

I. INTRODUCTION

In this wrongful-death case, we must determine whether a nonsettling defendant is entitled to settlement credits under Chapter 33 of the Texas Civil Practice and Remedies Code. We hold that the record here triggers the presumption that the nonsettling defendant is entitled to settlement credits against the amounts the jury awarded the nonsettling plaintiffs because the nonsettling plaintiffs benefited from the settling plaintiff's settlement proceeds. We further hold that the trial court must give the nonsettling plaintiffs an opportunity to demonstrate that they did not benefit from another party's settlement. Consequently, we reverse the court of appeals' judgment and remand this case to the trial court for proceedings consistent with this opinion.

II. BACKGROUND

Clifton Short died from blood loss and infection related to a perforated colon that occurred during polypectomy surgery. Dr. Stephen James Utts performed the initial surgery, and Dr. Jean-Pierre Forage performed the subsequent surgery to repair the colon. Dennie Short, individually and as executor of Clifton Short's estate, Norma Short, Patricia Ann Cain, and Sam Short, respondents in this case, and Dorothy Short Walker sued Utts, Forage, and HCA South Austin Medical Center for Clifton Short's alleged wrongful death.

Early in the litigation, all plaintiffs nonsuited with prejudice their claims against Dr. Forage, leaving Dr. Utts and HCA as defendants. Later, Dorothy Walker agreed to settle with HCA for \$200,000. The settlement agreement between Walker and HCA states that HCA agreed to pay \$50,000 to Dorothy

Walker Short and \$150,000 to Shore & Fineberg, L.L.P. The HCA settlement check in the record shows that HCA paid the entire \$200,000 directly to Shore & Fineberg's trust account.

On the same day Walker signed the settlement agreement, she signed another document requesting that the Short family's counsel distribute — from “any monies belonging to me that he or his firm may have in his possession” — \$10,000 to each Short family member remaining in the suit in his or her individual capacity. Soon thereafter, the individual Short family members and the Estate settled with HCA for \$10 each. Then, Walker and the Short family nonsuited with prejudice their claims against HCA. About two months later, Walker nonsuited with prejudice her claim against Dr. Utts. Thus, Walker no longer participated in the suit, and only Dr. Utts and the other Short family members remained parties.

Before trial, Dr. Utts filed his written election for a \$200,040 dollar-for-dollar settlement credit under Chapter 33 of the Texas Civil Practice and Remedies Code. (At the motion-for-judgment hearing, Dr. Utts's counsel noted that the written election inadvertently omitted the \$10 reflecting the estate's settlement with HCA.) The Short family members and the Estate objected to Dr. Utts's election. They argued they were the only “claimants” currently involved in the case and that HCA's settlement with them was only \$10 each. Therefore, they argued that Dr. Utts was entitled to a \$10 per plaintiff credit. Dr. Utts did not respond to this argument.

The parties tried the case to a jury. The jury found that Dr. Utts's and HCA's negligence proximately caused the Short family's damages. The jury found Dr. Utts twenty-five percent negligent and HCA seventy-five percent negligent. The jury awarded the Estate \$100,000, Norma Short \$300,000, and the three children Dennie, Patricia, and Sam, \$12,000 each. The Short family and the Estate moved for

judgment on the verdict, allowing only a \$10 per plaintiff settlement credit. Dr. Utts responded to the motion for judgment, objected to the \$50 credit limitation, and requested a credit for the entire \$200,000 HCA paid to Walker. In his response, Dr. Utts asserted that he was entitled to the entire \$200,000 credit because the Short family benefited from Walker's settlement, and Walker's nonsuiting him was merely an attempt to circumvent how the statutory settlement credit should apply.

The Short family, in response, argued that Walker was not a "claimant" as Chapter 33 defines that term; therefore, Dr. Utts was not entitled to a credit for Walker's \$200,000 settlement. They also argued that the factual claims and references to documents in Dr. Utts's response to their motion for judgment were never offered into evidence during trial, were not part of the record, and were inadmissible hearsay.

Dr. Utts replied that Walker was a "claimant" under Chapter 33. He also filed a motion to reopen the evidence in the event the plaintiffs argued that the evidence about the settlement details that Dr. Utts intended to rely on during the motion-for-judgment hearing was untimely. Finally, Dr. Utts requested that the trial court take judicial notice of various pleadings and motions filed in the case.

