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Supreme Court of Texas.
In re Pirelli Tire, L.L.C., Relator.
No. 04-1129.

November 29, 2005

Appearances:

Debora B. Alsup, Thompson & Knight, LLP, Austin, Texas, for Relator.

Victor M. Carrera, Law Office of Victor M. Carrera, P.C., Edinburg, TX, for Real Party In Interest.

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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JUDGE: Please be seated. The Court is ready to hear argument in 04-1129, In re Pirelli Tire.

COURT MARSHALL: May it please the Court. Ms. Debora Alsup will present argument for the relator. We'll later have reserved five minutes for rebuttal.

ORAL ARGUMENT OF DEBORA B. ALSUP ON BEHALF OF THE PETITIONER

MS. ALSUP: May it please the Court. This Court has not considered a forum non conveniens case in a foreign accident situation which Justice Hecht's dissent in Dow versus Alfaro(786 S.W.2d 674). This Court likewise has never written on the merits of the forum non conveniens statute, the Civil Practice and Remedies Code Section 71.051. This is a forum non conveniens foreign accident case at first impression therefore before this Court offering this Court an opportunity to re-iterate that Texas is not the courthouse for the world as Justice Hecht wrote in his dissent in Dow versus Alfaro. Moreover, the legislature had recently-- in this last session-- have revisions to 71.051 making it clear that any trial court shall consider the forum non conveniens factors in 71.051(B) and shall enter findings of fact and conclusions of law on those factors.

JUDGE O'NEILL: Let me ask you, though, under 'A' how did you to review an in the 'interest of justice' standard?

MS. ALSUP: Your Honor, the state at standard is of course, abuse

of discretion for 'interest of justice' but there are several cases out of Fort Worth and San Antonio that say that the 'interest of justice' standard in 'A' is a much more lenient standard for a foreign plaintiff than the, the 71.051(B) factors for a U.S. domestic but out of Texas resident and you consider those factors in assessing the 'interest of justice.' And our point here has been that it clearly-- what the trial court did hear was clearly an abuse of discretion because if you look at every single one of the forum non conveniens factors which of course come from the Gulf Oil versus Gilbert case (67 S.Ct. 839) from the United States Supreme Court. We consider everyone of those factors they all favor in Mexico.

JUDGE O'NEILL: But if you're, if you're using the 'B' factors, then you're treating non-residence under 'A' people you're treating them the same and if that's the case. Why differentiate between 'A' and 'B'? Why did the legislature do that?

MS. Alsup: Well, I think the legislature-- we don't know exactly what the legislature did there but I-- they made clear in the legislative history that 'A' was to be a more lenient standard and therefore if you do look at 'B' and treat them the same but it fails under 'B,' it necessarily has to fail under 'A.' This case also could not have more compelling facts that warranted a dismissal in favor of the Mexico forum. You've got a single vehicle accident in Mexico. Mexican passenger, Mexican driver, it's a roll-over accident that the 1988 GMC pick-up truck was transporting 2500 pounds of seafood from-- between two Mexican cities on a Mexican highway. A tire blows there's a roll-over, the passenger is ejected from the vehicle and dies, but in Mexico there's criminal liability for a driver where there's a deceased in the, in the accident. And so the evidence at the scene showed blood from around the engine of the pick-up where the deceased passenger was apparently drug around the vehicle and laid into the driver's seat so that-- and, and, and then the driver fled so that when the Mexican police came and investigated the accident, they thought that the plaintiff-- he's-- the State is the plaintiff here-- they thought he was driver yet the medical examiner's report shows that all his injuries are consistent with being a passenger.

JUDGE: What does that matter for forum non conveniens?

MS. Alsup: What, what it matters is that we cannot get access, we can't talk to the driver of the vehicle that apparently fled. We, we don't know what the, the speed of the car was, we don't know what type of maintenance they have done on the car. We can't talk to the owner of the vehicle, we can't talk to the owner of the seafood business.

JUDGE: Was that because of the rules of Mexican law?

MS. Alsup: Two reasons, one we have hire-- had to hire a Mexican International Investigation Company to try to find this. They have found the lawyer for them who said that he will not talk to Pirelli without a payoff. He wants \$5,000 and a laptop.

