IN THE SUPREME COURT OF TEXAS

No. 07-0697

PAUL H. SMITH, ET AL., PETITIONERS,

v.

THOMAS O'DONNELL, EXECUTOR OF THE ESTATE OF CORWIN DENNEY, RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE FOURTH DISTRICT OF TEXAS

Argued September 10, 2008

JUSTICE WILLETT, joined by JUSTICE WAINWRIGHT, dissenting.

This legal-malpractice appeal turns on whether *Belt*[1] or *Barcelo*[2] should control. Decided a decade apart, both decisions have their place in our jurisprudence — *Barcelo* states the general rule (non-clients cannot file malpractice suits), *Belt* the exception (executors sometimes can). Unlike the Court, I believe today's case is governed by *Barcelo*'s general privity barrier, as it is rife with *Barcelo*-like concerns of divided loyalties and conflicts of interest. Indeed, this case presents exactly the sort of gamesmanship flagged in *Belt*, "an opportunity for some disappointed beneficiaries to

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[1] *Belt v. Oppenheimer, Blend, Harrison & Tate, Inc.*, 192 S.W.3d 780 (Tex. 2006).

[2] *Barcelo v. Elliott*, 923 S.W.2d 575 (Tex. 1996).

recast a malpractice claim for their own 'lost' inheritance, which would be barred by *Barcelo*, as a claim brought on behalf of the estate."[3]

A lawyer's focus should be stubbornly client-focused, concerned with today's representation of satisfied clients, not tomorrow's litigation from dissatisfied critics. The Court's decision, I fear, sends this troubling message: *caveat advocatus*–zealously represent your client at your own risk. It's hard to be zealous while nervous. For the concerns expressed in *Barcelo* (and echoed in *Belt*), I would affirm the trial court's summary judgment for Cox & Smith.

I. *Barcelo* and *Belt* Revisited

Barcelo held that trust beneficiaries lacked privity with the trustor's attorney and therefore had no claim for legal malpractice.[4] The Court reaffirmed the general Texas rule that an attorney's professional duty of care extends only to his client, and declined to recognize an exception to the privity barrier applicable "in the estate planning context."[5] The Court's chief rationale was that relaxing the privity rule might create conflicts of interest that would discourage lawsuit-wary attorneys from acting solely and zealously on behalf of their clients:

> Such a cause of action would subject attorneys to suits by heirs who simply did not receive what they believed to be their due share under the will or trust. This potential tort liability to third parties would create a conflict during the estate planning process, dividing the attorney's loyalty between his or her client and the third-party beneficiaries. . . .
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> . . . .

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[3] *Belt*, 192 S.W.3d at 788.

[4] *Barcelo*, 923 S.W.2d at 578-79.

[5] *Id*. at 577.

> We believe the greater good is served by preserving a bright-line privity rule which denies a cause of action to all beneficiaries whom the attorney did not represent. This will ensure that attorneys may in all cases zealously represent their clients without the threat of suit from third parties compromising that representation.[6]

In *Barcelo*, we did not identify an actual conflict of interest between the third-party beneficiaries and the attorney. Our decision to adopt a bright-line rule must therefore be read as based on the mere *possibility* of conflicts of interest between the client trustor or testator and the third-party beneficiary.

Belt, on the other hand, held that independent executors of an estate could sue an estate-planning attorney for injury to the estate as a whole.[7] The alleged injury to the estate in *Belt* was a substantial and avoidable estate-tax liability.[8]

A critical distinction between *Belt* and *Barcelo* is that in *Belt* the interests of the testator, the estate, the executors, and the heirs were aligned. In *Belt*, we respected and reconciled *Barcelo* by emphasizing that the potential conflicts of interest that concerned us in that case were absent in *Belt*:

> [I]n *Barcelo*, we held that an attorney's ability to represent a client zealously would be compromised if the attorney knew that, after the client's death, he could be second-guessed by the client's disappointed heirs. Accordingly, we held that estate-planning attorneys owe no professional duty to beneficiaries named in a trust or will.
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> While this concern applies when disappointed heirs seek to dispute the size of their bequest or their omission from an estate plan, it does not apply when an estate's personal representative seeks to recover damages incurred by the estate itself. Cases brought by quarreling beneficiaries would require a court to decide how the decedent intended to apportion the estate, a near-impossible task given the limited, and often

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[6] *Id.* at 578-79.

[7] *Belt*, 192 S.W.3d at 782.

