

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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**Oct 05 2020**

APPEAL FROM CHEROKEE COUNTY  
Court of Common Pleas  
The Honorable J. Mark Hayes, II, Circuit Court Judge

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**SC Court of Appeals**

Case No: 2007-CP-11-00802  
Appellate Case No.: 2020-000161

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David L. O'Shields,.....Appellant,

v.

Piedmont Glass & Mirror, Inc., Julie Taylor, David Taylor, and Carolina  
Storefront Systems, Inc.,.....Respondents,

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**RESPONDENTS' FINAL BRIEF**

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s/ Joseph L.V. Johnson  
(SC Bar No: 77477)  
JoeJohnson@SATMLLC.COM  
Saint-Amand, Thompson & Mathis, LLC  
210 South Limestone Street, Suite 1  
Gaffney, South Carolina 29340  
Tel.: 864-489-6052  
Fax: 864-489-5406

Attorney for Respondents

October 5, 2020

Other Counsel of Record:

Thomas A. Belenchia (SC Bar No: 2371)

tab@abizlaw.com

Chelsea R. Rikard (SC Bar No: 102355)

crr@abizlaw.com

P.O. Box 3421

Spartanburg, SC 29304

Tel: 864-699-9803

Attorneys for Appellant

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**STATEMENT OF ISSUES ON APPEAL**

1. Did the circuit court err in applying the Statute of Frauds to find that the Appellant was not a partner or shareholder?
2. Did the circuit court err in failing to find that Respondents were equitably estopped from asserting the Statute of Frauds?
3. Did the circuit court err in applying the Statute of Limitations to find that Appellant was not a partner or shareholder?
4. Did the circuit court err in failing to find that Appellant was oppressed as a shareholder by Respondents Taylor?
5. Did the circuit court err in failing to find that Respondent Carolina Storefront Systems, Inc. is a successor corporation of Piedmont Glass & Mirror Company, Inc.?

## STATEMENT OF THE CASE

On December 21, 2007, David L. O'Shields (hereinafter "Appellant") filed an action in the Cherokee County Court of Common Pleas seeking damages against Piedmont Glass & Mirror Company, Inc. (hereinafter "PGM"), David Taylor (hereinafter "David"), and Julie Taylor (hereinafter "Julie") (all collectively hereinafter "Respondents"). The Respondents filed a timely Answer and Counterclaim to this action on January 22, 2008 with the Cherokee County Clerk of Court's Office. On October 4, 2010, the Respondents were granted partial summary judgment against some of the Appellant's claims. (R. pp. 1-3). Thereafter, on October 9, 2013, the Appellant filed an Amended Complaint adding Carolina Storefront Systems, Inc. (hereinafter "CSS") as a party to this case and alleging new causes of action against CSS. (R. pp. 50-65). On October 8, 2014, the Respondents filed their Amended Answer and Counterclaim to the Amended Complaint. (R. pp. 66-90). At the time of trial on February 27, 2019, the Appellant's causes of action included: Accounting, Conversion, Ultra Vires, Conflict of Interest, Breach of Fiduciary Duties, Preference, Judicial Dissolution, Civil Conspiracy, Negligent Misrepresentation, Negligent Supervision, Fraudulent Transaction, and Violation of S.C. Code Ann. §33-14-300 et seq.. The causes of action filed by the Appellant for the personal injury claim and wage claim were dismissed prior to trial. (R. pp. 1-13). Also at the time of trial, Respondents had several defenses, namely, Laches/Statute of Limitations, Unclean Hands, Failure to Pay for Shares, and Statute of Frauds. The Respondents further had counterclaims against the Appellant including Breach of Duty of Loyalty, Violation of S.C. Code Ann. §33-8-420, and Breach of Fiduciary Duties.

This case was tried as a bench trial on February 27 and 28, 2019 before the Honorable J. Mark Hayes, II. On June 4, 2019, the final order in the case was filed dismissing all causes of action for all parties. (R. pp. 4-13). On June 14, 2019, the Appellant filed and served a Notice of Motion and Motion to Reconsider pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure. On January 2, 2020, an Order denying the Motion to Reconsider was filed in the Cherokee County Clerk of Court's Office. (R. pp. 14-16). On January 30, 2020, the Appellant served his Notice of Appeal in this matter.

