

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM UNION COUNTY
Court of Common Pleas
William A. McKinnon, Circuit Court Judge

Civil Action No. 2019-CP-44-00054

Dwayne Thompson, Respondent,

v.

LG Chem, Ltd.; LG Chem America, Inc.; and Rolling Fog
Vapor Company, LLC..... Defendants,

Of which LG Chem, Ltd. and LG Chem America, Inc., are
the..... Petitioners.

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

C. Mitchell Brown
Rachel Atkin Hedley
A. Mattison Bogan

NELSON MULLINS RILEY & SCARBOROUGH LLP
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, SC 29201
(803) 799-2000

Attorneys for LG Chem Ltd. and LG Chem America, Inc.

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INTRODUCTION

Petitioners LG Chem, Ltd. (“LG Chem”) and LG Chem America, Inc. (“LGCAI”) (collectively, “Petitioners”) ask this Court to grant certiorari to review the Court of Appeals’ order dismissing their appeal. The circuit court judge permitted this litigation to go forward against them despite the absence of suit-related minimum contacts with South Carolina necessary to support the exercise of personal jurisdiction when an earlier circuit court judge found that minimum contacts had not been shown. This is precisely the type of case where review is needed.

Of importance, Respondent does not disagree that the order at issue involves a substantial right (due process). Respondent also recognizes that South Carolina courts have – and should – allow interlocutory appeals in certain circumstances – including in cases where the rights at issue are constitutionally derived. And while arguing that a blanket rule allowing appealability should not be adopted, Petitioners make no attempt to support their assertion that appeal is not warranted in this case. It is.

Following South Carolina precedent allowing immediate appeal under S.C. Code Ann. § 14-3-330 in analogous situations involving substantial rights, the Court should find that the trial court’s order is immediately appealable by modifying *Mid-State Distributors v. Century Importers*, 310 S.C. 330, 426 S.E.2d 777 (1993), a case that does not even address the precise issue in the case before this Court. North Carolina has long allowed immediate appeals in cases where the sufficiency of minimum contacts is at issue, with no resulting catastrophic disruption and waste of judicial resources as Petitioners forewarn, and South Carolina courts should do so as well.

Based on the significant issues in this case, along with the facts and law cited in the Petition and this Reply, the Court should grant the Petition and modify *Mid-State* to review the Court of

Appeals' order dismissing this appeal and hold that an immediate appeal under the limited exception that Petitioners have requested is permissible.

ARGUMENT

I. Respondent does not contest that an order such as the one at issue in this case affects a “substantial right.”

South Carolina Code § 14-3-330(2) provides that “[a]n order affecting a substantial right” is immediately appealable if it “in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action.”

Here, the constitutional guarantee of due process is implicated when the court finds a nonresident defendant has sufficient minimum contacts and denies a motion to dismiss for lack of personal jurisdiction on that basis. Respondent does not argue otherwise. To the contrary, Respondent recognizes that “an order denying a Rule 12(b)(2) motion to dismiss arguably does affect a substantial due process right” (Resp’t’s Return to Pet. For Writ of Cert. at 2.)

II. Respondent agrees that some immediate appeals are allowed on a case-by-case basis under § 14-3-330.

Respondent agrees that S.C. Code § 14-3-330 permits immediate appeal of some interlocutory orders “on a very limited, case-by-case basis.” (Resp’t’s Return, at 5.) This case involves one of those interlocutory orders that requires immediate appeal.

Respondent focuses on the availability of eventual appeal after trial as weighing against appealability here. (Resp’t’s Return to Pet. For Writ of Cert. at 2.) But Respondent concedes that South Carolina courts have allowed immediate appealability of interlocutory orders under § 14-3-330(2) in cases that affect a substantial right, even if an appeal may later be taken. In fact, Respondent cites to some of those cases. (*See* Resp’t’s Return at 2.) Notably, Respondent

acknowledges that this Court has permitted interlocutory orders when “rights that are constitutionally derived” are at issue – which is the case here.

For example, in *Hagood v. Sommerville*, 362 S.C. 191, 607 S.E.2d 707 (2005), cited by Respondent, the South Carolina Supreme Court found that an order disqualifying a party’s counsel of their choice was an immediately appealable order. The respondent there argued any error could be corrected on appeal after final judgment. Yet the Supreme Court, looking to the points made by other courts concerning the appealability of such an order, held that the order affected a substantial right and should be immediately appealable, even though appeal after final judgment would be available. *Id.* at 197, 607 S.E.2d at 710.

Other South Carolina appellate cases also have allowed immediate appealability for orders that affected substantial rights. *See, e.g., Bateman v. Rouse*, 358 S.C. 667, 675, 596 S.E.2d 386, 390 (Ct. App. 2004) (finding that trial court erred by not allowing immediate appeal of an order denying a request for jury trial); *McLaughlin v. Strickland*, 279 S.C. 513, 516, 309 S.E.2d 787, 789–90 (Ct. App. 1983) (allowing immediate appeal of order denying father leave to withdraw his consent to adoption); *see also Keller v. Keller*, 296 S.C. 411, 373 S.E.2d 692 (Ct. App. 1988) (pre-*Midstate* case, which was not specifically overturned, permitting interlocutory appeal from an order denying a motion to dismiss for lack of personal jurisdiction where the sufficiency of minimum contacts was at issue).

Here—because of the substantial Due Process rights involved in requiring nonresident defendants to participate in the defense of a lawsuit when constitutional minimum contacts are lacking—this Court should make the same limited exception to the general rule barring immediate appeals of interlocutory orders.

III. Respondent ignores the many North Carolina cases allowing immediate appeal of orders allowing the exercise of personal jurisdiction.

