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.

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

This is an appeal from an order dismissing a product liability action for lack of specific personal jurisdiction. This product liability action arises out of a defective lithium-ion battery manufactured by Respondent LG Chem, Ltd., ("LG") that exploded in Appellant Reid Fleming's pocket and caused him severe injuries. The lower court granted LG's motion to dismiss for lack of personal jurisdiction.

On April 21, 2021, Fleming filed a complaint against LG, among others, in South Carolina state court. (R. pp. 17-29). Fleming asserted product liability causes of action for strict liability, negligence, breach of express and implied warranties, and unfair trade practices. *Id.*

On July 15, 2021, LG filed a motion to dismiss for lack of personal jurisdiction. (R. pp. 30-32). On January 10, 2022, Fleming filed a memorandum and exhibits in opposition to LG's motion. (R. pp. 71-270). On January 18, 2022, the lower court held a hearing on the motion. (R. p. 537).

On February 7, 2022, the lower court entered an order granting LG's motion. (R. pp. 3-12). On February 17, 2022, Fleming filed a motion to reconsider. (R. pp. 417-26). On February 23,

2022, the lower court denied the motion. (R. pp. 14-16). On March 21, 2022, Fleming filed a notice of appeal from the lower court's orders. (R. p. 1).

On April 19, 2022, Fleming filed a motion to certify this case to the Supreme Court because the lower court's decision is in conflict with five other circuit court orders. (Mot. to Certify). Although LG did not oppose the motion, the Supreme Court denied it on May 17, 2022. (Order).

FACTS

LG lithium-ion batteries are well-known and popular batteries in the e-cigarette and vaping community. (R. p. 21 ¶ 23). Since at least 2016, LG has known that consumers use its lithium-ion batteries in vaping devices and could anticipate that its batteries would be used to power e-cigarette/vaping devices.[1] (R. p. 19 ¶¶ 10.d., 28).

Reid Fleming, a South Carolina citizen, bought LG lithium-ion batteries from Defendants Planet Vape and SCECigarette's retail locations in Charleston, South Carolina, to use in an e-cigarette. (R. p. 21 ¶ 20). The batteries were designed, manufactured, and distributed by LG. (R. p. 21 ¶ 22). On May 24, 2018, one of the LG batteries exploded in Fleming's pocket. (R. p. 22 ¶ 31). He suffered serious burn injuries that required hospitalization and caused permanent physical and mental damage. (R. p. 22 ¶¶ 31-35).

LG is a Korean parent company with various subsidiaries located around the world. (R. pp. 36, 97-99). It maintains five subsidiary companies in the United States, including LG Chem

[1] *See, e.g.*, Lebov, Harrison, *A Darker Shade of Green: Hazards Associated with Lithium Ion Batteries*, 17 J. HIGH TECH. L. 78, 93-94 (2016) ("[C]omputers and cell phones are not the only products that are under fire for malfunctioning li[thium]-ion batteries, as everything from speakers and fax machines to ***electronic cigarettes*** and 'hoverboards' are also in the news." (emphasis added)); *id.* at 94 n.67 ("When li[thium]-ion batteries malfunction in electronic cigarettes, usually due to incompatible voltages, they have been known to explode and cause horrific burns.").

America, Inc., which is in the business of sales and trading for LG. (R. pp. 98-99). LG Chem America is authorized to do business in South Carolina. (R. p. 244).

On April 21, 2021, Fleming filed a complaint against LG, The Planet Vape, SCECigarette, and John Doe Distributors #1-3. (R. pp. 17-29). He alleged that LG designed, manufactured, and distributed the battery that injured him, a size 18650 lithium-ion battery. (R. pp. 21, 549). Fleming alleged that LG knew or had reason to know that third parties sold the batteries for use in consumer e-cigarette/vaping devices but did nothing to prevent these sales. (R. pp. 19, 21-22). Against LG, Fleming asserted product liability causes of action for strict liability and negligence, and a cause of action for unfair trade practices. (R. pp. 22-28).

Fleming alleged facts to show specific jurisdiction over LG in South Carolina, including *inter alia* that Fleming bought the battery in South Carolina, LG's size 18650 lithium-ion battery caused tortious injury in South Carolina, LG transacts business in South Carolina by shipping its lithium-ion batteries into South Carolina ports and to South Carolina businesses, and LG expected its batteries to be used in South Carolina. (R. pp. 18-19). Fleming alleged LG's South Carolina contacts relate to his claims. (R. p. 19).

On July 15, 2021, LG filed a motion to dismiss for lack of personal jurisdiction arguing that neither general[2] nor specific jurisdiction exist in this case.[3] (R. p. 30). When Fleming filed the complaint, South Carolina circuit courts had already denied LG's motions to dismiss for personal jurisdiction in five other lithium-ion battery cases. (R. pp. 19-20). When Fleming filed

[2] The absence of general jurisdiction is not contested.

