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**SC Court of Appeals**

STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

The Honorable Jessica A. Salvini

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Appellate Case No. 2024-002063

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Jon Kane,

Appellant,

v.

Darien Applegate; Darien E. Applegate Trust;  
Darien E. Applegate, Successor in Partnership;  
Big Blue Allure, LLC; Allure Outdoor, LLC;  
Allure Advertising, LLC; Lamar OCI South Corp.;  
Lamar Advertising,

Defendants

of which Darien Applegate, individually,  
and as Trustee of the Darien E. Applegate Trust,  
and as Successor in Partnership; Big Blue Allure, LLC;  
and Allure Outdoor, LLC are the Respondents.

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FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

- I. DID THE CIRCUIT COURT ERR IN DISMISSING APPELLANT’S CLAIMS AS TIME-BARRED UNDER THE THREE-YEAR STATUTE OF LIMITATIONS WHEN THE CLAIMS AROSE FROM DEFENDANT DARIEN APPELEGATE’S CONDUCT IN 2022, NOT JOE APPELEGATE’S DEATH IN 2019?
- II. DID THE CIRCUIT COURT ERR IN FAILING TO RECOGNIZE THAT THE SUBJECT CLAIMS WERE BROUGHT AGAINST DARIEN APPELEGATE INDIVIDUALLY, AS WELL AS OTHER DEFENDANTS, NOT AGAINST THE ESTATE OF JOE APPELEGATE? (THIS IS NOT A CREDITOR CLAIM.)
- III. DID THE CIRCUIT COURT PROCEDURALLY ERR BY CONSIDERING A STATUTE OF LIMITATIONS DEFENSE IN A PRE-ANSWER MOTION TO DISMISS, CONTRADICTING ESTABLISHED SOUTH CAROLINA PRECEDENT IN *GLENN V. SCH. DIST. NO. FIVE OF ANDERSON CTY.*?
- IV. DID THE CIRCUIT COURT ABUSE ITS DISCRETION IN ARBITRARILY DISMISSING THE APPLICATION OF S.C. CODE § 33-41-560 REGARDING PARTNERSHIP CONTINUATION WITHOUT PROVIDING ANY ANALYSIS OR REASONING?
- V. DID THE CIRCUIT COURT ERR IN FAILING TO DIFFERENTIATE BETWEEN LEGAL AND EQUITABLE CLAIMS WHEN APPLYING STATUTES OF LIMITATIONS, PARTICULARLY FOR CONSTRUCTIVE TRUST, ACCOUNTING, AND OTHER EQUITABLE REMEDIES?

## STATEMENT OF THE CASE

This is an action arising from Darien Applegate's unauthorized sale of partnership assets following the death of her husband, Joe Applegate. Jon Kane and Joe Applegate formed a partnership in 2015 to establish a billboard venture in Mount Pleasant, South Carolina, maintaining an amicable and productive business relationship until Joe Applegate's death in 2019. Following Joe's death, Darien Applegate initially continued the partnership relationship with Kane, but ultimately sold the partnership's billboard to Lamar OCI South Corp. in 2022 without Kane's knowledge or consent and without distributing any proceeds to Kane.

### Procedural History

This action commenced on June 22, 2023, when Appellant Jon Kane filed a Complaint against Respondents Darien Applegate (individually and as Successor in Partnership), Darien E. Applegate Trust, Big Blue Allure, LLC, Allure Outdoor, LLC, Allure Advertising, LLC, Lamar OCI South Corp., and Lamar Advertising. (R. pp. 13-201). The Complaint asserted that Kane and Joe Applegate (Darien Applegate's late husband) formed a partnership in spring 2015 for the construction and operation of a digital billboard along Highway 41 in Mount Pleasant, South Carolina. According to the Complaint, Kane contributed his expertise and secured the billboard location, while Joe Applegate provided funding for construction through his company, Allure Advertising, LLC, which formally entered the lease for the billboard site. The parties agreed to split profits equally once Joe Applegate was reimbursed for construction costs.

Construction of the billboard was completed in late 2016/early 2017, and in April or May 2019, Joe Applegate informed Kane that construction expenses had been fully reimbursed, triggering their 50/50 profit-sharing arrangement. (¶¶ 13-19 at R. pp. 14-15; ¶¶ 35-37, at R. pp. 17; ¶ 51 at R. p. 20). The Complaint further alleged that the partnership formed an LLC called

“Big Blue Allure, LLC,” and both Kane and Joe Applegate signed the Articles of Organization as “Partners.” (¶¶ 30-33, R. pp. 17-18; Exh. F, R. pp. 77-80).

The Complaint included extensive documentary evidence supporting Kane’s claims, including emails where Joe Applegate referred to Kane as his “partner” (R. pp. 74-76), a June 2017 valuation showing the billboard was worth approximately \$1,340,000 (¶ 43, R. p. 18; Exh. K, R. pp. 112-125), insurance policies in the name of Big Blue Allure, LLC (¶¶ 33-34, R. p.17; Exh. G, R. pp. 81-101), and numerous communications demonstrating the partnership relationship.

