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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Mikell R. Scarborough
Master in Equity

Appellate Case No. 2025-001384
Civil Matter No. 2022-CP-10-02589

John Kachmarsky, individually, as Manager of K&T Group, LLC, and as Trustee of the Revocable Trust of John Kachmarsky dated November 30, 2007, as member of K&T Group, LLC,

Appellant,

v.

David G. Taylor, individually and as Manager of K&T Group, LLC; Taylor Capital, LLC, as member of K&T Group, LLC; and K&T Group, LLC, and Foley Bullock, LLC,

Respondents.

INITIAL BRIEF OF RESPONDENTS

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STATEMENT OF ISSUES ON APPEAL

I. Where evidence presented after the trial could have been discovered prior to trial and was not relevant to the issues Appellant litigated and presented at trial, did the trial court abuse its discretion in denying Appellant's motion for relief from judgment under Rule 60(b)(2)?

II. Where Appellant presented no evidence of the intent to defraud, where the post-trial evidence Appellant presented could have been discovered to trial and was not relevant to the issues Appellant litigated and presented at trial, and where Appellant's allegations of fraud did not amount to extrinsic fraud, did the trial court abuse its discretion in denying Appellant's motion for relief from judgment under Rule 60(b)(3)?

III. Whether granting Respondent's motion to amend its answer and counterclaim where the amendment did not change the parties or claims and did not prejudice Appellant was an abuse of the trial court's discretion?

STATEMENT OF THE CASE

Appellant and Respondent own, use, and rent desirable office space in downtown Charleston through a limited liability company—K&T Group, LLC—and have done so for over twenty years. Although their friendship has not lasted as long, the successful business relationship has endured. Appellant brought this lawsuit seeking to dissolve the term company and claiming wrongful dissociation based on a dispute over $3,750 about whether Respondent's law firm should have to pay additional rent for a summer intern's temporary use of a single office. Appellant lost at trial.

Appellant then sought post-trial relief pursuant to Rule 59(e), claiming a host of evidentiary errors, none of which he presses in this Court. Subsequently, four months after trial, Appellant claims to have uncovered a fact he now characterizes as evidence of "actively concealed" fraud: that Taylor Foley—the law firm that occupied K&T Group's office space—paid fair-market-value rent to an entity called Taylor Tax Law, and that Taylor Tax Law, in turn, paid rent to K&T Group according to the formula that Appellant and Respondent mutually agreed to at Appellant's insistence. Despite Appellant's inflammatory rhetoric, there is nothing vaguely scandalous about that fact, nor does it have anything to do with the theories of liability that Appellant pled, litigated for two years, and then tried—unsuccessfully—against Respondent.

In support of this post-trial "revelation," Appellant relies on an affidavit of April Shores, the same individual whom Respondent listed as the first witness with relevant knowledge in his interrogatory responses and whom Appellant never deposed or called to testify at trial. Appellant also claims that he couldn't have known about the rental arrangement between Taylor Foley and Taylor Tax Law, even though he (on behalf of K&T Group) had many times received rental payments from Taylor Tax Law, and even produced six rent payments checks from Taylor Tax

Law to K&T Group in this very action. Moreover, Appellant's counsel asked Taylor during his deposition who paid rent to K&T Group, and Taylor directly told Appellant's counsel: "It would come from my S corporation [Taylor Tax Law] to our joint LLC, K&T Group." (Defs' Mot. to Recon., Ex. A, Dep. of David Taylor at 56:15–18). Appellant himself was personally present during the deposition. No one asked another question that day or any of the 438 days from there until the trial of this case.

Ultimately, the trial court denied Appellant's requests for post-trial relief, finding that Appellant failed to exercise due diligence that would have produced the evidence he framed as "newly discovered" and that such evidence—even if "newly discovered"—did not support the claims Appellant pressed during litigation and presented at trial. Now, Appellant asks this Court to reverse the decision of the trial court and permit Appellant to retry a case that he lost the first time, and to do so upon a completely different theory of liability against Respondent and with evidence that was immaterial to this litigation prior to final judgment. South Carolina law prohibits the unprecedented relief that Appellant seeks in this Court, and for good reason. If litigants were empowered to utilize evidence that was always available to them to reopen a case long after a final judgment for the purpose of obtaining a second (or third or fourth) chance at a trial on a new theory, litigation would be interminable and post-judgment procedure would be ripe for abuse.

FACTS

This dispute involves the interests of a limited liability company formed in 2003: K&T Group, LLC ("K&T Group" or the "Company"). K&T Group's interests are owned in equal halves by Appellant the Revocable Trust of John Kachmarsky dated November 30, 2007 (the "Kachmarsky Trust"), and Respondent Taylor Capital, LLC ("Taylor Capital"). The respective principals of those member entities are John Kachmarsky (Trustee) and David Taylor, who are

also the managers of K&T Group. The primary asset of the Company is a commercial office known as Suite 330 of the Franke Building at 171 Church Street in Charleston ("Suite 330").

Under the Company's Operating Agreement, K&T Group is a Term company. (Defs' Ex. 1.) Under the South Carolina Uniform Limited Liability Act (the "LLC Act"), a Term company like K&T Group has limited rights of transfer and exit. *See* S.C. Code Ann. § 33-44-101(19) ("Term company means a limited liability company in which its members have agreed to remain members until the expiration of a term specified in the articles of organization."); (Trial Tr. 104:20–105:4.) Kachmarsky, a corporate and estate planning attorney for more than thirty years, understands the implications of establishing a term company, and intended to have them here. (Id. at 104:20–105:12). According to the Operating Agreement, the stated purpose of the Company is "to hold and manage Company Property." (Defs' Ex. 1, § 1.10.) Kachmarsky and Taylor operate different commercial entities within Suite 330, and K&T Group rents the remaining office space in Suite 330 to third parties. For the last several years, Suite 330 has been occupied by rent-paying tenants, save for infrequent vacancies. (Trial Tr. 100:21–101:9.)

Early in K&T Group's existence, Taylor and Kachmarsky agreed on a formula for the rent that each would owe to the Company for their own occupation of office space in Suite 330. (Trial Tr. 102:16–103:3). The formula resulted in rental payments that were below fair market value, and Kachmarsky insisted that K&T Group not enter into written leases for the members' own occupation of office space. (Trial Tr. 80:1–23; 154:18–23.). Prior to 2014, Taylor occupied office space in Suite 330 and paid K&T Group rent (according to the agreed-upon formula) through an entity called Taylor Tax Law. (Evid. Hearing Tr. at 36:22–37:14.) In 2014, Taylor started a new law firm, Taylor Foley, which began occupying space in Suite 330. From that point, Taylor Foley

paid fair-market-rent to Taylor Tax Law, and Taylor Tax Law paid rent to K&T Group according to the formula that Taylor and Kachmarsky agreed upon. (*Id.*)

Since K&T Group's inception, Kachmarsky has managed the collection of rents and the Company's finances. (Trial Tr. 48:10 – 49:5; 80:24 – 82:2.) During discovery in this case, Appellant produced six rent checks from Taylor Tax Law to K&T Group for Taylor Foley's occupation of office space. (Evid Hearing Tr. at 42:24–43:6, Exs. 1–6). Similarly, Respondents produced in discovery an email between Taylor and April Shores titled "K&T Group Rent," in which Taylor inquires about a rent payment "from Taylor Tax Law to K&T Group." (*Id.* at 52:2–12.) At no point prior to the final judgment in this case did Appellant object to or complain about Taylor Tax Law's payment of rent to K&T Group, which was always in accordance with the agreed-upon formula.

At trial, Appellant presented evidence of certain payment disputes that have arisen a few times during the more than twenty years of Company operations. The disagreements raised by Appellant occurred prior to the statutory period, that is, more than three years before the filing of this action, save one.[1] (Trial Tr. 82:3 – 83:11.) The one disagreement that occurred during the statutory period involves Taylor Foley's temporary use of an otherwise vacant office in Suite 330 for the firm's summer intern in 2021. At trial, the trial court received evidence and testimony regarding that dispute, as set forth in the trial court's November 26, 2024 Order. At trial, Appellant presented no evidence related to the rental arrangement between Taylor Foley, Taylor Tax Law,

[1] After the trial, the trial court found that the disagreements giving rise to Appellant's claims occurred prior to the statutory period (except for one) and therefore that those disagreements could not support Appellants' claims. (November 26, 2024 Order at 3, 7–8.) Appellants do not challenge that holding in this appeal.

and K&T Group and had no concerns about the arrangement that was within plain sight. As Kachmarsky testified at the post-trial evidentiary hearing:

> It would be fair to say that I don't really care -- I wouldn't care who the checks came from -- I mean, or who the tenant was. I mean, the rent was being paid. I wouldn't care what the account had on it, whose name it was in or anything like that.

(Tr. Evid. Hearing at 124:17–125:24).

