THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Roger M. Young, Circuit Court Judge

Appellate Case No. 2022-000346

Reid Fleming..... Appellant

v.

LG Chem, Ltd……. Respondent.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

This is an appeal from an order dismissing a products liability action for lack of personal jurisdiction. Appellant Reid Fleming filed his Complaint on April 12, 2021 naming as defendants the Planet Vape, LLC, SCECIGARETTE LLC, and LG Chem, Ltd. Appellant alleged that he was injured when an 18650 battery cell he purchased from defendants The Planet Vape and SC E-Cigarette as a standalone battery to power his e-cigarette device exploded in his pocket. (R. p. 22.) Appellant alleged that LG Chem manufactured the 18650 lithium-ion battery cell. (R. p. 21.)

Appellant served his Complaint on LG Chem in South Korea through the Hague Service Convention on June 15, 2021. On July 15, 2021, LG Chem moved to dismiss Appellant's complaint for lack of personal jurisdiction. (R. pp. 30-32.) LG Chem's motion was supported by the Affidavit of Mr. Hwi Jae Lee, dated July 13, 2021 and filed July 15, 2021. (R. pp. 33-39.)

On January 7, 2022, pursuant to the circuit court's instructions, both parties filed their briefs. LG Chem filed its Memorandum of Law in Support of its Motion to Dismiss. (R. pp. 46-47.) Appellant filed his Response in Opposition to Defendant's Motion to Dismiss, attaching in support the affidavit of his counsel, dated January 7, 2022, and copies of LG Chem's 2018 and 2017 financial statements; import data; a Certificate of Authority and Business Registration for a

subsidiary of LG Chem; and orders from a North Carolina federal district court and other South Carolina trial courts. (R. pp. 68-270.)

On January 11, 2022, LG Chem filed the Reply Affidavit of Hwi Jae Lee (R. pp. 271-276) and a Motion for Leave to File a Reply Brief. (R. pp. 387-416.) On January 11, 2022, Fleming filed the Declaration of Nickie Bonenfant and appendices. (R. pp. 277-386.)

The court conducted a lengthy hearing on January 18, 2022, during which the court asked many questions, and both parties were allowed ample opportunity to argue the facts and the applicable law. (R. pp. 537-578.) On January 26, 2022, the Court notified the parties by email that LG Chem's Motion to Dismiss was granted and directed LG Chem to submit a proposed order. (R. p. 494.) On February 2, 2022, LG Chem submitted its proposed order. (R. pp. 498-510.) Appellant raised one specific objection regarding the factual depiction of his allegations and generally objected to the overall analysis in the Court's Order. (R. pp. 512-526.) LG Chem then submitted an amended proposed order that clarified the allegations to which Appellant had objected. (R. pp. 528-534.) Appellant raised no further objections. On February 7, 2022, the Court entered its Order granting LG Chem's Motion to Dismiss. (R. pp. 3-13.)

On February 17, 2022, Appellant filed his Motion to Reconsider, attaching as an exhibit portions of a transcript of the personal deposition of an LG Chem employee taken in September 2018 in a lawsuit in Georgia. (R. pp. 417-434.) Appellant asked the Court to reconsider its February 7, 2022 Order, arguing that the Order was based on a misunderstanding and/or misapprehension of facts regarding LG Chem, Ltd.'s products and South Carolina contacts and that the Order effectively leaves Appellant with no forum for his claims against LG Chem. (R. p. 417.)

On February 22, 2022, LG Chem filed its Response in Opposition to Fleming's Motion to Reconsider, supported by exhibits, and arguing that the Court correctly applied the law to the facts

and that a motion to reconsider is not an appropriate time to raise matters that could have been – but were not – raised before the Court ruled on the Motion to Dismiss. (R. pp. 435-536.) On February 23, 2022, the Court entered its Order denying Appellant's Motion to Reconsider. (R. pp. 14-16.)

On March 21, 2022, Appellant filed his Notice of Appeal. (Notice of Appeal; R. p. 1.) On April 19, 2022, Fleming filed a motion to certify this case to the Supreme Court. (Mot. to Certify) On May 17, 2022, the Supreme Court denied the motion. (5/17/22 Order.)

STATEMENT OF FACTS

A. Appellant's claims.

Appellant Reid Fleming is a resident of Anderson County, South Carolina. (R. p. 17.) Appellant alleged that on or around May 24, 2018, he was injured when a lithium ion battery he had purchased from Planet Vape and SC E-Cigarette for use with his e-cigarette device exploded in his pocket. (R. 22.) Fleming further alleged that these retailers marketed or represented the batteries as being LG brand. (R. p 21.) Although not specifically identified in his Complaint, Appellant agrees the type of battery he allegedly purchased and used as a standalone battery with his e-cigarette device was an 18650. (Appellant's Initial Br., at 14)

B. LG Chem's motion to dismiss.

LG Chem is a Korean corporation with its headquarters and principal offices in Seoul, South Korea. (R. p. 36.) Appellant did not dispute this fact and conceded that general jurisdiction was not at issue. (R. p. 17, 543.)

LG Chem's motion to dismiss was supported by admissible evidence, through the Affidavit of Hwi Jae Lee, showing that LG Chem did not serve a consumer market in South Carolina (or anywhere else) for standalone 18650 batteries. LG Chem never designed, manufactured,

distributed, advertised, or sold its lithium ion battery cells directly to consumers for use as standalone, replaceable batteries (with e-cigarette devices or for any other purpose) in South Carolina or anywhere else. (R. p. 37.) The lithium ion cells that LG Chem manufactured were industrial component parts, not standalone, replaceable consumer batteries; and they were not designed to be handled by consumers. (R. p. 37.) LG Chem never conducted any business with the South Carolina vape store that allegedly sold the subject battery cell to a South Carolina consumer as a standalone battery; never authorized them or anyone else to advertise, distribute, or sell its lithium ion cells to individual consumers for use as standalone, replaceable batteries; and never distributed, supplied, sold, or shipped any lithium ion battery cells to anyone in South Carolina known to LG Chem to be engaged in the business of selling 18650 lithium ion cells directly to individual consumers for use as standalone, replaceable batteries to power vaping devices. (R. pp. 37-39.)

C. Appellant's proffer of extrinsic evidence concerning unrelated business activities.

In opposition to LG Chem's Motion to Dismiss, Appellant introduced import data charts and the Declaration of Nickie Bonenfant, Chief Operating Officer of a company called ImportGenius, to show the Court that LG Chem had shipped "lithium ion battery products" to South Carolina. Appellant argued that the charts showed that LG Chem had shipped hundreds of products into the Port of Charleston, either directly or using a subsidiary company (LG Chem America, Inc.) as a consignee or distributor. (R. p. 76.) Appellant also stated that LG Chem was "registered to do business in South Carolina" (R. pp. 79, 244) and submitted the decisions of five other South Carolina trial courts that had denied similar motions to dismiss in other cases involving similar claims after relying on similar information and exhibits. (R. pp. 79-81 & 248-270).

Appellant argued that his exhibits showed "984 shipments through the Port of Charleston, with 818 of those shipments co-signed by LGCAI." (R. p. 76.) In so doing, Appellant created the misimpression that those 984 shipments were lithium ion battery products, when in fact not a single one of the entries on the 59 page chart attached as Exhibit 3 to his Opposition reflected shipment of any type of lithium ion battery product to anyone in South Carolina. Instead, the shipment descriptions on the chart refer to "methyl acrylate", "ethyl hexyl acrylate", "resin ABS", "acrylic acid," and "synthetic rubber," among others, which are petrochemical products, not lithium ion battery products. (R. pp. 393, 274, 405).

