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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

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 REPLY BRIEF OF APPELLANT

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Respondents do not dispute the central facts. For two years, Taylor pursued unsubstantiated counterclaims accusing Kachmarsky of "diverting opportunities from K&T" in breach of the express duty of loyalty set forth in Section 6.2 of their operating agreement. (Answer and Counterclaim, R. p. 89, ¶ 39; p. 90, ¶¶ 48-49). Unable to substantiate these allegations, he abandoned them the night before trial. Evidence emerged after trial that Taylor had been doing exactly what he accused Kachmarsky of, but far worse. Taylor collected $10,500 per month in rent from his law firm, Taylor Foley, for K&T Group's property, while remitting only $5,750 to K&T Group and pocketing the $4,750 difference—a scheme spanning nearly a decade that diverted approximately $395,239 from K&T Group. As testimony at the evidentiary hearing confirmed, Taylor never disclosed this arrangement to Kachmarsky, to his own law partners, or even to his office manager. (R. p. 1892:5-11 (Taylor); p. 1927:5-14 (Bullock); R. p. 1953:15-25 (Shores); R. pp. 1891:1-1892:11, 1972:24-1973:19 (Kachmarsky)). His former law partners were so aggrieved when they discovered it that they filed a Motion to Intervene in this litigation. (Motion, R. pp. 452-478; Orders Granting Intervention, R. pp. 23-25; p. 26).

Respondents now argue Appellant should have discovered this scheme—while simultaneously contending it "was not relevant to the issues Appellant litigated." (Resp. Br. at 1). Respondents cannot have it both ways. As our Supreme Court observed, "You cannot have your cake and eat it. You cannot have it both ways." *Ketterman v. South Carolina Farm Bureau Mut. Ins. Co.*, 302 S.C. 276 n.1, 395 S.E.2d 187 n.1 (1990). As the Court explained 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). If the evidence "was not relevant," as Respondents now state, discovery tailored to relevant matters would never have found it. Even Taylor conceded the point. Asked why this undisclosed arrangement never came up at

trial, he testified: "I don't think it was relevant to what we were talking about at that hearing." (R. pp. 1892:23-1893:2).

But relevance to the original claims is not the standard for obtaining relief under Rule 60(b)(2). Under Rule 60(b)(2), the central question, among others discussed in Appellant's Brief, is whether the evidence "will probably change the result if a new trial is granted." *Southeastern Housing Foundation v. Smith*, 380 S.C. 621, 638, 670 S.E.2d 680, 689 (2008). After hearing the evidence, the trial court found that it would—and correctly granted relief pursuant to Appellant's Rule 60(b)(2) and (3) motion. The court stated: "I think the cases of Raby and Bowman are distinguishable under these facts. I find that the information 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" (R. pp. 2017:17-2018:10; April 24, 2025 Order, R. pp. 23-25). The evidence would change the result because it directly supports the remedies Appellant originally sought: judicial expulsion, judicial dissolution, and partition of Company Property. Respondents filed a Motion for Reconsideration, repackaging the same arguments that the court had already considered and rejected. (R. pp. 1284-1302). Yet the court reversed itself a second time on the same record, resulting in its third change of position in this case. (June 17, 2025 Order, R. pp. 28-31).

Perhaps most telling is what Respondents' Brief does not address. The words "duty of loyalty"—or even the word "loyalty"—appear nowhere in their Brief, despite Appellant's argument that Taylor breached this express duty. Nor do Respondents engage with *Jacobson v. Yaschik* or *Lesesne v. Lesesne*—the cases establishing that a fiduciary's non-disclosure is itself fraudulent and that courts must scrutinize self-dealing transactions "with the most zealous vigilance." In his original Answer and Counterclaim, Taylor expressly acknowledged that "Section 6.2 of the K&T Operating Agreement imposes upon all managers a duty of loyalty," and alleged

that "diversion of business opportunities from K&T constitutes a breach of the K&T Operating Agreement." (Answer and Counterclaim, R. p. 89, ¶ 39; p. 90, ¶¶ 48-49). By Taylor's own standard, and the express written requirements of the Operating Agreement, his diversion of $395,239 constitutes a breach far worse than anything he alleged against Kachmarsky. Respondents' Brief refuses to grapple with this breach for one reason: its revelation would have changed the outcome at trial.

