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Supreme Court of Texas.
Phc-Minden, L.P. d/b/a Minden Medical Center, Petitioner,
v.
Kimberly-Clark Corporation, Respondent.
No. 05-0823.

November 16, 2006

Appearances:

R. Brent Cooper, Cooper & Scully, P.C., Dallas, TX, for petitioner.

James K. Horstman, Cray Huber Horstman Heil & VanAusdal LLC, Chicago, Illinois, for respondent.

Before:

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

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JUSTICE: PHC versus Kimberly-Clark Corporation. May it please the Court, Mr. Cooper will represent argument for petitioner. Petitioner's have only five minutes for rebuttal.

ORAL ARGUMENT OF R. BRENT COOPER ON BEHALF OF THE PETITIONER

MR. COOPER: May it please the Court. This case involves the appeal from the denial of a special clearance. The facts actually is very simple in this case, the points in line case will returning to Texas from a trip, I believe it's Alabama. Well, passing through the Louisiana. This is Eddie from the Campbell that receive treatment in emergency room at PHC-Minden Hospital. She was treated, she was released, she return to Texas to Long View which she resided. Four days after she return to Long View, she was admitted to Good Shepherd Hospital and about two weeks there after she passed away for "Toxic Shock Syndrome," there the allegations. Now, the question in this case is whether or not there were sufficient context with PHC-Minden to subject the two jurisdiction here-- in the State of Texas. Privates have found most ...

JUSTICE: I was, I was intrigue, did she said the hospital or only the main factors?

MR. COOPER: She just only sued the manufacturer, Kimberly-Clark

was the identity who brought in Good Shepherd, PHC-Minden, a group of physician in Louisiana as well I this believe this positions in the State of Texas. The plaintiff is file no suit and was made no claim against PC-- PHC-Minden. Now, in this case there is no issue about specific jurisdiction. Court of Appeals Trial Court says that doesn't exist. The only argument concerns juror jurisdiction and it is unclear in the Trial Court exactly how the profounder during jurisdiction, would ask for findings of fact that the things of law and there was a refusal for falters. However, the Court of Appeals, the 12th of appeals has basically found two basis for inferring duce-- juror jurisdiction. One was under the Single Business Enterprise Theory and the argument their is that PHC-Minden is on province scout there out of Tennessee, that is the current preparation. Province of health care has some hospitals in the State Texas is doing business and the question was could they use the parents contacts with the State of Texas to confer general jurisdiction alone the subsidiary. That was one basis that the Court of Appeals found. The second basis was that they found that there was continuous and systematic context with Texas PHC-Minden. Now, we believe there two very important legal issues for this Court which will, we believe, dramatically alter the landscape regarding what evidence can be considered to determine if there is a general jurisdiction over PHC-Minden. First one is; does Texas recognize the Single Business Enterprise Theory, is it valid? If it's not a large portion of the evidence that the 12th Court of Appeals used to establish jurisdiction over PHC-Minden, close by the way Sir. The second issue is; what is the relevant jurisdictional term frame for looking at contacts by PHC-Minden and the, the, the issue there is whether not the Court is restricted to looking at contacts occurring on or before the day of injury or whether not the Trial Court can look at contacts that occur after the day of issue in order to confirm jurisdiction on the state-- State of Texas. Now, first of with respect to the Single Business Enterprise it is never been adapted by this Court. There's Courts Appeals that apply it this Court has-- had the opportunity in Southern Union Case but basically decided under 2.21 it really did need to go that far because of the lack of the fraud finding in the Lower Court. We believe that this Court should not recognize a Single Business Enterprise Theory. Now, generally that theory says that a companies that are not operated in separate entities but whether integrate their resources to achieve a common business purpose could be consider as a Single Business Enterprise. Now, the problem with that is, any corporation that goes out and requires a subsidiary. One of the reasons she do that is "Hopefully to achieve some economy sub scam" that is the the, the parent company may be able to afford certain services for the subsidiary in most-- be able to say money of the half of the subsidiary. There's going to be something relationship. The problem we believe with this theory is that it was so negligence, that is so confused that wasn't excuse. Will have basically no doubt is you know, whether or not your engaging what activities that would subject the parent to what building of subsidiaries for fast reversal.

