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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

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

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

APPELLANT'S FINAL REPLY BRIEF TO RESPONDENT TRAVIS PATTERN & FOUNDRY INC.'S FINAL BRIEF

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INTRODUCTION

The lower Court failed to view the evidence and all inferences in a light most favorable to Bierer, as required by Rule 56 SCRCP. Specifically, the court erred when it ruled as a matter of undisputed fact that Bierer and Associates, Inc. ("Bierer") knew, or should have known, prior to July 2018 that Travis Pattern & Foundry, Inc. ("Travis") was paying Bierer's National Sales Manager, Rick Kennerly to market products to Bierer's electrical utility customers, in direct competition with Bierer. Travis concedes, as it must, that whether Bierer had actual knowledge of this wrongful conduct until sometime after July 2018 is a disputed question of fact. Moreover, Bierer indisputably asked Kennerly whether the representation in the IEEE brochure that he worked for Travis was correct and Kennerly informed Bierer that the information was a mistake.

Whether Bierer exercised reasonable diligence by inquiring of Kennerly, the person about whom the biographical was written, is a question of fact for the jury. In addition, Travis cherry-picks a few isolated emails, and other documents, out of literally millions of documents produced in this litigation to try and establish as a matter of law that Bierer should have known of this wrongful conduct prior to July 2018. Travis argues that because Bierer knew that Kennerly was legitimately working with Travis, on Bierer's behalf, to manufacture, develop and test clamps that were distributed by Bierer and used in Bierer's personal protective grounding products, this Court should therefore infer that Bierer should have known that Travis was simultaneously and illegitimately paying Kennerly to compete against Bierer for the sale of these very same products. However, the Court must construe all reasonable inferences against Travis, and in favor of Bierer for purposes of summary judgment.

Travis also concedes that Kennerly repeatedly lied and deceived Bierer about his relationship with Travis up to the day he was terminated by Bierer. However, Travis contends that it should not be bound by Kennerly's fraudulent concealment arguing that Bierer failed to present

sufficient evidence that Kennerly was Travis' agent. Yet, Travis' brief clearly identifies Kennerly as its "sales representative" and even boasts that Travis marketed Kennerly as its sales representative to the electrical utility industry. Whether Kennerly was an agent of Travis and acting in the course and scope of his agency relationship when he fraudulently concealed this relationship from his employer, Bierer, are questions of fact for the jury to determine at trial.

ARGUMENT

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

Travis claims that Bierer's investigation into Kennerly's relationship with Travis after reading the IEEE brochure was unreasonable as a matter of law. Travis alleges that Bierer blindly and unreasonably trusted Kennerly to a fault and failed to conduct a reasonable investigation into Kennerly's relationship with Travis until 2018. (Travis Br. 3-4). Whether Bierer "unreasonably trusted" Kennerly or failed to conduct a "reasonable investigation" are quintessential jury questions, rather than undisputed facts upon which summary judgment can be granted.

Under the discovery rule, the statute runs from the date the injury resulting from the wrongful conduct either is discovered or may be discovered by the exercise of reasonable diligence. The exercise of reasonable diligence means "an injured party must act with some promptness where the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some right ... has been invaded or that some claim against another party might exist." *Graniteville Co. v. IH Servs., Inc.*, 316 S.C. 146, 148, 447 S.E.2d 226, 228 (Ct. App. 1994). Here, the evidence firmly establishes that Bierer promptly acted when Walter Bierer and Joe Bierer became aware of the statement in the IEEE brochure that Kennerly worked for Travis. They immediately inquired of Kennerly whether the statement was correct. In response,

Kennerly told Walter and Joseph Bierer that Travis employee Dick Pelletier had written the brochure and incorrectly assumed Kennerly was an employee of Travis because Kennerly spent so much time assisting Travis with developing clamps for use in personal protective grounding equipment on behalf of Bierer. Kennerly assured Walter that he was not employed by Travis and laughed off the situation as a simple misunderstanding. *See* (WB Aff. ¶ 13; JB Aff. ¶¶ 12-13; Dep. W. Bierer (Feb. 23, 2022) at 243:7-244:1; Dep. J. Bierer (August 31, 2022) at 86:22-87:15.) **(R. pp. 397 ¶ 13; 406-407 ¶¶ 12-13; 431:7-432:1; 443:22-444:15).** This explanation appeared reasonable because Kennerly was working with Travis on behalf of Bierer to develop clamps for Bierer's grounding assembly product line. (WB Aff ¶ 11; JB Aff ¶ 10). **(R. p. 396 ¶ 11; 405 ¶ 10).**

