IN THE SUPREME COURT OF TEXAS

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NO. 04-1129
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IN RE PIRELLI TIRE, L.L.C., RELATOR

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ON PETITION FOR WRIT OF MANDAMUS
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Argued November 29, 2005

JUSTICE JOHNSON, joined by CHIEF JUSTICE JEFFERSON dissenting.

In *Dow Chemical Co. v. Alfaro*, 786 S.W.2d 674 (Tex. 1990), this Court considered whether by Texas Civil Practice and Remedies Code section 71.031, the Legislature statutorily abolished the doctrine of *forum non conveniens* as to suits such as this. Section 71.031 provided:

> (a) An action for damages for the death or personal injury of a citizen of this state, of the United States, or of a foreign country may be enforced in the courts of this state, although the wrongful act, neglect, or default causing the death or injury takes place in a foreign state or country, if:
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> > (1) a law of the foreign state or country or of this state gives a right to maintain an action for damages for the death or injury;
> > (2) the action is begun in this state within the time provided by the laws of this state for beginning the action; and
> > (3) in the case of a citizen of a foreign country, the country has equal treaty rights with the United States on behalf of its citizens.
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> (b) All matters pertaining to procedure in the prosecution or maintenance of the action in the courts of this state are governed by the law of this state.
> (c) The court shall apply the rules of substantive law that are appropriate under the facts of the case.

TEX. CIV. PRAC. & REM. CODE § 71.031. This Court held that it did. *Alfaro*, 786 S.W.2d at 679. This Court cited with approval the statement used by the court in *Allen v. Bass*, 47 S.W.2d 426, 427 (Tex. Civ. App.—El Paso 1932, writ ref'd) to the effect that the statutory language provides an absolute right for persons subject to the statute to try their cases in the courts of this State:

> Dow and Shell argued before this Court that the legislature did not intend to make section 71.031 a guarantee of an absolute right to enforce a suit in Texas brought under that provision. . . .
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> . . . .
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> Our interpretation of section 71.031 is controlled by this court's refusal of writ of error in *Allen v. Bass*, 47 S.W.2d 426 (Tex. Civ. App.—El Paso 1932, writ ref'd). In *Allen* the court of civil appeals held that old article 4678 conferred an absolute right to maintain a properly brought suit in Texas courts. The suit in *Allen* involved a New Mexico plaintiff and defendant arising out of an accident occurring in New Mexico. The court of appeals reversed a dismissal granted by the trial court on grounds similar to those of forum non conveniens, holding that "article 4678 opens the courts of this state to citizens of a neighboring state *and gives to them an absolute right to maintain a transitory action of the present nature and to try their cases in the courts of this state*."

Alfaro, 786 S.W.2d at 676, 678 (emphasis added).

In consideration of and in response to *Alfaro*, the Legislature enacted section 71.051.[1] Subsection (a) applied to claimants who were not legal residents of the United States and provided:

> With respect to a claimant who is not a legal resident of the United States, if a court of this state, on written motion of a party, finds that in the interest of justice an action to which this section applies would be more properly heard in a forum outside this state, the court may decline to exercise jurisdiction under the doctrine of forum non conveniens and may stay or dismiss the action in whole or in part on any conditions that may be just.

[1] Carl Christopher Scherz, Comment, *Section 71.051 of the Texas Civil Practice and Remedies Code—The Texas Legislature's Answer to* Alfaro*: Forum Non Conveniens in Personal Injury and Wrongful Death Litigation*, 46 BAYLOR L. REV. 99, 101, 106 (1994).

Act of May 27, 1997, 75th Leg. R.S., ch. 424, § 1, 1997 Tex. Gen. Laws 1680, *repealed by* Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 3.09, 2003 Tex. Gen. Laws 847 (former TEX. CIV. PRAC. & REM. CODE § 71.051(a)).[2]

In 2003, the Legislature amended section 71.051. The amendments, in part, repealed section 71.051(a) and amended subsection (b) so it provided:

> If a court of this state, on written motion of a party, finds that in the interest of justice and for the convenience of the parties a claim or action to which this section applies would be more properly heard in a forum outside this state, the court shall decline to exercise jurisdiction under the doctrine of forum non conveniens and shall stay or dismiss the claim or action. In determining whether to grant a motion to stay or dismiss an action under the doctrine of forum non conveniens, the court shall consider whether:
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> (1) an alternate forum exists in which the claim or action may be tried;
> (2) the alternate forum provides an adequate remedy;
> (3) maintenance of the claim or action in the courts of this state would work a substantial injustice to the moving party;
> (4) the alternate forum, as a result of the submission of the parties or otherwise, can exercise jurisdiction over all the defendants properly joined to the plaintiff's claim;
> (5) the balance of the private interests of the parties and the public interest of the state predominate in favor of the claim or action being brought in an alternate forum, which shall include consideration of the extent to which an injury or death resulted from acts or omissions that occurred in this state; and
> (6) the stay or dismissal would not result in unreasonable duplication or proliferation of litigation.

