THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

Michael G. Nettles, Circuit Court Judge

Appellate Case No. 2020-001007

Joseph Dean, ……..……. Appellant,

v.

CSX Transportation, Inc.,..…….……Respondent.

FINAL REPLY BRIEF OF APPELLANT

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ARGUMENT

Dean incorporates the arguments in his Brief of Appellant and attempts not to duplicate them here but only to reply as needed.

Repeated throughout CSX's brief is a conflation of the minimum contacts analysis with the analysis of whether a defendant's forum contacts are related to the plaintiff's claims. The former—minimum contacts—is not at issue in this case because CSX did not dispute it. The latter—the relatedness requirement—is at issue but, importantly, does not require an analysis of whether a defendant's conduct is directed to the forum. This makes many of CSX's arguments irrelevant. For the reasons stated in Dean's briefs, this Court should reverse.

I. The lower court erred when it separated CSX's jurisdiction contacts rather than considering them as a whole.

The lower court committed an error of law in this case when it separately considered CSX's jurisdiction contacts rather than viewing them as a whole, which led it to find incorrectly that Dean's FELA cause of action does not relate to CSX's South Carolina contacts.

CSX mischaracterizes Dean's argument. Dean does not (and never did) argue that, because CSX has so many South Carolina contacts, specific jurisdiction exists. (Br. of Resp't pp. 9-11). Dean argues that the way CSX set up its multi-state division operations with a headquarters in South Carolina that directs work in Virginia is relevant to how Dean's cause of action arises out of or relates to CSX's forum contacts. Instead of viewing this entire picture, the lower court parsed out and rejected each piece. (R. pp. 6-7). (finding each jurisdictional contact is "by itself" or "alone" insufficient for specific jurisdiction).

Dean brought suit in South Carolina because the work order that resulted in his exhaustion came from his boss in South Carolina who "was working in Florence, SC" at the time of the work

order and to whose authority CSX required Dean to submit.[1] Dean relies on CSX's conduct that occurred within the forum state as a direct result of CSX's business choice to operate railyards in multiple states from a single location in South Carolina. CSX deliberately chose to conduct business in a manner that ignores state lines within a division. Yet, when it comes to defending a lawsuit, it wants to embrace state borders.

CSX argues that the lower court did not separately consider the contacts, but does not explain how this Court can make that conclusion in the face of the lower court's findings that each category of evidence "alone" or "by itself" is not sufficient for specific jurisdiction. (R. pp. 6-7). Instead, CSX continues its incorrect characterization of Dean's argument as based on general jurisdiction principles rather than addressing the merits of the argument that the entire picture of its contacts is relevant to specific jurisdiction under the circumstances of this case.

The plain language of the lower court's order shows that it separated the jurisdictional contacts instead of considering them as a whole, and that is a reversible error of law.

The lower court and CSX expend much energy on whether CSX directed activities to forum residents. (R. pp. 8-10; Br. of Resp't pp. 6-7, 13, 17). This focus misses the issue. The case law about whether a defendant directed activities to a forum deals with methods of proving minimum contacts. CSX admitted that it has minimum contacts with South Carolina. (R. pp. 65, 18-19; Br. of App. p. 8). Once minimum contacts are established, the remaining considerations for a specific jurisdiction decision are whether the plaintiff's claims arise out of or relate to the defendant's minimum contacts and constitutional reasonableness.

[1] CSX implies that Koster could have been somewhere other than his South Carolina office when Dean called him. (Br. of Resp't p. 18). Dean's affidavit states: "When Larry Koster required me to work almost 20 of the previous 24 hours leading up to my injury, he was working in Florence, SC." (R. p. 34 ¶ 14). CSX filed its memorandum in support of and argued the motion to dismiss four days after Dean filed his affidavit. It presented nothing to rebut Dean's affidavit.

Minimum contacts are "a surrogate for presence in the state." *ESAB Group, Inc. v. Centricut, Inc.*, 126 F.3d 617, 623 (4th Cir. 1997). "The standard for determining the existence of personal jurisdiction over a nonresident defendant varies, depending on whether the defendant's contacts with the forum state also provide the basis for the suit. If those contacts form the basis for the suit, they may establish specific jurisdiction." *Carefirst of Md., Inc. v. Carefirst Pregnancy Ctrs., Inc.*, 334 F.3d 390, 397 (4th Cir. 2003). Combining the due process analysis[2] with the specific jurisdiction requirement that the contacts must form the basis for the suit, there are three parts to a specific jurisdiction analysis: "(1) the extent to which the defendant purposefully availed itself of the privilege of conducting activities in the State; (2) whether the plaintiff's claims arise out of those activities directed at the State; and (3) whether the exercise of personal jurisdiction would be constitutionally reasonable." *ESAB Group, Inc. v. Zurich Ins. PLC*, 685 F.3d 376, 391-92 (4th Cir. 2012) (internal quotation and alteration marks omitted).

