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Supreme Court of Texas.
Barbara Robinson, Petitioner,
v.
Crown Cork and Seal Company, Inc., Respondent.
No. 06-0714.

February 7, 2008

Appearances:
Deborah G. Hankinson, Deborah Hankinson PC, Dallas, TX, for petitioner.
Thomas R. Phillips, Baker Botts, LLP, Austin, TX, for respondent.
Kimberly R. Stuart, Crain, Caton & James, PC, Houston, TX, for respondent.
Joshua Klein, Baker norrs LLP, Washington, DC, for respondent.

Before:

Chief Justice Wallace B. Jefferson, Harriet O'Neill, Dale Wainwright, Scott A. Brister, David Medina, Paul W. Green, Phil Johnson, and Don R. Willett, Texas Supreme Court Justices, en banc.

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CHIEF JUSTICE JEFFERSON: The Court is now ready to hear argument in 06- 0714, Barbara Robinson versus Crown Cork & Seal.
THE COURT MARSHALL: May it please the Court. Ms. Hankinson will present argument for the petitioner. Petitioner has reserved eight minutes rebuttal.

ORAL ARGUMENT OF DEBORAH G. HANKINSON ON BEHALF OF THE PETITIONER

MS. HANKINSON: May it please the Court. This case is straightforward and simple and this is because the answer to the constitutional challenges presented are granted in two indisputable facts. First, the plain language of the Texas Constitution Article I, Section 16 and 29, and second, over a century of law from this Court consistently interpreting that language.
JUSTICE MEDINA: Is there a police power exception to this retroactive clause?
MS. HANKINSON: No. There is not, your Honor.
JUSTICE MEDINA: And why not?
MS. HANKINSON: Because Section 29 of Article I of the Texas

Constitution says that "There is no exception for anything contained in the Bill of Rights" and the retroactivity clause is contained in the Bill of Rights and this Court has consistently held. And I believe we've cited at least six or seven opinions from this Court acknowledging that fact in our brief -

JUSTICE MEDINA: How do -

MS. HANKINSON: - except the Barshop.

JUSTICE MEDINA: How does, how does the Barshop versus Medina County case apply to this?

MS. HANKINSON: That's correct. Barshop has language to the contrary that Barshop is not controlling and-- Barshop can be explained. First, Barshop did not involve a retroactivity challenge based on the vested right that obtains to an accrued cause of action. It involved the Edwards Aquifer Act and looking backward at the retroactive effect of the law, that is the permitting process under the conservation clause of the Constitution that the legislature was invoking, required-- allowed passed usage to be used to determine whether in-- and how permits would issued in the future. And so the Court determined that having that kind of retroactive effect did not make a law retroactive. Now, in the context of that discussion, the Court made a statement about the police power being available to override the retroactivity clause. There is no mention in that opinion of Section 29 of Article I of the Constitution. I don't know why it's not there whether it was not briefed, if the Court overlooked it. I'm not quite sure. But the point is, is that that provision remains in the Constitution and, and both before and after Barshop in cases that's specifically involved a retroactivity challenge, including ones involving accrued causes of action, the Court has invoked Section 29 and every time we find Section 29 mentioned in a Supreme Court opinion in connection with the police power and the Bill of Rights, you'll find that this Court has said that the police power is an exception-- is excepted from the, the rights that the people have reserved to themselves in the Bill of Rights.

JUSTICE MEDINA: Is there any difference in the statute and the statute that was decided by the Pennsylvania Superior Court in 2004 I believe?

MS. HANKINSON: There, there are a couple of differences, for example, with respect to the date that is used in-- for purposes of the-- of the, the corporate transactions but at the end of the day, it is the same statute and it's the same statute that has been Crown has now gone to several other states to get. And so at the end of the day, while the Pennsylvania Constitution under its Open Court's Provision has a remedies clause that invokes the retroactivity concept in the concept of vested rights, at the end of the day, the result is the same.

JUSTICE WILLETT: And that's still the only foreign Court to tackle this issue so far in Pennsylvania?

MS. HANKINSON: With respect to-

JUSTICE WILLETT: Did it-- the issue we're facing today?

MS. HANKINSON: I'm sorry?

JUSTICE WILLETT: The issue we're facing today, the Pennsylvania decision from '04 it's still the only one out there.

MS. HANKINSON: Yes. Your Honor, we checked before coming today for argument and that's the-- that's the only one that we see on the books. Of course, the last two statutes that Crown has passed in, in different states, they've made prospective only. But there are still several other retroactive statutes on the book but Pennsylvania which is the

home state for this corporation, it's-- Superior Court has said that "It is unconstitutional because it retroactively deprives the plaintiffs of their constitutional right to an accrued cause of action which is a vested right." So the analysis is the same at the end of the day and the technical differences in the statute, for example, with respect to the date make no difference.

JUSTICE MEDINA: Now there's some comment that this is a special law created only from Crown. Is it-- is that important?

MS. HANKINSON: It is a second basis on which the statute is unconstitutional.

JUSTICE MEDINA: No matter if other corporations benefit from this law?

MS. HANKINSON: It does matter with respect to the first element of the analysis under the special law provision of the Texas Constitution. Every time this Court has looked at a challenge under the special or local law provision of the Texas Constitution and has determined that the classification is not open-ended. That is that no one else falls within the category or the classification used in the law. The Court has determined that it is a special law. On this record, this is not an open-ended provision. It is not and it is tied to a date back in the 1960's. So it can't be open-ended. The events that trigger this particular immunity under the law date back to the 1960's. So we know whether anyone is within that or not because you can't have a transaction now and bring yourself within it if the original transaction hasn't already occurred.

CHIEF JUSTICE JEFFERSON: Why would someone have a vested right to a remedy against an innocent corporation?

