

HANKINSON's concurring opinion in our prior array of decisions in this case, has been abandoned on rehearing),¹ with no view garnering the support of a majority. In light of today's "resolution" of this case, we can only hope that the Legislature will act promptly to say with unmistakable clarity how settlement credits are to be applied in cases such as this.

There is at least a consensus of a majority of the Court on one point: *Drilex Systems, Inc. v. Flores*² remains good law when family members settle but remain parties pursuing claims against a non-settling defendant. I agree with the concurring opinion of CHIEF JUSTICE PHILLIPS to the extent that it concludes that *Drilex* remains authoritative and has not been overruled. I part company with that concurring opinion and JUSTICE BAKER's concurring opinion because neither correctly interprets what the Legislature meant when it used the term "the claimant" in Chapter 33 of the Texas Civil Practice and Remedies Code when one family member settles and withdraws from the case, but other family members continue to sue.

The concurring opinion of CHIEF JUSTICE PHILLIPS would eliminate settlement credits for payments to a settling family member if he or she non-suited all claims before the case was submitted to the jury, even though the definition of "the claimant" in section 33.001 does not support this construction. Indeed, the Legislature explicitly included the words "at the time of submission" in other definitions in section 33.011, but not in the definition of "claimant."

¹ *Utts v. Short*, 44 Tex. Sup. Ct. J. at 134, 138 (Dec. 7, 2000) (Hankinson, J., concurring), *op. withdrawn on reh'g*.

² 1 S.W.3d 112 (Tex. 1999).

JUSTICE BAKER’s concurring opinion sweeps *stare decisis* aside in advocating that we overrule *Drilex*, decided less than three years ago. JUSTICE BAKER’s opinion also advocates complete disregard of the Legislature’s will in several respects. That concurring opinion would only give effect to the Legislature’s express definition of “the claimant” when those words are used in subsection 33.012(a), but not when they are used in subsection (b).³ Nor would JUSTICE BAKER’s concurring opinion give effect to the Legislature’s directive in subsection 33.012(b)(1) that a non-settling defendant must be given credit for “the sum of the dollar amounts of *all* settlements” if it so elects.⁴ Non-settling defendants would receive only partial credit under JUSTICE BAKER’s analysis. JUSTICE BAKER’s opinion asserts that rewriting the statute is justified because judge-made law should be paramount over the Legislature’s directives. JUSTICE BAKER’s concurring opinion concludes that to read the Legislature’s enactment as written would lead to “absurd results,” not because the results are truly absurd, but because judge-made common law might be changed. As I explain in greater detail below, the common-law one-satisfaction principle remains intact under the Legislature’s settlement credit scheme because “the claimant,” which is the family unit, recovers only what the jury awarded it collectively, less all settlements. But even were the one-satisfaction rule impacted, that would not be a basis for refusing to give full effect to a statute. Within constitutional confines, the Legislature is free to change the common law if it so chooses.

I would give effect to the language chosen by the Legislature. In section 33.012, “the claimant” must be construed to include all those who claim damages for the injury or death of another person as well

³ TEX. CIV. PRAC. & REM. CODE § 33.012.

⁴ *Id.* § 33.012(b)(1) (emphasis added).

as that injured or deceased person. Section 33.012(b) requires that any recovery by “the claimant” must be reduced by a settlement with one or more family members, regardless of when they settle. The family members are, however, entitled to have the jury determine the amount of damages that should be apportioned to each, whether they have settled or not. I would therefore reverse the judgment of the court of appeals and remand this case for a new trial so that a jury can determine the amount of damages sustained by Dorothy Short Walker, her mother, siblings, and her father’s estate, and the settlement dollars paid to Walker can be credited in the same manner as the Court did in *Drilex*.

I

Clifton Short died while under the care of Dr. James Utts at a hospital owned and operated by HCA Health Services of Texas, Inc. Short’s estate, his widow, and the Shorts’ four adult children sued Utts, HCA, and another physician, Jean-Pierre Forage. All claims against Forage were later nonsuited. Before trial, one of the Shorts’ children, Dorothy Short Walker, settled with HCA for \$200,000. The other five plaintiffs settled with HCA for ten dollars (\$10.00) each. Walker non-suited her claims against Utts, but Clifton Short’s estate and the other Short family members did not.

The settlement agreement between Walker and HCA provided that \$50,000 of the \$200,000 was to be paid to Walker and \$150,000 was to be paid to the law firm that represented her and the other Short plaintiffs. The record reflects that the entire \$200,000 was paid into the law firm’s trust account, but there is correspondence in which Walker directed an attorney with that firm to distribute \$10,000 each to her mother and her three siblings from “any monies belonging to me that he or his firm may have in his possession.” Walker’s counsel stated on the record in the trial court that Walker executed a document

permitting him “to put \$150,000 into my trust account” to pay litigation fees and expenses for which Walker was jointly and severally liable. Thus, of the \$200,000 settlement paid to Walker, 75% of it went to the Short family’s attorneys, \$40,000 went to Short family members other than Walker, and Walker kept \$10,000.

