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Supreme Court of Texas.  
In Re General Electric Company, et. al., Relators,  
v.  
The Honorable Mark Davidson, 11th Judicial District, Harris County,  
Texas,  
Respondent.  
No. 07-0195.

November 14, 2007.

Appearances:  
Kurt H. Kuhn, Brown McCarroll, LLP, Austin, Texas, for relator  
General Electric Company.  
Charles S. Siegel, Waters & Kraus, LLP, Dallas, Texas, for Real  
Parties in Interest.

Before:

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

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CHIEF JUSTICE JEFFERSON: Please be seated. The Court is ready to  
hear argument in 07-0195, In Re General Electric Company.

SPEAKER: Mr. Kuhn will present argument for the relator. The  
relator has reserved five minutes for rebuttal.

#### ORAL ARGUMENT OF KURT H. KUHN ON BEHALF OF THE PETITIONER

MR. KUHN: May it please the Court.

Our oral argument in the Court of Appeals, virtually every  
question I received, as well as the argument from the other side was  
directed at the procedural issue of whether we could seek mandamus from  
a denial to a forum non conveniens motion. This Court's November 2nd  
Pirelli (247 S.W.3d 670) decision has put that issue to rest. So while  
I am happy to answer any questions the Court may have, it is my  
intention to direct my comments toward the substantive question of  
whether or not the MDL court erred here in deciding this motion. Now,  
opposing counsel would like to shield this decision from any meaningful  
review by this Court, by use of the phrase 'interest of justice.'

JUSTICE MEDINA: Does it -- does it matter of the health condition  
of the plaintiff in this condition whether or not he has mesothelioma

that is going to cause his demise in one day or six months. Is that a factor to be considered if --

MR. KUHN: It is not a factor, your Honor. At the time the legislature considered this -- these amendments, opposing counsel showed up and testified and they asked for exactly this type of exception in these types of cases, and the legislature didn't create it. The legislature has given us statutory factors that we are to look at in forum non conveniens, and it did not create a terminal illness exception.

JUSTICE MEDINA: Wasn't that statute designed to prevent this very type of situation from happening?

MR. KUHN: That's absolutely right, your Honor.

JUSTICE MEDINA: Plaintiff that has zero contacts with our forum, with our state. Was it their claims that cloud the dockets of our Courts?

MR. KUHN: That is absolutely right, your Honor. I think you have to start here with what the legislature has done, because the legislature has made clear that the forum non conveniens statutes has resulted in dismissal of cases just like this. You know at one point, Texas forum non conveniens law threatened to turn us into the court house for the world and the laughingstock of the legal community. After the Alfaro (786 S.W.2d 674) decision, the legislature came back and made clear that they intended FNC motions to apply and the statute to apply in personal injury actions. Over the next several sessions, the legislature again and again amended the act to make it clear.

In 1997, the legislature deleted the asbestos exception. In 2003, the legislature removed the permissive 'may' language and replaced it with 'shall' to make it clear that when it weighs it, the court was required, it was directed to decline jurisdictional dismissal.

Again, in 2005 when they made the amendments, in that case they took out the remaining "may" and replaced it with "shall" to make it clear that the factors that had to be weighed were mandatory.

CHIEF JUSTICE JEFFERSON: (b) (3) is one of those factors and have you really demonstrated a substantial injustice if this -- if your motion weren't -- if the dismissal on that forum non conveniens law grant.

MR. KUHN: Your Honor, I would say that if we have it in this case, there never will be a case.

CHIEF JUSTICE JEFFERSON: Well what is this to say? I just -- I want to know exactly what -- what is the substantial injustice.

MR. KUHN: Your Honor, I think it is demonstrated by the factors that are laid out for the Court and the public and private interest. In this case, everything that has to do with this case is in Maine. All of the witnesses --

JUSTICE MEDINA: Except -- except that you have three -- defendants that are Texas residents right?

MR. KUHN: That is right, your Honor, but that is not really a -- that is not a forum fact. I mean during the Pirelli argument, Justice O'Neill, from the bench, made this distinction in response to the same kind of argument. No one here is disputing there is jurisdiction in Texas, for this case. The question is whether or not this is the proper forum, and there is a difference between jurisdictional facts. For instance --

CHIEF JUSTICE JEFFERSON: So -- so -- they are substantially prejudiced because people have to travel to Maine, is that -- is that it?

MR. KUHN: Your Honor, we -- we won't be able to compel witnesses

to come from Maine to get here. We won't be able to view the premises. We won't be able to do anything you are allowed to do. I mean, what -- you will be essentially saying that is it were me to force the trial in Texas by deposition, with no ability to compel any production in Texas of any witness. I mean, the phrase 'substantial prejudice,' obviously just like 'the interest of justice' is somewhat amorphous. But the only thing I can say you Honor, and what we said in the briefing, is these are the factors, these are the facts in this case, and if this isn't the case, there never will be one.

If you look at what the legislature did and even the district court, it is worth pointing out, at the August 25th hearing, admitted that the entire purpose of the legislative enactment was to prevent cases like this from being filed in Texas that had no connection to the state. A denial from a forum non conveniens motion as Court has reviewed under abuse of discretion. Now in *Pirelli*, at footnote 3, the Court noted that under the current version of the statute, those factors are mandatory, and that same point was made in the concurrence and in the dissent. Plainly understood, in deciding a forum non conveniens motion, the district court does not have the discretion to ignore the statutory factors.

