ORAL ARGUMENT – 11/10/04
03-0659
AUSTIN NURSING CENTER INC V. LOVATO

MEEKER: The issue in this first case is if a party acquires standing to assert a survival action after expiration of limitations, can that late acquired standing relate back to confer jurisdiction to satisfy limitations.

O'NEILL: She had standing before as an heir.

MEEKER: That's what the CA held.

O'NEILL: Why didn't she?

MEEKER: The CA held that she had standing because the survival statute says personal injury actions survive to heirs, legal representatives and estates. The CA is the very first case, and the only case in Texas that has ever construed the survival statute itself to be a standing statute.

O'NEILL: She had standing just on a different capacity. Under the statute itself as an heir. It's just that her capacity changed. Isn't that right?

MEEKER: No. It's a question of standing. The general standing rule in Texas has always been, since the 19th century, that only personal representatives have standing to assert causes of action on behalf of estate.

BRISTER: Well our cases and everybody elses has sometimes used standing and capacity imprecisely shall we say. Sometimes we say standing, sometimes we say capacity, sometimes we use both words in the same sentence talking about one thing. Isn't this technically, truly capacity? Standing is a matter of you haven't been hurt by this. This is the woman's daughter. She probably alleged some hurt. Isn't it just a question of who has capacity to assert it rather than standing?

MEEKER: I believe that this is a question of standing and it's not a question of capacity. There is a difference and I agree that the cases are all over the place. And have used the terms interchangeable. But it is standing. Standing is a notion as to have justiciable interest, who has the right of action to assert this cause of action. And as it relates to the decedent's estate, it's very important you have this 4 year period during which administration can happen. Who has justiciable interest in that makes a big difference, because there are competing interests among a number of different people. There are creditors, there are heirs, there are parties that are holding on to possession of assets, there are persons who owe debts to the estate. And what the courts have always held is that we're going to apply a rule that gives order to the system. It doesn't prefer anyone of those people over another.

O'NEILL: The relation-back doctrine is an equitable doctrine. Talk to me about the equities in your favor in this case.

MEEKER: We have a bright line statute of limitations that says you have two years, in this case 75 days, to assert your cause of action and to acquire standing, to assert that cause of action.

O'NEILL: And the purpose of that is, so that evidence can be preserved. And I'm talking equities. What evidence has been not preserved as a result from filing as an heir as opposed to administration.

MEEKER: I'm aware of no evidence that has not been preserved in this law suit. Limitations is a question of equity. Jurisdiction is more of a fundamental question and you never get to the question of limitations unless you decide the issues of jurisdiction.

O'NEILL: So it's fair to say, you don't really have any equitable arguments. It's strictly legal.

MEEKER: I have an equitable argument in the sense that we were required to defend a lawsuit that was not brought by a party with standing for 2 years and 75 days.

OWEN: We said in Shepherd v. Ledford that you could qualify. The widow in that case alleged in her lawsuit that the estate did not need to be - no administration was necessary, that the debts had been paid and that there was a family agreement. Respondent says in this case that she did the same thing. That she fit within Shepherd.

MEEKER: Respondent did nothing of the sort in this case. In this case we had after death another heir, not respondent, file an application to be appointed alleging that administration was necessary. Nine months later respondent files the lawsuit. Shortly after that, respondent files her own application for probate alleging that administration is necessary. So the facts are entirely different. In that case, respondent can't come into the TC in her action and say, Wait a minute, administration is not necessary. Don't pay any attention to what I've done over there in the probate court. She filed five verified pleadings in the probate court asking to be appointed administrator of the estate. The law is, that the court cannot open up an administration of the estate without a finding that administration is necessary.

So the family settlement agreement that was used in Shepherd only goes to the issue of whether or not administration is necessary. In this case, respondent pleaded that administration was necessary in the probate court, she asked for a finding by the probate court that administration was necessary and, in fact, the probate court held that administration was necessary.

OWEN: What about our old decision in the Pope case. It's cited in the case that's going to be argued behind yours. Could you distinguish that?

