THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Jean H. Toal, Circuit Court Judge

Appellate Case No. 2024-001997
Civil Action No. 2022-CP-40-01265

Sarah J. Plant and Parker Plant, ...Respondents,

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.

FINAL BRIEF OF RESPONDENTS

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COUNTER-STATEMENT OF ISSUES ON APPEAL

1. **New Trial.** More than eight months after a jury found Appellants IMI Fabi, LLC and IMI Fabi (Diana) LLC (collectively, the "Fabi Defendants") were not liable for supplying asbestos-containing talc that caused Respondent Sarah Plant's malignant mesothelioma, Sarah and Parker Plant ("Plaintiffs" or "the Plants") discovered the Fabi Defendants failed to turn-over a large volume of material evidence, specifically requested in discovery, that supports the Plants' product liability claims. The Plants requested a new trial. After three hearings and substantive briefing, the circuit court granted that request. Did the circuit court abuse its discretion by ordering a new trial based on newly discovered evidence that the Fabi Defendants supplied the asbestos-containing talc Mrs. Plant was exposed to in numerous brands of cosmetic products? Did the circuit court abuse its discretion in ordering a new trial based on finding the Fabi Defendants committed fraud on the court in willfully concealing this evidence?

2. **Personal Jurisdiction.** The Fabi Defendants made millions of dollars from the sale of talc in South Carolina and knew their products would be used nationwide. The circuit court determined it had personal jurisdiction due to the Fabi Defendants' minimum contacts after completing an analysis under the widely recognized stream of commerce theory. Was the circuit court's decision to deny both the Fabi Defendants' motion to dismiss and motion for directed verdict unsupported by evidence or influenced by an error of law?

STATEMENT OF FACTS AND STATEMENT OF THE CASE[1]

I. Mrs. Plant used makeup throughout her life, including CoverGirl, Revlon, L'Oreal, Clinique, Estee Lauder, and Avon.

As a little girl, Mrs. Plant played dress-up with her family and performed in recitals, applying makeup provided by her mom and aunts. (R. p. 0429, lines 6-13; R. p. 3119, lines 91:3-20). During her youth, her mom also used Avon body powder in the house and on Mrs. Plant. (R. p. 0322, line 13-p. 0324, line 1).

Starting in middle school, Mrs. Plant created her own makeup routine and found products that she used "almost every day," with an increase to daily use in high school. (R. p. 0429, lines 1-5). Mrs. Plant used CoverGirl the most. To her, "makeup and CoverGirl were synonymous." (R. p. 0430, lines 3-4). In fact, she does not "remember ever not using CoverGirl." (R. p. 0430, line 3). The record shows (at a minimum) that she used the following products regularly:

Brand	Product	Minimum Timeframe[2]	Source
CoverGirl	foundation powder, blush, eyeshadow, bronzer	1998 - 2021	R. p. 0430, lines 11-23; p. 0431, line 1-p. 0432, line 21; p. 0357, lines 15-17; p. 1708, lines 77:7-13
Revlon	eyeshadow	2002 - 2005	R. p. 1707, lines 73:12-19; p. 0440, line 24-p. 0441, line 1

[1] Plaintiffs provide the Statement of Facts and Statement of the Case together because they are inextricably linked. The facts underlying Plaintiffs' claims and the evidence available to prove those claims are the foundation for the proceedings on the motion for new trial.

[2] Mrs. Plant was born in 1986. (R. p. 0320, lines 1-2). She attended middle school from the late 90's to the early 2000's (R. pp.0438, line 22-p. 0439, line 12), high school from 2001 to 2005 (R. p. 0437, lines 10-11), and college from 2005 to 2011 (R. p. 0321, lines 4-12).

L'Oreal	eyeshadow	2005 - 2011	R. p. 1712, line 90:25-91:2; p. 1723, lines 496:11-19 (high school); p. 0441, lines 2-6
Clinique	holiday packs (blush and eyeshadow), eyeshadow	2001-2011	R. p. 1710, line 85:2-p. 1711, line 86:1; p. 1711, lines 87:25-88:10; p. 1696, lines 166:8-22 and 168:6-21
Estee Lauder	holiday packs (blush and eyeshadow)	2001-2008	R. p. 1695, lines 163:15-164:3; p. 1696, lines 166:8-22 and 168:6-21
Avon	eyeshadow	2001-2008	R. p. 1693, lines 91:3-20

II. Mrs. Plant was diagnosed with mesothelioma and sued the companies that exposed her to asbestos.

Mrs. Plant led a relatively active lifestyle—hiking, biking, and enjoying time with her children. (R. p. 0433, line 23-p. 0434, line 1). When she started to have trouble breathing, she decided to go see a doctor. (R. p. 0358, lines 15-22). While her doctor initially suggested it could be adult-onset asthma, her precautionary chest x-ray revealed a problem with her lungs that needed immediate additional scanning. (R. p. 0423, lines 9-11; p. 0358, lines 15-22). Mrs. Parker, a married woman with three young children, received a diagnosis of mesothelioma in 2021 at the age of 35. (R. p. 0357, lines 15-17; p. 0436, lines 18-21). People diagnosed with mesothelioma have nine to eighteen months to live on average. (R. p. 0435, lines 21-22).

It is well-known that asbestos exposure causes mesothelioma, and in the last few years there has been a significant uptick in scientific publications detailing the connection between cosmetic talc and mesothelioma. (R. p. 0327, line 17-p. 0328, line 9; p. 0332, lines 7-14). Both asbestos and talc are naturally occurring minerals that are mined out of the earth. (R. p. 0326, lines 1-3; p. 0335, line-p. 0336, line 1). When

talc forms, it is not just pure talc, it always has "accessory minerals," including asbestos. (R. p. 0336, lines 2-17). Determining the cause of the disease involves taking a comprehensive look at a person's lifetime exposures to asbestos sources, including talc—as the time between exposure and diagnosis historically has been anywhere from 20 to 80 years. (R. p. 0329, lines 8-13).

Mrs. Plant and her husband sued various cosmetic talc manufacturers, suppliers, distributors, and end-product sellers of makeup and body powders. (R. pp. 0093-0160). Plaintiffs alleged that each defendant: (1) was negligent and its negligence was a proximate cause of Mrs. Plant's injuries; (2) was strictly liable for selling defective products that were a proximate cause of Mrs. Plant's injuries; and (3) breached an implied warranty in selling its products, and its breach was a proximate cause of Mrs. Plant's injuries. (R. pp. 0093-0160). Of the over 50 defendants included in the complaint, Plaintiffs only tried three defendants to verdict: the Fabi Defendants, including IMI Fabi, LLC ("IMI Fabi") and IMI Fabi (Diana) LLC ("IMI Fabi Diana"),[3] and Whittaker, Clark, and Daniels, Inc. ("WCD"). (R. pp. 0709-0711). The Fabi Defendants mill and sell talc, including talc sourced from Guangxi, China for incorporation into cosmetic and industrial products. (R. p. 1224, lines 2-7).[4] WCD acted as a distributor of milled talc, which included the sale of talc mined from Montana and Italy to the manufacturer of Gold Bond. (R. p. 0348, line 11-p. 0350,

[3] Plaintiffs also sued IMI Fabi (USA), but Plaintiffs dismissed the complaint against IMI Fabi (USA) during trial. (R. p. 0464, line 24-p. 0465, line 7).

[4] IMI Fabi Diana sold cosmetic talc from 2001 to 2004, IMI Fabi picked up the cosmetic side of the business after IMI Fabi Diana closed, and it sells cosmetic talc to this day. (R. p. 0367, line 21-p. 0369, line 4).

line 14; p. 0351, line 23-p. 0352, line 5; p. 0479, lines 15-16; p. 0480, line 19-p. 0481, line 4). The trial centered around two main issues: (1) whether each Defendant's talc had asbestos and (2) whether Mrs. Plant was exposed to the same.

First, Plaintiffs presented evidence that Defendants' talc contained asbestos. Plaintiffs' expert Dr. Longo explained when determining asbestos content "[i]t doesn't matter what the brand or manufacturer it is," as what matters is the source mine. (R. p. 0333, lines 13-19; p. 0334, lines 3-5). Dr. Longo testified about the tests he did on talc from source mines in China, Italy, and Montana. (R. p. 0337, line 22-p. 0338, line 25). His tests overwhelmingly showed talc from these source mines contained asbestos:

Source Mine	**Positive Tests / Total Sample**	**Identified Manufacturers**
China	106 / 112	Chanel, J&J, Avon
Italy	95 / 119	J&J, Cashmere Bouquet, Avon, Coty, Chanel
Montana	36 / 36	Gold Bond, Clubman, Pfizer, Avon

(R. pp. 0802-0805). In addition, the Plaintiffs presented evidence regarding FDA testing of Johnson & Johnson talc sourced from China, which the FDA found contained asbestos. (R. p. 0339, lines 9-24).

The Defendants, on the other hand, argued that their talc was devoid of asbestos. The Defendants attempted to counter Plaintiffs' evidence with similar arguments regarding the purity of their talc and the absence of asbestos contamination:

Argument	WCD (Italian/ Montana Talc)	Fabi Defendants (Chinese Talc)
Their talc was pure.	• "[T]he Montana talc, they went and found the ***purest talc*** they could find in the world to use in cosmetic talc." (R. p. 0479, lines 15-16). • WCD's expert went to Italy "himself and done the test and he shows how it develops and why you would expect it to be ***so pure*** and listed lots and lots of studies that tested for Italian talc." (R. p. 0480, line 19-p. 0481, line 4).	• Mr. Fabi "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." (R. p. 0486, lines 5-10).
Their talc did not contain asbestos.	• "And so, there's no epidemiological basis to conclude that Mrs. Plant's mesothelioma has anything to do with cosmetic talc. And there's good reason; it's not contaminated with asbestos." (R. p. 0478, lines 17-20).	• The Fabi Defendants "didn't warn about asbestos because, when that product left my client's dock, it didn't have asbestos in it." (R. p. 0483, lines 8-10). • "[T]hey carefully vetted their source mine, they vetted their talc on arrival, they vetted the finished product, and then did annual testing." (R. p. 0482, lines 8-11).

