ORAL ARGUMENT – 10/11/00
99-1165
APEX TOWING V. TOLIN

LAWYER: The first question this court may wish to consider is, Why does the *Hughes* jurisprudence require judicial finality? The answer is clarity, efficiency, and capability. These are important policy reasons for the limitation rules, because it _____ to lose valuable substantive rights. The claim in this case is an excessive...

O'NEILL: But again, didn't we cross that bridge in *Murphy*? Haven't we already created one exception and are you asking us to overrule *Murphy* and get back to *Hughes*?

LAWYER: No. We're not asking you to overrule *Murphy*. Our view of *Murphy* is that the statements therein that are relied on by the respondents are dicta and so they are not binding on this court as a precedent. In fact, the last five cases that this court has cited involving tolling rules for legal malpractice, all strongly held for bright line rules, which _____ the *Hughes* rule, and that rule is judicial finality.

O'NEILL: As a practical matter, why should we treat accountant malpractice cases any differently than attorney malpractice cases?

LAWYER: That's the issue this court looked at in Murphy. This is not an accountant malpractice case. I would sort of agree that there might be a lot of reasons it should. And maybe Murphy should have been decided in another way. There wasn't but three justices dissenting in that case. However, there are some reasons perhaps that would support it. There is no accountant/ client privilege. There is a legal malpractice _____ of attorney client privilege. And as you know, Justice Abbott pointed out in the last argument there is an imperilment of the attorney/client privilege if you force people to file a another lawsuit...

O'NEILL: But none of that is indicated as the reasoning in the Murphy case.

LAWYER: No. All Murphy says is that there's a tolling rule. It's never been applied outside the legal malpractice context. Should we apply it to accounting malpractice? And the court answered no. Then in discussing the rationale for that, the court described the Hughes case and admitted there was a misdescription of the case, that Hughes never involved an attorney termination rationale at all. And in fact, in Hughes and in Gulf Coast, another case this court decided, a legal malpractice holding, both cases it is clear in the facts of that case the lawyers were terminated more than two years before...

O'NEILL: But you're asking us to confine Murphy to accounting malpractice. And I guess my question is, on what policy basis would you do that? It would be the attorney/client privilege basis?

LAWYER: On the basis that the statements _____ dicta, and on the policy reasons that were enunciated in the five cases, the last five times this court looked at legal malpractice polling(?), and those policies are clarity, gives a legal system a chance to work out in the underlying case in a client's favor, so that you can avoid unnecessary litigation, so that maybe the malpractice case doesn't have to be filed. And that even benefits the malpractice defendants, because the system may work out things in such a way so that even the law is changed, and so what might be malpractice no longer is, or maybe some other thing works out and so there is no damages. Also, an important policy reason enunciated by this court in *Sanchez*, which is a 1995 case by this court was not discussed at all in *Murphy*, that clients should be forced to monitor their attorney's work product. And the settlement rule espoused by the respondents in this case forced clients to have to constantly monitor their lawyer. Because under their rule, limitations stops when there's a settlement agreement. And rather than at the end of the underlying case, which is a bright line rule of Hughes. And so that would force when you're arguing that oral agreements could be enforceable under certain circumstances, including this case. So that would force clients to have to record every conversation that their lawyers has, every fax, every e-mail. They would have to be copied on. That would increase transaction costs, and that would be bad policy. So that the policy of Sanchez does not make clients have to monitor their lawyer's work product. Give the lawyers the chance to have professionalism and some independence and to not be unduly hampered by having to constantly have their clients monitor them.

So it's the judicial finality rule of *Hughes* and the four other cases subsequently decided by this court. It does provide a bright line rule. The petitioner believes there is such a thing as a bright line rule, and that bright line rule in the context of legal malpractice...

HANKINSON: Do you agree that legal malpractice in the context of litigation may be different kinds of acts and omissions, and lead to different kinds of damages?

LAWYER: That's correct.

HANKINSON: There's not one kind of malpractice that leads to one kind of damage. Do you agree with that?

LAWYER: That's correct.

HANKINSON: Then isn't the *Hughes* rule overly broad to the extent that it applies finality of judgment to every situation regardless of what the underlying facts are, and in some instances where it doesn't make sense?

