STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SPARTANBURG	)	FOR THE SEVENTH JUDICIAL CIRCUIT
JERRY HOWARD CRAWFORD, Individually and as Personal Representative of the Estate of **EVELYN KAY CRAWFORD**	)	**C/A NO. 2017-CP-42-04429**
Plaintiff,	)	**ORDER GRANTING PLAINTIFF'S MOTION FOR NEW TRIAL PURUANT TO RULE 60(b)(2) and 60(b)(3)**
v.	)	
CELANESE CORPORATION, et al.,	)	
Defendants.	)	

Plaintiff Jerry Howard Crawford, Individually and as Personal Representative of the Estate of Evelyn Kay Crawford, by and through his undersigned counsel, moved before the Court for relief from judgment pursuant to Rule 60(b)(2) and (3) of the South Carolina Rules of Civil Procedure. For the reasons stated below, Plaintiff's motion is GRANTED.

Plaintiff commenced this lawsuit on December 4, 2017, via a Summons and Complaint filed in the Spartanburg County Court of Common Pleas. Therein, Plaintiff sought recovery for the losses suffered as the result of Jerry Crawford's repeated exposures to asbestos while working at the Hoechst Celanese facility in Spartanburg, South Carolina from 1970 to 1974. As a result of his exposure to asbestos, Jerry Crawford was diagnosed with mesothelioma in or about November of 2017. At the time of trial, Covil Corporation was the only remaining defendant in this matter, and, against Covil, Plaintiff had three discrete causes of action: negligence, strict liability, and breach of implied warranty.

The trial of this matter began on July 16, 2018. Despite the significant evidence that Jerry Crawford was exposed to asbestos insulation supplied and installed by Covil when he worked at

the Celanese plant in Spartanburg in the 1970s, that this exposure was a substantial factor in causing his mesothelioma, and that Covil had knowingly sold asbestos products without a warning, the jury returned a defense verdict. (TT 7/19, at 553:6-554:2; Verdict Form.)

At trial, Covil did not deny that it generally sold and installed asbestos insulation, but maintained that it lost its sales invoices in a fire in 1973. (TT 7/17, at 307:11-14.) In addition, Covil's corporate representative, Robert Glenn, testified that he had reviewed available records and found no documents reflecting that Covil supplied insulation to Celanese from 1970 to 1974 or did work at that facility during that time frame, or that Covil and Daniel Construction worked together between 1970 and 1974. (TT 7/17, at 305:23-306:12.). This purported lack of documents formed the foundation for Covil's defense at the trial of this case.

The lack of documentary evidence was contradicted by the testimony of Harley Neelands, a former employee of Daniel Construction, that while he was working at the Celanese Spartanburg plant, Daniel was installing insulation that it had purchased from Covil Corporation. (Neelands Dep., p. 49, ¶ 57.)

After trial, on October 19, 2018, this Court granted Plaintiff's motion for new trial pursuant to the Thirteenth Juror Doctrine but denied Plaintiff's motion for judgment notwithstanding the verdict. Covil subsequently appealed the Court's decision. The appeal has been briefed and is pending before the South Carolina Court of Appeals.

New evidence has now come to light that Covil has a data tape in its possession, possibly containing documents relevant to this case, that it never disclosed to Plaintiff in this litigation. The existence of this new evidence was revealed at a hearing against Covil in other asbestos cases pending before this Court. At the hearing on July 11, 2019, Mark Wall's[1] counsel informed the

[1] Mark Wall of Wall Templeton served as counsel for Covil during the trial of this case. He no longer represents Covil Corporation.

Court and the parties that it has a data tape dating back to the 1990s. This data tape is apparently the last back up of the data on the Covil computers before the company stopped doing business in 1991.

Covil's attorney, who represented Covil ~~for decades~~ in asbestos litigation from the mid-1970s until April of 2018, took possession of the data tape in 1991.[2] Covil acknowledged at the hearing that neither Covil, its' attorneys nor its' insurance carriers ever attempted to download the data from the back up tape. Even more surprising is that the existence of the data tape has never been disclosed to any plaintiff in the hundreds of asbestos lawsuits in which Covil has been sued.

