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COURT OF APPEALS
STATE OF NEW YORK

WALTON,

Appellant,

-against-

No. 67

STRONG MEMORIAL HOSPITAL, et al.,

Respondents.

20 Eagle Street
Albany, New York 12207
March 26, 2015

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY

Appearances:

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Karen Schiffmiller
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Number 67, Walton v.
2 Strong Memorial.

3 Counsel, would you like any rebuttal time?

4 MR. MARKARIAN: One minute, please, Your
5 Honor.

6 CHIEF JUDGE LIPPMAN: One minute, sure. Go
7 ahead.

8 MR. MARKARIAN: May it please the court, my
9 name is Ed Markarian. I'm the attorney for the
10 plaintiff on this appeal, which involves CPLR 214-a,
11 which provides the extension of the statute of
12 limitations for foreign - - - for foreign objects.
13 It says three things are not foreign objects:
14 chemical compounds, fixation devices, and prosthetic
15 - - -

16 CHIEF JUDGE LIPPMAN: Why is this a - - -
17 in this particular situation, why is it a fixation
18 device?

19 MR. MARKARIAN: It should not be a fixation
20 device, Your Honor. It is in the heart. It's not
21 fixating anything.

22 CHIEF JUDGE LIPPMAN: Oh, I'm sorry, all
23 right. Why is it a foreign object?

24 MR. MARKARIAN: It's a foreign object, Your
25 Honor. Foreign objects should be defined as

1 something that's not naturally in the patient, that
2 was put there as a result of a medical procedure,
3 that is not like a pacemaker or an IUD, which is
4 there - - - that's why you put it in there.

5 CHIEF JUDGE LIPPMAN: What about LaBarbera?

6 MR. MARKARIAN: LaBarbera says - - -
7 LaBarbera defined foreign object - - - it stated that
8 a foreign object is an object intentionally placed in
9 the patient for a continuing treatment purpose.
10 That's what LaBarbera says. We're asking this court
11 to refine that statement.

12 CHIEF JUDGE LIPPMAN: Okay, so - - - so you
13 agree that there is - - - this is very similar - - -
14 our situation is very similar to that case?

15 MR. MARKARIAN: It's not similar to that
16 case on the facts, Your Honor.

17 CHIEF JUDGE LIPPMAN: No, no, no, but that
18 holding could well be viewed as controlling this
19 holding - - -

20 MR. MARKARIAN: We are asking - - -

21 CHIEF JUDGE LIPPMAN: - - - if we don't
22 make some refinements?

23 MR. MARKARIAN: That's correct, Your Honor.
24 We need to refine the analysis.

25 JUDGE FAHEY: But the difficulty is - - -

1 an object's put in the body and it's this continuing
2 treatment function, I think, is - - - is the real
3 analytical problem - - -

4 MR. MARKARIAN: Correct.

5 JUDGE FAHEY: - - - in the whole thing
6 here. Of course, this was put in for a continuing
7 treatment for a three-day period - - -

8 MR. MARKARIAN: Yes, Your Honor.

9 JUDGE FAHEY: - - - but it ended up being
10 twenty-two years before it was discovered and dealt
11 with. But - - - but it's - - - it's a - - - it is -
12 - - it would be an alteration of the law, though - -
13 -

14 MR. MARKARIAN: It would.

15 JUDGE FAHEY: - - - in some degree or
16 certainly a refinement the way Judge Lippman put it.

17 MR. MARKARIAN: Yes, Your Honor.

18 JUDGE FAHEY: How - - - how would you
19 address that?

20 MR. MARKARIAN: To - - - to be totally
21 candid, Your Honor, I think the best way to
22 understand it is to understand why we have the
23 problem. And that dates back to the statement in
24 Rockefeller which really came out of a statement in
25 Rodriguez, and what the court is doing there is, I

1 call it, the pacemaker problem. The court looks at
2 the statute. It says foreign object cannot be three
3 things. It only says three things aren't foreign
4 objects. Those three things are chemical compounds,
5 fixation devices, and prosthetic aids and devices.
6 So you'll see in Rodriguez the court struggling with
7 that, because which of those three things would be
8 the IUD? Would be the pacemaker?

