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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

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

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,

of whom, Trystar, LLC and Travis Pattern & Foundry, Inc. are.....Respondents.

AND

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

v.

Walter Bierer; Brent Jefferies; and Joseph Bierer.....Third Party Defendants.

FINAL BRIEF OF RESPONDENT  
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## **STATEMENT OF ISSUES ON APPEAL**

- I. Did the trial court correctly conclude that Bierer’s claims against Travis Pattern were barred by the three-year statutes of limitation because Bierer was on notice of its claims against Travis Pattern before April 15, 2018?
- II. Did the trial court correctly conclude the doctrine of fraudulent concealment did not toll the statutes of limitation as to Bierer’s claims against Travis Pattern?

## **STATEMENT OF THE CASE**

On September 11, 2018, Appellant Bierer and Associates, Inc. (“Bierer”) initiated this action by filing a summons and complaint in the Richland County Court of Common Pleas against its former employee, Jan F. Kennerly (“Kennerly”), and Kennerly’s then-newly-formed company, R&D Utility Products, LLC. (R. pp. 38-65). The case was assigned to the Honorable R. Lawton McIntosh in the Richland County Business Court, by Order dated February 26, 2019, for the handling of all matters pertaining to this case. (R. pp. 1-2).

As is relevant to this appeal, on April 15, 2021, Bierer submitted its Third Amended Complaint, adding as defendants Respondents Travis Pattern & Foundry Inc. (“Travis Pattern”) and Trystar, LLC (“Trystar”). (R. pp. 66-118). Bierer’s claims encompassed allegations of (1) aiding and abetting breach of fiduciary duty, (2) tortious interference with contract, (3) tortious interference with prospective contract, (4) unjust enrichment, (5) common law unfair competition, and (6) violation of the South Carolina Trade Secrets Act, S.C. Code Ann. § 39-8-10, *et seq.* (2023). (R. pp. 94-110). Additionally, Bierer sought equitable remedies of accounting and constructive trust. (R. pp. 104, 106-07).

Respondents Travis Pattern and Trystar, among other parties, independently filed answers, denying the allegations in the Third Amended Complaint and asserting affirmative defenses of statutes of limitation and laches. (R. pp. 119-36, 139-92). On September 28, 2022, Travis Pattern filed a motion for summary judgment pursuant to Rule 56(c), SCRCF, contending that all of

Bierer's claims against Travis Pattern were time-barred by applicable three-year statutes of limitation. (R. pp. 198-221). Trystar filed an analogous motion for summary judgment on October 26, 2022. (R. pp. 336-54). Appellant responded to both motions with opposition briefs, and in turn, Respondents each submitted reply briefs. (R. pp. 374, 465, 550, 559).

The trial court heard arguments on Respondents' motions for summary judgment by WebEx on January 4, 2023. (R. p. 654). Thereafter, on February 6, 2023, the court issued an order granting Travis Pattern's and Trystar's respective motions for summary judgment. (R. pp. 3-23).

Following the adverse ruling, Bierer filed a motion to reconsider, and Travis Pattern and Trystar each submitted responses in opposition. (R. pp. 570, 579, 583). On March 30, 2023, the trial court conducted a WebEx hearing on the motion to reconsider, during which Bierer submitted supplemental material in support of its request for reconsideration. (R. pp. 592-617, 698). The trial court denied the motion to reconsider by order dated May 5, 2023. (R. pp. 27-37; *see also* R. pp. 24-26). Thereafter, on May 9, 2023, Bierer timely filed a notice of appeal of the trial court's February 6, 2023 and May 5, 2023 orders. (R. pp. 618-20).

### **STANDARD OF REVIEW**

“When reviewing the grant of summary judgment, the appellate court applies 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). The proper standard applied under Rule 56(c) “is the ‘genuine issue of material fact’ standard set forth in the text of the Rule.” *Kitchen Planners, LLC v. Friedman*, 440 S.C. 456, 463, 892 S.E.2d 297, 301 (2023) (rejecting the “mere scintilla” standard for summary judgment). Summary judgment is appropriate when “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment

as a matter of law.” Rule 56(c), SCRPC.

“In determining whether any triable issues of fact exist, the court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party.” *Madison ex rel. Bryant v. Babcock Ctr., Inc.*, 371 S.C. 123, 134, 638 S.E.2d 650, 655 (2006). However, “it is not sufficient for a party to create an inference that is not reasonable or an issue of fact that is not genuine.” *Kitchen Planners*, 440 S.C. at 463, 892 S.E.2d at 301 (quoting *Town of Hollywood v. Floyd*, 403 S.C. 466, 477, 744 S.E.2d 161, 166 (2013)). “[W]hen plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted.” *Bayle v. S.C. Dep’t of Transp.*, 344 S.C. 115, 120, 542 S.E.2d 736, 738 (Ct. App. 2001).

### **STATEMENT OF THE FACTS**

The basic facts of the case are undisputed. (R. p. 8 n.1). The instant lawsuit stemmed from Bierer’s falling out with its former employee, Defendant Kennerly, and the allegedly improper business relationships Kennerly developed with other manufacturers in the electric utilities market, including Travis Pattern. (*See generally* R. pp. 68-90).

In 2013, Kennerly began working as an independent sale representative for Travis Pattern, while simultaneously maintaining his employment with Bierer. (R. p. 82). At all times thereafter, Travis Pattern publicly marketed Kennerly as its sales representative. (R. p. 253; pp. 265-76; p. 293, lines 7-14; p. 294, line 20-p.295, line 15; p. 299, lines 8-13; p. 315, lines 2-24). Between 2013 and 2015, Bierer garnered substantial evidence putting it on specific notice of Kennerly’s alleged improper relationship with Travis Pattern, and potentially other manufacturers. (R. pp. 9-10, 255-64). Nevertheless, Bierer blindly, and unreasonably, trusted Kennerly to a fault and failed to conduct a reasonable investigation into Kennerly’s relationships with other companies until 2018.

(R. p. 225, lines 10-19; p. 242, lines 4-22; p. 243, lines 12-25; p. 247, lines 7-23). Bierer acknowledged in writing to Kennerly at that time: “No business other than Bierer would have tolerated this for any period of time.” (R. p. 263).

In 2018, Appellant called Travis Pattern directly to inquire if Kennerly was employed there, to which Travis Pattern readily stated he was working as its sales representative. (R. p. 88, para. 74; p. 225, lines 7-9; p. 242, lines 17-24). The impetus for Bierer’s investigatory phone call in 2018: a national newsletter that Appellant admitted seeing in 2014, which stated Kennerly worked for both Bierer and Travis Pattern. (R. p. 88, para. 74; p. 225, lines 7-25; p. 251-54; p. 321, lines 6-9; p. 326, lines 2-10).

Bierer did not file suit against Travis Pattern until April 15, 2021, bringing various claims against Travis Pattern related to its relationship with Kennerly. (R. pp. 94-110). Travis Pattern moved for summary judgment based on the running of the applicable three-year statutes of limitation, arguing Bierer had abundant notice of potential claims against Travis Pattern and failed to act as a reasonable company in bringing claims against Travis Pattern. (R. pp. 198-201, 210). In response, Bierer argued it first discovered Kennerly’s relationship with Travis Pattern when Bierer called Travis Pattern in 2018. (R. p. 374). Finding Bierer was on inquiry notice of its claims as early as April 9, 2013 and as late as October 14, 2015, the trial court granted Travis Pattern’s motion for summary judgment.<sup>1</sup> (R. p. 7).

## **I. FACTS AND CIRCUMSTANCES GIVING RISE TO APPELLANT’S KNOWLEDGE OF ITS CLAIMS AGAINST TRAVIS PATTERN**

By way of background, Travis Pattern and Bierer were both in the business of manufacturing products for the electric utility industry. (R. p. 74, para. 13; p. 81, para. 40). As is

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<sup>1</sup> The trial court ordered the same relief to Trystar on Bierer’s claims against it. (*See generally* R. pp. 6-23).

relevant to the case, Travis Pattern manufactured clamps that Bierer purchased to make grounding assembly products, which electric utility workers utilized to protect them from exposure to high-voltage electrical charges. (R. p. 82, paras. 43-44; p. 666, lines 12-21; p. 667, lines 10-13). The business relationship between Travis Pattern and Bierer was formed through Kennerly. (R. p. 81, para 41-p.82, para. 44).

