

No. 09-0048

IN THE SUPREME COURT OF TEXAS

MOTOR COACH INDUSTRIES MEXICO, S.A. DE C.V.,

Petitioner,

v.

JAMES HINTON, INDIVIDUALLY AND AS REPRESENTATIVE
OF THE ESTATE OF DOLORES HINTON, DECEASED, *et al.*,

Respondents.

On Petition for Review from the
Tenth Court of Appeals District, McLennan County, Texas
No. 10-06-00256-CV

**HINTON'S REPLY TO MCI'S RESPONSE TO
HINTON'S CROSS-PETITION FOR REVIEW**

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TO THE HONORABLE SUPREME COURT OF TEXAS:

Cross-Petitioners James Hinton, Individually and as Representative of the Estate of Dolores Hinton, Deceased, *et al.*, ("Hinton") file this Reply to the Response to Cross-Petition for Review filed by Motor Coach Industries Mexico, S.A. de C.V. ("MCI").¹

MCI correctly identifies the "only relevant question" with respect to Hinton's Cross-Petition: "whether Central Texas meets the statutory definition of a 'settling person.'"² Despite this, MCI devotes little analysis to this question, opting instead to focus on a few selected offers of proof – a tangential issue that did not mislead the trial court, the bankruptcy court, the jury, MCI, or anyone else, and did not affect the jury submission issue about which MCI complains. Hinton files this reply to address this issue and several misleading comments in MCI's Response.

I. MCI's focus on the testimony of a few plaintiffs in offers of proof is misleading. While some plaintiffs were obviously confused about the relationship between this state court product liability case and the bankruptcy case, others were not, and all plaintiffs testified truthfully and candidly about their knowledge and understanding of these complex proceedings.

To put it bluntly, MCI's Response to Hinton's Cross-Petition appears to be summarized as follows: "the Litigation Plan was a settlement, and the plaintiffs are liars." The procedural history of the Litigation Plan, and why it was not a settlement, is fully discussed in the Cross-Petition and will not be reiterated here. Hinton will, however, respond to the "liars" allegation.

¹ TEX. R. APP. P. 53.5.

² MCI Response, p. 6.

Initially, it is important to explain the context in which the testimony MCI relies on³ was elicited. The bankruptcy issue, and whether it constituted a settlement, had been fully (and repeatedly) briefed in the trial court.⁴ The trial court was fully aware of the bankruptcy court proceedings and was aware that all of the Hinton plaintiffs had filed proofs of claim in the bankruptcy court.⁵ These facts were a matter of public record and were never disputed.

However, Hinton and MCI both agreed that the bankruptcy court proceedings should not be discussed in front of the jury. In fact, MCI *agreed* to Hinton's motion in limine precluding any argument or evidence relating to the bankruptcy proceeding.⁶ When later discussing the bankruptcy issue with the trial court, MCI's counsel stated that "I would not want to offer anything to the jury that talks about the bankruptcy court," and "I do not want, under no circumstances, to even discuss bankruptcy or mention it or anything else."⁷

Despite these representations to the trial court, MCI sought to question several of the Hinton plaintiffs about the bankruptcy proceedings and their proofs of claim in the bankruptcy court. The trial court properly excluded this evidence, but MCI was permitted to make offers of proof.⁸ In the offers of proof, MCI asked many of the

³ Although MCI refers primarily to comments by the bankruptcy court, those comments discuss testimony elicited in the trial court in this case during offers of proof. As Hinton demonstrated in his Cross-Petition, the bankruptcy court was satisfied that the Hinton plaintiffs did nothing improper and instructed them to complete the proceedings required by the Litigation Plan, which they did in February and March of 2006.

⁴ *See, e.g.*, 16 CR 3804; 17 CR 3975.

⁵ *Id.*

⁶ 82 CR 19590, 19596; 1 RR 87, 90.

⁷ 9 RR 127; 9 RR 133.

⁸ 9 RR 137-43.

plaintiffs whether they "blamed" the bus company or its driver for the accident or felt the bus company or driver were "responsible." In response to this vague questioning, certain plaintiffs truthfully responded that they did not personally blame the driver or his company.⁹ Plaintiff Jim Freeman's testimony is perhaps the best example. Mr. Freeman suffered relatively minor injuries in the accident, but his wife of more than 50 years, Jo Catherine Freeman, was killed. When Mr. Freeman was asked during an offer of proof whether he "blamed" the bus driver, Mr. Freeman responded as follows: "Not even from the beginning. As a matter of fact, he was on our prayer list at the church the week after, as all the other members were."¹⁰ MCI appears to mock and ridicule Mr. Freeman's testimony, but "blame" is a moral concept, not a legal concept. MCI chose to ask vague, imprecise questions; they should not now be heard to complain about the answers, or be allowed to argue that those answers have some legal meaning that they plainly did not.

