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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.

FINAL BRIEF OF RESPONDENT TRYSTAR LLC

Brian C. Duffy (S.C. Bar No. 16247)
Blake A. McKie (SC Bar No. 80198)
DUFFY & YOUNG LLC
96 Broad Street
Charleston, South Carolina 29401
(843) 720-2044 – Telephone
(843) 720-2047 – Fax
bduffy@duffyandyoung.com
bmckie@duffyandyoung.com

John Ursu (*pro hac vice* MN Bar #32257X)
FAEGRE DRINKER BIDDLE & REATH LLP
2200 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55402
Tel: (612) 766-7000
Fax: (612) 766-1600
john.ursu@faegredrinker.com

Attorneys for Trystar LLC

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes, Rules & Regulations

I. STATEMENT OF ISSUES ON APPEAL

1. Did the trial court correctly conclude that Bierer's claims against Trystar were barred by a three-year statute of limitations because Bierer was on notice of a claim against Trystar before April 15, 2018?

2. Did the trial court correctly conclude that no facts established fraudulent concealment by Trystar to toll the statutes of limitations?

II. STATEMENT OF THE CASE

This appeal concerns a statute of limitations defense where the trial court found that the plaintiff was on notice of a claim at least six years before it initiated suit—too long under the relevant three-year statute of limitations period.

On April 15, 2021 Bierer & Associates, Inc. ("Bierer") sued Trystar LLC ("Trystar") for various business torts that were all premised upon the notion that Trystar had improperly stolen Bierer's business opportunities in conjunction with pre-existing claims against a former employee, Jan ("Rick") Kennerly. All of Bierer's claims against Trystar are subject to the three-year statute of limitations in S.C. Code Ann. § 15-3-535.

Trystar moved for summary judgment, designating evidence of Bierer's own words, showing that a reasonable person would know that a claim against Trystar existed as early as 2013. Following full briefing and a January 4, 2023 argument via WebEx, the trial court granted summary judgment on February 6, 2023, to Trystar and also its co-defendant Travis Pattern & Foundry, Inc. ("Travis"), holding that the undisputed facts showed that Bierer knew or should have known of its claims by 2015 at the latest, and that the doctrine of fraudulent concealment did not preserve the claims. (*See* R. pp. 6-22 (Feb. 6, 2023 Order); R. pp. 3-5 (Jan. 6, 2023 Form 4 Order)). The trial court later denied a motion to reconsider on the same grounds (after full briefing and a March 30, 2023 oral argument via WebEx)

because there was no clear error of law or manifest injustice in rejecting the same arguments and evidence it had already rejected. (R. p. 30 (May 5, 2023 Order, p. 4); *see also* R. pp. 24-25 (Apr. 3, 2023 Form 4 Order)).

On May 9, 2023, Bierer filed a notice of appeal from the February 6, 2023 Order Granting Summary Judgment to Respondents and the May 5, 2023 Order Denying Plaintiffs' Motion To Reconsider.

This Court should affirm the trial court.

III. FACTS

A. Introduction

The problem with Bierer's lawsuit is that it was brought years too late. As early as 2013, Bierer believed that Trystar "may possibly be circumventing" Bierer's sales efforts and that Trystar had a "history" of "undermining" Bierer's business. Almost annually, Bierer sent emails to Trystar or to Bierer's former employee Rick Kennerly admitting things like its "trust was waning" and that "no business other than Bierer would have tolerated this for any period of time." Bierer's own words showed that it knew claims against Trystar might exist as early as 2013, and that it had years to investigate and bring claims if it wanted to. But it waited to sue Trystar until 2021, years after the statute of limitations expired.

B. The Parties

Trystar is a Minnesota company that manufactures and distributes a variety of products in the electrical utility industry, including electrical cable and electrical power panel distribution equipment. (*See* R. pp. 69, 79 (Plaintiff's Third Am. Compl. ¶¶ 6, 28)). Bierer is a South Carolina company that also manufactures and sells equipment in the

electric utility industry. (*See* R. pp. 68, 74 (Plaintiff's Third Am. Compl. ¶¶ 1, 13)). Both have a substantial footprint in South Carolina's electrical utility market. Plaintiff and Trystar were introduced over a decade ago by Kennerly, one of Bierer's employees. (R. pp. 78, 79 (Plaintiff's Third Am. Compl. ¶¶ 27, 29)).

C. Events Giving Rise to Notice of a Claim

In 2009, as part of an initiative by Bierer to expand services into the utility grounding business, Kennerly identified Trystar as a manufacturer for cable and another company, Travis, as a manufacturer for clamps. (R. pp. 79-81 (Plaintiff's Third Am. Compl. ¶¶ 31-32, 41)). Kennerly initiated a business relationship with Trystar and Travis on Bierer's behalf, and Bierer began purchasing products from Respondents. (R. pp. 80, 82 (Plaintiff's Third Am. Compl. ¶¶ 32, 43)).

