THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

The Honorable Marvin H. Dukes, III, Presiding Judge

Case No. 2013-CP-1186

Charles R. Mikals and Donna Mikals.....Appellants

v.

Debra House.....Respondent

BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

This matter arises from the decision of the Honorable Marvin H. Dukes, III granting Respondent Debra House's ("House") Motion to Dismiss Appellants Charles Mikals and Donna Mikals' [collectively "the Mikals"] Complaint filed in Beaufort County, South Carolina for lack of personal jurisdiction.

Appellants filed the underlying lawsuit against Respondent Debra House, a Canadian citizen and resident, on May 7, 2013 alleging fraud and breach of fiduciary duty. (R. pp. 10-19). Respondent, proceeding pro se at the time, timely filed a Motion to Dismiss the Complaint pursuant to Rule 12(b)(2) of the South Carolina Rules of Civil Procedure along with her own accompanying Affidavit. (R. pp. 20-29). Thereafter, Appellants filed a Memorandum in Opposition to Respondent's Motion to Dismiss, along with an Affidavit of Appellant Donna Mikals. (R. p. 34, R. p. 47).

Additionally, Appellants' counsel requested a hearing on Respondents Motion to Dismiss, which was initially set for August 13, 2013 at 1:30 p.m. in Beaufort County, South Carolina. (R. p. 33). Appellants' counsel served Respondent in Canada with a Notice of Hearing on her own motion on July 19, 2013. (R. p. 33). At that time, Respondent was in her third trimester of pregnancy and under her physician's orders to refrain from any travel until after her childbirth. (R. p. 45). After Appellants withheld their consent to a continuance, Respondent filed a Motion for a Continuance of the hearing, which was subsequently granted. (R. p. 45).

Respondent subsequently obtained the undersigned legal counsel and served Appellants with a Notice of Counsel's Appearance on August 12, 2013. (R. p. 61). Additionally, the hearing on Respondent's Motion to Dismiss was rescheduled for September 3, 2013, with Respondent serving proper notice to Appellants on August 12, 2013. (R. p. 63). Respondent served

Appellants with a Supplemental Affidavit on August 29, 2013. (R. p. 178, lines 20-25, R. p. 179, lines 1-3).[1]

Respondent served a Memorandum in Support of her Motion to Dismiss by e-mail to Appellants' counsel and the Court three hours prior to the hearing, along with a hard copy of the same at the commencement of the hearing. (R. p. 88). During the hearing, Appellants' counsel advised that Appellants had no objection to Respondent's Affidavit previously served several days before, on the condition that the Court allow Appellants to submit a photocopy of an Affidavit of Mark Hinchcliffe, which had not been previously served on Respondent. (R. p. 178, lines 24-25, R. p. 179, lines 1-3).[2] Appellants' counsel also asked the Court for leave to submit a Supplemental Affidavit of Appellant Donna Mikals, which had not been previously served upon Respondent. (R. p. 179, lines 4-11).[3] The Court accepted both of Appellants' Affidavits submitted during the hearing. (R. p. 179, lines 10-14). Appellants also requested that the Court grant leave to file another supplemental memorandum within five days of the hearing, which the Court also allowed. (R. p. 179, lines 16-25, R. p. 180, lines 1-5).

Appellants thereafter submitted a Supplemental Memorandum in Opposition to the Motion to Dismiss on September 6, 2013. (R. p. 98). Appellants also submitted an Affidavit of Randy Mikals on September 6, 2013, without leave of Court to do so. *Id.* The Affidavit of Randy

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[1] Appellants incorrectly state in their Initial Brief that Respondent served a Supplemental Affidavit one day prior to the hearing. (Appellants' Brief p. 2).

[2] The Affidavit of Mark Hinchcliffe submitted by Appellants during the hearing contains a sworn

[2] The Affidavit of Mark Hinchcliffe submitted by Appellants during the hearing contains a sworn statement by Hinchcliffe that he executed the document on August 29, 2013. The Canadian "Commissioner for Taking Affidavits", however, states in the same Affidavit that it was "[s]worn to before me at Mississauga, ON on this 30[th] day of August, 2013. (R. pp. 128-129).

[3] In the Supplemental Affidavit of Appellant Donna Mikals, which Appellants submitted during the hearing, Appellant Mikals swears under penalty of perjury that she signed the same before a Notary Public on July 30, 2013. Janet Sauls, the Notary Public who notarized the same Affidavit for Appellant Mikals, however, states "[o]n the 30th day of August, 2013, Donna Mikals appeared before me and executed the following Affidavit." (R. p. 119).

Mikals submitted by Appellants without leave of the Court provides sworn testimony from the Affiant that he executed the Affidavit on September 6, 2013. (R. pp. 113-114). The Notary Public who witnessed Randy Mikals' Affidavit, however, states that the Affidavit was executed before her on August 6, 2013. (R. pp. 113-114).

The Court entered an Order on October 7, 2013 granting Respondent's Motion to Dismiss with Prejudice. (R. p. 3). Appellants thereafter filed a Motion to Alter or Amend the Court's Order on October 16, 2013. (R. p. 150). A hearing on Appellants' Motion to Alter or Amend was held on January 22, 2014. (R. p. 206). On January 23, 2014, the Court entered an Order denying Appellants' Motion to Alter or Amend and substituting the same for its Order of October 7, 2013. (R. p. 3).

