THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHEROKEE
COUNTY
Court of Common Pleas

J. Mark Hayes, II, Circuit Court Judge

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

David L. O'Shields, Appellant

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

APPELLANT'S FINAL BRIEF-INITIAL

October 5, 2020

s/Chelsea R. Rikard
A BUSINESS LAW FIRM, LLC
Thomas A. Belenchia (SC. Bar No. 2371)
tab@abizlaw.com
Chelsea R. Rikard (SC Bar No. 102355)
crr@abizlaw.com
Attorneys for Plaintiff
P.O. Box 3421
Spartanburg, SC 29304 T:
(864) 699-9803
Attorneys for Appellant

Other Counsel of Record:
Joseph L.V. Johnson
Saint-Amand, Thompson & Mathis,
LLC 210 S. Limestone Street, Suite
1 Gaffney, South Carolina 29340
Attorney for
Respondent (864)
489-6052

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STATEMENT OF THE CASE

Appellant David Lynn O'Shields ("Lynn") filed this action in 2007 against Respondents David Taylor ("David"), and Julie Taylor ("Julie"), and Piedmont Glass and Mirror Company, Inc. ("PGM"). (Summons and Complaint; R. p. 17-30). This matter involves an ownership dispute between Lynn, and Julie and David Taylor, for the ownership of a glass installation business in Cherokee County, South Carolina. The causes of action included: Accounting, Conversion, Ultra Vires, Conflict of Interest Transaction, Breach of Fiduciary Duties, Preference, Judicial Dissolution of Corporation, Civil Conspiracy, Negligent Misrepresentation, violation of the South Carolina Payment of Wages Act, claim for Workers Compensation, Negligence/Gross Negligence, and Negligent Supervision. (Id.; R. p. 17-30) At the same time, Appellant filed a petition with the South Carolina Worker's Compensation Commission. (Transcript, pg. 40; R. p. 120, lines 11-14) Respondents filed counterclaims including: Breach of Duty of Loyalty, Violation of the South Carolina Corporate Code § 33-8-420, and Breach of Fiduciary Duties. In 2014, Appellant filed an Amended Summons and Complaint and added Respondent Carolina Storefront Systems, Inc. ("CSS"). (Amended Summons and Complaint; R. p. 50-65). The Amended pleadings kept all of the original causes of action with the exception of the cause of action pursuant to the Workers Compensation Act, and it added the following causes of action: Fraudulent Transaction, Shareholder Oppression pursuant to S.C. Code Ann § 33-14-300, and Court Appointment of Receiver. (Id.) In the amended pleadings, Appellant sought a finding that he was oppressed as a shareholder, a divestment of profits that Respondents Taylor misappropriated, a finding that he was also a shareholder in Carolina Storefront Systems, Inc. and judicial dissolution and liquidation of assets of Piedmont Glass & Mirror Company, Inc. and Carolina Storefront Systems, Inc. Respondents filed the same counterclaims found in their original Answer and Counterclaim.

(Amended Answer and Counterclaim; R. p. 66-90).

In February 2019, this case was tried as a bench trial before the Honorable J. Mark Hayes, II. Appellant's causes of action for violation of the South Carolina Payment of Wages Act and Negligence/Gross Negligence were dismissed prior to the trial. All of Appellant's causes of action rested on the central issue of whether he was a shareholder in PGM. On June 4, 2019, the circuit court issued an Order finding that Appellant was not a shareholder in either of the Respondent entities, thus all of his causes of action are moot, as were Respondent's counterclaims. (Trial Order; R. p. 4-13). The Court did not rule on the causes of action individually or specifically, rather it applied the Statute of Frauds and the Statute of Limitations to find that Appellant failed to meet his burden of proof that he was a partner or a shareholder. (Id.). Appellant timely filed a Motion to Alter or Amend Judgment. (Appellant's Motion to Alter or Amend; R. p. 91-100). The Court received oral arguments on the motion from both parties and issued an Order on January 2, 2020. (Alter or Amend Order; R. p. 14-16).

FACTUAL BACKGROUND

Lynn is the brother of Respondent Julie Taylor and the brother-in-law of Respondent David Taylor (collectively referred to as the "Taylors"). (Transcript pg. 16; R. p. 101, lines 18-21).

I. The sole proprietorship of Piedmont Glass & Mirror Company

In the early to mid-1990's, Julie Taylor purchased a glass installation business called Piedmont Glass, Incorporated. (Transcript, pg. 181-183; R. p. 145-147). She renamed the business Piedmont Glass & Mirror and operated this business as a sole proprietorship. (Transcript, pg. 185-186; R. p.149-150). In 1995, Julie began to experience difficulty running and growing the business, therefore she approached Lynn and asked him to leave his current job and come work for her to manage her employees and "help her run and grow the business." (Transcript, pg. 18; 186; R. p. 103, lines 23-25; 150, lines 16-25). Lynn testified that Julie asked him to come work for her for one year at a reduced salary and in exchange, he would become a 50% partner in Piedmont Glass & Mirror. (Transcript, pg. 17; R. p. 102, lines 3-24). Lynn's wife, Sarah O'Shields, bore witness to this conversation and testified that while she and Lynn were at the home of Lynn and Julie's parents, Julie approached Lynn, expressed that she was having difficulty managing her crews, and offered for Lynn to work for her for one year at a reduced salary, in exchange for 50 percent of the business. (Transcript, pg. 105-106; R. p. 134-135). Additionally, Mark O'Shields, who is the brother of both Julie and Lynn, worked for Julie at Piedmont Glass and Mirror. (Transcript, pg. 116; R. p. 142, lines 9-14). Mark testified at trial that he was approached by Julie regarding this topic while he was also working for her. (Transcript, 117; R. p. 143, 1-18). He testified that Julie approached him and explained why she chose Lynn to be her business partner rather than him; "She said 'I want to explain to you why I chose Lynn to be my business partner and instead of you' . . . 'So, she told [Lynn] that, if he would come run the commercial glass business for one

year, that he would be 50 percent owner of the business and that's it.'" (Transcript, pg. 117; R. p. 143, lines 1-18). Lynn acknowledges this was an oral agreement and they did not have a written partnership agreement. (Transcript, pg. 48; R. p. 125, lines 5-7).

II. The Partnership of Piedmont Glass & Mirror Company

At the time that Julie approached Lynn with this offer, he was working for a manufacturing plant called Cone Mills. (Transcript, pg. 17; R. p. 102, lines 1-2). In 1994, Lynn worked exclusively for Cone Mills and his W-2 for 1994 reports that he earned $33,652.82 in income. (Lynn Tax Returns; R. p. 283-291). In the middle of 1995, Lynn accepted Julie's offer and went to work for her. (Transcript, pg. 18-19; R. p. 103-104; Lynn Tax Returns; R. p. 283-291). Lynn's W-2 for 1995 reports that he earned $21,680.16 from Cone Mills and $1,890.00 from Piedmont Glass & Mirror. (Lynn Tax Returns; R. p. 283-291). In 1996, Lynn worked exclusively for Julie and his tax return for that year reports that he earned $10,920.00 in wages. (Lynn Tax Returns; R. p. 283-291). The year of work pursuant to the agreement ranged from middle of 1995 until middle of 1996. (Transcript, pg. 48; R. p. 125, lines 17-22). Further, when Lynn began to work for Julie in 1995 he brought personal assets into the business including his Toyota pick-up truck as well as his personal tools, including power tools and hand tools; all of which he permitted the business to use. (Transcript, pg. 20-21; 51; R. p. 105-106; R. p. 127, lines 14-25). After Lynn worked for Julie for one year, he believed that he had become a 50% partner in Piedmont Glass & Mirror. (Transcript, pg. 50; R. p. 126, lines 12-22). Respondents have maintained the position that Lynn never became a partner. (*See generally*, Answer and Counterclaim; R. p. 31-49; Amended Answer and Counterclaim; R. p. 66-90; and Arguments by Respondent Counsel on Midtrial Motions, Transcript pg. 169- 170; R. p. 266-267).

In 1996, while Lynn was working for Julie, David Taylor decided to withdraw funds from

his retirement account and loaned it to Julie. (Transcript, pg. 227; 250-251; R. p. 170, lines 7-15; R p. 188-189). His 1996 tax return reports that he withdrew $42,231.56 from his retirement account, which he testified that he loaned to Julie to use in Piedmont Glass & Mirror. (1996 Taylor Tax Return; Transcript, pg. 227-228; R. p. 812; R. p. 170-171). Julie testified that this amount was paid by David prior to Piedmont Glass & Mirror incorporating. (Transcript pg. 213-214; R. p. 167-168).

