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Supreme Court of Texas.  
In re Team Rocket, L.P., MLF Airframes, Inc., and Mark L. Frederick,  
Relators.  
No. 06-0414.

February 15, 2007

Appearances:

Cynthia T. Sheppard, Cuero, TX, for realators.  
Gary L. Evans, for real parties in interest.

Before:

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

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PROCEEDINGS

JUSTICE: Please be seated. The Court is ready to hear argument in 06-0414 In re Team Rocket.

COURT MARSHALL: May it please the Court. Ms. Sheppard will present argument from the Relators. Relators have to reserve the five minutes for rebuttal.

ORAL ARGUMENT OF CYNTHIA T. SHEPPARD ON BEHALF OF THE PETITIONER

MS. SHEPPARD: May it please the Court, Counsel, Cynthia Sheppard for relators Team Rocket L.P., MLF Airframes, Inc., and Mark Frederick. Your Honors, the issue in this mandamus case is really not whether this respondent transport abuses discretion because it clearly it did when it disregarded proper the new procedure. Rule 87.5 makes clear the parties are entitled to only one venue determination in any given case and any subsequently filed case of this part of the same claims in parties. Here the plaintiff real, real parties and interest were unhappy with the first venue determination that they received in Harris County. When the trial court transferred the case to Williamson County where the defendants reside where they did a business and where the alleged negligence took place. Rather than follow the clear procedures set forth in the main statute and go ahead and try the cases in

Williamson County and then appeal that venue ruling. They chose instead to voluntarily nonsuit their case in Williamson County filed and refiled the same case in Fort Bend County where the only connection to this case is that it happens to be where the plane crash occurred.

JUSTICE: What do you do with their language in *Masonite* where we said that the ordinary situation where trial court abuses this discretion and the quality is, is that situation involves under the resources of the inter-trial court and the parties that are remain in, in that case even if the trial court has committed reversible error, we will not issue mandamus.

MS. SHEPPARD: Well, I think for one thing you can take the language from *In re Masonite* and support mandamus in this case because *In re Masonite*, this Court held that a trial court's failure to file a proper venue procedure is, is reason to issue a mandamus. And I think what's implied in that holding is that, if your party does reversible error built in to a case, and the trial in appeal have been absolute fiction because you know it's going to be reversed in which similar in County then there is no reason to do that. And the only way to enforce that statute and procedure that set for file legislature is to issue a mandamus.

JUSTICE: But then it involved multiple cases and multiple courts and we call that a truly extraordinary situation and specifically said if that were one case, one errant Court that will not be mandamus.

MS. SHEPPARD: Because-- your Honor. And my answer to that is twofold. One thing is this-- were not relying solely on *In re Masonite*. One thing that says this case a party is this is an error that is likely to be repeated by many parties. And that is because if plaintiffs realize that they can for-- form shop at their leisure, then they are going to do so until they find a friendly Court. And that means, that means a given plaintiff, even one plaintiff could file in the State of Texas 254 times -

JUSTICE: Well, we take ...

MS. SHEPPARD: - and one case.

JUSTICE: Counsel, we can still, if we can still stop that-- just wait until the case is tried and issue an opinion after that and say, "It didn't happen." Now that may not address with an injustice in your case as you perceived it. We could still stop that. It was just be after the trial, right?

MS. SHEPPERD: Well, if that what the case your Honor it will already be stopped because that is already is a clear law. It doesn't stop it because it gives the plaintiffs the right or the opportunity to abuse the system by jumping from court to court 'till they find one. He's willing to disregard the collateral estoppel effect to that first court's decision.

JUSTICE: And if find out, if an opinion in this case where the issue after trial, then we said, "Absolutely, don't do this." Even though we may not take that on mandamus, don't do it, then that's-- I'd like to think that Counsel across the state have been listening to that.

MS. SHEPPARD: Well, your Honor I, I'm-- you maybe right but as of, of the state of laws stands right now that already is, the law, there's ...

JUSTICE: Well, I'm not sure Justice O'Neill talked about *Masonite* in *Bridgetone versus Firestone* versus the 13th Court of Appeals in 1996. We said and in the case where the Woods argued that they were entitled to mandamus because there is no adequately needed that appeal. We said, we disagree quote their notes extraordinary circumstances in

this case. The rule is that venue determinations generally or not reviewable by mandamus. Do we have to overturn Bridgetone to get to your conclusion?

