ORAL ARGUMENT — 11/4/97
97-0423
SMITH BARNEY V. LINDSAY

CORDELL: This court must determine whether a corporation's statutory power to sue and be sued in the State of Texas gives a Texas corporate plaintiff, even one created for the purposes of forum shopping after all the operative facts have occurred, an absolute right to maintain to conclusion a suit in Texas courts on claims wholly unrelated to this state against a foreign corporation that happens to be authorized to do business in Texas.

Today this court is called upon to review the TC's conclusion that *H. Rouw Co. v. Railway Express*, El Paso 1941, writ ref'd opinion, prohibited the TC's consideration of Smith Barney's motion to dismiss under the doctrine of forum non conveniens in a suit on claims undisputedly having no relationship to Texas.

To paraphrase Justice Peeple's concurring opinion in *21 International v. Westinghouse*, in which he urged this court to reexamine *Rouw* and to overrule it, a sensible interpretation of our corporation laws do not require this result. The right to appear in court does not give a corporation an absolute right to insist on an utterly inconvenient and harassing forum. *H. Rouw Holding* to the contrary is wrong. Smith Barney asked this court to overrule *Rouw* and to definitively hold that Texas TC in claims in other than personal injury and wrongful death have the inherent power to dismiss transitory actions brought against domestic and foreign corporations authorized to do business in Texas under the discretionary doctrine of forum non conveniens, and to direct the trial judge to consider Smith Barney's motion to dismiss on the merits under the factors set forth in *Gulf Oil*.

HANKINSON: I take it by your argument that you're taking the position that *Rouw* currently is the law in Texas on this issue?

CORDELL: Yes.

ABBOTT: What discretion do trial courts have to ignore or go against existing controlling law?

CORDELL: They certainly have done so with *Rouw*. In fact, they _____ Keller court out of El Paso itself - just completely ignored *Rouw* in that decision where it affirmed that the forum non conveniens dismissal of a case brought by a Texas corporate plaintiff against numerous defendants.

ABBOTT: In this case did the TC abuse his discretion by following *Rouw*?

CORDELL: Yes, the TC absolutely abused its discretion, because it made an error of law.

It is an error of law.

GONZALEZ: To follow the law as it exists at the time?

CORDELL: Even where the law is unsettled this court has held that an erroneous application of the law is an abuse of discretion. And I think the law is very unsettled here.

PHILLIPS: In light of *Canadian Helicopters*, just to pick a case at a random, why don't you have an adequate remedy by appeal here just to go ahead with this trial and change the laws to end through the normal appellate process where we have the benefit of the CA's review?

CORDELL: You don't have an adequate remedy of appeal where the TC has not even ruled on the merits. Here, the failure to consider the forum non conveniens motion on the merits denies a party its right to consideration on the facts as they exist at the outset of the case. It's not like *Canadian Helicopters* or *CSR v. Link*. In those cases if Judge Link for instance had said, "I do not have the authority to grant the special appearance, I do not have authority to consider the special appearance," that would be the case before this court now, the special appearance cases that have come before the court or where there has been a consideration on the merits. Here, we have had no consideration on the merits. That cannot be remedied on appeal.

PHILLIPS: The best you could get would be to go back to the TC for that motion to be considered under the new state of the law?

CORDELL: Yes.

HANKINSON: I am a little bit confused by your argument that the law was unsettled in this area in light of the fact that you just said that *Rouw* is the controlling law. I understand that there are CA's decisions that have not mentioned *Rouw* during the intervening 40-50 years since *Rouw* was decided. But as Justice Peeple's and the San Antonio court said in their decision, *Rouw* was the controlling law, and I understand that to be your position, so how can the law be unsettled?

CORDELL: It is just exactly as you said. I think there are cases that have just not followed it where the facts would be directly contrary to those under *Rouw*. *Rouw* is a writ ref'd opinion, which has never been addressed by this court. But I think there are cases that go directly contrary to it that are other CA cases. Now they don't carry the writ ref'd designation. I concede that. But the El Paso court itself has totally ignored *Rouw*. So you do have an unsettled state of law where you have this one writ ref'd case, and then you have all the other CAs that have simply ignored it.

HANKINSON: Wouldn't the TC look to *Rouw* though since it is a writ ref'd case?