LAWYER: I don't think so, because the policies of the judicial finality are, I think, are satisfied by tolling until the terminal point of the underlying cases.

HANKINSON: You're saying that Hughes is a bright line rule and it should be applied on its

face from what it says, that we wait till the appellate courts are finished with a case in order for the statute to commence running. It's the tolling provisions that the injury may have occurred at some point in time before, I guess. In some instances, however, we may not need to wait till final judgment in order to protect the policies of Hughes. Is it necessary to modify Hughes in some way so it's not always applied in a case involving final judgment, or, should we look at the underlying policy reasons that were stated in Hughes to determine whether or not the rule should be applied?

LAWYER: No. Apex submits that even though lots of litigation increase transaction costs, uncertainty in the law, which is not good for limitations law, so there should not be a case-by-case basis.

HANKINSON: Well most limitations issues are decided on a case-by-case basis.

LAWYER: There's always an application of the facts to the governing rule. The rule that's in force since 1991 in the Hughes case, that if you've got a claim for legal malpractice involving litigation, that the limitations is tolling until the end of the underlying case. During the pendency of the case it's tolled. That's what Hughes said.

HANKINSON: So that means if it's a bright line rule, if we have a multi-party case and one party, the party who ultimately is going to sue his or her attorney for malpractice, their claim is resolved and it goes away. But the remainder of the litigation is still pending. And it doesn't reach judgment until 2-years later and then it goes through the appellate process over the next 2-years, so that means with the bright line rule, we have no exception because we have to wait till all appeals have been exhausted and the case is finally resolved, so that person who has been out of litigation for 4 years doesn't have to start worrying about seeing their lawyer until the appellate process is exhausted?

LAWYER: That's correct.

HANKINSON: Aren't there also competing considerations though, and that is, is that the law has an interest in preventing stale claims from being prosecuted and urging people to timely bring their lawsuits while witnesses are available, documents are still available that haven't been destroyed, and all of those kinds of things. We have competing considerations and under a strict application of Hughes, we're going to let someone whose issue has been resolved, whose case is over wait 4-5 years before they have to even start thinking about suing their lawyer.

LAWYER: There may be a solution to that. Very often there are other claims. But if truly this thing is taken care of and you have nothing left in that case, you can just sever out of the case, and then under Hughes the case is over and you go forward.

HANKINSON: I don't want my case severed. I would rather wait and think about suing my lawyer for 5 years.

LAWYER: That's the point of rules. You can always know have come up with some case that doesn't satisfy the - that seems to challenge the thing.

HANKINSON: My question to you is, I understand that we're talking about application of rules to fact situations. However, if a rule does not purport to deal fairly, taking all policy considerations into account if the rule is so broad or has effects that are absurd, then in fact, the rule doesn't work and perhaps the rule should be something narrower, or should be changed, or in someway?

LAWYER: I agree. I think the court should err on the side of the bright line rule. However, if you are presented with circumstances that are totally absurd, you should sparingly create exceptions. And the facts of this case don't provide any basis for...

HANKINSON: Why shouldn't we have an exception for situations in which the attorney/client relationship has been severed so that the statute begins to run at that point in time, which would be before cases have been concluded? Why shouldn't we have that exception?

LAWYER: Let's look at the policy considerations that are at play. If you sever the attorney/client relationship, then you are going to force the clients to certain, inconsistent conditions(?) by filing this second lawsuit. That's going to imperil the attorney/client privilege and it's also judicially inefficient and it promotes more malpractice claims than there otherwise would be, because if that litigation goes on for some time, you're forcing them to sue someone. I just think if you look at the policies, that there will always be policies on both sides.

HANKINSON: Should the *Hughes* rule be applied even if the application of the rule does not further the policies that were identified in the Hughes decision? That might be one of those absurd situations like you're talking about.

