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 O'NEILL delivered the opinion of the Court, in which CHIEF JUSTICE JEFFERSON, JUSTICE BRISTER, JUSTICE MEDINA, and JUSTICE JOHNSON joined.

JUSTICE WILLETT filed a dissenting opinion, in which JUSTICE WAINWRIGHT joined.

JUSTICE HECHT and JUSTICE GREEN did not participate in the decision.

Thomas O'Donnell, as executor of the estate of Corwin Denney, sued Cox & Smith, Corwin's attorneys, for legal malpractice, breach of fiduciary duty, and gross negligence/malice arising out of advice the attorneys gave Corwin while he was serving as executor of his wife's estate. The trial court granted summary judgment for the attorneys on all claims. The court of appeals reversed the summary judgment on the legal malpractice claim based on our holding in *Belt v. Oppenheimer, Blend, Harrison & Tate, Inc.*, 192 S.W.3d 780 (Tex. 2006). 234 S.W.3d 135, 138.

In *Belt*, we held that an executor was in privity with the decedent's attorneys and could sue them for estate-planning malpractice. 192 S.W.3d at 787. A prior case, *Barcelo v. Elliott*, 923 S.W.2d 575 (Tex. 1996), barred estate-planning legal malpractice claims brought by third-party beneficiaries of the estate. This case asks us to consider whether an executor may bring suit against a decedent's attorneys for malpractice committed outside the estate-planning context. We hold that the executor should not be prevented from bringing the decedent's survivable claims on behalf of the estate, and affirm the court of appeals' judgment.

I. Background

When Corwin Denney's wife, Des Cygne, died, Corwin served as executor of her estate. He retained Cox & Smith to advise him in the independent administration of her estate, and consulted the law firm regarding the separate versus community character of the couple's assets. According to Corwin, he and his wife had orally agreed that stock in Automation Industries, Inc., would be his separate property and stock in Gilcrease Oil Co. would be hers. Cox & Smith prepared a memorandum advising Corwin that the Automation and Gilcrease stock was presumed to be community property, and that additional information was necessary before classifying the assets. According to Cox & Smith, Corwin was also advised that he should probably pursue a declaratory judgment to properly classify the stock, which he declined to do. Cox & Smith, relying upon an analysis performed by Corwin's California accountant and without seeking a declaratory judgment, prepared an estate tax return that omitted any Automation stock from a list of Des Cygne's assets. Corwin died twenty-nine years later, leaving the bulk of his estate to charity. Approximately one month after his death, the Denney children, as beneficiaries of Des Cygne's trust, sued Corwin's

estate alleging that Corwin had misclassified the Automation stock as his separate property, and as a result underfunded their mother's trust. O'Donnell, the executor of Corwin's estate, settled the children's claims for approximately $12.9 million, less than half of their estimated value.[1] O'Donnell then brought this suit for legal malpractice against Cox & Smith, alleging that the attorneys failed to properly advise Corwin about the serious consequences of mischaracterizing assets, and that their negligence caused damage to Corwin's estate.

II. Procedural History

At the trial court, Cox & Smith won a summary judgment on all claims. The trial court did not state a basis for its decision. The court of appeals initially affirmed the summary judgment, holding that no cause of action had accrued to Corwin during his lifetime, and thus O'Donnell lacked privity with the lawyers. *O'Donnell v. Smith*, No. 04-04-00108-CV, 2004 WL 2877330, at *3 (Tex. App.—San Antonio Dec. 15, 2004). We vacated and remanded for reconsideration in light of our decision in *Belt*, 192 S.W.3d 780. In *Belt*, we held that there was no accrual problem under similar circumstances. 192 S.W.3d at 785–86. There, the independent executrixes of an estate brought a legal malpractice claim on the estate's behalf alleging that a negligently-drafted will had increased the estate's tax liability. *Id*. at 782. We held that because the injury that formed the basis of the claim occurred when the will was drafted, the claim accrued prior to the decedent's death. 192 S.W.3d at 785–86. We further held that legal malpractice claims for pure economic loss are

[1] According to O'Donnell's attorney, the Des Cygne beneficiaries' claims against Corwin were worth at least $32 million and perhaps as much as $40 million.

survivable and an estate's personal representative may bring survivable claims on behalf of the estate. *Id.* at 785–87.

