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Supreme Court of Texas.
Tangie Walters, Petitioner,
v.
Cleveland Regional Medical Center, Shirley Kiefer, and Keith Spooner, M.D.,
Respondents.
No. 08-0169.

September 9, 2009.

Appearances:
Christopher Bradshaw-Hull, Law Office of Christopher Bradshaw-Hull, Houston, TX, for petitioner.
Richard Sheehy, Sheehy Serpe & Ware, Houston, TX, for respondents Cleveland Regional Medical Center and Shirley Kiefer, R.N.
Diana L. Faust, Cooper & Scully PC, Dallas, TX, for respondent Keith Spooner, M.D.

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.

CONTENTS

CHIEF JUSTICE WALLACE B. JEFFERSON: Be seated, please. The Court is now ready to hear argument in 08-0169 Tangie Walters v. Cleveland Regional Medical Center, Shirley Kiefer and Keith Spooner, M.D.
MARSHALL: May it please the Court, Mr. Bradshaw-Hull will present argument for the petitioner. Petitioner reserves five minutes for rebuttal.

ORAL ARGUMENT OF CHRISTOPHER BRADSHAW-HULL ON BEHALF OF THE PETITIONER

ATTORNEY BRADSHAW-HULL: May it please the Court. I am proud to represent Tangie Walters, but before I get to Tangie, I want to discuss a fact situation that occurred 50 years ago. Respondents performed a cesarean section on petitioner and after a long period of increasing internal pain, petitioner submitted to a surgery for what was believed to be a tumor. It was discovered that she did not have a tumor, but a surgical sponge had been left inside her body allegedly after the surgery. Respondent pled that she had no knowledge and no way of knowing that a surgical sponge had been left inside her body until it was discovered more than 4-1/2 years later. Despite the fact that Ms. Gaddis had gone ahead and had, according to the Supreme Court, a long period of increasing internal pain, in 1965, Gaddis v. Smith was decided as a sponge case, which created the original discovery rule.

JUSTICE DAVID M. MEDINA: Okay, now the statute is quite clear. It says you have ten years and if you're...

ATTORNEY BRADSHAW-HULL: Yes, Your Honor.

JUSTICE DAVID M. MEDINA: Back ten years, you lose, so let's talk about whether or not there's a common-law claim here.

ATTORNEY BRADSHAW-HULL: We're within the 10-year statute of repose in our case.

JUSTICE DAVID M. MEDINA: Okay.

ATTORNEY BRADSHAW-HULL: In this situation as in Gaddis, the patient had a sponge in her that may have been causing internal problems for a period of time that she ultimately had a surgery for, in this case, she believed she had a tumor in Gaddis. In our case, Ms. Walters went in for a total hysterectomy and it was at that time of the total hysterectomy that they determined that she had a sponge in her. Prior to that time, she had seen Dr. Spooner after the surgery. She had seen the staff of Cleveland Regional Medical Center. She had seen Dr. Beavy. She had seen Dr. Willhims. She had seen Dr. Garnaputi. She had seen Dr. Pipkin. None of those doctors were able to go ahead and diagnose that she had a foreign object within her.

JUSTICE DON R. WILLETT: Which of those did she see in those first two years after surgery?

ATTORNEY BRADSHAW-HULL: The first two years, she went ahead and saw Dr. Spooner when she was discharged from the hospital and he told her that the pain that she had in her abdomen was as a result of her breastfeeding and that once she stopped breastfeeding, the pain in her abdomen subsided.

JUSTICE DON R. WILLETT: Let me stop you one second. So, surgery in December of '95.

ATTORNEY BRADSHAW-HULL: Yes, Your Honor.

JUSTICE DON R. WILLETT: And the pain present immediately according to the record?

ATTORNEY BRADSHAW-HULL: According to her, immediately afterwards, she was doubled over in pain with more intense pain she had ever felt in her whole life and it was at that point in time that she complained to the staff of the hospital and they gave her two enemas and medication.

JUSTICE DON R. WILLETT: This is while she's still in the hospital.

ATTORNEY BRADSHAW-HULL: While she was still in the hospital and she said that after that, the pain became manageable and it was after that that she talked to Dr. Spooner. She talked to Dr. Spooner, and she...

JUSTICE DON R. WILLETT: How long, how fast was that after the surgery?

ATTORNEY BRADSHAW-HULL: That was within the week and then she had a well visit two weeks afterwards with Dr. Spooner and there was no notation whatsoever that she was having pain at that time. So it is our position that the severe pain that she had was taken care of by the two water enemas that they gave her and the medication. There's no evidence in the record that indicates that that severe pain that she was experiencing immediately after the surgery was as a result of the sponge as opposed to as a result of actually having the surgery.

JUSTICE DON R. WILLETT: Is there evidence in the record showing sort of continued pain post surgery during that two-year period?

ATTORNEY BRADSHAW-HULL: No, there is no evidence in the record that she had that she testified she continued to have some problems. She went to work. She never missed a day from work. She didn't go see any doctors. About in 1998, there were some indications that she began

having abdominal pain, which was diagnosed by Dr. Beavy as being cystitis and over that period of time, from 1998 until 2005, she underwent treatment.

