IN THE SUPREME COURT OF TEXAS

NO. 04-1129

IN RE PIRELLI TIRE, L.L.C., RELATOR

ON PETITION FOR WRIT OF MANDAMUS

Argued November 29, 2005

JUSTICE WILLETT, joined by JUSTICE WAINWRIGHT as to Part I, concurring.

I agree that this Mexico car accident case does not belong in the Texas judicial system, but for reasons simpler than those posited by the Court.

I. The Unadorned Language of Section 71.051(a) Controls This Case

Boiled down, the Court's holding is that the various common-law factors from *Gulf Oil* "clearly and overwhelmingly favor a Mexican forum for resolution of this dispute."[1] I agree wholeheartedly that the *Gulf Oil* factors require dismissal, but I disagree that the Legislature provided that these factors apply and should inform the Court's analysis.

It is undisputed that the governing statutory provision in this case is subsection (a) of section 71.051,[2] which covers suits brought by foreign plaintiffs and imposes a modest standard for forum

[1] ___ S.W.3d at ___ (citing *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947)).

[2] *See* Act of May 27, 1997, 75th Leg., R.S., ch. 424, § 1, sec. 71.051(a), 1997 Tex. Gen. Laws 1680, 1680, *repealed by* Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 3.09, 2003 Tex. Gen. Laws 847, 855. All references in this opinion to TEXAS CIVIL PRACTICE & REMEDIES CODE section 71.051 are references to the 1997 version governing this dispute.

non conveniens dismissals, not subsection (b),[3] which covers suits brought by legal residents and imposes a markedly tougher standard. Subsection (a) asks only whether the case "would be more properly heard in a forum outside this state";[4] it says nothing, presumably on purpose, about the perceived adequacy of that forum's remedy or about the balance of public and private interests that animates the *Gulf Oil* factors.

It is true that the 78th Legislature repealed subsection (a) effective September 1, 2003, and that all forum non conveniens disputes, regardless of plaintiff's residency, are now governed by the six-factor balancing test of subsection (b).[5] But it is also true that subsection (a) was on the books and controlling when this case was filed, and subsection (a) plainly omits any *Gulf Oil*-type considerations. The Court today adopts a no-harm, no-foul approach because a foreign plaintiff who loses under the more pro-plaintiff subsection (b) must necessarily lose under subsection (a), but given that this litigation predated the elimination of subsection (a), I would apply that less-onerous (for defendants) standard from the start. The subsections are simply and indisputably different. Lawmakers enacted two distinct standards based on the plaintiff's residency status, and it is a distinction with a difference. Cases involving foreign plaintiffs do not require the same balancing of interests as cases involving resident plaintiffs.[6] I would not blur the statute's residency-based

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[3] *See* Act of May 27, 1997, 75th Leg., R.S., ch. 424, § 1, sec. 71.051(b), 1997 Tex. Gen. Laws 1680, 1680, *amended by* Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 3.04, 2003 Tex. Gen. Laws 847, 854.

[4] TEX. CIV. PRAC. & REM. CODE § 71.051(a).

[5] Act of June 2, 2003, 78th Leg., R.S., ch. 204, §§ 3.04, 3.09, 23.02(d), 2003 Tex. Gen. Laws 847, 854–55, 899.

[6] I do not venture to comment on how such residence-based distinctions would fare if challenged on constitutional grounds, as the issue is not raised in this case.

distinction by importing factors that elected policymakers, for reasons good or bad, chose not to include in cases involving nonresident plaintiffs.

The Court contends that subsection (a)'s catch-all phrase "in the interest of justice" is sufficient to justify cutting-and-pasting the *Gulf Oil* factors from subsection (b). The Court concedes these factors are not controlling but considers them nonetheless instructive in determining whether forum non conveniens dismissal is required under subsection (a). No doubt, weighing the six specifically enumerated *Gulf Oil* factors may prove helpful in explicating a gauzy "interest of justice" standard, but in my view, applying them is contrary to what the Legislature enacted, and thus what the Legislature intended.[7] Lawmakers drew a bright-line distinction between residents and nonresidents who wish to invoke this State's judicial machinery and conferred a preference on the former. "Courts must take statutes as they find them,"[8] and treating this case as a *post*-September 1, 2003 case rather than a *pre*-September 1, 2003 case by importing language from one provision to another eviscerates the distinction between subsections (a) and (b).

