ORAL ARGUMENT – 09/25/02
01-1040
HONDA V. SANCHEZ, ET AL

HOLMAN: We are presenting the court with two strong issues today. One dealing with statutory construction. And one dealing with choice of law. Although we said in our brief that the court should address the rendition issue first, I have some problem with the logic of that. The rendition issue is the statutory construction issue. The remand issue is the choice of law issue. Here's my problem. The statutory construction issue is whether the CA erred in interpreting a Texas statute? I think before we get to that question, we've got to determine whether the case was properly decided under Texas law. So it appears to me that logically the choice of law issue needs to be addressed first to determine whether we're under Texas or Mexican law.

O'NEILL: Why did you not waive that by moving for entry of the judgment on the _____?

HOLMAN: The argument is based on Fojtik. And that case is a case in which they moved for judgment and then tried to challenge the factual sufficiency of the jury findings on appeal. The court said you can't do that because that's inconsistent form of relief.

In this case we have preserved our right to have this under Mexican law in three different ways. We filed a motion to apply Mexican law. That was denied. We filed a renewal of our motion to apply Mexican law after Leon James and Brownsville Sports Center were dismissed from the case at the close of plaintiff's evidence. We filed an objection to the charge. All of which preserved error. Now the reason that the Fojtik line of cases doesn't apply because that's not an inconsistent form of relief. We're asking for an alternative form of relief. We're saying the case was improperly rendered under Texas law. The case was improperly decided because either it was improperly decided under Texas law, or it should have been brought under Mexican law. Either way the result would have been the same.

PHILLIPS: If we decide you're right that this case should be decided under Mexican law and that you didn't waive error for that, then don't we still have - there's no cross-petition or cross-point from the plaintiffs below, respondents here, that they want another trial under Mexican law. But do we still have to look at your rendition point or why not? It would certainly make the case easier for us if we didn't.

HOLMAN: We've asked the court for a remand under Mexican law, and I think that that's the proper result. I don't think you can render it under Mexican law. I think if you determine that Mexican law was applied...

PHILLIPS: If the law of Mexico does apply, then you withdraw your request for a rendition under Texas law since it never should have applied in the first place.

HOLMAN: I think we have to.

The other issue is the Fojtik of factual sufficiency challenge. And this of course is a legal challenge. And this court has held that you can preserve legal challenge in a whole bunch of different ways, not the least of which is having three different times when the judge was specifically presented with a request for_____ and denied. So we feel that we certainly have preserved error under the choice of law issue.

With regard to the choice of law, we think the facts are simple. This is a suit brought by Mexican parents for the death of a 10-year old boy who was a Mexican national. The death occurred in Mexcio, caused by a product that was purchased in Mexico and the negligence of his parents, which occurred in Mexico. The only fact that ties this case to Texas is that the product was once sold in Texas, 9 years before it was purchased used in Mexico by the Mexican parents. That's the only fact.

Now they have raised in their reply brief a lot of facts that cannot be considered. And those facts are, for example, the consent decree _____. That evidence was excluded by the TC. It cannot be considered. They raised the fact, well Mr. Ramos went to the Brownsville dealership. You notice in the brief that they've submitted, they say he went to the Brownsville dealership and he didn't get the proper warnings. But if you will notice there is no cite to the record on any of those statements that they make in their brief. The reason for that is, all of those things were excluded also.

PHILLIPS: Do you concede that BSC was Honda's agent for the purpose of passing on warnings?

HOLMAN: Not under the theory that they argue. They argue that they were required to pass on warnings because of the consent decree. The consent decree by its very terms, and this is in the record at page 928 in the clerk's record, did not even apply to dealers. So the dealer was under no obligation to convey any warnings at all.

The second part of that equation is, that at the time Mr. Ramos went into the store, which is 1989, they didn't even have ATVs. The ATVs were removed, and this is undisputed in the record, in 1987. He wasn't even selling 3-wheel ATV's at the time Mr. Ramos went into the store. And there is certainly no duty in Texas, no post-sale duty to warn causal browsers of anything.

You have a situation where he goes into the store. He states that he didn't ask questions the first time. The second time he went in there and asked some questions. But there's nothing in the record that says that he was a customer of theirs, that he bought anything there. There is no duty to warn casual browsers in Texas. So in answer to your question, I don't believe that that's relevant.

