THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Case No. 2012-CP-23-06209
Case No. 2012-CP-23-06211

Emil P. Kondra, individually, and as Trustee of Emil P. Kondra Revocable Trust, Emil P. Kondra, LLC, Emil P. Kondra Family Trust, Eileen Saxton and Douglass E. Kondra, as Trustees of the Emil P. Kondra Family Trust, Douglass E. Kondra, Helen Perry, and Lawrence F. D'Alessio,

Respondents,

v.

Robert A. Nitsch and Veronica G. Nitsch, Individually, and as Trustees of the Amended and Restated Veronica G. Nitsch Revocable Trust and the Amended and Restated Robert A. Nitsch Revocable Trust

Appellants.

John M. Campbell, Jr., Esq.,

Respondents,

v.

Robert A. Nitsch and Veronica G. Nitsch, Individually, and as Trustees of the Amended and Restated Veronica G. Nitsch Revocable Trust and the Amended and Restated Robert A. Nitsch Revocable Trust

Appellants.

INITIAL BRIEF OF APPELLANTS

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March 25, 2016

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II. Did the Trial Court err in holding that Appellants' counterclaims were barred by applicable statutes of limitations without allowing Appellants to complete discovery?

III. Did the Trial Court err in deferring to a Discovery Referee's decision on a dispositive issue, where the Discovery Referee decided the dispositive issue *sua sponte*, outside the scope of the referral, and without allowing the parties to present evidence or be heard on the issue?

STATEMENT OF THE CASE

This is an appeal from an order granting summary judgment, prior to the close of discovery, based on the statute of limitations. The Honorable Edward W. Miller, Greenville County Circuit Court Judge, granted summary judgment in favor of Respondents Emil P. Kondra, individually, and as Trustee of Emil P. Kondra Revocable Trust, Emil P. Kondra, LLC, Emil P. Kondra Family Trust, Eileen Saxton and Douglass E. Kondra, as Trustees of the Emil P. Kondra Family Trust, Douglass E. Kondra, Helen Perry, and Lawrence F. D'Alessio (the Kondra Respondents) and John M. Campbell, Jr. (Campbell) on all counterclaims brought against them by Appellants Robert A. Nitsch and Veronica G. Nitsch, Individually, and as Trustees of the Amended and Restated Veronica G. Nitsch Revocable Trust and the Amended and Restated Robert A. Nitsch Revocable Trust (Appellants).

On September 11, 2012, Appellants filed a demand for arbitration with the American Arbitration Association, seeking to arbitrate various claims against Respondents arising out of a corporate merger in which Appellants and Respondents participated as shareholders of the acquired corporate entities. (Kondra Respondents' Complaint; Campbell Complaint.) Respondents filed separate actions in the Greenville County Court of Common Pleas on September 26, 2012, seeking to stay the arbitration proceedings and obtain a declaratory judgment. (*Id.*) The Trial Court granted the stay, and Appellants filed answers and counterclaims. (Appellants' Answers & Counterclaims.) Both the Kondra Respondents and Campbell filed motions to dismiss Appellants' counterclaims. (Kondra Respondents' Motion to Dismiss; Campbell Motion to Dismiss.) Both cases were transferred to the business court. The Kondra Respondents' motion was denied and

Campbell's motion was granted in part and denied in part. (Order Denying Kondra Respondents' Motion to Dismiss; Order Granting in Part and Denying in Part Campbell's Motion to Dismiss.) The Kondra Respondents then filed a reply to the counterclaims, raising, inter alia, the affirmative defense that Appellants' counterclaims are barred by the applicable statutes of limitations. (Kondra Respondents' Reply to Counterclaim.) Campbell has never served or filed any responsive pleading to the counterclaim against him that was not dismissed.

The parties began to conduct discovery, but reached impasse on several discovery disputes. The Honorable Edward Miller signed an order dated February 11, 2015, appointing Mason A. Goldsmith as a Discovery Referee to resolve some of the parties' discovery disputes. (Order of Referral.) The Discovery Referee held a hearing on April 1, 2015, and received written submissions from the parties. (April 1 Hearing Transcript (partial).) Pursuant to the Order of Reference, only discovery issues were presented to the Discovery Referee. On August 21, 2015, the Discovery Referee issued a Report and Recommendation setting forth his findings on some of the disputed discovery issues. (Discovery Referee Report.) In the Report and Recommendation, the Discovery Referee also concluded that Appellants' counterclaims should be dismissed because they were barred by the applicable statutes of limitations. (*Id.*, 19-22.)