9 So what the court did, it alluded to it in
10 Rodriguez, and then it did it expressly in
11 Rockefeller; it said, we're going to define fixation
12 device to cover the pacemaker, to cover the IUD, so
13 it gives this very broad definition.

14 JUDGE FAHEY: So it's really a temporal
15 problem then. It's - - - because defendants rely on
16 the case that says if something's intentionally
17 planted, it's a foreign device, so and this obviously
18 was done intentionally. It's - - - and - - - and it
19 holds something in place, but it was only meant to be
20 there for a short period of time, so it's
21 analytically a temporal problem then.

22 MR. MARKARIAN: I think what we need to do
23 is reevaluate whether it was correct to say fixation
24 device should cover the pacemaker.

25 JUDGE FAHEY: Well - - -

1 MR. MARKARIAN: It shouldn't, because
2 fixation device is a technical medical term.

3 CHIEF JUDGE LIPPMAN: Is your - - - is - -
4 -

5 JUDGE READ: Well, how should it be
6 defined? Well, what - - - what should we do? How
7 should we - - -

8 MR. MARKARIAN: Fixation device should be
9 given its medical definition. In none of the prior
10 cases, did anyone have to talk about the medical - -
11 -

12 JUDGE ABDUS-SALAAM: And where would we get
13 that medical definition if - - -

14 MR. MARKARIAN: Med - - -

15 JUDGE ABDUS-SALAAM: - - - do doctors agree
16 on a definition - - -

17 MR. MARKARIAN: Yes. The defense - - -

18 JUDGE ABDUS-SALAAM: - - - for a fixation
19 device?

20 MR. MARKARIAN: There are two definitions
21 we've proposed. The defense agrees with one of them.
22 And that is a fixation device is a device which binds
23 or supports body tissues or structures.

24 CHIEF JUDGE LIPPMAN: Is it really what
25 you're up against here that - - - that by a common

1 meaning, by just common sense, foreign object, but
2 yet you have a very well-settled law, including the
3 case we talked about, that seems to say it isn't. So
4 is there really argument that by any standard,
5 putting as - - - standard, putting aside technical
6 definitions, this a foreign object, but you have
7 cases that say it really can't - - - it shouldn't be
8 considered as such.

9 MR. MARKARIAN: We need - - -

10 CHIEF JUDGE LIPPMAN: Isn't that what this
11 is about?

12 MR. MARKARIAN: This is what - - -

13 CHIEF JUDGE LIPPMAN: You want us to
14 comport the facts in this case with common sense and
15 a normal meaning as opposed to the development of the
16 law, which we agree has gone from one thing to the
17 other, the IUD, the - - - the, you know, the suture,
18 the - - - all the different variations - - - I think
19 the packing in the teeth, and we're to the point
20 where you're coming to us and saying, from an equity
21 perspective, well, you know, this plaintiff suffered,
22 it's a foreign object, and I understand the law is
23 derived in a certain way, but we ought to - - - as
24 you say - - - whatever you want to call it, retool
25 the law, refine the law, to cover a situation, which

1 again, by a normal meaning, or a common sense
2 meaning, this is a foreign object?

3 MR. MARKARIAN: Yes, Your Honor.

4 CHIEF JUDGE LIPPMAN: Okay.

5 JUDGE PIGOTT: So you have a hip
6 replacement, and now you've had it for sixteen years,
7 and you - - - and unbeknownst to you a piece of it
8 broke off, and it causes you pain, and it - - - and
9 you go in to have it removed, and you say, ah-ha, you
10 know, this - - - this - - - this gives me a medical
11 malpractice case against the doctor who put this in,
12 because this - - - this foreign object here is what
13 caused my pain and that's the - - - the notice I got,
14 and therefore I have - - - I have a lawsuit.

15 MR. MARKARIAN: No, Your Honor, because
16 that's a fixation device or a prosthesis, and those
17 are expressly excluded. We're - - -

18 JUDGE READ: Those are things that failed?
19 Are you making some distinction between a - - - a
20 device that has a therapeutic process that - - - that
21 failed and saying this is different?

