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Supreme Court of Texas.
Retamco Operating, Inc., Petitioner,
v.
Republic Drilling Company, Respondent.
No. 07-0599.

September 11, 2008.

Appearances:

James L. Drought, Drought, Drought & Bobbitt, L.L.P., San Antonio, Texas, attorney for petitioner.

Douglas W. Alexander, attorney for respondent.

Before:

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

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COURT ATTENDANT #1: Oyez! Oyez! Oyez! The Honorable, the Supreme Court of Texas, all persons having business before the Honorable the Supreme Court of Texas are admonished to draw near and give their attention, for the Court is now sitting. God save the State of Texas and this Honorable Court.

CHIEF JUSTICE JEFFERSON: Thank you. Please be seated. Good morning. The Court has three matters on its oral submission docket. And in the order of their appearance, they are docket number 07-0599, Retamco Operating Inc. versus Republic Drilling Company from Bexar County and the Fourth Court of Appeals District. Docket number 07-0783, Irving W. Marks versus St. Luke's Episcopal Hospital from Harris County and the First Court of Appeals District. And 07-0787, Spectrum Healthcare Resources, Inc. and Michael Sims versus Janice McDaniel and Patrick McDaniel from Bexar County and the Fourth Court of Appeals District.

The Court has allotted 20 minutes per side in each argument and expects to complete all well before noon and we will take a brief between the arguments. This proceedings are being recorded and the link to the arguments should be posted on a Court's web site by the end of the day today. The Court is now ready to hear argument in 07-0599, Retamco Operating Inc. versus Republic Drilling.

COURT ATTENDANT #2: May it please the Court. Mr. Drought will present argument for the petitioner, petitioner has reserve 5 minutes for rebuttal.

ORAL ARGUMENT OF JAMES L. DROUGHT ON BEHALF OF THE PETITIONER

MR. DROUGHT: May it please the Court. I'm assisted in this case with my partner thirty years Calhoun Bobbitt. This is a special appearance case. Our client Retamco sued Republic in Bexar County. Republic then filed the special appearance which the trial Court denied. The Court of Appeals reversed holding that the Michiana's purposeful availment standard was not met by-- when there was only one contact, one sole contact that took place in Texas.

What I'd like to discuss with you today are; what are the operative facts of the fraudulent conveyance cause of action. What were Republic's contacts to Texas and how were those contacts substantially connected to Republic's cause of action under the fraudulent transfer act. Or stated in another way how does, how does the record in this case satisfy the substantial connection to operative facts which y'all established in, in Moki Mac. And finally, permitting, I want to discuss with you how Republic's conducts purpose or how Republic purposely availed itself of the protections and benefits of laws at State of Texas.

Now, the background of this case is long. Retamco filed suit against Paradigm in 1999 in San Antonio, alleging causes of action for breach of contract and fraud regarding royalties that were due our client Retamco. And while the suit was pending, Paradigm conveyed it's oil and gas interest in Fayette County and Webb County to Republic which is an affiliated company. And ...

JUSTICE: How is it affiliated, does the record reflects it?

MR. DROUGHT: The record reflects it. We pled it. They've never, they've never denied it.

JUSTICE HECHT: Does record reflect how it's affiliated?

MR. DROUGHT: I'm not certain that it does but Republic is a parent company of, of Paradigm. What, what Republic does not contest in this case is that this case involves the Texas Company Paradigm. I mean Retamco that sued a Texas Company Paradigm in a Texas District Court under the Uniform Transfer Act involving oil and gas leases there in the State of Texas. And that while the suit was pending, this oil and gas interest were transferred from Paradigm to Republic.

CHIEF JUSTICE JEFFERSON: What exactly were the interests?

MR. DROUGHT: The interests were 74 oil and gas leases in Fayette County and one great big lease - the Briscoe lease was a 40 thousand acre lease.

JUSTICE BRISTER: No, I mean who was the interest in the leases?

MR. DROUGHT: There was a working interest. That when I pass it working interest is I mean a working interest is more than just passive because you've got responsibilities but it was working interest but they were not the operator. It was a working interest in the leases.

JUSTICE BRISTER: But they would have responsibility to pay expenses as well as receive revenues.

MR. DROUGHT: Yes sir. That's correct. So the, the record also reflects that after this transfer took place Paradigm became insolvent. Now, the record also shows that this transfer was made without the payment of the reasonable equivalent value and ...

JUSTICE BRISTER: But under Michiana do we care whether it was fraudulent or not?

MR. DROUGHT: Yes, Sir.

JUSTICE BRISTER: So that's for the jury. Right?

MR. DROUGHT: Well, ...