CORDELL: It does carry the writ ref'd designation. But the point is, that it is an erroneous conclusion of law. I think a judge could look at all these other cases. Because there is an unsettled

state of the law here, you do have contrary opinions, and where there is an unsettled state of the law an erroneous legal conclusion does constitute an abuse of discretion.

BAKER: I'm not sure I understand. You say there's an unsettled law because there are conflicting opinions out of this court or CAs?

CORDELL: Out of CAs.

BAKER: Unless I'm mistaken, doesn't an opinion writ ref'd from this court have the level of authority of opinion from this court?

CORDELL: Yes, it does.

BAKER: And if not overruled, it's controlling law as Judge Hankinson suggests, and that you have conceded?

CORDELL: It is a writ ref'd opinion, which this court has now set aside.

BAKER: So is it then the bottom line, we have to overrule *Rouw* to get where you want to go?

CORDELL: Absolutely. And I'm asking you to do that.

BAKER: But how can we do that? In the context of a mandamus if the TC follows controlling law how can it abuse its discretion?

CORDELL: This court has as Professor Albright pointed out in instances before overruled prior precedent...

BAKER: Overruled on appeal or in a mandamus?

CORDELL: That was *National Tank v. Brotherton*. That was on a mandamus proceeding.

HANKINSON: I don't know of any Texas case law in which the forum non conveniens issue has specifically been addressed in the context of a mandamus like this. Is there any law for example in the federal jurisprudence that discusses whether the review of a decision on a forum non conveniens motion is appropriately brought up by mandamus?

CORDELL: I'm not aware of any.

HANKINSON: Or in any other states where the doctrine may be further developed than it is

in Texas?

CORDELL: I'm not aware of any at this time.

HANKINSON: Or anything that would support your position that there is no adequate remedy at law when the TC denies a motion to dismiss on forum non conveniens grounds?

CORDELL: I think this court's own logic in *CSR v. Link* supports this, that it is a question of vital importance. It is an extraordinary case. And in that situation, the interest of all parties and the public and the business community demand that serious questions regarding the applicability of the doctrine of forum non conveniens and whether a TC may property decline jurisdiction under that doctrine should be settled by this court at the earliest possible moment.

HANKINSON: Are you asking this court then to also adopt new standards for mandamus procedures where we should use the mandamus procedure to answer particular questions of law that may be important to the jurisprudence of the state as opposed to direct appeal?

CORDELL: I think that you go back as Justice Hecht discussed in *Canadian Helicopters*. This question can be handled under the abuse of discretion standard if you heighten scrutiny of abuse of discretion. And I think there was an abuse of discretion here, because there was an error of law.

ABBOTT: There was abuse of discretion because the TC followed *Rouw,* that's your position?

CORDELL: Where the law is unsettled, I believe that, that there was an abuse of discretion here.

ABBOTT: Let me make sure we're on the same wave length with regard to *CSR v. Link*. And _____ establish a new category called the "Mass Tort" category?

CORDELL: Yes, you did.

ABBOTT: And does this case fall under a "Mass Tort" case?

CORDELL: No. It certainly is not a mass tort, and I wasn't trying to indicate that.

ABBOTT: Is there a multiplicity of cases involved or surrounding around this one particular case?

CORDELL: I think this case is extraordinary in that it affects thousands of corporations subject to the Texas Business Corporation Act. And if *Rouw* is allowed to stand, it creates an enormous potential for a new wave of forum shopping in the state. So, I do think it's extraordinary

in that circumstance.

HECHT: Even if the trial judge didn't abuse her discretion in this case shouldn't we clarify the law? Is there anything about mandamus procedure that prevents us from clarifying the law?