In this case, the district court abused its discretion by failing to give weight to these mandatory factors listed in 71.051, and instead, buying into the ill-advised attempt to help the Richards avoid federal court. Under the doctrine of *expressio unius est exclusio alterius*, we know that when the legislature has defined for us what those factors are to be considered, that any other factors should be excluded, and was pointed out by Justice Medina at the beginning. There is no exception for terminal illness cases.

JUSTICE BRISTER: What if -- what is the -- what was the evidence about what's the problem in federal courts in Maine?

MR. KUHN: Your Honor, there was no actual evidence, but they relied on what the district court relied on, were some opinions that were filed and other cases pointing out that it is slower. And the [inaudible]

JUSTICE BRISTER: How -- how slow -- how slow were the -- is the Federal MDL?

MR. KUHN: Your Honor, it's -- the MDL is under transition. The Federal MDL is under transition, it is under new leadership.

CHIEF JUSTICE JEFFERSON: The answer is much, much slower. Under -- I mean the -- the -- what -- what has been happening in Texas is a much, much faster, quicker expedited review than typically what happens in the federal system. That -- isn't that correct?

MR. KUHN: I believe that is correct, your Honor. And if you want to look at it -- I mean, we believe what you should be looking at is Maine, and you should not be considering whether or not this case will be removed. We do not know if it ever will be removed, if it ever will be, it will be filed in Maine. But let's say that it is, let's say you want to take that into consideration. There is absolutely no way to rule that the federal model is an inadequate forum. You said in *Pirelli* that a court was adequate, and of course *Pirelli* was talking about Mexico, and you recognize that Mexico does not -- does not recognize the same rights to a tort plaintiff. But you cited approvingly, the language in the Fifth Circuit *Vasquez* (325 F.3d 665) case, and you pointed out that just because another jurisdiction might make different policy decisions about how to resolve tort disputes, does not make it inadequate. What all this boils down to, your Honor, and when you talk about how it is slower in federal court, is historically the Federal

MDL pushes a settlement model before trial. No one is ultimately denied trial in the federal court. They challenged the constitutionality of the Federal MDL, however, the Third Circuit -- the Third Circuit denied that argument. Surely there is more of a push by the Federal MDL to encourage settlement than what we see from our judge in Texas.

CHIEF JUSTICE JEFFERSON: Well the cases are filed there, you just never hear about them again. And -- and I think the legislature, the way they crafted the statute and the way this Court and the company advisory committee promulgated the rules, it -- it seems to have been an effective system more so, much more so than federal [inaudible].

MR. KUHN: Your Honor, it may be that we are better than the federal system, it may be, but that is not the question. I mean, it would be the height of judicial arrogance for us to say, and I -- there is no stronger defender than Texas courts or this Court than I am. But it would be the height of judicial arrogance for us to say simply because that federal model is different. It --

CHIEF JUSTICE JEFFERSON: You do not have to argue this but if -- if you are -- if you are going to argue it, our system is better, whether that is arrogant to say or not. But the question under Pirelli is, does that make it inadequate, and I thought that was where you were headed.

MR. KUHN: That is where I am headed, your Honor. And -- and if you look at Pirelli, what it says citing Vasquez, is that alternative forum is about if the parties will not be treated unfairly, even though they may not enjoy the same benefits as they receive in an American court. We cannot say, no one can say, that the federal courts are inadequate to resolve the disputes of non-Texans. That has never been found in any court, in any decision, until now. And this Court -- it is not a valid finding. And --

JUSTICE BRISTER: Are you -- are you aware of any case that has ever held the United States Federal Court system as an inadequate forum.

MR. KUHN: No, your Honor. I just received yesterday afternoon a filing that I believe the Court got last week, about a case out of Washington, it was additional authority, I believe it is the Zales case. And in the Zales case, the appellate court, without any real analysis, said that you could have conditioned, it was in Arkansas, everything happened in Arkansas but they filed in Washington State, and they said you could condition it or require it not be removed. They did not ever hold that the federal court was inadequate in that case. But I will tell the court that the Washington Supreme Court has granted review on that case. It is set for argument November 29th, and a big distinction between Washington and Texas is that Washington works under -- without a statute and it is based on simply the common law. But I do not expect Washington to uphold that decision in the long run anyway, and there the only issue is, can they condition it on this and is that constitutional.

Let me say, your Honor too about this consideration -- this concern about the idea of being filed in federal court. It is pure supposition of whether or not this case will end up in federal court. That was discussed in the rehearing argument between the district court and opposing counsel, was the Losey case. In the Losey case, the court granted a forum non conveniens motion and ordered it to be dismissed because he said it should be filed in Connecticut. But the plaintiff did not refile in Connecticut; they came and refiled in Delaware, ostensibly to avoid federal removal. We have no assurance that this case is refiled, it will be filed in Maine, and we had no

assurance if it is filed in Maine that it would be removed or even removable. We are not here, your Honor, because we are afraid of Maine courts. We are here because we cannot have a Texas MDL Court decide that it is a place to require defendants to waive their federal rights. We have a right to seek a federal forum and the state court should not be a place to abrogate that right.

