IN 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
Case No. 2023-CP-08-02553
Appellate Case No. 2024-002053

Thorne Healthtech, Inc. and Thorne Research, Inc., ... Appellants,

v.

Mary Kay Ross, ...Respondent.

INITIAL BRIEF OF RESPONDENT

HAYNSWORTH SINKLER BOYD, P.A.

Stafford J. McQuillin III (SC Bar #78203)
J. Boone Aiken, IV (SC Bar #105243)
P.O. Box 340
Charleston, SC 29402
843.722.3366
mmcquillin@hsblawfirm.com
baiken@hsblawfirm.com

Sarah P. Spruill (SC Bar #68337)
P.O. Box 2048
Greenville, SC 29602
864.240.3200
sspruill@hsblawfirm.com

Attorneys for Respondent Dr. Mary Kay Ross

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

STATEMENT OF ISSUES ON APPEAL

1. Was the circuit court within its discretion in dismissing this action based on the doctrine of *forum non conveniens* and its finding that "the convenience of the parties and the interests of justice are better served by dismissing this action in favor of a New York forum"?

2. Did the circuit court correctly find that it lacked personal jurisdiction over Dr. Mary Kay Ross in this action?

STATEMENT OF THE CASE AND FACTS

This is an appeal from the circuit court's dismissal of this action on two separate and independent grounds, lack of personal jurisdiction and *forum non conveniens*.[1] (Orders, R. at ____).

I. The Parties

The Respondent in this action is Dr. Mary Kay Ross, the former Chief Medical Officer for Onegevity Health, LLC ("Onegevity"), a subsidiary of Thorne HealthTech, Inc. ("Parent Corporation"). (Amended Complaint ¶ 6, Offer Letter, Conley Aff. ¶ 4, R. at ____). An offer letter dated July 26, 2021, signed by Dr. Ross and Nathan Price, as Chief Executive Officer of Onegevity, recites that Dr. Ross was being offered "a full-time position with Onegevity, a division of Thorne HealthTech." (Offer Letter, R. at ____).

The offer letter further recites that Dr. Ross was to report directly to Dr. Price, that the terms of the offer letter were binding, that the initial term was three years, that Dr. Ross was entitled to certain benefits including severance and stock options, and that Dr. Ross was entitled to "reasonable moving expenses for your relocation to New York." (*Id.*). The letterhead for the offer letter refers to "Thorne" and shows a "corporate" address in New York and a "manufacturing" address in Summerville, South Carolina. (*Id.*).

The offer letter contemplates that the parties would later enter into an employment contract. (*Id*). There is no evidence, however, that Dr. Ross signed such an agreement. Both parties presented the circuit court with an "Employment Agreement" listing Dr. Ross and Parent Corporation as the parties, which was executed by Parent Corporation but not by Dr. Ross.

[1] Thorne has not appealed the circuit court's ruling that it lacked general jurisdiction over Dr. Ross (Brief of Appellant ("App. Br.") at n. 5). Nor has it argued on appeal that the circuit court erred in failing to allow jurisdictional discovery.

(Employment Agreement, R. at ____). The Employment Agreement defines "Thorne" to mean "Thorne HealthTech, Inc., a Delaware Corporation, whose principal place of business is 152 West 57th Street, 10th Floor, New York, New York 10019[.]" (*Id.*). The amended complaint does not allege that Dr. Ross signed the Employment Agreement. (Amended Complaint, R. at ____). Instead, it alleges as follows:

> 11. An Offer of Employment letter dated July 26, 2021 (the "Offer Letter") was executed by and between the parties, and its terms and conditions were subsequently addressed in an Employment Agreement between the parties dated August 2, 2021 (the "Employment Agreement"). The Employment Agreement provides that Ross's employment with Thorne shall be governed by and construed in accordance with South Carolina law.

(R. at ____).

After accepting the terms of the offer letter from Parent Corporation, Dr. Ross and her husband moved from Georgia to New York where they continued to reside until October 2024, after Dr. Ross's termination in July 2023. (Ross Aff. ¶¶ 2, 4, 14, 19, 22, Amended Complaint ¶ 20, R. at ____). By all accounts, Dr. Ross made one visit to South Carolina during her tenure with Onegevity/Parent Corporation. (Ross Aff. ¶¶ 15-16, Monteleone Aff. ¶¶ 8-11, Phipps Aff. ¶¶ 4-8, R. at ____).

The Appellants in this matter are Parent Corporation, a Delaware corporation, and Thorne Research, Inc., a South Carolina corporation (collectively, "Thorne"). (Amended Complaint ¶¶ 1-2, R. at ____). Thorne Research, Inc. is a separate subsidiary of Parent Corporation. (*Id.* ¶ 3, R. at ____).