MEEKER: Pope is a case where the party filed a state court cause of action in an interstate commerce case. And the defendant said no, this is an interstate commerce case and, therefore, the FELA applies. And only personal representatives have standing in an FELA case. So she went out and got appointed, re-filed as personal representative. And what the court said was, there is no new cause of action, the cause of action is essentially the same and, therefore, limitations is not a problem.

OWEN: How is that different here?

MEEKER: That's different because she had standing to file her state court cause of action. In our case, Ms. Lovato did not have standing to file the survival action at any point in time during the period of limitations.

OWEN: But limitations had run on her federal claim before she filed it. She filed a claim as the widow not as a personal representative. Then after limitations ran, she filed a federal cause of action as the personal representative and we held limitations had not run.

MEEKER: The court didn't focus on standing in that case. What the court focused on was whether or not it was a new cause of action. And said no, it's the same cause of action. She pleaded the same cause of action essentially in both cases. In our case the question is not whether or not it's a new cause of action. The question is, whether or not she had jurisdiction to begin with. In Pope, the plaintiff had standing all along. The plaintiff had standing to file her incorrect lawsuit, which she did, and she acquired standing and then had standing to file her new federal cause of action, which she did. So it's not a question in Pope of having late acquired standing relate back to confer earlier jurisdiction where it never existed. In Pope, jurisdiction and standing existed throughout. That's what the court held. That's our position in that.

HECHT: Do you think the standing impairment in a case like this could be cured if limitations had run?

MEEKER: Yes.

HECHT: So that you could file the suit and even though you didn't have standing the judge wouldn't come in and dismiss it. The defendant wouldn't be entitled to dismissal. You would just abate it until the standing problem was fixed.

MEEKER: If the court heard it prior to expiration of limitations?

HECHT: Yes.

MEEKER: I don't believe that's the law. Because standing is an element of the plaintiff's cause of action, and once the defendant calls the issue, then the plaintiff has to come in and prove standing and, therefore, the court has jurisdiction.

HECHT: In Subaru, looking at another kind of subject matter jurisdiction impairment, we said that some things can be fixed and you should try to fix those things. We said the same thing in Fodge(?). If it can be fixed you should abate it, try to fix it. If we can't, then we have to dismiss the case. Does that same rule apply here do you think?

MEEKER: That you can abate it then, therefore, get around the statute of limitations?

HECHT: No, not limitations. Aside from limitations. If the defendant came in two weeks later and said, Look the plaintiff is not the personal representative. Dismiss the case. The plaintiff would have a good argument by saying well give me a chance to get qualified by the probate court.

MEEKER: I think you can do that. In fact, I think the plaintiff in this case did fix it. She did acquire standing. Her problem is, she acquired it too late. And she never had standing during the period of limitations. That's her essential problem.

BRISTER: Of course, you cite Bell v. Morris, and there the 14th court said you can't fix standing. If you don't have standing the day you file you are out of luck. Right?

MEEKER: I believe so.

BRISTER: Now that doesn't make any sense at all does it?

MEEKER: The principle of Bell v. Morris makes a lot of sense. The principle of Bell is that the - at that time wife tried to intervene in a lawsuit claiming the royalties that her husband owned. And the court said no, you can't do that because you don't have standing. So she acquired standing later on, because in the divorce decree she was actually awarded the right to those royalties.

BRISTER: So now the day we have the hearing, there is no question she's an owner, she has an interest and we toss her out because you used to not have an interest. Even though you do now. That can't be right is it?

MEEKER: In Bell v. Morris, I think there were some procedural problems in Bell, but the principle is the same.

BRISTER: No. The principle I just asked you. It can't be right if somebody wasn't heard on day one, but on day two they were heard. They acquire the interest, defendant wants to toss them out because you had no standing in the past. I admit you have standing now. I admit you have a colorable claim against me. But you used to not have one so throw this case out.

