

This is an unofficial transcript derived from video/audio recordings

Supreme Court of Texas.  
Kristin Terk Belt and Kimberly Terk Murphy, Joint Independent  
Executrixes of  
the Estate of David B. Terk, Deceased, Petitioners,  
v.  
Oppenheimer, Blend, Harrison and Tate, Inc., Glen A. Yale, J. David  
Oppenheimer  
and Kenneth M. Gindy, Respondents.  
No. 04-0681.

September 29, 2005

Appearances:  
Barry Snell, (argued), Bayne Snell & Krause, San Antonio, for  
petitioner.  
Mark J. Cannan, (argued), Clemens & Spencer, P.C., San Antonio,  
TX, for respondent.

Before:

Chief Justice Wallace B. Jefferson, Justice Don R. Willett,  
Justice Harriet O'Neill, Justice David Medina, Justice Paul W. Green,  
Justice Nathan L. Hecht, Justice Dale Wainwright, Justice Phil  
Johnson, Justice Scott A. Brister.

CONTENTS  
PROCEEDINGS  
ORAL ARGUMENT OF BARRY SNELL ON BEHALF OF THE PETITIONER  
ORAL ARGUMENT OF MARK J. CANNAN ON BEHALF OF THE RESPONDENT  
REBUTTAL ARGUMENT OF BARRY SNELL ON BEHALF OF PETITIONER

PROCEEDINGS

COURT ATTENDANT #1: Oyez. Oyez. Oyez. The Honorable, the Supreme Court of Texas. All persons having business before the Honorable, the Supreme Court of Texas are admonished to draw near to give their attention for the Court is now sitting. God save the State of Texas and this Honorable Court.

JUSTICE: Thank you. Please be seated. Good morning, the Court has three matters on this oral submission docket in the order of their appearance, they are: Docket number 04-0681, Kristin Terk Belt and others versus Oppenheimer, Blend, Harrison & Tate and others from Bare County and the Fourth Court of Appeals District. Justice Green is not sitting in that case. And docket number 04-0607, consolidated with 04-0608, In Re The John G. and Marie Stella Kennedy Memorial Foundation and In Re Frost National Bank and others. Justice O'Neill will not be sitting in that case. And both of these cases Justice Johnson is participating but was not able to be present for argument this morning.

The Court has allotted twenty minutes preside in these matters and the Court will take a brief recess between this argument. The proceedings are being recorded would link to the arguments should be posted on the Court's website by the end of the day today. The Court is ready to hear argument in number 04-0681, Kristin Terk Belt and other versus Oppenheimer, Blend, Harrison & Tate and others.

COURT ATTENDANT #2: May it please the Court. Mr. Barry Snell will represent argument for the petitioners. Petitioners have reserved five minutes for rebuttal.

ORAL ARGUMENT OF BARRY SNELL ON BEHALF OF THE PETITIONER

MR. SNELL: Good morning Chief Justice Jefferson and members of the Court. May it please the Court. The issue in this case is whether the Court will extend the immunity the Court has previously granted in the case of Barcelo versus Elliott to attorneys engaged in the state claiming against suits by beneficiaries. The question is whether the Court will extend that rules. So that's also to bar suits by the, the client's objective to which-- If so if the rule is so which and then it will mean that lawyers will do the state claiming or will never had to answer to anyone they will have complete immunity because the only person is that can sue when a state claiming goes a wrier or the client whose not deceased, the beneficiaries who are barred in Barcelo and, and the executrix which is the question before the Court today.

JUSTICE: Was that's-- none of this and we're just dealing with the pleadings right, in this case?

MR. SNELL: That's correct, Justice.

JUSTICE: We have no evidence at all?

MR. SNELL: No. Certainly on the summary judgment on the pleadings, your Honor.

JUSTICE: Yeah. So with respect to the pleadings, what is there about the complaints that the proceeding couldn't have know about if, if in your view we have better video records with notion.

MR. SNELL: Well, your Honor, for example, the, the decedent may well not have been aware that, that he could avoid a lot of taxes on the 6 million dollars in cash, in cash equivalents. They had in state as he approached his death. About entrance ...

JUSTICE: But that, that not come to life until after his death or could be, could he-- could in your view a better lawyer have told him about that before he died?