Some of the Hinton plaintiffs were also specifically questioned about the nature and legal implications of the bankruptcy proceeding. Undoubtedly, some were confused, and a few had virtually no recollection at all. This is hardly surprising. Understanding a single complex litigation matter is difficult enough for a lay person, and likely even more difficult for the Hinton plaintiffs, many of whom were elderly. Trying to understand the

⁹ In addition to touching upon the bankruptcy issues, which MCI did not want to raise in front of the jury, this questioning regarding "blame" or "fault" was improper and inadmissible. Under the Texas Rules of Evidence, testimony regarding "blame" or "fault" is not appropriate because it is not based on proper legal concepts. Even assuming the Plaintiffs had been qualified as expert witnesses to offer opinions on the proper concepts of "negligence" and "proximate cause," and had been asked questions using those terms, those terms must be specifically and correctly defined. *See, e.g., Birchfield v. Texarkana Mem. Hosp.*, 747 S.W.2d 361, 365 (Tex. 1987); *E-Z Mart Stores, Inc. v. Terry*, 794 S.W.2d 63, 64 (Tex. App.—Texarkana 1990, writ denied); *Harvey v. Culpepper*, 801 S.W.2d 596, 601 (Tex. App.—Corpus Christi 1990, no writ); *see also Aguirre v. Vasquez*, 225 S.W.3d 744 (Tex. App.—Houston [14th Dist.] 2007, no pet.) (reversing summary judgment on judicial estoppel based on testimony regarding "blame").

interrelationship between the bankruptcy proceeding and the state court proceeding, and the separate claims pending in each, would have been virtually impossible, particularly when both cases had been pending for more than two years by the time of the trial in this case. MCI specifically ridicules Rev. Hinton¹¹ for his statement that he did not know about the bankruptcy court, but this statement was not intended to mislead anyone – nor did it. To lay people, a court is a court, and Rev. Hinton would probably have given the same response if MCI had asked him about any other specific court – such as a "probate court," or a "county court at law," or a "federal court."

More importantly, MCI fails to note that some of the plaintiffs demonstrated a fairly good, albeit simplistic, understanding of the bankruptcy proceeding.¹² Ms. Bills testified that she was aware of the bankruptcy proceeding, that she had a claim pending there, and that she relied upon her attorneys to represent her in connection with that proceeding.¹³ When asked what the claim in the bankruptcy case was for, she testified, "I really don't know. I'm not an attorney, and that's why I asked for an attorney to help me with that matter."¹⁴ She was also asked why she thought the bus company "owes her money,"¹⁵ to which she truthfully responded, "I don't know that the bus company does owe me money."¹⁶ The testimony of Robert Melvin Akers is perhaps the best example.

¹⁰ 13 RR 291 (referring to the other church members injured and killed in the accident).

¹¹ Rev. Hinton, a retired pastor, was 84 years old at the time of trial. His wife of 54 years, Dolores, was killed in the accident.

¹² See Offer of Proof Testimony of Susan Akers Bills (16 RR 219-24); Offer of Proof Testimony of Robert Melvin Akers (15 RR 244-49); Offer of Proof Testimony of Elaine Horton (9 RR 127-36).

¹³ 16 RR 220.

¹⁴ 16 RR 223.

¹⁵ One can reasonably assume that if counsel had asked one of the Hinton plaintiffs during direct examination at trial whether he or she thought that MCI "owed them money," MCI would have objected.

¹⁶ 16 RR 224.

He testified that he was aware that his attorneys had submitted a proof of claim in the bankruptcy case on his behalf, but when asked about the legal effect of that submission, he candidly responded: "It's not my – I don't understand the bankruptcy situation at all. I don't know how that plays into all this...."¹⁷

Finally, MCI incorrectly states that it was prevented from cross-examining the plaintiffs about the negligence of Cummings and Central Texas. In fact, MCI questioned several of the plaintiffs about the alleged negligence of Cummings and Central Texas, eliciting testimony about how fast Cummings was going, whether the plaintiffs thought that was too fast, and road and weather conditions at the time of the accident.¹⁸ MCI offered this evidence (as well as evidence from other fact and expert witnesses) regarding the bus driver's and the charter company's negligence in connection with its "sole cause" defense.¹⁹ The jury rejected it.

The plaintiffs truthfully and consistently testified that they relied upon their attorneys to prosecute their claims in the bankruptcy court and in the state court. The trial court was fully aware of the bankruptcy proceedings and the fact that the plaintiffs had claims pending there. The testimony MCI relies upon was elicited during offers of proof – when the jury was not present – so no one was misled by any confusion on the part of the plaintiffs. Most notably, this testimony had absolutely no effect on the jury submission issue, which was determined by the trial court based on the extensive prior

¹⁷ 15 RR 245-46.

¹⁸ 5 RR 171-74; 13 RR 81-87; 18 RR 85-91.

¹⁹ MCI was limited to relying on "sole cause" as a defense because, as discussed below, it failed to timely join Cummings and Central Texas as "responsible third parties" in this case.

briefing on the bankruptcy issues. Finally, the plaintiffs' confusion does not change the fact that the Litigation Plan was not a "settlement" under Chapter 33.

II. The same allegations made by MCI here were raised in the bankruptcy court in motions to strike the Hinton claims. After Hinton had an opportunity to respond to those allegations, the bankruptcy court denied the motions and instructed the Hinton plaintiffs to complete the proceedings outlined in the Litigation Plan.

