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SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Jessica A. Salvini

Appellate Case No. 2024-002063

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.

FINAL REPLY BRIEF OF APPELLANT

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Respondents want this Court to believe that Jon Kane's lawsuit is about Joe Applegate's death. It is not. This case is about what Darien Applegate did after that death—secretly selling partnership property while continuing to operate the partnership business as if nothing had changed. Respondents' Initial Brief reveals a fundamental misunderstanding of both partnership law and the nature of Kane's claims. They argue that because Joe died in 2019, all claims must have accrued then, ignoring the obvious: death is not a wrongful act. Dissolution is not breach of fiduciary duty. The passage of time is not conversion.

The wrongful conduct here—the actual breach that damaged Kane—occurred when Darien Applegate pocketed the proceeds from selling the partnership's billboard in 2022. By conflating dissolution with termination, natural death with tortious conduct, and partnership rights with estate claims, Respondents seek to escape liability through legal sleight of hand. This Court should see through their misdirection and reverse the circuit court's erroneous dismissal.

I. RESPONDENTS FAIL TO ADDRESS THE FUNDAMENTAL DISTINCTION BETWEEN PARTNERSHIP DISSOLUTION AND TERMINATION.

Respondents' brief reveals the same misapprehension of partnership law that underlied the circuit court's ruling. Throughout their brief, Respondents conflate partnership "dissolution" with "termination," treating Joe's death as if it instantly extinguished the partnership and all associated rights. This error pervades their entire statute of limitations analysis.

South Carolina's Uniform Partnership Act explicitly distinguishes between dissolution and termination. S.C. Code § 33-41-920 states:

> On dissolution the partnership is not terminated, but continues until the winding up of partnership affairs is completed.

This is not a mere technicality—it is a core principle of partnership law that protects partners' rights during the transition period following dissolution. As this Honorable Court acknowledged in *Beck v. Clarkson*:

> Section 33-41-920, Code of Laws of South Carolina (1976), makes it clear that an act of dissolution does not terminate the partnership. It is equally clear that dissolution does not extinguish the partner's fiduciary duties owed one to the other. This principle is set forth in the description of the fiduciary duty found in Section 33-41-540(1), Code of Laws of South Carolina (1976), as follows:
>
> Every partner must account to the partnership for any benefit and hold as trustee for it any profits derived by him without the consent of the other partners from any transaction connected with the formation, conduct or liquidation of the partnership or from any use by him of its property.
>
> *Beck v. Clarkson*, 387 S.E.2d 681, 686, 300 S.C. 293, 303 (Ct. App. 1989). (citing statute language that remains unchanged through present).

As acknowledged in *Weeks v. McMillan*, dissolution is merely "the change in the relation of the partners caused by any partner ceasing to be associated in the carrying on as distinguished from the winding up of the business." 291 S.C. 287, 291, 353 S.E.2d 289, 291 (Ct. App. 1986) (quoting S.C. Code § 33-41-910). The partnership entity continues to exist until properly wound up and terminated.

Respondents offer no response to this critical distinction. They simply assert that "any alleged partnership automatically dissolved" upon Joe's death and that therefore all claims became time-barred. (Respondents' Br., p. 8). This analysis skips the entire winding-up phase during which:

1. Partners retain rights to partnership property.
2. Partners owe continuing fiduciary duties.
3. Partners have authority to bind the partnership for winding-up purposes.

4. Partnership business may continue under certain circumstances.

The Complaint alleges—and for purposes of a motion to dismiss, we must accept as true—that no winding up occurred after Joe's death. Instead, Darien Applegate continued the partnership business with Jon Kane before secretly selling the partnership's primary asset. These allegations establish that the partnership remained in existence through at least May 2022.

Respondents' citation to cases discussing automatic dissolution upon death misses the point entirely. No one disputes that Joe's death triggered dissolution under S.C. Code § 33-41-930(4). The issue is what happened after dissolution—specifically, whether the partnership continued during winding up and whether Darien Applegate's conduct created or continued partnership rights and obligations. Such factual determinations are beyond the scope of a Rule 12(b)(6) motion and must be reserved for the jury or finder of fact.

