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 BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

This is a case filed by a Virginia resident against a Virginia corporation relating to an alleged incident that occurred in Virginia. Appellant Joseph Dean (hereinafter "Appellant") filed this action in the Florence County Court of Common Pleas on April 1, 2020 alleging a claim under the Federal Employers Liability Act ("FELA") against his employer, Appellee CSX Transportation, Inc. (hereinafter "CSXT"). Appellant alleges that CSXT was negligent with respect to an incident in which Appellant was allegedly injured that occurred in Richmond, Virginia on or about April 17, 2017 while Appellant both lived and worked in Virginia for CSXT. *See Compl* .(R. pp. 12-17) Appellant also filed the exact same lawsuit against CSXT in Duval County, Florida on April 8, 2020, and that case is in discovery and remains pending. *See Florida Comp.* (R. pp 47-59). On April 15, 2020, CSXT filed a motion to dismiss the South Carolina case pursuant to Rule 12(b)(2) of the South Carolina Rules of Civil Procedure alleging that the court lacked personal jurisdiction over CSXT in this case. *See Mtn. to Dismiss* (R. pp. 18-22). A hearing was held before the Honorable Michael G. Nettles on May 26, 2020, attended by counsel for all parties. On June 17, 2020, the trial court entered an Order granting CSXT's motion and dismissing the case without prejudice. *See Trial Ct. Order* (R. pp. 3-11). Appellant filed a timely notice of appeal on July 16, 2020.

STATEMENT OF FACTS

This case arises out of an April 17, 2017 accident that occurred in Richmond, Virginia while Appellant was working for CSXT. CSXT is a Virginia corporation with its principal place of business in Florida, *See Lamp Aff.* (R. pp. 21-22), and Appellant concedes that CSXT is not "at home" or subject to general jurisdiction in South Carolina. *See Mem. in Opp. to Mtn. to Dismiss*, (R. p. 25 at ¶ 3) ("CSX asserts that it is not subject to general jurisdiction in South Carolina, which Mr. Dean does not dispute."). Appellant worked as a Trainmaster for CSXT in Richmond, Virginia at CSXT's Richmond Yard. *See Compl.* (R. p. 13 at ¶ VII) The Richmond Yard was Appellant's home terminal, and Appellant had lived in Virginia and worked in this position since 2012. *See Appellant's Aff.*, (R. p. 32-34 at ¶ 5). Appellant's direct boss was a Terminal Manager, who also worked in Richmond, Virginia. *Id.* at ¶ 6.

According to Appellant, on April 17, 2017, Appellant allegedly saw a broken knuckle in the Richmond yard that was obstructing a walking area, which he attempted to move. *Compl.*, (R. pp. 13-14 at ¶ VIII). When he attempted to pick up the knuckle, he allegedly stepped into a hole, which caused a "pop" in his back. *Id.* After reporting this alleged injury, Appellant attempted to return to the CSXT office at the Richmond Yard in his truck. *Id.* He allegedly "blacked out" while driving and crashed into a telephone pole, which further injured Appellant. *Id.*

In an effort to link this claim in some way to South Carolina, however, Plaintiff alleges that the sequence of events leading up to his alleged injury began almost 36 hours earlier on April 15, 2017, when Appellant reported to work for his regular night shift at the Richmond Yard

at approximately 5:30 PM. *See Appellant's Aff.* (R. p. 33 at ¶ 9).[1] Then, in the early morning hours of April 16, 2017, while Appellant was on duty, a train derailment occurred in the Richmond Yard. *Id.* at ¶ 10. At the time of this derailment, Appellant's boss, the Richmond, Virginia Terminal Manager, was not working, and Appellant made the decision to call the Florence Division Manager, Larry Koster (who was his boss's boss), to report the derailment. *Id.* at ¶ 11. Koster allegedly told Appellant in this one telephone call to remain on duty to take care of the derailment on April 16, 2017. *Id.* Appellant's shift between April 15, 2017 and April 16, 2017 was allegedly nineteen hours. *See Compl.*, (R. pp. 13-14 at ¶ VIII). Appellant went off duty for about four (4) hours once this shift ended before reporting back to work at 6:00 p.m. on April 16 for his regularly scheduled night shift. *Id.*

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." *Cockrell v. Hillerich & Bradsby Co.*, 363 S.C. 485, 491, 611 S.E.2d 505, 508 (2005) (citing *Engineered Prods. v. Cleveland Crane & Eng'g*, 262 S.C. 1, 201 S.E.2d 921 (1974)). "The party seeking to invoke personal jurisdiction over a non-resident defendant by using South Carolina's long-arm statute bears the burden of establishing jurisdiction." *Power Products and Services Co., Inc. v. Kozma*, 379 S.C. 423, 430, 665 S.E.2d 660, 664 (Ct. App. 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." *Moosally v. W.W. Norton & Co., Inc.*, 358 S.C. 320, 328, 594 S.E.2d

[1] Because this case was decided on a motion to dismiss, there was little factual development in the circuit court except as it related to jurisdictional issues. CSXT's citations to the complaint and Appellant's Affidavit in this Statement of Facts simply reflects allegations made by Appellant but should not be construed as an admission by CSXT to any facts alleged except to the extent they relate to the jurisdictional issue decided by the circuit court.