Kennerly began working for Bierer in 2003 and remained a full-time employee of Bierer until his termination by Bierer's principal owner, Walter Bierer in 2018. (R. p. 8; p. 74, paras. 14-15). In 2009, Bierer tasked Kennerly with finding and purchasing for Bierer cable and clamps from other suppliers, as part of Bierer's expansion into the utility grounding business. (R. p. 78, para. 27). In furtherance of this new grounding assembly initiative, and at the direction of Walter Bierer, Kennerly identified Travis Pattern as the manufacturer "best suited" to sell clamps to Bierer. (R. p. 81, para. 41). Thereafter, Kennerly and Travis Pattern initiated a working relationship, allegedly on Bierer's behalf. (R. p. 81, para. 42).

In 2011, Bierer placed its first order for clamps with Travis Pattern. (R. p. 82, para. 43). Over the next four years, facts continually came to light that put Bierer on notice that Kennerly had established a business affiliation with Travis Pattern which Bierer contends in its Third Amended Complaint to have been legally improper. (R. pp. 8-11). Travis Pattern and Kennerly both deny that their business relationship was ever improper or unknown to Bierer.

**A. In 2012, Bierer was aware Kennerly was dissociating from his employment with Bierer.**

Beginning in 2012, Bierer became aware that Kennerly was taking steps to distance himself from Bierer and his employment with Bierer. (R. p. 263). One of several steps Kennerly took during this time was to switch his email and phone from company accounts to his own personal accounts. (R. p. 238, lines 22-24; p. 240, lines 8-10; p. 263). Walter Bierer, as well as his sons Joe

Bierer and Brent Jefferies, both of whom were in management roles with Bierer, noticed Kennerly's dissociative activities at that time and characterized them as "obvious." (R. p. 243, lines 1-11; p. 245, line 23-p.246, line 17; p. 263).

Around this same time, Kennerly also greatly reduced the amount of credit card receipts and reports he submitted to Bierer from his sales trips. (R. p. 245, lines 10-15; p. 263; p. 328, lines 12-19; p. 329, lines 11-14). In addition, Walter Bierer noticed that Kennerly ceased introducing representatives from other companies to Bierer in a work capacity and, instead, "began presenting himself to customers and others in the industry as essentially an independent marketing expert or broker." (R. p. 240, lines 20-25).

After six years of accepting Kennerly's dissociative behaviors, Walter Bierer finally fired Kennerly in 2018. (R. p. 255). In his termination email to Kennerly on July 11, 2018, Walter Bierer listed the dissociative activities that had been going on since 2012, recognizing: "No business other than Bierer would have tolerated this for any period of time." (R. p. 263). As Mr. Bierer admitted:

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. . . .

(R. p. 263 (emphasis added)).

Bierer admits it failed to "regulate outside employment" activities beyond what Kennerly reported himself. (R. p. 249, lines 5-6). Bierer also failed to investigate any of Kennerly's outside relationships with other manufacturers in the electrical utility industry, despite knowing that Kennerly was regularly spending long periods of time with and openly conducting business with other manufacturers, including Travis Pattern and Trystar.

**B. Beginning in 2013, Kennerly openly worked for Travis Pattern as a sales representative.**

Evidence regarding Kennerly's attempts to dissociate himself from Bierer in 2012 was compounded by Kennerly's establishment of allegedly conflicting business relationships with Travis Pattern, Trystar, and other manufacturers. (R. pp. 69-70; p. 684, lines 10-20). As of 2013, Travis Pattern had retained Kennerly as an independent sales representative for Travis Pattern's utility grounding products division ("UGD"). (R. p. 70, para. 7; p. 82, para. 45; p. 285, lines 14-24). As an independent sales representative, Kennerly received a 10% commission on all sales made through Travis Pattern UGD, including Travis Pattern's sale of utility grounding products to Bierer. (R. p. 82, para. 45; p. 203). In addition to selling Travis Pattern's products, Kennerly frequently spent time in various laboratories with Travis Pattern to assist in its product testing. (R. p. 231, line 23-p. 232, line 19; p. 233, line 1-p. 235, line 8; p. 311).

In 2013, Walter Bierer, and other employees of Bierer, understood that Kennerly was engaged in a business relationship in some form with Travis Pattern. In fact, Walter Bierer stated Kennerly "wasn't hiding that he was working with Travis [Pattern] in the lab," and that he knew that Kennerly went out to Travis Pattern and Trystar and spent many hours there working. (R. p. 233, lines 12-14; *see also* R. p. 323, lines 2-4; p. 685, lines 12-25). During the same time when Kennerly was openly working with Travis Pattern and Trystar, Bierer started to notice a drop in its sales and suspected Trystar of undermining Bierer's business. (R. p. 356).

On April 9, 2013, Bierer sent an email to Trystar, accusing Trystar of "circumventing [Bierer's] efforts to establish and support new sales." (R. p. 356; p. 657, line 20-p. 658 line 4). Later that same year, Bierer again acknowledged its concern that Trystar was undermining its business, stating in an email on December 5, 2013 that "another line [had been] crossed with Trystar." (R. pp. 358-59; p. 658, lines 5-9). Nonetheless, Bierer did not investigate any potential

claims against Trystar or inquire further of Kennerly's dealings with Trystar or Travis Pattern. (R. p. 684, lines 3-8).

Walter Bierer admitted it was public knowledge by 2014 that Kennerly was working for both Bierer and Travis Pattern. (R. p. 228, lines 13-17). Despite admittedly knowing their affiliation, Walter Bierer maintained he was unaware of the exact nature of Kennerly and Travis Pattern's relationship and believed Kennerly was working *with* Travis Pattern *to benefit Bierer*. (R. p. 395, para. 10-p. 396, para. 11). In 2014, however, Travis Pattern consistently represented Kennerly to the public—and to Bierer—as a Travis Pattern UGD sales representative. (R. pp. 251-54, 265-81). Travis Pattern UGD's Manager, Alex Martin, testified he made no attempt to "hide" Kennerly's relationship with Travis Pattern because he "d[id]n't need to." (R. p. 293, lines 7-14). Martin further testified that all of Travis Pattern's activities with Kennerly were done out in the open in the electrical utility industry and that Kennerly's relationship with Travis Pattern was well known in the industry. (R. p. 294, line 20-p. 295, line 15). This, of course, makes perfect sense, since a company such as Travis Pattern would *want* its national sales representative to be well known throughout the industry, as that industry knowledge would serve to increase product sales.

Kennerly also acknowledged the obvious nature of his conduct, testifying: "I recall telling Walter [Bierer] that I worked with Travis Pattern & Foundry. There was no hiding that. It was public information. Hundreds of people, maybe thousands of people, know this." (R. p. 299, lines 8-13). As evidence that other vendors in the electrical utility industry were aware of Kennerly and Travis Pattern's relationship, Trystar's Director of Customer Sales & Support, Dan Moerke, testified he was not only aware of the relationship but that it was "open and obvious." (R. p. 315, lines 2-24). At no point did Travis Pattern or Kennerly ask others to keep their relationship secret from Bierer. (R. p. 294, line 20-p. 295, line 15; p. 299, lines 8-13; p. 315, lines 2-24).

**C. By 2014, Appellant had actual notice of claims against Travis Pattern.**

In 2014, Bierer received indisputable, physical notice that Kennerly was working as a sales representative for Travis Pattern. The first circumstance giving rise to notice in 2014 was when Travis Pattern presented a technical seminar on October 24, 2014. (R. pp. 251-54). According to Walter Bierer, hundreds of people attend these seminars, including major people in the industry: “All the electronics and electrical engineers in the country and lots of vendors [attend this seminar].” (R. p. 229, lines 13-15, 22-p. 230, line 1; *see also* R. p. 658, lines 9-11). Kennerly and another Travis Pattern employee, Dick Pelletier, attended the seminar and presented on Travis Pattern’s behalf. (R. pp. 253-54). In fact, they were the only two presenters. (R. pp. 253-54).

