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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

Appellate Case No. 2023-000780
Case No. 2018-CP-40-04841

Bierer and Associates, Inc., Appellant,

v.

Jan F. Kennerly, Jr., Danielle Kennerly, EUSA, LLC, J&D Farms, LLC, Trystar LLC; Travis Pattern & Foundry, Inc.; Illinois Tool Works, Inc.; and David Deinek, Defendants,

Of which, Trystar LLC and Travis Pattern & Foundry Inc. are Respondents.

AND

Jan F. Kennerly, Jr., Defendant/Third Party Plaintiff,

v.

Walter Bierer, Brent Jeffries, and Joseph Bierer, Third Party Defendants.

APPELLANT'S FINAL BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other

I. STATEMENT OF ISSUES ON APPEAL

A. DID THE TRIAL COURT ERR BY CONCLUDING THAT THE APRIL 9, 2013 AND DECEMBER 5, 2013 EMAILS ESTABLISHED AS A MATTER OF LAW THAT BIERER WAS ON INQUIRY NOTICE OF ITS CLAIMS AGAINST TRYSTAR?

B. DID THE TRIAL COURT ERR IN GRANTING SUMMARY JUDGMENT ON THE AFFIRMATIVE DEFENSE OF STATUTE OF LIMITATIONS BY CONCLUDING THAT THE INVESTIGATION THAT BIERER UNDERTOOK UPON DISCOVERING THE 2014 IEEE BROCHURE WAS UNREASONABLE AS A MATTER OF LAW?

C. DID THE TRIAL COURT ERR BY CONCLUDING THAT THE OCTOBER 15, 2015 EMAIL ESTABLISHED AS A MATTER OF LAW THAT BIERER WAS ON INQUIRY NOTICE OF ITS CLAIMS AGAINST THE RESPONDENTS?

D. DID THE TRIAL COURT ERR AS A MATTER OF LAW IN GRANTING SUMMARY JUDGMENT ON THE AFFIRMATIVE DEFENSE OF STATUTE OF LIMITATIONS WHERE THE RECORD CONTAINS CONFLICTING TESTIMONY AS TO WHEN BIERER WAS ON INQUIRY NOTICE OF ITS CLAIMS AGAINST THE RESPONDENTS?

E. DID THE TRIAL COURT ERR IN GRANTING SUMMARY JUDGMENT TO THE RESPONDENTS WHERE KENNERLY'S FRAUDLENT CONCEALMENT TOLLED THE STATUTE OF LIMITATIONS ON BIERER'S CLAIMS AGAINST THE RESPONDENTS?

II. STATEMENT OF THE CASE

From 2003 until July 2018, Rick Kennerly ("Kennerly") was a trusted Bierer & Associates, Inc. ("Bierer or Appellant") employee and for the last nine years of employment he was the national sales manager for Bierer products. (Bierer RIO Travis Mot. SJ, Ex. A, WB Aff. ¶¶ 4-5 (hereinafter "WB Aff. ¶ ____")) **(R. p. 394 ¶¶ 4-5).** On July 10, 2018, Bierer discovered that Kennerly had in fact hidden his improper financial relationship with Respondents Travis Pattern & Foundry, Inc. ("Travis") and Trystar, LLC ("Trystar") [collectively Respondents] and Kennerly was thereafter terminated. (Id. ¶ 6; Bierer RIO Travis MSJ, Ex. B, JB Aff. ¶ 6 (hereinafter "JB Aff. ¶___").) **(R. pp. 394 ¶ 6; 404 ¶ 6).** Bierer filed an initial complaint naming Kennerly, and a

business owned by him, on September 11, 2018. After conducting discovery, and obtaining documents from the Respondents, and other companies through out-of-state subpoenas, Bierer filed its Third Amended Complaint against the Respondents on April 15, 2021. Bierer's Third Amended Complaint alleges claims of aiding and abetting breach of fiduciary duty, tortious interference with existing contractual relations, tortious interference with prospective business arrangements, unjust enrichment, common law unfair competition and violation of the South Carolina Trade Secrets Act. Bierer also seeks equitable remedies of accounting and constructive trust against Respondents. (3d Am. Compl. at 27-41) **(R. pp. 78-81).** Travis accepted service of the Third Amended Complaint on April 22, 2023. Trystar's counsel accepted service of the Third Amended Complaint on May 10, 2021. Thus, under Rule 3(a), SCRCP, Bierer's action against the Respondents commenced on the date of filing the amended pleading, April 15, 2021.

The Respondents denied the allegations in the Third Amended Complaint and asserted the affirmative defenses of statute of limitations and laches to Bierer's claims. On September 28, 2022, Travis moved for summary judgment based on these aforementioned affirmative defenses. (Travis Mot. SJ) **(R. pp. 198-335).** On October 26, 2023, Trystar also moved for summary judgment on these same grounds: that Bierer's legal claims were barred the applicable statute of limitations and likewise, the equitable claims barred by laches. (Trystar Mot. SJ) **(R. pp. 336-373).** Bierer filed its responses in opposition to these motions on December 28, 2022, arguing Bierer was on inquiry notice of its claims against the Respondents no earlier than July 10, 2018, and argued Kennerly's fraudulent concealment of his relationships with the Respondents tolled the statute of limitations. (Bierer RIO to Travis Mot. SJ; Bierer RIO to Trystar Mot. SJ) **(R. pp. 374-464; 465-549).** Travis and Trystar each filed replies in support of their motions and thereafter, the Court heard argument from the parties by WebEx on January 4, 2023.

On February 6, 2023, the lower court entered an order granting summary judgment to Travis and Trystar based on its findings that Bierer was on inquiry notice of the existence of potential claims against Travis and Trystar as early as April 9, 2013, and as late as October 14, 2015. (Feb. 6, 2023 Order; *see also* Jan. 6, 2023 Form 4 Order) **(R. pp. 6-23;3-5).** Bierer then filed a motion for reconsideration of the February 6, 2023 order on February 16, 2023. (Bierer Mot. to Reconsider.) **(R. pp. 570-578).** Travis and Trystar filed responses in opposition to this motion on February 23, 2023. (Travis RIO Mot. to Reconsider; Trystar RIO to Mot. to Reconsider.) **(R. pp. 579-282; 583-591).** The lower court conducted a hearing on the same by WebEx on March 30, 2023. During the hearing, the lower court heard arguments from the parties and considered the supplemental material submitted in conjunction with the parties' briefings and argument. (Bierer Supp. to Motion to Reconsider.) **(R. pp. 592-617).**

By order dated May 5, 2023, the Court denied Bierer's motion to reconsider, affirming its award of summary judgment to Travis and Trystar on the same grounds as the February 6, 2023 order. (May 5, 2023 Order; *see also* April 3, 2023 Form 4 Order.) **(R. pp. 27-37; 24-26).** On May 9, 2023, Bierer filed its notice of appeal of the February 6, 2023 order and the May 5, 2023 order. (NOA). **(R. pp. 618-653).**