During the hearing on the motion for judgment, the trial court took judicial notice of several documents in the trial court's file, including the pleadings and Dr. Utts's election for a settlement credit. Then, Dr. Utts attempted to offer several documents into evidence, but the Short family members objected. These documents included (1) correspondence between plaintiffs' counsel and HCA's counsel about how Walker's and the Short family members' settlement proceeds would be distributed; (2) a copy of the HCA \$200,000 check made payable to a trust account of the plaintiffs' counsel; and (3) correspondence from Walker instructing the plaintiffs' counsel to give each Short family member \$10,000 from the monies

belonging to Walker in the firm's trust account. The trial court allowed Dr. Utts to offer the documents and discuss their contents on the record, and it heard the Short family's objections. Additionally, during the motion for judgment hearing, the Short family's counsel stated that "[Walker] got \$200,000, and then she also executed the document giving me permission to put \$150,000 into my trust account for fees and expenses which she was jointly and severally liable for." The trial court advised the parties that it would take all the matters at the hearing, including whether Dr. Utts's evidence was admissible, under advisement.

Following the hearing, the trial court notified the parties in a letter that it could not consider Dr. Utts's post-verdict evidence and that Dr. Utts waived his right to a \$200,000 credit because he did not introduce the evidence about the settlement before submission to the jury. The trial court's letter also stated that Walker was not a "claimant" under Chapter 33, because the statute's definition of that term requires that the claimant be a party seeking recovery when the trial and verdict occurred. The trial court sent with the letter its final judgment, which reflected the amounts the jury awarded, less a \$10 credit (\$50 total) for the Estate's and each family member's settlement with HCA.

Dr. Utts then filed several formal bills of exception, identifying the evidence the trial court heard but refused to admit during the hearing on the motion for judgment. The trial court next signed an order that overruled Dr. Utts's objection to the Short family's motion for judgment, denied his motion to reopen the evidence, and granted his request to take judicial notice of the pleadings and motions.

Dr. Utts timely appealed and raised three issues: (1) whether he met his burden to prove a settlement by introducing evidence after a verdict was reached; (2) whether he was statutorily entitled to a settlement credit for the Walker settlement, or whether the multiple claimants could structure a settlement

to avoid his right to a credit; and (3) whether a dollar-for-dollar credit for a lump-sum settlement with multiple claimants should be subtracted from the total damages the jury awards, rather than allocated based on each claimant's percentage of recovery from the total verdict. 987 S.W.2d at 629. In deciding Dr. Utts's second issue, the court of appeals concluded that although Walker was a "claimant" under Chapter 33, Dr. Utts was not automatically entitled to apply a credit for Walker's settlement against the other Short family members' recoveries. The court of appeals held that one claimant's settlement cannot be applied against a different claimant's recovery under Chapter 33. 987 S.W.2d at 630. Because it resolved Dr. Utts's second issue, the court of appeals declined to consider Dr. Utts's first and third issues. 987 S.W.2d at 633.

Dr. Utts petitions this Court for review on three grounds. First, he argues that he is entitled to a credit for Walker's settlement with HCA based on how we construed section 33.012(b) of Chapter 33 in *Drilex Sys., Inc. v. Flores*, 1 S.W.3d 112 (Tex. 1999). Second, Dr. Utts argues that the term "claimant" is not limited to those derivative plaintiffs remaining in the suit at the time the trial court submits the case to the jury. Third, Dr. Utts seeks a credit for Walker's settlement because, he contends, the settlement transaction was a "sham" intended to circumvent Chapter 33's proper operation and purposes.

III. SETTLEMENT CREDITS — WHEN THEY MAY APPLY TO NONSETTLING PLAINTIFFS

Today the Court expresses three positions about whether *Drilex's* Chapter 33 settlement-credit analysis applies here: (1) four members of the Court contend that we should overrule *Drilex* and thus it

does not apply, ___ S.W.3d at ___ (Baker, J. concurring); (2) two members argue that *Drilex* is distinguishable and does not control because Walker was not a party seeking damages when the trial court submitted the case to the jury, ___ S.W.3d at ___ (Phillips, C.J., concurring); and (3) three members argue that *Drilex's* Chapter 33 analysis is correct and applies, ___ S.W.3d at ___ (Owen, J., dissenting). Accordingly, we do not apply *Drilex* to determine which settlement amounts Dr. Utts may credit against the Short family members' recoveries.

However, a majority of the Court agrees that we must consider Dr. Utts' contention that he is entitled to full credit for Walker's settlement with HCA because the transaction's structure allowed the Short family members to avoid the statutory settlement credit. The court of appeals rejected that argument. It noted that Dr. Utts did not attempt to present evidence in the trial court to support his allegation that the settlement was a "sham" until after the jury returned its verdict. 987 S.W.2d at 631. The court of appeals opined that Dr. Utts knew how the Walker settlement was distributed well before the trial court submitted the case to the jury; therefore, Dr. Utts could have offered evidence about the Walker settlement, even in the face of a motion in limine, by presenting the evidence to the trial court outside the jury's presence. 987 S.W.2d at 632.