MEEKER: Because that standing - a party with standing never brought it. That's what limitations is. Somebody has to bring to assert the cause of action within the period. And bringing that cause of action requires that you actually invoke the jurisdiction of the court.

BRISTER: Since it's standing, actually somebody that didn't have standing on day one, but has it on day two, nobody says anything. We proceed to judgment. It becomes final and 100 years later we can set it aside because after all standing is subject matter jurisdiction and can be set aside at anytime.

MEEKER: Theoretically.

BRISTER: That's not going to be a very good way to handle this question is it?

MEEKER: Except in your situation, I assume what they are doing is filing some sort of bill of review and there are other issues involved.

BRISTER: No. They just fight the collection action when it comes up. You can collaterally attack a judgment without subject matter jurisdiction. Right?

MEEKER: I believe that's correct.

BRISTER: So the judgments will be set aside 100 years later because we find out unbeknownst to anybody in the whole lawsuit the day it was filed somebody allegedly didn't have standing.

MEEKER: The burden is different in that case. The burden in that case, if you raise it after judgment, is you look solely to the pleadings. And in our case, that's not what we had. We actually called the issue. We said, as part of your cause of action, you have to prove it, come in and produce evidence.

O'NEILL: But you called it 1-1/2 years after the suit was filed. You waited till limitations ran then called the issue. Whereas, I believe in response to J. Hecht's question, if you had called it before limitations ran, she could have abated the action and avoided the limitations bar.

MEEKER: That's correct. Then the question becomes who are we going to put the burden on in terms of having standing to bring your cause of action. Should we put it on the defendant, or should we put it on the plaintiff who is actually bringing the cause of action, to actually acquire the standing to assert the cause of action that she is trying to assert?

BRISTER: Of course if it's standing, it's on the court. We can raise that on our own even if y'all ignore standing.

MEEKER: That is correct.

BRISTER: If we looked at this as a capacity question instead, there's no question a defendant could waive capacity by not timely filing a verified objection to capacity.

MEEKER: That's accurate. And that's one of those things where we're going to call it one thing so we fit the result. And I think that's a different way of addressing it. The CA I think honestly tired to find a way to address the result. They didn't do it that way. And I don't think this court has ever done that, and I don't think this court should try to call it one thing so we get to result. We need to actually look at what it is. And this truly is a question of justiciable interest. And who are we going to say has a justiciable interest in this cause of action during those 4 years after date of death? Are we going to say it's anybody in the world, as in the Lorenz case where they are not even an heir. Are we going to say it can be an heir: can it be one heir out of 16 different people?

BRISTER: This is a med/mal case?

MEEKER: Yes.

BRISTER: This is the woman's daughter. And why does a person's child not have a sufficient stake in the lawsuit regarding the death of their parent?

MEEKER: She will when she actually receives the estate. But during this period of time, there are competing interests. And the law says there are competing interests. And we recognize that. Because it's not just a question of heirs.

BRISTER: When you go into bankruptcy, the trustee has the only capacity to bring suit for the reason you just described. That's not because all the creditors hadn't been harmed. They are just as harmed before and after bankruptcy. It's because there's a different person that has the capacity to bring the charged after bankruptcy is filed.

MEEKER: I would argue that's standing. I think bankruptcy is a good example. Here's another good example. Someone sets up a trust in their will, and the trust is set to terminate - there's a lifetime beneficiary when the trust terminates, then the assets are distributed to other people. So when that person dies are the ultimate beneficiaries do they then have standing to assert claims on behalf of that? No. The trustee still has to administer it. The trustee still has to make sure that assets go to wherever they need to go to. If there's a business in the asset, the debts need to be paid.

OWEN: Let's go back to Shepherd. It seems to me the only thing you can point to as saying that the estate required administration was that she had this medical malpractice claim. That was the only asset out of the estate. It was worth more than $2,000. Am I correct?

MEEKER: That is apparently what happened. Again, that's part of her cause of action.