TEX. CIV. PRAC. & REM. CODE § 71.051(b).

The Court acknowledges that former section 71.051(a) was written in permissive terms: "the court *may* decline to exercise jurisdiction under the doctrine of forum non conveniens and *may* stay

[2] Further references to particular sections of the Civil Practice and Remedies Code, unless specifically noted otherwise, will be to the statutory language applicable to this case even though the statutes may have been subsequently amended.

or dismiss the action in whole or in part on any conditions that may be just." ___ S.W.3d at ___; *see Ross v. Tide Water Oil Co.*, 145 S.W.2d 1089, 1092 (Tex. 1941) (noting that the word "may" in a statute "ordinarily connotes discretion or permission; and it will not be treated as a word of command unless there is something in the context or subject matter of the act to indicate that it was used in that sense"). The 2003 amendments to section 71.051 changed several aspects of the statute, including incorporating the word "shall." By 2003, the Legislature had enacted Texas Government Code section 311.016. According to section 311.016(2), a duty is imposed when the word "shall" is used in a statute. Thus, the 2003 amendments to section 71.051 changed the statute from granting a permissive power to the trial court in regard to *forum non conveniens* decisions under 71.051(a) to imposing a duty to act when certain findings are made in regard to specified factors.[3] There is no indication in section 71.051 that "may," as used in section 71.051(a), was used to command, direct action by, or impose a duty to act on the part of the trial court,[4] however, and the Court does not so determine.

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[3] The concurrence asks where it would all end if we defer to the trial court's discretion in this case. The answer is, where the Legislature says it ends, subject to constitutional limitations on the Legislature's power. The end may have come closer with the 2003 amendments to section 71.051.

[4] In construing the language of a statute our objective is to determine and give effect to the Legislature's intent. *McIntyre v. Ramirez*, 109 S.W.3d 741, 745 (Tex. 2003). We do so by giving effect to the Legislature's intent as expressed by the plain and common meaning of the statute's words, *State v. Shumake*, 199 S.W.3d 279, 284 (Tex. 2006), or by use of definitions provided by the Legislature, *see, e.g.*, TEX. GOV'T CODE §§ 311.016, 312.002, unless a contrary intention is apparent from the context, *Taylor v. Firemen's and Policemen's Civil Service Commission of City of Lubbock*, 616 S.W.2d 187, 189 (Tex. 1981), or unless such a construction leads to absurd results. *Univ. of Tex. S.W. Med. Ctr. v. Loutzenhiser*, 140 S.W.3d 351, 356 (Tex. 2004).

When Pirelli filed its *forum non conveniens* motion, the trial court was faced with two applicable statutes. Section 71.031 gave the Arans[5] an absolute right to bring and try their case in Texas. *See Alfaro*, 786 S.W.2d at 676, 678-79. Section 71.051(a) permitted the trial court to refuse to exercise jurisdiction under certain circumstances. Section 71.051(a) required the trial court to make several decisions when determining how to rule on Pirelli's motion. The decisions included evaluating evidence presented by the parties, resolving controverted factual matters (if any), and considering and applying the law to the facts as the court found them to be.

When the trial court has discretion to grant or deny relief based on its factual determinations, we review the trial court's actions for abuse of discretion. *See Bocquet v. Herring*, 972 S.W.2d 19, 20-21 (Tex. 1998) (noting that the abuse of discretion standard of review as to a trial court's factual determinations applies when a trial court has discretion either to grant or deny relief based on its factual determinations). The abuse of discretion standard is especially appropriate when the trial court must weigh competing policy considerations and balance interests in determining whether to grant relief, as it did in this instance. *See Gen. Tire, Inc. v. Kepple*, 970 S.W.2d 520, 526 (Tex. 1998). When no findings of fact or conclusions of law are filed, the trial court judgment is to be upheld on any legal theory supported by the record. *See Davis v. Huey*, 571 S.W.2d 859, 862 (Tex. 1978); *Seaman v. Seaman*, 425 S.W.2d 339 (Tex. 1968). If the record contains legally sufficient evidence both against and in support of the trial court's decision then mandamus will not lie because weighing conflicting evidence is a trial court function. *See West v. Solito*, 563 S.W.2d 240, 245

[5] As does the Court, I will refer collectively to the plaintiffs as "the Arans."

(Tex. 1978) ("[A]n appellate court may not deal with disputed areas of fact in a mandamus proceeding."). The abuse of discretion standard is not "whether, in the opinion of the reviewing court, the facts present an appropriate case for the trial court's action." *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241 (Tex. 1985).