PROCEDURAL HISTORY

Appellant filed this lawsuit in June 2022, asserting three claims against Respondents: (1) breach of the Operating Agreement, (2) judicial expulsion under S.C. Code Ann. § 33-44-601, and (3) judicial dissolution under S.C. Code Ann. § 33-44-801. (Compl.) As Appellant acknowledges, he pursued three theories of liability during this litigation: (1) Taylor's alleged failure to pay rent for a summer intern's use of office space within Suite 330, (2) Taylor's alleged refusal to contribute proportionately to Company expenses, and (3) Taylor's alleged violations of banking covenants with Ameris Bank. (*See* App.'s Initial Brief at 2–3). For more than two years, the parties conducted discovery based on Appellant's asserted theories of liability.

On September 17, 2024, the trial court held a non-jury trial on Appellant's claims and Respondents' counterclaim, where it received documentary evidence and live witness testimony. On November 26, 2024, the trial court issued an order, finding that Appellant did not satisfy his burden of proof for the claims asserted in his Complaint and dismissing those claims with prejudice, and finding that Respondents satisfied their burden of proof for their counterclaim and entering judgment in Respondents' favor on that claim. (November 26, 2024 Order) (the "2024 Order").

On December 6, 2024, Appellant filed a motion for reconsideration pursuant to Rules 52(b), 59(e), and 60, arguing that the trial court committed a host of evidentiary and procedural

errors. (Pl's Mot. to Recons., December 6, 2024). Appellant does not advance any of the arguments included in his motion for reconsideration with this Court, save for his argument that the trial court wrongfully granted Respondents' motion to amend its answer and counterclaim pursuant to Rule 15(a). (*See generally*, App.'s Initial Brief.)

On January 17, 2025, Appellant filed a motion for relief from judgment under Rule 60(b)(2), arguing that purportedly "newly discovered" evidence justified relief from the final judgment entered in this case. (Pl's Mot. for Relief from Judg.) Appellant's "newly discovered" evidence was testimony from April Shores, a witness that Respondents listed as a first witness with relevant knowledge in response to the first Interrogatory Appellant served more than two years before trial. (Tr. Evid. Hearing at 50:20–51:23). Appellant never deposed Ms. Shores and did not call Ms. Shores as a witness during the trial.

Respondents filed a Response to Appellant's Rule 60(b)(2) Motion on January 24, 2025. (Defs' Response to Mot. to Recons., January 24, 2025). And Appellant filed a Reply on January 27, 2025. (Pl's Reply to Mot. to Recons., January 27, 2025.) On January 27, 2025, the trail court held a hearing on Plaintiff's Rule 60(b)(2) motion and determined that an evidentiary hearing was necessary. (Hearing Tr. 40:9-23.)

On March 10, 2025, the Court held the evidentiary to determine whether Appellant was entitled to any relief under Rule 60(b). (Tr. Evid. Hearing.) After hearing testimony from the relevant witnesses about Appellant's post-trial evidence, the trial court noted the fatal flaw in Appellant's pos-judgment motion: "The problem is that, as I see it, is this stuff should have been found during discovery." (*Id.* at 142:15–16.) At the conclusion of the hearing, the trial court offered Appellant the opportunity to brief the issue of extrinsic fraud. (*Id.* at 152:16–153:7.) The parties submitted the requested memoranda on March 24, 2025 and March 31, 2025, respectively. (Pl's

Supp. Memo. to Mot. to Recons.; Defs' Reply to Mot. to Recons.)

On April 24, 2025, the Court held a status conference over Zoom. (Hearing Tr.). The same day, the Court issued an Order granting Appellant's motion for relief from judgment and for a new trial, holding:

> Based upon the totality of the circumstances presented by the Plaintiff, the Court GRANTS the Motion as it finds evidence of extrinsic fraud in the underlying case which could not have been discovered during the course of the trial, and which could change the outcome.

(April 24, 2025 Order.)

On May 2, 2025, Respondents filed a motion to reconsider the trial court's April 24, 2025 Order, arguing that Appellant's failure to exercise due diligence foreclosed his ability to obtain relief under Rule 60(b)(3) and that Appellant's post-trial evidence did not come close to demonstrating clear and convincing evidence of extrinsic fraud. (Defs' Mot. to Recons.) On June 17, 2025, the trial court issued an order granting Respondents' motion to reconsider and reinstating in full the 2024 Order. (June 17, 2025 Order) (the "2025 Order"). In the 2025 Order, the trail court found that Appellant failed to exercise due diligence and could have discovered the evidence he presented post-trial as "newly discovered":

> Since April Shores was disclosed as a witness and this information could have been discovered during this litigation, the Court concludes that the fraud alleged in this instance is not extrinsic but is intrinsic to this case. In the colloquy on pages 42-44 of the March 10, 2025 transcript, Defendant Taylor disclosed that Taylor Tax Law was paying rent to K&T Group. Plaintiff Kachmarsky was present at Taylor's deposition when this was disclosed and no further inquiry was made during discovery.

(*Id.* at 2.) The trail court also found that such evidence did not support the claims that Appellant pled and pursued to conclusion at trial:

> The Court concludes that while there was a business relationship between the members of the LLC, it was not based on profit but on equity – each party was to pay the same amount of rent; therefore, it did not matter what the amount of rent

> was paid, provided that rent was equal. While Taylor Capital, LLC did not always pay rent on time, it did eventually pay its share.
>
> […]
>
> While Plaintiff has established that Taylor Capital, LLC received more income than it paid to K&T Group, under the business relationship which they used, that matter becomes immaterial. Furthermore, this could have been discovered during litigation, but apparently was not.

Id. at 2–3.

On June 30, 2025, the trial court held a hearing on Appellant's December 6, 2024 motion for reconsideration under Rule 59(e), which remained pending. (Hearing Tr.). At the hearing, the trial court asked the parties for additional briefing on the application of *Boathouse at Breach Inlet v. Stoney*, 442 S.C. 633, 900 S.E.2d 483 (Ct. App. 2024) to Appellant's claims for judicial dissolution and judicial expulsion. (*Id.*) On July 17, 2025, Respondents filed a supplemental memorandum in opposition to Appellant's motion for reconsideration. (Defs' Supp. Memo. to Mot. to Recons.) On July 23, 2025, Appellant filed a reply. (Pl's Reply to Memo. to Mot. to Recons.)

On August 1, 2025, the court entered an Order denying Appellant's motion for reconsideration, holding:

> While the information and events presented to the Court post-trial give this Court concern, the parties have the ability to resolve this matter between themselves. The Court, however, is limited to the record presented at trial and accordingly, the Plaintiff's Rule 59(e) Motion to Reconsider is respectfully DENIED.

(August 1, 2025 Order.) This Appeal followed. (Not. of Appeal; Amend. Not. of Appeal.)

STANDARD OF REVIEW

A. Motion for Relief From Judgment Under Rule 60(b)

"Whether to grant or deny a motion under Rule 60(b) lies within the sound discretion of the judge." *Raby Const.*, LLP v. Orr, 358 S.C. 10, 16, 594 S.E.2d 478 (2004). The appellate

"standard of review, therefore, is limited to determining whether there was an abuse of discretion." *Id.* "An abuse of discretion arises when the judge issuing the order was controlled by an error of law or when the order is based on factual conclusions that are without evidentiary support." *Curry v. Carolina Ins. Grp. of SC, Inc.,* 428 S.C. 60, 78, 832 S.E.2d 760, 768 (Ct. App. 2019).

B. Motion to Amend Under Rule 15(a)

Rule 15(a) states that "a party may amend his pleading . . . and leave shall be freely given when justice so requires and does not prejudice any other party." SCRCP 15(a). "Motions to amend pleadings to conform to proof may be made upon motion of any party at any time, even after judgment, and are within the sound discretion of the trial judge." *Ball v. Canadian Am. Exp. Co.*, 314 S.C. 272, 275, 442 S.E.2d 620, 622 (Ct. App. 1994) (citing Rule 15(b), SCRCP). A trial court's ruling on a motion under Rule 15(a) "will not be overturned without an abuse of discretion or unless manifest injustice has occurred." *Berry v. McLeod*, 328 S.C. 435, 450, 492 S.E.2d 794, 802 (Ct. App. 1997).

ARGUMENT

I. The Trial Court Correctly Denied Appellant's Motion for Relief from Judgment Under Rule 60(b)(2).

Appellant filed this lawsuit in 2022, alleged that Respondents committed certain breaches, pursued those claims for more than two years, and presented those theories of liability at trial. After trial, the trial court rejected each of Appellant's theories and entered judgment in favor of Respondents. More than a month-and-a-half later, Appellant filed a motion for relief from judgment under Rule 60(b)(2), presenting for the first time a brand-new theory based upon years-old evidence. The trial court rejected Appellant's post-trial efforts, finding that Appellant could have discovered the evidence earlier and that the evidence, in any event, did not support Appellant's claims.