JUSTICE: But there are factors to consider to determine whether or not a Holy home subsidiary area is in itself a single business unit.

MR. COOPER: Your Honor, some Courts are adapted four factors, some Courts adapted five factors, some Courts have adapted eight factors and you can go all over the Court, there is no continuity. We also think that there's a lack of-- likelihood of inconsistent results because again one of the issues is ...

JUSTICE: It was exhaust testing pretty simple whether or not the

subsidiary has it-- its own board separate from the parent company whether or not their, their engage in a different type of business that generation profits for the parent company. I mean there's some pretty clear alliance to determine whether or not as a single business unit or truly a holy on subsidiary or some other operation.

MR. COOPER: Well, and and I believe that, that could be the case just within the, the opinion on what did the Court would adapt the theory. What factors the Court decided, where will factors or relevant elements with respect to the single business enterprise. The Courts of Appeals and it also interchange this, this concept and said, "It doesn't include those activities normally associate with the ownership of a subsidiary corporation," and again that is such a, a nebulous, inexact concept and again while mending normal for one business may not be normal for the other. That of course trying to, to maintain corporate sep-- separate as far as trying to come up with some predictability. You don't have-- it also we take is it one of the problems with what the Courts of Appeals up on take on this there is no counterpart.

JUSTICE: There is no what? I'm sorry.

MR. COOPER: Fraud, under Article 2.21, again, there, there's a question that it's application here because it was too any matter relating to irrational from contractual obligations. What we have here is support obligation is no questioned about that. However, it ...

JUSTICE: So if, so if you did where operating subsidiary to perpetuate the fraud and we can impute contacts?

MR. COOPER: If you, if you were operating as fraud we think their opinion of other basis that would allowed the imputation.

JUSTICE: Like what?

MR. COOPER: Such as this Court has, has recognized the partnership that staple joint enterprise, joint ventures, alter ego that alter ego theories where you operate the ...

JUSTICE: But, but we normally don't impute minimum context. And some dis ...

MR. COOPER: Well,

JUSTICE: Are, are you saying it's okay, sometimes it's so when, I understand your saying not in this case but I'm trying-- other than this case where's a live?

MR. COOPER: Well, we believe that the legislature as I understand your question correctly, Justice Brister. The legislature has legally set forth the distinct public policy about piercing the corporate bail.

JUSTICE: So, so if you meet those requirements then you ...

MR. COOPER: Fraud, then you can use and you not be able to impute the context.

JUSTICE #5: Do you think people as you want had not application, whatsoever in a toward case.

MR. COOPER: Well, it is the, the language is questionable which says any manner or relating to or asking from the contractual obligation which is part of 1997 Amendments. And, and again we know that the legislature as we rest from 1989 that they broad in 2.21. Well, vertically yes, more or less horizontally to include affiliates not only subsidiaries and they brought it beyond just a pure contractual relations. However, the delay in it's process it does say it must relate to or rise from a contractual obligation. We believe that plaintiffs in State of Texas had alter disposal lurks theories to pierce of corporate bail. This one is not needed, this one is contrary to 2.21, this one also we believe, we've be very difficult to read this and to understand whether or not what they were doing was or was not

consistent with this theory and we would urge the Court at this opportunity or to take this opportunity to clarify Texas law and the whole that Texas is not -

JUSTICE: Can we back the, the date issue.

MR. COOPER: Okay. The, the other issue concerns the date. And it, it's important because the, the Court of Appeals in this case -

JUSTICE: Can anybody, they, they don't say it's anything after you file a suit.

MR. COOPER: Well, there would not open to the filing of the lawsuit.

JUSTICE: But in between the incident and the filing of the lawsuit.

MR. COOPER: What the, the Court, the Court of Appeals just as requested there were three contracts they said where long term systematic write-ups.

JUSTICE: Right.

MR. COOPER: Where then was when the cable company cuts cable here in Texas to ride in that service ...

JUSTICE: And the people reviewing X-rays those ...