A. As it has frequently done in the past, this Court should look to North Carolina cases on immediate appealability.

Respondent ignores Petitioners’ discussion of this Court’s frequent citations to North Carolina cases when addressing whether an order is immediately appealable. As discussed more fully in LG Chem and LGCAI’s petition, North Carolina courts have found that interlocutory orders may be immediately appealable under a statute similar to South Carolina’s,¹ which permits interlocutory appeals of orders “affecting a substantial right,” such as personal jurisdiction. *See Hardee ex rel. White v. Lowe’s Cos., Inc.*, 640 S.E.2d 445, at *2 (N.C. Ct. App. 2007) (table) (“[A] substantial right exists where the interlocutory order denying a motion to dismiss for lack of personal jurisdiction ‘raises questions concerning due process and minimum contacts.’ “); *Love v. Moore*, 305 N.C. 575, 581, 291 S.E.2d 141, 146 (1982) (finding that allowing immediate appeal only for “minimum contacts” jurisdictional question “ensures that parties who have less than ‘minimum contacts’ in this state will never be forced to trial against their wishes” and thus protects foreign defendants’ constitutional rights and promotes judicial economy). *Cf. Goldston v. American Motors Corp.*, 392 S.E.2d 735, 737–38 (N.C. 1990) (finding that interlocutory order

¹ *See* N.C. Gen. Stat. Ann. § 7A-27(b)(3). Although the North Carolina statutory language has an additional provision permitting “immediate appeal from an adverse ruling as to the jurisdiction of the court over the person or property of the defendant,” N.C. Gen. Stat. § 1-277(b), the North Carolina courts have interpreted this right to be *limited* to where the appeal raises questions concerning due process and minimum contacts, because those are the questions *affecting a substantial right*. *See* Petition at 12–13 for discussion of those cases.

disqualifying attorney involved a substantial right and was immediately appealable) (cited in *Hagood v. Sommerville*, 362 S.C. 191, 607 S.E.2d 707 (2005)).

B. North Carolina cases show the fallacy of Respondent's fears of disruption, delay, and flooding the appellate courts with appeals of denial of Rule 12(b)(2) motions.

Respondents devote significant attention to an imagined disruption that would follow if the Court were to allow interlocutory appeals of orders allowing the exercise of personal jurisdiction over nonresident defendants despite the absence of minimum contacts with South Carolina. However, North Carolina courts have been allowing immediate appeal of these cases since at least the early 1980s and have not been plagued with the many adverse effects that Respondent predicts, such as flooding the appellate courts with repetitive submission of settled issues of law and fact; delaying progress of the cases for several years; forcing trial courts to spend extra hours refamiliarizing themselves with the case and starting anew (which should not be an issue in South Carolina state courts, where most cases are not assigned to particular judges for the duration of a case); and otherwise wasting judicial resources.

Although Respondent glosses over the harm to defendants in cases such as the one before this Court, denying immediate appealability of orders such as the one at issue here causes immediate and long-term damage by forcing a defendant to litigate a case through trial when constitutional minimum contacts – an inherent limitation on the power of courts – are absent. In addition to violating the defendant's constitutional right, denying immediate appeal for such cases creates a dearth of precedent to guide lower courts on important constitutional issues.

IV. The Court of Appeals and Respondent principally relied on precedent that did not address the issue in this case.

Respondent urges this Court to follow *Mid-State Distributors, Inc. v. Century Importers, Inc.*, 310 S.C. 330, 336, 426 S.E.2d 777, 781 (1993), without addressing the key fact that *Mid-*

State focused only on the issue of whether the subject order was sufficiently final and did not address the immediate appealability of an order that oversteps the boundaries of a court's power by subjecting a defendant to the expense and burden of litigation when constitutional minimum contacts are lacking. Based on this critical distinction alone, this Court should address and modify the rule in *Mid-State* to find a narrow exception holding that an order denying a motion to dismiss for lack of personal jurisdiction is immediately appealable when the issue is the sufficiency of constitutional minimum contacts.

V. Respondent did not challenge the remaining issues in LG Chem and LGCAI's Petition.

Respondents have not addressed the substance of Petitioners' arguments as to why the circuit court's orders should be reversed, nor has Respondent addressed the additional issue raised that the second circuit court judge reversed the first circuit court judge's decision that a sufficient showing of constitutional minimum contacts had not been made. For all the reasons stated in their Petition, Petitioners respectfully submit that review is necessary and appropriate here to correct an error of constitutional magnitude and to provide guidance to the lower courts of this state to clarify that *Sumatra* does not support finding a foreign defendant subject to personal jurisdiction in South Carolina when it did not form any suit-related contacts with the state.

CONCLUSION

This Court should grant the petition for writ of certiorari to review the order of the Court of Appeals dismissing this appeal. It should then modify *Mid-State Distributors* and hold that an order permitting a suit to go forward despite the absence of constitutional minimum contacts is immediately appealable.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: /s/ C. Mitchell Brown

C. Mitchell Brown

SC Bar No. 012872

E-Mail: mitch.brown@nelsonmullins.com

Rachel Atkin Hedley

SC Bar No. 16941

E-Mail: rachel.hedley@nelsonmullins.com

A. Mattison Bogan

SC Bar No. 72629

E-Mail: matt.bogan@nelsonmullins.com

1320 Main Street / 17th Floor

Post Office Box 11070 (29211-1070)

Columbia, SC 29201

(803) 799-2000

*Attorneys for Petitioners LG Chem, Ltd. and LG Chem
America, Inc.*

Columbia, SC
August 8, 2022