ENOCH: One of the conditions that is identified in determining choice of law questions

is the economic risk that may be suffered by a resident defendant. Why wouldn't Texas be interested in resident defendant's economic concern to the extent that they wouldn't want equal - in other countries that may have very liberal damages law to be making their law applying to defendants over here when we have businesses that export their products around the world apply? Why wouldn't that be a significant factor for having this case tried in Texas?

HOLMAN: I think Texas does have an interest in protecting resident defendants. And Texas does have an interest in providing remedies for its citizens. We don't have any resident defendants or any Texas citizens in this case. Honda doesn't have any factories here. Of course it has some dealerships here. This court has held that just the mere idea of stream of commerce, the fact that they _____ the stream of commerce is not enough on itself to justify jurisdiction. It's certainly not enough as a single factor to justify application of Texas law.

You also have the case of Larchmont v. _____ in which the court said, there may be some equitable things that we should decide. There may be some public policy things that we could decide that maybe it would be more equitable to have Texas law apply than other law apply. But the court said in that case, we can't use the public policy doctrine to determine choice of law. We can't determine if it would be more equitable somewhere else. All we have to determine is which law applies. And in this case it is very clear which law should apply. In this stream of commerce analysis that the CA used misconstrued the balancing that needs to be done in a choice of law analysis.

The analytical framework that they used is that because it once entered the stream of commerce, then Texas law attaches to that product permanently no matter where that product travels nor no matter what country it causes an injury in. And that can't be the law, and it's not the proper law and it's not the proper analysis. It's a weighing. The determination is where is the most significant relationship.

JEFFERSON: On that question, are we supposed to be looking at the conduct of the parties, or are we looking at the product itself? Where should our focus be?

HOLMAN: I think you look at both. It's not only price liability action, but it's also a negligence action alleged against the parents. You look at the product. And you look at the product in terms of what was done with the product. There are allegations that there are marketing and design defect. And you can look at where the product goes and where the product was designed and manufactured, which was Japan. But you should also look at where the relationship of the parties was. And they admitted that the relationship of the parties focused in Mexico. And therefore the relationship of the parties even to this product was in Mexico, because they bought the product in Mexico.

PHILLIPS: Apparently there's no discretion in the TC. It's a legal call. So in looking at this does the fact that the jury put 33-1/3 percent on each parent make choice of law any different than it would have been if they had put 0 on everybody but Honda?

HOLMAN: Sure.

PHILLIPS: So the TC has to guess in a vacuum and then we reverse it in twenty-twenty hindsight?

HOLMAN: No. I think it's a different analysis. The TC has to make a judgment of law and he was given that opportunity several times even before the case went to the jury. And he in sending it to the jury determined that there was some evidence of the parent's negligence. So I think that he had also had that question posed to him. But this court, at least under the Surgitech(?) v. Able case, when you're doing a de novo review you look at the entire record. This is a question of law that's subject to a de novo review. You look at the entire record. In looking at the entire record you have one fact that connects this with Texas and that's it. That's the stream of commerce test.

PHILLIPS: Our review, choice of law, he is offended(?) by the amount of contributory responsibility that the jury put on the parents?

HOLMAN: I think so. I think that because you look at the entire record you're kind of retrying the issue and you have the benefit that the TC didn't have with having the entire record.

HANKINSON: Couldn't that mean that the determination would be different depending at what point in time during the trial the TC made the decision, so that it could be one decision on choice of law before the case went to the jury, and a different choice afterwards. How would that work? Certainly that can't be the case.

HOLMAN: I don't think it is the case. What we're focusing on is the decision that was made by the TC before the case was submitted to the jury. We're not asking this court to go back and reanalyze it based on what he should have done after the case was already submitted to the jury.

I think that the proper analysis is the time before the case was sent to the jury. That's when the TC could have done something about it.

HANKINSON: Wouldn't the fact though that the parent's conduct was an issue at all in the case impact the analysis regardless of what the jury decided?

HOLMAN: Sure. The judge had to determine that there was some evidence to submit their negligence in the first place. So there's negligence certainly played a part, or should have played a part in his analysis.

Let me turn to the statutory construction issue. The statutory construction issue as you know is whether the - it's a simple question. Are the parents separate claimants under 330.011(1), or are they a single claimant? If they are a single claimant, then their negligence should have been combined, and if it's combined then they are barred from recovery as the TC found.