OWEN: That means Shepherd was wrong. In those facts the only asset that Ms. Shepherd had was the survival claim, or that the estate had was the survival claim. Yet, we said she is the widow, she's going to inherit, no children. The other heirs have agreed that she gets it. And this is the only asset. And she was allowed to proceed. I still have a hard time seeing how this is different from Shepherd if the only asset is the survival claim itself.

MEEKER: Because in Shepherd she demonstrated that no administration was necessary.

OWEN: Ms. Shepherd - what you're basically saying is if Ms. Shepherd had then after she filed the lawsuit gone to the probate court and been named administration, she would have pled herself out of the survival claim.

MEEKER: I think she would have.

OWEN: So here if the plaintiff had not gone in and gotten administration, she would fit squarely within Shepherd, but since she got letters she's out.

MEEKER: No. She still would had to have proven that no administration was necessary and none was pending. And remember she's only one of 16 different heirs.

OWEN: Didn't she allege in an affidavit there was an agreement among the heirs?

MEEKER: She alleged that there was an agreement.

OWEN: Was that controverted?

MEEKER: It was controverted by her own sworn pleadings in probate court. That affidavit was signed within a month after she had actually obtained an order from the probate court naming her administrator, and finding that administration was necessary. Remember family settlement agreement is only evidence that no administration is necessary.

OWEN: The only thing you can point to that required administration was this claim?

MEEKER: That's all that I'm aware of, but again that's part of her cause of action. And that's what she said. That's what she alleged under verified pleadings to the probate court that, yes, in deed, administration was necessary. I think there's two other reasons that administration is necessary in this case. One, there were competing claims to be appointed administrator. Her's was not the only application for appointment. Jim Bob Wilson, another heir, had a previous application on file. A probate court needs to decide that. And also there were several heirs. There were a number of different heirs. And when there are a number of different heirs, you have competing interests as to how you handle this asset and how you divide up other assets. And the law is clear on that, is we're going to look to one person. We're going to clothe one person with standing to take care of that situation.

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RESPONDENT

MELENDEZ: We would like to present four alternative theories why we believe Ms. Lovato had standing. The first theory is because it complies with the Shepherd case. It complies with

Shepherd because Ms. Lovato is an heir. And it's because during her summary judgment evidence, she proved that during the period of time prior to her appointment as independent administratrix, there was an agreement pending among the heirs of how the property should be divided, and there was proof that there was no debts. It's during that period prior to her appointment as independent administratrix that we were able to prove that no administration was necessary, therefore, she had standing during that period.

HECHT: How can that be? I mean she is swearing that administration is necessary, and she won relief on that allegation.

MELENDEZ: That's right. She applied for that part of the administration to be appointed as an administrator about 2 months after she had filed her petition under the survivorship statute. She made that application in order to protect the property. She thought this was the best way to do it, and following case law, she thought once she was appointed, that appointment would be laid back based on good current case law.

HECHT: But you're saying that as a matter of fact when she filed the survivor claim, no administration was necessary. But an administration was necessary. Nothing changed between the time she filed the lawsuit and the time she filed the application for administration.

MELENDEZ: When she made that application for appointment as administration, she wanted to become appointed administrator based upon a family agreement. However, it's not until they filed their motion for summary judgment that there was no standing, that we look to see was in fact an administration necessary during that period of time.

HECHT: During what period of time?

MELENDEZ: Prior to her appointment as administrator. The facts show that during that period of time, there was a family agreement of how the property should be distributed. Also there were no debts. That doesn't change the facts. Those were the facts as they existed prior to her appointment. Her appointment did not occur until May 2002.

HECHT: The question is. When was an appointment of an administration necessary?

MELENDEZ: According to the probate court that order was signed in May 2002.

HECHT: Until then it wasn't necessary?

MELENDEZ: We had in good faith filed a petition, but there are still facts to show that an administration was not necessary prior to that order being signed by the court in May 2002. And that's not inconsistent.

HECHT: If they're not inconsistent to say, to go in to the probate court and say I swear

to God, administration is necessary, and go down the street to the other court and say no administration is necessary.

