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Supreme Court of Texas.
MOKI MAC RIVER EXPEDITIONS, Petitioner,
v.
Charles DRUGG and Betsy Drugg, Individually, and as Representatives of
the
Estate of Andrew Patrick Drugg, Respondents.
No. 04-0432.

November 17, 2005

Appearances:
E. Thomas Bishop, (argued), Bishop & Hummert, P.C., Dallas, TX,
for petitioner.
Steven E. Aldous, (argued), Braden, Vamer & Aldous, P.C., Dallas,
TX, for respondent.

Before:

Chief Justice Wallace B. Jefferson, Justice Don R. Willett,
Justice Harriet O'Neill, Justice David Medina, Justice Paul W. Green,
Justice Nathan L. Hecht, Justice Dale Wainwright, Justice Phil
Johnson, Justice Scott A. Brister.

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CHIEF JUSTICE JEFFERSON: Please be seated.
The Court is ready to hear argument in 04-0432, MOKI MAC RIVER
EXPEDITIONS v. Drugg.

ORAL ARGUMENT OF E. THOMAS BISHOP ON BEHALF OF THE PETITIONER

SPEAKER: May it please the Court. Mr. E. Thomas Bishop will
present argument for the petitioner. Petitioner has reserved five
minutes for rebuttal.

MR. BISHOP: Good morning.

When Al Quist and the man who subsequently became known as Moki
Mac allegedly did it again leading boy scout troops on treks to the
Grand Canyon 50 years ago. They probably anticipated desert days, cold
nights, and perhaps even an occasional rattlesnake. But members of the
Court I submit to you the never anticipated nor would they
constitutionally required to anticipate being hold into a Dallas
[inaudible] years later.

JUSTICE O'NEILL: Present that in half the Internet then.

MR. BISHOP: They did not comment on the Internet direct --

JUSTICE: And in markets have changed since then obviously, but how is this different or is it different from the Michiana case that the court decided not too long ago?

MR. BISHOP: Respectfully, Justice Medina, I think it is a stronger case for the absence of personal jurisdiction which is what we're talking about for two reasons. In Michiana, there's no question about the fact that there was delivery on the product within the state of Texas. Moki Mac had never delivered the product in the state of Texas. It's never led a lasting trip. It's never led a hiking trip in the state of Texas. And the second thing that you have in the Michiana case, your Honor, is a misrepresentation or at least the allegation of a misrepresentation that truly does form the core of the case. I asked you to examine, I asked all the members of the Court to examine what's this case really about? Is this about a brochure? Is this about a Visitor's Acknowledgment of Risk or, members of the Court, is it about a slip-and-fall on a hiking trail in the Grand Canyon?

And what I submit to the Court, respectfully, is that it really is different. A business injury in Texas is not the equivalent of a bodily injury outside of Texas. And I think from the handout that we have before you and from all the briefing that we have supplied, you can see that in the analysis of the cases.

JUSTICE O'NEILL: Well, it strikes me that significant needs of Michiana was the factory outlets. Michiana did not advertise at all, did not try to sell to Texans, and responded to an isolated phone call initiated by a Texan. It appears in the record here that is -- I'm sorry if you don't have what piece -- a significant piece of Moki Mac business comes from Texas and they want that. They solicit that. They -- if someone makes an inquiry or hits their website, they go on in distribution list. And --

MR. BISHOP: What's the difference there? Fair question limits you about getting a fair answer. First of all, let me back up and again state to you and emphasize this, this is not a business injury case. This is a bodily injury case. And I submit to you, Justice O' Neill, that makes all the difference because what for are bodily injury, what for -- whatever negligence that may have occurred on that hiking trail in the state of Arizona, none of us would be here. And what I suggest to you that Michiana holds when it talks about attenuated contacts or when it talks about for fortuitous contacts or random contacts.

In my report, what I suggest to you that cases other than Michigan Supreme Court, like the Buffalo Bill Cody's Lodge case or somebody fell off a horse in Wyoming, or a ski resort in Canada, or even a Holiday Inn in the case of the Wims v. Beach Terrace. What those courts say to us is this, the complaint in this action involves a personal injury that occurred in New Jersey and then allegedly resulting from defendant's negligent conduct in maintaining its Motor Inn. While it is true that the plaintiffs might not have visited the Motor Inn, if plaintiffs have not seen the defendant's brochure, the puzzle link between the brochures and the injury is simply too attenuated to say that the -- an injury arose from defendant's activities.

