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Supreme Court of Texas.
Transcontinental Insurance Company, Petitioner,
v.
Joyce Crump, Respondent.
No. 09-0005.
January 20, 2010.

Oral Argument

Appearances:David Brenner, Burns Anderson Jury & Brenner, Austin, TX, for Petitioner.

Peter M. Kelly, Law Office of Peter M. Kelly, Houston, TX, for Respondent.

Before:

Chief Justice Wallace B. Jefferson, Justice Nathan L. Hecht, Justice Harriet O'Neill, Justice Dale Wainwright, Justice David M. Medina, Justice Paul W. Green, Justice Phil Johnson, Justice Don R. Willett.

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MARSHALL: All rise.

CHIEF JUSTICE WALLACE B. JEFFERSON: Be seated, please. The Court is ready to hear argument in 09-0005, Transcontinental vs. Crump.

MARSHALL: May it please the Court, Mr. David Brenner will present argument for the Petitioner. The Petitioner has reserved five minutes for rebuttal.

ORAL ARGUMENT OF DAVID BRENNER ON BEHALF OF THE PETITIONER

ATTORNEY DAVID BRENNER: May it please the Court, this case presents three separate and distinct issues. The first is whether the producing cost standard set forth by this Court in Ledesma is applicable only to product liability cases or is it a producing cause standard that applies to all types of cases in which producing cause is the appropriate standard? The second is whether the Robinson/Daubert criteria for evaluation of expert testimony is limited to toxic tort cases or whether it also applies to workers' compensation cases. And finally, whether the fee shifting provisions of the

Labor Code prohibit a right to trial by jury or a plenary hearing on the issue of the amount of reasonable necessary attorneys' fees. With the Court's permission, I would address the producing cause issue first. Factually, Mr. Crump worked for FritoLay. On May 9th, 2000 while he was at work, he hit his knee on a tape machine receiving a bruise. He first received treatment for the bruise about two weeks later. In June he began to develop problems. He was diagnosed him with cellulitis, he was a post renal transplant patient, he had kidney insufficiency, hemochromanitis, Hepatitis C and elevated liver enzymes. Over the next several months he continued to decline, his physician diagnosed with end stage liver disease, cirrhosis of the liver, histoplasmosis infection, and then by January 23rd, 2001, Mr. Crump passed away. The autopsy listed cause of death as propoxyphene toxicity, artherosclerotic cardiovascular disease, chronic kidney failure, chronic liver disease. The death certificate lists cardio respiratory arrest, cirrhosis and ileus. Nothing in the medical examiner's report, the autopsy or any of the medical records suggest that the work-related contusion in any way contributed or caused the death. At trial, Dr. Hunt reviewed the autopsy report, reviewed the medical records, presented his opinion that death was not associated with the contusion, but was an ordinary disease of life. Ms. Crump, filing her claim for death benefits, replied on the testimony of Dr. Daller, a transplant surgeon. The relevant portion of his testimony, the disputed portions can be found in three pages of the transcript. Nevertheless, he alleged that the contusion caused a systematic progression of hepatatic insufficiency because Crump could not fight infection based on his immune suppressive state, it weakened him to the point where he eventually succumbed to death. Now, the issue with producing cause in this case, I believe should begin with the Court's decision in 1937 in TI vs. Burnett.

JUSTICE NATHAN L. HECHT: Why do you think -- let me just speed you up a little bit on that. Why do you think that the trial court's refusal to give the other the requested definition of producing cause was reversible error?

ATTORNEY DAVID BRENNER: This Court held that failure to give a complete instruction of producing cause or a complete instruction of any proper legal standard is error by the trial court. In this case, as I was going to --

JUSTICE NATHAN L. HECHT: But in Ledesma we specifically did not hold that it was reversible error.

ATTORNEY DAVID BRENNER: I don't think that's correct. As I read Ledesma, specifically what the Court held is that, “It is fundamental error to our system of justice that parties have the right to be judged by a properly instruct by a jury properly instructed in law.” And the Court also held that, “When a proper objection is made to an omission of an essential element, the failure is error.” Now that's --

JUSTICE NATHAN L. HECHT: But in the section dealing with, the section in Ledesma dealing with the producing cause instruction is fairly brief.

ATTORNEY DAVID BRENNER: It is fairly brief, Your Honor, and the Court held that the failure to properly instruct the jury was error, and then the Court went on and said, “Not only was it error here, but this instruction was improper as well.” I don't think, I don't know an opinion where the Court generally says, “This is also reversible error.” Once you --

JUSTICE NATHAN L. HECHT: So your position here is that reversible error

doesn't have to be shown. It's just per se reversible?

