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Supreme Court of Texas.
Jeremy Molinet
v.
Patrick Kimbrell, M.D. and John Horan, M.D.
No. 09-0544.

October 13, 2010.

Appearances:

Eugene W. Brees of Witehurst, Harkness, Brees & Cheng, P.C., for petitioner.
R. Brent Cooper of Cooper & Scully, P.C., for respondent.

Before:

Chief Justice Wallace B. Jefferson; Nathan L. Hecht, Dale Wainwright, David M. Medina, Paul W. Green, Phil Johnson, Don R. Willett, Eva M. Guzman, and Debra H. Lehrmann, Justices.

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CHIEF JUSTICE WALLACE B. JEFFERSON: The Court is ready to hear argument in the first cause 09-0544, Jeremy Molinet v. Patrick Kimbrell.

MARSHAL: May it please the Court, Mr. Brees will present argument for the petitioner. Petitioner has reserved five minutes for rebuttal.

ORAL ARGUMENT OF EUGENE W. BREES ON BEHALF OF THE PETITIONER

ATTORNEY EUGENE W. BREES: May it please the Court, Mr. Chief Justice. If healthcare providers are going to have the benefit of the designation of responsible third parties, then they have to abide by the same rules as everyone else. This 60-day provision in 33.004E would apply in healthcare liability cases. Those are not my words. Those are the words of Senator Ratliff during the floor debate on House Bill 4 and they clearly and definitively answer the question before this Court concerning whether Petitioner is entitled to join Drs. Horan and Kimbrell. We are mindful of the fact that the Court's objective in this case is to give full effect to the legislative intent as expressed in the statutory language of Chapter 33 of the Civil Practice and Remedies Code. Here the language of Chapter 33 clearly and unambiguously confirms Senator Ratliff's comments concerning that

legislative intent.

JUSTICE DAVID M. MEDINA: Before we get there, how do we get to jurisdiction on this?

ATTORNEY EUGENE W. BREES: Your Honor, Government Code 22.225C provides that when the justices of the Court of Appeal disagree on a question of law material for the case, this Court has jurisdiction.

JUSTICE DAVID M. MEDINA: So you take it that the concurring opinion by Justice Simmons is in conflict with the majority opinion?

ATTORNEY EUGENE W. BREES: Yes and primarily, we rely on the Leland v. Brandal case, a similar case to this case. Also out of the San Antonio Court of Appeals and also involving Chapter 74, in that case, as the Court is well aware, there was a concurring opinion where Justice Duncan questioned whether 74.351, the expert report requirement allowed a 30-day extension to be granted if the trial court had found the report to be adequate, but the Appellate Court deemed that it was deficient. She was clearly skeptical of that what she termed a radical interpretation of the statute.

JUSTICE DAVID M. MEDINA: It seems to be more of a comment than a disagreement with the analysis and result of the majority opinion.

ATTORNEY EUGENE W. BREES: And yet the Court accepted jurisdiction in that case. The Court deemed that her comments, although she agreed with the majority opinions' interpretation of the statute and she did not say that she agreed with what she was questioning as a potential interpretation of the statute, this Court deemed that to be a sufficient disagreement to accept jurisdiction and there was another case, the Travis County v. Pelzel case where the Court accepted jurisdiction based on a concurring opinion. Now, admittedly, in that case, Justice Patterson disagreed with one of the two bases for jurisdiction that the two majority justices had accepted so there was a pretty clear disagreement there. That's why I say the Leland case is closer to fact to this case and this Court having accepted jurisdiction in Leland I think it's very analogous to this case and there is a sufficient basis to say that there's a disagreement between Justice Simmons concurring in this case and the majority opinion for this Court to properly accept jurisdiction of the case. Now, it's our position that there is no inherent conflict between Chapter 33 and Chapter 74.

JUSTICE DEBRA H. LEHRMANN: Can I ask you, please, what is your answer to the argument that 74.251 is the more specific provision?

ATTORNEY EUGENE W. BREES: Well, that question only becomes important if there is a conflict if Chapter 33 is, in fact, a contrary law to Chapter 74. So I think the first issue that this Court must address is whether there is indeed a conflict between those two provisions. If there is no conflict, then this issue of specificity versus generality--

JUSTICE DEBRA H. LEHRMANN: What about the languag of notwithstanding any other law?

ATTORNEY EUGENE W. BREES: Again, that doesn't come into play if Chapter 33 is not another law that is contrary to Chapter 74 and in that regard, a reading of the two statutes and they must be read in conjunction with each other, shows that there is no true conflict. In other words, 33.004 is not a contrary law to 74 and, therefore, 33.004 can be read and interpreted just based on its own language.

