

ORAL ARGUMENT – 10/3/00
99-0755
TEXAS HEALTH ENTERPRISES V. GEISLER

UTSINGER: This is a health care liability claim that asserts causes of action for wrongful death and survival. It's brought by Ray Geisler, the son of Ruth Simmons. Ray Geisler brings this cause of action in his individual capacity as well as the representative of the estate.

O'NEILL: Doesn't your position presume that the purpose of punitive damages is to compensate plaintiffs?

UTSINGER: No, it does not. Certainly in any situation where you have punitive damages, a corollary of that is someone's going to get them. There's no question about that. But we believe that the consistent jurisprudence of this state has always been, there should be a reasonable relationship between the amount of actual damages that are suffered and the amount of punitive damages that are awarded. And, so, consequently, somewhere in that equation there has to be some consideration of the actual amount of damages that were awarded...

O'NEILL: But why does it make a difference as to which one is awarded per individual plaintiff if the purpose of punitive damages is to punish and deter?

UTSINGER: Several reasons for that. One goes back to the question of the reasonable relationship. The second has to do with when you consider the punitive damages themselves and the punishment aspect of those damages, at what point do you draw the line as to where do you stop punishing? Someone has to make that decision regardless of who gets the money.

O'NEILL: But couldn't they have said in the statute, couldn't they have articulated that in the statute rather than leave it open as they appeared to have?

UTSINGER: Certainly that could have been legislatively corrected. It was not. I might remind the court that in *De La Lastra*, it was very apparent from several justices on this court that you did not combine wrongful death and survival damages in order to set that floor.

HANKINSON: In that case though, at base was the constitutional requirement or prohibition against the award of the punitive damages to the parents in their wrongful death action. So wasn't the court having to reconcile the constitutional requirement with the statutory language?

UTSINGER: The way I read that opinion, no. The way that I read the opinion, it appears as if the court held specifically that they were not going to increase that floor by considering the parent's actual damages in it. And to take that concept a step further, it didn't make any difference in that case that the parents were the ultimate beneficiaries of the money. It appears, as I interpret the case, that the court specifically held that you cannot combine these two types of damages.

Regardless of who gets the money, that becomes irrelevant.

HANKINSON: At bottom, you would agree that this is a matter of statutory interpretation in this case: interpreting the legislature's language and intent in §41.008?

UTSINGER: Yes.

HANKINSON: In this case that's what you're asking us to do?

UTSINGER: It was 41.007 at the time.

HANKINSON: And right now it's 41.008, and we're looking at the earlier language.

UTSINGER: Right. They had a different language and they added the word 'claimant' under 41.008.

HANKINSON: Let's look at that language. And tell us specifically what language in the applicable statutory provision you hang your hat on to interpret the statute the way that you would have us do. And that is, that we do no look at the total amount of actual damages awarded to determine how the cap should be applied? What language are you looking to?

UTSINGER: The first thing I look to is the way this court interpreted 41.007 in *De La Lastra* that said the word "claimant" did not appear in the statute.

HANKINSON: Let's put that aside. Assume that we don't agree with your interpretation of that case, so that we've got to go back to the statute. And I understand you're not conceding that point. But go back to the language of the statute and explain to us how looking at the language in the statute would lead to the interpretation that you would have us give it?

UTSINGER: As we would interpret it, it appears that under 41.008 it talks about how the parties seeks recovery of exemplary damages related to the injury of another person, death of another person or harm to another person, claimant includes both the other person and the party seeking recovery for exemplary damages. I assume that's the language that you're talking about that you want me to address, is that correct?

HANKINSON: I want you to tell us what language in the statute leads to the interpretation that you would have us give the statute?

UTSINGER: There are two things. First, that statute appears to contemplate a singular award of punitive damages, because it puts both of these parties together. Secondly, and perhaps this is the distinction between this case and any other case that the court sees, but in the jury charge in this case there was an opportunity to give punitive damages to two parties. And that's unquestioned.

And they gave \$5 million against the two corporate defendants on behalf of the survival claim and zero damages to Mr. Geisler.

HANKINSON: I understand. Now we on to the jury charge. Take me back to the statute because the statute says, that the damages awarded against a defendant may not exceed an amount equal to the greater of 4 times the amount of actual damages. What in that language would lead us to look at less than the total amount of actual damages awarded in applying the cap? I'm looking at the pure statutory interpretation question, not the way the case was submitted to the jury, not prior case law. I want to go back to the statute. How would you have us interpret that language and what are you hanging your hat on to give the interpretation that you would give to it?

