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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Roger M. Young, Sr., Circuit Court Judge

Appellate Case No. 2024-002053

Thorne HealthTech, Inc. and Thorne Research, Inc.,

Appellants,

v.

Mary Kay Ross,

Respondent.

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STATEMENT OF ISSUES ON APPEAL

1. DID THE TRIAL COURT ERR IN HOLDING THAT THE EMPLOYMENT AGREEMENT'S FORUM SELECTION CLAUSE IS UNENFORCEABLE?

2. DID THE TRIAL COURT ERR IN HOLDING THAT IT LACKED SPECIFIC PERSONAL JURISDICTION OVER DR. ROSS?

3. DID THE TRIAL COURT ERR IN HOLDING THAT THE AMENDED COMPLAINT SHOULD BE DISMISSED UNDER THE DOCTRINE OF *FORUM NON CONVENIENS*?

STATEMENT OF THE CASE

This case involves a series of disputes between an employer and its former employee. Appellants Thorne HealthTech, Inc. ("**Thorne HealthTech**") and Thorne Research, Inc. ("**Thorne Research**") (collectively, "**Thorne**")[1] filed their original Summons and Complaint on September 14, 2023, and an Amended Complaint on January 8, 2024. The Amended Complaint included causes of action for breach of contract, breach of fiduciary duty, violations of the South Carolina Unfair Trade Practices Act, and declaratory judgement. Broadly, Thorne alleged that its former employee, Respondent Mary Kay Ross ("**Dr. Ross**"), violated her legal and contractual obligations by, *inter alia*, accessing and disseminating confidential and proprietary information. The Amended Complaint also sought a declaration of the parties' rights and obligations under her employment agreement.

Dr. Ross filed a Motion to Dismiss the Amended Complaint on February 7, 2024. Dr. Ross argued that Thorne's action should be dismissed for lack of personal jurisdiction and pursuant to the doctrine of *forum non conveniens*. Thorne countered that its causes of action relate to Dr. Ross's South Carolina contacts; that Dr. Ross's in-state contacts were extensive; and that application of *forum non conveniens* is inappropriate in this case.

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[1] Appellant Thorne Research is a wholly owned subsidiary of Thorne HealthTech. Am. Compl., ¶ 1–3, Jan. 8, 2024.

The circuit court held a hearing on May 23, 2024. It entered a July 23, 2024 Order dismissing all causes of action, finding that it lacked personal jurisdiction over Dr. Ross and that *forum non conveniens* favored dismissal. After its Motion for Reconsideration was denied, Thorne filed its Notice of Appeal on December 4, 2024. Thorne respectfully requests that the Court of Appeals reverse the trial court's order because: **(1)** the unresolved questions surrounding a South Carolina forum selection clause in Dr. Ross's Employment Agreement preclude dismissal; **(2)** Thorne made a *prima facia* showing that Dr. Ross is subject to personal jurisdiction in South Carolina; and **(3)** dismissing the case under the doctrine of *forum non conveniens* was improper.

FACTS

Thorne is a company focusing on innovative solutions to health and wellness. Am. Compl., ¶ 4, Jan. 8, 2024. Thorne hired Dr. Ross to serve as Chief Medical Officer for Onegevity Health, LLC, a wholly-owned subsidiary of Thorne HealthTech. *Id.* at ¶ 6. Two of the key documents related to Dr. Ross's employment relationship with Thorne are the Offer Letter and the Employment Agreement. *Id.* at ¶¶ 11–12, 15–16. The Offer Letter stated that the complete terms and conditions of Dr. Ross's employment would be set forth in a subsequent written employment agreement. *Id.* at ¶ 11; Mot. to Dismiss, Ex. A to Ex. 3, pp. 1, 3 (the "**Offer Letter**.") The Employment Agreement included a South Carolina forum selection clause and provided that the Employment Agreement "will be governed by and construed in accordance with the law of the State of South Carolina." Am. Compl., ¶ 12; Mem. of Law in Opp. to Mot. to Dismiss, Ex. I, § 8.1 ("**Employment Agreement**.") The Employment Agreement is signed by Thorne. The parties disagree on whether Dr. Ross signed the document. The parties also disagree on whether Dr. Ross

accepted the Employment Agreement by acquiescence or performance, even if she did not sign the agreement.

Thorne's primary facilities for purposes of medical affairs, sales and marketing, research and development, manufacturing capacity and efficiencies, in-house laboratory and testing, materials management, and shipping are located in Berkeley County at 620 Omni Industrial Boulevard, Summerville, South Carolina. Am. Compl., ¶ 7; Mem. of Law in Opp. to Mot. to Dismiss, Ex. C, Aff. of Holly Walter, SHRM-CP ¶¶ 3–4 ("**Walter Affidavit**."). The overwhelming majority of Thorne's workforce are in Summerville, South Carolina. Walter Affidavit, ¶ 5–6. Dr. Ross is a Georgia resident. Am. Compl., ¶ 5. Although Dr. Ross had office space in Thorne's New York office, the Amended Complaint alleges that she routinely conducted business in South Carolina, entered into contracts to be performed in the State, and was involved in the production, manufacture, or distribution of goods with the reasonable expectation that those goods were to be used or consumed in South Carolina. *Id.* at ¶¶ 8–10; *see also* S.C. Code Ann. § 36-2-803. The Amended Complaint also alleges that Dr. Ross routinely collaborated with Thorne's South Carolina-based Medical Affairs Department staff, Sales and Marketing Department staff, and Research and Development Department staff. Am. Compl., ¶ 9; S.C. Code Ann. § 36-2-803. Thorne submitted a multitude of affidavits showing her extensive contacts with Thorne's South Carolina professionals. Mem. of Law in Opp. to Mot. to Dismiss, Ex. C–H. Finally, the Amended Complaint alleges that Thorne suffered damages as a result of Dr. Ross's actions. Am. Compl., ¶ 19; S.C. Code Ann. § 36-2-803.

Dr. Ross's employment term was three years. Employment Agreement, 2–3; Offer Letter, 1–2. When her employment started on or about August 2, 2021, she began to reap certain benefits including a $400,000 salary; access to a 401(k) plan; access to medical, dental, and vision plans;

and conditional rights to the company's restricted stock units. Am. Compl., ¶ 15; Employment Agreement, 3. Dr. Ross's employment with Thorne ended on or about July 18, 2023. Am. Compl., ¶ 20.

Following termination of Dr. Ross's employment, the parties took varying interpretations as to what written agreements control the parties' respective rights and obligations. *Id.* at ¶ 40. Thorne filed its original Summons and Complaint requesting a declaratory judgment to that effect. *See generally* Compl., Sept. 13, 2023. Thorne filed an Amended Complaint as a matter of course on January 8, 2024. Rule 15(a), SCRCP. The Amended Complaint consisted of four causes of action: **(1)** breach of contract; **(2)** breach of fiduciary duties; **(3)** violations of the South Carolina Unfair Trade Practices Act; and **(4)** declaratory judgment. Am. Compl., ¶¶ 21–41. In its declaratory judgment action, Thorne sought a judicial decree defining the parties' rights, duties, status, and legal relationship pursuant to the Offer Letter, Employment Agreement, and any other relevant documents. *Id.* at ¶¶ 38–41. Although varying in their scope, the causes of action sounding in breach of contract, breach of fiduciary duty, and violations of the South Carolina Unfair Trade Practices Act generally focused on Dr. Ross improperly accessing and disseminating confidential and propriety information regarding Thorne's business dealings. *Id.* at ¶¶ 21–37; S.C. Code Ann. § 39-5-10 *et seq*. Thorne alleges that Dr. Ross misused her position with Thorne for her own personal benefit or the benefit of others. *Id*.