MR. SNELL: Oh yes, Sir. Of course, a better lawyer could have tell that. Also, that some of the transactions were undertaken just to say, failed before the IRS because they weren't properly documented, proper appraisals had been done, things haven't been done that the cause attempted the state planning not to pass most of the remedy of service.

JUSTICE: I, I know we're only dealing with the pleadings. But is there anything he pleaded that first and only came to life after his death?

MR. SNELL: All of the matters would claim that only came to life after his death, your Honor, he, he-- unless he or very stood to state plan on himself and wouldn't have needed a lawyer. He, he couldn't and wouldn't have known the transactions, for example, that were undertaken were not sufficiently documented the past motion with the IRS.

JUSTICE: But then-- but in your view a better lawyer would have

know that before he died?

MR. SNELL: Yes, your Honor. He would have done it right in the first place so I could-- when of a better question have known here be from duly existed.

JUSTICE: Do you claim that injury curdles at the time the state is structured and is just not discoverable until after death?

MR. SNELL: Yes, your Honor. It-- that, that is what we claim. We-- the Court's questions addresses what's known as the legal injury rule of or a few state planning attorney as we alleged fell short in the services of a legal injury occurred right then during the decedent's lifetime at a minimum the, the decedent could've sued how to get his money back or pay the cost of correcting the defective estate plan having another lawyer goes through to fix the things that were wrong.

JUSTICE: Well, but I think this follows up on just the next question. Do, do you claim the nature of the injury here then is inherently undiscoverable and the discovery rule has to apply?

MR. SNELL: I, I do claim that, your Honor. However, your the-- the towards-- the question of discovery rule really pertains to limitations

-

JUSTICE: Exactly.

MR. SNELL: - to the clause of action approves the purpose of limitations. Where the cause of actions approves though for other purposes or other limitations are, are governed by different criteria. The discovery rule really doesn't have anything to do when it at, when a cause of action approves for purposes of other than limitations. And I would direct the Court to a discussion in Squift versus State Farm, 129, February 3rd, 792, it's a Fifth Circuit case 1997 applying Texas Law which incidentally has a good discussion of Texas Law as to the approval of causes of action on the legal malpractice. But it points out that a cause of action will approve for ownership purposes, the core is the statute of limitation begins to run. Then the Court says, "The discovery is relevant to a determination of bringing statute of limitations begins to run." But that is not an element necessary for a cause of action to approve for purposes other than statute of limitation analysis. The, the rule that governs when a cause of action approves for other matters is the legal injury rule and this Court's opinion in Apex Towing versus Toling, 41 South West 3d, page 119 says, "A cause of action proves when facts that come in to existence that authorized a claimant to seek judicial recovery." It's clear that a clan could face or estate-planning services doesn't get that service at least it was not well done. As soon as that the lawyer completes the work in a defective manner the injury has occurred and, and at least, the client would now have a right to seek judicial relief for the cause of fixing in her recovery of the fee that was paid. So ...

JUSTICE: What that the survival statute allows personal representatives to bring the lawsuit for injuries occurred-- incurred by the descendant-- decedent during the decedings lifetime. Is at that ...

MR. SNELL: I, I believe that is correct.

JUSTICE: So what are the, what are the injuries that are-- that occurred here as a result of the faulty mistake advice?

MR. SNELL: Well, the, the-- of course, there would be a legal injury that occurred and that he paid for estate-planning services that he, that he didn't get. I think the real injury that occurred at that moment in his life when he, he reached the point of no longer being able to correct his will or change his will or correct his estate plan ...

...

JUSTICE: Most of it, most of that's-- at the moment of death, right?

MR. SNELL: Well, yes, Sir. If they were conscious at the-- and, and, and accompanied at a very moment of the death.

JUSTICE: No, I mean if, if he, if he sets up a trust an hour before he dies then he didn't get tax in it, he doesn't set it up and then the he gets the tax is ineffective posed at the moment of death, didn't it?

MR. SNELL: Yes, Sir. The tax was-- they are determined as of the moment of death. But, but when he lapses in the spinal unconsciousness with the defective estate plan in place, I think the harms clearly done then ...

JUSTICE: Well, we meet that even there technically one lapse did to unconsciousness a year before death, guardian might be appointed. All might be done by the guardian, so really until death he's not hard.

MR. SNELL: I don't now Judge, can a guardian right of will, I wouldn't have thought so that the perhaps ...