MS. SHEPPARD: No, I'm sorry I misunderstood your question your Honor. I thought you meant whether it was, it was error for the court to not get collateral estoppel to the first ruling. Clearly, that's already the law so if all we have is a regular appeal without a mandamus, the state of the law states the same. And that is you're not suppose to do that trial court, but we're not going to allow any intervention at this point. We're going to make the parties and the Court's ways. There's an other ways of resources trying a case and filing an appeal that has absolutely no benefit to anybody.

JUSTICE: It doesn't that benefit you? I mean if you win at trial, the case goes away. If you lose, you get another shot.

MS. SHEPPARD: Regarding my clients I can-- I guarantee, I've guaranty. Most clients do not want to have to try our case twice. This is-- you know if I would win ...

JUSTICE: Many, many clients would like it their ways to have a free new trial. And so I mean, I, I, I hear what you're saying in terms of having to do it again. But you only have to do it again if you don't win. I mean if you lose, don't you want another shot by the automatic reverse?

MS. SHEPPARD: Well, I think the efficient use of our resources but the parties and the courts is to try the case on the right court one time. And the only way to do that is to issue mandamus to make this trial court transfer it back to Williamson County and really that's the whole purpose of the venue statutes in the first place because we go back to the days when there were multiple trials and multiple appeals in this states statute has passed to prevent that. So there's one trial and there's one appeal. And we don't have all these longtime theories litigations going on. And one problem with it and, and the second part of my answer to your question Justice O'Neill is that this Court has a adopted a balancing test. And in my prudential and other cases this Court has stated that there-- it's really a flexible role and you-- it involves a careful consideration of different just prudential considerations of both the private parties and the public interest. And one test is whether there any benefits to mandamus and what the detriments are if you don't issue mandamus. And here, there been absolutely no benefit in my opinion, not resenting your, your opinion Justice O'Neill to not issue mandamus. And the detriments would be great and that's what I want to concentrate on because it's not just the cause to these parties of trying the case one more time.

JUSTICE: But it is primary the causes, same to me, I mean the litigation is driven by cause. Irrespective of what the value of the case maybe. It seems to me that you need to get it right the first time otherwise, courts and companies and plaintiffs are wasting time and a waste in money, and a waste in resources like the use to file another litigation.

MS. SHEPPARD: Well, in this current your Honor, and, and, and to me it's just a, it's a public policy question of whether we want to orderly raise the judicial resources of this state in this common situation.

JUSTICE: But how is that different if I got a medical malpractice case. And then on the plaintiff, and I put on a doctor who's clearly not qualified or I, I try to qualify an attendant as a doctor to articulate the standard of careful brain surgery. I mean that's just clearly wrong the court lets demand. Well, that's a waste of trial



because that's reversible error. Why can a mandamus trial courts really on a miscibility of the expert.

MS. SHEPPARD: Well, and I think an argument could be-- maybe you should-- mandamus occurred when reversible errors are then built in because the trial and the appeal are fiction. Reversible errors Article 10. However, I'm not asking you to do that in this case. I'm asking for a more limited holding that in this particular circumstance and, and one reason is additional reason, two reasons are talked about is, to protect the integrity of the venue statutes. And because that is the only way you can do that. If the plaintiffs are allowed to circumvent that statute by just form shopping and trying to find a judge that I think that will rule in their favor. Then the whole intent of that statute vitiates and becomes meaningless. The, the venue statutes are considered important by the State of Texas that's clear from the amount of litigation that goes over venue and the amount of legislation we've had. And it's important that cases are tried in proper counties where those counties have a connection to the case and to the cause of action.

JUSTICE: What about our language in Walker v. Packer that and a part of remedy is not inadequate just because it may involve more expense where it may involve delay.

MS. SHEPPARD: Yes, your Honor, and, and their last, the most recent cases on mandamus and AIU and in every-- In my Prudential. They both addressed that issue and said, "It is, it's not just the mere expense, is this other probably can private interest that we have to consider?" It's the impact on the legal system to allow ...

JUSTICE: That is not like Masonite though, you really of-- sort of allocating in public policy exception to the rule in Walker

MS. SHEPPARD: Well, I'm not, one that's already-- one ...

JUSTICE: This is just the one case. It's just ...

MS. SHEPPARD: One-- that's-- in my opinion already there. And when you combine In re Masonite with In re Prudential and In re AIU where this Court has adopted a balancing test to see what's going to benefits there are to having mandamus and then what detriments will occur if you don't. I take the balance comes out in our favor as a matter of public policy. Does allows and abuse of a system, it allows plaintiff to take advantage of defendants you have ...

