ORAL ARGUMENT – 3/7/01
00-0643
MD ANDERSON V. NOVAK

LAWYER: A plaintiff without standing cannot bring a suit either individually or as a representative of a putative class. The CA was wrong to suggest that a plaintiff without standing, like Mr. Novak, could potentially represent a class.

The CA's error occurred when it analyzed the issue in terms of a class of individuals who may have given money to MD Anderson in response to a fundraising letter in Jan. 1998. But there is no class in this case. Only a lawsuit by an individual seeks to pursue relief on behalf of himself and if a class is later certified in the future on behalf of others like him.

Texas courts have held on a handful of occasions that until the TC certifies a class a suit brought as a class action is to be treated as an individual lawsuit by the named plaintiff against the named defendant or defendants. The Dallas CA recently held just last month in a case called Grissel, which is to be reported but has been yet at 2000 Weslaw, 122, 115: If an individual plaintiff lacks standing and, therefore, cannot bring a stand alone lawsuit, which this court has held on numerous occasions and as the CA properly held to be the case with Mr. Novak, then the case should be dismissed for lack of jurisdiction with no further action. And the mere existence of class allegations cannot save that lawsuit from dismissal.

The Texas courts that have spoken on this general issue are relatively few in number, but I think that the words that have been spoken in those cases are clear and unambiguous. We've cited in our brief the Lashley case from Dallas. There is the Petty case from the Austin CA that very clearly says that if the court determines that the individual plaintiff does not have standing, then the court's analysis should cease. That should be the end of the matter.

The San Antonio court in the MMO case has similarly held that standing is a bar to a plaintiff who cannot allege his own personal injury and standing under this court's Texas Association of Businesses case.

The federal courts have been even more clear. We cite the Simon case in our brief, but there are others. One case that is not cited in the brief but it is cited in the Petty case, which we cite, is the O'Shea v. Littleton case from the US SC, 414 US 488, 1974, that directly holds "if none of the named plaintiffs purporting to represent a class establishes the requisite of a case or controversy (and in that case they were talking about standing) none may seek relief on behalf of himself or any other member of the class."

There is simply no indication in Texas or federal law regarding class actions that making class allegations somehow separates a putative class from any other lawsuit, and that a defendant or defendants may properly seek to have that suit dismissed for lack of jurisdiction because the plaintiff has no standing.

We're a little bit unclear actually about Mr. Novak's position in this case, because his brief in response seems to suggest that he agrees that he needs to show standing. And his only attempt to do that is reliance on the federal mail fraud statute. Mr. Novak agreed in the DC when this case was below that there is no private right of action for mail fraud. Because there was a federal cause of action alleged this case was initially removed to federal court. Mr. Novak then moved to remand the case based on his assertion that the mail fraud statute did not set out a private right of action. The state then agreed with him and said that if he were willing to

stipulate that there was no private right of action under the federal mail fraud statute, then the case could be properly remanded.

ABBOTT: Are there any members of the putative class who would have a private right of action?

LAWYER: Not under the federal mail fraud statute.

ABBOTT: Not under that, but in this case are there any members of a putative class? My question, I guess I'm just saying other than Mr. Novak is there anybody else who has the potential right, a cause of action?

LAWYER: There are individuals who gave money. If they came forward and brought a cause of action similar to those brought in this suit, we would certainly still assert sovereign immunity and any other defenses that we had, including the voluntary donation and other things discussed by the CA. But I don't know that we would assert lack of standing against an individual who had actually given money.

ABBOTT: If you were to prevail, the cause of action asserted by Mr. Novak would be dismissed for want of jurisdiction. And he's the only person right now who has actually filed a claim. And so I guess that makes the whole thing go away for right now with the possibility that somebody else could file a lawsuit later.

LAWYER: Yes. And I would like to maybe address that a little further. If the court has some concerns about fairness - what happens to members of a class- the US SC and the Texas courts have made clear that despite the lack of merit while a class action suit is pending before dismissal or before a denial of class certification statute of limitations are tolled. That's the American Pipe & Construction Co. Of course it's not discussed in the brief. That's a US SC case from the mid 70's. It says that statute of limitations are tolled for plaintiffs who may have relied on the presence or pending class action. But once that is dismissed or class certification is denied, then the statute of limitations picks up again and begins to run again. And that is intended to preserve the rights of those who may have relied on a class action. There is certainly no unfairness to any members of a putative class by dismissing Mr. Novak's case. They are adequately protected and would if they wanted to be able to bring their own lawsuit.

The Salvaggio case that the CA relied on, we think is _____. Standing was never asserted in that case. The question was, whether Mr. Schwartz could serve as an adequate class representative. But the issue there was that prior to class certification, they had actually brought in - the TC had suggested that Mr. Schwartz might not be an adequate representative, so the plaintiffs have brought in another class rep that all of the defendants stipulated would be an adequate class representative. Standing simply was never asserted or discussed really in that case, and we don't think that it could form the basis or support the CA's judgment in this case.