MS. HANKINSON: Your Honor, that's spin. Innocent corporation and innocent successor as used in this particular law is spin. If you look at the law on successor liability and what happens when corporate transactions occur. The common law which this state-- which this Court recognized in 19-- in 1880 said that "When certain corporate transactions take place, the liabilities have to go some place" and you can do one of two things and variations of the two things. You can do an asset purchase in which one corporation purchased this-- the assets of another and the liabilities remain with the first corporation. If you do a merger or consolidation what we have both in this case, ultimately a merger, then the two corporations come together and become one and the liabilities are there with the surviving corporation. Typically, what you have is you have an exchange of stock by the part of the shareholders. They give up their stock in the old corporation or in the new corporation and as a result to that, you have continuity of ownerships. The law does not [inaudible] the idea that corporations can engage in transactions in order to [inaudible] in their liabilities. The liabilities lie some place depending on the kind of transaction. Here, we have a merger. First of all, we had a stock purchase, then Crown sold off the insulation assets but kept the old liabilities.

JUSTICE HECHT: You say Crown sold them off. I thought Mundet sold them off.

MS. HANKINSON: The papers, your Honor, which are in the record indicate that Crown owned 80 percent of Mundet at the time this happened and then when the assets were sold, it was sold by Mundet, a division of Crown Cork & Seal. And that's what the New York transaction documents reflect on the Bill of Sale. So apparently, at that point and time, Crown was controlling it and it kept the liabilities. So the bottom line is, is this whole idea of no settled expectation because this is an innocent successor spin.

JUSTICE O'NEILL: Well, let's talk about -

MS. HANKINSON: Crown is Mundet.

JUSTICE O'NEILL: - let's talk about settled expectations. Where do we draw the line? It seems like the Court of Appeals struggled with the difference between a mere expectation and a vested right. Some Court's holding a mere expectation is a cause of-- I mean, is not a cause of action and has to be a final judgment. Where do we draw the line now?

MS. HANKINSON: But not this Court. This Court has never said that. In 1849, this Court first held that an accrued cause of action is a vested right and ever since that De Cordova case in-- in 1849, this Court has consistently helped through Mellinger in 1887, Middleton in 1916, City of Tyler versus Likes in 1997, Baker Hughes in 1999, this Court has never said that "A judgment is what is necessary for there to be a vested right." If you look at the language from De Cordova that this Court then cited again in Mellinger and has over and over again cited. The language is that "The legislature cannot extinguish or eliminate an accrued cause of action either by adjusting the statute of limitations or by creating a new immunity or defense, it cannot do that without giving a reasonable opportunity to the holder of the vested right to preserve that right." This statute is a total elimination. There was no reasonable opportunity given for Mrs.-- Mr. and Mrs. Robinson to be able to preserve their right. So your Honor, the answer to your question is that "The Texas Constitution has a retroactivity clause that prescribes a prohibition against retroactive laws." This Court beginning in 19-- in 1849 and the language has never changed since then, has said that "There is a settled expectation on an accrued cause of action because the events giving rise to the cause of action have already occurred." That's what accrual means and -

CHIEF JUSTICE JEFFERSON: And--

MS. HANKINSON: - that's what why it's a settled expectation, Justice Hecht said the same thing with respect to the accrual of the defense. I'm sorry, your Honor.

CHIEF JUSTICE JEFFERSON: We can't and, and we-- you're saying that the Court can't look at the legislature's belief that there is emergencies. There's a crisis situation or an emergency in order to do what we, at least, suggest what we could do in Barshop and say the legislature in its exercise the police powers can.

MS. HANKINSON: That's exactly right and if you look back, your Honor, at, at De Cordova and Mellinger, that was exactly the lengthy discussion this Court had that there is no such thing as an emergency that a legislature can rely upon in order to override something it the Bill of Rights. There's a whole discussion about emergencies and why that can't be the case? Because then, the police power swallows the Bill of Rights. If you create an exception under the police power, you trample on the specific language of the Texas Constitution. My suggestion to the Court is that the language in Barshop is stray language that does not fit with the other 150 years of jurisprudence in this Court and the fact that it did not cite Section 29 can only mean that the state of the record before the Court, it was not attached.

JUSTICE WAINWRIGHT: Well, as, as with many constitutional rights, the issue might be a bit more nuance and that, perhaps, is not quite as straightforward as, as, as we see it. In terms of the right, assume it's a vested right, why is it not appropriate to look at this as a matter of restricting to some degree the remedy not taking the right away because the statute just limits liability. Didn't say you can't will have no claim at all and it's also pointed out there's been recovery by your client against other parties and other defendants in

the case.

MS. HANKINSON: Well, -

JUSTICE WAINWRIGHT: It sounds like you're saying that the right has to be against this particular defendant, not -

MS. HANKINSON: Correct.

JUSTICE WAINWRIGHT: - the right to have a recovery for the injury suffered against some culpable parties.

MS. HANKINSON: First of all, your Honor, I disagree with you that this is nuance in anyway. Writing in his discussion of the Texas Constitution at page 62 points out "That what is a vested right under the Texas Constitution is a diverse, presents diverse questions depending on the circumstances and if we're going to answer the question, you have to look at the line of cases that deal with your specific situation. So we're dealing here what accrued cause action and your Honor, there is nothing nuance about the multiple opinions from this Court about an accrued cause of action being a vested right that's protected under the Constitution. Second of all, it extinguishes the cause of action, the accrued cause of action here and dating back again to De Cordova, and then in Mellinger and everything in 20th century that this Court decided, the Court has said that "You cannot extinguish a cause of action without providing a reasonable opportunity to preserve the right or if the remedy is affected to substitute a remedy." Now, the argument that Crown makes that you were referring to with respect to multiple defendants does not hold water and here's why. Because we learn in first year law school that a cause of action accrues against the particular defendant. This Court in Flores just said that "Defendants were not tangible, then you have to prove your case against a particular defendant." And as a result to that, this Court had said that "Separate causes of action can be severed into separate lawsuits." You don't have one cause of action against multiple defendants, if you have multiple tortfeasors contributing to the injury. You have a separate cause of action as a matter of law. That's why you could sever this particular case, for example, and only have Crown here and not the other defendants. If it were one cause of action, you can't do that.

JUSTICE WILLETT: The are lengthy legislative findings, of course, that proceed to the body of the statute and -

MS. HANKINSON: I'm sorry, your Honor?

JUSTICE WILLETT: There are lengthy legislative findings, of course -

MS. HANKINSON: There are not in this case.

