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Supreme Court of Texas.
GALBRAITH ENGINEERING CONSULTANTS, INC., Petitioner,
v.
SAM POCHUCHA and Jean Pochucha, Respondents.
No. 07-1051.

December 11, 2008.

Appearances:
Stephen E. Walraven, San Antonio, TX, for Appellant.
Robert W. Loree, San Antonio, TX, for Respondent.

Before:

Wallace B. Jefferson, Chief Justice, Nathan L. Hecht, Harriett O Neill, Dale Wainwright, Scott A. Brister, David Medina, Paul W. Green, Phil Johnson, and Don R. Willett, Justices.

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CHIEF JUSTICE JEFFERSON: Court is ready to hear argument in 07-1051. Galbraith Engineering v. Sam Pochucha and Jean Pochucha.
SPEAKER: May it please the Court. Mr. Walraven will present argument for the petitioner. Petitioner has reserved five minutes for rebuttal.

ORAL ARGUMENT OF STEPHEN E. WALRAVEN ON BEHALF OF THE PETITIONER

MR. WALRAVEN: May it please the Court. A is the construction of one word, the word "limitations" found in Section 33.004(e) of the Civil Practice and Remedies Code. 33.004 is a section that was added as part of House Bill 4, the Tort Reform Actions in 2003, authorizing the designation of potentially responsible third parties whose fault negligence could also be submitted to the jury. Section(e) provides that there is a 60-day reopening of limitations to join -- or that limitations for 60 days will not bar the joining of these designated potential responsible third parties. What does limitations mean?
JUSTICE MEDINA: Let me ask you this, Court of Appeals stated that Section 16.008 doesn't matter -- it doesn't matter if it's a statute of limitations or statute of repose, does it?
MR. WALRAVEN: Yes. Wouldn't be here but, of course, I do disagree with the Court of Appeals. I think the Court of Appeals missed the point. This Court has explained on a couple of occasions and knows every case who's looked at it has noted, a statute of repose and a statute of limitations are fundamentally different. This Court in the

case from 2003 explained the purpose of repose to give absolute protection to certain parties from the burden of indefinite liability. In the case from the early '90's, the Trinity River Authority case, this Court noted that the difference involved a substantive definition of rights rather than procedural limitation of rights. That is, an engineer in this case or an architect or the other beneficiaries of statutes of repose have a substantive right to be free from suit which is fundamentally different from the statute of limitations. They have different purposes. They work differently. And lumping them all together may or may not make sense. Now, as the Court of Appeals did, Section 16 of the Civil Practice and Remedies Code is titled limitations. And it includes statutes of limitations. It includes statutes of repose and other administrative proceedings dealing with related issues.

JUSTICE MEDINA: The Court --

MR. WALRAVEN: So the word "limitations" can -- certainly can be used broadly. Question --

JUSTICE MEDINA: The Court of Appeals -- Court of Appeals also said there was no distinct -- distinction with the legislature on those two terms. Is that -- is that also incorrect?

MR. WALRAVEN: I think it would be safe to say that the use of the term limitations in that statute, in section -- in Chapter 16 of Civil Practice and Remedies Code which was enacted at different times and different ways means different things. There were repose for example, is found in that section -- in that 16.011 dealing with surveyors. The word is omitted from the statute which is otherwise almost identical dealing with architects and engineers. I don't think there's any basis for concluding the legislature in setting a ten-year statute of repose intended something different between surveyors and between engineers and architects. But yes -- so the word can be used broadly. The word "limitations" can be used broadly. Question is where they think it can be used narrowly? Just the statute of limitations. You go to Black's Law Dictionary you find statute of limitations is distinguished from statute of repose. So it can be used narrowly and it can be used broadly. And the question is how was it used in Chapter 33, not how it was used in Chapter 16. And I think the Court of Appeals got it wrong. And I think they got [inaudible] -- and I believe that for two reasons or a couple of different basis.