III. STATEMENT OF FACTS

Bierer & Associates, Inc. ("Bierer") was founded by Walter Bierer in 1988 in a shed adjacent to his home. He started the company to sell meters that he invented and developed for use by electrical utility lineman. (WB Aff ¶ 3; Jan. 4, 2023 Hr'g Tr. at 12:15-25.) **(R. pp. 394 ¶ 3; 665:15-25).** In 2003, Walter Bierer hired Kennerly as Bierer's second employee and Kennerly remained a full-time employee until he was terminated in July 2018. (WB Aff. ¶ 4; Feb. 6, 2023 Order at 3). **(R. p. 394 ¶ 4; p. 8).** During this time, Kennerly developed a very close relationship

with the Bierer family. (WB Aff. ¶ 13; JB Aff. ¶13) **(R. pp. 397 ¶ 13; 406 ¶ 13).** This is especially true for Walter Bierer who, prior to learning of Kennerly's deceit, had included him in Walter Bierer's Last Will and Testament. (WB Aff. ¶ 13.) **(R. p. 397 ¶ 13).**

While Kennerly initially started at Bierer as an engineer, he transitioned to the role of national sales representative for Bierer in 2009. (WB Aff. ¶ 5) **(R. p. 394 ¶ 5).** In that role he was Bierer's interface and "eyes and ears" in the marketplace- he was the sole managerial employee interacting with Bierer's customers and material suppliers. In this role he was also charged with overseeing and managing Bierer's sales force comprised of sales representatives under contract with Bierer. (WB Aff ¶ 5; JB Aff ¶ 5) **(R. pp. 394 ¶ 5; 404 ¶ 5).** In 2009, Walter Bierer tasked Kennerly with identifying manufacturers that could develop clamps and cable suitable for use in Bierer's new initiative to offer grounding assemblies[1] to its customers. (Feb. 6, 2023 Order at 3) **(R. p. 8).** Given this directive, Kennerly began working with Travis to develop clamps and with Trystar for cable for use Bierer's grounding assemblies. (WB Aff ¶ 10; JB Aff ¶9; Jan. 4, 2023 Hr'g Tr. at 14:1-15:19). **(R. pp. 395 ¶ 10 ; 405 ¶ 9 ; 667:1 - 668:19).**

Unbeknownst to Bierer and as early as 2013, Kennerly had entered into agreements with Travis and Trystar in which he received compensation for utilizing Bierer's sales force to promote and sell the Respondents' products around Bierer. (Bierer RIO Trystar Mot. SJ, Ex. F, 2013 Trystar Agrmt; Bierer RIO Travis Mot. SJ, Ex. G, 2013 Travis 1099; WB Aff. ¶¶ 6, 12; JB Aff. ¶¶ 6,11; *see also* Bierer RIO Travis Mot. SJ, Ex. D, Dep. of W. Bierer (Feb. 24, 2022), 230:14-23; 232:13-233:7 (hereinafter "Dep. of W. Bierer (Feb. 24, 2022) at _____"); Jan. 4, 2023 Hr'g Tr. at

[1] Grounding assemblies are designed to protect electric utility workers while working on high voltage power lines in the event of an unexpected electrical charge. The personal protective grounding assemblies are comprised of a cable, clamps, and ferrules. *See* (Jan. 4, 2023 Hr'g Tr. at 13:12-21.) **(R. p. 666:12-21).**

15:9-16:15.) **(R. pp. 529-545; 449-450; 394 ¶ 6; 396 ¶ 12; 404 ¶ 6, 405 ¶ 11; 424:14-23; 425:13-426:7; 668:9-669:15).** For such services, Kennerly, without Bierer's knowledge, was paid approximately $850,000 from Travis and $1.4M by Travis from 2013 – July 2018. (Jan. 4. 2023 Hr'g Tr. at 16:16-22) **(R. p. 669:16-22).** At all times during his Bierer employment, Bierer understood Kennerly to have an "open and obvious" working relationship (ex: traveling to testing, attending trade shows) with Travis and Trystar *on behalf of Bierer*. *See e.g.* (WB Aff ¶11; JB Aff ¶10.) **(R. pp. 396 ¶ 11; 405 ¶ 10).** At no point in during his employment with Bierer, did Bierer have actual knowledge that Kennerly was working as a sales representative for Travis and Trystar and receiving commissions for his services. (WB Aff. ¶¶ 6, 12; JB Aff. ¶¶ 6,11; *see also* Dep. of W. Bierer (Feb. 24, 2022), 230:14-23; 232:13-233:7.) **(R. pp. 394 ¶ 6; 396 ¶ 12; 404 ¶ 6; 405-406 ¶ 11; 424:14-23; 425:13-426:7).** When Bierer learned of these relationships on July 10, 2018, Walter Bierer terminated Kennerly effective July 13, 2018. (WB Aff ¶ 6; JB Aff ¶ 6**.) (R. pp. 394 ¶ 6; 404 ¶ 6).**

IV. THE LOWER COURT'S ORDER

The lower court granted summary judgment to Travis and Trystar concluding that Bierer was on inquiry notice as early as April 9, 2013, and as late as October 14, 2015. (Feb. 6, 2023 Order at 2; May 5, 2023 Order at 2-3) **(R. pp. 7; 28-29).** The lower court relied upon a single email between Bierer and Trystar sent in 2013 where Bierer complained about Trystar selling cable directly to Bierer customers and a second internal email within Bierer where Joe Bierer is complains that Trystar is continuing to sell cable directly to Bierer customers. (Trystar Mot. SJ, Exs. 1 & 2) **(R. pp. 355-359).** Bierer did not have an exclusivity agreement with Trystar that would have prohibited Trystar from selling direct to Bierer customers. (WB Aff. ¶ 18; JB Aff. ¶ 18.) **(R. pp. 400 ¶ 18; 408-409 ¶ 18).** Bierer was aware that this was a common practice in the

industry and Bierer did not have any cause of action against Trystar for simply selling direct to Bierer customers. (Id.) Nevertheless, the court concluded that Bierer failed to conduct a reasonable investigation into the circumstances surrounding Trystar's direct sales to its customers and if Bierer had conducted a reasonable investigation it would have learned that Trystar was paying Kennerly to divert these sales, utilizing Bierer's network of independent sales representatives. (Feb. 6, 2023, Order at 2, 8; May 5, 2023 Order at 5-7) **(R. pp. 7, 13; 31-33).**

