ORAL ARGUMENT – 9-6-00
99-1056
AMERICAN HOME PRODUCTS V. CLARK

DUGGINS: This is an interlocutory appeal. It presents the case of 8 women from Utah, each of them have formally admitted that she has not ever set foot in the State of Texas, and each of them has nonetheless _____ joined in Johnson county _____ litigation off Linda Gallup, a Johnson county resident, whom each of the respondents has also formally admitted she has not met.

None of these respondents were prescribed these drugs in Texas, purchased them in Texas, took them in Texas, or received any medical treatment for their alleged injuries in Texas.

ENOCH: Let's assume all that's true. A plaintiff just comes to town and sues several defendants but they just pick someone off the street to sue who lives here. And that person concedes that they live here, and so now you've got your lawsuit. So now you have an issue of, can they prove liability? Can they prove causation? And of course, they can't prove any of that. Can you bring that up on an interlocutory appeal that they sued them for the sole purpose of getting venue in this county?

DUGGINS: If it is a multi-plaintiff case, yes, you can.

ENOCH: By claiming that it's an improper joinder?

DUGGINS: You can attack the joinder and you...

ENOCH: But the plaintiff didn't join anybody. The plaintiff just has sued several defendants and they sued a defendant here. It's only one plaintiff bringing multiple defendants. And so what you're saying is any one of the defendants could come in and say you improperly sued that defendant under the joinder?

DUGGINS: No. If it were a single plaintiff case, a single plaintiff coming in and suing somebody off the street, no that's not a _____.

ENOCH: So that's a single plaintiff. Suppose you have 2-3 plaintiffs who all independently sue this defendant. Can other defendants come in and argue that that's an improper joinder in order to address the venue question?

DUGGINS: Yes, they could, but they would have to do it by attacking the joinder of the plaintiffs in the case, because that is what this statute addresses: multiple plaintiff cases.

ABBOTT: Which of these plaintiffs cannot independently establish venue in Johnson county?

DUGGINS: None of these plaintiffs can independently establish venue except for the Johnson county plaintiff who sued her prescribing physician.

ABBOTT: Which of these plaintiffs are suing that same physician?

DUGGINS: None of them. The 8 ladies we have before you in this case are just the tip of the iceberg that we're looking at.

BAKER: Well does that make any difference to this lawsuit and this issue?

DUGGINS: No, it does not make a difference for the resolution of this case.

BAKER: Then let's see if we can resolve this case under this statutory construction issue. What I'm concerned about is, do you agree that an order under §15.002 cannot be interlocutory appeal?

DUGGINS: I do not agree in a multi-plaintiff case.

BAKER: Where does it say in 15.002 that a multi-plaintiff case is handled differently for appeal purposes?

DUGGINS: It does not say that in 15.002. It says that in 15.003, which is a later and more specific statute directed to multiple plaintiff cases.

GONZALES: But that's only if you're dealing with the issue of joinder.

DUGGINS: Yes. And that's how we got here. We attacked the joinder of these women from Utah in this case. We assert that they cannot _____ under this statute. And we asked for their claims to be dismissed for improper joinder or, alternatively, transferred to a proper venue.

ENOCH: You said these ladies from Utah did not sue this doctor in Johnson county?

DUGGINS: The doctor is named as a defendant in the lawsuit. It's just one petition. The only reason he is named, the only factual allegations against the physician in the lawsuit are that he prescribed diet drugs to Glenda Gallup, the Johnson county resident. None of the out-of-state plaintiffs alleged any cause of action of this physician.

Our challenge to joinder was overruled by the TC.

HANKINSON: If you cannot bring your case within §15.003, then the CA had no jurisdiction to consider the denial of your venue motion, correct?

DUGGINS: Correct.

HANKINSON: Under §15.003, a TC is required to make certain determinations that were the subject of this court's opinion in *Surgitek*?

DUGGINS: Correct.

HANKINSON: And aren't those the very determinations that the CA in subsection (d) is expected to review in an appeal from a §15.003 determination?

DUGGINS: The CA is expected to review whether the joinder or intervention is proper.

HANKINSON: Right. That's under section (d) where the legislature has prescribed what the CA must do during the course of its review.

DUGGINS: That is correct.

HANKINSON: Do we have an order in this case that the CA could review under §15.003(c) as the statute prescribes?

DUGGINS: We do have such an order.

