

# NO. 09-0048

## IN THE SUPREME COURT OF TEXAS

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Motor Coach Industries Mexico, S.A. de C.V.,  
f/k/a Dina Autobuses, S.A. de C.V.

*Petitioner/Respondent*

v.

James Hinton, Individually and as Representative  
of the Estate of Dolores Hinton, Deceased, *et al.*

*Respondents/Petitioners*

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On Appeal from the Court of Appeals  
For the Tenth Judicial District of Texas

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### **RESPONSE TO CROSS-PETITION FOR REVIEW**

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**TABLE OF CONTENTS**

INDEX OF AUTHORITIES ..... iii  
ISSUES PRESENTED ..... iv  
STATEMENT OF FACTS ..... 2  
SUMMARY OF THE ARGUMENT ..... 6  
ARGUMENT..... 6  
CONCLUSION AND PRAYER..... 12  
CERTIFICATE OF SERVICE..... 14

## INDEX OF AUTHORITIES

### Cases

<i>C&amp;H Nationwide v. Thompson</i> , 903 S.W.2d 315 (Tex. 1994).....	7, 11
<i>Elbaor v. Smith</i> , 845 S.W.2d 240 (Tex. 1992) .....	12
<i>Knowlton v. U.S. Brass Corp.</i> , 864 S.W.2d 585 (Tex. App.—Houston [1st Dist.] 1993), <i>aff'd in part</i> <i>and rev'd in part on other grounds</i> , 919 S.W.2d 644 (Tex. 1996).....	11
<i>MCI Sales &amp; Serv., Inc. v. Hinton</i> , 272 S.W.3d 17 (Tex. App—Waco 2008).....	1, 7, 8, 10
<i>Nat'l Liab. &amp; Fire Ins. Co. v. Allen</i> , 15 S.W.3d 525 (Tex. 2000).....	9
<i>Palais Royal, Inc. v. Gunnels</i> , 976 S.W.2d 837 (Tex. App.—Houston [1st Dist.] 1998, <i>pet. dismiss'd</i> ) .....	11

### Statutes

TEX. CIV. PRAC. & REM. CODE § 33.011 .....	2, 7, 9, 10, 11
Act of June 2, 2003, 78th Leg., R.S., ch. 204, 2003 Tex. Gen. Laws 847 .....	10

## **ISSUES PRESENTED**

1. Is a party that pays \$5 million to be distributed to the plaintiffs in exchange for a release of any liability for its role in causing the plaintiffs' personal injuries a "settling person" for purposes of proportionate responsibility under Chapter 33 of the Civil Practice and Remedies Code?

2. May plaintiffs arrange their receipt of \$5 million in funds paid on behalf of a potentially liable party in exchange for a release of liability in such a manner that they can prevent the trial court from submitting the paying party's proportionate responsibility in the court's charge as a "settling person"?

TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF TEXAS:

Motor Coach Industries Mexico, S.A. de C.V. (“MCI Mexico”), files this Response to the Cross-Petition for Review filed by the plaintiffs in the underlying suit, James Hinton et al. (“Plaintiffs”).<sup>1</sup>

In this personal injury case involving a bus accident, the Plaintiffs argue that they have discovered how a defendant can pay \$5 million into the registry of the court and get a full release from liability, yet not be a “settling person.” The court of appeals saw through this charade and correctly held that the trial court erred by refusing to submit to the jury the bus driver, Johnny Cummings, and his employer and the bus owner, Central Texas,<sup>2</sup> to determine their proportionate responsibility. This holding is correct because, after filing for bankruptcy, Central Texas paid its full \$5 million insurance limits to the bankruptcy court for the sole purpose of discharging tort claims against Central Texas from a class of “Bus Crash Claimants,” which included all Plaintiffs. Under the applicable version of section 33.011(5), Central Texas is a “settling person”—that is, “a person who at the time of submission has paid or promised to pay money or anything of monetary value to a claimant at any time in consideration of potential liability . . . for which recovery of damages is sought.” *MCI Sales & Serv., Inc. v. Hinton*, 272 S.W.3d 17, 39 (Tex. App—Waco 2008) (quoting Act of June 3, 1987, 70th Leg., 1st C.S., ch. 2, § 2.07, 1987 Tex. Gen. Laws 37, 41 (amended 1985 and 2003) (current version at TEX.

