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Supreme Court of Texas.
Methodist Healthcare System of San Antonio, Ltd., L.L.P., W.C. Schorlemer, M.D.
and Robert Schorlemer, M.D., Petitioners,
v.
Emmalene Rankin, Respondent.
No. 08-0316.

September 9, 2009.

Appearances:
R. Brent Cooper, Cooper & Scully PC, Dallas, TX, for petitioners.
Rosemarie Kanusky, Fulbright & Jaworski LLP, San Antonio, TX, for petitioners on rebuttal.
Carl Robin Teague, Law Office of Carl R. Teague, San Antonio, TX, for respondent.

Before:

Chief Justice Wallace B. Jefferson; Nathan L. Hecht, Harriet O'Neill, Dale Wainwright, David Medina, Paul W. Green, Phil Johnson and Don R. Willett, Justices.

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CHIEF JUSTICE WALLACE B. JEFFERSON: Please be seated. The Court is ready now to hear argument in 08-0316 , Methodist Healthcare System v. Emmalene Rankin.
MARSHALL: May it please the Court, Mr. Cooper will present argument for the petitioner. The petitioners have reserved five minutes for rebuttal.

ORAL ARGUMENT OF R. BRENT COOPER ON BEHALF OF THE PETITIONER

ATTORNEY R. BRENT COOPER: May it please the Court. I almost feel like my case has already been argued once this morning, but I will go ahead and try to cover some of the points that were not addressed in the earlier argument. Now this you hear is whether or not the statute of repose violates the open courts provision and as a preliminary matter, I think one of the things that I'm sure this Court is aware is that the open courts challenges that have been made in the past create a certain tension between this Court and the legislature. This Court, as well as the legislature, each have functions to do and one of the functions, obviously, of the legislature is to modify the law, including common law remedies in order to affect public policy. Now, this Court, in order to address the tension, that's T-E-N-S-I-O-N, between the open courts provision and the legislature has adopted several, I think, rules or accommodations. One is that as we start with a statute, we presume that it's constitutional. The second one, and

this Court recently did this, said this in Owens Corning v. Carroll is that it's within the authority of the legislature to make reasoned adjustments to the legal system in order to affect public policy. All of this then comes into the test which this Court has adopted most recently two years ago in Yancy regarding whether or not a statute will survive an open courts challenge or not and it's not whether or not necessarily it impinges upon somebody's rights or doesn't...

JUSTICE DAVID M. MEDINA: How does this statute survive?

ATTORNEY R. BRENT COOPER: This statute survives the open courts challenge because it is not arbitrary and it is not unreasonable when balanced against the statutes purposes and basis.

JUSTICE NATHAN L. HECHT: Does that have to do with the length of time? Would it be different if it was a two-year and one-month statute of repose?

ATTORNEY R. BRENT COOPER: I think that goes into it, Your Honor, because this Court and what I tried to do and let me say I think I've read every single open courts cases that's been decided in the last 100 years by this Court and they are mindboggling to say the least, but there are certain factors, particularly in the last 30 years, that this Court hasn't looked at in order to determine whether or not the legislative action is arbitrary or unreasonable. Now the first one is whether or not the remedy, whether or not the change is directly related to a crisis identified by the legislature and the change bears a relationship to the articulated legislative goals. For example, in the Owens Corning case, this Court identified there was a problem that the legislature had saw and that is plaintiffs from other states whose cause of actions were barred by the statute of limitations were coming into Texas to try to use our courts and our systems to affect causes of action that were otherwise barred in their own states.

JUSTICE DAVID M. MEDINA: What's the problem here? Isn't the problem allegedly insurance rates and an insurance crisis?

ATTORNEY R. BRENT COOPER: Sure, if you look at the legislative history, in fact if you go to the amicus brief by the hospitals on page 10, it talks about a study, the Nelson study that was made before, ordered by Senator Ratliff, before a 2003 session.

JUSTICE DAVID M. MEDINA: So we're to believe that insurance crisis continues forever?

ATTORNEY R. BRENT COOPER: Well, I think the issue is what existed at the time the legislature made their decision because obviously one of the things, Your Honor, one of the purposes in adopting this statute was to try to eliminate the crisis.

JUSTICE DAVID M. MEDINA: Should there be...

ATTORNEY R. BRENT COOPER: Hopefully, it would eliminate part of the crisis.

JUSTICE DAVID M. MEDINA: Well let's say it has. Should there be evidence to show that the so-called insurance crisis is now over and, therefore, can the statute be attacked on that basis?

