THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Roger M. Young, Sr., Circuit Court Judge

Appellate Case No. 2022-000346

Reid Fleming,……..…….……Appellant,

v.

LG Chem, Ltd.,……..…….……...Respondent.

INITIAL REPLY BRIEF OF APPELLANT

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Appellant Reid Fleming submits this Reply to the brief of Respondent LG Chem, Ltd. This appeal is about LG's attempt to avoid civil liability for its defective lithium-ion batteries under the guise of specific jurisdiction. LG's entire brief is based on its argument that, because it allegedly did not manufacture a lithium-ion battery intended for use as a standalone consumer product, it is not subject to specific jurisdiction for any case brought by plaintiffs injured while using a lithium-ion battery as a standalone consumer product. Its argument is a merits defense and has no place in a jurisdictional analysis. Perhaps more importantly, (1) LG denied only that it sold a size 18650 lithium-ion battery as a standalone consumer product but never denied that it imported or sold 18650 lithium-ion batteries in South Carolina. (Aff. & Reply Aff. of Lee); and (2) LG cites to no law that considers a consumer's use of a product as part of the jurisdictional analysis. The lower court's acceptance and reliance on LG's incorrect premise is a legal error that warrants reversal.

FACTS

LG's facts focus almost exclusively on whether it manufactured, distributed, or sold a lithium-ion battery for use as a standalone consumer product but does not deny that it does business in South Carolina, sells lithium-ion batteries in South Carolina, maintains minimum contacts with South Carolina, or ever sold a size 18650 lithium-ion battery in South Carolina. Fleming replies to two of LG's specific factual allegations.

LG attacks Fleming's citation to a deposition transcript showing that LG supplied a size 18650 battery for an e-cigarette product. (Br. of Resp't pp. 7-8; Mot. to recon. pp. 3-4). LG argues that it only intended for their incorporation to circuitry inaccessible to a consumer. (Br. of Resp't p. 7). In its two supporting affidavits, LG never denies that it knew consumers used its batteries as consumer standalone products. (Aff. & Reply Aff. of Lee). Given the length and dearth of litigation involving exploding LG batteries used as standalone consumer products, LG

must at some point stop pretending it did not know that consumers used its lithium-ion batteries as standalone products. *See Dilworth v. LG Chem, Ltd.*, 2022 Miss. LEXIS 254, 18 (Sup. Ct. Miss. 2022) ("[A]t some point LG Chem has to stop acting surprised.").

LG accuses Fleming of creating a "misimpression" that it imported 984 lithium-ion battery shipments into South Carolina. (Br. of Resp't p. 5). There is no misimpression. Fleming's memorandum to the lower court states that import data "shows 984 shipments through the Port of Charleston, with 818 of those shipments co-signed by LGCAI." (Pl. Memo. in Opp. to Mot. to Dismiss p. 6). Fleming's brief to this Court likewise states that Judge Jefferson found evidence "that LG Chem America imported 984 shipments of LG's products." (App. Br. p. 5). That statistic comes directly from an unappealed order denying LG Chem's motion to dismiss for lack of specific jurisdiction in *Williamson v. Pirates Cove Vapor Lounge, LLC, et. al*, 2019-CP-07-02270 (June 21, 2021). In that order, Judge Deadra Jefferson wrote "Plaintiff alleges that Defendant LG Chem America, Inc., a wholly-owned subsidiary of Defendant LGC[hem], aided in importing 984 shipments of Defendant LGC[hem]'s products," and cited to an affidavit submitted by the plaintiff. (Memo. in Opp. to Mot. to Dismiss, Exh. 7 p. 7 n.5). Fleming did not make or create a misimpression about the shipments.

ARGUMENT

In its response, LG cites to no law from the United States Supreme Court, the Fourth Circuit, South Carolina District Court, or South Carolina state courts that hold specific jurisdiction in a product liability action exists only where the specific product model size is sold in the forum state by the manufacturer **and** used in the exact manner intended by the manufacturer. LG's unfounded argument on this point is the basis of the lower court's holding. Because the law does not support this premise and the facts alleged and presented below do support specific jurisdiction under the correct legal analysis, this Court should reverse.