In 2013, Bierer became frustrated by and repeatedly expressed concerns regarding Trystar's sales practices in relation to Bierer customers. Specifically, on April 9, 2013, Joe Bierer wrote to Trystar's Dan Moerke noting that Trystar "may possibly be circumventing" Bierer's "efforts to establish and support new [cable/jumper] sales":

Message

From: Joe Bierer [joebierer@bierermeters.com]
Sent: 4/9/2013 4:03:16 PM
To: dan.moerke@trystar.com
Subject: Cable/Jumper sales

Hi Dan,

I hope all has been well with you, it has been a while since we last had a chance to talk.

It has come to our attention over a period of time, after noticing a drop in cable/jumper sales, emails from customers, etc., that Trystar may possibly be circumventing our efforts to establish and support new sales. I remember having dinner with you and Rick in Louisville almost two years ago and discussing this very topic.

(R. p. 356 (Trystar SJ Ex. 1 (yellow highlighting added))).

And on December 5, 2013, Joe Bierer sent another email to Bierer sales representatives, including Kennerly, again expressing concern with respect to Trystar's "history" of "undermining **any** and **all** business that Bierer has introduced them to":

From: Joe Bierer [joebierer@bierermeters.com]
Sent: 12/5/2013 2:37:04 PM
To: 'David Deinek' [david@bdlmi.com]; 'Rick Kennerly' [rickkennerly@bierermeters.com]
Subject: RE: Fwd: vendors

David,

It is obviously too late in this case, but yes, another line was crossed with Trystar.

You can chalk that business (First Energy) up as lost, at least for Bierer anyway. Trystar has a history (two other product lines) of undermining **any** and **all** business that Bierer has introduced them to by simply having product shipped directly to the customers location that Bierer foolishly supplied them, as in this case. We supposedly put a stop to this sometime ago, until now.

Please inform Bierer if you are ever required to contact one of our vendors.

Thanks,

Joseph S. Bierer
Bierer & Associates, Inc.
10730 Farrow Rd.
Blythewood, S.C. 29016

(R. p. 358 (Trystar SJ Ex. 2 (yellow highlighting added) (emphasis in original))). These emails reflect Bierer's knowledge by the end of 2013 that Trystar "may possibly be circumventing" its sales efforts and that certain business could be "chalk[ed] up" "as lost, at least for Bierer anyway" when "another line was crossed" with Trystar.

Additional information as to Kennerly's outside activities surfaced in Fall 2014. On October 24, 2014, Kennerly presented at a technical seminar on behalf of Travis Pattern. (R. p. 9 (Feb. 6 Order, p. 4); R. p. 658, lines 9-21 (1-4-23 Hearing Tr.)). The seminar was advertised in an industry newsletter with a biography for Kennerly that read, "has worked for Bierer Meters as an engineering and operations manager for 15 years *and Travis for 2*

years." (R. p. 9 (Feb. 6 Order, p. 4 (emphasis added)); R. p. 227, line 2-p. 228, line 2 (Travis MSJ Ex. 1 (W. Bierer Depo Trans. (Day 1)))). At his deposition, Walter Bierer acknowledged seeing the brochure in November 2014. (R. p. 9 (Feb. 6 Order, p. 4 & n.2); R. p. 225, lines 10-19 (Travis MSJ Ex. 1 (W. Bierer Depo Trans. (Day 1)))). Also, at a weekly company meeting around this time, Walter Bierer confronted Kennerly who "laughed off" the suggestion that he worked for Travis. (R. p. 10 (Feb. 6 Order, p. 5); R. p. 225, lines 10-19 (Travis MSJ Ex. 1 (W. Bierer Depo Trans. (Day 1)))).

On October 15, 2015, Walter Bierer warned Kennerly by email: "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 when you are gone for weeks at a time with no reporting. As I said before, my trust is waning." (R. pp. 264-65 (Trystar SJ Ex. 3, p. 5-6)).

In April 2016, Kennerly emailed Walter Bierer to note that he would be spending some "off" time in San Antonio, Texas, to meet with industry representatives. (R. p. 334 (Travis SJ Exhibit 14, p. BIERER_PROD_00032764)). Thereafter, one of Bierer's managers emailed the Bierer management group observing, "From talking with [another sales representative], [Kennerly] helps many people with other Manufacturer's products," and noting that he hadn't "realized that 'off' time was a factor." (R. p. 334 (Travis Pattern SJ Ex. 14, p. BIERER_PROD_00032764)). Walter Bierer's wife Billie Bierer responded that comment should be reserved and that "Rick is doing business." (R. p. 334 (Travis Pattern SJ Ex. 14, p. BIERER_PROD_00032764); *see also* R. p. 717, line 15-p. 718, line 5 (3-30-23 Mot. To Reconsider Tr.)).