ATTORNEY DAVID BRENNER: No, I think reversible error is shown, but the failure to properly instruct the jury and omit a critical element of a legal instruction is reversible error as a matter of law.

JUSTICE NATHAN L. HECHT: And what was omitted? That would be --

ATTORNEY DAVID BRENNER: There are two parts to the producing cause standard. First it's the substantial factor; and second it's the but-for analysis. In this case, the but-for analysis was totally omitted. It wasn't included in any part of the charge. In Ledesma, an opinion of the Court, the Court focused on the, the Court first notes that the jury instruction was incomplete. Then the Court notes that the part that was submitted, the substantial factor portion, the first part of the cause-in-fact analysis was archaic in terminology, so a different terminology should have been used. But the but-for test without which such event would not have occurred is essential in every producing cause standard and didn't exist in this standard anywhere. Interestingly --

JUSTICE PAUL W. GREEN: And the instruction that you requested did not include the substantial factor part of the Ledesma.

ATTORNEY DAVID BRENNER: It did. It didn't use the word “substantial,” but I believe it was substantially consistent with substantial factor argument. Prior to the Ledesma instruction, this Court on at least six different occasions has given a specific definition. It also included “excited,” but it didn't use the word “substantial.” Ledesma changed it to include “substantial.” So for sixty years prior precedent didn't use that exact word. But there's two parts: There is the substantial factor, and the instruction that we proffered was that it needed to be a direct and natural result of the, that the injury needed to be a direct and natural result of death. That's the substantial factor. The but-for test is without which such injury would not have occurred. It was the but-for test that was omitted from the charge. Now in TI vs. Burnett, the Court dealt with an injured worker who received a blow to the head which caused permanent and total disability. Sometime later, within a year, he developed typhus. He died from the typhus and the family filed a death claim asserting that physician testimony supported the fact that the blow to the head weakened his condition and made him susceptible to typhus. So what they argued in essence is that the weakened condition caused by the work-related injury made him more susceptible and therefore was a producing cause of death. The Court looked at the producing cause analysis and they said that the analysis starts with the definition of what is an injury under the Workers' Compensation Act. The Court said it has to be injury -- they defined “injury” as “damage or harm to the physical structure of the body and such diseases that naturally result there from.” The Court proffered, this Court proffered the question, if he does not die from a disease that results from the injury, but the injury makes him simply more susceptible, can it be compensable? And the Court says no, it cannot, it can never be compensable because the disease has to derive from the injury, a weakened state is not sufficient. The Court then said that producing cause should be defined as that cause that, “In a natural and continuous sequence produces death without which such death would not have occurred.” The substantial factor and the but-for test. The same standard and same fact scenario was repeated in this case's decision in Jacoby and in the Austin Court of Appeals decision in Schulle, all cited in our brief. Again in 1940, three years later, this Court struggled with the definition of

“producing cause.” This Court held that the definition of producing cause and proximate cause under Texas jurisprudence is the same, except for the foreseeability factor. Prior to Ledesma there were always two definitions. There was the substantial factor, was it an efficient, exciting or contributing cause that in a natural sequence produced the incident or death. That was the substantial factor test that was applied. And the second part, and without which such event would not have occurred. In Ledesma this Court changed the first part to in essence apply what has been applied in workers' compensation cases for the previous thirty years, and that's natural-- the direct and natural result aspect of it. So what the Court held in Ledesma is consistent with sixty, seventy years of jurisprudence in workers' compensation cases. And it is that instruction that was requested of the trial court and refused. Now as it pertains to Ledesma and the charge in this case, we cited to specific findings of the jury. The jury when it was instructed in this case came back with three questions trying to understand the specific producing cause charge. The jury asked, “Is this a medical or legal definition? If medical, what is the natural sequence? Are we discussing the natural sequence from Crump or normal person?” It's clear that the jury in this case actually struggled with this standard and was trying to consider the standard. And we believe that based on the evidence if the but-for aspect of the charge was included, clearly the jury would have reached a different conclusion. The Fourteenth Court of Appeals in evaluating this and finding no error took a rather unusual approach. First, the Court held that the substantial factor aspect of the case doesn't apply to workers' comp cases. Then disregarding the fact that the only other aspect that could apply, the but-for wasn't included, they went on to hold that the substantial factor aspect that was presented was sufficient for workers' compensation cases. Finally they concluded that Ledesma would not apply because in workers' comp cases a different producing cause standard would be applied than in all other producing cause cases. Now, there is no precedent from this Court that a different producing cause standard is applied in different causes of action. In fact, the producing cause standard applied in Ledesma, is applied in DTPA claims and in every other claim where producing cause standard is necessary.