JUSTICE HECHT: Well -- well how has Judge Davidson required you to do that?

MR. KUHN: Because Judge Davidson has said that he would grant the motion. He would rule properly on this motion if we would agree that it --

JUSTICE MEDINA: How was it withdrawn?

MR. KUHN: Well, your Honor, he also said in open court. I know the -- the -- the letter of -- of an explanation was not an order, it was simply a letter, was withdrawn. But he said in open court that the only reason he would deny this motion was because of the potential of removal. And the other side has admitted in their briefs that all we had to do was agree that this case would not be removed and he would grant the motion. So I do not think that there is really even any issue here that that is -- was the ultimatum that was given to us that we refused.

JUSTICE JOHNSON: Well in -- in Pirelli, the defendants agreed to waive any statute of limitations. So there were -- there are conditions that a trial court can set and the statute says, under (c) that the -- the court may set terms and conditions for staying or dismissing as the interest of justice may require, giving due regard to the interest of the parties. So, what standard are we to use there that would preclude the trial court from setting a condition such as what we are talking about the trial court concluded here.

MR. KUHN: Sure, your Honor, and let me begin by saying the -- in Pirelli you mentioned the limitations but that there was also the return jurisdiction clause.

JUSTICE JOHNSON: Right.

MR. KUHN: And we had no problem with those standard things that are used that when there is a removal or --

JUSTICE JOHNSON: Well, what my question was --

MR. KUHN: Sure.

JUSTICE JOHNSON: --what -- what standard is it, if you have any suggestion, should be used under (c) for setting those conditions?

MR. KUHN: Right, absolutely, your Honor, and I am -- what I want to say is that when it uses the phrase 'interest of justice' in (c), it has already told us in (b) that for interests of justice for the convenience of party, these are the factors you have to consider. So when it reuses that same phrase in (c), what it is telling us is you can set those conditions necessary to make sure there is not a change in those factors in (b). And that would include a limitation defense that we cannot go to Maine and then argue, 'Oh, because you did not file in Maine until now.' Obviously that would be an unjust result because it would be penalizing them. We had no problem with that, but what you cannot do is set an unconstitutional condition, and that is what has happened in this case.

JUSTICE MEDINA: Why -- why is it an unconstitutional condition? You still have the right to litigate; you have a right to litigate in Texas courts.

MR. KUHN: Right, your Honor, but it is not about our right to litigate. It is not our right about the trial, it is about our right to removal with a federal forum. And under the supremacy clause, if

Congress gives us the right to remove, which is what has been laid in this case or which has been requested we waive, if this case is refiled in Maine and it is subject to removal, the court, the state court in Texas nor the State Legislature can make us give up that right. There is a case I wanted to cite to the Court.

JUSTICE JOHNSON: Well -- but the only results of that is -- you have a choice. Your -- you have a full, fair choice. It seems the legislature has provided it by statute so the case can be filed here. We discussed that in 70 -- we discussed that in *Pirelli* -- the *Alfaro* 4-3-1 as I recall. The -- you can file it here. Now, why is it if you are given a choice that that is not something the trial court can force you to make or assume jurisdiction again?

MR. KUHN: Because it is an insult to the supremacy clause and the state, no matter what it does, cannot take away our right to removal. If you look at -- there is a case I want to cite *Donovan v. City of Dallas*, 377 U.S. 408, and in that case, this Court granted a mandamus and ordered the trial judge to enjoin parties from filing a suit in federal court. The U.S. Supreme Court took that case and reversed, and it said 'It is impermissible for a state court to enjoin a party from proceeding in federal court.'

JUSTICE JOHNSON: But they are not enjoining you here. They are giving you a choice, stay in Texas or agree that you will not go to federal court. They're -- they are not enjoining you --

MR. KUHN: They're -- they are conditioning our right to a decision on a state court motion based on our agreement to waive federal rights, and that a state cannot do. If you look at the *Kansas Public Employees* (4F.3d 614) case, it is cited in the brief, in that case they used severance. The party has tried to use severance to avoid the case being removed at federal court. And they said you cannot reach it because under state procedure, we severed out that part of the case. It went up to the Eighth Circuit. What the Eighth Circuit said, 'It is well established, the courts cannot directly or indirectly prevent, defeat, or limit the free exercise of the right to removal.' As soon as Congress gives us that right, the State Legislature nor the state courts can come back and force us to give up that right if and when at best.

CHIEF JUSTICE JEFFERSON: No further questions. Thank you, counsel. The Court is ready to hear argument from the real parties in interest.

SPEAKER: May it please the Court. Mr. Siegel will present argument for the real parties in interest.

ORAL ARGUMENT OF CHARLES S. SIEGEL ON BEHALF OF THE RESPONDENT

JUSTICE MEDINA: Mr. Siegel, does this constitutional argument have any basis here or is it just a red herring?

MR. SIEGEL: It is a red herring to us, your Honor. We do not see -- we -- the -- in court, Judge Davidson did not nor could he restrict the defendant's right to remove any case, anywhere. Of course they -- their time to remove the Texas case has come and gone. It is, of course, not the case at all that Judge Davidson could issue any order in Texas that could restrict anything the parties do in Maine. The only thing that Judge Davidson did is recognizing the indisputable nature of the Federal MDL, and of course, it -- and I want to -- JUSTICE BRISTER: But if -- I mean,

a frequent condition on these FNC cases is waived any objections to personal jurisdiction in Maine or wherever, right?