Judge Miller adopted the Report and Recommendation on September 28, 2015 without any hearing or argument. (Order of Adoption.) Thereafter, Respondents filed motions for summary judgment based on the statute of limitations analysis contained in the Discovery Referee's Report. (Kondra Respondents SJ Motion; Campbell SJ Motion.) Appellants sought reconsideration of Judge Miller's order adopting the Report and

Recommendation and submitted their opposition to the motions for summary judgment. (Appellants' Motion to Reconsider; Appellants' Memorandum, 11/30/15.) Judge Miller held a hearing on the motions on December 3, 2015. (12/3/15 Hearing Transcript.) On December 21, 2015, he granted Respondents' motions for summary judgment. (SJ Order.) Appellants timely served and filed this appeal on January 21, 2016. (Notices of Appeal.)

STATEMENT OF FACTS

This case involves a dispute over whether Appellants received proper consideration in connection with a corporate merger. Appellant Robert A. Nitsch and Respondent Emil Kondra were long-time shareholders and directors of Ellcon-National, Inc., and its subsidiary Ellcon-Drive, LLC (collectively, "Ellcon"). Appellant Veronica Nitsch is the wife of Appellant Robert A. Nitsch and was also a shareholder of Ellcon. Ellcon merged with Faiveley Transport USA, Inc., in July 2008, at which time Ellcon shareholders were paid consideration, purportedly in proportion to their share ownership. (Kondra Respondents' Complaint ¶ 29; Appellants' Answer ¶ 29.) Pursuant to the Merger Agreement, escrow and stockholders' funds were established containing additional consideration to be paid to the Ellcon shareholders, after deducting expenses associated with post-closing matters. (Kondra Respondents' Complaint ¶ 30, 31; Appellants' Answer ¶ 30, 31.)

Appellants' counterclaims are based on allegations that Respondent Emil Kondra and other Kondra Respondents fraudulently inflated their stock ownership prior to the merger and caused the Ellcon stock book to reflect the inaccurate share percentages. Appellants contend that the Kondra Respondents and Campbell deliberately misrepresented the stock ownership percentages in connection with the merger and falsified information in

the company's stock book, resulting in Appellants receiving less than they were entitled to in merger proceeds. (Counterclaims against Kondra Respondents ¶¶ 37-40, 47, 53, 74, 84, 126, 127, 131; Counterclaims against Campbell ¶¶ 26, 28-30, 36, 40, 41, 48, 52, 59-61, 67, 74, 75.) [1] Appellants specifically alleged that they were not aware that they received inadequate consideration at the time of the merger, but gained such awareness only upon receiving one of the versions of the Ellcon stock book in August 2010. (Counterclaims against Kondra Respondents ¶¶ 7, 8, 13, 33, 58, 59; Counterclaims against Campbell ¶¶ 36, 52.) Appellants also contend that Respondents failed to make appropriate payments from the escrow and stockholders' funds in 2010. (Counterclaims against Kondra Respondents ¶¶ 22, 23, 106; Counterclaims against Campbell ¶¶ 17-22, 69.)

Respondents contend that the stock book was in the possession and control of Helen Perry at all times prior to the merger. (Campbell Dep. 31:24-32:15.) Appellants have attempted to take Ms. Perry's deposition, but have not been able to do so. Based on the testimony to date, it appears that Ms. Perry created a second stock book immediately prior to the merger, but absent Ms. Perry's testimony, there is no competent proof as to why she did so. (Campbell Dep. 77:3-78:7.) What does not appear to be in dispute is that the first time any stock book was provided to Appellants was August 12, 2010.

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[1] Because Campbell did not file a Reply to the Counterclaims against him, such Counterclaims must be deemed admitted, at least for purposes of this motion. S.C.R.C.P., Rules 7(a) (party against whom a counterclaim is filed must file a reply), 8(d) ("[a]verments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading"), 12(a) (a reply to a counterclaim must be filed within 15 days of notice of an order denying a motion to dismiss). *See also, Motors Ins. Corp. v. State by & ex rel. Dep't of Highways & Pub. Transp.*, 313 S.C. 279, 281, 437 S.E.2d 555, 556-57 (Ct. App. 1993) ("Allegations made in a complaint that are not denied in the answer are deemed admitted.")

ARGUMENT

I. The Trial Court erred in granting summary judgment despite evidence from which a trier of fact could have concluded that Appellants' claims were timely filed.

The Trial Court granted summary judgment based on one piece of evidence – the affidavit testimony of Appellant Veronica Nitsch that in the years prior to the merger she reviewed certain documents and that she shared some of the documents with attorneys with whom she consulted about various matters, including potential litigation against Respondents. (SJ Order 4-8.) No other record evidence is even mentioned by the Trial Court. (*Id.*)

Ms. Nitsch's affidavits do not state or imply that the information she obtained before the merger and shared with her attorneys had anything to do with claims in this case concerning merger-related and post-merger conduct. Only by speculating that there is such a connection could the Trial Court grant summary judgment. But the caselaw concerning summary judgment generally, and statute of limitations cases specifically, establishes that inferences are to be drawn in favor of the non-moving party, with factual disputes and debatable inferences to be resolved by a jury. The Trial Court's approach to the summary judgment motions – resolving factual ambiguities and drawing inferences in favor of Respondents – was completely backwards.

a. Summary judgment is a drastic remedy to be cautiously invoked.