[8] *Id.*

> conflicting, evidence available to prove such intent. In cases involving depletion of the decedent's estate due to negligent tax planning, however, the personal representative need not prove how the decedent intended to distribute the estate; rather, the representative need only demonstrate that the decedent intended to minimize tax liability for the estate as a whole.
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> Additionally, while the interests of the decedent and a potential beneficiary may conflict, a decedent's interests should mirror those of his estate. Thus, the conflicts that concerned us in *Barcelo* are not present in malpractice suits brought on behalf of the estate.[9]

II. The *Barcelo* Privity Barrier Should Govern this Case

Today's case should fall under the *Barcelo* privity barrier because conflicts of interest abound. While this case has a slightly altered procedural posture—suit filed by the executor, not the beneficiaries directly—there is little confusion that the executor is a pass-through, essentially bringing the children's claims in the estate's name. The trust beneficiaries had interests that directly conflicted with the interests of Corwin Denney, the client. The trust was established at the death of Denney's second wife, Des Cygne, pursuant to her will. Every asset that went into Des Cygne's trust was an asset that Denney could not treat as his separate property and spend or otherwise use as he wished. *Barcelo*'s central holding is that this conflict of interest necessarily means that trust beneficiaries do not share privity with the client's attorneys, who should focus solely on the client's best interests and wishes.

The trust beneficiaries, Denney's children, could have sued Denney during his lifetime for failing to adequately fund Des Cygne's trust with her rightful share of the couple's community property. The beneficiaries declined to do so, almost surely aware that Denney would have

[9] *Id.* at 787 (footnote and citations omitted).

vigorously contested any characterization of the Automation Industries stock as community property and that he would have offered evidence of an oral agreement with Des Cygne that all the stock was his separate property. Nor did the beneficiaries sue Denney's attorneys after Denney's death. If they had, they would have lost under *Barcelo*. Instead, they waited thirty-four days after their father died and sued his estate. The executor, O'Donnell, raised no limitations defense but instead settled with the beneficiaries for generous sums.[10] He then sued Cox & Smith for malpractice, essentially taking the position that Denney's attorneys should have persuaded him, against his strong and repeated wishes, to surrender more assets to Des Cygne's trust. So we have a *Barcelo* suit draped in *Belt* garb. I would disallow the legal makeover.

The record is clear that Denney believed that all the Automation Industries stock was his separate property and that he opposed funding the trust with this prized asset. O'Donnell, with nothing to win or lose personally by settling with the trust beneficiaries, has now become a conduit for the trust beneficiaries' claim that Denney should have been more generous to the trust and less generous to himself. Under *Barcelo*, attorneys should not be forced to answer such claims. The privity rule should preempt lawsuits where the executor effectively serves as a pass-through for the beneficiaries' claims.

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[10] Affidavits submitted by the executor's experts assert that Denney failed to fund Des Cygne's trust with Automation Industries stock worth approximately $1.8 million at the time of her death, resulting in claims by the trust beneficiaries that O'Donnell settled years later for over $12.86 million. O'Donnell also paid the estate counsel who advised him $2.3 million for eight months of work that included one deposition.

III. A Bypass Suit for Every Bypass Trust?

Because of the conflicts of interest inherent in expecting an attorney to safeguard the interests of clients and beneficiaries alike, claims by disappointed beneficiaries would discourage attorneys from focusing solely on the client's best interests, the essential teaching of *Barcelo*. I see no special significance to the fact that the beneficiaries here were beneficiaries to a trust that was not created by Denney's will. *Barcelo* also concerned a separate trust that allegedly was not properly funded.[11] Regardless, the critical similarity with *Barcelo* is that the interests of the beneficiaries whose claims led to the malpractice suit were not necessarily aligned with the interests of the deceased client, and the mere risk of divided loyalties compelled us to maintain a bright-line privity barrier that precluded legal malpractice suits filed by third parties.

I would not read *Belt* to apply whenever third parties manage to bring suit against the estate instead of the attorneys or the client directly. Again, the trust beneficiaries here could have brought suit against Denney or his attorneys but declined to do so. In *Barcelo*, the disappointed trust beneficiaries apparently could have pursued litigation against the executor of the client's estate, but instead settled with the estate "for what they contend[ed] was a substantially smaller share of the estate than what they would have received pursuant to a valid trust."[12] Bypass trusts and other trusts are extremely common estate planning devices for couples wishing to minimize taxes or serve other

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[11] *Barcelo*, 923 S.W.2d at 576.

