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Supreme Court of Texas.
A.G. Edwards and Sons Inc., Petitioner,
v.
Maria Alicia Beyer, Respondent.
No. 05-0580.

March 22, 2007

Appearances:

Robert B. Gilbreath, Hawkins, Parnell & Thackston, LLP, Dallas, TX, for petitioner.

Angela M. Nickey, Robles Bracken Coffman & Hughes, El Paso, TX, for respondent.

Before:

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

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CHIEF JUSTICE JEFFERSON: The Court is now ready to hear arguments in 05- 0580, A.G. Edwards & Son versus Maria Alicia Beyer.

ORAL ARGUMENT OF ROBERT B. GILBREATH ON BEHALF OF THE PETITIONER

MR. GILBREATH: Please the Court. When the court of appeals, to reach its holding, must add words to one statute and omit the entire last phrase from another statute. That's pretty good indication that Court's holding is wrong. But before I address the statutory construction issue in this case, I'd like to get a potential red herring out of the way. The Court need not decide in this case whether to recognize a lost document exception to Section 439 of the of the Probate Code. Why? Because Ms. Beyer has never argued for a lost document exception to statute. Instead, she contends that this case falls within a loophole, such that Section 439 simply doesn't apply, but whether or not to recognize a lost document exception is not an issue before the Court. Now, in Stauffer versus Henderson (801 S.W.2d 858), the Court held that under Section 439 of the Probate Code, extrinsic evidence is not admissible to create a right of survivorship and a joint account. The only way to establish survivorship rights is to produce a signed writing complying with Section 439 of the Probate

Code. And the trial court and the court of appeals in this case, however, permitted Ms. Beyer to use extrinsic evidence to complete the very one that her father intended to leave her.

JUSTICE MEDINA: Well, is that, is that because there were some lost documents by the bank? You think that had anything to do with the allowing of that evidence and otherwise, perhaps, would not have been admissible?

MR. GILBREATH: Her position was that Section 439 ought not to apply in this situation because as she contends that bank lost this document.

JUSTICE MEDINA: And I, I have, as I read the file, I thought there was some agreement as to the document being misplaced -

MR. GILBREATH: No.

JUSTICE MEDINA: - the bank's employee.

MR. GILBREATH: There is none. They-- they, kind of, portray it that way but, but that's not what the evidence is in this case, your Honor. The evidence is that it was disputed whether the bank lost this document. I want to make that point very clear. Is it does come across that way and Court said, the Court of Appeals has been-- in some of the briefing, but we dispute that we lost that document. She put on extrinsic evidence to say that her father signed this document and that she took it to the bank but there was nobody from the bank that said, yes, we got the document. There is some testimony that they tried to characterize that way from Mr. Niemeier, the broker. Well, what he said was, 'I went and I-- when she came to the bank' and said, 'Where are the documents?' He said, 'He went and he checked and he found-- the only thing he looked for was called a cash convenience accounts and check writing authorization' and he said, 'Once I found that, that's all I needed.' He never said, 'Oh, I found the joint account agreement', which she says 'was lost.' And we put on evidence that we turned the place upside down looking for that document and never found it. So there is a dispute about ...

JUSTICE MEDINA: The check agreement was the document that he found in his desk or is that something different?

MR. GILBREATH: He went to the front portion of the office to find the cash writing or the check, the cash convenience account, I think they call it check writing authorization, and that's where he found that.

JUSTICE HECHT: But there's no dispute that the right of survivorship account was not created, and they concede that, I think.

MR. GILBREATH: Well, they do. They-- that's right, your Honor. They take that position, but I think what's important-- because what, what they're going to argue to you is that, well, we didn't use extrinsic evidence to prove survivorship rights.

JUSTICE HECHT: This is-- isn't this more in the nature that malpractice or negligence, sort of, claim as opposed to, you know, we agree that we wouldn't touch the basis so we don't have account, but you said, 'You would give us that, kind of, account and you messed it up.' So you should have some liability for that.

MR. GILBREATH: That's their position, your Honor, and what they said, and I'll tell you we, we didn't use extrinsic evidence to try to prove survivorship rights in a joint account. But they did, your Honor, because what they did was they used extrinsic evidence. Their extrinsic evidence was Alicia Beyer and-- and-- Mr. Beyer's housekeeper, Nora, Nora Aldaba. They'd testified that they took home this Joint Account Agreement and that Mr. Beyer signed that agreement and that it had survivorship rights in it and thereby created survivorship rights in

Alicia Beyer. So they used extrinsic evidence to establish that she had survivorship rights in his account. Then they take the position that we destroyed those survivorship rights by losing the document. So that's a key point that they did use extrinsic evidence here to ...

JUSTICE O'NEILL: Well, let me just ask you this. Let's, let's take as true, and I understand you're disputing of these facts, take as true that the bank did, in fact, lose a signed written agreement. What would be the recourse against the bank in that situation?