JUSTICE PHIL JOHNSON: But we've always interpreted workers' compensation more liberally, or at least it's been the history of the decisions of this Court that workers' compensation is interpreted in favor of coverage. So we have the statute, the Workers' Comp Statute, whereas in some of the common law cases we're not dealing with the statute and the statutory interpretation that we built up through the course of history.

ATTORNEY DAVID BRENNER: There is no question that the Workers' Compensation Act is and should be interpreted in favor of reaching its goal; and that is to provide compensation to people who are injured in the course and scope of employment.

JUSTICE PHIL JOHNSON: Compensation being both medical and payments?

ATTORNEY DAVID BRENNER: Absolutely. But I don't think that this Court or any other Court has interpreted the Workers' Compensation Statute to be interpreted liberally to provide compensation for injuries that are not related to work-related injury. And by expanding producing cause beyond what's been done before, you're not expanding the Workers' Compensation Act to achieve the goal of the Act, you're expanding the Workers' Compensation Act to include injuries that are not related.

JUSTICE PHIL JOHNSON: But you're not--they're not contending for an

expansion, as I understand it, they're contending for status quo, and you say we need to narrow that down just a little bit.

ATTORNEY DAVID BRENNER: Not at all. The charge that we're submitting is the same charge that was given in 1937, it's the same charge that was given in 1940, it's the same charge that was approved by this Court in 1969. That's what we proposed, and the Ledesma charge is completely consistent with each and every one of those decisions. By eliminating the but-for analysis you actually broaden the scope of what might be covered beyond those that arise from a work-related injury. The way the Fourteenth Court of Appeal arrived at its conclusion is by looking at Flores vs. Retirement System, but we believe the Flores vs. Retirement System is not a workers' compensation case, doesn't define or address workers' comp issues, but instead is looking at recovery under the Employer Retirement System in Texas which doesn't have a producing cause standard but instead has a standard by the Legislature that “directly results” is the term they use. With respect to the second issue before the Court, the issue of whether Robinson should be applied, the Fourteenth Court of Appeals held that Robinson only applies to cases in which, only applies to toxic tort cases. We believe that the Robinson, that the Court's decision is inappropriate and conflicts with the decision of these Courts and other Courts. Specifically this Court applied Robinson in Cooper Tire vs. Mendez. In Cooper Tire vs. Mendez this Court was dealing with a defective tire and dealing with an engineer expert. While this Court held that the Robinson factors should be flexible, the Court still held that that should be a starting point in which the evaluation should be done. The Fifth Circuit in Black vs. Food Lion did a similar analysis dealing with medical experts and the cause of an injury and causation analysis. In that they said that Daubert should be the starting point. After the Daubert factors are applied, then the Court should then look and see if there are other factors that may assist the trial court in its gate-keeping function. In fact, as we cited in the brief, at least three prior courts, other courts, have applied Robinson analysis in the evaluation in the expert testimony in workers' compensation cases. We believe the trial court's failure to provide Robinson and applying only the analysis that applies to the specific as opposed to the general fails to follow the gate-keeping function. Thank you.

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

MARSHALL: May it please the Court, Mr. Peter M. Kelly will present argument for the Respondent.

ORAL ARGUMENT OF PETER M. KELLY ON BEHALF OF THE RESPONDENT

ATTORNEY PETER M. KELLY: May it please the Court, as Mr. Brenner noted, this case presents three disparate issues, and admittedly each one of them could serve some clarification from this Court, but none of them would be the basis for reversal of the judgment that is presented to this Court. First with respect to the producing cause, as Justice Hecht noted, in the Ledesma opinion the Court did not reverse on the basis of the archaic language in the producing cause definition, the Court reversed on a different basis, on a different charge error. The Court rewrote modernized the definition of “producing cause,” and it's now being applied. For instance, the new revisions, we've got a piece of paper to stick in the new PJC for the DTPA. So it's being applied outside of the pure products liability arena and into the DTPA as well. And the question is to what extent does the Ledesma modernization of producing cause will be applicable to these workers'

compensation cases? And the answer is in a limited fashion, because there are four basic differences between the charge that was submitted here, the charge question that was submitted here, and the one that was approved in Ledesma. First, you got rid of the language that says “exciting and efficient,” as just archaic language that will just confuse the jury. We have no quarrel with that, I don't think that makes any substantive difference. Secondly, got rid of the “natural sequence” and replaced that with “without which” language, the “but-for” language. So there's three differences, and the fourth one is, and this one is where Ledesma does not get applied in the workers' compensation context, is the addition of substantial factor. There is no requirement under workers' compensation that the workplace injury be a substantial factor in the injury for which compensation is being sought. It should be a factor, but the jury is not required to go into any sort of relativistic analysis to determine whether it's a substantial or a primary or relatively insubstantial.

