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NO. 03-05-379

RANDY HUGHES, Individually)
and as Personal Representative)
for the ESTATE OF SHILOH)
HUGHES; CLINT ROYSE,)
Individually and as Personal)
Representative for the ESTATE)
OF AFTON HUGHES ROYSE; and as)
Next Friend of JAGR ROYSE;)
WILLIE WATKINS; Individually)
and as Personal Representative)
for the ESTATE OF JOYCE)
WATKINS; SHIRLEY RITCHEY;)
CAROLYN LARGENT; BETTY GENTRY)
and JOHNNY WATKINS)
Plaintiffs,)

IN THE DISTRICT COURT

OF WISE COUNTY, TEXAS

TXI TRANSPORTATION COMPANY;)
AURELIO MELENDEZ; and RICARDO)
REYNA RODRIGUEZ)
VS.)
WILLIE WATKINS, Individually)
and as Personal Representative)
for the ESTATE OF KIMBERLY)
WATKINS HUGHES)

271st JUDICIAL DISTRICT

(MOTION FOR JUDGMENT HEARING, June 14, 2004)

On the 14th day of June, 2004, the following
proceedings came on to be heard in the above-entitled and
numbered cause before the Honorable John H. Fostel, Judge
presiding, held in Decatur, Wise County, Texas:

Proceedings reported by Computerized Stenographic
Method.

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L E G E N D

"Uh-huh" is an affirmative response while

"Huh-uh" is a negative one.

Words, phrases and/or spellings are underscored to emphasize that, while they may be incorrect as they are transcribed in their underscored state, the Court Reporter has transcribed them exactly as the speaker uttered them.

1 P R O C E E D I N G S

2 (Proceedings were had on the
3 14th day of June, 2004.)

4 THE COURT: All right. If we could have
5 appearances, please, beginning on my left.

6 MR. STRADLEY: Mark Stradley for
7 Defendants.

8 MR. STEINDORF: Mike Steindorf for
9 Defendants.

10 MR. TAYLOR: Ben Taylor for Defendants.

11 MR. FORBIS: Chris Forbis for Defendants.

12 MR. KELLY: Dee Kelly for the Plaintiffs.

13 MR. BOYD: Derrick Boyd for the Plaintiffs,
14 your Honor.

15 MR. SIMPSON: Mike Simpson for the Plaintiffs, your
16 Honor.

17 MR. POWERS: Alan Powers for the
18 Plaintiffs, your Honor.

19 MR. WILLIAMSON: Allen Williamson, Guardian
20 ad Litem.

21 THE COURT: All right.

22 MR. BOYD: Your Honor, we're here on a motion for
23 judgment in the Hughes case. I have --

24 I think there's some -- there's a couple of motions the
25 Defense may have, but in our motion for judgment, we've

1 essentially, I think, got two issues, and that's to
2 prove --

3 We went through their objections, your Honor, and I think
4 we've addressed some of them, and then there's a couple
5 of issues left of their objections to our proposed
6 judgment.

7 Number one is, with respect to prejudgment interest on
8 future damages, the Legislature adopted a law that went
9 into effect September 1 of 2003, that basically
10 eliminated the right to recover prejudgment interest on
11 future damages.

12 Our proposed judgment is set up, Judge, we filed the suit
13 May 28th of 2003, so we included prejudgment interest on
14 future damages from May 28th, 2003 to August 31 of 2003,
15 and then had not included any -- from after that date.

16 The second issue, your Honor, is with respect to the
17 statutory cap on exemplary damages. There's a case out
18 of Fort Worth, and we have filed a brief with the Court
19 this morning, the Auld case, which essentially says that
20 the statutory cap on punitive damages is an affirmative
21 defense that must be pled.

22 There's no pleading in this case by Defendant TXI
23 Transportation Company of the statutory cap on exemplary
24 damages, so we have proposed a judgment that -- not
25 include a cap on exemplary damages, which would award

1 \$7,500,000.00.

2 And I asked this morning to see if you all had one. If
3 you all have got one, then we'll agree to it. If you all
4 have got one, then we'll agree to it.

5 MR. STRADLEY: Not with me, your Honor, but
6 I remember amending those pleadings in April, I
7 believe -- rather than March that added that as an
8 affirmative defense.

9 If I could have a few moments before a ruling is made, to
10 look at the Court's file of their last amended answer,
11 your Honor.

12 THE COURT: All right. When you --
13 It would fall --
14 I don't know where that would to fall; certainly not
15 within this probably.

16 MR. BOYD: And we would -- we would agree,
17 obviously, if they've pled to this --

18 THE COURT: You might check with the
19 coordinator. I mean, some -- If she's got some of those
20 documents on her computer where she could maybe help you
21 out there to get it --

22 MR. TAYLOR: And, your Honor, whether that
23 amendment was, in fact, filed or not, the cap is pleaded
24 in the Plaintiffs' Third Amended Petition and Plaintiffs'
25 Fourth Amended Petition.

1 The case they're citing out of Fort Worth is a case where
2 they said that there's fair notice, because the wrong
3 statute was cited.

4 There's also case law, your Honor, out of the 14th Court
5 of Appeals, a Seminole Pipeline case that it's just not
6 an affirmative defense, so the language from that 14th --
7 Excuse me.

8 -- the Fort Worth Court of appeals case, would not be
9 controlling.

10 THE COURT: All right.

11 MR. TAYLOR: We have --

12 In fact, I'm reading from the Plaintiffs' petition, your
13 Honor. This was newly added in the third amendment and
14 it was repeated in the fourth.

15 The statutory cap on exemplary damages does not apply in
16 this case under the provisions of the Texas Civil
17 Practices and Remedies Code, 41.008(c), that's out of the
18 Plaintiffs' own pen, so that issue was joined in the case
19 with our denial, whether an amendment was filed or not,
20 and we objected to their failure to submit a question on
21 cap busting, so I think that's a nonissue.