In *Graniteville Co. v. IH Servs., Inc.*, 316 S.C. 146, 447 S.E.2d 226 (Ct. App. 1994), the Court ruled that whether a building owner that suffered fire loss exercised reasonable diligence by retaining a fire investigator to provide a report on the origin of the fire, prior to filing suit, was a jury question. The Court stated, "we hold Graniteville's employ of an expert eight days after the fire, to determine its cause, is evidence of reasonable diligence that at the very least places into controversy the question of whether or not reasonable diligence was exercised. *Id*. at 148-149, 447 S.E.2dat 228. In reaching this holding, the Court relied upon *Santee Portland Cement Co. v. Daniel Int'l Corp.,* 299 S.C. 269, 274, 384 S.E.2d 693, 696 (1989), *overruled on other grounds by Atlas Food Sys. & Servs., Inc. v. Crane Nat. Vendors Div. of Unidynamics Corp.*, 319 S.C. 556, 462 S.E.2d 858 (1995). In *Santee Portland Cement Co*., the trial court granted summary judgment because Santee had previously noticed cracks in concrete silo Bin #12 prior to the collapse of Bin # 13, which it was suing over. Santee had been given assurances by the defendant that the repairs to Bin #12 were relatively small and Santee inspected the silos visually and the silos were periodically checked by the Mine Safety and Health Administration. Id. at 270-71; 384 S.E.2d at

693-94. The Supreme Court ruled that "All of the evidence introduced went to the reasonableness of Santee's actions, which was an issue to be decided by the jury." *Id.* at 274, 384 S.E.2d at 696; *see also Brown v. Finger*, 240 S.C. 102, 113, 124 S.E.2d 781, 786 (1962) ("The burden of establishing the bar of the statute of limitations rests upon the one interposing it ... and where the testimony is conflicting upon the question, it becomes an issue for the jury to decide.")

Travis selects a sentence, in isolation, from Am. Jur. Proof of Facts Third Edition for the proposition that due diligence may require the plaintiff to go beyond the defendant's personal assurances before concluding its investigation. (Travis Br. at 20). The case cited by the authors of Am Jur Proof of Fact, *Gen. Builders Supply Co. v. River Hill Coal Venture*, 796 F.2d 8 (1st Cir. 1986), for the proposition that under certain circumstances, due diligence may require more than accepting the assurances of the defendant, involved assurances made by an investment advisor about an investment in a joint venture that the advisor recommended. *See* 32 Am. Jur. *Proof of Facts* 3d § 129. In *Gen. Builders Supply Co,* the Court observed:

> In this case, however, Percuoco was not a wholly disinterested advisor, a fact known by appellants. He was the person who brought the coal venture to appellants' attention, vouched for the characters of the organizers and, more or less, encouraged the appellants to invest their funds in this particular project. A reasonable person would easily recognize that if Percuoco's advice in the matter was even innocently incorrect, he might try to cover himself in the hope that the investment situation might turn around later, and that their money and his reputation would be saved. Plaintiffs' participation as joint venturers gave them a unique opportunity to adequately investigate the true status of their investments…Given such a situation as we have here, the investors' due diligence burden goes beyond the duty to make a reasonable inquiry. An investor must also " 'apply his common sense to the facts that are given to him' in determining whether further investigation is needed." *See Cook, supra,* at 696 n. 24 (quoting Note, *The Due Diligence Requirement for Plaintiffs under Rule 10b–5,* 1975 Duke L.J. 753, 779). *Considering that Percuoco was the "broker" in their purchase of the units, and Goldberg was the promoter and president of the venture manager corporation, it behooved the investors to look beyond the personal assurances of these two persons.* It is clear that with the power available to make their own inspections and evaluations, their discovery efforts must be characterized as minimal.

