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Supreme Court of Texas.
Paul H. Smith, et al,
v.
Thomas O'Donnell, Executor of the Estate of Corwin Denney.
No. 07-0697.

September 10, 2008.

Appearances:
Casey L. Dobson, Scott, Douglass & McConnico, L.L.P., Austin, Texas, for petitioners.
Vincent L. Marable III, Paul Webb, P.C., Wharton, Texas, for respondent.

Before:

Chief Justice Wallace B. Jefferson; Don R. Willett, Harriet O'Neill, Dale Wainwright, Phil Johnson, Nathan L. Hecht, Scott A. Brister, and David M. Medina, Justices.

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REBUTTAL ARGUMENT OF CASEY L. DOBSON ON BEHALF OF PETITIONER

CHIEF JUSTICE JEFFERSON: Be seated please. The Court is ready now to hear argument in 07-0697, Smith versus O'Donnell.
COURT MARSHALL: May it please the Court. Mr. Dobson will present argument on behalf of the petitioner. The petitioner has reserved five minutes for rebuttal.
MR. DOBSON: Good morning, your Honors. May it please the Court. The question before us is straight forward enough. What is the impact of your decision in Belt on our case? Or to put it in terms of the decision we're here appealing from was the San Antonio Court of Appeals correct when it said on page 143 of the opinion below that this Court in Belt foreclosed a Barcelo analysis for suits brought by personal representatives on behalf of an estate.
We obviously do not believe that a Barcelo analysis is foreclosed by Belt and we further believe that a Barcelo analysis compels this Court to uphold our summary judgment on the threshold legal question of duty. To decide whether a Barcelo analysis is appropriate in this case, we need to talk about what a Barcelo analysis is. I can start by talking about what it, it is not. And it is not a question for the fact finder. I recall being a little bit taken aback the first time I read the Court of Appeals' opinion when they said the following on page 144. "Applying Belt to the summary judgment record before us, we agree with O'Donnell that a fact issue exist as to privity thereby precluding summary judgment in favor of Cox and Smith a fact issue as to privity."
What question is it exactly am I going to ask the jury in San Antonio about the purely legal question of privity or that is to say a duty whether that exist in this instance. I think that statement by the

Court of Appeals that there is a fact issue on this purely legal question reflects a fundamental misunderstanding of what a Barcelo analysis is.

JUSTICE BRISTER: But didn't the executor in privity for Cox and Smith?

MR. DOBSON: Your Honor, for purposes of non-estate planning legal malpractice claims, our answer is no. And that is the, the rule we're are over ...

JUSTICE BRISTER: Say, Mr. Denney had a medical malpractice claim and attorney told them that he got four years to file that and he dies a year and a half later or two and a half years later and doesn't-- couldn't the estate sue the attorney who gave wrong advice about how long the limitations period was causing it to lapse-- I mean, surely if-- if that claim survives, survival question but the clai-- if the claim survives the state can bring and hear in privity. Right?

MR. DOBSON: Respectfully, your Honor, we believe the answer to that question is no. We believe that the rule ought to be that for non-estate planning legal malpractice cases unasserted during the decedent's lifetime. The rule not to-- that, that you ought to follow the Barcelo analysis, the policy analysis and the claim you just describe should be barred and why is that?

And that's because of the policy, the two overwriting policy concerns articulated in Barcelo reaffirmed by Chief Justice Jefferson's opinion in Belt.

Number one, is a pre-death concern that by allowing such suits by people other than the client we're going to interfere with the attorney-client relationship because the attorney feels like he could be second guessed by someone other than the client. So policy concern number one, out of Bors-- Barcelo is before the client dies.

Policy concern number two is a very practical concern, a post-death concern what Barcelo called the intolerable tension and proof problems regarding what the decedent's wishes and instructions were as expressed to her lawyer during her lifetime as opposed to what denial non-clients or saying should and would have been the decedent's instructions and wishes according to them had they just been properly advised and, and Justice Brister, speaking to your hypothetical, I have had in 22 years numerous people pay my firm tens of thousands of dollars and they'll come in and tell me their tale of woe about breach of fiduciary duty or breach of contract or however they think they've been wronged and we do a big analysis and we have them in the office and I'll write down the pros and cons of litigation and numerous people have left my office last 20 plus years having been told by a viable causes of action against solvent defendant's and they decide for numerous reasons including the cause estimate I gave them nevertheless, not to pursue it.

