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SUPREME COURT OF TEXAS
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NO. 17-0019

IN THE SUPREME COURT OF TEXAS

**IN RE MAHINDRA, USA INC.**

Original Mandamus Proceeding
From the 152nd Civil District Court of Harris County, Texas
No. 2016-40032

# BRIEF ON THE MERITS IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS

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***ORAL ARGUMENT REQUESTED***

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**Respondent:**

The Honorable Robert Schaffer, Judge of the 152nd Civil District Court in Harris County, Texas

Harris County Civil Courthouse, 201 Caroline, 11th Floor, Houston, Texas 77002

**Real Parties in Interest:**

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## STATEMENT OF THE CASE

**Nature of the Proceedings:** This mandamus petition arises from a case involving a Mississippi man who was killed in Mississippi by an allegedly defective tractor that was purchased in Mississippi, designed and manufactured in India, and partially assembled in Texas. The estate is being administered by a Mississippi court.

**Trial court/Respondent:** The Respondent is the Honorable Robert Schaffer, Judge of the 152nd Civil District Court in Harris County, Texas.

**Real Parties in Interest:** Plaintiffs in the underlying action, Cause No. E-2016-40032 in 152nd Civil District Court in Harris County, Texas, namely "Jason Alan Cooper, individually as administrator of the estate of Venice Alan Cooper and as next of friend of Faith Cooper, and Christopher Cody Cooper". Hereinafter collectively referred to as "Plaintiffs".

**Proceedings below:** Because the action arises out of the accidental death in Mississippi of a life-long Mississippi resident, Relator filed a forum non conveniens motion. Plaintiffs contended dismissal was inappropriate because named plaintiffs were residents of Texas subject to the Texas-residency exception. Relator contended the exception did not apply because the claims were representative claims. The trial court found the Texas-residency exception did apply and denied the motion. On September 13, 2016, Relator filed a petition for writ of mandamus with the Court of Appeals for the First District, which was denied in a per curiam opinion. The panel consisted of Chief Justice Radack and Justices Jennings and Bland. *In re Mahindra, USA Inc.*, No. 01-16-00718-CV, 2016 WL 7368048 (Tex.App.—Houston Dec. 20, 2016 orig. proceeding).

## STATEMENT OF JURISDICTION

The Court has mandamus jurisdiction under Texas Rule of Appellate Procedure 52 and Texas Government Code Section 22.002(a), which provides that the Supreme Court "may issue writs of . . . mandamus agreeable to the principles of law regulating those writs, against a . . . judge of a district or county court . . . ." TEX. GOV'T CODE §§ 22.002(a).

## ISSUES PRESENTED

**1.** Did the trial court abuse its discretion by failing to undertake the choice-of-law analysis raised by Relator?

**2.** Did the trial court abuse its discretion in applying the Texas-residency exception to the claims of an administrator of a Mississippi estate contrary to the 2015 amendments to the forum non conveniens statute?

**3.** Did the trial court abuse its discretion in concluding plaintiffs' wrongful death claims were individual in nature (as opposed to representative or derivative) for purposes of applying the 2015 amendments to the forum non conveniens statute?

**4.** Does Relator lack an adequate remedy by appeal where the trial court denied a motion to dismiss on forum non conveniens grounds?

## STATEMENT OF THE FACTS

The Petition alleges that on March 30, 2016, Venice Alan Cooper (hereinafter "Decedent")—a resident of Webster County, Mississippi—was killed while working on a tractor manufactured by Mahindra. (App. 2, at 1). This incident and subsequent investigation occurred in Webster County, Mississippi at Decedent's home. (App. 2, at 1; MR 002-004). Similarly, the majority of the witnesses and the emergency responders to the scene were and are based in Mississippi. (MR 003-005). The tractor at issue was purchased in Mississippi. (MR 034). After his death, Decedent's estate was opened in the Chancery Court of Webster County, Mississippi and remains pending there. (MR 036-37). Plaintiffs have engaged in substantial activity in Mississippi Chancery Court while administering Decedent's estate. (MR 037-43).

Plaintiffs are the sons of Decedent. On June 10, 2016, they filed this action in Harris County, Texas as individual wrongful death beneficiaries, as next-friend of Decedent's granddaughter, and as the administrator of Decedent's estate. (App. 2, at 1). The Mahindra tractor at issue was designed and manufactured in India. (App. 6, ¶5). The front-end loader at issue was manufactured outside of Texas by a Kansas company (also a defendant). (App. 7). Mahindra's United States headquarters are in Houston and the front-end loader was attached to the tractor there. (App. 6, ¶3, 5). The assembled tractor was purchased in and maintained in

Mississippi. (MR 034). And, the accident occurred in Mississippi, almost all of the witnesses reside in Mississippi, the estate of the Decedent is being administered in Mississippi, and the Decedent was a resident of Mississippi. (MR 002-006, 025-044).