JUSTICE: If the Harris County Court post first file that is not motion transfer venue would we have mandamus to look at that, say that was wrong?

MS. SHEPPARD: No, your Honor. No, no. That's clearly ...

JUSTICE: So how will you-- anywhere solve in this situation?

MS. SHEPPARD: Well, it because in that ...

JUSTICE: And then.

MS. SHEPPARD: On a situation we would have followed the rule and that would have been if we had in-- if we had disagree with the trial court, we, we could have tried it in Harris County and we could have appealed and proven the Williamson County was the proper County.

JUSTICE: The case had no connection with Harris County apparently.

MS. SHEPPARD: Well, the plaintiffs lived there and claimed that they are ...

JUSTICE: Separately they [inaudible]

MS. SHEPPARD: I believe they claim that could have claimed cliff, plaintiff together there before they, they took off.

JUSTICE: Now, let's, let's assume they had no connection rather than the fact that they lived there which is usually not good enough under venue statute. So if you'd have lost that when you concede you

would have had-- you would have, you would have had jurisdiction to grant mandamus to say no to the category Williamson to get so far.

MS. SHEPPARD: Oh, no you Honor. Your Honor I think that's ...

JUSTICE: So really that the ...

MS. SHEPPARD: It goes both ways to the plaintiff and the defendant. Is, if whoever lose this, the venue hearing, has the burden of trying the case in that County and proving that the venue decision was wrong.

JUSTICE: Right. So the-- I mean the difference in our case in a hypothetical I asked about is frankly just the difference in the egregiousness of the behavior of nonsuit of filing a case a second time to avoid the court's decision.

MS. SHEPPARD: Well, that's certainly part of it? But also it's an opportunity to-- for further abuse for instance, right now we could go if you all don't issue mandamus. It lifted stay order and we got back to trial Fort Bend County. We could pick a jury that plaintiffs could decide, they don't really like the looks of that jury or they don't think the judge as just firmly as they thought in nonsuit again. And they can go file in another county, and they can keep fi-- re-filing and so they find a, a judge ...

JUSTICE: But as long as limitations hadn't run they can always do that.

MS. SHEPPARD: Right, exactly.

JUSTICE: Your case is little stronger because they filed it out, we had an order say in venue goes to Williamson County.

MS. SHEPPARD: Yes, Judge.

JUSTICE: So there not just, there not just circumventing a judge they don't like their defying order.

MS. SHEPPARD: The defying an order in there, in there circumventing that statute which is you have one venue hearing, and that was the final of common effect. And in that cases, in any subsequently filed cases. And what they have done is they said and the trial court has said, "You know what, we're not-- we don't care with that statute says. And we're not going to give it collateral estoppel effect. And we're just going to file so we find the Court will like that or any decision will like better." And that's an abuse of the system. And that's why I think it's-- this case is said to apply and makes it fall within the exceptional circumstances, top cases we're going to have granted mandamus.

JUSTICE: If we don't grant mandamus here, what effect would that have in your view on just effecting in settlement dynamics on going to be injecting a-- should've new atmospheres into the case that may-- kind of wrath sort of gamesmanship it fit all.

MS. SHEPPARD: Well, I mean-- you know, your Honor, I have huge effects in the, in those kind of issues. It would-- it can definitely affect the resources of, of our client to the point where that may have to settle a case they would not otherwise settle. It invites gamesmanship. It has a court that has no connection to this case making vital decisions and legal decisions about this case. Offenses grab us violation issue where-- were, were-- we have a, a motion to dismiss based on-- you know, the part of the cause of action is missing. This Judge in Fort Ben County should not be making that decision. The Williamson County should be make-- making that decision.

JUSTICE: Is there a transcript of the venue hearing in Fort Bend County?

MS. SHEPPARD: No, your Honor. It, it was not on record.

JUSTICE: So we don't have the recorded comments of the Judge or

the rationale?

MS. SHEPPARD: No, your Honor. I wish you do, but we have not brought this for-- since they are not of record. It's just the evidence that was submitted.

JUSTICE: Any further questions?

MS. SHEPPARD: I'm sorry, my time is up. Thank you.

JUSTICE: The Court is ready to hear argument from the Real Parties.

ORAL ARGUMENT OF GARY L. EVANS ON BEHALF OF THE RESPONDENT

MR. EVANS: May it please the Court, Mr. Evans to present argument for the Real Parties in Interest. Members of the Court, opposing Counsel, my name is Gary Evans. It is my distinct privilege to represent Creekmore family in this case including Leslie, Denise, Kevin, Mitch, and Garry Creekmore and those are the loving wife, daughter and sons of Thomas Great Creekmore who loss his life on December 20, 2002 in Fort Bend County, Texas in the external aircraft that he was flying, went out of control, questioned Fort Bend County, Texas.