22 MR. MARKARIAN: If it went in there - - -
23 if it was - - - that was why you had the operation,
24 to put the pacemaker in and it fails, then it's not a
25 foreign object.

1 JUDGE READ: Well, what about Judge - - -

2 MR. MARKARIAN: This court has held that.

3 JUDGE READ: What about Judge Pigott's
4 hypothetical?

5 MR. MARKARIAN: That went in as a
6 prosthesis or a fixation device. It can't - - - once
7 it goes in, I'm not asking the court to change the
8 rule. If it goes in as one of those things - - -

9 JUDGE PIGOTT: Like a polyvinyl catheter?

10 MR. MARKARIAN: A polyvinyl catheter is not
11 a fixation device. It doesn't fixate anything. It
12 doesn't support anything.

13 CHIEF JUDGE LIPPMAN: So - - - so how do
14 you support the idea that - - - that I suggested, you
15 know, common sense says it's a foreign - - - what's
16 the distinction I think - - -

17 MR. MARKARIAN: Here is - - -

18 CHIEF JUDGE LIPPMAN: - - - what the
19 questions are - - - are - - - let's say, I think you
20 think, half this panel or the - - - thinks, yeah,
21 it's a foreign object. But then when you look at
22 these cases, how do you distinguish these other - - -
23 what's - - - what's the defining criteria that tells
24 us, in this case it's so clearly a foreign object.

25 MR. MARKARIAN: This court needs to take

1 back its definition of a fixation device. It needs
2 to take it back. It was not - - - this court was not
3 asked in any of those prior cases to look at the
4 technical definition. What it was trying to do with
5 fixation devices cover the pacemaker, and it did, but
6 that's not what a fixation device is. It has a
7 narrow, technical meaning. So we ask that you take
8 back the definition, give fixation device - - -

9 CHIEF JUDGE LIPPMAN: So once you get the
10 right definition for that, then you know what a
11 foreign object is.

12 MR. MARKARIAN: No. Now you have to define
13 foreign object. And that's - - -

14 CHIEF JUDGE LIPPMAN: Okay, so - - - so
15 once you define the first part right, how are you
16 defining foreign object?

17 MR. MARKARIAN: Foreign object, four steps.
18 The first step is, is it something that would
19 naturally be in the body? Second step is, did a
20 doctor put it there?

21 CHIEF JUDGE LIPPMAN: Well, those two are
22 relatively easy. What's the third and fourth? Go -
23 - -

24 MR. MARKARIAN: Third step is the hard one.
25 The third step is the pacemaker and the IUD. We need

1 that criteria to say those aren't foreign objects.
2 And you can say this. And you can look at some of
3 the languages in Rodriguez; you're talking about
4 purpose of the IUD in Rodriguez. And that's what the
5 third step should be. If the purpose of putting it
6 in was the purpose of the operation, the patient
7 wanted it, the patient knows it's there, it's not
8 latent. It's patent. The patient knows about it,
9 then it's not foreign.

10 CHIEF JUDGE LIPPMAN: Okay, what's the
11 fourth?

12 MR. MARKARIAN: The fourth step are just
13 are just the statutory exclusions.

14 CHIEF JUDGE LIPPMAN: Okay.

15 MR. MARKARIAN: And if you do that, I
16 think, this case, the polyvinyl catheter is a foreign
17 object and - - -

18 JUDGE READ: And that's because it fails
19 your third step?

20 MR. MARKARIAN: That's co - - - it's - - -
21 it fails all of the steps. It is not a pacemaker.
22 The patient didn't go in asking to have the polyvinyl
23 catheter in his heart.

24 CHIEF JUDGE LIPPMAN: To put that
25 permanently in your body, yeah.

1 MR. MARKARIAN: And it was latent. He
2 wouldn't know it was there, unlike the pacemaker.
3 And - - - and we ask that that be the standard.

