

NO. _____

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

PETITION FOR WRIT OF MANDAMUS

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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-197,280 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 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?
2. Did the trial court abuse its discretion by failing to undertake the choice-of-law analysis raised by Relator?
3. Did the trial court abuse its discretion in concluding plaintiffs' wrongful death claims were individual in nature (as opposed to representative) 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?

REASONS TO GRANT REVIEW

The Court should accept review of this case because it involves the construction of a statute that was recently amended in direct response to an opinion from this Court. Furthermore, the issues presented in this appeal raise vital questions for the Texas jurisprudence, resolution of which will have an impact on the state at-large.

After *In re Ford Motor Co.*, 442 S.W.3d 265 (Tex. 2014) was decided, the Texas legislature promptly passed HB 1692, amending the Texas-residency exception to the state's forum non conveniens statute. This legislation attempted to prevent wrongful death claims for non-resident individuals from being brought in Texas and to prevent non-residents from riding into Texas courts on the coattails of a resident. The issues in this case ask the Court to, for the first time, clarify the meaning of terms such as "plaintiff", "derivative plaintiff", and "representative" as they are employed in the newly amended Texas-residency exception. Given that within this Court has recently reviewed a nearly identical question and the legislature immediately responded by amending the statute, it is clear that the application of the Texas-residency exception to out-of-state injuries is a matter of significance to the state of Texas above and beyond any one case.

Because the trial court and the court of appeals have committed errors of law in their construction and application of the amended Texas-residency exception,

this Court should accept this case for review. Clarification, once and for all, of the proper application of the Texas-residency exception is vitally important to all parties to Texas litigation both now and in the future.

STATEMENT OF THE FACTS

The Petition alleges that on March 30, 2016, Venice Alan Cooper (hereinafter “Decedent”)—a resident of Webster County, Mississippi—was working on a tractor manufactured by Mahindra when an equipment malfunction caused his death. (App. 2, at 1). This incident and subsequent investigation occurred in Webster County, Mississippi at Decedent’s home. (App. 2, at 1; MR002-004). Similarly, the majority of the witnesses and the emergency responders to the scene were and are based in Mississippi. (MR003-005). The tractor at issue was purchased in Mississippi. (MR034). After his death, Decedent’s estate was opened in the Chancery Court of Webster County, Mississippi and remains pending there. (MR036-37). Plaintiffs have engaged in substantial activity in Mississippi Chancery Court while administering Decedent’s estate. (MR037-43).

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 and

assembled in Texas. (App. 6, ¶5). Mahindra's United States headquarters are in Houston. (App. 6, ¶3). The front-end loader at issue was manufactured outside of Texas by a Kansas company (also a defendant). (App. 7). The assembled tractor was purchased in and maintained in Mississippi. (MR034). 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. (MR002-006, 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, instead denying 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. This petition for writ of mandamus follows.

SUMMARY OF THE ARGUMENT

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.

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 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). Likewise, each defendant is amenable to process in Mississippi and, as such, makes Mississippi an adequate “alternate forum”. *Id.* 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* (MR002-006, 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 on the scene of the accident. *See*, Tex. R. Civ. P. 176.3; *see also* (MR002-006, 025-032).

The most important factors in a forum non conveniens analysis are the public/private-interest factors 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 interest factors 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); (MR002-006, 025-044). In addition, Plaintiffs would have Texans bear the burden of judicial resources for litigating a case that has no significant factual connection to Texas, which also implicates public interest factors favoring Mississippi as the proper forum. *Id.*

Furthermore, the private interest factors, 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 litigation 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. (MR006, 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. (MR036-044).

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 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 when that is the case the trial court is required to dismiss the action. The only issue for the trial court was whether the Texas-residency exception applies.

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 in response to 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. (MR045-047) (“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 applying the Texas-residency exception to the administrator of an out-of-state resident's estate

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; MR044). 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 stand 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* subject to the Texas-residency exception and are subject to dismissal.

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 review by this Court.

E. 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). By disregarding Relator's choice-of-law argument, 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). 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; MR002-006, 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. (MR002-006, 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; MR036-044).

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 of the assembly of the tractor at issue. As previously stated, the tractor was designed and manufactured in India and the front-end loader at issue was 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 failed to engage in a choice-of-law analysis at all. This, in and of itself, was an abuse of discretion by the trial court. Courts have no discretion to fail to apply or analyze the law. *See, Walker*, at 240. And applying Mississippi law, the court abused its discretion in denying Relator's motion to dismiss.

2. *Under Mississippi law, Plaintiffs are "representatives"*

Though Plaintiffs try to plead around it, their claims are wrongful death claims. 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.*; (MR036-044).

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”).

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 as an individual.

3. *As “representatives”, the Texas-residency exception is inapplicable*

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 or as a derivative claimant 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. This failure merits review by this Court because the legislature specifically set out to address forum non conveniens issues relating to wrongful death representatives/derivative claims.

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,

FORMAN WATKINS & KRUTZ LLP

By: */s/ Edwin S. Gault, Jr.*

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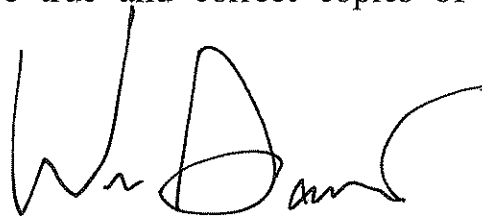
ATTORNEYS FOR RELATOR

MAHINDRA USA, INC.

VERIFICATION

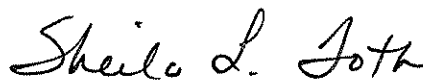
STATE OF MISSISSIPPI §
 §
COUNTY OF HINDS §

BEFORE ME, the undersigned Notary Public, on this personally appeared Edwin S. Gault, Jr., who, being by me duly sworn by me on his oath, deposed and said that he is an attorney for Relator, Mahindra USA, Inc.; that he has read the foregoing Petition for Writ of Mandamus; that every factual statement in the petition is supported by competent evidence included in the appendix or record; and that the documents included in the Appendix to the Petition for Writ of Mandamus and in the Mandamus Record are true and correct copies of the originals.



Edwin S. Gault, Jr.

SUBSCRIBED AND SWORN TO BEFORE ME, this 6th day of January, 2017.



Notary Public



CERTIFICATE OF COMPLIANCE

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

I hereby certify that this Petition contains a total of **4,494** words, excluding the parts of the petition exempted under TEX. R. APP. P. 9.4(i)(I), as verified by Microsoft Word 2010. This Petition is therefore in compliance with TEX. R. APP. P. 9.4(i)(D).

Dated: January 9, 2017.

/s/ EDWIN S. GAULT, JR.

Edwin S. Gault, Jr.
Counsel for Relator,
Mahindra USA, Inc.

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 9th day of January, 2017.

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/s/ EDWIN S. GAULT, JR.

Edwin S. Gault, Jr.

APP. 1

P-1
DISMY

CAUSE NO. 2016-40032

JASON ALAN COOPER, §
INDIVIDUALLY, AS §
ADMINISTRATOR OF THE ESTATE OF §
VENICE ALAN COOPER, AND AS NEXT §
FRIEND OF FAITH COOPER, AND §
CHRISTOPHER CODY COOPER §

v. §

MAHINDRA USA, INC., AND §
KMW, LTD. §

IN THE DISTRICT COURT OF

FILED

Chris Daniel
District Clerk

AUG 12 2016

HARRIS COUNTY, TEXAS

Time: _____
By _____
Deputy

152nd JUDICIAL DISTRICT

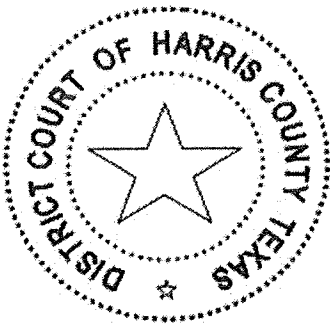
**ORDER ON DEFENDANT MAHINDRA USA, INC.'S MOTION TO DISMISS BASED
UPON FORUM NON CONVENIENS**

After considering Defendant Mahindra USA, Inc.'s Motion to Dismiss Based Upon Forum Non Conveniens, Plaintiffs' Response, and arguments of counsel, if any, this Court is of the opinion that Defendant's Motion should be DENIED.

It is ORDERED that Defendant's Motion is DENIED.

SIGNED this _____ day of **AUG 12 2016**, 2016.


PRESIDING JUDGE



I, Chris Daniel, District Clerk of Harris County, Texas certify that this is a true and correct copy of the original record filed and or recorded in my office, electronically or hard copy, as it appears on this date.
Witness my official hand and seal of office
this September 12, 2016

Certified Document Number: 71482755 Total Pages: 1

Chris Daniel, DISTRICT CLERK
HARRIS COUNTY, TEXAS

In accordance with Texas Government Code 406.013 electronically transmitted authenticated documents are valid. If there is a question regarding the validity of this document and or seal please e-mail support@hcdistrictclerk.com

APP. 2

2016-40032 / Court: 152

CAUSE NO. _____

JASON ALAN COOPER,	§	IN THE DISTRICT COURT OF
INDIVIDUALLY, AS	§	
ADMINISTRATOR OF THE ESTATE OF	§	
VENICE ALAN COOPER, AND AS NEXT	§	
FRIEND OF FAITH COOPER, AND	§	
CHRISTOPHER CODY COOPER	§	
	§	HARRIS COUNTY, TEXAS
v.	§	
	§	
MAHINDRA USA, INC., AND	§	
KMW, LTD.	§	_____ JUDICIAL DISTRICT

PLAINTIFFS' ORIGINAL PETITION

Plaintiffs Jason Alan Cooper, individually, as administrator of the Estate of Venice Alan Cooper, and as next friend of Faith Cooper, and Christopher Cody Cooper file this Original Petition complaining of Defendants Mahindra USA, Inc., and KMW, Ltd., and would respectfully show this Court the following:

I. FACTUAL BACKGROUND

On March 30, 2016, Venice Alan Cooper was killed while working on his Mahindra 8560 4WD tractor, at his home in Webster County, Mississippi, when a hydraulic line ruptured and caused the front end loader on the tractor to suddenly fall. Mr. Cooper was trapped between the front wheel of the tractor and the front end loader. Mr. Cooper was pronounced dead at the scene from traumatic asphyxiation. The incident was witnessed by Mr. Cooper's fourteen year old grand-daughter, Faith Cooper.

Defendant Mahindra USA, Inc. is in the business of manufacturing and selling tractors. Defendant Mahindra manufactured and assembled the tractor in question and its parts. In doing so, it incorporated component parts, including the loader by Defendant KMW, Ltd., into the tractor and rebranded the parts as its own. The tractor failed to have

a mechanical or hydraulic safety device. Defendants failed to include safety devices or safety measures which would have prevented the equipment from failing or malfunctioning. Mr. Cooper's heirs and family members now bring this suit to recover damages.

II. DISCOVERY LEVEL

Plaintiffs seek to conduct discovery under Level 2 of the Texas Rules of Civil Procedure, and affirmatively plead that they seek monetary relief in excess of the jurisdictional limits of this Court.

III. PARTIES

Plaintiff Jason Alan Cooper, who brings claims individually, as well as administrator of the Estate of Venice Alan Cooper, and as next friend of Faith Cooper, is an individual residing in Harris County, Texas.

Plaintiff Christopher Cody Cooper is an individual residing in Harris County, Texas.

Defendant Mahindra USA, Inc. is a domestic corporation doing business in Texas. It may be served through its registered agent: Edward E. Hartline, 2323 S. Shepherd, Houston, Texas 77019.

Defendant KMW, Ltd., is a limited liability company that engages in business in Texas by contracting with Texas residents by mail or otherwise and either party is to perform the contract in Texas and also by committing a tort in whole or in part in Texas, but does not maintain a registered agent in Texas. Defendant may be served by serving the Secretary of State of Texas, provided that the citation and original petition are forwarded, by certified mail, return receipt requested to any officer or director of

Defendant, including its registered agent, Michael Bender, at 535 West Garfield Avenue, Sterling, Kansas 67579.

IV. JURISDICTION AND VENUE

This Court has personal jurisdiction over the Defendants because Defendants reside in and/or do business in Texas. At least one Defendant maintains its headquarters in this state. Venue is proper in this County as it is the County in which at least one Defendant maintains its principal office in this state.

V. CAUSES OF ACTION

1. NEGLIGENCE, MANUFACTURING DEFECT, DESIGN DEFECT, FAILURE TO WARN (MAHINDRA, KMW)

Plaintiffs incorporate the above allegations as if fully set forth herein.

A hydraulic line blew and the front end loader on the Mahindra tractor fell on Cooper. Cooper suffocated and was killed. Defendant Mahindra incorporated component parts, including the loader, into their product, and rebranded them as their own. Defendant is engaged in the business of manufacturing, selling, and leasing tractors. It placed their products in the stream of commerce by selling or leasing equipment to individuals and businesses throughout the country. Further, it failed to properly train and supervise those manufacturing, designing and assembling its products and their component parts.

Defendant KMW is in the business of manufacturing and selling front-end loaders and other component parts for tractors. Defendant placed its products in the stream of commerce by selling equipment to individuals and businesses throughout the country, including to Mahindra.

Defendants' design of the equipment was unreasonably dangerous. Defendants were negligent in failing to design the equipment in a manner in which it could be operated safely. The tractor's design did not incorporate a mechanical or hydraulic safety device in accordance with applicable commercially available design standards. Defendants failed to include safety devices or safety measures which would have prevented the equipment from failing and/or malfunctioning. Defendants were aware of safer alternative designs, yet failed to ensure a safer design was instituted. Safer alternative designs known to Defendants were economically and technologically feasible at the time the product left the control of the manufacturer by the application of existing or reasonably achievable scientific knowledge. Plaintiffs allege that a safer alternative design would have prevented or reduced the risk of injury to their decedent.

Finally, Plaintiff asserts that Defendants' equipment was defective because Defendants failed to properly warn of dangerous characteristics of the tractor and its parts. At the time of the incident, Mr. Cooper was using Defendants' equipment according to its reasonably foreseeable usage. The risk of harm to Mr. Cooper was foreseeable through this reasonably anticipated, intended use at the time of manufacture, and Defendants' actions were a proximate cause of the injuries and damages sustained.