When reviewing a trial court's decision to grant summary judgment, an appellate court applies the same standard applied by the court below. *Grinnell Corp. v. Wood*, 389 S.C. 350, 355, 698 S.E.2d 796, 798 (2010). South Carolina courts characterize summary judgment as a "drastic remedy" that must be "cautiously invoked to ensure a litigant is not

improperly deprived of a trial on disputed factual issues." *Lord v. D & J Enters.*, 407 S.C. 544, 553, 757 S.E.2d 695, 699 (2014). Where even a scintilla of evidence supports the non-moving party, summary judgment should be denied. *Id.*

At the summary judgment stage, all facts and reasonable inferences therefrom are to be resolved in favor of the non-moving party. *David v. McLeod Reg'l Med. Ctr.*, 367 S.C. 242, 247, 626 S.E.2d 1, 3 (2006). Thus, even when there is no dispute as to evidentiary facts, summary judgment should be denied if there is disagreement concerning the conclusions to be drawn from those facts. *Bell v. Progressive Direct Ins. Co.*, 407 S.C. 565, 575, 757 S.E.2d 399, 404 (2014).

Above all, doubts are to be resolved against the moving party. As such, summary judgment is not appropriate where further inquiry into the facts is desirable to clarify application of the law. *Evening Post Publ. Co. v. Berkeley Cty. Sch. Dist.*, 392 S.C. 76, 82, 708 S.E.2d 745, 748 (2011). Particularly where the record reflects the possibility that the court below granted summary judgment without considering all of the non-moving party's evidence, reversal is warranted. *Team IA, Inc. v. Lucas*, 395 S.C. 237, 247-48, 717 S.E.2d 103, 108 (Ct. App. 2011) (reversing summary judgment where trial court did not address facts in supplemental affidavit in opposition to summary judgment but instead merely included boilerplate statement that "[t]his Court has considered the issues, reviewed the arguments, documents, and pleadings submitted by all Parties and reviewed the Court's file extensively.")

b. The viability of a statute of limitations defense is normally a question for the jury.

The statute of limitations defense is an affirmative defense. Rule 8(c), S.C.R.C.P. As such, Respondents have the burden of proof. *Cole v. S.C. Elec. & Gas, Inc.*, 355 S.C.

183, 195, 584 S.E.2d 405, 412 (Ct. App. 2003) ("It is well established that a party pleading an affirmative defense has the burden of proving it.")

Analysis of a statute of limitations defense calls for careful review of the facts and circumstances surrounding when and how the party against whom the defense is asserted discovered the facts that led to the filing of the claim. Pursuant to South Carolina's discovery rule, the pertinent question is when the injury leading to the underlying cause of action "reasonably ought to have been discovered." *Holly Woods Ass'n of Residence Owners v. Hiller*, 392 S.C. 172, 183, 708 S.E.2d 787, 793 (Ct. App. 2011). In other words, the statute begins to run when the injured party knows, or should have known by the exercise of reasonable diligence, that a cause of action has arisen. *Id.;* S.C. Code Ann. § 15-3-535. This is an objective standard. *Id.* Notably, the trigger for the limitations period to begin running is discovery of the injury, rather than when the underlying acts or omissions occurred. *Cline v. J.E. Faulkner Homes, Inc.*, 359 S.C. 367, 371-72, 597 S.E.2d 27, 29 (Ct. App. 2004).

Fact-specific questions concerning when a plaintiff gained particular bits of information, and how a reasonable person would have reacted to each new piece of information, necessarily involve grounds for reasonable differences of opinion. As such, South Carolina courts have been loath to remove such questions from the purview of the jury. *Arant v. Kressler*, 327 S.C. 225, 229, 489 S.E.2d 206, 208 (1997) ("When there is conflicting testimony regarding the time of discovery, it becomes an issue for the jury to decide."); *McAlhany v. Carter*, __ S.C. __, 781 S.E.2d 105, 111 (Ct. App. 2015) (where evidence conflicted as to date of plaintiff's discovery of particular harm giving rise to claim, statute of limitations question was for the jury). At the summary judgment stage,

if there is any evidence supporting the non-moving party's position, the conflicting evidence must be submitted to the jury. *Moriarty v. Garden Sanctuary Church of God*, 341 S.C. 320, 338, 534 S.E.2d 672, 681 (2000) (application of the discovery rule and determination of the date the limitations period began to run present "questions of fact for the jury when the parties present conflicting evidence"); *Maher v. Tietex Corp.*, 331 S.C. 371, 377, 500 S.E.2d 204, 207 (Ct. App. 1998) (jury must resolve conflicting evidence as to whether a claimant knew or should have known he had a cause of action).