Now let's say that one of those clients leave my office, a few months later, they die and their personal representative who was probably, who was probably somebody close to them and probably knows about the complaints they came to see me about. But the-- my putative client never related, what his final decision was about pursuing that claim, all the personal representative finds is my letter saying, "You have viable claims against solvent defendant's." But now the statute's trying-- well, she sues me saying ...

JUSTICE BRISTER: Of course, right. That ...

MR. DOBSON: And, and, and so, and so that is why the ...

JUSTICE BRISTER: I understand that of course. The doctor could make the same argument.

MR. DOBSON: Pardon me, Judge.

JUSTICE BRISTER: Doctor could make the same argument. There's no question, your malpractice claim against your doctor survives, the doctor would say, "Look, don't do this, that and the other in dispute, profile of that who told, who to do what," and they said, "I don't care, I'm not eating brand muffins the rest of my life," or whatever else -

MR. DOBSON: And I, and I have ...

JUSTICE BRISTER: - and somebody else gets to bring suit and the doctors are just out of luck. Why should lawyers be different from doctors.

MR. DOBSON: And I, and I-- well, because I, I have tried cases for doctors where a main, one of my main defenses was the plaintiff acted AMI against medical advice. And the difference there is that plaintiff is there for me to cross-examine about them acting and ...

JUSTICE BRISTER: Unless they died in the interim.

MR. DOBSON: If they died in the interim, that hasn't happened to me I suppose there could be an instance where that person filed their claim and died and the state continues to pursue it and I haven't had a chance to depose them yet. But I'm not here saying that legal malpractice claims that are brought, that are filed and then the plaintiff dies don't get to go forward I've, I've acknowledge that those obviously survive and get to go forward. I'm talking about unasserted non-estate malpractice claims that were not brought before the decedent passed away.

JUSTICE HECHT: I didn't see much about this in the briefs. Wouldn't it have been terribly against Mr. Denney's interest, personal interest to, to have characterized this differently.

MR. DOBSON: Of course, it was, your Honor and that ...

JUSTICE HECHT: Would there been greater estate tax on his deceased wife's estate?

MR. DOBSON: And, and your Honor, among the summary judgment grounds that the Court of Appeals turned us around on that we did not bring to this Court was quasi-estoppel, we also had a discouragement theory that, that Mr. Denney didn't do anything if, if the plaintiff's are correct that Mr. Denney didn't do anything or his estate didn't do anything but return that which was never rightfully his but Mr. O'Donnell and this is in our briefing and in the summary judgment proof Mr. O'Donnell the executor freely admitted when I deposed him below these many years ago that Mr. Denney was substantially benefited by the decision that was made regarding the automation industry stock during his lifetime and it would have been a substantial detriment to him had the decision been another way because the pro--

JUSTICE HECHT: Because it gave him, it gave him more control over more money and reduce the state taxes that his wife was dead.

MR. DOBSON: Exactly, Justice Hecht. It is no mystery as to why Corwin Denney either as to what his wishes were or why they were were that way like the most memorable testimony which is quoted in our brief is from his fifth wife Nancy who said Corwin didn't care when he got it, how he got it or who he was moved to when he got it, it was his and that was his consistent lifetime position across death, divorce and annulment.

CHIEF JUSTICE JEFFERSON: And no dispute-- and there's no dispute about this?

MR. DOBSON: I don't believe there's any dispute about that, the only dispute is according to the plaintiff summary judgment proof and their expert. If Paul Smith and Jack Guenther had just tried harder

that perhaps they could have gotten Mr. Denney to change his med. and the failure to try harder is negligence and not writing what we would now colloquy recall a CYA letter once he made that decision it was negligence but I don't think there's any dispute about what Corwin wanted. In Belt, you acknowledged Barcelo and you said that the reason Belt was different from Barcelo is is that Belt was an estate planning legal malpractice case. So the two policy concerns that that caused you to decide Barcelo as you did were not present in Belt. When you have ...

JUSTICE O'NEILL: But we, we did use that language but we also wrote more broadly and seem to pin it to survivability alone.

MR. DOBSON: Now, it ...

JUSTICE O'NEILL: We said that the Terks legal malpractice claim is brought on behalf of the decedent's estate and survives the decedent and Terks may maintain the suit against the attorney's and there are other sentences where we throw in estate planning but there are also pieces of it where we, we analyze in terms of survivability.

MR. DOBSON: Justice O'Neill, I realize that and if, and if, and if that was the end of the question you'll have had, I pretended to use the last couple of years to pull me out before I got all dressed up and came down here this morning. The survivability issue was necessary to your analysis in Belt but it was not sufficient. You went on and considered the Barcelo factors. You said, because this is an estate planning legal malpractice case we don't have to worry about that divided loyalty about that interference with the attorney-client relationship while the client is alive because we know that the object of the representation and the instruction was, "Limit my estate tax liability."