Now, Appellant asks this Court to find that the trial court abused its discretion, reverse the trial court's judgment, re-open this case, and permit Appellant a do-over of the trial he lost, so that he can pursue an entirely new and untenable theory of liability. South Carolina law does not permit a litigant to skirt the finality of a judgment so that he can pursue a different theory in the hopes of a different result. The Court should affirm the trial court's denial of Appellant's motion for relief from judgment under Rule 60(b)(2) for the following reasons.

First, there is no plausible argument that the evidence Appellant now presents "could not have been discovered by due diligence prior to trial." SCRCP 60(b)(2); *see Lanier v. Lanier*, 364 S.C. 211, 217, 612 S.E.2d 456, 459 (Ct. App. 2005). Appellant's "newly discovered evidence" that was presented on January 17, 2025 comes from a witness who was disclosed on November 9, 2022, and even as a witness on the very topic Appellant claims is the subject of concealment: "payment of rents to K&T Group, LLC." For more than two years while this case was litigated, Appellant never asked her a question. Further, Appellant himself produced six separate checks during discovery clearly showing that Taylor Tax Law (and not Taylor Foley) paid rent to K&T Group for Taylor Foley's occupation of Suite 330. Moreover, Taylor in fact disclosed the rental arrangement during his deposition in this case. Nevertheless, Appellant never conducted any discovery on this issue.

As the trial court correctly held, Appellant's failure to exercise any due diligence to discover (or, more accurately, to advance) this evidence available to him during more than two years of litigation is fatal to his request for relief under Rule 60(b)(2). *See Lanier*, 364 S.C. at 217, 612 S.E.2d at 459 ("South Carolina's strong policy towards finality of judgments trumps a party's ability to set aside a judgment where, as here, the party could have discovered the evidence prior to trial."), 364 S.C. at 220, 612 S.E.2d at 461 ("Where a litigant could have discovered the new

evidence prior to trial, he or she is not entitled to relief under Rule 60(b)(2).").

Second, Appellant's new theory of liability and "newly discovered" evidence are not material to the issues that he raised in the Complaint, litigated for two-and-a-half years, and tried against Respondents. In his Complaint, Appellant asserted three theories that he pursued during discovery and presented during trial. As Appellant has conceded, none of those issues have anything to do with the new theory of liability against Respondent, which Appellant himself describes as a "separate and distinct breach." (App.'s Initial Brief at 26). Because Appellant's "new" evidence is not relevant to any of the theories he asserted in his Complaint, litigated, or pursued at trial, it is not "material to the issues raised by the pleadings" and cannot be grounds for a Rule 60(b)(2) motion. *Johnston v. Belk-McKnight Co. of Newberry*, 188 S.C. 149, 198 S.E. 395, 398 (1938) (holding that "newly discovered evidence" under Rule 60(b)(2) must be "material to the issues raised by the pleadings"); *see also Morin v. Innegrity, LLC*, 424 S.C. 559, 578, 819 S.E.2d 131, 141 (Ct. App. 2018) (denying Rule 60(b)(2) motion because the moving party "chose not to make the [relevant] issue a material part of its trial theory").

Third, Appellant's post-trial evidence does not support the claims he pled, litigated, and tried against Respondents. It is undisputed that Taylor and Kachmarsky agreed upon a formula for the rent that each would pay to the Company for each's occupation of office space in Suite 330, and there is no dispute Taylor paid rent for his use of office space according to the formula.[2] Appellant's "new" evidence is testimony demonstrating that that Taylor's law firm, Taylor Foley (the sub-tenant), paid fair-market rent to Taylor Tax Law (the tenant) while Taylor Tax Law paid

[2] There is no dispute that Taylor's entities paid rent to K&T Group according to the agreed-upon formula, save for the dispute over $3,750 in rent payments that the parties disputed were owed based on Taylor Foley's impermanent occupation of excess office space, which was the subject of the trial in this case. The trial court resolved that dispute by finding that no rental payments were owed to K&T Group. (November 26, 2024 Order at 3–4.)

rent to the Company according to the formula that Appellant and Respondent agreed upon and each utilized. That is not evidence of fraud or of any breach. Appellant cannot claim that Taylor breached a fiduciary duty by failing to direct Taylor Tax Law to pay more to the Company than the agreed-upon rent, and to pay rent in excess of the formula used to determine Appellant's rent. No fiduciary duty would obligate an equal partner in a business to pay rent above and beyond his agreed-upon share and in excess of what his equal partner pays. As the trial court correctly found:

> While there was a business relationship between the members of the LLC, it was not based on profit but on equity – each party was to pay the same amount of rent; therefore, it did not matter what the amount of rent was paid, provided that rent was equal.

(April 24, 2025 Order at 2.)

Accordingly, as the trial court found, the premise of Appellant's new theory is flawed: there were no "substantial rental payments owed to K&T Group." (App.'s Initial Brief at 7.) If a court determined that Respondent breached a duty by not paying funds to K&T Group, it would have ignored the agreement the parties had come to, at Kachmarsky's insistence, as to how they would use and pay for the property owned by the Company. Moreover, some finding of a breach by Taylor for paying additional rent based on fair market value would beget the corollary claim that Kachmarsky breached his fiduciary duty by failing to charge and remit fair market value for the space he occupied. The fact that Kachmarsky had no partners in his firm and could simply pass the benefit of ownership to the occupying entity does not mean that Taylor was required to gift the benefit of this ownership interest in K&T Group (and the sub-market rent) to his law partners who did not invest in or bear the risks of ownership of the property.

Appellant would have this Court reverse the trial court and reopen a case that has been tried to judgment so that he can essentially start an entirely different lawsuit that would involve new claims and new discovery. It cannot be the law in South Carolina that a trial court's refusal to

entertain such a request subjects it to reversal.

a. <u>Appellant's Post-Trial Evidence is Not New And Could Have Been Discovered Prior to Trial</u>.

Rule 60(b)(2) authorizes a trial court to relieve a party from a final judgment only in the presence of "newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b)[.]" SCRCP 60(b)(2). To obtain relief under Rule 60(b)(2), Appellant was required to establish five separate factors: "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*, 364 S.C. at 217, 612 S.E.2d at 459.

South Carolina law is clear that "Rule 60(b)(2) allows the court to grant a new trial only if the newly discovered evidence could not have been discovered by due diligence prior to trial. *Lanier*, 364 S.C. at 220, 612 S.E.2d at 460. Thus, a party seeking to undo a final judgment cannot obtain relief under Rule 60(b) if he "could have discovered the new evidence prior to trial." *Id.* ("South Carolina's strong policy towards finality of judgments trumps a party's ability to set aside a judgment where . . . the party could have discovered the evidence prior to trial."). Of course, evidence that was known to a party or within its possession prior to trial cannot be "newly discovered." *Se. Hous. Found. v. Smith*, 380 S.C. 621, 637, 670 S.E.2d 680, 688 (Ct. App. 2008) (citing *Lanier,* 364 S.C. at 218, 612 S.E.2d at 459). The party seeking to undo a final judgment under Rule 60(b)(2) bears the burden of presenting evidence that he could not have discovered the proffered evidence earlier. *Perry v. Heirs at Law of Gadsden,* 357 S.C. 42, 46, 590 S.E.2d 502, 504 (Ct. App. 2003).

The trial court correctly denied Appellant's motion for relief from judgment under Rule

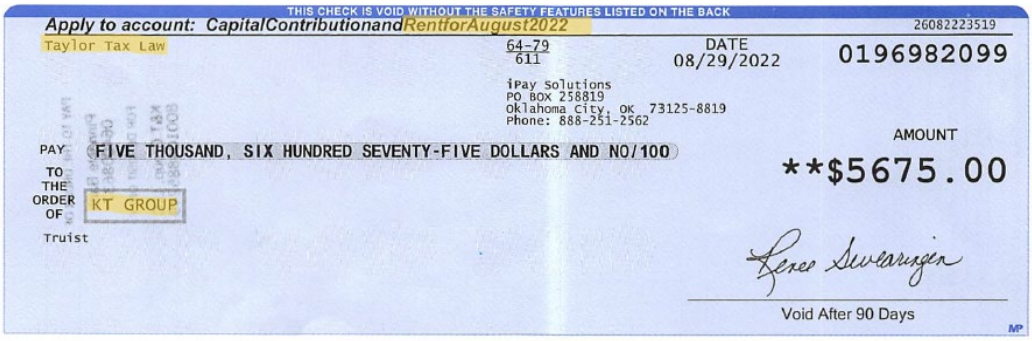
60(b)(2) because Appellant could have easily discovered the evidence he presented post-trial through the exercise of even minimal diligence. In the November 26, 2024 Order, the trial court reasoned, "April Shores was disclosed as a witness and this information could have been discovered during this litigation[.]" (November 26, 2025 Order at 2.) The Court also explained that "Taylor disclosed that Taylor Tax Law was paying rent to K&T Group" while "Kachmarsky was present at Taylor's deposition" and yet "no further inquiry was made during discovery." (*Id.*) The Court also found that Appellant's post-trial evidence was not relevant to, and did not support, the claims that Appellant pled, litigated for two years, and presented at trial, holding that the evidence was "immaterial." (*Id.* at 3.) As the trial court correctly determined, those fatal flaws sunk Appellant's request for relief from judgment.