Appellant also argued that his exhibits showed that "13 shipments of LG Chem lithium ion batteries went through the Port of Charleston and shipped out to businesses operating in South Carolina." (R. p. 76.) In fact, the chart appeared to show a single shipment to a South Carolina entity (a car manufacturer) prior to the date of the alleged incident in this case (May 24, 2018). The chart also appears to show 8 other shipments to the same car manufacturer in 2019 (after Appellant's incident) and 3 shipments on the same post-incident date (December 21, 2018) to a power company in Raleigh, North Carolina. Nothing in Appellant's Exhibit 4 supports the inference that the 13 shipments (12 of which occurred after the alleged incident in this case) were 18650 lithium ion battery cells shipped to vape stores. (R. pp. 393, 274, 405.)

Appellant offered no evidence to support his argument that "a lithium ion battery is a lithium ion battery." Nor did he offer any evidence to support his analogy offered at the hearing that the distinction between different types of lithium ion battery products "would be like . . . drawing a distinction between light cigarettes and ultra light cigarettes." (R. p. 568.) To the contrary, the admissible evidence (and information that is readily publicly available) supports that "lithium-ion battery products" encompasses multiple different types of products. For example,

lithium-ion battery cells the size and shape of a purse or briefcase can be joined together in battery systems the size of an office desk to power electric vehicles, such as cars and buses. (R. p 53.)

The type of battery cell allegedly at issue in this case (and in every other decision Appellant submitted and asked the trial court and this Court to consider) is an 18650 lithium-ion cell, which measures 65 mm in length and 18 cm in diameter and is cylindrical in shape and comes in many different models. (R. pp 53, 549.) [1]

And regardless of the size or type of lithium ion battery cell at issue (indisputably the 18650 here), LG Chem never supplied any lithium ion battery cells (of any size or type) to consumers for use as standalone, replaceable batteries. (R. p. 37.) Any consumer in South Carolina – or anywhere else in the United States – who purchased an LG 18650 lithium-ion battery cell as a standalone battery (whether for an e-cigarette device or for any other purpose) had access to the cell through a distribution chain that LG Chem did not authorize. (R. p. 37.)

D. Appellant's untimely proffer of new facts in support of his Motion to Reconsider.

After the circuit court granted LG Chem's Motion to Dismiss, Appellant moved to reconsider for two reasons: (1) Appellant argued that the Order was issued based on "a misunderstanding and/or misrepresentations of fact" regarding LG Chem's products and contacts with South Carolina; and (2) Appellant argued the result was unfair because Appellant was left "with no forum" and "no recourse" for his claims. (R. p. 417.) In support of the first point, Appellant introduced portions of a transcript of the personal deposition of an LG Chem employee taken in September 2018 in a lawsuit in Georgia, responding to questions about the use by Phillip

[11] At the time of the relevant events, LG Chem manufactured 18650 lithium-ion battery cells. LG Chem spun off its battery division on December 1, 2020 to a newly formed wholly-owned subsidiary called LG Energy Solution, Ltd. LG Energy Solution, Ltd. now manufactures 18650 lithium-ion cells. (R. p. 35.)

Morris of 18650 cells in the charging unit of its IQQS vaping device. Appellant argued that LG Chem's counsel had misrepresented facts to the court concerning LG Chem's business activities. (R. pp. 419-421.)

Non-confidential portions of the deposition excerpts Appellant submitted (that he did not quote or otherwise bring to the circuit court's attention) explained that the IQOS device was designed to incorporate a lithium ion cell with protective circuitry in a charging unit and that, unlike the vaping device at issue in this suit, was not designed or manufactured to be powered by 18650 lithium ion cells sold directly to consumers as standalone, replaceable batteries. (R. p. 439.) Instead, the 18650 cell is incorporated with protective circuitry and inaccessible to the consumer, similar to laptop computers, power drills, e-bikes, and other consumer electronics manufactured using 18650 lithium ion cells embedded in battery packs with protective circuitry.[2]

At the hearing on the Motion to Dismiss, LG Chem's counsel had explained to the circuit court the difference between e-cigarette devices powered by an embedded battery and the type of vaping device at issue in this case, which is a type designed by third parties, acting without LG Chem's authorization, to be powered by 18650 cells used as standalone, replaceable batteries. (R. pp. 554-555, 547 (describing the different LG Chem products in general and their purposes); R. p. 560 (describing generally that LG Chem did not sell 18650 cells to be handled by consumers but instead to "go to a manufacturer that would incorporate it with protective circuitry embedded in a device"); R. p. 562 (same).

Also in support of his Motion to Reconsider, Appellant provided the circuit court with native

[2] As an aside, publicly available information showed that the IQOS device was first approved by FDA for sale in the United States nearly a year after Plaintiff's alleged incident. *See* https://www.fda.gov/news-events/press-announcements/fda-permits-sale-iqos-tobacco-heating-system-through-premarket-tobacco-product-application-pathway. (R. p. 439.)

excel files for the Appendices to the Declaration of Nickie Bonenfant that had previously been filed in "PDF" format. (R. pp. 417-434.) In his Motion to Reconsider, Appellant stated that he could not tell from the excel spreadsheets which type of lithium ion battery was involved in the shipments to the car manufacturers in South Carolina, (R. p. 418), ignoring LG Chem's admissible evidence supporting the conclusion that the shipments to car companies were not 18650 lithium ion cells and also ignoring the fact that his appendices can be searched for "18650," resulting in two entries for shipments that arrived in the United States at a California port for delivery to a manufacturer located in California. (R. pp. 274, 574.) Appellant then asked the court to reconsider its decision, or in the alternative, to allow Appellant to "seek leave of court to conduct jurisdictional discovery into the issues regarding LG Chem's South Carolina contacts and the lithium ion batteries it designs for use with vaping devices for Phillip Morris." (R. p. 426.)

Promptly after LG Chem submitted its Memorandum in Opposition to the Motion to Reconsider, the circuit court denied the Motion on the basis that "a motion for reconsideration is not a vehicle to re-litigate previously raised issues" or "to raise argument or present evidence that could have been presented prior to the entry of judgment." (R. p. 15.)

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." *Cockrell v. Hillerich & Bradsby Co.*, 363 S.C. 485, 491, 611 S.E.2d 505, 508 (2005); *see also Hidria, USA, Inc. v. Delo*, 415 S.C. 533, 539, 783 S.E.2d 839, 842 (Ct. App. 2016). "The decision of the trial court should be affirmed unless unsupported by the evidence or influenced by an error of law." *Cockrell*, 363 S.C. at 491, 611 S.E.2d at 508 (citing *Engineered Prods. v. Cleveland Crane & Eng'g*, 262 S.C. 1, 201 S.E.2d 921 (1974)).

ARGUMENT

The crux of this case turns on whether the circuit court correctly found that Appellant's vague and conclusory allegations that LG Chem supplied "lithium ion battery products" to South Carolina and expected consumers in South Carolina to use its "lithium ion battery products" did not satisfy Appellant's burden of proving that jurisdiction could be exercised over a foreign company alleged to have manufactured a product that indisputably arrived in South Carolina through an unknown and unauthorized chain of distribution.