MR. SIEGEL: Yes.

JUSTICE BRISTER: And if they waive that in Texas, there is no question a court in Maine would enforce that.

MR. SIEGEL: Actually, your Honor, we pointed out a case that our firm had. It is treated in one of our footnotes or -- I believe it is in a footnote or maybe in text. A case called the Dory case, in which the defendant simply reneged on their promise to waive personal jurisdiction [inaudible] in Texas.

JUSTICE BRISTER: All right, let me -- let me -- let me perhaps rephrase, 99 percent of the time, Maine is going to -- if you waive a right on the record in a Texas court, they are going to enforce that somewhere else in the United States.

MR. SIEGEL: Yes, I -- I -- I -- I have expressed myself the wrong way. It's -- it's -- it is true that a Maine Court presumably would look at the conditions -- look at the commitments made in the earlier court, that is true, that is true. Has it -- did this operate in some unconstitutional way? No, it did not, to -- to me the analysis is, did the defendants have any constitutional right to a forum non conveniens dismissal in the first place. Of course not, they did not because the U.S. Supreme Court has held that a state may -- is constitutionally free to reject forum non conveniens doctrine altogether. And of course, that was the situation that prevailed in Texas for most of the last century.

JUSTICE BRISTER: Is there anything in the interest of justice that requires this case to be tried in Texas rather than up in Maine where the guy lived all -- I mean, he lived, worked his whole life in Maine, right.

MR. SIEGEL: Your -- your Honor, I would answer by the -- your use of the word try. Yes, if the case were kept in Texas, there was a chance that it would be tried before Mr. Richards died.

JUSTICE BRISTER: Right, but that is -- that is the only reason in the interest of justice we should not send this guy, this Maine guy with his Maine problems to Maine, to let the people of Maine try that.

MR. SIEGEL: No, I mean I have -- I have --

JUSTICE BRISTER: What other instances --

MR. SIEGEL: -- I have argued in our -- I have argued in our brief that it would have been a perfectly plausible decision for Judge Davidson to deny this forum non conveniens motion without regard to the unique circumstances of --

JUSTICE BRISTER: MDL.

MR. SIEGEL: -- MDL and Mr. Richards exigent health. They have not demonstrated any compelling inconvenience in -- in my opinion. There are three defendants headquartered in this case in Texas, that is of course a great distinction from Pirelli, where there was only a nominal defendant that probably that owned the car, I think, for 11 days and then sold it.

JUSTICE JOHNSON: They just say that, as in Pirelli, he cannot make anyone from Maine come to Texas to testify in front of a jury. And I think it -- it -- most lawyers who have tried lawsuits recognized the difference between reading a deposition to a jury, or even showing a video and putting someone on the stand for the jury to see them cross examined.

MR. SIEGEL: Your Honor, I think the best way I can answer this is -- is by reference to the -- the other letter I sent the Court

before argument. The letter dated November 12th, in which I simply reviewed our recent cases. My firm is Waters & Kraus where I -- I guess we are one of the prominent plaintiffs firms handling asbestos cases in Texas. We have -- I have listed five cases that were all dismissed on forum non conveniens grounds. Then I have listed -- involving out-of-state residents and out-of-state exposure to asbestos. Then I have listed 11 cases, also involving out-of-state residents and out-of-state exposure to Texas, in which no forum non conveniens motion was ever made. And so we know that the defendants utilized the doctrine of forum non conveniens as a purely tactical matter, in those cases in which they think they might be better off in the foreign forum as opposed to Texas.

JUSTICE BRISTER: Just like -- just like the plaintiffs from Maine, choose to sue in Texas as a purely tactical manner.

MR. SIEGEL: Absolutely, absolutely.

JUSTICE BRISTER: So they think it is better for them.

MR. SIEGEL: Of course and there is neither -- there is nothing wrong with --

JUSTICE BRISTER: But we do not care, as a Court, we are not trying to decide, 'Gosh, this is going to be a great case for the plaintiff or a great case for the defendant.' We -- we are not interested in your technical advantage. We are interested in an argument why should Texas juries should and courts and appeals courts be trying cases for people that are up in Maine, having car wrecks and getting asbestos disease and stuff like that, let -- Maine is a good state to do that.

MR. SIEGEL: All I can say, your Honor, is that had the legislature decided that no out-of-state claims should be brought in Texas, they would have said that. JUSTICE MEDINA: Were those other claims that you cited, were those mesothelioma plaintiffs?

MR. SIEGEL: All of them, each and every one of them. And the only reason, the only point of my letter of course was to undermine the assertion that these cases are indefensible if the plaintiff and the exposure witnesses are out of state. Of course they are defensible, they are simply defensible in Texas when the defendants prefer to defend them in Texas. Now, what we know goes on in the MDL is that Judge Davidson has made it very clear that his customary ruling will be in any case in which the defendants choose to avail themselves of the motion because they decide it is better to defend the case elsewhere, that he will grant such a motion. And of course, that is the reason I cited the first list of cases, was to show that there is no plague of out-of-state cases. All there is a bunch of out-of-state cases that the defendants choose to defend here. And when they decide they prefer to defend it elsewhere, Judge Davidson sends them packing. There has been one case, and one case only that I am aware of, or that they have ever cited to this Court or to the Court of Appeals or to Judge Davidson, in which he has denied a forum non conveniens motion, and it is this one.