ARGUMENT

I. Respondents Cannot Have It Both Ways on Due Diligence.

Respondents' due diligence argument defeats itself. They simultaneously contend that Appellant (1) should have discovered this evidence through diligent discovery, but (2) the evidence "was not relevant to the issues Appellant litigated and presented at trial." (Resp. Br. at 2). As our Supreme Court has observed, "You cannot have your cake and eat it. You cannot have it both ways." *Ketterman v. South Carolina Farm Bureau Mut. Ins. Co.*, 302 S.C. 276 n.1, 395 S.E.2d 187 n.1 (1990). And as the Court explained 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). South Carolina courts have never held that parties must conduct discovery on claims they have no reason to believe exist. If the evidence "was not relevant to the issues Appellant litigated," then discovery tailored to relevant matters would never have found it.

Taylor himself confirmed this. When asked why he never mentioned the purported sublease during trial, Taylor responded: "I don't think it was relevant to what we were talking about at that hearing." (R. pp. 1892:23-1893:2). Taylor cannot now argue Appellant should have discovered evidence that Taylor himself deemed irrelevant to the litigation.

Respondents conflate two different things: knowing that Taylor Tax Law paid rent to K&T Group, versus knowing that Taylor was secretly collecting more rent from Taylor Foley and pocketing the difference. Kachmarsky knew rent was being paid. He had no reason to suspect the second. Taylor was a Manager of K&T Group, a member of Taylor Foley, and owner of Taylor Tax Law. As Kachmarsky testified at the evidentiary hearing:

> I wouldn't care who the checks came from...the rent was being paid.

(R. p. 1984:10-13).

This testimony reflects a reasonable expectation that a fiduciary (even one he has disagreements with) would act honestly, not that Kachmarsky was on notice of fraud. Taylor admitted as much:

> Q: 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?
> A: It had nothing to do --
> Q: Is that correct?
> A: That's right.

(R. p. 1892:5-11).

Respondents point to Taylor's deposition testimony where he mentioned that rent "would come from my S corporation [Taylor Tax Law] to our joint LLC, K&T Group." (Resp. Br. at 3). But notably, Respondents add the words "[Taylor Tax Law]" in brackets—those words do not appear in Taylor's actual statement. Taylor's vague reference to "my S corporation" revealed nothing about the $4,750 monthly diversion. The evidentiary hearing confirmed that no one knew about this scheme except Taylor—not his law partner Brent Bullock (R. p. 1927:5-14), not his office manager April Shores (R. p. 1953:15-25), not Kachmarsky (R. pp. 1891:1-1892:11; 1972:24-1973:19). Respondents cannot fault Appellant for failing to discover what Taylor successfully concealed from everyone around him.

Respondents' reliance on *Raby Construction* and *Bowman* actually proves Appellant's point. The trial court specifically found these cases distinguishable when it initially granted Appellant's Rule 60(b) motion: "I think the cases of Raby and Bowman are distinguishable under these facts." (R. p. 2018:1-2).

A. The *Raby* Case Demonstrates Why Relief Is Warranted.

In *Raby Construction v. Orr*, 358 S.C. 10, 594 S.E.2d 478 (2004), the Supreme Court's denial of relief hinged on a key finding that is entirely absent in our case: the availability of witnesses who knew the truth and were explicitly identified as having that knowledge. As the Supreme Court explained: "Bailey [the witness] was identified in respondent's answers to interrogatories as a witness who could testify as to the accounting for the South City Grill project and the amounts owed on the project. Yet Bailey was not deposed. In her testimony at the Rule 60(b) hearing, she acknowledged that if she had been deposed prior to the settlement and asked if there were computer records, she would have testified as to the existence of those records." *Id.* at 22.

Here, the opposite is true. Respondents identified Shores and Bullock as witnesses, but unlike Bailey, they had no knowledge of the scheme to disclose. Bullock testified he had never heard that Taylor was diverting rents paid for use of K&T Company Property until after the trial had ended. (R. p. 1927:5-14). Shores testified she "didn't know" about the diversion. (R. p. 1953:15-25). Deposing these witnesses would not have revealed the scheme because they themselves were unaware of it.

Most importantly, the central issue in *Raby* was precisely what the appellant later claimed was fraudulently concealed—the amounts owed for construction work. The appellant knew what he was looking for and had explicit notice of where to find it.

By contrast, in our case, the diversion of rental payments was not part of the original claims. Kachmarsky had no knowledge of Taylor's secretive unilateral action because, as Taylor admitted at the evidentiary hearing, Taylor never told him. (R. p. 1892:5-11).

