

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge
William A. McKinnon, Circuit Court Judge

Appellate Case No. 2020-000407

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SC Court of Appeals

Douglas Kelsey.....Plaintiff,

v.

House of Blues Myrtle Beach Restaurant Corporation;
HOB Entertainment, Inc.; and Travis Scott Wagoner.....Defendants.

AND

House of Blues Myrtle Beach Restaurant CorporationThird-Party Plaintiff,

v.

Throttlefest, LLC; American Outlaw Spirits Incorporated;
Full Throttle LLC; and Full Throttle Sloon Shine, LLC.....Third-Party Defendants.

Of Whom House of Blues Myrtle Beach Restaurant Corporation is the Appellant and Throttlefest, LLC, American Outlaw Spirits Incorporated, Full Throttle LLC, and Full Throttle Sloon Shine, LLC are the Respondents.

**INITIAL BRIEF OF APPELLANT
(AS TO RESPONDENTS AMERICAN OUTLAW SPIRITS INCORPORATED,
FULL THROTTLE LLC, AND FULL THROTTLE SLOON SHINE, LLC)**

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STATEMENT OF ISSUE ON APPEAL

Whether the Circuit Court erred in dismissing Appellant's third-party claims against Respondents American Outlaw Spirits Incorporated, Full Throttle LLC, and Full Throttle Sloom Shine, LLC based upon a lack of personal jurisdiction?

STATEMENT OF THE CASE

The first-party lawsuit was filed in the Horry County Court of Common Pleas on May 12, 2017, asserting various causes of action related to injuries first-party plaintiff Douglas Kelsey (“Kelsey”) sustained in a motorcycle-on-motorcycle collision on May 16, 2014 in Myrtle Beach, South Carolina. R.* (Compl.). Following the filing of a First Amended Complaint on July 7, 2017, Appellant House of Blues Myrtle Beach Restaurant Corporation; Respondents American Outlaw Spirits Incorporated, (“American Outlaw Spirits”), Full Throttle LLC (“Full Throttle”), and Full Throttle Sloon Shine, LLC (“Sloon Shine”); Respondent Throttlefest, LLC; Travis Scott Wagoner (“Wagoner”); Michael “Fajita Mike” Garner (“Garner”), and others, were all named defendants. R.* (First Amd. Compl.). Kelsey alleged that Appellant and Respondents were liable for the over-service of alcohol to Wagoner during an event called “Throttlefest 2014.” See id.

On October 15, 2019, Kelsey filed a Second Amended Complaint, at which time only the House of Blues Defendants and Wagoner remained as defendants in the case. R.* (Sec. Amd. Compl.).

On October 18, 2019, Appellant answered the Second Amended Complaint and asserted a Third-Party Complaint. R.* (HOB Answer and Third-Party Compl.).

On December 17, 2019, Respondents American Outlaw Spirits, Full Throttle, and Sloon Shine, each filed a separate motion to dismiss the third-party claims, alleging, amongst other things, that the court lacked personal jurisdiction over each entity. R.* (Amer. Outlaw’s Mot. to Dismiss); R.* (Full Throttle’s Mot. to Dismiss); R.* (Sloon Shine’s Mot. to Dismiss). On January 3, 2020, each of the Respondents filed a corresponding Memorandum in Support of their Motion to Dismiss. R.* (Amer. Outlaw’s Memo. in Support of Mot. to Dismiss); R.* (Full Throttle’s Memo. in Support of Mot. to Dismiss); R.* (Sloon Shine’s Memo. in Support of Mot. to Dismiss).

Appellant filed a Memorandum in Opposition to Respondents' motions. R.* (HOB's Memo. in Opp., Feb. 5, 2020).

On February 5, 2020, a hearing on Respondents' Motions to Dismiss was held before The Honorable William A. McKinnon. R.* (McKinnon Feb. Hr'g Tr.). Judge McKinnon heard argument from counsel for the parties and took the matter under advisement. McKinnon Feb. Hr'g Tr., p. 28, line 24 – p. 29, line 1.

On March 26, 2020, Judge McKinnon entered a written order granting the motion to dismiss. R.* (Order, Mar. 26, 2020).

On April 6, 2020, Appellant filed a Motion to Alter or Amend pursuant to Rule 59(e), SCRCF. R.* (HOB Mot. to Alter or Amend, Apr. 6, 2020). Respondents filed a Memorandum in Opposition to the Motion to Alter or Amend on April 17, 2020. (Joint Memo. in Opp. to Mot. to Alter or Amend).

On July 23, 2020, Judge McKinnon held a hearing on the Motion to Alter or Amend. R.* (McKinnon July Hr'g Tr.). The matter was again taken under advisement. R.* (McKinnon July Hr'g Tr. p. 51, lines 2-3).

On July 31, 2020, Judge McKinnon entered an Order granting in part and denying in part the Motion to Alter or Amend and providing that the new Order substitute in place of the Court's March 26, 2020 Order. R.* (Order, July 31, 2020).

Appellant filed the instant appeal from Judge McKinnon's Order.

This brief of Appellant follows.¹

¹ This matter has been consolidated for purposes of the Record on Appeal with the appeal from the Orders of The Honorable Benjamin Culbertson, which granted the Motion to Dismiss of the other third-party defendants, Throttlefest, LLC. Though they share a single appellate case number, separate briefs are being filed with respect to the two appeals.