2. STRICT LIABILITY (MAHINDRA, KMW)

Plaintiffs incorporate the above allegations as if fully incorporated herein.

A hydraulic line blew and the front end loader on the tractor fell on Mr. Cooper during his use of the tractor. Mr. Cooper suffocated and was killed. The tractor and its parts were defective. Defendants should be held strictly liable for the products placed into the stream of commerce.

3. GROSS NEGLIGENCE (MAHINDRA, KMW)

Plaintiffs incorporate the above allegations as if fully incorporated herein. Plaintiffs will further show that the acts and/or omissions of Defendants, when viewed objectively from the Defendants' standpoint, involve an extreme degree of risk considering the probability and magnitude of the potential harm to others.

Defendants had actual subjective awareness of the risk involved, but nevertheless proceeded in conscious indifference to the rights, safety, and/or welfare of others, including Mr. Cooper. Defendants knew or should have known of the risks posed. As such, Defendants' actions and omissions constitute gross negligence and malice as those terms are understood by law.

VI. DAMAGES

Plaintiffs sue in every capacity and for every element of damages to which they are entitled by reason of the matters made the basis of this suit, including the damages under the Wrongful Death Act (TEX. CIV. PRAC. & REM. CODE. ANN. § 71.002 et. seq.) and the survival statutes (TEX. CIV. PRAC. & REM. CODE. ANN. § 71.021) of this state. This suit is brought under the applicable statutes of the State of Texas for the death of Venice Alan Cooper. Plaintiffs seek damages for past and future medical expenses; loss of past and future earning capacity; past and future pain and suffering; mental anguish; and past and future loss of household services.

As a direct and proximate result of the negligence and gross negligence of Defendants, Cooper sustained numerous severe injuries and subsequently died as a result. Plaintiffs sue in every capacity and for every element of damages to which they are entitled. Specifically, Plaintiffs sue for all damages to which they are entitled under TEX.

CIV. PRAC. & REM. CODE. ANN. § 71.002 et seq., and TEX. CIV. PRAC. & REM. CODE.

ANN. § 71.021 et seq., including, but not limited to:

- Pecuniary losses, including but not limited to the loss of care, maintenance, support, services, advice, counsel and contributions, both in the past and future;
- Loss of society and companionship, including but not limited to the loss of the positive benefits flowing from the love, comfort, companionship and society from Mr. Cooper, deceased, both in the past and future;
- Mental anguish, including the emotional pain, torment and suffering, both in the past and future;
- Loss of inheritance, including the loss of the present value of the assets and contributions that Mr. Cooper, deceased, would have added to the estate and left at his natural death to surviving spouse, both in the past and future;
- Medical expenses, including the charges for medical treatment incurred by Plaintiffs; and
- Funeral and burial expenses, including the reasonable and necessary charges incurred by Plaintiffs for the funeral and burial of Mr. Cooper.

Plaintiffs seek damages greater than \$1,000,000. Plaintiffs seek all wrongful death damages allowed by Texas law for family members. The Estate of Venice Alan Cooper and its beneficiary or beneficiaries seek all survival damages allowed by Texas law. Plaintiffs also seek punitive or exemplary damages. Finally, Plaintiffs also seek costs, attorneys' fees, pre-judgment and post-judgment interest, and any other relief to which they may be entitled.

All conditions precedent have been performed or have occurred.

VII. REQUEST FOR DISCLOSURE

Pursuant to TEX. R. CIV. P. 194, Plaintiffs request that each Defendant disclose within fifty (50) days of service of this Request for Disclosure, the information and/or material described in Rule 194.2.

VIII. JURY DEMAND

Plaintiffs respectfully demand a jury trial and tender the appropriate fee.

IX. PRAYER

Plaintiffs pray that each Defendant be cited to appear and answer this suit. Plaintiffs ask that this case be set for trial without delay, and that Plaintiffs recover judgment from Defendants for damages in such amount that the evidence may show and the trier of fact may determine to be proper.

Respectfully submitted,

THE BUZBEE LAW FIRM

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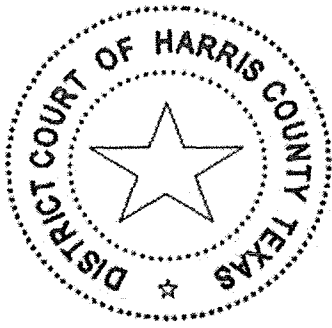
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Facsimile: (713) 533-9376

ATTORNEYS FOR PLAINTIFFS



I, Chris Daniel, District Clerk of Harris County, Texas certify that this is a true and correct copy of the original record filed and or recorded in my office, electronically or hard copy, as it appears on this date.
Witness my official hand and seal of office
this September 12, 2016

Certified Document Number: 70587647 Total Pages: 7

Chris Daniel, DISTRICT CLERK
HARRIS COUNTY, TEXAS

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APP. 3

Vernon's Texas Statutes and Codes Annotated
Civil Practice and Remedies Code (Refs & Annos)
Title 4. Liability in Tort
Chapter 71. Wrongful Death; Survival; Injuries Occurring Out of State (Refs & Annos)
Subchapter D. Forum Non Conveniens

V.T.C.A., Civil Practice & Remedies Code § 71.051

§ 71.051. Forum Non Conveniens

Effective: June 16, 2015

Currentness

(a) Repealed by Acts 2003, 78th Leg., ch. 204, § 3.09.

(b) If a court of this state, on written motion of a party, finds that in the interest of justice and for the convenience of the parties a claim or action to which this section applies would be more properly heard in a forum outside this state, the court shall decline to exercise jurisdiction under the doctrine of forum non conveniens and shall stay or dismiss the claim or action. In determining whether to grant a motion to stay or dismiss an action under the doctrine of forum non conveniens, the court shall consider whether:

(1) an alternate forum exists in which the claim or action may be tried;

(2) the alternate forum provides an adequate remedy;

(3) maintenance of the claim or action in the courts of this state would work a substantial injustice to the moving party;

(4) the alternate forum, as a result of the submission of the parties or otherwise, can exercise jurisdiction over all the defendants properly joined to the plaintiff's claim;

(5) the balance of the private interests of the parties and the public interest of the state predominate in favor of the claim or action being brought in an alternate forum, which shall include consideration of the extent to which an injury or death resulted from acts or omissions that occurred in this state; and

(6) the stay or dismissal would not result in unreasonable duplication or proliferation of litigation.

(c) The court may set terms and conditions for staying or dismissing a claim or action under this section as the interests of justice may require, giving due regard to the rights of the parties to the claim or action. If a moving party violates a term or condition of a stay or dismissal, the court shall withdraw the order staying or dismissing the claim or action and proceed as if the order had never been issued. Notwithstanding any other law, the court shall have continuing jurisdiction for purposes of this subsection.

(d) A request for stay or dismissal under this section is timely if it is filed not later than 180 days after the time required for filing a motion to transfer venue of the claim or action. The court may rule on a motion filed under this section only after a hearing with notice to all parties not less than 21 days before the date specified for the hearing. The court shall afford all of the parties ample opportunity to obtain discovery of information relevant to the motion prior to a hearing on a motion under this section. The moving party shall have the responsibility to request and obtain a hearing on such motion at a reasonable time prior to commencement of the trial, and in no case shall the hearing be held less than 30 days prior to trial.

(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 provided 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 .

(f) A court that grants a motion to stay or dismiss an action under the doctrine of forum non conveniens shall set forth specific findings of fact and conclusions of law.

(g) Any time limit established by this section may be extended by the court at the request of any party for good cause shown.

(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 .

(i) This section applies to actions for personal injury or wrongful death. This section shall govern the courts of this state in determining issues under the doctrine of forum non conveniens in the actions to which it applies, notwithstanding Section 71.031(a) or any other law.

Credits

Added by Acts 1993, 73rd Leg., ch. 4, § 1, eff. Aug. 30, 1993. Amended by Acts 1995, 74th Leg., ch. 567, § 1, eff. Sept. 1, 1995; Acts 1997, 75th Leg., ch. 424, § 1, eff. May 29, 1997; Acts 2003, 78th Leg., ch. 204, §§ 3.04, 3.09, eff. Sept. 1, 2003; Acts 2005, 79th Leg., ch. 248, § 1, eff. Sept. 1, 2005; Acts 2015, 84th Leg., ch. 537 (H.B. 1692), § 1, eff. June 16, 2015.

V. T. C. A., Civil Practice & Remedies Code § 71.051, TX CIV PRAC & REM § 71.051

Current through the end of the 2015 Regular Session of the 84th Legislature

End of Document

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APP. 4

CAUSE NO. 2016-40032

JASON ALAN COOPER, Individually as	§	IN THE DISTRICT COURT OF
Administrator of the Estate of VENICE	§	
ALAN COOPER, and as Next Friend of	§	
FAITH COOPER, and CHRISTOPHER	§	
CODY COOPER	§	
	§	
v.	§	HARRIS COUNTY, TEXAS
	§	
	§	
MAHINDRA USA, INC. and	§	
KMW, LTD.	§	152nd JUDICIAL DISTRICT

**MAHINDRA USA, INC.'S MOTION TO DISMISS BASED UPON FORUM NON
CONVENIENS AND INCORPORATED MEMORANDUM IN SUPPORT**

MAHINDRA USA, INC., (hereinafter “Mahindra” or “Defendant”) submits this Motion to Dismiss Based Upon Forum Non Conveniens and hereby requests the claims against it be dismissed pursuant to Texas Civil Practices & Remedies Code § 71.051. This action arises from events that transpired entirely in Mississippi involving equipment sold in Mississippi to a Decedent whose estate is being administered in Mississippi. As such, this action belongs in Mississippi.

I. BACKGROUND

The Petition alleges that on March 30, 2016, Venice Alan Cooper (hereinafter “Decedent”)—a resident of Webster County, Mississippi—was working on a tractor manufactured by Mahindra when an equipment malfunction caused his death. *See*, Petition, at 1-2. This incident and subsequent investigation of the incident occurred in Webster County, Mississippi at Decedent’s home. *See*, Petition, at 1-2; *see also*, Webster County Sheriff’s Report, attached as Exhibit 1; EMS Incident Report, attached as Exhibit 2; NMMC EMS Report,

attached as Exhibit 3. Similarly, the majority of the witnesses and the emergency responders to the scene were and are based in Mississippi. *Id.* The tractor at issue was purchased in Mississippi. *See*, May 18, 2016 Letter, attached as Exhibit 4. After his death, Decedent's estate was opened in the Chancery Court of Webster County, Mississippi and remains pending there. *See*, Chancery Court Civil Cover Sheet, attached as Exhibit 5; *see also*, Chancery Court Clerk Receipt, attached as Exhibit 6. Plaintiffs have engaged in substantial activity in Mississippi Chancery Court during the process of administering Decedent's estate, such as: opening the estate, seeking letters of administration, submitting an oath to the court, petitioning the court for leave to open a safety deposit box, opening and reviewing the contents of the safety deposit box, reporting back to court on results of deposit box search, and committing to making a "true and perfect inventory" of the debts and assets of the estate. *See*, Petition for Letters of Administration, attached as Exhibit 7; *see also*, Order Granting Letters of Administration, attached as Exhibit 8 (acknowledging Jason Alan Cooper also sought leave to open safety deposit box); Oath of Administrator, attached as Exhibit 9; Letters of Administration, attached as Exhibit 10.

On June 10, 2016, Plaintiffs 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.

II. ARGUMENT

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). The facts and evidence in this case are located exclusively in the state of Mississippi.

Mississippi's wrongful death and survival law will apply to this action. And, the estate of Decedent has been opened, is being administered in, and will be resolved in Mississippi. The only question is whether the Texas-residency exception to forum non conveniens is applicable; as discussed below, it is *not applicable* in accordance with the 2015 amendments to the forum non conveniens statute. Therefore, this case belongs in Mississippi under the doctrine of forum non conveniens, and this court should grant Mahindra's motion to dismiss.

A. All Forum Non Conveniens Factors Support Dismissal

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 is to assess 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 jurisdiction in Mississippi, where the court would have specific personal jurisdiction over each. Likewise, each defendant is amenable to process in Mississippi and, as such, makes Mississippi an adequate "alternate forum". *Id.* 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. In addition, the following known witnesses are located in Mississippi, far outside the subpoena power of the courts of Texas: Diana Bright (eyewitness), 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 on the scene of the accident. *See*, Tex. R. Civ. P. 176.3; *see also*, Exhibits 1-3.

The most important factors in a forum non conveniens analysis are the public/private-interest factors 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*, 67 S.Ct. 839 (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 (Ct.App.Tex. 2011). Other public interest factors 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*, 108 S.Ct 1945, 1953 (1988). Given that the equipment 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 (Ct.App.Tex. 2005). In addition, Plaintiffs would have Texans bear the burden of judicial resources for litigating a case that has no factual connection to Texas whatsoever, which also implicates public interest factors favoring Mississippi as the proper forum. *Id.*

Furthermore, the private interest factors, 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 litigation where the incident occurred—Mississippi. See, *Vinmar Trade Finance, Ltd. v. Utility Trailers de Mexico, S.A. de C.V.*, 336 S.W.3d 664, 677 (Ct.App.Tex. 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. Plaintiffs may contend that Mississippi is an inconvenient forum, but considering that they have engaged in significant activity administering Decedent’s estate in Mississippi, these arguments are unpersuasive.

Under the sixth and final factor, there is again no argument that there will be unreasonable duplication. In fact, dismissal will lead to synergy between this wrongful death

action and the estate action, which is already pending in Mississippi. As such, this factor also supports Mississippi as the proper forum.

B. The Texas-Residency Exception Does Not Apply

As is evident from the foregoing, the facts of this case strongly favor dismissal on the basis of forum non conveniens; each and every factor considered supports this case being more properly heard in Mississippi rather than Texas. But, the inquiry does not end there. Plaintiffs will likely contend that the Texas-residency exception to the state's forum non conveniens statute applies.

This motion admittedly turns on whether the Texas-residency exception applies to this action. If the exception does not apply, dismissal is required under the statute, but if it does the motion must be denied, at least in part.