MR. GILBREATH: The recourse, here's-- the, the answer to that question, your Honor, is that it depends upon what the courts do with the potential lost document exception. I think as the law stands now under Section 439, if there's an allegation that the bank, so it's going to be a case where the plaintiff says, 'the bank lost the document,' and then they've got prove it. How they can prove it? Well, they need extrinsic evidence to do that, but Section 439 says, 'No, you can't use extrinsic evidence. You have to have a written document.' So-- and that's their position as well-- that's just not fair, but that's the way the statute operates. So what we need is one of two things. If this is a real problem, banks losing documents ...

JUSTICE O'NEILL: I know. Let's just take as a hypothetical: Bank lost the document.

MR. GILBREATH: Right. They have no recourse under the laws that stand unless there are two unpublished cases where the Courts allowed extrinsic evidence to prove up a lost document. Now, those were not lawsuits against the bank. The other way that they could-- if the bank loses a document, the other recourse is for the legislature to create a lost document exception. Now, why do I say the legislature instead of the Courts? Because the legislature has enacted statutes providing-- allowing parties to prove up lost documents. There's Section 85 of the Probate Code that allows proof of the lost ...

JUSTICE O'NEILL: But do, I mean, do you think that's what the legislature really intended -

MR. GILBREATH: I ...

JUSTICE O'NEILL: - in the Probate Code?

MR. GILBREATH: I ...

JUSTICE O'NEILL: I mean, let's say that there is a, a fire that breaks out in the document room, and all of the sudden, all these agreements are destroyed, then you would say everybody-- his, his agreement was destroyed, loses their right of survivorship?

MR. GILBREATH: Well, that would be different situation than here where there's a claim against the bank for negligence. Let's say, I guess they could see the bank that you are negligence on allowing this fire to occur.

JUSTICE MEDINA: [inaudible] What is a hurricane like Hurricane Katrina or some, some other manmade or a natural event?

MR. GILBREATH: That's right and the courts either-- the courts may recognize a lost document exception, which is a dicey proposition because once you do that, you open up the banks to all kinds of extrinsic evidence where a party can come in and say, 'well, we had a lost document here, so you paid the wrong the people,' and there could be all kinds of circumstances beyond the ones that you're thinking.

JUSTICE HECHT: Well, that's what happened in Bank of America versus Haag (37 S.W.3d 55), right?

MR. GILBREATH: That's what happened in Bank of America versus Haag, needs to happen here probably is for the legislature who created a lost document exception. They've done in another instances for lost wills and lost negotiable instruments and a reason on legislature to do

it is because there are a lot unforeseeable problems to creating a lost document exception, and so the legislature can take testimony from participants in the industry, law professors, and other experts, you can say. Here's situations where you would want to allow extrinsic evidence to prove up a lost document, maybe the fire at the bank situation. Here are situations where it shouldn't be allowed, and they can set a standard of proof when they can apply the statute to particular situations.

JUSTICE: Well, what, well, couldn't, couldn't Section 439 be read to be limited to ownership disputes between parties to the account, which is not the, the issue here?

MR. GILBREATH: No, your Honor. I can't for two reasons, and this one, what I opened with is to get to that conclusion. The court of appeals had to do two, I think, remarkable things. First, they had to add words to Section 439, and we talked about that in our brief, how they added an entire phrase to make it seem like this statute only applies in a suit against the decedent survivors. Next, and this is the most remarkable part, they'd relied on Section 437 to say that it doesn't apply in this situation. And the Court, without any ellipses points or any other indications that it was doing so dropped off the entire last phrase of Section 437. And that entire last phrase is key here because what it says, 'is-- 437' says, 'The provisions of Section 438 through 440, the concerned beneficial ownership are only relevant controversies between their persons, between these persons ...

JUSTICE O'NEILL: Well, you, you left out 'as between parties.

MR. GILBREATH: Yes, but I'm not trying to-- I was trying to be quick about my recitation, but as between parties, but the key-- what I want to get to is the last phrase that they-- court dropped off, and have no bearing on the power of withdrawal of these persons as determined by the terms of the account contracts. Now, the court of appeals just dropped that entire last phrase, put a period, acted like that Section or that phrase didn't exist. Why? Because that phrase makes it very clear what Section 437 is trying to do, what's it saying that banks-- you can-- and financial institutions, you can rely on the account agreements to determine that survivorship rights, the fact ...

JUSTICE HECHT: But suppose customer comes into bank and says, 'I want to set up a-- one account of right of survivorship. How do I do that?' And the bank employee says, 'Well, this is how you do it,' and there's no question about this or you just tape record it or something, so that there's no doubt that this is what happened. And the banker gives bad advice, which says, well, you should fill out this form or do this but forget to check it or they don't use the right language or something. And, and the customer makes very clear that this is what I want, and I'm depending on you to advise me here, and so it doesn't happen. So the account was not set up correctly. Does the bank had any liability for that?