Following Joe Applegate’s death on June 29, 2019, Kane alleged that Darien Applegate continued the partnership relationship, involving Kane in day-to-day operations and acknowledging his ownership interest in text messages and communications. Specifically, Darien Applegate requested Kane handle partnership financial matters (Exhs. O & P, R. pp. 134-142), consulted with him about business operations, referred to the billboard as “our sign” (Exh. T, R. pp. 156-158), and asked Kane if they could “add a second face to our sign at the marina.” (¶ 65, R. p. 20).

However, on December 30, 2021, Darien Applegate executed a transfer and assignment of the billboard lease to Lamar OCI South Corp. (¶ 75, R. p. 22; Exh. Z, R. pp. 194-199), and on May 5, 2022, Articles of Merger were filed merging Allure Advertising, LLC into Lamar OCI South Corp. (¶ 76, R. p. 22; Exh. W, R. pp. 167-175). The Complaint alleged that on or about May 11, 2022, Darien Applegate completed the sale of the partnership assets without Kane’s knowledge or consent. (¶ 79, R. p.23)

The Complaint asserted sixteen causes of action, including declaratory judgment, breach of contract, breach of fiduciary duty, fraud, constructive fraud, unjust enrichment, accounting,

conversion, wrongful dissolution, and various other claims arising from the partnership relationship and subsequent sale of partnership assets. (Complaint at R. pp. 23-44).

On October 18, 2023, the Applegate Defendants filed a Motion to Dismiss in Lieu of Answer pursuant to Rules 12(b)(6) and 12(b)(9) of the South Carolina Rules of Civil Procedure. (Motion, R. pp. 202-205; Memo in Support of Motion, R. pp. 206-215). The Motion argued that all of Kane's claims were time-barred under both the South Carolina Probate Code and the general three-year statute of limitations.

On August 30, 2024, Kane filed a Memorandum in Opposition to Defendants' Motion to Dismiss in Lieu of Answer. (R. pp. 216-240). The Memorandum presented several detailed arguments against dismissal: (1) that a statute of limitations defense cannot procedurally be raised in a pre-answer motion to dismiss under *Glenn v. Sch. Dist. No. Five of Anderson Cty.*; (2) that Kane's claims were not time-barred because the damages occurred when Darien Applegate sold the partnership assets in May 2022, not upon Joe Applegate's death in 2019; (3) that Kane's claims were not subject to probate limitations because they sought declaratory judgment regarding partnership rights rather than making claims against the estate; (4) that S.C. Code § 33-41-560 regarding partnership continuation applied because Darien Applegate continued to operate the partnership with Kane after Joe Applegate's death; and (5) that the extensive documentary evidence attached to the Complaint substantiated both the original partnership with Joe Applegate and the continued partnership relationship with Darien Applegate.

A hearing on the Motion to Dismiss was held before the Honorable Jessica A. Salvini on September 4, 2024. (Transcript, R. pp. 257-276). During the hearing, Kane's counsel emphasized the documentary evidence demonstrating both the original partnership with Joe Applegate and the continued partnership relationship with Darien Applegate after Joe Applegate's death. Kane's

counsel argued that the claims were not against Joe Applegate's estate but rather concerned Kane's vested property rights as a partner. (R. pp. 269-274).

At the hearing, counsel for Kane explained the critical difference between partnership dissolution and termination. Though a partner's death dissolves a partnership, South Carolina law explicitly states that dissolution does not terminate a partnership, which "continues until the winding up of partnership affairs is completed." S.C. Code § 33-41-920. The damages in this case occurred in May 2022, when the partnership assets were sold without Kane's knowledge or consent - well within the statute of limitations period. (R. p. 273:3-8).

Multiple text messages and communications substantiated the continuation of the partnership relationship with Darien Applegate after Joe Applegate's death. These communications included Darien Applegate referring to "our sign" and requesting Kane's ongoing involvement in partnership operations. (¶ 65, R. p. 20; Exhs. O & P, R. pp. 134-142; Exh. T, R. pp. 156-158).

On the probate code issue, Kane's counsel emphasized that these were not claims against the estate, but rather claims for declaratory judgment regarding the partnership. (R. p. 27, lines 2-9). Kane's ownership interest in the partnership property vested prior to Joe Applegate's death and remained valid regardless of probate proceedings. Kane was not a creditor and had no need to assert claims at the time of Joe Applegate's death.

Following the hearing, on October 1, 2024, the Circuit Court granted the Applegate Defendants' Motion to Dismiss, holding that all of Kane's claims were time-barred by the statute of limitations. (Order, R. pp. 1-5). The Court found that "pursuant to S.C. Code Ann. § 33-41-930(4), dissolution of a partnership is caused by the death of any partner. Here, all of Plaintiff's claims are based on and arise out of his allegations of a partnership between himself and Joe

Applegate. As Joe Applegate died on June 29, 2019, the partnership dissolved as of that date. Accordingly, all of Plaintiff's claims began to accrue on June 29, 2019." (Order at R. p. 3).

