THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM EDGEFIELD COUNTY
Court of Common Pleas
G. Thomas Cooper, Jr., Circuit Court Judge

Case No. 2016-CP-19-00168

Appellate Case No. 2019-001689

Bettis C. Rainsford, ……Appellant,

v.

Apex Bank, Jim Clayton, Matt Daniels, and Brad Hailey, ……Defendants,

Of whom, Matt Daniels and Brad Hailey are the ……...Respondents.

FINAL BRIEF OF APPELLANT

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2. Did the circuit court err in granting Respondents' motion to dismiss without allowing Appellant to obtain jurisdictional discovery from Respondents where jurisdictional discovery was necessary and Appellant's complaint made sufficient allegations related to personal jurisdiction?

3. Did the circuit court err in finding it did not have personal jurisdiction over Respondents where Respondents committed tortious acts in South Carolina and had sufficient minimum contacts with South Carolina?

STATEMENT OF THE CASE

Appellant Bettis C. Rainsford initiated this breach of contract action on May 31, 2016, by filing the Summons and Complaint against Defendant Apex Bank ("Apex"). (R. p. 3). Thereafter, on July 15, 2016, Apex removed the case to the United States Bankruptcy Court for the District of South Carolina where it remained until the bankruptcy court remanded the case back to the circuit court on November 7, 2017. (R. p. 3). On March 2, 2018, Appellant filed a Motion to Amend the Summons and Complaint to add Defendant Jim Clayton ("Clayton") and Respondents Brad Hailey and Matt Daniels (collectively, "Respondents") as defendants. (R. p. 3). The circuit court granted Appellant's motion on April 30, 2018. (R. p. 3).

Appellant filed an Amended Summons and Complaint on April 30, 2018, against Respondents, Apex, and Clayton. (R. pp. 11–28). In the Amended Complaint, Appellant alleged causes of action against all defendants for breach of contract, violation of the South Carolina Unfair Trade Practices Act ("SCUTPA"), and interference with prospective advantage. In support of his Amended Summons and Complaint, Appellant submitted copies of the contract, deed in lieu of foreclosure, and emails between him and Kevin Moloney, Apex's attorney and agent. (R. pp. 79–83).

On September 26, 2018, Respondents filed a Motion to Dismiss the Amended Complaint or in the Alternative for Summary Judgment. (R. pp. 29–38). On June 19, 2019, Appellant filed a motion seeking to compel Respondents to appear at depositions on the issue of jurisdiction and a motion seeking to compel Respondents and Apex to fully respond to Appellant's discovery requests. (R. pp. 39–40). On June 28, 2019, Respondents filed separate affidavits related to jurisdiction. (R. pp. 41–42).

On July 8, 2019, counsel for Appellant sent the circuit court a letter requesting the court schedule a hearing on Appellant's motions to compel. (R. pp. 125–26). The circuit court responded by email and asked Appellant's counsel to coordinate with counsel for all defendants to set a time for the requested hearing on Appellant's motions to compel. (R. pp. 127–34). The circuit court held the hearing on August 13, 2019. (R. pp. 48). On September 9, 2019, the circuit court issued an order dismissing Respondents and denying Appellant's motion to compel jurisdictional discovery from Respondents. (R. pp. 2–10). Appellant filed a timely notice of appeal of the circuit court's September 9, 2019 order on October 8, 2019. (R. pp. 135–40).

FACTUAL BACKGROUND

Appellant initially contacted Clayton, the founder of Apex, in early 2015 in an effort to assist Apex in realizing the highest value from its purchase of mortgage loans on the Mount Vintage Plantation golf course and town center. (R. p. 15, ¶ 19). Although legally a community bank in Eastern Tennessee, Apex has become the third most profitable bank in the United States of its size by the predatory practice purchasing troubled mortgage loans and deficiency judgments all over the country at steep discounts and then pursuing the unfortunate debtors and guarantors with a vengeance. (R. p. 14, ¶12). Rainsford was a founder of the Mount Vintage Plantation but sold his interest to his former partner Talmadge Knight. (R. p. 14, ¶¶ 8, 9). He believed the best results for Apex and South Carolina could be achieved by uniting the ownership of the amenities it had under the mortgage with unsold real estate lots. (R. p. 15, ¶ 18). Clayton referred him to Respondent Daniels, who had Respondent Hailey contact Appellant. (R. p. 15, ¶¶ 20, 21). Respondent Hailey invited Appellant to travel to Knoxville to discuss the matter, and Appellant gave Respondent Hailey an enormous amount of information about Mount Vintage Plantation during the meeting. (R. p. 15, ¶¶ 21, 22).

Sometime later, in the summer of 2015, Kevin Molony, an attorney representing Apex, contacted Appellant to discover information about Knight because Apex had a deficiency judgment with respect to the golf course and town center loans. (R. p. 16, ¶ 25). Molony informed Appellant he had full authority to address all issues with respect to Apex's loan portfolio in South Carolina. (R. p. 16, ¶ 27).

Appellant continued to try to set up a meeting with Clayton, and, on September 15, 2015, Appellant emailed Clayton and Respondent Daniels requesting a meeting to discuss Mount Vintage Plantation. (R. p. 16, ¶ 29). The next day, Clayton responded, "With litigation pending,

it would be inappropriate and uncomfortable to communicate at this time." (R. p. 16, ¶ 30). Appellant responded by stating he was unaware of litigation pending "other than the bank's efforts to collect deficiency judgments against Talmadge Knight and Mike Hooker."[1] (R. p. 16, ¶ 31).

Two weeks later, Molony visited Appellant's office to discuss two lots which Knight's company conveyed to one of Appellant's companies as part of a settlement between Appellant and Knight. (R. p. 16, ¶ 32). Appellant acknowledged Apex held a mortgage on the two lots and indicated he would be willing to provide Apex with a deed-in-lieu-of-foreclosure in order to save the bank the trouble and expense of foreclosing on them. (R. p. 17, ¶ 33). Molony also told Appellant he discovered Knight had a tract of land, which had been subject to the lien of SunTrust Bank, in Saluda County which Knight had conveyed away. (R. p. 17, ¶ 34). Molony indicated that Apex wanted to pursue this property by purchasing the judgment of SunTrust Bank ("the SunTrust judgment"). (R. p. 17, ¶ 34). Appellant pointed out that the SunTrust judgment was also against him and a company he owned, subjecting him and his company to being pursued by Apex should it acquire the SunTrust judgment. (R. p. 17, ¶ 35).