Appellants thereafter filed the Notice of Appeal on February 15, 2014. (Notice of Appeal). On March 18, 2014, one day after the deadline for Appellants to file their initial brief and designation of matter with the South Carolina Court of Appeals, Appellants mailed both their initial brief and designation of matter to the Court for filing as indicated on the USPS date stamp of the mailing envelope.[4] As this Court had not yet received Appellants' Initial Brief, on March 19, 2014, two days after the filing deadline for the same, Deputy Clerk V. Claire Allen mailed a letter to Appellants' counsel stating the following:

> Pursuant to Rule 208(a)(1) and Rule 209(a) of the South Carolina Appellate Court Rules (SCACR), the appellants' initial brief and designation are due within 30 days after serving the notice of appeal. Our records reflect the appellants' brief and designation of matter were due on March 17, 2014. A motion to file the appellant's initial brief and designation of matter will have to be made.
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> March 19, 2014 letter from Court re Appellants' past due Initial Brief.

[4] Appellants certified the letter and Proof of Service accompanying their initial brief and designation of matter to indicate that they had both been mailed on March 17, 2014. The USPS date deposit stamp on the mailing envelope, however, clearly indicates that neither the initial brief nor designation of matter waw actually mailed on March 18, 2014.

Appellants have not filed a Motion to File the Appellants' Brief and Designation of Matter with this Court to date, despite their failure to timely file the initial brief within thirty days after serving their Notice of Appeal as required by Rule 208(a)(1) and Rule 209(a) of the South Carolina Appellate Court Rules. *See* Rule 208(a)(1), SCACR; Rule 209(a), SCACR.

STATEMENT OF THE FACTS

Respondent is a Canadian citizen. (R. p. 10, R p. 66). Respondent has always been a Canadian citizen and has resided in Ontario, Canada for her entire life. (R. p. 66). Appellants alleged in their Complaint that Respondent had called to, e-mailed to, and travelled to Beaufort County, South Carolina on one or more occasions to solicit Appellant Charles Mikals' agreement to use his personal line of credit for the purpose of securing financing for a Canadian company that was a successor of his own Canadian company and that was owned by Mr. Mikals' own children at the time of the alleged solicitation. (R. p. 1, R. p. 11, R. pp. 13-14).[5] Respondent was employed by some of the various Canadian Greenline entities owned by either Appellants or Appellants' children from 2000 until her termination in 2010. (R. p. 4, R. p. 98, R. p. 117).

It is undisputed that Respondent has never been domiciled in South Carolina or the United States at any point in time. (R. p. 30, R. p. 65). Respondent's Affidavit and supporting records show that she has worked solely in Canada since 2000. (R. p. 30, R. p. 65). Both of the individual Appellants have dual citizenship in both the United States and Canada. (R. p. 125). Appellants contend that their business records illustrate that Respondent's most recent physical entrance into South Carolina occurred on February 8, 2008.[6] (R. p. 118, R. p. 196, lines 1-6, R. p. 167). Respondent contends that she did not enter the State of South Carolina at any point during 2008 or any time thereafter. (R. p. 66). Respondent provided the court with a copy of the Canadian Border Services Agency's ("CBSA") certified "Border Crossing Record" as an exhibit

[5] Greenline Plywood Products was owned by Respondents' children in Canada and operated as a successor to Forest Products, another Canadian company formerly owned by Respondents. (R. p. 11).

[6] Although Appellant Donna Mikals' Supplemental Affidavit in Opposition to Respondent's Motion to Dismiss references such business records, no such business records have been submitted as part of the record and the nature of such referenced business records has never been explained or clarified by Appellants. (R. p. 117).

to her Affidavit and in support of her testimony as to her entrances into South Carolina, as well as the United States in general. (R. pp. 73-78). Respondent also exhibited her official Passport to her Affidavit. (R. pp. 79-83).

Prior to the commencement of the action that is the basis of this appeal, Respondent brought a wrongful termination action against her previous employers in the Superior Court of Ontario, including both of the Appellants in this matter. (R. p. 184, lines 11-25, R. p. 185, lines 1-4, R. p. 201, lines 3-20, R. p. 50). This matter is still pending in Canada to date. (R. p. 184, lines 11-25, R. p. 185, lines 1-4, R. p. 201, lines 3-20, R. p. 50). Appellants' counsel in this matter served Respondent with the underlying South Carolina lawsuit by submitting an acceptance of service to her Canadian counsel, who represents her in regards to the Canadian wrongful termination matter. Appellants' South Carolina counsel in this matter included a letter with the Acceptance of Service, Summons, and Complaint, stating that Appellants would drop the South Carolina lawsuit if Respondent agreed to drop the Canadian lawsuit pending against them. Appellants' counsel further stated that in the event that Respondent refused to dismiss her pending wrongful termination lawsuit in Canada, then Appellants' son, Randy Mikals, would file a separate lawsuit of his own in South Carolina against Respondent, in addition to the lawsuit underlying this appeal. (R. p. 202, lines 17-25, R. p. 203, lines 1-10, R. pp. 88-89). At the hearing on the Motion to Dismiss, Appellants admitted that they are not seeking monetary damages as a remedy in the underlying lawsuit. (R. 203, lines 3-10). Appellants have not specifically stated their alleged purpose in filing and prosecuting this lawsuit against Respondent. (R. 203, lines 3-10). The wrongful termination action is currently pending in the Superior Court of Ontario. (R. p. 99, R. pp. 163-164).