JUDGE: How's that, how's that different from litigating in say, Harlan, Kentucky.

MS. Alsup: Because in Texas courts have no power to compel even if we could talk to these people. Texas courts have no power to compel these Mexican witnesses to come to a Texas courthouse for a trial.

JUDGE: Well, you've got the Hague Convention. You've got letters rogatory and I'm a little bit confused because the argument appears to be that those were in effective because they refused to appear. But if they refused to appear, how is it going to be more convenient if they don't appear at the trials in Mexico or if they don't appear for trials in Texas.

MS. Alsup: Let me tell you what I've learned about the Hague from my research about the Hague. And from that the-- what the trial lawyers have done and make a record in this case. The Hague only gives a vehicle to use Mexican procedural law. It, it doesn't give us American discovery, it's only a vehicle to, to go down there and use Mexican procedural law.

JUDGE O'NEILL: Which, which will hamper you if you're in Mexico as well?

MS. Alsup: That's true. That is absolutely true. We're-- You're equally pampered in Mexico because their procedure only allows a judge to ask questions, you can submit questions to the judge.

JUDGE #2: And that's where I'm, I'm having a hard time seeing why it's more beneficial to litigate in Mexico under that of the six factors if the same rules they're going to restrict testimony or going to restrict the testimony whether you're here or there.

MS. Alsup: Because at least in Mexico a Mexican Court can have some compulsory process over these witnesses but what we learned and had put in record is that in order for the Hague or the Mexican process to work, you have to have three trips down there before the Mexican authorities will go out and try to find these witnesses. That means three court recorders, three videographers, three sets of lawyers going down to Mexico, hoping that the witness will show before ...

JUDGE #3: But I still how that's different from trying a case anywhere else in United States. You still have to compel someone to come to court, you have to compel someone to, to testify and they don't always respond to a subpoena or always respond to a court order, you know, they would go out to the Appalachian Mountains.

MS. Alsup: That's true but our United States procedures are available to use in the United States and there are not these cumbersome, expensive, time-consuming procedures by, by the Hague to get documents, prepared, translated, set from a Court here, issued to a Court there, who then goes and tries to find the witness but very cumbersome, expensive, difficult.

JUDGE: You know, I've been involved in litigation in Mexico, didn't assume to be anymore cumbersome than in any other significant litigation than in the United States.

MS. Alsup: Well, I think that the cases as you say that if the witnesses are uncooperative, the Hague is just going to be ineffective. And significantly, the record in this case shows the plaintiff's own expert, Professor Han Bodie-- Hans Bodie says, 'At time, he leave this Court has no authority by virtue of the Hague Convention to compel anyone to do anything before anybody in Mexico.'

JUDGE O'NEILL: Well, but it has-- that's going to be different. I guess what I'm struggling is if the case is dismissed and tried in Mexico, how's that more convenient because the witnesses aren't going to come forward there either. If the court in Mexico don't have authority to get him to court how does it benefit Pirrelli if they're going to try the case in Mexico. The witnesses aren't go show up, anyway. I mean if the Mexican side of discovery is not going to happen because of defects in the Mexican system. Then isn't it more beneficial to Pirrelli that the evidence that will have will come from their American witnesses dealing with the alleged tire defects and things like that.

MS. Alsup: Well, Justice O'Neill, I think it's a practical manner if it's tried in Mexico, if Pirrelli's not making all these trips up and down to try to get the discovery about that expense that it doesn't have to be incurred from the offset. I, I don't-- I can't tell you

about Mexican procedure and how the Mexican ...

JUDGE: First, I want to-- on the flip, flip side, we don't want to try every person who interchange from Mexico simply goes 'our rules are better.'

MS. Alsup: Exactly, again it's the courthouse for the world that if there are no significant connection to Texas there's a lie-detecting agent ...

JUDGE: Mexican legal-- civil Leg-- justice system doesn't work?

MS. Alsup: Then it needs to work ...

JUDGE: Does that mean we should try all their cases for them.

MS. Alsup: If it doesn't work, it needs to not work in Mexico, it is incredibly expensive and cumbersome to have it not work in Texas.