In this case, CSX admitted its minimum contacts but challenged whether those contacts form the basis for Dean's FELA action. (R. pp. 18-19, 65). Therefore, the minimum contacts analysis is not relevant to this case.

CSX's reliance on minimum contacts law conflates the analyses for minimum contacts and relatedness. (Br. of Resp't pp. 6-7, 11, 13, 17). It argues that Dean is not a South Carolina resident, so CSX conduct directed to him is not sufficient for specific jurisdiction, and that it directed no activities to South Carolina residents. (Br. of Resp't p. 13). Even if the Court considers this minimum contacts argument to decide relatedness, CSX overstates the law.

[2] "A court's exercise of jurisdiction over a nonresident defendant comports with due process if the defendant has 'minimum contacts' with the forum, such that to require the defendant to defend its interests in that state 'does not offend traditional notions of fair play and substantial justice.'" *Carefirst*, 334 F.3d at 397 (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)).

To determine that 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, 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." *Cribb v. Spatholt*, 382 S.C. 490, 499, 676 S.E.2d 714, 719 (Ct. App. 2009) (internal quotation marks omitted). CSX bases its argument on the statement that, under the "power" prong, "the court must find the defendant directed his activities to residents of South Carolina and the cause of action arises out of or relates to those activities." *Id.* at 499, 676 S.E.2d at 719. (Br. of Resp't pp. 6-7, 13, 17). It reads this to require that Dean argue something to this effect: "In this case, CSX directed x activity to a South Carolina resident and that x activity caused my injuries." This overstates the minimum contacts threshold and ignores that every South Carolina case that uses the direct-activities-to-forum language equates it with purposeful availment[3] (which CSX admitted), as did the Court of Appeals for the Fourth Circuit when it listed purposeful availment as the first part of the specific jurisdiction analysis. *ESAB Group, Inc. v. Zurich Ins. PLC*, 685 F.3d 376, 391-92 (4th Cir. 2012); *ESAB Group, Inc. v. Centricut, Inc.*, 126 F.3d 617, 623 (4th Cir. 1997).

The placement within South Carolina of a multi-state Division Headquarters, 1,800 miles of track, 1,000 employees, major rail yards and terminals is plainly activity directed within South Carolina and towards its residents. It is undisputed that CSX purposefully availed itself of the

[3] *See Hidria, USA, Inc. v. Delo, d.d.*, 415 S.C. 533, 541-42, 783 S.E.2d 839, 843 (Ct. App. 2016); *Pitts v. Fink*, 389 S.C. 156, 164-65, 698 S.E.2d 626, 630-31 (Ct. App. 2010); *Leggett v. Smith*, 386 S.C. 63, 73-74, 686 S.E.2d 699, 705 (Ct. App. 2009); *Cribb*, 382 S.C. at 499-500, 676 S.E.2d 719; *Moosally v. W.W. Norton & Co.*, 358 S.C. 320, 331-32, 594 S.E.2d 878, 884-85 (Ct. App. 2004); *S. Plastics Co. v. S. Commerce Bank*, 310 S.C. 256, 260-61, 423 S.E.2d 128, 131 (1992); *Aviation Assocs. & Consultants, Inc. v. Jet Time, Inc.*, 303 S.C. 502, 508, 402 S.E.2d 177, 180 (1991).

privileges of conducting business in South Carolina. The dispute is whether Dean's FELA action arises out of those business activities directed to South Carolina.

CSX wants to focus only on where the injury occurred and where Dean lived—Virginia. CSX asserts that Dean points to its "unrelated general business operations within South Carolina" in a "veiled attempt to bolster" the specific jurisdiction argument. (Br. of Resp't p. 11). It argues that its business operations in South Carolina have "nothing to do with" Dean's injuries. (Br. of Resp't p. 12). The record says otherwise.