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<sup>1</sup> Consistent with the appellate court’s opinion, this Response will refer to Cross-Petitioners James Hinton et al. as “Plaintiffs.”

<sup>2</sup> “Central Texas” refers to Central Texas Trails, Inc., Central Texas Bus Lines, Inc., and Kincannon Enterprises. As the lower court does in the portion of its opinion addressing the proportionate responsibility issue, this Response will refer to Central Texas and Cummings collectively as “Central Texas.”

## STATEMENT OF FACTS

On February 14, 2003, the Plaintiffs boarded a bus chartered by Central Texas and driven by Cummings to take them from Temple to Dallas. (CR 1111; 5 RR 98-99, 133; 9 RR 109-10; PX 17 at p. 3.) The weather was overcast with reduced visibility due to fog, haze, and heavy rain. (5 RR 135; 9 RR 109-10; PX 17 at pp. 3, 20; PX 20.) The stretch of highway between Temple and Waco was particularly treacherous because of the ascending grade, the flooded road surface, and the 20-foot wide earthen median that had no temporary or permanent barrier. (PX 17 at pp. 5-6, 20.) The tread on one of the rear tires of the bus measured 2/32 of an inch and on another measured 3/32 of an inch, so thin that the Plaintiffs' own expert testified that he would not have felt safe riding in that particular bus. (6 RR 200-03; PX 17 at p. 39.)<sup>4</sup>

According to the Plaintiffs who noticed, Cummings was driving too fast for the conditions – about 65 mph. (5 RR 171-73; 13 RR 80-86.) As the bus crested a hill Cummings saw cars stopped ahead.<sup>5</sup> (PX 16 at p. 8; PX 17 at p. 3, 6, 35.) Instead of trying to stop, Cummings steered hard left and drove the bus across the rain-soaked median into the southbound lanes of Interstate 35, hoping to successfully navigate through the head-on traffic. (*Id.*) His tactic failed. The bus slammed into the front of a Suburban (instantly killing two of its occupants) causing the bus to spin

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<sup>3</sup> Unless otherwise noted, all references to Chapter 33 will refer to the version in existence before the 2003 amendments.

<sup>4</sup> The NTSB's Vehicle Dynamics Simulation Study stated that on marginal wet pavement tire treads with less than 4/32 inch are as slippery as ice when the surface of the roadway is just barely flooded. (PX 17 at p. 39.)

<sup>5</sup> An accident had previously occurred and the traffic was stopped because I-35 northbound was shut down. (7 RR 47-50.)

counterclockwise, tip over on its right side, and slide to a stop over the ditch between southbound I-35 and the access road. (PX 17 at p. 3.)<sup>6</sup> As a result, five occupants of the bus died, and many others were injured. (*Id.*)

After the accident, but before the Plaintiffs filed suit, Central Texas and Cummings filed for bankruptcy in the Western District of Texas, Waco Division. (CR 3804, 20329; DX 312.) The Plaintiffs filed claims as creditors against the bankruptcy estate based on their injuries that were caused by the negligence of Central Texas and Cummings. (44 RR DXOP.) To settle these claims, Central Texas' insurance carrier paid its \$5 million limits into the registry of the bankruptcy court to be held in an interest-bearing account and distributed among the bus occupants, including the Plaintiffs, who asserted claims against Central Texas. (CR 3804; DX 312.) The Plaintiffs separately filed the underlying suit against MCI Mexico and others, claiming that the bus was unreasonably dangerous because it was not equipped with three-point passenger seatbelts or with laminated glass passenger windows. (CR 1117.) The Plaintiffs did not assert claims against Central Texas or Cummings in the state court litigation. (*Id.*)