CORDELL: None whatsoever. And I think the court should take this opportunity to clarify the law, that the cases from *Rouw* and decided afterwards have created a real patch work of decisions regarding the availability of forum non conveniens in commercial cases in this state. For instance, a foreign corporation authorized to do business in Texas can assert forum non conveniens if the suit is brought by a foreign or domestic partnership, that's the *Forcum-Dean v. Missouri Pacific Railroad Co.* Or, where the suit is brought by a foreign corporation not authorized to do business in Texas, that's *Direct(?) Colors(?).* Or *w*here the plaintiffs and defendants are individually nonresidents, *Sarieddine v. Moussa*, in which the Dallas CA held, "We hold that Texas continues to recognize the validity of the theory of forum non conveniens for all cases except those involving personal injury or death." Forum non conveniens may be available to a nonresident individual defendant in a suit by a Texas corporation, that's the *VanWinkle Hooker Corp. v. Rice.* And because the courts have just chosen to ignore *Rouw* and not follow it, forum non conveniens may even be available to Texas corporations and partnerships sued by another Texas corporation, that's the *A.P. Keller Dev., Inc. v. One Jackson Place, Ltd.* If the real parties in interest are correct in their interpretation of *Rouw*, forum non conveniens would be available in commercial cases to all classes of defendants except to domestic and foreign corporations authorized to do business in Texas when sued by a domestic or foreign corporation authorized to do business. I submit that is a distinction with no statutory basis and without any logic.

BAKER: So your viewpoint is, when both parties to the suit in their otherwise domesticated or have a permit to do business, one of the others got a forum non conveniens case?

CORDELL: I think there is nothing in the common law that prohibits that. That's the beauty of forum non conveniens for the TC, that it is a very flexible doctrine. And under the *Gilbert v. Gulf Oil* factors, those are going to predominate. But there is nothing in the common law of Texas that would prevent a defendant in that situation from asserting forum non conveniens and then having the trial judge review that in her sound discretion. And that factor will be given a great deal of weight as it should be under *Gulf Oil*. But, the point is, there is nothing outside of *Rouw* in the common law of Texas that precludes that.

BAKER: But you do agree it is an abuse of discretion standard on review by the appellate court?

CORDELL: On the denial of the merits.

BAKER: Would you also agree the same standard of review applies if it's an ordinary

appeal on this issue, the TC's ruling on a motion for forum non conveniens?

CORDELL: Yes, I do agree with that.

BAKER: So why isn't that an adequate remedy on appeal then, because it goes back to your argument that you never have had as yet a decision on the merits because of *Rouw*, so then we have to overrule to get where you want to go in the first place?

CORDELL: Yes. I think the court should take this opportunity to clarify...

BAKER: Since we haven't had a merit's decision, you can't argue the merits?

CORDELL: That's correct.

BAKER: The whole issue is overrule *Rouw*, and then we will go forward?

CORDELL: Correct.

HANKINSON: Should TC rulings on the merits of a motion to dismiss on forum non conveniens' grounds be reviewable on mandamus ordinarily?

CORDELL: Subject to the ordinary standards for mandamus.

GONZALEZ: Which are?

CORDELL: Abuse of discretion on an adequate remedy.

GONZALEZ: As you know, we've had difficulty in venue cases, and jurisdictional disputes. What is the status of discovery in this case?

CORDELL: There's been no discovery at all.

GONZALEZ: Because of our stay?

CORDELL: Yes. The case is as though it were filed and our motion remains to be considered by the court.

ABBOTT: What is the amount of controversy?

CORDELL: Millions.

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RESPONDENT

CARNEGIE: There are three issues here. The first, which the court has focused on quite a bit already, is mandamus procedure. The second, is the law of forum non conveniens. And the third, deals with the facts of this case. Because under any standard, I contend, that it does not justify dismissal for forum non conveniens even under the *Gilbert and Piper v. Reyno* standard.

Of course, the first requirement for any mandamus is there has to be no adequate remedy by appeal. If there is an adequate remedy by appeal this court doesn't have to go any farther in looking at this case. The law is crystal clear I think, that the mere inconvenience of a trial and proceedings in Texas never makes your appeal remedy inadequate by itself. *CSR v. Link* is very clear on that.

ABBOTT: What about a concept of let's call it "mootness," and that is, that if this issue is never addressed in a mandamus proceeding it will always become mooted because the parties will always be forced to settle out. And, therefore, the issue will never reach the Texas SC and never have the opportunity to overturn *Rouw*?