The uncontested evidence is that CSX chose to set up its business operations as a multi-state division with the Division Headquarters in South Carolina, from which CSX employees directed work in other states and exercised authority over CSX employees in other states. (R. pp. 32-34). Dean was "required to" report the Virginia derailment to Koster, his boss in South Carolina. (R. p. 33 ¶ 11). Working from a South Carolina office, Koster ordered Dean to work until the derailment resolved and to work his next regular shift. (R. pp. 33-34). This work order caused Dean "to work many hours without adequate rest" and resulted in his injuries. *Id.*

CSX chose to connect its Virginia railyard operations and Dean's employment with its South Carolina headquarters. "[T]o the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. Requiring a corporation to respond to litigation arising from those activities can hardly be said to be undue for purposes of the Due Process Clause." *Lesnick v. Hollingsworth & Vose Co.*, 35 F.3d 939, 942 (4th Cir. 1994) (internal citation and quotation marks omitted). CSX exercises the privileges of conducting its multi-state business activities in South Carolina, and asserting specific jurisdiction over it in this case that arises from those activities can hardly be said to be undue.

CSX cites to two unpublished FELA opinions as support for its argument. (Br. of Resp't pp. 7-8). Neither case is supportive because they are factually distinguishable. In *Wheeler v. Norfolk Southern Ry. Co.*, 2020 U.S. Dist. LEXIS 219646, *6 (S.D. Miss. March 26, 2020), the "only connection" between the case and the forum is that the plaintiff lived in the forum. Here, CSX's Division Headquarters in the forum exercised authority over Dean's employment in Virginia and gave him a direct work order that caused his injuries.

In *Galloway v. Illinois Central R.R., Co.*, 2019 U.S. Dist. LEXIS 108305, *11-12 (E.D. La. June 28, 2019), the plaintiff did not allege that any of the defendant's forum contacts led to his injuries, which the court found insufficient to prove the relatedness requirement. Here, Dean alleges that "his exhaustion at having worked over twenty hours of the previous twenty-four" caused the truck accident and that CSX acted negligently in failing to "schedule sufficient time off" for him to "adequately rest before resuming his duties." (R. pp. 14-15).

The Court should find Dean's FELA action arises out of or relates to CSX's South Carolina contacts and activities.

II. The lower court erred in focusing on the forum of the injury and Dean's residence rather than the forum of CSX's tortious conduct.

The lower court and CSX apply a minimum contacts analysis to the phone call in which Koster directed Dean to work overtime by focusing on whether it was CSX conduct directed towards a South Carolina resident. As explained above, any consideration of whether conduct is directed towards the forum is relevant to the minimum contacts analysis and not the relatedness requirement.

The phone call is not used to establish minimum contacts, that is plainly established without the phone call. The phone call is part of how Dean's claim arises out of or relates to CSX's South Carolina contacts—its Division Headquarters that controls and directs work orders to its Virginia

railyard. CSX says the lower court held that "a single call from an out of state resident directed to an individual allegedly in South Carolina cannot create personal jurisdiction." (Br. of Resp't p. 18). To the extent that is the holding, it does not apply to this case because Dean does not make that argument. The phone call does not create jurisdiction. Specific jurisdiction is established based on undisputed minimum contacts, constitutional reasonableness, and relatedness. As to relatedness, Dean made the phone call to South Carolina because ***CSX required him to as part of his job duties and CSX chose to operate multi-state railroads from a South Carolina location***. Yes, Dean made the call. But, he did it because CSX told him to do it.

CSX argues that one phone call made by the plaintiff cannot establish the connection for specific jurisdiction. The bases for its argument are summed up as follows: (1) Dean and not CSX made the phone call directed to South Carolina, (2) Dean's residence and location in Virginia is relevant to specific jurisdiction, and (3) the work order given on the phone is not a tort because the injuries occurred in Virginia. Each argument is incorrect.

First, that Dean made the phone call is not relevant. He made it because CSX required him to do so. (R. p. 33). Regardless, CSX does not cite any law stating that a phone call cannot be a basis for the relatedness requirement. It makes the same error as the lower court—the cases it cites discuss a phone call as evidence of minimum contacts rather than as the relation between the litigation and the forum.[4] (Br. of App. p. 15 n.4).

[4] *See Scansource, Inc. v. Mitel Networks Corp.*, 2011 U.S. Dist. LEXIS 68342, *7-8 (D.S.C. 2011) (addressing plaintiff's reliance on one phone call in South Carolina to discuss settlement of the case and holding that one "call, especially one made for purposes of settlement, is not sufficient to establish specific jurisdiction over a defendant"); *Porter v. Berall*, 293 F.3d 1073, 1076 (8th Cir. 2002) (stating "[c]ontact by phone or mail is insufficient to justify exercise of personal jurisdiction under the due process clause" as the reason why plaintiff did not satisfy the requirements of "the nature and quality" and "quantity" of "contacts with the forum state"); *Cleveland v. Accumarine & Transp., LP*, 2011 U.S. Dist. LEXIS 27682, *12 (D.S.C. 2011) (". . . Defendant's telephone call to Plaintiff in South Carolina is insufficient to constitute ***minimum contacts*** with [] South

