THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Jessica A. Salvini, circuit court Judge

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.

RESPONDENTS' FINAL BRIEF

Dated: August 13, 2025
Charlotte, North Carolina

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STATEMENT OF THE ISSUES ON APPEAL

Respondents Darien Applegate, individually and as Trustee of the Darien E. Applegate Trust, Big Blue Allure, LLC, and Allure Outdoor, LLC ("Respondents" or "Applegate Defendants") respectfully contend that the issues raised on appeal by Appellant are:

I. Did the circuit court properly consider the statute of limitations in a pre-answer motion to dismiss?

II. Did the circuit court properly dismiss Appellant's claims as time-barred?

III. Did the circuit court properly refuse to apply S.C. Code § 33-41-560 to Appellant's claims?

STATEMENT OF THE CASE

This action arises from Appellant Jon Kane's ("Appellant") assertion of partnership rights in an outdoor advertising sign, or billboard, in Mount Pleasant, South Carolina years after his alleged partner, Joe Applegate ("Joe"), passed away. Appellant now contends that Joe's widow, Darien Applegate ("Mrs. Applegate"), excluded him from the partnership and sold the billboard without distributing any profits to him. However, any claim Appellant had based on such a purported partnership arose prior to or at the time of Joe's death.

STATEMENT OF FACTS

Appellant alleges that he entered into a partnership with Joe in late spring or early summer of 2015 "for the construction and operation of a billboard" on a piece of property located on Highway 41 in Mount Pleasant, South Carolina. (R. p. 15, ¶ 19). At that time, Joe "was already in the billboard business" and owned "a billboard company, Allure Outdoors LLC ("Allure Outdoors") formed on March 2, 2011." (R. p. 15, ¶ 14). According to Appellant, under the terms of that partnership, his "contribution was the procurement of a viable site for a billboard," while Joe "would fund the construction;" and then once Joe was "reimbursed the out-of-pocket costs for construction, [Appellant] and [Joe] would share equally all net proceeds generated through the venture." (R. p. 15, ¶ 19).

Appellant purportedly introduced Joe to the owner of the property off Highway 41. (R. p. 15, ¶¶ 17-18). According to Appellant, the partnership "finalized a lease agreement" for the billboard in October of 2015, (R. p. 16 ¶ 20); notably, however, the lease attached to the Complaint is dated January 13, 2016 and identifies a different entity, Allure Advertising, LLC, ("Allure Advertising") as the lessee of the premises for the purpose of erecting a billboard. (R. pp. 182-193). In June of 2016, the construction company emailed a quote for the cost of constructing the billboard, (R. p. 16, ¶¶ 22-23); again, the quote stated that the words "Allure Advertising" would be placed on the billboard itself, with no mention of any other entity, (R. pp. 55-60). On August 17, 2016, Appellant alleges that he and Joe executed Articles of Organization for a new entity, Big Blue Allure, LLC ("Big Blue"). (R. p. 17, ¶ 30). According to Appellant, the partnership obtained insurance policies on the billboard, both issued to Big Blue. (R. p. 17, ¶¶ 33-34).

Construction of the billboard began in the winter of 2016 and was completed sometime in 2017. (R. pp. 17-18, ¶¶ 35, 37, 43). In April or May of 2019, Joe "informed Plaintiff the out-of-pocket expenses associated with the construction of the Billboard had been paid off." (R. p. 19, ¶ 51). Appellant does not allege that he ever received any distributions, payments, or compensation in connection with the billboard.

Sadly, Joe passed away on June 29, 2019. (R. p. 19, ¶ 52).

Following Joe's death, Appellant alleges that Mrs. Applegate "assured Plaintiff of her understanding of the details of the partnership agreement and the billboard venture," sought "information and guidance regarding the valuation of the billboard," and "communicated to Plaintiff that she knew of and intended to honor the partnership agreement . . . ." (R. pp. 19-20, 31, ¶¶ 54, 63, 135). Yet in January of 2020, Mrs. Applegate removed Appellant's name from what Appellant contends was a partnership bank account. (R. p. 20, ¶ 62). In "mid to late Summer of 2020 . . .