Molony, as Apex's attorney who had previously told Appellant that he had complete authority with respect to collecting judgments for Apex in South Carolina, assured Appellant Apex intended to pursue Knight's property and did not intend to pursue Appellant on the judgment. (R. p. 17, ¶ 36). He further stated that, if Appellant cooperated with the conveyance of the lots in-lieu-of-foreclosure, Apex would not pursue Appellant, his companies, or his properties. (R. p. 17, ¶ 37).

Pursuant to these assurances, and as described in detail in the Amended Complaint,

[1] Hooker was Knight's business partner in Mount Vintage after Appellant and subject, as a guarantor, along with Knight, to the deficiency judgments on the Golf Course and the Town Center, for which the Appellant was not liable.

Appellant and Molony, acting on behalf of Apex, entered into a *written* Agreement which clearly set forth all elements of the agreement and which was agreed to in an email signed by Molony, as Apex's authorized agent. (R. pp. 18–19, ¶¶ 39–47). In the weeks following, Rainsford had numerous telephone calls with Molony who repeatedly confirmed that Respondent Hailey, as Apex's officer, had also agreed to the terms of the agreement. (R. p. 20, ¶¶ 48–53). Molony stated that he called Respondent Hailey several times to get the executed document back and was assured it would be sent to him soon. (R. p. 20, ¶¶ 48–53).

In a later telephone conversation, Molony stated that he had been informed by Respondent Hailey that "the bank's CEO[, Respondent Daniels,] has become involved and that he's in charge now." (R. p. 20, ¶ 53). Subsequently, Apex refused to abide by the terms of the contract. (R. p. 21, ¶ 56). Both Respondent Hailey and Respondent Daniels were involved in the management of Moloney and the decision to breach the contract. (R. pp. 21, 24–27, ¶¶ 54, 75, 76, 82, 86, 91, 92, 93).

Thereafter, Apex acquired the SunTrust judgment and began collection proceedings against Appellant. (R. p. 21, ¶¶ 57, 59). On May 10, 2016, Apex filed a claim against Appellant's company, Gup's Hill Plantation, LLC ("Gup's Hill"), which was in Chapter 11 bankruptcy, based on the SunTrust Judgment. (R. p. 22, ¶ 61). In an effort to resolve the financial issues related to Gup's Hill, Appellant had located an investor who was prepared to purchase a mortgage loan held by FB Acquisition Property I, LLC ("FB Acquisition"). (R. p. 22, ¶ 62). This mortgage was secured by the Edgefield Inn, which Gup's Hill owned. (R. p. 22, ¶ 62). However, Appellant was unable to complete this process and reorganize Gup's Hill because Respondents and Apex, using knowledge that they had acquired pursuant to breaching the contract, purchased the mortgage loan from FB Acquisition. (R. p. 22, ¶ 64).

STANDARD OF REVIEW

Rule 12(b)(2) allows a court to dismiss an action for lack of personal jurisdiction. "The question of personal jurisdiction over a nonresident defendant is one which must be resolved upon the facts of each particular case." *Cribb v. Spatholt*, 382 S.C. 490, 496, 676 S.E.2d 714, 717 (Ct. App. 2009). This Court should reverse a circuit court's decision on the question of personal jurisdiction where it is "unsupported by the evidence or influenced by an error of law." *Id.* "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." *Id*. at 496, 676 S.E.2d at 717–18 (quoting *Cockrell v. Hillerich & Bradsby Co.*, 362 S.C. 485, 491, 611 S.E.2d 505, 508 (2005)). "When a nonresident defendant attacks the allegations of a complaint based on jurisdiction, the [C]ourt is not confined to the allegations of the complaint but may resort to affidavits or other evidence to determine jurisdiction." *Id.* at 496, 676 S.E.2d at 718 (quoting *Power Prods. & Servs. Co. v. Kozma*, 379 S.C. 423, 430, 665 S.E.2d 660, 663 (Ct. App. 2008)).

ARGUMENT

I. The circuit court violated Appellant's due process rights by considering Respondents' motion to dismiss at the hearing on Appellant's motions to compel without giving Appellant adequate notice

This Court should reverse the circuit court's order dismissing Respondents because Appellant did not receive proper notice that the circuit court would consider and rule on Respondents' motion to dismiss at the August 13, 2019 hearing. "Procedural due process mandates that a litigant be placed on notice of the issues which the court is to consider." *Blanton v. Stathos*, 351 S.C. 534, 542, 570 S.E.2d 565, 569 (Ct. App. 2002). Accordingly, Rule 6(d) of the South Carolina Rules of Civil Procedure provides:

> A written motion other than one which may be heard *ex parte* and notice of the hearing thereof, shall be served not later than ten days before the time specified for the hearing, unless a different period of time is fixed by these rules or by an order of the court.

Rule 6(d) requires affidavits opposing to be served not later than two days before the hearing. Our courts have explained Rule 6(d) requires "specific notice of the day certain fixed for the hearing must be furnished not later than ten days prior to such hearing unless the exceptions stated in Rule 6(d)" apply. *Dedes v. Strickland*, 307 S.C. 152, 154, 414 S.E.2d 132, 134 (1992).