"The decision to grant or deny a motion under Rule 60(b) is within the sound discretion of the trial court." *Lanier*, 364 S.C. at 215–16, 612 S.E.2d at 458 (quoting *Bowman v. Bowman,* 357 S.C. 146, 151, 591 S.E.2d 654, 656 (Ct. App. 2004)). Accordingly, the Court's review is limited to determining whether the trial court abused its discretion in denying Appellant's motion for post-trial relief. *Id.* Because the substantial evidence demonstrates that Appellant could have discovered the evidence he presented post-trial as "new," the Court should affirm the decision of the trial court.

It is beyond reasonable dispute that Appellant could have discovered, through due diligence, the evidence he presented post-trial as "newly discovered." In his deposition of Taylor, which took place fourteen months before trial, Appellant's counsel asked: "Who would have documents supporting where the rent would have been paid from?" Taylor responded: "It would come from my S corporation to our joint LLC, K&T Group." (Defs' Mot. to Recon., Ex. A, Dep. of David Taylor at 56:15–18.) During the evidentiary hearing, Taylor explained that his "S

corporation" is Taylor Tax Law, a fact that Kachmarsky knew well because it was a partner with Kachmarsky's former law firm, Kachmarsky Taylor. (Tr. Evid. Hearing at 43:7–44:11.) And Kachmarsky was present at Taylor's deposition. (*Id.* at 122:19-22; 44:12–14.) Appellant's counsel did not ask any questions about Taylor's S corporation paying rent to K&T Group, nor did Appellant conduct any discovery on the topic during the two years that the parties litigated this case. As Taylor explained in his deposition, had Appellant's counsel asked about the matter, he would have explained that Taylor Tax Law was "the primary tenant and it has been since we bought the property." (*Id.* at 44:21–22.)

Further, Appellant was actually in possession of documents clearly demonstrating that Taylor Tax Law was the entity paying rent to K&T Group. According to his own testimony, Kachmarsky managed the K&T Group's leases and finances. (Trial Tr. 48:10–14; 80:24–81:9). It's not surprising, then, that Kachmarsky himself produced checks during discovery clearly showing that Taylor Tax Law paid rent to K&T Group for Taylor Foley's occupation of Suite 330:


THIS CHECK IS VOID WITHOUT THE SAFETY FEATURES LISTED ON THE BACK
Apply to account: CapitalContributionandRentforAugust2022
26082223519
Taylor Tax Law
64-79
611
DATE
08/29/2022
0196982099
iPay Solutions
PO BOX 258819
Oklahoma City, OK 73125-8819
Phone: 888-251-2562
AMOUNT
PAY
FIVE THOUSAND, SIX HUNDRED SEVENTY-FIVE DOLLARS AND NO/100
**$5675.00
TO THE ORDER OF
KT GROUP
Truist
Void After 90 Days

In fact, Appellant was in possession of, and produced in this lawsuit, six checks from Taylor Tax Law to K&T Group for rent. Respondent presented these checks as Exhibits 1 – 6 at the March 10 Evidentiary Hearing. (Evid. Hearing Tr. at 42:24–43:6.) Similarly, Respondents produced, in discovery, an email between Taylor and April Shores titled "K&T Group Rent," in which Taylor inquires about a payment "from Taylor Tax Law to K&T Group." (*Id.* at 52:2–12.)

The fact that Taylor Tax Law (and not Taylor Foley) paid rent to K&T Group was not "actively concealed;" it was always out in the open. Nevertheless, during more than two years of discovery, Appellant did not request any documents related to Taylor Tax Law's rental payments to K&T Group, the transactions between Taylor Foley and Taylor Tax Law, or any agreement between Taylor Foley and Taylor Tax Law. Nor did Appellant serve any Interrogatories on those topics.

Likewise, Appellant failed to depose the witness with first-hand knowledge of this subject, who Respondents made readily available during discovery. Appellant had every opportunity, prior to trial, to obtain testimony from April Shores, the witness he proffered post-trial for "newly discovered" testimony related to payments between Taylor Foley and Taylor Tax Law. As Taylor explained during the evidentiary hearing, Ms. Shores had intimate knowledge of Taylor Foley's finances, and she had access to the Quickbooks of Taylor Foley. (Evid., Hearing Tr. at 50:16–19.) In response to Appellant's Interrogatories, in 2022, Respondents listed April Shores as a witness with knowledge on "the payment of rents to K&T Group." (*Id.* at 50:20–51:23.) Nevertheless, in more than two years of discovery, Appellant never deposed Ms. Shores.

Prior to trial, Respondents listed April Shores as the only non-party on their witness list. (Defs' Mot. to Recon., Ex. C at 5.). Appellant did not call Ms. Shores as a witness at trial. In other words, Respondents offered Ms. Shores, from the earliest moments of discovery, as a witness with knowledge, but Appellant never endeavored to obtain the knowledge Ms. Shores had. To discover the evidence he characterizes as "concealed," all Appellant had to do was ask the first listed witness a single question at any point during the two-and-a-half years that this case was litigated. Accordingly, Appellant could not, after losing at trial, legitimately present Shores' testimony as "newly discovered" evidence. The record contains further examples of invitations and

opportunities for Appellant to have pursued this discovery and where Appellant failed to do so, including written discovery and testimony of other potential witnesses. (*See generally* Defs' Mot. to Recon., Ex. B.)

If Appellant failed, prior to trial, to discover the facts he presented post-trial as "concealed," it is because he failed to exercise any due diligence to discover these facts that were always open and obvious to him, not because Taylor fraudulently concealed anything. As Taylor explained during the evidentiary hearing, he never brought up the rental arrangement because it was not relevant to any of the claims Appellant asserted against him at trial. (Evid. Hearing Tr. at 42:7–13.) In his brief, Appellant concedes that the rental arrangement he claims Taylor "concealed" was not relevant to his claims. (App.'s Initial Brief at 26) (describing the evidence presented post-trial as "clearly outside the scope of the original claims"). In fact, Appellant testified to the same effect when defending his failure to look into the issue he now complains about:

> A. It would be fair to say that I don't really care -- I wouldn't care who the checks came from – I mean, or who the tenant was. I mean, the rent was being paid. I wouldn't care what the account had on it, whose name it was in or anything like that.

(Evid. Hearing Tr. at 125:10–15.) Appellant's apparent ignorance about the rental arrangement is the result of his own failure to exercise due diligence, not any "active concealment" by Taylor. The fact of the matter is that Appellant never concerned himself with this evidence, which was always out in the open and known to him, until his other theories of Respondents' liability failed at trial.

For these reasons, the trial court had ample evidence from which to find that Appellant could have discovered the subject evidence had he exercised due diligence, meaning that the trial court did not abuse its discretion in denying Appellant's motion for relief from judgment.

Accordingly, Appellant was not entitled to any relief under Rule 60(b)(2) and this Court should affirm the trial court's denial of Appellant's motion for relief from judgment.

b. <u>Appellant's New Theory of Liability and "Newly Discovered" Evidence Are Not Material to the Issues Appellant Litigated and Tried Against Respondents</u>.

To obtain relief under Rule 60(b)(2), the moving party must present newly discovered evidence and demonstrate that the new evidence "is material to the issue." *Lanier*, 364 S.C. at 217, 612 S.E.2d at 459. Where newly discovered evidence is not "material to the issues raised by the pleadings," it cannot be grounds for relief under Rule 60(b)(2). *See Johnston*, 188 S.C. at 149, 198 S.E. at 398 (holding that "newly discovered evidence" under Rule 60(b)(2) must be "material to the issues raised by the pleadings"). By the same token, where a party discovers "new evidence" that is not material to any theory the party presented at trial, relief under Rule 60(b) is not available. *See Morin*, 424 S.C. at 578, 819 S.E.2d at 141 (denying Rule 60(b)(2) motion because the moving party "chose not to make the [relevant] issue a material part of its trial theory").

