

ORAL ARGUMENT — 1/19/2000
99-0366
UTTS V. SHORT

COOPER: Unlike the cases earlier today, this is a very narrow case, and really involves one issue. And that is, the application of the dollar for dollar credit in a wrongful death case.

Most of the issues we believe that were presented in the CA were decided by this court in the *Drilex* decision. And I think for the purposes of the oral argument there were three rulings with three holdings by this court in *Drilex* that are Germaine to this case: 1) the court held that under the plain language of §33.011(1), the term “claimant” includes all family members or derivative beneficiaries; 2) the court held in *Drilex* that the total of damages to be recovered by the family, that is all the beneficiaries, are to be totaled and then subtracted from the total verdict rendered by the jury for all the beneficiaries; and 3) this court held that the remaining damages should be allocated among the party seeking recovery based upon each party's percentage of the damages found by the jury.

ABBOTT: If I recall correctly though in *Drilex* we did not confront or address the issue about when all the individuals who are asserting claims or asserting claims on their own behalf as they are here. They are saying that these are our individual claims, we have our own unique damages, and, therefore, we are entitled to our own money.

COOPER: I think that is a distinction without a meaning. If you go to the language of “claimant” in 33.011, which talks about those situations where you seek damages for injury to another person, which was *Drilex*, because the plaintiff in that case...

ABBOTT: I know. In *Drilex*, the injury was to another person and everyone was piggy-backing off of the injury to that person. Here, you have somebody who died; as a consequence of that death these folks have their own individual interests.

COOPER: However, going back to the language it talks about where you're seeking injury because of the death of another person and that is referring, I believe, to a wrongful death or to a survival claim. The literal language of 33.011(1) “claimant” where it talks about where you seek damages because of the death of another person, and we believe that that encompasses the wrongful death and the survival claim and that the same rules that apply in *Drilex* would apply in a wrongful death or survival situation.

HANKINSON: A wrongful death action is a statutory cause of action in which the legislature has designated certain beneficiaries to recover particular kinds of damages as a result of someone's death. Under your interpretation in the way the application of this interpretation would work in this case, essentially one beneficiary could recover damages in their own behalf, walk away from the lawsuit and absolutely preclude the other beneficiaries from recovering what they are entitled to do

under the statute. How do we reconcile the legislature's obvious intent by the plain meaning of the wrongful death statute with how you would have us interpret the comparative responsibility statutes?

COOPER: Two points I would like to make. First, it is true that in the wrongful death statute the individual statutory beneficiaries have their own claims. But they are derivative claims and this court has held on numerous locations that those claims are derivative. For example, if the decedent was greater than 50 percent at fault, it bars any recovery by the statutory beneficiaries.

HANKINSON: But it's derivative of the claim of the person who died, not of the co-beneficiary. The derivative nature flows from the death of the person who then gives rise to the cause of action. It is not derivative of a co-beneficiary.

COOPER: The same argument could be made in *Drilex*, and that is, that Texas - this court has recognized sort of a statutory, a common law right to loss of consortium where there has been a family member severely injured. That is not the family member who's injured cause of action. It belongs to the individual child, spouse, or whatever.

HANKINSON: There's a fine difference here in that under *Drilex* we were dealing with common law. Here, we've got a statutory cause of action that the legislature has provided for certain people. So actually what we're having to do here is reconcile two statutory provisions. And that's what I'm trying to understand because it seems to me that you'd probably even have to admit, I would think, that it would be very unfair for one beneficiary to walk away with the entire recovery and leave the other beneficiaries with totally incapable of recovering what the legislature said they should be entitled to recover. Would you agree that that's an unfair result?

COOPER: Again, two points. One of the things this court said in the *Drilex* case is, there may be some harsh results that are occasioned by this, but that's the way the legislature drafted it. Second, the fact that you have a statutory cause of action as opposed to common law, again this court has held on numerous occasions, that what the legislature giveth, the legislature can taketh away. But third, and I believe this is the most important thing, what we are arguing, what we propose in our brief would eliminate that situation.

HANKINSON: Do you agree with me it's an unfair result?

COOPER: If someone who has damages from a purely justice - yes, that would be an unfair result.