STANDARD OF REVIEW

Personal jurisdiction over a nonresident defendant is a question to be resolved upon the facts of each particular case. *Power Products & Servs. Co., Inc. v. Kozma*, 379 S.C. 423, 430, 665 S.E.2d 660, 664 (Ct. App. 2008) (citing *Cockrell v. Hillerich & Bradsby Co.*, 363 S.C. 485, 491, 611 S.E.2d 505, 508 (2005)).

"The decision of the trial court should be affirmed unless unsupported by the evidence or influenced by error of law." *Moosally v. W.W. Norton & Co., Inc.*, 358 S.C. 320, 327, 594 S.E.2d 878, 882 (Ct. App. 2004) (citing *Hammond v. Cummins Engine Co.*, 287 S.C. 200, 336 S.E.2d 867 (1985) (stating that this Court is bound by Circuit Court's finding that nonresident defendant is subject to its jurisdiction absent determination that Circuit Court's ruling is without evidentiary support or controlled by error of law). "[A] finding by the Circuit Court as to jurisdiction or lack of jurisdiction will not be disturbed on appeal **unless wholly unsupported by the evidence or manifestly influenced or controlled by error of law**." *Moosally v. W.W. Norton & Co., Inc.*, 358 S.C. 320, 327, 594 S.E.2d 878, 882 (Ct. App. 2004) (citing *Industrial Equip. Co. v. Frank G. Hough Co.*, 218 S.C. 169, 173, 61 S.E.2d 884, 885 (1950)) (emphasis provided).

It is well-settled that the party seeking to invoke personal jurisdiction over a non-resident defendant by using South Carolina's long-arm statute bears the burden of establishing jurisdiction. *Power Products & Servs. Co., Inc. v. Kozma*, 379 S.C. 423, 430, 665 S.E.2d 660, 664 (Ct. App. 2008). "At the pretrial stage, the burden of proving personal jurisdiction over a nonresident is met by a prima facie showing of jurisdiction either in the complaint or in affidavits." *Moosally v. W.W. Norton & Co.*, 358 S.C. 320, 328, 594 S.E.2d 878, 882 (Ct. App. 2004). When a nonresident defendant attacks the allegations of a complaint based on jurisdiction, the court is not confined to the allegations of the complaint but may resort to affidavits or other

evidence to determine jurisdiction. *Coggeshall v. Reprod. Endocrine Assocs. of Charlotte*, 376 S.C. 12, 16, 655 S.E.2d 476, 478 (2007).

ARGUMENT

I. THE TRIAL COURT'S FINDING THAT IT LACKED PERSONAL JURISDICTION OVER HOUSE SHOULD BE AFFIRMED AS IT WAS NOT WHOLLY UNSUPPORTED BY THE EVIDENCE AND WAS NOT INFLUENCED BY A MANIFEST ERROR OF LAW

Appellants' initial argument is essentially that the trial court erred by considering materials outside the four corners of the Complaint itself in reaching its decision to dismiss the case. Appellants argue that the lower court erred in considering Respondent's affidavits and supporting evidence as to the issue of personal jurisdiction and contend that the lower court could not properly consider any affidavits other than their own. Appellants misconstrue Rule 12 in regards to motions to dismiss for lack of personal jurisdiction.

Appellants are correct in their assertion that Motions to Dismiss under Rule 12 *generally* contemplate an examination of nothing more than the four corners of the Complaint itself. This is certainly true in regards to motions to dismiss for failure to state a claim under Rule 12(b)(6) as to consider anything in addition to the face of the Complaint would equate to transforming a 12(b)(6) Motion into a Motion for Summary Judgment under Rule 56. The court is not, however, required to disregard anything and everything other than the Complaint where a Motion to Dismiss is predicated upon a lack of personal jurisdiction over the defendant. *Coggeshall v. Reprod. Endocrine Assocs. of Charlotte*, 376 S.C. 12, 16, 655 S.E.2d 476, 478 (2007). In such instances, the court is not confined to the allegations of the complaint and may review and consider affidavits or other evidence in order to determine jurisdiction. *Id.*

As the Appellants are the party seeking to invoke personal jurisdiction over the Respondent, a non-resident defendant, by using South Carolina's long-arm statute, they bear the full burden of establishing jurisdiction. *S. Plastics Co. v. S. Commerce Bank*, 310 S.C. 256, 259, 423 S.E.2d 128, 130 (1992). Courts have generally held that, at the pretrial level, the burden of

proving personal jurisdiction over a nonresident defendant is met by a prima facie showing of jurisdiction either in the complaint or in the affidavits. *Moosally v. W.W. Norton & Co.*, 358 S.C. 320, 328, 594 S.E.2d 878, 882 (Ct. App. 2004). However, where a nonresident defendant attacks the allegations of a complaint based on jurisdiction, as the Respondent has here by way of a Rule 12(b)(2) Motion, the court is not confined to the allegations of the complaint and is at liberty to determine jurisdiction by and through affidavits and other evidence. *Coggeshall v. Reprod. Endocrine Assocs. of Charlotte*, 376 S.C. 12, 16, 655 S.E.2d 476, 478 (2007).