The court of appeals also observed that Dr. Utts took no countermeasures to protect himself from the potentially adverse consequences of Walker's settlement with HCA. The court of appeals noted that Dr. Utts did not attempt to keep Walker in the suit for a jury submission, he did not request the trial court to structure the jury submission in a way that would permit establishing a fraud or sham claim, and he did nothing to preserve a potential claim against HCA. 987 S.W.2d at 632.

Dr. Utts concedes that, before the case was submitted to the jury, he did not offer the evidence demonstrating the settlement's nature nor did he request a fact-finding that the settlement was a sham. Dr. Utts did request the trial court, after the verdict, to reopen the evidence to allow him to demonstrate the nature of the settlement. Although the trial court denied this request, Dr. Utts does not challenge that ruling here. Instead, he argues that it is not his burden to prove the transaction's nature. Dr. Utts asserts several reasons why placing the burden on him is improper: (1) he is a stranger to this transaction; (2) the Short family's attorney is an officer of the court and has a fiduciary responsibility to show the transaction's fairness; (3) one who claims a gift has the burden to prove that such is the fact; and (4) imposing the burden upon the nonsettling defendant to prove the settlement's nature not only unfairly penalizes the nonsettling defendant, but also allows settling parties to circumvent the one-satisfaction rule. Finally, Dr. Utts contends that even if he has the burden to prove how the settlement actually worked, the evidence in the record is enough to demonstrate the transaction's spuriousness.

A. APPLICABLE LAW

A defendant seeking a settlement credit has the burden to prove its right to such a credit. *Mobil Oil Corp. v. Ellender*, 968 S.W.2d 917, 927 (Tex. 1998). In *Ellender*, we determined that to obtain a dollar-for-dollar settlement credit, Chapter 33 requires only a written election before the case is submitted to the fact finder. 968 S.W.2d at 927 (citing TEX. CIV. PRAC. & REM. CODE § 33.014). We recognized that Chapter 33 is silent about which party must prove the settlement amount; thus, we referred to the common law. *Ellender*, 968 S.W.2d at 927. In doing so, we concluded that the common law requires

only that the record show, in the settlement agreement or otherwise, the settlement credit amount. *Ellender*, 968 S.W.2d at 927 (relying on *First Title Co. v. Garrett*, 860 S.W.2d 74, 78 (Tex. 1993)).

Once the nonsettling defendant demonstrates a right to a settlement credit, the burden shifts to the plaintiff to show that certain amounts should not be credited because of the settlement agreement's allocation. *Ellender*, 968 S.W.2d at 928. In *Ellender*, we noted that requiring a nonsettling defendant to prove the settlement agreement's allocation before receiving a settlement credit unfairly penalizes the nonsettling defendant. Moreover, we recognized that settling plaintiffs are in a better position than nonsettling defendants to ensure that the settlement awards are properly allocated. *Ellender*, 968 S.W.2d at 928; *see also Texas Gen. Petroleum Corp. v. Leyh*, 52 F.3d 1330, 1340 (5th Cir. 1995); *Hess Oil Virgin Islands Corp. v. UOP, Inc.*, 861 F.2d 1197, 1208 (10th Cir. 1988).

B. ANALYSIS

Dr. Utts' allegation that the Walker-HCA settlement is a "sham" transaction is actually a claim that, to avoid the Short family members benefiting from the Walker-HCA settlement in contravention of Chapter 33's settlement-credit scheme, he is entitled to a credit for the settlement under Chapter 33. We disagree with the court of appeals' analysis about how Dr. Utts should have raised this issue in the trial court. In *Ellender*, we were not confronted with the issue that we consider here. But *Ellender's* Chapter 33 analysis provides guidance. *See Ellender*, 968 S.W.2d at 927-28. A defendant must file an election for a dollar-for-dollar settlement credit before the case is submitted to the jury, and the record must reflect that credit amount. TEX. CIV. PRAC. & REM. CODE § 33.014; *Ellender*, 968 S.W.2d at 927. But when a case

involves facts suggesting that a nonsettling plaintiff may have benefited from the proceeds of another plaintiff's settlement, the nonsettling defendant must raise this allegation to the trial court — not the jury — and present evidence of the benefit as part of its burden in electing for a dollar-for-dollar credit. The nonsettling defendant may present this evidence to the trial court outside the jury's presence and request that the trial court resolve its settlement-credit claim before the trial court submits the case to the jury. Indeed, the nonsettling defendant may consider the trial court's settlement-credit ruling critical to its election decision. Thus, the trial court should resolve the issue before it submits the case if the nonsettling defendant so requests. However, the nonsettling defendant may also urge its settlement-credit motion and introduce evidence thereon after the jury has returned its verdict, provided the nonsettling defendant properly filed a written election under Chapter 33 before the case was submitted. A nonsettling defendant's allegation that nonsettling plaintiffs benefited from another plaintiff's settlement must be resolved in this manner because the trial court, not the jury, determines how a settlement credit applies as part of the trial court's function when it determines the judgment to render based on the jury's verdict. *See Ellender*, 968 S.W.2d at 928-29.