JUDGE: I know you briefed this issue but the 75.051(A) can you explain to me or give me other examples where the statute gives a trial court or seems to give the trial court discretion whether to grant or not to grant by using the word 'may.' The court may decline exercise jurisdiction. And then has the phrase that we have never granted mandamus, that I know of, in the 'interest of justice,' I mean, it looks like the, the statute was designed to give the trial court its own discretion. And so my question is, we may disagree with the trial court's ruling we-- you know, we're sitting as a trial court and we may have granted the motion but how is it-- how have you shown that it's abuse of discretion when the statute confers that discretion expressed them at the trial court?

MS. Alsup: The statute is discretionary if the 'may' standard. However, there are, there are no cases from this Court but there are cases from Fort Worth and, and San Antonio, the Feltham versus Bell Helicopter% case (41 S.W.3d 384) I've cited. It's a 2001 accident and plaintiffs in Canada, component manufactured in Texas, it was dismissed under Subsection A. The Jones versus Raytheon case (120 S.W.3d 40) dismissed under Subsection A. And both of those courts said that the 'A' standard-- going back to, to our answer to Justice O'Neill, I hope this answers your question but it's, it's a lesser standard. And so you look at the 'B' factors. But what I'm going to show this Court is that every single 71.051(B) factor merely takes in favor of Mexico here. And if all of the 'B' factors, the more stringent standard set-- means that this case has go to, to Mexico then clearly you abused your discretion under the lesser 'interest to justice' standard.

JUDGE: Well, it was that the calls they favor under 'B' going to Mexico, does that mean trial court abuse its discretion in not granting the motion -

MS. Alsup: Yes, your Honor.

JUDGE: - simply because they favor?

MS. ALSUP: Simply because those Gulf Oil versus Gilbert factors in 'B.' Every single factor says shall go to Mexico.

JUDGE: Well, does it say, does it you go to Mexico or these factors that the trial court is to consider?

MS. Alsup: Either fact that the trial court has to consider.

JUDGE: Okay. And, and even assuming they favor as the Chief Justice said we might conclude in favor transferring right to Mexico, is there anyone of them got the mandates going to Mexico so that the trial court would have clearly violated the law or misuse of law, abuse its discretion if we could use that term? I'm not going to apply ...

MS. Alsup: Well, I believe it work this way, every single federal court that has considered the 75.051(B) factors although it's common law in the federal system since, since the Gulf Oil factors. And the-- under these facts have said that in a similar situation, Mexico is

available forum. Mexico is an adequate forum even though it has reduced damage caps. It would work as substantial injustice to the parties that, that case state in Texas.

JUDGE: All of those factors go to the 'interest of justice' phrase in Subsection A, I would presume.

MS. Alsup: All of those, yes. All of those factors ...

JUDGE #1: Right. Now, even, even if we assume that those factors preponderate or almost in our opinion mandate to go. What do we with the language that says if the trial court finds certain matters, the 'interest of justice' then it may decline exercise jurisdiction and it may stay or transfer. How do we judge that?

MS. Alsup: I believe that, the 'may' is simply what we cited of the abuse of discretion of the discretion standard. The trial court has discretion but the trial court can abuse its discretion when every single accident fact and every single factor favors that the case should not be in Texas. The case should be in Mexico. So I think all 'may' means is discretion and the court abuses its discretion if every factor points to another forum.

JUDGE: When the suit was filed, the Garza Motors was the defendant, is that correct?

MS. Alsup: That is correct. Garza ...

JUDGE: Does that change the analysis in, in any way?

MS. Alsup: No-- Garza Motors was the defendant and there was a stipulation to dismiss if we agreed not to remove the case to the federal court. I think that it makes no difference, your Honor, because the fact is, this vehicle with the tire-- that perhaps wasn't even on it at the time-- was in Texas for eleven days. If a transient movement from auction house in Arkansas through Texas here for eleven days as, as efficient contact with Texas, I think not.

JUDGE: Thank you, Counsel. The Court is ready to hear argument from the respondent, the real party.

COURT MARSHALL: May it please the Court. Mr. Victor Carrera will present the argument for Real Party In Interest.