Analysis of a statute of limitations defense in a Rule 56 motion thus calls for an evaluation of when the plaintiff was or should have been aware of her injury. If all the evidence demonstrates that, after gaining such awareness, the plaintiff waited longer than the term of the limitations period to bring her claims, the claims are time-barred. If even a scintilla of evidence suggests that the claims were brought within the limitations period, however, the question of timeliness is for the jury.

c. There are numerous issues of material fact in this case.

Appellants filed an arbitration demand on September 11, 2012. This date is the measuring stick for statute of limitations purposes. *Nowlin v. Gen. Tel. Co.*, 314 S.C. 352, 354, 444 S.E.2d 508, 509 (1994) (the statute of limitations is tolled with respect to "actions involving [a] claim submitted to arbitration"). Respondents contend, and the Trial Court held, that Appellants' claims are subject to three-year limitations periods. (SJ Order 6.) Thus, any claims that accrued after September 11, 2009, are timely.

Since the beginning of this litigation, Appellants have maintained, as a core basis for their claims, that Respondents misrepresented and/or falsified the contents of Ellcon's stock books. (Counterclaims against Kondra Respondents ¶¶ 37-40, 47, 53, 74, 84, 126,

127, 131; Counterclaims against Campbell ¶¶ 26, 28-30, 36, 40, 41, 48, 52, 59-61, 67, 74, 75.) Appellants alleged that Respondents withheld the contents of the stock books, and other corporate information, until August 2010 or later. (Counterclaims against Kondra Respondents ¶¶ 7, 8, 13, 33, 58, 59; Counterclaims against Campbell ¶¶ 36, 52.) In addition, Appellants have alleged that they discovered, on August 12, 2010, that certain funds that were required to be distributed pursuant to the Merger Agreement were not distributed as required. (Counterclaims against Campbell ¶ 23.) Appellants also alleged that Respondents improperly demanded that Appellants execute a release of all claims on July 1, 2010, as a condition of receiving funds to which Appellants were already entitled under the Merger Agreement. (Counterclaims against Kondra Respondents ¶ 106; Counterclaims against Campbell ¶ 69; Kondra Respondents Complaint ¶ 36.)

Respondents have struggled mightily to prevent Appellants from conducting discovery in this case. Although this has permitted Respondents the luxury of delaying a decision on the merits for nearly four years, it dooms their arguments for summary judgment. There is no evidence showing that Appellants knew about the stock book problems and other post-merger issues prior to the dates alleged in the Counterclaims. Respondents have not taken a single deposition. They have refused to make Helen Perry available for deposition despite testifying that Ms. Perry was the "custodian of Ellcon's business records" (Campbell Dep. 31:13-16), "custodian of the stock book" (Campbell Dep. 69:3-4), and "keeper and custodian of all times and for all purposes of the Ellcon stock book" (Campbell Dep. 77:23-25). For his part, Respondent Campbell refused to produce any documents concerning his communications about the stock book. (Campbell Dep. 23:3-25:1.)

Respondents thus have no basis to challenge the veracity of Appellants' allegations that they were misled in connection with the merger and only discovered the misrepresentations when they were able to inspect the first version of the stock book, which was not made available until August 2010.

d. The Veronica Nitsch Affidavits do not warrant summary judgment.

Despite the undisputed timing of the stock book disclosures that led to the filing of this lawsuit, the Trial Court relied exclusively on affidavits of Appellant Veronica Nitsch concerning her activities prior to the merger. Ms. Nitsch submitted affidavits on March 19, 2015, and May 12, 2015, in connection with the proceedings before the Discovery Referee. (Veronica Nitsch Affidavits dated 3/19/15 & 5/12/15.) The purpose of these submissions was to articulate for the Discovery Referee how Ms. Nitsch had obtained certain disputed documents, what she did with the documents, and with whom she shared their contents. The May 12 affidavit was submitted in response to specific requests from the Discovery Referee for information about attorneys employed by the Nitsches, including attorneys who received copies of the disputed documents. (Goldsmith letter, 4/20/15, Requests L, M.) In an effort to respond thoroughly, Ms. Nitsch identified attorneys who were retained for any purpose, including personal estate planning. (Veronica Nitsch 5/12/15 Aff. ¶ 7.)

The sum and substance of the affidavit testimony is that Ms. Nitsch suspected Respondents of wrongdoing, reviewed documents she believed reflected the wrongdoing, and consulted with various attorneys about various matters including potential litigation against Respondents. (Veronica Nitsch 3/19/15 Aff. ¶¶ 5, 7, ; 5/12/15 Aff. ¶¶ 7-11.) Ms. Nitsch's affidavits do not address the following:

- The merger, which occurred after the events described in the affidavits, or any injury to Appellants resulting therefrom;
- Inaccuracies in the different versions of the stock books, the first of which Appellants did not receive until August 2010;
- Respondents' failure to distribute escrow and stockholders' funds pursuant to the Merger Agreement; or
- Respondents' representations in the Merger Agreement and the breach thereof.