JUSTICE WILLETT: Let me ask you a question in that, and the Chief talked about the lawmakers responding in emergency situation that, sort of, compelled them to pass to statute and of course, you say Section 29, very forceful, very categorical, hard to get around Section 29, but putting that aside for a moment, how, how do we, how do we normally treat legislative statements of emergency and, and findings that this really does create a compelling situation of this urgent action?

MS. HANKINSON: First of all, we don't have any legislative findings here. I can find no history on this-- on the Crown statute in which the legislature ever held hearings in which it ever study the issue and made legislative findings like you would find in the Edwards Aquifer Act or in Article 459(d)(i) or under the most recent law in 2005 dealing with asbestos claims where there are lengthy findings. What you have here is the statement of one legislator who'd made his statement part of the record and this Court has consistently held most recently in 2006 in the AT&T case that "the statements of a single

legislator are not legislative history. " And then on top of it, the record in the summary judgment case, this, you know, contradicts what he said on the record. This was to save hard crest successors from bankruptcy. That's not Crown and the statute only applies to Crown. So that proves the point that the Court has been very careful about not looking at the statements of a particular legislator with respect to ascertaining that. So we don't have, your Honor, the, kind of findings that you're referring with.

JUSTICE WILLETT: Looking quickly to Section 16, all the clauses there have a, a federal constitutional counterpart.

MS. HANKINSON: No they do not.

JUSTICE WILLETT: Except -

MS. HANKINSON: Except.

JUSTICE WILLETT: - except for retroactive law.

MS. HANKINSON: Right.

JUSTICE WILLETT: Some people say, "Well, maybe just a civil, sort or counterpart to ex post facto. Is there any, sort of, research used to dug up or honor that describe the, the history behind the adoption of that provision?

MS. HANKINSON: The earliest discussion of it is that De Cordova case, your Honor. That-- looking at that provision then Mellinger goes into a very lengthy discussion as well, and what's very, very clear I think from the discussion to most two opinions is that the people meant what they said. They deliberately put it the Bill of Rights a protection to themselves from retroactive laws enacted by the legislature allowing no exception for emergencies or the exercise of police power or anything. That makes the Texas Constitution different from the Federal Constitution and why this case should be decided on this Court's precedent and not on anything else and -

CHIEF JUSTICE JEFFERSON: Thank you, Ms. Hankinson. Other further questions. The Court is ready to hear argument from the respondents.

THE COURT MARSHALL: May it please the Court. Mr. Phillips and Ms. Stuart will present argument for the respondent and Mr. Cruz will present argument for the Attorney General. Mr. Phillips will open with the first 15 minutes.

ORAL ARGUMENT OF THOMAS R. PHILLIPS ON BEHALF OF THE RESPONDENT

JUSTICE MEDINA: Mr. Phillips, what's the public interest or emergency that the Texas legislature was trying to protect the citizens of Texas against -

MR. PHILLIPS: This Court -

JUSTICE MEDINA: [inaudible] on this retroactive law?

MR. PHILLIPS: Your Honor, this was-- I have one piece of the asbestos crisis which has been, perhaps, the greatest challenge the Civil Justice System in the history of America.

JUSTICE MEDINA: [inaudible].

MR. PHILLIPS: It's a thousand of suits clogging the Court. Seventy-five companies approximately have gone bankrupt. All the major target manufacturers are in bankruptcy and the bankruptcy trust are paying two and a half of five cents on the dollar and coins. Suits have proliferated to secondary and tertiary to the defendants.

JUSTICE MEDINA: [inaudible] What interest is of Texas legislature have in protecting foreign corporations?

MR. PHILLIPS: Well, this is a foreign corporation that has a thousand employees and a thousand retirees in Texas affects property taxes, the, the local economy. This company cannot, cannot sell itself because one of the things Ms. Hankinson said is that "This class was a static class, everything that happened back in the 1960's and nothing had changed, it can change." If Coca-Cola decided that wanted to buy its own bottling cap entity, it couldn't look at Crown Cork right now as a corporate successor to Mundet, it would buy into hundreds of millions of dollars of asbestos suits. So when you-- this corporate structure could have been done in several ways. If the seller had been willing, it could have been an asset sale in which case no liabilities, it could have been bought-- Crown could have bought Mundet and kept it as a separate subdivision of the company cap where there's a wholly-owned subsidiary, then the liability that Crown would have been occurred would have been kept at the total value of that subsidiary. And so what this bill did? It said, "Looked at the fact that in the 1960's when these transactions were taking place, there was no 402 (a) yet." There was no knowledge that asbestos was one to turn into a crisis. So it limited the exposure of someone who bought a company before anybody knew about all this problems at the total amount they paid for the company.

CHIEF JUSTICE JEFFERSON: The legislature did that in all areas? Can they just eliminate successor corporate liability under these innocent corporations theory?

MR. PHILLIPS: Well, successor liability is now a statutory matter. Generally, each state regulates it that corporations in each state.

CHIEF JUSTICE JEFFERSON: But I'm, I mean, for tomorrow, you know, the corporations buy each other all the time. Can they just say from this point forward a-- or as it be, you know, retroactively, we're going to, we're going to say that the plaintiff that has an accrued cause of action against the successor corporation no longer has that claim. We're going to eliminate it.

MR. PHILLIPS: It's not our case -

CHIEF JUSTICE JEFFERSON: Yeah.

MR. PHILLIPS: - and it may create some due process issues. But this is a pretty narrow-- as the Court of Appeals pointed out, this is a very narrowly tailored statute to take care of that national problem starting with one step.

JUSTICE BRISTER: Does it include anybody other than that Crown Cork?

MR. PHILLIPS: Well, we know that Exxon, has claimed it.

JUSTICE BRISTER: That seems to make -

MR. PHILLIPS: It could include other people because new people are still being sued in asbestos as people run out of money and as I've mentioned earlier, if anybody wanted to buy Crown, they would inherit these lawsuits if the statute were not in [inaudible].

JUSTICE O'NEILL: But even if you assume that, that the statute has laudatory purposes, and that it was enacted but it's not facially unconstitutional. Couldn't it just have been enacted to apply prospectively rather that retrospect?

MR. PHILLIPS: It could and, your Honor, I think it's important to look to at the Owens Corning decision of this Court. If it applied only prospectively, it would defeat the intent, the purpose of the statute because there are 20,000 pending cases -

JUSTICE O'NEILL: But we don't -

MR. PHILLIPS: - against Crown Cork in Texas.