JUSTICE BRISTER: And you should the, should the trial judge be

deciding whether it's fraudulent or not. If it's fraudulent it stays in Texas, if it's not fraudulent it goes. Isn't that kind of what the jury is supposed to do.

MR. DROUGHT: No, your Honor, I think that in this case when we're talking about substantial contacts with the operative facts we have joint tortfeasors. Both, both Paradigm and Republic are joint tortfeasors and I think that, that, that means to be taken into consideration and that, that was not the case in, in Michiana or Moki Mac.

JUSTICE BRISTER: Well, that's not what the plaintiff said in Michiana ...

MR. DROUGHT: Yeah, well, -

JUSTICE BRISTER: And if we defer to the trial Court in Michiana comes out the other way doesn't it ...

MR. DROUGHT: - well, the trial ...

JUSTICE BRISTER: While you mis-- you misrepresented something to somebody in Texas?

MR. DROUGHT: The trial Court in this case ruled in our favor. And all of the facts that implied facts doing our favor and I think that, that in, in Michiana you had one telephone contact made with an out of State defendant. I think I'm going to be to show you a lot more than that in this case. So I mean the ...

JUSTICE BRISTER: You make sales of working interest on Texas leases if it's to somebody in California and if it's fraudulent you can sue them in Texas, if it was not fraudulent you can't. Because if it's not fraudulent -

MR. DROUGHT: [inaudible] that's ...

JUSTICE BRISTER: - not fraudulent you can't sue him anyway?

MR. DROUGHT: Right.

JUSTICE BRISTER: So is-- aren't we-- aren't you arguing we should decide the case on the jurisdictional inquiry?

MR. DROUGHT: Well, I'm-- I think that if, if Republic participated in a fraudulent transaction in a bilateral tort like, like the fraudulent conveyance act, you know, that it is committed an act here that is-- that the operative facts are connected to the, to the conduct of the defendant and I think that it should-- you should reverse on that opinion.

CHIEF JUSTICE JEFFERSON: How do we, how do we know though that this tran-- transaction was, was fraudulent?

MR. DROUGHT: Because we've alleged it. They-- we had facts in our record that supported it, we-- for instance that there was no consideration paid, or very little consideration paid that it rendered, that it rendered Paradigm insolvent. I think that-- and they haven't denied that and also the, the trial court ruled in our favors and so all implied facts are, are to our benefit -- or considered to our benefit.

CHIEF JUSTICE JEFFERSON: But you would agree that you have to do more than just allege a transfer that under the statute. It's more than just an allegation, there's going to be some proof of fraud and then, and then you have to establish it again before the jury or how does that work?

MR. DROUGHT: Well, yeah, we have to establish it again before the jury but we pled it.

CHIEF JUSTICE JEFFERSON: Right.

MR. DROUGHT: And they-- and this-- and then it became Republic's responsibility to negate it and they didn't. These are, I mean, one of the-- McCallum testified that, that Paradigm became insolvent. There

was testimony that no consideration was paid or very little consideration was paid. These are all elements of fraudulent conveyance act and we pled that and they didn't negate it. I would have to prove it again.

JUSTICE O'NEILL: Do, do you think we can distinguish Michiana and Moki Mac on the facts that the property itself is located here. Those cases we were concerned with fortuitous sort of contacts with the state but in, in this case we've got leases that are actually located here in ...

MR. DROUGHT: You can distinguish it on that point but you can also distinguish it on the point that Republic participated in, in a fraud and-- when you have, when you have the fraudulent conveyance act, you need to understand that it takes two people to do that. Fraudulent conveyance is a tort. The tortfeasors are the transferor Paradigm and the transferee Republic. And the injury occurs or the tort occurs where the injury results. And the injury resulted when the assignment was filed in the State of Texas by Republic. So I think you can distinguish on both of those points.

But the, the petition, the petition in our case specifically alleged and this was to answer some of your questions. We specifically alleged that the Paradigm and Republic actively participated in a fraudulent transfer of Texas assets while the suit was pending against Paradigm and with knowledge of Retamco's claims and that it was made-- this is what our petition said-- to hinder, delay and defraud Retamco the reasonably equivalent value was not paid and a Paradigm became insolvent. And the one thing that occurred in California is they signed the assignment that the oil and gas interest there and-- but it was because of that single fact that the Court of Appeals felt that, that the due process clause would be offended if Republic was called to defend itself here in Texas.

Now, I want talk about the substantial connection to the operative facts and addressing the, the operative facts Republic's contacts and the connection to Retamco's cause of action under the UFTA. First of all, I mentioned that it is a tort and the tortfeasors are both the parties. But also under the UFTA, this is Section 24.007 it basically provides that the tort is accomplished when the assignment is completed by filing it in the county, the county clerk's office.

