THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Judge

Case No. 2016-000584

CJR Resources, Inc. f/k/a Ron's Building Materials, Inc.....Respondent,

v.

Commercial & Industrial Floors, Inc., and Dabney Maides.....Appellants,

v.

Christopher M. Keel ..... Respondent.

FINAL BRIEF OF APPELLANTS

William R. McKibbon III
SC Bar No. 68454
601 E. McBee Ave, Ste. 204
Greenville, SC 29601
864.235.0071, 864.235.0072 (f)
will@legalcarolina.com
Attorney for Appellants

Courtney C. Atkinson
9 Toy Street
Greenville, SC 29601
(864) 214-2319
catkinson@malawfirmsc.com
Attorney for Respondent
Christopher M. Keel

John T. Crawford, Jr.
704 E. McBee Ave.
Greenville, SC 29601
(864) 242-4899
crawford@conlaw.com
Attorney for Respondent
CJR Resources, Inc.

Table of Contents and Cases

Cases

STATEMENT OF ISSUES ON APPEAL

1. Did the court err in granting summary judgment as to the breach of duty of loyalty where the record contains irrefutable evidence of Christopher Keel competing or otherwise acting contrary to the interests of Appellants while still employed by Appellant Commercial & Industrial Floor, Inc. ("CIF")?

2. Did the court err in granting summary judgment as to Appellants' breach of contract claim when evidence was presented that Keel engaged in competitive and solicitation practices while employed by Appellants?

3. Did the court err in granting summary judgment as to the causes of action for fraud in the inducement and breach of contract accompanied by a fraudulent act when the record contained evidence of Respondent Keel quitting work after one month, stealing a legal bill from his employer, and evincing intent not to work for his employer's benefit?

4. Did the court err in invalidating both the Asset Purchase Agreement's ("APA") non-compete and Keel's non-compete contained in his employment agreement when the APA was a sale of business covenant rather than an employee agreement, when the agreements were equally negotiated and mutually agreed upon by the parties, and where both agreements were expressly modifiable by the court so as to avoid complete invalidation?

5. Did the court err in ruling that the APA language created a 1 year bar on Appellants' claims where such provision related only to the specific "representations and warranties" contained within the APA itself?

6. Did the court err in granting summary judgment as to all claims based upon the statute of limitations when Respondent Keel's conduct in 2013 gave rise to every cause of action?

STATEMENT OF THE CASE

Respondent CJR Resources, Inc., f/k/a Ron's Building Materials, Inc. initially filed a Summons and Complaint on October 28 2013 against Appellants Commercial & Industrial Flooring, Inc. ("CIF") and Dabney Maides ("Maides") for breach of contract related to an installment contract on CIF's purchase of Ron's Building Materials, Inc. (R. p. 33). In July 2008, Appellants purchased Ron's Building Materials, Inc. from the Respondents for $1.25 million. $1,050,000 was paid at closing, and Appellants entered

into an installment promissory note for the remaining $200,000.00 of the purchase price. (R. p. 67).

Namely, the Complaint alleged that Appellants had ceased making installment payments without justification and breached their contract with Respondent. Appellants responded by filing their Answer, Counterclaims, and Third-party Complaint against Respondent Christopher Keel, alleging, among other things, that Keel had violated covenants not to compete, breached his contract of employment, breached his duty of loyalty, committed fraud in the inducement, and breached a contract accompanied by a fraudulent act. (R. p. 54). Appellants sought damages from Keel's contractual and tortious conduct and further prayed for return of the purchase price ($1.25 million) of Ron's Building Materials, Inc. Included in these affirmative claims for relief were affirmative defenses related to the cessation of payments under the installment contract to Respondent CJR Resources, Inc. ("CJR").