878, 882 (Ct. App. 2004). "The decision of the trial court should be affirmed unless unsupported by the evidence or influenced by an error of law." *Cockrell*, 363 S.C. at 491, 611 S.E.2d at 508.

ARGUMENTS

I. THE LOWER COURT CORRECTLY FOUND THAT CSXT'S GENERAL BUSINESS OPERATIONS IN SOUTH CAROLINA AND OTHER CONTACTS WITH SOUTH CAROLINA UNRELATED TO THE LITIGATION DO NOT GIVE RISE TO SPECIFIC JURISDICTION OVER CSXT IN A CASE LIKE THIS ONE INVOLVING A VIRGINIA RESIDENT SUING A VIRGINIA CORPORATION OVER AN INCIDENT THAT OCCURRED IN VIRGINIA.

The trial court correctly ruled that it could not properly exercise specific personal jurisdiction in a FELA case brought against a corporation incorporated in Virginia, by a Virginia resident,[2] seeking recovery for alleged injuries that allegedly occurred in Virginia. Personal jurisdiction is the authority of a court over a particular person or entity. *Cribb v. Spatholt*, 382 S.C. 475, 481, 676 S.E.2d 706, 709-10 (Ct. App. 2009). It is exercised as either "general jurisdiction" or "specific jurisdiction." 382 S.C. at 482, 676 S.E.2d at 710. "General jurisdiction is the State's right to exercise personal jurisdiction over a defendant even through the suit does not arise out of or relate to the defendant's contacts with the forum." *Coggeshall v. Reproductive Endocrine Associates of Charlotte*, 376 S.C. 12, 16, 655 S.E.2d 476, 478 (2007). "Specific jurisdiction is the State's right to exercise personal jurisdiction because the cause of action arises specifically from a defendant's contacts with the forum." *Id.*

Appellant concedes that general jurisdiction does not exist in this case, but nevertheless the distinction between general jurisdiction and specific jurisdiction remains important in light of the arguments Appellant presents. In this regard, courts utilize two separate analyses when

2 While Appellant claims that he recently moved to South Carolina, he admits that at the time of the accident at issue he both lived and worked in Virginia.

determining whether there is general jurisdiction or specific jurisdiction. For general jurisdiction to apply, a defendant must have an "enduring relationship" with the forum state. *Cribb*, 382 S.C. at 497, 676 S.E.2d at 718. This "enduring relationship" exists if the defendant's contacts are "'continuous and systematic' as well as 'so substantial and of such a nature as to justify suit against the defendant on causes of action arising from dealings entirely different from those activities.'" *Id.*; *see BNSF Ry. Co. v. Tyrrell*, 137 S. Ct. 1549, 1558 (2017) (holding that "'[a] court may assert general jurisdiction over foreign (sister-state or foreign-country) corporations to hear any and all claims against them when their affiliations with the State are so 'continuous and systematic' as to render them essentially at home in the forum State.'"). Thus, general jurisdiction does not require a connection between the defendant's contacts with the forum and the litigation.

Conversely, the power of a South Carolina court to exercise specific jurisdiction does require such a connection to the litigation and arises from the long arm statute, codified at S.C. Code Ann. § 36-2-803. "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." *Cockrell*, 363 S.C. at 491, 611 S.E.2d at 508. "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." *Cribb*, 382 S.C. at 483, 676 S.E.2d at 711. To make this determination, courts 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 and fair." 382 S.C. at 484, 676 S.E.2d at 711. As to the "power" prong of the specific jurisdiction analysis, "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.* (emphasis added). Thus, "there must exist a clear, firm nexus between the acts of the defendant and the allegations forming the basis of the complaint." *Pitts v. Fink*, 389 S.C. 156, 164, 698 S.E.2d 626, 630 (Ct. App. 2010). In other words, "'[t]he substantial connection between the defendant and the forum State necessary for a finding of minimum contacts must come about by an action of the defendant purposefully **directed toward the forum State**.'" *Id.* (quoting *Asahi Metals Indus. Co. v. Sup. Ct. of Cal.*, 480 U.S. 102, 112 (1987)) (emphasis added). Specific jurisdiction cannot rest on a "random, fortuitous, or attenuated contact" between the defendant, the forum state, and the litigation. *See Moosally v. W.W. Norton & Co., Inc.*, 358 S.C. 320, 332, 594 S.E.2d 878, 884 (Ct. App. 2004).

The distinction between general jurisdiction and specific jurisdiction and the requirement that the forum contacts be connected to the allegations in the complaint for specific jurisdiction to apply was recently illustrated in an FELA action in federal court. In *Wheeler v. Norfolk Southern Railway Company*, C/A No. 3:19-CV-159 HTW-LRA, 2020 WL 6802835 (N.D. Miss. Mar. 26, 2020), the plaintiff was injured while working on the clean-up of a derailment in Louisiana, but he chose to bring suit in Mississippi, where the plaintiff resided. The plaintiff admitted that the court did not have general jurisdiction over Norfolk Southern but claimed that specific jurisdiction could exist. In rejecting this argument, the court held as follows:

> Wheeler was injured in Louisiana, as a result of Hulcher's operations in Louisiana and Wheeler's work in Louisiana. The only connection this case has to Mississippi is that Wheeler, the Plaintiff, resides in Mississippi. Therefore, this is not a lawsuit "arising out of or related to the defendant's contacts with the forum state." **To the extent Norfolk Southern does business in Mississippi (or not), those operations did not impact Plaintiff's injuries.**

