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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 TRYSTAR LLC'S FINAL BRIEF

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INTRODUCTION

The lower 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 Trystar LLC ("Trystar") was paying Bierer's National Sales Manager, Rick Kennerly, to market products to Bierer's electrical utility customers, in direct competition with Bierer. There are only two emails sent in 2013 that even mention Trystar that the lower court relied upon to conclude that Bierer was on inquiry notice that Trystar was paying Kennerly to compete against Bierer improperly and unfairly. Whether these two emails put Bierer on notice of Trystar's wrongful conduct is a question of fact for the jury. The lower court failed to view the evidence and all inferences in a light most favorable to Bierer, as required by Rule 56 SCRCP when it ruled otherwise. None of the other documents or information identified in the lower court's Order and in Trystar's Brief identify Trystar at all.

The lower court also relied upon certain documents that pertain to Kennerly's general conduct or are specific to Travis Pattern & Foundry (Travis). Bierer promptly investigated these other events by inquiring directly with Kennerly. The question of whether Biere exercised reasonable diligence by asking its trusted employee about these events is a jury issue. Kennerly failed to disclose and fraudulently concealed his relationships with Trystar and Travis.

ARGUMENT

I. THE TRIAL COURT INCORRECTLY CONCLUDED BIERER'S CLAIMS AGAINST TRYSTAR WERE BARRED BY A THREE-YEAR STATUTE OF LIMITATIONS BECAUSE BIERER WAS NOT ON NOTICE OF A CLAIM AGAINST TRYSTAR BEFORE APRIL 15, 2018.

While Trystar properly acknowledges that South Carolina requires examination of the facts of this case using an "objective standard," (*see* Trystar Br. 9, 14), its analysis fails to incorporate,

despite noting, the requisite that the determination be made from the lens of "a reasonable person of common knowledge and experience." *See Majstorich v. Gardner*, 361 S.C. 513, 520, 604 S.E. 728, 732 (S.C. App. 2004) (holding the exercise of reasonable diligence requires "some promptness where the facts and circumstances place a reasonable person of common knowledge and experience on notice that a claim against another party might exist."). Given this requirement - whether it was objectively reasonable for someone in Walter Bierer's position - the president of a closely held family company - to believe the word of one of his most trusted senior officers, Kennerly, based on the objective evidence before him at that time, is a question of fact for the jury.

The record contains evidence from which a jury could conclude that Bierer was not on inquiry notice of its claims until July 2018. For example, in 2013, the evidence in the record is that Bierer was aware of competitive conduct, such as a manufacturer selling around a distributor once it obtains the distributor's customer information, being common in the industry. An April 2013, Bierer email to Trystar (which went unanswered) reflects Bierer's understanding that the drop in cable sales was a result of Trystar engaging in such competitive conduct based on Bierer customer information it was receiving from Bierer using the drop-shipment method to fulfill orders. *See* (Bierer Int. Br. at 11-13). The December 5, 2013 email illustrates internal steps being taken by Bierer to eliminate drop shipping. *See* (Trystar Mot. SJ, Ex. 2; JB Aff. ¶19) **(R. pp. 357-359 ; 410-411 ¶19).** Additionally, there is evidence that Bierer sales thereafter recovered. *See* (WB Aff. ¶16 (noting sales of cable products using Trystar cable at its peak in 2015)) **(R. pp. 398-400 ¶ 16).** Given these facts, whether a reasonable person in Bierer's position would have been on notice of potential claims against Trystar in 2013 for paying a Bierer employee to sell around Bierer, is again – establishes a jury question.