III. The partnership incorporated into Piedmont Glass & Mirror Company, Inc.

In 1999, three years after Lynn earned a 50% share in the partnership and after David loaned Julie money, the partnership decided to incorporate into a statutory close corporation. (PGM Corporate Records; R. p. 292-295). Therefore on December 10, 1998, David, Julie, and Lynn executed the following documents:

- Articles of Incorporation for Piedmont Glass & Mirror Company, Inc. ("PGM") with effective begin date as of January 1, 1999.
- Business Tax Application, that identified the following owners and amounts: David Taylor, 20%; Julie Ann Taylor, 40%; David Lynn O'Shields, 40%.
- Waiver of Technical Compliance with § 33-16-200(a), identifying David Taylor, Julie Taylor, and David Lynn O'Shields as shareholders and the holders of all "of all issued and outstanding shares of stock of the" corporation.
- Waiver of Notice of Organizational Meeting of Shareholders, signed by David Taylor, Julie Taylor, and David Lynn O'Shields as shareholders.
- Minutes of Organizational Meeting of Shareholders identifying the following shareholders: Julie Ann Taylor holder of 400 shares; David Lynn O'Shields holder of 400 shares; David L. Taylor holder of 200 shares.
- Shareholder Management Agreement signed by David Taylor, Julie Taylor, and David Lynn O'Shields as shareholders.
- Stock Transfer Ledger identifying the following shareholders: Julie Ann Taylor holder of 400 shares; David Lynn O'Shields holder of 400 shares; David L. Taylor holder of 200 shares.[1]

(PGM Corporate Records; R. p. 292-310, 314-317, 329-338).

[1] Respondents David and Julie Taylor testified that the signatures on the Stock Transfer Ledger are not theirs. (Transcript, pg. 193-194; R. p. 155-156). Julie Taylor admits that David Taylor maintained control of corporate records. (Transcript, pg. 194-195; R. p. 156-157).

Lynn testified that the partnership transformed into the corporation. (Transcript, pg. 22; R. p. 107, lines 18-22). The assets, the equipment, and the bank accounts of the partnership transferred into PGM, and they continued to operate in the same industry as the partnership. (Transcript, pg. 22; R. p. 107). At the time, Lynn noticed that the incorporating documents described above identified him as a holder of 400/1,000 shares rather, than 500; however, he relied upon the representation by David and Julie, that despite the documents showing 400 shares, he actually owned 500 shares (or 50%). (Transcript, pg. 23-24; R. p. 108-109). At trial, Julie Taylor admitted that her prior deposition testimony, given in April 2010, confirmed that the Business Tax Application, which identified Lynn as holder of 40% of PGM, was true, accurate, and correct to the best of her knowledge. (Transcript, pg. 200-201; R. p. 160-161). She also admitted that she signed the Shareholder Management Agreement that identified Lynn as a shareholder. (Transcript, pg. 203-204; R. p.162-163).

In 2001, PGM held a special meeting and decided to obtain a loan in order to acquire the building in which it operated. (Transcript, pg. 28-29; PGM Corporate Records; R. p. 111-112; R. p. 312-313). When PGM incorporated, and David was a shareholder, David and Julie represented to Lynn that the bank required David be an owner in the corporation, even though the incorporation occurred two years before the loan was obtained. (Transcript, pg. 23; R. p. 108). In order to acquire the loan, Lynn was required to pledge all of his personal assets, including his home, his car, and his wife's jewelry, as collateral for this loan. (Transcript, pg. 36-37; R. p. 116-117). Lynn testified that if he were not a shareholder in PGM, he would have not pledged his assets on a loan for the corporation. (Transcript, pg. 37; R. p. 117, lines 13-15).

Beginning in 1999, PGM began to file tax returns as an S-Corporation. (PGM Tax Returns; R. p. 375-489). These returns were prepared and signed by David Taylor, who was and still is a

Certified Public Accountant. (PGM Tax Returns; R. p. 375-489; Transcript, pg. 257, 264; R. p. 195, lines 20-24; R. p. 200, lines 10-15). From 1999 until 2006, every tax return prepared by David and filed by PGM identified to the IRS that Lynn was a shareholder holding 40% of shares of the corporation. (PGM Tax Returns; R. p. 357-420). David admitted in trial testimony that he is aware, as CPA, that if a tax return contains an error, he could have filed an amended return. (Transcript, pg. 264-265; R. p. 200-201). At trial, Julie Taylor admitted that her deposition testimony, given in April 2010, confirmed that these tax returns were true and accurate and correct to the best of her knowledge. (Transcript, pg. 199; R. p. 159, lines 22-25).

All corporate formalities, including annual meeting minutes and corporate resolutions that were executed from the date of incorporation until 2007 reported that all shareholders were present, and were signed by Lynn, as well as David and Julie. (PGM Corporate Records; R. p. 292-324).

IV. Shareholder Oppression and Fiduciary Duties

While Lynn was involved in PGM from 1999 until 2007, he was excluded from fully partaking in the business as a shareholder in that he was refused access to the Corporations' financial records by David, he did not have authority to sign checks, to hire or fire employees, or to make deposits. (Transcript pg. 35-36; R. p. 115-116). In regard to the handling of PGM's finances and financial records, Lynn testified that David Taylor handled the finances of the business. (Transcript, pg. 34- 35; R. p. 114-115). Julie Taylor testified that it was David's responsibility to ensure that PGM's taxes were paid on time. (Transcript, pg. 199; R. p. 159, lines 17-21). David testified that Julie handled the checkbook and he "handled preparing . . . the financial statements and legal reporting requirements and so forth." (Transcript, pg. 256; R. p. 194, lines 12-18). At some point prior to 2007, Lynn received a call from Internal Revenue Service regarding past due taxes for PGM. (Transcript, pg. 36; R. p. 116, lines 5-7). Records presented at trial, revealed that

PGM began to accrue tax liens and penalties filed by the IRS and South Carolina Department of Revenue, as early as 1998. (Transcript, pg. 146-147; Tax Liens; R. p. 251-252; R. p. 652-793). Most of the liens accrued from the years 2005-2013. (Transcript, pg. 147; R. p. 252, line 9). On direct examination when asked about the accrual of these liens, David Taylor explained that they were related to a cash flow problem. (Transcript, pg. 230-231; R. p. 173, lines 16-22). However, on cross examination David Taylor admitted that some were not "filed in a timely manner" because they were forgotten about, even though it was his responsibility to ensure that they were filed on time. (Transcript, pg.251-253; R. p. 189-191). Further, David admitted that in December 2005 PGM loaned Lynn and Julie's parents $10,000.00. (Transcript, pg.254-255; 2005 Check; R. p. 192-193; R. p.794-795). He also admitted that in November 2005 – the month prior to writing this $10,000.00 check- PGM had two tax liens filed against them in an aggregate amount of approximately $7,000.00. (Transcript, pg. 255; Tax Liens; R. p. 193, lines 5- 25; R. p. 652-793 (page 652 showing liens accrued in September and November 2005)). Further, in 2006 and 2007, when PGM continued to accrue tax liens, PGM's check registry demonstrates that PGM made numerous payments to Bank of America for loan payments. (PGM Check Registry; R. p. 796-810). David Taylor admitted, however, that he had his mortgage through Bank of America at one time, and that PGM did not have any loans with Bank of America. (Transcript, pg. 257-259; R. p.195-197). In response to this admission, he states that he "may of advanced some money out of our personal account;" therefore he believes PGM is required to pay their personal payments. (Transcript, pg. 259-260; R. p.197-198).

In 2007, Lynn suffered a severe and debilitating accident while working on a project for PGM. (Transcript, pg. 37-38; R. p. 117-118). He fell from a significant height while standing on a ladder and crushed his right heel bone. (Transcript, pg. 37-38; R. p. 117-118).

After numerous and extensive surgeries, Lynn ultimately decided to remove his right leg below the knee due to the invasive and severe pain. (Transcript, pg. 38; R. p. 118, lines 5-20). At the time of his accident, Lynn's treating orthopedic surgeon instructed him not to return to work for six months. (Transcript, pg. 39; R. p.119, lines 22-25). He could not drive during this time. (Transcript, pg. 39-40; R. p. 119-120). Lynn communicated this prognosis to David and Julie. (Transcript, pg. 39; R. p. 120). Julie admitted that she received a note from his treating doctor regarding the same. (Transcript, pg. 197-198; R. p. 157-158).

Despite Lynn's injury, David and Julie believed that he could have continued to work for PGM in their office. (Transcript, pg. 191-192, 244; R. p.153-154; R. p.185, lines 10-23). At this time, in 2007, Lynn was no longer provided notice of shareholder meetings, and he did not partake in any shareholder meetings of any kind. (PGM Corporate Records; R. p. 325-329). When he attempted to return to work after six months, as prescribed by his treating physician, Lynn was told the he "could stay there as long as [he] wanted to, but [he] was not going[sic] to get paid." (Transcript, pg. 40; R. p. 120, lines 6-10). This action was instituted in 2007 shortly following these incidents. (Summons and Complaint; R. p. 17-30). In the Complaint, Lynn alleged that the corporate documents of PGM represented that Lynn owned 40% of the shares in PGM and that Respondents Taylors represented to him that he actually owned 50% of the shares. (Summons and Complaint; R. p. 17-30). Both of these allegations were denied by Respondents. (Answer and Counterclaim; R. p. 31-49). Up until the time of his accident he was permitted to partake in shareholder meetings and he was listed as a shareholder on the corporate tax returns. (*See generally*, Corporate Tax Returns; R. p. 375-489; *compare* PGM Corporate Records prior to 2007 and post 2007; R. p. 292-338). However, following his accident he was excluded entirely from the business and was not allowed to partake in any decisions nor was he identified as an owner any

longer. (*compare* PGM Corporate Records prior to 2007 and post 2007; R. p. 292-338; *see* post-2007 PGM Tax Returns; R. p. 421-489; Transcript, pg. 33-34; R. p. 113-114).