Defendant Applegate stated to Plaintiff that she had nothing in writing, or otherwise, indicating the existence of the partnership or Plaintiff's rights in the business." (R. p. 21, ¶ 70).

On December 30, 2021, Mrs. Applegate assigned the billboard lease to Defendant Lamar OCI South Corporation ("Lamar OCI"). (R. p. 22, ¶ 75). Then, on May 5, 2022, Allure Advertising filed Articles of Merger listing the surviving party as Lamar OCI. (R. p. 22, ¶ 76). On May 11, 2022, Mrs. Applegate sold the "Partnership, including the Billboard, to Lamar, OCI" and kept the proceeds. (R. p. 23, ¶¶ 79-80).

On June 22, 2023, Plaintiff filed a Complaint in the Court of Common Pleas in Charleston County. (R. p.13). Plaintiff asserted sixteen causes of action against Mrs. Applegate, individually and ostensibly as "the Successor in Partnership," of the Darien E. Applegate Trust (the "Trust"), Big Blue, Allure Outdoor, Lamar OCI and Lamar Advertising. On October 18, 2023, Mrs. Applegate, the Trust, Big Blue, and Allure Outdoor (the "Applegate Defendants") filed a Motion to Dismiss in Lieu of an Answer. ("Motion to Dismiss," R. p. 202). In advance of the hearing on the Motion to Dismiss, the Applegate Defendants submitted a memorandum of law in support of their Motion to Dismiss on August 28, 2024, (R. p. 206); Plaintiff submitted his own brief in opposition on August 30, 2024, (R. p. 216). The Motion to Dismiss was heard by the Honorable Jessica A. Salvini on September 4, 2024, during which counsel for the Applegate Defendants reiterated that Appellant's claims each began to accrue upon Joe's death on June 29, 2019 and were thus time-barred. (R. pp. 7-11, 18).

On October 1, 2024, Judge Salvini entered an order granting the Motion to Dismiss. ("MTD Order," Motion to Dismiss Order). In the MTD Order, Judge Salvini held that "Plaintiff has failed to state facts sufficient to constitute causes of action against Defendants as Plaintiff's claims are time barred by the Statute of Limitations." (R. p. 3).

Appellant filed a detailed Motion to Reconsider the MTD Order on October 10, 2024. ("Motion to Reconsider," R. p. 241). In the Motion to Reconsider, Appellant argued that his claims were in fact not time-barred because he did not suffer damages until "after Joe Applegate's death" when Mrs. Applegate sold the billboard, and that he did not know and should not have known that Mrs. Applegate "was acting or would act in contravention of the partnership." (R. pp. 245-46). Appellant also contended that the circuit court could not properly consider a statute of limitations defense raised in a motion to dismiss filed before an answer. (R. pp. 247-48). In addition, Appellant argued that the partnership he had with Joe did not end at dissolution, but instead that Appellant and Mrs. Applegate "were partners." (R. pp. 242-43). According to Appellant, Mrs. Applegate continued the partnership business and thus the partnership. (R. p. 246). Appellant simultaneously argued that Mrs. Applegate did not inherit any rights in the partnership property, but that he had vested "ownership rights" in the billboard that "were not extinguished by the death of Joe Applegate." (R. pp. 244, 246-47).

In an Initial Order Regarding Motion to Reconsider, entered by Judge Salvini on October 18, 2024, the circuit court indicated that it would decide the matter on written submissions alone, and permitted both parties to file additional written submissions. ("Initial Order," R. p. 6). Appellant did not submit any further memorandum to the circuit court. On October 29, 2024, the Applegate Defendants submitted a Memorandum of Law in Opposition to Plaintiff's Motion for Reconsideration arguing that the circuit court could properly consider the statute of limitations on a pre-answer motion to dismiss, that Appellant's claims were all indeed barred by the statute of limitations because they were brought more than three years from Joe's death and the dissolution of any alleged partnership, and that Mrs. Applegate neither continued any partnership after Joe's death nor became partners with Appellant. ("Brief on Motion to Reconsider," R. p. 250).

