ORAL ARGUMENT — 9/8/98
97-0827
DOUGLAS V. DELP

FRAZIER: This legal malpractice case presents several issues import to the jurisprudence of this state. This court should reverse the CA's judgment and affirm the TC's judgments as to Billy Delp on the basis that he lacked standing as a bankrupt debtor to prosecute his claim. As to Gertrude Delp, a judgment of the TC should be affirmed on the directed verdict, because she presented no probative evidence of causation testimony. As to Billy Delp, Billy Delp of course filed bankruptcy after he filed this legal malpractice claim. Once he filed bankruptcy, of course, under §541 of the Code, the trustee had title, had the right to prosecute, settle or abandon that cause of action.

BAKER: Wasn't this a voluntary Ch. 11 by Mr. Delp?

FRAZIER: Yes, it was, the trustee.

BAKER: And isn't he a debtor possession in the Ch. 11?

FRAZIER: No. A trustee was appointed.

BAKER: I understand that. But under the framework of an 11, he still keeps on working, he just stopped everything the day he filed it, isn't that right? He has control of his business and what he does with his assets, and he has to work out a plan of reorganization with his current creditors?

FRAZIER: That's one of the things that he does as a debtor.

BAKER: Do I understand that the plan of reorganization in this case was proposed by the creditors and not by Mr. Delp?

FRAZIER: Yes, one of his main creditors, Mr. Harbison, it was his plan of reorganization that was confirmed by the bankruptcy court and he did appeal that up to the Fifth circuit.

BAKER: So he had a cram down on the 11th, is that right?

FRAZIER: I don't know if it would be a cram down, but it was obviously something that Mr. Delp opposed.

BAKER: Is that the basis for your viewpoint then that because he appealed the asset situation, that he lost that there and that's res judicata to his standing in the state court?

FRAZIER: Yes. The fact that he did appeal that order, which is a final appealable order under federal law, then the decision by the DC and the appellate courts are res judicata even if it's on the jurisdictional issue. But even under Ch. 11, our position is that all the cause of action of the assets by virtue of the code still go into an estate, and the trustee has the exclusive right to prosecute that claim. And so Billy does not have standing in this court, in the CA, or in the TC, and therefore, this court should dismiss his claim.

HECHT: Who does?

FRAZIER: Right now Tracey has the claim, and that goes into whether the sale of the claim to Tracey was valid or not in accordance with this court's decision. If the court holds that the sale was invalid, then it would still be the trustee, who didn't intervene in the case. If the sale was valid, of course, then Tracey purchased the sell for consideration.

HANKINSON: What is the interplay between the standing issue as to Mr. Delp and the res judicata issue? Are those alternative arguments or does the standing issue need to be dealt with first before the res judicata issue can be dealt with?

FRAZIER: I think they are separate issues. I think by virtue of the code, the trustee has exclusive right, and he can't prosecute his claim. The fact that there was a plan and then he did appeal that plan bars the attack on the sale, because the sale was contained within the plan. The plan specifically said, "Here is a liquidating trust, you shall sell it by this date." He did appeal that, but the record doesn't disclose exactly the content of the issues that he raised in the 5th circuit CAs, but he did appeal it, and it was affirmed. And we know that under federal law that even if he's claiming the court didn't have jurisdiction because it was sold to Tracey, a non-client, he still had to raise that under federal res judicata law. Under the USSC decision that we found in *Insurance Corporation of Ireland*, a 1982 case says that, "even issues of subject matter jurisdiction have to be raised in that appeal." And so he has no basis here in this court to say that the assignment was improper. But as to whether the sale was proper, as to whether the plan that allowed for the sale, he had to take that up in the bankruptcy court. And once that was affirmed by the 5th circuit, he can't collaterally attack it in the state courts. So although they are closely related, we think that there were two separate bases that this court should overrule and reverse the Ft. Worth CA's judgment and affirm the dismissal as to the Billy Delp.

OWEN: If this had been assigned to truly a third-party, the malpractice claim, would the defendant in the malpractice lawsuit have standing to object to the assignment assuming the defendant in the malpractice case was not a party to the bankruptcy proceeding?

FRAZIER: No, I don't think the defendant would have standing to object to the assignment.

OWEN: Why not?

FRAZIER: Once we're into the bankruptcy court, then the federal bankruptcy law and the policies behind that apply, and I don't think you would have standing to go into the bankruptcy court.