II. The Litigation

The underlying complaint was filed by Thorne on September 14, 2023 and included one cause of action for declaratory judgment. (Complaint, R. at ____). The complaint is short, 21

paragraphs, and alleges vaguely that "Thorne is an interested party to the writing(s) by and between the parties, and Thorne's rights, status, and other legal relations are affected by these writings. A dispute has arisen between the parties, and Thorne is therefore entitled to a determination of the respective rights, duties, and obligations of the parties." (Complaint ¶ 20, R. at ____). There is no further discussion of the "dispute," nor is there any indication of what Thorne wants declared. Parent Corporation filed a separate action against Dr. Ross in Delaware pertaining to stock options on the same date. (Delaware Complaint, R. at ____).

Dr. Ross brought her own suit in New York on October 16, 2023, naming as defendants Parent Corporation, Onegevity, and Paul Jacobson as Chief Executive Officer of Parent Corporation ("New York Action"). (NY Complaint, R. at ____). The New York Action states claims for age discrimination, retaliation, and breach of contract.[2] (*Id.*).

The complaint in this action was served on Dr. Ross on November 7, 2023 in Georgia. (Aff. of Service, R. at ____). Dr. Ross moved to dismiss on December 28, 2024. (Motion to Dismiss, R. at _____). Immediately thereafter, Thorne filed an amended complaint on January 8, 2024. (Amended Complaint, R. at ____). The first twelve paragraphs mirror the complaint. (*Id.*). The remainder of the amended complaint purports to assert claims for breach of contract, breach of fiduciary duty, violations of the South Carolina Unfair Trade Practices Act, and declaratory judgment. (*Id.*). These claims hinge on vague allegations relating to "accessing and disseminating confidential and proprietary information regarding Thorne's business dealings[.]" (Amended Complaint ¶¶ 17-18, 23-24, 30-31, 33, R. at ____).

[2] In response to footnote 4 of the Appellants' brief and as of the date of Respondent's initial brief, the defendants' motion to dismiss the New York Action was denied, the case remains pending, and discovery is beginning.

Dr. Ross again moved to dismiss, including arguments that the circuit court lacked personal jurisdiction and that the doctrine of *forum non conveniens* should be applied so that the parties could resolve their dispute in New York. (Motion to Dismiss and Memorandum in Support, R. at ____). In support of her motion, she attached affidavits from Bryan Conley (the former Chief Financial Officer of Thorne Research, Inc.), her attorney in the New York action, and herself. (Attachments to Motion to Dismiss, R. at ____). Dr. Ross attached two documents repeatedly referenced in the amended complaint to her affidavit, the offer letter and the unsigned Employment Agreement. (Offer Letter, Employment Agreement, R. at ____). In her affidavit, Dr. Ross stated, among other things, that she lived and worked in New York during her employment at the corporate office in New York, that her supervisors were also headquartered in the New York office, and that she visited South Carolina once during the term of her employment. (Ross Aff. ¶¶ 2, 13-18, R. at ____). She denied signing the Employment Agreement. (*Id.* ¶ 11, R. at ____).

Thorne opposed the motion, essentially arguing that this action should remain in South Carolina based on a "forum selection clause" in the Employment Agreement and the fact that most of Thorne Research, Inc.'s operations are in South Carolina.[3] (Memorandum in Opposition, Walter Aff., R. at ____). In response to the motion, Thorne submitted six affidavits from employees of the Parent Corporation and Thorne Research, Inc. (Affs. of Walter, Price, Monteleone, Cokins, Phipps, and Frick, R. at ____). The affidavits do not include any evidence that Dr. Ross signed the Employment Agreement, nor do they refute that she lived and physically

[3] Thorne has attempted to conflate the Parent Company and Thorne Research, Inc. throughout this litigation by referring to both entities as Thorne. A review of the offer letter and the Employment Agreement, however, show that Dr. Ross was to be employed by the Parent Corporation. (Offer Letter, Employment Agreement, R. at ____). In contrast, the Affidavit of Holly Walter, attached to Thorne's memorandum opposing dismissal, is limited to Thorne Research, Inc. and the locations of its employees and facilities. (Walter Aff., R. at ____).

worked in New York and reported to New York based supervisors. (*Id.*). Nor was any evidence provided or argument made as to whether the alleged "accessing and disseminating confidential and proprietary information regarding Thorne's business dealings" giving rise to the complaint had anything to do with South Carolina.