ORAL ARGUMENT OF VICTOR M. CARRERA ON BEHALF OF THE RESPONDENT

MR. Carrera: Mr. Chief Justice, members of the Court, my name is Victor Carrera and I represent the the Real Parties In Interest, who were the family of Valentin Hernandez Serrano who was killed in this accident when a tire blew out. I disagree with the statement made but it's also did-- this Court has not considered forum non conveniens since the Dow case because two and a half years ago, this issue was here on mandamus. The Bridgestone/Firestone cases (470 F.Supp.2d 917) (420 F.3d and mandamus was denied.

JUDGE O'NEILL: But haven't we abandoned that standard in Prudential (148 S.W.3d 124) in the AIU. What's the difference between a forum selection clause that we've said is mandamus of the word prospect of jury waiver, we have said now is mandamus of all and a forum non conveniens motion.

MR. Carrera: Those are contractual actions and what I've been able to see in that to me it would be a difference.

JUDGE O'NEILL: But why? I see that is the difference, but why?

MR. Carrera: The parties had agreed in advance to-- where they're going to hear their, their dispute or whether they're going to have a

jury hear their dispute or not.

JUDGE O'NEILL: So it would be the ones voluntary, ones involuntary and that's why the mandamus point-- the mandamus factors whether there's an adequate remedy on appeal. And I don't know why there'd be any less or more of a remedy on appeal because it's contractual or not contractual. I guess is the question on it.

MR. Carrera: Well, as I understood the analysis in those cases, it would be useless because according to the court's analysis, the party should not be required to do something that was useless and that was, you know, as matter of law on those cases of contract law would, would be a novelty.

JUDGE: But what creates the forum here, is it the fact that the vehicles in Texas were eleven days is that ...

MR. Carrera: In fact the-- that the tire was on a vehicle sold in Texas.

JUDGE: There wa-- this-- to go back to the Chief's question regarding this question with the trial judge and if hypothetically, the trial judge did not abuse his discretion in this case, it either comes back to us and we reviewed on the different circumstance and find that the trial cohered in that the case should have been tried in Mexico and not here. Why should we go to that entire procedure to waste the assets of both parties and, and ...

MR. CARRERA: Well, your Honor, that's the way that procedure's always been forum non conveniens analysis in Texas. It's been held that the-- a remedy is by-- available by way of appeal, the same as for choice of law. A lot of things can happen in the interim. The case can be tried or you may choose to appeal or not appeal depending on the result. I understand what you're saying if that would occur then presumably the case will be reversed and if the plaintiff had a ...

JUDGE: That would be the most inconvenient way to do it. After all forum non conveniens is aimed at everybody's convenience.

MR. Carrera: It may be in the ...

JUDGE: The most inconvenient way to do it would be to try the case twice.

MR. Carrera: It may-- that's, that's true, your Honor, but if the reversal would say, 'There was an error here, you need to go try this in Mexico.' And then the Mexican Courts rejected, what happens then? Comes back to Texas and I gets retried again. But the issue here ...

JUDGE: Why would the Mexican Courts reject this case? Because I think -

MR. Carrera: I don't ...

JUDGE: - car wreck, car wreck that occurs in Mexico, that they stipulated that they'll submit to the jurisdiction of ...

MR. Carrera: They, they're being rejected as we speak, your Honor, at least half a dozen Mexican jurisdictions I believe been rejected this type of cases and we provided information -

JUDGE: Why is, why is, why is that?

MR. Carrera: -because the Mexican Court say, 'I do not have jurisdiction over a foreign party and that the parties cannot stipulate the jurisdiction.'

JUDGE: Well, that raises the question: How many Mexican personal injury cases do we want in Texas? I assume people slip in the grocery store in Mexico just like they do in Texas, have car wrecks, products fail. We, we simply cannot do the civil justice system for Mexico and charge the Mexican the American taxpayers for it, can we? I mean, it's simple. We've got to tell Mexican citizens and Mexican nationals, 'No, you need-- if, if your country is doing you injustices, you need to

talk to your country. We cannot do this for you on our own penny.'
Right?

MR. Carrera: The difference here is that we have United States defendant, the manufacturer of the product in United States and it was sold in the United States.

JUDGE: Yeah. And if-- and, and almost every major manufacturer will have some American affiliate and many things we hope to indeed ship and sale, sell many things to folks in Mexico to huge market. And so if Mexico refuses to allow suit against any of those people, we or an American taxpayer is going to have to run a civil justice system for everybody in Mexico. We can't do that, can we?