ATTORNEY R. BRENT COOPER: Well I don't believe it can, Your Honor. The question is whether or not there was this legitimate basis.

JUSTICE DAVID M. MEDINA: At the time of the statute.

ATTORNEY R. BRENT COOPER: At the time it was passed because it's almost, it puts the legislature almost in a catch-22 position. If it doesn't work, then you say well there was no real relation. If it does work, then you're saying well, there was no, we don't need it now and I think if you look at all the Court's prior cases involving open courts, we've gone back to the time that the legislature passed, for example, in the Owens Corning case. We look back at the condition that existed.

In the Lebohm case v. City of Galveston, it's just the opposite. They looked back and said there was no legislative goal. There was no problem being addressed when they totally abolished all liability for any premises defects and the Court said because there was not this relationship.

JUSTICE HARRIET O'NEILL: Well let's look at the elements of an open courts violation. The restriction can't be unreasonable or arbitrary.

ATTORNEY R. BRENT COOPER:Correct.

JUSTICE HARRIET O'NEILL:Now, I don't think arbitrary is really what applies here. To me, arbitrary would be if they just said we're not going to allow any cancer cases or any particular type of case. So let's just look at unreasonable. Unreasonable when balanced against the statute's purpose and basis. And the purpose of the statute of repose is to get rid of stale claims because witnesses have died, memories fade, proof is difficult and it's just not fair, but in a res ipsa case, when there's no questions to liability, then why wouldn't you measure reasonableness against that type of claim?

ATTORNEY R. BRENT COOPER: Well, first off, I disagree with the assumption you just made. The sole purpose of the statute of repose, according to the legislative history, wasn't just to get rid of stale claims.

JUSTICE HARRIET O'NEILL: But that's a major purpose of the statute of repose.

ATTORNEY R. BRENT COOPER: But if you go to the Nelson report, if you go to the testimony before the legislature, there were several problems. One is the long tails that accompany these types of cases.

JUSTICE HARRIET O'NEILL: Okay, alright.

ATTORNEY R. BRENT COOPER:And...

JUSTICE HARRIET O'NEILL:Let me give you that. All right, there aren't very many foreign object cases. So if we allow foreign objects cases which have been recognized as unique in other jurisdictions, I mean, that's not going to affect the healthcare crisis enough to, if you want to weigh that element. There are just a handful of them. They're unique.

ATTORNEY R. BRENT COOPER: Well, again there was testimony, Your Honor, with all deference to the legislature that said (1) that having these long tails did affect insurance rates, (2) doctors who were retiring who would no longer buy coverage could be liable for 10 or 15 years after they retired with no insurance and still have this exposure with no insurance then after the retirement because the claim hadn't been brought for 10 years or 15 years. All that was addressed before the legislature in 2003 as part of the problem and part of the reason perhaps doctors didn't want to come to Texas and we had a shortage of doctors at that time.

JUSTICE HARRIET O'NEILL: But, again, why wouldn't we carve out res ipsa cases as just a different animal as other states, many other states have done as to their statutes of repose?

ATTORNEY R. BRENT COOPER: With all due respect because this is not the legislature. This is the Court and the question is whether or not our legislature had a reasonable basis to do what they did.

CHIEF JUSTICE WALLACE B. JEFFERSON: Did they have a reasonable basis for limitations under the Neagle and do you think those cases were wrongly decided to say the open courts applies to prevent the application of the two-year statute?

ATTORNEY R. BRENT COOPER: Well this gets into the factor, Your Honor, the second factor, and that is the effect, how broad an effect

it is and, again, I'm going to answer your question. In the Owens case, the Owens court, this Court said, well we're not really affecting a lot of Texans, we're just affecting people in other states who come here to sue who are barred by their other states' statute of limitations. So it was very narrow. We also know, for example, that in the Trinity case v. URS, in footnote 6 of this Court's opinion, this Court said that 99.6%, according to a study of all claims were brought within 10 years so you had a very small segment of people being affected. The two-year statute, I think being honest with the Court, would affect a lot more people than are going to be affected by the 10-year statute of repose. So there is going to be a larger group, a larger segment of the population. You have more minors affected and you have obviously and there was testimony and I'll tell you where it is if you go to the TAP amicus brief, page 20, there was statistics given about what percentage of claims were brought within three years, what percentage were brought within six years and then it concluded that 99% of all the OB/GYN claims were brought within eight to nine years of the time of the treatment. And so with respect to this case, this statute of repose here that we're dealing with, we know that within eight to nine years, 99% of all the claims that are going to be brought against OB/GYNs which typically are claims involving babies where there would be this long tail, are brought within the eight to nine years, so we have a very, very small segment or portion of the population that would be excluded by the statute that's being adopted by the legislature.