In this case, the court of appeals held, on remand, that (1) a fact issue existed as to whether a malpractice cause of action accrued during Corwin's lifetime; (2) such a claim would survive in favor of the estate; and (3) no evidence supported O'Donnell's malice claim. 234 S.W.3d at 145–48. Cox & Smith argued to the court of appeals that despite our holding in *Belt*, the summary judgment should have been affirmed because O'Donnell lacks privity with Cox & Smith. Cox & Smith based its argument on *Barcelo*, 923 S.W.2d 575, in which we held that estate-planning attorneys owe no duty to third-party beneficiaries, and are not subject to malpractice lawsuits brought by them. Cox & Smith contends legal malpractice claims cannot be brought by anyone but the client, and *Belt* merely created a narrow exception for executors bringing estate-planning legal malpractice claims. The court of appeals rejected this argument, and we consider it here.

III. Privity Between Attorneys and Executors of the Client's Estate

An executor is a personal representative who "'stands in the shoes'" of the decedent. *Belt*, 192 S.W.3d at 787. As a general rule, an estate's personal representative may bring the decedent's survivable claims on behalf of the estate. *Id.* at 784*; see also* TEX. PROB. CODE § 233A ("Suits for the recovery of personal property, debts, or damages . . . may be instituted by executors or administrators."). In *Belt*, we considered whether the executrixes' legal malpractice claim was survivable. 192 S.W.3d at 784. At common law, actions for damage to real or personal property survive the death of the owner. *Id*. Thus, we held that "legal malpractice claims alleging pure economic loss survive in favor of a deceased client's estate." *Id.* at 785.

Having identified these claims as survivable, we must consider whether there is any reason for an exception preventing executors from bringing them. Cox & Smith again relies on our holding in *Barcelo*, where we identified the longstanding privity rule barring non-clients from suing for legal malpractice. 923 S.W.2d at 577. In that case, the beneficiaries of a will and a trust agreement sued the estate-planning attorney for legal malpractice, alleging that negligent drafting had harmed their interests. *Id*. at 576. We refused to join the majority of states that relax the common-law privity barrier for intended beneficiaries, and held that third parties lack privity with a deceased's attorney and cannot sue for malpractice. *Id.* at 577–79.

We identified two policy considerations that supported our decision in *Barcelo*. First, allowing these suits could disrupt the attorney–client relationship. If third parties could sue for estate-planning legal malpractice, attorneys would be distracted by the threat of future lawsuits from disgruntled heirs, making them less able to serve their clients. *Id.* at 578. Second, third-party estate-planning malpractice suits would allow disappointed beneficiaries to seek a greater share of the estate by claiming the testator's true intent was different from what is expressed in a formally-executed will, and thus create "a host of difficulties." *Id.*

Cox & Smith contends *Barcelo* bars all legal malpractice suits brought by non-clients, with the exception of estate-planning malpractice claims brought by executors, like that in *Belt*. To adopt the rule Cox & Smith suggests would place us alone among the states, and would unnecessarily immunize attorneys who commit malpractice. None of the concerns we voiced about third-party malpractice suits apply to malpractice suits brought by an estate's personal representative. The threat of executor lawsuits will not impede the attorney–client relationship, because the estate's suit is

based on injury to the deceased client, as opposed to any third party. The estate's suit is identical to one the client could have brought during his lifetime. An estate's interests, unlike a third-party beneficiary's, mirror those of the decedent. *Belt*, 192 S.W.3d at 787.[2]

Cox & Smith argues that the estate's interest in this suit is not truly in line with the decedent's because Corwin had always intended to keep the community-property stock out of the trust and treat it as his own property, and he did so without seeking the declaratory judgment Cox & Smith recommended.[3] This argument, though, goes to the weight of the legal malpractice claim and does not change the fact that O'Donnell "stands in the [deceased's] shoes" in assessing the claim's merit and deciding whether or not to assert it on the estate's behalf. *Id*. Of course, if the evidence demonstrates that Corwin would have ignored Cox & Smith's advice no matter how competently provided, the malpractice claim will fail for lack of proximate causation. But at this point in the proceedings, the merits of the malpractice claim are undeveloped. There is at least some evidence that Corwin would have followed his lawyers' advice to pursue a declaratory judgment if they had clearly advised him to do so or warned him adequately of the severe consequences of mischaracterizing community assets.