The parties disagreed on a very fundamental question—how to test talc for asbestos. The available tests have varying sensitivity levels, thus producing different results. (R. p. 0473, lines 21-25). This, in part, explains the stark contrast between the parties' positions. Without going into the particulars of the different testing types, WCD and the Fabi Defendants chose to use J4-1 testing. (R. p. 0473, lines 21-25; p. 0475, lines 12-13). While the Fabi Defendants said they went above and beyond that, it is the only type of testing listed on the documents certifying the absence of asbestos

in their talc. (R. p. 0475, lines 12-13). Unlike Plaintiffs' experts, neither company used the more sensitive TEM testing, which scientists have urged is a superior testing method. (R. p. 0474, lines 1-2; p. 0476, lines 20-24).

Second, with respect to product identification, Plaintiffs presented evidence that Mrs. Plant used CoverGirl and Gold Bond, which was uncontested by the Defendants. Plaintiffs argued that the Fabi Defendants sold a product called Talc 141, that CoverGirl formulas pre-dating the Fabi Defendants used Talc 141, and that the Fabi Defendants sold Talc 141 to Procter & Gamble ("P&G") during 2001 to 2021 when Mrs. Plant used CoverGirl. (R. p. 0470, line-p. 0471, line 4; p. 0469, lines 22-24). The Fabi Defendants argued that while CSI distributed their talc to P&G and P&G made CoverGirl products, "Procter & Gamble made all kinds of makeup. It doesn't mean it got into something Ms. Plant used. There's argument that IMI Fabi was Covergirl's sole supplier. There's no evidence of that." (R. p. 0490, lines 15-19). Plaintiffs' evidence established Mrs. Plant used Gold Bond in the 90's and early 2000's and WCD acted as the exclusive provider to Gold Bond for years. (R. p. 0469, lines 17-21; p. 0472, lines 2-7). WCD argued that the Gold Bond powder used by Mrs. Plant did not contain its talc, because the evidence only showed she used it in 2013 and WCD stopped distributing talc in 2004. (R. p. 0477, lines 2-10).

Third, Plaintiffs established that exposure to asbestos in cosmetic talc products was a substantial factor in causing Mrs. Plant's mesothelioma. Asbestos that gets released into the air and breathed in—no matter the fiber type and no "matter where the asbestos is found, what the product is"—causes genetic damage.

(R. p. 0343, lines 13-22). Essentially, the asbestos fibers damage genes that protect humans from defenses against errors in cells. (R. p. 0331, lines 9-19). As a result, the International Agency for Research on Cancer has confirmed that talc containing asbestiform fibers is a Group 1 carcinogen. (R. p. 0343, lines 1-12). Most importantly, talc that contains asbestos, without a doubt, "causes cancer in humans." (R. p. 0343, lines 9-12). If a person is exposed to asbestos levels above background, and a person gets mesothelioma, it is caused by asbestos. (R. p. 0330, lines 2-12). The background level of asbestos in the air generally is low—it is 0.0003 fibers per cc. (R. p. 0347, lines 16-21). Studies have shown, however, that using a product containing talc with trace amounts of asbestos "would exceed the standards—occupational standards, which at that time, was at 5 fibers per [cubic centimeter]" (R. p. 0346, lines 2-11). There are hundreds of papers showing people who have been exposed to cosmetic talc and who now have mesothelioma. (R. p. 0332, lines 7-14).

Mrs. Plant's exposures started when she was a baby, and a 30-year latency period is within the typical window between first exposure and diagnosis. (R p. 0340, lines 10-18). Because she used CoverGirl on her face at least weekly for 15-plus years, Plaintiffs' causation expert Dr. Haber concluded this exposure was a substantial factor in the development of her mesothelioma. (R. p. 0345, lines 1-16). She also used Gold Bond on her body at least weekly for over a decade, which was also a substantial factor in her development of mesothelioma. (R. p. 2964, lines 2-25).

Ultimately, the jury found WCD liable and ordered the company to pay $29 million to the Plants. (R. pp. 0709-0711). The jury, however, found the Fabi

Defendants not liable. (R. pp. 0709-0711). The question then became why the jury found WCD liable but not the Fabi Defendants.

III. The circuit court held three hearings regarding the Fabi Defendants' withholding of relevant documents and ultimately ordered a new trial.

In seeking discovery in another case in South Carolina, Plaintiffs' counsel learned that the Fabi Defendants withheld a substantial amount of evidence in this case. During discovery in this case, the Fabi Defendants stressed they had few documents and limited knowledge about where their talc went because it was all sold via a distributor—Cosmetic Specialties Inc. ("CSI"). (R. p. 0373, line 20-p. 0374, line 16). Plaintiff's counsel later learned the Fabi Defendants played an active role in the sale of their talc, routinely sent it directly to manufacturers, sold a large volume of talc, and kept records detailing the same. (R. pp. 2141-2180). Counsel identified significant inconsistencies between the new information and the evidence the Fabi Defendants disclosed in depositions, discovery responses, and trial testimony in this case. (R. pp. 2141-2180). It became clear the Fabi Defendants had substantial responsive records that they chose not to produce in this case. Less than a year after the jury's verdict, Plaintiffs decided to bring this issue to the circuit court's attention and filed a motion for new trial under South Carolina Rule of Civil Procedure 60(b)(2) and (3), contending that the Fabi Defendants concealed documents and committed fraud. (R. pp. 1539-1559).

The Honorable Judge Jean Toal (Chief Justice of the South Carolina Supreme Court, Retired) held the first hearing on the motion for new trial in April of 2024. (R. p. 0509, lines 4:4-10). The circuit court noted that "something is not right about this,

and I am disturbed about that. And I want to get to the bottom of it before I make any kind of ruling on this matter." (R. p. 0525, lines 70:19-23). Due to the seriousness of the accusations and the drastic remedy requested, the circuit court noted the necessity "to do several things that [were] going to be time consuming, but they need[ed] to be done." (R. p. 0525, lines 71:10-12). The circuit court needed to know more about how the new documents and the Defendants' lies related to product identification, which the circuit court viewed to be the "centerpiece" of the Fabi Defendants' argument and "the basis upon which the jury discharged IMI Fabi from liability." (R. p. 0517, line 39:19-p. 0518, line 40:23). The circuit court indicated its intention to conduct a second hearing, where the judge intended to allow the Fabi Defendants' counsel, including Mr. Sommerville, to explain what happened in more detail. (R. p. 0525, lines 70:8-14).

At the second hearing in June, the circuit court wanted to learn more about why certain records were not produced and to understand the extent of the newly discovered evidence. Plaintiffs submitted an initial chart to the circuit court explaining the responsive material that was withheld by both IMI Fabi Diana and IMI Fabi, and the materiality of the information contained within. (R. p. 0552, lines 9-14). The circuit court specifically wanted to hear why Mr. Sommerville did not turn over relevant IMI Fabi Diana documents, but he advised the circuit court of a conflict the day before the hearing. (R. p. 0615, lines 4-21). At the time of trial, Mr. Sommerville acted as "the lawyer responsible for coordinating all their asbestos litigation in the United States." (R. p. 0591, lines 3-6). He also acted as the custodian

for the IMI Fabi Diana records. (R. p. 0637, line 32:6-p. 0638, line 33:22). Despite this setback, the circuit court still held the hearing and provided the parties with an opportunity to speak on the issues. The circuit court also further clarified that the issue was not the failure to produce one document, but the problem was "all the other stuff that links IMI Fabi to the manufacturers of the cosmetics that appeared long after this case was tried." (R. p. 0589, lines 9-14).

The circuit court set a third hearing in August. As was a common thread, the circuit court again stressed the gravity of granting a new trial and acknowledged that "[a] new trial is a very, very high standard." (R. p. 0631, lines 9-10). Having received all of Mrs. Sommerville's IMI Fabi Diana records and discovery as to IMI Fabi from other cases, Plaintiffs provided the circuit court with a 40-page chart detailing what they thought the Fabi Defendants concealed. (R. p. 0641, lines 45:8-12). This time, the circuit court heard from Mr. Sommerville. (R. p. 0637, line 32:6-p. 0638, line 35:20). He explained that he and two associates went through the IMI Fabi Diana documents and determined what to produce to Plaintiffs. (R. p. 0643, lines 55:4-56:2). Mr. Sommerville testified "I did my best. I made a good faith effort. I didn't intentionally conceal anything. But I have done one go-through of those documents with two good associates, and I sent them down." (R. p. 0645, lines 61:3-7). The Fabi Defendants ask this Court to believe the inquiry should have ended after Mr. Sommerville denied that he intentionally withheld anything. When doing his review, however, he "wasn't looking specifically for P&G or Avon or anybody." (R. p. 0645, lines 64:4-5). The circuit court, after hearing his testimony and reviewing all the

documents, decided that Mr. Sommerville "made a decision knowing what the documents said." (R. p. 0660, lines 124:6-7). He may have said "I'm rushed and that kind of thing, but he knew what the documents were." (R. p. 0660, lines 124:8-10). It appeared he decided not to disclose relevant evidence subject to Plaintiffs' discovery requests to Mr. Fabi and to Plaintiffs' counsel.

The circuit court then gave the parties one more chance to argue their case. The circuit court stated "I'm unsure about this thing, quite honestly. My inclination is to grant a new trial, but I want to look one more time at the very arguments" made by defense counsel in closing. (R. p. 0663, lines 134:10-13). The circuit court agreed to admit the Fabi Defendants' closing argument video and watch it again. (R. p. 0663, lines 134:14-15). The circuit court requested both parties submit simultaneous dispositive orders and allowed them time to object to each other's filings. (R. p. 0663, lines 134:15-23).

Ultimately, the circuit court granted Plaintiff's motion as to newly discovered evidence and fraud on the court, acknowledging that thousands of pages were not produced. (R. p. 0013). While the Fabi 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." (R. p. 0013). The circuit court also opined that Mr. Sommerville's actions "induced, or suborned, Mr. Fabi to perjure himself on the stand during the *Plant* trial." (R. p. 0017).

