THE STATE OF SOUTH CAROLINA
In the Supreme Court

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., Petitioner,

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.

PETITION FOR WRIT OF CERTIORARI

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Certificate of Counsel

Counsel for Petitioner certifies that a petition for rehearing in this matter was timely made and ruled upon by the Court of Appeals on July 24, 2025.

QUESTIONS PRESENTED FOR REVIEW

1. **Whether the Court of Appeals erred as a matter of law by imposing a subjective standard in applying the discovery rule, contrary to this Court's holding in *Walbeck v. I'On Co.*, 439 S.C. 568, 889 S.E.2d 537 (2023), that discovery rule questions are objective questions for the jury when conflicting evidence exists?**

2. **Whether the Court of Appeals' decision conflicts with established Supreme Court precedent requiring that discovery rule determinations be made by a jury rather than by a court as a matter of law when the record contains conflicting testimony regarding when a plaintiff should have been on notice of potential claims?**

3. **Whether the Court of Appeals erred in its application of the fraudulent concealment doctrine by failing to recognize that an agent's fraudulent concealment within the scope of employment tolls the statute of limitations against the principal, contrary to this Court's holding in *West v. Service Life & Health Ins. Co.*, 220 S.C. 198, 66 S.E.2d 816 (1951)?**

4. **Whether the Court of Appeals created a novel and problematic standard for reasonable diligence that effectively eliminates the protection the discovery rule provides to parties dealing with trusted employees in positions of fiduciary responsibility?**

STATEMENT OF THE CASE

A. Nature of the Case

This case involves claims by Bierer and Associates, Inc. ("Bierer" or “Petitioner”) against two manufacturing companies, Travis Pattern & Foundry, Inc. ("Travis") and Trystar LLC ("Trystar"), for their role in secretly employing Bierer's trusted national sales manager, Jan "Rick" Kennerly, to use Bierer's sales force and customer relationships to divert millions of dollars in sales away from Bierer to Travis and Trystar.

B. Procedural History

i. Lower Court

Bierer filed its initial complaint against Kennerly in September 2018, immediately after discovering on July 10, 2018, that Kennerly had been secretly working for Travis and Trystar while employed by Bierer. After conducting discovery, including many out-of-state subpoenas, and receiving documents that implicated Travis and Trystar in Kennerly's misconduct, Bierer filed its Third Amended Complaint on April 15, 2021, adding Travis and Trystar as defendants and alleging claims for aiding and abetting breach of fiduciary duty, tortious interference, unjust enrichment, unfair competition, and trade secret violations.

Both Travis and Trystar thereafter moved for summary judgment at the close of discovery, arguing that Bierer's claims were barred by the three-year statute of limitations because Bierer should have discovered these claims years earlier. The trial court granted both motions, finding that Bierer was on inquiry notice of potential claims as early as April 2013 and as late as October 2015. *See* Feb. 6, 2023, Order granting SJ, and May 5, 2023, Order denying Mot. to Reconsider. **(R. pp. 6-23; 27-37).**

ii. Court of Appeals

The Court of Appeals affirmed this decision in an unpublished opinion dated July 2, 2025, holding that "Bierer's claims against Travis and Trystar accrued at some point between 2013 and 2016" and therefore, Bierer's claims filed in the Third Amended Complaint were barred by the statute of limitations. (*See Bierer and Associates, Inc. v. Jan F. Kennerly, Jr.*, 2025-UP-226, 2025 WL 1825570, (S.C. Ct. App. July 2, 2025), **attached as Exhibit 1 hereto**. The Court held that Bierer should have discovered these relationships based on: (1) emails in 2013 complaining about Trystar selling directly to Bierer customers; (2) a 2014 IEEE conference brochure describing

Kennerly as working for Travis; and (3) a 2015 email from Walter Bierer expressing concerns about Kennerly's "outside activities."

As to the 2013 emails, the appellate court relied upon an email between Bierer and Trystar sent in April 2013 wherein Bierer complained about Trystar selling cable directly to Bierer customers and a second internal Bierer email wherein Joe Bierer complains that Trystar is continuing to sell cable directly to Bierer customers. Despite evidence in the record that Bierer did not have an exclusivity agreement with Trystar that would have prohibited Trystar from selling direct to Bierer customers and that this was a common practice in the industry, **(R. pp. 400 ¶ 18; 408-409 ¶ 18)**, the Court of Appeals nevertheless concluded that Bierer failed to conduct a reasonable investigation into the circumstances surrounding Trystar's direct sales to its customers and if Bierer had conducted a reasonable investigation it would have learned that Trystar was paying Kennerly to divert these sales, utilizing Bierer's network of independent sales representatives, Ex. 1 at *4-5.

In addressing the 2014 IEEE brochure, **(R. pp. 251-254)**, the Court of Appeals held that Bierer "should have known through reasonable diligence its rights [were] invaded." Ex. 1 at *3. Such holding disregarded evidence that Walter Bierer saw this brochure, confronted Kennerly about it, and Kennerly "laughed off" the notion that he worked for Travis and convinced Bierer that the biography was erroneous. Bierer accepted Kennerly's explanation and did not check behind him by contacting Travis because to do so would have exhibited a lack of trust in one of Bierer's most valuable employees. **(R. pp. 397 ¶ 13; 406-407 ¶¶ 12-13; 431:7-432:1; 443:22-444:15).** Yet although Kennerly had given Bierer no reason to mistrust him until this point, had a longstanding employment relationship with Bierer, and had been charged as part of his job with Bierer to work with Travis to design clamps, **(R. p. 396 ¶ 11; 405 ¶ 10),** the Court of Appeals

found it unreasonable for Bierer to take Kennerly's more than plausible and reasonable explanation that the IEEE brochure merely reflected a misunderstanding by the author that Kennerly's work with Travis was on behalf of Bierer. (Id.).

Lastly, the court relies upon an October 14, 2015, email, **(R. pp. 305-307),** as additional evidence the statute of limitation barred Bierer's claims. In this email, Walter Bierer confronted Kennerly about his lack of reporting to Bierer and suggests that Kennerly should start looking for employment elsewhere. In this email, Walter Bierer states "You have purposely separated yourself from Bierer by maintaining private telephone and email accounts which leads me to wonder what other activities you may be conducting on my dime." **(R. pp. 306-307).** As is evidenced by the Court of Appeals' decision, it completely disregarded Walter Bierer's affidavit pertaining to this October 14, 2015 email wherein Walter Bierer explains that the outside activities he was referring to were Kennerly's relationship with Eddins Electric Company, a South Carolina corporation, and were in no way related to or evidence of a suspicion on his part that Kennerly was providing sales services to Travis, Trystar, or any third party. **(R. pp. 398-400 ¶ 16).** The holding also does not account for the fact that at the time this email was sent, Bierer sales using Travis and Trystar products were at their peak and Bierer had no reason to suspect Kennerly of any wrong-doing pertaining to Travis or Trystar. (Id.). Moreover, the Court of Appeals, in finding Bierer's diligence lacking, Ex. 1 at *3, also ignored that following this October 2015 email, Kennerly assured Walter Bierer that he wished to continue his role with Bierer and increased his efforts to connect with Walter Bierer and the rest of the management team more frequently. **(R. pp. 398-400 ¶ 16).**

Finally, the Court of Appeals rejected Bierer's argument that Kennerly's fraudulent concealment should be imputed to Travis and Trystar as their agent, and thus, toll the statute of limitations. Ex. 1. at *5-6. Although there was evidence that Trystar intentionally did not respond

to Bierer's inquiries, **(R. pp. 513:21 – 515:23),** that Travis' employment of Kennerly was not openly touted in the industry,[1] and that both Travis and Trystar were able to divert millions of dollars of sales from Bierer because of Kennerly's conduct, the appellate court concluded that Kennerly's concealment of his employment as a sales agent with Travis and Trystar, as well as his facilitating Travis' and Trystar's use of Bierer's sales force **(R. pp. 453:12- 454:10),** should not be imputed to Travis and Trystar because there was "no evidence" the fraud occurred within the scope of Kennerly's agency relationship with Travis and Trystar. Ex. 1 at *6.