The distinction between dissolution and termination also undermines Respondents' statute of limitations argument in another crucial way: Kane had no reason to bring claims while the partnership continued to operate with Darien and no breach had occurred. It was only when Darien Applegate breached her duties by selling partnership property without Kane's knowledge that actionable harm occurred.

This critical error in understanding partnership law pervades the circuit court's entire analysis. By treating dissolution as termination, the court improperly concluded that all claims accrued upon Joe's death, when in fact the partnership continued to exist and operate for years thereafter. This legal error alone requires reversal.

II. RESPONDENTS' ATTEMPT TO CHARACTERIZE APPELLANT JON KANE'S CLAIMS AS ARISING FROM JOE APPLEGATE'S DEATH IGNORES THE COMPLAINT'S EXPLICIT ALLEGATIONS.

Respondents' entire statute of limitations argument rests on a false premise: that Kane's claims arose from Joe Applegate's death in 2019. (Respondents' Br., pp. 8-14). This mischaracterization ignores the Complaint's explicit allegations and attempts to transform property rights claims into estate claims through sleight of hand rather than legal analysis.

"Under the discovery rule, the statute of limitations begins to run from the date the injured party either knows or should know, by the exercise of reasonable diligence, that a cause of action exists *for the wrongful conduct*. *True v. Monteith*, 327 S.C. 116, 119, 489 S.E.2d 615, 616 (1997) (emphasis added). "Under § 15-3-535, the statute of limitations is triggered not merely by knowledge *of an injury* but by knowledge of facts, diligently acquired, sufficient to put *an injured person on notice of the existence of a cause of action against another*." Id. (Emphasis added).

Contrary to Respondent's contention, there was no injury or cause of action at Joe's death, nor does the Complaint allege a cause of action against Joe's estate. **Death of a partner is not a wrongful act. It does not constitute a breach of fiduciary duty. Death is not conversion. Nor does it amount to fraud.** Death causes dissolution under S.C. Code § 33-41-930(4), but dissolution itself causes no damage and breaches no duty. It does not terminate the partnership. See *Beck v. Clarkson, quoted supra.* The wrongful conduct here—the secret sale of partnership assets—occurred years after Joe's death. That is what this lawsuit is about.

The Complaint makes abundantly clear that Kane's damages arose from Darien Applegate's actions –her unauthorized sale of partnership property in May 2022—not from Joe's death in 2019. For example:

Direct Allegations of the 2022 Sale:

- **Paragraph 79**: "Upon information and belief, Defendant Applegate, without consulting Plaintiff, executed a sale of the Partnership, including the Billboard, to Lamar, OCI South Corporation on or about May 11, 2022." (Complaint, R. p. 23).

- **Paragraph 80**: "Upon the closing of the sale, Defendant 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 Plaintiff's equity and interest in the partnership." (R. p. 23).

Partnership Continuation After Joe's Death:

- **Paragraph 57**: "On or about November 11, 2019, Plaintiff texted Defendant Applegate regarding delivery of a check to Joe Sharp, to which Defendant responded she would 'have to transfer money from my account' as the 'Big Blue' account lacked sufficient funds for payment." (R. p. 20).

- **Paragraph 58**: "On December 17, 2019, Defendant Darien Applegate sent a text in a group that included Kevin Madrykowski ('Madrykowski') and Plaintiff, requesting Plaintiff send a check for commissions owed to sales representative, Mary Adams." (R. p. 20).

- **Paragraph 65**: "On or about January 16, 2020, Defendant Applegate texted Plaintiff, asking, '[Can] we add a second face to our sign at the marina? [Hwy. 41 location]" (R. p. 20).