Second, you said in Belt that because this was an estate planning legal malpractice claim as opposed to another kind of claim that we-- that you weren't going to have to engage in what Chief Justice Jefferson called, in Belt, "the near impossible task" of proving what a decedent's intent would have been in other non-estate planning circumstances because we know that the intent of the representation in Belt was to decrease estate taxes. No-- the lawyer defendants, nobody was going to claim in the Belt case that Mr. Terk the decedent in that case and walked in and up to Hammerblend Firm in San Antonio and said, "Boys, the object to my representation is to pay the maximum estate tax liability." That, that-- what that intolerable conflict what Chief Justice Jefferson called, "the near impossible task." You said was not going to be present in Belt because the-- that was the kind of place we're talking about.

JUSTICE WAINWRIGHT: How would you address the argument that the point you just made from Belt are that legal advice the propriety of which you don't till after death is what Belt was talking about, not something narrowly just about estate planning.

MR. DOBSON: And, and Justice Wainwright, I would, I would address that in this way, you said in Belt that one of the reasons you decided Belt the way you did is that if you didn't, it might give a free pass to lawyers that engaged in faulty estate tax planning advice because the consequences of that bad advice would rarely be known until after death. Contrast that with our case, contrast that with the position we've taken here.

Well, what we're saying is is that a non-estate planning malpractice that those claims such us the claim in this case readily could have been discovered and litigated in the decedent's lifetime. And that's what we're saying should be barred under the Barcelo

analysis. Look at the two Barcelo policy factors in light of the facts of this case.

Do we have the potential if Paul Smith and Jack Guenther can be all in the court 40 years later to answer for their, for their advise.?

Do we have the potential looking back if you knew these kind of claims could come that you'd have divided loyalty as to Corwin when Corwin was taking the adamant position, this is what I want.

What if that lawyer sitting there thinking well oh gosh. When old Corwin dies, I'm not get sued by the people that could ultimately be the beneficiaries of another decision. So you've got that Barcelo factor and then as to the second Barcelo factor, what the Belt opinion cause the near impossible task of ferreting out the, the wishes and intent and instructions of the decedent as expressed to his lawyers as to pose to what the non-client is saying now, we got that here in states. When you can see that, you can see the tension that, that your opinion talked about in Barcelo in the briefs in this case and I suspect in the arguments in this Court this morning. Mr. Smith and Mr. Guenther have testified, look, we, we showed him the 20 page, it's my memo, we probably told him his California oral agreement with his wife was no good, we talked to his accountant, we talked to his California lawyer and Corwin nevertheless made this decision. The plaintiff comes back, comes back and says, "Well, that's not good enough, you should have been more forceful, you should have written a CYA letter. Perhaps you should have withdrawn from the representation before you did this."

And now if I've got to try this case, I've got to go back without obviously the benefit of Corwin's testimony and try to prove what Corwin wanted. And it's, it's a-- I, I believe this is what Chief Justice Jefferson called this a near impossible task. Just as one example Texas Rule of Evidence 601(b), the Dead Man Statute. I wouldn't be surprised if, if, if the unfortunate circumstance you send me back down to try this case Jack Guenther and Paul Smith had individual meetings with Corwin that they testified about. What they said, Corwin said, "No way," "Heck, no, no declaratory judgment, that stuff is mine." Oh, I wouldn't be surprised when we go back down if they don't say, "Under rule 601(b), I can't get that in." Just as the Dallas Court of Appeals very recently said in the Coleman versus Coleman case.

One business partner dies executor's wife says, "I want you to wind up this partnership and distribute my husband share of the assets." The living partner says, "Oh no, we had a oral deal about how this was going to be handled." And the Dallas Court of Appeals said, "Sorry, you don't get to testify about that under Rule 601(b)." And so we've got the, the near impossible task which you called in Belt that, that immediate tension that-- were the, that policy implication of Barcelo is implicated here. Unless you all got questions, I'll sit down and wait for rebuttal.

CHIEF JUSTICE JEFFERSON: Are there any questions? There are none. Thank you, Counsel. The Court is ready to hear argument from the respondent.

COURT MARSHALL: May it please the Court. Mr. Marable will present argument on behalf of the respondents.