The only portion of the Trial Court's ruling that attempts to connect Ms. Nitsch's affidavits to the post-Merger allegations is the following:

> A review of the Nitsches [sic] counter-claims reveals that they claim that they should have had more stock than they owned at the time of the merger, and that this resulted from the improper conduct of the Kondra plaintiffs, with the assistance of John Campbell. Therefore, these claims regarding inadequate stock ownership can be traced back to 1964 and forward. Regardless of when any alleged damages might have become known, the conduct the Nitches allege to be improper goes back well before 2008. Further, the Nitches argument is further defeated by Ms. Nitsch's own actions. That is, according to her affidavits, Ms. Nitsch was seeking advice from lawyers regarding claims against the Kondra plaintiffs and Mr. Campbell as early as 1998 and certainly by 2005.

(Order Granting SJ, 8.) This passage simply does not address the substance of Appellants' counterclaims. Appellants allege fraud and misrepresentation in connection with the merger, including misrepresentations in the Merger Agreement and thereafter. (Counterclaims against Kondra Respondents ¶¶ 37-40, 47, 53, 74, 84, 126, 127, 131; Counterclaims against Campbell ¶¶ 26, 28-30, 36, 40, 41, 48, 52, 59-61, 67, 74, 75.) Further, Appellants allege they became aware that the representations were false when they finally received the first version of the stock book in August 2010. (Counterclaims against Kondra Respondents ¶¶ 7, 8, 13, 33, 58, 59; Counterclaims against Campbell ¶¶

36, 52.) No review of corporate records and consultation with counsel prior to the merger could have informed Appellants that they had a claim based on the merger, distributions due in 2010, and information obtained thereafter.

The fact issues in this case compare favorably to those that precluded summary judgment in *McAlhany v. Carter*, __ S.C. __, 781 S.E.2d 105 (Ct. App. 2015) and *Holly Woods Ass'n of Residence Owners v. Hiller*, 392 S.C. 172, 708 S.E.2d 787 (Ct. App. 2011). *McAlhany* involved claims by a homebuyer arising from his discovery of mold in the home he purchased. The plaintiff testified that he discovered the mold when he first moved into the home, outside the limitations period. 781 S.E.2d 105, 111. However, he later testified that he did not discover the mold until a point in time within the limitations period. *Id.* Although the conflict in testimony was merely between two statements by the plaintiff, this Court held that summary judgment was inappropriate, concluding that "a trier of fact could find [plaintiff] was confused as to the dates rather than purposefully intending to contradict his earlier testimony." *Id.* In addition, the plaintiff in *McAlhany* sued another party over termite damage, which he discovered as soon as he bought the home, outside of the limitations period. Nevertheless, this Court held that even the plaintiff's investigation and discovery of termite damage did not put him on notice of a potential claim for mold damage. 781 S.E.2d 105, 111-12. Discovery of one claim does not put a party on notice of another.

Holly Woods involved claims by property owners against the developers of their properties. The evidence reflected that many of the problems raised at trial were similar to problems that had been well documented for more than a decade before the lawsuit was filed. 392 S.C. 172, 184-85, 708 S.E.2d 787, 793-94. Nevertheless, there was

testimony that some of the problems were discovered for the first time during the limitations period. *Id.* As such, this Court held that the statute of limitations defense was properly a jury question, concluding that "the problems, though similar in nature, were different." 392 S.C. 172, 185, 708 S.E.2d 787, 794.

Here, in direct contradiction of the holding in *Holly Woods*, the Trial Court's ruling was essentially that because Appellants suspected some alleged misconduct prior to the merger, it cannot sue over other misconduct that began with the merger in July 2008, continued over a two-year period thereafter, and was first discovered in 2010. This is exactly the type of analysis this court rejected in *McAlhany* when it held that knowledge of one type of damage prior to the limitations period, even to the point that lawyers were contacted and litigation filed, did not equate to knowledge of another type of damage in the same home.

The Trial Court's ruling usurped the role of the jury. The record reflects that the fraud and misrepresentation Appellants alleged, including most importantly discrepancies in the stock book and post-merger distributions, are new claims that did not and could not have accrued when Veronica Nitsch consulted attorneys prior to the merger. If respondents wish to submit evidence and present arguments that the suspicions Appellants had before the merger somehow put them on notice of post-merger claims, they are free to do so. But as the record currently exists, there is no such evidence.

II. The Trial Court erred in refusing to allow the parties to complete discovery before proceeding to grant summary judgment.