CHIEF JUSTICE WALLACE B. JEFFERSON: And why is that?

ATTORNEY PETER M. KELLY: Why is that, because the workers' compensation system, and this is going back to many writings from this Court, the statute is to be liberally construed to afford benefits. The trope is benefits should be liberally available, limited remedies, liberally available. So if there is a workplace injury, it just has to be a cause of the subsequent damages for which the workers' compensation system provides --

JUSTICE PAUL W. GREEN: Does that apply to DTPA?

ATTORNEY PETER M. KELLY: Well, DTPA is not to be as liberal because that goes deeper into the history, back to the 1917 and 1913 Workers' Compensation Act, where you were actually having a surrendering of a cause of action by the worker. So it has to be even more liberally construed than other remedial -- it's not purely a remedial statute, it's actually replacement.

JUSTICE PAUL W. GREEN: But there's liberally construed and then there's liberally construed.

ATTORNEY PETER M. KELLY: There's even more liberally construed, which this Court gets into in the Garcia analysis on the constitutionality. What is the price for surrendering the cause of action, the common law cause of action?

JUSTICE DALE WAINWRIGHT: There has to be a cut-off somewhere doesn't there? I mean how far can you take the workplace injury caused a condition which then led, how much later in time, how much further--how far from the workplace, to an injury that you can still call work related?

ATTORNEY PETER M. KELLY: The language that was used for eighty years, it's a natural sequence, if the injuries are in a natural sequence from the workplace injury. Now that's been replaced with but-for analysis, with the but-for language, but still the natural sequences subsumes and includes both the -- it has to be a factor, it has to flow in a natural sequence, and it also can be argued it includes the but-for. So the charge that was submitted has all of the essential elements that were identified. But again returning to substantial factor, we can look how the substantial factor is simply not in issue in these workers' compensation because there is one limited exception to that and that is in heart attacks. And in heart attacks, which is in 408.008, the statute specifically requires this relativistic analysis. There has to be a primary cause for the workplace injury or the workplace

activity, the other cause is the heart attack. So the Legislature knows how to impose this requirement for relative balancing whether this is a substantial or a minor cause, but did not do it for the system as a whole, only did it with respect to heart attacks.

JUSTICE NATHAN L. HECHT: So producing cause means something different in comp cases than other kinds of cases unless it involves a heart attack?

ATTORNEY PETER M. KELLY: Well --

JUSTICE NATHAN L. HECHT: Seems kind of complicated.

ATTORNEY PETER M. KELLY: Well, the heart attack situation would have I guess a more specific charge derived specifically from that statute. But generally in the workers' compensation, all other situations, it would be essentially the Ledesma statement without the substantial factor.

JUSTICE NATHAN L. HECHT: But in heart attack with a substantial factor?

ATTORNEY PETER M. KELLY: It's either substantial factor or primary factor, but --

JUSTICE NATHAN L. HECHT: ...might be yet a third variation, primary factor?

ATTORNEY PETER M. KELLY: That would be a third variation on it.

JUSTICE NATHAN L. HECHT: If substantial factor is required in comp cases, all comp cases, if we're going to use the Ledesma definition, then does that require a new trial in this case?

ATTORNEY PETER M. KELLY: No, it would not because substantial factor is subsumed into the natural sequence. And the language that was used was the Eastland Court of Appeals to prove specifically this language.

JUSTICE NATHAN L. HECHT: Mm-hm.

ATTORNEY PETER M. KELLY: There are cases on both sides. Substantial factor has never been included before. The Court did not reverse on the absence of substantial factor in Ledesma and there's no reason for it to do it now. It's prospective going forward, all those issues would have been subsumed and part of the argument on natural sequence.

JUSTICE DALE WAINWRIGHT: And natural sequence is broader than substantial factor? I mean there could be some things that are left out by a substantial factor definition that are included by natural sequence.

ATTORNEY PETER M. KELLY: Yes. And our --

JUSTICE DALE WAINWRIGHT: And it doesn't answer the question to say substantial factor is subsumed by natural sequence, because there are some injuries that would be covered under natural sequence that wouldn't be under substantial factor.

