

ORIGINAL

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Letitia H. Verdin, Circuit Judge

C.A. No. 2012-CP-23-1735

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NOV 12 2013

SC Court of Appeals

Appellate Case No.: 2013-000690

Hidria USA, Inc.Appellant,

v.

Delo, d.d., d/b/a *Slovenske Novice*Respondent.

**FINAL BRIEF OF RESPONDENT
DELO, D.D., D/B/A SLOVENSKE NOVICE**

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SC Court of Appeals

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STATEMENT OF ISSUES PRESENTED

1. Did the Circuit Court correctly determine that Hidria failed to present sufficient evidence to establish the trial court's authority to exercise personal jurisdiction over Delo under South Carolina's long-arm statute, where all of the evidence before the trial court indicated that Delo has no connection with South Carolina?

2. Did the Circuit Court properly apply the "effects test" established in *Calder v. Jones*, 465 U.S. 783 (1984), to determine that Hidria failed to establish any basis for the exercise of personal jurisdiction over Delo, where there was no evidence before the trial court suggesting that South Carolina was the focal point of Delo's publication of articles in the Republic of Slovenia, written in the Slovene language, and directed to a Slovenian audience, about a Slovenian businessman?

3. Did Hidria waive, and thereby fail to preserve for appellate review, its argument that South Carolina courts may exercise personal jurisdiction over Delo solely based on Hidria's allegation of injury in South Carolina, where Hidria raised the issue for the first time in its Motion for Reconsideration to the Circuit Court, and where the argument blatantly misapplies South Carolina law?

STATEMENT OF THE CASE

Appellant Hidria USA, Inc. (“Hidria”) commenced this action for defamation against Respondent Delo, d.d., d/b/a *Slovenske Novice* (“Delo”) on March 7, 2012, in the Court of Common Pleas for Greenville County. *See* (R. pp. 10-13.) Delo timely moved for dismissal of the action for lack of personal jurisdiction. *See* (R. pp. 14.) In response, Hidria amended its complaint and Delo promptly filed a motion to dismiss Hidria’s Amended Complaint on the basis of lack of personal jurisdiction. *See* (R. pp. 27-30.); *and* (R. p. 31.)

After conducting a hearing on Delo’s motion to dismiss and reviewing Delo’s responses to Hidria’s jurisdictional discovery, Circuit Court Judge Letitia Verdin granted Delo’s motion and dismissed the Amended Complaint for lack of personal jurisdiction. *See* (R. pp. 3-4.) Hidria sought reconsideration of the trial court’s dismissal order, arguing for the first time that the trial court had personal jurisdiction over Delo solely because Hidria alleged an injury in South Carolina. *See* (R. pp. 69-70.) Judge Verdin denied Hidria’s motion, finding that Hidria failed to allege that Delo committed any tortious act within South Carolina as required for the application of S.C. Code Ann. § 36-2-803(A)(3). *See* (R. pp. 7-8.) This appeal followed.

STATEMENT OF THE FACTS

Delo is a corporation organized and existing under the laws of the Republic of Slovenia. (R. p. 108, ¶ 3.) It publishes *Slovenske Novice*, a newspaper printed and distributed primarily in the Republic of Slovenia. (R. p. 109, ¶ 11.) Delo publishes a print version of the newspaper and posts articles on its website only in Slovene, a language spoken primarily in the Republic of Slovenia. (R. p. 109, ¶ 12.) Delo does not

produce any English version of its newspaper in print or on the internet. *Id.* This case arises out of two articles published in *Slovenske Novice* – one on December 11, 2011, and one on April 23, 2012 – primarily discussing the lifestyle and business dealings of Edvard Svetlik, a Slovenian businessman. (R. p. 108, ¶ 2.); (R. p. 142-51.) The articles discuss Mr. Svetlik’s accumulation and distribution of wealth throughout his family in Slovenia, other European countries, and the United States of America, and compares the Svetlik family’s luxurious lifestyle to that of their employees in Slovenia. (R. p. 142-51.) The articles also mention Mr. Svetlik’s various business interests, including Hidria, which is incorporated under Delaware law but operates facilities in a number of other states including South Carolina. *Id.* Hidria shares common ownership with Hidria, d.d., a Slovenian business entity controlled by Edvard Svetlik and his family. *Id.* (Appellant’s Br. 2.)