Covil attempts to excuse the inexcusable by arguing that the plaintiffs in asbestos litigation in years past could have possibly found the data tape if only they had looked hard enough for it. It is undisputed that in the case at issue here, the existence of the data tape was never disclosed either formally in discovery responses or informally. In fact, at the trial of this case, when ~~the~~ counsel for Covil argued against a spoliation charge, counsel stated:

> As I mentioned in my argument earlier, we had produced 25,000 pages worth of documents approximately in this case. It has ben 27 years since this business ceased in 1991, and, frankly, we understand that the records have been kept in prior counsel's office, and we are—understand everything has been produced that we have. In addition to that, there is no additional testimony or evidence that portions of records were destroyed by Covil at any point besides the fire, which we contend was not a deliberate or intentional act on behalf of Covil.

(TT 7/16/18).

Thus, Covil announced, in open Court, that all the documents had been produced in this case. That was clearly not the case. It is undisputed that Covil never gave the data tape to the Plaintiff or his counsel or even listed the data tape in its discovery responses.

[2] Daniel White of Gallivan White & Boyd represented Covil for over 30 years and took possession of the data tape in 1991.

Following the disclosure to the parties in July of 2019, nearly a year after the trial in this case, of the existence of the data tape, the Court ordered disclosure of the tape. Plaintiff and Covil jointly hired an independent forensic computer expert to determine what data, if any, may exist on the tape. The expert has had the data tape since August of 2019. To date, the expert has determined that tape contains data and that the data does not appear to have been intentionally destroyed.

However, the expert has not yet been able to find the necessary programs it will take to read and download the data on the tape. It is unclear if the expert will ever locate the necessary programs to retrieve any data or how long it may take. It is equally clear that this data could and should have been downloaded in 1991 in the midst of a sea of asbestos litigation.

Relief is warranted under Rule 60(b)(2)

Rule 60(b)(2), SCRCP, states that "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: . . . (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)." The term "newly discovered evidence" is a term of art and refers to evidence which existed at the time of the final judgment, order, or proceeding but which had not been discovered by the proponent of the Rule 60(b)(2) motion. *E.g.,* 11 Charles Alan Wright et al., Federal Practice and Procedure § 2859 (Supp. 2007) ("Under [Rule 60(b)(2)], the evidence must have been in existence at the time of the trial...."). "Whether to grant or deny a motion under Rule 60(b) lies within the sound discretion of the judge." *Raby Const., L.L.P. v. Orr*, 358 S.C. 10, 17-18, 594 S.E.2d 478, 482 (2004).

The South Carolina Court of Appeals has stated that to receive a new trial based on newly discovered evidence, the moving party 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, 612 S.E.2d 456 (Ct. App. 2015).

The Covil data tape constitutes newly discovered evidence under Rule 60(b)(2). According to the information provided by Covil's counsel, this data tape has been in existence since the 1990s and has been passed among the various counsel that have represented Covil in asbestos litigation. This evidence was thus in existence at the time of the jury's verdict in this case. The evidence was discovered in another hearing nearly a year after the trial of this case.

Further, Plaintiff could not have discovered this evidence with due diligence. Plaintiff sought to discover all Covil documents relevant to its sales and installation of asbestos insulation at Celanese Spartanburg, but Covil withheld the data tape and the documents on the tape. Plaintiff could not possibly have discovered information and documents that were intentionally withheld by Covil in violation of its discovery obligations. Finally, what is contained on this tape is unknown to the parties and the Court because of the inaction of Covil, its lawyers and its carriers in failing to download the data. I find it probable that the evidence contained on the tape is not likely to be merely cumulative or impeaching.