Appellant's post-trial theory of liability is not material at all to the issues that Appellant asserted in his Complaint, litigated for more than two years, and presented at trial. (*See, e.g.*, January 27, 2025 Hearing Tr. at 17:7–10.) Instead, Appellant sought in his motion for relief from judgment to present a "whole new lawsuit." (*Id.* at 25:19 – 27:22; *see also id.* at 22:1-16.) Prior to his 60(b) motion, Appellant asserted three theories that he pursued during two-and-a-half years of discovery and presented during trial. As Appellant has conceded to the trial court and again to this Court, none of those issues have anything to do with the new theory of liability against Taylor. In support of his motion for relief from judgment, Appellant represented to the trial court that Appellant's Complaint "contained no allegations regarding David Taylor's diversion of rental proceeds from tenant Taylor Foley, LLC . . . as this separate and distinct breach of fiduciary duty was unknown to Plaintiff[.]" (Pl's Memo. in Supp. of Mot. for Relief from Judg. at 3). In its

submission to this Court, Appellant confirms that the post-trial evidence it presented was "clearly outside the scope of the original claims" he pursued prior to judgment. (App.'s Initial Brief at 26.)

During more than two years of litigation, Appellant did not pursue the theory that Taylor's rental arrangement was unlawful, despite having knowledge of the arrangements and the amount of rent that K&T Group was receiving as a result of the arrangement. Appellant—having failed to allege this theory in his Complaint, conduct any discovery on the topic, or present it at trial—cannot now argue that evidence about that rental arrangement is material to the issues in this case, while simultaneously describing the new theory as "separate and distinct." (App.'s Initial Brief at 26.) Appellant has taken the position that he did not fail to exercise due diligence because he could not have known about evidence irrelevant to the issues in the case. *Id.* at 23–26. Appellant cannot have it both ways under Rule 60(b)(2). Either the evidence was relevant to the issues in the lawsuit, meaning he failed to exercise due diligence in failing to discover it, or the evidence is not material to the issues in the lawsuit, meaning that it cannot support a motion under Rule 60(b).

Appellant's understanding of the law is apparently that a party can litigate a lawsuit for years under one theory and then, after losing at trial and having a final judgment entered against him, reopen the case if he finds something additional to dispute. That is not the law in South Carolina. If it were, every unsuccessful litigant could abuse Rule 60(b) to resuscitate a failed lawsuit under a new theory of liability in an attempt to avoid the result of the trial on the issues raised. That is not the purpose of Rule 60(b), and it would completely undermine "South Carolina's strong policy favoring the finality of judgments." *Lanier*, 364 S.C. at 220, 612 S.E.2d at 461; *see also Bryan v. Bryan*, 220 S.C. 164, 168, 66 S.E.2d 609, 610 (1951) (noting that Rule 60(b)'s standard is intentionally demanding because "otherwise litigation would be interminable"). In

other words, if substantiated, Appellant's request for a re-do would create a dangerous precedent, interpreting the law in a way that leaves it open to, and incentivizes, blatant abuse.

c. <u>Appellant's Post-Trial Evidence Would Not Change the Result Because It Does Not Support His Claim for Breach of Fiduciary Duty</u>.

Appellant's post-judgment request for relief under also failed because the evidence he presented post-trial—even assuming arguendo that it was newly discovered—would do nothing to change the result of the trial he lost. Under Rule 60(b)(2), the moving party must establish that the newly discovered evidence "will probably change the result if a new trial is granted." *Lanier,* 364 S.C. at 217, 612 S.E.2d at 459. Put differently, the new evidence must be "outcome changing." *Morin*, 424 S.C. at 578, 819 S.E.2d at, 141.

There is nothing remotely outcome-changing about Appellant's post-trial evidence because it does nothing to support Appellant's cause of action for breach of fiduciary duty. K&T leased office space to an entity owned by David Taylor, and it also leased office space to an entity owned by John Kachmarsky. It is not in dispute that Taylor and Kachmarsky agreed on a formula for the rent that each entity would owe, and K&T received rent from each entity according to that formula. (Trial Tr. 102:16-103:3). Appellant's post-trial evidence does not indicate that Taylor's entity paid less than it owed to K&T Group according to that formula. In other words, Appellant's post-trial evidence does not call into doubt the agreement between Taylor and Kachmarsky, and it does not change the fact that K&T Group received the rent that it was entitled to under that agreement. Instead, Appellant presented evidence post-trial that Taylor Tax was the tenant who made rental payments to K&T Group, rather than Taylor Foley, the entity that actually occupied the space. And Appellant presented post-trial testimony from Ms. Shores purporting to demonstrate that Taylor Foley (the sub-tenant) paid more to Taylor Tax (the tenant) than Taylor Tax paid to K&T. Those facts have no material legal consequence.

Appellant claims that David Taylor has a fiduciary obligation to pay every cent received by Taylor Tax to K&T Group. Not surprisingly, Appellant cites no relevant law in support of that proposition. Taylor Tax Law paid the full amount of rent due to K&T Group under the parties' agreement. The fact that Taylor Foley allegedly paid more in rent to Taylor Tax does not obligate David Taylor to direct the difference to K&T Group. No fiduciary duty imposes such an obligation, and Appellant cannot provide citation to any case that stands for that proposition. And, of course, if David Taylor was required to direct every cent received by Taylor Tax Law to K&T Group, Taylor Tax Law would be paying rent well above and beyond the parties' agreement, and according to a formula different that the formula applicable to Kachmarsky. In arguing Taylor must pay rent to K&T in amount more than the agreed-upon formula, Kachmarsky seeks to strike a different bargain than the one that was agreed to—one that benefits only him.

Moreover, Appellant cannot complain about the amount of rent paid to K&T Group where he rejected a proposal to enter into written fair-market-value leases and insisted that there be no written lease between K&T Group and he and Taylor's respective law firms. At trial, Kachmarsky admitted that his law firm does not pay fair market value for the space it occupies in Suite 330, and that he rejected a proposal to enter into fair-market-value leases. (Trial Tr. 80:10-23). At the March 10, 2025 evidentiary hearing, Taylor testified that he would have preferred to enter into fair market value leases, but that Kachmarsky refused. (Evid. Hearing Tr. at 35:23–36:13.) Of course, if the parties had entered into written leases, Appellant would have absolutely no argument that Taylor breached a fiduciary duty by paying rent according to a fair-market-value lease.

Similarly, Appellant cannot now claim that Taylor had a fiduciary duty to pay rent in an amount above and beyond what the parties agreed to, and above and beyond what Kachmarsky paid for his office space. If, as Kachmarsky now seeks to have it, Taylor breached a duty by not

passing along the difference of the fair market value rent that Taylor Tax Law collected, then Kachmarsky breached a duty by failing to rent his space for K&T Group's benefit at fair market value. Each such new claim would fly in the face of what the trial established (without dispute) was the members' agreement as to how to operate their Company and its investment property. As in his litigation efforts, Kachmarsky wants it both ways, that is, when he realizes after an earlier decision that a different approach may be to his benefit.

While it is plain that the new theory Appellant sought to pursue post-trial would do nothing to change the result, the more fundamental point is that Appellant's post-trial claims are separate and distinct from the case Appellant brought and tried and lost. The law does not permit one person in business with another to bring a suit about a breach of the governing documents of the business or breach of duty for various reasons, take the case to trial on those theories and issues, reach an unsuccessful conclusion, and then reopen the case to allege a new dispute with the business partner based on some other claimed wrongdoing and thereby hope to avoid the downside associated with the unsuccessful litigation. This is why relief under Rule 60(b)(2) is explicitly limited to circumstances where newly discovered evidence "is material to the issue" and would "probably change the result." *Lanier*, 364 S.C. at 217, 612 S.E.2d at 459. A holding to the contrary would create a bold new precedent in the law would lead to many dissatisfied litigants abusing the system by seeking retrials under new theories based on old evidence.

d. <u>Appellant's Post-Trial Evidence Would Not Change the Result Because It Does Not Support His Claims for Judicial Expulsion or Judicial Dissolution</u>.

Even if Appellant could demonstrate that the evidence he presented post-trial was "newly discovered" and "material" to the issues at trial, the evidence would do nothing to change the result of a trial of this case because it does nothing to help him clear the "high bar" required to justify judicial expulsion or judicial dissolution. Dispute the personal issues that developed between

Taylor and Kachmarsky, the undisputed evidence is that the Company was, at all relevant times, fulfilling its purpose and that it continues to do so.

A Court may judicially expel a member from a limited liability company only where the plaintiff demonstrated that the member:

> (i) engaged in wrongful conduct that adversely and materially affected the company's business;
>
> (ii) wilfully or persistently committed a material breach of the operating agreement or of a duty owed to the company or the other members under Section 33-44-409; or
>
> (iii) engaged in conduct relating to the company's business which makes it not reasonably practicable to carry on the business with the member[.]

S.C. Code Ann. § 33-44-601(6).

The South Carolina Court of Appeals has recently recognized that:

> [Limited liability company] members seeking to expel a fellow member . . . "are required to clear a high bar" and a court may not order disassociation "merely because there is a conflict." "[D]isagreements and disputes among [limited liability company] members that bear no nexus to the [limited liability company's] business" do not justify a member's expulsion, and "it must be unfeasible, despite reasonable efforts, to keep the [limited liability company] operating while the disputed member remains affiliated with it.