The seminar was publicly advertised in the Institute of Electrical Engineers (“IEEE”) regional newsletter in November 2014 (the “IEEE brochure” or the “brochure”). (R. pp. 251-54). The IEEE brochure stated the two speakers at the seminar were “Rick Kennerly of Travis”<sup>2</sup> and “Dick Pelletier of Travis.” (R. p. 253; *see also* p. 227, lines 8-10). The brochure also provided a biography for the presenters, and Kennerly’s read, in part, that he “ha[d] worked for Bierer Meters as an engineering and operations manager for 15 years and Travis UGD for 2 years.” (R. p. 253; *see also* p. 46, para. 40; p. 227, lines 11-18; p. 658, lines 9-18).

Walter Bierer acknowledged he was made aware of the seminar brochure around November 2014. (R. p. 225, lines 10-21; p. 228, lines 13-25; p. 431, lines 1-12; p. 670, lines 4-8). In his deposition, Walter Bierer clearly conceded that Bierer was aware of the IEEE brochure in 2014 but declined to investigate the statements that Kennerly worked for Travis Pattern:

- Q: So it’s publicized in a national publication that [Kennerly] works with your company, and he also works with Travis?”  
A: Uh-huh.  
Q: Is that right?

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<sup>2</sup> Kennerly is commonly referred to as “Rick.” (R. p. 46 n.1).

A: That's right.  
Q: And this is in November of 2014?  
A: That's right. . . .  
Q: There's [the IEEE brochure.] And [the brochure] goes out to the engineering community about this conference, correct?  
A: I would say yes.  
Q: My point in all this, Mr. Bierer, is that the information that [Kennerly's] working with Travis and your company in 2014 is -- is public knowledge. It's in national newsletters?  
A: That's right.  
. . .  
Q: I assume you didn't know about it?  
A: No. I did. Just about everybody in our office saw this.  
Q: Okay. And what happened?  
A: Yeah. We -- we review that. In our Monday morning meeting, I brought it to [Kennerly]. I said, "[Kennerly], what's all this about?" He said, "I didn't have anything [to do with that brochure]" -- he laughed it off. He laughed it off. . . . At that point I still had lots of faith and trust in Kennerly, so I believed him, and everybody in the office believed him.

(R. p. 228, lines 13-17; p. 431, lines 1-20).

Joe Bierer, Bierer's Vice President, confirmed Bierer learned about the IEEE brochure sometime after the publication was released in November 2014 and Bierer's employees confronted Kennerly with the brochure. (R. p. 321, lines 6-10; p. 404, para. 3; p. 658, lines 18-21). According to Joe Bierer, Bierer simply accepted Kennerly explanation: "He explained it away as somebody wrote his biography incorrectly. He didn't write the biography." (R. p. 321, lines 10-12).

Joe Bierer confirmed that Bierer management believed the words "worked for," as used in the brochure, were critically important. (R. p. 324, lines 19-22). In his deposition, Joe Bierer testified: "So working with and working for -- that's two different things. You work with somebody, you assume you're not getting paid by that company. You work for somebody, you're getting paid." (R. p. 324, lines 19-22).

Despite their clear testimony that Bierer knew of the IEEE brochure around November 2014, Walter and Joe Bierer later claimed in affidavits that they were not aware of the brochure

until 2015 or 2016—still five or six years before Bierer filed suit against Travis Pattern. (R. p. 397, p. 406, para. 12; Hr’g Tr., p. 709, lines 3-11). Regardless of whether Bierer saw the brochure in 2014, 2015, or 2016, Bierer failed to contact Travis Pattern to verify or investigate the statements in the IEEE brochure until July 2018. (R. p. 88, para. 74; p. 671, lines 7-24). Bierer failed to take reasonably diligent steps to investigate its potential claims against Travis Pattern or Kennerly. (R. p. 690, line 21-p. 691, line 5).

In 2014, the same year Travis Pattern nationally publicized its relationship with Kennerly, Travis Pattern also sent Bierer multiple sales quotations that identified Kennerly as a Travis Pattern sales representative, working on behalf of Travis Pattern UGD. (R. pp. 265-81). These quotations related to sales of Travis Pattern products to Bierer and were sent directly to Bierer’s employees in its customer service and/or procurement department(s), not Kennerly. (R. pp. 265-81). More specifically, the quotations were sent to the email address `customer_service@bierermeters.com`, as well as to other Bierer employees. (R. pp. 265-81). At least six quotations provided by Travis Pattern to Bierer in 2014 reflected “Rick Kennerly UGD.” (R. pp. 265-81).

Importantly, the initialism “UGD” was specific to Travis Pattern’s utility grounding division, as illustrated by the email address listed on the quotations from Travis Pattern: `UGD@travispattern.com`. (R. pp. 265-81). More importantly, the post-nominal letters “UGD” after Kennerly’s name was a clear reflection that Kennerly held a position at Travis Pattern UGD. Several of the quotations were also addressed to Chris Watson, Bierer’s procurement or customer service representative, but there were no post-nominal letters listed after Chris Watson’s name, only Kennerly’s name. (R. pp. 265, 268-69, 271, 273, 279-80). Despite this notice, Bierer never asked Travis Pattern to explain why it was identifying Bierer’s own officer and employee as a Travis Pattern UGD sales representative for products that Travis Pattern was selling to Bierer.

As further evidence of the open nature of the Travis Pattern-Kennerly relationship, and Bierer's knowledge thereof, Bierer received emails from its customers wherein customers were requesting products from Travis Pattern through Kennerly. For example, in September 2015, an employee of General Pacific, David Yang, sent an email to Kennerly's email address that was owned and operated by Bierer (rickkennerly@bierermeters.com). (R. pp. 300-04). In that email, Mr. Yang discussed Travis Pattern's products and a potential upcoming sales plan. At the end of the email, Mr. Yang asked: "Would you be handling this as Travis' national sales manager or Bierer's or ?" (R. p. 301).

In 2015, tensions started to boil over between Bierer and Kennerly, with Bierer growing weary of Kennerly's dissociation from Bierer and Kennerly's allegedly competitive activities. (R. pp. 305-07). On October 14, 2015, Walter Bierer confronted Kennerly by email regarding Kennerly's lack of reporting, Kennerly's "outside activities," and Kennerly's distancing from Bierer's business. (R. pp. 305-07). Walter Bierer wrote:

I think it is important that you understand my current thoughts. I see your lack of reporting your activities (itinerary and reports) as a symptom of a larger issue which is your lack of accountability to anyone and everyone in our company including me. More and more I am beginning to wonder why I am paying you large sums of money to disappear for weeks at a time. For years I have trusted you were always doing the "right thing" but my trust is waning.

Your outside activities seem almost chaotic - in that almost everything you are currently doing seems to put you at odds with everyone in our company about something. What feedback I do get from the field, you have no respect for any of your fellow employees and are quick to throw anyone of them under the bus as being incompetent and that you, basically and single handily, run Bierer & Associates. While this may enhance your stature, it demeans everyone else in our company including me.

You have purposefully separated yourself from Bierer by maintaining private telephone and e-mail 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.

I think it may be time for you to begin looking for employment elsewhere unless you can think of some way to resolve and reverse all of the issues mentioned. You do have many wonderful traits and it may be that you have simply outgrown our company.

Carefully think over what I have said and then I would like to hear your thoughts on this.

(R. pp. 305-07; p. 659, lines 1-13).

Around the same time, Bierer was aware that Kennerly was frequently conducting product testing with Travis Pattern. (R. p. 231, line 230-p. 232, line 19; p. 233, line 12-p. 235, line 8; p. 311; p. 685, lines 12-25). In a November 12, 2015, email from Kennerly to Walter Bierer, Joe Bierer, and Brent Jeffries, Kennerly reported his attendance at a testing lab with Travis Pattern, specifically stating he was meeting with Alex Martin of Travis Pattern to assist in testing several items. (R. p. 433, lines 6-21). None of the testing Kennerly participated in was paid for by Bierer, which Bierer acknowledges, further revealing that Kennerly was openly operating on behalf of companies other than Bierer and substantiating that Bierer knew Kennerly had no business reason *for Bierer* to be attending the testing. (R. p. 435, lines 5-18).