Appellant challenges the circuit court's decision to consider matters outside the pleadings, but Appellant himself offered matters outside the pleadings in opposition to LG Chem's motion to dismiss. Appellant now challenges the conclusions the circuit court drew after considering the very evidence Appellant offered and asks this Court to go back to the pleadings and decide the issue based solely on his allegations.

But the law is well-established that a circuit court has the authority to go beyond the pleadings when deciding a motion to dismiss, and the circuit court in this case carefully reviewed the evidence presented, and properly concluded that Appellant simply did not support his burden of proof. Indeed, in this appeal, noticeably absent from Appellant's statement of "undisputed" evidence at the bottom of page 21 is any citation to evidence to support his assertions that "it is undisputed that LG manufactures lithium-ion batteries, and specifically size 18650 batteries, for use throughout the United States, including South Carolina" and "[t]t is undisputed that LG imported hundreds of shipments of lithium-ion batteries into the port of Charleston."

Appellant's Complaint made no mention of 18650 lithium-ion batteries, even though he acknowledges that this is the type of product allegedly at issue in this suit. Appellant's Complaint also pled no facts to support his conclusory assertion that his claims were "related" to forum-

specific conduct by the defendant. And Appellant offered no evidence to contradict LG Chem's evidentiary proof that it never designed, manufactured, distributed, advertised, or sold 18650 lithium-ion battery cells for sale to consumers as standalone, replaceable batteries in South Carolina, or anywhere else.

Appellant asks this Court to find that his conclusory allegations that LG Chem shipped "lithium ion batteries" to South Carolina and that he was injured in South Carolina by use of a lithium ion battery allegedly manufactured by LG Chem was sufficient to support his burden of proof.

Appellant's argument completely ignores the "relatedness" element of the due process standard, which the U.S. Supreme Court most recently reaffirmed in *Ford Motor Co. v. Montana Eighth Judicial District Court*, 141 S. Ct. 1017, 1026 (2021) (and numerous other cases since the South Carolina Supreme Court's 2008 decision in *State v. NV Sumatra Tobacco Trading, Co.*, 379 S.C. 81, 666 S.E.2d 218 (2008)), which the Fourth Circuit Court of Appeals recently reaffirmed in *Wallace v. Yamaha Motors Corp, U.S.A.*, No. 19-2459, 2022 WL 61430, at *5 n.6 (4th Cir. Jan. 6, 2022), and which the North Carolina Court of Appeals recently applied in a similar case (*Miller v. LG Chem, Ltd.*, 2022-NCCOA-55, 281 N.C. App. 531, 868 S.E.2d 896) that Appellant did not address.

The circuit court correctly found that Appellant's conclusory allegations were not sufficient to meet his burden of proof, properly considered matters outside the Complaint (including affidavits offered by Appellant himself), and correctly concluded that Appellant had failed to satisfy his burden of proving that his claims arose out of or related to contacts LG Chem formed with South Carolina because shipment of lithium ion battery cells or batteries to sophisticated manufacturers in South

Carolina was not related in any way to Appellant's claim that he was injured by use of an 18650 lithium ion cell as a standalone, replaceable battery.

I. The circuit court acted within the scope of its authority by considering matters outside the pleadings when granting the motion.

A. The circuit court had authority to consider matters outside the pleadings.

"The party seeking to invoke personal jurisdiction over a non-resident defendant . . . bears the burden of establishing jurisdiction." *Power Prods. & Servs. Co., Inc. v. Kozma*, 379 S.C. 423, 430, 665 S.E.2d 660, 664 (Ct. App. 2008). To meet his burden, Appellant must establish both that the long-arm statute is satisfied and that constitutional due process is satisfied. South Carolina's long-arm statute requires a finding that the plaintiff's claims arise from the defendant's activities. *See* S.C. Code Ann. § 36-2-803(A)(4); *Sullivan v. Hawker Beechcraft Corp.*, 397 S.C. 143, 150, 723 S.E.2d 835, 839 (Ct. App. 2012).

At the pretrial stage, the plaintiff meets his burden of proving personal jurisdiction over a nonresident defendant by a prima facie showing of jurisdiction either (1) in the complaint or (2) in affidavits. *See Cockrell*, 363 S.C. at 491, 611 S.E.2d at 508; *Sullivan v. Hawker Beechcraft Corp.*, 397 S.C. 143, 150, 723 S.E.2d 835, 839 (Ct. App. 2012).

It is well established that a circuit court has authority to consider matters outside the pleadings when considering a motion to dismiss for lack of personal jurisdiction. *Coggeshall v. Reprod. Endocrine Assocs. of Charlotte*, 376 S.C. 12, 16, 655 S.E.2d 476, 478 (2007) ("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."); *see also*, *Power Prods.* 379 S.C. at 428, 665 S.E.2d at 663 (citing defendants' affidavits submitted to negate facts alleged in the complaint and support their argument that there was an insufficient nexus from their actions to support jurisdiction); *Hidria*,

USA, Inc. v. Delo, 415 S.C. 533, 538, 783 S.E.2d 839, 841 (Ct. App. 2016) (citing to affidavits submitted by both plaintiff and defendant in affirming the trial court's dismissal).

Further, Appellant offered affidavits and other extrinsic evidence in support of his Opposition to LG Chem's motion to dismiss. (R. pp. 72-73, 75-76, 79.) Appellant also argued to the circuit court that other trial courts within the state had considered and relied upon the same information when denying similar motions to dismiss brought by LG Chem in those cases. (R. pp. 79-81.)

Accordingly, even if it were error for the circuit court to consider extrinsic evidence, which it was not, Appellant invited the court to consider extrinsic evidence and therefore waived any argument that it was improper for the court to do so. *Gordon v. Busbee*, 397 S.C. 119, 130, 723 S.E.2d 822, 828 n.2 (Ct. App. 2012) ("An appellant cannot cause or invite the trial court to err and then complain about the court's actions on appeal.").

B. Appellant's generic and conclusory allegations were not sufficient to meet his burden of proof.

The circuit court correctly found that the Complaint did not establish a prima facie showing of personal jurisdiction because Appellant (1) did not plead any jurisdictional facts specific to the product at issue and (2) did not plead any facts showing a connection between Appellant's claims in this lawsuit and LG Chem's contacts with South Carolina. (R. p. 6.)

Vague and conclusory allegations cannot support the exercise of jurisdiction. Instead, a plaintiff must allege specific facts to establish the contacts necessary to invoke either general or specific jurisdiction. *See Power Prods.*, 379 S.C. at 433, 434, 436, 665 S.E.2d at 665, 666, 667 (affirming trial court's dismissal based on lack of personal jurisdiction because plaintiff did not establish facts—either through the complaint or affidavits—to confer jurisdiction). Conclusory allegations will not suffice. *Id.* at 433, 665 S.E.2d at 665, 666; *see also SouthStar Fin. LLC v. T-*

Zone Health Inc., No. 2:21-cv-02511-DCN, 2021 WL 5235223, at *2 (D.S.C. Nov. 10, 2021) (finding that complaint failed to allege enough facts to support specific personal jurisdiction).

In *Sullivan v. Hawker Beechcraft Corp.*, 397 S.C. 143, 723 S.E.2d 835, 838 (Ct. App. 2012), the complaint alleged that the court had personal jurisdiction based on the same kind of allegations as found in Appellant's complaint:

> [E]ach [defendant] has caused tortious injury within this State as set forth herein, and each regularly does or solicits business, or engages in a persistent course of conduct or derives substantial revenue from goods used or consumed or services rendered in this State as contemplated under the statute.