Keel denied all such claims in his Answer, as did CJR Resources, Inc. Keel and CJR filed motions for summary judgment on September 25 and 29, 2015, respectively. (R. pp. 113, 116). A hearing was held on November 3, 2015. By Order dated December 16, 2016, the court granted summary judgment to Respondents on all causes of action raised against them, as well as for Respondent CJR Resources, Inc.'s claim for breach of contract against Appellants, and set the case for a damages hearing on that single affirmative cause of action. (R. p. 5). Appellants filed a motion to alter or amend the judgment, which was denied by Order dated February 23, 2016. (R. p. 26). Appellants timely served and filed their Notice of Appeal. The damages hearing at the circuit court was then stayed pending the outcome of this appeal.

STANDARD OF REVIEW

When reviewing the trial court's decision to grant summary judgment, an appellate court applies the same standard applied by the circuit court. Lanham v. Blue Cross & Blue Shield of S.C., Inc., 349 S.C. 356, 361, 563 S.E.2d 331, 333 (2002). Summary judgment is appropriate when there is no genuine issue of material fact such that the moving party is entitled to prevail as a matter of law. Rule 56(c), SCRCP; Fleming v. Rose, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002). "In determining whether any triable issues of fact exist, the court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the nonmoving party." David v. McLeod Reg'l Med. Ctr., 367 S.C. 242, 247, 626 S.E.2d 1, 3 (2006).

"In determining whether any triable issues of fact exist, the court should construe all ambiguities, conclusions, and inferences arising from the evidence most strongly against the moving party. Even when there is no dispute as to evidentiary facts, but only as to conclusions or inferences to be drawn from them, summary judgment should be denied. It is dependent upon the existence of plain and undisputable facts upon which reasonable minds cannot differ." Allen v. Long, 332 S.C. 422, 426, 505 S.E.2d 354, 356 (Ct. App. 1998) (internal citations omitted).

Therefore, the *only* way summary judgment can be granted is if:

1) it is *clear* that there is *no* genuine issue of material fact; *and*

2) the moving party is entitled to judgment as a matter of law.

From this two-prong requirement, the Allen standard provides further instruction upon how to determine whether there are triable issues of fact under the first prong:

All 1) ambiguities, 2) conclusions, and 3) inferences from the record are to be construed most strongly against the moving party (the Plaintiff/Third-party Defendant in this case). Last, the moving party must show plain and undisputable facts upon which reasonable minds cannot differ. Summary judgment is a strong burden to overcome by a moving party.

Applying the appropriate standard of review to the facts and issues before this Court, Appellants would show that the lower court failed to appropriately apply this critical standard of review and summary judgment must be reversed.

ARGUMENT

1. **The lower court erred in granting summary judgment as to Respondent Keel's breach of duty of loyalty because Appellant Maides' affidavit indisputably showed Keel was engaged in competing activities while employed by CIF.**

"It is implicit in any contract for employment that the employee shall remain faithful to the employer's interest throughout the term of employment. An employee has a duty of fidelity to his employer." Berry v. Goodyear Tire & Rubber Co., 270 S.C. 489, 491, 242 S.E.2d 551, 552 (1978). South Carolina has recognized a tort action for breach of the duty of loyalty. See Lowndes Products, Inc. v. Brower, 259 S.C. 322, 335–39, 191 S.E.2d 761, 767–70 (1972) (key employees who contacted and met with investors and a customer of current employer to lay plans to start a competing textile company, who left their employer without notice, and who leased space and ordered materials to build manufacturing equipment were guilty of disloyalty, and owed damages to employer). See Foreign Academic & Cultural Exchange Services, Inc. v. Tripon, 394 S.C. 197, 205, 715 S.E.2d 331, 335 (2011).