STANDARD OF REVIEW

The question of personal jurisdiction over a nonresident defendant is one which must be resolved upon the facts of each particular case. State v. NV Sumatra Tobacco Trading, Co., 379 S.C. 81, 88, 666 S.E.2d 218, 221 (2008). “At the pretrial stage, the burden of proving personal jurisdiction over a nonresident is met by a *prima facie* showing of jurisdiction either in the complaint or in affidavits.” Cockrell v. Hillerich & Bradsby Co., 363 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 court is not confined to the allegations of the complaint but may resort to affidavits or other evidence to determine jurisdiction.” Power Prods. & Servs. Co. v. Kozma, 379 S.C. 423, 430, 665 S.E.2d 660, 664 (Ct. App. 2008). The circuit court’s decision should be affirmed unless unsupported by the evidence or influenced by an error of law. Cribb v. Spatholt, 382 S.C. 490, 496, 676 S.E.2d 714, 717 (Ct. App. 2009).

FACTS

The underlying first-party action arose from a motorcycle-on-motorcycle collision on May 16, 2014 in Myrtle Beach, South Carolina, which resulted in injuries to first-party plaintiff Kelsey. Kelsey alleged that Travis Wagoner was overserved with two free shots of liquor, allegedly given to him by Michael “Fajita Mike” Garner during an event called Full Throttle Saloon Festival, known also as “Throttlefest 2014.” R.* (Sec. Amd. Compl. ¶¶ 8-15); R.* (HOB Third-Party Compl. ¶¶ 93, 107-109). There is a dispute over whether Garner was acting as an employee of Appellant, Respondents, and/or the other Third-Party Defendant, and who was responsible for his training and supervision. Compare R.* (Sec. Amd. Compl. ¶¶8, 29, 40-42), with R.* (HOB Third-Party Compl. ¶¶ 114-117).

Respondents, and others, were previously parties to the first-party action. The first-party claims against Respondent American Outlaw Spirits were dismissed on January 22, 2018 and the first-party claims against Respondents Full Throttle and Sloon Shine were dismissed on August 13, 2019. R.* (Order of Dismissal, Jan. 22, 2018); R.* (Order of Dismissal, Aug. 13, 2019).

When Kelsey filed his Second Amended Complaint, Appellant filed an Answer and also asserted the following causes of action against the third-party defendants, including Respondents: breach of contract, negligent misrepresentation, negligence, equitable indemnification, contractual indemnification, and contribution. R.* (HOB Answer and Third-Party Compl.).

In the Third-Party Complaint, Appellant alleged that Appellant and third-party defendant Throttefest, LLC entered into a Co-Promotion Agreement (“Agreement”) with an effective date of March 19, 2014, concerning the functions and acts necessary for promoting and conducting the Throttle Fest event, to be held May 9-17, 2014 at the House of Blues location in Myrtle Beach, South Carolina. R.* (HOB Third-Party Compl. ¶97); R.* (Co-Promotion Agreement, Exhibit to Throttefest’s Memo. in Support of Mot. to Dismiss, Dec. 30, 2019). Michael Ballard and Jesse

James Dupree are affiliated with Throttlefest, LLC, as well as related entities Full Throttle, Sloon Shine, and American Outlaw Spirits, on behalf of which the two men attended the Throttle Fest 2014 event. R.* (HOB Third-Party Compl. ¶¶ 112-113). Appellant avers that throughout the Throttle Fest event, Fajita Mike was acting as the employee or agent of all of the Third-Party Defendants, including Respondents. Id. ¶¶ 114-115. Further, the Third-Party Defendants all had the opportunity and responsibility to supervise and control Fajita Mike and all financially benefited from Fajita Mike's alleged actions. Id. at ¶ 116-117.

Respondents' Motions to Dismiss asserted a variety of arguments for dismissal, which were opposed in Appellant's memorandum. See R.* (Amer. Outlaw's Mot. to Dismiss); R.* (Full Throttle's Mot. to Dismiss); R.* (Sloon Shine's Mot. to Dismiss); R.* (HOB's Memo. in Opp., Feb. 5, 2020). These arguments were addressed again in Appellant's motion to alter or amend and the hearing on the motion. (HOB Mot. to Alter or Amend, Apr. 6, 2020); R.* (McKinnon July Hr'g Tr.).

In the circuit court's amended order, the court ultimately resolved the matter solely on the claim of lack of personal jurisdiction. R.* (Order, July 31, 2020). Specifically, the Court ruled:

The primary allegations at issue involve the actions Michael Garner. House of Blues acknowledges in its Answer that it issued Garner a W-2 for his work during the Event. Seeking to distance itself from Garner's actions, House of Blues then says Garner was "part of the Throttlefest festival talent." House of Blues admits that it and Throttlefest undertook the duties for promoting and conducting the Throttle Fest event and asserts that Throttlefest was responsible for "festival talent/personalities." House of Blues nevertheless seeks to reach through the Throttlefest LLC to its two individual members and even further beyond that, tracing duties through those members to each of their other businesses. It seeks to hold responsible those non-resident, non-contracting parties with the duties of the contracting party, and to hold them responsible for acts or omissions in the performance of the contract. It seeks to hold a South Dakota real estate holding company, for example, responsible for the alleged actions of "festival talent" that another entity purportedly

obtained—and whom House of Blues reported to the IRS was their employee.