Second, as to Dean's residence or location in Virginia, Dean never argued that it is "irrelevant" to specific jurisdiction (Br. of Resp't p. 14) but that it is not dispositive of specific jurisdiction (Br. of App. pp. 13, 16). CSX now argues that, even though specific jurisdiction is based on a defendant's conduct, a court looks "at which forum the case-related activities of the defendant are aimed or directed toward," and the work order was made to someone who resided and was located in Virginia. (Br. of Resp't p. 14). It cites no law for this proposition.

The only requirement for relatedness is that "the *suit* must arise out of or relate to the defendant's contacts with the *forum*." *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773, 1780 (2017) (internal quotation and alteration marks omitted; emphasis in original). CSX's contacts with South Carolina include its Division Headquarters to which it required Dean to report a derailment and from which it directed Virginia railyard operations and ordered Dean to work overtime. The overtime resulted in his exhaustion and led to his injuries. (R. pp. 13-15, 33-34). The suit arises out of or relates to CSX's South Carolina contacts.

Third, CSX's discussion of where the tortious conduct occurs again misses the point. (Br. of Resp't p. 16). Dean does not have to prove the occurrence of a tort in South Carolina.[5] To satisfy the relatedness requirement, Dean shows that part of the conduct that proves his tort cause of action relates to and arises out of CSX's South Carolina contacts. The point is that CSX's South Carolina activities at its Division Headquarters gave rise to the alleged tort and relate to the FELA

Carolina." (emphasis added)); *Denver Truck & Trailer Sales v. Design & Bldg. Servs.*, 653 N.W.2d 88, 93-94 (S.D. 2002) (holding a phone call threatening a lien is insufficient to find defendant "could have reasonably anticipated being haled into court" in the forum and noting that anticipation of being haled into court is relevant to purposeful availment (internal quotation marks omitted)); *Michiana Easy Livin' Country, Inc. v. Holten*, 168 S.W.3d 777, 789 (Tex. 2005) (holding a single, unsolicited phone call made by a forum resident to a non-resident defendant does not constitute "purposeful availment of any jurisdiction in which the [caller] happens to live").

[5] Even the long-arm statute refers to only "a tortious act in whole ***or in part*** in this State." S.C. Code Ann. § 36-2-803 (2003) (emphasis added).

cause of action. Notably, CSX cites minimal law on the relatedness requirement. The United States Supreme Court described it as "a controversy [that] is related to or arises out of a defendant's contacts with the forum." *Helicopteros Nacionales De Colombia v. Hall*, 466 U.S. 408, 414 (1984). Dean's FELA action is a controversy that is related to or arises out of CSX's Division Headquarters in South Carolina that exercised authority over and directed work orders to him in Virginia.

Finally, CSX asks the Court to address the underlying merits of the FELA action by arguing Koster's work order "is not the action that led to any of Appellant's alleged injuries or damages." (Br. of Resp't p. 21). Not only is that improper merits analysis on a Rule 12(b)(2), SCRCP, motion, it is directly contradicted by the record. Dean alleges that, on the day of his injuries, he was working "with only four hours rest between" his two shifts and "as he was driving he 'blacked out,' likely due to the pain and his exhaustion at having worked over twenty hours of the previous twenty-four, and the truck crashed into a telephone pole." (R. pp. 13-14). Dean also alleges "that CSX failed to schedule sufficient time off for Plaintiff to rest before resuming his duties for Defendant." (R. p. 15). These are direct allegations that the lack of rest (resulting from Koster's order) caused his injuries.

III. The lower court erred in relying on a general jurisdiction opinion to hold that specific jurisdiction does not exist.

The lower court relied on *BNSF Railway Co. v. Tyrrell*, 137 S. Ct. 1549 (2017), a general jurisdiction case, to hold that there is not specific jurisdiction in this case. (R. p. 4). The extent of the lower court's reliance on the case demonstrates the legal error. The lower court criticized Dean for arguing it could exercise specific jurisdiction in light of *BNSF*'s "clear ruling" and "striking similarities to this case." (R. p. 4).

