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Supreme Court of Texas.
Spir Star AG, Petitioner,
v.
Louis Kimich, Respondent.
No. 07-0340.

December 10, 2008.

Appearances:

Sarah B. Duncan, Locke Liddell & Sapp LLP, Austin, Texas, for
Petitioner.

Scott Rothenberg, Law Offices of Scott Rothenberg, Bellaire,
Texas, for Respondent.

Before:

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

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CHIEF JUSTICE JEFFERSON: The Court is ready to hear argument in
07-0340, Spir Star AG v. Louis Kimich.

SPEAKER: May it please the Court.

MS. DUNCAN: And good morning.

CHIEF JUSTICE JEFFERSON: Good morning.

MS. DUNCAN: I'm sorry.

SPEAKER: That's okay.

SPEAKER: Go ahead.

MS. DUNCAN: Go ahead, I'm sorry.

SPEAKER: May it please the Court, Ms. Duncan will present argument
for petitioner. Petitioner has reserved five minutes for rebuttal.

ORAL ARGUMENT OF SARAH B. DUNCAN ON BEHALF OF THE PETITIONER

MS. DUNCAN: All right. Again, may it please the Court. Sarah
Duncan on behalf of Spir Star AG. The issue presented today is one of
jurisdiction. Is Spir Star AG a corporation organized under the laws of
Germany in doing business there, subject to jurisdiction in Texas?
Whether that's general, so that it's subject to jurisdiction on any
claim, every claim, or specifically the facts of this case. I'd like to
start this morning with general jurisdiction and I believe the Court
will find, based on its recent opinion, in PHC-Minden, that any
assertion of general jurisdiction over Spir Star AG in this case will

violate the due process clause. And then to give you a quick hypothetical that I think proves the point. Then I'll move on to specific jurisdiction and show how Spir Star AG, which I will call AG, intentionally structured its business so that it did not purposely avail itself of the laws of Texas or the privilege of doing business here. And that there can be no substantial connection between any such act and the operative facts of this litigation under this Court's decision in Moki Mac.

As the Court cautioned in PHC-Minden, general jurisdiction is a very different inquiry than specific jurisdiction. A much more demanding minimum contacts analysis and it's not just the number of the contacts, it's the nature of the contacts. One of the decisions that the Court extensively discussed in PHC-Minden was what it labeled the only decision by the United States Supreme Court to permit and exercise a general jurisdiction. That case was Perkins v. -- I believe it's Benguet Mining. And look what -- look what happened in that case, it was the Philippine Islands, a company in the Philippines. The president, general manager and principal stockholder, during the occupation by Japan, returns home to -- to Ohio. He has an office, and he has a home. In that office and in that home he keeps the company files, he has two secretaries working with him in Ohio, he distributes company checks to himself and his two secretaries, out of Ohio banks, the company's funds are kept in an Ohio bank.

But it wasn't the fact of an office that was significant to the Supreme Court, and it wasn't the fact of the home, it was the activities that were conducted out of that office and out of that home. Apparent --

JUSTICE O'NEILL: Would you -- would you agree that if Limited is an AG company, then there certainly are minimum contacts? Because didn't the Court of Appeals premise general jurisdiction --

MS. DUNCAN: I don't --

JUSTICE O'NEILL: -- on the fact that this was an AG company?

MS. DUNCAN: Certainly, the Court latched on to the use of the word "we" on the Web site and office. But I don't -- I don't -- I believe the answer to your question is no. Under this Court's decision in BMC Software recently --

JUSTICE O'NEILL: [Inaudible] Limited would have enough contacts for general jurisdiction?

MS. DUNCAN: Oh, no question that Limited would, but whether those contacts are -- would be attributed to AG, for instance if it were a subsidiary, is a different question. Limited has not contested jurisdiction.

JUSTICE O'NEILL: If it were a subsidiary though, you'd still say you couldn't get to the parent under the same analysis?

MS. DUNCAN: On this record, no. Because as the Court said in Michiana, we're looking only at the contacts of the defendant. The only exception to that general rule is if there is a showing that the foreign defendant controls the operations of the Texas entity -- whatever structure, whatever business structure that entity has.

JUSTICE MEDINA: How did they not control that situation here when you had two of the three, I believe, directors involved in setting up this corporation in Texas, and they -- that AG allows this company in Texas to use its -- its name exclusively?

