

BNSF RY. CO. v. SUPERIOR COURT FOR LOS ANGELES

S226284

Supreme Court of California

May 4, 2015

Reporter

2015 CA S. Ct. Briefs LEXIS 1011

BNSF RAILWAY COMPANY, Petitioner, vs. SUPERIOR COURT FOR THE COUNTY OF LOS ANGELES, Respondent.; VICKI L. KRALOVETZ, individually and as the Personal Representative of the Estate of Peter J. Kralovetz, AARON KRALOVETZ and SARAH KRALOVETZ, Real Parties in Interest

Type: Petition for Appeal

Prior History: Petition for Review from the Decision of the Second District Court of Appeal, Case No. B260798, After the Judgment of the Superior Court of California, County of Los Angeles, Case No. BC552015 The Hon. Emilie Elias, Judge Presiding.

Counsel

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Title

Petition for Review

Text

CERTIFICATE OF INTERESTED PARTIES

Pursuant to California Rule of Court 8.208, real parties in interest and their counsel certify that apart from the attorneys representing the real parties in interest in this proceeding, as disclosed on the cover of this Brief, real parties in interest and their counsel know of no other person or entity that has a financial or other interest in the outcome of the proceeding that real parties in interest or their counsel reasonably believe the Justices of this Court should consider in determining whether to disqualify themselves under canon 3E of the Code of Judicial Ethics.

Dated: May 5, 2015

SHARON J. ARKIN

Pursuant to California Rules of Court, Rule 8.500, real parties in interest respectfully petition for review of the published decision of the Second Appellate District, Division Four, filed on March 27, 2015. A copy of the opinion is attached as Exhibit A to this Petition.

QUESTIONS PRESENTED

Issue 1: The primary issue in this case is the same as in a case already pending before this Court, *Bristol-Myers Squibb v. Superior Court (Anderson)*, Supreme Court Case No. S221038: "Does general jurisdiction exist in light of [Daimler AG](#)

v. Bauman (2014) 571 U.S. [134 S.Ct. 746, 187 L.Ed.2d 624]?” In this case, similar to the defendant in *Bristol-Myers Squibb*, the defendant was registered with the California Secretary of State to do business in California, designated an agent for service of process, operated offices in California, had thousands of employees in California, and generated over a billion [*2] dollars a year in revenue from its California operations. In addition, the defendant in this case, BNSF Railway Company (“BNSF”), also utilizes the California courts to initiate lawsuits against other individuals and entities.¹

Because the same issue, with a number of similar underlying factual predicates, is already the subject of review by this Court, it is respectfully requested that, at the very least, review be granted pursuant to California Rules of Court, Rule 8.512(d)(2).

There is another related issue that also warrants grant of review in this case:

Issue 2: Does the fact that BNSF, as a foreign corporation, qualified to do business [*3] in the State of California and designated an agent for service of process under Corporations Code section 2105 constitute consent to personal jurisdiction in California as to any claim?²

WHY REVIEW SHOULD BE GRANTED

As noted above, this case involves the same issue regarding application of principles of general [*4] jurisdiction as articulated by the United States Supreme Court that is currently before this Court in *Bristol-Myers Squibb*. The factual predicate in this case is also largely the same as in the *Bristol-Myers Squibb* case: Both *Bristol-Myers Squibb* and BNSF have registered to do business in California, have appointed agents for service of process in California, employ hundreds or, in the case of BNSF thousands, of workers in the state, operate extensive offices and facilities in the State, and generate *billions* of dollars in revenue derived directly from their operations in California. Because both the relevant issue and the relevant facts of the two cases overlap, it is respectfully requested that review be granted in this case pursuant to California Rules of Court, Rule 8.512(d).