MELENDEZ: The reason we don't believe it's inconsistent is because if you look at the facts, what is it that we're saying. We are saying that there are no debts, and we're saying that there was a family agreement. Based on those two facts, then we can in good faith say well during that period of time no administration was necessary.

OWEN: Why did administration become necessary?

MELENDEZ: We wanted to protect the property. The order took effect in May 2002. If we decide to apply as the defense would argue, apply the order back retroactively, apply the order that says that the necessity for an administration occurred prior to the order. Occurred prior, that is, during the pre-limitations period. Then we should apply the entire order back, not just that portion of the order finding necessity.

OWEN: Let's say she filed the lawsuit, and then subsequently her brother was named administrator then what happens?

MELENDEZ: There was a family agreement among her and her brother...

OWEN: What happens under the law if she files a lawsuit but then her brother is subsequently named the administrator by the probate court? What happens to the lawsuit? Has limitations run or not, or does he relate back to the filing of the lawsuit? How does that work?

MELENDEZ: If we're saying that an improper party, a party without standing files the lawsuit, and the limitations has expired prior to the administrator being named as the proper party, then according to the defense then limitations has passed.

OWEN: I'm asking what's your position? If her brother had been named administrator instead of her, would you still have a valid claim?

MELENDEZ: Yes.

OWEN: How?

MELENDEZ: The relation-back doctrine. The relation-back doctrine should apply in this case for two reasons. It should apply on the basis of the equitable principles of relation-back. The relation-back doctrine has been codified in the probate code 37. Probate code 37 says that when an administrator has been appointed...

OWEN: What if someone who was not an heir had filed the lawsuit. Let's say a friend, as next friend, and then her son was appointed administrator after limitations had run. Would that

preserve the claim?

MELENDEZ: There would be two theories in order to preserve the claim, and two conflicting theories. For instance in this case, we have an heir. An heir under the survivorship statute has a justiciable interest. But if a non-heir all of a sudden is appointed as administrator, what do they rely on in order to find standing prior to the time of limitations? In my opinion they can rely on probate code 37, which is an equitable principle of relation back, which has been codified.

OWEN: What if there was a will, and this was the daughter, but she had been cut out of the will. Would she have standing to bring a survival action?

MELENDEZ: She's not an heir. But if she is appointed, if there's a family agreement and she's appointed...for instance if there's a family agreement that she be appointed or receive distribution of the estate and that she be the administrator, I don't see why not.

In this case there was a family agreement. The family agreed that all the money should be distributed. The family agreed that Ms. Lovato should be appointed the administrator. This is not inconsistent with your normal everyday life of how families interact when one of their parents have died. There was no debts and there was a family agreement on what to say.

Again, the question is, is that inconsistent with reality? No. It is not. Those facts were present in this case. Even though she filed an application for heirship, that doesn't change the facts that she had a family agreement, and there was no debts.

BRISTER: Families sometimes agree. Sometimes they don't. The deal is you've got a family agreement and no debts. So you file the lawsuit. Now you've got standing. One of the family members changes their mind and claims they were under duress. A new creditor emerges and says I have a debt. You do have a debt. You owe me. Then we pay that off. So if this is standing, standing is coming and going.

MELENDEZ: That's right.

BRISTER: How can we have jurisdiction that is there one day, gone the next, and then reappears?

MELENDEZ: That's exactly my point. If you want to apply the order appointing her as administrator, it as of the date of the order when the evidence was heard that the court made a decision that administration was necessary. It's the date of the order when the court...

BRISTER: Wouldn't it be easier to treat this as capacity? Where if they've got an objection that she should bring this with a different hat, they have to swear to it and otherwise they waive it.

MELENDEZ: Yes. In order to facilitate the whole purpose of the probate court. They want to preserve the property for the heirs and pay the bills. That's what the whole object of administrating the estate is all about. And one of the ways to do it is obviously through a family agreement or through the probate court's appointment of administrator or executor.