HANKINSON: If there is a way for us to attach the meaning to the comparative responsibility statute without abrogating the rights of anyone to recover under the wrongful death statute, then isn't that the approach that we should take?

COOPER: Again, the same thing would be true in *Drilex*. If you have one child who

settles for a lot of money in which might cut off the rights of the rest of the family, you could argue the same thing: that would be unfair, that would be harsh as well.

HANKINSON: But a factual distinction that your opponents make to *Drilex* is the fact that in that particular instance all of the claimants were still before the court. And they use that as the means to distinguish *Drilex* and to attach meaning to the language in the statute. Would you respond to that argument why that's not a distinction with a difference?

COOPER: That is in my opinion the only distinction that exist between this case and the *Drilex* case, and that is, does the claimant for whom you're seeking credit for, the settlement payment, have to be a party at the time of submission? And again in *McIver*, Joy McIver was not a party at the time of submission, but the Houston 1st CA held "that nonetheless, what monies she received would be credited against her daughter, Lori Cranes' recovery in that case." Second, and we've supplemented our brief in the *Proffit* case which was decided in the last month or two by the San Antonio CA, you had the parents who had a separate wrongful death claim in a separate lawsuit who were never parties to the lawsuit involving the spouse, the estate, or the children and the SA CA held "that nonetheless there would be a credit." Now what I think the solution to this is, and this is what we put in our brief and the one that I've given the handout is, and that is, the simple solution is you go ahead and the nonparties submit their damages; add them all together; subtract out all of the damages which are the settlement credits; and then you divide what's remaining among the people who are still remaining in the lawsuit.

ABBOTT: Which specific statutory language do you reply upon for submitting the settled party who is no longer a part of the lawsuit?

COOPER: There are a couple. First in 71.010, the Civil Pract. & Rem. Code talks about wrongful death claims and envisions in that statute one submission for the entire claim. Texas, and this court has long held that...

ABBOTT: Looking under §33.012, what specific language under there?

COOPER: There is no specific language under there. But the legislature has authorized this system in other situations as well. For example, before 1987 this court in *Otis Elevator v. Russell*, said you had to figure out your damages in order to recover them so you could look at whether or not punitives were excessive or not. Then this court came back in *Wright(?) v. _____* in 1987 and said, "no, that's superfluous, we're not going to require them." However, the legislature has come back since *Wright(?) v. _____* in 1995 and made the punitive damage statute apply to worker's comp. wrongful death cases and requires now that there be findings of for example, economic losses, _____ losses _____ . And there are other situations for example, this court has not addressed the situation but at least one CA has in *Wynne v. Towing(?)* dealing with a medical malpractice cap. The question was if you have some settling defendants and the remaining defendant

is subject to the cap, the court said you have to submit or the plaintiff is entitled to request submission of the settling defendants in order to increase the amount of cap, which benefits the plaintiffs. This issue has not been addressed by this court. However, I think there is more than ample authority by analogy that would allow this procedure to be done. And I think it avoids the unfair result that Justice Hankinson referred to. And again, what I have in the handout you have three situations: 1) plaintiff 3 is the settling party in all of them and one is where he settles for the exact amount awarded by the jury; 2) where he settles for an amount less than what was awarded by the jury; and 3) where he settles for an amount in excess of what was awarded by the jury.

This method, I believe, does at least two things: 1) it gives some protection to the beneficiaries who are still in the lawsuit; but 2) it also ensures that the defendants are going to receive their credit of the settlement which was one of the goals and one of the policy issues that was issued by this court in the *Drilex* case.

HANKINSON: But in this particular instance, you have a defendant who settled that particular party's claim, not the other's claims under the wrongful death statute.

COOPER: The hospital settled with Mrs. Walker and then dismissed the remaining - well actually it paid \$10 for each one.

HANKINSON: But isn't that a distinction though, the fact that we have someone who has brought their peace with the defendant and gone their way? And wouldn't it be okay for a defendant to decide to settle all the claims of a particular plaintiff and send them on their way?

COOPER: Absolutely. And what I'm saying is, it's to the plaintiff's benefit if they want to have the settlement credit apply to a larger number to have the settling plaintiff submit it as far as their damages are concerned in order to allow them to recover more actual damages.