Here, the trial court considered the Complaint, as well as Affidavits and other evidence submitted by both parties. Several of the Affidavits submitted by Appellants were facially invalid and internally inconsistent. (R. p. 119, R. pp. 113-114, R. pp. 128-129). Appellants' Affidavits are improperly notarized as required by Rule 11(c), SCRCP. For example, Appellant Donna Mikals swore under penalty of perjury in her Supplemental Affidavit that she signed the same before a notary public on July 30, 2013. (R. p. 119). The Notary Public who notarized her Affidavit, however, states that she signed the same in her presence on August 30, 2013. (R. p. 119).

Likewise, Randy Mikals' Affidavit provides sworn testimony that it was executed on September 6, 2013, yet the Notary Public states that Mr. Mikals signed the same affidavit before her on August 6, 2013. (R. pp. 113-114). Finally, Mark Hinchcliffe testified under oath in his Affidavit that he executed the same on August 29, 2013. (R. p. 128). To the contrary, however, the Canadian "Commissioner for Taking Affidavits" states in the very same Affidavit of Hinchcliffe that it was "[s]worn to before me at Mississauga, ON on this 30[th] day of August, 2013." (R. p. 129). **Certainly, the trial court was not required to give credence or any significant evidentiary weight to Appellants' Affidavits that are internally inconsistent on**

their very face. (R. p. 119, R. pp. 113-114, R. pp. 128-129). Indeed, the court has the power to determine that the allegations set forth in Appellants' Affidavits relating to jurisdiction over Respondent are conclusionary or contradicted by other evidence. *Power Products and Servs. Co. v. Kozma*, 379 S.C. 423, 665 S.E.2d 660 (Ct. App. 2008) (allegations that tort took place in state rebutted by other facts). Moreover, in the absence of sufficient allegations, the court must dismiss the complaint. *International Mariculture Res. v. Grant*, 336 S.C. 434, 520 S.E.2d 160 (Ct. App. 1999).

The trial court's decision "should be affirmed unless unsupported by the evidence or influenced by error of law." *Power Products & Servs. Co., Inc. v. Kozma*, 379 S.C. 423, 430, 665 S.E.2d 660, 664 (Ct. App. 2008). Here, the lower court's ruling was supported by Affidavits and other evidence submitted by both parties for the court's consideration. There is ample evidence to support the court's holding that no personal jurisdiction exists over Respondent. Likewise, the lower court's decision was not influenced by an error of law. As such, the lower court's ruling must be affirmed.

II. THE TRIAL COURT DID NOT ERR IN HOLDING THAT APPELLANTS' ATTEMPTS TO ASSERT PERSONAL JURISDICTION OVER HOUSE, A CANADIAN CITIZEN, IN SOUTH CAROLINA OFFENDED THE "TRADITIONAL NOTIONS OF FAIR PLAY AND SUBSTANTIAL JUSTICE" AS THE WITNESSES AND RECORDS INVOLVED ARE IN CANADA AND HAVE NO RELATION TO SOUTH CAROLINA

Appellants next argue that the lower court erred in determining that asserting personal jurisdiction over Respondent would "offend the traditional notions of fair play and substantial justice." (Appellants' Brief p. 8). Appellants present an argument in this regard that wholly ignores the lower court's finding that virtually all of the banks, corporations, and witnesses involved are Canadian. Appellants also fail, to their own detriment, to confront the lower court's finding that the character of such a case would "dictate that Canadian records, Canadian reports,

Canadian budgets, Canadian accountants and the like be involved." (R. p. 2). Likewise, Appellants have set forth no reason that the lower court erred in finding that "South Carolina is not a convenient forum for such a case" or that there would be "almost no South Carolina interest in exercising jurisdiction." (R. p. 2). The burden, however, in showing that the lower court's holding is either (a) unsupported by the evidence or (b) influenced by an error of law, rests upon the shoulders of the Appellants and the Appellants alone. *Moosally v. W.W. Norton & Co., Inc.*, 358 S.C. 320, 327, 594 S.E.2d 878, 882 (Ct. App. 2004). Appellants have failed to meet their burden on appeal and the holding of the lower court should be affirmed.

Traditionally, our courts have employed a two-step analysis in determining whether it is proper to exercise personal jurisdiction over a nonresident defendant. *Power Products & Servs. Co., Inc. v. Kozma*, 379 S.C. 423, 431, 665 S.E.2d 660, 664 (Ct. App. 2008) citing *S. Plastics Co. v. S. Commerce Bank*, 310 S.C. 256, 423 S.E.2d 128 (1992). First, the trial judge must determine that the South Carolina long-arm statute applies to the particular situation. *Id.* The trial court's analysis of personal jurisdiction, however, does not end here. *Id.* Second, the trial judge must determine that the nonresident's contacts in South Carolina are sufficient to satisfy due process requirements. *Id.* This second prong mandating compliance with due process is often *not* met *even where the first prong of ensuring the application of the long arm statute* ***is*** *met. Southern Plastics Co. v. Southern Commerce Bank,* 310 S.C. 256, 423 S.E.2d 128 (1992); *Hume v. Durwood Medical Clinic, Inc.*, 282 S.C. 236, 318 S.E.2d 119 (Ct. App. 1984), cert. dismissed, 285 S.C. 377 329 S.E.2d 443, cert. denied, 474 U.S. 848 (1985); *Wells Am. Corp. v. Sunshine Elecs.*, 717 F. Supp. 1121 (D.S.C. 1989).