The lower court also relied upon a brochure advertising an Institute of Electrical Engineers ("IEEE") seminar where Kennerly was presenting. (Feb. 6, 2023, Order at 2, 8-9; May 5, 2023, ,Order at 7.) **(R. pp. 7, 13-14; 33).** The brochure stated that Kennerly "has worked for Bierer Meters as an engineering and operations manager for 15 years and Travis [Pattern] for two years." (Feb. 6, 2023 Order at 4; May 5, 2023 Order at 7; Travis Mot. SJ, Ex. 3, 2014 IEEE Brochure at 3.) **(R. pp. 9; 33; 253).** Walter Bierer undeniably saw this brochure and confronted Kennerly about it. (Feb. 6, 2023, Order at 5; May 5, 2023, Order at 7.) **(R. pp. 10; 33).** Kennerly "laughed off" the notion that he worked for Travis and convinced Bierer that the biography was erroneous. (Feb. 6, 2023, Order at 5). **(R. p. 10).** Bierer accepted Kennerly's explanation, and did not check behind him by contacting Travis because to do so would have exhibited a lack of trust in one of Bierer's most valuable employees. (WB Aff. ¶13.) **(R. p. 394 ¶13).**

Lastly, the court relies upon an October 14, 2015, email where Walter Bierer confronted Kennerly about his lack of reporting to Bierer and suggests that Kennerly should start looking for employment elsewhere. (Feb. 6, 2023, Order at 5, 9; May 5, 2023, Order at 7-8.) **(R. pp. 10, 14; 33-34).** In this email, Walter Bierer states You have purposely separated yourself from Bierer by maintaining private telephone and email accounts which leads me to wonder what other activities you may be conducting on my dime." (Feb. 6, 2023, Order at 5; Travis Mot. SJ, Ex. 10, Oct. 14,

2015 Email.) **(R. pp. 10; 305).** The lower court completely disregarded Walter Bierer's affidavit pertaining to this October 14, 2015 wherein Walter Bierer explains that the outside activities he was referring Kennerly's relationship with Eddins Electric Company, a South Carolina corporation, and were in no way related to or evidence of a suspicion on his part that Kennerly was providing sales services to Travis, Trystar, or any third party. (WB Aff. ¶ 16.) **(R. pp. 398-400 ¶ 16).** Moreover, following this email, Kennerly assured Walter Bierer he wished to continue his role with Bierer and increased his efforts to connect with Walter Bierer and the rest of the management team more frequently. (Id.)

V. STANDARD OF REVIEW

"When reviewing an order granting summary judgment, the appellate court applies the same standard as that used by the trial court pursuant to Rule 56(c), SCRCP." *Lawing v. Univar, USA, Inc.*, 415 S.C. 209, 220, 781 S.E.2d 548, 554 (2015) (citing *Turner v. Milliman*, 392 S.C. 116, 122, 708 S.E.2d 766, 769 (2011)). Summary judgment is only appropriate where there is no genuine issue of material fact, and it is clear the moving party is entitled to judgment as a matter of law. Rule 56(c), SCRCP. In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party. *Koester v. Carolina Rental Cir.*, 313 S.C. 490, 493, 443 S.E.2d 392, 394 (1994). "At the summary judgment stage of the litigation, the court *does not weigh conflicting evidence with respect to a disputed material fact.*" *Lanier Const. Co. v. Bailey & Yobs, Inc.*, 384 S.C. 275, 278, 681 S.E. 2d 909, 911 (Ct. App. 2009) (emphasis added) (quoting *S.C. Prop & Cas. Guar. Ass'n v. Yensen*, 345 S.C. 512, 518, 548 S.E.2d 880, 883 (Ct. App. 2001)). Rather, when the Court is presented with a motion for summary judgment based on the statute of limitations and the testimony in the record is conflicting on the question, it becomes an *issue for*

the jury to decide. *See Walbeck v. I'On Co.*, 426 S.C. 494, 519-20, 827 S.E. 2d 348, 361 (Ct. App. 2019).

VI. ARGUMENT

The lower court erred in granting the Respondents summary judgment because the record reflects a genuine issue of material fact exists regarding the time at which Appellant was on inquiry notice of its claims against the Respondents. Yet despite such evidence the lower court held,

> Plaintiff was on inquiry notice as early as April 9, 2013, and as late as October 14, 2015, of the existence of potential claims against the Moving Defendants. Plaintiff contends that, following such notice, Defendant Jan Kennerly ("Kennerly") denied or fraudulently concealed the existence of any wrongdoing to Plaintiff. But a reasonable investigation would have revealed to Plaintiff the complained-upon misconduct more than three years before Plaintiff filed claims against the Moving Defendants. Plaintiff failed to conduct a reasonable investigation. Accordingly, South Carolina's three-year statutes of limitation bar all of Plaintiff's legal claims against the Moving Defendants. Likewise, Plaintiff's equitable causes of action against the Moving Defendants are barred by laches.

(Feb. 6, 2023 Order at 2; *see also* May 5, 2023 Order at 2-3). **(R. pp. 7; 28-29).** However, whether Bierer exercised reasonable diligence in its discovery of its claims against the Respondents is appropriately before the jury when examining the testimony of Walter and Joseph Bierer in conjunction with the facts known to them at the relevant times. Moreover, the lower court erred in finding Kennerly's conduct, as an agent of the Respondents, did not toll the statute of limitations because there is extensive evidence of Kennerly's fraudulent concealment of his business arrangements with the Respondents to sell the Respondents' products around Bierer using the Bierer's sales force. (Feb. 6, 2023, Order at 11-15.) **(R. pp. 16-20).** Accordingly, the lower court's award of summary judgment should be vacated. *See* (Jan. 4, 2023 Hr'g Tr. at 12:14 - 24:16, 27:7-30:13, 39:17-42:7; Mar. 30, 2023 Hr'g Tr. at 2:14-17:13, 29:1-31:19.) **(R. pp. 665:14-677:16, 280:7-683:13; 692:17-269:7; 699:14-714:13, 726:1-728:19).**

The three-year statute of limitations imposed by S.C. Code Ann. § 15-3-535 begins to run "from the date the injured party either knows or should know, by the exercise of reasonable diligence, that a cause of action exists for the wrongful conduct." *True v. Monteith*, 327 S.C. 116, 119, 489 S.E.2d 615, 616-17 (1997) (citing *Dean v. Ruscon Corp.,* 321 S.C. 360, 363, 468 S.E.2d 645, 647 (1996)). "The exercise of 'reasonable diligence' means the injured party must act with some promptness where the facts and circumstances of an injury place a reasonable person of common knowledge and experience on notice that a claim against another party might exist." *Id.* In the presence of conflicting testimony regarding the time at which plaintiff was on notice of a potential claim, the question of when plaintiff discovered, or should have discovered, the alleged harm is an objective question properly within province of the jury. *Arant v. Kressler*, 327 S.C. 225, 229, 489 S.E.2d 206, 208 (1997); *see also Dubar v. Carlson*, 341 S.C. 261, 269, 533 S.E.2d 913, 917 (Ct. App. 2000) ("[G]enerally, statute of limitations issues are for the jury, rather than the court, to resolve.") Therefore, viewing the entire record in this matter, and all reasonable inferences that may be drawn therefrom, in the light most favorable to Appellant, requires a finding that a genuine issue of material fact exists as to when Appellant was on notice of its claims against the Respondents. Therefore, the award of summary judgment to the Respondents should be vacated.