[3] SCECigarette filed an answer asserting as a defense other Defendants' intervening, superseding, or sole negligence caused Fleming's injuries. (R. p. 40).

the Complaint, LG already consented to jurisdiction over it in the federal District Court of South Carolina in another lithium-ion battery case. (R. p. 20).

LG did not deny that it does business in South Carolina or sells lithium-ion batteries in South Carolina. It did not deny minimum contacts with South Carolina or that it ever sold size 18650 lithium-ion batteries in South Carolina. (R. pp. 46-66). Instead, LG argued that it did not design, manufacture, distribute, or sell a lithium-ion battery to "consumers for use as standalone, replaceable batteries, in South Carolina." (R. p. 48). LG argued it manufactured lithium-ion batteries for use as "industrial component parts that are designed to be incorporated into battery packs." (R. pp. 37, 47). In other words, LG argued there is no specific jurisdiction because its product was misused as a product sold on its own rather than sold already incorporated into another product.

Fleming filed a memorandum and exhibits in opposition to LG's motion. (R. pp. 71-85). Fleming submitted data showing over 900 shipments of LG products into the port of Charleston, South Carolina. (R. pp. 184-243, 292-386).[4] LG imported 419 shipments of lithium-ion batteries through the port of Charleston, some destined for South Carolina businesses. (R. pp. 243, 292-386).

Fleming submitted an opinion from the Western District of North Carolina showing that LG purposefully served the consumer electronics market with lithium-ion batteries. (R. pp. 159-83) *Celgard, LLC v. LG Chem, Ltd.*, 3:14-cv-00043, 2015 WL 2412467 *1, 25 (W.D.N.C. May 21, 2015) (stating "Celgard supplied LGC . . . with uncoated base films to be used in the production of lithium-ion batteries ***for consumer-electronic*** ("CE") products" and quoting LG as saying an

[4] Because the printed copies of this data contain small print, Appellant suggests the Court review the data in the electronic version of the record on appeal.

injunction would "strip[] Best Buy and Wal-Mart (with respect to ***consumer electronics*** products) . . . of their ability to provide products containing these batteries to consumers" (emphasis added)).

Fleming submitted numerous opinions from South Carolina circuit courts in LG lithium-ion battery cases where LG lost motions to dismiss for lack of specific jurisdiction. In *Williamson v. Pirates Cove Vapor Lounge, LLC, et. al*, 2019-CP-07-02270 (June 21, 2021), the plaintiff was injured by an LG lithium-ion battery in an e-cigarette. (R. pp. 256-65). As in this case, LG argued that it did not design, manufacture, or sell 18650 lithium-ion batteries as a standalone consumer product. (R. p. 257). The Honorable Deadra L. Jefferson denied LG's motion to dismiss for lack of personal jurisdiction. (R. pp. 256-65). Judge Jefferson found evidence that LG "markets and sells the subject batteries in the State of South Carolina", including that LG Chem America imported 984 shipments of LG's products. (R. p. 262). In *Holtzendorff v. Vapor Tek USA, LLC, and LG Chem Ltd.*, 2018-CP-0201518 (May 6, 2020), the Honorable Courtney Clyburn Pope denied LG's motion to dismiss for lack of personal jurisdiction. (R. pp. 266-67). In *Roberts v. Planet Vape, LLC, et. al*, 2020-CP-10-00912 (Dec. 17, 2020), the Honorable Bentley Price denied LG's motion to dismiss for lack of personal jurisdiction. (R. pp. 268-70).

On January 18, 2018, the lower court held a hearing on the motion. (R. p. 537). LG argued mainly that Fleming must show LG itself imported and sold a size 18650 lithium-ion battery to a consumer retailer in South Carolina. LG explained that 18650 merely describes the size of the battery. It "just means the 18 is the 18 millimeters diameter, the 65 millimeters is the length, zero is cylindrical. So that's a size." (R. p. 549 lns. 14-16). 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?
>
> Basically, they are immune from suit if their product causes harm under your theory.

(R. p. 551). LG answered that because "nothing that LG Chem is doing to supply to be part of this distribution chain", it should not expect to be sued by an individual consumer that got the product from a third party. (R. pp. 552-53).

Fleming argued that he alleges LG's failure to "actually take command of their distribution chain." (R. p. 565). Fleming argued the consumer use of the battery purchased from a third party is a merits defense of product misuse and not a valid basis to deny specific jurisdiction. (R. p. 566). Fleming pointed to LG's numerous shipments of lithium-ion batteries into South Carolina and said LG's distinction of only the size 18650 battery "would be like . . . drawing a distinction between light cigarettes and ultra light cigarettes." (R. p. 568). The point is that Fleming bought and was injured by LG's battery in South Carolina and LG intended to serve a South Carolina market with lithium-ion batteries such that it should have expected to be subject to suit here for a claim related to a lithium-ion battery. (R. p. 568-70).