MR. MARABLE: May it please the Court, opposing Counsel. Justice Brister I think you asked the first question was: Isn't the executor in privity? And I would direct you to, it's head note 17 in Belt where Chief Justice writing in the Aeto opinion says, "It's undisputed that the Terks or the independent executors of the estate -- I'm paraphrasing -- they may bring the claim on behalf of the estate. We previously-- as to personal representative, we previously held a

bankruptcy trustee can maintain a legal malpractice claim and we say this holding is in accord of the jurisdictions which is recognized because the estate stands in the shoes, it's in privity." So-- an answer to that, to that first question, Belt's decided that issue that there is privity in that regard.

JUSTICE HECHT: Suppose the children had brought this lawsuit rather than the executor, what would the result be?

MR. MARABLE: In the sense of the proof or in the sense of the ultimate result to the case at the end of the day.

JUSTICE HECHT: In the sense what-- how would it be different? The proof I assume is the same but ...

MR. MARABLE: I don't think it would be different other than the ...

JUSTICE HECHT: They'd be out under Barcelo?

MR. MARABLE: No.

JUSTICE BRISTER: They wouldn't be on privity.

MR. MARABLE: I'm sorry. Who would ...

JUSTICE BRISTER: I would not be in privity.

MR. MARABLE: Corwin Denney had sued Cox and Smith, there'd be privity

CHIEF JUSTICE JEFFERSON: [inaudible] case.

JUSTICE BRISTER: If the children has sued Cox and Smith.

MR. MARABLE: I'm sorry. If the children had filed a lawsuit against Cox and Smith ...

JUSTICE HECHT: This suit, if the children had filed this suit against Cox and Smith.

MR. MARABLE: There's no privity. They could not have filed this lawsuit against Cox and Smith.

JUSTICE HECHT: But why, why do they sue an executor who probably sympathetic and then the executor sues the lawyer.

MR. MARABLE: They sue the executor because he is legally responsible for Corwin Denney not funding the trust correctly from 68 through the date that he dies. He's the only-- the, the claim that they file is because you didn't put the money and of the trust like he should have and we're now entitled to all of this money, the money that should have been in there plus the penalties plus the interest.

JUSTICE HECHT: What, or what would, what do you suppose would have been the result if they'd sued their father while he was still alive?

MR. MARABLE: For, for not putting it in correctly. Then you would have litigated this issue of whether or not I had put that in correctly and whether or not I had engaged in any misconduct. And Corwin Denney would have said, I ...

JUSTICE HECHT: I ...

MR. MARIABLE: - I believe that-- and I didn't mean to interrupt you, go ahead, Judge.

JUSTICE HECHT: It would have had some hard feelings, over that.

MR. MARABLE: Would have been hard feelings. Number two, Corwin Denney would have said what he said, he said, "I don't think that it's community property, I think it was separate property. And I funded it correctly." And I, I think that gets into your question in this argument that we're trying to do something which is contrary to the intent of Corwin Denney and I think this goes to an issue which Justice Brister even raised in oral arguments in the Belt case.

There's one thing to get into a fight where Daddy goes to the estate planning lawyer and says, "I'm going to allocate this money to this child, this money to this child," then after his death, they come in and say, "No, Daddy want me to have more." He didn't want that child

to have any. That is the-- that is an issue that is raised and, and, and Justice Brister raised that and that's what he-- I think there was a reference to Justice Jefferson referencing the near impossibility or trying to aside this issues. I think that's Justice Philip's comment from Barcelo not the Chief Justice's comment. It is a different issue when you have Corwin Denney who says, "It is my personal belief that this is separate property, not community," and the lawyers don't tell him, "Corwin, you were wrong." It's not, and on this record, that is the, that is the evidence and that is the finding in this case.

I agree he believed it and in fact there's a quote from his-- the, the woman he was married, though, that's his last wife who said, "He believed that it was his regardless of when he acquired it or how he acquired it." If somebody walked in to any family law practitioner and said, "That's my belief." The family law practitioner have to tell him and say, "I don't know any jurisdiction which recognizes that, I believe it's a strongly held belief but you're wrong." That's what the ...

JUSTICE BRISTER: So you're saying the difference in this in Belt or Barcelo is that here, you had a duty. He wasn't just making a discretionary decision.

MR. MARABLE: That's part of it. But, but the other part of it is, is that you resolve, when I say you, this Court and Justice Green was, was not sitting it's the same panel members, it was all this type of issue in the Belt case when you said this type of problem can come up when the beneficiary of the will is also the executor 'cause in Belt you asked the counts from petitioner several times, you said, look, the executive-- the estate a lot of times is a beneficiary, and you got this problem where you got the same person asserting a claim in his capacity as an executive is also a beneficiary. And there's two footnotes in the opinion it's ...