2020 WL 6802835, at *3 (emphasis added).

Similarly, in *Galloway v. Illinois Central Railroad Company, Inc.*, C/A No. 18-14038, 2019 WL 2716947 (E.D. La. June 26, 2019), the plaintiff alleged that he was injured while working as a trackman in a railyard in Mississippi when a crane operator that was holding up a rail suddenly moved the crane, causing the rail to fall onto the plaintiff's left foot. The plaintiff argued that the court could exercise personal jurisdiction over the railroad in that case because "although the plaintiff's injuries occurred in Mississippi, his employment with defendant is in Louisiana and the injury occurred on a job that originated and ended in Louisiana." *Id.* at *1. The plaintiff, a resident of Louisiana, pointed out that the railroad conducted a significant amount of business in Louisiana, and the plaintiff received safety training in Louisiana as well as all of his paychecks and all other work-related payments. He argued that his training in Louisiana "led him to expect that the crane operator who dropped the piece of rail that caused his injuries would not move until directed to move." *Id.* at *3. However, the court rejected the plaintiff's invitation to exercise specific personal jurisdiction and held, "None of these facts show that the incident forming the basis of this action arises out of defendant's contacts with Louisiana. Plaintiff admits that the incident in which he was injured, and which forms the basis of his claim, occurred in Mississippi rather than Louisiana. . . . Plaintiff's attempt to tenuously connect the incident occurring in Mississippi to Louisiana by pointing to the location of his payment and his safety trainings is unpersuasive." *Id.*; *see Lebrun v. Kansas City Southern Railway Company*, No. 2:19-cv-00078-JRG-RSP, 2019 WL 4686523, at (E.D. Tex. Sept. 3, 2019) (finding that although the defendant had some connections to Texas, the mere fact that the plaintiff, a Louisiana resident who was injured in Louisiana, "was operating on a train car that was heading to Texas or any other state amounts to the random, fortuitous, or attenuated contact that the Fifth Circuit has instructed is insufficient.").

Similar to the FELA plaintiffs in *Wheeler* and *Galloway*, Appellant concedes that South Carolina courts do not have general jurisdiction over CSXT for any and all cases and instead argues only that specific jurisdiction exists as to this case. *See Appellant's Brf.*, at 4. As discussed below, this argument is misplaced and the trial court correctly ruled that Appellant failed in his burden to establish personal jurisdiction over CSXT in this case.

Contrary to Appellant's contention, in conducting its specific jurisdiction analysis, the lower court did not consider CSXT's alleged contacts with South Carolina separately rather than as a whole, nor did it turn a blind eye or "divorce itself" from CSXT's business operations within South Carolina or find that such operations were irrelevant to specific jurisdiction. Instead, the court meticulously followed the specific jurisdiction analysis set forth above, considered all of CSXT's contacts with South Carolina alleged by Appellant, and found that the alleged general contacts between CSXT and South Carolina do not create the substantial connection to the allegations of this case to permit the court to exercise specific jurisdiction.

Again, the allegations set forth in Appellant's Complaint are that on April 16, 2017, he was employed by CSXT as a trainmaster, and his "home terminal was [CSXT's] Richmond Yard in Richmond, Virginia." *See Compl.* (R. p. 13 at ¶ VII). He allegedly was required to work a "nineteen-hour shift" in Virginia the day before the incident at issue and only had four hours of rest before beginning his next shift on April 16. *Id.* (R. pp. 13-14 at ¶ VIII). While working in the Richmond Yard, Appellant allegedly stepped in a hole and injured his back. *Id.* Later, when attempting to return to the office at the Richmond Yard in his truck, Appellant allegedly "blacked out" and struck a telephone pole. *Id.* All of these events occurred in Virginia.

As to CSXT's alleged general contacts and operations within South Carolina, Appellant argued before the trial court that "CSX maintains significant South Carolina contacts, including a

division headquarters in Florence, two major rail yards, an intermodal terminal, over 1,800 miles of track, and approximately 1,000 employees." *See Trial Ct. Order* (R p. 5). This was basically a general jurisdiction argument that the trial court properly rejected. After recognizing the United States Supreme Court's holding in *Goodyear Dunlop Operations, S.A. v. Brown*, 564 U.S. 915, 927 (2011) that "[a] corporation's 'continuous activity of some sorts within a state . . . is not enough to support the demand that the corporation be amenable to suits unrelated to that activity," the trial court found that "the fact that CSXT has miles of track or over 1,000 employees within South Carolina cannot by itself subject CSXT to specific jurisdiction in this State." *Id.* (R. pp 5-6) (emphasis added). Likewise, as to Appellant's work in South Carolina for CSXT five years prior to the accident and his occasional contacts and meetings in South Carolina while he worked in Virginia, the trial court found "that the fact that Plaintiff at one time was an employee of CSXT in South Carolina and worked for the Florence Division while he lived in Virginia and occasionally attended meetings in South Carolina unrelated to this particular accident do not allow the Court to exercise specific personal jurisdiction over CSXT." *Id.* p. 6 (emphasis added). Thus, in conducting the specific jurisdiction analysis, the trial court correctly found that the business operations of CSXT within South Carolina and Appellant's previous work in South Carolina did not form the "substantial connection" or "clear, firm nexus" with the allegations of the Complaint required for the exercise of specific jurisdiction and were unrelated to Appellant's accident that occurred in Virginia while Appellant had been working in Virginia for five years.

