

No. 16-0418

In the
SUPREME COURT OF TEXAS

**Sheri Durham and Denise Jenkins, as Administrator
of the Estate of Jessica Haley Durham,**
Petitioners,

v.

Children's Medical Center of Dallas *et al.*,
Respondents.

On Appeal from the Fifth District Court of Appeals at Dallas, Texas, No. 05-14-01464-CV and County Court at Law No. 4, Dallas County, Texas,
Trial Court No. CC-11-01231-D, Hon. Ken Tapscott, Presiding

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FOR THE CONVENIENCE OF THE COURT

The following abbreviations are used in this brief:

Chapter 74	Chapter 74 of the Texas Civil Practice and Remedies Code. This statute governs health care liability claims in Texas, and its statute of limitations provision is the subject of this appeal. <i>See</i> Tex. Civ. Prac. & Rem. Code § 74.251(a) (West 2016).
Durham	Sheri Durham—Jessica’s mom, who asserted a wrongful death claim in this lawsuit.
Jenkins	Denise Jenkins—the administrator the Estate of Jessica Haley Durham, who asserted a survival claim in this lawsuit.
Jessica	Jessica Haley Durham—the patient treated by Respondents when she was 12. She died at the age of 15. Because she is deceased, she asserted no claims in this lawsuit, and no claims are asserted on her behalf.
Petitioners	Collectively Durham and Jenkins. Jessica is not a petitioner, as no claims are or can be asserted on her behalf.
Respondents	Collectively the health care providers who treated Jessica in Dallas when she was 12. They are referred to by their last name only after their first reference in the brief.

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STATEMENT OF THE CASE

Nature of the Case:	This health care liability claim stems from the death of Jessica, a 15-year old. CR 139 (showing November 16, 1993 as Jessica's date of birth). Respondents treated Jessica when she was 12, and she died well over two years after that care. CR 23-26 (care in August 2006 and death in December 2008). In February 2011—four years after the treatment in questions—Petitioners brought claims for wrongful death and survival related to Jessica's death. CR 72-79, 80-87, 88-197, 198-253, 2Supp.CR 16-29.
Trial Court Proceedings:	Respondents moved for summary judgment based on expiration of the statute of limitations and lack of evidence supporting a defense to the limitations bar. CR 72-79, 80-87, 88-197, 198-253, 254-567, 2Supp.CR 16-29. Jessica's mother, Sheri Durham, and the administrator of Jessica's estate, Denise Jenkins, responded. CR 568-812. Respondents objected to certain evidence and replied. CR 813-817, 818-823, 824-830, 831-838, 839-848, 849-854.
Trial Court's Judgment:	The trial court—County Court at Law No. 4, Dallas County, Texas, the Honorable Ken Tapscott, presiding—sustained certain objections to Petitioners' summary judgment evidence and denied others. CR 855-56, 856-59, 864-66, 867-68. The trial court then granted all the summary judgment motions. CR 860-61, 862, 863, 869. The trial court later denied Petitioners' request for a new trial. CR 912. An appeal followed. CR 6-8.

Court of Appeals' Opinion:	The Dallas Court of Appeals affirmed the trial court's summary judgment. <i>Durham v. Children's Med. Ctr. of Dallas</i>, 488 S.W.3d 485, 489, 498 (Tex. App.—Dallas 2016, pet. filed). Justice Whitehill wrote the unanimous opinion for the panel, which also included Justices Myers and Evans. <i>Id.</i>

STATEMENT OF JURISDICTION

The issues in this appeal turn on the straightforward application of, but not interpretation of, section 74.251(a) of the Texas Civil Practice and Remedies Code. This provision provides a strict two-year statute of limitations that is not tolled or unconstitutional when applied to the facts of this case. Accordingly, Texas Government Code section 22.001(a)(3) (West 2016) does not support the Court exercising jurisdiction as a case “involving the construction or validity” of the statute.

The other provisions of section 22.001 do not support the Court exercising jurisdiction, either. First, the justices in the Dallas Court of Appeals did not disagree on any question before the court. *See Durham v. Children’s Med. Ctr. of Dallas*, 488 S.W.3d 485, 489, 498 (Tex. App.—Dallas 2016, pet. filed); *see also* Tex. Gov’t Code § 22.001(a)(2).

Second, Texas law has no conflicting opinions regarding the statute of limitations as applied to wrongful death and survival claims arising from the death of a minor who is older than 12 years old both at the time of the treatment at issue and when she dies. Instead, Texas law is clear that section 74.251’s statute of limitations runs from the date of treatment, and that the open courts provision of the Texas Constitution does not apply to statutory claims like those asserted by Petitioners. *Compare Bala v.*

Maxwell, 909 S.W.2d 889, 892-93 (Tex. 1995) (two-year statute of limitations runs from date of treatment if ascertainable), *Fort Worth Osteopathic Hosp., Inc. v. Reese*, 148 S.W.3d 94, 96 (Tex. 2004) (common-law claimants' claims are extinguished upon their death), *Diaz v. Westphal*, 941 S.W.2d 96, 100-01 (Tex. 1997) (open courts not applicable to statutory causes of action like wrongful death and survival claims), and *Baptist Mem. Hosp. Sys. v. Arredondo*, 922 S.W.2d 120 (Tex. 1996) (same), with *Weiner v. Wasson*, 900 S.W.2d 316 (Tex. 1995), *Neagle v. Nelson*, 685 S.W.2d 11 (Tex. 1985), *Nelson v. Krusen*, 678 S.W.2d 918 (Tex. 1984), *Sax v. Votteler*, 648 S.W.2d 661 (Tex. 1983), and *Adams v. Gottwald*, 179 S.W.3d 101 (Tex. App.—San Antonio 2005, pet. denied) (open courts applied to *living* adults' or minors' common-law claims for negligence). It is based on this well-established law that the Dallas Court of Appeals affirmed the trial court's take-nothing judgment. *Durham*, 488 S.W.3d at 489-95.

Further, cases applying the tolling provision of section 74.251(a) regarding minors under the age of 12 do not apply here because the minor was over the age of 12 both when the treatment at issue was provided and when she died. See, e.g., *Gross v. Kahanek*, 3 S.W.3d 518, 519 (Tex. 1999) (statutory tolling for a 6- or 7-year old); *Brown v. Shwartz*, 968 S.W.2d

331, 333-34 (Tex. 1998) (statutory tolling for a minor whose claims arose before he was born, but the tolling no longer applied once the child died).

Third, the provisions of section 22.001(a)(4) or (5) do not apply. Nor did the trial court or court of appeals commit any error, much less an error of such importance to the jurisprudence of this State that it must be corrected. Tex. Gov't Code § 22.001(a)(6). Accordingly, the Court should decline to exercise jurisdiction and deny the Petition for Review.

RESPONDENTS' RESPONSIVE ISSUES

Issue 1: Petitioners assert statutory wrongful death and survival actions that are health care liability claims governed by Chapter 74 of the Texas Civil Practice and Remedies Code. The claims arise from the death of a 15-year old, who was 12 when the care at issue was provided.

Was summary judgment proper on Respondents' section 74.251 limitations defense when:

- a.) Petitioners filed their statutory wrongful death and survival claims more than two years after the last date of treatment at issue;
- b.) the decedent-patient was 12 years or older at the time of the treatment at issue and at the time of death;
- c.) Petitioners failed to exercise due diligence in filing their claims; and
- d.) the statute of repose was not raised in the trial court or court of appeals, and in any event the claims are barred by limitations?

Issue 2: The doctrine of fraudulent concealment is an affirmative defense to a limitations bar which, if established, may save time-barred claims.

Did Petitioners carry their burden to create a fact issue on each element of their fraudulent concealment defense when there was no evidence that each Respondent-health care provider:

- (a) committed a tort,
- (b) knew a wrong occurred,
- (c) had a fixed purpose to conceal the wrong, and
- (d) concealed the wrong from the patient through deception?

INTRODUCTION

United States Supreme Court Justice Oliver Wendell Holmes, Jr. once lamented, “I have said to my brethren many times that I hate justice, which means that I know if a man begins talk about that, for one reason or another he is shirking thinking in legal terms.” *The Mind and Faith of Justice Holmes* 435 (M. Lerner ed. 1943). Petitioners’ Brief on the Merits shirks thinking in legal terms in the name of feigned notions of justice. But courts should not rewrite the law merely because a result may seem unfair.

In crying unfairness, Petitioners ignore two time-honored maxims well-reflected in Chapter 74 and this Court’s holdings as applied to wrongful death and survival actions. First, Chapter 74 contains a hard and fast deadline to file claims within two years of the treatment at issue, with no discovery rule. At most, a plaintiff has a “reasonable time” to discover the injury, requiring a plaintiff to exercise due diligence in filing suit. Second, the open courts provision applies only to common-law causes of action; it does not apply to statutory wrongful death and survival actions, which did not exist at common law. This Court has repeated these maxims time and again, even pre-dating the current health care liability statute.

Notwithstanding, Petitioners ask this Court to ignore these maxims and rewrite Texas law. Rewrite Texas law to loosen Chapter 74’s statute of

limitations with a broad discovery rule. Rewrite Texas law to apply the open courts provision to statutory claims. These requests are contrary to the Texas Constitution, Chapter 74, and holdings from this Court.

But Petitioners efforts to do so do not end there. Petitioners also advocate application of fraudulent concealment to circumvent the limitations bar. Yet the record contains no evidence—admissible or otherwise—of essential elements of this affirmative defense. To find fact issues on this defense would require this Court to rewrite Texas law on fraudulent concealment and on summary judgment practice.

Under well-established and long-standing precedents going as far back as case law interpreting the predecessor statute to Chapter 74, article 4590i, Petitioners' claims are time-barred. Any holding to the contrary requires rewriting Chapter 74 and reversing numerous holdings from this Court, contrary to principles of stare decisis.

The trial court got it right in granting Respondents' motions for summary judgment. The Dallas Court of Appeals likewise got it right in affirming the trial court's take-nothing judgment. This Court should deny the Petition for Review or, alternatively, affirm the trial court's order granting Respondents' motions for summary judgment.

STATEMENT OF FACTS

I. Jessica's Accident and Medical Treatment in Hawaii and the Roles of the Health Care Provider Respondents in Dallas

On July 26, 2006, Jessica, a 12-year old,¹ sustained multiple severe injuries in a car accident in Maui, Hawaii. CR 23. Jessica received emergency treatment in Maui and more extensive treatment in Honolulu at Kapiolani Medical Center for Women and Children ("KMC"). *Id.* Doctors at KMC discovered during their examination and treatment that Jessica had dilatation of her ascending aorta, appearing unrelated to the accident. CR 219, 221.

On August 15, 2006, the Hawaii health care providers transferred Jessica to Children's Medical Center of Dallas ("Children's"). *Id.* The Hawaii health care providers also consulted with Jessica's pediatrician, Patrick Hieber, M.D.,² prior to the transfer (on August 14-15, 2006) to confirm Children's was an appropriate receiving hospital. CR 331, 348.

Jessica arrived at the Children's emergency room ("ER") on the morning of August 16, 2006. CR 23. Timothy Rupp, M.D. was the ER physician who first saw Jessica, and he evaluated her stability for admission

¹ Jessica's date of birth was November 16, 1993. CR 139.

² Dr. Hieber had been Jessica's pediatrician since birth. CR 132. Dr. Hieber had no contact with Jessica or her mother, Sheri Durham, between August 15, 2006 and Jessica's death on December 25, 2008. CR 312, 313-14, 316, 320.

to the orthopedic department at Children's. CR 199; 1Supp.CR 126. Dr. Rupp also consulted with the orthopedic department regarding her potential admission. CR 245. Nurse practitioner Lori Thornton saw Jessica in the ER to provide the orthopedic consultation. 1Supp.CR 96, 127. Thornton took Jessica's medical history, during which Jessica's mother, Sheri Durham, told Thornton about the finding of an enlarged aorta by the Hawaii health care providers. 1Supp.CR 98, 101-02.

Based on Dr. Rupp's evaluation—his only contact with Jessica (CR 199)—and the orthopedic consultation and discussions with Jessica's family (who wanted Jessica to be able to attend her father's funeral), Jessica was discharged from Children's on August 16, 2006. CR 24, 73, 787; 1Supp.CR 98, 128, 138-39. Discharge orders included returning to the Children's orthopedic department on August 21, 2006, for follow-up orthopedic care. *Id.*

Jessica returned to Children's for her scheduled follow-up appointment on August 21, 2006. Lawson Copley, M.D., an orthopedic surgeon, evaluated her on this date to follow-up on the Hawaii orthopedic care. CR 24, 503. Dr. Copley performed surgery on Jessica's leg injury the next day, and he ultimately discharged Jessica from Children's, ten days

later, on August 31, 2006. CR 118, 505, 542; 1Supp.CR 274. This was the last time Dr. Copley cared for Jessica. CR 73.

David Kines and Amy Holland were nurse practitioners in the Children's orthopedic department in August 2006. CR 157-59; 2Supp.CR 10. On August 22, 2006, Durham told Holland about the Hawaii health care providers' finding of an enlarged aorta. CR 134; 2Supp.CR 10, 23. Holland ordered a cardiology consultation but shortly thereafter put a hold on the consultation. CR 143; 2Supp.CR 23. Kines, who had the shift after Holland, then placed a telephone order for a two-view chest x-ray to evaluate Jessica's aorta. CR 143, 171, 173-77, 180-82; 2Supp.CR 10-11.³ Nurse practitioner Thornton also provided orthopedic-related care to Jessica during her August 22-31, 2006 hospital stay. 1Supp.CR 99, 103-04, 105-08.⁴

³ Other than this telephone order, the only other involvement Kines had with Jessica's care was to approve a medication order for her on August 30, 2006. CR 171-72. Kines had no personal contact with Jessica or Durham. CR 170-71, 121-22. Holland made some orthopedic orders in connection with Jessica's care during her hospital stay of August 22-31, 2006. 2Supp.CR 10-11, Holland had no further contact with Jessica after her discharge on August 31, 2006. *Id.*

⁴ Thornton did not provide any care or treatment to Jessica after her discharge. 1Supp.CR 28.

Jessica was discharged from Children's on August 31, 2006 when she was transferred to Scottish Rite Hospital for further orthopedic care. CR 24, 789; 1Supp.CR 109-10, 122. Jessica did not return to Children's at any time after August 31, 2006 (the day of her discharge). CR 130. In fact, none of the Respondents provided any care or treatment to Jessica after her discharge from Children's on August 31, 2006.

Well over two years later, on the morning of December 25, 2008, Jessica suddenly died. CR 25. She was 15 at the time. CR 790. The autopsy report concluded that Jessica died from "cardiac tamponade due to hemopericardium due to ruptured aortic dissection." CR 127, 197, 247.

That Jessica had a cardiac condition was not news to Durham. She knew since the Hawaii hospitalization in July-August 2006 that Jessica had an enlarged aorta. CR 112-13, 456-57. She also knew, from speaking with the medical examiner on December 25, 2008, that the likely cause of Jessica's death was a ruptured aorta. CR 515. As noted above, the official cause of death, listed in the April 16, 2009 amended death certificate, was cardiac tamponade, hemopericardium, and ruptured aortic dissection. CR 127, 197, 247.

II. Litigation Arising Out of the Accident and Jessica's Death

Petitioners sued the Hawaii health care providers (and others alleged to be at fault for the underlying accident) in Hawaii federal court on July 24, 2008. CR 268. The same Dallas-based attorneys who represented Petitioners in the trial court herein represented them in the Hawaii litigation. 1Supp.CR 197-230. Prior to her July 29, 2009 deposition in the Hawaii litigation, Durham consulted with counsel about whether to sue Dr. Hieber and the other Dallas health care providers (Respondents). CR 469.

In the Hawaii pleadings, Petitioners alleged that the Hawaii health care providers failed to properly, if ever, communicate to the health care providers at Children's in Dallas what conditions Jessica had upon transfer and which conditions required specific and timely follow-up care. CR 268, 280-81, 300-02. But one of the experts in the Hawaii litigation opined, in his October 12, 2009 expert report, that the Hawaii health care providers were not negligent and that the Dallas health care providers (Respondents) had the duty to evaluate Jessica's dilated aorta. CR 775, 781, 784.⁵

Despite having this information, Petitioners did not serve section 74.051 notice letters and medical authorizations on Respondents until December 6, 2010—more than a year after the expert in the Hawaii

⁵ Petitioners ultimately settled with all parties to the Hawaii litigation. CR 514.

litigation discussed the purported duty of the Dallas health care providers. CR 249; 1Supp.CR 160. Petitioners filed this lawsuit on February 17, 2011, over four years after Jessica's last date of treatment by any Respondent. 1Supp.CR 6.

All the Respondents challenged Petitioners' initial section 74.351 expert reports, which resulted in an interlocutory appeal. *See Children's Med. Ctr. of Dallas v. Durham*, 402 S.W.3d 391 (Tex. App.—Dallas 2013, no pet.). On remand, each Respondent moved for summary judgment on the affirmative defense of limitations and Petitioners' gross negligence claims. CR 72, 80, 88, 198, 254; 1Supp.CR 18; 2Supp.CR 9. Petitioners filed a combined response to all of the motions, and Respondents replied and objected to Petitioners' summary judgment evidence. CR 568, 813, 818, 824, 831, 839, 849.

III. The Trial Court Decisions

The trial court sustained some of these objections but denied others. CR 855, 857, 864, 867. The trial court then granted summary judgment in favor of all Respondents on all claims.⁶ CR 860, 862, 863, 869. Petitioners later sought a new trial, which the trial court denied. CR 883, 912.

⁶ Except for Thornton, whose claims Durham dismissed with prejudice pursuant to a settlement with her. CR 880. Durham previously had non-suited The University of Texas Southwestern Medical Center. 2Supp.CR 8.

IV. The Court of Appeals' Decision

Petitioners appealed to the Dallas Court of Appeals. After briefing and oral argument, a panel of the court of appeals unanimously affirmed the trial court's take-nothing judgment. *Durham v. Children's Med. Ctr. of Dallas*, 488 S.W.3d 485, 489, 498 (Tex. App.—Dallas 2016, pet. filed). In doing so, the court held that section 74.251's two-year statute of limitations expired before Petitioners filed suit or sent a notice letter. *Id.* at 487-96. The court further held no tolling provision or affirmative defense to limitations asserted by Petitioners saved the time-barred claims. *Id.* at 496-98.

SUMMARY OF THE ARGUMENT

The trial court properly granted summary judgment in favor of Respondents on Petitioner Jenkins' survival action because Petitioners did not provide notice of this claim or file suit within two years of August 31, 2006, the last possible date any Respondent could have committed a negligent act or omission. Petitioners' assertion that limitations on the survival claim was tolled between August 31, 2006 and Jessica's death on December 25, 2008 is not supported by the authority Petitioners cite in supposed support, or, for that matter, by any Texas law.

The discovery rule does not apply to health care liability claims because the limitations period for those claims trumps “any other law.” See Tex. Civ. Prac. & Rem. Code § 74.251(a) (West 2016) (“Notwithstanding any other law....”). And the open courts provision cannot save a survival claim because that provision applies only to common-law, not statutory, claims. The Dallas Court of Appeals, therefore, properly affirmed the trial court’s judgment on the survival action.

The trial court also properly granted summary judgment in favor of Respondents on Petitioner Durham’s wrongful death action. This Court’s holdings—in *Gross v. Kahanek*, 3 S.W.3d 518 (Tex. 1999), *Brown v. Shwarts*, 968 S.W.2d 331 (Tex. 1998), and *Baptist Memorial Hospital System v. Arredondo*, 922 S.W.2d 120 (Tex. 1996)—controlled the disposition of the wrongful death action. In *Gross*, *Brown*, and *Arredondo*, this Court held that a health care liability claim based on the wrongful death of a minor must be filed within two years of the date of alleged negligence to be timely. *Gross*, *Brown*, and *Arredondo* all expressly rejected the argument made by Petitioners here: that limitations on a wrongful death claim is tolled until a minor’s death, when the minor is 12 years old or older at the time of the care and treatment at issue and at the time of her death.

The Dallas Court of Appeals, therefore, also properly affirmed the trial court's judgment on the wrongful death action.

Because Petitioners did not timely provide notice of their claims or file suit on or before August 31, 2008, their claims are barred, unless they created fact issues on a defense to the limitations bar. Petitioners failed to carry this burden. Petitioners first argue the open courts provision of the Texas Constitution saves their time-barred claims. Both the trial court and court of appeals properly held it does not.

Open courts is not available to Petitioners as a limitations defense. Open courts provides a limitations defense only if the claim is a common-law cause of action. The claims at issue here are a wrongful death action and a survival action—each a statutory claim. Accordingly, open courts cannot and does not apply to Petitioners' claims.

Second, even if applicable (which cannot occur unless this Court reverses numerous precedents), claimants cannot rely on open courts without establishing they exercised due diligence in pursuing the claims. The record establishes, as a matter of law, that Petitioners did not exercise due diligence in pursuing their wrongful death and survival actions. Specifically, Petitioners did not file suit for sixteen to eighteen months after retaining counsel and learning of their injuries through an expert report.

Case law instructs that their delay constitutes a lack of due diligence as a matter of law.

The trial court and court of appeals also rightly held Petitioners failed to raise a fact issue on their fraudulent concealment defense to limitations. Petitioners presented no summary judgment evidence that each Respondent committed an actionable tort, knew about it, had a fixed purpose to conceal it, and engaged in deceptive conduct to conceal the wrong.

Given the trial court's proper rulings and judgment, and the Dallas Court of Appeals' correct application of this Court's precedent to the established facts of the case, this Court should deny the Petition for Review or, alternatively, affirm the trial court's summary judgments as to all Respondents.

ARGUMENT

I. The Two-Year Chapter 74 Statute of Limitations Expired Before Petitioners Filed Suit

Petitioners have no common-law claim before the Court. Petitioners also do not assert any claim on behalf of a minor, as contemplated by section 74.251 of the Texas Civil Practice and Remedies Code. *Cf.* Petitioners' Brief on the Merits at xii (Issue Presented No. 2).

The only claims before the Court are (1) a statutory wrongful death action brought by Jessica's surviving parent, Petitioner Sheri Durham, and (2) a statutory survival action brought by Petitioner Denise Jenkins, as the administrator of Jessica's estate. CR 26. Petitioners ignore this distinction, arguing as if Durham and Jenkins assert their claims directly on behalf of Jessica, the minor. This is not a mere oversight or semantics. Rather, this is a key legal distinction, for two principal reasons.

First, when Jessica passed away on December 25, 2008, she lost standing to assert a claim or potential claim against Respondents. *See Armes v. Thompson*, 222 S.W.3d 79, 83 (Tex. App.—Eastland 2006, no pet.). Consequently, at the moment Jessica died, she no longer had or owned any claim or potential claim against Respondents. *Id.* at 83-84. As this Court has said, upon a minor's death, the minor's common-law tort claim is "extinguished." *Fort Worth Osteopathic Hosp., Inc. v. Reese*, 148 S.W.3d 94, 96 (Tex. 2004). In other words, that claim no longer exists.

Second, at the moment Jessica passed away, her estate came into existence. *See Armes*, 222 S.W.3d at 83. This estate is an entity distinct and separate from Jessica. *See Nguyen v. Morales*, 962 S.W.2d 93, 95 (Tex. App.—Houston [1st Dist.] 1997, no pet.); Tex. Estates Code §§ 22.012, 22.027 (West 2016).

To be clear, Jessica’s estate can assert a claim, but only because the Legislature has granted it that right. Specifically, only through the existence of section 71.021 of the Texas Civil Practice and Remedies Code (“Survival Statute”)—a statute in which the Legislature granted a survival cause of action—can Administrator Jenkins seek recovery for Jessica’s alleged personal injuries in favor of her heirs, legal representatives, and estate. This is because survival causes of action did not exist at common law. *See, e.g., Fort Worth Osteopathic Hosp.*, 148 S.W.3d at 96; *Diaz v. Westphal*, 941 S.W.2d 96, 100 (Tex. 1997).

Similarly, Petitioner Durham, as Jessica’s surviving parent, can pursue recovery for her alleged injuries only because of sections 71.002 and 71.004 of the Texas Civil Practice and Remedies Code (“Wrongful Death Statute”)—a statute in which the Legislature granted a wrongful death cause of action. A wrongful death cause of action likewise did not exist at common law. *See, e.g., Fort Worth Osteopathic Hosp.*, 148 S.W.3d at 96; *Diaz*, 941 S.W.2d at 100.

Consequently, only by the legislative creation of wrongful death and survival claims do Petitioners have the causes of action and remedies they seek in this case. *See Diaz*, 941 S.W.2d at 101. At common law, by contrast, Petitioners had no cause of action or remedies.

Said another way, Petitioners' claims are statutorily created wrongful death and survival actions. As a result, arguments regarding the constitutionality of section 74.251—including as applied to a minor or the applicability of open courts—are without merit because the open courts provision applies *only* to common-law claims. Accordingly, the only limitations issues before the Court are whether section 74.251 (1) bars Administrator Jenkins' survival action, and (2) bars Durham's wrongful death action. Tex. Civ. Prac. & Rem. Code § 74.251.

A. Standard of review

De novo is the standard of review applicable to review of the trial court's order granting Respondents' traditional motions for summary judgment. *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 215 (Tex. 2003). To prevail on a traditional summary judgment motion, the movant "must establish that there is no genuine issue as to any material fact and that he or she is entitled to judgment as a matter of law." *Randall's Food Markets v. Johnson*, 891 S.W.2d 640, 644 (Tex. 1995). When the movant shows entitlement to summary judgment, the burden shifts to the nonmovant to establish a fact issue or avoidance defense. *Centeq Realty, Inc. v. Siegler*, 899 S.W.2d 195, 197 (Tex. 1995).

