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Supreme Court of Texas.
G. Byron Kallam, M.D.; Mary Angeline Finke, M.D.; The Medical Clinic of North
Texas, P.A.; Obstetrical and Gynecological Associates of Arlington; Gerald
Thompson, M.D.; and Family Health Care Associates, Petitioners,
v.
Sharon Boyd, Respondent.
No. 05-0027.

December 7, 2006.

Appearances:
Christine Roseveare, Strasburger & Price, L.L.P., Dallas, for petitioners.
J. Wade Birdwell, Wallach Andrews & Stouffer, P.C., Fort Worth, Texas, for petitioners.
Charles W. Fillmore, Fillmore Law Firm, L.L.P., Fort Worth, Texas, for respondent.

Before:

Per Curiam - Wallace B. Jefferson, Don R. Willett, Harriet O'Neill, David M. Medina, Paul W. Green, Nathan L. Hecht, Dale Wainwright, Phil Johnson, and Scott A Brister, Justices.

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JUDGE: The Court is now ready to hear argument in 05-0027 G. Byron Kallam, M.D. and others versus Sharon Boyd.
COURT ATTENDANT: May it please the Court. Mr. Birdwell and Ms. Christine Roseveare present argument for the petitioners. Petitioners have reserved five minutes for rebuttal. Ms. Reserveare will have the first seven minutes. Mr. Birdwell present for rebuttal.

ORAL ARGUMENT OF CHRISTINE ROSEVEARE ON BEHALF OF THE PETITIONER

MS. ROSEVEARE: May it please the Court. Good morning. If I may I would like to start with the preliminary issue of the recent developments of the facts of this case and discuss what I believe are the dispositive effects of those events. As the Court is not that aware of the promoters of this case changed dramatically on June 28 of this year when Ms. Boyd passed away. The Open Courts doctrine in which the Court of Appeals made its ruling and to reinstate the portion of

Ms. Boyd's claims is not available to re-- really take the survival claims that this state that remain in this case. Accordingly, the Court of Appeals decision should be reversed. It's important to consider first to that this Court can consider Ms. Boyd's death and then that the Court should. On September 22nd day that Allan Boyd, Jr. petition to Court substitute for the respondent in this matter. And petitioners agreed to that substitution. So we have an agreement at this point that the, the state should substituted and the Court should. And consider this as it's rival action which it is, it's split hanger in 1950 this Court said that in fact, such a substitution was proper, will not required and, and that-- 'cause certainly, Rule 7 says that, that the appeal should proceed as though the death didn't occur. But this Court said that, that's a procedural rule only should in effect the substitution rights of the parties and that this Court should in fact consider that death can't if I consider the death and should where that is both economic relief and will tend to expedite this position of the case. The fact of the matter is Open Courts is an applicable to survival actions. And a survival action is all remains in this case. And so the question that was pending before the Court, pardons Boyd's death is no longer necessary to be dispossitive in this instance. So Court has an opportunity instead to make a rather simple ruling on the basis of what remains at this point on. The Court has repeatedly indicated that, that Open Courts is not applicable in survival actions, Court said that in Bala versus Maxwell and said that again in, in the Alt decision. And that is all that remains to be considered here. So we would ask the Court to consider that in the-- in your decision. Beyond that ...

JUDGE: Just to be-- it's perfectly clear. Will you ask in us to do on that basis after the developments to this summon?

MS. RESERVEARE: We would ask the Court to affirm the summary judgment of the trial court based on the ground that was before the trial court and Board of Court of Appeals at the time which was the limitations bar. The grounds for summary judgment in this case is not changed and is remained consistent throughout. At one point in time, the respondents had what can essentially be deemed in affirmative defense-- through an affirmative defense in the context of Open Courts that affirmative defense to be affirmative defense limitations has evaporated is not available to the respondent at this time. But that doesn't changed our grounds for summary judgment or grounds for summary judgment was that limitations bar applies. It applies in same way that it always has. It simply-- there is no longer a response to that affirmative defense that was perhaps, available at earlier points in this case.

JUDGE: And that-- and available argument is that in the response to your position is-- at least that you put in this that the-- because the survival actions to a statutory claim not a common law claim, the Open Courts argument is not available.

MS. ROSEVEARE: That's correct. Beyond that of course is an affirmative questions on that issue.

JUDGE: Well, it seems pretty simple then, there have been a lot of questions here. But I guess petitioner argument is a little different. This was something that perhaps, we-- you were missing. And I wish you would know that. But it's just not very hot this morning.

MS. ROSEVEARE: I, I'd noticed that. It's not what I expected. But I think that this, this is change in nature of this case, change in nature of this case dramatically. And, and, and it's something that, that takes-- provides the Court with an opportunity to render decision

without waiving into the more complicated and perhaps, more controversial, you know, that this before the Court which has to do with the-- well, that standard applicable to the Open Courts. The use of Open Courts and misdiagnoses cases and facts that Mrs. Boyd has passed and trial court is no longer a common law cause of action and provides the Court with that opportunity should it used to do so.