Following a hearing on May 23, 2024, the circuit court granted the motion to dismiss on July 23, 2024, finding that there was no personal jurisdiction over Dr. Ross and that the doctrine of *forum non conveniens* favored dismissal. (Order, R. at ____). Thorne moved to reconsider on August 2, 2024.[4] (Motion, R. at ___). The circuit court denied the motion on November 6, 2024. (Order, R. at ____). This appeal followed.

ARGUMENT

I. The circuit court was within its discretion in dismissing this action based on the doctrine of *forum non conveniens.*

A. Thorne's argument on appeal was not raised to the circuit court and is not preserved for this Court's review.

On appeal, Thorne has raised a new argument, claiming that the circuit court misapplied the factors set forth in *Macaulay v. Wachovia Bank of S.C., N.A.*, 333 S.C. 201, 206, 508 S.E.2d 46, 49 (Ct. App. 1998). (App. Br. at Argument III). A review of the record shows no treatment of *forum non conveniens* in Thorne's memorandum in opposition to the motion to dismiss and no mention of the doctrine by Thorne's counsel at the hearing. (Motion, Transcript, R. at ____). Thorne's motion for reconsideration does not cite *Macaulay*, does not list any factors, and does not charge that the dismissal on this ground suffered from any error of law. (Motion, R. at ____). Instead, Thorne asked the circuit court to reconsider "the relevance of physical distance, especially

[4] Thorne did not serve the motion on the circuit court within ten days as required by Rule 59(g), SCRCP.

where Thorne—the only party who still has any presence in New York—is ready and willing to litigate in South Carolina." As such, the argument presented on appeal is not preserved for this Court's review. *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 734 (1998) (holding that an argument must have been raised to and ruled on by the circuit court to be preserved for appellate review). The Court may affirm the order of dismissal on this basis alone. *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (providing that an appellate court need not address remaining issues when resolution of a prior issue is dispositive).

B. Standard of Review

In 1979, the South Carolina Supreme Court adopted the doctrine of *forum non conveniens*. *Braten Apparel Corp. v. Bankers Trust Company*, 273 S.C. 663, 259 S.E.2d 110 (1979). "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). Generally, "[a]n abuse of discretion occurs when the trial court's ruling is based on an error of law or is not supported by the evidence." *Nelson v. Harris*, 441 S.C. 379, 386, 893 S.E.2d 592, 595 (Ct. App. 2023). Although Thorne's brief correctly recites this standard, its brief appears to urge a *de novo* or preponderance of the evidence standard. As argued below, the circuit court's ruling was an appropriate exercise of discretion and was supported by the law and the evidence.

C. The circuit court's determination that "the convenience of the parties and the interests of justice are better served by dismissing this action in favor of a New York forum" is consistent with South Carolina law and the evidence in the record.

Under the doctrine of *forum non conveniens*, "a court with proper jurisdiction [may] dismiss an action when the convenience of the parties and the ends of justice would be better served if the action were tried elsewhere." *Fed. Land Bank of Columbia*, 292 S.C. at 179, 355 S.E.2d at 297. "The doctrine is generally invoked whenever the forum has little or no relationship

to a cause of action. A court should not dismiss an action under the doctrine unless the balance of factors strongly favors the defendant." *Id.* (citations omitted).

The circuit court presented the following analysis of the issue:

> Here, the Court finds that South Carolina has little to no relationship to Plaintiffs' causes of action. Specifically, Defendant's employment and relevant interactions occurred in New York, where both Thorne HealthTech's headquarters and the primary parties involved are based.[5] Plaintiffs' causes of action are grounded in actions that took place in New York.[6] Defendant's direct supervisors, the key witnesses, and the pertinent documents are all located in New York, further emphasizing New York's central role in this dispute.[7] The Court finds that granting a dismissal would not prejudice Plaintiffs. Rather, it would require them to initiate their action in New York—the state where a pending action involving Defendant's employment has already been filed[8]; where nearly every witness resides[9]; where Plaintiffs' law firm has an office and is involved in an action with Defendant; where Defendant and her husband, Mr. Stephen Ross, lived and were employed during their tenure with Plaintiffs[10]; and where convening this action would substantially benefit all parties involved due to convenience and proximity. As such, the convenience of the parties and the interests of justice are better served by dismissing this action in favor of a New York forum.

(Order, R. at ____) (footnotes added to provide examples of support in Record on Appeal).