In the present case, the lower court's Order granting summary judgment ("SJ Order") rightfully states that a party may recover from an employee who fails to "remain faithful to the employer's interest throughout the term of employment," or when an employee "works to compete against the employer while still working for the employer," or when key employees "...contacted...customers of current employer to start a competing company...." (R. p. 20, lines 12-24). Despite the correct recitation of law, the lower court then not only failed to recognize the existence of disputed fact, but actually found fact in favor of the Plaintiff/Third-party Defendant. (R. p. 21, lines 2-3). This was error, as the court ignored the following evidence which required denial of summary judgment:

a. Appellant Maides' Affidavit filed October 30, 2015 contains testimony and exhibits that require denial of summary judgment for his cause of action for breach of duty of loyalty.

    i. While employed by Appellant CIF, Respondent Keel bid upon a job for himself (and was awarded soon after) through Triangle Construction for the Bavarian Pretzel Factory. (R. p. 318, 328) Also on that date he was communicating with Triangle Construction regarding at least 2 other flooring jobs (he was awarded those jobs, too, as well as 2 others after that). The documents prove this occurred before he quit his employment. (R. pp. 318, 326-356). These facts are both material and conclusive, or at least inferential of disloyal conduct and summary judgment should have been denied.

ii. Paragraph 8 of Mr. Maides affidavit refers to a 'Duradek' job that CIF was working on getting before Keel left CIF's employ. When Keel left, CIF didn't get the job – Keel did, as evidenced by Exhibit 5 to the affidavit, an email from Timothy Shepherd confirming that he worked on that job for Keel's company. (R. p. 358). From these facts, reasonable minds certainly may differ and reasonable inferences drawn in Appellants' favor conclude the existence of disloyalty when applying the appropriate standard of review.

iii. In paragraph 15 of Mr. Maides' affidavit, he avers that CIF's primary installers/subcontractors became unavailable to him immediately upon Keel's quitting CIF, another adverse consequence to CIF. (R. p. 319). And Keel stated in his deposition that he uses the same installers and always has (Keel deposition p. 93, ln 11-16). (R. p. 274). The immediacy of these consequences makes an inference of Keel's disloyalty reasonable as well.

In light of the record evidence above-cited, Appellants presented more than sufficient material facts from which either facially or inferentially would require a denial of summary judgment, and the lower court's decision must be reversed.

2. The lower court erred in granting summary judgment as to the claim of breach of contract because Appellant Maides' affidavits establish Keel's competition/solicitation while employed as well as damages suffered therefrom from loss of flooring contracts.

With regard to Appellants' breach of contract action, the lower court granted summary judgment for the following quoted reason: "CIF has not and cannot meet [its]

burden in the instant action because it has not and cannot point to any actual evidence to prove either that Keel breached the agreements at issue or that CIF suffered any damages as a direct and proximate result of any such alleged breach by Keel." (R. p. 18). The record reflects that the lower court's conclusion is indisputably flawed.

Maides' affidavit and accompanying exhibits offer substantial evidence of competition/solicitation in breach of the agreements (the APA and the employment agreement) (see, e.g., paragraphs 8-13 of Maides' Affidavit, as well as Exhibits 2 and 3 to Maides October 2015 Affidavit). (R. pp. 317-320, 324-325, 326-356). The affidavit specifically references damages from losing a Duradek job and a Triangle job. Mr. Maides also names specific jobs Keel solicited and received while still an employee, all of which constituted lost business opportunity as Keel should have secured such jobs for CIF and/or not bid them for himself in violation of the agreements. Mr. Maides also testified that he lost his installers due to Keel, and Keel testified such installers did in fact come to exclusively install for him (Keel deposition p. 93, lns 11-13) (R. pp. 18, 274)+.

Any one of these facts are sufficient to defeat summary judgment under the stringent standard which strongly favors the non-moving party. Maides offered numerous material facts from which a fact finder could reasonably conclude a breach and damages flowing therefrom. With all conclusions and inferences from the entire record to be resolved in Appellants' favor, the record contains numerous material disputes of fact related to Respondent Keel's breach, and the lower court must be reversed.

3. The lower court erred in granting summary judgment as to the causes of action for fraud in the inducement and breach accompanied by fraudulent act because Keel evaded his obligations under the Asset Purchase Agreement, stole a legal bill from his employer and surreptitiously held it for four years to use in his defense, and because statements were made to

Appellant Maides that would reasonably lead to the conclusion that Keel never intended to work for Appellants' benefit.