On February 7, 2022, the lower court entered an order granting LG's motion to dismiss. (R. pp. 3-13). The court held Fleming's complaint did not establish a prima facie case of specific personal jurisdiction because Fleming did not allege LG supplied 18650 lithium-ion batteries for sale and use as a standalone consumer product and, therefore, did not plead a connection between Fleming's claims and LG's conduct. (R. p. 6).

The lower court held the evidence Fleming submitted in opposition to LG's motion did not support specific personal jurisdiction because it did not show that LG imported the specific size 18650 lithium-ion battery into South Carolina for the consumer market. (R. pp. 7-8).

The lower court held that LG's shipments of products allegedly not the 18650 lithium-ion battery are not suit-related contacts to support specific jurisdiction. (R. pp. 8-9). It cited to *Ford*

Motor Co. v. Mont. Eighth Judicial Dist. Court, 141 S. Ct. 1017, 1028 (2021), for the proposition that sales of the same model product at issue in the case do support jurisdiction. (R. pp. 8-9).

The lower court held that a stream of commerce theory does not support specific jurisdiction in this case. It found this case factually distinguished from *State v. NV Sumatra Tobacco Trading, Co.*, 379 S.C. 81, 666 S.E.2d 218 (2008), based on its findings that LG did not distribute the size 18650 lithium-ion batteries to South Carolina consumers as a standalone product or to a distributor to supply them to South Carolina consumers as a standalone product. (R. pp. 9-10). The court held that Fleming's purchase of the battery in South Carolina is insufficient evidence because it involves Fleming and not LG's conduct. (R. p. 10).

Finally, the lower court held that, because it found Fleming did not satisfy the power prong, it did not need to address the fairness prong of the jurisdictional analysis. (R. p. 11). However, the court proceeded to state that it is unfair to find specific jurisdiction in this case because LG's South Carolina contacts are not related to Fleming's claims. (R. p. 11).

On February 17, 2022, Fleming filed a motion to reconsider making factual and legal arguments. (R. pp. 417-26). Factually, Fleming argued that he submitted evidence that LG made over fifty shipments of lithium-ion batteries into South Carolina and those records do not establish whether the shipments are a size 18650 because they simply say "LITHIUM ION BATTERY." (R. p. 418). Fleming argued that, regardless of the size, they are all lithium-ion batteries and show LG conducts significant lithium-ion battery business in South Carolina. Fleming argued the court incorrectly held that LG does not manufacture a size 18650 battery for consumers or e-cigarettes, and cited to deposition testimony showing LG supplied a size 18650 battery for an e-cigarette product. (R. pp. 419-20). Fleming argued that LG artfully says it did not design a "standalone,

replaceable" product while knowing that it manufactures a lithium-ion battery for vaping devices. (R. pp. 420-21).

Legally, Fleming challenged all of the lower court's holdings. As to the prima facie showing of specific jurisdiction, he argued the complaint plainly alleges that LG's conduct falls within S.C. Code Ann. § 36-2-803 and the statute makes no mention of the purpose for which a defendant targeted the forum. (R. pp. 421-22). As to LG's suit-related contacts, Fleming argued the lower court "radically narrowed" the jurisdictional analysis without legal support by requiring evidence of business activity of the same ***size*** battery when "a lithium-ion battery is a lithium-ion battery" because the "technology is the same." (R. pp. 423-24). As to stream of commerce, Fleming argued the holding is based on the inaccurate fact that LG never designed a size 18650 battery for vaping devices. (R. p. 424). Regardless, the legal analysis is flawed because there is no legal requirement for Fleming to show that LG specifically targeted South Carolina with the one battery that harmed him. (R. pp. 424-25). Finally, as to fairness, Fleming argued the result is patently unfair because LG is already litigating these same cases nationwide and in South Carolina. (R. p. 425). The dismissal will mean that LG "cannot be subject to jurisdiction anywhere in the U.S. for these claims because" it allegedly "does not sell these batteries 'as standalone, replaceable' power sources", while Fleming, who bought and was injured by the battery in South Carolina, must litigate in a foreign country and still face the same argument—that LG did not sell it as a standalone, replaceable product. (R. pp. 425-26).

On February 23, 2022, the lower court denied the motion to reconsider without a hearing. (R. pp. 14-16). The order contains only a standard of review section, which is largely federal law on Rule 59(e), and does not include analysis.

On March 21, 2022, Fleming filed a notice of appeal from the lower court's orders.

STANDARD OF REVIEW

"The question of personal jurisdiction over a nonresident defendant is one which must be resolved upon the facts of each particular case." *Cribb v. Spatholt*, 382 S.C. 490, 496, 676 S.E.2d 714, 717 (Ct. App. 2009). "The circuit court's decision should be affirmed unless unsupported by the evidence or influenced by an error of law." *Id.* at 496, 676 S.E.2d at 717.