JUSTICE DEBRA H. LEHRMANN: And would your answer be the same or not with regard to the provision in Chapter 74 that says that it trumps other laws in medical liability?

ATTORNEY EUGENE W. BREES: Exactly, that comes into play only if there's a conflict, only if 33 is, in fact, a contrary law. Now 74.351 that the precise language used in that statute is that an "action" to "commence" a

healthcare liability claim must be brought within two years. 33.004 doesn't use any of those words. It doesn't refer to commencing an action. It doesn't say the statute of limitations is extended or tolled. In fact, in Galbraith, a recent decision of this Court, the Court did not refer to 33.004 and that case involved and interpretation of 33.004 and a statute of repose in Chapter 16 of the code, the Court did not refer to 33.004 as a tolling or extension statute. Instead, it referred to it as that limitations cannot be raised as a bar and 33.004 talks only about joinder. It says that a responsible third party may be joined in a case notwithstanding what would otherwise be a limitations bar if it's done within 60 days. So 74.251 says there's a two-year statute. 33.004 doesn't contradict that.

CHIEF JUSTICE WALLACE B. JEFFERSON: Well the doctor would think that an action was commenced against him, wouldn't he?

ATTORNEY EUGENE W. BREES: I agree. I agree. The practical effect of 33.004 is to commence an action against the responsible third-party doctor. However, it is being commenced in the form of a joiner or procedurally in the form of a joinder. If the Court accepts the proposition that 33.004 is not a conflicting statute, then you don't have to address this issue of conflict with Chapter 74 either the notwithstanding other law provision in 251 or the conflict resolution provision in 74.002.

JUSTICE PAUL W. GREEN: But, clearly, those two provisions are, there's some tension there. I mean, the legislature obviously with some tending to in terms of the tort reform, Med Mal Reform Act to try to strictly limit those med-mal cases to a two-year limitations period. Wouldn't you agree?

ATTORNEY EUGENE W. BREES: I would agree with that with the caveat that as Senator Ratliff's statement also indicates the legislature was intending to permit joinder of responsible third parties in med-mal cases.

JUSTICE PAUL W. GREEN: Which has the effect, right, which has the effect of undercutting the other policy under Chapter 74.

ATTORNEY EUGENE W. BREES: I wouldn't refer to it as undercutting it. I would refer to it as the legislature was setting up a check-and-balance system of Chapter 33 and part of that check-and-balance system, as discussed in Justice Simmons' concurring, was to permit joinder of the responsible third party if done within 60 days.

JUSTICE PAUL W. GREEN: But, clearly, it's within the prerogative of the legislature to both set limitations periods and enact provisions that would somehow abrogate those provisions through some other policy like in the proportionate responsibility statute.

ATTORNEY EUGENE W. BREES: Yes.

JUSTICE PAUL W. GREEN: Are you familiar with the what is it the Flack v. Hanke case out of San Antonio?

ATTORNEY EUGENE W. BREES: No, Your Honor.

JUSTICE PAUL W. GREEN: Well, it issued this morning. You have to get up really looking at all these cases, but it highlights that tension in the respect that in that particular case, a plaintiff sues a defendant and makes an arrangement with the defendant because limitations has run on some law firms that were implicated in the deal and the defendant brought in as third-party defendants, responsible third parties, by the agreement between the plaintiff and the defendant and the plaintiff sued those defendants, even though limitations had run and then dismissed the original defendant by agreement. Do you think that's what the legislature had in mind that these kind of agreements could be calculated by parties in order to bring in people to avoid the statute of limitations?

ATTORNEY EUGENE W. BREES: Not really, Your Honor, I don't think the legislature had that in mind. I

think, again, the legislature was setting up this check-and-balance system, which is a delicate check-and-balance system and as Justice Simmons' concurring opinion states, the effect of the Court of Appeals' decision in this case and the effect of not allowing of joinder of med-mal responsible third parties beyond a two-year period is to upset that balance system, but only to upset it in med-mal cases, not to upset it in others.

JUSTICE PAUL W. GREEN: Interestingly, Justice Simmons authored the opinion that was issued this morning and permitted that to take place, interesting.

JUSTICE DALE WAINWRIGHT: What if the original defendant in your case were dismissed?

ATTORNEY EUGENE W. BREES: If the original defendant was dismissed?

JUSTICE DALE WAINWRIGHT: And just had the joined party? Would that be permissible in your mind?

ATTORNEY EUGENE W. BREES: Yes.

JUSTICE DALE WAINWRIGHT: Not a problem at all?

ATTORNEY EUGENE W. BREES: Not a problem at all. Not a problem at all.