Several months later, in April 2016, Kennerly emailed Walter Bierer stating that while traveling to San Antonio, Texas, for Bierer, Kennerly would be spending some “off” time to meet with industry representatives. (R. p. 334). Walter Bierer forwarded Kennerly’s email to Joe Bierer, Jamie Bierer, and Brent Jefferies, all of whom were in managerial-level roles with Bierer. (R. p. 334). Clearly recognizing it was incongruous for Kennerly to be meeting with industry representatives in his “off” time, Jamie Bierer and Brent Jefferies responded to the email and questioned what Kennerly meant by “off” time. (R. p. 334). Additionally, Brent Jeffries added that he was aware Kennerly was helping “many people with other [m]anufacturer’s products,” but he admitted he never asked if this was done on “off” time, “as [he] never realized that ‘off’ time was

a factor.” (R. p. 334; *see also* R. p. 659, line 14-p. 660, line 2). Brent Jeffries’ email response further highlighted that at least one customer had contacted Bierer regarding Kennerly’s help with another manufacturer’s products; regardless, Brent Jeffries “ha[d] not bothered to call” the customer back to inquire on the matter. (R. p. 334).

## **II. BIERER’S INVESTIGATION AND RESULTING LAWSUIT**

Despite the buildup of information at Bierer’s disposal regarding Kennerly’s alleged wrongdoing with Travis Pattern and other companies, Bierer did not exercise reasonable diligence or investigate the matter until July 2018. (R. p. 88, para. 74; p. 686, lines 14-17). In July 2018, Bierer allegedly *again* came across the 2014 IEEE brochure that noted Kennerly worked for Travis Pattern UGD. (R. p. 46, para. 39; p. 88, para. 74; p. 241, lines 7-16; p. 671, lines 5-24). Walter Bierer testified he saw the IEEE brochure “years before” but “somehow this conversation came up again” in July 2018, and he “wanted to put it to rest.” (R. p. 225, lines 12-25; p. 671, lines 7-18).

On July 10, 2018, armed with the exact same information it possessed in 2014, and faced with the same concerns, Bierer contacted Travis Pattern to inquire if Kennerly worked for Travis Pattern. (R. p. 88, para. 74; p. 241, lines 22-24; p. 325, lines 2-10; p. 658, lines 23-25; p. 662, lines 22-24; p. 671, lines 7-16). A Travis Pattern employee readily stated Kennerly was a Travis Pattern UGD sales representative. (R. pp. 88, para. 74; p. 660, lines 11-14, p. 671, lines 17-18). That same day, Bierer confirmed Kennerly had what Bierer considered to be conflicting relationships with several other companies, including Trystar. (R. pp. 89, para. 77; p. 671, lines 21-24). Thereafter, Bierer terminated Kennerly’s employment effective July 13, 2018. (R. pp. 89, para. 76; p. 255). When asked if Appellant got any new information in 2018 prior to Kennerly’s termination, Joe Bierer admittedly responded, “No.” (R. p. 326, lines 7-10; *see also* R. p. 660, lines 15-18).

Two months after terminating Kennerly, in September 2018, Bierer filed the first Complaint in this action, naming Kennerly and Kennerly's newly formed company as the only two defendants. (R. p. 39). Bierer did not include Travis Pattern as a defendant in its initial lawsuit, instead conducting third-party discovery as to Travis Pattern and others. (R. p. 199). On April 15, 2021, two-and-a-half years after filing its initial Complaint, Bierer added Travis Pattern, and others, as a defendant. (*See* R. p. 68). In its Third Amended Complaint, Bierer alleged it discovered its claims against Travis Pattern on July 10, 2018 when it called Travis Pattern to ask about the 2014 IEEE brochure. (R. p. 88, para. 74).

### **III. SUMMARY JUDGMENT AND APPEAL**

Travis Pattern moved for summary judgment, arguing Bierer's claims were barred by the statutes of limitation because Bierer was on notice of its claims against Travis Pattern as early as 2012 and as late as 2015. (R. p. 210). After holding a hearing on the matter, the trial court granted Travis Pattern's motion for summary judgment. (R. p. 6). In its order, the trial court thoroughly detailed the evidence before it and applied the correct law. (*See* R. pp. 6-23). The court found Bierer was on inquiry notice of its potential claims against Travis Pattern as early as April 9, 2013, and as late as October 14, 2015. (R. p. 7).

The court cited evidence in support of its ruling, including Kennerly's dissociation in 2012, Bierer's emails regarding Trystar's alleged misconduct in 2013, the 2014 IEEE brochure, and Bierer's emails to Kennerly in 2015 and 2018. (R. pp. 13-16). The court also concluded the statutes of limitation were not tolled by the doctrine of fraudulent concealment because the record was devoid of evidence as to Travis Pattern's fraudulent concealment. (R. pp. 16-20). Lastly, the trial court held Bierer's equitable claims were barred by laches.<sup>3</sup> (R. pp. 20-22). Bierer now argues on

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<sup>3</sup> Appellant did not appeal the trial court's ruling that its equitable claims were barred by laches.

appeal that the trial court erred in granting summary judgment in favor of Travis Pattern based on the running of the statutes of limitation. However, Travis Pattern respectfully submits that the order granting summary judgment should be affirmed.

### ARGUMENTS<sup>4</sup>

#### **I. THE TRIAL COURT CORRECTLY GRANTED SUMMARY JUDGEMENT BECAUSE BIERER WAS ON NOTICE OF ITS CLAIMS AGAINST TRAVIS PATTERN BEFORE APRIL 15, 2018.**

The statutes of limitation for Bierer’s claims against Travis Pattern are three years. *See* S.C. Code Ann. § 15-3-530(5) (2005) (governing claims for aiding and abetting breach of fiduciary duty, tortious interference with an existing contractual relationship, tortious interference with prospective contractual and business relations, and unjust enrichment); S.C. Code Ann. § 39-8-70 (2023) (applying to trade secret claim). Bierer filed its Third Amended Complaint in this action, which first named Travis Pattern as a defendant, on April 15, 2021. (*See* R. p. 68). Accordingly, Bierer is barred by the statutes of limitation for any claims that accrued before April 15, 2018.

With respect to Bierer’s claims initiated under section 15-3-530(5), South Carolina follows the discovery rule, which is codified at section 15-3-535. *See* S.C. Code Ann. § 15-3-535 (2005); *Graham v. Welch, Roberts & Amburn, LLP*, 404 S.C. 235, 239, 743 S.E.2d 860, 862 (Ct. App. 2013) (“The ‘discovery rule’ applies to actions brought under section 15–5–530(5).”). Under the discovery rule, the statute of limitations begins to run when “the person knew or by the exercise of reasonable diligence should have known that he had a cause of action.” S.C. Code Ann.

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Therefore, the trial court’s ruling on the issue of laches is the law of the case and should be affirmed by this Court. *See Shirley’s Iron Works, Inc. v. City of Union*, 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013) (“An unappealed ruling is the law of the case and requires affirmance.” (citing *Transp. Ins. Co. & Flagstar Corp. v. S.C. Second Injury Fund*, 389 S.C. 422, 432, 699 S.E.2d 687, 691 (2010))).

<sup>4</sup> Travis Pattern adopts by reference the arguments made in the Brief of Respondent Trystar.

§ 15-3-535. Likewise, the discovery rule applies to Bierer's cause of action for misappropriation of trade secrets, as the South Carolina Trade Secrets Act provides that the statute of limitations begins to run when "the misappropriation is discovered or by the exercise of reasonable diligence should have been discovered." S.C. Code Ann. § 39-8-70.

