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 Nos. 2012-CP-23-06209 & 2012-CP-23-06211
Appellate Case No. 2016-000130

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

v.

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

John M. Campbell, Jr., Esquire, ... Respondent,

v.

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

INITIAL BRIEF OF RESPONDENTS

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2. Did the trial court properly rule Appellants' counterclaims were untimely where the undisputed evidence established Appellants had actual knowledge of their potential claims and even consulted with counsel regarding those claims more than three years before asserting them?

3. Did the trial court properly rule Appellants' counterclaims were untimely where the additional discovery sought by Appellants was not shown to be relevant and could not have changed the court's analysis of the timeliness of the counterclaims?

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COUNTER-STATEMENT OF THE CASE[1]

This appeal arises from a dispute regarding the ownership of shares in Ellcon National, Inc. ("Ellcon"), a manufacturer of railroad car components headquartered in upstate South Carolina. In 2008, Ellcon merged with a subsidiary of Faiveley Transport USA, Inc. ("Faively"), from which Ellcon's shareholders—including Emil and Douglass Kondra and Robert and Veronica Nitsch—received substantial consideration for the Ellcon shares they owned. (*See* Kondra Compl. at 5, ¶¶ 28–29 and Exhibit B [R. __ and __]; Answer at 4, ¶¶ 28–29 [R. __].) Four years later, the Nitsches filed a demand for arbitration against Emil and Douglass Kondra and against John M. Campbell, Esquire, who had served as outside general counsel for Ellcon, alleging the Nitsches' shares were diluted by improper and concealed stock transactions that had occurred in 1964 and 1985. (*See* Demand for Arbitration, Sept. 11, 2012 [R. ___].) Specifically, they alleged the Ellcon corporate stock records showed an inaccurate and inflated number of shares owned by Emil and Douglass Kondra, who thus allegedly received more than their fair share from the merger. (*Id.* at ¶¶ 1–4, 38–44, 55–67 [R. ___].) The Nitsches also claimed the other Respondents, including Mr. Campbell, assisted the Kondras in the wrongdoing that resulted in the allegedly excessive proceeds. (*Id.* at ¶¶ 6–13, 68–86 [R. ___].)

In response to the Nitsches' arbitration demand, the Kondras[2] and Mr. Campbell filed declaratory judgment actions in South Carolina state court requesting a declaration that, *inter alia*, there was no binding arbitration agreement between the parties, and that all funds from the merger were properly accounted for, properly distributed to, and received by the Ellcon

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[1] Respondents do not agree to be bound by Appellants' Statement of the Case and includes their own statement as provided by Rule 208(b)(2), SCACR.

[2] For the sake of simplicity, the plaintiffs in Civ. Action No. 2012-CP-23-06209 will be referred to collectively as "the Kondras."

stockholders. (*See* Kondra Complaint at 8–10 ¶¶ 46–54 [R. ___]; Campbell Complaint at 7–8 ¶¶ 35–38 [R. ___].) The Kondras and Mr. Campbell also moved to stay the arbitration. (*See* Kondra Motion to Stay, Oct. 22, 2012 [R. ___]; Campbell Motion to Stay, Oct. 22, 2012 [R. ___].) The Nitsches moved to dismiss the suits and compel arbitration. (*See* Motion to Dismiss Kondra suit, Nov. 2, 2012 [R. __]; Motion to Dismiss Campbell suit, Nov. 2, 2012 [R. __].) The trial court reviewed memoranda in support of these motions, heard arguments on December 13, 2012, and subsequently issued orders staying the arbitration and denying the Nitsches' motions to dismiss the suits. (*See* Order, Feb. 6, 2013 [R. __]; Order, Feb. 6, 2013 [R. ___].) There has been no appeal of these orders.

The Nitsches subsequently answered and asserted counterclaims against the Kondras and Mr. Campbell for fraudulent misrepresentation, negligent misrepresentation, fraudulent concealment, unjust enrichment, breach of fiduciary duty, negligence, aiding and abetting a breach of fiduciary duty, and conversion. (*See* Answer in Kondra suit at 21–32, ¶¶ 63–134 [R. ___]; Answer in Campbell suit at 13–18, ¶¶ 38–76 [R. ___].) Each of the counterclaims involved the alleged misrepresentation or concealment of the number of shares actually owned by the Kondras. (*Id.*)

The suits were transferred by consent motion to the business court pilot program. (*See* Order assigning Kondra suit, May 6, 2013 [R. ___]; Order assigning Campbell suit, May 6, 2013 [R. ___].) The Kondras and Mr. Campbell subsequently filed motions to dismiss the counterclaims, arguing in part that they were barred by the applicable statute of limitations and that the Nitsches had failed to state facts sufficient to constitute a claim. (*See* Kondra Motion to Dismiss, March 25, 2013 [R. ___]; Kondra Amended Motion to Dismiss, May 24, 2013 [R. __]; Campbell Motion to Dismiss, March 23, 2013 [R. ___].) The trial court denied the Kondras'

motion but granted Mr. Campbell's motion in part, dismissing four of the five of the counterclaims against him.[3] (*See* Order, Oct. 25, 2013 [R. __]; Order, Oct. 25, 2013 [R. __].) There has been no appeal of these orders.

The parties attempted to engage in discovery but encountered disputes centering on privileged documents that had been removed from Emil Kondra's home office beginning in the early 2000s through 2008 by his wife and surreptitiously given to the Nitsches in black trash bags. On July 25, 2014, counsel for the Appellants the Nitsches moved to have a Discovery Referee appointed. The trial court granted the motion with no objection and appointed Mason A. Goldsmith, Esquire, who was suggested by counsel for the Nitsches, as Discovery Referee. (*See* Order, Feb. 12, 2015 [R. ___].)

The Referee conducted an extensive analysis of the discovery issues assigned to him, including reviewing multiple submissions and briefs by the parties, as well as holding a hearing in his office on April 1, 2015. Among the discovery issues before him was the question of whether the Kondra's could compel the Nitsches to produce certain documents the Nitsches had created to document and evaluate the Kondras' supposed wrongdoing. (*See id.* at 2 ¶ 2 [R. __]; *see also* Plaintiffs' Motion to Compel Defendants' Response to Plaintiff's Third RFP [R. __].) The Nitsches had initially produced these documents but had then "clawed them back," asserting they were privileged. (*See* Veronica Nitsch Aff. at 4, ¶ 4 (Mar. 19, 2015) [R. __].) In support of their effort to resist producing these documents, the Nitsches voluntarily submitted three affidavits to the Referee in which Veronica Nitsch repeatedly stated she had created these documents between 2004 and 2008 for the purpose of aiding the Nitsches and their attorneys in

[3] The court dismissed the counterclaims against Mr. Campbell for fraudulent concealment, negligent misrepresentation, breach of fiduciary duty, and negligence, and permitted the counterclaim for fraud to proceed. (*See* Order, Oct. 25, 2013 at 3–5 [R. __].)

evaluating their claims against the Kondras and Mr. Campbell. (*Id.* at 4, ¶ 5 [R. __] ("I created these documents from 2004 to 2008. Most of them are spreadsheets in which I evaluated Ellcon's balance sheets and other financial records. I created these documents to aid my attorneys in evaluating my claims against Plaintiffs."); *see also* Veronica Nitsch Aff. at 2–5, ¶¶ 2–3, 7–8, and 11 (May 12, 2015) [R. __] (stating the Nitsches employed attorneys from 1999 through 2015 "[t]o review Emil Kondra & John Campbell documents" and to "[d]iscuss[] questions about Emil Kondra's self-dealing under the guidance of John Campbell").