ARGUMENT

The lower court erred in accepting LG's unfounded argument that 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. There is no United States Supreme Court, Fourth Circuit, or South Carolina state law that supports the lower court's holding. Further, and perhaps more importantly, the lower court's ruling improperly injects merits-based defenses into the specific jurisdiction analysis.

Fleming bought the LG lithium-ion battery in South Carolina. That LG states it did not sell the battery to the retailer who sold it to Fleming is not relevant to specific jurisdiction. Rather, it is the basis of a cross-claim between LG and the retailer or a third-party claim against whoever bought it from LG and allowed it to end up in the hands of the retailer.

Fleming used the battery for the purpose for which it was sold to him and for which LG knew retailers were selling and consumers were using its lithium-ion batteries. That LG alleges this is a misuse goes to the merits of a product liability action and not the exercise of specific jurisdiction. The lower court held that there is no specific jurisdiction because LG allegedly did not intend its batteries for use as a standalone consumer product. This holding effectively makes LG immune from all liability for its lithium-ion batteries exploding and injuring consumers because it could not be subject to specific jurisdiction anywhere for an unintended use of its

product. The lower court improperly converted a specific jurisdiction analysis from being based on the defendant's state conduct to being based on a plaintiff's conduct in using the product. This is not supported by the Constitution or case law.

The specific jurisdiction analysis is relevant to all of the issues on appeal. South Carolina "traditionally" used "a two-step analysis to determine whether specific jurisdiction is proper by 1) determining if the long arm statute applies and 2) determining whether the nonresident's contacts in South Carolina are sufficient to satisfy due process requirements." *Cribb v. Spatholt*, 382 S.C. 490, 498-99, 676 S.E.2d 714, 718-19 (Ct. App. 2009). "However, a more recent trend compresses the analysis into a due process assessment only." *Id.* at 499, 676 S.E.2d at 719. Therefore, the statutory and constitutional requirements are met in South Carolina when the exercise of jurisdiction is consistent with due process.

The due process standard "requires a defendant possess minimum contacts with the forum state such that maintenance of suit does not offend traditional notions of fair play and substantial justice." *Id.* at 499, 676 S.E.2d at 719. To determine whether this standard is satisfied, "[t]he court must (1) find that the defendant has the requisite minimum contacts with the forum, without which, the court does not have the power to adjudicate the action and (2) find the exercise of jurisdiction is reasonable or fair." *Id.* (internal quotation marks omitted). These are referred to as the power and fairness prongs.

Under the power prong, the "minimum contacts analysis requires a court to find that the defendant directed its activities to residents of South Carolina and that the cause of action arises out of or relates to those activities." *Power Prods. & Servs. Co. v. Kozma*, 379 S.C. 423, 432, 665 S.E.2d 660, 665 (Ct. App. 2008). The defendant must "purposefully avail[] itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its

laws." *Id.* at 432, 665 S.E.2d at 665. This "'purposeful availment' requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of random, fortuitous, or attenuated contacts." *Id.*

Under the fairness prong, the court considers "the following factors: (1) the duration of the defendant's activity in this State; (2) the character and circumstances of its acts; (3) the inconvenience to the parties; and (4) the State's interest in exercising jurisdiction." *Cribb*, 382 S.C. at 500, 676 S.E.2d at 719.

Because Fleming satisfied the power (Arguments I-IV) and fairness (Argument V) prongs of the due process analysis to establish that the exercise of specific jurisdiction is proper in this case, this Court should reverse the lower court's decision.

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

The lower court erred in holding that the allegations of Fleming's complaint did not establish a prima facie showing of specific jurisdiction. Its error is largely the result of the court's misguided focus on the existence of allegations related to the specific size battery at issue sold as a standalone consumer battery. (R. p. 7).

"When a nonresident defendant attacks the allegations of a complaint based on jurisdiction, the court is not confined to the allegations of the complaint but may resort to affidavits or other evidence to determine jurisdiction." *Power Prods. & Servs. Co. v. Kozma*, 379 S.C. 423, 430, 665 S.E.2d 660, 664 (Ct. App. 2008). "[A] plaintiff is not required to assert he will be meritorious on personal jurisdiction; rather, he must demonstrate enough facts to support a prima facie showing." *Sullivan v. Hawker Beechcraft Corp.*, 397 S.C. 143, 152, 723 S.E.2d 835, 840 (Ct. App. 2012).