LG states that the "crux" of this case is whether the lower court correctly held that Fleming's jurisdictional allegations are "vague and conclusory." (Br. of Resp't p. 9). The "crux" of this appeal is the lower court's holding that specific jurisdiction is based on the defendant-manufacturer's intended use of a product. If the Court finds this premise legally incorrect—which it should—then the lower court's entire decision must be reversed.

I. FLEMING ESTABLISHED A PRIMA FACIE SHOWING OF SPECIFIC JURISDICTION IN THE COMPLAINT.

The lower court's holding on Fleming's prima facie complaint allegations is based on the incorrect premise that the defendant-manufacturer's intended use for a product is part of the specific jurisdiction analysis. It held the jurisdictional allegations insufficient because of an absence of allegations about a battery "that was re-sold as a standalone consumer battery." (Order p. 4). As explained in Fleming's initial brief, the falsity of that legal premise is grounds for reversing the lower court's entire decision. (Br. of App. pp. 14-17).

In its response, LG does not cite to law that states the defendant-manufacturer's intended use for a product is part of the specific jurisdiction analysis. (Br. of Resp't pp. 13-15). Instead, it cites to case law about the conclusory nature of jurisdictional allegations. *Id.* None of the cases LG cites discuss the defendant-manufacturer's intended use of a product. *Power Prods. & Servs. Co. v. Kozma*, 379 S.C. 423, 665 S.E.2d 660 (Ct. App. 2008) (addressing misappropriation of trade secrets and where tortious conduct occurred); *Sonoco Prods. Co. v. ACE INA Ins.*, 877 F. Supp. 2d 398 (D.S.C. 2012) (addressing failure to insure plaintiffs where defendant was a Canadian corporation that wrote a Canadian insurance policy);[1] *Sullivan v. Hawker Beechcraft Corp.*, 397 S.C. 143, 723 S.E.2d 835 (Ct. App. 2012) (addressing a plane crash and jurisdictional

[1] *Sonoco* actually supports Fleming's arguments on appeal. The District Court stated that "the jurisdictionally significant relationship" is "the extent to which [the defendant] availed itself of the privilege of doing business in South Carolina." *Id.* at 406-07. It made no mention of any consideration of the defendant's intent for a consumer's use of its products but, instead, rejected that premise when it stated that the focus was not on "the activities of" the plaintiff. *Id.* at 407.

allegations that "repeat[ed]" the language of the long-arm statute).

LG incorrectly argues that Fleming did not make allegations about the relatedness of his claims to LG's South Carolina contacts. (Br. of Resp't p. 15). To the contrary, Fleming alleged that LG serves a market in South Carolina for its lithium-ion batteries and one malfunctioned here and injured Fleming. (Cmplt. pp. 3-4). Fleming alleged that LG knew, before his injury, that consumers bought and used its lithium-ion batteries in vaping and e-cigarette devices and did nothing to stop those sales in South Carolina. (Cmplt. p. 3). Fleming alleged that the LG battery he bought is a well-known battery in the vaping community and that LG knew or anticipated that a consumer would use its battery in a vaping device. (Cmplt. p. 5). These allegations are more than sufficient as prima facie evidence of the relatedness requirement, and the lower court erred in finding to the contrary.

Finally, LG's arguments as to evidence outside of the pleadings and jurisdictional discovery are not at issue on appeal. (Br. of Resp't pp. 11-13, 20-21). Fleming did not argue that the lower court may not consider matters outside of the pleadings but, instead, argued its analysis of the evidence presented is legally flawed.

Fleming presented a prima facie showing of specific jurisdiction in the complaint, and this Court should reverse the lower court's holding to the contrary.

II. THE LOWER COURT INCORRECTLY FOCUSED ON WHETHER LG SERVED A CONSUMER STANDALONE MARKET FOR A SIZE 18650 BATTERY AND, REGARDLESS, THE EVIDENCE OF LG'S MARKET ACTIVITIES FOR THE SIZE 18650 LITHIUM-ION BATTERIES IS CONTESTED.

LG's argument on this issue misses the mark by continuing to inject as part of the due process analysis whether it intended use of lithium-ion batteries as a standalone consumer product. (Br. of Resp't p. 15). This consideration is wholly irrelevant. Regardless, LG's individual arguments also fail on the merits.