MR. Carrera: Well, your Honor, there's actually a statute in the Texas Civil Practice and Remedies Code that says if we have equal treaty rights with the-- a signatory country, they can bring a wrongful death action of personal injury action in Texas.

JUDGE: The legislature can make a determination here, and it's your contention that this statute gives that some discretion to the trial court.

MR. Carrera: Well, absolutely ...

JUDGE: Has it change-- has that change with the Amendment in 2003?

MR. Carrera: I don't think that particular one has change. Now the Amendment in 2003 eliminated Subsection A which the relator contends a lesser standard and modified Subsection B and I think the reason for that was because there was sort of uneven protection type of analysis if you're saying that 'A' is a lesser standard between a foreign litigant and a non-Texas resident who's a United States citizen that was the distinction at that time. I think that distinction would not conform with the treaty obligations that we discussed although we did not, we did reached that, your Honor.

JUDGE: Can a trial judge abuse its discretion in denying motion to transfer a forum or dispense a forum [inaudible]?

MR. CARRERA: I don't believe your-- that, that, that if, if there was absolutely no connection with Texas, I think probably. If there was absolutely no connection to Texas.

JUDGE: So there's some stand-- you think there's some standard under the statute. It's not just the trial judge can't just do 'willy nilly' whatever he or she feels like?

MR. Carrera: The, the only case that I've seen that, that construes Subsection A as it's done case by case basis and it's been said there's a great deal of discretion and a lot of discretion that's what we got here.

JUDGE: Turn on the other side of the coin, can a trial court abuse its discretion by granting a motion for new trial in the 'interest of justice'?

MR. Carrera: I don't believe so, your Honor, there is a, a valid basis I saw ...

JUDGE: What if there is no valid basis and there's a, you know, that, that there's 'willy nilly' [inaudible] Texas, is that mandamus or ...

MR. Carrera: I believe that's, that's a subject of an appeal.

JUDGE: Isn't that, isn't that, on the sound discretion of the judge for the trial judge to decide whether or not a new trial should be granted on whatever basis he or she so chooses?

MR. Carrera: Yes. The same way in Subsection A here case by case basis, your Honor. And in the-- under the record of this case ...

JUDGE: But I just want to be clear.

MR. Carrera: Yes, Sir.

JUDGE: You think the trial judge can or cannot abuse its discretion under Section A?

MR. Carrera: I think as I said earlier if the record shows absolutely no connection to Texas, then it would probably be an abuse of discretion.

JUDGE: But where do you draw the line, the vehicle and the tires in Texas for half an hour is that, is that enough to create -

MR. Carrera: The vehicle -

JUDGE: - jurisdiction?

MR. Carrera: - and the tire was sold in Texas. Now that brings up the other case that Ramos Sanchez versus Brownsville Sports Center case (51 S.W.3d 643) is very similar to this case, your Honor. There a need to [inaudible] Brownsville I think the third owners where in Mexico, had a wreck. That is still binding and precedent here. The trial court had that precedent not only with regard to the forum non conveniens issued with regard to the choice of law issue. And here, the trial court cannot clearly have abuse of discretion for purposes of mandamus, if it follows existing Texas precedent.

JUDGE: I'm just trying to think of how this trial will work out though that the engineers on defect and the experts and the personal injury folks, the family. Not one of the witnesses at trial would be from Cameron County.

MR. Carrera: That's probably true, your Honor.

JUDGE: Indeed not one of the witnesses at trial will be from Texas.

MR. Carrera: That's not true at all.

JUDGE: Who, who will be from Texas?

MR. Carrera: One, I read out what the expert reconstruction is that that ...

JUDGE: So if we present this ...

MR. Carrera: So I guess ...

JUDGE: But of course expert could be hired. So wherever the expert is hired from that's the con-- most convenient place to try the case.

MR. Carrera: No, your Honor, here ...

JUDGE: None of the fact witnesses indeed will be from Texas.

MR. Carrera: I don't believe so, your Honor.

JUDGE: Tamaulipas Mexico is a lot closer than say, Amarillo. Correct?

MR. Carrera: It's a lot closer to, to Brownsville Texas than Amarillo your Honor.