Dr. Ross moved to dismiss the Amended Complaint on February 7, 2024. Mot. to Dismiss, Feb. 7, 2024. In her Memorandum of Law, she argued that the trial court lacked personal jurisdiction. Mem. of Law in Supp. of Mot. to Dismiss, 10–20, May 22, 2024. Specifically, Dr. Ross insisted that she was a New York-based employee and that her contacts with South Carolina were nominal. *Id.* Dr. Ross also urged the trial court to dismiss Thorne's action based on the

doctrine of *forum non-conveniens*. *Id.* at 20–21. In support of her argument, Dr. Ross cited a complaint she filed in New York[2] against Onegevity, Thorne HealthTech, Inc., and Paul Jacobson (Thorne's CEO). *Ross v. Onegevity*, Supreme Court of the State of New York, County of New York, Index No. 655082/2023, Complaint, Oct. 16, 2023 (the "**New York Complaint**").[3] Despite the fact that Dr. Ross resides in Georgia, she argued that it would be more convenient for the parties to litigate in New York than in South Carolina. Mem. of Law in Supp. of Mot. to Dismiss, 20–21, May 22, 2024. Thorne filed a Memorandum in Opposition to the Motion. Mem. in Opp. to Mot. to Dismiss, May 21, 2024.

The trial court held a hearing on May 23, 2024. Tr. of Mot. to Dismiss Hearing, May 23, 2024[4]. The parties filed supplemental briefs on May 28, 2024 and June 3, 2024. Supp. Mem. in Opp. to Mot. to Dismiss, May 28, 2024; Response to Supp. Mem., June 3, 2024. The court entered

[2] The New York Complaint was filed *after* Thorne's South Carolina Complaint was filed. South Carolina Complaint, Sept. 14, 2023; New York Complaint, Oct. 16, 2023. The New York Complaint was also served after Thorne's South Carolina Complaint was served. South Carolina Aff. of Service, Nov. 7, 2023; New York Aff. of Service, Nov. 13, 2023. Thorne moved to dismiss the New York lawsuit based on the first-filed rule, as well as a variety of other deficiencies in the pleadings. Thorne's Motion to Dismiss the New York lawsuit is currently pending.

[3] There was also an action between the parties pending in the Delaware Chancery Court regarding a dispute over Dr. Ross's alleged entitlement to Restricted Stock Units ("**RSUs**"). *Thorne HealthTech, Inc. v. Ross*, Chancery Court, State of Delaware, Case No. 2023-0935-NAC. The RSU Plan's forum selection clause required that any disputes arising under the Plan be litigated in Delaware. Dr. Ross did not contest personal jurisdiction in that case. She did, however, file a Motion to Dismiss for lack of subject matter jurisdiction. The Chancery Court entered an order denying Dr. Ross's Motion. The parties ultimately agreed on a Stipulation that ended the case and granted Thorne the core relief it requested in its Verified Complaint.

[4] The Motion to Dismiss for this case, as well as a similar motion to dismiss in *Thorne HealthTech, Inc., and Thorne Research, Inc. v. Stephen H. Ross*, Case No. 2024-CP-08-00077, Court of Common Pleas, Berkeley County (Appellate Case No. 2024-002067) were heard together. Thus, the two hearings share the same transcript. Although there is some degree of overlap, the oral argument for this case can be found at pages 4 through 51 of the transcript and oral argument associated with the *Stephen H. Ross* case can be found at pages 51 through 60.

an Order on July 23, 2024 granting Dr. Ross's Motion to Dismiss. Order Granting Mot. to Dismiss, July 23, 2024 (the "**Order**"). The court held that it lacks specific jurisdiction over Dr. Ross[5] and that Thorne's action should be dismissed under the doctrine of *forum non conveniens*. Order, 5–12. After its Motion for Reconsideration was denied, Thorne filed a Notice of Appeal on December 4, 2024. Order Denying Mot. for Reconsideration, Nov. 6, 2024; Notice of Appeal, Dec. 4, 2024. No discovery has been taken in this case.

ARGUMENTS

I. THE UNRESOLVED QUESTIONS OF FACT AND IMPROPER CONCLUSIONS OF LAW SURROUNDING THE SOUTH CAROLINA FORUM SELECTION CLAUSE PRECLUDE DISMISSAL.

The parties dispute whether Dr. Ross signed an Employment Agreement that includes a South Carolina forum selection clause. The parties also disagree on whether Dr. Ross accepted the Employment Agreement (and in turn the forum selection clause) by acquiescence or performance. The trial court improperly decided these questions in favor of Dr. Ross and granted her Motion to Dismiss. Issues of fact should be resolved in favor of the non-moving party at the Rule 12 stage. The trial court's Order should be reversed.

A. Standard of Review

Thorne respectfully submits that given the unique circumstances presented, the Court should undertake a *de novo* review of the trial court's holding that the forum selection clause is inapplicable.[6] The trial court's Order provides no meaningful analysis of the contract issues

[5] The court also held that it lacked general jurisdiction over Dr. Ross. Thorne does not appeal the trial court's holding with respect to general jurisdiction.

[6] While acknowledging that it has no precedential value, Thorne respectfully requests that the Court consider its recent *per curium* opinion where it noted the lack of clarity in our law with respect to forum selection clauses, including the appropriate standard of review. *B & B Crane Serv., LLC v. Iron Planet, Inc.*, No. 2021-001399, 2023 WL 8621090, at *1 (S.C. Ct. App. Dec. 13, 2023) (*per curium*) (unpublished).

involved in this case. With regard to the key factual issue – whether Dr. Ross signed the Employment Agreement or accepted its terms by acquiescence or performance – the Order incudes a fleeting statement to the effect that the court believes the Employment Agreement was unsigned and is therefore invalid. The Order provides no assessment of Thorne's acquiescence or performance arguments. The trial court committed separate and distinct errors in its factual determinations, application of legal standards, and legal conclusions.

South Carolina's pleading rules provide that a "*prima facie* showing of personal jurisdiction at the pre-trial stage is all that is required to continue the civil action. To do otherwise would require a much greater degree of specificity in the pleadings than is currently mandated by the South Carolina Rules of Civil Procedure . . . It would be inconsistent with this Court's decisions dealing with other pre-trial dismissal motions if a special niche were maintained for personal jurisdiction." *Mid-State Distributors, Inc. v. Century Importers, Inc.*, 310 S.C. 330, 335, 426 S.E.2d 777, 780–81 (1993). The Court must take the plaintiff's allegations as true and resolve all factual disputes in its favor. *Brown v. Invest. Mgmt. & Res., Inc.*, 323 S.C. 395, 399, 475 S.E.2d 754, 756 (1996); *M.B. Kahn Const. Co. v. Three Rivers Bank & Tr. Co.*, 354 S.C. 412, 415, 581 S.E.2d 481, 482 (2003); *Mid-State Distributors, Inc.*, 310 S.C. at 335, 426 S.E.2d at 780–81.

As outlined below, the circuit court departed from Rule 12 standards and completely disregarded the facts alleged by Thorne in the operative complaint. The circuit court also erred in its legal conclusion that the Employment Agreement was invalid. Finally, by omission, the trial court committed errors of fact and law by failing to give due consideration to Thorne's fact-specific acquiescence and performance arguments, while simultaneously rejecting both. The trial court's holding on this issue is more akin to a post-discovery, summary judgment disposition than a Rule 12 order. "Summary judgment is not appropriate when further inquiry into the facts is desirable

to clarify the application of law." *Coker v. Cummings*, 381 S.C. 45, 51, 671 S.E.2d 383, 386–87 (Ct. App. 2008). In sum, *de novo* review is warranted.

B. Legal Standards

Performance or acquiescence generally constitutes acceptance under South Carolina law. "The necessary elements of a contract are an offer, acceptance, and valuable consideration." *Clardy v. Bodolosky*, 383 S.C. 418, 425, 679 S.E.2d 527, 530 (Ct. App. 2009). A written contract is valid if one party signs it and the other acquiesces. *Bishop Realty & Rentals, Inc. v. Perk, Inc.*, 292 S.C. 182, 185, 355 S.E.2d 298, 300 (Ct. App. 1987).