UTSINGER: The statute does not say one way or another. It just simply says, damages awarded against the defendant. That's all that it says.

HANKINSON: And it also talks about the amount of actual damages. Why doesn't that on its face say that we look at the total amount of actual damages awarded to determine the exemplary damages to be awarded against a defendant?

UTSINGER: Certainly this court could do that. But we would disagree strongly about that.

HANKINSON: So the answer to my question then is that the language perhaps does not lend itself to that particular interpretation and you're relying on prior interpretations of this court of that language and the way the case was submitted to the jury, is that fair?

UTSINGER: That is a fair comment. I would also go back to the concept, too, of survival and wrongful death damages. Those are two distinct separate causes of action, and they've always been. And so what the TC did was _____ those together. But perhaps a more interesting question is this: what happens if Ray Geisler in the jury charge is awarded punitive damages himself? Instead of a zero, what if he is awarded punitive damages, too? Do you then go back and take a look at both of their damages and add them together so that you have an actual damages group. You multiply that times 4 for the estate, and then you add them both again together and multiply that times 4 for Mr. Geisler.

HANKINSON: What if the charge had been a little bit different in this case. And the question had been asked and one blank given, the amount of exemplary damages that should be awarded as against these defendants, and the \$5 million was put in the blank. And then there was a separate question that asked to whom the damages should be awarded? Would you be arguing differently in this case? Would that then mean that we would look at the total amount of actual damages to determine the cap?

UTSINGER: I believe that we would if the jury charge was submitted correctly.

HANKINSON: If it had been submitted that way, then you would agree with Ms. Walker's position, then?

UTSINGER: Yes, and as a matter of fact.

HANKINSON: So your view is, is that this case really turns on how the jury charge was presented?

UTSINGER: That's part of what it turns on. Part of it turns on also the absence of any clear, definitive language in 41.007, as it was in effect at the time this case was tried. And it also turns on the opinion of this court in *De La Lastra* that indicated specifically because the word 'claimant' was not in 41.007, this court determined that you should not combine wrongful death and survival benefits.

BAKER: What about 41.001 on the definitions, which starts out: In this chapter 'claimant' means. Couldn't that lead to an interpretation that across the board under any section in this chapter that we're talking about claimant meaning multiple parties; therefore, you can combine actual damages for more than one party to do the calculations even though it's not stated in there, and even though *De La Lastra* said what it said?

UTSINGER: If this court chooses to reverse *De La Lastra*, then that conclusion could be reached. And I cannot quarrel with that from the standpoint...

BAKER: Well the other side says it's a distinguishable case because of the constitutional issue that Justice Hankinson raised in the first place. So it's really off point to some degree because you're faced with, as the court said in that case, you can't go against the constitution, so surely a statute can't be interpreted to violate a constitutional prohibition?

UTSINGER: If the court had interpreted in *De La Lastra* that case the way that the plaintiffs wanted it, it would have done no violence to art. 16, §26 for this reason: The parents themselves while they may have been beneficiaries of the estate, is perhaps a backdoor way for them to recover punitive damages. But as a matter of law, anyone could have been under an estate a beneficiary of that estate. And so in that case, coincidentally the parents would have gotten those punitive damages through the probate proceedings or some other way. So we don't believe that that case is distinguishable. When you go back and examine it carefully, I think it says very clearly that the court did not intend to combine wrongful death and survival damages because those had been distinct, separate causes of action. And we believe that the collateral effect of the constitutional issue really is not the controlling point.

ABBOTT: So do you believe that ruling in favor of the respondent would require us overruling *De La Lastra*?

UTSINGER: Yes. I don't see any way that you can avoid that when you examine the specific holding, and I think that Justice Hecht, and Enoch and perhaps CJ Phillips had concurred in that. And if my recollection is correct, I think Justice Hecht said that he agrees with the court's interpretation of 41.007 and the fact that it does not have in there the claimant language that was presented.

Our position on the issue of combining wrongful death and survival damages is pretty straightforward. They are separate and distinct causes of action. They should not be combined. A statute itself does not say that you should combine those particular items. And because of that distinction, they should not be combined.