On August 21, 2015, the Referee submitted his findings in a Report & Recommendation ("R&R") to the trial court. (*See* R&R [R. ___].) The R&R concluded the disputed documents removed from Emil Kondra's home were protected by the attorney-client privilege. (*Id.* at 9–19 [R. ___].) In addition, the R&R concluded that, based on information presented to the Referee in the affidavits submitted by the Nitsches, many of the discovery disputes were mooted by the fact that the Nitsches' counterclaims were barred by the statute of limitations. (*Id.* at 22 [R. ___] ("The statements contained in Mrs. Nitsch's sworn affidavits evidence that starting no later than 2005, Mrs. Nitsch carefully photocopied and catalogued the mass of documents taken from Emil Kondra and incorporated them into spreadsheets that she 'created . . . to aid [her] attorneys in evaluating [her] claims against Plaintiffs.' Based on this testimony, I find that the statute of limitations began running no later than 2005, and likely began running much earlier.").)

The trial court adopted the R&R as the findings of fact, conclusions of law, and order of the court in an Order dated September 29, 2015. [R. ___.] There has been no appeal of this order. The Kondras and Mr. Campbell subsequently moved for summary judgment. (*See* Motions for Summary Judgment, Oct. 5, 2015 [R. __ and __].) A week later, before the court

ruled on the motions for summary judgment, the Nitsches moved for reconsideration of the court's order adopting the R&R. (*See* Motion for Reconsideration, Oct. 12, 2015 [R. ___].)

The trial court heard arguments on the pending motions on December 3, 2015. While arguing in support of the motions for summary judgment, the Kondras' counsel noted that "this motion really is administrative" because the trial court had already adopted the R&R in its entirety and declared it to be the order of the court, and thus "[t]he law of this case is that the statute of limitations has expired" and "all we really need is an order carrying out the administrative task of dismissing the cases pursuant to that." (Tr. 39:13, 41:21–25 [R. ___ and ___].)

In a ruling filed on December 23, 2015, the trial court denied the Nitsches' motion for reconsideration of the order adopting the R&R. No appeal has been taken of this order. Also on December 23, 2015, the trial court granted the Kondras' and Mr. Campbell's motions for summary judgment. [R. ___ and ___.] On January 25, 2016, the Nitsches filed Notices of Appeal in both civil actions, appealing only the trial court's order granting summary judgment on their counterclaims.

COUNTER-STATEMENT OF THE FACTS

The relevant facts date back to 1964, when the shareholders then in control of Ellcon decided to sell the company to some younger shareholders, including Emil Kondra, who already owned 60 shares of Ellcon, and Robert Nitsch. (*See* Answer at 8, ¶ 1 [R. ___]; Reply at 1–2, ¶ 1, Exhibits A & B [R. ___].) The 1964 transaction was documented in a Stock Purchase Agreement, which indicates Emil Kondra purchased an additional 1,460 shares (for a total of

1,520 shares),[4] and Robert Nitsch purchased 200 shares. (*See* Reply at 1–3, ¶¶ 1–7, Exhibits A–D [R. ___].)

Over the following four decades, Emil Kondra's shares increased due to stock splits and decreased due to stock transfers he made to family members and trusts; however, he did not receive any new shares after the 1964 transaction. (*See* Reply at 3, ¶ 8, Exhibit E [R. ___].) In addition, in 1985, Emil Kondra's son, Douglass Kondra, who already held stock certificates for 1,030 shares, was issued a stock certificate for 78 additional shares, which were purchased outright and through an employee payroll deduction plan available to all shareholders. (*See* Reply at 4, ¶ 12 [R. ___]; Ellcon Stock Book at 45 [R. __].)

Over the years, the number of shares owned by each shareholder was disclosed annually to all Ellcon shareholders, including the Nitsches. (*See* Reply at 3, ¶ 8, Exhibit E [R. ___].) Every year from 1964 to 2008, Ellcon held an annual shareholder meeting, and the minutes of each were provided to every shareholder, including the Nitsches, at the next annual shareholder meeting for the shareholders' approval. (*See id.*) These minutes listed each shareholder's name and the number of shares owned by that shareholder. (*See id.*) Each year's minutes and the stock list were unanimously approved by the shareholders. In addition, at all times since 1964, Robert Nitsch was a member of the Board of Directors and Executive Committee and had access to the

[4] The Nitsches have argued the 60 shares Emil Kondra owned before the 1964 transaction were supposed to be redeemed in 1964. (*See, e.g.,* Demand for Arbitration, Sept. 11, 2012 at ¶ 36 [R. ___].) This argument, however, is directly refuted by the Shareholders Agreement executed by the new owners of Ellcon in 1964, which indicates Emil Kondra owned 1,520 shares consisting of the 60 shares he already owned and the 1,460 shares he purchased in 1964. (*See* Reply at 1–2, Exhibit B [R. ___].) Robert Nitsch signed, and presumably read, this 1964 Shareholders Agreement. (*See id.*) Moreover, Robert Nitsch received the minutes of a special meeting of the Ellcon Board of Directors held in 1964, which also state that Emil Kondra's 60 shares were not to be redeemed and that he acquired 1,460 *additional* shares. (*See* Reply at 3, ¶ 7, Exhibit D [R. ___].)

financial records and the Ellcon Stock Book. (*See* Kondra Compl. at 3, ¶ 14 [R. ___]; Answer at 3, ¶ 14 [R. ___]; *see also* Bylaws of Ellcon-National, Inc., adopted May 29, 1963, Art. IV §§ 6–7 [R. ___] (noting the stock books "shall be open for inspection as prescribed by Section 10 of the Stock Corporation Law," and requiring the corporate Treasurer to keep "full and accurate accounts" of the corporations finances and to "render an account of his transactions and of the financial condition of the corporation whenever requested by the Board"); *id.* at Art. III § 9 [R. ___] ("[T]he Directors of this corporation shall have the general management and control of the business and affairs of the corporation and shall exercise all the powers that may be exercised or performed by the corporation.").)

In 2008, Ellcon and its affiliate, Ellcon-Drive, LLC, entered an agreement with Faiveley to sell both companies to Faiveley in the form of a merger. (*See* Kondra Compl. at 3–6, ¶¶ 19–34, Exhibit B [R. ___]; Answer at 12, ¶ 19 [R. ___]; Reply at 5, ¶ 19, Exhibit F [R. ___].) As part of the negotiation and preparation for this merger, Robert and Veronica Nitsch, both of whom were shareholders, personally hired New York attorneys to perform their own due diligence on the merger.[5] (*See* Kondra Compl. at 4, ¶¶ 22–25 [R. __].) The Nitsches' New York counsel sent an extensive list of due diligence questions to Ellcon and requested voluminous company records from Ellcon even though Robert Nitsch always had ready access to the information and records requested. Ellcon provided the requested documents and responded at length to the questions. Satisfied with the terms of the merger, Robert Nitsch moved to approve

[5] The attorneys currently representing the Nitsches are the fourth firm they have retained in this suit in the past six years in connection with the sale of Ellcon to Faiveley. Each of the Nitsches' attorneys requested extensive discovery from the Kondras regarding the same issues of stock ownership. In an effort to resolve this matter amicably, the Kondras attempted to comply with all of Defendants' requests, incurring substantial expenses along the way. When presented with the Ellcon corporate records, every prior firm ceased to continue with the complaints lodged by the Nitsches in the instant case.

the merger at the meeting where the Ellcon Board of Directors recommended the merger to the Ellcon shareholders. (*See* Kondra Compl. at 5, ¶¶ 26–28 [R. __]; Answer at 4, ¶¶ 26–28 [R. __].) The merger agreement was closed on July 31, 2008, and the Nitsches personally received $8,486,848.40 from the merger.[6]

More than four years later, the Nitsches filed a demand for arbitration, claiming they received less from the merger than they should have due to the allegedly improper and concealed stock transactions in 1964 and 1985. This litigation followed.

