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SWEAT: In this case the beneficiaries of the estate, the creditors, the heirs, etc., have been denied any opportunity for recovery, _____ the merits in this case because allegedly the administrator didn't qualify quickly enough.

Even though this suit was filed before limitations expired, even though the court appointed administrator fully participated in the case, and even though the facts of the case never changed, the identity of the defendant never changed, and the defendant was not harmed in any way, and has not been able to show any harm, the CA we think confused a lot of different concepts in this case, and basically came up with a rule that really doesn't make any sense.

JEFFERSON: Do you agree fundamentally that she had no standing at the time she filed it?

SWEAT: Not really, because she had filed an application to probate the estate, to open administration prior to the time that suit was filed. The probate code says that's an _____ proceeding. J. Brister referred to the bankruptcy earlier. I think that it's similar to that. At the time that that petition was filed, that proceeding then covers all the property, all the claims of the estate. It is totally within the control of the probate court, and the probate court appointed an administrator as an officer of the court to take care of that administration for the benefit of beneficiaries and for the benefit of the heirs, the benefit of the creditors. But as this court said a long time ago in Dowlin v. Boyd, it's not for the benefit of people that owe money to the estate. And that's what's going on here.

HECHT: Would she have had standing even if she had not filed an application for administration?

SWEAT: At some point the court has to deal with that issue. Who is here to represent the estate?

HECHT: The question earlier was, did she have standing when suit was filed? And you said yes. And now you said because an administration application was pending. And I'm asking you if an application were not pending, would she still have had standing when she filed the lawsuit?

SWEAT: I think at that point, the court would quite properly have said this is a claim of the estate and how do you have to _____ to represent this claim of the estate? And if she could not demonstrate that, and could not bring anybody forward to represent that claim, and that's what's happened in a lot of cases before the court. When you're faced with a situation where it can't be fixed, then the court has no choice but to dismiss. But that's not what we have here.

HECHT: I guess my question is, the individual plaintiff who is there, is that what can be fixed, or can just anybody come back in here and say well, no, none of these people who filed suit could ever qualify as administrators. But I did and so I want to relate back.

SWEAT: I think that the court should focus more on the policy behind why we need somebody there. And the focus is, can we get somebody in front of the court to represent his claim, and if we can't, then...

HECHT: I understand that. I'm just trying to test how far that goes. So if a lawyer goes in and files suit and says I am _____(coughing). There is a decedent. I think there may be a survival claim out there, but I haven't been able to find anybody yet who is qualified under the statute to bring it. I think that person will materialize at some point, but meanwhile I'm filing suit to preserve this claim. And that would be okay in your view?

SWEAT: If it can be fix. Because the focus is, who are we trying to protect here? Are we trying to protect the defendant who doesn't want to pay anybody, or are we trying to protect the estate...

O'NEILL: And that's a good question because I think there's been an argument made that under the health care medical liability insurance improvement act, the relation-back doctrine should not apply.

SWEAT: I certainly would anticipate that would be their argument.

O'NEILL: Well you're indicating that they intended to protect this type of...

SWEAT: Exactly. And how this court - this kind of dealt with an issue similar to that in the Chilkowitz(?) decision involving rule 28. And the court in that said, we're not extending limitations. The policy that I think the court talked about several times, the Sacks v. _____ case, going to be where you said what was intended in the statute was to have some point at which there was certainty and predictability in terms of when a claim would be brought. And that's why the legislature said it was the 2 years and 75 days. In this case, the lawsuit was filed within that. The defendant got notice, both the statutory notice and the lawsuit being filed. So the defendant has received all the notice they ever would have received. They've got a chance to go out and find their witnesses, go through the medical records, which by the way they already have the medical records because they are the healthcare provider, and they are actually in a much better position to defend that case than the administrator would be because she has no personal knowledge of the claim. It's all the deceased persons claim that's being brought forward.

So in that case, this is - we're not extending limitations at all. This is not some other law that would override or would be disregarded by the medical liability act. It's a procedural rule. Just like in many other cases, in fact I think it's ironic in this particular case the defendants were the ones who came in the last minute and filed an amended answer and wanted it to relate back.

And of course the court granted leave to do that. So these procedural things come up and the court has always allowed pleadings to flush out what the real issues and who the real parties are.

HECHT: Wanted what to relate back?

SWEAT: The pleadings. The defendants in this case on the eve of trial filed leave to file an amended answer to add additional allegations. And they were granted leave.