JUSTICE: Do almost anything with Court approval.

MR. SNELL: Honestly, that's beyond my expectation to tell you that ...

JUSTICE: It's not usual, that's adequate.

MR. SNELL: But-- Yes, I suppose. Technically, there's no question that estate taxes arise of-- based on what your estate has in it and what form and types at the time of your death. I, I do acknowledge that. But the legal injury under any analysis of legal injuries has already occurred does the clients could bring that cause of action, you could've seek judicial redress.

JUSTICE: Help, help me figure out how this is going to work. The personal representatives of the estate or almost always beneficiaries in type, I mean that's a fact. People, I mean yes, the super wealthy appoint banks but everybody else supports kids.

MR. SNELL: It's all from the ...

JUSTICE: Spouses or kids? So they're usually going to be the beneficiaries too. And the main thing we're talking about wording taxes is that-- during my life, I have to give up control of the property. So I don't get the tax on it. If I have control of it generally speaking I'm going to get tax on it, right?

MR. SNELL: There's a greater or lesser extensive control of either detain ...

JUSTICE: So some base-- so basically these cases you wanted to bring and they say you are can never be brought no way, no how, your cases going to be people who were beneficiaries saying, "Daddy would have left us all this money earlier and give it up." And they're going to be saying, as what daddy told us. And so we're going to be-- how are we going to prove that one way or the other?

MR. SNELL: Well, your Honor, that's going to, that's a proof issue like any other case would dispute it facts. It maybe a difficult proof issue the, in, in this case we'll have evidence that, that they did have admitted they didn't discussed certain estate-planning techniques with the, with the decedent. And it certainly they did everything they did say, I mean he did a lot of estate-planning, they made a lot of transfers, partnerships only advised the law.

JUSTICE: The question will be even though he has estate plan expresses no intent to give up control. We believe privately he had such a estate plan.

MR. SNELL: Yes, Sir, that would be a fact question and it can be proof question and in many occasions that it would be a difficult and



may be even in summarable one but the, that the fact that a case is hard to prove ...

JUSTICE: That makes you estate, that make a estate-planning more or less expensive?

MR. SNELL: Judge, I don't honestly they would, it would affect the estate-planning. I think the cause of anything, it make the lawyers ...

JUSTICE: Of course, of course you, let's, let's assume people who are liable for things charged more money that if they are not allowable for things, that's pretty easy, right?

MR. SNELL: Yes, your Honor.

JUSTICE: And if their rule is right basically your argument that you started out with, they can't be sued for anything by anybody so as estate-planning opportunity.

MR. SNELL: Perhaps so, your Honor, and we, we could make insurance a lot less costly if we don't let people of burden in all the [inaudible] and sue.

JUSTICE: Calls all the Court, insurance will be taken.

MR. SNELL: Yes, Sir, we can, we can make manufacture in cheaper of manufacturers, we're not responsible for defective products and a lot would deal [inaudible] the economy would resolve criteria but that ...

JUSTICE: In Barcelo, we were worried that it would be better to have bright line rule and process would approved to them.

MR. SNELL: Yes, Sir, I'm just ...

JUSTICE: And perhaps you know the McDonald case.

MR. SNELL: Yes I do, your Honor.

JUSTICE: And it's here too.

MR. SNELL: Yes, your Honor.

JUSTICE: And I, I haven't looked at the record in the case but from the Court of Appeals opinion, it looks like the services were rendered about 30 years before the decedent's death and that there may have been a problem of characterization of the decedent's previously his wife's property as separate from of community, separate it will gone to her heirs and if it in community you will going to make the share. So it just looks from reading the opinion that the decedent might have had a reason in his own mind to what characterized the properties of community rather than separate. Even though 30 years later the complaint is more legitimate characterized as separate. Is that not an example of the case that would be very hard to sort through 30 years later when the tax is late or more than people think that should be?

MR. SNELL: It sounds hard to me Justice Hecht it really does. It is him like who present difficult proof of problems but it's not uncommon, I believe it we have a in medical malpractice, for example the issue of causation in science behind cause of effect is ultimate extremely difficult to prove and difficulty can may conclude it's not usually better grounds for a denying litigant's access to Courts to try the remedy of wrong. Some cases would be very easy to prove others maybe in summarably difficult to prove. But we never let that standards as a barrier at least, traditionally we don't do that allowing litigants they are dying in Court to seek justice when they've been wrong.