JUSTICE O'NEILL: - but we don't know that in this case. I don't, I

mean, I haven't looked at the record that I haven't seen any evidence cited that, that these particular cases that we're already in the pipeline would cause the company to get bankrupt in the, the Court of Appeals' opinion specifically refers to negative impact on Crown Cork's financial vigor. You know, it-- I didn't see any evidence that, but for wiping out these lawsuits, the company was going to go under which is the purported reason for the statute.

MR. PHILLIPS: Well, I don't know that the Supreme Court of Texas has to find that the company would be bankrupted but for the statute but -

JUSTICE O'NEILL: But do you think -

MR. PHILLIPS: But we do know that before these statute started being passed throughout the nation, Crown's stock went from $60 to less than a dollar.

JUSTICE O'NEILL: But I guess my, my question is "If we're talking about the police power and the public good, does it have to be to actually save our company that will die, otherwise, or is it just negative impact on financial vigor?" What, what, sort of, public interest is there to protect the financial vigor as opposed to liability?

MR. PHILLIPS: Well, I think this is about and I think that's the way the Court treated this and, and several recent cases starting with Texas Water Commission versus Wright in 1971 and then in Barshop. You look at the rights that are impacted versus to public good.

JUSTICE WILLETT: Let me ask you about Barshop--

MR. PHILLIPS: And more severe the impact, I think, the higher the good has to be.

JUSTICE WILLETT: Quickly on Barshop, dozen years ago, unanimous opinion authored by a fine jurist and nowhere mentions Article I, Section 29.

MR. PHILLIPS: Well, I think that Article I, Section 29 is virtually a total red herring. What that says is, is that "Everything in the Bill of Rights and indeed, everything in the rest of this document, the rest of the Constitution is accepted either the general powers of the State." That only means that the Constitution is superior to a statute which this Court in [inaudible] had a trouble with in the 1860's and '70's so it needed to be said. But it does not in trying a [inaudible] black view of constitutional interpretation, we balance rights all the time. Boullion and Deets both used Article I, Section 29 to say that the Bill of Rights did not give an individual a private right of action against another individual. It operated only against the State and the only case I'm aware of in the entire jurisprudence of this Court that used Article I, Section 29 to limit the rights of the legislature to or a Court to balance constitutional right was the Traveler's Insurance versus Marshall. Chief Justice Kerdens, opinion in 1934 which essentially had been dead lettered since the United States Supreme Court and an opinion by Justice Brandeis, in the Henderson case -

JUSTICE WILLETT: What is it-

MR. PHILLIPS: - interpreted that same provision to your -

JUSTICE WILLETT: And what does that mean? I mean looking at the, the words on paper, what does Section 29 mean?

MR. PHILLIPS: It means that the Constitution is more important than the statute but a statute can't violate the Constitution but on any clause where there is a brief speech, due process, new applies a normal rules of constitutional interpretation of interpreting broad language that you would anywhere else. In fact, looking at the

jurisprudence, if petitioner were to prevail in this case, it would truly be a landmark opinion because only retroactivity challenge in the entire history of this Court since 1836, the Court has never struck down a law as violating either retrospective clause that was the Republic's language or retroactive clause except for cases involving a statute of limitations that had run and a change in the statute of limitation would revive that cause of action. And the Court most recently did that in Baker Hughes versus Keco. They've done it several times before but despite all the language and a lot of dicta and a lot of general statements of the law about it-- if-- it's a vested action that can't be taken away, the only hold-- it's the only time the cause is actually been applied is in the statute of limitation situation. And on special law, Article III, Section 56, the last time the Court struck down a special law, not a local law, not at geographical law, but a special law was year 1942 or 1950 depending on how you count the Rodriguez case. So this is truly a, a startling proposition based on the Court's jurisprudence.

JUSTICE MEDINA: Isn't, isn't corporate successor liability just part of inherent risk of larger and acquisition. I mean if we don't limit the amount of money a company can make after an acquisition or after emergency. How can I, how can a legislature limit its liability?

MR. PHILLIPS: Well, since this is a statutory matter, the legislature can change the statute and if they have a, a reasonable need for that, it survived due process. In my opinion, if balancing any harm cause to a claimant against the public good, the public good outweighs, they can make that statutory change.

JUSTICE MEDINA: Will you look at -

MR. PHILLIPS: Here, this was never met -

JUSTICE MEDINA: one particular requirement or do you look at all the citizens of Texas that had been exposed to asbestos and [inaudible] death? And how is that [inaudible]?

MR. PHILLIPS: This is [inaudible] is an as-applied challenge. I think you have to look at least the large part at, at Mrs. Robinson and, and how-- and the Robinson family. I think in drawing this balance, you, you also have to look at the state as a whole. And the, the cases are entirely consistent on this but is seems to me there's four factors that have been looked at in making a balance which is increasingly what the Court's going to do before they are ever going to actually strike a law down this by reading the retroactivity clause. It seems to me, first, you look at the expectations of the involved parties at the time the events were taking place. So you look at, at Mr. Robinson in the Navy yard not realizing there was any problem but if he did, his expectations are he would have a suit against this manufacture on that who assets for all their divisions which included Crowning as well as insulation and included asbestos and non-asbestos and division was $7 million. So that's his expectation.

CHIEF JUSTICE JEFFERSON: You're sharing your time with co-counsels. Is that correct?

MR. PHILLIPS: I am and as I counted, I have four more minutes.

CHIEF JUSTICE JEFFERSON: Okay.