CHIEF JUSTICE JEFFERSON: What's the type, what's the type of question that is-- that you would ask the jury in this case?

MR. MARABLE: Well, if you submit -

CHIEF JUSTICE JEFFERSON: About his intent or -

MR. MARABLE: - submitted ...

CHIEF JUSTICE JEFFERSON: - what, what he would have done?

MR. MARABLE: Well, and you wouldn't submit it in a tag question, it used to have been brought from negligence question. The negligence if any if Cox and Smith approximately cause damage.

CHIEF JUSTICE JEFFERSON: And what's the evidence of the negligence?

MR. MARABLE: The negligence is not telling him you cannot characterize property this way.

CHIEF JUSTICE JEFFERSON: And what's the evidence of what his reaction would have been? Was ...

MR. MARABLE: He would follow his lawyer's advice.

CHIEF JUSTICE JEFFERSON: That's the evidence?

MR. MARABLE: That is the evidence and there's evidence in the-- here is the global evidence and here's the arguments that's been in the Court of Appeals. Justice Jefferson, let me get right back to you. Footnote 7 and footnote 8 of the Belt opinion discussed the two situations where the executors also a beneficiary required to come in and show the actual intent of the client and what this Court said is, it's issues of proof. If you can't prove what the intent was then you lose your case and that's how you'll dealt with in terms of an evidentiary issue. The actual evidence and this was part of the summary judgment arguments made.

Cox and Smith took the position that Corwin had decided to characterize this as community as separates so therefore, there could be no negligence -- not negligence cause it didn't argue that -- quasi-estoppel precluded the claim because he had made that decision and therefore they could not be held responsible for it.

Now what the Fourth Court of Appeals said is, "You never told him that he could not do it because it was wrong." And the evidence that was relied upon is evidence and, and Mr. Wagner took the deposition and it goes something like this. Did he follow his lawyers and he's talking to Mr. Smith who represented him for a number of years. Mr. Smith said yes and he kept pursuing it by saying as follows: "Is he the kind of guy that's kind of wishy washy about this that you know, you'll file it but you're not really too sure or if you tell him that that's what it is, does he follow it?" And he says, "I know of no instance when he was told, you know, what the advice was, he didn't follow it." And that is in the Fourth Court of Appeals opinion and that's the evidence and that's what's going to go to the jury [inaudible]..., question ...

JUSTICE HECHT: I just want to make sure the same I asked to the petitioner that this would have cost him money.

MR. MARABLE: Yes. Yes.

JUSTICE HECHT: And where have been more taxes to his wife's estate and he would have less control over less money.

MR. MARABLE: Yes, yes. I mean he-- it would've been a situation where, it wouldn't have cost him money in the sense that is the, the money that his wife's estate would have been-- money that his wife's estate's pay but clearly, he would have had a smaller amount of money for his estate. There's no question about that. And the question that the jury would have to decide is it if he was told, "You cannot do it this way. You have got to allocate that 1.8 million and if he said, 'I don't care, I'm going to do it that way and I'm going to take the risk' and I'm going to go ahead and not fund these trusts like I should," then if the jury believes that that's what he's going to do then you lose the case cause you can't show that Cox and Smith's negligence was approximate cause but in terms of ...

JUSTICE HECHT: Would the jury have to or would there be evidence on what he would have done if his-- if he'd been sued sooner. If his children had sued him sooner. Is that the kind of thing the trial should get into whether he would have cut them off and take it all income out of the wife's trust and make sure they didn't get a penny. Or do-- or is that app-- or do you think that's irrelevant in the case?

MR. MARABLE: I'll be honest with you, I don't know in the context of how you would do it but I would believe that it probably comes in under a theory that I mean, they've got a theory in this case that this was a set up between O'Donnell and the beneficiaries of the trust not of the, of, of Mr. Denney's wife's trust. Not the beneficiaries of his will, that's his, that's why.

JUSTICE HECHT: But the, the beneficiaries of the wife's trust re all the kids. Right?

MR. MARABLE: Sure, and so the issue is does this theory that they've got come in that they waited right until at the end 'cause they didn't want to make their Dad mad and they were trying to increase what they could have received because he didn't give them anything. I think it probably does, 'cause I think it probably may have some bearing on their argument that it was his intent the whole time to do it this way. I mean, I can't think of a way that I would exclude it right now and, your Honor, and my response to that is is what we've try to say in the brief. Mr. O'Donnell was not a beneficiary of any of this, he was an

executor who hired Gibson, Dunn, Gibson, Dunn looked at it and said, "You know, this thing is going to risk the whole estate, you all need to settle it." That-- all response would be is is that we did what our lawyers told us to do and our lawyers looked at it and said it's because Cox and Smith made a mistake on this back in 1968.