MS. DUNCAN: Well, it's -- it's a trademark name to start at the end of your question. So, Spir Star Limited can't use that name without permission from Spir Star AG. The two directors, the common -- two common directors of AG and Limited came to Texas on their vacations to

look at setting up an authorized distributor here. And again, we've got separate capacities and separate entities. Those actions were not taken on this record, on behalf of Spir Star AG. They were taken by those two men, Mr. DeGraaf and Mr. Strobach in their individual capacities. So, unless the Court is going to substantially change --

JUSTICE O'NEILL: But isn't that -- isn't that disputed? I mean, my understanding of their argument is that the statement on the Web site that we ventured overseas and established means that the action really was taken on behalf of that. They were acting in their capacity as AG.

MS. DUNCAN: But look at those statements on the Web site. They don't say we ventured over the Atlantic and started a subdivision, an office of Spir Star AG. They say -- the Web sites say, we ventured across Atlantic and started a whole different company. So, as long as this Court's long history of treating separate entities separately is gonna stand.

JUSTICE O'NEILL: I understand. But I mean your argument that they were here in their individual capacity then doesn't really matter under what you're saying. As long as they created a separate company it doesn't matter whether --

MS. DUNCAN: That's right. Even --

JUSTICE O'NEILL: -- they did it individually or if AG created it.

MS. DUNCAN: That's right. Even if it were a subsidiary of AG, the same analysis would apply.

JUSTICE BRISTER: And they were just directors. They were not officers of Limited or were they?

MS. DUNCAN: Apparently, a joint-stock corporation in Germany, the director is an officer.

CHIEF JUSTICE JEFFERSON: The two companies shared the president in common though, is that correct? AG Limited?

MS. DUNCAN: Yes. Walter DeGraaf.

CHIEF JUSTICE JEFFERSON: And -- and that president spent six months in Texas, up to six months at a time?

MS. DUNCAN: Not -- it's not exactly six and six because he also spends a great deal of time in Singapore.

CHIEF JUSTICE JEFFERSON: And isn't it true AG ships maritime containers with, you know, miles and miles of cable from Germany to Houston monthly?

MS. DUNCAN: Title passes, that sale is made in Germany and it is shipped to Houston at Limited's request.

CHIEF JUSTICE JEFFERSON: And AG took -- had contracts with Limited and sent invoices and received payment from Texas Limited?

MS. DUNCAN: Yes.

CHIEF JUSTICE JEFFERSON: And none of that supports specific jurisdictions?

MS. DUNCAN: I don't believe so. Because a specific jurisdiction, we're looking for a purposeful act by AG in Texas that's substantially connected to the operative facts of this litigation.

CHIEF JUSTICE JEFFERSON: In Asahi Metal, the -- the Supreme Court said that there are several factors to look at in determining whether there's specific jurisdiction. And I just want -- want to give you a chance to comment on -- on these. There are four. Designing the product for market in the forum state, advertising in the forum state, establishing channels for providing regular advice to customers in the forum state, and marketing the product through a distributor who's agreed to serve as a sales agent in the forum state. When you look at those factors, why wouldn't that support specific jurisdiction here?

MS. DUNCAN: Well, Asahi is one -- a plurality opinion. And it's --

it's not exactly in line with this Court's opinion in Moki Mac. Two, those sales occur in Germany. AG only sells the hoses together with the fittings, assembled products, to European customers. It otherwise sells only component parts. Those component parts are assembled pursuant to the needs of customers wherever they are in the world. The only advertising, if you want to call it that -- that AG did in Texas, it did everywhere in the world through a Web site. There was no, on this record, there is no advertising directed at Texas. There is no designing of a product for Texas. This is, as you say, reels of hose and cargo containers or boxes of fittings. And those sales are made by AG through a Texas resident in Germany.

JUSTICE O'NEILL: The Web site, allows customer interaction, as my understanding. So, if the customer goes on to the Web site and submits a question about its particular business, who answers that question?

MS. DUNCAN: Spir Star AG directs it to the authorized distributor for the questioner's location. If it's Singapore, it's Singapore. If it's France, it's France. If it's North or South America, it's Limited.

JUSTICE O'NEILL: So, it comes to AG but then is forwarded to the distributor?

MS. DUNCAN: If it comes through AG's Web site, it comes to AG. If it comes to -- through Limited's Web site, it goes to Limited directly.

CHIEF JUSTICE JEFFERSON: Does it make a difference at all that we don't have findings of fact conclusions of law and did you have a responsibility to request those and get those?

MS. DUNCAN: I don't believe it does make a difference on this record. Yes, if -- if we had wanted findings and conclusions that would have been our responsibility to request them. I don't think on this record, there's a dispute. Justice O'Neill, you were mentioning the Web sites. If you read Strobach's and DeGraaf's testimony and look at the Web sites, they're entirely consonant. There's -- there's no -- the statements on the Web site. There's no difference. Both men testified that Limited is not a subsidiary. The -- they on their own, on vacation came here, their expenses were not reimbursed by AG.