Our second point has to do with a no evidence point. To briefly address the no evidence point, I would just simply say when you read the CA's opinion and analyze it, it gives fairly short shrift to the issues relating to HEA as to negligence and gross negligence. And if this court were to examine carefully the gross negligence conclusions of the Ft. Worth CA, we are confident that the court will say: They really didn't specify how it is under *Moriel* given the subjective and objective factors that must be considered. How it is under *Moriel* that there is that evidence that would support an award of punitive damages in this case. That argument and that point relates to HEA only and not Texas Health. And to better understand that, the court needs to understand that Kern Manor was operated by Texas Health. HEA was a management company that provided certain ancillary services to Kern Manor. When you look at the record it's very clear that it is just mush. Basically there are references to corporate in there. And there are people who say, Well we made a hot line call. Or there is evidence that says that HEA has some responsibility for looking at charts. But there is no question that Texas Health Enterprises operated that home, hired the people to work there, and that every person employed there was an employee of Texas Health Enterprises.

PHILLIPS: How about the evidence that someone from a higher location than the local nursing home decided to staff-up the nursing home at the time of a state inspection, and then staff it down when there was no pending inspection, decided to not provide certain supplies based on an internal budget that had already been met. How can those decisions be anybody other than the corporate super structure?

UTSINGER: Assume that is completely correct. I would like to look at the record and confirm that. What did that have to do with the death of Ruth Simmons? If perhaps on some occasion, at some point in time there was a staffing irregularity for purposes of a survey that was being done, how is that related to gross negligence and entire want of care, the *Moriel* standards that are required for this event? You just can't say they were bad people at one point in time and, therefore, they should be responsible in this case.

HANKINSON: The allegation in this case is inadequate staffing at the nursing home is what caused her to not receive the care that she was required to get. I'm afraid I don't understand how you

can say that's unconnected.

UTSINGER: The allegation was inadequate staffing, and the negligence under staffing was specifically the question.

HANKINSON: So if we have a corporate office who is aware that it is understaffed to the point that they staff it up before the state inspectors come, so that they can pass the inspection and pull the staff out afterwards, because they don't want to do, I'm afraid I'm missing your point and would like for you to explain it further why there is not the causal connection?

UTSINGER: In this instance, there was evidence that the administrator and director of nurses were responsible for staffing and hiring and even budgeting. I believe the evidence was that on an occasion when there was a survey, they staffed up and then staffed down after that. Now if that singular event is sufficient for Ruth Simmons to be able to recover for punitive damage, then the connectedness of punitive damages is one that requires a number of logical leaps.

OWEN: Wasn't there evidence though that HEA was in charge of monitoring the charting for Ms. Simmons?

UTSINGER: There is a passing reference that they had some responsibility for monitoring charting. And as a matter of fact, nurse Lair(?), the only evidence that is in the record nurse Lair who worked for 5 weeks at the nursing home said: no one from HEA was here during that period of time. And that appears to be the primary evidence on which they hang their hats.

ENOCH: Is it your point that under *Moriel* that there might be a want of care here, but as long as you weren't aware of which person would be injured by the want of care, there is no gross negligence?

UTSINGER: No. We would not take it that far. We would not take it to the point of saying that we have to identify the person. But we would say it takes more than just general terms saying: there was a bad survey at this home at one point in time, or at one point in time that staffed-up and then this lady had her leg amputated, had a heart attack 3 days later, went into a coma, and then died 3 days later, and so all of a sudden the management company who had those general responsibilities is responsible for gross negligence under *Moriel*.

ENOCH: Staffing-up to meet the standards that the state set for operating the home just to pass the test and then making the intentional decision to staff-down is no evidence of the first prong, which is the awareness of an extreme risk. That's no evidence of an awareness of an extreme risk which is the intentional staffing-up to pass the standards set by the state for providing care, and then staffing-down. You say it doesn't meet that standard?

UTSINGER: Yes, it could. It could meet that standard if it's just out there. Where is the

evidence that says about the time that this event occurred that they staffed-up and staffed-down? Where is the evidence that says at this particular time when she was there, there was chronic under-staffing and people weren't there, not just for her but for anyone?

ENOCH: But that's the second prong, which is of extreme risk of injury. So if the person that was injured wasn't injured at the time that the risk was being undergone, then that's where you say they miss? So if we drive recklessly down the street one time and we don't hurt anybody, but then later on somebody gets injured, there's just no connection between the extreme awareness here and the actual risk?