LAWYER: I think there might be. I think the way that the system should work is, if you've got a rule you've got to follow it. Sometimes it may seem a little bit unusual, but that's the price you have to pay. It's worth it because there's more predictability, and predictability is an important value. In *Weiner v. Watson* this court said that clarity and the legitimacy of the judiciary is predicated on the stability of decision making process. And you need to have some rule that if you make everything into a case-by-case basis, then there's no predictability, and so that's part of the price you pay. The competing rules in this case are a settlement rule and _____ - termination of representation rule on the respondents, and then the judicial finality rule that _____ a bright line rule. Anyone can go down to the courthouse and find out when the dismissal order was entered and find out when the case was over. And that just provides a lot of certainty, and it avoids all the bad policy - it avoids - it's very inefficient for the judicial system, and under their rule when does settlement occur? In this case, they are going to tell you: Well we've got the plaintiff's lawyer in the underlying case saying the case settled Jan. 1995 and here's why. Well we've got affidavits from two of the defense counsels saying no it didn't settle at that time. And so there are so many

disputes. The fact of this case show why the settlement rule is no good because that rule will spawn unnecessary satellite litigation regarding what date.

HANKINSON: Don't most parties to a lawsuit know when they've settled their case?

LAWYER: No. They know when the case is over. But there are all kinds of factfinders who can intervene. And especially when you are doing something important like when limitation starts.

HANKINSON: It's not unusual for there to be fact questions associated with making a determination about whether a claim is barred by limitations. That's not an unusual situation.

LAWYER: Well I think most of the difficulties that arrive in that regard - in my belief is the discovery rule. And that is something that - the policy for that is, it's unfair to the client if they didn't know if it was inherently undiscoverable. And they didn't know about it, we don't want to cut them off. But the policies here is just the opposite because if you've got a settlement rule you're putting the burden on the victim of a malpractice to monitor the lawyer and figure out well what was the settlement date so I will know when my litigation starts running. The policy discovery rule is just the opposite if they litigate against the settlement rule. Because what's the burdens of the Hughes rule? All that means is the malpractice defendants have an incentive to file their dismissal papers. And there's usually a very small gap between the settlement of a case and then the end of the underlying case when the dismissal order is filed with the court.

Well what's the price? It's a huge price and unnecessary satellite litigation and it can increase costs in the judicial system. So it seems to me that the Hughes' rule is the bright line rule and it's best serving all the policies that need to be served. On stare decisis principles, obviously this court should strongly consider the issues of efficiency, fairness and legitimacy. You don't want to be changing the rules so often. Hughes strongly _____ the last five times this court looked at it. And to me it should be continued forward because when does settlement occur? I mean there's often multiple defendants. Do you go by when all of them sign off on settlement documents?

ABBOTT: Is there a fact issue as to that in this case?

LAWYER: At minimum there's clearly a fact issue because there were affidavits that were contradictory that were in the summary judgment evidence. I would say as a matter of law because the settlement document, which is in the packet we provided to the court, had an integration clause and that was after the alleged letter to the Judge ____ clerk that they claim is the settlement of the case. So there's an integration clock there. So under the rule evidence rule we believe that as a matter of law their proof is inadmissible and incompetent under _____. And therefore, the only competent evidence in the record would show that the case was settled in April, 1995, which was less than two years before the case was filed.

In the alternative, the very reason it's a fact issue and this just shows all the increase satellite litigation that will occur under the settlement rule, the Hughes rule is fair. It's fair to all the parties involved and it satisfied all the policy decisions this court has shown.

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RESPONDENT

SHEPHERD: To affirm the summary judgment at issue in this case, the court need not decide whether Hughes v Mahaney & Higgins is the law, whether Murphy v. Campbell is the law, or whether neither of them is the law.

The reason is that Apex, 3 years before this case was filed, agreed to settle the underlying case. And therefore, even if Hughes is the law which provides the latest date for the statute of limitations to commence, Hughes told them to stop on the day that Atex agreed to settle the underlying case. That day was January 27, 1995. Apex's lawyer, Ken Kirkendal, _____ wrote the plaintiff's lawyer in a letter. Mr. Kirkendal testified that he was authorized to settle the case for $4,500,000, plus a specified amount of court costs. Mr. Kirkendal went on to say that we have agreed to this settlement. Mr. Kirkendal didn't say I'm anticipating settlement or this is a settlement offer. He said that we have agreed to this settlement.

