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Supreme Court of Texas.
TXI TRANSPORTATION COMPANY, Ricardo Reyna Rodriguez, Aurelio Melendez,
Appellants,
v.
Randy HUGHES, et. al.
No. 07-0541.

October 16, 2008.

Appearances:
Reagan Simpson, for Petitioner.
Brian Stagner, for Respondent.

Before:

Wallace B. Jefferson, Chief Justice; Don R. Willett, Harriet O'Neil, David M. Medina, Paul W. Green, Nathan L. Hecht, Dale Wainwright, Phil Johnson, and Scott A. Brister, Justices.

CONTENTS
ORAL ARGUMENT OF REAGAN SIMPSON ON BEHALF OF THE PETITIONER
ORAL ARGUMENT OF BRIAN STAGNER ON BEHALF OF THE RESPONDENT
REBUTTAL ARGUMENT OF REAGAN SIMPSON ON BEHALF OF THE PETITIONER

CHIEF JUSTICE JEFFERSON: The Court is now ready to hear argument in 07- 0541 TXI Transportation Company versus Randy Hughes (TXITransp. Co. v. Hughes, 224 S.W.3d 870).

ORAL ARGUMENT OF REAGAN SIMPSON ON BEHALF OF THE PETITIONER

SPEAKER: May it please the Court. Mr. Reagan Simpson will argue for the petitioner. He is reserving five minutes for rebuttal.

JUSTICE MEDINA: Mr. Simpson, I wanna talk about voir dire and in this -- in this case it appears that there was one Hispanic on the voir dire panel and one person that looks Hispanic.

MR. SIMPSON: That's great.

JUSTICE MEDINA: And there's a --

MR. SIMPSON: What looked Hispanic according to the jury consultant for the plaintiff?

JUSTICE MEDINA: Okay. Just for the record I am Hispanic, and I hope I look Hispanic. You know, there is what appears to be in the record race neutral reasons for striking Gonzalez. And that being that he was a new resident from Wise County and that he worked for a -- or his wife worked for a big corporation. What -- so on his face, it appears that the Batson challenge would fail. I wanted your response to that and also want to know what your thoughts are about this not being another reason to just eliminateprint or re-strikes in the voir dire process.

MR. SIMPSON: The second question first, I think, the second question is probably more of a rule making or perhaps a legislative

decision on whether the preemptive strikes are worth the effort and Justice Brister has discussed that very recently in the Davis v. Fisk Electric Company [Davis v. Fisk Elec. Co., --- S.W.3d ----, 2008 WL 4370670] case.

Addressing your first question everything in this case has to be looked at. All the issues were all intertwined. And whatis different about this case from a lot of others and what is similar about this case with the Davis v. Fisk case is that you have front and center the racial issue before trial and before voir dire there was discussion of the ille gal alien evidence before the judge and the judge while he said, 'Approach the bench, if you're gonna say certain things', he had already decided to let in a statement made to an INS official in 1999. So the issue of illegal alien status was already before the court. The court knew that was a big issue. You have this note that says look -- looks Hispanic. And also in the Davis v. Fisk case racial discrimination wasn't factual cause of action brought. Here you have, what we think, is a fortuitous injection of illegal alien -- aliens in the caseand that takes it all the more something that the court needed to look at and make a decision on and we have the --

JUSTICE BRISTER: So did the strike survive Davis v. Fisk?

MR. SIMPSON: I don't believe it does.

JUSTICE BRISTER: Because?

MR. SIMPSON: Because for the --

JUSTICE BRISTER: No questioning. Nobody asked it with a single question?

MR. SIMPSON: Nobody asked a single question. The only Hispanic was taken off the panel because the issues in the case, the way it was ended up trying was certainly put that issue front and center and you look at the totality of the circumstances, as I read the court's opinion andthat's all -- one of the many issues that revolved around this.

JUSTICE BRISTER: Is that familiar with Wise County or do -- is this a large Hispanic population. What are the demographics?

MR. SIMPSON: I'm not sure. It changed a lot since I grew up in Jack County and it's a lot bigger and it's kind of a better community now of the Fort Worth area. So it's much changed here --

JUSTICE BRISTER: Not many on this particular jury panel?--

MR. SIMPSON: There is only one, Frank Gonzalez, the only Hispanic. I think it's clear in the record. The issues in thiscase, I think, can be summarized in two sentences.

The primary issues, first is this: The illegal alien evidence that was admitted combined with the broad form negligence submission against both the truck driver and TXI. They commissioned to this non- Hispanic jury to decide that the truck driver was responsible not because he crossed the center line of the highway but because he crossed the US-Mexico border and was allowed to drive the truck.

The second point is if you're gonna put an 18- wheeler driving on the wrong side of the road and all the surrounding motorists never see it on the wrong side of the road and the accident happens in 18-wheeler's own lane of traffic you need a lot more evidence than what the plaintiffs came up in this case to make a plausible theory of fake-leftsyndrome then they presented at the trial and --

JUSTICE MEDINA: You know there's -- there's a --

MR. SIMPSON: -- letting all the defense evidence in.

JUSTICE MEDINA: Well, there's -- there's still the experts on where the accident occurred.

MR. SIMPSON: I'm sorry.

JUSTICE MEDINA: There's a dispute with the experts on where that accident occurred. Correct?

MR. SIMPSON: There is difference of opinions by the experts on the -- where the accident occurred. That's correct.