In a series of communications regarding Kennerly's termination in July 2018, Walter Bierer admitted that Bierer had been on notice of facts supporting Kennerly's "conflict of interest" for "*many years*":

From: Walter Bierer <wbierer@aol.com>
Date: July 11, 2018 at 3:40:20 PM EDT
To: rickkennerly@gmail.com
Subject: Re: Conflict of Interest

Rick,

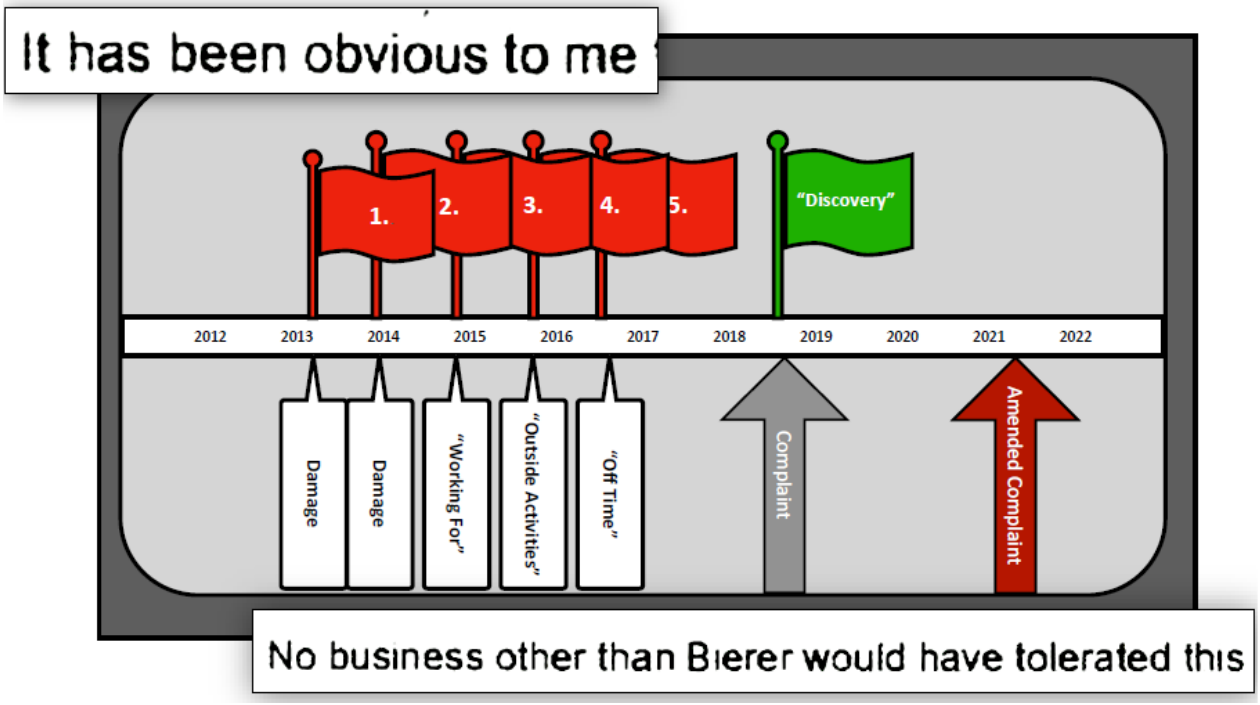
It has been obvious to me that you have been trying to separate yourself from Bierer and appear as an independent entity within the electric utility industry for many years. You separated your phone in 2012. Separated your e-mail account at or around the same time. With few exceptions, you haven't turned in credit card receipts for 15 years. Other than very recently, no trip reports. Unknown whereabouts for weeks. Alternative business cards? Product development for other companies. Product representation and financial arrangements with other companies.

You have chosen to be accountable to no one. No business other than Bierer would have tolerated this for any period of time. No more!

(R. p. 367 (Trystar SJ Ex. 4, with yellow highlighting added)). In this email, Walter Bierer stated: "No business other than Bierer would have tolerated this for any period of time." (*Id.*)

All of Bierer's claims against Trystar grow out of association with Kennerly and his activities. (*See* R. pp. 164-65, 170, 173, 174, 177, 186 (Third Amended Compl. ¶¶ 98, 112, 123, 125, 127, 138, 167)). Those claims are based on decade-old concerns as to Kennerly that Bierer's founder described as having for "many years," and long before the relevant statute of limitations lookback to April 15, 2018. Tellingly, Bierer's own belief as to Trystar's interference with customer relations began as early as 2013. As the timeline below illustrates, Bierer had notice of many red flags based on the above-described emails and

circumstances long before its July 2018 email describing knowledge of Kennerly's disassociation as "obvious" and reflecting that only "Bierer would have tolerated this":



The July 11, 2018 email reflected Bierer's pre-existing knowledge, hardly a marker of "discovery" of a claim. And while Bierer filed its claim against Kennerly shortly thereafter, it waited nearly three more years, until April 2021, to file its claims against Trystar.

Based on these undisputed, objective facts, the trial court entered summary judgment to Trystar, holding that the legal claims were barred by the statute of limitations and the equitable claims were barred by laches. (R. p. 6 (Feb. 6, 2023 Order); *see also* R. pp. 24-25 (Jan. 6, 2023 Form 4 Order)).