Despite the lack of any evidence of any connection or contacts between Delo and the State of South Carolina, Hidria initiated this action against Delo in South Carolina, alleging that Delo defamed Hidria by publishing the two articles in question. Although Hidria has continuously argued that South Carolina courts could exercise personal jurisdiction over Delo related to Hidria’s defamation claims, and despite being provided the opportunity for jurisdictional discovery, Hidria has repeatedly failed to produce even one fact in support of its jurisdictional claims. Instead, the only evidence before the Circuit Court demonstrated that: 1) Delo is not incorporated or licensed to do any business in South Carolina; 2) does not transact any business in South Carolina; 3) has no facilities, properties, employees, agents, or affiliates within South Carolina; 4) has no paying subscribers located in South Carolina; 5) and derives no marketing, advertising, or

other revenue from South Carolina whatsoever. (R. pp. 108-10, ¶¶ 5-10; 14-17.) The Circuit Court also reviewed evidence showing that no representative of Delo ever visited South Carolina in connection with the newspaper articles at issue, as well as evidence showing that internet traffic originating from South Carolina to the *Slovenske Novice* website was inconsequential, at best (R. pp. 110-11, ¶¶ 18-25.) Hidria did not present any contradictory evidence to the trial court. Instead, it presented an affidavit from its General Manager, consisting of nothing more than baseless, unsupported and vague speculation as to how reporters gathered information for the articles, the demographics of South Carolina's population, and the extent of distribution or availability of *Slovenske Novice* via the internet in South Carolina. *See generally*, (R. pp. 105-06, ¶¶ 5-14.)

ARGUMENT

Summary of Argument

In this appeal, Hidria asks this Court to expand personal jurisdiction in South Carolina to include any person anywhere in the world who publishes a statement on the internet that is alleged to have defamed a business located in South Carolina. As further explained in this brief, Hidria's position is illogical and wholly unsupported by South Carolina law. Due process restricts a court's ability to indiscriminately assert personal jurisdiction over non-resident parties by requiring a minimal showing of a connection between the defendant, the alleged conduct, and the State. South Carolina law does not allow, as Hidria suggests, a court to dispense with the parameters of Due Process simply because a defendant maintains a webpage accessible to South Carolina residents.

In its initial brief, Hidria essentially raises two issues for this Court's consideration. First, Hidria asks this Court to find that the Circuit Court wrongly

concluded that Delo did not have sufficient minimum contacts to establish personal jurisdiction in South Carolina. However, Hidria completely ignores the evidence supporting the trial court's conclusion and Hidria's own clear failure to meet its jurisdictional burden. Alternatively, Hidria creatively (albeit incorrectly) argues that the Circuit Court improperly applied the "effects test" in determining that jurisdiction of Delo was lacking. In its briefing, Hidria fails to acknowledge that it encouraged the Circuit Court to apply the same interpretation of the "effects test" as presented by Delo, and misrepresents the original scope of its arguments before the trial court. Unfortunately for Hidria, it can find no relief in its alternative argument because the Circuit Court applied the "effects test" in a manner consistent with the South Carolina Code and case law, and it is simply too late for Hidria to make new arguments concerning the application of the doctrine.

For these reasons and the others discussed further below, the Court should affirm.

I. The Circuit Court correctly applied South Carolina's long-arm statute in dismissing Hidria's claims against Delo on the basis of lack of personal jurisdiction.

The trial court's exercise of personal jurisdiction over a nonresident defendant must be determined based on the individual facts of the case. *Cockrell v. Hillerich & Bradby Co.*, 363 S.C. 485, 491, 611 S.E.2d 505, 508 (2005). Once the trial court has determined that it does not have personal jurisdiction, "[t]he decision of the trial court should be affirmed unless unsupported by the evidence or influenced by an error of law." *Id.* In the pretrial stages of litigation, the plaintiff has the burden of making a prima facie showing that jurisdiction exists. *White v. Stephens*, 300 S.C. 241, 244, 387 S.E.2d 260, 262 (1990); *Int'l Mariculture Res. v. Grant*, 336 S.C. 434, 437, 520 S.E.2d 160, 161 (Ct.