	Raby Construction	Present Case
Subject Matter	Concealed evidence (accounting records) was directly related to central issue in litigation (amounts owed).	Concealed scheme (rental diversion) was separate from issues in litigation.
Witnesses	Bailey was specifically identified as having knowledge of the accounting records.	Identified witnesses (Shores, Bullock) had no knowledge of the rental diversion scheme and did not learn about it until after the judgment was entered.
Testimony	Bailey admitted she would have revealed the records if asked during deposition.	Shores and Bullock testified they were "surprised" and "didn't know" about the scheme.
Discovery Focus	Appellant was actively seeking evidence about construction costs.	Appellant did not suspect the undisclosed rental diversion scheme existed.

B. *Bowman* Further Demonstrates Why Relief Is Warranted.

Bowman v. Bowman, 357 S.C. 146, 591 S.E.2d 654 (Ct. App. 2004), further illustrates why our situation warrants relief. In *Bowman*, the central issue of the litigation was the equitable division of the marital estate—including whether the wife's defined benefit plan should be included in the marital property. The husband was made fully aware by wife of the existence of this benefit plan throughout the litigation.

The Court of Appeals emphasized: "Wife acknowledged this post-filing retirement account at her May 11, 2000 deposition, approximately seven months prior to trial. Also prior to trial, Husband noticed the deposition of James Kenneth Player, the executive vice president of Wife's employer, for the purpose of gaining additional evidence and information concerning the defined benefit plan." *Id.* at 153.

Despite having this knowledge and opportunity, the husband "elected not to take Player's deposition, opting instead to enter into [a] stipulation with Wife." *Id.* The court concluded that the husband "was aware prior to trial of this asset and Wife's reluctance to disclose it" and "faced no legal impediment prior to trial precluding his access to information concerning any aspect of Wife's defined benefit plan." *Id.* at 154.

Here, our case is markedly different:

	Bowman	**Present Case**
Knowledge	Husband knew about the benefit plan and did not pursue discovery.	Appellant had no knowledge of rental diversion scheme.
Discovery Opportunity	Husband identified witness with knowledge but chose not to depose.	Even identified witnesses had no knowledge of the scheme.
Central Issue	Benefit plan was central to the divorce action.	Rental diversion was separate from claims in complaint.
Notice	Wife acknowledged benefit plan in deposition.	Taylor never disclosed scheme during deposition or trial, later testifying he did not think it was "relevant" information.

C. *Lanier* is Likewise Inapposite.

Lanier v. Lanier, 364 S.C. 211, 612 S.E.2d 456 (Ct. App. 2005), involved misplaced evidence, not concealed evidence. There, the wife knew an antenuptial agreement existed but could not locate it; the court denied relief when she found it in her own desk drawer after trial. Here, Kachmarsky had no knowledge the diversion scheme existed. Taylor concealed it from everyone, including his own law partners.

D. This Case Presents the Exact Opposite Scenario from *Raby* and *Bowman.*

Unlike both *Raby* and *Bowman*, where critical information was accessible through identified witnesses, Taylor never disclosed this arrangement to anyone. Respondents identified Ms. Shores and Mr. Bullock in their discovery responses as individuals who were "expected to

have knowledge of the parties' use of office space in Suite 330, the payment of rents to K&T Group, LLC, as well as Kachmarsky's conduct."

What makes this case materially different is that even these identified witnesses had no knowledge of the scheme until after the judgment was entered. Bullock explicitly testified when asked, "And when did you first become aware that only 5,750 was being remitted to the K&T Group?" he responded "It was late 2024, December." (R. p. 1927:5-14). Similarly, Shores testified she "didn't know" about the diversion of funds at the time. (R. p. 1953:15-25). Even if Appellant had deposed these witnesses, they could not have revealed what they themselves did not know.

The crucial distinction is that in both *Raby* and *Bowman*, the information could have been discovered through witnesses who possessed the concealed knowledge. Here, no amount of diligence could have uncovered a scheme whose very existence was concealed from everyone, including those closest to Taylor. Without any knowledge of the scheme or reasonable basis to suspect it existed, Appellant had no foundation upon which to formulate discovery requests or pursue deposition questioning about a matter that, to all appearances, did not exist. The scheme was discovered only because of the fortuitous circumstance of the Taylor Foley firm dissolution in December 2024, after the judgment was entered.

II. The Proper Standard for Relief under Rule 60(b)(2) Is Whether the Evidence Could Change the Outcome.

Respondents misstate the Rule 60(b)(2) standard. They argue the newly discovered evidence is not "material to the issues raised by the pleadings" because it was "not relevant to the issues Appellant litigated." (Resp. Br. at 19-20). This conflates materiality with relevance to the original claims.