Section 71.051(a) plainly required the trial court to affirmatively find that in the interest of justice a forum outside Texas would be more proper for the action before the case could be dismissed or stayed. If the trial court did not make such a finding, the statute did not authorize the court to dismiss or stay the action. Even if the trial court made such a finding, the statute did not command or impose a duty on the trial court to dismiss or stay the action; it permitted a dismissal or stay. *See Ross*, 145 S.W.2d at 1092 (noting that "may" is not a word of command). This accords with the traditional view of *forum non conveniens*: its purpose is to permit a trial court to decline exercising jurisdiction over a case when the case should more properly be brought in another forum. *See Alfaro*, 786 S.W.2d at 676-77.

Pirelli does not deny that part of its burden in showing "in the interest of justice a forum outside Texas would be more proper for the action" was to prove and obtain a finding in the trial court that an adequate alternative forum existed.[6] To the contrary, it joins issue on the question. When a party with the burden of proof challenges the factfinder's failure to find in its favor, we treat the absence of the finding as a refusal by the factfinder to make the finding. *See Sterner v. Marathon*

[6] If analysis of the findings required of the trial court were not to be based on factors used by the Court, but on analysis of the whole of the phrase "in the interest of justice a forum outside Texas would be more proper for the action" as the concurrence asserts, the applicable review process and my conclusions would not change. The standard of review, evidentiary requirements, deference to the trial court's exercise of discretion, and outcome of the analysis would be the same.

Oil Co., 767 S.W.2d 686, 690 (Tex. 1989). Because the trial court did not grant Pirelli's motion and because we may not resolve factual disputes or reweigh evidence presented to the trial court, Pirelli should prevail on the issue only if the evidence is conclusive that Mexico is an adequate alternative forum. *Id.* Evidence in the record, however, is not conclusive as to that question. In analyzing the issue of an adequate alternative forum, the Court says the Arans failed to affirmatively state that prescriptive rights have not accrued in the Mexican forum and posits that "if they have not, then limitations would not appear to be an obstacle to the Mexican forum in the first place." But those matters were for the trial court to consider and weigh in exercising its discretion. Both Pirelli and the Arans submitted evidence on the question of whether Mexican courts would provide an adequate alternative forum. The filings included expert affidavits,[7] copies of Mexican statutes, and copies of decisions in other jurisdictions. The Arans submitted an affidavit from Professor Hans Baade questioning, among other matters, the extent to which Mexican statutes of limitations can be waived by Pirelli, even though Pirelli stipulated for purposes of its motion that it would submit to Mexican jurisdiction and waive any limitations defenses. Pirelli submitted documents that it contends shed doubt on the evidence relied upon by the Arans. The question of how much weight, if any, to give competing affidavits and evidence is a determination generally entrusted to the trial court in matters such as this. *See Bocquet*, 972 S.W.2d at 20-21. When the trial court does not issue findings of fact, reviewing courts should presume that the trial court resolved all factual disputes in favor of its determination. *See BMC Software v. Marchand*, 83 S.W.3d 789, 795 (Tex. 2002) (reviewing trial

[7] Additional affidavits were submitted by both the Arans and Pirelli after oral arguments in this court. I have not considered those because they were not before the trial court when it made its decision. *See In re Bristol-Meyers Squibb Co.*, 975 S.W.2d 601, 605 (Tex. 1998).

court ruling on special appearance); *Worford v. Stamper*, 801 S.W.2d 108, 109 (Tex. 1990) (same).

The Court evaluates the record according to the factors explicated in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947). The Court determines, in part, that (1) Pirelli demonstrated Mexico is an adequate alternative forum, (2) "on balance" the private interests that are implicated favor the Mexican forum, and (3) the happenstance that the truck was in Texas for eleven days before it was sold and imported to Mexico is insufficient to provide Texas with any interest in the case. The Court concludes that the *Gulf Oil* factors clearly and overwhelmingly favor a Mexican forum for resolving the dispute. That assessment is the predicate determination required by section 71.051(a)—"in the interest of justice an action to which this section applies would be more properly heard in a forum outside this state"—necessary for moving to the question of whether the case "may" be dismissed or abated under the statute's provisions.