HECHT: But they don't relate back.

SWEAT: If they don't relate back, then - well I understand. But they were granted leave to amend their answer at the last minute.

As this court can see, I think from the long line, you've been dealing with these types of issues for a hundred years. And probate is a very complex and it's somewhat of a messy business. Almost all of these cases that come up, come up because of this uncertainty about who ought to bring the claim? are there heirs? are there administrators? are we going to appoint an administrator? And one of the things that strikes me as a real problem here for a probate lawyer is, what if you don't think there's any debts, and you advise your client as the sole heir to come file this lawsuit. And then the defendants now have a real incentive to go out and let's see if we can find some creditors after this limitations runs. And then we can prove there's a need for administration.

HECHT: But isn't there a need for an administration if the claim is worth more than $2,000?

SWEAT: No. Actually I think it's typically - there's considered to be a necessity for administration if there is more than two claims, if there is more than two creditors. But I don't think there's a dollar amount on...

HECHT: I thought everybody agreed that if the value of the estate was more than $2,000 there's a necessity for administration no matter how many debts there are.

SWEAT: I'm not aware of that provision in the probate code. I think you could have - if you had a $1,000 asset and three people were claiming it, I think the court can still open administration. It would be foolish to do that economically.

HECHT: Well I assume you hope that this chosen action is worth more than $2,000.

SWEAT: Certainly.

HECHT: We're wasting our time here.

SWEAT: The court has dealt with this before. As far back as the Polk case. The US SC

dealt with it. And they've always looked at it from the standpoint of basically it's a harm analysis. Are we harming the estate or are we harming the defendant? If there's no harm to the defendant, then why should we adopt a rule that harms the estate that the administrator is supposed to protect at the expense of the defendant who is out there preparing their defense just as they would have if Carolyn Polk had filed the lawsuit.

JEFFERSON: You cited Lovato in your brief and of course we've heard argument today in that case. Are there distinctions between these cases that make a difference? In that case, she was an heir who brought a wrongful death suit. There are differences between these two. Is that enough of a reason to say one court got it right and the other got it wrong?

SWEAT: I don't think there's a distinction. There may be a distinction without a difference here. Because the - and this is over the years the court and certainly the defenses have cited you a number of cases that says if there's a necessity for administration, only the administrator can bring a case. Well if you're an heir, as I read that you're an heir or you're a creditor. And you're sitting there and you would love to bring this lawsuit but there's an administrator in place. Unless that administrator just flat says I'm not going to do it, in which case the court has made exceptions to that rule. The administrator is the person.

BRISTER: Your client was not an heir?

SWEAT: She's the sister of the deceased, so she would not be a statutory heir.

BRISTER: So why did she do this? Why did she jump in and bring a lawsuit?

SWEAT: It's interesting. I guess this was all done at the last minute so there's no much of a record. I would tell you she is probably a creditor and she's also was a joint owner in some property that had to be partitioned. And there was nobody else to do it.

BRISTER: No kids?

SWEAT: There was a child but she was - shall we say not in a position to serve. I think if you focus on the policy, and that's what would ask the court to do is to focus on the policy of why we have standing? It's not to protect the defendant. The standing requirement is so that the court can make a decision that's going to be binding on everybody. Once the administrator gets in the case, and this is what the court said in Price v. Anderson, once the administrator is in the case, then it's binding on the estate and standing is not a problem anymore. And that's what happened here.

The court alluded to this in your Embry decision where J. Abbott sort of as an ____ said, the style of that case is estate of _____, not executor or administrator or anything like that. And the court said well we assume, since nobody raised it, that there's a personal representative and that Mr. Embry is the personal representative and as a plaintiff - and it's okay. And you affirmed the case. Certainly if there had been a standing problem there that troubled the court, you would

have been dismissing the case rather than affirming it.

HECHT: She asserted here when she filed the survival action that she was the estate representative and in fact she wasn't.

SWEAT: That's true. It illustrates the problem. As I said, a lot of these cases - it's a mistake. Obviously if we had it to do over again, if Mr. Bagley had it to do over again, we would do it differently.

OWEN: What's the latest point in time that you can mature your standing right? Can you do it after judgment, but while the TC still has plenary jurisdiction? Can you do it on appeal?

SWEAT: There are a couple of cases that I recall where the court has remanded a case. This court has abated cases to go back...

OWEN: I'm talking about probate.