CARNEGIE: That's not the case at all. There's nothing about this case that creates an extraordinary pressure to settle. In contrast, *CSR v. Link*, the defendant in that case was potentially subject to thousands of lawsuits. This is one lawsuit standing alone that's being litigated in Texas. Even in the jurisdictional context where constitutional rights are involved, the remedy by appeal is ordinarily considered adequate in the absence of some kind of exceptional circumstances like were involved in *CSR v. Link*. Inherently, all that forum non conveniens involves is a complaint that it is not convenient to be here.

HECHT: Well, not exactly. There is an additional argument made in the brief that this is a burden on the judicial resources of the state, particularly as they are needed by the State citizens, to dispose of cases that don't have anything to do with Texas?

CARNEGIE: There are two issues there. First of all, Texas has expressed a clear preference to give Texas citizens a right of access to Texas courts. That's what *Rouw* holds. That's what §71.051(f)(1) of the *Alfaro* statute clearly says. It says, "Texas residents are exempt from forum non conveniens under that statute." And every state has that kind of preference for its own citizens to give them a right to access to their own courts. The US SC, in fact in *Piper v. Reyno*, pointed out that the DC in that case was absolutely correct. It says, "The distinction between resident or citizen plaintiffs and foreign plaintiffs is fully justified. The plaintiff's choice of forum is entitled to greater weight when the plaintiff has chosen his home forum." So every state gives preference to their own citizens with regard to a right of access to their courts.

The second point here is, that this is not really a battle between New York and Texas. This case is not centered in New York. It is centered in Poland. And the burden on New

York residents is very similar to the burden on Texas residents in terms of having the case here. Three of the plaintiffs in this case are Polish residents with no connection to New York. When this case was originally filed in Texas, the first thing Smith Barney did was remove it to federal court on the grounds that there was complete diversity arguing that none of the plaintiffs really had a sufficient connection with New York to destroy diversity. They argued that George Borey was either fraudulently joined or a nominal plaintiff and they argued that the privatization group, which is the Texas corporation involved in this case, did not have its principal place of business in New York. So the connection with New York is limited to a couple of Smith Barney employees who are in New York.

Another part of that is, that their proof for this mandamus is grossly inadequate. Their attempt to prove all the witnesses are in New York are based on a couple of affidavits that are on information and belief. They say that Mike Bashan and Frank Zarb, who are two nonparty witnesses, are located not in New York but in the New York area. And in fact, Mr. Bashan's deposition shows that he resides in Connecticut not New York. And we don't know for sure about Mr. Zarb, because the affidavits just aren't clear enough to establish that.

Now when you talk about these witnesses, you've got Polish witnesses, they are no more subject to process form a New York court than they are from a Texas court. The witnesses in Connecticut are no more subject to process from a New York court than a Texas court. With regard to all the witnesses in Poland, I don't think it can be seriously argued that New York is so much more convenient than Texas, that it justifies transferring this case to New York.

HECHT: But in Smith Barney's reply, they say they're not asking for a ruling on that aspect of it. They want to go back to the TC and get a consideration of those facts and a ruling. You said, all that is involved is the inconvenience to the parties. But the argument in the abstract says, "no, it is a burden on the state resources as well."

CARNEGIE: That's true. But what I'm saying is, the burden on the state resources goes to the public interest factors in the forum non conveniens analysis. And what I'm saying is, compared to New York, which is the alternative forum that they are trying to justify here, there's not a significant difference. New York would be impacted in its public resources as well.

HECHT: I understand that's your position in this case. But generally speaking, do you agree that the burden on the state is a factor to take into account in applying forum non conveniens?

CARNEGIE: Yes, I do. There's the issue of whether this was an abuse of discretion. That is absolutely essential to a mandamus. And I think the court cannot possibly abuse its discretion by following what Mr. Cordell has admitted is controlling precedent in *Rouw*. If you start saying that courts abused their discretion by following controlling precedent, you're on a real slippery slope there.

GONZALEZ: That's exactly what the court did in *Lunsford v. Morris*.

PHILLIPS: Was that case wrong?

CARNEGIE: I do think that in that regard it was wrong. I agreed with your dissent in that case. It can't possibly be an abuse of discretion to follow 100 years of controlling precedent, and I believe Justice Phillips, you agreed with in your concurrence with that part of the dissent. And that's about the only case I can think of where this court has done this and it created quite a furry in the CLE circles.