Number one is of course legislative history of House Bill 4. That was the Tort Reform Act. It was in many ways intended to limit the causes of action. And to argue that it created what is perhaps a gaping hole in statutes of repose is probably not consistent with what they were trying to do in passing House Bill 4. If you look at the legislative history of the testimony, several times you will find a clear indication that the legislature was aware that limitations and repose are different. There is the testimony given by Senator Duncan quoted in the briefs about how limitations and repose are two different things. And they need to be treated differently and considered differently. So which is putting indication that they used the word limitations with that background in mind. That is they used it in a more narrow limited sense, not to be redundant. The -- even more detailed was the testimony from Slack who was offering a variety of amendments. That's quoted in respondent's brief or attached in respondent's brief, partially quoted. And it points out dealing with the situation we have here. The situation where a person might be designated as a responsible third party, but the cause of action against that person is barred.

JUSTICE MEDINA: What -- what's so wrong with having a ten-year absolute drop-dead limitation and then on that -- the very last moment it's discovered wait, there's another party, my granting an extra 60 days to have that party, what's so wrong with that?

MR. WALRAVEN: Well, of course that's a decision -- the legislature certainly could make. They certainly could create an exception.

JUSTICE MEDINA: Well, that seems to be the court of appeals' holding.

MR. WALRAVEN: It is. But it is inconsistent with the purposes of a statute of repose. A statute of repose says after this period of time, you aren't going to be bothered with it. After this period of time, you could throw away your records. You don't have to worry about this. You have a substantive right to be free of suit. And one of the things that I think the court of appeals missed is they say, well, it's just an extra 60 days. Ten years and 60 days, what's the big deal? And what they're overlooking is that if you sue a remodeller. Somebody redid the roof. The roof leaks. You sue the -- the new roofer who put the new roof on. He can designate the original architect, the original engineer, the original contractor who built that building 20, 40, 50 decades ago. It's not a 60- day expansion. It could be a decades-long expansion of the liability, of the exposures. Not just 60 days. And that's exactly the reason you have statutes of repose. That's why this particular interpretation is problematical. It allows this indefinite liability.

JUSTICE MEDINA: This is a question that has no bearing on the outcome of the case, but what happened to Mr. Cox? Where is he in the proceedings? Is he dismissed? He resolved the issues?

MR. WALRAVEN: You know I don't know whether the case against him was severed, settled or what. I -- I honestly can't tell you. I apologize.

JUSTICE MEDINA: No problem.

MR. WALRAVEN: I wasn't involved at the trial court level. But you -- you could see this -- this indefinite expansion. There's one hallmark of construction litigation is everybody gets sued. The architects, the engineers, the remodellers, the people -- the owners. anybody responsible for maintenance. You can get one guy, one defendant within the period of limitations if the petitioner's interpretation is right, everybody who has had anything to do with that property can be brought in despite the statutes of repose. Product suppliers, even though their statute of repose is decades past can be added. I just don't think that that is the purpose of the designation of third parties. And the purpose of allowing limitations to be open. You realize Chapter 33, of course, deals with torts. The typical limitations period in tort is two years, some torts are one year. Allowing people to be brought in after two or three years or four years is perhaps not a great hardship. But with this dealing with an expansion of limitations, it's something on a significantly different order of magnitude than when we're dealing with statutes of repose which are 10 or 12 or 15 years. And we're dealing with obviously long term used entities, improvements to real property. Buildings, they can last 50 to 100 years. So I -- I think if you interpret the word -- as petitioner would argue broadly -- that it's to include repose, you have done serious damage. You created a huge gaping hole in the statutes of repose.

JUSTICE MEDINA: When is it -- when does the date begin on the statute of repose? Is it -- is it--

MR. WALRAVEN: The date of substantial completion of the project,

the building.

JUSTICE MEDINA: So if a home -- if a home is complete today then they have ten years to bring a claim against whomever may have performed defectively. And you -- you stated but that would allow someone to bring in a contractor 24 years down the road. I -- I don't understand your hypothetical.