JUSTICE DON R. WILLETT: And that was, of course, the two-year period.

ATTORNEY BRADSHAW-HULL: Yes, Your Honor. If you look at 2005's records, in particular Dr. Garnaputi, Dr. Garnaputi says that for about eight years, she was having pain in her abdomen, which would be that 1998 date. So.

CHIEF JUSTICE WALLACE B. JEFFERSON: Is it clear to you that the legislature intended to abolish completely the discovery rule and wanted there to be no more claims after two years, so is this only a matter of constitutional challenge under the open courts provision?

ATTORNEY BRADSHAW-HULL: Right and when that occurred, the Supreme Court went ahead and heard Neagle v. Nelson, which was also a sponge case. There were two sponge cases. The last two sponge cases that I'm aware of that were decided by the Supreme Court were both decided in January of 1985 and in both of those cases, Bradford being the first, it was of the firm opinion with no discussion which we believe was basically addressed by the fact that in the Gaddis opinion, the Court wrote "is a virtual certainty that the patient has no knowledge on the day following the surgery nor for a long time thereafter, a foreign body was left in the incision."

JUSTICE NATHAN L. HECHT: It seems pretty clear to me that Ms. Walters could not have done more than she did to find out what was wrong with her - at least a strong case could be made for that, yet it seems equally clear that this sponge was discoverable just by an x-ray, I take it.

ATTORNEY BRADSHAW-HULL: That's what they argued. Dr. Spooner nor...

JUSTICE NATHAN L. HECHT: And so what I'm wondering is do you think open courts just constitutionalizes a discovery rule or is the rule different?

ATTORNEY BRADSHAW-HULL: The rule that was annunciated in Neagle when the first open courts case that dealt with the two-year statute of limitations, which at that point was 4590(i) stated that "the open courts provision of our constitution protects the citizens such as Neagle from legislative acts and abridge his right to sue before he had a reasonable opportunity to discover the wrong and bring suit."

JUSTICE NATHAN L. HECHT: It's the "such as" that makes me wonder because you know we treat the discovery rule categorically and we don't look, there's a determination whether it applies and that's made irrespective of the particular plaintiff or defendant. That's just, we look at this kind of circumstances and we say, categorically, is this the sort of thing that's inherently undiscoverable or not. Then if it does apply, then we look at the particular plaintiff and we say, well you did do enough. You didn't do enough and make an ad hoc individualized determination. I'm wondering is that "such as", does that mean the same thing happens in the open courts, that there's some sort of broader categorical determination and then we look at some particularized application?

ATTORNEY BRADSHAW-HULL: I think as to "such as" , they were talking about, again, a person with a foreign body as opposed to just anybody that's complaining about a misdiagnosis. The two seminal cases dealing with (1) open courts and (2) the original discovery rule were both sponge cases. In the Supreme Court Robinson v. Weaver stated "the courts long recognized the distinction between cases involving

misdiagnosis and foreign objects" and has viewed foreign object cases with greater favor and Robinson's decided in 1977. Since 1985, there's not been a sponge case before the Supreme Court and it's our basic position that the reason for that is is that the sponge cases are treated differently than the misdiagnosis cases. The actual discovery rule came about as a result of foreign body cases, the sponge case. The problem begins when the Gaddis opinion, which said in it that "it should be noted that our holding is limited to causes of action, in which a physician leaves a foreign object in the patient's body." What happened then was that the Supreme Court went ahead and extended the case or the rationale to those cases that involved misdiagnosis, which creates a whole can of worms.

JUSTICE NATHAN L. HECHT: It seems to me that your argument fundamentally is that the constitutional rule should be the same as Gaddis.

ATTORNEY BRADSHAW-HULL: Should be the same as Gaddis and/or Nelson v. Krusen. I mean there's only a slight difference between the two.

JUSTICE NATHAN L. HECHT: But the open courts and discovery rule for limitations are two quite different things.

ATTORNEY BRADSHAW-HULL: Yes, the only reason I say that, Your Honor, is that for the holding in Nelson was to sue before he has a reasonable opportunity to discover the wrong and bring suit. So in the Neagle v. Nelson, it's to discover the wrong and bring suit. So she may have had an opportunity to, her doctors may have had the opportunity had they gone ahead and done it, which would include Dr. Spooner. Dr. Spooner's arguing now a simple x-ray would have found the sponge. The problem is he didn't do a simple x-ray. The problem is that Cleveland Regional Hospital didn't do a simple x-ray. In fact, the doctors that eventually saw her prior to the bowel surgeon finding the sponge within the mass, they did pelvic CAT scans. I mean they did more advanced tests trying to find out what was wrong with her. Unfortunately, the CT scan wouldn't have shown the sponge and didn't show the sponge.

JUSTICE NATHAN L. HECHT: I'm looking at it a little more broadly and I'm wondering, you know, the classic argument under open courts is workers compensation and maybe it was because it was one of the earlier ones and the argument is "well you can change the whole employer/employee injury compensation system even though there are some plaintiffs who can easily prove fault and there are some employers who can easily prove no fault, but we're going to lump them altogether and we're going to say this is a good, fair system for everybody." Can the legislature for medical malpractice come in and say "well, there are some sponge cases where you're going to be able to prove it, some where you're not going to be able to, some things that can be brought in two years, some things that are going to take longer. We're going to try to make a comprehensive solution."