22 MR. BOYD: Well, if they pled it,
23 obviously, it's a non-issue; but if not, I think they
24 have the burden to plead their affirmative defense, but
25 if they've got the pleading, then it is a non-issue,

1 so --

2 But other --

3 That and the prejudgment interest issue on future damages
4 are the only two issues I think with respect to
5 objections to the judgment, and if they have other
6 issues --

7 THE COURT: All right.

8 MR. BOYD: -- let them present them.

9 THE COURT: We'll hear those.

10 MR. TAYLOR: May I approach, your Honor?

11 We have --

12 THE COURT: You may.

13 MR. TAYLOR: Ben Taylor with Mr. Stradley,
14 and Mr. Steindorf, and Mr. Forbis for the Defendants.
15 Your Honor, the jury returned its verdict in this case
16 May 13th, 2004. Defendants have set their hearing today
17 on a motion to disregard jury findings and for judgment
18 notwithstanding the verdict.

19 The Plaintiffs filed their motion for entry of judgment
20 June 8th, 2004, a third-party Plaintiff -- a third-party
21 Defendant also. We now have a couple of alternative
22 judgments submitted in response to our objections. We've
23 also filed objections which we've set for hearing today.
24 Your Honor, the Defendants have submitted their written
25 JNOV motion and objections to the Court, and we request

1 that the motions -- the motion and the objections be
2 sustained.

3 We do not plan to present all the issues to the Court,
4 because -- unless the Court were to reverse its repeated
5 rulings regarding the Plaintiffs' accident reconstruction
6 expert Mr. Marshek, I don't think the Court is going to
7 grant a judgment NOV in toto and render a take-nothing
8 judgment.

9 Your Honor, without waiving the other points, we won't
10 cover, unless asked about, and with leave of the Court, I
11 would like to focus on just a couple of issues I think
12 deserve the Court's special attention.

13 The first is the issue of malice or gross neglect. I'm
14 going to leave our charge objections for another day, if
15 that's necessary. But, your Honor, just considering the
16 evidence presented, the Court should disregard any
17 finding of malice or gross neglect against TXI
18 Transportation Company and the jury's assessment of
19 punitive or exemplary damages, because there is no
20 evidence at all, much less the statutorily required clear
21 and convincing evidence that TXI Transportation Company,
22 acting through its corporate vice principals had actual
23 subjective awareness of any extreme risk resulting from
24 Mr. Rodriguez driving an 18-wheeler in Wise County or
25 anywhere else in Texas.

1 Plaintiffs have skillfully, but inappropriately inflamed
2 ordinary jurors to find gross neglect by stirring up
3 prejudice against Mr. Rodriguez, because of his
4 immigration troubles and misrepresentations he may have
5 made to the immigration authorities, or other
6 authorities, so he could earn a living in this country.
7 Your Honor, giving the Plaintiffs the full benefit of
8 their evidence, it is not probative on its face of actual
9 conscious indifference to a known, extreme risk of harm.
10 Had it been known, the fact that Mr. Rodriguez being an
11 illegal alien does not prove he is an incompetent or
12 reckless driver, and that TXI Transportation Company had
13 actual awareness of some extreme risk of harm from him
14 driving a truck.

15 With respect, Plaintiffs have invoked prejudice against
16 foreigners as a substitute for the clear and convincing
17 evidence they were required, but failed to adduce in
18 support of their claim for exemplary damages against TXI
19 Transportation Company.

20 Even if the standard correctly in this case were gross
21 negligence, which it's not, the Plaintiffs adduced no
22 clear and convincing evidence of gross negligence by TXI
23 Transportation Company. Findings of gross neglect and
24 exemplary damages and apportionment of exemplary damages
25 should all be disregarded; and at minimum, a partial

1 judgment NOV should be granted ordering that the
2 Plaintiffs take nothing on their claims for exemplary
3 damages.

4 Your Honor, the finding of exemplary damages should also
5 be disregard, because among other reasons, neither Clint
6 Royse, no Jagr Royse, nor any of the other Plaintiffs
7 pleaded a maximum amount, or even any amount that they
8 were requesting for exemplary damages in -- in response
9 to the Court's ruling on special exceptions.

10 We today heard erroneous, hypertechnical arguments about
11 the Defendants allegedly failing to plead the cap; but,
12 your Honor, on the other side of that, the Plaintiffs
13 have not even pleaded an amount.

14 The Greenhalgh case the Court may be familiar with.
15 Its's not cited in our papers, Greenhalgh versus Service
16 Lloyds. That -- That was the first case I argued in the
17 Supreme Court and we lost. That was a case, with a
18 different court, Judge Mauzynad, the majority, but that
19 was a case where in response to special exceptions, the
20 Plaintiff amended and alleged \$100,000.00 as the maximum
21 amount sought for punitive damages. The jury comes in
22 with \$128,000.00. The Plaintiff moves to amend its
23 pleadings; granted.

24 Bob Gammage from the Austin Court of Appeals said, no,
25 that's an abuse of discretion. The Supreme Court says,

1 no, trial court had to grant the amendment.

2 Well, what do we have here, your Honor?

3 We don't have any pleading of any amount of punitive
4 damages. This is a surprise, prejudice, sandbag
5 situation.

6 We didn't even know, your Honor, until the Plaintiffs
7 gave us their proposed charge shortly before the end of
8 the trial, for whom exemplary damages questions were
9 going to be submitted. It turned out just Clint Royse
10 and Jagr Royse. There were other Plaintiffs who had
11 pleaded claims, but we never got the ruling in --

12 Excuse me.

13 -- the amended pleading setting out amounts requested as
14 a maximum amount.

15 Under these conditions, your Honor, it would be a
16 violation of the due process clause, and contrary to the
17 rules regarding pleadings and special exceptions, and --
18 and the Court's order, which we respectfully request the
19 Court enforce.