On November 4, 2024, the circuit court entered its Final Order Regarding Motion to Reconsider denying the motion because there was no "material fact or principle of law that either has been overlooked or disregarded and further finds no error of law or fact not appropriately considered." ("Final Order," R. p. 8).

On December 3, 2024, Appellant timely appealed from the MTD Order, the Initial Order, and the Final Order. (R. p. 277).

ARGUMENT

I. THE CIRCUIT COURT PROPERLY CONSIDERED THE STATUTE OF LIMITATIONS IN RULING UPON APPELLANT'S PRE-ANSWER MOTION TO DISMISS.

Appellant contends that the circuit court erred in considering Respondents' statute of limitations argument solely because it was raised in a motion to dismiss filed before Respondents filed an answer. Yet South Carolina law does not stand for such hyper-technicalities, but instead promotes the efficient resolution of claims through the early assertion of affirmative defenses.

Under South Carolina law, a motion to dismiss under Rule 12(b)(6), SCRCP, on the grounds of an affirmative defense may be filed and ruled upon prior to the filing of an answer. Spence v. Spence, 368 S.C. 106, 124, 628 S.E.2d 869, 878 (2006) (observing that "the general prohibition against pleading an affirmative defense in a motion to dismiss has been relaxed in modern practice," and that the South Carolina "Rules of Civil Procedure . . . allow a party to raise Rule 12(b) defenses in a pre-answer motion").

Specifically, the circuit court properly held that a motion to dismiss on the basis of a statute of limitations can be filed and considered in a pre-answer motion to dismiss, citing Flateau v. Harrelson, 355 S.C. 197, 208-209, 584 S.E.2d 413, 419 (Ct. App. 2003); accord Beach First Nat'l Bank v. Gurnham (In re Estate of Gurnham), 407 S.C. 194, 206, 754 S.E.2d 875, 881 (2014) ("[A] claim filed beyond the time set forth in a statute of limitations ordinarily is barred only if the statute

of limitations is raised as an affirmative defense or by way of a motion to dismiss."). In Flateau, this Court affirmed a circuit court's dismissal of a complaint under Rule 12(b)(6), SCRCP, precisely because the South Carolina Tort Claims Act's statute of limitations barred the cause of action. Id. Appellant attempts to distinguish Flateau on the basis that the statute of limitations in the Tort Claims Act is "jurisdictional in nature" rather than an affirmative defense. 355 S.C. at 207, 584 S.E.2d at 418. But in Flateau, the Court of Appeals repeatedly describes the Tort Claims Act's provision that actions are "forever barred," if not brought within two years, as a "two-year ***statute of limitations***," "the Act's ***statute of limitations***," and, finally, as "the Act's two-year ***statute of limitations***." Id. at 207-208, 584 S.E.2d 418-419 (emphasis added). Nowhere in that case did this Court discuss the circuit court's fundamental authority to hear the assertion that plaintiff's claims were time-barred. Flauteau is indistinguishable from this case, and clearly holds that a pre-answer motion to dismiss under 12(b)(6) on the basis of the statute of limitations is procedurally proper.

II. THE CIRCUIT COURT PROPERLY DISMISSED APPELLANT'S CLAIMS AS TIME-BARRED.

"On appeal from the dismissal of a case pursuant to Rule 12(b)(6), an appellate court applies the same standard of review as the trial court." Rydde v. Morris, 381 S.C. 643, 646, 675 S.E.2d 431, 433 (2009). This Court must "construe the complaint in a light most favorable to the nonmovant and determine if the 'facts alleged and the inferences reasonably deducible from the pleadings would entitle the plaintiff to relief on any theory of the case.'" Santos v. Harris Inv. Holdings, LLC, 439 S.C. 214, 218-19, 886 S.E.2d 483, 485 (Ct. App. 2023) (internal citations omitted). Where the complaint, "on its face . . . fails to state a cognizable claim," dismissal is proper. Id. at 220, 886 S.E.2d at 486.