The Court further found that "each of these claims is governed by a three-year statute of limitations" and that because the Complaint was filed more than three years after Joe Applegate's death, all claims were time-barred. (R. pp. 3-4). The Court summarily rejected Kane's argument regarding the application of S.C. Code § 33-41-560 concerning continuation of the partnership, providing no analysis or reasoning for this conclusion. (R. p. 4).

Kane filed a Motion to Reconsider on October 10, 2024, arguing that the Court had misapplied the law regarding partnership dissolution versus termination, failed to consider the continuing partnership with Darien Applegate, and improperly applied the statute of limitations to claims that did not accrue until May 2022. (R. pp. 241-249).

In his Motion for Reconsideration, Kane presented several key arguments challenging the Circuit Court's dismissal order, including that dissolution of a partnership does not terminate a partnership under South Carolina law. He specifically cited Section 33-41-920 of the South Carolina Uniform Partnership Act, which clearly states: "On dissolution the partnership is not terminated, but continues until the winding up of partnership affairs is completed." (Motion to Reconsider at R. p. 242).

The Circuit Court denied the Motion to Reconsider in a brief order that did not address any of Kane's specific arguments. (R. p. 8). Kane timely filed a Notice of Appeal on December 3, 2024.

## STATEMENT OF FACTS

### Formation of the Kane-Applegate Partnership

Jon Kane and Joe Applegate met around 1998 during their employment at Adams Outdoor, an advertising company focused on billboards. (¶ 11, R. p. 14). Around 2002, Kane hired Joe Applegate as his sales manager in the Charleston region. (¶ 12, R. p. 14). In Spring 2015, Kane contacted Joe Applegate to gauge his interest in collaborating on an advertising billboard venture. (¶ 13, R. p. 14). Joe Applegate confirmed his interest in a partnership arrangement, explaining that if Kane could find a suitable location, Kane's contribution would be site procurement while Joe Applegate would fund construction. (¶ 13, R. p. 14). They agreed that all net proceeds would be split evenly once Joe Applegate was reimbursed for the construction outlay. (¶ 13, R. p. 14).

Kane identified a potential billboard location in North Mount Pleasant along Highway 41 on property owned by Joseph Sharp, with whom Kane had a ten-year relationship. (¶¶ 15-16, R. p. 15). Sharp agreed to allow the billboard on his property only if Kane and Joe Applegate would be partners in the deal. (¶ 18, R. p. 15). Based on this agreement with Sharp and between themselves, Kane and Joe Applegate became 50/50 partners in the billboard venture. (¶ 19, R. p. 15).

In October 2015, Kane and Joe Applegate, through their partnership, finalized a lease agreement with Sharp for the construction of the billboard. (¶ 20, R. p. 16; Exh. Y, R. pp. 184-193). Throughout late 2015 and early 2016, they conducted due diligence for the project, investigating costs and logistics. (¶ 21, R. p. 16).

### Documentary Evidence of Partnership

Documentary evidence abundantly supports the existence of the partnership. On August 2, 2016, in an email exchange with a representative of BB&T bank regarding a loan for billboard construction, Joe Applegate specifically referred to Kane as “my partner on this site” and copied Kane on the correspondence. (¶¶ 28-29, R. p. 17; Exh. E, R. pp. 74-76). The email states: “I copied my partner on this site (Jon Kane) and he will forward his information to you directly after you and I can have a conversation.” (Exh. E, R. pp. 74-76).

On August 17, 2016, Kane and Joe Applegate executed Articles of Organization for “Big Blue Allure, LLC.” (¶ 30, R. p. 17; Exh. F, R. pp. 77-80). Both parties signed the documents, and both were listed as “Partner” in their respective titles. (¶¶ 31-32, p. 17; Exh. F, R. pp. 77-80). The name “Big Blue Allure, LLC” combined elements from Kane’s “Big Blue Media LLC” and Joe Applegate’s “Allure LLC.” (¶ 31, R. p. 17).

On October 12, 2016, the partnership obtained two insurance policies from Scottsdale Insurance Co. and Century Insurance Group for the billboard property, issued under the name “Big Blue Allure, LLC” with the address for location of risk specified as 2386 Highway 41, Mt. Pleasant, S.C. 29466. (¶¶ 33-34, R. p. 17; Exh. G, R. pp. 81-101).

Construction of the billboard began in late 2016 and continued into early 2017. (¶ 35, R. p. 12). On November 17, 2016, Joe Applegate sent Kane an email with the subject “Touchdown” and attached a picture of himself and the newly completed billboard. (¶ 37, R. p. 17; Exh. H, R. pp. 102-104).

On April 28, 2017, in an exchange with investment bank Johnson, Fretty & Company regarding a valuation of the billboard, Joe Applegate wrote: “I would like my partner to be able to join [the meeting],” referring to Kane. (¶ 38, R. p. 18; Exh. I, R. pp. 105-109).