UTSINGER: If you drive recklessly down the street and no one is injured, the question then becomes: If someone dies subsequently for some reason and they had multiple allegations, should that evidence be the evidence, the recklessness in that event be the evidence that triggers the punitive damages? I understand your point and it's well taken. We're not arguing that you have to in this instance say: We intended for Ms. Simmons to not have proper care. And so that's the requirement that's placed on the plaintiffs. We're not asking for the court to make that determination.

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RESPONDENT

GONZALES: Ms. Walker, are punitive damages intended to punish the bad conduct of this defendant here?

WALKER: Yes. This court has repeatedly held on numerous occasions that punitive damages are intended to punish and to deter and not to compensate a specific plaintiff.

GONZALES: Let's assume that your client could have brought separate actions, different lawsuits - a wrongful death and a survival action separately. Would he be able to look to the wrongful conduct in a separate suit in order to punish, in order to get punitive damages in a separate suit? Under your argument I'm wondering whether or not it leads us to the conclusion that if in fact the intent of punitive damages is to punish the bad action of the defendant here, and if you find damages in one suit because of the bad action why shouldn't you be able to count those damages in a separate suit under your argument?

WALKER: I don't think that that issue is before the court in this case. But I would point out that this court has held in a prior case that payment by a defendant of punitive damages in previous cases may be used to mitigate or to show the jury in the existing lawsuit that a great amount of exemplary damages should not be awarded, because that defendant has already paid punitive damages for that conduct in other cases. Although wrongful death and survival actions are distinct causes of action, I think what the statute looks at, what public policy looks at, what existing case law looks at, and the purpose behind a ratio between punitive damages and actual damages, what all those look at is punishing the core nexus of culpable acts, the core conduct found by the fact finder

to constitute gross negligence. And when you're looking at punishing that core conduct logically, you look to all the damage, all the actual damages caused by that conduct, and all the actual damages are then multiplied by 4.

ABBOTT: Let's apply that to this case. To clarify Justice Gonzales's question, let's assume that these two cases had been tried separately. Let's assume Geisler's claim was prosecuted first and no punitive damages were awarded, but there were how much in actual damages?

WALKER: There was \$221,000 of actual damages to the estate, and \$500,000 of actual damages to Mr. Geisler, individually as a wrongful death beneficiary.

ABBOTT: And then after Geisler's claim is prosecuted on the hills of that is the claim of the estate where punitive damages are awarded. Would you look to the actual damages awarded that are being required to be paid for by Geisler and aggregate those with the actual damages required to be paid...

GONZALES: If as you say, the purpose is to punish for all the damages caused by the wrongful conduct.

WALKER: Well I think that that argument could be made. I think that a plaintiff could make that argument and say that - I think there would be several hurdles you would have to overcome to make that argument if the cases were not in fact tried together, because I think you would have to show that the core nexus of culpable conduct found by the jury was in fact the same in both cases. The other problem is that the language of 41.007, which we are looking at, says: exemplary damages awarded against a defendant may not exceed 4 times the actual damages.

GONZALES: Is it the actual damages to the one suit or can we consider others?

WALKER: Exactly. That's the question. And I don't think in this case that issue is before the court. Whether the actual damages would be the actual damages in this particular case found by this particular jury - I mean you would also potentially have a problem that you would have not the same finders of fact making determination of gross negligence as you found making the determination of actual damages if there had been mixed trials.

ABBOTT: The problem would be its application in some other cases. Take for example where you have 10 asbestos claims tried together; all the plaintiffs were exposed at the same plant, all plaintiffs got asbestosis; would you aggregate all the actual damages to determine the application of the cap?

WALKER: I think that that depends again on the core conduct. In my mind, if you have grossly negligent conduct found by a fact finder that runs individually to individual plaintiffs, then those are separate punitive damages award. And you would multiply only the actual damages of

those particular plaintiffs. And that is in fact what the Ft. Worth CA did in *I Gotcha v. McGinnis*.

ABBOTT: So you're staying then if punitive had been awarded on the Geisler claim here, then you wouldn't aggregate the actual damages?