JUSTICE DON R. WILLETT: Which of the out-of-state cases that involve open court provisions are worded, which of those provisions are worded most similarly to ours if you know off hand?

ATTORNEY R. BRENT COOPER: Well, we gave a listing in our brief and I know the THR amicus brief had a listing as well. Obviously, I believe there were 13 of them, Your Honor, that had exceptions for foreign objects. Our legislature chose not to have exceptions for foreign objects, so obviously ours would not be within that group of 13. There were 21, however, that applied to all cases even foreign object cases and I think ours would be closer to those. I've got a table, I could read them to you, but they're in our brief there. They're also in the THR amicus brief, but that gets to the third factor that this Court has looked at in determining whether or not the actions are unreasonable or arbitrary and that is if you go to the Owens Corning decision, I keep going back to that, and this Court says we're going to do this. We're bringing Texas into the mainstream of other jurisdictions by this action and apparently the thought process behind that was that if 30 or 40 or 45 other legislatures have adopted the same or similar legislation, how can you say that our legislation is unreasonable or arbitrary. In fact, in the Trinity case, this Court noted that 46 other states had enacted analogous statutes of repose as part of their basis for this Court's decision in the Trinity case and we've supplied to the Court what other jurisdictions have done. Again, 33 states and one territory have medical statutes of repose. Thirteen have exemptions for foreign objects and the other thing that I think is very important is that no state in the United States has a statute of repose that's longer than Texas. We have, we're tied, for the longest statute of repose for medical negligence cases in the United States. There are some in other states that are as short as three years, but our legislature, again, I think it shows the reasonableness of what our legislature did.

JUSTICE DON R. WILLETT: Do statute of repose simply serve in your mind sort of a broader distinctive purpose than limitations statutes

do?

ATTORNEY R. BRENT COOPER: It does and this Court recognized it, I believe, in the Tabler case where it said it's, statute of repose is sort of the outside boundary. And it may operate to cut off cases and causes of action before they even arise, but it's for the purpose of giving manufacturers, of giving surveyors, of giving contractors knowledge that after a certain period of time they don't have to be worried about suits from houses they constructed, products they sold, in this case medical treatment that was rendered and it's sort of the legislature conferring some peace of mind to these particular groups.

JUSTICE DALE WAINWRIGHT: Harping back to the argument in the last case, why wouldn't cutting off a claim before it even accrues raise an open courts bell?

ATTORNEY R. BRENT COOPER: Well, they believe that that is the test for open courts violations. It's not the test. Obviously, Judge Wainwright, every legislation that's passed probably is going to impact certain Texans positively and other Texans negatively. That's true, I think, with probably every statute that's been passed, but the question, again, is not whether or not, I was going to say you nine, but you eight justices would have done the same thing. That's not the test because you might not.

JUSTICE NATHAN L. HECHT: I'm curious about what the test is though because it looks a little like negotiation. The legislature starts out and says okay, if you're under six, you have until your eighth birthday and then they say well, if you're under 12, you have until your 14th birthday. Now they say 10 years no matter what. I get the feeling that we're sort of haggling.

ATTORNEY R. BRENT COOPER: Well there obviously was a lot of discussion. There was a lot of testimony that was taken trying to come up with a result that both sides of the aisle felt was fair. This was passed fairly overwhelmingly with support on both sides of the aisle as being something that was fair and there obviously is negotiation in all bills, Your Honor. I mean it's probably ugly, but that's the way it happens.

JUSTICE DALE WAINWRIGHT: The legislature can haggle and move its statutory targets. The Constitution should set up a principle, shouldn't it?

ATTORNEY R. BRENT COOPER: The Constitution has set up principles and I think, Your Honor, the first principle is as I started my argument and that is with the separation of powers is that the legislature has a job to do and they're equipped to do these jobs with committees where they can do fact-finding and fact gathering and stuff that perhaps this separate body over here, the Supreme Court, doesn't have those abilities to do. So the question is did they do it in such a fashion that complies with this Court's standards for open courts, the Constitution, that is was it arbitrary and unreasonable and I believe the evidence in this case shows that it was not.

JUSTICE DON R. WILLETT: Why do we need a statute of repose if, in the previous case we heard that the two-year statute is absolute, categorical, definitive and if that's true then why do we need a 10-year outside boundary statute of repose?