ARGUMENT

I. The circuit court did not abuse its discretion in ordering a new trial under Rule 60(b), SCRCP.

A. Standard of Review

It is within the circuit court judge's "'sound discretion'" to determine how to rule on a motion for new trial under South Carolina Rule of Civil Procedure 60(b). *Curry v. Carolina Ins. Grp. of SC, Inc.*, 428 S.C. 60, 77, 832 S.E.2d 760, 768 (Ct. App. 2019) (citing *BB&T v. Taylor*, 369 S.C. 548, 551, 633 S.E.2d 501, 502 (2006)). As such, the appellate court is limited to review under an abuse of discretion standard. *Id.* "A trial court's order granting or denying a new trial upon the facts will not be disturbed unless the decision is wholly unsupported by the evidence or the conclusion reached is controlled by an error of law." *RFT Mgmt. Co. v. Tinsley & Adams L.L.P.*, 399 S.C. 322, 334, 732 S.E.2d 166, 172 (2012). The Fabi Defendants improperly attempt to incorporate a *de novo* standard into the analysis, by citing a case that has nothing to do with the review of a Rule 60 decision. *See Aiken v. S.C. Dep't of Revenue*, 429 S.C. 414, 419, 839 S.E.2d 96, 98 (2020) (analyzing how to handle an appeal related to statutory interpretation). To be clear, an abuse of discretion standard already requires this Court to review the appeal for errors in law, and the fact that there may be a legal question raised in conjunction with a Rule 60 order does not otherwise transform the standard of review.

B. The IMI Fabi Defendants' arguments are misplaced.

South Carolina Rule of Civil Procedure 60(b)(2) allows for a new trial based on newly discovered evidence and 60(b)(3) allows for a new trial based on fraud on the

court. The Fabi Defendants make three overarching arguments that need to be addressed at the onset.

First, they make a blanket statement that "the entire theory underlying the circuit court's new-trial ruling has been explicitly rejected by the South Carolina Supreme Court." (Final Brief, p. 28). The Fabi Defendants argue that the circuit court's grant of a new trial based on their "alleged failure to produce materials in discovery," was "not a legitimate basis for seeking a new trial." (Final Brief, p. 11). However, they ignore the fact that the South Carolina Supreme Court expressly disagreed with a litigant that stated: "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." *Chewning v. Ford Motor Co.*, 354 S.C. 72, 82, 579 S.E.2d 605, 610 (2003). The Fabi Defendants' assertion is based almost exclusively on their interpretation of a single case, *Raby Construction, L.L.P. v. Orr*, 358 S.C. 10, 594 S.E.2d 478 (2004). *Raby Construction* involves a disagreement between a contractor and a restaurant owner regarding construction costs. *Id*. at 14, 481. Litigation ensued, culminating in the entry of an agreed judgment. *Id*. at 14-15, 480-81. The restaurant owner learned through a former employee of the contractor that the contractor kept a second set of books that showed a lower cost, and the owner requested a new trial. *Id*. at 15-18, 480-81. The Court affirmed the denial of the Rule 60 motion by the circuit court, but the failure to produce the second ledger did not form the exclusive basis for the decision. *Id*. at 22, 484-85. The Court affirmed because the contractor disclosed the former employee's existence via interrogatory responses

prior to entry of judgment, the restaurant owner decided not to depose her, and the former employee would have testified about the ledger if asked earlier. *Id*. Moreover, counsel told the restaurant owner about this second ledger two days prior to settlement. *Id*. In this case, unlike in *Raby Construction*, the Fabi Defendants did not provide forthright information in their interrogatory responses that Plaintiffs ignored. As will be discussed in more detail below, the non-disclosure of discovery can serve as a basis for a new trial so long as the surrounding legal requirements—such as due diligence—are met.

Second, Appellants state that "nothing in the circuit's court ruling has to do with IMI Fabi, LLC." (Final Brief, p. 27). This is also not true. The chart that the circuit court used when determining the extent of the withheld information covers evidence related to IMI Fabi Diana and IMI Fabi. (R. pp. 2141-2181). During the hearings, Judge Toal found "the biggest concern to me is all the contact and communication between IMI-Fabi and the cosmetic manufacturers." (R. p. 0656, lines 106:23-25). In summarizing some of that information, the order acknowledged that the withheld evidence shows the Fabi Defendants distributed millions of pounds of talc to P&G between 2001 and at least 2018, the Fabi Defendants sold talc to P&G other than Talc 141, and the Fabi Defendants had samples of that talc in their possession. (R. pp. 0015-0016). The documents showing the extent of the relationship between the Fabi Defendants and the manufacturers clearly expand beyond IMI Fabi Diana, which ceased operations in 2004. While a lot of the order discusses the actions taken by Michael Sommerville in his role as the custodian of the IMI Fabi Diana

records, it is clear that the evidence considered by the circuit court extends beyond that and encompasses both Fabi Defendants.

Third, the Fabi Defendants take issue with the circuit court's characterization of Mr. Fabi and Mr. Sommerville. They state that "the evidence fully demonstrates the truthfulness of Mr. Fabi's testimony and the propriety of Mr. Sommerville's 'silence' during that testimony." (Final Brief, p. 42). While a court must "consider the testimony and reasonable inferences to be drawn therefrom in the light most favorable to the nonmoving party," that does not somehow limit a judge's ability to look beyond what a witness is saying. *Vinson v. Hartley*, 324 S.C. 389, 405, 477 S.E.2d 715, 723 (Ct. App. 1996). "Under South Carolina law, an intent to deceive may be inferred when there is no other reasonable or plausible explanation for the . . . false representation." *Floyd v. Ohio Gen. Ins. Co.*, 701 F. Supp. 1177, 1190 (D.S.C. 1988). The Fabi Defendants' disagreement with the circuit court's assessment as to the credibility of Mr. Fabi and Mr. Sommerville does not mean that the court acted in a way that was improper or partial to the Plaintiffs. The decision to grant a new trial, based on both Rule 60(b)(2) and (b)(3), was backed by a plethora of facts and a correct interpretation of the law.

C. The circuit court did not abuse its discretion in granting a new trial based on newly discovered evidence.

South Carolina Rule of Civil Procedure 60(b)(2) provides a court may relieve a party from a final judgment based on "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule

59(b)."[5] Rule 60(b)(2), SCRCP. To obtain a new trial, the movant must establish that the newly discovered evidence: "(1) will probably change the result if a new trial is granted; (2) has been discovered since the trial; (3) could not have been discovered before the trial; (4) is material to the issue; and (5) is not merely cumulative or impeaching." *Lanier v. Lanier*, 364 S.C. 211, 217, 612 S.E.2d 456, 459 (Ct. App. 2005) (citing James F. Flanagan, *South Carolina Civil Procedure* 484 (2nd ed.1996)) (internal citations omitted). These factors were addressed and considered by the circuit court, which correctly found they weigh in Plaintiffs' favor. (R. p. 0011).

1. Thousands of documents have been newly discovered since trial, and the information provided was anything but cumulative.

The Fabi Defendants contend that none of the evidence obtained after trial by the Plaintiffs was new, as it pertained to facts already presented to the jury or known to the Plaintiffs. (Final Brief, pp. 30-31, 34-35 n.4). As discussed *supra*, Plaintiffs made a comprehensive chart detailing some of the evidence that they discovered after trial. While this 40-page chart is not a complete accounting, it aptly demonstrates the massive amount of information missing in this case. Some of it involves records kept while IMI Fabi Diana processed cosmetic talc (2001 to 2004) and other evidence involves records kept after IMI Fabi took over operations (2005 to present).[6] The Fabi

[5] To move for a new trial under Rule 59, "a motion for new trial shall be made promptly after the jury is discharged, or in the discretion of the court not late than 10 days thereafter." Rule 59(b), SCRCP.

[6] Mr. Sommerville holds the records for IMI Fabi Diana, which are in paper form. The IMI Fabi documents are held electronically, and the company is believed to have a retention policy of at least 10 years. (R. p. 2391, line 24-p. 2392, line 2).

Defendants do not contend that they previously turned over this evidence. The argument instead seems to be that the evidence is cumulative.

First, it is important to look at what evidence was available to Plaintiffs. Plaintiffs had limited information sourced from other cases when creating a potential exhibit list, as follows:

Brand	Evidence "known" to Plaintiffs	Source
Avon	2022 Avon Interrogatory response that identified the Fabi Defendants as an approved vendor in 2009	R. pp. 2573-2600
Revlon	2015 Fabi Defendants' Certificate of Analysis for Talc 3351 for Revlon (Proposed 394)	R. p. 1212
	2017 Fabi Defendants' Certificate of Analysis for Talc 141 for Revlon (Proposed 393)	R. p. 1212
Estee Lauder	2001 Material Safety Data Sheet for Fabi Defendants' Talc for EL (Proposed 387)	R. p. 1212
	2001 Fabi Defendants' Certificate of Analysis for Talc 3355 for EL (Proposed 390)	R. p. 1212
	2007 Fabi Defendants' Certificate of Analysis for Talc 3355 for EL (Proposed 389)	R. p. 1212
	2008 Raw Materials Estee Lauder Specification for Fabi Defendants' Talc 643 (Proposed 388)	R. p. 1212
CoverGirl	2004 Letter to P&G from Fabi Defendants re: Certification and attached data sheets (Proposed 243)	R. p. 1206

Plaintiffs also had a small amount of evidence produced by the Fabi Defendants in this case that showed some interactions with and sales to P&G and *one* bill of lading detailing a sale to Revlon. (R. pp. 2965-3084). None of this evidence explains the true link between the companies or the amount of talc the manufacturers used from the Fabi Defendants.