## ARGUMENTS

### Standard of Review

Though the Appellant made both legal and equitable claims in his Amended Complaint, the crux of his case centers around the Appellant's alleged position as a shareholder in PGM. The Appellant concedes that without his status as a shareholder, all of his causes of action fail. "A shareholders derivative action, as well as an action for stockholder oppression, is one in equity." *Ballard v. Roberson*, 399 S.C. 588, 733 S.E.2d 107 (S.C. 2012) (citing *Straight v. Goss*, 383 S.C. 180, 191, 678 S.E.2d 443, 449 (Ct.App.2009)). However, this broad scope does not relieve the appellant of his burden to show that the trial court erred in its findings. *Id.* (citing *Pinckney v. Warren*, 344 S.C. 382, 387–88, 544 S.E.2d 620, 623 (2001)). Though the appellate court can review the record and make findings based on its view of the preponderance of the evidence, it is not required to disregard the findings of the trial judge, who saw and heard the witnesses, and was in a better position to determine the credibility of the witnesses. *Id.*, (citing *Pinckney v. Warren*, 344 S.C. 382, 387, 544 S.E.2d 620, 622 (2001)); *Ingram v. Kasey's Associates*, 340 S.C. 98, at 105, 531 S.E.2d 287 (S.C. 2000).

#### **I. The circuit court correctly applied the Statute of Frauds to find that the Appellant was not a partner or shareholder in the Respondents' corporations.**

This case centers around the ownership of the Respondents' corporations but is particularly complicated due to the familial relationships between the parties. The Appellant herein is the brother of Julie. (R. p. 101, lines 14-21). Julie and David have been married for 40 years as of the trial date. (R. p. 144, lines 17-24). The parties' involvement with the business that will become the subject of this litigation started in the early 1990's when Julie began working for Brian Currie as an employee of Piedmont Glass, Inc. (hereinafter "PG") (R. p. 144-

147). After a fire occurred at the office of PG while Julie was still an employee there, she bought out Brian Currie's interest and assets in PG, including the phone number, and his interest in the remaining equipment. (R. pp. 146-149). Later, on April 14, 1995, PG was dissolved at the South Carolina Secretary of State's Office. (R. p. 811). She began operating shortly thereafter as Piedmont Glass and Mirror as a sole proprietorship. (R. pp. 149-150). At some point afterwards, Julie approached the Appellant and asked him to work for her at her new sole proprietorship. (R. pp. 150-151). The Appellant was not happy with his prior job, and ultimately left it to work for Julie. (R. p. 143, lines 10-11). After the Appellant began working for Julie, he was not performing the job she had requested, so she enlisted the help of David to help grow the business. (R. p. 151). PGM was incorporated as a new entity effective January 1, 1999. (R. pp. 292-293). A number of years passed with this arrangement, until May of 2007 when the Appellant suffered an injury while working. (R. p. 117, line 19-p. 118, line 25). The Respondents offered him a desk job in lieu of working in the field, but the Plaintiff refused (R. pp. 153-154, 204-205). After his refusal, the Appellant was fired from PGM, as he had been several times before due to poor work, in addition to the several times he quit. (R. pp. 152, 184, 186, 203). Shortly thereafter, this suit was initiated. CSS was created in March of 2011. (R. pp. 339-370). PGM was dissolved administratively on February 22, 2013. (R. p. 371).

Since the beginning of litigation, the financial viability of PGM and CSS has been reduced greatly, due to issues with the economy and the litigation. (R. pp. 173-176). Additionally, there are several thousands of dollars' worth of tax liens levied against the Respondents. (R. pp. 233, 652-793). As noted by the circuit court at the time of trial, "the financial hallmarks of the corporations are debt and unpaid governmental liabilities." (R. p. 12).

Appellant's entire case rests upon whether Appellant had an interest in PGM as a shareholder. Appellant asserts that he had a verbal agreement with Julie to work for her for one year for less money, and afterwards, he would own 50% of the business. (R. p. 102). This alleged agreement was made prior to the incorporation of PGM, and accordingly, Appellant asserts that a partnership was created and thereafter transferred into PGM. Appellant further alleges, as will be discussed *infra*, that CSS is successive entity, and accordingly he owns 50% of that entity also.