B. The statute of limitations expired before Petitioners filed suit

Respondents bore the initial burden to establish the statute of limitations expired on Petitioners' claims prior to the time they were filed on February 17, 2011. *See Shah v. Moss*, 67 S.W.3d 836, 842-43 (Tex. 2001). Respondents met this burden, which then shifted the burden to Petitioners to attempt raising a fact issue on any avoidance defense to this limitations bar. *See Boyd v. Kallam*, 152 S.W.3d 670, 676 (Tex. App.—Fort Worth 2004), *pet. dismiss'd as improvidently granted*, 232 S.W.3d 774 (Tex. 2007) (dismissing petition after plaintiff's death while appeal pending so that the parties could flesh out constitutional questions about her open courts claim).

The parties do not dispute this is a health care liability claim, and, thus, the limitations period is governed by section 74.251. *Arredondo*, 922 S.W.2d at 121; *Bala v. Maxwell*, 909 S.W.2d 889, 892-93 (Tex. 1995). Under section 74.251, the statute of limitations on Petitioners' claims is a “hard and fast” deadline of two years. Tex. Civ. Prac. & Rem. Code § 74.251; *see Poland v. Ott*, 278 S.W.3d 39, 61 (Tex. App.—Houston [1st Dist.] 2009, *pet. denied*) (noting that Representative Nixon, in enacting H.B. 4 [Ch. 74], intended a “hard and fast deadline” for the expert report requirement, just as there already was with the statute of limitations provision).

The two-year statute of limitations on Petitioners' claims began to run from one of three possible dates: (1) the date of the breach or tort, (2) the date the relevant treatment was completed, or (3) the last date of relevant hospitalization. Tex. Civ. Prac. & Rem. Code § 74.251; *Bala*, 909 S.W.2d at 891. Petitioners cannot choose which of these three dates applies to their claims. *Bala*, 909 S.W.2d at 891. Rather, limitations on Petitioners' claims against each Respondent runs from the date of that Respondent's allegedly tortious conduct, if the date is ascertainable. *Shah*, 67 S.W.3d at 841.

As stated by this Court, when the date of the alleged tort is ascertainable, "further inquiry into the second and third categories is unnecessary." *Id.* at 841. In contrast, only when the date of the alleged tort is not ascertainable does limitations run from the last date of relevant treatment or hospitalization. *Kimball v. Brothers*, 741 S.W.2d 370, 372 (Tex. 1987).

Here, the parties do not dispute that the date on which each Respondent is alleged to have been negligent is ascertainable. Petitioners do not dispute that August 31, 2006 is the last possible date of negligence by any Respondent, since this was the date Jessica was last discharged from Children's. CR 6. Though for most of the Respondents, the date of their

alleged negligence is prior to August 31, 2006,⁷ for the convenience of the Court, Respondents use August 31, 2006 as the date of the allegedly tortious conduct at issue.

At the time of the care at issue, Jessica was already 12 years old. CR 139. Per section 74.251, she thus had two years to sue Respondents under section 74.251. Tex. Civ. Prac. & Rem. Code § 74.251(a). Yet Durham and Jenkins did not sue Respondents until February 17, 2011. 1Supp.CR 6. Using the last possible date of alleged negligence—August 31, 2006—Durham and Jenkins filed the lawsuit more than four years and five months after the last date of any alleged negligence. Accordingly, they filed the wrongful death and survival claims long after the applicable statute of limitations expired. *See Shah*, 67 S.W.3d at 842-45. The trial court, therefore, properly granted summary judgment as to all Respondents, unless Petitioners raised a fact issue on a savings clause that would save their claims from a limitations bar.

⁷ Based on the allegations in Petitioners' live petition, the applicable dates of alleged negligence by each Respondent are: Children's—August 31, 2006 (CR 24), Holland—August 22, 2006 (CR 24), Kines—August 22, 2006 (CR 24), Dr. Copley—August 31, 2006 (CR 24), Dr. Hieber—August 15, 2006 (CR 23-24), and Dr. Rupp—August 15, 2006 (CR 23).

II. Petitioners Failed to Establish That Any Savings Clauses Applied to Avoid the Limitations Bar on Their Claims

A. Petitioners bore the burden to establish a defense to the limitations bar

Because Respondents conclusively proved Petitioners' health care liability claims were not timely filed, the burden shifted to Petitioners to plead and prove a defense to the limitations bar. *Yancy v. United Surgical Partners Int'l, Inc.*, 236 S.W.3d 778, 782 (Tex. 2007); *Shah*, 67 S.W.3d at 846-47; *KPMG v. Harrison Cnty. Hous. Fin. Corp.*, 988 S.W.2d 746, 748 (Tex. 1999). Petitioners argue before this Court that they timely filed their claims based on the following defenses to limitations:

- (1) The open courts provision of the Texas Constitution;
- (2) Application of the statute of repose in section 74.251(b) of the Texas Civil Practice and Remedies Code; and
- (3) Respondents' alleged fraudulent concealment.

None of these three defenses saves Petitioners' claims.

B. Open courts cannot apply to save Petitioners' claims, which are statutory, not common-law, claims

The open courts provision applies only to "a cognizable" or "well-recognized" common-law cause of action. *Diaz*, 941 S.W.2d at 100; *Moreno v. Sterling Drug, Inc.*, 787 S.W.2d 348, 355 (Tex. 1990). But Petitioners' claims are statutory in nature—a wrongful death claim and a survival claim. CR 26. As mentioned above, neither wrongful death nor survival actions

existed at common law. *Fort Worth Osteopathic Hosp.*, 148 S.W.3d at 96; *Diaz*, 941 S.W.2d at 100.

This is hardly a novel or controversial argument, for this has been the law of this State since its inception. *See, e.g., Russell v. Ingersoll-Rand Co.*, 841 S.W.2d 343, 344-345 (Tex. 1992) (noting that wrongful death and survival claims “are creatures of statute abrogating the common law rule....”); *Rose v. Doctor’s Hosp.*, 801 S.W.2d 841, 845 (Tex. 1990) (in holding open courts did not apply to the plaintiffs’ wrongful death claims, the Court noted that “[the common-law medical malpractice claim died with Rex Rose had it not been preserved by the legislature in the wrongful death statute. The Roses’ remedy, therefore, was conferred by statute not by the common law.”) (citation omitted); *Moreno v. Sterling Drug, Inc.*, 787 S.W.2d 348, 355-56 (Tex. 1990) (“This court has repeatedly said there was no recognized common-law cause of action for wrongful death.”); *Elliott v. Brownwood*, 106 Tex. 292, 294 166 S.W. 1129, 1129 (1914) (“Prior to the enactment of article 4694, Revised Statutes, 1911, the common law was in force in Texas and damages could not be recovered for the death of anyone.”); *Johnson v. Farmer*, 89 Tex. 610, 612 (1895) (“Until the passage of the act of May 4, 1895, which changes the rule of the common law as to the survival causes of action, the injured party, if he had lived could not

have maintained a suit against the legal representatives of the person inflicting the injury, after death of the latter.... [W]hen the injured party dies, the beneficiaries under the act could not under the same circumstances maintain the action.”); *Yoakum v. Selph*, 83 Tex. 607, 608, 19 S.W. 145 (1892) (“It has been repeatedly said, and is well recognized, that in suits of this class no right of action existed at common law survived the decease of the person injured, but it abated with his death. Suits for damages for injuries resulting from the death of a person are exclusively statutory.”) (citations omitted); *Tex. & Pac. Ry. Co. v. Richards*, 68 Tex. 375, 378-379, 4 S.W. 627, 629 (1887) (“Under the common law, as well as the civil law, the cause of action which the appellee now seeks to assert would not survive her father’s death, and there is no statute in this state changing this rule. The rule of the common law, upon the question under consideration, is as imperative here as though it had been expressly enacted by statute; and it denies to the appellee the right to assert and maintain the claim set up in her petition.”) (citations omitted); see also W. Page Keeton *et al.*, *Prosser & Keeton on The Law of Torts* §§ 125A-127, at 940-61 (5th ed. 1984) (discussing the lack of common-law remedies for wrongful death or survival and that the only rights conferred in such instances is statutorily created).

Because Petitioners' claims exist solely by statute, they cannot rely on or use open courts as a defense to the limitations bar on their claims. *Diaz*, 941 S.W.2d at 100; *Bala*, 909 S.W.2d at 893; *see also Horizon/CMS Healthcare Corp. v. Auld*, 34 S.W.3d 887, 903 (Tex. 2000). More specifically, Jessica's common-law negligence claim as a minor—or a claim that could be asserted on her behalf while she was living—"was extinguished" when she died. *Fort Worth Osteopathic Hosp.*, 148 S.W.3d at 96.

In addition to this insurmountable hurdle, Petitioners also waived an open courts' defense to limitations. Further, even if open courts could apply to this case and was not waived, it would not save Petitioners' time-barred claims because they did not use diligence in bringing their claims. Simply put, an open courts defense to the limitations bar fails here.

1. Petitioners waived the open courts defense to a limitations bar because they did not raise it below

Petitioners never argued below that the limitations statute was unconstitutional (on its face or as applied to them) or that open courts should apply to save their claims. CR 584-98; Appellants' (Petitioners herein) Brief at 2, 20-42. Petitioners did not even use the words "open courts" in the court of appeals until their reply brief. But then, Petitioners disavowed reliance on that doctrine, judicially admitting they "did not

argue on appeal, or in response to [the] motions for summary judgment, that their claims were saved by the ‘open courts’ doctrine.” Appellants’ (Petitioners herein) Reply Brief at 2-3. Petitioners continued, arguing it was a “mystery” as to why Appellees (Respondents herein) argued about the open courts doctrine in their brief because open courts was “simply not at issue” in the appeal. *Id.* at 3.

Petitioners cannot now argue, for the first time ever, that open courts saves their claims from a limitations bar. Initially, in summary judgment practice, a non-movant’s arguments to avoid the movant’s entitlement to summary judgment must be expressly presented by written response to the motion. *McConnell v. Southside Indep. Sch. Dist.*, 858 S.W.2d 337, 341, 343 (Tex. 1993). Issues not expressly presented to the trial court by written motion, answer, or other response shall not be considered on appeal as grounds for reversal. Tex. R. Civ. P. 166a(c); *McConnell*, 858 S.W.2d at 343; *see also D.R. Horton-Texas, Ltd. v. Markel Int’l Ins. Co.*, 300 S.W.3d 740, 743 (Tex. 2009) (declining to address argument not made in summary judgment response). Likewise, when an issue is not presented and argued in the opening brief of an appellant, the issue is waived for purposes of appeal. *See, e.g., Bankhead v. Maddox*, 135 S.W.3d 162, 164 (Tex. App.—Tyler 2004, no pet.) (holding fee issue not raised in opening brief was

waived); *Lopez v. Montemayor*, 131 S.W.3d 54, 61 (Tex. App.—San Antonio 2003, pet. denied) (declining to consider issue not raised in appellant’s original brief).

Petitioners therefore waived any open courts defense to limitations. Regardless, open courts cannot save Petitioners’ claims from a limitations bar in this case.

2. Limitations on the survival claim was not tolled

Petitioners argue the survival claim of Jenkins, as administrator of Jessica’s estate, was timely filed on February 17, 2011 because limitations was tolled (1) between the dates of Respondents’ alleged negligence in August 2006 and Jessica’s death on December 25, 2008, and (2) for seventy-five days after Petitioners provided notice of claim on December 6, 2010. These arguments are without merit.

a. *Weiner v. Wasson, Neagle v. Nelson, Nelson v. Krusen, Sax v. Votteler, and Adams v. Gottwald* did not involve survival claims

Petitioners claim that *Weiner v. Wasson*, 900 S.W.2d 316 (Tex. 1995), *Neagle v. Nelson*, 685 S.W.2d 11 (Tex. 1985), *Nelson v. Krusen*, 678 S.W.2d 918 (Tex. 1984), *Sax v. Votteler*, 648 S.W.2d 661 (Tex. 1983), and *Adams v. Gottwald*, 179 S.W.3d 101 (Tex. App.—San Antonio 2005, pet. denied), stand for the proposition that the statute of limitations on the survival

claim was tolled until Jessica died because she was a minor at the time of her death. Petitioners are wrong.

In *Weiner*, *Sax*, and *Adams*, each patient was alive when the claim was filed and throughout the pendency of the lawsuit, meaning that the claims were not statutory survival claims. *Weiner*, 900 S.W.2d at 317; *Sax*, 648 S.W.2d at 663, 667; *Adams*, 179 S.W.3d at 102. In *Weiner*, an adult claimant asserted a medical negligence claim based on alleged negligence that had occurred when he was 15 years old. *Weiner*, 900 S.W.2d at 317. In *Sax*, a child's parents sued on her behalf based on allegedly negligent medical treatment when she was eleven years old. *Sax*, 648 S.W.2d at 663. In *Adams*, a 17-year-old patient's parents filed suit on her behalf based on allegedly negligent medical treatment provided when she was 14 years old. *Adams*, 179 S.W.3d at 102.

In each case, the defendants argued that the claims against them were time-barred under the two-year statute of limitations in section 10.01 of article 4590i of the Texas Revised Civil Statutes or section 4 of article 5.82 of the Texas Insurance Code (the predecessor provisions to section 74.251 of the Texas Civil Practice and Remedies Code). *Weiner*, 900 S.W.2d at 317; *Sax*, 648 S.W.2d at 663; *Adams*, 179 S.W.3d at 102. In each case, the courts held that application of the statute of limitations was unconstitutional

under open courts when applied to *living* minors' *common-law* negligence claims. *Weiner*, 900 S.W.2d at 319; *Sax*, 648 S.W.2d at 667; *Adams*, 179 S.W.3d at 102-03.

Here, there is no living minor's common-law claim.

Neagle and *Nelson* also provide no support for Jenkins' position. *Neagle* involved an adult's common-law medical negligence claim for failure to remove a sponge used during an appendectomy. *Neagle*, 685 S.W.2d at 11-12. In *Neagle*, the Court held the statute of limitations applicable to the patient's common-law cause of action unconstitutional under open courts because the patient did not know about the retained sponge until after limitations had run. *Id.* *Nelson* involved the "wrongful birth" claim of a child's parents. *Nelson*, 678 S.W.2d at 919, 923.⁸ In *Nelson*, the Court held the statute of limitations applicable to the parents' common-law "wrongful birth" cause of action unconstitutional under open courts because the parents did not know their child was at an increased risk to develop muscular dystrophy until after limitations had run. *Id.* at 919-20.

Weiner, *Neagle*, *Nelson*, *Sax*, and *Adams* did not imply, much less hold, that section 74.251 or any predecessor statute violates open courts

⁸ The Court did not address limitations on the minor's "wrongful life" claim because it held there is no "wrongful life" cause of action in Texas. *Id.* at 925.

when applied to a survival action—a *statutory* claim. As such, none of these cases supports Petitioners’ arguments.

Rather than looking to *Weiner*, *Neagle*, *Nelson*, *Sax*, and *Adams* for guidance, this Court instead should look to the analysis and holding in *Diaz v. Westphal*, 941 S.W.2d at 100-01. In *Diaz*, the plaintiff—the decedent’s son—asserted a survival claim. *Id.* In response to the defendant asserting a limitations bar under article 4590i, the plaintiff contended that the open courts provision would have saved his father’s health care liability claim if the father had survived and brought his claim on his own behalf. *Id.* This Court rejected that argument, holding open courts did not apply to statutory claims and, thus, the claim was time-barred. *Id.*

The plaintiff in *Diaz*, similar to Petitioners here, asserted that it would have been impossible for the father to have discovered his health care liability claim before limitations expired under the statute. This Court rejected the argument that the father’s claim would have been tolled until his death based on his inability to discover the claim. *Id.* at 99-100. In doing so, the Court noted the plaintiff’s argument invoked the discovery rule, which does not apply to health care liability claims. *Id.* Likewise, in this case, Petitioners’ argument that they could not have discovered their

claims until after limitations had expired is merely a discovery rule argument that cannot defeat Respondents' limitations defense. *See id.*

Diaz demonstrates that section 74.251's statute of limitations bars a survival claim even when the decedent may otherwise have been able to assert the claim had the decedent survived to file suit. Because neither the discovery rule nor the open courts provision applies to such survival claims, neither can save Petitioner Jenkins' survival claim. Accordingly, the trial court properly granted Respondents' motions for summary judgment, and the Dallas Court of Appeals properly affirmed the trial court's judgment.

b. *Gross v. Kahanek* and *Brown v. Shwartz* involved statutory tolling that does not apply here

Petitioners also argue that *Gross v. Kahanek*, 3 S.W.3d 518 (Tex. 1999), and *Brown v. Shwartz*, 968 S.W.2d 331 (Tex. 1998), stand for the proposition that the statute of limitations on claims involving the death of minors under section 74.251 is tolled until the death of the minor. This argument likewise lacks merit.

When the Legislature passed Chapter 74 and its predecessor statute (Article 4590i), it created an exclusive statutory scheme for handling health care liability claims. *See Hill v. Milani*, 686 S.W.2d 610 (Tex. 1985). That section 74.251 is the exclusive statute of limitations applicable to health

care liability claims is clear in the first four words of the statute's limitations provision: "Notwithstanding any other law...." Tex. Civ. Prac. & Rem. Code § 74.251(a). This means that Chapter 74 itself provides the only source for any tolling of section 74.251's statute of limitations. *See, e.g., Hill*, 686 S.W.2d at 610 (tolling provision in Chapter 16 of the Texas Civil Practice and Remedies Code does not apply to health care liability claims).

Chapter 74 provides only two circumstances for tolling of section 74.251's statute of limitations. First, the statute of limitations is tolled for seventy-five days if the claimant provides proper notice of a claim before the applicable two-year statute of limitations expires. Tex. Civ. Prac. & Rem. Code § 74.051; *Carreras v. Marroquin*, 339 S.W.3d 68, 74 (Tex. 2011); *Thompson v. Cmty. Health Inv.*, 923 S.W.2d 569, 571 (Tex. 1996); *see also Hill*, 686 S.W.2d at 610 (interpreting predecessor statute, Article 4590i).

Second, limitations can be tolled under the express terms of section 74.251 for certain minors. Specifically, section 74.251 tolls the statute of limitations for minors under 12 years old, so that they have until the age of 14 to file suit or have suit filed on their behalf. Tex. Civ. Prac. & Rem. Code § 74.251(a); *see also Hill*, 686 S.W.2d at 610 (interpreting same provision of predecessor statute Article 4590i).

Gross and *Brown* involved this latter tolling provision (as to section 10.01 of Article 4590i). *Gross* involved claims brought by the parents of a deceased 6- or 7-year-old. *Gross*, 3 S.W.3d at 519 (date of birth stated as “1986” and date of death stated as “June 12, 1993”). These claims were based on medical care provided beginning when the decedent was 3-4 years old. *Id.* at 519.

Consequently, the tolling provision of Article 4590i applied because the decedent was under 12 years old at the time of the care at issue and her death. *See Gross*, 3 S.W.3d at 521. Based on this tolling provision, as well as the 75-day notice tolling provision, this Court held the claim was timely because it was filed within two years and seventy-five days of the decedent’s death. *Id.* In other words, because the child was within the statutory tolling period (under 12 years old), limitations on claims related to her death did not begin to run until the child’s death.

Similarly, in *Brown*, the parents of a deceased two-day old baby filed a survival action based on medical care provided four days before the baby was born. *Brown*, 968 S.W.2d at 333. Again, the same tolling provision applicable in *Gross* applied in *Brown* because the child was less than 12 years old at the time of the incident and his death. *Id.* at 334. Specifically, this Court stated:

As we have already explained, limitations on Dillon's action began to run on the date Shwarts treated him. Section 10.01 provides, however, that "minors under the age of 12 years have until their 14th birthday in which to file, or have filed on their behalf, their claim." **The effect of this provision was to toll all running of limitations on Dillon's claim until his death....** Once Dillon died, he ceased being a minor under the age of twelve years old **and the tolling provision in Section 10.01 no longer applied.** Thus, limitations began to run at his death.

Id. (emphasis added).

This is the same tolling provision found in section 74.251 of the Texas Civil Practice and Remedies Code. Still, neither *Gross* nor *Brown* are on point because the tolling provision in those cases (for minors under 12) does not apply here. Specifically, Jessica was already 12 years old or older (1) at the time of Respondents' alleged negligence in August 2006, and (2) at the time of her death in December 2008. CR 780. As such, this tolling provision for minors under age 12 does not apply here, and Petitioner Jenkins' survival claim is barred by limitations. The trial court thus properly granted summary judgment on the survival claim.

3. Limitations on the wrongful death claim was not tolled

Like the survival claims, Petitioners argue limitations on Durham's wrongful death claim was tolled because Jessica was a minor whose death occurred more than two years after the last date of treatment. Likewise, this

argument is contrary to holdings from this Court. This Court specifically rejected this argument in three cases: *Gross v. Kahanek*, *Brown v. Shwarts*, and *Baptist Memorial Hospital System v. Arredondo*. *Gross*, 3 S.W.3d at 521; *Brown*, 968 S.W.2d at 334; *Arredondo*, 922 S.W.2d at 121.

Each of these cases involved wrongful death claims asserted by one or both of the parents of a minor patient. *Gross*, 3 S.W.3d at 519; *Brown*, 968 S.W.2d at 333; *Arredondo*, 922 S.W.3d at 120. In each case, this Court held the statute of limitations on a parent's wrongful death claim, based on the death of a minor patient, began to run on the date of the allegedly negligent care and treatment, not the date of death. *Gross*, 3 S.W.3d at 521; *Brown*, 968 S.W.2d at 333-34; *Arredondo*, 922 S.W.2d at 121.

In each case, this Court held limitations was *not* tolled on a parent's wrongful death claim merely because the child was a minor at the time of her care and treatment and death. *Gross*, 3 S.W.3d at 521 ("Limitations on a wrongful death claim based on negligent health care is not tolled or extended because the decedent is a minor"); *Brown*, 968 S.W.2d at 334 ("Limitations on a wrongful death action based on negligent health care is not tolled or extended because the decedent was a minor"); *Arredondo*, 922 S.W.2d at 121 ("A statutory beneficiary files a wrongful death action to recover her own damages based on a minor's death. . . . Therefore, the

tolling provision of section 10.01 that applies to a minor does not apply to an adult's wrongful death claims") (citation omitted). In each case, the statute of limitations barred the wrongful death claim because it was not filed within two years of the last date of the treatment. *Gross*, 3 S.W.3d at 521; *Brown*, 968 S.W.2d at 334; *Arredondo*, 922 S.W.2d at 122.

Contrary to Petitioners' argument, this Court specifically has held that a parent's wrongful death claim is time-barred when, as here, the minor child survives for more than two years after the allegedly negligent treatment. *Gross*, 3 S.W.3d at 519-20; *Brown*, 968 S.W.2d at 334; *see also Russell v. Ingersoll-Rand Co.*, 841 S.W.2d 343, 348 (Tex. 1992). The same result occurs when the decedent is an adult. *Brown*, 968 S.W.2d at 334; *Russell*, 841 S.W.2d at 348; *see also Diaz*, 941 S.W.2d at 100; *Zweig v. S. Tex. Cardiothoracic and Vascular Surgical Assocs., PLLC*, 373 S.W.3d 605, 608-09 (Tex. App.—San Antonio 2012, no pet).

While this result may seem unfair, the unfairness of the result does not alter the analysis or outcome: "While there are circumstances when this result will seem harsh, it is well within the Legislature's prerogative to prescribe the limitations period for a wrongful death claim which, it must be remembered, did not exist at common law and is a creature of statute."

Brown, 968 S.W.2d at 334. Indeed, as this Court has noted, all statutes of limitations potentially result in barring a meritorious claim:

All statutes of limitation provide *some* time period during which the cause of action is assertible. However, preclusion of a legal remedy alone is not enough to justify a judicial exception to the statute. The primary purpose of limitations, to prevent litigation of stale or fraudulent claims, must be kept in mind.

Robinson v. Weaver, 550 S.W.2d 18, 20 (Tex. 1977) (emphasis in original).

Petitioners' wrongful death claims are barred here just as they were in *Gross*, *Brown*, and *Arredondo*. August 31, 2006 was the last possible day of any allegedly negligent treatment by Respondents. Under *Gross*, *Brown*, and *Arredondo*, limitations on Durham's wrongful death claim started to run on this date, at the latest. *Gross*, 3 S.W.3d at 521; *Brown*, 968 S.W.2d at 333-34; *Arredondo*, 922 S.W.2d at 121.

But Petitioners did not provide a notice of claim until December 6, 2010, more than four years after August 31, 2006. Petitioners did not file suit for another two months, on February 17, 2011. Based on this Court's holdings in *Gross*, *Brown*, and *Arredondo*, Durham's wrongful death claim is time-barred. *Gross*, 3 S.W.3d at 521; *Brown*, 968 S.W.2d at 334; *Arredondo*, 922 S.W.2d at 122.

Because a wrongful death action is a statutory claim and not a common-law claim, an open courts defense to the limitations bar is not

available. *See, e.g., Arredondo*, 922 S.W.2d at 121-22. Nor does the tolling provision for minors under 12 years old apply. *See id.* at 121. Therefore, Durham’s wrongful death claim is barred by the two-year statute of limitations in section 74.251 of the Texas Civil Practice and Remedies Code. The trial court properly granted summary judgment on the wrongful death claim.