STANDARD OF REVIEW

"Summary judgment is appropriate when a claimant fails to commence an action within the applicable statute of limitations." *McMaster v. Dewitt*, 411 S.C. 138, 143, 767 S.E.2d 451, 453 (Ct. App. 2014) (citing *Kreutner v. David*, 320 S.C. 283, 286–87, 465 S.E.2d 88, 90 (1995)). In reviewing a decision to grant summary judgment, an appellate court applies the same standard as the circuit court. *Vaughan v. Town of Lyman*, 370 S.C. 436, 440, 635 S.E.2d 631, 633 (2006). Under this standard, summary judgment is appropriate when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. "In determining whether any triable issue of fact exists, the evidence and all inferences which can be reasonably drawn therefrom must be viewed in the light most favorable to the non-moving party." *Summer v. Carpenter*, 328 S.C. 36, 42, 492 S.E.2d 55, 58 (1997).

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[6] This amount included $6.3 million in consideration from their shares of Ellcon and its subsidiary Ellcon Drive, plus an additional $2.1 million from pre-closing cash dividends, marketable securities, escrow funds, and corporate owned life insurance funds and the interest thereon. (*See* Kondra Compl., Ex. A at 34–35 [R. ___]; *id.* at Ex. B §§ 2.9, 2.14, and 2.15 [R. __, __, and __].)

Although the nonmoving party is entitled to a favorable view of the evidence and reasonable inferences therefrom, "more is required than mere speculation to withstand [a] motion for summary judgment." *D.R. Horton, Inc. v. Wescott Land Co., LLC*, 398 S.C. 528, 556, 730 S.E.2d 340, 355 (Ct. App. 2012) (citing *RoTec Servs., Inc. v. Encompass Servs., Inc.*, 359 S.C. 467, 471, 597 S.E.2d 881, 883 (Ct. App. 2004)); *see also McNight v. S.C. Dept. of Corr.*, 385 S.C. 380, 389, 684 S.E.2d 566, 570 (Ct. App. 2009) ("South Carolina courts have consistently held evidence must amount to more than speculation and conjecture to submit a case to the jury.") (citations omitted).

ARGUMENTS

This court should affirm the rulings of the lower court for several reasons. First, because the Nitsches appealed only from the order granting summary judgment and did not appeal the prior orders ruling their counterclaims were untimely, the earlier ruling has become the law of the case and its conclusion that the counterclaims are untimely cannot be challenged on appeal. Next, even if the trial court's rulings were reviewable on appeal, this Court must nevertheless affirm because there was no genuine issue of material fact regarding the counterclaims' untimeliness, nor would the additional discovery desired by the Nitsches have unearthed any such factual disputes. Finally, contrary to the Nitsches' arguments on appeal, the trial court's rulings were based on that court's own knowledge and independent review of the evidence, not on excessive deference to the Referee who, in any event, was acting within the scope of the authority consented to by the parties.

I. This Court must affirm the trial court's rulings because the Nitsches failed to appeal from the orders concluding their counterclaims were untimely.

As a preliminary matter before even addressing the substantive arguments raised on appeal, this court must affirm the trial court's ruling that the Nitsches' counterclaims are

untimely because the Nitsches' failure to appeal from the orders finding them untimely establishes those rulings as the law of the case and precludes consideration on appeal:

> It is a fundamental rule of law that an appellate court will affirm a ruling by a lower court if the offended party does not challenge that ruling. [] Failure to challenge the ruling "is an abandonment of the issue and precludes consideration on appeal." [] The unchallenged ruling, "right or wrong, is the law of the case and requires affirmance."

Lindsay v. Lindsay, 328 S.C. 329, 338, 491 S.E.2d 583, 588 (Ct. App. 1997); *see also Judy v. Martin*, 381 S.C. 455, 458, 674 S.E.2d 151, 153 (2009) ("Appellant may not seek relief from an unappealed order of the trial court because the order has become the law of the case."); *Buckner v. Preferred Mut. Ins. Co.*, 255 S.C. 159, 160–61, 177 S.E.2d 544, 544 (1970) (holding an unappealed ruling, right or wrong, is the law of the case).

Here, the trial court issued three rulings regarding the untimeliness Nitsches' counterclaims:

> (1) A September 29, 2015 order adopting the R&R—including its findings and conclusions regarding the counterclaims' untimeliness—and declaring them to be "the findings of fact, conclusions of law and order of this Court,"
>
> (2) A December 23, 2015 order denying a motion to reconsider the September 29, 2015 order, and
>
> (3) A December 23, 2015 order granting summary judgment on the counterclaims.

(*See* R. ___, ___, and ___.) The first and second orders above conclusively ruled the Nitsches' counterclaims were barred by the applicable statutes of limitations. Those rulings were appealable orders effectively striking out part of an Answer, and the Nitsches could have appealed from those rulings and should have done so if they wished to challenge the trial court's conclusions. *See* S.C. Code Ann. §§ 14-3-330(2)(c) (authorizing the interlocutory appeal of an

order that "strikes out an answer or any part thereof or any pleading in any action"); *P.J. Construction Co., Inc. v. Roller*, 287 S.C. 632, 633, 340 S.E.2d 564, 565 (Ct. App. 1986) ("An order striking a portion of a pleading is immediately appealable.").

The Nitsches, however, did not appeal from those orders[7]. Rather, they appealed only from the subsequent order granting summary judgment. The administrative nature of the motion for summary judgment was made clear at the motion hearing. (*See* Tr. 39:13 (explaining "this motion really is administrative"); Tr. 40:21–25 (explaining that, because the trial court adopted the R&R *in toto*, "The law of this case is that the statute of limitations has expired. And so, really, with respect to our motion, all we really need is an order carrying out the administrative task of dismissing the cases pursuant to that.").)

The Nitsches were not required to immediately appeal the entry of summary judgment on the counterclaims as the entire case had not yet been adjudicated. *See Link v. Sch. Dist. of Pickens Cnty.*, 302 S.C. 1, 6, 393 S.E.2d 176, 179 (1990) ("Link was entitled . . . to wait until final judgment to appeal the summary judgment ruling against him."). However, having chosen to immediately appeal the summary judgment order, they were required to at the same time appeal the prior order adopting the R&R and the order denying the motion to reconsider that order, which also contained a final legal disposition that the counterclaims were time-barred. The Nitsches' failure to do so precludes this Court from reviewing the trial court's conclusion the counterclaims were untimely, and thus requires this Court to affirm.

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[7] While both the summary judgment order of the trial court and the R&R and adopting orders cited to three affidavits for the respective statute of limitations rulings therein, the R&R and adopting orders specifically relied in part on paragraphs in the May 12, 2015 affidavit—viz., paragraphs 4 and 9—which were not specifically referenced by the trial court in the summary judgment order.

II. The trial court properly granted summary judgment on the Nitsches' counterclaims because the undisputed evidence establishes the untimeliness of the counterclaims beyond any genuine issue of material fact.