Following the Court of Appeals' denial of Bierer's Motion for a Rehearing on July 24, 2025, Bierer timely filed this Petition pursuant to Rule 242, SCACR granting this Court jurisdiction to review the decision of the Court of Appeals.

C. Statement of the Facts

Bierer & Associates, Inc. ("Bierer") was founded by Walter Bierer in 1988 in a shed adjacent to his home. He started the company to sell meters that he invented and developed for use by electrical utility lineman **(R. pp. 394 ¶ 3; 665:15-25).** In 2003, Walter Bierer hired Kennerly as Bierer's second employee and Kennerly remained a full-time employee until he was terminated in July 2018. **(R. p. 394 ¶ 4; p. 8).** During this time, Kennerly developed a very close relationship with the Bierer family. **(R. pp. 397 ¶ 13; 406 ¶ 13).** This is especially true for Walter Bierer who, prior to learning of Kennerly's deceit, had included him in Walter Bierer's Last Will and Testament. **(R. p. 397 ¶ 13).**

[1] Travis' assertion that it was well known that Kennerly worked with Travis is contradicted by the very industry individual, Bud Dygert, that introduced Kennerly to Travis Pattern 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. **(R. pp. 457:19- 458:21).**

While Kennerly initially started at Bierer as an engineer, he transitioned to the role of national sales representative for Bierer in 2009. **(R. p. 394 ¶ 5).** In that role he was Bierer's interface and "eyes and ears" in the marketplace- he was the sole managerial employee interacting with Bierer's customers and material suppliers. In this role he was also charged with overseeing and managing Bierer's sales force comprised of sales representatives under contract with Bierer. **(R. pp. 394 ¶ 5; 404 ¶ 5).** In 2009, Walter Bierer tasked Kennerly with identifying manufacturers that could develop clamps and cable suitable for use in Bierer's new initiative to offer grounding assemblies[2] to its customers. **(R. p. 8).** Given this directive, Kennerly began working with Travis to develop clamps and with Trystar for cable for use in Bierer's grounding assemblies. **(R. pp. 395 ¶ 10; 405 ¶ 9; 667:1 - 668:19).**

Unbeknownst to Bierer and as early as 2013, Kennerly had entered into agreements with Travis and Trystar in which he received compensation for utilizing Bierer's sales force to promote and sell Travis' and Trystar's products around Bierer. **(R. pp. 529-545; 449-450; 394 ¶ 6; 396 ¶ 12; 404 ¶ 6, 405 ¶ 11; 424:14-23; 425:13-426:7; 668:9-669:15).** For such services, Kennerly, without Bierer's knowledge, was paid approximately $850,000 from Travis and $1.4M by Travis from 2013 – July 2018. **(R. p. 669:16-22).** At all times during his Bierer employment, Bierer understood Kennerly to have an "open and obvious" working relationship (ex: traveling to testing, attending trade shows) with Travis and Trystar *on behalf of Bierer*. *See e.g.* **(R. pp. 396 ¶ 11; 405 ¶ 10).** At no point ~~in~~ during his employment with Bierer, did Bierer have actual knowledge that Kennerly was working as a sales representative for Travis and Trystar and receiving commissions for his services. **(R. pp. 394 ¶ 6; 396 ¶ 12; 404 ¶ 6; 405-406 ¶ 11; 424:14-23; 425:13-426:7).**

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

When Bierer learned of these relationships on July 10, 2018, Walter Bierer terminated Kennerly effective July 13, 2018. **(R. pp. 394 ¶ 6; 404 ¶ 6).**

STANDARD OF REVIEW

"When reviewing an order granting summary judgment, the appellate court applies the same standard as that used by the trial court pursuant to Rule 56(c), SCRCP." *Lawing v. Univar, USA, Inc.*, 415 S.C. 209, 220, 781 S.E.2d 548, 554 (2015) (citing *Turner v. Milliman*, 392 S.C. 116, 122, 708 S.E.2d 766, 769 (2011)). Summary judgment is only appropriate where there is no genuine issue of material fact, and it is clear the moving party is entitled to judgment as a matter of law. Rule 56(c), SCRCP. In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party. *Koester v. Carolina Rental Cir.*, 313 S.C. 490, 493, 443 S.E.2d 392, 394 (1994). "At the summary judgment stage of the litigation, the court *does not weigh conflicting evidence with respect to a disputed material fact.*" *Lanier Const. Co. v. Bailey & Yobs, Inc.*, 384 S.C. 275, 278, 681 S.E. 2d 909, 911 (Ct. App. 2009) (emphasis added) (quoting *S.C. Prop & Cas. Guar. Ass'n v. Yensen*, 345 S.C. 512, 518, 548 S.E.2d 880, 883 (Ct. App. 2001)). Rather, when the Court is presented with a motion for summary judgment based on the statute of limitations and the testimony in the record is conflicting on the question, it becomes an *issue for the jury to decide*. *See Walbeck v. I'On Co.*, 426 S.C. 494, 519-20, 827 S.E. 2d 348, 361 (Ct. App. 2019).

ARGUMENT

This petition presents important questions of law that warrant this Court's review. The Court of Appeals' decision creates novel legal standards that conflict with established Supreme Court precedent and will have far-reaching implications for employment relationships and

commercial litigation throughout South Carolina. Accordingly, Bierer's Petition should be granted.

I. The Court of Appeals' Decision Creates a Novel and Problematic Standard for the Discovery Rule That Conflicts with Established Supreme Court Precedent.

The Court of Appeals' decision fundamentally misapplies this Court's discovery rule jurisprudence by imposing an unreasonably harsh standard that effectively punishes parties for trusting their employees. This conflicts with established precedent in several critical ways.

A. Conflict with *Walbeck v. I'On Co.*

In *Walbeck v. I'On Co.*, 439 S.C. 568, 581, 889 S.E.2d 537, 543-44 (2023), this Court clearly established that "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." The Court further held that "the presence of conflicting testimony regarding the time discovery should have occurred necessarily requires the jury's resolution."

Here, the record contains substantial conflicting evidence regarding when Bierer should have been on notice of its claims. Walter Bierer's detailed affidavit testimony explained his reasonable understanding of the events in question, including his specific knowledge that the "outside activities" referenced in his 2015 email concerned Kennerly's suspected relationship with Eddins Electric Company, not Travis or Trystar. Joe Bierer's affidavit also provides evidence appropriate for a jury determination as to whether Bierer's actions, based on the information known to it between 2013-2015, were reasonable. These affidavits – which were not ruled sham affidavits and thus necessarily must be considered as evidence in the record – create a genuine issue of material fact inappropriate for summary judgment. Yet, despite this conflicting testimony, the Court of Appeals resolved these factual disputes as a matter of law, directly contravening *Walbeck*.

