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

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.

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. Did the lower court err in reversing and vacating its April 24, 2025 Order granting Plaintiff's Motion for Relief from Judgment pursuant to Rule 60(b)(2) and 60(b)(3), SCRCP, where newly discovered evidence revealed that Defendant Taylor, in breach of his fiduciary duty and express duty of loyalty under Section 6.2 of the Operating Agreement, concealed his diversion of approximately $395,000 in rental income through an undisclosed arrangement that could not have been discovered through due diligence before trial and would have affected the outcome of the case?

II. Did the lower court abuse its discretion in reinstating its November 26, 2024 judgment on Defendants' counterclaim and awarding approximately $95,000 in attorney's fees where Defendants withdrew their original counterclaims and filed entirely new allegations on the eve of trial, depriving Plaintiff of the opportunity to conduct discovery and prepare defenses?

STATEMENT OF THE CASE

For nearly a decade, Respondent David Taylor systematically diverted approximately $395,000 in rental income from K&T Group, LLC—a company he co-owned and co-managed with John Kachmarsky. While Taylor's law firm paid $10,500 monthly to rent office space from K&T Group, Taylor ensured that only $5,750 reached the company's accounts. The difference flowed through Taylor Tax Law, LLC, an entity Taylor controlled, in direct violation of his express duties of loyalty under Section 6.2 of the Operating Agreement and South Carolina law.

This scheme remained hidden from everyone involved. Taylor's own law partners at Taylor Foley, LLC didn't know. The firm's office manager of nearly twenty years didn't know. And critically, John Kachmarsky—Taylor's business partner at K&T Group, LLC, to whom he owed fiduciary duties—didn't know.

This surreptitious scheme, however, came to light after the original trial concluded and judgment was entered in November 2024. When Taylor Foley began dissolving in December 2024, the firm's partners discovered they had been paying nearly double what K&T Group received. Informed of this newly discovered evidence, Kachmarsky sought relief under Rule 60(b), demonstrating that Taylor had breached the very duties of loyalty that Taylor himself had acknowledged in his own legal filings.

The lower court initially recognized the significance of this evidence, granting relief and finding extrinsic fraud that "could not have been discovered during the course of the trial, and which could change the outcome." Yet two months later, without holding another hearing, the court reversed itself—imposing an impossible standard that would require parties to seek discovery for claims they have no reason to suspect exist.

RELEVANT FACTS

K&T Group, LLC ("K&T" or "Company") is a South Carolina, term, manager-managed limited liability company formed in 2003, with two equal members: John Kachmarsky, Trustee of the Revocable Trust of John Kachmarsky dated November 30, 2007 and Taylor Capital, LLC. (Complaint, R. pp. 35-84; Operating Agreement, R. pp. 2467-2504). Each member holds a fifty percent (50%) membership interest in K&T. (R. p. 2468). David G. Taylor ("Taylor") and John Kachmarsky ("Kachmarsky") serve as the two managers of K&T. (R. p. 2474, ¶ 2.1(p); p. 2482, ¶ 5.8).

K&T owns a 5,106 square foot commercial office suite in the Franke Building located at 171 Church Street, Suite 330, Charleston, SC 29401 comprised of TMS Number 458-05-03-120 with 1,186 square feet and TMS Number 458-05-03-121 with 3,920 square feet. ("Company Property") (R. p. 37, ¶ 5; p. 2468).

According to the Operating Agreement, K&T's business purpose is specifically defined in Section 1.10 as "to hold and manage the Company Property, including but not limited to servicing, managing, improving, operating, leasing, mortgaging, refinancing, pledging, selling or otherwise dealing with the Company Property and engaging in such other activities as the Management Committee deems necessary or appropriate to the foregoing purposes." (Operating Agreement, R. p. 2471). Said differently, the Company is in the business of renting out its commercial office space to tenants.

RELEVANT PROCEDURAL HISTORY

A. The Lawsuit

On June 15, 2022, Plaintiff filed a lawsuit against Defendants David G. Taylor (individually and as Manager of K&T Group, LLC) and Taylor Capital, LLC (as Member of K&T Group, LLC).

(Complaint, R. pp. 35-84). The Complaint asserted causes of action for breach of contract based on: (1) Taylor's failure to pay rent for office space occupied within the Company Property, (2) his persistent refusal to contribute proportionately to Company expenses, and (3) his violations of banking covenants with Ameris Bank that jeopardized the Company's financial stability. (Id., R. pp. 36-43).

The Complaint sought judicial expulsion of Taylor Capital, LLC as a Member of K&T Group, LLC, judicial dissolution of the Company, and partition of Company Property based on the specific causes of action and supporting allegations contained therein. The Complaint contained no allegations regarding David Taylor's surreptitious diversion of rental proceeds from tenant Taylor Foley, LLC, discussed below, as this separate and distinct breach of fiduciary duty was unknown to Plaintiff (and even Taylor's own law partners at Taylor Foley) at the time of trial.

On August 19, 2022, Defendants filed their Answer and Counterclaim, contending that Plaintiff had, *inter alia*, violated the K&T Operating Agreement by staying at the office overnight, refusing to provide Taylor with working login credentials to access certain financial records on QuickBooks, and allegedly "divert[ing] opportunities from K&T to other entities owned by Kachmarsky." (Original Answer and Counterclaim, p. 6, ¶¶ 48-49, R. p. 90). Notably, Defendants alleged that "Kachmarsky prioritized placing tenants in the office suites he owned over the office suites owned by K&T," and that that Kachmarsky's alleged diversion of business opportunities from K&T "constitutes a breach of the K&T Operating Agreement." (Id.).[1]

[1] As set forth below, all of the counterclaims contained in Defendants' original Answer and Counterclaim would later be abandoned by Defendant on the eve of trial. Nonetheless, Defendants' acknowledgement of the Operating Agreement and express duties imposed on Managers are very relevant to the instant appeal.

The Answer and Counterclaim expressly acknowledged that, "Section 6.2 of the K&T Operating Agreement imposes upon all managers a duty of loyalty," that "Section 6.3 of the K&T Operating Agreement imposes upon all managers a duty of care," and that "Section 6.4 of the K&T Operating Agreement requires each manager to discharge his duties 'consistently with the obligations of good faith and fair dealing.'" (Id., p. 5, ¶¶ 39-41, R. p. 89) (Emphasis added).

By consent order filed July 18, 2023, the case was assigned to the Master in Equity. (Order, R. p. 1).

B. Relevant Pre-Trial Motions

On August 23, 2023, Plaintiff filed a Motion for Summary Judgment as to Defendants' Counterclaim, later supported by a December 28, 2023 Memorandum. (Motion, Memorandum, R. pp. 104-110). Plaintiff highlighted that during David Taylor's July 7, 2023 deposition, Taylor testified in ways that demonstrated Defendants suffered no damages from the breaches alleged in their Counterclaim. (Motion, Memorandum, Deposition, R. pp. 106-110). Specifically, Taylor testified that he didn't know if they lost tenants, couldn't quantify monetary damages, found it "hard to say" if there was lost revenue, and confirmed no one refused to move in because of Kachmarsky's supposed conduct. (Memorandum, pp. 3-4, quoting Taylor Deposition at p. 98:1-3, 99:4-16, 100:3-6, R. pp. 108-109). Plaintiff asserted that without demonstrable damages, Defendants' counterclaim failed to meet an essential element of their breach of contract claim, entitling Plaintiff to summary judgment as a matter of law. (Id.)

On January 4, 2024, the Court summarily denied Plaintiff's Motion for Summary Judgment without prejudice, preserving Plaintiff's right to raise the issue at trial. (R. p. 4).

On January 4, 2024, the Court also entered a scheduling order, stating that discovery shall be completed by April 5, 2024, and that all dispositive motions shall be filed by April 19, 2024.

(R. p. 7). Accordingly, Plaintiff proceeded with trial preparation, filing a pre-trial brief on the issue before the Court on September 16, 2024. (R. pp. 151-154).