ATTORNEY PETER M. KELLY: [Inaudible] this particular injury, reversal of this particular cause, and this cause would be no, because it was a natural sequence of events and it was --

JUSTICE DALE WAINWRIGHT: Substantial factor too, in your opinion?

ATTORNEY PETER M. KELLY: Arguably. You know, we didn't have the burden of establishing that because it's a regular comp case and there is no substantial factor requirement. And part of the reason for that is the workplace environment can be very complex. Someone is picking up a box, it can be very complex and very simple, someone just picking up a box can injure themselves. And what was, that's a workplace injury. Well, what was the substantial factor of it? Was it the act of -- was it a preexisting condition or the act of picking up a box or whatever? The fact that there was a workplace injury though, entitles the worker to compensation. So and part of it is the streamlining aspect of it, in that when you start getting into the relativistic analysis of what is a substantial factor and a less substantial factor or a primary factor, you can get bogged down to a lot more fact finding. Part of the idea is the liberally available benefits, swiftly available benefits, handled on an administrative basis. If we're going to be going into intense factual analysis with regard, and balancing whether something is, at what point does it cross the threshold of being a substantial factor, then that will just bog down the process and make these cases hard to determine.

JUSTICE PAUL W. GREEN: So you're saying because of the workplace environment being complex, that if somebody is injured in a manner that's within the zone, some zone of reasonable disagreement about causation, whether it's substantial factor, whether it's continuous and natural sequence and so forth, it's in the zone, then that's what matters, it doesn't have to be as precise as substantial factor?

ATTORNEY PETER M. KELLY: Right. And that comports with the longstanding policy in favor of benefits being liberally available.

JUSTICE PAUL W. GREEN: And that would be different than context outside of Comp, you say?

ATTORNEY PETER M. KELLY: Yes. Comp is a different animal because it is the tradeoff, the worker has given up the right to a common law cause of action. By the same token, the worker -- I mean there are all sorts of tradeoffs in comp, but that makes comp a different situation. And the statute needs to be interpreted differently, but there's never --

JUSTICE NATHAN L. HECHT: Let me ask you about the reliability question.

ATTORNEY PETER M. KELLY: On to the Havner question?

JUSTICE NATHAN L. HECHT: Yes. Well, no, I'm not sure if it's Havner, but --

ATTORNEY PETER M. KELLY: Well, that's what's interesting about it, and that is sort of one of my principal points on this.

JUSTICE NATHAN L. HECHT: Well, let me ask you first. I was unclear from the Court of Appeals' opinion and from your argument whether there's no reliability standard or a special reliability standard or exactly what? The Court of Appeals is very clear, “We're not going to apply Robinson.” It seemed to me, I mean they say, “We disagree,” and that's about as clear as it gets.

ATTORNEY PETER M. KELLY: I think the answer to your question, you have to

walk through what exactly is being proved here. And what the first thing is being proved would have to be proved is is the burden of proof on the carrier? The carrier is the defendant, they're the one that has to establish by a preponderance of evidence.

JUSTICE NATHAN L. HECHT: Right.

ATTORNEY PETER M. KELLY: Now, then the next is what can be applied, what expert evidence can be adduced to get there? And I think all the expert testimony has to be subject to Robinson or Gammeill standards. What the Court did was say--

JUSTICE NATHAN L. HECHT: Well, the Court of Appeals seems to be wrong about that. It seemed to say, “We're not going to apply Robinson.”

ATTORNEY PETER M. KELLY: Well, Robinson is a flexible standard and it is flexibly applied in situations like this where you have clinical treating doctors. I mean Dr. Daller was just a doctor who was there who was actually treating Mr. Crump. And analytically the way to look at that is that the sixth Robinson standard, the application of the theories in nonjudicial settings, ends up subsuming the other standards. Here he has used his theories to actually treat Mr. Crump in a life and death situation, and in comporting with how other doctors also treated Mr. Crump.

JUSTICE NATHAN L. HECHT: So you think -- but well, let me make sure I understand. You think that the medical testimony in a Comp case must be reliable just as it must be in any other case?

ATTORNEY PETER M. KELLY: Yes.

JUSTICE NATHAN L. HECHT: No special standard?

ATTORNEY PETER M. KELLY: Right.

JUSTICE NATHAN L. HECHT: And whether you apply Robinson or Gammiell or whatever test you apply kind of depends on the kind of evidence that's being introduced and the circumstances?

ATTORNEY PETER M. KELLY: Yes.

JUSTICE NATHAN L. HECHT: And then you claim that the differential analysis, differential diagnosis in this case met that standard?