B. The Decision Creates an Impossible Standard for Reasonable Diligence

The Court of Appeals' holding effectively requires employers to assume their trusted employees are lying whenever any potentially suspicious information arises, regardless of the employee's position of trust or the reasonableness of their explanations. Under this standard, when Bierer discovered the 2014 IEEE brochure stating Kennerly worked for Travis, the Court of Appeals found it unreasonable for Bierer to accept Kennerly's explanation that this was a misprint, despite Kennerly's 15-year relationship with the company and Walter Bierer's trust in him. It further ignored evidence that Kennerly's explanation was reasonable given his legitimate work with Travis on behalf of Bierer and that Walter Bierer chose not to call Travis to avoid damaging his relationship with a valued, managerial-level employee.

This standard contradicts the principle that reasonable diligence must be evaluated based on what "a person of common knowledge and experience" would do under the actual circumstances. *Stokes-Craven Holding Corp. v. Robinson*, 416 S.C. 517, 525-26, 787 S.E.2d 485, 489 (2016).

C. The Decision Conflicts with the Objective Nature of the Discovery Rule

This Court has consistently held that the discovery rule applies an objective standard. *Burgess v. Am. Cancer Soc'y, S.C. Div., Inc.*, 300 S.C. 182, 186, 386 S.E.2d 798, 800 (Ct. App. 1989). However, the Court of Appeals' analysis necessarily depends on subjective determinations by the lower courts about what Bierer should have concluded from ambiguous information, rather than what a reasonable person in Bierer's position would have done given the full context of its relationship with Kennerly. Such determination improperly usurps a question properly before a jury.

II. The Decision Conflicts with Prior Supreme Court Holdings Requiring Jury Determination of Discovery Rule Questions When Conflicting Evidence Exists.

The Court of Appeals' decision to resolve discovery rule questions as a matter of law conflicts with established Supreme Court precedent requiring jury determination when conflicting evidence exists.

A. Established Precedent Requires Jury Determination

In *Brown v. Finger*, 240 S.C. 102, 113, 124 S.E.2d 781, 786 (1962), this Court held: "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." Similarly, in *Arant v. Kressler*, 327 S.C. 225, 229, 489 S.E.2d 206, 208 (1997), this Court held that "in the presence of conflicting testimony regarding the time at which plaintiff was on notice of a potential claim, the question of when plaintiff discovered, or should have discovered, the alleged harm is an objective question properly within province of the jury."

B. Material Conflicting Evidence Exists in the Record

The record contains evidence which substantially conflicts with the arguments of Travis and Trystar regarding when Bierer should have been on notice.

i. 2013 Emails

Bierer presented evidence that it reasonably understood Trystar's conduct as legitimate marketplace competition in the absence of an exclusivity agreement. The evidence in the record illustrates Bierer's reasonable understanding that the decline in sales Bierer was seeing in its distribution of Trystar cable to its customers was a result of legitimate, marketplace competition and that such tactics were common in the industry in the absence of an exclusivity agreement. Instead, when the record is viewed as a whole, rather than cherry-picking language from two emails, it is clear that in 2013 Bierer would have no reason to suspect that Trystar was using a trusted Bierer employee – Kennerly – to divert bulk cable sales from Bierer and sell directly to

Bierer customers. It is the damage resulting from this conduct – Travis' and Trystar's retention of Kennerly and use of the Bierer sales network to divert sales around Bierer – for which Bierer seeks recovery. *See* **(R. pp. 701:1-708:2)**.

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

In October 2009, during the point in time in which Bierer was looking for a cable supplier for its grounding equipment, Bierer was introduced to Dan Moerke of Trystar at the ICUEE trade show in Louisville, Kentucky. **(R. pp. 408-409 ¶ 18).** During the trade show and later that night at a private dinner attended by Dan Moerke, Joseph Bierer, and Kennerly, Mr. Moerke indicated that Trystar was not in the utility market at that time and that Trystar was not running the correct stranding or insulation for ASTM F855 rated grounding cable (the kind Bierer was seeking). (Id.) Joseph, Kennerly, and Mr. Moerke discussed the possibility of Trystar making ASTM F855 rated grounding cable for Bierer that would be private labeled and resold by Bierer to Bierer customers. (Id.) At that point in time, it was unknown whether Trystar had the capability to produce such cable. **(R. pp. 408-409 ¶ 18; 527:2-528:7).**

During this discussion, Joseph Bierer also raised a concern with Mr. Moerke that if Bierer helped Trystar develop such cable and Bierer sourced cable from Trystar, Bierer did not want Trystar direct sourcing to Bierer's customers. **(R. pp. 408-409 ¶ 18).** In response to this concern, Mr. Moerke assured Joseph that Trystar had no interest in selling direct to Bierer customers

because Bridgewater (Trystar) did not have the outside sales force. (Id.) After helping Trystar develop cable suitable for grounding, Bierer began to order private-labeled cable from Trystar in January of 2010 to provide to its customers. (Id.) Thereafter, Bierer sold this cable to its customers as a stand-alone product, or as part of the grounding assembly (which consisted of the Trystar cable, Travis clamp, and a ferrule).

Effective January 2013, and unbeknownst to Bierer, Kennerly entered into an agreement with Trystar to receive commission for Trystar sales. *See* **(R. pp. 529-545; 394 ¶ 6; 404 ¶ 6; 424:14-426:18).** Mr. Moerke testified that Kennerly informed Trystar he had Walter Bierer's permission to enter into this agreement. **(R. pp. 513:21-514:1).** Yet, almost four months after entering into the agreement, Mr. Moerke received an email from Joseph Bierer on April 9, 2013, noting a drop in jumper/cable sales and complaining about Trystar selling direct to Bierer's customers despite the assurance Mr. Moerke had given to Joseph in 2009 that this would not occur. *See* **(R. pp. 356; 510:1-511:23).**

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

The evidence in the record is that Joseph Bierer did reach out to Trystar when irregularities were noticed. Having received no response from Mr. Moerke to the April 2013 email that would

indicate the lost sales were anything other than Trystar taking advantage of addresses provided for drop-ship orders, Bierer took steps internally to prevent Trystar from shipping cable directly to Bierer's customers by requiring in-house fulfillment for Bierer customer orders for Trystar cable. **(R. pp. 400-401 ¶ 18; 408-411 ¶¶ 18-19).** This belief, as well as the remedial action being taken, is reflected in email correspondence dated December 5, 2013, wherein Joseph is surprised Trystar has been provided with a customer's information to drop-ship a Bierer order. S*ee* **(R. pp. 357-359; 701:1-708:2).**

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

ii. 2014 IEEE Brochure

The record contains facts and testimony from which a jury could find Bierer acted reasonably in accepting Kennerly's explanation that the 2014 newsletter contained a "misprint"

and thus Bierer did not have notice of a potential claim against Travis or Trystar. *See* **(R. pp. 708:3-710:19).** At all times during his Bierer employment, Bierer understood Kennerly to have open and obvious business interactions with Travis, on *behalf of Bierer*. **(R. pp. 396 ¶ 11; 405 ¶ 10).** Bierer supported such interactions because it distributed Travis products to Bierer customers and it used Travis clamps in its personal protective grounds that Bierer assembled and sold to Bierer customers. (Id.) Around 2015 or 2016,[3] Walter Bierer was presented with the IEEE brochure which indicated Kennerly had worked for Travis for two years **(R. pp. 397 ¶ 13; 406-407 ¶¶ 12-13; 431:7-432:1; 443:22-444:15).** At the next weekly management meeting, Walter Bierer confronted Kennerly about the language in the IEEE brochure. **(R. pp. 397 ¶ 13; 406 ¶ 12).** In response, Kennerly began laughing and told Walter and Joseph Bierer that Travis employee Dick Pelletier had written the brochure and incorrectly assumed Kennerly was an employee of Travis because Kennerly had spent so much time in assisting Travis with developing clamps for use in personal protective grounding equipment on behalf of Bierer. (Id.) Kennerly assured Walter that he was not employed by Travis and laughed off the situation as a simple misunderstanding. *See* **(R. pp. 397 ¶ 13; 406-407 ¶¶ 12-13; 431:7-432:1; 443:22-444:15).**