However, on September 16, 2024—the day before trial was scheduled to begin—Defendants moved to withdraw all of their original counterclaims and amend their Complaint to assert entirely new counterclaims against Plaintiff. (R. pp. 155-166). Significantly, the proposed Amended Counterclaim abandoned Defendants' initial allegations entirely, substituting fundamentally different claims. (R. pp. 159-166). The new counterclaim focused exclusively on Kachmarsky's supposed conduct regarding a disputed $8,750 payment from early 2022. Defendants alleged that Kachmarsky filed suit based on "stale and minor disputes" as pretext to force Taylor Capital out of their investment. (R. p. 164 at ¶ 51). Defendants now—two years and three months after the filing of the instant lawsuit and on the afternoon before trial—claimed Kachmarsky's filing of the instant lawsuit breached Kachmarsky's fiduciary duties and sought attorney's fees as damages.

On September 17, 2024, the first day of trial, Plaintiff objected to Defendants' pre-trial motion to amend, arguing that allowing the amendment would be prejudicial as Plaintiff would have no opportunity to conduct discovery on the new allegations, develop appropriate defenses, or otherwise prepare to defend against these new counterclaims. (R. pp. 1592:20-1595:25). After hearing arguments from counsel, the Court granted Defendants' motion to amend over Plaintiff's objection. (R. p. 1600:18-20)[2]

[2] Although Defendants' Motion to Amend was granted, Defendants' Amended Answer and Counterclaim was not formally filed with the Court until after the trial on October 10, 2024. (R. pp. 96-103).

C. The Trial

Thereafter, the Court held a one-day non-jury trial regarding Plaintiff's claims for Breach of Contract, judicial expulsion of Taylor Capital, LLC pursuant to S.C. Code Ann. §33-44-601, judicial dissolution of the Company under S.C. Code Ann. § 33-44-801, and partition of the Company Property, as well as Defendants' newly-raised counterclaim. (Trial Tr., R. pp. 1616-1790; Pl's Exhs., R. pp. 2072-2325; Defs' Exhs., R. pp. 2326-2419). Following the presentation of evidence and testimony, the Court asked counsel for the parties to prepare proposed orders for the Court's consideration, and the matter was taken under advisement.

D. The Judgment

On November 26, 2024, the Court entered an Order dismissing all of Plaintiff's claims with prejudice and entering judgment on Defendants' newly-raised counterclaim in favor of Defendants against John Kachmarsky individually. (R. pp. 9-22). The Court's Order awarded Defendants costs and attorneys' fees for the defense of claims, to be determined at a subsequent hearing after submission of supporting affidavits.[3] Of note, this Order, which was prepared by Defendants' counsel and adopted by this Court, expressly identified Taylor Foley, LLC as the Tenant of K&T Group, LLC, stating: **"The party that rents space *from the Company*, and which temporarily used and ultimately rented the specific office at issue, *is the law firm Taylor Foley*."** (R. p. 13). (Emphasis added).

[3] On December 11, 2024, Defendants' counsel filed an Affidavit of Costs and Attorney's fees, asserting Defendants had incurred $96,291.45, which based on its language, includes pursuing several counterclaims, which were ultimately abandoned on the eve of trial. (Affidavit of Costs, R. p. 386-387).

E. Post-Trial Motions

On December 6, 2024, Plaintiff timely filed a Motion for Reconsideration pursuant to Rules 52(b), 59(e), and 60 of the South Carolina Rules of Civil Procedure. (R. pp. 167-385). As discussed in further detail below, Plaintiff requested that the Court alter or amend its judgment, asserting that the Court had misunderstood, mistook, failed to fully consider, and/or rule upon arguments or issues raised in Plaintiff's Complaint, at trial, and in the record. Specifically, Plaintiff argued that the Court disregarded substantial evidence presented at trial, made findings inconsistent with the evidence and testimony, and failed to rule on certain arguments and factual issues properly presented to the Court, including the issue of whether partition was appropriate.

Newly Discovered Evidence.

Subsequently, on January 17, 2025, Plaintiff filed a Rule 60(b)(2) Motion for Relief from Judgment Due to Newly Discovered Evidence. (R. pp. 388-451; Memo in Support at R. pp. 531-567). In this motion, Plaintiff presented newly discovered new evidence that Defendant David Taylor, a Manager of K&T Group, LLC, had surreptitiously collected and diverted substantial rental payments owed to K&T Group, LLC from tenant Taylor Foley, LLC for his own benefit. (Id). This evidence did not come to light until after trial, when Taylor's ex-law partners attempted to negotiate a lease with Kachmarsky and realized that Taylor Foley had been paying more rent than K&T had been collecting, and that Taylor had been diverting these rents for his own personal benefit. (Id).

Specifically, Plaintiff provided an affidavit from April M. Shore of Taylor Foley, LLC, attesting that from October 1, 2015, through January 2025, Taylor Foley, LLC had paid $982,300.00 in rent for use of office space held by K&T Group, LLC, but at Defendant Taylor's direction, these payments were made to Taylor Tax Law, LLC, an entity owned and controlled by

David Taylor, rather than directly to K&T Group, LLC. (R. pp. 410-412). Plaintiff asserted that Taylor only submitted $587,061.00 of the sums received to K&T Group, LLC, withholding approximately $395,239.00 in undisclosed rental proceeds from the Company in violation of Section 6.2, 6.3, and 6.4 of the K&T Operating Agreement, which include Taylor's express Duty of Loyalty to the K&T. (R. pp. 388-395).[4]

Defendants filed a Response to Plaintiff's Rule 60(b)(2) Motion on January 24, 2025. (R. pp. 493-527). Plaintiff filed a Reply on January 27, 2025, noting, *inter alia*, that Defendants made no attempt to deny that Defendant Taylor had collected and diverted rental payments for his own benefit in violation of his express duties under the Operating Agreement. (R. pp. 528-530).

On January 27, 2025, the Court heard arguments on Plaintiff's Rule 60(b)(2) motion to reopen the judgment. (H'rg Trans., R. pp. 1792-1832). At the end of that hearing, the Court stated that an evidentiary hearing would be needed to determine if Plaintiff could establish a basis for relief from judgment under the requirements of Rule 60(b), SCRCP. (R. p. 1831:9-23). Specifically, the Court was interested in finding out whether Plaintiff could establish Defendants had engaged in extrinsic fraud, which as discussed below, is a requirement for obtaining relief from judgment pursuant to Rule 60(b)(3), SCRCP, but not a requirement for obtaining relief pursuant to Rule 60(b)(2), SCRCP. (Id.). Defendants did not object to having a hearing on these issues.

[4] On January 22, 2025, Foley Bullock, LLC, a law firm comprised of Taylor's former law partners at Taylor Foley, LLC, David Foley and Brent Bullock, filed a Motion to Intervene. (R. pp. 452-478). The Motion revealed that Taylor's own law partners were unaware he had been diverting their firm's rent to Taylor Tax Law, LLC since 2014, only discovering the scheme when they received conflicting lease rates while trying to secure their continued tenancy after Taylor's departure. (Id.).

F. The Evidentiary Hearing

On March 10, 2025, the Court held an evidentiary hearing to establish whether Plaintiff met the requirements for obtaining relief from the judgment pursuant to Rule 60(b). (Hr'g Tr., R. pp. 1860-2013). During this hearing, testimony was taken from several witnesses, including David Taylor, Brent Bullock (partner at Taylor Foley, LLC), April Shores (office manager for Taylor Foley, LLC), and John Kachmarsky. (Id.).

The evidence presented focused, *inter alia*, on (1) whether David Taylor had directed tenant payments to entities under his control rather than to K&T Group, LLC, (2) whether these actions constituted violations of his fiduciary duties as Manager under the Operating Agreement, (3) whether Plaintiff had reason to pursue discovery related to claims that were not asserted in his complaint or known to him at the time of trial, and (4) whether Defendants had engaged in extrinsic fraud. (Id.).

From October 1, 2015 through January 2025, tenant Taylor Foley, LLC paid $982,300.00 in rent for use of office space held by K&T Group, LLC. (Plaintiff's Memo in Support of Rule 60(b) Motion, R. pp. 537-538). At Defendant David Taylor's direction, however, Taylor Foley, LLC did not make these rent payments directly to K&T Group, LLC, but rather to Taylor Tax Law, LLC, an entity *owned and controlled* by David Taylor. (Id., pp. 537-540). Defendant David Taylor did not submit and/or report the entirety of the rental payments received from Taylor Foley, LLC to K&T Group, LLC. Instead, Defendant David Taylor only submitted $587,061.00 of the sums received from tenant Taylor Foley, LLC to K&T Group, LLC, causing $395,239.00 in undisclosed rental proceeds to be withheld from the Company for Taylor's own benefit. (Id., pp. 537-538). Despite the requirements set forth under 6.2, 6.3, and 6.4 of the K&T Operating

Agreement, Taylor did not disclose this scheme to Kachmarsky or even his partners at Taylor Foley, LLC. (Operating Agreement, R. p. 2483).