ATTORNEY R. BRENT COOPER: I think if you look at the Nelson report, I think there's some question about whether or not the open courts accommodations for those causes of action that were inherently undiscoverable or impossible to discover would be carried over with this language and the legislature was wanting to put a total outside limit to say regardless of the open courts accommodations, regardless

of the minority issues, as far as minors, 10 years is going to be the outside limit and there's also, I think, if you read the legislative history, a difference, perceived difference in the way this Court treats statutes of repose versus statutes of limitations.

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

MARSHALL: May it please the Court, Mr. Teague will present argument for the respondents.

ORAL ARGUMENT OF CARL ROBIN TEAGUE ON BEHALF OF THE RESPONDENT

ATTORNEY CARL ROBIN TEAGUE: May it please the Court, Emmalene Rankin, who is the respondent in this case requests that this Court affirm the judgment of the Court of Appeals and remand this case to the trial court for a trial. The other side has taken several positions in this case and I have listed for you all of the steps which I believe are the seven elements. They have, in essence, one or the other has contested all but two of those issues. For example, they take the position that a medical negligence case is not a common law cause of action. I think this Court has clearly and fairly recently decided that a medical negligence case such as the case brought by Emmalene Rankin is a common law or was a common law cause of action. They also take the position that the application of the discovery rule to sponge cases was never well established. You've discussed Gaddis v. Smith several times this morning. Gaddis v. Smith is a Supreme Court case. There was no doubt left by Gaddis v. Smith as to whether the discovery rule was well established. In fact, in order to abolish the discovery rule, it took an act of the Texas legislature. There's never been even a hint that this Court was going to itself abolish the discovery rule. In fact...

JUSTICE NATHAN L. HECHT: Do you think statutes of repose are constitutional in some context, like for architects or engineers?

ATTORNEY CARL ROBIN TEAGUE: I think in some context they are.

JUSTICE NATHAN L. HECHT: Why not this one?

ATTORNEY CARL ROBIN TEAGUE: I think in this case because the test was met by Emmalene Rankin, at least we're talking about summary judgment evidence, the test was that she under the test, she did not have a reasonable opportunity to discover the wrong, her injury and to bring suit.

JUSTICE NATHAN L. HECHT: Well, I'm sure there are some people that want to sue engineers or architects that didn't have a reasonable chance either, but it cuts across the board doesn't it? That's a whole [inaudible] of a repose is it doesn't matter.

ATTORNEY CARL ROBIN TEAGUE: I think there's the distinction in the architecture and engineers' cases that have been decided is that the statute of repose already passed, the 10 years passed before the injury occurred. In this particular situation, the injury occurred at the same time the statute of repose began to run. Another distinction between our case and the architects and engineers case is that in our case, we have no other person to sue. In the architects and engineers cases, those are normally premises liability cases.

JUSTICE NATHAN L. HECHT: What if they weren't? What if there were a plaintiff that had nobody but the engineer to sue?

ATTORNEY CARL ROBIN TEAGUE: Well, then there would be more difficult to distinguish the cases, I think, if there was no other person, for example, the premises owner or occupier.

JUSTICE DAVID M. MEDINA: It seems to me that you're saying that

there should be a different rule applied to personal injury claims versus property damage claims.

ATTORNEY CARL ROBIN TEAGUE: Not necessarily. I think there should be though a different rule applied to the category of foreign objects cases. I think that they are in a different category. They are more difficult to discover.

JUSTICE DAVID M. MEDINA: How would you carve that out?

ATTORNEY CARL ROBIN TEAGUE: Well I think I would carve it out under the test that this Court has already established, the test of the constitutionality of the statute as applied is whether there has been a reasonable opportunity to discover the wrong and bring suit. In this particular situation, I think that we have raised that fact issue, the fact issue is whether there has been a reasonable opportunity. I believe the summary judgment evidence clearly indicates that she did not. Emmalene Rankin did not have a reasonable opportunity to discover the wrong and bring suit and, in fact, that fact issue is not even contested by the defendants in this case. They have not argued against that.

CHIEF JUSTICE WALLACE B. JEFFERSON: Could a legislature say that you could give a period of time, say 25 years, 50 years, that that excuse the phrase, but as a matter of law, is enough time for a plaintiff to have a reasonable opportunity to discover? In other words, through 50 years you go for tests and you're going to get x-rays at some point during that 50- year period most likely or with modern science, it's more able to discover foreign objects and that sort of thing. Is there a time period the legislature could have testimony from and say this is enough time for the average person to discover a foreign object and we're going to cut it off at this point so that these doctors can retire with peace of mind.