WALKER: No, you would. Because the core culpable conduct, the core facts found by the jury to constitute gross negligence are the same for Geisler and for the estate. There are no independent acts of gross negligence running from THE or HEA to Gesiler individually. Therefore, the conduct that we're trying to punish and deter is one core set of facts and it encompasses just that core set of facts. So there is no independent acts of negligence running from THE an HEA to Mr. Geisler. So the actual damages, the total harm caused by that culpable conduct to Ruth Simmons, and as a result to her wrongful death beneficiary are combined to form the actual damages.

ABBOTT: I don't understand why that analysis would not apply to an asbestos claim, or any mass tort claim.

WALKER: It could apply if the core culpable conduct is the same. For example: in *I Gotcha v. McGinnis*, in that case a single defendant negligently served alcohol to two minors. The minors left the bar together and were killed in a car wreck. The minor who was killed parents brought wrongful death cause of action. The minor who survived brought his own grossly negligence cause of action against the bar. Because the grossly negligent conduct was different as to the deceased minor (he may have been very intoxicated and the bar negligently continued to serve him when he was very intoxicated) verses their conduct towards the other minor who was just injured those are two different sets of culpable conduct. Because of that, there were two punitive damages award. One punitive damages award went to the estate of the deceased minor, and one punitive damages award went to the minor who survived, who brought his negligent cause of action. In that situation, the court did not combine those two plaintiff's actual damages and multiply them by 4 to get the cap. They combined the actual damages cause by that particular culpable conduct of the defendant. So the wrongful death beneficiary's damages were combined and multiplied by 4 to reach the cap as to the punitive damages awarded to the decedent.

HANKINSON: At bottom we have a statutory interpretation question here, and we're not writing on a clean slate. Because as Mr. Utsinger has pointed out, we decided *De La Lastra* several years ago. Why doesn't our disposition of that case and the holding in that case control the way we interpret the statute here and lead to the result that Mr. Utsinger is urging us to reach?

WALKER: I very much disagree with Mr. Utsinger's contention that *De La Lastra* would have to be overruled. *De La Lastra*, this court wrote: it is well established that this provision, the constitutional provision defines the class of persons who are entitled to wrongful death damages - punitive damages. Parents of the deceased while they are entitled to maintain an action under the wrongful death statute are included in art. 16, §26 and, are therefore, unable to recover punitive damages. That is the key to the whole case. This court specifically held that because parents are

excluded from the constitutional provision allowing recovery of punitive damages in wrongful death cases, they could not recover those damages.

HECHT: What difference does it make if the law excludes or the jury found that they shouldn't get it?

WALKER: What the jury did was not award punitive damages to Ray Geisler. And we're not contending that under the jury charge that that was erroneous. What we're contending is the total actual damages caused by the defendant's culpable conduct included Ray Geisler's actual damages. Therefore, Ray Geisler's actual damages are multiplied by 4 to compute the cap.

HECHT: But in *De La Lastra* one claimant could not get punitive damages because the law wouldn't allow it. In this case, one claimant is not going to get punitive damages because the jury wouldn't allow it. What's the difference?

WALKER: The jury was aware of the fact that Mr. Geisler was a wrongful death beneficiary. The jury was also aware of the fact and it was on the record that Mr. Geisler's brother was a wrongful death beneficiary and that they were bringing this suit on behalf of the estate of Ruth Simmons. So I think to say that the jury was unaware that this would pass through to Mr. Geisler would not be accurate. That evidence was before the jury and the only reason that two blanks were put there was so that the jury could apportion the money between Mr. Geisler as individually as a wrongful death beneficiary and the estate.

HECHT: Just as an aside, how does that make sense if the function of punitive damages is to punish? How does the apportionment - that sounds more compensatory?

WALKER: The law requires that the jury apportion punitive damages between all the parties seeking punitive damages. Typically what would happen is the jury charge would ask for an amount of money, as Justice Hankinson pointed out, and then the next question following would say: As between these plaintiffs how do you allocate the punitive damages? In this case those two questions were combined. And if you look at the charge, in question 6 and 7, the *Moriel* factors are listed and then it says: What amount of money, if any. And then it lists the two individuals - Walker Gesiler individually and the estate who are in this case making claims for punitive damages. So those two questions were just combined into one question.