The Supreme Court has held that, "It is not always necessary, in order to give validity to a contract, that it should be signed by both parties; it may be sufficient if it be signed by one party and accepted, held, and acted upon by the other." *Peddler, Inc. v. Rikard*, 266 S.C. 28, 32, 221 S.E.2d 115, 117 (1975). "Acceptance of a contract by assenting to its terms, holding it and acting upon it, may be equivalent to a formal execution by one who did not sign it." *Dan Ryan Builders W. Virginia, LLC v. Main St. Am. Assurance Co.*, 452 F. Supp. 3d 338, 349 (D.S.C. 2020). Stated differently, "It has long been a paradigm of South Carolina law that when a contract signed by one party only is accepted by the other party, it becomes binding upon both just as if it were signed by both." *Jaffe v. Gibbons*, 290 S.C. 468, 473, 351 S.E.2d 343, 346 (Ct. App. 1986).

C. The Court May Exercise Personal Jurisdiction Over Dr. Ross Based on a Forum Selection Clause in her Employment Agreement.

The Employment Agreement between the parties in this case includes the following forum selection and choice of law provision:

> This Agreement will be governed by and construed in accordance with the laws of the State of South Carolina. ***Ross agrees to submit to the jurisdiction of a South Carolina court for the purpose of enforcing or interpreting a term or condition of this Agreement***. An order, judgment, or decree of a South Carolina court may be transferred without Ross's objection to another jurisdiction to enforce its compliance.

Employment Agreement, § 8.1 (emphasis added); *see also* Am. Compl., ¶ 12 (alleging that, "The Employment Agreement also provides that Ross agrees to submit to the jurisdiction of South Carolina for the purpose of enforcing or interpreting a term or condition of the agreement.")

While Dr. Ross does not dispute that Thorne signed the Employment Agreement, she claims that she did not. Thorne disagrees but, without discovery, has been unable to test Dr. Ross's claim. In short, there is a factual dispute concerning execution of the Employment Agreement. The trial court disregarded Thorne's position and decided in a single sentence that, "[T]he Employment Agreement, despite possessing a forum selection clause potentially linking Defendant to South Carolina, remained unsigned by Defendant, thereby invalidating its contribution to establishing personal jurisdiction." Order, 8. Issues of fact at the Rule 12 stage are to be resolved in favor of the non-moving party. *Brown v. Invest. Mgmt. & Res., Inc.*, 323 S.C. 395, 399, 475 S.E.2d 754, 756 (1996). Therefore, as a threshold matter, the trial court erred in summarily deciding that Dr. Ross did not sign the Employment Agreement.

D. The Court May Exercise Personal Jurisdiction Over Dr. Ross Based on Her Acquiescence to and Performance Under the Employment Agreement.

Even if discovery were to establish that Dr. Ross did not sign the Employment Agreement, the agreement nevertheless is enforceable based on principles of contract law, namely acquiescence and performance. Dr. Ross was employed with Thorne for approximately two years. During that time, she accepted a variety of benefits pursuant to the Employment Agreement. She was paid a significant annual salary of $400,000.00. She received bonuses. She was granted conditional rights to restricted stock units. She received other benefits such as the right a participate in a 401(k) plan, medical plan, dental plan, vision plan, and paid leave. To take the position now that she was entitled to reap all the benefits of the Employment Agreement but need

not honor its forum selection clause is an incredibly one-sided approach that undermines well established principles of contract law. Even if she did not sign the Employment Agreement, Dr. Ross acquiesced to its terms in exchange for her compensation and benefits. She also acted on the contract. She was employed for two years, a substantial portion of the agreed upon three-year term. Accordingly, the applicable provisions of the Employment Agreement should be enforced as written.

Thorne presented these arguments to the trial court. But rather than adhering to our Rule 12 standards and resolving the applicable questions in Thorne's favor, the trial court dismissed the Amended Complaint in its entirety. This portion of the trial court's Order included no citations to authority, no meaningful discussion or reasoning, and – with respect to the acquiescence and performance issues – no acknowledgment of Thorne's arguments whatsoever. The trial court's Order should be reversed on these grounds.

***

The trial court concluded that the Employment Agreement was "unsigned," despite allegations to the contrary by Thorne. The court also posited that the forum selection clause was unenforceable without even considering Thorne's acquiescence or performance arguments. The case was dismissed at the Rule 12 stage, and the law is clear – Thorne must only make a *prima facia* showing of personal jurisdiction. The trial court failed to resolve issues of fact in Thorne's favor for the purposes of the Rule 12 motion. Thorne respectfully requests that the Court of Appeals reverse accordingly.

II. DR. ROSS IS SUBJECT TO PERSONAL JURISDICTION IN SOUTH CAROLINA.

The trial court's Order should be reversed because the Court has specific personal jurisdiction over Dr. Ross. The Court has the power to exercise personal jurisdiction because Dr.

Ross knowingly entered a long-term employment contract with a South Carolina company and all four causes of action in Thorne's Amended Complaint relate to her employment. Moreover, personal jurisdiction is fair and reasonable in this case. Dr. Ross reaped a variety of benefits through her employment with a South Carolina company, interacted extensively with her peer South Carolina employees, and should have reasonably anticipated that she may be summoned to appear in a South Carolina court.

A. Standard of Review

A trial court's personal jurisdiction decision should be affirmed unless unsupported by the evidence or influenced by an error of law. *Engineered Prods. v. Cleveland Crane & Eng'g,* 262 S.C. 1, 4, 201 S.E.2d 921, 922 (1974); *Hammond v. Cummins Engine Co.,* 287 S.C. 200, 336 S.E.2d 867 (1985). As outlined in the sections that follow, the trial court's Order was both unsupported by the evidence and influenced by errors of law.

Personal jurisdiction determinations must be resolved based upon the facts of each particular case. *State v. NV Sumatra Tobacco Trading, Co.*, 379 S.C. 81, 88, 666 S.E.2d 218, 221 (2008). "[A] *prima facie* showing of personal jurisdiction at the pre-trial stage is all that is required to continue [a] civil action." *Mid-State Distributors, Inc. v. Century Importers, Inc.*, 310 S.C. 330, 335, 426 S.E.2d 777, 780–81 (1993). Affidavits may be submitted in support of the court exercising jurisdiction, but they are not required as the allegations of the complaint will ordinarily suffice. *Brown v. Invest. Mgmt. & Res., Inc.*, 323 S.C. 395, 399, 475 S.E.2d 754, 756 (1996). Factual disputes must be resolved in favor of the plaintiff. *M.B. Kahn Const. Co. v. Three Rivers Bank & Tr. Co*., 354 S.C. 412, 415, 581 S.E.2d 481, 482 (2003) (emphasis added).

B. Legal Standards

1. Specific Jurisdiction

In this case, the Court has specific jurisdiction over Dr. Ross pursuant to our State's long-arm statute. Section 36-2-803 provides that the court may exercise personal jurisdiction where, *inter alia*, a cause of action is related to a party transacting business, entering into contracts, or causing injury in the State. S.C. Code Ann. § 36-2-803. The long-arm statute extends to the outer limits of federal due process, and therefore "the sole question becomes whether the exercise of personal jurisdiction would violate due process." *Leggett v. Smith*, 386 S.C. 63, 72, 686 S.E.2d 699, 704 (Ct. App. 2009).

Due process requires the defendant possess sufficient minimum contacts with the forum state such that she could reasonably anticipate being summoned to its courts. The specific jurisdiction analysis consists of two prongs: (1) the "power prong" that examines whether the defendant has sufficient minimum contacts with the forum state and (2) the "fairness prong" that assesses whether the court's exercise of jurisdiction is reasonable or fair. *Moosally v. W.W. Norton & Co.*, 358 S.C. 320, 331, 594 S.E.2d 878, 884 (Ct. App. 2004) (citing *S. Plastics Co. v. S. Com. Bank*, 310 S.C. 256, 260, 423 S.E.2d 128, 131 (1992)).