JUSTICE O'NEILL: So -- so I wanna book a cruise and I got a Web site and I find the cruise line and it says safety equipment will be provided.

MR. BISHOP: Right.

JUSTICE O'NEILL: We entered into the contract. They pay you X amount and here's what you gonna provide and I go on the cruise, the boat sinks and there are no life preservers.

MR. BISHOP: Right. You probably have a valid claim against where

the cruise land presides. I don't know what country you're in or what ocean waters are you in, you may have a valid claim against them there. But the mere fact that you got a brochure from them --

JUSTICE O'NEILL: No, it's a contract. I mean contract --

MR. BISHOP: It is a contract but what is --

JUSTICE O'NEILL: So these were breach of contract claims, do you think there'll be specific jurisdiction here?

MR. BISHOP: I do not. And I'm again focusing loudly and proudly, I'm saying it without reservation. Bodily injury and personal injury claims are different. And when you examine the case law courts throughout the nation that had faced Justice O' Neill, Disney World, Holiday Inn, Beach Terrace, Hyatt Corporation or Buffalo Bill Cody's Resort in Wyoming, they've said you know what, it's just too attenuated to say "Gosh, I read that brochure, they kinda lured me into it." And the reason they say that is because without the causal conduct where the injury and the accident occurred, in this case undisputedly in Arizona, there is no suit.

JUSTICE: So the plaintiff in Michiana would have received his SUV and it had some defect on it. The next morning he drives and he is injured. You're saying that -- that would have changed the outcome in Michiana?

MR. BISHOP: Well, my sense in Michiana is the court said and I'm trying to remember the exact language in majority opinion.

JUSTICE: It is a well-written opinion by Justice Brister who said that.

MR. BISHOP: Well, I'm sure he'd appreciate it. The Court said in that opinion, it's not about what the plaintiff alleges. It's not about the label they attached to it when there is misrepresentation or breach of contract or forum. It's about the defendant's contact. Remember, we're here on a jurisdiction case and our also state with its might, power, and majesty. Exercise all that might, power, and majesty, over a Utah river rafting outfitter that is not incorporated here, has no offices here, has no employees here, has never let a rafting trip here, has never let a hiking trip here.

JUSTICE O'NEILL: But its purposeful availment is the test and --

MR. BISHOP: Purposeful availment is the test.

JUSTICE O'NEILL: -- and they have purposely tied to get Texans to come out there.

MR. BISHOP: Let me -- let me see if this responds to that. Purposeful availment is not passive availment. The foreseeability of causing injury in another state is not a sufficient landmark for exercising personal jurisdiction over an out-of-state defendant who has not consented to be sued there. Now, that was the Michigan Supreme Court in *Witbeck v. Bill Cody's Ranch*.

Let me hit the advertising point that you made, Justice O' Neill. Quote, the fact that a corporation actively advertises to Michigan residence does not mean it submits to the burden of defending any and all causes of action brought in Michigan that may result from Michigan customers visiting its out-of- state facilities in *Oberlies v. Searchmont Resort*. You can change the name of the state in that particular quote but you're gonna get the exact same result. And I want -- I wanna mention, when you talk about purposeful availments, purposeful availment of what? Of the privilege of conducting activities within the forum state so as to invoke the benefits and protections of the forum state.

Members of the Court, my clients never sued or had been sued in the State of Texas, couldn't have been sued in the locale where this

accident and injury occurred in Arizona indisputably, couldn't have been sued in the state of Utah where it is incorporated where street family members have their location, all their operations indisputably. But what I suggest to you, not only for Michiana because obviously it did not involve a bodily injury out-of-state, but I think under the same principle, Justice Brister said in that opinion where the plaintiff relies on the fraud and that sort of what they've swung the allegations in doing this. It may determine choice of law, but it does not determine jurisdiction. What determines personal jurisdiction? And that what is purposeful availment direct conduct -- in the case of a tort, I would suggest to you at least a bodily injury tort, something which directly causes that accident or injury. And you can't have that. I respectfully submit in a bodily injury case where you have an out-of-state defendant and an out-of-state of injury.