HANKINSON: Do we have an order that says that the TC did not make a determination under 15.003, and instead decided the venue issue under 15.002?

DUGGINS: We could appeal an order that generically says your motion to transfer venue and your motion to strike joinder is overruled.

HANKINSON: And then the CA sent it back to the TC for clarification and in that particular order doesn't the order say that the determination was made under 15.002 that venue was proper and that the TC did not make any determination under 15.003?

DUGGINS: The second order which we presented as error in the first place does so recite.

HANKINSON: If it says that, that the TC made no determination under 15.003, then what can the CA review when its appellate review is specifically set out by the legislature in 15.003? I'm just trying to figure out how to get where you want us to go in light of that prescription.

DUGGINS: What the CA reviews is precisely what the statute tells it to review: whether

it's a joinder or an intervention it's proper based on an independent determination from the record. Now this statute lets multiple plaintiffs intervene or join one of two ways.

HANKINSON: So if the TC does not issue a decision under 15.003, then you're saying under 15.003, the CA in the first instance can issue a ruling based on that?

DUGGINS: Yes, I am. That is because this is a purely legal issue. It is done based on the record. It is by the very terms of the statute an independent review of the record, and it is by this court's *Surgitek* decision, a de novo review.

HANKINSON: So you are appealing from a failure to rule under 15.003 and asking us to hold that the CA in the first instance can make a 15.003 determination as part of its appellate review?

DUGGINS: We appeal from a 15.003 decision. All the evidence in the TC is 15.003 evidence. There is never a single contention made in the TC that any one of these plans could show proper venue.

HANKINSON: I understand that that's your contention, that you challenged the CA's decision to send the matter back to the TC for an additional order. And I know you don't concede that point. But assume with me that that's proper. I'm just trying to understand how it is that under those circumstances the CA has jurisdiction to review this order. Is it your position that when the TC explicitly says, "I am not ruling under 15.003, because I find venue proper under another provision", that the CA's appellate jurisdiction includes the ability to in the first instance make a determination under 15.003?

DUGGINS: In a multiple plaintiff case in which joinder is challenged? Yes, that is our position.

HANKINSON: So in fact it's not really appellate review. It's acting almost as the TC in the first instance.

DUGGINS: It is de novo review as you held it was in the *Sergitek* opinion. The reason that that is our position, and the reason that that has to be the law if this statute is to be effectuated is, you don't go forum shopping for the most unbiased court and level playing ground available if the statute can be avoided, if the interlocutory appeal can be avoided simply by having a client trial judge sign an order finding proper venue in the face of all reality.

O'NEILL: Isn't that a legislative call? If that's the scheme that they set up that even if there's error we can't correct it. Couldn't they have more clearly made an exception for multi-plaintiff cases? Wouldn't that have been a pretty easy thing to do without all this sort of statutory meandering?

DUGGINS: It is a legislative call. And this is what they did. The legislative intent on this statute is just as clear as a bell. In the senate debate just before they passed the statute that became 15.003, Senator Sibley spoke to Senator Montford who was the sponsor of this bill. And the exchange is "You know we had an event down in S. Texas where we had something like 2,000 out-of-state plaintiffs who all piled into one place down in Eagle Pass. Would this put a stop to that?" Senator Montford replied: "It sure does Senator. I think it will stop forum shopping. I think that is an abuse in the system that must be addressed, and that clearly is the intent of this bill." The question before this court, I believe, is whether the legislature...

O'NEILL: Clearly they intended this as a joinder and intervention statute. But did they intend this to be a backdoor review of all venue determinations under 15.002 if there is more than one plaintiff involved? That's your argument, right?

DUGGINS: That is the argument. It's not a fact or review either. Look at what this statute says. It starts out in subsection (a) by saying, that if there is more than one plaintiff joined, each has to show independent venue. That's the general rule. If you can't, you may not join or intervene in the case unless you meet these 4 requisites.

O'NEILL: And so that's the starting point is 15.002?

DUGGINS: Yes it is. It is reemphasized in subsection (b). Again, you may not intervene or join unless you show either of two things: 1) proper venue; or 2) those same 4 requisites. (C) provides the interlocutory appeal and provides that the CA is to determine whether the joinder or intervention is proper. To effectuate the legislative intent and to, I think, go by the plain language of this statute to make that determination, you have to determine 2 things: that they show proper venue; or did they meet those 4 requisites. The statute doesn't say that the CA has to determine whether joinder is proper under section (b)(2) to the exclusion of section (b)(1). It doesn't say the CA is to determine whether intervention or joinder is proper under these 4 factors to the exception to the exclusion of the general rule also stated in the same subsection.