Fleming specifically alleged conduct that falls within the long-arm statute and the two-step due process analysis. South Carolina's long-arm statute sets forth the circumstances under which the court may exercise specific jurisdiction. The sections applicable to this case are as follows:

> (A) A court may exercise personal jurisdiction over a person who acts directly or by an agent as to a cause of action arising from the person's:
>
> (1) transacting any business in this State;
>
> . . .
>
> (4) causing tortious injury or death in this State by an act or omission outside this State if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this State;
>
> . . .
>
> (8) production, manufacture, or distribution of goods with the reasonable expectation that those goods are to be used or consumed in this State and are so used or consumed.
>
> (B) When jurisdiction over a person is based solely upon this section, only a cause of action arising from acts enumerated in this section may be asserted against him.

S.C. Code Ann. § 36-2-803. The statute says nothing about how a plaintiff uses a product.

Fleming alleged LG "transacts business in South Carolina including the shipment of battery products" into South Carolina ports, caused "tortious injury or death in South Carolina" by acts outside of the state when it regularly does business in the state, and "produces, manufactures, and distributes batteries with the reasonable expectation that those batteries will be used in South Carolina and they are used in South Carolina." (R. p. 18).

Fleming alleged LG has minimum contacts with South Carolina that relate to his claims, including delivering lithium-ion batteries in the state, distributing lithium-ion batteries through the state ports, manufacturing lithium-ion batteries with the expectation that they will be used in South Carolina, and knowing that individuals use LG's batteries in vaping devices but doing nothing to

stop the sale of batteries for that purpose. (R. p. 19). Finally, Fleming alleged exercising personal jurisdiction over LG is fair because it is currently litigating other similar cases in South Carolina where the court denied motions to dismiss for lack of personal jurisdiction, and LG consented to jurisdiction of the federal courts of South Carolina in a similar case. (R. p. 20).

Despite specific allegations of all of the elements of due process, the lower court held that Fleming did not make a prima facie showing because the allegations are not "specific" to the size 18650 battery for resale "as a standalone consumer battery." (R. p. 6). The lower court did not cite any law that requires jurisdictional pleading of a specific product size or use. There is no such law, and the court's holding is legal error.

LG's intended-use argument is a merits-based defense to the validity of the claim, and not a part of the specific jurisdiction analysis. As this Court explained, "'[t]he concept of jurisdiction refers to the authority of a court over a particular person (personal jurisdiction) or the authority of a court to entertain a particular action (subject matter jurisdiction), but the concept does not refer to the validity of the claim on which an action against a person is based.'" *Cribb v. Spatholt*, 382 S.C. 490, 497, 676 S.E.2d 714, 718 (Ct. App. 2009) (quoting *Boan v. Jacobs*, 296 S.C. 419, 421, 373 S.E.2d 697, 698 (Ct. App. 1988) (holding that "lack of personal jurisdiction by the North Carolina court can be asserted as a defense to the action in South Carolina, but cannot be asserted as the basis for a motion to dismiss the action for lack of jurisdiction by the South Carolina court")).

The lower court also summarily held that Fleming did not plead a "connection" between his claims and LG's actions. (R. p. 6). This is unsupported by the law or evidence. The "connection" requirement is merely showing "an affiliation between the forum and the underlying controversy, principally, an activity or an occurrence that takes place in the forum State and is therefore subject to the State's regulation." *Ford Motor Co. v. Mont. Eighth Judicial Dist. Court*,

141 S. Ct. 1017, 1025 (2021) (internal quotation and alteration marks omitted). Specific jurisdiction attaches "when a company [] serves a market for a product in the forum State and the product malfunctions there." *Id.* at 1027. Here, Fleming alleged that LG served a market in South Carolina for lithium-ion batteries and one of them malfunctioned here. (R. pp. 19-20). That is prima facie evidence of a relation between Fleming's action and LG's forum activity.

The lower court's ruling on this issue is unsupported by the evidence and is legal error, and this Court should reverse.

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.

The lower court's analysis of the jurisdictional evidence outside of the Complaint is unsupported by the evidence and amounts to legal error.

The lower court found it "uncontroverted" that LG did not ship size 18650 lithium-ion batteries to anyone in South Carolina or the consumer vaping industry. (R. pp. 7-8). Initially, the premise of this finding is that Fleming needed to make such a showing for the court to exercise specific jurisdiction. As explained below, that is a false premise and renders the court's entire ruling on this issue reversible.

Regardless, the evidence is not "uncontroverted." Fleming presented evidence of hundreds of shipments of LG batteries into the port of Charleston. Some of the available data identifies the shipments as "LITHIUM ION BATTERY" and does not identify the size battery. (R. pp. 243, 292-386). The lower court improperly chose to weigh that evidence in LG's favor by finding the shipments did not contain size 18650 batteries despite the fact that the shipment records do not specify a battery size.