Now, the Republic's, Republic's contacts with Texas are not just substantially connected to the operative facts of this litigation. They are the operative facts of this litigation because it's, it's important to recognize in a fraudulent transfer case that, that doesn't fit in neatly to the substantial connection that you have in a, in a fraud or misrepresentation case. This is not because there isn't a substantial connection between the, the context and the operative facts of the case so there most definitely is, unlike a fraud case or misrepresentation case like you had in Moki Mac, in a fraudulent conveyance case the focus is not on the defendant's contacts or actions with the plaintiff but instead it's on the defendant's relationship to the debtor, the debtor's property and the transfer of the property. And here Republic's contacts with Paradigm and Paradigm's property and the tra-- and the documents that transferred Paradigm's property are the operative facts of this case. And I ...

JUSTICE HECHT: If Paradigm was an Arizona Corporation?

MR. DROUGHT: No. It's a Texas corporation ...

JUSTICE HECHT: If it were -

MR. DROUGHT: Oh ...

JUSTICE HECHT: - if if it were an Arizona corporation and these

leases were in Texas and transferred what would your position be?

MR. DROUGHT: If we had jurisdiction over Paradigm otherwise?

JUSTICE HECHT: Uh hum.

MR. DROUGHT: Well, I, I think that we would still have a cause of action because the fraud occurred here. It ...

JUSTICE HECHT: Well, if the focus is on the debtor, the debtor's in Arizona.

MR. DROUGHT: Well, the focus is on the debtor, the property to be conveyed. You talking about Texas property.

JUSTICE HECHT: This exact same facts, but the debtor's in Arizona.

MR. DROUGHT: Right. I think that the, the same-- if we otherwise have jurisdiction over the debtor then the same rule would apply. We would have, we would have jurisdiction because the fraud occurred here in Texas. The ...

JUSTICE WAINWRIGHT: So are you arguing for a special rule of personal jurisdiction when uniform fraudulent conveyance act or transfer act is at issue?

MR. DROUGHT: Well, I don't think it's a special rule but I think that when you have ...

JUSTICE WAINWRIGHT: Because normally we respect separate corporate entities.

MR. DROUGHT: I was-- I don't-- I'm not advocating that a special rule be adopted, you know, but I think that under specific jurisdiction when you have a fraudulent conveyance act because you've got two tortfeasors that are committing a tort in Texas involving Texas property that, that we have satisfied the due process clause. So the-- what-- I mean what we have here is out of state defendant Republic that's making a conscious decision to participate in a scheme to place Texas property into the hands of its Texas affiliate or out of the hands of its Texas affiliate. And outside the reach of, of our Texas creditor and this, this transaction involving the-- our Texas debtor, Texas creditor, Texas property and the pending Texas suit was never going to happen unless Republic was involved in this case. And I see my time is up so I'll sit down and address the rest of it in a minute. Thank you, your Honors.

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

COURT ATTENDANT #2: May it please the Court. Mr. Alexander will present argument for the respondent.

ORAL ARGUMENT OF DOUGLAS W. ALEXANDER ON BEHALF OF THE RESPONDENT

MR. ALEXANDER: May it please the Court. I'd like to focus on two points. First, the question by Justice Brister concerning do we focus on fraudulent transfer at the special appearance stage and then the point-- question raised by Justice O'Neill about the property being located in Texas and how we grapple with that. Turning first to the fraudulent transfer, no. At the special appearance stage we do not get into that question. The two things that we focus on-- this is really what was wrestled, wrestled with in Michiana.

Are the actions by the defendant, the reasonable expectations of the defendant not the allegation against the defendant? We don't do that of the special appearance stage and at this case-- in this case let's focus first on the actions and on the reasonable expectations.

The actions here alleged were that a California corporation was the fraudulent transferee of property and that property was-- were, were-- was non-operating mineral interest. Okay it was passive. Non-operating mineral interests. That was the action and everything occurred in California, I mean we're talking about Paradigm ...

JUSTICE BRISTER: Mean the corporation's related?

MR. ALEXANDER: They're related. The record is not clear exactly how. They are all affiliated. But the, the other thing I think that is significant when we're talking about the actions of the parties because they're talking about joint tortfeasors. Paradigm although a Texas corporation, I think the record also reflects the principal office's in California and all the principals are in California so this is a case where when they talk about where did the fraud occur. The alleged fraud all occurred in California I mean that's where the scheme-- the alleged scheme was supposedly hatched if there was bad faith on the part of the transferee that was all done in California. The one connection here is that the property is in Texas.