App. 1999) (citing *Southern Plastics Co. v. Southern Commerce Bank*, 310 S.C. 256, 259, 423 S.E.2d 128, 130 (1992)). This burden may be met by allegations in the complaint or in affidavits. *Cockrell*, 363 S.C. at 491, 611 S.E.2d at 508; *see also Coggeshall v. Reproductive 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.”). However, unsupported and conclusory allegations will not be counted. *Harlan v. Aгенjca Wydawniczo-Reklamowa “Wprost” Sp. Zo.o*, C.A. No. 7:05-cv-2605-HFF, 2006 WL 360023 at *2 (D.S.C. Feb. 15, 2006) (citations omitted). Instead, “[p]laintiffs must allege facts . . . which satisfy each element of the personal jurisdiction analysis.” *Id*; *see also McKnight v. S.C. Dept. of Corrections*, 385 S.C. 380, 390, 684 S.E.2d 566, 571 (Ct. App. 2009) (holding that an affidavit which was “at best nothing more than conjecture and speculation . . . does not create any genuine issues of material fact”). Where “the defendant counters the plaintiff’s allegations with evidence that personal jurisdiction does not exist,” “[a] plaintiff [will not be allowed to rely on the bald assertions of jurisdiction in the complaint, but] must present affidavits or other evidence supporting jurisdiction over the defendant.” *Harlan*, 2006 WL 360023 at *2; *see also* 4 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1006 (3d ed. 2012) (“When a defendant provides affidavits to support a Rule 12(b)(2) motion, the plaintiff may not simply rest on the allegations of the complaint.”).

In order to exercise “specific” personal jurisdiction over a defendant, a plaintiff must show that such jurisdiction is authorized by S.C. Code Ann. § 36-2-803, South

Carolina's long-arm statute.¹ *White*, 300 S.C. at 245, 387 S.E.2d at 262. However, South Carolina's long-arm statute "has been construed to extend to the outer limits of the due process clause." *Moosally v. W.W. Norton & Co., Inc.*, 358 S.C. 320, 329, 594 S.E.2d 878, 883 (Ct. App. 2004). "Because we treat our long-arm statute as coextensive with the due process clause, the sole question becomes whether the exercise of personal jurisdiction in this case would violate the strictures of due process." *Id.*

The due process clause, contained in the Fourteenth Amendment of the Constitution, sets limits upon a state court's power to exert personal jurisdiction over any defendant which is not a resident of the forum state. *Asahi Metal Ind. Co. v. Superior Court*, 480 U.S. 102 (1987). In order to show that a forum may exercise personal jurisdiction over a defendant under the due process clause, a plaintiff must demonstrate that the court has both the power to assert jurisdiction over the defendant and that the extension of such jurisdiction would be fair. *Builder Mart of America, Inc. v. First Union Corp.*, 349 S.C. 500, 506, 563 S.E.2d 352, 356 (Ct. App. 2002) (discussing "(1) the power prong and (2) the fairness prong") (citations omitted), *overruled on other grounds by Farmer v. Monsanto Corp.*, 353 S.C. 553, 579 S.E.2d 325 (2003). The plaintiff has the burden of satisfying both of these tests. "If either prong fails, the exercise of personal jurisdiction over the defendant fails to comport with the requirements of due process." *Southern Plastics Co.*, 310 S.C. at 260.

Under the "power prong," "[b]efore personal jurisdiction may be exercised over a nonresident, due process requires that there exist minimum contacts between the

¹ Hidria concedes that South Carolina courts could not acquire "general" personal jurisdiction over Delo. *See* (Appellant Br. 5.) Accordingly, Delo will only discuss specific jurisdiction in this response.

defendant and the forum state such that the maintenance of the suit does not offend traditional notions of fair play and justice.” *Aviation Assocs. & Consultants, Inc. v. Jet Time, Inc.*, 303 S.C. 502, 507, 402 S.E.2d 177, 180 (1991). “Without minimum contacts, the court does not have the ‘power’ to adjudicate the action. . . . It is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws.” *Moosally*, 358 S.C. at 332, 594 S.E.2d at 884 (citations omitted); *see also Aviation Assocs.*, 303 S.C. at 508, 402 S.E.2d at 180. The minimum contacts must be sufficient that the defendant would reasonably anticipate being haled into court within the forum state. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980). “The ‘purposeful availment’ requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of random, fortuitous, or attenuated contacts.” *Moosally*, 358 S.C. at 332, 594 S.E.2d at 884 (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985)). “[T]he focus must center on the contacts generated by the defendant, and not on the unilateral actions of some other entity.” *Cockrell*, 363 S.C. at 491, 611 S.E.2d at 508 (citations omitted).

In addition to demonstrating that the court has the requisite power over the defendant, the plaintiff must also show that the court’s exercise of its power would be reasonable and fair. The fairness prong of the test requires the court to examine factors such as: “(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." *Id.* at 492, 611 S.E.2d at 508 (citations omitted).