On June 15, 2017, the billboard had an estimated value of \$1,340,000 according to a valuation by Johnson, Fretty & Company. (¶ 43, R. p. 18; Exh. K, R. pp. 112-124).

In August 2018, Joe Applegate drafted information on Kane's professional background to be added to Allure Outdoors's website. (¶ 47, R. p. 18; Exh. N, R. pp. 129-133). The addition of Kane's profile to the company website further demonstrates his recognized role in the business.

In late 2018 or early 2019, Joe Applegate informed Kane that he was experiencing health issues and assured Kane that his spouse, Darien Applegate, had full knowledge of their partnership agreements and business operations. (¶ 50, R. p. 19).

#### Reimbursement of Construction Costs and Joe Applegate's Death

In April or May of 2019, Joe Applegate informed Kane that the out-of-pocket expenses associated with the construction of the billboard had been paid off, triggering the 50/50 profit-sharing arrangement. (¶ 51, R. p. 19). Joe Applegate passed away on June 29, 2019. (¶ 52, R. p. 19).

#### Continued Partnership with Darien Applegate

During the probate period, which lasted approximately one year following Joe Applegate's death, Darien Applegate assured Kane of her understanding of the partnership agreement and the billboard venture. (¶¶ 53-54, R. p. 19). In October 2019, Darien Applegate again discussed the agreement with Kane, acknowledging her awareness of the business deal, but expressing a need to complete probate before she would be ready to make decisions about the business's future. (¶ 55, R. p. 19).

The documentary evidence shows that Darien Applegate continued to involve Kane in partnership business operations immediately after Joe Applegate's death and throughout the probate period:

1. On November 11, 2019, Darien Applegate texted Kane regarding delivery of a check to Joe Sharp (the property owner for the billboard site), indicating she would “have to transfer money from my account” as the “Big Blue” account lacked sufficient funds for payment. (¶ 57, R. p. 20; Exh. O, R. pp. 134-138). This text explicitly showed Darien Applegate’s acknowledgment of the “Big Blue” business account associated with the partnership and her direct involvement in managing partnership financial matters.
2. On November 14, 2019, in the same text exchange, Darien Applegate asked Kane, “Where do I send the invoice?” regarding a payment to Sharp, demonstrating her reliance on Kane for operational knowledge about the partnership. Kane provided the business address and continued to participate in partnership operations at Darien’s direct request. (Exh. O, R. p. 135).
3. On November 24, 2019, further text exchanges show Darien Applegate discussing payment arrangements for the billboard business, with Kane providing guidance on payment timing and procedures that had been established during the partnership with Joe Applegate. (Exh. X, R. pp. 176-181).
4. On December 17, 2019, Darien Applegate sent a text message in a group that included Kevin Madrykowski (the sales manager for the partnership) and Kane, requesting that Kane send a commission check to sales representative Mary Adams. (¶ 58, R. p. 20; Exh. P, R. pp. 139-142). Kane considered this a normal request, as he regularly paid commissions to Mary Adams via check from a bank account used for the partnership venture. (¶ 59, R. p. 20). This communication, in which Darien Applegate directed Kane to handle financial matters for the business after Joe Applegate’s death, supports Kane’s contention that Darien Applegate continued to treat him as a partner with financial

authority in the ongoing operations. Mary Adams, like others, acknowledged recognized that Jon Kane and Joe Applegate were partners. (¶ 59, R. p. 20; Exh. Q, R. pp. 143-145).

5. In January 2020, while Darien Applegate removed Kane's name from the partnership's bank accounts at BB&T (without his knowledge or consent), she continued to treat him as a partner, seeking information and guidance regarding the valuation of the billboard. (¶¶ 62-63, R. p. 20; Exh. S, R. p. 149-155). In a text message, she stated the appraisal is done, "Basically they are saying it's worth what we put into building it," to which Kane responded with his assessment of the valuation. (Exh. S, R. pp. 149-155).
6. On January 16, 2020, Darien Applegate texted Kane, explicitly referring to the billboard as "our sign" when asking: "Can we add a second face to our sign at the marina? [Hwy. 41 location]" (¶ 65, R. p. 20; Exh. T, R. pp. 156-158). She added that she needed information for an appraisal in accordance with probate paperwork. (¶ 65, R. p. 20). The use of "our sign" and "we" clearly indicated Darien's recognition of Kane's ownership interest in the partnership property.
7. In the same exchange, Darien Applegate asked Kane whether a lease for another of Joe Applegate's billboard locations was filed with the State. (¶ 66, R. p. 21). Kane responded, "We can add second face, I'm working through landowner next door for trees. I believe everything was filed with the state. Should be in the lease folder." (¶ 67, R. p. 21; Exh. T, R. pp. 156-158). Again, the use of "we" by both parties demonstrates the ongoing partnership relationship.