In 2015, the Texas legislature amended the forum non conveniens statute in direct response to the Texas Supreme Court's application of the Texas-residency exception in *In re Ford Motor Company*, 442 S.W.3d 265 (Tex. 2014), in which the court found that the exception applied to a case involving an out-of-state accident causing the death of an out-of-state resident simply because the estate was opened in Texas and some wrongful death beneficiaries were residents of Texas. *See*, Texas House Bill Analysis, attached as Exhibit 11 ("Recent court cases involving an unintended use of forum non conveniens have highlighted problematic loopholes created by broad statutory definitions of certain terms [and this bill] seeks to address these loopholes."); *see also*, "Texas legislature passes two bills affecting personal injury and wrongful death litigation", Lexology at <http://www.lexology.com/library/detail.aspx?g=367ef62e-2c48-48cf-a5d3-a378b00ddae7>, attached as Exhibit 12 (discussing HB1692 as direct response to *In re Ford*). Under the amendments, the legislature sought to "remove a provision that, in a cause of

action in which a party seeks recovery of damages for personal injury to or the wrongful death of another person, included in the definition [of plaintiff] both that other person and the party seeking such recovery”. *See*, Exhibit 11. This amendment intended “to curb the practice of foreign plaintiffs filing claims in Texas courts involving incidents that happened outside state borders”. *See*, Exhibit 12.

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). Under subsection (h)(2)(B), the Texas-residency exception is inapplicable to any representative/administrator/next friend for derivative claimants of individuals who are not residents of Texas. This provision establishes that the Texas-residency exception is inapplicable here.

a. Mississippi Wrongful Death and Survival Law Applies

Mississippi law—in particular, Mississippi’s wrongful death and survival law—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. 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 (Ct.App.Tex. 1999); *see also*, Restatement (Second) Conflict of Laws § 145-46. 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 presumption. 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 centers”. *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.

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. 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.

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 [where incident occurred in foreign jurisdiction], we would be undercutting [that foreign jurisdiction]’s right to create a hospitable climate for investment.”). Mississippi’s wrongful death and survival statutes have likely been crafted over many years in order to strike complicates policy balances within the state. To suddenly apply the wrongful death and survival law of Texas to a case like this would significantly undermine Mississippi’s interests and legislative scheme. *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 no connection to this lawsuit whatsoever other than the residency of decedent's children and the location of Mahindra's corporate offices. Mississippi, on the other hand, has an overwhelming relationship to and interest in this case. As such, Mississippi's law of wrongful death and survival will apply.

b. Under Mississippi Law, Plaintiffs are "Representatives"

Regardless of how they try to plead around it, plaintiffs' claims are brought on behalf of the estate and the wrongful death beneficiaries. Under the Mississippi wrongful death and survival statute, these claims are not *actually* individual claims. Instead, these claims are brought in a representative capacity on behalf of "any and all parties interested in the suit". *Sauvage v. Meadowcrest Living Center*, 28 So.3d 589, 594 (Miss. 2010) (quoting Miss.Code Ann. § 11-7-13). 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.*

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 (1) the heirs (under the will or pursuant to the intestate succession statutes), (2) the estate, and (3) the statutory wrongful death beneficiaries. The Statute speaks in terms of a litigant 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 in place so that plaintiffs will “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). In *Willing v. Estate of Benz*, 958 So.2d 1240 (Ct.App.Miss. 2007), the court reaffirmed this representative/fiduciary function of individual wrongful death beneficiaries, noting that the beneficiary “has an affirmative duty” to the other beneficiaries. *Id.*, at 1256. And, in *Hornburger v. Baird*, 508 F.Supp. 84 (N.D. Miss. 1980), a Mississippi federal court held that a wrongful death plaintiff’s action was “for the benefit of those lawfully entitled to recover damages . . . for the wrongful death of decedent”. *Id.*, at 85.

Under the aforementioned case law, it is clear that plaintiffs seeking recovery under Mississippi’s wrongful death and survival statutes are “representatives” of a broader group of derivative claimants. Simply put, there is no such thing as bringing a Mississippi wrongful death claim purely as an individual.

c. As “Representatives”, the Texas-Residency Exception is Inapplicable

Despite being framed as claims brought in plaintiffs’ individual capacities, these claims are brought in a representative capacity on behalf of the estate. 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 those claims are brought in a representative capacity on behalf of or as a derivative claimant 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.

III. CONCLUSION

The claims in this case are brought in a representative capacity on behalf of the estate of a Mississippi resident for injuries sustained in Mississippi arising from alleged defects in equipment sold and maintained in Mississippi. Mississippi law will apply to this case. Plaintiffs are already actively administering the estate of Decedent in the state of Mississippi. As such, this case belongs in Mississippi under Texas Civil Practices & Remedies Code § 71.051. Accordingly, Mahindra's Motion to Dismiss Based Upon Forum Non Conveniens should be granted and the claims of Plaintiffs dismissed in their entirety and at Plaintiff's costs.

Respectfully submitted,

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CERTIFICATE OF CONFERENCE

I hereby certify that on June 16 and June 17, 2016 I conferred with plaintiffs' counsel Tony Buzbee and Joseph Gourrier regarding this issue. Both were opposed to the motion. Mr. Buzbee suggested I move forward with the motion as no agreement could be reached.

/s/ EDWIN S. GAULT, JR.
EDWIN S. GAULT, JR.

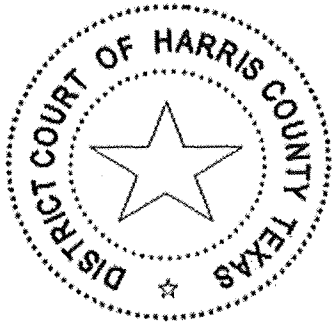
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing pleading has been served upon counsel for all parties to this proceeding by delivering a copy of the same to each via electronic mail, hand, facsimile, Federal Express, or by First Class United States mail, properly addressed and postage prepaid on this 11th day of July, 2016.

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I, Chris Daniel, District Clerk of Harris County, Texas certify that this is a true and correct copy of the original record filed and or recorded in my office, electronically or hard copy, as it appears on this date.
Witness my official hand and seal of office
this September 12, 2016

Certified Document Number: 71022414 Total Pages: 13

Chris Daniel, DISTRICT CLERK
HARRIS COUNTY, TEXAS

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APP. 5

CAUSE NO. 2016-40032

JASON ALAN COOPER,	§	IN THE DISTRICT COURT OF
INDIVIDUALLY, AS	§	
ADMINISTRATOR OF THE ESTATE OF	§	
VENICE ALAN COOPER, AND AS NEXT	§	
FRIEND OF FAITH COOPER, AND	§	
CHRISTOPHER CODY COOPER	§	
	§	HARRIS COUNTY, TEXAS
v.	§	
	§	
MAHINDRA USA, INC., AND	§	
KMW, LTD.	§	152 nd JUDICIAL DISTRICT

PLAINTIFFS' RESPONSE TO DEFENDANT MAHINDRA USA, INC.'S MOTION TO DISMISS BASED UPON FORUM NON CONVENIENS

Plaintiffs Jason Alan Cooper, individually, as administrator of the Estate of Venice Alan Cooper, and as next friend of Faith Cooper, and Christopher Cody Cooper file this Response to Defendant Mahindra USA, Inc.'s Motion to Dismiss Based Upon Forum Non Conveniens, and would respectfully show the following:

BACKGROUND

On March 30, 2016, Venice Alan Cooper was killed while working on his Mahindra 8560 4WD tractor, at his home in Webster County, Mississippi, when a hydraulic line ruptured and caused the front end loader on the tractor to suddenly fall. Mr. Cooper was trapped between the front wheel of the tractor and the front end loader. Mr. Cooper was pronounced dead at the scene from traumatic asphyxiation. The incident was witnessed by Mr. Cooper's fourteen year old grand-daughter, Faith Cooper.

Defendant Mahindra USA, Inc. is in the business of manufacturing and selling tractors. Defendant Mahindra manufactured and assembled the tractor in question and its parts. In doing so, it incorporated component parts, including the loader by KMW, Ltd., into the tractor and rebranded the parts as its own. The tractor failed to have a mechanical or hydraulic safety

device. Defendants failed to include safety devices or safety measures which would have prevented the equipment from failing or malfunctioning. Mr. Cooper's heirs and family members have brought this suit to recover damages. Almost immediately after answering this suit, Defendant filed this Motion to Dismiss Based Upon Forum Non Conveniens before participating in any discovery. As Plaintiffs will show in this Response, Defendant has failed to meet its burden, and its Motion should be denied.

SUMMARY OF ARGUMENT

- Plaintiffs are residents of Texas. Texas' forum non conveniens statute is clear that a Court may not dismiss a plaintiff's claim on forum-non-conveniens grounds if a plaintiff is a legal resident of the state the lawsuit is filed in.
- Defendant frames Plaintiffs' claims as those brought only in a representative capacity. Defendant is incorrect. Jason Alan Cooper brings *individual* claims. His presence in this suit is not limited to being the administrator of the Estate of Venice Alan Cooper, and the next friend of Faith Cooper. Christopher Cody Cooper also brings *individual* claims. Faith Cooper's claims are also individual claims.
- Plaintiffs do not need to solely rely upon the Texas-resident exception, as the connection to Texas is far from tenuous here. Texas should remain the forum for this case.
- Defendant bears the burden of showing the public and private interest factors strongly favor dismissal on the basis of forum non conveniens. The factors do not strongly favor dismissal, and in fact support Texas as the forum for this case.
- At the core of this case are the decisions regarding the product's design, manufacturing, and warnings at the hands of Defendant. Defendant incorporated its company in Texas, is headquartered in Texas, has managers and employees in Texas, and the decisions regarding the manufacturing and design process are made in Texas.
- Defendant claims it is inconvenient to defend this case in Harris County, yet Defendant has used Harris County as a sword on numerous occasions. And Defendant now attempts to deny access to those same courts for Plaintiffs.

ARGUMENT AND AUTHORITIES

- A. Plaintiffs are residents of Texas. A Court may not stay or dismiss a Plaintiff's claim on forum-non-conveniens grounds if the Plaintiff is a resident of Texas.**

Texas's forum *non conveniens* statute provides:

If a court of this state, on written motion of a party, finds that in the interest of justice and for the convenience of the parties a claim or action to which this section applies would be more properly heard in a forum outside this state, the court shall decline to exercise jurisdiction under the doctrine of forum *non conveniens* and shall stay or dismiss the claim or action.

TEX. CIV. PRAC. & REM. CODE § 71.051(b). The statute applies to actions for personal injuries or wrongful death. TEX. CIV. PRAC. & REM. CODE § 71.051(i). Notwithstanding this, courts “*may not stay or dismiss* a plaintiff’s claim [on forum-non-conveniens grounds] if the plaintiff is a legal resident of this state.” *Id.* § 71.051(e) (emphasis added). This Texas-resident exception “ensure[s] access to Texas courts for Texas plaintiffs.” *In re Ford Motor Co.*, 442 S.W.3d 265, 269 (Tex. 2014). This is not discretionary. Thus, when the Texas-resident exception outlined in subsection 71.051(e) applies—as it does here—a case may not be dismissed on forum *non conveniens* grounds no matter how tenuous the connection is to Texas.

Defendant itself notes that the current version of the forum non conveniens statute is intended “to curb the practice of foreign plaintiffs filing claims in Texas courts involving incidents that happened outside state borders.” While the incident here happened outside Texas’ borders, Defendant ignores the importance of the following: the plaintiffs in this case are not foreign plaintiffs. Jason Alan Cooper and Christopher Cody Cooper are sons of the late Alan Cooper. Jason Alan Cooper and Christopher Cody Cooper currently reside in Texas. They also resided in Texas at the time of the incident. Faith Cooper is Jason Cooper’s daughter. Under Section 151.001 (a)(1) of the Texas Family Code, a parent has the right to designate the residence of a child, which they have done here. TEX. FAMILY CODE § 151.001. If for example, the only claim in this lawsuit was Jason Alan Cooper bringing a claim as the representative,

administrator, guardian or next friend, then Defendant's argument would hold weight. As it stands, it does not. Jason Cooper's presence in this suit is not limited to being the administrator of the Estate of Venice Alan Cooper, and the next friend of Faith Cooper. Jason Alan Cooper brings *individual* claims. Christopher Cody Cooper also brings *individual* claims. Faith Cooper's claims are also individual claims.

Defendant demonstrates a complete misunderstanding of the Texas residency exception's applicability. Defendant states the following in its Motion: "Under subsection (h)(2)(B), the Texas-residency exception is inapplicable to *any representative/administrator/next friend* for derivative claimants of individuals who are not residents of Texas. *This provision establishes that the Texas-residency exception is inapplicable here.*" Motion at p. 7 (emphasis added). There is a gap in logic. As stated earlier, Plaintiffs' claims are not only in a representative capacity. As Plaintiffs have brought forth individual claims, this defeats Defendant's argument.

Defendant then contends that under Mississippi law, Plaintiffs' claims are characterized as that of "representatives." Defendant claims that if this Court applies Mississippi's characterization of Plaintiffs' claims to Texas' forum non-conveniens statute, essentially conflating the two, then the Texas-residency exception no longer applies to Plaintiffs. It is improper to change the meaning of Texas' statute. And it is improper to do so by pointing to how a court *in a different state* has defined what constitutes a claim in a representative capacity. By doing so, Defendant is attempting to selectively mix and match the laws of two different states to come up with a favorable reading or interpretation of Texas' statute.

B. Defendant's heavy burden.

Forum non conveniens is rooted "in considerations of fundamental fairness and sensible and effective judicial administration." *Dow Chemical Co. v. Castro Alfaro*, 786 S.W.2d 674,

703 (Tex. 1990). The doctrine should be applied “with caution, exceptionally, and only for good reasons.” *Van Winkle-Hooker Co. v. Rice*, 448 S.W. 2d 824, 827 (Tex. Civ. App.—Dallas 1969, no writ). “*Unless the balance is strongly in favor of the defendant*, the plaintiff’s choice of forum should rarely be disturbed.” *Sarieddine v. Moussa*, 820 S.W.2d 837 (Tex. App.—Dallas 1991, writ denied) (emphasis added); *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508, 67 S. Ct. 839, 843 (1947).