On July 11, 2016, Relator filed a motion to dismiss for forum non conveniens, in which Relator argued that the case belonged in Mississippi and also sought application of Mississippi's wrongful death and survival laws for purposes of the forum non conveniens analysis. (App. 4). At the hearing on this motion, on August 12, 2016, the only issue before the court was whether the Texas-residency exception in the amended forum non conveniens statute applied. (App. 8). The trial court refused to engage in a choice-of-law analysis and also rejected any attempt to categorize these claims as "derivative" or "representative" under the statute. (App. 8, at 10-12, 21-24, 27-32). Instead, the trial court denied the motion on the basis that Plaintiffs were Texas residents covered by the Texas-residency exception and, therefore, forum non conveniens could not be applied to them. (App. 8, at 11, 24, 27-28, 31-32.).

On September 13, 2016, Relator filed a petition for writ of mandamus with the Court of Appeals for the First District, which was denied in a per curiam opinion on December 20, 2016. (App. 9). This petition for writ of mandamus follows.

## SUMMARY OF THE ARGUMENT

The issues in this case ask the Court to, for the first time, clarify the meaning of terms such as "plaintiff", "derivative claimant", and "representative" as they are employed in the newly amended Texas-residency exception. The Texas-residency exception prohibits the application of forum non conveniens to a plaintiff who is a Texas resident. Pursuant to the 2015 amendments to the forum non conveniens statute, claims brought as a representative/administrator/guardian/next friend are excluded from the definition of "plaintiffs" for the purpose of the application of the Texas-residency exception, meaning that any such claims are subject to a forum non conveniens analysis. The amended statute also requires the court to analyze the application of the Texas-residency exception on a plaintiff-by-plaintiff basis.

The trial court abused its discretion in its application of the forum non conveniens statute. First and foremost, the trial court failed to acknowledge that claims were brought on behalf of the estate by the estate's administrator. The caption of the Petition plainly states that one of the sons (Jason) is pursuing a claim "[i]ndividually, as **Administrator of the Estate** of Venice Alan Cooper, and as next friend of Faith Cooper." These claims cannot fit under the amended Texas-residency exception under the most basic reading of the amended statute.

Second, the trial court refused to engage in a choice of law analysis. Mississippi's wrongful death and survival statutes apply to this claim. In

Mississippi, wrongful death and survival claims are brought in a representative capacity on behalf of all beneficiaries and the estate, regardless of whether the claims are referred to as claims brought in an individual capacity by the plaintiff bringing the claim. As such, the claims of these Plaintiffs are brought in a representative capacity and therefore cannot fit under the amended Texas-residency exception.

Finally, even if Texas law were to apply, these claims are not covered by the Texas-residency exception because they are derivative of an out-of-state resident and the statute makes no provision for the Texas-residency exception to apply to derivative claimants of out-of-state residents. Such a reading comports with the Legislature's intent when it amended the Texas-residency exception following this Court's opinion in *In re Ford Motor Company*, 442 S.W.3d 265 (Tex. 2014) in order to "harmonize the wrongful-death statute's broader derivative-beneficiary rule with the Texas-resident exception." *Id.*, at 283.

Forum non conveniens factors demand the dismissal of this case. Because the trial court's ruling improperly denied Relator's motion to dismiss by failing to appropriately analyze and apply the law, Relator has no adequate remedy by appeal. Mandamus is appropriate.

## ARGUMENT AND AUTHORITIES

### I. The trial court abused its discretion in denying Mahindra's motion to dismiss

#### A. An error in analyzing and applying the law is an abuse of discretion

For a writ of mandamus, this court analyzes the issues under a clear abuse of discretion standard. *See, e.g., Walker v. Packer*, 827 S.W.2d 833, 839 (Tex. 1992). In Texas, "[a] trial court has no 'discretion' in determining what the law is or applying the law to the facts." *Id.*, at 840. "[A] clear failure by the trial court to analyze or apply the law correctly will constitute an abuse of discretion, and may result in appellate reversal by extraordinary writ." *Id*. (citing *Joachim v. Chambers*, 815 S.W.2d 234, 240 (Tex. 1991)). As such, if it is shown that the trial court in the instant case failed to properly analyze or apply the law, then reversal by extraordinary writ is appropriate.

#### B. All forum non conveniens factors support dismissal

Under Texas's forum non conveniens statute, a court is **required** to dismiss a claim or action "if the statutory factors weigh in favor of the claim or action being more properly heard in a forum outside Texas." *See, e.g., In re ENSCO Offshore Intern. Co.*, 311 S.W.3d 921, 924 (Tex. 2010).