Id. at 148, 723 S.E.2d at 835. The South Carolina Court of Appeals held that, even with a liberal construction of the statute and the complaint, the plaintiff had "failed to allege any facts that show that [the defendants] (1) have regular transactions of business or solicitation, (2) engage in a persistent course of conduct, (3) derive substantial revenue, or (4) consume goods or services rendered in South Carolina." *Id.* at 151, 723 S.E.2d at 839 (emphasis added).

In *Sonoco Products Co. v. ACE INA Insurance*, 877 F. Supp. 2d 398, 407 (D.S.C. 2012), the United States District Court for the District of South Carolina dismissed a case against a Canadian insurance company for lack of jurisdiction. Applying the same legal standard as South Carolina state courts (by construing the allegations in the light most favorable to plaintiff, drawing all inferences and resolving all factual disputes in its favor), the court held that the plaintiffs "offer nothing more than a conclusory statement to show that ACE INA solicited business in South Carolina." *Id.* at 407 (citing *Masselli & Lane, PC v. Miller & Schuh, PA*, 215 F.3d 1320 (Table) (4th Cir. 2000), for the proposition that a court need not "credit conclusory allegations" when deciding whether a plaintiff makes a prima facie showing of personal jurisdiction).

Here, the bulk of Appellant's jurisdictional allegations contained boilerplate legal conclusions matching the language of the long-arm statute.[3] (R. p. 18.) Appellant made no allegations about 18650 lithium-ion batteries specifically, but alleged only that LG Chem delivers and distributes "lithium ion battery products" to South Carolina companies and through the ports of South Carolina and that LG Chem "has known" since 2016 that individuals use LG Chem's lithium ion battery products to power devices such as flashlights and personal vaporizing devices. Appellant did not make any specific allegations that would show either contacts of LG Chem with South Carolina related to the particular product at issue in this case or how those contacts might possibly relate to Appellant's claims in this case.

Based on these insufficiently specific allegations, the circuit court acted well within its authority by looking beyond the pleadings to the extrinsic evidence offered by both parties.

C. The circuit court's Order is supported by uncontroverted evidence.

Appellant argues that the circuit court erred by weighing evidence in LG Chem's favor and misconstruing evidence as "uncontroverted" when it was not. This is incorrect.

LG Chem's evidence that it never designated, manufactured, distributed, advertised or sold 18650 lithium-ion battery cells for sale to consumers as standalone, replaceable batteries is uncontroverted. (R. pp. 37-38.) Appellant did not plead contrary facts, and Appellant did not introduce any evidence to controvert LG Chem's admissible evidence on this point.

With regard to the import charts, Appellant argues that the lower court should have found that Appellant met his burden of proof by submitting exhibits of spreadsheets that purportedly

[3] *See, e.g.*, R. p. 18 "LG Chem Ltd.'s products . . . cause tortious injury or death in South Carolina by acts or omissions occurring outside the state under circumstances where LG Chem Ltd. regularly does or solicits business, engages in other persistent conduct and/or derives substantial revenue from goods used or consumed or services rendered in the state of South Carolina."

showed shipments by LG Chem through a South Carolina port. Appellant also appears to argue that evidence of LG Chem's subsidiary's certificate of authority in South Carolina met his burden. Neither argument is correct. The spreadsheets are unauthenticated and inadmissible hearsay, and even if they were admissible, which they are not, they do not show that Appellant's claims arise out of or relate to those shipments or the subsidiary's certificate.

The circuit court properly considered the evidence and concluded that the facts submitted did not support Appellant's burden. LG Chem's counsel pointed out at the hearing that the charts were searchable, that the only entries showing any type of lithium ion battery going to South Carolina was going to a car manufacturer, and the charts only appeared to show one shipment of 18650 cells, which was going to a battery packer in Long Beach, California. (R. pp. 545-46, 574; R. p. 440 (correcting record to explain there appeared to be two shipments to the packer in California.) Further, LG Chem introduced evidence showing that, of the 13 shipments that were described as "lithium ion batteries" (only one of which occurred prior to the date of Appellant's alleged incident), not a single shipment involved 18650 lithium ion cells (R. p. 274.).[4] Appellant offered nothing to contradict that evidence.

It was only *after* the circuit court rendered its decision that Appellant submitted the charts in native excel format for the Court's review and argued that the record did not support one way

[4] Mr. Lee was a knowledgeable witness who set forth concrete and specific facts in his Affidavit. In particular, Mr. Lee attested that he worked at LG Chem for five years before LG Chem spun its battery business off in December 2020 and that his area of job responsibility included sales of battery packs and small application battery cells, including 18650 cylindrical lithium ion battery cells. Mr. Lee attested to the specific purpose for which LG Chem designed, manufactured, and sold its 18650 battery cells and specifically attested that LG Chem never did any business with the retailers that sold 18650 battery cells to Plaintiff as standalone consumer products and never authorized anyone to supply its 18650 cells to individual consumers as a standalone, replaceable battery. (R. p. 36.) In his Reply affidavit offered in response to Appellant's 59 pages of "import records", Mr. Lee further attested that not a single one of the entries on those 59 pages reflected shipment of 18650 lithium-ion cells to anyone in South Carolina. (R. p. 274.)

or the other whether or not the "lithium ion battery" shipments to South Carolina were "similar" to the product at issue. (R. p. 418.) This argument was untimely and therefore waived even if it had been correct, which it was not, because (1) LG Chem's admissible evidence explained that the shipments were not 18650 cells and (2) it appeared on the face of the evidence that Appellant submitted that the shipments were going to a car manufacturer. The circuit court was entitled to conclude that Appellant's import charts (even if they had been admissible) could not support a finding that LG Chem had directed activities to South Carolina that were related to Appellant's claim for injury allegedly resulting from use of an LG 18650 lithium-ion cell as a standalone, replaceable battery that he bought from a vape store to power his e-cigarette device.

Therefore, contrary to Appellant's argument, the circuit court did not improperly weigh evidence in LG Chem's favor. The circuit court did not need to weigh evidence, when Appellant offered nothing to contradict LG Chem's admissible evidence. The argument of counsel that he did not know what the charts meant does not constitute contrary evidence.

Further, the spreadsheets attached to Appellant's Motion for Reconsideration were unauthenticated and inadmissible hearsay. *See* SCRE 901 & Note (citing *State v. Jeffcoat*, 279 S.C. 167, 303 S.E.2d 855 (1983)) ("Even when evidence is properly authenticated, it must still be admissible under the other rules of evidence."); *State v. Anderson*, 386 S.C. 120, 126, 687 S.E.2d 35, 38 (2009) ("The analysis regarding the admissibility . . . involves a two-prong approach. . . . If a hearsay exception is applicable, then the next consideration in assessing admissibility is authentication."). Beyond a lack of foundation and authentication, the exhibits to Appellant's affidavits and memorandum are inadmissible hearsay even if they were relevant, which they are not. Thus, relying on Appellant's exhibits would be error, even if they supported his position, which they did not. *See Yarborough & Co. v. Schoolfield Furniture Indus., Inc.*, 275 S.C. 151, 153,

268 S.E.2d 42, 43 (1980) (finding that the court lacked personal jurisdiction and stating that plaintiff's counsel's affidavits were "conclusory in nature and based almost entirely on hearsay. We hold that they should have been excluded from the trial court's consideration"). Appellant did not address or otherwise contest in the lower court, or this Court, that his exhibits were inadmissible, and the inadmissibility of the exhibits remains uncontested.