JUSTICE: Where statutes and limitations about them?

MR. SNELL: Yes, there are statutes and limitations, your Honor. Of course, there's generally, in the field of legal malpractice this Court knows the discovery rule is applicable again it was taken to the malpractice claims and in the-- it is often the nature I think that malpractice in estate-planning that it is inherently undiscoverable

because it is-- it's a highly technical complex field. It doesn't necessarily follow common sense at all as part of that of a county.

JUSTICE: We've the ...

MR. SNELL: And it take someone who is high in training and skilled to detect the malpractice in many cases.

JUSTICE: We've discussed this morning whether the decedent has suffered an injury. Do you say that the estate suffered any injury and it so in what regard?

MR. SNELL: Yes, your Honor. The estate has paid of million and half in taxes that could've been avoided to compliment estate-planning.

JUSTICE: And, and have we recognized of the in a estates injury and that we never expect before? For legal malpractice I suppose.

MR. SNELL: Not that I've been able to discover, your Honor. I have ...

JUSTICE: We have section to Barcelo?

MR. SNELL: No, Sir. I mean, not in the, in the context of the estate-planning. You know, in other context, you know, I think so. I mean, if a, if a lawyer had negligently failed to found an answer in the default judgment when we're taken against of and in supposed when that person died. You Honor, I don't, I don't think you're being questioned, I don't think Mr. Fernandez told you that the, that person of the estate couldn't seek or address. So but, but I don't know that you've been encountered before in the area of legal malpractice and inform of the estate-planning.

JUSTICE: I was thinking of cone and decent and which is perhaps dicta-- well, not dicta but comment that the statement suffers no harm from a negligently drafted. Tell me your doctrine ...

MR. SNELL: I, I actually think your Honor that, that was in Justice Spector decent-- by the way in, in Barcelo, Justice Justice Spector said, in that decent that the test of the personal representative would succeed to the testators cause of action upon a testators death. Now she made that statement and no one took issue with it. Of course, I understand that's a dicta and it's only in the decent are certainly don't make it is absolutely controlling but it seem to be the, the mind set of the course the testators would sue. But the problem there is that, I think Justice Spector was talking about there's, there's only a disappointed beneficiary of Aunt Sally doesn't get the, the thing that she was to get. The estate itself is not diminished. This goes to the residuary rather than [inaudible]. So the testator has a different cause of action, does his estate is not reduced. Here are the testators trying to [inaudible] estate itself in, in-- I think it's easily important distinction from Barcelo. Here, the testator and all the beneficiaries, I mean, they are executor-- excuse me-- and all the beneficiaries are presumably aligned. They have a common goal of having the estate file being as largest possible rather than competing beneficiaries struggling over the size of their particular piece of act. Which you know ...

JUSTICE: Well, not all-- I mean, not all these. Some people actually leave their estate to the government for reasons. I can't imagine but some people do it and you could decide to do it this way.

MR. SNELL: Yes, you Honor. It what using ...

JUSTICE: Not out, it's not out of the question.

MR. SNELL: What if it would be hard to understand why he would be spending a lot of money on the estate planners go about whose job was to reduce taxes. If that were your objective just leave it to the government. There are a lot of policy considerations that are going by the lay side at the justice corner and directing us to this decision in

Barcelo which by the way was only a five-three decision to make that everyone would agree there are policy reasons there, there well recognized, we don't usually want innocent parties to have to bear the financial burden of, of someone else's mistakes. We generally agree that tolling of people accountable for their neglect improves the behavior and tends to discourage a negligent behavior.

JUSTICE: Thank you. Thank you, Mr. Snell, are there any further questions?

MR. SNELL: No, your Honor. I'm sorry, I forgot the red light.

JUSTICE: We'll hear from your time for rebuttal. The Court is now ready to hear argument from the respondent.

COURT ATTENDANT #3: May it please the Court. Mr. Mark Cannan will present the argument for the respondent.