He testified that he was not provided notice of nor was he allowed to partake or vote in 2008, 2009, or 2011 special meetings. (Transcript, pg., 33-34; R. p. 113-114; post 2007 PGM Corporate Records; R. p. 292-338). Further, from 2009 until the time PGM was administratively dissolved in 2013, the tax returns filed by PGM failed to list Lynn as a shareholder.[2] (PGM Tax Returns; R. p. 421-489; Certificate of Dissolution; R. p. 371).

V. Incorporation of Carolina Storefront Systems, Inc.

In 2011, four years after the present action was filed and while it was still pending, David Taylor filed to create a new statutory close corporation called Carolina Storefront Systems, Inc. ("CSS"). (CSS Corporate Records; R. p. 339-370). David Taylor was the only officer and sole owner. (Transcript, pg. 260; R. p. 198, lines 10-15; CSS Corporate Records; R. p. 339-370). When asked for the reason why this entity was created, David stated that he met with a consultant and he explained the financial position of PGM, which included the "potential for some federal liens down the road, and existing liens we had to Piedmont Glass . . . SCDOR was knocking at the door getting ready to jerk our license . . [s]o we had to get refinancing done and the only way we could do it was start a new entity." (Transcript, pg. 234; R. p. 177, lines 14-25). After CSS was created, PGM was ultimately forfeited and administratively dissolved by the Secretary of State. (Certificate of Dissolution; R. p. 371). He explained that the reason PGM was forfeited in 2013 was because some of the tax liens "and a potential for so many others to come forward, and an inability to secure any type of products." (Transcript, pg. 258; R. p. 196, lines 2-6).

At the same time that CSS was created, David and Julie, as shareholders and officers of

[2] The 2007 and 2008 tax returns were not provided in litigation.

PGM, held a special meeting and voted to sale all real and personal property of PGM to CSS. (PGM Corporate Records; R. p. 326). Lynn was excluded from participation in this vote as he was not provided notice of the meeting nor did he cast a vote. (Transcript, pg. 34, 212; R. p. 114, lines 2-14, p. 166, lines 9-13; PGM Corporate Records; R. p. 326). On October 31, 2011 Julie, as President of PGM, executed a deed to sale the real property owned by PGM to CSS for $5.00. (Deed; R. p. 372-374). Immediately after this purchase, the real property was appraised and mortgaged. (Transcript, pg. 260; R. p. 198, lines 19-21). Julie Taylor admitted in trial testimony that the work done by CSS is not different than the work done by PGM. (Transcript, pg. 198; R. p. 158, lines 13-15).

As a result of not being able to return to PGM after his accident, Lynn testified that he "came close losing everything." (Transcript, pg. 42; R. p. 121, lines 18-22). He has lost money as a result of being excluded from participation in PGM as a shareholder. (Transcript, pg. 42-43; R. p. 121-122). He now lives on disability payments. (Transcript, pg. 43; R. p. 122, lines 7-9). He has suffered emotionally from the accident and the subsequent ouster from PGM. (Transcript, pg. 43; R. p. 122, lines 10-24). He has been diagnosed and is treated for PTSD. (Transcript, pg. 43; R. P. 122, lines 14-24). His wife, Sarah, testified that the accident and the events that followed have greatly diminished him as a person, in that he is not as active civilly, with his family, or even with her. (Transcript, pg. 108; R. p. 136, lines 3-17). This has affected his relationship with his children. (Transcript, pg. 108; R. p. 136, lines 3-17). The events as described above have caused them to struggle to pay their bills as the amount that he receives now is less than what he made in one week with PGM. (Transcript, pg. 108-109; R. p. 136-137).

VI. Trial Testimony of Expert John P. Freeman

At trial, Appellant's case in chief relied upon the expert testimony of Professor John P.

Freeman. (*See generally*, Transcript, pg. 69; R. p. 206). Professor Freeman has had an illustrious, 35-year career as an educator at the University of South Carolina School of Law, beginning in 1973 and teaching securities courses and business courses covering agency, partnership, corporations, LLCs, business planning, corporate finance, and legal accounting. (Transcript, pg. 70; R. p. 207, lines 8-17). In his business courses, he taught law students how business entities such as partnerships and corporations were formed, how they are and should be managed, about the duties and obligations of its officers and owners, including the majority shareholders, and about the principals governing business governance. (Transcript, pg. 71-72; R. p. 208-209). He has testified before Congress and the South Carolina General Assembly, and he has worked with the South Carolina Attorney General by providing testimony related to business structure and governance. (Transcript, pg. 72-73; R. p. 209-210). He has provided expert testimony on numerous occasions for matters involving business governance malfeasance and pyramid schemes. (Transcript, pg. 72-73; R. p. 209-210). He has never been unqualified to testify as an expert when proffered to do so. (Transcript, pg. 74; R. p. 211, lines 21-25). Professor Freeman was qualified to testify in the present matter as an expert in the field of proper conduct by business managers in factual settings involving business governance decisions and stock issuance actions. (Transcript, pg. 75; R. p. 212, lines 7-13).

In regard to the present matter, Professor Freeman reviewed (1) the corporate documents for Piedmont Glass & Mirror, PGM, and Carolina Storefront Systems; (2) the tax returns filed by PGM; (3) deed from PGM to CSS; (4) he read the transcripts of deposition testimony for Lynn, Julie, David and David's 30(b)(6) deposition; (5) he read the deposition testimony of Lynn before the Worker's Compensation Commission; and (6) he read the testimony of Julie Taylor before the Worker's Compensation Commission. (Transcript, pg. 75-77; R. p. 212-214; Deed; R. p. 372).

Professor Freeman offered three opinions: (1) regarding Lynn's status, he opined that (a)Lynn was a partner in Piedmont Glass & Mirror, (b) he was a shareholder in PGM, and (c) a shareholder in CSS; (2) CSS is a mere continuation or successor of PGM; and (3) the Taylors, as holders of the majority of shares for PGM, engaged in oppressive behavior towards Lynn as the minority shareholder. (Transcript, pg. 78, 84-85, 88-89; R. p. 215, lines 6-19; 221-222, 224-225).

First, Professor Freeman opined that Lynn gained ownership in the unincorporated entity of Piedmont Glass & Mirror by working for one year at a reduced rate, thus he earned sweat equity. (Transcript, pg. 78, 93; R. p. 215, lines 6-19; R. p. 288, lines 1-25). He acknowledged that the agreement was oral and the partnership was a handshake partnership. (Transcript, pg. 78; R. p. 215, line 20). He pointed out that logic suggests that individuals will not take a lower paying job when they could keep their old one unless there was an incentive to do so. (Transcript, pg. 79; R. p. 216, lines 2-8). Professor Freeman took great interest and afforded great weight to Julie's own testimony before the Worker's Compensation Commission in which she *twice* referred to Lynn as her partner. (Transcript, pg. 79; R. p. 216, lines 9-24). He states "[t]hose are her words under oath before a tribunal at the hearing, and I take that into account at – because the idea of him becoming a partner, and then becoming a co-owner of a, of a stock company kind of is a continuum to me." (Transcript, pg. 79; R. p. 216, lines 20-24). He references this testimony by stating, "[l]ater on in their testimony on page 27 the worker's comp hearing, again speaking about Lynn, she said I would expect an adult, this is Julie, testimony under oath, what was a part owner of a company to have more interest in his company. That, again, suggests that he is part owner of the company." (Transcript, pg. 80; R. p. 217, lines 8-13). Further, Professor Freeman found that Lynn made contributions to the partnership – not just in sweat equity- but by contributing free use of his truck and equipment. (Transcript, pg. 80-81; R. p. 217-218). He further relied upon the corporate documents, including

the shareholder meeting minutes, shareholder management agreement, stock transfer ledger, and the waiver of technical compliance in support of his opinion that he was a shareholder. (Transcript, pg.81; R. p. 218, lines 5-24). He opined that the Waiver of Technical Compliance, that was executed upon incorporation, reveals that Lynn was a holder of issued and outstanding shares, and as such "he's not just a subscriber who didn't pay." (Transcript, pg. 81, 86; R. p. 218, lines 17-24; R. p. 223, lines 15-25). Professor Freeman continues to discuss that he takes into account that Lynn has to provide a personal guarantee for a business loan for PGM; "[t[he reason I take that into account is there not a single, sane, understanding, thinking, at-will employee anywhere, who, for the benefit of being an at will employee and nothing more, would be willing to pledge, to sign a personal guarantee that basically puts all of your personal wealth on the line." (Transcript, pg. 81-82; R. p. 218-219). Lastly, he found the corporations representations on tax returns that Lynn was holder of 400 shares as supportive of his opinion that Lynn was indeed a shareholder. (Transcript, pg. 82; R. p.9, lines 11-17).