4. Even if open courts could be considered, it cannot save Petitioners’ claims

Because the health care liability claims before the Court are only statutory claims, the Court need not address the merits of Petitioners’ open courts challenge. But even if open courts could be applied to these statutory claims, it cannot save Petitioners’ untimely claims.

a. Petitioners did not exercise due diligence

“Open-courts challengers must themselves be diligent in bringing suit.” *Tenet Hosps. Ltd. v. Rivera*, 445 S.W.3d 698, 700 (Tex. 2014). Open courts does not toll limitations; it merely “gives litigants a reasonable time to discover their injuries and file suit.” *Yancy*, 236 S.W.3d at 784. In other words, an open courts claimant must use “due diligence” in asserting her rights. *Stockton v. Offenbach*, 336 S.W.3d 610, 618 (Tex. 2011) (citing *Shah*, 67 S.W.3d at 847); *Yancy*, 236 S.W.3d at 785. This Court has held “delays of four months, seventeen months, and twenty-two months to

constitute a lack of due diligence as a matter of law—such that an open courts challenge must fail at summary judgment.” *Rivera*, 445 S.W.3d at 704 (citing *Stockton*, 336 S.W.3d at 617-18; *Yancy*, 236 S.W.3d at 785; *Shah*, 67 S.W.3d at 847).

The facts establish that Petitioners did not exercise due diligence as a matter of law. On the day Jessica died, the medical examiner told Durham that Jessica probably died from a ruptured aorta. CR 25. On April 16, 2009, the Final Autopsy Report listed Jessica’s cause of death as “cardiac tamponade due to hemopericardium due to ruptured aortic dissection.” CR 742-48. Despite knowing with certainty, by April 16, 2009, that Jessica’s death was caused by a problem with her aorta, Petitioners waited more than one year (December 6, 2010) to send Respondents notice of claim letters, and waited twenty-two months (February 17, 2011) to file suit. See *e.g.*, CR 6, 249; 1Supp.CR 6.

Based on this Court’s opinions in *Stockton*, *Yancy*, and *Shah*, Petitioners’ actions “constitute a lack of due diligence as a matter of law—such that an open courts challenge must fail at summary judgment.” *Rivera*, 445 S.W.3d at 704. But, considering the following additional pertinent facts, Petitioners’ failure to exercise due diligence as a matter of law becomes even more certain. These additional facts include:

1. 2008: Sometime during this calendar year a legal proceeding was initiated on Jessica's behalf in Hawaii. CR 515;
2. Prior to July 29, 2009: Petitioner Durham consulted with counsel about whether to file suit against Respondents. CR 469;
3. Prior to July 29, 2009: Petitioner Jenkins appeared as administrator of Jessica's estate in the Hawaii litigation. CR 270, 437;
4. Prior to July 29, 2009: The same counsel represented both Petitioners in the Hawaii litigation and the trial court herein. CR 267-68, 416, 496, 920;
5. October 12, 2009: Expert Report of Dr. Charles Kleimann, issued in Hawaii litigation, stated that Jessica's physicians in Dallas, Texas had the responsibility to evaluate her aorta prior to her death. CR 775-84;
6. Prior to November 23, 2009: Petitioners assert wrongful death and survival actions based on Jessica's death in the Hawaii litigation. CR 282, 303-04, and;
7. After filing suit against Respondents, Petitioners use Dr. Kleimann's October 12, 2009 report as a Chapter 74 expert report served on Respondents. CR 755 n.1, 774-84.

These additional facts established that Petitioners delayed filing suit for more than eighteen months after consulting with counsel about whether to sue Respondents. CR 469. They also delayed filing suit for more than sixteen months after Dr. Kleinmann issued his report criticizing Jessica's care by Respondents. CR 775-84. Finally, they delayed filing these wrongful death and survival actions against Respondents for more than fourteen

months after they asserted these same actions in the Hawaii litigation. CR 282, 303-04.

In addition to this Court's opinions in *Stockton*, *Yancy*, and *Shah*, addressing a lack of due diligence as a matter of law, Texas courts of appeals also have held that delays of twelve to fourteen months constitute a lack of due diligence as a matter of law. *See, e.g., O'Connor v. Bollinger*, No. 12-12-00351-CV, 2013 WL 4769264, at *3 (Tex. App.—Tyler Sept. 4, 2013, no pet.) (mem. op.) (14 months); *Pech v. Tavaréz*, 112 S.W.3d 282, 287 (Tex. App.—Corpus Christi 2003, no pet) (14 months); *Fiore v. HCA Health Services of Texas, Inc.*, 915 S.W.2d 233, 237-38 (Tex. App.—Fort Worth 1996, writ denied) (13 months); *LaGesse v. PrimaCare, Inc.*, 899 S.W.2d 43, 46 (Tex. App.—Eastland 1995, writ denied) (12 months).

The law and evidence remove any doubt that, as a matter of law, Petitioners failed to exercise due diligence in asserting their health care liability claims against Respondents.

b. Because Petitioners did not exercise due diligence, the Court need not address whether section 74.251 is reasonable

If a plaintiff lacks due diligence in bringing suit, the Court “need not address whether the law was reasonable.” *Rivera*, 445 S.W.3d at 706. In *Stockton*, *Yancy*, and *Shah*, the Court never addressed whether the health care liability claim statute of limitations was constitutionally reasonable because the claimants failed to exercise due diligence. *Stockton*, 336 S.W.3d at 617-18; *Yancy*, 236 S.W.3d at 785; *Shah*, 67 S.W.3d at 847. The same result is warranted here; because Petitioners failed to exercise due diligence as a matter of law, the Court need go no further even if it decides to consider the open courts issue.

C. Petitioners’ new argument before this Court, the statute of repose, is not properly raised and is not applicable

1. Petitioners waive asserting that the statute of repose saves their time-barred claims

In this Court, Petitioners assert for the first time that the statute of repose in section 74.251(b) of the Texas Civil Practice & Remedies Code saves their claims. Petitioners never argued below that section 74.251(b) was applicable or somehow made their claims timely.

Because Petitioners did not present this issue to either the trial court or in their opening brief in the court of appeals, it has been waived and

cannot now be considered as grounds for reversal. Tex. R. Civ. P. 166a(c); *D.R. Horton-Texas, Ltd.*, 300 S.W.3d at 743; *McConnell*, 858 S.W.2d at 343; *Bankhead*, 135 S.W.3d at 164; *Lopez*, 131 S.W.3d at 61. Regardless, section 74.251(b) does not save Petitioners' time-barred claims.

2. The statute of repose is not applicable, and cannot save, Petitioners' claims

Petitioners argue section 74.251(b) exists “to address circumstances where it would be legally, factually, or constitutionally impossible, whether by affirmative acts or concealment or by virtue of an independent, final negligent act, to assert a claim within the two-year period described in Section 74.251(a)” and that “[t]he **medical malpractice statute's statute of repose period was created precisely to address cases like this.**” Petitioners' Brief on the Merits at xii, 24 (emphasis in original). This assertion and characterization of 74.251(b)'s statute of repose is incorrect. The statute of repose was not created to address situations or cases like this.

The statute of repose is not a statute of limitations. Nor is it a tolling provision that extends the limitations period. Rather, as explained by this Court in *Methodist Healthcare System of San Antonio, Ltd., L.L.P. v. Rankin*, 307 S.W.3d 283 (Tex. 2009), “[w]hile statutes of limitations operate procedurally to bar the enforcement of a right, a statute of repose

takes away the right altogether, creating a substantive right to be free of liability after a specified time.” *Id.* at 287 (quoting *Galbraith Eng’g Consultants, Inc. v. Pochucha*, 290 S.W.3d 863, 866 (Tex. 2009)). The statute’s purpose was to “create a final deadline for filing suit that is not subject to any exceptions.” *Id.* at 286. The statute’s purpose is not, as Petitioners argue, to extend the limitations period.

By contrast, limitations periods “afford plaintiffs what the legislature deems a reasonable time to present their claims and protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired.” *Murray v. San Jacinto Agency, Inc.*, 800 S.W.2d 826, 828 (Tex. 1990). Thus, a statute of limitations creates “a point of repose and to terminate stale claims” as opposed to creating absolute repose. *Id.* Said another way, a statute of repose can bar a claim in which limitations has not yet run. But a statute of repose will never serve to extend the limitations period when the claim is time-barred by the limitations period.

In this regard, Petitioners incorrectly cite *Walters v. Cleveland Regional Medical Center*, 307 S.W.3d 292 (Tex. 2010), as support for their position. *Walters* is a retained sponge case, in which the defendant left a sponge in the plaintiff during a surgery in December 1995. *Id.* at 294. The

sponge was discovered during a surgery in 2005. *Id.* at 295. The plaintiff filed suit in August 2005, less than two months after the sponge was discovered yet within ten years of the date of the original surgery. *Id.*

In the trial court, three defendants moved for summary judgment, arguing the claim was time-barred under section 74.251(a). *Id.* The trial court granted summary judgment, and the First Court of Appeals affirmed, “holding that [the plaintiff] had not established that the limitations statute violated Open Courts.” *Id.*

This Court reversed. *Id.* at 296. But it did not do so based on the statute of repose. Rather, the Court held the plaintiff “raised a genuine issue of material fact as to whether she discovered the sponge and brought suit within a reasonable time,” and that she did not “unreasonably delay filing suit once the sponge was discovered.” *Id.* In other words, open courts applied to the *living* plaintiff’s claim, as opposed to application of the statute of repose.

Other attempts to rely on this and other statutes of repose, in an effort to revive claims otherwise barred by the applicable statute of limitations, have been unsuccessful. *See, e.g., Zweig*, 373 S.W.3d at 609-10; *Heckel v. Allen Samuels Chevrolet*, No. 14-07-00254-CV, 2008 WL 4308406, at *3-4 (Tex. App.—Houston [14th Dist.] Aug. 28, 2008, no pet.)

(mem. op.); *Borth v. Saadeh*, No. 07-05-0094-CV, 2006 WL 684490, at *1 (Tex. App.—Amarillo Mar. 16, 2006, no pet.) (mem. op.); *Styers v. Harris Co.*, 838 S.W.2d 955, 957 (Tex. App.—Houston [14th Dist.] 1992, writ ref'd).

These courts have rejected arguments similar to Petitioners argument because statutes of repose exist to “fix an outer limit beyond which no action can be maintained.” *Heckel*, 2008 WL 4308406, at *3-4 (quoting *Holubec v. Brandenberger*, 111 S.W.3d 32, 37 (Tex. 2003)). They do not exist to extend the applicable statute of limitations. *See Styers*, 838 S.W.2d at 956, 957; *see also Zweig*, 373 S.W.3d at 609.

Said another way, for a statute of repose to apply, a claimant must prove both that her claim is timely under the applicable statute of limitations and that her claim is within the applicable statute of repose. *Heckel*, 2008 WL 4308406, at *3-4; *Styers*, 838 S.W.2d at 957.

More bluntly, arguments that statutes of repose serve to extend the applicable statute of limitations have been described as “illogical and absurd.” *Styers*, 838 S.W.2d at 957. An argument the statute of repose can and should be used to extend limitations in a health care liability claim to address the performance of an “impossible act” before the expiration of limitations, as Petitioners do here, has also been rejected. *Zweig*, 373 S.W.3d at 610.

Zweig involved a situation like this case. In *Zweig*, the plaintiff alleged negligence based on medical care provided during bypass surgery on December 8, 2008 and while the patient was hospitalized until December 23, 2008. *Id.* at 607. The patient died on April 29, 2009. *Id.* The plaintiff gave notice of the claim on April 28, 2011, and filed suit on April 29, 2011—within two years of death but more than two years and 75 days after the care was provided. *Id.* The plaintiff (the patient’s adult daughter) asserted a wrongful death and survival health care liability claim based on the care provided in December 2008. *Id.*

The defendant health care providers moved for summary judgment, asserting the claims against them were not timely filed within two years of December 23, 2008 (the last possible date of alleged negligence), as required by section 74.251. *Id.* The plaintiff argued that limitations was tolled because decedent was “mentally incapacitated” from the time of surgery until he died, and that the requirement under section 74.251 that suit be filed within two years of December 23, 2008 created “an impossible condition” requiring an incompetent person (the decedent) to sue before limitations expired. *Id.* at 608. As Petitioners do here, the plaintiff sought relief under open courts and argued her claim was timely filed under the statute of repose. *Id.* See Petitioners’ Brief on the Merits at 27, 29-32.

The San Antonio Court of Appeals rejected both arguments. *Zweig*, 373 S.W.3d at 609-10. It rejected her constitutional open courts argument because her wrongful death and survival actions were not common-law claims and “would not exist absent legislative enactment.” *Id.* at 609. It rejected her statute of repose argument because she was “confusing a statute of limitations with a statute of repose.” *Id.* at 609-10.

For these reasons, if the repose argument has not been waived, the statute of repose does not apply here and cannot resurrect Petitioners’ time-barred claims.

D. Petitioners failed to raise a fact issue on their affirmative defense of fraudulent concealment

Fraudulent concealment is an affirmative defense to a statute of limitations bar. *Shah*, 67 S.W.3d at 841; *Earle v. Ratliff*, 998 S.W.2d 882, 888 (Tex. 1999). For this reason, Petitioners bore the burden to prove fraudulent concealment. *See Shah*, 67 S.W.3d at 841. To establish fraudulent concealment, Petitioners had to show:

1. An underlying tort by each physician or health care provider;
2. That each physician or health care provider knew a wrong had occurred;
3. That each physician or health care provider deliberately concealed or had a fixed purpose to conceal that wrong;

4. That each physician or health care provider used deception to conceal that known wrong from Durham, and;
5. That Durham reasonably relied on each physician or health care provider's deception.

Id. at 846; *Limon v. Yahagi*, No. 13-12-00019-CV, 2012 WL 3133804, at *3-6 (Tex. App.—Corpus Christi Aug. 2, 2012, no pet.) (mem. op.).

1. Petitioners' allegations of fraudulent concealment do not match the facts

a. Petitioners' allegations of fraudulent concealment

Generally, Petitioners alleged that Respondents collectively failed to assess, diagnose, and treat Jessica's enlarged aorta and failed to tell Durham they had not done so. *Durham*, 488 S.W.3d at 496. More specifically, Petitioners alleged fraudulent concealment exists because "each defendant knew that Jessica's enlarged aorta had not been treated or otherwise addressed prior to her transfer to Scottish Rite, even though [Durham] was told otherwise." Petitioners' Brief on the Merits at 34. Accordingly, Petitioners had the burden to show each Respondent (1) knew "Jessica's enlarged aorta had not been treated or otherwise addressed prior to her transfer to Scottish Rite, even though [Durham] was told otherwise," (2) had a fixed purpose to conceal those known facts from Durham, (3) used deception to conceal those facts from Durham, and (4) Durham relied

on each Respondent's deceptive conduct. *Shah*, 67 S.W.3d at 846; *Limon*, 2012 WL 3133804, at *3-6.

b. The facts pertinent to fraudulent concealment

Petitioners cite to specific locations in the Clerk's Record for the "facts" on which they base their fraudulent concealment defense. Petitioners' Brief on the Merits at 2-7, 34.⁹ Review of these specific portions of the Clerk's Record reveals the actual facts are quite different than those portrayed in Petitioners' Brief on the Merits.¹⁰

First and foremost, Durham admits that, on August 22, 2006, she was aware Jessica had not received a cardiology evaluation of her aorta. CR 788.¹¹ The facts also established that Durham had no contact with Respondents after that time, and that Durham had no belief Respondents Dr. Hieber, Dr. Rupp, Dr. Copley, or Mr. Kines were responsible for or would arrange the cardiology evaluation then or at some time in the future. CR 786-90.

⁹ The specific pages of the Clerk's Record cited by Petitioners are 625, 630-31, 633, 644, 646-47, 656-59, 663, 674-74, 682, 684, 689, 697, 788-89.

¹⁰ Although Petitioners assert and rely on actions by Thornton, Petitioners dismissed their claims against Thornton pursuant to a settlement with her. CR 880.

¹¹ On August 22, 2006, Durham told Holland of a concern about Jessica's aorta. Holland said she would arrange for a cardiology evaluation. *Id.*

Accordingly, even assuming the evidence established fraudulent concealment by one or more of these Respondents, any tolling of limitations would have ended on August 22, 2006 because Durham knew then that Jessica had not received a cardiology evaluation. *See Shah*, 67 S.W.3d at 841 (fraudulent concealment tolling ends when a plaintiff discovers the fraud or could have discovered the fraud with reasonable diligence).

2. The facts do not give rise to fraudulent concealment

Durham alleges Holland told her, on August 22, 2006, that a cardiology evaluation had been ordered and she should have no concerns unless told otherwise. But this fact, even taken as true, did not raise a fact issue on fraudulent concealment because nothing suggests Holland made these assurances to Durham to conceal a known wrong or to deceive her. *See Shah*, 67 S.W.3d at 846.

Also, significantly absent from this statement by Holland—assuming it is true—was any evidence showing that, when the consultation was later put “on hold” or not done, that Holland—or anyone else—knew some wrong had occurred and used deception to purposefully conceal this wrong from Durham. Without evidence of this nature, fraudulent concealment cannot be established. *See Limon*, 2012 WL 3133804, at *3-6; *see also Turner v.*

Christus St. Michael Health Sys., No. 06-15-00068-CV, 2016 WL 1719261, at *1-2 (Tex. App.—Texarkana Apr. 28, 2016, no pet.) (mem. op.).

Accordingly, Petitioners' cited evidence establishes the Dallas Court of Appeals correctly determined there was no evidence indicating any Respondent knew he, she, or someone else involved in Jessica's care had done anything wrong with respect to the cardiology evaluation. *See Durham*, 488 S.W.3d at 496. Petitioners also presented no evidence that any Respondent purposefully concealed such wrong from Durham by using deception. *See id.* For these reasons, the summary judgment evidence from Petitioners did not raise a fact issue as to fraudulent concealment by any Respondent.¹² Thus, the trial court properly granted summary judgment against Petitioners with respect to this limitations defense.

CONCLUSION AND PRAYER

Petitioners' claims are barred by the two-year statute of limitations in section 74.251 of the Texas Civil Practice and Remedies Code. No tolling provision in the statute applies, and open courts cannot save Petitioners' late-filed statutory claims. Further, Petitioners did not carry their burden to raise a fact issue on any other affirmative defense to limitations. Accordingly, the trial court properly granted Respondents' motions for

¹² Petitioners also have provided no authority showing that alleged fraudulent concealment that might be attributable to any one Respondent can and should be attributed to all other Respondents.

summary judgment on limitations, and the court of appeals properly affirmed.

This Court should deny the Petition for Review. Alternatively, the Court should affirm the take-nothing judgments in favor of Respondents. Either way, Respondents ask the Court to tax their costs of appeal against Petitioners and to grant them all other relief as this Court deems just.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On May 12, 2017, I served a true and correct copy of Respondents' Brief on the Merits on Petitioners' and Respondents' counsel through the e-filing system.

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CERTIFICATE OF COMPLIANCE

Relying on the word count in Microsoft Word (2010), I certify that this computer-generated document contains 10,807 words, excluding those matters listed in Texas Rule of Appellate Procedure 9.4(i)(1). The text for the body of this document is in 14-point Georgia font, and the footnotes are in 12-point Georgia font. Other than the cover, there are at least one-inch margins on all sides on each page of the Brief.

/s/Michael A. Yanof
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[Vernon's Texas Statutes and Codes Annotated](#)
[Civil Practice and Remedies Code \(Refs & Annos\)](#)
[Title 4. Liability in Tort](#)
[Chapter 74. Medical Liability \(Refs & Annos\)](#)
[Subchapter F. Statute of Limitations \(Refs & Annos\)](#)

V.T.C.A., Civil Practice & Remedies Code § 74.251

§ 74.251. Statute of Limitations on Health Care Liability Claims

Effective: September 1, 2003

[Currentness](#)

(a) Notwithstanding any other law and subject to Subsection (b), no health care liability claim may be commenced unless the action is filed within two years from the occurrence of the breach or tort or from the date the medical or health care treatment that is the subject of the claim or the hospitalization for which the claim is made is completed; provided that, minors under the age of 12 years shall have until their 14th birthday in which to file, or have filed on their behalf, the claim. Except as herein provided this section applies to all persons regardless of minority or other legal disability.

(b) A claimant must bring a health care liability claim not later than 10 years after the date of the act or omission that gives rise to the claim. This subsection is intended as a statute of repose so that all claims must be brought within 10 years or they are time barred.

Credits

Added by [Acts 2003, 78th Leg., ch. 204, § 10.01, eff. Sept. 1, 2003](#).

Editors' Notes

VALIDITY

<For validity of this section, see [Adams v. Gottwald, D.D.S., P.C., 179 S.W.3d 101 \(Tex. App.--San Antonio 2005, pet. denied\)](#).>

[Notes of Decisions \(124\)](#)

V. T. C. A., Civil Practice & Remedies Code § 74.251, TX CIV PRAC & REM § 74.251

Current through the end of the 2015 Regular Session of the 84th Legislature

488 S.W.3d 485
Court of Appeals of Texas,
Dallas.

Sheri Durham and Denise Jenkins, as Administrator
of the Estate of Jessica Haley Durham, Appellants

v.

Children's Medical Center of Dallas, Amy
Holland, CPNP, David W. Kines, FNP,
Lawson Copley, M.D., J. Patrick Hieber,
M.D., and Timothy J. Rupp, M.D., Appellees

No. 05-14-01464-CV

|

Opinion Filed April 25, 2016

Synopsis

Background: Estate administrator and patient's mother sued physicians and nurses who had treated patient before she died asserting survival and wrongful-death claims. Defendants moved for summary judgment which the County Court at Law No. 4, Dallas County, granted. Plaintiffs appealed.

Holdings: The Court of Appeals, Whitehill J., held that:

[1] as a matter of first impression, open courts clause of state constitution did not prevent running of statute of limitations against otherwise untimely filed survival and wrongful-death claims, and

[2] summary judgment evidence did not create a reasonable inference that defendants actually knew that a wrong occurred, or that they had a fixed purpose to conceal it, as elements of fraudulent concealment which would toll statute of limitations.

Affirmed.

West Headnotes (11)

[1] Death

🔑 Nature and form of remedy

At common law, a person did not have his or her own cause of action for the death of another person.

[Cases that cite this headnote](#)

[2] Death

🔑 Computation of period of limitation

Tolling provision of medical negligence statute of limitations, providing that minors under age 12 years have until their 14th birthday in which to file action, does not apply to an adult's wrongful-death and survival claims based on the death of a minor under 12. [Tex. Civ. Prac. & Rem. Code Ann. § 74.251\(a\)](#).

[Cases that cite this headnote](#)

[3] Death

🔑 Survival of right of action of person injured

At common law a person's own personal-injury claims did not survive his or her death.

[Cases that cite this headnote](#)

[4] Constitutional Law

🔑 Right of access to the courts and a remedy for injuries in general

Wrongful-death and survival claimants cannot establish an open-courts violation under state constitution because they have no common law right to bring either. [Tex. Const. art. 1, § 13](#); [Tex. Civ. Prac. & Rem. Code Ann. §§ 16.003\(b\), 71.021\(b\)](#).

[Cases that cite this headnote](#)

[5] Constitutional Law

🔑 Right of access to the courts and a remedy for injuries in general

Death

🔑 Constitutional and statutory provisions

Because estate administrator's survival claims were statutory claims, open courts clause of state constitution, which applies to common-law claims, did not apply. [Tex. Const. art. 1](#),

§ 13; Tex. Civ. Prac. & Rem. Code Ann. §§ 71.021(b), 74.251(a).

Cases that cite this headnote

[6] Limitation of Actions

Infancy

Since decedent was over 12 years old when health care providers treated her, there was no statutory tolling, under medical negligence statute of limitations providing that minors under age 12 years have until their 14th birthday in which to file action, for administrator's survival claims. [Tex. Civ. Prac. & Rem. Code Ann. § 74.251\(a\)](#).

Cases that cite this headnote

[7] Death

Application of general statutes of limitations

Health

Limitations;time requirements

Medical malpractice statute of limitations, which conflicts with wrongful death statute of limitations as to when statute begins to run, controlled in wrongful death action based on health-care liability claims, regardless of any rights minor patient would have had if she had survived; medical malpractice statute applied to all health care liability claims notwithstanding any other law.

Cases that cite this headnote

[8] Limitation of Actions

Concealment of Cause of Action

The elements of fraudulent concealment, which tolls limitations period in a medical-negligence case, are: (1) the defendant actually knew that a wrong occurred, (2) the defendant had a fixed purpose to conceal the wrong, and (3) the defendant concealed the wrong from the plaintiff.

1 Cases that cite this headnote

[9] Limitation of Actions

Concealment of Cause of Action

Fraudulent concealment, which tolls limitations period in a medical-negligence case, requires more than evidence that the physician was negligent; it also requires evidence that the defendant actually knew the plaintiff was in fact wronged, and concealed that fact to deceive the plaintiff.

Cases that cite this headnote

[10] Limitation of Actions

Concealment of Cause of Action

Fraudulent concealment tolling ends when the plaintiff discovers the fraud or could have discovered the fraud with reasonable diligence.

Cases that cite this headnote

[11] Limitation of Actions

What constitutes concealment

Summary judgment evidence submitted by estate administrator and patient's mother, who brought survival and wrongful death claims respectively against health care providers who treated patient before she died, did not create a reasonable inference that providers actually knew that a wrong occurred or that they had a fixed purpose to conceal it, as elements of fraudulent concealment which would toll statute of limitations for medical negligence; evidence showed only what providers allegedly did and did not do, failing to assess, diagnose, and treat patient's enlarged aorta and failing to tell mother that they had not done so, when they treated patient. [Tex. Civ. Prac. & Rem. Code Ann. § 74.251\(a\)](#).