With regard to LG Chem's subsidiary, LGCAI, Appellant argues that the lower court incorrectly held that he must show that the South Carolina contacts of LG Chem's subsidiary "could be legally imputed to LG Chem for those contacts to matter in this case" (citing Order at 5). The quote was taken out of context, as that paragraph of the Order was clearly addressing Appellant's own arguments from below that LGCAI's Certificate of Authority to do business in South Carolina and alleged shipping products through South Carolina were evidence that LG Chem itself had contacts with this State. For that to be a valid argument, Appellant would have had to meet a heavy burden to show that LGCAI is an alter ego of LG Chem for purposes of imputing contacts, and Appellant provided no facts whatsoever in response to LG Chem's evidence that there were none. (R. p. 273; *see also Black Magic, LLC v. Hartford Fin. Servs. Grp., Inc*., No. 2:20-CV-1743-BHH, 2021 WL 964969, at *5 (D.S.C. Mar. 15, 2021); J.*R. v. Walgreens Boots All., Inc*., 470 F. Supp. 3d 534, 549 (D.S.C. 2020); *Fitzhenry v. One on One Mktg. LLC*, No. 2:14-CV-4782-DCN, 2015 WL 4459023, at *5 (D.S.C. July 21, 2015).

Finally, Appellant argued that the circuit court should follow the decisions of five other trial courts that had denied similar motions to dismiss, based on similar evidence. LG Chem showed that those decisions were contrary to law and were not supported by the evidence introduced in those cases. For example, the record in two of the cases, *Williamson v. Pirates Cove Vapor Lounge, LLC, et al.*, 2019-CP-07-02270 and *Roberts v. Planet Vape, et al.*, 2020-CP-10-

00912,[5] included admissible evidence, which those circuit courts failed to consider, showing that LGCAI never sold 18650 battery cells (or any type of lithium ion batteries) to *anyone* in South Carolina (let alone consumer retail vape stores). (R. pp. 395, 408-416.) And yet, Appellant relied on those cases to argue that LGCAI had distributed LG Chem's 18650 lithium ion batteries into South Carolina, which was not accurate. And a review of the entries on the import charts Appellant offered in opposition to LG Chem's motion to dismiss plainly showed that LGCAI was not involved in a single shipment of any "lithium ion battery" to South Carolina; instead, LGCAI was only involved in shipments of petrochemical products. (R. p. 274.) Therefore, Appellant's argument that the circuit court ignored evidence that LG Chem had a subsidiary (LGCAI) that distributed its lithium ion battery cells (including 18650) in South Carolina is both legally unsound and factually contradicted by the evidence. *See also Durham v. LG Chem, Ltd. et al*, No. 1:20-CV-01277-SDG, 2021 WL 1573899, at *2 (N.D. Ga. Apr. 22, 2021) *consolidated appeal filed* (dismissing LG Chem, Ltd. from five Georgia lawsuits for lack of personal jurisdiction and declining to transfer cases to other jurisdictions based on the plaintiffs' failure to establish personal jurisdiction in the transferee forums, the court also recognized that the plaintiffs in those cases had voluntarily dismissed LGCAI with prejudice because LGCAI "did not sell, manufacture, or distribute the batteries at issue in this litigation during the relevant time period.") (R. p. 441.)

As such, the circuit court in this case properly considered the evidence and concluded that Appellant had not offered any evidence to support a finding that LG Chem created contacts with South Carolina related in any way to his claims.

[5] After the circuit court denied LG Chem, Ltd.'s and LG Chem America, Inc.'s motions to dismiss in that case, the plaintiff voluntarily dismissed his claims against these entities after determining, based on review of CT scans, that the 18650 lithium-ion cell at issue in that case had not been manufactured by LG Chem, Ltd., but rather was a counterfeit cell that had been disguised by an unidentified third party to appear as an LG 18650 cell when it was not.

D. Appellant waived any argument for jurisdictional discovery.

To the extent Appellant may attempt to argue in his reply brief that the circuit court should have allowed him the opportunity to conduct jurisdictional discovery, that argument is waived.

First, the issue was not raised in his Initial Brief, and any argument not raised or argued in Appellant's initial brief is abandoned. *See Glasscock, Inc. v. U.S. Fid. & Guar. Co.*, 348 S.C. 76, 81, 557 S.E.2d 689, 692 (Ct. App. 2001) ("[E]ven though [Appellant] more fully addressed the issue in its reply brief, an argument made in a reply brief cannot present an issue to the appellate court if it was not addressed in the initial brief. Accordingly, we find that [Appellant's] argument was not properly presented to this Court and is deemed abandoned."); *Jackson v. Bi–Lo Stores, Inc.*, 313 S.C. 272, 277, 437 S.E.2d 168, 171 (Ct. App. 1993) (" '[T]hese arguments are not properly before this Court because an appellant cannot make new arguments for reversal in a reply brief.' "); see also, *State v. Hewins*, 409 S.C. 93, 118 n. 9, 760 S.E.2d 814, 827 n. 9 (2014) (Pleicones, J., concurring) ("It is well settled appellants may not make new arguments for reversal in their reply brief.").

Second, Appellant did not request jurisdictional discovery before the Court ruled on LG Chem's Motion to Dismiss. As the lower court correctly stated, "[i]mportantly, a motion for reconsideration is not a vehicle . . . 'to raise argument or present evidence that could have been presented prior to the entry of judgment.' " (R. p. 15) (citing *Dash v. Mayweather*, No. C/A 3:10-1036-JFA, 2010 WL 3606829, at *1 (D.S.C. Sept. 13, 2010) (quoting *Exxon Shipping Co. v. Baker*, 554 U.S. 471, n.5 (2008) (alterations added))). *See also Dixon v. Dixon*, 362 S.C. 388, 399, 608 S.E.2d 849, 854 (2005) (finding that party's failure to raise an alternate remedy was not preserved because it was first raised in a Rule 59 motion); *Stevens & Wilkinson of S.C., Inc. v. City of Columbia*, 409 S.C. 563, 566–67, 762 S.E.2d 693, 695 (2014) (finding that it was error for the

court of appeals to consider an argument that was improperly raised for the first time in a Rule 59(e) motion to amend judgment after trial court granted partial summary judgment in favor of plaintiff); *Staubes v. City of Folly Beach*, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000) ("It is well-settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved for appellate review."). Therefore, Appellant waived any request for jurisdictional discovery by failing to raise it until after the lower court had already issued an order dismissing the case.

Third, even if Appellant had timely raised a request for jurisdictional discovery or preserved the issue for appeal (which he did not), the circuit court would have been correct and well within his discretion to deny any such request because Appellant did not show why the belated jurisdictional discovery he sought in one sentence at the end of his Motion to Reconsider was appropriate or necessary. (R. p. 447.)

II. The circuit court correctly found that Appellant's claims did not arise out of or relate to contacts formed by LG Chem with South Carolina.

"The question of personal jurisdiction over a nonresident defendant is one which must be resolved upon the facts of each particular case." *Cockrell*, 363 S.C. at 485, 611 S.E.2d at 505.

