

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

DEC 23 2015

SC Court of Appeals

Letitia H. Verdin, Circuit Court Judge

Case No.: 2014-CP-23-5266
Appellate Case No.: 2015-001667

Blanche G. Creswell,.....Appellant,

v.

Robin Culbertson and Chip Culbertson d/b/a Asheville Cotton Company, and
Asheville Cotton Company,.....Respondents.

INITIAL BRIEF OF THE APPELLANT

Gregory A. Morton
Donnan & Morton, P.A.
4 Arborland Way
Greenville, SC 29615
(864) 675-6010
Attorney for Appellant

Other Counsel of Record

James P. Walsh, Esquire
Clarkson, Walsh, Terrell &
Coulter, PA
P. O. Box 6728
Greenville, SC 29606
Attorney for Respondents

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Statement Of Issue On Appeal

Whether the Trial Court erred in holding Defendants' business contacts with South Carolina—including shipping fourteen percent of its total shipments over a five year period to customers located in South Carolina, regularly emailing two hundred seventy-three (273) South Carolina customers every three weeks, advertising on a local television station broadcasting in Upstate South Carolina for six years, and holding a live presentation at one event in South Carolina—were insufficient minimum contacts to subject Defendants to trial in Greenville, South Carolina, which is only fifty miles from Defendants' store.

Statement Of The Case

This is a slip and fall case arising from injuries to Plaintiff at Defendants place of business in Asheville, North Carolina. Plaintiff is a resident of Greenville County. The action was commenced by a Complaint filed September 24, 2014. Defendants moved to dismiss the matter for lack of personal jurisdiction.

By agreement, the parties conducted discovery on the jurisdictional issue. The Trial Court heard the Motion on May 26, 2015. The Trial Court issued a short form order on June 1, 2015 dismissing the matter. Plaintiff filed a SCRCP Rule 59(e) Motion to Reconsider. The Trial Court issued a form order on June 22, 2015 denying the Motion to Reconsider.

Plaintiff served the Notice of Appeal on July 21, 2015.

Facts

This is a trip and fall case which occurred when Plaintiff Blanche Creswell, a Greenville County resident, tripped and fell in Defendants' store located in Asheville, North Carolina. Plaintiff, while carrying a bolt of fabric from the display area to the cutting area in the store, tripped

over a basket display on the floor as she rounded the end of a counter. The low level basket display was set up by Defendants' employees, and Plaintiff suffered serious personal injuries.

The factual details regarding the injuries are not pertinent at this time as the only issue on appeal is the question of the exercise of personal jurisdiction over Defendants. The limited discovery conducted on the jurisdictional issue reveals numerous contacts between Defendants' business and South Carolina. While there is only one physical location, the limited shipping records maintained by Defendants for the store show 336 shipments of goods by the store. (Robin Culbertson Deposition, Ex 1, ROA ____). Of these, more shipments went to South Carolina than any other state, except for the shipments within the store's local state of North Carolina. The total shipments to South Carolina customers were nearly fourteen percent of the total shipments, and nearly twenty five percent of the total shipments to locations outside of North Carolina.

In addition to shipping goods to customers located in South Carolina, Defendants maintain an email list which includes 273 customers located in South Carolina. (Robin Culbertson Deposition, Ex 2, ROA ____). The Defendants send emails approximately every three weeks, advertising sales and classes to be conducted at the store. (Robin Culbertson Deposition, pp. 41-44, ROA ____). The purpose of these emails is to solicit and generate business from the recipients, including customers in South Carolina.

Defendants also advertised on WLOS-TV, which broadcasts in the Upstate South Carolina area. These advertisements lasted for a six year period (William Culbertson Deposition, pp. 8 - 9, ROA ____ - ____). While the advertisements were not occurring at the time Plaintiff was injured, these were nevertheless targeted to a geographically local audience, including Upstate South Carolina residents.

Defendant Robin Culbertson also travelled to South Carolina and presented at a quilting event attended by thirty to forty people. (Robin Culbertson Deposition, pp. 49-51, ROA ___ - ___). Robin Culbertson admitted she would have spoken about and promoted the store during that event. (Robin Culbertson Deposition p. 49 - 51, ROA ___).

When these facts are viewed in the context of the applicable legal principles, traditional notions of fair play and substantial justice are not violated by Defendants defending this matter fifty miles from the store in the area which they advertised, solicited customers, and shipped product.

Legal Principles

The legal principles regarding the exercise of personal jurisdiction in South Carolina are well settled. These principles were reviewed and summarized by this Court as follows:

However, a more recent trend compresses the analysis into a due process assessment only. *Id.* At 431, 665 S.E.2d at 664-65; see also *Cockrell*, 363, S.C. at 491, 611 S.E.2d at 508 (“Because South Carolina treats its long-arm statute as coextensive with the due process clause, the sole question becomes whether the exercise of personal jurisdiction would violate due process.”).