JUSTICE MEDINA: What -- what --

MR. SIEGEL: Excuse me. JUSTICE MEDINA: In what discretion --

MR. SIEGEL: Yes, I am sorry.

JUSTICE MEDINA: --in what discretion does the trial court have, if any, in these mandatory forum cases such as this one?

MR. SIEGEL: Your Honor, I -- as I said the -- the -- the legislature well could have said, you cannot file a claim in



Texas unless you are a Texas resident.

JUSTICE MEDINA: They has six factors to consider --

MR. SIEGEL: Right, and -- and --

JUSTICE MEDINA: -- and watch them equally.

MR. SIEGEL: Right. And then he must decide whether the facts as presented, will in -- in light of those facts will a dismissal serve the interest of justice. And all Judge Davidson did, is decide that in this unique case, it would not serve the interest of justice to send Mr. Richards and Mrs. Richards packing to the forum in which there are 38,000 other cases pending, and which nothing ever happens.

CHIEF JUSTICE JEFFERSON: What makes it more likely that his case will be tried in Texas than -- other in Maine or in Federal MDL.

MR. SIEGEL: Well, under the Texas MDL procedures for asbestos cases set up by Judge Davidson, there is a mandatory fast track for exigent cases. And by the way the court -- the legislature could have in -- in -- its extensive restructuring of the asbestos litigation and in the MDL enabling statute, it certainly could have said, 'Do not bring an out-of-state asbestos claim here.'

JUSTICE MEDINA: Does Judge Weiner still presides over the MDL in the Eastern District Pennsylvania?

MR. SIEGEL: He passed away a couple of year -- about a year and a half ago and it is now in front of Judge Giles. And it's no -- it's no derogation of Judge Giles or his efforts. It is just the simple reality that results when there 38,000 cases --

JUSTICE MEDINA: [inaudible]

MR. SIEGEL: --parked in front of one judge.

CHIEF JUSTICE JEFFERSON: I hesitate to ask this question but it is in the case so in -- assuming your client does not survive this process, this mandamus, what happens to the case?

MR. SIEGEL: He has now passed away and we don't --

CHIEF JUSTICE JEFFERSON: When -- when -- when was that?

MR. SIEGEL: We -- I'm sorry.

CHIEF JUSTICE JEFFERSON: When?

MR. SIEGEL: It was -- I want to say in the spring of this year, maybe the summer. I could supply the exact date for the Court.

JUSTICE JOHNSON: Counsel -- MR. SIEGEL: And -- and -- I'm sorry, go ahead.

JUSTICE JOHNSON: I --

CHIEF JUSTICE JEFFERSON: What is the impact of that on the case?

MR. SIEGEL: Well, you know, certainly the acute exigence that -- that was important to Judge Davidson is gone. Does that make sense now that the case has been pending for over two years in Texas to pull up the drawbridge, and now send it to the MDL. We say not.

JUSTICE BRISTER: Well, but the question is, does it -- are you aware of any case where anybody has ever said the U.S. federal courts are an inadequate forum?

MR. SIEGEL: No and -- and -- that would be preposterous.

JUSTICE BRISTER: Does it make sense in a case, if this is the only one, that we should -- you are asking -- I mean that is what you are asking us precisely to say.

MR. SIEGEL: I -- I -- I respectfully disagree, your Honor -- Judge Davidson did not say that the U.S. federal court system is an inadequate forum and of course that --

JUSTICE WAINWRIGHT: He said it was in black hole.

MR. SIEGEL: That would be preposterous. He said that and four other federal judges have said that.

JUSTICE WAINWRIGHT: But what does black hole mean? MR. SIEGEL: It means a case in which despite everyone's best efforts --

JUSTICE BRISTER: You cannot escape its gravity, yes.

MR. SIEGEL: Yeah, you cannot escape its gravity --

JUSTICE BRISTER: And escape.

MR. SIEGEL: And -- and -- and I should -- I should add that among the 38,000 case pending in the Federal MDL, are thousands and thousands and thousands of mesothelioma cases.

JUSTICE WAINWRIGHT: And the Third Circuit federal Court of Appeals has instructed that the sick and the dying and the widows and the survivors should have their claims addressed first. And Amici in briefing, we can go look at the numbers ourselves, say that by 2006 nearly 75,000 of the 110,000 cases in the MDL have been resolved and calls the Federal MDL or describes it as having an impressive track record. Now, you may still say that Texas is better and we will take that as a compliment, but I -- I guess again the question is why can't justice be done in the federal system?

MR. SIEGEL: Your Honor, I think it was not a clear abuse of discretion, and of course, in the context we are here today on, it doesn't only have to be an abuse of discretion, it has to be a clear abuse of discretion.