20 At a minimum, therefore, on this independent reason, as
21 well, we request a partial judgment NOV that the
22 Plaintiffs take nothing on their claims for exemplary
23 damages, as a final alternative, your Honor, and this is
24 in our objections and in our motion to disregard, the
25 statutory cap in Section 41.008(b) of the Texas Civil

1 Practices and Remedies Code must be applied. The
2 Plaintiffs have affirmatively pleaded the nonapplication
3 of that statute that is in issue.

4 The Seminole Pipeline case out of the Fourteenth Court of
5 Appeals, 979 S.W.2d 730, and a jump cite 758-59. That
6 case clearly holds it's not an affirmative defense, but
7 even under the Fort Worth case law treating it as an
8 affirmative defense, here the Plaintiffs affirmatively
9 joined issue by pleading, 41.008(c) and the
10 non-application of the stat of the cap.

11 MR. BOYD: Your Honor, it is in the
12 pleadings, and we just -- so wasn't in our file, so we'll
13 withdraw that part and we'll agree that they can apply
14 the statutory cap.

15 THE COURT: All right.

16 MR. TAYLOR: Your Honor, on the fetus
17 issues, the Court called them "interesting," but did not
18 permit oral argument on our motion for partial summary
19 judgment. That was a motion challenging Clint Royse's
20 claims for the wrongful death of his unborn children.
21 Your Honor, the jury's answers to Questions 8 and 9
22 regarding Twins A and B should be disregarded, and those
23 answers totaled \$400,000.00 should be excluded from any
24 judgment for Clint Royse in this case. With respect,
25 your Honor, it should be Clint Royse's burden to seek a

1 change in the law on appeal on this issue.

2 Unless and until the Supreme Court overrules the Witty
3 case from 1987, it is absolutely indefensible and against
4 the law for the Court to force defendants to bear the
5 cost of appealing and superseding a judgment, including
6 \$400,000.00 for fetal deaths when the governing law is
7 indisputable that no cause of action existed for the
8 wrongful death of an unborn fetus on December 17th of
9 2002.

10 Your Honor, even though the Fort Worth case is being
11 looked at by the Supreme Court, as we speak, those cases
12 specifically and emphatically require proof of a viable
13 fetus to come within their 14th Amendment equal
14 protection holdings.

15 Clint Royse here has no evidence and he has no jury
16 finding that either of the unborn twins was a viable
17 fetus. Clint Royse has no cause of action for the death
18 of his unborn children, as a matter of law. Defendants
19 respectfully object, this Court would be exceeding its
20 role, and eviscerating precedent, if it recognizes a
21 cause of action and renders judgment awarding damages for
22 the wrongful death of Cline Royse' unborn twins.

23 With respect, your Honor, only the Texas Supreme Court
24 has the authority to consider and possibly overrule its
25 1988 --

1 Excuse me.

2 -- 1987 Witty decision. The Court does not properly have
3 that authority, and Plaintiffs ought to admit that on the
4 record.

5 Your Honor, at the summary judgment record included that
6 Afton Hughes was apparently six weeks pregnant with twins
7 at the time of the December 17th, 2002, occurrence in
8 question.

9 Clint Royse has asserted he is entitled to recover for
10 the loss of his unborn twins under the Texas Wrongful
11 Death Act. That claim was timely asserted in the third
12 amended petition filed February 6th, 2004.

13 Your Honor, an additional 14th Amendment equal protection
14 claim was asserted in Plaintiffs' fourth amended
15 petition, but that petition was not filed a full 14 days
16 before the final pretrial hearing.

17 Your Honor, I -- I won't belabor the pleading amendment
18 issue, but I would like to focus on -- on the substantive
19 law issue here in a brief historical perspective.

20 In December of 2002, the Wrongful Death Act permitted
21 beneficiaries to sue for the death of an "individual."
22 Before codification in the Texas Civil Practice and
23 Remedies Code, the early -- the earlier Texas Wrongful
24 Death Act used the word "person" instead. In 1987, and
25 over a very forceful and scholarly dissent by Justice

1 Kilgarlin, the Supreme Court held in Witty that the
2 Legislature did not intend the words "persons" or
3 "individual" to include a stillborn fetus, and that
4 without an actual live birth, the parent of a stillborn
5 fetus has no statutory wrongful death cause of action.

6 Later in 1987, the Texas Supreme Court reversed a
7 decision by the Fort Worth Court of Appeals and held in
8 the Tarrant County Hospital District case that the death
9 of even a viable fetus cannot support a statutory
10 wrongful death claim.

11 The Texas Supreme Court also reaffirmed that no such
12 claim will be recognized unless and until the Legislature
13 amended the Wrongful Death Act.

14 The next important development, your Honor, is 1999, the
15 Fort Worth court's decision in Parvin versus Dean. In
16 Parvin versus Dean, the en banc Fort Worth Court of
17 Appeals

18 held that the Texas Wrongful Death Act as authoritatively
19 construed by the Supreme Court in Witty, violates the
20 14th Amendment's equal protection clause; insofar as the
21 act prohibited parents of unborn, but "viable" fetuses
22 from pursuing statutory wrongful death claims. Parvin is
23 a "no pet" decision.

24 Later in September 2002, a panel of Fort Worth Court of
25 Appeals affirmed the holding and reasoning of the Parvin

1 case in Reese versus Fort Worth Osteopathic Hospital. In
2 December 2002, the events at issue in this case occurred,
3 and Afton and the twins she was apparently carrying died.
4 Your Honor, then in 2003, the 78th Legislature passed
5 Senate Bill 319, and amended the Wrongful Death Act, so
6 that for causes of action accruing on or after September
7 1, 2003, the term "individual" is going to include an
8 unborn child at every stage of gestation from
9 fertilization until birth.

10 Also for causes of action accruing on or after September
11 1, 2003, the term "death" is going to be defined to
12 include, for an individual who is an unborn child, the
13 failure to be born alive. According to summary judgment
14 evidence, Afton was six weeks pregnant when she -- when
15 she died on December 17 -- or 18, 2002.

16 Appropriately, under the facts of this case, Clint Royse
17 has not argued that his alleged cause of action for the
18 wrongful death of his unborn children accrued on or after
19 September 1, 2003.