In determining whether to dismiss a case based on forum *non conveniens*, the trial court should consider a number of private and public factors, including: (1) the relative ease of access to sources of proof; (2) the availability of compulsory process for attendance of unwilling witnesses; (3) the cost of obtaining attendance of willing witnesses; (4) the enforceability of any judgment entered; (5) the burden imposed upon the citizens of the state and on the trial court; and (6) the general interest in having localized controversies decided in the jurisdiction in which they arose. *Lee v. Na*, 198 S.W.3d 492, 495 (Tex. App.—Dallas 2006, no pet.) (citing *Gulf Oil*, 330 U.S. at 508; *Moussa*, 820 S.W.2d at 840).

A plaintiff has an interest in selecting a forum in which to bring his or her suit. *See A. P. Keller Dev. Co. v. One Jackson Place, Ltd.*, 890 S.W.2d 502, 505 (Tex. App.—El Paso 1994, no writ). A defendant bears the burden of proof on all elements of the forum non conveniens analysis and must establish that the balance of factors strongly favors dismissal. *See RSR Corp. v. Siegmund*, 309 S.W.3d 686, 710-11 (Tex. App.—Dallas 2010, no pet.). A defendant seeking forum non conveniens dismissal “bears a heavy burden in opposing the plaintiff’s chosen forum.” *Sinochem Int’l Co., Ltd. v. Malaysia Int’l Shipping Corp.*, 549 U.S. 422, 430, 127 S. Ct. 1184, 1191 (2007). The doctrine rests on a strong presumption in favor of the plaintiff’s choice of forum, a presumption a defendant may overcome only when the private and public interest

factors clearly point toward trial in the alternative forum. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255, 102 S. Ct. 252, 70 L. Ed. 2d 419 (1981).

In *Gulf Oil Corp. v. Gilbert*, the United States Supreme Court set forth factors federal trial courts should consider in applying the doctrine of forum non conveniens, and Texas courts have adopted these factors. 330 U.S. 501, 507, 67 S. Ct. 839, 91 L. Ed. 1055 (1947). The private factors a trial court should consider are the relative ease of access to sources of proof, availability of compulsory process for attendance of unwilling witnesses and the cost of obtaining attendance of willing witnesses, the ability to view the premises (if appropriate), and other practical matters to make trying the case easy, expeditious, and inexpensive. *Id.* at 508. The trial court should also consider other public factors including the burden imposed upon the citizens of the state and on the trial court, and the general interest in having localized controversies decided where they arise. *Id.* at 508-09. Subsection (5) of section 71.051 requires the defendant to prove that the “balance of the private interests of the parties and the public interest of the state predominate in favor of the claim or action being brought in the alternate forum.” TEX. CIV. PRAC. & REM. CODE ANN. § 71.051(b)(5). Unless Defendant can show that “the balance is strongly in favor of the defendant, the plaintiff’s choice of forum should rarely be disturbed.” *Moussa*, 820 S.W.2d at 840 (quoting *Gilbert*, 330 U.S. at 508). It has not, and cannot do so here.

1. *The situs of an injury does not necessarily govern the location of a lawsuit, and in order to prevail on a Motion to Dismiss based on forum non conveniens, the Courts are clear that Defendant must show that the balance of factors is strongly in favor of dismissing a lawsuit from plaintiff’s chosen forum.*

In *In re Old Republic Nat’l Title Co.*, a lender named AmericanHomeKey, Inc. filed suit in Texas alleging an insurance underwriting company named Old Republic breached its fiduciary

duty on ten mortgage loans. 2011 Tex. App. LEXIS 714, *1 (Tex. App.—Houston [14th Dist.] Feb. 1, 2011). The company was a Florida company, and the lender was a Texas company. *Id.* at *2. The ten mortgage loans were issued in Florida; the property and its purchasers are in Florida; the mortgages were entered into in Florida; and numerous witnesses resided in Florida. *Id.* at *1-4. The underwriting company stated it anticipated calling the borrowers, who lived in Florida and who would not voluntarily travel to Texas to testify. *Id.* at *3. The lender alleged the closing coordinator on all ten loans was an employee in a Texas branch. *Id.* at *7. The trial court denied Old Republic's motion to dismiss, and that even with evidence of Old Republic's contentions, the Court of Appeals found that "the balance of factors is not weighed so heavily in favor of the defendant that the court should disturb the plaintiff's choice of forum." *Id.* at *9. The petition for writ of mandamus was denied. *Id.* Defendant must show the balance of factors weighs heavily in favor of dismissing the case. It has not, and cannot do so here.

In *Tullis v. Georgia-Pacific Corp.*, the plaintiff was injured in an automobile collision in Tennessee involving a truck owned by a Georgia corporation. 45 S.W.3d 118, 119, 2000 Tex. App. LEXIS 6612, *120 (Tex. App.—Fort Worth 2000). The Georgia corporation was authorized to do business in Texas. *Id.* at *121. The plaintiff filed a personal injury suit in Texas, and Defendant moved to dismiss based on forum non conveniens. *Id.* at *120. The Texas Court of Appeals found the district court had erred in granting a Motion to Dismiss based on forum non conveniens even when Plaintiff moved to Colorado after the incident, and the incident occurred in Tennessee. *Id.* at *133. The Court noted that the Plaintiff desired the case to be in Texas, and that a plaintiff has an interest in selecting the forum in which to bring the suit. *Id.* at *132. Plaintiff received some medical treatment in Texas, and resided in Texas at the time of the incident. *Id.* The Court noted that the defendant had not shown that "requiring it to litigate in

Texas ... would cause a substantial injustice resulting in detrimental harm to its ability to mount a viable defense.” *Id.* The Court further noted Georgia-Pacific has not shown that the public and private interests strongly predominate in favor of dismissal. *Id.*

In *Vinson v. Am. Bureau of Shipping*, 318 S.W.3d 34 (Tex. App.—Houston [1st Dist.] 2010), the Court of Appeals reversed the trial court’s dismissal based on forum non conveniens. The Plaintiff in *Vinson* was an Alabama resident who was injured while working in Singapore. *Id.* at 38. Defendant argued that all Defendants would agree to submit to the jurisdiction of Singapore. *Id.* Plaintiff argued Houston was the proper forum because one Defendant was based in Houston; a director of Defendant lived in Houston; relevant persons and documents were located in Houston; and even though there was medical treatment in Singapore and Alabama, there was medical care that occurred in Houston as well. *Id.* at 39. As stated by the Court, the Court’s inquiry “focuses on the *parties’ ability to obtain evidence and testimony from potential witnesses* with knowledge relevant to [the plaintiff’s] claims.” *Id.*, at 46. The focus is not on “the physical location of the witnesses at the time of the incident.” *Id.* Simply put, Defendant cannot simply point to the location of the witnesses in Mississippi at the time of the incident. To satisfy its burden, Defendant must put forth evidence as to the difficulty in obtaining evidence and testimony.

As the Courts have shown, the situs of an injury is not always the forum in which a case must proceed, and Defendant must show that the balance of factors is strongly in favor of dismissing a lawsuit from plaintiff’s chosen forum. It has failed to do so here.

C. Plaintiff does not need to solely rely upon the Texas-resident exception, as the connection to Texas is far from tenuous here. Texas should remain the forum for this case.

Defendant states that “all forum non conveniens factors support dismissal” in this matter. Defendant even goes as far as stating this case “has no factual connection to Texas whatsoever.” Defendant is incorrect. An analysis of the factors reveals Texas should remain forum for this case. There is a clear connection to Texas, and public and private interests would not be better served if Plaintiff’s case was heard in Mississippi.

1. *Relative ease of access to sources of proof, and the availability of compulsory process of attendance of unwilling witnesses.*

Defendant contends that the sources of proof are solely in Mississippi, and the prosecution of this claim in Texas will serve as an inconvenience to the parties. Defendant’s position is an overreach, and its Motion should be denied.

a. *Defendant is headquartered in Harris County.*

According to Defendant’s own website, Defendant’s filings with the Secretary of State, and Defendant’s marketing materials, Defendant Mahindra is a domestic corporation *in Texas*, and is headquartered *in Texas*, and specifically *in the County where this case is filed*. See Exhibit A, Mahindra’s Website; Exhibit B, Mahindra’s Marketing Brochure; Exhibit C, Secretary of State Page for Mahindra; Exhibit D, Mahindra’s Public Information Report; and Exhibit E, Affidavit of Andrew Dao. Defendant’s managers, and employees involved in the manufacturing, design and distribution (and the decision-making behind such) of Defendant’s products are in Texas. *Id.* Despite maintaining the headquarters for its entire operations in this state, Defendant attempts to convince this Court that maintaining this lawsuit in Harris County (and Texas as a whole) would be *inconvenient* for Defendant.

At the core of this case are Defendant’s acts and failures in ensuring it designed and manufactured a product that was safe. This emanates from Texas. This alone establishes an overwhelming factual connection to Texas. Regardless of whether the product is ultimately sold

in Mississippi, New York, Wyoming, Florida, or any other state, many (if not all) of the decisions involving the product trace back to Texas. As Defendant's management and base of operations are located here in Houston, key decisions regarding the manufacturing, design, production and distribution of Defendant's products originate from Texas. This means that a significant number of witnesses reside in, and will be deposed/presented in Texas. As this is a case involving products liability claims, these decisions will be critical in this litigation.

Defendant's operations in Houston go directly toward the analysis of ease of access to sources of proof. Not only will numerous witnesses be in Houston, voluminous records and materials related to the lengthy design and manufacture process will be at Defendant's headquarters here in Texas. The other Defendant in this matter, KMW, contracted and had sustained contact with Defendant Mahindra regarding parts for the tractor. Records related to agreements between KMW and Mahindra would also be at Defendant's headquarters here.

Defendant states "the first responders, the store that sold the equipment, the equipment itself, and other evidence are located in Mississippi." Notably, Defendant fails to state *how* the equipment got to the store. Defendant fails to state *where* the equipment was manufactured, designed and initially distributed. Defendant fails to state *where* the individuals involved in the decision-making of the manufacturing and design process are located. Defendant merely states "other evidence" is located in Mississippi, without taking any steps to describe what that evidence is.

Any argument by Defendant that the case's presence in Mississippi would facilitate the examination of the tractor and equipment involved in the Occurrence is illusory. The tractor will be examined by the parties, and presumably the parties' experts. There is a strong likelihood the parties' experts will be from different states—not Mississippi. The parties' attorneys are located

in Texas. The parties (and their experts) will have to travel for the inspection, regardless of where the case is filed. Further, the tractor is not going to be in the courtroom. The tractor will be presented to this Court and jury in the form of pictures and media. The equipment's current location should not dictate where the case should be.

Defendant's refusal to participate in the discovery process—discovery Plaintiffs are entitled to by statute—effectively deprives Plaintiffs of the opportunity to identify by name all of the numerous individuals expected to have knowledge of the manufacture, design and distribution of the tractor at issue in this case. As set forth in Plaintiffs' Petition, Plaintiffs have alleged a hydraulic line blew and the front end loader on the Mahindra tractor fell on Cooper. Cooper suffocated and was killed. Although the tractor was not purchased in Texas, Defendant Mahindra designed and manufactured the tractor. Defendant placed their products in the stream of commerce by selling or leasing equipment to individuals, businesses and distributors throughout the country. Plaintiffs have also alleged Defendant failed to properly train and supervise those manufacturing, designing and assembling its products and their component parts, and that Defendant was negligent in failing to design the equipment in a manner in which it could be operated safely. The tractor's design did not incorporate a mechanical or hydraulic safety device which would have prevented the equipment from failing. Thus, the individuals involved in this decision-making are key witnesses that Defendant entirely fails to mention in its Motion.

Plaintiffs do not contend *all* sources of proof are here in Texas. There are sources of proof outside of Texas. Texas, however, has a substantial connection to this case, and a measurable amount of evidence is here in Texas.

b. Plaintiffs are treating for their injuries in Texas.

Venice Alan Cooper's death has had a measurable effect on Jason Cooper, Christopher Cooper and Faith Cooper. Faith Cooper was with Venice Alan Cooper at the time he was killed. All Plaintiffs are currently seeing a clinical psychologist for the emotional trauma and injuries they are suffering from. *See* Exhibit F, Affidavit of Jason Cooper; Exhibit G, Affidavit of Christopher Cooper. Dr. Suzi Phelps is a psychologist who maintains her office in Bellaire, Texas. *Id.* Plaintiffs intend to continue treating with Dr. Phelps in Texas. *Id.* As such, Dr. Phelps will be a witness who will be able to describe Plaintiffs' diagnoses, prognoses, and treatment. Should Plaintiffs seek any additional treatment from other providers, Plaintiffs will be doing so in Texas. *Id.*

c. Defendant has not shown the unwillingness of witnesses to testify in this matter.

Defendant emphasizes to this Court multiple times throughout its Motion that the estate of Venice Alan Cooper has been opened and is being administered in Mississippi. Defendant contends this wrongful death lawsuit must then also belong in Mississippi. There is no case law cited by Defendant (and Plaintiffs have found none) to support the notion that a personal injury or wrongful death suit has to be filed in the same venue as the probate or estate proceeding. If this were the case, a plaintiff would then have to wait months (and possibly longer) to initiate an estate proceeding, at the risk of narrowing where he or she would be able to file a lawsuit.

Plaintiffs reside in Texas. Plaintiffs are currently treating for their injuries in Texas, and the treating provider resides in and practice in Texas. As Plaintiffs live in Texas, if Plaintiffs treat with any other providers onward, they will be in Texas. It will be more convenient for Plaintiffs to secure their attendance at trial if the case remains in Texas. Plaintiffs would be responsible for compensating the treating providers for travel costs and time, even if they are

willing to come. Family members that will testify about the effect of the incident on the Plaintiffs live in Houston.

Defendant fails to offer any evidence supporting that the “known witnesses” would not willingly come to Texas to testify. Defendant simply attempts to paint with a broad brush in suggesting that none of the witnesses could come to Texas to testify. Defendant then contends that Mississippi will be better for compulsory process for the attendance of unwilling witnesses. Defendant names several emergency personnel and witnesses that arrived on the scene after the incident, and concludes without any basis, that these witnesses would be unwilling to testify and would need to be somehow compelled to do so.