JUSTICE O'NEILL: With breach of contract, you could. If I set my money in, we may have refund within 30, you know, outside of 30 days you can get refund.

MR. BISHOP: Right.

JUSTICE O'NEILL: And I request that outside those 30 days but they don't return it to me. Breach of that contract, I can sue him here to get my money back.

MR. BISHOP: Yes.

JUSTICE: And if it was a -- if your client was Disney World, which advertises constantly in Texas papers, different rule if you're injured. The Disney World, they've arguably --

MR. BISHOP: Yes. It would be. I call that the Budweiser rule. Budweiser is everywhere. But my client is not Land Center or Budweiser or Disney World. It has two brothers and one sister that run -- that are second generation in river rafting outfitters out of and only out of respectfully the State of Utah. They don't run anywhere but Utah and in the State of Arizona because that's where they were born, raised and grown. And what I suggest the Court in that regard is each of these out-of-state injury cases that involve whether it's a hotel or a dude ranch or some type of recreational activities as the amicus point out in this case. The real gist, the real substance to use this Court words from *Jim Walters Homes v. Reed*, the real substance of the cause of action is where did the person actually have the accident and get hurt and I don't know what the boundaries are in terms of this notion that we have of... it must arise out of, it must relate to the forum state. But I know that Justice Brister said in the Michiana case, we're not here to talk about the relationship among the plaintiff, the forum, and the litigation, but the defendant, the forum in the litigation. And this --

JUSTICE: Let me ask -- let me change the facts a little bit. Tell me at what point you would agree that there's jurisdiction in Texas if Moki Mac had contacted the Druggs first instead of the other way around?

MR. BISHOP: No.

JUSTICE: Okay. What if Moki Mac had after contacting the Druggs and the Druggs said, "Sounds interesting. Can you meet with us about it? Moki Mac travels to Dallas immediately, will that change the outcome?"

MR. BISHOP: No.

JUSTICE: What if Moki Mac said, well, when we come to meet with you, we're gonna bring the equipments so you have to put it on and we'll leave it with you, be sure to bring it with you when we're doing this expedition. Would that have changed the outcome?

MR. BISHOP: No.

JUSTICE: So --

MR. BISHOP: I'm doing that consistently. I want you to see why I'm doing it because I'm trying to persuade you that when it comes to bodily injury outside of the state, all these preliminary actions within the state do not establish specific jurisdiction. That's what we're here about it and the reason why specific jurisdiction is dependent upon the act that causes harm. Preliminaries, but here is a great brochure, here are some stuff you might wanna use --

JUSTICE: Let me add another fact then. In the hypothetical, Moki Mac travels to Dallas, brings the equipment, they're gonna use in the expedition and says, "Our guides are well-trained, never lost a person. Here's the training that we've had, we assure to you that nothing will happen. Nobody is gonna fall to get injured."

MR. BISHOP: You're making it harder for me now.

JUSTICE: Well -- well, we're not just deciding your case. We're trying to draw a line from lots of cases and we're trying to make sure what you're arguing makes sense in a bigger picture.

MR. BISHOP: Well, it is important because as you can see from the -- not just our filing but the amicus, lots of other people that are affected by this an entire recreational industry that has to answer the question that I started to ask before Justice O'Neill promptly interrupted me as I thought she would, which is it -- is it not only constitutionally permissible but should these two river rafting folks have really anticipated that they were born to be sued in Dallas County on a Grand Canyon Trail Hiking Acts that when even -- when even, members of the Court, the plaintiffs did not recite about this --

JUSTICE: It sounds like what you're positing is a rule that's distinguishes personal injury from commercial, you said that.

MR. BISHOP: [inaudible]

JUSTICE: And the gist, Grand Canyon is not purposeful availment. It's purposeful availment that has a nexus to the personal injury.

MR. BISHOP: It really is.

JUSTICE: So -- so it's different from -- from Burger King.

MR. BISHOP: Yes.