JUSTICE DON R. WILLETT: I have a factual question. Your client saw Dr. Allen, that was the original defendant. Did he see the other two physicians contemporaneously? Or did Dr. Allen consult with them without your client's knowledge? What was the chronology of all that?

ATTORNEY EUGENE W. BREES: Well, the chronology was that the plaintiff saw Dr. Horan in August of '04, August 31, '04 was the earliest state of negligence as to Dr. Horan. Dr. Horan was the football team physician and then was saw Dr. Kimbrell in November of 2004. So those are the operative dates for in terms of calculating the two-year what would otherwise be the two-year limitations.

JUSTICE DON R. WILLETT: But all three doctors were, all three were seen? I mean your--

ATTORNEY EUGENE W. BREES: Yes.

JUSTICE DON R. WILLETT: Okay, before--

ATTORNEY EUGENE W. BREES: Yes, I would like to mention one thing, 74.251 says there's a two-year statute of limitations. In that same Chapter 74.051, that's the statutory notice provision where if a perspective plaintiff provides written notice in the form contemplated by the legislature, it buys an additional 75 days. It adds 75 days to the limitations period. 051 says that if that notice is given, the limitations will be tolled for 75 days. Well, if 251 really means two years and nothing but two years, then there's a conflict with 051, but nobody is suggesting that 051 is not enforceable. 051, in addition to Senator Ratliff's comments, evidence is clear legislative intent that the two-year statute in 251 is not absolute, notwithstanding the fact that many cases--

CHIEF JUSTICE WALLACE B. JEFFERSON: Including one of our own.

ATTORNEY EUGENE W. BREES: --refer to it as an absolute statute of limitations, absolute two year. It's really not. There are other exceptions to it as well. Minority, the open courts, when the open courts provision comes into effect, it's not truly an absolute two-year statute of limitations and 051 clearly indicates that. So the legislature said in 251, a two-year statute. Now, remember, that dates back to 1975 in 5.82 of the insurance code and then that was recodified in 1977 in Section 10.01 of Article 4590i and then it's carried forward yet again in 2003 in Chapter 74. I think an argument can be made that the rule of statutory interpretation and when you're looking at two potentially conflicting statutes, if the Court deems that these two statutes are, indeed, in conflict,

the later enacted one prevails. There's an argument that the two-year statute and notwithstanding any other law, etc., language, is the older statute. It dates back to '75 or '77. Admittedly, it was recodified in '03 and they were in the same Bill in '03, but there's still an argument that it's the earlier enacted language and, therefore, the later enacted, which is Chapter 33 would prevail. If the Court deems that there is a conflict and then it becomes important to look at how do you construe the interplay of these two statutes, that's when legislative intent and legislative history becomes important because you're construing two different statutes, not just one statute, but two different statutes. You can't look at Chapter 74 in isolation. You have to look at its interplay with Chapter 33 and you've got two clear statutes--74 saying two-year statute and then the conflict resolution provision. You've got Chapter 33 that says in 002 that says it applies to tort cases. Med-mal is a tort case. You've got 004e that says you can add a defendant within 60 days notwithstanding what would otherwise be a limitation spar. When you're construing two different statutes on their face, clear and unambiguous, it's important to look at legislative intent even to cautiously look at it as this Court has said in past decisions. When we look at legislative history, we must cautiously do so even a cautious look at Senator Ratliff's comments make it abundantly clear that 33 applies in this case. The question posed by Senator Hinojosa was directly the issue involved in this appeal and Senator Ratliff's answer was directly that answer. My time is up. I will allow time for rebuttal.

JUSTICE NATHAN L. HECHT: Was there any other discussion, I take it not in the history of the debates on the statute about this provision? The interplay of these provisions, was there any. This is a ...

ATTORNEY EUGENE W. BREES: The only legislative history that I'm aware of and is before the Court is the question and answer between Senator Hinojosa and Senator Ratliff.

CHIEF JUSTICE WALLACE B. JEFFERSON: Well, there was a discussion in the Bill analysis as well, I think, with respect to this that supports your side, I think.

ATTORNEY EUGENE W. BREES: Right.

JUSTICE DON R. WILLETT: But even, but you would argue that even putting aside the legislature history be cause some of us on the Court are not all that enamored of consulting that, but you would say even putting that aside, there is no just looking at the text, there's no conflict between 33 and 74.

ATTORNEY EUGENE W. BREES: Correct. If you look at the precise text of both statutes, there's no conflict and if the Court accepts that argument, then all you're looking at is the language of 33, which is clear that it would apply.

JUSTICE DON R. WILLETT: Without any need to look at any of colloquies on the Senate floor or anything else?

ATTORNEY EUGENE W. BREES: No.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, Mr. Brees. The Court is ready to hear argument from the respondents.