JUDGE: Well, let's get to those merits. Did the-- was her claim cut off that Courts she knew a reasonably should have known that she had this condition?

MS. RESERVEARE: She knew reasonably, should have known.

JUDGE: And is that the standard or is in the possibility standard? Let's get to the merits.

MS. RESERVEARE: The state here does not knew or should have known. In fact, that's the discovery rule standard this Court has said repeatedly that, that the health care liability act has-- was eliminated the discovery rule in Manko malpractice cases. What we're talking about here instead is the constitutional standard which is a much higher bar applicable to the Open Courts provision. Court has repeatedly said that the standard then should be reasonable opportunity to discover the wrong. So the question before this Court is: What does it mean to have a reasonable opportunity to discover your wrong? And misdiagnoses cases, the Board opinion is stands now. We'll tell you that where there has been a misdiagnoses if you have no reasonable opportunity to discover your wrong. And we would submit that, that's not the standard. Instead, what the Court should be considering what the Court has would be exception in the Helman decision considered over the years is whether something is impossible or exceedingly difficult to discover. And which own in sense something can be both reasonable. In this circumstances, it could be both reasonable for someone to seek exactly on opinion and reasonable for someone do not to seek a second opinion. The question is: Was there a reasonable opportunity and seeking second opinion in this case was in fact a reasonable opportunity under these facts. And in meaning of this diagnoses cases that's going to be the facts-- that's going to be the opportunity and so that should be the standard at this point of time unless the Court would-- within with that or place it.

MR. BIRDWELL: May it please the Court. And this is what the Court is looking at is the determination of what is the significance of the two reasonable Court alternatives with regard to constitution on appeal if these facts of such that it is reasonable to inquire but are equally reasonable with regard do not inquire unless the Court of Appeals suggest here that, that, that Board can stand all the diagnoses been alleged. And that's the reasonable. This also replicate the constitutional question, doesn't make any posture if you will. Our argument is that it doesn't make it impossible and the possibility as it is. The question is: Could she have? not should she have? It involved-- excuse me-- and by focusing on-- now, what the Court-- we believe we further that the Open Courts got in and the focused on the "should have" not only to the "should have" but when all the way to actual conformation of the misdiagnoses, no work basically would pass the objective "should have" standard. And went to the completely subject [inaudible]. That's the Court of Appeals did here as well. But it seems we hold them and this point could simply rely on the diagnosis of, of of hemorrhoid. And not that we for rules under no duty of inquiries at that point of time and therefore, could just simply wait until she eventually had a conformation of the earlier misdiagnosis that she alleged. The Court is essentially not only adopting the

discovery rule but jealous seeing the objective portion of discovery rule. And in saying, "It own this diagnoses cases that there has to be an actual conformation of the misdiagnoses for there to be any triggering with regard to the review of inquiry." Now that's contrary to this Court's early jurisprudence. And it's also contrary to the Court's jurisprudence sit from the Court fraudulent concealment. And it's important here, I think, Court to know that Helman is different from Shaw and from Earl v. Rat% looking in one distinct category. And that is-- in the latter two cases the Court would deal in with both the doctrine dealt in the Court's doctrine and the doctrine of fraudulent concealment whereas in Helman there was no allegation with the Court fraudulent concealment for obvious reasons because the person who was sued was simply if he followed his duty to make a, a diagnosis that was alleged-- it was then in this diagnosis earlier and have no continuing relationship with the profession so we would know opportunity if you will to fraudulently concealed the alleged negligence. Now, when this Court took a look at the facts before in Shaw and in Earl, the Court would deal specifically with fraudulent concealment. Before it when known to the Open Courts and the Court effectively merged the two concepts. In Burlman where should take this Court held that knowledge of such facts that would put a patient on notice of a possible lead to inquire further and if such inquiry would lead to the discovery of the underlying rule within the limitations period that knowledge of those facts is knowledge of the underlying cause of action as a matter of law. And in Shaw, although the Court does not expressly these are same thing with regard to Earl. The Court effectively makes that standard with regard to Open Courts and it only stands for reason. If you are aware of facts that it would be reasonable for you to inquire further in to those facts then that is all the constitution requires. You have the opportunity. The constitution says, "Nothing in fact whether you should be part of that-- to those facts." The constitution simply says, "All you have to have is the opportunity that, that the circumstances with regard to the statute of limitations do not make it impossible or it seemingly difficult or you to make that writ of inquiry."

JUDGE: So do you, do you think that Negal versus Nelson was correctly decided?

