on in their own closing argument:

> So, where does that leave us? That leaves us China. And what did you hear about China? Dr. Longo said things like, "All Chinese talc is the same." He's checked it. He's checked it all.
>
> And there are a couple of things in evidence. There is Plaintiff's Exhibit No. 3804, which is one of those charts that the lawyers made, and it's a summary of MAS testing from Italy, Vermont, Montana, Brazil, and China, and when you flip to the back and you look at China, where did it come from? Chanel, Johnson & Johnson, Johnson & Johnson, Johnson & Johnson, Johnson & Johnson, and Avon. Not IMI Fabi. Not even Procter & Gamble.
>
> There's another one, Plaintiffs' Exhibit 3677. The first 43 pages are pictures of Johnson & Johnson products. And then, when you go all the way to the back here, there is some references to China. Some Chinese talc from someplace called Imerys, J&J, J&J, J&J, J&J, Chanel. Nothing about IMI Fabi.
>
> Now, Dr. Longo says it's all the same. It's 90,000 square miles. That's three times the size of the state of South Carolina. So, saying it's all the same, I think that's kind of like saying all American barbecue is the same,

> and it's 20 to 1:00 so the Lady Gamecocks have tipped off, but if they were here today and you went over to the Palmetto Pig over by the arena, that's where you're going to get South Carolina barbecue. Going to Midwood's Smoke House? That's not barbecue.
>
> Same concept applies to saying China. All talc in all 90,000 square miles is exactly the same? It's not reasonable. It's not a reasonable conclusion. Unless you have been to the mine where IMI Fabi is getting its talc and you tested that, you don't know what's in it or what's not in it, and none of that evidence came to you today.
>
> The only person who came and testified to you about that was Mr. Corrado Fabi. He said, before he got in the business, he went to China, and they looked with his team to find the most pure talc they could find, and they tested it, and they rejected the stuff that had asbestos in it. He wouldn't buy it because he didn't want to have a cosmetic talc source with asbestos in it to start.
>
> And you heard some testimony about—I think it was J&J and Pfizer trying to, like, remove asbestos from talc. IMI Fabi (Diana) and IMI Fabi LLC didn't do that. They didn't even want that question. They said, "We want to it start out pure. We're not going to try to take it out. We don't want it in there in the first place."
>
> And they said that, and then they checked to make sure. And they checked and they checked and they checked and they checked. And that's important because, if there's no asbestos in the product that IMI Fabi sold, then it can't cause mesothelioma. Even the plaintiffs' expert—this is Dr. Haber who said that: "Doctor, do you agree that talc without asbestos does not cause malignant mesothelioma?"
>
> ANSWER: "As far as I know, that's true."
>
> So I submit to you that for my clients, IMI Fabi (Diana) and IMI Fabi LLC, the plaintiffs have failed to meet their burden of proof with respect to the question of whether or not there, in fact, is asbestos in any of the cosmetic talc sold by IMI Fabi (Diana) or IMI Fabi LLC.
>
> And so, I would ask you, when you get the verdict form, and you're asked about the theories of liability for each of them, for IMI Fabi (Diana) and IMI Fabi LLC, you check no, because the plaintiffs have failed to meet the first thing they need on their burden of proof.

(R. pp. 484–487; Trial Tr. 2018:22–2021:11 (arguments of IMI Fabi's counsel).) Finally, the Plants' counsel brought the jury back to this exact same theme and theory in rebuttal:

> And in trying to make you believe that, they ignore the fact that there was powerful, undisputed evidence about asbestos in the exact source mine that they used over and over and over again. [*sic* There is no such testimony in the record.]
>
> This isn't helping me. Ah-ha.
>
> We're not talking about all American barbecue being the same. We're not talking about a 90,000-square foot region where lots of people live. We're talking about the specific talc mine that is the identical talc mine that was used by Chanel, that was used by Avon, that was used by Johnson & Johnson, which was established not only by Dr. Haber but by Dr. Longo.

(R. p. 492: Trial Tr. 2030:7–18 (argument of Plants' counsel).)

* * * * *

Nothing in the circuit court's order changes the Plants' fundamental failure of proof on the dispositive point that there is no asbestos in the IMI Fabi entities' talc. The law does not allow a circuit court to rewrite the history of a trial in order to grant a second one, but that is precisely how the new-trial order here reads. Because nothing in the "new" evidence addresses the Plants' complete failure of proof on a dispositive issue in the case, the circuit court erred as a matter of law by ordering a new trial. *E.g.*, *Jamison*, 373 S.C. at 272–73, 644 S.E.2d at 768; *Lanier*, 364 S.C. at 217, 612 S.E.2d at 459; *see also Morin v. Innegrity, LLC*, 424 S.C. 559, 578–79, 819 S.E.2d 131, 141–42 (Ct. App. 2018) (affirming the denial of a Rule 60(b) motion because the "newly discovered evidence" was not "outcome-changing"). Its ruling should be vacated, and the jury's verdict should be reinstated.