MR. COOPER: People reviewing X-rays two of those we're aided to do after the date of injury but before the lawsuit was filed.

JUSTICE: After defendant moved into Texas after the injury but before the lawsuit was filed wouldn't be any problem in suing them in Texas with year.

MR. COOPER: If, if you are physically present here or be completed in agent for servicing process ...

JUSTICE: So why is it that the right date for minimum context to? When they file suit 'cause the quest-- the question we want to know, we don't really care what we have jurisdiction, why should we care what we have jurisdiction over when they were injured. We got jurisdiction over for the lawsuit that's what juris-- person of jurisdiction is about.

MR. COOPER: Well, two, three issues. First of all, that is Court of Appeals had consider this issue on at least interrogations. We have those ...

JUSTICE: I don't think we've never said ...

JUSTICE: This, this Court, this Court has not directly said ...

JUSTICE: But we intended to look at stuff before they enter to it.

MR. COOPER: Yeah, in the fact if you, if you look at the guardian lockage ...

JUSTICE: But my question is, everybody agrees before the injuries find but, but we got directly pours the case have that the twin injury have file and it just seems to me personal jurisdiction is a question of whether a Court has jurisdictional over the person when the case is filed.

MR. COOPER: Proper reasons, first of, we know with the respect to specific jurisdiction we're looking at the issue at the time of the injury. I know we're talking about general jurisdiction but for, for making the inquiry as far what contact we're looking at in specific use ...

JUSTICE: Scatter rights from they.

MR. COOPER: Scatter rights from that and any use at the time of injury. Number, number two is the, the due process in this issue in the Burger King Case when the Supreme Court in this issue is also leading to this Court in the common case the, I don't know there's two of it and one from the Supreme Court where they talked about that predictability that defendants ...

JUSTICE: Volkswagen.

MR. COOPER: Although it's Cobol versus American just slip my mind but from West Court in 2002.

JUSTICE: American Tie.

MR. COOPER: American Tie had said the defendants ought to be able to have a construction of business in order to not subject themselves to jurisdiction and if you look at the cases that, that that Court relies upon and if you look on the cases that Volkswagen and Burger King lob on. There looking a case where the contacts, where occurred prior to the time of the entry. We, we also think that-- if, if you look at other issues and again altered not directly on point but such as the standard of care that would finish only-- it's true. It's standard care at the time of injury statute limitations we're looking in the time of injured. Most everything we're looking at, with respect to the conduct of that defendant is occurring at the time of the injury. The a-- again we, we believe that based upon well established and then again many this cases are, are petition to that. We pretend that we've cited from the Courts of Appeals where the Courts of Appeals although many years of held that it is, the time of injury it does control. We believe that the-- the reason we believe that I think it has become part of the present.

JUSTICE: But that, Mr Cooper going back to what just, just what you say I mean, if, if I had someone move in next door to me and they get sued, I mean they change their residence and they get sued next year, something that happen two years ago and their living here wherever here it is in Texas. What is unfair about arguing sued in Texas under those of general jurisdiction just when they have minimum contacts. What minimum contact is, is it on general jurisdiction.

MR. COOPER: Well, really minimum contacts comes into at the most part of exercise of one was that.

JUSTICE: All right, okay.

MR. COOPER: Really that's, that's what we have the minimum contacts because ...

JUSTICE: Listen-- this general jurisdiction if, if we come forward, if we fast forward and bring your client in here, instead of living here your client was in Louisiana but there's sufficient that, that we would have jurisdiction at the time the suit was filed. What-- Why is that entered your client at that point and it will not be unfair to the neighbor that I have that to sue them for something it happen before.

MR. COOPER: Well, to then if it you-- if it your neighbor could be, could be there, there present. We don't have an issue regarding the law of statute from using what against the Courts terminal age insufficient to try to takes service serving the Sector State, you go there and deserve them to hear if it's CT Corporation over it's a person with the mix motive. Here though when we're still talking about jurisdiction, we still talking about this legal fiction. As far as whether not there are contacts to authorize the service of the sector State and this is one imported only and we still have the due process issues regarding whether or not the minimum contact and the predictability issue which I mean most Courts, this Court in this descriptive said issue on the, the, the minimum contacts as whether not to defendant at the time the issue could invasion of proceedings that been element to Texas Court. And all the language if you look at this Court, Burger King Case, the Volkswagen Case have talked about the defendant at the time the injury occurs "Does he have that pursuit ability of then held into Texas Court."