The Referee concluded and trial court ruled the Nitsches' counterclaims were time-barred because they knew or should have known of their potential claims more than three years before asserting them. *See* R&R at 15–18 [R. __]; Order, Sept. 29, 2015 [R. __]; Order, Dec. 3, 2015 at 4–8 [R. __]. The analysis of the timeliness of the counterclaims hinges on when the statute of limitations began to run. The law is clear that "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*, __ S.C. __, __ S.E.2d __, 2015 WL 5247124, at *4 (Sept. 9, 2015). "'This standard as to when the limitations period begins to run is *objective* rather than subjective,'" and the clock begins running even if it is not until later that the claimant develops a full-fledged theory of recovery, becomes certain of his claim, or learns of additional facts supporting his claim. *Id.* at *4 (emphasis in original); *Bayle v. S.C. Dep't of Transp.*, 344 S.C. 115, 126, 542 S.E.2d 736, 741 (Ct. App. 2001) (noting the discovery rule does not "require absolute certainty a cause of action exists before the statute of limitations begins to run"); *Tanyel v. Osborne*, 312 S.C. 473, 475, 441 S.E.2d 329, 330 (Ct. App. 1994) ("The statute of limitations . . . begins to run when the plaintiff should know that he might have a potential claim against another person, not when the plaintiff develops a full-blown theory of recovery."). As explained more fully below, the trial court's rulings below were correct because the evidence establishes beyond any

factual dispute that the Nitsches were or should have been aware of their potential claims against Mr. Campbell, the Kondras, and the other Respondents before 2009.[8]

A. The "drastic remedy" of summary judgment is appropriate where, as here, there is no conflicting evidence or testimony for a jury to resolve.

As an initial matter, the Nitsches argue summary judgment is a "drastic remedy" that should be "cautiously invoked," *see* Brief of Appellant at 9–10, and that the "viability of a statute of limitations defense is normally a question for the jury," *id.* at 10–12. Neither of these arguments, however, enable the Nitsches to avoid the conclusion that their counterclaims are barred by the statutes of limitations. As to their first argument, our courts have held the "drastic remedy" of summary judgment *can and should be invoked* where, as here, the undisputed evidence shows a claim is barred by the statute of limitations. *See, e.g., Jackson v. Doe*, 342 S.C. 552, 537 S.E.2d 567 (Ct. App. 2000) (reiterating the "drastic remedy" description *en route* to affirming the trial court's grant of summary judgment on untimely claim); *Bloom v. Ravoira*, 339 S.C. 417, 529 S.E.2d 710 (2000) ("We note that our decision is no departure from the rule that summary judgment is a 'drastic remedy' which should be 'cautiously invoked.' [] Nevertheless, in the rare case where a verdict is not reasonably possible under the facts presented, summary judgment is proper.").

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[8] Each of the Nitsches' counterclaims is governed by either a two- or three-year statute of limitations. *See* S.C. Code Ann. § 15-3-530(4) (three-year statute of limitations for conversion); *id.* § 15-3-530(5) (three-year statute of limitations for tort actions, such as negligence, negligent or fraudulent misrepresentation, fraudulent concealment, fraud, unjust enrichment, and breach of fiduciary duty); *id.* § 33-8-300(e) (two-year statute of limitations after discovery of breach of fiduciary duty by a director or, at most, three-years after the cause of action has accrued); *id.* § 33-8-420 (two-year statute of limitations after discovery of breach of fiduciary duty by an officer or, at most, three-years after the cause of action has accrued). The Nitsches filed their demand for arbitration on September 11, 2012. Accordingly, the key dates for determining whether they were or should have been aware of various of their claims are September 11, 2010 (for breach of fiduciary duty claims against Emil and Douglass Kondra, who were officers and directors) and September 11, 2009 (for all other claims).

As to the Nitsches' second argument, the case law—including the case law they cite—is clear that a jury question regarding a statute of limitations arises only when there is *conflicting evidence or testimony* regarding when a party received the knowledge that did or should have put him on notice of his claim. Here, the Nitsches point to no conflicting testimony or evidence regarding when they became aware of or should have become aware of their claims, nor can they manufacture a factual dispute by seeking to minimize Ms. Nitsch's affidavits or through their own inconsistent testimony. *See McMaster v. Dewitt*, 411 S.C. 138, 767 S.E.2d 451 (Ct. App. 2014) (affirming summary judgment on statute of limitations grounds where trial court had properly ignored plaintiff's attempt to manufacture an issue of fact through his own conflicting affidavit testimony). In short, summary judgment is appropriately granted on an untimely claim where, as here, there is no conflicting testimony or evidence and thus there is no genuine issue of material fact requiring a jury's resolution.

B. The affidavits of Veronica Nitsch warrant summary judgment and demonstrate beyond any factual dispute that the Nitsches were aware of their potential claims more than three years before asserting them.

The trial court properly concluded the Nitsches' counterclaims were untimely based on the Nitsches' admission that they suspected and were investigating Respondents' alleged wrongdoing long before 2009. Specifically, Veronica Nitsch conceded in her affidavits that between 2000 and 2008, she received, copied, catalogued and analyzed voluminous business and financial documents purloined from Emil Kondra's home with the goal of uncovering what she believed to be Respondents' wrongdoing related to the finances and stock of Ellcon, and that she then provided the documents and analysis to her attorneys for their investigation and evaluation of the claims against Respondents, to wit:

2. Beginning in the early 2000's, and continuing through 2007, Helen Kondra—Emil Kondra's wife, and an Ellcon Shareholder—came to my home and informed me that Helen Perry, Ellcon's Secretary and also an Ellcon shareholder, was destroying Ellcon documents at Emil Kondra's direction. . . .

3. In addition to informing me of Helen Perry's document destruction, Helen Kondra provided me with stacks of unorganized (simply tossed into the bags) Ellcon documents for my review. Specifically, Helen Kondra provided me with multiple large black plastic trash bags filled with documents. I photocopied the documents and Helen Kondra returned to my home to collect the originals. . . .

* * *

7. My husband and I employed the following attorneys during the following time frames:

   1998–1999: Leatherwood, Walker, Todd & Mann—To review Emil Kondra & John Campbell documents;

   * * *

   1999–Present: Merline & Meacham—***Discussed questions about Emil Kondra's self-dealing under the guidance of John Campbell. . . . They also reviewed spreadsheets I created about Ellcon.***

8. I gave some or all of the documents I received from Helen Kondra to at least the following [attorneys]: Snow Becker Krauss, Merline & Meacham, Hutton Law Group, Blake Harper, Fensterstock & Partners and Gibbes Burton.

9. I initially kept copies of the disputed documents to sort and organized them . . . . As my analysis of the documents progressed and I recognized that ***the documents I received from Helen Kondra demonstrated misconduct by Emil Kondra, John Campbell and others, I kept the documents to pursue any claims my husband and I might have against those individuals*** . . . .

(Veronica Nitsch Aff. at 2–5, ¶¶ 2–3, 7–8, and 11 (May 12, 2015) [R. __].) Similarly, in another of her affidavits, Ms. Nitsch admitted that from 2004 to 2008, she was aware of and sought legal counsel regarding potential claims against the Respondents:

> I have reviewed the documents I provided to my attorneys, Fensterstock & Partners LLP ("F&P"), for production to Plaintiffs in this matter . . . ***I created these documents from 2004 to 2008.*** Most of them are spreadsheets in which I evaluated Ellcon's balance sheets and other financial records. ***I created these documents to aid my attorneys in evaluating my claims against Plaintiffs."***

(Veronica Nitsch Aff. 3–4, ¶¶ 3, 5 (Mar. 19, 2015) [R. __] (emphasis added).) Based in part on these admissions, the Referee and the trial court concluded the Nitsches should have been and, in fact, were aware of their claims against the Kondras, Mr. Campbell, and the other Respondents prior to September 11, 2009, and their counterclaims were thus untimely.