IV. STANDARD OF REVIEW

As is well-established, appellate courts reviewing a grant of summary judgment apply the same standard applied by the trial court pursuant to Rule 56(c), SCRCP. *Fleming v. Rose*, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002). Under South Carolina Rule of Civil

Procedure 56(c), summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Bierer does not dispute that a three-year statute of limitations under S.C. Code Ann. § 15-3-535 (1976) applies to its legal claims against Respondents. *See* Bierer Initial Br. at 8. Therefore, summary judgment is warranted on the statute of limitations defense in this matter when there is no reasonable dispute that "the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some claim against another party might exist" more than three years before the filing of the lawsuit. *Stokes-Craven Holding Corp. v. Robinson*, 416 S.C. 517, 525-26, 787 S.E.2d 485, 489 (2016); *see* S.C. Code Ann. § 15-3-535 (requiring that "all actions initiated under Section 15-3-530(5) must be commenced within three years after the person knew or by the exercise of reasonable diligence should have known that he had a cause of action"). "[W]hen there is no conflicting evidence or only one reasonable inference can be drawn from the evidence, the determination of when a party knew or should have known that he or she had a claim becomes a matter of law to be decided by the trial court." *Turner v. Milliman*, 381 S.C. 101, 110, 671 S.E.2d 636, 641 (Ct. App. 2009) (citation omitted), *aff'd in part, rev'd in part on other grounds*, 392 S.C. 116, 708 S.E.2d 766 (2011). That standard is easily met here.

V. ARGUMENT

In its Third Amended Complaint, Bierer alleged that Trystar wrongfully used Plaintiff's confidential information to "usurp sales and customers" from Plaintiff, and "intentionally interfered with prospective and future contractual and business relationships between Bierer and its customers." (R. pp. 95, 101 (Third Am. Comp. ¶¶ 98(b),

123)). But undisputed evidence shows that for eight long years before filing suit—as early as April 2013—Bierer believed Trystar was interfering with its business by diverting customers. That knowledge alone—and certainly, when combined with evidence of years of suspicions as to Kennerly's activities—renders the claims Bierer filed against Trystar in 2021 untimely. The trial court properly held that evidence of Bierer's knowledge in 2013 through 2018 would put a person of common knowledge and experience on notice that some claim against Trystar might exist, so that Bierer could begin an investigation into whether to file any such claims then. Bierer did not do so, and waited until 2021 to file claims against Trystar. At that point, all such claims were barred by the three-year statute of limitations. None of Bierer's arguments on appeal undermine the trial court's well-grounded conclusions. Further, Bierer makes no argument on appeal with respect to the equitable claims and has therefore forfeited them.

A. Undisputed facts establish that Bierer was on notice of a claim against Trystar long before April 15, 2018.

As noted above, the statute of limitations begins running when "the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some claim against another party might exist." *Stokes-Craven Holding Corp.*, 416 S.C. at 525-26, 787 S.E.2d at 489; *see also Gibson v. Bank of Am., N.A.*, 383 S.C. 399, 405-406, 680 S.E.2d 778, 782 (Ct. App. 2009) ("The limitations period … begins to run when the plaintiff 'knew or by the exercise of reasonable diligence should have known that he had a cause of action.'" (quoting S.C. Code Ann. § 15-3-535 (2005))); *Majstorich v. Gardner*, 361 S.C. 513, 520, 604 S.E.2d 728, 732 (S.C. App. 2004) (citation omitted) (observing that the exercise of reasonable diligence requires "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").

As the trial court noted in its February 6 Order on the Respondents' motions for summary judgment, the statute runs even if the person does "not know the exact nature of the wrong" where the person is nevertheless "aware of their injuries." *Brown v. Pearson*, 326 S.C. 409, 418, 483 S.E.2d 477, 482 (S.C. App. 1997) (applying the statute of limitations on summary judgment even though plaintiffs did not "know the exact nature of the wrong" against them). Bierer makes no attempt in its brief to address this standard in *Brown*. Indeed Bierer fails to cite a single case in Section VI.A of its initial brief addressing the knowledge evidenced by the 2013 emails pertaining to Trystar. And that is telling.

Bierer's avoidance of precedent notwithstanding, it is well-established that the statute begins to run when a plaintiff is on notice "that some right of his has been invaded or that some claim against another party might exist," not when a "full-blown theory of recovery [is] developed." *Snell v. Columbia Gun Exch.*, 276 S.C. 301, 303, 278 S.E.2d 333, 334-35 (1981); *see also Gibson*, 383 S.C. at 406, 680 S.E.2d at 782 (holding that the fact that an injured party may not comprehend the full extent of the damage is immaterial for purposes of the statute of limitations). Even if the plaintiff did not *actually* think about bringing a lawsuit, if an objectively reasonable person would have done so, then summary judgment is required. *See, e.g.*, *Dorman v. Campbell*, 331 S.C. 179, 184, 500 S.E.2d 786, 789 (S.C. App. 1998) ("The date on which discovery should have been made is an *objective* rather than subjective question." (emphasis added)); *see also Ashley River Indus., Inc. v. Mobil Oil Corp.*,

135 F. Supp. 2d 733, 743 (D.S.C. 2000) ("[T]he discovery rule does not require *actual notice* of anything, or knowledge of the full extent of the damage." (emphasis added)).