JUSTICE HECHT: And the, the fee that's recited in the brief was all for this part of the worker, what did Gibson, Dunn do some other representation for the executor.

MR. MARABLE: The-- as I understand it, the amount which I believe is 2.3 -

JUSTICE HECHT: Right.

MR. MARABLE: - it's attributable solely to defending the fiduciary litigation filed by the beneficiaries of Mr. Denney's wife's trust. There was a question of that in the deposition of Mr. Mresky and he said acknowledge that attorneys fees that Gibson Dutcher-- Gib-- that Gibson, Dunn would have had to expended that would have-- they would have expended any way in, in, in handling the estate would not be recoverable by Cox and Smith. In his affidavit attributes that. If there is some distinction, I'm, I'm sure-- and plus I believe you all have the issue right now in front of you whether or not attorney's fees from collateral litigation can constitute damages anyway and legal malpractice cases from the Akin Gump case. And-- there's a ques--

JUSTICE JOHNSON: What's your position briefly in regard to the dead man statute?

MR. MARABLE: The, the answer is it's the first time that I've heard the question today but I, and I don't-- the, the, the case out of Dallas has not been cited but my-- I have not seen a recent case in which anybody has successfully used it because there's usually exceptions and because there are, as I recall and I'm, and I'm talking about this hearing at about 2 minutes ago.

CHIEF JUSTICE JEFFERSON: It's called, "corroboration."

MR. MARABLE: Corroboration. I don't see that there's an issue or fight here about corroboration. We agree as to what his position was. I mean, it's his position that it's my-- the, the real, the legal issue or the malpractice issue is and you shouldn have been told that you were wrong.

So I don't see that they're going to be deprived a defense under a dead man statute issue but I think that goes to an issue that Justice Hecht asked the petitioner's in Belt. He said, "Isn't there an unfairness about this?" Cause he was asking specifically about O'Donnell. He said, "Look, the malpractice in that case occurred 30 years ago. Isn't there some type of unfairness or isn't there a difficulty in trying to defend these cases that have, that have that happened like this in the past?"

And the answer that you got in that case Justice Hecht was that the difficulties in the defense had been prove and things like that does not justify, not recognizing the cause of action and, and I would-- I want to address that issue because you did hear that from opposing counsel in terms of this unfairness of the difficulty he's got trying to defend this. The real, the person that has a problem in trying to present the case, if there is a problem is going to be the plaintiff cause my client has passed away.

So I'm the one who's going to have to be able to, to be my burden of proof, I'm going to have to be able to present some evidence as to what he would have done which is this issue that we've been talking about because in fact, that is one of the issues Justice Brister, when I referred to those two footnotes from the Belt case that talked about

what the bargain was of the executor beneficiary in that case to present evidence in order to have successfully pursue the claim.

So I'm in a situation where, you know, I don't have a live client there who wasn't, who would suppose that so-- and I'm going to present that testimony of the case without it. But that issue that they're talking about, that, that he's got his lawyers and there's no client there could oppose, that's going to exist in any case like this once the client's passed away, 'cause he's obviously deceased. It could have happened two days and two years ago when that lawsuit gets filed, I don't have a live client that I can put on the stand and ask these kind of questions that he's saying is affecting his defense. And you seen the record in this case, this is not a case in which the underlying documents have been destroyed or we've lost every witness cause I believe it did in the testimony as about 300 boxes of underlying documents that were discussed by the lawyers in the depositions involving Mr. Mresky and the reason is because Mr. Denney never threw anything away and he wrote a biography which detailed his life. I mean, this is a case in which no one is going to be in a situation where they cannot put on a legitimate defense if that's a legitimate concern.

But the other thing is we litigate cases like this all the time. I mean, they-- in National Gas Pipe Line. Yeah, we're addressing an issue of 2001 where they had leases that they were arguing terminated 59 years before the lawsuit was filed and San Antonio just issued an opinion filing a termination of a lease based on activity except ...

CHIEF JUSTICE JEFFERSON: Well, you can imagine if Barcelo applies in a case like this that when the client is giving advice and lawyers giving advice to, to his or her client that-- well, maybe it makes sense to bring in, you know, the children or the beneficiaries and get releases and, you know, cause you worry and, and the law changes and you know, there are impacts that might extend far beyond decades later and are you thinking about more protecting yourself or imagining these lawsuit from beneficiaries or you-- advising your client. Doesn't it drive kind of stake between the, the lawyer and client and, and perhaps make the lawyer act in his or herself interest.