JUDGE: Counsel, today, today, if I mean, if it was the same case and the trial court believed that factors weigh in favor of granting the motion to transfer venue. The statute says, 'The Court shall decline exercise jurisdiction and shall stay or dismiss the claim or action.' That's the, the change in 71.051. So isn't it fair to say the legislature has now announced its position on this and has removed the discretion in these cases under the pre-2003 statute and now has made dismissal mandatory that those factors apply. Is it a policy question or is it legal?

MR. Carrera: Number one, since it is subsequent legislation, it would not apply. And in fact, I believe that the relator has, has so stated in their brief that it would not apply. I, I did not brief that issue whether-- on that particular issue but I don't believe it would change it the mandamus standards. And when you're looking at several factors to be considered ...

JUDGE: What, what I'm-- I guess what I'm actually asking is that, is it a legislative determination whether the trial court will have

discretion in circumstances such as these or not. Pre-2003, the legislature says 'may' in the 'interest of justice' without missing those factors. Pre-2003 they say, 'shall' and you consider the formal, formal 'B' factor.'

MR. Carrera: I don't think so because if that have been the legislature's intent, why not have an interlocutory appeal on the denial of forum non conveniens motion.

JUDGE: But on, on other hand, on that venue non conveniens motion, the legislature specifically said, 'And nobody can appeal or review anything the trial judge has absolute discretion.' That it can't be changed by anybody as we said in the Garcia case (137 S.W.3d 36) last year. They could have said in statute, the trial judge has discretion whether to dismiss or national forum con-- non conveniens and nobody can appeal that but they did not. So we, we know they could have said that but they didn't say her. Is that a distinction.

MR. Carrera: I don't think you can read into that your Honor.

JUDGE: Counsel.

MR. Carrera: Yes sir.

JUDGE: In the former A 71.051(A) where had the trial court's find in the 'interest of justice' that the same language is in the amendment and 'B,' if a court finds in the 'interest of justice' and it comes back to us but shall decline and shall to stay or dismiss language. How you reconcile those two, do you think there's still some discretion if the trial judge before reaching any of the 'shall' language has confined in the 'interest of justice.'

MR. Carrera: Any time you have ...

JUDGE: This is how I guess my question's how different are the two standards if in the 'interest of justice' is a conditional or a determination on which the other findings are conditioned.

MR. Carrera: I don't believe there is a difference because again the only analysis that this is a case by case type of, of a situation to be analyzed and I believe that it would not be mandamus it'll be absent you know, the situation we talked about which has absolutely no connection to Texas.

JUDGE: And if the judges in Cameron County decide, I'm more sure they're more familiar with litigation, litigation perhaps, you are more than I am, I'm not with it at all, but if they decided things were not good down there will start in effect. In retaining all kinds of suits of personal injuries from Mexico, take place in Mexico between Mexican nationals, can this Court do anything about it? Should we do anything about it or is that just none of our business that's what the people of Cameron County want to pay for?

MR. Carrera: Again, here this is not purely between Mexican nationals, an American company has been sued, earlier you made some question about ...

JUDGE: Of course, then you can-- again you know, we live in a - as the folds says a flat world - a car has components from everywhere, a computer has components from everywhere. Some of them surely will have come from America from time to time and for most things of any com-- most things, they could hurt somebody really bad or may have an American component where you just sue an American company. They may not be liable but you could name them. And if that's the case and the Cameron County judges decided, 'We don't like the way the cases are handled in Mexico but we're going to handle them for everybody, for Mexico as long as they had an American defendant.' Is this Court, Should we worry about that? Can we worry about that? Or is that just up to what Cameron County people want to pay for?

MR. Carrera: Your Honor, there's, there's--this was analyzed in that Brownsville Sport Center case, Sanchez versus Brownville Sport Center that where a Mexican-- there is no Mexican defendant, just an American defendant that there was a, a false conflict that took there. There's no, I guess no public policy reason for Mexican damaged lost to apply I, I do know that that case was-- is, is still has, has not been overruled and I believe that that analysis is sound.

JUDGE: Mr. Carrera, is it more just adding a defendant and isn't it, isn't it adding a defendant whose products are approximate cause of the accident in question?

MR. Carrera: Excuse me, I didn't ...