The proper standard under Rule 60(b)(2) is whether the evidence "will probably change the result if a new trial is granted." *Southeastern Housing Foundation v. Smith*, 380 S.C. 621, 638,

670 S.E.2d 680, 689 (2008). Put differently, the evidence must be "outcome changing." Evidence that Taylor diverted $395,239 from K&T Group is outcome-changing because it provides substantial grounds for the remedies Appellant sought: judicial expulsion under S.C. Code Ann. § 33-44-601 (for "willfully or persistently commit[ting] a material breach of the operating agreement or of a duty owed to the company") and judicial dissolution under S.C. Code Ann. § 33-44-801 (where a 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"). The trial court recognized this when it initially granted relief.

Respondents cite *Johnston v. Belk-McKnight Co.* and *Morin v. Innegrity, LLC* for the proposition that evidence must be "material to the issues raised by the pleadings." (Resp. Br. at 19-20). But in *Morin*, 424 S.C. 559, 819 S.E.2d 131 (Ct. App. 2018), the movant knew about the relevant issue before trial and "chose not to make" it part of the trial theory. Here, Appellant did not know about Taylor's scheme and could not have "chosen" to make it part of his case because Taylor never disclosed he was diverting company rents to anybody. Additionally, in *Johnston*, the Court actually *affirmed* an order granting a new trial based on newly discovered evidence, noting that "[n]ewly discovered evidence raising a new ground of claim or defense is, of course, not cumulative." 188 S.C. at 157, 198 S.E. at 398. As the *Morin* court explained, "Relief under the rule depends upon the post-trial discovery of previously unknown, outcome-changing facts the moving party could not have, with due diligence, unearthed before trial." 424 S.C. at 578, 819 S.E.2d at 141. That is precisely what occurred here.

III. Taylor Breached His Duty of Loyalty Under Section 6.2.

Respondents' Brief does not contain the words "duty of loyalty" or even the word "loyalty." This omission is remarkable given that Taylor's duty of loyalty under Section 6.2 of the

Operating Agreement is the central issue in this appeal. Respondents offer no defense to Taylor's breach of this duty—because there is none.

South Carolina law imposes strict fiduciary duties on managers of business entities. As the Court of Appeals emphasized in *Lesesne v. Lesesne*, "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." 307 S.C. 67, 413 S.E.2d 847 (Ct. App. 1991). Respondents do not address *Lesesne* or this standard. This case presents exactly such a transaction.

Respondents contend Taylor paid rent according to an "agreed-upon formula" and therefore breached no duty. This argument fails because Taylor's conduct violated each subsection of Section 6.2 of the Operating Agreement, which mirrors S.C. Code § 33-44-409(b)(1)-(3) and (h)(2)-(3).

Section 6.2(a) 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 of the Company's Property including the appropriation of a Company Opportunity." (R. p. 2483). Taylor derived $395,239 in "profits...from the use...of the Company's Property." He did not "account to the Company" for these amounts. He did not "hold as trustee." Moreover, transferring rental income generated by Company Property to an outside entity—even under the pretense of a sublease—constitutes appropriation of a Company Opportunity.

Section 6.2(b) 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 dealt with the Company on behalf of Taylor Tax Law—an entity he owns and controls—whose interest in retaining $4,750 per month was adverse to K&T Group's interest in receiving that rent.

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). K&T Group's business purpose is "to hold and manage the Company Property, including but not limited to...leasing" commercial office space. (Operating Agreement § 1.10, R. p. 2471). By collecting rent from Taylor Foley for Company Property and diverting it to his own entity, Taylor directly competed with the Company's core business.

When confronted with these duties at the evidentiary hearing, Taylor tried to hide behind corporate form. Asked whether he received any "property, profit, or benefit," Taylor responded: "Actually, no. That would be Taylor Tax Law that did if you want to get down to the definitions." (R. pp. 1879:23-1880:2). But Taylor cannot escape personal liability by routing funds through his S corporation. The Operating Agreement lists Taylor individually—not Taylor Tax Law—as a Manager of K&T Group, and Section 6.2 imposes fiduciary duties on him personally. Taylor acknowledged as much when asked whether his affiliation with Taylor Tax Law eliminates his duty of loyalty to K&T Group: "It does not." (R. p. 1894:12-18).