MR. GILBREATH: The bank doesn't have liability for that, your Honor, because it requires extrinsic evidence, unreliable extrinsic evidence so the plaintiff coming-in before them saying, 'Well, this was what happened,' and the bank officer was saying, 'No, that's not what happened.'

JUSTICE HECHT: But if-- I suppose that the customer goes in and says, 'I need you to wire this money to this escrow agent by such and such time, otherwise, I'm going to lose this deal,' and the bank says, 'Fine, we'll do that,' and they don't do it, and I suppose they'd have some liability in that situation, would they?

MR. GILBREATH: Yes, and, and the reason ...

JUSTICE HECHT: It's hard to see the difference.

MR. GILBREATH: Well, the reason is as, as you explained in Stauffer versus Henderson, and that's explained in the Probate Code-- the Uniform Probate Code, in order for banks to be induced to provide these joint account agreements with rights of survivorship, they need a great deal of certainty about their liability, and because if there are situations where parties can come in with extrinsic evidence, something besides the writing and saying-- besides the writing and allege that, 'Well, I did have survivorship rights and you botched it,' then, the banks aren't going to want to offer this agreements, so if they continue to do so then what they'll do is just interplead the funds in every case until they have absolute certainty that there is no outstanding potential claim that could be based on extrinsic evidence ...

JUSTICE JOHNSON: But how does an interpleader help you in this case -

MR. GILBREATH: Interpleader ...

JUSTICE JOHNSON: - because if the parties agreed, there was no agreement, you still end up with the complaint that you did not-- that you lost the agreement. So how does an interpleader help you in a situation like this?

MR. GILBREATH: In a situation like this, it probably wouldn't help us, but banks are going to take, take the most cautious approach that they can find under the law. I want to give the Court one hypothetical that I think demonstrates why the protection-- why the statute applies to this situation, why it's inherent in the statute. Let's take this hypothetical. Nephew tape records a telephone conversation with uncle. Uncle says, 'I'm going down to the bank right now and I'm going to open up the joint account and I'm going to give you survivorship rights.' The tape-recorded conversation, uncle goes down to the bank. He changes his mind and he's-- fills out just a plain old joint account agreement, no survivorship rights. Then uncle dies, the bank takes a look at the, the account documents and decides, 'Look. There's no survivorship rights here.' So they give the money to uncle's heirs. Nephew then comes into Court he sues and says 'I have survivorship rights in that account and you paid the wrong people, so owe me damages and I prove it with this tape recording.' Well, the bank moves for summary judgment because under Section 439, the tape recording is not admissible.

JUSTICE HECHT: And the motion should be granted.

MR. GILBREATH: Motion should be granted. So ...

JUSTICE HECHT: Then the tape recording is between the bank officer and, and the customer instead of-- between these people, then I agree, to change of mind in essence to make it worse.

MR. GILBREATH: It would, but I think that's a situation that the legislature may need to address but perhaps, a lost document except ...

JUSTICE WAINWRIGHT: Let's go back to the lost document. You said, 'It's disputed that the joint account agreement was lost by A.G. Edwards.' The respondent says, 'Pointing to some record, cites that Niemeier found the documents including the joint account agreement, showed them to the plaintiff, Beyer.' So is it disputed that A.G. Edwards had the joint account agreement at some point and time properly executed by the Beyers?

MR. GILBREATH: Yes, your Honor. Very much so.

JUSTICE WAINWRIGHT: How so if Niemeier said, he had them and show them to Beyer after she sign it?

MR. GILBREATH: That's a mischaracterization of a little of the evidence. But that's Alicia Beyer's testimony about what happened with

Mr. Niemeier. She said she went into the office. He went to-- and she said, 'Where, you know, why don't I have licensed account set up?' He said, 'Well, you didn't give me the documents back.' And then, he says-- and she says, 'Yes, I did,' so he says 'Let me go check.' And he comes back and says, 'Okay. I found the documents. We're fine.' So their characterization on that is that it included the joint account agreement but Mr. Niemeier testified when he went back there, the only thing that he looked for was this cash-writing check convenience account, this cash-writing-- check-writing authorization and that's all he found, not the joint account agreement. So it is disputed.

JUSTICE WAINWRIGHT: And the jury found to the contrary that against A.G. Edwards, implicitly, at least.

MR. GILBREATH: That-- they didn't, your Honor, because we objected. At, at the charge stage, we-- our first objection was we object to the omission of the questions asking whether or not there was ever a signed joint account agreement that was lost by A.G. Edwards, and over our objection, they refused to submit that question. So there can be no deemed or implied finding that there was a lost document that was signed by Mr. Beyer and that A.G. Edwards lost.