Our long-arm statute, S.C. Code Ann. § 36-2-803 (1976), has been construed to extend to the limits of due process. *Hammond v. Cummins Engine Co.*, 287 S.C. 200, 336 S.E.2d 867

(1985). Section 36-2-803(1)(a) gives South Carolina broad powers to exercise personal jurisdiction over a person as to a cause of action arising from the person's transacting any business in this State. *Id.*; *See also Power Products & Services Co., Inc.*, 379 S.C. 431, 665 S.E.2d 664 (Ct. App. 2011). **However, a mere recitation of the long-arm statute in a Complaint is not sufficient to support a finding of personal jurisdiction without sufficient factual allegations therein to support such.** *Sullivan v. Hawker Beechcraft Corp.*, 397 S.C. 143, 151, 723 S.E.2d 835, 839 (Ct. App. 2012), cert. dismissed (June 7, 2012), reh'g denied (Mar. 29, 2012).

"It is clear that personal jurisdiction over a non-resident defendant may be invoked only if the nonresident's contacts in South Carolina are sufficient to satisfy due process requirements." *Power Products & Services Co., Inc.*, 379 S.C. 431, 665 S.E.2d 664 (Ct. App. 2011). Due process requires that there exist minimum contacts between the defendant and the forum state such that maintenance of the suit does not offend traditional notions of fair play and substantial justice. *Id.* Any telephone discussions that Respondent had with Appellants as a part of her job with either Appellants themselves or their children, if any, do not create personal jurisdiction under our long-arm statute. *See* S.C. Code § 36-2-802; *See also* S.C. Code § 36-2-803. Notably, in *Sullivan v. Beechcraft Hawker Corp.*, the South Carolina Court of Appeals held that even under our State's quite broad long-arm statute regarding tortious injuries, the Plaintiff had nevertheless failed to allege any fact that the Defendant: (1) had regular transactions of business or solicitation; (2) engaged in a persistent course of conduct; (3) derived substantial revenue, or (4) consumed goods or services rendered in South Carolina. *Sullivan v. Hawker Beechcraft Corp.*, 397 S.C. 143, 153-54, 723 S.E.2d 835, 841 (Ct. App. 2012). Such is the case here as Appellants have alleged nothing more than a vague statement that Respondent engaged in *some*

form of business in South Carolina on behalf of the Appellants' and/or Appellants' children's own company and that any such acts would have been in the course of her duties as an employee of a company owned by Appellants and/or Appellants' children. Appellants have asserted no facts whatsoever as to what type of "business" they contend that Respondent conducted. In fact, they have made *no* allegation that Respondent acted for the purpose of monetary gain. As such, the Long Arm Statute does not apply in this matter to confer personal jurisdiction upon the Respondent (a Canadian citizen and Canadian employee). (R. p. 10, R. p. 16).

Further, Appellants were required to not only satisfy the "power prong" of the two-step analysis in order to show personal jurisdiction, but were also required to fulfill the second element of the analysis (the "fairness prong") by showing that the nonresident Respondent had minimum contacts in South Carolina sufficient to satisfy the requirements of due process. *Aviation Associates & Consultants, Inc. v. Jet Time, Inc.*, 303 S.C. 502, 505, 402 S.E.2d 177, 179 (1991). Even where the Long Arm Statute does apply, South Carolina courts have often held that the requirements of due process have nevertheless not been met. *Southern Plastics Co. v. Southern Commerce Bank,* 310 S.C. 256, 423 S.E.2d 128 (1992); *Hume v. Durwood Medical Clinic, Inc.*, 282 S.C. 236, 318 S.E.2d 119 (Ct. App. 1984), cert. dismissed, 285 S.C. 377 329 S.E.2d 443, cert. denied, 474 U.S. 848 (1985); *Wells Am. Corp. v. Sunshine Elecs.*, 717 F. Supp. 1121 (D.S.C. 1989). In other words, even where the South Carolina's Long Arm Statute is met, personal jurisdiction will *still* not exist if due process is not met. *Id.* The trial court correctly held that even if the Appellants' allegations, on their face, satisfy the "power prong" of a jurisdictional analysis, they nevertheless fail to fulfill the "fairness prong." (R. p. 1).

The Lower Court Correctly Held that the "Fairness" Prong was Not Met.

Under the Fairness prong, the court must consider: (1) the duration of the activity of the nonresident within the State; (2) the character and circumstances of the commission of the nonresident's acts; (3) the inconvenience resulting to the parties by conferring or refusing to confer jurisdiction over the nonresident; and (4) the State's interest in exercising jurisdiction. *Clark v. Key*, 304 S.C. 497 (1991). The lower court specifically held that Appellants' "fail the fairness test." (Order on Reconsideration at 1). The lower court went on to hold that "[t]o exercise jurisdiction in this case would be to offend 'traditional notions of fair play and substantial justice'". *Id.* The lower court was correct.