Because Appellant's Complaint failed on its face to state cognizable claims upon which relief could be granted, the circuit court properly dismissed each of Appellant's claims against the Applegate Defendants.

A. The Circuit Court Properly Determined that Appellant's Claims Began to Accrue Upon Joe Applegate's Death in 2019.

Each of Appellant's claims against the Applegate Defendants arose out of his alleged partnership with Joe Applegate, such that they began to accrue no later than the date of his death in 2019.

1. *The Circuit Court Properly Understood the Nature of Appellant's Claims Against the Applegate Defendants.*

As an initial matter, Appellant mistakenly contends that the circuit court failed to understand the nature of his claims. Specifically, Appellant contends that the circuit court misconstrued his claims as "being against Joe Applegate's estate," rather than as "claims to enforce his vested property rights as a partner." Appellant's Br., p. 16. Appellant argues the circuit court failed to recognize that the conduct was all committed by Mrs. Applegate after Joe Applegate's death, and as a result, his claims did not begin to accrue until years later.

In reality, the circuit court understood that, although Appellant alleges that Mrs. Applegate "executed a transfer and assignment of the lease for the land on which the billboard is located," Appellant's claims "are based on and arise out of his allegations of a partnership between himself and Joe Applegate." (R., pp. 2-3).

Additionally, Appellant claims the circuit court mischaracterized his relationship to the billboard by treating him as creditor of Joe's estate as opposed to a partner with "vested property rights" and "ownership interest in the partnership assets." Appellant Br., p. 17. Appellant argues that because a "partner's interest in the partnership is his share of the profits and surplus and is personal property" under S.C. Code Ann. § 33-41-730, he has a direct ownership interest in the partnership property that gives rise to such profits and surplus.

But Appellant was on notice prior to June 29, 2019 that Joe did not believe, or certainly was not acting as though, he was in a partnership with Appellant to own the billboard. In fact, Appellant was aware for more than three years prior to Joe's death that another entity, Allure Advertising, claimed ownership over the Billboard. For example, the January 13, 2016 lease agreement for the billboard listed Allure Advertising, as the tenant and owner of the billboard, but nowhere identifies any partnership, Big Blue, or Appellant. (R. p. 182). When a valuation of the billboard was performed in June of 2017, it likewise identified Allure Advertising as the owner, again without mentioning any partnership or Appellant. (R. p. 112). Yet Appellant does not allege that he was a member of Allure Advertising or that the alleged partnership ever held an interest in Allure Advertising. In other words, even if Appellant were correct that a partnership existed that gave rise to him having rights and an ownership interest in the partnership's profits and surplus, he was on notice years before Joe's death that Allure Advertising claimed ownership over and title to that property. Because of this, as set forth below, the circuit court correctly determined that Appellant's claims are all time-barred.

2. *Appellant's Claims Began to Accrue No Later Than Joe Applegate's Death in 2019.*

Appellant also incorrectly argues that the circuit court erred in holding his claims began to accrue upon Joe Applegate's death, but instead did not start to run until several years later. As the circuit court correctly found, however, Appellant's claims in this action all rise and fall on the existence of an alleged partnership with Joe Applegate. Pursuant to S.C. Code § 33-41-930(4), "dissolution is caused . . . by the death of any partner . . . ." Plaintiff admits that Joe Applegate died on June 29, 2019, (R. p. 19, ¶ 52); accordingly, any alleged partnership automatically dissolved at the same time.