JUSTICE O'NEILL: But again, I mean, that's what I get from the briefing. Is everybody trying to disclaim this Web site language and its hypertechnical, all this stuff, but from what I hear in your argument today, is that it really doesn't matter.

MS. DUNCAN: I -- I don't -- on further reflection, I don't really think it does because it's entirely consonant with the AG director's testimony.

In fact -- the hypothetical I promised for general jurisdiction -- assume this dispute was between one of AG's customers, European customers, to whom it delivers the assembled hoses and fittings, and that customer was suing AG for breach of contract. If the Court of Appeals express holding of general jurisdiction stance, that suit can be brought by that European customer in Texas. And I think that hypothetical, it demonstrates that general jurisdiction is just totally inappropriate here. It is not at all like Perkins or any other case that's found general jurisdiction.

What is puzzling, I think, about the Court of Appeals' opinion and I've had people insist that it's actually a specific jurisdiction opinion. And I think that's because here there were no jurisdictional allegations made by the plaintiff against Spir Star AG, and it has been somewhat of a constantly moving target. And it has been ultimately, in the amended response in the trial court and the briefing in the Court of Appeals, and I think in this Court, it has been what this Court foreshadowed in Moki Mac, a blurring of the distinction between general

and specific jurisdiction.

The court -- the third type of evidence the Court of Appeals relied on is the volume of product sales. But at the same time, the Court of Appeals recognized, the title was passing to those products in Europe. Well, this Court said in American Type Culture, when title passes outside the State of Texas, Texas sales cannot properly be characterized as a bedrock fact that supports jurisdiction. So, that part of the Court of Appeals' opinion sort of looks like [inaudible] of commerce jurisdiction. But it's like the Court of Appeals took the easy part of the general jurisdiction test and the easy part of the specific jurisdiction test, and just didn't have any analysis on the hard part.

The hard part is what act did AG, what purposeful act in Texas occurred in this case, and what is the substantial connection between that act and the operative facts of this litigation.

JUSTICE MEDINA: Well, the directors are the same people run one operation are running the -- this operation in Texas are. It certainly seems that they set it up.

MS. DUNCAN: Well --

JUSTICE MEDINA: It seems more like a -- some type of scam to avoid jurisdiction in Texas. That just doesn't happen [inaudible] come here in Texas and be on vacation in lovely Houston.

MS. DUNCAN: Judge, you sound like my father, whose history is with General Motors. I would suggest that it's not a scam. This Court quoted from a Fifth Circuit opinion recently, the technicalities make a difference in jurisdictional inquiries. And here we are dealing with separate companies, interlocking directorship has never been in and of itself a reason to disregard the corporate structure. So, think of it not as a scam but as this Court recognized in Michiana, as a company who is -- has structured its business to avoid availing itself of the privilege of doing business in our state.

CHIEF JUSTICE JEFFERSON: But it also structured its business to take advantage of the Texas market, a pretty lucrative market.

MS. DUNCAN: AG didn't. Two of the directors of AG decided to take advantage of the Texas -- and it's not -- it's not the Texas market, it's the North and South America market. But that's -- that's why I say it's, and that's why we cited the Longza case out of San Antonio, is that -- we all have to be very careful figuring out who did what and what can properly be attributed to a third party.

JUSTICE WAINWRIGHT: You referenced the volume of sales, points made in the Court of Appeals' opinion. What if 100 percent of the business was with Texas even though title passed in Germany, would your --

MS. DUNCAN: I have --

JUSTICE WAINWRIGHT: -- would your position change?

MS. DUNCAN: No, it would not. Because the same structural limitations on jurisdiction would exist.

JUSTICE HECHT: And it doesn't matter whether the directors created the -- created Limited or it was a subsidiary?

MS. DUNCAN: I don't believe it does. Not -- not within this Court's jurisprudence and that of the Supreme Court.

JUSTICE HECHT: Unless they would -- I think we used the word "fused" in the [inaudible].

MS. DUNCAN: Unless one controls the operation of the other, that's the way the Court put it in BMC Software. And there is no proof of that in this -- this record. I mean, I -- I don't wanna stereotype my German ancestors, but this record shows -- I'll stereotype my Scottish ancestors -- this record shows a type of separation of businesses that

we rarely see in this country with close corporations. When the last purposeful act of AGs in the State of Texas was in 1995, when it delivered and installed the equipment necessary to crimp the fittings into the hoses. When it sold that equipment to Limited, it sent Limited an invoice, it demanded payment, Limited paid that invoice.