Plaintiffs have obtained affidavits from two key witnesses in Mississippi. Scott Dean is the coroner in Webster County, Mississippi. *See* Exhibit H, Affidavit of Scott Dean. Mr. Dean examined Venice Alan Cooper’s body and signed Mr. Cooper’s death certificate. *Id.* Mr. Dean determined the cause of death to be “traumatic asphyxia, as a consequence of his chest being compressed from a hydraulic lift arm” of the tractor. *Id.* Mr. Dean is willing to come to Texas to provide testimony in this case, *without the need for a subpoena.* *Id.* And he will do so at a time mutually convenient for the parties. *Id.*

Amanda Vance is a deputy for the Sheriff’s Office in Webster County, Mississippi. *See* Exhibit I, Affidavit of Amanda Vance. Ms. Vance was the first member of the local authorities to be present at the scene, and one of the first responders to the incident. *Id.* Ms. Vance is willing to come to Texas to provide testimony in this case, *without the need for a subpoena.* *Id.* And she will do so at a time mutually convenient for the parties. *Id.*

Importantly, Defendant fails to identify the individuals involved in the manufacturing, design and distribution of the tractor. Defendant fails to identify the individuals involved in

determining what warnings accompany the tractor. These witnesses will be Defendant's own employees. And many, if not the vast majority, of the witnesses likely reside in Texas, *not Mississippi*. Texas is where Defendant maintains its operations. Defendant has not—and cannot—show how access to sources of proof will be easier in Mississippi than in Texas.

Further, Defendant ignores that witnesses in Mississippi may decide to willingly appear for deposition in Mississippi, without the need for court intervention. The deposition testimony may then be used at trial here in Texas, without the need for the witness to actually appear in Texas.

2. Cost of obtaining attendance of willing witnesses.

As Plaintiffs live in Texas, if Plaintiffs treat with any additional medical providers onward, these providers will be in Texas. Plaintiffs' treating psychologist is in Texas. It will be more convenient for Plaintiffs to secure a treating provider's attendance at trial if the case remains in Texas. Plaintiffs would be responsible for compensating any treating providers for travel costs and time, even if they are willing to provide testimony. Numerous family members that will testify about the effect of the incident on the Plaintiffs live in Houston.

Similarly, Defendant's own cost of obtaining attendance of willing witnesses (e.g. its own employees, including any managers and corporate representatives) will likely be less here than in Mississippi. Defendant's own employees, managers and corporate representatives will have to travel from Texas if the case is dismissed.

3. Enforceability of any judgment.

Enforceability would not be an issue. Defendant is headquartered here, and Plaintiffs live here.

4. Burden imposed on citizens of the state and on the trial court, and the general interest in having localized controversies.

Private and public interests would not be better served if Plaintiffs' case was heard in Mississippi instead of Texas. There is an interest for Texas residents to hear controversies involving companies that do business in Texas, design and manufacture goods in Texas, distribute goods from Texas, have an office in Texas and employ residents of Texas.

"The Texas legislature and courts have developed an almost paternalistic interest in the protection of consumers and the regulation of the conduct of manufacturers that have business operations in the state." *Mitchell v. Lone Star Ammunition, Inc.*, 913 F.2d 242, 250 (5th Cir. Tex. 1990) (emphasis added); see *Dow Chemical Co. v. Alfaro*, 786 S.W.2d 674 (Tex. 1990). Here, as the 5th Circuit found in *Mitchell*, Texas has a substantial interest in the resolution of the claims and defenses. The Texas system of tort liability for defective products serves as an incentive to encourage safer design and to induce corporations to control more carefully their manufacturing processes. *Baird v. Bell Helicopter Textron*, 491 F. Supp. 1129, 1141 (N.D. Tex. 1980).

There would be a disproportionate impact on the individual Plaintiffs who may not be able to bear such additional costs as well as Defendant can. A trial in this matter would take several weeks. Indeed, proceeding with the case in Texas would be cheaper for Plaintiffs and Defendant, in terms of logistics and accommodations for persons and witnesses involved in the trial. There is no genuine economic hardship in maintaining suit here; in fact, an economic hardship arises if the case is pursued in Mississippi.

The balance of all parties' interests favors maintaining the suit in Harris County. Defendant has failed to meet its burden. See *Signature Mgmt. Team, LLC v. Quixtar, Inc.* 281 S.W.3d 666, 673 (noting that movant failed to identify "unwilling witnesses who are beyond the subpoena power" and also failed to "introduce any evidence attempting to quantify the additional

witness expense that a Texas forum would entail”); *see also In re Williams Gas Processing Co.*, No. 14-07-01026-CV, 2008 Tex. App. LEXIS 701, 2008 WL 257275, at *2 (Tex. App.—Houston [14th Dist.] Jan. 31, 2008, orig. proceeding, mand. denied) (mem. op.) (noting that movant’s proof did not address whether witnesses would testify voluntarily, whether it would be burdensome for any witness to travel to Texas, or the costs associated with obtaining witnesses in Texas).

D. Defendant has failed to establish that Mississippi, and not Texas law, applies.

In Texas, the “most significant relationship test” governs conflicts of law cases sounding in tort. *Gutierrez v. Collins*, 583 S.W.2d 312, 318 (Tex. 1979). In wrongful death actions, the legislature has instructed the courts to apply the rules of substantive law “that are appropriate under the facts of the case.” TEX. CIV. PRAC. & REM. CODE § 71.031(c). The Texas Supreme Court has interpreted § 71.031(c) to incorporate the most significant relationship test. *Total Oilfield Serv. Inc. v. Garcia*, 711 S.W.2d 237, 239 (Tex. 1986).

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.—San Antonio 1999). The significant relationship test is set forth in sections 6 and 145 of the Restatement (Second) of Conflicts. Restatement (Second) Conflict of Laws § 6, 145-46. The choice of law principles, set out in section 6, are:

- (1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.
- (2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include:
 - (a) the needs of the interstate and international systems,
 - (b) the relevant policies of the forum,

- (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
- (d) the protection of justified expectations,
- (e) the basic policies underlying the particular field of law,
- (f) certainty, predictability and uniformity of result, and
- (g) ease in the determination and application of the law to be applied.

Id. When applying the above principles in a tort case, the following factors from section 145 must be considered:

- (1) The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6.
- (2) Contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:
 - (a) the place where the injury occurred,
 - (b) the place where the conduct causing the injury occurred,
 - (c) the domicile, residence, nationality, place of incorporation and place of business of the parties, and
 - (d) the place where the relationship, if any, between the parties is centered.

Id. “Application of the most significant relationship test does not turn on the number of contacts in section 145, but rather on the qualitative nature of those contacts as affected by the policy factors found in section 6.” *Sanchez v. Brownsville Sports Ctr., Inc.*, 51 S.W.3d 643, 668 (Tex. App—Corpus Christi 2001). A court must determine the relationship between the contacts and the policy factors on a case by case basis. *Id.* In its Motion, Defendant fails to mention where the product in question was manufactured and designed. The decisions regarding such manufacture and design took place in Texas. As set forth throughout this Motion, although Mississippi is where the death of Venice Alan Cooper occurred and where the tractor was purchased, **conduct causing the injury occurred here in Texas**. Further, the domicile and residence of Plaintiffs *and* Defendant is in Texas. Defendant is headquartered here. Texas, not Mississippi, law should apply.

E. Defendant's activity in Harris County's courts.

Plaintiffs would show this Court that Defendant has often used the Harris County courts as a sword. This year alone Defendant has filed two lawsuits in Harris County, Texas. *See* Exhibit J, Harris County District Clerk's Listing of Mahindra Lawsuits. Defendant has filed eight lawsuits in Harris County since 2010. *Id.* This does even not include any lawsuits Defendant may have filed in other counties within Texas.

In Cause No. 2016-44504, *Mahindra U.S.A. Inc., v. Brookville Farm & Garden Equipment, Inc.*, Mahindra filed a lawsuit against Brookville even though it acknowledged in its Petition that Brookville does not maintain a regular place of business in Texas. *See* Exhibit K, Petition in Cause No. 2016-44505. Mahindra, however, alleged that Brookville engaged in business in Texas and that venue was proper "because defendant Brookville entered into a written contract with MUSA ... and the contract's terms state that venue for any case or controversy arising under or pursuant to the contract shall be in Harris County, Texas." *Id.*

Assuming *en arguendo* that the contract between Mahindra and KMW has similar language, if Mahindra and KMW had a dispute over the tractor and its parts, then the dispute would be required to take place in Harris County, Texas, under the laws of Texas. Yet, taking Defendant's stance, an individual who is injured by the *same* tractor and parts in question should not have access to the same Texas courts. This is wholly inconsistent, and patently unfair.

Defendant wants to use the Texas courts as a sword when it desires, yet now attempts to block *Texas residents* from accessing those same courts. Plaintiffs' family has suffered a tragic loss. Instead of litigating this case on the merits, Defendant (despite all of its ties to Texas) has chosen to file a Motion to Dismiss on the basis of convenience. This Motion is a waste of the parties' and the Court's time.

F. Finally, even if this Court were inclined to grant Defendant's Motion, it cannot do so at this time.

"The court shall afford all of the parties ample opportunity to obtain discovery of information relevant to the motion prior to a hearing on a motion under this section." TEX. CIV. PRAC. & REM. CODE § 71.051(d). Plaintiffs have not had "ample opportunity" to obtain discovery relevant to the Motion prior to the hearing. In fact, Defendant Mahindra has filed a protective order in this case. Defendant seeks to entirely deprive Plaintiffs of its right to discovery. Defendant cannot game the system.

Defendant's Motion should be denied as Defendant has not met its burden. And even though Plaintiffs were not required to do so, Plaintiffs put forth ample reasons as to why the case should not be dismissed.

Alternatively, in the event the Court is inclined to grant Defendant's Motion, the hearing should be continued until Plaintiffs have had an opportunity to conduct discovery. *See* Exhibit E, Affidavit of Andrew Dao. Thus, in the alternative, Plaintiffs request a continuance of the hearing on Defendant's Motion.

CONCLUSION

The factors do not strongly favor dismissal of this case from Texas. Defendant has simply not met its burden. Plaintiffs have also demonstrated the case should remain in Texas. Even in the event this Court were to find that dismissal was warranted, however, because Plaintiffs have not had an opportunity to obtain discovery of information directly relevant to the Motion, this Motion should be denied, or continued, on that basis alone.

Plaintiffs ask that this Court deny Defendant's Motion. Plaintiffs pray for any and all other relief to which they may be entitled.

Respectfully submitted,

THE BUZBEE LAW FIRM

By: /s/ Andrew Dao

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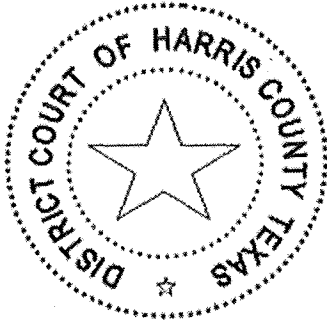
ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this document has been duly served on counsel of record in accordance with the Texas Rules of Civil Procedure on August 11, 2016.

/s/ Andrew Dao

Andrew Dao



I, Chris Daniel, District Clerk of Harris County, Texas certify that this is a true and correct copy of the original record filed and or recorded in my office, electronically or hard copy, as it appears on this date.
Witness my official hand and seal of office
this September 12, 2016

Certified Document Number: 71435427 Total Pages: 20

Chris Daniel, DISTRICT CLERK
HARRIS COUNTY, TEXAS

In accordance with Texas Government Code 406.013 electronically transmitted authenticated documents are valid. If there is a question regarding the validity of this document and or seal please e-mail support@hcdistrictclerk.com

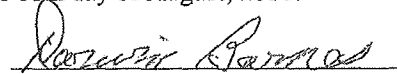
APP. 6

AFFIDAVIT OF DARWIN BARNES ON BEHALF OF MAHINDRA USA, INC.

This day appeared Darwin Barnes, who under oath does depose and states as follows:

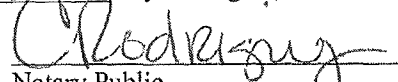
1. I am over the age of twenty-one, have personal knowledge of the facts set forth herein, have conferred with Mahindra USA Inc.'s counsel, and I am competent to make this declaration.
2. I am presently employed as General Counsel with Mahindra USA, Inc. ("Mahindra USA"). I have been with Mahindra USA since March 2015. I am familiar with Mahindra USA's corporate structure, company history, and product manufacturing and distribution.
3. Mahindra USA, Inc. is headquartered in Houston, Texas. It is a subsidiary of Mahindra and Mahindra Limited, which is headquartered in India.
4. Mahindra USA tractors are manufactured in Japan, South Korea, and India.
5. The tractor at issue in this case, product serial number is KNGR-1619 and model number 85604WD, was originally designed and manufactured in India.
6. The decisions regarding the manufacture and design of that tractor took place in India.

I declare under penalty of perjury under the laws of the State of Texas that the foregoing is true and correct, and that this affidavit was executed in Houston, Texas on this the 11th day of August, 2016.

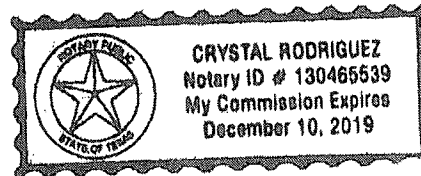

Darwin Barnes

STATE OF Texas
COUNTY/CITY OF HARRIS

Subscribed and sworn to before me on this the 11TH day of August, 2016.


Notary Public

My Commission Expires: 12/10/2019



APP. 7

CAUSE NO. 2016-40032

JASON ALAN COOPER, Individually as	§	IN THE DISTRICT COURT OF
Administrator of the Estate of VENICE	§	
ALAN COOPER, and as Next Friend of	§	
FAITH COOPER, and CHRISTOPHER	§	
CODY COOPER	§	
	§	
v.	§	HARRIS COUNTY, T E X A S
	§	
	§	
MAHINDRA USA, INC. and	§	
KMW, LTD.	§	152 nd JUDICIAL DISTRICT

SPECIAL APPEARANCE OF KMW, LTD.

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, KMW, Ltd., and files this its Special Appearance pursuant to Rule 120(a) of the Texas Rules of Civil Procedure and would respectfully show unto the Court the following:

I.

KMW, Ltd. is incorporated in the state of Kansas. Its principle place of business is located in Kansas.

II.