JUSTICE WILLETT: Going back to your taping typo, so if the bank itself had not just audio taped, it may be a videotaped the entire series of back and forth transactions, including maybe even capturing on videotape the executed documents, even that would be inadmissible?

MR. GILBREATH: I think under law as it stands, it might be. Now the Court could certainly ...

JUSTICE WILLETT: Might be?

MR. GILBREATH: Inadmissible. Inadmissible. But the Court could certainly recognize a lost document exception for that situation if the Court felt comfortable that it was intruding on the-- the legislative domain or that that wouldn't create unforeseeable problems. But it's probably a situation best addressed by the legislature for the reasons that pointed out. And they've, again, they've never asked for a lost document exception to Section 439 because if they had one, and they wouldn't a claim against us because when she settled with her brothers and sisters, that would have waived any claim against us. We couldn't have solved the damages 'cause she still relied on this lost document exception.

JUSTICE: Any further questions? Thank you, Mr. Gilbreath. The Court is now ready to hear arguments from the respondent.

ORAL ARGUMENT OF ANGELA M. NICKEY ON BEHALF OF THE RESPONDENT

MS. NICKEY: May it please the Court. Ms. Nickey [inaudible]. May it please the Court. I'm Angela Nickey for Alicia Beyer. As Justice Jefferson's question indicated, Alicia Beyer does believe that Section 439(a) of the ...

JUSTICE: Ms. Nickey, I'm sorry. We can barely hear you.

MS. NICKEY: I'm sorry.

JUSTICE: Can you just speak a little louder, please?

MS. NICKEY: Certainly.

JUSTICE: Thank you.

MS. NICKEY: And Alicia Beyer does not believe that Section 439(a) of the Probate Code should apply in this case. The reason being, as this Court has said, the, the purpose of the multiparty account

provisions in the Probate Code. Can-- I'm sorry. Can you hear me now?
I'm-- thank you.

JUSTICE: A little better.

MS. NICKEY: And-- is to protect financial institutions from becoming involved in disputes between parties as to the beneficial ownership of joint accounts. But in this case, Alicia Beyer's claims against A.G. Edwards have nothing to do with the dispute among the parties to the account. Alicia Beyer has recognized that because there is no Joint Account Agreement, the only agreement that the bank had that would have the appropriate survivorship language. She had no right to claim to rubber sheet as he gets her father to stay.

JUSTICE MEDINA: And what, what's your position on this parol evidence issue in this lost document exception?

MS. NICKEY: We-- in this case, Alicia Beyer could not have used a lost document exception to prove, again, as against her father's estate, and, and I don't think the Court has to reach that issue because Alicia Beyer's claims against A.G. Edwards are about a lost document, failure to maintain the documents, and failure to assure that an account actually operated as the depositor had requested without ...

JUSTICE MEDINA: But it seems, it seems to me that he follow your strict language of the statute that under no circumstance can parol evidence ever be used against a bank in this type of situation.

MS. NICKEY: That's correct. To prove survivorship as against his estate of the deceased party.

JUSTICE MEDINA: Then how do you prevail?

MS. NICKEY: This is not a case in which Alicia Beyer is attempting to prove that she has survivorship rights, and no Court has ever applied Section 439(a) in a situation outside where a bank or a party was needing to determine what the survivorship rights were. Instead, Alicia Beyer's case is about the bank's liability for its own negligence, malfeasance, breaches of contract and failing to maintain the document and failing to assure that the, that the account operated as requested.

JUSTICE MEDINA: Well, how, how do you prove that without this evidence being admitted, which is parol evidence?

MS. NICKEY: Her-- our position is that Section 439(a) does not bar an-- parol evidence or evidence in the decedent's intent in a case that is not about the ownership of the account, and that is because as Section 430-- 437, as stated earlier, talks about that the Probate Code, Section 438 through 440, have to do with the relationship between the parties to the account and are relevant only to controversies between those persons. On the other hand, the legislature has actually segregated the multiparty account provisions of the Probate Code into two sections. The first, which is 438 through 440, deal with the relationship between the parties to the account. The second is 444 through 449, which deal with the depositor-financial institution relationship. This is the depositor-financial institution relationship cause of action because there is no prohibition in that sections-- those sections and either in Section 444 through 449 for a bank to-- there's no provision to protect the bank from the liability for maintaining an account as the depositor requested, had the legislature intended to provide protections to a bank in a multiparty account situation, had intended to relieve it of any obligation to keep and maintain documents other than an account with operate as intended, it could have done so. It did not. Similarly, there is no evidentiary bar as there is in Section 439(a) in any, in any of the, in Section 444 through 449 that deal with the depositor-financial institution

relationship. Had the legislature intended ...

JUSTICE HECHT: To the point of prescribing this language that has to be used to create this kind of account -

MS. NICKEY: Correct.