MR. WALRAVEN: Let me -- let me apologize. From a kitchen fire, there is a suit against the manufacturer of the stove, that -- there where the kitchen fire is. The stove says no, it's not my fault. I'm gonna designate, as a third party pursuant to 33.004, the original designer of the house, the original builder of the house, the original architect and engineer who built this house 50 years ago. Under the petitioner's interpretation, that designation will allow the plaintiff 60 days to bring all those people in. And they have to come forward and defend. They have no witnesses. They have no documents. They have no memory. But they have to come in and defend that case. That's the loophole that is being urged, and that's the loophole that the Court of Appeals decided should be recognized in what otherwise has been put to bed. What substantive right to be free from liability has this huge loophole.

JUSTICE MEDINA: How's that different from toxic tort exposure claims where a manufacturer may have acquired a company and then they get sued because they're the successor to that company, they have to go back and look -- look at records, 20, 30, 40 years ago and reconstruct some knowledge that may or may not be there? And the courts allow those cases to go forward.

MR. WALRAVEN: Absolutely. The legislature specifically addresses those sort of things in Chapter 16 of the Civil Practice and Remedies Code. And it lays out a scheme for dealing with these long-tail claims. And when they don't show up and what happens. And obviously there's a balance there. You want wrongdoers to stand up for them and pay what they owe, but on the other hand, I mean that's an argument for never having a statute of limitations. You need to cut off old claims. You need to give some protection to somebody who did something a long time ago. It's a balance. And the legislature in the case of toxic torts, I don't recall from the top of my head the section in Chapter 16, specifically deals with that. And says here's the balance. And they have with respect to builders of buildings said the balance is after ten years and unless you sent a letter or written notice, you're gonna extend that to 12 years. That's where we're going to cut it off. Once a building is 10 or 12 years old, the original contractor, the original architect, in my client's case, the original engineer, is protected. He is free from having to defend his work on that case. That's the balance that the legislature created when they passed the statute of repose and to recognize an exception to that with respect to this designation of third parties. I think just takes away a huge portion of that protection, and I don't think it was the intent of the legislature to do that as part of tort reform. And -- and this would apply to any statute of repose. The -- the healthcare liability statutes of repose. We've got a -- a brief on that, an amicus brief. Products liability statutes of repose. If the logic of the Court of Appeals is accepted, the statutes of repose are gonna be gone. Anytime you can get a plaintiff's lawyer who can come up with some defendant who will go then for perhaps consideration, designate all these people whose claims are -- are barred. And that's why I think the correct interpretation of this statute is simply to apply it literally. It uses the word "limitation," interpret it to mean statutes of limitation. Just like it

says.

CHIEF JUSTICE JEFFERSON: Any questions? Thank you, Counselor. The Court is ready to hear argument from the respondents.

SPEAKER: May it please the Court. Mr. Loree will present argument for the respondents.

ORAL ARGUMENT OF ROBERT W. LOREE ON BEHALF OF THE RESPONDENT

MR. LOREE: May it please the Court. In the statutory scheme, limitations is a broad term. I've put some examples in the brief. For example, the subject statute section 16.008, which is commonly referred to as statute of repose, is in the Civil Practice and Remedies Code under the chapter entitled limitations. It's also in the sub-chapter entitled limitations of personal actions. In addition, Section 16.008 as well as 16.009, which is commonly referred to as the statute of repose for contractor, uses the terms more than once, that these statutes are ten-year limitation periods. And I think that Courts -- one of the Courts -- this Court's latest writings on the statute of repose in Holubec v. Brandenberger which is cited in petitioner's brief. It's discussed another statute of repose, not this one, but in discussing that statute of repose, even this Court indicated that it was an existing limitations period. So in the statutory scheme and also in this Court's writings, limitations is broad enough to encompass repose. And I think that --

JUSTICE GREEN: So -- so -- so you have, let's say two years to bring suit against somebody for negligence, if they happen to be an engineer you have ten years to bring a claim against that engineer plus 60 days?

MR. LOREE: Well, you know if your negligent claim against an engineer, has gotta be brought in ten years. But if it's a latent defect, you don't discover for a period of time like in this case, there is that ten-year period under Section 16.008 for engineers and architect. However, there's exceptions to that period. And I think that's what we're really talking about here. Does a legislature have authority to in graph exceptions on the initial termination period of the so-called statute of repose?