Second, it is important to compare the known evidence against the newly discovered evidence. The newly discovered evidence told a different story regarding the amount of talc sold by the Fabi Defendants, as follows:

Brand	Est. Talc Sold (*Plant* discovery)	Est. Talc Sold (newly discovered)	Timeframe
CoverGirl (Noxell/ P&G)	510,600[7]	8,500,000 lbs[8]	2001-2018
Avon	0 lbs	213,300 lbs	2001-2003
Revlon	24,000 lbs	753,400 lbs	2001-2004, 2013-2021
L'Oreal	0 lbs	10,000 lbs	2003
Estee Lauder	0 lbs	1,000 lbs	2014

(R. pp. 2141-2181). The new evidence showed the Fabi Defendants had direct communications with the manufacturers and/or about the manufacturers, such as:

Brand	Parties	Subject
CoverGirl	CSI/ Fabi Defendants	2013 report by the Fabi Defendants discussing heat treatment for P&G talc
	CSI/ Fabi Defendants	2014 report by the Fabi Defendants regarding the shipment of P&G talc to a processing center for heat treatment
	CSI/ Fabi Defendants	2014 report by the Fabi Defendants that P&G received obsolete data from an old contract
	CSI/ Fabi Defendants	2015 report by the Fabi Defendants regarding P&G's receipt of talc

[7] The Fabi Defendants provided Purchase Order 5600309120 for 33,600 lbs, 101915-7 for 32,000 lbs, 101915-6 for 35,000 lbs, 101915-2 for 35,200 lbs, 101915-3 for 35,200 lbs, 101915-4 for 32,000 lbs, 101915-10 for 35,200 lbs, 101915-11 for 32,000 lbs, 101915-9 for 10,000 lbs, 101915-13 for 32,000 lbs, 101915-12 for 35,200 lbs, 101915-14 for 32,000 lbs, 101915-16 for 25,600 lbs, 101915-15 for 35,200 lbs, 101915-17 for 35,200 lbs, 101915-18 for 35,200 lbs. (R. pp. 3012-3084).

[8] This number only relates to known quantities of Talc 141 sold to P&G. But, "[t]hey also sold 3355 to P&G. We knew nothing about that, and it would have been lovely to have known that since 3355 is a powder that specified for use in a loose powder. We knew nothing about it." (R. p. 0651, lines 85:15-19).

	CSI/ Fabi Defendants	2016 report that the Fabi Defendants that P&G will heat treat its talc and contaminated bags will be returned to the Fabi Defendants
	CSI/ Fabi Defendants	2016 Report that P&G rejected 61,600 lbs of Talc 141
Avon	BVQI/ Fabi Defendants	2001 audit letter and emails sent to Fabi Defendants confirming an audit to be completed on behalf of Avon
Revlon	CSI/ Fabi Defendants	2019 emails re: a Revlon request for proposal
	CSI/ Fabi Defendants	2021 emails re: country of origin for talc 3355 and 141
L'Oreal	CSI/ Fabi Defendants	2002 fax sent by Fabi Defendants to CSI including raw materials certification required by L'Oreal and a sample request from L'Oreal
Estee Lauder	Estee Lauder/Fabi Defendants	2002 fax to Fabi Defendants from Estee Lauder requesting samples
	CSI/ Fabi Defendants	2002 fax from CSI to Fabi Defendants regarding "Estee Lauder" self-audit
	CSI/ Fabi Defendants	2014 letter from Fabi Defendants to CSI advising CSI that it did not find microbial contamination in its talc as reported by Estee Lauder
	CSI/ Fabi Defendants	2019 emails re: Estee Lauder's purchase of talc products

(R. pp. 2141-2181). The new evidence also showed the Fabi Defendants kept talc samples that they organized by manufacturer (*i.e.* labeled P&G). (R. pp. 2386-2388).

While Plaintiffs may have suspected the Fabi Defendants had *some* connections with manufactures other than P&G, the Plaintiffs did not know the true connection with all of the manufacturers prior to trial. The Court agreed that the "unproduced information linked some of the talc manufactured by [the Fabi Defendants] to the talc products used by Plaintiff Sarah Plant." (R. p. 0002). The evidence is in no way cumulative.

2. Plaintiffs diligently sought discovery from the Fabi Defendants.

The Fabi Defendants contend Plaintiffs did not diligently seek discovery. (Final Brief, pp. 28-33). South Carolina Courts have adopted the Black Law definition of "due diligence," which is defined as "the diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or to discharge an obligation." *Jamison v. Ford Motor Co.*, 373 S.C. 248, 272, 644 S.E.2d 755, 768 (Ct. App. 2007) (internal citations omitted). Due diligence requires some effort and is "a context-specific concept generally akin to the degree of diligence a reasonably prudent person would exercise in tending to important affairs." 58 Am. Jur. 2d New Trial § 308. For example, where evidence is misplaced by the party seeking a new trial, the movant needs to show he or she made a "specifically targeted search to find the missing evidence." *Lanier*, 364 S.C. at 220, 612 S.E.2d at 460. As a whole, courts have held due diligence does not require a party "to undertake repeated exercises in futility or to exhaust every imaginable option." *See, e.g.*, *Hannigan v. United States*, 131 F. Supp. 3d 480, 488 (E.D.N.C. 2015).

Plaintiffs diligently sought discovery from the Fabi Defendants at various points in the case, as follows:

Event	Date	Source
Plaintiff's Jurisdictional Discovery served on Fabi Defendants	Sept. 27, 2022	R. pp. 1784-1798
Advised Fabi Defendants of intent to take 30(b)(6) deposition if no further information provided	Jan. 16, 2023	R. pp. 2449-2452
First Notice of Deposition sent to Fabi Defendants	Jan. 25, 2023	R. pp. 1824-1830

Corrado Fabi 30(b)(6) Deposition taken	Feb. 15, 2023	R. pp. 2287-2298

Plaintiffs asked a variety of questions to determine what business the Fabi Defendants had in South Carolina, how the Fabi Defendants distributed cosmetic talc, and the extent of their relationship with various manufacturers.

First, Plaintiffs sent jurisdictional interrogatories and requests for production. (R. pp. 1784-1798). Those requests asked specifically targeted questions regarding Avon, Estee Lauder (the manufacturer for Estee Lauder and Clinique), Noxell Corporation (a subsidiary of P&G that manufactured CoverGirl),[9] and Revlon. (R. p. 1798). IMI Fabi answered on October 12, 2022 (R. pp. 1799-1823). IMI Fabi Diana answered shortly thereafter and provided nearly identical answers. (R. pp. 0523, lines 62:5-63:6). A sample of the questions and answers are as follows:

Question	Answer	Source
Did IMI supply, sell, distribute, and/or contract with another entity for the purpose of supplying products to any of the entities listed on Exhibit B?[10]	Assuming plaintiffs mean Exhibit A, no.	R. p. 3188
All DOCUMENT, files, or materials related to products that IMI sold, supplied, delivered, or distributed to any of the entities in Exhibit A from 1989 to the present. This request is intended to include, but is not limited to, brochures, purchase orders, sales, records, invoices, formula sheets,	None	R. p. 3189

[9] The limited documents produced in this case as to Noxell are P&G sales documents. The Fabi Defendants clearly understood the link between Noxell and P&G.

[10] While the interrogatory references "Exhibit B," this appears to be a typographical error. The Fabi Defendants responded regarding the companies identified in "Exhibit A," which included Avon, Estee Lauder, Noxell, and Revlon.

Material Safety Data Sheets, and other literature demonstrating IMI's product line.		
The complete searchable database of shipments/sales from IMI to any of the entities in Exhibit A.	None	R. p. 3190
Please produce, from 1986 to present, all samples and/or exemplars of products IMI sold, distributed, supplied, and/or retailed to any of the entities in Exhibit A.	None	R. pp. 3190-3191

Next, Plaintiffs sent a 30(b)(6) deposition notice to the Fabi Defendants seeking to depose their designated representative. (R. pp. 1824-1856). Once again, Plaintiffs sought documents, which they defined as:

> any and all written, printed, typed, recorded or graphic material, however produced, or reproduced, stored, known to exist, by way of example and not by limitation, invoices, contracts evidencing purchase or receipt, ledger cards, material requests, communications, writings, printings, records, worksheets, abstracts, summaries, statistics, notes, market data, journals, ledgers, expense reports, specifications, contracts, contract bids, purchase orders, bills of lading, shipping orders, dock receipts, cancelled checks, computer print-outs, microfilm, microfiche, which in any way pertain to the document request made herein.

(R. p. 1855). They specifically requested:

- All documents referenced or relied upon to prepare for and provide testimony in this case.

- All documents in your possession, including sales records, correspondence, and any other documentary proof of the supply of talc by IMI FABI'S, either directly or through brokering agreements, to each co-defendant in this case.

- All documents detailing the identity by code number of every grade of talc IMI FABI sold to Cosmetic Specialties or any co-defendant in this case.

- All documents related to the results of all testing for the presence of asbestos in all grades of talc sold to Cosmetic Specialties and/or any co-defendant in this case.

- All documents related to the testing protocol(s) used to evaluate the presence of asbestos in talc IMI FABI sold to Cosmetic Specialties and/or any co-defendant in this case.

- All correspondence between IMI FABI and Cosmetic Specialties and/or any defendant in this case.

- All documents reviewed by IMI FABI in responding to written discovery in this case.

- All former testimony of IMI FABI in talc/asbestos litigation, including all deposition transcripts, trial transcripts, declarations, and affidavits.

- All documents pertaining to the above-referenced matters of examination.

(R. pp. 1855-1856). In response, Plaintiffs received about 1,000 documents. (R. p. 0646, lines 65:18-22). They received some documents related to CoverGirl (P&G) and a few related to Revlon. (R. pp. 2965-3084; R. pp. 2885-2889). The Fabi Defendants did not supply any documents related to Avon, Clinique, Estee Lauder, or L'Oreal.

Lastly, Plaintiffs deposed the Fabi Defendants via Corrado Fabi, their corporate representative. At the beginning of deposition, his counsel confirmed that Plaintiffs had "all of the responsive documents that [they] were able to get from [Corrado Fabi] or any other source." (R. p. 3208, lines 25:8-10). This included documents held by Mr. Sommerville for IMI Fabi Diana. The only new documents that came up during the deposition were two distributorship agreements between the Fabi Defendants and CSI. (R. pp. 2037-2049). Plaintiffs' counsel left an exhibit number for those documents, and counsel asked the court reporter to follow-up with the Fabi Defendants in February 2023 regarding disclosure. (R. pp. 2453-2457). They

were never produced in this case. During the deposition, Mr. Fabi reiterated the Fabi Defendant's ignorance regarding where their talc went and how it was used. (R. p. 2294, lines 1-6) ("I'm not aware about brands, cosmetic brands, because that's not my expertise"; "our contract is Cosmetic Specialties, so we have no information of Cosmetic Specialties' customer").