In Texas, the doctrine of forum non conveniens for personal injury and wrongful death actions is governed by Texas Civil Practices & Remedies Code § 71.051. Under this statute, a court analyzes whether "in the interest of justice and

for the convenience of the parties" the case is "more properly heard" in a different forum. *Id.*

In analyzing this question, the court must consider the following factors: (1) whether an alternative forum exists; (2) whether that forum provides an adequate remedy; (3) whether maintenance of the claim in this state would work a substantial injustice on the moving party; (4) whether the alternative forum can exercise jurisdiction over all of the defendants; (5) whether the balance of private and public interests predominate in favor of the claim being brought in the alternate forum, including whether the injury occurred in that forum; and, (6) whether the stay or dismissal would result in unreasonable duplication of litigation. *Id*.; *In re ENSCO*, at 924.

There is no dispute that factors (1), (2), and (4) support Mississippi as the proper forum for this litigation. All defendants stipulate to personal jurisdiction in Mississippi, where the court would have specific personal jurisdiction over each. The same cannot be said of Texas, where KMW, Ltd. is likely *not* subject to personal jurisdiction. (App. 7); *see also, Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco County*, 137 S.Ct. 1773, 1782 (June 19, 2017)(no specific jurisdiction where injury and defendant's conduct have no connection to forum). Likewise, each defendant is amenable to process in Mississippi and, as such, makes Mississippi an adequate "alternate forum." *In re*

*ENSCO*, at 924. And, there is no basis for concluding that the remedy afforded in Mississippi is inadequate; as the Texas Supreme Court has made clear, "[a] forum is inadequate if the remedies it offers are so unsatisfactory **they really comprise no remedy at all**". *Id*. (emphasis added). No such claim can be plausibly made.

The third factor—whether a substantial injustice would occur for the moving party if the case proceeded in Texas—supports dismissal. As the Texas Supreme Court has made clear, this factor "weighs strongly in favor of the claim being more properly heard in a forum outside Texas" when evidence and witnesses relevant to the action are outside the subpoena power of the state of Texas. *See, In re General Elec. Co.*, 271 S.W.3d 681, 689-90 (Tex. 2008). Here, where the first responders, the store that sold the equipment, the equipment itself, and other evidence are located in Mississippi, far outside the subpoena power of the courts of Texas, dismissal is favored. *See*, Tex. R. Civ. P. 176.3; *see also* (MR 002-006, 025-035). In addition, the following known witnesses are located in Mississippi, far outside the subpoena power of the courts of Texas: Diana Bright, Jonathan Blakely, Amanda Vance, Dr. John Walrod, Heath Johnson, Joe Huffman, Lynn Dean, Scott Dean, Thomas Booth II, and at least seven additional emergency medical responders who were at the scene of the accident. *See*, Tex. R. Civ. P. 176.3; *see also* (MR 002-006, 025-032).

The fifth and most important factor in a forum non conveniens analysis is the public/private-interests factor from *Gulf Oil*, which have been incorporated into the Texas forum non conveniens statute. *See, e.g., In re Pirelli Tire, L.L.C.*, 247 S.W.3d 670, 678-80 (Tex. 2007) (citing *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 67 S. Ct. 839, 91 L. Ed. 1055 (1947)). Among the most important of these interests—where the injury occurred—clearly supports the case being heard in Mississippi. *See, Schippers v. Mazak Properties, Inc.*, 350 S.W.3d 294, 300 (Tex. App. 2011); (App. 2, at 1).

Other public interests similarly support Mississippi as the appropriate forum. As the United States Supreme Court has made clear, there is a "local interest in having localized controversies decided at home" and in having cases litigated "in a forum that is at home with the state law that must govern the case." *See, Van Cauwenberghe v. Biard*, 486 U.S. 517, 108 S. Ct. 1945, 1953, 100 L. Ed. 2d 517 (1988). Given that the equipment which was purchased in Mississippi and maintained in Mississippi allegedly led to the death in Mississippi of a Mississippi resident thereby creating a Mississippi estate being administered by Mississippi courts, this undoubtedly constitutes "a localized controversy" such that Mississippi has a general interest in the case. *See, e.g., Yoroshii Investments (Mauritius) Pte. Ltd. v. BP Intern. Ltd.*, 179 S.W.3d 639, 645 (Tex.App. 2005); (MR 002-006, 025-044). Plaintiffs would have Texans bear the burden of judicial resources for

litigating a case that has no significant factual connection to Texas, thereby implicating additional public interest factors favoring Mississippi as the proper forum. *Id.*

In their briefing on this issue, Plaintiffs have urged that Texas is the place where the injurious conduct occurred because the front-end loader was attached to the already-manufactured tractor in Texas as it passed through the state on its way to Mississippi. *See*, Plaintiff's Response to Petition for Writ of Mandamus, at 5-8, 18. But, there is no allegation whatsoever that this particular front-end loader was attached to this particular tractor in some sort of negligent manner. Instead, Plaintiffs claims center around the *warning and design decisions* relating to pairing this type of tractor with this type of front-end loader and excluding certain safety devices as part of that decision. (MR 034-35). All decisions relating to the design and manufacture of the tractor, the front-end loader, the hydraulic line, and the warnings on the front-end loader were made outside of Texas and no relevant proof on these subjects will be found in Texas. (App. 6, 7).