20 In fact, this lawsuit was filed, your Honor, May 28th of
21 2003.

22 The Reese case out of Fort Worth is a petition-granted
23 case. It's not a petition-dismissed case, as the
24 Plaintiffs inadvertently, and repeatedly, and erroneously
25 cited it in their response to the Defendants' motion for

1 partial summary judgment regarding unborn children.

2 The Reese case is petition for review granted in the
3 Supreme Court as of May 22, 2003, and the Supreme Court
4 heard oral arguments in the Reese case October 8th of
5 2003.

6 A decision could issue in the Reese case this coming
7 Friday, or any Friday. We don't know. Reese also
8 involves wrongful death claims like those asserted by
9 Clint Royse where the fetus was not born alive, and where
10 the alleged cause of action necessarily accrued before
11 September 1, 2003.

12 If the Reese case is reversed by the Supreme Court, the
13 resulting precedent will unquestionably defeat Clint
14 Royse' statutory claim asserting the Defendants
15 wrongfully caused the deaths of his unborn children on
16 December 17 or 18, 2002.

17 Your Honor, as the Court knows, we respectfully dispute
18 that Reese and Parvin correctly state the law, and we
19 also dispute that Clint Royse has timely alleged any 14th
20 Amendment equal protection claim, but the Court doesn't
21 even have to reach those issues. The jury's answers to
22 Questions 8 and 9 would have to be disregarded even
23 assuming Clint Royse timely alleged the 14th Amendment
24 equal protection claim, and even assuming the Reese and
25 Parvin cases were correctly decided by the Fort Worth

1 Court of Appeals.

2 Your Honor, I respectfully challenge Plaintiffs' Counsel
3 to repeat in open court their assertions that Reese and
4 Parvin apply, when the mother was only six weeks
5 pregnant, and when there is no evidence whatsoever of
6 viable fetus under any definition, whether statutory or
7 case law.

8 With respect those assertions in Plaintiffs' April 19th,
9 2004, response were erroneous as a review of the Parvin
10 opinion reveals, and I have a copy if the Court would
11 like to look at it. The fact of measured heartbeats is
12 not legally sufficient proof of viability. There's not
13 evidence of any medical judgment by an attending
14 physician that either of the twin fetuses possess the
15 capacity to live outside their mother's womb after their
16 premature birth from any cause.

17 There's also no evidence that either of the twin fetuses
18 had a biparietal diameter of 60 millimeters or greater.
19 That's out of the Texas Health & Safety Code, your Honor.
20 And finally, your Honor, if the issue were raised, we
21 tendered a question out of an abundance of caution on
22 whether the fetuses were viable and the Plaintiffs
23 persuaded the Court to refuse that submission.

24 Your Honor, it is our respectful submission that if the
25 Court follows the Fort Worth case law currently under

1 review by the Supreme Court, then consistency would
2 compel the Court to require evidence and jury findings of
3 viable unborn fetuses; otherwise, there is no authority
4 for asserting any 14th Amendment equal protection
5 challenge to the Texas Wrongful Death Act, as it applies
6 to this pre-September 1, 2003 case, and again, that's
7 assuming just for purposes of argument that the
8 Plaintiffs timely pleaded the 14th Amendment equal
9 protection challenge.

10 Lastly, your Honor, the Defendants respectfully challenge
11 Plaintiffs' assertion that -- assertions that Senate Bill
12 319 should be considered in ruling upon the issue of the
13 claim for unborn children. Plaintiffs represented in
14 their summary judgment response that this Court should
15 utilize the 2003 statutory amendments, because the
16 amended Wrongful Death Act is more specific than the
17 prior act, which actually governs Clint Royse's alleged
18 cause of action. The simple answer to that, your Honor,
19 is that the changes made by Senate Bill 319 expressly
20 apply only to a cause of action that accrued on or after
21 the act -- on or after the enactment's effective date,
22 which was September 1, 2003.
23 Senate Bill 319 expressly does not apply to any cause of
24 action like those asserted by Clint Royse, which accrued
25 before September 1, 2003. Instead, the Legislature

1 expressly enacted an effective date provision that any
2 cause of action that accrued before September 1 of 2003,
3 is governed by the law as it existed before September 1,
4 2003, and that law is continued in effect for that
5 purpose.

6 Your Honor, the law before September 1, 2003, was Witty
7 and Tarrant County Hospital District, and perhaps
8 depending on the Supreme Court's decision in Reese -- the
9 Parvin versus Green case.

10 Clint Royse has no cause of action under the Supreme
11 Court's Witty decision. Clint Royse has no timely
12 pleading of the 14th Amendment equal protection
13 violation; and in any event, he has no evidence, no jury
14 findings of viable unborn fetuses within the holdings of
15 the Fort Worth Court of Appeals in the Reese and Parvin
16 cases.

17 Rule 301 and the Texas Supreme Court's Spencer decision
18 require this Court to disregard the jury's answers to
19 Questions 8 and 9, because they never should have been
20 submitted and are immaterial.

21 Your Honor, we acknowledge the constitutional issues,
22 assuming they're properly before the Court are
23 controversial and divisive, but the application of
24 existing precedents is not. With respect, Clint Royse
25 has no cause of action for the loss of the twins under

1 the applicable Texas Wrongful Death Act, and he also has
2 no evidence and no jury findings that the twins Afton was
3 apparently carrying were viable fetuses. The rule of
4 stare decisis compels this Court to respect existing
5 precedent to ensure certainty and predictability of the
6 law. It should be Clint Royse' burden to seek any change
7 in the law in the Court of Appeals or the Supreme Court
8 perhaps. It should not be the Defendants' burden to
9 defend and possibly appeal a judgment based on
10 emotionally charged claims that are not recognized under
11 existing law.

12 Your Honor, I think for our motion to disregard and for
13 judgment NOV, those are the issues we wanted to cover for
14 the Court.