HANKINSON: How does all this dovetail with what was going on in the federal courts in terms of resolving the maritime issue?

SHEPHERD: Actually the letter from Mr. Kirkendal to Mr. Canon, was a ____ attached to the letter from Mr. Kirkendal to the federal court, where Mr. Kirkendall advised the federal court that on Jan. 27, 1995, he received authority to settle the case, and therefore, there would be no need for the federal court to rule on any pending motions because of the settlement, and that Apex, in fact, was not going to respond to any of the pending motions because of the settlement.

ENOCH: Have you never had an experience with a letter like this when it finally came down to pay the money that there was still a dispute?

SHEPHERD: That in fact can happen. However, because the underlying case was a maritime case, the law is clear that federal law applies to determination of whether this constituted an enforceable settlement. And federal law is clear that even simply a settlement memorialized by correspondence between the counsel, it's not just enforceable in a maritime case, it is summarily enforceable by motion to enforce.

ENOCH: But your point is that people, even though they have this, it's still in question that somebody may have to bring some action to enforce it. I mean, by federal law, they've already determined that yes, we can summarily enforce it and go to court and get a summary judgment on this.

SHEPHERD: In fact, it's less than a summary judgment. In state court, you might have to get a summary judgment. In federal court, you can do it by way of a motion to enforce. But as of this time, it was enforceable if someone had backed out, and no one did. The case settled exactly on these terms.

ENOCH: So the affidavits of some of the defense attorneys that was referenced here is immaterial?

SHEPHERD: The affidavits are _____.

ABBOTT: So you're saying, don't apply Hughes, don't apply Murphy?

SHEPHERD: Actually what I am saying is if you apply Hughes, on this date January 27, 1995, Hughes told them to stop because neither the policy implication of Hughes were applicable anymore.

HANKINSON: That goes back to our question that we've been debating all morning. And that is, is Hughes a bright line rule so that you look for the exhaustion of court activity in a case, or are we going to look at what point in time the policies of Hughes are no longer furthered so that we can look at things on a case-by-case basis?

SHEPHERD: I think the proper analysis is you look at thing on a case-by-case basis like the court does with everything.

HANKINSON: Do you agree that if we were to disagree with you on that point and say that Hughes was a bright line test, that we would instead be looking at the point in time in which the court acted upon the settlement by dismissing the case because that would be our finality of judgment exhaustion of court action, whatever we would like to call that rule? A bright line application of Hughes would push the date later?

SHEPHERD: I would agree with that except that, if Hughes was modified by Murphy...

HANKINSON: Just put that aside for a second. Just the straightforward question. Under the rules stated in Hughes, would the date then actually be later than January?

SHEPHERD: Yes.

HANKINSON: So we would have to look at the policy reasons or a Murphy modification in order to get where you want us to go?

SHEPHERD: Yes.

ABBOTT: Also, you are saying that because of this settlement it would not implicate any attorney/client privileged information if the client in filing the claim against the first lawyer were to assert certain claims that the lawyer, Ernie Canon, who the lawyer would find out about and be able to use in the underlying case, that wouldn't occur because the case had already been settled?

SHEPHERD: Could not occur because the settlement is enforceable. In fact, Apex would not have to take any position in the underlying case just like Mr. Kirkendal advised federal court right here: We're not going to respond to any motions. We don't have to. Likewise, with respect to the second policy consideration in Hughes concerning the liability of a legal malpractice case would depend upon the outcome of the underlying case, that is no longer implicated here because damages are fixed. There are $4.5 million as _____ of court costs. So the viability implication of the Hughes consideration is not implicated either.

HANKINSON: Then the way we would approach these case is not by looking for the date at which we have a final judgment and the date at which all appeals have been exhausted, but instead we would get out the list of policy reasons for Hughes, analyze the facts of the particular case, and determine at what point in time furtherance of those policies were no longer at stake?

SHEPHERD: I believe that is an appropriate and fair way . The list is short. It's just too hot for consideration.

HANKINSON: I understand. We would analyze each case on a case-by-case basis to determine whether those policy considerations are furthered from a particular point in time on, and if they are not, then that's the test as opposed to looking at the finality of the judgment.