This Special Appearance is filed prior to any Motion to Transfer or any other plea, pleading, or motion filed by this Defendant.

III.

This Court does not have jurisdiction over this Defendant because this Defendant is not amenable to process issued by the Court's of Texas in that:

1. This Defendant is not a resident of Texas and is not required to maintain and does not maintain a registered agent for service in Texas.

2. This Defendant has not committed any tort, in whole or in part, within the State of Texas.
3. This Defendant does not maintain a place of business in Texas, does not manufacture any goods in the state of Texas, and has no real property, employees, servants, or agents within the State of Texas.
4. The assumption of jurisdiction by the Court over this Defendant and its property would offend traditional notions of fair play and substantial justice, depriving the Defendant of due process as guaranteed by the Constitution of the United States.

WHEREFORE, your Defendant requests that the Court set this Motion for hearing on notice to Plaintiffs and, that after hearing, that the Court grant this motion and dismiss all claims of the Plaintiffs against this Defendant for want of jurisdiction.

RAMEY, CHANDLER, QUINN & ZITO, P.C.



NICHOLAS E. ZITO
State Bar No. 22279500
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Houston, Texas 77057
(713) 266-0074
Fax: (713) 266-1064

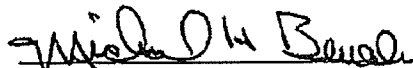
ATTORNEYS FOR DEFENDANT
KMW, Ltd.

VERIFICATION

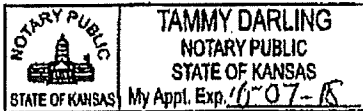
STATE OF KANSAS


COUNTY OF RICE

Before me, the undersigned Notary Public, on this day personally appeared Michael Bender, and after being duly sworn stated under oath that he is the President of KMW, Ltd. in this cause, that he has read the above Special Appearance; and that every statement contained in it is within his personal knowledge and is true and correct.


Michael Bender

SWORN and SUBSCRIBED before me this 6th day of July, 2016, to certify which witness my hand and seal of office.




Notary Public in and for
The State of Kansas

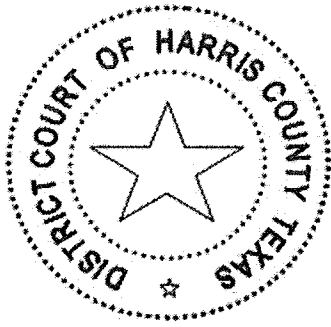
My Commission Expires: Oct 7 2018

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing instrument was forwarded to all interested parties this, the 8th day of July, 2016 via electronic delivery, facsimile and/or certified mail. Notice was further given that the original of said document was being filed with the Clerk of Court herein.

A handwritten signature in black ink, reading "Nicholas E. Zito". The signature is written in a cursive style with a horizontal line underneath it.

Nicholas E. Zito



I, Chris Daniel, District Clerk of Harris County, Texas certify that this is a true and correct copy of the original record filed and or recorded in my office, electronically or hard copy, as it appears on this date.
Witness my official hand and seal of office
this September 12, 2016

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APP. 8

MOTION FOR PROTECTION
AUGUST 12, 2016

REPORTER'S RECORD
VOLUME 1 OF 1 VOLUMES
TRIAL COURT CAUSE NO. 2016-40032

COOPER, JASON ALAN) IN THE DISTRICT COURT
vs.) HARRIS COUNTY, TEXAS
MAHINDRA USA, INC.) 152ND JUDICIAL DISTRICT

MOTION FOR PROTECTION

On the 12th day of August, 2016, the following proceedings came on to be held in the above-titled and numbered cause before the Honorable ROBERT K. SCHAFFER, Judge Presiding, held in Houston, Harris County, Texas.

Proceedings reported by computerized stenotype machine.

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1 (Judge enters)

2 THE COURT: Come on up.

3 MR. GAULT: Good afternoon, your Honor.

4 THE COURT: Good afternoon. We've got two things here,
5 right?

6 MR. GAULT: Yes, your Honor.

7 THE COURT: A Motion for Protection and a Motion to
8 Dismissal?

9 Let's take up the Dismissal one first. I think you're here
10 for Mahindra?

11 MR. GAULT: Yes.

12 THE COURT: And everybody here for Mahindra?

13 MS. GARNER: I'm here for Mahindra.

14 THE COURT: You're not?

15 MR. ZITO: I'm here for KMW.

16 THE COURT: You're probably joining in Mahindra's Motion?

17 MR. ZITO: Not for the Dismissal. I did not join in that
18 for today.

19 THE COURT: Okay.

20 MR. DAO: Andy Dao for the Plaintiffs and Jessie Gourrier
21 and co-counsel.

22 THE COURT: Okay. I guess my first question would be is
23 this a timely Motion, or is it a little quick on the draw since the
24 case was just filed a month ago?

25 MR. GAULT: Yes, your Honor. It was filed --

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1 THE COURT: A month before this Motion was filed.

2 MR. GAULT: Correct.

3 THE COURT: Okay.

4 MR. GAULT: Yes, your Honor, we think the issue is ripe. We
5 don't believe any Discovery is necessary. This is a -- you know, the
6 facts of this case, all this action happened in Mississippi.

7 And, so, we thought that the proper thing to do was to bring
8 it to the Court as the earliest as possible opportunity. Rather than
9 getting into Discovery and all that, we wanted to bring that to the
10 Court's attention and raise this issue now.

11 MR. DAO: You Honor, we believe we've brought enough in our
12 Response to not only defeat the Motion right now, but we do believe
13 that their Motion, right, was filed prematurely.

14 THE COURT: Is there a Discovery that you -- is there
15 jurisdictional Discovery, not case specific Discovery, that you want
16 to conduct?

17 MR. DAO: Your Honor, I don't think that we needed to
18 respond to this Motion, but in the event your Honor's inclined to --

19 THE COURT: No, you've got to roll the dice now.

20 MR. DAO: I don't think we need it, your Honor.

21 THE COURT: Okay. Let's go. All right.

22 Now, my next question is doesn't the Texas Statute place
23 jurisdiction in Texas?

24 Isn't there a statute that you cited to --

25 MR. DAO: The Texas Residence Exception Statute.

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1 THE COURT: Resident Exception Statute that puts
2 jurisdiction here in Texas.

3 MR. GAULT: That's what we are going to argue, your Honor.
4 No. We do think that the Texas Residency Exception does not
5 apply.

6 THE COURT: Why is that?

7 MR. GAULT: Based on the amendment from the legislature last
8 year --

9 THE COURT: Whose legislature?

10 MR. GAULT: This legislature.

11 THE COURT: Okay.

12 MR. GAULT: In 2015 the Texas Legislature amended the
13 statute and amended that part of the statute with respect to the
14 Texas Residence Exception. And what it did, your Honor --

15 THE COURT: What section are we talking about? CPRC what?

16 MS. GARNER: CPRC 71.051.

17 THE COURT: I got it here. I got it. I'm computer literate
18 here.

19 MR. GAULT: I'm not.

20 THE COURT: 71 point what?

21 MS. GARNER: 051.

22 THE COURT: 051. Okay. Which section are you talking about
23 that the legislature in all of their wisdom amended?

24 MR. GAULT: I want to say it's Sub Section 8.

25 THE COURT: No. 8 has to be part of a letter.

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1 MR. GAULT: I'm sorry. H. Your Honor, it is H and in
2 particular what this sub section says that it defines what a
3 Plaintiff is. And if you go back to the earlier in the Statute, it
4 says a Plaintiff -- Texas Residency Exception was found in Sub
5 Section 8 and says:

6 "The Court may not stay or dismiss a Plaintiff's claim if
7 the Plaintiff is a legal resident of the state or a derivative
8 claimant of a legal resident of this state."

9 That's Sub Section E. So, there's two prongs to that
10 exception. The second one doesn't matter here because the deceased
11 was a resident of Mississippi, not of Texas.

12 So, the only thing that we're looking at is that first prong
13 of the exception, which is if Plaintiff is a legal resident of the
14 state.

15 You flip back to or down to Sub Section H where it defines
16 Plaintiff and this is what the legislature change. They changed it
17 your Honor -- and I've read a lot of cases over the last two
18 months -- they've changed it because of cases like this where an
19 injury -- and accident happened outside the state being filed and
20 there was a case. The Ford Motor case. That was 2014. And this is
21 what the legislature -- this is what they wrote in and what they
22 said, your Honor, is they defended Plaintiff and then it says:

23 "The current does not include a representative,
24 administrator, guardian or next friend who is not otherwise a
25 derivative claimant of a legal resident of this state."

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1 So, the point is, your Honor, is that this is a wrongful
2 death and survivor case. The Plaintiffs in this case bring this suit
3 in a representative capacity and that is true whether you look at
4 Mississippi Law -- which we've cited to in our briefs. There is no
5 question about it.

6 THE COURT: Who are the Plaintiffs in this case?

7 MR. GAULT: The Plaintiffs, your Honor -- the deceased is
8 named Allan Cooper from Mississippi.

9 THE COURT: Okay.

10 MR. GAULT: His two sons are named Chris and Jason Cooper.

11 THE COURT: So, the representative of the estate?

12 MR. GAULT: Exactly, your Honor. Also, there is also a
13 third Plaintiff.

14 THE COURT: And the two sons?

15 MR. GAULT: The two sons and the third Plaintiff is a
16 14-year-old granddaughter, who is also a Plaintiff. And she was
17 living in Mississippi at the time with her grandfather.

18 THE COURT: Okay. What about the two sons?

19 MR. GAULT: The two sons they are residents of Texas.

20 THE COURT: Okay.

21 MR. GAULT: But they clearly are Plaintiffs in a
22 representative capacity.

23 THE COURT: Clearly?

24 MR. GAULT: Excuse me.

25 THE COURT: Clearly? You may be defining terms a little

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1 different. Who are they representing?

2 MR. GAULT: Your Honor, the Complaint says they bring the
3 claims individually and as the -- Chris brings it as Next Friend for
4 the daughter as well.

5 THE COURT: Does the daughter -- do the children of a
6 deceased individual have independent causes of action under the Texas
7 Wrongful Death Statute?

8 MR. GAULT: I do not believe so.

9 THE COURT: You do not believe so?

10 MR. GAULT: I do not.

11 THE COURT: Would y'all like to annunciate your opinions of
12 that because the Court already has one?

13 MR. DAO: Yes, your Honor. We believe that they do have
14 their own individual claims and we made it clear in our Partition
15 that, not only are the claims of the estate being brought, but also
16 the individual claims.

17 THE COURT: I would agree with you because this Sub Part B
18 talks about somebody who is acting on behalf of someone else. Would
19 you agree with that?

20 MR. DAO: Yes, your Honor.

21 THE COURT: A representative, an administrator, a guardian
22 or a next friend are all acting on behalf of someone else?

23 MR. DAO: Correct.

24 THE COURT: Okay. Now, what are the children's names?

25 MR. DAO: I'm sorry, your Honor?

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1 THE COURT: The two kids that --

2 MR. GAULT: There's only one.

3 THE COURT: Okay. I thought you said there were two sons.

4 MR. GAULT: There's only one minor. The two sons are Jason
5 Cooper and Christopher Cooper.

6 THE COURT: Jason and Christopher?

7 MR. GAULT: Yes. Those are the individual claims, your
8 Honor.

9 THE COURT: Okay. And whose capacity are -- on behalf of
10 whom are Jason and Christopher bringing cases? They're not. They're
11 here on their own, aren't they?

12 MR. GAULT: No, sir. I do not believe so.

13 THE COURT: Well, what about the Texas Wrongful Death
14 Statute?

15 MR. GAULT: They -- your Honor, that -- whatever they are
16 pursuing under the Texas Wrongful Death Statute is in a
17 representative capacity.

18 THE COURT: And your authority for that is what because I
19 don't agree with you?

20 MR. GAULT: Okay. I do have that --

21 THE COURT: It's Statute 71 -- what's the Wrongful Death
22 Statute?

23 MR. GAULT: I believe, your Honor, it is 71.001.

24 THE COURT: .001. Okay.

25 MR. GAULT: And the Survival is --

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1 THE COURT: .021 as I recall.

2 MR. GAULT: -- is .021.

3 Your Honor, if I can address --

4 THE COURT: Just hold on. Just one second.

5 MR. GAULT: Okay.

6 THE COURT: "An action to recover damages provided for by
7 this statute is an exclusive benefit of surviving spouse, children
8 and parent of the deceased."

9 Now, it seems to me and I believe the case law supports
10 this, is that those are actions not in their representative capacity
11 but as the surviving spouse, child or parent of the deceased.

12 Why do you say that they are acting in a representative
13 capacity?

14 MR. GAULT: Yes, your Honor. Two points -- two points:

15 No. 1, is the section that you have read I think that, when
16 you look at this, it says the surviving spouse, children or parent of
17 the deceased may bring the action or one or more of those individuals
18 may bring the action for the benefit of all.

19 And, so, the point is that wrongful death is derivative by
20 its very nature.

21 THE COURT: I agree with that.

22 MR. GAULT: And, so, the Plaintiffs are bringing that in a
23 representative capacity.

24 THE COURT: I don't agree with that.

25 MR. GAULT: I do have a case, your Honor.

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1 THE COURT: I would love to see it.

2 MR. GAULT: May I make one more point before I get to that
3 case?

4 One of the things, your Honor, that is I think important for
5 this Court's decision is we think Mississippi Law applies to this.
6 We think the Mississippi Wrongful Statute applies to this. We think
7 the Mississippi cases construing the Wrongful Death Statute applies
8 to this. So, I have cases, your Honor.

9 THE COURT: I gathered that. Otherwise, you wouldn't be
10 filing this to dismiss this case here.

11 I understand you want the case to be pursued in Mississippi.
12 I completely get that. My point is that this is a statutory -- the
13 Wrongful Death Statute is a statutory cause of action that is created
14 and for these wrongful death beneficiaries.

15 They're not acting on behalf of anyone. They're acting on
16 behalf of themselves. The damages that they are going to be
17 recovering are not on behalf of anyone. They're on behalf of
18 themselves.

19 A spouse is not recovering any damages in a wrongful death
20 action on behalf of her spouse. She's recovering her mental anguish,
21 her damages that she suffered as a result of the death of her spouse.

22 So, I don't see how you can say that that puts them back in
23 Mississippi outside the State of Texas under these circumstances.