MR. PHILLIPS: And secondly, you look at, of course, if you look at Crown Cork, as I've already mentioned, they, they had no knowledge that buying a company that had one division that makes some asbestos insulation products that was already out of business the time of it's merger was effective but that would lead them to hundreds of millions of dollars at the time of this statute, $413 million in liabilities. When you look at change in reliance and here's where I think you have

to look at these individuals on an as applied challenge. How did Mrs. Robinson change her behavior in reliance on the state of the law as it was. And the answer from the record is not at all. There were suits brought against 21 different entities. So a claimer [inaudible] against 20. Some of those people were dismissed, some have settled, some have gone away. But there was no, saying, well, our discovery shows really there's just one defendant, we're going to cut everybody else loose because we know we can hit this defendant because they've been bought out by a larger company. There's no change in reliance at all. So that, that's the balance on not allowing the statute on striking it down. On the other side, you have two factors that we've already discussed. One is, what is the public interest in not having transactions from 40 years ago, bankrupt of, important, business entity within the state. And the other is, as we saw in Owens Corning, what would happen if we change it from retroactive to prospective only? And would that defeat the purposes of the statute? And Owens Corning really seems to me as the closest case to this one. There, people had been streaming him from all over America and suing in Texas for claims for, in asbestos suits. And they were able-- either to use the statute of limitation in Texas [inaudible] statute of limitations in their homes take and the legislature stops that and it stopped it retroactively and said, essentially you, you were bound by whichever limitations period was shorter. And the practical effect of that was that a number of Alabama plaintiffs would file suit between January 1 and May 29 of 1997 and were already in Texas Court or out of Court. And it could no longer proceed in Texas and no longer had a suit in Alabama. And that was not just against one of 21 defendants, they were out against all defendants. Their claim was over and this Court looked at whether or not that presented a retroactivity problem. And one of the things the Court looked at in reaching the answer no, it did not, was that if you only applied the statute prospectively, it would defeat the very purposes of unclogging the Courts of having, Texas Courts open for the remedies that Texas citizens needed to pursue. And so the Court upheld that statute.

JUSTICE O'NEILL: And what is the brief in this case to support that letter finding?

MR. PHILLIPS: The fact that, that we know that there are about 20,000 claims in at least a thousand different lawsuits against Mundet in Texas.

JUSTICE O'NEILL: But from what I understand, there's no evidence in the record that they would have threatened the financial existence of Crown Cork.

MR. PHILLIPS: Well, I'm not sure again that financial existence is the necessary test. But if you look at the past history, that Crown was in, within a dozen years or so after this lawsuit started. If you look at the late 1990's and around the turn of the century, their stock was almost worthless, their debt was [inaudible] and they were not able to borrow anymore. And the statutes in the states where most of the suits were pending and Texas is, of course, the biggest state for asbestos claims against them and most other defendant. Have been instrumental and turning the company's, economics around to some extent.

JUSTICE WILLETT: But just to nail this down really quickly, going back to 29, when the people of Texas say everything in this Bill of Rights is accepted out of the general powers of government and shall forever remain in [inaudible] that is nothing more than just the statement of a legal truism that statutes are subordinate to the constitution.

MR. PHILLIPS: Yes and, and if you look at opinions from the 1860s and ' 70s, they needed that. Because there were challenges to constitutional provisions on the grounds that they violated the statute. So this was taking Texans back to the first principle. If there are no more questions, I will return the balance of time to Ms. Stuart who will speak primarily on retro-- on the special laws but also as a trial counsel [inaudible] more details about the progress of this case.

JUSTICE MEDINA: Why shouldn't this be construed as special law that certainly appears to be protecting only one single foreign corporation?

ORAL ARGUMENT OF KIMBERLY R. STUART ON BEHALF OF THE RESPONDENT

MS. STUART: Respectfully Judge Medina, that's not the test. And the petition I would point to you that maybe because Crown is the only one here today. That this is a special law but this Court, in its line of cases, as held-- that the test for a special law is not whether it may now apply or whether only one defendant or one party maybe before you, but whether there's a reasonable basis for the law and it applies equally on all within the class. Every case that this Court has decided, and there have been cases that have upheld classes of one. For example, [inaudible] the case out of [inaudible] and Julith Garden there was a class of only one. But as long as the classifications are reasonable, then the Court should uphold it as not a special law. And the petitioner told you that this was not an open-ended class and that is simply not true. First of all, there's a cap whereas a corporation is liable only up to the fair market value of the company at the time they merged. But that scaled to present-day value. We do not know and petitioners, it's petitioner's burden to prove statute unconstitutional. And it's a heavy burden and the petitioner's has not come forth of any company but this case, that the statute may now, may not now apply to. But as time goes on and the time value of money changes, they maybe up the cap with the corporation [inaudible] they've merged. There maybe future successors and my co-counsel gave you the example. If Coca-Cola were to decide, they didn't wanted to have within itself a canning operation, would it merge with Crown Cork & Seal? Probably not. It would go find another company. Also, there are new defendants being added to asbestos litigation all of the time. You know, there are CLE's out there talking about new defendants. How do you defend yourself in asbestos litigation? There has been several articles in the national media talking about those toaster defendants becoming involved in asbestos litigation. So the class of asbestos defendants which is what the statute was designed to protect, is ever expanding. And so this is simply not an open-ended classification. And even if this class were not open-ended at this point, the Court would still go look to whether there was a reasonable basis for the law and whether it operated equally on the class. Well, what was the reasonable basis? The reasonable basis is separating out culpable defendants, culpable successors from innocent successors. And the legislature made a determination that when should a corporation have known that it would be submerged in this liability and they picked the date of-- in May 13, 1968. So if we look at the history of asbestos litigation and what knowledge was in asbestos litigation at that time, that's a reasonable

date by which to conclude that a successor should have known of the risk. And Justice Medina, you raised the question, shouldn't the merger, in and of itself, the nature of a merger alert a company that there are risks. Yes, it should. But not prior to that day. What company would have known that this could possible happen by that day? So what the legislature -

JUSTICE MEDINA: Well, well, some, some perhaps, very good plaintiffs lawyers would, would argue that this knowledge was out there in the '30s and way before 1960 when Dr. Zelicof published his papers. So I mean, how do you come up with that? That seems to be as good as date as anybody. But others would argue that the knowledge was out there in '30s and '40s when studies were done by Canadians and other industrial hygienist.

MS. STUART: You're exactly correct, your Honor. And the answer to that question is there are many dates out there. In fact, there's a recent case out of the 14th Court of Appeals called "Altimore." That was just decided, I believe in the summer of 2007 where they go into about five pages of discussion on what knowledge was out there about asbestos and the dangers of asbestos in, in, in the field of knowledge. This is a heavily litigated point in every asbestos trial.