1 Cases that cite this headnote

West Codenotes

Recognized as Unconstitutional

[Tex. Rev. Civ. Stat. Ann. art. 4590i § 10.01](#)

***487 On Appeal from the County Court at Law No. 4, Dallas County, Texas, Trial Court Cause No. CC-11-01231-D, Ken Tapscott, Judge.**

Attorneys and Law Firms

[Kenneth B. Chaiken](#), [Robert L. Chaiken](#), [Carrie P. Kitner](#), Plano, TX, for appellants.

Aaron D. Nadeau, Rockwall, TX [Michael A. Yanof](#), [Cassie Dallas](#), [John B. Kronenberger](#), [Ronald W. Johnson](#), [Amie P. Fordan](#), [Stan A. Thiebaud](#), [Russell G. Thornton](#), [David M. Walsh IV](#), [Jeffery Mark Kershaw](#), [Michelle E. Robberson](#), [Cory M. Sutker](#), [John A. Scully](#), Dallas, TX, for appellees.

Before Justices [Myers](#), [Evans](#), and [Whitehill](#)

OPINION

Opinion by Justice [Whitehill](#)

This case presents an issue of first impression: If a 12-year-old person receives medical treatment and dies more than two years after that treatment ends, does the Texas Constitution's Open Courts Clause prevent the running of limitations against otherwise untimely filed survival and wrongful-death claims against her health-care providers? We conclude that the answer is no because the Open Courts Clause does not apply to these statutorily created claims.

We also conclude that appellants failed to raise a genuine fact issue regarding fraudulent concealment.

Accordingly, we affirm the trial court's take-nothing summary judgment.

I. BACKGROUND

A. Facts.

We draw these facts from appellants' live pleading and from the summary judgment evidence:

The decedent, Jessica Haley Durham, was born on November 16, 1993.

In July 2006, Jessica was seriously injured in a car accident in Hawaii. Her injuries included a [broken leg](#) and a ruptured [*488 spleen](#). The Hawaii doctors also diagnosed her to have [dilatation of the ascending aorta](#) that did not appear to be trauma related and for which they recommended follow-up with a pediatric cardiologist in Texas.

Jessica was transferred to appellee Children's Medical Center of Dallas, where she arrived on August 16, 2006. Her general pediatrician, appellee J. Patrick Hieber, M.D., helped arrange the transfer. But Hieber did not see Jessica after her transfer to Children's, nor did he see her again before she died in 2008.

Appellee Timothy Rupp, M.D. and nurse practitioner Lori Thornton treated Jessica when she arrived at Children's. That was the only day on which Rupp had any interaction with Jessica. Jessica was discharged from Children's that same day with instructions to return to the Children's orthopedic clinic on August 21 for follow-up orthopedic surgery.

Appellee Lawson Copley, M.D. evaluated Jessica on August 21, 2006. Jessica was admitted to Children's on August 22, and Copley operated on her left leg that same day. She remained at Children's until August 31, when she was transferred to Texas Scottish Rite Hospital. Copley was Jessica's attending physician during her stay at Children's.

Appellees Amy Holland, CPNP, and David W. Kines, FNP, also provided health care services to Jessica during her stay at Children's.

Jessica never returned to Children's after she went to Scottish Rite, and appellants concede that August 31, 2006, was the "date of Jessica's last treatment by the Appellees." ¹

On December 25, 2008, Jessica suddenly became ill and died because her [aorta ruptured](#). Jessica was 15 years old when she died.

B. Procedural history.

Appellant Sheri Durham is Jessica's mother. Appellant Denise Jenkins is the administrator of Jessica's estate.

On December 6, 2010, more than four years after appellees last treated Jessica and almost two years after she died, appellants sent letters to appellees pursuant to civil practice and remedies code Chapter 74 giving them notice of appellants' health-care-liability claims.

On February 17, 2011, 73 days after sending their notice letters, appellants sued appellees asserting survival and wrongful-death claims related to Jessica's death. The gist of their suit was that appellees failed to act on the information they had about Jessica's enlarged aorta and failed to treat or obtain treatment for that condition.

After appellees unsuccessfully challenged appellants' expert reports, *Children's Med. Ctr. of Dallas v. Durham*, 402 S.W.3d 391 (Tex.App.–Dallas 2013, no pet.), appellees filed summary judgment motions based on limitations. The motions also raised alternative partial summary judgment grounds attacking Durham's claim for punitive damages. Appellants filed a single combined summary judgment response. Appellees filed reply briefs, some of which included objections to appellants' summary judgment evidence.

The trial judge sustained some objections to appellants' evidence and overruled others. The trial judge also granted all the summary judgment motions, resulting *489 in a take-nothing judgment. Appellants filed a new-trial motion, which the trial judge denied. Appellants timely appealed.

II. STANDARD OF REVIEW AND BURDENS OF PROOF

We review a summary judgment de novo. *Smith v. Deneve*, 285 S.W.3d 904, 909 (Tex.App.–Dallas 2009, no pet.).

When we review a traditional summary judgment for a defendant, we determine whether the defendant conclusively disproved an element of the plaintiff's claim or conclusively proved every element of an affirmative defense. *Id.* We take evidence favorable to the nonmovant as true, and we indulge every reasonable inference and resolve every doubt in the nonmovant's favor. *Id.* A matter is conclusively established if ordinary minds could not differ as to the conclusion to be drawn from the evidence. *In re Estate of Hendler*, 316 S.W.3d 703, 707 (Tex.App.–Dallas 2010, no pet.).

“A summary judgment movant on limitations bears the burden to ‘(1) conclusively prove when the cause of action accrued, and (2) negate the discovery rule, if it applies and has been pleaded or otherwise raised, by proving as a matter of law that there is no genuine issue of material fact about when the plaintiff discovered, or in the exercise of reasonable diligence should have discovered the nature of its injury.’ ” *Equitable Recovery, L.P. v. Heath Ins. Brokers of Tex., L.P.*, 235 S.W.3d 376, 385 (Tex.App.–Dallas 2007, pet. dismissed) (quoting *KPMG Peat Marwick v. Harrison Cty. Hous. Fin. Corp.*, 988 S.W.2d 746, 748 (Tex.1999)). The discovery rule is not at issue in this case. If the movant carries its burden, the nonmovant must produce evidence raising a genuine fact issue in avoidance of limitations. *Id.*

III. ISSUES

Appellants raise six issues:

1. Was limitations tolled as to Jenkins's survival action because Jessica was a minor who was still alive more than two years after the date of her last medical treatment?
2. Was limitations tolled as to Durham's wrongful-death claims because Jessica was a minor who was still alive more than two years after the date of her last medical treatment?
3. Did appellants raise a genuine fact issue regarding whether appellees engaged in fraudulent concealment, which would toll limitations?
4. Did the trial court err by granting summary judgment as to appellants' claims for punitive damages?
5. Did the trial court err by deeming the expert report of Dr. Ron Blair irrelevant to fraudulent concealment?
6. Did the trial court err by sustaining appellees' objections to the expert reports of Dr. Ron Blair, Dr. Sandra Clapp, and Dr. Charles Kleinman?

For the reasons discussed below, we conclude that appellants' claims are time-barred as a matter of law. We also conclude that appellants did not raise a genuine fact issue on fraudulent concealment.

IV. ANALYSIS

A. The Law of Limitations.

1. The Statute.

The parties agree that [civil practice and remedies code § 74.251](#) supplies the applicable statute of limitations. [Section 74.251\(a\)](#) provides:

Notwithstanding any other law and subject to Subsection (b), no health care liability claim may be commenced unless *490 the action is filed within two years from the occurrence of the breach or tort or from the date the medical or health care treatment that is the subject of the claim or the hospitalization for which the claim is made is completed; provided that, minors under the age of 12 years shall have until their 14th birthday in which to file, *or have filed on their behalf*, the claim. *Except as herein provided this section applies to all persons regardless of minority or other legal disability.*

[TEX. CIV. PRAC. & REM.CODE ANN. § 74.251\(a\)](#) (emphases added).

[Section 74.251\(b\)](#) is a ten-year statute of repose, *id.* [§ 74.251\(b\)](#), which does not apply in this case.

Moreover, [§ 74.251\(a\)](#) is virtually identical to its predecessor, [Texas Revised Civil Statutes article 4590i, § 10.01](#).² See *Adams v. Gottwald*, 179 S.W.3d 101, 103 (Tex.App.–San Antonio 2005, pet. denied) (quoting both statutes). Several cases relevant to our analysis were decided under [§ 10.01](#). See, e.g., *Brown v. Shwartz*, 968 S.W.2d 331, 333 (Tex.1998) (quoting [§ 10.01](#)). We thus occasionally refer to [§ 10.01](#) in our discussion.

Also, according to [§ 74.051\(c\)](#)'s plain terms, the [§ 74.251\(a\)](#) limitations period is tolled for 75 days if the claimant gives notice of his or her claim as Chapter 74 requires. [CIV. PRAC. & REM. § 74.051\(c\)](#).

2. [Section 74.251\(a\)](#) applies to statutorily created wrongful-death and survival claims.

[1] At common law, a person did not have his or her own cause of action for the death of another person. *In re Labatt Food Serv., L.P.*, 279 S.W.3d 640, 644 (Tex.2009) (orig.proceeding). The legislature, however, created such a cause of action by enacting the Wrongful Death Act. *Id.*; see also [CIV. PRAC. & REM. §§ 71.001–.012](#).

[2] [Civil practice and remedies code § 16.003\(b\)](#) provides the general limitations period for wrongful-death claims. But [§ 74.251\(a\)](#) overrides [§ 16.003\(b\)](#) if the wrongful-death claim is also a health-care-liability claim. See *Bala v. Maxwell*, 909 S.W.2d 889, 892–93 (Tex.1995) (per curiam) (interpreting [§ 10.01](#)). Furthermore, [§ 74.251\(a\)](#)'s tolling provision for minors under age 12 does not apply to an adult's wrongful-death claim based on the death of a minor under 12. See *Baptist Mem'l Hosp. Sys. v. Arredondo*, 922 S.W.2d 120, 121 (Tex.1996) (per curiam) (interpreting [§ 10.01](#)).

[3] Similarly, at common law a person's own personal-injury claims did not survive his or her death. *Austin Nursing Ctr., Inc. v. Lovato*, 171 S.W.3d 845, 849 (Tex.2005). The legislature, however, replaced this rule by enacting the survival statute, which provides that “[a] personal injury action survives to and in favor of the heirs, legal representatives, and estate of the injured person.” [CIV. PRAC. & REM. § 71.021\(b\)](#). A personal-injury claim brought on a deceased person's behalf is commonly called a “survival action” or a “survival claim.” See, e.g., *Austin Nursing Ctr.*, 171 S.W.3d at 848 (using both terms).

Unlike wrongful-death claims, there is no separate statute of limitations for survival claims. *Brown*, 968 S.W.2d at 333. If a survival claim is also a health-care-liability claim, however, it is governed by [§ 74.251](#). See *Gross v. Kahaneck*, 3 S.W.3d 518, 521 (Tex.1999) (per curiam) (applying *491 [article 4590i](#)'s limitations provisions to survival action).

3. The Open Courts Clause and Personal-Injury Claims.

The supreme court in *Weiner v. Wasson*, 900 S.W.2d 316 (Tex.1995), established that the Texas Constitution's Open Courts Clause, [TEX. CONST. art. I, § 13](#), limits the statute of limitations' effect on a minor's common-law personal-injury claim. In that case, Dr. Weiner operated

on Wasson when Wasson was 15 years old. *Weiner*, 900 S.W.2d at 317. Just over four years later, Wasson sued Dr. Weiner for negligence. *Id.* The trial court granted summary judgment for Dr. Weiner based on limitations. But the court of appeals reversed, and the supreme court agreed with the court of appeals. *Id.* Specifically, the supreme court held that § 10.01 was “unconstitutional as applied to minors because it purports to cut off Wasson's cause of action before he reaches majority, an age at which he may lawfully sue on his own behalf.” *Id.* at 318. The court then considered what statute of limitations applied to Wasson's claim and held that civil practice and remedies code Chapter 16's general limitations and tolling provisions applied, thereby giving Wasson two years after reaching age 18 to sue. *Id.* at 321. *Weiner*'s holdings apply to § 74.251. *Adams*, 179 S.W.3d at 103.

[4] But the Open Courts Clause does not apply to statutory claims, and both survival and wrongful-death claims are statutory claims. *Bala*, 909 S.W.2d at 893. More specifically, “wrongful-death and survival claimants cannot establish an open-courts violation because they ‘have no common law right to bring either.’ ” *Horizon CMS Healthcare Corp. v. Auld*, 34 S.W.3d 887, 903 (Tex.2000) (quoting *Bala*, 909 S.W.2d at 893).

4. Limitations in Health–Care–Liability Claims Arising from a Minor's Death.

The supreme court has twice addressed limitations in health-care-liability claims arising from a minor's death (but both cases involved minors who were under 12 when they died).

In *Brown v. Shwartz*, Christina Brown was in her pregnancy's third trimester when Dr. Shwartz treated her for health problems. 968 S.W.2d at 333. Four days later, Brown went to a different doctor and prematurely gave birth to a son, Dillon, who died the next day. *Id.* Brown and her husband timely gave Dr. Shwartz notice of their claims, which tolled limitations for 75 days, and then filed a wrongful-death and survival lawsuit against Dr. Shwartz two years and 76 days after Dr. Shwartz treated Brown. *Id.* at 333, 334. The supreme court held that the Browns' wrongful-death claims were time-barred. Specifically, under § 10.01, the two-year limitations period began to run when the allegedly negligent treatment occurred, and “[l]imitations on a wrongful death action based on negligent health care is not tolled or extended because the decedent was a minor.” *Id.* at 334 (citing

Baptist Mem'l Hosp. Sys., 922 S.W.2d at 121). Thus, although the Browns' timely notice to Dr. Shwartz tolled limitations for 75 days, they still filed their wrongful-death claims one day too late. *Id.*

The Browns' survival action, however, was timely because it was “the same action Dillon had the day he died” and § 10.01 tolled limitations to age 14 for injury claims by patients under 12 years old when the treatment occurred. *Id.* Although Dillon's death stopped the tolling on his personal-injury claims and started limitations running against the Browns' survival claims, Dillon's prior tolling period meant *492 that the Browns' survival claims were timely. *Id.* at 334–35.

The supreme court also decided similar issues in *Gross v. Kahanek*, 3 S.W.3d 518 (Tex.1999) (per curiam). The Kahaneks' daughter Kyndil suffered from seizures, and Dr. Gross treated her with a drug regimen until September 1992. *Id.* at 519. Another doctor continued the drug regimen thereafter. *Id.* Kyndil died on June 13, 1993, at the age of either six or seven, allegedly from drug poisoning. *Id.* at 519–20. The Kahaneks asserted wrongful-death and survival claims against Dr. Gross on June 13, 1995. *Id.* at 520.

The supreme court held that the wrongful-death claims were time-barred under § 10.01 because (i) the evidence conclusively established that Dr. Gross last treated Kyndil in September 1992 and (ii) wrongful-death claims are not tolled because the decedent is a minor. *Id.* at 521. But the survival claim was not time-barred because limitations on Kyndil's personal-injury claim was tolled until her death and the survival claim was filed within two years and 75 days after she died. *Id.*

B. First Issue: Was the statute of limitations tolled as to appellant Jenkins's survival claims because Jessica was a minor?

1. Section 74.251(a) tolling does not apply.

Our task in construing § 74.251(a) is to ascertain and effect the legislature's intent. See *City of San Antonio v. City of Boerne*, 111 S.W.3d 22, 25 (Tex.2003). We initially limit our review to the text's plain meaning as the sole expression of legislative intent, unless the legislature has supplied a different meaning by definition, a different meaning is apparent from the context, or applying the plain meaning would lead to absurd results. *Abutahoun v.*

Dow Chem. Co., 463 S.W.3d 42, 46 (Tex.2015). We read the statute as a whole and interpret it so as to give effect to every part. *City of San Antonio*, 111 S.W.3d at 25.

Under § 74.251(a), limitations began to run on any personal-injury claim arising from appellees' conduct no later than August 31, 2006, which is the last day that any appellee treated Jessica. See CIV. PRAC. & REM. § 75.251(a). Because Jessica was 12 years old when appellees treated her, § 74.251(a)'s tolling provision for minors under 12 does not apply. See *id.* Accordingly, under § 74.251(a)'s plain language and this case's undisputed facts, Jenkins's survival action is time-barred unless a different tolling doctrine applies.

2. Minority age tolling does not apply.

Appellants argue that limitations was tolled because Jessica was a minor. They rely on four cases for support: *Weiner*, *Adams*, *Brown*, and *Gross*. These cases, however, do not support appellants' argument.

Specifically, *Weiner* and *Adams* stand for the general point that, because of the Open Courts Clause, § 74.251(a) does not apply to a minor's *common-law personal-injury claims* arising from health care. *Weiner*, 900 S.W.2d at 318; *Adams*, 179 S.W.3d at 103. Jessica was a minor, so had she survived her final illness, limitations would have been tolled for her personal-injury claims until she turned 18. From that result, Jenkins extrapolates that it would also be unconstitutional to apply § 74.251(a) to her statutory survival action. We disagree.

Although *Weiner* says that § 10.01 (now § 74.251) “is unconstitutional as applied to minors,” 900 S.W.2d at 321, Jessica was, upon her death, no longer a minor. See *Brown*, 968 S.W.2d at 334 (“Once Dillon died, he ceased to be a minor under twelve years old....”). *Weiner* and *Adams*, *493 which involved common-law personal-injury claims, do not address survival claims that exist only by statute and therefore receive no protection from the Open Courts Clause. See *Bala*, 909 S.W.2d at 893. Thus, *Weiner* and *Adams*, which is to the same effect as *Weiner*, are not on point.

Next we consider *Brown* and *Gross*. *Brown* and *Gross* each applied tolling to survival claims filed after a patient under age 12 died, but the opinions do not specify whether the tolling arose from (i) § 10.01 's tolling provision itself or (ii) applying the Open Courts Clause. Jenkins argues that

Brown and *Gross* relied on the Open Courts Clause and, because the Open Courts Clause applies to all minors, limitations was tolled for Jenkins's survival claims until Jessica's death.³ We reject Jenkins's argument.

First, *Brown* quotes the statutory tolling provision in support of its holding that limitations was tolled during the infant patient's life:

[L]imitations on Dillon's action began to run the day Shwartz treated him. Section 10.01 provides, however, that “minors under the age of 12 years shall have until their 14th birthday in which to file, or have filed on their behalf, the[ir] claim.” The effect of *this provision* was to toll all running of limitations on Dillon's claim until his death. *Weiner v. Wasson*, 900 S.W.2d 316 (Tex.1995).

968 S.W.2d at 334 (emphasis added). Thus, Dillon's parents had two years and 75 days from the day Dillon died to file their survival claims, which they timely did. *Id.* at 335. But Jessica was over 12 when appellees treated her, so the statute did not toll limitations on her claims. Accordingly, Jenkins cannot invoke statutory tolling for her statutory survival claims.

Second, *Gross* simply reiterates *Brown*. Again, the case involved a survival claim filed after a minor under 12 died. 3 S.W.3d at 519–20. And again, the court held that limitations was tolled until the minor's death, which made the survival claim timely. *Id.* at 521. Although the *Gross* court did not cite the statutory tolling provision, it did cite *Brown* to support its tolling analysis, and *Brown* cites the statutory tolling provision for its holding.

Jenkins, however, argues that (i) both *Brown* and *Gross* also cite *Weiner* in support of the tolling analysis, and (ii) thus the Open Courts Clause was the basis for the *Brown* and *Gross* holdings because *Weiner* was decided based only on the Open Courts Clause. We are not persuaded.

To begin, although *Weiner* differs from *Brown* and *Gross* in that *Weiner* was asserting his own common-law personal-injury claim, it does serve to illustrate how minority tolling provision works in the abstract. *Weiner* thus helps explain how minority tolling applies to the statutory claims in *Brown* and *Gross*.

Additionally, as shown above, *Brown* relied specifically on § 10.01 's statutory tolling and did not mention the Open Courts Clause. Also, *Gross* cited *Brown* and was factually

similar to *Brown* in that both cases involved patients under 12. Because § 10.01's statutory tolling was available in *Gross* just as it was in *Brown*, the better reading of *Gross* is that the court relied on statutory tolling.

Moreover, reading *Brown* and *Gross* as statutory tolling cases keeps them consistent with the supreme court's other holdings *494 that (i) survival claims are statutory in nature and (ii) the Open Courts Clause therefore does not apply to survival claims. See *Horizon/CMS Healthcare Corp.*, 34 S.W.3d at 903; *Bala*, 909 S.W.2d at 893.

[5] [6] In sum, Open Courts Clause analysis applies to common-law claims, and statutory tolling analysis applies to statutory claims. Because Jenkins's survival claims are statutory claims, the Open Courts Clause does not apply. Since Jessica was over 12 when appellees treated her, there is no statutory tolling for Jenkins's survival claims. See CIV. PRAC. & REM. § 74.251(a).

For the above reasons, we reject appellants' first issue.

C. Second Issue: Was limitations tolled as to appellant Durham's wrongful-death claims because Jessica was a minor and she died more than two years after appellees last treated her?

[7] As noted above, § 74.251(a) overrides the general wrongful-death statute of limitations for health care liability claims. See *Bala*, 909 S.W.2d at 892–93. And under Chapter 74's plain terms, Durham's wrongful-death claims are time-barred because she sued more than two years and 75 days after appellees last treated Jessica. See CIV. PRAC. & REM. § 74.251(a). Because the Open Courts Clause does not apply to wrongful-death claims, it also does not affect § 74.251(a)'s operation in wrongful-death cases. See *id.* (“Except as herein provided this section applies to all persons regardless of minority or other legal disability.”); *Bala*, 909 S.W.2d at 893; *Baptist Mem'l Hosp. Sys.*, 922 S.W.2d at 121–22.

Brown reinforces this result. The *Brown* court said:

Limitations on a wrongful death action based on negligent health care is not tolled or extended because the decedent was a minor.... This means that an action for the wrongful death of a child who lives more than two years after a prenatal injury will

as a rule be barred by limitations, but the same result ensues when the decedent is an adult.... While there are circumstances when this result will seem harsh, it is well within the Legislature's prerogative to prescribe the limitations period for a wrongful death claim which, it must be remembered, did not exist at common law and is a creature of statute.

968 S.W.2d at 334 (citations omitted). The court adhered to this reasoning regarding a post-natal injury in *Gross*, 3 S.W.3d at 521. *Brown*'s reasoning thus applies fully here.

Part of Durham's argument is that it would be illogical to allow tolling for survival claims but not for wrongful-death claims. But, because we have concluded that there was no tolling for Jenkins's survival claims, there is no inconsistency in our applying the *Brown* analysis and rejecting tolling for Durham's wrongful-death claims. Moreover, to the extent that there is an inconsistency in these statutory regimes, that is for the legislature to address, not us.

Durham also argues that we should recognize equitable tolling because § 74.251(a) operates unfairly when a minor dies more than two years after the date of last treatment, effectively barring a beneficiary's wrongful-death claim before it accrues. But the supreme court has accepted that result when the deceased person is an adult. *Diaz v. Westphal*, 941 S.W.2d 96, 97–101 (Tex.1997). Accordingly, we decline to adopt the new equitable tolling doctrine Durham proposes.

*495 Durham further argues that *Russell v. Ingersoll-Rand Co.*, 841 S.W.2d 343 (Tex.1992), supports her position. *Russell*, however, was decided under the general wrongful-death statute of limitations. See *id.* at 344. *Russell*, the original plaintiff in that case, sued in 1982 related to chronic obstructive pulmonary disease. *Id.* His case was still pending when he died in 1988, and his survivors then sued seven new defendants for wrongful death. *Id.* The supreme court held that the new wrongful-death claims derived from *Russell*'s rights, and that those claims were barred because *Russell*'s personal-injury claims against the new defendants would have been time-barred had he brought them in 1988. *Id.* at 345–52.

Durham reasons that because Jessica's personal-injury claims would not have been time-barred had she lived to assert them, *Russell* means Durham's derivative wrongful-death claims are likewise timely. We are not persuaded because *Russell* did not involve § 74.251(a), which bars Durham's wrongful-death claims regardless of any rights Jessica would have had she survived. Thus, *Russell* is distinguishable.

At oral argument, Durham argued that the ten-year statute of repose in § 74.251(b) suggests that the statute of limitations in § 74.251(a) must be subject to tolling. See *Walters v. Cleveland Reg'l Med. Ctr.*, 307 S.W.3d 292, 298 (Tex.2010) (“Put simply, a ten-year repose period has no purpose unless the two-year limitations period has exceptions....”). We are not persuaded by Durham's argument because § 75.251(a) is already subject to several tolling rules and we find no basis for judicially creating a new tolling rule for that statute.

For example, by its own terms, § 74.251(a) provides tolling for patients under 12 (but also specifically excludes tolling for minors 12 or older). And the Open Courts Clause effectively tolls the statute for minors' common-law personal-injury claims. *Weiner*, 900 S.W.2d at 318–21; see also *Walters* 307 S.W.3d at 293–94 (reiterating that there is Open Courts tolling in “surgical sponge cases”). And, as we discuss below, fraudulent-concealment tolling can be available in health-care-liability cases. But it does not follow from these discrete tolling doctrines that we should create a new tolling doctrine for wrongful-death claims involving the death of a minor occurring more than two years after the last medical treatment. Such a development in the law is not for us, an intermediate appellate court, to address. Cf. *Martin v. Clinical Pathology Labs., Inc.*, 343 S.W.3d 885, 892 (Tex.App.–Dallas 2011, pet. denied) (judicial exceptions to employment-at-will doctrine must be created by the supreme court).