### Darien Applegate's Subsequent Actions and Sale of Partnership Assets

In mid to late Summer of 2020, after the conclusion of probate for Joe Applegate's estate, Darien Applegate's behavior toward Kane suddenly changed. She informed Kane that she had nothing in writing indicating the existence of the partnership or Kane's rights in the business. (Complaint, ¶ 70, R. p. 21). This stark reversal contradicted her previous acknowledgments of the partnership through numerous text messages and business interactions. She claimed she was entitled to assume full operational control of the partnership and its business as the Administrator of Joe Applegate's estate. (¶ 71, R. p. 21).

This reversal was particularly striking given her consistent pattern of treating Kane as a partner in the months following Joe Applegate's death. From November 2019 through January 2020, Darien Applegate had repeatedly engaged Kane in partnership business operations, using terminology such as "our sign" and "we" when discussing the billboard, and relying on him to handle financial matters for the partnership.

In a subsequent conversation, Curtis Applegate (Joe and Darien Applegate's son) assured Kane that he was familiar with the partnership, had informed Darien Applegate of the partnership, and expressed confusion over Darien Applegate's refusal to honor the partnership obligations. (¶ 72, R. pp. 21-22). Curtis Applegate referenced an email he had sent to both Kane and Joe Applegate with paperwork related to the partnership attached. (¶ 72, R. pp. 21-22; Exh. AA, R. pp. 200-201). This indicates that Darien Applegate was fully aware of the partnership relationship but chose to deny it after probate concluded.

On November 19, 2021, without consulting Kane, Darien Applegate filed a Change of Registered Agent request with the S.C. Secretary of State for "Allure Outdoors, LLC," changing the agent from "Russell J. Applegate" to her own name. (¶ 73, R. p. 22; Exh. U, R. pp. 159-162).

On the same day, she filed Amended Articles of Organization to change the name of “Allure Outdoors, LLC” to “Applegate Outdoor, LLC.” (¶ 74, R. p. 22; Exh. V, R. pp. 163-165). These actions, taken without Kane’s knowledge or consent, were part of a coordinated effort to obscure Kane’s ownership interest and prepare for the unauthorized sale of partnership assets.

On December 30, 2021, Darien Applegate, without consulting Kane, executed a transfer and assignment of the lease for the land on which the billboard is located. (¶ 75, R. p. 22; Exh. Z, R. pp. 194-199). The assignee to the lease rights was Defendant Lamar OCI South Corporation. (¶ 75, R. p. 22). This transfer directly contradicted her earlier communications with Kane in which she referred to the billboard as “our sign” and consulted with him about operational decisions.

On May 5, 2022, Articles of Merger were filed for “Allure Advertising, LLC,” with Lamar OCI South Corporation as the surviving entity. (¶ 76, R. p. 22; Exh. W, R. pp. 166-175). This transaction occurred without any notice to Kane despite his established partnership interest.

Upon information and belief, prior to the filing of the Articles of Merger, Lamar OCI South Corporation engaged in due diligence before purchasing the Partnership from Darien Applegate and should have discovered or inquired about Kane’s interest. (¶¶ 77-78, R. p. 22).

On or about May 11, 2022, Darien Applegate, without consulting Kane, executed a sale of the Partnership, including the Billboard, to Lamar OCI South Corporation. (¶ 79, R. p. 23). Upon the closing of the sale, Darien Applegate had unilaterally and improperly transferred all interests held under the Partnership to Lamar OCI, absconding with the totality of sale proceeds and other pecuniary values tied to Kane’s equity and interest in the partnership. (¶ 80, R. p. 23). This final act of selling the partnership assets without Kane’s knowledge, consent, or

compensation represents the culmination of damages that triggered the causes of action in this case.

### The Circuit Court's Erroneous Findings

As set forth below, The Circuit Court made several critical errors in its Order dismissing Appellant's claims:

1. The Court incorrectly determined that "Plaintiff has failed to state facts sufficient to constitute causes of action against the Applegate Defendants, as Plaintiff's claims are time-barred by the statute of limitations." (R. p. 3). This finding ignores that Plaintiffs' claims did not arise until May 2022 when Darien Applegate sold partnership assets without Kane's knowledge or consent, well within the three-year statute of limitations.
2. The Court improperly considered a statute of limitations defense in a pre-answer motion to dismiss, stating that "a motion to dismiss on the basis of a statute of limitations is not permitted prior to the filing of an answer," and relying on *Flateau v. Harrelson*, 355 S.C. 197, 201, 584 S.E.2d 413, 415 (Ct. App. 2003). (R. p. 3). This directly contradicts established South Carolina precedent in *Glenn v. School District No. Five of Anderson County*, 294 S.C. 530, 534, 366 S.E.2d 47, 49-50 (Ct. App. 1988).
3. The Court erroneously concluded that "all of Plaintiff's claims are based on and arise out of his allegations of a partnership between himself and Joe Applegate," when in fact the claims were brought against Darien Applegate individually and other defendants, not against Joe Applegate or his estate. (R. p. 3)
4. The Court mistakenly ruled that "all of Plaintiff's claims began to accrue on June 29, 2019" (the date of Joe Applegate's death), failing to recognize that Kane's interest in the

partnership was already vested and that many claims arose from Darien Applegate's subsequent surreptitious conduct. (R. p. 3)