MCI's response mischaracterizes the bankruptcy court proceedings in many ways. First, MCI claims that "the Plaintiffs' attorneys [announced] in open court that a settlement had been reached."²⁰ This is simply wrong, and a review of MCI's citation to the record reveals no such announcement or even any discussion of a settlement. MCI also states that Central Texas' insurance carrier paid its \$5 million in limits to settle the claims. This is misleading at best. Central Texas' carrier was *ordered* by the bankruptcy court to tender those monies to the court as part of its marshalling of the debtor's assets.²¹ It was undetermined at that point who might have a claim to those proceeds, and how the bankruptcy court would handle the various competing claims to those funds.

Moreover, as discussed in Hinton's Cross-Petition, the bankruptcy court specifically afforded Hinton the option of *not* settling his claims, and to have those claims adjudicated pursuant to the Litigation Plan. MCI suggests that Hinton somehow acted improperly, when all he did was exercise the choice offered to him under the bankruptcy court's orders to settle, or not to settle. He chose not to settle.

²⁰ MCI Response, p. 5, citing 85 CR 20215-16.

²¹ 84 CR 20018.

Finally, MCI devotes much of its Response to the concerns initially expressed by the bankruptcy court after the motion to strike Hinton's claims was filed in the bankruptcy court. Yet MCI conveniently omits the fact that, once the Hinton claimants had an opportunity to respond to that motion, he specifically found that "the concerns raised in [the Court's] Show Cause Orders have been satisfied and properly shown by the pleadings submitted by the Litigation Plan Participants," and ordered that the Litigation Plan proceedings be completed pursuant to an agreed timeline.²²

III. MCI's efforts to confuse the issue before this Court stem from MCI's failure to timely join Cummings and Central Texas as "responsible third parties." MCI's lack of diligence does not convert the bankruptcy case into a "settlement" under Chapter 33.

MCI criticizes Hinton's decision not to settle their bankruptcy claims as a "clever scheme," and rather than focus on the legal analysis chooses instead to engage in "name-calling" and character attacks. Although the court of appeals erred in concluding that the Litigation Plan was a settlement under Chapter 33, that court properly ignored MCI's attacks and described the Litigation Plan as a "good-faith, albeit unsuccessful, attempt to avoid the possible detriment to the Plaintiffs if Central Texas' proportionate responsibility were submitted to the jury."²³ This incorrectly presumes that Hinton controlled the proportionate responsibility submission.

MCI had the remedy it seeks here within its own control – submission of a proportionate responsibility question – yet it failed to avail itself of that remedy. MCI

²² 25 RR PX2.

²³ *MCI Sales and Service, Inc. v. Hinton*, 272 S.W.3d 17, 42 n. 19 (Tex. App.—Waco 2008, pet. filed).

could have joined Cummings and Central Texas as "responsible third parties" under Section 33.004, which would have entitled MCI to the submission of a proportionate responsibility question.²⁴ In fact, MCI attempted to do so by filing a motion for leave to join Cummings and Central Texas on February 14, 2005 – the day limitations would have expired.²⁵ But MCI waited until the eve of trial to set its motion for hearing, so the trial court properly denied MCI's request.²⁶

MCI had the ability to ensure that Cummings' and Central Texas' fault would be considered by the jury. MCI's lack of diligence in protecting its own interests does not convert the Litigation Plan into a settlement under Chapter 33, and Hinton should not be penalized for carefully and deliberately protecting his interests by *not* settling his bankruptcy claim in compliance with the bankruptcy court's orders and judgment.

PRAYER

Respondents/Cross-Petitioners respectfully pray that the Court grant their Cross-Petition for Review, affirm the decision of the court of appeals regarding MCI's issue, and reverse the court of appeals decision on Cross-Petitioners' point and render judgment for Cross-Petitioners against MCI in the amounts as assessed by the trial court. Cross-Petitioners also pray for all other relief to which they may be entitled.

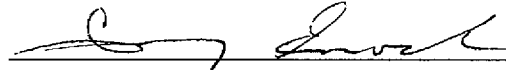
²⁴ TEX. CIV. PRAC. & REM. CODE § 33.003 (1995). The version of the statute that governs this case required responsible third parties to be "joined" rather than merely "designated," as the current statute provides. See *Hinton*, 272 S.W.3d at 35.

²⁵ 3 CR 690; 3 CR 696.

²⁶ *Hinton*, 272 S.W.3d at 36. MCI raised the joinder issue in the court of appeals, but has apparently abandoned it.

Respectfully submitted,

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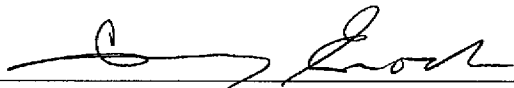
CERTIFICATE OF SERVICE

The undersigned certifies that on this 11th day of June, 2009, this document was served on all parties or their attorneys of record listed below by certified mail, return receipt requested, pursuant to the Texas Rules of Appellate Procedure.

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