Id. at 12-13 (emphasis added).

Moreover, Travis omits the following sentence from the same section of Am. Jur. Proof of Facts:

> Where the defendant supplied false information that lulled the plaintiff into reasonably believing that all was well, the plaintiff may be found to have discharged its duty of due diligence. This is particularly true where the defendant used its position of trust to misguide the plaintiff.

32 Am. Jur. *Proof of Facts* 3d § 129.

Here, Kennerly was clearly in a position of trust at Bierer. He was an Executive Vice President and functioned as the national sales manager. Kennerly clearly used his position of trust to misguide Bierer.[1]

In conclusion, Bierer acted promptly when it first learned that the IEEE brochure stated that Kennerly "worked for" Travis to determine whether this information was accurate. Bierer contacted the very person who the biographical information was about, Rick Kennerly. Kennerly used his position of trust to misguide Bierer, and lulled Bierer into reasonably believing that all was well, and that the information was the result of a misunderstanding. The lower court's ruling that Bierer's investigation was insufficient as a matter of law is contrary to the decisions of *Graniteville Co. v. IH Servs., Inc., Santee Portland Cement Co.,* and *Brown v Finger.* Under this line of authority, the question of whether Bierer acted with reasonable diligence is a question of fact for the jury to determine.

[1] Lastly, the section in Am Jur Proof of Facts relied upon by Travis further states that "[t]here is also authority that, in cases in which a plaintiff has justifiably relied on a defendant's false statement or omission that also constitutes constructive fraud, irrespective of the good faith in which it is made, the plaintiff has no duty to make inquiries about the misrepresentation unless it has knowledge of its own or of facts which should arouse suspicion and cast doubt upon the truth of the statement made." 32 Am. Jur. *Proof of Facts* 3d § 129.

II. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT ON THE AFFIRMATIVE DEFENSE OF STATUTE OF LIMITATIONS WHERE THE RECORD CONTAINS CONFLICTING TESTIMONY AS TO WHEN BIERER WAS ON INQUIRY NOTICE OF ITS CLAIMS AGAINST THE RESPONDENTS.

Travis asserts that it publicly marketed Kennerly as its sales representative. (Travis Br. at 3). However, Bierer was a small "Mom and Pop" operation located in rural South Carolina. Kennerly was Bierer's sole interface and "eyes and ears" in the national marketplace. (WB Aff. ¶ 5, JB Aff. ¶¶ 4-5). **(R. p. 394 ¶ 5; 404 ¶¶ 4-5).** Furthermore, Travis never contacted Bierer to confirm Kennerly's claim that Bierer approved of Kennerly being a sales representative for Travis, even though Travis knew it would be improper to hire Kennerly unless Bierer consented. Travis' assertion that it was public information that Kennerly worked with Travis is also contradicted by the very industry individual, Bud Dygert, that introduced Kennerly to Travis when Bierer was looking to make a clamp for its grounding assembly. Mr. Dygert testified that he was not aware that Kennerly was a sales representative for Travis until he was informed of the same by Joseph Bierer – after Kennerly's termination. (Bierer RIO to Travis MSJ, Ex. I, Dep. of B. Dygert, 15:19 – 16:21). **(R. pp. 457:19 – 458:21).** Travis' position, as expressed by its CEO Travis Garske, is that Mr. Bierer should keep better tabs on his corporate officer, and this is not Travis' problem.[2] (Id., Ex. C, Dep. T. Garske, 25:21-27:15, 43:8 – 44:24.) **(R. pp. 414:21-416:15, 417:8-418:24).** Travis also fails to mention that Kennerly repeatedly lied and deceived Bierer about his relationship with Travis up to the day he was terminated by Bierer.