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RESPONDENT

NOVAK: I have felt throughout most of the briefing in this case that the state has not understood what this cause of action is about. While I don't presume the same lack of understanding on the part of this court, I would like to just bullet point for the court what the theory of this case is.

Number 1, MD Anderson is a part of the Univ. of Texas. John Mendelsohm and his MDA associates are state employees. John Mendelsohm and others at MDA mailed to the respondent and others a letter seeking monetary contributions from those recipients of the letter so as to assist MDA in furthering its cancer research.

The letter contained a false representation to the effect that MDA cured one of every two cancer patients it treated. The false statement was made to induce recipients to part with their money. The mailing of fraudulent materials with the intent to cause a recipient to part with his or her property is a violation of law. Mendelsohm and others at MDA acted unlawfully in mailing the fundraising letter containing the false representation.

Texas law provides that the unlawful acts of state officials are not the acts of the State of Texas, and that state officials who act unlawfully are subject to suit in their individual capacities for declaratory and other relief by individuals against whom such unlawful activities are directed.

By virtue of MDA's attempt to induce respondent and all those who received the letter to part with their money, respondent and all those who received the letter have "an interest that is peculiar to them as recipients" that sets them apart from members of the general public who did not receive the letter. Because this letter potentially deprives the recipients of a valuable property right, they have standing to prosecute this cause of action. And that is the reliance and a quote from this court's 1984 decision in Hunt v. Bass(opinion by Mr. Justice Wallace).

Under Hunt v. Bass, this showing of "particular personal interest" confers standing in this cause of action. Confers standing on the respondent. As between MDA and the recipients of the letter, the truthfulness of the context of a fundraising letter creates a "justiciable controversy". That is the reliance on this court's opinion, Board of Water Engineers v. the City of San Antonio, 1955 opinion by Mr. Justice Garwood.

A requirement of a direct injury as a component of standing applies only to challenges to a statute or an ordinance. That is as the statute is applied causes plaintiff some special injury. That position is derived from Mr. CJ's opinion in Texas Worker's Comp. v. Garcia, 1995 opinion of this court.

Therefore, the standing under Texas case law, I suggest to the court, that the standing is there. One of the components that I think is critical for the court to look at here in determining this standing and the justiciable controversy is the fact that this false and fraudulent statement was thrown out to all of the recipients of the letter. And there is a line of a cases here in Texas that they arise in the CA under the commonality aspect of class action cases where they refer to core documents that are used to perpetuate a fraud on the recipients of the documents. Core document cases that imply fraud are almost prima facie certifications for a class action so long as the fraudulent representations were made to all members of the class.

Now I suggest that in this situation there is a very, very close analogy between the commonality argument based on the core fraudulent documents and the standing in this case relating to the controversy that's caused by the mailing of the documents. And given the fact that a core document was mailed to everyone of the putative class members, I suggest to the court that it doesn't make any difference whether the respondent in this case put up any money or not. The standing is there by virtue of the justiciable controversy, by virtue of having received a core document. And the common issue here is going to be whether or not the statement that was made was false. Once it is determined that the statement that was made was in fact false, then any member of the putative class can step forward and say, I paid money in reliance on that. I want my money back.

So I suggest that what the solicitor general indicated was that this court must reverse this case because of a standing issue that was brought up for the first time on appeal. MDA never raised the issue of standing in the TC as represented in all of their briefs. Their basis in the TC was simply that they had sovereign immunity and that no private cause of action existed on respondent's part under the Federal Conspiracy and Mail Fraud statute. Those are the only points that were raised.

Thinking that this was a private cause of action for mail fraud, they removed the case to the federal DC here in Austin, and the case was remanded back because obviously this is not a case about a private mail fraud cause of action. This is a case about seeking a declaratory judgment saying that conduct of state officials was unlawful. And as a consequence of that, the putative class members are entitled to their money back insofar as they may have relied on the false statement. And that is the respondent's position in this case.

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REBUTTAL

LAWYER: First, I have a copy of our motion to dismiss for lack of jurisdiction. On page 4, the first major heading for the arguments, Plaintiff's Lack of Standing Under Enumerated Cause of Actions. And it goes through and discusses why there is no standing. That was in fact raised in the TC. And second, I would just like to point out, that the argument that there should be no requirement of a direct injury in this suit would lead to the type of situation which has been rejected in every court where an individual could for instance simply read the Wall Street Journal every morning, be on the mail list for lots of prospectuses, and then if the individual is able to identify what he or she believes are false or fraudulent statements could develop a _____ securities class action practice that does not need to find an individual who's actually been injured, or who has given money or lost money on reliance on those statements.

It is a theory of justice that the courts have never accepted. We do require that kind of injury because we want people to come before the courts who have suffered some injury, so that the courts don't feel that they are basically offering advisory opinions on things that may or may not be injustices that have happened in society. We require the individuals who have been a part of those transactions and who have been injured or who claim to have been injured by this to come before the courts and bring those lawsuits. And that is why Mr. Novak's suit must fail. He cannot argue that he has standing. And he does not have standing to bring his own suit and, therefore, cannot act on behalf of himself or on behalf of a putative class.