Specifically, the evidentiary hearing revealed that David Taylor, as manager of K&T Group, established an undisclosed arrangement whereby Taylor Foley LLC paid approximately $10,500 per month in rent, but only $5,750 was remitted to K&T Group through Taylor Tax Law. (H'rg Tr., R. pp. 1865:20-25; 1926:20-1927:14). Taylor retained the difference of approximately $4,750 per month for years via Taylor Tax Law, an entity, which he owned and controlled, resulting in nearly $395,239 in diverted funds.[5] (R. pp. 1926:20-1927-14; 410-411; 2420-2422).

Taylor's Admissions About Creating the Scheme.

The evidence demonstrates that Taylor created and maintained this arrangement through calculated steps. First, Taylor unilaterally created this arrangement, positioning Taylor Tax Law as a middleman between K&T Group and Taylor Foley, LLC. During the evidentiary hearing, Taylor admitted this purported sublease arrangement was his creation alone:

> Q. You unilaterally made the decision to create a sublease and lease it to Taylor Foley; is that correct?
> A. Who else could have made that decision? Yes. I'm the one that made that decision.
>
> (R. p. 1919:12-16).

Second, Taylor expressly admitted he never disclosed this arrangement to John Kachmarsky, his co-manager. When directly asked, "So the answer to the question is at no point did you ever tell John Kachmarsky that you were receiving $10,500 a month for rent but you were

[5] In addition to serving as a Manager of K&T with express written duties to the Company and its members, David Taylor also controlled Taylor Tax Law, LLC, and was a name partner at Taylor Foley, LLC. As demonstrated by the testimony at the evidentiary hearing, Mr. Taylor's "wearing of many hats" led to clear conflicts of interest, which could have been entirely avoided had he simply informed both John Kachmarsky and his law partners at Taylor Foley about his intended financial arrangements before unilaterally implementing them. (R. p. 1947:10-1948:19).

going to pocket the $5,000?" Taylor responded: "That's right. It had nothing to do with--" (R. p. 1892:5-11.). Taylor then attempted to justify his actions rather than denying them. When asked, "What precluded you from saying, John, I'm going to start charging $5,000 more in rent for my office from the tenants that we have," Taylor had no coherent answer and merely responded, "I'm sorry. What's the question?" (R. p. 1889:6-21).

The Scheme Was Unknown to All Other Parties.

Critically, the arrangement was unknown even to Taylor's own law partners at Taylor Foley, LLC. Brent Bullock, a partner at Taylor Foley, testified he was "surprised" to learn about this arrangement (R. p. 1927:10-14). April Shores, Taylor's long-time office manager since 2006, testified she didn't know about any "sublease" arrangement prior to "the last 90 days" before the evidentiary hearing (R. p. 1953:22-25).

John Kachmarsky testified he first learned about the discrepancy between what Taylor Foley was paying and what K&T Group was receiving in "mid-December" through communications with Jamie Khan (R. p. 1968:18-1970:1). When asked directly at the evidentiary hearing if he had "any belief in [his] wildest imagination that David was charging more than he was collecting," Kachmarsky unequivocally responded, "No. It was a surprise to me." (R. p. 1972:24-1973:3). Mr. Kachmarsky further testified that it was only when "Ms. Shores did the affidavit" that "it became clear that there was a discrepancy, a rather large one, in what he was charging his law firm and paying to K&T Group" (R. p.1969:16-23).

The Scheme Was Never Disclosed at Trial.

Faced with this dilemma, Taylor attempted to excuse the rental diversion scheme arguing that Taylor Capital had had "sublease" with Taylor Foley, even though the Operating Agreement did not permit him to enter into a sublease without violating sections 6.2, 6.3, and 6.4 of the

Operating Agreement. (R. pp. 1888:5-1889:21; Operating Agreement, R. p. 2483). Significantly, the existence of the alleged "sublease" arrangement was never disclosed during the original trial. Taylor made no mention of a sublease at the underlying trial, nor did Taylor refer to Taylor Foley, LLC as a subtenant. To the contrary, Defendants' proposed order, drafted by his counsel, which the lower Court adopted on November 26, 2024, states the exact opposite, contradicting his post-hoc justification for diverting rental proceeds for his personal use: "The party that rents space from the Company, and which temporarily used and ultimately rented the specific office at issue, is the law firm Taylor Foley." (R. p. 13).

When asked why he did not refer to the existence of a purported sublease during trial or in the Court order drafted by his counsel, Taylor responded, "I don't think it was relevant to what we were talking about at that hearing." (R. pp. 1892:23-1893:2). By his own admission, Taylor acknowledged that the undisclosed sublease arrangement he devised was not relevant to the trial and, by implication, Plaintiff's claims against him. When asked directly, "Let's first agree that it was never referenced in court or the order. Do you agree with that?" Taylor attempted to evade the question before acknowledging, "I don't really know." (R. p. 1893:3-6).

No Written Documentation Despite Taylor's Professed Preference for Leases.

Throughout the evidentiary hearing, in an attempt to divert attention from his own apparent self-dealing, Taylor repeatedly criticized Kachmarsky for not wanting written lease agreements for K&T Group, testifying that he "would prefer to have paid fair market value" (R. p. 1895:11-13) and claiming he wanted to have leases. Yet remarkably, despite Taylor's professed preference for formal written agreements, the evidentiary hearing revealed Taylor failed to create a written sublease agreement for the very arrangement he now claims justified his diversion of K&T funds.

When asked about the existence of a written sublease agreement, Taylor's own law partner Brent Bullock testified that "There is no written lease" (R. p. 1938:18-25).

Following the evidentiary hearing, the Court requested that the parties submit additional briefing on the Rule 60(b) Motion. (R. p. 2011:19-22).

On March 24, 2025, pursuant to the Court's instructions, Kachmarsky filed Plaintiff's Memorandum in Support of Rule 60(b) Motion for Relief, wherein Kachmarsky argued that relief was appropriate because the evidentiary hearing established that (1) David Taylor orchestrated a deliberate scheme to misappropriate company assets while concealing his actions, (2) Taylor's conduct constituted a clear breach of his duty of loyalty to the company and its members, (3) Relief from judgement was warranted under Rule 60(b)(2) due to newly discovered evidence of this scheme, and (4) Relief from judgment was warranted under Rule 60(b)(3) because Taylor's actions constituted extrinsic fraud. (R. pp. 531-567; Exhs. at R. pp. 568-986). Kachmarsky further argued that the well-settled doctrine of judicial estoppel precluded Taylor from adopting a position regarding the existence of a sublease than the one he took at trial. (R. pp. 558-561).

On March 31, 2025, Defendants filed Defendants' Response to Plaintiff's Motion for Relief from Judgment. (R. pp. 1082-1265).

On April 4, 2025, Plaintiff filed a Reply to Defendants' Response, thoroughly addressing Defendant's Response, and noting that under well-established South Carolina law, Taylor's mere failure to disclose this scheme while serving as a fiduciary itself constitutes a fraudulent act justifying relief, citing *Jacobson v. Yaschik*, 249 S.C. 577, 155 S.E.2d 601 (1967), which states, "nondisclosure becomes fraudulent when it is the duty of the party having knowledge of the facts to uncover them to the other." Additionally, Plaintiff cited the well-settled case of *Lesesne v. Lesesne*, 413 S.E.2d 847, 307 S.C. 67 (Ct. App. 1991), which states "It is a well-settled equitable

rule that anyone acting in a fiduciary relationship shall not be permitted to make use of that relationship to benefit his own personal interests. It is a doctrine repeatedly announced by the courts of this nation that courts of equity will scrutinize with the most zealous vigilance transactions between parties occupying confidential relations toward each other and particularly any transaction between the parties by which the dominant party secures any profit or advantage at the expense of the person under his influence." (Reply, R. pp. 1266-1283).

The Court Grants Plaintiff's Rule 60(b) Motion.