4 CHIEF JUDGE LIPPMAN: Okay, counsel.

5 MR. MARKARIAN: Thank you very much.

6 CHIEF JUDGE LIPPMAN: So you'll have your
7 rebuttal. Let's hear from your adversary.

8 MS. GOLDBERG: May it please the court, my
9 name is Barbara Goldberg. I represent the
10 defendants.

11 CHIEF JUDGE LIPPMAN: Counsel, why doesn't
12 his four-part test make sense to you?

13 MS. GOLDBERG: Your Honor, it doesn't make
14 sense because it doesn't cover the myriad of medical
15 devices, protocols and procedures that this court
16 recognized in the LaBarbera case.

17 CHIEF JUDGE LIPPMAN: No, no, I understand
18 that, what we've said up until now. Why doesn't the
19 test that he - - - he agrees that we have to refine,
20 change, fine-tune what we said before. Why doesn't
21 what he's suggesting make sense as a test?

22 MS. GOLDBERG: Because I don't think that
23 the court can draw a meaningful, analytical
24 distinction between a device such as a pacemaker or
25 an IUD, which, as he puts it, provides the fix, and

1 another type of device, which is also intentionally
2 inserted, which enables essential medical treatment
3 to be provided.

4 CHIEF JUDGE LIPPMAN: Yeah, but he says one
5 is designed to be permanent and you know it's there,
6 and it should be there, and - - - and that in your
7 situation it's not. That's the distinction he's
8 making.

9 MS. GOLDBERG: Your Honor, I think that,
10 again, I'm going back to LaBarbera, I - - -

11 CHIEF JUDGE LIPPMAN: No, no, no, why isn't
12 this a valid rule? He's saying change that or at
13 least refine it. Why isn't what he's saying logical
14 and fair? That's - - - that's my question.

15 MS. GOLDBERG: Because I think that his
16 definition, he is going to end up greatly expanding
17 the definition of foreign object. He's going to
18 overlook the - - -

19 JUDGE READ: Well, he is. I think that's
20 clear, but I asked the question's what's - - -

21 MS. GOLDBERG: - - - and I think that
22 that's contrary - - -

23 JUDGE READ: - - - what's wrong with that,
24 other than the fact that obviously we're being asked
25 to, at least partially, overrule our case law?

1 MS. GOLDBERG: Your Honor, going back to
2 the Flanagan case and in the three other cases where
3 the court has addressed this issue -- the Rodriguez
4 case, the Rockefeller case, and the LaBarbera case --
5 the court has been very, very much aware of the
6 concept of a statute of limitations as a statute - -
7 -

8 JUDGE PIGOTT: What struck me - - -

9 MS. GOLDBERG: - - - of repose.

10 JUDGE PIGOTT: - - - what struck me in this
11 case, though, in - - - in LaBarbera, they made the
12 point that the "foreign object" is one that is
13 negligently left in a parent - - - patient's body
14 without any intended continuing treatment purpose,
15 which is what this sounds like.

16 And they distinguish the - - - the
17 LaBarbera case saying, this stent was placed in the
18 plaintiff's nose, was implanted with an intentional
19 continuing treatment objective. It cannot be said to
20 have been "left" in the plaintiff's nose. This
21 clearly was left in his body, I think, with the
22 assumption that it wouldn't cause any harm, but that
23 it certainly wasn't left there for any medical
24 purpose, correct?

25 MS. GOLDBERG: Well, it - - - initially it

1 was, Your Honor, and his own expert - - -

2 JUDGE PIGOTT: No, initially it was, but
3 I'm saying left in. I mean, I know it was put it for
4 a purpose, but after three days they were - - - they
5 were going to take it out and they didn't.

6 MS. GOLDBERG: And it was the same thing in
7 LaBarbera. They were supposed to take the stent out
8 after ten days, and they didn't. And at that point,
9 the stent did not serve - - - serve any continuing
10 treatment function. It - - -

11 JUDGE PIGOTT: Does it make a difference,
12 though, that this was only a part of it? In other
13 words, they - - - they - - - they intentionally - - -
14 they clearly wanted to take this out, I mean, and
15 then they didn't get it all, so they said, well,
16 let's leave it.

17 MS. GOLDBERG: No, Your Honor, I don't
18 think that does make a difference, because the court
19 has said that once something is intentionally placed
20 in the patient's body, the negligent failure to
21 remove it later on doesn't transform it into a
22 foreign object. And I don't think that any
23 meaningful distinction can be made between a part of
24 something that remains in a patient, or whether the
25 entire object remains in the patient.