HANKINSON: What is wrong with the interpretation given to the statute by the Austin CA that looks to 33.012(b)(1) and looks at the language which says, that the reduction shall apply to only the settling claimant's damages? It seems to me that's specific language the Austin court hung its hat on and that your opponents do today. I know you've come up with a different idea, but they hung their hang on some specific; what your response to that?

COOPER: The primary basis for the Austin CA decision was, and if you think of it as a hub and the spokes of the wheel, you have the decedent here in the middle and then you have the wrongful death beneficiaries on the spokes around there. What the Austin CA said is, you cannot put them altogether. You have to look at each separate wrongful death beneficiary in conjunction with the particular decedent. And again, I believe it's inconsistent with the literal language of the statute; and 2) I believe that it's inconsistent with what this court held in *Drilex*, because you can make the same argument that is, you have the injured party and then you have the wife and kids around there, and if you applied the Austin court's rationale, then *Drilex* would not have been decided the way it

was. Rather you would have had to look at for example the son and the injured party, the wife and the injured party, the daughter and the injured party and you would have had four or five or six different claimants and that was not this court's holding in *Drilex*.

HANKINSON: So 33.012 talks about a settlement: if a claimant has settled with one or more persons, then the court shall reduce the amount of damage to be recovered by the claimant.

COOPER: Right. And this court held, the claimant in *Drilex* included the whole family. This court held that the term "claimant" encompass the entire family. And that's why I think the CA's decision cannot be on its conceptional basis reconciled with this court's decision in *Drilex* because otherwise you would have had to split up each claimant in *Drilex* in order to reconcile it with what the CA has decided.

I think also in this case we have the issue of the fact that Mrs. Walker, the one who settled and nonsuited her claims, was a party to the lawsuit. And again, if you look we believe at the statute as a whole, there are certain parties: the defendant, a settling person, and a contribution defendant all require that you be a party at the time of submission of the case to the jury. There is no requirement with respect to the term "claimant." And this court in *Laidlaw v. City of Wilmer* held that where you have a statute and you have certain terms which are limited and other terms which are not limited, you don't apply that same limitation to the terms that are not limited. And we believe that that's what plaintiffs in this case are trying to get this court to do.

ABBOTT: Why doesn't the language in 312 that says, "the court shall further reduce the amount of damages to be recovered by the claimant with respect to the cause of action", not specifically limit your ability to reduce the amount concerning Mrs. Walker?

COOPER: Because this court in *Drilex* held that the term "the claimant" encompass the injured person: his wife, kids. It's a _____ term not a limited term.

ENOCH: It seems to me that it would not be a viable distinction on whether or not the settling party was a party at the time of the verdict or not because the solution would be for a defendant anytime that they were faced with one defendant who has settled that was a family member is just to make them be a plaintiff against their will. You just would add them. And it seems to me it doesn't solve the issue.

COOPER: The persons who would benefit by adding the settled plaintiff back and including them in the charge would be the plaintiffs, not the defendant. Because again under the format that we're suggesting it would raise the amount of damages from which the settlement credit would be subtracted. And so it would be beneficial to the plaintiff to have the settling plaintiff added back in.

Also there were four concerns that were addressed by counsel in the brief.

One of them was, well the second wife scenario, it addresses that. The medical payment scenario, it addresses that. Also if you settle out with the best looking plaintiff or best witness plaintiff, it addresses that, because their damages can still be submitted. This solution I believe addresses every single argument that has been raised by the plaintiff in their brief.

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RESPONDENT

LAWYER: I think Justice Hankinson hit right on the issue, and the issue is, whether or not this court will do away with approximately 100 years or more of wrongful death law in an effort to construe a statute where the wrongful death implications were never mentioned by the state legislature.

I challenged them at the previous argument to come forward with any statement by the legislature that when they enacted 33.012 or 33.011, that they meant to change this entire body of law and make these separate claims of each wrongful death beneficiary into one lump claim.

OWEN: The statute 33.001(1) talks about the death of another person. And it talks about that claimant shall include both that person and the dead person and the party seeking recovery. We know that the decedent doesn't have a cause of action. So what does the statute mean when it refers to death of another person?