To be sure, the lower court identified several reasons that the Appellants had failed to meet their burden of proof under the "fairness prong". (R. p. 1). Specifically, the lower court held that South Carolina is not a convenient forum for this case and that South Carolina has no interest in exercising jurisdiction in this matter. (R. p. 2).

The facts alleged by Appellants are insightful on these points. Specifically, Appellants allege that the following facts support a finding that Respondent purposefully availed herself of the laws of South Carolina: (1) Respondent, as an employee of Appellants' companies (or Appellants' children's companies), which operate in *both* South Carolina and Canada, traveled to South Carolina twice in 2006 on company business and *at Appellants'* request; and (2) Appellants allege, in a quite vague manner, that Mrs. House made *long-distance* telephone calls to Appellants in South Carolina concerning a company line of credit (for either their own company or a successor to the company they previously owned, but which was then owned by their children) at the Bank of Montreal – again, a **Canadian bank**. (R. pp. 1-2). These facts are not sufficient to create minimum contacts, as the lower court correctly held.

Moreover, Appellants have not contested the following facts: (1) Mrs. House is a Canadian citizen who has lived and worked solely in Canada for her entire life; and (2) she was originally hired by a Canadian business owned by Plaintiffs in 2000. (R. p. 10, R. p. 50, R. p. 30, R. p. 65).

a. <u>The Lower Court Correctly Held that South Carolina is Not a Convenient Forum.</u>

The lower court correctly held that "South Carolina is not a convenient forum for [this] case." (R. p. 2). In making such a determination, the lower court found the following:

> Taking the Plaintiffs' allegations as fact: 1) The Defendant is a Canadian citizen; 2) The loans and line of credit which form the basis [of] the action are from the Bank of Montreal and; 3) the loans and line of credit were for the benefit of Canadian corporations.
>
> It is clear from the four corners of the Complaint that the truth or falsity of the representation of financial health of a Canadian corporation will be a crucial component of the Plaintiff's case. The character and circumstances of such a case dictate that Canadian records, Canadian reports, Canadian budgets, Canadian accountants and the like be involved.
>
> South Carolina is not a convenient forum for such a case.
>
> (R. pp. 1-2).

The lower court placed great emphasis on the fact that ***all*** **of the banks and corporations involved in this matter are Canadian banks and Canadian corporations.** (R. pp. 1-2). As the lower court pointed out, it is clear from the four corners of Appellants' Complaint that no South Carolina companies are involved in this matter in any capacity. R. pp. 1-2, R. pp. 10-19). Likewise the lower court found it significant that all the records, reports, budgets, and literally all documents involved in this case are physically located in Canada. (R. pp. 1-2). The court further found that all witnesses, individuals, companies, and banks involved in this matter are Canadian. (R. pp. 1-2). As the lower court correctly pointed out "it is clear from

the four corners of the Complaint that the truth or falsity of the representation of financial health of a Canadian corporation will be a crucial component of Plaintiff's case." (R. pp. 1-2). The records and other evidence of these Canadian banks and Canadian entities are located in Canada as the lower court correctly pointed out. Such a scenario would not create a convenient forum for such a case as is required under the "fairness prong". (R. pp. 1-2).

The lower court also placed great weight on the fact that all of the individuals involved in this case, as is apparent from the four corners of the Complaint, are Canadian. (R. pp. 1-2, R. p. 125). In fact, the *only* individuals or entities involved in this matter who are considered residents of South Carolina are the two individual Respondents themselves. (R. pp. 1-2, R. p. 125). **The Respondents, however, are also Canadian citizens with dual residency in both the United States and Canada.** (R. p. 125).

Indeed, Respondent Donna Mikals has admitted on several occasions that she has travelled extensively to and from Canada, both prior to and after attaining dual citizenship in the United States. (R. p. 117, R. p. 189, lines 6-16). To be sure, Appellant Donna Mikals provided sworn testimony in her supplemental Affidavit that "[p]rior to moving to Beaufort County in 2006, I resided in Canada. Both before my move and after, I have travelled extensively between Canada and South Carolina." (R. p. 117). Appellant Donna Mikals then goes on in her supplemental Affidavit to essentially attempt to provide expert testimony on the border crossing laws relating to travel between Canada and the United States – both countries of which she is a citizen. (R. p. 117). Additionally, Appellants' counsel advised the lower court at the hearing on Respondent's Motion to Dismiss that "[b]oth before [Donna Mikals'] move and after, she traveled extensively between Canada and South Carolina." (R. p. 189, lines 6-10). Counsel then proceeded to advise the lower court at the hearing that it was Appellant Donna Mikals' position,

based upon her extensive travel between Canada and the United States, that "[p]rior to June 1 of 2009, formal travel documents were not even required to come between the United States and Canada ... [y]ou didn't even have to have a passport." (R. p. 189, lines 8-14). Appellants now contend, however, that it would be inconvenient for them if jurisdiction over this matter were to rest with the Canadian courts, despite their being citizens of Canada. In forwarding this argument, Appellants certainly make no mention of their dual citizenship in Canada. In fact, Appellants wholly fail to address the fact that they are citizens of Canada at all. (R. p. 125). Likewise, while Appellants repeatedly argued to the lower court that Appellant Donna Mikals both previously and currently "traveled extensively between Canada and South Carolina", they now make attempts to convince this Court that Canada is essentially a foreign land to them to which they have no relation. (R. p. 189, lines 6-10).