The claims of the remaining Short plaintiffs against Utts proceeded to trial. Before the case was submitted to the jury, Utts requested a dollar-for-dollar settlement credit under section 33.012(b)(1) of the Texas Civil Practice and Remedies Code.⁵ Utts contended that the credit should be \$200,050, the total amount paid by HCA to settle the Short family’s claims against it. Utts relied on the provision in section 33.012(b)(1) that says “[i]f the claimant has settled with one or more persons, the court shall . . . reduce the amount of damages to be recovered by the claimant” by “the sum of the dollar amounts of all settlements” if elected by the defendant.⁶ The Short plaintiffs countered that only a \$50 credit was permissible, which was the sum of the \$10.00 payments to each of the five Short plaintiffs other than Walker. They took the position that Walker was no longer a “claimant” when the case went to trial because she was no longer a party to the suit.

The jury awarded the following damages:

Estate of Clifton Short	\$100,000
Norma Short	\$300,000
Dennie Short	\$12,000
Patricia Short Cain	\$12,000
Sam Short	\$12,000

⁵ TEX. CIV. PRAC. & REM. CODE § 33.012(b)(1).

⁶ *Id.*

The jury found that 25% of the negligence in treating Clifton Short was attributable to Utts and 75% was attributable to HCA. The trial court entered judgment against Utts in accordance with this verdict after allowing only a \$50 settlement credit for the HCA settlement.

Dr. Utts appealed. The court of appeals affirmed the trial court's judgment in all respects, although it did not agree with the Short plaintiffs' interpretation of Chapter 33.⁷ The court of appeals concluded that each wrongful death beneficiary was a separate "claimant" under section 33.012,⁸ and that "only the settling claimant's damages shall be reduced by the amount of that claimant's settlement."⁹ The court of appeals therefore held that Utts was not entitled to any credit for the settlement paid to Dorothy Walker since Walker did not seek and did not recover damages from Utts.¹⁰

II

In construing the statutes at issue, we all agree that the statutes themselves are the starting point. I begin with section 33.012, which is where the Legislature directed that settlement credits must be given.¹¹ Section 33.012 uses the words "the claimant" throughout. Section 33.012 first directs how the damages to be recovered by "the claimant" are to be reduced for "the claimant's" percentage of responsibility:

⁷ *Utts v. Short*, 987 S.W.2d 626, 630-31 (Tex. App.—Austin 1999, pet. granted).

⁸ *Id.* at 631 (holding that "[b]ecause each wrongful death beneficiary has an individual, personal injury, we hold that the settlement of one claimant cannot be applied against the recovery of a different claimant").

⁹ *Id.* at 630 (emphasis omitted).

¹⁰ *Id.* at 633.

¹¹ TEX. CIV. PRAC. & REM. CODE § 33.012.

(a) If the claimant is not barred from recovery under Section 33.001, the court shall reduce the amount of damages to be recovered by the claimant with respect to a cause of action by a percentage equal to the claimant's percentage of responsibility.¹²

Section 33.012 then directs how the damages to be recovered by "the claimant" are to be further reduced if "the claimant" has settled with one or more persons:

(b) 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 one of the following, as elected in accordance with Section 33.014:

- (1) the sum of the dollar amounts of all settlements; or
- (2) a dollar amount equal to the sum of the following percentages of damages found by the trier of fact:
 - (A) 5 percent of those damages up to \$200,000;
 - (B) 10 percent of those damages from \$200,001 to \$400,000;
 - (C) 15 percent of those damages from \$400,001 to \$500,000; and
 - (D) 20 percent of those damages greater than \$500,000.¹³

It is obvious that an injured person or the estate of a deceased person who seeks damages is "the claimant" within the meaning of section 33.012. But who is "the claimant" when family members of the injured person or of the decedent seek damages? Section 33.011(1) defines "Claimant":

(1) "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. 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

¹² *Id.* § 33.012(a).

¹³ *Id.* § 33.012(b).

that other person and the party seeking recovery of damages pursuant to the provisions of Section 33.001.¹⁴

Only certain family members can seek damages for the death of or injury to another person.¹⁵ Those are the spouse, children, and parents.¹⁶ Section 33.011(a) says that a family member who seeks damages, together with the person who is injured or dies, is included within the meaning of “claimant.” The question then arises, who is included within “claimant” if more than one family member brings a derivative claim.

Each person who sues for his or her own derivative injuries is claiming under and through the injured or deceased person.¹⁷ The definition of “claimant” dictates that each family member becomes connected with the injured or deceased person. Importantly, section 33.011 does not imply that the injured person or the deceased can be considered part of “the claimant” more than once. Based on the express definition of the “claimant,” each family member is joined with the injured or deceased person, and accordingly, each is in turn joined with other relatives for purposes of the definition of “claimant.” Chapter 33 treats the injured or deceased person as the hub when claims are made for his or her injury or death. There can be one or more spokes emanating from that hub. These spokes are the derivative claims of a spouse, child, or parent of the injured or deceased person. But each spoke is part of the whole. Each

¹⁴ *Id.* § 33.011(1).

¹⁵ *See id.* § 71.004(b) (identifying who may recover under the wrongful death statutes); *Ford Motor Co. v. Miles*, 967 S.W.2d 377, 383-84 (Tex. 1998) (setting forth who may recover under the common law for injuries to another person).

¹⁶ TEX. CIV. PRAC. & REM. CODE § 71.004(b); *Miles*, 967 S.W.2d at 383.

¹⁷ *See Russell v. Ingersoll-Rand Co.*, 841 S.W.2d 343, 347 (Tex. 1992).

family member is part of “the claimant,” joined at the center because of his or her relationship to the injured or deceased person.