Appellant does not dispute that each of his claims are governed by a three-year statute of limitations – including any claim to windup the partnership affairs or to enforce an accounting against

the partnership. S.C. Code §§ 15-3-530(1), -530(2), -530(5), -530(7). Appellant instead argues that the three-year statute of limitations was not triggered at Joe Applegate's death, but in May 2022 when the sale of the Mount Pleasant billboard was completed and when his "damages occurred." Appellant's Br., p. 15. According to Appellant, "the partnership continued after Joe Applegate's death," and each of his claims "are based on subsequent conduct by Darien Applegate." Appellant's Br., p. 16. Appellant is wrong.

Under S.C. Code Ann. § 33-41-930(4), dissolution of a partnership "is caused . . . by the death of any partner." Once dissolution is triggered, the partnership continues to exist only "until the winding up of partnership affairs is completed." S.C. Code Ann. § 33-41-920. Thus, when Joe passed away on June 29, 2019, (R. p. 19, ¶ 52), any alleged partnership between him and Appellant automatically dissolved. Nowhere in the Complaint does Plaintiff allege that he and Mrs. Applegate separately and subsequently entered into a partnership agreement for the ownership and operation of the Mount Pleasant billboard going forward. Rather, each of Plaintiff's allegations is based on Mrs. Applegate stepping into her husband's shoes and continuing an existing partnership with Plaintiff. See, e.g., (R. p. 52, ¶ 55) (Darien Applegate's acknowledgment of "the business deal between the corporate entity of JA"), (R. p. 20, ¶ 64) ("Darien Applegate was aware of the partnership agreement and intended to honor it."), (R. p. 24, ¶ 90) (accusing Mrs. Applegate of being in breach of the agreement between Plaintiff and Joe "by refusing to honor the partnership agreement"). Yet, because any alleged partnership between Appellant and Joe had dissolved automatically upon Joe's death, there were no "shoes" for Mrs. Applegate to step into.

Each of Appellant's claims rises and falls on the existence of an alleged partnership with Joe prior to Joe's death:

- Declaratory judgment: The statute of limitations on Appellant's claim for a declaration of the existence of a partnership also plainly began to run no later than when the alleged partnership was dissolved by Joe Applegate's death on June 29, 2019.

- Breach of contract/breach of contract with fraudulent intent: The statute of limitations for any breach of an alleged partnership agreement likewise began to run no later than the dissolution of the partnership (and thus the termination of the partnership agreement). Again, Appellant does not allege that he and Mrs. Applegate entered into any separate or new partnership agreement following her husband's death, and instead explicitly bases his breach of contract claim on Mrs. Applegate breaching "the partnership agreement" that existed between him and Joe – a contract to which Mrs. Applegate was not even a party. (R. p. 24, ¶¶ 85, 90). The only person who could have breached a partnership agreement with Appellant was Joe, such that any breach of contract claim clearly arose no later than June 29, 2019.

Moreover, the allegations in the Complaint reveal that Joe actually breached the purported terms of the alleged partnership agreement prior to his death. In the years prior to Joe's death, Appellant was on notice that the lease for the billboard was not in the name of any partnership, but in Allure Advertising, and that Allure Advertising continued to represent its ownership over the billboard in a 2017 third-party valuation. (R. pp. 112, 182). Appellant further alleges that he was to receive 50% of the profits from the billboard once Joe had been reimbursed for all of his expenses; Joe allegedly informed Appellant that the costs had been repaid in April or May of 2019. (R. pp. 15, 19). Appellant acknowledges that Joe's confirmation that construction costs had been fully reimbursed, triggered "their 50/50 profit-sharing arrangement." Appellant's Br. p. 18. But Appellant ignores the fact that he does not allege that he ever received any such share of the profits or distribution from the partnership prior to Joe's death, in breach of the purported partnership agreement. Despite this, Appellant did not commence this action until more than three years after

Joe's death, three years after the termination of any partnership agreement, and more than three years after Joe allegedly had already breached that purported partnership agreement.