JUSTICE MEDINA: Okay. Before we get in to questions whether or not the DPS Officer's opinion should have been admitted, isn't it important for the other side to -- to show that on a negligent hiring situation know that your client had a duty to make sure that this driver was ableto operate a vehicle, that type of vehicle especially. Before he was hiredand do the list of factors that are outlined in your brief, so why isn't his -- his legal status in this country an issue?

MR. SIMPSON: There are two reasons. Fundamentally -- fundamentally this is not a negligent hiring case. And the reason itisn't, if you look at the Texas American Bank v. Bogus [Texas American Bank v.Boggess, 673 S.W.2d 398] case, which cites the Mooney [Mooney v. Stainless, Inc., 338 F.2d 127] case, a Sixth Circuit case. And says, if you have driver inattention for inattention by a worker. That's not a negligent hiring kind of situation 'cause anybody can be inattentive. The reason fundamentally this is a negligent hiring case is because this is a case about whether somebody drove in the wrong side of the road. Everybody knows to drive on the right side of the road. Somebody who was issued a commercial driver's license by the state of Texas. He has passed a skills test. He has passed a knowledge test twice to get his license first and then get reinstated, knows to drive on the correct side of the road. How many years of training do you need to have in order to have -- to know to drive on the right side of the road. How much experience do you have to have. Three years is, according to the majority opinion below, three years experience is certainly enough to know to drive on the right side of the road. So fundamentally this is not a negligent hiring case. That claim was brought and not submitted in order to inject the illegal alien status into the case.

JUSTICE GREEN: You're saying that every case that involves a car on the -- on the wrong side of the highway can never be a -- a negligent hiring case?

MR. SIMPSON: I'm not saying every case. But I'm certainly saying this case because the theory is that he drifted into the wrong lane. He should know to drive on the right side of the road. This is not -- he needed to know how to downshift his gears or he needed to know about air brakes, or he needed to know something of that. This is not that kind of case and --

JUSTICE GREEN: Well, but I could see a case where the plaintiff could set up a -- a situation where a driver has consistently been shown to be inattentive, you know, playing his iPod or he'll be on the cell phone --

MR. SIMPSON: Yes.

JUSTICE GREEN: -- or one thing like that or another and -- and end up on the wrong side of the -- of the -- of the highway stripe.

MR. SIMPSON: That's true but that was of the other things that would cause him to go on the wrong side of the highway, inattention, falling asleep and, of course, in this case we have actually no record of any kind of problems that this driver had.

The other reason is not a negligent hiring case is evidence specific in this case. And that is the fact that he didn't have a social security number, the fact that he lied about getting his driver's license, those issues have nothing whatsoever to do with his ability to drive a truck. And even the majority opinion below said that

those were collateral matters, they have nothing to do with his driving ability. And that was the whole focus of this case, was he was an illegal alien. He didn't have a social security number, he was not here because he wanted to work, but didn't have the right to be here. Ad Nauseam questions about this pervades the entire trial on a negligent hiring claim that they ended up not submitting because they submitted a general negligence question which omitted the issue of driver incompetence.

CHIEF JUSTICE JEFFERSON: And directed to the Court's charge, correct?

MR. SIMPSON: Yes.

CHIEF JUSTICE JEFFERSON: And what were those objections and what--how should the case have been submitted.

MR. SIMPSON: The case -- well, first of all, I don't think there should have been a negligent hiring claim submitted at all. And that was one of the objections that was made. But if it's gonna be submitted and we tendered and it's behind the tab 11, I believe that the Court, at the break we supplied page 51 in the record. We submitted the proper question that we have, 'Do you find the driver is unfit or incompetent?' And that should have been submitted as part of a negligent hiring claim.

Mr. Taylor said we're not all that desirous of having that submitted. He did that to try to avoid any claim that was inviting error by suggesting this question and this Court dealt with this in the Ulico Casualty v. Allied Pilots [Ulico Cas. Co. v. Allied Pilots Ass'n, 262 S.W.3d 773] case, where you said, 'If you submit something to try to make sure that something is right, you're not inviting error.' Well, now they're trying to claim, the Court of Appeals is trying to claim, that Mr. Taylor by saying, 'I'm not desirous of having this.' He didn't even request it. It was requested, it was refused.

On page 71 there was an objection generally to omission from the charge of the question inquiring about whether the driver was incompetent. And the reason that question wasn't submitted, the reason they never submitted a negligence per se question which we also made an objection to at page 51 of the same record is so that they could put everything in and argue generally and let the jury decide generally on the negligence question and that's particularly acute when you look at and compare that with the negligent entrusting case against Mr. Melendez which did require driver incompetence as part of it. So the jury looks at it and says, 'Where driver incompetence is required over here but now on TXI and the truck driver we just have this general negligence question with no guidance whatsoever so I guess there could be any reasons they're negligent.'

He shouldn't have been behind that wheel because he didn't have a social security number he shouldn't have been here in this country. He shouldn't have been driving and that he hadn't been driving, this accident wouldn't have happened. And that has nothing to do with negligent hiring. This Court has held that you have to have a nexus between the incompetence so it's incompetence and what happened on the road. There's absolutely no nexus whatsoever here in this case.