On April 24, 2025, the Court held a status conference with the parties, wherein the Court heard argument related Foley Bullock, LLC's Motion to Intervene. (R. pp. 2014-2033). However, prior to hearing the argument on that Motion, the Court stated it had made a decision to GRANT the Rule 60(b) Motion, finding the existence of extrinsic fraud, the newly-discovered evidence could not have been discovered prior to trial, and that discovery could have changed the outcome of the trial, stating:

> THE COURT: Thank you very much. All right. I am happy to hear from you, but I will tell you that I have made up my -- **I've made my decision with regards to the Rule 60 motion**, and I'll state what it is.
>
> But basically looking at the totality of the factors before the Court, I've determined that I am going to grant the motion for a new trial under 60(b)(2) because **I do find that there was fraud**, which was the test that we discussed at the hearing.
>
> I think the cases of Raby and Bowman are distinguishable under these facts. **I find that the information that the plaintiffs have sought could not have been discovered during the course of the trial and that they could change the outcome of the proceeding.**
>
> And it's on that basis that I'm going to

> grant the motion for -- basically for a new trial is what I see that as. Rule 60(b)(2) and (3) are the two motions that they moved under.
>
> (R. pp. 2017:15-2018:10). (Emphasis added).

Addressing the Motion to Intervene, the Court made the additional observation:

> The Court: […] what got this whole case back to where the Court's having to review it again is the fact that they entered into a lease agreement with Kachmarsky on behalf of K&T, and that's when apparently they discovered, well, we've been paying $10,500 a month when K&T is only receiving $5,500 a month.
>
> That brings the question of breach of fiduciary duty and all the things that the partners in the LLC owe to one another. That's basically the reason why I granted the new trial under Rule --
>
> (R. pp. 2027:21-2028:6) (Emphasis added).

Later that day, the Court entered Form 4 Order granting Kachmarsky's Rule 60(b) Motion for Relief and the Motion to Intervene, stating, *inter alia*, "This matter came before the Court on a Zoom hearing on Plaintiff's Motion pursuant to Rule 60(b)(2) & (3), SCRCP for a new trial and for relief from the Court's judgment entered November 26, 2024. 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." (R. pp. 23-25) (Emphasis added).

On May, 2, 2025, The Court entered a more formal Order granting intervention. (R. pp. 26-27).

On May 2, 2025, Taylor filed a Motion for Reconsideration of the Court's decision granting a Rule 60(b)(2). (R. p. 1284). Taylor did not raise any new issues in its Motion for Reconsideration, but merely reiterated its previous positions, including its tenuous argument that Plaintiff's "could

have discovered" the evidence during litigation, disregarding that a Plaintiff does not have a duty to conduct discovery regarding actions that are concealed in order to bring claims he does not know exist.

On May 9, 2025, counsel for Kachmarsky wrote the Court to inquire whether the Court wished them to file a return or whether it could rely on its previous filings given the extensive briefing already filed by the parties, which address these issues. (R. p. 1504; see Plaintiff's previous Memo in Support filed March 24, 2025, R. pp. 531-567, and Reply, filed April 4, 2025, R. p. 1266-1283). The Court did not respond.

On June 16, 2025, Kachmarsky and Taylor attended a second mediation in this case, but were unable to reach a resolution. (Proof of ADR, R. p. 1505).

On June 17, 2025, without holding a hearing, the Court issued an Order on Taylor's Motion for Reconsideration, reversing itself once again and reinstating the November 26, 2024 Order it had vacated. (R. pp. 28-31). The Court's Order stated, "I am bothered by this case." (R. at p. 28). Despite previously finding the existence of extrinsic fraud in the underlying case which could not have been discovered during the course of the trial, and which could have changed the outcome of the case, and the existence of fiduciary duties between the members as established by the K&T Operating Agreement, the Court now 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. While Taylor Capital, LLC did not always pay rent on time, it did eventually pay its share." (R. p. 29). The Court further held, "on the issue of whether the fraud alleged in Plaintiff's Rule 60(b)(3), SCRCP Motion, the Court reverses its decision as to extrinsic fraud. 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," completely reversing its earlier decision and disregarding that a party has no duty to seek evidence to support claims he does not know exist. (Id.).

On June 20, 2025, Counsel for Kachmarsky wrote the Court to schedule a hearing on Plaintiff's Motion for Reconsideration, which had been filed on December 6, 2024. (R. p. 1506).

On June 30, 2025, the Court held a hearing on Kachmarsky's Motion for Reconsideration. (H'rg Tr., R. pp. 2034-2071). At the hearing. Kachmarsky's counsel argued that the Motion should be granted because the Court erred in multiple respects: First, the Court improperly excluded Defendants' pattern of prior conduct, which should be admissible under Rule 404(b) to show motive, common scheme, and intent, including Defendants' repeated failures to pay rent over multiple years. Second, the Court's findings contradicted the evidence presented at trial, particularly regarding Defendants' occupation of offices without payment since at least February 2021, which was supported by unrebutted witness testimony. Third, the Court should have granted judicial expulsion under S.C. Code Ann. § 33-44-601(6) and judicial dissolution under § 33-44-801(4) because Defendants' pattern of wrongful conduct made it 'not reasonably practicable to carry on the business' and unreasonably frustrated the company's economic purpose. Fourth, the Court failed to rule on Plaintiffs' partition claim despite evidence being presented. Finally, the Court erred in allowing Defendants' prejudicial last-minute amended counterclaim filed the day before trial, incorrectly finding that Kachmarsky breached fiduciary duties merely by filing suit, and awarding approximately $95,000 in attorney's fees to Defendants when their conduct necessitated the litigation. (Motion, R. pp. 167-385; H'rg Tr., R. pp. 2034-2071).

In response to Kachmarsky's arguments regarding the need for judicial dissolution and judicial expulsion, counsel for Defendants argued that this case did not meet the requirements set

forth by the Court of Appeals in *Boathouse v. Stoney*.[6] (R. p. 2057: 4-10). However, as counsel for Plaintiff noted at the hearing, *Boathouse* was distinguishable from the present case because it involved the practicability of continuing to conduct business with a 5% passive, minority member. By contrast, this case involves 50/50 members who are both equal members and equal managers, and who are not able to make decisions regarding the business with one another. (R. p. 2066:1-9; 2069:5-18). As a result, the Court asked the parties to file memos distinguishing *Boathouse* from the present case. (R. p. 2066:11-20).

On July 10, 2025, pursuant to the Court's instructions, Kachmarsky filed Plaintiff's Memorandum Distinguishing *Boathouse v. Stoney* in support of Motion for Reconsideration. (R. pp. 1507-1519).

On July 17, 2025, Taylor filed Defendants' Supplemental Memorandum in Opposition to Plaintiff's Motion for Reconsideration. (R. pp. 1520-1570).

On July 23, 2025, Kachmarsky filed Plaintiffs' Reply to Defendant's Supplemental Memorandum in Opposition to Plaintiff's Motion for Reconsiderations. (R. pp. 1571-1583).

On August 1, 2025, the court entered a Form 4 order denying Plaintiff's Motion for Reconsideration, stating:

> 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.
>
> (R. p. 32).

This Appeal follows.

STANDARD OF REVIEW

[6] *Boathouse at Breach Inlet v. Stoney*, 442 S.C. 633, 900 S.E.2d 483 (Ct. App. 2024)

Rule 60(b) Motions

"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).

Construction of Contracts

"The construction of a clear and unambiguous contract is a question of law for the court." *Hawkins v. Greenwood Development Corp*., 328 S.C. 585, 593, 493 S.E.2d 875 (Ct. App. 1997). The appellate standard of review for questions of law is *de novo*. *Town of Summerville v. North Charleston*, 662 S.E.2d 40, 378 S.C. 107 (2008).

ARGUMENT

I. The Lower Court Erred in Reversing and Vacating its April 24, 2025 Order Granting Plaintiff's Motion for Relief from Judgment Pursuant to Rule 60(b)(2) and 60(b)(3), SCRCP.