Accordingly, we hold that, when a nonsettling defendant contends it is entitled to a credit because a nonsettling plaintiff benefited from another plaintiff's settlement proceeds, the nonsettling defendant must file a written election before the trial court submits the case to the jury and ensure the settlement amount is in the record, just as it would in any other Chapter 33 case. *See* TEX. CIV. PRAC. & REM. CODE § 33.014; *Ellender*, 968 S.W.2d at 927. Then, through pre- or post-verdict discovery, the nonsettling defendant must present evidence to the trial court that demonstrates the nonsettling plaintiff benefited from

the settlement the nonsettling defendant relies on. If the evidence shows such a benefit, then the trial court should apply the settlement credit reflecting that benefit unless the nonsettling plaintiff presents evidence that he or she did not benefit from the settlement. In other words, once the nonsettling defendant presents evidence of the nonsettling plaintiff's benefit from a settlement, the trial court shall presume the settlement credit applies unless the nonsettling plaintiff presents evidence to overcome this presumption. As we recognized in *Ellender*, a nonsettling party should not be penalized for events over which it has no control. *Ellender*, 968 S.W.2d at 927. Like the *Ellender* plaintiffs who were in the best position to demonstrate how they agreed to allocate settlement amounts for punitive and actual damages, the nonsettling plaintiffs in the circumstances here are in the best position to demonstrate why they did not benefit from the settlement. *See Ellender*, 968 S.W.2d at 928.

Here, the record indicates that Dr. Utts filed a written election for \$200,040 before the trial court submitted the case to the jury. Moreover, the settlement agreements between Walker and HCA and the Short family members and HCA are in the record. *See Ellender*, 968 S.W.2d at 927. Furthermore, Dr. Utts properly raised his claim that he may be entitled to credit Walker's settlement with HCA against the Short family members' jury awards. In his response to the Short family's motion for judgment, he alleged that the Short family members who did recover from Dr. Utts benefited from the Walker settlement.

Moreover, during the motion for judgment hearing, and in his formal bills of exception, Dr. Utts offered the types of evidence a nonsettling defendant may rely on to establish that a nonsettling plaintiff benefited from another plaintiff's settlement. The settlement between Walker and HCA, the \$200,000 check from HCA made payable to the trust account of the plaintiffs' firm, Walker's letter instructing

plaintiffs' counsel to distribute a total of \$40,000 from that trust account to the individual Short family members, and the settlement agreement between the Short family members and HCA for nominal amounts all demonstrate that the Short family members benefited from Walker's settlement with HCA. Further, plaintiffs' counsel made statements before the trial court and the court of appeals suggesting that \$150,000 from the Walker-HCA settlement went to the plaintiffs' attorneys for fees and costs. Nothing in the record shows whether Walker actually received \$50,000 as the settlement agreement states, or whether she only received \$10,000. Therefore, we conclude that the record evidence and counsel's statements together raise a presumption that Dr. Utts may be entitled to a credit for \$190,000 of the settlement amount. Consequently, we presume that each individual Short family member's recovery from Dr. Utts should be credited with the amount reflecting the benefit he or she received from the settlement proceeds. *See Ellender*, 968 S.W.2d at 927. The burden thus shifts to each Short family member to present evidence showing why the settlement credit should not apply. To avoid the credit, each member must demonstrate that he or she did not benefit from the Walker-HCA settlement agreement

IV. DISPOSITION

Because we announce a new proposition of law today, we remand this case to the trial court to allow each Short family member an opportunity to present evidence to show that he or she did not receive any benefit from the Walker-HCA settlement. Then, if the trial court determines that the Short family members have not overcome the presumption that Dr. Utts is entitled to apply a settlement credit to each individual's recovery, the trial court should allow Dr. Utts settlement credits consistent with this opinion.

Thus, we reverse the court of appeals' judgment and remand the case to the trial court for proceedings consistent with this opinion.

V. SETTLEMENT CREDITS – DERIVATIVE PLAINTIFFS

For different reasons, a majority of the Court concludes that *Drilex's* Chapter 33 settlement-credit analysis does not control the settlement-credit issue in this case. I write here separately to explain why I believe that, although it remains the law, *Drilex* was wrongly decided and thus does not apply.

Dr. Utts argues that he is entitled to a credit for Walker's settlement with HCA based on how we interpreted section 33.012(b) in *Drilex*. Dr. Utts urges that all wrongful-death beneficiaries should be treated as one "claimant" under section 33.012(b) because that interpretation is consistent with our decision in *Drilex*. See *Drilex*, 1 S.W.3d at 124. The Short family, on the other hand, have consistently argued that Dr. Utts is not entitled to a settlement credit, despite evidence of the settlement amount, because Walker was not a "claimant" in the suit when it went to trial.