The important information in this case is in Mississippi. For example, though Plaintiffs contend that a manufacturing defect existed which caused a hydraulic line to "rupture" (MR 034), the record suggests that the hydraulic line had actually been disconnected by Decedent at the time of the accident. (MR 027). The primary witnesses who offer this evidence—several first responders, as well as

Decedent's girlfriend Diana Bright and Decedent's neighbor Jonathan Blakely—are all residents of Mississippi. (MR 004, 026-30).

Therefore, the private interests, such as "ease of access to sources of proof", "availability of the compulsory process for attendance of unwilling witnesses", and other relevant practical considerations support litigating this case where the incident occurred—Mississippi. *See, Vinmar Trade Fin., Ltd. v. Util. Trailers de Mexico, S.A. de C.V.*, 336 S.W.3d 664, 677 (Tex. App. 2010). Here, the forum where the equipment was bought, maintained, repaired, allegedly malfunctioned, and currently is located is the more appropriate forum. In addition, witnesses who may have knowledge of the maintenance and repairs on the equipment or may have information about damages will likely be located in Mississippi. (MR 006, 025, 034) (Decedent's girlfriend and individuals at Evergreen AG may have relevant information). Plaintiffs have even engaged in significant activity administering Decedent's estate in Mississippi, establishing that it is not an inconvenient forum for them. (MR 036-044).

Finally, because KMW, Ltd. is likely not subject to personal jurisdiction in Texas but is subject to personal jurisdiction in Mississippi, there is a strong possibility of duplicative litigation if the Texas case is not dismissed. (App. 7). As such, the sixth factor also supports dismissal here.

As the foregoing analysis makes clear, the forum non conveniens factors support dismissal and therefore the trial court was required to dismiss the action. Accordingly, this case turns on the trial court's interpretation and application of the Texas-residency exception to the forum non conveniens statute.

### C. The Texas-residency exception excludes some Texas residents from forum non conveniens

The Texas-residency exception to the forum non conveniens statute "allows a plaintiff residing in Texas to maintain a lawsuit [in Texas] even when the suit would otherwise be subject to dismissal for forum non conveniens." *In re Bridgestone Americas Tire Operations, LLC*, 459 S.W.3d 565, 567 (Tex. 2015).

In 2015, the Texas Legislature amended the forum non conveniens statute following the application of the Texas-residency exception in *In re Ford Motor Company*, 442 S.W.3d 265 (Tex. 2014), in which this Court found that the exception applied to a case involving an out-of-state accident causing the death of an out-of-state resident because the estate was opened in Texas and some wrongful death beneficiaries were residents of Texas. (MR 045-047) ("Recent court cases involving an unintended use of forum non conveniens have highlighted the problematic loopholes created by broad statutory definitions of certain terms [and this bill] seeks to address these loopholes."). The relevant portion of the current version of the statute states the following:

> (e) The court may not stay or dismiss a plaintiff's claim under Subsection (b) if the plaintiff is a legal resident of this state or a derivative claimant of a legal resident of this state. The determination of whether a claim may be stayed or dismissed under Subsection (b) shall be made with respect to each plaintiff without regard to whether the claim of any other plaintiff may be stayed or dismissed under Subsection (b) and without regard to a plaintiff's country of citizenship or national origin. If an action involves both plaintiffs who are legal residents of this state and plaintiffs who are not, the court shall consider the factors by Subsection (b) and determine whether to deny the motion or to stay or dismiss the claim of any plaintiff who is not a legal resident of this state.
>
> . . .
>
> (h) For purposes of Subsection (e):
>
> (1) "Derivative claimant" means a person whose damages were caused by personal injury to or the wrongful death of another
>
> (2) "Plaintiff" means a party seeking recovery of damages for personal injury or wrongful death. The term does not include:
>
> (A) a counterclaimant, cross-claimant, or third-party plaintiff or a person who is assigned a cause of action for personal injury; or
>
> (B) a representative, administrator, guardian, or next friend who is not otherwise a derivative claimant of a legal resident of this state.

Texas Civil Practices & Remedies Code § 71.051(e) and (h); (App. 3). Under subsection (h)(2)(B), the Texas-residency exception is inapplicable to any representative or administrator claims brought on behalf of a non-resident of Texas.

