IN THE SUPREME COURT OF TEXAS

NO. 04-0432

MOKI MAC RIVER EXPEDITIONS, PETITIONER,

v.

CHARLES DRUGG AND BETSY DRUGG, INDIVIDUALLY, AND AS REPRESENTATIVES OF THE ESTATE OF ANDREW PATRICK DRUGG, RESPONDENTS

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE FIFTH DISTRICT OF TEXAS

Argued November 17, 2005

JUSTICE JOHNSON, joined by JUSTICE MEDINA, dissenting.

Texas' long-arm jurisdiction over non residents reaches as far as the federal constitution allows. *See Guardian Royal Exch. Assurance, Ltd. v. English China Clays, P.L.C.*, 815 S.W.2d 223, 226 (Tex. 1991). But, just how far the constitution allows has not been a simple question since *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). *See* Mark Maloney, *Specific Personal Jurisdiction and the "Arise From or Relate To" Requirement . . . What Does It Mean?*, 50 WASH. & LEE L. REV. 1265, 1266-67 (1993). As to a state's exercising in personam jurisdiction over a non resident, federal due process requires "only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and

substantial justice.'" *International Shoe*, 326 U.S. at 316 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)). Specific jurisdiction over a nonresident defendant comports with federal constitutional due process if the defendant's alleged liability arises from or is related to an activity conducted within the forum state. *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408, 414 & n.8 (1984). It is "the defendant's conduct and connection with the forum" that are critical. *Michiana Easy Livin' Country, Inc. v. Holten*, 168 S.W.3d 777, 789 (Tex. 2005) (*citing Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985)).

There is nothing wrong with an enterprise arranging its affairs so that it avoids doing business in or engaging in activities directed toward a particular forum and thereby precludes that forum's exercise of jurisdiction over it. *See World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980). The key inquiry is whether a defendant *has* so arranged its affairs. If not, then "he should reasonably anticipate being haled into court" in the forum. *Id*. The Supreme Court has not been overly restrictive in its view of federal due process limits on a forum's exercise of jurisdiction over nonresidents that purposefully direct activities toward the forum's residents:

> [W]here a defendant who purposefully has directed his activities at forum residents seeks to defeat jurisdiction, he must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable. Most such considerations usually may be accommodated through means short of finding jurisdiction unconstitutional. For example, the potential clash of the forum's law with the "fundamental substantive social policies" of another State may be accommodated through application of the forum's choice-of-law rules. Similarly, a defendant claiming substantial inconvenience may seek a change of venue.

Burger King, 471 U.S. at 477.

Moki Mac is a Utah company which has conducted guided tours in the Grand Canyon for many years. In addition to general advertising and maintaining a website for potential clients to access, Moki Mac's efforts to attract customers include targeting particular persons to whom it sends brochures describing Moki Mac's rafting and hiking trips. Its targeted audience includes persons who previously inquired about or have taken its trips. At and for several years prior to the time reservations were made for Andy's trip in 2001, Moki Mac's targeted audience included Texas residents. As the Court sets out, some of Moki Mac's efforts which were directed toward Texas residents included regular advertising in Texas, hiring public relations firms to target media groups and tour operators in Texas, soliciting Texas residents through mass and targeted direct-mail campaigns, and utilizing particular customers to become *de facto* group leaders to plan, organize and promote Moki Mac trips. Moki Mac also has given discounted trip prices to some Texas clients who brought potential customers to Moki Mac's attention.

Participants on Moki Mac's guided rafting and hiking trips engage in activities and encounter conditions which Moki Mac recognizes pose risks of injury and death. Its brochures and "Visitors Acknowledgment of Risk" form (the VAR agreement) identify certain risks, warn that enumerated risks and "other unknown or unanticipated risks may cause injury or death," and state that Moki Mac has taken reasonable steps to provide "appropriate equipment and/or skilled guides so you can enjoy an activity for which you may not be skilled." One of the specific dangers warned of was falling during a hike with resulting injury or death. Andy Drugg fell during a hike and was killed.