CHIEF JUSTICE JEFFERSON: Lets, lets-- and I'm-- I'm jumpin ahead a little bit.

MR. ALEXANDER: Sure.

CHIEF JUSTICE JEFFERSON: Let's assume that they conclusively prove that there was a fraudulent transfer that the there was this relationship and, and Republic received these intending to make, what's, Paradigm insolvent and to make sure the principles were able to retain their money. Let's assume that that was proved. Wouldn't Texas have an interest in having that case tried here because you defraud a plaintiff in Texas of assets that were owed to it through a proper-- in this case default judgment?

MR. ALEXANDER: Well, that-- yeah let's get right to that.

CHIEF JUSTICE JEFFERSON: Assuming a whole lot, I know.

MR. ALEXANDER: Yeah. It's assuming a lot but I, but I think it does jump ahead to the question of the property. Because I think that frankly this case implicates a lot of very difficult issues with respect to minimum contacts. And let me, and let me nuance your question if I can with different types of property. I think that if we were talking about-- let's take one of these larger new condominiums that, that we have in Austin. Let say that the, the property that was being transferred fraudulently transferred was such a huge apartment complex. I think that you would say that in that case, yes Texas would have an interest in having that litigated in Texas and I'll explain a little bit why in a second.

JUSTICE HECHT: And however, are you also assuming that the interest is passive?

MR. ALEXANDER: I'm assuming that the interest is ...

JUSTICE HECHT: The condos is passive?

MR. ALEXANDER: Well, no. Actually in the condo case I'm not assuming passive and I-- and that's why I want to give you the scale. I'm, I'm, I'm assuming active. I'm assuming that you, you have a Canadian corporation comes in and, and acquires the condo and, and it's, and it's not passive. In that, in that case I think everyone would conclude that Texas would have the interest and litigate it. But now, let's take the case of, you know, an investor of Montana's got an investment portfolio part of that is invested in one of these real estate investment trusts so they get a passive interest in this condo down in Texas.

In that case I say, no. That, that Texas in that instance would not have an interest. Now, the problem I guess to the question is that

it does ask us to assume a lot. Because it does ask us to assume ourselves outside of Michiana. I mean the problem is, is when you go back to Michiana we simply don't get to that question at this stage. What-- and, and, and I think it's important to understand that it well-- as well.

We're, at the stage in the case where from the standpoint of, of the Courts, we are near-- we are not deciding whether the conduct was bad, you know, whether the plaintiff has a legitimate claim, whether the plaintiff has a legitimate claim, whether the defendant is wrongful or rightful. We just don't do that at that stage and that's what makes these cases so difficult is that you draw these lines were for instance in Michiana the dissenting justices are appalled by the fact that you've got a plaintiff with a cause of action that, that's you know, it seemed-- everybody seemed to admit that there was fraud and yet you don't get there in terms of Texas jurisdiction because he cannot at the special appearance stage we don't get that far. Now, let me get back to the property interest. Why should it make a difference? Why do we care if you know, it's an active or passive interest and I think ...

JUSTICE O'NEILL: Well, a fraudulent transfer is a little bit different than your typical sort of fraud. I mean you transferred an interest in the property that's a working interest. Republic is responsible for maintaining the leases, paying money on the leases, it assumed the obligation so it's-- in a sense it's contractual in nature, it's the passage of contract rights over. And we said in Moki Mac that there would be a breach of contract claim in Texas. So it seems to me that this follows more on that line of the spectrum, it wasn't that they made a random telephone call that the sale was based on. You got-- they could be sued here for anything connected with the lease.

MR. ALEXANDER: They could. But let's, let's get down kind of -- I think we're, we're really at the nub of, of the issue of where we draw the line. And let's, let's spend some time talking about that. Here's, here's the problem with that. Yes. It's different than for instance owning stock, I mean I think with stock you just risk your investment. When you're talking about a non-operating interest, you're on the line for expenses as well. Okay. So far so good but, but nonetheless it's still a passive interest. We're not, we're-- you know, we're not dealing with state regulators everyday. What we have is, is a situation and, and let me bring this back into principles we can talk about under minimum contacts. What you, what you have is a situation in which and this is-- I think this is a point to remember. You can structure your dealings to avoid jurisdiction. I mean everybody agrees that. That's what was said in World Wide Volkswagen that's what was echoed in Michiana. And, and so ...