The fact that Ms. Nitsch's affidavits do not discuss the 2008 merger or mention inconsistent versions of the Ellcon stock book does not, as the Nitsches now argue, eliminate the damning effect of her admissions. *See* Brief of Appellant at 15. This is because *each* of the counterclaims arises from the same core allegation, namely that over several decades the Kondras allegedly wrongly and secretly inflated their ownership of Ellcon's stock. (*See* Counterclaims against Kondras at ¶¶ 64, 73, 78, 84, 91, 98, 103, 111, 116, 124, 131; Counterclaims against Campbell at ¶¶ 39, 48, 59–60, 67, 74; *see also* Brief of Appellant at 7 ("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.").) Accordingly, the fact that from 2000 to 2008 the Nitsches suspected, investigated, and/or were aware of potential claims arising from this wrongdoing is fatal to each of their counterclaims.[9] For example, if they knew

[9] Ms. Nitsch admitted in her affidavit that from 2004 to 2008 she used the pilfered Ellcon documents to create "spreadsheets in which I evaluated Ellcon's balance sheets and other financial records . . . to aid my attorneys in evaluating my claims against Plaintiffs." (Veronica Nitsch Aff. 3–4, ¶¶ 3, 5 (Mar. 19, 2015) [R. __]

or suspected the Kondras had secretly manipulated and inflated their stock ownership, the Nitsches should have known they had a potential claim for fraudulent or negligent concealment if the stock books to which they had access were not accurate.[10] Similarly, if they had sufficient concern to seek legal counsel from 1999 to 2008 regarding potential claims arising from inflated stock numbers, they should have known or suspected that the shareholder payouts from the merger consummated in 2008 would unjustly enrich the Kondras at their expense. Stated differently, each of the causes of action and supporting details the Nitsches have asserted flow from and are premised on the supposedly inflated stock ownership that they knew of or at least suspected years ago. Hence, the counterclaims are untimely.

The shared basis of all the counterclaims makes this suit distinguishable from the cases on which the Nitsches' rely in their brief. *See* Brief of Appellants at 16–17. For example, in *McAlhany v. Carter*, 415 S.C. 54, 781 S.E.2d 105 (Ct. App. 2015), this Court held the plaintiff's notice of termite damage in his home did not simultaneously put him on notice of mold damage, and thus the former claim was time-barred while the latter was not. The Court specifically noted this was because the two claims had nothing to do with each other. *Id.* at 66, 781 S.E.2d at 112 ("'Mold has nothing to do with infestation of termites.'") (citation omitted). Here, in contrast, each of the Nitsches counterclaims share a common nucleus of alleged wrongdoing, and thus notice of the Kondras' supposed stock manipulation and financial self-dealing and of the other Respondents' alleged assistance in those endeavors placed or should have placed the Nitsches on notice of *all* of their counterclaims. In addition, *McAlhany* is distinguishable in its holding

[10] As an Ellcon Director and Executive Committee member, Robert Nitsch had access to the financial records and the Ellcon Stock Book at all times since 1964. (*See* Kondra Compl. at 3, ¶ 14 [R. ___]; Answer at 3, ¶ 14 [R. ___]; *see also* Bylaws of Ellcon-National, Inc., adopted May 29, 1963, Art. IV §§ 6–7 [R. ___]; *id.* at Art. III § 9 [R. ___].)

that the plaintiff's uncertainty and inconsistency in his deposition regarding the date he first discovered the mold damage gave rise to a question of fact. Here, in contrast, there was no uncertainty or inconsistency within Ms. Nitsch's affidavits, nor have the Nitsches pointed to any conflicting evidence or testimony regarding the date they knew or should have known of their potential claims.

Similarly, the Nitsches' reliance on *Holly Woods Ass'n of Residence Owners v. Hiller*, 392 S.C. 172, 708 S.E.2d 787 (Ct. App. 2011) is misplaced. In *Holly Woods*, this Court held the trial court properly denied a motion for directed verdict on statute of limitations grounds because there was conflicting evidence regarding whether the plaintiffs learned or should have learned of the problems giving rise to their claims within three years prior to bringing suit. *See id.* at 183, 708 S.E.2d at 793–94 ("The record contains evidence that the Association did not learn of several problems within the development until 2002."). Here, in contrast, the Nitsches were aware of the alleged problems that underlie *all* of their claims long before the deadline for bringing suit. The fact that it was not until later that they received confirmation of their suspicions or became certain of their claim does not shield them from the fact that they knew of and investigated their potential claims. *See Stokes-Craven Holding Corp. v. Robinson*, __ S.C. __, __ S.E.2d __, 2015 WL 5247124, at *4 (Sept. 9, 2015) (holding the limitations period commences when a person knew or should have known of his potential claims, even if it is not until later that he becomes certain of his claim or learns additional facts supporting his claim).

C. There are no genuine issues of material fact precluding summary judgment.

On appeal, the Nitsches attempt to avoid the statute of limitations by arguing they were unaware of the full details of the alleged wrongdoing until recently and/or that they only recently gained access to the supposedly damning evidence the Respondents had previously

kept concealed. *See* Brief of Appellant at 12–13. Specifically, they point to three post-2009 "discoveries" they believe should prevent the application of the statute of limitations. *Id.* at 13. Each of the three is discussed individually in more detail below.

As an initial matter, however, the Nitsches' argument misses the mark because each of the post-2009 actions or discoveries are merely the continuation and consummation of claims the Nitsches have been (or should have been) aware of for years. As explained in the preceding section, the common nucleus of *each* counterclaim is the Kondras' alleged inflated and improper acquisition of stock shares—wrongdoing that has been suspected and investigated by the Nitsches for many years. *See* Brief of Appellant at 12 (conceding the "core basis" for all of the counterclaims is that Respondents "misrepresented and/or falsified the contents of Ellcon's stock books"). The fact that post-2009 discoveries confirmed the Nitsches' suspicions or provided them with a full-fledged theory of recovery does not alter the statute of limitations analysis. *See Stokes-Craven Holding Corp. v. Robinson*, __ S.C. __, __ S.E.2d __, 2015 WL 5247124, at *4 (Sept. 9, 2015) (noting the statute of limitations begins to run when a person could or should have known a cause of action might exist, not when a person obtains actual knowledge of the facts giving rise to the potential claim); *Bayle v. S.C. Dep't of Transp.*, 344 S.C. 115, 126, 542 S.E.2d 736, 741 (Ct. App. 2001) (noting the discovery rule does not "require absolute certainty a cause of action exists before the statute of limitations begins to run"); *Tanyel v. Osborne*, 312 S.C. 473, 475, 441 S.E.2d 329, 330 (Ct. App. 1994) ("The statute of limitations . . . begins to run when the plaintiff should know that he might have a potential claim against another person, not when the plaintiff develops a full-blown theory of recovery."). Additional reasons explained more fully below also rebut the Nitsches' argument that these post-2009 "discoveries" allow them to escape the bar of the statute of limitations.

1. The "stock books and other corporate information" provided in August 2010 do not save the untimely counterclaims.

The Nitsches argue the "Respondents withheld the contents of the stock books, and other corporate information, until August 2010 or later," implying that only then could they learn of the Kondras' alleged financial improprieties and stock manipulation. *See* Brief of Appellants at 13; *see also id.* at 15 (arguing the claims Ms. Nitsch referred to in her affidavit testimony did not include the supposed inaccuracies in the stock book received in 2010 and that "they became aware that the representations were false when they finally received the first version of the stock book in August 2010"). This argument should be rejected, however, because the Nitsches *were* aware of and seeking legal counsel regarding the Kondras' alleged financial wrongs from 2004 to 2008, and with their suspicions thus aroused they could and should have investigated the Stock Book they now claim was not promptly supplied to them. *See Burgess v. Am. Cancer Soc.*, 300 S.C. 182, 386 S.E.2d 798 (Ct. App. 1989) (affirming summary judgment on untimely claims, holding a party who had notice years ago that something was amiss but delayed investigating and filing suit cannot later avoid the application of the statute of limitations by claiming ignorance of facts and circumstances she could have known through the exercise of ordinary care and reasonable diligence).