Summary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery. *Baughman v. AT&T*, 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991). "Summary judgment is not appropriate where further inquiry into the facts

of the case is desirable to clarify the application of the law." *Bell v. Progressive Direct Ins. Co.*, 407 S.C. 565, 575, 757 S.E.2d 399, 404 (2014).

No party filed a motion for summary judgment in this case until after the Discovery Referee decided, *sua sponte*, that the counterclaims should be thrown out. Respondent Campbell had not even filed a Reply to the counterclaims against him. His motion to dismiss, which was ruled on in October 2013, did not raise any statute of limitations defense. (Campbell Motion to Dismiss Counterclaims.) Thus, Campbell had not given any notice whatsoever that he was relying on a statute of limitations defense, most likely because it was so obvious that the allegations against him surrounded the merger and post-merger acts and omissions and were thus timely.

The very purpose of the referral to the Discovery Referee was to break up a logjam in the discovery process. If either the Trial Court or Respondents believed the case was ready for dispositive motions, it would have been pointless to refer it to the Discovery Referee, who took months to issue a ruling, at great expense to the parties. The point of engaging the Discovery Referee was not to provide Respondent's trial counsel an ally in fighting the counterclaims but to facilitate the timely resolution of discovery issues. In the 30 months between the filing of the cases and the appointment of the Discovery Referee, only two depositions were taken, and both Appellants and Respondents had filed motions seeking additional document production. Simply put, none of the parties believed this case was ready for dispositive motions or trial until the Discovery Referee's inexplicable decision to expand his own authority and decide the statute of limitations issue.

The Trial Court's order itself reflects the lack of a factual record on the statute of limitations issue. The sole basis for the Trial Court's ruling was testimony from Veronica

Nitsch that she reviewed documents obtained from Helen Kondra and, based on her review of such documents, consulted with counsel about possible claims against Emil Kondra. (SJ Order p. 4-6.) The affidavits make no connection between the pre-merger discussions with attorneys and post-merger claims in this case.[2] Any such connection is entirely speculative.

While Appellants contend there is ample proof in the record to support reversal of summary judgment, even if the Court disagrees, this case should be remanded for the completion of discovery. Appellants have yet to take the deposition of Helen Perry, the custodian of the stock book. This alone justifies remand of this case for further discovery. In addition, the parties' numerous discovery disputes, some addressed by the Discovery Referee and many not, warrant additional consideration at the trial court level. As all the parties and the Trial Court recognized prior to the Discovery Referee's sudden interest in the merits, this case is not ripe for dispositive motions.

III. The Trial Court erred in deferring to findings and conclusions of the Discovery Referee that clearly exceeded the scope of the Discovery Referee's Authority.

A special referee has only the authority delegated to him in the order of reference. *S.C. DOT v. M & T Enters. of Mt. Pleasant, LLC*, 379 S.C. 645, 657, 667 S.E.2d 7, 14 (Ct. App. 2008); *Bunkum v. Manor Properties*, 321 S.C. 95, 98, 467 S.E.2d 758, 760 (Ct. App. 1996); *Smith v. Ocean Lakes Family Campground*, 315 S.C. 379, 381, 433 S.E.2d 909, 910 (Ct. App. 1993). A special referee does not have subject matter jurisdiction over matters outside the scope of the order of reference. *Deep Keel, LLC v. Atl. Private*

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[2] Even the Discovery Referee conceded that the documents reviewed by Ms. Nitsch were not relevant to the claims in this case. (Report 24 ("after reviewing the documents, I do not see how they can be relevant to this case").) If the information Ms. Nitsch shared with counsel prior to the merger is not relevant, how can the Trial Court determine as a matter of law that consultation with counsel about the irrelevant documents triggers the limitations period for claims based on the merger (which had not even occurred yet) and post-merger activities?

Equity Grp., LLC, 413 S.C. 58, 75, 773 S.E.2d 607, 616 (Ct. App. 2015). When a special referee purports to decide issues outside the scope of the order of reference, such rulings must be vacated. *Id.*; *S.C. DOT*, 379 S.C. 645, 657-58, 667 S.E.2d 7, 14.

The Trial Court referred only discovery issues to the Discovery Referee. In addition to identifying specific discovery motions, the order of reference described the Discovery Referee's authority as follows:

> The discovery referee shall issue one or more Reports and Recommendations containing his conclusions concerning the discovery issues referred to him for consideration. If at any time following the entry of this Order, additional discovery disputes arise not set forth above, any party may request that the Court refer the dispute to the discovery referee.