CHIEF JUSTICE JEFFERSON: But, but there's a little twist on it here when you're talking about a fraudulent transfer, can you intentionally do that to [inaudible] -

MR. ALEXANDER: Yes. Well, well, this is-- and this is why I want to get back to this business of the fact that you can be a liable on the contract. Yes, you can be called into Texas Court if for instance you fail to make-- if you default on your expenses. Okay. But what you can do in that situation is that they-- you can structure your conduct so that that does not occur. In other words you, you, you say, "I am not going to invest in an oil well in South Texas unless I have sufficient money in the bank that I will never find myself in a South Texas court defending a breach of contract action." That's something over which you have control. What you don't have-- the concern here with fraudulent conveyance or fraudulent transfere is it's so easy to

allege.

JUSTICE O'NEILL: Sorry. Can you repeat that I've, I've, I missed -
MR. ALEXANDER: Okay.

JUSTICE O'NEILL: - that.

MR. ALEXANDER: Okay. What you have said is that, that when you are in a position where you owe expenses. There are situation where if you breach your contract you can be hauled into a Texas court. Okay. Now, mind you that that doesn't have anything to do with our lawsuit here. But, but my point is this, you can structure your conduct so that that does not occur. In other words if I'm an investor in Montana and I'm looking at investing in Texas. And I'd never in my life want to find myself in a South Texas court for either breach of contract or fraud. What I can do is just say, "I'm going to make sure I've got sufficient money in the bank that, that will never happen that I will never be liable for breach of contract."

JUSTICE O'NEILL: But that doesn't mean you can't be sued here.

MR. ALEXANDER: Well, it does if you don't breach your contract, what, what would you be sued for?

JUSTICE O'NEILL: I, I just don't understand the concept of putting money here to cover it.

MR. ALEXANDER: Okay. What I'm saying is, is that and, and again I think that were getting down to nub issues. You-- you're not going to be sued here if you do not default. Okay. In other words if you, if you, if you structure your conduct so that you will never default on your obligations, why would you be sued? And the problem is again structuring your conduct which you don't want to -

JUSTICE BRISTER: It's a title dispute.

MR. ALEXANDER: What's that?

JUSTICE BRISTER: It's, it's a title dispute.

MR. ALEXANDER: Well, the title dispute then you are really at that point ...

JUSTICE BRISTER: But you read here South Texas saying a hundred years ago this really all belonged to my family.

MR. ALEXANDER: Okay. But then the person to the Court for that is the operator. I mean that's-- and that's where I think you have to draw the line.

JUSTICE GREEN: What about royalty interest? You want to enforce your royalty [inaudible]

MR. ALEXANDER: Say what?

JUSTICE GREEN: The royalty interest that you have you say, you have a non-participating interest as well.

MR. ALEXANDER: That's correct.

JUSTICE GREEN: So you would have to enforce that here wouldn't you?

MR. ALEXANDER: Well, enforce it if that ever became a problem. And again, I-- you know, I'm not trying to be cute with the Court on this. What you have is-- and, and that's-- this is such an important case because we have thousands of people who make these kind of investments. It's kind of like-- and, and let me back off and give the Court an example.

JUSTICE GREEN: But not that, but not that many who make fraudulent transfers and which-- but it sounds to me like what you're saying is, is if you have a fraudulent transfer case, it's sort of your arguments immunizes anybody from out of state.

MR. ALEXANDER: Oh no. Absolutely not. I mean I think that and let's make this clear and it was clear those had a way too, no one is trying to immunize anybody. One thing that, that is important under...

We're just asking where is this to be adjudicated. California has a uniform Fraudulent Transfer Act. It's the California Civil Code Section 3439. It is identical to Texas. "Identical", we don't have choice of law problems in this case. If the plaintiff here goes and sues in California they have jurisdiction over this California corporation. They have a cause of action under a uniform fraudulent transfer act that is identical to Texas.

So the question is in cases like this "Do you require the plaintiff to go out of state?" or "Do we force the defendant to come to Texas?" That's the tough question. And the problem is I mean just give you another example, let's say that you buy shares in a Texas corporation and it's alleged that you fraudulently transferred them. Are you going to force the defendant in Montana who's completely innocent to come down to Texas to defend against that?

JUSTICE GREEN: Are there any California cases that, that present the same type of issue that you've seen?

MR. ALEXANDER: No. Are you, are you talking about on the, on the ...

JUSTICE GREEN: If-- the Uniform Fraudulent Transfer Act an out of state defendant applying that statute in California. Just like we're trying to do here in Texas. Are you familiar of any cases out of California like that?

MR. ALEXANDER: Yeah. I mean there are-- and we've look to some of them, there's none that frankly give us much guidance on this because none of are invo-- involving non-operating in minimal interest that, that we have seen. So there's none that help us much but the-- you know, getting back to my point again, we're not talking about immunizing anybody. We're not talking about denying anybody a remedy. The -

JUSTICE O'NEILL: One of the things -

MR. ALEXANDER: - only question is "Which Court do we have to adjudicated?"