ENOCH: To move to .003, do we have to conclude that the plaintiffs from Utah have not sued this doctor in Johnson County?

DUGGINS: You have to conclude that they have not properly pleaded a cause of action against this doctor from Johnson county.

ENOCH: Is that one of the elements that the court can consider on whether this is a joinder or venue determination?

DUGGINS: Yes.

ENOCH: So in .003, one of the elements that the appellate court will look to is whether

or not the plaintiff has stated a cause of action against the defendant that it would otherwise establish venue. That would be one of the elements in the improper joinder?

DUGGINS: That is one of the elements of the de novo review of whether this joinder or intervention is proper.

ENOCH: So if these ladies sued the doctor, but as you say there is no showing that the doctor ever treated them, that would be a factor in determining whether or not .002 - proper venue, or is that a factor in .003 -proper joinder?

DUGGINS: Both. I have to concede that under rule 87, you presume the existence of a cause of action if it is properly pleaded. And so for showing proper venue purpose if you have properly pleaded a cause of action against a resident defendant, you have met that test.

ABBOTT: What's your definition of proper pleading?

DUGGINS: Alleging the cause of action.

ABBOTT: Did they not allege a cause of action for conspiracy among all the defendants?

DUGGINS: They certainly did not. Conspiracy is not mentioned in their live pleading nor or the elements of a conspiracy asserted in their live pleading for _____.

ABBOTT: So what they said in their response is incorrect?

DUGGINS: Yes it is.

ENOCH: The pleading is all identical, which is they go through all the manufacturers, the product, and they get down to the doctor. Your argument is that when they get to the doctor the pleadings only demonstrate the doctor treated one of the multiple plaintiffs?

DUGGINS: That's true.

ENOCH: And you're saying it's not proper joinder because these plaintiffs really don't have a cause of action against that doctor?

DUGGINS: They have not properly pleaded a cause of action against that doctor. And they can't in good faith. They don't have a cause of action against that doctor.

ENOCH: And to move from .002 to .003, the court is permitted under .003 to conclude that there's not a proper cause of action alleged against the defendant that is named?

DUGGINS: Yes. That the party's whose joinder is being challenged have not pled an action against the local defendant, which is improper venue. Otherwise, if you could just pick a name out of the phonebook and stick it in your petitions because it was a local defendant and, therefore, got you proper venue, even if it's a physician who prescribes diet pills every single diet drug case in this country could be in Johnson County Texas or any other of the counties in Texas.

ENOCH: That's the question here, isn't it? The question is, these plaintiffs are relying on the fact that they've named this doctor as a defendant in their lawsuit to maintain venue in Johnson County. And your defense is, you just can't do that. You just can't go and pick someone off the street and name them as a defendant in your lawsuit and avoid interlocutory appeal under .003?

DUGGINS: That is correct. And another important issue is whether you can come up with that theory for the first time on appeal never having presented it to the TC in the first place.

PHILLIPS: Well passing that issue and going just to the first one. If they had alleged that every plaintiff in this case was treated by that doctor, would they have established their venue under 15.002, even if at trial you could show that that was false and maybe proceed with sanctions, etc.?

DUGGINS: Yes, they would have. If they had pled a cause of action against an individual defendant, resident of that county, they would have shown proper venue in that county. And our remedy would be appeal _____ judgment. It is to avoid situations where you have people who have no business in the county _____ one person who does have that the legislature passed this statute in the first place. Its express purpose was to prevent this situation. If you effectuate that intent, the CA should as the statute correctly tells it to determine whether the joinder is proper based on an independent determination of the record.

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RESPONDENT

O'NEILL: Ms. McCally, but for the plaintiff Gallup, what are the remaining plaintiffs' claims against Dr. Raines?

MCCALLY: What the record shows is that the _____ pled specifically in the record on page 29, all of the claims that are pled in the petition are pled against only the defendants that are named. But one _____ I want to raise with the court that shows a specificity of pleading, though it doesn't mention the doctor's name individually, is the one that's on page 29, and it's the misrepresentation claim. Plaintiffs bring a misrepresentation claim that reads: "Plaintiffs bring this claim against all defendants, including Dr. Tupin(?).