JUSTICE MEDINA: Let's talk about some of these decisions made on the experts and Justice Gardner's dissent. He states that the expert Dr. Marshek disregarded the observations of four disinterested witnesses and came to the conclusion that the accident occurred perhaps on -- on the other side of the road based on some gouge mark in the road and -- and there's also a challenge as to whether or not that expert's opinion is even admissible because it failed certain

standards. Can you address that please?

MR. SIMPSON: Yes, I will. In fact I have a handout that the Court should have which had experts from Dr. Marshek's opinion. And the two key things in his opinion are, that the gouge mark made by the wheel of the Yukon defines the angle of the tractor-trailer. Once the tire deflated the wheel of the Yukon defines the angle of the tractor-trailer. There's actually no scientific basis for saying that and if you look on the excerpt that I provided he says--

JUSTICE MEDINA: Was there any scientific basis that the -- the wheel deflated prior to the accident?

MR. SIMPSON: Well, we know that because of the collision the wheel deflated. In fact the entire wheel came off.

JUSTICE MEDINA: But that was the opinion of the DPS officer, right, that -- that's the -- if you have something in the road causing the tire to deflate?

MR. SIMPSON: Yes. The officer said -- Officer Raney said that that may have happened. But if you look at the first page of the handout, 'Is it your opinion there was no steering input provided at that point by the driver can't really use?' 'I don't think there was much steering input.'

You don't know whether there was any steering input being provided by the driver of the Yukon. 'Cause if you don't know what steering input is being provided by the driver of the Yukon, how can you tell that the direction of the wheel of the Yukon has anything to do whatsoever with the direction of the tractor-trailer rig.

Putting aside, if you look at Exhibit 272 which shows the entire left wheel is gone, putting aside that the change in the trajectory of the Yukon and the tearing off of the wheel could affect the direction of the gouge mark. There's absolutely no basis, scientific or otherwise for saying that.

The other key thing to all of all this testimony is whether the -- is that his opinion that the tire . made the gouge mark at the second wheel, when it hit he second wheel of the Yukon, and that's the second page I have in the handout. Because he admits that there's more damage on the fourth wheel of the tractor-trailer than there was at the second wheel of the tractor-trailer. So how does he know that the tire made the gouge mark when it connected or collided with the second wheel as opposed to the fourth wheel which seems to be kind of opposite of what you would expect. He has no basis for it.

Other than, as Justice Gardner pointed out. It didn't fit his theory. So it didn't fit his theory, it must have had the collision with the second wheel and made the gouge mark rather than the fourth wheel. And then the last thing I have on the handout is his admission. Nobody knows what the braking was. Nobody knows what the steering was of the tractor- trailer rig. It's all total speculation. That is Dr. Marshek's opinion.

JUSTICE JOHNSON: Counsel, can I ask a question? You're running short on time, but also there seems to be a difference between your position about what these witnesses actually saw and opposing counsel's brief about what they do or did not see. Would you address that, please.

MR. SIMPSON: Well, the issues in this case are common sense. When you're driving down the highway, are you looking at every car in front of you? No, you're not. But when those brake lights come on or when somebody does something unusual, then you look at that car. That's what all these people said. I never saw the tractor-trailer rig in the opposite lane of traffic. (Inaudible) Lawrence said, 'It doesn't take a

rocket scientist to know that your trailer wasn't outside of its lane. Michelle Wyndham says, 'I could see clearly in front of me. She was about to pass Jerry on. I could see clearly in front of me. I think I would have seen the tractor-trailer rig if it had gone into the -- to the other lane.' Now they say, well she didn't see the tractor-trailer rig. Well, why didn't she see it? Because it was in his lane and [inaudible] on Lawrence. So to say that she didn't watch it every time, she didn't have a binoculars watching every move and that tractor-trailer rig means nothing.

We have motorists behind and in front of -- this tractor-trailer rig that never sought outside his lane. We have an accident that happened in the truck's own lane, it's nothing but total speculation that it [inaudible] syndrome happened and by putting this illegal alien evidence under the guise of impeachment which was not under the guise of negligent hiring which where he wanted to submit it because the elements weren't submitted and we objected to that, allowed this jury to decide the issues of the case on things the juries should not decide issues on.

JUSTICE WAINWRIGHT: I wanna ask the question on your rebuttal involving the charge in the submission for the -- the twins that were lost in the accident and whether or not that submission in itself invited error.

CHIEF JUSTICE JEFFERSON: Thank you, Counsel. The Court is now ready to hear argument from the respondents.

SPEAKER: May it please the Court. Mr. Brian Stagner will present argument for respondents.

ORAL ARGUMENT OF BRIAN STAGNER ON BEHALF OF THE RESPONDENT

MR. STAGNER: May it please the Court. Let me just start by getting immediately into -- Justice [inaudible] I think your question on the relevance of the immigration evidence to the negligent hiring claim and the negligent entrusted. And --

JUSTICE MEDINA: The first question was the -- the striking of the only Hispanic juror in the voir dire panel then the notation of the other person that looks Hispanic, you know, that in itself and the reasons given in the record seemed to be race neutral but -- and you look in to the totality of the entire case it -- it seems to be -- you know, get out to set it up perfectly to exclude the Hispanics on the jury.

MR. STAGNER: Yeah, I would note one thing that looks Hispanic obviously wasn't next to Mr. Gonzalez, it was next to Patricia White --

JUSTICE BRISTER: Yeah, but it's not race neutral either.

JUSTICE: We didn't strike Patricia White.

JUSTICE BRISTER: I know. It shows that somebody was thinking about that, doesn't it?