SWEAT: Well I think it would be the same thing until the judgment becomes final. Once the judgment is final, then the court pretty much loses any ability to fix it. I think, as I recall, there was a case where the substitution was made while the case was on appeal.

OWEN: When you say final, you mean all appeals have been taken. So let's suppose the administration lingered, the defendant got summary judgment, but then on appeal the administration came through. Then you would say, we've got standing.

SWEAT: In that situation, you haven't changed - for one thing if it's a motion for summary judgment, that denotes to me that it would be some kind of a judgment on the merits, which of course would not be.

OWEN: The defendant says she is not an heir, she's not a personal representative, she doesn't have standing capacity to bring the suit. The TC says I agree, summary judgment granted. You take it up on appeal, administration is pending, and it finally the probate court appoints the administrator. Can you cure standing that late in the game?

SWEAT: That would - I think it would because if you focus strictly on what are we are trying to cure, what the court on appeal, what the court want is we want to know that this decision is going to be binding on somebody and once you have that somebody in the lawsuit, then the lawsuit should go forward. We should find ways to decide cases on the merits as opposed to finding ways to get rid of them and denying people their day in court.

BRISTER: She's not asserting that she personally had standing?

SWEAT: No. As a survival action this is strictly the injury to Carolyn Polk, and the

benefits from the suit would go to whoever the heirs and creditors are determined by the probate court to be.

BRISTER: And whoever the representatives of the estate are, no question they would have standing?

SWEAT: Yes.

BRISTER: So why is this a case of standing rather than capacity?

SWEAT: I don't know. I think it's capacity. I think the estate has always been the real party in interest. To me if a corporation files a lawsuit, you have rule 12 to find out did the lawyer who filed that lawsuit really represent the corporation? Is he authorized to file that lawsuit. If he's not, well then that's a problem. I think this is the same situation. You have an estate before the court. Is there somebody authorized to represent that estate? If there's not, then you either fix it or the lawsuit has to be dismissed. In this case it was fixed. It was fixed before it was ever raised.

One of the things that I think the CA overlooked and this court certainly has not, is that there is a long line of cases and the relation-back doctrine really is in two parts. One there have been relation-back doctrine cases involving pleadings, amending the pleading after limitations, and the courts have said that relates back. That would be FELA cases, the Polk case, and the Wolff case. And then also you have this idea about the probate relation-back, and we have §37 that says that when an executor or administrator is appointed their authority relates back to the death of decedent. I think that's very important because from a probate lawyer's standpoint, there are a lot of times when family members, executor, the executor named in the will, the administrator who has applied, may be faced with a situation where they need to do something. They need to pay a bill. They need to do some kind of a transaction for the benefit of the estate or to protect the estate property. If the court says that Ms. Lorentz didn't have standing and never acquired standing and her appointment didn't relate back, then what you're also saying is anytime an administrator does anything for the benefit of the estate before they get those letters, then the debtor who owes money to the estate can come back in and say oh, sorry. All bets are off. I'm not bound by that agreement. I'm not bound by whatever that transaction was. And the heirs and the creditors of the estate now get harmed and they thought they were being taken care of. And what's the policy for that? Why are we trying to protect the person who owes money to the estate at the expense of the people who rightfully should receive that money.

I think that's a policy that's separate and apart from limitations. The Price case dealt strictly with limitations from the standpoint of was the defendant harmed? In this case, there's no harm, there's never been any harm and they've never tried to demonstrate any harm. This is on all fours with Price. The real distinction I think is that the rule is not different, but the policies are different when you are talking about the plaintiff, the standing of plaintiff verses the standing of defendant. In Price, the concern was did the estate's representative know about the lawsuit? Did the estate's representative have a chance to participate? The court found that they did, therefore, no

standing problem.

From the standpoint of the plaintiff, the defendant is never going to be harmed unless you change the facts of the case, or unless you change the identity of the defendant. Just changing the title behind the plaintiff's name doesn't change the defendant's liability one iota. And there's nothing in this case that would do that, and we're not asking for a rule that would do that.

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RESPONDENT

LAWYER: The first place to start is, Ms. Lorentz is not an heir. She doesn't fall into either the Shepherd exceptions for who can file a survivor lawsuit. And so we have to look back and what does that mean to her lawsuit?

O'NEILL: Is she not a personal representative? Would she not qualify as a personal representative?

LAWYER: Not at the time she filed her lawsuit or not at the time the limitations period expired.