MARSHAL: May it please the Court, Mr. Cooper will present argument for the respondents.

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

ATTORNEY R. BRENT COOPER: Very briefly, one, there is no jurisdiction for this Court to hear this case. Number two, there is a conflict between the two statutes. Justice Medina, with respect to jurisdiction in the Brandal case, there was a disagreement between Justice Duncan and the majority regarding whether or not the trial court was the one who had defined that the report was deficient or could the Court of Appeals find it. There

was a disagreement in how the statute was to the interpreter. In this case, Justice Simmons did not disagree with the interpretation of the statute. Rather, she just made the comment, the legislature probably ought to address this. That is different from the decision there in Leland v. Brandal. We don't believe there is a disagreement among the justices of the Court of Appeals. There is no disagreement among the Courts of Appeals or with respect to any decision of this Court and, as we said in our brief, we don't believe the Court has jurisdiction.

CHIEF JUSTICE WALLACE B. JEFFERSON: Isn't there, at least, a holding if not dicta in the Moreno case v. Palomino- Hernandez that says 33.004e would apply in this situation?

ATTORNEY R. BRENT COOPER: The medical malpractice situation, Judge, I don't, Your Honor, I'm not, don't recall that. I will check though and if it does, then the question is if it's dicta, would it be a holding that would be a conflict among the plaintiffs. But let's get back to the merits of this case and that is is there a conflict between 3304 and 74.251 and the answer is clearly there is. In Chilkewitz, this Court said with respect to 10.01, which was recodified, that it's an absolute two-year statute of limitations with two exceptions. One is the open courts, minors, inherently undiscoverable injury, such as the Walters v. Cleveland case, this Court decided last term. Number two was tolling within the statute itself, that is within 4590i or within Chapter 74.

JUSTICE EVA M. GUZMAN: How would you respond to Senator Ratliff's comments though that pretty succinctly evidence thought process there?

ATTORNEY R. BRENT COOPER: It is very specific, it's just wrong and it just doesn't reflect what the statute says. For example, and I was trying to think of an example. If the statute says black and then you get a Senator up there that says white, what's the public to do? What's the Court to do and that's exactly what we have in this case. You have a statute that is very, very specific on its face.

JUSTICE DEBRA H. LEHRMANN: Can I, but what do you do about the language that specifically says in the joinder statute even though such joinder would otherwise be barred by limitations. Isn't that very specific?

ATTORNEY R. BRENT COOPER: Well it says, well what it says in cases other than medical malpractice cases, you can joinder after the statute of limitations has expired, but with respect to Chapter 74 cases, you have two things that applies. One is 74.002, which says this chapter, this section controls over any other law to the extent there's any conflict and then number two is, with respect to conflict resolution, you have 74.251, the notwithstanding any other law and this Court, going back 25 years to 1985 in Hill v. Milani, which had to do with the predecessor of 16.068, the tolling when a person's outside the state. Then we had Bala v. Maxwell case where this Court was addressing the issue of which controls, 16.003 in a wrongful death case or, at that time, 10.001 of 4590i, this Court says notwithstanding any other law means notwithstanding any other law Chapter 4590i or, in this case, 74 would control.

CHIEF JUSTICE WALLACE B. JEFFERSON: Well sometimes like the case we issued just last week or a week ago, the legislature says it in both statutes, notwithstanding any other law, and they conflict and we've got to make a decision on what the overall policy is.

ATTORNEY R. BRENT COOPER: Well, but I think perhaps the more accurate analogy is the case you issued two weeks ago and that is the Texas Lottery case where there was the Texas Lottery statute and Justice Johnson and you had the UCC and you had a conflict resolution provision that was built in to the UCC and what this Court said, the majority, unanimous Court as I recall, said if there is a conflict resolution provision that's built into the statute, it controls. We're not going to look at legislative history. We're not going to look to construction aids. We're not going to look to anything. We're going to look to how the legislature said we are two resolve that conflict. And that statute, that was the First State Bank of McQueen case, the Court said, Justice Johnson, we agree with FSB that because the legislature expressly and unambiguously set out the method for resolving conflicts between the UCC and other statutes, it would be improper for us to go outside the language of the statute and use cannons of construction and that's what legislative history is, to resolve this question. Here, the leg-

islature two times put in provisions on how to resolve conflicts between Chapter 74 and other statutes.

JUSTICE PAUL W. GREEN: How do you address the the balancing argument that Justice Simmons raised?