JUSTICE O'NEILL: Well, presuming, presuming the validity or the, the, the good intentions behind the statute. Let's presume it has a good purpose and, and but where does it lose that purpose by making it prospective only rather than retroactive?

MS. STUART: Your Honor, I see I only have seven seconds left but I would like to answer your question. The answer to that question lies in everything out there by the asbestos litigation that this Court knows and the record before this case. In this state alone, Crown had 20,000 pending cases against it. This Court -

JUSTICE O'NEILL: It was directed at that particular 20,000 case docket?

MS. STUART: No, your Honor. I think what the state was-- with this statute is directed as is the problem that this Court has addressed and Owens Corning versus Malone, this Court recognized that asbestos litigation and the State of Texas was a disaster. And that the legislature should address it, but this Court could not. In Ortiz versus Fibreboard the United Supreme Court -

JUSTICE O'NEILL: I guess my, my point is, if, if it were unconstitutional to the extent it was retroactive.

MS. STUART: Yes, your Honor.

JUSTICE O'NEILL: It would still follow the effect that was intended to sign .

MS. STUART: Respectfully, your Honor, it did not. And, and I think my co-counsel's analogy that Owens Corning is, is an example of that. The asbestos problem has long but recognized by the courts of this state, by the courts of the other 49 states and by the United States Supreme Court as a pending problem. And the financial difficulties of the corporations that are involved in asbestos litigation have always seen it as a pending problem. For this reasons why the major player are all gone and -

CHIEF JUSTICE JEFFERSON: Is it your intention that we hear from the state?

MS. STUART: Yes, your Honor.

CHIEF JUSTICE JEFFERSON: Well, I think your time has expired, the state's time that the Court has asked, to hear from the state. So Mr. Cruz, would you make your presentation.

MR. CRUZ: Mr. Chief Justice and may it please the Court. There are

two relatively straightforward ways to uphold the statute issue here or either under Barshop balancing or concluding that the statute effects is a statutory remedial provision. But there's a more important provision, which I'd like to focus my argument. Which is the scope of vested rights. The state would submit that all causes of action are contingent. There has been language in dicta in past cases that has been difficult to follow. And indeed the Court of Appeals in this case threw up its hands at trying to follow what that dicta meant. But what we would argue is that, by its very nature and accrued cause of action is an expectancy, a hope of ultimately prevailing.

JUSTICE O'NEILL: But haven't we said the opposite?

MR. CRUZ: With respect, your Honor, the Court never has clearly said the opposite. What the Court has said clearly, is in Ex parte Able, the Court said, a vested right "Is something more that such a mere expectation. It must to become a title, legal or equitable," that's the clearest thing this Court has ever said on it. Now, there is language in Mellinger and Middleton that can be read to the contrary. But the language in both of those cases is contradictory. And in fact, what I would point this Court to is, is De Cordova. Ms. Hankinson relied on De Cordova as her central case to look at. And I point the Court in particular, is the paragraph that begins at star six. Where the Court explains, "The statute of limitations maybe changed if it is soon to run. But once it is run, it can't be changed." That paragraph I would submit, explains the basic dichotomy. The day before a statute limitation is about to run, the defendant is in the same position as the plaintiff is with an accrued cause of action. They have a claim under current law, in a day they're going to be out. The law changes, De Cordova says, tough luck. It may have been two years, now it's five. If your statute hasn't run, if the contingency hasn't become an actuality.

JUSTICE O'NEILL: Isn't, isn't the premise then that you have an opportunity before the statute to get some sort of relief. Here, there's no substitution, it's a complete extinguishment of, of the cause of action.

MR. CRUZ: With respect to the opportunity to correct is relevant only if there's a vested right to begin with. If it is a mere expectancy, if there is no right, then there needn't be an opportunity to correct. If, if I had slipped and fall on walking in to this courtroom, I would not have a property right in the potential to sue the state under the Tort Claims Act.

JUSTICE O'NEILL: But if you did sue and I mean, let's say there was a waiver. Let's say it's common law and you got summary judgment on your claim, could the legislature then come in and say, no more recovery for slip and falls.

MR. CRUZ: In, in our judgment, yes. Up until a final non-reviewable waiver.

CHIEF JUSTICE JEFFERSON: And where, where do you point to other, other US Supreme Court decisions or other states that have that holding?

MR. CRUZ: Among the Federal Courts of Appeals, the Federal Courts of Appeals are divided 7-3 on this question with the majority agreeing with what we submit, that "An accrued cause of action is not a vested right." And the state intends to submit a short supplemental letter laying out that breakdown just to provide those authority to the Court. The seven follow the Hammond case, which we cite in our brief, the Hammond case which clearly states "That rights in tort do not vest until there is a final non-reviewable judgment."

JUSTICE MEDINA: Is there a distinction between this statute and statute of Pennsylvania Supreme Court interpreted in 2004?

MR. CRUZ: The statutes are functionally identical. The Pennsylvania Court was applying a different provision of its constitution. And the Pennsylvania law is clear that a, a, a cause of action is a vested right. Texas law is at best conflicting and in our judgment, the better argument is, that it's not a vested right. You have Ex parte Able, you have a series of Court of Appeals decisions we've cited.

CHIEF JUSTICE JEFFERSON: It seems to me that it's not a vested right. The next legislative section will be very interesting. People coming and droves to, to eliminate causes of action. Isn't it, I mean, that's not a concern that the Court ought to have.

MR. CRUZ: Mr. Chief Justice, respectfully, that is a judgment for the legislature to make. Justice Stevens, writing for the US Supreme Court [inaudible] talked about that retroactive positions often serve entirely benign and legitimate purpose -

CHIEF JUSTICE JEFFERSON: It is, it is for the legislature. But we have to decide what does vested right mean as a matter of law. And then the legislature does what it, what it will do.

MR. CRUZ: The alternative construction which various opinions of assumed but never held means that every plaintiff has a, a property right, an entitlement in a possibility of whomever they might sue at any given moment. And this Court has repeatedly said that "No litigant has a vested right in a statute or rule that affects remedy that's in Able. Article I, Section 16 does not forbid laws, which merely affect the remedy. This Court has repeatedly said, you don't have an entitlement for the law to remain. Even Mellinger and Middleton, the two strongest cases with the broad language. Mellinger is explicit that a state of facts must exist that, that entitle a plaintiff to recover in Court. You're not entitled to recover until you have a final judgment. You have a hope of recovery.