A. APPLICABLE LAW

Chapter 33 of the Code, Texas's proportionate-responsibility statute, governs how settlement credits apply in tort suits. See TEX. CIV. PRAC. & REM. CODE § 33.002; *Ellender*, 968 S.W.2d at 926. Chapter 33 refers to a party asserting a tort claim as a "claimant" and defines that term:

"Claimant" means a party seeking recovery of damages pursuant to the provisions of

Section 33.001, including a plaintiff, counterclaimant, cross-claimant, or third party plaintiff seeking recovery of damages.

TEX. CIV. PRAC. & REM. CODE § 33.011(1). Section 33.011(1) also provides:

In an action in which a party seeks recovery of damages for injury to another person, damage to the property of another person, death of another person, or other harm to another person, “claimant” includes both that other person and the party seeking recovery of damages pursuant to the provisions of Section 33.001.

TEX. CIV. PRAC. & REM. CODE § 33.011(1).

Under Chapter 33, a claimant may not recover damages if his or her percentage of responsibility is greater than fifty percent. TEX. CIV. PRAC. & REM. CODE § 33.001. But if a claimant’s contributory negligence is less than fifty percent, the claimant’s recovery is reduced only by that percentage. TEX. CIV. PRAC. & REM. CODE § 33.012(a). Moreover, if a claimant has settled with one or more defendants, section 33.012 requires the trial court to reduce the damages the claimant recovers according to one of two methods — a dollar-for-dollar credit or a sliding scale — as the defendant elects. TEX. CIV. PRAC. & REM. CODE §§ 33.012(b), 33.014. The dollar-for-dollar credit section provides:

If the claimant has settled with one or more persons, the court shall further reduce the amount of damages to be recovered by the claimant with respect to a cause of action by a credit equal to . . . (1) the sum of the dollar amounts of all settlements

TEX. CIV. PRAC. & REM. CODE § 33.012(b)(1).

In *Drilex*, we determined for the first time how sections 33.011(1) and 33.012(b) work together in a case involving derivative plaintiffs suing multiple defendants because of a family member’s injury. *Drilex*, 1 S.W.3d at 112. Based on how we interpreted section 33.011(1), and the potential unfairness to nonsettling defendants who have no control over how plaintiffs may design settlements to avoid full

settlement credits, we concluded that the entire family was one claimant for purposes of applying a settlement credit under section 33.012(b). *Drilex*, 1 S.W.3d at 122; *see also General Chem. Corp. v. de La Lastra*, 852 S.W.2d 916, 923 (Tex. 1993); *J.D. Abrams, Inc. v. McIver*, 966 S.W.2d 87, 96 (Tex. App.—Houston [1st Dist.] 1998, pet. denied).

Under the one-satisfaction rule, a plaintiff is entitled to only one recovery for any damages suffered because of a particular injury. *Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378, 390 (Tex. 2000). The one-satisfaction rule provides that, when a claimant seeks recovery for the same injuries from multiple parties, the claimant is entitled to only one recovery on those injuries. *Stewart Title Guar. Co. v. Sterling*, 822 S.W.2d 1, 5 (Tex. 1991). In requiring that each claimant's jury award is reduced by any amount for which he or she settles, section 33.012 upholds this rule.

B. ANALYSIS

Like the court of appeals, I believe that the real issue presented here is whether section 33.012(b) permits a nonsettling defendant to apply one derivative plaintiff's settlement as a credit against a different derivative plaintiff's recovery. We answered that question yes in *Drilex*. *See Drilex*, 1 S.W.3d at 115-16. However, the facts and the arguments raised here should cause the Court to reexamine *Drilex's* Chapter 33 analysis. And, in doing so, I conclude that *Drilex* was wrongly decided.

In *Drilex*, we applied Chapter 33 to a suit in which an injured worker, Jorge Flores, and his family sought recovery for Flores' injuries. The Flores family settled with one defendant. *Drilex*, 1 S.W.3d at 115. Specifically, the Flores children settled individually with the defendant for different amounts. The

parents jointly accepted a lump sum to settle their claims. And Jorge, individually, received a settlement amount. *Drilex*, 1 S.W.3d at 120-21. The jury then awarded the Flores family members damages from another defendant. *Drilex*, 1 S.W.3d at 116. The issue was whether, under section 33.012(b), the Flores family members were individual “claimants” so that the trial court should have credited each individual’s jury award with the amount for which he or she settled, or whether the Flores family members were collectively one claimant so that the trial court should have credited the aggregate jury award with all the amounts paid in the settlements. *Drilex*, 1 S.W.3d at 121. We concluded that the entire family was one claimant. *Drilex*, 1 S.W.3d at 122.