JUSTICE HECHT: - is to avoid disputes over this. And it seems to me that your position completely circumvents that. And now, you can get around that provision of the statute by simply alleging that the bank was negligent.

MS. NICKEY: You can't enter a ...

JUSTICE HECHT: And, and worst of all, is then the bank has to pay twice or almost twice. Whereas before, there was a big fuss but the, but the money was only going to be paid once.

MS. NICKEY: That's correct. And the bank pays twice because it is the bank's negligence in losing the document. The bank pays out in this case.

JUSTICE HECHT: Dispute about-- we're trying to avoid disputes. So try to avoid -

MS. NICKEY: I think ...

JUSTICE HECHT: - you know, the possible in this case that the daughter went home ask her father to sign it with change of [inaudible] to sign it.

MS. NICKEY: That's correct. The legislature intended, I believe, to protect banks as it says, from getting involved in disputes among the parties to the account. The legislature did not intend to protect the bank against this kind of dispute, and if there is to be such protection for a bank when it is in the financial institution-depositor relationship, Alicia Beyer versus A.G. Edwards, not Alicia Beyer versus her siblings through her father's estate, then the legislature should provide that protection. It is our belief that reading the statutes, the legislature did not provide that protection.

JUSTICE WAINWRIGHT: Jury question one ask, did the negligence of any of the person's name below proximately caused the absence of the written account agreement providing for rights of survivorship? The jury said, 'yes,' that A.G. Edwards was negligence-- negligent in that regard and that your client was negligent in that regard.

MS. NICKEY: That's correct.

JUSTICE WAINWRIGHT: What was the evidence that the written documentation of survivorship rights was properly executed and in the hands of A.G. Edwards?

MS. NICKEY: Alicia Beyer, well, first, Mr. Niemeier testified that he had prepared the joint account agreement so that it would be providing rights of survivorship to Alicia Beyer.

JUSTICE WAINWRIGHT: Who said that?

MS. NICKEY: Mr. Niemeier, the A.G. Edwards account executive. Alicia Beyer testified that she took the documents home to her father and that they discussed him. He understood what the right of survivorship would be and that he signed them-- she signed him, and they returned them to A.G. Edwards. Nora Aldaba, who was Mr. Beyer's housekeeper, also testified that she saw the document signed.

JUSTICE MEDINA: And how did you know she-- what she was saying? She didn't read English. She didn't, as I understand, didn't read English or speak English.

MS. NICKEY: She, well, you have to take Mr. Niemeier-- for Nora Aldaba's testimony to be, be valid, you have to take Mr. Niemeier's testimony and Nora Adalba's testimony, sort of, together. Mr. Niemeier did say that he prepared the document so that there would be a right of survivorship, and Alicia Beyer testified that there were no changes

[inaudible] the documents. They were just signed, and Nora Aldaba testified that she did see this-- the documents being signed, three documents being signed and that she, herself put the documents in an envelope and turned them in to A.G. Edwards.

JUSTICE WAINWRIGHT: To whom at A.G. Edwards?

MS. NICKEY: To the-- she asked for Mr. Niemeier. Mr. Niemeier was not available and so the receptionist in front so that she would take the documents and Ms. Aldaba left.

JUSTICE WAINWRIGHT: As I understand it, later, Mr. Niemeier said, 'He didn't know-- didn't think they had the documents, and there was a search.'

MS. NICKEY: Yes, Mr. Niemeier testified that he-- Alicia Beyer testified that she came back to check on the account and that saw the Joint Account Agreement and the other two documents, that she saw a free documents. And Mr. Niemeier denied that, that visit ever happened and so that he never did search for the documents or find the documents before Mr. Beyer's death.

JUSTICE HECHT: Is there any dispute that the account funds belonged to the decedent before he died?

MS. NICKEY: No.

JUSTICE: What were the damages for?

MS. NICKEY: The damages were five-sixths of the account. Ms. Beyer claimed that she lost five-sixths of the account because she had to share her siblings through an intestate succession, and she had five siblings when the account should have been completely hers.

JUSTICE JOHNSON: And would you address Counsel's comment about the refusal to submit a question about, where the documents lost or where there-- was there are at lost or not.

MS. NICKEY: A.G. Edwards hasn't raised that point on appeal. When we were at trial, we believed that the absence of the documents was the appropriate question. This is-- was an unusual case. We believe that who-- was their fault for the absence of the document and whose fault was that.

JUSTICE JOHNSON: Did they ask for a question?

MS. NICKEY: I never thought whether the question was submitted or not.

JUSTICE: Could you-- is the-- are these kinds of documents affected when signed or when delivered to an authorized bank officer?

MS. NICKEY: Well, there is some evidence in the case that it would be-- the, the documents would not be valid until they went to the home office. And Alicia Beyer asked for copies of her documents and she testified that Niemeier told her, "I will send you copies after they have been approved by home office." That's why she didn't keep copies in the first place. I'm not sure on when the document would be effective. Clearly, if you had a signed document at your home and you never returned it to the bank as is A.G. Edwards' claims, the bank would have no idea what you wanted in your accounts and the bank would not be liable for the-- a document it never fell into interpret a document it never received.