1 JUDGE PIGOTT: If - - - if you left a
2 sponge in, isn't that - - -

3 MS. GOLDBERG: Well, Your Honor, that's
4 very different, and that's something else that I want
5 to emphasize in terms of the definition of a foreign
6 object. The foreign object at issue in the Flanagan
7 case was surgical clamps. And ever since Flanagan,
8 not only this court, but the Governor's Program Bill
9 in connection with the enactment of CPLR - - - CPLR
10 Section 214-a, it has emphasized a very, very narrow
11 definition of foreign object of this type of object
12 that serves a temporary function during the surgery
13 and has absolutely no function after the surgery.

14 In Rockefeller, for instance, the court
15 referred to objects such as surgical clamps,
16 scalpels, and sponges are introduced into the
17 patient's body to serve a temporary medical function
18 for the duration of the surgery. In LaBe - - -
19 LaBarbera, the court referred to the consistent
20 restraint against opening up the foreign object
21 exception.

22 JUDGE STEIN: Well, what's the logic,
23 though, of - - - of saying that that's a foreign
24 object because it's - - - it's intended to be there
25 only for the duration of the surgery, versus the case

1 in which it was intended to be there only for three
2 days, and - - - and then they went in to get it, but
3 left it there. What - - - what's - - - what's the
4 difference?

5 MS. GOLDBERG: Your Honor, the difference
6 is that initially it was put in to serve an essential
7 medical function - - -

8 JUDGE STEIN: Well, the same with the
9 catheter here - - -

10 JUDGE READ: Well, the sponge was used too.

11 JUDGE STEIN: Yeah.

12 JUDGE READ: The sponge was initially - - -

13 JUDGE STEIN: Right, and the sponge.

14 JUDGE READ: - - - serving - - -

15 MS. GOLDBERG: Yes.

16 JUDGE READ: - - - a purpose during the
17 surgery.

18 MS. GOLDBERG: But - - - but this is after
19 the surgery, and the court has consistently drawn a
20 distinction between something that's limited to the
21 duration of the surgery and something that's put in -
22 - -

23 JUDGE STEIN: But - - - but what's the
24 purpose - - -

25 MS. GOLDBERG: - - - for a continuing

1 purpose - - -

2 JUDGE STEIN: - - - what's the purpose for
3 that distinction? That's my question.

4 MS. GOLDBERG: I'm - - - I'm sorry, Your
5 Honor?

6 JUDGE STEIN: What is the purpose of that
7 distinction? Only to limit the number of cases, or
8 what is the purpose of that?

9 MS. GOLDBERG: I think that it is a bright-
10 line distinction that enables the court to determine
11 what is a fixation device and what is a foreign
12 object.

13 JUDGE FAHEY: But you see going - - - going
14 back to the question we had before, just to follow up
15 with Judge Stein, is the temporal problem, you know,
16 it's - - - is it - - - is - - - one day is okay.
17 Three days, you're saying, no, that's not okay. And
18 - - - and it's - - - I'm trying to think of a legal
19 rule that we could apply that people would know how
20 to reasonably apply, and it's - - - it's hard for me
21 to conceive of one in this context.

22 MS. GOLDBERG: Your Honor, I think the
23 court has already said what the legal rule is, and
24 the court has said - - -

25 JUDGE FAHEY: So you're saying, leave it.

1 MS. GOLDBERG: Yes. I'm saying leave it.

2 JUDGE FAHEY: One day is okay; three days
3 is not okay.

4 MS. GOLDBERG: The key fe - - - the court
5 has already said that the key feature is the
6 uncontroverted protocol of insertion - - -

7 CHIEF JUDGE LIPPMAN: Counsel, but - - -
8 but the question that Judge Stein asked you was,
9 what's the logic of that, other than to limit cases?

10 MS. GOLDBERG: The logic of - - -

11 CHIEF JUDGE LIPPMAN: From a - - - from a
12 policy of fairness perspective, what is the logic
13 between the one day and the three day or whatever it
14 is?