SHEPHERD: I agree with that. And that is exactly what the Dallas CA held in *Deer(?) v. Scott* _____ *Insurance*, when the court held that the statute did not permit when the settlement papers were signed or when the judgment _____order was entered. With respect to analyzing the policy consideration, I do want to make one point about the second Hughes policy consideration. And that is, perhaps if the underlying case turns out one way, there will not be a legal malpractice case. And I believe that the weight of that consideration today no longer is as great as it was in 1992 when Hughes was decided because of this court's recent decision in *Burrow(?) v.* _____ in extending fee forfeitures to cases where there _____. So the law today is, even if the CA or this court ultimately _____ "legal malpractice" damages, we can still have a legal malpractice case based on this court's decision in _____.

Apex has argued that their case is somehow saved by §16.064 of the Civil Practice and Remedies Code. The law is clear that even at the summary judgment level, you get the benefit of §16.064. It is the plaintiff's words that prove two things. And that is, that the _____ case was dismissed; and secondly, that the other case was dismissed because of lack of jurisdiction. The court in *Malcolm v.* _____, the voluntary dismissal was not good enough. It's not going to

trigger §16.064. What happened here was that the plaintiffs filed this case in Louisiana and prosecuted it for 18 months. Shortly before the Louisiana case was dismissed on the plaintiff's voluntary motion, they filed the case in Texas.

The reason §16.064 doesn't help Atex here is that the order of dismissal in the Louisiana case specifically said that the case is dismissed on the plaintiff's motion to dismiss all _____. Nothing about jurisdiction. The Louisiana court never made a finding that there was no jurisdiction _____. The Louisiana court even issued something called 'reasons for opinion', kind of like a TC opinion that tells it why _____. Nothing in that opinion says that the case was dismissed for jurisdictional reasons. And therefore, §16.064 is not implicated. It's the plaintiff's burden of proof that the case was dismissed because of lack of jurisdiction. And there's no proof in the record - none whatsoever, that that Louisiana case was dismissed for lack of jurisdiction. In fact the proof is directly to the contrary. It proves that the case was dismissed on Atex's voluntary motion to dismiss without prejudice. And under the *Melburn* case, that is not sufficient to implicate 16.064, and under the _____ v. General American case, it specifically said that when the order doesn't say it was dismissed jurisdiction, it's not good enough. Section 16.064 doesn't apply.

Additionally, 16.064 has a provision that says if a case is filed in intentional disregard to jurisdiction, it's not going to fly even if it's dismissed for want of jurisdiction. That is what we have here. In the case of _____ *Slumberjay*, the court held that if a litigant chooses for technical tactical reasons to litigate in _____, in a jurisdiction where it is ultimately determined that there is no jurisdiction, we're not going to implicate §16.064 to _____ that the statute of limitations for that litigant.

What happened here was, and very shortly after the underlying case was dismissed, the plaintiff chose to sue a Texas law firm over a Texas case that involved a Mississippi accident in New Orleans, LA. The plaintiffs prosecuted that case for 18 months. It didn't like the way it was going, so they filed the Texas case and then voluntarily dismissed the Louisiana case. What they've done here, they made a technical, tactical decision to foreign shop to sue a Texas law firm over a Texas case over a Mississippi accident in New Orleans and it backfired. That's plain and simple. They don't meet the _____ exception 16.064.

To the extent the court finds there is some sort of conflict between Murphy and Hughes...

ABBOTT: Is there one?

SHEPHERD: There may not be one. In Hughes it doesn't say that either Mahaney or his law firm did not continue to represent Hughes in an advisory capacity, in a nonadvocacy capacity. If the Mahaney Higgins law firm or Mahaney himself continued to advise the Hughes in any fashion after the withdrawal under the witness advocate(?) rule, the decision in Hughes v. Mahaney &

Higgins and the decision in Murphy v. Campbell do not conflict at all. In fact they are perfectly consistent...

BAKER: But that's a big if isn't it?

SHEPHERD: I don't know if it's a big if.

BAKER: It's not in the opinion in Hughes.