In *Drilex*, we professed to follow section 33.011(1)’s plain language to conclude that “claimant” under section 33.012(b) means all family members suing for damages arising from another family member’s injury or death. But, in doing so, we did not adhere to our statutory-construction rule that we must not construe statutes in a way that would lead to an absurd result. *C&H Nationwide, Inc. v. Thompson*, 903 S.W.2d 315, 322 n.5 (Tex. 1994). In section 33.011(1), the Legislature defined “claimant” in the first sentence as “a party seeking recovery of damages pursuant to the provisions of section 33.001 [the proportionate-responsibility statute].” However, instead of applying that definition in *Drilex*, we relied on section 33.011(1)’s second sentence to define claimant. *Drilex*, 1 S.W.3d at 122. The second sentence explains that, when someone sues because he or she has suffered a loss caused by another person’s injury or death, “claimant includes both that other person and the party seeking recovery of damages pursuant to the provisions of section 33.001.” TEX. CIV. PRAC. & REM. CODE § 33.011(1). Based on that sentence, we concluded in *Drilex* that, for settlement-credit purposes under section 33.012(b), “the

Legislature defined claimant to include both the injured party and the party or parties seeking recovery of damages for injury to that person.” *Drilex*, 1 S.W.3d at 123.

However, reading Chapter 33 as a whole and under well-established Texas law, it is evident that the Legislature did not intend for section 33.011(1)’s second sentence to provide a separate definition of “claimant.” Rather, the second sentence ensures that, when a suit involves derivative claims, the derivative plaintiff cannot recover if the injured or deceased person’s negligence is greater than fifty percent. *See* TEX. CIV. PRAC. & REM. CODE §§ 33.001, 33.011(1). Further, the second sentence ensures that, if the injured or deceased person’s negligence does not bar the claim, the derivative plaintiff’s recovery is reduced by a percentage equal to the injured or deceased person’s percentage of responsibility. *See* TEX. CIV. PRAC. & REM. CODE § 33.012(a).

We have recognized causes of action for certain family members who suffer personal damages arising from another family member’s injury or death. *See, e.g., Reagan v. Vaughn*, 804 S.W.2d 463, 467 (Tex. 1990); *Whittlesey v. Miller*, 572 S.W.2d 665, 668 (Tex. 1978). But such derivative claims would not exist but for a family member’s injury or death. Therefore, the injured or deceased person’s contributory negligence, if more than fifty percent, precludes a derivative plaintiff’s recovery. *See Reagan*, 804 S.W.2d at 467. On the other hand, if the injured or deceased person’s contributory negligence is less than fifty percent, then the trial court must reduce the derivative claimant’s jury award by the injured or deceased person’s contributory negligence. TEX. CIV. PRAC. & REM. CODE § 33.012(a). Then, if the derivative plaintiff settles his or her derivative claims, which reflect his or her personal injuries, the trial court should credit those amounts to any jury award the derivative plaintiff receives against nonsettling

defendants. TEX. CIV. PRAC. & REM. CODE § 33.012(b). This analysis gives all the language in sections 33.001, 33.011(1), and 33.012 meaning that comports with Texas law.

Furthermore, in *Drilex*, we not only misconstrued section 33.011(1), but we also read language *into* its second sentence. That is, we determined that under the second sentence “the Legislature defined claimant to include both the injured party and the party *or parties* seeking recovery of damages for injuries to that person.” *Drilex*, 1 S.W.3d at 123 (emphasis added). Reading *parties* into section 33.011(1)’s second sentence which only refers to *person* — singular nor plural — likewise led to our erroneous conclusion that a claimant in cases involving derivative claims includes the injured or deceased and the entire family. *Drilex*, 1 S.W.3d at 123.

Additionally, in *Drilex*, we misplaced our reliance on two cases to support our conclusion that “claimant” under section 33.012(b) includes all the derivative plaintiffs as one. First, we cited *General Chemical Corp.*, 852 S.W.2d at 923. *See Drilex*, 1 S.W.3d at 122. But in *General Chemical Corp.*, we held that Texas’s Constitution prohibits a parent from recovering punitive damages for wrongful death. *General Chem. Corp.*, 852 S.W.2d at 923. We noted that the court of appeals arrived at the contrary conclusion based on, among other things, the definition of claimant in section 41.001(1) of the Texas Civil Practice and Remedies Code chapter discussing exemplary damages. In doing so, we recognized that section 41.001(1)’s definition includes both the deceased person and the party seeking exemplary damages. *See General Chem. Corp.*, 852 S.W.2d at 923. However, contrary to what we said in *Drilex*, we did not, in *General Chemical Corp.*, “construe” or “conclude” anything about section 41.001(1)’s meaning. *See Drilex*, 1 S.W.3d at 122. Rather, we only acknowledged, and then rejected, the court of

appeals' reliance on that provision. *General Chem. Corp.*, 852 S.W.2d at 923-24.