LG focuses largely on the evidence of its imports to South Carolina. It disputes the substance of the evidence and whether it is admissible. As to substance, the evidence shows that LG regularly imports lithium-ion batteries into the port of Charleston in South Carolina. (Exh. 4 to Moore Aff.; Appendices to Bonenfant Declaration). Fleming bought the LG 18650 lithium-ion battery that exploded and injured him from a South Carolina retailer. Whether that particular battery came through the port or got to South Carolina through other means is not dispositive of specific jurisdiction. *See State v. NV Sumatra Tobacco Trading, Co.*, 379 S.C. 81, 666 S.E.2d 218 (2008) (finding specific jurisdiction where foreign manufacturer alleged it sold only to an independent reseller and did not actually ship or sell the product in the United States). The point is that LG ships lithium-ion batteries into South Carolina—purposefully availing itself of the privilege of conducting business in this State—and should expect to be haled into court in South Carolina for injuries caused by its batteries. Just recently, the United States Supreme Court "reaffirmed" that "when a corporation has continuously and deliberately exploited a State's market, it must reasonably anticipate being haled into that State's courts to defend actions based on products causing injury there." *Ford Motor Co. v. Mont. Eighth Judicial Dist. Court*, 141 S. Ct. 1017, 1027 (2021) (internal citation and alteration marks omitted). Finally, it is significant that LG fails to respond to Fleming's point that whether the battery got to Fleming through LG's efforts or a third party has nothing to do with specific jurisdiction but, rather, is the subject of a claim between LG and the third party. (Br. of App. pp. 15-16). LG's silence on this point is telling of the weakness of its argument.

As to admissibility, LG cites to no law requiring that evidence of specific jurisdiction is admissible at trial as part of the due process analysis.[2] Hearsay, by definition, applies to a statement "other than one made by the declarant **while testifying at the trial or hearing**, offered in evidence to prove the truth of the matter asserted." Rule 801(c), SCRE (emphasis added). The import data is not offered at trial. Regardless, the evidence is properly authenticated by affidavit and is a nonhearsay record of regularly conducted activity and a public record and report under Rules 803(6) & (8), SCRE.

LG argues that the lower court should not have considered the import data because Fleming submitted it to the lower court in a PDF format prior to the hearing but in a "native excel format" after the lower court issued its order. (Br. of Resp't p. 16). This argument is disingenuous at best. LG does not argue there is any difference in the evidence but only that it is in two formats. The native excel files enabled the lower court to search for itself, and there is nothing improper about providing the court with a more convenient evidentiary format.

LG accuses Fleming of taking "out of context" the lower court's ruling that Fleming must show LG Chem America's South Carolina contacts could be imputed to LG for those contacts to matter in this case. (Br. of Resp't p. 18). Nothing is taken out of context. Rather, the lower court's order is broadly worded—"Plaintiff did not show that non-party LGC[hem]A[merica]I's contacts could be imputed to LG." (Order p. 5). Many of the shipments of LG's batteries to the Port of Charleston are to LG Chem America as Consignee, and Fleming wants to ensure on

[2] LG cites to *Yarborough & Co. v. Schoolfield Furniture Indus., Inc.*, 275 S.C. 151, 268 S.E.2d 42 (1980), for the proposition that the lower court would have erred if it relied on Fleming's exhibits of import data. (Br. of Resp't p. 17). t p. 17). *Yarborough* does not support this position. In *Yarborough*, the Court held that two affidavits prepared by the respondent's counsel in support of personal jurisdiction were "conclusory" and based on hearsay. *Id.* at 153, 268 S.E.2d at 43. It does not state that evidence of specific jurisdiction must be admissible at trial or that data which is properly authenticated and not hearsay is improper evidence of specific jurisdiction.

appeal that those contacts are not seen as disregarded by the lower court. (Br. of App. p. 17).

Finally, LG argues that the lower court correctly ignored and ruled contrary to five other circuit court decisions that found specific jurisdiction existed over LG in cases involving exploding lithium-ion batteries. (Br. of Resp't pp. 18-19). LG argues that it proved the other circuit courts were wrong in those decisions. *Id.* It is neither appropriate nor procedurally proper for LG or the lower court to decide that other circuit court judges erred in their rulings. LG cannot reargue an adverse decision in another case. Instead, the decisions of other circuit court judges on the same issue are relevant, persuasive evidence that the lower court unnecessarily discounted, especially where the legal argument is the same and similar facts support the rulings.