MR. BIRDWELL: Based upon facts that these are-- I believe, I believe so the, the question here is whether or not the parents in that case were aware of diagnostically significant information in order to know that they reasonably could have gone further and made that to the Court. And there was, there was reason to believe in that case that, that was not, that was not the case. Here, we have a woman who is aware. There is re-- the record is, is clear that she is aware of the diagnostic circumstances. She is addressed with, is, is, is looking at. And the Court of Appeals basically rhetorically denigrates for personal and professional experience possibly saying, "All the doctors have superior knowledge. Why should she be forced to diagnosed when they did?" And from a rhetorical standpoint that make sense. It's also the essential arguments being made by the plaintiff in actual rape case that the Court is going to hear in February where the plaintiffs are arguing that-- well, there's no duty to self-diagnose. But of course, the defense in that case is not arguing that there was duty to the self-diagnose. The question is, is to her duty to act on your awareness of diagnostic significance of your circumstances. In that case of your symptoms in this case not only of the symptoms but also of the specific test that is involved.

JUDGE: As-- is this the duty of fact that didn't any waive by the

fact that she was a nurse.

MR. BIRDWELL: Your Honor, a patient has a duty to act as a reasonably prudent person under the circumstances. Her circumstances included the fact that she was a nurse. Now it-- the standard is not necessarily wanted but they reasonably prudent nurse because she is not acting as a nurse under the circumstances.

JUDGE: So she would apply the standard differently for somebody who is not a nurse?

MR. BIRDWELL: Yes, your Honor. I, I-- it does, it does-- again, this is not an argument for, for a duty to self-diagnose. This is not an argument that's-- that, that says in fact, she had an opportunity to diagnose herself. No. This is an argument that says, "She was aware of her circumstances and the diagnostic significance of those circumstances." She had three negative tests from three previous fecalith called "blood tests." She knew the significance that they were negative and effectively what the Court of Appeals does is, is the Court of Appeals says, "Well, we will credit that knowledge," because then that means she can rely on the diagnosis of hemorrhoids because she has a negative test here. But with regard to the fact that she doesn't complete this diagnostic test which is not an annual well-woman. It is specifically prescribed for her-- had worsening symptoms. She knows it's a diagnostic test because she doesn't completed because the bleeding she's suffering brings it non-diagnostic. She also knows that she didn't completed even though her symptoms were worse.

JUDGE: Why didn't she completed? Why didn't she completed?

MR. BIRDWELL: According to the record, she contacted the -- if I may, your Honor -- according to the record, she contacted to doctor's office and said, "Look, I have read the packaging." The packaging says that if I'm actively bleeding that this is a non-diagnostic test, what does, you know, should I do that? Should I take this test when I'm actively bleeding when the package says, "It's no good if I do that." She talked to a nurse, the nurse said, "Well, clearly, the package says that and don't do it, all cost to the doctor." The doctor did not get back with the recording her own testimony. But that does not relieve her of the awareness that a diagnostic test that was not given to her to confirm hemorrhoids but to determine whether there was something else was not completed. That was the opportunity.

JUDGE: Justice Wainwright.

JUDGE: Counsel, Dr. Thompson said in her deposition that there was no reason that Boyd should have known she had colon cancer. Wouldn't that great a bit of a hurdle to you? that on of the doctors says, "There's no ruling that she should have known." And then the, the doctor's office when she called to say, "You are really-- should I take this take home test?" told her, "No, you don't need to." It-- kind of put the patient in a bit of a corner, aren't you?

MR. BIRDWELL: No, your Honor. I'm not. And, and in it, in it ...

JUDGE: And even if, even if a patient has symptoms of something very serious in this case called a "rectal cancer" that was not diagnosed in there are multiple examinations, multiple Well Woman Examinations over the years going back to 1996. And so she goes to the doctors they-- in this diagnosis that-- this diagnosis is hemorrhoids multiple times that gave her a take home test, take, take home test as under the circumstances you're experiencing don't think each calls the doctor's office, doctor offices yet don't take it. And then another physician, and Dr. Thompson says, "There's no reason she should have known she had cancer." You don't see at the fact question at least sufficient for the jury?

MR. BIRDWELL: No, your Honor, I don't. And the reason I don't because Dr. Thompson's question goes to the ultimate issue i.e.-- again, it's fact to this concept to self-diagnosis, [inaudible] self-diagnosed. That's not the test that his statement that she had no reason to self-diagnose. It's not the test. The question is: Would she aware with the Court-- to the-- in Court which is all that the constitution require. And when you combine for clear understanding of the diagnostic significance of the-- or negative test with her father's history, with her own knowledge from her own professional experience.

JUDGE: And she had policy removed herself from the early 90's? But what should she have done there? She had multiple test, went for examination said the take home test she was told not to take what more should she have done rather than asked and be examined by two different doctors and been, been told that it's not cancer?

MR. BIRDWELL: With regard to, to my weaker client she still had a full year within with which to, to, to do something about it. Within that period of time she did absolutely nothing. What she should have done is she still had to test when her bleeding stops so that the test was diagnosed that she could have done that. If the bleeding continue, that means her symptoms were something which means that she was not being that. She could go back to see the doctor and give that opportunity to find out what in fact is going on. Again, she have the opportunity and reason to inquire [inaudible].

JUDGE: Counsel, you did a [inaudible] you expire there, there are further questions.

MR. BIRDWELL: Thank you, your Honor.

JUDGE: Thank you.