Boathouse at Breach Inlet, LLC by & through Stoney v. Stoney, 442 S.C. 633, 900 S.E.2d 483 (Ct. App. 2024) (quoting *IE Test, LLC v. Carroll*, 226 N.J. 166, 140 A.3d 1268, 1279 (2016)) (alterations in original).

In *Boathouse*, Court relied on seven factors to determine that, there, judicial expulsion was not appropriate:

> (1) [T]he nature of the [limited liability company] member's conduct relating to the [limited liability company's] business; (2) whether, with the [limited liability company] member remaining a member, the entity may be managed so as to promote the purposes for which it was formed; (3) whether the dispute among the [limited liability company] members precludes them from working with one another to pursue the [limited liability company's] goals; (4) whether there is a

> deadlock among the members; (5) whether, despite that deadlock, members can make decisions on the management of the company, pursuant to the operating agreement or in accordance with applicable statutory provisions; (6) whether, due to the [limited liability company's] financial position, there is still a business to operate; and (7) whether continuing the [limited liability company], with the [limited liability company] member remaining a member, is financially feasible.

Id. (alterations in original).

Here, consideration of these factors leads to the same result that the Court of Appeals reached in *Boathouse*: expulsion is not an available remedy. At trial, Appellant presented evidence of Taylor Capital's allegedly wrongful conduct: the failure to pay $8,750 in rental payments arising from Taylor Capital's alleged use of a single extra office. (November 26, 2024 Order at 9 (citing Trial Tr. at 113:13 – 114:17).). The trial court held, as a factual matter, that Taylor Capital in fact owed no rental payments to the Company.[3] If this Court were to consider Appellant's post-trial evidence, i.e., the rental arrangement between Taylor Tax Law, Taylor Foely, and K&T Group, that evidence would likewise demonstrate no wrongful conduct on behalf of the relevant member, Taylor Capital. As discussed in greater depth above, Taylor always caused Tayor Tax Law to pay to the K&T Group rent according to the formula that Taylor and Kachmarsky agreed upon. Turning to the first *Boathouse* factor, then, the nature of Taylor Capital's conduct weighs strongly against expulsion.

Factors two through five focus on whether the Company can operate given the dispute between members. *Boathouse*, 442 S.C. at 652, 900 S.E.2d at 493. Here, the uncontested evidence presented at trial demonstrates that the Company can operate and is fulfilling its purpose. The Company's purpose is to hold and lease Company property, that is, the office space located in Suite 330 in the Franke Building. (November 26, 2024 Order at 2 (citing Ex. A, § 1.10).) The

[3] Appellant does not challenge the factual findings that the trial court reached after the trial of this case.

uncontested evidence presented at trial demonstrates that the Company has been fulfilling that purpose, as Suite 330 has been occupied for the past several years by rent-paying tenants, save for infrequent vacancies. (*Id.* (citing Trial Tr. 100:21–101:9).) Appellant has presented no evidence, at trial or otherwise, that the Company cannot operate, that it cannot fulfil its purpose, or that it is otherwise deadlocked. In fact, Appellant himself testified neither Taylor nor Taylor Capital is doing anything to frustrate the operation of the Company. (Trial Tr. 101:22 – 102:15.) (Q. [I]s there anything that David Taylor or Taylor Capital is doing to frustrate the leasing of the space now? A. At this point, there's not that I'm aware of."). As the trial court correctly held, "Indeed, the evidence demonstrates that . . . [the Company] continues to fulfill its purpose to hold and manage Company Property." (November 26, 2024 Order at 8.) Accordingly, *Boathouse* factors two through five strongly weigh against expulsion.

The final *Boathouse* factors, which consider the financial viability of the Company, also weigh decidedly against expulsion. The only evidence in the record demonstrates that the Company remains successful in leasing office space without significant vacancy, and Appellant has presented no evidence—at trial or otherwise—which indicates that "continuation of the Company" would be "financially unfeasible." *Boathouse*, 442 S.C. at 654, 900 S.E.2d at 495. Moreover, the property the Company owns and operates is worth roughly $2 million. (Trial Tr. at 115:21–116:1.) Each of the seven factors articulated by the Court of Appeals in *Boathouse* weigh strongly against expulsion, and post-trial evidence that Appellant seeks to present does nothing to change that calculus under any of *Boathouse*'s seven factors.

In *Boathouse*, like here, there existed animosity between the members of the relevant company (there, a restaurant). There, one member presented evidence that the other engaged in conduct that directly hurt the business, including denigrating the restaurant to food vendors,

attempting to change management of the Company, and vying to purchase land that the Company was also of interest to the Company. *Id.* at 442 S.C. at 652, 900 S.E.2d at 493–94. Nevertheless, the Court found that judicial expulsion was not an available remedy because, despite the animosity between members, the restaurant continued to operate and was finically viable. *Id.* The Court on which *Boathouse* heavily relied reached the same conclusion with respect to the subject company in that case. *IE Test*, 226 N.J. at 185, 140 A.3d at 1280 (holding that judicial expulsion was not appropriate because "the business operated with increasing revenue despite the deteriorating relationship between [the members]").

The evidence in this case compels the same conclusion. The Company continues to lease office space with few, if any, vacancies, and the Company continues to be financially viable. Further, the evidence in the record demonstrates that Kachmarsky has always "managed the operations and the money" with limited input from Taylor. (November 26, 2024 Order at 10 (citing Trial Tr. 48:10–49:5; 80:24–82:2).) Appellant presented no evidence, at trial or otherwise, that Taylor or Taylor Capital has interfered with operations in any way, or the Kachmarsky has been prevented from managing the operations of the Company. As the Court correctly held after trial, the relatively minor rent dispute between Kachmarsky and Taylor "in no way makes it 'unfeasible, despite reasonable efforts, to keep the [limited liability company] operating[.]'" (*Id.* at 9 (citing *Boathouse*, 442 S.C. at 652, 900 S.E.2d at 493).) Accordingly, like the plaintiff in *Boathouse*, Appellant failed to clear the "high bar" required for member expulsion at trial, and his post-trial evidence does nothing to change that conclusion.

Nor does the evidence Appellant presented at trial or after trial support his claim for judicial dissolution of the Company, an even more drastic remedy than judicial expulsion. At trial, Appellant sought judicial dissolution under subsections (a), (b), and (e) of S.C. Code Ann. § 33-

44-801(4), which permit a Court to dissolve a limited liability company if its finds that: (a) the economic purpose of the company is likely to be unreasonably frustrated; (b) another member has engaged in conduct relating to the company's business that makes it not reasonably practicable to carry on the company's business with that member; or (e) the managers or members in control of the company have acted, are acting, or will act in a manner that is unlawful, oppressive, fraudulent, or unfairly prejudicial to the petitioner. S.C. Code Ann. § 33-44-801(4). Courts generally apply similar standard to claims of judicial dissolution and judicial expulsion. *See, e.g.*, *Emerald Invs., L.L.C. v. Ashley River Properties II, L.L.C.*, No. 2009CP100553, 2013 WL 9929629, at *5 (S.C. Com. Pl. Apr. 26, 2013) (using the same standard to determine that both expulsion and dissolution were inappropriate).

For the same reasons that judicial expulsion was not a remedy available to Appellant, judicial dissolution likewise was likewise not an available remedy. As discussed above, the only evidence on the topic demonstrates that the Company is "fulfilling its purpose" and has continued to be economically successful, meaning that Appellant failed to demonstrate that "the economic purpose of the company is likely to be unreasonably frustrated" under subsection (a), or that carrying on the business is not "reasonably practicable" under subsection (b). (Trial Tr. 101:22 – 102:15.) (Q. [I]s there anything that David Taylor or Taylor Capital is doing to frustrate the leasing of the space now? A. At this point, there's not that I'm aware of."). In addition, Appellant has failed to demonstrate that Taylor Capital or manager Taylor is in control of the Company, as required for a showing under subsection (e). *See* S.C. Code Ann. § 33-44-801(4)(e) (requiring a showing of unlawful conduct by "the managers or members in control of the company). The only evidence on that point demonstrates that, if any member or manager is in control of the Company, it is Appellant. Appellant testified at trial that, for nearly twenty years and for all times relevant

here, Appellant has managed the operations and the money, including advertising, rentals, and banking. (Trial Tr. 48:10–49:5; 80:24–82:2.) In fact, Appellant acknowledged at trial that Taylor has no more control over K&T Group than he has. (Trial Tr. 111:17 – 20.).

Appellant's post-trial evidence likewise does nothing to change this analysis: the uncontested evidence is that K&T Group functions just fine and continues to fulfil its purpose of leasing office space in Suite 330. Accordingly, Appellant's evidence does not support his claim for judicial dissolution, and this Cout should affirm the trial court's decision to reject Appellant's requests for post-trial relief under Rule 60(b)(2).