BNSF Railway Co. v. Tyrrell, 137 S. Ct. 1549 (2017) does not support the exercise of specific jurisdiction in this case, nor was it error for the lower court to discuss the case in its ruling. As pointed out by Appellant, *Tyrrell* was a FELA case brought in Montana even though

neither plaintiff resided or suffered injury in Montana. The plaintiffs attempted to argue that there was general jurisdiction over BNSF in Montana, solely due to BNSF having "over 2,000 miles of railroad track and more than 2,000 employees in Montana" and admitted that there were no other connections with the state or specific jurisdiction. *Id.* at 1559. The Supreme Court rejected this claim, holding that these contacts were not sufficient for general jurisdiction. Moreover, the Court made clear that while "the business BNSF does in Montana is sufficient to subject the railroad to specific personal jurisdiction in that State **on claims related to the business it does in Montana**", this would not warrant jurisdiction over BNSF for all cases. *Id.* at 1559 (emphasis added). In this case, of course, Appellant's claim has nothing to do with the business CSXT does in South Carolina. Thus, the comparison in the trial court's order between this case and *Tyrrell* is solely meant to illustrate that just because CSXT has thousands of miles of track and business operations in South Carolina, like BNSF does in Montana, it is not automatically subject CSXT to personal jurisdiction in South Carolina. The trial court then, as discussed below, went on to find that the allegations in Appellant's Complaint were not sufficiently related to CSXT's contacts with South Carolina to subject CSXT to specific jurisdiction.

Despite admitting that CSXT's contacts with South Carolina do not give rise to general jurisdiction and the lower court's holding finding no connection between CSXT's general business operations in the State and this case, Appellant continues to point to CSXT's unrelated general business operations within South Carolina in a thinly veiled attempt to bolster his claim that South Carolina courts can exercise specific jurisdiction over Appellant's claims against CSXT. In his brief, Appellant again states, "CSX's South Carolina contacts include the Florence Division Headquarters, 1,800 miles of track, 1,000 employees, major rail yards and terminals,

and Dean's training and work assignments." *See Appellant's Brf.*, at 10. This attempt by Appellant to continue to interject CSXT's unrelated forum contacts into the specific jurisdiction analysis is precisely the type of "sliding scale approach" rejected by the United States Supreme Court in *Bristol-Myers Squibb Co. v. Superior Court of California*, 137 S. Ct. 1773 (2017). There, under the specific jurisdiction analysis set forth by California, "the strength of the requisite connection between the forum and the specific claims at issue [was] relaxed if the defendant ha[d] extensive forum contacts that [were] unrelated to those claims." *Id.* at 1781. The Supreme Court rejected this approach to specific jurisdiction and held, "Our cases provide no support for this approach, which resembles a loose and spurious form of general jurisdiction." *Id.* Instead, the Court reaffirmed that "[f]or specific jurisdiction, **a defendant's general connections with the forum are not enough**.'" *Id.* (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 927 (2011)) (emphasis added).

This Court should likewise reject such a "sliding scale" approach for this case. Appellant's accident in Virginia while working for a Virginia corporation has nothing to do with CSXT's business activities in South Carolina. As such, Appellant's continued attempt to support his claim of specific jurisdiction with CSXT's unrelated South Carolina contacts is unavailing and the trial court's ruling finding no personal jurisdiction over CSXT for this incident should be affirmed.

II. THE LOWER COURT CORRECTLY FOUND THAT THE ONE PHONE CALL PLACED BY APPELLANT IN VIRGINIA TO CSXT'S DIVISION MANAGER DID NOT CREATE THE SUBSTANTIAL CONNECTION BETWEEN THIS LITIGATION AND SOUTH CAROLINA NECESSARY FOR THE EXERCISE OF SPECIFIC JURISDICTION.

Given the absence of any connection between the Virginia derailment and accident that would authorize personal jurisdiction over CSXT in this case by South Carolina courts,

Appellant premises his specific jurisdiction argument solely on the basis of one call that he made from Virginia to his supervisor who allegedly was in South Carolina at the time of the call. Specifically, in his affidavit made in opposition to Respondent's Motion to Dismiss, Appellant stated, "At the time of the derailment, my boss, the Terminal Manager, was on vacation or otherwise not working. Therefore, I reported the derailment to the Division Manager, Larry Koster (who was my next higher up boss) as I am required to do. Larry Koster required me to remain on duty to take care of the derailment which required me to remain on the job almost 20 hours." *See Appellant's Aff.* (R. p. 33 at ¶ 12). Appellant asserts that this one phone call to his boss's boss was not "a random, single phone call," but was "a way in which Dean's FELA action 'arises specifically from a defendant's contacts with the forum' because it caused his injuries." *Appellant's Brf.* at 16. Appellant's argument is misplaced and, more importantly, it incorrectly stands the specific jurisdiction analysis on its head. As the cases cited above and discussed below attest, the focus for specific jurisdiction is on whether *the defendant* directed its activities toward a resident of the forum state. Here, it is undisputed that CSXT directed no activities at a resident of South Carolina. Rather, it was Appellant who allegedly directed his conduct toward South Carolina. Yet, Appellant cites no authority supporting the proposition that a Plaintiff, rather than Defendant, can create personal jurisdiction by virtue of *the plaintiff's* actions being directed at the forum state.