2. <u>The Power Prong</u>

The power prong focuses on minimum contacts, specifically, whether "the defendant directed its activities to a resident of this State and that the cause of action arises out of or relates to those activities." *S. Plastics Co. v. S. Com. Bank*, 310 S.C. 256, 260–61, 423 S.E.2d 128, 131 (1992). "[A] plaintiff need not show that her claim 'came about because of the defendant's in-state conduct.' Instead, the specific jurisdiction test is more expansive, supporting a court's exercise of jurisdiction over an out-of-state defendant where that defendant's in-state contacts '<u>relate to</u>' the plaintiff's claim." *Elec. Buffalo, LLC v. Kuhmute, Inc.*, No. 2:21-CV-02764-DCN, 2021 WL 5597860, at *5 (D.S.C. Nov. 30, 2021) (emphasis in original) (internal citations omitted).

Indeed, a "causation-only approach finds no support in this Court's requirement of a 'connection' between a plaintiff's suit and a defendant's activities." *Ford Motor Co. v. Montana Eighth Jud. Dist. Ct.*, 592 U.S. 351, 352, 141 S. Ct. 1017, 1019, 209 L. Ed. 2d 225 (2021).

Even a single act that causes harm in this State may create sufficient minimum contacts where the harm arises out of or relates to that act. *Moosally v. W.W. Norton & Co.*, 358 S.C. 320, 331, 594 S.E.2d 878, 884 (Ct. App. 2004); *see also Berkeley PG Corp. v. Southbank Inv. Grp., Inc.*, 291 S.C. 315, 320, 353 S.E.2d 305, 308 (Ct. App. 1987) (holding that, "The cases are legion that a single contact with the forum state is sufficient transacting of business to give its courts personal jurisdiction over a nonresident if the contact gives rise to, or figures prominently in the cause of action under consideration.") Importantly, "[P]hysical presence in the State is not required to establish personal jurisdiction." *State v. NV Sumatra Tobacco Trading, Co.*, 379 S.C. 81, 90, 666 S.E.2d 218, 222 (2008). "Courts have routinely found that breach of contract claims arise from or relate to the act of entering the contract at issue and that the exercise of specific jurisdiction over a defendant-party to the contract is proper in connection to those claims." *Elec. Buffalo, LLC v. Kuhmute, Inc.*, No. 2:21-CV-02764-DCN, 2021 WL 5597860, at *5 (D.S.C. Nov. 30, 2021); *see also Choice Hotels Int'l, Inc. v. Madison Three, Inc.*, 23 F. Supp. 2d 617, 621 (D. Md. 1998); *Ramada Franchise Sys., Inc. v. Hanna Hotel Enterprises, LLC*, 147 F. Supp. 2d 840, 846 (N.D. Ohio 2001).

3. The Fairness Prong

The fairness prong examines whether exercising jurisdiction would be fair or reasonable. The Court must consider: **(1)** the duration of activity of the nonresident within the state; **(2)** the character and circumstances of the commission of the nonresident's acts; **(3)** the inconvenience resulting to the parties by conferring or refusing to confer jurisdiction over the nonresident; and

(4) the State's interest in exercising jurisdiction." *State v. NV Sumatra Tobacco Trading, Co*., 379 S.C. 81, 91, 666 S.E.2d 218, 223 (2008).

C. The Exercise of Personal Jurisdiction over Dr. Ross Comports with the Power Prong of the Due Process Analysis.

The Court has the power to exercise personal jurisdiction over Dr. Ross because Thorne's causes of action relate to her South Carolina contacts. All claims in this case relate to Dr. Ross's employment relationship with Thorne. The Amended Complaint and affidavits submitted to the trial court support personal jurisdiction.

Thorne is a South Carolina company, and Dr. Ross knew of its predominant presence in the State when she accepted her long-term employment offer. Both Plaintiffs, Thorne HealthTech, Inc. and Thorne Research, Inc.[7], are registered to do business in South Carolina. Am. Compl., ¶¶ 1–3, Jan. 8, 2024. Thorne's primary facility for purposes of medical affairs, sales and marketing, research and development, manufacturing capacity and efficiencies, in-house laboratory and testing, materials management, and shipping is located at 620 Omni Industrial Boulevard, Summerville, South Carolina. *Id*. at ¶ 7. Thorne also has a large secondary distribution center located at 558 Omni Industrial Boulevard, Summerville, South Carolina. Walter Affidavit, ¶ 4. As of August 2023, Thorne had approximately 689 employees. *Id.* at ¶ 5. The vast majority of Thorne's workforce – 571 employees or 82.9% – are located in South Carolina. *Id.* at ¶ 6. When Dr. Ross accepted an offer of employment with a company that has nearly 83% of its employees in South Carolina, including virtually all of its core business teams, there was a reasonable expectation that she would be doing business here, availing herself of the laws of the State, and having extensive contacts with South Carolina. Moreover, during the interview process, Dr. Ross

[7] Thorne Research, Inc., a wholly owned subsidiary of Thorne HealthTech, Inc. Am. Compl., ¶¶ 1–3. Thorne Research, Inc. is organized under the laws of South Carolina. *Id*.

was directly informed that she would be constantly working with the company's South Carolina teams. Mem. of Law in Opp. to Mot. to Dismiss, Ex. D, Aff. of Nathan Price, Ph.D, ¶¶ 3–8 ("**Price Affidavit**.") Dr. Ross understood that her professional responsibilities would be tethered to South Carolina.[8] *Id.* Dr. Ross understood that virtually all medical affairs, labs and testing, sales, marketing, and production efforts took place in South Carolina. *Id.* She accepted a three-year employment contract with that knowledge. *Id.*; Employment Agreement, § 2.1; Offer Letter, 1–2.

Turning to the Amended Complaint, Thorne asserted four causes of action. The declaratory judgment action requests a declaration of the parties' rights and obligations under the employment contract.[9] The breach of contract claim concerns a breach of the employment contract by virtue of Dr. Ross improperly accessing and disseminating Thorne's confidential business information. The breach of fiduciary claim relates to Dr. Ross's violations of her fiduciary duties as an officer of Thorne. The Unfair Trade Practices Act claim relates to statutory violations by Dr. Ross while working for Thorne. Simply put, all of the alleged wrongdoing and underlying facts that will demonstrate her culpability relate to Dr. Ross's employment with Thorne. Without the employment relationship between Dr. Ross and Thorne, this lawsuit would never have been filed.

The case law supports personal jurisdiction where a plaintiff's claims relate to a defendant's employment. In *Belimed, Inc. v. Bleecker*, a South Carolina supplier of medical products filed suit against its former employee ("**Bleecker**") for breach of contract and violations of the state and federal trade secrets acts. No. 2:22-CV-00891-DCN, 2022 WL 939819 (D.S.C.

[8] Dr. Ross's contacts with Thorne's South Carolina-based teams during her employment were extensive. In an effort to limit the length of Thorne's Brief and avoid repeating its arguments, Section II(D), which outlines the scope of her contacts, is incorporated here by reference.

[9] The declaratory judgment requests an interpretation of agreements involving a South Carolina party and provides the Court with an independent basis to reverse the trial court's Order.

Mar. 29, 2022). Bleecker worked in Arizona and moved to dismiss for want of personal jurisdiction. The *Belimed* facts draw several parallels to our case. Both cases involved defendant employees based in another state (Bleecker in Arizona and Dr. Ross in New York) who regularly communicated with their employers' South Carolina professionals. Dr. Ross claims she traveled to South Carolina one time in just under two years. Bleecker traveled to South Carolina "two times per year to South Carolina from 2015 to 2019, zero times in 2020, and only once in 2021." *Id.* at *4. The court denied Bleecker's motion to dismiss, holding that, "This action, at its core, concerns the terms of Bleecker's employment with a South Carolina-based company and, therefore, arises out of Bleecker's connections with South Carolina." *Id.* at *5. Similarly, every single cause of action in this case relates to Dr. Ross's employment with Thorne.