Furthermore, as Ellcon shareholders, the Nitsches were participants in annual shareholders meetings in which the number of shares owned by each shareholder was disclosed. The minutes of those meetings, containing each shareholders' name and number of shares, were provided to every shareholder at the next annual shareholder meeting for the shareholders' approval. (*See* Reply at 3, ¶ 8, Exhibit E [R. ___].) Similarly, Robert Nitsch was a member of the Board of Directors and Executive Committee since 1964, and had access to the financial

records and the Ellcon Stock Book. (*See* Kondra Compl. at 3, ¶ 14 [R. ___]; Answer at 3, ¶ 14 [R. ___]; *see also* Bylaws of Ellcon-National, Inc., adopted May 29, 1963, Art. IV §§ 6–7 [R. ___]; *id.* at Art. III § 9 [R. ___].) In sum, the Nitsches were not without reason or means to investigate the potential claims they were or should have been aware of prior to 2009, and their receipt of the stock book in 2010 was, at most, a confirmation of what they already suspected and about which they had already sought legal counsel.

2. The allegedly improper post-merger distribution of funds discovered in 2010 does not save the untimely counterclaims.

The Nitsches argue they did not learn until August 2010 that certain funds from the merger were not distributed as required by the Merger Agreement. *See* Brief of Appellant at 13 (citing Counterclaims against Campbell ¶ 23). This discovery, however, cannot save their counterclaims from the statute of limitations because the only claim to which it is relevant was dismissed years ago. In their brief, the Nitsches cite to paragraph 23 of their counterclaim against Mr. Campbell to establish the supposed relevance of this post-2009 discovery. That paragraph, however, is merely part of the factual background section of the counterclaims. The sole counterclaim to mention or rely on this supposed wrongdoing is the fourth counterclaim asserting a cause of action for Breach of Fiduciary Duty—a counterclaim that was dismissed years ago. (*See* Order, Oct. 25, 2013 at 3–5 [R. __].) Accordingly, the post-2009 discovery of a fact that is relevant only to an already-dismissed counterclaim has no bearing on the analysis of whether the remaining counterclaims were timely asserted.

3. Respondents' "demand[] that Appellants execute a release of all claims on July 1, 2010" does not save the untimely counterclaims.

The Nitsches argue the Respondents improperly required them to sign a release of claims on July 1, 2010 as a condition of receiving funds to which they were entitled under the

Merger Agreement. *See* Brief of Appellant at 13 (citing Counterclaims against Kondras at ¶ 106; Counterclaims against Campbell at ¶ 69). They apparently believe (as indicated by the paragraphs of the pleadings they cite) this post-2009 conduct is relevant to their counterclaim for breach of fiduciary duty. Notably, that counterclaim was dismissed years ago as to Mr. Campbell. (*See* Order, Oct. 25, 2013 at 3–5 [R. __]). As to the Kondras, only Douglass (and not Emil) is implicated in the supposedly improper demand in July 2010 that the Nitsches execute a release.(*See* Counterclaims against Kondras at ¶ 106 [R. __] (alleging "*Douglass* Kondra also failed in his unqualified obligation" when, "[a]long with attorney Campbell, *Douglass* Kondra improperly represented that the Nitsches were required to sign a release") (emphasis added).) Accordingly, the 2010 request that the Nitsches sign a release is relevant (if at all) only to the discovery of Douglass' breach of fiduciary duty.

This counterclaim, however, is time barred because Douglass' alleged wrongdoing in 2010 was the same ongoing wrongdoing the Nitsches were or should have been aware of years earlier. *See id.* ¶¶ 104–07 (alleging Douglass owed the Nitsches a fiduciary duty dating back at least to the time of the merger and has been in constant breach of that duty ever since, giving rise to a single indivisible injury, namely that the Nitschs "received less than their fair share of compensation from the Merger"). When an ongoing tort is permanent in nature and gives rise to a single injury, the statute of limitations runs from the earliest time the injured party did know or should have known of the potential claim. *See, e.g., Stokes-Craven* at *10 (holding a claim against an attorney alleging breach of fiduciary duty arose as soon the plaintiff was or should have been aware of the claim, not at the conclusion of the representation in which the alleged malpractice is repeatedly occurring); *Harrison v. Bevilacqua*, 354 S.C. 129, 580 S.E.2d 109 (2003) (declining to adopt the "continuing tort" or "continuing treatment" doctrines, noting they

"offend[] the clear policy set by the Legislature in its adoption of statutes of limitations," and thus holding the plaintiff's claim arising from a lengthy pattern of tortious conduct was untimely); *Anderson v. Short*, 323 S.C. 522, 524–25, 476 S.E.2d 475, 476–77 (1996) (holding statute of limitations began to run when patient first knew or should have known of potential claim against physician for prescribing addictive narcotic drugs, not at later date when the ongoing course of treatment was concluded, and thus holding the claim was time barred).[11]

Even if Douglass' alleged breach of fiduciary duty on July 1, 2010 was distinct from the wrongdoing the Nitsches could and should have known about years earlier, the counterclaim of the Nitsches is nevertheless time barred by the two-year statute of limitations that applies when such a claim is asserted against a corporate officer or director.[12] A claim of breach of fiduciary duty against an officer or director of a corporation must be brought "within two years after the time when the cause of action is discovered." *See* S.C. Code Ann. §§ 33-8-300(e) and -420(e). At all relevant times, Douglass was both an Ellcon officer and director. In the years prior to the merger, he served as Ellcon's President, Chief Operating Officer, and a member of its Board of Directors, and upon the closing date of the merger, he became Ellcon's CEO and the Chairman

[11] *Cf. Janssen*, 414 S.C. 33, 78, 777 S.E.2d 176, 199–200 (2015) (noting that where there is "a series of discrete, independently actionable wrongs," the older wrongs may be time-barred but the newer wrongs are not); *Silvester v. Spring Valley Country Club*, 344 S.C. 280, 287, 543 S.E.2d 563, 567 (Ct. App. 2001) (noting that in the context of "continuing" nuisance, *i.e.*, repeatedly recurring one, each recurrence is subject to its own statute of limitations).

[12] Respondents did not rely on the two-year statute of limitations before the Referee or the trial court, nor did the trial court rely on the two-year statute of limitations in its ruling. Respondents, however, as the prevailing party below may assert additional sustaining ground not raised to or ruled upon by the court below. *See* Rule 220(c), SCACR ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal."); *I'on, LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000) ("Under the present rules, a respondent—the "winner" in the lower court—may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court."); *see also* Toal, *et al.*, *Appellate Practice in South Carolina* 62 (2d ed. 2002) (same).

of its Board. (*See* Kondra Compl., Ex. A at 34, 36 [R. __].) Accordingly, even if the Nitsches did not discover his breach of fiduciary duty until July 1, 2010, the two-year statute had run by July 1, 2012, more than two months before they filed their demand for arbitration.