II. The Trial Court Correctly Denied Plaintiffs' Motion for Relief from Judgment Under Rule 60(b)(3).

In an even more far-fetched attempt at post-judgment relief, Appellants also requested relief from judgment under Rule 60(b)(3), claiming—without supporting evidence—that Taylor engaged in "extrinsic fraud" on the trial court. The trial court correctly denied that request. (June 17, 2025 Order at 2.) For the following reasons, the trial court did not abuse its discretion, and this Court should affirm.

First, the clear fact that Appellant could have discovered his post-trial evidence prior to trial dooms his request for relief under Rule 60(b)(3), just as it doomed his request under Rule 60(b)(2). *See Raby Const.*, 358 S.C. at 21, 594 S.E.2d at 484 ("[E]ven in cases of extrinsic fraud [under Rule 60(b)(3)], a party does not have a claim if he failed to exercise due diligence in discovering the existence of facts or documents during the underlying litigation.").

Second, Appellant has not presented any evidence, let alone the "clear and convincing" evidence required, that Taylor acted with the "intent to defraud." *Perry*, 357 S.C. at 47, 590 S.E.2d at 504–05 ("Like all other types of fraud, proving fraud upon the court requires showing that the perpetrator acted with the intent to defraud[.]"). Appellant cannot claim that Taylor intentionally

and fraudulently concealed evidence that was not relevant to any theory of liability Appellant pursued during litigation and that Appellant never conducted any discovery on. And, in fact, Taylor concealed nothing. In his deposition, Taylor freely disclosed the rental arrangement between Taylor Foley, Taylor Tax Law, and K&T Group, and he did so directly to Appellant's counsel and with Appellant himself in attendance. Yet, over more than two years of discovery, Appellant never sought a single document or any information related to the rental arrangement. What interrogatory or request for production did Taylor not respond to? What deposition testimony does Appellant contend was evasive? Taylor did not conceal any document or any answer. In fact, it is more appropriate to say that Appellant concealed the question! Accordingly, Appellant cannot reasonably claim that Taylor "actively concealed" irrelevant information about which discovery was never sought, let alone present "clear and convincing" evidence that Taylor acted with the "intent to defraud."

Third, Appellant cannot obtain relief under Rule 60(b)(3) because, even if Appellant could substantiate his allegations that Taylor actively concealed evidence, those allegations amount to "intrinsic fraud" and do not come close to constituting "extrinsic fraud." Even where a litigant intentionally and fraudulently conceals evidence, forges documents, or commits perjury, South Carolina law is clear that those acts constitute "intrinsic fraud" and do not justify relief from a final judgment. *See Raby Const.,* 358 S.C. at 19, 594 S.E.2d at 483. Appellant's allegations of "active concealment" of facts and evidence, even if substantiated, fall well short of justifying relief from judgment under Rule 60(b).

a. <u>Appellant's Evidence Could Have Been Discovered Prior to Trial</u>.

Under Rule 60(b)(3), a trial court may undo a final judgment only if the movant demonstrates "fraud, misrepresentation, or other misconduct of an adverse party." SCRCP

60(b)(3). To obtain relief under Rule 60(b)(3), a movant is required to demonstrate "extrinsic fraud" that could not have been discovered prior to trial, which requires that party to show by "clear and convincing evidence" that that the opposing party acted with an intent to defraud the Court. *Hagy v. Pruitt*, 339 S.C. 425, 431, 529 S.E.2d 714, 717 (2000); *Chewning v. Ford Motor Co.,* 354 S.C. 72, 78, 579 S.E.2d 605, 608 (2003). Because "[w]hether to grant or deny a motion under Rule 60(b) lies within the sound discretion of the [trial] judge," this Court's "standard of review . . . is limited to determining whether there was an abuse of discretion." *Raby Const*., 358 S.C. at 17–18, 594 S.E.2d at 482.

South Carolina Courts have long applied the very same due diligence standard applicable to Rule 60(b)(2) to a movant's request for post-trial relief under Rule 60(b)(3). A party does not have a claim for extrinsic fraud if he failed to exercise due diligence in discovering the existence of facts or documents during the underlying litigation. *Chewning*, 354 S.C. at 83, 579 S.E.2d at 611; *see also Raby Const.*, 358 S.C. at 21, 594 S.E.2d at 484 ("Indeed, even in cases of extrinsic fraud, a party does not have a claim 'if he failed to exercise due diligence in discovering the existence of facts or documents during the underlying litigation.'").

The trial court did not abuse its discretion in denying Appellant's post-judgment request for relief under Rule 60(b)(3) because, as discussed at length above, the substantial evidence demonstrates that Appellant could have discovered the evidence he presented after judgment as "new." Appellant has always known that Taylor Tax Law was the entity paying rent to K&T Group, and he has always known that Taylor Foley was the entity that actually occupied the office space. If Appellant failed to discover that Taylor Foley paid fair-market-value rent to Taylor Tax Law as a part of the arrangement, that failure is the result of a complete lack of due diligence. Despite Taylor disclosing the arrangement during his deposition, despite possessing evidence that

Taylor Tax Law paid rent to K&T Group for Taylor Foley's occupation of the space, and despite receiving interrogatory responses that listed the relevant witness as one who would have knowledge on the topic, Appellant conducted absolutely no discovery—over more than two years of litigation—on the facts he now presents as new. Just as Appellant's failure to exercise due diligence sinks his ability to obtain relief under Rule 60(b)(2), as discussed above, that failure is likewise fatal to any request for post-judgment relief under Rule 60(b)(3). *See Chewning*, 354 S.C. at 83, 579 S.E.2d at 611.

b. <u>Appellant Has Not Presented Any Evidence, Let Alone "Clear and Convincing" Evidence, that Taylor Acted Fraudulently</u>.

To prevail under Rule 60(b)(3), Appellant must demonstrate that Taylor committed "fraud upon the Court," or, as the Supreme Court characterizes it, "an affront to the administration of justice." *Chewning*, 354 S.C. at 84, 579 S.E.2d at 611 n.7. The bar is necessarily and intentionally high. As the Court of Appeals noted:

> Fraud 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, 357 S.C. at 47, 590 S.E.2d at 504–05 (quoting *Chewning,* 354 S.C. at 78, 579 S.E.2d at 608). "Like all other types of fraud, proving fraud upon the court requires showing that the perpetrator acted with the intent to defraud, for there is no such thing as accidental fraud." *Id.* (citing *Chewning,* 354 S.C. at 78, 579 S.E.2d at 608) ("Fraud upon the court, whatever else it embodies, requires a showing that one has acted with an intent to deceive or defraud the court."). Further, "[a] claim of fraud upon the court requires proof by clear and convincing evidence." *Sanders v. Smith*, 431 S.C. 605, 613, 848 S.E.2d 604, 608 (Ct. App. 2020).

Appellant did not present any evidence, let alone the "clear and convincing" evidence required, that Taylor acted with the "intent to defraud." As explained in greater detail above, Taylor did not conceal anything regarding the rental arrangement between Taylor Foley, Taylor Tax Law, and K&T Group. It is manifestly unfair for Appellant to fail—for two and a half years—to ask Taylor for any documents or information about a given topic and then claim that Taylor intentionally and fraudulently concealed the very information Appellant failed to discover (or even ask about). Further, as described above, the evidence in the record demonstrates the Taylor was always open and honest about the arrangement, as he freely and accurately testified about it in his deposition. There is simply no evidence that Taylor concealed anything, let alone "clear and convincing evidence" that Taylor acted with a fraudulent intent.

Bereft of any evidence of actual fraud, Appellant is left with an unsupported claim that Taylor "actively concealed" the fact that Taylor Faoley paid fair-market-value rent merely because he did not disclose it. But non-disclosure is not "active concealment," nor is it fraud. As Taylor explained during the evidentiary hearing, he never brought up the rental arrangement because it was not relevant to any of the claims Appellant asserted against him at trial (Evid. Hearing Tr. at 42:7–13), a point that Appellant readily agrees with. (App. Brief at 26) (describing the evidence presented post-trial as "clearly outside the scope of the original claims"). Appellant should not be permitted to characterize his post-trial evidence as immaterial to excuse his own lack of due diligence during discovery and simultaneously argue that the evidence was so highly relevant that Taylor's non-disclosure of it during the case amounts to "active concealment" and fraud. That logic obviously does not work. The truth makes much better sense: Taylor didn't disclose what Taylor Foley paid in rent because Appellant sued him about issues that had nothing to do with that. Again, where is the interrogatory that Appellant alleges was not answered completely? Or the

request for production? Or the deposition question?, Appellant cannot reasonably claim that Taylor "actively concealed" information he was never asked about, much less present "clear and convincing" evidence that Taylor acted with the "intent to defraud," as Rule 60(b)(3) plainly requires. *See Sanders*, 431 S.C. at 613, 848 S.E.2d at 608.

c. Even if Appellant Could Substantiate His Unsupported Allegations of Fraud, Those Allegations Do Not Come Close to Constituting "Extrinsic Fraud."