JUSTICE: At least it's your understanding that it had to be approved with the home office?

MS. NICKEY: That was our understanding from Alicia Beyer's testimony. Yes, but she, she was told not to keep a copy of-- [inaudible] she need to keep a copy of the documents because it would have to be approved by home office.

JUSTICE BRISTER: So really, there's lots of siblings had disputes about assets especially when it's a million dollars in cash, and one

them is usually taking care of mom or dad, and what keeps everyone of them from saying, you know, you could have a rule that you have to keep copies, that's not what they told me and then I have to keep it. Well, you-- what, what's to keep that every one of the siblings say-- from saying, 'I signed it all and gave it to him. They must just have lost it.'

MS. NICKEY: There is nothing to keep that kind of claim. I don't believe there's anything in the Probate Code that protects a bank from that kind of claim. Simply, my answer will be that's what juries are for and there is nothing in the Probate Code that prevents that.

JUSTICE BRISTER: No, we had rules-- we've had rules like the statute of frauds because we think more people are going to lie about you promised to give me your house, then are going to actually lose the writing where they gave them the house. And if I had to guess, are you likely to have more siblings to lie about Daddy wanted to leave everything to me versus banks who threw away the account agreements, I'm guessing there's going to be more the former than the latter.

MS. NICKEY: There may be, and-- but that protection from that kind of claim is simply not in the Probate Code and certainly none in Section 439(a), because 439(a) applies between the parties to the account, and I think it's important to note here. 439(a) was A.G. Edwards' only objection under the Probate Code in this case. A.G. Edwards never raised any of the other 440-- 403449 any other type of protections to the trial court or to the court of appeals. This was simply an evidentiary objection.

JUSTICE BRISTER: They -

JUSTICE O'NEILL: This account started out as a joint account with right of survivorship between these two parties, correct?

MS. NICKEY: At one time, yes.

JUSTICE O'NEILL: And then when she became a resident alien, in order to protect the funds for tax purposes, she was taken off the account.

MS. NICKEY: That's correct. She was placed back on the account.

JUSTICE O'NEILL: So that would distinguish her from her siblings in the estate dispute?

MS. NICKEY: That's true. That's ...

CHIEF JUSTICE JEFFERSON: There's at least some ambiguity about whether 439 governs here or not and whether extrinsic evidence comes in or not. What-- wouldn't it be prudent for the Court to just follow its ruling in the prior case? What's it -

JUSTICE HECHT: Stauffer

CHIEF JUSTICE JEFFERSON: Stauffer, and then let the legislature conduct hearings where, you know, bank examiners testify and the public testify and, and then write rule of it they think it's appropriate to permit this kind of evidence in a case not involving a dispute between the punitive owners but involving a case like this?

MS. NICKEY: I think the important distinction there is Section 437. Section 439(a) simply does not apply in the banking-- banking institution-depositor relationship. It is relevant only when there's a dispute among the parties. And that is not to say the banks are entitled to rely on it. When the bank is faced, it has its document, and it is faced with their claim that the bank paid the wrong party by a sibling or another family member. The bank has the document and it can sort out that claim. It can defend itself certainly and nothing in the court of appeals' opinion keeps that from happening. It can defend itself and say, 'We paid the correct party because here's the document.' There were no right of survivorship. They were a right of

survivorship and it can defend those kinds of claims. And nothing in the court of appeals' opinion diminishes that protection, and that was protection that wasn't indeed the bank's. This, however, is a completely separate cause of action. There is no dispute over the ownership of the funds. Alicia Beyer unfortunately had to recognize that.

JUSTICE BRISTER: We do have to reverse the attorney's fees award under Gullo Motors versus Chapa.

MS. NICKEY: Correct. I believe that the, the new standard.

JUSTICE BRISTER: Which parts do you agree Chapa (2004 WL 1902533 requires to be segregated out and which part is not?

MS. NICKEY: As I believe that some, but not all, of the separate federal court proceeding may need to be segregated. That was such an unusual use of that Federal Court proceeding that I believe most of it would be permissible because Alicia Beyer had to-- it was not just an interpleader, but was also an [inaudible] for an injunction.

JUSTICE BRISTER: That-- didn't she-- she got attorney's fees in the Federal Court?

MS. NICKEY: No, Sir. She did not. The Federal Court, in the end, was awarding attorney's fees but did not award Alicia Beyer her attorney's fees because she had been awarded them in the State Court.

JUSTICE BRISTER: Set off.