ATTORNEY PETER M. KELLY: Yes.

JUSTICE NATHAN L. HECHT: And is there anything besides Coastal Tankships to back that up? I mean it basically says a differential diagnosis is always okay.

ATTORNEY PETER M. KELLY: Well, like I just argued, Robinson actually backs that up, because you have this relying, in the medical circumstance, this clinical medical circumstance of treating Mr. Crump. You have the application of these methods in the life and death circumstance, and that extra judicial -- he's not just saying it because he's a hired expert asked to give -- I mean he's actually there trying to solve Mr. Crump's problems, trying to save Mr. Crump's life, and so that application in itself gives the credibility to the opinions and the way he treated it. What's curious about the way the

argument is -- the way the argument was presented in the brief is that the carrier starts off arguing Robinson standards, and then when in goes into the kill, in for the kill to say why the evidence is ultimately inadmissible and should not have been before the Court, it switches over to a Havner analysis and he starts citing to Havner and Coastal Tankships. And Havner is simply not applicable in this circumstance because Havner by its own terms is the analysis of epidemiological studies going from general causation to specific causations for the party bearing the burden of proof. And we did not bear the burden of proof at trial in this case. That was the carrier that had the burden. They had the burden to -- and this is going back to the Daller question, we don't even have to get to Dr. Daller's testimony because the burden was on the carrier to rule in other causes and not rule out other causes.

JUSTICE NATHAN L. HECHT: And why doesn't Dr. Hunt's testimony that he wasn't sure whether the infection could have moved from the bruise to the rest of the body and kill him, why isn't that equivocation destructive of causation? The carrier had the burden of proving that it wasn't caused, right?

ATTORNEY PETER M. KELLY: Yes.

JUSTICE NATHAN L. HECHT: And you argue that because he equivocated on the infection, that that undermined his testimony?

ATTORNEY PETER M. KELLY: Well, he equivocated several times in response to direct questions.

JUSTICE NATHAN L. HECHT: Well, it looked like twice in the briefs.

ATTORNEY PETER M. KELLY: I think at least two times he said possibly. And a third time he said, “I have no idea.” And just the admission of “I have no idea what role the infection played,” that's not going to meet the burden, that's not going to get into that 51 percent. The jury, as the assessor of the credibility, as the assessor of the expert testimony has the right and the opportunity to disregard any portion of Hunt's testimony.

JUSTICE NATHAN L. HECHT: And in the briefs that's indicated on three pages of the record in Volume 8. Is that the focus of the -- I mean is that where we should look to focus in on whether Dr. Hunt's testimony gets them there?

ATTORNEY PETER M. KELLY: Right. And I believe that was under the cross-examination in Volume 8, under the cross-examination of Dr. Hunt. And the weakness of Dr. Hunt's testimony does not let them carry the burden, and we don't even need to get to the issue of Havner or Daubert or Robinson or anything else with regard to Daller because they just simply haven't met their burden. We can rely on Hunt and get there and completely avoid the admissibility or the applicability of Dr. Daller's testimony.

JUSTICE DON R. WILLETT: If we decide to apply the Ledesma definition in full of producing cause, tell us why the error was not reversible, or there may have been error but it wasn't reversible?

ATTORNEY PETER M. KELLY: Well, first of all you have a large waiver issue. I mean for the first time today I've heard that the but-for might be significant to the jury's decision. It wasn't presented to the trial court, and in fact the trial court did not even rule on the objection to the -- they ruled on the tender of the language but not the objections, so you have a

trial court waiver. Then I think you have a briefing waiver here, and reading through, I could not figure out what their actual complaint was, and my response actually focused on the "exciting and efficient" language because they made some complaint about archaic language. But now I hear for the first time and the Court is hearing for the first time that they're really complaining about but-for or substantial factor language, and from the get go, I think we have a waiver issue that you have to get past. Secondly, the language that was used in this is not reversible error under Lamon [Ph.]. There hasn't been any establishment that the jury was confused. I mean bear in mind what the jury was confused about was the natural sequence language. They asked two questions about natural sequence. Well, that is still in the same, in the tender that was made by the carrier. If it caused jury confusion, well, the carrier was asking for the same natural sequence language. And that goes to another issue is whether the tender, to be reversible error, the tender made by the carrier has to be substantially correct. Now they're saying Ledesma rules. Well, Ledesma got rid of natural sequence, and the tender by the carrier includes natural sequence.

JUSTICE PAUL W. GREEN: Well, they apparently agree with you on that point, I guess.

ATTORNEY PETER M. KELLY: What?