PHILLIPS: I want to go back to your hypothetical about the difference between this and the *I Gotcha v. McGinnis* case. It seems to me that a survival cause of action and a wrongful death cause of action can be for quite different things: an in conduct which led to a death. If the conduct causes a long drawn out death with a lot of suffering, the survival cause of action can be quite different from a case where it's immediate. And the difference between the wrongful death beneficiary whose compensation is for this person no longer being alive, and the estate whose compensation is for suffering before death could be much more different than the distinction between

how much alcohol two young people were served at the same time sitting together in a bar. So I didn't understand your distinction between these cases.

WALKER: I think that again then we're focusing on the damages suffered by a particular plaintiff or in a particular cause of action. And that is not the focus. The focus is on the culpable conduct of the defendant...

HANKINSON: But isn't that what the court did in *De La Lastra*? There's language repeatedly in that opinion that talks about the distinction between the wrongful death claim and the survival action and the damages that are awarded for each. Isn't that the whole point behind *De La Lastra*?

WALKER: First of all, I believe that the whole point behind *De La Lastra* is that this court is going to uphold the constitution when it does not include parents as persons who are entitled to recover punitive damages in wrongful death cases. I think that that is the bottom line holding of *De La Lastra*. Concerning Justice Phillips' question, it is the culpable conduct of the defendant that is being punished. The total damages that that causes are added together and multiplied by 4.

PHILLIPS: But that conduct can be quite different in certain circumstances for these two different causes of action.

WALKER: If there is different conduct and it is established to the jury that there is different conduct, then there would be two punitive damages award.

PHILLIPS: So you've got to come up to the SC of Texas in each situation like this and let us review the evidence to see if basically there is one set of conduct for both causes of action or two sets of conduct, and then once we decided that, you can decide the multiplier number?

WALKER: In this case, there is no direct contact, there is no direct action between Walter Geisler and THE & HEA. They did nothing directly to be grossly negligent to him. Their gross negligence flows through Ruth Simmons, and I believe that that is the way it works in 99% of the wrongful death and survival cases.

PHILLIPS: If their gross negligence causes a quick death versus a prolonged death, that's going to result in quite different types of damage for these two causes of action.

WALKER: Again, you're focusing on the damages of the plaintiff, or the survival damages and the wrongful death damages instead of focusing on the culpable conduct, the nucleus of conduct found by the finder of fact to constitute gross negligence.

PHILLIPS: Particular in the case of a nursing home where somebody goes in and they come out prematurely dead, there is more than one instance of conduct that is typically alleged.

There are different things, and that's what you've alleged, is a lot of different conduct by different entities at different times and some of that may affect these two causes of action quite differently. But be that as it may, would you answer the contention that your allegations of gross negligence go principally to the nursing home on-site and not to the management, and how do you tie the management's alleged gross negligence into this particular death?

WALKER: First of all, I think there were several comments here of how far do we take this? How far we take it is a scintilla. And as long as there is a scintilla of evidence in this record to support the jury's finding, then there is legally sufficient evidence. And the record shows that HEA managed this nursing home. Richard Knight, the president of HEA testified on vol. 6, page 198, that HEA was to provide all these support services. That includes: financial; purchasing; major physical plant repair; nursing consulting; personnel functions to the extent that it's predominantly hiring and licensor. That is the president of HEA giving that testimony. Then when you look at the record and you see a total absence of those functions being performed at this nursing home, Justice Baker in *Mobil Oil Co. v. Elander* recognized that corporate omissions can constitute the basis for gross negligence.

OWEN: Did HEA do the hiring and the firing?

WALKER: The testimony that I've recited constitutes a scintilla of evidence that HEA did do the hiring and firing.

OWEN: What was the evidence? Did they do the hiring and the firing or not?

WALKER: There is conflicting testimony on that point. And viewing the evidence in the light most favorable to the jury verdict and disregarding all contrary evidence, it's our position that the evidence is sufficient.

OWEN: Precisely where and what was the evidence that they did the hiring and the firing?

WALKER: It comes right here from Mr. Knight, who is the president of HEA on vol. 6, page 198, that says that HEA provides personnel functions to the extent that it's predominately hiring and licensor. Additionally, HEA employed RN nurse consultants and regional consultants to monitor quality assurance, monitor resident care and treatment, ensure proper charting and staffing at the THE owned nursing homes. And that's vol 6, pgs. 198 - 202. Also the President of HEA's testimony on those pages. HEA's RN nurse consultants were responsible for insuring proper resolution of all state sited deficiencies. And that's vol 6. of the record, page 201.