In finding that Hidria failed to demonstrate that the Circuit Court had the necessary power to exercise personal jurisdiction over Delo, the court noted that Delo had not transacted business in South Carolina, just as Hidria points out in its initial briefing. *See* (Order of Dismissal). However, that was but one of the court's many findings to support its conclusion that Delo did not have sufficient minimum contacts with South Carolina such that it can be said to have "purposely availed" itself of the laws of this State or expected to be "haled" into court here. The Circuit Court also recognized that "[w]hile the alleged defamatory article was accessible by residents of South Carolina [over the internet], *Slovenske Novice* has no online subscriptions in South Carolina nor is there any evidence of [Delo] directing any online business activity towards this State." *Id.* Stated otherwise, the Circuit Court found that the mere accessibility of the article via the unilateral use of the internet by someone located in South Carolina could not meet the definition of traditional minimum contacts. This well-reasoned decision was based on the evidence presented by Delo through an unrefuted affidavit evidencing that Delo owns no property and operates no facilities in South Carolina, has no employees, agents, or affiliates who are located in South Carolina, has no South Carolina subscribers or newsstand sales, targets no advertisements to persons or entities in South Carolina, publishes no English-language versions of its stories either in hard copy or online, and has minimal website traffic from South Carolina. (R. pp. 108-10, ¶5-19.) Despite its arguments to this Court, Hidria did not present the Circuit Court with any evidence, nor did it successfully rebut any of Delo's evidence, which could have supported any

determination that Delo “purposefully availed” itself of the benefits of conducting business in South Carolina.

This Court has examined how the “purposeful availment” test should be applied in the defamation context. In *Moosally v. W.W. Norton & Co., Inc.*, 358 S.C. at 320, 594 S.E.2d at 878, a case that involved a defamation claim brought against a source, author, and publisher of a book of national interest widely distributed in South Carolina, the Court considered whether to uphold the trial court’s dismissal of claims against the defendants, all of whom were non-residents of South Carolina, for lack of personal jurisdiction. The Court first determined that the source, who had given information to the author about the subject matter, did not “purposefully avail” himself of the privilege of doing business in South Carolina, and therefore that South Carolina courts could not exercise jurisdiction over him. *Id.* at 333, 594 S.E.2d at 885.

With regard to the author, the Court also determined that South Carolina had no jurisdiction, even though he wrote a book on a topic of national interest with the knowledge and expectation that copies of such book would be distributed, sold, and read in South Carolina. The Court noted that “an individual does not ‘purposefully avail’ himself of the laws of this State merely by virtue of having authored a single literary work on a topic of national interest.” *Id.* at 334, 594 S.E.2d at 885.

However, the Court did hold that South Carolina could exercise personal jurisdiction over the publisher of the book. Notably, the Court found jurisdiction over that party based on its extensive sales and distribution efforts specifically directed at the State of South Carolina, and did not do so on the ground that the publisher made the book available to readers in South Carolina via the internet, as Hidria seeks to do in the present

case. The Court characterized the publisher as having “continually endeavored to exploit the South Carolina market,” *id.* at 335, 594 S.E.2d at 886, and noted that (a) the publisher’s books were sold at 315 bookstores within the State; (b) many of the publisher’s books were sold directly to educational institutions within South Carolina; and (c) the publisher employed a number of sales representatives who repeatedly visited South Carolina for the sole purpose of selling the publisher’s books to South Carolina customers. The Court concluded that “W.W. Norton’s continual practice of marketing and distributing books in South Carolina satisfies the power prong of the due process analysis.” *Id.* at 336, 594 S.E.2d at 886.²

By contrast, in the present case, Delo sold no copies of its newspapers in South Carolina, did not employ any sales representatives to market its publication in South Carolina, and did not publish the articles in question in South Carolina except through its publication of them in every state and country throughout the entire world by posting them on the internet, in Slovene. Additionally, the *Moosally* Court cited W.W. Norton’s extensive commercial presence and revenue generation in South Carolina as a ground for asserting personal jurisdiction. Contrarily, Hidria produced no evidence in this case to refute Delo’s showing that it has no commercial presence in South Carolina and does not derive any revenue from the State. Instead, Hidria argues that Delo is subject to personal jurisdiction in South Carolina because the articles at issue were available to readers in South Carolina through the internet. Similar arguments were wholly rejected by this Court in *Moosally*. There, the Court held that the author of an alleged defamatory