JUDGE: Isn't it just more than adding a defendant to secure jurisdiction in Texas, isn't this case about adding a defendant who's at-- the allegation is whose product was approximate cause of the accident in question?

MR. Carrera: Yes, your Honor. And here, there's no question that there was a blow out because of this accident. On the tire manufactured by the relator. And so and, and experts had looked at it, car experts claimed the tire was defective. Their experts say it wasn't. That's the issue here, it is an American product, it's just fortuitous that the accident with this tire happened in Mexico involving-- and, and a Mexican national was killed.

JUDGE: Would your position be any different if this accident had occurred in Iowa or apparently the tire was made where the car was originally sold etc... Would a Cameron County judge need to dismiss that one for forum non conveniens?

MR. Carrera: If it hadn't been sold in Cameron County.

JUDGE: Well, that same facts it passed through for eleven days again but it started and ended up in Iowa; and, all the injuries are in Iowa; the defendant's manufacturers in Iowa. Surely, then it would be, 'We all sent it to Iowa.'

MR. Carrera: Well, yeah. I don't practice law and I was so ...

JUDGE: It wouldn't make any difference to you.

MR. Carrera: It would not make any difference to me but you know, nobody in Iowa has hired me lately, your Honor, but I, I think a valid argument could be made and Texas has an interest in regulating the product sold in Texas.

JUDGE: So anything further?

JUDGE: The issue for you whether the tire was on a vehicle sold in Texas or the American-made tires sold on a vehicle ...

MR. Carrera: Well, for purposes of forum non conveniens and when you're looking at the inconvenience to the defendant, you know, it should make no difference to them in which state in United States the litigation was brought. Here, the tire was sold in Texas that is the, the nexus to Texas, where the vehicle sold in Texas.

JUDGE O'NEILL: But it seems like where the vehicle sold is more related to a jurisdictional requirement none of them contacts, then it really is convenience to the parties. I mean, I, I understand the vehicle being sold but, but in terms of determining which forum is more convenient, I don't-- I doesn't seem that it might be a factor to consider.

MR. Carrera: Well, that's what we are considering here, though. And why is it incon-- is it more convenient for an American company to want to go to a court in Mexico. It, it doesn't make any sense. Here Cameron County is not inconvenient to the place to live in, Reynosa about 60 miles away from Brownsville. Which is you know closer than Selavictoria Camliges.

JUDGE: Any further questions? Thank you.

MR. Carrera: Thank you, and again it's a pleasure to be here. A lot of new faces.

JUDGE: Thank you very much.

JUDGE: This is also put about of Mr. Carrera's last point. Why in the world are you all wanting 'Oh please, send us Company to Mexico to litigate this case there against Mexican nationals.

REBUTTAL ARGUMENT OF DEBORA B. ALSUP ON BEHALF OF PETITIONER

MS. Alsup: Well, ...

JUDGE: Just sounds a little fishy. One puts-- what's

MS. Alsup: The truth is as a practical matter that a law of Mexico can apply their damage caps in Mexico. Mexican Court presumably can, can compel attendance of those witnesses.

JUDGE: What about his argument that Mexican Courts are not allowing American companies to stipulate the jurisdiction?

MS. Alsup: Your-- let me tell you about that in the, in the Firestone cases there, there been several different venues where those Firestone cases have been handled and the Federal MDL was handled or is probably still being handled in Indianapolis. And in that case the, the district court the Federal District Court made the decision to send the any foreign accident plaintiffs dismiss those cases but to retain any U.S. resident plaintiffs as for those foreign accident plaintiffs there was overturn jurisdiction clause in the dismissal order that go to Mexico in that instance and, and if in Mexico we believed that's an available forum because the defendants have stipulated to jurisdiction over there in Mexico. But, what happened is that some plaintiffs have gone to Mexico not to the location where the accident happened in, in those cases but to a different Mexican state. Mexico is a federation of 31 separate states, they went to a different state they didn't advise the defendant that they were going to that court in Mexico I think it was in Morelos rather than - I'm not thinking about that the state where it was - Veracruz that's right, it was Veracruz and the Mexican Court dismissed the case not knowing that the defendant had consented to jurisdiction in Mexico then, then the plaintiffs went back to the Indianapolis to the federal court and said, 'Oh, Mexico isn't available forum because they dismissed our case, for one to jurisdiction on Firestone.' And the Seventh Circuit and here is the cite it-- this decision was just handed down on August 2005 it's a 420 fed 3rd 702. The Seventh Circuit remanded to the a district court and said this is awfully odd. Didn't even go to the right state in Mexico. Defendants weren't advised. I need you the district court to determine whether Mexico is an available forum be-- or determined whether the system which just manipulated.