The evidence is that LG shipped lithium-ion batteries to South Carolina and Fleming purchased a size 18650 lithium-ion battery in South Carolina. "Regardless of how the [product] arrived in South Carolina, minimum contacts" can still be established by a defendant's "actions indicat[ing] that it purposely availed itself of conducting business." *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 lower court improperly adopted and used as a central part of its analysis LG's distorted argument that Fleming must show LG served a consumer market for standalone lithium-ion batteries in South Carolina. There is no law requiring consideration of a manufacturer's intended use of a product in the specific jurisdiction analysis. The analysis is the defendant's contacts with the forum state—not how the plaintiff or any third party uses the product in the state.

The lower court's holding is a vast change in specific jurisdiction law. As one example, under the court's ruling, a car manufacturer could argue there is no personal jurisdiction because it did not intend a consumer to drive in excess of the speed limit.

LG intended for its lithium-ion batteries to reach South Carolina consumers—whether inside or outside of a consumer product. That a third party, and not LG, may have sold the battery for a certain use does not make LG immune from personal jurisdiction for its product. As the United States Supreme Court stated, "jurisdiction in cases like these" should not "ride on the exact reasons for an individual plaintiff's purchase." *Ford Motor Co. v. Mont. Eighth Judicial Dist. Court*, 141 S. Ct. 1017, 1029 (2021).

The lower court's holding ignores the distinction between a merits defense of product misuse and the constitutional due process analysis for specific jurisdiction. *See Cribb v. Spatholt*,

382 S.C. 490, 497, 676 S.E.2d 714, 718 (Ct. App. 2009) ("The concept of jurisdiction refers to the authority of a court over a particular person (personal jurisdiction) or the authority of a court to entertain a particular action (subject matter jurisdiction), but the concept does not refer to the validity of the claim on which an action against a person is based." (internal quotation marks omitted)).

Further, the lower court's holding is antithetical to South Carolina's strict liability law. The lower court essentially held that LG is immune from specific jurisdiction because Fleming's injury was caused by a third party's sale of the product for an allegedly improper use. However, South Carolina's strict liability statute says:

> (1) One who sells any product in a defective condition unreasonably dangerous to ***the user or consumer*** or to his property is subject to liability for physical harm caused to the ***ultimate user or consumer***, or to his property, if
>
> (a) The seller is engaged in the business of selling such a product, and
>
> (b) It is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
>
> (2) The rule stated in subsection (1) ***shall apply although***
>
> (a) The seller has exercised all possible care in the preparation and sale of his product, and
>
> (b) The ***user or consumer has not bought the product from*** or entered into any contractual relation with the ***seller***.

S.C. Code Ann. § 15-73-10 (emphasis added). The statute specifically contemplates that the person harmed may not be the person to whom the seller sold the product. The statute specifically applies even though the purchaser and/or person harmed bought the product from a third party. *See also 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."). The statute demonstrates that, under South Carolina law, LG's

complaints about Fleming's lawsuit are really claims between LG and whomever in its distribution chain allowed the lithium-ion batteries to end up in a vaping store. LG is the seller with control over its product distribution chain—that is why South Carolina law charges the seller with liability. *See Purvis v. Consolidated Energy Products Co.*, 674 F.2d 217, 219 (4th Cir. 1982) ("The doctrine of strict products liability in tort was created to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves." (internal quotation marks omitted)).

The lower court's holding that use of the product affects specific jurisdiction is wholly unsupported by State or Federal law, and should be reversed.

Finally, the lower court incorrectly held that Fleming must show LG Chem America's South Carolina contacts could be legally imputed to LG for those contacts to matter in this case. (R. p. 7). The court cited to no law for this ruling. *Id*. Regardless, the point is not that LG Chem America's contacts are imputed to LG but that LG has a mechanism for getting its products to South Carolina. Its subsidiary—part of its distribution chain—is authorized to do business in South Carolina. In *Sumatra*, it did not matter that the manufacturer's products reached the United States and South Carolina markets through independent distributors or resellers. The pertinent fact was that Sumatra intended to and did serve a South Carolina market with its cigarettes. 379 S.C. at 90-91, 666 S.E.2d at 222-23. The same is true of LG in this case. It intended to and did serve a South Carolina market with its lithium-ion batteries.

The lower court's rulings on this issue 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.

The lower court adopted LG's position to focus exclusively on whether LG sold the size 18650 lithium-ion battery in South Carolina. However, "18650" merely describes the size of a battery—it is not a separate model or design. (R. pp. 549, 567). It is really a distinction without a difference. Regardless, there is no legal requirement that the suit-related contacts involve the ***defendant's*** sale or distribution of the exact ***size*** product at issue. The cases cited by the lower court do not supports its holding to the contrary.