² The *Moosally* Court’s personal jurisdiction analysis was approvingly cited and adopted by the Supreme Court of South Carolina in *Cockrell v. Hillerich & Bradsby Co.*, 363 S.C. 485, 611 S.E.2d 505 (2005).

statement was **not** subject to personal jurisdiction in South Carolina, because he had undertaken no actions to bring the statements into the State. The Court noted that “[t]he fruits of his labor – be it in literary or in cinematic form – arrived in South Carolina not through his efforts, but through the efforts of others, and therefore [could] not serve as the basis for jurisdiction.” *Id.* at 334, 594 S.E.2d at 885. The *Moosally* Court’s jurisdictional analysis as to that author applies equally to the circumstances of the instant case.

In another defamation case with many factual similarities to the case before this Court, the United States District Court for the District of South Carolina rejected personal jurisdiction. *Harlan v. Agencja Wydawniczo-Reklamowa “Wprost” Sp. Zo.o*, 2006 WL 360023 (D.S.C. Feb. 15, 2006), involved a libel action brought in South Carolina against a Polish magazine arising out of three articles about a Polish political candidate. The articles reported that the candidate was involved in a number of different illegal activities in Poland and the United States, including the assertion that one of the plaintiffs, a South Carolina attorney, had aided the candidate in his illegal activity. The magazine in question was published in both English and Polish language editions, had a distributor in the United States, published English-language versions of its stories on its website, contained many English-language advertisements, and had one mail order subscriber in South Carolina. The defendants moved to dismiss the complaint for lack of personal jurisdiction under Rule 12(b)(2).

The District Court granted the motion, holding that neither the magazine publisher nor the American distributor had sufficient “minimum contacts” with South Carolina to support the exercise of personal jurisdiction under the due process clause. Stating that

“the critical issue for the court to analyze is the nature and quality of commercial activity conducted by an entity over the Internet in the forum state,” *id.* at *3, the District Court rejected the plaintiffs’ claim that by publishing the stories in question on its website, the magazine had established “minimum contacts” with South Carolina.

The argument for personal jurisdiction that was rejected by the District Court in *Harlan* is exactly the basis of Hidria’s argument here – that merely by publishing an article on the internet that allegedly defames a person in South Carolina, the publisher becomes subject to jurisdiction in South Carolina. The District Court properly found that this argument is unreasonable and over-reaching, and that mere publication on the internet does not confer jurisdiction in South Carolina. Likewise, in the instant case, the trial court clearly recognized that due process does not permit the exercise of personal jurisdiction over a nonresident defendant merely because it has published a statement on the internet about a South Carolina resident. The Circuit Court’s order leaves no room for doubt that Hidria failed to present the trial court with any basis for the exercise of personal jurisdiction over Delo and, particularly, failed to show that Delo “purposefully availed” itself of the privilege of doing business in South Carolina. Accordingly, the trial court lacked the power to exercise personal jurisdiction over Delo. Nothing argued by Hidria before this Court undermines that conclusion.

II. The Circuit Court’s order dismissing Hidria’s claims against Delo on the basis of lack of personal jurisdiction should be affirmed because Hidria failed to satisfy the requirements of the “effects test” as pronounced in *Calder v. Jones*

Like its failure to meet the requirements of the South Carolina long-arm statute, Hidria also failed to demonstrate that the trial court had personal jurisdiction over Delo under the “effects test” as established by the United States Supreme Court in *Calder v.*

Jones, 465 U.S. 783 (1984). Aptly named, the “effects test” focuses on the location of the ultimate effects of a defendant’s actions. In order to satisfy this test, a plaintiff must establish three elements: “(1) the defendant committed an intentional tort; (2) the plaintiff felt the brunt of the harm in the forum, such that the forum can be said to be the focal point of the harm; and (3) the defendant expressly aimed his tortious conduct at the forum, such that the forum can be said to be the focal point of the tortious activity.” *Pitts v. Fink*, 389 S.C. 156, 168, 698 S.E.2d 626, 632 n.3 (Ct. App. 2010) (quoting *Carefirst of Md., Inc. v. Carefirst Pregnancy Ctrs., Inc.*, 334 F.3d 390, 398 n. 7 (4th Cir. 2003)). In the defamation context, in order to show that the forum “can be said to be the focal point of the tortious activity,” a plaintiff must establish that the speaker “manifest[ed] an intent to target and focus on” the readers of the forum state. *Young v. New Haven Advocate*, 315 F.3d 256, 263 (4th Cir. 2002).