In the bankruptcy proceeding, the Plaintiffs prepared and obtained approval for an "Apportionment Plan" whereby Central Texas' \$5 million (plus interest) was placed in a "Liability Fund." (CR 3817-24) (App. Tab 6 to Pls.' Pet.) Under the Apportionment Plan, each "Bus Crash Claimant," including each of the Plaintiffs, was assigned a percentage of the Fund. However, each Claimant had the option of instead participating

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<sup>6</sup> The NTSB's Vehicle Dynamics Simulation Study concluded that the bus would not have lost control if it had not been steered to the left so hard and followed by hard breaking, but probably would have smashed into the rear of other vehicles before it was able to stop. (PX 17 at p. 39.)

in a “Litigation Plan,” in which their claims would be “tried” before a Special Judge chosen by the Litigation Plan participants. (*Id.*) The Special Judge was authorized to increase each Claimant’s apportioned recovery by no more than 10%. (*Id.*) Additionally, the Litigation Plan participants could agree at any time to a distribution of those funds. (*Id.*)

The Apportionment Plan was approved and the bankruptcy estate was closed before the underlying state court lawsuit was tried. MCI Mexico sought to submit Central Texas and Cummings in the charge as settling persons. (CR 3804, 3898, 19706, 19835, 19842.) The trial court ultimately did not submit Central Texas or Cummings in the charge. (CR 19731.) Moreover, the court refused to allow MCI Mexico’s lawyers to cross-examine the Plaintiffs about the negligence of Cummings and Central Texas and about their claims against the bankruptcy estate. (9 RR 127-46, 277-90; 13 RR 279-96; 16 RR 213-31; 23 RR 9-14; 44 RR DXOP.) The jury found that MCI Mexico was liable and awarded approximately \$17 million. (CR 19731.)

After the jury’s verdict, but before the trial court entered judgment, United States Bankruptcy Judge Larry Kelly became aware of the Plaintiffs’ testimony in their state court lawsuit that they did not know about their claims against the Central Texas bankruptcy estate. Judge Kelly then ordered a show-cause hearing:

I’ve read the response that was filed by the – what’s called the Plaintiffs in this case. And, specifically, . . . one of the issues I had raised when I set the show cause was, there just seemed to be an awful lot of people that didn’t know they had filed claims in bankruptcy court, didn’t know they had money coming, didn’t know anything at all about it. That concerned me greatly, and that set up today’s hearing.

(CR 20178) (App. Tab A.)

During that hearing, Judge Kelly read excerpts of the Plaintiffs' testimony given during MCI Mexico's offer of proof in the state court. (CR 20209-14.) In that testimony, some of the Plaintiffs swore they did not blame the bus driver for the accident, they never made a claim against the bus driver or the owner of the bus, and they did not know of the claim they had made or the plan they and their attorneys had approved. (*Id.*) One of the Plaintiffs denied knowing his own lawyers, and another denied knowing that there was a bankruptcy court. (*Id.*)

Judge Kelly concluded that despite what they said in this case, the Plaintiffs were fully aware that they were making claims against Central Texas in the bankruptcy proceedings based on the numerous notices sent to them, the motions filed on their behalf regarding allocation of the insurance proceeds, the order requiring all Plaintiffs to attend a mediation, the Plaintiffs' attorneys' announcement in open court that a settlement had been reached, and the filing of the Motion to Approve the Litigation Plan and Settlement Agreement. (CR 20215-16.) He noted that the Apportionment Plan distribution must have been a topic of conversation amongst the Plaintiffs:

I'm setting the stage to say why it made no sense to me that an entire population of claimants, who belong to the same church, substantially, as another entire population, one population apparently understood enough to get a lot of money out of the Court, and the other population didn't know squat. And the other population, the one that's here today with six or eight different law firms, doesn't know doodle. Nothing. Zero. Nada. And I'm telling you that is a complete lack of credibility.

And it sort of hurts my feelings, because I always think in terms of churches and people that attend church as not being liars. And, so, they're either incredibly misinformed . . . or money somehow got involved, and

people came up with these real simple approaches.