JUSTICE: It's different from most all of the personal jurisdiction cases except maybe Michiana. You mentioned some other states that looked at it but here it's different from all of our cases except maybe Michiana --

MR. BISHOP: The focal point of the story and the harm side, that's the magic words of Michiana. Let me ask you, would any of us being here today absent, not brochures in Texas, but I submit to you accurately or Visitor's Acknowledgement of Risks that I submit to you not only warned the specific precaution of the very risk and the very injury that was anticipated or came about in this case. But would any of us really be here? Is there a story without these actions in the State of Arizona, and I submit there's not. And that is one of the central reason why Arizona --

JUSTICE O'NEILL: Well, that makes sense to me like a forum nonconvenience argument --

MR. BISHOP: Not entirely. It's -- it's really something. It's really this argument is the argument of under the constitution I respectfully submit that individuals have a right not to be hauled into a court, a thousand miles from their home, a thousand miles from the place where they are supposed to have inflicted harm or injury and that place was Arizona. I reserve rebuttal.

CHIEF JUSTICE JEFFERSON: Thank you, Counsel.

This Court is ready to hear argument from the respondent.

SPEAKER: May it please the Court. Mr. Steven Aldous will present argument for the respondents.

ORAL ARGUMENT OF STEVEN E. ALDOUS ON BEHALF OF THE RESPONDENT

MR. ALDOUS: Your Honors, this case would be over if we were in Michigan but we're not. And I submit to you, Justice Medina, that Michiana is totally different in this case. As Justice Brister said in the written opinion in this Court, Michiana involved the question of whether or not personal jurisdiction exists over a nonresident who allegedly made a misrepresentation in a telephone call. That what was Michiana dealt with. That's what how Michiana ruled. Now, I suspect that we wouldn't be here right now if they went for the fact that the Court of Appeals in this case decided to the Memorial Hospital v. Fisher. I put it in my petition in response to the petition for review. But I must say right off the bat that this case is not Michiana, this case is not Memorial Hospital v. Fisher. This case is Siskind v. Villa and the only difference between this case in Siskind is that in that case they did extensive advertising in telephone books whereas as Justice O'Neill pointed out the telephone book is a piece of paper, the Internet is much better. What we have here are acts of the defendant directed at Texas which is based upon -- which arise upon and related to the claims that are being observed in this lawsuit. First of all --

JUSTICE: But the defendant did not initiate the contact.

JUSTICE O'NEILL: Well [inaudible] --

MR. ALDOUS: The initial contact, that's correct. The very first phone call came from Texas.

JUSTICE O'NEILL: I did -- I mean I mentioned the Internet. But it's a different animal. I mean to place an ad in Texas in the phone book you gotta come here, buy the ad in Texas. In the Internet, you just put up the Web site you don't know who's gonna hit it.

MR. ALDOUS: That's right. And I don't rely upon the Internet to point out that's why we do it --

JUSTICE O'NEILL: I understand it seems to me the more salient point is when you start gathering information in creating mailing lists through the Internet. That -- that is more of a purposeful availment than as just a Web site.

MR. ALDOUS: And that's -- that's correct. That's what I've given to Justice Wainwright. You're right. That initial call from Annie Seals, it came from her. But Moki Mac in the finding of the trial court and then reported in the Court of Appeals' opinion and supported by the record, they put Annie Seals' name into their computer database. And as the Court of Appeals said there is no evidence that directly reflects that Annie Seals requested the schedule for 2001 or the two brochures that she was sent in 2001. So what we have is Moki Mac on its own as a direct and purposeful act directed at Texas sent Annie Seals, the two brochures, and a schedule for the 2001 season. What else did they do? Barbara Franklin sent in a deposit on behalf of Andy, the 13-year-old boy who got in this case. They -- she sent in the deposit, Moki Mac in return sent her back a receipt.

In addition to that, Moki Mac says the what I'm gonna call "the release" because it's shorter than the Visitor's Acknowledgement of Risk. But they sent the release and testified at court in this hearing

that they expect people to rely on the representations made in that release. And they expect them to act accordingly. And as a result, the Druggs signed it and Moki Mac testified they would've not been allowed to go in the trip had they not executed this release and sent it back. And when asked in the Court, Mr. Quist said that that agreement is effective at the time and at the place that the person signs it.

JUSTICE O'NEILL: So they signed it right before they got on the boat in Arizona, what then?

MR. ALDOUS: What then? I'll be relying solely on the brochures. But --

JUSTICE: But how is this case have anything to do with brochures?