LAWYER: From the very beginning of the wrongful death statute, Texas courts have construed it to be a derivative claim of the dead person. Just as Justice Hankinson suggested. In other words, if the dead individual was more than 50% negligent or back in the old days contributory negligent at all, it would foreclose a claim by any of the beneficiaries. And that is the purpose for it in the statute too because it relates back to 33.001, which says, If the claimant is more than 50% responsible, you don't get anything.

OWEN: But the use of the word "claimant" is not limited to comparative responsibility. It's also used in terms of the settlement parts of the statute. What did the legislature mean when they used the words "death of another person" in connection with settlement credits?

LAWYER: I've got some exhibits because I can't explain without pictures. What we have is Clifton Short who died; and then we have the wrongful death beneficiaries as well as the representative of the estate. The statute, 33.011 says, "in an action in which a party seeks recovery of damages for the death of another, the claimant includes both that other person and the party seeking recovery of damages."

OWEN: Clifton Short can't seek damages?

LAWYER: That's right. Assume for me he is in a car wreck instead of a medical malpractice case like this. And before he died he settled with the automobile driver that was negligent on the other side. After his death, the family discovered that the seatbelt was in fact defective and that's another reason why he passed away. The family members then bring a wrongful death action against the seatbelt manufacturer. In that case, the statute says, "that if Clifton Short while he was alive received a settlement, it would apply against all of the other wrongful death beneficiaries..."

OWEN: But that's when he was still a claimant. Now he is dead.

LAWYER: But as it says, that each one of these people with Clifton Short is a claimant.

OWEN: But there is no Clifton Short. Back to our facts. He did not make a claim before he died.

LAWYER: That's exactly what the difference is between this case and *Drilex*. In *Drilex*, Jorge Flores was alive and making a claim at the time of submission to a jury. In this case, if you had Jorge Flores - and I will tell you truthfully and honestly, I cannot tell from the opinion written by Justice Abbot of whether or not it was even important to you how the case actually settled. Because it recites that it was an agreed judgment. Now to me what that means is there was a settlement and the court had to approve it because some of the children were minors. But it does not say in how the original settlement was worked out. In other words, did the settlement agreement say, we're going to pay the plaintiffs x number of dollars and the court then just subsequently distributed the money, that is a distinction. Because in this case, the only evidence before the court was there was one settlement agreement and that was between Dorothy Short Walker and HCA. And then there was the \$10. But in the context of what you asked, then each one of these is a claimant under the reading of the statute.

Now Justice Baker when you wrote the *Mobil Oil* opinion, you said that, when there is a settlement covering some or all of the damages awarded in the judgment §33.012 required the TC to reduce the judgment accordingly. In this case, what you have is if the claimant - this is 33.011(2) and here it would be Jorge Flores along with each individual family member has settled with one or more persons, the court shall further reduce the amount of damages to be recovered by Jorge and each one of the individual beneficiaries, or derivative claimants in that case. And because they all received money by the judgment if in accordance with y'all's view in *Mobil Oil* it would mean that that entire amount has to come back. In other words they are all related because he is still alive.

Now in the wrongful death context, that just doesn't work. Because as you pointed out, he no longer make the claim because he is dead. He cannot make the settlement. Therefore, each one of these is a claimant and there is nothing in the middle to connect them. There can be no award in the judgment unless he would have settled before his death and that certainly isn't the case here.

ABBOTT: What then would be the purpose of them adding the wrongful death language in 33.011? What's the effect of that?

LAWYER: The effect of that is to allow each TC to reduce the amount of percentage of fault to each of the beneficiaries to whatever the deceased individual is negligent. For instance, what it says is that Clifton Short - say Clifton Short was 20% negligent, you have to say that they are both...

ABBOTT: There is nothing in here about percent of fault. This is a reduction in the amount of damages.

LAWYER: Right. For credit. But you have to go back. What we are talking about now is solely the definition of claimant. Claimant is used in 33.001, 33.012 in each one of those. And 33.012 all it refers to is "you shall reduce the amount of damages awarded to a plaintiff by a settlement from the claim."

ABBOTT: Under your interpretation of 33.011, there really is no reason for the legislature to have added the words "death of another person?"