24 MR. GAULT: Well, your Honor, our position would be Texas
25 Wrongful Death Statute does not allow this claim.

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1 We think under the Choice of Law Analysis that this Court
2 would make when you look at Texas Law with respect to the most
3 significant relationship test, those factors favor a place in
4 Mississippi Law including Mississippi's Wrongful Death Statute. Not
5 Texas Wrongful Death Statute.

6 So, how the Mississippi Supreme Court views Plaintiffs under
7 the Mississippi Statutory -- and it's all statutory whether it's a
8 survival or a wrongful death case, the Mississippi Court is clear it
9 is in a representative capacity. And we think -- it is our position
10 that that law involves this case. That statute controls this case.
11 Not the Texas Wrongful survivor.

12 THE COURT: Now, that's a point we need to talk about.

13 MR. GAULT: Yes, your Honor.

14 THE COURT: Whose law applies to this case?

15 MR. DAO: We believe Texas Law applies.

16 THE COURT: Under what authority? Under what circumstances?

17 MR. DAO: This is a product failure case in which Mahindra
18 is headquartered and has its operations here in Houston.

19 The decisions regarding the manufacturing, the design, the
20 warranty that accompanies that product those decisions are made and
21 come directly from Houston.

22 THE COURT: How do you know?

23 MR. DAO: This is their only headquarters.

24 THE COURT: How do you know the decisions were made in
25 Houston as opposed to some other jurisdiction?

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1 I mean, you're making that statement but we don't have any
2 evidence of that.

3 MR. DAO: Well, your Honor, we've attached our Response
4 documents from the Secretary of State's web site where their managers
5 and directors are located in Houston. They market their product here
6 in Houston. Their marketing brochures are here in Houston.

7 In terms of the people on the Secretary of State website,
8 there is no other address other than the Houston address. Everything
9 that we've seen so far says that all these people are in Houston.

10 THE COURT: So, you believe that because of that, that Texas
11 Law applies to this lawsuit.

12 MR. GOURRIER: Well, not just that, your Honor. The Court
13 asked the question why we believe Texas Law applies to this. The
14 Plaintiffs who are bringing this claim are Texas residents. So, by
15 reason of them living here in Texas, they would be subject to Texas
16 Law.

17 THE COURT: So, what happens in another state -- an injury
18 which occurs in another state you wouldn't have a choice of law
19 problem here?

20 MR. DAO: Not regarding the wrongful death issue, your
21 Honor, because --

22 THE COURT: But that's not all we are taking about here.

23 MR. DAO: Certainly. And the Court is aware that when we're
24 looking at a Choice of Law Analysis you have to look at the
25 particular issue that is in dispute.

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1 Right now we're talking about whether or not these folks are
2 wrongful death beneficiaries. And, so, that is why I'm focusing on
3 that particular issue.

4 So, as far as whether or not they are wrongful death
5 beneficiaries, the Court is correct, under Texas Law because they
6 live here in Texas, they are wrongful death beneficiaries.

7 You can't apply Mississippi Law to Texas residents because
8 then you're giving Mississippi Law extraterritorial effect which
9 would be unconstitutional.

10 THE COURT: And they would argue that you're giving Texas
11 Law extraterritorial effect for an incident which occurred in
12 Mississippi.

13 MR. DAO: We're not because as far as the wrongful death
14 issue is concerned, Texas Law would apply to this Texas resident.

15 Now, if we're talking about another issue, we can talk about
16 which law would apply to that particular issue.

17 THE COURT: Anybody have authority that I can look at on
18 this?

19 MR. GAULT: On which particular point, your Honor, because
20 I've got a lot?

21 THE COURT: Well, on the Choice of Law Analysis in this
22 situation.

23 MR. GAULT: Yes, your Honor.

24 THE COURT: I think you have to determine whose law applies
25 if they conflict with one another.

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1 MR. GAULT: Yes, your Honor. May I address that?

2 THE COURT: If I ask you to, which I just did I think.

3 MR. GAULT: Thank you.

4 The which law applies is Texas follows -- like a lot of
5 states do -- the Restatement Second Test, which is the most
6 significant relationship test.

7 And what the factors of those most significant relationship
8 test -- there's four:

9 Where the injury occurred, where the conduct causing the
10 injury occurred, the residence of the parties and where the
11 relationship between the parties is spent.

12 And, so, your Honor, I want to address that and I also want
13 to address going back to something that was talked about earlier.
14 The first prong where the injury occurred shows -- if you look at the
15 cases -- significant weight in deciding the choice of law issue.

16 So, that issue No. 1 certainly favors Mississippi.

17 But the second thing where the conduct causing the injury
18 occurred. So, what they argue and what they have argued is, wait a
19 minute, the negligent act took place here in Houston because that is
20 where Mahindra is headquartered.

21 So, this is a design defect claim about a tractor and the
22 front-end loader. All right. So, they say all of these decisions
23 and everything -- design and everything else had to happen here. And
24 that is, quoting their Response, the core of why it should be in
25 Texas.

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1 Your Honor, they filed their Response yesterday. I saw
2 these arguments for the first time at 8:30 yesterday morning, which,
3 if the Court would allow, I would like to attach it as an exhibit.
4 And then I have copies for everybody.

5 THE COURT: Is it an affidavit that responds to what they
6 have alleged?

7 MR. GAULT: Absolutely, your Honor.

8 THE COURT: Well, don't we have to allow them the
9 opportunity to conduct some Discovery on that particular issue?

10 MR. GAULT: I don't think this is going to be an issue
11 that's very complicated that would require Discovery, your Honor.

12 THE COURT: What is the issue contained with that affidavit?

13 MR. GAULT: If I may, and I will get copies to -- so, your
14 Honor, this is an affidavit of the general counsel of Mahindra. And
15 what it says is that Mahindra USA, which is here in Houston, is a
16 subsidiary of Mahindra and Mahindra Limited, which is in India. And
17 that the tractor in question in this case was designed and
18 manufactured in either India, South Korea or Japan. And not in
19 Houston.

20 So, what they claim was designed and manufactured in Houston
21 is not correct. And they didn't any evidence to say that in the
22 Motion before they set it or their Response.

23 Second, your Honor, the real claim that they make here
24 involves the front-end loader of the tractor. And they say it should
25 have had a safety device. The deceased was working on the hydraulic

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1 line and the front-end loader came down.

2 They claim that -- the basis of their claim is that this
3 front-end loader should have had a safety device to prevent it from
4 doing that. All right.

5 Well, Mahindra, who's based in Houston, did not design or
6 make the front-end loader. Mr. Zito's client designed and made the
7 front-end loader, and they're based in Kansas. Not Texas.

8 So, all of this contact supposedly with Texas that they put
9 in their Response are not true with respect to design and the
10 manufacture of the front-end loader and the tractor.

11 So, your Honor, that was a digression from the four points
12 of the Most Significant Relationship Test for determining what law
13 applies; but I think that's critical to understand because that's
14 what they rely on in they're Response.

15 THE COURT: Okay.

16 MR. DAO: Your Honor, may I attach they affidavit as an
17 exhibit?

18 THE COURT: You may.

19 MR. GAULT: Thank you. 1.

20 (Defendant's Exhibit No. 1 marked.)

21 THE COURT: Okay. Y'all want to respond?

22 MR. DAO: Before we get a little too far afield, your
23 Honor, yes, we would like to respond to that.

24 What counsel for Mahindra has just told the Court is only
25 partially true. Based on what's here in the affidavit, as of the

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1 status of Discovery right now, we don't have a reason to disagree
2 with it.

3 However, as counsel indicated, the problem with the
4 particular design in this case involves the front-end loader. We're
5 saying that it did not t have safety devices on it that are set forth
6 in the industry design format.

7 Now, he indicated that KMW is the one -- is the one who
8 actually manufacturers the loader. That is true, your Honor.
9 However, Mahindra then got that loader, rebranded it as a Mahindra
10 loader and then attached it to the tractor in this case, your Honor.

11 And, so, the decision to take KMW's loader and rebrand it as
12 a Mahindra loader was made by Mahindra. And if there is something
13 wrong with that loader, then Mahindra is also going to be liable for
14 it because they rebranded it and put their name on it under Texas
15 Law.

16 And, so, because of that, your Honor, we're saying that
17 since Mahindra's corporate headquarters are here in Houston, the
18 decisions to rebrand the KMW loader as a Mahindra loader was made
19 here in Houston.

20 THE COURT: See, I have a problem with that because since
21 you've conducted no Discovery, you don't know where that decisions
22 were made.

23 MR. GOURRIER: Your Honor --

24 THE COURT: You're guessing. It's a guess.

25 MR. GOURRIER: I will give the Court that. You're right.

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1 The status of the Discovery right now is we don't know whether or not
2 that is actually correct. However, we do know where the Plaintiffs
3 live. And under the Forum Non Conveniens Statute the Plaintiffs live
4 in Texas, then the Court can't stay or dismiss the case.

5 So, that's the --

6 THE COURT: No -- oh, okay. All right.

7 MR. GOURRIER: Of our Response.

8 THE COURT: All right. Okay. Anybody have any authority
9 from Texas courts that deals with this either directly or close to
10 these topics?

11 MR. DAO: On the issue of the residency exception?

12 THE COURT: The residency -- any of it. Any of the issues
13 that we are talking about here whether the Texas Wrongful Death
14 Statute, the Mississippi Wrongful Death Statute because the people
15 live here in Texas or whether the courts has to utilize all of
16 Mississippi Law in its Choice of Law Evaluation.

17 MR. GAULT: Yes, your Honor. So, we have briefed the issue
18 on the Choice of Law Analysis and why Mississippi Law should apply in
19 this case. And those are in our brief and I'm happy to go through
20 them with you. But, your Honor, the Texas Residency Exception just
21 that we are arguing about with respect to whether it's a wrongful
22 death Plaintiff is a representative or brought -- the lawsuit is
23 brought in a representative capacity.

24 That statute -- that amendment is so new, your Honor, there
25 have been no appellate decisions on that. And I have looked for

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1 trial court decisions in West Law and couldn't find that either, your
2 Honor.

3 THE COURT: Well, you won't state trial court decisions on
4 West Law because we generally don't write opinions about it.

5 MR. GAULT: There are a few. You're right, your Honor. But
6 I looked. I looked yesterday before I came because I wanted to know
7 if anybody has ruled on this.

8 And, your Honor, I think this may be the first ruling on
9 this new amendment. Certainly, I have seen none and I have looked.

10 MR. ZITO: Just, this isn't my Motion and I'm not the Movant
11 but if you're out of curiosity for anything that might help you I can
12 show you something.

13 THE COURT: I am curious and you know that, Mr. Zito.

14 MR. ZITO: I know you don't want to look at a book; but, if
15 you look at what I underlined in the statute this sentence here and
16 then read there.

17 THE COURT: What am I looking at? The Wrongful Death
18 Statute?

19 MR. ZITO: The Forum Non Conveniens. Read what it says
20 there and then over here.

21 THE COURT: "The Court will not dismiss a Plaintiff's claim
22 under Sub Section B if the Plaintiff is a legal resident of this
23 state or a derivative claimant of a legal resident of this state.
24 Derivative claimant means a person whose damages were caused by
25 personal injury to or the wrongful death of another."

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1 Okay. So, it says:

2 The Court may not dismiss a Plaintiff's claim if the
3 Plaintiff is a legal resident or derivative claimant.

4 MR. ZITO: Derivative claimant of another resident of the
5 state. That's the problem. See what they did?

6 THE COURT: Derivative claimant of a legal resident.

7 MR. GOURRIER: Your Honor, I would ask the Court to continue
8 reading to the next section under the definition of derivative
9 claimant. There's a definition of Plaintiff.

10 "Plaintiff means a party seeking recovery of damages for
11 personal injury or a wrongful death," which is what the Plaintiffs in
12 this case are doing, your Honor.

13 And under the section the Court just read, that Plaintiff is
14 someone seeking damages for wrongful death the Court cannot stay or
15 dismiss their claims.

16 THE COURT: Now, wait a minute. Now, just a second.

17 MR. ZITO: I don't think that's what that says.

18 MR. DAO: That what that says --

19 THE COURT: A Plaintiff, as discussed in this statute, is
20 someone who is seeking recovery of damages for personal injury
21 wrongful death.

22 MR. DAO: Okay.

23 THE COURT: Your guys are the Plaintiff?

24 MR. GOURRIER: Yes.

25 THE COURT: Christopher is a Plaintiff. Both Jason and

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1 Christopher are Plaintiffs. Okay. Now, let's go back:

2 "The Court will not stay or dismiss a Plaintiff" -- that's
3 Jason and Christopher's claim -- "under Sub Section B if they are
4 legal residents of the state or a derivative claimant of other legal
5 residents of this state."

6 Well, they are legal residents of this state, correct?

7 MR. DAO: Correct.

8 THE COURT: Yes? "Or a derivative claimant of a legal
9 resident of this state."

10 And they are not derivative claimant of a legal resident of
11 the state, right?

12 MR. ZITO: Right.

13 THE COURT: Okay. If it's an either/or, then how is that
14 helping?

15 MR. DAO: When you get to the definition to derivative
16 claimant.

17 THE COURT: Right but it's an "or."

18 Jason and Christopher are residents of the State of Texas,
19 correct?

20 MR. ZITO: But my point is, though, it looks like the
21 legislature is making a definition of Plaintiff and saying that if
22 you're a wrongful death claimant, you're a derivative claimant.

23 THE COURT: I don't think it is --

24 MR. ZITO: You've got to kind of read it a couple of times
25 and think about it.

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1 THE COURT: Well, but if it's a either/or -- first of all,
2 in a wrongful death claim, under this definition everybody's a
3 derivative claimant, right?

4 MR. ZITO: That's how it seems to read.

5 THE COURT: So, then that would completely eliminate this
6 part of this clause "a legal resident of the state."

7 MR. ZITO: I am just showing yow it's there, Judge, because
8 it seems to be saying that a wrongful death claimant is a derivative
9 claimant and a derivative claimant is not protected from dismissal if
10 they're not claiming a result of injury or death by a nonresident of
11 the state.

12 THE COURT: Well, what about the first part of it?

13 "A Plaintiff is a legal resident of the state."