ATTORNEY BRADSHAW-HULL: Well, I think the legislature perhaps could have done that. We're still waiting for the legislature in medical malpractice to give us that form set of interrogatories they said they were going to give us. So if they can't go ahead and give us the standard form interrogatories in a med mal case, I don't think they can go through line item and say these cases are covered, these cases aren't covered.

JUSTICE NATHAN L. HECHT: But you think open courts would allow them to do that?

ATTORNEY BRADSHAW-HULL: I think open courts, no, I think you would then have to go and revisit to see whether or not it was a violation of the open courts since you're the actual final arbiter of whether or not

it's an open courts violation.

JUSTICE NATHAN L. HECHT: But at least it's consistent with the jurisprudence to say they could take caps, limitations, all other burdens of proof, all kinds of whether it was an expert report, all these things into account and say we're going to restructure this whole system and that meets open courts even though there may be a case here and a case there that those people complain under the old system I would have done better.

ATTORNEY BRADSHAW-HULL: I think that those folks can still come in and address before you whether or not it's an open courts violation and I think that it is a very, very small segment of individuals that can come forward and talk about open courts. I understand what you're saying, Your Honor, for instance in res ipsa. The Supreme Court actually, I mean the legislature actually went forward and say you don't need an expert now that the Supreme Court says you do on causation, but in terms of on negligence, you don't need to have an expert in certain cases, one of them being operating on the wrong part of the body, leaving a foreign body. I understand, I think that's what you're talking about. You could make a laundry list of cases that they say do or don't violate the open courts provision.

JUSTICE NATHAN L. HECHT: Well and besides, it would be hard for a workers comp employee or employer, but just take the employee to come in and say "well fine, that was a fine system for everybody else, but I can prove negligence topside and bottom and I shouldn't have to suffer because you made a system for everybody else."

ATTORNEY BRADSHAW-HULL: Right and I understand that and I agree in that circumstance if all you're saying is that in this case I could have proven it. I mean someone bought insurance and they bought it for this premium for this coverage. They have been selling medical malpractice insurance since 1985, the last time you revisited foreign object cases, and so I think that both the insurers and the doctors are aware that if you leave a foreign body.

CHIEF JUSTICE WALLACE B. JEFFERSON: And you would have us continue that trend so Gaddis and Nelson and now this case, every foreign object case that is not discoverable would violate open courts to apply to your statute of limitations.

ATTORNEY BRADSHAW-HULL: Yes, Your Honor.

CHIEF JUSTICE WALLACE B. JEFFERSON: Would the same analysis apply or would it be different for statutes of repose? Would the same analysis mean ten years, that limit is unconstitutional and, if not, why not? What's the difference?

ATTORNEY BRADSHAW-HULL: The statute of repose is something that occurred more recently by the legislature with a whole different legislative history. The article that we're talking about originally in the two-year statute of limitations for a medical malpractice case, I think it's Article 5.62 or whatever it was, many, many moons ago when we all first practiced law.

CHIEF JUSTICE WALLACE B. JEFFERSON: My point I know this is not your case, but can the legislature say "well there is going to be an outside limit and we're going to enforce it" and is that, in general, constitutional? What's the difference between two years and 10 years?

ATTORNEY BRADSHAW-HULL: I think, again, if in the 10 years they were looking at the medical liability insurance improvement act, you'd have to consider what was the legislative history. Here we're looking at ancient legislative history in our case because in every reformulation of this rule since 1975, I believe, '68, we've been dealing with the same language be it the original article in the

Insurance Code and then we're dealing with 4590(i), then we're dealing with chapter 74. It's identical language and so I haven't gone ahead and gotten into ancient legislative history. Obviously what was going on in the Insurance Code back in the 60's is not relevant to what was presently going on with the "need for tort reform", which is a whole other can of worms for us. But in this situation, the - if you're saying "do we have a separate rule for the sponge people versus everybody else." Well in looking at it and what the Supreme Court has written on in the past is basically that the sponge cases are not particularly susceptible to fraudulent prosecution. There's either a sponge or there's not. No one's going to open themselves up and shove one in. Furthermore, the injuries are objectively verifiable since the sponge is discovered in a mass -- it finally is discovered either as in Gaddis when it was in a tumor or with Tangie Walters when it was in adhesions that were bound to her bowel and to her uterus. Furthermore, the -- one of the reasons to have the statute of limitations back with the Insurance Code was to go ahead and avoid stale claims that the doctor would have to defend, but in our instance, all of the witnesses, Tangie Walters, Dr. Spooner, Shirley Kiefer, the scrub nurse, have all been deposed. All of the medical records, be they either from Dr. Spooner, Cleveland Regional, Dr. Beavy, Dr. Willhims, Dr. Pipken, Dr. Garanputi are all in evidence.

CHIEF JUSTICE WALLACE B. JEFFERSON: Counselor, your time has expired.