**D.** The trial court erred in failing to engage in a choice-of-law analysis as to claims brought pursuant to a state wrongful death scheme

The trial court disregarded Relator's choice-of-law argument, denying the motion on the grounds that Plaintiffs were Texas residents and, as such, fit under the Texas-residency exception to the forum non conveniens statute. (App. 1, 8). In fact, the trial court did not even engage in a choice-of-law analysis. By ignoring Relator's choice-of-law argument and failing to engage in a choice-of-law analysis, the trial court abused its discretion. Mississippi wrongful death law applies to the case and under Mississippi law wrongful death claims are brought in a representative capacity.

1. *Mississippi wrongful death and survival law applies*

Mississippi law—in particular, Mississippi's wrongful death and survival scheme—will apply to this action. Under Texas law, "[t]he court shall apply the rules of substantive law that are appropriate under the facts of the case" for acts or omissions that occur out of state. Tex. Civ. Prac. & Rem. Code Ann. § 71.031 (West).

"When a party contends that the law of another jurisdiction should apply, Texas courts will first examine if the applicable laws conflict." *Vanderbilt Mortg. & Finance, Inc. v. Posey*, 146 S.W.3d 302, 313 (Tex. App. 2004). If there are no conflicts concerning issues relevant to the case, then there is no need for the court to engage in a choice-of-law analysis. *Id*.

Here, the wrongful death and survival statutes of Mississippi and Texas conflict in several important ways. In particular, Plaintiffs make claims for mental anguish/emotional distress relating to the death of their father, but these damages are not available under the Mississippi wrongful death statute. *See, e.g., Ellis v. Kovalchuk*, 2014 WL 12540546, *3 (S.D.Miss. 2014) ("Mississippi law does not allow for recovery of mental anguish or emotional stress damages in a wrongful death action.").

Plaintiffs also seek punitive damages, but Mississippi law allows punitive damages in a narrower set of circumstances considered to be "highly unusual" and "extreme cases." *See, Gamble ex rel. Gamble v. Dollar General Corp.*, 852 So.2d 5, 15 (Miss. 2003); (Miss. Code. Ann. § 11-1-65 (West) ("clear and convincing evidence" must prove "actual malice, gross negligence which evidences a willful, wanton or reckless disregard for the safety of others, or [] actual fraud")); *contra*, Tex. Civ. Prac. & Rem. Code Ann. § 71.009 (West) ("willful act or omission or gross negligence"). Punitive damages are also capped differently in the two states. *See*, Tex. Civ. Prac. & Rem. Code Ann. § 41.008(b) (West) (caps based on economic damages); Miss. Code. Ann. § 11-1-65 (West) (caps based on net worth of defendant).

Finally, and most importantly, wrongful death beneficiaries in Mississippi have their claims bound up in a representative "trust relationship" with the estate

whereas in Texas those claims can proceed separate and apart from the estate. This distinction is discussed at length in Section I(D)(2) below, but it bears mentioning that this representative relationship impacts the ability of wrongful death beneficiaries to, among other things, litigate and negotiate settlements of wrongful death claims.

"Substantive laws" are those rules and principles touching on the rights of individuals and the remedies available to them when those rights are violated. *See, e.g., Chislum v. Home Owners Funding Corp.*, 803 S.W.2d 800, 803 (Tex. App. 1991). The above-referenced conflicts clearly bear on the rights and remedies of the parties to this litigation and, as such, the wrongful death and survival schemes of Mississippi and Texas are in direct conflict. Having established that a conflict exists, the trial court was bound to apply Texas's choice of law rules. *Id.* ("When determining choice of law questions, Texas courts should follow the choice of law directives of its own jurisdiction.").

Texas applies the "most significant relationship" test from the Restatement (Second) when analyzing choice of law issues. *Ford Motor Co. v. Aguiniga*, 9 S.W.3d 252, 259-60 (Tex. App. 1999); *see also,* Restatement (Second) of Conflict of Laws § 145 (1971). It should also be noted that, "as a general rule, in matters of tort or personal injury, the situs of the injury determines the rights and liabilities of

the parties." *Id.* Here, there is no dispute that "the situs of the injury" is Mississippi and, therefore, a presumption exists that Mississippi law controls.

Application of the "most significant relationship" test only supports this position. The "most significant relationship" analysis in tort cases looks to the following factual matters: "(1) the place where the injury occurred; (2) the place where the conduct causing the injury occurred; (3) the domicile, residence, nationality, place of incorporation and place of business of the parties; and, (4) the place where the relationship, if any, between the parties is centered." *Id.*; *see also, Spence v. Glock, Ges.m.b.H.*, 227 F.3d 308, 312 (5th Cir. 2000) (applying Texas choice of law analysis). In the present case: the injury occurred in Mississippi; the equipment was purchased in Mississippi; the equipment was maintained in Mississippi and any potential repairs or modifications likely occurred in Mississippi; the equipment allegedly failed in Mississippi; the entire relationship between Decedent and the defendants was created and existed in Mississippi through the purchase and use of the equipment; and, the real party in interest—the estate—is located, being administered, and must be closed in Mississippi by Mississippi courts. (App. 2, at 1; MR 002-006, 033-044).