We so held in *Drilex*.¹⁸ In that case, Jorge Flores, a husband and father, was catastrophically injured. He, his wife, and his children sued two defendants. All the plaintiffs settled with one defendant. In the trial against the remaining defendant, the jury awarded damages to each of the plaintiffs. We were called upon to determine how the settlement credit required by section 33.012(b) should be applied. We held that “under the plain language of section 33.011(1), the term ‘claimant’ in section 33.012(b)(1) includes all of the family members.”¹⁹ We rejected the arguments that the Short family makes in the case before us today. We said that “[i]f the Legislature had intended that each of the parties seeking recovery for damages for the same person be treated as individual claimants, it could easily have written the statute” to say so.²⁰

In *Drilex*, we cited with approval²¹ a case in which the facts were analogous to those in this case, *J.D. Abrams, Inc. v. McIver*.²² In *McIver*, Lori Crane was severely injured. Her mother, Joyce McIver, sued in her individual capacity and as the guardian of Crane’s estate.²³ Prior to trial, settlements were

¹⁸ *Drilex Sys., Inc. v. Flores*, 1 S.W.3d 112, 122-23 (Tex. 1999).

¹⁹ *Id.* at 122.

²⁰ *Id.*

²¹ *Id.* at 122-23.

²² 966 S.W.2d 87 (Tex. App.—Houston [1st Dist.] 1998, pet. denied).

²³ *Id.* at 90 n.2, 96.

reached with several defendants, totaling \$2,497,175.²⁴ The jury subsequently awarded Crane \$13,500,000, but no damage issue was submitted to the jury for her mother's individual claims.²⁵ The trial court allowed a settlement credit of only \$1,782,881.20, the aggregate amount of the settlements it had allocated to Crane.²⁶ The court of appeals reversed, holding that the full amount of the settlements, including the amounts paid to McIver for her individual claims, must be applied to reduce the judgment in favor of Crane.²⁷ The court of appeals concluded that under section 33.012, "claimant" included both McIver, who was a derivative plaintiff, and Crane, the injured person.²⁸ The court in *McIver* rejected the argument that is now made by the Short family in this case:

Crane also contends that this result would make her give a credit for money she never received, money that by court order went to another person, McIver, for McIver's own losses. While that is true, we believe the legislature intended this result in order to protect defendants from plaintiffs who would manipulate settlements among those "seek(ing) recovery of damages for injury to another person."²⁹

In *Drilex*, we, too, rejected the argument that settlements paid to a family member should not be deducted from the recovery by other family members. In approving the analysis in *J.D. Abrams v.*

²⁴ *Id.* at 97.

²⁵ *Id.* at 96-97.

²⁶ *Id.* at 96.

²⁷ *Id.* at 96-97.

²⁸ *Id.* at 96.

²⁹ *Id.* at 97.

McIver, a unanimous Court reiterated that “the claimant” as used in sections 33.011 and 33.012 meant “the entire family”:

As noted by the First Court of Appeals in *McIver*, a claimant’s recovery is reduced only by the amount of settlement money already received by that claimant. *McIver*, 966 S.W.2d at 96-97. In this case, the entire family is treated as one claimant; therefore, all of the settlement money must be deducted from the family’s recovery. If, however, there were another claimant (for example, a second injured employee), that claimant’s settlements would not be deducted from the Flores family’s recovery, and similarly, the Flores family’s settlement would not affect the other claimant’s recovery.³⁰

In *Drilex*, we were fully apprised that the statute’s plain language might lead to seeming inequities. We observed, “some plaintiffs may recover more than the amount awarded by the jury, and some plaintiffs’ awards will be reduced by settlement amounts paid to other plaintiffs.”³¹ We nevertheless recognized our obligation to apply the statute as written, not as we might have written it if we were the Legislature: “Although such results may seem harsh, they are mandated by the statutory language and are consistent with legislative intent.”³²

Although we observed in *Drilex* that “harsh results” might occur under section 33.012, we did not have occasion to consider in any detail whether inequities might occur in applying the settlement credit provisions when some but not all family members settle. Now that the Court is presented with a case in which one of several family members has settled and withdrawn from the suit, we have been given the

³⁰ *Drilex*, 1 S.W.3d at 123 n.10 (emphasis omitted); see also *id.* at 126 (Owen, J., dissenting from the judgment but agreeing with the Court’s analysis and resolution of the settlement credits issue).

³¹ *Id.* at 123.

³² *Id.*

benefit of more focus on the particular question of how “the sum of the dollar amounts of all settlements” is to “reduce the amount of damages to be recovered by the claimant.”³³ On examining the statute with this question in mind, it appears that “harsh results” are not likely in cases like this one. A reasonable construction of section 33.012 is that it permits non-settling family members to obtain jury findings as to the damages to be apportioned to each family member, including those who have settled. The total settlement amounts are then deducted from the damages awarded to “the claimant,” not just from the damages awarded to non-settling members of “the claimant.”