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[2] In *Belt*, we noted that several considerations should discourage beneficiaries who also act as an estate's personal representative from pursuing estate-planning malpractice claims in order to increase their own shares. First, mismanagement could subject the personal representative to removal. *Belt*, 192 S.W.3d at 787–88 (citing TEX. PROB. CODE § 222(b)(4)). Second, any damages recovered would be paid to the estate, then distributed according to the existing estate plan. *Id*. at 788. These concerns are not present here because O'Donnell is not a beneficiary of Corwin's will or Des Cygne's, and furthermore, the claim is not for estate-planning malpractice.

[3] The dissent asks, "would the client be rooting for the executor and the beneficiaries?" The answer is almost certainly yes. The Des Cygne beneficiaries received fixed amounts under Corwin's will. The only beneficiaries that stand to benefit from the suit against Cox & Smith are the charity to which Corwin intended to leave the bulk of his estate and possibly Corwin's widow.

And although Cox & Smith suggests, and the dissenting justices assume, that O'Donnell colluded with the Denney children in settling their claims, there is nothing in the record that would support such a presumption. If Cox & Smith can in fact demonstrate collusion at trial, it would presumably negate causation and/or mitigate damages on the legal malpractice claim, and could subject O'Donnell to personal liability to Corwin's beneficiaries for violating his fiduciary duties as executor of Corwin's estate. We see no reason to create a rule that would deprive an estate of any remedy for wrongdoing that caused it harm by prohibiting the estate from pursuing survivable claims the decedent could have brought during his lifetime.

Cox & Smith argues that the court of appeals' decision creates an end-run around *Barcelo*, allowing disgruntled beneficiaries to sue to increase their inheritances. However, the Des Cygne beneficiaries' claims were not against Corwin's estate as beneficiaries of his will, but against Corwin as executor of their mother's estate. Had they known during his lifetime that Corwin had misallocated their mother's community property and brought suit while he was alive, as the dissenting justices say they should have, any judgment or settlement they might have obtained for damage to their mother's estate would have been collectable from Corwin, who then could have asserted a claim against Cox & Smith for legal malpractice. In such a case, under Cox & Smith's and the dissenting justices' view, *Barcelo* would extinguish Corwin's malpractice claim upon his death simply because the Des Cygne beneficiaries were also beneficiaries of Corwin's estate. We do not believe *Barcelo* will bear such an expansive reading. To the contrary, when negligent legal advice depletes the decedent's estate in a manner that does not implicate how the decedent intended to apportion his estate, *Barcelo*'s concerns about quarreling beneficiaries and conflicting evidence

do not arise. *See Barcelo*, 923 S.W.2d at 578. Here, the beneficiaries of Des Cygne's trust do not dispute Corwin's intent as expressed in his will. They have already been paid a settlement out of Corwin's estate for damage Corwin allegedly caused to their mother's trust; the outcome of O'Donnell's legal malpractice suit against Cox & Smith will have no impact on their recovery, and they have no interest in that suit.

Adopting the broad rule Cox & Smith proposes would preclude executors from recovering for any claims the estate has to pay potential beneficiaries due to bad legal advice the decedent received during his lifetime. For example, according to Cox & Smith and the dissenting justices, if Corwin had improperly handled co-owned property based on bad legal advice and then died, his estate would be liable to the co-owner and could sue for legal malpractice so long as the co-owner was not related to Corwin and therefore a potential beneficiary of his estate. If a judgment was entered against Corwin because counsel botched his defense in a personal injury action arising out of an automobile accident, and Corwin later died, his estate could not assert a malpractice claim for damages that his estate must pay if the injured party happened to be a beneficiary of his will. We see no reason to extend the *Barcelo* privity bar to survivable malpractice suits brought by an executor, and declined to do so in *Belt.* We do not read *Barcelo* to bar O'Donnell's suit against Cox & Smith.