We thus reject appellants' second issue.

D. Third Issue: Did appellants raise a genuine issue of material fact regarding whether fraudulent concealment tolled limitations?

1. Applicable Law.

The supreme court recognized fraudulent concealment as a viable ground for tolling limitations under § 10.01. See, e.g., *Shah v. Moss*, 67 S.W.3d 836, 841 (Tex.2001);

Borderlon v. Peck, 661 S.W.2d 907 (Tex.1983). Similarly, the courts of appeals have continued to apply fraudulent concealment under § 74.251(a). See, e.g., *Limon v. Yahagi*, No. 13–12–00019–CV, 2012 WL 3133804, at *3–6 (Tex.App.–Corpus Christi Aug. 2, 2012, no pet.) (mem.op.).

On summary judgment, the party seeking to avoid limitations based on fraudulent concealment bears the burden of raising a genuine fact issue on each of its elements. *496 *Bertrand v. Bertrand*, 449 S.W.3d 856, 868 (Tex.App.–Dallas 2014, no pet.); see also *Shah*, 67 S.W.3d at 841.

[8] [9] [10] The elements of fraudulent concealment are (1) the defendant actually knew that a wrong occurred, (2) the defendant had a fixed purpose to conceal the wrong, and (3) the defendant concealed the wrong from the plaintiff. *Shah*, 67 S.W.3d at 841. Thus, fraudulent concealment requires more than evidence that the physician was negligent; it also requires evidence “that the defendant actually knew the plaintiff was in fact wronged, and concealed that fact to deceive the plaintiff.” *Earle v. Ratliff*, 998 S.W.2d 882, 888 (Tex.1999) (footnote omitted). Finally, fraudulent-concealment tolling ends when the plaintiff discovers the fraud or could have discovered the fraud with reasonable diligence. *Shah*, 67 S.W.3d at 841.

2. Application of the Law to the Facts.

[11] For the reasons discussed below, we conclude that appellants failed to raise a genuine fact issue regarding whether appellees actually knew that a wrong occurred or that they had a fixed purpose to conceal the wrong.⁴

The alleged wrongs in this case are appellees' alleged failures to assess, diagnose, and treat Jessica's enlarged aorta and their alleged failures to tell Durham that they had not done so. For purposes of fraudulent concealment, however, it is not enough that appellees may have known that they did or did not do these things; appellants had to produce evidence that appellees knew their conduct was negligent. See *Shah*, 67 S.W.3d at 846 (plaintiff's affidavit failed to show “that Dr. Shah knew, after the November 1992 surgery, that he was negligent”); *Earle*, 998 S.W.2d at 888 (plaintiff must show that defendant “actually knew the plaintiff was in fact wronged”). And appellants had

to produce evidence that appellees had a fixed purpose to conceal their negligence. See *Shah*, 67 S.W.3d at 841.

Appellants' evidence does not create a reasonable inference that appellees actually knew that a wrong occurred or that they had a fixed purpose to conceal it. Instead, their evidence shows only what appellees did and did not do when they treated Jessica in August 2006. We summarize this evidence as follows:

Dr. Hieber

Dr. Hieber, Jessica's pediatrician, who did not see her after she returned from Hawaii, testified by deposition that he saw the Hawaii doctors' notes that Jessica needed to consult with a pediatric cardiologist, and that he did not do anything to determine whether she received a pediatric follow-up.

Dr. Rupp and Nurse Thornton

Dr. Rupp and Nurse Thornton saw Jessica in the Children's emergency room when she arrived from Hawaii. Rupp did not say anything in his August 16, 2006 discharge notes about Jessica's enlarged aorta.

Thornton testified by deposition that she was aware of Jessica's aortic condition when she saw Jessica in the Children's emergency room. She also said that Durham told her that Durham was very distraught over her financial condition and said that she wanted the "excessive costs" *497 to stop before Jessica was transferred to Scottish Rite Hospital.

Appellants assert that Durham denied that this conversation ever occurred, but her affidavit does not contain such a denial. Durham, however, did say in her affidavit that Thornton and Rupp told her that all of Jessica's medical needs at the time were met and that Jessica needed only additional orthopedic care.

Thornton acknowledged that the pediatric cardiology consult was an unresolved issue when Jessica left the hospital.

Nurse Holland

Medical records showed that on August 22, 2006, Nurse Holland ordered a cardiology consult. On that same day a "hold" on that consult was ordered, and a "2 view chest x-

ray to evaluate aorta" was ordered instead. Dr. Tejas Shah testified that the x-ray was not the appropriate test for the enlarged aorta.

Durham testified by affidavit that, after Jessica's August 22, 2006 surgery, she told Holland that there was some concern about Jessica's enlarged aorta while she was in Hawaii. She further said:

Amy Holland told and assured me that she would arrange for a cardiologist to evaluate Jessica's aorta, and that unless I heard otherwise from a cardiologist or another member of Jessica's healthcare team at [Children's], I should assume that the enlarged aorta had been so evaluated and that evaluation yielded no further concern requiring additional medical intervention.

Durham also said that (i) Holland later told Durham that a cardiology consultation for further evaluation of Jessica's aortic condition had been ordered, and (ii) no one at Children's ever told her that the consultation had been held or canceled.

Expert witness Dr. Blair

Appellants' expert witness Ron Blair, M.D., furnished an affidavit in which he incorporated his attached supplemental expert report by reference. His report opined that each appellee (and Nurse Thornton) breached the applicable standard of care.

We assume without deciding that appellants' evidence raises a fact issue as to whether appellees were negligent in treating Jessica and in informing Durham about what appellees had and had not done. But appellants produced no evidence that appellees *knew* they were negligent. The evidence suggests that at least some of the various health-care providers involved in Jessica's care knew, at various times, that Jessica had not been evaluated by a pediatric cardiologist and that Durham had not been told of that fact. The evidence, however, does not support an inference that any appellee actually knew that he, she, or it had been negligent when that appellee failed to follow up on the pediatric-cardiology consultation or when that appellee

failed to advise Durham that the consultation had not occurred.

Nor does the evidence support an inference that any appellee had a fixed purpose to conceal a wrong from appellants.

Without some evidence of these elements, appellants did not raise a genuine fact issue regarding fraudulent concealment. *See Shah*, 67 S.W.3d at 846 (plaintiff failed to raise a fact issue that “Dr. Shah knew about the alleged negligence” or intended to conceal it).

We thus reject appellants' third issue.

V. CONCLUSION

We have rejected appellants' first, second, and third issues. It is unnecessary for us to consider their fourth, fifth, and sixth issues.

***498** For all of the above reasons, we affirm the trial court's judgment.

All Citations

488 S.W.3d 485

Footnotes

- 1 Some appellees contend that their particular “date of last treatment” of Jessica was before August 31, but they all concede that appellants alleged that they negligently treated Jessica sometime in August 2006.
- 2 Act of May 30, 1977, 65th Leg., R.S., ch. 817, 1977 Tex. Gen. Laws 2039, 2052 (amended 1993 and 1995), *repealed by* Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 10.09, 2003 Tex. Gen. Laws 847, 884.
- 3 Appellants' reply brief asserts that they are not relying on the Open Courts Clause. But they rely on *Weiner*, which is an Open Courts Clause case, and on arguments that *Brown* and *Gross* are also Open Courts Clause cases.
- 4 As noted above, the trial court sustained some objections to appellants' evidence. Appellants' fifth and sixth issues address those rulings. For purposes of analyzing appellant's third issue, we assume, without deciding, that the trial court erred in sustaining those objections, and we have considered all the evidence that appellants have cited in their appellate brief to support their fraudulent-concealment issue.



KeyCite Yellow Flag - Negative Treatment

Proposed Legislation

Vernon's Texas Statutes and Codes Annotated
Government Code (Refs & Annos)
Title 2. Judicial Branch (Refs & Annos)
Subtitle A. Courts
Chapter 22. Appellate Courts
Subchapter A. Supreme Court

V.T.C.A., Government Code § 22.001

§ 22.001. Jurisdiction

Effective: September 1, 2003

[Currentness](#)

(a) The supreme court has appellate jurisdiction, except in criminal law matters, coextensive with the limits of the state and extending to all questions of law arising in the following cases when they have been brought to the courts of appeals from appealable judgment of the trial courts:

- (1) a case in which the justices of a court of appeals disagree on a question of law material to the decision;
 - (2) a case in which one of the courts of appeals holds differently from a prior decision of another court of appeals or of the supreme court on a question of law material to a decision of the case;
 - (3) a case involving the construction or validity of a statute necessary to a determination of the case;
 - (4) a case involving state revenue;
 - (5) a case in which the railroad commission is a party; and
 - (6) any other case in which it appears that an error of law has been committed by the court of appeals, and that error is of such importance to the jurisprudence of the state that, in the opinion of the supreme court, it requires correction, but excluding those cases in which the jurisdiction of the court of appeals is made final by statute.
- (b) A case over which the court has jurisdiction under Subsection (a) may be carried to the supreme court either by writ of error or by certificate from the court of appeals, but the court of appeals may certify a question of law arising in any of those cases at any time it chooses, either before or after the decision of the case in that court.
- (c) An appeal may be taken directly to the supreme court from an order of a trial court granting or denying an interlocutory or permanent injunction on the ground of the constitutionality of a statute of this state. It is the duty of the supreme court to prescribe the necessary rules of procedure to be followed in perfecting the appeal.

(d) The supreme court has the power, on affidavit or otherwise, as the court may determine, to ascertain the matters of fact that are necessary to the proper exercise of its jurisdiction.

(e) For purposes of Subsection (a)(2), one court holds differently from another when there is inconsistency in their respective decisions that should be clarified to remove unnecessary uncertainty in the law and unfairness to litigants.

Credits

Acts 1985, 69th Leg., ch. 480, § 1, eff. Sept. 1, 1985. Amended by [Acts 1987, 70th Leg., ch. 1106, § 1, eff. June 20, 1987](#); [Acts 2003, 78th Leg., ch. 204, § 1.04, eff. Sept. 1, 2003](#).

[Notes of Decisions \(283\)](#)

V. T. C. A., Government Code § 22.001, TX GOVT § 22.001

Current through the end of the 2015 Regular Session of the 84th Legislature



KeyCite Yellow Flag - Negative Treatment

Distinguished by [Chilkewitz v. Hyson](#), Tex., October 21, 1999

909 S.W.2d 889

Supreme Court of Texas.

Nataranja BALA, M.D., Petitioner

v.

Martha Sue MAXWELL, Individually and as
Representative of the Estate of Fred Maxwell,
Jr., Deceased, and as Representative of all
wrongful death beneficiaries, Respondent.

No. 95-0331.

|

Nov. 2, 1995.

Wrongful death and survival action was brought against physician for failing to diagnose patient's cancer. The District Court No. 56, Galveston County, I.A. Lerner, J., entered summary judgment on limitations grounds, but the Court of Appeals, [892 S.W.2d 146](#), reversed. On further review, the Supreme Court held that: (1) case did not involve negligent course of treatment such that statute of limitations did not begin to run until last date of treatment; (2) medical malpractice statute of limitations rather than wrongful death statute applied in wrongful death action based on medical negligence; and (3) application of medical malpractice statute of limitations in instant case did not violate open courts provision of Texas Constitution.

Judgment of Court of Appeals reversed; take-nothing judgment rendered.

West Headnotes (7)

[1] Limitation of Actions

🔑 [Negligence in Performance of Professional Services](#)

Although medical malpractice statute of limitations specifies three dates from which limitations period may run, plaintiff cannot simply choose among any of such dates. [Vernon's Ann.Texas Civ.St. art. 4590i, § 10.01](#).

[17 Cases that cite this headnote](#)

[2] Limitation of Actions

🔑 [Negligence in Performance of Professional Services](#)

Under medical malpractice statute of limitations, if injury results from negligent course of treatment, rather than specific instance of negligence, limitations period begins to run on last day of treatment; however, when precise date of breach or tort is ascertainable, limitations period begins on that date. [Vernon's Ann.Texas Civ.St. art. 4590i, § 10.01](#).

[32 Cases that cite this headnote](#)

[3] Limitation of Actions

🔑 [Negligence in Performance of Professional Services](#)

Physician's alleged failure to diagnose patient's cancer did not involve continuing course of treatment such that statute of limitations governing malpractice claim did not begin to run until last date of treatment, and statute instead began to run on date physician performed second test and ordered cell biopsy and received report that, while stomach lesion was probably benign, malignancy could not be ruled out; it was alleged that physician was negligent at time of second test in failing to order additional tests, and subsequent examination and third test led to diagnosis of cancer. [Vernon's Ann.Texas Civ.St. art. 4590i, § 10.01](#).

[37 Cases that cite this headnote](#)

[4] Death

🔑 [Computation of Period of Limitation](#)

Medical malpractice statute of limitations, which is in conflict with wrongful death statute of limitations as to when statute begins to run, controlled in wrongful death action based on medical negligence; medical malpractice statute applies to all health care liability claims notwithstanding any other law. [Vernon's Ann.Texas Civ.St. art. 4590i, § 10.01](#); [V.T.C.A., Civil Practice & Remedies Code § 16.003\(b\)](#).

24 Cases that cite this headnote

[5] **Constitutional Law**

🔑 Time for Proceedings

Limitation of Actions

🔑 Constitutionality of Statute

Application of two-year medical malpractice statute of limitations to survival and wrongful death claims premised on medical negligence did not violate open courts provision of Texas Constitution, despite contention that patient could not have discovered his action before his death; open courts violation requires that plaintiff establish that he has well-recognized common law cause of action, and, at common law, personal injury claim did not survive injured party's death and deceased's heirs did not have common law action for their own losses. [Vernon's Ann. Texas Const. Art. 1, § 13](#); [Vernon's Ann. Texas Civ. St. art. 4590i, § 10.01](#).

33 Cases that cite this headnote

[6] **Constitutional Law**

🔑 Conditions, Limitations, and Other Restrictions on Access and Remedies

To establish open courts violation, plaintiff must satisfy two-part test: (1) plaintiff must establish that he has well-recognized common law cause of action, and (2) plaintiff must show that restriction of his claim is unreasonable when balanced against purpose of statute. [Vernon's Ann. Texas Const. Art. 1, § 13](#).

8 Cases that cite this headnote

[7] **Abatement and Revival**

🔑 Actions for Personal Injuries

Death

🔑 Nature and Form of Remedy

At common law, personal injury claim did not survive injured party's death, and deceased's heirs did not have common law action for their own losses.

2 Cases that cite this headnote

Attorneys and Law Firms

*[890 John Roberson](#) and Brian K. Johnson, Houston, for Petitioner.

[Francis I. Spagnoletti](#), David A. Bickham, and [John D. Charbonnet, Jr.](#), Houston, for Respondent.

Opinion

PER CURIAM.

In this wrongful death and survival action, the Maxwell family alleges that Dr. Nataranja Bala negligently failed to diagnose the [cancer](#) which caused Fred Maxwell's death. We hold that both the survival and wrongful death claims are barred by [Article 4590i, section 10.01, of the Texas Revised Civil Statutes](#).

In December 1986, doctors hospitalized Maxwell for evaluation of [anemia](#). Dr. Bala performed an [esophagogastroduodenoscopy](#) (EGD), which revealed a lesion in Maxwell's stomach. A biopsy of the lesion showed no sign of malignancy.

On December 9, 1987, Dr. Bala performed a second EGD, and ordered a biopsy of cells from the [stomach lesion](#). The pathologist reported that the lesion was probably benign, but that malignancy "[could not] be ruled out with certainty." The report noted that tests on additional stains had not been completed, and an addendum to the report would follow. The addendum report, dated December 23, 1987, stated that the cells were consistent with a [carcinoid](#), a type of benign tumor.

Maxwell next saw Dr. Bala on May 31, 1989. At that time, Dr. Bala scheduled a follow-up EGD for July 26, 1989. The EGD showed that the [stomach lesion](#) had become ulcerated. Because a biopsy indicated the presence of malignant cells, Dr. Bala recommended exploratory surgery. Pre-surgery tests led to the discovery of [cancer](#) in Maxwell's right lung and stomach. Although he underwent treatment for the [cancer](#), he died on September 14, 1989.

On September 30, 1991, the Maxwells filed this suit, alleging that Dr. Bala and his partner, Dr. Mani,

negligently failed to diagnose the [cancer](#) that led to Maxwell's death. The *891 trial court determined that the statute of limitations barred both the wrongful death and survival claims and rendered summary judgment for the doctors. The court of appeals affirmed with respect to Dr. Mani, but reversed the summary judgment for Dr. Bala on both claims. 892 S.W.2d 146.

Dr. Bala contends that the court of appeals mischaracterized his 1986, 1987, and 1989 examinations of Maxwell as a continuing course of treatment, and therefore incorrectly held that the limitations period began on July 29, 1989, when Dr. Bala last treated Maxwell. Instead, Dr. Bala argues, the limitations period began in 1987, when the alleged negligence occurred.

Dr. Bala also argues that the court of appeals erred by holding that the statute of limitations did not bar the Maxwells' wrongful death claim. The court of appeals found the suit timely under [section 16.003\(b\) of the Texas Civil Practice and Remedies Code](#), which provides a two-year limitations period for wrongful death claims, beginning on the date of death. According to Dr. Bala, section 10.01 of the Medical Liability Act preempts the wrongful death statute of limitations when a wrongful death claim is based on medical negligence.

The Survival Claim

[1] [2] [Article 4590i, section 10.01](#) provides the limitations period for medical malpractice actions:

Notwithstanding any other law, no health care liability claim may be commenced unless the action is filed within two years from the occurrence of the breach or tort or from the date the medical or health care treatment that is the subject of the claim or the hospitalization for which the claim is made is completed....

[TEX.REV.CIV.STAT.ANN. art. 4590i, § 10.01](#) (Vernon Supp.1995). Although the statute specifies three dates from which the limitations period may run, a plaintiff cannot simply choose among any of these dates. [Kimball v. Brothers](#), 741 S.W.2d 370, 372 (Tex.1987). If the injury results from a negligent course of treatment, rather than

a specific instance of negligence, the limitations period begins on the last date of treatment. *Id.* However, when the precise date of the breach or tort is ascertainable, the limitations period begins on that date. *Id.*

[3] The court of appeals held that the Maxwells' claim was based on Dr. Bala's continuing treatment for a [stomach lesion](#), and there was no ascertainable date of the tort. The court of appeals relied on [Chambers v. Conaway](#), 883 S.W.2d 156 (Tex.1993), in reaching this conclusion. In *Chambers*, the plaintiff complained to her family physician about a lump in her breast. The physician ordered a [mammogram](#), and determined that the lump was benign. Three years later, the plaintiff underwent a second [mammogram](#), from which the physician determined “‘everything [was] fine.’” *Id.* at 157. Between the first and second [mammograms](#), and after the second [mammogram](#), the physician treated the plaintiff on numerous occasions for other problems. After the second [mammogram](#), she never again mentioned problems with her breasts. Eventually, she was diagnosed with [breast cancer](#) by another doctor.

In response to the doctor's summary judgment motion, the plaintiff presented an affidavit from a doctor who stated that, if a patient complains of a lump in her breast, a family physician has a duty to follow-up on this condition during subsequent visits. This evidence tended to establish that the defendant was negligent in each office visit after the plaintiff's initial complaint about her breast. Thus, the limitations period did not begin until the last of these office visits. *Id.* at 158.

Unlike *Chambers*, this case does not involve multiple failures to perform follow-up tests. The Maxwells allege that Dr. Bala was negligent in 1987 because he failed to order additional tests after the biopsy report stated malignancy could not be ruled out. The next time Dr. Bala examined Maxwell was in 1989. During the 1989 examination, *892 Dr. Bala ordered the third EGD, and the results of this test led to the [diagnosis of cancer](#). Thus, any negligence could only have occurred in 1987.

The Maxwells suggest that, by failing to diagnose the [cancer](#) in 1987, and therefore not initiating a course of treatment for the [cancer](#), Dr. Bala's negligence continued until the [cancer](#) was discovered. We have previously held that when a physician fails to diagnose a condition, the continuing nature of the diagnosis does not extend the

tort for limitations purposes. *Rowntree v. Hunsucker*, 833 S.W.2d 103, 108 (Tex.1992). “While the failure to treat a condition may well be negligent, we cannot accept the self-contradictory proposition that the failure to establish a course of treatment is a course of treatment.” *Id.* at 105–06 (quoting *Nykorchuck v. Henriques*, 78 N.Y.2d 255, 573 N.Y.S.2d 434, 434, 577 N.E.2d 1026, 1029 (1991)).

Rowntree also involved claims that a physician had breached his duty to perform tests which would have revealed the patient's high blood pressure, which ultimately lead to a stroke. This Court found that the doctor could have breached this duty “only on those occasions when he had opportunity to perform such [follow-up] examinations.” *Id.* at 108. Likewise, Dr. Bala could have breached a duty to perform additional tests only when he examined Maxwell in 1986, 1987, or 1989. Because no signs of malignancy appeared in 1986, and Dr. Bala ordered tests which led to the diagnosis of cancer in 1989, a negligent failure to conduct follow-up procedures could have only occurred in connection with the December 1987 examination and EGD. We conclude that the limitations period commenced at that time.

The Wrongful Death Claim

[4] Generally, wrongful death claims are subject to a two-year limitations period that begins on the date of death. TEX.CIV.PRAC. & REM.CODE § 16.003(b). However, when a wrongful death action is based on medical negligence, the medical malpractice limitations statute, Article 4590i, section 10.01, conflicts with section 16.003. Section 10.01 provides that health care liability claims must be filed within two years from the alleged breach. TEX.REV.CIV.STAT.ANN. art. 4590i, § 10.01. A “health care liability claim” is defined as a cause of action for “treatment, lack of treatment, or other claimed departure from accepted standards of medical care or health care or safety which proximately results in injury to or death of the patient.” *Id.* § 1.03(a)(4).

The majority of courts of appeals that have addressed the conflict between the two statutes have determined that section 10.01 overrides section 16.003. See *Todd v. Planned Parenthood*, 853 S.W.2d 124, 127 (Tex.App.—Dallas 1993, writ denied); *Blackmon v. Hollimon*, 847 S.W.2d 614, 616–17 (Tex.App.—San Antonio 1992, writ denied); *Shidaker v. Winsett*, 805 S.W.2d 941, 943 (Tex.App.

—Amarillo 1991, writ denied); *Sanchez v. Memorial Medical Ctr. Hosp.*, 769 S.W.2d 656, 660 (Tex.App.—Corpus Christi 1989, no writ). But see *Wilson v. Rudd*, 814 S.W.2d 818, 822 (Tex.App.—Houston [14th Dist.] 1991, writ denied). In *Shidaker*, the court stated that, if section 16.003 controlled medical negligence claims resulting in death, “[t]his result would be the antithesis of the legislative purpose in enacting the Medical Liability and Insurance Improvement Act to alleviate a perceived medical malpractice insurance crisis, a part of which was the adoption of the absolute two-year limitations period.” *Shidaker*, 805 S.W.2d at 943.

In this case, the court of appeals held that section 16.003 governed the Maxwells' claims against Dr. Bala because “[t]he plain language of section 16.003(b) reflects a clear legislative intent to adopt an absolute two-year limitations period for wrongful death actions, and that period is triggered only by the event of death.” 892 S.W.2d at 154. This reasoning ignores the clear language of section 10.01, which applies to all health care liability claims *notwithstanding any other law*. By including this language, the Legislature unequivocally expressed its intent that, when the time limitations of *893 section 10.01 conflict with another law, section 10.01 governs. A wrongful death plaintiff suing on a medical negligence theory therefore does not necessarily have two full years from the time of death to bring a lawsuit. Rather, the statute of limitations expires at the same time it would have for the decedent, two years after the alleged negligence occurred.

As discussed above, under section 10.01, the limitations period for the Maxwells' claims expired in December 1989. Because the Maxwells' wrongful death action was not filed until 1991, section 10.01 bars this claim.

Application of the Open Courts Provision

[5] The Maxwells argue that, if the limitations periods for the survival and wrongful death actions began in 1987, application of the two-year limitations period of section 10.01 violates the “open courts” provision of Article I, section 13 of the Texas Constitution. The Maxwells claim that Fred Maxwell could not have discovered his action against Dr. Bala before his death, and strict application of the limitations period is unreasonable.

[6] To establish an open courts violation, a plaintiff must satisfy a two-part test. *Moreno v. Sterling Drug, Inc.*, 787 S.W.2d 348, 355 (Tex.1990). First, he must establish that he has a well-recognized common law cause of action. *Id.* Second, he must show that the restriction of his claim is unreasonable when balanced against the purpose of the statute. *Id.*

[7] At common law, a personal injury claim did not survive an injured party's death, nor did a deceased's heirs have a common law action for their own losses. *Kramer v. Lewisville Memorial Hosp.*, 858 S.W.2d 397, 403 (Tex.1993). Such actions are now permitted only by statute. *Id.* Because the Maxwells have no common law right to bring either a wrongful death or survival action, they cannot establish an open courts violation.

Conclusion

Both the survival and the wrongful death claims are subject to the time limitations of [section 10.01](#). Because this two-year period expired in December of 1989, the Maxwells' action was untimely. Accordingly, a majority of this Court grants Dr. Bala's application for writ of error and, pursuant to Texas Rule of Appellate Procedure 170, without hearing oral argument, reverses the judgment court of appeals and renders judgment that the Maxwells take nothing.