To meet the power prong, the suit must arise out of or relate to the defendant's contacts with the forum. *See Cockrell*, 363 S.C. at 491–94, 611 S.E.2d 505, 509–10 (2005); *Power Prods.*, 379 S.C. at 433–35, 665 S.E.2d at 665–67; *see also Ford Motor Co. v. Montana Eighth Jud. Dist.*, 141 S. Ct. 1017, 1025 (2021); *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773, 1780 (2017) (citing *Daimler AG v. Bauman*, 571 U.S. 117, 127 (2014).) Specifically, the court must "find that 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." *Southern Plastics*, 310 S.C. at 260, 423 S.E.2d at 131; *Power Prods.*, 379 S.C. at 432, 665 S.E.2d at 665; *Coggeshall*, 376 S.C. at 16, 655 S.E.2d at 478

(citing *Cockrell*, 363 S.C. 485, 611 S.E.2d 505); *see also SouthStar Fin. LLC v. T-Zone Health Inc.*, .No. 2:21-cv-02511-DCN, 2021 WL 5235223, at *3 (D.S.C. Nov. 10, 2021) (citing *Ford* and *Bristol-Myers*).

The circuit court correctly found that Appellant did not satisfy his burden of proof on this issue, requiring dismissal of the complaint against LG Chem.

A. Affiliation between the lawsuit and the forum must be created by the defendant, which did not happen here.

Appellant argues that the lower court erred when concluding that Appellant had failed to show the required affiliation between his claims and LG Chem's actions. (Initial Brief, at 13) Appellant quotes *Ford* for the proposition that the required affiliation exists if a product manufactured by LG Chem allegedly malfunctions in the state. That is not an accurate summary of *Ford*'s holding.

In *Ford*, the Supreme Court reiterated that the constitutional touchstone focuses on the contacts between the defendant and the forum state—not contacts with the forum formed by the plaintiff or other third parties. *Ford*, 141 S. Ct. at 1026 (specific jurisdiction requires "a connection between the defendant's contacts with the forum and the specific claims at issue") (quoting *Bristol-Myers*, 137 S. Ct. at 1776)); *see also Walden*, 571 U.S. at 284; *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984) ("When a controversy is related to or 'arises out of' a defendant's contacts with the forum, the Court has said that a 'relationship among the defendant, the forum, and the litigation' is the essential foundation of in personam jurisdiction.")

In *Ford*, which consolidated two cases that originated in Montana and Minnesota state courts, the Supreme Court found that those two states had properly exercised personal jurisdiction over Ford in cases in which a consumer plaintiff asserted product liability claims against the company based on use of a Ford vehicle that had arrived in the forum state (where the accident

occurred) as the result of consumer relocations and resales, and was not designed, manufactured, or sold in the forum by Ford. Although Ford did not bring the specific vehicles to the forum states, Ford itself engaged in extensive and wide-ranging activities in the forum state in furtherance of its undisputed intention to serve a consumer market for the very same type of vehicles at issue.

It was Ford, not unauthorized third parties, that supplied consumers in Minnesota and Montana with Ford vehicles (and specifically Explorers and Crown Victorias); it was Ford, not unauthorized third parties, that advertised those vehicles to in-state consumers on TV and billboards and by "every means imaginable"; and it was Ford that licensed dealers to sell, maintain, and repair Ford cars in Minnesota and Montana. *Ford*, 141 S. Ct. at 1028. As the Court noted, Ford had "a veritable truckload" of relevant, suit-related contacts with the forum States. *Id*. at 1031.

By contrast, here, it was unauthorized third parties—not LG Chem—that supplied consumers in South Carolina with lithium ion battery cells through retail stores that had no connection to LG Chem. There were no retailers licensed by LG Chem to supply LG lithium ion battery cells directly to consumers. There were no dealers authorized by LG Chem to repair or replace lithium ion battery cells for consumers. There were no TV or billboards or other advertisements whereby LG Chem "urged" consumers to purchase lithium ion battery cells as standalone, replaceable batteries for any purpose. Any connections that exist between South Carolina and this lawsuit were formed entirely by Plaintiff and other third parties; none by LG Chem.

Similarly, in *Cockrell*, the Supreme Court of South Carolina found personal jurisdiction was lacking over defendants—the University of Massachusetts at Lowell Baseball Research Center and James Sherwood, a mechanical engineer and Director of the Research Center—because

the subject product (baseball bats) "did not arrive in South Carolina through the respondents' efforts." 363 S.C. at 494, 611 S.E.2d at 510. Instead, the bats arrived in South Carolina through the unilateral efforts of the distributor, Hillerich.

Here, LG Chem's purported involvement with the subject suit is even more attenuated than the defendants in *Cockrell* or *Ford*. LG Chem introduced admissible, uncontroverted evidence showing that it never served a consumer market in South Carolina for standalone, replaceable 18650 batteries and never authorized anyone to sell its 18650 cells directly to consumers for use as standalone, replaceable batteries. (R. pp. 37-38.)

B. The circuit court was correct to focus on facts concerning the particular product at issue, rather than Appellant's vague allegations about "lithium ion battery products" in general.

The U.S. Supreme Court's precedents make clear that the manufacturer's forum contacts must relate to the specific product at issue in the suit, not any product a manufacturer might sell. *See Ford*, 141 S. Ct. at 1028 ("Ford had advertised, sold, and serviced those two car models in both States for many years. *(Contrast a case, which we do not address, in which Ford marketed the models in only a different State or region.)* In other words, Ford had systematically served a market in Montana and Minnesota for the very vehicles that the plaintiffs allege malfunctioned and injured them in those States.") (emphasis added). Appellant's argument that "a lithium ion battery is a lithium ion battery" fails in the face of this controlling authority.

In support of his argument on this point, Appellant relies on the Georgia case of *LG Chem, Ltd. v. Lemmerman*, 863 S.E.2d 514 (Ga. Ct. App. 2021). That reliance is misplaced for a host of reasons. *First*, unlike South Carolina, which (like most states) places the burden of proving jurisdiction on the plaintiff, Georgia requires the defendant to carry the burden of proof on this issue. *See Amerireach.com, LLC v. Walker*, 719 S.E.2d 489, 496 (Ga. 2011), *as amended on denial*

of reconsideration (Dec. 8, 2011) ("Having moved to dismiss for lack of personal jurisdiction, Appellants had the burden of proving such lack of jurisdiction.").

Second, in *Lemmerman*, the plaintiff specifically alleged in his complaint "that LG Chem advertised, marketed, sold, distributed, and placed its 18650 lithium-ion batteries (including the battery at issue in this case) into the stream of commerce in Georgia through the use of wholesalers, distributors, and retailers with reasonable expectation that [its products] would be used in this state and which [were] in fact used in this [S]tate." *Lemmerman*, 361 Ga. App. at 165, 863 S.E.2d at 518. The Georgia court found the absence of contradictory evidence determinative of the jurisdictional issue. Therefore, this decision in no way supports Appellant's argument that it does not matter what type of lithium ion battery is at issue. To the contrary, the *Lemmerman* decision directly undermines that argument and further highlights that the circuit court was correct to look past generic allegations that LG Chem supplied "lithium ion battery products" into South Carolina, on which Appellant here so heavily relies, and instead to focus on the particular product at issue in this suit – which Appellant contends is an LG 18650 cell.