ORAL ARGUMENT OF MARK J. CANNAN ON BEHALF OF THE RESPONDENT

MR. CANNAN: Good morning. May it please the Court, on behalf of the respondent. Clearly, the Fourth Court of Appeals felt that the Court's decision in Barcelo was controlling of the facts and circumstances in this case and that the-- in fact, to enforce of that precedent compel the decision there, I think it compels the result today. This Court just had the opportunity and task to discuss the importance of precedents. I, I refer to the, the Court's case in, in Wayner versus Western discussing medical malpractice limitation in Wayners. And, and apply and there the Court was asked to overturn the precedent of same twelve ...

JUSTICE: Oh, but when would have to overturn, we would just distinguished there. I mean, you'd agreed that when you have beneficiaries competing for the price, it's very different and have any executor or executrix bring a suit on behalf of the decedent.

MR. CANNAN: I would not agree with that is different, your Honor. That the practical impact and the interest asserted are identical whether it be the first to one representative or the beneficiaries in person.

JUSTICE: Well, except that the-- what they are trying to do-- I, I see that they could have rely that, the thing that they be a beneficiary there was also an executor, but the beneficiaries were all trying to get their different pieces of the pie, where the executors trying to maximize the value of the estate.

MR. CANNAN: Well, to, to carry the pie analogy, the personal administrators attempting to determine that the extend of the pie if you will which will determine then how many pieces can be divided up among the beneficiaries. Clearly the interests in terms vis a vis the estate-planning considerations of the, the underlying defendant's the lawyers are, are no different in the policy considerations which were emphasized in Barcelo.

JUSTICE: Well, let say you have a bank executor. And the bank has no interest and he get's what? I just want to maximize the assets. What, what would be wrong with allowing that the executor to sue. There's no conflict of interest?

MR. CANNAN: Well, the conflict of interest arises on behalf of the estate planner at the time of the estate-planning. Irrespective of whose going to be asserting the interest of the estate. If the interest of the beneficiaries or the interest of the personal representative are



to maximize the estate, in, in this case what we're talking about our tax consequences. Then the lawyer of the estate planner at the time of the estate-planning, his consideration is the interest of the distributor at the time for his client, the testator. Without any consideration of any potential claims whether those potential claims be brought by the beneficiaries or by representative of the estate. The interests of the beneficiaries or the representative of the estate, at the time of the estate-planning and this was certainly a primary reason expressed in Barcelo for the bright line privity rule that, if the estate planner at that time had to take into consideration the interest of potential claimants and I suppose that would encompassed both personal representatives or beneficiaries directly. If the estate plan had to take into consideration, those contingencies and those potential claims and then the as dedication and loyalty to the client would be conflicted.

JUSTICE: But your position -

MR. CANNAN: But if they wouldn't matter who-- whose the potential claimant.

JUSTICE: - but your position was-- would result in no malpractice for estate planners, ever?

MR. CANNAN: At least in the circumstances presented in, in this case or in Barcelo.

JUSTICE: Well, but in, in what circumstances would there ever be-- you could ever bring one?

MR. CANNAN: Before the Court is not to question of a totally invalid will for example that would be created by the estate planners. We have here a valid will that expresses the intent of the testator on its base, knowing invalidity that, that to challenge that is to start exploring what may have been the intent of the testator irrespective of, of that would-- will expressing negligent. Before the Court for example, would not make a case of the estate planner who created an entirely invalid will but they got benefit the intended beneficiaries.

JUSTICE: But it looks like from the pleadings that if-- and that's all we have, that what might be being claimed is that the same order to do something. Everybody agrees that he did and the lawyer messed it up.

MR. CANNAN: I, I don't see that in the pleadings. Your Honor, I, I think that all ...

JUSTICE: Failure to obtain appraisals for certain insurance policy before transfer. Failure to obtain appraisals for certain ranges things should know. I mean, it's impossible just to read the pleadings that, that was on a checklist of things that should've been done to make this valid and it wasn't done that. And I don't know whether that's true or not but ...

MR. CANNAN: The will has have no questions the validity of the will. The failure to take appraisals to transfer properties have to do with transfer properties and partnerships. There we get into the question of life time consequences of tax deficiency. The emphasis by petitioner's is that there are tax consequences after death and this is harmful because -

JUSTICE: What, what, what I'm saying, what I'm saying ...

MR. CANNAN: - but there could have been questions have controlled of the assets.