Second, he opined that CSS is a mere continuation or successor corporation of PGM. (Transcript, pg. 84-85; R. p. 221-222). On the morning of the trial, Professor Freeman drove by the building owned and operated by CSS located 906 S. Granard St. Gaffney, SC, and found that the sign at the front of the building still advertises that Piedmont Glass & Mirror, Inc. operates at that location (Transcript, pg. 83; R. p. 220, lines 8-22). He understood that CSS operates from the same premises as PGM, it still has the same assets as PGM, and it is the same operation as PGM. (Transcript, pg. 84; R. p. 221, lines 4-8). The fact that David Taylor is the sole owner of CSS did not change his mind of a de facto merger; "David has now taken a hundred percent control, but that, doesn't change my mind when it comes to succession because David and his wife were the Taylor family, [sic]with their 60/40, if you accept that, were in control or de facto control along

the way." (Transcript, pg. 84; R. p. 221, lines 8-12). In this case, he believes there to be a de facto merger because all assets were moved from one company to another and the same controller controls both entities. (Transcript, pg. 84; R. p. 221, lines 13-17). He also opines that succession liability can be found where, as here, there has been a wrongful exclusion of Lynn and a fraudulent conveyance of PGM's assets to CSS for the purpose of defeating Lynn's claims as an owner of the business. (Transcript, pg. 84; R. p. 221, lines 17-23).

Third, Professor Freeman analyzed the aforementioned record and opined that the Taylors engaged in oppressive conduct as the holders of the majority of shares. (Transcript, pg. 94; R. p. 229, lines 10-22). He believes there are good grounds to believe that Lynn was enticed to leave his employment, work for one year, and get an ownership interest, that later transferred into PGM (Transcript, pg. 85; R. p. 222, lines 10-20). Then when he is disastrously injured in 2007, "the corporate paperwork changes where he is no longer a shareholder," and the Taylors suddenly take the position that Lynn never paid for his subscription and was never a shareholder. (Transcript, pg. 85-86; R. p. 222-223). In his experience, Professor Freeman discussed that "when you are dealing with shares of stock and issuing them to people or offering them to people, it's well recognized that there's a duty on the part of the those doing the offering, whether it's corporation or the control group, to give somebody in Lynn's position 'full and fair disclosure of all material facts concerning those shares." (Transcript, pg. 88; R. p. 224, lines 4-9). If there was an obligation for him to pay for his shares, then this should have been communicated to him. (Transcript, pg. 88; R. p. 224, lines 10-12). He finds that the Taylors did not fulfill their duties to Lynn as controllers and holders of a majority of shares. (Transcript, pg. 88-89; R. p. 224-225). Further, he finds supportive of this opinion the fact that Lynn was denied access to critical corporate documents and financial records. (Transcript, pg. 91; R. p. 227, lines 15- 20). When asked about his opinion for Lynn to be able to

access the benefit of his shares, Professor Freeman states "Well he is frozen out." (Transcript, pg. 90; R. p. 226, lines 8-22). He believes Respondent's position that he was never a shareholder is the "ultimate oppression, freezeout, squeeze-out case." (Transcript, pg. 90-91; R. p. 226-227).

VII. Trial Testimony of Expert Geoffrey Handel

Appellant's case in chief at trial also relied upon expert testimony provided by Geoffrey Handel. Mr. Handel was offered in the areas of forensic accounting, tax preparation, and fraud examinations. (Transcript, pg. 121; R. p. 231, lines 4-22). Mr. Handel has been certified to testify as an expert in both criminal and civil trials. (Transcript, pg. 121; R. p. 231, lines 14-16). In his review as an expert, Mr. Handel reviewed financial records of PGM and CSS, including the tax returns for both PGM and CSS, American Express bills from 2003-2006, bank records for CSS, statements for two MBNA cards, check stubs, as well as the tax liens. (Transcript, pg. 122-123; R. p. 232-233). He also read the deposition testimony provided by David Taylor in his individual and 30(b)(6) depositions. (Transcript, pg. 123; R. p. 233, lines 2-9). Mr. Handel has an extensive background in working with taxes, and in his experience, as a fraud examiner he looks at tax returns as being substantially correct because they are signed under penalty of perjury. (Transcript, pg. 125-126; R. p. 234-235). In his opinion, when a Certified Public Accountant, such as David Taylor, signs a tax return under penalty of perjury it is reasonable to assume that what is represented on that return is accurate and true and this indicates that the company was taking position that Lynn was an owner of 40% of the shares of the corporation. (Transcript, pg. 126; R. p. 235, lines 10-17). Additionally, Mr. Handel pointed out that if a CPA, who filed a return, later realizes that a mistake has been made on a return, then he or she can file an amendment. (Transcript, pg. 127; R. p. 236, lines 4-12). David Taylor acknowledged being aware of this fact as well. (Transcript, pg. 264; R. p. 200, lines 16-19).

Mr. Handel also provided clarification as to how the Rules of Attribution treat Mr. and Mrs. Taylor. (Transcript, pg. 128; R. p. 237, lines 9-21). The Rules of Attribution are found within the Internal Revenue Code and treat married couples as one. (Transcript, pg. 128; R. p. 237, lines 9-21). Therefore, under the Rules when David and Julie took the position on their 2012 PGM return that they were the only two owners, then they are treated as one, and this supports the assertion that there was no ownership change into CSS. (Transcript, pg. 128-129; R. p. 237-238).

Next, Mr. Handel reviewed the sale of the real and personal property of PGM to CSS to determine if it was an arms-length transaction. (Transcript, pg. 129-131; R. p. 238-240). What he found was that the purchase price listed on the deed was $5.00, however, CSS, the successor corporation, went to the bank, got a loan for approximately $180,000.00 and acquired the building. (Transcript, pg. 132; R. p. 241, lines 4-15; Deed; R. p. 372). "The money then went to the first corporation and paid off an existing loan it appears, and then gain and loss was computed based on that amount." (Transcript, pg. 132; R. p. 241, lines 4-9). The building was being offered at $320,000.00, but "the building was conveyed for the amount of the loan, which is kind of unusual." (Transcript, pg. 132; R. p. 241, lines 10-15). This is unusual because normally, for an arm's length transaction, the first corporation would have sold it for fair market value, which would have been reported as a gain to the first corporation and distributed to the shareholders. (Transcript, pg. 132; R. p. 241, lines 17-22) It was Mr. Handel's opinion that this did not happen here. (Transcript, pg. 132; R. p. 241, lines 23-25).

Third, Mr. Handel reviewed the records to determine if there had been any self-dealing within PGM. His review included an examination of statements for two credit cards through MBNA. (Transcript, pg. 133; R. p. 242, lines 16-21). One account ends in 4773 and the other ends in 3569. (Transcript, pg. 133; R. p. 242, lines 16-21; MBNA 4773; R. p. 490- 575; MBNA 3569; R. p. 576-

627). In regard to these specific accounts, Mr. Handel understood from the deposition testimony that he read, that these cards were used for primarily personal transactions until they were transitioned to be used by PGM in 2005 or 2006. (Transcript, pg.134; R. p. 243, lines 6-21). However, upon the transition to exclusive use by PGM, the balances were not paid off. (Transcript, pg. 134; R. p. 243, lines 22-24). He identified that David Taylor, in his deposition, acknowledged that several transactions on these accounts were personal, including Paypal transactions, a transaction at a diamond store, and a payment to play paintball. (Transcript, pg. 135; R. p. 244, lines 15-22). He then reviewed the books and finances to see how these personal transactions were treated and whether they were paid off by the individuals. (Transcript, pg.135-136; R. p. 244-245). His conclusion was that "the deposition indicated that Mr. Taylor acknowledged that these items should be reimbursed, but, in the records, there's no evidence that they ever were." (Transcript, pg. 136; R. p. 245, lines 6-9). However, he did find that in the check stubs from PGM, "there are some MBNA payments in the[sic] checks that I have, and yet there are not indication of any reimbursement for any of the items that have been acknowledged as personal." (Transcript, pg. 136; R. p. 245, lines 9-12 MBNA Check Stubs; R. p. 628-651). He stated that when an individual removes or takes money from a corporation, it can affect the corporation in many ways, such as creating a cash flow problem, which can cause the corporation to accrue things such as tax liens. (Transcript, pg. 136-137; R. p. 25-246). The MBNA check stubs that he reviewed included checks written to pay off the MBNA accounts prior to them being used exclusively by the business. (Transcript, pg. 138-139; R. p. 247-248). The checks were written from the account of Piedmont Glass & Mirror, and there are a total of 18 checks made from June 2003 through December 2005. (MBNA Check Stubs; R. p. 628-651; Transcript pg, 139; R. p.248, lines 1-19). When looking at the MBNA statements he noticed numerous transactions that he could not relate to the business of

commercial glass installation including: Home & Garden, Eddie Bauer, Eagle Outfitters, Vans Skatepark, Williams and Sonoma, Pottery Barn, University of Memphis - Mr. Handel clarified that David Taylor admitted this transaction was personal and was made by mistake. (Transcript, pg. 140-141; R. p. 249-250).