While Appellants are quick to claim that they would be significantly burdened by jurisdiction over them in Canada, they nevertheless argue that any burden imposed upon Respondent that would arise from jurisdiction in South Carolina would merely be insignificant and unworthy of the Court's consideration. Their argument is unavailing. This Court's opinion in *Cribb v. Spatholt*, which discussed the issue of inconvenience to the parties in conferring or refusing to confer jurisdiction over a nonresident, provides guidance on this point. *Cribb v. Spatholt*, 382 S.C. 475, 489, 676 S.E.2d 706, 713 (Ct. App. 2009). In *Cribb*, the Court considered not only the inconvenience that conferring jurisdiction over the nonresident would create for the plaintiff, but the court also contemplated the burden that conferring jurisdiction would place upon the nonresident defendant. *Id.* The Court additionally analyzed the convenience or inconvenience to the parties in the event that *not* conferring jurisdiction to the parties would create. *Id.* Just as in *Cribb*, the denial of jurisdiction upon the Respondent here

would create very little, if any, burden upon the Appellants as they admittedly travel between South Carolina and Canada very frequently. In contrast, however, jurisdiction over the Respondent in South Carolina would create an extreme burden upon her. Respondent, unlike the Appellants, is not a dual citizen of both Canada and the United States, but rather solely a citizen of Canada. Likewise, Respondent does not travel to and from South Carolina, or anywhere else in the United States for that matter, whereas Appellants have admitted that they partake in significant and frequent travel between the Canada and the United States. The Appellants' own convenience is not the sole consideration before the court as they now suggest. *See Colite Indus., Inc. v. G.W. Murphy Const. Co., Inc.*, 297 S.C. 426, 429, 377 S.E.2d 321, 322 (1989) (the frequency of travel of both parties is relevant in analyzing inconvenience of jurisdiction to parties). The lower court correctly held that "South Carolina is not a convenient forum." (R. p. 2).

b. The Lower Court Correctly Held that South Carolina has No Interest in Exercising Jurisdiction.

Appellants argue that South Carolina has a significant interest in exercising jurisdiction in this case. They contend that it is their absolute right to seek redress over the Canadian Respondent here in South Carolina because the State has a substantial interest in the matter simply by virtue of their holding dual citizenship status in South Carolina. Appellants misinterpret the law in this regard.

As the lower court pointed out, this case involves an allegation that a Canadian citizen provided faulty financial information about a Canadian company (owned by Appellants' own Canadian children) to Appellants (who are also Canadian citizens) in order to use Appellants' personal line of credit for purposes of obtaining financing from a Canadian bank. (R. pp. 1-2). The sole connection that this matter has to South Carolina is the fact that Appellants currently

own property in South Carolina. (R. p. 125). As evident from the four corners of the Complaint, no South Carolina companies are involved, but rather only Canadian companies. (R. pp. 10-19, R. pp. 1-2). No South Carolina banks are involved, while the allegations in the Complaint relate in large part to the Bank of Ontario (a Canadian bank) (R. pp. 10-19, R. pp. 1-2). As the lower court also correctly pointed out, literally *all* of the evidence and witnesses involved are Canadian. (R. pp. 1-2). It would be utterly wasteful for this State to expend its judicial resources on a case that has no connection to this State, aside from the fact that the Appellants are joint residents of this State. Appellants' status as joint South Carolina residents, however, is not, in and of itself, sufficient reason for South Carolina's courts to adjudicate this dispute, particularly when the similar judicial remedies would presumably be available to Appellants in Canada, where they are also citizens and where they are frequently physically present, upon their own repeated admission. (R. p. 125).

Appellants' primary interest in litigating this case in South Carolina appears to be this State's relatively long statute of limitations period, as well as the fact that the statute of limitations in Canada has expired.[7] (R. p. 90). To be sure, the statute of limitations for Appellants' claims in Canada is one year shorter than the statute of limitations for the same claims in South Carolina.[8] (R. p. 90). Indeed, the Appellants themselves admit that they have failed to assert these claims in the Canadian court system, whether as a compulsory counterclaim to their pending Canadian litigation with Respondent or otherwise, and admit that the Canadian statute of limitations for their claims has long expired. (Appellants' Initial Brief p. 15).

[7] Canada, including Ontario, places a two-year statute of limitations on virtually all legal civil actions, including those for Fraud and Breach of Fiduciary Duty, which Respondents herein have alleged. *See* Canada Civil Limitations Act, 2002 (enacted in 2004).

[8] Additionally, the claims that Appellants have attempted to assert in this matter are actually *compulsory* counterclaims to the suit pending between these very parties in Canada. (Appellant Donna Mikals Aff. – Ex. A).

Appellants attempt to assert their failure to bring suit against Respondent in Canada during the pendency of the statute of limitations as an argument in support their appeal. (Appellants' Initial Brief p. 15). The Fourth Circuit, however, has previously held that a plaintiff's selection of South Carolina for its longer statute of limitations is not a proper basis for asserting personal jurisdiction. *See Ratliff v. Cooper Labs, Inc.*, 444 F.2d 745, 746 (4th Cir. 1971) (discussing that plaintiff's primary purpose in asserting jurisdiction in South Carolina appeared to be the State's relatively long statute of limitations and denying personal jurisdiction).