At no point in time during his employment with Bierer, did Bierer know that Kennerly had been working as a paid sales representative for Travis and Trystar since at least 2013, receiving commissions for his sale of Travis products around Bierer, as well as for those sales made by the

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

Bierer sales force on behalf of Travis and Trystar. **(R. pp. 394 ¶ 6, 396 ¶ 12; 404 ¶ 6, 405-406 ¶ 11; 424:14-23; 425:13-426:7).**

This explanation seemed reasonable to Walter and Joseph Bierer at the time because of Bierer's extensive relationship with Travis. **(R. pp. 397 ¶ 13; 406 ¶ 12).** Additionally, at this time annual cable sales using Travis products were at their peak and Walter Bierer was pleased with the growth in sales. Thus, Bierer accepted this explanation from Kennerly, believing Kennerly was one of Bierer's most trusted and valuable employees. **(R. pp. 397 ¶ 13; 406-407 ¶ 13).** Walter Bierer had worked with Kennerly for over a decade, Joe Bierer for close to a decade, and both believed Kennerly was an honest person. (Id.) Walter had even included Kennerly in his Last Will and Testament. **(R. p. 397 ¶ 13).** Because of this trust, and the knowledge that Kennerly's job at Bierer required he spend considerable time with Travis in developing and testing the clamps for Bierer's grounding assemblies, Bierer accepted Kennerly's explanation. **(R. pp. 397 ¶ 13; 406-407 ¶¶ 12-13).** Moreover, Walter Bierer did not go behind Kennerly's back and continue to inquire about the brochure with Travis because it would have demonstrated to Kennerly that Walter did not trust Kennerly. **(R. p. 397 ¶ 13).** Such action by Walter would have caused significant morale problems if the statement in the brochure was in fact just a misstatement as Kennerly explained. **(R. pp. 397 ¶ 13; 609-613).**

By granting summary judgment for Travis, the lower court concluded as a matter of law that Bierer did not act with reasonable diligence in its investigation of the statements made about Kennerly's relationship with Travis in the IEEE brochure. This was error. When considering a motion for summary judgment all reasonable inferences must be viewed in the light most favorable to the non-moving party. Here, Bierer confronted its employee Kennerly about the statements made in the brochure and more particularly whether he had an employment relationship with

Travis. In response to this inquiry, Kennerly lied and denied that he had any type of relationship with Travis and that the statement in the brochure was a misprint. Bierer accepted this representation as reasonable. The trial court erred by ruling that Bierer's acceptance of Kennerly's representation was unreasonable as a matter of law. Whether one's actions are reasonable or unreasonable is a quintessential jury question. *See Logan v. Cherokee Landscaping & Grading Co.,* 389 S.C. 611, 618, 698 S.E.2d 879, 883 (Ct. App. 2010) ("If there is conflicting evidence as to whether a claimant knew or should have known he or she had a cause of action, the question is one for the jury."). Therefore, it was error for the lower court to award summary judgment.

iii. 2015 Walter Bierer Email to Kennerly

The evidence in the record is that the "outside activities" referred to in the October 14, 2015 email did not concern Kennerly's performance in his sales capacity and that Bierer sales of Travis and Trystar products were at an all-time high. While it is unclear why the lower courts disregarded Walter and Joseph Bierer's affidavits,[4] it is improper for the lower courts to grant

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

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

summary judgment when Bierer presented testimony contradicting the evidence relied on by ~~the~~ Travis and Trystar that creates a genuine issue of material fact. *See* **(R. pp. 674:3-677:16; 710:20-713:3; 614-616).**

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

Around this time, Kennerly, with Walter Bierer's permission, had taken time away from work to go on several golfing trips to Myrtle Beach, **(R. pp. 398-400 ¶ 16).** Kennerly's sister was married to the son of, what appeared to be, an extremely successful businessman in the electrical contracting business, Jerry Eddins. (Id.) It was clear to Walter Bierer that Kennerly idolized him. (Id.) At one point, Kennerly boasted of Eddin's award of a large multi-million-dollar government electrical contract to wire and install the lighting on the Ravenel Bridge in Charleston, South Carolina. (Id.) As time progressed, Kennerly returned from these trips- which Walter had been told were merely family outings- talking about meeting "SC big business" and political figures during these and other golfing outings around the Columbia, SC area. (Id.) It was apparent to

Walter Bierer that Kennerly was enamored with the business and political connections he was allegedly making. (Id.) Simultaneously, Kennerly began displaying an abrasive and demeaning attitude toward his fellow employees at work and as more and more of Kennerly's attention was directed to these in-state family/political outings, he began to fall short of fulfilling the responsibilities in his role at Bierer. (Id.)

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

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

iv. 2018 Walter Bierer Email

Finally, again, Walter Bierer's affidavit sets forth that this email was sent to Kennerly *after* Walter learned of Kennerly's relationship with Travis and Trystar in July 2018 and reflects his realization at that time that the actions Kennerly had taken as early as 2012 were steps Kennerly

surreptitiously took to distance himself from Bierer and his employment at Bierer. **(R. pp. 394-395 ¶ 8).**

It is evident that Walter did not ignore the conduct referenced in his email. As to Kennerly getting a new phone, Kennerly told Walter that he lost his company phone on the West Coast and so he had to replace it using his personal information to have it set up while on the road. (Id.; *see also* **(R. pp. 394-395 ¶ 8; 421:16-423:10).** As to establishing a Gmail account, Walter approved that based on Kennerly's explanation that Gmail was more user friendly than the bierermeters.com domain. (Id.) As to receipts, Kennerly complained that the receipts were hard to keep up with, so Walter Bierer compromised and agreed Kennerly could just itemize his monthly company credit card statements. **(R. pp. 394-395 ¶ 8).** Finally, as to trip reports, Kennerly gave these to the management team orally at Bierer Monday management meetings each week, so Walter Bierer did not insist he write them up. (Id.) However, when Kennerly began missing these meetings, Walter Bierer insisted he turn in written reports, which Kennerly eventually did so towards the latter part of his employment. (Id.) Thus the evidence is that Walter Bierer did inquire with Kennerly about such conduct, and where requested, Kennerly complied with Walter Bierer's instructions to address the concern. Whether Walter Bierer's acceptance of Kennerly's benign explanation for such conduct at the time of its occurrence should have put Bierer on notice of potential claims against Travis and Trystar is a question of fact for the jury.

While Travis and Trystar each have explanations for how a "reasonable person" should have been on notice, it is clear that the above evidence presented by Bierer is material and is evidence which undeniably conflicts with the evidence presented by Travis and Trystar. Accordingly, it is proper for a jury, not a court through summary judgment, to make such determination.

III. The Court of Appeals Erroneously Applied the Law of Fraudulent Concealment and Agency, Creating a Conflict with Established Precedent.