MR. ALDOUS: Well, --

JUSTICE: Explain this specific jurisdiction.

MR. ALDOUS: All right. The allegations by the claim for --

JUSTICE: If they weren't -- if they weren't negligent on the trail, you wouldn't have cause of actions at all.

MR. ALDOUS: Well, no. That's just causation. And the reason I say that is for a negligent misrepresentation case, if the representation as the Court of Appeals said, which were specific and safety-related concerns not just general advertising, but specifically related to safety. The question is, was that a misrepresentation and did that misrepresentation caused harm? The defendants wanted you to do a jurisdictional analysis on the causation portion of the case, that's not what it's about.

JUSTICE: I'm trying to think what Mr. Bishop points out; this was a personal injury case argument. Remind me of some personal injury cases where the bodily injury occurred outside Texas that we said you have jurisdiction to sue here.

MR. ALDOUS: There is not a single case that I've been able to find in my research. Now, we'll say that the little thing that you got up there today is the first time I've seen those cases cited, so I haven't reviewed them. But I will say that there --

JUSTICE O'NEILL: It's out far [inaudible] come to mind?

MR. ALDOUS: I'm sorry?

JUSTICE O'NEILL: [[Inaudible]]

MR. ALDOUS: No. Well, tell me what jurisdiction it is.

JUSTICE O'NEILL: Well, it's been a while since the trial court had told me --

JUSTICE: It's a forum selection.

JUSTICE O'NEILL: -- that's what the forum motion means, it was created because of -- everybody was from other countries and because the jurisdiction --

MR. ALDOUS: That's right, but their plaintiff here is in Texas

JUSTICE: That's [inaudible] v. Shiloh Co.. You said it matters where this contract was signed, what if the -- this plaintiff received that all information in Texas, went on vacation to Honduras and signed the contract there, what would the forum be?

MR. ALDOUS: Well, it depends on the context of the defendant in transmitting those brochures or getting those brochures. And just a question -- just to go back to your question, I've not found a single case that treats a personal injury action any different than a commercial injury as you've said. And the reason I bring this up is you went to break panes in your opinion. Michiana says, "It's not the claims, it's the actions of the defendants directed at the forum and their relationship too."

Now, what he's advocating is the exact opposite of what you said. He is saying that it's not that, it's what kind of injury did the

plaintiff suffer and where did it happen? But going back to your question, Justice Medina, I would say this that it always is gonna go back to what did the defendant do in the forum that is and is it related to that claim? And --

JUSTICE O'NEILL: Let me ask you this, if we were to find no specific jurisdiction, would we remand the Court of Appeals for a general jurisdiction analysis?

MR. ALDOUS: I think we'd have to because they --

JUSTICE O'NEILL: As much as they didn't touch that.

MR. ALDOUS: -- they specifically said they did wrong. Now, I will say this that if you look at the Michiana case and compare to this case, you will not -- no matter how you slice their difference, you had you -- and I mean this with right respect but do not rely on the advocacy of all those here presented to tell you what the record says because the record is pretty clear and it's not a very long brief. But there is no question that the actions of Moki Mac are what got the receipt, I mean the release here and that it was not solicited by anybody and then there was a requirement that they had and if -- and they say, well, the amicus is very concerned about whether or not all of the river rafting companies are gonna have to respond to cases as well. It's very simple. All the courts have said you can specifically design your business so that you are not subject to the jurisdiction of a particular place if you want to.

JUSTICE: That the Cruise Line Industry is taking care of that by the forum selection clause on the back of the tickets.

MR. ALDOUS: That's correct. That's one way.

JUSTICE: Okay.

MR. ALDOUS: Another way is not to make misrepresentations in Texas.

JUSTICE: Here's something that I wrestle with in Michiana. What does it matter who initiated the phone call?

MR. ALDOUS: That initial phone call?

JUSTICE: Right.

MR. ALDOUS: Well, if it were only that there was distant initial inquiry from the times in this case made clearly, that would be the situation where a part -- a defendant cannot be held in the Court here for the unilateral acts of [inaudible]. But that's not where this story ends. And that's why it's important because it is the actions of the defendant that matter. And when you look at the actions of the defendant, it is clear that they permit the purposeful availment test. One of the things chosen in Michiana is you said purposeful availment of one of those issues is, did you try to get profit from this state and from the people in this state? On Michiana you said, one sale they might have a profit and one for the lawsuit but they didn't have a profit.