HANKINSON: I understand from your briefing that you take the position that the parents should be viewed as a unit because their conduct was unitary. If that's the case, then why was it submitted to the jury in a way in which each parent was treated as an individual and their individual conduct was judged by the jury?

HOLMAN: I think's that a misnomer. They weren't really submitted as separate claimants. Because the pattern jury charge and the case law said that under 71.12 of the pattern jury charge, if you're going to submit them as separate claimants you submit separate issues.

HANKINSON: But they each had their name under the issue and they each had a blank by them. So they jury considered as they worked through the issue each parent individually and assessed a percentage of responsibility to each one of them. And so my problem is it seems a little bit inconsistent to me separate and apart from the statutory construction argument to look at a jury charge that was submitted in this way and then try after the fact to say we put them together. It would seem to me they would have needed to have been submitted together if we were asking the jury to judge their conduct as a unit.

HOLMAN: We're not complaining that there is any defect in the way it was submitted. We are complaining that it should have been submitted that way because the pattern jury charge says when there are multiple plaintiffs and they are going to be aggregated together you submit them as one unit. If their argument is correct that it should have been submitted as one whole unit, then not only are the parents but the deceased should have been submitted as one whole unit. There's no precedent for that. And there is no harm to us because we're not complaining about the way it was submitted.

HANKINSON: I understand you're not complaining about the way it was submitted. I'm just saying that it seems to me that your argument challenging after the fact is inconsistent with the way it was submitted to the jury.

HOLMAN: I don't think so. What we're saying is that the CA misapplied the law to the charge as submitted. And the misapplication of law was based on this court's construction of ch. 33.011(1). It's the same as if the court after the fact applied settlement credits or decided an election between damage remedies and so forth.

HANKINSON: But if your interpretation of the statute is correct, then shouldn't the jury charge be submitted differently in the future?

HOLMAN: I think that that's certainly a call that this court can make. I think that there is no harm in submitting it that way at all.

PHILLIPS: Despite all your talk about Drilex is that you both admit in your briefs that there is some factual intensiveness to this. If the parents are separated and they are living in different countries and one is totally responsible and the other one isn't, that's a different situation. And if

they are both standing there and jointly participating in the conduct that's alleged to be negligent. Given that situation it seems to me that you have to do something in this submission to alert the trial judge which _____ your version of the facts would make this fall into. Of course it's a confusing area. It's still a relatively new area in Texas law. But the trial judge wasn't really tipped off by either the submission or the objections as to who thought who should be aggregated and who shouldn't be.

HOLMAN: But if there were separate duties as if you have the woman in Nebraska and the husband in Houston that tells the kid to go play out in the traffic, then they should have submitted separate issues. The irony of this is that when they went up to the CA and they tried to argue that they should be considered separately Honda's argument was that they should have submitted them separately. And that they had waived their argument because they failed to submit it separately. Now that we get to the SC...

HANKINSON: I don't understand what you mean by submitting it separately. Why isn't a separate submission with separate blanks for each parent? I'm missing something.

HOLMAN: They're arguing that they should be treated like two different plaintiffs that had no relation to each other. If I have two different plaintiffs, they are in a automobile accident, then they have two separate submissions. One verses Honda, one verses Honda. And we argue that they should have submitted it that way and that they waived it. Now in the SC for the first time they are arguing that we should have submitted it another way and that we waived it. But of course that argument's waived because it was never raised in the CA.

PHILLIPS: (Couldn't understand the chief's question.

HOLMAN: Brownsville and Leon James were parties to the appeal. They say in their briefs that they weren't parties to the appeal. And the reason that they were parties to the appeal is they were challenging the dismissal against them. So the CA came down and entered this ruling against Honda and in its final ruling it said Brownsville Sports Center and Leon James are liable to pay cost. Brownsville and Leon James then filed a motion for rehearing that said we're not liable to pay cost. You held against us and filed an argument to that. The plaintiffs agreed to that and submitted a thing saying that they didn't oppose it and the CA corrected the judgment. The certificate for review is filed in the 45 days of that order.

JEFFERSON: On your brief on page 19, you say the case does not involve an effort to impute or otherwise attribute the liability of one spouse to another spouse. We're not dealing with an innocent spouse situation. If we were would the result be different here, and how, and why?