(CR 20223.)

Judge Kelly concluded:

And when I look at the detail that took place, when I look at the conversations that had to occur, when I recognize that everybody was in the same bus, substantially in the same church group, and the same town; and then I go through the pleadings that are filed in the state court, and their clients are going to be put on the stand and asked questions, the lawyers had to confer with their clients.

When I look at the pleadings filed in the bankruptcy court, they had to confer. Plus, they were all sent to these people. They referred all this. *Never heard of bankruptcy court, never seen this proof of claim in my life, is total BS. That's my personal opinion. I don't believe it.*

(CR 20215-16) (emphasis added).

### **SUMMARY OF THE ARGUMENT**

The Plaintiffs' petition for review invites this Court to approve a clever settlement scheme created for the sole purpose of avoiding the submission of the settling party's responsibility in violation of Chapter 33. Under the plain language of section 33.011, Central Texas and Cummings are "settling persons," and the court of appeals correctly held that the trial court erred by refusing to submit their proportionate responsibility to the jury.

### **ARGUMENT**

The only relevant question is whether Central Texas meets the statutory definition of a "settling person." As the court of appeals correctly held, it does because, at the time the case was submitted to the jury, Central Texas had made a payment to the Plaintiffs (or, at a minimum, a promise to pay the Plaintiffs) in consideration of its potential

liability. TEX. CIV. PRAC. & REM. CODE § 33.011(5); *see also C&H Nationwide v. Thompson*, 903 S.W.2d 315, 330 (Tex. 1994) (“[W]e hold that ‘settlement,’ as used in the Comparative Responsibility Law, means money or anything of value paid or promised to a claimant in consideration of potential liability.”).

The Plaintiffs spend the bulk of their petition attempting to refute the appellate court’s conclusion that Central Texas’ payment and the Plaintiffs’ carefully crafted handling of that payment through the Litigation Plan was a settlement under Chapter 33. The Plaintiffs put forth various reasons why this arrangement does not satisfy certain criteria they claim are necessary for enforcement of a settlement agreement. (*See* Pet. at 5-6, 14-15.) Whether the agreed-upon plan meets some common-law definition of a “settlement agreement” chosen by the Plaintiffs is irrelevant. The Plaintiffs do not dispute that the Litigation Plan was “prepared by and agreed to by the Plaintiffs.” 272 S.W.3d at 42. Nor do the Plaintiffs dispute that the plan included a provision “discharging Central Texas from all debts, including the Plaintiffs’ tort claims.” *Id.* The bankruptcy court confirmed the plan and closed the bankruptcy case in October 2004, before the underlying case was submitted to the jury in November 2005. *Id.* at 38. The Plaintiffs gave themselves the option to accept proportional shares of that payment under the Apportionment Plan or to take those same funds and place them into a Litigation Fund. The Plaintiffs also gave themselves the option to divide the Litigation Fund at any time.

The Plaintiffs object to the court of appeals’ characterization of Central Texas’ payment as “apparently nonrefundable.” *Id.* at 42. The Plaintiffs assert that the Plan did

not specify what would happen if any of the Plaintiffs failed to meet the requirements for recovery and that their claims could have been denied outright. (Pet. at 9.) However, the language they quote from the bankruptcy judge<sup>7</sup> in support of this argument demonstrates that the money was in no case going to be returned to Central Texas or its insurer:

[The Litigation Plan] doesn't say what happens if, for some reason, there's money left over with the 22, the group of 22 [Plaintiffs]. What happens to it? Doesn't say. ***I don't think you're going to give it back to the insurance company. I don't think the Debtor gets it.***

(CR 20228 (emphasis added).) Moreover, the Litigation Plan expressly provides that those parties participating in the Plan (*i.e.*, the Plaintiffs) “may agree at any time to approve full or partial distribution of the Litigation Funds to any or all participants.” (CR 3820 (Order Approving Apportionment Plan, p. 4)) (App. Tab 6 to Pls.’ Pet.) Thus, regardless of whether the proceeding contemplated in the Litigation Plan was truly adversarial, the only contingency affecting the Plaintiffs’ receipt of the payment from Central Texas was the Plaintiffs’ choice over when to receive it.