15 MS. GOLDBERG: Because the logic, Your
16 Honor, is that it enables us to determine what is a
17 fixation device and what is - - -

18 CHIEF JUDGE LIPPMAN: I - - - I understand
19 enables us to limit cases. I get that. And that's
20 what you're saying. The question is, why is that a
21 better rule, if our purpose is to deliver justice?
22 Why is it more fair? Why is it more just to have
23 that rule? Not because - - - I understand that you
24 could do it, and therefore less cases, you can - - -
25 plaintiffs can win on. I get that. Why is it

1 fairer? What's better about it?

2 MS. GOLDBERG: Your Honor, fairness is not
3 always the dispositive consideration.

4 CHIEF JUDGE LIPPMAN: I understand that.
5 I'm asking you on a fairness basis. Tell us why it's
6 more fair? Why it's more just? We are in the
7 justice business. Tell us.

8 MS. GOLDBERG: Your Honor, it's fair
9 because we also have to consider that this type of -
10 - - this type of rule that my adversary is proposing,
11 it's going to allow cases to be brought fifteen,
12 twenty, twenty-five, fifty years after the procedure
13 at issue. And that was something that the - - -

14 JUDGE ABDUS-SALAAM: You're advocating a
15 statute of repose, which we already have. Counsel, I
16 - - - I wonder, your adversary said that there were
17 two definitions - - - two possible definitions for a
18 fixation device, and you agreed with one, not the
19 other. Which one did you agree with and which one
20 did you not?

21 MS. GOLDBERG: Your Honor, I'm actually
22 advocating for a very broad definition of fixation
23 device. What - - - I'm saying that a fixation device
24 is a device that not only itself provides the fix, as
25 he puts it, as an IUD or a pacemaker might, but any

1 medical device which is intentionally inserted in a
2 patient to enable essential medical treatment to be
3 provided.

4 And in this case, his own ex - - - his own
5 expert made the point that these catheters were
6 essential to treatment. It's at page 345 of the
7 record. These catheters are placed to permit
8 monitoring of arterial and venous pressures for
9 management of fluid replacement, blood pressure and
10 prevention and/or treatment of congestive heart
11 failure.

12 JUDGE PIGOTT: So - - - but they're not in
13 permanently. I - - - I think that where I - - - I
14 lose - - - I lose that argument. In other words, I
15 get that, you know, it was - - - it was necessary,
16 but if you leave a sponge in, a clamp in, bad thing.
17 If you leave - - -

18 MS. GOLDBERG: But Your - - - Your Honor,
19 there are other types of devices which are supposed
20 to be left in for a temporary period also.

21 JUDGE PIGOTT: Right.

22 MS. GOLDBERG: This - - -

23 JUDGE PIGOTT: But if you put this in, even
24 though it's not supposed to be there, there's a
25 conscious decision to leave this - - - we won't call

1 it a foreign object in this patient, and say, let's
2 see what happens, probably nothing, unfortunately,
3 something. But we're saying, well - - -

4 MS. GOLDBERG: At Your - - - Your Honor,
5 the minute the decision is made to leave it in the
6 patient, it's not the clamp situation. Nobody
7 deliberately decides to leave a clamp in a patient.
8 Here, it appears from that nurse's - - -

9 JUDGE PIGOTT: You're saying because they
10 do it intentionally, it's okay.

11 MS. GOLDBERG: No, Your Honor, I'm - - -
12 I'm - - -

13 JUDGE PIGOTT: I think of - - - I think of
14 things like when they - - - when they do fixations
15 now with - - - with broken bones and things like - -
16 - there's an awful like of fixation devices in the
17 medical field. Now, if they wander off, that's what
18 I was - - - I was - - - I was asking your - - - your
19 adversary about something that wanders off from a hip
20 or an elbow or something like that, that's different,
21 it seems to me. I - - - I - - - I just wonder why
22 knowing - - - knowing - - - that this does not belong
23 in the patient, you say, well, if we called our
24 lawyer, he'd say it's a fixation device, so the hell
25 with the patient; we can leave it in; it's not big

1 deal. But if the lawyer says you better take it out,
2 because it's a foreign object, well, then we better
3 go back in and take it out.