A. Kennerly is an agent of Trystar and Travis

Under South Carolina law, Kennerly's fraudulent concealment of this illegitimate relationship with Travis and Trystar tolls the statute of limitations until Bierer became aware of this wrongful conduct. *See West v. Serv. Life & Health Ins. Co.,* 220 S.C. 198, 202, 66 S.E.2d 816, 817 (1951). The evidence in the record illustrates Kennerly was an agent of Travis and Trystar and that in this capacity, he fraudulently concealed these relationships and their collective use of Bierer sales reps to sell Travis' and Trystar's products around Bierer.

The determination of whether an employee was acting within the scope of employment is typically a jury question. As stated in *Pridgen v. Ward*, "An act is within the scope of a servant's employment where [it is] reasonably necessary to accomplish the purpose of his employment and in furtherance of the master's business." 391 S.C. 238, 244, 705 S.E.2d 58, 62 (Ct. App. 2010). The court further stated that "if the servant acts for some independent purpose of his own, wholly disconnected with the furtherance of his master's business, his conduct falls outside the scope of his employment." *Id.* Here, Kennerly's fraudulent misrepresentations and concealments furthered Trystar and Travis' business because Bierer was perhaps their largest customer for cable and clamps used in protective grounding equipment. Kennerly was protecting this business for Trystar and Travis' benefit, for which he received commission income from them. Accordingly, as an agent of Travis and Trystar, Kennerly's actions tolled the statute of limitations.

B. Kennerly fraudulently concealed his relationship with Travis and Trystar.

The record is clear that Kennerly began receiving commission for his sales services and utilization of the Bierer sales representatives on behalf of Travis and Trystar beginning in 2013. **(R. pp. 449-450; 529-545).** It is undisputed that Kennerly never disclosed these relationships to

Bierer and actively sought to conceal the same. Even when confronted about his relationship with Travis and Trystar on July 11, 2018, Kennerly continued to lie about his relationships with Travis and Trystar. *See* **(R. p. 258).** In his email communication, Kennerly stated he did not work for Travis in 2014. **(R. pp. 258; 396 ¶ 12; 405-406 ¶ 11).** However, the record reflects that Travis was issuing Kennerly a 1099 for commission as early as 2013. **(R. pp. 449-450).** Similarly, Kennerly's admission on July 11, 2018, that he was "guilty as charged" when confronted about his secret relationship with Trystar illustrates he had not informed Bierer of the same. *See* **(R. pp. 258; 396 ¶ 12; 405-406 ¶ 11).** Moreover, Kennerly continued to be deceitful by stating Trystar "had its own network of reps that handle all the selling in which I have nothing to do with." (Id.) This was a lie. Trystar, through Kennerly, used Bierer sales reps to sell Trystar products around Bierer. **(R. pp. 507:12-508:10).**

It is an inescapable conclusion that Kennerly fraudulently concealed his illegitimate relationship with Travis and Trystar by directly lying to Bierer about the existence of these relationships, and by failing to disclose these relationships in violation of his fiduciary duty. *Ellie v. Miccichi*, 358 S.C. 78, 101, 594 S.E.2d 485, 497 (Ct. App. 2004) ("Non-disclosure becomes fraudulent concealment only when it is the duty of the party having knowledge of the facts to make them known to the other party to the transaction.") Under the doctrine of fraudulent concealment, "deliberate acts of deception by a defendant calculated to conceal from a potential plaintiff that he has a cause of action toll the statute of limitations." *Doe v. Bishop of Charleston*, 407 S.C. 128, 140, 754 S.E.2d 494, 500–01 (2014) (citing *Strong v. Univ. of South Carolina Sch. of Med.*, 316 S.C. 189, 191, 447 S.C. 850, 852 (1994)). The fraudulent concealment doctrine "applies in situations 'where the defendant has wrongfully deceived or misled the plaintiff in order to conceal the existence of a cause of action.' Under this doctrine, because of the defendant's wrongful acts

of concealment, the plaintiff is not aware of the facts giving rise to his claim within the limitations period." *Harrell v. BMW of N. Am., LLC,* 517 F. Supp. 3d 527, 537 (D.S.C. 2021) (quoting *Edmonson v. Eagle Nat'l Bank*, 922 F.3d 535, 549 (4th Cir. 2019)).

C. Conflict with *West v. Service Life & Health Insurance Co.*

The Court of Appeals erred by requiring that Kennerly's fraudulent concealment fall within the scope of his agency relationship with Travis and Trystar. In *West v. Service Life & Health Ins. Co.*, 220 S.C. 198, 202, 66 S.E.2d 816, 817 (1951), this Court held that a principal "is held liable to third persons in a civil suit for the frauds, deceits, concealments, misrepresentations, negligence, and other malfeasances and omissions of duty of his agent in the [scope] of his [agency], although the principal did not authorize or justify or participate in, or indeed, know of such misconduct, or even if he forbade the acts or disapproved of them." *Id.* (quoting *Huestess v. South Atl. Life Ins. Co.*, 88 S.C. 31, 70 S.E. 403, 407 (S.C. 1911)); *see also E.A. Prince & Son, Inc. v. Selective Ins. Co. of Se.,* 818 F. Supp. 910, 912 (D.S.C. 1993) ("Questions of agency and an agent's authority ordinarily should not be resolved by summary judgment where there are *any* facts giving rise to an inference of an agency relationship or authority." (emphasis added)). Under *West*, the companies are liable for Kennerly's fraudulent concealment regardless of whether they authorized it, so long as an agency relationship existed—which it undeniably did in this case.

D. Scope of Employment Question Should Be Determined by Jury

The Court of Appeals found no evidence that Kennerly's fraudulent concealment fell within the scope of his agency relationship with Travis and Trystar. However, this determination ignores substantial evidence from which a jury could conclude otherwise:

- Kennerly received approximately $2.25 million in total compensation from Travis and Trystar between 2013 and 2018

- Kennerly's fraudulent concealment directly benefited Travis and Trystar by allowing them to use Bierer's sales force and customer relationships
- Trystar failed to respond to Bierer's 2013 emails questioning their conduct, instead leaving Kennerly to respond

As this Court held in *E.A. Prince & Son, Inc. v. Selective Ins. Co. of Se.*, 818 F. Supp. 910, 912 (D.S.C. 1993), "Questions of agency and an agent's authority ordinarily should not be resolved by summary judgment where there are any facts giving rise to an inference of an agency relationship or authority."

IV. The Decision Raises Important Questions of First Impression Regarding the Scope of Reasonable Diligence in Employment Relationships

A. Novel Questions Regarding Trust Relationships

The Court of Appeals' decision undermines the foundation of employment relationships by requiring employers to assume their trusted employees are lying whenever potentially suspicious information arises. This raises novel questions about whether the discovery rule should account for the reasonable reliance employers place in trusted, long-term employees; how to balance the policy of encouraging prompt discovery of claims against the practical realities of employment relationships built on trust; and whether different standards should apply when dealing with employees in fiduciary positions.

B. Practical Implications for South Carolina Businesses

The Court of Appeals' holding will have far-reaching consequences for South Carolina businesses, effectively requiring employers to immediately investigate any potentially suspicious information about employees, regardless of the context, to operate with the assumption of employee dishonesty in ambiguous situations, and abandon trust-based employment relationships in favor of constant surveillance.