In addition to the factual similarities discussed above between *Bristol-Myers Squibb* and this case, there is additional evidence which adds to the analysis and further warrants review in this case: Unlike the defendant in *Bristol-Myers Squibb*, in this case there is evidence that BNSF has affirmatively invoked the protections of the California courts by initiating numerous legal actions [*5] against both other companies and individuals in the courts of this State. (RJN, Exhs 2, 3.) This additional activity on the part of BNSF allays any possible concern that notions of due process would be offended by exercising general jurisdiction over BNSF.

There is another related, but distinct, issue which is also raised in this petition however, and which warrants a separate grant of review. One issue never addressed by the *Bauman* decision, but which is relevant in both *Bristol-Myers Squibb* and this case, is the question of whether qualifying to do business under California’s Corporations Code section 2501, and appointment of an agent for service of process as required under that statute, constitutes consent to general jurisdiction. The only specific case in California addressing this issue, *Grey Line Tours of Southern Nevada v. Reynolds Electrical and Engineering Company, Inc.* (1987) 193 Cal.App.3d 190, 194-195 relied solely on a 1936 federal district court decision for its conclusion that compliance with the statute does not constitute consent to personal jurisdiction. The *Grey Line* court conducted no legal analysis or statutory construction in reaching [*6] its conclusion and dismissed out-of-hand the Judicial Council’s own conclusion to the contrary. And the federal district court decision rested primarily on the fact that this Court had not analyzed the issue.

¹ As discussed below, certain of the information identifying BNSF Railway Company’s associations with California were the subject of real parties’ request for judicial notice in the appellate court. The Court of Appeal denied that request (Slip Op., p- 4-6), but it is renewed in this Court in the concurrently-filed Request for Judicial Notice.

² Although this specific issue was not raised in either the trial court or the appellate court in this case, given the broad application the *Bauman* holding has been given, this is a critical issue that must be addressed by this Court in order to assure that the courts of this State can adjudicate cases involving corporations which qualify to do business here. Because this is a legal issue based on undisputed facts and the issue is of critical importance, review is warranted. (*Civil Service Employees Ins. Co v. Superior Court (Schlichting)* (1978) 22 Cal.3d 362, 374-375; *Brown v. Fair Political Practices Commission* (2000) 84 Cal.App.4th 137, 140.)

In the event this Court concludes that, despite its broad wording which goes far beyond the standard principles of stare decisis and precedent, *Bauman* applies in either *Bristol-Myers Squibb* or in this case, this consent issue is critical. California citizens who, through the Secretary of State, authorize companies to operate freely in this State, are entitled to impose on those companies the very same right to exercise general jurisdiction as they can impose on domestic corporations. Indeed, refusing to permit such an exercise of jurisdictional power unfairly disadvantages domestic corporations: By subjecting domestic corporations to general jurisdiction, but protecting foreign corporations from the same degree of jurisdictional power, the foreign interlopers obtain a business advantage. But the Legislature's language in 2105, and as interpreted by the Judicial Council, warrants the conclusion that by qualifying to do business in California a corporation consents to personal [*7] jurisdiction here for all possible claims, whether related to its business in the State or not.

The issue of personal jurisdiction, and the *Bauman* court's effort to limit application of general jurisdiction principles, if accepted at face value, affect a broad number and types of cases and determination of these issues is critical to the proper exercise of this State's judicial power. Review should be granted, either independently of, or as a grant-and-hold in light of, the *Bristol-Myers Squibb* case.

STATEMENT OF THE CASE

A. Statement of Facts

This is an asbestos wrongful death action brought by the heirs of Peter J. Kralovetz. (Slip Opinion, p. 2.) Among other exposures, the complaint in this action alleges that Mr. Kralovetz was exposed to asbestos for which defendant BNSF was responsible while Mr. Kralovetz was working at a dismantling facility and roundhouse in Wichita, Kansas. (*Ibid.*)

BNSF admitted that its operations in California are "substantial, systematic, and continuous." (Slip Opinion, p. 3.) Indeed, given the facts presented by BNSF itself in support of its motion to quash, it would be difficult to argue otherwise. For example, BNSF [*8] admitted that: (1) BNSF obtains \$ 1.4 billion dollars in revenue annually from its business operations in California. [Excerpts to the Petition for Writ of Mandate ("EP"), 82:69.]; (2) BNSF owns 1,149 miles of railroad tracks in California. [EP 37:28-38:1.]; (3) BNSF employs 3,520 people in California. [EP 38:5.]; (4) BNSF maintains railway facilities in California. [EP 82:12-14.]