Despite all of this, the Fabi Defendants still argue that the Plaintiffs could have discovered evidence with "a modicum of due diligence." (Final Brief, p. 33). They argue that that Plaintiffs should have sought discovery from CSI[11] or Mr. Sommerville, after hearing Mr. Fabi's deposition testimony a week prior to trial. (Final Brief, pp. 29-30, 32). This completely ignores the case management order by which the South Carolina asbestos docket is governed. The relevant deadlines are as follows:

Event	Date
Plaintiff designation of fact and expert witnesses	105 days after filing complaint
Defendant designation of fact and expert witnesses	125 days after filing complaint
Fact witness depositions (except Defendant's 30(b)(6) witnesses)	70 days before trial

[11] Regarding CSI, the Fabi Defendants fail to acknowledge their role in delaying Plaintiffs' ability to seek discovery from CSI. On December 30, 2022, counsel for the Plaintiffs sent an email to counsel for the Fabi Defendants seeking clarification as to why "the affidavit did not include the information about Color Specialties as we had discussed. Particularly because it seems like if IMI did only ever supply to Color Specialties it may clear up the PJ issue." (R. p. 2445). On January 12, 2023, counsel for the Fabi Defendants replied back that "the only cosmetic talc client for Imi Fabi is in NJ." (R. p. 2447). As of January 16, 2023, Plaintiffs' counsel knew that the distributor's name was "Cosmetic Specialties," but the Fabi Defendants had yet to provide an affidavit confirming. (R. p. 2447).

Deposition of Defendant's 30(b)(6) witnesses	45 days before trial (unless otherwise agreed by the parties)
Discovery completed	30 days before trial
Final witness lists exchanged by parties	14 days before trial
Final exhibit lists exchanged by parties	7 days before trial

(R. pp. 1733-1739). Moreover, their argument ignores South Carolina Rule of Civil Procedure 30's directive that "[a] party desiring to take the deposition of any person upon oral examination shall give ten (10) days notice in writing to every other party to the action." Rule 30, SCRCP. Accordingly, any additional depositions would have taken place (at the earliest) during trial. Plaintiffs did not have the opportunity to reasonably seek additional discovery prior to the commencement of trial.

Similarly, any argument Plaintiffs needed to seek discovery from the manufacturers to act diligently also fails. When responding to jurisdictional discovery, the Fabi Defendants "didn't just say maybe we have a relationship. They said, no, we do not have a relationship with anybody in sworn discovery responses." (R. p., 0659, lines 119:22-25). Plaintiffs still took Mr. Fabi's deposition to confirm the accuracy of these statements, where he continued to feign ignorance regarding the Fabi Defendants' relationship with manufacturers. The fact that Plaintiffs had some stray documents regarding the makeup companies that may have used the Fabi Defendants' talc, does not mean that Plaintiffs had to go down every possible rabbit hole. Based on the Fabi Defendants' consistent assurances that they turned over all relevant discovery and the applicable court deadlines, Plaintiffs acted diligently.

3. The newly discovered evidence is material, and it therefore would likely have produced a different result.

The Fabi Defendants contend that the presentation of this additional evidence would undoubtably result in a no liability finding by the jury. (Final Brief, pp. 33-39). Evidence, however, is likely to change the result "'when the newly discovered evidence calls into question the validity of the judgment by directly refuting the underpinnings of the theory which prevailed.'" *Se. Hous. Found. v. Smith*, 380 S.C. 621, 638, 670 S.E.2d 680, 689 (Ct. App. 2008) (citing 11 Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, *Federal Practice and Procedure* § 2859 (2d ed. 2008)). A court is not required to show that a new trial would change the result, but that it would *probably* change the outcome. *Lanier*, 364 S.C. at 217, 612 S.E.2d at 459.

First, the analysis requires a deeper look at the arguments made during trial. At trial the Fabi Defendants feigned ignorance. They claimed they did not know where their talc was going or how it was being used. The newly discovered evidence contradicts this claim and shows it to be false:

Argument	Newly Discovered Evidence
CSI was their only cosmetic talc customer. (R. p. 0373, line 25-p. 0374, line 7; p. 0376, lines 16-18).	• The Fabi Defendants kept charts from 2000 to 2002 that listed 17 customers and identified Cosmetic Specialties and P&G as separate customers. (R. pp. 2299-2334).
CSI was protective of its customer list. (R. p. 0376, line 25- p. 0377, line 3).	• The Fabi Defendants were subject to a few audits each year, where they dealt directly with the manufacturers. (R. p. 2217, line 139:12-p. 2218, line 142:15). • The Fabi Defendants and CSI often talked about manufacturers by name, and the Fabi Defendants

	communicated directly with the manufacturers. (R. pp. 2141-2181).
The Fabi Defendants had no clue where their talc went. (R. p. 0373, line 25-p. 0374, line 13).	• The Fabi Defendants worked with the manufactures, rather than CSI, to ship talc directly to the manufacturers. (R. p. 2216, line 136:16-p. 2217, line 139:2; R. pp. 2335-2385). • A large quantity of talc was sent directly to the manufacturer, rather than CSI in New Jersey. (R. pp. 2397-2407).

Next, the court must evaluate what argument prevailed with the jury. The Fabi Defendants used a similar tactic in closing. The Court found that the "principal focus" of the defense presented by the Fabi Defendants "was product identification." (R. p. 0003). Counsel argued that the Plaintiffs have "to prove not just talc, but our talc, and that's important because no connection means no causation." (R. p. 0488, lines 20-22). They went on to say that Plaintiffs did not prove any connection to CoverGirl and/or CoverGirl's powders in the limited number of documents that they presented. They accomplished this using an animated slide where counsel aggregated the over 100 exhibits presented by the Plaintiffs in their case in chief. (R. p. 0489, lines 10-24). Counsel then "removed" each piece of evidence that had nothing to do with the Fabi Defendants, leaving only two exhibits remaining. (R. p. 0489, lines 10-24). Counsel kept reiterating the lack of documents, urging "[t]here's no witnesses from Procter & Gamble. There's no documents. That means no causation." (R. p. 0491, lines 2-3). The circuit court found this argument particularly compelling, as the circuit court believed it distinguished the WCD case from the case against the Fabi

Defendants. As to WCD, the jury "got all kinds of context. We have none. And it turned out that was not so." (R. p. 0661, lines 126:17-18).

The jury used those arguments and the available documents in determining whether to find the Fabi Defendants liable. In doing so, they had to link the available evidence directly to the elements of proof. For example, not only did Plaintiffs have to show that the Fabi Defendants' talc was in products that Mrs. Plant used, they also had to show that for every alleged cause of action that talc was a substantial factor in causing her disease. Plaintiffs had to prove that "the Plaintiff's exposure to the Defendant's asbestos product was of such frequency, regularity, and duration that it was a substantial factor in bringing about the disease or injury." (R. p. 0701). Instead of being limited to talc sales for seven months in 2001 and one month in 2007, it appears that at least one manufacturer used the Fabi Defendants' talc for almost 20 years. This evidence would have provided a shift in the weight and credibility of the evidence regarding substantial connection. As another example, in regard to negligence, "a Defendant cannot be held responsible for something that could not be expected to happen." (R. p. 0702). This is why the relationship between the manufacturers and CSI and the Fabi Defendants matters. It matters that they knew that their asbestos-containing talc was being used by manufacturers who made makeup for use on a person's face.

The circuit court had substantial information before it to find that the presentation of the newly discovered evidence to the jury probably would have

produced a different result. The Court properly granted a new trial under Rule 60(b)(2).

D. The trial court did not abuse its discretion in granting a new trial based on fraud on the Court.

South Carolina Rule of Civil Procedure 60(b)(3) provides that a court may relieve a party from a final judgment based on "fraud, misrepresentation, or other misconduct of an adverse party." Rule 60(b)(3), SCRCP. Similar to the rules that apply to newly discovered evidence, a movant cannot prevail "where he or she has access to the disputed information or has knowledge of inaccuracies in an opponent's representations at the time of the alleged misconduct." *Raby Const., L.L.P.*, 358 S.C. at 21, 594 S.E.2d at 484 (internal citation omitted). The circuit court continually stressed that to grant a new trial based on fraud, it was not enough that the Fabi Defendants were sloppy or telling lies; the burden of proof exceeded that standard. (R. p. 0550, lines 13-23).

When determining whether a party has committed fraud on the court, a court must look at whether the fraud was intrinsic or extrinsic.[12] "The essential distinction

[12] The Fabi Defendants briefly mention a dissenting opinion authored by Judge Toal in an attempt to show that she does not understand how extrinsic evidence works. (Final Brief, p. 14); *see Aaron v. Mahl,* 381 S.C. 585, 596 (2009). *Aaron v. Mahl*, 381 S.C. 585, 595-96, 674 S.E.2d 482, 487-88 (2009). In that dissent, she cited *Chewning*, which the Fabi Defendants recognize as good law. *Id*. at 595, 487 ("*See Chewning,* 354 S.C. at 84, 579 S.E.2d at 611 (recognizing that where an attorney embarks on a scheme to intentionally conceal documents, extrinsic fraud constituting a fraud upon the court occurs.") Her dissent is not about the law, but the facts. *Id.* at 596, 488 ("In my view, the evidence shows that Appellant's attorney intentionally concealed the Collection Agreement. As a result of these actions, Respondent was prevented from fully litigating her claim that the assignment was invalid during the Indiana litigation.").

between intrinsic and extrinsic fraud for purposes of relief from judgment is the ability to discover the fraud." *Gainey v. Gainey*, 382 S.C. 414, 426, 675 S.E.2d 792, 798 (Ct. App. 2009). Not disclosing materials, committing perjury, or presenting forged documents at trial—by itself—is considered intrinsic fraud. *See Chewning*, 354 S.C. at 81-82, 579 S.E.2d at 610; *see also Raby Const., L.L.P.*, 358 S.C. at 19, 594 S.E.2d at 483. Intrinsic fraud, "is fraud which misleads a court in determining issues and induces the court to find for the party perpetrating the fraud." *Raby Const., L.L.P.*, 358 S.C. at 19, 594 S.E.2d at 483. Extrinsic fraud, on the other hand, requires intent to deceive. "[A]n act of perjury or concealment of a document coupled with an intentional scheme to defraud the court justifies the setting aside of a judgment pursuant to Rule 60(b) due to extrinsic fraud." *Ray v. Ray*, 374 S.C. 79, 86, 647 S.E.2d 237, 241 (2007). For example, in *Ray*, the wife submitted an accounting to the court that contained misrepresentations as part of a divorce proceeding. *Id*. That constituted intrinsic fraud. *Id*. She also delayed the payment of a substantial sum of money to her until after the divorce to avoid reporting it. *Id*. In doing so, and in taking this further intentional step to deceive the court, the Court found that she committed extrinsic fraud. *Id*.