The facts underlying today's case are extreme, and invocation of the forum non conveniens doctrine is manifestly warranted in this case where:

1. The plaintiffs are Mexican citizens who reside in Mexico;

2. Defendant Pirelli is a Delaware corporation with its principal place of business in Georgia;

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[7] *Alex Sheshunoff Mgmt. Servs., L.P. v. Johnson*, 209 S.W.3d 644, 651 (Tex. 2006) ("Ordinarily, the truest manifestation of what legislators intended is what lawmakers enacted, the literal text they voted on.").

[8] *RepublicBank Dallas, N.A. v. Interkal, Inc.*, 691 S.W.2d 605, 607 (Tex. 1985) (internal quotation marks omitted) (quoting *Simmons v. Arnim*, 220 S.W. 66, 70 (Tex. 1920)).

3. The allegedly defective tire was manufactured in Iowa;

4. The tire, Mexican-registered truck, and all other accident-related physical evidence are in Mexico;

5. The accident occurred in Mexico and the damages were suffered there;

6. The Mexican police and medical examiner investigated the accident;

7. All witnesses to the accident are in Mexico;

8. Several significant witnesses refuse to come to Texas for depositions or testimony;

9. One of the plaintiffs has refused to come to Texas for a deposition despite filing suit here;

10. Compelling the witnesses and plaintiff to appear may not be possible; and

11. Pirelli has stipulated that it is amenable to suit in Mexico.

These undisputed facts demonstrate convincingly that Texas has no dog in this fight. As we stated in *In re Smith Barney, Inc.*, "It is fundamentally unfair to burden the people of Texas with the cost of providing courts to hear cases that have no significant connection with the State."[9] It seems beyond serious dispute that this case "would be more properly heard in a forum outside this state,"[10] and those voted-on words constitute the applicable legal test. Mexico has the paramount stake in this lawsuit; Texas, virtually none. When the most consequential connection between a case and the chosen forum is a plaintiff's decision to sue there, little more need be said. On these uncontested facts, there is no need to balance the various considerations subsection (b) applies to cases involving

[9] 975 S.W.2d 593, 598 (Tex. 1998).

[10] TEX. CIV. PRAC. & REM. CODE § 71.051(a).

resident plaintiffs. The complete absence of a nontrivial Texas connection is sufficient in itself to mandate dismissal.

I would simply hold, under the governing pre-September 1, 2003 statute, that where (1) the plaintiffs are not legal residents of the United States and (2) a non-Texas forum is more appropriate, the forum non conveniens doctrine protects the court system of this State and its citizens, who as taxpayers fund the courts and who as jurors serve as finders of fact. By holding otherwise, the trial court abused its discretion based on section 71.051(a).

II. The Governing Statute Requires No "Adequacy" Assessment

The Court and the Dissent also consider whether Mexico would provide an "adequate" alternative forum. The voluminous filings in the trial court and this Court persuade me that this issue is hotly contested and its resolution by a court unfamiliar with Mexican procedural and substantive law is not a simple task.[11] In any event, such an inquiry is unnecessary. Section 71.051(a) does not mandate an "adequacy" assessment, however measured, of an alternative forum when the plaintiffs are not legal residents. It merely asks whether the case "would be more properly heard in a forum outside this state"—that is, the movant need only establish the *existence* of another forum, not its *adequacy*. Mexico indisputably has civil courts that entertain tort claims for its citizens who are injured in Mexico. By contrast, subsection (b) of the statute, applicable to plaintiffs who are legal

[11] Just one of the affidavits in the record, by a Mexican attorney and concerning Mexico's jurisdiction over Pirelli, is thirty pages long and has roughly three inches of attachments, in Spanish and English.

residents of the United States, lists as factors for the court's consideration whether "an alternative forum exists" and whether that alternate forum "provides an adequate remedy."[12]

Moreover, whatever legal impediments to relief in Mexico that plaintiffs have demonstrated, the record points to no legal barrier to plaintiffs seeking relief in the State where Pirelli is incorporated (Delaware), or where Pirelli has its principal place of business (Georgia), or where the allegedly defective tire was manufactured (Iowa).