Moreover, even if an employer does immediately investigate a suspicion, a question arises as to whether such investigation was sufficient. Again, in 2013 Bierer raised concerns about whether Bierer customer info was being given to Trystar. In response to this inquiry, Bierer was told not only by Kennerly, but also by a member of his sales force, that it was a one-time occurrence based on specific customer needs. Yet, under the rulings of the lower two courts, Bierer should have assumed that not only was Kennerly, a trusted employee lying, but also another member of the Bierer sales force. The same is true for Bierer as to the 2014 IEEE brochure, and for Kennerly's explanation to Walter Bierer following his receipt of Walt's 2015 email. Employers are left with an unclear line of when they are permitted to rely on an employee's word and when such reliance begins to run the clock on the statute of limitations.

C. Inconsistency with Discovery Rule Policy

The discovery rule exists to balance the competing interests of providing plaintiffs adequate time to discover claims while encouraging prompt action. The Court of Appeals' decision upsets this balance by punishing reasonable reliance on employee explanations, requiring immediate investigation based on ambiguous information, and effectively eliminating the protection the discovery rule provides in complex employment relationships.

V. The Decision Will Undermine Fraudulent Concealment Protections

The Court of Appeals' narrow interpretation of when an agent's fraudulent concealment tolls the statute of limitations will severely limit this important protection for plaintiffs. By requiring that fraudulent concealment fall within the "scope" of the agency relationship, the decision creates an impossible standard for plaintiffs dealing with employee misconduct, allows principals to benefit from their agents' concealment while avoiding liability, and conflicts with the established principle that principals are liable for agent misconduct even when unauthorized.

Moreover, barring a document stating that fraudulent concealment is within the scope of an agency relationship, the likelihood of which is incredibly low, South Carolina employers, especially small business owners, are left with uncertainty as to how they could ever protect themselves from a scenario like the present one absent assuming any questions it may have concerning an employee's conduct are improper.

CONCLUSION

For the foregoing reasons, this case presents important questions of law that warrant this Court's review. The Court of Appeals' decision conflicts with established Supreme Court precedent, creates novel and problematic legal standards, and will have significant adverse consequences for employment relationships and commercial litigation in South Carolina. Accordingly, Petitioner respectfully requests that this Court grant the petition for writ of certiorari and reverse the decision of the Court of Appeals.

Respectfully submitted,

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Attorneys for Petitioner Bierer and Associates, Inc

August 22, 2025
Columbia, SC

Exhibit 1

Unpublished Opinion
2025-UP-226, 2025 WL 1825570, (S.C. Ct. App. July 2, 2025)

The South Carolina Court of Appeals

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Re: Bierer and Associates, Inc. v. Jan F. Kennerly, Jr.
Appellate Case No. 2023-000780

Dear Counsel:

Enclosed is the decision of the Court. The remittitur will be sent as provided by Rule 221(b) of the South Carolina Appellate Court Rules.

Very truly yours,

CLERK

cc: The Honorable R. Lawton McIntosh

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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.

Appellate Case No. 2023-000780

Appeal From Richland County
R. Lawton McIntosh, Circuit Court Judge

Unpublished Opinion No. 2025-UP-226
Heard February 13, 2025 – Filed July 2, 2025

AFFIRMED

James Mixon Griffin and Margaret Nicole Fox, both of Griffin Humphries LLC, of Columbia, for Appellant.

Brian C. Duffy and Blake Abernethy McKie, both of Duffy & Young, LLC, of Charleston, and John W. Ursu, of Minneapolis, all for Respondent Trystar LLC.

Lyndey Ritz Zwing Bryant, of Adams and Reese LLP, and John Fisher Beach, of John Beach Mediation, LLC, both of Columbia, for Respondent Travis Pattern & Foundry, Inc.

PER CURIAM: Appellant Bierer and Associates, Inc. (Bierer) appeals the trial court's grant of both Respondents'—Trystar LLC (Trystar) and Travis Pattern and Foundry, Inc. (Travis)—motions for summary judgment on Bierer's claims against them. Bierer argues the trial court erred by finding that these claims were barred by the statutes of limitations as a matter of law and that fraudulent concealment by the Respondents did not toll the statutes. We affirm.

FACTS/PROCEDURAL HISTORY

This case centers around the actions of Jan "Rick" Kennerly, who worked for Bierer from 2003–2018. Bierer develops and sells various products for use in the electrical utility industry. Beginning in 2009, Kennerly served as a national sales representative for Bierer. That same year, Bierer tasked Kennerly with identifying manufacturers to develop parts for a new product. Kennerly located Travis to manufacture one part (clamps) and Trystar to manufacture another (cables). The issues in this case arose because, while in this role, Kennerly entered into employment contracts with other companies, including Travis and Trystar, allegedly without Bierer's knowledge or approval and against Bierer's employment policy.

In 2012, Kennerly switched his professional contact information from Bierer's company account to his personal account. Around this time, Kennerly began to submit fewer credit card receipts and reports from sales trips. Walter Bierer, Bierer's

owner, and his son Joe Bierer, another Bierer employee, took notice of these activities, referring to them in hindsight as "obvious" efforts to dissociate from Bierer.

In 2013, Kennerly began working for Travis as an independent sales representative and also entered into an employment agreement with Trystar. Walter admits that Kennerly "wasn't hiding that he was working with Travis" and that Kennerly spent many hours working with Travis and Trystar as they developed product parts. Walter claims he understood Kennerly to have working relationships with Travis and Trystar on behalf of Bierer, but he was never aware that Kennerly worked directly for these companies as a compensated sales representative. However, in 2015, Walter emailed Kennerly expressing discontent with Kennerly's performance and noting it may be time for Kennerly to look for employment elsewhere.

The event that precipitated this litigation occurred on July 10, 2018, when Walter "came across" an advertisement for a conference that described Kennerly as a Travis employee. Though Walter acknowledges having seen this brochure "years before," he decided to "put it to rest" in 2018 by calling Travis to ask if Kennerly worked directly for Travis. After learning on this call that Kennerly was in fact a Travis employee, Bierer called Trystar and discovered that Kennerly was also employed by Trystar. Walter fired Kennerly that same day.

Bierer filed an initial complaint against Kennerly in September 2018. On April 15, 2021, after conducting third-party discovery, Bierer added Travis and Trystar (in addition to others) as defendants. In its Third Amended Complaint, Bierer brought claims against Travis and Trystar for aiding and abetting breach of fiduciary duty, tortious interference with existing contractual relations, tortious interference with prospective business arrangements, unjust enrichment, common law unfair competition, and violation of the South Carolina Trade Secrets Act. Bierer alleged it discovered its claims against Travis and Trystar on July 10, 2018, the day it made the two phone calls discussed above.

Travis and Trystar both moved for summary judgment, arguing Bierer's claims against them were barred by statutes of limitations[1] because Bierer was on notice of these claims years before the statutory look-back date of April 15, 2018. In response, Bierer asserted that Kennerly fraudulently concealed his employment and that this tolled the statutes of limitations. After a hearing on the matter, the trial

[1] S.C. Code Ann. § 15-3-530(5) (2005); S.C. Code Ann. § 39-8-70 (2016).

court granted both motions, finding Bierer was on notice of its potential claims as early as 2013 and as late as 2015. This appeal followed.