(Order of Reference, p. 2 (emphasis added).) Pursuant to the order of reference, the Discovery Referee held a hearing on April 1, 2015. At the hearing, not a word was spoken by counsel or the Discovery Referee about the statute of limitations or the possibility of summary judgment being considered. On April 20, 2015, the Discovery Referee sent the parties a letter posing 22 specific follow-up questions concerning the discovery issues addressed at the hearing. (Goldsmith 4/20/15 letter.) The letter contained not one mention of the statute of limitations or the possibility of summary judgment being considered. None of the correspondence to the Discovery Referee made any reference to the statute of limitations or summary judgment. Needless to say, Respondents never requested that the order of reference be amended or supplemented to grant the Discovery Referee authority over dispositive motions, nor did the Discovery Referee seek such authority.

On July 9, 2015, the Discovery Referee sent the parties a letter reflecting his preliminary ruling and seeking a proposed order from Respondents' counsel. In that

letter, the Discovery Referee noted that affidavits from Ms. Nitsch (submitted at his request) showed that she had consulted with attorneys prior to the merger about possible claims against Respondents. (Goldsmith 7/9/15 letter, p. 2.) Although he acknowledged that "it is difficult to conceive how [the documents] can be relevant to this lawsuit," the Discovery Referee nevertheless opined that "how this matter is not barred by the applicable statute of limitations is a mystery." (*Id.*)

Unfortunately, the Discovery Referee decided not to leave the mystery to the Trial Court or to investigate the matter further by taking evidence or holding another hearing. Instead, he had Respondents' counsel prepare an order recommending summary judgment be granted to Respondents. The Discovery Referee's Report contained no factual findings in support of the summary judgment recommendation. (Report p. 4-9.) Its discussion of the issue consists largely of quotations from three affidavits submitted by Ms. Nitsch, followed by the conclusory finding that all claims accrued by 2005 at the latest. (Report, p. 19-22.) The Report contains no analysis of any specific claims or any of Appellants' allegations concerning the 2008 Merger and events thereafter.

The Trial Court adopted the Discovery Referee's Report in a one-paragraph opinion that consists, in its entirety, of the following:

> These cases were transferred to me on May 15, 2013. Certain complex discovery disputes arose, and pursuant to a Motion filed by the Defendants, I issued an Order dated February 12, 2015, appointing Mason A. Goldsmith as the Discovery Referee to inquire into the matters set forth in that Order. On August 21, 2015, I received a Report and Recommendation from Mr. Goldsmith, a copy of which is attached to this Order. I have reviewed this Report and Recommendation and, after this review, and based on my knowledge of the record in this case, hereby adopt and approve this Report and Recommendation and order it be the findings of fact, conclusions of law and order of this Court.

Based on this language, it seems unlikely that, when the trial judge adopted the Discovery Referee's Report, he even knew that the Discovery Referee raised and ruled on a dispositive motion. The Trial Court's order referred to "[c]ertain complex discovery disputes," but did not purport to retroactively expand the Discovery Referee's scope of authority to encompass summary judgment motions that had not yet been filed.

Evidently recognizing that neither the Discovery Referee nor the Trial Court had any basis for granting summary judgment motions that had never been made, Respondents hustled to file motions to lend ex post facto legitimacy to the opinions of the Discovery Referee. (Respondents' Motions for Summary Judgment.) Appellants timely moved for reconsideration of the order adopting the Discovery Referee's Report and submitted arguments opposing the motions for summary judgment. (Appellants' 10/12/15 Motion for Reconsideration; 11/30/15 Memorandum.) Ultimately, the Trial Court denied Appellants' motion to reconsider and granted the summary judgment motions.

The Discovery Referee clearly lacked authority to make any findings concerning the statute of limitations. *Deep Keel, LLC v. Atl. Private Equity Grp., LLC*, 413 S.C. 58, 75, 773 S.E.2d 607, 616 (Ct. App. 2015). Neither the Kondra Respondents nor Campbell had a pending motion for summary judgment; the Kondra Respondents had already made and lost a Rule 12(b)(6) motion on the issue and Campbell had not even filed a Reply to Appellants' Counterclaims. It is not clear when the Discovery Referee decided to weigh in on the statute of limitations issue, but when he did so he failed to give any notice or an opportunity to be heard to Appellants, or to seek expanded authority from the Trial Court.

He simply announced his conclusion and directed Respondents to formalize it in a Report.

Rule 53(b), S.C.R.C.P, provides that "some or all of the causes of action in a case may be referred to a master or special referee by order of a circuit judge or clerk of court. . . . A case shall not be referred to a master or special referee for the purpose of making a report to the circuit court." While Appellants do not take issue with the manner in which the Trial Court referred the discovery issues to the Discovery Referee, they contend that based on the limitations of Rule 53(b), it remained incumbent on the Trial Court to make the ultimate decision on any issues decided by the Discovery Referee. It was not appropriate simply to defer to the Discovery Referee's conclusions. And it was particularly inappropriate to defer to the Discovery Referee's conclusions on a matter outside the scope of the reference.