Taylor's own legal filings destroy his defense. In his original Answer and Counterclaim, Taylor expressly acknowledged that "Section 6.2 of the K&T Operating Agreement imposes upon all managers a duty of loyalty." (Answer and Counterclaim, R. p. 89, ¶ 39). He alleged that Kachmarsky breached this duty by "divert[ing] opportunities from K&T to other entities owned by Kachmarsky" and by "prioritiz[ing] placing tenants in the office suites he owned over the office suites owned by K&T." (R. p. 90, ¶ 48). Taylor characterized this as a "breach of the K&T

Operating Agreement." (R. p. 90, ¶ 49). By Taylor's own standard, and the express terms of the Operating Agreement, his conduct—diverting $395,239 in rental income from Company Property to entities he owned—was a far worse breach than anything he alleged against Kachmarsky.

There was no "sublease." Respondents now claim a "sublease" arrangement justified Taylor's conduct. But this is a post hoc fabrication. At trial, Taylor's counsel identified Taylor Foley as "the Tenant"—not a subtenant. The Court's Order—drafted by Taylor's counsel—identifies "Taylor Foley" as "the party that rents space from the Company." (Order, R. p. 13). The word "subtenant" only appeared after the scheme was discovered. Taylor's own law partner testified there was no sublease. (R. p. 1927:5-23).

Taylor's inconsistent positions warrant judicial estoppel. *Cothran v. Brown*, 357 S.C. 210, 592 S.E.2d 629 (2004). At trial, he successfully maintained that Taylor Foley was "the party that rents space from the Company." Now, he claims Taylor Foley was merely a "subtenant" of Taylor Tax Law. These positions are totally inconsistent, and Taylor succeeded with his first position, obtaining a favorable judgment. When asked why he never mentioned the alleged "sublease" at trial, Taylor admitted he didn't "think it was relevant to what we were talking about in that hearing." (R. pp. 1892:23-1893:2).

Taylor admitted he acted unilaterally. When asked "You unilaterally made the decision to create a sublease and lease it to Taylor Foley; is that correct?" Taylor responded: "Who else could have made that decision? Yes. I'm the one that made that decision." (R. p. 1919:12-16). When asked whether K&T had anything to do with the allocation between his personal office and other space, Taylor admitted: "Correct." (R. p. 1920:11-13). And when asked where in the Operating Agreement it gave him the right to sublease, Taylor's response was telling: "Where does it not?" (R. p. 1870:7-10). This cavalier attitude toward his fiduciary duties speaks for itself.

Respondents suggest Kachmarsky should have noticed the scheme from the checks. But the checks from Taylor Tax Law to K&T Group revealed nothing about (1) the amount Taylor Foley was paying to Taylor Tax Law ($10,500 per month), (2) the fact that Taylor Tax Law was only remitting approximately half of that amount ($5,750) to K&T Group, or (3) the fact that Taylor was pocketing the difference ($4,750 per month). The checks would not have revealed the rental diversion scheme. As Kachmarsky testified, all he knew was that rent was owed and rent was coming in. (R. p. 1974:7-15). Only Taylor could see both sides of the transaction—and he made sure no one else did.

Moreover, any sublease arrangement would have required member approval. Section 5.2(a) of the Operating Agreement requires unanimous approval of the members for "[a]ny amendment to this Agreement or the Articles of Organization." (R. p. 2480, at 5.2(a)). A purported sublease that fundamentally altered how rental payments were handled—diverting nearly $400,000 from the Company over nearly a decade—would have required such approval. Taylor never sought it. And critically, Section 12.6 provides that any waiver of a breach "shall be made only by a written waiver in each case." (R. p. 2499). Section 12.10's Entire Agreement clause confirms that all prior agreements "whether written or oral, are terminated and superseded by this Agreement." (R. p. 2500). There is no subsequent writing waiving Taylor's duty of loyalty or authorizing him to divert Company income to his own entity. The Operating Agreement was never amended, and Taylor's fiduciary obligations remain in full force.

Finally, Respondents' "corollary claim" argument is a false equivalence. They argue that finding Taylor breached would mean Kachmarsky breached too. (Resp. Br. at 13). But Kachmarsky was not collecting rent from anyone. Taylor's breach was not in failing to pay fair market rent—it was in collecting $10,500 from Taylor Foley, remitting only $5,750 to K&T Group, and pocketing

the $4,750 difference. Kachmarsky had no such arrangement. He was not interposing an entity between a tenant and K&T Group to capture a spread. Taylor did so and told no one.