"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." *Chewning*, 354 S.C. at 81, 579 S.E.2d at 610 (internal citations omitted). For

example, the withholding of evidence—such as by the submission of a false interrogatory response—may modify the theory emphasized at trial, encourage a party to abandon a theory before it even gets to the jury, and/or limit a party's ability to find other relevant documents. *Rozier v. Ford Motor Co.*, 573 F.2d 1332, 1342-44 (5th Cir. 1978) (cited in *Chewing* and *Ray*'s analysis of fraud on the court). In this context when looking at whether withheld evidence would have impacted the trial, the evidence should be weighed in favor of the moving party. *Id*. at 1346 ("a litigant who has engaged in misconduct is not entitled to 'the benefit of calculation, which can be little better than speculation, as to the extent of the wrong inflicted upon his opponent.'" (citing *Minneapolis, St. Paul & S.S. Marie Ry. Co. v. Moquin*, 283 U.S. 520, 521-22 (1931)).

Extrinsic fraud is considered problematic as it "'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 adjudicating cases that are presented for adjudication.'" *Ray*, 374 S.C. at 85, 647 S.E.2d at 240 (citing *Evans v. Gunter,* 294 S.C. 525, 529, 366 S.E.2d 44, 46 (1988)). It is not limited "to misconduct of an attorney or an officer of the court." *Id*. However, the subordination of perjury by an attorney and/or the intentional concealment of documents by an attorney seem to be the most common ways to prove extrinsic fraud. *Chewning*, 354 S.C. at 82-83, 579 S.E.2d at 610. Extrinsic fraud must be proven by clear and convincing evidence. *Id.* at 86, 612.

As is relevant here, Mr. Sommerville acted as national counsel for the Fabi Defendants (and hired counsel in this case) and held records on behalf of IMI Fabi Diana starting in 2019 (if not earlier). (R. p. 0578, line 20-p. 05780, line 23; p. 0646, lines 66:11-16). Based on his testimony at the August hearing, the records consist of about 13,000 pages in 7 bankers' boxes. (R. p. 0638, lines 35:21-23; p. 0646, lines 65:23-66:1). In this case, he chose to disclose only about 1,000 pages. (R. p. 0646, lines p. 65:18-22). He flew to Italy and was present during Mr. Fabi's deposition, and he attended the trial in its entirety. (R. p. 0643, lines 53:16-18, 56:15-17). He, however, did not educate Mr. Fabi on the content of those documents. Mr. Fabi testified in a deposition subsequent to trial as follows:

Question	Answer	Source
Let me ask you this, sir: Is your understanding that Mr. Sommerville went to IMI Fabi (Diana) or the Diana plant in 2019 and removed documents, and those are the ones you just said were, your understanding was, a lot of documents, is that right?	I know he went there on behalf of IMI Fabi.	R. p. 2056, line 65:18-p. 2057, line 66:2
Have you ever seen those documents since Mr. Sommerville removed them from the plant?	No, I didn't.	R. p. 2057, lines 66:4-7
Do you have any clue what's contained in those documents that Mr. Sommerville removed from the Diana plant?	No, I don't.	R. p. 2057, lines 66:8-11
Okay. Do you have knowledge one way or the other, sir, if any or all of the Diana documents that Mr. Sommerville removed have been produced to us?	No, I don't know.	R. p. 2057, lines 66:12-18

In other words, Mr. Sommerville maintained exclusive control over the documents—such that even Corrado Fabi did not have access to IMI Fabi Diana's records and documents. Now that the content of those boxes has been disclosed, it is known that all relevant documents were not produced in this case.

The question becomes whether the failure to disclose was intentional and intended to deceive. As Mr. Sommerville insisted that he did not intentionally withhold any documents, the circuit court was charged with determining whether his denial was credible. In making that determination, the circuit court looked to how he handled his role as counsel for IMI Fabi Diana in another case. In the *Hemmings* case out of New York, Mr. Brown acted as the Rule 30(b)(6) corporate representative for IMI Fabi Diana in 2022. Mr. Sommerville thought that he reviewed some of the IMI Fabi Diana records in preparation for the deposition. (R. p. 0646, lines 66:17-24).

The *Hemmings* deposition transcript was not provided to the Plants. During that deposition, Mr. Brown identified CSI as the distributor for the Fabi Defendants, he acknowledged that the Fabi Defendants generally knew the manufactures that purchased their talc (naming Lander Company, Delager, Coty), and he opined that the Fabi Defendants should have had talc exemplars for 2001 to 2004. (R. p. 2465, lines 22:16-21; p. 2466, lines 26:1-15; p. 2470, lines 44:12-22). Mr. Brown also testified that he was not asked to check for any or documents, and he could have done so. (R. p. 2469, line 41:15-p. 2470, line 42:18). While Mr. Sommerville stated that Mr. Brown did not need to look because most of the requests related to documents that pre-dated IMI Fabi Diana (1970 to 2000), that was not true as to all the questions—especially

those related to business documents. (R. p. 2471, lines 49:1-5). The opposing attorney also pointed out that Mr. Sommerville provided no documents to show the date IMI Fabi Diana came into existence and whether the company assumed any liabilities for the company that previously owned the plant now operated by IMI Fabi Diana. (R. p. 2471, lines 49:6-14).

What is important, however, was that similar to this case, Mr. Sommerville kept the Rule 30(b)(6) deponent in the dark regarding the IMI Fabi Diana records:

Question	Answer	Source
So is it your understanding that there are no documents from the operation of the Diana plant that are in existence today?	I'm not sure. I'm not sure if they threw them all away or just stuff that was in boxes.	R. p. 2466, lines 28:15-19
Has Mr. Sommerville or IMI Fabi's attorney asked you to look to see if there's any documents pertaining to the operation of the plant in existence?	No.	R. p. 2467, lines 30:1-5
So as far as you know there could still be documents pertaining to the operation of the plant that still exist in the plant today.	Yes.	R. p. 2467, lines 31:3-6
You just don't know what they are?	No.	R. p. 2467, lines 31:7-8

It does not appear that Mr. Sommerville chimed in and advise anyone that he in fact had documents sitting in his office. Mr. Sommerville had a duty to prepare the corporate representative, and it appears he failed to do so in the New York case.

Based on that history, the judge expressed concerns regarding his credibility, finding that "Attorney Sommerville clearly has no issue with not complying with the court rules of procedure and concealing information." (R. p. 0010). Based on what the

parties now know to be in the IMI Fabi Diana files and based the testimony by Mr. Brown in *Hemmings*, it appears Mr. Sommerville knew that IMI Fabi Diana had talc samples and knew that IMI Fabi Diana had knowledge regarding the manufacturers. The circuit court found the Fabi Defendants deliberately concealed requested evidence. (R. p. 0014).

"[T]he cases are legion that no party in a proceeding can stand behind letting the attorney take all the documents and put them in the attorney's office and thereby absolve the corporation . . . from being responsible to their knowledge. That's the oldest . . . scheme in the book." (R. p. 0576, lines 5-13). Like the wife in *Ray*, the Fabi Defendants concealed evidence. That concealment resulted in false deposition and trial testimony, which is a classic example of intrinsic fraud. Mr. Sommerville did not make an effort to correct the record or to make sure that the Fabi Defendants understood the content of the documents in his possession, even when he knew counsel was relying upon on a lack of documents defense. As required by *Gainey*, Plaintiffs did not have the ability to discover the fraud because the Fabi Defendants kept asserting that no additional documents existed. The failure to produce the IMI Fabi documents limited Plaintiffs from presenting their full case at trial and seeking additional documents from IMI Fabi and/or IMI Fabi Diana, thereby constituting extrinsic fraud. The court properly granted a motion for new trial under Rule 60(b)(3).

II. The circuit court's personal jurisdiction ruling is supported by the evidence and correct under South Carolina law.

A. Standard of Review

Courts have held that when reviewing the denial of motions to dismiss for lack of personal jurisdiction, "'[t]he decision of the [circuit] court should be affirmed unless unsupported by the evidence or influenced by an error of law.'" *Abdulla v. S. Bank*, 439 S.C. 391, 399 (Ct. App. 2023) (quoting *Cockrell v. Hillerich & Bradsby Co.*, 363 S.C. 485, 491 (2005)). Similarly, when reviewing the denial of a motion for directed verdict, the circuit court judge's ruling should only be reversed "when there is no evidence to support the ruling or when the ruling is governed by an error of law." *Click Props., LLC v. Thomas SC Props., LLC*, 445 S.C. 468, 491, 914 S.E.2d 488, 500 (Ct. App. 2025), *reh'g denied* (Apr. 10, 2025). Like the standard of review for a motion for new trial, there is nothing in the relevant case law that transforms the standard of review to *de novo*.

B. The circuit court's personal jurisdiction ruling is not appealable.

In their notice of appeal, the Fabi Defendants stated that they intended to appeal the circuit court's rulings "regarding the Appellants' motions regarding personal jurisdiction and the door-closing statute."[13] (Notice of Appeal). The Fabi

[13] In the notice of appeal, the Fabi Defendants include a ruling by the circuit court denying their request to have the jury decide personal jurisdiction and door-closing. (R. p. 0461, lines 8-15). The Fabi Defendants only used the term "door-closing statute" once in their brief, and they failed to provide any legal analysis. (Final Brief, p. 4). The Fabi Defendants needed to do more than just raise the issue in their notice and allege error in their brief. *Fields v. Melrose Ltd. P'ship*, 312 S.C. 102, 106, 439 S.E.2d 283, 285 (Ct. App. 1993); *First Sav. Bank v. McLean*, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994). It was their burden to include argument and supporting authority

Defendants attached trial transcripts that detailed the circuit court's denial of their motion to dismiss (R. p. 0311, line 7-p. 0318, line 24) and motions for directed verdict (R. p. 0447, line 2- p. 0449, line 24; p. 0456, line 19-p. 0459, line 25 (first); p. 0467, line 6-p. 0468, line 5 (second)).