A. THE LOWER COURT ERRED BY CONCLUDING THAT THE APRIL 9, 2013, AND DECEMBEER 5, 2013 EMAILS ESTABLISHED AS A MATTER OF LAW THAT BIERER WAS ON INQUIRY NOTICE OF ITS CLAIMS AGAINST TRYSTAR.

In awarding summary judgment, the lower court incorrectly adopted the Respondents' argument that the April 9, 2013 and December 5, 2013 emails (collectively the 2013 Emails), "show on their face" that Appellant was on inquiry notice of potential claims against Trystar in 2013 (May Order at 6 ; *see also* Feb Order at 6). **(R. pp. 32; 11).** To the contrary, the evidence in

the record illustrates Bierer's reasonable understanding that the decline in sales Bierer was seeing in its distribution of Trystar cable to its customers was a result of legitimate, marketplace competition and that such tactics were common in the industry in the absence of an exclusivity agreement. (The cherry-picked language from the 2013 emails on which the lower court relies cannot be viewed in isolation when determining whether Bierer was on inquiry notice. Instead, when the record is viewed as a whole, it is clear that in 2013 Bierer would have no reason to suspect that Trystar was using a trusted Bierer employee – Kennerly – to divert bulk cable sales from Bierer and sell directly to Bierer customers. It is the damage resulting from this conduct – the Respondents retention of Kennerly and use of the Bierer sales network to divert sales around Bierer – for which Bierer seeks recovery. *See* (Mar. 30, 2023, Hr'g Tr: 4:1-11:2.) **(R. pp. 701:1-708:2).**

Examination of the evidentiary record illustrates that there are facts from which a jury could find Bierer acted reasonably diligently with regard to the 2013 emails. As set forth below, such conclusion is more than plausible when the factfinder considers that historical nature of Bierer's relationship with Trystar, Joseph Bierer's inquiry to Trystar, and the common industry competitive tactic used by companies like the Respondents when they obtain Bierer's customer information as a result of Bierer utilizing "drop-ship fulfillment."

In October 2009, during the point in time in which Bierer was looking for a cable supplier for its grounding equipment, Bierer was introduced to Dan Moerke of Trystar at the ICUEE trade show in Louisville, Kentucky. (JB Aff. ¶ 18.) **(R. pp. 408-409 ¶ 18).** During the trade show and later that night at a private dinner attended by Dan Moerke, Joseph Bierer, and Kennerly, Mr. Moerke indicated that Trystar was not in the utility market at that time and that Trystar was not running the correct stranding or insulation for ASTM F855 rated grounding cable (the kind Bierer

was seeking). (Id.) Joseph, Kennerly, and Mr. Moerke discussed the possibility of Trystar making ASTM F855 rated grounding cable for Bierer that would be private labeled and resold by Bierer to Bierer customers. (Id.) At that point in time, it was unknown whether Trystar had the capability to produce such cable. (Id.; *see also* Bierer RIO Trystar Mot. for SJ, Ex. E, Dep. of J. Bierer, (Aug. 31, 2022, 217:2-218:7.) **(R. pp. 408-409 ¶ 18; 527:2-528:7).**

During this discussion, Joseph Bierer also raised a concern with Mr. Moerke that if Bierer helped Trystar develop such cable and Bierer sourced cable from Trystar, Bierer did not want Trystar direct sourcing to Bierer's customers. (JB Aff. ¶ 18.) **(R. pp. 408-409 ¶ 18).** In response to this concern, Mr. Moerke assured Joseph that Trystar had no interest in selling direct to Bierer customers because Bridgewater (Trystar) did not have the outside sales force. (Id.) After helping Trystar develop cable suitable for grounding, Bierer began to order private-labeled cable from Trystar in January of 2010 to provide to its customers. (Id.) Thereafter, Bierer sold this cable to its customers as a stand-alone product, or as part of the grounding assembly (which consisted of the Trystar cable, Travis clamp, and a ferrule).

Effective January 2013, and unbeknownst to Bierer, Kennerly entered into an agreement with Trystar to receive commission for Trystar sales. *See* (Bierer RIO Trystar Mot. SJ, Ex. F; WB Aff. ¶ 6; JB Aff. ¶ 6; Dep. of W. Bierer (Feb. 24, 2022) at 230:14-233:18.) **(R. pp. 529-545; 394 ¶ 6 ; 404 ¶ 6; 424:14-426:18).** Mr. Moerke testified that Kennerly informed Trystar he had Walter Bierer's permission to enter into this agreement. (Bierer RIO to Trystar MSJ, Ex. C, Dep. D. Moerke (Aug. 3, 2022) at 63:21-64:1.) **(R. pp. 513:21-514:1).** Yet, almost four months after entering into the agreement, Mr. Moerke received an email from Joseph Bierer on April 9, 2013 noting a drop in jumper/cable sales complaining about Trystar selling direct to Bierer's customers despite the assurance Mr. Moerke had given to Joseph in 2009 that this would not occur. *See*

(Trystar Mot. SJ, Ex. 1; Dep. D. Moerke (Aug. 3, 2022) at 60:1-61:23.) **(R. pp. 356; 510:1-511:23).**

Importantly, at the time Joseph Bierer sent this email, Bierer believed that Trystar was selling direct to those customers for which it received an address to drop-ship a Bierer order. (JB Aff. ¶ 18.)[2] **(R. pp. 408-409 ¶ 18).** Notably, this occurrence, a manufacturer selling around a distributor once it obtained the distributors' customer information, was a common problem in the distributorship business. Bierer knew it did not have an exclusive agreement with Trystar which prevented this conduct; therefore, the most Bierer could do was complain to Trystar and remind Mr. Moerke that he indicated that Trystar was not interested in selling direct when he first met with Joseph Bierer in 2009. (WB Aff. ¶ 18; JB Aff. ¶ 18.) **(R. pp. 400-401 ¶ 18; 408-409 ¶ 18).**

The evidence in the record is that Joseph Bierer did reach out to Trystar when irregularities were noticed. Having received no response from Mr. Moerke to the April 2013 email that would indicate the lost sales were anything other than Trystar taking advantage of addresses provided for drop-ship orders, Bierer took steps internally to prevent Trystar from shipping cable directly to Bierer's customers by requiring in-house fulfillment for Bierer customer orders for Trystar cable. (WB Aff. ¶18; JB Aff. ¶¶ 18-19.) **(R. pp. 400-401 ¶ 18; 408-411 ¶¶ 18-19).** This belief, as well as the remedial action being taken, is reflected in email correspondence dated December 5, 2013 wherein Joseph is surprised Trystar has been provided with a customer's information to drop-ship