CHIEF JUSTICE JEFFERSON: Are there any further questions? Thank you, Counselor.

MS. DUNCAN: Thank you.

CHIEF JUSTICE JEFFERSON: The Court is ready to hear argument from the respondent.

SPEAKER: May it please the Court, Mr. Rothenberg will present argument for the respondent.

ORAL ARGUMENT OF SCOTT ROTHENBERG ON BEHALF OF THE RESPONDENT

MR. ROTHENBERG: May it please the Court. Time permitting, I intend to address three issues for the Court. First, the proper application of the standard of review in this case to the facts of this case. Second, the existence of a serious question as to whether this Court has jurisdiction to hear this matter. And then third, what I perceived to be an analytical error by AG and I'll -- I'll refer to Spir Star AG as AG, simply to shorten the title, that affects both the merits of this case, and also this Court's jurisdiction. This is an appeal from the trial court's denial of AG's special appearance. Chief Justice Jefferson, you asked the question whether it mattered, whether there were findings of fact in conclusions of law requested, I would submit that under this Court's own authority in BMC Software, it's an enormous difference --

JUSTICE O'NEILL: Well -- so, let's presume all facts in support of the record, in your favor --

MR. ROTHENBERG: Yes.

JUSTICE O'NEILL: -- and let's presume that the founders of Limited were not individuals acting on their own, but were acting on behalf of AG. The argument has been made that that doesn't make a difference, as long as there are two separate entities and those corporate formalities are respected, it doesn't matter if it's a wholly-owned subsidiary or something individual shareholders created on their own.

MR. ROTHENBERG: And if you like to jump right to the let's assume and then what we're here, the answer is, under the record in this case, properly reviewed through the -- the proper prism which is that all the presumptions are -- are resolved in favor of the -- Judge Coselli's order. AG did a really bad job of observing those corporate formalities and the record in this case is replete with instances where AG, while it had a distributor in Texas, jumped in and actually took action in the State of Texas itself specifically. Mr. Strobach, the director of AG since 1980 testified that Mr. DeGraaf, who's the president of both AG and Limited, spent approximately six weeks per year at Limited's Houston office. And while he was there, he was being paid by AG and by Limited. And he was performing functions on behalf of AG and Limited. If AG is going to pay Mr. DeGraaf, its president, to come to Texas for six weeks a year, and it's going -- and he's going to participate in activities in the Houston office, it seems --

JUSTICE BRISTER: But if a judge also taught at a law school and received a salary from the state and the law school, how is the judge asking -- acting for the law school when they're sitting on the bench? Your argument is if they're paid by two people and occasionally they

work for two people, they always are working for both, but that can't possibly be right, is it?

MR. ROTHENBERG: Well, it's not always right, but under the facts in this case, it is right because the evidence establishes that one of the principals actually was coming to the State of Texas for the specific purpose --

JUSTICE BRISTER: I'm assuming the judge goes over to the law school and the judge comes sit on the bench and maybe surreptitiously the judge reads or thinks about the class while sitting in the court chambers. That then is your working for -- I mean --

MR. ROTHENBERG: Absolutely not.

JUSTICE BRISTER: A lot of people -- a lot people for two companies get two salaries and split their time between offices there -- are they always acting for both?

MR. ROTHENBERG: No, your Honor. But under the record on this case, he was.

JUSTICE BRISTER: Because he got the salary --

MR. ROTHENBERG: Because he came to Texas specifically to determine the problems with the hoses and the fittings and to bring that knowledge and information back to AG in Germany so that they could improve the product and make the product better. And that is right out of the record in this case.

JUSTICE MEDINA: Well, that happens quite often in -- in major corporations where a director or CEO will go down to a subsidiary to see why that facility is not running properly and take it back to their headquarters and make determination on how to fix the problem.

MR. ROTHENBERG: Except this isn't a case where it's one principal of -- of AG, it's two of them. One of them who is in Texas for six weeks out of the year and one of whom is in Texas for 47 approximately percent of the year.

JUSTICE MEDINA: Are -- are the rules different for close corporation than they are for a publicly traded corporation?

MR. ROTHENBERG: I cannot say that they are, your Honor. I don't believe they are.

JUSTICE BRISTER: What else?

MR. ROTHENBERG: What else as far as the facts that make this -- okay.

JUSTICE O'NEILL: Well let me make sure I understand your argument. Legally, you're trying to establish that Limited's actions are imputed to AG and vice versa; that they're -- they're operating as one company. That's a pretty high threshold of proof, isn't it?