For this alleged agreement, the Appellant agrees the terms were completely verbal. (R. p. 125). When asked when the agreement was made, the Appellant only knew that it was in 1995. (R. p. 124). The Appellant's wife, Sarah O'Shields, testified at trial that the agreement was made in "around 1990...'95 maybe, I'm not sure. Some time in the '90s. Early '90s." (R. p. 138, lines 19-22). The Appellant further submitted his income tax returns as evidence that he took less pay. (R. pp. 283-291). The Appellant asserts this is evidence that he took less pay to supplement his claim of possessing a verbal contract. These records are hardly conclusive when you factor in that the Appellant acknowledged he later received payments that were not reflected on his tax returns and could not remember if he did prior to PGM's incorporation. (R. p. 132).

The Respondents asserted the Statute of Frauds as a defense due to the nature of the alleged verbal contract asserted by the Appellant. The Statute of Frauds requires in relevant part:

No action shall be brought whereby:

...(5) To charge any person upon any agreement that is not to be performed within the space of one year *from the making thereof*;

Unless the agreement upon which such action shall be brought or some memorandum or note thereof shall be in writing *and signed by the party to be charged therewith* or some person thereunto by him lawfully authorized.

S.C. Code Ann. §32-3-10 (2007) (emphasis added)

The Appellant submits that the Statute of Frauds is inapplicable because the terms of the alleged verbal contract could be completed within a year. The evidence does not suggest that, however, as the statute requires that the performance take place within one year “from the making thereof.” S.C. Code Ann. §32-3-10 (5) (2007). In this case as mentioned above, the details were scarce as to *when* the alleged contract was made or agreed to. All of the testimony was vague as to when this alleged agreement took place, and there is no clear documentation to support the Appellant’s position. Furthermore, even if one were to accept that the parties had an agreement made and performed within the space of a year, the Appellant himself acknowledged that after a year, nothing changed with his business relationship with Julie. (R. p. 125). Therefore, the circuit court correctly determined that the Statute of Frauds applies in this matter. (R. pp. 4-13).

The Appellant also submits that the nature of a partnership does not require a written agreement to be formed. The record in this case, however, shows absolutely no clear evidence that a partnership was formed. The Appellant and David both testified that no tax filings as a partnership were ever filed with the IRS. (R. pp. 128, 187). The Appellant filed his taxes under a W-2, which is typically issued for an employee of a company. (R. pp. 283-291). Defendant claims that he brought his personal tools into the alleged partnership but did not offer any proof. (R. pp. 105-106). Furthermore, all employees of the Respondent corporations were required to have their own tools. (R. p. 164). The Appellant additionally claimed that he pledged personal property to support the business, but submitted no loan agreements, lien certifications, or any other documentation whatsoever to support this claim. (R. p. 37). The Appellant submitted no

further evidence at trial to support his claim that he owned 50% or had a partnership, and accordingly the trial court correctly decided that a partnership was not formed.

In addition, in order for the Appellant to have any interest in PGM, he had to pay consideration for his shares of stock. The subscription agreement submitted at trial states in relevant part:

RESOLVED, that the subscriptions for shares in the Corporation, as set forth above, be accepted and that *upon payment therefore* by the subscribers, the Corporation through its proper officers shall cause to be issued to the said subscribers appropriate certificates which shall represent fully paid and nonassessable common shares of the Corporation.

(R. p. 308, emphasis added)

Naturally, in order for the Appellant to have an ownership interest in PGM and/or CSS, he would need to prove he was a shareholder in PGM. The Appellant's position is that the alleged verbal contract to work for less money was efficient consideration, and this consideration was what he paid for PGM's shares. It is without question that Julie and David paid for their shares of stock in PGM; Julie with the rights and assets to her sole proprietorship business, and David with a loan of approximately \$42,000. (R. pp. 148-149, 167-168, 170-172, 812-815). "A tentative subscription to stock which is not final, but which contemplates an act to be done in the future by the subscriber to make the subscription binding, is, of course, unenforceable as a contract." *Baker v. Mutual Loan & Inv. Co.*, 61 S.E.2d 387, 218 S.C. 47 (S.C. 1950) (citing 13 Am.Jur., Sec. 224, Page 331); see also *Williams v. Benet*, 34 S.C. 112, 13 S.E. 97 (S.C. 1891). If the Appellant's contention is that the alleged one-year work agreement is the consideration he paid for his stock in PGM, then accordingly his entire case rises and falls by that position. What is particularly interesting, however, is that there are corporate documents that indicate that