O'NEILL: But do you concede that there is no treatment, there was no relationship between the two, you haven't alleged conspiracy? Are you saying that you can just pick out a

phonebook, list the name in there, and if you plead it that way, you can get there?

MCCALLY: I perceive two different questions here, and I think the answer in both of them is, yes. One, I would concede that none of the plaintiffs in this case (in this field) have alleged initial treatment by Dr. Raines. That does not on the other hand mean that the petition does not allege a cause of action against Dr. Raines.

O'NEILL: What cause of action? I guess that's my original question.

MCCALLY: All of the causes of actions are alleged. And that's really all that was before the TC is what the pleadings says.

HECHT: You've got to have some liability theory, you have to have some causation theory and damages to allege a cause of action. How do these 8 plaintiffs have a liability theory, a causation theory or damages against this doctor?

MCCALLY: They have one because they conflict(?) and at the venue proceeding that's all they have to do. If the court is asking me whether they will be able to meet their burden of proof and whether or not this defendant will ultimately be proven to be a proper defendant those are difficult questions I can't answer on this record, because the trial lawyers below didn't have to answer it for the venue. That's what this court has said by Tex. Rule of Civ. Proc. 87.

HECHT: So when the petitioner says you can pick a name out of the phonebook and stick it in the pleadings, you think that's right?

MCCALLY: I don't think that's right, but this court told me that was right in *Wilson v. Texas Parks & Wildlife*. You said that because of the balance that has been struck by the venue statutes when read together, it's not a perfect statute, but that's exactly what happens, is that the potential for fraud in the pleading, mistake in a pleading, anything that causes a pleading to be ultimately not founded is balanced by 15.064, which is an automatic reversible error. As I say this is not perfect venue. But what happened was that the plaintiffs got together and negotiated with the defendants and there were 4 _____ available basically. There was whether or not there would be an interlocutory appeal? There was a question about what the standard or quantum of proof would be at the venue stage? What the standard or quantum of proof would be at the appellate stage at the end of the case if there was no interlocutory appeal? How was any defendant ever going to prove harm? They divided up those 4 _____ these plaintiffs and defendants _____ and _____ negotiated this bill, and the plaintiffs won two and the defendants won 2. And it was a compromise bill that nobody liked. And that's what we're stuck with. There was no interlocutory appeal and a plaintiff need only demonstrate prima facie evidence of the venue facts, because the cause of action as pleaded even petitioner's accept this.

PHILLIPS: And what is your misrepresentation pleading against the doctor?

MCCALLY: When you take the pleading as a whole, the misrepresentation and the facts that are incorporated therein, is that the diet drugs were prescribed, they were distributed into the markets without the disclosure that these were off-label uses. The two different component drugs were individually approved by the FDA, but not the proof for combination use.

PHILLIPS: Essentially your theory is that if my doctor fails to tell me something about a drug he gives me, and you're getting that drug from another doctor, you can sue my doctor for being part of a national failure - sort of seeping out misinformation throughout the community?

MCCALLY: That's not what the pleading says. That's possibly what the proof will bear out. The thing that I need to answer your question with, is that...

PHILLIPS: I'm just trying to test if it's really been pled here - if you have pled a cause of action on the face of this against Dr. Raines. But you're not saying these women from Utah got their medicine from a doctor in Cleburne?

MCCALLY: That's correct.

PHILLIPS: So I'm trying to just to understand and since you're pleading is kind of long help me?

MCCALLY: What I'm saying is that on page 29 of the record it's illustrative of a single cause of action the way it is pled - a misrepresentation against an individual physician - and it's pled as a misrepresentation of material facts about diet drugs that were relied upon by the plaintiffs and that reliance upon the misinformation proximately caused their damages.

ABBOTT: What misrepresentations were made to the out-of-state plaintiffs by Dr. Raines?

MCCALLY: It's not contained in this record nor was it presented to the TC in any form. It would have been an evidentiary question, not challenged by Dr. Raines.

ABBOTT: So there is nothing in the pleadings indicating that any representations were made to the out-of-state plaintiffs by Dr. Raines?

MCCALLY: That's not entirely correct.

ABBOTT: Tell me the exact verbiage in the pleadings indicating that Dr. Raines made a representation to the out-of-state plaintiffs?

MCCALLY: My recollection of the specific representation in the pleading is that false and material misrepresentations were made to plaintiffs. It doesn't say what they were is my point.