COURT ATTENDANT: The Court is ready to hear argument from the respondent. May it please the Court. Mr. Fillmore is to present argument for this matter.

ORAL ARGUMENT OF CHARLES W. FILLMORE ON BEHALF OF THE RESPONDENT

MR. FILLMORE: May it please the Court. My argument this, this morning refer to some two points; First, the petitioners at this point are part from raising Sharon Boyd's recent death 18 months in the dependency of petition for review in this Court 10 months after the full version on the merits completed. To raise that as effort, death is a new ground for affirming the summary judgment as a new ground for challenging Boyd's rights and they have the Courts. And second point is on the merits of Boyd that the Courts depends, the evidence, the record is replete with evidence that shows she did not having reasonable opportunity discover for wrong during the period of limitations and therefore, that the trial court's summary judgment was erroneous. With respect to the first point, the language of Rule 7.1 could not be any clear. Specifically says that if a party dies after the trial court renders judgment but before the case has been final disposed of on appeal, the Appellate Court will proceed to adjudicate the appeal as if all parties were alive. Now we've exercised our-- at the co-obligation to notify the Court that Sharon Boyd had died back in June. We did not in any way shake the form agree that, that fact can now be injected into these proceedings where on the merits ruling of the parties' positions.

JUDGE: But the problem is you're asking this to be clear statute

on constitution as applied. We turned out to declare things on constitution specially sort of Court no session starts up unless we just have to.

MR. FILLMORE: And I believe the Court has to in, in this case, your Honor.

JUDGE: Well, but we could remand for, you know, these new facts to be taken into account before we-- I mean, if she's right, and I mean, that it is true survival actions or statutory and that makes your case go away, this is-- we just kind of correct to anticipate declaring something on the constitution which we knows but won't make any difference.

MR. FILLMORE: Two points, your Honor. First of all, I think the Court can remand to fact because I think, under set Rule 7.1, the Court must proceed that the rule says, "Could you take this as if she's alive?" The Court must then address the er-- the issue of whether she have a reasonable opportunity to discover the wrong. And in that instance, the Court should conclude that it was the part of the Court of Appeals unanimous, unanimous little properly concluded the-- that there's evidence in the record to show that she did not. And in that instance, the case should be remanded by-- to allow us the opportunity to develop the record, to develop the record that would respond that this new changed circumstance. But in particularly, your Honor, the Court follows Rule 7.1. The Court should address the error. The Court of Appeals correctly found and identified that the trial court's ruling. And in that instance, it's to correct the error. To correct the error also require the Court to correct the erroneous effects of that error. And in this case, the erroneous effect of the error was to deny Sharon Boyd for her opportunity to a trial on the merits on her Open Courts defense while she was alive. And at the point of time when the trial court ruled back in September 2003, we know that she live for another two years and nine months but we try to get better and straight that on appeal. Now, but for the trial court's error Sharon Boyd would have seen a trial on the merit on this case. She would have been given the opportunity therefore, to preserve for Open Courts rights and a verdict and a judgment that the law is clear there have to-- could not be taken away from her because of her death.

JUDGE: Is there any authority for that?

MR. FILLMORE: Yes, your Honor, I believe there is because the circumstances of this case, the circumstance of this case carry out for the Court to exercise its equitable power.

JUDGE: But I mean, what, what you're arguing means that the trial judge didn't puts your trial judge so that the Open Courts' provision was required the-- as to disregard the fact that's above cause of action statutory.

MR. FILLMORE: No, no, your Honor, what I'm, what I'm asking Court to do is this case has specially separate trial in October. This-- the, the-- I believe it was October certainly within the year. The summary judgment was granted in September. She was-- she left for another two years and nine months ...

JUDGE: But trial judge since she's got busy trying another stuff I mean, to take it two years and should died. Your -

MR. FILLMORE: But that's ...

JUDGE: - your argument would be ...

MR. FILLMORE: My argument would be ...

JUDGE: [inaudible] it's-- but if it's, if it was-- if the judge had made one mistake rather than the other.

MR. FILLMORE: My argument would be, your Honor, and is, is what--

of course, that's not what happened but in the-- my argument would be in that instance that just like what happened in the old case in Bal versus Maxwell and then the Mark v. Anderson she expired-- dictation expired before they have or have an opportunity to make it to the trial court to preserve the rights. But that's not what happened here. What happened here is we know she lived another two years nine months.

JUDGE: But I, I gets back to my question. We, we never said that your opportunity that was bring your claim meet the opportunity to get the verdict. We just said: It's been an opportunity to file the case.

MR. FILLMORE: Well, I believe the Court ...

JUDGE: What-- when they-- when that we said it means opportunity to get your case to I thought trial.

MR. FILLMORE: What, what ...

JUDGE: What this-- what Open Courts means?

MR. FILLMORE: Well, I think I'm not-- I think the issue, your Honor, is she should be given the opportunity. Open Courts guarantees or remedies.

JUDGE: [inaudible] you said, "There's authority."