Appellant owned 40% of PGM. (R. pp. 813-815). It is difficult to reconcile, accordingly, why the Appellant is asserting a claim to 50% in PGM ownership yet is relying on documents that purport a 40% ownership in PGM. (R. pp. 4-13, 126-127). Ultimately, even if the court did not find the Statute of Frauds applied, the Appellant failed to show sufficient evidence of ownership in 50% of PGM. The Appellant never acted as shareholder since the inception of PGM. He never received dividends, was fired frequently, and made no assertive attempts to review the financial records of the corporations. (R. pp. 115, 130, 152, 184, 186, 203) As further noted by the circuit court, “[t]he [Appellant] made no management decisions.” (R. p. 5). Contrast the actions of the Appellant with that of David and Julie, who personally invested their assets, and even mortgaged their own home for the benefit of the Respondent corporations. (R. pp. 148-149, 167-168, 170-172, 812-828). Consequently, as the moving party, even *without* the Statute of Frauds as a defense, the Appellant failed to meet his burden of proof to show his ownership interest in any of the Respondent corporations.

**II. The circuit court correctly decided that Respondents were not equitably estopped from asserting the Statute of Frauds.**

The Appellant further contends that if the Statute of Frauds do apply, then the doctrine of equitable estoppel should stand as a defense to this claim by the Respondents. The doctrine requires that the party asserting estoppel “must show that he has suffered a definite, substantial, detrimental change of position in reliance on the contract, and that no remedy except enforcement of the bargain is adequate to restore his former position.” *Springob v. Univ. of S.C.*, 407 S.C. 490, 757 S.E.2d 384 (S.C. 2014) (citing *Collins Music Co. v. Cook*, 281 S.C. 580, 583, 316 S.E.2d 418, 420 (Ct.App.1984)). “It is not sufficient to show merely that he has lost an expected benefit under the contract.” *Id.* “Before the estoppel doctrine can be invoked, however,

**there must be competent proof of the existence of the oral contract.**” *Springob v. Univ. of S.C.* , 407 S.C. 490, 757 S.E.2d 384 (S.C. 2014) (citing *Atl. Wholesale Co. v. Solondz*, 283 S.C. 36, 40, 320 S.E.2d 720, 723 (Ct.App.1984)) (emphasis added). In the instant case, a review of evidence does not remotely show that there is any competent proof that the oral contract even existed. The Appellant submitted tax records that he acknowledged may not be accurate as a basis for proof of the contract. The Appellant relied on testimony from himself, his wife, and his brother to support his claim, though none of the testimony accurately portrayed the terms of the alleged contract, nor the manner in which it was created. The Appellant further claimed that Julie stated that he was a partner in a prior deposition, but she clarified at trial that she was referring to the actions of someone if they *were* a partner of a company. (R. pp. 154-155). The Appellant never filed any partnership paperwork with any governmental agency to prove its existence. Lastly, there is **no** documentation anywhere that shows that the Appellant was a partner and/or 50% owner of PGM. Because the Appellant failed to produce to the circuit court competent proof of the existence of the oral contract, the court correctly determined that equitable estoppel was inapplicable in this case.

The Appellant additionally argues that the equitable doctrine of partial performance should apply in this case. “[W]hen there is no writing, but part performance is alleged to remove an oral contract from the Statute of Frauds, a court of equity must find the following factors before it may compel specific performance of the oral contract: 1) clear evidence of an oral contract; 2) the contract had been partially executed; and 3) the party who requested performance had completed or was willing to complete his part of the oral contract.” *Fesmire v. Digh*, 683 S.E.2d 803, 385 S.C. 296 (S.C. App. 2009), (citing, *Settlemyer v. McCluney*, 359 S.C. 317, 320, 596 S.E.2d 514, 516).

Here again, the Appellant's argument that the Statute of Frauds was incorrectly applied fails again due to the lack of evidence. Because the case law requires "**clear** evidence of an oral contract" under the terms of *Settlemyer*, again the Appellant's claims have no merit. Even if you take the Appellant's position that he was to work for one year and become partner, he even acknowledged in his testimony after one year that nothing changed. (R. p. 125). Accordingly, the circuit court correctly decided that there was insufficient evidence to make a finding that the oral agreement existed.