In this case, Appellant's counsel communicated with the circuit court by letter requesting a hearing be set on Appellant's motions to compel. (R. p. 125–26). Specifically, Appellant's counsel stated:

> The parties seek the court's ruling on several recent filings so we can move forward with discovery. [Appellant] is attempting to schedule depositions of the individual defendants in Tennessee to address personal jurisdiction only. The motions need to be resolved before we can proceed with these depositions. I respectfully request a hearing to resolve these discovery motions be set at a time amenable for the Court. Currently, the outstanding discovery motions are as follows:

1. Motion to Compel Jim Clayton (filed 6/3/19);
2. Motion to Compel Matt Daniels, Brad Hailey, and Apex Bank (filed 6/19/19); and
3. Motion to Compel Matt Daniels and Brad Hailey (filed 6/19/19).

(R. p. 125). The circuit court responded by email and requested Appellant's Counsel coordinate a date with opposing counsel for the requested hearing on the outstanding discovery motions. (R. pp. 127–34). After a discussion of possible dates, the circuit court set the hearing for August 13, 2019. However, at no point did the circuit court indicate it would also hear arguments and rule on Respondents' motion to dismiss. In fact, in the circuit court's order granting Respondents' motion to dismiss, the circuit court noted the matter before the court at the August 13, 2019 hearing was Appellant's motions to compel and whether the allow Appellant to conduct jurisdictional discovery as to Respondents. (R. p. 2).

At the hearing on Appellant's motion to compel, Respondents' counsel indicated he believed the circuit court should determine Respondents' motion to dismiss as a threshold matter to determining whether to grant Appellant's motions to compel. However, Appellant did not have the required ten-day-notice that the August 13, 2019 hearing would also concern Respondents' motion to dismiss. Thus, Appellant did not have the opportunity to fully and fairly prepare opposing arguments to Respondents' motion to dismiss or submit affidavits to the circuit court pursuant to the procedure outlined in Rule 6(d). In their memorandum in opposition to Appellant's motions to compel, which was submitted the day of the August 13, 2019 hearing, Respondents indicated they believed the hearing on Appellant's motions to compel inappropriate until such a time as the circuit court ruled on their motion to dismiss. (R. p. 46). However, the August 13, 2019 hearing was noticed as a hearing on Appellant's motions to compel, and not as a hearing on Respondents' motion to dismiss.

Thus, if the circuit court believed it needed to consider Respondents' motion to dismiss prior to Appellant's motions to compel, the circuit court should have continued the hearing until the appropriate notice was given and Appellant had a fair opportunity to prepare his arguments in opposition to Respondents' motion to dismiss and any supporting affidavits. However, as discussed in more detail below, the circuit court erred in deciding Respondents' motion to dismiss prior to deciding Appellant's motions to compel. In doing so, the circuit court applied the higher burden of whether Appellant's Amended Complaint made a prima facie showing of personal jurisdiction when ruling on Appellant's motions to compel. The circuit court inappropriately went beyond the scope of determining whether Appellant was entitled to conduct discovery on the issue of personal jurisdiction and instead reached the merits of Respondents' personal jurisdiction argument without allowing Appellant a full and fair opportunity to respond due to lack of notice.

As Appellant did not receive appropriate notice that the August 13, 2019 hearing would include Respondents' motion to dismiss, the circuit court violated Appellant's due process rights by ruling on Respondents' motion to dismiss following the August 13, 2019 hearing. Appellant respectfully requests this Court reverse the circuit court's order dismissing Respondents in order to give him the procedural due process to which he is entitled.

II. The circuit court erred in refusing to allow Appellant to conduct discovery on the limited question of jurisdiction where the allegations in Appellant's complaint were sufficient to support his claim for personal jurisdiction and were not clearly frivolous

The circuit court erroneously dismissed Respondents from this case without allowing Appellant the opportunity to conduct discovery on the limited issue of jurisdiction. "When the plaintiff can show that discovery is necessary in order to meet [a] defendant's challenge to personal jurisdiction, a court should ordinarily permit discovery on that issue unless [the] plaintiff's claim

appears to be clearly frivolous." *Graham Law Firm, P.A. v. Makawi*, 396 S.C. 290, 299, 721 S.E.2d 430, 435 (2012).

The circuit court based its decision principally upon the case of *Sullivan v. Hawker Beechcraft Corp.*, 397 S.C. 143, 145, 723 E.E.2d 835, 839 (Ct. App. 2011). (R. p. 8). However, that case is factually distinct from the instant case. In *Sullivan*, the appellant offered no specific factual information to support his claim of personal jurisdiction; instead, he simply made the allegation that the respondents were subject to personal jurisdiction because they caused "tortious injury or death in this State by an act or omission outside this State 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." *Id.* at 148, 723 S.E.2d at 838 (quoting S.C. Code Ann. § 36–2–803(A)(4)). The *Sullivan* respondents then submitted affidavits which effectively countered the charge that they "derive[d] substantial revenue from goods used or consumed or serviced rendered in this State." *Id.* at 148, 723 S.E.2d at 838. In the face of these affidavits, Sullivan did not produce any factual data to counter the Respondents claims. Thus, the *Sullivan* court held the Appellant had offered only "speculation or conclusory assertions" to support his claim of personal jurisdiction, and therefore the circuit court was correct in denying jurisdictional discovery. *Id.* at 151, 723 S.E.2d at 840 (quoting *Tuttle Dozer Works Inc. v. Gyro–Trac (USA), Inc.*, 463 F.Supp.2d 544, 548 (D.S.C 2006)).

In this case, however, the Amended Complaint provided substantial evidence of the Respondents purposefully directing their actions at a South Carolina resident. In paragraphs 53, 75 and 81 of the Amended Complaint, the Apex attorney, after weeks of telling Appellant repeatedly that Respondent Hailey, as the Chief Credit Officer of Apex, had confirmed that he and Apex were in full agreement with the Agreement, told Appellant that "the bank's CEO has become

involved and that he's in charge now." (R. pp. 20, 24–25). Apex subsequently disavowed the Agreement. This statement that "the bank's CEO has become involved and that he's in charge now" unquestionably ties Respondent Daniels to the breach of the Agreement between the Appellant and Apex. Respondent Hailey's involvement is also clearly set forth in the Second Amended Complaint in paragraphs 48, 49, 50, and 51 which outlines how Respondent Hailey repeatedly told Apex's South Carolina attorney that he would be executing the Agreement to send back to Appellant and then conspired with Daniels to breach the Agreement. (R. p. 20).