The Breach Claims Are Based on the 2022 Sale:

- **Paragraph 92** (Breach of Contract): "On or about May 11, 2022, Defendant Applegate irreparably breached the contractual obligations of the partnership by engaging in negotiations and subsequently completing a sale of the personal property legally owned by the partnership to Lamar OCI South Corp." (R. p. 24)

Indeed, Appellant's claims for Breach of Contract, Breach of Fiduciary Duty, Conversion, Fraud, and other claims, arise from Darien Applegate's actions –her unauthorized sale of partnership property in May 2022—not from Joe's death in 2019. Respondents cannot credibly argue that Kane could have sued for conversion of sale proceeds before the sale occurred, or for breach of fiduciary duty before the breach happened. Yet that is precisely what their statute of limitations argument requires.

Respondents also mischaracterize the nature of Kane's claims by repeatedly referring to them as claims against the estate or creditor claims. (See, e.g., Respondents' Br., p. 7). This is demonstrably false by even a cursory review of the Complaint. The Complaint names Darien Applegate individually and in various representative capacities—not Joe Applegate's estate. Jon Kane seeks to enforce his partnership rights against Darien Applegate and the various defendants based on their conduct, not to collect a debt from Joe's estate.

The distinction is critical: Kane's claims are based on Darien Applegate's breach of her own duties as a partner (whether as successor to Joe or as Kane's new partner), not on any obligation that arose during Joe's lifetime. As the Complaint alleges and the documentary evidence shows:

1. Darien Applegate acknowledged the partnership's existence after Joe's death.
2. She continued operating the partnership business through 2022. (Complaint, ¶¶ 54, 55, 135, R. p. 19).
3. She actively engaged Kane in partnership matters, including having him sign checks and handle collections. (¶ 63, R. p. 20; ¶ 112, R. p. 27)
4. She sold partnership property without Kane's knowledge or consent (¶ 79, R. p. 23; ¶ 93, R. p. 25).

III. RESPONDENTS CANNOT TRANSFORM LEGITIMATE FINANCING ARRANGEMENTS INTO POSTHUMOUS BREACHES.

In a Hail Mary attempt to deflect from the fact that death is not a wrongful act, Respondents' brief intimates that Joe somehow breached his agreement with Kane years earlier by placing the lease in Allure Advertising, LLC. (Respondents' Br., pp. 10-11). This argument completely ignores the facts established in the Complaint and exhibits.

The evidence shows Joe utilized this structure of using LLCs as title-holding vehicles for partnership ventures in order to obtain construction financing—not to exclude partners. Bob Keziah, who was Joe's partner in a similar billboard venture, confirms in his affidavit that Joe "wanted to set up a separate LLC for each Billboard location he was involved in with other partners." (Complaint, Exh. B, R. pp. 50-54). The BB&T loan correspondence demonstrates Joe needed this structure to leverage his banking relationships for the partnership's benefit, and he was transparent with Kane throughout, copying him on all communications. (Complaint, Exh. E. R. pp. 74-76).

Most tellingly, the partnership procured and maintained insurance policies for the billboard under Big Blue Allure, LLC's name. (Complaint ¶¶ 33-34, R. p. 17; Exh. G, R. pp. 81-101). If Allure Advertising truly owned the billboard independently of any partnership interest, why would the partnership maintain and pay for insurance on an asset it didn't own? Businesses don't insure assets unless they have an insurable interest. This insurance coverage, combined with Joe's transparent use of LLCs to obtain construction financing, demonstrates that the billboard was a partnership asset. Respondents cannot transform Joe's legitimate financing arrangements into posthumous breaches to distract from their untenable position that Kane's claims somehow arose from a natural death rather than Darien's subsequent conversion of partnership assets.

IV. RESPONDENTS MISSTATE BOTH THE LAW AND THE RECORD BY CLAIMING KANE'S STATUTE OF LIMITATIONS DEFENSE CAN BE RAISED IN A PRE-ANSWER MOTION.

Respondents begin their brief by asserting that "South Carolina law does not stand for such hyper-technicalities" regarding the prohibition against raising statute of limitations defenses in pre-answer motions. (Respondents' Br., p. 5). This characterization ignores binding South Carolina precedent.