**III. The circuit court correctly applied the Statute of Limitations to find that Appellant was not a partner or shareholder.**

The basic nexus of this case is twofold; the Appellant believes that the individual Respondents took money from a corporation he claims an ownership interest in, and he is seeking his alleged interest in the two corporations. Disregarding for a moment the frailty in the Appellant's evidence that he had an agreement to be a 50% owner in PGM, the heart of the case also depends on *when* he believed that he possessed a lesser interest and when he believed the individual Respondents had taken money from the corporations. There are two applicable Statute of Limitations relevant to this matter: S.C. Code Ann §33-8-420 (e) (2006) and S.C. Code Ann §15-3-530 (2005). The former statute, as part of the South Carolina Business Corporation Act, requires "an action against an officer for failure to perform the duties imposed by this section must be commenced within three years after the cause of action has accrued, or within two years after the time when the cause of action is discovered, or should reasonably have been discovered, whichever sooner occurs..." S.C. Code Ann §33-8-420 (e) (2006) Giving the Appellant the benefit of the doubt, to have a viable cause of action, he must a) prove he is a shareholder, and b) prove that he filed his suit within three years after the cause of action has

accrued. The latter Statute of Limitations is the basic three-year statute of limitations as applicable to most civil actions.

In the instant case, as previously stated, the Appellant executed documents on December 10, 1998 that showed an interest less than 50%. (R. pp. 297-338) The Appellant knew he signed these documents that showed that he did not own 50% of PGM in 1998. (R. pp. 126-127). The Complaint in this matter was filed on December 21, 2007, well beyond, viewing in the light most favorable to the Appellant, the three years Statute of Limitations. (R. pp. 17-30). The Appellant testified that he was assured by the individual Respondents that he owned 50% without offering any proof, however, as the circuit court noted, “[e]ven if the oral assurance was made, the [Appellant] took no action.” (R. pp. 10, 109).

Furthermore, the Appellant admitted at trial that he was under the belief that the individual Respondents were using corporate funds inappropriately since 1999, and yet again, took no action. (R. pp. 129-130). He also claimed that the individual Respondents denied him access to the corporate accounts “on a several occasions” and he again did nothing. (R. p. 115). Lastly, the Appellant claimed that the Respondents’ breached their duties by accruing tax liens, yet the Appellant did nothing when the IRS contacted him about liens “well before the injury.” (R. pp. 116, 138-139).

For all of the foregoing reasons, the Respondents would submit that the Appellant unduly delayed in his filing this matter, and the circuit court correctly decided that the Statute of Limitations applies to this case.

**IV. The circuit court correctly found that the Appellant was not oppressed as a shareholder by Respondents Taylor**

In the order denying the motion to alter or amend judgment, the circuit noted, when referring

to the oppressive cause of action claimed by the Appellant, that “[t]he [Appellant]’s failure to prove shareholder status in PGM or Carolina Storefront Systems is dispositive of these issues, and thus no amendment is made to this Court’s prior order.” (R. p. 15). This clarifying language was used to supplement the circuit order’s original order which stated: “The [Appellant] has not met his burden of proof necessary to show that he is a valid shareholder in either corporation, and lacks standing to claim an injury to himself as a shareholder or to claim derivatively a harm to either of the corporate entities.” (R. p. 10). Thus, because the Appellant lacked standing to file the action, the circuit court would not have been required to rule on the individual causes of action, namely, whether the Appellant was oppressed as a shareholder if for no other reason that the court determined he *wasn’t* a shareholder. The Appellant failed to meet his burden of proof, and that issue of his shareholder status was dispositive of all other issues.

Notwithstanding, the Appellant has requested this Honorable Court to address the issue of whether the circuit court nonetheless should have determined that the Appellant was oppressed as a shareholder. The Appellant relies heavily upon *Ballard v. Roberson*, 399 S.C. 588, 733 S.E.2d 107 (S.C. 2012) and *Kiriakides v. ATLAS FOOD SYSTEMS & SERV.*, 343 S.C. 587, 541 S.E.2d 257 (S.C. 2001) to support his proposition that *if* the Appellant is a shareholder, the actions of the Respondent were under the purview of oppressive behavior. Both the *Kiriakides* and *Ballard* cases outline the notion that there is no set standard to determine whether oppressive behavior has occurred or not. The *Kiriakides* opinion noted that:

“In particular, we do not believe the Legislature intended a court to judicially order a corporate dissolution solely upon the basis that a party's "reasonable expectations" have been frustrated by majority shareholders. To examine the "reasonable expectations" of minority shareholders would require the courts of this state to microscopically examine the dealings of closely held family corporations, the intentions of majority and minority stockholders in forming the

corporation and thereafter, the history of family dealings, and the like. We do not believe the Legislature, in enacting section 33-14-300, intended such judicial interference in the business philosophies and day to day operating practices of family businesses.”