15 THE COURT: Response?

16 MR. BOYD: Your Honor, I'll be happy to
17 respond to those points the Court wants me to. Many of
18 them are going to be repetitive of what the Court has
19 already heard.

20 Is there anything in particular the Court wants to --

21 THE COURT: The issue of the unborn
22 fetuses.

23 MR. BOYD: Your Honor, just -- just very
24 briefly, without repeating all of the arguments that we
25 made, we did not proceed, your Honor, on the viable

1 theory. As the Court will remember we proceeded on a
2 statutory construction theory, based upon the holdings in
3 Parvin and Reese, and how the new definition that came
4 under the Wrongful Death Act would have been fine in our
5 opinion in those cases.

6 So that, your Honor, we believe gave us the -- gave us
7 the right to have the cause of actions submitted.

8 THE COURT: All right.

9 MR. BOYD: Is there anything -- anything
10 further, your Honor?

11 THE COURT: No.

12 MR. TAYLOR: We also have before the Court, and have set
13 today our objections to the Plaintiffs' proposed form of
14 judgement and those have motivated some responses.

15 I think the Plaintiffs have agreed now that a statutory
16 cap will be applied.

17 The one remaining issue: We've complained about the
18 intervention not being disposed of. They apparently have
19 a dismissal that they want to put on the record.

20 MR. BOYD: Your Honor, just for the record,
21 for purposes, the lienholder for Kim Hughes' medical
22 provider filed an intervention. We reached an agreement
23 with them before trial and there was a notice of
24 dismissal filed, and --

25 I don't need to mark this. It's in the Court's file. It

1 was filed April 26th of 2004. It shows here that the
2 file mark copy of the letter shows it cc'd to Mr. Monk,
3 who represented the lienholder, and to Mr. Stradley, who
4 represented TXI, so -- because that notice of dismissal
5 has been filed, they're no longer in the lawsuit and
6 don't need to be addressed in the judgment.

7 MR. TAYLOR: I think the -- there is
8 perhaps going to need to be some evidence on the ad litem
9 issue. We've got that in our objections.

10 Final issue, your Honor, that I'll raise today has to do
11 with prejudgment interest. The original judgment
12 improperly included prejudgment interest on future
13 damages. That's forbidden by the September 1, 2003
14 legislation. That legislation applies, your Honor,
15 expressly to judgments signed or subject to appeal on or
16 after September 1, 2003.

17 Mr. Boyd, I believe, in his alternative submissions has
18 taken a --

19 I hate to use this phrase.

20 -- a split-the-baby approach, and straddled
21 September 1st, 2003, and given the Plaintiffs prejudgment
22 interest on future damages up to September 1st, 2003, and
23 then none after September 1st, 2003, we'll verify that
24 math, but your Honor, that split-the-baby approach is not
25 appropriate. The statute applies and forbids. It is --

1 It is illegal, and with respect, it's unconstitutional to
2 award any prejudgment interest on future damages in a
3 judgment signed or subject to appeal on or after
4 September 1, 2003.

5 MR. BOYD: And, your Honor, the reason we
6 have included that --
7 We don't disagree with what the statute says. I'm not
8 sure I agree with the constitutional argument that
9 Mr. Taylor is making, but obviously when we filed this
10 lawsuit May 28th, 2003, the right to recover prejudgment
11 interest
12 on future damages and wrongful death cases existed for
13 our clients, the Legislature changed that effective
14 September 1, 2003.
15 Our position is they can't retroactively take away
16 prejudgment interest that would've already accrued on
17 future damages from May 28th through September 1; so
18 therefore, we have --
19 The judgment that we have has compensatory damages award
20 by the jury, prejudgment interest on past damages all the
21 way up to today's date, and prejudgment interest on
22 future damages up to the date that the law changed,
23 September 1 of 2003.

24 MR. TAYLOR: And our simple response --
25 There's probably more case law on this. I haven't cited

1 this in the briefs, but there is a case out of Amarillo
2 that goes against what Mr. Boyd just said. It's sort of
3 an implicitly vested rights argument. It's a Midgard,
4 M-i-d-g-a-r-d out of Amarillo, and what it holds is that
5 a Plaintiff or a claimant has no vested right in
6 prejudgment interest law until at least after signing of
7 a judgment and here, of course, there is no judgment
8 signed.

9 So the state of law before is not something in which the
10 Plaintiffs would have any vested right. And, in fact,
11 the prior right established by C&H Nationwide versus
12 Thompson was a five to four decision by the Texas Supreme
13 Court construing an earlier statute. That case was on
14 rehearing on four dissents. It sat on rehearing for two
15 years before the case settled, and there was never a
16 ruling on the motion for rehearing.

17 As you'll note, your Honor, the PJC, even since 1996, our
18 committees have been suggesting past and future
19 submission because of the obvious constitutional
20 difficulties with awarding prejudgment interest on
21 damages that have not even accrued.

22 THE COURT: So does the statute itself specifically say,
23 or are you just interpreting other cases?

24 MR. TAYLOR: Yes. Your Honor, it's --

25 THE COURT: Where's the statute?

1 MR. TAYLOR: Do you have a Finance Code and
2 I'll just pull it for you. I don't have it --

3 THE COURT: Probably not.

4 MR. TAYLOR: Okay. Well, I can quote you
5 the effective date. If you go to the end of House Bill
6 4, and I don't have the whole statute with me; I do not.

7 The --

8 If you --

9 House Bill 4 was enacted by the Legislature and approved
10 by Governor Perry on June 11, 2004. At the very end
11 there's Article 21, that has a lengthy set of effective
12 dates provisions. The punitive damages changes which
13 we've already discussed apply for cases filed on or
14 after.

15 Article 6, and I believe it's 6.04 of House Bill 4 has a
16 special provision applicable to all of the interest
17 changes made in House Bill 4. The provisions of this
18 article apply to judgment signed or subject to appeal on
19 or after September -- the effective date -- the effective
20 date in Article 21, September 1, 2003.