In its Order, the lower court granted summary judgment as to causes of action for fraud in the inducement and breach of contract accompanied by a fraudulent act. With regard to fraud in the inducement, the court granted summary judgment specifically and solely on the following: "CIF has not and cannot meet its heightened burden of proof in regard to its claim for fraud in the inducement because it cannot establish, as a most basic requirement, that any representation made by Keel was false or that Keel had knowledge that any statement he made was false" (relying upon elements set forth in Turner v. Milliman, 392 S.C. 116, 122, 708 S.E.2d 766,769 (2011). (R. p. 22, lines 13-16).

With regard to breach of contract accompanied by a fraudulent act, the lower court stated that CIF must prove 1) a breach of contract; 2) fraudulent intent related to the breaching of the contract and not merely to its making; and 3) a fraudulent act accompanying the breach." (R. p. 19) (citing Rotec Servs. v. Encompass Servs., 359 S.C. 467,470, 597 S.E.2d 881, 883 (Ct. App. 2004). The court immediately thereafter stated that "[CIF] cannot present any actual evidence of any of the required elements for that claim against Keel." (R. p. 19, lines 23-24). For purposes of this Argument, Appellants refer to the above treatment of breach of contract.

What remains is a holding from the lower court that the record contained no evidence of fraudulent intent, fraudulent act, or fraudulent representation (R. pp. 19-20, 22). This holding was error, as the court failed to consider several key pieces of evidence on the record in a light most favorable to Appellants, from which conclusions and reasonable inferences could be drawn to show fraudulent acts, intent, and knowing misrepresentation. Taken in turn:

a. The Asset Purchase Agreement (APA) of July 17, 2008, Article 3.2 specifically states that Keel shall be subject to a one year employment contract. (R. p. 146). That language is undisputed. It is further undisputed that Keel quit employment barely more than a month after that, in late August, 2008 as stated in the Order. (R. p. 8). It is also undisputed that Keel knew he was subject to a 5 year non-compete, that he agreed he was bound by that non-compete, and that he knew he had to stay until the 5 years expired (Keel deposition, p. 98 ln 17-21) (R. p. 275). Keel also admittedly took his installers from CIF immediately to work for him, contracted in competition before even quitting his employment, and immediately had numerous contracts after quitting (see Argument 1, infra, and Maides' affidavit and exhibits) (R. pp. 274, 318-356).

From all of these facts on the record, with all reasonable inferences drawn and viewed most strongly against the moving party, a fact finder could reasonably infer a fraudulent intent from the very beginning of Keel's employment, a fraudulent act in quitting less than one month after receiving over $1 million dollars for his company, and that his representations under his APA non-compete and his employment agreement were false and knowingly so made.

b. August 10, 2010 invoice from Smith Moore Leatherwood to Appellant CIF. This document was admittedly stolen by Mr. Keel, as Keel's attorney states in footnote 4 of Keel's brief in support of summary

judgment: "This document was left out in the open in CIF's office and readily accessible while Keel was still an employee of CIF." (R. p. 127). "Out in the open" or not, Mr. Keel, while an employee, not only absconded with a legal bill that was not his, but he also has held that legal bill for over 4 years only to produce it at this time.

Why would Keel steal a legal bill in 2010, a bill which also made no reference to him personally, and then purposefully save it for years? A reasonable inference of fraudulent intent and action can and should have be drawn in Appellants' favor under the Rule 56 standard.

c. Maides' October 20, 2015 affidavit paragraph 10 – Tami Keel, Mr. Keel's ex-wife, called Maides and specifically told him Keel intended to just "ride out his time." (R. p. 317). From this statement, an inference of Mr. Keel's intent may be reasonably drawn when viewed most strongly against the moving parties.

Appellants submit the record as a whole, and specifically the above-referenced facts, present numerous genuine issues of material facts, and further that Keel's fraudulent intent, acts, and misrepresentation are reasonably inferable for purposes of a summary judgment motion, and the lower court's ruling must be reversed on both the fraud in the inducement and breach of contract accompanied by a fraudulent act claims.