- Breach of fiduciary duty/constructive trust: In this case, fiduciary duties would only arise between Appellant and a partner. Kuznik v. Bees Ferry Assocs., 342 S.C. 579, 598, 538 S.E.2d 15, 25 (Ct. App. 2000) (describing fiduciary duty between partners). As discussed above, however, Appellant does not allege that *Mrs. Applegate* was his partner or that he entered into any partnership agreement directly with her.[1] The only partner that Appellant identifies is Joe; under the facts alleged by Appellant, Joe is the only person who could have owed him fiduciary duties. Therefore, the statute of limitations for any alleged breach of those duties necessarily began to run prior to the death of Appellant's purported partner, Joe.

- Unjust enrichment/quantum meruit/conversion: Appellant's entitlement to any profit or gain or interest in an alleged partnership or partnership property – whether "vested" or otherwise – was likewise founded upon the existence of the *partnership*. The statute of limitations for any claim arising from the taking of that profit/interest thus began to run upon the dissolution of the partnership itself. This is reinforced by Appellant's own argument that under S.C. Code § 33-41-720(e), Mrs. Applegate did not acquire any right to specific partnership property by virtue of being Joe's widow, but the billboard and partnership profits continued to be the property of the alleged partnership. Because the partnership automatically dissolved upon Joe's death, any claim Appellant had in the billboard arose at that time. Appellant acknowledges that he did not (and did not allege) that he filed any claim as a creditor against the estate. Appellant's Br. p. 17. Appellant does *not*

[1] Appellant tacitly acknowledges this, alleging that pursuant to S.C. Code § 33-41-540, Mrs. Applegate owed him "duties in a fiduciary capacity given Defendant's knowledge of Plaintiff's existing partnership agreement and Plaintiff's belief that he was at all times the sole operating officer of 'Big Blue Allure, LLC' and its assets." (R. p. 27, ¶ 111). But S.C. Code § 33-41-540 applies only to *partners* – not to people who merely knew about a partnership to which they were not a party, or because Appellant held certain beliefs about being an officer in a limited liability company.

allege that he took any steps to wind up the partnership's affairs, or indeed made any attempt whatsoever to exercise any "ownership interest" over the partnership property

- Accounting: The statute of limitations for any claim for an accounting of the partnership assets likewise clearly began to run no later (and arguably far earlier) than the dissolution of the alleged partnership at Joe's death. Specifically, S.C. Code Ann. §33-41-550(1) provides that "[a]ny partner shall have the right to a formal account as to partnership affairs . . . [i]f he is wrongfully excluded from the partnership business or possession of its property by his copartners." As noted above, Appellant was on notice years prior to Joe's death that the billboard was owned by Allure Advertising and was not in the name of the partnership or any entity in which Appellant believed he had an interest. (R. pp. 112, 182). Any action for an accounting arose well over three years before Appellant commenced this action.

- Fraud/constructive fraud/unfair trade practices: The basis for Appellant's fraud claim is that Mrs. Applegate deceived Appellant into believing she would continue "to honor the partnership agreement" between Appellant and Joe "in violation of her fiduciary and contractual duties" "as a partner via succession." (R. p. 31, ¶¶ 135, 139). Because any such alleged partnership was dissolved as a matter of law upon Joe's death, however, any fraud – as well as any fiduciary or contractual obligations in connection with that partnership – necessarily had to occur prior its dissolution. This is so because the statute of limitations for a cause of action for fraud in South Carolina is governed by the "discovery rule." Burgess v. Am. Cancer Soc., S.C. Div., Inc., 300 S.C. 182, 185, 386 S.E.2d 798, 799 (Ct. App. 1989). Accordingly, because Appellant knew that the partnership dissolved as a matter of law upon Joe's death and Mrs. Applegate had no ability to "continue" it, or "such facts and circumstances could have been known" to him "through the exercise of ordinary care and reasonable diligence," the statute of limitations bars his claims based in fraud. Rush v. Stribble, 2024 S.C. App. Unpub. LEXIS 196, at *2-3 (Ct. App. May 29, 2024). In addition,

as set forth below, any duty upon which a claim for constructive fraud could have been based necessarily ended upon Joe's death and the dissolution of the partnership.