ABBOTT: And is there any pleading stating that the out-of-state plaintiffs relied upon any representations made by Dr. Raines?

MCCALLY: There is that same pleading on page 29 that says, "The plaintiffs relied upon the defendant's representations." And that is a pleading that was never accepted to by Dr. Raines.

ABBOTT: So does your case live or die based upon our interpretation of page 29?

MCCALLY: No, I don't believe it does. I think the initial consideration this court has got to determine is whether you can even look at page 29; whether or not you can undertake a review of the TC's 15.002 determination in the face of a statute that clearly says that you cannot.

O'NEILL: So as I understand your argument whether or not there was collusive pleading or false pleading or blatantly wrong pleading and the TC just absolutely erred in the worst possible way, we can't look at it, and that was the compromise the legislature reached?

MCCALLY: That's exactly what I'm saying. You cannot look at it now.

PHILLIPS: What if your venue in Johnson county depended on Dr. Raines being a defendant and the claim of the Utah plaintiffs is that Dr. Raines was less than 6 foot tall. That is something that is clearly recognized as not a cause of action under our jurisprudence. Is that enough? It doesn't specially accept to the claim that he was under 6 ft. tall because in fact he was under 6 ft.

MCCALLY: That would be a very difficult question because the cases from this court and lower courts do not give us a lot of guidance about what is a proper pleading under Rule 87. But I have to say that the cases that do exist would say, "no you could not review that at this point", that the TC is not entitled under Rule 87 to do anything but presume the existence of a cause of action...

PHILLIPS: So there is no reason for him his to specially accept I guess.

MCCALLY: Dr. Raines didn't challenge the venue. In fact, he supported the venue. There is every reason for him to specially accept if he feels that he's going...

PHILLIPS: But the defendants who were not happy with the venue could specially accept as to your claim against another defendant?

MCCALLY: They could.

PHILLIPS: But as long as you're willing to plead some cause of action and name him, that's the end of the game?

MCCALLY: According to your decision in *Wilson v. Texas Parks & Wildlife*. It's the end of the inquiry today on interlocutory basis, the very beginning of the inquiry at the end - that's the beginning of the end of the inquiry at the appeal of the conclusion of the case, because if I bank on my ability to bring that person in as a proper defendant and I am wrong about that, whether because I have deliberately done it or inadvertently done it and a summary judgment is granted during the course of the proceedings, I lose as a matter of law. They need not ever show harm by having it in Johnson County.

PHILLIPS: You must admit based on what you've already told us that it's a high risk proposition to bring this suit in Johnson county for some of these plaintiffs. Why is it so important to be there?

MCCALLY: I can't tell you from this record why it's important to be there. I only know that this court has consistently year-after-year upheld the plaintiff's ability to choose a venue so long as it is a proper venue.

O'NEILL: Let's say that there was no 15.002 motion. It's my understanding your present counsel says there really was, that this was an afterthought. But putting all that aside, let's presume there never was a 15.002 motion and we were only looking at a 15.003 motion. There have been no TC determination under 15.002. We could independently review whether each plaintiff independently established venue?

MCCALLY: Yes, you could if the TC and the CA had made such a decision. After hearing the argument today, I would have to give that caveat. There is no question that 15.003(c) gives the CA an independent review over the TC's decision allowing or denying joinders. So both a plaintiff or a defendant agreed by a joinder decision has the right to interlocutory appeal.

O'NEILL: And aren't we putting form over substance, which is something we rejected in *Surgitek* by saying, "well because the TC ruled under 15.002, it's going to take away that independent review"?

MCCALLY: Actually the opposite. For you to construe the statute as petitioners would have you do so today, is to put that form over substance. The substance of this statute, as you said in *Abel*, is that the interlocutory appeal is designed for decisions allowing or disallowing joinder, not venue. It doesn't matter whether you call it venue or joinder. If it is joinder just by virtue of the fact that the TC in this case denied something that's called a motion to transfer venue and strike joinders (had the word 'joinder' in it), that's form. Substance is that under this statute the only way that the plaintiffs are able to maintain venue in Johnson county is by piggybacking, which is what that statute is designed to prohibit, then and only then, do you have in substance a joinder decision. But that's not the facts before the court today.

HANKINSON: But you agree though that §15.003 is the applicable venue provision for

multiple plaintiffs's suits? Because in the first sentence it talks about what must happen when you have multiple plaintiffs, that each much independently establish proper venue. So it is a venue provision.