JUSTICE O'NEILL: - One of the things we've always been concerned with in this analysis is somebody being hailed into court here unexpectedly that never had enough contacts here to expect to be hailed into Court.

MR. ALEXANDER: Correct.

JUSTICE O'NEIL: But they can expect clearly to be hailed into Court on a number of causes act-- of action just based on there under shift interest and their on going obligation on this leases. As-- are we parsing it just a little bit thin.

MR. ALEXANDER: I don't think so. And, and that's what-- I mean and let's talk about that I don't think were parsing it too thin because again when I make this investment, I'm a Montana investor investing in Texas. I am fully prepared to be hauled into Court if I'm-- if it's alleged that breach my obligations. I'm not prepared to be hauled into Court because some yahoo accuses me of fraudulent transfer. Okay.

I will, I will voluntarily assume the risk that all default when somebody will pull me in, I am not going to voluntarily assume that somebody somewhere because I mean again if you're a plaintiff there's three things that you want in a lawsuit. You want liability, damages and collectibility. And, and in the case in which the operator's no longer the deep pocket what are people start doing, they start digging around for other people. So it's a very real concern and the reason I don't think it's parsing it too thin-- is again you're talking over here about contract but under what circumstances can you get hauled in on, on a fraud case.

And, and let's talk about reasonable expectations because I think this is important. And let me give this an overway that I think will help. If you look at the Garden Royal case. I think that the Garden Royal case gives us a lot of help with the whole idea of what the state interest. When can we bring in the state regulations to kind of inform or tip the balance with respect to the, the minimum contact inquiry. And let me give you a classic contrast that I think helps eliminate this. Wiggi, Wiggi was a case who which there was an out of state insurance company that was doing business in California that is selling, selling of policy to California residents but never step foot in the state. And then that case there's a statute that says which subjected foreign corporations to suit in California on insurance contracts with residence. Okay.

Now, talking about reasonable expectations, if you were a foreign insurance company contemplating to do a business in California, do you have a reasonable expectation of being brought into the State. If somebody says, "You wrongfully sued on if-- you know, wrongfully did not pay a claim, he answers absolutely, yes." Because here you have the statute that you can look and says, "Well, guess what happens if I engage in business in California." This contrast that with our case. In our case we have a statute that says this, "This is Texas Business Corporation Act, a foreign corporation, my client shall not be considered to be transacting business in the state by reason of, of acquiring in transaction outside of Texas which happened here non-operating minimal interest which are the interest involve in this case."

So if I'm-- you know, if I'm in Montana and I go see a lawyer and I say, "I never in my life want to find myself in a suit in South Texas based on this investment particularly for fraud." If the question of good faith if we brought in into question, advise me, am I going to be drawn in on some mysterious claim for fraudulent transfer. The, the-- I think that the lawyer looking at this would say no. No. Because the State of Texas is decided that that is such a minimal contact. It's a passive situation as contrast of whether these are the examples provided involving royal. If you're engage in insurance, if you're actively marketing your insurance policies into Texas you're going to be nailed. If you're actively-- and this is another example, securities. If you're actively marketing securities in the State of Texas they were going to be subject to sued to here and sued on that. If you are actively producing hazardous toxic wastes and they end up in the Texas stream you're going to be hauled into Court here, reasonable expectations. And each of those cases there is a reasonable expectation on the part of the defendant and again erasing the [inaudible] of whether there is liability that if a sued is brought I am going to be brought into Texas for that. It is existing your case.

JUSTICE: What do you, what do you do ...

JUSTICE O'NEILL: If Paradox files, if Paradox files bankruptcy, the trustee can bring Republic in to collect on this leases, can it? I mean what I did that you've shot to be brought into Texas.

MR. ALEXANDER: Well, brought in Texas on what? I mean this is, I mean this is-- again this is the question of a risk.

JUSTICE O'NEILL: But couldn't the trustee in bankruptcy bring in Republic from California on a fraudulent transfer theory. I mean from the lawyer is advising ...

MR. ALEXANDER: Okay. That's where I draw the line. No. I mean, I, I think that the, I think that-- well, first of back up and, and lets look at what ...

JUSTICE O'NEILL: On advising our client in Montana -

MR. ALEXANDER: Okay.

JUSTICE O'NEILL: - and can I in good faith told him that the-- that bankruptcy trustee cannot bring you in on fraudulent transfer into a Texas Bankruptcy Court?