LAWYER: I must not be explaining it right because I do think that's important. But I think it's important for another reason. In other words, they defined claimant in that way so that in 33.001 it says, "a claimant can recover only if his negligence is less than or equal to 50%." Now in the wrongful death context very seldom are any of the wrongful death beneficiaries going to be negligent in and of themselves. There are cases where that could happen. But what they wanted to do is to make sure that you counted this negligence, that is of the deceased, as imputable to the beneficiaries. That's why they make them the claimant, so that if the claimant's negligence, the claimant being both of those negligence together, operates to reduce the award of each one of the beneficiaries. That's why claimant is defined in that way and you can also look at 33.012(a), which the first part which says, that if the claimant is not barred from recovery under 33.01, the court shall reduce the amount of damages to be recovered by the claimant with respect to a cause of action by a percentage equal to the claimant's percentage of responsibility. What the legislature was saying is, you consider these a claimant when you're fixing a percentage of responsibilities; therefore, you reduce by the say 20% negligent, you reduce it by 20%." All the way around.

Now what they are arguing is that this equal claimant. That whole circle.

HECHT: In your view in Drilex, if one of the children had settled and nonsuited, what would have been the effect - how would the settlement be credited? The same way you are arguing here?

LAWYER: With respect to that individual, if you take my view that is that if someone settled is no longer part of the case, then they are no longer a claimant. And under Justice Baker's

writing in *Mobil Oil*, which I think everybody agreed on this court that was sitting at the time, is you only - when there is a settlement covering some or all of the damages awarded in a judgment...

HECHT: So if one of the family members, one of the children had settled in the *Drilex* case, then the credit would only be given to any settlement received by the people that are still in the suit?

LAWYER: That's correct.

HECHT: We said though, we must view the entire Flores' family as one claimant. But you say that's just because they were all still in the case?

LAWYER: That's one reason. And it was also because the individual whose injury were the basis of the claim was still alive and capable of recovering under the judgment. Clifton Short could not recover under the judgment. I mean this court has said, there is no such thing as a _____. An estate party you have to bring it to a personal representative just for the survival client. From 1890 in *Nelson v. Galveston RR* this court said, hey, even one of these beneficiaries have a separate claim that only applies to that individual. The reason that it becomes different in addition to the fact that they are gone is that in as I said, I don't know what the settlement agreement in *Drilex* provided, if it was a whole settlement. In other words, in your situation if one of the minors if it just said, we settle with the plaintiffs for \$200,000 and then the court awarded it all to one of the minors, and that minor went away with all of her claims, then I wouldn't agree. I would say that that does apply to all of the claimants.

ENOCH: You make a distinction between *Drilex* and this case by the fact that Flores was alive in *Drilex*. But if all of the claims are derivative whether it's a wrongful death or it's a personal injury claim, your argument seems to apply just as well to Flores as here. Each of the people who had a derivative claim: loss of consortium, loss of parental support and all of that, even if Flores is still alive is identical to the claim that the family has here in Clifton Short's death, which is loss of consortium and loss of parental comfort and solace. So it seems to me the damages being awarded are identical. The only thing that's missing is the individual damages that might go to Mr. Flores that would not go to Mr. Short except the estate is entitled to get those kinds of damages. If that's not really a distinction don't you really say *Drilex* somehow was decided wrong?

LAWYER: No, I struggled. I will admit to you. I struggled to make a distinction with *Drilex*. It perhaps has something to do with the fact that real thrust of the *Drilex* case involved the admissibility of an expert's opinion. I looked at the briefing on that case. It was pretty shallow on this issue. I also looked at the *Abrams McIver* case that the Houston CA has decided in which Justice Abbott cited to in his opinion, and I don't think that has any application to this case. Because in that case there was only one person claiming on behalf of one injured person. So, by definition that is one claimant. But it's totally different in this case when you have these multiple claimants. In order to read the statute the way that they say suggest, you would have to read "in an action in which a

party seeks recovery of damages for the death of another person, claimant includes both the dead person and all of the parties seeking damages on behalf or through that dead person.” And that simply is not the case.

HECHT: Do you agree that petitioner's suggestions do remedy the apotheosized inequities in the statute?