On appeal, Thorne argues that the circuit court misapplied the factors set forth in *Macaulay v. Wachovia Bank of S.C., N.A.*, 333 S.C. 201, 206, 508 S.E.2d 46, 49 (Ct. App. 1998). (App. Br. at Argument III). Those factors are:

> (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;[11] (4) ease, time efficiency and expense incurred trying the

---

[5] (Ross Aff. ¶¶ 15-17, Amended Complaint ¶¶ 1-3, 20, R. at __).
[6] (Ross Aff. ¶ 21; Bauer Aff. ¶ 3, R. at ____).
[7] (Ross Aff. ¶ 14; Bauer Aff. ¶¶ 2-3, R. at ___)
[8] (Complaint in New York Action, R. at ____).
[9] (*See* Ross Aff. ¶ 14; *see also* Bauer Aff. ¶¶ 2-3, R. at ___)
[10] (Ross Aff. ¶¶ 13,16, R. at __).
[11] The parties agree that this factor is not applicable. Similarly, it appears from Thorne's argument that enforceability of a judgment does not work in favor of New York or South Carolina. (App. Br. at Argument III). Nor are there any particular administrative or conflict of laws issues that would favor one jurisdiction over another.

> case; (5) enforceability of a judgment, if one is obtained; (6) administrative difficulties for South Carolina courts; (6) local interests in the trial; and (7) difficulties for South Carolina courts arising from conflict of laws and interpretation of foreign law.

(footnote added).

Thorne has submitted its preferred treatment of the factors, but it has not shown any abuse of discretion. With respect to the unsigned Employment Agreement and its jurisdiction clause found in section 8.1, that issue is treated in the discussion of personal jurisdiction below. It is noteworthy, however, that there is not a forum selection clause in the Employment Agreement. (Employment Agreement ¶¶ 8.1, 6.1(d), R. at ____). Nothing about section 8.1 requires that litigation take place in South Carolina. (*Id.*).

As far as the ease of access to sources of proof and witness availability and the cost of obtaining attendance and local interests in the trial, the record is clear that Dr. Ross was physically located in New York as were her supervisors during her employment. (Ross Aff. ¶ 13-18, R. at ___). There is also no dispute that the Parent Corporation is a Delaware Corporation and its corporate offices are located in New York. (*See* Amended Complaint ¶ 1, Offer Letter, R. at ____). Nor is there any dispute that Dr. Ross does not reside in South Carolina. (Amended Complaint ¶ 5, R. at ____). These facts all support the connection to New York and New York's interest in to adjudication of these claims. As such, there is evidence supporting the circuit court's findings that the parties' disputes should be resolved in New York.

With respect to the ease, time, efficiency and expense incurred trying the case, there is an action pending in New York raising issues surrounding Dr. Ross's employment. Based on the very vague allegations contained in the amended complaint and the arguments in Thorne's brief that this case stems from Dr. Ross's employment, there does not appear to be any reason why

Thorne's claims should not proceed in New York. The fact that Thorne Research, Inc. is predominantly located in South Carolina does not mean that the circuit court abused its discretion.

Having considered the record and the arguments before it, the circuit court's analysis is supported by the record and constitutes a valid exercise of its discretion. Accordingly, this Court must affirm the circuit court's dismissal of this action based on its finding that "the convenience of the parties and the interests of justice are better served by dismissing this action in favor of a New York forum."

II. The circuit court correctly found that Dr. Ross is not subject to personal jurisdiction in South Carolina for purposes of this action.

A. 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. *State v. NV Sumatra Tobacco Trading, Co.*, 379 S.C. 81, 88, 666 S.E.2d 218, 221 (2008). "The decision of the trial court will be affirmed unless unsupported by the evidence or influenced by an error of law." *Id.*; *see Cockrell v. Hillerich & Bradsby Co.*, 363 S.C. 485, 491, 611 S.E.2d 505, 508 (2005); *Coggeshall v. Reprod. Endocrine Assocs. of Charlotte*, 376 S.C. 12, 16, 655 S.E.2d 476, 478 (2007); *Cribb v. Spatholt*, 382 S.C. 475, 481, 676 S.E.2d 706, 709 (Ct. App. 2009). "When a motion to dismiss attacks the allegations of the complaint on the issue of jurisdiction, the court is not confined to the allegations of the complaint but may resort to affidavits or other evidence to determine jurisdiction." *Coggeshall*, 376 S.C. at 16, 655 S.E.2d 476; *Cribb*, 382 S.C. at 481, 676 S.E.2d at 709.[12] Accordingly, modern

[12] To the extent Thorne has cited earlier cases that purport to apply a Rule 12(b)(6), SCRCP standard, those cases have been supplanted by the more recent precedent cited here. With respect to the quoted discussion from *Mid-State Distributors, Inc. v. Century Importers, Inc.*, 310 S.C. 330, 335, 426 S.E.2d 777, 780-81 (1993), a review of the full quote in context shows that the analysis there pertained not to the standard of review for decisions on personal jurisdiction, but

South Carolina case law shows that circuit courts are required to carefully consider the facts and record before them in making decisions on issues of personal jurisdiction and those decisions will not be reversed absent an abuse of discretion. In other words, circuit courts are not required to find jurisdiction because a plaintiff has made vague jurisdictional allegations in its complaint.