Although the affidavits submitted by the Respondents show that they did not live here, did not have property here, go to school here, or send their children to school here, they do not address the principal contention of the Appellant that they purposefully directed their company to injure the Appellant. Thus, with the very specific factual allegations contained in the Amended Complaint, the circuit court was clearly in error under *Sullivan* when it denied the Appellant the right to conduct limited jurisdictional discovery.

Moreover, the circuit court applied the wrong standard to decide whether Appellant was entitled to conduct jurisdictional discovery. Instead of looking at the allegations of the complaint and determining whether the allegations, if true, were "clearly frivolous," the circuit court applied the higher standard of whether Appellant's complaint made a prima facie case for personal jurisdiction. This clear error of law requires reversal of the circuit court's order, and Appellant should be permitted the opportunity to conduct limited discovery on the jurisdictional issues.

In the order dismissing Respondents, the circuit court completely ignored the allegations of Appellant in the Amended Complaint, placed more weight on the affidavits of Respondents, and applied a heightened burden on Appellant. In discussing whether Appellant should be entitled to jurisdictional discovery, the circuit court stated: "The Court finds that [Appellant] cannot make

a prima facie showing of personal jurisdiction under Rule 8(a) SCRCP and the long-arm statute. There is no personal jurisdiction over Daniels and Hailey, and permitting jurisdictional discovery would be a fishing expedition." (R. p. 8). However, South Carolina law indicates circuit courts should grant a plaintiff the opportunity to conduct jurisdictional discovery as long as the plaintiff's claim does not appear to be "clearly frivolous." *Graham Law Firm, P.A.*, 396 S.C. at 299, 721 S.E.2d at 435.

The circuit court erred in finding Appellant was not entitled to jurisdictional discovery because there was no prima facie showing of personal jurisdiction. A plaintiff would never need to conduct jurisdictional discovery if there was already a prima facie case made for personal jurisdiction. The opportunity to conduct jurisdictional discovery is a tool to help plaintiffs gather the facts necessary to meet their burden of showing a prima facie case for personal jurisdiction. Circuit courts should freely allow this discovery when "it is necessary in order to meet [a] defendant's challenge to personal jurisdiction" and their claims are not clearly frivolous. *Id.* This burden is much lower than the standard the circuit court applied.

When applying the appropriate legal burden, the circuit court would have determined that Appellant's claims were not frivolous and he was entitled to conduct discovery on the jurisdictional issues. In the Amended Complaint, Appellant alleged both Respondents purposefully availed themselves of this state when they participated in a scheme with Apex to mercilessly target and harm Appellant in South Carolina. (R. p. 13, ¶¶ 4–5). The Amended Complaint further alleged both Respondents had personal involvement in inducing Apex to breach the contract with Appellant, directing and managing Apex's attorney in his interactions with Appellant, and seeking out ways to intentionally harm Appellant economically. (R. pp. 21, 24–27, ¶¶ 54, 75, 76, 82, 86, 91, 92, 93). Accepting these allegations as true, as the circuit court was

required to do, the facts show both Respondents were personally involved in directing an agent in South Carolina to meet with Appellant in order to gather information about South Carolina citizens and property in South Carolina in order to advance their own business interests in South Carolina and profit at the expense of South Carolina citizens. *See Brown v. Inv. Mgmt. & Research, Inc.*, 323 S.C. 395, 399, 475 S.E.2d 754, 756 (1996) ("Courts will take as true the allegations of the nonmoving party and resolve all factual disputes in its favor." (quoting 5A Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 1351 (Supp. 1995))).

Although Appellant argues, in the alternative *infra*, that his Amended Complaint met the prima facie burden for personal jurisdiction, the Court does not need to reach that issue if it agrees with Appellant that discovery was necessary to help him respond to Respondents' objection and his claims were not clearly frivolous. The nature of Appellant's allegations against Respondents are that they participated in a conspiracy with Apex and Defendant Clayton, who was not an officer or director of Apex, to injure Appellant. The secretive nature of conspiracies make discovery in this case necessary. As this Court has noted in *Island Car Wash, Inc v. Norris*, 292 S.C. 595, 601–02, 358 S.E.2d 150, 153 (Ct. App. 1987):

> Conspiracy may be inferred from the very nature of the acts done, the relationship of the parties, the interests of the alleged conspirators and other circumstances. *Nottingham v. Wrigley*, 221 Ga. 386, 144 S.E. (2d) 749 (1965). Civil conspiracy is an act which is by its very nature covert and clandestine and usually not susceptible of proof by direct evidence; concert of action, amounting to a conspiracy, may be shown by circumstantial as well as direct evidence. *Mixon v. Phoenix Landscaping Co.*, 136 Ga. App. 344, 221 S.E. (22d) 225 (1975); see also 15A C.J.S. Conspiracy Section 29 at 691 (1977).
>
> And in order to establish a conspiracy, evidence direct or circumstantial, must be produced from which a party may reasonably infer the joint assent of the minds of two or more parties to the prosecution of the unlawful enterprise. Proof showing concert of action in the commission of the unlawful acts, from which the

> natural or reasonable inferences arise that the acts were in furtherance of the common design of the alleged conspirators, is sufficient; at least to establish a *prima facie* case of conspiracy. 15A C.J.S. Conspiracy Section 30 at 698-700 (1977).
>
> Moreover, the field of admissibility of evidence is broadened in proof of conspiracy. *Hall v. Walters*, 226 S.C. 430, 85 S.E. (2d) 729 (1955). In general, broad discretion and great latitude are permitted in the reception of evidence in conspiracy cases. The law permits great latitude in the admission of circumstantial evidence tending to establish a conspiracy and to connect those advising, encouraging, aiding, abetting and ratifying the overt acts committed for the purpose of carrying into effect the objects of a conspiracy; the jury should have before them and are entitled to consider every fact which has a bearing on and a tendency to prove the ultimate fact in issue. 15A C.J.S. Conspiracy Section 29 at 690, 693-94 (1977); *Coleman v. Stevens*, 124 S.C. 8, 117 S.E. 305 (1923).