MR. MARABLE: No and, and the reason is is because the beneficiaries that you are talking about, would be the, beneficiaries of the, I mean, there's two sets of beneficiaries. When you, Chief Justice, we say beneficiaries. There would be beneficiaries of the underline will or Corwin Denney which is the foundation in Nancy Denney and then you have the beneficiaries of this trust. Everybody that was involved in this case, Mr. Smith and it's Mr.-- I believe it's Guenther, Guenther, I don't pronounce the name correctly.

He knew when they're doing the separate versus community allocation. He knew that that was an important issue for Corwin for the, deceased wife's estate and for all the people that were going to take under the trust. He wouldn't do anything different or not different that's why he suggested that option of the declaratory judgment because everybody knew that if you didn't do it right, and you made a mistake on this, you got improper funding of the trust. So you don't have any of the-- I mean, that argument was made by opposing counsel but I don't think you got any situation where he say, "Well, I'm concerned about what advice I can give you because of potential lawsuit."

CHIEF JUSTICE JEFFERSON: Well, I'm talking about in the, in the future if this is the-- I mean, if we, if we decide the case in favor of your client and, and under these circumstances there's privity and potential liability then in the next interaction between a lawyer and

the client in the case like this, I mean, aren't you thinking well beyond your client, you're thinking about yourself, you're thinking about any other suit that might be impacted then might-- it's most of them assuming.

MR. MARABLE: Absolutely not. You're thinking about whether-- I mean, if Corwin Denney comes in and he says in the-- I think the number was 33 or $39 million is when my wife's died, I've got a 30-- I got $39 million between the two of us and she's got trusts that had been set up and I got to fund these trusts, okay. I mean, we all know what you're going to do. You got to fund the trusts properly. So I mean, you're not thinking and worrying about, you know, "Oh, I'm, I'm going to do something different because I can get sued, you're sitting there knowing if you don't do it right, then there's going to be a potential claim because your client is committed a breach of fiduciary duty."

JUSTICE HECHT: But it's always fades in faces, I mean, he might also say and I don't want to put a dime more in them then I have to.

MR. MARABLE: But I, I, I agree with you and I think that that's the underlying cases ...

JUSTICE HECHT: So let's say, there's a 50 chance it's going to be improper, I want to take that risk. If there's a 70 percent, if there's a 90 percent, I don't want to take that risk.

MR. MARABLE: And, and that is the issue that I think maybe gets to the crux of this because the Cox and Smith lawyers didn't say, it's 20 percent or 90 percent are there some potential issue, they did two things.

JUSTICE BRISTER: Lawyers, lawyers never do.

MR. MARABLE: Some, some, and the issue I think in this case and that's what terrified the Gibson, Dunn lawyer that looked at this, he was like there's no way that you could allow him to sign off on this. You had to tell him, no or properly funded ...

JUSTICE O'NEILL: But didn't that vote of the, the claim, I mean that goes to the liability claim and not whether it can be brought. I mean, they ultimately lose it -

MR. MARABLE: Right.

JUSTICE O'NEILL: - and maybe bar by limitations.

MR. MARABLE: All we just used frankly the issues that we've been talking about most of them are all underlying liability merit issues and eve-- the Justice Hecht's issue about, you know, we are all if it'd been 80 percent or if it's 60 percent, I don't, I'm not want to make that decision and do it. That's a merit issue, too. Cause if he was given that advice and decided, "I'm going to roll the dice and risk it," then they could successfully try to argue that there is no negligence, they didn't violate any duty. But that's the underlying merits or the case as what the Fourth Court already said, "We're going back." And that's nothing to do with whether or not there's a, a Barcelo issue or privity in that. And I'm not-- I'm out of time. So I'll stand free for the questions.

CHIEF JUSTICE JEFFERSON: Are are there any further questions? Thank you, Counsel.

REBUTTAL ARGUMENT OF CASEY L. DOBSON ON BEHALF OF PETITIONER

MR. DOBSON: May it please the Court, Justices. The kind of questions you were asking about the underlying lawsuit or that, the

Denney children sued their father's estate and Gibson, Dunn and Crutcher representation and kind of how we got here or the reason we're urging this Court to adopt the bright line rule. These children waited 30 years after their mother died to file this case but only 34 days after their father died and it's exactly for the reason Justice Hecht suggested was the ...

JUSTICE O'NEILL: Why wouldn't you decide that on limitations or latches?