Respondents also emphasize that K&T Group is a "term company" with "limited rights of transfer and exit." (Resp. Br. at 4). This is a red herring. K&T's status as a term company does not create a loophole that permits a manager to divert Company proceeds in express contravention of the Operating Agreement. The Operating Agreement expressly imposes fiduciary duties on the Managers—including Taylor individually—regardless of the Company's term structure. *See* Operating Agreement § 6.2. (R. p. 2483). A term company's limited exit rights make fiduciary compliance more important, not less, because members cannot simply walk away from misconduct. Taylor's argument amounts to claiming that because Kachmarsky is locked into the Company, Taylor was free to steal from it.

IV. Taylor's Non-Disclosure Constitutes Extrinsic Fraud Under Rule 60(b)(3).

Under Rule 60(b)(3), SCRCP, relief from judgment may be granted for "fraud, misrepresentation, or other misconduct of an adverse party." To obtain such relief, the moving party must demonstrate extrinsic fraud—"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). Taylor's conduct clearly satisfies this standard.

A. A Fiduciary's Non-Disclosure Is Itself Fraudulent.

In *Jacobson v. Yaschik*, 249 S.C. 577, 155 S.E.2d 601 (1967), the Supreme Court addressed a defendant who argued "that the only wrong alleged in the complaint was that he was silent" about a material financial arrangement. Id. at 590. The Court rejected this defense: "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." Id. The Court explained that the duty to disclose arises in 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. at 591.

Taylor falls into all three categories. He had a "preexisting definite fiduciary relation" with Kachmarsky under Section 6.2 of the Operating Agreement. Kachmarsky "expressly repose[d] a trust and confidence in Taylor as his co-manager." And the Operating Agreement governing K&T Group "in its essential nature, is intrinsically fiduciary and necessarily calls for perfect good faith and full disclosure." Because Taylor owed Kachmarsky and the Company a fiduciary duty, his non-disclosure is fraudulent as a matter of law—independent of any separate showing of intent. The fiduciary relationship itself establishes the duty to disclose; the failure to disclose establishes the fraud.

Respondents do not address *Jacobson*, nor do they explain how Taylor's admitted non-disclosure to his fiduciary partner was anything other than fraudulent under this standard.

B. Taylor's Concealment Constitutes Extrinsic Fraud.

Respondents argue Taylor's concealment constitutes only "intrinsic fraud." (Resp. Br. at 30-35). But *Chewning* defines extrinsic fraud 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 (2003). Taylor's concealment did exactly that. This is not a case where a party failed to produce documents in response to discovery requests—the scenario *Chewning* describes as "generally" intrinsic fraud. Taylor collected $10,500 per month from Taylor Foley but remitted only $5,750 to K&T Group, pocketing the difference. He concealed this diversion from everyone—including his own law partners and office manager—and never disclosed it despite his fiduciary duty to do so. His concealment ensured Kachmarsky could never present claims he didn't know existed. As Kachmarsky testified, had he known, he "would have moved to amend [his] lawsuit" because it "could lead to or alter or change the decision of the Court." (R. pp. 1974:20-1975:3).

V. *Boathouse* Does Not Apply to Deadlocked Co-Managers.

Respondents claim "the successful business relationship has endured." (Resp. Br. at 2). This ignores that the relationship has "endured" while Taylor was secretly self-dealing in violation of Section 6.2 of the Operating Agreement. That the business has not collapsed despite Taylor's diversion of Company rents does not mean the breach should be excused or that the parties can continue to work together.

Respondents rely on *Boathouse at Breach Inlet v. Stoney*, 442 S.C. 633, 900 S.E.2d 483 (Ct. App. 2024), but that case involved a completely different membership and management structure. In *Boathouse*, Laurence (the putative plaintiff) was a passive 5% member with no management authority. Richard, the 60% member-manager, operated the restaurant without needing Laurence's participation. The Court found Laurence's conduct—negative comments to vendors—did not "evidence conduct relating to the Company's business that would warrant judicial dissociation." Id. at 652. The Court emphasized that members seeking expulsion "are required to clear a high bar" and that "it must be unfeasible, despite reasonable efforts, to keep the [limited liability company] operating while the disputed member remains affiliated with it." Id.

Here, that high bar is cleared. Two 50/50 partners serve as co-managers with equal authority. Neither can function without the other's cooperation. And unlike *Boathouse*, where the member's conduct "lacked a sufficient nexus to the company's business," id. at 654, here the nexus is direct and undeniable. K&T Group's stated business purpose is "to hold and manage the Company Property, including but not limited to...leasing" commercial office space. (Operating Agreement § 1.10, R. p. 2471). Taylor diverted rental income from that very property. By collecting rent from Taylor Foley for Company Property and diverting it to his own entity, Taylor both competed with and undermined the Company's core business. It is "not reasonably practicable to carry on the business" with a co-manager who has secretly diverted nearly $400,000. The statutory standard is satisfied.