JUSTICE JOHNSON: Well, that was the question I was going to a while ago, how -- what's -- what's the difference between this case and Pirelli. I dissented in that, and I lost that case because --

MR. SIEGEL: I would --

JUSTICE JOHNSON: -- I thought it was not an abuse of discretion and the court held -- what -- what is the difference between this case and facts and the factors in case, because in Pirelli at least we had the truck that went through Texas. Here the fellow -- I mean we do not have a truck that went through Texas.

MR. SIEGEL: No, you have -- but you do have three non-nominal defendants headquartered here who made their tortuous decisions here. These are not defendants like the defendant in Pirelli that the plaintiff nonsued it. These --

JUSTICE JOHNSON: Both --

MR. SIEGEL: -- are three straight forward defendants.

JUSTICE JOHNSON: There were some Texas defendants in Pirelli, they nonsued it, so you have the defendants that are here in Texas. So what else differentiates this from Pirelli?

MR. SIEGEL: It -- it was the -- it was the trial judges recognition that the defen-- that it is not really about convenience, it is not about any that, it is about flushing the case down the Federal MDL black hole so that it will never be heard. And again -- and -- and so there -- the -- the -- it is sort of -- JUSTICE JOHNSON: And the trial court in Pirelli could have decided it may never have been heard in Mexico either. I -- I mean, and that may be the reason that that trial court did not want to send it to Mexico.

MR. SIEGEL: It might have been, your Honor, but -- but I think -- I -- I -- first of all, I do have to -- I do have to emphasize the basic distinction between an American citizen as plaintiff and a Mexican citizen as plaintiff. And -- and a lot of what --

JUSTICE BRISTER: That is true there -- but there's also a big

difference between us and we are not so sure about the Mexican Courts versus we are not so sure about those federal courts.  
MR. SIEGEL: Your Honor, it -- it -- it was not -- it -- it simply was not an indictment of the federal system as a system for handling tort cases. If -- if -- if the defendants have said, 'We will consent -- we would like this case moved to the federal district court in Maine,' fine. But that is not what they are saying. They are saying, we do not want it moved to Maine state court, so we know that all of this business about convenience and all of that is kind of hollow. We do not even want it moved to the Maine federal district court. No, we want it flushed down the black hole, and in fact we so clearly and insistently want that that we simply refuse to stipulate that we won't remove the case. If they were really concerned about the convenience of witnesses, if that had any true merit, wouldn't they simply have made that stipulation. No, they want a forum non conveniens dismissal and a second attempt to remove the case.

JUSTICE WAINWRIGHT: Counsel, it does seem that the State MDL is moving along pretty well, doing well, the judges are -- are -- are keeping the docket moving. What is your answer to the concern that the precedent set by such a decision could open the gates wider than the legislature intended?

MR. SIEGEL: It -- it -- it's -- I -- I -- I think my answer is that in the -- in the significant amount of time since Judge Davidson has made this decision, there has been no other such case. All of these cases that I have listed and presumably many other cases from many other plaintiffs firms have continued to be dismissed. This is a truly unusual -- the -- the only reason we are in this situation is because there simply was no viable defendant to sue in Maine, which is not usually the case. And in fact it is hardly ever the case and I'll -- I'll -- tell the court doing our jobs as plaintiffs' lawyers, we look long and hard for a viable Maine defendant to sue and there simply wasn't one. That -- and -- and that situation that there was one local company that the plaintiff had -- had some testimony about in his deposition, and that company is bankrupt. And -- and so this is truly a very rare situation. And -- and again I would -- we do not know how the Washington Supreme Court is going to rule, it may affirm the intermediate appellate court's ruling, as this Court sometimes does, or it may not. But at least the Washington Court of Appeals has said that what Judge Davidson did is not strange, it is not a clear abuse of discretion. In fact, it was an abuse of discretion not to do what Judge Davidson did. Simply recognizing that in the reality of the -- the reality posed by the unfortunate state of the Federal MDL, and again this is not plaintiff's advocacy, it is not Judge Davidson talking, it is the Federal District -- the Chief Federal District Judge in Maine, it is the Federal District judge in Mississippi, it is Judge Kent in Galveston, it is now in the other supplemental case I submitted, one of the federal judges in Massachusetts, all of them recognize this practical reality and it is no impugning of the federal system.

JUSTICE WILLET: In which of those enumerated factors does that black hole argument --

MR. SIEGEL: Convenient, it would be -- it would be I would say 71.051 (b), in the interest of justice and for the convenience of the parties.

JUSTICE WILLET: And -- and that --

MR. SIEGEL: The parties, it does not say defendants, it says parties, that must include the plaintiffs and we told Judge Taylor--

JUSTICE BRISTER: That was --

MR. SIEGEL: -- that it would be highly inconvenient for him to not. JUSTICE BRISTER: That was in the interest of justice but it is not in any of the factors.

MR. SIEGEL: No but it is -- it -- it -- it is in the sort of prefatory statement. And then -- and of course it would also --

JUSTICE WILLET: [inaudible] sort of boiler plate prefatory language but not in the listed statutorily [inaudible]

MR. SIEGEL: It would also be covered by (b) (5), the balance of the private interests of the parties and the public, and was not --

JUSTICE JOHNSON: You argued (b) (1).

MR. SIEGEL: I'm sorry.

JUSTICE JOHNSON: You argued (b) (1).