Third, in bringing this decision to the Court's attention, Appellant does not inform the Court of the numerous other courts (trial and appellate) that have found personal jurisdiction lacking over LG Chem in other jurisdictions based upon the same analysis supporting the circuit court's decision here, including neighboring North Carolina. *See, e.g. Miller v. LG Chem, Ltd.*, 2022-NCCOA-55, 281 N.C. App. 531, 868 S.E.2d 896; *LG Chem, Ltd. v. Superior Ct. of San Diego Cnty.*, 80 Cal. App. 5th 348, 295 Cal. Rptr. 3d 661 (2022); *Kadow v. LG Chem, Ltd.*, No. B309854, 2021 WL 5935657 (Cal. Ct. App. Dec. 16, 2021), *review denied* (Mar. 30, 2022); *State ex rel. LG Chem, Ltd. v. McLaughlin*, 599 S.W.3d 899 (Mo. 2020); *Eriksen v. ECX, LLC, et al.*, No. 79473-I, 2020 WL 6395534 (Wash. Ct. App. Nov. 2, 2020) (unpublished); *LG Chem, Ltd. v.*

Granger, No. 14-19-00814-cv, 2021 WL 2153761 (Tex. App. May 27, 2021); *Richter v. LG Chem, Ltd*., No. 18-CV-50360, 2022 WL 5240583 (N.D. Ill. Sept. 27, 2022); *Straight v. LG Chem, Ltd*., No. 2:20-CV-6551, 2022 WL 16836722 (S.D. Ohio Nov. 9, 2022); *Grizzard v. LG Chem Ltd*., No. 2:21CV469, 2022 WL 17076706, at *7 (E.D. Va. Nov. 18, 2022); *but see Dilworth v. LG Chem, Ltd*., No. 2021-CA-00629-SCT, 2022 WL 7274532, at *5 (Miss. Oct. 13, 2022).

C. Unrelated activities in the forum do not count.

Appellant's focus on whether it could be determined from the import charts whether the "lithium ion batteries" were 18650 lithium-ion cells is misguided. First, LG Chem introduced admissible affidavit testimony establishing that the listed shipments to car manufacturers were not 18650 lithium ion battery cells. (R. pp. 271-275.) Second, and dispositive here, is the fact that – regardless of what type of battery cells were shipped to the car manufacturer (and the admissible evidence showed they were not 18650 cells) – shipments of lithium ion battery cells to a manufacturer or battery packer to be incorporated with protective circuity (not sold loose as standalone batteries to consumers) is not related in any way to the claims at issue in this case, as the circuit court correctly found.

Indeed, the U.S. Supreme Court has held that, even when the manufacturer has extensive in-state contacts for the very product at issue, such contacts cannot support the exercise of specific jurisdiction if unrelated to the litigation. *Bristol-Myers*, 137 S. Ct. at 1781 ("[E]ven regularly occurring sales of a product in a State do not justify the exercise of jurisdiction over a claim unrelated to those sales."); *Goodyear Dunlop Tire Operations, S.A. v. Brown*, 564 U.S. 915, 919 n. 6 (2011) (same). In *Bristol-Myers*, the non-resident defendant had five research laboratories in the forum state that employed 160 employees, 250 in-state sales representatives, an in-state government advocacy center, and an in-state distributor – all for the very drug at issue in the case

(Plavix), but the Court still found jurisdiction lacking because those extensive, in-state contacts were not related to the non-resident plaintiffs' claims. *Bristol-Myers*, 137 S. Ct. at 1781 ("[E]ven regularly occurring sales of a product in a State do not justify the exercise of jurisdiction over a claim unrelated to those sales."); *Goodyear*, 564 U.S. at 919 n. 6. *Fidrych v. Marriott Int'l, Inc*., 952 F.3d 124, 140 (4th Cir. 2020) ("Marriott's qualification to do business in South Carolina and its involvement in ninety hotels in the state have nothing to do with the claims asserted in this case and thus are not relevant to our inquiry.") (citing *Walden*, 571 U.S. at 284); *Wallace v. Yamaha Motors Corp., U.S.A.*, No. 9:19-CV-0730-DCN, 2019 WL 6170419, at *4 (D.S.C. Nov. 20, 2019) *aff'd sub nom. Wallace v. Yamaha Motors Corp, U.S.A.*, No. 19-2459, 2022 WL 61430 (4th Cir. Jan. 6, 2022)) (citing and quoting *Goodyear* to support the court's finding that "[t]he fact that Yamaha sells or markets the same type of motorcycle as the one involved in Wallace's accident in South Carolina is not a connection between Wallace's claims and Yamaha's contacts that might support specific jurisdiction").

Applying these authorities, two California Courts of Appeal recently found personal jurisdiction lacking over LG Chem cases involving similar claims, despite evidence in that case showing that LG Chem extensively supplied 18650 battery cells to original equipment manufacturers and battery packers in that state (California) because those sales were unrelated to the plaintiff's claims. *See, LG Chem, Ltd. v. Superior Ct. of San Diego Cnty.*, 80 Cal. App. 5th 348, 295 Cal. Rptr. 3d 661 (2022) (*Lawhon*); *Kadow v. LG Chem, Ltd*., No. B309854, 2021 WL 5935657, at *1 (Cal. Ct. App. Dec. 16, 2021); *see also, Richter v. LG Chem, Ltd.*, No. 18-CV-50360, 2022 WL 5240583 (N.D. Ill. Sept. 27, 2022) (sales to sophisticated customers in Illinois were not related to personal injury claims arising from use of 18650 lithium-ion cell as a standalone, replaceable battery for a vaping device).

Therefore, the circuit court correctly found that Appellant's allegations or exhibits showing that LG Chem supplied products to South Carolina could not satisfy due process because Appellant did not (and could not) show that his claim of injury by use of an 18650 lithium-ion battery cell (that he bought from a South Carolina vape store) as a standalone battery to power his e-cigarette was sufficiently related to any conduct LG Chem directed to South Carolina to satisfy due process.

D. Awareness of the activities of third parties cannot support the exercise of jurisdiction.

"In addition, the defendant's activities directed to a resident of this State must be its own and not the unilateral activities of some other entity." *S. Plastics*, 310 at 261, 423 S.E.2d at 131; *see also Walden v. Fiore*, 571 U.S. 277, 291 (2014) (holding that, for purposes of personal jurisdiction, "it is the defendant, not the plaintiff or third parties, who must create contacts with the forum State"); *Madden v. Petland Summerville, LLC*, No. 2:20-CV-02953-DCN, 2021 WL 5770294, at *4 (D.S.C. Dec. 6, 2021) (finding that marketing actions—which were those of a Summerville, South Carolina franchise, not the defendant franchisor—could not be attributed to the nonresident franchisor for jurisdictional purposes) (citing *Walden*, 571 U.S. at 278).[6]

Appellant argues that what matters is that "the battery was available for [Appellant's] purchase in South Carolina. (Initial Brief, at 22.) But this argument ignores the complete lack of

[6] Despite well-settled state and federal jurisdictional law supporting the lower court's holding that jurisdiction cannot be based on the unilateral activities of a third party, Appellant argues that the court's analysis on this issue is antithetical to South Carolina's strict liability law. This argument was not raised or ruled on by the lower court and, therefore, is not preserved for appeal. *See Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998); *Byrd ex rel. Julia B. v. McLeod Physician Assocs. II*, 427 S.C. 407, 418, 831 S.E.2d 152, 157 (Ct. App. 2019). Even if it were preserved, however, the strict liability statute (and cases cited by Appellant on the merits of a strict liability claim) do not address personal jurisdiction and are irrelevant to the constitutional issues underlying a personal jurisdiction analysis.

evidence that LG Chem had anything to do with its 18650 battery cell (if, in fact, the cell at issue in this case was manufactured by LG Chem – which has not been established) arriving in a South Carolina vape store available for purchase by a consumer. And unlike the *Ford* case, where Ford did not direct the specific cars at issue to the forum state but did extensively serve a consumer market in those states for those very type of vehicles, here, the undisputed evidence supports the circuit court's finding that LG Chem did not serve a consumer market in South Carolina for the type of product at issue here (standalone 18650 batteries).