MR. ROTHENBERG: That's only a -- a fraction of our argument. I mean -- yes, we are arguing that because Limited -- I'm sorry. AG goes out on its Web site and affirmatively states before God and the world that we went out and formed Limited, that that certainly creates a fact issue along with the other factors --

JUSTICE O'NEILL: Well no, I mean, I -- I'm -- presume with me that they created their own subsidiary --

MR. ROTHENBERG: Certainly.

JUSTICE O'NEILL: -- let's get away from the -- whether they're racking individually or not individually. Let's presume that Limited is a wholly-owned subsidiary of AG. In order to have jurisdiction over AG, you've got to impute Limited's contacts to AG.

MR. ROTHENBERG: Or we have to have AG having its own contacts in the State of Texas and that's what I believe the record establishes, both in the sense of Mr. Strobach and in the sense of Mr. DeGraaf. Both of whom are principals of both companies.

JUSTICE BRISTER: Other than the actions of the joint employees and the website, is there anything AG did in Texas?

MR. ROTHENBERG: Okay. Well, they did -- and -- and again, I -- I want the Court to keep in mind when I answer this, I'm not saying that each of these matters or -- or acts that I'm representing is enough to establish minimum contacts, general or specific jurisdiction. That's not the test. And that goes to the analytical problem that I think that AG has in this case, and I'll get to that in a moment. What I'm saying is when you take the totality of these, it adds up to a --

JUSTICE BRISTER: That's -- that's what I'm trying to get.

MR. ROTHENBERG: Certainly. We have Mr. DeGraaf, the president spending the six weeks per year for the benefit of both companies paid by both companies. We have Mr. Strobach representing in his deposition that officers and directors of AG attended trade shows in the State of Texas. We have Mr. Strobach testifying that Mr. DeGraaf takes the information he gains at Limited's Houston office back to Germany, so that AG can use that information to make changes and modifications to its products. We have Mr. DeGraaf who is a director of AG and president of Limited who has lived in Houston since the year 2000. He spends half the year in Germany, a little less than half the year in Houston, Texas. He's paid by both AG and Limited for the time that he spends in the State of Texas in Houston. While in the State of Texas, he works out of AG offices and he is authorized -- he testified specifically that while he's in Texas, he is authorized to act on behalf of AG while he's here in -- in Houston. Lastly, Mr. DeGraaf testified that while in the State of Texas, he stays in contact and communication with other AG officers and directors. So I think you take all of those factors plus the representation of -- we formed, and you've got yourself at least a fact issue regarding the alter ego, slash, piercing the corporate veil or however you wanna phrase that, but you've certainly got substantial activity in the State of Texas by AG that is designed to improve AG's products and ultimately, AG sales in the State of Texas.

JUSTICE HECHT: It's hard to see how an officer of one company going to another company to see how they're doing and calling back home and then going back home, make them alter egos.

MR. ROTHENBERG: Well, I think if we're talking about a weekend trip -- and again, minimum contacts is not something that's subject --

JUSTICE HECHT: But 50 times a year, I mean that doesn't make you an alter ego, you're just checking out the business.

MR. ROTHENBERG: No, no, no. It doesn't make him an alter ego, but it certainly is a contact with the State of Texas of AG's own that helps you establish the minimum contacts.

JUSTICE HECHT: I thought you were arguing two things, alter ego and direct contacts by AG.

MR. ROTHENBERG: Right.

JUSTICE HECHT: And with respect to alter ego, it's hard to see how any of that makes two businesses alter egos.

MR. ROTHENBERG: And I will agree, Justice Hecht, that the far stronger argument in my opinion is the one towards specific jurisdiction as a result of AG's own contacts.

CHIEF JUSTICE JEFFERSON: But the Court of Appeals, was its holding based on general jurisdiction?

MR. ROTHENBERG: It was actually based on both. Most of the --

CHIEF JUSTICE JEFFERSON: [Inaudible] they said it was based on general jurisdiction and we -- assume we disagree, we think it conflicts with PHC and American Type Culture, wouldn't we have jurisdiction over this case? Conflict.

MR. ROTHENBERG: No, your Honor. Would you like -- I'll be happy to deal with the jurisdictional issue at this point, if -- if you would like. And that is Section 22.225B3 of the government code is very specific when it says that petitions for review are not allowed in situations involving interlocutory appeals allowed by law. There are two significant exceptions to that of course, 22.225D which carves out three specific interlocutory appeals for which the legislature told us regardless of what we just said in -- in B3, we're gonna give the Supreme Court of Texas jurisdiction, and that involves class actions, first amendment motions for summary judgment and silicosis-asbestosis cases, certain issues arising in those. Specifically, left out of that list was 51.014(7) which is the granting or denial of special appearances. So that's an indication that the legislature did not intend to extend jurisdiction to this particular type of case to this Court.