1. Bierer had notice of its injuries as to Trystar more than eight years before it filed suit.

Here, Bierer's own admissions in its management's emails show that it knew of Trystar's alleged diversion of customers as early as 2013. It then had three years to investigate, during which it either knew or should have known by the exercise of reasonable diligence that it had a claim. The undisputed evidence is that on April 9, 2013, Joe Bierer wrote to Trystar's Dan Moerke noting that Trystar "may possibly be circumventing" Bierer's "efforts to establish and support new [cable/jumper] sales." (R. p. 356 (Trystar SJ Ex. 1)). That email (among other evidence) shows Bierer's early knowledge of its alleged injuries and, upon the "exercise of reasonable diligence," that "some claim against [Trystar] might exist." *Snell v. Columbia Gun Exch.*, 276 S.C. at 303, 278 S.E.2d at 334-35. The December 2013 internal Bierer email reinforces that knowledge by reflecting that "another line was crossed" with Trystar and that Trystar had a history of undermining "any and all" business. (R. 358-59 (Trystar SJ Ex. 2)). Accordingly, Bierer believed in 2013 that Trystar was interfering with customer relationships, the same misconduct it belatedly alleged in the Third Amended Complaint.[1]

[1] In this respect, given the black-and-white evidence of awareness of injury, the case is very unlike cases where the question of notice has been one for the jury. *Cf., e.g.*, *Walbeck v. I'On Co., LLC*, 439 S.C. 568, 573, 580, 889 S.E.2d 537, 539, 543 (2023) (noting that "facts of this case are complicated, and . . . not for the weary." (cleaned up)).

Moreover, Bierer's belief in Trystar's potential interference coincided with Bierer's growing awareness and suspicion of Kennerly's independent activities from 2012 to 2018. During those six years, Kennerly established independent email and phone arrangements, non-traditional expense reporting, frequent, extended time away, and was even described in a publication as working for another manufacturer (Travis). These activities led Walter Bierer to warn Kennerly on October 15, 2015, by email, that "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 when you are gone for weeks at a time with no reporting. As I said before, my trust is waning." (R. pp. 364-65 (Trystar SJ Ex. 3, pp. 5-6)). And upon termination, Walter Bierer reiterated these very same concerns and admitted, "It has been obvious to me that you have been trying to separate yourself from Bierer . . . for many years. . . . You have chosen to be accountable to no one. No business other than Bierer would have tolerated this for any period of time." (R. p. 367-(Trystar SJ Ex. 4, p. 1)). Bierer's burgeoning concerns "for many years" plainly creates a statute of limitations problem for Bierer because it nonetheless waited until 2021 to file suit against Trystar.

South Carolina's statute of limitations imposes an objective standard that does not permit willful ignorance to preserve an untimely claim. The trial court properly found that under circumstances like these, summary judgment is warranted. And other courts have as well. *See, e.g.*, *Christensen v. Mikell*, 324 S.C. 70, 73-74, 476 S.E.2d 692, 694 (1997) (affirming summary judgment on statute of limitations grounds); *Brown*, 326 S.C. at 418, 483 S.E.2d at 482 (same); *Abrasives-South, Inc. v. Korte*, 226 F. Supp. 3d 584, 586-89 (D.S.C. 2016) (same).

In analyzing these circumstances, *Abrasives-South, Inc. v. Korte* is particularly instructive. In that comparable case, the court granted summary judgment on the same types of tort claims—trade-secret misappropriation, unfair trade practices, and breach of fiduciary duty—as at issue here. In that case, in 2012, the plaintiff confronted the defendant "regarding suspicions that he had been providing information to other competitors and vendors." *Id.* at 585 (internal quotation omitted). The suspicions were documented in letters and emails, which were exchanged over the course of several years, including in connection with proceedings abroad. *Id.* at 586. But the plaintiff did not actually file its lawsuit until 2016. Invoking the same statutes of limitations at issue here, *see id.* at 586, the defendant argued the claims were time-barred. The district court agreed, and granted summary judgment to the defendant. It reasoned that "[a] reasonable person armed with these facts standing in Plaintiff's shoes would be on notice that a claim against [the defendant] might exist." *Id.* at 588. While "[t]hat reasonable person may not know the precise contours of the potential claims . . . this is precisely the type of circumstance that requires a plaintiff to 'act with some promptness' in ascertaining the viability of and pursuing its claims." *Id.* In *Abrasives-South*, even under the most "plaintiff-friendly interpretation" of the facts, the plaintiff was on notice that it "might have had a claim" more than three years before it filed suit, and the claims were thus time-barred. *Id.* at 588-89. Just so here.

2. An objective standard applies to the question of notice.

In its Initial Brief, Bierer offers a series of alternative explanations for why it *subjectively* may not have thought it had a claim against Trystar, largely related to "drop-

ship arrangements" that were in place for a time—where Trystar would ship directly to a Bierer customer and thereby obtained that customer's contact information. (*See, e.g.*, Bierer Initial Br. at 9-13.) This is all irrelevant, because the standard in South Carolina is *objective*. Under established legal standards, Bierer did not need to know subjectively the exact nature of the wrong; its claim is barred if an *objectively* reasonable person, exercising reasonable diligence, would have investigated and pursued a claim within the three-year statute of limitations under S.C. Code Ann. § 15-3-530(5). Bierer simply did not do so.