In this case, the lower court correctly applied the specific jurisdiction analysis set forth by South Carolina courts as well as the United States Supreme Court which provides that "[w]here a forum seeks to assert specific jurisdiction over an out-of-state defendant who has not consented to suit there, this 'fair warning' requirement' is satisfied if the defendant has 'purposefully directed' his activities **at residents of the forum**, . . . and the litigation results from alleged

injuries that 'arise out of or relate to' those activities. *Burger King Corp. v. Rudzewicz*, 571 U.S. 462, 472-73 (1985) (emphasis added).

No court has found that a plaintiff's residence or location is irrelevant to the specific jurisdiction determination. To the contrary, the complete holding from *Keeton v. Hustler Magazine, Inc.*, 564 U.S. 770 (1984), which Appellant fails to provide in his brief, is:

> **The plaintiff's residence is not, of course, completely irrelevant to the jurisdictional inquiry.** As noted, the inquiry focuses on the relations among the defendant, the forum and the litigation. Plaintiff's residence may well play an important role in determining the propriety of entertaining a suit against the defendant in the forum. That is, plaintiff's residence in the forum may, because of defendant's relationship with the plaintiff, enhance defendant's contacts with the forum. **Plaintiff's residence may be the focus of the activities of the defendant out of which the suit arises.** . . . But plaintiff's residence in the forum State is not a separate requirement, and lack of residence will not defeat jurisdiction established on the basis of defendant's contacts.

Id. at 780 (emphasis added). Thus, while the Court in *Walden v. Fiore*, 571 U.S. 277 (2014) did hold that "[t]he proper question is not where the plaintiff experienced a particular injury or effect but whether the defendant's conduct connects him to the forum in a meaningful way," the Court also continued to recognize that "[t]o be sure, a defendant's contacts with the forum State may be intertwined with his transactions or interactions with the plaintiff or other parties." *Id.* at 286, 290. In other words, while the focus of the specific personal jurisdiction analysis is the defendant's conduct and activities, a court must still look at which forum the case-related activities of the defendant are aimed or directed toward, and the plaintiff's location can be relevant to this analysis.

For instance, in *Walden*, the Court noted that the entirety of the defendant DEA agent's activities directed toward the plaintiffs occurred in Georgia while they were in Georgia and that none of the defendant's "challenged conduct had anything to do with Nevada itself." *Walden*,

571 U.S. at 289. In explaining why no "minimal contacts" existed between the defendant and the plaintiffs' residence of Nevada, the Court held:

> It is undisputed that no part of petitioner's course of conduct occurred in Nevada. Petitioner approached, questioned, and searched respondents, and seized the cash at issue, in the Atlanta airport. It is alleged that petitioner later helped draft a "false probable cause affidavit" in Georgia and forwarded that affidavit to a United States Attorney's Office in Georgia to support a potential action for forfeiture of the seized funds. . . . Petitioner never traveled to, conducted activities within, contacted anyone in, or sent anything or anyone to Nevada. In short, when viewed through the proper lens—whether the *defendant's* actions connect him to the *forum*—petitioner formed no jurisdictionally relevant contacts with Nevada.

Id. at 288-89. In other words, the *Walden* Court reaffirmed previous Supreme Court holdings that for specific jurisdiction purposes, "the plaintiff cannot be the only link between the defendant and the forum." *Id.* at 285; *see Gordon v. Huncke*, C/A No. 7:11-cv-2572-HMH-JDA, 2011 WL 13177173, at *3 (D.S.C. Sept. 27, 2011) ("Defendants are not subject to specific personal jurisdiction in South Carolina because their taking Plaintiff to Pageland was not purposefully directed at residents of South Carolina since Plaintiff was a resident of North Carolina at the time."). As such, in this case, as in *Walden*, Mr. Koster's alleged conduct in ordering Appellant, who was in Virginia, to continue working the derailment in Virginia did "not have anything to do with [South Carolina] itself," and is not a proper basis for specific jurisdiction over CSXT in South Carolina.

In fact, while Appellant asserts that "the location of the tortious conduct is a proper forum for specific jurisdiction," Appellant fails to identify any alleged tort by CSXT or Mr. Koster that actually occurred in South Carolina. *See Appellant's Brf.*, at 12. Appellant asserts that the South Carolina long-arm statute allows a South Carolina court to exercise personal jurisdiction over a defendant due to the defendant's "commission of a tortious act in whole or in part in this State."