The Druggs received Moki Mac's brochures from a Texas acquaintance. After reviewing the brochures and corresponding with Moki Mac from Texas, the Druggs decided to allow thirteen-year-

old Andy to go on one of the trips. Moki Mac confirmed Andy's reservation and in accordance with its usual procedures forwarded to the Druggs a VAR agreement which Moki Mac required to be signed before persons could take one of their trips. Betsy and Andy signed the agreement in Texas and returned it to Moki Mac. The agreement set out several risks which could be encountered on a Moki Mac trip and specified the possibility of injury or death:

> In consideration of the services of Moki Mac River Expeditions, Inc., their officers, agents, employees, and stockholders, and all other persons or entities associated with those businesses, (hereinafter collectively referred to as "Moki Mac"), I agree as follows: . . .
>
> I agree to assume responsibility for the risks identified . . . . Therefore, I assume full responsibility for myself, including my minor children, for bodily injury, death, loss of personal property, and expenses thereof as a result of those inherent risks an/or of my negligence in participating in this activity.
>
> . . .
>
> [T]his agreement shall be effective and binding upon myself, my heirs, assigns, personal representatives, estate, and all members of my family, including any minors accompanying me.

At its special appearance hearing, Moki Mac's representative testified that Moki Mac considered the VAR agreement to have been effective when and where it was signed by the Druggs—in this case, Texas.

The Court notes that for Texas courts to properly exercise specific jurisdiction over Moki Mac as a non resident, Moki Mac must have had (1) minimum contacts with Texas by purposefully availing itself of the privilege of conducting activities here, and (2) liability arising from or related to those contacts. ___ S.W.3d ___. The Court concludes that Moki Mac's contacts with Texas were targeted to a particular audience, were purposeful, not a "mere fortuity," and thus satisfied the first

prong of the jurisdictional due process inquiry. *See id*. at ___. However, the Court determines that the Druggs' suit did not "arise from or relate to" Moki Mac's activities in Texas and that the second prong of the due process inquiry was not met.

As part of its analysis the Court references a "restrictive proximate-cause" test used by the First Circuit Court of Appeals. *See Nowak v. Tak How Invs., Ltd.*, 94 F.3d 708 (1st Cir. 1996), *cert. denied* 520 U.S. 1155 (1997). The *Nowak* facts are analogous to those before us and in my view the opinion sets out a fair and reasonable approach to the relatedness aspect of the jurisdictional question.

Tak How was a Hong Kong corporation which owned a hotel in Hong Kong and had no place of business outside Hong Kong. It had no shareholders, assets, or employees in Massachusetts. It advertised in national and international magazines and listed the hotel in various hotel guides used at travel agencies in Massachusetts. On one occasion it sent direct mail solicitations to former Tak How guests, including previous guests living in Massachusetts. The company employing Mr. Nowak in Massachusetts had an agreement with Tak How for rates when its employees stayed at the hotel. When its employees went to Hong Kong for business the company booked reservations at the hotel. Mrs. Nowak accompanied her husband to Hong Kong on a business trip and they stayed at the hotel pursuant to reservations made by the company. Mrs. Nowak drowned in the hotel swimming pool. Mr. Nowak and his children sued Tak How in Massachusetts. Tak How removed the case to federal court and the federal district court refused to dismiss for lack of personal jurisdiction. The First Circuit affirmed. In doing so, the court surveyed and discussed the various approaches taken to the due process relatedness issue, just as the Court does in its opinion. The

Nowak court then noted the First Circuit's reputation as a proponent of the more restrictive "proximate-cause" standard as to the relatedness issue and the importance of foreseeability in the due process analysis: "Foreseeability is a critical component in the due process inquiry, particularly in evaluating purposeful availment, *and we think it also informs the relatedness prong*." *Id*. at 715 (emphasis added). *See also Burger King*, 471 U.S. at 474 ("[T]he foreseeability that is critical to due process analysis . . . is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.") (*quoting World-Wide Volkswagen*, 444 U.S. at 297). The *Nowak* court concluded that adherence to the proximate cause construct in jurisdictional issues should not be so strict as in tort issues:

> We see no reason why, in the context of a relationship between a contractual or business association and a subsequent tort, the absence of proximate cause per se should always render the exercise of specific jurisdiction unconstitutional.
>
> When a foreign corporation directly targets residents in an ongoing effort to further a business relationship, and achieves its purpose, it may not necessarily be unreasonable to subject that corporation to forum jurisdiction when the efforts lead to a tortious result. The corporation's own conduct increases the likelihood that a specific resident will respond favorably. If the resident is harmed while engaged in activities integral to the relationship the corporation sought to establish, we think the nexus between the contacts and the cause of action is sufficiently strong to survive the due process inquiry at least at the relatedness stage.
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> . . .
>
> While the nexus between Tak How's solicitation of [Nowak's employer's] business and Mrs. Nowak's death does not constitute a proximate cause relationship, it does represent a meaningful link between Tak How's contact and the harm suffered.

Id. at 715-16.

The court then applied further considerations articulated by the Supreme Court as being appropriate to determining if the exercise of personal jurisdiction by a forum over a non resident defendant would be constitutional:

> Our conclusion . . . does not end the inquiry. Personal jurisdiction may only be exercised if it comports with traditional notions of "fair play and substantial justice." *International Shoe*, 326 U.S. at 320. Out of this requirement, courts have developed a series of factors that bear on the fairness of subjecting a nonresident to a foreign tribunal . . . as follows: "(1) the defendant's burden of appearing, (2) the forum state's interest in adjudicating the dispute, (3) the plaintiff's interest in obtaining convenient and effective relief, (4) the judicial system's interest in obtaining the most effective resolution of the controversy, and (5) the common interests of all sovereigns in promoting substantive social policies."

Id. at 717 (quoting *United Elec., Radio & Mach. Workers v. Pleasant St. Corp.*, 960 F.2d 1080, 1088 (1st Cir. 1992)); *see Burger King*, 471 U.S. at 477-78. Such an approach properly focuses on and emphasizes the actions of a nonresident defendant that has purposefully directed actions at a forum's residents, and on the reasonable foreseeability to the defendant that its actions will make it amenable to suit in that forum.

While Moki Mac might have a strong *forum non conveniens* argument, *see* TEX. CIV. PRAC. & REM. CODE § 71.051, the facts before us do not present a compelling case that Texas' exercise of *jurisdiction* over Moki Mac would be unreasonable. *See Burger King*, 471 U.S. at 477. Moki Mac's conduct was particularly designed to and did increase the likelihood that Texas residents would respond favorably. Andy Drugg's death occurred while he was engaged in activities integral to the relationship Moki Mac induced by its efforts specifically directed toward Texas residents. Moki Mac should have reasonably foreseen that an injury to a client such as Andy while the client participated in activities integral to the relationship directly produced through Moki Mac's activities directed

toward Texas residents would subject Moki Mac to being sued over the injury in Texas. There was a meaningful link between Moki Mac's actions directed toward Texas residents and the Druggs' suit. Accordingly, I would hold that the substance of the Druggs' suit is related to Moki Mac's activities which were purposefully directed toward Texas residents; the second prong of the due process inquiry is satisfied; it is not unreasonable or unfair to Moki Mac for Texas to exercise jurisdiction over Moki Mac as to the Druggs' suit; and subject to a "fair play and substantial justice" analysis, the exercise of jurisdiction by Texas in this case falls within the boundaries of federal constitutional due process requirements. *See Nowak*, 94 F.3d at 715-16.

The court of appeals performed the "fair play and substantial justice" analysis which the Supreme Court has indicated both protects a non resident from improper exercise of jurisdiction by a forum, and yet might allow a lesser showing for the exercise of jurisdiction over a defendant who purposefully directs activities toward the forum. *See Burger King*, 471 U.S. at 477-78 (noting considerations which sometimes "serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required"). I agree with the court of appeals' analysis and determination that the exercise of specific jurisdiction over Moki Mac by Texas would not offend traditional notions of fair play and substantial justice. ___ S.W.3d ___.

I would affirm the judgment of the court of appeals.

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Phil Johnson
Justice

OPINION DELIVERED: March 2, 2007