ATTORNEY CARL ROBIN TEAGUE: I think that's probably what the legislature intended to do. However, this Court has decided. There are two controlling decisions that this Court should be guided by. One is in the Shaw v. Moss which established the test of reasonable opportunity and the second is that in the Shaw v. Moss, this Court decided that this is a fact issue and so whether it's 10, 12, 13, 14, 15, up to 25 years...

CHIEF JUSTICE WALLACE B. JEFFERSON: That's a repose case? Shaw v. Moss was a statute of repose or a limitations?

ATTORNEY CARL ROBIN TEAGUE: I believe that all of these cases are statute of repose cases because this Court defines statute of repose in the Trinity River Authority.

JUSTICE HARRIET O'NEILL: I think Shaw, Shaw was a statute of limitations wasn't it?

ATTORNEY CARL ROBIN TEAGUE: Well I think it's called a statute of limitations, but I think by definition under Trinity River Authority, both of these statutes, the two-year statute and the 10-year statute are both really statutes of repose. I mean you can call it a limitation statute, but it's still a statute of repose because it's not an accrual statute.

JUSTICE DAVID M. MEDINA: Is there a way for your client to prevail without declaring this statute unconstitutional?

ATTORNEY CARL ROBIN TEAGUE: Excuse me?

JUSTICE DAVID M. MEDINA:Is there a way for your client to prevail without declaring this statute unconstitutional?

ATTORNEY CARL ROBIN TEAGUE: I don't believe so. I believe that this case hinges on whether the statute as applied is unconstitutional. This is not a facial attack. This is an as-applied attack. So I think

that for her case to proceed, this Court would have to hold that as applied, the statute violates her rights under the open courts provision.

JUSTICE NATHAN L. HECHT: I'm not sure I understand the concept of open courts as applied. It seems to me that the whole point of open courts is that you balance the regimen that has come along, like workers comp, against all of the rights of the people involved so that workers comp trades a fault finding for limited benefits in short, right? The employee, doesn't have to show fault, but the employers' liability is limited, but there would be lots of employees who could easily show fault and lots of employers who could easily show that there was no fault, yet we don't have an as-applied case saying well the workers comp act as applied to this particular employee who can show clear fault is not an open courts violation. Why is this different?

ATTORNEY CARL ROBIN TEAGUE: Let me see if I can start off by addressing it this was. Of course, there is a distinction between an as-applied attack and a facial attack.

JUSTICE NATHAN L. HECHT: Generally, but...

ATTORNEY CARL ROBIN TEAGUE: This is not a facial attack. This is an as-applied challenge or attack by one plaintiff, Emmalene Rankin, under the facts of this case. She is not even trying to say that the statute is facially unconstitutional in all sponge cases. For example, there is distinction, I think, or difference in the factual situations in the earlier case, the Tangie Walters case and this case because there's been some discussion as to whether the symptoms were more recognizable in the Tangie Walters case, but this is an as-applied case.

JUSTICE NATHAN L. HECHT: So do you think that an employee who can show that his on-the-job injury was his employer's fault has an as-applied challenge to the workers compensation act under the open courts provision?

ATTORNEY CARL ROBIN TEAGUE: I don't take that position.

JUSTICE NATHAN L. HECHT: No, I'm asking you if he could do that.

ATTORNEY CARL ROBIN TEAGUE: I think that that gets back to the question of whether the benefits outweigh the balancing issue and I think when you balance, and I think the balancing there is that the employee has other rights. I should say though and maybe this will be part of an answer here is remember that under the workers comp statute, the employee gets compensation whereas under this case, if you rule in favor of the defendants, Emmalene Rankin gets no compensation.

JUSTICE NATHAN L. HECHT: But in any event, you think this is an as-applied challenge?

ATTORNEY CARL ROBIN TEAGUE: Absolutely. This is not a facial attack.

JUSTICE NATHAN L. HECHT: And the next question I have with that is there any other kind under a statute of repose because the people who sue in less than 10 years don't need to make one and the people who sue in more than 10 years, that's all they have left. So is there anything other than an as-applied challenge to a statute of repose?

ATTORNEY CARL ROBIN TEAGUE: That may be the case because I can't think off the top of my head where you would have a facial attack.

JUSTICE NATHAN L. HECHT: Right.