LAW/ANALYSIS

I. Statutes of Limitations

Bierer's claims against Travis and Trystar are subject to two separate three-year limitations periods. S.C. Code Ann. § 15-3-530(5) (applying a three-year statute of limitations to claims for "injury to the person or rights of another" that are "not arising on contract"); S.C. Code Ann. § 39-8-70 (applying a three-year statute of limitations to trade secret claims). In South Carolina, the limitations period is defined by the discovery rule. S.C. Code Ann. § 15-3-535 (2005) ("[A]ll actions initiated under [s]ection 15-3-530(5) must be commenced within three years after the person knew or by the exercise of reasonable diligence should have known that he had a cause of action."); § 39-8-70 ("An action for misappropriation must be brought within three years after the misappropriation is discovered *or by the exercise of reasonable diligence should have been discovered*." (emphasis added)). "Under the discovery rule, the limitations period commences when the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some claim against another party might exist." *Stokes-Craven Holding Corp. v. Robinson*, 416 S.C. 517, 525–26, 787 S.E.2d 485, 489 (2016). "[W]hether the particular plaintiff actually knew he had a claim is not the test," rather, "courts must decide" the notice question based on the "circumstances of the case." *Young v. S.C. Dep't of Corr.*, 333 S.C. 714, 719, 511 S.E.2d 413, 416 (Ct. App. 1999). In other words, the "standard as to when the limitations period begins to run is *objective* rather than subjective." *Burgess v. Am. Cancer Soc'y, S.C. Div., Inc.*, 300 S.C. 182, 186, 386 S.E.2d 798, 800 (Ct. App. 1989).

Accordingly, the statutory period begins to run "when a person *could or should have known*, through the exercise of reasonable diligence, that a cause of action might exist in his or her favor, rather than when a person obtains actual knowledge of either the potential claim or of the facts giving rise thereto." *Stokes-Craven*, 416 S.C. at 526, 787 S.E.2d at 489–90 (quoting *Burgess*, 300 S.C. at 186, 386 S.E.2d at 800). To exercise reasonable diligence, "an injured party must act [promptly] where the facts and circumstances of an injury 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." *Wiggins v. Edwards*, 314 S.C. 126, 128, 442 S.E.2d 169, 170 (1994) (quoting *Snell v. Columbia Gun Exch.*, 276 S.C. 301, 303, 278 S.E.2d 333, 334 (1981)). "[T]he focus is upon the date of

discovery of the *injury*, not the date of discovery of the *wrongdoer*." *Id.* (emphases added). Thus, the limitations period begins to run as soon as the injured party knows or should have known through reasonable diligence its rights have been invaded, even if it "[does] not know the exact nature of the wrong." *Brown v. Pearson*, 326 S.C. 409, 418, 483 S.E.2d 477, 482 (Ct. App. 1997).

Because Bierer filed its Third Amended Complaint, which named Travis and Trystar as defendants, on April 15, 2021, the statutes of limitations bar any claims that accrued before April 15, 2018. We find that reasonable diligence would have revealed to Bierer the existence of possible claims well before this date. The record indicates Bierer's claims against Travis and Trystar accrued at some point between 2013 and 2016. Therefore, we hold Bierer's claims were barred as a matter of law and the trial court did not err by granting Travis's and Trystar's motions for summary judgment.

A. 2015 Email

Kennerly began to exhibit behaviors as early as 2012 that evidenced an intent to distance himself from Bierer, such as transferring his email and phone from the company account to personal accounts, submitting fewer receipts and other reports, and openly conducting business with manufacturers. Bierer contends it never suspected misconduct because it accepted Kennerly's "benign explanation" for these actions. However, Walter emailed Kennerly the following in October 2015:

> 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 . . . . 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 the issues mentioned.

This email suggests that Bierer had notice of potential claims involving Kennerly. Bierer argues that, at the time Walter sent this email, it "had no reason to suspect Kennerly of any wrong-doing pertaining to Travis or Trystar." It further argues, "[t]here was no information from which Bierer could reasonably be on notice that its trusted employee had entered into side deals with Travis and Trystar to

sabotage Bierer sales using Bierer's sales force." This argument misinterprets the discovery rule. It does not matter that Bierer was unaware of Kennerly's specific misconduct involving Travis and Trystar. The pertinent question is whether Bierer was on notice of *some claim* against another party. *Stokes-Craven*, 416 S.C. at 525–26, 787 S.E.2d at 489. The content and tone of Walter's email illustrates Bierer's suspicions about Kennerly's conduct. Had Bierer exercised reasonable diligence to investigate Kennerly's activities at this time, it could have discovered its claims against Travis and Trystar. When viewed alongside the additional evidence outlined below, no genuine issue exists as to whether Bierer's claims accrued prior to April 15, 2018.

B. Notice of Claims against Travis

Travis submits it consistently presented Kennerly to the public as its sales representative.[2] Most notably, in 2014, Kennerly spoke at a technical seminar presented by Travis and attended by hundreds of industry engineers and vendors. An advertisement for the program in a regional newsletter stated the presenters were "[Kennerly] of Travis" and "Dick Pelletier of Travis." A biography of Kennerly in this newsletter described that he "has worked for [Bierer] as an engineering and operations manager for 15 years and Travis UGD for 2 years."

The undisputed evidence shows that Bierer could have discovered its claims against Travis when it first saw this advertisement, which occurred years prior to 2018.[3] The exercise of reasonable diligence—such as by making the exact phone call Bierer made in 2018—would have revealed to Bierer that Travis employed Kennerly as sales representative. The crucial question, of course, is why Bierer did not reach out to Travis when it initially discovered the 2014 advertisement that described Kennerly as a Travis employee. Walter claims he did confront Kennerly when he first came across the newsletter, but Kennerly laughed it off. Walter contends he believed Kennerly's explanation that the Travis employee who created

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[2] Of note, it does appear that the public understood Kennerly to be the sales representative for both Bierer and Travis. For example, one customer emailed Kennerly at his Bierer email address asking, "Would you be handling this as [Travis's] national sales manager or Bierer's?"

[3] The record contains conflicting evidence regarding when Bierer first discovered the newsletter. In deposition testimony, Walter Bierer claimed to have been aware of it the year it was published, in 2014. However, in his affidavit submitted in opposition to summary judgment, Walter claimed he first learned of the advertisement in 2015 or 2016.

the advertisement "assumed Kennerly was an employee of Travis because Kennerly had spent so much time assisting Travis." According to Bierer, a jury must determine whether Bierer acted reasonably by relying on Kennerly's statements. The question for the court is *not* whether Bierer acted reasonably but whether Bierer could have discovered the claims through the exercise of reasonable diligence. *Stokes-Craven*, 416 S.C. at 526, 787 S.E.2d at 489–90. Bierer "cannot escape the application" of the discovery rule by "claiming ignorance" of Kennerly's relationship with Travis because this relationship "could have been known" to Bierer through "the exercise of ordinary care and reasonable diligence." *Burgess,* 300 S.C. at 185, 386 S.E.2d at 799.

In sum, we find Bierer's claims against Travis accrued when it *first* discovered the newsletter that listed Kennerly as a Travis employee, and there is no genuine issue that this occurred before April 15, 2018. Thus, the statutes of limitations bar Bierer's claims against Travis and the trial court did not err by granting Travis's motion for summary judgment.

C. Notice of Claims against Trystar

Communications between Bierer and Trystar indicate that Bierer suspected Trystar was interfering with customer relationships as early as 2013. In an email sent on April 9, 2013, Bierer accused Trystar of "possibly circumventing [its] efforts to establish and support new sales." On December 5, 2013, Bierer wrote to Trystar that "another line was crossed" and that "Trystar has a history (two other product lines) of undermining **any** and **all** business that Bierer has introduced them to by simply having product shipped directly to the customer[']s location that Bierer foolishly supplied them, as in this case."