SHEPHERD: What I do know is that in the opinion in Murphy v. Campbell, Justice Hecht wrote that in Hughes that Hughes _____ sue the lawyer is still representing them. So that to me suggests that Mahaney & Higgins were at least in a nonadvocacy capacity, which would have been perfectly appropriate...

BAKER: But in this case, the Beaumont court held in context of the argument you're now making, this court has subsequently narrowed the tolling provisions to situation where the client is continuing to use the single lawyer in the pending litigation. And that's where the interpretations come that make an alleged difference between - that Murphy did something to Hughes.

SHEPHERD: Because I don't know all of the facts of Hughes, I don't know whether they are inconsistent or not. But they may well not be, and based on Justice Hecht's opinion in Murphy v. Campbell it suggests to me _____ providing _____ at all. The reason I think that Murphy is a better rule of law is because under Murphy the plaintiffs still has until _____...

BAKER: Do we have to hold that what you're saying is correct that Murphy is a rule of law rather than an observation about what happened?

SHEPHERD: You don't even have to get to whether Murphy is rule of law to affirm the summary judgment here.

BAKER: I understand that. But that's not your argument now.

SHEPHERD: My argument is, that even if the court were to find that this were not a binding settlement agreement or for some reason as Justice Hankinson in her questions - we should always take a bright line rule and turn a blind eye to the policy considerations under Hughes...

BAKER: I thought you agreed with her too that the policy conditions apply because you apply the facts of the case to the policy reasons and see where you are there.

SHEPHERD: I agree that that should be the law. But if we were to have an absolute - if Hughes means we always have an absolute bright line rule without consideration of whether the policy considerations still apply, we believe that the controlling law is Murphy, and that Murphy is

the better rule of law because under Murphy the plaintiffs had a _____ later.

HANKINSON: But if Murphy says what Murphy says, then wouldn't the result have had to have been different in Hughes based on what Hughes said, not what Murphy says about Hughes, but on the face of the two opinions? On the face of the two opinions Hughes indicates that the lawyer was relieved of his obligations to represent the client.

SHEPHERD: I read Hughes a little differently. I believe that on the face of the Hughes' opinion it said that Mahaney withdrew from his position as an advocate. It says he withdrew under the witness advocacy(?) rule. That doesn't mean he didn't continue to counsel _____...

BAKER: But that's just pure speculation to base the whole change on this whole business on a speculation that he may have continued to advise them, therefore, he was still in the case, therefore, we have this big change.

SHEPHERD: All I'm doing is saying that Hughes in response to the initial question that was asked by Justice Hecht, that Hughes and Murphy may not necessarily conflict based on quite frankly something that Justice Hecht wrote in Murphy about Hughes.

* * *

LAWYER: I want to first address the issue that Oxford was replaced by my client approximately 9-12 months after Oxford entered the case. I don't see how this case bears joint circle liability between these law firms, because any wrong that Bland committed is separate and distinct from any wrong that Oxford may have committed. The fundamental wrong in this case is the failure to file a limitation of liability pleading. That's why you have a case involving a docket(?), which sets this rule out. It's a strange kind of a case to begin with. And then you have a limitation of liability which is a strange proceeding. It's a _____ proceeding. But it has to be filed within 6 months. Oxford did not file.

If it would have been filed, the client knows it because the case is _____ and it goes to federal court. So the litigants knew it when Bland took this case over and when it tried it, Atex was on notice through Bland that no limitation of liability had been filed. And to the extent that Atex could have sued Oxford, that in my opinion as somewhat as a maritime lawyer, that cause of action accrued at the date of the firing, so as you can never rectify that cause of action. Once 6 months is gone, there is no Murphy inconsistency there which would prevent the lawsuit against Oxford's _____.

He failed to meet that deadline. There is nothing he can do to go back and file it.

ENOCH: The position wouldn't necessarily be inconsistent except that until you got to the judgment, you wouldn't know if you had any damages?