HOLMAN: I don't think so. And the reason that I don't think so - and I've wrestled with this issue myself, because you want to think out this whole argument. You have a wife in Nebraska that has nothing to do with it. Why should the husband's negligence bar her recovery. And I think the reason is because that's a policy determination that was made by the legislature. The legislature decided we want all derivative claimants to be a single claimant. And if their combined negligence

exceed 60%, then they can't recover. There's no contention here that the language of the statute is ambiguous at all. Because there's no contention that the language is ambiguous this court doesn't get to policy. This court has to take these statutes as they find them. And since this court has already written twice that the definition of claimant includes all the people that are seeking recovery, then I think this court doesn't get into those kind of policy issues. This court merely has to apply the statute.

Now is it fair? I don't know. Certainly she would have a recovery against the father. She would be able to sue the father. There's all kind of cases in Texas where another wrongful death beneficiary sued another wrongful death beneficiary for wrongful death. She would have a recovery against the most negligent person. So she's not left without a remedy. But is it fair, or just? Is it it good policy? Probably good policy in this case because we have parents that are equally liable for violation of their joint duty.

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RESPONDENT

HANKINSON: Do you agree that the choice of law question should be decided by the court first?

GRILLO: I think it could change how the case comes out. That's correct.

HANKINSON: Do you think in order of decision that it should be the first issue decided?

GRILLO: If the case is decided based on Mexican law it would not likely be retried in light of the expense involved verses the damages you might recover.

There are two issues. First, as to the jury verdict issue, there is no authority in Texas for this court to combine separately submitted wrongful death claimants after verdict to see if the statutory bar is...

HANKINSON: Would you mind addressing the choice of law question first.

GRILLO: The point brought up by Mr. Holman and I think the court addressed was what does the court consider? One of the issues Mr. Holman referenced was what about the consent decree. The TC excluded it at trial. But the problem is that's not the way the analysis with choice of law is done. The choice of law analysis is done by the evidence relevant to that issue brought before the TC.

The choice of law issue was decided first by Honda filing their motion, their exhibits, and the respondent filing their response and their exhibits. Specifically in those exhibits was the Consumer Product & Safety Commission consent decree. It was relevant to the choice of law issue because of what Honda agree to do in that decree. Specifically it agreed to use its best

efforts to ensure its dealer communicated the warnings required to be communicated to any prospective customer of a Honda dealer.

If you listen to the words best efforts it doesn't sound very strong. But if you look at the specific language in the consent decree it states best efforts. In fact includes a duty, an obligation on behalf of Honda to insert a provision into their contract with their dealer to ensure the decree is complied with. We offered into evidence as part of that response to the motion the contracts that were signed by Honda and Brownsville Sports Center.

HANKINSON: If we were to consider the consent decree in the contracts how do those facts balance against the factors that are part of the most significant relationship test since it is a balancing?

GRILLO: I would start off by citing as authority the Sept. 25 docket. There's a statement down here that says before buying a used ATV, the father inquired about ATV's at the Brownsville dealership. There are no product liability choice of law cases that have these type of facts. The fact that the person who ultimately purchased the vehicle that killed his son went to the very dealer that sold it. And he went to that dealer, although he was a prospective customer, he may have been window shopping, unique to this case that prior to him going in there Honda already agreed that they have to contractually require their dealer to warn him.

HANKINSON: How does that balance against though the other facts that Mr. Holman have mentioned and in particular the fact that the injury occurred in Mexico?

GRILLO: That's one of those four factors under §145.

HANKINSON: And one that is to be given significant attention.

GRILLO: I disagree with that. In 1979, this court adopted the most significant relationship test in Gutierrez. That test itself doesn't provide emphasis to any factor. In fact, Gutierrez specifically says it's not the number of contacts, it's the quality, and no one specific factor to be given more emphasis than any other.

HANKINSON: And so that's my question. If you're relying on the Brownsville dealership from the consent decree, how would you weight that? How would write the opinion weighing those facts against the facts that Mr. Holman has listed in his argument where he says the test weighs in favor of Mexico as the choice of law? Do the balancing for use. What does the opinion look like?