HECHT: But you say you have four theories, and the first one is Shepherd. And in Shepherd you have to have no necessity for an administration. And here you have everybody in the family that ever said one way or the another about it saying that there is a necessity for administration. Until this lady comes up to respond to summary judgment and says there is not.

MELENDEZ: Right. Ms. Lovato when she filed that application, she wanted to protect the estate.

HECHT: I know that's what she wanted to do and I know that's what she's trying to do here. But she's swearing to a fact that she later swears is not true and then obtains relief on it. And that doesn't bother you.

MELENDEZ: It doesn't bother me because all of a sudden the issue that she didn't have standing is argued and I think inequitably. The fact doesn't change that at that time she did have a family agreement. She had a family agreement of how to distribute the estate. And at that time also there were no debts pending. Those are simply the facts that existed. The fact that she wanted to go ahead and apply for administration because she wanted to protect the estate the best way she knew how, and she thought it would be related back. That's what she wanted to do but that doesn't change the facts that there was no debts and there was a family agreement. Those facts were present at the time. Now how the court interprets those facts to mean or what the results are, that's just what the court says. The court says that if there are no debts and that there's a family agreement, there's no necessity of administration.

HECHT: What are your other three theories?

MELENDEZ: The third one falls into their argument that we should apply only a portion of the court's order finding a necessity of administration. They are saying we should grab that order that was signed on in May 2002, take that portion of the order that says administration was necessary and retroactively apply it. But they don't want to apply it to the entire order. They just want to apply that portion of the order. I think that would be unfair. If you're going to apply a portion of the order that says that an administration is necessary, you need to apply the entire order retroactively back. That would be the fair thing to do.

The third theory is the relation-back doctrine. The third theory is that under the relation-back doctrine that has been codified under the probate code 37. Probate code 37 says when an administrator hasn't been appointed, that they take the property of the decedent as of the date of the decedent's death. And the purpose of that is so that the administrator who has already been appointed., who has done business prior to that appointment, their transactions have been

ratified in order to fulfill the purpose of the probate court.

OWEN: The probate order sets out percentages specifically that each heir is going to take of the estate. Did that match up with the family agreement and did you put that in your summary judgment?

MELENDEZ: I don't believe it was put in the summary judgment as far as distribution of the estate. What happened is, that the heirs - the reason there was a delay in obtaining an appointment was because the heirs began to die. The original heirs they died. New heirs all of a sudden came into the picture. We had to try to locate these heirs, which is not uncommon situation in the way sometimes there is a delay in obtaining a hearing on the administration of the estate, because you want to notify all the heirs.

OWEN: You say at the time the lawsuit was filed there was an agreement. And did you set forth what the terms of that agreement are, to show that facts had changed by the time that you asked for administration of the estate?

MELENDEZ: No. What we did in response to the summary judgment is we stated under oath, Ms Lovato said that there was a family agreement, that...

OWEN: By that time she had already filed for administration. Right?

MELENDEZ: Even prior to that time. When she filed her lawsuit there was already an agreement...

OWEN: No. In her affidavit in response to the motion for summary judgment, she swore that there was a family agreement and no need for administration. Yet, she had a pending application for administration.

MELENDEZ: Yes.

OWEN: Did she attempt to explain that at the time she filed the lawsuit the facts were different?

MELENDEZ: No. There was no explanation on that. Only the fact that there was a family agreement. And if we're going to strictly say that that's inconsistent and it shouldn't be applied, then in other words the fact that at the time that she filed her application for appointment, and she's also saying there is no need for administration, that's too inconsistent to use. Then there was still a window of opportunity that there was no application by her for an administration. It's during that period that she had a family agreement because when she filed her lawsuit, she had an agreement...

OWEN: Say I'm the TC here. You're saying there's a family agreement. The other side is saying, your honor, that can't be true because she's filed for administration and there is a

proceeding. So somebody has got to resolve that fact question. You put all the facts in front of the TC, otherwise it seems like all the TC has to go on is whether there is administration so there can't be as a matter of law unless you give me more facts. How can you say that there was no need for administration?