In addition to this authority providing that the circuit court is not confined to the allegations of the complaint in considering a motion to dismiss on personal jurisdiction grounds, courts may take notice of items referenced in the complaint in deciding whether a plaintiff has stated a claim. *See Hall v. Virginia*, 385 F.3d 421, 424 n. 3 (4th Cir. 2004); *Am. Chiropractic v. Trigon Healthcare*, 367 F.3d 212, 234 (4th Cir. 2004) (providing the Court may take judicial notice of documents which are "integral to and explicitly relied on in the complaint" and authentic to determine whether Plaintiff has stated a claim); *Loftus v. F.D.I.C.*, 989 F. Supp. 2d 483, 488 (D.S.C. 2013) ("In addition to accepting the truth of all factual allegations, a court also must consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the

---

rather whether orders denying motions to dismiss on personal jurisdiction grounds are immediately appealable. As stated there,

> The 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. Further, after a prima facie showing, the appeal of the personal jurisdiction issue prior to a full development of the facts serves no useful function. There is no finality in a denial of the motion to dismiss for lack of personal jurisdiction. Just as with a denial of a 12(b)(6), the prima facie showing will succeed or fail at trial. 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.

Id.

complaint by reference, and matters of which a court may take judicial notice." (quotation omitted)); *Pension Ben. Guar. Corp. v. White Consol. Indus., Inc.*, 998 F.2d 1192, 1196 (3d Cir. 1993) ("a court may consider an undisputedly authentic document that a defendant attaches as an exhibit to a motion to dismiss if the plaintiff's claims are based on the document. . .. Otherwise, a plaintiff with a legally deficient claim could survive a motion to dismiss simply by failing to attach a dispositive document on which it relied.") Here, this would include consideration of the offer letter and the unsigned Employment Agreement.

B. Dr. Ross did not enter an enforceable agreement containing a jurisdiction clause.[13]

As repeatedly mentioned in Thorne's brief, Dr. Ross's contractual employment term was to be three years. (App. Br. at Facts, Arguments I(D), II(C), II(D)). This duration of employment is confirmed in the offer letter. (Offer Letter, R. at ____).

The amended complaint does not allege the Employment Agreement was signed by Dr. Ross. (Amended Complaint, R. at ____). Nor has any version of the document signed by Dr. Ross been produced, although both parties have attached the unsigned version to their filings. (Employment Agreement, R. at ____). Dr. Ross has sworn she did not sign it. (Ross Aff. ¶ 11, R. at ____). Quite simply, there is no basis for the Appellant's arguments that the circuit court erred in finding that the Employment Agreement was unsigned.

Moreover, given the time required for performance (three years), any action based on the Employment Agreement as filed in South Carolina, is subject to the statute of frauds. S.C. Code Ann. § 32-3-10 ("No action shall be brought whereby: . . . (5) To charge any person upon any

[13] Thorne incorrectly characterizes section 8.1 of the Employment Agreement as a forum selection clause. It makes no reference to where any dispute must be resolved. Instead, it provides "Ross agrees to submit to the jurisdiction of a South Carolina court . . .."

agreement that it not to be performed within the space of one year from the making thereof; Unless the agreement upon which such action shall be brought or some memorandum or not thereof shall be in writing and signed by the party to be charged therewith[.]"). As such, Thorne's arguments relating to substantial performance or acquiescence are unavailing.[14]

Moreover Dr. Ross's employment, salary, and benefits, were consistent with the offer letter signed by both parties. There is no later event which would indicate any agreement on the part of Dr. Ross to submit herself to personal jurisdiction in South Carolina. Under the standard recited above, the circuit court was within its discretion in finding that the Employment Agreement was unsigned by Dr. Ross and therefore, inapplicable.

In addition, as a general matter, while Dr. Ross agreed to the terms presented in the offer letter, she did not assent to the terms of the Employment Agreement. *See, e.g.*, *Bugg v. Bugg*, 272 S.C. 122, 125, 249 S.E.2d 505, 507 (1978) ("Where it is determined that the parties intended not to be bound until the written contract is executed, no valid and enforceable obligation will be held to arise."); *see also Potomac Leasing Co. v. Otts Mkt., Inc.*, 292 S.C. 603, 606, 358 S.E.2d 154, 156 (Ct. App. 1987) ("It is well settled in South Carolina that in order for there to be a binding contract between parties, there must be a mutual manifestation of assent to the terms.").