B. There is certainly no "fraud" here.

As an alternative basis for disregarding the jury's verdict and allowing a new trial, the circuit court declared that Mr. Sommerville "committed a fraud upon this Court" because (1) he supervised the document-review process for IMI Fabi (Diana)'s records and (2) he silently

watched Mr. Fabi testify that Cosmetic Specialties is the IMI Fabi entities' only customer of cosmetic talc. (R. pp. 17–19; Am. Order Granting New Trial at 17–19.)

This is absurd.

If allowed to stand, this ruling would make the litigation process an unnavigable minefield for attorneys. How can a lawyer legitimately exercise his or her professional judgment to evaluate the actual words used in an adversary's discovery requests when doing so risks exposing the lawyer to being accused of defrauding the court? And how can a lawyer legitimately undertake a risk that a client's honest answer to a deposition question can result in the lawyer being deemed a fraudster because the circuit court disagrees with the answer given?

The Court only needs to look to South Carolina Supreme Court precedent to vacate this untenable ruling, as it is wrong as a matter of law.

Rule 60(b)(3), SCRCP, permits a new trial when there is "fraud, misrepresentation, or other misconduct of an adverse party." The Plants must prove this position "by clear and convincing evidence." *See Gainey v. Gainey*, 382 S.C. 414, 427, 675 S.E.2d 792, 799 (Ct. App. 2009) ("When a party asserts grounds for relief because of fraud, misrepresentation, or other misconduct of an adverse party under Rule 60(b)(3), SCRCP, the movant must prove her entitlement by clear and convincing evidence.").

Most importantly, the South Carolina Supreme Court has unequivocally held that "[a]llegations of perjury, failure to produce requested discovery, or use of forged documents amount only to intrinsic fraud" and provide no basis for vacating a verdict and ordering a new trial. *Raby Construction*, 358 S.C. at 21 n.5, 594 S.E.2d at 483 n.5. As it explained:

> We reiterated in *Chewning* [*v. Ford Motor Co.*, 354 S.C. 72, 579 S.E.2d 605 (2003),] that "in order to secure equitable relief on the basis of fraud, the fraud must be extrinsic." . . . The classic case of intrinsic fraud is perjured testimony or presenting forged documents at trial. Allegations

> that a party failed to disclose documents also generally amount to intrinsic, rather than extrinsic, fraud.

Id. at 19, 594 S.E.2d at 482–83 (cleaned up).

While the IMI Fabi entities forcefully and completely reject the notion that either they or Mr. Sommerville have committed any type of fraud ***at all***, the circuit court's Rule 60(b)(3) ruling is wrong as a matter of law even if everything in the circuit court's order is true (which, again, it is not). What the circuit court has accused Mr. Sommerville of doing—failing to produce documents, and failing to correct alleged perjury—is exactly what the Supreme Court has held cannot be grounds for a new trial.

In fact, when the circuit court judge was on the Supreme Court, she took the same position on this issue that is found in the new-trial order here—a position that the rest of the Supreme Court expressly rejected. *Compare Aaron v. Mahl*, 381 S.C. 585, 593, 674 S.E.2d 482, 486 (2009) (holding "allegations that a party failed to disclose documents generally amount to intrinsic, rather than extrinsic, fraud") (4-1 majority opinion), *with id.* at 596, 674 S.E.2d at 488 (arguing in dissent that "repeatedly failing to disclose the Collection Agreement constituted extrinsic fraud") (Toal, C.J., dissenting).

Tellingly, the only authority cited in the circuit court's order is the same *Chewning* decision on which *Raby Construction* relied for its holding that allegations of failing to produce requested documents and of perjury do not give rise to a new trial. In *Chewning*, the Supreme Court held that allegations that counsel for Ford had proactively hired a fake expert witness "to testify falsely during numerous Bronco II trials" and then "knowingly withheld" materials that would have proven the falsity of that testimony were sufficient to support a claim for fraud to survive a Rule 12(b)(6) motion. 354 S.C. at 85–86, 579 S.E.2d at 612. That bears no resemblance to this matter.

Here, the circuit court took issue with Mr. Fabi's testimony that Cosmetic Specialties is the exclusive customer of the IMI Fabi entities with respect to cosmetic talc. (R. p. 17; Am. Order Granting New Trial at 17.) In the circuit court's view, the end users of that talc—manufacturers like Procter & Gamble—should also be considered "customers" of the IMI Fabi entities, and Mr. Sommerville's failure to correct Mr. Fabi's testimony on this point "knowingly induced and permitted perjured testimony to be given by Mr. Fabi on behalf of IMI Fabi." (*Id.* at 18.)

Respectfully, there is nothing untrue at all about Mr. Fabi's testimony, and it is a significant overreach by the circuit court to deem an out-of-state attorney a fraudster and a corporate representative a liar because the circuit court disagrees with how a company characterizes to whom it sells its products. What's more, the evidence fully demonstrates the truthfulness of Mr. Fabi's testimony and the propriety of Mr. Sommerville's "silence" during that testimony.