Under the discovery rule, the "exercise of reasonable diligence" means "that 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." *Dean v. Ruscon Corp.*, 321 S.C. 360, 363–64, 468 S.E.2d 645, 647 (1996) (citing *Snell v. Columbia Gun Exchange, Inc.*, 276 S.C. 301, 278 S.E.2d 333 (1981)). "The date on which discovery should have been made is an objective, not subjective, question." *Young v. S.C. Dep't of Corrections*, 333 S.C. 714, 719, 511 S.E.2d 413, 416 (Ct.App.1999). As such, the question is not whether the particular plaintiff actually knew it had a claim, but rather, "courts must decide whether the circumstances of the case would put a person of common knowledge and experience on notice that some right of his has been invaded, or that some claim against another party might exist." *Majstorich v. Gardner*, 361 S.C. 513, 520, 604 S.E.2d 728, 732 (Ct. App. 2004) (quoting *Young*, 333 S.C. at 719, 511 S.E.2d at 416). "Moreover, the fact that the injured party may not comprehend the full extent of the damage is immaterial." *Dean*, 321 S.C. at 364, 468 S.E.2d at 647.

Bierer's claims against Travis Pattern revolve around Travis Pattern's alleged efforts to work in concert with Kennerly to divert business opportunities and sales from Bierer. As set forth more fully below, Bierer had sufficient knowledge of Travis Pattern's business relationship with Kennerly and the alleged resulting damage well before April 15, 2018. Indeed, by April 9, 2013, Bierer had knowledge of sufficient information to know or to discover through reasonable

diligence that some right of its had been invaded or that some claim against Travis Pattern might exist. *See Snell*, 276 S.C. at 303, 278 S.E.2d at 334. At the very latest, the statutes of limitation applicable to Bierer’s claims against Travis Pattern began to run in 2016, which, by Bierer’s own admission, is the latest it discovered the IEEE brochure—the exact same information it allegedly “re-discovered” in 2018.<sup>5</sup> Therefore, Bierer’s claims are barred by the statutes of limitation.

**A. Bierer had actual notice of Travis Pattern’s alleged wrongdoing by 2016, at the latest.**

Bierer’s initial discovery of the IEEE brochure—especially when viewed in context of the other facts and circumstances that put Bierer on notice from 2012 to 2015 (as discussed below in subsection B)—confirms that Bierer was on notice of its claims years before it finally investigated the IEEE brochure in 2018. The undisputed evidence shows that if Bierer had exercised reasonable diligence and investigated the IEEE brochure when it first discovered the brochure in 2014, 2015, or 2016, Bierer would have discovered its claims against Travis Pattern well before the date necessary for Bierer to have avoided missing its deadline under statutes of limitation.

Indeed, by Bierer’s own admission, the one piece of evidence that sparked its 2018 inquiry and discovery of claims was Walter Bierer’s alleged “re-discovery” of the IEEE brochure. (R. p. 88, para. 74; p. 671, lines 7-24). As Bierer readily admits, Walter Bierer had already discovered that same IEEE brochure years before, either in 2014, as Mr. Bierer stated in his deposition, or in 2015 or 2016, as later stated in his affidavit. Even viewing the evidence in a light most favorable

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<sup>5</sup> In its Order Granting Summary Judgment, the trial court concluded Bierer was on inquiry notice as earlier as April 9, 2013, and as late as October 14, 2015, based in part on its finding that Bierer was aware of the IEEE brochure in November 2014. Travis Pattern fully agrees with the propriety of the trial court’s order, including its finding that Appellant was aware of the IEEE brochure in November 2014. However, in direct contradiction to Bierer’s own deposition testimony, Walter Bierer and Joe Bierer submitted affidavits in support of Bierer’s response in opposition to summary judgment that stated Bierer did not discover the IEEE brochure until 2015 or 2016. In any event, Bierer’s knowledge in 2014, 2015, or 2016 still renders Bierer’s claims untimely.

to Bierer, the absolute latest date Bierer knew or should have known it had a claim against Travis Pattern was in 2016 when Walter Bierer saw and confronted Kennerly about the IEEE brochure.

Walter Bierer's varying testimony regarding when Bierer discovered the IEEE brochure does not create an issue of material fact precluding summary judgment because, assuming the statutes of limitation were not triggered until 2016, Bierer's lawsuit would still not have been timely filed in 2021. As the trial court aptly recognized: "Even if the Court accepts Walter Bierer and Joe Bierer's suggestion that they did not learn of the IEEE [brochure] until 2015 or 2016, having such actual knowledge at that time still renders [Bierer's] claims against [Travis Pattern] barred by the statutes of limitation and laches, as [Bierer's] claims against [Travis Pattern] were not filed until April 2021, between five and six years after actual knowledge of the IEEE brochure." (R. pp. 9-10 n.2).

Recognizing this fact, Bierer attempts to save itself by arguing a jury question exists as to whether it acted reasonably in failing to investigate the information in the brochure beyond merely asking Kennerly why the brochure stated he worked for both Bierer and Travis Pattern. Bierer maintains its *subjective* feelings of trust and faith in Kennerly is enough for a jury to find it acted with reasonable diligence in its investigation, arguing the trial court thus erred in concluding as a matter of law that Bierer did not act with reasonable diligence. However, Bierer's argument is unavailing because the determination of whether the statute of limitations has begun is an *objective*, not *subjective*, question. *Majstorich*, 361 S.C. at 520, 604 S.E.2d at 732. "The adequacy of the plaintiff's due diligence investigation is measured against an objective standard that considers what the reasonably prudent person would have done under the circumstances of particular case." 32 Am. Jur. *Proof of Facts* 3d § 129 (Sept. 2023 Update).

A party's subjective explanation of its investigation, or lack thereof, does not amount to conflicting evidence for the jury to resolve in order to determine whether the party knew or should have known it had a cause of action; "[r]ather, *courts* must decide whether the circumstances of the case would put a person of common knowledge and experience on notice that some right of his has been invaded, or that some claim against another party might exist." *Majstorich*, 361 S.C. at 520, 604 S.E.2d at 732 (quoting *Young*, 333 S.C. at 719, 511 S.E.2d at 416) (emphasis added); *see also* 32 Am. Jur. *Proof of Facts* 3d § 129 (providing a list of factors the *court* will typically consider in determining whether the plaintiff satisfied its duty to investigate, including factors such as whether the plaintiff adequately reviewed documents and information in its own possession for whatever clues they may provide, the plaintiff's opportunity to discover the wrongdoing, and the plaintiff's level of sophistication and expertise). Because a wrongdoer is likely to deny or conceal its misdeeds, "*due diligence often requires the plaintiff to go beyond the defendant's personal assurances before concluding its investigation.* Depending on the circumstances of the case, due diligence might require a plaintiff to . . . [c]ontact other persons who have had dealings with the defendant[.]" 32 Am. Jur. *Proof of Facts* 3d § 129 (emphasis added).

The fact is, when Bierer saw the IEEE brochure in 2014, 2015, or 2016, stating Kennerly "ha[d] worked for . . . Travis UGD for 2 years," Bierer was on notice that its rights may have been invaded and some claim might exist. Bierer's own argument inherently admits the IEEE brochure put it on notice because Bierer argues it acted with reasonable diligence once it was on notice by questioning Kennerly about the brochure in a company meeting. Clearly, as evidenced by Bierer's own internal questioning, Bierer was subjectively aware that the facts in the brochure warranted an investigation into whether Kennerly was wrongfully engaged in business with Travis Pattern.

Moreover, Joe Bierer revealed in his deposition testimony Bierer’s management believed there was a critical distinction between Bierer’s own interpretation and understanding of the phrases “working *with*” and “working *for*” a company, further evincing why the IEEE brochure’s statement that Kennerly “worked *for*” Travis Pattern was enough to subjectively put Bierer on notice. (See R. p. 322, line 24-p. 323, line 1, p. 324, line 19-p.325, line 1). According to Joe Bierer, Bierer believed the statement “working *for*” a company meant that you were actually getting paid by that company, whereas the statement “working *with*” indicates you are not getting paid. (See R. p. 322, line 24-p. 323, line 1, p. 324, line 19-p.325, line 1). Thus, the IEEE brochure also provided Bierer with subjective notice that Kennerly may be getting paid by Travis Pattern—the very fact Bierer maintains it was completely ignorant of until it called Travis Pattern in 2018. (See R. p. 659, lines 14-18).