4. The court erred in ruling that the non-compete agreements in this case were invalid as a matter of law because South Carolina law does not prohibit 5 year non-competes in sales of businesses and because Keel's non-compete in his employment contract was either reasonable or was modifiable by the court.

There are two noncompetition agreements in this case – one contained in the Asset Purchase Agreement, and one separately contained in the Employment Agreement. (R. pp. 153, 163). The Order finds as fact that the APA non-compete and the Employment Agreement are "essentially the same." (R pp. 15-16). That finding is incorrect. The Noncompetition Agreement of 7.1(a) in the APA states that the Respondents covenant not to …."own, manage, operate…the building supply and flooring installation lines of business…." (R. p. 153). It has no bearing upon any employee relationship. The most important distinction, however, is that the APA specifically is an agreement between a buyer and seller of a business, and the employment agreement is between employer and employee.

The Asset Purchase Agreement.

South Carolina recognizes as valid 5 and even 10-year non-competes when the restrictive covenant relates to the sale of a business. See Smoak v. Carpenter Enterprises, Inc., 319 S.C. 222, 460 S.E.2d 381 (1995); Condon v. Best View Cable Vision, Inc., 292 S.C. 117, 355 S.E.2d 7 (Ct.App. 1986). In both Smoak and Condon, neither a 5 year nor a 10 year covenant not to compete was deemed invalid by its time period restrictions. Furthermore, the lower court's authority regarding the APA noncompete was incorrectly applied. The lower court relied upon the case of Faces Boutique, Ltd. v. Gibbs, 318 S.C. 39, 42, 455 S.E.2d 707, 708 (Ct.App. 1995) (SJ Order p. 11). The Faces case related only to an employer-employee relationship, not to a sale of business. Therefore, the lower court's reliance upon it was improper and without regard to the controlling law of Smoak and Condon, *infra*.

In the present case, there is a 5 year non-compete in the APA; in other words, a 5 year non-compete as part of a sale of a business. Therefore, the lower court erred in holding that the restrictive covenant contained in the APA was unenforceable as a matter of law by virtue of its 5 year duration. Further, Mr. Keel stated that he was subject to these non-compete/nonsolicitation terms and did not dispute their enforceability (Keel deposition, p. 35, ln 15-19; p. 98, ln 19-21) (R. pp. 273, 275).

In section 7.1(b) of the APA, the Seller and Shareholder agree to specific restrictive covenants against solicitation for a period of 5 years after Last Date of Employment. (R. p. 153). It is undisputed that the last date of employment for Chris Keel was May 31, 2013. (R. p. 9, ln 12). Again, this restrictive covenant is agreed to by the Seller (Ron's Building Materials, Inc.) and the Shareholders as part of the sale of a business, not between employer and employee (Ron Keel, Joyce Keel, and Chris Keel). It was binding upon all those parties. (R. p. 160). The 7.1(a) and 7.1(b) covenants are part of the sale of the business. Because South Carolina precedent validates 5 year restrictive covenants in sales of business; because the record reflects agreement to those terms; and because all conclusions and reasonable inferences must be resolved in favor of Appellants, summary judgment must be reversed.

Also in 7.1(d), the parties agreed that the court had the power to make modifications to the terms of 7.1(a) through (c) if the court determined as a matter of law that any term would otherwise be unenforceable. (R. p. 154). It allows for the court to reduce scope or duration to make the covenants enforceable. Thus, the covenants should not have been entirely and summarily dismissed as unenforceable for the following reasons: 1) the case law previously cited supports these terms as enforceable; 2) the

agreements were binding to Seller and the Shareholders per the APA, NOT the Employment Agreement; 3) the parties specifically contracted their agreement as to the reasonableness of the covenants; and 4) as a last resort, the court was contractually authorized to modify the covenants to a point of validity.

Keel's Employment Agreement.

The lower court found the restrictive covenant contained in Keel's Employment Agreement to be unenforceable as a matter of law. Applying the criteria set forth in Faces, the court found that the restrictive covenants were defective in being 1) not reasonably limited in its operation with respect to time and place; and that 2) the covenant was unduly harsh and oppressive in curtailing the legitimate efforts of Keel to earn a livelihood. (R. pp. 16-17).