The Trial Court's Order granting summary judgment closely tracked the conclusions of the Discovery Referee. Like the Discovery Referee, the Trial Court considered no evidence other than the affidavits of Ms. Nitsch. (SJ Order 4-8.) While purporting to address the argument that further discovery was needed, the Trial Court did so in conclusory fashion, without addressing any of Appellants' specific claims, such as claims related to the stock book, non-payment of escrow and stockholders' funds, or misrepresentations surrounding the merger and post-merger acts and omissions. It is apparent that the Trial Court presumed that the Discovery Referee had fairly considered the arguments and evidence and thus deferred to the Report.

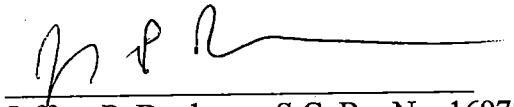
The Discovery Referee's perfunctory handling of the statute of limitations issue, and the Trial Court's unwillingness to conduct a full, *de novo* review of the issue,

deprived Appellants of a full and fair opportunity to litigate its case and present evidence on a key dispositive issue. Even if this Court were to reject Appellants' other arguments, it should remand this matter to the Trial Court with instructions to consider the statute of limitations issue *de novo*, without any deference to the "findings" of the Discovery Referee.

CONCLUSION

The Trial Court erred because the evidence is clearly conflicting as to whether Appellants knew or should have known about their claims before the merger took place. At the very least, the statute of limitations issue should be remanded pending the completion of discovery. Moreover, the odd and fundamentally unfair circumstances in which a discovery dispute morphed into an outright dismissal of Appellants' claims warrants a remand to ensure the Trial Court considered all the evidence and did not merely defer to the extra-judicial conclusions of the Discovery Referee.

Respectfully submitted,



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Attorney for Respondents

This 25th day of March, 2016.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Case No. 2012-CP-23-06209
Case No. 2012-CP-23-06211

Emil P. Kondra, individually, and as Trustee of Emil P. Kondra Revocable Trust, Emil P. Kondra, LLC, Emil P. Kondra Family Trust, Eileen Saxton and Douglass E. Kondra, as Trustees of the Emil P. Kondra Family Trust, Douglass E. Kondra, Helen Perry, and Lawrence F. D'Alessio, Respondents,

v.

Robert A. Nitsch and Veronica G. Nitsch, Individually, and as Trustees of the Amended and Restated Veronica G. Nitsch Revocable Trust and the Amended and Restated Robert A. Nitsch Revocable Trust Appellants.

John M. Campbell, Jr., Esq., Respondents,

v.

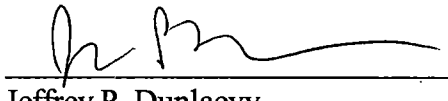
Robert A. Nitsch and Veronica G. Nitsch, Individually, and as Trustees of the Amended and Restated Veronica G. Nitsch Revocable Trust and the Amended and Restated Robert A. Nitsch Revocable Trust Appellants.

PROOF OF SERVICE

I certify that I have served a copy of Appellants' Initial Brief on Respondents by depositing a copy of it in the United States Mail, postage prepaid, on March 25, 2016, addressed to its attorney of record:

C. Mitchell Brown, Esq.
Meridian, 17th Floor
1320 Main Street
Columbia, SC 29201

Respectfully submitted,



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ATTORNEYS AT LAW LLC

RECEIVED
APR 06 2016
SC Court of Appeals

March 25, 2016

Jenny Abbott Kitchings
Clerk of Court
1220 Senate Street
P.O. Box 11629
Columbia, South Carolina 29211

RE: *Emil P. Kondra, Individually, and as Trustee of the Emil P. Kondra Revocable Trust, et al v. Robert A. Nitsch and Veronica G. Nitsch, Individually, and as Trustees of the Amended and Restated Veronica G. Nitsch Revocable Trust, et al v. Robert A. Nitsch and Veronica G. Nitsch, Individually, and as Trustees of the Amended and Restated Veronica G. Nitsch Revocable Trust, et al*
Appellate Case No. 2016-000130

Dear Ms. Kitchings:

Please find an original and one (1) copy of the Initial Brief of Appellants and Designation of Matter to be included in the Record on Appeal with regard to the above-referenced matter together with a Proof of Service. Please return file-stamped copies to me in the self-addressed and stamped envelope provided.

Thank you for your assistance in this regard.

Sincerely,

Lisa Romaniello
Legal Assistant

Enclosures

cc: C. Mitchell Brown

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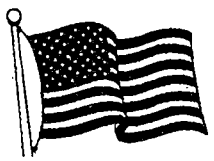

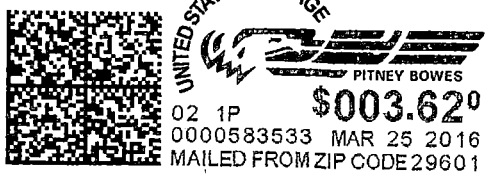

FIRST CLASS MAIL

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