When equal partners cannot agree on collecting rent, paying bills, or managing tenants in a property business—and one partner has been secretly diverting company funds for nearly a decade—continued operation is not reasonably practicable. Two failed mediations confirm these parties cannot "resolve this matter between themselves."

The newly discovered evidence supports each of the remedies Appellant originally sought:

Judicial Expulsion. Under S.C. Code Ann. § 33-44-601(6), a court may expel a member who has "willfully or persistently committed a material breach of the operating agreement or of a duty owed to the company" or "engaged in conduct relating to the company's business which makes it not reasonably practicable to carry on the business with the member." Taylor's systematic diversion of $395,239 from Company Property satisfies both grounds.

Judicial Dissolution. Under S.C. Code Ann. § 33-44-801(4), dissolution is warranted where a 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." The parties are

deadlocked co-managers who cannot function together—a twenty-year pattern of escalating disputes now compounded by evidence of a nearly decade-long diversion scheme.

Partition. The evidence demonstrates why partition is an appropriate equitable remedy given the complete breakdown of the fiduciary relationship.

Respondents and the lower court acknowledge the dysfunction but offer no solution except to force these parties to remain locked together indefinitely. That is not a viable business arrangement.

VI. The Eve-of-Trial Amendment Prejudiced Appellant.

Respondents claim the amendment "did not change the parties or claims and did not prejudice Appellant" and "simply articulated what the litigation had been about all along." (Resp. Br. at 1 and 37). The record demonstrates otherwise.

For two years, Appellant defended against counterclaims alleging Kachmarsky violated the duty of loyalty by "diverting opportunities from K&T." (Answer and Counterclaim, R. p. 89, ¶ 39; p. 90, ¶¶ 48-49). The amended counterclaim alleged something entirely different: that *filing a lawsuit* constituted breach of fiduciary duty. These are not the same theory. One accuses Kachmarsky of self-dealing; the other accuses him of seeking judicial relief. The evidence required to prove—and to defend against—each theory is entirely different.

On September 16, 2024—the night before trial—Respondents abandoned those original claims entirely and substituted the new allegations. This is not "narrowing" claims; it is substituting an entirely different theory of liability.

At the hearing on the motion to amend, Appellant's counsel objected:

> [Y]esterday morning was the first time we learned about this new counterclaim and that they're going to raise issues and damages that we've never heard of before. […] We don't know what the damages are. We don't know what the theories are. […] We don't have an opportunity to understand the basis of their claim.

(R. p. 1593:14-25).

"[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." *Ball v. Canadian Am. Exp. Co.*, 314 S.C. 272, 275, 442 S.E.2d 620, 622 (Ct. App. 1994). The new claim—that filing a lawsuit constitutes breach of fiduciary duty—required entirely different evidence and defenses than the original duty of loyalty claims. Appellant had no opportunity to conduct discovery, develop defenses, or prepare for trial on these new allegations.

The prejudice is compounded by what emerged after trial: Respondents abandoned their duty of loyalty claims only for evidence to surface that Taylor—not Kachmarsky—had been violating these exact duties for nearly a decade. The tactical maneuvering deprived the Court of a complete record and rewarded Respondents with a fee award of approximately $95,000.

Respondents also grossly mischaracterize the underlying lawsuit. They claim 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." (Resp. Br. at 4). This is false. The Complaint sought judicial expulsion, judicial dissolution, and partition based on multiple breaches including Taylor's persistent failure to pay rent for space he occupied, his refusal to contribute proportionately to Company expenses, and his violations of banking covenants with Ameris Bank. (Complaint, R. pp. 36-43). Reducing a multi-faceted lawsuit to "$3,750" for a "summer intern" grossly misrepresents the record. The newly discovered evidence is material precisely because, as the trial court initially acknowledged, it "could change the outcome of the proceeding." Evidence that Taylor diverted $395,239 from K&T Group goes directly to the remedies Appellant sought: judicial expulsion, dissolution, and partition.

Filing a lawsuit to resolve a partnership dispute is not a breach of fiduciary duty. But diverting $395,239 from the Company is. Taylor was awarded $95,000 in attorney's fees while secretly pocketing four times that amount from K&T Group.

VII. The Trial Court's Reversal Was an Abuse of Discretion.

The trial court *granted* Appellant's Rule 60(b) motion. After conducting an evidentiary hearing with live testimony from Taylor, Bullock, Shores, and Kachmarsky, the court found *Raby* and *Bowman* distinguishable and stated:

> 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.
>
> (R. p. 2018:2-9).