Relief is warranted under Rule 60(b)(3)

Rule 60(b) also provides that the Court may relieve a party from a final judgment, order, or proceeding for "fraud, misrepresentation, or other misconduct of an adverse party." SCRCP 60(b)(3). Relief under 60(b)(3) can generally be granted only for extrinsic fraud that prevents a party from presenting its case. *Chewning v. Ford Motor Co.*, 354 S.C. 72, 81, 579 S.E.2d 605, 610 (2003). Extrinsic fraud is "fraud that induces a person not to present a case or deprives a person of the opportunity to be heard. Relief is granted for extrinsic fraud on the theory that because the

fraud prevented a party from fully exhibiting and trying his case, there has never been a real contest before the court on the subject matter of the action." *Hilton Head Ctr. of South Carolina v. Public Serv. Comm'n*, 294 S.C. 9, 11, 362 S.E.2d 176, 177 (1987).

The Supreme Court has held that concealment of documents by an attorney is extrinsic fraud in that "the attorney, being an officer of the court, prevents the opposing party from presenting his case." *Chewning*, 354 S.C. at 82 (citing *In the Matter of Goodwin*, 279 S.C. 274, 305 S.E.2d 578 (1983); *Bankers Trust Co. v. Braten*, 317 S.C. 547, 455 S.E.2d 199 (Ct. App. 1995)).

Concealment of documents is also fraud upon the court. *Chewning*, 354 S.C. at 83. "[F]raud upon the court is a narrow and invidious species of fraud that 'subvert[s] the integrity of the Court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases that are presented for adjudication.'" *Perry v. Heirs at Law of Gadsden*, 357 S.C. 42, 47, 590 S.E.2d 502, 504-05 (Ct. App. 2003). In order to show fraud upon the court, a plaintiff must show "that one has acted with an intent to deceive or defraud the court." *Chewning*, 354. S.C. at 78. "Attorney fraud calls into question the integrity of the judiciary and erodes public confidence in the fairness of our system of justice. Accordingly, where an attorney embarks on a scheme to either suborn perjury or intentionally conceal documents, extrinsic fraud constituting a fraud upon the court occurs." *Id.* at 83–84.

Here, Covil represented to counsel, this Court, and to the jury that every document had been produced and any missing documents had been lost in a fire. It is important to note that Covil does not and has not existed since 1993. It has been nothing more than a shell operated, controlled and abused by its insurers and those who purport to be attorneys for Covil. In finding in Covil's

favor, the jury apparently credited this assertion and faulted Plaintiff for the lack of documentary evidence showing Covil's presence at Celanese Spartanburg. Covil's concealment of the data tape, which may very well contain the very documents that Covil claimed were destroyed, constitutes fraud against Plaintiff and fraud on this Court. This gross misconduct is an additional ground for relief from the jury's verdict and granting a new trial.

CONCLUSION

For the reasons set forth herein, the Court grants Plaintiff's motion for relief from judgment under SCRCP 60(b)(2) and (3) and finds that the concealed data tape is an additional basis for granting a new trial.

AND IT SO ORDERED this 25 day of November 2019

Jean H. Toal, Chief Justice of the Supreme Court, Retired, acting as Circuit Court Judge

Columbia, South Carolina.

Spartanburg Common Pleas

Case Caption: Jerry Howard Crawford , plaintiff, et al VS Celanese Corporation , defendant, et al

Case Number: 2017CP4204429

Type: Order/Other

IT IS SO ORDERED.

s/ Jean H. Toal #2758

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November 25, 2019

Jenny Abbott Kitchings
Clerk of Court, South Carolina Court of Appeals
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Re: *Crawford v. Celanese Corporation, et al.; of whom Covil is the Appellant*
Appellate Case No. 2018-001965

Dear Ms. Kitchings:

Per our letter of November 18, 2019, please find enclosed the signed and filed Order of Chief Justice Jean H. Toal (Ret.) Granting Plaintiffs' Motion for a New Trial Pursuant to Rule 60(b)(2) and Rule 60(b)(3).

Please let me know if you have any questions or concerns or if you need anything further from us.

Very truly yours,

Elizabeth C. Moultrie
Senior Paralegal to John D. Kassel,
Theile B. McVey, and Jamie Rae Rutkoski

ECM:bmh

Enclosure

cc: Ashley K. Braithwaite, Esquire (w/enclosures)
Graham Pollock Powell, Esquire (w/enclosures)
Charles W. Branham III, Esquire (w/enclosures)

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