Thorne respectfully requests that the Court also consider *Tekway, Inc. v. Agarwal*, No. 19-CV-6867, 2020 WL 5946973 (N.D. Ill. Oct. 7, 2020) and *Env't 360, Inc. v. Walker*, 713 F. Supp. 3d 442 (M.D. Tenn. 2024). In *Tekway*, an Illinois employer filed suit against an out-of-state employee ("**Agarwal**") for violation of non-competition agreements. The Court denied Agarwal's motion to dismiss for lack of personal jurisdiction, finding that she knowingly accepted employment with a forum state company, entered into a multi-year employment contract that foreshadowed a long-term relationship with the state, and engaged in constant communications with the employer's in-state professionals – all facts that are present in the instant case. The Court concluded that Agarwal's motion to dismiss:

> [P]laces too much weight on the fact that she never physically crossed the state boundaries. Personal jurisdiction does not require physical presence in the forum state. It is an inescapable fact of modern commercial life that a substantial amount of business is transacted solely by mail and wire communications across state lines, thus obviating the need for physical presence within a state in which business is conducted. Personal jurisdiction cannot be avoided simply because a defendant did not physically enter the forum state.

Tekway, Inc., 2020 WL 5946973 at *7 (internal citations omitted). The *Tekway* court's holding echoes that of the *Belimed* court: "Agarwal entered into an employment relationship with an Illinois company, and the claims at issue arise out of that relationship." *Id.* at *8.

In *Env't 360, Inc. v. Walker*, the court began its opinion by asking, "In an age where remote work has become increasingly common, this case presents a prescient question: does this Court have specific personal jurisdiction over an employee who accepts employment with a Tennessee corporation, remotely works for that corporation for several years, and then harms that corporation by allegedly violating the noncompete provision of his employment agreement?" *Env't 360, Inc. v. Walker*, 713 F. Supp. 3d 442, 444 (M.D. Tenn. 2024). The court ultimately answered "YES." The case involved a Tennessee-based employer filing suit against a former employee ("**Walker**") to enforce the terms of a noncompetition agreement. Similar to the instant case, *Env't 360* involved an out-of-state employee who knowingly accepted a long-term employment contract with a company he knew had the majority of its operations in another state. Like Dr. Ross, Walker filed a motion to dismiss arguing that he was approached with the employment opportunity while living out of state, he was out of state when he signed the employment agreement, his employment terminated while he was out of state, and the conduct alleged in the complaint had nothing to do with his Tennessee contacts. *Id.* at *4. The court denied Walker's motion to dismiss, holding that he could have reasonably anticipated being hailed into a Tennessee court.

Thorne's Amended Complaint and affidavits make a *prima facie* showing of personal jurisdiction. Even though the operative complaint includes specific factual allegations that support personal jurisdiction, the trial court, contrary to South Carolina law, ignored those factual allegations and ruled in Dr. Ross's favor. The circuit court also made errors of law in its analysis. The trial court's Order focuses on physical presence and injects a causation element into its

analysis, both of which have been rejected by our courts. *State v. NV Sumatra Tobacco Trading, Co.*, 379 S.C. 81, 90, 666 S.E.2d 218, 222 (2008) (holding that physical presence is not required to establish personal jurisdiction); *Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017, 1026 (2021) (holding that, "[n]one of our precedents has suggested that only a strict causal relationship between the defendant's in-state activity and the litigation will do"); *S. Plastics Co. v. S. Com. Bank*, 310 S.C. 256, 260, 423 S.E.2d 128, 131 (1992) (holding that the claim must merely relate to the alleged conduct). In the end, the correct standard is whether the claim *relates to* the in-state contacts. Here, all four of Thorne's causes of action relate to or arise out of Dr. Ross's employment relationship with a South Carolina company and the professional misconduct in which she engaged.

D. The Exercise of Personal Jurisdiction over Dr. Ross Comports with the Fairness Prong of the Due Process Analysis.

1. The duration of Dr. Ross's activity in South Carolina supports personal jurisdiction.

Dr. Ross was not a transitory or short-term employee at Thorne. She was a highly paid professional who signed a three-year employment contract. She was employed for approximately two years. Dr. Ross knowingly accepted employment with a South Carolina company, entered into a multi-year contract that foreshadowed a long-term relationship with the State, and engaged in extensive contacts with South Carolina. The "duration" factor of the fairness prong analysis supports personal jurisdiction.

2. The character and circumstances of Dr. Ross's South Carolina acts created a reasonable expectation of litigation in South Carolina.

i. Thorne's Amended Complaint and affidavits show that Dr. Ross routinely conducted business in South Carolina and conducted business inherently related to Thorne's interests in the State.

Dr. Ross regularly conducted business, carried out her professional responsibilities, and interacted with the South Carolina facility's Medical Affairs Department, Sales and Marketing Department, and Research and Development Department. Thorne's Amended Complaint and affidavits establish a *prima facie* showing of personal jurisdiction.

The Amended Complaint alleges that Dr. Ross routinely conducted business in South Carolina and conducted business inherently related to Thorne's interests in the State; carried out her professional responsibilities, and interacted with the various South Carolina teams; contracted to supply services or things in South Carolina; entered into contract(s) to be performed in whole or in part in South Carolina; was involved in the production, manufacture, or distribution of goods with the reasonable expectation that those goods were to be used or consumed in South Carolina and were so used or consumed; and, caused tortious injury to Thorne. Am. Compl., ¶¶ 8–10, 19; *see also* S.C. Code Ann. § 36-2-803. The Amended Complaint, alone, sets forth sufficient facts to confer personal jurisdiction.

The affidavits submitted by Thorne provide an even more granular set of facts to support personal jurisdiction. Rob Monteleone, Thorne's Senior Vice President for Professional Sales, submitted an affidavit underscoring the fact that Dr. Ross routinely worked with Thorne's Professional Sales team, located in South Carolina. Mem. of Law in Opp. to Mot. to Dismiss, Ex. E, Aff. of Rob Monteleone ¶¶ 4–7 ("**Monteleone Affidavit**.") A core function of Dr. Ross's role was to increase product sales to Thorne's healthcare practitioner customer base. *Id.* The marketing campaigns were developed and coordinated with Thorne's South Carolina-based Sales Team. *Id.*

Jessica Cokins, Thorne's Vice President for Brand Marketing, also submitted an affidavit explaining her frequent collaboration with Dr. Ross. Mem. of Law in Opp. to Mot. to Dismiss, Ex. F, Aff. of Jessica Cokins ¶¶ 5–9 ("**Cokins Affidavit**.") Ms. Cokins is based in the South

Carolina facility. Her professional calendar reflects twelve different meetings involving Dr. Ross and South Carolina teams. *Id.* The calendar only shows meetings in which Ms. Cokins participated; there are undoubtedly many more that Dr. Ross attended with other South Carolina team members. *Id.*; *see also* Monteleone Affidavit; Phipps Affidavit; Frick Affidavit; Walter Affidavit.