JUSTICE: Any other questions? Thank you kid.

JUSTICE: Court's is ready to hear argument.

JUSTICE: May it please the Court, Mr. Hortsman is ready to set argument for rebuttal.

ORAL ARGUMENT OF JAMES K. HORSTMAN ON BEHALF OF THE RESPONDENT

MR. HORTSMAN: Good morning. May it please the Court. My name is Jim Hortsman. I represent Kimberly-Clark Comp., co-counsel here with me this Susan Cooley. Counsel's suggested this Court in certainly the amicus curiae that this is a case where the Court of take up a single business enterprise doctrine is something dig with it properly get rid of it because it's a lot of problems allegedly stand from.

JUSTICE: It's seems pretty popular with the Courts of Appeals.

MR. HORTSMAN: But that's ...

JUSTICE: Which is little troubling since we've never said there is such an animal.

MR. HORTSMAN: Well, that's true this Court has been trusted. More importantly I think-- it's important to, to see right a way this is not a case that involves the Single Business Enterprise doctrine as a mechanism for imposing liability unless the Counsel is talking about [inaudible] is talking about. Everybody is worried about the Single Business Enterprise factor if it used to impose liability another wise an involve Court of a failure.

JUSTICE #6: Sample here.

MR. HORTSMAN: We're talking about in this case the Single Business Enterprise Theory simply is a doctrine for imposing jurisdiction.

JUSTICE: Why should the two be different?

MR. HORTSMAN: Well, primarily, I think because jurisdiction, where talking about due process the Texas long term statute. It's a whole different package of, of concerns, constitutional laws. I think well,-- although we're talking a lot of single business enterprises theory we're really looking to it by analogy I think in the jurisdictional context. Here, the the question here is not whether Kimberly-Clark can sue MMC, it's just never it were. MMC is not an involve corporate failure, MMC admits that he treated Mrs. Ligenson but though, though the property, now they're dispute that their negligent but this-- we're not suing a province, the parents. We're just trying pursuing the subsidiary MMC.

JUSTICE: The Kimberly-Clark raised single business enterprise theory or similar theory in the lower Courts?

MR. HORTSMAN: Yes, with this explanation. We, we plead the facts underlying the jurisdictional theory the cases that we cited. What we really arguing below was alter ego that-- that's really what the point was. The Court of Appeals had reach out and, and took the single business enterprise theory but what we we're looking at was the alter-ego theory. We looking at the BMC Software that 2002 opinion of this Court in Commonwealth Genuine versus New York.

JUSTICE: The petitioner says that alter-egos sorts of partners and we don't need single business enterprise theory, what's your response again?

MR. HORTSMAN: You might be right about that. With-- I, I think that's really instructed as you look at the Court of Appeals decision in El Cordia that's the case at least all the elements imposed, single business enterprise and alter-ego in this side. It does an elements

involve and they're different but their pretty close.

JUSTICE: I mean you don't think you have to show that you were kind of perpetuator in actual fraud -

MR. HORTSMAN: Yeah.

JUSTICE: And that's because this is untoward grand in the contract or what?

MR. HORTSMAN: That's right. We've relied on the three decision of this Court that I've just mentioned with the course talks about the alter-ego theory no mentioned of reforming fraud in the four context Section 2.21 about the language of that, that provision and committee comments clearly implies only to contracts. Now, the legislature from wanted to immunity alter-ego jurisprudence of the Court. The legislature could have said, "Now, we going to require fraud and fraud content in the tort context too. But he didn't do that."

JUSTICE: What, what, what authority about the piercing the corporate bails and in towards the case as in shown in the fraud?