Thus, the nature of Appellant's claims against Respondents require discovery in order to meet Respondents' objections to personal jurisdiction and explain more specifically why their conduct in causing a tortious injury in this state supports exercising personal jurisdiction over them.

As the Supreme Court of Tennessee has explained, circuit courts are usually faced with a dilemma when choosing whether to allow jurisdictional discovery because "[o]ften a complete resolution of the jurisdictional issue is not possible at the beginning of litigation because not enough evidence has been developed." *First Cmty. Bank, N.A. v. First Tennessee Bank, N.A.*, 489 S.W.3d 369, 403 (Tenn. 2015) (quoting *Chenault v. Walker*, 36 S.W.3d 45, 45 (Tenn. 2001)). However, "[i]f a court seeks to develop more evidence, by ordering discovery or an evidentiary hearing, the burden on an out-of-state defendant may in some cases be nearly as great as if the court simply ruled from the start that jurisdiction was present and allowed the litigation to proceed." *Id.* This dilemma was not present in this case as Appellant only requested discovery on the limited jurisdictional issues and sought to take the depositions of Respondents in Tennessee. Thus, there would not have been a great burden on Respondents, especially when compared to the

injustice of not allowing Appellant a full opportunity to gather the facts necessary to present his claim for personal jurisdiction and the circuit court's error in applying a heightened standard to Appellant's request for jurisdictional discovery. Appellant simply requested an opportunity to conduct this extremely limited discovery on the issue of jurisdiction prior to the circuit court ruling on Respondents' motion to dismiss. Appellant's request for jurisdictional discovery was sufficiently limited to balance his right to conduct discovery with any burden on Respondents if the circuit court later found there was no personal jurisdiction.

Accordingly, the circuit court erred in deciding the jurisdictional question before Appellant had the opportunity to conduct discovery on the jurisdictional issue. *See Brown*, 323 S.C. at 399–400, 475 S.E.2d at 756 (discussing the importance of delaying a decision on personal jurisdiction in order to allow parties to conduct discovery in complex cases and noting this leads "to a more accurate judgment than one made solely on the basis of affidavits" (quoting 5A Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 1351 (Supp. 1995))).

III. The circuit court erred in dismissing Respondents from this action due to lack of personal jurisdiction where they committed a tortious act in South Carolina and had sufficient minimum contacts with this state

Appellant notes the Court does not need to consider merits of the jurisdictional argument if the Court believes the circuit court erred in refusing to grant Appellant the opportunity to conduct discovery. However, this Court should also reverse the circuit court's order because Appellant met his burden of showing a prima facie case of personal jurisdiction. Respondents committed tortious acts in South Carolina and their contacts with South Carolina satisfy due process concerns.

"[T]he party seeking to invoke personal jurisdiction over a nonresident defendant via our long-arm statute bears the burden of proving the existence of personal jurisdiction." *Moosally v. W.W. Norton & Co.*, 358 S.C. 320, 327, 594 S.E.2d 878, 882 (Ct. App. 2004). However, the party

must only make a prima facie showing of personal jurisdiction at the pretrial stage. *Brown*, 323 S.C. at 399–400, 475 S.E.2d at 756. "To do otherwise would require a much greater degree of specificity in the pleadings than is currently mandated by the South Carolina Rules of Civil Procedure." *Id.* (quoting *Mid-State Distributors, Inc. v. Century Importers, Inc.*, 310 S.C. 330, 335, 426 S.E.2d 777, 780 (1993)). The question of whether a non-resident may be haled into courts in South Carolina involves a two-step analysis of (1) whether the South Carolina long-arm statute applies and (2) whether the nonresident's contacts in South Carolina are sufficient to satisfy due process. *Sullivan v. Hawker Beechcraft Corp.*, 397 S.C. 143, 150, 723 S.E.2d 835, 839 (Ct. App. 2012).

The long-arm statute "affords broad power to exercise personal jurisdiction over causes of action arising from tortious injuries in South Carolina." *Id.* at 151, 723 S.E.2d at 839. The long-arm statute provides:

> A court may exercise personal jurisdiction over a person who acts directly *or by an agent* as to a cause of action arising from the person's:
> (1) transacting any business in this State;
> (2) contracting to supply services or things in the State;
> (3) commission of a tortious act in whole or in part in this State;
> (4) causing tortious injury or death in this State by an act or omission outside this State 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;
> (5) having an interest in, using, or possessing real property in this State;
> (6) contracting to insure any person, property, or risk located within this State at the time of contracting;
> (7) entry into a contract to be performed in whole or in part by either party in this State; or
> (8) production, manufacture, or distribution of goods with the reasonable expectation that those goods are to be used or consumed in this State and are so used or consumed.

S.C. Code Ann. § 36-2-803(A) (emphasis added). In the Amended Complaint, Appellant alleged the South Carolina long-arm statute provides jurisdiction over Respondents due to their commission of a tortious act and tortious injury in this state, causing tortious injury or death in this State by an act or omission outside this State 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,[2] having an interest in, using, or possessing real property in this State, and entry into a contract to be performed in whole or in part by either party in this State. (R. p. 13, ¶¶ 4, 5). Appellant detailed how Respondents were personally involved in breaching the contract, engaging in unfair trade practices in violation of the South Carolina Unfair Trade Practices Act (SCUTPA), and interfering with Appellant's attempt to reorganize his company, Gup's Hill, and with the prospective advantage of the Appellant. These tortious actions occurred in South Carolina and caused tortious injury to Appellant in South Carolina. Thus, the South Carolina long-arm statute clearly provides for South Carolina courts to have personal jurisdiction over Respondents.