In addition to the factual factors, courts also look to the overriding policy considerations of each state. Policy considerations heavily support application of Mississippi's wrongful death and survival statute here. As has been stated *ad*

*nauseam*, the injury/death of a Mississippi resident occurred in Mississippi and his estate is being administered in Mississippi's courts. (MR 002-006, 044). As such, Mississippi has an interest in applying its own laws—the laws which will govern the estate of Decedent as it is being administered by the state's courts and which Decedent himself lived under and structured his home and business life around. Likewise, the laws of Mississippi are the very laws to which the wrongful death beneficiaries—named as plaintiffs here—have subjected themselves in administering the estate in Mississippi. (App. 2, at 1; MR 036-044).

Furthermore, because this action relates to equipment purchased in Mississippi, there are also economic interests at stake for the state. The state of Mississippi has a strong interest in cultivating a balance between the economic and business interests of the state and the interests of its individual residents, particularly those who may be victims of tortious injury. *See, e.g., Vasquez v. Bridgestone/Firestone, Inc.*, 325 F.3d 665, 674 (5th Cir. 2003) ("Were we to apply Texas law [when incident occurred in foreign jurisdiction], we would be undercutting [that foreign jurisdiction]'s right to create a hospitable climate for investment."). To apply the wrongful death and survival law of Texas to a case like this would undermine Mississippi's interests and legislative efforts to strike complicated policy balances in the state. *See, e.g., In re Estate of Davis*, 706 So.2d 244, 248 (Miss. 1998) (acknowledging importance of analyzing "entire statutory

scheme" for wrongful death in addressing importance of "beneficiary status under the statute").

Texas has minimal connection to this lawsuit, limited solely to the residency of Decedent's children, the location of Mahindra USA's corporate offices, and the location where the already-manufactured front-end loader was attached to the already-manufactured tractor. As previously stated, the tractor was designed and manufactured in India and the front-end loader at issue was designed and manufactured outside of Texas. (App. 6, 7). Mississippi, on the other hand, has an overwhelming relationship to and interest in this case. Mississippi's wrongful death and survival law will apply.

Importantly, the trial court failure to engage in a choice-of-law analysis at all was an abuse of discretion in and of itself. Courts have no discretion to fail to apply or analyze the law. *See*, *Walker*, at 840. And applying Mississippi law, the court further abused its discretion in denying Relator's motion to dismiss.

2. *Plaintiffs are "representatives" under Mississippi law*

Though Plaintiffs try to plead around it, their claims are wrongful death claims brought in a representative capacity. Under the Mississippi wrongful death and survival statutes, such claims are brought in a representative capacity on behalf of "any and all parties interested in the suit", not in any individual capacity. *Sauvage v. Meadowcrest Living Ctr., LLC,* 28 So. 3d 589, 594 (Miss. 2010)

(quoting Miss. Code. Ann. § 11-7-13 (West)). While the estate is pending, the appropriate parties with interest in the action cannot be established and the entirety of the claims rest with the estate. *Long v. McKinney*, 897 So.2d 160, 174-75 (Miss. 2004). Ultimately the Webster County, Mississippi Chancery Court will have to approve the accounting and final distribution of estate proceeds, including compensation to counsel. *Id*.; (MR 036-044).

Mississippi courts have consistently affirmed this view of the Mississippi wrongful death and survival statute. In *Long*, the Mississippi Supreme Court explained:

> The possible claimants are . . . bringing the suit "for the benefit of all persons entitled under law to recover…" and "for the benefit of all parties concerned…." Thus, bringing suit **in such a representative capacity** renders named plaintiff a fiduciary to all he or she proposes to represent, much the same as in litigation instituted by the executor or executrix of an estate.

*Id.*, at 169 (emphasis added). This is a protection ensuring that plaintiffs "properly prosecute the litigation, enter into fair settlement negotiations, and handle all funds recovered as trust funds for the benefit of those entitled to them." *Id*. "All heirs and beneficiaries, including the estate, **are bound up in** the trust relationship." *Id.* (emphasis added); *see also Willing v. Estate of Benz*, 958 So. 2d 1240, 1256 (Miss. Ct. App. 2007) (beneficiary "has an affirmative duty" to other beneficiaries); *Hornburger v. Baird*, 508 F.Supp. 84, 85 (N.D. Miss. 1980) (wrongful death

plaintiff's action "for the benefit of those lawfully entitled to recover damages . . . for the wrongful death of decedent"). In fact, the Mississippi Supreme Court, in explaining its "one suit" rule and the fiduciary relationship it creates, directly contrasted Mississippi's rules with those of Texas—where "the same persons who may recover under their wrongful death statute may bring the suit." *Long*, at 171, FN11.