MR. STAGNER: I'm sure -- it was written the same handwriting, I think we went through this in the brief, the same handwriting from the same jury consultant who noted other features identifying features about the panel members.

JUSTICE BRISTER: The jury is not suppose to notice that feature, are they?

MR. STAGNER: I -- I don't know if they are or not. I would hope that that would not factor into what the --

JUSTICE BRISTER: Write down, what looks black.

MR. STAGNER: No, I don't.

JUSTICE BRISTER: [inaudible]

MR. STAGNER: No, I don't. What I know is that there were two race neutral reasons given for striking Mr. Gonzalez. Patricia White --

JUSTICE BRISTER: And I won't bother you a long time but my colleagues don't all agree with -- why do we need to protect the system where we can strike the only Hispanic on the jury when the defendants are Hispanic because we don't want people who had not been a long-time residents in the county, why -- why is our fair and impartial system so dependent on, gosh we need to have the right to keep those new residents from being on the jury?

MR. STAGNER: I'm -- I'm not sure I can defend that because I'm not sure I disagree with you on that fundamental issue. What I do know is the existing case law allows that. It's one of the legitimate bases for striking jurors for exercising preemptory strikes, I know that.

JUSTICE BRISTER: In preemptory strikes in Davis v. Fisk, nobody asked the guy any questions about being a new resident.

MR. STAGNER: I think it actually survives. It was the combination of being a new resident and working for a large transportation company. Not only that, but his wife worked in the transportation industry and you can imagine if you were suing a transportation company --

JUSTICE BRISTER: Suing the trucking company you just can't have anybody that works for airlines on the jury.

MR. STAGNER: And -- and the entire point of the preemptory system whether we agree with her or not is that you can strike the less than ideal juror as long as you do it on a legitimate basis and both of those has been recognized in the laws as legitimate grounds for doing that.

JUSTICE BRISTER: (Inaudible) -- we're gonna be very -- we're not gonna believe that if you never ask too many questions about it.

MR. STAGNER: There's a completely different dynamic working in Davis v. Fisk, as I'm sure you know. It was racial discrimination case where each side used all -- virtually, all of their preemptory strikes to get rid of the opposing race. It -- and again it worked both ways. The plaintiff exercises six of six to -- to get rid of white jurors and the defense used five of six to get rid of African-American jurors.

And -- and one critical difference, there two I think is that the race neutral reasons that were offered for striking the African-American jurors, the panel members were actually more true of the white panel members who were not struck. The perfect example was one of the explanations offered for striking an African-American juror is that by a nonverbal look, a smile, or a smirk, they seemed to express erroneous to assess punitive damages. They were struck for that reason yet the white panel members who openly acknowledge that would -- they'd be happy to assess punitive damages, they were not struck so it just didn't hold water in that case and you had the other dynamic of it being a -- a race-relations case.

JUSTICE MEDINA: What's the legal nexus of the so- called illegal alien in the cause of this accident?

MR. STAGNER: The way it has been painted, I think I say right. I don't think there is a nexus between an illegal alien crossing the center line. I don't --

JUSTICE MEDINA: Why is it so significant in this case? So significant that the first witness called by your side was the defendant driver himself.

MR. STAGNER: Sure. Let me start with the negligent entrusted. It's the easiest to explain. Negligent entrusted is the requirement that the driver be unlicensed or unfit, doesn't have to be both that's this

Court holding in Williams v. Steves [Williams v. Steves Indus., Inc., 699 S.W.2d 570, 571], where you had a -- a qualified driver with the safe driving record and what the court said there is, 'It is adequate to be unlicensed, that's enough to sustain a claim for negligent hiring.'

CHIEF JUSTICE JEFFERSON: But the -- but the trial could take in place with evidence of this driver was unlicensed. You didn't have to get into the illegal alien status to -- to make that point.

MR. STAGNER: I respectfully disagree on that. The -- the statutory requirement to hold a commercial driver's license both under Texas law and the Federal Motor Carrier Act is have a social security number or be a legal nonresident.

CHIEF JUSTICE JEFFERSON: Yes, but couldn't -- couldn't the parties have agreed, 'Okay, there will be evidence here that this driver is unlicensed.' Can we stipulate to that? Is that reference to immigration status?

MR. STAGNER: That's possible. And in fact, your Honor, if you look at our first question it was, 'Did you lie on your driver's license application?' That was it. If you would say, 'Yes,' you could moved on. He didn't say, 'Yes.' He said, 'No, I did not lie on my driver's license application.' At that point we have no choice but to show how he lied on that driver's license application.

JUSTICE WAINWRIGHT: Is there a criminal conviction on that basis?

MR. STAGNER: We did not show a criminal conviction on that basis, your Honor. What -- what we showed was -- and -- and now we are sort of jumping in the negligent hiring. So -- so we had a negligent lie -- excuse me, the negligent entrusted based on the fact that he was unlicensed and you get a negligent hiring or go on negligent hiring was to show, one, the TXI had not done its due diligence that his seven years of hiring experience which was the only basis for putting him behind the wheel of his truck, he had no training. He admitted he had no training. That was the one true thing he said on his lie -- on his application. TXI admitted they didn't train him. TXI admitted that they didn't test him, that they took him on face value, the seven years of uninterrupted driving experience in and around Dallas and what we were able to prove in part through this immigration evidence, to the INS Q&A that he swore under oath that he was using a false social security number, working in the United States. He had not lived in the United States until 1996 which disproved the first job. His first driving job that he had listed on his application was from '94 to '96. We were able to use his sworn statement prior -- inconsistent statement under oath that he was not even in the United States until '96. You're also --

JUSTICE HECHT: His own collateral matter though.