All Citations

909 S.W.2d 889, 39 Tex. Sup. Ct. J. 77

148 S.W.3d 94
Supreme Court of Texas.

FORT WORTH OSTEOPATHIC HOSPITAL, INC.,
d/b/a/ [Osteopathic Medical Center of Texas](#), Craig
Smith, D.O., and Reid Culton, D.O., Petitioners,
v.

Tara REESE and Donnie Reese, Individually
and as Legal Representatives of the Estate
of Clarence Cecil Reese, Respondents.

No. 02–1061.

|
Argued Oct. 8, 2003.

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Decided Aug. 27, 2004.

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Rehearing Denied Dec. 3, 2004.

Synopsis

Background: Mother and father brought wrongful death and survivor action, on behalf of viable fetus who died in utero, against treating physicians and hospital, and also brought medical negligence claims in their individual capacities. The 17th District Court, Tarrant County, Fred Davis, J., granted defendants' motions for summary judgment, and mother and father appealed. The Court of Appeals, [87 S.W.3d 203](#), affirmed in part, reversed in part, and remanded. Review was granted.

Holdings: The Supreme Court, Thomas R. Phillips, C.J., held that:

[1] wrongful death and survival statutes do not violate the Equal Protection Clause by prohibiting parents of a stillborn fetus from bringing claims under them, and

[2] genuine issues of material fact precluded no-evidence summary judgment on mother's mental anguish claim.

Court of Appeals affirmed in part and reversed in part; judgment rendered; remanded.

Harriet O'Neill, J., filed a concurring opinion.

[Steven W. Smith](#), J., filed a dissenting opinion.

West Headnotes (7)

[1] Death

🔑 Right of action of person injured

A parent's claim for loss of consortium and mental anguish damages for the death of a child is entirely derivative of the child's cause of action against a tortfeasor, and if the child has no cause of action, neither do the parents.

[3 Cases that cite this headnote](#)

[2] Constitutional Law

🔑 Wrongful death and survival

Death

🔑 Constitutional and statutory provisions

The wrongful death and survival statutes do not violate the Equal Protection Clause by prohibiting parents of a stillborn fetus from bringing claims under them. [U.S.C.A. Const.Amend. 14](#); [Vernon's Ann.Texas Const. Art. 1, § 3](#); [V.T.C.A., Civil Practice & Remedies Code §§ 71.001\(4\), 71.002\(b\), 71.003\(c\)\(4\), 71.021\(a\)](#).

[4 Cases that cite this headnote](#)

[3] Judgment

🔑 Absence of issue of fact

To succeed in a motion for traditional summary judgment, a movant must establish that there is no genuine issue of material fact, so that the movant is entitled to judgment as a matter of law. [Vernon's Ann.Texas Rules Civ.Proc., Rule 166a\(c\)](#).

[59 Cases that cite this headnote](#)

[4] Judgment

🔑 Presumptions and burden of proof

In deciding whether there is a disputed issue of material fact which precludes traditional summary judgment, every doubt must be resolved in favor of the nonmovant, and evidence favorable to the nonmovant must

be taken as true. [Vernon's Ann.Texas Rules Civ.Proc., Rule 166a\(c\)](#).

58 Cases that cite this headnote

[5] Judgment

 Presumptions and burden of proof

To defeat a no-evidence summary judgment motion, the nonmovant must produce summary judgment evidence raising a genuine issue of material fact. [Vernon's Ann.Texas Rules Civ.Proc., Rule 166a\(i\)](#).

95 Cases that cite this headnote

[6] Judgment

 Weight and sufficiency

A genuine issue of material fact exists, which precludes no-evidence summary judgment, if the nonmovant produces more than a scintilla of evidence establishing the existence of the challenged element. [Vernon's Ann.Texas Rules Civ.Proc., Rule 166a\(i\)](#).

68 Cases that cite this headnote

[7] Judgment

 Tort cases in general

Genuine issues of material fact as to whether hospital and physicians breached their legal duty to provide competent medical care to mother, and whether mother suffered damages from her own injury as opposed to merely suffering grief over loss of fetus, precluded no-evidence summary judgment for hospital and physicians, in mother's action for mental anguish damages relating to alleged medical negligence which caused fetus to be stillborn. [Vernon's Ann.Texas Rules Civ.Proc., Rule 166a\(i\)](#).

1 Cases that cite this headnote

West Codenotes

Negative Treatment Reconsidered

[V.T.C.A., Civil Practice & Remedies Code §§ 71.002\(b\), 71.021\(b\)](#).

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Opinion

Chief Justice PHILLIPS delivered the opinion of the Court, in which Justice [HECHT](#), Justice [OWEN](#), Justice [O'NEILL](#), Justice [JEFFERSON](#), Justice WAINWRIGHT and Justice [BRISTER](#) joined.

We again address whether parents of a stillborn child can sue for statutory wrongful death and survival damages. This case presents the new issue of whether foreclosing this claim denies such plaintiffs and their unborn fetuses their constitutional right to equal protection of the laws. Because we conclude that the Legislature's decision to exclude such claims is not unconstitutional, we hold that the court of appeals erred in concluding that the Equal Protection Clause guarantees parents the right to bring a wrongful death or survival claim for a stillborn child. [87 S.W.3d 203, 205](#).

We also must decide whether the mother in this case raised a fact issue on her own claim for medical malpractice. We hold that the court of appeals correctly reversed the trial court's summary judgment, which prohibited the mother from maintaining her own cause of action for mental anguish. *Id.* We therefore reverse the judgment of the court of appeals in part, affirm in part, and remand to the trial court for further proceedings in accordance with this opinion.

I

Tara Reese went to the Fort Worth Osteopathic Medical Center emergency room in her seventh month of pregnancy, complaining of a racing pulse and dizziness. Doctors determined that she had a high pulse rate and [high blood pressure](#) and sent her to the labor and delivery room for further observation. On multiple occasions through the course of the evening, doctors monitored the

heart tones of the fetus, which were often difficult to detect. The following morning the doctors confirmed that the fetus would be stillborn.

Tara and her husband, Donnie Reese, brought suit against Fort Worth Osteopathic Hospital, Osteopathic Family Medicine Clinics, Craig Smith, D.O., Roberta *96 Beals, D.O., Reid Culton, D.O., and John Chapman, D.O. (health care providers), for negligence, gross negligence, and vicarious liability, seeking damages under the wrongful death and survival statutes and for personal injuries to Tara Reese. The trial court granted summary judgment in favor of all health care providers. The Reeses appealed all claims except that against Dr. Chapman. The court of appeals affirmed the summary judgment disposing of Donnie Reese's individual bystander claim, but reversed the remainder of the summary judgment, remanding the case to the trial court. The health care providers petitioned this Court for review, arguing that the court of appeals incorrectly held that the Reeses could assert wrongful death and survival actions and that Tara Reese could assert her own individual claim. Donnie Reese did not appeal the adverse judgment against his individual claim.

II

At common law, the death of a person who was physically injured by a defendant's negligence and died from those injuries had two important consequences with respect to legal recovery. First, the decedent's own tort action was extinguished. Second, third persons who suffered loss by the decedent's death, like children, parents or a spouse, lost their right to recover. W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 127 at 945 (5th ed.1984). To ameliorate this harsh result, the Texas Legislature followed the lead of the British Parliament and other states and enacted the wrongful death and survival statutes in 1860 and 1895. See generally Wex S. Malone, *The Genesis of Wrongful Death*, 17 Stan. L.Rev. 1043 (1965) (detailing the passage of Lord Campbell's Act in England in 1840 and the creation of wrongful death causes of action by American courts and legislatures after 1838). Our wrongful death statute provides: "A person is liable for damages arising from an injury that causes an individual's death if the injury was caused by the person's or his agent's or servant's wrongful act, neglect, carelessness, unskillfulness, or default." *Tex. Civ. Prac. & Rem.Code*

§ 71.002(b). Our survival statute provides: "A cause of action for personal injury to the health, reputation, or person of an injured person does not abate because of the death of the injured person or because of the death of a person liable for the injury." *Id.* § 71.021(a).

In 1987, this Court held that these laws did not modify the common law rule against recovery with respect to a stillborn fetus. *Witty v. Am. Gen. Capital Distrib., Inc.*, 727 S.W.2d 503, 506 (Tex.1987). We reasoned in *Witty* that the Legislature did not intend the words "individual" or "person" to include an unborn fetus. *Id.* at 504. Because of the common-law rule that legal rights were contingent upon live birth, we opined that the Legislature would have expressly created a wrongful death or survival cause of action for an unborn fetus if it intended to do so. *Id.* at 505. In so holding, we expressed no opinion about whether a fetus is a person in either the philosophical or scientific sense. *Id.* at 506.

Since 1987, this Court has repeatedly affirmed its decision in *Witty*. See *Brown v. Shwartz*, 968 S.W.2d 331, 335 (Tex.1998); *Krishnan v. Sepulveda*, 916 S.W.2d 478, 479–80 (Tex.1995); *Pietila v. Crites*, 851 S.W.2d 185, 187 (Tex.1993) (per curiam); *Blackman v. Langford*, 795 S.W.2d 742, 743 (Tex.1990) (per curiam); *Tarrant County Hosp. Dist. v. Lobdell*, 726 S.W.2d 23 (Tex.1987) (per curiam). In *Brown*, we held that a fetus, later born alive, was a "patient" within the meaning of *TEX. REV. CIV. STAT. art. 4590i, § 1.03(a)(4)*, and that the statute of limitations for its *97 wrongful death action began to run from the date of its prenatal injuries. The dissent argues that because this recognized "legal injury" to a fetus, it implicitly disaffirmed *Witty*. But the Court in *Brown* explained that its holding was indeed consistent with *Witty*. *Brown* held that a fetus achieves the status of a patient whose injuries are entitled to legal recognition only upon live birth, at which time that status then relates back to the date of injury for limitations purposes. *Brown*, 968 S.W.2d at 335. In *Krishnan*, we emphasized that the Legislature still had not amended the wrongful death and survival statutes to change our holding in *Witty* and create a wrongful death or survival cause of action for loss of a fetus. *Krishnan*, 916 S.W.2d at 481. Relying on the presumption that legislative inaction is legislative acquiescence, we again declined to recognize a statutory cause of action when the Legislature had not altered the statute. *Id.* at 481. We also declined to recognize a common law right to recover for the loss of

companionship stemming from the death of a fetus. *Id.* at 482. None of these cases raised the question whether the law violated the Equal Protection Clause.

In 2003, the Legislature did grant the parents of a stillborn child a cause of action under the Wrongful Death Act. See *Tex. Civ. Prac. & Rem.Code* § 71.001(4) (defining “individual” under the wrongful death act to include “an unborn child at every stage of gestation from fertilization until birth”). However, the statute expressly does not apply to claims “for the death of an individual who is an unborn child that is brought against ... a physician or other health care provider licensed in this state, if the death directly or indirectly is caused by, associated with, arises out of, or relates to a lawful medical or health care practice or procedure of the physician or health care provider.” See *Tex. Civ. Prac. & Rem.Code* § 71.003(c)(4). Additionally, the Legislature expressly stated that the statute operates prospectively only. See Act of June 2, 2003, 78th Leg., R.S., ch. 822, § 1.04, 2003 Tex. Gen. Laws 2607, 2608. The parties do not contend that this case involved anything other than a lawful medical procedure, so this case would not be covered even if the new statute were applicable.

The Reeses first urge that we recognize the repeated error of our jurisprudence in this area and overrule *Witty*. Because the Legislature has left the holding of *Witty* in place for all suits against health care providers arising after September 1, 2003, we decline to overrule *Witty* for those cases remaining in the court system that arose before that date.

Next, the Reeses correctly point out that none of our previous decisions on this issue address the equal protection arguments that were the basis for the court of appeals' decision. They urge us, as a matter of first impression, to hold that the wrongful death and survival statutes are unconstitutional on equal protection grounds.¹

The United States Constitution prohibits the government from denying persons equal protection of the laws. The Fourteenth Amendment provides that “No State shall ... deny to any person ... the *98 equal protection of the laws.” *U.S. CONST. amend XIV, § 1*. The Texas Constitution contains a similar provision: “All free men, when they form a social compact, have equal rights, and no man, or set of men, is entitled to exclusive separate public emoluments, or privileges, but in consideration of

public services.” *TEX. CONST. art. 1, § 3*. The parties do not argue any distinction between these two clauses, and we have said that both guarantees “require a similar multi-tiered analysis.” *Ford Motor Co. v. Sheldon*, 22 S.W.3d 444, 451 (Tex.2000); see also *Rose v. Doctors Hosp.*, 801 S.W.2d 841, 846 (Tex.1990) (“Texas cases echo federal standards when determining whether a statute violates equal protection.”). Two classifications are at issue here. The first is the distinction in the wrongful death statute between parents of a stillborn fetus and parents of a child born alive. The second is the distinction under the survival statute between a fetus that dies in utero and a fetus that is born but dies subsequent to birth. The United States Supreme Court has held that the unborn are not included within the protection of the Fourteenth Amendment, which contains the Equal Protection Clause. That Court held in *Roe v. Wade*, 410 U.S. 113, 158, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), “that the word ‘person,’ as used in the Fourteenth Amendment, does not include the unborn.” While the Supreme Court has acknowledged the state's interest in the life of a fetus before birth, *Planned Parenthood v. Casey*, 505 U.S. 833, 846, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992), it has never repudiated its holding in *Roe* that the Equal Protection Clause does not apply to a fetus. The Legislature may therefore extend wrongful death and survival causes of action only to persons that are born live without violating the federal Equal Protection clause. The Reeses do not argue that our state constitution's guarantee of equal protection is broader than or different from the federal constitution in this regard. See *Tex. Dep't of Transp. v. Barber*, 111 S.W.3d 86, 106 (Tex.2003). In the absence of this showing, we decline on this record to hold that our state constitution provides additional protection to fetuses or requires that we abandon the common-law rule.

[1] A parent's claim for loss of consortium and mental anguish damages for the death of a child is entirely derivative of the child's cause of action against a tortfeasor. See generally *Diaz v. Westphal*, 941 S.W.2d 96, 99 (Tex.1997). If the child has no cause of action, neither do the parents. It is not a violation of the Equal Protection Clause to fail to provide parents with a claim for the wrongful death of a fetus in utero when the Equal Protection Clause does not prohibit a legislative body from withholding a wrongful death cause of action from the fetus. There is a distinction between the harm that a mother suffers from injury to part of her body and the loss of a fetus. *Edinburg Hosp. Auth. v. Trevino*, 941 S.W.2d

76, 79 (Tex.1997); *Krishnan*, 916 S.W.2d at 481–82. The former is a direct cause of action that the mother has in her own right, while the latter is a derivative claim.

[2] We therefore hold that the wrongful death and survival statutes do not violate the Equal Protection Clause by prohibiting parents of a stillborn fetus from bringing claims under them.²

*99 III

Next, we address the court of appeals' holding that the trial court erred in granting summary judgment for the health care providers, thereby prohibiting Tara Reese's separate cause of action for the damages she suffered as a result of her doctors' alleged negligence. 87 S.W.3d at 206.

[3] [4] [5] [6] The health care providers moved for summary judgment under both Rule 166a(c) and Rule 166a(i). Tex.R. Civ. P. 166a(c), 166a(i). To succeed in a motion for summary judgment under Rule 166a(c), a movant must establish that there is no genuine issue of material fact so that the movant is entitled to judgment as a matter of law. Tex.R. Civ. P. 166a(c). In deciding whether there is a disputed issue of material fact, every doubt must be resolved in favor of the nonmovant and evidence favorable to the nonmovant must be taken as true. *Cathey v. Booth*, 900 S.W.2d 339, 341 (Tex.1995); *Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 548–49 (Tex.1985). Under Rule 166a(i), a movant must establish that “[a]fter adequate time for discovery ... there is no evidence of one or more essential elements of a claim or defense on which an adverse party would have the burden of proof at trial.” Tex.R. Civ. P. 166a(i); see also *Johnson v. Brewer & Pritchard, P.C.*, 73 S.W.3d 193, 207 (Tex.2002). To defeat a Rule 166a(i) summary judgment motion, the nonmovant must produce summary judgment evidence raising a genuine issue of material fact. Tex.R. Civ. P. 166a(i); *Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 600 (2004). A genuine issue of material fact exists if the nonmovant produces more than a scintilla of evidence establishing the existence of the challenged element. *Ford Motor Co.*, 135 S.W.3d at 600; *Morgan v. Anthony*, 27 S.W.3d 928, 929 (Tex.2000).

[7] The health care providers argued in their summary judgment motions that as a matter of law a bystander cannot recover mental anguish damages in a medical

malpractice case. Additionally, the health care providers claimed that Tara Reese failed to present any evidence that she sustained legally recoverable damages resulting from the health care providers' alleged negligence. The trial court granted both motions. The court of appeals reversed the trial court, holding that Reese presented more than a scintilla of evidence to support her claims against the health care providers arising from their negligent care and treatment. We agree.

Reese produced an affidavit from another obstetrician stating that her health care providers failed to monitor her blood pressure or evaluate her tachycardia, and that such failure fell below the legal standard of care. The obstetrician's affidavit is some evidence that Reese's doctors breached their legal duty to provide competent medical care to her. See *Krishnan v. Sepulveda*, 916 S.W.2d 478, 480 (Tex.1995).

In *Krishnan*, this Court held that mental anguish damages are recoverable when a doctor's medical negligence causes injury, which includes the loss of a fetus. 916 S.W.2d at 480–82. Although the hospital argues that there is no evidence of any physical injury to Tara Reese “that would not have otherwise occurred,” we recognized in *Krishnan* that recovery may be had in this situation “even absent proof of physical injury” other than the loss of the unborn child. *Id.* at 482. The elements of a mother's claim include: (1) a breach of the “legal duty to provide competent medical care to [the mother,]” (2) that “proximately caus[es] ... the loss of her fetus[.]” (3) “coupled with the mental anguish resulting *100 from the loss of an unborn child.” *Id.* We stated in *Krishnan*, however, that not all mental anguish resulting from the loss of an unborn child is recoverable. *Id.* Specifically, we held that parents may not recover “damages for loss of society, companionship, and affection[.]” *Id.*

In *Edinburg Hospital Authority v. Trevino*, 941 S.W.2d 76, 79 (Tex.1997), we expanded our holding in *Krishnan*. As in this case, the mother in *Edinburg Hospital Authority* brought a claim against her doctor for mental anguish resulting from negligent treatment that allegedly caused her child to be stillborn. *Id.* at 78. To prove her mental anguish damages, she presented

evidence that she had made preparations in expectation of the arrival of her baby: she had set aside a room in her home for the baby and purchased furniture for the room. She also testified that the loss of the fetus

“still hurts [her] like it was yesterday,” that she carries a clipping of the funeral service with her, and that her marriage deteriorated after the loss of the fetus.

Id. at 79. We held that the mother's evidence related to her grief over the loss of the fetus as a separate individual, but did not relate to damages suffered as a result of the mother's own injury. *Id.* Because *Krishnan* was decided after the trial in *Edinburg Hospital Authority*, we remanded the case to the trial court in the interest of justice to allow the mother to present evidence of “mental anguish damages suffered because of loss of the fetus resulting from an injury to the mother.” *Id.*

The hospital suggests that Tara Reese only provided evidence of her grief from the loss of her unborn child. We disagree. Certainly, there is evidence in the record that Tara Reese grieved over this loss. While such grief may be non-compensable under our law, it is nonetheless an expected, natural consequence of the loss of an unborn child, and it is not surprising that Tara Reese's affidavit would reflect such grief. We believe, however, that the affidavit also raises a fact question as to mental anguish damages separate and apart from the “loss of society, companionship, and affection.” Reese described a “long and painful delivery” that was made even more psychologically traumatic because she had to experience the delivery “knowing [her] baby was dead.”

We conclude that this evidence of mental anguish suffered during the course of Reese's medical treatment is sufficient to raise a fact question regarding compensable mental anguish damages from her own injury. See *Krishnan*, 916 S.W.2d at 482. Consequently, we affirm the court of appeals' holding that Reese produced sufficient evidence raising material fact issues as to whether Tara Reese suffered mental anguish damages for her own injury sufficient to defeat the summary judgment motion.

* * *

For these reasons, we reverse the court of appeals' judgment in part and affirm in part. We render judgment that the Reeses take nothing on their wrongful death and survival claims, and we remand Tara Reese's individual medical negligence claim to the trial court for further proceedings in accordance with this opinion.

Justice O'NEILL filed a concurring opinion.

Justice SMITH filed a dissenting opinion.

Justice SCHNEIDER did not participate in the decision.

*101 Justice O'NEILL, concurring.

I agree with the dissent that neither the 8th nor the 24th Legislature intended to exclude from the wrongful death and survival acts a viable human fetus who dies before birth, and for reasons that Justices Kilgarlin and Gonzalez, and now Justice Smith, have expressed, *Witty v. American General Capital Distributors, Inc.*, 727 S.W.2d 503 (Tex.1987), was wrongly decided. See *Krishnan v. Sepulveda*, 916 S.W.2d 478, 483–90 (Tex.1995); *Edinburg Hosp. Auth. v. Trevino*, 941 S.W.2d 76, 85–92 (Tex.1997). I am also sympathetic to the dissent's general frustration with the doctrine of legislative acceptance in certain circumstances. But in this area, the Legislature has failed to act for well over a decade and a half even though the Court has continued to follow *Witty* and repeatedly invited the Legislature to clarify the statutory meaning if it thought the *Witty* court did not interpret the wrongful-death and survival acts correctly. See *Krishnan*, 916 S.W.2d at 479–80; *Pietila v. Crites*, 851 S.W.2d 185, 187 (Tex.1993) (*per curiam*); *Blackman v. Langford*, 795 S.W.2d 742, 743 (Tex.1990) (*per curiam*); *Tarrant County Hosp. Dist. v. Lobdell*, 726 S.W.2d 23 (Tex.1987). The Legislature has now acted and, without wholly disavowing *Witty*, amended the statutory definition of “individual” to include “an unborn child at every stage of gestation from fertilization until birth.” Tex. Civ. Prac. & Rem.Code § 71.001(4). Under these circumstances, I agree with the Court that we are bound by *Witty* and therefore join the Court's opinion.

Justice SMITH, dissenting.

This medical malpractice case arises from treatment provided to Tara Reese and her unborn child, named Clarence Reese by the parent-plaintiffs, who died in utero on May 12, 1998. Citing *Witty v. American General Capital Distributors, Inc.*, 727 S.W.2d 503 (Tex.1987), the defendants assert that health care providers owe no legal duty of reasonable care to a human fetus who dies before birth. In response, the plaintiffs request that we overrule *Witty* and recognize a cause of action under both

the wrongful death statute and the survival statute for negligence that causes the prenatal death of a viable fetus.

The wrongful death statute provides: “An action for actual damages arising from an injury that causes an *individual's* death may be brought if liability exists under this section.” [Tex. Civ. Prac. & Rem.Code § 71.002\(a\)](#) (emphasis added). The survival statute provides: “A cause of action for personal injury to the health, reputation, or person of an injured *person* does not abate because of the death of the injured person....” [Id. § 71.021\(a\)](#) (emphasis added).

The initial question presented in this case is whether the words “individual” and “person” include a viable fetus who dies before birth. Relying on “legislative acquiescence” and stare decisis, the Court concludes that they do not. I disagree.

I

The Texas Wrongful Death Act was enacted by the 8th Legislature¹ and the Texas Survival Act was enacted by the 24th Legislature.² Before the plaintiffs' causes of action accrued, no relevant parts of those enactments had been substantively ***102** amended.³ Therefore, in resolving this case, the Court must ascertain and effectuate the intent of the enacting Legislatures. See [Crown Life Ins. Co. v. Casteel](#), 22 S.W.3d 378, 383 (Tex.2000) (“The primary rule in statutory interpretation is that a court must give effect to legislative intent.”); [Manry v. Robison](#), 122 Tex. 213, 56 S.W.2d 438, 447 (1932) (“[I]n the absence of some specific amendment we should give [a statute] the meaning which it had at the time of its enactment.”).

In my view, when adopting the wrongful death act and the survival act, neither the 8th Legislature nor the 24th Legislature intended to exclude a viable human fetus who dies before birth. In addition, when construing a statute, a court should not draw any inference regarding the intent of the enacting legislature from the inaction of subsequent legislatures. My position regarding what is commonly referred to as “legislative acquiescence” is consistent with the majority of jurisdictions. See, e.g., [Helvering v. Hallock](#), 309 U.S. 106, 119–20, 60 S.Ct. 444, 84 L.Ed. 604 (1940) (“To explain the cause of non-action by Congress when Congress itself sheds no light is to venture into

speculative unrealities.”). Finally, I believe that the Court is not constrained in this case by its prior decisions. An analysis of the factors traditionally considered by courts establishes that *Witty* and its progeny are weak precedent. Moreover, the initial question presented in this case is too important to be resolved solely on the basis of stare decisis.

The Court should abandon the interpretation of [sections 71.002 and 71.021 of the Civil Practice and Remedies Code](#) first announced in *Witty*.⁴ Instead, we should construe “individual” and “person” to include a fetus, as urged by Justice Kilgarlin in his *Witty* dissent, which was joined by Chief Justice Hill and Justice Ray. [Witty](#), 727 S.W.2d at 506–12. Similarly, we should adopt the reasoning of Justice Gonzalez's dissents in [Krishnan v. Sepulveda](#), 916 S.W.2d 478, 483–89 (Tex.1995) and [Edinburg Hospital Authority v. Trevino](#), 941 S.W.2d 76, 85–92 (Tex.1997), which assert that a fetus falls within the definitions of “individual” and “person.”⁵

***103** Given my view of the proper interpretation of “individual” and “person” in the wrongful death and survival statutes, I do not reach the substantial constitutional issues raised in this case because the plaintiffs' causes of action would be statutorily recognized.⁶ I also do not reach the issue regarding whether Tara Reese, the mother, raised a fact issue on her own claim for medical malpractice. Finally, because of my concern about the Court's analysis regarding whether a viable human fetus is a “person” under the equal protection provisions of the United States Constitution and the Texas Constitution, I do not join any part of the Court's opinion.