ATTORNEY R. BRENT COOPER: With all due respect to Justice Simmons, I don't believe it's a balancing argument. I believe it's just a matter of following what the legislature put in place. As this Court has said, I believe it was in the advanced Fitzgerald v. Advanced Spine case, and may be later in the Entergy case, this Court said we may not agree with what the legislature did. We may have done something different, but that's not--

JUSTICE PAUL W. GREEN: But don't you agree there's an inherent unfairness in allowing responsible third parties and that the defendant has brought them and can blame them and yet the plaintiff is unable at that point.

ATTORNEY R. BRENT COOPER: Well then how would that be any different, Your Honor, then where the responsible third party that's been designated is the employer who's protected by workers compensation. The plaintiff can't sue him. Or the responsible third party who's been designated is a Chinese corporation that is outside the jurisdiction and cannot be brought into Texas and be sued here as well. You have that same if you want to call it unfairness or whatever in other situations, but this is what the legislature put in place and they specifically provided in 2003 that you could sue employers who were protected by the workers compensation bar.

JUSTICE DALE WAINWRIGHT: Why isn't the answer that the legislature can address some unfairness, but can't be perfect?

ATTORNEY R. BRENT COOPER: Well and, again, as this Court has said on many occasions, the legislature's job is to pass the statutes. We may not agree with what they do or how they do it, but the judicial branch's obligation is to interpret the statutes in the [inaudible], of the language that's been passed.

JUSTICE EVA M. GUZMAN: In a practical response to this perceived unfairness, I suppose would be getting in there and quickly doing some discovery enforcing the designation?

ATTORNEY R. BRENT COOPER: Correct and in this case, again, this isn't, there's no open courts' argument that presents itself. One of the original treaters was Dr. Horan, who did, I think, the original surgery. There was wound care performed in 2004 by Dr. Kimbrell. Then there was a re-rupture of the Achilles tendon after that where they knew there was problems.

JUSTICE DON R. WILLETT: So you say there was reason to know from the get-go--

ATTORNEY R. BRENT COOPER: There is.

JUSTICE DON R. WILLETT: --that these other two could have been implicated and their conduct might have been off kilter.

ATTORNEY R. BRENT COOPER: So this is not a case where the plaintiff did not have a reasonable opportunity to bring--

CHIEF JUSTICE WALLACE B. JEFFERSON: And you think the result would be different if the plaintiff didn't have that knowledge?

ATTORNEY R. BRENT COOPER: Well if you go back to this Court's decision last term in the Walters v. Cleveland Regional case, which had to do with retained foreign objects, this Court said for statute of limitations, not for statutes of repose but for statute of limitations that the plaintiff under the open courts must have a reasonable opportunity to discover and bring their lawsuit. In this case, that is, I understand, is conceded. The plaintiff did have an opportunity, did know about it, could have brought it, didn't bring it. And then the question

is okay, are we going to ignore what the legislature said and what they passed in 74.002a and 74.251a?

JUSTICE DEBRA H. LEHRMANN: Wouldn't your construction though let's say if the plaintiff was not able to determine that. Wouldn't it encourage the defendant to wait until the statute had passed to designate that responsible third party and then where are you? You know, there's nothing that could be done by the plaintiff and isn't that just fundamentally unfair because they're going to have no reason to try to disprove their negligence and so isn't that just going to put the injured party at a huge disadvantage?

ATTORNEY R. BRENT COOPER: With all due respect, Your Honor, I don't believe it does because I believe one of the things this Court talks about with respect to the open courts analysis is the plaintiff has an obligation if they're going to bring a lawsuit to go out and find who's injured them and how they were injured and it's not up to them to wait on the defendants to say well, actually, there was somebody else who injured you and you need to be suing them. They have an independent obligation under Texas law to go out and ascertain the cause of their injury, who did it, how they did it or whatever. So--

JUSTICE NATHAN L. HECHT: Can't this be cured by a pretrial order?

ATTORNEY R. BRENT COOPER: I'm sorry, a pretrial order?

JUSTICE NATHAN L. HECHT: A pretrial order?

ATTORNEY R. BRENT COOPER: And also, also, Your Honor, we also see frequently where one of the first sets of discovery that's sent to the defendants is do you contend that the conduct of any other healthcare provider or any other person in the world caused the plaintiff's injuries? That's usually in the first set of discovery that we get. So--

JUSTICE NATHAN L. HECHT: But can't the trial courts set deadlines to settle?

ATTORNEY R. BRENT COOPER: The trial court can set deadlines where you have to do this and--

JUSTICE NATHAN L. HECHT: You can't designate a responsible third party after such and such a date?

ATTORNEY R. BRENT COOPER: I believe it's subject to being changed by the trial court by pretrial scheduling order, Your Honor.