14 MR. GAULT: May I address that?

15 THE COURT: No. Just hold on. Me and Mr. Zito are still
16 working this one.

17 MR. ZITO: It is troubling.

18 THE COURT: Yeah, because it's an "or."

19 MR. ZITO: I will be truthful, your Honor -- well --

20 THE COURT: Doesn't that mean either one of those apply?

21 MR. ZITO: I don't know what it means.

22 THE COURT: Well, that's because the Texas Legislature wrote
23 this.

24 MR. ZITO: Right. And I don't profess to know the
25 legislative intent of whatever they talk about, but I just thought

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1 I'd point it out to you that it's not very clear.

2 MR. GOURRIER: Your Honor, I would go so far as to say that
3 as far as the Texas Residency Exemption is concerned, the legislature
4 did not change that part of the statute.

5 The language that was added is dealing with the situation
6 where there is a derivative claimant. That is what the legislature
7 was adding. They --

8 THE COURT: Here's the problem that I've got and they --
9 excuse me -- either work out whether we have to do a Choice of Law
10 Analysis here. And if we have to do a Choice of Law Analysis, we
11 can't do this today because, under the Plaintiff's theory about where
12 the decision was made, you have no evidence on this.

13 You have speculation. You have guessing. You have no
14 evidence because you've conducted no Discovery.

15 MR. GOURRIER: Well, we sent Discovery, your Honor. That's
16 the second Motion that's set for --

17 THE COURT: I know that. I know. Yes?

18 MR. DAO: Just one thing, Judge. The Texas Residency
19 Exception what we put forward in our briefing was they we are not
20 solely relying on that. We --

21 THE COURT: I know.

22 MR. DAO: And, so, when it comes down to it the death -- we
23 are aware of terms of the people that are going to be testifying in
24 this case. The Plaintiffs are here in Houston. Their treating
25 provider lives here in Houston.

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1 THE COURT: What treating provider?

2 MR. DAO: The psychologist.

3 As for their argument, their burden on this Motion to
4 Dismiss for Forum Non Conveniens they feel it's wrongly dismissing
5 from Texas and going to Mississippi. And what we said is they -- one
6 of the things they put in their Motion is, well, their witnesses are
7 in Mississippi.

8 We went and got two affidavits from -- granted it's not
9 everyone, but we got two affidavits from two individuals they
10 identified in Mississippi. They said they would be willing to come
11 down to Texas without the need for a subpoena.

12 So, have the Plaintiffs, the treating provider, and we have
13 two witnesses including the coroner who diagnosed or -- who signed
14 the death certificate and determined the cause of death as well as
15 the first responders, the deputy that arrived at the scene first.

16 Those two people are willing to come to Texas. Also, even
17 though -- going back to your Honor's point about their witnesses that
18 we don't know in terms of where they would be is that one thing they
19 we've included in our Motion aside from the Secretary of State
20 document that we referenced earlier is that Mahindra right now is
21 contending through the bulk of the Motion that it's inconvenient for
22 the lawsuit to be heard in Houston.

23 And since 2010 alone they have used Harris County as a
24 square in terms of as a Plaintiff, filing cases in Harris County
25 about maybe ten times in one of the exhibits that we referenced.

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1 And, they are trying to deny access to those same courts for the
2 Texas Residents.

3 The whole point that -- going back to the additions of the
4 Forum Non Conveniens Statute that the legislature did, based on their
5 own briefing, it was to prevent a situation where let's say, for
6 example, he didn't have sons who were bringing their own individual
7 claims. So, let's say there is an administrator recipient living in
8 some random state that doesn't have an individual claim of himself or
9 herself. That that person was the only Plaintiff in this case, then,
10 yes, Texas is an impediment. But in this case -- and that person
11 would only be in the representative capacity of Allan Cooper.

12 But we don't have that here. We have our Plaintiffs that
13 are, in fact, Texas residents. There is a connection to Texas, and
14 they're headquartered in Texas. Even though that may not mean that
15 all or a majority of the witnesses will be from their Houston
16 headquarters, it goes towards in terms of the totality of the
17 circumstances that the Court looks at whether it is convenient for
18 the parties to be here.

19 The Plaintiffs have filed it here and they want it to be
20 here. Mahindra's headquartered here, and they themselves have filed
21 lawsuits in this court.

22 So, what we're saying is that is another thing they impart
23 in the analysis we have included in our Response. That's why in
24 terms of they have to show strongly that it should not stay in Texas,
25 and we don't think they've met their burden. And we -- and I know

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1 the Court would have a few more questions on that, but I just wanted
2 to put that.

3 You know, we are not really on the Texas Residence.

4 THE COURT: Okay.

5 MR. DAO: The Texas Resident matters is because it goes into
6 the other analysis as well.

7 THE COURT: Okay. Here's the problem that I have:

8 Really it says this is a Forum Non Conveniens Statute,
9 right?

10 MR. GAULT: Yes.

11 THE COURT: So, this statute was designed and it was written
12 with Forum Non Conveniens claims in mind. It says:

13 "The Court may not stay or dismiss a Plaintiff's claim if
14 the Plaintiff is a legal resident of the state."

15 MR. GAULT: Your Honor, and I just wanted to point out
16 earlier, that it is an important point back on H where it defines
17 Plaintiff and that was what they amended. And it defines a
18 Plaintiff. It specifically excludes and says a term does not include
19 a representative. And our point is a wrongful death and a survivor's
20 claim is by its very nature derivative and representative and that is
21 clear under Mississippi Law and I think it is also, your Honor, when
22 you read Texas Wrongful Death and Survival Statutes.

23 And I think that is just -- wrongful death type cases and
24 survival type cases, which are brought on behalf of all the
25 beneficiaries, you can't get just one beneficiary and go out and file

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1 a lawsuit and say I'm going to make a wrongful death lawsuit. I'm
2 going to file a wrongful death lawsuit and --

3 THE COURT: Sure you can.

4 MR. GAULT: -- keep all this money for myself.

5 THE COURT: I can get this one.

6 MR. DAO: I'm sorry, your Honor.

7 THE COURT: If the others don't participate, why not? If my
8 mother dies as a result of someone's negligence and I bring the case
9 and my brothers choose not to bring the case and I resolve the case,
10 I'm only proving up my damages and the estate's damages.

11 Now, my brothers may be able to benefit for the damages
12 awarded to the estate without bringing the case but they cannot
13 benefit from their own mental anguish and emotional trauma that
14 resulted from my mother's death.

15 MR. GAULT: And that, your Honor, is different than the
16 Mississippi Wrongful Death Statute, which is why --

17 THE COURT: But you are asking me to completely ignore a
18 statute which was passed by the state legislature for this specific
19 circumstance:

20 Where someone makes a Forum Non Conveniens claim as in this
21 case.

22 You're asking me to ignore the Texas Statute, which I think
23 is clear that it allows for Texas to have jurisdiction have the
24 lawsuit filed.

25 You know, I'm giving you the opportunity to take it up.

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1 MR. GAULT: I understand that, your Honor.

2 THE COURT: Because, if there is no case law, take it up.
3 You are not going to hurt my feelings, by the way --

4 MR. GAULT: Understood, your Honor.

5 THE COURT: -- if you did that.

6 MR. GAULT: And I should, your Honor.

7 So, the point that we would make, again, boils down to
8 representative and is a wrongful death and survival claim brought in
9 a representative capacity. And, again, as cited in our briefs, there
10 is no question under Mississippi Laws it is. And I believe, based on
11 my reading of the Texas Statutes, it is as well.

12 But that's what the Court has to decide. Secondly, your
13 Honor, and this has not been brought up today, what they did in their
14 Response filed at 8:30 yesterday morning was say, oh, wait, well, you
15 know, you may be right about that representative stuff, but we are
16 making individual claims. But nowhere in their Complaint do they say
17 what the individual claims are. Nowhere --

18 THE COURT: Wait a minute. Wait a minute. I haven't read
19 their Complaint. So, are you saying that they filed the lawsuit on
20 behalf of the estate, the children and the granddaughter for
21 negligence and product liability, correct?

22 MS. GARNER: Let me find it, your Honor.

23 THE COURT: Negligence, defect, failure to warn --

24 MR. GAULT: Correct.

25 THE COURT: Those are their claims, right?

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1 MR. GAULT: Okay.

2 THE COURT: And they brought the suit on behalf of Jason,
3 Venice, Faith and Christopher. And Jason's acting individually and
4 the administrator of the estate of Venice Allan Cooper. I believe
5 that's the father?

6 MR. DAO: Yes, your Honor.

7 THE COURT: Now, make your comment again.

8 MR. GAULT: Yes, your Honor.

9 THE COURT: Nowhere does it say that the claimant --

10 MR. GAULT: Nowhere does it say when they say we're making
11 individual claims they don't say what that is. And in their Response
12 filed yesterday, 20 pages, long and they do not say what they claim
13 is.

14 Now, your Honor, I assumed when I walked in here that they
15 were going to make a bystander, emotional-distress type claim. And I
16 just -- that's what I assumed they would be trying to make. Well,
17 clearly that couldn't be the case for two sons who were in Texas at
18 the time.

19 THE COURT: They can't make bystander claims because they
20 are not here. Their claims --

21 MR. GAULT: So, that's right. So, for example, what claim
22 does the 14-year-old daughter have? I don't think she would have a
23 right to sue under Wrongful Death Statute in Texas.

24 THE COURT: The 14-year-old granddaughter? I don't know. I
25 don't know the answer to that question because I don't know how they

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1 will argue that.

2 But at the very lest you have got two individual who are
3 children of the deceased, who are residents of the State of Texas and
4 they are bringing a lawsuit for the death of their father.

5 And they are seeking loss of companionship, mental anguish,
6 loss of inheritance. Those are the damages that they are suing for
7 me. It's clear to me in the Petition.

8 MR. GAULT: Well, fair enough, your Honor. But the -- for
9 example, like I said the 14-year-old daughter's claim is in there.
10 She clearly would not have her dad -- her father as a Plaintiff.
11 And, so she would not have a claim.

12 THE COURT: I don't know how the 14-year-old daughters stays
13 in the case either. But that's not what we're here to determine.
14 We're here to determine are there other Texas residents who have
15 filed a lawsuit here.

16 MR. GAULT: I understand.

17 THE COURT: And there are two. And you are asking me to
18 ignore a clear statement in the Forum Non Conveniens Statute that
19 says:

20 "The court my not stay or dismiss a Plaintiff's claim if the
21 Plaintiff" -- these two individuals -- "are legal residents of this
22 state."

23 MR. GAULT: No, your Honor. I'm not asking you to ignore
24 that. I'm asking you to apply the Texas rules regarding Choice of
25 Law, which I think you would conclude Mississippi Law applies.

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1 Then --

2 THE COURT: Then where -- give me the circumstances where
3 the Texas Forum Non Conveniens Statute applies?

4 MR. GAULT: I'm sorry. Could you ask that again?

5 THE COURT: Where else does the Texas Forum Non Conveniens
6 Statute applies?

7 MR. GAULT: Your Honor, it applies this way because -- I'm
8 not asking you to ignore anything about Texas Law.

9 THE COURT: Well, sure you are. You are asking not to
10 consider it.

11 MR. GAULT: No, sir. No, sir. I'm asking you to apply the
12 Choice of Law Rule, which would apply Mississippi Wrongful Death
13 Statutes to this case. And then, your Honor --

14 THE COURT: Go ahead and finish your sentence.

15 MR. GAULT: On the Forum Non Conveniens Statute, if you
16 applied Mississippi Law, then this claim is brought in a
17 representative capacity and the exception does not apply.

18 THE COURT: Okay. All right. I hear what you are saying.
19 I disagree with you. Your Motion is denied.

20 MR. DAO: Thank you, your Honor.

21 THE COURT: Take it up, counsel. Really, I've been
22 reversed. I thought it was wrong then, too; but, you know, they get
23 to make that decision.

24 MR. GAULT: Your Honor, Motion for Protective Order in
25 Discovery, we do feel like this is a critical issue. And, as I've

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1 said, and we do plan --

2 THE COURT: Take it up and request a stay and I will
3 consider it.

4 MR. DAO: Is it denied?

5 THE COURT: No, it's not denied. I said take it up and
6 request a stay; and, if they take it on appeal, I will follow their
7 route and stay the case so they can take this up to the Court of
8 Appeals.

9 MR. GAULT: Thank you, your Honor.

10 (Hearing ended)
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STATE OF TEXAS
COUNTY OF HARRIS

I, Cynthia Martinez Montalvo, Official Court Reporter in and for the 152nd District Court of Harris, State of Texas, do hereby certify that the above and foregoing contains a true and correct transcription of all portions of evidence and other proceedings requested in writing by counsel for the parties to be included in this volume of the Reporter's Record in the above-styled and numbered cause, all of which occurred in open court or in chambers and were reported by me.

I further certify that this Reporter's Record of the proceedings truly and correctly reflects the exhibits, if any, offered by the respective parties.

I further certify that the total cost for the preparation of this Reporter's Record is \$_____ and was paid by FormanWatkins.

/s/Cynthia Martinez Montalvo

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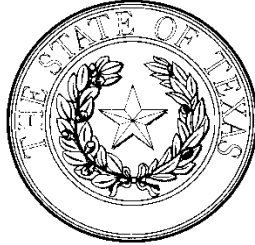
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APP. 9

Opinion issued December 20, 2016



In The
Court of Appeals
For The
First District of Texas

NO. 01-16-00718-CV

IN RE MAHINDRA, USA INC., Relator

Original Proceeding on Petition for Writ of Mandamus

MEMORANDUM OPINION

Relator, Mahindra, USA Inc., has filed a petition for writ of mandamus, challenging the trial court's August 12, 2016 order denying its motion to dismiss based on forum non conveniens.*

* The underlying case is *Jason Alan Cooper, Individually, as Administrator of the Estate of Venice Alan Cooper, and as Next Friend of Faith Cooper, and Christopher Cody Cooper v. Mahindra USA, Inc. and KMW, LTD.*, cause number 2016-40032, pending in the 152nd District Court of Harris County, Texas, the Honorable Robert Schaffer presiding.

We **deny** the petition for writ of mandamus.

PER CURIAM

Panel consists of Chief Justice Radack and Justices Jennings and Bland.