Dr. Stephen Phipps, Thorne's Chief Innovation Officer submitted an affidavit outlining his extensive contacts with Dr. Ross. Mem. of Law in Opp. to Mot. to Dismiss, Ex. G, Aff. of Stephen Phipps, ND, Ph.D., ¶¶ 9–14 ("**Phipps Affidavit**.") Dr. Phipps is based in South Carolina. He explained that there were constant and recurring videoconference meetings involving him, Dr. Ross, and other South Carolina-based Thorne employees regarding brain health projects and Thorne supplements. *Id.* Prior to the meetings, Dr. Ross and Dr. Phipps would often prepare by consulting one another on the molecular networks and other scientific aspects of the projects. *Id.* They also collaborated on several marketing projects being handled by the South Carolina team in connection with Thorne's brain health product suite, the SynaQuell[10] portfolio, and how to advance the science and clinical aspects of the SynaQuell product line. *Id.* Dr. Ross, Dr. Phipps, and other South Carolina personnel collaborated extensively to that end. *Id.*

Amanda Frick, Thorne's Vice President for Medical Affairs, submitted an affidavit highlighting her frequent collaborations with Dr. Ross. Mem. of Law in Opp. to Mot. to Dismiss, Ex. H, Aff. of Amanda Frick, ND, LAc, ¶¶ 4–8 ("**Frick Affidavit**"). Ms. Frick is located in South Carolina. Dr. Ross and Ms. Frick worked together on a variety of projects, including brain tests and the SynaQuell projects. *Id.* They also connected on clinical studies, webinars, sales education

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[10] SynaQuell is a multi-ingredient nutritional supplement that supports healthy brain structure and cognitive function. https://www.thorne.com/products/dp/synaquell, last visited on May 15, 2024.

initiatives, and updates for testing and content development. *Id.* These projects often required weeks of collaboration between Dr. Ross and the South Carolina staff. *Id.* Dr. Ross and Ms. Frick participated in videoconference meetings on a regular basis, many of which were initiated and scheduled by Dr. Ross. *Id.*

Holly Walter, Thorne's Vice President for Human Resources, also submitted an affidavit. Mem. of Law in Opp. to Mot. to Dismiss, Ex. C, Aff. of Holly Walter, SHRM-CP ("**Walter Affidavit**"). Ms. Walter is located in Thorne's Summerville facility. *Id.* at ¶¶ 2–3. Ms. Walter stated in her affidavit that she and Dr. Ross communicated on multiple occasions regarding onboarding, human resources matters, and other administrative matters. *Id.* at ¶ 7.

Finally, Thorne's affidavits demonstrate that Dr. Ross's professional work product invariably flowed through Thorne's South Carolina facilities. Cokins Affidavit, ¶¶ 5–7. Dr. Ross's brain health tests and programs were to be developed, tested, marketed, manufactured, sold, and distributed through the South Carolina facility – as are virtually all of Thorne's products. *Id.* The same applied to the SynaQuell supplement. *Id.* For each project, Dr. Ross and Thorne's South Carolina professionals participated in meetings, exchanged emails, and worked in tandem to bring the products from the conceptual stage to a point where they could be made available for sale. Given the nature of Thorne's South Carolina business, the overwhelming presence of its professionals in South Carolina, and its stream of commerce through the South Carolina facility, all of Dr. Ross's professional responsibilities in one way or another touched South Carolina.

A significant portion of Dr. Ross's professional time was spent interacting with a variety of different South Carolina professionals to develop strategies for wellness products that would be designed, marketed, and manufactured in South Carolina. Although she had office space in New

York, Dr. Ross was a South Carolina employee working for a South Carolina company. Personal jurisdiction should attach.

ii. Dr. Ross visited South Carolina to familiarize herself with her new colleagues and the Summerville facility.

Dr. Ross traveled to South Carolina and attended a meeting with Rob Monteleone and Dr. Mario Roxas, Thorne's Director of Research and Development, on or about September 9, 2022. Monteleone Affidavit, ¶¶ 8–11. Mr. Monteleone unequivocally stated in his affidavit that the purpose of the meeting was to strategize about implementing Thome's campaign to increase brain health product sales to its health-care practitioner customer base. *Id.* at ¶ 11.

During her time in South Carolina, Dr. Ross also met with Dr. Phipps. Phipps Affidavit, ¶¶ 4–8. In his affidavit, Dr. Phipps explained that the purpose of their meeting was to discuss areas of professional collaboration. *Id.* The next day, Dr. Ross was given a tour of the Summerville facility. *Id.* Dr. Phipps' affidavit states that the purpose of the tour was to allow Dr. Ross to learn how Thorne utilizes medical sciences to develop and implement its products from the research and development stages to manufacturing. *Id.* After the facility tour, Dr. Ross spent the remainder of the day in Summerville meeting several onsite operational groups with whom she would be working. *Id.*

iii. Dr. Ross even held herself out as a South Carolina employee.

Dr. Ross held herself out as being a member of the South Carolina team. The telephone number in her email signature block begins with a South Carolina area code:

Dr. Mary Kay Ross, MD, FACEP
Chief Medical Officer
office 843-779-8139
Thorne | Facebook | Instagram

Dr. Ross never requested that she be assigned a New York telephone number, nor did she request any change to the signature block that would identify her as being based in New York. The signature block includes no information that would lead one to believe Dr. Ross was based anywhere but South Carolina.

iv. The Trial Court Failed to Resolve Issues of Fact in Thorne's Favor.

Despite the allegations of Thorne's Amended Complaint and the numerous affidavits offered in opposition to Dr. Ross's motion to dismiss, the trial court refused to decide questions of fact in Thorne's favor as is required at the Rule 12 stage of any case. The trial court's findings that Dr. Ross only had "minimal," "limited," or "non-essential" interactions and "[i]solated emails and calls" with Thorne's South Carolina professionals are factual conclusions that are irreconcilable with Thorne's Amended Complaint and affidavits. Order, 5, 8–10. Moreover, the trial court's Order depicts Dr. Ross's visit to the Berkeley County facility as a "non-commercial facility visit and [having] a communal meal, absent of any form of business dealings or negotiations." *Id*. at 8; *see also id*. at 9–10. This finding simply cannot be squared with the affidavits by Dr. Phipps and Mr. Monteleone stating the clear business purposes underlying her visit. Indeed, if Dr. Ross's professional sphere was truly circumscribed to the New York office, there would have been no need to tour the South Carolina facility and meet its people. The trip foreshadowed the extensive collaboration with Thorne's South Carolina teams that would define her employment.

Rather than resolving issues of fact in favor of the non-moving party as is required by our Rule 12 standards, the trial court relied almost exclusively on three affidavits filed by Dr. Ross. The first was an affidavit she prepared. The thesis of Dr. Ross's affidavit was that her office was located in New York, and she only traveled to South Carolina once. Def.'s Mot to Dismiss, Ex. 3,

Aff. of Mary Kay Ross, Feb. 7, 2024. The trial court's Order's reliance on physical presence is misplaced and completely ignores her extensive South Carolina contacts. *See e.g.*, Order, 2, 6, 8.

The second affidavit was by Bryan Conley, a disgruntled former Thorne employee who was represented by the same counsel as Dr. Ross in a separate dispute with Thorne. Def.'s Mot to Dismiss, Ex. 1, Aff. of Bryan Conley, Feb. 7, 2024; *Thorne HealthTech, Inc. v. Bryan Conley*, Case No. 2023-CP-10-0694, Ninth Judicial Circuit, South Carolina, Complaint (the "**Conley Complaint**"). In that case, Thorne was forced to file a motion for preliminary injunction to prevent Mr. Conley from violating a confidentially agreement. Conley Complaint, ¶ 2–3. Specifically, Mr. Conley threatened to make public certain confidential and proprietary information to which he had access solely through his employment at Thorne. *Id.* To say that Mr. Conley might be partial is an understatement. Turning to the substance of his affidavit, Mr. Conley does not offer anything new. He talks about Dr. Ross's physical presence in New York. The statements provided by Mr. Conley are biased, redundant, and duplicative.

The third affidavit Dr. Ross submitted was by Vincent Bauer, the attorney handling the New York lawsuit she filed against Thorne. Def.'s Mot to Dismiss, Ex. 1, Aff. of Vincent Bauer, Feb. 7, 2024. Mr. Bauer does not add much to Dr. Ross's argument. He basically states there is another action pending in New York that was filed and served after the South Carolina action. From there, Mr. Bauer offers his unsolicited opinions on the sufficiency of Thorne's Complaint and his view on the reason Thorne filed suit against Dr. Ross. This portion of his affidavit is unsupported by facts and inadmissible, not to mention completely improper, and should have been stricken or otherwise disregarded by the trial court. Taken together, Dr. Ross's affidavits show that **(1)** her entire jurisdictional argument hinges on the fact she was assigned an office in New York, **(2)** a disgruntled former Thorne employee has decided to inject himself into the case to offer

redundant information, and **(3)** Dr. Ross's New York attorney feels the court should rule in favor of his client. Notwithstanding the fact that the court must resolve issues of fact in Thorne's favor, Dr. Ross's affidavits pale in comparison to the jurisdictional information Thorne presented. The Court of Appeals should reverse the trial court's Order.