The second exception of course comes in C which is where the justices of the Courts of Appeals disagree on the question of law material to the decision, and in this case, there was no dissenting opinion, or that there is a different holding than other Courts of Appeals or this Supreme Court. Now, that's where the -- the distinguishing factor of these minimum contacts cases comes in because there's something that AG did in its briefing that -- that I had time wrapping my mind around, and it really wasn't until about 3:30 this morning in my hotel room that I figured it out. And that is, what AG did was they took a look at each individual aspect of jurisdiction that we claimed created jurisdiction in the State of Texas and shot it down based upon one or more of this Court's or one of the U.S. Supreme Court's cases saying that's not sufficient. But the problem is, the parts are less than the whole because the court considers jurisdiction --

JUSTICE BRISTER: But we'd only have jurisdiction if there's a case exactly identical to this one.

MR. ROTHENBERG: Very similar, your Honor. And in this case, where you've got the --

JUSTICE BRISTER: Has this Court ever said -- I mean this case is written; this Court's written lots of these on -- lots of opinions on these special appearances on interlocutory appeals, and I would dare to say that no two of them are exactly alike.

MR. ROTHENBERG: Nor would I expect this case to be treated like a snowflake where you'd have to have the exact same number of points or geographic -- geometric structure, but this -- the facts of this case where you've got the director and the president coming to Texas spending substantial amount of time in Texas, and -- and we're forgetting perhaps one of the most important aspects of all in terms of the fair play and justice of hailing AG into this state. And that is the -- the deposition testimony of the president who said, the reason that we decided to form Limited and put it in Houston, Texas is because the ship channel is there and you've got all those factories and you've got all those oil refineries, and they need this -- this hose and this pipe.

JUSTICE BRISTER: Is -- is there any evidence in the record that Limited is unable to pay judgment to your client if they should beat you?

MR. ROTHENBERG: The record is absolutely silent as to whether they could or could not pay.

JUSTICE BRISTER: I just -- I just wonder why if you got a perfectly good Texas corporation who admits jurisdiction and is good

for the judgment, why you wanted to spend two years going after a German corporation?

MR. ROTHENBERG: Because we have the problem of responsible third party, comparative causation and all of the nightmares that that brings into a case where we end up trying an empty chair and percentages are appropriated and -- and in it's --

JUSTICE BRISTER: Responsible third party, I mean if it's -- if it's a defective product, everybody in the chain pays. They can't -- they can't blame that on the manufacturer. As a responsible third party, they're liable for it personally. So, why would you spend several years trying to go after -- why -- why should we, if your position prevails, encourage everybody to spend years going after European corporations? Is that good for your -- your client? Who is that good for?

MR. ROTHENBERG: Well, I think in terms of a -- an attorney's responsibility, a plaintiff's attorney's responsibility to seek -- to make his client whole and to bring to justice each of the parties that are responsible for causing the injury to a resident of the State of Texas who was injured in the State of Texas. It's not just a question of [inaudible] --

JUSTICE BRISTER: I -- I agree with you.

MR. ROTHENBERG: -- it's a question of justice. [Inaudible]

JUSTICE BRISTER: If Limited -- if Limited's no good for it, no good for the judgment, it makes perfect sense. You'd have a duty to do it. But --

MR. ROTHENBERG: Your Honor --

JUSTICE BRISTER: -- there's no evidence that Limited has any -- would have any problem paying the judgment and Texas law allows them, Limited once it pays the judgment to go after any manufacturer like AG.

MR. ROTHENBERG: But here's the problem, your Honor. We're not allowed to do discovery into their ability to pay a judgment. We're not allowed to until after the case is over. So, in any case, how are we ever going to know whether in fact they --

JUSTICE BRISTER: Well, I'll ask whether they've got insurance.

MR. ROTHENBERG: Certainly. But --

JUSTICE BRISTER: You've done that?

MR. ROTHENBERG: I believe the discovery in this case was limited specifically to the special appearance issues. So, the answer is no.

JUSTICE HECHT: Let me ask you about the Web sites.

MR. ROTHENBERG: Certainly.

JUSTICE HECHT: Apart from what was said on it, disregarding that, is the structure of the Web site something that you think contributes to the contacts in Texas?

MR. ROTHENBERG: No. And -- and with that I respectfully disagree with my Limited trial counsel. The information that was placed on that Web site could have been tattooed on the lower back of the president of AG. And in my opinion, it serves absolutely the same function. It's not the procedural structure of the Web site that's at issue and that's another reason why I questioned jurisdiction in this Court because AG was so bent upon the notion that this is the first time that we're gonna hold a -- a court -- a foreign company liable solely because of hype on their Web site. Well, no. It could have been on a billboard, it could have been on a pamphlet, the fact that it's on a Web site is -- is really no more or less relevant to this case.