OWEN: No, I'm sorry. The bankruptcy is over, the malpractice claim has been assigned to a truly third-party who had no interest in the malpractice lawsuit. Then the assignee of the claim tries to proceed in state DC against the defendant, the malpractice defendant, the malpractice defendant have standing to object to the assignment?

FRAZIER: If the assignment came by virtue of the bankruptcy, then our position is no, because the trustee had the right to do that. But the policies underlying *Zuniga* and *Gandy* would not apply because again it was in the context in the _____ of the bankruptcy. Now if there were no bankruptcy and bankruptcy wasn't involved at all, then under *Zuniga* and *Gandy* then yes. The policies under state law in that context would have given the defendant a right to raise the *Zuniga* and *Gandy* issues.

OWEN: Are you saying that turns on federal preemption then?

FRAZIER: Federal preemption, the supremacy clause, the purposes behind the bankruptcy laws to give the creditor/debtor a fresh start in exchange for giving the creditors the most out of the bankruptcy estate, we believe are preeminent and that the policies which are very important, which we certainly agree with in *Zuniga* and *Gandy* are not implicated in a bankruptcy trustee liquidating sale. They're two different sets of policies.

OWEN: How do you distinguish the *Integrated Resources* case?

FRAZIER: *Integrated Resources*, that's a 3rd circuit that admittedly is squarely against us. The 3rd circuit looked at that and they felt that if it's nonassignable, that that non assignability is traced into a bankruptcy estate and that the sell was void. That's what the 3rd circuit held.

HANKINSON: Do you have any authority from any other federal court that counters the *Integrated Solutions* case?

FRAZIER: We have looked at that, and just very few cases that have dealt with this issue and all of those are in our briefs. And there was nothing that has countered *Integrated*.

HANKINSON: Well the *Integrated Solutions* case discusses the US SC decision in *Buttner* that was decided in 1979, in which the court, although not on these facts and not dealing with this issue, did talk about the fact that congress had left the determination of property rights in a bankruptcy proceeding to state law.

FRAZIER: That's correct.

HANKINSON: Why doesn't that principle undercut your argument here that *Zuniga* and Texas law and the nonassignability of legal malpractice claims shouldn't be the law with respect to this case?

FRAZIER: Because, we interpret the *Buttner* opinion and the other cases that talk about that the rights of property interest are defined by the state. Meaning that, let's see what can be cut and be taken into the bankruptcy estate, and what interest does the bankrupt debtor have and are there other interests. Well here, Billy Delp had the only interest in this claim. And so that was defined by state law. But as far as whether or not he can assign it, then we feel that that is a different question that no one else has an interest. He has the only interest. Then you look at the purposes of the bankruptcy act.

HANKINSON: Obviously pre-bankruptcy Mr. Delp could not have assigned or sold this claim under Texas law?

FRAZIER: Yes.

HANKINSON: Why would a trustee in bankruptcy have greater rights vis-a-vis the claim than Mr. Delp would?

FRAZIER: Our position is is that his ability to sell it is part of his responsibility. And we don't really consider it a greater right, it's just that the rights in that interest basically change and the purposes of the bankruptcy act come into play. But he certainly could have settled the case and this is really what this was - was a settlement of his claim for $25,000. He could have settled the case, he could have entered his own agreement.

ABBOTT: What would be wrong with that conclusion, and that is, by concluding that it is the trustee once the legal malpractice cause of action goes into the bankruptcy estate it is only the trustee who has the authority to prosecute the case and/or settle?

FRAZIER: That's our position and that's what the federal law says case after case. He has the exclusive right...

ABBOTT: Your position is that it can be transferred out - sold as it was in this case to Tracey?

FRAZIER: Pursuant to a court order that allowed the sale. He abided by the order and sold it.

ABBOTT: But what I'm saying is not allowing a sale, that it would be left solely with the trustee to settle it or to prosecute it and not sell it to anyone else?

FRAZIER: That certainly would be an option and that would keep in tact the *Zuniga* and *Gandy* policies. But our position is of course, that he can dispose of it in the best way that he deems fit allowed by the federal bankruptcy court for the benefit of the creditors. And if that is settling it in this case or selling it expeditiously, which the code says he has to do expeditiously, then he ought to have that discretion.

ENOCH: Does it make any difference to you about Delp's standing whether the trustee has the authority to assign it to Tracey or not? Does it affect the outcome of this on the issue of whether or not Mr. Delp has standing, as to whether or not the trustee assigned it to anybody else or not?