JUSTICE O'NEILL: Let me, let me ask you very quickly.

CHIEF JUSTICE JEFFERSON: One final question.

JUSTICE O'NEILL: In terms of the vested right analysis, if there is a vested right, if there clearly is, then you'd agree that under the constitution, the police power couldn't have a right?

MR. CRUZ: We would not agree with that. Barshop is quite clear and a whole series of decisions of this Court are quite clear that in applying the retroactivity provision, this Court balances and this Court balances the judgment that the legislature make. Much as Justice Steven says, once the legislature is explicit and says, "We want this to apply retroactively, get a series of questions ask me about this particular provision." Here, the legislature was quite clear. It intended this to provide-- apply retroactively which means the only way not to do so is to conclude that that is unconstitutional. And this Court, as over and over again, as Mr. Phillips observed, this Court has never struck down an action as retroactive in the face on an assertion of legislative authority to do so. And so that's inherent and how the Court -

JUSTICE WILLETT: In light of Barshop's failure to discuss or even cite Section 29.

MR. CRUZ: Section 29 respectfully has, has, I would submit, no impact on this case. What Section 29 says, it's very similar to the Ninth and Tenth Amendments to the US Constitution. What is says is "The legislature doesn't have the power to do anything that violates the Bill of Rights." Well, that is true and it is also a truism but it begs

the question what violates the Bill of Rights. I would agree, the legislature lacks the power to pass an unconstitutionally retroactive law. But this Court has made clear in assessing what's unconstitutionally retroactive, once assesses and balances, much like Barshop did. The police power that is being asserted. So if it is unconstitutionally retroactive, then Section 29 says, the legislature doesn't have the power to do it, but to answer that question, you have to look to the balance.

CHIEF JUSTICE JEFFERSON: Any further questions?

JUSTICE WAINWRIGHT: Did Section 17 take away? Eliminate a remedy or a right in your view?

MR. CRUZ: In, in our judgment, it eliminated a remedy. And so that, a straightforward ground to resolve these case is to conclude that there was a statutory remedy, which was a suit-- not against Mundet. The tortfeasor was Mundet. But through a statutory remedy, the plaintiff is allowed to sue another plaintiff, Crown, through as a statutory mechanism is now made equally liable. And so the Court has said over and over again, eliminating a remedy, raises no retroactive-- retroactivity concern.

JUSTICE WAINWRIGHT: There was a successor liability under the common law to that.

MR. CRUZ: Well, Ms. Hankinson asserted that but has not relied on cases saying that. And, and regardless of whether there was or not, I would, I would refer this Court to the, to the Rose versus Doctors Hospital cases and all of the wrongful death cases. Where, where the analogy is really quite strong. And those cases in, in, in Rose, for example, Rex Rose had passed away. In this case, Mundet is no more and yet there was a statutory mechanism to sue, to provide a lawsuit even though Rex Rose wasn't there anymore. The analogy is the same here and this Court had no difficulty concluding that that remedy could be altered by the legislature without raising any retroactivity concerns.

CHIEF JUSTICE JEFFERSON: The Court will hear rebuttal and Ms. Hankinson, you, you'll have additional time if you need it.

REBUTTAL ARGUMENT OF DEBORAH G. HANKINSON ON BEHALF OF PETITIONER

MS. HANKINSON: Thank you, your Honor. I fundamentally disagree with Mr. Phillips and the Solicitor General and the State of Texas law. An accrued cause of action is a vested right in Texas. And I'd like to point out two cases to the Court. One, they have discussed the Owens Corning case and let me read to you what it says." Considerations of fair notice, reasonable reliance, and settled expectations play a prominent role when a state legislature shortens an existing statute of limitation for causes of action arising in that state or when it creates an immunity where none existed before, thereby disrupting settled expectations and extinguishing accrued causes of action." That's the policy that underpins all of this Court's decisions in which it has recognized in an accrued cause of action is a vested right. The Solicitor General would ask you to change Texas law when the people have not changed the language of the constitution.

JUSTICE WAINWRIGHT: I'm, I'm having a little trouble following you, Ms. Hankinson, when you say that the legislature eliminated a cause of action. The cause of action seems it still be there. The remedy is limited to the fair market value that company that was

purchased gets under the facts of this case, you're saying because that amount has already been paid out. In this case, your client has no remedy.

MS. HANKINSON: That's correct.

JUSTICE WAINWRIGHT: Why is that the same though as saying the cause of action has been eliminated?

MS. HANKINSON: It's the same difference if you have a cause of action without a remedy. What, what this Court has said is that the Court cannot, I'm sorry.

JUSTICE WAINWRIGHT: But, but I'm following analogy with statutes of limitations. The concept there is, the claims still exist but the statutes run and you just can't recover on it then. I mean-- the, the reasoning there is pretty clear in lots of cases. You're saying this is different though.

MS. HANKINSON: This is City of Tyler versus Likes. This is exactly what this is. In City of Tyler versus Likes, the plaintiff had a cause of action that had accrued as a result of flood damage. The state came in and created a new immunity that apply to the City of Tyler, which gave it a defense to the claim, a new immunity, a new affirmative defense. And here's what this Court said in City of Tyler versus Likes, "Like a statute of limitations, a statute defining a municipality sovereign immunity affects a plaintiff's remedy. The legislature can affect the remedy by providing a shorter limitations period for an accrued cause of action. Without violating the retroactivity provision of the constitution if it afford a reasonable time or fair opportunity to preserve a claimants rights under the former law or if the amendment does not borrow all remedy." That case is directly on point with this case. That is the one where this Court said, "A new immunity that bars the remedy, violates the retroactivity provisions." In that particular case, there was not a bar because of reasonable opportunity to pursue the claim existed. So there was no constitutional violation. Similarly, the Court came along in Baker Hughes versus Keco and said the same thing with respect to an accrued defense limitations. When the right to the defense arose, the legislature could not come in and take that away. It applies to defend -

JUSTICE BRISTER: Bankruptcy statutes, do they?