Although Hidria now argues that the Circuit Court’s application of the “effects test” was too narrow, in its arguments before the trial court, Hidria actually relied upon the very same law as Delo – even citing the three factors approved in *Calder*. See (R. p. 61). Also, while noting that South Carolina state appellate courts have not specifically adopted the *Calder* “effects test,” Hidria conveniently ignores that this Court has expressly recognized that “[w]hile courts are split in their interpretation of the breadth of the *Calder* ‘effects test,’ courts unanimously agree the test requires that the defendant commit an intentional tort aimed at the forum state.” *Pitts v. Fink*, 389 S.C. at 168, 698 S.E.2d at 632 n.3 (quoting *Carefirst of Md., Inc.*, 334 F.3d at 398 n. 7). Because South Carolina state courts have not had the opportunity to fully analyze the “effects test,” other courts’ analysis of circumstances similar to the instant case may be instructive.

In the *Harlan* case discussed above, the District Court rejected the plaintiffs' claims that South Carolina had jurisdiction under the "effects test" based upon an internet publication allegedly defamatory of a South Carolina resident, noting that that test only gives rise to jurisdiction where a plaintiff has shown that the defendant "expressly aimed its tortious conduct at the forum." Finding that the plaintiffs had not met this requirement, the District Court commented:

Plaintiffs fail, however, to present any facts to support their allegations that Defendants expressly aimed their tortious conduct at South Carolina. As noted earlier, Defendants made little or no effort to circulate hard copies of their publication in South Carolina. In addition, while Plaintiffs establish that Defendants disseminate *Wprost* over the Internet to English-speaking audiences, they make no showing as to any specific targeting of South Carolina residents. The Internet transmission of *Wprost* in English could be targeted to audiences in any number of English-speaking foreign or American states; yet the federal Constitution demands that South Carolina in particular be the "focal point of the tortious activity," before the Court can exercise jurisdiction over Defendants. Simply placing *Wprost* into the stream of commerce, whether on paper or via the Internet, does not qualify as a minimum contact with South Carolina – even if copies of *Wprost* make their way to this State.

Harlan, 2006 WL 360023 at *4 (citations omitted). This reasoning is directly applicable to the facts of the instant case, and obviously supports the Circuit Court's rejection of jurisdiction in the analogous facts presented here.

Similarly, in 2002, the United States Court of Appeals for the Fourth Circuit decided a case, *Young v. New Haven Advocate*, 315 F.3d at 256, with many factual similarities to the case currently before this Court. The *Young* case involved several articles published by two Connecticut newspapers both in hard copy and on their websites concerning Connecticut's policy of transferring many of its prisoners to prisons located in Virginia for long-term incarceration. The articles were critical of the conditions in one specific Virginian prison, as well as the warden in that same institution.

The warden brought a defamation action in Virginia, claiming that because the reporters had made phone calls to Virginia in researching the story, the stories concerned events and conditions in Virginia, the articles were posted on their websites which could be accessed in Virginia, and because his reputation was harmed and he suffered injury in Virginia, the Virginia court properly had jurisdiction over the Connecticut papers. The District Court agreed with this reasoning and denied the defendants' motions to dismiss for lack of personal jurisdiction under Rule 12(b)(2).

The Fourth Circuit panel, however, unanimously disagreed and reversed the District Court's decision. Applying the Supreme Court's decision in *Calder v. Jones*, 465 U.S. at 783, and its own precedent in *ALS Scan, Inc. v. Digital Service Consultants, Inc.*, 293 F.3d 707, 711 (4th Cir. 2002), the Fourth Circuit held that when evaluating personal jurisdiction in defamation cases based upon news stories posted on the Internet:

We thus ask whether the newspapers manifested an intent to direct their website content – which included certain articles discussing conditions in a Virginia prison – to a Virginia audience. As we recognized in *ALS Scan*, **“a person's act of placing information on the Internet” is not sufficient by itself to “subject [] that person to personal jurisdiction in each State in which the information is accessed.”** Otherwise, “a person placing information on the Internet would be subject to personal jurisdiction in every State,” and the traditional due process principles governing a State's jurisdiction over persons outside of its borders would be subverted. Thus, the fact that the newspapers' websites could be accessed anywhere, including Virginia, does not by itself demonstrate that the newspapers were intentionally directing their website content to a Virginia audience. Something more than posting and accessibility is needed to “indicate that the [newspapers] purposefully (albeit electronically) directed [their] activity in a substantial way to the forum state,” Virginia. The newspapers must, through the Internet postings, manifest an intent to target and focus on Virginia readers.