3. <u>Dr. Ross, residing in a neighboring state, will suffer no inconvenience from litigation in South Carolina</u>.

Upon information and belief, Dr. Ross is a resident of Georgia. Am. Compl., ¶ 5. She was served in Tybee Island, Georgia. Aff. of Service, Nov. 28, 2023. Thorne is a South Carolina company. South Carolina is much more central to the parties, despite the trial court's suggestion that the case should be litigated in New York. Order, 11.

Further, Dr. Ross secured counsel in South Carolina. In *Belimed, Inc. v. Bleecker*, *supra*, the court held that although a defendant residing in Arizona might be inconvenienced by litigating in South Carolina, that factor was allayed by the fact that he retained local counsel to defend him. No. 2:22-CV-00891-DCN, 2022 WL 939819 at *5 (D.S.C. Mar. 29, 2022). Unlike the defendant in *Belimed* who lived across the country, Dr. Ross resides in Georgia. Any theoretical burden would be even less given her proximity.

4. <u>South Carolina has a strong interest in exercising jurisdiction over Dr. Ross</u>.

South Carolina has a strong interest in hearing this case because of Thorne's significant presence in the Berkeley County community, with a local workforce of approximately 571 employees. Walter Affidavit, ¶¶ 5–6. The allegations Thorne makes against Dr. Ross are serious. Thorne contends that its rights were violated when Dr. Ross improperly accessed and disseminated confidential and proprietary information regarding Thorne's business dealings. Am. Compl., ¶ 18. Thorne maintains that Dr. Ross misused her position with Thorne for her own personal benefit or the benefit others. *Id.* at ¶ 19.

The Amended Complaint's allegations all relate to Dr. Ross's employment relationship with Thorne. In *Belimed*, the court concluded that South Carolina has an interest in "resolving controversies arising from contracts concerning the state's commerce and its interest in applying the state's own laws." *Belimed, Inc. v. Bleecker*, No. 2:22-CV-00891-DCN, 2022 WL 939819, at *5 (D.S.C. Mar. 29, 2022). Berkeley County and the State have a strong interest in hearing an action by a local company that employs hundreds of South Carolina citizens and claims its rights were violated under South Carolina law.

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Thorne's Amended Complaint and the six affidavits it filed provide ample grounds to support the exercise of personal jurisdiction over Dr. Ross. The Court has the power to exercise jurisdiction because all of Thorne's causes of action relate to Dr. Ross's employment with Thorne. Dr. Ross entered into a long-term employment contract with a South Carolina company having approximately 83% of its workforce based in South Carolina. Dr. Ross's entry into a contract to be performed in South Carolina, on its own, places her within the jurisdiction of South Carolina courts. When she accepted the position, and certainly when she committed the wrongful acts alleged in the Amended Complaint, there was a reasonable expectation she may be asked to appear in a South Carolina Court. Thorne's filings also demonstrate that exercising personal jurisdiction over Dr. Ross is fair and reasonable in light of the duration and nature of her contacts, coupled with the practicalities and interests associated with litigating the case in South Carolina.

In its filings with the trial court, Thorne provided, by way of affidavit, detailed examples of Dr. Ross's South Carolina contacts, including the names of individuals with whom Dr. Ross communicated, dates of collaboration, and even descriptions of specific projects on which Dr. Ross worked. Unfortunately, the circuit court declined to include these facts in its Order, much less

resolve the factual disputes in Thorne's favor for the purposes of the Rule 12 motion.[11] For these reasons, Thorne respectfully requests that the Court of Appeals reverse the trial court's decision.

III. THE DOCTRINE OF *FORUM NON CONVENIENS* DOES NOT SUPPORT DISMISSAL.

The trial court erred in dismissing Thorne's action based on *forum non conveniens*. The court failed to assess the appropriate factors and reached conclusions inapposite with the facts and circumstances of the case. Its Order should be reversed.

A. Standard of Review

A *forum non conveniens* ruling by the trial court is reviewed under an abuse of discretion standard. "The decision to invoke the doctrine of forum non conveniens is within the discretion of the trial court." *Fed. Land Bank of Columbia v. Davant*, 292 S.C. 172, 179, 355 S.E.2d 293, 297 (Ct. App. 1987). For the reasons set forth below, the trial court abused its discretion in dismissing Thorne's action as *forum non conveniens.*

B. Legal Standards

Forum non conveniens is a well-established doctrine which allows a court with proper jurisdiction to dismiss an action when the "convenience of the parties" and the "ends of justice" would be better served if the action were tried elsewhere. *Id.* at 179, 297. In determining the applicability of *forum non conveniens*, the court must assess public and private considerations, including: **(1)** the relative ease of access to the sources of proof; **(2)** witness availability and costs of obtaining witness' attendance; **(3)** the possibility of viewing premises, if applicable to the action;

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[11] The Court must take as true the nonmoving party's allegations and resolve all factual disputes in its favor, including affidavits, which may be submitted – but are not required – to establish personal jurisdiction. *Brown v. Invest. Mgmt. & Res., Inc*., 323 S.C. 395, 399, 475 S.E.2d 754, 756 (1996); *Mid-State Distributors, Inc. v. Century Importers, Inc*., 310 S.C. 330, 335, 426 S.E.2d 777, 780 (1993).

(4) ease, time efficiency, and expense incurred trying the case; **(5)** enforceability of a judgment, if one is obtained; **(6)** administrative difficulties for South Carolina courts; **[7]** local interests in the trial; and **[8]** difficulties for South Carolina courts arising from conflict of laws and interpretation of foreign law. *Macaulay v. Wachovia Bank of S.C., N.A.*, 333 S.C. 201, 206, 508 S.E.2d 46, 49 (Ct. App. 1998) (renumbered) citing *Braten Apparel Corp. v. Bankers Trust Co.*, 273 S.C. 663, 259 S.E.2d 110 (1979).

The party asserting *forum non conveniens* has a heavy burden of proof. *Nienow v. Nienow*, 268 S.C. 161, 169, 232 S.E.2d 504, 508 (1977). Courts should not dismiss actions under this doctrine unless the balance is strongly in favor of the defendant. *Id.* (Emphasis added); *Santa Fe Eng'rs, Inc. v. Carolina Door Prods., Inc.*, 275 S.C. 215, 216–17, 268 S.E.2d 581, 582 (1980) (holding that, "[T]he plaintiff's choice of forum should be left undisturbed unless the balance of factors strongly favor the defendant's motion") (emphasis added); *Fed. Land Bank of Columbia*, 292 S.C. at 179–80, 355 S.E.2d at 297 (holding that where the amounts of defendant's North Carolina and South Carolina debt were unresolved, granting a *forum non conveniens* motion would not be "promoting the ends of justice, it appears to us that it would frustrate justice.") Many courts have also come to acknowledge the reality that "documentary and testimonial evidence" is "more conveniently available now through electronic storage and transfer and through remote discovery and hearing proceedings," and that physical distance is "not necessarily a determinative factor." *Lehram Cap. Invs., Ltd. v. Baker & McKenzie Int'l*, 2024 IL App (1st) 230095, ¶ 33; *see also Mil-Ray v. EVP Int'l, LLC*, No. 3:19-CV-00944-YY, 2021 WL 2903224 (D. Or. July 8, 2021).

C. The Trial Court's Order Dismissing Thorne's Amended Complaint is Unsupported by the *Forum Non Conveniens* Considerations.