There's another issue here though. They are trying to present this as though the court didn't consider their motion. And what they're trying to do is say, "change the law and give us a second bite at the apple," without even considering whether the result was wrong, because the result in this case, I contend, is right. And even in an ordinary appeal much less a mandamus, if the court reaches the right result but simply for the wrong legal reason CAs affirm, and that should be done here. There's no basis for giving a mandamus that's just a second bite at the apple mandamus.

ENOCH: Going along the lines of the burden issue. If one of the major considerations of forum non conveniens is the convenience of the parties to try a lawsuit, then why isn't that a strong argument for a mandamus in a forum non conveniens issue as opposed to any other concern? Expense of litigation as an example. Or an improper ruling that might result in the case being retried. You're going to be trying the case anyway. If the issue is convenience, the convenience of trying this case, that convenience is expended, it's gone through the trial. There's nothing left to be arguing, "well we would have had a more..." The whole issue of the convenience is to not have this trial in this _____ because of the inconvenience. Once that's been passed doesn't that in fact moot the forum non conveniens argument?

CARNEGIE: Two responses to that. First of all, I would contend that that very aspect of forum non conveniens is never an appropriate item for mandamus, because mandamus just doesn't lie for that. But the second thing is forum non conveniens is really not that simple. It goes beyond mere inconvenience to the point where the defendant has to be really prejudiced here. And when it comes up on appeal, that's part of the harmless error rule. They're not going to have to show just, gee it wasn't very convenient for us to be here. They are going to have to show, we were hurt by this. And they would have to show the same thing to get a dismissal for forum non conveniens: This is going to hurt us. And they haven't shown that. There's nothing that they have to show that. There's no difference in New York between access to witnesses than there is to Texas or that sort of thing from which you can reasonably argue that there's going to be a harm to bring this case in Texas to Smith Barney. In fact, if anything, they have an advantage because they have control over their own witnesses and the choice of whether to bring them here and whether to stick us with having to use depositions at trial. So there's not a reasonable argument here that they've presented, that there's actually going to be a harm here at all much less the kind of irreparable harm that would

justify mandamus.

HANKINSON: Mr. Cordell asks us to overrule *Rouw*. What is your response to his argument?

CARNEGIE: My response is that *Rouw* is correct. My other response is that simply overruling a case without regard to whether the ultimate result of the order was correct is not a proper use of mandamus. I say that *Rouw* is correct for several reasons. First of all, as I pointed out, *Piper Aircraft v. Reyno,* out of the US SC says, there's absolutely nothing wrong with forums giving preference to their own residence as far as access to the court. The second thing is, that *Rouw* has been the law in Texas for more than 50 years. And if you look at the *21 International* it brought up *Rouw* very squarely. That's right about the same time the *Alfaro* statute was enacted, and nobody thought twice about it. The legislature didn't change it.

The other thing we know why *Rouw* is correct, is that when the legislature enacted the Model Business Corporation Act after *Rouw* was enacted, they kept exactly the same kind of substantive language that had been construed in *Rouw* and didn't change it. The legislature is presumed to know the result in *Rouw*, and when they enact another statute with exactly the same substantive language they are presumed to intend that it will be construed in the same way. And that's exactly what they did.

Then you get to the *21 International* case, which brought *Rouw* to the forefront, right in the middle of the *Alfaro* brew ha ha. And that statute they didn't act to change it, and in fact, when they did enact §71.051, which is the forum non conveniens statute dealing with personal injury cases, they expressly put in an exception for Texas residents. It said, "Texas residents are not subject to this forum non conveniens statute," which is exactly what *Rouw* holds. So what we have in all of this is a clear preference by the legislature to allow Texas residents to have full access to Texas courts unimpeded by forum non conveniens. I think it's crystal clear.

PHILLIPS: Do you dispute opposing counsel's characteristics that this corporation was purely a litigation vehicle.

CARNEGIE: Absolutely They have no evidence to support that. George Borey's deposition was taken and he testified that the reason he reincorporated the corporation in Texas was because Texas had a more favorable tax climate, and because he wanted to get into energy related areas, which of course, Texas is known for and very favorable for. So his testimony was that he did it for business reasons not for forum shopping. It was done some 6 months before this lawsuit was filed.

BAKER: If you had filed it before he did that where would your argument be, whatever his reasons why he incorporated?