MR. ALEXANDER: I don't know the answer to that question. That's not our case. I don't know the answer. I think not but I don't know.

JUSTICE O'NEILL: Oh I don't know.

MR. ALEXANDER: But in that-- I mean in our case I'm talking about a private litigant. I mean I'm talking about the bankruptcy trustee. I mean once you bringing in you know, a trustee ...

JUSTICE O'NEILL: We're talking at reasonable expectations about being hauled into a Texas Court?

MR. ALEXANDER: For what? I have a reasonable expectation of being hauled if I default, if I default. And this is why it so important, substantial connection Moki Mac. If I default on, on my contract to make payments I have a reasonable expectation of being brought into Court for that. Okay? Because there was a substantial connection between the allegation and what I'm be brought in the court for. But to say that because, because over here I can be brought into Court for substant-- for a breach of contract that, that per force means that I have forever waive the notion that I can brought in for something over here, that's disturbing.

JUSTICE O'NEILL: If Republic had sign the contract in Texas, would your argument be different?

MR. ALEXANDER: Somewhat, yes. And I, and I think because-- I mean we're focus on two things. I mean, one is the actions, the other the reasonable expectations. Here all of the actions were in, in, in California so if one of those actions happen to be in Texas that would weigh closer towards minimum contacts. So yes it was.

JUSTICE O'NEILL: So isn't, isn't where the contract signed a bit fortuitous, completely in the parties control.

MR. ALEXANDER: And is there's something wrong with that, I mean I'm back to potential defendant's may structure their primary conduct with some minimum assurance as to where that conduct will and will not rendered them liable to suit Worldwide Volkswagen.

JUSTICE WAINWRIGHT: But does-- is a land different it's-- I mean we're not talking about piece of personal of property. We're talking about a piece of Texas. It can never be taken out of Texas and the allegation is the party that owns direct interest in this dirt was involved in fraud in obtaining ownership of the dirt.

MR. ALEXANDER: Well, ...

JUSTICE WAINWRIGHT: Does that make it different from a couch when there's an argument about fraud and ownership of a couch of piece of personality.

MR. ALEXANDER: Yes and yet, it's the type of the interest involved. In other words-- and again I would-- I really would tell the Court to rest with Gardee and Royal and we're talking about governmental regulation if the piece of dirt that were talking about again is, is the condominium down here so that and I-- and it's owned in fee so that everyday I'm dealing with regulators on ADA issues ...

JUSTICE WAINWRIGHT: You're not dealing with any regulators you just part owner in the property and somebody else manages it. I just, I just ...

MR. ALEXANDER: I think I'm just total passive non-operating interest so that I am not dealing with state regulators on, on a daily basis then it is more like stock. It would all be almost like or like

only that in dealing investment in real state investment trust, I mean do we want in Texas to say that if you are nearly investing in, in, in a, in a venture and in corporal interest where you get money but you have to write checks if that's really all it is that anytime, anywhere and that's the, the problem. But if somebody alleges fraudulent transfer, you're in court in Texas, that's a huge concern. That is not far away of saying if you merely own stock in a Texas corporation you own a piece of that corporation in Texas. But are we going to say that if you just own some shares of stock if somebody you know, in Montana invest in a Texas corporation they have to come in call it to, to Texas for that, I think not.

CHIEF JUSTICE JEFFERSON: Justice Green.

JUSTICE GREEN: I apologize your Honor, Chief. Mr. Alexander, you, you haven't talk about the, the implied findings on the trial Court's order. Could you address whether that has any impact on your opinion on whether or not the court actually found that there was some fraudulent transfer in this case?

MR. ALEXANDER: I don't think that we, I mean that we have was a denial of special appearance. I don't think that again under Michiana there's no applied, there's no applied finding of anything. I mean you know, back to, to Michiana we have a deal and I think was repeated seven times in the dissenting opinion. We, we had someone who was admitting that they were liable for fraud. We don't have this here. I have a client who is saying absolutely not I am not liable for fraudulent transfer and under Michiana that's not an inquiry we get into. So again I mean we, we have to-- and that's what-- again that's what make these cases difficult because depending on where you draw the line there going to be either innocent plaintiff's who have to go out of state but for every innocent plaintiff that has go out of state how many innocent defendant's are they're going to be drag into Texas on very on, on context that I say under all of this factors including the Gardee and Royal governmental interest which really-- and when it get into that, that does not even supply the minimum contact they can only tipped the scale. We don't have minimum contacts here.