GRILLO: The balancing has to look at those four factors. The conduct concerned in this case, as all cases address in products liability choice of law cases say, is the product. Not one case says you look at contributory negligence. Not one case says you look at what the jury assesses. They all say you look at the product. And there's three facets of looking at the product: design; manufacturing; and stream of commerce. Obviously design and manufacturing aren't concerned

with Texas or Mexico. The stream of commerce is where this first sale of this product occurred down in Brownsville. In addition unique to this case is that Mr. Ramos down in the Brownsville/Matamoros area, crossed the border and went over to the only Honda dealer in that entire area. Mr. James who was the owner of Honda testified that the primary area of responsibility is Matamoros and Brownsville. So it's extremely reasonable and foreseeable that he's going to go over and go to the only Honda dealer to get that information.

He went there on two occasions. We specifically pled in plaintiff's pleadings that there's a failure to warn of not buying this vehicle for his 8 year old son. And there were two failures to warn. He testified that if he had gotten that information he wouldn't have purchased the product.

The other factor there is there is no Mexican defendant involved. If you're going to apply the choice of law and be concerned with the limitations in the liability section or the damage section of Mexican law, all the cases are consistent is that you look what the reason behind that is. The reason behind those limitations is to protect Mexican defendants. There are no Mexican defendants. This court in Duncan v. Cessna(?) made a specific point: if there's no party to be affected by the specific conduct they are concerned with, then that state would not have an interest in it.

O'NEILL: But you would agree that Mexico is the place with the most direct interest in the plaintiff's monetary recovery?

GRILLO: I would agree it is a interest.

O'NEILL: What interest would any other state have in the plaintiff's recovery here?

GRILLO: The interest in Texas is that we have a product's liability system designed to deter defective products being sold in Texas. If you had a system that says okay we're going to find you liable, but we're going to award you nominal damages, which is what this is going to be if it exceeds just the expenses in the case, then you have no deterrence. So you've eliminated that issue. And in fact, I think the interest in having a person from your state being compensated is to make sure they get adequate compensation. There can be no concern if they get more compensation. It's to ensure they get at least the compensation of that forum state by request.

ENOCH: Let's assume you're correct about our product's liability interest. That may not be Mexico's product's liability interest nor any other country's product's liability interest. It's one thing if there's a direct sale and the individual then takes the property with him or herself and goes elsewhere. That's one issue. But once these products are sold, they are out there, I would assume in Canada and in Mexico there are lots of American made products sold in the US that get moved over there. Does Canada really expect American product's liability law to apply to their citizens relationship to that product they are driving on their street? It seems to me that's a fairly significant consideration here and not simply just the US's interest in product's liability.

GRILLO: I certainly think that's a factor to consider. It's just not one factor. But that's why the restatements suggest that you consider the interest of the forum states. That's why you go back to this analysis: design, manufacture and the stream of commerce. Obviously by the time it gets to Canada, and it's been sold in Texas and got resold in Georgia, that argument loses any weight.

Of course Canada is going to have an interest in it, but the same analysis also exist: is there a Canadian defendant? If there is a Canadian defendant that sold the product it would be more likely you would want to apply Canadian law because they are going to be affected by the liability scheme and the damage scheme in Canada.

ENOCH: Canada's strongest interest is in its own citizen's health and welfare and safety. Wouldn't that be the strongest interest of any country?

GRILLO: I think it's a interest. I think when you start saying the strongest interest, that's not how the analysis is done in the most _____ relationship test. You look at the context and you evaluate through all the facts. We can't isolate them and just say there's on fact. I mean there's no question we could always say it's always the place of injury. That used to be the law before 1979. We eliminated that consideration. Now we say we have to look at all the facts. It may be if it was sold in Texas, it was designed in Georgia, there may be some other considerations. That is one factor. It's not the definitive factor.

O'NEILL: Didn't we also say in _____ Brown that you have to divide it up on an issue by issue basis. And so perhaps the argument you just made about products liability concerns would govern the liability question. But in terms of the damages question how you calculate and allocate damages, again I keep coming back to the Torrington language that talks about the particular plaintiff's recovery. And you would agree that there's no interest in protecting the defendant against financial hardship in Texas because it's a Japanese company. So there's no interest there. Texas has no interest in protecting Honda from financial hardship in this case

GRILLO: They're not a corporation out of Texas.

O'NEILL: So it doesn't pull in that piece of Torrington, and there's no interest in the plaintiff's monetary recovery on the damages side here. And maybe liability to protect Texas citizens from product defects on the liability side. But in terms of analyzing the damages issue _____ _____ to see where Texas has an interest in the plaintiffs here compensatory damages when they are not citizens.