Specifically, Appellant's Amended Complaint alleged Apex's and Respondent Daniels's South Carolina attorney, Moloney, confirmed multiple times that Respondent Hailey, on behalf of Apex, had agreed to the terms of the written Agreement to which Moloney, as the authorized agent and attorney of Apex, had agreed, as evidenced by his email signature, but Apex breached the contract after the involvement, and at the direction, of Respondent Daniels. (R. p. 20, 23, ¶¶ 53, 75). The Amended Complaint alleges Apex breached the contract *only* after receiving direction from Respondent Daniels. (R. p. 25, ¶ 81). The evidence of the personal involvement of Daniels

[2] Apex, as agent for Respondent Daniels, had acquired at least two other multimillion-dollar loans in Edgefield County from which it expected to realize substantial profits. (*See* R. p. 14, ¶¶ 12, 13 and 14).

is set forth in the Second Amended Complaint. There, in ¶¶ 53, 75 and 81, the Apex attorney, after weeks of telling Appellant repeatedly that Respondent Hailey, as the Chief Credit Officer of Apex, had confirmed that he (Respondent Hailey) and Apex were in full agreement with the Agreement, told Appellant that "the bank's CEO has become involved and that he's in charge now." (R. pp. 20, 23, 25). Apex subsequently disavowed the Agreement.

The statement that "the bank's CEO has become involved and that he's in charge now" is the "smoking gun" that unquestionably ties Daniels to the breach of the Agreement between the Appellant and Apex and to the tortious acts of engaging in unfair trade practices in violation of the SCUTPA and in interfering with the prospective advantage of the Appellant.

As the then 50% owner of Apex, now believed to be the 100% owner, Respondent Daniels was clearly using Apex as his agent, thus meeting the long-arm statute's provision that a court may exercise jurisdiction over "a person who acts directly *or by an agent*." § 36-2-803(A) (emphasis added). The language in the Amended Complaint clearly states that Apex was the agent of Respondent Daniels ("Apex, *on the instructions and at the direction of Mr. Daniels, CEO and major shareholder of Apex*, refused to execute the Agreement with the Appellant, and thereby breached the contract with the Appellant." (emphasis added)). (R. p. 25–26, ¶¶ 81, 85 and 91).

Although South Carolina state courts have not specifically addressed whether a corporation can be deemed any agent of an officer, this issue has been addressed in a number of states around the country. "[F]or a corporation to be considered an agent of an officer for personal jurisdiction purposes," the facts must support "(1) that the corporation engaged in purposeful activities . . . in relation to the transaction; (2) that the corporation's activities were performed for the benefit of the individual defendant; (3) that the corporation's activities were performed with the knowledge and consent of the individual defendant; and (4) that the individual defendant exercised some control

over the corporation." *Beatie & Osborn LLP v. Patriot Sci. Corp.*, 431 F. Supp. 2d 367, 389 (S.D. N.Y. 2006). *See also Retail Software Servs., Inc. v Lashlee*, 854 F.2d 18, 22 (2nd Cir. 1988) (finding that a corporation acted as the agent of individual defendant officers where the corporation "engaged in purposeful activities in the state (selling franchises) with the consent and knowledge of the defendants, who both benefited from those activities and exercised extensive control over [the corporation] in the transaction underlying this suit"); *Houbigant, Inc. v. Dev. Specialists, Inc.*, 229 F.Supp.2d 208, 224 (S.D.N.Y. 2002) ("Agency is properly found if the corporate entity engaged in purposeful activities within this state in relation to [the] transaction for the benefit of and with the knowledge and consent of the [individual] and . . . [the individual] exercised some control over [the corporate entity] in the matter.").

In this case, there is no doubt (1) that Apex was engaged in purposeful activities in relation to the transaction, (2) that Apex's activities were performed for the benefit of Respondent Daniels (as Respondent Daniels was a 50% shareholder of Apex), (3) that Apex's activities were performed with the knowledge and consent of Respondent Daniels, and (4) that Respondent Daniels, as CEO, exercised total control over Apex. Thus, by any reasonable standard, Apex *was* the agent of Respondent Daniels.

Given that Apex was unquestionably Respondent Daniels's agent, the South Carolina long-arm statute provision of "causing tortious injury or death in this State by an act or omission outside this State 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," certainly applies to Respondent Daniels, as Apex was "engaging in" a "persistent course of conduct, or derived substantial revenue from goods used or consumed or services rendered in this state," as it had already purchased at least two other mortgage loans/deficiency judgments in

Edgefield County. *See* § 36-2-803(A)(4). (R. p. 14, ¶¶ 12, 13 and 14). Thus, the Amended Complaint clearly sets forth a prima facie showing that South Carolina's long-arm statute provides jurisdiction over Respondent Daniels.

Respondent Hailey's involvement is also clearly set forth in the Amended Complaint, which explains how he repeatedly told Apex's South Carolina attorney that he would be executing the Agreement to send back to Appellant and then conspired with Respondent Daniels to breach the Agreement and to commit the tortious acts of engaging in unfair trade practices in violation of the SCUTPA and in interfering with the prospective advantage of the Appellant. (R. p. 20, ¶¶ 48, 49, 50, and 51). Thus, the Amended Complaint clearly sets forth a prima facie showing that South Carolina's long-arm statute provides jurisdiction over Respondent Hailey.

In *Magic Toyota v. Southeast Toyota Distributors*, 784 F. Supp. 306 (D.S.C. 1992), the South Carolina District Court addressed the personal jurisdiction of a forum state over an out-of-state officer or director. The Court explained:

> It is inconceivable that a corporate employee who cleverly refrains from committing tortious acts in the forum state can evade being haled into court there, while a less savvy employee, who commits the acts in the forum state, may be haled into court there, where both employees are acting on behalf of their employers with the purpose of injuring the plaintiff residing in the forum state. An agent who takes purposeful and calculated action against a plaintiff in a particular forum, fully conscious of the consequences of his actions, should be amenable to suit in that forum.