MS. NICKEY: That's correct. But I think the use of that interpleader cause of action to try to include a-- an injunction and try to stop the State Court proceeding makes this akin to a situation where a party has to defeat a, a counter claim in order to protect their, their contract cause action. Alicia Beyer had to go over to the Federal Court, in fact, the, the injunction, and that really was most of it, but I believe that some of that would have to be segregated. The rest of the case-- this is really just one transaction, and it's one story that needed to be told and discovered from start to finish. It may present somewhat unusual situation, but simply, as the Court said, 'Here simply because some legal services advance recoverable and unrecoverable claims.' They are not disallowed simply because they do double duty. And in telling this one story that needed to be told anyway to understand the context and the whole, to understand all of the facts. Most to those facts also supported the other causes of action. There was not really a separate independent basis for fraud or a basis for breach of fiduciary duty or basis for negligence.

JUSTICE BRISTER: Well, except, except by the time all this went to trial, you'd gotten all the money from the bank that interpled.

MS. NICKEY: It-- well she, Alicia Beyer had received-- no. Actually not. The federal interpleader was not finished until, I believe, a month or month and a half, but the final order was in September and this case went to trial in August.

JUSTICE O'NEILL: And you would say that Section 439 operated properly in that proceeding because it kept any testimony regarding the lost documents out -

MS. NICKEY: Absolutely.

JUSTICE O'NEILL: - as against the estate.

MS. NICKEY: Absolutely. It was the lost of the document and 439(a) itself that [inaudible] Alicia Beyer this cause of action against the bank and had the bank not lost the document, we, we wouldn't be here because see what it said, we could decide either Alicia gets the money or she does not depending on the language and the case would have been over. However, the bank lost the document and Alicia Beyer ...

CHIEF JUSTICE JEFFERSON: Well, so, so what does happen when there

are claims from both, six of the jury say there was no joint account and of course, Beyer does and, and turns out the bank is just going to have to pay twice, or they abate one case until the other is decided or what happens?

MS. NICKEY: I think the appropriate issue would be to abate one case until the other is, is decided until the dispute among the parties is decided.

JUSTICE O'NEILL: Well, now that goes against, I think, the position you state here is that 439(a) would replay that sort of debate [inaudible] versus-- between the parties to the estate.

MS. NICKEY: That's correct, Judge. But I think there would, would not be a cause of action against the bank until Alicia Beyer ...

CHIEF JUSTICE JEFFERSON: That's all because at 439, you definitely-- the bank would definitely have to pay because there is no written document and then, they have to litigate this other and they have to pay twice. And where is the-- which can be-- it can't both ways, either there was a joint account, the right of survivorship -

MS. NICKEY: Right.

CHIEF JUSTICE JEFFERSON: - or there was not.

MS. NICKEY: As among the parties, 439(a) would apply absolutely, and if Alicia Beyer had tried to go into Federal Court and tried prove up some sort of lost document exception that, first, doesn't exist and lost in that case, then she would have a cause of action against the bank for losing the document. And in this case, she recognized there's no document. I have no cause of action. I can't go into Federal Court in bad faith and try to claim against my siblings.

CHIEF JUSTICE JEFFERSON: Any further questions? Thank you, Counsel.

REBUTTAL ARGUMENT OF ROBERT B. GILBREATH ON BEHALF OF PETITIONER

MR. GILBREATH: I'll attempt to answer your question about leaving it up to the legislature with-- I'm going to finish up with that hypothetical uncle-nephew hypothetical. I started with-- to make the point that what the, the decision we're taking that 439(a) applies in the situation is implicit or inherent in the statutory scheme, and that's what Justice Hecht found when in Stauffer versus Henderson, you know, Section 439(a) says, 'You have to have it in handwriting.' Well, it didn't say anything in the statute about you can't use extrinsic or parol evidence, but that was inherent and implicit in the statute, and that's what the Court held in Stauffer versus Henderson. Right?

JUSTICE WAINWRIGHT: Counsel, Stauffer did not involve a lost of document. Did it?

MR. GILBREATH: No.

JUSTICE WAINWRIGHT: You know, Stauffer did not involve a party claiming that the bank committed separate and independent tort by losing the document they created, a right of survivorship. Stauffer was exactly a 439(a) situation where parties were claiming the right to the funds based upon the written right of survivorship agreement that just didn't exist. So Stauffer is not on all fours with this case, is it?

MR. GILBREATH: No. It's not on all fours, your Honor. But the holding in Stauffer applies here through the statutory scheme, and let me explain why would by finishing if it that nephew-uncle hypothetically. We are to said, "The nephew says, 'I want to use this

extreme of evidence is tape recording to establish that I have survivor should bright to that money.'" You paid that the wrong people so you owe me damages. He get their bank at summary judgment on it, because he's attempting to establish survivors of rights 439 clearly applies. So the nephew goes and he reads a law and he sees that, that's right, but then he reads the by error cases says, 'Okay, I'm just going to amend my petition and now I will alleged that 'I should have had survivors of rights and that you guys, the bank batch to the documents, and therefore you are owe me damages of the amount of the account proceeds.