III. The circuit court correctly found that the stream of commerce analogy did not support the exercise of jurisdiction on the facts of this case.

A. *Sumatra* does not stand for the proposition that a manufacturer is subject to jurisdiction in any forum where its product may be found.

Appellant alleged that LG Chem manufactured a product outside the state and expected that it would be distributed or misused [by others] in South Carolina. *See* Compl. ¶ 10(b), 10(d)–(e)). Appellant argues that, under *State v. NV Sumatra Tobacco Trading, Co.*, 379 S.C. 81, 666 S.E.2d 218 (2008), these allegations are sufficient to support the exercise of jurisdiction "regardless of how [the battery cells] arrived in South Carolina." (Appellant's Initial Brief, at 22.)

Appellant's interpretation of *Sumatra* is incorrect, however, because that interpretation does not follow from *Sumatra* and because it is inconsistent with U.S. Supreme Court precedents recognizing that alleged awareness of third party actions is legally insufficient to support the exercise of specific jurisdiction. Instead, "it is the defendant's actions, not his expectations, that empower a State's courts to subject him to judgment." *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 883 (2011) (plurality op.); *Ford*, 141 S. Ct. at 1025 (the relevant "contacts must be the defendant's own choice"); *World-Wide Volkswagen Corp. v Woodson*, 444 U.S. 286, 297 (1980) ("[T]he foreseeability that is critical to due process analysis is not the mere likelihood that a

product will find its way into the forum State. Rather, it is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.").

Under these precedents, contrary to Appellant's argument, it *does* matter how products of the type at issue arrive in the state. In *Ford*, there was specific jurisdiction despite Ford not having brought the particular car at issue into the state. But Ford conceded that it extensively served consumer markets in the forum states for the exact same types of cars at issue – Ford Explorers and Crown Victorias. Even though the specific cars at issue did not arrive in the forum for purchase by consumers through Ford's actions, it was undisputed that numerous other cars (of the same type) did. Thus, the U.S. Supreme Court rejected Ford's causation-only argument.

But here, by contrast, it is true *not only* that the particular 18650 lithium-ion cell at issue in this case (if LG Chem even manufactured it, which was never established) arrived in South Carolina through the unilateral actions of third parties *but also* that *any* 18650 lithium ion cell that arrived in any vape store or other retailer in South Carolina for sale to a consumer as a standalone battery can only have done so through the unilateral actions of third parties, and not resulting from or related to any conduct LG Chem directed here.

In *Sumatra*, our Supreme Court recognized that "[t]he foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum state. Rather, it is that the defendant's conduct and connection with the forum state are such that he should reasonably anticipate being haled into court there." 379 S.C. at 89, 666 S.E.2d at 222 (emphasis added). The Court concluded this standard was met in *Sumatra* in light of the volume of cigarettes the defendant admittedly distributed for sale to consumers throughout the United States, including 7 million cigarettes to consumers in South Carolina. But here, LG Chem denies

that it distributed any 18650 battery cells to anyone for sale as a standalone product to consumers in South Carolina—or anywhere else. And despite Appellant's argument that LGCAI's subsidiary distributed batteries here, Appellant did not make any such allegations in the Complaint and did not offer any evidence to support the statement – which is simply untrue.

Appellant's expansive interpretation of *Sumatra* would effectively eliminate the protections of due process for a foreign manufacturer, because a plaintiff could meet his burden of proving jurisdiction by simply alleging – in conclusory fashion and without supporting evidence – that a foreign manufacturer placed its products into the stream of commerce and expected they would make their way to South Carolina. That is not the law.

B. *Sumatra* is distinguishable on its facts.

In *Sumatra*, the South Carolina Supreme Court recognized that "[t]he question of personal jurisdiction over a nonresident defendant is one which must be resolved upon the facts of each particular case," 379 S.C. at 88, 666 S.E.2d at 221 (emphasis added). The facts of the case before this Court are highly distinguishable from those in *Sumatra*. In that case, the Indonesian cigarette manufacturer admitted that it intended to sell its cigarettes to consumers throughout the United States, including almost seven million cigarettes sold to consumers in South Carolina in one year as the direct result of its intended chain of distribution. *Id.* at 87–92, 666 S.E.2d at 221–24. Further, in *Sumatra*, the Indonesian manufacturer sold its cigarettes to its designated distributor, which then distributed the cigarettes to South Carolina for the specific purpose of distributing them to consumers as a consumer product. *Id*., at 86, 666 S.E.2d at 220.

By contrast, here, Appellant did not allege, nor could he, that LG Chem distributed its 18650 lithium ion battery cells directly to consumers as a standalone product, or to any distributor or other intermediary for the purpose of supplying the cells directly to consumers as a standalone

product. And LG Chem's admissible evidence showed that LG Chem did not design, manufacture, distribute, advertise, or sell its 18650 battery cells directly to or for use by consumers as standalone, replaceable batteries, and that it never authorized anyone else to do so either. (R. pp. 37-38.) This important fact readily and materially distinguishes *Sumatra* from the case before this Court.

The *Sumatra* court itself recognized that a decision on personal jurisdiction must be based on the unique facts of each case, and the distinguishable facts of this case cannot be shoehorned within the holding of *Sumatra*, as the circuit court correctly found.

IV. The circuit court correctly found that the fairness prong did not support a finding of personal jurisdiction.

South Carolina courts recognize that to satisfy due process, the court must find that (1) the defendant has the requisite minimum contacts with the forum, without which the court does not have the power to adjudicate the action (the power prong); and (2) the exercise of jurisdiction would be "reasonable" or "fair" (the fairness prong). *See S. Plastics Co. v. S. Commerce Bank*, 310 S.C. 256, 260, 423 S.E.2d 128, 131 (1992).

Because the power prong was not satisfied, the circuit court correctly concluded that it was not necessary to reach the fairness prong. In a case where due process is not satisfied, fairness considerations simply do not come into play. "Even if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; even if the forum State has a strong interest in applying its law to the controversy; [and] even if the forum State is the most convenient location for litigation." *World-Wide Volkswagen Corp v. Woodson*, 444 U.S. 286, 294 (1980). Therefore, the circuit court correctly found that it need not reach the fairness prong, because the power prong was not satisfied.

The circuit court also correctly found that, even if it did reach the fairness prong, exercising personal jurisdiction in this case would be unconstitutionally reasonable and unfair to subject LG

Chem to personal jurisdiction in South Carolina when it played no part in the path that brought its alleged product here. *S. Plastics Co.*, 310 S.C. at 260, 423 S.E.2d at 131 (finding it would be unfair to subject a bank to jurisdiction in any state where its letter of credit might be used); *Straight*, No. 2:20-CV-6551, 2022 WL 16836722 (S.D. Ohio Nov. 9, 2022) (rejecting plaintiff's fairness arguments and finding that it would be unreasonable to exercise jurisdiction over LG Chem in a suit in Ohio where the record contradicted plaintiff's factual assertion that LG Chem was "flooding" the U.S. vaping market with 18650 cells).

CONCLUSION

For the reasons stated above, this Court should affirm the judgment of the circuit court.

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Roger M. Young, Circuit Court Judge

Court of Appeals Appellate Case No. 2022-000346

Reid Fleming,..... Appellant,

v.

LG Chem, Ltd. ..... Respondent

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR.

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