The Nitsches may argue the fiduciary duty Douglass allegedly owed them was not premised on his status as an Ellcon officer or director but on his status as the "Stockholder Representative" under the Merger Agreement, whereby he was to act as the stockholders' "attorney-in-fact and agent" for certain tasks related to the merger. (*See* Kondra Compl., Ex. B at 66–67 [R. __].) These statuses, however, cannot be separated from one another. Indeed, the Supreme Court has previously rejected a shareholder's attempt to avoid the two-year statute of limitations by arguing a corporate officer "owed them a fiduciary duty separate and apart from that owed as an officer of [the corporation], based upon an alleged special relationship." *See Clearwater Trust v. Bunting*, 367 S.C. 340, 346–47, 626 S.E.2d 334, 337 (2006). In *Clearwater Trust*, the plaintiffs had sought advice from a corporate officer regarding the value of their shares and the potential of any future sale or merger of the company. In reliance on the officer's misrepresentations, they sold their shares several months before a merger that, had they waited, would have netted them a substantial profit. They sued, but the trial court dismissed their complaint, ruling their claim for breach of fiduciary duty was barred by the two-year statute of limitations found in section 33-8-420(e). The Supreme Court affirmed, rejecting the plaintiff's attempt to argue that the officer owed them some other, special fiduciary duty apart from his status as an officer (which, if true, would be subject to a three-year statute of limitations). The Court held that neither the officer's status as a fellow shareholder nor the fact that the plaintiffs had reposed trust in him and sought and relied on his advice gave rise to any fiduciary duty that

was separable from his status as a corporate officer. Accordingly, the Court affirmed the dismissal of the plaintiffs untimely claim. *Id.* at 351–52, 626 S.E.2d at 339–40.

In sum, under either the two-year limitations period applicable to a claim for breach of fiduciary duty by an officer or director, or under the three-year limitations period for such claims asserted against others, Douglass' request on July 1, 2010 that the Nitsches sign a release is not a "discovery" that saves their counterclaim from the bar of the statute of limitations. Accordingly, the trial court properly ruled this counterclaim, like the others, was untimely.

III. The trial court's ruling was not premature because further discovery could not alter the conclusion the Nitsches' counterclaims were time-barred.

As a general rule, summary judgment should not be granted until the opposing party has had a full and fair opportunity to investigate. *Dawkins v. Fields*, 354 S.C. 58, 69, 580 S.E.2d 433, 439 (2003). This general rule, however, is subject to two significant, related exceptions. First, "the nonmoving party must demonstrate the likelihood that further discovery will uncover additional relevant evidence and that the party is not merely engaged in a fishing expedition." *Id.* Second, when the motion for summary judgment is based on the untimeliness of a claim, additional discovery is unnecessary if further information *could not* alter the limitations analysis. *Bayle v. S.C. Dept. of Transp.*, 344 S.C. 115, 128–29, 542 S.E.2d 736, 743 (Ct. App. 2001) (affirming summary judgment on an untimely claim and noting, "The record in the case *sub judice* does not demonstrate further discovery would have contributed to the resolution of the issue at hand—namely, whether the statute of limitations barred Bayle's action") (citing *Thomas v. Waters*, 315 S.C. 524, 445 S.E.2d 659 (Ct. App. 1994)). Accordingly, this Court has previously affirmed trial court orders granting summary judgment despite the fact that discovery requests were pending. *See, e.g., Martin v. Companion Healthcare Corp.*, 357 S.C. 570, 593

S.E.2d 624 (Ct. App. 2004); *CEL Products, LLC v. Rozelle*, 357 S.C. 125, 591 S.E.2d 643 (Ct. App. 2004); *Bayle*, 344 S.C. at 128–29, 542 S.E.2d at 743.

Here, the Nitsches did not demonstrate to the trial court nor have they explained to this Court whether and how the discovery they seek will uncover additional relevant evidence that could alter the statute of limitations analysis. For example, the only specifically-identified discovery they desire is to depose Helen Perry, the custodian of the Ellcon stock book. *See* Brief of Appellant at 8, 13, and 19.[13] But Ms. Perry's deposition could not alter the inescapable conclusion the Referee and trial court drew from Ms. Nitsch's affidavits, namely that the Nitsches were aware of and investigated their potential claims against Respondents for many years before bringing suit. The fact the Nitsches do not know *why* Helen Perry allegedly created a second stock book in 2008 cannot change the statute of limitations analysis because the Nitsches were already aware of the Kondras supposed financial self-dealing and the fact that Ms. Perry was purportedly aiding them in their endeavors. (*See* Veronica Nitsch Aff. at 2, ¶ 2 (May 12, 2015) [R. __] (stating that "[b]eginning in the early 2000's," Ms. Nitsch was aware that "Helen Perry, Ellcon's Secretary and also an Ellcon shareholder, was destroying Ellcon documents at Emil Kondra's direction"); *id.* at 3, ¶ 3 [R. __] (noting the misappropriated documents that alerted the Nitsches of their potential claims were intended for destruction by Ms. Perry); *see also* Veronica Nitsch Aff. at 3, ¶ 7 (Oct. 14, 2012) [R. __] (stating that as of May 2009, the Nitsches were aware that Ms. Perry was continuing to conceal and destroy confidential Ellcon information and documents)). The fact that the Nitsches have not yet been

[13] They also make an non-specific reference to "the parties' numerous discovery disputes" that allegedly "warrant additional consideration at the trial level." Such vague assertions, however, cannot be evaluated and fail to rise to the level of a showing of how these disputes are relevant to the statute of limitations analysis.

able to ask Ms. Perry about the particular details of her alleged wrongdoing does not and cannot alter the fact that they were aware of all their potential claims from 2000 to 2009.

In addition, the Nitsches argue that the Referee's conclusion that they had long been aware of their claims cannot be squared with his conclusion that the "Disputed Documents" are not relevant to their claims. *See* Brief of Appellant at 19 n.2 (citing R&R at 24); *see also id.* at 21 (citing Referee's letter, July 9, 2015). This argument should be rejected.

As an initial matter, the R&R and the orders adopting the R&R have not been appealed. Further, the Nitsches overlook the fact that the "Disputed Documents" are only a small number of particular privileged or private documents that form but a small fraction of the Ellcon documents misappropriated, reviewed, and analyzed by the Nitsches and their counsel. (*See* R&R at 4 [R. __] ("At the core of the issues referred to me are a group of 105 documents that I have chosen to refer to as the 'Disputed Documents.' The Disputed Documents are a subset of a larger group of over 4,600 pages of documents that were taken by Helen Kondra from Emil Kondra's home office to Mrs. Nitsch."). Accordingly, it is not a contradiction for the Referee to conclude that these few documents were not necessary or relevant to the Nitsches' counterclaims while simultaneously concluding the Nitsches should have been and were aware of their potential claims based on the thousands of pages of other taken documents.

In sum, the Referee and trial court correctly concluded the discovery disputes between the parties, including the additional desired discovery, were irrelevant to the untimeliness of the counterclaims and could not forestall the application of the statute of limitations.

IV. The trial court's rulings regarding the timeliness of the counterclaims were based on the court's independent knowledge and evaluation of the law and facts.

The Nitsches argue the trial court erred by "deferring" to the Referee's findings and conclusions that were supposedly beyond the scope of the reference. *See* Brief of Appellant at

19–24. Specifically, they argue the Referee's authority was limited to resolving specific discovery disputes, and that because the timeliness of their counterclaims was never challenged it came as a complete surprise when the Referee first mentioned the issue. *Id.* at 20. The Nitsches also speculate that when the trial court issued its order adopting the Referee's findings and conclusions, the court had not reviewed the R&R and was ignorant of the fact the R&R contained findings and conclusions regarding the timeliness of the counterclaims. *Id.* at 21.