In light of the materials submitted to address the lack of contacts of these Third-Party Defendants and other matters of record, House of Blues cannot establish that the three non-resident companies themselves had sufficient contacts to have purposefully availed themselves of the privilege of conducting activities within South Carolina. *See generally Cockrell v. Hillerich & Bradsby Co.*, 363 S.C. 485, 492, 611 S.E.2d 505, 509 (2005) (“The foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum state. Rather, it is that the defendant's conduct and connection with the forum state are such that he should reasonably anticipate being haled into court there.”); *Aviation Assocs. [and Consultants, Inc. v. Jet Time, Inc.]*, [303 S.C. 502, 507-08,] 402 S.E.2d [177,] 180 (nonresident seller’s limited contact insufficient); *Power Prod. & Servs. Co. v. Kozma*, 379 S.C. 423, 433, 665 S.E.2d 660, 666 (Ct. App. 2008) (finding conclusory assertions unavailing). **The only contact that these entities could be argued to have made here was the requirement by ThrottleFest that House of Blues buy liquor from the Third-Party Defendants to serve at the ThrottleFest event. This singular contact, which was directed by ThrottleFest rather than the Third-Party Defendants themselves, is not enough to create jurisdiction. These Defendants did not conduct the requisite activity to have purposefully availed themselves of the laws of South Carolina. In other words, the actions of Throttlefest in South Carolina can subject itself to the jurisdiction to the courts of South Carolina, but not additional parties.**

Additionally, House of Blues alleges that Ballard and Dupree, in conducting their duties as the hosts of ThrottleFest, were also serving as agents of the Third-Party Defendants, by nature of their positions within those companies. House of Blues therefore argues that the contacts made by Ballard and Dupree should be imputed to the Third-Party Defendants. The Court disagrees. **House of Blues has not provided sufficient evidence that Dupree and Ballard were serving as agents for the Third-Party Defendants. Mere conclusory statements or allegations in pleadings concerning Dupree and Ballard serving as agents for these Third-Party Defendants are not enough to base the exercise of jurisdiction upon. As a result, the Court cannot exercise jurisdiction over these parties on this, or any other basis as alleged by House of Blues.**

Because the Court finds it lacks the “power” to hear this matter with regard to these Defendants, the Court need not address the “fairness” prong of personal jurisdiction.

The Court declines to address Third-Party Defendants’ other defenses and arguments, as the Court has found it does not have personal jurisdiction over these parties.

R.* (Order, July 31, 2020, pp. 5-7 (emphasis added)).

LAW/ANALYSIS

The Circuit Court erred in dismissing Appellant's third-party claims against Respondents American Outlaw Spirits Incorporated, Full Throttle LLC, and Full Throttle Sloon Shine, LLC based upon a lack of personal jurisdiction.

Applicable Law

“The concept of jurisdiction refers to the authority of a court over a particular person (personal jurisdiction) or the authority of a court to entertain a particular action (subject matter jurisdiction), but the concept does not refer to the validity of the claim on which an action against a person is based.” Cribb v. Spatholt, 382 S.C. 490, 497, 676 S.E.2d 714, 718 (Ct. App. 2009) (quoting Boan v. Jacobs, 296 S.C. 419, 421, 373 S.E.2d 697, 698 (Ct. App. 1988)). Courts may have specific jurisdiction over a cause of action arising from a defendant's contacts with the state pursuant to the long-arm statute. Id. at 498, 676 S.E.2d at 718.

The South Carolina Long-Arm Statute is codified at Section 36-2-803 of the South Carolina Code. The Long-Arm Statute provides, in relevant part:

- (A) 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;
 - ...
 - (3) commission of a tortious act in whole or in part in this State;
 - ...
 - (7) entry into a contract to be performed in whole or in part by either party in this State;
 - ...

S.C. Code Ann. § 36-2-803(A)(1), (3), & (7).

Despite the enumerated provisions of the Long-Arm Statute, South Carolina Courts has construed the statute to extend to the outer limits of the due process clause. Meyer v. Paschal, 330 S.C. 175, 498 S.E.2d 635 (1998); Cozi Investments v. Schneider, 272 S.C. 354, 252 S.E.2d 116

(1979) (stating that South Carolina's long-arm statute has been construed as a grant of jurisdiction as broad as constitutionally permissible).

Thus, our courts no longer follow the traditional two-step analysis to determine whether specific jurisdiction is proper by 1) determining if the long arm statute applies and 2) determining whether the nonresident's contacts in South Carolina are sufficient to satisfy due process requirements. Cribb, 382 S.C. at 498, 676 S.E.2d at 718. Instead, the recent trend compresses the analysis into a due process assessment only. Id. (citing Cockrell v. Hillerich & Bradsby Co. 363 S.C. 485, 491, 611 S.E.2d 505, 508 (2005) ("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 v. Reprod. Endocrine Assocs. of Charlotte, 376 S.C. 12, 16, 655 S.E.2d 476, 478 (2007). 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., Inc., 358 S.C. 320, 331-32, 594 S.E.2d 878, 884 (Ct. App. 2004). "The foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum state." State v. NV Sumatra Tobacco Trading, Co.,

379 S.C. 81, 89, 666 S.E.2d 218, 222 (2008). “Rather, it is that the defendant's conduct and connection with the forum state are such that he should reasonably anticipate being haled into court there.” Id. “This theory of personal jurisdiction is known as the ‘stream of commerce’ theory.” Id. Notably, the South Carolina Supreme Court specifically declined to adopt the “stream of commerce plus” theory advanced by the Respondent, which would require that in addition to placement of a product into the stream of commerce, a defendant must show “additional conduct indicating an intent or purpose to serve the market in the forum state.” Id. at 81 n. 5, 666 S.E.2d at 222 n.5 (noting that the United States Supreme Court’s opinion in Asahi Metal Ind. Co., Ltd. V. Superior Court of California, 480 U.S. 102 (1987) was merely a plurality opinion).

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; and (4) the State’s interest in exercising jurisdiction. State v. NV Sumatra Tobacco Trading, Co., 379 S.C. 81, 91, 666 S.E.2d 218, 223 (2008).