MR. DOBSON: Your Honor, limitations in this case, it'd be a discovery rule case, it would be my burden to go on and put proof that Corwin Denney knew of sufficient facts to put a reasonable personal and inquiry notice that he had a claim against his lawyers and that's the clock began running and went in. How am I going to prove that in 2009? I can't cross-examine Corwin, the, the, the people I really like to depose are his long time California Accountant Joe Schneider ...

JUSTICE O'NEILL: Well, you, you say that, that they told him there was a problem that put him on notice that there was a problem.

MR. DOBSON: Yes, ma'am.

JUSTICE O'NEILL: And the-- should have known then that that there was a problem there that ...

MR. DOBSON: And I, and I-- and if you make me try this case, believe me, I will be trotting that theory out. But I, but I, but I fear that in a situation where I've got the burden of proof, the juries going to also want to hear from people like Joe Schneider or Corwin's long time California lawyer where the undisputed summary judgment proof is after he got the advice from Paul Smith and Jack Guenther. He went back to California and discussed this with Mr. Schneider and his Californian lawyer his name just take me, Mr. Schneider has passed away. The California lawyer has Alzheimer's that that telling me that I can go litigate the discovery rule, your Honor, I submit is not a reasonable substitute for the bright line that I'm asking the Court to draw here.

Gibson, Dunn and Crutcher charged $2.3 million to this estate and for $2.3 million manage to take a grand total of one deposition that of Paul Smith who 30 years later without reviewing any documents in only having fond memories of his old friend and client Corwin has asked the question to the best to your recollection, "Mr. Smith, was Mr. Denney always somebody who followed his lawyer's advice?" and Paul said, "Yeah, best as I recall, he was that kind of guy." Well, that is the slender read that we're going to go try this case on if we don't draw this bright line.

It was a set up to come and take his deposition and, and Keith Keiser the former General Counsel of Cox and Smith, my long time friend defended that deposition and as from counsel as the one who Gibson, Dunn and Crutcher set it up through and he says it was a set up but I can't depose him because unfortunately we lost Keith Keiser a couple of years ago. And you see this story over and over and over again in this case.

JUSTICE HECHT: Even though the bright line should be aware of?

MR. DOBSON: The bright line should be this. For non-estate planning, legal malpractice cases, unasserted at time of death that could have been discovered and litigated during the decedent's lifetime the Barcelo rule ought to cut that off. Mr. O'Donnell made the decision to pay the Denney children in the underlying case $13 million without filing a motion for summary judgment as to limitations and after taking one deposition, a decision that probably didn't just have old Corwin rolling over in his grave but spinning in it.

But under Barcelo, the estate should now not be able to visit the consequences of that decision on my clients and force them to litigate the question of what did Corwin Denney really want done and what were his instructions really were 30 years ago. As a matter of policy, don't make Corwin's-- Denney's attorney's try to perform what and Chief Justice Jefferson it is in your opinion in Belt the near impossible task of litigating his long ago intense in instructions.

JUSTICE O'NEILL: Would it, would it make any difference if the-- if, if there had been affirmative advice saying don't put this, the stock into your wife's trust. It is separate property and that we're just clearly wrong. I mean, it seems like we're talking a lot about the facts. And if you, if we, if we come out with the rule you proposed, it could wipe out lot of very good claims as well, based on the facts before us.

MR. DOBSON: Your Honor, I, I believe that the bright line rule that I am urging the Court to adopt will eliminate more claims that shouldn't be brought than more legitimate claims than should. I think it will be the rare case indeed when a non-estate planning legal malpractice right that could have been discovered and litigated du--

JUSTICE O'NEILL: Well, I'm-- if. I [inaudible] but probably disagree with that assessment but are there any other jurisdictions that have adopted that rule?

MR. DOBSON: No, Ma'am and in fact were are one of only eight states who even follow the Barcelo rule. We're in a distinct minority here. So looking to other states ...

JUSTICE O'NEILL: And none that would follow the rule you propose? None that follow that rule?

MR. DOBSON: None of that eight that are like us, I'm not sure if any-- I am sure that those eight have not spoken to this precise question. I don't believe with the exception. Well, I, I honestly don't remember the exception. And in some cases will be lost Justice O'Neil that just like your opinion says in Barcelo yet some legitimate cases will be lost if we draw this bright line but the greater good, the greater good is serve by drawing the line and that's what we urge the Court to do. Thank you all, very much.

CHIEF JUSTICE JEFFERSON: Further questions? Thank you. The cause is submitted. And that concludes arguments for this morning, the Marshall will adjourn the Court.

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