II

I recognize the importance of stare decisis and acknowledge that precedent must not be lightly discarded. However, “[s]tare decisis is not an inexorable command; rather, ‘it is a principle of policy and not a mechanical formula of adherence to the latest decision.’ ” [Payne v. Tennessee](#), 501 U.S. 808, 828, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991) (quoting [Helvering v. Hallock](#), 309 U.S. 106, 119, 60 S.Ct. 444, 84 L.Ed. 604 (1940)).

Recognizing that the doctrine of stare decisis is not absolute, this Court has previously overruled itself in

this specific area of the law. In *Trevino*, Justice Gonzalez noted:

In *Leal v. C.C. Pitts Sand & Gravel, Inc.*, 419 S.W.2d 820, 821 (Tex.1967), this Court held that parents of a viable infant born alive have a cause of action under the Wrongful Death Statute if the baby later dies from injuries inflicted while in utero. In the process, we overruled *Magnolia Coca Cola Bottling Co. v. Jordan*, 124 Tex. 347, 78 S.W.2d 944 (1935), citing one legal writer who remarked that “[s]eldom in the law has there been such an overwhelming trend in such a relatively short period of time as there has been in the trend towards allowing recovery for prenatal injuries to a viable infant.” *Leal*, 419 S.W.2d at 822.

Trevino, 941 S.W.2d at 88 (Gonzalez, J., dissenting). Like *Magnolia Coca Cola Bottling Co. v. Jordan*, *Witty* was wrongly decided and should be overruled. Cf. *Sanchez v. Schindler*, 651 S.W.2d 249, 251 (Tex.1983) (overruling *March v. Walker*, 48 Tex. 372, 375 (1877)—“It is time for this court to revise its interpretation of the Texas Wrongful Death statutes....”).

Texas courts have recognized several factors that weaken the precedential value of an opinion. For example, the Court of *104 Criminal Appeals utilizes the following factors when determining whether to overrule precedent: 1) the original decision was flawed from the outset, due to flawed reasoning, lack of authority, or misplaced reliance upon cited authorities; 2) the decision conflicts with other precedent; 3) the decision has been undercut by the passage of time; 4) the decision produces inconsistency and confusion in the law; and 5) the decision consistently creates unjust results. *Hammock v. State*, 46 S.W.3d 889, 892–93 (Tex.Crim.App.2001). The foregoing factors are present in this case, as are additional considerations that undermine the precedential value of *Witty* and its progeny.

A

Witty was wrongly decided—its reasoning was flawed and it lacked authority. Rather than replicate verbatim the lengthy and eloquent dissents authored by Justices Kilgarlin and Gonzalez, I adopt by reference their reasoning concerning the proper interpretation of “individual” and “person” in the wrongful death and survival statutes. The dissents in *Witty*, *Krishnan*, and

Trevino demonstrate that the common law definition of “person” during the period when the wrongful death act and the survival act were enacted treated a human fetus as a legal person and that other historical evidence indicates the enacting Legislatures intended to include a fetus within the meaning of “person” for purposes of those acts.

Justices Kilgarlin and Gonzalez conducted an extensive examination of the common law concerning legal personhood, dating to its eighteenth century English origins, and produced persuasive evidence that a fetus was regarded as a legal person under the common law during the last half of the nineteenth century.⁷ The majority in *Witty* did not dispute or otherwise directly address the dissent's historical evidence regarding the common law definition of “person” and failed to consider how the common law informed the understanding and intent of the enacting Legislatures.

In his dissent in *Witty*, Justice Kilgarlin also stated:

In Chapter IX of that Code, entitled “Of Homicide,” the legislature provided “[t]he person upon whom the homicide is alleged to have been committed, must be in existence by actual birth.” Tex. Pen.Code art. 545 (1856); Oldham & White, *Digest, Laws of Texas* 425 (1859); Paschal, *Digest of the Laws of Texas*, Vol. I, article 2206. If the legislature found it necessary to limit persons upon whom a homicide could be committed to those born alive, can we not infer two things? One, is there not another category of “persons” than those in existence by actual birth? If so, that is a concession that a fetus was a person, but that the legislature did not intend to follow “the ancient law,” and make it the subject of a homicide. Two, if the legislature found it necessary in the 1856 Penal Code to qualify “person” to one born alive, why did not the Wrongful Death Act contain the same qualification? Law of February 2, 1860 ch. 35, 1860 Tex. Gen. Laws 32, 4 H. Gammel, *Laws of Texas* 1394 (1898). Can it not be argued that had the legislature intended a similar limitation on “person,” it would have said so, contrary to the assertion by the court “that the legislature did not intend the words ‘individual’ or ‘person’ *105 to be construed to include an unborn fetus.” 727 S.W.2d at 504.

Witty, 727 S.W.2d at 510.

It is also significant that the Legislature criminalized abortion in 1854.⁸ The Texas law outlawing abortion was part of a national movement that began in the mid-nineteenth century. By 1860, twenty of the thirty-three states had outlawed abortion by statute. By 1880, abortion was illegal in every state. *See* Eva R. Rubin, *Abortion, Politics, and the Courts: Roe v. Wade and Its Aftermath* 13–15 (1987). The relevance of the 1854 enactment outlawing abortion to the understanding and intent of the Legislature that adopted the wrongful death act in 1860 is clear: it is unlikely that only three regular sessions later, the Legislature had fundamentally altered its view regarding whether a fetus should be recognized as a legal person. In addition, when the survival act was adopted in 1895, the 1854 abortion enactment remained in effect.

B

Another factor undermining *Witty* is that it conflicts with other, more recent precedent. In *Brown v. Shwartz*, 968 S.W.2d 331 (Tex.1998), the Court concluded that, in a wrongful death suit involving a child who died the day after birth, limitations began to run from the time the prenatal injury occurred.⁹ The test to determine when the statute of limitations begins to run on a tort action is whether the act causing the damage constitutes a legal injury. *See, e.g., Atkins v. Crosland*, 417 S.W.2d 150, 153 (Tex.1967). *Shwartz* conflicts with *Witty* because, under *Witty*, there is no legal injury giving rise to a wrongful death or survival cause of action until the child is born alive. Based on *Witty*, any legally recognized injury is merely hypothetical until birth occurs—potentially many months after limitations begin to run under *Shwartz*. *Witty* cannot be reconciled with *Shwartz* in light of well-established limitations principles.

Witty is also in tension with some of this Court's earlier jurisprudence that remains good law. In *Nelson v. Galveston, Harrisburg & San Antonio Railway Co.*, 78 Tex. 621, 14 S.W. 1021 (1890), the Court concluded that a pregnant mother could bring wrongful death and survival actions against her deceased husband's employer on behalf of their unborn child, relying in part on the common law:

Perhaps no case, when it was decided in 1798, involved more important rights than that of *Thellusson v. Woodford*, 4 Ves. 319. Counsel and judges of high

authority engaged in its discussion and decision. Replying to the contention that an unborn child was a nonentity, and, in that case, the limitation was therefore void, Mr. Justice Buller said: "Let us see what the nonentity can do. He may be vouched in a recovery, though it is for the purpose of making him answer over in value. He may be an executor. He may take under the statute of distributions. He may have an injunction, a guardian."

*106 *Id.* at 1022. The *Nelson* Court further noted: "We think, also, that the plaintiff in this case, although unborn at the time of his father's death, was in being, and one of his surviving children." *Id.* at 1023. The majority in *Witty* acknowledged that *Nelson* remained good law. *See Witty*, 727 S.W.2d at 505.

C

Witty has been undercut by the passage of time. The majority in *Witty* stated that "by a ratio of better than two to one, the majority of states have ruled in favor of permitting a wrongful death action on behalf of an unborn fetus...." *Id.* The dissent clarified that thirty-five states and the District of Columbia had ruled in favor of permitting those actions and only eight states had ruled against. *Id.* at 512.

At the time *Witty* was decided, Montana and North Carolina were included among the eight states that did not "allow this type of recovery." *Id.* at 512 n. 3. Both states have since recognized a wrongful death action for a viable fetus who dies before birth. *See Strzelczyk v. Jett*, 264 Mont. 153, 870 P.2d 730, 733 (1994) (holding that a "full-term fetus should be considered a 'person' "); *DiDonato v. Wortman*, 320 N.C. 423, 358 S.E.2d 489, 491 (1987) (holding that "the word 'person' in the Wrongful Death Act includes a viable fetus"). Arkansas has also since recognized an action for a viable fetus who dies before birth. *See Aka v. Jefferson Hosp. Ass'n, Inc.*, 344 Ark. 627, 42 S.W.3d 508, 512 (2001) (overruling Arkansas Supreme Court precedent that a "viable fetus is not a 'person' within the meaning of Arkansas's wrongful-death statute").

Although not unanimous, an overwhelming majority of jurisdictions continues to recognize a wrongful death

action for negligent conduct that causes the prenatal death of a viable fetus.

D

Witty and its progeny have produced inconsistency and confusion in the law. One example is the different resolution of the mental anguish claims in *Trevino* and in this case. Relying on *Witty*, the Court in *Trevino* stated:

Mora sought to prove mental anguish damages in part by presenting evidence that she had made preparations in expectation of the arrival of her baby: she had set aside a room in her home for the baby and purchased furniture for the room. She also testified that the loss of the fetus “still hurts [her] like it was yesterday,” that she carries a clipping of the funeral service with her, and that her marriage deteriorated after the loss of the fetus. This evidence relates to the grief that Mora felt over the loss of the fetus as a separate individual and not as part of her own body. *Krishnan* and our decision today clarify that a woman can recover mental anguish damages resulting from negligent treatment that causes the loss of a fetus *as part of* the woman's body.

Edinburg Hosp. Auth. v. Trevino, 941 S.W.2d 76, 79 (Tex.1997).

In this case, the Court attempts to distinguish Tara Reese's testimony from Shirley Mora's testimony. However, the testimony of the two women is in fact very similar. Reese's affidavit stated:

On the morning of May 12, 1998, I was told that our baby had died. I was devastated. I had carried this baby for almost eight months and then that part of me was suddenly gone. When the baby died, a part of me died too.

The feeling of carrying a part of me that was no longer living is difficult to describe. To make it worse, I had to go through a long and painful delivery, *107 knowing our baby was dead. I will never forget that feeling as long as I live.

Afterwards, I cried uncontrollably because of what happened to us. There were many nights when I could not sleep and had nightmares about our loss. My heart was broken.

My husband and I received some counseling from our pastor, but I do not know if I will ever fully recover from what happened.

Reese's testimony is only semantically, not substantively, different from that given by Mora. Reese's statements express mental anguish above and beyond that resulting from the loss of a part of her body, such as a finger.

The Court's half-hearted and ultimately unconvincing attempt to distinguish Reese's testimony from Mora's testimony illustrates that the legal artifice constructed by *Witty*, which equates a viable human fetus with a finger or other part of a woman's body, is untenable. Indeed, this legal fiction is belied by the dichotomous biological reality wherein the fetus receives blood and nourishment from the mother through the umbilical cord and placenta, but possesses its own unique genetic makeup and organs. While a fetus is profoundly interconnected with the mother, it is at the same time growing and developing into a separate human being. A mother cannot reasonably parse the mental pain and anguish she feels, distinguishing between the effect of a miscarriage on her own body and the concomitant death of the fetus. As a result, the standard established by *Trevino* and applied by the majority in this case is simply a “magic words” test under which the mother must describe her mental anguish without making too numerous or too explicit references to the deceased fetus.

E

The rule announced in *Witty* continues to create unjust results. It produces the counterintuitive consequence, which was likely not intended by the enacting Legislatures, that “it is more profitable for the defendant to kill than to injure.” *Witty*, 727 S.W.2d at 506–07 (Kilgarlin, J., dissenting).

Before *Witty*, the Alabama Supreme Court recognized this injustice:

To deny recovery where the injury is so severe as to cause the death of a fetus subsequently stillborn, and to allow recovery where injury occurs during pregnancy and death results therefrom after a live birth,

would only serve the tortfeasor by rewarding him for his severity in inflicting the injury. It would be bizarre, indeed, to hold that the greater the harm inflicted the better the opportunity for exoneration of the defendant. Logic, fairness and justice compel our recognition of an action, as here, for prenatal injuries causing death before a live birth.

Eich v. Town of Gulf Shores, 293 Ala. 95, 300 So.2d 354, 355 (1974) (footnote omitted).

This year, New York's highest state court premised a decision on the same rationale. See *Broadnax v. Gonzalez*, 2 N.Y.3d 148, 777 N.Y.S.2d 416, 809 N.E.2d 645 (N.Y.2004). In overturning its prior decision in *Tebbutt v. Virostek*, 65 N.Y.2d 931, 493 N.Y.S.2d 1010, 483 N.E.2d 1142 (1985), which was similar to the Texas decision in *Krishnan*, the New York court stated:

[W]e are no longer able to defend *Tebbutt's* logic or reasoning.

As its dissenters recognized, the rule articulated in *Tebbutt* fits uncomfortably into our tort jurisprudence. Infants who are injured in the womb and survive the pregnancy may maintain causes of *108 action against tortfeasors responsible for their injuries. Further, a pregnant mother may sue for any injury she suffers independently. A parent, however, cannot bring a cause of action for wrongful death when a pregnancy terminates in miscarriage or stillbirth.

Injected into this common law framework, *Tebbutt* engendered a peculiar result: it exposed medical caregivers to malpractice liability for in utero injuries when the fetus survived, but immunized them against any liability when their malpractice caused a miscarriage or stillbirth. In categorically denying recovery to a narrow, but indisputably aggrieved, class of plaintiffs, *Tebbutt* is at odds with the spirit and direction of our decisional law in this area.

Broadnax, 777 N.Y.S.2d 416, 809 N.E.2d at 648 (citations omitted).

F

In addition to the factors discussed above, the Court has recognized that, when determining whether to overrule precedent, we should “pause and consider how far the reversal would affect contracts and transactions entered into and acted upon under the law of the Court.” *Thompson v. Kay*, 124 Tex. 252, 77 S.W.2d 201, 207 (1934) (quoting *Sydnor v. Gascoigne*, 11 Tex. 449, 455 (1854)). The doctrine of stare decisis has been strictly followed by this Court in cases involving established rules of property rights. *Southland Royalty Co. v. Humble Oil & Ref. Co.*, 151 Tex. 324, 249 S.W.2d 914, 916 (1952). Stare decisis “is never stronger than in protecting land titles, as to which there is great virtue in certainty.” *John G. & Marie Stella Kenedy Mem'l Found. v. Dewhurst*, 90 S.W.3d 268, 281 (Tex.2002). In that area and others involving vested property or contract rights, reversing precedent may have the undesirable effect of “upsetting long-settled expectations.” See *id.*

Overruling *Witty* will not upset existing economic arrangements based on long-settled expectations. Tortfeasors have no long-settled expectation of immunity from causes of action arising out of negligent conduct that results in the prenatal death of a viable fetus. Cf. *Moragne v. States Marine Lines*, 398 U.S. 375, 403–04, 90 S.Ct. 1772, 26 L.Ed.2d 339 (1970) (overruling longstanding United States Supreme Court precedent and recognizing wrongful death action under general maritime law—“It can hardly be said that shipowners have molded their conduct around the possibility that in a few special circumstances they may escape liability for such a breach.”).

III

The initial question presented in this case—whether the words “individual” in the wrongful death statute and “person” in the survival statute include a viable human fetus who dies before birth—is sharply contested. The defendants argue: “The Reese fetus was not born alive. Therefore, Texas law prohibits any recovery under the wrongful death and survival statutes based on the ‘death’ of the Reese fetus.” In response, the plaintiffs argue: “The time has come for this Court to re-examine and narrowly overrule *Witty* as it applies to viable unborn children,

restore sanity to an area of jurisprudence that is morally and legally repugnant, and bring Texas into step with those states that recognize these claims.”

In resolving this case, the Court does not assert that *Witty* was correctly decided in 1987. Rather, the Court concludes in summary fashion that the original 6–3 decision *109 should not be overruled.¹⁰ However, whether the words “individual” and “person” include a fetus who dies before birth is too important a question to be resolved in that manner.

Based on the analysis set forth in parts I and II above, *Witty* should be overruled. Cf. *Moragne*, 398 U.S. at 405, 90 S.Ct. 1772 (“Finally, a judicious reconsideration

of precedent cannot be as threatening to public faith in the judiciary as continued adherence to a rule unjustified in reason, which produces different results for breaches of duty in situations that cannot be differentiated in policy. Respect for the process of adjudication should be enhanced, not diminished, by our ruling today.”).

I would affirm the court of appeals' judgment. The Court reverses in part and affirms in part that judgment. Accordingly, I respectfully dissent.

All Citations

148 S.W.3d 94, 47 Tex. Sup. Ct. J. 999

Footnotes

- 1 In *Parvin v. Dean*, a case not appealed to this Court, the court of appeals held that the law violated both the United States and Texas Constitutions. 7 S.W.3d 264, 274 (Tex.App.—Fort Worth 1999, no pet.). The *Parvin* court wrote: “We perceive no rational or compelling state interest that justifies the wrongful death and survival statutes' unequal application to born babies while at the same time excluding viable but unborn babies and the unequal application to their parents.” *Id.* at 274. For reasons we explain below, we reject the *Parvin* court's equal protection analysis.
- 2 In so holding, we join a number of other jurisdictions around the country that have reached the same conclusion. See *Marie v. McGreevey*, 314 F.3d 136, 141–42 (3d Cir.2002); *Kandel v. White*, 339 Md. 432, 663 A.2d 1264, 1269 (1995); *Hernandez v. Garwood*, 390 So.2d 357, 359 (Fla.1980); *Justus v. Atchison*, 19 Cal.3d 564, 139 Cal.Rptr. 97, 565 P.2d 122, 132 (1977).
- 1 See Act approved Feb. 2, 1860, 8th Leg., R.S., ch. 35, 1860 Tex. Gen. Laws 32 (current version at [Tex. Civ. Prac. & Rem.Code §§ 71.001–71.020](#)).
- 2 See Act approved May 4, 1895, 24th Leg., R.S., ch. 89, 1895 Tex. Gen. Laws 143 (current version at [Tex. Civ. Prac. & Rem.Code §§ 71.021–71.030](#)).
- 3 In 2003, after the plaintiffs' causes of action accrued, the wrongful death statute was amended. See Act approved June 20, 2003, 78th Leg., R.S., ch. 822, 2003 Tex. Gen. Laws 2607. The Act became effective on September 1, 2003. Among other changes, the Legislature provided, for the first time, a definition of “individual” in the statute. “ ‘Individual’ includes an unborn child at every stage of gestation from fertilization until birth.” *Id.* § 1.01, [sec. 71.001](#), 2003 Tex. Gen. Laws 2608. The new statutory definition and the other amendments to the wrongful death statute “apply only to a cause of action that accrues on or after the effective date of [the] Act.” *Id.* § 1.04, 2003 Tex. Gen. Laws 2608. Therefore, this case “is governed by the law as it existed immediately before the effective date of [the] Act.” *Id.*
- 4 In *Witty*, the Court noted: “The recent codification of the Wrongful Death Act provides recovery for ‘damages arising from an injury that causes an individual's death.’ [Tex. Civ. Prac. & Rem.Code Ann. § 71.002\(b\)](#) (emphasis added). Prior to the codification, the Act provided recovery of ‘damages on account of the injuries causing the death of any person.’ [Tex.Rev.Civ. Stat. Ann. art. 4671](#) (Vernon Supp.1941–1985) (emphasis added). The legislature did not intend any substantive change in the Act by substituting the word ‘individual’ for the word ‘person’ in the recodification. [Tex. Civ. Prac. & Rem.Code Ann. § 10](#), 1985 Tex. Sess. Law Serv. 7219 (Vernon).” *Witty*, 727 S.W.2d at 504. The wrongful death statute did not define “individual” until after the Reeses' causes of action accrued. The survival statute uses “person” throughout rather than “individual,” and has never defined “person.”
- 5 In his *Trevino* concurrence, Justice Abbott stated: “I would be inclined to overrule *Witty* and allow recovery for the wrongful death of a fetus. However, the Treviños have not made any argument to this Court that *Witty* should be overruled.” [Trevino](#), 941 S.W.2d at 85 (Abbott, J., concurring).
- 6 Under the federal supremacy clause, we are bound by *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973) and its progeny. However, the resolution of this case is not controlled by that line of cases. *Roe v. Wade* does not foreclose state law remedies for negligent medical treatment that, without the consent of the mother, causes the death of a human

fetus. See, e.g., *Summerfield v. Superior Court*, 144 Ariz. 467, 698 P.2d 712, 723 (1985) (“*Roe v. Wade* balances the rights of the fetus against the rights of its mother and concludes that the latter’s right to privacy outweighs the former’s right to life in the first trimester of pregnancy; it ‘neither prohibits nor compels’ the inclusion of a fetus as a person for the purposes of other enactments.”) (citation omitted); *O’Grady v. Brown*, 654 S.W.2d 904, 910 (Mo.1983) (“*Roe v. Wade*, while holding that the fetus is not a ‘person’ for purposes of the 14th amendment, does not mandate the conclusion that the fetus is a legal nonentity. ‘The abortion issue involves the resolution of the mother’s rights as against the child when the two are in conflict. Whatever may be the determination of the rights in that context, this special relation gives a third-party tortfeasor no comparable rights.’”) (citation omitted).

7 In concluding that Arizona’s wrongful death statute provided a cause of action for a viable fetus who dies before birth, the Arizona Supreme Court provided a scholarly analysis of the relevant common law. See *Summerfield*, 698 P.2d at 715–21.

8 See Act approved Feb. 9, 1854, 5th Leg., ch. 49, § 1, 1854 Tex. Gen. Laws 58. The sentence for aborting a fetus was “confinement to hard labor in the Penitentiary not exceeding ten years.” *Id.*

9 In resolving *Shwartz*, the Court concluded that a fetus was a “patient” with a “doctor-patient” relationship. *Shwartz*, 968 S.W.2d at 334. In a concurrence, Justice Gonzalez noted that every definition of “patient” contained in a Texas statute referred to a “person” or “individual.” *Id.* at 336–37 (Gonzalez, J., concurring). The conclusion in *Witty* that a fetus is neither an “individual” nor a “person” is therefore inconsistent with the conclusion in *Shwartz* that a fetus is a “patient.”

10 For example, the Court incorrectly asserts that the Legislature has endorsed “the holding of *Witty*.” 148 S.W.3d at 97. In fact, the Legislature rejected this Court’s holding in *Witty* in 2003. *Witty* involved a workplace injury that caused the prenatal death of a viable fetus. See *Witty v. Am. Gen. Capital Distrib., Inc.*, 697 S.W.2d 636, 638 (Tex.App.-Houston [1st Dist.] 1985), *rev’d in part*, 727 S.W.2d 503 (Tex.1987) (Kimberly Witty “alleged that while employed by defendant as a receptionist, she tripped over a utility outlet and fell with such force that her unborn baby was fatally injured.”). In reversing the court of appeals, this Court specifically held that a fetus was not an “individual.” *Witty*, 727 S.W.2d at 504. If the same set of facts occurred today, a similarly situated plaintiff would be entitled to bring a wrongful death action against her employer for the death of her unborn fetus. See *Tex. Civ. Prac. & Rem.Code* §§ 71.001–71.020.



KeyCite Yellow Flag - Negative Treatment

Distinguished by [Chilkewitz v. Hyson](#), Tex., October 21, 1999

941 S.W.2d 96

Supreme Court of Texas.

Gustavo DIAZ, M.D., Petitioner

v.

Carolyn WESTPHAL, individually and a/
n/f of Eric Michael Westphal, a minor, and
as independent executrix of the estate of
Michael Westphal, deceased, Respondent.

No. 96-0433.

|

March 21, 1997.

Patient's estate, wife, and minor child brought wrongful death and survival action against physician who treated patient's Hodgkin's disease with medication. The 319th District Court, Nueces County, Max Bennett, J., granted summary judgment for physician on limitations grounds. The Court of Appeals, Yanez, J., [918 S.W.2d 543](#), affirmed summary judgment on claims by wife and estate, but reversed and remanded child's claims. Physician filed application for writ of error. The Supreme Court, [Gonzalez, J.](#), held that: (1) discovery rule did not toll limitations period applicable to son's statutory claims, and (2) open courts doctrine did not apply to child's statutory action.

Reversed and rendered.

West Headnotes (7)

[1] Health **Actions and Proceedings**

Victims of medical negligence have common-law right to sue for their injuries.

[1 Cases that cite this headnote](#)**[2] Death** **Nature and Form of Remedy****Death** **Right of Action of Person Injured****Death** **Defenses**

Wrongful death and survival claims are statutory in nature, and right to maintain such actions is entirely derivative of decedent's right to have sued for his own injuries immediately prior to his death, and is subject to same defenses to which decedent's action would have been subject. [V.T.C.A., Civil Practice & Remedies Code §§ 71.004, 71.021](#).

[4 Cases that cite this headnote](#)**[3] Limitation of Actions** **Negligence in Performance of Professional Services**

Period of limitations for health care liability claim runs from date breach or tort occurred, date treatment that is subject of claim is completed, or date hospitalization for which claim is made is completed. [Vernon's Ann.Texas Civ.St. art. 4590i, § 10.01](#).