*Kiriakides v. ATLAS FOOD SYSTEMS & SERV.*, 343 S.C. 587, 599, 541 S.E.2d 257 (S.C. 2001)

The South Carolina Supreme Court concluded that a case-by-case analysis was necessary to determine if shareholder oppression has occurred. The Appellant has insisted on several reasons that oppression has occurred. First, the Appellant claims that the tax liens that have accrued against the Respondent corporations somehow was oppressive to the Appellant, though he did not produce any evidence to support that his management of the corporations would have resulted in any different scenario. (R. pp. 4-13). David was able to explain at trial that the liens were mostly a result of economic hardship. (R. pp. 173-176). This argument also ignores the fact that David and Julie *personally* levied a mortgage against their home to pay off debts of PGM, which seems counterintuitive if they were attempting to oppress the Appellant *if* he were a shareholder. (R. pp. 178, 816-828). The Appellant also claims that a loan for \$10,000 from PGM again somehow oppressed the him, however, this loan was made to the Appellant’s mother, who had no ownership or other rights in any of the Respondent corporations. (R. pp. 191-192).

The Appellant further contends that he was oppressed by self-dealing transactions allegedly committed by Julie and David to the detriment of PGM. First, the Appellant failed to provide any clear evidence of this, despite retaining an expert witness to examine the financial records of PGM and CSS. During the trial, there were several instances wherein the Appellant’s expert Geoffrey Handel could not attest to how PGM’s finances operated. (R. pp. 254-259). In fact, the Appellant’s expert witness never testified to an exact amount that the Appellant was

actually allegedly owed in this matter. Furthermore, this argument has no merit, when it was clear that the Appellant and members of his immediately family received benefits to the detriment of PGM, namely, a cell phone provided to the Appellant's wife and daughter, along with the aforementioned loan to the Appellant's mother. (R. pp. 131, 140, 165, 182-183, 191-192, 829-831). Consequently, the Appellant's claims fail again: the Appellant did not provide proof that he was a shareholder, and even if his evidence was sufficient to show that he was, he was engaging the similar oppressive behavior that he is claiming the Respondents engaged in. The Respondents submitted a defense of unclean hands to the circuit court. The doctrine of unclean hands precludes a party from recovering in equity if the party acted unfairly in the matter that is the subject of the litigation to the prejudice of the opposing party. *Robinson v. the Estate Pinckney Harris*, 391 S.C. 114, 705 S.E.2d 41 (S.C. 2011) (citing *First Union Nat'l Bank of S.C. v. Soden*, 333 S.C. 554, 568, 511 S.E.2d 372, 379 (Ct.App.1998)). The circuit court was not required to rule on the unclean hands defense because it was clear from the record that the Appellant was not a shareholder, and thus the oppressive claim could not proceed notwithstanding the defense. Nevertheless, the Respondents would submit that even if the Appellant would be found to be a shareholder, not only does he not have sufficient evidence to support his shareholder oppression cause of action, this claim would be barred by the equitable defense of unclean hands. Furthermore, as noted above, the Appellant admitted that he believed that Julie and David engaged in transactions that benefited them to the detriment of PGM since 1999, yet did nothing. (R. pp. 129-130). As previously discussed, the Statute of Limitations would additionally bar the claims of the Appellant in regards to shareholder oppression.

**V. The circuit court did not err in failing to find that Respondent Carolina Storefront Systems, Inc. is a successor corporation of Piedmont Glass & Mirror Company, Inc.**

Much like the argument in Paragraph 4 above, the Appellant is contending that the circuit court should have ruled on whether CSS was a successor corporation to PGM. This argument likewise is ineffective due to the fact the Appellant failed to prove he was a shareholder in PGM and he presented no evidence that he had any interest in CSS independent of his claims against PGM. The circuit court, therefore, had no reason to rule on that issue, given the Appellant's lack of standing to make those claims.