A single transaction is sufficient to confer jurisdiction if these factors are met.” Moosally, 358 S.C. at 331, 594 S.E.2d at 884; see also Askins v. Firedoor Corp., 281 S.C. 611, 616, 316 S.E.2d 713, 716 (Ct. App. 1984) (“The cases are legion that a single contact with the forum state is sufficient to give its courts personal jurisdiction over a nonresident if the contact gives rise to, or figures prominently in the cause of action under consideration.”). Although a single act may support jurisdiction, it must create a “substantial connection” with the forum. Burger King Corp., 471 U.S. 462, 475 n. 18 (1985); White v. Stephens, 300 S.C. 241, 247, 387 S.E.2d 260, 263 (1990). 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. Southern Plastics Co. v. Southern Commerce Bank, 310 S.C. 256, 423 S.E.2d 128 (1992).

Discussion

A. There is Personal Jurisdiction Over the Full Throttle Entities

The circuit erred in finding that the court lacked specific jurisdiction over Full Throttle and Sloon Shine where there is evidence that both entities were beneficiaries of the Co-Promotion Agreement and were promoted during and benefited from Throttlefest 2014. The Cockrell, Aviation Assocs., and Power Prod. & Servs. Co. cases cited by the circuit court in support of its findings are inapposite from the present case.

The Cockrell case involved dismissal for lack of personal jurisdiction over a Massachusetts research center and professor who certified aluminum baseball bats as meeting certain NCAA regulations, in a lawsuit related to injuries suffered by a teen baseball player injured when a line drive ball off an aluminum bat struck him in the head. Cockrell v. Hillerich & Bradsby Co., 363 S.C. 485, 611 S.E.2d 505 (2005). The Cockrell Court ruled that Hillerich, the bat manufacturer, unilaterally distributed and sold the bats in South Carolina, and that the respondents had no control over the distribution of the bats and did not profit from their sale. Id. at 494, 611 S.E.2d at 510. Unlike the distinct entities and interests in Cockrell, Appellant has contended that Throttlefest was acting as the agent of Sloon Shine and Full Throttle, who were direct beneficiaries under the Agreement. See Fernander v. Thigpen, 278 S.C. 140, 143, 293 S.E.2d 424, 426 (1982) (“The doctrine of apparent authority provides that the principal is bound by the acts of its agent when it has placed the agent in such a position that persons of ordinary prudence, reasonably knowledgeable with business usages and customs, are led to believe the agent has certain authority and they in turn deal with the agent based on that assumption.”). As discussed *infra*, Throttlefest’s purpose in entering into the Co-Promotion Agreement was, at least in part, to benefit and promote its related entities Sloon Shine and Full Throttle by driving up sales of Sloon Shine’s alcohol and drawing visitors to the Full Throttle Saloon in South Dakota.

The Aviation Assocs. case involved dismissal for lack of personal jurisdiction over an Oklahoma broker related to the sale of an aircraft, where any contract entered was not executed or to be performed in South Carolina and the only contact with the broker was unsolicited and unilaterally initiated by the South Carolina entity. Aviation Assocs. & Consultants, Inc. v. Jet Time, Inc., 303 S.C. 502, 506-509, 402 S.E.2d 177, 179-180 (1991). The Aviation Assocs. Court wrote that in conducting the due process inquiry for person jurisdiction “the focus must center on the contacts generated by the defendant, and not on the unilateral actions of some other entity.” Id. at 507, 402 S.E.2d at 180. However, none of the cases relied upon in support of that statement involved related entities with common officers who came to the forum state and participated in the alleged contractual breaches and tortious conduct, as is the case here.

Lastly, the Power Prod. & Servs. Co. case involved dismissal for lack of personal jurisdiction over non-resident former employees and independent contractors, where the Court found that any tortious conduct would have necessarily occurred after the defendants discharge from employment of the South Carolina company, as there was no allegation or evidence that any trade secrets were misappropriated during their employment. Power Prod. & Servs. Co. v. Kozma, 379 S.C. 423, 433-34, 665 S.E.2d 660, 665-66 (Ct. App. 2008). With respect to River Technologies, the company for whom the former employees were now working, there was only evidence that they considered doing business in South Carolina, but no evidence of any actual commercial activity in South Carolina or movement of its business to this State. Id. at 434-35, 665 S.E.2d at 666-67. Unlike Power Prod. & Servs. Co., there is undisputed evidence that Michael Ballard and Jesse James Dupree both attended Throttlefest 2014 in Myrtle Beach, South Carolina, as well as Throttlefest events at House of Blues in years prior. As discussed *infra*, they wore multiple hats during the 2014 event, including acting as representatives of Throttlefest, Full Throttle, Sloon Shine, and American Outlaw Spirits, promoting their various ventures and brands.

Full Throttle averred that its owner, Michael Ballard's, attendance at Throttle Fest was not sufficient contact to subject Full Throttle to the jurisdiction over this state. Full Throttle further contended that while Appellant alleged that Full Throttle had a responsibility to supervise Michael Garner, there is "undisputed evidence in this case that Garner was *not* an employee of Full Throttle during the Throttle Fest event." R.* (Full Throttle Memo. in Supp. of Mot. to Dismiss, p. 7). Full Throttle further argued that it was "inconvenient for Full Throttle to defend this suit in South Carolina" and South Carolina's interest in providing redress for its citizens is diminished when a non-resident does not operate in South Carolina. *Id.*

Sloon Shine relied upon an argument that it does not directly sell its product in South Carolina; rather, it contracts with distributors who sell throughout the region. Sloon Shine contended that its moonshine is not presently available in South Carolina "and has not been for several years." Sloon Shine further alleged, in the same manner and through the same arguments as Full Throttle, that the due-process requirements have not been met.