CARNEGIE: If he had not, then they might have a forum non conveniens under *Rouw*. But

he did it substantially before. And the testimony is, that he did it for business reasons not forum shopping reasons.

The scenario that is brought up in one of the amicus briefs that suggest that corporations are going to come and incorporate in Texas just for forum shopping, I think, is a silly suggestion. It just doesn't happen. We haven't seen a flood of forum shopping by corporations coming to Texas incorporating here just so they can sue here. In the fifty years since *Rouw* has been around when it was highlighted in *21 International Holdings,* we didn't see it. We're not going to see it. It just doesn't happen. And there are very good reasons why it doesn't happen. Corporations in other states who have business litigation don't want to come to Texas just so they can file suit, because it's going to be just as expensive for them to prosecute the suit here as it's going to be for the defendant to defend it if it's an inappropriate forum.

In addition to that, the corporation by doing that would subject themselves to general jurisdiction in Texas. They are not going to do it. And in commercial cases, unlike personal injury cases, where I think we do see forum shopping and have a forum shopping problem in this state there's not the kind of advantage. Texas is not this plaintiff's mecca for commercial cases that some seem to think it still is for personal injury cases. So this is not a thing that corporations are going to come here just for forum shopping reasons. It's not reasonable. It hasn't happened in 50 years. It's not going to happen. If this was a big problem, *Rouw* would be cited 100 times instead of only 7, and only 3 of those cases according to the amicus are even significant at all.

This is not an issue of, does Texas have forum non conveniens? Texas clearly does have forum non conveniens. What *Rouw* establishes is a minor exception to it, and I say it's minor, we know it's minor from looking at how often *Rouw* has been cited. And it's just a preference for Texas residents to have access to their own courts, which is a strong version of what every other state does anyway, and what the US SC in the *Piper v. Reyno* case said, is absolutely appropriate.

I don't think that it's proper for this court on a mandamus proceeding to come in, change the law without regard to whether the result was right, because the court didn't say: I'm not going to consider your motion. It said, your motion is denied. And they said, well ignore the result, change the law, give us a second bite at the apple, even though it may or may not make a difference. And that's just not a proper thing for mandamus to do.

SPECTOR: Are you suggesting that the TC did consider the motion on its merits?

CARNEGIE: I don't think that the TC got to the factual question. No, I don't. But that gets to the issue that I talked about earlier. Even if the court got to the right result for the wrong reason it shouldn't be disturbed on appeal much less on mandamus. And I don't think that this court can properly decide whether it should reverse much less issue a mandamus without deciding whether the result was wrong as well as the reasoning. And that's particularly true on a mandamus.

BAKER: Is it then your argument if you get that far that on the merits of there's disputed fact questions about how this corporation came about and why and so forth and so _____?

CARNEGIE: Exactly. And on a disputed fact issue like that, you can't say that that's an abuse of discretion for the court to rule way or the other. So ultimately, this ruling would have to be affirmed.

BAKER: You don't think the TC considered the merits, which would involve the factual issues, how can we get to that mandamus?

CARNEGIE: I think that on an appeal it could be reviewed to determine whether the merits of this would justify it. In the order, the court didn't say what its grounds were. But it clearly didn't say, I'm not going to consider the motion. It said, the motion is denied. And if that's right for any reason, including that it would not be an abuse of discretion to deny it on the merits, whether or not the court actually had that reason for it, if it's right for that reason or shouldn't be disturbed for that reason, then it shouldn't be reversed. And the idea of a mandamus is not to just change the law to give somebody a second bite at the apple when the court clearly was right, clearly followed precedent that it was absolutely bound by. There's just no abuse of discretion there, no basis for issuing a mandamus for that sort of thing.

Finally, you get to the adequate remedy by appeal. There's no reason why this can't be taken up on appeal. Every case recognizes that the appellate remedy is adequate when all you have is an inconvenience of trial even in the jurisdictional cases where you've got constitutional rights that are being impacted. And there is certainly an argument there, the violations of those constitutional rights might be harmed per se that doesn't exist in forum non conveniens. It's simply an inconvenience argument.