OWEN: What was the evidence about the status of staffing at the time that the negligence occurred? Was it understaffed or not?

WALKER: Yes. At the time that this act occurred, the nursing home's license had been revoked. It was so bad that the state had revoked the nursing home's license.

OWEN: I thought your opposition said that they had restaffed up to try to get their license back. And my question was, what was the status of staffing at the time the negligence occurred?

WALKER: It's my understanding based on the record at the time this negligence occurred, this nursing home was not licensed and had not cured the state deficiencies concerning staffing. I think that the record references to that are set forth in the independent ground that we presented that HEA and THE were not licensed. And that because this court decided the *Auld* decision, you don't have to reach that issue in this case. And that was an independent ground that we raised to say that 4590(i) did not cap the punitive damages against HEA in this case or against THE because they were not a licensed facility. And 4590(i) requires a nursing home to be licensed in order to come within the definition of 4590(I) health care provider. So those record references are in our brief under that independent ground.

ENOCH: Isn't it possible that there might be a core conduct that occurred but the jury just determined that as to one of the parties it was deserving of punishment, but as to one of the other parties it was not deserving of punishment? Couldn't a zero finding of punitive damages for Mr. Geisler be a decision that for that conduct there shouldn't be punishment? Assuming that this is just punishment and not compensation isn't that some sort of consideration about what the amount of the punitives ought to be capped at?

WALKER: In this case the conduct is the same. To say that the jury didn't award any punitive damages to Geisler because there's no conduct running to him, the conduct goes through Ruth Simmons. The conduct is THE and HEA's grossly negligent conduct towards Ruth Simmons. As a result of that conduct, because his mother died, because his mother suffered, because he suffered emotional distress damages, Walter Geisler was damaged. Those damages that Walter Geisler suffered were caused by THE and HEA's grossly negligent conduct as found by the finder of fact. So the conduct of THE and HEA is the same for Ruth Simmons as it is for Walter Geisler. Therefore, the total damages that that conduct caused are added together and multiplied by 4 under the cap. In situations where there are separate nucleuses of culpable conduct on behalf of a defendant running to different plaintiffs as in *I Gotcha* and as in the *Seminole Pipeline* case, then in those cases the actual damages caused by that culpable conduct of the defendant are added together and multiplied by 4. It doesn't necessarily include all the actual damages of all the plaintiffs.

ENOCH: So it's possible that the person that was the object of the evil motive or gross negligent conduct would suffer little damage, but a derivative claimant - loss of consortium or something - might suffer great damage. And therefore the punitives that would be awarded would be based on essentially 4 times the larger amount of damages even though the jury determined that there was pretty nominal damages to the person the focus of this bad conduct was. And in your

scenario then, you would add all those damages together to figure out the cap even though the person who was the object of the conduct suffered very little damages as a result of it?

WALKER: Yes. If a car went down the street and hit somebody and killed them instantly, and they suffered very little damages, no medical expenses, no pain and suffering...

TAPE 1, side a runs out.

WALKER: ...attributable to that nucleus of culpable conduct are added together and multiplied by 4 to reach §41.007's 4 times actual damages cap.

HECHT: If the jury thought that the culpable conduct was directed at the events that led to the suffering of the patient before her death, rather than to the cause of death or afterward, couldn't they use that division in culpable conduct to make one award for the survivor claim and one award for the wrongful death? You say no.

WALKER: Walter Geisler's damages are actual damages caused by the culpable conduct of the defendant. Therefore, to punish and deter that culpable conduct all of the actual damages are added together and multiplied by 4. And it's our position that if this is a jury charge case, if this case pivots on how it was submitted to the jury, then that issue has been waived. There was no objection to the charge. That issue has never been raised. So if this court is going to make the case a jury charge issue case, then we win for sure.

HECHT: But the petitioner wants to stand on the charge and wants to say that the division makes sense. That's part of their argument. In fact they concede as I heard them earlier that if there had just been one line this would be a totally different case.

WALKER: As a matter of law, I don't think there can be two punitive damages awards stemming from one nucleus of culpable conduct. And that's our position, that in this case there was one punitive damages award that instead of submitting two separate questions asking for the dollar amount of the blank, and then followed by a give percentages, and it makes no sense to me that if the jury had awarded zero percent, that then Mr. Utsinger is happy with the charge, but because the jury awarded zero dollars now somehow that interjects reversible error in the case. That makes no sense to me.