LG never denied that it imported or sold 18650 lithium-ion batteries in South Carolina. (Aff. & Reply Aff. of Lee). It only denied that it sold them in South Carolina (or anywhere) as a standalone consumer product. *Id.* The lower court's rulings on alleged "uncontroverted" evidence are unsupported by the evidence and are legal error, and this Court should reverse.

III. LG'S IMPORTS AND SALES OF LITHIUM-ION BATTERIES IN SOUTH CAROLINA SUPPORT THE EXERCISE OF SPECIFIC JURISDICTION IN THIS CASE.

LG's argument on this issue is that, for specific jurisdiction to exist in this case, it must have intended to and actually sold the size 18650 lithium-ion battery in South Carolina as a standalone consumer product. (Br. of Resp't pp. 22-29). Despite Fleming's arguments to the contrary, LG still cannot cite to a single case that requires the defendant to sell or distribute to an in-state retailer the exact size product at issue for its intended purpose. (Br. of App. p. 17). LG's four arguments on this issue are a misstatement of the law and evidence in this case.

First, LG's South Carolina contacts are the basis of the relatedness requirement. LG cites to *Ford Motor Co. v. Mont. Eighth Judicial Dist. Court*, 141 S. Ct. 1017 (2021), and *Cockrell v. Hillerich & Bradsby Co.*, 363 S.C. 485, 611 S.E.2d 505 (2005), in support of its

argument that specific jurisdiction does not exist because alleged "unauthorized third parties" and not LG supplied South Carolina consumers with its lithium-ion batteries. (Br. of Resp't pp. 22-24). Neither case supports LG's argument.

In *Ford*, the plaintiffs were residents of the forum states and suffered injury in the forum states. 141 S. Ct. at 1023. The Ford vehicles at issue were not designed, manufactured, or first sold in the forum states, but Ford did sell the same models in the forums. *Id.* at 1022-24. The Supreme Court rejected Ford's argument that the relatedness requirement is satisfied "only if the defendant's forum conduct gave rise to the plaintiff's claims." *Id.* at 1026 (internal quotation and alteration marks omitted). It held the specific jurisdiction inquiry "**never**" required "proof that the plaintiff's claim came about because of the defendant's in-state conduct." *Id.* at 1026 (emphasis added). Instead, specific jurisdiction can attach "when a company like Ford serves a market for a product in the forum State and the product malfunctions there." *Id.* *Ford* did not hold that a manufacturer's suit-related forum contacts must include direct evidence that it sold the specific size product in the state.

LG argues that *Ford* means, for specific jurisdiction to exist, it must directly authorize or license a dealer to sell lithium-ion batteries to consumers for use as standalone, replaceable batteries. (Br. of Resp't p. 23). This argument misstates *Ford* and distorts LG's knowledge and conduct. Ford argued jurisdiction existed "in only the States of first sale, manufacture, and design." 141 S. Ct. at 1026. The Supreme Court rejected that argument, holding "[a] different State's courts may yet have jurisdiction because of another activity or occurrence involving the defendant that takes place in the State." *Id.* (internal quotation and alteration marks omitted). Jurisdiction does not depend "on the exact reasons for an individual plaintiff's purchase." *Id.* at 1029. Therefore, that Fleming bought and used the size 18650 lithium-ion battery for consumer use is not relevant to the specific jurisdiction due process analysis. Where, as here, a defendant

company "serves a market for a product in a State and that product causes injury in the State to one of its residents, the State court's may entertain the resulting suit." *Ford*, 141 S. Ct. at 1022.

As to LG's knowledge and conduct, Fleming alleged that LG knew since at least 2016 that consumers used its lithium-ion batteries as standalone products and did nothing to stop those sales including, "specifically, in South Carolina." (Cmplt. p. 3). As one court has pointed out, "LG Chem deliberately ships millions of batteries to the United States market every year, reaping millions of dollars in profit. . . . at some point LG Chem has to stop acting surprised." *Dilworth v. LG Chem, Ltd.*, 2022 Miss. LEXIS 254, *18 (Sup. Ct. Miss. 2022).