- Wrongful dissolution: Because the alleged partnership automatically dissolved upon Joe Applegate's death, the statute of limitations for any claim related to its dissolution began to run at that time. Put simply, there was no partnership for Mrs. Applegate to dissolve after her husband died.

- Interference with contractual relationship/negligent or tortious interference with contractual relationship: Again, the only contractual relationship purportedly being interfered with by Mrs. Applegate was the alleged partnership between Appellant and Joe; as that partnership dissolved upon Joe's death, any claims based on the existence of that partnership agreement necessarily began to run at that time.

When Joe died in 2019, any alleged partnership between Appellant and Joe automatically dissolved as a matter of law, and the statute of limitations began to run on all of Appellant's claims. Despite this, Appellant did not commence this action until June 22, 2023, more than three years later. Accordingly, all of his claims are time-barred.

B. The Circuit Court Properly Applied the Statute of Limitations to Appellant's Claims for an Accounting, Constructive Fraud, Constructive Trust, and Unjust Enrichment.

1. Appellant Failed to Preserve This Argument on Appeal.

Appellant further contends that the circuit court committed reversible error by applying the statute of limitations to claims he contends are equitable in nature. However, Appellant's argument is procedurally improper and cannot be heard on appeal, because he did not raise this argument before the circuit court at any stage, including in his briefing on his motion for reconsideration. "Appellant cannot present this argument for the first time on appeal." Dunes W. Golf Club, LLC v. Town of Mount Pleasant, 401 S.C. 280, 302 n.11, 737 S.E.2d 601, 612 n.11 (2013); accord Atlantic Coast

Builders & Contractors, LLC, v. Lewis, 398 S.C. 323, 330, 730 S.E.2d 282, 287 (2012) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review."). "At a minimum, issue preservation requires that an issue be raised to and ruled upon by the trial judge," otherwise, "if not raised to the trial court, the issues are deemed waived on appeal." Herron v. Century BMW, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011). By failing to raise any argument to the circuit court concerning the applicability of the statute of limitations to claims he contends are equitable in nature, Appellant waived that issue and failed to preserve it for appeal.

2. Appellant's Claims Are Nonetheless Barred by the Statute of Limitations.

Even had Appellant preserved this issue, the statute of limitations properly applies to bar the claims he describes as "equitable." As Appellant himself noted, "[a] suit for declaratory judgment may be legal or equitable, and is characterized as such by the nature of the underlying issue outlined in the complaint." Lowcountry Open land Tr. v. State, 347 S.C. 96, 101, 552 S.E.2d 778, 781 (Ct. App. 2001). In his first cause of action, Appellant seeks a declaration that a partnership existed between himself and Joe, and that the partnership owned certain property – in other words, Appellant seeks a declaration of the legal, *not equitable*, rights between the parties. This claim is legal in nature and therefore barred by the statute of limitations.

Appellant also seeks an accounting, but acknowledges this claim "arise[s] from the fiduciary relationship inherent in a partnership." Appellant's Br., p. 21. Indeed, S.C. Code Ann. § 33-41-550(1) provides a partner with the statutory "right to a formal account as to partnership affairs" if they are "wrongfully excluded" from the business or property of the partnership. But Appellant cannot base an accounting claim on the existence of a partnership which the statute of limitations bars him from suing to establish ever existed. "As a matter of law," – *not equity* – "Plaintiff cannot prevail in an attempt to force an accounting for a partnership that doesn't exist." Curtis v. CafÉ

Enters., 2016 U.S. Dist. LEXIS 160990, at *36 (W.D.N.C. Nov. 21, 2016) (applying S.C. Code Ann. § 33-41-550). Because any claim to enforce partnership rights or a partnership agreement is barred by the three-year statute of limitations, Appellant's claim for an accounting is likewise barred.