5. The Court incorrectly applied a uniform three-year statute of limitations to all sixteen causes of action without distinguishing between legal and equitable claims, which are subject to different standards. (R. p. 3)
6. The Court summarily rejected Kane's argument regarding S.C. Code § 33-41-560 concerning partnership continuation, providing no analysis or reasoning for this conclusion and stating only that "This section does not apply to the partnership as alleged by Plaintiff and does not avoid application of the statute of limitations." (R. p. 4). This arbitrary dismissal of a key statutory provision constitutes an abuse of discretion.

#### STANDARD OF REVIEW

In deciding a motion to dismiss pursuant to Rule 12(b)(6), SCRCP, the trial court should consider only the allegations set forth on the face of the plaintiff's complaint. *Stiles v. Onorato*, 318 S.C. 297, 300, 457 S.E.2d 601, 602 (1995). A Rule 12(b)(6) motion should not be granted if "facts alleged and inferences reasonably deducible therefrom would entitle the plaintiff to any relief on any theory of the case." *Id.* The question is whether, in the light most favorable to the plaintiff, and with every doubt resolved in his behalf, the complaint states any valid claim for relief. *Toussaint v. Ham*, 292 S.C. 415, 416, 357 S.E.2d 8, 9 (1987).

#### ARGUMENT

I. THE CIRCUIT COURT ERRONEOUSLY APPLIED THE STATUTE OF LIMITATIONS TO JOE APPLGATE'S 2019 DEATH, NOT CLAIMS ARISING FROM DARIEN APPLGATE'S 2022 CONDUCT.

The Circuit Court erred in holding that all of Kane's claims were time-barred by the three-year statute of limitations under S.C. Code Ann. § 15-3-530. The Court incorrectly

determined that all claims accrued on June 29, 2019, the date of Joe Applegate's death. (Order, R. p. 3). This determination mischaracterizes the nature of Kane's claims and ignores both the continuing relationship with Darien Applegate and the fact that many claims arose from her conduct in 2021-2022, not from Joe Applegate's death.

The Complaint clearly alleges that Kane's damages occurred when Darien Applegate sold the partnership asset to Lamar OCI South Corp. on May 11, 2022, without Kane's knowledge or consent. (§ 79, R. p. 23). The Complaint was filed on June 22, 2023, well within the three-year statute of limitations for any claims arising from this sale. The Circuit Court's conclusion that all claims accrued in 2019 ignores the fact that Kane could not possibly have brought claims for damages that had not yet occurred.

The Circuit Court's analysis fails to recognize that Kane's claims arise exclusively from Darien Applegate's conduct, not from Joe Applegate's death or the original partnership. The Complaint details numerous specific acts by Darien Applegate that form the basis of the claims, including, but not limited to:

1. Claims for breach of fiduciary duty against Darien Applegate (Fourth Cause of Action). (R. pp. 27-28).
2. Claims for fraud and constructive fraud based on Darien Applegate's misrepresentations after Joe Applegate's death (Seventh and Eighth Causes of Action). (R. pp. 30-35).
3. Claims for conversion based on Darien Applegate's 2022 sale of partnership assets (Twelfth Cause of Action). (R. pp. 38-40).
4. Claims for wrongful dissolution based on Darien Applegate's actions, not Joe Applegate's death (Thirteenth Cause of Action). (R. pp. 41).

These claims could not have accrued at Joe Applegate's death because they are based on subsequent conduct by Darien Applegate. The Circuit Court's blanket application of a single accrual date to all sixteen causes of action critically misunderstands the nature of the claims and ignores the specific factual allegations in the Complaint.

Moreover, even if Joe Applegate's death triggered dissolution of the partnership under S.C. Code Ann. § 33-41-930(4), dissolution does not automatically terminate a partnership. S.C. Code Ann. § 33-41-920 explicitly states that "[o]n dissolution the partnership is not terminated, but continues until the winding up of partnership affairs is completed." Under South Carolina law, "a partner's interest in the partnership is his share of the profits and surplus and is personal property" (S.C. Code § 33-41-730). This property interest survived Joe Applegate's death.

The Complaint alleges facts showing that the partnership continued after Joe Applegate's death, with Darien Applegate assuming a partner role. The documents attached to the Complaint demonstrate Darien Applegate asking Kane to perform the same partnership duties he had performed when Joe Applegate was alive. (Tr., R. p. 271, lines 14-16).

## II. THE CIRCUIT COURT FAILED TO RECOGNIZE THAT THE CLAIMS WERE BROUGHT AGAINST DARIEN APPLGATE INDIVIDUALLY, NOT AGAINST JOE APPLGATE'S ESTATE.