O'NEILL: Why? What's a personal representative? What does that mean?

LAWYER: She has to be appointed by the probate court to be the personal representative of the estate. Somebody vested with authority - given the justiciable interest in the lawsuit by the probate court to say yes, you can sue on behalf of the probate court.

O'NEILL: But isn't that sort of like saying an heir has to be found by the probate court to be an heir as well? Can't somebody file as a personal representative and until that's contested they can bring the suit. It's just more of a question of capacity.

LAWYER: Yes and no. It could be a question of capacity if you look at it as to they have the authority to do whatever they want until challenged. The problem of why it is no and should be no is that if they don't have a justiciable interest, why can't I just go file a lawsuit on behalf of Ms. Lorentz, and I will just fix it later? I have no authority to represent Ms. Polk's estate or Ms. Lorentz either until I'm given the justiciable interest by the probate court saying that I am the administrator or executor of the estate. And that's what didn't happen in this case. She said she was, and that was found to be knowingly false in the TC. It was not found to be an inadvertent estate.

BRISTER: The CA seemed to turn on that, that all this was a lie. What difference does that make? What if she was just mistaken? Her lawyer told her that the letters had been issued and she was the personal representative and it turns out to be wrong. If it's important that it's a lie, then the case comes out different if she was just mistaken.

LAWYER: At least in that situation where if she was misinformed by her lawyers, she would possibly have a legal malpractice case.

BRISTER: She didn't have a lawyer. She filed it herself and didn't know. She just thought she could.

LAWYER: Pro se parties are charged with knowing the law just like having a lawyer. And if a lawyer told her the wrong information...

BRISTER: But lawyers know the law and when they misstate it, it's not always because they are lying. Sometimes it's because they are mistaken. So pro se, just like a lawyer, files a lawsuit, says I'm the representative. It turns out she is mistaken, but we can't say she was fraudulent. She is just mistaken. Does that case come out different? That doesn't make any difference does it?

LAWYER: This gets back to who is in the best position to know who the plaintiff is?

BRISTER: I don't care about that. I'm just trying to decide whether we should pay any attention to the fact that it was a fraudulent lie, which my thinking is, we shouldn't if the result would be just the same if she was mistaken?

LAWYER: I could see at least under equity if she was mistaken because she was misinformed by her lawyer.

BRISTER: If she was mistaken we might like her better. But we can't turn the law on that. And you argument is, she just had no authority, she couldn't do it even if she was just mistaken.

LAWYER: That's correct.

BRISTER: So it's irrelevant that she lied, because the result under your argument and theory is it would be just the same if she was just honestly in good faith mistaken?

LAWYER: Except under our rule 13 argument that she...

BRISTER: That what? That we can sanction her? What difference does that make about standing?

LAWYER: It makes none.

O'NEILL: Okay. So she files her pleading and would it make a difference if she had said, I have filed an application in the probate court and I will be the personal representative because - there's nothing to prevent me from doing that. We've done everything we need to do. We don't have the probate court order yet. I will be. That will be okay?

LAWYER: I would say probably not, because the probate proceedings have safeguards in place for that sort of exigent circumstance. The probate court appoints somebody temporary administrator, and so you don't have to wait for the full hearing to be appointed fully the administrator of the estate. Also, the case law has developed some situations for emergency...

O'NEILL: But if she said I have applied to be temporary administrator. It's the last day of limitations. And she says I've applied to be temporary administrator. It hasn't happened yet. But my application is there. Standing or no standing?

LAWYER: She would not have standing. But there would be a category of people with standing. And that's the heirs. Because the case law has also carved out an exception for the exigent circumstances. The example when the administrator of the estate refuses to file the lawsuit on behalf of the estate, the heirs can get together and bring that lawsuit.

BRISTER: So if she filed a suit. Instead of saying I'm the representative of the estate, she said I'm the next friend of the minor who's an heir under the estate. Everything would be okay?

LAWYER: Probably. Except in this case the heir was not a minor. The heir is an adult potential plaintiff who can file a lawsuit on her own behalf. Then you get back to is the - you can then question whether she's really the personal representative of the heir or not, and whether she has standing. Because under the family code traditionally only the court appointed guardian, or the mother and father. The whole concept of standing being we want to get the right category of people filing lawsuits...