[12] *Id*.

estate planning goals.[13] As happened here, the beneficiaries to the trust created by the will of the first spouse to die may have to wait until the surviving spouse dies, since the surviving spouse typically receives income from the trust until death, and the corpus of the trust then goes to the beneficiaries. If *Barcelo* can be circumvented in three simple steps—(1) beneficiaries sue the estate to resolve an objection to how the trust was funded or created; (2) executor settles with the beneficiaries; (3) executor then recoups the settlement by suing the attorneys who long-ago advised one or both spouses—*Barcelo*'s privity bar will prove porous indeed. I would limit *Belt* to cases where the court can safely assume that the interests of the client, the executor, and the disappointed heir or trust beneficiary are plainly and truly aligned, a situation we manifestly do not see here.

Further, if the only prerequisite to suit against a deceased client's attorney is that it must be brought by the executor, an endless variety of claims could be brought on the theory that the attorney's advice resulted in a smaller estate or trust. Every lawyer who advised a client to plead guilty or not, file for bankruptcy or not, settle a dispute or not, incorporate a business or not, and so on, would be fair game. I suspect that many experienced estate-planning attorneys have encountered a client who plans to "breathe his last breath and spend his last dollar," and who wishes not to be bothered with the paperwork, expense, meetings, or loss of control over assets involved in maximizing his estate. Today's decision arguably places a duty on attorneys to dissuade such a client

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[13] *See, e.g.*, *Stoll v. Henderson*, No. 01-07-00733-CV, 2009 WL 468872, at *1 (Tex. App.—Houston [1st Dist.] Feb. 26, 2009, no pet. h.); *In re Townley Bypass Unified Credit Trust*, 252 S.W.3d 715, 718–19 (Tex. App.—Texarkana 2008, no pet.); *Baker Botts, L.L.P. v. Cailloux*, 224 S.W.3d 723, 733 (Tex. App.—San Antonio 2007, pet. denied); *Rosen v. Wells Fargo Bank Texas, N.A.*, 114 S.W.3d 145, 148 (Tex App.—Austin 2003, no pet.); *id.* at 155–56 (Kidd, J., dissenting) (describing bypass trust); *Guest v. Cochran*, 993 S.W.2d 397, 399–400 (Tex. App.—Houston [14th Dist.] 1999, no pet).

from his carefree inclinations, and to steer him instead to altruism, a task, in my view, better left to those with divinity degrees instead of law degrees.

The distinction between this case and *Belt* is best captured with this question: would the client be rooting for the executor and the beneficiaries? In *Belt* we assumed the answer was "yes" so long as the client wanted his estate-tax liability minimized, thus leaving more to the chosen heirs. As the interests of the client-testator, estate, executor, and heirs were perfectly aligned, extending privity from the client to the executor made perfect sense.

In today's case, a "yes" answer is less clear. To put it mildly, the record does not suggest that Denney would be rooting for the trust beneficiaries, his six children, whom he wanted to inherit only nominal sums from himself and Des Cygne, with the bulk of his estate going to charity.[14] The

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[14] The flavor of the relationship between Denney and his children is provided in a letter Denney wrote to daughter Carolyn in 1979, a copy of which was sent to all his children, in which he made clear that he wanted his children only to inherit modest amounts:

> As I look back over my life, I feel extremely fortunate to have been able to have started with absolutely nothing and end up with the potential, in some small way, to contribute to the world . . . .
>
> Now, I would like to discuss with you, each of my children, with your having the knowledge that each will receive a copy of this letter.
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> . . . DesCygne and I made the trip to pay a visit on more than one occasion with your extending less than a warm welcome to DesCygne. . . . As I recall, not too many months later, you insisted that you be given a wedding almost immediately. Your mother was very much opposed to the wedding, but I sanctioned same, only because of my suspicion of the nature of the urgency, which later became substantiated.
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> As you know, I soon became suspicious that [son in law] Gerry would never amount to anything. . . . The culmination of these episodes was the asking by you and Gerry that I loan to you $10,000.00 for the purchase of a gasoline filling station. The result, of which, was a complete squandering of the money.
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> . . . DesCygne was very aware of the hatred you, [daughter] Mary, and [daughter] Anne felt for

California suit by the children directly precipitated the Texas legal malpractice suit. *Barcelo* endeavored to bar legal-malpractice suits by beneficiaries with a bright-line rule because conflicts might arise due to "concomitant questions as to the true intentions of the testator."[15] *Belt*