MR. SIEGEL: I -- your Honor, I -- I also argued in our brief and to Judge Davidson that they simply had not met their -- their showing under any of these. And -- and was it an abuse of discretion for Judge Davidson to conclude, perhaps to think to himself, gee is there a substantial injustice being worked here. Well, I know there isn't because they frequently defend these out-of-state cases here. And then he might further have concluded that this man is dying of mesothelioma or perhaps now, he would conclude, or you all could conclude that this case has been pending a long time. It would be nice for Mrs. Richards to not have to go back to the end of the line in Pennsylvania. What -- is that a clear abuse of discretion. This is a judge who routinely sends these cases packing whenever the defendants decide they want them sent there.

JUSTICE JOHNSON: If the judge said why he was not going to send this one, does that affect -- or do we have to speculate or do we -- what standard do we use for deciding why he did or did not send it, when he made a specific statement, and in your brief here on page 12, you say the reason for the denial was the fact that what would happen down the line is a removal. So --

MR. SIEGEL: But I -- but I --

JUSTICE JOHNSON: -- are we focus on that.

MR. SIEGEL: But this Court -- this Court may affirm or deny relief on any basis argued. And I think it -- if -- if the Court is uncomfortable or if the Court feels that there is something unseemly about the implied criticism of federal courts, and we say it is not a criticism of the federal system entirely, just this one proceeding. It is not even a criticism; it is simply a recognition --

JUSTICE MEDINA: It is just a process that --

MR. SIEGEL: -- it is just a process. Then the Court may also look at the other points that we have asserted. For instance --

JUSTICE JOHNSON: But didn't he say that he would send it but for that?

MR. SIEGEL: Yes, he did, yeah. And of course, again, if they were really interested in the convenience of trial in Maine and the ability to call witnesses and present them live instead of by deposition, and if that is what this was really all about, wouldn't they have made -- signed this stipulation.

JUSTICE BRISTER: But there is the problem, it is one thing for us to think, we do not like the way things they -- they do things in Alabama and we would not do them that way. It is another thing to say, and because we do not like the way they do things in Alabama, Alabama people can come over here and sue. But wouldn't the people of Alabama be a little -- maybe somebody a little offended by that.

MR. SIEGEL: I don't -- I don't think --

JUSTICE BRISTER: And I mean part of this deal is, not that we are going to war with Alabama or Maine, but that we just do not want to be stepping on each other's toes, unnecessarily.

MR. SIEGEL: I do not think there was anything wrong with Judge Davidson simply echoing a -- I mean was it unseemly for the federal judge in Maine to make this observation. Was it unseemly for the other three federal judges we cited?

JUSTICE BRISTER: Well, it is part of his system. The Federal MDL is part of the federal courts system and it you know, it is one thing for us to complain about what is going on in the Texas system because we have some responsibility for it.

MR. SIEGEL: But -- but why --

JUSTICE BRISTER: And for us to start complaining about somebody else's system, that is a little different, isn't it?

MR. SIEGEL: I -- I -- in this context, I -- I just respectfully disagree, your Honor, because again it was simply -- do the interests of justice in these unusual narrow circumstances, will they be served by dismissal. I might also ask if it is okay, it -- it is hard for me to think of what possible kind of denial of a forum non conveniens motion could ever be upheld if this case is reversed. I mean again, the court -- the -- the legislature did not forbid all out-of-state plaintiffs or all out-of-state asbestos cases from being filed in Texas, its -- it continues to employ a discretionary forum non conveniens standard which necessarily means, at least I think it does, that occasionally a judge will deny a motion. What type -- what type of case might result in a permissible denial if this doesn't.

CHIEF JUSTICE JEFFERSON: Further questions. Thank you, Counsel.

REBUTTAL ARGUMENT OF KURT H. KUHN ON BEHALF OF THE PETITIONER

MR. KUHN: Just to answer the question the chief raised during the other side. I was just handed an obituary from the Bangor Daily News that says that the plaintiff passed away on August 19th, the other night.

CHIEF JUSTICE JEFFERSON: And does that have any --

MR. KUHN: It does not have any impact at all. We have always said, your Honor, to the trial court, the MDL court, it -- it -- the nature of these cases, this is not a unique case. I mean, he testified to the legislature exactly this. All these cases are the same, all these cases present when the individual is facing a terminal illness, which is going to happen soon. We could not have gotten this to case in trial any sooner in Texas than it could have in Maine. And if there is any delay in this case, which it -- a delay is unfortunate in any case. It is because the plaintiff, or more particularly the plaintiff's attorneys encouraged him to file a lawsuit in a jurisdiction that had

absolutely nothing to do with this case, 2,000 miles from where it belonged. If he had filed this case in Maine, I do not know if it would have been removable or not, but it would have proceeded along the route it should have gone along. And every case is going to be like that. And there have not been any other forum non conveniens cases since this one was decided because they would have been agreed to by the other side, granted or in some instances, they have not been raised. But the idea that the defendant does not push a forum non conveniens in some other case does not have anything to do with the factors that the legislature has specifically enumerated for us to consider. And he tells you now, he tells you it is not one of those factors, it just falls under this nebulous condition. And actually let me back up there, the court did not condition under (c), it did not do that. It asked at one point if we thought it could and we told it -- it could not, for the same reasons you cannot consider it under (b) the same constitutional issues. But it did not, it decided it under (b). He just said in the interest of justice, the statutes say 'interest of justice' I am going to deny this motion. And that is not a valid factor the legislature has enumerated.