ATTORNEY CARL ROBIN TEAGUE: I think that let's say, use maybe an unreasonable circumstance, let's say that the statute of limitation was a six-month statute of limitations, you might have a facial attack here, but this is a 10-year statute and so I think under this

circumstance, it has to be an as-applied attack.

JUSTICE NATHAN L. HECHT: Right. And the whole purpose of repose is to cut off no matter what so basically this undermines the purpose of repose.

ATTORNEY CARL ROBIN TEAGUE: I don't think it undermines the purpose of repose. This is for number one, it's an as-applied challenge. Number two, as Justice O'Neill, I think, has recognized, there are not many foreign object cases. This is not something that's going to happen every day, every minute. Number three, the purpose of the statute of repose is to bar stale claims and this is not what is called a stale claim. This is a sponge case or a foreign objects case as distinguished between those cases which you might refer to as stale claims. This case is one that is inherently undiscoverable and objectively verifiable because we know when you take the sponge out of the subject and there's an earlier surgery, you add one and one and you get two there.

JUSTICE PAUL W. GREEN: But if you have like an architects and engineers statute of repose, I could see a situation where 12, 15 years after a building has been built, an inspection reveals some design defect that if they don't fix it, the building is going to fall down. Isn't that the same thing?

ATTORNEY CARL ROBIN TEAGUE: I don't think so because...

JUSTICE PAUL W. GREEN: It's an undiscoverable, latent, inherently undiscoverable problem perhaps.

ATTORNEY CARL ROBIN TEAGUE: Okay. Here, I think though, the distinction is that in the situation you just referred to, the statute of repose has already run by the time the injury occurs. So if it's a 10 year...

JUSTICE PAUL W. GREEN: The defect has always been there.

ATTORNEY CARL ROBIN TEAGUE: The defect has always been there, but the statute of repose began to run at the end of construction and ran 10 years later and then the accident and injury occurred let's say at 12 years later. So at that point, you get into the vested rights issue.

JUSTICE PAUL W. GREEN: Well, I know you were talking about an accident. I'm just talking about fixing it. When it's recognized and like you find the sponge later, you know. The injury occurred back when the building was built, not when it fell down because they fixed it before it fell down. It still costs a lot of money to fix. Why wouldn't there be some open courts challenge there?

ATTORNEY CARL ROBIN TEAGUE: You might have an open courts challenge there, but then you get into the vested rights issue there and the question is whether the statute of repose has run before the injury occurs and in all the situations that have been decided so far, the statute of repose in the architect and engineer cases has run before the injury occurs so that's one of the distinctions between this case and those kind of cases and I should say that in the Trinity River Authority case, this Court didn't decide, I mean it reserved some questions and it reserved the question as to whether the person who was injured would have a, under other circumstances, would have a open courts challenge to the statute of repose.

JUSTICE DON R. WILLETT: This Court has said recently as Justice Green sort of suggests that injury happens when it happens and not when somebody happens upon it, but when it happens way back when not when it's discovered five, 10, 15 years down the road.

ATTORNEY CARL ROBIN TEAGUE: Okay and maybe the distinction here is between an injury to the building owner because of a design defect and the injury to a person who suffers a personal injury because of a

design defect. The Trinity River Authority case got into that issue, I think, but there may be an open court challenge, but to me there are distinctions between those cases and this sponge case. Maybe I'm not...

JUSTICE PHIL JOHNSON: Counsel, let me ask this and the opposing counsel mentioned it. Other states have exceptions for sponge cases and different types of cases. Surely the legislature undertook to pursue those matters. I doubt if they just forgot about the sponge cases and so we're really dealing with whether or not we're going to defer to the legislature to a certain extent here, are we not and we're just going to have to say they're wrong and that their judgment on this was just erroneous.

ATTORNEY CARL ROBIN TEAGUE: Well I think it's just the opposite. I don't think this Court defers to the legislature. I think that legislature defers to the Court in this case. I think the legislature clearly, clearly decided not to except sponge cases or foreign object cases. There's no question about that. They could have done so, but decided not to do so. I think, in effect, the legislature left to this Court to decide foreign object cases under the open court provision. The legislature had a choice. They could have either excepted them under the statute or left it up to the open court provision to be dealt with by the Court and I think that they decided not to except them by the statute, but to leave for a decision by this Court on a case-by-case basis under the open courts provision. I have a little more time left. Let me answer some of the questions that this Court posed earlier. The Chief asked whether the legislature abolished the discovery rule. Clearly, this Court has held several times that the legislature abolished the discovery rule. So the challenge in this case is not under the discovery rule as it is under the open court provision.