The words “the claimant” as used in Chapter 33, mean “the claimant” for all purposes. When one family member settles, it is a settlement by “the claimant” even if only that one family member receives payment. That is because, as discussed above, section 33.011(1) defines “claimant” to include a party seeking damages for the death of or injury to another person together with the person who has been injured or killed.³⁴ If others are also seeking damages for the death of or injury to the same person, they are linked through that injured or deceased person to all who have derivative claims. By the same token, when section 33.012(b) says with regard to settlements that “the court shall further reduce the amount of damages to be recovered by the claimant,” “the amount of damages to be recovered by the claimant” includes a settling family member even though the settlement may bar that individual from actually receiving what the jury awards.

³³ TEX. CIV. PRAC. & REM. CODE § 33.012(b)(1).

³⁴ *Id.* § 33.011(1).

This is in harmony with how the wrongful death statutes view derivative claims of family members. The wrongful death statutes treat all family members' injuries resulting from the death of another family member as a single injury, with damages divided by the jury into "shares" among the individual beneficiaries:

(a) The jury may award damages in an amount proportionate to the injury resulting from the death.

(b) The 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.³⁵

As we explained more than fifty years ago, each individual wrongful death beneficiary has the right to recover damages proportionate to his or her injury, but there is but one sum to be recovered and divided among them in a single action:

The statute gives the right of action to all the persons within the classes named to recover one sum. That sum must be apportioned among those persons according to their several rights, but under the statute there can be but one action.³⁶

In determining "an amount proportionate to the injury resulting from the death,"³⁷ a jury should be able to consider all the beneficiaries, even those who have settled, if dollar-for-dollar settlement credits have been claimed by a non-settling defendant. The fact that a settlement may preclude a beneficiary from actually receiving the amount awarded by the jury should not affect what the jury is to decide under the wrongful death statutes and under section 33.012(b), which is the total injury resulting to all statutory beneficiaries. Any settlement amounts should be deducted from the total award to all family members, and

³⁵ *Id.* § 71.010.

³⁶ *Texas & P. Ry. Co. v. Wood*, 199 S.W.2d 652, 654 (Tex. 1947).

³⁷ TEX. CIV. PRAC. & REM. CODE § 71.010(a).

the remaining recovery should be allocated to non-settling family members based on the percentage that the jury award to each bears to the total amount found by the jury as damages suffered by the non-settling plaintiffs. An example of the mathematical calculation is included in Appendix A.

The Short plaintiffs argue that in some cases, family members are hostile towards one another and a settling family member may not be inclined to cooperate with the remaining plaintiffs in proving the settling person's damages. While this may be true in some instances, that is not a basis for construing "the claimant" to mean something other than what the Legislature has said it means. Moreover, defendants face similar difficulties in cases in which they ask the jury to determine the percentage of responsibility of a "settling person" (*i.e.*, a settling defendant) or a "responsible third party" under section 33.003.³⁸

In this case, the Short plaintiffs should be entitled to ask a jury to divide the amount it finds to be "proportionate to the injury resulting from the death"³⁹ of Clifton Short into shares among each of the beneficiaries, including Dorothy Walker. From the total amount of damages awarded to the widow and children of Clifton Short, Utts should be entitled to a settlement credit for all settlement amounts, which in this case would be \$200,050, because that is what section 33.012 requires. "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 . . . by a credit equal to . . . the sum of the dollar amounts of *all* settlements."⁴⁰ I would hold that the trial court erred in refusing to give Utts credit for the full amount of the settlement paid to Dorothy

³⁸ *Id.* § 33.003.

³⁹ *Id.* § 71.010(a).

⁴⁰ *Id.* § 33.012(b) (emphasis added).

Walker, and that the court of appeals' judgment affirming the trial court must be reversed. Although the Short plaintiffs did not ask the trial court to submit the question of Dorothy Walker's damages to the jury, in the interest of justice, I would further hold that the Short plaintiffs are entitled to a new trial to have that determination made if they so choose.⁴¹

III

CHIEF JUSTICE PHILLIPS's concurring opinion confirms that *Drilex* was correctly decided. But CHIEF JUSTICE PHILLIPS's opinion concludes that when a party settles and withdraws from the case, that party can no longer be considered part of "the claimant" and no credit should be given for settlement dollars paid to that settling party.⁴² CHIEF JUSTICE PHILLIPS's opinion advocates that only those remaining as plaintiffs at the time the case is submitted to the jury can be "claimants."

This construction of "claimant" effectively inserts the words "at the time of the submission of the case to the trier of fact" at the end of the definition of "claimant" in section 33.011(1):

(1) "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. 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 [at the time of the submission of the case to the trier of fact].⁴³

⁴¹ TEX. R. APP. P. 60.3.

⁴² __ S.W.3d at __.

⁴³ TEX. CIV. PRAC. & REM. CODE § 33.011(1).

But when the Legislature intended to impose such temporal limitations, it said so plainly, as it did in the subsection immediately following 33.011(1):

(2) “Defendant” includes any party from whom a claimant seeks recovery of damages pursuant to the provisions of Section 33.001 *at the time of the submission of the case to the trier of fact.*⁴⁴

If “claimant” meant only a person remaining as a party at the time the case is submitted to the jury, then it would have been entirely unnecessary to include the phrase “at the time of submission of the case to the trier of fact” in subsection 33.011(2).