Full Throttle Saloon was a reality television series that chronicles the daily operations of the world's largest biker bar, Full Throttle Saloon, located in Sturgis, South Dakota. The concept of bringing Full Throttle Saloon to Myrtle Beach for an event called Throttle Fest began in 2012, with a three-day festival, and continued for four days in 2013 and for ten days in 2014. R.* (HOB Memo. in Opp., Ex. A: Depo. Tr. of Robert Simeone o/b/o House of Blues, p. 165, line 17 – p. 167, line 20). Appellant contends that while Throttlefest LLC was the only named entity that entered into the 2014 Co-Promotion Agreement with House of Blues, it was acting as an agent of the remaining Third-Party Defendants American Outlaw Spirits, Full Throttle, and Sloon Shine. R.* (HOB Third-Party Compl., ¶¶ 97, 124).

These entities are all owned and managed by either Michael Ballard and/or Jesse James Dupree. Ballard and Dupree are the managing members of Throttlefest LLC. *Id.* at ¶¶ 97, 112-

113). Ballard is also the sole managing member of Full Throttle and Sloon Shine. *Id.* at ¶ 112. Dupree is also the sole incorporator and officer of American Outlaw Spirits. *Id.* at ¶ 113.

Further, both Sloon Shine liquor and American Outlaw Spirits liquor were being distributed, purportedly for free, by Fajita Mike at Throttle Fest 2014. *Id.* at ¶¶ 105-109. Jesse James Dupree previously testified that he attended Throttlefest 2014 along with several other personalities from the Full Throttle Saloon show, including Michael Ballard, Michael “Fajita Mike” Garner, and Greg “Goat” Cook. R.* (HOB Memo. in Opp., Ex. B: Depo. Tr. of Jesse James Dupree, p. 9, line 7 – p. 10, line 15).

Full Throttle’s contention that the actions of Fajita Mike are unrelated to Michael Ballard and Throttlefest are without foundation. The bases for the allegations asserted by Appellant against Full Throttle (as well as the other third-party defendants) is that owners Michael Ballard and Jesse James Dupree attended the Throttlefest event as representatives of their respectively owned companies. House of Blues further contends that Ballard and Dupree were tasked with and had the opportunity and responsibility to supervise and control Fajita Mike’s actions. R.* (HOB Third Party Compl., ¶¶ 97-117). Accordingly, Fajita Mike—at a minimum—was an agent of the corporations and companies owned and represented at Throttlefest 2014 by Ballard and Dupree.

Indeed, House of Blue’s manager Robert Simeone confirmed his understanding that Fajita Mike was under the control of Ballard—acting on behalf of all entities owned and controlled by Ballard:

Q. Do you have a recollection of having an express understanding with ThrottleFest that Fajita Mike and his activities would be limited to the deck versus inside the Music Hall?

A. **Fajita Mike’s movements were under the direction of Mike Ballard. Mike Ballard told Fajita Mike the role that he wanted him to play.**

Q. How do you know?

A. **Mike told me that's what he was going to have him do.**

...

Q. So...Steve-O, who was not a house of Blue employee, had supervisory power over House of Blues employees?

A. Over the crew that Mike brought that we put on our payroll so that could pour drinks. They brought a bar manager with them every year to schedule those girls, tell them when they worked – when they would work and make sure that we knew who was coming. They would communicate with us and tell us what staff they were bringing with them and when they were going to show up each year.

Q. Prior to ThrottleFest, did you know Steve-O?

A. No.

Q. How was House of Blues able to evaluate whether Steve-O would be, I guess, an appropriate individual to manage people selling alcohol under the House of Blues license?

A. He came -- he came with Mike [Ballard]. I mean, that was part of Mike's entourage, you know. The people that we listed before were part of ThrottleFest's crew: Mike, Jesse, Goat, Fajita....

R.* (HOB Memo. in Opp., Ex. A: Depo. Tr. of Robert Simeone o/b/o House of Blues, p. 52, lines 13-22; p. 65, lines 1-23 (emphasis added)).

During Michael "Fajita Mike" Garner's deposition in the first-party action, taken on October 9, 2018, he testified:

Q. Jackyl performed at the House of Blues 2014, correct?

A. Yes.

Q. **You were selling, I guess, shots that night of S'Loonshine; is that correct?**

A. **I'm sure. Probably, S'Loonshine and Jesse James and something else.** I mean, I don't remember exactly what we were selling.

...

Q. And the flavors, **what type of liquor were you selling?**

A. I did -- we did, you know, **primarily the Jesse James and S'Loonshine.** We also did like Fireball and all the other

stuff, too. I mean, it just depended on whatever was -- you know, really it depended on the crowd.

R.* (HOB Memo. in Opp., Ex. C: Depo. Tr. of Michael Garner, p. 12, lines 10-17; p. 18, lines 12-18 (emphasis added)).

Travis Wagoner, the at fault driver who was allegedly overserved at Throttle Fest 2014 testified to the following at his deposition, held April 23, 2018:

Q. ...Sum total, how many -- how many alcoholic drinks did you have at House of Blues while you were there?

A. I had about four of the -- those can beers. They serve can beers. I want to think that they was 22 ounce.

Q. Okay.

A. And one liquor drink and we had -- I think it was two or three liquor shots.

Q. Okay.

A. And two of the liquor shots was served by somebody from the group with the moonshine -- or the show. The -- the Full Throttle show.