In addition, as demonstrated through the real parties' request for judicial notice in the appellate court (which was denied by that court (Slip Opinion, pp 4-6), but which is renewed in support of this petition): (1) BNSF has applied to be, and is, qualified to do business in the State of California pursuant to Corporations Code section 2105, and has been registered with the California Secretary of State as such since 1970. (RJN, Ex. 1.); (2) BNSF has appointed an agent for service of process in this state. (RJN, Ex. 1.); and, (3) BNSF has filed at least seven lawsuits, as the plaintiff (six lawsuits) or a cross-complainant (one lawsuit) in just Los Angeles and Orange Counties since 2005. (RJN, Exhs. 2, 3.)

B. Statement of Proceedings

BNSF moved to quash service of the summons [*9] and complaint on it on the grounds that, under [*Goodyear Dunlop Tires Operations, S.A. v. Brown* \(2011\) 131 S.Ct. 2846](#) and [*Daimler AG v. Bauman* \(2014\) 134 S.Ct. 746](#), general jurisdiction did not lie in this case. (Slip Opinion, p. 2.)

After permitting further jurisdictional discovery and additional briefing, the trial court denied the motion. (Slip Opinion, pp 3-4.) The Court of Appeal reversed, holding that although BNSF "transacts substantial business in California," that business "constitutes a relatively small portion of its overall operations," and it is therefore not "at home" in California as required under *Bauman* and *Goodyear*. (Slip Opinion, pp 1314.)

DISCUSSION

The general jurisdiction question in this case is identical to that in the case already under review by this Court, *Bristol-Myers Squibb v. Superior Court (Anderson)*, Supreme Court Case No. S221038. As such an order granting review

in conjunction with the *Bristol-Myers Squibb* case pursuant to California Rules of Court, Rule 8.512(d) is warranted and is hereby respectfully requested.

Indeed, the factual predicates underlying BNSF's activity in California are [*10] virtually identical to those in the *Bristol-Myers Squibb* case: Each foreign corporation qualified to do business in the state; each foreign corporation generates as much as, or more than, a *billion* dollars in revenue based on its California operations, each foreign corporation employs hundreds or thousands of workers in the State; and each foreign corporation maintains extensive property and facilities in California. This Court's analysis of the general jurisdiction issue in *Bristol-Myers Squibb* case will largely apply with respect to the analysis applicable to this case. It is therefore respectfully requested that the issues in this case be preserved by a "grant-and-hold" order pursuant to Rule 8.512(d).

As noted above, however, further briefing in this case may be warranted in order to decide the issue of whether, by registering to do business in this State under Corporations Code section 2105, a foreign corporation "consents" to general jurisdiction in this State.

Either way - whether as a "grant-and-hold" or as an independent grant of review on the consent issue, granting of the instant petition is essential.

1.

BECAUSE THE ISSUES IN THIS CASE ARE VIRTUALLY IDENTICAL TO THOSE CURRENTLY PENDING BEFORE THIS COURT IN BRISTOL-MYERS SQUIBB, A GRANT AND HOLD ORDER SHOULD ISSUE IN THIS CASE

In granting review in *Bristol-Myers Squibb*, this Court identified one of the two issues for review as: "Does general jurisdiction exist in light of *Daimler AG v. Bauman* . . . ?"