The Legislature took pains to include the limitation “at the time of submission” in subsection (5) of section 33.011 in defining a “settling person.” The Legislature defined “settling person” to mean only a settling defendant, not a settling plaintiff, “at the time of submission”:

(5) “Settling person” means 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 pursuant to the provisions of Section 33.001 with respect to the personal injury, property damage, death, or other harm for which recovery of damages is sought.⁴⁵

The Legislature did not impose a similar limitation in defining “claimant.” It did not say that a claimant is only a person who remains a party at the time the case is submitted to the jury. When the Legislature includes a qualifier such as “at the time of the submission of the case to the trier of fact,” as it did in subsections 33.011(2) and 33.011(5), and omits it in other subsections of the same provision, as it did in subsection 33.011(1), we should presume that the exclusion was intentional. As we said in *Laidlaw Waste*

⁴⁴ *Id.* § 33.011(2) (emphasis added).

⁴⁵ *Id.* § 33.011(5).

Systems (Dallas), Inc. v. Wilmer, “[w]hen the Legislature employs a term in one section of a statute and excludes it in another section, the term should not be implied where excluded.”⁴⁶ Courts must take the words of the Legislature as they find them.

IV

The Short family asks and four MEMBERS of this Court advocate in JUSTICE BAKER’s concurring opinion that we overrule *Drilex*.⁴⁷ A majority of the Court properly declines to do so for a number of reasons, not the least of which is that *Drilex* was correctly decided.

Our construction of sections 33.011 and 33.012 in *Drilex* was dictated by the words that the Legislature chose. The portion of the *Drilex* decision that dealt with settlement credits was unanimous. The Court was asked on rehearing in *Drilex* to reconsider the settlement credits issues among others, and we did so for almost one year. The Court then withdrew its original opinion, but in the substituted opinion, the section dealing with settlement credits and how “claimant” must be construed remained unchanged. We construed the statutes as their text requires: “under the plain language of section 33.011(1), the term ‘claimant’ in section 33.012(b)(1) includes all of the family members.”⁴⁸ We continued, “[b]ecause we must view the entire Flores family as one claimant for section 33.012(b)(1) purposes, the total of all

⁴⁶ 904 S.W.2d 656, 659 (Tex. 1995) (citation omitted).

⁴⁷ __ S.W.3d at __.

⁴⁸ *Drilex Sys., Inc. v. Flores*, 1 S.W.3d 112, 122 (Tex. 1999).

damages to be recovered by the family must be reduced by the total of all settlements received by the family.’⁴⁹

Each of us, including all four MEMBERS of the Court who today join in JUSTICE BAKER’s concurring opinion, had an extended opportunity in *Drilex* to consider what we all agreed at the time was the “plain language” found in sections 33.011 and 33.012.⁵⁰ We fully understood the import of our decision, going so far as to say that the statutes might, in some situations, “result in ‘gross inequities.’”⁵¹ But we unanimously recognized that such results “are mandated by the statutory language and are consistent with legislative intent.”⁵²

But even were a majority of the Court to now have doubts about our prior construction of Chapter 33, overruling *Drilex* and adopting an abrupt change would not be a prudent or wise jurisprudential course on which to embark. This Court has long recognized that it is in the area of statutory construction that *stare decisis* has its greatest force.⁵³ As the United States Supreme Court explained, “when the questions are of statutory construction, not of constitutional import, Congress can rectify our mistake, if such it was, or change its policy at any time, and in these circumstances reversal is not readily to be made.”⁵⁴

⁴⁹ *Id.*

⁵⁰ *See id.* at 122-23.

⁵¹ *Id.* at 123.

⁵² *Id.*

⁵³ *Marmon v. Mustang Aviation, Inc.*, 430 S.W.2d 182, 186 (Tex. 1968); *Moss v. Gibbs*, 370 S.W.2d 452, 458 (Tex. 1963).

⁵⁴ *United States v. South Buffalo Ry.*, 333 U.S. 771, 775 (1948) (citing *Massachusetts v. United States*, 351 U.S. 611 (1948)).

We issued our opinion on rehearing in *Drilex* in August 1999, and there was no further rehearing of that decision. The Legislature thereafter met in the 2001 session and did not alter section 33.011 or section 33.012. We presume that the Legislature was aware of how this Court had construed those sections and that the Legislature’s failure to amend them indicates its acceptance of that construction. As we explained in *Marmon v. Mustang Aviation, Inc.*, “[a] statute is the creation of the Legislature and should an interpretation of a statute by the courts be unacceptable to the Legislature, a simple remedy is available by the process of legislative amendment.”⁵⁵

Apparently, the JUSTICES joining JUSTICE BAKER’s concurring opinion disagree that *stare decisis* is a compelling reason to abide by previous constructions of a statute. But less than two years ago, the same MEMBERS of the Court said in *Grapevine Excavation, Inc. v. Maryland Lloyds*,⁵⁶ that “*stare decisis* demands the result we reach here. *Stare decisis* has its greatest force in statutory construction cases. Adhering to precedent fosters efficiency, fairness, and legitimacy. More practically, it results in predictability in the law, which allows people to rationally order their conduct and affairs.”⁵⁷

JUSTICE BAKER’s concurring opinion argues that the Court should not presume that the Legislature acquiesced in *Drilex*’s interpretation of “the claimant” because rehearing of our original decision in this case, *Utts*, was pending when the Legislature adjourned. That argument ignores two important facts. The first is that *Drilex* was in full force and effect as precedent when the Legislature adjourned in 2001 and had

⁵⁵ 430 S.W.2d at 186 (citing *United States v. South Buffalo Ry.*, 333 U.S. 771, 775 (1948)).