A. Taylor's Conduct Constitutes a Clear Breach of His Duty of Loyalty to the Company and its Members.

Taylor's actions represent a textbook violation of the Duty of Loyalty imposed by Section 6.2 of the Operating Agreement.[7]

Section 6.2(a) of the Operating Agreement explicitly requires managers "to account to the Company and to hold as trustee for the Company any property, profits, or benefits derived by the Manager in the conduct of […] the Company's business or derived from the use by the Manager

[7] The subject duties expressed in K&T's Operating Agreement are identical to those duties imposed on Managers by S.C. Code § 33-44-409 (b)(1)-(3) and (h)(2)-(3).

of the Company's Property including the appropriation of a Company Opportunity" (Operating Agreement, R. p. 2483). Taylor deliberately violated this duty by diverting rental income generated by Company Property from the Company to an entity under his control. This conduct directly contradicts the obligation to hold profits derived from Company business or property as trustee for the Company. Moreover, transferring rental income generated by Company Property to an outside entity—even under the pretense of a surreptitiously arranged sublease—clearly constitutes appropriation of Company opportunity.

Section 6.2(b) further requires Managers "to refrain from dealing with the Company in the conduct […] of the Company's business as or on behalf of a party having an interest adverse to the Company" (R. p. 2483). Taylor clearly violated this duty by conducting the Company's business (renting commercial office space) in a manner that redirected rental income from the Company to Taylor Tax Law, LLC—an entity he owns and controls.

Additionally, Section 6.2(c) requires Managers "to refrain from competing with the Company in the conduct of the Company's business before dissolution of the Company" (R. p. 2483). By using Company Property to generate rental income for his separate entity rather than the Company itself, Taylor unequivocally engaged in direct competition with the Company's business.

Taylor's own legal filings in this matter provide compelling evidence that he fully understood the duties imposed by Section 6.2 of the Operating Agreement. In his original Answer and Counterclaim filed on August 19, 2022, Taylor explicitly acknowledged that "Section 6.2 of the K&T Operating Agreement imposes upon <u>all managers</u> a duty of loyalty." (Original Answer and Counterclaim, R. pp. 89-91, ¶39) (Emphasis added). This acknowledgment is significant because it demonstrates Taylor's clear awareness of the very obligations he violated.

More notably, Taylor's counterclaim against Kachmarsky—which he later completely abandoned on the eve of trial—specifically alleged that Kachmarsky violated the Operating Agreement by supposedly "divert[ing] opportunities from K&T to other entities owned by Kachmarsky" and "prioritiz[ing] placing tenants in the office suites he owned over the office suites owned by K&T." (Id., ¶ 48). Taylor's own filings characterized these alleged actions as a breach of the K&T Operating Agreement.

When confronted with these duties during the evidentiary hearing, Taylor admitted he understood these obligations yet maintained he hadn't breached them despite the overwhelming evidence to the contrary. However, this position taken by Taylor in his own legal filings is fundamentally inconsistent with his current defense. Taylor cannot credibly maintain that diverting rental income from Company Property to his own entity (Taylor Tax Law, LLC) is permissible when he previously argued that diverting business opportunities from K&T constitutes a breach of the very same express duty contained in the K&T Operating Agreement. (Original Answer and Counterclaim, at R. pp. 89-91). By his own legal standard articulated in his previously-filed counterclaim, Taylor's conduct in redirecting rental income away from the Company to his personal benefit represents a clear violation of Section 6.2 of Operating Agreement.

B. Taylor's Non-Disclosure of the Rental Diversion Scheme is By Definition a Fraudulent Act Under South Carolina Law.

In the seminal case of *Jacobson v. Yaschik*, the South Carolina Supreme Court addressed fiduciary duties and established integral principles that apply to fiduciary relationships. Specifically, the court recognized that fiduciaries must make "full disclosure of all relevant facts" when dealing with those to whom they owe duties. 249 S.C. 577, 155 S.E.2d 601 (1967). The *Jacobson* court further expounded on the duty to disclose:

> The defendant takes the position that the only wrong alleged in the complaint was that he was silent as to the arrangement he had previously made to sell the stock of the corporation. The nondisclosure of this fact becomes fraudulent because it was the duty of the defendant, having knowledge of the facts, to disclose such to the plaintiff. We have held that nondisclosure becomes fraudulent when it is the duty of the party having knowledge of the facts to uncover them to the other. The duty to disclose may be reduced to three distinct classes: (1) where it arises from a preexisting definite fiduciary relation between the parties; (2) where one party expressly reposes a trust and confidence in the other with reference to the particular transaction in question, or else from the circumstances of the case, the nature of their dealings, or their position towards each other, such a trust and confidence in the particular case is necessarily implied; (3) where the very contract or transaction itself, in its essential nature, is intrinsically fiduciary and necessarily calls for perfect good faith and full disclosure without regard to any particular intention of the parties.

Id. (Emphasis added).

Just as the defendant in *Jacobson* had a duty to disclose material financial information to another business participant, Taylor had a duty to disclose his rental diversion scheme to K&T Group and to Mr. Kachmarsky. His nondisclosure became fraudulent precisely because of his fiduciary duty as a manager of K&T Group. The rental arrangement that Taylor unilaterally established—whereby Taylor Foley paid $10,500 in rent while only $5,750 was remitted to K&T Group—constitutes exactly the type of material financial information that a fiduciary is obligated to disclose. As held by our Supreme Court, this type of non-disclosure itself constitutes a fraudulent act—one which manifestly warrants granting Plaintiff relief from the Judgment in this case.

C. Relief from Judgment is Clearly Warranted Under Rule 60(b)(2), SCRCP.

Pursuant to Rule 60(b)(2), SCRCP, "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 […] newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)." 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." *Southeastern Hous. Found. v. Smith*, 380 S.C. 621, 638, 670 S.E.2d 680, 689 (Ct. App. 2008) (citations omitted). Each of these elements is established here.

1. The Newly Discovered Evidence Could Not Have Been Discovered Through Due Diligence Before Trial**.**

As demonstrated by the facts and procedural history in this case, Plaintiff exercised reasonable diligence throughout discovery but could not have uncovered Taylor's scheme for several compelling reasons:

First, Plaintiff's complaint specifically focused on Taylor's occupation of additional office space without proper payment, his failure to honor banking commitments, and other operational issues. (Complaint, R. pp. 36-43). The complaint makes no reference whatsoever to any rental diversion scheme because Plaintiff had absolutely no knowledge or reason to suspect such a scheme existed. Discovery in the original action was necessarily tailored to the claims actually presented in the complaint, which dealt with entirely different issues.

Second, the very nature of Taylor's concealment made discovery impossible through normal channels. Taylor deliberately created a financial arrangement that was unknown even to his own law partners. As Brent Bullock testified, even Taylor's partners at Taylor Foley were unaware of this arrangement until the firm began dissolving in late 2024 (Tr. p. 1930:14-1931:8). Mr. Bullock expressly contradicted Taylor's testimony that there was sublease in place between Taylor Foley and Taylor Tax Law.

> Q: To your understanding, was this a lease or a sublease?
> A: It was a lease.
> Q: And the lease was between Taylor Foley and K&T?

A: Correct.

(R. p. 1927:18-23)

Bullock testified was "surprised" to learn that Taylor Foley was paying more money to rent the Company Property than what was being remitted to K&T:

Q. And when did you first become aware that only
5,750 was being remitted to the K&T Group?
A. It was late 2024, December.
Q. Is that when the firm was breaking up?
A. Yes.
Q. Were you surprised?
A. Surprised at what?
Q. To learn that you were paying ten-five in
rent but only fifty-seven-fifty was being remitted?
A. Yes.

(R. p. 1927:5-14)

April Shores, Taylor's long-time office manager, testified that she had only learned about the purported sublease arrangement recently (after trial and after the time had expired to move for a new trial under Rule 59(b), SCRCP:

Q: Had you ever heard the arrangement between
Taylor Foley and K&T referred to as a sublease prior to the last 90 days?
A: No.
(R. p. 1953:22-25)

Third, Taylor never disclosed this arrangement during the litigation despite his continuing fiduciary duty of full disclosure. When asked during the evidentiary hearing if he had ever told John Kachmarsky about this arrangement, Taylor admitted he had not (R. pp. 1891:1-1892:11). This admission is particularly significant because it establishes that Taylor deliberately withheld this information, not just from Plaintiff generally, but specifically during the litigation process when he had both legal and fiduciary obligations to disclose this information.