Mr. Fabi testified that Cosmetic Specialties was the exclusive customer of the IMI Fabi entities, including IMI Fabi (Diana), for cosmetic talc. (R. pp. 373–374, 378–379; Trial Tr. 1191:20–1192:13, 1196:23–1197:6.) And he testified that IMI Fabi (Diana) sold its cosmetic talc to Cosmetic Specialties F.O.B. from the IMI Fabi (Diana)—and later the IMI Fabi LLC—dock. (R. p. 374; Trial Tr. 1192:9–13.)

Mr. Fabi testified that once the IMI Fabi entity sells its cosmetic talc to Cosmetic Specialties, the IMI Fabi entity does not track where its talc ends up, and it only has "very limited knowledge" of where its talc may end up "because Cosmetic Specialties has always been very protective of its customer list." (R. pp. 376–377; Trial Tr. 1194:16–1195:3.) He juxtaposed sales of cosmetic talc, which the IMI Fabi entities sell to Cosmetic Specialties for it to then sell

to its own customers, with sales of industrial talc, which the IMI Fabi entities sell directly to end users:

> Q: Yeah. So, the idea that everything that IMI Fabi sells goes to Cosmetic Specialties and you have no knowledge of what happens after that isn't always the case; right?
>
> A: No, I disagree, because we don't know what Cosmetic Specialties and its customers do with our products. And if we speak of industrial talc, we sell directly, then we don't know what customers do with our material.
>
> Court Reporter: I'm sorry, I didn't get the end of your sentence.
>
> A: Sorry?
>
> Court Reporter: I didn't understand. "Then we don't know what customers . . . "
>
> A: Industrial—the talc customers are direct customers, so many cases, we know what industrial talc customers do with our material.

(R. p. 391; Trial Tr. 1209:1–16.)

Mr. Fabi never denied knowing that some IMI Fabi cosmetic talc ended up with manufacturers, such as Procter & Gamble. (*See, e.g.*, R. p. 501; Fabi Dep. 63:7–9 ("We are aware that Cosmetic Specialties sold our products to Procter & Gamble.").) He also explained Cosmetic Specialties would sometimes request the IMI Fabi entity to send a certificate of analysis to Cosmetic Specialties' own customer regarding the IMI Fabi entity's talc. (R. p. 392; Trial Tr. 1210:10–25.) But Mr. Fabi does not consider the manufacturers that may purchase talc from Cosmetic Specialties to also be IMI Fabi's actual customers—because they aren't.

The documents upon which the circuit court based its incorrect conclusion specifically show that Cosmetic Specialties is the entity placing the purchase order with IMI Fabi (Diana), even if the ultimate shipping destination is to one of Cosmetic Specialties' own customers. (*E.g.*, R. p. 1138; Cosmetic Specialties Purchase Order 101915-16.)

And to remove any doubt, Mr. Grexa, the owner of Cosmetic Specialties, agrees with Mr. Fabi's testimony on the very point on which the circuit court declared Mr. Fabi to be a liar. (*See, e.g.*, R. p. 2620; Grexa Dep. in *Lozano* ("Q: Does CSI consider Revlon one of its customers or an IMI Fabi customer? A: Yes, we would consider Revlon a CSI customer."); R. p. 2625; Grexa Dep. in *Diaz* ("IMI Fabi would not be involved in—with documents with regard to Revlon. The relationship would be between Revlon and Cosmetic Specialties.").)

The circuit court's disagreement with the actual witnesses about how they run their respective companies is no basis for a finding of "fraud." The new trial order should be vacated.

* * * * *

At bottom, the circuit court's Rule 60(b)(3) ruling is directly contrary to controlling law and can be vacated on that basis alone. But the Court should not lose sight of the fact that there is simply no "fraud" in play here at all. Rather than only vacating the circuit court's ruling as being wrong as a matter of law, the IMI Fabi entities respectfully urge the Court to acknowledge the absence of any type of "fraud" here in order to restore Mr. Sommerville's professional standing and Mr. Fabi's credibility, which have been improperly attacked without any basis.

CONCLUSION

The IMI Fabi entities do not belong in a South Carolina court because they have no contacts whatsoever with this state related to the subject matter of this case. The circuit court committed a constitutional error when it declared that their generalized existence within the "stream of commerce" was sufficient to subject them to personal jurisdiction here, and the United States Supreme Court has rejected the circuit court's exact reasoning.

But even if jurisdiction did attach to either IMI Fabi entity, there is nothing in the law or the record to support the circuit court's decision to throw out the jury's defense verdict. The

South Carolina Supreme Court has rejected the circuit court's exact reasoning regarding its grounds for ordering a new trial as to IMI Fabi (Diana). And there is nothing at all in the circuit court's new-trial order that relates to IMI Fabi, LLC, or IMI Fabi (USA) (which the Plants have already dismissed as a defendant), making the order facially defective as to those two entities as well.

Accordingly, the IMI Fabi entities respectfully request that the Court vacate the circuit court's jurisdictional rulings, vacate the circuit court's new-trial order, or both.

Respectfully submitted,

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PROOF OF SERVICE

I, the undersigned of the law offices of Womble Bond Dickinson (US) LLP, attorneys for Appellants, do hereby certify that I have served all parties to this appeal with a copy of the pleading(s) specific below by emailing them at the addresses below:

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