LAWYER: No, I do not.

HECHT: Why is that?

LAWYER: The whole basis of settlement is to stop because of _____. People make settlement decisions based on a variety of reasons. If you say that you're going to be settled but still be a party it may do away with the incentive to settle entirely. But more likely what it will do is do away with the incentive to be part of the case and cooperate to the extent that you can. For instance, take the scenario of a second wife with the first children from a deceased husband. Say that the second wife settles and the reason for her settlement is that she wants to get ceremonial remarried again. Now the children would have to be burdened by that settlement and the fact that she has ceremonially remarried would affect the way our society looks at her lost claim. But the sole reason that she settled was so that she would not have to expose her claim for that. So I don't think it remedies anything. And it goes contrary to everything that this court has said about the effect of settlement and there is no provision in the Tex. Civ. Pract. & Rem Code for submission of any settling plaintiff. There is authority for the settling defendant to establish the joint several liability angle. But there is just simply nothing to support this remedy. And the reason they came up with this between the Austin CA and now is because these scenarios that I present to you if the court does what they want are real and they are harmful.

PHILLIPS: Let's suppose everything you have said is right. Why shouldn't a TC or any court that has to apportion this look at what actually happens to the original settlement? In this case the \$200,000 of which \$10,000 went to each of the five. Why shouldn't those payments be taken into account and this treated as \$10,000 settlement for each of the people who received the money?

LAWYER: There are two ways you can do that. One is statutorily and that's what we are arguing here about. I say the statute doesn't do that.

PHILLIPS: Well the statute is silent on that but it also may not presume that somebody who takes money immediately gives it to somebody else. And we've got all the law in Mary Carter cases everywhere else that it's been developing over the last decade or generation to try to, I suppose, put some fairness overlay on our holdings...

LAWYER: I agree with you. And we do not dispute that they had the ability to go to that TC and to prove that this was a sham as they said 500,000 times in their briefing. They had the

ability to put on evidence. They had the ability to call Dorothy Short Walker to trial. They had the ability to try to submit here. When they sought a credit for Dorothy Short Walker settlement, we immediately objected letting them know that this issue was in dispute. They didn't do that though, because at the time of voir dire they chose to point out the absence of one of the children in an effort to make a trial strategy. And if failed. When they appealed to the CA, they failed to appeal some of the rulings of the TC in admitting evidence concerning the issue of sham.

OWEN: Why should it matter if it's a sham? If the money got paid, why shouldn't that just be taken into account?

LAWYER: Well that's the statutory issue. I'm talking about the issue of should a court always be allowed to protect whether or not the agreements made in its court were not a sham. And that always has been the case. I say that a court always has the ability to discover the true nature of the claim. But the reason they say that this is just a statutory case is because they dropped the ball on the appeal on that issue. So it's not before us. And it certainly is the entitlement of any defendant to go into the TC and say, Hey this is not fair, and here is why. But they did not do that and they dropped the ball in the CA. It was a factual inquiry. They not bring the facts forward to the Austin CA, and that issue was decided against them and the factual inquiry part of it is not before this court.

Don't change the statutory part of this argument because they failed to appeal on the factual part of this.

ENOCH: Describe to me going back to the statute when you're talking about Drilex, - suppose the second wife has some concern about what the evidence might look like if she doesn't settle, and so she chooses to settle. Now she settles for some amount of money and the defendant pays some amount of money. Why should not that affect the remaining claims of the remaining heirs under wrongful death?

LAWYER: Because that is not the damage of the other individual beneficiaries. Presumably a defendant is only going to pay an individual plaintiff the damages that are warranted to that individual plaintiff for those damages. If they pay more than that, then that's just second guessing.

ENOCH: So your argument in this case is Dorothy Short Walker got some sort of amount of money in settlement that the hospital based on its understanding of the case felt was her damages. That's all she got was what they thought reasonably settled her damages.

LAWYER: All I can tell you is that in this record, the only evidence of what was sought in that settlement is the settlement agreement itself. As this court has said, is the premier evidence of what was agreed.

ENOCH: They would evaluate their case based on the person who they are going to

settle with, opportunity to gain more than that say at trial?

LAWYER: Exactly.