The three-year statute of limitations similarly applies to Appellant's claim for constructive fraud. See, e.g., Clemons v. Home Telecom Co., 2022 S.C. C.P. LEXIS 1090, *4 (Berkeley Co. Circuit Ct. Aug. 8, 2022) ("Under the South Carolina Code, actions for . . . constructive fraud . . . are subject to a three-year statute of limitations."). As the South Carolina Supreme Court has held, "[w]hen the relationship" between the parties which creates a duty to disclose "ends, the duty to disclose, which is the basis of fraudulent concealment claim, ceases to exist." Strong v. Univ. of S.C. Sch. of Med., 316 S.C. 189, 191-92, 447 S.E.2d 850, 852 (1994) (citing O'Neal v. Throop, 596 N.E.2d 984 (Ind. Ct. App. 1992) (when physician-patient relationship terminates, the constructive fraud terminates, and the statute of limitations begins to run)). In Strong, the Supreme Court affirmed a grant of summary judgment to defendants on the grounds that the plaintiff's claim for constructive fraud began to accrue when the patient-physician relationship ended, and thus was barred by the statute of limitations when plaintiff delayed in filing suit. Id. Albeit in a different context, the logic of Strong holds true in this case: upon the termination of the partnership that would have given rise to any fiduciary duty, when Joe died, the fiduciary duty underlying Appellant's claim for constructive fraud likewise terminated. Accordingly, Appellant's constructive fraud claim began to accrue in June 2019 and is now time-barred.

Appellant's claim for a constructive trust, arising from that same alleged fiduciary duty, is similarly time-barred. Indeed, the Supreme Court of South Carolina long ago declared: "The trust imposed . . . being in its nature an implied or constructive trust, constitutes no exception to the operation of the statute of limitations." Beard v. Stanton, 15 S.C. 164, 168 (1881).

Finally, Appellant's claim for unjust enrichment is also time-barred, as just this year this

Court held that "the applicable statute of limitations for the claims of unjust enrichment and conversion in civil actions is three years." Mares v. Est. of Marx, 2025 S.C. App. Unpub. LEXIS 33, at *4 (Ct. App. Jan. 29, 2025).

Because each of Appellant's claims began to accrue no later than Joe's death on June 29, 2019, the circuit court properly determined they were time-barred by the applicable three-year statute of limitations.

III. THE CIRCUIT COURT DID NOT ERR IN REFUSING TO APPLY S.C. Code § 33-41-560.

Lastly, Appellant incorrectly argues that the circuit court abused its discretion in refusing to apply S.C. Code § 33-41-560. Pursuant to S.C. Code § 33-41-560(2), "[a] 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." S.C. Code § 33-41-560(2). Appellant contends that under this provision, Mrs. Applegate continued the partnership by continuing the partnership business without liquidating it. Appellant's Br., p. 19. However, this section explicitly applies only to partnerships "for a fixed term or particular undertaking" which continue to do business *after* that fixed term expires or the particular undertaking is accomplished. S.C. Code § 33-41-560(1).

Here, there is no allegation in the Complaint that the alleged partnership between Appellant and Joe was for a fixed term or particular undertaking, much less that the term expired or the undertaking was completed. Furthermore, even if the alleged partnership were for a fixed term, it is physically and legally impossible for "the partner**s**" (plural) who "habitually acted" in connection with the partnership business to continue that business when one partner dies. In short, the circuit court correctly concluded that S.C. Code § 33-41-560(2) does not apply to this action. Appellant cannot rely on this section to avoid the statute of limitations' bar to chis claims.

CONCLUSION

Because the circuit court properly dismissed Appellant's claims as time-barred by the applicable statute of limitations, this Court should affirm the circuit court's Order dismissing Appellant's Complaint and the subsequent Order denying Appellant's Motion for Reconsideration.

Dated: August 13, 2025
Charlotte, North Carolina

By: Jennifer Houti by RBF

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