As an initial matter, Respondents note that although the order of reference in the case at bar diverges from that contemplated by Rule 53(b), SCRCP and Code section 14-11-85,[14] the Nitsches have not challenged that procedure, which they suggested and to which the parties consented. *See id.* at 23 ("Appellants do not take issue with the manner in which the Trial Court referred the discovery issue to the Discovery Referee."). An unchallenged ruling cannot be reviewed or reversed on appeal, and in any event this procedure was harmless because, as explained below, the trial court did not "defer" to the Referee's report, but rather ruled based on the court's own knowledge and evaluation of the facts and law.

Next, as stated herein above, the Appellants have failed the appeal the R&R or the orders adopting the R&R. Hence, this Court should reject Appellants' complaints about the R&R and the orders.

In any event, contrary to the Nitsches' assertions, the trial court did not "defer" to the Referee's findings and conclusions. The order granting summary judgment, which is the only order the Nitsches have appealed, was based not on deference to the Referee but on the trial court's own consideration and analysis of a fully-briefed motion supported by exhibits and oral

[14] Rule 53 and the Code instruct that a matter should not be referred to a master or referee for the purpose of making a report to the trial court.

argument. Indeed, the order granting summary judgment expressly states the trial court's ruling was based on the court's own knowledge and review of the evidence and the law. (*See* Order, Dec. 23, 2015 at 4 [R. __] (noting that "[e]ven if I were to accept the argument from counsel for the Nitsches" that the Referee exceeded his authority, "I nevertheless hold that the statute of limitations for these claims has expired" because "*I have reviewed the affidavits on which this finding is based*") (emphasis added).)[15]

Even assuming *arguendo* that the trial court's ruling was premised on deference to the Referee's findings and conclusions (which it was not), the Nitsches are nevertheless incorrect in their argument that the R&R—the adoption of which they have not appealed—was impermissibly beyond the scope of the reference. According to Rule 53, a Referee "shall exercise all power and authority which a circuit judge sitting without a jury would have in a similar matter." *See* Rule 53(c), SCRCP.[16] The wide-ranging powers contemplated by the Rule support the Referee's and trial court's belief that the Referee was well within his power to address a material issue raised by the evidence that would affect and potentially moot a number of the issues he was to resolve. (*See* R&R at 19 [R. ___] ("As a logical progression in my

[15] Similarly, both the order adopting the R&R and the order granting summary judgment state the decision to adopt the R&R—a decision the Nitsches have not appealed but which they seem to challenge in this argument section—was based on the court's own knowledge of the record. (*See, e.g.,* Order, Sept. 29, 2015 at 2 [R. __] ("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 & Recommendation and order it to be the findings of fact, conclusions of law and order of this Court.") (emphasis added); Order, Dec. 23, 2015 at 2 [R. __] ("After reviewing the Report and Recommendation, and *based on my knowledge of the record in this case*, I adopted the Report and Recommendation as the findings of fact and conclusions of law of the Court by Order entered September 29, 2015.") (emphasis added).)

[16] The reference in the case at bar, of course, differed somewhat from Rule 53 in that it was referred for purposes of producing a Report and Recommendation rather than for the purposes of the Referee entering a binding judgment on any claims. Nevertheless, the wide-ranging powers bestowed by Rule 53(c) validate the Referee's and trial court's statements that the Referee could and should address an issue presented by the material submitted to him.

analysis of the issues referred to me by Judge Miller, I find the applicable statute of limitations on the Nitsches' claims began to run no later than 2005. I make this finding because, if the Nitsches' claims are barred by the statute of limitations, my other findings regarding discovery issues would be moot."); Order, Dec. 23, 2015 at 4 [R. __] ("[T]he Court would not direct a Discovery Referee to ignore material issues raised by the documents and evidence submitted to him, especially when such issues in turn affect the discovery issues. . . . When an issue like the statute of limitations is recognized in the process of analyzing discovery issues, it should be called to the Court's attention, and set forth in the Report and Recommendation of the Discovery Referee, as discovery issues would be thereby affected.").

The Nitsches are also incorrect in their assertion that the Referee simply came up with the statute of limitations issue without prompting and they were thus blindsided because that issue was supposedly never discussed or contemplated. Ironically, it was the Nitsches themselves who brought the issue to the trial court's attention through their voluntary reliance on affidavits they created and submitted in support of their efforts to "claw back" spreadsheets they had created from 2004 to 2008 documenting and seeking legal counsel regarding their potential claims. Furthermore, the timeliness of the counterclaims *was* a significant issue discussed at that stage of the litigation. In the same hearing where the parties requested a Referee, counsel for the Kondras stated "the statute of limitations is a huge issue" and "a very significant issue" in the case. (Jan. 20, 2015 Tr. at 30:19-20 and 31:3–4.) Similarly, the timeliness of the counterclaims was discussed at the hearing before the Referee:

> SPECIAL REFEREE: If I'm reading Ms. Nitsches' affidavit correctly, it went on over what, maybe three, possibly even four years?
>
> MR. BROWN: Approximately three years.

> SPECIAL REFEREE : Three. Let's just say three. And so it appears from Ms. Nitsches' affidavit that Ms. Kondra would bring some material, Ms. Nitsch would copy it, give it back to her, but this process was repeated several times.
>
> MR. BROWN: That's my understanding.
>
> SPECIAL REFEREE: I mean, doesn't that—should not that have put Ms. Nitsch on notice that something was going on that was at least peculiar?

(April 1, 2015 Tr. at 44:5–19.)

Finally, the R&R and the trial court's orders in this suit are easily distinguished from the case on which the Nitsches rely: *Deep Keel, LLC v. Atl. Private Equity Grp., LLC*, 413 S.C. 58, 773 S.E.2d 7 (Ct. App. 2015). In *Deep Keel*, the appellant appealed directly from a judgment entered by the Master-in-Equity that exceeded the scope of his reference. Here, in contrast, even assuming the Referee's R&R exceeded the scope of the subject matter jurisdiction granted to him by the order of reference, the Nitsches have not appealed the R&R nor have they appealed the order adopting it. Rather, they have appealed only the order granting summary judgment—an order based on the trial court's own evaluation and analysis of the parties' briefing, supporting evidence, and arguments. Stated differently, even if the R&R went beyond the scope of the Referee's authority (which it did not), that error was rectified and made harmless by the fact the trial court subsequently performed its own, independent review and evaluation of a subsequent motion and arguments before granting a partial judgment that was unquestionably within the trial court's scope of authority to grant.

CONCLUSION

For the foregoing reasons, Respondents respectfully request this Court affirm the ruling of the trial court entering summary judgment on Appellants' counterclaims.

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Attorneys for Respondents

Columbia, South Carolina

May 25, 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 Nos. 2012-CP-23-06209 & 2012-CP-23-06211
Appellate Case No. 2016-000130

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

v.

Robert A. Nitsch and Veronica G. Nitsch, Individually, and as Trustee 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., Esquire, ... Respondent,

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, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for the Respondents, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Pleadings: Initial Brief of Respondents

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May 25, 2016

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May 25, 2016

The Honorable Jenny Abbott Kitchings
Clerk of Court
SC Court of Appeals
1220 Senate Street
Columbia, SC 29201

RE: Emil P. Kondra v. Robert A. Nitsch
Appellate Case No. 2016-000130

Dear Ms. Kitchings:

Enclosed please find the original and one copy of the Initial Brief of Respondents and Respondents' Designation of Matter for the Record on Appeal in regard to the above-referenced matter. We would ask that you file the originals and return clocked-in copies to us via our courier.

By copy of this letter to counsel of record, we are serving them with copies of the brief and designation.

Very truly yours,

Miles Coleman

Miles E. Coleman

MEC:lpw
Enclosures
cc: Jeffrey P. Dunlaevy, Esquire
A. Martin Quattlebaum, Esquire
Sam W. Outten, Esquire