The Plaintiffs argue that there was no “settlement” between Central Texas and the Plaintiffs because the Second Amended Plan of Reorganization, approved by the bankruptcy court, states that the Plaintiffs “have not settled their claims.” (Pet. at 6.) The court of appeals correctly afforded no weight to this conclusory statement in Central Texas’ reorganization plan. 272 S.W.3d at 41-42. (“We also give no credence to the *ipse dixit* statement in Central Texas’ reorganization plan that “[s]ome of the bus crash

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<sup>7</sup> While the Plaintiffs are critical of the court of appeals for allegedly relying on facts that occurred after the trial (*see* Pet. at 5), the Plaintiffs’ petition quotes extensively from the bankruptcy court proceedings that occurred after the case was submitted. (*See id.* at 6-9.) Moreover, the Plaintiffs’ criticism is unfounded because the bankruptcy judge was describing the situation as it existed before the trial in the state court matter.

claimants [the Plaintiffs] have not settled their claims against the Debtors [Central Texas]’ . . . .”). Conclusory statements such as this within the various plans and bankruptcy court orders have no effect on the Court’s determination whether, under Texas law, Central Texas is a “settling person.” See TEX. CIV. PRAC. & REM. CODE § 33.011(5). If possible, a court must ascertain a statute’s meaning from its language alone, without reference to extraneous matters. See *Nat’l Liab. & Fire Ins. Co. v. Allen*, 15 S.W.3d 525, 527 (Tex. 2000).

The Plaintiffs assert that “an MCI affiliate was a party to the bankruptcy proceedings [and] voted without objection for the plan of reorganization.” (Pet. at 6.) None of the entities that were defendants in this lawsuit were parties to the bankruptcy proceeding. The bankruptcy court filings identify two affiliated corporations with no connection to the underlying lawsuit—MCI Financial Services, Inc., the servicer on a bus lease on which Central Texas owed money; and MCI Service Parts, Inc., a trade creditor of Central Texas. (DX 312 (Debtors’ Second Amended Plan of Reorganization)) (App. Tab 7 to Pls.’ Pet.) The Plaintiffs’ suggestion that MCI Mexico and the other defendants in this suit somehow agreed with the Plaintiffs’ efforts to get around Chapter 33 because certain affiliated entities joined with other creditors in approving Central Texas’ reorganization plan is specious.

The Plaintiffs also complain that treating Central Texas’ payment as a settlement could have had a “disproportionate impact” on their ultimate recovery. (Pet. at 11.) But the “dilemma” the Plaintiffs describe is the same choice plaintiffs face in every case where a defendant with limited funds offers that money in settlement. In every case

subject to the “percentage credit” under the former version of section 33.012, a plaintiff faces the risk that the settlement will reduce his or her recovery by more than the value of the settlement. This “dilemma” is merely a product of the scheme established by the Legislature. Moreover, the Plaintiffs chose to file their suit on June 23, 2003, just eight days before the effective date of the amendments to Chapter 33 that eliminated the sliding-scale credit. *See* Act of June 2, 2003, 78th Leg., R.S., ch. 204, 2003 Tex. Gen. Laws 847, §§ 4.06 (amending TEX. CIV. PRAC. & REM. CODE § 33.012 to delete the sliding-scale settlement credits), 23.02(c) (making the amendment to section 33.012 applicable to any suit filed on or after July 1, 2003). So the Plaintiffs could have avoided this false dilemma of perhaps being subjected to the sliding scale by waiting eight more days to file suit.