The rule that statute of limitations cannot be raised in a pre-answer motion to dismiss is not a "hyper-technicality"—it is an established principle of South Carolina civil procedure that has been consistently applied by our courts. In *Glenn v. Sch. Dist. No. Five of Anderson Cty.*, 294 S.C. 530, 534, 366 S.E.2d 47, 49-50 (Ct. App. 1988), this Honorable Court 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."

This principle was not merely dicta or an isolated holding—it represents the considered judgment of South Carolina courts regarding the proper procedural framework for raising affirmative defenses. This is not an obscure procedural rule—it reflects the fundamental principle that affirmative defenses require factual development that cannot occur on a motion to dismiss.

Respondents cite *Spence v. Spence*, 368 S.C. 106, 628 S.E.2d 869 (2006), for the proposition that "the general prohibition against pleading an affirmative defense in a motion to dismiss has been relaxed in modern practice." (Respondents' Br., p. 5). However, Respondents' Brief notably fails to include the rest of the quote, which states: "*Most courts* allow such defenses to be raised in a motion to dismiss under Rule 12(b) 'when there is no disputed issue of fact raised by an affirmative defense, or the facts are completely disclosed on the face of the pleadings, and realistically nothing further can be developed by pretrial discovery or a trial on the issue raised by the defense....'" Id. (quoting Wright and Miller, supra, § 1277) (emphasis added).

This case presents precisely the type of factual disputes that make dismissal inappropriate. Here, multiple factual disputes preclude dismissal, including:

1. When did Kane's claims accrue?
2. Did the partnership continue after Joe's death?
3. When did Kane discover Darien's breach?
4. What was the partnership arrangement regarding continuation?

These questions require factual development, not resolution on the pleadings.

Indeed, Respondents offer no response to the procedural unfairness created by the circuit court's approach. By allowing a statute of limitations defense to be raised in a pre-answer motion, the circuit court deprived Kane of the opportunity to:

1. Conduct discovery regarding the continuation of the partnership.
2. Develop evidence concerning Darien Applegate's conduct after Joe's death.
3. Present evidence regarding the application of equitable doctrines such as estoppel.

The statute of limitations is an affirmative defense under Rule 8(c), S.C.R.C.P., precisely because it requires factual development beyond the face of the complaint. *Glenn* remains good law on this procedural point. The Supreme Court itself acknowledged the continuing validity of this rule in *McLendon v. South Carolina Dept. of Highways*, 443 S.E.2d 539, 313 S.C. 525 (1994), where it expressly declined to decide whether a statute of limitations defense could be raised by motion to dismiss, instead referencing *Glenn*. "We express no opinion on whether it is appropriate to raise a statute of limitations defense by a motion to dismiss." *Id. at n. 1.* Respondents' attempt to characterize this essential procedural protection as a mere "technicality" should be rejected.

CONCLUSION

Respondents want this Court to affirm a dismissal based on a fundamental misunderstanding of partnership law. They conflate dissolution with termination, transform

legitimate business arrangements into posthumous breaches, and ask this Court to decide disputed factual issues on a motion to dismiss. But the law is clear: partnerships continue during winding up, death is not a wrongful act, and statute of limitations defenses cannot be raised in pre-answer motions when factual disputes exist.

The circuit court's dismissal rests entirely on the erroneous premise that Joe Applegate's death in 2019 triggered all of Kane's claims. It did not. Kane's claims arose when Darien Applegate secretly sold partnership property in 2022 while continuing to operate the partnership business. That is the wrongful conduct at issue here—not a partner's natural death three years earlier.

For all these reasons, this Court should reverse the circuit court's order dismissing Kane's Complaint and remand for further proceedings. Kane is entitled to his day in court to prove that Darien Applegate breached her fiduciary duties and converted partnership property. The circuit court's premature dismissal denied him that opportunity based on errors of law that this Court should correct.

[Signature on following page]

Respectfully submitted,

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