JUSTICE WAINWRIGHT: If -- if in Justice Green's hypothetical it's not a latent defect -- defect, then --

MR. LOREE: Well then if it's a negligent claim or DTPA claim, you're gonna blow through the two-year limitation period, but that's something that would be decided down below.

JUSTICE WAINWRIGHT: But how does the ten-year limitations period work if there's a two-year limitation period also at work? I'm not sure I understand your answer to Justice Green's question.

MR. LOREE: In -- in this case, there's a DTPA claim for a latent defect on the Pochucha's home which is a French drain that nobody knew about and to write before the ten years expired when somebody got in there and tunneled underneath the house and found that the French drain that the engineer designed,and inspected, and certified, the insulation wasn't done properly. It was allowing substantial water penetration in to lower floor of the house. Nobody knew about it. So under the two-year claim, you have the discovery rule applicable, but the ten-year claim is ten years from the date he initially did the work and that you know --

JUSTICE BRISTER: But it's written -- it's written just like a ten-year limitations period.

MR. LOREE: Yes, it is.

JUSTICE BRISTER: So if you -- what if the -- the statute said you got two years to sue for a car wreck and the next statute said you've got four years to sue for a car wreck. You'd have a direct conflict because one says two and one says four.

MR. LOREE: No. Because the underlying claim is subject to --

JUSTICE BRISTER: In my hypothetical, one statute says you've got two years to file a car wreck and the other says you've got four. Those would conflict.

MR. LOREE: No, the two-year has a discovery rule applicable because it conceivably --

JUSTICE BRISTER: I didn't put anything about discovery rule in there. I said if one statute says you've got two years to file suit and one says four, you've got a conflict.

MR. LOREE: Potentially, yes.

JUSTICE BRISTER: Now, the statute -- neither statute says anything about discovery rule. Negligence -- there's no negligence statute that says anything about discovery rule, that's the Court's interpretation. So now you're saying there's a statute that says two years and a statute that says ten. And that seems to create a conflict.

MR. LOREE: Potentially, the DTPA has a written --

JUSTICE BRISTER: Right.

MR. LOREE: -- discovery rule and --

JUSTICE BRISTER: Negligence does.

MR. LOREE: That's correct.

JUSTICE BRISTER: We did that.

MR. LOREE: Yes.

JUSTICE BRISTER: And so you're saying the two conflict.

MR. LOREE: Not in operation. In your -- in your -- in your hypothetical they do, but when you apply the discovery rule they don't.

JUSTICE WAINWRIGHT: Why can't -- why can't there be a discovery rule to a ten-year limitation period too?

MR. LOREE: I don't think the legislature has engrafted a discovery rule but they haven't --

JUSTICE WAINWRIGHT: But they didn't with negligence either.

MR. LOREE: Excuse me?

JUSTICE WAINWRIGHT: But they didn't with negligence either.

MR. LOREE: They have engrafted exceptions to the -- the cut off period on the commonly referred to statutes of repose. But on negligence claim, that's a common law addition, you know, under the discovery rule.

JUSTICE WAINWRIGHT: I guess the -- the -- what we're probing is if you're saying that limitations means limitations, whether it's this statute 16.008 or the negligence statute, and you should treat them similarly not as totally separate animals, don't we get into some problems?

MR. LOREE: Potentially, there are similarities and a lot of similarities between statutes of repose and statute of limitation, but there are also some differences. But I'd also like to point out, Galbraith's proposed ruling that limitations just means traditional statute of limitations not statute of repose creates problems. It's also inconsistent with the statutory scheme the legislature adopted concerning limitations and I'll give some examples. The first one, and it's in the handout that I filed yesterday, is a Civil Practice and Remedy Code Section 16.069, counterclaim and cross claim, which allows a defendant to counterclaim and cross claim when it's been sued, if the claim arises out of the same transaction and occurrence even if

limitations has expired, if you do so in 30 days. For example --

JUSTICE JOHNSON: Was that a third party claim or just a cross claim or counterclaim?