MR. HORTSMAN: I said primarily this, this Court's decision in BMC Software and Commonwealth General just in the last few years, talked about the, the alter ego theory no mentioned fraud. But, but going on there seems to be honestly probably some redundancy in the the independent development of single business enterprise and alter ego jurisdiction series preserve, their so close. But there's never a-- there's really not conflicting authority. There been cases in Court of Appeals that been found jurisdiction based on single business enterprise theory, this is ain't the first one. In the release not a conflict in authority, is such. None of the decisions that held that fraud is required impose jurisdiction based on alter ego theory or single business enterprise theory not part of this that fraud is required. He find dictate some of the Court of Appeals decisions and in fact in the decision on this case, where the Court says, "In the all reliance same authority and they all said the same thing." They said "Generally with alter ego theory fraud is required" and if by that thing they mean generally including contract actions they're absolutely right. But it's always the same a little snip it in, in the same reliance on authority. Generally speaking, generally speaking fraud maybe required but in the 3rd context, fraud is not required.

JUSTICE: So in the fraud three, I'm confused, in the Torque case are you arguing that this standard for piercing for jurisdiction and for liability is the same or different?

MR. HORTSMAN: I, I believe that probably allotted.

JUSTICE: Okay. So when you say fraud is not required your just talking about piercing for purposes of jurisdiction?

MR. HORTSMAN: That' all we've got.

JUSTICE: All right. And the reason is because we should have lower standard in jurisdiction because we're just talking about jurisdiction?

MR. HORTSMAN: Well, not just jurisdiction but we're talking about is pretty well said this concepts, minimum context, due process of the well-established rules under the Belonger statute.

JUSTICE: Well, I think I, I might agree with you on the fair play and you know, inconvenience side because after all that somebody from Texas is manipulating Louisiana Corporation so though in Texas is not that big deal but the other part of minimal contacts is that Texas is just one state. We keep go ordering around people in Minnesota there where else and somebody in Texas is doing something with the corporation of Louisiana when do something to the person in Texas but come to looks like we're messing around with Louisiana where first start ordering people around over there. And I mean, there is that

traditional motions of the limits of sovereignty in minimum contacts. Applies that change to calls that common employees and swift the bank accounts and stuff like that.

MR. HORTSMAN: I don't think it is change. I, I think the point of when you're imputing the contacts, the contacts of the parent to subsidiary the meaning of that is that your saying that those contacts are in common to the parent in the subsidiary. For example this case ...

JUSTICE: Wait. We've set, we've set in a bunch of cases, we don't impute contacts. We don't impute contacts and lot different circumstances. So and, and I think the U.S. Supreme Court has too where hasn't take, hasn't it to impute somebody's contacts to somebody else. We want to know what was this defendant's contacts and your theories seems to me, to acquire imputations or going to require, we going to impute what providence did to MHC.

MR. HORTSMAN: PHC.

JUSTICE: Yes. Maybe, maybe it's a difference in the words but I think you do every imputation inherently in the alter ego jurisdictional theory and in the single business enterprise theory, not all the time. But, when the, the opinions of this Court is said when the, the parent and the subsidiary so closely intertwine that the operations are fused. In this case, the records shows that its employees of province are handling the day to day business of MMC. They determined a long range financial rules, this time ...

JUSTICE: But it typically, typically that's a fact that should goes to a jury as to whether a, a company is an alter ego of one of those subsidiaries and so if the jury want to determine on the liability phase that there was no alter ego here. Then wouldn't the due process rise at the subsidiary have been violated?

MR. HORTSMAN: I, I'm not positive I get the point of that but I do think it's ...

JUSTICE: Well, my understanding is your argument is the different analysis of the jurisdictional phase versus the liability phase because if there alter ego then you can impute contacts for jurisdictional purposes.

MR. HORTSMAN: Yes.

JUSTICE: What if it's also believe? What if it's say, "Okay, that, that's sort of you know alter ego wide." Where going to look at special appearances and say, and not doing thing there could be alter ego here, then you go to trial and he goes to the jury and they say that there not alter egos of each other. There not and that it would have been improper to it's contacts. Would have been violated the due process price of the Louisiana felony.