Lastly, even if section 8.1 of the Employment Agreement could be applied to Dr. Ross, the language of that clause would not be dispositive on the issue of personal jurisdiction. *See Springmasters, Inc. v. D & M Mfg.*, 303 S.C. 528, 402 S.E.2d 192 (Ct.App.1991) ("Although not controlling, a choice of law provision is relevant in deciding whether to exercise personal jurisdiction."); *Coggeshall*, 376 S.C. at 20-21, 655 S.E.2d at 480-81 (quoting same). As will be

[14] Although the statute of frauds was not raised to the circuit court, this Court may affirm for any reason appearing in the record. Rule 220, SCACR.

shown below, the circuit court considered the record before it in light of the applicable standard and found that this action should be dismissed. Therefore, the dismissal should be affirmed.

C. Thorne has not established personal jurisdiction in this matter.

The question of personal jurisdiction over a nonresident defendant is one which must be resolved upon the facts of each particular case. *NV Sumatra Tobacco Trading, Co.*, 379 S.C. at 88, 666 S.E.2d at 221. When personal jurisdiction is challenged by a motion pursuant to Rule 12(b)(2), SCRCP, the "party seeking to invoke personal jurisdiction . . . by utilization of our long-arm statute [S.C. Code Ann. § 36-2-803] has the burden of establishing jurisdiction." *Aviation Assocs. & Consultants, Inc. v. Jet Time, Inc.*, 303 S.C. 502, 505, 402 S.E.2d 177, 178 (1991).

As set forth by this Court,

> Traditionally, our courts have conducted 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. However, a more recent trend compresses the analysis into a due process assessment only.

Cribb, 382 S.C. at 475, 676 S.E.2d at 710-11 (citations omitted). Due process requires that 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. *Coggeshall*, 376 S.C. at 16, 655 S.E.2d at 478. "Further, the due process requirement mandates the defendant possess sufficient minimum contacts with the forum state such that he could reasonably anticipate being haled into court there." *Power Prods. & Servs. Co. v. Kozma*, 379 S.C. 423, 431-32, 665 S.E.2d 660, 665 (Ct. App. 2008).

Courts apply a two-pronged analysis when determining whether a defendant possesses minimum contacts with the forum state such that maintenance of suit does not offend traditional notions of fair play and substantial justice. *Id.* at 432, 665 S.E.2d at 665. "The 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.* It is not enough to merely satisfy the "power" prong, a plaintiff must also satisfy the "fairness" prong of the test. *Cribb*, 382 S.C. at 489-90, 676 S.E.2d at 714 (finding that although there were minimum contacts with the state, dismissal was appropriate under the fairness prong because "nothing which [was] the subject of this litigation ha[d] taken place in South Carolina").

1. Dr. Ross lacked minimum contacts with South Carolina with respect to the causes of action asserted.

To satisfy the "power prong," the Court must find the defendant directed his activities to residents of South Carolina and that the cause of action arises out of or relates to those activities. *Moosally v. W.W. Norton & Co.*, 358 S.C. 320, 331-32, 594 S.E.2d 878, 884 (Ct. App. 2004). As summarized by Thorne, South Carolina courts have "the power to exercise 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[.]" (App. Br. at Argument II at Introduction). The record, however, includes evidence painting a different picture.

The offer letter and Employment Agreement, which were executed by Parent Corporation and therefore reflect Parent Corporation's intent, show that the three-year term of employment was with Onegevity and the Parent Corporation. (Offer Letter, Employment Agreement, R. at ____). Neither Parent Corporation nor Onegevity are South Carolina companies. The statistics relating to a South Carolina work force and presence are those for Thorne Research, Inc., a separate

subsidiary of Parent Corporation. (Walter Aff., R. at ____). Thorne did not provide any information for Parent Corporation or Onegevity.