JUSTICE EVA M. GUZMAN: And it operates most as a disadvantage to those who wait right until the time for the statute to run because then you could potentially not have the time to discover any other--

ATTORNEY R. BRENT COOPER: Correct. I mean if a person knows, in this case, Jeremy Molinet knew that he had had an Achilles injury. He knew that the surgery could fail and waited three years to even attempt to sue one of the, the two initial treating physicians in this case and I don't believe that that's what the law encourages or what the law should encourage. The law ought to encourage if you've been injured, you need to go out and find who's injured you, how you were injured, and go ahead and commence the lawsuit.

JUSTICE PHIL JOHNSON: Counsel, opposing counsel starting off by saying these statutes don't conflict. That's his lead position, I guess.

ATTORNEY R. BRENT COOPER: I could not disagree more, Your Honor. What the legislature has said and this Court in the Chilkewitz case said is that with respect to 4590i, now it's Chapter 74, it's a two-year statute of limitations with two exceptions. One is open courts, which is not involved here. Number two is you have the tolling provisions of Chapter 74 that are included as well. Other than that, it's an absolute and this Court used

the term absolute in the Chilkewitz case. Also this Court used the term absolute, I believe it was either the Rankin case or the Walters case, I believe it was, it was an absolute statute of limitations. Now, how is it absolute if you can wait, sue some parties, you can wait three or four years and then they designate a responsible third party and then you can bring them back in. It's like there is no statute of limitations? It totally obliterates the legislative intent expressed by the legislature in passing House Bill 4 particularly Chapter 74.251. In fact, in the Rankin case--

JUSTICE PHIL JOHNSON: Well if we get into legislative intent, if we get into what they said above and beyond the statutory language, then you have.

ATTORNEY R. BRENT COOPER: I don't, correct, I don't think you get there, but this Court in the Rankin case last term said that we recognize the length of time that the insureds are exposed to potential liability has a bearing on the rates that insurers must charge. And so this Court last term has recognized the importance of having an absolute two-year limitation. If you have what they argue, that is you can designate a responsible third-party healthcare provider at any time and then they can be sued within 60 days, the only statute, the only limitations then in Texas on suing healthcare providers is the statute of repose under Pochucha, Galbraith v. Pochucha, which this Court has said last term in June of 2010 that with respect to the statute of repose, it's going to control over 33.04e because if you let 33.04e control over a statute of repose and this was architects and engineers, then basically you're doing away with the statute of repose.

JUSTICE NATHAN L. HECHT: It just strikes me that the problem is largely tactical, the plaintiff has not chosen to sue someone until the limitations has run. The defendant knows that. The defendant wants to add the person in and gives him an empty-chair argument, which he didn't have before. Maybe it won't do any good, but it's something. Now the plaintiff is trying to counter that by adding him back into the case, take that argument off the table, but it seems to me all of this can be cured by the trial judge if he just sets earlier deadlines and says you got add parties by this. You got to name responsible third parties by that and after this date, we're going to trial.

ATTORNEY R. BRENT COOPER: Right. Well the events of the trial where none of this happens within 60 days of trial. The scheduling order, I agree, Your Honor, would resolve a lot of this and it's open to the parties to move the plaintiff to move for the trial court to enter a scheduling order putting dates well in advance of the trial and well in advance of the statute of limitations if the plaintiff has, indeed, commenced their case.

JUSTICE PAUL W. GREEN: Well frequently cases are filed right bumping up on limitations to begin with.

ATTORNEY R. BRENT COOPER: Some are. Some are, Your Honor, without question, but many are commenced within a month of the event happening. So obviously there is a public policy in Texas to encourage people to file their lawsuits timely, file them early while the evidence is fresh, but, again, I don't think that that necessarily governs this Court's decision here today because I think what governs this Court's decision here today is the plain language of the statute.

JUSTICE EVA M. GUZMAN: Because if you want to get into policy arguments, there also seems to be some policy issues with allowing the designation, but then tolling, so--

ATTORNEY R. BRENT COOPER: Correct.

JUSTICE EVA M. GUZMAN: --so we really want to address this as a matter of policy.

ATTORNEY R. BRENT COOPER: Well, but if we're talking about the policy and enacting the statute, again, I believe that's a matter for the legislature as opposed to this Court. Whether or not this is a statute that should or should not be enacted, that's something the legislature holds hearings on, hears testimony, and makes a decision.

JUSTICE EVA M. GUZMAN: We at least know what Senator Ratliff thought and we know that sought it up a bit to designate it in writing.