The Court of Appeal in this case relied exclusively on *Bauman* to conclude that general jurisdiction does not lie in the State of California as against BNSF. (Slip Opinion, pp 12-14.) Thus, the issue to be addressed in *Bristol-Myers Squibb* is identical to the issue presented here.

And the factual predicates in the two cases are also similar. In *Bristol-Myers Squibb*, the evidence demonstrated that Bristol-Myers generated nearly \$ 1 billion in revenue between 2006 and 2012 in the sale of a single drug, Plavix, in California (see, [228 Cal.App.4th 605, 615](#)); BNSF admitted below that it generates \$ 1.4 billion *per year* in revenue from its California railroad operations. [EP, 82:6-9.] In *Bristol-Myers Squibb*, the defendant employed 404 people in the State of California (see, [228 Cal.App.4th 605](#)); BNSF has almost 10 times that [*12] number of employees in California, i.e., 3,520. [EP 38:5.] In *Bristol-Myers Squibb*, the defendant had research and sales facilities and offices throughout the state (see [228 Cal.App.4th 605, 615](#)); BNSF admitted to operating 1,149 miles of railroad tracks in California [EP 37:28-38:1], as well as maintaining other railway facilities in this State. [EP 82:12-14.]

Apart from those facts, there are only two factual distinctions between *Bristol-Myers Squibb* and this case. First, in *Bristol-Myers Squibb*, the evidence in the trial court confirmed that the defendant corporation has registered to do business in this State and, pursuant to that registration, had designated an agent for service of process. In this case, that evidence was not submitted to the trial court, but was submitted to the Court of Appeal by way of a Request for Judicial Notice - which was denied by the appellate court. (Slip Opinion, pp 4-6.) But, as discussed in the concurrently-filed Request for Judicial Notice to this Court, that evidence should have been considered by the appellate court and its consideration makes the factual circumstances in this case even more analogous with those [*13] in *Bristol-Myers Squibb*.

Second, as the Request for Judicial Notice in this case also demonstrated, and unlike the facts in *Bristol-Myers Squibb*, BNSF has actively invoked the jurisdiction of the California courts on numerous occasions over the years. This fact actually bolsters the conclusion that general jurisdiction should lie as to BNSF: It is irrational to conclude that while BNSF can invoke the jurisdiction of the California courts, due process protects it from the exercise of general jurisdiction by those same courts.

In any event, the issue of general jurisdiction is identical in each case and the facts of each case are sufficiently similar to warrant a grant of review in this case, even if it is with an order deferring briefing pending the resolution of the *Bristol-Myers Squibb* case. Real Parties respectfully request that, at the very least, review be granted pursuant to California Rules of Court, Rule 8. 512(d).

2.

REVIEW SHOULD ALSO BE GRANTED IN ORDER TO ADDRESS THE ISSUE OF WHETHER QUALIFYING TO DO BUSINESS IN CALIFORNIA CONSTITUTES CONSENT TO THE GENERAL JURISDICTION OF ITS COURTS

The fact that BNSF qualified to do business in this State under [*14] Corporations Code section 2105 raises an issue separate from the question of general jurisdiction: Consent.

As the U.S. Supreme Court has itself recognized, personal jurisdiction may also be exercised over a defendant who *consents* to jurisdiction, even when neither special jurisdiction nor general jurisdiction would otherwise lie. (*Insurance Corp. of Ireland v. Campagne des Bauxies de Guinee* (1982) 456 U.S. 694, 704.) And this consent doctrine may include “state procedures which find constructive consent to the personal jurisdiction of the state court in the voluntary use of certain state procedures.” (*Ibid.*) Nearly a century ago, Justice Holmes confirmed that a corporation which appoints an agent for service of process, in compliance with state laws requiring it to do so in order to transact business in the state, could rationally be held to consent to jurisdiction. (*Pennsylvania Fire Ins. Co. v. Gold Issue Mining and Milling Co.* (1917) 243 U.S. 93, 94; see, also, *Burnham v. Superior Court of California* (1990) 495 U.S. 604, 622 [holding that service on a defendant within the state does not trigger the analysis of whether [*15] “fair play and substantial justice” was met, and citing to several cases applying the in-state service rule to foreign corporations who had appointed an agent for service of process].)