[2] When Bierer placed orders for cable with Trystar, it had the option to have Trystar ship the cable directly to the Bierer customer ("drop-ship fulfillment"). If Bierer utilized drop-ship fulfillment, it had to provide Trystar with its customers name and information. Once Trystar obtained this customer information, it then had the information necessary to sell directly to that Bierer customer for future cable orders thereby cutting Bierer out of those sales. However, if Bierer had Trystar ship the cable to Bierer for Bierer to then send to the Bierer customer ("in-house fulfillment"), Trystar did not have access to Bierer's customer information and thus the ability to sell around Bierer. *See* (Bierer Mot. to Reconsider Supp. at 5-7.) **(R. pp. 599-601).**

a Bierer order. *See* (Trystar Mot. SJ, Ex. 2; Mar. 30 Tr. at 4:1-11:2.) **(R. pp. 357-359; 701:1-708:2).**

Such correspondence illustrates Bierer inquiring with Kennerly and David Deinek (a Bierer sales rep under Kennerly's management) about why Kennerly or the sales team he managed provided Trystar with Bierer customer addresses for direct shipments. *See* (Trystar Mot. SJ, Ex. 2 ("I thought we were all in agreement this wasn't going to continue to happen?"); JB Aff. ¶ 19.) **(R. pp. 357-359; 410-411 ¶ 19).** The evidence before the Court is that in response to this inquiry from Joseph Bierer, Kennerly expressed astonishment and Deinek apologized for the same indicating he was trying to fill a "rush order" for a Bierer customer. (Id.) There is nothing in this email that puts Bierer on notice of a potential claim against Trystar. In fact, Trystar was well within its legal right to sell directly to Bierer customers since Bierer did not have an exclusivity agreement with Trystar. (WB Aff. ¶ 18; JB Aff. ¶¶ 18-19). **(R. pp. 400-401 ¶ 18; 408-411 ¶¶ 18-19).** Trystar's wrongful conduct was paying Bierer's employee Kennerly to divert sales from Bierer to Trystar. Neither Bierer's knowledge that Trystar was selling direct to its customers nor any of the language in the 2013 emails, that would have put Bierer on notice that Trystar was unlawfully competing against Bierer by paying its national sales manager to divert sales away from Bierer to Trystar. *See* (Bierer Mot. to Reconsider Supp. at 3-14.) **(R. pp. 597-608).**

This email further illustrates Bierer's diligence in matters related to Trystar and exhibits Bierer's understanding in December 2013 that Trystar was gaining a competitive advantage over Bierer because of Bierer's use of drop-ship fulfillment which provided Trystar with Bierer customer information. At a bare minimum, whether Bierer was reasonable in assuming in 2013 that it was losing sales as a result of drop-ship fulfilment - a common, legitimate competitive practice utilized in the distributorship industry – rather than as a result of an unknown side

agreement between Trystar and Kennerly to unfairly utilize Bierer's sales force and customer information, is a question for the jury.

B. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT ON THE AFFIRMATIVE DEFENSE OF STATUTE OF LIMITATIONS BY CONCLUDING THAT THE INVESTIGATION THAT BIERER UNDERTOOK UPON DISCOVERING THE 2014 IEEE BROCHURE WAS UNREASONABLE AS A MATTER OF LAW.

It is improper for the lower court to discount the objective facts presented by Appellant as to why it was not on inquiry notice and instead view the statement in the 2014 IEEE brochure that Kennerly "has worked for Travis for 2 years" in isolation. (Feb. 6, 2023 Order at 9; May 5, 2023 Order at 7). **(R. pp. 14; 33).** The record contains facts and testimony from which a jury could find Bierer acted reasonably in accepting Kennerly's explanation that the 2014 newsletter contained a "misprint" and thus Bierer did not have notice of a potential claim against the Respondents. *See* (Mar. 30 Hr'g Tr. at 11:3-13:19.) **(R. pp. 708:3-710:19).** Accordingly, the lower court erred by granting summary judgment.

At all times during his Bierer employment, Bierer understood Kennerly to have open and obvious business interactions with Travis, on *behalf of Bierer*. (WB Aff ¶ 11; JB Aff ¶ 10). **(R. pp. 396 ¶ 11; 405 ¶ 10).** Bierer supported such interactions because it distributed Travis products to Bierer customers and it used Travis clamps in its personal protective grounds that Bierer assembled and sold to Bierer customers. (Id.) Around 2015 or 2016,[3] Walter Bierer was presented with the IEEE brochure which indicated Kennerly had worked for Travis for two years. (WB Aff.

[3] There is conflicting evidence in the record as to whether Walter Bierer saw the brochure in 2014 as he stated in his deposition or at some point in 2015 or 2016 as set forth in his subsequent affidavit. It is not disputed that when he first saw the brochure he confronted Kennerly at a management meeting with the same. Joseph Bierer's testimony is that this confrontation was in 2015 or 2016. Regardless of the date adopted by the lower court, it does not change the appropriate analysis and arriving at the proper conclusion that the statute of limitations began to run at the earliest on July 10, 2018.

¶13; JB Aff. ¶¶ 12-13; Bierer RIO Travis Mot. SJ, Ex. E, Dep. W. Bierer (Feb. 23, 2022) at 243:7-244:1 (hereinafter "Dep. W. Bierer (Feb. 23, 2022) at ___"); Bierer RIO Travis Mot. SJ, Ex. F, Dep. J. Bierer (Aug. 31, 2022) at 86:22-87:15 (hereinafter "Dep. J. Bierer (Feb. 23, 2022) at ___").) **(R. pp. 397 ¶ 13; 406-407 ¶¶ 12-13; 431:7-432:1; 443:22-444:15).** At the next weekly management meeting, Walter Bierer confronted Kennerly about the language in the IEEE brochure. (WB Aff. ¶ 13; JB Aff. ¶ 12.) **(R. pp. 397 ¶ 13; 406 ¶ 12).** In response, Kennerly began laughing and told Walter and Joseph Bierer that Travis employee Dick Pelletier had written the brochure and incorrectly assumed Kennerly was an employee of Travis because Kennerly had spent so much time in assisting Travis with developing clamps for use in personal protective grounding equipment on behalf of Bierer. (Id.) Kennerly assured Walter that he was not employed by Travis and laughed off the situation as a simple misunderstanding. *See* (WB Aff. ¶ 13; JB Aff. ¶¶ 12-13; Dep. W. Bierer (Feb. 23, 2022) at 243:7-244:1; Dep. J. Bierer (Feb. 23, 2022) at 86:22-87:15.) **(R. pp. 397 ¶ 13; 406-407 ¶¶ 12-13; 431:7-432:1; 443:22-444:15).**