The Circuit Court profoundly mischaracterized Kane's claims as being against Joe Applegate's estate, subject to probate limitations under S.C. Code Ann. § 62-3-803. This critical error formed a substantial basis for the Court's dismissal order. Contrary to the Court's interpretation, Kane's claims were not creditor claims against Joe Applegate's estate but rather claims to enforce his vested property rights as a partner.

This distinction is crucial for several reasons:

First, Kane's property rights as a partner vested prior to Joe Applegate's death. Under S.C. Code Ann. § 33-41-730, "a partner's interest in the partnership is his share of the profits and surplus and is personal property." Kane's ownership interest in the partnership assets was established at the formation of the partnership in 2015 and was reinforced when Joe Applegate confirmed in April/May 2019 that construction costs had been fully reimbursed, triggering their 50/50 profit-sharing arrangement. (¶ 51, R. p. 19).

Second, Kane had no obligation to file a creditor claim against Joe Applegate's estate because he was not a creditor. As a partner with vested property rights, Kane's relationship to the partnership assets was not that of a creditor to a debtor but rather that of a co-owner. This fundamental distinction means that the probate limitations period for creditor claims had no application to Kane's situation.

Third, S.C. Code Ann. § 33-41-720(e) explicitly states that "[a] partner's right in specific partnership property is not subject to dower, curtesy, or allowances to widows, heirs, or next of kin." This provision makes clear that Darien Applegate, as Joe Applegate's widow, did not automatically acquire rights to partnership property that would supersede Kane's ownership interest.

The Circuit Court further erred by failing to recognize that Kane's claims were primarily against Darien Applegate individually for her own conduct after Joe Applegate's death, not for any actions of Joe Applegate or his estate. The Complaint details numerous instances where Darien Applegate acknowledged the partnership and Kane's ownership interest, only to later deny his rights and sell partnership assets without his knowledge or consent. (¶¶ 54-69, R. p. 19; 79-80, R. p. 23). Minimally, the Complaint establishes the existence of evidence supporting the

existence of a partnership with Darien Applegate following Joe Applegate's death, whether as a continuation of the partnership or as a new partnership between Darien Applegate and Jon Kane.

By misconstruing Kane's property rights claims as creditor claims against an estate, the Circuit Court applied an incorrect legal framework that fundamentally tainted its analysis of the statute of limitations issue. This error requires reversal.

### III. THE CIRCUIT COURT COMMITTED REVERSIBLE PROCEDURAL ERROR BY CONSIDERING A STATUTE OF LIMITATIONS DEFENSE IN A PRE-ANSWER MOTION TO DISMISS.

The Circuit Court committed a clear procedural error by considering the statute of limitations defense in a Rule 12(b)(6) motion to dismiss. South Carolina law explicitly prohibits this practice. As the Court of Appeals has unequivocally held, "The statute of limitations is not a defense listed under Rule 12(b) which may be raised by pre-answer motion. It is also not listed under any other subdivision of Rule 12 and, therefore, is not a defense or objection which Rule 12 permits to be raised by pre-answer motion." *Glenn v. Sch. Dist. No. Five of Anderson Cty.*, 294 S.C. 530, 534, 366 S.E.2d 47, 49-50 (Ct. App. 1988).

The Circuit Court erroneously relied on *Flateau v. Harrelson*, 355 S.C. 197, 584 S.E.2d 413 (Ct. App. 2003), to justify considering the statute of limitations defense. (Order R. p. 3). However, *Flateau* is fundamentally distinguishable from this case. *Flateau* involved the South Carolina Tort Claims Act's statute of limitations, which is a specialized statutory provision that operates differently from the general statute of limitations applicable in this case.

The Tort Claims Act contains specific statutory provisions regarding time limitations that are jurisdictional in nature. By contrast, the general statute of limitations is an affirmative defense that must be pled in an answer, not raised in a pre-answer motion. The Circuit Court's

reliance on *Flateau* ignores this crucial distinction and contradicts the clear precedent established in *Glenn*.

By basing its dismissal on an improperly raised affirmative defense, the Circuit Court committed reversible error. This procedural error alone is sufficient grounds for reversal.

#### IV. THE CIRCUIT COURT ERRONEOUSLY DISMISSED THE APPLICATION OF S.C. CODE § 33-41-560 WITHOUT PROVIDING ANY LEGAL ANALYSIS.

The Circuit Court's most glaring error was its arbitrary dismissal of Kane's argument regarding the application of S.C. Code § 33-41-560. The Court simply stated that this section "does not apply to the partnership as alleged by Plaintiff and does not avoid application of the statute of limitations to bar the claims alleged by Plaintiff," without providing any analysis or reasoning for this conclusion. (R. p. 4)

"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) (citing *Nienow v. Nienow*, 268 S.C. 161, 232 S.E.2d 504 (1977); *State v. Hill*, 266 S.C. 49, 221 S.E.2d 398 (1976)). The trial court abused its discretion by summarily rejecting a statutory provision central to Kane's case without providing any legal analysis or reasoned basis for its conclusion.