Due process requires a defendant possess minimum contacts with the forum state such that maintenance of suit does not offend traditional notions of fair play and substantial justice. *Coggeshall*, 376 S.C. at 16, 655 S.E.2d at 478. “Further, the due process requirement mandates the defendant possess sufficient minimum contacts with the forum state such that he could reasonably anticipate being haled into court there.” *Power Prods.*, 379 S.C. at 431-32, 665 S.E.2d at 665.

Courts apply a two-pronged analysis when determining whether a defendant possesses minimum contacts with the forum state such that maintenance of suit does not offend traditional notions of fair play and substantial justice. *Id.* At 432, 665 S.E.2d at 665. “The court must (1) find that the defendant has the requisite minimum contacts with the forum, without which, the court does not have the ‘power’ to adjudicate the action and (2) find the exercise of jurisdiction is reasonable or fair.” *Id.* To support a finding of due process, both prongs must be satisfied. *Id.*

To satisfy the power prong, the court must find the defendant directed his activities to residents of South Carolina and that the cause of action arises out of or

relates to those activities. Moosally v. W.W. Norton & Co., 358 S.C. 320, 331-32, 598 S.E.2d 878, 884 (Ct. App. 2004) The *Moosally* court stated:

It is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities with the forum state, thus invoking the benefits and protections of its laws. 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. Whether the constitution requirement of minimum contacts has been met depends on the facts of each case.

Id. At 332, 594 S.E.2d at 884-85. Finally, under the fairness prong, the court must consider the following factors: (1) the duration of the defendant’s activity in this State; (2) the character and circumstances of its acts; (3) the inconvenience to the parties by conferring or refusing to confer jurisdiction over the nonresident; and (4) the State’s interest in exercising jurisdiction. *NV Sumatra Tobacco Trading*, 379 S.C. at 91, 666 S.E.2d at 223.

Cribb v. Spatholt, 382 S.C. 475, ___, 676 S.E.2d 706, ___ (Ct. App. 2009).

The analysis therefore turns on whether: 1) Defendants have the requisite minimum contacts with South Carolina, and, 2) whether the exercise of jurisdiction is reasonable or fair. When the facts of this case are viewed in light of these legal principles, both of these requisite elements are satisfied.

Argument

I. Traditional Notions of Fair Play and Substantial Justice Are Not Offended By This Matter Being Tried In Greenville County, South Carolina.

When the applicable legal principles are applied in light of the facts—which facts show substantial, intentional and continuous contacts with South Carolina and customers in South Carolina—it is evident Defendants are properly subject to personal jurisdiction in South Carolina. Traditional notions of fair play and substantial justice are not violated by Defendants having to defend this matter in Greenville County, the residence of Plaintiff. The trial is only fifty miles

from Defendants business location, and due process is not violated by Defendants defending the matter here.

While Defendants do not have complete shipping records, the records that do exist show total shipments of three hundred thirty-six (336) transactions between 2011 and 2015 (Robin Culbertson Deposition, Exhibit 2, ROA _____). Of the three hundred thirty-six total shipments, more shipments were made to South Carolina than any state than Defendants' home state of North Carolina (Robin Culbertson Deposition, Exhibit 1, ROA ____). The shipments to South Carolina were approximately fourteen percent (14%) of the total of all shipments by Defendants, and were almost twenty-five percent (25%) of all shipments by Defendants to locations other than South Carolina.

In addition to successfully selling and shipping goods to South Carolina customers, Defendants also maintain an active email data base which contains names and addresses of two hundred seventy-three (273) customers in South Carolina (Robin Culbertson Deposition, Exhibit 2, ROA _____). Robin Culbertson testified that she emails the customers approximately every three weeks (Robin Culbertson Deposition, pp. 41-44, ROA ____ --____). The purpose of the emails is to solicit customers regarding sales in the store as well as classes that are being conducted in the store (Robin Culbertson Deposition, pp. 41 to 44, ROA _____ - _____). Clearly, these emails are direct solicitations to South Carolina residents to visit the Asheville, North Carolina store.

In addition to actually shipping goods to South Carolina customers, and in addition to soliciting South Carolina residents more than once a month to come to the store in Asheville for sales and/or classes, Defendants also previously advertised for a six year period on the WLOS television station. The market for WLOS encompasses upstate South Carolina, which includes

Greenville County (William Culbertson Deposition, pp. 8 to 9, ROA _____ - _____). While the television advertising in upstate South Carolina ended in approximately 2004, the prior course of advertising constitutes additional purposeful availment of business activities with South Carolina residents.

Finally, Robin Culbertson also appeared and presented in person at an event in South Carolina in 2012 (Robin Culbertson Deposition pp. 49 – 51, ROA _____ to _____). This was a live presentation on quilting, and was attended by thirty to forty people. Robin Culbertson admitted she would have spoken about and promoted the store during that event (Robin Culbertson Deposition, pp. 49 - 51, ROA _____).

The Trial Court did not address any of these significant contacts in the short, four sentence order dismissing this case (Order dated January 1, 2015, ROA _____). Plaintiff re-emphasized these significant contacts in the SCRCP Rule 59(e) Motion (Motion, ROA _____), but again received only a brief two sentence order of denial (Order dated June 22, 2015, ROA _____). While the Trial Court did not address and evaluate these substantial contacts either separately or cumulatively, these ongoing intentional, regular, and systematic contacts are such that traditional notions of fair play and substantial justice are not offended by subjecting Defendants to jurisdiction in South Carolina.