MR. STAGNER: It -- it's not a collateral matter Justice Hecht. The only way the -- if you look on the face of the --

JUSTICE HECHT: He might of lied on his marriage license but --

MR. STAGNER: But his marriage lic--

JUSTICE HECHT: [inaudible] the case.

MR. STAGNER: With his marriage license didn't qualify him to drive. Under the Federal Motor Carrier Act, you're qualified based on two things: training or experience.

JUSTICE BRISTER: Your whole -- your whole case is he crossed over the yellow line rather than what all the eyewitnesses say which is that your client crossed over that yellow line. And what is it about commercial driver's license that only people that have that know you shouldn't cross over the yellow line. I mean, my 11-year-old daughter knows you don't cross over the yellow line. Why does proving that he --

his license was no good show that all -- that's why he -- I mean, there's got to be a causal connection and I don't see where that proves he didn't know you weren't supposed to cross the yellow line.

MR. STAGNER: They are both -- both TXIs witnesses, Mr. Kennemer and our regulatory expert, Mr. Bensmiller, testified that the more experience the driver has, the less likely that driver is to cause an accident. We're not claiming that --

JUSTICE BRISTER: I disagree with that. But this accident didn't happen from backing up or parallel parking or something that's hard to do. This is just driving down the street. Do you go with the yellow line or not?

MR. STAGNER: Sure. And -- and it's --

JUSTICE BRISTER: We don't have to go Harvard for that, do you agree with that?

MR. STAGNER: Absolutely. This isn't about -- we - - we've never contended that Mr. Rodriguez was a maniac driving down the road on the wrong side. He never would have gotten to paradise that day. Had he been driving down the wrong side? We never contended --

JUSTICE MEDINA: You -- you never do that though. In today's politically-charged world with the so-called illegal immigrant being the burden of all America's problems, and just as unfortunate society has blamed American-Indian, the Italians and different period of time, the Irish, the Jews, now it's the illegal immigrants turn again. In the same -- in -- in the same context when you read the entire record of that, it was only offered to do just that to -- to let this jury know that. We have an illegal alien over here and they have caused us horrible horrendous accident and which is to punish him, disregard the facts. So tell me how that is wrong? That -- that my view of that is wrong?

MR. STAGNER: Because it all goes to his experience. Again, TXI throughout trials that this man had seven years of uninterrupted driving experience without accident. We were able to prove in part using the -- the immigration evidence that he had a little over two years. We were able to do that by directly showing that for example when he said that he had been here from '94 to '96 driving were he used the immigration evidence to show, he was not here till '96. When he claimed he'd worked for 19 straight months immediately before this job. So went out -- it wasn't any faded memory problem when he said he'd worked 19 months for Aggregate Haulers prior to this job we're able to show that three months into the job he'd been deported.

JUSTICE MEDINA: Let's talk about the charge. There's this admission of charges, if my memory is correct about the two unborn twins and there's no cause of action for that. No recovery for that. The judge corrected that after the verdict. But that is so -- seems to invite error that it -- for whatever reason Judge Smith says, should have known that can't recover on that but it's just -- says like he add some more. Got an illegal alien, he killed-- -- got involved in an accident, very horrible and yet he had these two unborn twins. And so that's an issue was wrong in itself. Why -- why isn't that reversible error?

MR. STAGNER: Your Honor, as it was pointed out in the brief, the jury was gonna know that [inaudible] was pregnant. It was in the medical records. That's was all admitted without objection as part of her survivor claim. So the jury was going to know that she was pregnant --

JUSTICE MEDINA: Absolutely.

MR. STAGNER: -- whether we asserted the claim for that or not.

JUSTICE MEDINA: Why shouldn't that -- why should that not have been excluded from the charge or there's no recovery?

MR. STAGNER: Well -- we finally believed that there was a recovery time the existing law in the Second District was that -- that a -- that the wrongful death act to the extent it differentiated between parents of still born children and live born children was unconstitutional. So we had a viable cause of action under the existing law. Now, what happened was after trial that before final judgment was entered this Court reversed the Reese [Reese v. Fort Worth Osteopathic Hosp., Inc., 87 S.W.3d 203, 205] holding, the Reese case that we were relying on under the Fourth Court of Appeals and that's what led the court modifying its judgment to remove that. The other -- the other flaw about this -- to make up that argument is that the history the four --

JUSTICE: [inaudible]

MR. STAGNER: I -- I understand that four deaths weren't enough that the jury was somehow in sense with the fact that the unborn children. That's what we pushed him over the edge. There were four deaths in this accident and I have a hard time believing that the jury was -- that wasn't enough that they were so inflamed by the unborn children that it led to an improper verdict.

JUSTICE JOHNSON: Counsel, would you address the differences between the two positions on the eyewitnesses and their credibility and -- and that aspect of the case -- the significant part of both briefs?