JUSTICE NATHAN L. HECHT: How are they different, do you think?

ATTORNEY CARL ROBIN TEAGUE: How are they different? I think that they are related to each other. I think if you look at, read all of the opinions of this Court and under open courts and discovery rule, there is a relationship between the two.

JUSTICE NATHAN L. HECHT: So that prompted my question.

ATTORNEY CARL ROBIN TEAGUE: Excuse me?

JUSTICE NATHAN L. HECHT: How do you think they're different?

ATTORNEY CARL ROBIN TEAGUE: Well, one is the test under the open courts provision is whether there has been a reasonable opportunity to discover the wrong or the injury and bring suit and I would say that it would be almost splitting hairs to distinguish between the tests under both. I mean, I think there is a similarity and I think that this Court's opinions bear that out. There is a question of whether the open courts provision should be categorically applied, and I think that this Court could carve out categories for application of the open courts provision as it has done in the discovery rule cases, but certainly if this Court decides to carve out, apply the open courts provision just to categories of cases, the foreign objects cases would be one of those categories to which the open courts provision should apply just as the foreign objects cases are one of the, in fact the first category of cases to which the discovery rule was applied.

JUSTICE DAVID M. MEDINA: How does that compare to your attack as applied to your client, you're talking about an individual situation versus carving out an entire group of citizens to pursue it.

ATTORNEY CARL ROBIN TEAGUE: I think that first you begin with the category of cases to which the open courts provision would apply and then you go from there you go into the evidence and you have to

determine whether the evidence is such that the plaintiff did not have a reasonable opportunity to discover the wrong and bring suit and I think that would be one of the ways you would distinguish the facts in this case to the facts in the Tangie Walters case. The discussion earlier, I think, would bear that out that there may be some evidentiary differences between our case and the Tangie Walters case. So, broad category would be foreign objects cases, but the narrower category would be in which situation did a plaintiff have a reasonable opportunity to discover or not have a reasonable opportunity to discover and I think the summary judgment evidence there would make those distinctions. In other words, there might be some foreign objects cases where there was a reasonable opportunity to discover within either the two-year or 10-year statute of repose.

JUSTICE DAVID M. MEDINA: Well it seems to me though if the legislature wanted to carve out, they would have had a carve out and for us to do otherwise would be exceeding our authority there to carve out a special section.

ATTORNEY CARL ROBIN TEAGUE: Well, I don't think so because maybe I'm going too far, but the test is whether there is a reasonable opportunity to discover the wrong and bring suit. All I'm saying is and when you apply that or all I'm suggesting is that when you apply that test, it's more readily applied to a foreign object case than it is to, for example, a misdiagnosis case. The Court has held in the Robinson v. Weaver case that the discovery rule didn't apply to misdiagnosis cases. I think you would probably reach the same conclusion in an open courts provision case.

JUSTICE NATHAN L. HECHT: Do you disagree with the analysis of other states' laws in the hospital's brief and the hospital amicus brief?

ATTORNEY CARL ROBIN TEAGUE: Other states' laws or other courts holdings?

JUSTICE NATHAN L. HECHT: Well, both. Statutes...

ATTORNEY CARL ROBIN TEAGUE: I think that they probably have, well summarized that there are some states that have an exception, some states that don't have an exception, that's true. I understand that. There are some courts that have upheld in as-applied and there are some courts that have struck down laws as applied. But this Court in deciding the open courts provisions has not yet decided the case under other courts ruling. This Court has decided it based upon its own rulings.

CHIEF JUSTICE WALLACE B. JEFFERSON: Any further questions? Thank you, Mr. Teague. The Court will hear rebuttal.

MARSHALL: May it please the court, Ms. Kanusky will present the rebuttal for the petitioners.

REBUTTAL ARGUMENT OF ROSEMARIE KANUSKY ON BEHALF OF PETITIONER

ATTORNEY ROSEMARIE KANUSKY: May it please the Court, we start with a basic premise that we think is a positive [inaudible] and is simply incorrect. Is there a reasonable opportunity to discover and bring suit? That might be a question that was applicable to the prior case involving limitations, but it's not applicable to this case involving the statute of repose.

JUSTICE NATHAN L. HECHT: And why?

ATTORNEY ROSEMARIE KANUSKY: Because the very purpose of the differing statutes.

JUSTICE NATHAN L. HECHT: So if it was three years, you wouldn't have the same strong argument that you have with 10 years?