FRAZIER: No it doesn't.

ENOCH: So it's not going to change the outcome on Delp's standing depending on who else got this thing?

FRAZIER: That is correct. And we asked the CA to say, "What does Tracey have?" "Who has standing?" And they just simply said that he didn't have standing to dismiss or prosecute the claim. But our position is, that Billy Delp doesn't have standing by virtue of him filing bankruptcy. And these other issues about the assignability, the sell to Tracey, even res judicata really are separate issues. He doesn't have standing to be before this court, the CA or even the TC. It would be either the trustee, should the sale not be proper in the court's view, or Tracey who did purchase the cause of action for value. But it's not Mr. Delp is our position.

HECHT: If the trustee didn't pass this right to prosecute, or settle, or whatever it was, the trustee still has it in your view?

FRAZIER: Yes.

HECHT: If the bankruptcy is concluded so now who has it?

FRAZIER: First of all, it's not in the record but we did check. The bankruptcy is still pending as far as we know. We checked with the DC. It's still pending. It has not been closed. And so, the trustee is still there and they are still doing some things, and so he would have it and then he would have that right.

HANKINSON: But in fact, the sale of this particular asset was the subject of the final order out of the bankruptcy court that was appealed to the 5th circuit?

FRAZIER: Yes.

HANKINSON: And the record reflects that?

FRAZIER: Yes. There are bankruptcy documents, the plaintiff reorganization is in the record, the order confirming that plan is in the record, and the bill of sale that recites the entire history of the appeal of that order.

HANKINSON: And it was the confirmation order and the sale itself that were subject of the appeal to the 5th circuit?

FRAZIER: The order of confirmation was the subject of the appeal. The record doesn't reflect if you took a separate appeal after the sale or filed any motion in the bankruptcy court to contest that particular sale. Our position is, since the plan of reorganization specially said that these assets go into a liquidating trust and *must be* sold by a certain time period, that he had to appeal and say whatever he wanted to raise, but he had to attack that sale, that asset he should have appealed and said that is not subject to this order, not subject to a liquidating sale. He did not do that or even if he did, we have an order affirming from the 5th circuit. So, the validity of the sale has already been decided and cannot be decided in our position in the state court system.

BAKER: Are you saying then, a Texas state court can't now decide that that was a nonassignable, nonexempt asset to go into a liquidating trust? So that's all over?

FRAZIER: That's our position. Because of the appeal to the 5th circuit. Even again on jurisdictional grounds under federal res judicata law, which is the law of course because it was a federal order.

As to Gertrude, her claim went to trial and she presented her case, and the court granted directed verdict. One of the issues before this court is is expert testimony required for causation in legal malpractice cases? The CA held that, "Yes, when it's not in the knowledge of ordinary lay persons," then they went on and held that this was a case that was within the knowledge of lay persons, and that this obviously is record intensive or fact intensive. But in looking at the case and looking as our brief points out, we had 2-1/2 years between the compromise settlement agreement and Billy's bankruptcy, we had a host of lawsuits, we had the downturn in the market, we had bad business decisions, which they admit, they had debts that weren't paid, and he needed expert testimony to connect those two.

HANKINSON: Why doesn't your standing in res judicata arguments also apply to Mrs. Delp's claim?

FRAZIER: They do. She doesn't have standing either because the damage that she is seeking is damage to the joint community property estate.

* * * * * * * * * * *

RESPONDENT

LAWYER: What we have is a collision between policies here, and the need to try to find some result that puts these two policies together in some meaningful way. We have never contested that Billy Delp's legal malpractice claims went into Billy Delp's bankruptcy estate.

The question is, they went into that estate with certain restrictions on them. One of the restrictions is brought up in *Barcello*, a case from this court which says that you have to have privity to bring a malpractice claim.

OWEN: Could the trustee have pursued the claim?

LAWYER: Yes.

OWEN: If we agree with you that the trustee could not viably assign the claim, doesn't the claim still reside with the trustee?

LAWYER: Probably.

HANKINSON: So Mr. Delp doesn't have standing? If the trustee has the claim, the he doesn't have the claim, he doesn't have standing? Yes or no!

LAWYER: I don't believe Billy Delp has standing in this case. Let me back up. The trustee derives his standing to prosecute this claim from Billy Delp, who is the trustee. Those are the only two people under Texas law who have standing.