⁵⁶ 35 S.W.3d 1 (Tex. 2000).

⁵⁷ *Id.* at 5 (citations omitted).

been the law since August 1999. The second is that a majority of the Court in our original decisions in *Utts* reaffirmed *Drilex*,⁵⁸ as we do today. The first *Utts* opinions were issued in January 2000, prior to the commencement of the 2001 legislative session. Although, as noted above, a majority of the Court could not agree on how sections 33.011 and 33.012 were to be construed and applied to facts that differed from *Drilex*, a majority confirmed that *Drilex* governs how settlement credits are to be applied when a settling plaintiff remains a party to the case. Although the motion for rehearing in *Utts* was outstanding when the 2001 legislative session ended (we granted the motion for rehearing on June 7, 2001, ten days after the end of the session), before, during, and at the close of the last legislative session, *Drilex* had authoritatively construed “the claimant” as used in sections 33.011 and 33.012 to mean “all of the family members”⁵⁹ when they all remain parties to the suit while pointedly noting that harsh results may occur under the statutes.⁶⁰ The only issue left open in our original *Utts* opinions was how Chapter 33 was to be construed when one plaintiff settles before trial, a situation different from that in *Drilex*.

V

Undaunted by *stare decisis* and the analysis that we all agreed was correct in *Drilex*, JUSTICE BAKER’s concurring opinion says that we should ignore the second sentence in the definition of “claimant” in construing subsection 33.012(b) (dealing with settlement credits) even though we must give effect to that

⁵⁸ *Utts v. Short*, 44 Tex Sup. Ct. J. 134, 136 (Dec. 7, 2000) (Gonzales, J., concurring), 143 (Owen, J., concurring), *ops. withdrawn on reh’g*.

⁵⁹ *Drilex*, 1 S.W.3d at 122.

⁶⁰ *Id.* at 123.

sentence in subsection 33.012(a) (dealing with comparative responsibility). This is a remarkable position, unsupported by any authority. It would be highly unusual for this or any other court to hold that a term expressly defined in a statute has one meaning in one sentence of that statute, and a different meaning when used in the very next sentence.

“Claimant” is defined in section 33.011(1):

(1) “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. 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 33.001.⁶¹

Section 33.012 then uses the words “the claimant” three times in subsection (a), and twice in subsection (b):

(a) If *the claimant* is not barred from recovery under Section 33.001, the court shall reduce the amount of damages to be recovered by *the claimant* with respect to a cause of action by a percentage equal to *the claimant's* percentage of responsibility.

(b) 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 one of the following, as elected in accordance with Section 33.014:

- (1) the sum of the dollar amounts of all settlements; or
- (2) a dollar amount equal to the sum of the following percentages of damages found by the trier of fact:
 - (A) 5 percent of those damages up to \$200,000;
 - (B) 10 percent of those damages from \$200,001 to \$400,000;

⁶¹ TEX CIV. PRAC. & REM. CODE § 33.011(1).

- (C) 15 percent of those damages from \$400,001 to \$500,000; and
- (D) 20 percent of those damages greater than \$500,000.⁶²

“Claimant” means the same thing in both subsections (a) and (b). The statutory definition of “claimant” cannot be parsed to give effect to the second sentence in subsection (a) but not subsection (b).

What justification does JUSTICE BAKER’s concurring opinion offer for refusing to give effect to the second sentence in the definition of “claimant”? An “absurd result,” the opinion says. The result would be “absurd,” JUSTICE BAKER’s concurring opinion concludes, because it would override the one-satisfaction rule and “Texas law.” In other words, the statute would change the common law, and when the Legislature does that, the results are necessarily absurd.

Assuming for the moment that Texas law might be modified by sections 33.011 and 33.012, the Legislature may change the common law by statute if it so chooses, as long as the state and federal constitutions are not violated. No one has suggested that the settlement credit scheme devised by the Legislature is unconstitutional. JUSTICE BAKER’s concurring opinion repeatedly states that in light of “Texas law,” the Legislature could not have meant what it said.⁶³ This ignores the fact that “Texas law” is what the

⁶² *Id.* § 33.012(a),(b) (emphasis added).

⁶³ The opinion says:

- “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.’” ___ S.W.3d at ___.
- “This analysis gives all the language in sections 33.001, 33.011(1), and 33.012 meaning that comports with Texas law.” ___ S.W.3d at ___.
- “[T]reating 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.” ___ S.W.3d at ___.
- “*Drilex*’s results demonstrate why our Chapter 33 analysis was wrong and leads to results inconsistent with Texas law.” ___ S.W.3d at ___.

Legislature decides it is, even if it overrides the common law. A court cannot refuse to give effect to a statute simply because it alters the common law.

But sections 33.011 and 33.012 do not abrogate the one-satisfaction rule. The one-satisfaction rule analysis in JUSTICE BAKER’s concurring opinion depends entirely on that opinion’s definition of “the claimant,” not the Legislature’s. JUSTICE BAKER’s concurring opinion says that “the claimant” means each individual family member. But that is not what section 33.011(1) says. The Legislature intended “the claimant” to mean all family members who assert a claim, as a unit. There can be no over-recovery by a family unit under section 33.012. The settlement credits are applied to the entire family’s claim. Viewed as a single unit, as intended by the Legislature, “the claimant” will receive only the total amount awarded by the jury less the settlement credits.