In *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773 (2017), nonresident plaintiffs attempted to sue a drug manufacturer in California—a forum where the manufacturer sold the product—because other plaintiffs who lived in California alleged similar injuries as the nonresidents. *Id.* at 1777-78. The nonresident plaintiffs did not live in the forum, were not injured in the forum, and did not ingest the product in the forum. *Id.* at 1778. The manufacturer did not contest specific jurisdiction as to the resident plaintiffs' claims even though it neither developed nor manufactured the drug in California. *Id.* at 1778. As to the nonresidents, the Supreme Court found "missing" "a connection between the *forum* and the *specific claims* at issue" because the "nonresidents' claims involve[d] no harm in California and no harm to California residents." *Id.* at 1782-83 (emphasis added). *Bristol-Myers* stands only for the proposition that a nonresident who suffered no harm in the forum state cannot piggyback on the specific jurisdiction established by resident plaintiffs who suffered harm in the forum state. *See Ford Motor Co. v. Mont. Eighth Judicial Dist. Court*, 141 S. Ct. 1017, 1031 (2021) (describing the *Bristol-Myers* plaintiffs as "engaged in forum-shopping"). *Bristol-Myers* does not say that a manufacturer's suit-related contacts with a forum must include direct evidence that the manufacturer sold the specific size product in the state.

Ford Motor Co. v. Mont. Eighth Judicial Dist. Court, 141 S. Ct. 1017 (2021), also does not support the lower court's holding. In *Ford*, the plaintiffs were residents of the forum states and suffered injury in the forum states. *Id.* 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. Ford argued that the relatedness requirement is satisfied only by a link that is "causal in nature: Jurisdiction attaches only if the defendant's forum conduct gave rise to the plaintiff's claims." *Id.* at 1026 (internal quotation and alteration marks omitted). The Supreme Court rejected that argument. 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. 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.* The *Ford* Court did not hold that a manufacturer's suit-related contacts with a forum must include direct evidence that the manufacturer sold the specific size product in the state. It addressed the factual scenario before the Court and rejected a causal link requirement.

The Court of Appeals of Georgia recently denied LG's argument that jurisdiction did not exist because a size 18650 battery "was purchased from an unauthorized retailer outside of LG Chem's approved distribution channel and for unauthorized use as a standalone, rechargeable battery in an electronic vaping device." *LG Chem, Ltd. v. Lemmerman*, 863 S.E.2d 514, 523 (Ga. App. 2021). The Georgia Court was "unpersuaded by LG Chem's argument in light of the United States Supreme Court's recent decision in" *Ford*. *Id.* at 523. The Court found it proper to exercise specific jurisdiction over LG because, *inter alia*, "LG did not deny that it advertised, marketed, sold, distributed, and regularly placed the batteries into the stream of commerce (through wholesalers and distributors to canvas the entire country without restriction) with the expectation

and intention that they be sold in Georgia. It also did not deny that it sent these batteries directly to Georgia, or that these batteries indeed were sold in Georgia for use in consumer products." *Id.* at 526-27. The same result is warranted in this case.

Considering all of LG's South Carolina contacts, it is apparent that specific jurisdiction is satisfied because Fleming's cause of action relates to those contacts. Relatedness is satisfied when there is "an affiliation between the forum and the underlying controversy, principally, an activity or occurrence that takes place in the forum state."[5] *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773, 1781 (2017) (internal quotation and alteration marks omitted). LG's activities in South Carolina are importing and selling numerous, repeated shipments of lithium-ion batteries. Fleming's cause of action is based on a defective lithium-ion battery that he bought in South Carolina and that injured him in South Carolina. *See Ford*, 141 S. Ct. at 1028 (listing plaintiff's injuries in the forum in analysis of "how all [the forum]-based conduct relates to the claims in these cases"). This satisfies the relatedness requirement of the power prong.

The lower court's ruling on this issue is unsupported by the evidence and is legal error, and this Court should reverse.

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. The lower court held Fleming did not present evidence to support the stream of commerce theory

[5] The Supreme Court of the United States used numerous phrases to describe relatedness. *See, e.g.*, *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011) ("[S]pecific jurisdiction is confined to adjudication of issues deriving from, or connected with, the very controversy that establishes jurisdiction" (internal quotation marks omitted)); *Helicopteros Nacionales De Colombia v. Hall*, 466 U.S. 408, 414 (1984) (referring to "a controversy [that] is related to or arises out of a defendant's contacts with the forum"); *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 780 (1984) (referring to "the relations among the defendant, the forum, and the litigation").

solely because the court found this case factually distinguishable from *State v. NV Sumatra Tobacco Trading, Co.*, 379 S.C. 81, 666 S.E.2d 218 (2008), a leading South Carolina case on the theory. The lower court's holding is legal error because the facts of this case fall within the law stated in *Sumatra*.

In *Sumatra*, the State of South Carolina filed an action against Sumatra, a tobacco product manufacturer, for failing to make payments under a settlement agreement that required tobacco manufacturers to pay damages to certain states for the states' tobacco-related healthcare costs. *Id.* at 84-85, 666 S.E.2d at 219-20. Sumatra filed a motion to dismiss for lack of personal jurisdiction. Sumatra argued that it is an Indonesian corporation that sells its non-Indonesian market products to only an "independent reseller." *Id.* at 85-86, 666 S.E.2d at 220. It argued that various entities may have distributed the cigarettes to the United States but Sumatra did not distribute them. *Id.* at 86, 666 S.E.2d at 220. The lower court denied the motion to dismiss, and the Supreme Court affirmed the finding of specific jurisdiction.