As a preliminary matter, the Fabi Defendants cite a portion of the transcript where the circuit court states its intention to "deny the motion for summary judgment." (R. p. 0458, line 3). In their brief they explain that they intend to appeal "both oral rulings finding personal jurisdiction over foreign companies," and they alter the trial transcript excerpt to say "directed verdict" instead of "summary judgment." (Final Brief, pp. 2, 23). To the extent they later attempt to make any argument regarding their intention to also appeal the summary judgment decision, a denial of a motion for summary judgment is not appealable in South Carolina. *Click Props., LLC v. Thomas SC Props., LLC*, 445 S.C. 468, 483, 914 S.E.2d 488, 495–96 (Ct. App. 2025), *reh'g denied* (Apr. 10, 2025) (citing cases). The Court, therefore, should not consider this issue.

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showing abuse of discretion. *First Sav. Bank*, 314 at 363, 444 at 514. Even if the Fabi Defendants attempt to argue the door-closing statute in their reply brief, that issue should be deemed abandoned. *McClurg v. Deaton*, 395 S.C. 85, 87 n.2, 716 S.E.2d 887, 888 n.2 (2011) ("It is axiomatic that an issue cannot be raised for the first time in a reply brief."). In any event, Plaintiffs have provided sufficient evidence to this Court that Mrs. Plant used products containing the Fabi Defendants' talc in South Carolina, and her diagnosis resulted from that use. S.C. Code Ann. § 15-5-150. Moreover, there is case law questioning whether the door-closing statute even applies to limited liability companies, such as the Fabi Defendants. *Thompson Indus. Servs., LLC v. Wiggin*, No. CV 3:24-2809-MGL, 2025 WL 934418, at *5 (D.S.C. Mar. 27, 2025) (explaining it only applies to corporations).

That leaves the Court with the denial of the motion to dismiss and the motion for directed verdict. Appeals from the Circuit Court are governed by South Carolina Appellate Court Rule 201 which is clear that "[a]ppeal[s] may be taken . . . from any final judgment, appealable order or decision." SCACR 201(a). Thus, only "final" orders are appealable. Typically, the denial of a motion to dismiss and a motion for directed verdict are considered interlocutory and not appealable until entry of judgment. *Ashenfelder v. City of Georgetown*, 389 S.C. 568, 573, 698 S.E.2d 856, 859 (Ct. App. 2010).

At the end of the trial, after the jury issued its verdict, WCD filed a timely Rule 59 motion. (R. pp. 1443-1507).[14] A Rule 59 motion stays "[t]he time to appeal for all parties," until it is ruled upon. Rule 59, SCRCP. That motion remains pending due to WCD's bankruptcy stay. (R. pp. 1536-1538). It does not appear that a final judgment has been entered in this case as to either defendant. Rule 58, SCRCP ("A judgment is effective only when so set forth and entered in the record"). Due to the multi-defendant nature of this case, it appears that the circuit court will not enter a final judgment as to the Fabi Defendants unless they request entry and the circuit court finds that there is no reason to delay issuance. Rule 54(b), SCRCP; *see also Ashenfelder v. City of Georgetown*, 389 S.C. 568, 574-577, 698 S.E.2d 856, 859-861 (Ct. App. 2010).

[14] WCD simultaneously filed a motion for judgment notwithstanding the verdict, which remains pending. (R. pp. 1508-1535). Rule 50 similarly stays the appellate deadlines until the circuit court rules on the motion. Rule 50(e), SCRCP.

While a court of appeals "may consider the otherwise interlocutory ruling denying a motion to dismiss for lack of personal jurisdiction when it is joined with other appealable matters," that is not the end of the analysis. *Welch v. Advance Auto Parts, Inc.*, No. 2023-001096, 2025 WL 1450573, at *6 (S.C. May 21, 2025). The Court must decide whether the issues on appeal have a sufficient nexus to be considered together. *Hodge v. UniHealth Post-Acute Care of Bamberg, LLC*, 422 S.C. 544, 575 n.6, 813 S.E.2d 292, 309 n.6 (Ct. App. 2018). The Court may also consider, where no certification has been entered under Rule 59(b) and the order has not otherwise been written and entered in the docket, whether it wishes to use its discretionary authority to rule on an order is subject to revision. *See Ashenfelder v. City of Georgetown*, 389 S.C. 568, 578, 698 S.E.2d 856, 861 (Ct. App. 2010); *see also Bowman v. Richland Mem'l Hosp.*, 335 S.C. 88, 91, 515 S.E.2d 259, 260 (Ct. App. 1999).

Here, as shown above, the circuit court decided the motion for new trial with reference to entirely different facts and law than that relevant to the jurisdictional ruling. Moreover, there is nothing in the motion for new trial opinion making clear that its decision regarding personal jurisdiction is final and not otherwise subject to revision. Based on the procedural posture of this case, and the fact that the circuit court granted a new trial based on a plethora of missing evidence, any appeal regarding jurisdiction is premature as the record is not yet fully developed. Plaintiffs urge this Court to find that the question of personal jurisdiction is not appealable at this time.

C. South Carolina courts have personal jurisdiction over the Fabi Defendants.

If this Court determines that the appeal regarding personal jurisdiction is not premature, there are still substantial facts in the record to support the circuit court's findings. The Fabi Defendants do not need to be "at home" and subject to general jurisdiction for this Court to find it has personal jurisdiction over the Fabi Defendants. In fact, other judges in this circuit have agreed that the sale of asbestos-containing products in the forum state is sufficient to confer personal jurisdiction over a defendant manufacturer. *See, e.g.*, *Lineberger v. CBS Corp.*, No. 1:16-CV-390, 2017 WL 3883712, at *1 (W.D.N.C. Aug. 14, 2017), *report and recommendation adopted*, No. 1:16-CV-00390-MR-DLH, 2017 WL 3879092 (W.D.N.C. Sept. 5, 2017) (allegations that the defendant sold asbestos products in North Carolina and the plaintiff was exposed to those products while working in North Carolina were sufficient to state a prima facie case of specific personal jurisdiction).

When determining whether a court has jurisdiction, the plaintiff has the burden of proving that personal jurisdiction exists. *Abdulla v. S. Bank*, 439 S.C. 391, 400, 887 S.E.2d 138, 142 (Ct. App. 2023). The starting point for specific jurisdiction is South Carolina's long-arm statute. It lays out various factors to be considered when determining whether personal jurisdiction attaches, such as "transacting any business"; "contracting to supply services or things"; and/or committing "a tortious act in whole or in part" in South Carolina. S.C. Code Ann. § 36-2-803(A). As the South Carolina long-arm statute is "'[c]oextensive with the [D]ue [P]rocess [C]lause, the sole question becomes whether the exercise of personal jurisdiction in this case would

violate the strictures of due process.'" *Abdulla*, 439 S.C. at 401, 887 S.E.2d at 143 (citing *Moosally v. W.W. Norton & Co.*, 358 S.C. 320, 329, 594 S.E.2d 878, 883 (Ct. App. 2004)). Due process requires that "the maintenance of the suit is reasonable, in the context of our federal system of government, and does not offend traditional notions of fair play and substantial justice." *Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, 592 U.S. 351, 358 (2021) (citations omitted).

The Fabi Defendants ask this Court to hold that exercising personal jurisdiction over them is contrary to due process. The Fabi Defendants continue to focus on the fact that they sold products to CSI "F.O.B." The Fabi Defendants argue that because their products were sold "F.O.B.," any end products that reach South Carolina did so at the direction of CSI and CSI acted "unilaterally." (Final Brief, pp. 19-20). This shipping term, however, "is a formal term relating to title and who bears the risk of loss," and it is not in and of itself determinative when completing a due process analysis. *Diamond Crystal Brands, Inc. v. Food Movers Int'l, Inc.*, 593 F.3d 1249, 1272–73 (11th Cir. 2010). Even if all the products were directly sent to CSI (which they were not) and then sent to customers in South Carolina, that does not mean that a court is automatically divested of jurisdiction. In *Ford*, "the company sold the specific cars involved in the crashes outside the forum States, with consumers later selling them to the States' residents." *Ford Motor Co.*, 592 U.S. at 366. The Supreme Court stressed that such "an exclusively causal test of connection," as requested by the Fabi Defendants "is inconsistent with our caselaw." *Id*. The Fabi

Defendants continue to try and distract this Court with a single factor, but that is not how the law works.

The Fabi Defendants suggest that the circuit court based its decision on the motion for directed verdict exclusively on improper facts. (Final Brief, p. 8). This is not true. While the trial record does not mention any involvement by the Fabi Defendants in the Cosmetic, Toiletries, and Fragrance Association, the other statements (R. p. 0459, lines 3-25) are supported by facts in the record as follows:

Statement	Support	Source
The Fabi Defendants had a long relationship with countless manufactures and distributors around the world.	The Fabi Defendants have over 3,000 talc customers around the globe.	R. p. 0362, lines 20-25.
Their own advertising materials demonstrates an awareness of the international nature of distribution of cosmetic products to women.	The Fabi Defendants' website states that they offer high-quality talc products that can be sent all over the globe, and it has a section that talks about talc for cosmetics.	R. p. 1180, lines 6-13; p. 0363, lines 1-3.
It bought additional mines or sought out additional mines to service this burgeoning and growing United States Market.	When the Fabi Defendants began operations as IMI Fabi Diana, they selected a new source mine in China.	R. p. 0408, lines 10-22.

With those issues cleared, the Court should now look at whether the facts in the record support a finding of jurisdiction. To determine whether a court can exercise specific personal jurisdiction, a court must look at three factors: (1) purposeful availment; (2) connection of the claims to the defendant's contacts with the state; and (3) reasonableness. *Lineberger*, 2017 WL 3883712, at *2 (citing *Carefirst of Md, Inc. v. Carefirst Pregnancy Ctrs., Inc.*, 334 F.3d 390, 397 (4th Cir. 2003)).