JUSTICE O'NEILL: Again, ...

MR. GILBREATH: And then I can get my evidence.

JUSTICE O'NEILL: That hypothetical seems so different to me. I mean, let's take another [inaudible] that's an extreme on this [inaudible]. Let's take a hypothetical where the bank officer says, 'I lost it. You know, my dog ate it. I really did lose it. I stipulate to that.' But you go the trial and you say, 'That stipulation can't come in. That evidence can't come in.' That would be the, the hypothetical on the other side that ...

MR. GILBREATH: Sure. Yes. And at this-- if that issue were before this Court, and then I-- the Court might well decide that there should be a lost document exception for that situation, but that, again, they have not asked for a lost document exception.

JUSTICE WAINWRIGHT: Well, their position is they don't need an exception to 439(a) because it doesn't apply to this situation because it's an independent claim against the bank for losing the document. It's not a claim for survivorship funds based upon the written agreement.

MR. GILBREATH: Exactly. That is exactly what ...

JUSTICE WAINWRIGHT: So they are not seeking an exception, at least, not-- that's not their position. It may be your position.

MR. GILBREATH: That's correct. They're not seeking and that's [inaudible].

JUSTICE WAINWRIGHT: In fact, Justice O'Neill's point, I know you say the fact that A.G. Edwards had the document with the right-- written right of survivorship in it and its possession was disputed, but the jury had to have found that A.G. Edwards had it in its possession, didn't it?

MR. GILBREATH: No.

JUSTICE WAINWRIGHT: First question, question one that I read before -

MR. GILBREATH: Yes.

JUSTICE WAINWRIGHT: - that said and combined that with question two, the jury found that A.G. Edwards was 80 percent liable in proximately causing the absence of the written agreement in question.

MR. GILBREATH: The ...

JUSTICE WAINWRIGHT: How, how could the jury not have found at least implicitly that A.G. had it to approximately cause its absence?

MR. GILBREATH: Okay. I have an answer for that, your Honor, because at least that two [inaudible] because the legal matter, because of the objection to the omission of that question.

JUSTICE WAINWRIGHT: And I'm not sure, and I'm not sure that constitutes a waiver at this point or affects this point actually.

MR. GILBREATH: But it is a-- and let me get to the factual basis for concern, and that is, and you'll see it throughout their brief. They talked about either we lost the document or we quote 'failed to secure it.' Now, what-- they had two theories of the case. Their

primary theory of the case was there was a document and we lost it. Their secondary backup theory was that we should have, we got notice. We got a wire on December 27 that said from a home office, it said, 'Where is the joint account agreement?' And their theory-- their backup theory of the case was that we should have called Alicia Beyer and said, 'Hey, you need to get the document in here.' And that was one of their theories and they put on evidence and it's reflected in their brief that we should have follow that with the least he had buyer and said, 'Where's the document? You better did that sign, you better did it.'

JUSTICE MEDINA: Who would prompt the call from your home office.

MR. GILBREATH: The home office has procedures and after, I think it's two weeks, after an account was opened, if they don't have the account agreement, they send wires to the broker that says, 'Hey, where is the account?' And that's what happened there. So currently, her backup theory was they should have called and said, 'Hey, you may get the document in here.' So that, your Honor, is how the jury could have found ...

JUSTICE WAINWRIGHT: But the jury also found in question 6 and 7 that A.G. Edwards agreed with Alicia Beyer and Federico Beyer to open the joint accounts. Jury said, 'Yes, that agreement occurred.' Question, that's 6, question 7, the jury said, 'A.G. Edwards failed to comply with that agreement.' That's question 7, and in question one, the jury said, A.G. Edwards proximately caused the absence of the written agreement that it, it later-- the jury later found A.G. Edwards's agreed in terms of opening the right-- the account with right of joint survivorship. I'm finding a hard time and finding it hard following your contention that the jury did not conclude that A.G. Edwards had the written agreement and its possession after it was executed.

MR. GILBREATH: They might have conclude that or they might have found that we were negligent and failing to follow up that we breached the contract by failing to carry out the agreement to open it up with the joint account agreement by failing to call her and say, you know, 'Where's the document? Get it in here.' But as a legal matter, it's very clear that the Court can't-- they cannot be a deemed or implied finding that there was a document that was lost because it was her burden of proof to get that finding. We objected to its omission, and therefore, without that finding, the Court can't say whether it was a deemed or implied finding.

JUSTICE WAINWRIGHT: You argued to the jury that you had not lost the document in closing?

MR. GILBREATH: Yes.

CHIEF JUSTICE JEFFERSON: Any further questions? Thank you, Counselor. The cause is submitted and the Court will take a brief recess.

2007 WL 5329475 (Tex.)