MCCALLY: I think even this court in *Abel* has said that it's really not a venue provision, that it is a joinder provision, that the underlying decision must be a joinder decision just as the statute says.

HANKINSON: Then in a multiple plaintiff case, must a TC always make a determination about whether or not joinder was proper?

MCCALLY: In fact, the TC is prohibited under the plain language of the statute if a plaintiff is able to independently establish venue. If a plaintiff has general venue, then the TC cannot go on to the 15.003.

HANKINSON: If the TC should have decided the joinder issue, but didn't, is there any remedy under 15.003 for review of the TC's failure to make a decision on joinder, which is what happened here? We have a TC who specifically says in the order: "I'm not going to decide the case on 15.003 because 15.002 and 15.005 take care of the venue issue." But the defendant asked for a 15.003 determination and you all also during the course of the venue pleading battle that went back and forth, invoked 15.003 and indicated that you were prepared to prove the joinder elements in 15.003. If the TC should have made a determination under 15.003, but failed to do so, which is what I understand Mr. Duggins is arguing, then what remedy or relief does the defendant have?

MCCALLY: I think the only relief that they have is potentially in a case where there is no 15.002 ruling; therefore, there is not a ruling on what is proper venue. The TC did what the statute commanded that they do, which is not reach 15.003 because he did find 15.002. That's the problem with everything that the petitioner has said in this case. They are telling you that in every multiple plaintiff case in which there is even an allegation, even if it is in the alternative that a plaintiff can prevail on 15.003, that there is an interlocutory review. They don't even suggest that a plaintiff has to plead 15.003 before they get an interlocutory review of a 15.002 decision in a multiple plaintiff case.

I'm not telling this court anything you don't know about the floodgates that that would open up. It would merely as the recent decision in *American Home Products v. Adams*, out of the Ft. Worth CA, petition is pending in this court said, "even a car accident with two people, same family members, that's a multiple plaintiff case. If they say that they could sustain venue on 15.002 and the TC agrees with them, under the petitioner's argument, they have an interlocutory appeal in that case. Just because there are two plaintiffs, that can be the law and it's not what the legislative intent was. The petitioner has suggested the legislative history is as clear as a bell on this particular statute; and I couldn't agree with him more. Senator Montford went on in that discourse to say that he did not want this statute, 15.003(c), to return us to the old plea of privilege proceeding.

And he was assured that that was not the purpose because the only decision that was supposed to be appealable on an interlocutory basis was a decision for joinder, and this court reaffirmed that notion in the *Abel* case. You didn't hear petitioner cite any cases, not a single case from any court below, that has gone through _____, because there isn't one.

ENOCH: It seems to me one of the difficulties here is it's pretty easy to envision joinder where venue is for like the *Polaris* case where there was somebody who had the cause of action that permitted to be down there, but the defendant didn't live down there. But where an individual defendant who is in the long string of distribution of a product lives down there, and all the plaintiffs by looking at this case should we decide that if you name the defendant, then you get .002, not .003. It seems to me it produces the abuse is going just the other way, which is from now on you avoid the joinder problem by simply including the individual defendant over which there is venue in that county, not because the cause of action but because the defendant lives there, you avoid the .003 altogether. You just name them which is what happened in this case. Doesn't that produce like a floodgate going just the opposite? There is no appeal of an improper venue determination through the joinder process because the plaintiffs will just simply name the one defendant that lives in that county. Doesn't that create an abuse going the other way, too?

MCCALLY: It certainly would under the way the petitioners have presented the _____ argument. There's one prong, and it's the one that I mentioned before. The only way that there can be an abuse such as you described is if there is collusion between that local venue defendant. That has to be presumed in every one of these cases because the way they argue it never will a defendant stand up and say, "wait a minute, I may be a venue defendant, I may live here, but that doesn't mean I want t be sued by 3 plaintiffs, 5 plaintiffs, etc." Why would a defendant stand by and allow himself to be sued when he feels there's no basis for the lawsuit by any other plaintiff other than the single lead plaintiff? That has to happen in every case for the abuses that you describe to go on.

BAKER: Under our jurisprudence defendants don't have a choice on whether they want to be sued or not. Isn't that correct?

MCCALLY: True.