ATTORNEY ROSEMARIE KANUSKY: I think the length of time goes to the weighing analysis, but it is just part of that underlying test. In returning to your concern earlier, we do have an awkward situation that Ms. Faust and I from the prior case had discussed at length between ourselves. It's an as-applied challenge, but its effect is a facial challenge simply because of this tension between the questions we're forced to answer in properly applying the open courts analysis. The function of asking whether the statute is reasonable is not focused on the individual, it's focused on bigger public policy concerns, that the legislature was free to take evidence on, to weigh, to decide for itself what was best for that particular point in time. It's particularly critical, I think, in the retained object context. In 1967, when this Court adopted the discovery rule for those cases, there was a certain status of the medical technology that no longer exists. It was perfectly reasonable in a real-world context for the legislature to consider the changing role of technology, the changing role of medical care and the crisis, not just insurance rates, Your Honors, but also access to healthcare. It was completely reasonable for the Court to determine a 10- year statute of repose would address those issues. There is a direct connection between the crisis, the purpose of the statute, and what the legislature did.

JUSTICE PAUL W. GREEN: They did that in both cases, in both the two-year limitations case, statute and the 10-year statute.

ATTORNEY ROSEMARIE KANUSKY: Exactly.

JUSTICE PAUL W. GREEN: So should there be a reason to permit foreign object cases in statute of limitations claims or circumstances, but not in 10-year repose claims?

ATTORNEY ROSEMARIE KANUSKY: Yes.

JUSTICE PAUL W. GREEN: And what would those be?

ATTORNEY ROSEMARIE KANUSKY: Well, I think part of your concern, Justice Green, harkens back to the question in the prior case. Is two years absolute in this context? Maybe it is because we haven't had an opinion from this Court specifically addressing chapter 74 and I realize it's substantially similar to its predecessor, but it was also enacted as part of the whole scheme of attempts to bring some stability to the insurance and healthcare industry. It was part of a very long legislative process. Three times is the charm is what I like to say. We don't have an opinion from this Court that says two years is absolute. It might be appropriate to so hold in the other case. In this case, I don't think you need to decide that because the purpose of the statute of repose is different from that of limitations.

JUSTICE HARRIET O'NEILL: And does that depend upon what the legislature names it because it seems to me that the statute of limitations it says the discovery rule doesn't apply is the statute of repose.

ATTORNEY ROSEMARIE KANUSKY: I think that's one of the concerns that the Fourth Court was struggling with. Both statutes are absolute in the terms of the Fourth Court. That is a concern. However, we do have some statutory guidance in this case. The Fourth Court, I think, glossed over the fact that a different provision of Chapter 74, 74.051(c) specifically describes 74.251(a) as a statute of limitations and, of course, subpart B specifically says it is a statute of repose. It may be splitting hairs, but the legislature is trying to communicate to litigants and to the Court that it intended something different by enacting those two provisions.

JUSTICE DALE WAINWRIGHT: There are differences also, aren't they? I'm not sure if they're determinative here, but a statute of repose can cut off a claim before it even accrues, generally not with the statute of limitations.

ATTORNEY ROSEMARIE KANUSKY: That's true.

JUSTICE DALE WAINWRIGHT:The statute of repose begins to accrue at the time of the act giving rise to the injury. The statute of limitations may or may not accrue at that point in time.

ATTORNEY ROSEMARIE KANUSKY:That's true.

JUSTICE DALE WAINWRIGHT:Are there other differences that might be material here between the two?

JUSTICE HARRIET O'NEILL: Let me just follow up on that. In light of the fact the legislature said the discovery rule doesn't apply to a statute of limitations, they blurred the distinction between traditional statute of limitations and statute of repose. I mean, you said you're splitting hairs to try to find the difference in this context.

ATTORNEY ROSEMARIE KANUSKY:Exactly. I think the legislature has struggled with the terminology in other cases as well and, Justice Wainwright, I believe you know that from the Pochucha Galbraith case. They very broadly characterized all of the statutes in Chapter 16 in the Civil Practice and Remedies Code as limitations periods, but some of them are clearly called statutes of repose within those particular subsections and some of them operate much like the two-year statue in healthcare liability claims because they are absolute. They run from a certain date.

CHIEF JUSTICE WALLACE B. JEFFERSON: Are there any further questions?

ATTORNEY ROSEMARIE KANUSKY: Thank you, Your Honors.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, counsel. The cause is submitted. That concludes the arguments for this morning and the Marshall will adjourn the Court.

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