HANKINSON: But as Justice Owen just asked, this claim was swept into the bankruptcy estate with the filing of the Ch. 11 and became an asset of the estate?

LAWYER: Correct.

HANKINSON: And we have no evidence that it ever reverted back to or went back to Mr. Delp in terms of him owning the claim?

LAWYER: Correct.

HANKINSON: So if it resides in the trustee, then the trustee owns the claim at this point in time, and Mr. Delp does not?

LAWYER: That's correct.

HANKINSON: Now if Mr. Delp does not own the claim, then he doesn't have standing to pursue it, correct?

LAWYER: That's correct. He does not have standing to pursue the claim, but the claim that resides with the trustee in bankruptcy is subject to the state imposed restrictions on assignability. The trustee does not receive an asset with greater rights to it than Billy Delp had when he put it in the bankruptcy _____.

HANKINSON: Do you agree with Mr. Frazier's characterization of the confirmation order in the bankruptcy proceeding? Did the confirmation order provide for this liquidating trust in the sale of the assets and so on?

LAWYER: That's what it provided.

HANKINSON: Do you agree that that was a final judgment on the merits from a court of competent jurisdiction?

LAWYER: Yes.

BAKER: What was the basis for Mr. Delp's appeal of the confirmation order in the Ch. 11 disclaiming particular or for some other reason?

LAWYER: His arch enemy, Mr. Harbison, was the man who proposed the claim and he was imposed with the entire liquidation claim. And I'm not sure that this legal malpractice claim was a focal point in that opposition.

BAKER: Was this a case where he proposed a plan that the creditors didn't buy and Mr. Harbison proposed one and they voted for that. So he had to go with it whether he liked or not?

LAWYER: I believe so, but I don't recall for sure.

HANKINSON: So in fact, this particular challenge or this particular claim was a part of this confirmation order?

LAWYER: I don't know. I know that the trustee subsequently sold the cause of action that Billy Delp had...

HANKINSON: Pursuant to the confirmation _____?

LAWYER: I believe so.

HANKINSON: So what element of res judicata defense is missing in this particular case?

LAWYER: I don't see this as a res judicata case because the claim we're talking about is a legal malpractice claim. It's never been resolved on its merits. Parties were never identical.

HANKINSON: What is missing from the identity of parties requirement?

LAWYER: In the legal malpractice claim, I guess the parties were identical, but it was never resolved on its merits. There has never been a judgment. All that's happened is that it's been sold.

HANKINSON: But the judgment that Mr. Frazier is claiming should be given res judicata _____ is the confirmation order in the bankruptcy proceeding?

LAWYER: That's true, that's what he is claiming. The problem is, is that the - we don't' contest the trustee's right to sell that cause of action. Maybe that's where we are hung up here. We don't contest that it went in there. We don't contest that the trustee can sell it. What we are saying, is the trustee if he sells that cause of action, sells it with these state imposed restrictions. And therefore, Tracey & Associates who is acting as the strawman for the insurance company has no standing whatsoever under *Zuniga* and under *Barcello* to come in and dismiss this claim because of those state imposed restrictions.

HECHT: Well Mr. Delp has not standing to complain about it?

LAWYER: That's correct.

HECHT: So what's he doing _____?

LAWYER: Because he is probably the only person left in this scenario who has any standing.

HECHT: So why is Mr. Delp here?

LAWYER: Because he opposed the dismissal of a claim. I think the trustee can bring it on Mr. Delp's behalf. Obviously, Mr. Delp has to be active in the bringing of that claim. I think that if you look at the policy that the bankruptcy court is trying to effect here it is trying to get the maximum amount of dollars that it can for an asset, which is in the bankruptcy estate. Now, it could sell it for some money which would go to the creditors, which it did, but if it does so, it passes with those state imposed restrictions.

HECHT: Does *Zuniga* allow that otherwise? Can you assign the proceeds of a legal malpractice claim without assigning a claim?

LAWYER: I don't see anything in *Zuniga* that prevents the assignment of the proceeds of the claim. I see it as preventing the assignment of the claim itself. And it's not just *Zuniga*. It is *Zuniga* and it is the *Booth* case and it is the *Vinson & Elkins* case. And in the 5th circuit, CA in *Britton v. Seal* has said the same thing and adopted the Texas rule for purposes of the 5th circuit. And

as recently as *Inez v. Nichols*, the court even said that in the context of a divorce, the husband can't assign a legal malpractice claim to the wife as part of reconciling the property. It's a fairly adamantly enforced rule in this state. And I might add, it is the rule in some 30 odd jurisdictions throughout this country for all the reasons that we don't want people trafficking in the economic benefits of legal malpractice case, and that is precisely what happened here.