ATTORNEY R. BRENT COOPER: Correct, but this Court has also addressed Senator Ratliff's comments in other context. In re Collins, in dealing with ex parte communications under 74.052, I believe, the affidavits, the argument was made in that case. Well, Senator Ratliff said on the record that none of the privileges were going to change by the enactment of Section 74 and this Court, in the In re Collins case said basically first we have cautioned that legislative history cannot override a statutes plain meanings and then the Court goes on to say and they were trying to argue that this Court ought to look at Senator Ratliff's--

CHIEF JUSTICE WALLACE B. JEFFERSON: Does the legislature itself say that we should look or may look at legislative history irrespective of the clarity in the text?

ATTORNEY R. BRENT COOPER: Well, Your Honor, I think you only get to the legislative history--

CHIEF JUSTICE WALLACE B. JEFFERSON: I'm asking does the government code say you can look at it irrespective of the textual clarity?

ATTORNEY R. BRENT COOPER: It talks, you go 311.025, I believe, is the statute cited by Counsel. It talks about in construing a statute. Now, again, you get to the question of what's construing a statute, is that--

CHIEF JUSTICE WALLACE B. JEFFERSON: Well you have to construe, that part of the statute too, it says you can look [inaudible].
ATTORNEY R. BRENT COOPER: Right, what does that mean construing? Does it mean is it subject to more than one interpretation? This Court, though, even in cases where 311.025 was referenced has said repeatedly three things. One is that if the statute is plain on its face, the inquiry stops there.

CHIEF JUSTICE WALLACE B. JEFFERSON: Except there are cases where the inquiry stops there and yet we cite the colloquy among senators and representatives.

ATTORNEY R. BRENT COOPER: Well you do and I think it's sort of to justify why we stopped our inquiry perhaps at that point in time. I don't know, but this Court, I mean, repeatedly, I mean you go to the Entergy case, you said that. You go in June of 2010, the Gonzalez v. Guilbot case. Courts must first look to the plain and common meaning of the words chosen. If the statutory language is unambiguous, the judges' inquiry is at an end. Second, this Court has held repeatedly that we're not going to allow legislative history to override a statute's plain words. The In re Collins case that I just cited for you earlier. The Galbraith case you said that and then, finally, the third rule, which I think is very critical is that if the legislature specifically provides a mechanism for resolving conflicts, that mechanism controls and there is no resort to the rules of construction. Justice Johnson's Texas Lottery Commission case two weeks ago said that we just, we don't care. We're not going to look at which statute was enacted first, which was enacted latter. [InaudibleOE

JUSTICE DON R. WILLETT: But Mr. Brees argues plain language too.

JUSTICE DEBRA H. LEHRMANN: Right.

ATTORNEY R. BRENT COOPER: The plain language, I'm sorry?

JUSTICE DON R. WILLETT: Mr. Brees argues plain language cuts in his favor.

ATTORNEY R. BRENT COOPER: Well, I disagree. First he argues there's no conflict and how you argue there is no conflict between 3304e and 74.251, which is an absolute two-year statute of limitations, I don't see that. I think there is a tremendous conflict and then the question is does, do the statutes contain their own con-

flict resolution provisions and I believe if you go to 74.002a, which says Chapter 74 controls to the extent of any conflict of any other law and 74.251a, which says notwithstanding any other law and this Court has interpreted that on at least I believe three or four other occasions, the conflict resolution is clearly built into the statute. Thank you.

CHIEF JUSTICE WALLACE B. JEFFERSON: Further questions? Thank you.

ATTORNEY R. BRENT COOPER: Thank you.

REBUTTAL ARGUMENT OF EUGENE W. BREES ON BEHALF OF PETITIONER

JUSTICE DON R. WILLETT: Just out of curiosity, why didn't your client add the other two doctors as co-defendants in the original suit?

ATTORNEY EUGENE W. BREES: I cannot address that because I was not trial counsel. I do not know what the thinking was. I do know, Your Honors, that it's easy to say responsible third parties or med-mal plaintiff should know who they're going to sue long before limitations expires, but that's not how it works in the real world. Sometimes clients don't come to you until late. You have to investigate cases. Your discovery is very limited early on in a case. You're not allowed to take depositions of the doctors or the defendants if you sued until an expert report is served. It just doesn't work that way in the real world and to cut off a med-mal plaintiff's opportunity to bring in a responsible third party named by a med-mal defendant outside two years would upset the apple cart of the check-and-balance system as Justice Simmons talked about and that is an important consideration for this Court. Government code 311023, which is the provision that allows this Court to look at legislative history also says one factor that may be considered is the consequences of a particular interpretation of the statute and the consequence of the interpretation by the San Antonio Court of Appeals is to upset this check-and-balance apple cart.

JUSTICE NATHAN L. HECHT: Do you agree that if there were time, a scheduling order could fix the problem?