First, the Employment Agreement was agreed to by Mr. Keel, completely voluntarily, and he admitted to being bound by its terms (Keel deposition p. 35, ln 11-14) (R. p. 273). Thus, he admitted and agreed to be bound by the 5 year non-compete contained within that employment agreement. As 'reasonableness' is a critical component of a non-compete's analysis, Appellants submit that 1) his unqualified agreement that he was bound by the terms; and 2) the fact that he received $500,000.00 at the closing table in selling his business; these facts easily allow inferences or conclusions to satisfy the reasonableness test for purposes of surviving summary judgment. There is no South Carolina law, and none cited in the Order, that expressly outlaws 5 year non-competes, and thus summary judgment should have been denied for the issue to carry over to the fact finder at a full trial on the merits.

Secondly, the Employment Agreement contains important provisions requiring the reversal of the lower court. First, section 11 ("No Strict Construction") states "The language used in this Agreement shall be deemed to be the language chosen by the parties hereto to express their mutual intent, and no rule of strict construction shall be applied against any party." (R. p. 164). By this language, there is complete mutuality of intent in the language. That is a very different situation from an employee who must sign a non-negotiable non-compete as a condition of employment. The inclusion of this term leads to the following: 1) the indisputable fact that the parties intended all of the language and the terms in the Employment Agreement; 2) a strong inference that "No Strict Construction" was included for the purposes of eliminating the normal "strict construction" applied against employers. In any event, any conclusions, ambiguities, or reasonable inferences must be resolved in Appellants' favor.

Section 10 of the agreement, "Severability," specifically provides the court with authority to "reform" the restrictive covenants if it deems necessary to make them legally enforceable. (R. p. 164). Therefore, even if the court deemed part of the non-compete unreasonable, it should have reformed rather than invalidated it. Therefore, summary judgment must be reversed.

Section 8, "Survival," states that the non-compete and its terms shall survive and continue in full force and effect notwithstanding any termination of Employment. (R. p. 163). Read in connection with Section 8, Section 6 states that the non-compete applies as long as the employee is employed by the Company. (R. p. 163). Keel was employed by CIF until May 31, 2013.

Also, Mr. Maides affidavit, exhibit 4, is a letter from Ideal Business Solutions to Mr. Keel stating his new compensation terms of employment upon his return in 2009. The letter specifically reads, "This agreement refers to an additional non-compete previously signed." (R. p. 357). From this language, a reasonable inference or conclusion would be that the non-compete was incorporated into Keel's employment throughout, that the non-compete would be in effect and incorporated into the terms stated in that letter. The inferences and conclusions reasonably drawn, particularly when combined with the other sections of the agreement noted above, when resolved in Appellants' favor, require a reversal of the lower court's grant of summary judgment.

5. The lower court erred in ruling that the Asset Purchase Agreement's limitation on claims barred Appellants' claims because the APA limitations applied only to representations and warranties made within the APA itself.

The lower court held that Article VIII of the APA barred any claim of CIF against Seller or Shareholder (including Keel) of any sort unless such claim was brought within 1 year from July 2008. This holding was error upon a plain reading of the APA.

Article VIII (8.4a) provides two categories of claims that it states are subject to a one-year time period following the closing: 1) a covenant or obligation to be performed or complied with prior to the Closing Date; and 2) a representation or warranty.... (See SJ Order p. 8, or APA p. 15) (R. p. 155). As to (1), that term clearly applies only to claims related to things to be performed before the closing date. Appellants have not alleged any obligations before the Closing Date were violated, so that section has no application here. As to (2), it refers to "representation or warranty." Representations or warranties are a specific section in the APA – Article IV (R. pp. 147-152). Appellants also are not suing on any of those representations or warranties. Appellants actions relate to the non-compete

in section VII and common law claims arising out of conduct of Keel occurring well after the execution of the APA and other actionable conduct occurring years after (in 2013). Thus the limitations in Article VIII are inapplicable to this case, and summary judgment must be reversed.