ATTORNEY BRADSHAW-HULL: I apologize.

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

MARSHALL: May it please the Court, Ms. Faust and Mr. Sheehy will present argument for the respondents. Mr. Sheehy will open with the first 10 minutes.

ORAL ARGUMENT OF RICHARD SHEEHY ON BEHALF OF THE RESPONDENT

ATTORNEY RICHARD SHEEHY: Good morning, Your Honors. I am Richard Sheehy. I'm here on behalf of the hospital and the nurse. As always, I am pleased to be before the Court. There is no dispute in this case that the plaintiff's claim is barred by the applicable statute of limitations. The alleged malpractice took place in December of 1995. The case was filed in August of 2005. I take issue with the comment about the record made by my friend, Mr. Bradshaw-Hull, that there was no evidence of pain between 1975, I'm sorry 1995 and 1998. We believe the record is clear that she was complaining about abdominal pain in the same part of her body starting shortly after the surgery and continuing on for a period of 10 years. That is in the record. We believe it is clear that it is there and that it was not that she was pain free during the time that the statute of limitations.

JUSTICE DON R. WILLETT: So you said the record shows continuous pain from the date of surgery for those first couple of years afterwards?

ATTORNEY RICHARD SHEEHY: Yes, Your Honor.

JUSTICE PHIL JOHNSON: And is it your position she would not have had pain from anything else. It had to be from the sponge?

ATTORNEY RICHARD SHEEHY: Well, certainly it would have, the only condition that she mentioned that she had suffered from pain before the surgery was an abnormal -- with pain from an abnormal menstrual cycle. She had that same pain before the surgery. She did not say that she was

suffering from pain from any other condition and, in fact, during the first two years that after the surgery, she didn't see a doctor at all. So to blame some other condition as the basis for her pain makes no sense at all when she sought no medical treatment at all during that period of time.

JUSTICE DON R. WILLETT: If she had never complained of pain, would you say her claim was still barred?

ATTORNEY RICHARD SHEEHY: Yes, Your Honor, I would and that really comes down to what Justice Hecht was talking about and that has to do with the whole issue about what can the legislature do under the open courts provision. If I can, I will come back to that. Can I come back to that in just a second? No I won't. You're the judge, I will follow what you ask although I have to say what I hear about 1975 being ancient history, it makes me a little nervous. I remember 1975. Certainly, it's a more difficult case that had there had been no pain, no indication at all suffering from a problem. The question then really becomes...

JUSTICE NATHAN L. HECHT: But I'm not sure I understand that because but for the statute, the discovery rule would apply, pain, no pain, x-ray, no x-ray, it would apply, right?

ATTORNEY RICHARD SHEEHY: Correct, there is no discovery rule from the ancient history.

JUSTICE NATHAN L. HECHT: Well, then, it must be if it weren't for the statute, the discovery rule would apply and then the pain only goes to whether the person using, protected by the discovery rule, used appropriate diligence in discovering -

ATTORNEY RICHARD SHEEHY: Certainly. No question that if we were back prior to the ancient history of 1975, the discovery rule would apply, but we know that starting in 1975, the legislature said we are not going to have a discovery rule. There's an absolute two-year statute of limitation.

JUSTICE NATHAN L. HECHT: But I was asking because you said that the pain matters and if it doesn't matter to the application to the existence of the discovery rule, it only matters in its individual application, is it different for open courts?

ATTORNEY RICHARD SHEEHY: Let me address that directly because I think that raises a significant question about which direction this Court is going to go with respect to the open courts provision. As Your Honors are aware, there are two parts of the open courts doctrine. The first is, of course, the well-recognized cause of action - that is, common-law cause of action - that is being restricted and number two, that the restriction by the legislature is arbitrary or unreasonable when judged against the rights that it is restricting. Up until now, within reason, I think it is fair to say that the Court has held in other cases that when it is impossible and we can talk about the standard in just a second, but when it is impossible or exceedingly difficult for a plaintiff to discover, then, in fact, the balance tips away from the legislature in favor of the plaintiff. If - I certainly believe this Court may decide that in this context of this medical malpractice statute that the legislature may impose a strict two-year statute of limitations and we're sorry that it may cause problems for a limited number of people, but we believe that the legislative intent or the public policy outweighs, in favor of the two-year statute, outweighs any problems it may cause.

CHIEF JUSTICE WALLACE B. JEFFERSON: Do we have to overrule Gaddis and Nelson to say exactly that.

ATTORNEY RICHARD SHEEHY: Well, I think Gaddis clearly because I

think the statute has essentially done that. I would like to say that you wouldn't have to overrule the opinions of this Court since that time. I will tell you you're going to have distinguish them probably to the extent that you would effectively be overruling them because I think there is at least language, now whether it's dicta or not, I'd have to go back and think about that a little bit more, but clearly up until now, this Court has held that the two-year statute of limitations, the absolute two-year statute of limitation, is not immune from an open courts challenge and, again, you may be able to and if I went back and looked at it and determined if it was dicta, you may not have to overrule them, but getting to Your Honor's Justice Hecht's point that if, in fact, this Court decides that the absolute two-year statute of limitations is a reasonable and nonarbitrary exercise of police power such that we are going to enforce it even though there may be circumstances in which an individual plaintiff may suffer, so be it and under those circumstances, Your Honor, pain has nothing to do with it.