ENOCH: And so there would be no basis to define claimant to be anybody other than the individual claimant who is tied to the person who had died?

LAWYER: That's right.

HANKINSON: You say you struggled with Drilex. Is it necessary for us to disavow any language in Drilex to reach the result that you are talking about in interpreting the statute, or does Drilex stand under your analysis?

LAWYER: I can answer that in two ways. And the first would be, if I don't know enough of the facts of Drilex and the manner in which it settled as I described whether or not it was a general settlement subject _____ divided by the court, then clearly it is not in conflict if you rule in my favor in this case and maintain Drilex as it is. However, if you choose to just accept my interpretation and there is no difference in the manner or method of settlement, the only distinguishing factor is that Dorothy Walker was not submitted to the jury. If you believe that that distinction as we've argued is sufficient to make her not a claimant subject to the 33.012 statute, then it is consistent with Drilex. If you reject that and the only thing left is that Dorothy Walker - if you say she was - just because she wasn't there - doesn't mean she wasn't a claimant, then I think that the only distinction is this is a wrongful death case and that was not. And you will have to write it in the manner in which I know that your intellect will allow you so that everybody would accept it.

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REBUTTAL

COOPER: The question, Do you have to overrule Drilex? I believe you do.

HANKINSON: Or disavow some language perhaps.

COOPER: I think you do. I think it's unquestionable that Mr. Short - they say he didn't have a cause of action - yes he did. That's the estate's cause of action. This court in _____ v. *Lavender*(?) said, Under the survival action it's the damages the decedent could have brought had he lived. So, yes, he has a cause of action. Second, if you look at Mr. Flores here and his family what plaintiff's counsel argued is you have to look at each one separately. That was argued in *Trilex*, and this court said, If the legislature had intended that each of the parties seeking recovery for damages for the same person be treated as individual claimants it could easily have written the statute as follows: In an action in which a party seeks recovery for damages for injury to another person both the other person and the party seeking recovery of damages are claimant. And the court noted. Instead, the legislature provided that claimant includes both the other person and the party

seeking recovery of damages.

ENOCH: Even the way the statute is written, the argument is that Mrs. Walker would not have received anything from HCA more than what it evaluated she would get as a damage item if the case were tried. Do you agree that that's how the defendant would have settled that case with Mrs. Walker? They would not have paid her anymore money than what they thought she would be awarded at the time of trial.

COOPER I totally agree with that. One of the things this court in *Drilex* and the Houston 1st court said in *McIver* is, the reason we have the language that we do is so we don't have to go through all these mini trials on whether or not it's a sham or subterfuge.

ENOCH: What were the damages at the trial that were awarded? Were they awarded based on what Sam and Patricia Short's damages were or were they awarded on something else?

COOPER: The damages that were awarded at the trial were the damages _____ by every person carving out the _____ Short Walker. Everyone else was submitted...

HANKINSON: They were submitted individually with a finding as to each one individually. So they were not grouped together in any way.

COOPER: Just like the *Flores* case. Now counsel said, we have not shown any indication there was an intent by the legislature for this to be the law. And again in our brief under the co-construction act, the legislature said, You look at three things. One is, you look at what the old law was. If you go back to 22.12(a), you look at the definition of claimant and it only meant the person seeking recovery as a plaintiff, counter-plaintiff, cross-plaintiff. When they passed this statute in 1987 they lumped a bunch more language onto it. And the reason they did was because what the court found in *McIver* and what this court adopted in the *Drilex* case was, it was to prevent manipulation of settlements. That was the evil which the legislature sought to cure when they amended the definition of claimant in 1987. So I think there is a fair, clear direction of what the legislature was trying to do when they passed this statute in 1987 and greatly expanded who was a claimant from old 22.12(a).

We've got some illustrations that were attached in our brief to show what can happen and why the legislature drafted the statute as they did, to prevent TC's from having to go through all these hearings on whether or not there's been an attempt to manipulate the settlement credit. And again, as far as whether or not we showed a sham or not, I don't think we have to. Because I think this court in *Drilex* and the *McIver* court said, We're never going to get to that, we're not going to digress, go down that rabbit trail, we're going to credit everything that's received against the total amount received, awarded to the family.