21 We've actually cited in our objections, a Fort Worth
22 Court of Appeals case law, the Columbia case, that makes
23 this point, that --

24 MR. BOYD: Yeah. But that doesn't address
25 future damages, the Columbia case. Doesn't address --

1 The statute, your Honor --

2 The statute, I think, is silent specifically as to what

3 happens to cases that were already on file in which

4 prejudgment interest would've already been accrued. I

5 don't think there's a specific provision statute --

6 I don't disagree that what Mr. Taylor says is the

7 language as to the effective date. It does say it

8 applies to any judgment signed on or after September 1,

9 2003, and that's why we cut off any interest on future

10 damages after that date.

11 But what would have already been accrued under the case

12 law that was in existence at the time, which is still

13 good law, we believe we're entitled to recover in the

14 judgment.

15 MR. TAYLOR: It's interesting, your Honor.

16 The statute has an application provision. It applies to

17 the judgments. There's only going to be one final

18 judgment in this case. Rule 301 says one final judgment.

19 Mr. Boyd's argument is the statute applies to percentage

20 "X" of the judgment, and that's against the law. It's

21 sort of like the argument we've heard previously that

22 the 2000 --

23 It's kind of ironic that the statute for fetuses is going

24 to be applied in full, because that's helpful; but the

25 statute on interest is not going to be applied, because

1 that's not helpful.

2 MR. BOYD: Your Honor, I thought I had a
3 copy of the statute here. I think most of that text
4 that's being cited is from the language of House Bill 4.

5 MR. TAYLOR: Right. But if you --

6 MR. BOYD: Instead it's B in the Finance
7 Code 3.04 --

8 MR. TAYLOR: If you've got the Finance Code
9 the application provision will quote the exact number
10 to --

11 MR. BOYD: Right.

12 THE COURT: I'm going to grant your
13 objection on that.

14 MR. TAYLOR: So, no prejudgment interest on
15 any future damages?

16 THE COURT: Correct.

17 MR. BOYD: And for the record, your Honor,
18 we would object to failing to include any prejudgment
19 interest on future damages from --

20 THE COURT: Sure.

21 MR. BOYD: -- May 28th through September 1,
22 and I assume that's overruled?

23 THE COURT: Overruled.

24 MR. BOYD: Okay.

25 MR. TAYLOR: Your Honor, I have an order to

1 present on the JNOV and the objections, and I've given
2 Mr. Boyd a copy of it. I think the form of the order is
3 unobjectionable.

4 THE COURT: Let me see.

5 MR. TAYLOR: Here's an additional copy for
6 Mr. Boyd.

7 And what we've done is for the JNOV and for the
8 objections, we've put "sustained" or "overruled," and are
9 respectfully requesting that the Court sign and indicate
10 its rulings on our motions.

11 MR. BOYD: Your Honor, the only problem
12 with this order is that it doesn't specify the arguments
13 that they have made listed.

14 And I guess we can redraft one that lists the specific
15 arguments Mr. Taylor made this morning, and submit it --
16 and we can submit an agreed form.

17 MR. TAYLOR: I think that the cap issue
18 makes the motion for judgment NOV sustained in part; but
19 otherwise, overruled, and that the prejudgment interest
20 ruling makes the objections sustained in part, but
21 otherwise overruled, but we need a ruling on those
22 motions in 306A(2) directs the Court and Counsel to try
23 to cause all decisions of the Court to be reduced to
24 writing and signed with the date of signing, stated
25 therein.

1 MR. BOYD: Right. Right. And I agree with
2 the way the order is stated, but I think the order needs
3 to say which ones were sustained and which ones were
4 overruled.

5 MR. TAYLOR: We're at the Court's pleasure.
6 We'll -- We'll prepare the order any way the Court likes.

7 THE COURT: I think we need to state what
8 is sustain, what's overruled.

9 MR. BOYD: If you want to prepare one,
10 Ben, we'll -- we don't have a problem with it.

11 MR. TAYLOR: Well, yeah, we can prepare it
12 and --

13 May we go off the record for one moment, your Honor?

14 THE COURT: Pardon?

15 MR. TAYLOR: May we go off the record for
16 one moment?

17 THE COURT: Sure.

18 (Discussion off the record.)

19 MR. TAYLOR: All right. Your Honor, then I
20 propose --

21 I don't even know if the Court is going to be available
22 30 minutes after we finish this to get us an order.

23 We -- We need to --

24 THE COURT: I have announcement docket at
25 11:00 o'clock. We've got about eight cases on it, so I

1 will probably be here and then I've got docket this
2 afternoon so --

3 MR. TAYLOR: All right. Then with the
4 Court's permission what I may --
5 Your Honor, I understand the Court has requested in
6 response to the Plaintiffs's request, a more specific
7 order on the JNOV and the objections to the Plaintiffs'
8 proposed form of judgment, and we will -- we will work
9 with Plaintiffs' Counsel to prepare that for the Court's
10 signature reflecting the Court's rulings today.

11 And we also believe that the motion will -- and
12 objections may be implicitly denied, to the extent the
13 judgment is in Plaintiffs' favor, but we will prepare
14 that document in accordance with the Court's request and
15 the Plaintiffs' request.

16 MR. BOYD: Your Honor, I have to tender a
17 final judgment in accordance with the Court's rulings on
18 prejudgment interest issue and the statutory cap.
19 The only blank, I believe, that was left in here is the
20 fee for the Mr. Williamson, so if we need to take that
21 up.

22 Other than that, I think we need to tender judgment.

23 MR. TAYLOR: And, your Honor, we have not
24 reviewed these indepth, but the accuracy of Mr. Boyd's
25 work is usually very good.

1 Our objections continue as stated in our motion to
2 disregard jury findings and for judgment NOV, and in all
3 of the objections that we've previously filed to the
4 extent they're still applicable, we'd like the record to
5 reflect those were before the Court whenever the Court
6 signs a judgment.

7 THE COURT: All right. It shall reflect
8 that.

9 (Ad Litem Exhibit Nos. 1 & 2.
10 marked for identification.)