Other courts have explicitly held that were state statutes require a foreign corporation to designate an agent for service of process, that constitutes consent to jurisdiction of that state’s courts, irrespective of whether jurisdiction would otherwise lie. (See, e.g., *Senju Pharmaceutical Co., Ltd. v. Metrics, Inc.* (D.N.J. 2015) F.Supp.3d , 2015 WL1472123; *Perrigo Company v. Merial Limited* (D. Neb. 2015) 2015 WL 1538088; *Acorda Therapeutics, Inc. v. Mylan Pharmaceuticals, Inc.* (D. Del. 2015) F.Supp.3d , 2015 WL 186833, *13; *Gucci America Inc. v. Li* (2nd Cir. 2014) 768 F.3d 122; *Tiffany (NJ) LLC v. China Merchants Bank* (2nd Cir. 2014) 589 Fed.Appx. 550, 553, as amended September 23, 2014; *Bane v. Netlink, Inc.* (3rd Cir. 1991) 925 F.2d 637, 640; *Allied-Signal Inc. v. Purex Ind., Inc.* (N.J. Super.Ct.App.Div. 1990) 576 A.2d 942; see, also, Restatement (Second) Conflicts [*16] of Laws, § 44, comment a [“By authorizing an agent or public official to accept service of process in actions brought against it, the corporation consents to the exercise by the state of judicial jurisdiction over it as to all causes of action which the authority of the agent or official extends. This consent is effective even though no other basis exists for the exercise of jurisdiction over the corporation.”].)

California requires out-of-state corporations that wish to conduct intrastate business in California to obtain a certificate of qualification from the Secretary of State. (Corporations Code section 2105.) Included in the requirements to obtain that certification, a corporation must name “an agent upon whom process directed to the corporation may be served within this state.” (Corporations Code section 2105, subdivision (a)(5).) Subdivision (a)(6)(A) of that statute also requires the corporation to provide “irrevocable consent to service of process directed to it upon the agent” And subdivision (a)(6)(A) “extends” that consent to search warrants, irrespective of whether the corporation is a party or a non-party to the matter for which the search warrant is sought. [*17]

Only one case decided under section 2105 discusses whether the “consent” demanded as a condition for transacting business in this state, *Gray Line Tours of Southern Nevada v. Reynolds Electrical and Engineering Co., Inc.* (1987) 193 Cal.App.3d 190, 194-195.³ In *Gray Line Tours*, the plaintiff argued that the defendant’s qualification to do business in California and the appointment of an agent constituted consent to jurisdiction. The *Gray Line Tours* court, however, rejected

³ In dicta, *DVI, Inc. v. Superior Court* (2002) 104 Cal.App.4th 1080, 1095 cited to *Gray Line Tours* for its proposition that simply registering with the Secretary of State to conduct intrastate business and appointing an agent for service of process does not confer

that argument based on nothing more than a 1936 federal district court decision, *Miner v. United Air Lines Transport Corporation (S.D. Cal. 1936) 16 F.Supp. 930*. That decision, in turn, reached its conclusion not on the basis of any statutory construction or reasoned analysis, but on the assumption that because "the highest court in California has given to this legislation no construction which authorizes service of process upon the statutory agent of the foreign corporation defendant where the suit is found upon a cause of action in no way connected with business transacted with in this state . . .," no such consent could be implied.

[*18]

The *Gray Line Tours* court conducted no statutory analysis, did not examine any legislative intent and simply rejected out-of-hand the Judicial Council Comments to California's long-arm statute, Code of Civil Procedure section 410.10 which concluded that, in fact, registering to do business in this State and appointing an agent for service of process *does* constitute consent to jurisdiction on *any* suit filed.