S.C. Code Ann. § 36-2-803. Appellant argues that "CSX committed a tortious act in whole or in part in South Carolina by inadequately training Dean and ordering him to work overtime and return for his next shift with inadequate rest." *Appellant's Brf.*, at 14. However, in interpreting the long-arm statute, the South Carolina Supreme Court has held, "Generally, the place of the wrong is determined where the last event necessary to make an actor liable for an allege tort takes place, or, as otherwise stated, the place where the injury is suffered rather than the place where the act which caused the injury was committed." *Parker v. Williams & Madjanik, Inc.*, 270 S.C. 570, 574, 243 S.E.2d 451, 454 (1978); *see Aviation Associates and Consultants, Inc. v. Jet Time, Inc.*, 303 S.C. 502, 506-07, 402 S.E.2d 177, 179 (1991) ("It is well-settled that 'a contract is executed when the last act necessary for its formation is done and at the place where the final act is done.'"). The trial court recognized this fact and stated that "courts in other jurisdictions interpreting similar language have found that 'when the 'tortious act' is not physically tangible, such as a telephone call, it is not the situs of where the telephone call was placed or received but instead, the situs of where the resultant injury to Plaintiff was suffered.'" *See Trial Ct. Order*, (R. p. 9) (quoting *Dickerson v. Perdue*, No 07-CV-206 DRH, 2007 WL 2122418, at *4 (S.D. Ill. July 20, 2007). Thus, to the extent that Mr. Koster's alleged instructions to Appellant to work the derailment could constitute a tort, the location of this alleged tortious conduct for specific jurisdiction purposes was Virginia, as that is the place where Appellant's accident and injuries occurred.

Moreover, the telephone call was not placed by Mr. Koster, but it was instead Appellant who initiated the call. *See Appellant's Aff.,* (R. p. 33 at ¶ 11). The lower court keenly recognized this distinction and held, "Plaintiff's phone call to Koster therefore does not constitute tortious conduct *by the defendant* directed at South Carolina as is required for the

Court to exercise personal jurisdiction in this case." *See Trial Ct. Order*, (R. p. 9-10 at 7-8). Appellant claims "[t]hat Dean placed the phone call to Mr. Koster is an incorrect focus." *See Appellant's Brf.*, at 17. However, in considering personal jurisdiction allegedly arising from telephone calls, South Carolina courts focus on who initiated the calls. In *Aviation Associates and Consultants, Inc. v. Jet Time, Inc.*, 303 S.C. 502, 402 S.E.2d 177, the Court of Appeals held as follows when finding a lack of personal jurisdiction:

> In regard to the character and circumstances of [defendant's] acts, there is nothing before this Court that indicates that [defendant] purposefully availed itself of the privilege of conducting business activities in South Carolina to the extent necessary to find personal jurisdiction over it in this case. **Every communication between the parties was initiated by [plaintiff].** [Defendant] merely responded to [plaintiff's] unsolicited, unilateral contact by talking on the telephone to [[plaintiff] when [plaintiff] called, and returning one telecopy in which it acquiesced to [plaintiff's] request to register two of its customers with [defendant]. This type of attenuated, isolated contact should not subject [defendant] to suit in the in the initiator's home forum.

303 S.C. at 508-09, 402 S.E.2d at 180 (emphasis added). In fact, as set forth above, focusing on whether the defendant or the plaintiff initiated the call is completely in line with South Carolina jurisprudence on specific jurisdiction which requires a finding that "*the defendant* directed his activities to residents of South Carolina and that the cause of action arises out of or relates to those activities." *Cribb*, 382 S.C. at 483, 676 S.E.2d at 711 (emphasis added); *see Walden v. Fiore*, 571 U.S. 277, 285 (2014) ("But the plaintiff cannot be the only link between the defendant and the forum.").

Furthermore, even if Appellant's telephone call to Mr. Koster could somehow be considered activity by CSXT occurring in South Carolina, it cannot be argued that this activity was directed at a resident of the forum as the precedent cited above requires. Moreover, this singular phone from Virginia to South Carolina does not form the "substantial connection"

between the litigation and South Carolina required for the exercise of specific jurisdiction. *See Pitts v. Fink*, 389 S.C. 156, 164, 698 S.E.2d 626, 630 (Ct. App. 2010). No matter how Appellant packages the argument, Appellant cannot escape the fact that this single communication initiated by him is precisely the type of "random, fortuitous, or attenuated contact" that other courts have found insufficient to support specific jurisdiction. *See Moosally v. W.W. Norton & Co., Inc.*, 358 S.C. 320, 332, 594 S.E.2d 878, 884 (Ct. App. 2004).

To illustrate this point consider the following. CSXT's Florence Division covers multiple southeastern states, including South Carolina, North Carolina, Georgia, Virginia and West Virginia. Plaintiff's affidavit is silent as to how he has personal knowledge that Koster was in South Carolina at the time of the call as opposed to traveling in any of the other states he supervised. Even assuming Plaintiff is correct and Koster was in South Carolina when he received a call from a Virginia resident asking about a Virginia derailment and requesting instructions about what to do in Virginia, personal jurisdiction simply does not turn on the fortuity of where Koster happened to be located when Plaintiff reached him by phone. This is particularly true in a case like this where the incident and subsequent injuries alleged by Plaintiff had nothing to do with South Carolina and no connection to this state, but also occurred in Virginia.