Cockrell v. Hillerich & Bradsby Co., 363 S.C. 485, 611 S.E.2d 505 (2005), also does not support LG's position but, rather, supports reversal of the lower court's decision. The respondent-defendants in *Cockrell* were a research center and engineering firm that tested and certified bats that another company manufactured and sold. *Id.* at 489-90, 611 S.E.2d at 507. The Court of Appeals held specific jurisdiction did not exist against these out-of-state defendants because they "had no control over the distribution of bats and did not profit from their sale." *Id.* at 494, 611 S.E.2d at 510. In this case, LG has control over the distribution of its own products and profits from their sale all over the United States, including in South Carolina.

LG's attempt to avoid specific jurisdiction by pointing to third-party conduct is unsupported by case law or the facts of this case.

Second, the lower court erred by focusing on the specific size 18650 lithium-ion battery. Fleming maintains there is evidence that LG sold size 18650 lithium-ion batteries in South Carolina but, regardless, whether the defendant sold the particular product in the forum state is not a necessary or sole inquiry for specific jurisdiction.

LG again cites to *Ford* for the proposition that a "manufacturer's forum contacts **must** relate to the **specific** product at issue in the suit." (Br. of Resp't p. 24) (emphasis added). *Ford*

says no such thing. In *Ford*, the Supreme Court noted that Ford advertised and sold the same car **models** as those at issue in the case. 141 S. Ct. at 1028. It contrasted (but did not rule on) that case "in which Ford marketed the models in **only a different State** or region." *Id.* (emphasis added). The facts in this case are not that LG only marketed or sold size 18650 lithium-ion batteries in a different state. To the contrary, LG does not deny that it ever sold a size 18650 lithium-ion battery in South Carolina. (Aff. & Reply Aff. of Lee). Rather, the evidence undoubtedly shows that LG sold **model** lithium-ion batteries in South Carolina, and there is a reasonable inference that it sold **size** 18650 batteries because there are hundreds of shipments of lithium-ion batteries into the State without an identifying size, and Fleming (and many other plaintiffs suing LG in South Carolina) bought the size 18650 battery in South Carolina.

LG attacks Fleming's citation to *LG Chem, Ltd. v. Lemmerman*, 863 S.E.2d 514, 523 (Ga. App. 2021), but its attack is unfounded. (Br. of Resp't pp. 24-25). In *Lemmerman*, the plaintiff alleged LG sold the size 18650 lithium-ion battery in Georgia, and LG did not deny that it ever sold size 18650 batteries in Georgia, it only denied that it sold them for use a consumer standalone product. 863 S.E.2d at 173-74. Here, LG submitted affidavits denying many contacts with South Carolina but has never denied that it sold size 18650 lithium-ion batteries in South Carolina. (Aff. & Reply Aff. of Lee). *Lemmerman* directly supports reversal of the lower court's decision.

Finally, LG cites to decisions of courts in other states that found specific jurisdiction did not exist over LG. (Br. of Resp't pp. 25-26). As hundreds of cases involving exploding LG batteries are pending across the United States, both parties can cite to cases decided in their

respective favor.[3] This court is not bound by any of them but may merely find a case persuasive if it so chooses. Further, specific jurisdiction decisions are fact-intensive. For example, LG cites to *State ex rel. LG Chem, Ltd. v. McLaughlin*, 599 S.W.3d 899 (Miss. 2020), in which "the sale of LG Chem's batteries into Missouri by an independent third party is the **only contact** between LG Chem and Missouri that [the plaintiff] allege[d]." *Id.* at 904 (emphasis added). In this case, Fleming presented evidence of LG's repeated shipments of its products, including lithium-ion batteries, into the port of Charleston.[4]

Third, LG's in-state activities are related to Fleming's action. LG argues that unrelated forum activities "do not count." (Br. of Resp't pp. 26-28). It does not specify which prong of the due process analysis it is arguing about. Regardless, the Court should reject LG's attempt to discount its hundreds of shipments of lithium-ion batteries into South Carolina. No case law states that, for specific jurisdiction to exist, the defendant-manufacturer must sell the exact model and size product in the forum. The United States Supreme Court most recently stated it "never framed the specific jurisdiction inquiry as always requiring proof of