MR. LOREE: That's a cross claim. For example, in this case if the Pochucha's had known about Galbraith Engineering before the ten years expiring, they didn't, they could've sued both Cox the builder and Galbraith Engineering, the engineer. And if the answer date was after the ten-year period in the repose under Galbraith's interpretation, Cox could not have cross claimed against the engineer because limitation would mean the traditional statute of limitation not the statute of repose, which had already expired. I don't think the legislature intended that result and that would not be fair to the contractor and who might have a cross claim against the engineer who did the -- allegedly faulty work. Here's another example --

JUSTICE JOHNSON: But -- but under that, under your scenario there they could -- everybody would be designated as responsible parties from -- submitted to the jury.

MR. LOREE: Well, there -- there would be no responsible parties 'cause then both of them would've been sued, but the cross claim would come after the period of repose expired. So that's not an issue on responsible third parties, that's parties already before the Court. That's just an example where their interpretations would create an anomaly in that section under cross claims and counterclaims.

JUSTICE BRISTER: But under your interpretation, if the Pochuchas had waited 40 years, they sued, they would obviously barred by the statute of repose.

MR. LOREE: Their underlying claim wouldn't be any good.

JUSTICE BRISTER: Right.

MR. LOREE: Because they still have the time to sue [inaudible] --

JUSTICE BRISTER: But -- but my -- point my point is 33.004(e) doesn't say anything about the underlying claim having to be good.

MR. LOREE: Well, that's presumed because --

JUSTICE BRISTER: It doesn't say anything about it.

MR. LOREE: It does --

JUSTICE BRISTER: You're saying we need to read it just like it says and the problem with that is you can break 40 years, trump up the case with somebody, and say, "Look, I'm just suing you. I know I'm not gonna be able to win. Name them as responsible third party so I can get my 60 days," and then it jumps back in.

MR. LOREE: Well, your underlying claim has to be good.

JUSTICE BRISTER: Where does it say that?

MR. LOREE: It doesn't say that, that's a potential. But you're giving the plaintiff by far too much credit. What's more likely -- what's more likely to happen -- a bigger risk of conclusion according there -- their ruling that you would not allow joinder after the statute repose, but would still allow designation so the defendants would get an apportionment of liability and the plaintiff could not recover, that is not fair. And there is a bigger risk of collusion because in contractors or builders they often work with subs, architects and engineers if they could designate those people have no liability they could testify to whatever they want following the sword and says the builder who is timely sued didn't do anything wrong and there's a much greater risk of collusion in that respect. For parties who'd normally and customarily work together than in your scenario, your Honor. And that's one of the problems that I was highlighting. In addition, when the legislature wanted to make it clear that certain limitation provisions did not apply to a situation, it specifically

stated that in the statute and a good example of that statute is Civil Practice and Remedies Code Section 16.061 which has to do what limitation provisions are exempted from cause of action by the state. And it's in the handout and it specifically exempts numerous limitation provision because if a legislature had intended to exempt or not have certain limitation provisions applied to the proportionate responsibility statute 33.004(e), it could've easily said so.

JUSTICE BRISTER: It could've easily said this -- decided this either way. The problem is they didn't.

MR. LOREE: But if you look at the legislative history, they talked about it and it -- their -- Galbraith proposed ruling would upset the legislative compromise.

JUSTICE BRISTER: I'm -- well, I'm wondering about that. I mean, you've got a statute that says ten years no ifs, ands, or buts --

MR. LOREE: Well, it's --

JUSTICE BRISTER: -- except for a notice --

MR. LOREE: There are some exceptions.

JUSTICE BRISTER: Except the notice with, you know, except a notice with -- within and two years thereafter for basic labor. For these favored kind of people like architects, engineers, interior designers, ten years and with few exceptions that's absolutely it. And then we've got a general statute that says for everybody, architects, non-architects, doctors, lawyers, Indian chiefs, you're not barred by limitations, you remain the third party. This looks like a general statute compared to one about architects and if you got one -- if we -- if we had one that says, architects ten years that's it, never. And the general statute that says, well, a responsible third party to get 60 days. What if those would have to conflict and would have to go with the more specific statute, wouldn't we?