MR. STAGNER: Sure. It is undisputed that not a single witness, I didn't even call them eyewitnesses, they were people who happened to be in the vicinity, the closest one was -- was two football fields behind the route truck but not a single witness saw either vehicle outside of its own lane. But we know that didn't happen. What Wilton said six times in his deposition and he repeated at trial, excuse me, Mr. Lawrence, the driver of the Ford truck, what he said was he never saw the route truck until he heard them release from the collision and he looked down the road.

Now, as Counsel has pointed out when asked -- well, if he had been -- we just driving in the other lane. Wouldn't you have noticed that? Sure, he would have noticed that. Our position wasn't that he spent miles of his time driving the other lane. Our position was that for at least the three or four seconds that it took for Mr. Rodriguez to drive around Coby Jobe, who was turning the car in front him had slowed down, pulled over to the shoulder and was making a right hand turn. For the three or four seconds it took this untrained driver to go around Coby Jobe to get four to six feet over the center line, that was within his on the wrong side of the road an --

JUSTICE HECHT: On that connection, on page one of your brief you say for reasons known only to the driver and the sentence goes on anyway concludes Rodriguez was driving on the --in the wrong lane.

MR. STAGNER: Mm-hmm.

JUSTICE HECHT: And there's a site to four references in the record and two or three of them are experts Dr. Marshek -- Marshall was an expert, right?

MR. STAGNER: Marshek.

JUSTICE HECHT: Yes, a Marshal, Kurt Marshal?--

MR. STAGNER: No, Kurt Marshek was -- there wasn't a separate Marshal. --

JUSTICE HECHT: And Lee Jackson --

MR. STAGNER: Lee Jackson.

JUSTICE HECHT: And then Mr. Melendez, the owner of the truck.

MR. STAGNER: Yes.

JUSTICE HECHT: Right. Who based it on the driver's recollection that it was two or three seconds that he was moving to the right so where did that put him when he started off? Is -- is that the evidence on where he was right -- right before the accident.

MR. STAGNER: Yeah. And I always like to rely on my own expert so let me talk about some of the independent pieces of information --

JUSTICE HECHT: It's -- it's a big record and I just want to be sure that --

MR. STAGNER: It is big --

JUSTICE HECHT: -- those are the references there that we need to look at.

MR. STAGNER: Yeah. It is a big record. The --

JUSTICE WAINWRIGHT: Your answer is -- that's where we need to look and that's all you are aware of in the record.

MR. STAGNER: What I'm aware of in the record is that Mr. Rodriguez said he turned two or three seconds and he changed it at one second. We know that the gouge mark that Jackson, excuse me, that Jackson, Trooper Raney and Dr. Marshek, also the gouge mark was the point of impact. It was six inches to one foot inside the lane. We know that even TXI's own expert, Mr. Painter said that a 1.4 second turn would move him laterally to the right approximately seven feet. And then we have the testimony for Mr. Wilton, one -- one of the -- the passenger in the Ford truck but what he did testify to was that when he heard the noise and he looked down the road, he saw the Yukon come off of the back. He saw the rock truck curving to the right. He saw the -- the Yukon come off of the rock truck and the Yukon was in its own lane. So --

JUSTICE GREEN: When he came off the truck.

MR. STAGNER: When it came off at the back of the truck, it was in its own lane.

JUSTICE BRISTER: He never said in its own lane when it hit the truck.

MR. STAGNER: No, but I think it means that the rock truck, it is at least consistent with our theory that the back of the rock truck was in her lane.

JUSTICE HECHT: How could that be if the gouge mark was in the other lane.

MR. STAGNER: Because the -- then again you have to take into count the sheer length of this. The gouge mark was -- was at the second axle of the truck. And you can drop back possibly 20 or 25 feet from that to -- to the end of the truck.

CHIEF JUSTICE JEFFERSON: You can see there's at least some evidence her car was the one that crossed over in front of the truck.

MR. STAGNER: I -- I can see that -- that there is a lot of evidence that at some point, she crossed the centerline. That -- that's exactly consistent with our theory. The question is why, what prompted --

JUSTICE BRISTER: Is that one of your theories?

MR. STAGNER: No one disputes that. The question is --

JUSTICE BRISTER: That is -- that's the case, how can we exclude the evidence of three or . four cell phone calls made it precisely the moment of the accident? That just seems completely unfair to let -- you mentioned whoever trial counsel was, 40 times we're suing this illegal immigrant but the fact the she received cell phone calls undisputed at the time of the accident and the trial judge excludes that.

MR. STAGNER: It -- it -- and I know just a cell phone --

JUSTICE BRISTER: What was he thinking?

MR. STAGNER: And let me say that just because we said unfair it

triggered a thought, I don't want to paint that this is unfair. I wanna -- for three years and three months prior to this, Mr. Rodriguez and it's in the record, it wasn't allowed to go to jury. He was driving a rock truck, took a turn too sharp, flipped the rock truck. The trial court excluded that evidence because he found it would be too prejudicial to the defense. The trial court also allowed in the clearance pole which had disappeared --

JUSTICE BRISTER: We're gonna try to get in, that the driver who we've blamed for this had an accident three years before that and therefore, must have been negligent on this occasion.

MR. STAGNER: When you go through his experience and yes, that -- that the whole point in making the hiring claim is they have to . examine the safe driving record. Does he have a safe driving record?

JUSTICE BRISTER: So if you have an accident, that's coming in every future accidents in evidence that you were negligent forever.

MR. STAGNER: It -- it -- unfortunately, if you are a commercial driver of the Federal Motor Carrier Act --

JUSTICE BRISTER: But skip over that ruling.