The offer letter included a term providing that Dr. Ross would be paid "reasonable moving expenses" for relocating to New York. (Offer Letter, R. at ____). The Employment Agreement with Parent Corporation explicitly states that Dr. Ross's responsibilities as Chief Medical Officer "**will be performed at Thorne's offices in New York City**."[15] (Employment Agreement ¶ 1.3, R. at ____) (emphasis added). Dr. Ross's supervisors were located in New York. (Ross Aff. ¶¶ 14, R. at ___). Consistent with those terms, Dr. Ross was New York based and visited South Carolina once in connection with her employment. (Ross Aff. ¶ 2, 15-18, R. at ____)

The evidence in the record mirrors that in *Delta Apparel, Inc. v. Farina*, 406 S.C. 257, 271-72, 750 S.E.2d 615, 622-23 (Ct. App. 2013). In reversing the trial court's finding that there was personal jurisdiction, this Court provided the following discussion:

> Delta alleged in its complaint that the trial court had personal jurisdiction over Farina because Farina entered into an employment relationship with Delta, a corporation doing business in the state of South Carolina. Further, Delta claimed Farina engaged in an ongoing business relationship with Delta; however, Delta only offered Merrill's supplemental affidavit in support of its claims. In her affidavit, Merrill explained Delta's chief executive officer (CEO) and the vice president's offices are located in Greenville, and she asserted both had interviewed Farina and discussed the requirements of the position with him. She stated Farina inquired of Delta's CEO about his job responsibilities at the Ceiba plant and also held conversations with the vice president regarding his employee benefits, termination, and severance settlement. Finally, Merrill stated Farina was aware that Delta's corporate offices were in Greenville and that he had contact with individuals in the corporate offices on a regular basis.
>
> Despite Delta's assertion that Farina had sufficient contacts with South Carolina to support a finding of personal jurisdiction, the California Tax Board sent its requests to withhold money from Farina's pay checks to offices in Duluth, Georgia. Further, Farina's severance settlement with Delta was executed in Duluth and filed in

[15] For purposes of the Employment Agreement, Thorne means the Parent Corporation. (Employment Agreement, R. at ____).

> DeKalb County, Georgia. Despite Merrill's assertions within her affidavit, she never stated where the interview and conversations between Farina and Delta's corporate officers occurred, and Delta admitted in oral argument that Farina's interview occurred in North Carolina. Finally, Merrill never asserted that Farina came to Greenville for any of the other activities listed in the affidavit.
>
> In light of these facts, we believe Farina established he did not have the minimum contacts required for the trial court to have personal jurisdiction over him. The California Tax Board's notices went to offices located in Duluth, Farina signed his severance settlement in Duluth, and Farina worked in Honduras during his employment. While Farina may have spoken with officers that worked in the Greenville corporate office, there was no evidence to show Farina ever traveled to South Carolina for those conversations. Thus, Farina's contacts do not establish that he would have reasonably expected to be haled in to court in South Carolina, nor were the contacts sufficient for this State to fairly exercise personal jurisdiction over him. Accordingly, we reverse the trial court because South Carolina did not have personal jurisdiction over Farina.

Id.

Thorne has produced no affidavits indicating that Dr. Ross directed her activities to South Carolina or that Dr. Ross's one visit to South Carolina or interactions with residents of South Carolina relate to the cause of actions asserted against Dr. Ross apart from general statements that the claims are related to her employment. Those vague allegations alone are not enough to establish minimum contacts as shown in *Delta Apparel, Inc.* *See also Aviation Assocs. & Consultants, Inc.*, 303 S.C. at 508, 402 S.E.2d at 180 (1991); *Commissioning Agents, Inc. v. Long*, 143 F. Supp. 3d 775, 788-89 (S.D. Ind. 2015) (holding that receipt of salary or other payments from a forum state company does not in itself establish personal jurisdiction if the defendant's role and activities were conducted outside the forum state); *Travel Leaders Leisure Grp., LLC v. Cruise & Travel Experts*, No. 19CV02871SRNECW, 2020 WL 4604534, at *17 (D. Minn. Aug. 11, 2020) (determining that administrative activities such as sending emails from outside the forum state do not establish personal jurisdiction).

For purposes of this analysis, the defendant's activities directed to a resident of this State must be his or her own and not the unilateral activities of some other entity. *S. Plastics Co. v. S. Com. Bank*, 310 S.C. 256, 261, 423 S.E.2d 128, 131 (1992). All of the contacts argued by Thorne connect back to Thorne Research, Inc. and not any purposeful availment by Dr. Ross. For example, as Thorne stated, "Dr. Ross **was directed** to visit the South Carolina facility so she could connect with her new colleagues . . . ." (Pl. Mem. in Opp., p. 10, R. at ____) (emphasis added). This directive underscores that Dr. Ross's presence in South Carolina was a result of her employer's instructions and not a voluntary or deliberate action to establish business ties within this state.