The Judicial Council's analysis ("*Basis of Judicial Jurisdiction*," which appears in the annotations to California's "long-arm" statute, Code of Civil Procedure section 410.10) addresses jurisdiction over both individuals and corporations.

As to foreign corporations - like BNSF - the Judicial Council confirms that California "has power to exercise judicial jurisdiction over a foreign corporation *which has authorized an agent or a public official to accept service of process in actions brought against the corporation as to all causes of action to which such authority extends*. (Subparagraph (3); emphasis added.) Further, the Judicial Council states, "[b]y authorizing an agent or public official to accept service of process in actions brought against it, [*19] *a corporation consents to the exercise of judicial jurisdiction over it as to all causes of action to which the authority of the agent or official extends*." (*Ibid*; emphasis added.) Most importantly for the issues in this case, the statute requiring foreign corporations to qualify to conduct intrastate business in California and to designate an agent for service of process "*does not limit the required consent to causes of action that arise from only intrastate business done in the state, and includes all causes of actions that may be brought in the state against a foreign corporation*." (*Ibid.*, emphasis added, citing to Corporations Code section 6403 [see, now section 2105, subdivision (a)].)

If *Bauman* is given effect outside of its limited factual scope and applied to situations like that in this case, i.e., involving extensive intrastate business by a corporation, it will be essential that this Court examine and decide the consent issue so that California citizens are able to obtain jurisdiction over out-of-state corporations who actively transact business - and derive significant revenue - from this State.

Even under *Bauman*, California's domestic [*20] corporations are indisputably subject to general personal jurisdiction, simply by being incorporated here. So, too, are those corporations which may be incorporated elsewhere, but have their principal place of business in this State. If foreign corporations are permitted to conduct business in this State *without being subject to the same general personal jurisdictional mandates as domestic corporations, those foreign corporations will have a commercial advantage over California's home-grown corporations*. This is not a trivial issue. Such distinctions between domestic and foreign corporations may have a significant effect on domestic corporations and will manifestly have a significant effect on California citizens, like the real parties in this case, who attempt to hold foreign corporations accountable in the same way they could hold domestic corporations accountable.

Because of the importance of this issue, review should be granted in this case to address this issue.

CONCLUSION

At the very least, it is respectfully requested that review be granted pursuant to California Rules of Court, Rule 8.512(d) so that the issues in this case can be preserved pending this Court's [*21] resolution of the issue in *Bristol-Myers Squibb*. Alternatively it is respectfully requested that review be granted in order to also determine the consent issue.

Dated: May 5, 2015

general jurisdiction, but that determination was not necessary to the court's decision in that case and, in any event, the *DVI* court merely adopted the *Gray Line Tours* holding without analysis.

THE LANIER LAW FIRM

THE ARKIN LAW FIRM

By:

SHARON J. ARKIN

Attorneys for Petitioners

CERTIFICATE OF LENGTH OF BRIEF

I, Sharon J. Arkin, declare under penalty of perjury under the laws of the State of California that the word count for this Brief, excluding Tables of Contents, Tables of Authority, Proof of Service and this Certification is 3990 words as calculated utilizing the word count feature of the Word for Mac software used to create this document.

Dated: May 5, 2015

SHARON J. ARKIN

PROOF OF SERVICE S%

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 225 S. Olive Street, Suite 102, Los Angeles, CA 90012.

On **May 6, 2015**, I served the within document described as:

PETITION FOR REVIEW

on the interested parties in this action by placing true copies thereof enclosed in sealed envelopes addressed [*22] as set forth below.

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XBy Mail: By depositing with the U.S. Postal Service on this day with postage thereon fully prepaid at Brookings, Or.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on May 6, 2015 at Brookings, Oregon.

SHARON J. ARKIN

[SEE EXHIBIT A IN ORIGINAL]

[SEE EXHIBIT A IN ORIGINAL]