VIII. Appellant's arguments in trial motions and closing arguments.

At trial, Appellant presented arguments in response to Respondent's directed verdict motion following the close of Appellant's case in chief, and in closing arguments. (*See generally*, Transcript, pg. 164-169; 291-298; 303-304; R. p. 261-266, 268-275, 276-277). Appellant of course relied upon the factual record presented before the circuit court, and presented above, to aver that Appellant met his burden of proof regarding the three main elements of his case: (1) he was a shareholder in PGM and CSS; (2) he was oppressed as a the holder of a minority of shares of the corporations; and (3) CSS is a successor corporation of PGM. (Id.). Additionally, Appellant presented arguments that cited statutory and case law including: the statutory provision permitting the issuance of shares in a corporation for services performed, the doctrine of equitable estoppel and partial performance as an exception to the Statute of Frauds, the presentation of two secondary source cases from New York that are illustrative of the doctrine of equitable estoppel, the standards regarding shareholder oppression and shareholder squeeze-out, and the standard for holding a successor corporation liable for the debts and obligations of a predecessor corporation. (Id.)

Appellant's arguments before the circuit court identified that the Respondent's case relies upon a contradictory argument in that they ask the Court to focus on the lack of formalities regarding the partnership buy-in – i.e. that there was no written agreement – yet, they then ask the court to disregard the myriad of corporate formalities they executed identifying him as a shareholder in PGM. (Transcript, pg. 167; R. p. 264, lines 16-22).

IX. The Court's Order

The circuit court issued its order and findings regarding the trial on June 4, 2019. (Trial Order; R. p. 4-13). The court acknowledged that foundational to all of Lynn's claims adjudicated at trial was the assertion that he was indeed a shareholder. (Trial Order, pg. 3; R. p. 6). The Court's findings can be summarized as follows: (1) Appellant failed to meet his burden of proof that he was a shareholder in any entity because the 1996 oral agreement between Lynn and Julie cannot be judicially enforced due to the Statute of Frauds and the Statute of Limitations; (2) even if the oral agreement could be judicially enforced, the shareholder management required Appellant to pay for his shares; and (3) the preponderance of the evidence does not support Appellant's assertion that PGM authorized the issuance of his shares for past services performed if not for the sole reason of the lack of corporate formalities suggesting the same. (Trial Order, pg. 4, 6, 7; R. p. 7, 9, 10). Despite these findings the court made the following statements:

> Does the lack of sophistication justify the defendants' conduct when the evidence more-likely-than-not establishes that all the parties felt that the plaintiff had a vested interest in the business? It does not. As previously stated, the financial hallmarks of the corporations are debt and unpaid government liabilities. The accounting indicates an uncomfortable lack of regard and respect for the division between the corporate entities and the personal interests of the Taylors. The records also reflect the fact that the Taylors felt the plaintiff had a vested interest in the company when he was referred to as[sic] as "partner" and "owner" during the worker's compensation hearing. The defendants listed the plaintiff in numerous corporate documents as a shareholder. The plaintiff was, at least, considered a significant member of PGM by the defendants – he was given a title and his personal financial worth was leveraged and credit risk while, at the same time, claiming he was not a shareholder is wrong. For the same reason, it is wrong to have him listed on tax returns.

(Trial Order, pg. 9; R. p. 12).

X. Post-Trial Motions and Hearing

Following the issuance of the circuit court's order and opinion, Appellant filed a Motion to Alter or Amend Judgment, in which Appellant asked the Court to reconsider its findings related

to Appellant's failure to meet his burden of proof, the statute of frauds, and the statute of limitations. (Motion to Alter or Amend; R. p. 91-99). However, Appellant also asked the Court to issue a ruling on the following issues that were not addressed in the court' trial order: (1) the application of the doctrine of equitable estoppel to the Statute of Frauds; (2) the application of the doctrine of partial performance to the Statute of Frauds; (3) the application of the consistency doctrine to the positions taken in the corporation's tax returns; (4) whether CSS is the successor of PGM; and (5) whether Respondents Taylor engaged in shareholder oppression. (Id.).

A hearing was held on Appellant's Motion on October 23, 2019. (Motion Transcript coversheet; R. p. 278). In regard to the points that Appellant asked the court to reconsider, Appellant specifically addressed the Court's assertion that even if the oral agreement could be judicially enforced, the shareholder management required Appellant to pay for his shares. (Motion Transcript, 5-6; R. p. 279-280). Appellant noted for the court that the flaw in this finding is that it relies on the premise that Appellant's partnership interest could not be transferred into the corporation and that he was required to pay additional compensation for his shares at the time of incorporation, though the stock subscription agreement does not require such. (Motion Transcript, pg. 6; R. p. 280, lines 3-21). Further, Appellant clarified for the circuit court, that Respondents Taylors did not offer consideration in addition to what they paid into the unincorporated entity, years prior to incorporation. (Motion Transcript, pg. 6; R. p. 280, 13-21).

Second, at the hearing, Appellant responded to the circuit court's findings regarding the Statute of Limitations. ((Motion Transcript, pg. 7; R. p. 281, lines 19-25). Specifically, Appellant pointed out to the court that the counter to the court's holding that the statute began to toll upon Appellant's discovery regarding 40 vs 50% ownership, the statute did not begin to run until Appellant discovered that the Taylors and PGM took the position that he was not a shareholder

in any capacity. (Motion Transcript, pg. 7-8; R. p. 281-282).

The remainder of Appellant's presentations at the hearing involved asking the court to issue a written order on those legal theories and doctrines identified above.

The circuit court issued an order on January 2, 2020. (Order on Motion; R. p. 14-16). The court declined to reconsider any previous rulings. In response to Appellant's averments related to equitable estoppel and partial performance, the court found that "even if the oral agreement could be enforced, it would fail to have any bearing on Plaintiff's standing as a shareholder in either the incorporated businesses for the same reason pertaining to the subscription agreement and Statute of Limitations discussed in the [Trial] Order." (Order on Motion, pg. 2; R. p. 15). In response to the consistency doctrine, the court found that this theory does not apply as separate legal theory in this case. (Order on Motion, pg. 2; R. p. 15). Lastly, as to the shareholder oppression and successor liability issues, the Court continued to decline to offer a ruling on these issues given the court's findings that he was not a shareholder, and thus lacked standing to bring these actions. (Order on Motion, pg. 2; R. p. 15).

STANDARD OF REVIEW

An action for corporate dissolution is in equity. *Ward v. Ward Farms, Inc.*, 283 S.C. 568, 324 S.E.2d 63 (1984). Further, "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)).In an action in equity tried by the judge alone, on appeal the appellate court has jurisdiction to find facts in accordance with its views of the preponderance of the evidence. *Grosshuesch v. Cramer,* 367 S.C. 1, 4, 623 S.E.2d 833, 834 (2005); *Campbell v. Carr*, 361 S.C. 258, 263, 603 S.E.2d 625, 627 (Ct. App. 2004). Thus, an appellate court in an appeal of an equity case tried without a jury may find facts in accord with its view of the preponderance or greater weight of the evidence and may reverse a factual finding by the trial judge in such cases where the appellant satisfies this court that the finding is against the preponderance of the evidence. *Campbell,* 361 S.C. at 263, 603 S.E.2d at 627. This broad scope of review does not require the appellate court to disregard the findings of the trial court. *Dearybury v. Dearybury*, 351 S.C. 278, 283, 569 S.E.2d 367, 369 (2002). Nor is the appellate court required to ignore the fact that the trial judge, who saw and heard the witnesses, is in a better position to evaluate their credibility. *Ingram v. Kasey's Assocs.*, 340 S.C. 98, 105, 531 S.E.2d 287, 291 (2000).

When the very existence of a contract is questioned and the evidence is either conflicting or admits more than one inference then the question is one of fact. *Small v. Springs Industries, Inc.,* 292 S.C. 481, 357 S.E.2d 452 (S.C. 1986) (citing, *Capital City Garage and Tire Co. v. Electric Storage Battery Co*., 113 S.C. 352, 101 S.E. 838 (1920)). Further, the question of what the parties to a contract intended is a question of fact. *Soil Remediation Co. v. Nu-Way Envtl., Inc.*, 325 S.C. 231, 482 S.E.2d 554 (1997).

ARGUMENT

I. The circuit court erred in applying the Statute of Frauds to find that Appellant was not a partner in the partnership or shareholder in the subsequent corporations.

This Court should reverse the circuit court's ruling that Appellant failed to meet his burden of proof that he was a shareholder because the Statute of Frauds prevents the court from enforcing the oral agreement between Lynn and Julie to form a partnership in 1995. This finding further prevented the Court from finding that Lynn's ownership in the partnership transferred into the incorporated entity and making him a shareholder in PGM.