At no point in time during his employment with Bierer, did Bierer know that Kennerly had been working as a paid sales representative for Travis and Trystar since at least 2013, receiving commissions for his sale of Travis products around Bierer, as well as for those sales made by the Bierer sales force on behalf of Travis and Trystar. (WB Aff. ¶¶ 6, 12; JB Aff. ¶¶ 6,11; *see also* Dep. of W. Bierer (Feb. 24, 2022), 230:14-23; 232:13-233:7.) **(R. pp. 394 ¶ 6, 396 ¶ 12; 404 ¶ 6, 405-406 ¶ 11; 424:14-23; 425:13-426:7).**

This explanation seemed reasonable to Walter and Joseph Bierer at the time because of Bierer's extensive relationship with Travis. (WB Aff. ¶ 13; JB Aff. ¶ 12.) **(R. pp. 397 ¶ 13; 406 ¶ 12).** Additionally, at this time annual cable sales using Travis products were at their peak and Walter Bierer was pleased with the growth in sales. Thus, Bierer accepted this explanation from

Kennerly, believing Kennerly was one of Bierer's most trusted and valuable employees. (WB Aff. ¶ 13; JB Aff. ¶ 13.) **(R. pp. 397 ¶ 13; 406-407 ¶ 13).** Walter Bierer had worked with Kennerly for over a decade, Joe Bierer for close to a decade, and both believed Kennerly was an honest person. (Id.) Walter had even included Kennerly in his Last Will and Testament. (WB Aff. ¶ 13). **(R. p. 397 ¶ 13).** Because of this trust, and the knowledge that Kennerly's job at Bierer required he spend considerable time with Travis in developing and testing the clamps for Bierer's grounding assemblies, Bierer accepted Kennerly's explanation. (WB Aff. ¶ 13; JB Aff. ¶¶ 12-13.) **(R. pp. 397 ¶ 13; 406-407 ¶¶ 12-13).** Moreover, Walter Bierer did not go behind Kennerly's back and continue to inquire about the brochure with Travis because it would have demonstrated to Kennerly that Walter did not trust Kennerly. (WB Aff. ¶ 13.) **(R. p. 397 ¶ 13).** Such action by Walter would have caused significant morale problems if the statement in the brochure was in fact just a misstatement as Kennerly explained. (Id.; *see also* Bierer Mot. to Reconsider Supp. at 15-19.) **(R. pp. 397 ¶ 13; 609-613).**

By granting summary judgment for Travis, the lower court concluded as a matter of law that Bierer did not act with reasonable diligence in its investigation of the statements made about Kennerly's relationship with Travis in the IEEE brochure. This was error. When considering a motion for summary judgment all reasonable inferences must be viewed in the light most favorable to the non-moving party. Here, Bierer confronted its employee Kennerly about the statements made in the brochure and more particularly whether he had an employment relationship with Travis. In response to this inquiry, Kennerly lied and denied that he had any type of relationship with Travis and that the statement in the brochure was a misprint. Bierer accepted this representation as reasonable. The trial court erred by ruling that Bierer's acceptance of Kennerly's representation was unreasonable as a matter of law. Whether one's actions are reasonable or

unreasonable is a quintessential jury question. *See Logan v. Cherokee Landscaping & Grading Co.,* 389 S.C. 611, 618, 698 S.E.2d 879, 883 (Ct. App. 2010) ("If there is conflicting evidence as to whether a claimant knew or should have known he or she had a cause of action, the question is one for the jury.") Therefore, it was error for the lower court to award summary judgment.

C. THE LOWER COURT ERRED BY CONCLUDING THAT THE OCTOBER 14, 2015 EMAIL ESTABLISHED AS A MATTER OF LAW THAT BIERER WAS ON INQUIRY NOTICE OF ITS CLAIMS AGAINST THE RESPONDENTS.

Contrary to the holding of the lower court, the October 14, 2015, email from Walter Bierer to Kennerly does not irrefutably show Bierer's knowledge of facts sufficient to start the limitations period. (Feb. 6, 2023, Order at 9-10; May 5, 2023 Order at 7-8; Travis Mot. for SJ, Ex. 10). **(R. pp. 14-15; 33-34; 305-307).** The evidence in the record is that the "outside activities" referred to in the October 14, 2015, email did not concern Kennerly's performance in his sales capacity and that Bierer sales of Travis and Trystar products were at an all-time high. While it is unclear why the lower court disregarded Walter and Joseph Bierer's affidavits,[4] it is improper for the lower

[4] As set forth in its briefing before the lower court, the affidavits of Walter and Joseph Bierer are not sham affidavits and are appropriately included in the record of evidence to be considered by the lower court when ruling on the Respondents motions for summary judgment. (Mot. to Reconsider at 3-4 & n.1). **(R. pp. 572-573 & n.1).** However, for the lower court to have arrived at a ruling in favor of the Respondents, it necessarily did one of the following: 1) made an improper determination as to whether the evidence contained therein was reasonable to put Bierer on notice of its claims, or 2) ignored such evidence entirely on the grounds advocated by the Respondents – that the affidavits are sham affidavits. In either scenario, the lower court erred.

First, assuming the Court considered the entire record (including Bierer's affidavits), then the determination of whether Bierer's evidence put Bierer on notice of its claims prior to July 10, 2018, is a material question of fact for the jury – not the lower court. *See Arant*, 327 S.C. at 229, 489 S.E.2d at 208. Alternatively, in the event the lower court ignored Bierer's affidavits in reaching its ruling, such action also constitutes error absent a finding the same constituted sham affidavits. Bierer argued against such a finding and sought clarification on this issue in its Motion to Reconsider and the lower court declined to rule on the same. Instead, it simply held this issue was "beside the point" and chalked the same up to merely containing Bierer's "subjective understanding" of facts as they existed from 2013-2015. (May 5, 2023 Order at 8). **(R. p. 34).** But again, it is for the jury, not the lower court, to determine whether Bierer's understanding and investigation into the facts it knew at that time was objectively reasonable.

court to grant summary judgment when Appellant presented testimony contradicting the evidence relied on by the Respondents that creates a genuine issue of material fact. *See* (Jan. 4, 2023 Hr'g Tr. at 21:3-24:16; Mar. 30, 2023 Hr'g Tr. at 13:20-16:3; *see also* Bierer Mot. to Reconsider Supp. at 20-22.) **(R. pp. 674:3-677:16; 710:20-713:3; 614-616).**

In 2015, Bierer sales using Travis and Trystar products were at their peak and Bierer had no reason to suspect Kennerly of any wrong-doing pertaining to Travis or Trystar. (WB Aff. ¶ 16.) **(R. pp. 398-400 ¶ 16).** There was no information from which Bierer could reasonably be on notice that its trusted employee had entered into side deals with Travis and Trystar to sabotage Bierer sales using Bierer's sales force. The concerns raised by Walter Bierer in the October 14, 2015, email were generated from Kennerly's activities locally in South Carolina. (Id.) As presented in Walter Bierer's affidavit, the "outside activities" he references in the email were strictly related to Kennerly's relationship with Eddins Electric Company and to in-state outings and were in no way related to or evidence of a suspicion on his part that Kennerly was providing sales services to Travis, Trystar, or any third party. (Id.)