Second, in *Drilex*, we cited *J.D. Abrams*, 966 S.W.2d at 96, to support our conclusion that the entire Flores family comprised one claimant. *See Drilex*, 1 S.W.3d at 122. In *J.D. Abrams*, McIver and her daughter, Lori Crane, sued several defendants to recover damages for Crane's injuries arising from a car accident. *J.D. Abrams*, 966 S.W.2d at 96. Three defendants settled, and the trial court allocated part of two settlements to McIver and the entire third settlement to Crane. *J.D. Abrams*, 966 S.W.2d at 96. The jury awarded Crane, but not McIver, damages against the nonsettling defendant who was adjudged jointly and severally liable. The trial court credited the amounts Crane received from the settling defendants against her damage award. *J.D. Abrams*, 966 S.W.2d at 96. But the court of appeals held that the trial court should have granted the nonsettling defendant credit for the full amount the trial court allocated to Crane and McIver from all the settlements. *J.D. Abrams*, 966 S.W.2d at 96.

But the court in *J.D. Abrams*, and this Court in *Drilex*, ignored the fundamental flaw with defining "claimant" as multiple persons for purposes of applying settlement credits under section 33.012(b). That is, treating the entire family as one claimant — particularly when family members receive individual settlements in different amounts for their distinct losses — does not comport with Texas law which recognizes that derivative plaintiffs are asserting separate claims for their own losses caused by another person's injury or death. *See Reagan*, 804 S.W.2d at 467; *Whittlesey*, 572 S.W.2d at 668. No language in section 33.011 or section 33.012 suggests that the Legislature intended to group all derivative plaintiffs together as one claimant so that one derivative plaintiff's settlement wipes out another derivative plaintiffs' claims.

Indeed, *Drilex's* results demonstrate why our Chapter 33 analysis was wrong and leads to results inconsistent with Texas law. *See C&H Nationwide, Inc.*, 903 S.W.2d at 322 n.5. Because we concluded that the entire Flores family was one claimant under section 33.012(b), we determined that the total damages the Flores family recovered had to be reduced by the total settlements the family received. *Drilex*, 1 S.W.3d at 122. After reducing the total jury award by Jorge Flores' contributory negligence, and then subtracting the total settlements from the reduced jury award, we allocated the remaining amount among the family members according to their respective percentages of the total jury award. *Drilex*, 1 S.W.3d at 123. Accordingly, the children, Jorge, and Maria each individually received some, but not all, of the amounts the jury awarded them. Our *Drilex* Chapter 33 analysis, therefore, permitted the Flores children to recover a part of their jury awards contrary to the one-satisfaction rule. Because each child settled for more than what the jury awarded him or her, each child's settlement should have eliminated their individual jury awards. Moreover, because we included the Flores children when we reallocated the reduced jury award, our analysis resulted in Jorge and Maria recovering less than what they should have from their jury awards.

Had *Drilex* applied what I now believe is the correct Chapter 33 analysis, we would have affirmed the court of appeals' calculations. *See Drilex Sys., Inc. v. Flores*, 961 S.W.2d 209, 214-15 (Tex. App.—San Antonio 1996), *aff'd as reformed and remanded*, *Drilex*, 1 S.W.3d at 124. Specifically, the court of appeals concluded that the three Flores children's individual settlements eliminated their individual jury awards, because they each settled for more than they recovered after trial. Jorge and Maria settled for a lump sum, and Jorge also settled individually. Both settlements were for less than Jorge and

Maria recovered individually from the jury. Consequently, Jorge's and Maria's individual jury awards were reduced by 10% for Jorge's contributory negligence. Then, the court of appeals determined Jorge's and Maria's percentage of recovery from the jury verdict, which was 95% for Jorge and 5% for Maria, and applied the same percentage of recovery from the lump-sum settlement. After crediting Jorge's and Maria's individual jury awards with their individual percentage of recovery to the lump-sum settlement, and after crediting Jorge's individual jury award with his individual settlement, the court of appeals awarded the reduced jury award to Jorge and Maria. *See Drilex* 961 S.W.2d at 214-15.