JUSTICE: No. But I'm not saying that-- I, I understand you. And maybe it's a good idea to have this limited partnerships but maybe it isn't. But if to-- if what should decided that this is a good idea and no one wants to contest that but to get it done and have to be these appraisals let say this part of the burden of the pleading and there



were of these appraisals, then why isn't that just of classic malpractice?

MR. CANNAN: The appraisals were part of parcel of transfer in the properties to the limited partnerships and thus losing control of the properties. So that if one takes into considerations the, the judgments based upon lifetime consequences, i.e control of the assets. That control of the assets would, would mandate that no appraisals be done not a failure to, to appraise property that otherwise should've been appraised. But a failure to transfer property maintain control of the property and, and on even on the pleadings just no appraisals necessary. But, but again to determine the issue that, that the Court is suggesting, it goes back to presumably squaring match as to what the intent of the testator was irrespective of the, the documents that evidence say anything and, and that is contrary to, to what was stated at least to this point. But more importantly goes back to placing that estate planner into the conflict decision of considering not just the lifetime consequences for the testator and, and presumably, I mean, total testator but how it might look based on the tax consequences for the estate itself. Assertive, wondered give through the beneficiaries one was reading personal representative.

JUSTICE: Mr. Cannan, would, would you approach that is that once the testator does no cause of action can be brought for the estate-planning legal services. Would that provide perverse incentive for normally upstanding professionals to try to hide any problems until the testator does? Wouldn't that create an incentive that's inappropriate?

MR. CANNAN: With all due respect, I, I think I cast a shadow on the estate-planning part that, that's-- it's not, not appropriate not, not ...

JUSTICE: No, no, no. As I said, it perverse, I think generally an upstanding set of professionals. And, and I'm not saying that-- I don't said, that anyone is going to take advantage of it, I said, it creates an incentive, doesn't it?

MR. CANNAN: It, it does, it does but I think that, that is more than offset by the negative incentive on the other side that if a estate planners needed to be concerned about potential claims from unknown beneficiaries or personal representatives that, that would be a negative incentive not to represent the client. And frankly, it, it would also mean a lack of control by the client of his Counsel of choice. That a client would make a choice of Counsel who then would be making determinations not necessarily for the benefit of the individual whose selective in for estate-planning purposes but for the benefit of that client and unknown beneficiaries of personal representatives in the future. I think that the, the incentive at-- whatever incentive there would be for that folks to take advantage of the, the immunity if, if that's what you want to describe it as, is more than offset by the necessary impact of the bright line privity rule were eliminated. Here's-- for personal representatives as well as the beneficiaries.

JUSTICE: Of course, it, it would be easy enough to protect yourself against these claims. I mean, lots of the estate planners video taped the will signing today to show that they warn the client understand you want to keep in control of this and not put them in to a trust, I mean to take a moments work to protect yourself completely.

MR. CANNAN: In somewhat, certainly do that. So to practice to send somebody ...

JUSTICE: So why should we, why should we make a harsh rule like nobody can sue estate planners when they can easily protect themselves?

MR. CANNAN: I, I'm not sure everybody would have the, the ability

or, or frankly the forethought to protect themselves in a, in a way that the Court has described about. I think certainly many would and to the extent that would protect some folks, I, I suppose that's good, I, I'm not sure that, that would be complete protection in all cases if in fact to a lawsuit on behalf the beneficiaries of both estate. The representative were allotted but, but certainly some people would just assert to do that. But if the, the-- then that impact frankly of, of what is being hardly done on behalf of the petitioners it is to we point damages to the estate to tax consequences without any consideration at all of the lifetime consequences for the testator. An ineffectively, I think they're asking that, that the ports be allowed to rewrite wills that, that effectively what, what would occur is that notwithstanding that the testator would have the opportunity to take the advantage of whatever lifetime consequences he sought and get the advantage of those lifetime consequences whether it be 1 hour before death or 30 years before death and he took advantage of those lifetime consequences that petitioners are asking that we changed the will to allow certain tax consequences that were not contemplated at that time and, and that the attorney was the estate planner bearing burden of those taxes.

JUSTICE: But if that was such an overwhelming concern in cases like this wouldn't our jurisprudence be more the mainstream, I mean, Barcelo is not in the mainstream of American jurisprudence in this area, would you agree?

MR. CANNAN: I, I would agree with it, it is my authority if you [inaudible].

JUSTICE: And, and does any estate hold an executor who can't bring this type of action as suppose to the beneficiary?