OWEN: But can't we enforce that policy by recognizing that Billy Delp does not have standing to complain about the dismissal, but by holding that the defendant in malpractice claim who was not a party to the bankruptcy does have standing to raise the assignability issue? Can't we give full effect to *Integrated Solutions* in and all the other cases if we held that?

LAWYER: I don't believe so because what you have allowed to happen if you do that, is you have allowed the policy in *Zuniga* to be circumvented.

OWEN: How is that when the defendant, the malpractice defendant gets to assert the assignability and say, "You can't sue me, you don't have the right to sue me?"

LAWYER: Because they bought that claim for economic purposes and benefits. It's no different if you buy it for purposes of dismissing it to get an economic gain than it is if you buy it for purposes of prosecuting it to get an economic gain. And if the policy is going to be that there is some exception to *Zuniga*, when a malpractice action ends up in a bankruptcy court, then you will have businessmen who will come into a bankruptcy court, purchase legal malpractice claims and prosecute them as opposed to dismissing them, which is precisely what *Zuniga* and all the 30 something other odd states in this country have said, "We don't want happening because it demeans and undermines..."

HANKINSON: Why hasn't the federal court already dealt with this issue in this particular matter by its judgment confirming the bankruptcy order and by the 5th circuit having affirmed it on appeal?

LAWYER: I don't think that the *Zuniga* issues were brought before.

HANKINSON: Well doesn't res judicata bar all claims that were made in those that could have been brought?

LAWYER: If that defense belonged to Billy Delp's and was not a policy driven defense, but was really Billy Delp's defense in a way, that would be fine. But there is nothing in *Zuniga* or any of those cases that says that you can waive an assignability right.

HANKINSON: I'm not talking about *Zuniga*. I am not talking about state law. I am talking about the _____ and effect of the federal court judgment?

LAWYER: But res judicata is essentially a waiver law. It says, "If you don't raise everything that you can raise in a certain circumstance, you've waived it and you can't go back somewhere else in some other jurisdiction and argue it again." The restrictions on assignability are not something that belonged to Billy Delp. There are policy driven reasons that are there for the benefit of the people of the State of Texas.

If you can waive by res judicata, or otherwise the assignability provisions in *Zuniga*, then a simple document between the party who wants to sell his legal malpractice claim to some third-party in which he waives it would be affected.

OWEN: But we're only talking about Billy Delp. Billy Delp may waive his right to contest the assignability. That does not mean that the defendant in the malpractice claim that he or she could still assert the nonassignability under *Zuniga*. There is nothing wrong with that scenario is there? We could give full effect to the federal court judgment?

LAWYER: It does violence to *Zuniga*.

OWEN: How so, because the defendant in the malpractice case can still raise the nonassignability issue as long as they weren't a party to the bankruptcy?

LAWYER: How is that different from me having a malpractice case assigning it with a waiver document to some third-party. They still have the option to raise the same issue that Tracey & Associates has the option to raise?

OWEN: No, the defendant who you are suing they can still raise a nonassignability.

LAWYER: The only difference here is that the defendant purchased it. But I go back to the economic gain is the same in this instance. Whether or not you're buying that malpractice case for the purpose of dismissing it for economic gain, or if you're buying it for the purpose of prosecuting it for economic gain.

OWEN: If we send this back to the TC why can't the defendant in the malpractice case say, "You, Billy Delp, don't have the right to proceed. The only person that does is the trustee."

LAWYER: That's correct. I don't disagree with that. I just don't think that Tracey & Associates has standing under *Marcella*, or the right under *Zuniga* to prosecute that claim because it does violence to those policy driven rules.

BAKER: And neither do they have the right to dismiss it, is your argument?

LAWYER: That's exactly right.

HECHT: Tell us about Gertrude's right.

LAWYER: Again, Gertrude's cause of action is her sole management community property.

HANKINSON: And on what basis do you make that statement?

LAWYER: Only she can prosecute it, and she can't assign it. It's the very definition of sole management community properties.

HANKINSON: What makes it sole management community property under Texas law as opposed to jointly managed community property?

LAWYER: If only she has standing to pursue it, the community can't pursue it...