At the outset, it must be reiterated that Section 8.1 of the Employment Agreement provides that Dr. Ross "Ross agree[d] to submit to the jurisdiction of a South Carolina court for the purpose

of enforcing or interpreting a term or condition of this Agreement." Employment Agreement, § 8.1. If Dr. Ross signed the Employment Agreement, the case must be adjudicated in South Carolina. Even if she did not sign the agreement, she accepted it by acquiescence or performance. Therefore, this case be should adjudicated in South Carolina unless a finder of fact duly determines that Dr. Ross did not sign the agreement or accept it by acquiescence or performance.

1. The relative ease of access to sources of proof

The relative ease of access to the sources of proof in this case supports a South Carolina forum. Thorne submitted affidavits showing that its two main facilities and approximately 83% of its workforce are located in South Carolina. Dr. Ross is in Georgia. Documents are stored electronically and can easily be made available in discovery without regard for where physical copies (if any) may be stored. The first factor favors a South Carolina forum.

2. Witness availability and costs of obtaining witness' attendance

Witness availability and costs of attendance also supports a South Carolina forum. No discovery has taken place in this case, so it would be premature to identify primary trial witnesses. However, as noted above, the parties are located in the southeast; *i.e.*, South Carolina and Georgia. The small Thorne team located in New York would voluntarily appear at trial in South Carolina as needed. The second factor favors a South Carolina forum.

3. The possibility of viewing premises, if applicable to the action

There is no need to view the premises in this case. Thorne's Amended Complaint requests a declaration of the parties' rights under the contracts and a finding that Dr. Ross improperly accessed and disseminated confidential and proprietary information. Given the nature of this action, viewing the premises seems inapplicable.

4. Ease, time efficiency, and expense incurred trying the case

For many of the same reasons already discussed, the ease, time efficiency, and expense to be incurred in trying the case supports a South Carolina forum. Both parties are located in the southeast. Trying the case in South Carolina is much more efficient that doing so in New York. The majority of Thorne's workforce and its witnesses are in South Carolina. And its witnesses who may be located in New York will certainly cooperate with the court's trial schedule. Thorne sees no delay or complication in that regard. Thorne – the only party who still has any presence in New York – is ready and willing to litigate in South Carolina. The fourth factor favors a South Carolina forum.

5. Enforceability of a judgment, if one is obtained

Judgment enforceability favors a South Carolina forum. Whether the case is heard in South Carolina or New York, Thorne may be required to domesticate the judgment in Dr. Ross's home state of Georgia.

Section 8.1 of the Employment Agreement provides that, "An order, judgment, or decree of a South Carolina court may be transferred without Ross's objection to another jurisdiction to enforce its compliance." Employment Agreement, § 8.1 (emphasis added). Although Section 8.1 does not prohibit the transfer of judgments from other states, Dr. Ross has clearly waived her right to contest domestication of a South Carolina judgment.

Setting aside the Employment Agreement, Georgia's Uniform Enforcement of Foreign Judgments Law permits the enforcement of a foreign judgment in Georgia so long as the state from which the judgment originates has adopted substantially similar legislation. O.C.G.A. § 9-12-138. Both South Carolina and New York have enacted similar laws. In 1993, South Carolina passed its Uniform Enforcement of Foreign Judgments Act. S.C. Code Ann. § 15-35-900 *et seq*. Likewise, in 1970, New York enacted Article 54 of its Civil Practice Law and Rules, known as the

"Enforcements of Judgments Entitled to Full Faith and Credit Summary of Article." N.Y. C.P.L.R. 5401 (McKinney) *et seq*. In examining the applicable statutes, it appears judgment enforceability is neutral between South Carolina and New York. The Court should therefore leave Thorne's choice of forum undisturbed. *Mil-Ray v. EVP Int'l, LLC*, No. 3:19-CV-00944-YY, 2021 WL 2903224, at *12 (D. Or. July 8, 2021) (denying defendants' *forum non conveniens* motion given that "a judgment could be enforced in either jurisdiction" and the "factors do not favor defendant over plaintiff"); *Santa Fe Eng'rs, Inc. v. Carolina Door Prods., Inc.*, 275 S.C. 215, 216–17, 268 S.E.2d 581, 582 (1980) (holding that, "[T]he plaintiff's choice of forum should be left undisturbed unless the balance of factors strongly favor the defendant's motion.")

6. Administrative difficulties for South Carolina courts

There are no administrative difficulties for South Carolina courts in adjudicating this case. Both parties are represented by counsel licensed in the State. Both sides' attorneys are familiar with the Berkeley County Court as well as local custom and norm. Counsel for both parties have offices located just a short drive from the courthouse. All papers submitted to the court are filed and served electronically. Notices from the court are similarly served electronically. The sixth factor favors a South Carolina forum.

7. Local interests in the trial

Section II(D), *supra*, details the significant state and local interests in this action. Thorne employs hundreds of Berkeley County residents and has alleged serious misconduct by Dr. Ross affecting its confidential and proprietary interests. The community has an interest in South Carolina courts hearing claims made by its residents, including Thorne. The seventh factor favors a South Carolina forum.

8. Difficulties for South Carolina courts arising from conflict of laws and interpretation of foreign law

There are no conflict of law or interpretation of foreign law issues in this case. The Amended Complaint consists of four causes of action. The declaratory judgment and unfair trade practices claims stem from South Carolina statutory law. The breach of contract and breach of fiduciary duty claims are rooted in South Carolina common law. The Employment Agreement includes a South Carolina choice of law provision. Employment Agreement, § 8.1. The eighth factor favors a South Carolina forum.

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The trial court's Order fails to examine the eight *forum non conveniens* factors articulated by our appellate courts. Thorne's Amended Complaint and affidavits demonstrate that Dr. Ross's contacts with the State were extensive and that she availed herself of the protections and benefits of South Carolina law. Although Dr. Ross contests Thorne's allegations, when a defendant's ties to South Carolina cannot be determined with precision, the court should deny a motion to dismiss based on *forum non conveniens*. *Fed. Land Bank of Columbia v. Davant*, 292 S.C. 172, 179, 355 S.E.2d 293, 297 (Ct. App. 1987). The trial court's *forum non conveniens* analysis is fundamentally flawed. Thorne respectfully requests that the Court of Appeals reverse the trial court's Order.

CONCLUSION

The Court of Appeals should reverse the Order granting Dr. Ross's Motion to Dismiss based on the trial court's errors in its findings of fact, application of legal standards, and conclusions of law. Thorne was required to and did make a *prima facie* showing of personal jurisdiction. Unfortunately, the trial court ignored the allegations of the Amended Complaint and the six affidavits filed by Thorne employees and, instead, decided factual questions in Dr. Ross's favor – all in violation of established Rule 12 jurisprudence.

The Employment Agreement includes a forum selection clause in favor of South Carolina. The parties take diverging positions on its enforceability, raising genuine issues of material fact that should be reserved for a jury. However, at the Rule 12 stage, issues of fact must be resolved in favor of the non-moving party. The trial court declined to do so. If the Employment Agreement is binding, then the personal jurisdiction analysis ends there, and this case must remain in South Carolina.

All four of Thorne's causes of action relate to its employment relationship with Dr. Ross, as well as Dr. Ross's contacts with the State. The trial court's Order, however, fixates on physical presence. The court's analysis is, at best, incomplete. The notion that Dr. Ross's New York office was somehow siloed off from the rest of the company belies the realities of her employment and the sworn statements of Thorne's affiants. The trial court's personal jurisdiction holding must be reversed.

The doctrine of *forum non conveniens* is not applicable in this case. Both parties are located in the southeast. The parties and their counsel are well equipped to litigate in South Carolina, and doing so will be much more convenient than trying the case hundreds of miles away in New York. Berkeley County and the State have a meaningful interest in hearing serious claims of misconduct asserted by a South Carolina company who employs hundreds of South Carolina citizens.

For the reasons set forth herein, Thorne respectfully requests that the Court of Appeals reverse the trial court's Order granting Dr. Ross's Motion to Dismiss and remand the case for proceedings consistent with this Court's Opinion.

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Respectfully submitted,

s/ Kevin A. Hall

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