JUSTICE BAKER’s concurring opinion ignores another directive in section 33.012, which is that a non-settling defendant is entitled to a dollar-for-dollar credit for *all* settlement payments if it so elects.⁶⁴ JUSTICE BAKER’s concurring opinion argues that settlement credits should have been allocated in *Drilex* as the court of appeals had done.⁶⁵ But if this Court had followed the reasoning of the court of appeals, the non-settling defendant in *Drilex* would not have received credit for “the sum of the dollar amounts of

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- “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.” ___ S.W.3d at ___.

⁶⁴ TEX. CIV. PRAC. & REM. CODE § 33.012(b)(1).

⁶⁵ ___ S.W.3d at ___ (citing *Drilex Sys., Inc. v. Flores*, 961 S.W.2d 209 (Tex. App.—San Antonio 1998), *reversed* 1 S.W.3 112 (Tex. 1999)).

all settlements.’⁶⁶ In *Drilex* Jorge Flores was injured. He, his wife, and their three children sued two defendants. Prior to trial, each member of the Flores family settled with one defendant for a total of \$774,675. In an agreed judgment, specific settlement amounts were allocated to each plaintiff. In calculating settlement credits, the court of appeals reduced the jury’s award to each plaintiff by 10%, which was the percentage of fault attributed to Jorge Flores by the jury, and performed other calculations not relevant here. The court of appeals then erroneously calculated the judgment against the non-settling defendant by treating each family member as a separate “claimant” and applying settlement credits allocated to each family member only to the amount of the jury award to that family member:

Plaintiff:	Jury Award (less 10%):	Settlement Credit:	Unapplied Settlement Credit:	Judgment:
Jorge Flores	1,800,000	(671,491.90)	0	1,128,508.10
Maria Flores	90,000	(20,238.10) ⁶⁷	0	69,761.90
Gina Flores	13,500	(29,374)	15,874	0
Jose Flores	13,500	(27,286)	13,786	0
Georgette Flores	13,500	(26,285)	12,785	0

⁶⁶ TEX. CIV. PRAC. & REM. CODE § 33.012(b)(1).

⁶⁷ The court of appeals’ calculation was off by \$.01 in this regard. It used \$20,238.09 as the settlement credit, instead of \$20,238.10.

	\$1,930,500	(\$774,675)	\$42,445	\$1,198,270.00 ⁶⁸
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Had the court of appeals treated the family as a single claimant, the entire settlement amount of \$774,675 would have been deducted from the jury's total award to the family (after that award had been reduced by 10%). That would have resulted in subtracting \$774,675 from \$1,930,500, for a judgment of \$1,155,825. That is what this Court did in *Drilex*. Instead, the court of appeals' methodology would have resulted in a judgment of \$1,198,270, which meant that the non-settling defendant would not have gotten credit for \$42,445. The court of appeals did not give the non-settling defendant any credit for the amount by which the settlement payments to the Flores children exceeded the jury awards to them.

The Legislature was free to make the call that when family members sue for derivative claims, a non-settling defendant is entitled to full credit for all settlements paid to them or the injured or deceased person through whom they claim. The Legislature could have decided to view each member as a separate claimant, but it did not.

VI

If sections 33.011 and 33.012 were properly construed, the Court would not need to erect presumptions regarding sham transactions or deal with a host of thorny issues that will spawn satellite litigation. There would be no need to wrestle with when and how a trial court determines if there has been a sham, whether the attorney/client privilege forecloses discovery from counsel, and what to do if questionable transactions occur after the trial court's plenary jurisdiction expires. Under my construction

⁶⁸ The court of appeals again miscalculated, this time by \$.10, in arriving at the judgment, awarding \$1,198,270.10 rather than \$1,198,270.

of Chapter 33, no controversy over sham transactions, which was of concern to the court of appeals in *McIver*,⁶⁹ could ever materialize, as has happened in this case. But since a majority of the Court is sending this case back to the trial court to determine whether there was a sham transaction, a few observations are in order.

The first is that the Court gives little guidance on what evidence, if any, would rebut the presumption that the Court erects. In this case, counsel for the Shorts has been eager to explain to other lawyers across the state that in many cases, there is a “black sheep” in the family, and that the settlement device used in this case was conceived to skirt section 33.012(b).⁷⁰ In teaching other lawyers how to duplicate what to me is a transparent avoidance of the statute, counsel for the Shorts said, “[w]e have cases where sometimes you have a plaintiff you are not particularly proud of. Maybe it’s the dad. Maybe it’s the mom. Maybe it’s one of the kids, but there is somebody that you have got a problem with.”⁷¹ Counsel then detailed how the “black sheep” would accept the settlement offer and then dole out most of the proceeds to other family members in order to deprive the non-settling defendant of any settlement credit:

So let’s say you have a situation like we had where you have a black sheep of the family, and you have some people coming forward and they are going to offer you some money to settle the case [for \$300,000]. . . . I’m going to give \$235,000 of that to the black sheep, and then I’m going to give \$16,250 of that to each of the other plaintiffs, and then

⁶⁹ *J.D. Abrams v. McIver*, 966 S.W.2d 87, 97 (Tex. App. – Houston [1st Dist.] 1998, pet. denied) (concluding that the Legislature intended family members to be considered part of “claimant” “in order to protect defendants from plaintiffs who would manipulate settlements among those ‘seek(ing) recovery of damages for injury to another person’”).