JUSTICE PAUL W. GREEN: They must agree with you on that point.

ATTORNEY PETER M. KELLY: Yeah.

JUSTICE PAUL W. GREEN: That you don't need the substantial factor. But it does seem to show, have a but-for element in it, doesn't it?

ATTORNEY PETER M. KELLY: Well, now it does. I mean Ledesma does, and I think that is --

JUSTICE PAUL W. GREEN: A proposed instruction.

ATTORNEY PETER M. KELLY: Yes, it does, and I think that's duplicative of natural sequence. I mean I wasn't in chambers when the Court drafted the new Ledesma language, but I think that from just reading it, that the natural sequence and the but-for are roughly comparable.

JUSTICE NATHAN L. HECHT: And let me ask you -- we're kind of jumping around here, but as you say, there are three disparate issues. If there is a Constitutional right to a jury trial on the attorney fees, why doesn't that require reversal?

ATTORNEY PETER M. KELLY: If there is a Constitutional right.

JUSTICE NATHAN L. HECHT: Right.

ATTORNEY PETER M. KELLY: There is not a Constitutional right for the attorneys' fees.

JUSTICE NATHAN L. HECHT: I understand that's your position, but if there were, there was no hearing, no evidence, an affidavit post trial, why wouldn't that require reversal?

ATTORNEY PETER M. KELLY: For a limited remand on attorneys' fees. But again

if there's a Constitutional right, and it's not just our position, I mean there is no Constitutional right to it. First of all, what's interesting about the cases that have analyzed this is they all seem to jump right in sort of at the end of the process and ask whether the insurance company can get a jury trial on the attorneys' fees it's going to have to pay. That's just at the end of the process. We have to start at the very beginning, whether the workers' compensation scheme as a whole, including this little detail about fee shifting, is an adequate substitute for the workers' common law rights to sue their employer for a workplace injury. Now the Legislature sets up this very elaborate scheme, it happens to include this fee shifting, but the -- and the whole scheme as a whole is taken as a replacement for the common law rights. Now everybody gives up rights to a jury trial under this. The defendant can't advance, say, its own defenses in a jury trial, the plaintiff can't advance his cause of action, or the claimant, I should say in a jury trial. But now we have sort of insurance company exceptionalism, that the only player in this whole scheme who is entitled to a jury trial on an issue is -- outside of the pure appellate context is the insurance company when it comes down to the attorneys' fees. And so the analysis has to start with this initial trade off of the common law cause of action for the workers' rights.

JUSTICE NATHAN L. HECHT: But this is an additional late piece to the tradeoff; is that correct?

ATTORNEY PETER M. KELLY: That's right.

JUSTICE NATHAN L. HECHT: This doesn't come in until 2001?

ATTORNEY PETER M. KELLY: It doesn't' come in until 2001. Significantly --

JUSTICE NATHAN L. HECHT: The Legislature is restriking the deal basically, which it may be --

ATTORNEY PETER M. KELLY: Adjusting the deal, restriking the deal, but they've made the policy consideration that as part of this surrender of common law rights, there should be the opportunity for limited jury trial on issues appealed that the insurance company should have to pay for if the insurance company appeals and loses, and that is all part of something that should accrue to the worker for surrendering his common law rights. And in terms of the timing, as pointed out in the lower court's opinion, there was not a cause of action for attorneys' fees, and that's why the analysis has to start with the workers' comp, with the initial tradeoff and not down here because there was no cause of action for attorneys' fees, no right to attorney fees in a tort action in 1876. And that is when the, that is the [inaudible] of the Constitution, that's when the Constitutional analysis starts to begin. Because it was purely a creature of statute created solely as part of the workers' compensation scheme, there was not a preexisting Constitutional right to it. There was no right to be taken away in 2001.

CHIEF JUSTICE WALLACE B. JEFFERSON: Any questions? I see your time has expired, Counsel. If there are no questions, the Court will hear rebuttal. Thank you.

ATTORNEY DAVID BRENNER: Thank you.

JUSTICE DAVID M. MEDINA: What about this waiver issue?

REBUTTAL ARGUMENT OF DAVID BRENNER ON BEHALF OF PETITIONER

ATTORNEY DAVID BRENNER: Clearly the issue was provided to the Court, clearly an objection is made, it is in the record. The issue was provided that had both the substantial factor or the direct and natural result factor and the but-for factor. It was briefed, the issue, as should be presented, was presented to this Court, to the Court of Appeals and every other Court. What they are in essence arguing is that I should dissect the issue in great length.