Additionally, the record also illustrates that, prior to July 2018, the 2013 emails are the only evidence which directly involve Trystar. Outside of these two emails, not a single piece of evidence Trystar points to as evidence of Kennerly's dissociative conduct mentions Trystar. (Trystar Br. at 3-6). Specifically, the IEEE brochure pertained to Travis, not Trystar. The October 2015 email from Walter Bierer to Kennerly involved Kennerly's in-state, personal travel activities. (Bierer RIO to Trystar Mot. SJ at 12-13 & Bierer exhibits cited therein) **(R. pp. 476-477; 487-489 ¶ 16).** The 2016 email concerned Kennerly's presentation of other manufacturer's complimentary, non-competitive products at shows while promoting Bierer products (this did not include a material supplier like Trystar). *See* (Bierer RIO to Travis Mot. SJ at 6-7 and Bierer exhibits cited therein) **(R. pp. 379-380; 398 ¶ 15).** Similarly, the cell phone and trip reports referenced in the July 2018 email reflect actions taken by Kennerly in 2012 that at the time appeared benign and were not revealed as potentially being linked to Trystar until after initiation of this suit. *See* (Bierer RIO to Trystar Mot. SJ at 13-14 & Bierer exhibits cited therein). **(R. pp. 477-478; 483-484 ¶ 8; 520:16-521:10).** Thus, while Trystar argues Bierer was on notice prior to July 2018, it points to no evidence which summarily establishes that a person in Walter Bierer's position and with his experience would have been on notice of potential claims against Trystar prior to 2018.

Nor does Trystar provide this Court with any case law mandating a finding that Bierer's claims against Trystar are time-barred. Trystar cites a number of cases that are materially distinguishable from the factual predicate of the present case, and thus, are not instructive. As an initial matter, Trystar's reliance on *Brown v. Pearson*, 326 S.C. 409, 483 S.E.2d 477 (S.C. App. 1997), is misplaced. (Trystar Br. at 10). Unlike the present case, the appellants in *Brown*, did not refute the day on which they were on notice they suffered an actionable injury by a third party. *Id.* at 418-419, 483 S.E.2d at 482 ("Appellants do not dispute they became aware of their injuries

[victims of sexual abuse by a pastor] more than three years before bringing [their claims for negligent supervision and negligent hiring]." The appellants in *Brown* knew on the dates of abuse/injury occurred that "their rights had been invaded." *Id.* Such factual scenario stands in stark contrast to the present case, in which Bierer had no knowledge, nor reason to believe, its injury – declining cable sales in 2013 – was the result of third parties (Trystar and Kennerly) invading its rights.

Similarly, examination of the facts underlying the appeal in *Christensen v. Mikell*, 324 S.C. 70, 476 S.E.2d 692 (1996), illustrate it is inapposite to the present case. *See* (Trystar Br. at 12). In *Christensen*, the appellant's partnership purchased three parcels of land in 1977 and appellant believed the closing attorney had obtained title insurance on these properties. In March 1986, title to one of the properties, a 14-acre parcel, was contested by a third party based on a prior forgery in the chain of title. *Id.* at 72, 476 S.E.2d at 693. Following an unsuccessful attempt to refute the claim by appellant and the closing attorney, the parcel reverted back to a previous owner and appellant was forced to repurchase the lot. *Id*. at 72, 476 S.E.2d at 693-94. The appellant subsequently instituted a claim for legal malpractice against the closing attorney in 1993 that was held to be time-barred by the lower court because "appellant knew as early as March 1986 that the parcel of land was not covered by title insurance, despite appellant's belief that such coverage had existed since 1977." *Id.* at 72-73, 476 S.E.2d at 694. Thus, appellant "was on inquiry notice by March 1986 that he may have a potential claim against [the closing attorney]" and "even if appellant did not know the exact nature of the wrong or the extent of the damages in 1986, he should have known that his expectation of title insurance coverage had not been met by [the closing attorney.]" *Id.* at 73, 476 S.E.2d at 694. Unlike the appellant in *Christensen*, Bierer did not have a contractual expectation that Trystar would forgo selling directly to Bierer customers whose

information Trystar obtained through fulfilling drop-shipment order for Bierer. *See* (WB Aff. ¶ 18; JB Aff. ¶¶ 18-19). **(R. pp. 489-490 ¶18; 497-500 ¶¶ 18-19).** If Bierer had an exclusivity agreement with Trystar prohibiting Trystar from selling to Bierer's customers, then *Christensen* would be instructive. However, such agreement did not exist and thus, Trystar's reliance on this case is misplaced.