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

REBUTTAL ARGUMENT OF JAMES L. DROUGHT ON BEHALF OF PETITIONER

MR. DROUGHT: One statement that Mr. Alexander made that there's no proof in the record of, he said that something to the effect of Paradigm is a California corporation or expense for law offices in California, there's absolutely nothing in the record to that effect. Paradigm is a Texas corporation in it's all of it's conduct was occurred here in Texas.

JUSTICE BRISTER: Said that-- he said that was operating out of there.

MR. DROUGHT: Pardon me.

JUSTICE BRISTER: Said that he was out of there, the principles [inaudible]

MR. DROUGHT: And I thought, I thought he said that it's principal office was in California.

JUSTICE BRISTER: It's the principal's I think.

MR. DROUGHT: That's, that's not correct. Now, regarding purposeful

availment, the record in this case shows that Republic acquired is substantial interest in a number of oil and gas leases and oil wells and [inaudible] Republic is participated in the drilling of numerous oil and gas wells. In that connection it has acquired ownership in personal property in connection with these wells. And it assume the liabilities of Paradigm regarding Paradigm's operation of these wells.

JUSTICE HECHT: What has it done so far that pa-- purely passive investor would not have done?

MR. DROUGHT: Well, it's paid-- so far it's paid \$225,000 in operating the expenses to ...

JUSTICE HECHT: When does-- wouldn't the passive investor have to do that?

MR. DROUGHT: Well, I think so. But it's, it's also received \$1.2 million but what, what ...

JUSTICE HECHT: Well, has the passive investor would do that?

MR. DROUGHT: Well, that's true too. But it assumed liabilities.

JUSTICE HECHT: A passive investor would do that.

MR. DROUGHT: Well, I'm not so sure about that because if you assume liabilities you're liable to be sued here and so I don't see-- I mean this is not a passive investment. This is-- in fact, in this case it wasn't investment at all because Republic got this interest without pay anything for it. But, but I, I think that, that-- I don't think this is a passive investment. When you own working interest in oil well in Texas you own personal property, you own the land.

CHIEF JUSTICE JEFFERSON: Can you sue Republic anywhere else?

MR. DROUGHT: When this case was dismissed we sued in California because we didn't want loose our statute limitations claim but we made it subject to being that, you know, this Court reversed we would dismiss California and pursue here. But when Republic, when Republic took these leases it became bound to the Texas Operating Agreements, Gas Purchase Agreements, Gas Transportation Agreements, all of the agreements that are related to working interest, it became bound to do that if the operator didn't pay Republic would sue here in Texas for a payment of it's royalties and it acquired all of the rights in their oil and gas lease. All of the warranties, covenants and things to that nature, it acquired all those rights and he has rights to, to sue here in Texas. He's taking advantage of Texas laws. It so ...

JUSTICE JOHNSON: Well, all of that-- Counsel, all of that would have happened after the agreement, after the deal was done.

MR. DROUGHT: That's true.

JUSTICE JOHNSON: So the-- all the deal did was make those potential liabilities and those potential actions viable against them. And as I understand opposing counsel's position, he's not question about that. He just saying that prior to the deal being done which is what you're suing on you can't be sued on those actions cause they took place in California. Am, am I missing your position vis-a-vis his?

MR. DROUGHT: Well, what I'm saying is that under the, under the purposeful availment standard when you're considering specific jurisdiction you can look to other conduct or additional conduct that may indicate an intent of the corporation to be bound or to take advantage of Texas laws. And so we're not alleging general jurisdiction here but we, we do believe that Republic's contacts after the fact of actually signing the, the assignment are relevant to specific performance and particularly to a purposeful availment standard. And, and like I said before "It has paid \$225,000 in operating expenses it has received 1.2 million." And Republic deliberately engaged in this entire factual scenario to defraud our client by transferring his

property by her or getting his property from it's affiliate.

And our client, Steve [inaudible] to surrounds Republic-- I mean owns Retamco calls me up from time to time and he says, "Jim, this case is like, is like bear meat the more you chew it the tougher it gets." And so it is with the special appearance law we'd have, we'd have 15 cases or so where the Texas resident has lost everyone of them. And going back to the CMMM-- CMMC case back in 1996 you know, this Court said that, "We have so frequently and so recently reiterated the constitutional standards determining personal jurisdiction that we need not restate 'em again." And then it stated what the law is but I think what's happen here is that the San Antonio court is taking a look at Michiana and Moki Mac and it is interpreting it in a way much more restricted in what this Court intended. And then by doing so it is frustrating the rights of Texas residents to protect themselves and so we're respectfully request that the Court reverse. Thank you.

CHIEF JUSTICE JEFFERSON: Thank you. There no further question. The cause is submitted then the court will take a brief recess.

COURT ATTENDANT #2: All rise.

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