MR. LOREE: Not necessarily because I think you're bringing up a question that involves the complaint of potential indefinite liability, and the legislature has the authority to make that exception. It is already done so in the limitations of statute. If you look at Section 16.009, which is commonly referred to as the statute of repose concerning contractors, there is an exception already in there created by the legislature that could create indefinite liability because if an action against a contractor is based on willful misrepresentation or fraudulent concealment in connection with the performance of the construction or repair, that ten-year period does not apply.

So the legislature has already considered situations where there can be extended liability after the initial ten-year period in Section 33.004(e) is not -- just another exception that's gonna apply in limited circumstances. It's not gonna have universal application. It's only going to arise in very limited circumstances like in this case where the latent defect was discovered right before the ending of the initial ten-year period. The builder was timely sued, but the third parties weren't designated until right afterwards.

In addition, under the third party practice and as part of the tort reform in 2003, I think this Court may consider an amendment to the request for disclosures under Rule 194.2 and added L to required timely designation of responsible third parties. For all practical purposes when this type of situation ends the responsible third parties are gonna be designated within typically a year after maybe the initial ten-year period, because in all litigation all litigators in the State of Texas send out at the time of answer of the request for disclosure if they're not included in their pleadings. And those are answered and the responsible third parties are designated early on and they're

brought in within usually the -- the 11th year, maybe the 12th year at the most and in -- in the statute of what's called the statute of repose for the engineers and architects and contractors -- there's already a two-year extension in there. If you put them on notice before the ten-year period you get an additional two years to claim.

CHIEF JUSTICE JEFFERSON: I understand very well your argument about fairness and -- and I really haven't thought about, you know, the -- the collusion aspect or the possibility of that. But statutes of repose seem to have unfairness sort of sewn into them. I mean you've got ten years period and that's how I've always thought about it anyway. That it seems -- it seems to cut off remedy of some of the -- that they didn't even know one -- you know, that there's a problem, that there's a defect. You know, a discovery rule doesn't matter. It's ten years period and whatever unfairness that brings, legislature says that's -- that's our policy. So, why that -- and -- and if that's true then the cleaner answer here is just to say ten years is ten years, and there is no -- you can't bring in the third party period.

MR. LOREE: Well, if -- if that's what the Court decides to do and that may be the Court's direction, I don't know. But there is an issue of fairness there. If you're going to cut off the joinder after ten years and make it absolute and not recognize statutory exception then you should not allow the designation. And that would've been easily done. And in the handout I showed you, they could -- that the legislature could have put in CPRC in Section 33.004, they could've put in limiting language, or even better in the applicability section under the portion of responsibility statute 33.002 they could have added a sentence, this chapter does not apply to claims barred by Section 16.008 and the rest of the statute of repose. Now, that would be a fair result, if that's this Court's ultimate decision --

JUSTICE BRISTER: But -- but the whole --

MR. LOREE: -- but that is not like a --

JUSTICE BRISTER: -- but the whole -- the whole idea behind responsible third parties.

MR. LOREE: Excuse me?

JUSTICE BRISTER: The whole idea behind designating responsible third party is to include somebody that the plaintiff can't sue.

MR. LOREE: Not necessarily.

JUSTICE BRISTER: That's one of the main reasons behind it.

MR. LOREE: No.

JUSTICE BRISTER: It was -- it was true of employers so that -- so that the defendant who's a third party can designate the employer who the plaintiff can't sue because of Worker's Comp, but the defendant gets to cut their responsibility and argue to the jury it's all their fault. Same thing for defendants who can't be found for criminals. The whole idea behind -- a lot of the force behind the reforms for responsible third party was to add people that the plaintiffs either hadn't or frequently couldn't sue. You're saying that's not fair, unless, well that -- that may well be, but --

MR. LOREE: In -- in a limited --

JUSTICE BRISTER: -- that's what [inaudible] intended to do.