MR. FILLMORE: Yes.

JUDGE: I want the name of it.

MR. FILLMORE: That the authority is, your Honor, I'll give report. The-- I apologize, your Honor. But the, the Johnson versus Cherry 1987 Supreme Court case well, this Court said that the equitable power of the Court exist to the fairness and is flexible and adoptable to particular exigencies so that relief will be granted when it view of all the circumstances to deny it would permit one party to suffer. It goes wrong the hands with the other. Now, your Honor, in this case, it is fundamentally unfair for petitioners by their own malpractice to render what was otherwise a treatable and survivable cancer terminal. And then, by the trial court's erroneous ruling on their summary judgment motion to effectively run out the clock on Sharon Boyd's constitutional rights such that now.

JUDGE: But the-- you know, the part-- we don't draft statute of limitations.

MR. FILLMORE: No, your Honors, ...

JUDGE: Those people do.

MR. FILLMORE: But the Court has ...

JUDGE: Then your argument would be if instead of a couple of years, if it had been a couple of decades would be exactly the same. Now, words of this if somebody says, "They could have discovered the cancer in '78 and it wouldn't actually discovered until 2000 your argument would the same." She, she have no reasonable chance to discovery. And therefore,-- right?

MR. FILLMORE: Yes, your-- if she didn't have a reasonable opportunity to discover the wrong which we don't believe she did whether they-- it occurred back for back-- as the Court's question that were here where it occur only-- say years back, we would, we would sense ...

JUDGE: So would have-- so since, since we've done all these cases on the Open Courts legislature stat-- statute opposed from that malcases. We're gong to declare that unconstitutional not forced here but your argument is what have to declare that on constitutional in my hypothetical case, too.

MR. FILLMORE: No, your Honor, that, that's not what I'm arguing. This Court on Boarderline versus Pank recognized on equitable stoppable principles that it could-- that a healthcare provider by their own fraudulent concealment of the wrong-doing can be stopped from alleging

the statute of limitations defense. Now that's-- we're not asking the Court to go that far in this case. All we're asking is that they ought to be stopped from asserting her death as an independent ground for defeating or for Open Courts rights for the period of time between on the trial court erroneously granted the summary judgment and the time the two years are none most of thing is a case was on appeal but we try to correct that error. The Court can do that and remand the case back and allow us, give us two years and nine months. The time that this case was on appeal trying to correct the trial court's error. For our Court to have an opportunity then to present her case or Open Courts defense to the fact-finder and obtain the verdict and obtain the judgment that thereafter her death did not take a while.

JUDGE: So all of your claims are statutory at this point?

MR. FILLMORE: Yes, your Honor. The way this Court is interpreted that the, the interrelation between the su-- survival statute and the Open Courts defense in 4590(i). I, I, I believe that's right. The claims are statutory.

JUDGE: So and what you do say it before entering in this question is an argument for us to change the law?

MR. FILLMORE: I don't believe it is an argument to change the law. I think it's an argument you are for the Court to exercise its equitable power just like it is done before in this exact same in the 4590(i), based on equitable stock of principles prevented the defendant to property from its wrong-doing being able to do and then turn around and then sort of statute of limitations defense. That's all we were asking with the Court to do not, not even go that far. They still have those statute of limitations defense. We just have the right, they're just to stop from asserting her death during the time period that we know she -- what -- was alive that we have made it to trial, and didn't given the opportunity to preserve her Open Courts rights.

JUDGE: Mr. Fillmore, you can do that aren't we saying that their wrong-doing was in the appellate process as suppose to this diagnosis? That, that is a-- it's by, by asserting your rights in the trial court and then by this process going to be appellate system, how do we call that they are wrong-doing?

MR. FILLMORE: This-- I think it's twofold, your Honor. The wrong-doing in the first instance is the, there's re--evidence before the Court right now to show this that it was their negligence, their malpractice that ...

JUDGE: But that's the question of malpractice on limitations and, and Open Courts that used the merits. But you're, you're saying that somehow their wrong-doing has, has stretched this beyond her death. But isn't that really this-- the procedural process of how we handle cases? How do we it-- how wouldn't we be calling that process their wrong-doing if we do what you're asking us to it?

MR. FILLMORE: I don't, I don't think it would be necessary we have to call it "wrong-dong." We do know the Court reaches the merits if the Court of Appeals had other summary judgment motion. But it should never have been granted, it should never been granted.

JUDGE: But how do we call that somehow to fall for the defendants in making their argument?

MR. FILLMORE: I don't want to know the Court will believe the Court necessary has to call up their fault that the-- it's a replay of two things. I don't rely in malpractice that we cause her death that they're now wanting to turn around and assert. So closes in referring Court into whether she have reasonable opportunity discover long-- wrong but that the trial-- the Court of Appeals in the trial court

erred forecloses a further inquiry in to their liability for causing her death and effectively gives on the defense that they did not have or she was a lot. Well, I think the Court-- inactive-- analogize this to the instance where if the trial court erroneously incorporates the JNOV. The case goes up on appeal. This Court turns it around. It gets remanded back and the Court's function is to put the parties in the same position that they would have been in had the Court-- the trial court entered the correct judgment ...