Q. The Full Throttle show. When you say --

A. Fajita Mike.

Q. So two out of those three liquor shots that you're telling me about were served to you by Fajita Mike?

A. Yes.

Q. All right. With regard to the -- to the television show involving Throttlefest, had you ever seen that television show?

A. Some.

Q. Did you know who Fajita Mike was?

A. Just a little, yeah.

Q. So you understood him to be a television personality that appeared on that TV show?

A. Yes.

Q. You didn't understand him to be an employee of House of Blues, did you?

A. No.

...

- Q. All right. Who at House of Blues saw you being served by Fajita Mike?
- A. I don't know that -- for sure that somebody had saw.
- Q. Okay.
- A. But it --
- Q. So you're just guessing.
- A. Yes. That's a -- that's a guess.
- ...
- Q. ...Were there any of the seven to eight drinks that you're telling me that you consumed at the House of Blues that were just given to you?
- A. Yes. The -- the two shots from Fajita Mike.
- Q. Okay. They were just given to you?
- A. Yes.
- Q. There was no sale?
- A. No.
- ...
- Q. Okay. And you said that Fajita Mike gave you the two shots; right?
- A. Yes.
- Q. Did he approach you, or did you approach him?
- A. There was somebody -- well, we approached him.
- Q. Okay.
- A. The way to say, yes.
- Q. Was he by himself?
- A. No. He had a girl with him.
- Q. Okay. Well, do you know who the girl was?
- A. No. I -- I assume that she was actually -- well, she had cups and stuff with her.
- Q. Did she have on any identifying clothing that would let you know who she was?
- A. Like something to do with the -- the shine, the moonshine, or whatever it's called.
- Q. Okay. So was she wearing a House of Blues T-shirt?
- A. No.
- Q. She was wearing a T-shirt of the brand of liquor?

A. **Yes. As I recall, yes.**

Q. Okay. All right. Do you know who she worked for?

A. No.

R.* (HOB Memo. in Opp., Ex. D: Depo. Tr. of Travis Wagoner, p. 27, line 9 – p. 28, line 14; p. 45, line 20 – p. 46, line 2; p. 53, line 18 – p. 54, line 2; p. 64, line 7 – p. 65, line 10 (emphasis added)).

Wagoner was also familiar with the Jesse James Dupree, as the lead singer of Jackyl, who was promoting SloonShine on stage.

Q. The band Jackyl performed while you were there; correct?

A. Correct.

Q. **Do you recall the lead singer of Jackyl chugging the moonshine while he was on stage?**

A. **Yes.**

R.* (HOB Memo. in Opp., Ex. D: Depo. Tr. of Travis Wagoner, p. 86, lines 9-14 (emphasis added)).

Importantly, Michael Ballard, in addition to his role as co-owner of Throttlefest, LLC, also had an interest in the promotion of the liquor sales for Sloon Shine. It was Michael Ballard who contacted Fajita Mike and procured his attendance at Throttle Fest 2014. R.* (HOB Memo. in Opp., Ex. C: Depo. Tr. of Michael Garner, p. 61, lines 9-17). While Full Throttle maintains that “[i]t is a real estate holding company which transacts no business in South Carolina,” House of Blues has not been provided any opportunity to conduct even limited discovery on the jurisdictional issue or cross-examine the affiant regarding this matter in order to test its veracity. (Full Throttle Memo. in Supp. of Mot. to Dismiss, p. 3). It is also notable that the 2014 Co-Promotion Agreement originally had Full Throttle listed as the contracting party rather than Throttlefest. R.* (HOB Memo. in Opp., Ex. A: Depo. Tr. of Robert Simeone o/b/o House of Blues, p. 118, line 16 – p. 119, line 24).

Considering all of these facts, Appellant satisfied its burden to establish personal jurisdiction. There is evidence that Michael Ballard, Jesse James Dupree, and Fajita Mike attended Throttle Fest 2014 as representatives and agents of a conglomeration of entities that included Full Throttle and Sloon Shine. Ballard's Affidavit does not address 2014 sales of Sloon Shine but he admits that South Carolina sales comprised three percent of Sloon Shine's revenue in 2015. R.* (Aff. of M. Ballard, ¶ 18). Further, Sloon Shine was being sold at Throttle Fest 2014, including by Fajita Mike, was chugged by Jesse Dupree on-stage during the Jackyl concert, and was advertised on a t-shirt worn by the young woman who allegedly assisted Fajita Mike in distributing shots to Wagoner. All of these activities were directed at promoting the Full Throttle, Throttle Fest, and Sloon Shine brands to residents of South Carolina and give rise to the causes of action alleged in the Third-Party Complaint, satisfying the "power" prong of due process based upon both the stream of commerce theory and the entities minimum contacts with the State. See State v. NV Sumatra Tobacco Trading, Co., 379 S.C. 81, 90-91, 666 S.E.2d 218, 223 (2008) (holding that South Carolina court properly asserted personal jurisdiction over foreign cigarette manufacturer regardless of how the cigarettes arrived in South Carolina pursuant to stream of commerce theory); Moosally v. W.W. Norton & Co., Inc., 358 S.C. 320, 331, 594 S.E.2d 878, 884 (Ct. App. 2004) ("[A] single contact with the forum state is sufficient to give its courts personal jurisdiction over a nonresident if the contact gives rise to, or figures prominently in the cause of action under consideration.").