Well, in this case, the evidence is they've had 132 Texas residents going to river boat trip -- trips down the Colorado River in the five years preceding a hearing. Now, that shows that they want to do business here and clearly they do. In fact, one of the statements by Mr. Quist in the hearing was, we don't like to send money back to anybody. We like to keep the money, that's why they're in this business. There might be a two people running a mom-and-pop river boating family that's incorporated but in respect to that they're out there for a profit just like anybody else.

JUSTICE: So why this shouldn't be -- why this shouldn't be 15 percent from Texas from the last half decade maybe go to establish a general jurisdiction but not specific.

MR. ALDOUS: No, I understand. It is not an independent factor to be waived in the specific jurisdiction analysis other than this. One of the things that is important for all the courts whenever they look at this is the foreseeability that the defendant has that it might be held in the courtroom. Despite the protestations of Mr. Bishop, that is what that evidence goes to. That evidence goes to, look if you consistently do business in this State in an effort to get the citizens of this State to --

JUSTICE: We know that. We don't know that the 13 percent is doing business at this time. We don't know how many... I mean, for instance, here, they sent a brochure to one person who gave it to somebody else. I mean, what if that somebody else had been in Estonia then we have jurisdiction -- Estonian Courts have jurisdiction of Grand Canyon River rafters too?

MR. ALDOUS: That's not what the records says, your Honor. And I just feel like [inaudible] I mean --

JUSTICE: Seals. I mean, so the seals didn't give it and give it your clients?

MR. ALDOUS: That is correct. But with respect to the 132 other individuals, it relates to the forum that they actually signed saying that they would the same release, saying that they wouldn't go, that's how they knew that they were from Texas. It wasn't that they, you know, had somebody who was the contact point in Texas and then they had others spread out elsewhere. It wasn't the case. If you look at exhibit 14 --

JUSTICE: BRISTER So the deal -- so the difference is here if you -- if they'd awaited to sign -- to make people sign the release till they got to Arizona, they wouldn't have purposely avail but because we sent them ahead for you to actually look at them before you're already in Arizona ready to go then you purposely avail.

MR. ALDOUS: If I said that I apologize, I didn't mean to say that. I said that would change the analysis to focus on what the defendant's acts were with respect to the brochures because we have made allegations that the brochures themselves also contained similar misrepresentations to the release. And what I was saying is, I would have to then focus on whether or not the defendant's actions in giving those releases to the State of Texas were sufficient under the purposeful availment standard to justify a certain jurisdiction over them here. But going back to one thing that you brought up --

JUSTICE: Of course in Michiana there was a release signed in Texas when that RV was delivered.

MR. ALDOUS: But it was delivered by a common carrier, I mean in a state court totally by a plaintiff case.

JUSTICE: I assumed nobody from Moki Mac walked to this one over. I assumed it was delivered by the common carrier I.D., the postal service.

MR. ALDOUS: Right. But there is also no indication, I mean the Druggs had no idea that this forum existed. In other words, it was done for the benefit of Moki Mac in this day and it -- you know, Mr. Quist said in his testimony that he expects people to rely on the representations made in these agreements. And now that we are, does that make it -- does that make that it's wrong or somehow bad?

In the -- as we go through this and they come back on rebuttal, I wanna point out that the second Restatement towards Section 311 has never officially been adopted by this Court other than in this context in D.S.A. Inc. v. Hillsboro I.S.D. in 97-3662. The Court said, in a per curiam opinion, a party may recover for negligent misrepresentation

involving a risk of physical harm only if actual physical harm results and the court cited to the Second Restatement Section 311. Other than that, San Antonio Court of Appeals has cited too that provision in an adoptive sort of way. And the reason I'm bringing this up is, even if you were to say that Mr. Bishop is right then let's be all honest, we wouldn't be here if Andy Drugg, this 13-year-old boy, who is 6'1", and 250 pounds and probably a little young for what he is carrying, didn't fall off that ledge. Well, the reality is that if you check in our Second Amended Petition, we also asked for economic damages that result itself. I submit to you that in respect to whether or not, you know, determined that only personal injury is not compensable to the Section 311. We have also made the allegations and I think it really goes back to what you asked us, Justice O'Neill, you asked him if there would be personal jurisdiction if this were a contract case. And he said yes. The reality of it is you don't look at the cause of action, that's exactly what you said in that Michiana case, so it shouldn't change if the cause of action is negligent misrepresentation because of our contract. Because it is not part of the forum, it has nothing to do with the contacts of defendants to this jurisdiction. The contact of the defendant with this jurisdiction was to send a document that he intended for people to rely on here. They did rely on here and they were harmed as a result.