MELENDEZ: She wanted the administration. There's no doubt about that. But all we're trying to do is fit the facts with the result of the law. In other words if the court says, and if the law is that there is no need for administration based on the family agreement and no debts then she fits that perspective. Then she has standing. Only for the purpose of standing.

BRISTER: Is there some reason she couldn't allege both alternatively? What if you don't know exactly whether you have debts or not?

MELENDEZ: At that time, we were relying on - she wanted to do everything possible to preserve the estate and we thought the best way possible was to obtain...

BRISTER: She wanted to get the med/mal suit filed. Right?

MELENDEZ: Right.

BRISTER: Her mother is deceased. So her mother can't file. If somebody is going to file it's her or somebody else and she was willing to do whatever needed to be said to fit our little rules about who can bring these suits and who can't. Right?

MELENDEZ: That's why she filed in the probate court because she thought that would be the best way, and she thought it would...

BRISTER: If we want her to jump through that hoop, she will jump through that hoop. If we want her to jump through this hoop, she will jump through that hoop.

MELENDEZ: No. Not for the purpose of committing _____ report. No.

BRISTER: She just wants to get her med/mal case tried.

MELENDEZ: Yes. And these were the facts as they were...

BRISTER: And lawyers are telling her, well let's try this, well try that. This lady didn't know anything about the probate code.

MELENDEZ: No. She relied on her lawyers.

HECHT: The wrongful death claim was dismissed because of inadequate expert reports?

MELENDEZ: Yes.

HECHT: And that's final.

MELENDEZ: Yes.

HECHT: The expert reports didn't go to the survival claim or that just was never raised?

MELENDEZ: In the expert report the it never mentioned that. It just mentioned that the pressure ulcers were developed and breach of the standard of care. But because the expert reports never said that the pressure ulcers were a cause of death and then they were considered inadequate on that basis.

HECHT: You had a fourth theory.

MELENDEZ: The fourth theory is based on the equitable principles of relation-back doctrine once again. And we're moving away from the probate code 37 which talks about relation back. Now the equitable principles say that to do justice, to prevent unfairness and it's been argued that just because there is no subject matter jurisdiction within the statute of limitations, that this precludes the court from not applying the statute of limitations. For instance, if they are in a period of 2 years there was an absence of an indispensable party, and then the defense can raise a motion to dismiss because a indispensable party not being part of the lawsuits. And then they can apply the statute of limitations in order to have the lawsuit dismissed.

This court has applied equitable principles and not apply the statute of limitations even when an indispensable party was not part of the lawsuit during those 2 years. In the case of Price v. Anderson, this court applied equitable principles in order to prevent the statute of limitations from dismissing the lawsuit when during that period of time there was not a party that was included in the lawsuit. For instance in Price v. Anderson, everybody knows that an estate can not sue or be sued. Yet, the petition named the estate as a party. They failed to name the indispensable party, the administrator, during that period of time. After the two years had passed, they filed a motion to dismiss based on lack of subject matter jurisdiction, and they raised the statute of limitations to have the entire case dismissed. Because at the end of the two years they went ahead and named the right party, the administrator as the proper party. The SC decided that they were going to apply principles of equity and not apply the statute of limitations under the facts of those cases. Because they found that it would be unfair, unjust to apply it even because there had been no unfairness to the defense in that case. And those are the four theories that I believe would support standing.

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REBUTTAL

MEEKER: Price v. Anderson as well as almost all of the other cases cited in the Lorenz

case, is a pleading error case. It's a case where the defendant was sued in the name of the decedent's estate, and you're not supposed to do that. There are other cases where the plaintiff actually sues in the name of the decedent's estate. And that's a pleading error case. Our case is not fundamentally a pleading error case. Our case is a case where someone with standing never asserted that cause of action.

O'NEILL: Can you plead in the alternative as J. Brister asked? Could she have pled no administration necessary, but if it is, we will get it?