Notably, Bierer is making essentially the same arguments on appeal that it made in its motion to reconsider to the trial court, all of which relate to its subjective understanding. In doing so, Bierer is relying extensively on its own affidavits. Below, the parties litigated whether those affidavits constituted "sham affidavits" because portions contradicted deposition testimony, in particular, when Bierer became aware of the industry brochure. (R. p. 9 (Feb. 6 Order, p. 4 & n.2)). The Court recognized and relied on Walter Bierer's sworn deposition testimony that he was aware of the brochure identifying Kennerly as a Travis employee in November 2014. (R. 9 (Feb. 6 Order, p. 4)). The trial court considered Bierer's arguments about its subjective understanding but soundly rejected them because, as it emphasized, South Carolina law "asks *objectively* whether the plaintiff knew or should have known about its injuries." (R. p. 28 (May 5 Order, p. 2 (emphasis added))). Bierer's arguments about its subjective beliefs and its assumptions that Trystar was engaging in industry-standard competition do not replace South Carolina's *objective* standard for starting the statute of limitations clock when the plaintiff knew *or reasonably should have known of a claim*. (R. 28 (May 5 Order, p. 5)).

As this Court held in *Graham v. Welch, Roberts and Amburn, LLP*, summary judgment is appropriate based on objective written evidence that would have put "a reasonable person of common knowledge and experience" on notice, notwithstanding plaintiff's testimony regarding a different subjective belief. 404 S.C. 235, 239-40, 743 S.E.2d 860, 863 (Ct. App. 2013) (citation omitted); *see also Maher v. Tietex Corp.*, 331 S.C. 371, 380, 500 S.E.2d 204, 208 (Ct. App. 1998) (reversing jury verdict in favor of a plaintiff where plaintiff was on notice of the objective facts showing that "some right of [the plaintiff's] has been invaded . . . .").

The objective evidence of Bierer's awareness is indisputable here. Even drawing all reasonable inferences in Bierer's favor, Trystar has presented black-and-white evidence from Bierer's senior management that it was aware of Trystar's alleged interference and confronted Trystar about its concerns in April 2013. (R. pp. 358-59 (Trystar SJ Ex. 2)). While Bierer claims that it did not fully appreciate the significance of Trystar's actions, that doesn't mean Bierer acted reasonably nor does it prevent the statute of limitations from beginning to run. Bierer admittedly possessed information regarding its declining sales as early as April 2013, which it "chalk[ed] up" to Trystar interference as evidenced by both the April and the December 2013 emails. *Id.* As the trial court correctly observed, Bierer's "mistaken belief about the basis for [its] injury does not prevent the statute of limitations from running." (R. 33 (May 5 Order, p. 7)).

Indeed, the law bars late-filed claims for good reason. The Supreme Court of South Carolina has adopted this Court's recognition that "'[s]tatutes of limitations embody important public policy concerns as they stimulate activity, punish negligence, and

promote repose by giving security and stability to human affairs.'" *Stokes-Craven Holding Corp.*, 416 S.C. at 526, 787 S.E.2d at 490 (citing *Kelly v. Logan, Jolley & Smith, LLP.*, 383 S.C. 626, 632, 682 S.E.2d 1, 4 (Ct. App. 2009)). As the Court recognized, "'One purpose of a statute of limitations is to relieve the courts of the burden of trying stale claims when a plaintiff has slept on his or her rights.'" *Id.* (quoting *Kelly*, 383 S.C. at 632, 682 S.E.2d at 4). "'Another purpose of a statute of limitations is to protect potential defendants from protracted fear of litigation.'" *Id.* (quoting *Kelly*, 383 S.C. at 632, 682 S.E.2d at 4). Both concerns apply in force here. That is also why, under the discovery rule, the statute begins to run when a plaintiff learns of facts putting itself on notice "that some claim against another party might exist," not "after a full-blown theory of recovery has developed," because once a party is on actual or constructive notice that a claim "might exist," then it *still has three years* to investigate and bring a claim. *Brown*, 483 S.E.2d at 482 (citation omitted).

As a matter of law, and in accord with good policy, Bierer is properly charged with notice of a claim against Trystar as early as April 2013, such that its claim is time-barred by the three-year statute of limitations. Certainly Bierer had notice of a claim prior to April 2018, the three-year lookback from Bierer's filing of the Amended Complaint naming Trystar.

B. Kennerly's alleged fraudulent concealment did not toll the limitations period as to Trystar.

Bierer argues that the doctrine of fraudulent concealment tolls the running of the statute of limitations. (Bierer Initial Br. at 20-23.) This argument was also soundly rejected by the trial court, both at summary judgment and on the motion for reconsideration. (R.

pp. 16-20 (February 6 Order, p. 11-15); R. pp. 34-35 (May 5 Order, p. 8-9)). At the end of the day, without evidence of any fraudulent concealment *by Trystar*, Bierer wants to attribute alleged deception by Kennerly, an entirely different party, to Trystar. But Bierer has absolutely no evidence that any concealment occurred within an alleged agency role for Trystar, and so tolling is not appropriate.