Once Bierer had reason to believe that some right of its had been invaded, which it clearly did based on its own internal discussions of the brochure, “the requirement of *reasonable diligence* to investigate this information . . . takes precedence . . . .” *Binkley v. Burry*, 352 S.C. 286, 297–98, 573 S.E.2d 838, 844–45 (Ct. App. 2002) (footnotes omitted). When Bierer questioned Kennerly about the statements in the brochure, Kennerly “laughed it off.” (R. p. 431, lines 12, 17). Nonetheless, Bierer chose not to exercise reasonable diligence to investigate the information in the brochure because Walter Bierer trusted Kennerly and did not want to cause “morale problems” by posing questions about the brochure to someone other than Kennerly. (R. p. 397).

Even more so, Bierer had a business relationship with Travis Pattern at the time it was on notice of the IEEE brochure. This is unlike a situation where a plaintiff is unaware of *who* the purported tortfeasor may be and must conduct even more due diligence to determine whether it may have a potential claim. Here, Bierer and Travis Pattern had an established business

relationship through which Travis Pattern was selling products to Bierer and Bierer was selling products to Travis Pattern. The entities had a further relationship through Kennerly, of which Bierer was aware and had notice. Thus, Bierer could have simply called its business partner, not some unknown or unidentifiable potential tortfeasor, to investigate the potential grounds for a claim. Bierer failed to do so. (*See R.* p. 685, lines 1-10).

Bierer's *choice* to not diligently investigate the information on which it was on notice for years does not preclude summary judgment. The three-year clock started to tick when Bierer was on notice, regardless of Bierer's choice not to act like a reasonable company in the same circumstances. Appellant is barred from finally deciding to act on the exact same information years later and attempting to belatedly hold Travis Pattern liable. *Cf. Maher v. Tietex*, 331 S.C. 371, 377–79, 500 S.E.2d 204, 207–08 (Ct. App. 1998) (finding where the plaintiff raised questions to his employer about a fifty percent bonus plan and received indirect “singing and dancing” responses to his questions, the plaintiff's admitted dissatisfaction with the employer's response was “clear evidence that [the plaintiff] knew, could have known, or should have known at that time that he might have a cause of action over the fifty percent bonus plan”).

In *Gibson v. Bank of America, N.A.*, this Court found that a party's receipt of bank account balances with unfamiliar account activity would have prompted a reasonable depositor to contact the bank and the account's co-owner to conduct a simple inquiry into the account's activity. 383 S.C. 399, 407–08, 680 S.E.2d 778, 782–83 (Ct. App. 2009). Because a simple inquiry would have led to a discovery of the source of the account withdrawals, the Court found there was only one reasonable inference as to when the party knew or should have known that it had a claim against the bank—when the party received the bank account statement. *Id.* Accordingly, this Court reversed the trial court's denial of a defendant's motions for directed verdict and judgment

notwithstanding the verdict on the ground that the plaintiff's negligence claim was barred by the three-year statute of limitations set forth in section 15-3-530(5). *Id.* at 401–02, 680 S.E.2d at 779–80; *see also Baughman v. Am. Tel. & Tel. Co.*, 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991) (noting the standards for directed verdict and summary judgment are “mirrors”).

Just as in *Gibson*, there is only one reasonable inference as to when Bierer knew or should have known it had a claim against Travis Pattern—when Walter Bierer or Joe Bierer saw the 2014 IEEE brochure. A simple inquiry of Travis Pattern, the IEEE, or anyone involved in the drafting or publishing of the brochure would have eliminated any doubt over whether Kennerly was working for Travis Pattern. There is no question that due diligence required Bierer to do more than merely question Kennerly about his own wrongdoings. *See* 32 Am. Jur. *Proof of Facts* 3d § 129. As such, the determination of when Bierer knew or should have known that it had a claim against Travis Pattern was a matter of law for the trial court to decide, and the trial court did not err in refusing to submit the question to the jury. *See Gibson*, 383 S.C. at 407–08, 680 S.E.2d at 782–83.

Allowing Bierer to unreasonably trust Kennerly for an extended period of time before investigating the veracity of statements made regarding its employee in a nationally publicized article would be contrary to the objective reasonable diligence standard used to determine when the statute of limitations begins. (*See* R. p. 664, lines 1-12). Because there is no question of fact that Bierer discovered the IEEE brochure by at least 2016, and because the only reasonable inference is that Bierer knew or should have known that it had a claim against Travis Pattern when Walter Bierer or Joe Bierer discovered the 2014 IEEE brochure, the trial court did not err in granting Travis Pattern's motion for summary judgment. *See Kitchen Planners*, 440 S.C. at 463, 892 S.E.2d at 301 (holding it is not sufficient to survive summary judgment for a party to “create an inference that is not reasonable or an issue of fact that is not genuine.” (quoting *Town of*

*Hollywood*, 403 S.C. at 477, 744 S.E.2d at 166)).

**B. Bierer had constructive knowledge of potential claims as early as 2013.**

Bierer's actual knowledge of the IEEE brochure in 2016 was compounded by other facts and circumstances readily apparent to Bierer from 2012 to 2015 regarding Kennerly's behavior and relationship with Travis Pattern. The plethora of evidence before the trial court shows that this case is not one where notice is based on one single event or document, but rather, this case involves a constant drum beat of facts and circumstances placing Bierer on notice from 2012 to 2016. In addition to the 2014 IEEE brochure, the specific pieces of evidence Bierer disputes in this appeal are emails from April 9, 2013, December 5, 2013, October 14, 2015, and July 11, 2018. While the trial court made express findings and conclusions regarding these emails, there are also other pieces of evidence that existed from 2012 to 2016 that provide further support for the trial court's order and give additional context for affirming the trial court's order. *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.").

As the trial court properly found, the undisputed evidence of the record shows that Bierer was aware in 2012 that Kennerly was taking steps to dissociate himself from Bierer's company, and such evidence gave Bierer a basis on which later facts should have put Appellant on notice of potential claims. (R. p. 13). Bierer's only argument seems to be that, although it was aware of Kennerly's dissociative behavior and his relationship with Travis Pattern, Bierer failed to investigate such facts sooner because it blindly trusted Kennerly to act in its best interest. However, had Bierer exercised reasonable diligence and investigated Kennerly's misconduct when it became aware of it from 2012 to 2016, Bierer would have discovered its claims against Travis Pattern at least five years before it filed suit.

“Parties should act before memories dim, evidence grows stale or becomes nonexistent, or other people act in reliance on what they believe is a settled state of public affairs.” *Gibson*, 383 S.C. at 410, 680 S.E.2d at 784 (quoting *State ex rel. Condon v. City of Columbia*, 339 S.C. 8, 19, 528 S.E.2d 408, 414 (2000)). Accordingly, “South Carolina’s statute of limitations requires ‘very little to start the clock.’” *Maher*, 331 S.C. at 377, 380 S.E.2d at 207 (quoting *Roe v. Doe*, 28 F.3d 404, 407 (4<sup>th</sup> Cir. 1994)). “It is settled law that knowledge of facts sufficient to put a reasonable man on inquiry is equivalent to actual notice of such facts as a reasonably diligent inquiry would certainly have disclosed.” *Gov’t Emp. Ins. Co. v. Chavis*, 254 S.C. 507, 525, 176 S.E.2d 131, 140 (1970) (Brailsford, J. dissenting). “Reasonable diligence is intrinsically tied to the issue of notice. . . . [Courts] have interpreted the exercise of reasonable diligence to mean that 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.” *Hedgepath v. Am. Tel. & Tel. Co.*, 348 S.C. 340, 356, 559 S.E.2d 327, 336 (Ct. App. 2001) (cleaned up).