GRILLO: You can certainly argue there's a difference. But it goes back to my point, why impose liability if there's no damages?

O'NEILL: Would you agree that the law is you decide the law based on the question asked? You have to divide liability for damages.

GRILLO: You can't. In the Torrington case this court decided to use the Texas measure of damages even though there's a N. Carolina plaintiff. And of course maybe if the argument was that the parties had agreed to liability as to Texas. But that same argument would apply here. If Texas law should apply as to liability it makes sense to incorporate the entire scheme. Because what good is it going to say, you have a defective product, we're going to impose liability but you can go because there's no damages. There's no consequence.

O'NEILL: Well then the language in Torrington would just be surplusage that I just quoted. The language I just quoted from Torrington would have no effect. The way you just interpreted that language would overrule - I can't remember the name of the case. It said you have to look at the issues differently. The choice of law according to the issue you are analyzing: liability, damages.

GRILLO: Right. And you do that. And you can also consider what is the effect of looking at different interest. The interest in Texas is 1) ensuring there's a product liability scheme without which if there's no damages there is no scheme. There's an interest in Mexico. It's making sure their residents receive adequate compensation under their system.

HANKINSON: Why wouldn't Mexico have an interest in the sale since this particular resale occurred in Mexico?

GRILLO: That's probably a fact that they might, but it's not one of the factors I think listed in the restatement. The restatement really talks about the initial sale, not subsequent sales. The conduct described in the restatement suggests those three factors I mentioned earlier: design, manufacturer, and stream of commerce. Once it's in the stream of commerce, then it can go anywhere and it's already a product claim _____ first state.

O'NEILL: So you always go back to the state where a product was sold in the first place and not to the state with the most significant relationship?

GRILLO: No. It's one of the factors you consider. And that's why he went to the other situation about going into the dealership.

Let me address the second issue. That's the issue of whether or not separately submitted claimants could be added together. Honda asserts there's two theories why this court can do it. One is, Honda claims that the civil practices & remedies code, 33.011 says you can do it. Of course nothing in the Civ. Pract & Rem. Code says you can combine separately submitted claimants. In fact no case law has ever been cited to this court in which plaintiffs who have been submitted separately have been combined. In fact the only case that really addresses it is the Haney Electric case, which is the basis of the pattern jury charge. And it's the basis of the charge that was submitted in this case.

As the court pointed out, the way to resolve it is if you believed that claimants

was in fact one claimant, you would have an obligation to submit it. Claimants, Honda and the son. That wasn't done in the case. Once you separate it there has to be some authority for the court to go back and combine them. There's none. Nothing in the statute suggests that was the intent when they drafted 33.011.

Even Sen. Montford's. article which is cited as authority for this particular issue, he doesn't cite any statements of legislative intent by legislators during the legislature.

ENOCH: I'm trying to figure out how that would work. How would a child - a child is run over in the street and both parents and three cousins and brothers and sisters are all standing there right at the time it happens. How is any of their negligence the same negligence as the person standing next to them? The event, the activity might be the same, but it would seem to be the infinite variety of reasons well my back was turned, or I was in a conversation, or I thought Sam had the child, or I thought Belinda had the child. It's hard for me to envision a scenario where any individual who has been asserted to be negligent could have been identical to any other individuals, such that he would say well I'm going to list all of these people as one people, and I want the jury to say what was their negligence. One blank.

GRILLO: Certainly if it's submitted as a single entity, that would probably have to happen in some form. But the problem is as you point out first if the individuals have no connection you can't submit them together. The reason I argue these people should be submitted is two reasons. One is, the claimants under the Civ. Pract & Rem. Code, and they should be initially submitted as one claimant. Or secondly they are parents and they have a joint responsibility to supervise a child. There are some cases cited regarding joint supervision. But none of those cases 1) say that you can joint parents if you are submitted as separate. It just hasn't been done. This would be the first time it gets done. The second thing is the facts of this case don't support joint supervision. The facts of this case are unique. Are very different as to the father and the mother. The testimony in this case is the son asked his father for an ATV. The testimony in this case is the father after being asked that decided to start researching. He looked at different kinds. He got some information on it. And then he decided to go to Brownsville Sports Center as part of this process. He had gone there on two occasions. After he finally was satisfied with what to get, the father went out and bought it. After the father got it, he took it and put his son on it and trained him for 1-1/2 years. The mother wasn't involved. The father bought a helmet and instructed him to wear it. The father, at the one time he didn't have the helmet on punished him for that.