JUSTICE: To, to decedents get "two bites of the venue apple" and everybody else does it, or do they all get the same?

MR. EVANS: In, in this case your Honor, the, the plaintiffs chose to file suit in Harris County and he fought it and lost vision. And so why is it the nonsuiting and refiling celebrates. We, we look at the use of the, the nonsuit Justice Brister, as like many of the tools that serve procedure as a remedy. The remedy that family was looking at, at that time was whether or not they could try the case taken up on appeal, believing that the Judge Tony Lindsey had erred in your venue ruling or whether is the Supreme Court has talked about in previous cases whether you can use it as a remedial measure and vitiate the effect of a ruling that is believed to be erroneous. Therefore, the plaintiff is certainly not looking at it and say as "second bite of the apple." They're looking at it as a remedy that was used to correct ...

JUSTICE: But if your position is right then plaintiffs have a remedy for wrong venue ruling and defendants don't. Because defendants can't get mandamus review, your position is.

MR. EVANS: The plaintiffs don't need mandamus review 'cause you can just nonsuit and file all over again wherever you want. It would seem that the depending upon how the court rules in this particular case, your Honor, that either both parties that seek mandamus on an erroneous venue ruling or the playing field it could be rendered someone on level by having one party just as in Harris County case where the plaintiffs could not seek interlocutory appeal or mandamus review of Judge Lindsey's determination on venue. Now, again we believe that the, that the Relators are similarly bound by Judge Cobner's decision and the ...

JUSTICE: What -

MR. EVANS: Which ...

JUSTICE: - what have-- what's the fairness of a rule that defendants have to sit through the whole trial in the wrong place that plaintiffs don't? You get the first choice the first time anyway. Why should you get the first and the second and third and fourth and the defendants get no choice?



MR. EVANS: If, if I understand the, the Relators argument with respect to the refiling issue in the first place, I thought a respective views on counsel. The statute has run on this case that there will be no further nonsuiting-refiling simply because is, it's not, it's not visible. The statute limitations came instead of Texas already operates to limit the, the number of the cases upon which you can file a case and then if you suffering erroneous ruling seeks some type of a remedy that may or may not be on appeal or may or may not be some type of mandamus.

JUSTICE: That the remedy that you sought though, looking at Section 5 of rule 87 seem, it seems difficult under the language of that rule to, to argue that, that was appropriate or valid. Sec-- of Section 5 says, "If venue-- if an action has been transferred to a proper County, responsible motion to transfer then no further motions to transfer shall be considered regardless of whether the movement was a party to the proper proceeding or as added as a party subsequent." So the rule contemplates more than one proceeding in different places and says, "You only got one." It, It's going to be difficult for me to see the, the, the merits of your position on the transfer. I've got series of questions about the mandamus issue ...

MR. EVANS: Betterly not.

JUSTICE: Why were you so adamant to stay out of Williamson County?

MR. EVANS: It, it wasn't a matter of being adamant, your Honor. It was a matter of looking at the facts of the case as we presented to the Harris County District Court Judge. We felt that there were, there were substantial events that took place in Harris County. It was not, it was simply, it was not a con-- venue's issue. It was the venue facts included contract negotiations that took place in Harris County of building instructions were provided that to adopt Creekmore in Harris County.

JUSTICE: But we've got-- they argued this different problem here that's collateral estoppel. Two parties in litigation fight about an issue, a judge makes a ruling and if you don't like it, you have to appeal. You can't wait to a second suit later and fight about it then. You can't come back to sue on your second suit and say Judge Tony Lindsey was wrong because you waived that when you nonsuit it.

MR. EVANS: We, we rely upon your Honor, the-- this previous Courts-- the Court's previous rulings and they have any case of the case 849 Southwest 2nd Needle five, where the court held that the plaintiff is not precluded from refiling its claims in any respect so long as statute of limitations does not preclude a refiling.

JUSTICE: Was that a case where that had a hearing and the Judge had ruled.

MR. EVANS: That, that case have, I believe, your Honor just addresses the, the, the remedial effect such being ...

JUSTICE: How, how are you not going to be barred? Forget about whether Williamson County good-bad or indifferent by collateral estoppel that there was a prior order litigated by the parties and therefore it doesn't matter what the facts are in Williamson County. That's already been decided.