LAWYER: That's correct. On August 31, 1994, that's the verdict. That's when Oxford's malpractice, if any, occurred. You don't need to go address the Murphy issues. You've asked a lot of questions about Murphy today. Justice Cornyn, in the Hughes opinion at the end of it, he makes the statement - therefore we hold _____ malpractice be applied across the board. And that's the problem. You can't use the logic and say it applies to every malpractice situation, because you have legal situations where damages are _____ during the course of litigation, and there should be a plain _____. For instance, against Oxford here, if they really thought he did something wrong, they should have put him on notice right there. They had Bland to do it and then they had Kuykendal to do it. So they had two chances to put Oxford on notice and to use the judicial system to end all this litigation instead of going foreign shopping in trying to play Bland against Oxford in Louisiana. Because if you notice, when the case is dismissed in Louisiana, the case pends for 18 months. Bland doesn't even make an appearance because they are trying to leverage Bland against Oxford in a Louisiana court. And that is no reason under the logic of Murphy or under the logic of Hughes. Why should somebody get reported for fostering litigation beyond a 2-year period?

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REBUTTAL

ABBOTT: Counsel would you respond to opposing counsel's suggestion that the Hughes policy issues are not implicated here because of the settlement?

LAWYER: The Hughes policies are implicated very much so, because they are saying that in Jan, 1995, the case was settled. But there is no evidence in the record Atex got a copy of this letter. There was a $100,000 claim by Haliburton against Atex in the underlying case. That's not addressed anywhere here. This is only signed by Mr. Kirkendal. No one else. And according to his affidavit, he sent a blind PS to Mr. Canon. And according to him what the PS meant was that the number is $4.5 million, and if I can pay $4.5 million to settle Haliburton's claims as well as the plaintiff's claim, then let's see if we can work out some kind of settlement. That was what Mr. Kirkendal said.

HECHT: Who is he representing?

LAWYER: He was representing Atex.

HECHT: You say there is no indication that Atex got a copy of the letter. Their lawyer wrote it.

LAWYER: He did. That's true. It is not required that he send them a copy of the letter.

HECHT: Isn't he the agent for the client?

LAWYER: Right. It's a client _____ rationale of Schultz that under the settlement rule you have to always _____. And also because the settlement agreement, this is not a settlement is the main thing. and because it's not a settlement there's still a risk to Atex that it might have to assert inconsistent conditions. This is a limitations act case and their allegation against the defendants that they didn't file a timely litigation...

ABBOTT: Is the ultimate settlement different from this letter?

LAWYER: The ultimate settlement involved Haliburton taking a 50% discount on their judgment against Atex. And there's nothing in here about that. And Haliburton's own lawyer filed an affidavit saying that the case wasn't settled until March of 1995. We've got documents in the summary judgment proof showing that the terms were still being negotiated and settlement terms were not achieved until March, 1995. Atex doesn't know at this point that the settlement might fall apart and would have to continue to assert that the petition is timely. Whereas in the malpractice case we said that this was not timely.

We cite in our reply brief in Reading v. Hughes, 846 S.W.2d 1, and that clearly says that Mahaney & Higgins firm is no longer representing the parties at that time. So there is no mystery as to whether they continued forward in that litigation. This document shows that there will be huge transaction policies if this court changes from the judicial finality rule of Hughes to a settlement...

ENOCH: But Murphy could not have changed Hughes because one of Hughes' policies was the inconsistent position. And Murphy could not have said, Well that's no longer of concern if the lawyer has been fired. I don't read Murphy as really changing the underlying fundamental decision in Hughes.

LAWYER: Murphy did not change the judicial finality rule in the other four cases that followed Hughes, because Murphy did not involve legal malpractice. And so the issues _____ the legal malpractice _____ are not _____ and not discussed by Murphy and Murphy just said we're not going to extend it to legal malpractice.

I would point out that I believe that in Hughes this court considered different rules and decided that's one of judicial finality. We think it's a bright line rule. I believe the court did cite some other tolling rules. The judicial finality rule is needed. Atex needs to know when their limitations is.

HECHT: Were you here earlier when Mr. _____ was arguing?

LAWYER: Yes.

HECHT: You heard the cards on the table argument. Briefly what's your response to that?

LAWYER: I just think that that doesn't - whatever _____ that is doesn't justify the _____ in the system, and I just think that the abatement process is not going to be tenable.