11 MR. WILLIAMSON: Judge, if I may speak to
12 the ad litem issue?

13 THE COURT: Yes, you may.

14 MR. WILLIAMSON: I presented to the Court,
15 Ad Litem Exhibit 1 and 2, which I have tendered to both
16 Defense Counsel, and it consists of a statement that I
17 have presented to the Court for my time; and also, is an
18 affidavit, Judge, of the works performed and the
19 calculation of fees.

20 You'll find, Judge, there's some reference to numbers;
21 one, would be the time that I've spent to date, as of
22 today, June the 14th; and the second amount that I've
23 requested would be for anticipated work on any potential
24 appeal.

25 I submit those to the Court, Offer 1 and 2.

1 MR. STEINDORF: Objection; hearsay as to
2 both, your Honor.

3 MR. WILLIAMSON: And I tender myself for
4 cross examination, your Honor.

5 THE COURT: All right. Overrule your
6 objection.

7 They're admitted.

8 Any questions for Mr. Williamson?

9 MR. STEINDORF: Yes.

10 -----

11 CROSS EXAMINATION

12 MR. STEINDORF: Mr. Williamson, I've
13 noticed that in Exhibit 1, which is the listing of the
14 time entries that you have, you've got approximately 21
15 different depositions that you've read between receiving
16 the appointment on April the 27th and the commencement of
17 trial on May the 4th. What was your purpose in reading
18 those depositions?

19 MR. WILLIAMSON: Well, certainly, sir, so
20 you'll understand that's to familiarize myself with the
21 case. I had talked to Mr. Boyd, upon receiving this
22 appointment, and obviously didn't know anything about it.
23 It was set for trial in a week and I tried to get myself
24 up to speed on the facts.

25 MR. STEINDORF: Did you handle any

1 witnesses at trial?

2 MR. WILLIAMSON: No, sir.

3 MR. STEINDORF: Why was it important for you to read the
4 depositions?

5 MR. WILLIAMSON: It was important for me --
6 I feel it was my duty to understand the facts of the case
7 and be able to advise the Plaintiffs' Counsel and talk to
8 them intelligently about any potential appeal --

9 Excuse me.

10 -- any potential offers.

11 MR. STEINDORF: Was there any settlement
12 pending at the time you were appointed?

13 MR. WILLIAMSON: Yes, sir, the first day of
14 trial I was approached by Mr. Hurd and we talked briefly
15 about settlement. It was my understanding this Court
16 does not wish for me to engage in those types of
17 discussions, and so those negotiations ceased.

18 MR. STEINDORF: Now, your regular job is as
19 Assistant District Attorney here in Wise County?

20 MR. WILLIAMSON: Yes, sir.

21 MR. STEINDORF: And you have entered eight
22 hours a day for, I believe, seven days of trial?

23 MR. WILLIAMSON: Yes, sir.

24 MR. STEINDORF: Did you actually attend the
25 trial for all eight hours on each those days?

1 MR. WILLIAMSON: Yes, sir.

2 MR. STEINDORF: And how did you take into
3 consideration in proposing these fees, Mr. Williamson,
4 the time and labor, and the novelty and the difficulty of
5 the questions involved, and the skill required to perform
6 the legal services properly? How did that factor out of
7 the disciplinary rules and enter into the fees you
8 proposed?

9 MR. WILLIAMSON: I'm sorry. I don't follow
10 the question.

11 MR. STEINDORF: One of the topics in the
12 disciplinary rules, one of the ones that's covered in
13 your affidavit, Exhibit 2, is to consider the time and
14 labor required, the novelty and the difficulty of the
15 questions involved in the case, and the skill required to
16 perform the legal services you've performed. How did you
17 take those into account in connection with proposing this
18 fee?

19 MR. WILLIAMSON: Oh, yes, sir. I surveyed
20 other lawyers similarly situated that handle this type of
21 work.

22 I have been involved in this particular kinds of cases
23 before. We had one that was also tried to a jury last
24 year, those factors, and then based on that Gomez case
25 was how I arrived at those figures.

1 MR. STEINDORF: One of the factors is the
2 likelihood that taking this case would prevent you from
3 taking some other similar cases, and that's not a factor
4 in this situation, is it, Mr. Williamson?
5 Taking this appointment didn't preclude you from taking
6 any other work, did it?

7 MR. WILLIAMSON: Taking any other ad litem
8 cases?

9 MR. STEINDORF: Right.

10 MR. WILLIAMSON: That --
11 There's that potential, because this Court has a system.
12 It gives ad litem to various lawyers in town, and so, if
13 I'm on this one, then it would preclude me from working
14 on others.

15 MR. STEINDORF: Do you -- Do you normally
16 handle civil cases?

17 MR. WILLIAMSON: No, sir.

18 MR. STEINDORF: Okay. Did taking this ad
19 litem appointment preclude you from taking on any other
20 civil cases?

21 MR. WILLIAMSON: No, sir.

22 MR. STEINDORF: And why did you charge
23 \$50.00 an hour more for your time in court?

24 MR. WILLIAMSON: Because it was necessary
25 for me to be here, and the courtroom time, and I think

1 that's the standard.

2 MR. STEINDORF: But in the courtroom you
3 were simply observing?

4 MR. WILLIAMSON: Yes, sir.

5 MR. STEINDORF: The --

6 How did you factor in the time limitations imposed by the
7 client or by the circumstances on calculating this fee?

8 MR. WILLIAMSON: Well, the time limitations
9 for the first part are the fact that I was appointed on
10 April the 27th, and in this case it was set for trial on
11 May the 4th.

12 The second time factor is going to be the potential
13 appeal that was likely in this case, and then if there is
14 any recovery, certainly, we will have to do something
15 with for the client when we anticipate Section 140 of the
16 trust.