Young, 315 F.3d at 263 (citations omitted) (emphasis added). The Fourth Circuit concluded that because “the overall content of [the] websites is decidedly local” as the

majority of the content was directed at a local or state audience, “it appears that these newspapers maintain their websites to serve local readers in Connecticut, to expand the reach of their papers within their local markets, and to provide their local markets with a place for classified ads. The websites are not designed to attract or serve a Virginia audience.” *Id.* The Fourth Circuit ultimately concluded that “[t]he newspapers did not post materials on the Internet with the manifest intent of targeting Virginia readers,” and therefore, it would violate the defendants’ due process rights for a Virginia court to exercise personal jurisdiction over them. *Id.* at 264.

Like the plaintiffs in *Young* and *Harlan*, Hidria simply failed to establish that Delo had a “manifest intent” to target and focus on South Carolina readers. *See Young*, 315 F.3d at 263. The undisputed evidence showed that *Slovenske Novice* is a quintessentially Slovenian newspaper, published in Slovene, the national language in the Republic of Slovenia, and directed at its readership of citizens of the Republic of Slovenia, a nation with a population less than half that of South Carolina, on matters of local and national interest to Slovenians. (R. pp. 108-10, ¶¶ 5-19.) It distributes no hard copies of its paper at all to South Carolina, and web traffic to its website originating from South Carolina is insignificant.³ (R. pp. 110-11, ¶¶ 19-25.) The articles at issue concerned the business activities and luxurious lifestyle of a Slovenian businessman, and

³ Based upon a report generated by Google Analytics, a leading internet service widely used to generate detailed information about web traffic, the December article generated a total of 17 unique page views from the entire United States during December 2011, and generated less than 8 unique page views from South Carolina during this time period. The April article generated a total of 11 unique page views in the entire United States during April and May of 2012, and also generated less than 8 unique page views from South Carolina during this time period. According to the Google Analytics report attached as Exhibit D to Ms. Jakopec’s Affidavit, only articles with 8 or more unique page views originating within South Carolina are included in the report. The articles in question are not reported as one of these articles. *See* (R. pp. 137-39.)

the few mentions of Hidria were all made in this context. The Circuit Court's only reasonable conclusion was that Hidria failed to show that Delo "specifically targeted" South Carolina readers in any way, shape, or form, and thus failed to bear its burden of demonstrating that the trial court could exercise personal jurisdiction over Delo under the "effects test." Accordingly, The Circuit Court properly granted Delo's Motion to Dismiss.

III. Hidria failed to preserve its alternative argument that the Circuit Court could exercise personal jurisdiction over Delo solely based on Hidria's allegations of injury in South Carolina; and the argument blatantly misapplies the law.

Hidria now argues that the trial court failed to adequately address whether the exercise of its jurisdiction would have been appropriate under § 36-2-803(A)(3) of the long-arm statute because of Hidria's allegation that it felt the "effects" of the alleged defamation in South Carolina. In addition to being incorrect for the reasons stated above and further below, this argument has been waived.

It is well-established that a party may not raise an argument for the first time on a motion to reconsider. *See, e.g., Gartside v. Gartside*, 383 S.C. 35, 43, 677 S.E.2d 621, 625 (Ct. App. 2009). Any request made at the post-judgment stage of the proceedings is untimely where the request could have been made prior to judgment. *Buist v. Buist*, 399 S.C. 110, 124, 730 S.E.2d 879, 886 (Ct. App. 2012). To be preserved for appellate review, the issue must have been (1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity. *See S.C. Dep't of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 301-02, 641 S.E.2d 903, 907 (2007).

Initially, Hidria only argued to the Circuit Court that “South Carolina’s long-arm statute ‘affords broad power to exercise personal jurisdiction arising from tortious injuries in South Carolina.’” (R. p. 60.) In support of this proposition, Hidria cited only *Sullivan*, which, as noted above, applied § 36-2-803(A)(4). *Id.* Not until its motion for reconsideration did Hidria argue that the location of the injury alone was sufficient to confer jurisdiction, or cite § 36-2-803(A)(3) as the basis for its jurisdictional claim. Even then, the Circuit Court summarily rejected the argument, recognizing that Hidria had not so much as alleged in its complaint or provided in discovery any basis for finding that Delo committed any tortious act within the State warranting the application of subsection 3.