JUDGE: So if, so if there were a trial, would it be-- how would it look? Would it be an instruction to the jury that you're, you're to consider this case as if she was still living? Is it serious or ...

MR. FILLMORE: The, the jury would never know, your Honor, 'cause that's the-- it's-- that's a purely legal issue about the effect of her death on her Open Courts rights.

JUDGE: Jury wouldn't know what?

MR. FILLMORE: That-- the jury wouldn't be asked to make a finding about whether she was alive or not. That's a-- the effect of her death is a, is a purely legal issue in terms of her Open Courts rights. The only thing that would be submit to jury ...

JUDGE: So then as illegal issue that the Court would consider the case as if she were still living?

MR. FILLMORE: Yes, your Honor. They only should have be submit. The jury was-- is she have a reason by up to the discover wrong. That's the issue that would have been submit to the jury. Had-- is the Court-- trial court not here? But what I was saying in terms of remaining a back of counters of the JNOV, the Court then -- and there's a lot of cases that hold this -- the Court then calculates post judgment interest from the date of that judgment putting the parties back in the same position they would have been in had the trial court not there.

JUDGE: Mr. Fillmore, let me go the merits and you said you asked the jury that you have a reasonable opportunity to discover. What kind instruction would you give to the jury on that? That will be different from the malpractice limitations question that, that she knew or should have known. How, how would you differentiate those two?

MR. FILLMORE: The issue of all that given the same instruction that this Court based on what this Court's holdings-- specific holding was in Nelson versus Christian.

JUDGE: Oh, and the reasonable opportunity, you tell on that now?

MR. FILLMORE: Yes, your Honor. And that-- I'll turn for a second point here that's the merits of this appeal. It was in Nelson versus Christian that this Court first apply the Open Courts provision described down the statute of limitations in the context that the patient was did not replaced. You did not have reasonable opportunity to discover the wrong.

JUDGE: You believe Nelson is your best case?

MR. FILLMORE: Yes, your Honor, Nelson versus Christian. And, and Nelson has never been on the rule and has been repeatedly cited with approval by this Court and only to Open Courts decisions on its own to say. But in Nelson the Court specifically held that because the Open Courts provision operated to come up of the pe-- pled its rights before they knew or should have known specifically said, "Knew or should have known that the cap-- the limitations provision was on constitution just ..."

JUDGE: So how's that, how's that different from your mal-- malpractice standard?

MR. FILLMORE: I, I don't, I don't think it does, your Honor, because except for she is an individual, these are positions, they

would-- there have be evidence of the standard of care on which ...

JUDGE: What this-- goes it. What is your instruction to the jury on reasonable opportunity? If I have to -

MR. FILLMORE: I think ...

JUDGE: have submit that to the jury.

MR. FILLMORE: Yes, your Honor. The-- it's the instruction would be: She did not have a reasonable jury's instructed that the-- this is for do not have a reasonable opportunity to discover the wrong is you did not know or should have known of her injury before it was diagnosed on April 12, 2002.

JUDGE: Why at your limitations instruction?

MR. FILLMORE: I think the statute of limitations, your Honors, will be as at that point it's a matter of law 'cause there was no question.

JUDGE: Same instruction.

MR. FILLMORE: Well, ...

JUDGE: Same standard.

MR. FILLMORE: If there's even a reason to submit it to the jury at that point.

JUDGE: That-- what I am saying or what you just told me unreasonable opportunity isn't-- then you just say, "It's exact same standard as the statute of limitations defense." Even she knew, knew or should have known.

MR. FILLMORE: Yes, your Honor.

JUDGE: So we don't have any difference before in Open Courts standard and medical malpracti-- the, the statute of limitations defense.

MR. FILLMORE: I think it's exactly what it. I think that's exactly what and I think that's specifically what Nelson versus Christian Halls that the Court ...

JUDGE: Accepted in the DS in 1997 we said, "There is no discovery rule in medical malpractice actions and the legislature policy but the statute did polished."

MR. FILLMORE: Interestingly not the DS versus Watsfoll, your Honor, the issue was never before the Court. The Court did not ever get to the issue of whether it was knew or should have known or we were could have known because in that case, the claimant was dead and so the Court resolve in that case on the ground that she didn't have a common law right. Now, what the Court-- this Court has said, though, in the case of, of Shelter Works versus Hysen and I think is instructive on this point. The Court heirs in 1999 take the Supreme Court decision, the Court said, "In Moreson versus Chan we held that absolute a violation of the Open Courts provision of the Texas constitution 4590(i) abolished the discovery rule in cases governed by the Act." Now that the C,ourt is saying-- and this is all Nelson versus Christian said is, "The discovery rule was a, a rule that was inacted or by the-- recognized by this Court to apply to a cruel statute of limitations that is statute of limitations where the plaintiff's cause of action was barred depending on when it occurred." The Court said, "4590(i) that's internal of this limitation provision doesn't turn on a cruel language anymore." Therefore, we cannot used a, a-- the discovery rule as a rule of statutory interpretation. Very next page, the Court says, "But we do adopted as the standard by which the, the -- to, the of to determine their Open Courts rights but has the Court recognized the legislature does not have the power to cut off a plaintiff's cause of action before they knew or had it known that, that kind of action before they knew or should have known her injury."