MR. LOREE: -- that may be in limited situations. But the tort reform measures of 2003 where designed to allow defendants to bring in all responsible parties to a portion liability. And the legislature when they're discussing this to decide in order to assure fairness that we may need to make sure the plaintiff can join, even if there's a limitations issue or the statute of repose issue 'cause it was discussed. So the legislature considered fairness, but Galbraith's

proposed rule is designed to upset that legislative balance in that fairness. In addition in -- in the Code Construction Act when the legislature puts passing in enacting in statute it's presumed that they intended a fair, just and equitable result. So what Galbraith's proposed rule is is not fair. It would allow the designation, but not the joinder. If the Court's gonna say you can't designate and accept their argument, you shouldn't allow the -- you shouldn't not gonna allow the joinder, you shouldn't allow the designation in order to insure that the legislative compromise on fairness and that balance is maintained.

JUSTICE WILLET: What are we to do with the four or five times that this Court has referred to this statute as a statute of repose?

MR. LOREE: This statute -- it's commonly referred to a statute of repose, but it's also statute of limitations because they're -- they're similar. They're not separate and distinct entities. They're very -- they're similar and related in a lot of ways. They cut off causes of action. The main distinction is the triggering event for the running. So, there's similar, but there are some distinctions.

JUSTICE WAINWRIGHT: The opposing counsel said that the surveyor ten-year statute of repose uses the word repose 16.011, I think he said --

MR. LOREE: Yes.

JUSTICE WAINWRIGHT: -- is that different animal than this ten-year limitations in the provision at issue here?

MR. LOREE: It -- it also has a ten-year limitations, but the statute in dispute does not use a repose. That statute says it's independent of any other statute, but the one in dispute does not say that.

JUSTICE WAINWRIGHT: Right. So -- so does repose in 16.011 means something different from limitations in 16.008?

MR. LOREE: I think they're -- they're the same. There -- there are some differences, but they're essentially the same. They have different triggering events, but they do cut -- both of them cut off substitute rights and cuts off causes of actions.

JUSTICE MEDINA: In your --

MR. LOREE: But there are many exceptions to those.

JUSTICE MEDINA: In your exceptions, you stated earlier that you -- you get in -- plaintiff will get an additional two years to the statute of repose?

MR. LOREE: Under the --

JUSTICE MEDINA: Can -- can --

MR. LOREE: -- yes.

JUSTICE MEDINA: Where is that? And can you explain it quickly.

MR. LOREE: Yes. Under Sections 16.008 which is a statute of repose, the ten-year limitation period for architects and engineers. In the statute it says if you give notice within the ten-year period then you have two years after that date of notice. So, conceivably, you could give notice on the last day and get two more years in the statute, wouldn't that mean 12 years --

JUSTICE MEDINA: So if you get 12 years, what -- what, I can anticipate your answer, but what's wrong with an additional 60 days to cure whatever problem the plaintiff may have had in this situation?

MR. LOREE: I think the legislature within their powers have that authority to do that additional 60 days if that's the end of proportionate responsibilities statute. The same 12-year period is in the statute for contractors which is 6 -- Sections 16.009.

The last point I'd like to make is that the legislature has a

right to make exceptions. They have made exceptions. Some of them which could give extended liability that I've mentioned earlier. And I believe Galbraith is impermissibly asking this Court to rewrite the statute and the complaint should go to the legislature as an Exhibit 3, item 3 in exhibit. If the statute was worded this way then we wouldn't be here today, but the statute is not worded this way. And those words are not in there and those words need to added by the legislature.

So, unless there's any more questions, I'm finished.

JUSTICE MEDINA: Just -- just one question, do -- do you know what happened to Cox in this proceeding?

MR. LOREE: Yes. He was a -- the -- he's still involved. The -- the litigation is still pending against Cox. It's abated pending on this outcome because in order -- the petitioner asked that Galbraith be severed out so that summary judgment would no longer be interlocutory when go -- when it become final it can be taken up on appeal.

JUSTICE MEDINA: Thank you.