BAKER: So your argument doesn't really work out because you can't say, Wait a minute, don't sue me because I don't want to be sued. But you can say later on, I need a summary judgment because I'm not liable for anything, but that's not a venue question.

MCCALLY: No doubt about it. But there is absolutely nothing to prevent the venue defendant who filed an immediate(?) special exception for motion for summary judgment. Again, we're not talking about *American Home Products*. They are not saying we don't have a claim against them. They are saying we couldn't file the motion for summary judgment because our venue had to be determined first under the _____ pleadings. The _____ does no hold true for Dr. Raines. If Dr. Raines did not think he was a proper defendant in this case, he could have

immediately filed special exceptions to the petition or immediately file a motion for summary judgment that would put the plaintiffs to their proof as to him. He didn't do that in this case. No special exceptions and no motion for summary judgment.

BAKER: Nor did he contest venue.

MCCALLY: Not only did he not contest venue, he opposed a motion to transfer venue. He's the one who placed his affidavit on file saying he was a Johnson county resident. He believes venue was proper as to this petition, on this record in Johnson County, Texas. And the TC clearly agreed with that. That's the point that we are trying to make, is that for this court to do what the defendants want you to do, the first thing you will have to do is ignore the plain language of the statute and authorize an interlocutory appeal on every multiple plaintiff case for fear that there may be a polluted environment on _____ case. Then in order to get past the second hurdle that they must, you would have to undertake not only a review of the TC's decision that there wasn't a pleading on file, a notice pleading which is all that is required and a venue affidavit, you would have to for the first time in Texas jurisprudence look behind the pleading to see whether or not ultimately that individual would be a proper defendant.

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REBUTTAL

DUGGINS: On the question of whether Dr. Raines should have or could have done anything, I point out that in this record Dr. Raines generally denied the allegations of Glenda Gallup and asked that Glenda Gallup take nothing. That is the only answer he ever filed in this case. He certainly didn't understand that all of these people from Utah he had never heard of were suing him.

O'NEILL: How would your argument prevent us from going back to the general plea of privilege? That was a factor that the legislature considered and what about the argument that this was a compromise to keep from going back to that?

DUGGINS: The argument that she gave you was the history of 15.002, not of 15.003. All that _____ business was on 15.002, which was enacted 10 years before the legislature determined it wasn't working. And in 1995, passed this for the very situation we're looking at.

O'NEILL: That wasn't discussed in the legislative history of .003 at all, whether your interpretation could lead to going back to the days of _____?

DUGGINS: Yes, that's in the legislative history as well. And it's not, and it doesn't because this is a very specific case. Multiple plaintiff cases are extremely expensive for the county to go through, they are extremely expensive for the parties...

O'NEILL: But your argument would support the same result in a two-plaintiff case, and

wouldn't that bring the flood back?

DUGGINS: Yes, it would. In a car wreck case with the husband and wife suing in the same county, if the defendant challenged joinder which would be a frivolous pleading, and then took a frivolous appeal from _____ within 120 days, which is what the CA has to do. There would be sanctions for the frivolous appeal and in the meantime the trial proceedings would still go on in that 120 days because this statute doesn't stop anything from happening at the TC. That is not such a terrible result that somebody's going to bring a frivolous appeal under those circumstances.

O'NEILL: Perhaps it would be for the CA's.

DUGGINS: The floodgates would close up pretty quick. If there is a pleading, an actual cause of action alleged against an individual defendant that is out and out fraudulent, I don't think that's enough to get by this interlocutory appeal. I think that if you have a fraudulent pleading where people from Utah file something that says, I never heard of this man, but he prescribed Phen Phen to somebody else and, therefore, I think I can sue him because not only is he under 6 feet tall, but he shouldn't have prescribed Phen Phen to anybody. If they file that pleading that is fraudulent on its face, I think you can look beyond that as the federal courts do in issues of fraudulent joinders for removal purposes. If there is not under the pleadings and the evidence at the hearing a conceivable basis for recovery against a fraudulently named defendant, then the plaintiffs should not be able to rely upon that defendant for showing that the venue to get to joinder ...

PHILLIPS: No law on that yet, I guess?

DUGGINS: I'm unaware of any Texas case law on that. There is plenty of federal case law, some of which is cited in our briefing.

PHILLIPS: But there are some different considerations in the federal court. Basically if their courts have limited jurisdiction, then they search for ways to flush cases out where a court of general jurisdiction and presume you belong there?