⁷⁰ See Michael W. Shore, Settlement Traps: Credits, Liens, and the Empty Chair at Trial, Lecture at the 9th Annual Medical Malpractice Conference of the Texas Trial Lawyers Association (September 17-18, 1998) at 15-19 (transcript available from Preferred Records, Inc., Dallas, Texas).

⁷¹ *Id.* at 15.

I'm going to non-suit the black sheep entirely from the case, including against the remaining defendants, because if he got turned [sic] \$35,000, that's going to wipe out any recovery he would get anyway because no jury is ever going to give this jerk \$235,000 to begin with.

Now, before you do that, you kind of sit them down and you tell them—this needs to be well documented with your plaintiffs. You say, look, we are going to give you all this money. You are going to pay all the attorneys' fees and costs out of it, and then you are going to turn around, if you will agree to do this, and you are going to give a gift to your momma of most of the money that you got And, then, guess what? The defendant gets no settlement credit.

* * *

That's how we did it in Austin [in the *Utts v. Short* case]. It's held up. It works. It's valid. And if anybody needs the documents and how to document something like that, call us up. We'll send them to you.⁷²

If, on remand, Dr. Utts offers evidence of the foregoing statements of counsel, and the Short plaintiffs and Dorothy Walker counter with testimony that the payments were simply gifts, is the trial court nevertheless entitled to conclude that the transactions were in fact gifts and not a sham? Under the presumption that the Court has crafted, the answer should be “no.” The presumption is based on receiving a benefit. That presumption cannot be merely illusory and must be applied in a meaningful fashion.

A second concern I have is that a non-settling defendant should be entitled to know whether the trial court is going to find the transaction a sham *before* that defendant is bound by the statutorily required election under section 33.012 between a dollar-for-dollar settlement credit under (b)(1) and the percentages under (b)(2). The Court says that the determination of whether a payment by one family member to another is a sham can be determined after the jury's verdict, which is reasonable and will be

⁷² *Id.* at 16-17, 19.

necessary in some cases. But, the Court does not also say that if the trial court concludes that the payment was not a sham, then the defendant must be able to change its election to the percentages set forth in 33.012(b)(2) if it chooses to do so. The Court's silence should not be taken for anything other than its unwillingness to address the issue. The Court's opinion should not be interpreted as depriving a non-settling defendant of a meaningful choice that has been given by the Legislature.

A third concern is that the subterfuge may occur after a final judgment is entered and the trial court has lost plenary power. The defendant is then faced with a difficult burden in obtaining the settlement credit to which the Legislature has said it is entitled. Under these circumstances, a defendant must be given an opportunity to obtain relief in a separate proceeding.

Another question that is not considered in the Court's opinion is whether the attorney/client privilege applies if a non-settling defendant seeks evidence from plaintiffs' counsel or the settling defendant's counsel. Obviously, the privilege should not apply. The attorneys for the plaintiffs in this case apparently acknowledged this by producing evidence of the instructions they received regarding how the settlement proceeds were to be distributed.

Finally, nothing in the Court's opinion forecloses Dr. Utts from determining on remand whether the non-settling Short family members or the estate paid the same percentage of their respective recoveries as attorney's fees and costs that Dorothy Walker Short did. She paid 75% for attorney's fees and costs when she settled before trial. If the other family members paid less than 75%, then they have received an additional benefit from the settlement with Dorothy Walker Short.

By failing to apply sections 33.011 and 33.012 as written, the Court has unnecessarily multiplied the issues to be litigated.

* * * * *

I respectfully dissent.

Priscilla R. Owen
Justice

OPINION DELIVERED: JULY 3, 2002.

Appendix A

Assume that Dorothy Walker Short's claim had been submitted to the jury, that the jury had awarded her the same amount as her siblings, and that Dr. Utts were solely liable. The principal amount of the judgment would then be calculated as follows:

Estate of Clifton Short	\$100,000
Norma Short	300,000
Dennie Short	12,000
Patricia Short Cain	12,000
Sam Short	12,000
Dorothy Walker Short	<u>12,000</u>
Total	\$448,000
Less settlements	<u>(\$200,050)</u>
Judgment amount	\$247,950

This judgment amount would then be allocated among the non-settling plaintiffs based the proportion each jury finding bears to the total amount found for the non-settling plaintiffs, here \$436,000.00.

Percentage calculations:

Estate of Clifton Short	$\$100,000 / \$436,000 = 22.9358\%$
Norma Short	$\$300,000 / \$436,000 = 68.8073\%$
Dennie Short	$\$12,000 / \$436,000 = 2.7523\%$
Patricia Short Cain	$\$12,000 / \$436,000 = 2.7523\%$
Sam Short	$\$12,000 / \$436,000 = \underline{2.7523\%}$
	100.0000%

Allocation of judgment among non-settling plaintiffs:

Estate of Clifton Short	22.9358% of \$247,950 = \$56,869.31
Norma Short	68.8073% of \$247,950 = 170,607.70
Dennie Short	2.7523% of \$247,950 = 6,824.33
Patricia Short Cain	2.7523% of \$247,950 = 6,824.33
Sam Short	2.7523% of \$247,950 = <u>6,824.33</u>
	\$247,950.00