> her . . . . DesCygne's estate was only nominal, and resulted exclusively from what I had given to her . . . . In my will, there is an equally nominal amount to be divided equally between the six children. . . .
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> . . . I know you abhor the thought of getting a job . . . .
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> I was violently opposed to Mary marrying Gary; however, I gave them the best of weddings in Tulsa. Mary, was no better than you, in her hatred of DesCygne. . . .
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> . . . .
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> . . . Anne is the only one of my children who has ever visited me . . . .
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> With regard to [sons] Tommy and Pete, both of them were terrible problems for the several years following DesCygne's death. These problems involved rebellion against all moral standards, consumption of drugs, inabilities to hold a job, scrapes with the law, and squandering of money. . . .
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> With regard to [daughter] Deci, as you know, she has achieved an extremely poor academic record every school year. We still do not believe that this record is caused by anything other than a complete lack of application and a selfish desire to do ever what she wants. . . . Her use of drugs and alcohol has contributed to her downfall. . . .
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> At the time Deci made her decision, I explained to her that she was not going to inherit, except in a very nominal way, from her mother or me . . . .
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> Finally, I would like for you and the others to know, that upon my death the vast majority of my assets will go to the Denney Foundation.

Denney's last wife Nanci, in a deposition, summarized the suit that Denney's "horrible, odious, unattractive, disagreeable" children brought against the estate as follows: "They called him a liar and a fraud and a cheat. And I never understood why they really did it. I think they just wanted to get more money than he had left them."

[15] *Barcelo*, 923 S.W.2d at 578.

distinguished cases "when disappointed heirs seek to dispute the size of their bequest,"[16] and where the attorneys are being "second-guessed by the client's disappointed heirs,"[17] the situation here.

Cox & Smith advised Denney regarding Des Cygne's trust and her estate-tax filing. In the course of this advice the Cox & Smith attorneys advised Denney that the Automation Industries stock might, depending on choice-of-law questions, be deemed community property despite Denney's written representation to the attorneys that "DesCygne and I had a firm understanding that she had no interest in my stock in [Automation Industries]." Cox & Smith recommended that Denney seek a declaratory judgment regarding the proper characterization of the stock, but he refused, and instead "made a decision that it . . . was his separate property," according to the testimony of Cox & Smith attorney Jack Guenther. Denney always believed that the Automation Industries stock was his separate property, as he started the company in the 1940s, long before he married Des Cygne. Throughout his lifetime—through Des Cygne's death, three divorces, and a stock sale while married to his fifth wife—Denney insisted the stock was his alone. O'Donnell's testimony confirms Denney's consistent position for thirty years was "that he, not any of his wives, owned all the Automation Industries stock."

At bottom, the legal-malpractice claim is that Cox & Smith should have persuaded Denney to do something he believed was wrong and did not want to do. Denney's lawyers should not be subject to suit, decades after their representation, for implementing their client's express wishes to live out his life as a wealthier man, based on a then-defensible position that the stock was indeed his

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[16] *Belt v. Oppenheimer, Blend, Harrison & Tate, Inc.*, 192 S.W.3d 780, 787 (Tex. 2006).

[17] *Id.*

separate property and did not belong in Des Cygne's trust. The privity rule serves to tell lawyers in this situation to fight for Denney, not against him, and try to assure that he gets to keep his stock.

This case presents a conflict between client and trust beneficiary (Denney and his children) and also requires a presumption, against all record evidence, that Denney would cheer his estate's decision to settle with the children (who wanted the millions that Denney instead gave to charity) and then sue Cox & Smith for having carried out his wishes. Unlike the facts in *Belt*, what most benefits the living client who received the legal advice (treating the stock as separate property) and what the executor thought was in the estate's best interest (paying millions to settle claims that the stock was community property) are contradictory. These conflicting, misaligned interests were not present in *Belt*.

IV. Conclusion

On these facts, we cannot indulge *Belt*-like presumptions that Denney's interests while living "mirror those of his estate,"[18] that the estate's interests "are compatible with the client's interests,"[19] or that Denney would want to see his executor "standing in his shoes"[20] by suing the attorneys whose

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[18] *Id.*

[19] *Id.* at 789.

[20] *See id.* at 787 ("the estate 'stands in the shoes' of a decedent"); *id.* at 788–89 (noting that estate "merely 'stands in the shoes' of the client after death").

work Denney praised. O'Donnell is trying to squeeze into Denney's shoes, but the fit is quite uncomfortable, and the Court should not allow it.

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Don R. Willett
Justice

OPINION DELIVERED: June 26, 2009