MR. EVANS: It, it was decided and again, in going back to Justice Wainwright question, the, the case was decided with respect to the, the venue facts of decision in Harris County. The-- and again I, I think we're looking at a situation your Honor where, where the parties should be on the same playing field. And depending upon what the court rule, the question is whether or not a party has a remedy on appeal. And of course the, the real parties in interest Creekmore family believes that

both parties in this case, have a remedy on appeal as we talked about in Justice O'Neill's question regarding-- that was, was directly on point. To given the facts ...

JUSTICE: Suppose, suppose you miss the bound or suppose you're-- were to be told purportedly, that you can't file a suit and avoid a venue ruling. And that therefore, its reversible error. Do you still want to go forward in a trial that there's going to be reversible error one?

MR. EVANS: I wish I had that, first of all your Honor but in, in this case ...

JUSTICE: You, you can't win.

MR. EVANS: It's just, it's just one aspect of the case. And, and the question is whether or not this Court wishes to expand the ability to seek mandamus of a Trial Court Judge in matters that are incidental to the case by definition, venue determinations are incidental to the case.

JUSTICE: In this-- It, it does involve that. But I'm just wondering from your point of view, if you knew that, that was the answer, would you want to go forward knowing that no matter what is going-- it-- even if you win, it's going to be reversed.

MR. EVANS: Your Honor, I'd like to move forward in, in, in any venue in which the case can be tried under, under equitable-- in an equitable form.

JUSTICE: So I'm not sure that, I'm not sure that [inaudible] and I think everybody would. But I'm just wondering if, if you knew that this procedure would not avoid the venue if you knew that, and no question about it. And therefore, there's going-- no matter what is the outcome of-- in the trial court, the case is going to be reversed. Would you want to go forward or not? I'm just wondering.

MR. EVANS: Well, in to be quite frank your Honor, I don't think I'd want to move forward in any situation where I felt that, that the reversible error was absolutely of the ultimate result of a trial. I, I don't think that be in anybody's best interest. However, we don't believe that the legal landscape certainly at the time that the nonsuit was filed at the time that the case was refiled in Fort Bend County stands for that proposition in any respect.

JUSTICE: I, I know that your argument, I was really just focusing on adequacy of the remedy of that appeal because I was wondering, I know you have an argument about what was the clear views of discretion and I want to ask you that for second but, but if it was, if the relator prevails on that point, do you want mandamus to be the, the remedy to be withheld so that now you can't go forward with that reversal and you can't nonsuit or refile because limitations is right?

MR. EVANS: If I, if I understand your Honor's question, it, it seems to me that, that with-- if it is extremely difficult to separate the, the adequacy of the appeal issue for whether or not Judge Cobner abuses discretion in declining to transfer the case to Williamson County. And, and, and quite frankly the, the, the Judge's decision-- he, he looked at, at 87(5). And reading the plain text of 87(5). He, he determined that he was not barred from declining to transfer the case to Williamson County. Rule 87 on its phase does not refer to previously filed cases and as we've mentioned in our brief, the, the Creekmore family is relying upon the Supreme Court's line of cases that says that, "A nonsuit will put you back in the position as you were, that you were in originally." And I think again looking at that as a, as a remedial measure like, like many of the tools of some of the procedure are-- in like, in a interlocutory appeal or in mandamus. It assures the



party of being able to move forward on terms that it leaves to be correct under the circumstances. And I would ask the court also to consider if the, if the court expands this to ruling and makes the, the various Courts of Appeals who've addressed, who've addressed this issue and sought to modify the terms of rule 87 and expand it to a previously final proceedings. I can think of additional types of circumstances that would be slightly similar although would they or would they not come under same process. In other words, first ...

JUSTICE: Let me, let me ask you, let me intro-- should ask you about that. You mentioned the other Courts of Appeals, I think there are three other-- there have gone the other way.

MR. EVANS: Yes, your Honor.

JUSTICE: And do you think that sets of a conflict between those Courts and the Court in this case whether there wa-- was the 14th Court?

MR. EVANS: I, I don't believe that there's a, I believe that the Courts of Appeal are in conflict as to whether or not eight rule 87 pertains previously filed cases.

JUSTICE: And I ask whether mandamus is available.

MR. EVANS: Yes, your Honor.

JUSTICE: Right.

MR. EVANS: And ...

JUSTICE: So then, so there in conflict on the issues in this case.