The trial court's ruling that a single call from an out of state resident directed to an individual allegedly in South Carolina cannot create personal jurisdiction is also consistent with precedent. For example, a federal court in South Carolina has explicitly held that a "single phone call . . . is not sufficient to establish specific jurisdiction over a defendant." *Scansource, Inc. v. Mittel Networks Corp.*, C/A No. 6:11-cv-00382-GRA, 2011 WL 2550719, at *3 (D.S.C. June 24, 2011); *see Porter v. Berall*, 293 F.3d 1073, 1076 (8th Cir. 2002) ("Contact by phone or

mail is insufficient to justify exercise of personal jurisdiction under the due process clause."). For instance, in *Cleveland v. Accumarine and Transp., LP*, C/A No. 6:10-cv-01334-JMC, 2011 WL 939011 (D.S.C. Mar. 16, 2011), a Jones Act case, the plaintiff claimed that he was injured while working on the defendant's tug boat on the Mississippi River just above Baton Rouge, Louisiana. Nevertheless, the plaintiff filed suit in the District of South Carolina and argued that the court could exercise specific jurisdiction over the defendant because the defendant was doing business in the State of South Carolina, and the plaintiff was hired by the defendant in South Carolina. *Id.* at *3. The plaintiff alleged that he received a phone call from the defendant in South Carolina offering him employment, and the defendant further authorized medical care for the plaintiff in South Carolina after the accident. In fact, the plaintiff alleged that the defendant's failure to pay for medical care caused him to receive collection notices from a collection agency, and he sought resulting damages. With respect to the phone call on which the plaintiff accepted employment with the defendant, the court held, "Defendant's telephone call to Plaintiff in South Carolina is insufficient to constitute minimum contacts with the State of South Carolina." *Id.* at *4.

Similarly, in *Denver Truck and Trailer Sales, Inc. v. Design and Building Services, Inc.*, 653 N.W.2d 88 (S.D. 2002), a South Dakota corporation filed suit in South Dakota against a Colorado corporation with which it had contracted to redesign the plaintiff's Colorado location. As part of the suit, the plaintiff alleged tortious interference with a contract when the defendant Colorado corporation's attorney contacted the South Dakota corporation via a telephone call and threatened to file a materialman's lien on the building in Colorado, while the company was under negotiations to sell the building. In finding this phone call in which an alleged tortious act occurred insufficient for personal jurisdiction purposes, the South Dakota Supreme Court held

that "the mere fact of threatening a materialman's lien on property located in Colorado is insufficient to support a finding that [the Colorado corporation] could have reasonably anticipated being 'haled into court' in South Dakota." 653 N.W.2d at 93; *see Michiana Easy Livin' Country, Inc. v. Holten*, 168 S.W.3d 777, (Tex. 2005) (disapproving of opinions holding that "specific jurisdiction is necessarily established by allegations or evidence that a nonresident committed a tort in a telephone call from a Texas number"). Thus, even though Appellant alleges that Mr. Koster's "communication during the phone call is tortious conduct that caused his injuries," this repackaging of Appellant's argument does not get him around the fact that this single telephone call is insufficient to support specific jurisdiction. *See Appellant's Brf.*, at 15.

Moreover, even if this alleged conduct by Mr. Koster during this one phone call in directing Appellant to continue working the Virginia derailment could somehow form a connection to South Carolina, which it cannot, it does not constitute the "substantial connection" required for specific jurisdiction. *See Aviation Associates and Consultants, Inc.*, 303 S.C. at 508, 402 S.E.2d at 180 ("Although a single act may support jurisdiction, it must create a 'substantial connection' with the forum."). A review of Appellant's Complaint shows that the real impetus of this litigation is the fact that Appellant was first allegedly injured when he was walking through CSXT's Richmond, Virginia yard and stepped into a hole. *See Compl.* (R. pp. 13-14 at ¶ VIII). The first particular of alleged negligence against CSXT in the Complaint is that CSXT "failed to inspect and provide proper inspection, maintenance and repair of the Yard to be certain same was safe for its employees, including Plaintiff." *Id.* at ¶ X.b.

Additionally, this alleged injury in the Richmond Yard on April 17, 2017 and Appellant's subsequent automobile accident occurred well after Appellant's alleged phone call with Koster on April 16, 2017 and after Appellant had ended his previous shift and begun his normal shift.

Appellant's affidavit states that he reported the derailment to Mr. Koster in the early morning hours of April 16, 2017 and that Mr. Koster required him "to remain on the job almost 20 hours." *See Appellant's Aff.*, (R. p. 33 at ¶¶ 10-11). Appellant allegedly worked a "nineteen-hour shift" between April 15, 2017 and April 16, 2017 and then a thirteen-hour shift between April 16, 2017 and April 17, 2017 with "four hours rest between the two" shifts. *See Compl.*, (R. pp. 13-14 at ¶ VIII). While Appellant's affidavit states that Mr. Koster in this phone call in the early morning hours of April 16, 2017 required Appellant to complete the previous nineteen-hour shift to help with the derailment, there is no allegation that there was any subsequent contact with Mr. Koster or that he was the person who required Appellant to return to work the next day with only four hours rest to begin his normal shift. Appellant's affidavit merely states, "With virtually no rest, **I was required to begin my normal shift** at about 6:00 PM on April 16, 2017 and I worked without rest until 2-2:30 AM on April 17, 2017 when I was injured" and makes no mention of Mr. Koster giving this subsequent order. *See Appellant's Aff.*, (R. p. 33 at ¶ 12) (emphasis added). In other words, Mr. Koster's action in allegedly taking a phone call from Appellant the day before the accident and asking Appellant to assist with the derailment investigation does not constitute negligence, has no connection with Appellant stepping in a hole and wrecking his vehicle the next day, and it certainly is not the action that allegedly led to any of Appellant's alleged injuries or damages. *See Gray v. Southern Facilities, Inc.*, 256 S.C. 558, 567, 183 S.E.2d 438, 442 (1971) (stating that "a cause of action for negligence occurs only when injury or damage have been caused thereby to the complaining party"). Thus, Mr. Koster's one phone call from Appellant in Virginia during Appellant's previous shift in Virginia that related only to Appellant's work during that shift, does not form the "substantial connection" to this litigation

necessary to support specific jurisdiction over CSXT in South Carolina. Instead, it is at most a "random, fortuitous, or attenuated contact." *See Moosally*, 358 S.C. at 332, 594 S.E.2d at 884.