I wanna read a passage to you from Siskind. Siskind's allegations of misrepresentation based on Villa's Advertisements and Letters as well as his telephone conversations with Villa and Siskind relied on Villa's representations in Texas, and this fact is enough for jurisdiction. The connection between the claims and the contact, the representation made to him in Texas induced him to enter into the contract activity.

I know that in the discussion at Michiana, there was a great deal of argument, that statement is about, "Hey look, you can't just say that you relied on or the effects of fraud were felt in this day in order to judge by jurisdiction." And I believe that's correct and I don't think that anyone, no one is saying that in this case, the word it comes in is that if you make representations in the State of Texas that you intend to be relied on, you can't be sad to say, I didn't anticipate, that we'd ever have to answer a case in Texas. If you sent in information in Texas and it is wrong, it is a lie, it is a misrepresentation, whatever you wanna call it. You expect people to rely on it and they do to their detriment. Shouldn't you expect to be held in the Court here? And I believe that the answer is yes and it always has been yes. And there is no difference between this case and many cases that were decided unless you believe the spin took about one side and the other on what the facts are. But the facts are very simple. There are direct purposeful act by Moki Mac.

Justice Wainwright, you asked me earlier if there was a -- if -- would this change based upon the first contact who initiated? Well, let me say it differently. They did the first contact and suggest that if you wanna go, you can go. I'll put you on the reservation, and then you'll have to come here to do it, and design it in such that they don't have this issue that they have now. Surely, they could've done. But the reality is -- the reality is Moki Mac wanted the business in Texas just as much he wants the business in New York or anywhere else. That is only one part of the test but it shows that they wanted to make a profit off of this in Texas for their trips out in Arizona. One of the ways they protect themselves is by submitting this agreement with representations that they believed helped them that may also proved to

be faults in this case.

So, it's not just that they are actually profiting but it's also that they do have -- they have to anticipate that if they make false statements in items that they sent to Texas then they're gonna be held in the Court here.

JUSTICE: You're -- the Internet cases generally say passive Internet advertisement that says this is who we are, this is what we do, come spend money here, it's not enough. How is with Moki Mac did any different from that?

MR. ALDOUS: Well, they sent this release directly to my clients. It said this is what we'll do.

JUSTICE: One could argue when you put up a passive Web site, you are sending through the Internet exactly those same kinds of representations. US Courts uniformly say passive websites aren't enough to avail himself of any jurisdiction 'cause of course passive Web sites were just put up and yet aliens from outer space can look at them. It's not a purposeful availment we need to take in place.

MR. ALDOUS: All of Texas residents who've been on trips with Moki Mac have been required to sign that release which would be different than your passive side. Because it's not just --

JUSTICE O'NEILL: Would you say creation of list serves would cross the line?

MR. ALDOUS: No.

JUSTICE O'NEILL: I mean, creating a list of heads and then actively -- I mean, on my Internet, I get 20 a day from people who have me somehow on the list serve, would that cross the line from being a passive Web site to an active?

MR. ALDOUS: If that were true, I consider every hair color, 'cause my hair has gone gray on me, but no, I don't believe so unless -- because many times, for instance, your e-mail address may not even reveal where you are. And as far as I'm concerned, it really has to be the act directed to Texas and here, you know, as much as it's avoided in the briefing of the petitioners that I also rely on, then that is they sent this release and said sign it.

Looks like my red light is on and so I'll take a seat unless anybody else wants to ask their question. Thank you.

CHIEF JUSTICE JEFFERSON: Thank you.