It is evident, then, that my analysis carries out Chapter 33's purposes so that a derivative plaintiff's recovery is either (1) barred by the injured or deceased party's contributory negligence if greater than fifty percent, *or* (2) reduced by the injured or deceased party's contributory negligence if less than fifty percent and by any settlement amounts the derivative plaintiff receives. *See* TEX. CIV. PRAC. & REM. CODE §§ 31.001, 31.011(1), 31.012(a),(b). Moreover, my construction does not belie the one-satisfaction rule or Texas law recognizing derivative plaintiffs are asserting separate claims for their own losses, tangible and intangible, caused by injury to another person. *See Crown Life Ins. Co.*, 22 S.W.3d at 390; *Stewart Title Guar. Co.*, 822 S.W.2d at 8; *Reagan*, 804 S.W.2d at 467; *Whittlesey*, 572 S.W.2d at 668.

The dissent contends that *Drilex's* holding that claimant means the entire family for settlement credit purposes is in harmony with our wrongful death statute. ___ S.W.3d at ___ (Owen, J., dissenting). But section 71.010 actually supports my position that "claimant" under section 33.012(b) refers only to each individual derivative plaintiff just as section 33.011(1)'s first sentence provides. Section 71.010 provides that "[t]he jury may award damages in an amount proportionate to the injury resulting from the death" and

that “[t]he damages awarded shall be divided, in shares as found by the jury in its verdict, among the individuals who are entitled to recover and who are alive at that time.” TEX. CIV. PRAC. & REM. CODE § 71.010(a), (b). This language shows that each derivative plaintiff suffers a distinct, apportionable injury because of a family member’s death. Notably, neither section 71.010 nor any other law supports the dissent’s contention that, when a defendant elects a dollar-for-dollar settlement credit, a jury may determine how much a settling plaintiff would have recovered had he or she remained in the suit. *See* ___ S.W.3d at ___ (Owen, J., dissenting).

Additionally, the dissent and Dr. Utts contend that overruling *Drilex* and *J.D. Abrams* is contrary to our recent statement that the *stare decisis* doctrine prevents changing a statutory interpretation even if that long-standing judicial interpretation was incorrect. *See Grapevine Excavation, Inc. v. Maryland Lloyds*, 35 S.W.3d 1, 5 (Tex. 2000). And they urge that *stare decisis* exhorts us to “adhere to our precedents for reasons of efficiency, fairness and legitimacy.” *See Weiner v. Wasson*, 900 S.W.2d 316, 320 (Tex. 1995). The dissent and Dr. Utts also emphasize that the Legislature has met twice since *J.D. Abrams* issued and once since *Drilex* issued and has not amended the relevant Code provisions. They contend we should apply the legislative-acceptance doctrine in interpreting Chapter 33 and thus adhere to *Drilex*.

I agree that this Court should adhere to *stare decisis* and should not, without very good cause, change our previous statutory interpretation. However, this case is readily distinguishable from *Grapevine*, in which twenty years of precedent from this Court and courts of appeals constrained us to interpret a statute a particular way. *See Grapevine*, 35 S.W.3d at 5. *Drilex* is only slightly over two years old, and

while the Legislature has met once since we decided *Drilex*, Dr. Utts’s motion for rehearing was pending during that entire session. And, in any event, the Legislature has not amended or reenacted Chapter 33 or sections 33.011(1) and 33.012 since *J.D. Abrams* and *Drilex* issued. Therefore, we are not confronted with the fact that the public or the legal community has become accustomed to the law under these cases. Nor are we confronted with the presumption that the Legislature has acquiesced in *Drilex*’s Chapter 33 analysis. *See Grapevine*, 35 S.W.3d at 5 (“It is a firmly established statutory construction rule that once appellate courts construe a statute and the Legislature re-enacts or codifies that statute without substantial change, we presume that the Legislature has adopted the judicial interpretation.”).

The dissent’s accusation that my Chapter 33 analysis “advocates complete disregard for the Legislature’s will” is unfounded. *See* ___ S.W.3d at ___ (Owen, J., dissenting). Rather, I believe this Court strayed from the Legislature’s intent when we first construed Chapter 33 in *Drilex* and read language into section 33.011(1) that the Legislature did not write. I do not disagree with the dissent’s position that the Legislature, in enacting Chapter 33, had the authority to change common law. *See* ___ S.W.3d at ___ (Owen, J., dissenting). But when we construe a statute, we presume that the Legislature acted with knowledge of the common law and court decisions. *Phillips v. Beaber*, 995 S.W.2d 655, 658 (Tex. 1999). My Chapter 33 analysis adheres to this statutory-construction principle.

In sum, *Drilex*’s troubling effect is that a settlement with any one derivative plaintiff can deprive all other possible derivative plaintiffs of their full recovery for their independent injuries when they did not receive any proceeds from the settlement. Accordingly, to apply Chapter 33 in a manner that is consistent with its purposes and our law, the Court should overrule *Drilex* to the extent that it concludes that

“claimant,” for purposes of applying settlement credits under section 33.012(b), means all family members suing for damages arising from another family member’s injury or death.

James A. Baker, Justice

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