4 MS. GOLDBERG: Well, Your Honor, I - - - I
5 - - -

6 JUDGE PIGOTT: That's not the way we ought
7 to be practicing medicine.

8 MS. GOLDBERG: I think the - - - the
9 importance of - - - of that is that the minute
10 medical discretion is involved, the minute medical
11 judgment is involved, it takes it completely out of
12 the foreign object rule, because it's a medical - - -

13 CHIEF JUDGE LIPPMAN: Should the - - -
14 should the patient be told that you've exercised that
15 discretion to leave it there?

16 MS. GOLDBERG: Even assuming the patient
17 should be told, it's still - - - it's not a foreign
18 object situation.

19 JUDGE PIGOTT: You should be told, but you
20 don't, and then you get a stroke from it. Still
21 okay?

22 MS. GOLDBERG: We don't even know that in
23 fact - - -

24 CHIEF JUDGE LIPPMAN: Assume that - - -
25 assume that's what happened.

1 MS. GOLDBERG: It's - - - it's - - - that -
2 - - in that hypothetical, Your Honor, I'm not saying
3 that that's what happened here. In that
4 hypothetical, it's medical malpractice. It's an
5 exercise of judgment. It may be bad judgment. But
6 it's medical malpractice. It's not a foreign object
7 in the sense that a clamp is a foreign object and the
8 accrual rule applies unless and until the legislature
9 adopts the recovery rule.

10 CHIEF JUDGE LIPPMAN: Okay, counsel. Let's
11 hear from your - - -

12 JUDGE RIVERA: Can I - - - I'm sorry - - -
13 let me - - -

14 CHIEF JUDGE LIPPMAN: I'm sorry, Judge
15 Rivera.

16 JUDGE RIVERA: Yeah, I'm sorry. Just go
17 back to the question of limiting cases. Is that - -
18 - that goal of limiting cases le - - - a legislative
19 goal or is it a judicial gloss on the statute?

20 MS. GOLDBERG: I think that it is both,
21 Your Honor, because it was in the Governor's Program
22 Bill in connection with the enactment of Section
23 214-a. And this court has referred to it in
24 Flanagan. This court has referred to it in
25 Goldsmith. This court has referred to it in many,

1 many other cases. So I think that that is definitely
2 a concern. And as far back as Flanagan, the court
3 talked about the prejudice to the defendant when
4 memories have faded, witnesses are no longer
5 available, necessary evidence may no longer be
6 available.

7 CHIEF JUDGE LIPPMAN: Okay, counsel.
8 Thanks, counsel.

9 MS. GOLDBERG: Thank you, Your Honors.

10 CHIEF JUDGE LIPPMAN: Counsel, rebuttal.

11 MR. MARKARIAN: Just three points, Your
12 Honors. One, they did agree with the medical
13 dictionary definition of fixation device. They don't
14 want that definition. They want the broader
15 definition from the case law, but they agreed with
16 the medical definition.

17 Regarding legislative inaction, Your
18 Honors, we're not asking this court to reinterpret
19 any legislative words here. We're asking this court
20 to reinterpret its own language, and I think that
21 makes it different from a legislative inaction
22 standpoint.

23 And regarding temporal, there's nothing in
24 the statute about time; there's nothing in Flanagan
25 about time. It's - - -

1 JUDGE FAHEY: But this case does present us
2 with that problem. That's - - - it - - -

3 MR. MARKARIAN: My position, Your Honors,
4 is that time doesn't matter. It shouldn't be part of
5 the criteria. It's whether it's a fixation device.
6 And it's not. It's not naturally in the body; a
7 doctor put it there, and it's not like a pacemaker.

8 JUDGE FAHEY: Okay.

9 CHIEF JUDGE LIPPMAN: Okay, thanks.

10 MR. MARKARIAN: Thank you, Your Honors.

11 CHIEF JUDGE LIPPMAN: Thank you both.

12 Appreciate it.

13 (Court is adjourned)

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C E R T I F I C A T I O N

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of Walton v. Strong Memorial Hospital, No. 67, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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