Moreover, although Thorne has submitted affidavits outlining general contacts with South Carolina, the affidavits do not link that contact to the vague claims asserted in the amended complaint. (Affs. of Walter, Price, Monteleone, Cokins, Phipps, and Frick, R. at ____). Thorne has not appealed the finding that there was not general jurisdiction here. Therefore, to establish personal jurisdiction, Thorne had the burden of linking its claims to Dr. Ross's contacts with the state. It failed to do so as found by the circuit court. (Order, R. at ____). In contrast to this absence of evidence or allegation in the amended complaint on Thorne's part, Dr. Ross stated in her affidavit, "I understand that Thorne's allegations against me in the above captioned case are that I somehow improperly obtained and benefited from insider information about the August 2023 sale prior to the public announcement of the sale. These allegations are not true, but if they were, I would have only obtained this information while I was working with Paul Jacobson and Dr. Nathan Price in the New York corporate office, which housed "New York Research and Development

Department," as set forth in my May 27, 2023 final, updated Job Description Form. I have never discussed a sale of Thorne with anyone in South Carolina."[16] (Ross Aff. ¶ 21, R. at ____).

The circuit court considered the record before it and found that Thorne's general arguments relating to the operations of Thorne Research, Inc. and Dr. Ross's contact with South Carolina employees of Thorne Research, Inc. did not establish that Dr. Ross personally directed her activities to South Carolina or that those activities were sufficiently linked to the allegations of the amended complaint to satisfy the power prong. These findings are consistent with South Carolina case law and supported by evidence in the record and must be affirmed.

2. Thorne has not satisfied the fairness prong of the due process analysis.

Under the fairness prong, courts 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 by conferring or refusing to confer jurisdiction over the nonresident; and (4) the State's interest in exercising jurisdiction. *NV Sumatra Tobacco Trading, Co.*, 379 S.C. at 91, 666 S.E.2d at 223. "While choice of law analysis is separate and distinct from personal jurisdiction analysis, which state's law controls is a factor to be considered under the fairness prong of due process." *Moosally*, 358 S.C. at 332, 594 S.E.2d at 885.

Again, the offer letter and Employment Agreement show that the three-year term of employment was with Onegevity and the Parent Corporation. (Offer Letter, Employment Agreement, R. at ____). Neither Parent Corporation nor Onegevity are South Carolina companies.

[16] This characterization of the amended complaint comes from an email sent by Thorne's counsel summarizing the claims as follows: "Thorne is informed and believes the both Stephen and MK Ross inappropriately obtained insider information about the same pending Thorne transaction and that they attempted to utilize the insider information for their financial benefit." (Exhibit to Memorandum in Support of Motion to Dismiss, R. at ____).

Dr. Ross was New York based and her supervisors were in New York at the corporate offices for Parent Corporation. Thus, Thorne's arguments as to duration are misplaced.

With respect to the character and circumstances of Dr. Ross's acts, she lived and worked in New York. She did not sign the Employment Agreement, and there is no evidence that she undertook any action that would suggest she might anticipate being sued in South Carolina, nor did she agree to the application of South Carolina law. Yes, Thorne would have liked to get Dr. Ross to agree to South Carolina jurisdiction and choice of law, but she did not. Although Thorne submitted affidavits showing communications with the Summerville location, the affidavits do not link those communications with the allegations of the amended complaint, namely that Dr. Ross "access[ed] and disseminat[ed] confidential and proprietary information regarding Thorne's business dealings[.]" (Amended Complaint ¶¶ 17-18, 23-24, 30-31, 33, R. at ____). Nor is there any indication that the claims are linked to Dr. Ross's one visit to South Carolina.

As far as the last two factors, there is litigation pending in New York also relating to Dr. Ross's employment, so there is no "inconvenience to the parties by conferring or refusing to confer jurisdiction over the nonresident." In fact, the parties' resources would be better conserved by litigating in one jurisdiction rather than two. Lastly, South Carolina has minimal interest in exercising jurisdiction here. The only South Carolina party is Thorne Research, Inc., a separate subsidiary of the Parent Corporation, and a non-party to the offer letter and Employment Agreement.

Given the above, it would not be reasonable or fair for a South Carolina court to exercise jurisdiction of Dr. Ross in this case.

CONCLUSION

For any of these reasons, the circuit court's dismissal of this action should be affirmed.

Respectfully submitted,

HAYNSWORTH SINKLER BOYD, P.A.

s/ Sarah P. Spruill

Stafford J. McQuillin III (SC Bar #78203)
J. Boone Aiken. IV (SC Bar #105243)
P.O. Box 340
Charleston, SC 29402
843.722.3366
mmcquillin@hsblawfirm.com
baiken@hsblawfirm.com

Sarah P. Spruill (SC Bar #68337)
P.O. Box 2048
Greenville, SC 29602
864.240.3200
sspruill@hsblawfirm.com

Attorneys for Respondent Mary Kay Ross

May 1, 2025