6. The lower court erred in granting summary judgment on the basis of expiration of the statute of limitations because Maides' testimony clearly reflects discovery of injuries in 2013, giving rise to each and every cause of action, and because his conflicting testimony from Respondents makes the issue one for the fact finder at trial.

"Under South Carolina law, the burden of establishing the bar of the statute of limitations rests upon the one interposing it, and where the testimony is conflicting upon the question, it becomes an issue for the jury to decide." Little v. Brown & Williamson Tobacco Corp., 243 F.Supp.2d 480 (D.C.S.C. 2001); see also Hemingway v. Shull, 286 F.Supp. 243 (D.C.S.C. 1968) (conflicting testimony presents a jury question). If the evidence as a whole is susceptible to more than one reasonable inference, a jury issue [or fact finder issue] is created. See Claytor v. General Motors Corporation, 277 S.C. 259, 262, 286 S.E.2d 129, 130 (1982) (applying the same standard of review for summary judgment to an appeal from a directed verdict motion).

Dabney Maides' affidavits and exhibits repeatedly evidence Keel's injurious conduct from May 21, 2013 moving forward, breaching loyalties by contracting with other parties, breaching solicitation covenants and competition by engaging in a competing business and by taking CIF's installers, and by continuing an ongoing competing business, with every new contract, every theft of customer or subcontractor constituting a new injury and new cause of action. (Maides' affidavits May 14, 2014 and October 30, 2015, and Exhibits 1,2,3, and 5 to October affidavit) (R. pp. 313-358).

Keel worked for Appellants until May 2013. Maides' affidavits clearly state 1) he learned of competition only after this lawsuit began, 2) Tami Keel told Maides' of Keel's intent from the beginning after this lawsuit began, and 3) the injurious actions complained of relate to breaches of loyalty and competition that occurred in 2013 before and after Keel left CIF's employ, in violation of the APA non-compete and the employment agreement non-compete.

Furthermore, the record contains numerous references to specific discoveries made by Appellant in the spring and summer of 2013 and during the pendency of this lawsuit (see paragraphs 5-16 of Maides' Oct. 30, 2015 affidavit, and paragraphs 1-7 of Maides' affidavit of May 14, 2014) (R. pp. 313-314, 316-317). These discoveries relate to all of the claims in this action. By way of example, it cannot be disputed that Keel bid upon and obtained a contract for Bavarian Pretzel Works while he was employed by Appellants – in May 2013. Therefore, no statute of limitations could have begun to run for such breach or breaches until the conduct occurred giving rise to the cause of action, and the record reflects these instances of injurious conduct occurred in 2013, as did all discoveries of injury. See Little, at 486. The lower court therefore erred in barring the Appellants' claims, in their entirety, and summary judgment must be reversed.

CONCLUSION

For all of the foregoing reasons, the lower court's grant of summary judgment must be reversed and the case remanded to the circuit court for further proceedings.

August 26, 2016

William R. McKibbon III (S.C. Bar No. 68454)
601 E. McBee Ave, Ste. 204
Greenville, SC 29601
864.235.0071, 864.235.0072 (f)
will@legalcarolina.com
Attorney for Appellants

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Judge

RECEIVED
AUG 29 2016
SC Court of Appeals

Case No. 2016-000584

CJR Resources, Inc. f/k/a Ron's Building Materials, Inc.....Respondent,

v.

Commercial & Industrial Floors, Inc., and Dabney Maides.....Appellants,

v.

Christopher M. Keel ..... Respondent.

CERTIFICATION

I hereby certify, pursuant to Rule 210(g), South Carolina Appellate Court Rules, that the Final Brief of Appellants complies with Rule 211(b).

August 26, 2016

William R. McKibbon III
SC Bar No. 68454
601 E. McBee Ave, Ste. 204
Greenville, SC 29601
864.235.0071, 864.235.0072 (f)
will@legalcarolina.com
Attorney for Appellants