CSX argues the lower court compared this case to *BNSF* to show that the fact that CSX "has thousands of miles of track and business operations in South Carolina, like BNSF does in

Montana, [does] not automatically subject [it] to personal jurisdiction in South Carolina." (Br. of Resp't p. 11). This is contrary to the lower court's description of the facts of *BNSF*. It wrote: "like this case, the railroad was neither incorporated nor had its principal place of business in the forum state, the plaintiff's alleged injuries occurred in a non-forum state, and the plaintiff did not live or work in the forum state." (R. p. 4). These alleged "striking similarities" are not relevant to the relatedness requirement.

The lower court's reliance on *BNSF* to find specific jurisdiction did not exist in this case is reversible error.

IV. The lower court erred in finding the exercise of personal jurisdiction over CSX would be constitutionally unreasonable.

CSX does not dispute the lower court's failure to consider the four factors for constitutional reasonableness, *Cribb v. Spatholt*, 382 S.C. 490, 499-500, 676 S.E.2d 714, 719 (Ct. App. 2009), but argues those factors are not "an exclusive or mandatory list" for the court to consider. (Br. of Resp't p. 22). That is incorrect. The Supreme Court and this Court hold that the lower court "must consider" the fairness prong factors. *State v. NV Sumatra Tobacco Trading, Co.*, 379 S.C. 81, 91, 666 S.E.2d 218, 223 (2008) ("Under the fairness prong, the court ***must*** consider: . . . ." (emphasis added); *Cockrell v. Hillerich & Bradsby Co.*, 363 SC. 485, 492, 611 S.E.2d 505, 508 (2005) (same); *Leggett v. Smith*, 386 S.C. 63, 76, 686 S.E.2d 699, 706 (Ct. App. 2009) (same); *Cribb*, 382 S.C. at 500, 676 S.E.2d at 719 (same); *Moosally v. W.W. Norton & Co.*, 358 S.C. 320, 331, 594 S.E.2d 878, 884 (Ct. App. 2004) (same).

Contrary to CSX's argument, the lower court did not consider the fairness prong factors. It did not cite to or conduct any analysis of them. In a single paragraph, the lower court discussed the phone call from Dean to Koster and found it "is simply too tenuous of a connection to comply

with Due Process." (R. pp. 9-10). The court then wrote, "[a]s such," the exercise of personal jurisdiction over CSX in this case "would be constitutionally unreasonable." (R. p. 10).

Referring to a "single phone call made by Plaintiff" is not a consideration of the duration of CSX's activities in South Carolina. The discussion of the Florida safety suit is not a consideration of the convenience of the parties or South Carolina's interest in this litigation. (Br. of Resp't pp. 22-23). The lower court addressed the Florida safety suit only for its conclusion that Dean has a "remedy." (R. p. 10).

The lower court was required to but did not consider the factors for constitutional reasonableness. As explained in Dean's Brief, it is constitutionally reasonable for South Carolina to exercise specific personal jurisdiction over CSX in this case. (Br. of App. pp. 19-20).

V. The lower court erred in considering the Florida "safety suit."

CSX does not respond to Dean's arguments that (1) the availability of another forum does not mean jurisdiction in South Carolina is unconstitutional and (2) the focus of specific jurisdiction is on the defendant's contacts with the forum state and not the availability of another forum. (Br. of App. p. 20). Instead, it argues the Florida safety suit is relevant to the fairness prong of the constitutional reasonableness analysis. (Br. of Resp't pp. 23-24). It cites to no law that the availability of relief in another jurisdiction is relevant to whether the forum state may constitutionally exercise personal jurisdiction over the defendant.

Contrary to CSX's assertion, no part of the specific jurisdiction analysis involves "weighing one state's interest in exercising jurisdiction against another." (Br. of Resp't p. 23). It only involves the forum state's "interest in exercising jurisdiction." *Cribb*, 382 S.C. at 500, 676 S.E.2d at 719.

Finally, CSX cannot (for the first time on appeal) invoke principles of comity because it failed to argue it as a basis for the motion to dismiss. Under Rule 12(b)(8), SCRCP, a defendant

must plead that "another action is pending between the parties for the same action." CSX filed its motion to dismiss based only on Rule 12(b)(2), SCRCP. (R. pp. 18-19). Therefore, the lower court did not have a legal basis to dismiss the case based on the existence of another pending action. Regardless, CSX cites to no law that comity is a basis for finding a state lacks personal jurisdiction over a defendant.

CONCLUSION

For the reasons stated in Dean's briefs, the Court should reverse the lower court and find specific personal jurisdiction exists over CSX in South Carolina in this case.

Respectfully submitted,

Dated: February 17, 2021

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CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that the Final Brief of Appellant and Final Reply Brief of Appellant comply with Rule 211(b), SCACR.

February 17, 2021

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