Reading subsections (a) and (b) together, I would hold that the trial court need not consider whether Texas courts might provide a remedy that Mexico, for policy reasons of its choosing, would deny to her own citizens. Texas is not required to provide more relief to Mexican citizens than Mexico itself provides. Allowing the suit to proceed in Texas simply because this State may provide the most attractive or convenient forum for plaintiffs, or because plaintiffs rate Texas as the most advantageous forum as a matter of legal strategy, is not justified where Texas has no stake in the outcome.

III. Trial Court Discretion Under the Statute Is Not Boundless

Finally, I believe the Dissent makes too much of language in section 71.051(a) that the district court "may" decline to exercise its jurisdiction under the doctrine of forum non conveniens. In my view, "may" simply confirms that the district court's decision is a matter of discretion, subject to review for abuse of that discretion, or, when the case is before us on mandamus, a *clear* abuse of discretion.[13] Permissive does not mean limitless, and while appellate courts should not second-guess

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

[13] *In re Prudential Ins. Co.*, 148 S.W.3d 124, 135 (Tex. 2004) (orig. proceeding).

trial court rulings cavalierly, the word "may" does not render such rulings bulletproof and unreviewable. There is nothing unusual about giving trial courts discretion to make rulings and giving appellate courts authority to scrutinize those rulings for abuse. By this standard courts of appeals routinely review, by mandamus or direct appeal, all manner of discovery, evidentiary, continuance, new trial, severance, jury charge, and jury selection rulings, to name a few. More to the point, the Legislature knows how to grant trial courts absolute discretion in venue-related decisions,[14] but it did not bestow such unfettered discretion here.

I wonder where the Dissent's analysis would end. I see no limiting principle that turns on Mexico's geographic proximity to Texas or our long friendship and shared history with that nation. The analysis would seem to apply with equal force to any plaintiff located anywhere on Earth who wishes to sue any defendant located anywhere on Earth, based on an injury occurring anywhere on Earth. The Dissent appears to hold the view that so long as the Texas court has personal jurisdiction over the defendant, as it might with many global manufacturers under principles of general jurisdiction, and that defendant is unable to persuade the Texas trial court that another "adequate" alternative forum is available, then the case must be allowed to proceed in Texas, and the trial court's decision is immune from appellate review.

Considering a case at the opposite extreme, if the defendant and witnesses all lived in Texas, the claim arose in Texas, and Texas law applied, and the trial court nonetheless dismissed on forum non conveniens grounds, surely that decision would be reviewable despite the presence of the word

[14] TEX. CIV. PRAC. & REM. CODE § 15.002(c) (foreclosing appellate review of a trial court's decision regarding transfer of a case); *see also Garza v. Garcia*, 137 S.W.3d 36, 38–39 (Tex. 2004).

"may." Discretion works both ways, and if a trial court can abuse its discretion by dismissing a case, surely it can abuse its discretion by not dismissing a case.

I agree with the Court that this case should be dismissed. Texas, while hospitable as befits a state whose motto is *Friendship*,[15] is not and should not serve as the "courthouse for the world,"[16] particularly where, as here, Texas has no connection to the location, parties, or cause of the accident. Plaintiffs have offered no sound reason why Texas should be compelled to provide plaintiffs—including one plaintiff unwilling to travel here—a physical forum, court personnel, jurors, and other components of the Texas judicial system.

Burdening the Texas judicial system with cases like this one abuses the public interest, robs Cameron County citizen-jurors and litigants of scarce court resources, and offends "considerations of fundamental fairness and sensible and effective judicial administration."[17]

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Don R. Willett
Justice

Opinion delivered: November 2, 2007

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[15] TEX. GOV'T CODE § 3101.004.

[16] *Smith Barney*, 975 S.W.2d at 597 (quoting *'21' Int'l Holdings, Inc. v. Westinghouse Elec. Corp.*, 856 S.W.2d 479, 486 (Tex. App.—San Antonio 1993, no writ) (Peeples, J., concurring)).

[17] *Dow Chemical Co. v. Alfaro*, 786 S.W.2d 674, 703 (Tex. 1990) (Hecht, J., dissenting) (quoting *Adkins v. Chicago, R.I. & Pac. R.R.*, 301 N.E.2d 729, 730 (Ill. 1973)).