I do not disagree with the Court's assessment that the evidence and the record reflect a clear, strong balance in favor of dismissing or staying the case on the basis of *forum non conveniens*. But the "strong balance" or even a "clear and overwhelming" balance of the *Gulf Oil* factors in favor of dismissing or staying the case does not overcome at least two considerations. First, balancing of the interests involved, including the private interests, is a function of the trial court to which we should defer unless there is no evidence in the record supporting or tending to support the trial court's decision. *See Furr's Supermarkets, Inc. v. Bethune*, 53 S.W.3d 375, 378 (Tex. 2001) (recognizing that there is no abuse of discretion if some evidence supports the trial court's decision); *Womack v. Berry*, 291 S.W.2d 677, 682-83 (Tex. 1956) (orig. proceeding). Second, the Court's determination that a "strong" or "clear and overwhelming" balance of *Gulf Oil* factors favors dismissing or staying

the case does not override the permissive discretion afforded the trial court by section 71.051(a) in light of section 71.031's specific provision allowing suits such as this to be maintained in Texas. Quite simply, section 71.051(a) permitted, but did not command, the trial court to refuse to exercise its jurisdiction granted by section 71.031 even if the case would more properly be heard in Mexico.

In analyzing the trial court's decision not to dismiss or stay this case, the Court compares the trial court's decision not to dismiss the case with a trial court's taking affirmative action to consolidate twenty cases for trial under a rule of procedure permitting consolidation. *See In re Van Waters & Rogers, Inc.*, 145 S.W.3d 203 (Tex. 2004). But there is a difference between the trial court's actions in *Van Waters* and the trial court's actions in this case. In *Van Waters*, the Court evaluated the evidence and determined that the trial court abused its discretion by taking affirmative action to alter the usual process by which each individual lawsuit would be tried to a separate jury. *Id.* at 211. In the case before us, however, the trial court did not take affirmative action to alter a status that was, and for decades had been, authorized by statute: the filing and trying of a suit such as this in Texas.[8] The trial court here simply decided to exercise the jurisdiction vested in it by section 71.031. To make *Van Waters* a valid comparison to this case, the trial court in *Van Waters* would have had to refuse to consolidate cases for trial, then this Court would have had to determine on application for mandamus that the refusal was an abuse of discretion. The Court's comparison of this case to *Van Waters* does not persuade me that mandamus relief is proper here.

[8] "The statutory predecessors of Section 71.031 have existed since 1913." *Alfaro*, 786 S.W.2d at 675.

I agree with the Court that even when discretion is lodged in a trial court by use of the term "may" in a statute, there are circumstances in which the trial court has no room for exercising discretion. If all the facts and circumstances to be considered compel and admit of only one decision, there is no fact or circumstance in the record supporting or tending to support a contrary decision and the legal rights of the parties will not be prejudiced thereby, then there is no discretion to be exercised. *See In re Ethyl Corp.*, 975 S.W.2d 606, 610 (Tex. 1998) (citing *Womack*, 291S.W.2d at 683). And exercise of permissive discretion granted a trial court by a statute's (or procedural rule's) use of the word "may" could not be countenanced if the trial court were to exercise its discretion for a wholly improper or illegal reason such as, for example, the race or sex of a party. But this case is not one in which the record contains "no fact or circumstance supporting or tending to support a contrary conclusion." *See Womack*, 291 S.W.2d at 683. Nor is it one in which the record reflects that the trial court exercised its discretion for an improper or illegal reason. Thus, the trial court's decision pursuant to the permissive language of section 71.051(a) should not be subjected to mandamus relief. *See Pat Walker & Co. v. Johnson*, 623 S.W.2d 306, 309 (Tex. 1981) (denying mandamus relief under discretionary former Rule of Civil Procedure 21c which provided that a court of appeals "may" grant an extension of time for filing a statement of facts).

In short, we have said that the doctrine of *forum non conveniens* prevents a court from being compelled to hear a case over which it has jurisdiction. *See In re Smith Barney, Inc.*, 975 S.W.2d 593, 598 (Tex. 1998). The Legislature did just that in section 71.051(a): it prevented the trial court from being compelled to hear a case even if it determined that in the interest of justice another forum would be more proper. The Court now directs the trial court to proceed in the opposite direction:

to *not* hear a case over which the trial court had jurisdiction although the trial court refused to stay or dismiss the case as the Legislature gave it permission to do.

If this case were before us under the current version of section 71.051 which imposes a duty on the trial court to dismiss or stay a case on *forum non conveniens* principles under certain circumstances, I might well be of a different view. But it is not. The trial court's decision to exercise jurisdiction specifically provided for by one statute and not withdrawn by another was not arbitrary, was not unreasonable, nor was it without reference to guiding principles. Accordingly, I would hold that its decision was not an abuse of discretion.

I would not grant relief directing the trial court to dismiss or stay the case. Because the Court does, I dissent.[9]

Phil Johnson
Justice

OPINION DELIVERED: November 2, 2007

[9] The Court does not reach Pirelli's contention that the trial court abused its discretion in refusing to apply the law of Mexico. I would reach the issue and hold that Pirelli's appellate remedy is adequate to address the choice-of-law question. *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 136 (Tex. 2004).