JUSTICE HARRIET O'NEILL: In that situation, what would be the purpose then of the 10-year statute of repose?

ATTORNEY RICHARD SHEEHY: Well, there may not be a purpose of the 10-year statute. As I recall the legislative history, Your Honor, I believe that the 10-year statute of repose was put into the statute into chapter 74 to deal with Your Honors', the Court's rulings in prior cases on minors because it's very unusual for the legislature to specifically say this is a statute of repose and I suspect the legislature did that because this Court up until now has drawn a distinction between statutes of limitations and statutes of repose in the sense that the Court has been very unsympathetic to open courts challenges to statutes of repose and quite honestly, I'm getting a little bit out of the area because I haven't studied this for purposes of this case.

CHIEF JUSTICE WALLACE B. JEFFERSON: We will hear about that in just a moment, but.

ATTORNEY RICHARD SHEEHY: Right.

CHIEF JUSTICE WALLACE B. JEFFERSON: If we were to disagree with you and think that to hold your way would overrule Nelson and other cases, Morris v. Shanley and others, and decided not to just in terms of stare decisis, what would the remedy be? It couldn't be a legislative fix, right? So the Constitution would have to be amended?

ATTORNEY RICHARD SHEEHY: I would think so.

CHIEF JUSTICE WALLACE B. JEFFERSON: And do you think the people of Texas would say in a referendum that when a sponge is discovered, you know, eight years after the surgery that really couldn't have been discovered beforehand that that claim would be or should be brought [inaudible] .

ATTORNEY RICHARD SHEEHY: Let me if I may disagree a little bit if Your Honor's talking about our case, we believe, of course, it could have been discovered within months after the surgery. So it's a...

JUSTICE DON R. WILLETT: If what had happened?

ATTORNEY RICHARD SHEEHY: I'm sorry, Your Honor.

JUSTICE DON R. WILLETT: Could have been discovered if what had happened?

ATTORNEY RICHARD SHEEHY: Two parts to that answer. The first is that she doesn't have to discover the sponge. All she has to discover is the fact of injury, that's what starts the statute of limitations. She does not have to know the cause. But, secondly, had she gone to a specialist, to an OB/GYN, which she did 10 years later, and within 60

days, we had the sponge discovered, again, not conceding that the sponge was left in on this particular surgery, but for purposes here let's assume that it was.

JUSTICE DON R. WILLETT: Does the record show that she was ever referred to a specialist before she went to the one who discovered the sponge?

ATTORNEY RICHARD SHEEHY: I don't think the record reflects either way, Your Honor. We know that she didn't seek any medical treatment at all for two and one-half years after the surgery, two weeks after the surgery.

JUSTICE DON R. WILLETT: Do you think there's a fact question about whether the sponge was left in in 1995 or not?

ATTORNEY RICHARD SHEEHY: Your Honor, I'm not ready to concede that because there was another surgery in April of 2005 in which an incision was made where the first indication was that there may be a problem. We don't know. I mean, I think for purposes here in terms of Your Honor's analysis, because the claim of the plaintiff is for negligence during 1995, we probably have to assume for that purpose that the allegation deals with the wrongful act that took place then, but I don't want to be, I don't want the Court to believe that we are conceding that, in fact, that happened. There are reasons why we think it did not.

JUSTICE DON R. WILLETT: How are the facts here substantially different from the facts in Nelson, the other sponge case?

ATTORNEY RICHARD SHEEHY: Well, if we're going to, if we're not going to go down the path of an absolute two-year statute being applied on each time, then in the other cases, there seems to be no question on the part of the Court that the injury was impossible to discover during the two-year statute of limitations. In this case, the facts of this case, that is not so. It's not so by a long shot.

JUSTICE DON R. WILLETT: It is not so because she complained about pain.

ATTORNEY RICHARD SHEEHY: I'm sorry, Your Honor.

JUSTICE DON R. WILLETT: Because she complained about pain.

ATTORNEY RICHARD SHEEHY: She complained about pain increasing over time in the same part of the body during that point in time. I mean, and in fact in the case, in some of the cases, Boyd v. Kallam, that the plaintiffs rely on, the Court, in fact, distinguishes all the other cases on the grounds that there was no indication of any pain or injury during the time that the statute of limitations was running. In our case, under the facts of this case, if Your Honors are going to not go down the path that I would like you to go which is two-year statute is absolute, then the question becomes what is, how do we phrase the test on terms of how the open courts provision applies and then using that test because the Court has to decide this is a matter of law, does the plaintiff meet that test in order to avoid the statute of limitations in the face of a constitutional challenge and it is, I think Justice Hecht was asking this question a little bit earlier. It is important that number one, we understand that there is a distinction between the discovery rule and invalidating a statute under the open courts provision. There's a great distinction between those two things.

CHIEF JUSTICE WALLACE B. JEFFERSON: And maybe we can hear more about that from Ms. Faust, who because your time's expired here.