In addition, Travis relies extensively on statements made in an email written by Walter Bierer on July 11, 2018, after he learned that Kennerly was working for Travis. *See, e.g.* (Travis

[2] Garske also conceded that he too would have fired an employee who entered such an arrangement without his permission. *See* (Bierer RIO to Travis MSJ, Ex. C., 26:19-27:7). **(R. pp. 415:19-416:7).**

Br. at 29-30). Travis' reliance on this 2018 email as support for its argument Bierer was on notice beginning in 2012 of its potential claims against Travis is unwarranted. Walter Bierer explained that this email was sent to Kennerly *after* Walter learned of Kennerly's relationship with Travis. WB Aff. ¶ 8). **(R. pp. 394-395 ¶ 8).** Walter sent this email setting forth his realization that actions Kennerly had taken around 2012 were steps Kennerly surreptitiously took to distance himself from Bierer and his employment at Bierer. Id. Importantly, there is nothing about the dissociative conduct addressed in this email that links Kennerly to Travis in any form or fashion.

At the time the events took place, Walter accepted Kennerly's benign explanation for the occurrence of each. Id. As to his phone, Kennerly told Walter that he lost his company phone on the West Coast and so he had to replace it using his personal information to have it set up while on the road. Id.; *see also* Bierer RIO Travis MSJ, Ex. D at 115:16-117:10). **(R. pp. 394-395 ¶ 8; 421:16-423:10).** As to establishing a Gmail account, Walter approved that based on Kennerly's explanation that Gmail was more user friendly than the bierermeters.com domain. Id. As to receipts, Kennerly complained that the receipts were hard to keep up with, so Walter compromised and agreed Kennerly could just itemize his monthly company credit card statements. (WB Aff. ¶ 8.) **(R. pp. 394-395 ¶ 8).** Finally, as to trip reports, Kennerly gave these to the management team orally at Bierer Monday management meetings each week, so Walter did not insist he write them up. Id. However, when Kennerly began missing these meetings, Walter insisted he turn in written reports, which Kennerly eventually did towards the latter part of his employment. Id.

Travis relies upon the disputed testimony of Kennerly who claims that he told Walter Bierer about his working relationship with Travis. (Travis Br. at 8). Walter Bierer, of course, denies that Kennerly told him any such thing. (WB Aff. ¶ 6). **(R. p. 394 ¶ 6).** A jury must decide who is more credible, Walter Bierer or Rick Kennerly.

Travis also points to certain sales quotes sent to a low level Bierer employee from Travis that identified Kennerly on the quote, along with the letters UGD, the name of Travis' Utility Grounding Division, to argue that Bierer was on inquiry notice. (Travis Br. at 11-12). Again, Travis seeks to upend the summary judgment standard and construe the evidence, and inferences, against Bierer, rather than in favor of Bierer and against Travis. These quotes sent to Bierer do not clearly identify Kennerly as someone who is working for Travis. Instead, Kennerly's name on these quotes could just as easily be interpreted to mean that Kennerly is the Bierer representative ordering the product. *See* (Bierer RIO to Travis MSJ at 13; WB Aff. ¶ 9, JB Aff. ¶ 8**.). (R. pp. 386; 395 ¶ 9, 404-405 ¶ 8).** The evidence reflects that the management team was not aware of the language in these quotes until Travis was added to this lawsuit. Id. Such quotes were not sent to anyone on the management team (other than Kennerly). Id. Instead, they are directed to the "Attn" of two low-level employees. Id. As to the quote submitted in 2018, it does not appear to have been sent to anyone other than Kennerly and it is directed to the attention of a PG&E- not Bierer-employee. Id.

Travis references an email sent by David Yang, an employee of General Pacific, to Kennerly at Kennerly's bierermeters.com email address. (Travis Br. at 12). However, there is no evidence that anyone other than Kennerly ever saw, read, or even knew about this email or Kennerly's interaction with David Yang until after litigation began in 2018. *See* (Bierer RIO to Travis MSJ at 6; WB Aff. ¶ 14, JB Aff. ¶ 14.). **(R. pp. 379; 398 ¶ 14; 407 ¶ 14).** Travis also relies upon a trip report submitted to Bierer by Kennerly in November 2015 indicating that he was with Alex Martin of Travis to assist with testing several items. (Travis Br. at 13). This trip would not have put Bierer on notice of his secret relationship with Travis. At this point in time, November 2015, Kennerly's participation in such testing did not raise any red flags for the Bierer management