First, Bierer's fraudulent-concealment argument fails because there is no evidence that *Trystar* itself committed any act of deception that would qualify as fraudulent concealment. That routs Bierer's fraudulent concealment claim as to Trystar. Without any act by Trystar to fraudulently conceal Bierer's claims, the fraudulent-concealment doctrine does not apply. *See, e.g.*, *Crocker v. South Carolina Dep't of Health & Env. Control*, 428 S.C. 1, 10, 831 S.E.2d 924, 930 (S.C. App. 2019) (requiring "deceptive or bad faith attempts [by defendant] to conceal"); *see also* R. p. 373, condens. tr. p. 209, lines 16-19 (Trystar SJ Ex. 5 (Bierer Dep. at 209:16-19) ("Q. Mr. Moerke never said anything misleading to you, to the best of your knowledge; is that true? A. That would be correct, yes."))). For this reason, the trial court properly noted that "'summary judgment is proper if there is no evidence of conduct on *the defendant's* part warranting estoppel.'" (R. p. 17 (February 6 Order, p. 12) (quoting *Logan v. Cherokee Landscaping and Grading Co.*, 389 S.C. 611, 618-19, 698 S.E.2d 879, 883 (Ct. App. 2010) (citing *Hedgepath v. Am. Tel. & Tel. Co.*, 348 S.C. 340, 360, 559 S.E.2d 327, 338 (Ct. App. 2001)) (emphasis added))). Bierer itself even admits that fraudulent concealment applies only "in situations where the *defendant* has wrongfully deceived or misled the plaintiff." (Initial Br. p. 22 (cleaned up and emphasis added)). The

defendant who allegedly misled Bierer is not Trystar, and hence the fraudulent-concealment doctrine does not apply.

Second, on appeal, as below, Bierer attempts to rely instead on "*Kennerly's* fraudulent concealment" of the "illegitimate relationship with the Respondents" as the basis for tolling. (Bierer Initial Br. at 20 (emphasis added).) But as the trial court correctly determined, Bierer's attempt to attribute Kennerly's alleged fraudulent concealment to Trystar falls short because there is no evidence that Kennerly committed any act of deception *within the scope* of an agency relationship with Trystar or that he acted with Trystar's apparent authority.

As Bierer itself states, "*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." (Bierer Initial Br. pp. 21-22 (emphasis added).) Even Bierer does not argue such lies were made by Kennerly *on behalf of* Trystar. Bierer cites certain cases on page 22 of its brief addressing acts of deception by defendants, but those cases have no bearing on whether *Kennerly's* deception should be attributed to Trystar. For instance, in *Ellie, Inc. v. Miccichi*, 358 S.C. 78, 594 S.E.2d 485 (Ct. App. 2004), the defendant was required by contract to turn over funds from gaming machines to the plaintiff. *Id.* at 101-02, 497-98. The trial court and Court of Appeals held that there was evidence that the defendant withheld funds and thereby committed breach of contract and fraudulent concealment. *Id.* The case is not even a statute of limitations case, and there was no question as to whether acts of an agent should be attributed to the principal. While *Harrell v. BMW of North America*, LLC, 517 F. Supp. 3d

527 (D.S.C. 2021), is a statute of limitations case, the court simply found on a motion to dismiss that "the Amended Complaint does not contain sufficient information for it to conclude that Plaintiff's claims are barred by the statutes of limitations" when plaintiff alleged certain facts in support of various tolling doctrines. *Id.* at 537. Like *Ellie*, it's entirely irrelevant on questions of agency. Similarly, *Doe v. Bishop of Charleston*, 407 S.C. 128, 754 S.E.2d 494 (2014), merely recites the standard for fraudulent concealment tolling and does not address questions of agency. *Id.* at 140, 500-01 (reversing dismissal on the pleadings in part).

Bierer also cites *West v. Service Life & Health Insurance Co.*, 220 S.C. 198, 202, 66 S.E.2d 816, 817 (1951), for the proposition that a principal is responsible for acts of an agent even if they are disapproved (Bierer Initial Br. p. 22), but that too misses the mark. The threshold question is not whether or not Trystar approved but whether there is any evidence that Kennerly was *acting within the scope of agency* for Trystar in committing his alleged acts of deception. As the trial court concluded, there is *no evidence* that "Kennerly was acting 'in the course of his employment' [for Trystar] when making the purported misrepresentations to Plaintiff." (R. p. 18 (Feb. 6 Order, p. 13); *see also* R. p. 35 (May 5 Order, p. 9 ("The mere assertion that Kennerly was an agent of Trystar and/or Travis in some capacity is *not evidence* [he] concealed his efforts on Trystar's or Travis's behalf." (emphasis added)))).

Similarly, Bierer cites *E.A. Prince & Son, Inc. v. Selective Insurance Co. of the Southeast.*, 818 F. Supp. 910, 915 (D.S.C. 1993), but *E.A. Prince* rests on the agent's *apparent* authority on behalf of the principal, *id.* at 915, and here Bierer explicitly contends it did not

have notice of Kennerly's relationship with Trystar. Bierer cannot have it both ways—it can't rest on apparent authority for fraudulent concealment purposes but simultaneously deny notice of a claim against Trystar.