CHIEF JUSTICE WALLACE B. JEFFERSON: Well, you should. I mean if that's the ground for error in the submission, for the failure to submit the instruction, that that is a significant part of the case that the jury should consider, then that part ought to be argued forcefully, right?

ATTORNEY DAVID BRENNER: I think it is is.

CHIEF JUSTICE WALLACE B. JEFFERSON: I mean we are going to dissect what was submitted versus what you requested, and is it natural sequence? Well, apparently not because those are in both. So we're now gravitating toward this but-for argument, and it would help, it would aid the Court to know what the analysis is.

ATTORNEY DAVID BRENNER: Well, the analysis is both, Your Honor. The analysis is that “the excited efficient” is the wrong the language, it's not the language that's used, that has historically been used in workers' compensation cases. The language used by this Court time and time again is “direct and natural result,” and but it doesn't say “exciting or efficient.” And two, that the but-for analysis is not included in there. The analysis is both, Your Honor.

CHIEF JUSTICE WALLACE B. JEFFERSON: Well, no, I understand that's the analysis, but why? In your briefing do you explain why it is so critical to have the but-for proposition before the jury or submitted?

ATTORNEY DAVID BRENNER: I don't know that the briefing -- I think the briefing does. I think I go through Jacoby and the analysis in Jacoby, I think I go through the analysis in Schulle, I think I take the Court through analysis in TI vs. Burnett. All of those discuss both aspects of the case and how the facts are applied in a workers' compensation case. So if you take out the analysis of previous decisions that apply the but-for, perhaps it's not there. But if you look at the briefing as a whole and every aspect of the briefing and the case analysis, I don't know that they can be missed. It might be, but I think it's there. And from a waiver point that it wasn't raised and not argued and not an issue in this case, I think that's extending waiver beyond anything this Court has done in the past. I'll point out that with respect to Ledesma, the decision does say at the end that, it essentially [inaudible], “essential components of producing cause. The case must be a substantial cause of the event in issue, and it must be a but-for cause, namely one without the event would not occur.” That's in Ledesma. It's not new in Ledesma because it's in Parker where the Court looked at Parker. And if you look at Parker, which is cited in the brief, 440 SW 43, I believe what Parker is saying is that in a workers' compensation case you don't have foreseeability and you don't look at the culpability of the individual as being a substantial factor, but instead you look at the occupational, the occupation and the occupational injury as being the substantial factor. Those replace the substantial factor analysis. And I believe that Ledesma isn't

changing the standard. I think the standard on direct natural result, the first part is substantially the same, but is reclarifying it so it can be understandable to a jury in contemporary times. I believe that --

JUSTICE NATHAN L. HECHT: Let me ask you about the expert testimony. You agree you had the burden to show that it was not a producing cause?

ATTORNEY DAVID BRENNER: No question about that, Your Honor.

JUSTICE NATHAN L. HECHT: And you agree that the dispute seems to come down to a couple of pages in Volume 8 of the Reporter's Record?

ATTORNEY DAVID BRENNER: I think it comes out to page 196 to 199.

JUSTICE NATHAN L. HECHT: All right.

ATTORNEY DAVID BRENNER: And that's Dr. Daller's testimony. He suggested that Hunt provided evidence that would cause us to fail to meet our burden, and I would suggest that's not true. He basically refers to a portion where Hunt says, “That the hematoma may have provided a place for the infection to develop.” Very much so, very possible. And --

JUSTICE NATHAN L. HECHT: And I know time is short, but I take your point on that. On the attorney fees --

ATTORNEY DAVID BRENNER: Yes.

JUSTICE NATHAN L. HECHT: -- if the 2001 change had been made back in 1991, couldn't it have been part of restriking the workers' compensation deal as we sometimes refer to it?

ATTORNEY DAVID BRENNER: I don't think so. The Legislative history with the change has nothing to do with restriking the deal, the 2001 change was to protect the Subsequent Injury Fund. What the State found is that carriers were seeking judicial review and were entitled to recover money from the State. In order to protect the State interest, they presented this obstacle there, and that is to create a cause of action for attorneys' fees, otherwise the carrier couldn't recover back from the claimant and the claimant would have no stake in the outcome.

CHIEF JUSTICE WALLACE B. JEFFERSON: Any further questions? Thank you, Mr. Brenner. The cause is submitted. That concludes the arguments for this morning, and the Marshall will adjourn the Court.

MARSHALL: All rise.

[End of proceedings.]

Transcontinental Insurance Company, Petitioner, v. Joyce Crump, Respondent. 2010 WL 303248 (Tex.) (Oral Argument)

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