CHIEF JUSTICE JEFFERSON: Or that it's interactive, does that make a difference?

MR. ROTHENBERG: Well, it does but in this particular case,

opposing counsel is correct that a consumer in the state of Texas can pose a question and the only evidence that's available on the record is that AG would then refer the question back to the distributor. So I'm not gonna try to make any more out of that issue than there is in the record. I mean, we're constrained by the facts and -- and, you know, we need to deal with that.

JUSTICE HECHT: And -- and with respect to advertising now, that -- that part of the content, not the structure of the Web site, but the -- and not the [inaudible] open the office and those statements but just the fact that you can get information and it's [inaudible] advertising, and some -- a factor that the U.S. Supreme Court mentioned in Asahi?

MR. ROTHENBERG: Certainly. It is -- a fact-- I don't consider it the strongest factor but it's certainly a factor in the grand scheme of the totality of the circumstances that we think raised minimum contacts.

JUSTICE HECHT: But of course that's all -- some sort of advertising is on most commercial Web sites.

MR. ROTHENBERG: Absolutely true.

JUSTICE HECHT: But you have to go there to get it. I mean, unless they're fishing or something they're not poking it.

MR. ROTHENBERG: Well, that's [inaudible].

JUSTICE HECHT: [Inaudible] --

MR. ROTHENBERG: There's a show on the Food Network, forgive me for my proclivity, as I mention food.

But there's a show that offers points based on taste, based upon presentation, based upon, you know, the -- the general showmanship and different points are assigned to different factors depending on the strength and importance of them. And -- and in an informal sense, I think that's what we're dealing with here. The advertising that goes or is available to Texas residents is that a factor in minimum contacts? Yeah, I think it is. I think it's, you know, a gram that we put on the scale that may make the difference between tipping it or not. But it's certainly not the 30 point taste, you know, aspect of -- of the issue.

JUSTICE MEDINA: Is there any waiver issue involved here?

MR. ROTHENBERG: I'm sorry.

JUSTICE MEDINA: Waiver issue -- is there any waiver for AG to contest jurisdiction?

MR. ROTHENBERG: I would have -- in terms of our contesting the jurisdiction of this Court or in terms of AG contesting jurisdiction on the merits?

JUSTICE MEDINA: Yeah, on the merits.

MR. ROTHENBERG: There was, but this Court solved it by granting -- after all the briefing had been closed -- AG's motion for leave to amend its petition for review. Specifically, AG mentions to this Court in its petition and in its briefing on the merits that the Court of Appeals only addressed general jurisdiction. It did not address specific jurisdiction. I brought to this -- or, excuse me --

JUSTICE MEDINA: Right.

MR. ROTHENBERG: Mr. Kimich brought to this Court --

JUSTICE BRISTER: So, what -- what is the argument for specific jurisdiction? How does your claim -- your client's claim arise from the Texas contacts?

MR. ROTHENBERG: Well, we're not far along enough from the case or the discovery on the merits to know for sure who did what wrong, but if it's true that the president --

JUSTICE BRISTER: But unless the guy -- unless he saw the Web site, his claim doesn't arise from it?

MR. ROTHENBERG: No -- n-n-n-no -- I'm not dealing with that issue, I'm dealing with the issue of the president and director of AG who comes to Texas for the purpose -- on -- on a regular basis for the purpose of eliciting information, determining the strengths and weaknesses of their product and then uses -- takes that information, goes back to AG and uses it to incorporate improvements into their products. There's not just a product liability claim here. There's a negligence claim as well and a breach of warranty claim. And if in fact, this particular individual who was an officer of AG, who was working in the State of Texas, brought information back to the company in Germany and that information was improper or he failed to exercise due care, that is imputable to AG and therefore, there'd be a cause of action for that.

The court -- I'm down in yellow zones -- so I'll simply say, the Court may feel as though it's -- it may be constrained to affirm or reverse. I would suggest the third alternative in this case is presented by this Court's opinion in *County of Dallas v. Sempe* from earlier this year where the Court in 19 -- in 2006 granted the petition for review. In 2006, the Court heard oral argument and about six months ago the Court decided, hmm, in retrospect we may have a problem here with our jurisdiction and the Court dismissed the petition as improvidently granted. And I would suggest to the Court that in addition to the two obvious resolutions of this case that based on the jurisdictional issue --

JUSTICE BRISTER: Well, this is a big issue. Whether you can avoid Texas jurisdiction by setting up a Texas sub or not, that's an important question, isn't it?