JUDGE: And let's talk about the facts some of that regard. Obviously, Ms. Boyd was presented with several misdiagnosis of her provision. Is it one dram to be inescapable conclusion reading the facts from either brief, yours or your opponents, that she was troubled by the diagnosis; that she knew something wasn't quite right that's why she get going back; that why she asked the another doctors; that why she called about the take home test. There was something that didn't quite add up in, in-- from her perspective, don't you agree?

MR. FILLMORE: No, your Honor, I'm not until it begin, not until 2002. I think the Court goes back in legis-- in records. These visits where she's going to her health care providers are Well Woman Examinations. They are not there. She's not there because she's bleeding. She's there for other reasons and she reports in her meant bleeding. And to a person, it was-- nothing's going back with the told of this. There would have just two doctors who told us-- it was three, all three of the providers said, "You have nothing but hemorrhoids. You have nothing but hemorrhoids." And in fact, it was-- and Dr. Thompson gave her this take home total of whole test that they want to talk about that they-- his office there told her, "Don't do that because you have a bleeding hemorrhoids." It was only a month later than February 2001 that she goes back to petition of Dr. Kallam. And it's so disputed that, that point he puts up anoscope in her rectum and tells her, "I can see the bleeding hemorrhoid." Now that our argument is that because she had the- it was possible for her to lift up the table and say, "I don't believe you. I want to call an ascoty that she can be deemed to have constructive knowledge of her cancer from that point of." Well, that's not the law that, that should have be the law. And that conflicts with Nelson versus Christian and Helen versus Mateo.

JUDGE: So the standard is exceedingly difficult or impossible to discover your client disease?

MR. FILLMORE: I don't think so because in this instance they're really is in the match you'd ...

JUDGE: You just say if she could have jump off the table and said, "That's not right. Something's problematic with that." That's -

MR. FILLMORE: Well, ...

JUDGE: - possible not impossible.

MR. FILLMORE: The way this Court is interpreted this impossible condition requirement, I don't-- that's-- it is not a free radical impossibility. And for instance, in Nelson versus Christian, the, the injury was symptomatic as Counsel meets was-- the injury was symptomatic during the period of limitations.

JUDGE: Just to fill in the last three seconds. Do you take issue with the characterization of this case not as a survival action?

MR. FILLMORE: Yes, your Honor. I, I, I take it at this point of time that Court must continue to adjudicate this case as if Sharon Boyd was alive. Also I'll point out, your Honor, that Sharon Boyd did not have colon palates removed. I, I thought I understood the Court to say that, that's not on the record for fatherhood. The advents is clear in the record that those were not cancerous. They were not cancerous as they know evidence to say that they symptomatic in anyway or the-- that, that they were-- hers-- those symptoms are in anyway comparable to what she was experiencing.

JUDGE: So, so what was the procedure in the early 1990's that she had?

MR. FILLMORE: She didn't.

JUDGE: She didn't have any?

MR. FILLMORE: No. That was her, it was her father who had colon

palates removal.

JUDGE: But I'm aware the father I thought there was some indication in the brief at least that she had some, some of procedure in the early 90's. There was, -

MR. FILLMORE: None.

JUDGE: - there none?

MR. FILLMORE: None on it. Not that I recall and I think I was know that, I hope I would. But no, your Honor, it's-- she not have any proce-- [inaudible] at that.

JUDGE: Very quickly, I know you take issue with the characterization of this case as a survival action, putting that this to remain aside, do you agree or disagree that the Open Courts provision is flatly an applicable to survival actions?

MR. FILLMORE: Not in this case, your Honor. And that-- and I ...

JUDGE: Based on your equity arguments earlier?

MR. FILLMORE: No. I also believe, your Honor, that the Court in Alt left standing a separability argument that it result based mainly on language that was unique in statutory language that was unique to the capping Section 4590(i) that does not appear in the statute of limitations Section 4590(i). And I can briefly explain that the Court would like but I'm out of time. I did tell the Court that I would like post submission for [inaudible] that addressed the supplemental brief's opinion on the Board.

JUDGE: Counsel, do you want to briefly explain Yuvien 32nd or so?

MR. FILLMORE: Thank you, your Honor. What-- in Alt, the Court addressed the separability issue which is the issue of whether the cause of the constitution was on cutting-- cutting section was on constitution as applied to a life of plaintiff's claim to the Court severe out is arguably constitutional application to the dead patients claim. Now the Court said in this-- in all-- Yes, we think we can because this cutting section has a specific provision that says, "This cut applies not with standing the survival statutory." The Court looks over at Section 22.1, statute of limitations section there is no language like that. I think that it goes to the point that the legislature would never have passed a statute of limitations. The efficacy of which turned on the patient died. They would not have given the, the petio-- the healthcare providers, the benefit of the defense. If there are malpractice merits to kill the patient, and I take that argument is left out outstanding from the opposition.