1. The Fabi Defendants chose to do business in South Carolina.

First, courts should consider "the extent to which the defendant purposefully availed itself of the privilege of conducting activities in the state." *Lineberger*, 2017 WL 3883712, at *2. This requires a finding that a defendant had "'certain minimum contacts' with the forum state." *Int'l Shoe Co. v. Wash. Off. Of Unemployment Comp. & Placement,* 326 U.S. 310, 316 (1945). Courts have allowed the plaintiff to prove "minimum contacts" through the "stream of commerce theory." The Fabi Defendants argue that "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." (Final Brief, p. 21). That is not the case. While the Fabi Defendants attempt to discredit the legitimacy of the stream of commerce theory to establish minimum contacts, the South Carolina Supreme Court just affirmed that it is appropriate to use in asbestos cases such as this one. *See Welch*, 2025 WL 1450573, at *6. The stream of commerce theory looks to whether the defendant has an expectation that its products "will be purchased by consumers in the forum State." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291-98 (1980). This can be established by showing that a defendant sold, serviced, or advertised a product in the forum state. *Ford Motor Co.*, 592 at 355. While the Fabi Defendants focus on this idea of the need for "something more" based on their reading of *J. McIntyre Machinery, Limited v. Nicastro*, the burden is not nearly as high as they portray. (Final Brief, p. 23 (citing 564 U.S. 873, 877 (2001)). In fact, courts interpreting *J. McIntyre*, have declined to apply such a "stream of commerce plus" test. *Collett v. Olympus Med. Sys. Corp.*, 437 F. Supp. 3d 1272, 1280-81 (M.D. Ga. 2020).

To understand what constitutes minimum contacts, it is helpful to see what does not. In *Asahi*, the explosion of a motorcycle tire injured the plaintiff and killed his wife. *Asahi Metal Industry Co. v. Superior Court of California*, 480 U.S. 102, 105-106 (1987). Cheng Shin manufactured the tire's tube, and Asahi manufactured a component part—the tube's valve assemblies. *Id*. at 106. While Asahi knew that its valves might end up in the United States, Asahi did not advertise or solicit business in California. *Id*. at 106-07. Asahi had no part in the distribution system that brought its valves to California, and it did not design its products in anticipation that they would be sold in California. *Id*. As a result, the Supreme Court held Asahi did not have sufficient minimum contacts to establish personal jurisdiction. *Id*. at 116.

Unlike *Asahi*, the Fabi Defendants purposely sold and shipped talc to companies in South Carolina. In its affidavit to this circuit court, IMI Fabi, LLC acknowledged it has sold industrial-grade talc in South Carolina since 2016. (R. p. 0862). Documents produced in discovery by IMI Fabi show that between 2015 and 2021 IMI Fabi LLC generated revenue in excess of $11 million from sales of its industrial talc into South Carolina.

Year	Revenue	Lbs[15]
2015	$1,388,038.29	5,912,000
2016	$1,705,923.53	6,898,000
2017	$1,645,767.33	6,652,000
2018	$1,569,437.23	6,408,000
2019	$1,644,315.01	6,644,000
2020	$1,499,377.94	5,696,000
2021	$1,624,821.47	6,420,000
	$11,077,680.80	**44,630,000**

[15] The Exhibit lists the amount sold by tons. Each ton is 2,000 lbs.

(R. pp. 1087-1097). There is no doubt, based on the information presented to the circuit court in response to the motion to dismiss, that the Fabi Defendants repeatedly sold substantial quantities of talc in the state of South Carolina.

The Fabi Defendants' connection to South Carolina is further established by the newly discovered evidence received by Plaintiffs since trial. When the Fabi Defendants got into the market of distributing cosmetic talc in the United States, they executed a distributorship agreement that covered sales by CSI over the entirety of the agreed upon "territory," the United States and Canada. (R. p. 2041). Most importantly, it is also now known that the Fabi Defendants shipped their talc to a company in South Carolina for the purpose of testing their talc for asbestos. (R. p. 0515, lines 30:5-18).

The Fabi Defendants directly interacted with companies in South Carolina and directly shipped their products to South Carolina. The Fabi Defendants' contacts with the forum were anything but unilateral. The Fabi Defendants had sufficient minimum contacts with the state of South Carolina to support jurisdiction.

2. The Fabi Defendants chose to send their talc to South Carolina, and Mrs. Plant was exposed to the Fabi Defendants' talc in South Carolina.

Second, courts should consider "whether the plaintiffs' claims arise out of those activities directed at the state." *Lineberger*, 2017 WL 3883712, at *2. The Fabi Defendants argue that they must have systematically served a market in South Carolina for the very cosmetic products that plaintiff alleged caused her harm. (Final Brief, 16-17). The Fabi Defendants attempt to use *Bristol-Myers* to illustrate this point. (Final Brief, 20-21) (citing *Bristol-Myers Squibb Co. v. Superior Ct. of*

California, San Francisco Cnty., 582 U.S. 255, 264 (2017)). The defendant in *Ford* tried a similar argument, suggesting that *Bristol-Myers* squarely foreclosed jurisdiction, but the Supreme Court held otherwise. *Ford Motor Co.*, 592 U.S. at 366. As explained in *Ford*, the plaintiff in *Bristol-Myers* alleged an injury from a product sold out of state. *Id*. at 369. Ford argued that *Bristol-Myers* foreclosed jurisdiction even if Ford "regularly sold the same *kind* of product in the state." *Id*. at 369. However, that reading of *Bristol-Myers*, "misses the point" of the decision. *Id*. What was important was that the product was not prescribed in the forum state, it was not used in the forum state, and the injuries did not occur in the forum state. *Id*. Courts can look to where the injury occurred, and they are not limited by where the plaintiffs reside. *See Coggeshall v. Reprod. Endocrine Assocs. of Charlotte*, 376 S.C. 12, 20, 655 S.E.2d 476, 480 (2007).

While Mrs. Plant no longer lives in South Carolina, Plaintiffs alleged facts in their complaint and proved Mrs. Plant lived in South Carolina while using makeup containing talc. (R. p. 0104). Plaintiffs further alleged in their complaint that the claims arise out of the Fabi Defendants' "business activities in the State of South Carolina" and Mrs. Plant's exposure to their "products in the State of South Carolina." (R. pp. 0113-0114). The Fabi Defendants provided no evidence to show otherwise.

Plaintiffs attached additional evidence to their motion to dismiss to support Mrs. Plant's exposure in South Carolina. Growing up, Mrs. Plant routinely went to South Carolina during the summer and for Thanksgiving. (R. p. 1057, lines 3-14; p.

1067, lines 2-9). Mrs. Plant and her family brought their makeup from home, including her daily-use CoverGirl powder foundation, but they would also occasionally purchase CoverGirl and Maybelline blush and eyeshadow in Litchfield, South Carolina. (R. p. 1056, lines 3-12; p. 1059, lines 1-13; p. 1068, lines 17-25). As teenage girls, Mrs. Plant and her sister liked to do photo shoots on the beach, which required a replenishment of their supply. (R. p. 1069, lines 1-11). Mrs. Plant also lived in South Carolina for a time, and she continued to purchase her go-to products. (R. p. 1057, line 25; p. 1058, lines 12-22).

Plaintiffs further flushed out Mrs. Plant's connection to South Carolina and CoverGirl during trial. Mrs. Plant confirmed she and her family took yearly trips to Litchfield, South Carolina. (R. p. 0429, lines 18-21). Mrs. Plant confirmed that for over 15 years her go-to brand of powder foundation was CoverGirl. (R. p. 0442, lines 2-4). Mr. Fabi explained that the Fabi Defendants sell Talc 141 (R. p. 0377, lines 16-18), and Plaintiffs presented evidence that CoverGirl used Talc 141 for a lot of products—including loose and pressed powders. (R. p. 0384, line 21-p. 0385, line 6; pp. 0712-0722).

At the end of the day, the Fabi Defendants sell *one* product – processed talc ore. They sent millions of pounds of processed talc to South Carolina, Mrs. Plant was exposed to their talc in South Carolina, and her exposure contributed to her mesothelioma diagnosis. The Plaintiffs made a particularized showing of relatedness for the purpose of jurisdiction.

3. It is fair to require the Fabi Defendants to defend the lawsuit in South Carolina.

Third, a court should consider "whether the exercise of personal jurisdiction would be considered reasonable." *Lineberger*, 2017 WL 3883712, at *2. Looking at the defendant, the Fabi Companies had direct contact with companies in South Carolina and "exploited" that market, making the burden of defending a lawsuit in South Carolina minimal. *See uBID, Inc. v. GoDaddy Grp., Inc.*, 623 F.3d 421, 432 (7th Cir. 2010).[16] The state of South Carolina has an "interest in providing a forum for its residents to seek relief" when they suffer harm in South Carolina. *Id*. Yet, it is not uncommon, that "[w]hen brought into the courts of the state in which they selected to transact business—for injuries done to the citizens and workers of that state by their conduct—these parties respond with shock and surprise." *Welch*, 2025 WL 1450573, at *6 (S.C. May 21, 2025). The South Carolina Supreme Court recently affirmed that "[p]ersons and companies that choose to do business in South Carolina receive in return the benefit and protection of our laws and our legal system." *Id*. Any wrongs committed in South Carolina "will be subject to the remedies of those same courts." *Id*. Here, the scales must tip towards where Mrs. Plant was injured, rather than where the Fabi Defendants are incorporated.

CONCLUSION

The Fabi Defendants failed to demonstrate that the trial court abused its discretion in granting a new trial pursuant to Rule 60(b)(2) and (b)(3). As the decision

[16] While *uBID, Inc.* applies Illinois law, the Illinois long arm statue—like the one in South Carolina—requires that a court ensure compliance with due process. The analysis, therefore, is the same and is applicable here.

to grant a new trial and the granting of jurisdiction do not have the requisite nexus, the Court should decline to rule on this premature issue. Alternatively, the Fabi Defendants failed to show that the circuit court's determination regarding personal jurisdiction was not supported by sufficient facts and/or suffered from a legal error. Plaintiffs, therefore, respectfully request that this Court affirm the circuit court's Rule 60 ruling and remand this matter to the circuit court for a new trial.

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August 19, 2025

Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Jean H. Toal, Circuit Court Judge

Appellate Case No. 2024-001997
Civil Action No. 2022-CP-40-01265

Sarah J. Plant and Parker Plant, ...Respondents,

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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