Plaintiffs seeking recovery under Mississippi's wrongful death and survival statutes are "representatives." Simply put, there is no such thing as bringing a Mississippi wrongful death claim in a purely individual capacity.

3. *The Texas-residency exception does not apply to "representative" claims*

Despite being framed as claims brought in plaintiffs' individual capacities, these claims are representative claims under Mississippi law. As such, these claims fall under subsection (h)(2)(B) of the Texas forum non conveniens statute. Under this subsection, claims do *not* qualify for the Texas-residency exception if brought in a representative capacity on behalf of an individual who is not a resident of Texas. Because Decedent was a Mississippi resident, each claim in this action fits into this category and dismissal is required.

Because the trial court disregarded Relator's request for application of Mississippi law, it failed to recognize the vital importance of this issue to Relator's forum non conveniens motion to dismiss. (App. 8, at 11, 31-32). The trial court

failed "to analyze or apply the law correctly" and it, therefore, abused its discretion. *Walker*, at 840.

**E.** The trial court erred in failing to examine the Texas-residency exception on a plaintiff-by-plaintiff basis

The trial court denied Relator's motion as to all plaintiffs, including those claims made by the administrator of Venice Alan Cooper's estate, which is currently being administered in Mississippi. (App. 1, 8; MR 044). The forum non conveniens statute requires the court to determine whether each plaintiff independently satisfies the elements of the Texas-residency exception and also states that the Texas-residency exception cannot be applied to an administrator of an out-of-state resident's estate. (App. 3).

1. *The trial court abused its discretion in failing to analyze the claims on an individual basis in accordance with the 2015 amendments*

The trial court effectively lumped all of the claims together, concluding that because the Texas-residency exception applied no claims were to be dismissed. (App. 8, at 31-32). But, subsection (e) is clear that lumping the plaintiffs together is inappropriate under the amended statute; importantly, the dismissal determination "**shall be made** with respect to each plaintiff without regard to whether the claim of any other plaintiff may be stayed or dismissed." (App. 3) (emphasis added). Pursuant to the 2015 amendments, the court must analyze each set of claims on their own to determine whether the party bringing those claims

meets the elements of the Texas-residency exception. The estate's claim must stands on its own in a forum non conveniens analysis.

2. *Under the 2015 amendments, the Texas-residency exception cannot apply to the administrator of an out-of-state resident's estate*

Plaintiffs' Petition is clear that claims are being brought by Jason Alan Cooper "as administrator of the Estate of Venice Alan Cooper." (App. 2, at 1). Claims brought by an "administrator" are expressly covered by subsection (h)(2)(B). (App. 3). Therefore, these claims are *not* included in to the Texas-residency exception and are subject to dismissal.

Plaintiffs virtually concede this point in their briefing before this Court. For example, Plaintiffs state "the claims of the Estate are distinct from the *individual* claims brought." *See*, Plaintiff's Response to Petition for Writ of Mandamus, at 8-9. Then, later in their brief, Plaintiffs state: "If the only claim in this lawsuit was Jason Cooper bringing a claim as either a representative, administrator, guardian or next friend, then Defendant's argument would hold weight." *See*, Plaintiff's Response to Petition for Writ of Mandamus, at 10. Though Plaintiffs ignore the Legislature's clear mandate to analyze these claims on a plaintiff-by-plaintiff basis, it is clear even they recognize the intent of the Legislature to carve out the estate's claims from the protections of the Texas-residency exception.

The Texas statute clearly states that "[t]he determination of whether a claim may be stayed or dismissed under Subsection (b) **shall be made with respect to each plaintiff** without regard to whether the claim of any other plaintiff may be stayed or dismissed under Subsection (b) . . .". Tex. Civ. Prac. & Rem. Code § 71.051(e) (emphasis added). The court's failure to give forum non conveniens consideration to these claims was an abuse of discretion. Because this issue has never been analyzed and the Legislature added these specific provisions in direct response to a ruling of this Court, such an abuse of discretion merits correction by this Court.

3. *Decedent's sons and grand-daughter are also "derivative claimants" under the 2015 amendments*

Relator maintains that Mississippi law applies and, as a result, these claims are bound up in the claims of the estate. But, to the extent this Court finds Texas law controls these claims, the 2015 amendments to the forum non conveniens statute make plain that Decedent's sons and grand-daughter are "derivative claimants" of an out-of-state resident under the statute and, as such, are not covered by the Texas-residency exception.

The statute defines "derivative claimant" as "a person whose damages were caused by personal injury or the wrongful death of another." Tex. Civ. Prac. & Rem. Code § 71.051(h). As individuals seeking damages for the wrongful death of

another (Venice Alan Cooper), Decedent's sons and grand-daughter are clearly derivative claimants within the meaning of the statute.