JUDGE: As supposes of practical matter your client would agree if Cameron County abated its case for the plaintiff is to file in Mexico and then could find out whether the Mexican Court would take jurisdiction or not. You would have no objection to that?

MS. Alsup: I think there-- it would be appropriate time to have return jurisdiction clause -- I do think that's true.

JUDGE: Ms. Alsup do you think the broader issue AIU (148 S.W.3d 109) and Prudential change the mandamus stand if so how?

MS. ALSUP: You know, in the appellants circle it has been--

JUDGE: I heard a little of that discussion.

MS. Alsup: Generally discuss that Prudential particularly created a change in the court's prospective on mandamus action. And, and set standards for mandamus maybe somewhat broader than Walker versus Packer (827 S.W.2d 833) and those standards are certainly clear abuse of discretion no adequate remedy by appeal. But mandamus is an appropriate in an exceptional case to preserve important substantive and procedural rights from impairment or loss that was one the statements in Prudential. In this case this is a forum non-convenience case but it is about so much more than convenience.

JUDGE O'NEILL: Well, what-- let me ask you, you know, we've got a lot of jurisprudence that says on a motion for new trial pretty much in favor of discretion on the trial court's part and I believe that standard is that the trial court may in the 'interest of justice' grant a new trial and we've interpreted that to mean they just may and we can't really review that at all. How, how-- if we were to determine their 'may' in the 'interest of justice' it can be reviewed under abuse of discretion, What would it do with that jurisprudence or would this be a special rule carved out just because of the 'B' factors in the statute.

MS Alsup: I think it's the latter. I think that motion for new trial I have been the, the victim of motion a new trial after successful jury verdict. But I think it also difficult it-- to show in, in a motion for new trial how there was actually abuse of discretion. The record here have been made under all the 'B' factors that there was an abuse of discretion under each and everyone of these factors. I don't think this would change in the motion for new trial discretion.

JUDGE O'NEILL: And, and how it-- why is it different in, in that context?

MS. Alsup: Because we have identified the factors in the forum non-convenience arena to look at that the court has to consider in deciding on that motion, motion for new trial is, is open.

JUDGE: Any further questions?

JUDGE: Judge I have one, counsel, to think that why would this not be more appropriate to come up after trial in regard to your due process rights? At that point we can look and see w you actually had and if you were actually deprived of something you'd have bills reviewed I mean not bills review - bills exception and offers approved and things that you, you couldn't make? That's my first question, and the second one is, is the your second point on mandamus application of Mexican law as supposed to Texas law is that really reviewable to mandamus? Could you just breath those, real briefly please?

MS. Alsup: The-- why should we not have to try this case? Because the trial would be a complete sham. We don't have any of the evidence we need. We can't even prove that the tire ...

JUDGE: But we would know that then. We would, we would know that after the trial what you could or could not get.

MS. Alsup: We know it now that that we can't get it. How can we possibly defend ourselves we're not ...

JUDGE: We don't, we only know what you are saying. We don't know that. We don't know what are you telling us.

MS. Alsup: Well, I, I think I've shown in the record that we tried to get this evidence but we can't get it as requires pay off essentially to get-- even to talk to representative.

JUDGE: Okay.

MS. Alsup: Let say for the number one here complete fiction a wast of everybody's time. Number two, the choice of law I think choice of

law is, is secondary in, in this case and as far as being reviewable on the mandamus because if we don't even have that facts necessary to defend ourself. What difference does what law is applied to make. Thank you.

JUDGE: Thank you Counsel, the case was submitted. That concludes the argument for the day and the Marshall now will ad the court.

JUDGE JEFFERSON: All rise. Oyez, Oyez, Oyez the Honorable Supreme Court of Texas, now stands adjourned.

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