Fourth, the concept of a "sublease" was never referenced in court or in the order from the original trial. This was confirmed during the evidentiary hearing, where Taylor claimed he did not bring it up during trial because he did not think it was relevant to the proceedings. When asked why he did not refer to the existence of a purported sublease during trial or in the Court order drafted by his counsel, Taylor responded, "I don't think it was relevant to what we were talking about at that hearing." (R. pp. 1892:23-1893:2). By his own admission, Taylor acknowledged that the undisclosed sublease arrangement he devised was not relevant to the trial and, by implication, Plaintiff's claims against him. When asked directly, "Let's first agree that it was never referenced in court or the order. Do you agree with that?" Taylor attempted to evade the question before acknowledging, "I don't really know." (R. pp. 1892:23-1893:6). Discovery cannot reasonably be expected to uncover claims that were actively concealed and that Plaintiff had no reason to suspect existed.

The scope of discovery under Rule 26(b)(1), SCRCP, is limited to matters "relevant to the subject matter involved in the pending action." As a review of the original complaint clearly demonstrates, the subject matter of the pending action involved Taylor's occupation of specific offices without paying rent, his breach of banking commitments, and similar operational issues. The complaint contains no allegations whatsoever about Taylor's secret diversion of rental payments because Plaintiff had no knowledge of this scheme. Even Taylor admitted that the purported sublease arrangement was not relevant to the trial. (R. pp. 1892:23-1893:2).

The "due diligence" requirement in Rule 60(b)(2) cannot reasonably be interpreted to require a plaintiff to seek discovery on claims they had no knowledge existed. John Kachmarsky had no reason to suspect that David Taylor was collecting $10,500 in rent while only remitting $5,750 to K&T Group. As established at the evidentiary hearing, Taylor admitted he never

disclosed this arrangement to Kachmarsky, testifying "That's right. It had nothing to do--" when directly asked about his failure to disclose. (R. p. 1892:5-11).

Kachmarsky had no reason to conduct discovery on an arrangement he had no knowledge of, especially when Taylor's own filings and court submissions expressly contradicted the existence of such an arrangement. As our Supreme Court noted in *Oncology and Hematology Assoc. v. DHEC*, "discovery requests must be 'reasonably tailored' to include only relevant matters." 387 S.C. 380, 388, 692 S.E.2d 920, 924 (2010), quoting, In re CSX Corp., 124 S.W.3d 149 (2003). Accordingly, discovery obligations must be logically limited to what a litigant can reasonably anticipate. A plaintiff cannot use discovery to pursue claims he did not assert or even know existed.

The sublease and diversion of rental payments constitute the type of separate and distinct breach of fiduciary duty that was unknown to Plaintiff and clearly outside the scope of the original claims for which discovery was conducted. Accordingly, reasonable due diligence could not and would not have resulted in discovery of the newly-discovered evidence before trial.

2. The Newly Discovered Evidence Would Probably Change the Result if a New Trial is Granted.

Had this evidence been available at trial, it would have decisively changed the outcome. Although Taylor's undisclosed actions fell outside of the scope of Plaintiff's Complaint, the systematic diversion of approximately $395,239 in rental payments represents exactly the type of misconduct that would have *affected the outcome* in this case.

Here, Plaintiff sought judicial expulsion of Taylor Capital, LLC as a Member of K&T Group, LLC, judicial dissolution of the Company, and partition of Company property based on the specific causes of action in the Complaint. Although outside the scope of the Complaint, Taylor's scheme to divert company assets for personal gain through a deliberately undisclosed financial

arrangement is precisely the type of misconduct that justifies judicial expulsion under S.C. Code Ann. § 33-44-601 and judicial dissolution under S.C. Code Ann. § 33-44-801. It also provides grounds for equitable partitioning of the Company Property.

South Carolina law permits judicial dissociation of a member when that member "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)(iii). As established in *Boathouse at Breach Inlet v. Stoney*, courts consider factors including "the nature of the [limited liability company] member's conduct relating to the [limited liability company's] business" and "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." 442 S.C. 633, 652 (Ct. App. 2024).

The evidence of Taylor's conduct directly relates to the Company's business and demonstrates actions fundamentally at odds with the Company's purpose. Taylor diverted nearly $400,000 from the Company. This is precisely the type of conduct that makes it "not reasonably practicable" to carry on the Company's business with Taylor Capital remaining as a member. Unlike the insufficient grounds for dissociation rejected in *Boathouse* (which involved merely alleged negative statements and purchasing competing property), Taylor's newly discovered financial misconduct directly affects the Company's operations and financial stability.

Additionally, *Boathouse* was distinguishable from the present case because it involved the practicability of continuing to conduct business with a 5% passive, minority member. By contrast, this case involves 50/50 members who are both equal members and equal managers, and who are not able to make decisions regarding the business with one another.

Here, Plaintiff sought judicial expulsion of Taylor Capital, LLC as a Member of K&T Group, LLC, judicial dissolution of the Company, and partition of Company property based on the specific causes of action in the Complaint. Although outside the scope of the Complaint, Taylor's scheme to divert company assets for personal gain through a deliberately undisclosed financial arrangement is precisely the type of misconduct that justifies judicial expulsion under S.C. Code Ann. § 33-44-601 and judicial dissolution under S.C. Code Ann. § 33-44-801. Here, the lower court abused its discretion in finding that "the parties have the ability to resolve the matter between themselves." (Order, August 1, 2025, R. p. 32). In rendering its decision, the lower court based its decision on a misapplication of the judicial expulsion and judicial dissolution and statutes and applicable law. Further, its finding that two parties with 50/50 controlling interests and equal voting rights could "resolve the matter between themselves," especially given the breach of fiduciary duties and two failed mediations, is clearly based on factual conclusions that are without evidentiary support.

3. The Newly Discovered Evidence Was Discovered Since Trial.

As noted above, the newly discovered evidence regarding Taylor's diversion of rental income clearly meets this requirement. As established by the procedural history, the trial in this matter concluded on September 17, 2024, and the Court issued its order on November 26, 2024. The evidence concerning Taylor's scheme to divert rental payments from Taylor Foley, LLC was not discovered until December 2024, when the Taylor Foley law firm began dissolving.

This timing is corroborated by the testimony of Brent Bullock, a partner at Taylor Foley, who testified at the evidentiary hearing: "It was late 2024, December" when he first became aware of the rental payment discrepancy (R. p. 1927:5-14). Similarly, April Shores testified that she had

not heard of any "sublease" arrangement prior to "the last 90 days" before the evidentiary hearing (R. p. 1953:22-25).

John Kachmarsky testified that he first learned about the discrepancy between what Taylor Foley was paying and what K&T Group was receiving in "mid-December" through communications with Jamie Khan (R. p. 1968:13-1970:1). Mr. Kachmarsky further testified that it was only when "Ms. Shores did the affidavit" that "it became clear that there was a discrepancy, a rather large one, in what he was charging his law firm and paying to K&T Group" (R. p. 1969:19-23).

The evidence clearly shows that Taylor's concealment of the arrangement ensured that this evidence was not and could not have been discovered until after the trial had concluded and judgment had been entered.

4. The Newly Discovered Evidence is Material to the Issue.

The newly discovered evidence is undeniably material, not because it directly relates to the specific claims asserted in Plaintiff's original Complaint, **but because it would fundamentally change the outcome of the case.** The materiality test under Rule 60(b)(2) focuses on whether the evidence would likely alter the result if a new trial were granted, not whether it relates to the original claims.

This evidence of Taylor's breach of fiduciary duty through diversion of approximately $395,239 in rental payments provides substantial new grounds for the very remedies sought in Plaintiff's Complaint: judicial expulsion, judicial dissolution, and partition. As Plaintiff's counsel argued during the evidentiary hearing, the relevance of this evidence has to do with does it change the outcome (R. p. 2008:15-24)

The systematic diversion of funds by Taylor represents exactly the type of misconduct that justifies judicial expulsion under S.C. Code Ann. § 33-44-601 and judicial dissolution under S.C. Code Ann. § 33-44-801. This is particularly significant because Section 10.3(b) of the Operating Agreement specifically addresses "Events of Wrongful Dissociation," including situations where a member "willfully or persistently committed a material breach of this Agreement or of a duty owed to the Company or the other Members under Section 33-44-409 of the Act." (R. p. 2493).