MR. EVANS: Yes, your Honor. And, and, and that again goes to, goes to the wisdom of Judge Cobner's discretion with respect to this matter. And again with the, with the relators burden of proof on showing that the law was, you know, fully settled in that regard. That would be the inter-level proposition that the relators must prevail on before they can show that Judge Cobner failed to abide by that well-settled law and therefore abuses his discretion. So we have in that, in that, that unbroken chain that the relators need to, need to develop in order to be granted their mandamuss relief for first course is whether or not the law was se-- well-settled in that regard. I think we, we do have, you know, in a significant conflict in the Courts of Appeal.

JUSTICE: How does your position and posture are not encouraged forum shopping?

MR. EVANS: [inaudible]

JUSTICE: It seems to me that exa-- that's exactly what could occur here.

MR. EVANS: Yes, your Honor. The, the concept the "forum shopping" I think was very well laws of illustration in n re Shell case. And there you have most the lawsuits filed in multiple venues and apparently the plaintiffs are going to seek, you know, go with the lawsuit that they felt was going to be the most favorable form. I was certainly-- distinguished that case on the facts on this matter, your Honor. In this case, again good thing new facts in Harris County. In fact the venues is that, is that difficult creature to work with on many, many, many, many different levels. But the-- in this case, good venue facts in Harris County and, and erroneous decision with respect to the plaintiffs respectively. The-- once spoke-- made that determination. There, there's also no question in this case that Fort Bend County is proper venue. And Judge Cobner noted this although it was not transcribed. And Judge Cobner noted that's the ac-- the the accident did in fact take place in Fort Bend County. It took place almost within view of Fort Bend County court house. And so in that particular case, we started of with what the plaintiffs believe to be good venue, once that was transferred to Williamson County which under

the general venue statute is proper venue as to the defendants but only if the plaintiffs selected to, to file suit in Williamson County and could maintain venue no place else. Well, well, certainly with Fort Bend County being appropriate venue, that's why it was filed there. And the general venue statute, it came back to your original question, you Honor is that the general venue statute gives us guidelines where the cases can be filed. I don't know if it is single-- single case that can be filed in 256, you know, Counties open to state of Texas.

JUSTICE: Counsel, going back to what ...

JUSTICE: 254.

MR. EVANS: 254.

JUSTICE: Going back to what just said [inaudible]

MR. EVANS: It didn't much your Honor.

JUSTICE: He was addressing earlier. Let's assume for a moment that there is clear error here on abuse of discretion that your positions are is not. But if we assume that for a moment, what benefit to the system that you say in our denying mandamus in making the parties go through the process knowing there's a reversible error here? Well, you might choose to, but that would be your choice if, if it is-- let's assume there's that, let's say clear reversible error. What benefit to anyone other than maybe to the plaintiffs to settle for litigation process or something but that there's a system benefit that, let's talk about your benefits in detriments. Can you, can you address those?

MR. EVANS: Yes, your Honor. I'll be very please to with the-- the benefit your Honor is that it levels the playing field with respect to good manner in which the litigants manage and prosecute in order to defend their case. As we discussed originally, the, the case in Harris County what the plans believed to be an erroneous venue ruling -

JUSTICE: It was right.

MR. EVANS: - appeal.

JUSTICE: Level-- that was the playing field by letting you get out of it but not the defendants. So what other than that?

MR. EVANS: And, and again the, the, the defendants have that the playing field issue here your Honor, where if they are granted mandamus relief by this Court, that is a relief that was not available to the plaintiffs when they filed the case -

JUSTICE: Well,

MR. EVANS: - originally in Harris County.

JUSTICE: We were also talking-- you know, it's, it's an easier case when we can talk about clear error. And you know, we-- the assumption was you agree with us it is clearer than what it benefits in detriments. But aren't their disagreements in Texas about legal rulings at the trial court makes other granting directed verdict to matters summary judgment or matter venue rulings are not where the parties disagree about the legal validity of that ruling. And if there are disagreements like that, is there cost to the system, to delay, to stop the trial every time the par-- one party thinks of the trial judge made a wrong error on a-- this positive matter or on a venue ruling or whatsoever.

MR. EVANS: Your Honor, I, I think those disagreements are more the rules and there are the exceptions to be quite uncertain. However, in this case, the question from the, the Creekmore family is introspected is to what degree does an Appellate Court or this is Court become involved in incidental rulings that are the day to day problems of the Trial Court Judge and venues ...

JUSTICE: That's-- and that's discretionary. And the answer is as much as they want to, right? There's not a jurisdictional problem

there.

MR. EVANS: There's no jurisdictional problem-- it, it all ignored but it does good to whether or not the exceptional extraordinary circumstances are presented.