The dissent contends our decision will somehow allow disgruntled beneficiaries to employ gamesmanship to recover more than they were devised and will open up new avenues for attorney liability. Under *Barcelo*, beneficiaries cannot sue a decedent's attorneys for estate-planning malpractice. *Id*. at 579. But this case does not involve a claim of estate-planning malpractice and

it does not involve a suit by a decedent's beneficiaries against the decedent's attorneys. The Des Cygne beneficiaries did not sue Corwin's attorneys and have no interest in the outcome of the legal malpractice case. They did sue Corwin's estate, but did so in their capacity as the wronged beneficiaries of their mother's allegedly underfunded trust, not as disgruntled beneficiaries of Corwin's will. We see no reason to bar a completely separate lawsuit — that of the executor against Corwin's attorneys — simply because Des Cygne's beneficiaries sued the estate for Corwin's mishandling of their mother's trust.

IV. Malice

O'Donnell has filed a cross-petition challenging the court of appeals' holding that O'Donnell presented no evidence of malice to support an award of exemplary damages. *See* Act of Apr. 11, 1995, 74th Leg., R.S., ch. 19, § 1, 1995 Tex. Gen. Laws 108, 110 (amended 2003) (current version at TEX. CIV. PRAC. & REM. CODE § 41.003(a)). Malice has both an objective and a subjective prong; proof of malice involves an objective determination that the defendant's conduct involves an extreme risk of harm, and a subjective determination that the defendant had actual awareness of the extreme risk created by his conduct. *Kinder Morgan N. Tex. Pipeline, L.P. v. Justiss*, 202 S.W.3d 427, 447 (Tex. App.—Texarkana 2006, no pet.).

The objective prong is a function of both the magnitude and the probability of potential injury and is not satisfied if the defendant's conduct merely creates a remote possibility of serious injury. *Universal Servs. Co. v. Ung*, 904 S.W.2d 638, 641 (Tex. 1995). "Extreme risk" is not a remote possibility of injury or even a high probability of minor harm, but rather the likelihood of serious injury to the plaintiff. *Lee Lewis Constr., Inc. v. Harrison*, 70 S.W.3d 778, 785 (Tex. 2001). The

subjective prong requires evidence that the defendant was subjectively aware of the risk but consciously chose to do nothing. *Lee Lewis*, 70 S.W.3d at 786.

In reviewing a no-evidence summary judgment, we review the evidence in the light most favorable to the respondent against whom the summary judgment was rendered. *City of Keller v. Wilson*, 168 S.W.3d 802, 824 (Tex. 2005). If the respondent brings forth more than a scintilla of probative evidence to raise a genuine issue of material fact, a no-evidence summary judgment cannot properly be granted. *Reynosa v. Huff*, 21 S.W.3d 510, 512 (Tex. App.—San Antonio 2000, no pet.).

O'Donnell argues that he introduced more than a scintilla of evidence on both the objective and subjective prongs. We agree with the court of appeals that the strict standard for proving malice was not met. The evidence O'Donnell offered to prove that there was an extreme risk of harm amounts to conclusory statements from his expert and Corwin's California counsel. Similarly, the evidence raises no fact issue that Cox & Smith intended to cause Corwin injury or acted with actual awareness of an extreme risk of injury. Cox & Smith recognized that classifying the property was important, and informed Corwin that it was "presumably community," and that more information was needed to classify it properly. Cox & Smith also advised him that he should "probably" seek a declaratory judgment on the classification.

O'Donnell argues that it was inappropriate for the court of appeals to consider this evidence of "some care" exercised by Cox & Smith, because "some care" will not carry the burden on a no-evidence summary judgment. But the court of appeals is charged with considering "*all* the evidence" in reviewing punitive damage issues. *City of Keller,* 168 S.W.3d at 817 (emphasis in original). Moreover, we have held that in reviewing a summary judgment on malice, courts should consider

"all of the surrounding facts, circumstances, and conditions" in deciding whether an action was pursued with conscious indifference to risk. *Burk Royalty Co. v. Walls*, 616 S.W.2d 911, 922 (Tex. 1981).

The court of appeals did not err in considering evidence that Cox & Smith had in fact made some attempt to point Corwin down the path of correctly classifying the stock. Considering all the evidence, there is nothing to suggest that Cox & Smith had any intent to harm Corwin or consciously chose to not give him more detailed advice, and thus the court of appeals did not err in affirming the no-evidence summary judgment on malice.

V. Conclusion

For the foregoing reasons, the court of appeals' judgment is affirmed.

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Harriet O'Neill
Justice

OPINION DELIVERED: June 26, 2009