"[T]he Statute of Frauds requires that a contract that cannot be performed within one year be in writing and signed by both parties." *Springbob v Univ of South Carolina,* 407 S.C. 490, 496, 757 S.E.2d 384, 387 (2014) (citing *Davis v. Greenwood Sch. Dist.*, 50 S.C., 629, 634, 620 S.E.2d 65, 67 (2005) (citations omitted)). "If there is a possibility that a contract might be performed within one year, the statute of frauds is not a bar to enforcement of the contract." *Springbob*, (citing *Roberts v. Gaskins*, 327 S.C. 478, 484, 486 S.E.2d 771, 774 (Ct. App. 1997)). Statute defines a general partnership as an "association of two or more persons to carry on as co-owners a business for profit . . . ". S.C. Code Ann. § 33-41-210. In regard to a corporation specifically, statute further provides that a board of directors may authorize shares in a corporation to be issued *in consideration* for any tangible or intangible property or benefit to be corporation, including services performed. S.C. Code Ann. § 33-6-210 (emphasis added).

First and foremost, the Statute of Frauds is not applicable in this case, because the terms of the contract could be completed in one year. The terms of the agreement were: (1) Lynn works for Julie for one year and (2) in consideration he would receive 50% of Piedmont Glass & Mirror. Appellant presented three individuals at trial who were witness to this agreement and who attested

to these terms. Lynn completed his obligation under the agreement from the middle of 1995 until the middle of 1996. Lynn's 1995 and 1996 tax returns are evidence in support of these terms, as they illustrated that he took a significant wage reduction in order to come work for Julie. Even if there is a doubt as to whether the agreement could be completed in one year, the *Springbob* case permits fact finder to so find, so long as there is a *possibility* that the agreement might be performed within one year.

Second, the very nature of a partnership is informal and does not require a written agreement to be formed. The type of partnership at issue in this case was not a limited partnership that required formal filings of any type, rather it was a general partnership – or as Professor Freeman, a 'handshake' partnership. Such arrangement does not require a written partnership agreement, and such partnership begins as of the date Lynn and Julie began to carry on as co-owners. Respondents asserted even if such agreement existed, the partnership itself lasted for three years, thus putting it within the preclusive purview of the Statute of Frauds. However, Appellant pointed out to the trial court that the life of the partnership is not the 'agreement' in question; rather it is the agreement to form a partnership that must be analyzed under the Statute. That agreement can and was completed within one year, and as such is not subject to the Statute. The preponderance of the evidence regarding the terms of the agreement demonstrates that it could and was completed in one year. The circuit court's finding otherwise is against the burden of proof.

However, in its discussion and application of the Statute, the trial court presented an alternative finding for the sake of argument. For efficiency's sake, we believe it deserves to be addressed here. Specifically, the court found that "even if this Court could enforce the oral agreement that, in exchange for a year of work at a reduced rate, the [Appellant] would receive 50% partnership/ownership in the sole proprietorship, the subscription agreement is clear on its

face and the [Appellant] acknowledged that he paid no consideration for his stock." (Trial Order, pg. 6; R. p. 6).

This finding is also in error because (1) it relies on the premise that currency was required to be offered in order to be issued shares in PGM, (2) that such currency must be offered at the time of incorporation, and (3) the interests held in the partnership could not be transferred into the corporation. First, South Carolina statute specifically and unequivocally permits the issuance of shares in a corporation for the consideration of services performed and the offering of tangible property. The incorporators of PGM had full statutory authority to issue Lynn shares in consideration for him working for the business for one year at a reduced rate. Further, the plain language of the subscription agreement did not require currency or cash to be paid in order for shares to be issued. Such a reading of the subscription agreement would be a misinterpretation of its terms. Second, the consideration offered by Lynn *and the Taylors* was offered or paid *years prior to incorporation.* David Taylor testified and offered his 1996 tax return to demonstrate that he loaned Julie approximately $40,000.00 to use in the business. The business at that time, under even their case theory, was an unincorporated entity. It did not incorporate until three years later in 1999. Julie Taylor made her contribution by transferring her interest in the partnership and the assets that she had purchased for the partnership into the corporation. Lynn did the same; transferring his assets that he offered to the partnership and his interest in the partnership into the corporation. Thus, Lynn and the Taylors made their contributions to an unincorporated entity and were given shares in corporation of PGM as consideration. The court's finding otherwise is inequitable because it permits the Taylors to receive shares in the corporation for contributions that were made years prior to incorporation, but does not permit Lynn to do the same. Lastly, interests in a partnership can be transferred into a corporation. When an unincorporated entity

decides to incorporate, the laws regarding the formation of corporations does not require shareholders to offer consideration that is in addition to the consideration provided to the unincorporated entity that existed prior to formation. Professor Freeman, an expert in this area, testified that not only was it his opinion that Lynn has become a partner, but that he legally had the ability to transfer that interest into a corporation.

For these reasons, this Court should overturn the circuit court's finding that Appellant failed to meet his burden of proof that he was a shareholder because the Statute of Frauds prohibits judicial enforcement of the agreement to create a partnership.

II. Did the Circuit Court err in failing to find that Respondents were equitably estopped from asserting the Statue of Frauds?

This Court should find that the doctrine of equitable estoppel may be applied to prevent Respondent's reliance on the Statute of Frauds. "The doctrine of equitable estoppel may be invoked to prevent a party form asserting the statute of frauds." *Springbob v Univ of South Carolina,* 407 S.C. 490, 496, 757 S.E.2d 384, 387 (2014) (citation omitted). "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.'" *Id.* Further, the additional exception to the statute of frauds of partial performance is grounded in the principle of equitable estoppel. *Parr v. Parr*, 268 S.C. 58, 65-66, 231 S.C.2d 695, 698 (S.C. 1977) (finding that cases dealing with what constitutes sufficient part performance on the part of the party alleging the oral agreement all rest upon the principal of equitable estoppel). "This doctrine requires that the party sought to be charged upon a parol contract be denied the protection of the statute where the other party has done such acts in pursuance of and in reliance upon the agreement that the application of the statute against him would be unconscionable." *Parr*, 268 S.C. 58, 66, 231 S.C.2d 698. In order to compel specific

performance, a court must find (1) clear evidence of an agreement; (2) that the agreement has been partially carried into execution on one said with the approbation of the other; and (3) that the party who comes to compel performance has performed on his part, or has been and remains able and willing to perform his part of the contract. *Gibson v. Hrysikos*, 293 S.C. 8, 14, 358 S.E.2d 173, 176 (Ct. App. 1987) (citations omitted).

First, should the Court find that the terms of the subject agreement could not be completed within one year, the doctrine of equitable estoppel should be applied to prevent application of the Statue of Frauds. The circuit court erroneously refused to apply the equitable estoppel exception to the statute of frauds despite the presence of evidence meeting the elements of the same. In this case, an abundance of evidence was presented demonstrating that Lynn relied upon the representations made to him by the Taylors and by the corporate documentation that they created. First, he relied on Julie's representation that he would become her 50% partner if he came to work for her for one year and to make less money. He left his well-paying position at Cone Mills and came to work for her to make significantly less money. He testified to this and his tax returns support this testimony. He continued working there for three more years, still believing that he was her partner in the unincorporated entity. Then in 1999 when the business incorporated, he relied upon the oral representations of David and Julie that despite the incorporating documents he still owned 50% of the shares – or that he owned shares at all. He took on the burden of collateralizing his personal wealth, including his wife's jewelry, in order for PGM to obtain financing to purchase a permanent location. Personal guaranteeing a corporate loan, I would argue, is the utmost example of a definite, substantial, and detrimental change of position in reliance upon the agreement that he was a shareholder. Professor Freeman, in testimony before the trial court, questions this exact logic, by suggesting that no at-will, reasonable employee would agree to leverage their personal

wealth for the mere consideration of employment. There is no remedy except for enforcement of the agreement that Lynn is a partner, who's interest transferred into PGM, which is adequate to restore him to his former position.

Second, the additional equitable doctrine of partial performance is applicable here. The evidence contained in the record and presented at trial was clear that an agreement between Julie and Lynn existed. Three witnesses testified to its terms with specificity, and the personal tax returns offered by Lynn supported that he performed his obligation under the agreement. Respondents have never contested or denied that Lynn came to work for Julie and that he was paid less than his previous employment. The facts demonstrated that she willingly accepted his services, and in fact she admitted that she did ask him to come work for her in order to help "run and grow the business." Logic asks what incentive would Lynn have to help *grow* the business, if he were not acting pursuant to the understanding that he was an owner in said business. Lynn performed all of his obligations under the agreement to create a partnership and to apply the statute of frauds against him would be unconscionable as it would deny his standing as a shareholder in the subsequent corporations and would allow the injustices he has suffered emotionally and financially to stand.