Around this time, Kennerly, with Walter Bierer's permission, had taken time away from work to go on several golfing trips to Myrtle Beach, SC under the pretext that they were family events for the male members of his extended family. (WB Aff. ¶ 16.) **(R. pp. 398-400 ¶ 16).** Kennerly's sister was married to the son of, what appeared to be, an extremely successful businessman in the electrical contracting business, Jerry Eddins. (Id.) It was clear to Walter Bierer that Kennerly idolized him. (Id.) At one point Kennerly boasted of Eddin's award of a large multi-million dollar government electrical contract to wire and install the lighting on the Ravenel Bridge in Charleston, South Carolina. (Id.) As time progressed, Kennerly returned from these trips- which

Walter had been told were merely family outings- talking about meeting "SC big business" and political figures during these and other golfing outings around the Columbia, SC area. (Id.) It was apparent to Walter Bierer that Kennerly was enamored with the business and political connections he was allegedly making. (Id.) Simultaneously, Kennerly began displaying an abrasive and demeaning attitude toward his fellow employees at work and as more and more of Kennerly's attention was directed to these in-state family/political outings, he began to fall short of fulfilling the responsibilities in his role at Bierer. (Id.)

Thus, the October 14, 2015, email merely set forth Walter Bierer's observations and concerns, and requested Kennerly evaluate whether he wanted to continue his employment with Bierer. (Id.) This email simply reflects Walter Bierer's curiosity surrounding whether Kennerly was exploring and/or had more interest in working for Eddins Electric Co. or someone with connections to Jerry Eddins than continuing his employment with Bierer. (Id.) Furthermore, in response to this email, Kennerly assured Walter of his desire to continue in his role at Bierer and Kennerly subsequently increased his efforts to make sure he connected with the Bierer management team more frequently. (Id.)

Again, this document, as well as the other portions of the record relied on by the lower court in its ruling, cannot be viewed in a vacuum. Examining the facts as Bierer knew them at the time illustrates that the October 14, 2015, email does not create a scenario in which Bierer should have known that Kennerly was a sales representative for the Respondents and using Bierer's sales reps to receive commissions on sales made by bypassing Bierer. Accordingly, the lower court's orders should be reversed.

D. THE TRIAL ERRED AS A MATTER OF LAW IN GRANTING SUMMARY JUDGMENT ON THE AFFIRMATIVE DEFENSE OF STATUTE OF LIMITATIONS WHERE THE RECORD CONTAINS CONFLICTING TESTIMONY AS TO WHEN BIERER WAS ON INQUIRY NOTICE OF ITS CLAIMS AGAINST THE RESPONDENTS.[5]

In addition to the four documents above, the trial court also concluded as a matter of law that Bierer was aware as early as 2012 "Kennerly was taking steps to purportedly distance himself from his employment" based on email sent from Walter Bierer to Kennerly on July 11, 2018. (Feb. 6, 2023 Order at 3; Travis Mot. SJ, Ex. 10). **(R. pp. 8; 305-307).** As explained by Walter Bierer, this email was sent to Kennerly *after* Walter learned of Kennerly's relationship with Travis and Trystar in July 2018 and reflects his realization at that time that the actions Kennerly had taken as early as 2012 were steps Kennerly surreptitiously took to distance himself from Bierer and his employment at Bierer (WB Aff. ¶ 8.) **(R. pp. 394-395 ¶ 8).**

It is evident that Walter did not ignore the conduct referenced in his email. As to Kennerly getting a new phone, Kennerly told Walter that he lost his company phone on the West Coast and so he had to replace it using his personal information to have it set up while on the road. (Id.; *see*

[5] In its initial motions for summary judgment, the Respondents relied on multiple documents in support of barring Bierer's claims based on the statute of limitations. Many of those documents contain evidence dated after October 14, 2015, and were not incorporated in the "conclusions of law" section of the lower court's order granting summary judgment. In its motion to reconsider, Bierer requested the lower court rule on the remaining outstanding issues raised with regard to such evidence. (Bierer Mot. to Reconsider at 8-9.) **(R. pp. 577-578).** In denying the order to reconsider, the lower court relied on the same evidence utilized in its February 6, 2023 order indicating that the "pieces of evidence that existed outside of the limitations period" support the Court's order and determination of these issues is not "required or appropriate." (May 5, 2023 Order at 10.) **(R. p. 36).** Accordingly, Bierer has limited its argument herein to the documents cited by the lower court in its conclusions of law section of its February 6, 2023 Order and May 5, 2023 Order. However, in the event such evidence is relied on by the Respondents in this appeal and considered by this Court, Bierer hereby incorporates its responses to the same as set forth in its submissions to the court and maintains in each instance it is a jury question as to whether the facts as they existed at that time and as were known to Bierer put Bierer on inquiry notice of its claims against the Respondents.

also Dep. of W. Bierer (Feb. 24, 2022) at 115:16-117:10.) **(R. pp. 394-395 ¶ 8; 421:16-423:10).** As to establishing a Gmail account, Walter approved that based on Kennerly's explanation that Gmail was more user friendly than the bierermeters.com domain. (Id.) As to receipts, Kennerly complained that the receipts were hard to keep up with, so Walter Bierer compromised and agreed Kennerly could just itemize his monthly company credit card statements. (WB Aff. ¶ 8.) **(R. pp. 394-395 ¶ 8).** Finally, as to trip reports, Kennerly gave these to the management team orally at Bierer Monday management meetings each week, so Walter Bierer did not insist he write them up. (Id.) However, when Kennerly began missing these meetings, Walter Bierer insisted he turn in written reports, which Kennerly eventually did so towards the latter part of his employment. (Id.) Thus the evidence is that Walter Bierer did inquire with Kennerly about such conduct, and where requested, Kennerly complied with Walter Bierer's instructions to address the concern. Whether Walter Bierer's acceptance of Kennerly's benign explanation for such conduct at the time of its occurrence should have put Bierer on notice of potential claims against the Respondents is a question of fact for the jury.

E. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO THE RESPONDENTS BECAUSE KENNERLY'S FRAUDLENT CONCEALMENT TOLLED THE STATUTE OF LIMITATIONS ON BIERER'S CLAIMS AGAINST THE RESPONDENTS.