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[3] *See, e.g.*, *Williams v. LG Chem, Ltd.*, 2022 WL 873366, *12 (E.D. Miss. 2022) (finding specific jurisdiction over LG for an exploding 18650 lithium-ion battery where LG stated it did not sell "directly" to consumers or an entity that sold to consumers because those statements "did not rule out LG Chem's service of a consumer market"); *Dilworth v. LG Chem, Ltd.*, 2022 Miss. LEXIS 254 (Miss. 2022) (finding specific jurisdiction over LG for an exploding 18650 lithium-ion battery used in a vaping device); *LG Chem Am., Inc. v. Morgan*, 2020 WL 7349483, *29 (Ct. App. Tex. 2020) (finding specific jurisdiction over LG for an exploding 18650 lithium-ion battery used in an e-cigarette and holding "the issue of whether LGC's batteries were used in a foreseeable manner or were misused goes to the merits of a products liability action"); *Onofrio v. LG Chem*, 2020 Conn. Super. LEXIS 1623 (Sup. Ct. Conn. 2020) (finding specific jurisdiction over LG for injuries caused by an exploding 18650 lithium-ion battery used for vaping).

[4] As another example, in *LG Chem, Ltd. v. Superior Court*, 80 Cal. App. 5th 348 (Cal. Dist. Ct. App. 2022), "the undisputed facts show LG Chem deliberately structured its transactions to prevent 18650 batteries from being used by individual California consumers," whereas, in this case, Fleming alleges that LG "has known since 2016 that individuals use" its batteries in consumer vaping devices but "has done virtually nothing to prevent its lithium ion battery products from being sold individually throughout the U.S. and, specifically, in South Carolina." (Cmplt. p. 3).

causation—*i.e.*, proof that the plaintiff's claim came about because of the defendant's in-state conduct." *Ford Motor Co. v. Mont. Eighth Judicial Dist. Court*, 141 S. Ct. 1017, 1026 (2021). The proper inquiry is "the relations among the defendant, the forum, and the litigation." *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 780 (1984).

LG misreads *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773 (2017), as holding that "extensive in-state contacts for the very product at issue" do not support specific jurisdiction "if unrelated to the litigation." (Br. of Resp't p. 26). The United States Supreme Court already rejected this argument in *Ford.* It explained:

> We found jurisdiction improper in *Bristol-Myers* because the forum State, and the defendant's activities there, lacked any connection to the plaintiffs' claims. The plaintiffs, the Court explained, were not residents of California. They had not been prescribed Plavix in California. They had not ingested Plavix in California. And they had not sustained their injuries in California. In short, the plaintiffs were engaged in forum-shopping—suing in California because it was thought plaintiff-friendly, even though their cases had no tie to the State.
>
> That is not at all true of the cases before us. Yes, Ford sold the specific products in other States, as Bristol-Myers Squibb had. But here, the plaintiffs are residents of the forum States. They used the allegedly defective products in the forum States. And they suffered injuries when those products malfunctioned in the forum States. In sum, each of the plaintiffs brought suit in the most natural State—based on an affiliation between the forum and the underlying controversy, principally, an activity or an occurrence that took place there.

Ford, 141 S. Ct. at 1031 (internal quotation, citation, and alteration marks omitted). The same analysis is true in this case. LG sold lithium-ion batteries, including size 18650, for use throughout the United States. Individual consumers, including Fleming, bought LG size 18650 batteries in South Carolina. Fleming used the size 18650 battery in South Carolina and was injured by it in South Carolina. He brought suit in the most natural State based on an affiliation between the forum and the underlying controversy, principally, an activity or an occurrence that took place there. *Ford*, 141 S. Ct. at 1031.

LG's true goal is to force plaintiffs to sue it in South Korea. As the Supreme Court of Mississippi recently held, this stretches due process protections entirely too far.

> At oral argument for this appeal, LG Chem acknowledged that its position is that it cannot be sued in any state in the United States of America over the unauthorized standalone use of its batteries in vaping devices, despite the fact that millions of those batteries (resulting in millions of dollars in profits) have inundated the United States market. This position stretches the intended function of due process protection too far. Given LG Chem's effort to serve (directly or indirectly) the market for lithium ion batteries in Mississippi, the availability for sale in Mississippi of the battery that injured Mrs. Dilworth was related to LG Chem's activities in the state and was not a random, isolated, or fortuitous occurrence. And significantly—for purposes of establishing a prima facie case sufficient to withstand summary judgment—LG Chem did not controvert the allegations of the complaint that it placed its product into the stream of commerce with the expectation that it would be sold in Mississippi.