MS. HANKINSON: But that's a different issue, your Honor. Looking at, I mean, get some -

JUSTICE BRISTER: Well, in a way, this is like a bankruptcy statute that says, when the, when your-- the merged corporation, when you've spent everything, the merged corporation was, were, we're going to consider that part of your [inaudible] bankrupt. No question bankruptcy statute could wipe out a vested right.

MS. HANKINSON: That, that's true, your Honor.

JUSTICE BRISTER: And so -

MS. HANKINSON: But that's the question of Federal Supremacy in different issues. It's not a question of the Texas legislature.

JUSTICE BRISTER: Well, instead it -

MS. HANKINSON: Dealing with the Texas [inaudible] -

JUSTICE BRISTER: -it is only because the constitution says, bankruptcy laws have to be-

MS. HANKINSON: That's right.

JUSTICE BRISTER: -federal. But if it didn't do that and if states could have bankruptcy, isn't this if that [inaudible] -

MS. HANKINSON: And, and that the federal law is supreme. So I mean, we have that, those issues, that, that takes us to a whole different ballgame.

JUSTICE BRISTER: I understand.

MS. HANKINSON: Let me just say this. The Fifth Circuit gets it, twice in the last two years. This Court, the, the Fifth Circuit has looked at this Court's jurisprudence on accrued causes of action being vested rights dealing with the Texas statute of repose and has held exactly what we've told you, we believe the law is. That's the BNSF versus Poole case at 419 F.3d 355 and the Rule 47.5 decision Vaughn versus Feddersat 2007 West Law 1598732 . So the Federal Court's Rigor jurisprudence and they get it. They get it.

JUSTICE WILLETT: What do you make of opposing Counsel's construction of Article I, Section 29?

MS. HANKINSON: I don't understand it, your Honor. I really don't. Because the constitution is clear and when they say this Court has never held, we cited to you at pages 15 and 16 of our brief with parentheticals involved everytime this Court has said, "Here's [inaudible]. The legislature has broad discretion to legislate under its police power and we must uphold such legislation, as long as it is justified by a rational legislative purpose and does not violate a specific constitutional provision." Dates, "The Bill of Rights serves as a shield against the powers and laws of government." Bouillion, "The Bill of Rights has a limit on state power." Marshall,"That Article I, Section 29 "is an expressed limitation of police power" which does not appear in the Federal Constitution." Spawn , "The police power is subject to the limitations imposed by the constitution upon every power of government." Houston and TC Railroad Co,"If this were true, it would always it says, refusing to accept the mere fact that the ordinance was enacted pursuant police power sufficient to ensure its constitutionality because "if these were true, it would always be within legislative power to disregard the constitutional provisions giving protection to the individual". And then we cited several Courts of Appeals decision applying that. It means what it says. As the San Antonio Court of Appeals said back in the 1930s, "If it doesn't mean that, you've written it out of the constitution." And this Court's view of interpreting the Texas Constitution is to give meaning to the fine language of the constitutions. There is no debate about that. Let me mention about the state of the record with respect to the other defendants. This is not a toaster defend-- case. Cork is not a toaster defendant. They're a core insulation product defendant . Mr. Robinson worked in the Navy. He dealt with insulation products on boilers and on the ships. The other defendant's manufacture gaskets. They take the position that their chrysotile asbestos could not have caused his mesothelioma. And in fact, the amphibole that was in the insulation product is what caused it. Two defendants requested a sole proximate cause instruction to try to pin it on Crown. The only expert testimony in the record shows that that's why Justice Wainwright, we don't have one cause of action against multiple defendants. And why this Court in Flores said that "Each defendant has to make their own case."

JUSTICE HECHT: What is your response to the State's argument that the Federal Courts are divided on whether an accrued action was a vested right?

MS. HANKINSON: First of all, that that's irrelevant because that's not interpreting the Texas constitution. And it presents a different issue. And if the Court were to decide to weigh in and use the Federal Court's analysis, first of all, you have a different constitution. You don't have a provision like the retroactivity provision in the Federal Constitution. And second of all, you would have to decide to overrule your jurisprudence of over 150 years when the people have not changed

the language of the constitution.

JUSTICE BRISTER: But you don't disagree that they're divided.

MS. HANKINSON: Not.

JUSTICE BRISTER: -and, and go the other way?

MS. HANKINSON: I do not disagree, your Honor. That the state of the law, with respect to the Federal Court which are answering a different question that this Court did because the constitution is different, are split, that go a different way.

JUSTICE MEDINA: And Justice Frost's dissent?

MS. HANKINSON: Very well written, your Honor.

JUSTICE MEDINA: So it seems to analyze it and or just [inaudible] Texas Constitution and, and review that language. And the analysis stops there.

MS. HANKINSON: I think that's correct, your Honor. Why would it be anything else? This is a claim to, to a constitutional challenge under the Texas Constitution. She got it right. She did an excellent job in analyzing this Court's jurisprudence. Looking at other kinds things like, they what would have you do, take it outside the analysis, there is an unbroken line of authority that this narrow question is answered by. And relying on the Texas Constitution. And finally, let me just mention on the special law, I think they proved the point when they say, well if Coca-Cola brought Crown, we'd still only be dealing with Crown and Mundet, that's the whole point. The first transaction has to have occurred back in the 60s. What this record shows, is that Crown's expert did an exhaustive review and could not find any other corporation that met the kind of specific corporate transaction pre-- they, the, the date in the late 1960s that the statute incorporates. It proves the point, that this is a closed class. Your Honor, this case falls squarely within the core policy reasons that underpin Article I, Section 16. I'm worried when saw the amicus brief's come in. When you see a case like this and powerful special interest and corporations start pilling on. And you represent an individual. The individual doesn't have people to file amicus briefs because individual citizens don't have the resources to do that. And then it dawned on me, I don't need any other amicus brief for the Texas constitution because the people have already spoken to this Court through the constitution. You have already interpreted the plain language that they gave you and so they asked you to uphold this, And Mrs. Robinson asks you to find that this is a non-constitutional law. Thank you.

CHIEF JUSTICE JEFFERSON: Thank you. Ms. Hankison, the cause is submitted and the Court will take a brief recess.

THE COURT MARSHAL: All rise.