Trystar's reliance on *Abrasives-South, Inc. v. Korte*, 226 F.Supp.3d 584 (D.S.C. 2016) also misses the mark. (Trystar Br. at 12-13). While the claims asserted by the appellant in *Abrasives-South, Inc. v. Korte*, 226 F.Supp.3d 584 (D.S.C. 2016) may mirror those sought by Bierer against Trystar, the factual predicate underlying the grant of summary judgment in *Abrasives-South* is markedly different from the present case. In March 2012, following the departure of appellant Abrasives-South's ("AB") national sales manager Marty Korte ("Korte"), the president of AB, Jim Carter ("Carter") confronted Korte about suspicions he had that Korte had provided information to competitors and vendors. 226 F.Supp.3d at 585. By the end of the year, Carter was provided with confirmation that Korte had been impermissibly paid by a third party ("AWUKO") when such payment had been expressly forbidden by Carter in 2011 due to concerns regarding Korte's loyalty. *Id.* at 587-88. In January 2013, counsel for AWUKO confirmed that AWUKO had explicitly admitted in writing to having made substantial payments to Korte. *Id.* at 586. Thus, the Court held that such information would have put AB on notice that a claim against Korte might exist no later than January 2013. *Id.* at 588. Because AB did not bring suit until February 2016, the court granted Korte summary judgment based on the statute of limitations. *Id.* at 589.

Unlike *Abrasives-South,* Bierer was never informed prior to July 10, 2018, that Trystar or any third party was paying Kennerly to divert sales from Bierer. Moreover, upon learning Kennerly was receiving commissions from Trystar in July 2018, Bierer promptly filed suit against

Kennerly in September 2018. Within three years of learning of Kennerly's deceit, Bierer timely filed suit against Trystar in April 2021.

Finally, Trystar cites to two prior decisions of this Court - *Graham v. Welch, Roberts & Amburn, LLP*, 404 S.C. 235, 743 S.E.2d 860 (Ct. App. 2013) and *Maher v. Tietex Corp.*, 331 S.C. 371, 00 S.E.2d 204 (Ct. App. 1996) – in support of its claim that Bierer's "subjective beliefs and its assumptions that Trystar was engaging in industry-standard competition do not replace South Carolina's objective standard for starting the statute of limitations clock when the plaintiff knew or reasonably should have known of a claim." (Trystar Br. at 15). Glaringly missing from Trystar's analysis is that determination of this "objective question"– when Bierer was on notice of the alleged harm caused by Trystar – is a fact-specific question appropriately determined by a jury. In this case, Bierer's email to Trystar in 2013 went unanswered, and thus, whether it was reasonable for Bierer to assume the temporary drop in cable sales (that appeared to rectify itself after Bierer implemented a policy of not drop-shipping) was reasonable is a question for the jury. This is not a case akin to *Graham* & *Maher*, in which the records of each contained evidence of a communication by the respondents to the appellant that the lower court found to be sufficient to constitute notice of potential claims more than three years prior to the appellants' filing of their complaints. *See Graham,* 404 S.C. 235 at 240-41, 743 S.E.2d at 863 (finding an invoice from respondent to appellant in November 2005 "provides notice to 'a reasonable person of common knowledge and experience'" that the $4k check that appellant sent to respondent was used to offset the invoice rather than pay appellant's NY taxes); *Maher*, 331 S.C. at 379, 500 S.E.2d at 208 (finding an appellant's admission that in 1989 and 1990, based on conversations he had with respondent, appellant did not believe respondent would pay him bonus money to which he was contractually entitled, warranted a finding that appellant was on notice in 1989 and 1990 that he

might have a cause of action over the 50% bonus plan). Rather, it is clear from the record in this case that a genuine issue of material fact exists as to whether a reasonable person of common knowledge and experience as Bierer, exercising reasonable diligence, would have been on notice of Bierer's claims against Trystar prior to July 2018. *See 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).