DUGGINS: I do not disagree with that. But Texas state courts are charged to following the legislature's statutes. This statute provides an independent review of whether joinder is proper.

HANKINSON: If venue was proper as to each of these plaintiffs independently, then we never reach the joinder issue, correct?

DUGGINS: If I appeal the joinder decision and the CA determined that venue was proper for each plaintiff, I win.

HANKINSON: My question is, if I have five plaintiffs in a lawsuit and every one of them

were treated by the doctor who is the defendant and he resides in Johnson county, then the venue determination is that each of those plaintiffs independently has established venue in Johnson county, correct?

DUGGINS: Therefore they are entitled to join as plaintiffs in the case.

HANKINSON: But we don't reach the joinder issues presented by 15.003. 15.003 only applies in the absence of independent venue having been established by each plaintiff. Isn't that the way the statute reads.

DUGGINS: I disagree with that. Because the statute not only sets forth that exception that you have just articulated, it also sets out the general rule, you can't join unless you do one of two things: show proper venue; or show the 4 exceptions. You can't intervene unless you do one of two things: show proper venue; or show the 4 exceptions. Those are both the issues on joinder and those are both the issues that must be reviewed de novo in the interlocutory appeal. That is what the legislature meant to do to get rid of forum shopping.

HANKINSON: But subsection (c) of 15.003 does not provide for the CA to review the determination of whether or not each plaintiff has independently established venue. It only provides for review of the factors listed in (a) 1 - 4.

DUGGINS: It does not say that. It says, they are to be independently determined whether the joinder or intervention is proper. It doesn't say only under those 4 factors. To get to that determination, you have to determine whether venue is proper. Consider the case of a plaintiff who can show proper venue, but whose joinder gets stricken anyway by an erroneous TC. That plaintiff appeals. The CA says, Well you could show proper venue but therefore you're not a person seeking intervention who is unable to establish proper venue and therefore we have to dismiss your appeal. That's on the flip side of their argument.

HANKINSON: But the only way that we know whether or not a plaintiff has independently been able to establish venue is by looking at other venue provisions.

DUGGINS: Yes.

HANKINSON: Why isn't that then a decision by a TC under another venue provision that is not subject to interlocutory appeal?

DUGGINS: Because in this limited circumstance of multiple plaintiff cases, the legislature has said you can join one of two ways, and the CA on an interlocutory review you determine whether it's proper under either of those two ways.

HANKINSON: Look at the first sentence of part (c): Any person seeking intervention or

joinder who is unable to independently establish proper venue may take an interlocutory appeal, or a person opposing. There is the limitation on the appellate review that I was referring to, and that's what I'm having a hard time getting around. I want to give you a chance to be able to explain.

DUGGINS: I believe that's simply a description of one of the two ways. It is not a limitation upon the interlocutory jurisdiction for a couple of reasons.

HANKINSON: Doesn't it prescribe Mr. Duggins who may appeal a venue decision and what may be appealed? A person seeking intervention or joinder who is unable to independently establish venue or a party opposing intervention or venue may contest the decision by interlocutory appeal. Isn't that a limitation on the appellate remedy that's provided in the statute?

DUGGINS: I am a party opposing the joinder of 8 women from Utah who cannot show venue. There is no way around that. If that were a limitation on jurisdiction, that plaintiff could appeal. And if that were a limitation on jurisdiction...

BAKER: Can you say what you just said. There is no way around it because that encompasses a review of the merits of the TC's clarified order that said, I decided this case under 15.002 and .005? Your statement can only be made if and when a review of the merits of the TC's clarified order is done by a court?

DUGGINS: On the _____ of record in the de novo independent review in this interlocutory appeal set forth by the legislature.

BAKER: The second part of your argument is, therefore, that's what a CA has to do?

DUGGINS: And that is what the CA's have done. Counsel says there aren't any cases. They have to do it to determine whether joinder is proper. Because showing proper venue is one of the two ways that you get to join. So to determine whether joinder is proper, you have to look first, is venue proper? And if it is not, do you meet those 4 exception?.

BAKER: Cite the cases you say that have said that?

DUGGINS: They have done it. The Eastland court did it in *Burrows v. American Homecase*; the Corpus Christi court did it in the *Lopez v. Gerra* case. The San Antonio court came right and said it in its Masonite case, as did the Tyler court in its 15.003 case. They said review of joinder under 15.003 necessarily entails review of proper venue.