JUDGE: Further questions. Thank you, Counsel.

COURT ATTENDANT: [inaudible].

REBUTTAL ARGUMENT OF J. WADE BIRDWELL ON BEHALF OF PETITIONER

MR. BIRDWELL: There is an argument, couple of points. First with regard to whether or not Open Courts turning event. The equitable argument that Counsel makes is effectively to say that the Court can through revoke of equity changed, one is a clear statutory cause of action into a common law cause of action the purpose compliant a doctrine that only applies to, to the common law. Now, if you go-- if, if the Court wants to open that in all response with regard to-- you will have [inaudible] with regard to every statutory cause of action that the Open Courts cause claim does not guarantee them. So the, the appeals of equity law recognized, recognized it is to actually appeal

but out of me if you will to transform a statutory cause of action into a common law cause of action in order to comply, comply the Open Courts provision. With regard to your, your question about wrong-doing in the appellate process law that it's easy looking answer. The Court of Appeals found that it was part of the appeal was meritorious. There's no allegation at that point or here that anything that was done with regard to the appellate officers which frivolous and respondents have had that opportunity to raise that in effect they wanted to. So there is nothing upon which the Court could find that somehow that the estoppel of fact that the Court found with regard fraudulent concealment. It was appropriate that the Court does concealment. Finally, ...

JUDGE: Question we assume in this case in fact that the trial court will be ought to brief something actually brief something [inaudible].

MR. BIRDWELL: First, there's not, there's not in dispute as in fact with that. Second, your dealing with a clear issue of a judicial economy and the Court should case law with regard to summary judgments and the reason the Court finds that it can go ahead and grant and affirm summary judgments based upon grounds that were already presented to the trial court, I think this one applies here. We assert to the statute of limitations that defense is not changed, that defense is still available for the Court to affirm and that's defense is what the trial court gave as the summary judgment are. The Court of Appeals is the Court that found that there was a means for avoiding it and that means is no longer available due to her death. And so there is nothing to be gained with regard to sending this back to this -

JUDGE: [inaudible]

MR. BIRDWELL: - to-- I'm sorry, your Honor.

JUDGE: And the trial that-- trial court decided-- granted summary judgment she won't dead.

MR. BIRDWELL: That's true.

JUDGE: So you didn't have the argument that you're making now at that time. I mean, I understand your argument, your argument-- our position still the same we win. But the reason we win is now changed.

MR. BIRDWELL: And, and this is the Court that needs to be able to make that determination go on with the other. The Court of Appeals are going to be down by the Courts other than Earl decisions. We would go back if, if the Court send this back to file another motion for summary judgment. The trial courts has to going to say, "She's dead. It didn't apply. Will we brought back in the sacrament's initial common state point." If they're going to make that argument, that argument needs to be make here and have this Court make that determination now.

JUDGE: And you're absolutely certain that's what the trial courts going to do. And that why we had trials? Why we present motions to trial judges? Why the trial judges have the opportunity to take evidence that they think they need to in your argument? Do things that we can't do?

MR. BIRDWELL: There's been no suggestion as to what evidence might be necessary at the trial court other than her death. The trial court is necessary for a finding of fact. The fact of her death is not dispute, not in dispute here -

JUDGE: But is -

MR. BIRDWELL: - and not even ...

JUDGE: - let's put it out. The trial court hasn't-- hadn't opportunity to rule on art that you're making now about the survival action.

MR. BIRDWELL: That's true. That is true.

JUDGE: And what happens in the scenario where there are other cases, were facts or similar to this? And I can envision a party appealing and going to the appellate process and hopes that the party die-- the other party dies so that issues never resolved. So I-- why don't we just resolved this issue here once and for all? So that some sinners to lawyer then take the approach well, let's go ahead and appeal this and hope to have-- could does and now, we'll go from there.

MR. BIRDWELL: Well, to aspects in terms of response to that question. One, if in fact, there's some time with the lying topic [inaudible] now part of Counsel [inaudible] is in a position or Court of Appeals are in position to deal with the [inaudible] the Court of Appeal I mean, that the trial courts are in control of their doctrine [inaudible]. But, but second, with regard to that the, the, the decision in [inaudible] issue about if there is something that can occur that, that some wrong that the Court can address, that is not likely to gets with the Court put to that in example, pregnancy wasn't going to last more than nine months and it was going to get to Supreme Court along after that. Then the Court can go ahead and address that issue. And, and this is a similar context here. The Court has the fact of the Court-- has the law of the Court. This is the Court issue, it take the law making that affirmation.

JUDGE: Is there any further question? Thank you, Counsel. The case is submitted and the Court will take a recess.

COURT ATTENDANT: All rise.

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