JUSTICE: Well, how many appellate courts have you seen that just can't wait to get a lot more involved in incidental rulings. Do you think there's really a serious risk that appellate courts want to do that?

MR. EVANS: Your Honor, I'm a better-- the exactly one appellant argument -

JUSTICE: That's [inaudible]

MR. EVANS: I have no idea. That won't, that won't hold you to it ...

JUSTICE: Let me ask you, let me ask, I understand that you think that, that you're entitled to a nonsuit when you, when you want to or explore that. Could you have refiled in Harris County?

MR. EVANS: That-- your Honor that there was kind of the, the question I was going to touch on earlier because if, if the court grants mandamus in thi-- in this situation, if the court-- if the case was refiled in Harris County, the local rule. As Judge Brister adds on, Justice Brister adds ...

JUSTICE: Prospective to the Judge Lindsey?

MR. EVANS: Yes, yes your Honor. And, and that is exactly what would happen in that case. So we back, be back in Judge Lindsey ...

JUSTICE: So, so clearly you are trying to circumvent the ruling by the trial court when you had it switch to different County?

MR. EVANS: Your Honor, we, we can talk about the actual-- you know the intent circumvent to me is a little bit more of an aggressive word and then ...

JUSTICE: But if you ha-- I think Judge Green's points is it if you had a County, it didn't have such a local rule let's say have in Harris County. One good place we shot Judge to Judge.

MR. EVANS: You could and until the statute bring your Honor as you like. And, and, and the question that-- the related question your Honor is, is, is let's say you started often in another venue, same venue different form. Let's say you started of in County Court, and you, and you felt that there was a ruling in County Court that, that was not something that you want to, to tag along with you all the way to through trial and you nonsuit that case. And then you refile in district court where-- is concurrent jurisdiction. The version were situations presented there is, is-- you know the court going to allow mandamus to say well, you can't refile in district court let as go back to County Court were it began. And I think that's another variation on whether or not those exceptional extraordinary circumstances are presented so it by mandamus is available.

JUSTICE: So you think it's over, do you think it's a good rule if this Court says, "It's okay to do that or not?"

MR. EVANS: It's a rule your Honor in accordance with the pre-- the court's previous rulings. And, and in this particular case, it, it opens the door, yeah that, that there are two steep slopes upon me your Honor that, that are presented here. One is, the possibility of plaintiff's filing and refiled cases when they feel is so-- they do not have the case properly postured, you know, for any reason at the trial court level. The other steep slope is to me the more, the more significant of the two which is again how, how involve does the court willing to get into these matters that are incidental to the administration of the case.



JUSTICE: Further questions.

JUSTICE: Yes, chief. What was your position on why venue is proper in Harris County?

MR. EVANS: Your Honor there, there were-- we provided to the-- Judge Lindsey an affidavit by Garry Creekmore, Garry Creekmore was involved with all sorts of the, of these files deviation activities. And Garry Creekmore attested to the various things that took place in Harris County. The defendants had shift parts to-- from the Harris County. The defendants had, had it into contract negotiations in Harris County. Mr. Frederick had provided all sorts of coaching in instructions to Dr. Creekmore in Harris County.

JUSTICE: But you're under the, you're under the substantial part of the course of actions statute.

MR. EVANS: Yes, your Honor.

JUSTICE: So it was your position that a substantial part of the course of action arose because of negotiations of active reason.

MR. EVANS: Yes, your Honor.

JUSTICE: Of course, the defendants denied that, that happened in Harris County. They say the parts were delivered to an agent in Guadalupe County and other thing was. Was there a contested evidence on that, that the Judge presided?

MR. EVANS: Your Honor, there was a contested evidence but I, I don't-- thinking back to the, to the venue hearing in Tra-- in Harris County. I don't believe that the, that the defendants contested the venue facts that were pled through Garry Creekmore's affidavit. That, that's why we felt that it was an erroneous ruling by Judge Lindsey because looking at the, at the, at the general venue rule and how it is to be interpreted, the burden on the defendants at that point was to conclusively demonstrate. That there-- that none of those venue facts took place in Harris County. They didn't do that but Judge Lindsey transferred the case now is standing. Further questions.

JUSTICE: Thank you, Counsel.