South Carolina has absolutely no interest in exercising jurisdiction over this case, which is Canadian in every respect. The lower court correctly held that "[t]he character and circumstances of such a case dictate[s] that Canadian records, Canadian reports, Canadian budgets, Canadian accountants and the like be involved." (R. p. 2). The lower court's holding should be upheld as it was neither unsupported by the evidence nor influenced by an error of law.

III. THE TRIAL COURT DID NOT ERR IN REFUSING TO FIND THAT HOUSE SOUGHT AFFIRMATIVE RELIEF WHEN SHE FILED A RULE 12(B)(2) MOTION TO DISMISS

Appellants' final argument on appeal requires little response as it has little merit. Appellants essentially argue that Respondent's Motion to Dismiss is tantamount to a request for affirmative relief from the lower court and, accordingly, the dismissal should be reversed as she has waived any objection to its jurisdiction. (Appellants' Initial Brief p. 16). Appellants provide no authority for their position. This is because no such authority exists.

Rule 7(a) of the South Carolina Rules of Civil Procedure provides for an initial pleading demanding relief and a response thereto. Rule 7(a), SCRCP. Rule 7(a), SCRCP designates the counterclaim as such a pleading and specifically requires that a counterclaim be captioned as a "counterclaim" in the case caption. *Id.* South Carolina courts have held that it is the title of the

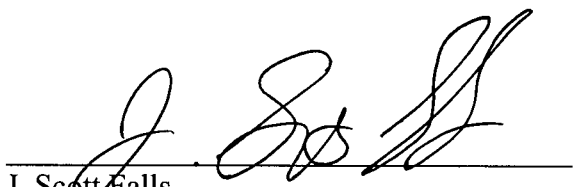
pleading rather than its substantive content that governs the pleading's ultimate designation and scope. *See Mauro v. Clabaugh*, 299 S.C. 1 184, 383 S.E.2d 244 (Ct. App. 1989) (the caption of a counterclaim, as opposed to its substance, is determinative of whether the pleading is a counterclaim or not).

Here, Respondent filed nothing more than a Motion to Dismiss for Lack of Personal Jurisdiction in response to Appellants' Complaint. (R. p. 20). Respondent has not filed an answer or a counterclaim in response to Appellants' Complaint. In fact, Appellants have not contended that Respondent has filed a counterclaim. Rather Appellants essentially ask this Court to construe Respondent's Motion to Dismiss as a counterclaim, despite its being captioned as a Motion to Dismiss and despite the fact that a motion to dismiss is incapable of obtaining affirmative relief on behalf of the moving party. Again, this argument is without merit.

A party filing a motion to dismiss may not rely upon such a pleading, and nothing more, to provide her with an award of damages. Certainly, had Appellants truly believed that Respondent's Motion to Dismiss was actually a counterclaim in the guise of a Rule 12(b)(2) motion, they would have filed a timely reply in response to such in order to avoid having a default judgment entered against them. Appellants did not do so. This is because a reply is not an available response to a motion to dismiss under the South Carolina Rules of Civil Procedure. Appellants' own actions do not support their current argument. Affirmative relief may only be sought by and through a properly captioned pleading that is capable of requesting such relief. As such, Appellants' argument that a motion to dismiss can be tantamount to a counterclaim is unavailing.

CONCLUSION

In order to prevail on this appeal, the Appellants have the burden of showing that the lower court's decision was either (1) unsupported by the evidence or (2) influenced by an error of law. Appellants have failed to meet their burden and, accordingly, the lower court's order should be affirmed and this appeal dismissed.



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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

The Honorable Marvin H. Dukes, III, Presiding Judge

Case No. 2013-CP-1186

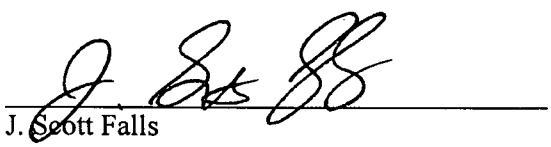
Charles R. Mikals and Donna Mikals.....Appellants

v.

Debra House.....Respondent

CERTIFICATE OF COUNSEL

The undersigned counsel for Respondent Debra House hereby certifies that the Respondent's Brief complies with Rule 211(b) of the South Carolina Appellate Court Rules.



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PROOF OF SERVICE

I, the attorney for Respondent in the appeal of *Charles R. Mikals and Donna Mikals v. Debra House*, Docket No. 2013-CP-1186, do hereby certify that on June 24, 2014, I personally served three copies of the Respondent's Final Brief by way of United Sates mail to counsel for the Appellants at the address indicated below:

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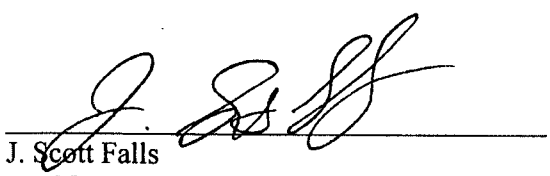

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