S.C. Code § 33-41-560(2) expressly states that the "continuation of the business by the partners or such of them as habitually acted therein during the term, without any settlement or liquidation of the partnership affairs, is prima facie evidence of a continuation of the partnership." This provision creates a statutory presumption of partnership continuation when the business continues without liquidation.

The Complaint contains substantial allegations and documentary evidence demonstrating the continuation of the partnership business after Joe Applegate's death. (¶¶ 54-69, pp. 19-21; Exhs. O and P, R. pp. 134-142; Exh. T, R. pp. 156-158; Exh. X, R. pp. 176-181). These allegations, when taken as true for purposes of a motion to dismiss, establish a prima facie case for the application of S.C. Code § 33-41-560(2).

The Circuit Court's dismissal of this statutory presumption without any explanation or reasoning is arbitrary and constitutes an abuse of discretion. The Court failed to address how or why this statutory provision does not apply to the partnership alleged by Kane, despite the clear factual allegations supporting its application.

Moreover, the Court's misapplication of this provision demonstrates its fundamental misunderstanding of partnership law. While S.C. Code § 33-41-930(4) provides that the death of a partner dissolves a partnership, dissolution does not terminate a partnership. S.C. Code § 33-41-920 explicitly states that "[o]n dissolution the partnership is not terminated, but continues until the winding up of partnership affairs is completed."

The Circuit Court failed to distinguish between dissolution and termination, incorrectly treating Joe Applegate's death as automatically terminating the partnership when in fact the statutory framework contemplates the continuation of partnerships even after technical dissolution. This error, combined with the arbitrary dismissal of S.C. Code § 33-41-560, requires reversal.

#### V. THE CIRCUIT COURT FAILED TO DIFFERENTIATE BETWEEN LEGAL AND EQUITABLE CLAIMS WHEN APPLYING STATUTES OF LIMITATIONS.

The Circuit Court erroneously applied the same three-year statute of limitations to all sixteen causes of action without distinguishing between legal and equitable claims. (R. p. 4).

This failure to differentiate between legal and equitable claims constitutes reversible error.

Several of Kane's causes of action are equitable in nature:

1. Declaratory Judgment (First Cause of Action)
2. Accounting (Sixth Cause of Action)
3. Constructive Fraud (Eighth Cause of Action)
4. Constructive Trust (Ninth Cause of Action)
5. Unjust Enrichment (Fifth Cause of Action)

Equitable claims are often subject to different standards and limitations than legal claims.

While legal claims are generally governed by statutes of limitations, equitable claims may be subject to the doctrine of laches or other equitable principles. The Circuit Court's blanket application of a three-year statute of limitations to all claims, without any analysis of their equitable nature, constitutes reversible error.

The equitable nature of these claims is particularly significant in the context of fiduciary relationships. Kane's claims for accounting and constructive trust arise from the fiduciary relationship inherent in a partnership. Under S.C. Code § 33-41-540, partners are accountable as fiduciaries. The Circuit Court's failure to address the fiduciary nature of the relationship and its impact on the equitable claims constitutes an additional basis for reversal.

#### CONCLUSION

For the foregoing reasons, the Circuit Court's dismissal order was fundamentally flawed and must be reversed. The Court erred in five critical respects that each independently warrant reversal: First, the Court erroneously applied the statute of limitations to claims that accrued when Darien Applegate sold partnership property without Kane's knowledge in May 2022, well

within the three-year limitations period. Dismissing claims that could not have been brought before the damage occurred constitutes reversible error.

Second, the Court mischaracterized Kane's property rights as mere creditor claims against Joe Applegate's estate. Kane's vested partnership interest is protected under S.C. Code § 33-41-730, which explicitly recognizes a partner's interest as "personal property" that predated and survived Joe Applegate's death.

Third, the Court disregarded binding South Carolina precedent *in Glenn v. School District No. Five of Anderson County* by considering a statute of limitations defense in a pre-answer motion to dismiss, an elementary procedural error that alone requires reversal.

Fourth, the Court arbitrarily dismissed the prima facie presumption of partnership continuation under S.C. Code § 33-41-560 despite substantial evidence of continued operations with Darien Applegate, providing no legal analysis for this conclusion.

Fifth, the Court failed to differentiate between legal and equitable claims, applying a blanket statute of limitations to constructive trust, accounting, and other equitable remedies that traditionally receive separate treatment under South Carolina law.

The Circuit Court's dismissal order represents both a misapplication of South Carolina partnership law and a procedural misstep that denied Kane his day in court. When the allegations of the Complaint are taken as true—as they must be at this stage—Kane has more than adequately stated claims for which relief can be granted. These claims deserve full evidentiary development through discovery, not premature termination based on a misapplication of the statute of limitations.

Appellant respectfully requests that this Court reverse the Circuit Court's Order dismissing Kane's claims, and remand this case for further proceedings consistent with South Carolina's partnership statutes and procedural rules.

Respectfully submitted,

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