BRISTER: I understand that. But this is what I am confused about. What if she has no standing? She's not claiming that she owns the cause of action. She's claiming she is representing an estate that does. And the estate would be hurt. No question that the estate was hurt. So why is this standing? She's saying she is going to collect the money and prosecute the case on behalf of somebody who was hurt. So why is that a problem of standing?

LAWYER: Because it goes to whether she has an interest. She wasn't hurt.

BRISTER: She's not asking for the money herself. Right?

LAWYER: Under your analogy I would be able to file a lawsuit on behalf of anybody I wanted to say was a plaintiff.

BRISTER: That's my question. Could you and, if so, is that a question of capacity or standing?

LAWYER: I think that's a question of standing. And the answer is no, or at least no. I think the case law says it's no.

BRISTER: You file it on behalf of some minor who has been beat up. You don't have legal authority for filing because you don't have proper relationship with the minor. But you're saying this minor has been hurt, and this minor needs money, and I will give the money to the minor. Why is no standing alleged there?

LAWYER: At least historically this court has treated the issue of whether the person actually filing the lawsuit having an interest is a justiciable interest being a standing question, not a capacity issue.

JEFFERSON: How would the law be threatened if we were to hold that it is a capacity issue? What damage would be done in the law, which would require the defendant to raise it and possibly to waive it?

LAWYER: It would just allow anybody to file lawsuits. At least with clear cut standing rules of being harmed and being able to bring - either being the right person to bring the lawsuit under the standing rules. We limit the class of people that brings the lawsuit. There are all sorts of creative ways that people try to creatively file lawsuits, and that is the way that it limits it.

OWEN: But you just raise it in capacity? You just say, no. I don't have capacity as opposed to all the subject matter jurisdiction problems that standing brings with it. What's the practical difference?

BRISTER: Do you think defendants won't challenge it anymore if they have to do it by capacity?

LAWYER: No. I don't think so. And in fact in another case that I've argued in the Dallas CA, we in fact challenged the capacity also because they were arguing it was standing verses capacity.

O'NEILL: So let's say it is standing. And you file it the day before limitations runs. And on that day you don't really know whether you have standing or not. You filed an application in probate court, you haven't had a chance to get a temporary appointment. Standing is yet to be determined. Why not apply the relation-back doctrine? I mean it's ultimately determined yes, she does have standing. What's unfair about that?

LAWYER: I would at least argue in the context of the medical malpractice lawsuit, the legislature has pretty much said don't apply any other laws or equities in this...

O'NEILL: So if it were not a medical malpractice case, would you see any reason not to analyze it that way: Okay, it's standing, that hasn't been determined yet. If she has standing it will relate back. Are you only relying on your MLIA argument?

LAWYER: In short, that would always be my fallback position. I think that if you look

at the relation-back doctrine in the cases that the petitioner has cited. There are some federal court cases, which include the Polk case, Texas applying federal law and following federal rules. And the federal rules of relation-back are broader than state court. And if you look at the state court cases they have cited, they apply the same federal rule or they apply different probate rules. If you look in §37 of the probate code, it's different than the uniform probate code, which is enacted in most of the other state law cases that they have cited. Section 37 only says they have the right to possess the estate as it existed way back when the person died. Under the uniform probate code, it actually says their powers relate back to when the person died.

The Texas legislature in deciding not to enact the probate code for whatever reason the legislature didn't want to enact the uniform probate code chose not to invoke the relation back power of the administrator to solve your situation.

O'NEILL: If you've got an $1 million estate and there's only one heir, no debts. Does that have to go through administration?

LAWYER: At least my understanding of the rules of probate, any estate that has a value of over $200,000 or has more than two debts needs to go through the probate proceeding. Now is there harm to not going through some form of probate proceeding? are there limited - you know there is all sorts of - you can file the will as _____ to title. There are lots of minimal probate ways you can go through that. And if it's just attached, the bank gives the guy the money, and where he's got $1 million stashed in his bed and the heir just goes and picks it up. Is there any harm to that? Probably. Nobody would ever know the difference.

O'NEILL: An argument has been made that it creates a gotcha situation where a defendant could lie behind the law, never challenge it, wait until limitations has run, go find a creditor somewhere and there's a gotcha. Now how do you avoid that?

LAWYER: I would at least go back to the facts of my case. There is no gotcha here. And gotcha was actually the other way around.

O'NEILL: But if we wrote it the way you want us to write it, would it create a potential for a gotcha situation?