BAKER: Does the statutory scheme that the legislature put in effect require an apportionment of punitive? Is that why cases are submitted that way?

WALKER: Cases are submitted that way because of the pattern jury charge. And the pattern jury charge §10.3 in the 1998 version of the General Negligence Pattern Jury Charge gives the general punitive damages dollar amount question listing the *Moriel* factors and then it's followed by also 9.7, which gives the percentages between the punitive damages claimants or the person

seeking punitive damages. And that's also reflected in PJC 81.6 and PJC 81.7 in the 1998 version of the medical malpractice products and premises cases.

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REBUTTAL

ENOCH: Mr. Utsinger, let me ask you the question that I asked Ms. Walker. You have wrongful death and survivorship based on a car wreck and clearly meet the *Moriel* standard for gross negligence: instantaneous death. So there are going to be some damages but not the medical and not the pain and suffering, but you've got tremendous loss for the family. And so the family member, and suppose you submit it as this way too for punitive damages and the jury says: Well the conduct was as to her punitive damages, smaller, regular damages, actual damages. And then as to all the wrongful beneficiaries: Well we've already given big punitive damages to the person who suffered and it goes to the estate anyway, so we've punished them. We've now punished them. We've given them a significant punishment and now we just give actual damages to the rest of the estate. And so you end up with nominal damages for the one that the focus was on and large damages for the other. And you make the argument, you can't combine. So they are limited to just 4 times what they awarded this person. Is that what the statute intended?

UTSINGER: We believe that it did. We believe that you cannot combine wrongful death and survival cause of action. Those have been separate forever.

ENOCH: And so the wrongdoer actually escapes punishment assessed based on the damages they caused?

UTSINGER: I believe in *Drilex* this court talked about it just can't help if it that's the result when it dealt with how you divide under the comparative responsibility act, the effect of a settlement credit. And sometimes that happens. The problem this court is faced with is one that is very, very difficult to grasp, because on one hand we are faced with the concept of punishing. We recognize that, that's the purpose of punitive damages and it's to punish the wrongdoer. On the other hand we are faced with the concept that's deeply ingrained in Texas law that says: these are two distinct causes of action. They can have different types of damages. They can have different types of gross sort of damages that the people suffer or actual damages that the people suffer from.

BAKER: But even though they are two separate actions, they are both derivative and they rise out of one person's injuries and death, isn't that correct?

UTSINGER: That's correct.

BAKER: So the other side argues that there's a nexus of conduct that caused the injuries that are divided by virtue of the statutory schemes that the legislature passed when under common law there was no right of recovery. So even though if they are two separate actions, does that lead

to the conclusion that you can't combine them under this 4100 statutory scheme on how you calculate punitive damages?

UTSINGER: We believe that you should not.

BAKER: But what's the basis of why you believe that?

UTSINGER: One reason is because this is what this court said.

BAKER: I know, you keep saying they are separate causes of action, they are separate cause of action, but how does the _____ work to get to your conclusion?

UTSINGER: And that's the difficulty with punitive damages. For some reason there has been a decision made of applying a cap under these circumstances - a 4 times cap. It's not our decision. It was the legislature's decision to say: that is a reasonable relationship. The relationship between actual damages and punitive damages should be 4 times. That's the legislative theory, and that's why you look at the actual damages, we believe, of the individual who suffered them.

HANKINSON: But the statute does not include language 'actual damages suffered by the particular individual.' I mean isn't that the piece that's missing from the statute that causes you difficulty in asking us to interpret the statute that way?

UTSINGER: Yes, either way.

HANKINSON: We have to engraft that language on in order to get to that point?

UTSINGER: That's what this court must do.

HANKINSON: And your view is, is that in *De La Lastra*, we already did that?

UTSINGER: Right, and said no it doesn't. The trial counsel did not waive any jury objections for two reasons. One, if the court had properly applied the 4 times caps, as we thought that it would have, then there would have been no error in the way the case was submitted. But secondly, is the 4590(i) caps. At that point in time, the belief of the trial counsel was that that sat an absolute cap of \$1.3 million on actual and punitive damages. So as the law was at that point in time, there was no reason to object.