Id. at 315. The issue of whether a corporate officer of director is liable if he commits or participates in the commission of a tort by his corporation in South Carolina was discussed by the South Carolina Supreme Court in *Hunt v. Rabon*, 275 S.C. 475, 272 S.E.2d 643 (1980). The Court noted, "If, however, a director or officer commits or participates in the commission of a tort, whether or not it is also by or for the corporation, he is liable to third persons injured thereby, and

it does not matter what liability attaches to the corporation for the tort." *Id.* at 477, 272 S.E.2d at 644 (quoting 19 Am.Jur.2d Corporations, 4, Liability for Torts). The Fourth Circuit Court of Appeals also addressed this issue in *Steinke v. Beach Bungee*, where it found officers and directors were personally liable in tort where they "personally directed" the corporate activities. 105 F.3d 192, 197 (1997).

The Amended Complaint specifically alleges Respondents participated in a concerted, team effort to induce Appellant to provide useful information to them through Moloney and then injure Appellant by breaching the contract, engaging in unfair trade practices, and interfering with Appellant's prospective advantage. This was a conspiracy among Clayton, Apex, and Respondents to injure Appellant. (R. p. 25–26, ¶¶ 82, 86, and 92). "A civil conspiracy exists when there is (1) a combination of two or more persons, (2) for the purpose of injuring the plaintiff, (3) which causes the plaintiff special damage." *Robertson v. First Union National Bank*, 350 S.C. 339, 348, 565 S.E.2d 309, 314 (Ct. App. 2002). Appellant is aware that it is black-letter law in South Carolina that a conspiracy cannot exist between a corporation and its officers and directors where the individuals are acting "*only for the corporation and not for any personal purpose of their own*." *McMillan v. Oconee Memorial Hosp., Inc.*, 367 S.C. 559, 626 S.E.2d 884 (2006) (quoting 16 Am.Jur.2d *Conspiracy* § 56 (2005) (emphasis added)). However, in this case, Clayton, by his own design, was not an officer or director, and was a principal beneficiary of the wrongful act by reason of his 50% ownership of Apex. Additionally, Respondent Daniels, though an officer and director, was also a principal beneficiary of the wrongful act by reason of his 50% ownership of Apex. Since Clayton, not an officer or director, was a part of the conspiracy, Respondent Daniels cannot contend that the Appellant's allegation of civil conspiracy is invalid against him on the basis that a corporation cannot conspire with itself.

That there was a conspiracy among the Respondents, Clayton, and Apex is strongly implied by the fact that Respondent Daniels's 50% partner, Clayton, was already aware of the potential liability of the Appellant under the SunTrust judgment some six weeks earlier, when Clayton responded to Appellant's email request to meet with him, by saying "With litigation pending, it would be inappropriate and uncomfortable to communicate at this time." (R. pp. 16, 23–24, ¶¶ 29, 30 and 74.) Clayton's knowledge of this fact strongly implies that he was involved in the conspiracy with Respondents and Apex. In the case of *Island Car Wash, Inc.*, 290 S.C. at 601–02, 358 S.E.2d at 153, this Court has provided that, "Proof showing concert of action in the commission of the unlawful acts, from which the natural or reasonable inferences arise that the acts were in furtherance of the common design of the alleged conspirators, is sufficient; at least to establish a *prima facie* case of conspiracy."

Our courts have interpreted our long-arm statute to "afford[] broad power to exercise personal jurisdiction over causes of action arising from tortious injuries in South Carolina" and has construed it to "extend to the outer limits of the due process clause." *Moosally*, 358 S.C. at 329, 594 S.E.2d at 883. Therefore, because the long-arm statute is "coextensive with the due process clause, the sole question becomes whether the exercise of personal jurisdiction in [a] case would violate the strictures of due process." *Id.* In order to satisfy due process, a defendant must "possess minimum contacts with the forum state such that maintenance of suit does not offend traditional notions of fair play and substantial justice" and "he could reasonably anticipate being haled into court there." *Cribb*, 382 S.C. at 499, 676 S.E.2d at 719. Thus, due process requires a two-step analysis of whether a court has the power to adjudicate an action and whether the exercise of jurisdiction is fair. *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." *Id.* The fairness prong requires a court to consider "(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; and (4) the State's interest in exercising jurisdiction." *Id.* at 500, 676 S.E.2d at 719.

The circuit court erred in finding Respondents had insufficient contacts with South Carolina. In finding Respondents did not have sufficient contacts, the circuit court focused entirely on Respondents' affidavits instead of on the nature of the allegations made by Appellant. In its order, the circuit court relied solely on Respondents' representations that they live in Tennessee, have never lived in South Carolina, do not have children in school in South Carolina, do not own property in South Carolina, do not work in South Carolina, and do not contract business in South Carolina. (R. p. 7).

However, the circuit court completely overlooked the fact that the Respondents "purposefully directed" their activities at a resident of this state. As the Amended Complaint clearly sets forth, the individual Respondents undertook actions "purposefully directing" their company, Apex, to breach the Agreement which the Appellant had reached with Apex's authorized attorney, to take advantage of our legal system by initiating supplemental proceedings against the Appellant, to engage in unfair trade practices in violation of the SCUTPA, and to interfere with the prospective advantage of the Appellant.

While a long line of cases before the United States Supreme Court, beginning with *Int'l Shoe v. Washington*, 326 U.S. 310, 66 S.Ct. 154 (1945), have established that the due process clause of the United States Constitution prohibits a state court from exercising personal jurisdiction over a non-resident defendant without "minimum contacts" with the forum state, such that having to defend a lawsuit there would not "offend traditional notions of fair play and substantial justice,"

a series of more recent Supreme Court cases, most notably in *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985), have ruled that where the out-of-state defendant "purposefully directed" its activities at residents of the forum state and that the plaintiff's injuries "arise out of defendant's forum-related activities," then personal jurisdiction is permitted. In *Burger King*, the Court noted "So long as a commercial actor's efforts are 'purposefully directed' toward residents of another State, we have consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction there."