team. *See* (Bierer RIO to Travis MSJ at 8; WB Aff. ¶ 17; JB Aff. ¶ 16.). **(R. pp. 381; 400 ¶ 17; 408 ¶ 16).** Kennerly had been tasked with developing new clamps with Travis for use in Bierer grounding assemblies. Id. While the testing was usually paid for by utility companies that were considering purchasing Bierer personal protective grounds, Bierer, at its own expense, routinely sent grounds to the labs to be tested in conjunction with Travis clamps. (Id.; *see also* Bierer RIO to Travis MSJ, Ex. E. at 294:1-4). **(R. pp. 381; 400 ¶ 17; 408 ¶ 16; 436:1-4).** Additionally, Bierer was not aware of, nor had it seen, the sign-in sheet for the PG&E testing in which Kennerly signed in as a Travis employee. Both Walter and Joseph Bierer became aware of that document after Kennerly was terminated. (WB Aff. ¶ 17; JB Aff. ¶ 16.). **(R. pp. 400 ¶ 17; 408 ¶ 16).**

Travis also cherry picks an April 2016 email from Kennerly wherein he informs Walter Bierer that while traveling to San Antonio, Texas, Kennerly would be spending some "off" time meeting with industry representatives. (Travis Br. at 13.) In its Brief, Travis does not attempt to link this email to its improper relationship with Kennerly, because there is not any connection. There is nothing in this email that references Travis or even identifies the industry representatives to whom Kennerly refers.

Additionally, the email chain dated April 12, 2016, does not reflect Bierer's knowledge that Kennerly was doing anything other than conducting business in furtherance of Bierer's interests. Bierer was aware that Kennerly, in his capacity as national sales manager, interfaced with sales representatives concerning other manufacturer's products that complimented Bierer products. (WB Aff. ¶ 15; JB Aff. ¶ 15). **(R. pp. 398 ¶ 15; 407-408 ¶ 15).** For example, after promoting a Bierer meter, it would be logical for the SNC product - Restore Light – to be brought up as a supplemental product for Bierer meter customers to use in a troubleshooting capacity. Id. Both Walter and Joe Bierer believed a demonstration of knowledge of Bierer products, as well as those

that could be used in conjunction with the same, would enhance the stature of Bierer in the industry. Id. Thus, the concerns raised in this email by other members of the management team - that Kennerly would be discussing another manufacturer's product, which did not compete with a current Bierer product but instead could be used in conjunction with the Bierer product being presented, did not raise a red flag concerning his deceit. (Id.; *see also* Bierer RIO Travis MSJ, Ex. F at 14:14-15:11, 18:17-19:24). **(R. pp. 398 ¶ 15; 407-408 ¶ 15; 439:14-440:11, 441:17-442:24).** Again, Bierer management trusted Kennerly, and thus, when Walter questioned him about his activities on the road, such as those set forth in the April 12, 2016 email, and he assured Bierer management that his conduct was above board, they believed him. (WB Aff. ¶ 15; JB Aff. ¶ 15.) **(R. pp. 398 ¶ 15; 407-408 ¶ 15).** Nothing about this email could have, or did alert Bierer to Kennerly's employment or secret relationship with Travis.

The facts relied upon by Travis are taken in isolation, out of context, and Travis requests this Court construe inferences from these isolated facts against Bierer, rather than in Bierer's favor as required under Rule 56. Ordinarily, the question of when a statute of limitations began to run is one left to the jury. Specifically, the question of when a plaintiff discovered, or should have discovered the alleged harm is for the jury to decide because it is an objective question. *Walbeck v. I'On Co., LLC*, 439 S.C. 568, 581, 889 S.E.2d 537, 543–44 (2023), *reh'g denied* (July 26, 2023). The burden of establishing the bar of the statute of limitations rests upon the one interposing it, and where the testimony is conflicting upon the question, it becomes an issue for the jury to decide. *Id.*, *Brown v. Finger*, 240 S.C. 102, 113, 124 S.E.2d 781, 786 (1962).