Persuasive here are two cases from New York reviewing the ownership status of individuals who were recognized on the corporations' documents and tax returns as being shareholders. These cases were both argued before and copies provided to the circuit court. (Transcript, pg. 165-166). In *Heisler v. Gingras*, 235 A.D. 900, 652 N.Y.2d 841 (N.Y. App. Div.1997), the law firm of Roemer and Featherstonhaugh P.C. ("the Firm") scheduled a special meeting of its shareholders and compiled a list of those shareholders that were entitled to vote at the meeting. Petitioners were excluded from that list and brought an action to confirm their

status as shareholders. The Firm argued that "since petitioners never paid the monetary consideration for their stock shares (in violation of the Firms Bylaws and Business Corporation Law § 504), nor received any stock certificates pursuant to the Firm's stock purchase agreement, they were not shareholders of record on the date of the special meeting." *Heisler*, 235 A.D. at 902, 652 N.Y.2d at 842. The Appellate Division found that the Firm invited Petitioners to become shareholders and held them out as such to the public without requiring payment of any monetary consideration. *Id.* In addition to sending out announcements that Petitioners were shareholders upon their hiring, the Court identified corporate formalities that the Firm executed demonstrating their shareholder status including: providing them notice to shareholders meetings for at least 6 years, permitting them to participate and vote in numerous shareholder meetings, and permitting them to take financial draws as a shareholders. *Id.,* 235 A.D. at 902, 652 N.Y.2d at 842-843. Further, the Firm billed their client's for Petitioners' work at the shareholder rate. *Id.,* 235 A.D. at 903, 652 N.Y.2d at 843. The Court found the most telling to be the Firm's shareholder valuations and triennial statements filed with the Court in the years prior to litigation pursuant to New York law. *Id.* The Court held that "[v]iewing the record as a whole, we find the evidence sufficient to establish that respondents acquiesced in petitioners shareholder status. Accordingly, respondents are now estopped from challenging petitioners' status." *Id.*

Second, in a post-trial slip opinion of *Matter of Wenger (L.A. Wenger Contracting Co.)*, 2010 WL 5186679, 2010 NY Slip Op 52236(U) (Sup Ct Suffolk County) (Judgment Affirmed as Modified by Wenger v. L.A. Wenger Contracting Co., Inc., N.Y.A.D. 2 Dept., February 5, 2014) the Supreme Court for Suffolk County reviewed whether Petitioner David Wenger was shareholder in five separate entities (four corporations and one limited liability company) and whether his father engaged in oppressive conduct as the holder of a majority shares. The record

presented to the Court demonstrated that Louis Wenger, David's father, had a Grantor Retained Annuity Trust ("GRAT") created in order to transfer 31% of the original corporation to David over a period of 4 years. *Id.* 2010 NY Slip Op at 1-2. This GRAT was also shown in a Gift Tax Return filed by Louis. *Id.* 2010 NY Slip Op at 1. Further, the exhibits presented to the Court included the tax returns and K-1's, which flow directly from the returns, filed by the entities for nine years on which Petitioner was listed as a shareholder. *Id.* 2010 NY Slip Op at 2. Petitioner also testified that he was required to become a personal guarantor on several lines of credit for one of the corporations. *Id.* 2010 NY Slip Op at 1. Louis even represented and swore to lenders of the corporation that David was a shareholder. *Id.* 2010 NY Slip Op at 5. When Louis and David began to disagree about the finances regarding the five entities, Louis sent David correspondence in which he demanded that David transfer all of his interest in the five entities back to Louis. *Id.* 2010 NY Slip Op at 5. Louis Wenger averred that though he understood the language of the GRAT, it was contingent upon David paying $200,000 per year for four years to the original corporation. *Id.* The Court then cited relevant authority including the following regarding taxes: "A party to litigation is equitably estopped from taking a[sic] position that is contrary to that taken in an income tax return." *Id.* 2010 NY Slip Op at 8 (citations omitted). Though the Court did find that the GRAT failed under state law, they ultimately held that

> both Louis Wenger and the five corporations that are subject of these combined lawsuits are equitably estopped from denying David Wenger's positions as a 31% shareholder. Nine years of corporate tax returns filed by the five corporations as well as corporate K-1's given to David Wenger by those entities, many of which are beyond the reach of the IRS at this point, cannot be ignored. When combined with the clear intent set forth in Louis Wenger's years of actions, the statements by Louis Wenger to sureties and lenders to the corporations, and the numerous correspondence, including that written after the parties were in dispute cannot be ignored. All the corporations and their majority shareholder, Louis Wenger, acted for years as though and for their mutual advantage, David Wenger was a 31% shareholder. The Court finds that he remains so to this date.

Id. 2010 NY Slip Op at 8.

These two cases are factually identical to the present matter and the Courts' analyzes squarely fit the appropriate analysis here. In *Heisler*, the Court placed significant emphasis on the law firm's positions taken in financial statements regarding the petitioners, the law firm's decision to allow the petitioners to partake in shareholder meetings for years, and the law firm's statements made to the public regarding petitioners' status as shareholders. The Firm's arguments regarding Petitioner's failure to pay compensation for the shares is identical to the averment by Respondents here. In the present matter, Respondents represented to the Department of Revenue, not just in tax returns, but in its CL-1 and its Business Tax Application, that Lynn was a shareholder. See, PGM Corporate Records. Julie made under oath representations to the Worker's Compensation Commission, by referring to him twice as her partner or part-owner. Also, Respondents provided notice to Lynn regarding shareholder meetings and accepted his vote in these meetings, not just once, but for years. *Id.* He also signed the management agreements as a shareholder. Thus, the just as the court found that the Firm acquiesced to Petitioners being shareholders, the Respondents here did the same.

Further, in *Wenger*, the Court found the tax returns to be the decisive fact, especially when combined with the actions of Louis Wenger including his representations made to the corporations' lenders. The Court said the tax returns cannot be ignored particularly when the returns are beyond the reach of the IRS. These same pivotal facts and circumstances are present here. PGM filed eight tax returns that were prepared by Respondent Taylor, as a licensed CPA. These returns are beyond the reach of the IRS now. Much like the representation made by Louis Wenger, here it was represented to PGM's lender that Lynn was a shareholder. Just like David Wegner, Lynn had to personally guarantee the corporation's loan and he had to pledge his personal wealth in order for

PGM to obtain said loan. The equitable foundation that the Court applied in *Wenger* should be applied here and Respondents should be equitably estopped from asserting that Lynn is not a shareholder.

These corporate formalities cannot be ignored. However, the circuit court's position on these formalities was as follows: the preponderance of the evidence does not support Appellant's assertion that PGM authorized the issuance of his shares for past services performed if not for the sole reason of the lack of corporate formalities suggesting the same. This finding is in line with Respondents case theory regarding corporate formalities. Namely, that the Respondent's ask the court to find that the formality of a written partnership agreement was required and was lacking, however they then ask the court to ignore or disregard the myriad of corporate formalities created that demonstrate and highlight Appellants' status as a shareholder. This point was made the court at trial. (Transcript, pg. 167). The circuit court's finding is flawed because it suggests that there was a lack of corporate formalities suggesting that Appellant was given shares, though the preponderance of the evidence decisively proves otherwise.

For the above reasons, Appellant respectfully requests this Court to find that the preponderance of the evidence supports the elements of equitable estoppel and to overturn the circuit court's refusal to apply this doctrine to Respondent's assertion that Lynn is not a shareholder.

III. The circuit court erred in applying the statute of limitations to find that Appellant was not a partner in the partnership or shareholder in the subsequent corporations.

This Court should reverse the circuit court's order finding that Appellant's claims were barred by the Statue of Limitations. Appellant's claims are subject to the three-year statute of limitation dictated by S.C. Code Ann. § 15-3-530. This section specifically provides that an action against the directors or

stockholders of a monied corporation to enforce a liability created by law, the cause of action in the case not considered to have accrued *until the discovery by the aggrieved party* of the facts upon which the liability was created, unless otherwise provided in the law under which the corporation is organized. S.C. Code Ann. § 15-3-530 (emphasis added).

The circuit court applied the Statute of Limitations solely to the issue of whether Lynn was a shareholder. He found that the statute barred the court from enforcing the oral representation made by the Taylors in 1998 or 1999 regarding Lynn being an owner 50% of the shares rather than the 40% that was reflected on PGM's corporate records. The court held the limitation period began accrue at the time Lynn discovered a discrepancy regarding whether he owned 40% or 50% of the shares. However, the question is not when did Lynn know or should have known that he was a 40% owner as opposed to a 50% owner. Rather, the appropriate inquiry for determining when the statute of limitations begins to run is when did Lynn discover that Respondents revered him as having *never* been a shareholder – because that is the central issue of this case. The core of this case is that Respondents abruptly in 2007 revered Lynn has never having been a shareholder, ousting him from the business, then opening a successor corporation and allowing the predecessor to dissolve. Respondents did not take the position that Lynn was never a shareholder until at least 2007, following his accident. The corporate documents and the tax returns firmly support this, as they clearly identified him as a shareholder in some capacity up and until his accident. It was not until 2007, that the corporate records show that he was excluded entirely from the business. Lynn testified that when he tried to return to the business, he was told that he was not going to be paid anything. Once the central issue of this case is correctly identified, being was he a shareholder at all, then it becomes clear that he timely filed this action in the same year that he discovered that the Taylors took this position.

For these reasons, we respectfully ask the Court to overturn the circuit court's ruling on the Statute of Limitations.