The circuit court ignored South Carolina law indicating that "[a] single transaction is sufficient to confer jurisdiction" and "[a] single act that causes harm in this State may create sufficient minimum contacts where the harm arises out of or relates to that act." *Moosally*, 358 S.C. at 331, 594 S.E.2d at 884. Although whether a person owns property in South Carolina or lives in South Carolina is relevant to the analysis of a person's minimum contacts, these factors are not the sole determining factors of whether there are sufficient minimum contacts. *See, e.g.*, *Brown*, 323 S.C. at 399, 475 S.E.2d at 756 (discussing South Carolina cases on personal jurisdiction and noting South Carolina courts have found minimum contacts where a defendant argued it "did not conduct business in the state, owned no property in the state, had no agents in the state, and had no other contacts with the state").

In this case, Respondents "purposefully directed" Apex to gather information from Appellant that would be beneficial to their business interests in South Carolina, to enter into a contract with Appellant in order to do so, and then later to breach the contract after receiving the information they needed. Respondents were also involved in further injuring Appellant by using the information they learned to take advantage of the protections and advantages of South Carolina to acquire the FB Acquisition loan at a discount and thereby interfere in the reorganization and

bankruptcy proceedings of Appellant's company. Respondents' contacts with South Carolina were continuous from the summer of 2015 when they directed and managed Moloney's interactions with Appellant to after September 2017 when they interfered in the bankruptcy and complicated the reorganization of Appellant's company Gup's Hill. They personally directed Apex to undertake these actions in South Carolina and to injure Appellant in South Carolina. Respondents took advantage of this forum when it was convenient to them and are now attempting to avoid it so they will not be required to answer for their actions, just like they took advantage of Appellant to obtain what they wanted and conspired with Apex to refuse to perform their obligations under the contract. *See Hammond v. Butler, Means, Evins & Brown*, 300 S.C. 458, 463, 388 S.E.2d 796, 798 (1990) ("In certain instances, an out-of-state defendant may be subject to jurisdiction under a long-arm statute on the theory that his co-conspirator conducted activities in a particular state pursuant to the conspiracy."). As such, South Carolina has a strong interest in exercising personal jurisdiction over Respondents due to their conspiracy to injure a South Carolina citizen for their own financial gain. *See Cribb*, 382 S.C. at 504, 676 S.E.2d at 721 ("South Carolina has an interest in providing redress for its citizens.").

As in *Hammond*, jurisdiction in this case "may not be avoided merely because [Respondents] did not physically enter South Carolina." 300 S.C. at 464, 388 S.E.2d at 799. Respondents participated in a scheme that makes it foreseeable and reasonable that South Carolina courts may exercise jurisdiction over them. Their contacts with South Carolina were not merely "random, fortuitous, or attenuated." *See Cribb*, 382 S.C. at 499, 676 S.E.2d at 719. Instead, they purposefully targeted Appellant in South Carolina in order to obtain beneficial information about companies, property, and citizens in South Carolina and took advantage of the bankruptcy court

and process in South Carolina in order to further injure Appellant and financially gain. Their contacts with South Carolina were purposeful, strategic, and planned.

Under *International Shoe*, to establish personal jurisdiction, it is also necessary to show that having to defend a lawsuit in South Carolina would not "offend traditional notions of fair play and substantial justice." 326 U.S. at 316. As noted above, this fairness prong, described in *Cribb*, requires a court to consider "(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; and (4) the State's interest in exercising jurisdiction." 382 S.C. at 500, 676 S.E.2d at 719. The case of *Kudnikov v. Chalk & Vermilion Fine Arts, Inc.*, 514 F.3d 1063, 1080 (10th Cir. 2008), authored by now Supreme Court Justice Neil Gorsuch, which further expands the discussion of fairness, is an excellent case on personal jurisdiction. There the Tenth Circuit described the factors which are traditionally considered as to whether personal jurisdiction over a defendant would "offend traditional notions of fair play and substantial justice." *Id.* Those factors are (1) the burden on the defendant, (2) the forum state's interests in resolving the dispute, (3) the plaintiff's interest in receiving convenient and effectual relief, (4) the interstate judicial system's interest in obtaining the most efficient resolution of controversaries, and (5) the shared interest of the several states [or foreign nations] in furthering fundamental social policies. *Id.* (quoting *OMI Holdings, Inc. v. Royal Ins. Co. of Canada*, 149 F.3d 1086, 1095 (10th Cir. 1998)).

Under these factors, it is clear that a South Carolina court assuming personal jurisdiction over the defendants would not "offend traditional notions of fair play and substantial justice." Respondents are already being represented by the counsel that represents Apex. Thus, there will be little incremental cost to the Respondents as their counsel continues to represent Apex. The Respondents have already begun doing business in South Carolina where they have purposefully

directed their bank to do business by acquiring loans and deficiency judgments through Apex in this state, including the judgment which is the subject of this case, but also at least two other mortgage loans. The issues here all involve South Carolina law, so that South Carolina has an interest in resolving the dispute. Appellant is litigating his case against Apex here in South Carolina. If he is required to go to the Respondents' home state of Tennessee to seek justice against these individual Respondents, it would be an enormous burden to him. The interstate judicial system's interest in obtaining the most efficient resolution of controversaries is best achieved by having claims against both Apex and the individual Respondents resolved here in South Carolina. And the shared interests of the several states in furthering fundamental social policies will not be impinged upon by having South Carolina resolve this case. As such, the circuit court erred in ruling Respondents were not subject to personal jurisdiction in South Carolina because they committed tortious acts and injuries here and had sufficient minimum contacts to satisfy the requirement of due process.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests the Court reverse the circuit court's order dismissing Respondents.

(Signature page follows)

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July 24, 2020.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM EDGEFIELD COUNTY
Court of Common Pleas
G. Thomas Cooper, Jr., Circuit Court Judge

Case No. 2016-CP-19-00168

Appellate Case No. 2019-001689

Bettis C. Rainsford, ……Appellant,

v.

Apex Bank, Jim Clayton, Matt Daniels, and Brad Hailey, ……Defendants,

Of whom, Matt Daniels and Brad Hailey are the ……...Respondents.

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 211(a), SCACR, I certify that this brief complies with the provisions of Rule 211(b), SCACR.

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