Under South Carolina law, Kennerly's fraudulent concealment of this illegitimate relationship with the Respondents tolls the statute of limitations until Bierer became aware of this wrongful conduct. *See West v. Serv. Life & Health Ins. Co.,* 220 S.C. 198, 202, 66 S.E.2d 816, 817 (1951). The evidence in the record illustrates Kennerly was an agent of Travis and Trystar and that in this capacity, he fraudulently concealed these relationships and their collective use of Bierer sales reps to sell the Respondents' products around Bierer. Accordingly, as an agent of Travis and Trystar, the lower court erred in finding that Kennerly's actions did not toll the statute of

limitations. *See* (Jan. 4, 2023, Hr'g Tr. at 29:12 – 30:12, 39:17-42:7; Mar. 30, 2023 Hr'g Tr. at 16:4-17.13; Bierer Mot. to Reconsider Supp. at 23.) **(R. pp. 682:12-683:12; 692:17-695:7; 713:4-714:13; 617).**

The record is clear that Kennerly began receiving commission for his sales services and utilization of the Bierer sales representatives on behalf of the Respondents beginning in 2013. (Bierer RIO to Travis Mot. SJ, Ex. G; Bierer RIO to Trystar Mot. SJ, Ex. F.) **(R. pp. 449-450; 529-545).** It is undisputed that Kennerly never disclosed these relationships to Bierer and actively sought to conceal the same. Even when confronted about his relationship with the Respondents on July 11, 2018, Kennerly continued to lie about his relationships with Travis and Trystar. *See* (Travis Mot SJ, Ex. 4 at Kennerly 011384.) **(R. p. 258).** In his email communication, Kennerly stated he did not work for Travis in 2014. (Id.; *see also* WB Aff. ¶ 12; JB Aff. ¶ 11.) **(R. pp. 258; 396 ¶ 12; 405-406 ¶ 11).** However, the record reflects that Travis was issuing Kennerly a 1099 for commission as early as 2013. (Bierer RIO to Travis Mot. SJ, Ex. G.) **(R. pp. 449-450).** Similarly, Kennerly's admission on July 11, 2018, that he was "guilty as charged" when confronted about his secret relationship with Trystar illustrates he had not informed Bierer of the same. *See* (Travis Mot. SJ, Ex. 4 at Kennerly 011384; WB Aff. ¶ 12; JB Aff. ¶ 11.) **R. pp. 258; 396 ¶ 12; 405-406 ¶ 11).** Moreover, Kennerly continued to be deceitful by stating Trystar "had its own network of reps that handle all the selling in which I have nothing to do with." (Id.) This was a lie. Trystar, through Kennerly, used Bierer sales reps to sell Trystar products around Bierer. (Dep. D. Moerke (Aug. 3, 2022), 53:12- 54:10.) **(R. pp. 507:12-508:10).**

It is an inescapable conclusion that Kennerly fraudulently concealed his illegitimate relationship with the Respondents by directly lying to Bierer about the existence of these relationships, and by failing to disclose these relationships in violation of his fiduciary duty. *Ellie*

v. Miccichi, 358 S.C. 78, 101, 594 S.E.2d 485, 497 (Ct. App. 2004) ("Non-disclosure becomes fraudulent concealment only when it is the duty of the party having knowledge of the facts to make them known to the other party to the transaction.") Under the doctrine of fraudulent concealment, "deliberate acts of deception by a defendant calculated to conceal from a potential plaintiff that he has a cause of action toll the statute of limitations." *Doe v. Bishop of Charleston*, 407 S.C. 128, 140, 754 S.E.2d 494, 500–01 (2014) (citing *Strong v. Univ. of South Carolina Sch. of Med.*, 316 S.C. 189, 191, 447 S.C. 850, 852 (1994)). The fraudulent concealment doctrine "applies in situations 'where the defendant has wrongfully deceived or misled the plaintiff in order to conceal the existence of a cause of action.' Under this doctrine, because of the defendant's wrongful acts of concealment, the plaintiff is not aware of the facts giving rise to his claim within the limitations period." *Harrell v. BMW of N. Am., LLC,* 517 F. Supp. 3d 527, 537 (D.S.C. 2021) (quoting *Edmonson v. Eagle Nat'l Bank*, 922 F.3d 535, 549 (4th Cir. 2019)).

Thus, Kennerly's fraudulent concealment of his relationship with the Respondents tolls Bierer's claims against the Respondents. As corporations, the Respondents can only act through their officers, employees, and agents. Kennerly, utilizing Bierer's sales force, was the primary sales channel for the Respondents and thus, the Respondents are liable for Kennerly's fraudulent concealment even if they did not authorize such behavior. The South Carolina Supreme Court ruled in *West v. Serv. Life & Health Ins. Co.,* 220 S.C. 198, 202, 66 S.E.2d 816, 817 (1951) that a principal "'is held liable to third persons in a civil suit for the frauds, deceits, concealments, misrepresentations, negligence, and other malfeasances and omissions of duty of his agent in the [scope] of his [agency], although the principal did not authorize or justify or participate in, or indeed, know of such misconduct, or even if he forbade the acts or disapproved of them.'" (quoting *Huestess v. South Atl. Life Ins. Co.*, 88 S.C. 31, 70 S.E. 403, 407 (S.C. 1911)); *see also E.A. Prince*

& Son, Inc. v. Selective Ins. Co. of Se., 818 F. Supp. 910, 912 (D.S.C. 1993) ("Questions of agency and an agent's authority ordinarily should not be resolved by summary judgment where there are *any* facts giving rise to an inference of an agency relationship or authority." (emphasis added)). Accordingly, the lower court's orders should be reversed because Kennerly's fraudulent concealment tolls the statute of limitations for Appellant's claims against the Respondents because Kennerly was undeniably an agent of the Respondents.

VII. CONCLUSION

Based on the foregoing, Bierer requests the Court reverse the lower court's award of summary judgment to the Respondents in the February 6, 2023, Order and May 5, 2023, Order.

Respectfully submitted,

By: *s/ James M. Griffin*

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January 17, 2024
Columbia, South Carolina

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

Appellate Case No. 2023-000780
Case No. 2018-CP-40-04841

Bierer and Associates, Inc.,	Appellant,
v.	
Jan F. Kennerly, Jr., Danielle Kennerly, EUSA, LLC, J&D Farms, LLC, Trystar LLC; Travis Pattern & Foundry, Inc.; Illinois Tool Works, Inc.; and David Deinek,	Defendants,
Of which, Trystar LLC and Travis Pattern & Foundry Inc. are	Respondents.
AND	
Jan F. Kennerly, Jr.,	Defendant/Third Party Plaintiff,
v.	
Walter Bierer, Brent Jeffries, and Joseph Bierer,	Third Party Defendants.

CERTIFICATE OF COUNSEL

I, James M. Griffin, certify that the Final Brief of Appellant complies with Rule 211(b) of the South Carolina Rules of Appellate Practice.

By: *s/ James M. Griffin*

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January 17, 2024