IV. The circuit court erred in failing to find that Appellant was oppressed as a shareholder.

The circuit court declined to rule on the issue of whether Appellant was oppressed as shareholder, however, this issue has arguable merit and is supported by the record, therefore we believe it deserves to be addressed here. In *Kiriakides v. Atlas Food Systems & Services, Inc*., 343 S.C. 587, 541 S.E.2d 257 (2001), the Court established how a court should determine whether majority shareholders have acted oppressively within the meaning of section 33–14–300. See*, Ballard v. Roberson*, 399 S.C. 588, 733 S.E.2d 107 (S.C. 2012). Section § 33-14-300(2)(ii) now permits a court to order dissolution if it is established by a shareholder that "the directors or those in control of the corporation have acted, are acting, or will act in a manner that is illegal, fraudulent, oppressive, or unfairly prejudicial either to the corporation or to any shareholder (whether in his capacity as a shareholder, director, or officer of the corporation)." *Kiriakides,* at 597. The *Kiriakides* Court analyzed the Legislative intent of this statute and found "that the terms "oppressive" and "unfairly prejudicial" are elastic terms whose meaning varies with the circumstances presented in a particular case." *Kiriakides,* at 602, 541 S.E.2d at 266. In *Ballard*, the Court re-emphasized that this was a fact-sensitive review and should therefore be determined through a "case-by-case analysis, supplemented by various factors which may be indicative of oppressive behavior." *Ballard* at 110 (citing, *Kiriakides* at 603, 541 S.E.2d at 266). *Ballard* noted that although the *Kiriakedes* court declined to set out specific factors, it observed several commonly considered ones including: "eliminating minority shareholders from directorate and excluding them from employment[,] ... failure to enforce contracts for the benefit of the corporation[, and] withholding information from minority shareholders." *Ballard* at 110.

(*Kiriakides* at 605 n. 28, 541 S.E.2d at 267 n. 28). The concern and focus in shareholder oppression cases is that the minority "faces a trapped investment and an indefinite exclusion [from] participation in business returns." *Kiriakides* at 604, 541 S.E.2d at 267 (citations omitted).

The classic 'freeze-out' that was found to exist in *Kiriakedes* is also present here. Additionally, several of the factors identified by the Court in *Ballard* can be found in this action. There is no doubt that the Taylors, as a married couple and unit, collectively owned a 60% of the shares in PGM, and David now owns 100% of CSS. First, the Taylors engaged in a litany of damaging and/or self-dealing transactions that were outlined in factual record above that include: (1) permitting decades of tax liens to compile against PGM and CSS, where David Taylor admitted that some were filed because he simply forgot to file the taxes; (2) giving a $10,000.00 loan from PGM accounts to a family member during a time when PGM could not pay tax liens and the month before accruing $7,000.00 in additional liens; (3) sending payments to MBNA to pay for personal transactions such as paintball, jewelry purchases, and Paypal transactions, many of which David Taylor admitted were personal; (4) making PGM send payments for a Bank of America loan, when David admitted that PGM had no loan with Bank of America, rather he had his personal mortgage there. Testimony revealed that David and Julie controlled the finances of PGM and that Lynn had limited, if any, access to the finances. Lynn actually testified that he was refused access to the finances by David Taylor when he asked.

Second, not only were the Taylors' self-dealing and misappropriation of corporate funds oppressive, but the ultimate oppression occurred when they removed Lynn entirely from the business. They indefinitely excluded him from partaking in the business as a shareholder and as an employee. They stopped providing Lynn notice of any meetings, they terminated him as an employee, they stopped listing him on returns, and they sealed the exclusion by allowing PGM to

accrue so many government liabilities that it was eventually forfeited and they transferred the remaining assets into a new corporation that they own exclusively. Professor Freeman, a leading authority in this context, opined that this case displays the classic squeeze out/freeze out scenario in light of *Kiriakedes.* Lynn has no chance of participating in any returns produced by either business. Lynn is now disabled and he is not allowed to partake in any profits from the business nor will he ever. He has been damaged emotional and financially. He now lives on a fraction of the money that he was making while he was with PGM. A fact sensitive review of this matter, such as the kind permitted by *Ballard* and *Kiriakides* demonstrate that the preponderance of the evidence clearly demonstrates that Lynn was oppressed and squeezed out of his opportunity to make a living from this business.

For these reasons, Appellant respectfully requests this Court consider these arguments and find that the majority shareholders engaged in oppressive conduct.

V. The circuit court erred in failing to find that Respondent Carolina Storefront Systems, Inc. was a successor corporation of Piedmont Glass & Mirror Company, Inc.

Much like the third issue on appeal, the circuit court did not rule on whether Carolina Storefront Systems, Inc. was a successor corporation of Piedmont Glass & Mirror Company, Inc. However, this issue too also has arguable merit and is supported by facts presented to the lower tribunal; thus, we believe it deserves to be addressed here. Successor liability can be imposed upon a purchasing or successor corporation, making them responsible for the debts of the predecessor when (1) there was an agreement to assume such debts; (2) the circumstances surrounding the transaction amount to consolidation or merger of the two corporations; (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. *Nationwide Mut. Ins. Co. v. Eagle Window*

& Door, Inc., 424 S.C. 256, 263, 818 S.E.2d 447, 451 (S.C. 2018) (citing, *Brown v. American Ry. Express Co.*, 128 S.C. 428, 123 S.E. 97 (1924)).

The South Carolina Supreme Court discussed the third and fourth exceptions listed above in the *Nationwide* case. See generally, *Nationwide*, 424 S.C. 263-270, 818 S.E.2d 451-455. The Court held that generally for the mere continuation exception to apply there must be a commonality of officers, directors, and shareholders in both corporations. *Nationwide*, 424 S.C. 266, 818 S.E.2d 452. The Court recognized, however, that

> the mere continuation test is a strict one, but we temper our holding by noting it is not completely inflexible. While commonality of ownership is a keystone of the analysis and almost always sufficient to establish mere continuation when paired with common directors and officers, we stress control is an essential consideration as well. Typically, ownership and control are found in tandem; however, there may be instances where directors or officers—lacking ownership—exert such control and influence over a corporation that their continued presence after a corporate acquisition is sufficient to establish successor liability. Although 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. However, our successor liability doctrine affords protection for plaintiffs in those cases where a corporate sale is driven by a desire to escape the predecessor's liabilities and obligations. Where the changing of corporate hats is tainted by such fraudulent intent, the successor corporation remains liable, even when the test for mere continuation is not otherwise satisfied.

Nationwide, 424 S.C. 269-270, 818 S.E.2d 454-455.

Here, the mere continuation and fraudulent transactions can and do apply to find that CSS is a successor of PGM. First, in support of the mere continuation exception, David Taylor testified that he is the sole owner and officer of CSS and this is supported by the corporate documents for CSS. Though Julie is not a shareholder or officer in CSS, she still exercises sufficient control and influence over it such that her continued presence is sufficient to establish liability. Mr. Handel introduced the Rules of Attribution at trial suggesting that a married couple such as Julie and David, under the rules, are treated as one. Thus, it is evident that Julie and David, as a unit, control

CSS, even though Julie is not an officer or shareholder on paper. Julie admitted that CSS still has the same operation as PGM, and even CSS's signage displays to the public that it is still PGM. Professor Freeman's opinion at trial supported this finding as well.

Second, successor liability can be found under the fourth exception identified in *Nationwide*. The sale of the personal and real assets from PGM to CSS is severely tainted by the Taylors desire to escape PGM's liabilities and obligations. David Taylor unequivocally admitted as much. He admitted that there was a great "potential for some federal liens down the road" and there was a mass of existing liens against PGM such that "SCDOR was knocking at the door getting ready to jerk our license." (Transcript, pg. 234; R. p. 177, lines16-25). Further he admitted that the reason PGM was forfeited in 2013 was because of some of the tax liens "and a potential for so many others to come forward, and an inability to secure any type of products." (Transcript, pg. 258; R. p. 196, lines 2-6). He blatantly admitted that they were trying to avoid SCDOR taking action against PGM and levying more liens against it. Moving the real and personal property out of PGM prevents such assets being foreclosed upon by a state agency such as SCDOR or following litigation. The sale took place while the present litigation was pending and was made with the knowledge that this action sought a judicial dissolution, accounting, and liquidation of PGM. The Taylors did get a refinancing, which did permit them to pay off some liens, but not all. Liens have continued to accrue against CSS as well. Mr. Handel, a forensic accountant, reviewed the sale of the real property and opined that it was not an arm's length transaction. The building was sold for $5.00, rather than fair market value. Mr. Handel found it unusual that the amount of the loan obtained for the building shows that it was only for the amount of the recorded mortgage for PGM. The sale is tainted by such fraudulent intent that CSS remains liable for the debts and obligations of PGM, including recognizing Lynn as a shareholder in the successor entity.

For the foregoing reasons, we respectfully ask this Court to find that CSS is a successor corporation of PGM, and that Appellant is a shareholder of both.

CONCLUSION

For the foregoing reason, Appellant respectfully requests this Court reverse the circuit court's order dismissing Appellant's claims.

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s/Chelsea R. Rikard

A BUSINESS LAW FIRM, LLC
Thomas A. Belenchia (SC. Bar No. 2371)
tab@abizlaw.com
Chelsea R. Rikard (SC Bar No.102355)
crr@abizlaw.com
Attorneys for Plaintiff
P.O. Box 3421
Spartanburg, SC 29304
T: (864) 699-9803
Attorneys for Appellant