ATTORNEY RICHARD SHEEHY: I think that [inaudible] let me, I'm sorry to make one final point knowing that it's coming off of her time and that is that keeping in mind also, we have to remember that second prong of the open courts test and although we may not say we're going to say it's absolutely two years and the public policy is such that

we're sorry, we're going to apply it across the board, the test that we use to determine if there is an open courts violation has got to be viewed in that context, that is we have got to give the legislature a tremendous amount of leeway if we're going to use that balancing test between arbitrary and [inaudible] .

CHIEF JUSTICE WALLACE B. JEFFERSON: You said "impossible to discover." That's not really a standard, is it? They're all possible. It's all possible to discover.

ATTORNEY RICHARD SHEEHY: Well, it's been, there are several ways that the Court has done the impossible or exceedingly difficult.

CHIEF JUSTICE WALLACE B. JEFFERSON: But impossible is what I'm focusing on.

ATTORNEY RICHARD SHEEHY: Well, the Court has used the term impossible because they talk about an impossibility. We're not going to require people to achieve an impossibility. That's probably a little strong for going down the road.

CHIEF JUSTICE WALLACE B. JEFFERSON: But that's the standard...

ATTORNEY RICHARD SHEEHY: But exceedingly difficult I think is certainly an appropriate test. Could it have been discovered and in this case we know that it could have been. Thank you, Your Honors.

ATTORNEY DIANA FAUST: May it please the Court, counsel. Here on behalf of Dr. Spooner, and co-defendant's counsel, I think, has cleared up the questions with regard to the status of the record here and I just would like to again emphasize that the record here is clear. Both of the respondents have pointed out in their briefs the various testimony by Ms. Walters herself in addition to the medical records that shows that she had admitted to having pain, abdominal pain in the same location for seven, eight, nine years. That was the question posed to her and she answered yes and the pain was always in the same location for 10 years.

JUSTICE HARRIET O'NEILL: What difference does that make? Let's take a hypothetical. Let's say that in this case she had pain every time she went to the doctor and she went to the doctor 20 times over a period of nine years and every time, they didn't discover, they had no reason to believe it could possibly be a sponge. Would that be a different case? Under your analysis, it wouldn't matter whether she went or not, would it?

ATTORNEY DIANA FAUST: Your Honor, where it makes a difference, I think, is that we have the Court looking at and, again, looking at the test whether it's unreasonable or arbitrary, this Court has said we will not require a claimant to perform an impossible condition and taking from that, a lot of times the Court's analysis, not necessarily this Court, but the various courts of appeals will say well, this was an impossible condition and here are some examples of impossible conditions. We do have this Court saying in Shaw v. Moss that there is a reasonable opportunity to discover the injury. In that particular case, it was eye surgery to correct a detached retina and then there is a continuation of the vision problem. There are other cases out of courts of appeals where there is a continuation of pain or a continuation or worsening of a symptom and the courts, including this Court in Shaw has concluded that that constitutes a reasonable opportunity to discover under the standard for open courts analysis. So I think that's where the facts in this case make it important if you look at this Court's pronouncements that we're not going to require a claimant to perform an impossible condition that is file a suit.

JUSTICE HARRIET O'NEILL: If she had gone once a month for nine years and nobody had discovered it, then you'd say she did all she

could and she would meet the discovery rule or she wouldn't be bound by the two-year statute of limitations.

ATTORNEY DIANA FAUST: Well, I think, Your Honor, it certainly might seem to make it appear more different. It would be much cleaner if she stayed symptomatic, but it then brings into the question of whether or not she's been misdiagnosed and whether then there is an issue with respect to what those separate diagnoses are each time she goes to see someone for that symptom.

JUSTICE HARRIET O'NEILL: Well, I can't tell if you're telling me that would be a different test or the same test if that were the case.

ATTORNEY DIANA FAUST: Well, I think, Your Honor, if this Court is going to stay with the test that we're not going to require her to perform an impossible condition, that could under the prior misdiagnosis cases could constitute an impossible condition. I think that would be a safer case [inaudible] .

JUSTICE DON R. WILLETT: What if, as I asked Mr. Sheehy, she had never complained of pain, was not symptomatic at all? Would her claim still be barred under the two-year limitations statute?

ATTORNEY DIANA FAUST: Your Honor, under the prior asymptomatic cases, it probably would not be.

JUSTICE DON R. WILLETT: Would not be barred?

ATTORNEY DIANA FAUST: Would not be barred.

JUSTICE NATHAN L. HECHT: But let me understand, are we applying this on a plaintiff-by-plaintiff basis this constitutional rule or are we talking about these kinds of cases because in Sax and in Weiner, for example, in the minor context, we said "well, you can get your minorities removed. Your parents can sue, all these other things can happen." We look at that across the board and say "well, those opportunities are not enough to give people in this position fair access to their common-law claim." It doesn't matter that in a particular instance the plaintiff's parents were absolutely willing to sue or that the person had had the minorities removed or any of the, we're just looking at across the board, is that right and the circumstances here are just illustrative of what might happen, but we're still looking for a constitutional answer or not?