MEEKER: I think she could, but it still gets back to the question of whether or not she actually has standing? That's the problem with this case, is she did not have standing during the period of limitations. And if she can plead that, then she can go into the probate court and actually get a hearing that appoints her administrator. Even if there's not much time left, she can go into the probate court and say I have not much time left. I need to be appointed temporary administrator. There are all kinds of procedures at play for her. None of those procedures - and certainly it's her burden to go ahead and do that. She has relief in this case.

HECHT: I was under the impression that the probate pleading had to be verified. Is that not true?

MEEKER: Certain probate pleadings have to be verified.

HECHT: Did this one have to be verified? Does the pleading of a necessity of administration have to be verified?

MEEKER: It does not. Pleadings as to determination of heirship do. And her pleading was also a pleading to determine heirship. And that brings up one of - we have this general standing rule in decedent estates so we can have a bright line rule to determine who has justiciable interests, and all these different facts scenarios. The fact scenarios range from we have multiple heirs, and only one wants to assert it. We don't know who all the heirs are. We have competing applications for appointment. We have competing wills. We don't know which will is going to be admitted, therefore, we don't know who is going to be the beneficiary.

O'NEILL: But we do have in this case a scenario where it could be determined that administration is not necessary?

MEEKER: It could be.

O'NEILL: So if you just don't know, you just don't know. So to be safe you go ahead and get it. So really your problem is she didn't plead it in the alternative?

MEEKER: No. My problem is she didn't have standing.

OWEN: The administrative order specifically found there were no debts, that she didn't own property exceeding $2,000. It does say that necessity exist for administration. Apparently we don't really know why. But we do know it specifically recites those things. Isn't it possible that she had standing at the time the lawsuit was filed, but subsequent events deprived her of standing. I mean theoretically she could have fit within Shepherd at the time she filed the lawsuit, and subsequent events could have taken her out of Shepherd. So standing as J. Brister says comes and goes.

MEEKER: It can come and go. It certainly did not in this case. No facts changed. The only thing that changed as a necessity of administration of this case, was one sentence in Ms. Lovato's summary judgment affidavit that was filed 1 month after the probate court had already determined that administration wasn't necessary.

JEFFERSON: How do we know absolutely no facts changed?

MEEKER: Because we presented that in our motion for summary judgment. We presented the entire probate court file.

BRISTER: If it turns out 100 years from now you are wrong, somebody is going to raise it again. Because you can always attack standing. There is no limitations on it. You can always bring it up later.

MEEKER: In this case it does not apply because the TC found that there was no standing.

BRISTER: If it comes out the other way. If this case and our companion case that came out the other way, they go, they get a judgment, somebody can attack it collaterally years from now because it turns out facts that none of us may have known about existed which deprives _____.

MEEKER: In theory, but it has to appear...

BRISTER: In theory means yes. Correct?

MEEKER: Yes. It has to appear on the face of the record. And still the question would be did she have standing or not at that particular time?

OWEN: I haven't read the summary judgment motion. What did you put in your summary judgment motion that conclusively established that at the time the lawsuit was filed she didn't have standing?

MEEKER: Probate court determination that administration was necessary...

OWEN: But that was only as of that date.

MEEKER: And probate applications that predated the lawsuit saying that administration verified. They say that administration was necessary. And her own verified pleading that said administration was necessary without limitation as to time. There was no limitation as to time.

O'NEILL:

You've got to do that to be able to file your administration. So if you're going to plead in the alternative, you've got to plead that in there. Right? I mean to go to the probate court, you've got to say that administration - I don't know. I don't know if it was necessary or not. So I am going to file here and if am going to stay in DC, without administration I've got to say it's not necessary. I just don't know. But I'm going to plead in the alternative. Then she's got to say in the probate court that it's necessary and let the court decide whether it is or not.

MEEKER: And then get a determination from the probate court whether or not it is. And she's got two years and 75 days to do that.

O'NEILL: It sounds like you're arguing some sort of estoppel.

MEEKER: She's collaterally estopped in this lawsuit from denying that administration is not necessary. That issue was determined by the probate court at her request.