MR. ROTHENBERG: It is an important question, but the problem is, you still -- the Court still has to address the specifics of 22.225 (c) and being an important issue with all due respect and I may be disagreeing with your Honor, if so, I do so -- I do so respectfully. But you still have to grapple with 225 (c) and fit it in there. And -- and I don't think this case fits.

CHIEF JUSTICE JEFFERSON: Further questions? Thank you, Counsel.

REBUTTAL ARGUMENT OF SARAH B. DUNCAN ON BEHALF OF THE PETITIONER

MS. DUNCAN: Under this Court's longstanding precedent, it is the plaintiff who has the burden to plead jurisdictional allegations. There were no allegations pleaded. If you look at the response to the special appearance and you look at the first supplemental response and you look at the amended response, it is anyone's guess whether this plaintiff is arguing general or specific. It -- the Court of Appeals express holding is general jurisdiction. That can't stand under longstanding United States Supreme Court authority and this Court's opinions in *PHC-Minden* and *American type culture*. But that's why I said, the Court of Appeals' discussion of the volume of business between Limited and AG and the contacts of Limited, a Texas general partnership with Texas, it sure sounds like specific stream of commerce jurisdiction.

Findings of fact and conclusions of law. The reason I said I don't believe they matter in this case is this Court's longstanding standards for reviewing the sufficiency of the evidence, as more -- most recently compiled in *City of Keller*. You've got to look at what a reasonable person is going to believe. And as the Court has made quite clear, as soon as this subsidiary, under this Court's precedent and Texas' long history with Professor Hamilton and the separate corporate entity,

imputing can't happen without some showing of control --

JUSTICE BRISTER: There's -- but there's attention here. When you set up -- if you set up a Texas subsidiary, you are purposely availing yourself of Texas Law. The oddity is that you do it to protect yourself from liability and if you purposely availed, you opened yourself to liability. So, with -- what kind of a -- counter purpose --

MS. DUNCAN: Well, this --

JUSTICE BRISTER: -- this is one of the odd areas where your purpose of availment of Texas Law is to protect yourself from Texas Law. Once you've won, you're -- you're definitely -- and this is a Texas corporation as I understand it.

MS. DUNCAN: Texas [inaudible] limited partnership.

JUSTICE BRISTER: So, you're availing yourself of Texas Law by setting up a Texas corporation. Should that trump the fact that you're availing yourself of a law that would protect you from liability?

MS. DUNCAN: Well, but that's where we get back to the separate entities. In -- assume that Limited was a subsidiary of AG, I don't think anyone here doubts that a parent is entitled to set up a subsidiary to handle a particular part of its business. But just assume that Limited is the part of AG's business that's assembling hoses pursuant to customer specifications in Texas. Under this Court's longstanding precedent, Limited's contacts with Texas can't be attributed to AG unless it's shown that AG controls Limited's operations. And, you know, if you look in the dictionary -- part of the problem we've got going on here is that these people are clearly not native English speakers. And they use words like subsidiary based on dictionary definitions which I don't think makes a whole lot of difference, but it does explain some of the peculiarities both in the testimony and on the -- the Web site. But that's why I don't think that whether we have findings and conclusions matter is that this Court will look at the record as a reasonable person would. And what we've gotta find --

JUSTICE BRISTER: But would a -- would a reasonable person in -- in advertising or [inaudible] Web site says, this is our -- our division. It's not a division, it's a sub-corporation. Would a reasonable person rely on what they said or on what the reality was? Should a -- and should the court do the same?

MS. DUNCAN: Well, let -- are you talking about what is actually on the Web sites?

JUSTICE BRISTER: Well, it's -- assume the Web site says, this is our division, this is a part of our company. In fact it wasn't a part of the company. It's a -- it's a separate corporation, sub-corporation, would you -- would you be reasonable in relying on what the Web site said or what the reality was?

MS. DUNCAN: And -- and here I -- here I think we're talking about the difference between jurisdiction and liability. Just because we're not gonna impute contacts for jurisdictional purposes from a sub to a parent, doesn't mean we don't still have alter ego and sham, perpetrator fraud liability. So yes, if there is someone who relies on a statement on the Web site, that this is a subdivision of multi-national incredibly solvent corporation. Yes, they may have shammed to perpetrate a fraud liability, but that's not necessarily going to equate to purposeful contacts for purposes of jurisdiction.

CHIEF JUSTICE JEFFERSON: Any further questions? Thank you very much. The cause is submitted and the Court will take a brief recess.

Westlaw.

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