ATTORNEY DIANA FAUST: Yes, Your Honor, and I think, for example, in the Weiner v. Wasson case, when the Court - and Sax - refused to go down that path and did apply it broadly more like a facial challenge, if you will. Here the only way that this claim has been brought is as applied to...

JUSTICE NATHAN L. HECHT: Well I'm wondering is there an as-applied challenge under open court? And I'm not sure I see what sense that makes, but we've never been clear on that, but it's hard to understand how there can be an as-applied challenge although the open courts is a lot like due process so maybe there is, but.

ATTORNEY DIANA FAUST: Well, and in looking at Weiner v. Wasson and the dissenting opinion there, which, of course, is now binding on this Court that to...

JUSTICE NATHAN L. HECHT: But it was well done.

ATTORNEY DIANA FAUST: The, well done, yes, Your Honor. I mean, really the test, it was discussed that the test should be applied each and every time that one of these cases comes to you, the complete test should be applied and we shouldn't just have a cursory review of oh, well, these facts constitute an impossible condition because it's a retained object. Technology has changed a lot. In 1995 from 1975, we now have radio-opaque sponges that show up on x-rays and we have radio-opaque strips on towels. We had one of those cases recently. We had a

pair of scissors in a young lady for 10 years a few years ago. These cases continue to happen, but they are very seemingly rare as compared to the other types [inaudible] .

JUSTICE DON R. WILLETT: When we're considering whether a plaintiff has had a reasonable opportunity to discover the injury, what factor stands out to you as sort of the most pivotal or important that we ought to look at?

ATTORNEY DIANA FAUST: Looking at whether there's a reasonable opportunity to discover, I think that the Court is going to need to, well, first of all, it will be a question of law. It's a constitutional issue. So obviously there won't be any fact issue with regard to what the claimant did or did not do during the statute of limitations period. If the record can be developed in such a way to show as in this case that no treatment was sought despite symptoms that by her own admission existed during that time, then I think that could weigh heavily in the Court's analysis that she had a reasonable opportunity. She was on notice that she had a continuing symptom because she had the pain prior to the surgery and then when it persisted for years under her own testimony progressed, Your Honor, I think that would be important for the Court to look at. Also, I think it would be important to look at whether or not she...

JUSTICE DALE WAINWRIGHT: Let me ask you a hypothetical issue, time's running out here. What if a little pill encapsulated in plastic were left inside her and there was some kind of medication from the little pill, but it didn't rupture for until three years after the surgery. I guess you would say the two-year statute of limitations would be a violation to apply, it would be violation of the open court provision?

ATTORNEY DIANA FAUST: It could be under that scenario, if we look at the open courts...

JUSTICE DALE WAINWRIGHT: Could or would? What's your opinion?

ATTORNEY DIANA FAUST: Well, depending on all the facts, Your Honor, if...

JUSTICE DALE WAINWRIGHT: No pain.

ATTORNEY DIANA FAUST: Nothing, no pain, no symptoms, then I think the Court would have to look at that analysis.

JUSTICE DALE WAINWRIGHT: When it ruptured, did it cause a problem?

ATTORNEY DIANA FAUST:I'm sorry?

JUSTICE DALE WAINWRIGHT:In my scenario only when it ruptured, did it cause a problem?

ATTORNEY DIANA FAUST: I think under the Court's prior precedent, yes, it would constitute a violation of open courts.

JUSTICE DALE WAINWRIGHT: A statute of repose that says, sets let's say a five-year statute. No, let's say 10 years and this little pill doesn't rupture until 11 years after the surgery and that's the only time there's any pain or problem after the rupture, would you say the same thing for a statute of repose then?

ATTORNEY DIANA FAUST: [inaudible] Your Honor, the statute of repose is quite different than limitations. A repose - and this Court said in Haluback is a different analysis and we will talk more about that in the next case, but also what's important that's been talked about here previously is the legislative history in 2003 and the factors that this Court looked at in URS and other reposed cases, for example, you extended the remedy. How many people would be affected by this if we cut it off at 10 years and there are various other factors that I think will be discussed later, but it's different and we would not agree.

CHIEF JUSTICE WALLACE B. JEFFERSON: Any further questions? Thank you, counsel.

ATTORNEY DIANA FAUST: Thank you, Your Honors.

CHIEF JUSTICE WALLACE B. JEFFERSON: The Court will hear rebuttal.