JUSTICE MEDINA: Was anything in that statute that says out-of-state plaintiffs cannot file their cases here?

MR. KUHN: I am sorry, your Honor, I could not --

JUSTICE MEDINA: There is nothing in the statute that precludes out-of-state plaintiffs autonomously.

MR. KUHN: And -- and the legislature should not have to do that. This is really about the point that -- that the Court made and it was Justice Hecht's -- Section 3 of the Prudential (148 S.W.3d 128) opinion, this is about the prudent use of manda control the court, to make them do what they are intended to do. If we do not do it in this case, if we cannot govern ourselves in this case, what is going to happen? The legislature -- what else can they do? They are going to have to come back in and amend. You know, if it was not for the mandamus ruling, they would have to make an interlocutory appeal in every case. And the legislature has to say at this point, 'What else can we tell you courts that we do not want this lawsuit being brought in Texas?'

On the constitutional question, I do not think it is a red herring at all. I think it is an important constitutional issue. The Court does not need to reach it because the Court can just look at the factors, as they did in *Pirelli*, and say under these factors, and of course *Pirelli*, one big difference, your Honor, that you asked about, is *Pirelli* was under the old statute. *Pirelli* was under the 'may,' now we have the 'shall.' Right, if anything in this case, it is more compelling, and in *Pirelli*, the tire was sold in Texas, on a vehicle in Texas. Here we do not have any venue facts, there is no forum facts that make this an appropriate place to bring this lawsuit. He admits in open court, he admits to this Court, he admitted to the Court of Appeals. We are here because he is forum shopping. He is here to avoid federal removal. That is not a proper reason under the statute. The legislature could have created that, we would have brought it up and it probably would be reversed by the federal courts.

JUSTICE MEDINA: How -- how is the Federal District in Pennsylvania any more convenient to your client than in Texas.

MR. KUHN: Your Honor, we will not be tried. This case will not be tried if it goes to trial in Pennsylvania. The MDL Court is a pretrial court. It will be sent back to the district court in Maine to be tried if it is eventually tried. Their argument is --

JUSTICE MEDINA: They will go back there for some -- they will go back there for some proceeding and -- right?

MR. KUHN: Their argument is that when you go to the MDL Court, which is the pretrial court just like our MDL Court in Houston, you do not get out quick enough, that is their argument. And it is not that it will not be tried in -- and, your Honor, as I said again, we are not saying this case will not be tried in Maine. What we are saying is, no one is afraid of Maine. The point is that this MDL Court, and he said so in his letter that he withdrew, but we all know what it is and it is the whole purpose of the MDL court. His ruling here is what he is going to say in every case going forward. Is Texas going to be used as a venue for plaintiffs to come, to force defendants to waive their right to removal? That is not a proper purpose for our state to act and that is not what the legislature intended.

JUSTICE JOHNSON: According to your -- your position is -- the record will show that the six factors are show -- are proved conclusively and that the trial court did not dismiss or stay condition on anything. We are simply here because your position is these are conclusively proved as in Pirelli, and that the trial court had no discretion to deny.

MR. KUHN: That is absolutely right, your Honor. The point that Justice Willett made in the concurrence in Pirelli, Texas has no dog in this fight and if the only connection that you can give us, the most consequential connection is the decision to sue here, then little more need be said. This case simply does not belong in our courts.

JUSTICE JOHNSON: Other than the defendants that, in this case, do in fact reside here and are still in the case.

MR. KUHN: Your Honor, when they named 27, 28, 100 defendants in these asbestos cases, there will always be defendants in almost every jurisdiction if they want them. The point is, that is not a venue decision, that is not a forum decision. That is a jurisdictional decision. And I do not dispute you have jurisdiction as a -- as a manufacture, jurisdiction is going to be had just about everywhere. The point is, it is not the proper forum decision.

CHIEF JUSTICE JEFFERSON: Further questions?

JUSTICE WAINWRIGHT: I have a question, Chief. As to the science of mesothelioma to -- years ago it was the case that after diagnosis, unfortunately persons afflicted with mesothelioma lived maybe another year and a half. And then I saw a case, actually presided over it as a trial judge, where there had been a diagnosis, I think more than six or seven years of mesothelioma, and the person -- plaintiff appeared in the trial, at court. What is the science now, the life expectancy after diagnosis, do you know?

MR. KUHN: I am afraid I would be subject to a Habner or a Dobner challenge on that, your Honor, but I will tell you though, it -- the amount of time has extended dramatically, and I think cases have recognized that. But our point is just that it is not really a valid consideration. If, you know, if the legislature had intended to have some sort exigent circumstances or you know, pending death exception, they were asked to do that, they did not do it, and that should be the end of it.

CHIEF JUSTICE JEFFERSON: Any further questions. The cause is submitted. That concludes the arguments for this morning and the marshall will adjourn the Court.

SPEAKER: All rise. O ye, O ye, O ye, the Honorable, the Supreme Court of Texas now stands adjourned.

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