BAKER: Because she's the only one left because of what happened to Mr. Delp, is that how you get there?

LAWYER: No, I think even the *Inez v.* _____ case, which I mentioned earlier where they tried to assign it to the community. I don't think you can assign a legal malpractice claim that belonged even to the community.

OWEN: Isn't the community property already?

LAWYER: The claim is not community property.

OWEN: It's not separate property?

LAWYER: It's sole management community property.

HECHT: So if you have a family business - husband and wife are running it - they go see a lawyer, he's negligent. Can they sue him for malpractice? Each of one of them has a sole management community property legal malpractice claim, is that correct?

LAWYER: I think that's the legal effect of *Zuniga*.

HECHT: Even though the advice was in connection with the management of a jointly managed entity?

LAWYER: Yes, and if there was a conflict of interest in that matter, then the lawyer should refer to _____ separate counsel.

HANKINSON: Does both the husband and the wife then get to recover the total amount of damage?

LAWYER: No.

HANKINSON: How does that work?

LAWYER: Dr. Berry testified in this case, and it's in the record in the CA's opinion, that Gertrude Delp's damages were her half of what was damaged, not the whole thing. That would be a double recovery if they could do that. In this instance, you have a husband and a wife whose property was damaged.

OWEN: Do they pursue it together and then they split it 50/50?

LAWYER: Yes. And of course, if you go further on down the road, that claim is sole management community property, therefore, any proceeds which comes from that claim is also sole management community property.

HANKINSON: If I understand your argument correctly, then you rely too on *Zuniga* as the basis for making this determination that this is not jointly managed community property, but in fact, sole management community property?

LAWYER: *Zuniga* and *Boothe*, *Vinson & Elkins*...

HANKINSON: But it's the line of cases dealing with the nonassignability of a legal malpractice claim as opposed to any particular cases that specifically deal with the definition of a jointly managed community property under Texas law?

LAWYER: That and also the *Barselo* case which says that, "only Gertrude Delp has privity with that lawyer to sue him for that..."

HANKINSON: All of the cases that help you make this determination are the legal malpractice nonassignability cases, not any particular cases dealing with the definition of jointly managed community property under Texas law?

LAWYER: I know of no cases which have dealt with that. We didn't cite any in our brief. If you look at §5.22 of the Family Law Code, it defines "separately managed community property" in a fashion. It doesn't contemplate malpractice cases specifically, but it certainly falls within that context because that's the only thing it can be. It can't be joint managed. These are issues I suppose that didn't exactly come up when *Zuniga* was decided. But here, we just have to find some sort of a balance between the very strong interests which Texas has in doing a couple of things. First of all, preventing the economic trafficking in the malpractice claims, whether it's by gaining an economic

advantage through dismissal or by purchasing it and prosecuting it. And also in holding lawyers accountable. It is a fundamental part of our system that clients must have some redress to the state courts when the lawyers they hire are negligent.

ABBOTT: Other than mental anguish damages, specify what damages Gertrude is seeking?

LAWYER: She is seeking the damage which occurred - Billy Delp testified, this is uncontradicted testimony at court and so recited in the CA's opinion, that the bankruptcy itself occurred as a result of the negligence of these lawyers.

ABBOTT: Other than mental anguish, she is seeking lost income by Mr. Delp? Her share of that, correct?

LAWYER: That's lost future income that both of them would have derived had they not lost all of their property, who is not an employee...

ABBOTT: They would have derived it through the companies?

LAWYER: Yes. The biggest item is the loss of value of the companies, and that was testified to by Mr. Berry _____ million.

ABBOTT: And here's the point I want to get to. With the assumption that Gertrude's lawsuit, the malpractice lawsuit is her sole management property, isn't it true that other than mental anguish damages, the damages that she is seeking are damages that could be recovered by Mr. Delp if he still had a viable lawsuit? Viable meaning that had not been put into the bankruptcy estate.

LAWYER: I don't agree with that.

ABBOTT: So Mr. Delp would not have the opportunity to sue for the totality of the loss of future income to the companies?

LAWYER: I think he would have the right to sue for half of that.

ABBOTT: So anytime that a husband and wife own shares in a company or something like that, they are both going to have to, according to your scenario, in the future they will both have to be parties to the lawsuit. One cannot prosecute a lawsuit by himself or herself for the entire community estate for the loss of future income to that particular company.