As a matter of law, Appellant could not have obtained relief under Rule 60(b)(3) because his unsupported allegations of fraud, even if somehow substantiated, do not come close to clearing the high bar for "extrinsic fraud" under South Carolina law.

"Fraud is extrinsic when it is collateral to the issues tried in a case and effectively deprives the litigant of a fair hearing or the opportunity to present its case." *Jamison v. Ford Motor Co.*, 373 S.C. 248, 273–74, 644 S.E.2d 755, 768 (2007); *Raby Const.*, 358 S.C. at 19, 594 S.E.2d at 482–83 ("Extrinsic fraud is 'fraud that induces a person not to present a case or deprives a person of the opportunity to be heard.'"). "Intrinsic fraud, on the other hand, is fraud which misleads a court in determining issues and induces the court to find for the party perpetrating the fraud." *Chewning*, 354 S.C. at 81, 579 S.E.2d at 610. Perjured testimony, producing fraudulent documents, and failing to disclose relevant evidence are all examples of intrinsic fraud. *Raby Const.*, 358 S.C. at 19, 594 S.E.2d at 482–83; *see also Chewning*, 346 S.C. at 31 ("[Intrinsic fraud] refers to fraud presented and considered in the judgment assailed, including perjury and forged documents presented at trial.").

"The essential distinction between intrinsic and extrinsic fraud is the ability to discover the fraud." *Ray v. Ray*, 374 S.C. 79, 84, 647 S.E.2d 237, 239 (2007). As the Supreme Court of South Carolina stated:

Equitable relief from a judgment is denied in cases of intrinsic fraud, on the theory

> that an issue which has been tried and passed upon in the original action should not be retried in an action for equitable relief against the judgment, and that otherwise litigation would be interminable; relief is granted for extrinsic fraud on the theory that by reason of the fraud preventing a party from fully exhibiting and trying his case, there never has been a real contest before the court of the subject matter of the action.

Bryan, 220 S.C. at 168, 66 S.E.2d at 610.

Even assuming that Appellant had presented evidence demonstrating that Taylor *did* actively conceal the rental arrangement between Taylor Foley, Taylor Tax Law, and K&T Group (a theory that is contrary to the evidence in the record), Appellant's request for relief under Rule 60(b)(3) would still fail because those allegations, even if proven, amount to concealing evidence. That is not enough under South Carolina law. *See Raby Const.*, 358 S.C. at 19, 594 S.E.2d at 483 ("Allegations that a party failed to disclose documents also generally amount to intrinsic, rather than extrinsic, fraud.").

And that outcome makes good sense. For the reasons discussed above, there is no reasonable dispute that Appellant could have discovered information related to the rental arrangement between Taylor Foley, Taylor Tax Law, and K&T Group. Appellant had the opportunity to ask questions to witnesses with relevant knowledge, to seek documents from Respondents or third parties that would have demonstrated the subject payments, to review the documents within his own possession that would have revealed the nature of the arrangement. In short, there's no question that Appellant had "the ability to discover" the alleged fraud prior to trial. *Ray*, 374 S.C. at 84, 647 S.E.2d at 239. If the Court were to entertain allegations of fraud which could have been discovered prior to judgment, "litigation would be interminable" and judgments would lack certainty and finality. *Bryan*, 220 S.C. at 168, 66 S.E.2d at 610; *see also Raby Const.*, 358 S.C. at 19, 594 S.E.2d at 483 ("Relief is granted for extrinsic but not intrinsic fraud on the theory that the latter deceptions should be discovered during the litigation itself, and

to permit such relief undermines the stability of all judgments."). Accordingly, this Court should affirm the trial court's denial of Appellant's motion for relief from judgment under Rule 60(b)(3).

III. The Trial Court Correctly Granted Defendants' Motion to Amend Answer under Rule 15(a) Because Appellant Was Not Prejudiced By the Amendment.

Appellant contends that the trial court erred in permitting Respondents to amend their counterclaim under Rule 15(a). Rule 15(a) states that "a party may amend his pleading . . . and leave shall be freely given when justice so requires and does not prejudice any other party." SCRCP 15(a). "Motions to amend pleadings to conform to proof may be made upon motion of any party at any time, even after judgment, and are within the sound discretion of the trial judge." *Ball*, 314 S.C. at 275, 442 S.E.2d at 622 (citing Rule 15(b), SCRCP). A trial court's ruling on a motion under Rule 15(a) "will not be overturned without an abuse of discretion or unless manifest injustice has occurred." *Berry*, 328 S.C. at 450, 492 S.E.2d at 802. The trial court order granting Respondents' motion to amend was well within the trial court's discretion; it caused no prejudice to Appellant.

Along with their initial Answer, Respondents brought a counterclaim for breach of the operating agreement of the Company. (*See* Defs' Ans. and Counterclaim.) The claim alleged violations of duties outlined in the operating agreement and sought damages, access to records, and recovery of attorney's fees. (*Id.*) Among the issues addressed in the claim were Appellant's use of the property and his marketing of available rental space. Following discovery, which was prolonged because Appellant refused to produce records without subpoenas to his various other entities, Respondents determined not to pursue certain of those allegations. They had gotten access to the records and otherwise determined that some of the alleged conduct would have been more properly focused on a time when the statute of limitations had already run.

In the amended counterclaim, Respondents brought the *same* cause of action for violation of the *same* duties, and sought to recover the *same* attorney's fees as alleged in the original claim. (*See* Defs' Amend. Ans. and Counterclaim.) The amendment simply articulated what the litigation had been about all along: Appellant's actions in bringing the suit and Respondent's contention that doing so was improper under the operating agreement. There was nothing new to discover. There was no prejudice.

South Carolina law provides that a court should grant a motion to amend under Rule 15(a) unless a party is "prejudiced by the amendment or [ ] there [i]s some other substantial reason to deny it." *Patton v. Miller*, 420 S.C. 471, 490, 804 S.E.2d 252, 262 (2017). "The prejudice Rule 15 envisions is a lack of notice that the new issue is going to be tried, and a lack of opportunity to refute it." *Parker v. Spartanburg Sanitary Sewer Dist.*, 362 S.C. 276, 286, 607 S.E.2d 711, 716–17 (Ct. App. 2005); *see also Patton v. Miller*, 420 S.C. 471, 491, 804 S.E.2d 252, 262 (2017) ("Rule 15 prejudice is some result flowing from the amendment that puts the non-moving party at a disadvantage in defending the merits, which disadvantage the party would not have faced if the amended claim had been included in the original pleading or a timely motion to amend."). The party opposing the amendment has the burden of establishing prejudice. *Foggie v. CSX Transp., Inc.,* 315 S.C. 17, 431 S.E.2d 587 (1993).

In their motion to amend, Respondents sought to narrow the scope of their counterclaim by removing allegations that were obviated by discovery and to articulate a single basis for their breach-of-contract counterclaim. The proposed amendment did not join parties, add claims, or request new or different relief. Accordingly, the trial court granted Defendants' motion to amend their counterclaim, finding that the amended counterclaim involved the same issues within the same timeframe as the Complaint and initial counterclaim, and that the amendment did not

prejudice Appellant because it involved subject matter that was the subject of two years of discovery. (Trial Tr. 17:4–18:11.). In other words, Respondents' amendment in no way prevented Appellant from having notice of the issue or hindered Appellant's ability to refute the issue. *See Parker*, 362 S.C. at 286, 607 S.E.2d at 716–17. Accordingly, the trial court acted within its discretion in granting the motion, and this Court should affirm.

CONCLUSION

This Court should affirm the trial court's denial of Appellant's Motion for Relief from Judgment, affirm the trial court's grant of Respondents' Motion to Amend, and affirm the judgment of the trial court.

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December 10, 2025
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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Mikell R. Scarborough
Master in Equity

Appellate Case No. 2025-001384
Case No.: 2022-CP-10-02589

John Kachmarsky, individually, as Manager of K&T Group, LLC, and as Trustee of the Revocable Trust of John Kachmarsky dated November 30, 2007, as member of K&T Group, LLC,

Appellant,

v.

David G. Taylor, individually and as Manager of K&T Group, LLC; Taylor Capital, LLC, as member of K&T Group, LLC; and K&T Group, LLC, and Foley Bullock, LLC,

Respondents.

CERTIFICATE OF COUNSEL

I, Brian Duffy, certify that the Initial Brief of Respondents David G. Taylor, individually and as Manager of K&T Group, LLC; Taylor Capital, LLC, as member of K&T Group, LLC; and K&T Group, LLC, and Foley Bullock, LLC, complies with Rule 211(b) of the South Carolina Rules of Appellate Practice.

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Dated: December 10, 2025