In *Martin v. Companion Healthcare Corporation*, this Court affirmed the trial court’s grant of summary judgment in favor of the defendants, finding it significant that “during the four-year interim between [the plaintiff’s] payment to [the defendant] and the filing of the instant cause of action, [the plaintiff could not] point to any events, other than her original payment of the claim and a meeting she had with attorneys, that caused her to ‘discover’ this claim.” 357 S.C. 570, 576, 593 S.E.2d 624, 628 (Ct. App. 2004). As the Court explained, “the triggering of the statute of limitations is ‘not when advice of counsel is sought or a full-blown theory of recovery developed,’ but rather when the facts and circumstances of an injury would put a person of common knowledge and experience on notice that a claim exists.” *Id.* (quoting *Dorman v. Campbell*, 331 S.C. 179,

184, 500 S.E.2d 786, 789 (Ct. App. 1998)). Thus, the statute of limitations began to run on the plaintiff's claim in *Martin* when she made the original payment, despite the fact that she did not subjectively understand the potential claim related to the payment until years later when she investigated the amount and met with attorneys. *Id.* at 577, 593 S.E.2d at 628.

Comparable to *Martin*, by the time Bierer discovered the IEEE brochure in 2016, Bierer had exactly the same information that it would have in 2018 when it actually followed-up and made inquiries. During the five-year interim between Appellant's 2016 discovery of the IEEE brochure and its filing of the instant cause of action, Bierer cannot point to any events, other than its "re-discovery" and investigation of the IEEE brochure in 2018, that caused it to "discover" its claims against Travis Pattern. Bierer admits it was prompted to call Travis Pattern after it saw the IEEE brochure again in 2018 and that it "learned of the extent of Kennerly's financial relationships with Trystar and Travis, as well as his relationship with [other companies], *while investigating the extent of Kennerly's misconduct.*" (R. p. 88, para. 74, p. 89, para. 77 (emphasis added)).

Bierer was aware of Kennerly's dissociative misconduct by 2012 and of the IEEE brochure by 2016, at the latest. The fact Bierer did not fully recognize "the *extent* of Kennerly's misconduct" until it finally investigated in 2018 does not rescue Bierer from the running of the statutes of limitation. *See Moriarty v. Garden Sanctuary Church of God*, 341 S.C. 320, 329, 534 S.E.2d 672, 676 (2000) ("[U]nder section 15-3-535 [and section 39-8-70], 'the statute of limitations is triggered not merely by knowledge of an injury but by knowledge of facts, diligently acquired, sufficient to put an injured person on notice of the existence of a cause of action against another.'" (citation omitted)); *Dean*, 321 S.C. at 363, 468 S.E.2d at 647 ("[T]he statute of limitations begins to run when a cause of action reasonably ought to have been discovered. . . . [T]he fact that the injured party may not comprehend the full extent of the damage is immaterial.").

In Bierer's emails dated April 9, 2013, and December 5, 2013, Bierer recognizes Trystar may be engaging in behavior that was causing a drop in Bierer's sales of certain products.<sup>6</sup> As the trial court aptly held, these emails establish Bierer was on notice as early as 2013 that some claim against Trystar might exist. (R. p. 13). Had Bierer investigated and brought a claim against Trystar in 2013, it likely would and could have discovered its claims against Travis Pattern as well. Bierer's own Complaint recognizes the similarities between its claims against Travis Pattern and Trystar, and how the discovery of Kennerly's wrongful conduct with one necessarily resulted in the discovery of Kennerly's wrongful conduct with the other. (*See* R. p. 88, para. 75, p. 89, para. 77).

Additionally, in 2014, Travis Pattern was openly advertising that Kennerly worked for Travis Pattern UGD, both to the public and Appellant. In 2014, Travis Pattern sent Bierer at least six quotations bearing Kennerly's name followed by a UGD title. These quotations were also sent to Kennerly's personal email account, alerting Bierer that Travis Pattern and Kennerly were communicating through channels outside of Kennerly's official work capacity with Bierer. Bierer, however, maintains it never received these quotations.

"Nevertheless, the question of whether [it] received the [quotations] is irrelevant, for knowledge of the information in [the quotations] was imputed to [Bierer] through [its] agent," Chris Watson or other employees in Bierer's procurement or customer service department. *Dorman*, 331 S.C. at 185–86, 500 S.E.2d at 789; *see id.* at 185–86, 500 S.E.2d at 789–90 (holding the statute of limitations began to run on homebuyers' claims arising from an unpermitted addition when homebuyers' attorney received a letter "indicating a potential problem with the addition,"

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<sup>6</sup> In addition to its earlier general statement of adoption, Travis Pattern specifically adopts and incorporates by reference Trystar's arguments regarding the April 9, 2013 email and the December 5, 2013 email.

regardless of whether homebuyers ever received a copy of the letter). These quotations should have alerted Bierer to question its understanding of Kennerly's relationship with Travis Pattern. *See Graham*, 404 S.C. at 240–41, 743 S.E.2d at 863 (acknowledging that based on the parties' course of dealings, appellant's assumption and understanding of an issue was reasonable; however, invoice containing a statement to the contrary of his understanding was sufficient to put a person of common knowledge and experience on notice).

Likewise, Travis Pattern's statement in the IEEE's national publication that Kennerly worked for its UGD division was sufficient to put Bierer on notice. Bierer concedes it was "public knowledge" and "in national newsletters" that Kennerly was "working with Travis and Bierer in 2014." Notwithstanding Bierer's subjective understanding of Kennerly's relationship with Travis Pattern, Bierer should be charged with the knowledge of the alleged wrongdoings between Travis Pattern and Bierer based on the widespread industry awareness of such facts by 2014. *See Hedgepath*, 348 S.C. at 358, 559 S.E.2d at 337 (holding "where events receive widespread publicity, plaintiffs may be charged with knowledge of their occurrence," and thus the trial court properly granted summary judgment because the "record is replete with uncontested evidence of widespread publicity and awareness of the alleged [wrongdoing]" prior to the running of the statute of limitations).

Bierer's emails from October 14, 2015, and July 11, 2018, further support the trial court's finding that Bierer had been aware of Kennerly's "outside activities" for a number of years before it finally exercised due diligence and investigated Kennerly's wrongful behavior. In the October 14, 2015 email, Bierer wrote to Kennerly and made it clear Bierer should have known it had a potential claim against another party by this date, especially in light of Kennerly's extensive dealings and product testing that was ongoing with Travis Pattern in 2015. In the email, Bierer

pronounces its concerns of “a larger issue,” including Kennerly’s lack of accountability to Bierer and “outside activities” which seem to put Kennerly at odds with Bierer. Bierer specifically stated Kennerly had purposely separated himself from Bierer by maintaining private telephone and email accounts, which led Bierer to “wonder what other activities [Kennerly] may be conducting on [Bierer] dime.” Because a simple inquiry in 2015 could have revealed the allegedly nefarious nature of Kennerly’s activities, it does not matter whether Bierer subjectively thought Kennerly’s “outside activities” were merely innocent games of golf or otherwise. The trial court correctly found that Bierer’s duty to exercise due diligence was clearly sparked by at least 2015. As a matter of law, a person of common knowledge and experience would have been on notice that some claim against another party might exist. *See Stokes-Craven Holding Corp. v. Robinson*, 416 S.C. 517, 526, 787 S.E.2d 485, 489 (2016).

Despite Kennerly’s activities admittedly raising questions and concerns in Bierer’s mind in 2015, Bierer failed to investigate until three years later, in 2018. Bierer’s email on July 11, 2018 plainly expresses that Bierer’s concerns with Kennerly had been ongoing since 2012. In the July 11, 2018 email, Walter Bierer stated it had been “*obvious*” to him that Kennerly had been trying to separate himself from Bierer “for many years.” (R. p. 263). Bierer’s argument that it acted reasonable in failing to investigate its claims sooner flies in the face of Walter Bierer’s admission in the July 11, 2018 email that, “No business other than Bierer would have tolerated this for any period of time.” (R. p. 263). Later, in his deposition, Walter Bierer reflected on this 2018 email. Counsel asked Walter Bierer whether it was unreasonable for Bierer to have tolerated Kennerly’s behavior, to which Walter Bierer responded: “It was unreasonable? Well, looking at how corrupt he totally was, it probably was unreasonable.” (R. p. 247, lines 7-10).