CHIEF JUSTICE JEFFERSON: Thank you, Counsel.

REBUTTAL ARGUMENT OF STEPHEN E. WALRAVEN ON BEHALF OF THE PETITIONER

MR. WALRAVEN: I have reserved five minutes. I don't think I'm gonna need that much, unless there are questions I don't anticipate. There are a couple of things I want to address, respond to.

One -- was the one that was touched on briefly with Justice Brister. He said that his respondent argued that it isn't fair to be able to designate somebody you can't sue. And as Justice Brister had one example, the employer. There are other examples, somebody who's bankrupt, has been discharged in bankruptcy. That isn't the statute, that isn't what it says. You can designate people that cannot be sued that was as you suggested one of the principle reasons for that statute. So I don't think that argument accurately portrays the thinking that went in to House Bill 4 and it certainly doesn't accurately portray what it says.

Another thing, the Chief Justice mentioned a concern over collusion. I think that may have come up with the Justice Brister as well. That is a problem. I heard that you shouldn't give the plaintiffs borrow that much credit. Well actually, I have a case where that happened. And it's on its way to the Fourth Court of Appeals as we speak. You may get to hear about it later. I don't think there's been any collusion in this case. It is certainly possible for a plaintiff to go to a defendant and say for consideration I'm gonna give you a big discount on your settlement if you'll designate these people for me that was done in writing. And that writing is an exhibit to a case that may be on its way here. So that does happen.

There is an incentive in 33.004 for a defendant to designate third parties broadly to shift liability on to anybody and everybody. But, of course, that ultimate shifting doesn't happen until there is a jury trial with evidence. You can't just name somebody, you gotta prove if you go back to the statute that they're responsible. So it's not just a matter of listing names.

There was also a suggestion that if you construe the word "limitations" as used in 33.004(e) that -- that interpretation will have an effect on all sorts of other statutes that use that word. And, of course, that's not what we're asking. As I pointed out, the word limitations as used sometimes more narrowly, sometimes more broadly and you have to look at it in each particular case. The issue about cross

claims and counterclaims among parties already in the suit is not the statute that subject to this appeal and is not the statute we're asking you to construe and is not something that we, you know, is -- is in any way involved. And if you can use the word narrowly here it may or may not have any effect on any other particular statute.

JUSTICE JOHNSON: Also, you have seen opposing counsel's handout?

MR. WALRAVEN: I have.

JUSTICE JOHNSON: And it says, indicates -- italics show the language not currently in the subject statutes. You said limitations in this -- in one section means different things. The word limitations in one section of --

MR. WALRAVEN: Of Chapter 16 is -- is different than other --

JUSTICE JOHNSON: Different in -- it's different in different places. Now I'm -- why would the legislature not -- if we read 33.004, why would we not give the legislature the doubt -- benefit of the doubt here. It says, not barred by limitations. And he said, if they wanted to say except those claims barred by Sections 1608, etc., etc., they could do so.

MR. WALRAVEN: Obviously --

JUSTICE JOHNSON: And [inaudible] the applicability chapter, 33.002, he says this chapter does -- it says this chapter does not apply to. And he says if they wanted to say claims barred by and -- and they could have easily done that. And so, when we say limitation your position is limitation means different things in different places. Why would we not want to say if the legislature wanted to accept these things out they could have done so, as you suggest --

MR. WALRAVEN: Well, you -- you can argue that in both ways. You could say if they had wanted to --

JUSTICE JOHNSON: Let's hear your side of it.

MR. WALRAVEN: Certainly. My side is if they had wanted to include that in 33.004(e), they would have said not only the bar of limitation, but also the statutes of repose. You've got 60 days to bring him back in. You could have rewritten it to put that in there to. You could have clarified this issue in that statute. You sure could have -- you could clarify it in their favor. You could have specifically clarified it in our favor. On the other hand, we're here to have the Court help construe the statute. And I see that --

CHIEF JUSTICE JEFFERSON: Any further questions. Thank you, Counsel. The cause is submitted. That concludes the arguments for this morning and the Marshall will now adjourn the Court.

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