Regarding the "fairness" prong, though not addressed in the circuit court's Order, these entities participated in a ten-day event at Throttle Fest 2014, which was the third annual event, growing in length each year. These entities were serving as promoters of alcohol, amongst other things. While some travel for depositions and trial may be required, in our technological age, conducting discovery and defending an action from South Dakota and Tennessee is hardly unusual

or burdensome. The only known employees who would be called to testify would be Jesse Dupree and Michael Ballard, whereas Appellant has a variety of witnesses in South Carolina and nearby North Carolina. Thus, when considering the available alternate forums, South Carolina is the most convenient. Lastly, South Carolina has an interest in exercising jurisdiction since these entities wreaked havoc by failing to procure the proper insurance coverage for the festival held in Myrtle Beach, South Carolina and failing to properly train and supervise their employee and agent, Fajita Mike, resulting in the alleged over service of alcohol to a bike week patron. Thus, South Carolina's exercise of jurisdiction is both reasonable and fair. See McGee v. Int'l Life Ins. Co., 355 U.S. 220, 223 (1957) (“[M]odern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity.”); see also Hardy v. Pioneer Parachute Co., 531 F.2d 193, 195 (4th Cir. 1976) (“No unconstitutional burden is imposed on a foreign corporation by requiring it to defend a suit in a forum located in a state where it has advertised and sold a product whose use gave rise to the cause of action.”).

Accordingly, the trial court's ruling that there was a lack of personal jurisdiction over Full Throttle and Sloon Shine should be reversed.

B. There is Personal Jurisdiction Over American Outlaw Spirits

In arguing that the circuit court lacked personal jurisdiction, American Outlaw Spirits incorporated the arguments of Full Throttle and Sloon Shine regarding the lack of minimum contacts and the failure to satisfy the due process analysis, albeit with regard to the contacts of the owner of American Outlaw Spirits, Jesse James Dupree, rather than the contacts by Michael Ballard. In addition, American Outlaw Spirits averred that the single brand of liquor manufactured by it, Devils Devil Cinnamon Whisky, was not placed into production until 2018.

As an initial matter, Dupree's affidavit provided: “American Outlaw Spirits manufactures one brand of liquor, Devils Devil Cinnamon Whiskey, and did not begin producing this liquor until

2018. American Outlaw Spirits did not transact business in South Carolina at the time of the Full Throttle Saloon Festival in May of 2014. American Outlaw Spirits did not become registered to do business in South Carolina until March 6, 2018. ... American Outlaw Spirits only has one brand of liquor available in South Carolina and it has never been carried by the House of Blues in Myrtle Beach, South Carolina.” R.* (Aff. of J.J. Dupree, ¶¶ 6, 7, and 13).

Dupree’s assertions in his affidavit are **directly controverted by his own deposition testimony** in the first-party action provided on October 9, 2018. Specifically, Dupree testified:

- Q. **Now, American Outlaw Spirits, does it have any other product other than the bourbon?**
- A. **Yes.**
- Q. What are those products?
- A. The Devil’s Devil.
- Q. What kind of alcohol is that?
- A. It’s a cinnamon whiskey.
- Q. **Any other product?**
- A. **A Tennessee – there’s a bourbon and a Tennessee – there’s honey bourbon, spice bourbon, regular bourbon, the Tennessee whiskey and the Devil’s Devil cinnamon whiskey.**
- Q. Is the Devil’s Devil a separate label from Jesse James Dupree’s bourbon; is it sold as Devil’s Devil?
- A. Yes.
- ...
- Q. **What American Outlaw Spirits Products were available for sale in May 2014?**
- A. **To the best of my recollection, the Jesse James products that were selling in 2014 available for sale would be the Jesse James regular bourbon, the Jesse James spice bourbon, and the Jesse James honey bourbon.**
- Q. **And to your personal knowledge or recollection, were all three of those products for sale at House of Blues May of 2014 during Throttlefest?**

- A. **To the best of my recollection, I think they were all three there.** I also recall that there was times that the House of Blues was not able to get all three of them.

R.* (HOB Memo. in Opp., Ex. B: Depo. Tr. of Jesse James Dupree, p. 98, line 23 – p. 100, line 25 (emphasis added)).

This direct testimony from Dupree undermines the validity of the statements within his affidavit. Additionally, Dupree admitted, after reviewing photographs taken during Throttlefest, that there were both S’loonshine products as well as American Outlaw Spirits/Jesse James Dupree products photographed. R.* (HOB Memo. in Opp., Ex. B: Depo. Tr. of Jesse James Dupree, p. 102, line 18 – p. 104, line 25).

To the extent that the discrepancy between the affidavit and testimony—which were never explained by Respondent—is based on some allegation that the Jesse James brand of liquor was being distributed by predecessor entity of American Outlaw Spirits, this does not connote a lack of personal jurisdiction but a need to clarify the proper party in interest.

As discussed more fully *supra*, the facts and law support a finding of personal jurisdiction over American Outlaw Spirits. There is evidence that Michael Ballard, Jesse James Dupree, and Fajita Mike attended Throttle Fest 2014 as representatives and agents of a conglomeration of entities that included American Outlaw Spirits. An American Outlaw Spirits liquor was being sold at Throttle Fest 2014 and distributed by Fajita Mike. These activities were directed at promoting the American Outlaw Spirits brand to residents of South Carolina and gave rise to the causes of action alleged in the Third-Party Complaint, satisfying the “power” prong of due process based upon both the stream of commerce theory and the entities minimum contacts with the State. See State v. NV Sumatra Tobacco Trading, Co., 379 S.C. 81, 90-91, 666 S.E.2d 218, 223 (2008) (holding that South Carolina court properly asserted personal jurisdiction over foreign cigarette manufacturer regardless of how the cigarettes arrived in South Carolina pursuant to stream of