John Kachmarsky testified that had he known about this breach, he "would have moved to amend [his] lawsuit and put it in" because he believes it "would be violative of the operating agreement" and "could lead to or alter or change the decision of the Court" (R. pp. 1974:21-1975:3). This assessment is well-founded, as Taylor's actions directly contravene the duties established in Section 6.2 of the Operating Agreement, which Taylor himself acknowledged during the hearing (R. pp. 1878:19-1879:6; p. 2483).

The materiality of this evidence is further underscored by its significance to the equitable remedies being sought. As Mr. Kachmarsky's counsel noted, "this company has one purpose...we rent out office space, and we split the profits" (R. p. 2010:1-3). Taylor's diversion of rental income fundamentally undermined that purpose, making it "no longer practical for these people to be in business together" (R. p. 2008:20-24; pp. 1278-1283).

5. <u>The Newly Discovered Evidence is not Merely Cumulative or Impeaching</u>.

The newly discovered evidence regarding Taylor's diversion of rental payments is not merely cumulative or impeaching but constitutes substantive evidence of a distinct and significant breach of fiduciary duty that was entirely absent from the original proceedings.

This evidence is not cumulative because it does not merely add to or strengthen evidence that was previously presented at trial. Rather, it presents an entirely separate and distinct breach of

fiduciary duty—Taylor's systematic diversion of rental payments—that was wholly unknown and unaddressed during the original proceedings. As Taylor himself admitted at the evidentiary hearing, he never mentioned the alleged "sublease" arrangement at trial because he didn't "think it was relevant to what we were talking about in that hearing." (R. pp. 1892:23-1893:2).

The evidence is not merely impeaching because it does not simply contradict or diminish Taylor's credibility as a witness. Instead, it establishes an independent, substantive violation of the Operating Agreement and Taylor's fiduciary duties as Manager. This evidence provides a substantive basis for the relief sought in Plaintiff's original complaint—judicial expulsion, dissolution, and partition—regardless of Taylor's credibility as a witness.

Furthermore, this evidence reveals a deliberate financial arrangement whereby Taylor Foley, LLC paid $10,500 per month in rent while only $5,750 was remitted to K&T Group through Taylor Tax Law. As Brent Bullock testified, the difference between what Taylor Foley was paying and what K&T Group was receiving was "almost double" (R. p. 1973:4-7). This constitutes substantive evidence of a systematic diversion of funds that continued for years, resulting in approximately $395,239 in diverted funds—evidence that stands on its own rather than merely supporting or impeaching other evidence.

John Kachmarsky's testimony further emphasizes the non-cumulative nature of this evidence. When asked if he "had any belief in [his] wildest imagination that David was charging more than he was collecting," Kachmarsky unequivocally responded, "No. It was a surprise to me" (R. pp. 1972:24-1973:3). He later testified that had he known about this conduct, he would have amended his lawsuit to include these allegations as they "could lead to or alter or change the decision of the Court" (R. p.1975:1-3).

This evidence reveals a breach of Taylor's duty of loyalty to K&T Group that is entirely distinct from the issues addressed at trial and directly relevant to the legal and equitable remedies requested, rather than merely impeaching testimony previously given.

6. The Lower Court Misapplied the "Could Have Discovered Standard" and Ignored the Basic Principle that a Party has No Duty to Discover Claims He Does Not Know Exists.

Respectfully, the Lower Court's assertion that Plaintiff "could have discovered" Taylor's scheme through due diligence distorts the applicable legal standard. Rule 60(b)(2) requires that newly discovered evidence "by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)." The standard is one of reasonable diligence, not theoretical possibility.

The South Carolina Supreme Court has never held that parties must conduct discovery on claims they have no reason to believe exist. As explained in *Oncology and Hematology Associates v. DHEC*, cited *supra*, "discovery requests must be 'reasonably tailored' to include only relevant matters." 387 S.C. 380, 388, 692 S.E.2d 920, 924 (2010). Discovery is properly limited to the claims and defenses at issue in the case—not speculative inquiries into potential wrongdoing that no one had reason to suspect.

The facts demonstrate why this principle is crucial in the present case. Taylor actively concealed his rental diversion scheme—even from his own law partners and office manager. Mr. Bullock testified that he was "surprised" to learn about the rental arrangement (R. p. 1927:5-14), and Ms. Shores testified she had never heard the arrangement between Taylor Foley and K&T referred to as a sublease prior to the last 90 days (R. p. 1953:22-25). If these individuals, who worked closely with Taylor, were unaware of the scheme, Plaintiff could not reasonably have been expected to discover it.

Here, the lower court abused its discretion by reversing and vacating its April 24, 2025 Order granting Kachmarsky relief from Judgment. It was error for the Court to find that Kachmarsky could have discovered the evidence by seeking discovery to support claims he did not know exist, particularly where Taylor failed to disclose his rental diversion scheme to anyone, including his own partners at Taylor Foley, LLC.

D. Because Taylor's Actions Constituted Extrinsic Fraud, Relief From Judgment Should Be Granted Pursuant to Rule 60(b)(3), SCRCP.

Under Rule 60(b)(3), SCRCP, relief from judgment may be granted for "fraud, misrepresentation, or other misconduct of an adverse party." As established in South Carolina law, to be entitled to relief based on fraud, the moving party must demonstrate extrinsic fraud. See *Jamison v. Ford Motor Co*., 373 S.C. 248, 644 S.E.2d 755 (Ct. App. 2007). Extrinsic fraud is defined as "fraud that induces a person not to present a case or deprives a person of the opportunity to be heard." *Chewning v. Ford Motor Co*., 354 S.C. 72, 81, 579 S.E.2d 605 (2003). By contrast, intrinsic fraud is fraud that "misleads a court in determining issues and induces the court to find for the party perpetrating the fraud." Id.

1. Taylor's Actions Constitute Extrinsic Fraud.

Taylor's deliberate scheme to divert rental payments from Taylor Foley, LLC while concealing this arrangement from both Plaintiff and K&T Group meets the definition of extrinsic fraud. His actions did not merely mislead the Court about facts presented at trial (which would constitute intrinsic fraud), but rather prevented Plaintiff from even having the opportunity to present this claim at trial.

2. Taylor Actively Concealed Material Financial Information.

Taylor's concealment of his sublease arrangement and diversion of approximately $395,239 in rental proceeds was not merely a failure to disclose during discovery or trial. Rather,

it was an affirmative, calculated scheme designed to prevent Plaintiff from discovering relevant facts that would have substantially altered the nature of the case.

As evidenced by the testimony at the evidentiary hearing, Taylor deliberately created a financial arrangement that was unknown even to his own law partners. Most importantly, Taylor admitted at the evidentiary hearing that he never disclosed this arrangement to John Kachmarsky. When asked directly, "So the answer to the question is at no point did you ever tell John Kachmarsky that you were receiving $10,500 a month for rent but you were going to pocket the $5,000?" Taylor responded with a clear admission: "That's right. It had nothing [to do with that]." (R. p. 1892:5-11).

This newly discovered evidence constitutes extrinsic fraud that prevented Plaintiff from presenting claims related to this significant breach at trial. The Defendant has attempted to justify his conduct by claiming the existence of a sub-lease, which is nothing more than a fabrication designed to justify his embezzlement scheme. This purported sublease does not exist and could not have been discovered precisely because it does not exist.

3. The Concealed Information Could Not Have Been Discovered Through Litigation

A critical distinction between extrinsic and intrinsic fraud is whether the aggrieved party could have discovered the fraud through normal litigation processes. In this case, Plaintiff had no reasonable way to discover Taylor's scheme through the normal discovery process because:

First, Plaintiff had no reason to suspect the existence of such an arrangement. As John Kachmarsky testified, when asked if he had "any belief in [his] wildest imagination that David was charging more than he was collecting," he unequivocally responded, "No. It was a surprise to me" (R. pp. 1972:24-1973:3). This lack of knowledge is further corroborated by the fact that April

Shores, who had direct access to Taylor Foley's records, testified she "didn't know" about the diversion of funds (R. p. 1953:22-25).

Second, the concealment was so complete that even Taylor's own law partners were unaware of the arrangement. As Brent Bullock testified, he only learned about the discrepancy in "late 2024, December" when the firm was breaking up (R. p. 1927:5-9). If Taylor's own law partners, who had direct access to the firm's financial records, were unaware of this arrangement, Plaintiff could not reasonably have been expected to discover it through normal discovery.