ATTORNEY EUGENE W. BREES: Not necessarily. Again, if the lawsuit is filed let's say three months, four months, even six months before limitations expired, which is not all that unusual, given the limitations on discovery early on in these cases even the Court says responsible third parties must be designated within 60 days or 90 days, the plaintiff is not going to have the opportunity to do that, not having all the information in front of him.

JUSTICE NATHAN L. HECHT: Right, but you don't know of any legal impediment to the trial court having such a schedule.

ATTORNEY EUGENE W. BREES: No, none whatsoever. I think the Court does have that, or the trial court would have that discretion. Jurisdiction.

JUSTICE DALE WAINWRIGHT: Before you get to jurisdiction, it sounds like for purposes of this joinder question that the plaintiff's ability to recover from these joined healthcare providers is in the control of the defendant healthcare provider rather than under the control of the plaintiff, in this limited situation.

ATTORNEY EUGENE W. BREES: That's correct.

JUSTICE DALE WAINWRIGHT: What's the risk that that's going to create problems of gamesmanship? What's the risk that the defendant is in the case from the beginning is going to be able to arrange a special deal in order to allow under these circumstances additional healthcare providers to be brought in, maybe limit recov-

ery against me, maybe who knows what the possible scenarios could be? What's the risk there?

ATTORNEY EUGENE W. BREES: I think there is that risk and I think that is what was underlying Justice Simmons' concurring opinion that if the risk is that the defendant would be allowed to bring in these other parties, point the finger at the empty chair, but the plaintiff would not have the opportunity to having evaluated the merits of that designation of the responsible third party to actually bring in that RTP to benefit financially potentially from that RTP's responsibility.

JUSTICE DALE WAINWRIGHT: And I understand that. I'm talking about the possible different risk, maybe not at issue in this case where the original defendant who's looking at down the barrel of the gun saying I'm the only party here. I can arrange a special deal or limitation on recovery for me by joining additional doctors here that then the plaintiff can sue, but if I don't do that, the plaintiff can't sue him because it's past two years.

ATTORNEY EUGENE W. BREES: That is a possibility. Frankly, that is a possibility, but I think that the more concerning check and balance that has upset is the one discussed by Justice Simmons in the concurring opinion. The Brandal case on jurisdiction is Justice Duncan did not say that she was interpreting the statute to preclude remand of that case to the trial court to consider the 30-day extension of time. She didn't disagree with the majority opinion. She was just expressing some ruminations about whether the statute could be interpreted that way and if she had felt that way, she would have dissented. She wouldn't have concurred and yet this Court accepted jurisdiction in that case. There was minimal disagreement perhaps between her and the majority and perhaps in this case it could be said there's minimal disagreement between Justice Simmons and the majority, but there is sufficient disagreement to permit this Court to exercise jurisdiction. The lottery case, Texas Lottery case mentioned by Mr. Cooper is distinguishable from this case. Number one, in that case there was a clear conflict between the two statutes. Again, I stand on my point that there is no conflict here. Secondly, the Lottery Act did not have a conflict provision similar to 33002, that is that it would apply in tort cases and 33017, which the Court of Appeals relied on saying 33017 and essentially cancels out 74.002. So you had two separate conflict provisions that cancelled each other out. Now 33.017 is not directly on point, but it is analogous. It expresses legislature's intent that Chapter 33 should prevail and further in the Lottery Commission case, there was no evidence of legislative intent or history that the Lottery Act would prevail, unlike the clear legislative history here. The Galbraith case is also distinguishable.

JUSTICE DALE WAINWRIGHT: Clear, you got my attention when you said clear legislative history. We have the statement of one legislator. We'll regard it, but one legislator. What if the other 30 Senators said something, 29 Senators said something different or thought something different or had a different reason for voting the way they did than him.

ATTORNEY EUGENE W. BREES: There is no evidence in the record of that.

JUSTICE DALE WAINWRIGHT: But that points out the hazards of relying for legislative intent on the state ment of one or a few or some individual legislators.

ATTORNEY EUGENE W. BREES: I think that's why this Court has said we must cautiously look at legislative history and as I said before, I think even cautiously looking at it, there is absolutely no doubt in Senator Ratliff's mind, the floor-sponsored House Bill 4, what Chapter 33 meant.

JUSTICE EVA M. GUZMAN: And is there any particular significance to the fact that Senator Hinojosa moved to have it reduced to writing and it was by unanimous consent in terms of what the others present were thinking about the statements?

ATTORNEY EUGENE W. BREES: I think that is further evidence that Senator Ratliff's statement was consistent with the intent of the entire legislature or at least the entire Senate.

CHIEF JUSTICE WALLACE B. JEFFERSON: Are there any further questions? Thank you, Mr. Brees. Coun sel, the cause is submitted and the Court will take a brief recess.

MARSHAL: All rise.

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