Dilworth v. LG Chem, Ltd., 2022 Miss. LEXIS 254, *9 (Miss. 2022). So it is in this case that LG intended to and did (directly or indirectly) serve a market for lithium-ion batteries (including size 18650), Fleming bought and was injured by one such battery, and South Carolina courts have specific jurisdiction over LG for a claim for Fleming's injuries.

Fleming's action satisfies the relatedness requirement of the power prong, and the lower court's ruling on this issue is unsupported by the evidence and is legal error, and this Court should reverse.

Fourth, Fleming does not rely on third-party activities to support specific jurisdiction. LG wants to blame someone else to avoid specific jurisdiction. LG claims that it does not know how the size 18650 battery got to South Carolina. (Br. of Resp't pp. 28-29). This is irrelevant because Fleming's claims are not based on the manner in which LG's batteries were transported into South Carolina but, rather, on LG's own conduct in manufacturing and distributing defective lithium-ion batteries. The activities supporting specific jurisdiction are those of LG—that it imported hundreds of its shipments of lithium-ion batteries to South Carolina and sold its batteries in South Carolina, and knew its defective size 18650 lithium-ion

batteries were sold in South Carolina for consumer use but did nothing to stop those sales. (Cmplt. ¶¶ 10.d-.e, 28-29). Fleming seeks to hold LG liable for its conduct as a manufacturer. This is separate from an injured party's claim against the retail seller. *See Hazel v. Blitz U.S.A., Inc.*, 433 S.C. 120, 137, 857 S.E.2d 4, 13 (2021) ("A claim based on the retail seller's negligence in such an instance is a separate claim from any claim based on negligence by the manufacturer."). Any claim for improper sales of LG's products by a retailer is a claim between LG and that retailer that has no effect on whether the court has specific jurisdiction over LG for Fleming's product liability claim.

LG is the one that improperly focuses on third-party activity in the jurisdictional analysis. The crux of its argument is that it is not subject to liability for sales to consumers who used the batteries as a standalone product. This focuses on the unilateral activity of a third-party seller or purchaser rather than on LG's own contacts.

It is significant that LG fails to substantively respond to Fleming's arguments that the lower court's ruling is contrary to South Carolina strict liability law and ignores the distinction between a merits defense of product misuse and due process for specific jurisdiction.[5] (Br. of App. pp. 15-16). LG does not address product misuse **at all** and only alleges that the strict liability argument is unpreserved. (Br. of Resp't p. 28 n.6). The argument is preserved. *See Holy Loch Distribs. v. Hitchcock*, 340 S.C. 20, 24, 531 S.E.2d 282, 284 (2000) ("[T]o preserve an issue for appellate review, the issue must have been raised to and ruled upon by the trial court."). At the hearing, the lower court asked LG: "How would your client ever get sued in the United States under your theory that they don't sell the individual product to an individual but they only sell it to manufacturers who repackage it someplace and then sell it in all the other states?

[5] In addition to the authority cited in Fleming's initial brief, *see also LG Chem Am., Inc. v. Morgan*, 2020 WL 7349483, *30 (Ct. App. Tex. 2020) (stating that consideration of the merits of a claim in a specific jurisdiction analysis confuses the roles of judge and jury by equating the jurisdictional inquiry with the underlying merits).

Basically, they [LG] are immune from suit if product causes harm under your theory." (Tr. p. 15). Fleming argued at the hearing (and alleged in the complaint) that, with knowledge of consumer use of its batteries, LG has done "precious little to actually take command of their distribution chain to get their arms around why are these batteries ending up in Vape stores across the nation." (Tr. p. 29). Fleming further argued "It is not a valid basis to deny jurisdiction just because this one widget you know we don't know exactly how it got there . . . ." and "[t]hey [LG] have the ability to defend the case on the merits about what the design intent for these individual batteries were or this quote unquote black market unauthorized use if in fact that is true. That is something we can just litigate on the merits." (Tr. pp. 34, 36). The issue of a merits defense and blaming a third party was squarely raised to the lower court and is properly before this Court on appeal.