Importantly, their claims are derivative of an *out-of-state* resident because Decedent was a Mississippi resident. There is no provision in the amended version of the statute for the Texas-residency exception to apply to claims classified as "derivative claimants of an *out-of-state* resident." The statute only says that derivative claimants of legal residents of the state of Texas are covered by the Texas-residency exception. Therefore, the Texas-residency exception does not apply to these claims. Such an interpretation provides the best avenue for "giving effect to every word, clause, and sentence" of the statute, and aligns with legislative intent when considering the context within which these amendments were made. *See, e.g., State Office of Risk Management v. Carty*, 436 S.W.3d 298, 302 (Tex. 2014).

This Court has historically held that wrongful death beneficiaries are "derivative claimants" under the wrongful death statute. *See, e.g., In re Golden Peanut Co., LLC*, 298 S.W.3d 629, 631 (Tex. 2009)("[U]nder Texas law, the wrongful death cause of action is entirely derivative of the decedent's rights."). For example, in *In re Labbatt Food Service, L.P.*, 279 S.W.3d 640 (Tex. 2009), this Court rejected an attempt by beneficiaries "to circumvent the derivative claim rule" stating "[t]he Legislature created an entirely derivative cause of action when it

enacted the Wrongful Death Act, and [the] beneficiaries are bringing an entirely derivative claim." *Id.*, at 646. In this opinion, the Court expressly distinguished between loss of consortium claims for non-fatal injuries and wrongful death claims for loss of love and support (like those raised here), stating the wrongful death claims were "not in the same category as a loss of consortium claim for purposes of derivative status analysis." *Id.*

This language highlights the fact that Texas wrongful death law treats Decedent's sons and grand-daughter as *derivative claimants* and not "plaintiffs" as that term is defined in the Texas-residency exception statute. In 2014, this Court veered from the precedent of treating wrongful death beneficiaries as deriving their claims from the decedent in *In re Ford*, stating:

> We acknowledge that the definition of "plaintiff" does not sit in isolation but must live in company with its neighbors in the broader body of law. If a general provision conflicts with a special or local provision, the provisions shall be construed, if possible, so that effect is given to both. No fair reading, however, can harmonize the wrongful-death statute's broader derivative-beneficiary rule with the Texas-resident exception. If we held that beneficiaries are not "plaintiffs" in deference to the derivative-beneficiary rule, we would render the bad-faith exception meaningless. If a good-faith assignee or personal representative can be a plaintiff, then a wrongful-death beneficiary must also be a distinct plaintiff. To hold otherwise would delete the bad-faith exception and violate our duty to give effect to all words so that none of the statute's language is treated as surplusage.

*Id*., at 283. In 2015, the Texas Legislature deleted the "bad-faith exception", narrowing the definition of plaintiff to expressly exclude assignees and personal representatives, and adding the category of "derivative claimant" to coexist alongside "plaintiffs." This Court can now clearly "harmonize the wrongful-death statute's broader derivative-beneficiary rule with the Texas-resident exception" by ruling that Decedent's sons and grand-daughter are "derivative claimants" of an out-of-state resident excluded from the protections of the Texas-residency exception. *Id*. Such a ruling would align this Court's jurisprudence with the Legislature's intent, and we urge the Court to do just that.

The trial court rejected this interpretation and its decision to do so was an abuse of discretion. (App. 8, at 10-12, 21-24).

## II. Mahindra has no adequate remedy on appeal.

In Texas, "[m]andamus will not issue where there is 'a clear and adequate remedy at law, such as a normal appeal.'" *Walker*, at 840. "The requirement that persons seeking mandamus relief establish the lack of an adequate appellate remedy is a 'fundamental tenet' of mandamus practice." *Id*. It is well-settled in Texas that "[a]n appeal is not adequate when a motion to dismiss on forum non conveniens grounds is erroneously denied." *Id*. As such, "mandamus relief is available, if otherwise warranted" here. *Id*.

## CONCLUSION AND PRAYER

Mahindra USA, Inc. prays that this Court grant its Petition for Writ of Mandamus and direct Respondent to withdraw the Order dated August 12, 2016, and to enter an order dismissing the claims of Plaintiffs on the basis of forum non conveniens.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

## TEXAS RULE OF APPELLATE PROCEDURE 9.4(I)(3)

I hereby certify that this document contains a total of **6,070** words, excluding the sections exempted under TEX. R. APP. P. 9.4(i)(l), as verified by Microsoft Word 2010. This document is therefore in compliance with TEX. R. APP. P. 9.4(i)(1).

Dated: July 7, 2017.

/s/ *Edwin S. Gault, Jr.*
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Counsel for Relator,
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## CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that a true and correct copy of the foregoing instrument has been forwarded to all known counsel of record set forth below via Efile service and/or facsimile, and to all other known counsel of record via Efile service and/or facsimile in accordance with the TEXAS RULES OF CIVIL PROCEDURE on this the 7th day of July, 2017.

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