The court then entered a Form 4 Order granting the motion, finding "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. p. 23). Respondents' Motion for Reconsideration raised no new issues and presented no new evidence.

"The exercise of a trial court's discretion implies conscientious judgment, not arbitrary action, and takes account of the law and particular circumstances of the case, being directed by the reason and conscience of the judge to a just result." *Horn v. Davis Elec. Constructors*, 312 S.C. 363, 366, 440 S.E.2d 398, 400 (Ct. App. 1994). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." *Clark v. Cantrell*, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000).

The trial court's June 17, 2025 Order reversing its grant of relief constitutes an abuse of discretion on multiple grounds.

First, the Order is based on an error of law. The court stated: "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." (June 17, 2025 Order at R. p. 29). This analysis ignores the Operating Agreement entirely. Section 6.2 imposes express fiduciary duties on Managers—including the duty to "account to the Company" for profits derived from Company Property and to "hold as trustee" any such profits. These contractual duties are not supplanted by a vague notion of "equity." A fiduciary cannot pocket $395,239 from Company Property simply because his co-manager paid "equal" rent. The duty of loyalty exists precisely to prevent such self-dealing.

Second, the court's suggestion that the parties could resolve this matter themselves is without evidentiary support. The parties attended two mediations—March 2023 and June 16, 2025—both ending in impasse. The timing here is critical: the second mediation failed on June 16, 2025. (ADR Report, R. p. 1505). The court issued its reversal order on June 17, 2025—the very next day. (R. p. 28). The court reversed course and reinstated a judgment that leaves these parties locked together in business, less than 24 hours after a mediator confirmed they cannot resolve their disputes. The record contains no evidence suggesting these parties can work together without judicial intervention. To the contrary, Taylor has called police to remove tenants, refused to consent to leases, and engaged in conduct that makes property management impossible. (Feb. 20, 2025 Hearing Transcript, R. pp. 1833-1859).

Third, the reversal reflects arbitrary action rather than conscientious judgment. The court reversed on the exact same record on which it had granted relief, without holding a hearing and without any new evidence. The Order opens with "I am bothered by this case"—an expression of personal frustration, not legal analysis. (R. p. 28). The court then blamed Kachmarsky for the fact

that fair market value was not used for rent, stating the arrangement existed "apparently due to the desires of John Kachmarsky." (Id.). But no rent formula authorized Taylor to secretly pocket $395,239 from Company Property without disclosure to his co-manager, his own law partners, or the Court.

CONCLUSION

Respondents' central argument—that Appellant should have discovered evidence that was "not relevant to the issues"—defeats itself. A party cannot be faulted for failing to pursue discovery on matters that were, by Respondents' own admission, irrelevant to the litigation.

But the problems with Respondents' position run deeper. Respondents do not address *Jacobson v. Yaschik* or *Lesesne v. Lesesne*—the cases establishing that a fiduciary's failure to disclose is itself fraudulent. They do not explain how Taylor's admitted non-disclosure to his 50/50 co-manager was anything other than a breach of the duty of loyalty he acknowledged in his own pleadings. They do not grapple with the fact that Taylor concealed this scheme from everyone—his partner, his law partners, his office manager—for nearly a decade.

Respondents rely on *Boathouse*, but *Boathouse* involved a 5% passive member with no management authority whose conduct "lacked a sufficient nexus to the company's business." This case involves 50/50 co-managers, a $395,239 diversion from Company Property, and two failed mediations confirming these parties cannot resolve their disputes. It is not reasonably practicable to carry on a business with a partner who has secretly diverted nearly $400,000 in rents from Company Property.

The trial court initially got it right. After hearing live testimony, the court found *Raby* and *Bowman* distinguishable, found extrinsic fraud that "could not have been discovered during the course of the trial," and found the evidence "could change the outcome." The court reversed itself

on the same record, without a hearing, the day after a second mediation failed. That reversal was error.

Appellant respectfully requests that this Court:

1. REVERSE the June 17, 2025 Order denying relief and August 1, 2025 Order denying reconsideration;
2. REINSTATE the April 24, 2025 Order granting the Rule 60(b) Motion;
3. REMAND for a new trial including the newly discovered evidence;
4. REVERSE the judgment on the counterclaim and VACATE the fee award; and
5. Grant such other relief as this Court deems just.

Respectfully submitted,

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February 10, 2026
Mount Pleasant, South Carolina

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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

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 Reply Brief of Appellant complies with Rule 211(b), SCACR.

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