IV. THE STREAM OF COMMERCE THEORY SUPPORTS THE EXERCISE OF SPECIFIC JURISDICTION OVER LG IN THIS CASE.

Fleming establishes minimum contacts as a whole and via the stream of commerce theory. (Br. of App. pp. 20-22). The lower court erred in finding this case factually distinguishable from *State v. NV Sumatra Tobacco Trading, Co.*, 379 S.C. 81, 666 S.E.2d 218 (2008), and this Court should reverse.

LG's argument on this issue, when read carefully, is extremely telling. It continues to blame third-parties who it alleges distributed Fleming's size 18650 battery into South Carolina. (Br. of Resp't pp. 29-31). LG argues that it matters how a product arrives in a state and then represents that "it is true that . . . *any* lithium ion cell that arrived in any vape store or other retailer in South Carolina for sale **to a consumer as a standalone battery** can only have done so through the unilateral actions of third parties." (Br. of Resp't p. 30) (italics in original; bold emphasis added). The nuance is that LG does not and cannot argue that it did not distribute or

sell size 18650 lithium-ion batteries in South Carolina. It only repeats that it did not do so for **use** as a consumer standalone battery. This is relevant to every issue on appeal but, as to this issue, it is relevant because LG cites to no stream of commerce law discussing a consumer's ultimate use of a product. That is because a consumer's use is not part of the specific jurisdiction analysis under any theory, including stream of commerce.

Specific jurisdiction existed in *Sumatra* "[r]egardless of how the cigarettes arrived in South Carolina," 379 S.C. at 90, 666 S.E.2d at 223, and the same result is factually and legally warranted in this case. Where LG purposefully and regularly conducts lithium-ion battery business in South Carolina, it "should reasonably anticipate being haled into court" here. *Sumatra*, 379 S.C. at 89, 666 S.E.2d at 222. This analysis is based on LG's conduct. The lower court erred in finding the stream of commerce theory does not apply to this case, and this Court should reverse.

V. FLEMING SATISFIED THE FAIRNESS PRONG.

LG's sole substantive argument as to fairness is that it is unfair to subject LG to personal jurisdiction in South Carolina "when it played no part that brought its alleged product here." (Br. of Resp't p. 33). How a product arrived in a forum is not part of the fairness prong consideration.[6]

LG does not even address the fairness prong factors. *Cribb v. Spatholt*, 382 S.C. 490, 500, 676 S.E.2d 714, 719 (Ct. App. 2009). LG does not argue that it would be fair to make Fleming litigate in Korea.

[6] LG cites to *S. Plastics Co. v. S. Commerce Bank*, 310 S.C. 256, 423 S.E.2d 128 (1992), for the proposition that it is unfair to subject a bank to jurisdiction in any state where its letter of credit might be used. (Br. of Resp't p. 33). The page LG cites to is an analysis of the power prong, not the fairness prong. Regardless, *S. Plastics*' holding has nothing to do with the facts of this case. Where a letter of credit might be used is incomparable to a manufacturer that distributes hundreds of shipments of its products to the forum state and cannot even deny that it sold the product at issue in this state.

The lower court erred in finding the fairness prong is not satisfied just because the power prong is not satisfied, and LG does not even defend that ruling in its brief. Because the lower court used an improper legal analysis, this Court should reverse and find the fairness prong is satisfied.

CONCLUSION

For these reasons and those stated in Fleming's initial brief, the Court should reverse the decisions of the lower court, find specific jurisdiction exists, and remand the case to proceed in circuit court.

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Roger M. Young, Sr., Circuit Court Judge

Appellate Case No. 2022-000346

Reid Fleming,……..…….……Appellant,

v.

LG Chem, Ltd.,……..…….…….……...Respondent.

PROOF OF SERVICE

The undersigned certifies that a copy of the *Initial Reply Brief of Appellant* has been served upon counsel for Respondent via electronic mail at the email addresses stated in the Attorney Information System as set forth below on December 21, 2022.

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Dec 21 2022
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December 21, 2022

Via E-Mail

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Re: Appellant's Initial Brief and Designation of Matter for the Record on Appeal
Reid Fleming v. LG Chem, Ltd., Appellate Case. No. 2022-000346

Dear Mrs. Kitchings:

Attached for electronic filing and service please find:

1. Initial Reply Brief of Appellant
2. Proof of Service

Please file the documents and return one file-stamped copy to me via email. By electronic copy of this letter,
I am serving all counsel of record with a copy of the same.

With kind regards, I am,

s/Kathleen C. Barnes

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