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

Travis concedes that Kennerly lulled Bierer into a false sense of security when he denied to Bierer that he was working for Travis, and otherwise misled Bierer about Kennerly's "outside activities." Travis, however, argues that "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." (Travis Br. at 31.) Travis' argument misses the point. The issue for summary judgment is whether there is sufficient evidence in the record, viewing the evidence in the light most favorable to the non-moving party, to create a genuine issue of fact. Here, there is more than sufficient evidence to create a jury question as to whether Kennerly was acting within the course and scope of his agency when he repeatedly lied to Bierer about his relationship with Travis. First, Travis concedes in its Brief that Kennerly was its sales representative. (Travis Br. at 3.) The evidence in the record fully supports Travis' statement. (Travis MSJ Ex. 3, Ex. 5, Ex. 7 at 50:7-14; 106:20-107:15; Ex. 8 at 248:8-13, Ex. 12 at 171:2-24). **(R. pp. 251-254; 265-281; 293:7-14; 294:20-295:15; 299:8-13; 315:2-24).**

In addition, there is sufficient evidence to create a factual question as to whether Kennerly was acting in the course and scope of this agency relationship when he misled Bierer about his relationship with Travis. Travis knew that Kennerly was a Bierer employee until his termination in July 2018. Travis also knew that it would be improper for Kennerly to work for Travis, and receive commissions from Travis for products sold to Bierer, who was Kennerly's employer. Travis relied exclusively on Kennerly to obtain Bierer's consent to simultaneously work for Travis, and to receive commissions from Travis on Bierer sales. *See* (Bierer RIO to Travis MSJ, Ex. C., Dep. T. Garske 25:21-27:15, 43:8-44:24). **(R. pp. 414:21-416:15, 417:8-418:24).**

Generally, "[a]gency is a question of fact." *Gathers v. Harris Teeter Supermarket, Inc.,* 282 S.C. 220, 226, 317 S.E.2d 748, 752 (Ct.App.1984). " [Q]uestions of agency ordinarily should not be resolved by summary judgment where there are *any* facts giving rise to an inference of an agency relationship." *Fernander v. Thigpen,* 278 S.C. 140, 142, 293 S.E.2d 424, 425 (1982) (internal quotation marks omitted). "If there are any facts tending to prove the relationship of agency, it then becomes a question for the jury [,]" and the grant of summary judgment is inappropriate. *Froneberger v. Smith*, 406 S.C. 37, 49-50, 748 S.E.2d 625, 631 (Ct. App. 2013); *Gathers,* 282 S.C. at 226, 317 S.E.2d at 752.

Furthermore, an employer is liable for the intentional wrong of an agent or employee, though it may constitute a crime, done in service of the principal's business, unless the employee's act was done solely to accomplish the employee's own personal purposes. *§ 7:20. Respondeat superior—Scope of agent's authority—Intentional torts, 1 Modern Tort Law: Liability and Litigation § 7:20 (2d ed.)*.

Whether the agent's act was the result of personal motives or the interests of the employer is one for the jury. If the act was in furtherance of the employer's business, the employer may be held liable for the injuries and damages incurred. *Id.* The Court in *Giant of Maryland, Inc. v. Enger*, 257 Va. 513, 516, 515 S.E.2d 111, 112 (1999) explained, "[T]he test of the liability of the master for the tortious act of the servant, is not whether the tortious act itself is a transaction within the ordinary course of the business of the master, or within the scope of the servant's authority, but whether the service itself, in which the tortious act was done, was within the ordinary course of such business or within the scope of such authority." *Id.*

Here, Kennerly was Travis' sales representative and in that capacity he received a commission from Travis on every sale to Bierer. In short, Travis was paying Kennerly to sell

clamps and products to Bierer. While performing this service for Travis, Kennerly intentionally deceived Bierer about his relationship with Travi, so that he could continue selling Travis products to Bierer. In addition, the IEEE conference, with the promotional brochure about which Kennerly was questioned, was without question work performed by Kennerly on behalf of Travis. These services performed by Kennerly on behalf of Travis were done in the ordinary course of Travis' business. Whether Kennerly's misrepresentations were solely the result of personal motives is a jury question.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I, James M. Griffin, certify that Appellant's Final Reply Brief to Respondent Travis Pattern & Foundry Inc.'s Final Brief complies with Rule 211(b) of the South Carolina Rules of Appellate Practice.

By: *s/ James M. Griffin*

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