MR. HORTSMAN: Well, I don't think so because the due process concerns the different and having a little trouble hypothetical. In this case, in this record there were really no disputed facts. All the facts that Kimberly-Clark relied upon was testimony and evidence given by Minden and province. This case essentially went to the court on totally undisputed factual record. So, so I think-- I don't mean to avoid your question but, but hear that, that hypothetically really doesn't imply.

JUSTICE: So your answer in this case because the facts were undisputed it was legal determination.

MR. HORTSMAN: It was.

JUSTICE: For liability and jurisdictional purposes.

MR. HORTSMAN: For liability I mean, where not just fair.

JUSTICE: Well, that's the point. Okay.

MR. HORTSMAN: I don't know if I can answer that. I think, we, we're require, where we develop the entity, the evidence we kept shown with this minimum contacts. They stop MMC's own contacts, it's state of Texas based on provinces contacts of statements-- assessments. Thank you. I'm just see them it's completely separate analytical animals where the the jurisdictional part were looking at some basic pretty clearly define jurisdictional due process sorts of things. I do think that the alter ego theory and in this single business enterprise theory tells us the, the currently starting imputing contacts of the parent to subsidiary and what the Court is said is that one of the parent is operating so closely that controls the subsidiary. Not in a normal way just a parent subsidiary relationship within the extraordinary way like in this case we actually have province employees physically running to take anything operations of property. The Court have said over the context of the parent then and the subsidiary are interchangeable. So for due process purposes the imputation is now a problem cause we really saying is that what province is doing is the same thing is what redundancy is doing -

JUSTICE: What ...

MR. HORTSMAN: - the same people reputable shows.

JUSTICE: That seems to me anyway to go back to the question Justice Hecht and in that there are or said that there are other ways for you to get to that corporation without the single business enterprise theory and that you have-- I seems to me here make the same argument is, is your admissary in that, that there are other avenues for you to get there context in Texan Tex-- Criminal Court willing they didn't adapt that theory and address it in any significant way because your able to establish from what you just said that there are seems to one in the same that, that would be your argument wherever you may got this case to get jurisdiction or not but certainly to get liability in those again said parent.

MR. HORTSMAN: Your Honor, I respectfully I, I challenge the arguing that jurisdiction be in proper in this Court. I don't think that there's a conflict in authority as to single business enterprise theory for jurisdictional purposes and I don't think there's a conflict in authority for the alter ego theory. It-- that's baseline with decision of this Court. I, I think it's clear when you look at that El Puerto decision, I just used at because it's easy reference. The elements are not exact of duplicates. What I'm saying frankly in the Court and you look at them it's pretty much the same and, and I do have to say, it appears to be a redundancy. If I'm correct with the alter ego theory in a Torque Case, fraud is not required and I believe I am correct about that. Then we put alter ego side by side with single, single business enterprise theory there's not much difference. You have to render why is the jurisprudence of the state require in [inaudible].

JUSTICE: Turned out the questions, time rode the time the contacts of material result.

MR. HORTSMAN: My view is, first on that question, I don't believe there is a conflict in authority of jurisprudence in the state. The Court of Appeals in this case pointed out that Federal Courts had a different view but the Court of Appeals said it looks like the State Courts, well, for up to the time of injury in Federal Courts go up to the time of the lawsuit.

JUSTICE #5: We've never said you go up to time of the lawsuit.

MR. HORTSMAN: This Court is not. I believe if, if-- based on general jurisprudence, I believe that it has to be up to the time of the lawsuit for some of the reasons that we have been expressed already

but some other examples too. In Federal Court diversity is always based not on it's time of injury but on the time of the suit. When a consideration is, is a person that have a sufficient age to sue or to be sued don't look back to the time of the injury, you look to the time of the sue. If a party is died since the time of the occurrence. We're not looking back to the time of the injury to figure out whether there's capacity to be sued and there's a lot of other indication, analogies, well patient residence of a party. Don't look back to the time of the injury, you look to the time of the sued is filed.

JUSTICE: So why shouldn't we look just to the time that the sued is filed rather than up to the time?

MR. HORTSMAN: You cannot-- I, I ...

JUSTICE: In other words if the contacts are mold that the time of the injury then at the time of sued. Would you then knock head general jurisdiction?