REBUTTAL ARGUMENT OF CYNTHIA T. SHEPPARD ON BEHALF OF PETITIONER

MS. SHEPPARD: Your Honors, in, in response to the, the last question. And I would just like to add that the question of whether the Harris County ruling on venue is a final because it was not appealed by the plaintiffs. That judgment is final and non appealable. So there's no issue before this Court in my opinion as to whether the decision to transfer to Williamson County was correct. They made that choice and in my opinion it was a fail error. Because now the only proper County to try this case in is Williamson County. The fact is there is no benefit that can occur or crue to anyone or anything to go forward with this case in Fort Bend County. There's only detriment to the parties, to the system ...

JUSTICE: And you're talking about the balancing that the-- in reference from AIU and prudential. Do you, do you believe those two cases changed the mandamus% standard from Walker.

MS. SHEPPARD: All right.

JUSTICE: And I ...

MS. SHEPPARD: I don't know that they changed it but they do get more specific about in what circumstances the court will consider mandamus. And I would, I would submit that, here you have an even

stronger case from mandamus than in those-- in prudential in AIU because there you simply protecting a, a private agreement between two parties that's a form selection in waiver of a jury trial. Here, you're protecting the legislature's statute. This is, this is the way we are going to decide a venue in these cases.

JUSTICE: Without AIU and Prudential? Do you think he would be successful on your mandamus argument?

MS. SHEPPARD: I think we would, your Honor. I think we would fall within the exceptional circumstances task set forth in Masonite.

JUSTICE: Even though Bridgetone says they're not exceptional circumstances, venue is not reviewable by mandamus generally?

MS. SHEPPARD: I think so, your Honor because, because of the things I've talked about. Because it is subject to repeated actions by plaintiffs to and circumventing the statute. I think those are the two main reasons that will lead to abuse of the system and leads to circumventing the statute and it's just, it's irreparable harm is what it is. There's no way of-- to remedy, trying the case in a wrong County by regular appeal.

JUSTICE: So do you think Bridgetone would made to be modified or overruled or Bridgetone just missed it when it said there are no extraordinary circumstances in that case.

MS. SHEPPARD: Your Honor, I have to be honest and say, I don't remember the facts that case were exactly like ours so I can't, I can't say honestly whether that can be distinguished or not but I will be happy to brief that for you.

JUSTICE: What, what's the plain-- what's the plaintiffs remedy when the trial court makes an erroneous decision as opposing Counsel contains Judge Lindsey did. What's-- they go to ...

MS. SHEPPARD: Then, why did the statute to set up? It-- whether it's the plaintiff or the defendant who loses, they have to try the case in that County -

JUSTICE: And that the -

MS. SHEPPARD: - and then ...

JUSTICE: - appeal decided whom?

MS. SHEPPARD: Then they appeal and its their burden to show that it-- the trial court mandamus say. And, and what they have done is they have shifted that burden to us to try a case in a wrong County in appeal and tried it again in a right County. When we are in the wrong-- the the wrong County. And, and I just would like, you know, just from a comment sense in, in, in just overview point of, point of view in this case. There's really not much of an argument not to issue mandamus. If the court will make clear that this is subject to mandamus, it's not going to happen. Because you can go to, to Fort Bend County and say look, if you do this Judge, you could be subject to mandamus because the, the law is clear that we're not going to allow you to try this in the wrong County. And just to illustrate very quickly what can happen with the abuse of their judicial resources. What if this was a different than like an individual against the small corporation. What if it-- there was a large corporation against the individuals as to a commercial case or contract case. That could change completely the dynamics of a lawsuit because that defendant will be able to just pam the defendant and, and it could cost orderly wisely cost just ...

JUSTICE: There are only, only ways that if you got one below. I mean you could win below. If, if, if we're ...

MS. SHEPPARD: We may not present with the Judge. I am sorry, I don't mean to interrupt. Because-- you know, if, if their going to stretch it out by delay, by extensive of expert witnesses and so forth

we, we may not make as to that point because of limited resources. And sometimes you have to do that in some scenarios but here you don't, there's no reason to from any point of view in my opinion. I believe that this Court needs to stop this kind of abuse of the system. Number one; to prevent abuse to prejudicial system; to discourage gamesmanship like occurred here; to uphold the integrity of the venue statute and; to enforce it in a meaningful way, and to prevent orderly waste of resources. And unless you have no further questions, the relators have requested that mandamus issue to the Fort Bend County Judge to remand the case or to transfer back to Williamson County.

JUSTICE: Any further questions? Thank you, Counsel.

MS. SHEPPARD: Thank you.

JUSTICE: The case is submitted and that concludes the arguments of-- today. The Marshall will adjourn the Court.

COURT MARSHALL: All rise. Oyez, oyez, oyez. The Honorable, the Supreme Court of Texas now stands adjourned.

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