LAWYER: It would create the potential for a gotcha, but it always goes back to at least in my mind to the concept of who is the plaintiff? And am I, the defendant, in the best position to know who the plaintiff is? No. The plaintiff is in the best position to know who the plaintiff is. There have been some cases that argue oh, there should have been shareholders and they filed in the...

O'NEILL: What if the plaintiff doesn't know who they are. They don't know until they go through the probate proceeding.

LAWYER: How can the plaintiff not know who they are?

O'NEILL: But they don't know if they need an administration or not. You don't know. You just said you don't know. So the plaintiff doesn't know and they proceed on two fronts. They find out later Whoops, I made a mistake. I did need it, or I didn't need it. So maybe the plaintiff doesn't always know.

LAWYER: We do allow alternative pleadings. And so they could plead yes, I am trying to become the administrator. I think that - or I've been appointed the temporary administrator. We're figuring that out in probate court.

O'NEILL: But I thought you said that if it's later determined they are not.

LAWYER: They can always file notice. They can always claim in the alternative no estate is pending and none is necessary. If one is pending and they are not appointed the administrator, it seems that would be a good fallback position for them that they would have to be an heir. The exception in Shepherd for the nonadministrator of the estate only applies to heirs. Ms. Lorentz is not an heir and would never qualify unless there is an estate pending to represent the estate and file this lawsuit, because she is not an heir. Maybe that should tell people always bring an heir along with you when you file your lawsuit I guess.

I'm not here meaning this to be a gotcha game. I would hope the defendants wouldn't play the gotcha game. But it goes back at least to the concept of the plaintiff should know who they are, whether they know ultimately on I'm going to be appointed the administrator of the will, estate or not. They know whether they've been to probate court or not. They know whether or not there's an estate pending or should know whether or not there's an estate pending.

OWEN: Well that's something you could find out too and raise early on before limitations has finally run can't you?

LAWYER: Why would we ever - this is exactly what happened in this case. We had no reason to think about that except for - getting ready for the trial. For the trial we thought they've not produced this stuff to us in discovery like we asked for it. Let's just walk over to the probate court and see what we can find. And then we found that this situation existed that she wasn't. And then we thought well she's not an heir and thus we're here. And that's why although J. Brister would not like for us to not think this knowing falsehood made a difference. It did make a difference in how we got here. Because we actually relied on what they told us at the beginning of the lawsuit, that she was the administrator of the estate.

OWEN: But if you had found out before limitations had run, you could just wait till limitations had run and then bring it up and say she's out of court. You're not prejudiced in any way. You know who is being sued, why, or who is suing you and why. You lost nothing that the statute of limitations is designed to protect.

LAWYER: Except for that standing or statute of limitations all at some end have a part that's harmful to some party or another. And correct, in the equities we haven't lost anything necessarily in the equities. But jurisdiction, you don't get to apply the equities...

OWEN: If it's just capacity, then that's something you could raise at any point in the lawsuit that could be cured. Isn't that correct?

LAWYER: That's my understanding of how capacity is dealt with.

BRISTER: You wouldn't be harmed as far as limitations being prepared. If a total stranger files a lawsuit saying I'm the representative, then as you say when you found out that's not true, you get rule 13 sanctions against for a total stranger. On the other hand if it's a sister that files the lawsuit when it should have been a child could file the lawsuit, both of them for the person who is undoubtedly died, you knew from the start what the case was. This was a medical malpractice case. You're just substituting somebody - really you're just substituting somebody to sit in the chair who has no knowledge of any of the facts in the case. You're substituting a representative. So how could a defendant possibly be harmed by that?

LAWYER: At the very least that would get back to what the legislature told us. The legislature in its choosing for doctors, decided we're going to extend the statute of limitations by 75 days from ordinary people, but we're not going to...

BRISTER: The reason they made it firm was because they wanted you to be ready, timely, to have the medical records, and the nurses and everybody still there be prepared. And the person who sits in the representative's chair doesn't affect any of that.

LAWYER: But they also wanted to not apply any other laws to that is why we gave them another 75 days. Among other reasons. But you are correct. It doesn't necessarily affect whether I know what is contained within the medical...

BRISTER: So then you would argue Chilkowitz(?) is wrong, because we changed who the named defendant was.

LAWYER: But in Chilkowitz(?) that goes back to at least what I would say is the distinction between the cases where the defendant is wrong verses the cases where the plaintiff is wrong. In the cases where the defendant is wrong, defendant sometimes create arcane or bazaar corporate structures. And so it's hard for the plaintiff to figure out...