MR. HORTSMAN: I believe it's a cumulative analysis founder. It all it came to see whether an entity is purposely avail itself with the benefits of a particular jurisdiction and historically under the longer statute, you look at the whole course of conduct in, in context this issues is simply wordy top that at all.

JUSTICE: Seems like using the example of the all the amakee raised if I run over somebody, I'm resident of Texas and I wrote to somebody that I was stayed whose resident of another stay and then I moved to California and the person sues three years later seems to me that they almost have to sue for another side back where I was residing at the time of the accident. Do you disagree with that?

MR. HORTSMAN: You might can cross under the line of statute. The place of the accident 'cause they committed a tort in State on ...

JUSTICE: I'm saying towards out of state my way-- the only connection with Texas is when I lived here when the accident occurred and I know at the time was sued, it seems to me like anybody have to sue for the defendant currently reside.

MR. HORTSMAN: Yeah, I review that.

JUSTICE: So in that's situation you would be looking just the time of sue not at the back that I spent 40 years before that 50 years living in Texas.

MR. HORTSMAN: Yes, I think that's right. I think, I'm sensitive to counsel's comment about the need for predictability and all of this it leads me on how stopping the analysis at the time of injury ends one predictability in stopping the analysis at the time of sue.

JUSTICE #5: Well, if you tell that concerns to due process, well let me ask first, you think due process in the biggest hurdle to a it's standing the consideration to time of suit versus time of injury? We talking about the purposeful availment in the company ranging their activities so they for example stay out State A that available to be sued perhaps in State B, they do that with regard to a presumably identified a group of consumers that going to buy their product, to use their products in certain places. They can change their decision from mouth to mouth but if you consider in subsequent month all the context that they were trying to avoid in a State for the prior month then their decisions becomes under my dead of minimum because your considering an arrangement that they hadn't-- that they had set up to stay out of that State but your considering their change you don't to subsequent month. If that's, if you understand that ...

MR. HORTSMAN: I see your view, your Honor. I do think that it's hideous on due process considerations in what's fair. I don't think that corporations had invested right before this Court decide whether

to stop that the injury or stop of sue. I don't think corporations had the vested right in conducting their activities in such way whether assuming that this Court had low longer with the other. They're maybe a lot more predictability once this the Court's rule but up with that point that ...

JUSTICE #5: I don't think you if had to try vested rights so much to due process consideration not to be hold on to a place that didn't that they may intentionally organized their fair so stay at up. It only be sued at the place where they purposefully avail themselves of the benefits of that jurisdiction. That could change from time to time. You can change between the time of injury, the time of sued. So then due process raised my question, the biggest hurdle to your argument that date of injury is not really relevant, you should accumulate this context due date of sue. So isn't due process is your biggest hurdle?

MR. HORTSMAN: I do think it all thus with due process but I guess what I'm in my hypothetical, are your question whether corporation after an injury has occurred that's a due process right to make changes in its activities with the idea that, that it going to escape the jurisdiction of this Court before suits is filed. That seems like stretched.

JUSTICE: And actually, I was bring you the other way around that may have range activities so that they're available to sued and acceptable to sued in Texas to you the date of injury for identify consumers bet then decide, we're going to change our arrangement so that we're include our consume up too for the next month. But then I get sue on our console right in Texas and the, the arrangement was just the prior month to include Texas. Follow?

MR. HORTSMAN: It's all right. Yes, all right.

JUSTICE : Just not-- is not avoiding, undoing the ability to be sued in one say thus expanding the ability to be sued in other States and I can change for corporation.

MR. HORTSMAN: I understand and I think it does come down to due process incase of appearance. Any other question?

JUSTICE: Thank you.

MR. HORTSMAN: Thank you, your Honors.

REBUTTAL ARGUMENT OF R. BRENT COOPER ON BEHALF OF PETITIONER

MR. COOPER: Just very briefly but first up only alter ego, Counsel says, "it only pass the contracts not toward cases." First of it disagree but in second, why would you be able take money from millions of dollars perhaps the corporation to where involve. If it's a contract claim, absolute it's a torque claim but we're going to not allow you take that same millions of dollars if it's contract -

JUSTICE: Your, your argument is contracts, you have a choice. You pick who your contract with and in towards you know.