Bierer argues that at the time these emails were sent, it believed Trystar was partaking in "legitimate, marketplace competition" by selling directly to Bierer's customers. According to Bierer, this problem (manufacturers selling around distributors once they obtain the distributors' customer information) is commonplace in the absence of an exclusivity agreement. Bierer claims that because it did not have an exclusivity agreement with Trystar, Trystar was "well within its legal right to sell directly to Bierer customers" and "the most [it] could do was complain to Trystar." In essence, Bierer argues it was not on notice that a claim against Trystar existed because it attributed the loss of sales to a legitimate competitive practice and was unaware of Kennerly's sales arrangement with Trystar.

However, this argument misrepresents the discovery rule. Bierer's subjective belief that Trystar was acting within the legal boundaries of marketplace competition is irrelevant. *See Burgess*, 300 S.C. at 186, 386 S.E.2d at 800 ("[The] standard as to when the limitations period begins to run is *objective* rather than subjective."). The fact that Bierer lacked knowledge of Kennerly's involvement is equally irrelevant. *See Wiggins*, 314 S.C. at 128, 442 S.E.2d at 170 ("[T]he focus is upon the date of discovery of the injury, not the date of discovery of the wrongdoer[.]"); *Brown*, 326 S.C. at 418, 483 S.E.2d at 482 (finding the statute of limitations began to run when the appellant "became aware of [its] injuries" even though they "did not know the exact nature of the wrong"). The question for the court is whether "a person of common knowledge and experience" in Bierer's position would be on notice that "*some* claim" against Trystar existed or likely existed. *Stokes-Craven*, 416 S.C. at 525–26, 787 S.E.2d at 489 (emphasis added).

When Trystar and Bierer began working together, Trystar represented to Bierer that it did not intend to sell directly to Bierer's customers because Trystar did not have its own sales force. Three years later, Trystar began doing exactly that—selling directly to Bierer's customers. Had Bierer exercised reasonable diligence to find out why, it could have discovered its claim against Trystar. For example, had Bierer spoken with its contact at Trystar to address its concerns, exactly as it did in 2018, it likely would have discovered that Trystar began selling directly to Bierer's customers after employing Kennerly as a sales representative.

Bierer argues it exercised reasonable diligence because it "reach[ed] out to Trystar when irregularities were noticed." But Bierer's initial email to Trystar went unanswered, and Trystar continued to sell directly to Bierer's customers. While Bierer raised the issue to its own sales team—including Kennerly—and sent another unanswered email to Trystar, it took no further steps to inquire why Trystar suddenly began to usurp its sales. This does not constitute reasonable diligence. Unconvincingly, Bierer relies on the subjective belief that Trystar was acting legally to shield itself against the discovery rule. It argues a jury must decide whether it reasonably attributed its loss of sales to legitimate competition rather than an "unknown side agreement between Trystar and Kennerly." However, reasonable diligence would have uncovered the existence of the "side agreement" between Kennerly and Trystar, if not in 2013 when these emails were sent, then certainly by 2015 or 2016 when Bierer's relationship with Kennerly began to sour. As explained above, it took one phone call in 2018 to learn of the sales agreement between Kennerly and Trystar. Had Bierer made a similar call when it sent the 2013 emails, Bierer would have known of its potential claim against Trystar years before April

15, 2018. For this reason, we hold the trial court did not err by finding Bierer's claims against Trystar were barred by the statutes of limitations.

II. Fraudulent Concealment

"In South Carolina, 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." *Hedgepath v. Am. Tel. & Tel. Co.*, 348 S.C. 340, 360, 559 S.E.2d 327, 338 (Ct. App. 2001); *see also Doe v. Bishop of Charleston*, 407 S.C. 128, 140, 754 S.E.2d 494, 500–01 (2014) ("Deliberate acts of deception by a defendant calculated to conceal from a potential plaintiff that he has a cause of action toll the statute of limitations."). "[S]ummary judgement is proper where there is no evidence of conduct on the defendant's part warranting estoppel." *Hedgepath*, 348 S.C. at 361, 559 S.E.2d at 339.[4] "South Carolina cases have applied estoppel in a number of different situations involving the statute of limitations." *Maher v. Tietex Corp.*, 331 S.C. 371, 380, 500 S.E.2d 204, 209 (Ct. App. 1998).

> The elements of 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. As to the party claiming estoppel, the elements are (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question; and (2) reliance upon the conduct of the party estopped.

Id. at 381, 500 S.E.2d at 209 (quoting *Brayboy v. Ewing*, 311 S.C. 272, 273, 428 S.E.2d 731, 732 (Ct. App. 1993)).

Bierer does not argue that Travis or Trystar engaged in fraudulent concealment. Rather, it claims Kennerly's conduct must be imputed to Travis and Trystar as their agent. It is true that a principal can be liable for the frauds, concealments, and misrepresentations of an agent in the course of employment, even if the principal did not authorize, justify, or participate in the misconduct. *West v. Service Life & Health Ins. Co.*, 220 S.C. 198, 202, 66 S.E.2d 816, 817 (1951). Bierer claims that Kennerly fraudulently concealed his "illegitimate" relationships with

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[4] Bierer does not characterize its fraudulent concealment argument as an estoppel claim. However, the law of equitable estoppel appropriately frames the argument.

Travis and Trystar by directly lying to Bierer about their existence and that, because Kennerly was the "primary sales channel" for Travis and Trystar, they are liable for this concealment even if it was unauthorized. But even if we assume an agency relationship existed, Bierer's argument fails because Bierer presents no evidence that Kennerly's alleged fraud fell within the scope of this relationship.[5]

In fact, the record does not contain any facts to suggest that any alleged fraud by Kennerly occurred within the scope of an agency relationship with Travis and/or Trystar. The record is clear that Travis held Kennerly out publicly as its employee. Similarly, the record indicates that Trystar made no efforts to conceal its employment relationship with Kennerly. As the trial court stated, "The mere assertion that Kennerly was an agent of Trystar and/or Travis in some capacity is not evidence [that he] concealed his efforts on Trystar's or Travis's behalf." For this reason, and because the record contains no evidence of fraudulent concealment by Travis or Trystar themselves, the trial court did not err by finding that fraudulent concealment did not toll the statutes of limitations on Bierer's claims.

CONCLUSION

Accordingly, the trial court's grant of both Respondents' motions for summary judgement is

AFFIRMED.

WILLIAMS, C.J., and GEATHERS and TURNER, JJ., concur.

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[5] To the extent that Bierer argues Kennerly acted under apparent authority to conceal these relationships, this argument fails because apparent authority can only be established by the principal, not the agent. *See, e.g.*, *Shropshire v. Prahalis*, 309 S.C. 70, 71, 419 S.E.2d 829, 830 (Ct. App. 1992). Bierer cannot argue Kennerly acted under apparent authority while also arguing it was unaware of the relationship between agent and principal.

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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.,	Petitioner,
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.

PROOF OF SERVICE

I, Jaime Harmon, legal assistant to the attorney for the Petitioner, Griffin Humphries LLC, located at 8906 Two Notch Road, Suite 200, Columbia, South Carolina 29223, hereby certify that on August 22, 2025, I have served all counsel in this action a copy of the **Petition for Writ of Certiorari** by emailing a copy to each attorney listed below using their primary email address listed in the Attorney Information System.

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