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REBUTTAL

CORDELL: There are two things that are very clear in this case. One, is that TPGI, the company that was transformed into this Texas corporation, has never had one iota of business here. The office is in the backroom of Mr. Borey's apartment in New York City, and since it has incorporated it has not done one thing in Texas.

ABBOTT: Where is that found in the record?

CORDELL: It's in our brief. The second thing that is clear here is that the court did not conduct any consideration of the merits.

HANKINSON: Does the record reflect just that the motion was denied? Is that what the order

says?

CORDELL: No, what she said was, "I'm going to deny the motion. I believe that the law in Texas has not changed." After they argued *Rouw* was the law, she says, "I believe the law has not changed." She then went on to say, "I believe the defendants are right, this case does not belong here." But that is what she announced.

HANKINSON: And that's in what, the reporter's record from the hearing?

CORDELL: That is in the mandamus transcript at Tab I. Counsel does not dispute that there is an alternate forum here. He wants to argue that the case is centered in Poland, and therefore, it shouldn't go to New York. Once the TC conducts the hearing, and if it decides to dismiss the case, it's his choice where to refile it. What he's arguing to this court is the *Gulf Oil v. Gilbert* factors, and this court is not going to conduct that analysis. This court hopefully will send the case back down. That is the TC's responsibility to do that, which it has not done here in this case.

ENOCH: Suppose you brought a motion for summary judgment and the trial judge just says, "I'm not ruling on the summary judgment?"

CORDELL: In fact, that happened in *Grant v. Wood*, and she was mandamused. Judge Sharolyn Wood refused to rule on a summary judgment, and the First CA mandamused her to conduct a ruling to have a hearing on it and enter a ruling. She didn't want to rule on it because that particular judgment if she had denied it would have given them the right to an interlocutory appeal. They asked for a ruling and said: "we need a ruling your honor, so that we can pursue our appellate rights." And the court said, "You have those appellate rights if I deny it," and she would not rule on it.

ABBOTT: But here you have a ruling. There's a signed order.

CORDELL: But the record is clear, that there was no consideration of the merits here.

BAKER: Did the judge sign the order overruling the motion at the end of the hearing, or was it signed at a later date?

CORDELL: I don't know.

BAKER: Don't we have some cases that say, "even though the TC may say something during the course of the hearing if they do something different later they can still change their mind without telling you?

CORDELL: No order was signed day.

BAKER: So your argument's a little stronger in this factual situation than the cases would allow?

CORDELL: March 19, the order was signed that day.

ENOCH: In the *Wood* case, the TC was depriving a litigant of an appellate right that they would have otherwise had, but for a failure to rule. But in the ordinary summary judgment context where it's just you either establish your right to judgment or you don't, and the TC refuses to rule would you not have to on the appeal demonstrate that there would be a different result, that you would have been entitled to a summary judgment? If she had ruled on it, you would have been entitled to summary judgment. The failure to rule on it just puts you in the same position as if she had overruled it. You've got to go to trial on the case.

CORDELL: No, I don't agree with that. The question is the power of the court to tell her to rule. Just like in this, the power of the court to tell her to rule.

GONZALEZ: She has ruled - denied the motion.

CORDELL: I should have said to consider the merits.

ABBOTT: To what extent must the court system be burdened in order to trigger mandamus? We talked in the *CSR* case that the court system in Harris County was being overburdened with thousands of lawsuits. To what extent do we measure when and how courts are overburdened, such that, it gives rise to us being able to take a mandamus action?

CORDELL: The term this court has used is "extraordinary," and I think this is extraordinary. The potential ramifications from this are extraordinary. It affects thousands of corporations in the State of Texas. And there is no bright line number.

ABBOTT: You say that it's thousands of corporations. I've heard during the argument today that there's only been 7 cases that cite *Rouw*, is that correct?

CORDELL: Yes.

ABBOTT: So wouldn't it be fair to say that it may have only been 7 cases on appeal concerning this matter?

CORDELL: There's not a _____ of cases about forum non conveniens. *Rouw* has survived to this point in large point because of its obscurity, and that obscurity is gone now. It is here. It is out there for everyone to see. *21 International* died. It did not get wide play. It was settled because the court could not _____ up, because it was settled after the court held that it could not grant mandamus in that case. If it had, it was bound to follow *Rouw*.