Third, when questioned about the nature of the rental arrangements at trial, Taylor never disclosed the existence of a sublease or the fact that he was collecting substantially more rent than was being remitted to K&T Group. As Taylor himself acknowledged at the evidentiary hearing, he never mentioned the alleged "sublease" arrangement at trial because he "didn't think it was relevant to what we were talking about at that hearing" (R. pp. 1892:23-1893:2).

4. Taylor's Conduct Deprived Plaintiff of the Opportunity to Be Heard.

The essence of extrinsic fraud is that it deprives a party of the opportunity to be heard on an issue. In this case, Taylor's concealment of his rental diversion scheme deprived Plaintiff of the opportunity to present claims related to this significant breach of fiduciary duty.

As John Kachmarsky testified, had he known about Taylor's scheme, he "would have moved to amend [his] lawsuit and put it in" because he believes it "would be violative of the operating agreement" and "could lead to or alter or change the decision of the Court" (R. pp. 1974:20-1975:3). By deliberately concealing this information, Taylor effectively prevented Plaintiff from presenting these claims to the Court.

This is precisely the type of conduct that Rule 60(b)(3) is designed to address. As Plaintiff's counsel argued during the evidentiary hearing, the concealment is the real issue (R. p. 2007:25).

Taylor's scheme was "effectively concealed" and "but for a little bit of luck that happened after the trial was over...we never would have known" (R. p. 1995:4-7).

When extrinsic fraud is established, relief from judgment under Rule 60(b)(3) is appropriate. The evidence presented at the evidentiary hearing clearly demonstrates that Taylor engaged in a deliberate scheme to divert rental income that should have been paid to K&T Group, in direct violation of his fiduciary duties under the Operating Agreement.

This is not a case where Plaintiff simply failed to discover evidence that was available through normal discovery channels. Rather, it is a case where Taylor deliberately concealed material information that would have fundamentally altered the nature of the case had it been known. This concealment deprived Plaintiff of the opportunity to present his full case to the Court, which is the very definition of extrinsic fraud. Moreover, as established by our Supreme Court in *Jacobson v. Yaschik,* "nondisclosure becomes fraudulent when it is the duty of the party having knowledge of the facts to uncover them to the other." 249 S.C. 577, 155 S.E.2d 601 (1967). Further, "It is a well-settled equitable rule that anyone acting in a fiduciary relationship shall not be permitted to make use of that relationship to benefit his own personal interests. It is a doctrine repeatedly announced by the courts of this nation that courts of equity will scrutinize with the most zealous vigilance transactions between parties occupying confidential relations toward each other and particularly any transaction between the parties by which the dominant party secures any profit or advantage at the expense of the person under his influence." *Lesesne v. Lesesne*, 413 S.E.2d 847, 307 S.C. 67 (Ct. App. 1991).

The lower court abused its discretion in finding that Taylor's concealment did not amount to extrinsic fraud when Taylor owed Kachmarsky a fiduciary duty and deprived him of the opportunity to present claims related to Taylor's breach of fiduciary duties and breach of the duty

of loyalty. Accordingly, this Honorable Court should therefore reverse the lower court, grant relief from judgment pursuant to Rule 60(b)(3), SCRCP, and allow Plaintiff to present his full case, including the newly discovered evidence of Taylor's breach of fiduciary duty through the diversion of rental income.

II. The Lower Court Erred in Reinstating its November 26, 2024 Judgment. Procedural Unfairness from Defendants' Last-Minute Counterclaim Merits Relief from the Order.

On September 16, 2024—the night before trial was scheduled to begin—Defendants moved to withdraw all of their original counterclaims and assert entirely new allegations. This last-minute amendment fundamentally prejudiced Plaintiff's ability to defend against the new claims. As this Court has made clear: "Ordinarily, amendments to conform to proof should be liberally allowed. *Soil & Material Engineers, Inc. v. Folly Associates*, 293 S.C. 498, 361 S.E.2d 779 (Ct. App.1987). However, "**if late amendment of the pleadings would cause prejudice to the opposing party, the court should either deny the amendment or grant a continuance reasonably necessary to allow the opposing party to meet the amendment."** *Ball v. Canadian American Exp. Co., Inc.*, 442 S.E.2d 620, 622, 314 S.C. 272, 275 (Ct. App. 1993), citing *National Time Share Sales, Inc. v. Maritime Ltd. Partnership*, 297 S.C. 43, 374 S.E.2d 678 (1988).

The *Ball* court further explained that **"[p]rejudice occurs when the amendment states a new claim or defense which would require the opposing party to introduce additional or different evidence to prevail in the amended action."** Id. (citing *South Carolina State Highway Department v. Rural Land Co*., 250 S.C. 12, 156 S.E.2d 333 (1967)).

Here, Defendants' eve-of-trial amendment created precisely this type of prejudice:

1. **Deprived Plaintiff of Discovery**: The new counterclaim required "additional or different evidence" that Plaintiff had no opportunity **to gather through discovery**, as explicitly noted during Plaintiff's objections on September 17, 2024.

2. **Eliminated Preparation Time**: The original counterclaims were completely abandoned and replaced with fundamentally different allegations about a disputed $8,750 payment from early 2022 —**requiring entirely new evidence and defenses.**
3. **Prevented Development of Defenses**: Because the amendment "state[d] a new claim," Plaintiff could not develop appropriate defenses or gather evidence to counter claims raised for the first time on the eve of trial.

The lower court's allowance of this amendment without granting a continuance violated the principles established in *Ball* and its predecessors and deprived Plaintiff of a fair opportunity to defend against the new claim. Accordingly, Appellant respectfully requests that this Honorable Court reverse lower Court's Order on Respondent's Counterclaim and vacate the attorney's fee award.

CONCLUSION

This case presents a clear and calculated breach of fiduciary duty that undermines the trust essential to business partnerships. David Taylor, as a Manager of K&T Group, LLC, systematically diverted nearly $400,000 in rental income that rightfully belonged to the Company—a scheme so carefully concealed that even his own law partners remained unaware of it for years. This was not a mere oversight or technical violation, but a deliberate breach of the express duties of loyalty imposed by both the Operating Agreement and South Carolina law.

The lower court initially recognized the gravity of this misconduct, correctly finding that Taylor's actions constituted extrinsic fraud that "could not have been discovered during the course of the trial, and which could change the outcome." Yet the court inexplicably reversed itself, placing an impossible burden on Plaintiff to have discovered claims he had no reason to suspect existed. This reversal contradicts established principles of South Carolina law, which recognize

that fiduciaries have an affirmative duty to disclose material information, and that breach of this duty through concealment constitutes fraud warranting relief.

The evidence is uncontroverted: Taylor admitted he never disclosed the rental diversion scheme to Kachmarsky. He admitted he unilaterally created the arrangement. Even his own testimony at the evidentiary hearing confirmed that he thought the scheme was "not relevant" to the original trial—an admission that underscores how effectively he concealed this breach. Under *Jacobson v. Yaschik* and its progeny, such concealment by a fiduciary is itself a fraudulent act justifying relief under Rule 60(b).

For these reasons, Appellant respectfully requests that this Court:

1. **REVERSE** the lower court's June 17, 2025 Order denying relief from judgment, and August 1, 2025 Order Denying Reconsideration, and
2. **REINSTATE** the April 24, 2025 Order granting Plaintiff's Rule 60(b) Motion;
3. **REMAND** this matter for a new trial that includes consideration of the newly discovered evidence of Taylor's breach of fiduciary duty;
4. **REVERSE** the lower court's November 26, 2024 judgment on Defendants' counterclaim and **VACATE** the attorney's fee award of approximately $95,000; and
5. **GRANT** such other relief as this Court deems just and proper.

The integrity of fiduciary relationships depends upon the courts' willingness to scrutinize breaches of trust "with the most zealous vigilance." *Lesesne v. Lesesne*, 413 S.E.2d 847, 307 S.C. 67 (Ct. App. 1991). This Court should not permit Taylor to benefit from his deliberate concealment of a scheme that violated his most basic duties to his business partner and the Company they jointly owned.

Respectfully submitted,

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February 10, 2026
Mount Pleasant, South Carolina

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

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 COMPLIANCE

The undersigned certifies that this Final Brief of Appellant complies with Rule 211(b), SCACR.

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