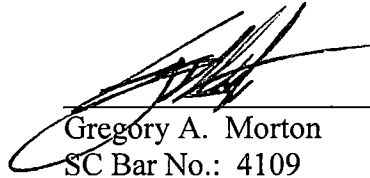
Conclusion

The exercise of personal jurisdiction as to Defendants in this matter does not offend traditional notions of fair play and substantial justice. The business activities of Defendants with regard to South Carolina were not random, isolated, or fortuitous; but rather were purposeful and structured. Defendants advertised on a local television station, shipped a substantial percentage of its out of state shipments to customers in South Carolina, presented to a group in South Carolina,

and maintained a large email list of South Carolina customers—which list was used every three weeks to solicit and encourage South Carolinians to travel the distance to Defendants’ store. Given these circumstances, it is not a violation of due process for Defendants to litigate this matter some fifty miles from the store.

Accordingly, it is respectfully submitted that the order of dismissal by the trial court should be reversed in this matter, and the case remanded for trial.

Respectfully submitted,



Gregory A. Morton
SC Bar No.: 4109

December 21, 2015

Donnan & Morton, P.A.
4 Arborland Way
Greenville, SC 29615
Phone: (864) 675-6010
Fax: (864) 675-6015
Attorney for Appellant

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C. A. No.: 2014-CP-23-5266
Appellate Case No.: 2015-00167

Blanche G. Creswell,.....Appellant,

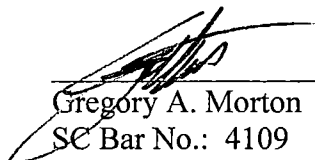
v.

Robin Culbertson, Chip Culbertson d/b/a Asheville Cotton Company, and
Asheville Cotton Company,.....Respondents.

PROOF OF SERVICE

I certify that I have served the Initial Brief of the Appellant on Robin Culbertson, Chip Culbertson d/b/a Asheville Cotton Company, and Asheville Cotton Company by depositing a copy of it in the United States Mail, postage prepaid, on December 21st, 2015, addressed to their attorney of record James P. Walsh, Clarkson, Walsh, Terrell & Coulter, P.A., P. O. Box 6728, Greenville, SC 29606, on December 21st, 2015.

December 21st, 2015



Gregory A. Morton
SC Bar No.: 4109
Donnan & Morton, P.A.
4 Arborland Way
Greenville, SC 29615
Phone: (864) 675-6010
Fax: (864) 675-6015
Attorney for Appellant

DONNAN & MORTON, P.A.

ATTORNEYS AT LAW

4 ARBORLAND WAY

GREENVILLE, SC 29615

PHILLIP D. DONNAN
GREGORY A. MORTON

TEL 864-675-6010
FAX 864-675-6015

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SC Court of Appeals

The Honorable Jenny Abbott Kitchings
Clerk of Court of the South Carolina
Court of Appeals
P. O. Box 11629
Columbia, SC 29211

RE: Blanche G. Creswell v. Robin Culbertson, Chip Culbertson d/b/a Asheville
Cotton Company, and Asheville Cotton Company
Appellate Case No.: 2015-001667
Our File No.: IND-12-281

Dear Ms. Kitchings:

Please find enclosed herein for filing the Appellant's Initial Brief, Proposed Designation of the Matters to be Included in the Record on Appeal, and Certificate of the same. By copy of this letter, the same documents are being forwarded to all counsel of record.

Please do not hesitate to contact my office if I need to provide anything further at this time.

Sincerely yours,

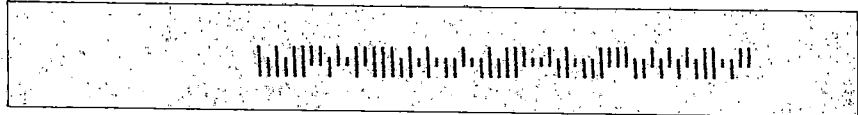
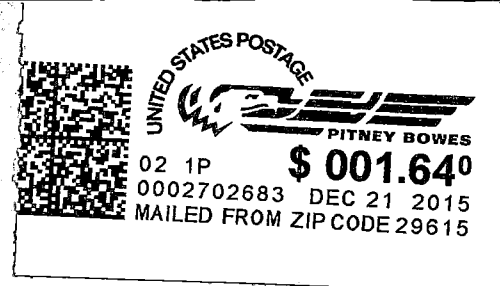


Greg Morton

GAM:mb

CC: James P. Walsh, Esquire – with enclosures

Enclosures



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DONNAN & MORTON, P.A.

Attorneys at Law
4 Arborland Way
Greenville, South Carolina 29615

TO:

The Honorable Jenny Abbott Kitchings
Clerk of Court of the South Carolina
Court of Appeals
P. O. Box 11629
Columbia, SC 29211