BRISTER: And the probate code doesn't?

LAWYER: The probate code may. But it's easier for the plaintiff to know who has been appointed to represent the estate verses if the estate is sued, the plaintiff may not know where the estate have even been filed. And so there is a big difference between Chikowitz(?) and this case

because when you have defendants who have corporate structures that can be difficult to navigate the maize, you would at least may want to cut the plaintiff some slack in that case. And also let's not forget that in those cases where defendants are there, someone is in the court withstanding. The plaintiff is standing holding the jurisdictional court open. Whereas when the plaintiff is wrong nobody is standing there with the door open.

BRISTER: But do you know exactly what the lawsuit was about from the first day you got it? This was a lady.

LAWYER: I didn't work on this lawsuit.

BRISTER: Whoever got the pleading. The doctor knew the day he got the pleading what this case was about.

LAWYER: I imagine. I do sometimes represent doctors who get claims who say, I have no idea who that person is, or whatever. But yes, as a general rule, the doctor knows what's going on and what it's about once they get the lawsuit.

JEFFERSON: And as a general rule the whole policy behind limitations is to give that doctor fair notice of the claim with a reasonable opportunity to contact witnesses while their minds are afresh. And that doctrine would survive our holding that this is a capacity question since the suit was filed within limitations rather than a standing question. Isn't that right.

LAWYER: It would.

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REBUTTAL

SWEAT: First of all, going back to your question about what you would do if the case was on appeal? That happened in the Duet(?) case that was cited in the brief. In that case, the suit was filed by estate of Duet(?), and that was the only title that was ever used. But the executor of the estate participated and apparently signed some affidavits in the course of the proceeding. And on appeal, the CA said we just amend the judgment to reflect that the judgment is John Duet, executor for the estate of Mr. Duet. And that's how they cured it. They didn't even send it back. They just fixed it.

One question that I think the court has alluded to that I would like to present is, with this idea of the heir filing the lawsuit. The heir thinks they are in the lawsuit, they think they have a claim: I'm the sole heir, there's no debts to be paid. And then 2-1/2 to 3 years later somebody finds a will. And the will left everything to somebody else. All of a sudden I'm no longer an heir. And under the defendant's rule, the lawsuit goes away because I'm not an heir anymore and I don't have any standing. And never had standing because the will would relate back to the date of the death. And the executor in the will would now be the person, the only person with standing. And

you've got four years to probate that will.

That seems to me to be a very unfair rule that has no benefit to a defendant other than it's a gotcha rule. And I just think the court should really think hard before adopting a gotcha rule to deny people a trial on the merits because it seems to me having a trial on the merits and deciding cases on their facts rather than on technicalities is a good policy.

Also, I would point out that to my knowledge other than the Boseman(?) case, which alluded to the relation back after a representative is appointed, I don't know that there is any cases in Texas that have directly said what the effect is of the appointment on acts that are taken by that administrator before her appointment.

From what I can tell, the great weight of authority is that it relates back and ratifies whatever she's done prior to her appointment. And I don't think this court has every said that's not the law, or that that's not the rule. And really if you read those cases in the context of probate code 37, that's sort of what that says. That the authority relates back to the death of the decedent, and you have possession of all the property, including this claim as of the death of the decedent.

It may be that the legislature didn't adopt the uniform probate code, because 37 was already there and why rewrite something that's already on the book.

The other thing that counsel mentioned, I would invite the court to go back and re-read Polk from the standpoint that I don't think they were applying federal rules. There was a federal statute involved. But as I understand it, those FELA cases were decided under state law procedures. The Polk case was a state law case under the state law rules and federal rules of civil procedure certainly wouldn't apply to that. I think that's just consistent with this court's long history of allowing the relation back in pleadings cases where you're not changing the defendant, and you're not changing the facts and the cause of action that it's based on.

The salient part in this case that I think supports the policy that we are asking the court to adopt is, that this was Carolyn Polk's claim and it's always been Carolyn Polk's claim. There's never been a question, well are these damages suffered by Cynthia Lorentz or somebody else? In this case it wouldn't matter who the administrator was. The administrator could be anybody in this room and it wouldn't change one fact in the case. And so why should we adopt a rule that would take away the rights of the beneficiaries, would hinder the creditors of the estate, and there's no _____ to the defendant, and accused harm to those people who are involved.