As it does with all the evidence at its feet prior to 2018, Bierer attempts to argue this 2018 email has no bearing on Bierer's earlier notice of its claims because Bierer did not realize the true extent and motive for Kennerly's actions until it investigated in 2018. Again, however, Bierer's subjective knowledge of the extent of its damages is immaterial to the triggering of the statutes of limitation. *See Dean*, 321 S.C. at 364, 468 S.E.2d at 647. This Court should not excuse Bierer from its obligation to exercise reasonable diligence because it blindly "trusts" the wrongdoer, Kennerly. Bierer provides the Court with no legal authority to the contrary. Even viewing the evidence in a light most favorable to Bierer, it is clear that the accumulation of evidence from 2012 to 2016, taken together, was sufficient to put a reasonable person on notice of its claims against Travis Pattern long before 2018.

Simply put, Bierer received pieces to a puzzle from 2012 to 2016. By 2016, it had every single piece to the puzzle, and yet, it refused or failed to put the puzzle together until 2018. The trial court correctly concluded that Bierer's claims against Travis Pattern were barred by the three-year statutes of limitation.

## **II. THE TRIAL COURT CORRECTLY CONCLUDED THAT NO FACTS ESTABLISHED FRAUDULENT CONCEALMENT BY TRAVIS PATTERN TO TOLL THE STATUTES OF LIMITATION.**

The trial court correctly rejected Bierer's argument that the doctrine of fraudulent concealment equitably tolled the running of the statutes of limitation as to Travis Pattern. As the trial court pointed out, Bierer relies exclusively upon alleged concealment by *Kennerly* as the basis for its position and fails to submit any evidence to create a genuine issue of material fact as to fraudulent concealment by Travis Pattern directly. Furthermore, the record shows Bierer had actual knowledge of facts sufficient to trigger an inquiry well outside the applicable limitation periods.

Under South Carolina law, “a defendant may be estopped from claiming the statute of limitations as a defense if some conduct or representation *by the defendant* has induced the plaintiff to delay in filing suit.” *Logan v. Cherokee Landscaping & Grading Co.*, 389 S.C. 611, 618, 698 S.E.2d 879, 883 (Ct. App. 2010) (emphasis added) (quoting *Hedgepath*, 348 S.C. at 360, 559 S.E.2d at 338). “Whether the defendant’s actions lulled the plaintiff into a false sense of security is usually a question of fact; however, summary judgment is proper if there is no evidence of conduct *on the defendant’s part* warranting estoppel.” *Id.* at 618–19, 698 S.E.2d at 883 (emphasis added) (citing *Hedgepath*, 348 at 361, 559 S.E.2d at 339). “The ‘elements of equitable estoppel as to the party estopped are: (1) conduct *by the party estopped* which amounts to a false representation or concealment of material facts; (2) the intention that such conduct shall be acted upon by the other party; and (3) knowledge, actual or constructive, of the true facts.’” *Id.* at 619, 698 S.E.2d at 883 (emphasis) (quoting *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 589, 553 S.E.2d 110, 114 (2001)).

Here, Bierer points to no actions *by Travis Pattern* constituting alleged fraudulent concealment and fails to satisfy any of the elements of equitable estoppel. Instead, Bierer attempts to argue that *Kennerly’s alleged concealment* should be imputed to Travis Pattern because Kennerly was an agent of Travis Pattern. However, Bierer fails to establish Kennerly was in fact Travis Pattern’s agent, that Kennerly’s conduct fell within the scope of its agency, or that Travis Pattern took any action to cloak Kennerly in any apparent authority as to any fraudulent misrepresentations. Even Bierer concedes, as it must, that Travis Pattern openly maintained its relationship with Kennerly, and the evidence shows Travis Pattern and Kennerly never discussed or contemplated any effort to hide the extent of their relationship from Bierer or anyone else in the industry. To the contrary, their relationship was out in the open. As a result, Bierer is unable to

point to any evidence in support of its agency argument. Additionally, for the reasons stated by the trial court in its order, Bierer finds no relief in its citation to *West v. Service Life & Health Insurance Company*, 220 S.C. 198, 66 S.E.2d 816 (1951). (*See R.* p. 18).

Likewise, Bierer’s agency argument is unavailing because Kennerly was at all relevant times *Appellant’s* employee, and therefore, under no circumstances could Bierer claim it lacked knowledge of its potential claims when it knew or should have known of the actions of *its own employee*. Any delay in filing cannot properly be attributable to any alleged misconduct by Travis Pattern. *Cf. Watters v. Terminix Serv., Inc.*, 376 S.C. 632, 635–36, 658 S.E.2d 110, 112 (Ct. App. 2008) (holding the plaintiff could not assert an estoppel theory to delay the start of the statute of limitations where the alleged misconduct was that of the plaintiff’s own expert and thus not attributable to the defendants).

Moreover, “[t]o claim the protection of the discovery rule, the injured party must have been reasonably diligent in discovering whether a cause of action existed.” *S.C. Farm Bureau Mut. Ins. Co. v. Kelly*, 345 S.C. 232, 237, 547 S.E.2d 871, 874 (Ct. App. 2001) (citing *Grillo v. Speedrite Prods., Inc.*, 340 S.C. 498, 502–03, 532 S.E.2d 1, 3 (Ct. App. 2000)). “Once a plaintiff’s duty to inquire has been triggered, for purposes of a claim that the statute of limitations should be tolled on the ground of fraudulent concealment, due diligence requires the plaintiff to conduct an investigation.” 32 Am. Jur. *Proof of Facts* 3d § 129. “[B]ecause a wrongdoer may well be expected to deny or otherwise conceal its misdeeds, *due diligence often requires the plaintiff to go beyond the defendant’s personal assurances before concluding its investigation.*” *Id.* (emphasis added). Depending on the circumstances of the case, due diligence often requires the plaintiff to “[c]heck news articles for indications of wrongdoing by the defendant” and “[c]ontact other persons who have had dealings with the defendant.” *Id.*

This case well illustrates the need for a party to investigate beyond merely questioning the wrongdoer. Bierer cannot seek refuge in an estoppel theory because any alleged delay in its discovery of its claims is due entirely to its own failure to exercise due diligence in its investigation. Had Bierer exercised due diligence, even by simply calling Travis Pattern, Bierer could have easily discovered its claims as early as 2013. Indeed, once Appellant decided to investigate and call Travis Pattern in 2018, there was absolutely no concealment by Travis Pattern, and Bierer ascertained the truth in a matter of seconds. The trial court, therefore, did not err in refusing to toll the statutes of limitation based on Kennerly's purported misrepresentations.

### **CONCLUSION**

The trial court did not err in granting summary judgment to Travis Pattern and Trystar on the basis of the statute of limitations. The undisputed evidence shows Bierer either knew or should have known of its claims against Respondents by 2016, at the latest, meaning the statutes of limitations ran at least two years before Bierer filed suit against Travis Pattern in 2021.

Bierer's arguments regarding its subjective explanations for failing to timely investigate its claims do not impact a court's objective determination of whether Bierer was on notice. The trial court, therefore, correctly concluded a reasonable investigation would have revealed to Bierer the complained-upon misconduct more than three years before it filed suit against Travis Pattern. Likewise, because there is no evidence of any fraudulent concealment by Travis Pattern, and because Bierer failed to conduct a reasonable investigation, the trial court correctly held that the statutes of limitations were not tolled as to Bierer's claims against Travis Pattern.

Based on the foregoing reasons, this Court should affirm in full the trial court's Order Granting Summary Judgment.

Respectfully submitted,

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Dated: January 16, 2024.

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**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

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

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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,

of whom, Trystar, LLC and Travis Pattern & Foundry, Inc. are.....Respondents.

AND

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

v.

Walter Bierer; Brent Jefferies; and Joseph Bierer.....Third Party Defendants.

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CERTIFICATE OF COUNSEL

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I, Lyndey R.Z. Bryant, certify that the Final Brief of Respondent Travis Pattern & Foundry, Inc. complies with Rule 211(b) of the South Carolina Rules of Appellate Practice.

Respectfully submitted,

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