II. KENNERLY'S FRAUDULENT CONCEALMENT TOLLED THE LIMITATIONS PERIOD AS TO TRYSTAR.

Trystar urges this Court to affirm the lower court's award of summary judgment to Trystar because the record lacks evidence that "Kennerly committed any act of deception within the scope of an agency relationship with Trystar or that he acted with Trystar's apparent authority." (Trystar Br. at 18.). The Court should reject this argument, because contrary to Trystar's statement, the record contains sufficient evidence to create a jury question as to whether Kennerly was acting within the course and scope of his agency when he failed to disclose his sales relationship with Trystar following Bierer's inquiries in 2013.[1] As an initial matter, an employer is liable for the intentional wrong of an agent or employee 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.*

[1] While it should be a foregone conclusion that Kennerly was an agent of Trystar during the relevant time period, to the extent Trystar disputes this fact, the existence of his sales rep agreement with Trystar beginning in 2013 and his receipt of commissions from Trystar for providing such services, provide more than enough evidence to survive summary judgment on this issue. *See Gathers v. Harris Teeter Supermarket, Inc.,* 282 S.C. 220, 226, 317 S.E.2d 748, 752 (Ct. App. 1984) ("[a]gency is a question of fact" and "if there are any facts tending to prove the relationship of agency, it then becomes a question for the jury"); *Fernander v. Thigpen,* 278 S.C. 140, 142, 293 S.E.2d 424, 425 (1982) (internal quotation marks omitted) ("[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."); *Froneberger v. Smith*, 406 S.C. 37, 50, 748 S.E.2d 625, 631 (Ct. App. 2013) (same).

Respondeat superior—Scope of agent's authority—Intentional torts, 1 Modern Tort Law: Liability and Litigation § 7:20 (2d ed.) In the presence of evidence of such agency relationship, whether the agent's act was the result of personal motives or by the interests of the employer is one for the jury. If the act was in the furtherance of the employer's business, the employer may be held liable for the injuries and damages incurred. *Id; see also Giant of Maryland, Inc. v. Enger*, 257 Va. 513, 516, 515 S.E.2d 111, 112 (1999) ("[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.")

The record in the present case contains evidence from which a jury could determine that Kennerly's failure to disclose his sales relationship with Trystar in response to the 2013 emails was conduct taken in furtherance of his sales role at Trystar and within the scope of his employment with Trystar. Trystar admits that upon receipt of the April 2013 email from Bierer, Trystar left it up to Kennerly to address the issue with Bierer. (Trystar MSJ, Ex. 1; Bierer RIO to Trystar MSJ, Ex. C at 59:1-65:23). **(R. pp. 355-356; 509:1-515:23).** Kennerly, as an employee of Bierer, had a duty to disclose this sales relationship with Trystar, but he did not. At a minimum, a jury question is created as to whether Kennerly's failure to address the concerns raised in the April 2013 email was done in furtherance of his sales services that he was providing to Trystar.

A similar question of fact exists as to December 2013 email. In response to an inquiry from Joseph Bierer, Kennerly prompts a member of the Bierer sales force, David Deinek, to represent to Joseph Bierer that time considerations with an order for Bierer's customer First Energy required Bierer use drop-shipment through Trystar to meet First Energy's timeline. *See* (Trystar

MSJ Ex. 2). **(R. pp. 357-359).** ("I remember this being a rush deal….")). Kennerly did not disclose to Bierer, despite his duty to do so, that he had a sales relationship with Trystar and he had financial incentive to have Trystar obtain the contact information for First Energy so Kennerly would thereafter receive commissions on future orders that went directly through Trystar, thereby cutting out Bierer. Given such evidence, summary judgment is inappropriate as to the issues of agency and the scope of Kennerly's authority as an agent for Trystar.

Finally, to the extent Trystar relies on any other evidence in the record outside of the two 2013 emails referenced above to support its position that Bierer was on inquiry notice, there is sufficient evidence in the record that Bierer acted promptly to investigate the concerns and exercised reasonable diligence. 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 immediately 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.*, 316 S.C. 146, 447 S.E.2d 226 (Ct. App. 1994) and *Brown v. Finger*, 240 S.C. 102, 113, 124 S.E.2d 781, 786 (1962). Under this line of authority, the question of whether Bierer acted with reasonable diligence is a question of fact for the jury to determine.

In addition, the facts relied upon by Trystar are taken in isolation, out of context, and Trystar 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*, 439 S.C. at 581, 889 S.E.2d at–44. 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*, 240 S.C. at 113, 124 S.E.2d at 786.

CONCLUSION

Based on the foregoing, Bierer requests the Court reverse the lower court's award of summary judgment in favor of 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 the Appellant's Final Reply Brief to Respondent Trystar LLC's Final Brief complies with Rule 211(b) of the South Carolina Rules of Appellate Practice.

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