Despite this contention, the Appellant has requested a ruling from this Court on that issue. The Appellant cites primarily *Nationwide Mut. Ins. Co. v. Eagle Window & Door, Inc.*, 424 S.C. 256, 818 S.E.2d 447 (S.C. 2018), which stands for the proposition that in the absence of a statute, a successor or purchasing corporation is not liable for the debt of a predecessor or seller, with four exceptions. The primary two exceptions noted by the Appellant are when “(3) the successor company was a mere continuation of the predecessor; or (4) the transaction was entered into fraudulently for the purpose of wrongfully defeating creditors' claims.” *Id.* at 263, 451 (citing *Brown v. American Ry. Express Co.*, 128 S.C. 428, 123 S.E. 97 (1924)).

Notably, the *Nationwide* case is distinguishable from the instant case due to the fact that the plaintiff in that action was an unrelated third party, whereas in the instant case, the Appellant is alleging he is actually an owner of the predecessor PGM. Notwithstanding, the Respondents concede that David was a shareholder and officer in PGM and is the sole shareholder and officer in CSS. Regardless, the third prong of the exceptions still requires this Court to exercise a “strict” test, and the *Nationwide* court notes “[a]lthough the mere continuation test is a high

burden for a plaintiff to meet, it is intentionally so, as corporate law generally favors the free transfer of assets and disfavors successor liability.” *Id.* at 269, 454.

The Appellant further argues that the fourth exception, or the fraudulent transaction exception, applies in this matter as well. The Appellant misconstrues the testimony of David, and misaligns his intentions as testified during the trial. David noted that he used the mortgage levied on his home and CSS not to *evade* creditors of PGM, but rather, in order to pay them off. (R. pp. 178-181, 816-828). The Appellant also relies on the testimony of their expert witness Geoffrey Handel to suggest that CSS only paid \$5.00 in consideration for the building owned by PGM. (R. pp. 372-374). Mr. Handel ultimately acknowledged that the \$5.00 stated consideration on the title deed to CSS “could be” an arms-length transaction. (R. p. 240, lines 15-18). This again was explained by David in his testimony to show that the purpose of the loan and transaction was to protect PGM. (R. p. 199). The Appellant has failed to prove that the Respondents entered into the transaction with CSS “fraudulently for the purpose of wrongfully defeating creditors’ claims.” *Id.* 263, 451 (citing *Brown v. American Ry. Express Co.*, 128 S.C. 428, 123 S.E. 97 (1924)) (emphasis added). Based upon this, the circuit court, had it been necessary to rule on the issue, could have easily determined that the Appellant failed to meet his burden of proof that CSS was a successive entity to PGM.

## CONCLUSION

This is a convoluted case due to the nature of the relationship between the parties. It is evident that this litigation created a strain on their relationship, and undoubtedly has ruined the corporations’ finances. Ultimately, however, the evidence is clear in many respects. First, the Appellant cannot prove the existence of an oral agreement from 1995 to create a partnership as required by the Statute of Frauds. Even if the Appellant were able to convince this Court that the

Statute of Frauds does not apply, the actual terms and existence of the contract is in great question. Furthermore, the Appellant cannot prove that he paid any consideration for his shares of stock in PGM, and thus has no standing to bring this action. The overarching theme is this case is that the Appellant failed to act on many occasions. When his alleged one-year contract was completed in 1996, he did nothing. When he was presented documents that show he did not own a 50% interest in PGM in 1998, he did nothing. When he suspected the individual Respondents of gaining individual financial benefits to the detriment of PGM in 1999, he did nothing. This case is a combination of a failure to act by the Appellant, and a failure to submit any clear proof of his allegations even if he had timely acted. Furthermore, he has filed his lawsuit complaining of actions by the individual Respondents that he himself has engaged in. Ultimately, the circuit court correctly decided that this matter should be dismissed with prejudice, and we respectfully request this Honorable Court do adjudicate the same.

Respectfully submitted,

s/ Joseph L.V. Johnson  
(SC Bar No: 77477)  
JoeJohnson@SATMLLC.COM  
Saint-Amand, Thompson & Mathis, LLC  
210 South Limestone Street, Suite 1  
Gaffney, South Carolina 29340  
Tel.: 864-489-6052  
Fax: 864-489-5406

Attorney for Respondents

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Other Counsel of Record:

Thomas A. Belenchia (SC Bar No: 2371)

tab@abizlaw.com

Chelsea R. Rikard (SC Bar No: 102355)

crr@abizlaw.com

P.O. Box 3421

Spartanburg, SC 29304

Tel: 864-699-9803

Attorneys for Appellant