This Court should also summarily dismiss Hidria attempts to belatedly argue that any injury to a party in South Carolina automatically gives rise to personal jurisdiction over an out-of-state defendant, regardless of where the actual allegedly tortious act was committed. Hidria clearly has waived its right to this argument by failing to timely raise it before the Circuit Court.

Moreover, Hidria’s argument is a blatant misapplication of the law. In addition to being contrary to the express plain language of § 36-2-803(A)(3), this argument completely ignores the fact that the Legislature enacted another subsection to specifically govern situations where an act committed out-of-state gives rise to an injury within South Carolina. Section 36-2-803(A)(4) provides that an out-of-state party may be subject to jurisdiction in South Carolina for an act committed elsewhere if it led to an injury in South Carolina and “if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed

or services rendered in this State.” The statute clearly provides that where an out-of-state defendant, such as Delo, is alleged to have committed an act outside of South Carolina which causes injury within South Carolina, it can be subject to South Carolina jurisdiction only if one of the § 36-2-803(A)(4) factors are satisfied.

This was recognized by the Court of Appeals in *Sullivan v. Hawker Beechcraft Corp.*, 397 S.C. 143, 151, 723 S.E.2d 835, 839 (Ct. App. 2011), which was the only case cited by Hidria in its initial memorandum to the Circuit Court for its long-arm statute argument and which it also cited in its Motion to Reconsider:

Our state’s long-arm statute affords broad power to exercise personal jurisdiction over causes of action arising from tortious injuries in South Carolina. However, even with a liberal construction of the statute and the complaint, [plaintiff has failed to allege any facts that show [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.

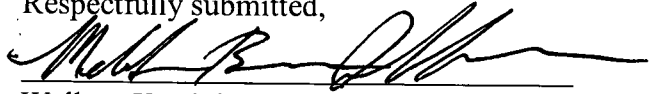
Id. (citations omitted). If, as Hidria proposes, all a plaintiff had to allege was simply that it had suffered injury in South Carolina, the *Sullivan* court’s analysis would have been incorrect and unnecessary. In fact, Hidria’s proposed interpretation of § 36-2-803(A)(3) would render § 36-2-803(A)(4) completely superfluous and irrelevant, given that Hidria would apparently always end the inquiry with the simple question of whether or not harm was suffered in South Carolina, regardless of where the tortious act was committed. Accordingly, Hidria’s argument that § 36-2-803(A)(3) allows South Carolina courts to exercise personal jurisdiction over Delo merely because Hidria alleges that it experienced the effects of the alleged defamatory act in South Carolina fails as a matter of law.

CONCLUSION

The Circuit Court gave Hidria ample opportunity to make a prima facie showing of personal jurisdiction, even allowing Hidria to conduct jurisdictional discovery. After reviewing the parties' arguments and discovery, the court correctly found that it did not have personal jurisdiction over Delo and dismissed Hidria's claims. Upon reconsideration, the trial court again rejected Hidria's arguments and rebuffed Hidria's attempt to introduce a new argument for jurisdiction. The evidence overwhelmingly supports the Circuit Court's order and highlights that Hidria simply did not present any basis for the court to decide otherwise. In particular, Hidria's argument that jurisdiction arises simply because it was injured in South Carolina by an article published on the internet, should be rejected here as it was by the District of South Carolina and Fourth Circuit in *Harlan* and *Young*, respectively.

Accordingly, this Court should affirm the Circuit Court's Order granting Delo's Motion to Dismiss for lack of personal jurisdiction.

Respectfully submitted,



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THE STATE OF SOUTH CAROLINA

In the Court of Appeals

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APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

SC Court of Appeals

Letitia H. Verdin, Circuit Judge

C.A. No. 2012-CP-23-1735

Appellate Case No.: 2013-000690

Hidria USA, Inc.Appellant,

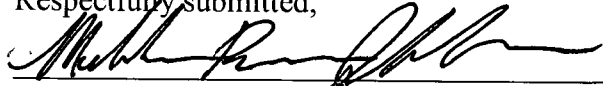
v.

Delo, d.d., d/b/a *Slovenske Novice*Respondent.

CERTIFICATE OF COUNSEL

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

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PROOF OF SERVICE

The undersigned counsel for Respondent certifies that Respondent's Final Brief and Certificate of Counsel have been served upon all other counsel of record by depositing copies of same in the U.S. Mail, first-class postage prepaid, addressed as follows:

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