REBUTTAL ARGUMENT OF CHRISTOPHER BRADSHAW-HULL ON BEHALF OF PETITIONER

ATTORNEY BRADSHAW-HULL: Thank you, Your Honor. I believe that the issue of pain is a red herring. When you're looking at the Nelson, the Neagle v. Nelson case, where it says "the open courts provision of our constitution protects a citizen such as Neagle", immediately before that, the paragraph before, they deal with the Nelson v. Krusen situation which is relating to minors and, in fact, that's what they said, "we've likewise declared unconstitutional that part of Article 4.82, Section 4 relating to minors." The Neagle decision was months after Krusen. The other thing is is that two weeks before the Neagle case came down, the Court wrote Bradford and if I can, I will read the opinion in Bradford. It was per curium. "This is a medical malpractice suit. On November 1, 1980, Mrs. Bradford discovered a sponge apparently left during surgery in 1975. Suit was filed in October 5 of 1981. The trial court rendered summary judgments for the defendants based on Article 5.82 Section 4 of the Insurance Code. The court of appeals affirmed in an unpublished opinion. Pursuant to Rule 483, we grant the application for writ of error and without hearing oral argument in accordance with this Court's decision Nelson v. Krusen, we reverse and remand." There is no discussion whatsoever about pain, about when she should or could or would or if it was impossible or possible. It just says this is a sponge case and we are going to go ahead and reverse it. And since that case came down, other than the case that was decided two weeks later, there have been no more sponge cases reach you and the reason for that is is that the sponge cases are handled directly in the same way as they are in the minors' cases. The other thing about pain being a red herring, on June 29 of 2006, I took Dr. Spooner's deposition and I went through all of the complaints that she made. I asked him. There's a document on file in the courthouse, which was his motion for summary judgment, that says "since plaintiff began experiencing pelvic/abdominal pain immediately following the tubal ligation and continued to experience a chronic pelvic/abdominal pain over the course of nine to 10 years prior to removal of the sponge, plaintiff could have reasonably known of her condition was related to the tubal ligation in 1995." I said "do you agree or disagree or have no opinion." He said, "I disagree with the statement." I asked him why you disagree and he said "without evaluating the patient it would be very difficult to make that decision." The trial court made the decision that because she was complaining of pain, therefore she should have known about the sponge. Dr. Spooner himself wouldn't even make that jump and say that the pain that she had was from the sponge. She could have pain after the surgery and, in fact, testified that she had doubling over pain and had been told prior to the surgery that with a tubal ligation, you're going to have pain and that her pain became manageable afterwards.

CHIEF JUSTICE WALLACE B. JEFFERSON: Are the standards, and the 5th Circuit said this, "exceedingly difficult" and "should have known" essentially the same thing?

ATTORNEY BRADSHAW-HULL: What they said in Nelson v. Krusen is you

have to have a reasonable opportunity to discover and file suit, which I believe is what the standard is. The impossibility problem begins when they say you have to do the impossible, which is to file suit before you have a reasonable opportunity to discover that there was an injury. So, which is what they discussed in Krusen and in Krusen, the child had Duchennes and there was evidence when he had stumbling that they could have run a test and determined from that test at that point, two years prior to the time they actually did the test, that the kid had Duchennes.

JUSTICE DALE WAINWRIGHT: What then would you believe, counsel, constitutes a reasonable opportunity to discover in a sponge case?

ATTORNEY BRADSHAW-HULL: It has to be actually discovered. I mean she went through...

JUSTICE DALE WAINWRIGHT: So take out "reasonable opportunity" in the phrase and just say "discover".

ATTORNEY BRADSHAW-HULL: No, "reasonable" means you have to have a physician go ahead and do it. I think that's what's reasonable.

JUSTICE DALE WAINWRIGHT: Well, I asked what would constitute a reasonable opportunity to discover and you said it has to be discovered. Sounds like you took "reasonable opportunity" out of the sentence.

ATTORNEY BRADSHAW-HULL: Well, "reasonable opportunity" in terms of a medical malpractice case because we're not going to allow Tangie Walters to testify at trial "all of these problems are from my sponge" or "I knew my sponge was causing all these problems." She's never going to get to say any of that. She's not qualified to say any of that. So a reasonable opportunity obviously has to, not obviously, I believe has to do with a medical doctor has to go ahead and make a determination that there is a sponge.

JUSTICE DALE WAINWRIGHT: What if the sponge is not discovered and we bump into the 10-year statute of repose period?

ATTORNEY BRADSHAW-HULL: Well, I'm going to stick around and I'm going to listen to and maybe I'm going to get some [inaudible] out of that, Your Honor.

JUSTICE DALE WAINWRIGHT: Well, you're not getting out of it that easy.

ATTORNEY BRADSHAW-HULL: I figured not. I know you too well. That, again,...

JUSTICE DALE WAINWRIGHT: We're deciding your case and it's important to try to get that right, of course, but we've got a big picture to look at and it has to be sensical and logical. What's the big picture? I want to make sure your position does not take us astray.

ATTORNEY BRADSHAW-HULL: Right, a reasonable opportunity regardless if it's my case or the next case, according to Neagle v. Nelson is is it violation of the open courts to go ahead and say you're going to pour someone out before that sponge is found. That's what the law is from Bradford. That's what the law is from Neagle v. Nelson. What you're getting into and I know you guys have gone, and woman, have gone ahead and written on Pachuca and on some different matters lately dealing with repose and you're up a whole lot more on that than I am, Judge, and maybe they're up more on that, but I would say that but for repose, there's no difference between if it's three years, five years, 10 years, 15 years, 20 years in terms of what is required. I believe it's an absolute when it says "such as Neagle" in the paragraph that includes "such as Krusen", which was the minor case and going back to what the legislature has done in segregating res ipsa, minors cases, foreign body cases, I think it's been treated that way for the past 20

years.

CHIEF JUSTICE WALLACE B. JEFFERSON: Any further questions? Than you, counsel. The cause is submitted and the Court will take a brief recess.

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