O'NEILL: But the jury awarded the same negligence. So they didn't quite see it that way.

GRILLO: And what happens if the jury awarded 10/50? Do we evaluate it differently? Of course not. The jury award could have come out anything. What if the jury awarded zero and sixty. Can we add them together? They would have made the same argument regardless of what the jury awarded. So the jury award can't determine it. It has to be done before the submission. If you do it afterwards, then you have to come up with some new rule why you can do it. You have to argue to the TC this is a joint supervisory situation. The claimants are one entity. We are going to

submit them as a single claimant.

PHILLIPS: Shouldn't the judge know beforehand what your position is? Neither one of you have argued that it's absolute. You argue that there's a fact based rationale behind whether or not you're going to aggregate different people's conduct _____, but based on what the particular facts of the case show.

GRILLO: That is correct.

PHILLIPS: The way this charge goes particularly with pattern jury charge _____ sometimes separate, sometimes the same, but the trial judge isn't going to know what you have in mind until after the jury verdict comes back and people start arguing _____.

GRILLO: And that's the point. The Drilex opinion wasn't out. There was no authority to suggest you would combine plaintiffs at the time. And it wasn't argued. So the jury charge that was submitted was essentially the same as in Haney Electric. And it's discussed in the pattern jury charge and it says this may not be the best way, but we can figure out how to interpret it. And that's what the CA did.

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RESPONDENT

HOLMAN: They say you should consider the facts that Mr. Ramos visited the Brownsville dealership. Even the CA said that that was irrelevant. The reason it's irrelevant is because he said when asked, Had you decided after you left the Brownsville dealership to buy a Honda? He said, no. I bought the Honda because my brother's compadre had it. And if he would have had a Yamaha he would have bought the same thing. That's at vol. 8, page 105 of the record.

Secondly, they say that there was no Mexican defendant here. There is no Texas defendant here. There are no interests to protect defendants in this case.

J. O'Neill asked about who has the most interest in the plaintiffs recovery? Of course that is Mexico. Texas has no interest in the plaintiff's recovery in this case. There is no contacts with Texas. There is a restatement of torts §178 that says in wrongful death case, the presumption is that the damages that the law that will govern damages in wrongful death cases is of(?) law of the forum where the wrongful death took place and the plaintiff suffered their injury.

PHILLIPS: Is it in the record whether or not Honda does business in Mexico?

HOLMAN: Yes they do do business in Mexico. And it is in the record. The motion to apply the substantive law of Mexico is found in the clerk's record at page 150. And in that they go through an analysis of all the contacts that Honda has elsewhere, and one of the things that they mentioned is that Honda does have a organization in Mexico.

OWEN: Was the Brownsville dealer considered the Matamoros dealer as well?

HOLMAN: He doesn't have any agency in Matamoros. The Brownsville dealer is the agent for the Texas _____.

With regard to the Haney Electric co., of course that can't apply because that case was decided before the statute and it never interpreted what the meaning of this statute is. This court has interpreted the meaning of that statute. General Chemical Corp. v. De La Lastra in dealing with 41.001(1), which is the same definition of claimant, the court said in that case that claimant means not only the deceased but all persons that are seeking recovery on behalf of the deceased. In Drilex this court said that claimant means all the members of the family, not just one claimant. Not separate claimants. Now does this make sense? Yes. It makes sense. The code construction act says that when you're construing the code singular means plural. Plural means singular. So you should consider that. They mean everybody that's suing on behalf the person.

Now if Drilex is the law and continues to be the law, then Drilex itself was applied after the jury entered its verdict. The Drilex interpretation of how you apply the jury findings is how Drilex applied that rationale to the jury findings. Hereto, we applied the statute after the jury had entered its findings. It's how you apply the law to the jury's findings. And that's what Drilex stood for, and that's what this case should stand for.

Finally, they say that you should consider that there are different facts with regard to the father and mother. And I could go in and I could point out to you all the facts that had to do with the mother. The mother said that she had bought the helmet. The mother rode on the vehicle herself. The mother knew that he was riding unsupervised. Knew that he rode into town. Knew that sometimes he didn't wear a helmet. But all that stuff is irrelevant.