MR. COOPER: The-- there's-- but to both it's an issue of due process is well, that is whether or not that whether or not his parent would be subject to the debts to be toward or be they contract gets of the subsidiary. And, and I think the legislature is may crystal clear in 2.21 that before we're going to disregard corporate separateness that Texas has recognize. We're going to require entirely happen to showing but will start of taking money away from the parents for the debts of the subsidiary or last person. Second, counsel's says, "well,

this is just for jurisdictional purposes this single business enterprise, it's really not for the liability purposes," but let assume you have the both parents, considering this case, any views that the contacts of the parent to keep the subsidiary as we have here and then we proceed forward and you got this found in, there's an appeal up there and it's appealed, what would it be? While the case purpose is -

JUSTICE: Well, that was, well that was -

MR. COOPER: - for liability.

JUSTICE: - that was my question and do you agree that, that there are facts issue involve her?

MR. COOPER: I would definitely disagree that there are was fact issues, for example -

JUSTICE: By and one.

MR. COOPER: - They, they said, in their brief, that there was evidence that we paid a million pad to venues, Texas venues. Well, actually what they gone was a AR or 28P1, all it showed was checks been mailed to an address or box you could [inaudible]. We don't know if there was a salesman who came in to Louisiana surveillance send you, was says Kimberly-Clark salesman, we going to send you bandage or something like that with bottom. There were shift from Delaware to-- I mean that and when we got the bill, but says you need to send the bills to Dallas, Texas because that's where the canning department is. So for let me say that we bought a million five in good and services from Texas entities. We don't think it supported by director. They also say that we gave refunds 51 Texas patients again you look at that it was perceive ...

JUSTICE: Wait, wait you talking about, I'm done about the fact issues in dispute as to termination of alter ego.

MR. COOPER: As far as the determination alter are involve, well, we do. For example he said that the province ran that they did operation issue testimony that there was board of governors who handled the day to day operations and they were not connected at all with profits. He says that the employees province, employees are done with rather run their whether the CFO's, CEO's and CNO require judge in province but the evidence was that the money comes from MMC province to pay their paychecks and that all three of this individuals consider themselves to be employees of-- amended medical procedures. We have, we have some good issues ...

JUSTICE: Above, above the question is, was there any conflict in evidence itself as oppose to what, what we have might have?

MR. COOPER: As far on the issue of the fact that none of the board of directors was connected with province, there was not. The fact the CNO's, CEO's, CFO got their paychecks from province and it reimburse from MMC that was nonsense.

JUSTICE: That you say all the evidences is that money was sent to Texas but you don't disagree the money was sent to Texas.

MR. COOPER: No question about it because it not -

JUSTICE: That's what accomplish ...

MR. COOPER: - it not has there pick orders and when the patients go to the hospital.

JUSTICE: Did their loose patient and there's an over payment and there is reimbursement could sees where it was sent back that map in Dallas, Texas.

JUSTICE: But if fraud as you say is the filament, then that's definitely it going to be a question.

MR. COOPER: What in there-- we don't believe there's any evidence.

JUSTICE: I understand.

MR. COOPER: A fraud and this ...

JUSTICE: But that's ...

JUSTICE: It kind of hard to see how fraud can be an element in this context, what does it mean? Usually, when your-- when fraud is involve in cheating somebody -

MR. COOPER: What ...

JUSTICE: - it is grant, this represents somebody to but if this having-- now my question is, are the context in Texas what's fraud got to with it?

MR. COOPER: Well, I think if you look at 2.21, fraud we're talking about is fraud in the statute that is perhaps it trying to prevent the parent company assets from being subjected to the debts of the subsidiaries and the trying to defraud the contract predators, picks is required to job the subsidiary. Any other question?

JUSTICE: Thank you Counsel. That's includes the arguments. This case will be submitted all the presented argument is adjourn.

COURT ATTENDANT: All rise. Oyez, oyez, oyez. The honor rule the Supreme Court of Texas.

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