In stating the specific jurisdiction analysis, the Court noted that the facts satisfied the long-arm statute and analyzed the due process requirements of minimum contacts and fairness. The minimum contacts requirement "mandates that the defendant possess sufficient minimum contacts with the forum state, so that he could reasonably anticipate being haled into court there." *Id.* at 89, 666 S.E.2d at 222. The stream of commerce theory is a means of establishing minimum contacts. As the *Sumatra* Court explained:

> The foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum state. Rather, it is that the defendant's conduct and connection with the forum state are such that he should reasonably anticipate being haled into court there. This theory of personal jurisdiction is known as the "stream of commerce" theory.

Id. at 89, 666 S.E.2d at 222.

The *Sumatra* Court found minimum contacts existed "as a whole ***and***, via the stream of commerce theory." *Id.* at 90, 666 S.E.2d at 222-23 (emphasis added). The contacts the Supreme Court cited to support its holding included that Sumatra manufactured a brand of cigarettes for sale in the United States, Sumatra owned the trademark for the brand, and over 6 million of that brand of cigarettes sold in South Carolina. *Id.* at 90, 666 S.E.2d at 222.

The facts of this case fall within the *Sumatra* ruling. The lower court's holding that this case is factually distinguishable from *Sumatra* is unsupported by the evidence and influenced by an error of law.

As to the evidence, it is undisputed that LG manufactures lithium-ion batteries, and specifically size 18650 batteries, for use throughout the United States, including South Carolina. It is undisputed that LG imported hundreds of shipments of lithium-ion batteries into the port of Charleston. The lower court focused on and accepted the contention that LG did not distribute the batteries. (R. pp. 9-10). This is immaterial because the same fact existed in *Sumatra* and did not prevent the Court from exercising personal jurisdiction where minimum contacts existed "[r]egardless of how the cigarettes arrived in South Carolina." 379 S.C. at 90, 666 S.E.2d at 223. This is a critical point in this case given LG's insistent argument that it did not sell the batteries to a consumer retailer in South Carolina and the lower court's acceptance of that argument. The lower court focused on LG's assertion that it did not intend its batteries for use as a standalone, replaceable battery for consumers. The intended use of the product is immaterial to personal jurisdiction. As indicated in *Sumatra*, the point is whether the defendant manufacturer intended to serve the forum market with its products, and LG plainly did so in this case.

As to the law, the lower court erred in holding that Fleming's purchase of the size 18650 lithium-ion battery in South Carolina is not relevant. (R. p. 10). The point is not so much Fleming's

purchase but that the battery was available for his purchase in South Carolina. Where LG purposefully and regularly conducts lithium-ion battery business in South Carolina with numerous South Carolina businesses, 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.

Despite its finding that Fleming did not satisfy the power prong, the lower court proceeded to address the fairness prong. Its analysis is minimal at best. The court simply stated that, because it found LG "has no contacts with South Carolina related to the claims at issue," then it is unfair to exercise specific jurisdiction over it. (R p. 11). This is no more than a ruling that the fairness prong is not satisfied just because the power prong is not satisfied. That is not the proper legal analysis, and this Court should reverse.

"[U]nder the fairness prong, the court must consider the following factors: (1) the duration of the defendant's activity in this State; (2) the character and circumstances of its acts; (3) the inconvenience to the parties; and (4) the State's interest in exercising jurisdiction." *Cribb v. Spatholt*, 382 S.C. 490, 500, 676 S.E.2d 714, 719 (Ct. App. 2009). There is evidence to support all of these factors.

First, LG has imported its products into a South Carolina port since at least 2007. (R. pp. 184-243). Second, its activities in South Carolina are continuous, voluminous, and plainly significant to the sales of its products to numerous customers. (R. pp. 184-243, 292-386). Third, it would be extremely inconvenient and impractical for Fleming to travel to Korea to pursue claims when the facts of the injuries occurred in South Carolina. It is not inconvenient for LG to defend

a claim in South Carolina where it is already defending other, similar cases in South Carolina federal and state courts. Fourth, "South Carolina has an interest in providing redress for its citizens." *Cribb*, 382 S.C. at 504, 676 S.E.2d at 721.

The fairness prong is satisfied in this case, and the Court should reverse the lower court on this issue.

CONCLUSION

For these reasons, 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.

CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that the Final Brief and Final Reply Brief of Appellant comply with Rule 211(b), SCACR, and with the Supreme Court's Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings, issued April 15, 2014.

January 25, 2023

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