17 MR. STEINDORF: How did you --
18 That trust has not been created yet?

19 MR. WILLIAMSON: No, sir.

20 MR. STEINDORF: You've estimated \$2,500.00
21 of your time for creating that trust?

22 MR. WILLIAMSON: That --

23 What that is, actually, I retained the services of
24 Shannon, Gracey, Ratliff & Miller in Fort Worth. Phil
25 McCrary, they prepare the Section 142 trust for me, and

1 that's they're fee.

2 MR. STEINDORF: Okay. What about the --

3 How did you factor in the nature and length of the

4 professional relationship with this client?

5 Actually, you didn't have any kind of length of

6 professional relationship with this client since this

7 appointment; right?

8 MR. WILLIAMSON: Since the appointment, no,

9 sir; but I do anticipate having a professional

10 relationship until the client reaches the age of

11 majority.

12 MR. STEINDORF: The --

13 How did you factor in whether this is a fixed or

14 contingent fee in representing these fees to the Court?

15 MR. WILLIAMSON: This -- This particular

16 Court only allows fixed fees on ad litem.

17 MR. STEINDORF: What is the final review

18 and administration entry of five hours on May the 14th?

19 MR. WILLIAMSON: Preparing for the

20 post-trial things that happened today, creation of the

21 file, review of the draft of the judgment, and the daily

22 transcripts that were provided to me by the Court

23 Reporter.

24 MR. STEINDORF: So should that say June

25 14th rather than May 14th?

1 MR. WILLIAMSON: Probably should.

2 No, today is the --

3 I'm sorry. I don't have my exhibit with me.

4 MR. STEINDORF: That's the one I'm asking
5 about.

6 MR. WILLIAMSON: No, that was after trial.
7 That was the day after trial.

8 MR. STEINDORF: Okay. What is -- What is
9 that five hours after the trial?

10 MR. WILLIAMSON: That is, as I stated, the
11 review of all the post-trial matters that occurred, the
12 transcripts, closing out the file, and preparing for the
13 judgment.

14 MR. STEINDORF: And why did you need to do
15 those things?

16 MR. WILLIAMSON: Because I anticipated
17 being cross examined today for my fees in this case, and
18 I wanted to make sure that I have everything in order.

19 MR. STEINDORF: Then what's the seven-hour,
20 post-trial administration?

21 MR. WILLIAMSON: That is anticipating as
22 to --

23 If there is a recovery in this case, and we hope that
24 there is, that would be working with Shannon, Gracey,
25 doing the trust, talking to the various banks.

1 Usually we set these up, as I said before, in a 142 trust
2 to be administered by the bank.

3 MR. STEINDORF: Now, you've included 50
4 hours of appellate work --

5 MR. WILLIAMSON: Yes, sir.

6 MR. STEINDORF: -- court respective
7 appellate work?

8 And how did you make that calculation?

9 MR. WILLIAMSON: That was a guess, to be
10 honest with you.

11 If we have another trial. Another case that we did last
12 year that was appealed. I did not, in that case, ask for
13 any appellate work, and I learned an important lesson, so
14 I have anticipated 325 hours or intermediate and for the
15 final appeal.

16 MR. STEINDORF: Okay. If you have --
17 If the Court saw fit to reduce this fee by the amounts
18 you charged for reading the depositions, would that bring
19 the out-of-court work compensation done to about
20 \$5,000.00?

21 MR. WILLIAMSON: Yes, sir.

22 MR. STEINDORF: And if the Court saw fit to
23 grant compensation for about half of the court time,
24 would that bring the court compensation down to about
25 \$6,000.00?

1 MR. WILLIAMSON: I assume that to be
2 correct.

3 MR. STEINDORF: Have you ever been involved
4 as an ad litem on a case that's been appealed before?

5 MR. WILLIAMSON: Yes, sir.

6 MR. STEINDORF: And have you prepared
7 affidavits and schedules like these that are marked as
8 Exhibit 1 and 2 previously?

9 MR. WILLIAMSON: Yes, sir.

10 MR. STEINDORF: What cases were those in?

11 MR. WILLIAMSON: The one that's closest to
12 this would be the Estate of McBride versus Aggregate
13 Haulers, which was tried in this court a year ago.

14 MR. STEINDORF: Pass the witness.

15 MR. BOYD: We have no questions, your Honor.

16 THE COURT: Anything further?

17 MR. WILLIAMSON: No, sir.

18 THE COURT: All right. Approve your
19 invoice on the fees.

20 MR. WILLIAMSON: Thank you, your Honor.

21 MR. BOYD: Your Honor, may I approach --

22 THE COURT: Yes.

23 MR. BOYD: -- just to fill in the blank on
24 Mr. Williamson's fee and signature.

25 MR. BOYD: Your Honor, this judgment

1 includes the punitive damages if that's our understanding
2 of the Court's ruling?

3 THE COURT: It did.

4 MR. BOYD: Your Honor, this is --
5 Mr. Taylor has handwritten in the order of changes on
6 these, which specifically reflect the rulings.
7 I think we can approve that as to form, your Honor.

8 THE COURT: There you go.

9 Anything further?

10 MR. TAYLOR: Just --

11 I'd like to get this filed and --

12 THE COURT REPORTER: I'll do it for him.

13 THE COURT: Get that done.

14 MR. BOYD: Thank you, Judge.

15 -----

16 (END OF PROCEEDINGS)

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1 STATE OF TEXAS)

2 COUNTY OF WISE)

3 I, Jeffery M. Goodwyn, Official Court Reporter
4 in and for the 271st District Court of Wise County, State
5 of Texas, do hereby certify that the above and foregoing
6 contains a true and correct transcription of all portions
7 of evidence and other proceedings requested in writing by
8 counsel for the parties to be included in this volume of
9 the Reporter's Record, in the above-styled and numbered
10 cause, all of which occurred in open court or in chambers
11 and were reported by me.

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

15 *I further certify that the total cost for the
16 preparation of this Reporter's Record is \$ _____ and
17 was paid/will be paid by _____.

18 WITNESS MY OFFICIAL HAND this the _____ day of
19 _____, _____.

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