Moreover, Bierer cannot create an apparent agency relationship between Trystar and Kennerly based solely on what *Kennerly* did; rather, South Carolina law holds that "apparent authority must be established based upon manifestations by the *principal*, not the agent." *Shropshire v. Prahalis*, 309 S.C. 70, 71, 419 S.E.2d 829, 829-30 (S.C. App. 1992) (cleaned up) (emphasis added); *see also Roberson v. Southern Fin. of S.C., Inc.*, 365 S.C. 6, 11-12, 615 S.E.2d 112, 115 (S.C. 2005) (same); *Frasier v. Palmetto Homes of Florence, Inc.*, 323 S.C. 240, 244-45, 473 S.E.2d 865, 868 (S.C. App. 1996) (similar); *Orphan Aid Soc. v. Jenkins*, 294 S.C. 106, 109-10, 362 S.E.2d 885, 887 (S.C. App. 1987) (similar). Again, Bierer identifies no conduct by *Trystar* to provide a basis for apparent authority for Kennerly's alleged acts of deception.

The trial court also properly concluded that, agency issues aside, "the fraudulent concealment doctrine does not toll the statute of limitations where the plaintiff knew or should have known of his claim despite the defendant's misrepresentation or omission." (R. p. 19 (Feb. 6 Order, p. 14 (quoting *Mest v. Cabot Corp.*, 449 F.3d 502, 516 (3d Cir. 2006))). As the Third Circuit noted in *Mest*, "Where common sense would lead the plaintiff to question a misrepresentation, the plaintiff cannot reasonably rely on that misrepresentation." *Mest*, 449 F.3d at 516. Thus, even assuming some act of Kennerly could possibly be attributed to Trystar, which it denies, fraudulent concealment still could not

save Bierer's claims because Bierer could not *reasonably* claim to have been the victim of fraudulent concealment.

Here, the same evidence that put Bierer on notice of a claim with respect to Kennerly's activities also prevents the application of fraudulent concealment. Bierer had notice of an industry publication that described Kennerly as a two-year employee of Travis in 2014, as well as awareness of Kennerly's independent phone, email, cursory expense reporting, and extended time away. In 2015, Walter Bierer "wonder[ed] what other activities you may be conducting on my dime when you are gone for weeks at a time with no reporting." (R. p. 365 (Trystar SJ Ex. 3, p. 6)). The law does not permit unreasonable reliance; rather, as the trial court correctly held, "a plaintiff must show evidence that its reliance on a misrepresentation was '*justifiable*.'" (R. p. 19 (Feb. 6 Order, p. 14 (quoting *Hurst v. Sandy*, 329 S.C. 471, 494 S.E. 2d 847 (Ct. App. 1997)) (emphasis in Order; emphasis added from citation))). For this reason, the trial court separately concluded, "Given Plaintiffs' actual knowledge of objective facts that began the limitation period, and its failure to reasonably follow up on them, the alleged concealment does not alter the Court's conclusion." (R. p. 35 (May 5 Order, p. 9)).

Bierer does not address this independent ground for the trial court's decision, but it is of course another basis upon which this Court could uphold summary judgment on the question of whether the statute of limitation should be treated as tolled. *See* Rule 220(c), SCACR ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal."); *see also I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 420–21, 526 S.E.2d 716, 723 (2000); *cf. Jones v. Lott*, 387 S.C. 339, 346,

692 S.E.2d 900, 903 (2010) (noting that pursuant to the two-issue rule, when a trial court's decision is based on multiple grounds, the appellate court will affirm unless the appellant appeals all grounds because any un-appealed ground becomes the law of the case).

In short, the doctrine of fraudulent concealment does not apply given (1) the absence of any evidence of Trystar actions calculated to conceal from Bierer a cause of action; (2) the lack of any evidence that Kennerly was acting within the scope of any agency relationship with Trystar or had apparent authority from Tystar when he purportedly misled Bierer; and (3) the lack of objective reasonableness with respect to Bierer's reliance on Kennerly's alleged misrepresentations. Accordingly, the statute of limitations is not tolled.

VI. CONCLUSION

This Court should affirm the trial court's entry of summary judgment in favor of Trystar on statute of limitations grounds. Bierer was on notice of a claim against Trystar for as long as eight years, and certainly more than three years, before it filed suit in April 2021.

Respectfully submitted,

s/ Brian C. Duffy
Brian C. Duffy (S.C. Bar No. 16247)
Blake A. McKie (SC Bar No. 80198)
DUFFY & YOUNG LLC
96 Broad Street
Charleston, South Carolina 29401
(843) 720-2044 – Telephone
(843) 720-2047 – Fax
bduffy@duffyandyoung.com
bmckie@duffyandyoung.com

and

John Ursu (*pro hac vice* MN Bar #32257X)
FAEGRE DRINKER BIDDLE & REATH LLP
2200 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55402
Tel: (612) 766-7000
Fax: (612) 766-1600
john.ursu@faegredrinker.com

Attorneys for Trystar LLC

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THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM RICHLAND COUNTY
COURT OF COMMON PLEAS

R. LAWTON MCINTOSH, CIRCUIT 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, Brian Duffy, certify that the Final Brief of Respondent Trystar LLC complies with Rule 211(b) of the South Carolina Rules of Appellate Practice.

s/ Brian C. Duffy
Brian C. Duffy
DUFFY & YOUNG, LLC
96 Broad Stgreet
Charleston, South Carolina 29401
(843) 720-2044 (phone)
(843) 720-2047 (fax)

Dated: January 16, 2024

Attorney for Respondent, Trystar LLC