The Plaintiffs erroneously suggest that the court of appeals applied the wrong version of section 33.011(5) based on the court’s statement that the statute “defines a settling person as one who pays or promises to pay ‘at any time.’” (*See* Pet. at 13.) But this language undeniably appears in both the pre-2003 version (the one that applies in this case) and the post-2003 version. As the court below correctly notes, this language makes irrelevant “the timing of the Litigation Plan’s hearing, verdict, and actual disbursements.” 272 S.W.3d at 41. The Plaintiffs argue that the court ignores that portion of the statute defining a “settling person” as “a person who *at the time of submission* has paid or promised to pay.” (Pet. at 11-13 (quoting TEX. CIV. PRAC. & REM. CODE § 33.011(5)).) But the court directly addresses this language in the same paragraph the Plaintiffs quote: “as of the time of submission of this case to the jury, the Litigation Plan had been in place

for over two years.” 272 S.W.3d at 41. At the time of submission, Central Texas had already made its payment to the Plaintiffs, and the means by which the Plaintiffs chose to divide that payment—the Litigation Plan—had already been agreed to by the Plaintiffs.

The Plaintiffs cite two cases from the Houston Court of Appeals for the proposition that a party cannot be a “settling person” unless the settlement occurs before the case is submitted to the jury. (Pet. at 12.) Both cases are distinguishable because there is no evidence that the parties that allegedly met the definition of a “settling person” in those cases tendered their settlement money before submission. To the contrary, the alleged “settling person” in those cases apparently participated in the underlying trial and settled only after submission of the case. *See Knowlton v. U.S. Brass Corp.*, 864 S.W.2d 585, 598 (Tex. App.—Houston [1st Dist.] 1993) (holding that Vanguard, a defendant in the underlying lawsuit, was not a “settling person” because it did not settle its claims with the plaintiffs until after the charge had been submitted), *aff’d in part and rev’d in part on other grounds*, 919 S.W.2d 644 (Tex. 1996); *Palais Royal, Inc. v. Gunnels*, 976 S.W.2d 837, 854 (Tex. App.—Houston [1st Dist.] 1998, pet. dismiss’d) (holding that Lott, a defendant in the underlying lawsuit, was not a “settling person” because it did not settle its claims with the plaintiffs until seven months after trial). Here, Central Texas is a “settling person” under the statute because at the time of submission it had already paid its \$5 million to the Plaintiffs in consideration of its potential liability and had been fully released as part of the order approving Central Texas’ reorganization plan. *See TEX. CIV. PRAC. & REM. CODE* § 33.011(5); *C&H Nationwide*, 903 S.W.2d at 330.

This Court has gone to great lengths over the past two decades to distance itself

from the days of clever settlement arrangements that skew the trial process, mislead the jury, and create the likelihood that a less culpable defendant will be hit with the full judgment. Indeed, the Court has previously condemned such schemes as violative of public policy. *See, e.g., Elbaor v. Smith*, 845 S.W.2d 240, 250 (Tex. 1992) (invalidating Mary Carter agreements). What would make churchgoers take the stand and testify under oath that, far from claiming the bus driver did anything wrong, they put him on their prayer list—while their sworn claims against him and the bus company were pending in bankruptcy court? Nothing but money and the desire to keep the bus driver and his employer off the verdict form. If the Court accepts the Plaintiffs’ invitation to approve their clever scheme, nothing will prevent plaintiffs from inducing settling defendants to place their funds in the court’s registry, a qualified settlement fund, or some other vehicle where the plaintiffs have access to the money and yet plausibly deny they have received the money.

### **CONCLUSION AND PRAYER**

MCI Mexico recognizes that whenever two petitions for review are pending, if the Court grants one, it almost always grants the other. The Court understandably wants to have the entire case before it. Here, however, the issues are so distinct—federal preemption vs. proportionate responsibility—and the court of appeals’ ruling on the latter issue is so clearly correct, that the Court should grant MCI Mexico’s petition and deny the Plaintiffs’ petition.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

A true and correct copy of the foregoing instrument has been mailed to all counsel of record by U. S. Mail, certified mail, return receipt requested on the \_\_\_\_ day of May, 2009, as follows:

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## **APPENDIX**

- A.** Excerpt from Exhibit 8 to Defendants' Response and Opposition to Plaintiffs' Motion for Judgment (Transcript of 1/13/06 Bankruptcy Hearing)