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Though not addressed by the circuit court, regarding the “fairness” prong, these entities participated in a ten-day event at Throttle Fest 2014, which the third annual event, growing in length each year. American Outlaw Spirits was serving as a promoter of its own alcohol, amongst other things. While some travel for depositions and trial may be required, in our technological age, conducting discovery and defending an action from Georgia is hardly unusual or burdensome. The only known current, employee of American Outlaw Spirits is Jesse Dupree, whereas the first-party plaintiff and House of Blues have a variety of witnesses in South Carolina and nearby North Carolina. Thus, when considering the available alternate forums, South Carolina is the most convenient. Lastly, South Carolina has an interest in exercising jurisdiction since American Outlaw Spirits wreaked havoc by failing to procure the proper insurance coverage for the festival held in Myrtle Beach, South Carolina and failing to properly train and supervise its’ employee and agent, Fajita Mike, resulting the alleged over service of alcohol to a bike week patron. Thus, South Carolina’s exercise of jurisdiction is both reasonable and fair. See McGee v. Int’l Life Ins. Co., 355 U.S. 220, 223 (1957) (“[M]odern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity.”); see also Hardy v. Pioneer Parachute Co., 531 F.2d 193, 195 (4th Cir. 1976) (“No unconstitutional burden is imposed on a foreign corporation by requiring it to defend a suit in a forum located in a state where it has advertised and sold a product whose use gave rise to the cause of action.”).

Accordingly, the trial court’s ruling that there was a lack of personal jurisdiction over American Outlaw Spirits should be reversed.

CONCLUSION

Based on the foregoing, Appellant respectfully requests that this Court reverse the Order of Dismissal entered by Judge McKinnon in favor of Respondents American Outlaw Spirits Incorporated, Full Throttle LLC, and Full Throttle Sloon Shine, LLC, and remand this matter to the circuit court.

Respectfully submitted,
COLLINS & LACY, P.C.

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ATTORNEYS FOR APPELLANT HOUSE OF
BLUES MYRTLE BEACH RESTAURANT
CORPORATION

**INITIAL BRIEF OF APPELLANT (AS TO
RESPONDENTS AMERICAN OUTLAW
SPIRITS INCORPORATED, FULL THROTTLE
LLC, AND FULL THROTTLE SLOON SHINE,
LLC)**

Columbia, South Carolina
December 21, 2020

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED

Dec 21 2020

SC Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge
William A. McKinnon, Circuit Court Judge

Appellate Case No. 2020-000407

Douglas Kelsey.....Plaintiff,

v.

House of Blues Myrtle Beach Restaurant Corporation;
HOB Entertainment, Inc.; and Travis Scott Wagoner.....Defendants.

AND

House of Blues Myrtle Beach Restaurant CorporationThird-Party Plaintiff,

v.

Throttlefest, LLC; American Outlaw Spirits Incorporated;
Full Throttle LLC; and Full Throttle Sloon Shine, LLC.....Third-Party Defendants.

Of Whom House of Blues Myrtle Beach Restaurant Corporation is the Appellant and Throttlefest, LLC, American Outlaw Spirits Incorporated, Full Throttle LLC, and Full Throttle Sloon Shine, LLC are the Respondents.

PROOF OF SERVICE

I certify that I have served INITIAL BRIEF OF APPELLANT (AS TO RESPONDENTS AMERICAN OUTLAW SPIRITS INCORPORATED, FULL THROTTLE LLC, AND FULL THROTTLE SLOON SHINE, LLC) by mailing a copy of same in the United States mail, with sufficient postage affixed thereto on this 21st day of December, 2020, to the following:

M. Dawes Cooke, Jr., Esquire
Jeffrey M. Bogdan, Esquire
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PROOF OF SERVICE

Columbia, South Carolina
December 21, 2020



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December 21, 2020

VIA U.S. MAIL AND EMAIL

The Honorable Jenny A. Kitchings
South Carolina Court of Appeals
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RECEIVED

Dec 21 2020

SC Court of Appeals

***Re: Douglas Kelsey v. House of Blues Myrtle Beach Restaurant Corporation, HOB Entertainment, Inc., and Travis Scott Wagoner; House of Blues Myrtle Beach Restaurant Corporation v. Throttlefest LLC, American Outlaw Spirits Incorporated, Full Throttle, L.L.C., and Full Throttle Sloon Shine, LLC
Appellate Case No. 2020-000407
Claim No. 188372477-001-GL
C&L File No. 001133-00111***

Dear Ms. Kitchings:

Please find enclosed for filing are the following:

1. Appellant's Motion to File Initial Briefs Out-of-Time, together with our firm's check in the amount of \$50.00 for the filing fee;
2. Initial Brief of Appellant (as to Respondents American Outlaw Spirits Incorporated, Full Throttle, LLC, and Full Throttle Sloon Shine, LLC) with Proof of Service of same;
3. Initial Brief of Appellant (as to Respondent Throttlefest, LLC) with Proof of Service of same; and
4. Designation of Matter.

Pursuant to the Supreme Court's Amended Order "re: Operation of the Appellate Courts During the Coronavirus Emergency" (2020-05-29-02, Appellate Case No. 2020-000447), we have not included any additional copies. If any additional copies are required, please let us know.

By copy of this letter and enclosures, we are serving same on counsel.

The Honorable Jenny A. Kitchings

December 21, 2020

Page 2

Thank you for your time and attention. Should you have any questions or concerns, please do not hesitate to contact us.

Respectfully,

s/Christian Stegmaier

Christian Stegmaier

CS/net

Encl.

The Honorable Jenny A. Kitchings

December 21, 2020

Page 3

cc (via U.S. Mail and email):

M. Dawes Cooke, Jr., Esquire

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