MR. CANNAN: I have not saying that particular issue of ours, your Honor. If-- it was mentioned in, in the Marilyn case which followed brief de novo I guess which followed by Barcelo for about a year. But it, it also said that, that case would be limited to if, if the executor brought the case a limited to the cause of the legal services at the time it says the only cause of action that accrued for estate prudence that but in this ...

JUSTICE: There was no a privity problem?

MR. CANNAN: For that particular limited recovery which is not what the plaintiffs are seeking here when we talked about the tax consequences to the extent. Thank you.

JUSTICE: Thank you.

#### REBUTTAL ARGUMENT OF BARRY SNELL ON BEHALF OF PETITIONER

MR. SNELL: Your Honor to address Justice O'Neill's question I, I would refer the Court to McDonald versus Pettus, 988 South West 2nd 9, which is a Supreme Court of Arkansas in 1999. If the Court did hold the executor couldn't bring a legal malpractice claim but that was based on the Nick Arkansas statute of the executive court allowed the executor to bring other claims on behalf of the estate saying that, the estate becomes the decision post [inaudible] the executor is the estate planner in terms of purposes and did find the necessary privity with the attorney. It was only in Arkansas statute that, that we don't have that did not allow the executor bring the legal malpractice claim.

JUSTICE: If we, if we agree with you in this case, don't we in

effect set aside all our cases saying that beneficiaries can't challenge? Any beneficiary-- even if a beneficiary is not a personal representative, they can ask the court to report a personal representative or substituted them. And if that's so, that can every beneficiary by getting themselves appointed personal representative end up doing the same thing, we said, "Beneficiaries can't do which is so insane, the testator wanted to give me all of the property instead of my brother or sister."

MR. SNELL: Your Honors, first of all I questioned the premise of your, of your, your question, I think that the personal representative is typically named in the will and ...

JUSTICE: Right, but that can be changed?

MR. SNELL: Well, I suppose it would be possible that someone could replace the executrix names, name by the testator ...

JUSTICE: Sure, he file, he filed a claim upon do influence and if the trial judge believes you, you replace them with you. And then in effect we're back where we were before all of this beneficiaries have a way around the system and they can end up suing saying, "Daddy minute to live more to me and less to her." And the estate planners are in a bit to pickled them.

MR. SNELL: Well, your Honors I, I suppose you can, you can come up with a hypothetical where that might happen to seem to awfully remote to me and, and, and, and, and it could happen in a case like this where the question is, not exclusively particular beneficiary who got that out. But it's a reduction in to the sides of the whole respect ...

JUSTICE: But that thing you're asking to do would avoid them. I would, I would withdraw land and says, "You're case but no other."

MR. SNELL: I wouldn't ask you to draw a line. This is my case but no other, but if it some case that's a, a lot different in this of course, the Court could rule differently on different facts. I would point out I would like to make your Honor-- Federal Law allows bankruptcy trustees to sue on behalf of the bankrupt for cause of action that accrued before the bankruptcy including legal malpractice. And, and, and, and that doesn't seem to have done any great violence to the ability of the attorneys to represent people prior to bankruptcy. I would, at least would, I can find nothing, I don't see that is a public concern, I don't think it has done any harm at all, I think it's very incongruous that we would let bankruptcy trustee sue for the estate of the bankrupt that we won't let an executor to do that.

JUSTICE: Well, our concern is the debtors are still alive. And so you can put them all in stand and asking. What they did you tell the lawyer to do? What, what was, what were the considerations? Here, it is quite gotten that somebody who is planning at the estate will do so and will haste that those who succeed him do not appreciate them. You keep people out take more control of the property then they think you should of. And then going back and saying, "Why you should have done it another way with the felony on the ground is aptly difficult to sort out."

MR. SNELL: Again, is, is the fact that proof maybe difficult grounds sort of a limited cause of action. I, I would suggest not but another incongruity I would like to mention I would did let the lawyer sued that to see his client estate for his fee and it just seems fundamentally unfair to let the lawyer sue for his fee but not the claim suit the malpractice. Thank you, your Honor.

JUSTICE: Thank you, Mr. Snell, the case is submitted and the Court will now take a brief recess.

COURT ATTENDANT #4: All rise.



2005 WL 6171277 (Tex.)