MR. STAGNER: The cell phone evidence, there was one call, that was excluded. The 1:55 call, that was the time of the accident. That -- that's what they say. There's absolutely no evidence that it was answered. Kim Hughes, who was driving the car, had not used that phone the entire morning. That -- that's undisputed in the offer of proof. The prior two hours, there had been three calls that that cell phone had been used for. All of them were used by her daughter in the back seat. An hour and a half before the accident, from that point until the accident, the cell phone was not used at all. The calls to the cell phone --

JUSTICE BRISTER: In the court of appeals opinion, it says that that there was evidence that offer proof outside the juries precedents that he -- presents that he made that call lasting two minutes at 1:55 and another one at 1:57 a and another one at -- incoming call on her phone at 1:55 and the driver's 911 call is 1:56.

MR. STAGNER: Correct. The incidents -- the 1:55 call that -- that is their issue that they raised. And -- and the point I'm making is there has to be some causal connection, something to link it. For example, they cite the Hiscott [Hiscott v. Peters, 754 N.E.2d 839] case. The Hiscott there was not only billing records, there was eye witness testimony that the driver had only one hand on the wheel, was distracted by the phone. Here, there was no corroborating evidence that the phone rang, that she heard it. Again, from 12:21 until the time of the accident, no one answered that phone. There were three calls. Clint was trying -- Clint was trying to call his -- his wife Aften in the back of the Yukon.

JUSTICE BRISTER: Great case and -- and great argument and you might have won with the jury on that but shouldn't the jury been allowed to decide that? I agree if somebody is sitting on the side of the road on a parked car and gets hit, and you want to introduce evidence that they were drunk. We don't let you do that because they weren't moving. It could not have possibly contributed to anything. But when there's some evidence which you concede there was, that maybe she crossed over the yellow line, why doesn't that create some tied together to explain to the jury why that might have happened?

MR. STAGNER: It -- it -- why I disagree is that it was not evidence. It -- there -- there was on the billing records, a two minute call. There was no other proof that it was ever answered. And -- and I agree with you that it would also go to the weight but there's a point

where if the evidence has no weight --

JUSTICE WILLETT: [inaudible] two minutes.

MR. STAGNER: I'm sorry.

JUSTICE WILLETT: Phones don't ring and ring and ring and ring for 120 seconds.

MR. STAGNER: Sure they do, in fact, Clint -- Clint Royse's call at 1:28 which everyone agreed was never answered. That was why he called his brother-in-law at 1:29. That was listed as a two minute call, no one ever answered. He was --

JUSTICE BRISTER: Which is more distracting, talking on the cell phone or diving through you pocket or purse to find where your cell phone that's ringing is?

MR. STAGNER: I don't believe there's evidence of either here.

JUSTICE JOHNSON: Now, so let me ask one question. I was seeing in the briefs somewhere that someone said that the lady who went to the wreck and rescued the baby heard someone speaking on the cell phone so it would seem as though the call had been answered somehow. Am I misremembering the briefing on that?

MR. STAGNER: You're not, Judge Johnson, it's two separate phones. That the phone -- the phone that she heard was Shiloh, the son, he was sitting in the front passenger seat. It was his phone. And -- and also one other thing, I know my time is up on that but if the point here was to find out whether this entire trial turned on the admission of that cell phone evidence, I would note that the jury knew that cell phones are being used in the car. They heard from Ms. Wyndham, as Justice Johnson just pointed out. She went up, she told the jury that this -- that the car was absolutely silent and still except for the voices she heard on the cell phone and the baby screaming. They knew cell phones were in use in the car. They factored that in the decision. It goes along with their theory of throw everything on the wall and see what -- see what sticks. Apparently, there was a tire blowout at the exact same time she was reaching for her phone while she was eating fast food. The jury heard all of this. They knew it. They knew all of that and they -- and they came to their decision anyway.

JUSTICE MEDINA: Now your time has expired. Chief, may I ask one question?

CHIEF JUSTICE JEFFERSON: Sure.

JUSTICE MEDINA: There is a 1961 case, I think it came out of Bomount, Penate v. Berry [Penate v. Berry, 348 S.W.2d 167, 168]. Essentially it says reference to the immigration status of an illegal alien for so long it got held that they saw prejudicial on its face that this harm is incurable. My understanding of this record is that the judge minus the jury did not let by simply prejudice like they normally would in the charge but also specifically references illegal alien status do not let that influence the jury's decision. Do you think that instruction is enough to cure whatever prejudicial effect that connotation may have?

MR. STAGNER: I think it was. In -- and in context we didn't -- this was not brought up in voir dire. It was not brought up in opening. It was not brought up in closing in bias. They brought it up in closing. He had that coupled with -- with the instruction I absolutely think that was enough.

CHIEF JUSTICE JEFFERSON: Any further questions? Thank you, Counsel.

REBUTTAL ARGUMENT OF REAGAN SIMPSON ON BEHALF OF THE PETITIONER

MR. SIMPSON: May it please the Court.

Yes, the submission of the unborn twins was prejudicial. And the court of appeal says "Well, the prejudice is taken care of because we got rid of the $400,000 award." Well, there's something about submitting a claim and presenting evidence of damages that goes beyond the jury's just that particular claim. It's part of the overall unfairness at every level they get a inferential rebuttal. We don't get an inferential rebuttal. They get stuff in that has no connection with the accident. We can't even get cell phone evidence in. Mr. Stagner said, 'We had no choice but to cross examine Ricardo Rodriguez as the first witness in this case.' They played his deposition.