REBUTTAL ARGUMENT OF E. THOMAS BISHOP ON BEHALF OF THE PETITIONER

MR. BISHOP: Members of the Court, my opponent stands up and says if we were in Michigan, we would have a different result. Respectfully, US Constitution is what governs this case not Michigan Law. And we wouldn't have a different result and we shouldn't have a different result, and that's why we're here. My opponent says, well, there was a finding of this fact and the other.

May it please the Court, we specifically asked for findings of fact. They were refused. The Court of Appeals started its opinion by saying we do not cite the legal principles which govern personal jurisdiction. May I respectfully submit that that's a double barrel recipe for disaster. When you don't have findings of a specific fact and you don't have, as the Court of Appeals did not have, a specific statement or the principles of the governance. My opponent says that, well, the Court of Appeals just relied on this overruled case. Well, it

did. It specifically did rely on Memorial Hospital v. Fisher which is very, very significant. But equally significant, I would submit to the Court, is the Court of Appeals' failure to address this key factual scenario that I know is at the bottom of all undermines. Moki Mac didn't know who the crews were, Justices. We didn't know who they were, we didn't solicit them. Annie Seals came to Moki Mac's said I'd like to make a reservation; we didn't have any space in the e-mail.

JUSTICE: All those businesses never knew who the clients are. Do they show up or submit a check?

MR. BISHOP: The purpose there I think though is when Justice O'Neill was asking me some questions about what if you go in and you solicit people and you're trying to get agreements, you're trying to get contracts with them, is it the same? And my answer is it's not the same. I still suggest all of you that when you have bodily injury involving an out-of-state defendant and out-of-state bodily injury, it's going to be a rare situation in the absence of general jurisdiction, which I'll talk about in just a minute, that you're gonna be able to say the plaintiff can file a suit anywhere and everywhere. Here, she read a brochure or later says, "Well, I relied upon it or when they have some harm."

Members of the Court, we have people on this trip from Nebraska, from Fairbanks Alaska, can we be sued there? Can we be sued in any of those states as long as somebody says I had some harm, I read it, I relied upon it? I suggest to you that the boundaries of constitutional due process are not so flimsy and I suggest to you further that what this case was all about is just an email --

JUSTICE O'NEILL: Let me ask you this, I'm sorry. You represent that you're gonna have cabins that are air-conditioned in Arizona on this trip. I go out there and I see that there aren't cabins that are air-conditioned. You breached that contract you've made. Can I sue you in Texas?

MR. BISHOP: Where did the breach occur? It had to --

JUSTICE O'NEILL: Well, you told me, I mean, the brochure you sent me and the information you sent me shows this nice air-conditioned cabins and I get out there and I see they're not out there.

MR. BISHOP: In what I suggest to you, Justice O'Neill, is to a certain extent what this Court said in the Michigan cases I've put in this raw handout. They said, you know, you can do all these things, but the punch line has to be a part of it. The damage, the harm, the injury, has to be a part of it.

JUSTICE O'NEILL: Well, I paid you my money before I came.

MR. BISHOP: Correct.

JUSTICE O'NEILL: And you made the misrepresentation to me in your brochure with these pictures of these cabins.

MR. BISHOP: You're saying that we knew there was no air-conditioning, we lured you out there. Different story.

JUSTICE O'NEILL: And why is that any different? Because the injury is money versus death?

MR. BISHOP: The nature of the harm is what I would say to you --

JUSTICE O'NEILL: Well, then if you represent to me here that that we're gonna have equipment was a same scenario, a family goes out there, they see that they don't have safety equipment, they don't enroll in the program, and they sue to get their money back. You're saying that case could go forward to Texas because there was a breach. There was a misrepresentation about equipment but because you get out there and go ahead and hide and you're injured because there's no equipment, that's different.

MR. BISHOP: I say that personal injuries in out- of-state defendant cases are different. And I ask the Court in the final moment, I'm out of time, take a look at fair play and substantial justice. It's fair to sue Moki Mac here. It's fair to sue him anywhere and that's not fair.

Thank you, members of the Court.

CHIEF JUSTICE JEFFERSON: Thank you.

The case is submitted and that concludes all cases today. The marshal will now adjourn the Court.

SPEAKER: All rise. Oyez, Oyez, Oyez. The Honorable, the Supreme Court of Texas now stands adjourned.

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