III. THE LOWER COURT CORRECTLY FOUND THAT THE EXERCISE OF PERSONAL JURISDICTION OVER CSXT IN THIS CASE WOULD BE UNREASONABLE AND UNFAIR.

Finally, the lower court fully considered the "fairness" prong of the personal jurisdiction analysis and properly found that the exercise of personal jurisdiction over CSXT in this instance would not be reasonable and fair. *See Trial Ct. Order*, (R. p. 10); *Cribb*, 382 S.C. at 483, 676 S.E.2d at 711. Appellant is correct that in making this determination, courts can 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." *Appellant's Brf.*, at 19 (quoting *Cribb*, 382 S.C. at 499-500, 676 S.E.2d at 719). However, Appellant's contention that the lower court's failure to consider these factors is "reversible legal error," in addition to being factually inaccurate, is an incorrect statement of law. South Carolina courts hold that this list of factors expounded by Appellant is by no means an exclusive or mandatory list for a trial court to consider under the fairness prong. *See Southern Plastics Co. v. Southern Commerce Bank*, 310 S.C. 256, 263, 423 S.E.2d 128, 132 (1992) ("In order to determine whether the exercise of jurisdiction over a foreign defendant is fair, we **may** look to the following factors, **among others**").

Furthermore, the trial court did consider the factors expounded by Appellant. As to the duration of CSXT's activities in this state and the character and circumstances of CSXT's acts related to this litigation, the lower court held, "This single phone call made by Plaintiff from Virginia is simply too tenuous of a connection to comply with Due Process." *Trial Ct. Order*, (R. p. 10). As to the convenience of the parties and South Carolina's interest in this litigation,

the Court noted that "[i]t is undisputed that Plaintiff has filed an identical action in Florida, where CSXT has its principal place of business" and that "the parties can litigate in Florida whether Virginia or Florida is the proper venue for Plaintiff to pursue his claims." *Id.* The trial court fully considered all relevant factors and properly concluded that it would be unreasonable and unfair to exercise personal jurisdiction over CSXT in this case. This ruling should be affirmed. *See Cockrell*, 363 S.C. at 491, 611 S.E.2d at 508 ("The decision of the trial court should be affirmed unless unsupported by the evidence or influenced by an error of law."

IV. THE LOWER COURT CORRECTLY CONSIDERED THE PENDENCY OF THE FLORIDA "SAFETY SUIT" IN ANALYZING THE "FAIRNESS" PRONG OF THE DUE PROCESS ANALYSIS.

The lower court's consideration of, and reference to, the lawsuit Appellant has pending in Florida relating to this same incident was entirely proper and in no way constituted legal error. Obviously, the existence of another suit in another forum involving the same exact parties and issues falls squarely within the analysis under the "fairness" prong of the due process analysis and is a proper consideration by the trial court when weighing one state's interest in exercising jurisdiction against another. An actual filed suit in another forum is far different than a defendant posing a hypothetical and pointing "to the availability of a forum where it is subject to general jurisdiction." *See Appellant's Brf.*, at 21. In fact, based on principles of comity, some courts will decline to exercise jurisdiction in a case where the exact same parties have a simultaneously pending case in other jurisdiction. *See Sparrow v. Nerzig*, 228 S.C. 277, 286, 89 S.E.2d 718, 722 (1955) ("Thus where a prior action is pending in the state court between the same parties and involving the same issues, and a decision by that court would adjudicate all the rights of the parties, the federal court, although having jurisdiction to entertain an action or declaratory judgment brought by a defendant in the pending cause, will decline to exercise it.");

Brightpoint, Inc. v. Pedersen, 930 N.E.2d 34, 39-40 (Ind. App. 2010) ("Courts in other jurisdictions likewise have concluded that where an action concerning the same parties and the same subject matter has been commenced in another jurisdiction capable of granting prompt and complete justice, comity ordinarily should require staying or dismissal of a subsequent action filed in a different jurisdiction, in the absence of special circumstances."). Thus, the lower court's consideration of the so-called Florida "safety suit", which is not on appeal and in which discovery is proceeding on the very issues raised in Appellant's Complaint in this case, was proper under the "fairness" prong, as it is relevant to South Carolina's interest in litigating this case and clearly supports a finding that an exercise of personal jurisdiction over CSXT in this South Carolina case is unfair and unreasonable.

CONCLUSION

For the reasons stated, this Court should affirm the judgment of the circuit court finding that specific personal jurisdiction over CSXT does not exist in South Carolina in this case and dismissing the Complaint without prejudice.

Respectfully submitted,

February 24, 2021

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