This is not a situation like you mentioned Justice Brister in Reliant Steel. If somebody gets up and says "I'm a mom and pop shop," then yeah, you can -- you can say you are misleading things. And you can cross examine on that. In direct examination, Ricardo Rodriguez did not take the stand and say "I'm an American citizen." And then they cross examined him. They put it in as a first witness. They played the deposition. They played that testimony and to say they had no choice than to cross examine. They created the cross examination. They injected it from the beginning of this case. And they were allowed to do that time and time again. And they were allowed to do that because the jury questions weren't formed right. Because the jury didn't get any kind of guidance on how to decide this case that was allowed to do anything they wanted to do in this case. And to say that they had no choice when they're injecting the issue is ridiculous.

Mr. Jackson didn't testify that the rock truck was on the wrong side of the road. I don't know why that keeps coming up in this case. You look at volume 9 pages 110 through 120. He clearly says no. There's no evidence whatsoever that the rock truck was ever in the wrong lane. I didn't think that they clearance pole. I thought the clearance pole was a first impact. I didn't think that the gouge mark was a first impact. I thought the gouge mark was the impact in the fourth wheel. Page 14 of DPS record says the first impact was a clearance pole. They get a little cute with the question, the impact. And I wanna say the impact means -- the initial impact. And then they tried to say that Jackson agreed that that was initial impact. He didn't. In fact in their brief they say Jackson agreed that that was initial impact. And then they say on page 38 of their brief, first look at the evidence that it wasn't the initial impact and they cite Jackson.

JUSTICE MEDINA: Whatever the trial judge great discretion as a gate keeper of the evidence, ask some question very, very good rule. And in this instance, the trial judge, whatever reason, decided to exclude the opinion testimony of the DPS trooper as being cumulative. Is -- is that in itself reversible error?

MR. SIMPSON: The testimony of an independent witness is not cumulative. She had experience, training -- advance training. She was supervised by a sergeant with 26 years in DPS core service. There were five DPS officers investigating a multiple fatality accident, something they do not do casually. Her -- her -- and we couldn't even put in the evidence that they thought the driver took corrective measures that they saw no evidence that the rock truck had gone on the wrong side of the road. And that is fundamentally unfair.

JUSTICE MEDINA: Do you have to have special qualification as to testify to that? Because my understanding she only went to two of the six training classes that are required to become a what is so called

expert in that area or is it the fact her experience is just stated sufficient enough for the trial judge to have allowed that testimony?

MR. SIMPSON: Well, in Lingafelter v. Shupe [Lingafelter v. Shupe, No. 10-03-00113-CV, 2004 WL 2610515] case it held that level two training is sufficient. We also have in this case that she was supervised by a 26- year veteran Sgt. Real. We also have that other officers were involved. This was no small accident that was investigated. And to say it is cumulative when they moved for mistrial and Officer Real was on the stand because they thought we were trying to put the accident report to the judge who kept it out in front of the jury. They moved for mistrial because they didn't want that accident report to get in. And then to say that that is cumulative is absolutely ridiculous in every level.

JUSTICE WAINWRIGHT: In the other cases you've cited where we've excluded expert testimony. A number of them, maybe most of them involve in absence of facts to support the expert's opinions or the conclusions from the facts that the expert looked at are just have an illogical leap and there is not a connection. It's so-called analytic gap. Here, Marshek, unlike Volkswagen v. Ramirez [Volkswagen of Am., Inc. v. Ramirez, 159 S.W.3d 897, 904- 05], for example, he made personal observations. They had in person measurements, conducted some physical test in reaching his conclusion that the rock truck crossed the center line. In Volkswagen, the expert didn't do any of that, didn't do any testing. Are you just disagreeing with the expert's interpretation of the facts or is there really some relevant in reliability question here that should lead us to exclude . the expert?

MR. SIMPSON: What we're saying is he made two assumptions that have no basis in fact and no basis in scientific methodology or scientific training that the angle of the gouge mark of the Yukon's wheel after it already had some collision without knowing any steering input from the driver of the Yukon which should have turned the wheel that that shows the angle of the rock truck at the time of the first impact at the second axle. That is essential to his opinions. He chooses the second axle because it fits with his -- his view when the major damage was done at the fourth axle. And he has absolutely no reason as Justice Gardner said to pick the second axle other than the fourth axle where most of the damage was other than he had done to fit my theory. As Mr. Herd said in cross-examining, "I know you don't think that it hit the fourth axle but why do you not take that it hit the -- that it hit the fourth axle and cause a gouge mark when that was the point of the biggest impact? How could it not have made a mark?" Well, it did made a mark maybe but not a very big mark.

JUSTICE WAINWRIGHT: And the second point?

MR. SIMPSON: Because those were assumptions that don't have a basis in fact that are simply speculated testimony. Because there's no scientific methodology that says I can look at my accident reconstruction book and whenever I see a wheel turned this way, that's gonna tell me the direction of the other car. There is nothing like that. So there's no scientific methodology and he is basing it on assumptions that don't hold up.

CHIEF JUSTICE JEFFERSON: Any further questions? Thank you, Counsel. That cause is submitted and the Court will take another brief recess.

SPEAKER: All rise.

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