LAWYER: I think that's the practical effect of *Zuniga* assuming that the lawyer represents both parties. Those are the facts we have in this case. These lawyers didn't just represent Billy Delp on behalf of the community. Under those facts, you might get a different answer. But in this

instance, these lawyers represented both parties, and both parties therefore have a claim for legal malpractice, and they are unique to them. And under those circumstances, then I think, yes, you are restricted.

* * * * * * * * * *

REBUTTAL

FRAZIER: All the damages that Gertrude is seeking except for her mental anguish was certainly injuries to the joint community property estate. That is the loss of the business and the future economic earning capacity and future loss of credit, which are really Billy's sole management community property, so she lacks standing on those on an additional ground.

The expert testimony, which is a way for this court to reverse and affirm the TC's judgment, the 1st CA's judgment is that Gertrude simply didn't present any evidence on causation to even get to the jury. And therefore, the directed verdict was proper on that ground alone.

ABBOTT: If that argument is true, and your argument about causation was true, would this not have broader implications than in just legal malpractice cases? Anytime you have a business suit, commercial litigation where someone is suing for damages caused to their company by someone else, and there is _____ time period where all sources, other factors come into play, decrease in oil prices, decrease in real estate market, wouldn't you always in the future according to your analysis have to have a causation expert to show that what one company did to another company, or what one person did to another company was in fact the cause of the damages as opposed to just leaving it up to a jury?

FRAZIER: Well if the general rule in Texas is that if a trier of fact, it's not within the ordinary knowledge and experience of the trier of fact of a jury, then they should be guided by expert testimony. So that would be the test. In a legal malpractice case when we are looking at whether an attorney reasonably foresaw and committed negligence and that was a substantial factor 2-1/2 years later in the bankruptcy that causes a legal malpractice case, and we know we have expert testimony for the reasonable standard of care, you would have to go further. So I think that the fact that this is a legal malpractice case makes this unique. But, even in the business context, if it's a very complex business enterprise and very complex in dealing with causation and the rule of evidence that it's not within the ordinary knowledge of lay person and expert testimony is needed to guide the trier of fact, then, yes, I think that would be the rule. But that is a general rule that we have to look at in each case.

ABBOTT: Isn't it true that no state has a hard and fast rule either by common law or by statute that an expert is needed to establish causation of damages between an illegal malpractice and what the damages eventually turned out to be?

FRAZIER: We haven't found any statutes, but we have found 7 jurisdictions - 6 of which

in our case in Missouri is the last one we found preparing for argument that have held that expert testimony in a legal malpractice case is required. In most of them they have different standards, but generally if it's outside the ordinary knowledge of a lay person.

ABBOTT: But is it required for causation damages or required to establish a standard of care on breach of that standard of care?

FRAZIER: These are causation cases. These are specific holdings as to causation. Unless it is, "so obvious" as one court held. "Are lay people not competent or not within the ordinary knowledge of lay persons unless it is clear and palpable," the Missouri court held. Those are the standards which are pretty much similar. If it's outside the ordinary knowledge of a lay person and connecting the compromised settlement agreement from whether the attorneys could have put in more, whether Harbison would have agreed to those terms, and then connecting that in the failure to advise the effect, and then 2-1/2 years later a bankruptcy, I think you have to have expert testimony to connect to make sure that the CSA was a substantial factor. As we list out in our brief in bullet points there were 22 external independent factors that we believe the evidence supports had an impact on the demise of the business enterprise in the bankruptcy. 22. And Billy even concedes, that had this company paid the debt that it owed to me, I wouldn't have filed bankruptcy, or that some of these were unforeseeable.

BAKER: All of the 22 bullet points are a part of the TC record, is that correct?

FRAZIER: Yes. They are taken from the testimony adduced at the trial.

BAKER: On the other side is Billy's testimony of the lay witness of what they said or didn't say led to the bankruptcy and his subsequent lawsuit?

FRAZIER: Right.

BAKER: So do you have conflicting testimony there?

FRAZIER: He's not competent.

BAKER: So you have to get to the point that your argument is that his testimony was no evidence?

FRAZIER: That's correct. His testimony is not _____.

OWEN: Is there any evidence of what would have happened had the settlement agreement not been signed and the lawsuit had gone forward?

FRAZIER: No, they didn't adduce any evidence about whether or not these things would

or would not have happened had there not been the CSA, or the CSA had included some of these terms that he thought should have been included. That he says really weren't negligence. It was just a failure to advise the Delps that these are not in and these are some potential ramifications.