[10 Cases that cite this headnote](#)**[4] Limitation of Actions** **In General; What Constitutes Discovery**

Discovery rule suspends accrual, and thus running of limitations, until plaintiff knew or in exercise of reasonable diligence should have known of wrongful act and resulting injury.

[9 Cases that cite this headnote](#)**[5] Death** **Computation of Period of Limitation**

Discovery rule could not apply, as a matter of law, to preserve deceased patient's medical malpractice claim beyond expiration of two-year limitations period such that wrongful death and survival claims brought by patient's minor child were barred by limitations. [Vernon's Ann.Texas Civ.St. art. 4590i, § 10.01](#).

[9 Cases that cite this headnote](#)**[6] Constitutional Law**

🔑 **Conditions, Limitations, and Other Restrictions on Access and Remedies**

To establish right to redress under open courts provision, litigant must show that he has cognizable common-law cause of action, and that restriction of claim is unreasonable or arbitrary when balanced against statute's purpose. [Vernon's Ann.Texas Const. Art. 1, § 13](#).

31 Cases that cite this headnote

[7] **Constitutional Law**

🔑 **Time for Proceedings**

Limitation of Actions

🔑 **Constitutionality of Statute**

Open court provision of State Constitution did not apply to statutory wrongful death and survival claims brought by patient's son, based upon theory that physician negligently overprescribed medication to patient, and thus application of Medical Liability Act's two-year limitation period did not violate State Constitution. [Vernon's Ann.Texas Const. Art. 1, § 13](#); [Vernon's Ann.Texas Civ.St. art. 4590i, § 10.01](#).

18 Cases that cite this headnote

Attorneys and Law Firms

*96 [Carlos Villarreal](#), Corpus Christi, for petitioner.

[J. Norman Thomas](#), Corpus Christi, for respondent.

Opinion

*97 [GONZALEZ](#), Justice.

In this medical malpractice case, we must decide whether Carolyn Westphal brought the wrongful death and survival claims she asserted on behalf of her minor child within the applicable statute of limitations. The trial court rendered summary judgment for the defendant doctor, holding that the suit was not timely. A divided court of appeals reversed and remanded the minor's claims for trial. [918 S.W.2d 543](#). We reverse the judgment of the court of appeals and render judgment for the defendant.

I

The facts of this case are largely undisputed. From 1977 to 1984, Dr. Gustavo Diaz prescribed [Cytotoxan](#) to treat Michael Westphal's [Hodgkin's disease](#). Diaz last treated Mr. Westphal on August 6, 1984. In September 1984, while on vacation out of state, Mr. Westphal experienced bleeding from his urinary tract and an inability to urinate. He went to a local hospital, where an emergency-room doctor advised him that he had been taking [Cytotoxan](#) too long, that the drug was causing his bleeding, and that he should cease taking the drug. He continued his vacation, and although he ceased taking [Cytotoxan](#), Mr. Westphal's symptoms continued. He again required hospitalization while on vacation. Upon returning to Texas, Mr. Westphal visited another emergency room, and his condition again required hospitalization.

Mr. Westphal did not sue Diaz at that time, but decided not to consult him again. Mr. Westphal selected another doctor, who treated his [Hodgkin's disease](#) and his [urinary tract problems](#). Later, in 1987 or 1988, Mr. Westphal's wife Carolyn gave birth to a child, Eric Westphal.¹ In April 1991, during examinations before bladder reconstructive surgery, the new doctor discovered [bladder cancer](#). Mr. Westphal did not file suit against Diaz before he died on April 27, 1992.

On May 20, 1993, Carolyn Westphal brought this suit against Diaz and Methodist Hospital, alleging statutory wrongful death and survival claims on behalf of her son, herself, and Mr. Westphal's estate. She contended that Diaz negligently prescribed [Cytotoxan](#) to Mr. Westphal for an extended period of time and that such prolonged duration and dosage proximately caused his fatal [cancer](#). Diaz answered with a general denial and moved for summary judgment solely on the ground that the two-year limitations provision found in section 10.01 of the Medical Liability and Insurance Improvement Act (the Medical Liability Act) barred the Westphals' claims. *See* [Tex.Rev.Civ. Stat. art. 4590i, § 10.01](#). In response, the Westphals alleged that [section 10.01](#) violated the Texas Constitution's "open courts" provision as applied in this case and that it did not govern the minor child's claims. *See* [Tex. Const. art. I, § 13](#). The trial court granted Diaz's motion, rendered summary judgment that the Westphals take nothing, and severed the claims against Diaz from those brought against Methodist Hospital.

With one justice dissenting, the court of appeals affirmed the trial court's summary judgment on Carolyn Westphal's claims and the claims she brought for Mr. Westphal's estate, holding that the limitations period had expired before she filed suit. 918 S.W.2d at 546. However, the appellate court reversed and remanded Eric Westphal's claims for trial. *Id.* at 551. In distinguishing his claims, the court reasoned that section 10.01 contained a tolling provision that extends the time within which minors may bring suit and that "Diaz's summary judgment motion and proof are inadequate to establish that the statute of limitations barred Eric's claims." *Id.* at 546–47. Only Diaz applied for writ of error. We granted the writ to determine whether, as Diaz contends, the court of appeals erred in reversing the trial court's summary judgment with respect to Eric Westphal.

II

We review Diaz's complaints under well known summary judgment standards. See *Sysco Food Serv., Inc. v. Trapnell*, 890 S.W.2d 796, 800 (Tex.1994); *Nixon v. Mr. Property Management Co.*, 690 S.W.2d 546, 548–49 (Tex.1985). A defendant who moves ^{*98} for summary judgment based on limitations must establish the defense as a matter of law. *Jennings v. Burgess*, 917 S.W.2d 790, 793 (Tex.1996); *Delgado v. Burns*, 656 S.W.2d 428, 429 (Tex.1983). To satisfy this burden, the defendant must conclusively negate any relevant tolling doctrines the plaintiff asserted in the trial court. *Jennings*, 917 S.W.2d at 793; see *Zale Corp. v. Rosenbaum*, 520 S.W.2d 889, 891 (Tex.1975) (per curiam).

[1] [2] Victims of medical negligence have a common-law right to sue for their injuries. *Rose v. Doctors Hosp.*, 801 S.W.2d 841, 843 (Tex.1990). In contrast, wrongful death and survival claims are statutory in nature. *Russell v. Ingersoll–Rand Co.*, 841 S.W.2d 343, 345 (Tex.1992); see Tex. Civ. Prac. & Rem.Code § 71.004 (conferring cause of action upon surviving spouse, children, and parents of decedent for damages decedent may have recovered if he had lived); *id.* § 71.021 (allowing decedent's heirs, legal representatives, and estate to bring suit for personal injuries decedent suffered before death). The right to maintain such actions "is entirely derivative of the decedent's right to have sued for his own injuries immediately prior to his death, and is subject to the same

defenses to which the decedent's action would have been subject." *Russell*, 841 S.W.2d at 347.

[3] The Legislature enacts statutes of limitation to ensure that claims are brought within a reasonable, prescribed time after a wrong occurs. *Russell*, 841 S.W.2d at 349; *Moreno v. Sterling Drug, Inc.*, 787 S.W.2d 348, 351 (Tex.1990). The parties to this case agree that Michael Westphal could have exercised his common-law right to sue Dr. Diaz for negligence within the limitations period prescribed in section 10.01 of the Medical Liability Act, which represents the Legislature's determination of what constitutes a reasonable time for bringing health care liability claims.² This statute provides:

Notwithstanding any other law, no health care liability claim may be commenced unless the action is filed within two years from the occurrence of the breach or tort or from the date the medical or health care treatment that is the subject of the claim or the hospitalization for which the claim is made is completed; provided that, minors under the age of 12 years shall have until their 14th birthday in which to file, or have filed on their behalf, the claim. Except as herein provided, this subchapter applies to all persons regardless of minority or other legal disability.

Tex.Rev.Civ. Stat. art. 4590i, § 10.01. Section 10.01 imposes an absolute two-year limitations period that runs from any one of three possible events: (1) the date the breach or tort occurred; (2) the date the treatment that is the subject of the claim is completed; or (3) the date the hospitalization for which the claim is made is completed. *State v. Thirteenth Court of Appeals*, 933 S.W.2d 43, 46 (Tex.1996) (per curiam); *Chambers v. Conaway*, 883 S.W.2d 156, 158 (Tex.1993); see *Jennings*, 917 S.W.2d at 793. One may extend the two-year period for seventy-five days by giving notice of a claim. See Tex.Rev.Civ. Stat. art. 4590i, § 4.01(c).

To refute Diaz's limitations defense, the Westphals contend in this Court that section 10.01's tolling provision extended the time for filing Eric Westphal's claims. They did not raise this argument in the court of appeals. Accordingly, we do not address the issue.

The Westphals do not dispute that Diaz last treated Mr. Westphal on August 6, 1984. Under section 10.01, the limitations period for his prospective medical malpractice claim began to run on August 6, 1984 and, absent a

statutory notice letter, expired two years later. *See Bala v. Maxwell*, 909 S.W.2d 889, 891 (Tex.1995) (per curiam) (noting that, under [section 10.01](#), limitations period begins on last date of treatment if injury results from negligent course of treatment, rather than specific instance of negligence); *see also Rowntree v. Hunsucker*, 833 S.W.2d 103, 105 (Tex.1992) (“There are some situations in which the statute would run from the date of the last drug treatment, if the course of that *99 treatment is the direct cause of the injury.”). The Westphals concede that Michael Westphal failed to bring suit within this two-year window and that limitations ran on his prospective claim against Diaz unless a tolling provision saved it. Consequently, because Eric Westphal's statutory claims are entirely derivative of his father's rights, Diaz was entitled to summary judgment if he conclusively disproved all tolling doctrines the Westphals pleaded that might have saved Mr. Westphal's potential negligence suit.³ *See Jennings*, 917 S.W.2d at 793; *Russell*, 841 S.W.2d at 347.

III

The court of appeals held that, because a fact issue existed as to whether Michael Westphal could have maintained a medical negligence claim immediately before he died, Diaz failed to conclusively prove that limitations barred Eric Westphal's wrongful death and survival claims. 918 S.W.2d at 547. In its opinion, the appellate court discussed two doctrines that arguably could have tolled Mr. Westphal's claim: the discovery rule and the Texas Constitution's open courts provision. Before beginning our analysis, we note that the court of appeals treated the discovery rule and the open courts doctrine as if they are one in the same. *See* 918 S.W.2d at 546–47 (purporting to apply “the discovery rule” to determine whether [section 10.01](#) is unconstitutional as applied to Eric Westphal's derivative claims). We disagree with the court of appeals' approach given our explication of the respective tests below, although it appears we have never expressly distinguished them before today. *See Morrison v. Chan*, 699 S.W.2d 205, 206–08 (Tex.1985) (treating plaintiff's open courts challenge distinctly from her argument urging application of discovery rule without discerning subtle differences between tests); *see also Desiga v. Scheffey*, 874 S.W.2d 244, 248 (Tex.App.—Houston [14th Dist.] 1994, no writ) (“Unfortunately, the various courts of appeals, in analyzing the constitutionality of the statute in terms of the open courts provision, have used language

similar to the abrogated discovery rule, thereby creating some confusion over the pleading and application of this constitutional argument.”); *Del Rio v. Jinkins*, 730 S.W.2d 125, 128 (Tex.App.—Corpus Christi 1987, writ ref'd n.r.e.) (“The two terms have very technical meanings and should not be interchanged.”).

A

[4] This Court adopted the discovery rule in *Gaddis v. Smith*, 417 S.W.2d 577, 580 (Tex.1967), a medical malpractice case. In so doing, we intended to assist courts in construing limitations statutes that expressly define the triggering event as the date a plaintiff's cause of action “accrued.” *Nelson v. Krusen*, 678 S.W.2d 918, 920 (Tex.1984) (citing *Gaddis*, 417 S.W.2d at 580). This rule of statutory construction suspends accrual, and thus the running of limitations, “until the plaintiff knew or in the exercise of reasonable diligence should have known of the wrongful act and resulting injury.” *S.V. v. R.V.*, 933 S.W.2d 1, 4 (Tex.1996) (citing *Trinity River Auth. v. URS Consultants, Inc.*, 889 S.W.2d 259, 262 (Tex.1994)); *see Krusen*, 678 S.W.2d at 920.

However, Diaz's summary judgment motion and supporting evidence establish that [section 10.01](#) applies, and the Westphals offered no argument or proof to the contrary. We have repeatedly held that [section 10.01](#) establishes an absolute two-year statute of limitations for health care liability claims, thereby abolishing the discovery rule in cases governed by the Medical Liability Act. *See, e.g., Jennings*, 917 S.W.2d at 793; *Krusen*, 678 S.W.2d at 920. By statute, Mr. Westphal's prospective cause of action accrued, if at all, on August 6, 1984, the date Diaz last treated him. *See Tex.Rev.Civ. Stat. art. 4590i, § 10.01; Bala*, 909 S.W.2d at 891.

[5] Nevertheless, the Westphals argue that Mr. Westphal could not have known Diaz's alleged negligence would result in his *100 terminal cancer, and therefore the statute of limitations did not begin to run on his medical malpractice claim until April 1991, when doctors discovered and informed him of this condition. In effect, the Westphals contend that the minor child's derivative claims, which his mother brought on May 20, 1993, were not barred by limitations because the father had a valid claim against Diaz immediately before his death on April 27, 1992. Under the established discovery-rule

jurisprudence discussed above, this position is without merit. As a matter of law, the discovery rule could not apply to preserve Mr. Westphal's claim beyond August 1986, when [section 10.01](#)'s two-year period expired.

B

Responding to Diaz's motion for summary judgment based on his limitations defense, the Westphals alleged that [section 10.01](#) violates the open courts provision of the Texas Constitution. This provision states that “[a]ll courts shall be open, and every person for an injury done him, and his lands, goods, person or reputation, shall have remedy by due course of law.” [Tex. Const. art. I, § 13](#). Unlike the discovery rule, the open courts doctrine is grounded in the constitutional guarantee of due process.⁴ See [Morrison](#), 699 S.W.2d at 207. This doctrine “is premised upon the rationale that the legislature has no power to make a remedy by due course of law contingent upon an impossible condition.” [Moreno](#), 787 S.W.2d at 355.

[6] To establish a right to redress under the open courts provision, a litigant must show (1) that he has a cognizable common-law cause of action, and (2) that restriction of the claim is unreasonable or arbitrary when balanced against the statute's purpose. [Moreno](#), 787 S.W.2d at 355; see [Jennings](#), 917 S.W.2d at 793; [Rose](#), 801 S.W.2d at 843). In several instances, we have held that the Medical Liability Act or its predecessors violated the open courts provision when applied to the facts of a particular case. See, e.g., [Weiner v. Wasson](#), 900 S.W.2d 316, 318 (Tex.1995); [Lucas v. United States](#), 757 S.W.2d 687, 690 (Tex.1988); [Neagle v. Nelson](#), 685 S.W.2d 11, 12 (Tex.1985); [Krusen](#), 678 S.W.2d at 923. Moreover, we have applied open courts to determine that the Medical Liability Act's limitations period unconstitutionally restricted a minor's claim. See, e.g., [Weiner](#), 900 S.W.2d at 318 (holding [section 10.01](#) unconstitutional because it cut off minor plaintiff's medical malpractice action before he reached majority and could sue on his own behalf); [Sax v. Votteler](#), 648 S.W.2d 661, 667 (Tex.1983) (determining that predecessor to [section 10.01](#) precluded minor plaintiff “from having her day in court to complain of an act of medical malpractice”). Diaz contends that the open courts doctrine does not apply because Eric Westphal cannot satisfy the first element of the open courts test. We agree.

At common law, no personal injury cause of action survived to a deceased tort victim's heirs, and the heirs had no claim for their own losses resulting from the tortious act. [Kramer v. Lewisville Mem'l Hosp.](#), 858 S.W.2d 397, 403 (Tex.1993). Such actions exist today only by statute. See [Tex. Civ. Prac. & Rem.Code §§ 71.002, -.004, -.021](#); [Moreno](#), 787 S.W.2d at 356. The court of appeals acknowledged that the child's cause of action is wholly statutory in nature. 918 S.W.2d at 546. However, in addressing the first part of the open courts test, the court of appeals analyzed whether *Mr. Westphal*, not his son, possessed a common-law remedy abrogated by [section 10.01](#). See *id.* at 547–48. Without citing authority, the court of appeals assumed that the child's statutory claims could be saved if the open courts doctrine would have applied to preserve Mr. Westphal's potential common-law claim against Diaz.

[7] In [Rose v. Doctors Hospital](#), 801 S.W.2d 841 (Tex.1990), Rex Rose's widow and parents sued Doctors Hospital for wrongful death. Applying the two-part open courts test, we asked first “whether the *Roses'* remedy is based upon a cognizable common law cause of action.” *101 [Rose](#), 801 S.W.2d at 845 (emphasis added). In answering that question, we stated:

Like all actions based upon theories of negligence, the *Roses'* cause of action was a common law claim. It would have died with Rex Rose had it not been preserved by the legislature in the wrongful death statute. The *Roses'* remedy, therefore, was conferred by statute, not by the common law. Because the *Roses* do not seek a common law remedy, the open courts provision does not apply to their wrongful death claim.

Id. (citation omitted); see also [Moreno](#), 787 S.W.2d at 355 (concluding that, when plaintiff's cause of action “was not recognized at common law, but was itself created by the legislature, any legislative abrogation of the cause of action would not be a true abrogation of a constitutional right”). We have adhered to this reasoning in recent cases. See [Baptist Mem'l Hosp. v. Arredondo](#), 922 S.W.2d 120, 121–22 (Tex.1996) (per curiam) (concluding that wrongful death plaintiff could not satisfy first prong of open courts test because plaintiff's claim was purely statutory,

although action was based on medical malpractice); *Bala*, 909 S.W.2d at 893 (holding that, “[b]ecause the Maxwells have no common law right to bring either a wrongful death or survival action, they cannot establish an open courts violation”). As with the Roses, Eric Westphal's claims are based upon a theory of negligence—that Diaz negligently over-prescribed *Cytosan* to his father, ultimately causing his father's fatal cancer. Also like the Roses, Eric Westphal's sole remedy was conferred by statute, not by the common law. Thus, as a matter of law, the open courts doctrine does not apply to this case.

Westphal failed to file suit against Diaz within the Medical Liability Act's statute of limitations, which would have applied to his prospective malpractice claim. As a matter of law, neither the discovery rule nor the open courts doctrine applied to toll limitations under the facts of this case. Because limitations would have barred Mr. Westphal's common-law action against Diaz, his son's wrongful death and survival claims are also barred. See *Russell*, 841 S.W.2d at 345. Accordingly, we reverse the judgment of the court of appeals and render judgment that the Westphals take nothing.

IV

Diaz conclusively established his limitations defense. The summary judgment evidence shows that Michael

All Citations

941 S.W.2d 96, 40 Tex. Sup. Ct. J. 434

Footnotes

- 1 The summary judgment record does not establish the exact date of the child's birth.
- 2 By statute, a health care liability claim is “a cause of action against a health care provider or physician for treatment, lack of treatment, or other claimed departure from accepted standards of medical care or health care or safety which proximately results in injury to or death of the patient.” *Tex.Rev.Civ. Stat. art. 4590i, § 1.03(a)(4)*.
- 3 Outside the health care liability context, wrongful death and survival claims are subject to a two-year limitations period commencing on the date of death. *Tex. Civ. Prac. & Rem. Code § 16.003(a)*; *Bala v. Maxwell*, 909 S.W.2d 889, 892 (Tex.1995) (per curiam). When the action is based on medical negligence, however, the Medical Liability Act's time limitation controls. *Bala*, 909 S.W.2d at 892–93.
- 4 The United States Constitution contains no comparable open courts guarantee. *Lucas v. United States*, 757 S.W.2d 687, 690 (Tex.1988).

922 S.W.2d 120
Supreme Court of Texas.

BAPTIST MEMORIAL HOSPITAL
SYSTEM, Robert L.M. Hillard, M.D., and
Robert A. Westbrook, M.D., Petitioners,
v.
Anna ARREDONDO, Individually and
on Behalf of the Estate of Alexander
Trent Arredondo, Respondent.

No. 95-0861.

|
Feb. 9, 1996.

|
Rehearing Overruled June 14, 1996.

Mother brought wrongful death action against hospital and physicians involved in delivery of her child, who died two days after delivery. The 166th District Court, Bexar County, John Specia, Jr., J., granted summary judgment for defendants on limitations grounds, and mother appealed. The Court of Appeals, Butts, J. (assigned), 904 S.W.2d 754, reversed and remanded. Defendants applied for writ of error. The Supreme Court held that: (1) tolling provision for minors in Medical Liability and Insurance Improvement Act did not apply to beneficiary's wrongful death action based on minor's death; (2) statute of limitations did not violate open court's provision of State Constitution; and (3) no evidence supported mother's claim of fraudulent concealment.

Writ granted, and reversed.

West Headnotes (6)

[1] **Death**

🔑 **Application of General Statutes of Limitations**

Limitations period of Medical Liability and Insurance Improvement Act applies to wrongful death actions that arise from alleged medical malpractice. [Vernon's Ann.Texas Civ.St. art. 4590i, § 10.01.](#)

[3 Cases that cite this headnote](#)

[2] **Death**

🔑 **Pecuniary Loss to Plaintiff or Beneficiary in General**

Statutory beneficiary files wrongful death action to recover her own damages based on minor's death.

[1 Cases that cite this headnote](#)

[3] **Death**

🔑 **Computation of Period of Limitation**

Provision of limitations period for bringing wrongful death action premised on alleged medical malpractice, that tolls claims by minors under age of 12 until their 14th birthday, does not apply to adult's wrongful death claims. [Vernon's Ann.Texas Civ.St. art. 4590i, § 10.01.](#)

[8 Cases that cite this headnote](#)

[4] **Constitutional Law**

🔑 **Conditions, Limitations, and Other Restrictions on Access and Remedies**

To establish open courts violation, plaintiff must prove that she has well-recognized common law cause of action, and that restriction on her claim is unreasonable when balanced against statute's purpose. [Vernon's Ann.Texas Const. Art. 1, §§ 13, 19.](#)

[6 Cases that cite this headnote](#)

[5] **Death**

🔑 **Nature and Form of Remedy**

At common law, deceased heirs did not have action for their own losses.

[Cases that cite this headnote](#)

[6] **Death**

🔑 **Nature and Form of Remedy**

Death

🔑 **Computation of Period of Limitation**

Wrongful death action of parent of minor was purely statutory, and so open courts

provision of State Constitution did not save her wrongful death action from statute of limitations. [Vernon's Ann.Texas Const. Art. 1, §§ 13, 19](#); [Vernon's Ann.Texas Civ.St. art. 4590i, § 10.01](#).

[4 Cases that cite this headnote](#)

***120** Appeal from San Antonio Court of Appeals, Fourth Judicial District. Shirley W. Butts, Justice.

Attorneys and Law Firms

[Ruth Greenfield Malinas](#), San Antonio, [Linda C. Breck](#), [Thomas F. Nye](#), Corpus Christi, [Bruce E. Anderson](#), Clem Lyons, Irene Rios (Alarcon), San Antonio, for petitioners.

[Peter J. Balega](#), [Sean F. O'Neill](#) and [Thomas G. Kemmy](#), San Antonio, for respondent.

Opinion

PER CURIAM.

In this wrongful death action, Anna Arredondo alleges that Doctors Robert L.M. Hilliard and Robert A. Westbrook, together with Baptist Memorial Hospital System, negligently treated her newborn son, causing his death. We hold that limitations bars her wrongful death claim.

On July 17, 1991, Anna Arredondo gave birth to Alexander Arredondo at Baptist Memorial Hospital. Less than four hours after delivery, the Hospital transferred Alexander ***121** to Medical Center Hospital, where he died on July 19, 1991.

On July 19, 1993, Anna Arredondo filed wrongful death and survival actions. The trial court found the statute of limitations barred Arredondo's wrongful death action and granted summary judgment for the doctors and the Hospital. The trial court severed the wrongful death action from the survival action, reserving the latter for trial. A divided court of appeals reversed and remanded. [904 S.W.2d 754](#).

The doctors and Hospital argue that the court of appeals incorrectly applied [section 10.01](#)'s tolling provision for minors to an adult beneficiary's wrongful death claim. SEE [TEX.REV.CIV.STAT.ANN. art. 4590i, § 10.01](#) (Vernon 1986). According to the doctors and the Hospital,

limitations began to run on July 17, 1991 when the alleged negligence occurred. We agree.

[1] Our recent decision in [Bala v. Maxwell](#), [909 S.W.2d 889 \(Tex.1995\)](#)¹, clarifies the conflict in the courts of appeals about which limitations statute should apply in wrongful death actions based on medical malpractice. Generally, wrongful death claims are subject to a two-year statute of limitations period that begins on the date of death. SEE [TEX.CIV.PRAC. & REM.CODE § 16.003\(b\)](#). However, in [Bala](#), we concluded that when a wrongful death action is based on medical malpractice, the Medical Liability and Insurance Improvement Act controls. See [TEX.REV.CIV.STAT.ANN. art. 4590i, § 10.01](#); [Bala](#), [909 S.W.2d at 892–93](#). [Section 10.01](#) provides that health care liability claims must be filed within two years from the alleged negligent act. [TEX.REV.CIV.STAT.ANN. art. 4590i, § 10.01](#). Therefore, the statute of limitations expires at the same time it would for the decedent, two years after the alleged negligence occurred. [Bala](#), [909 S.W.2d at 893](#).

[2] [3] The court of appeals correctly held that [section 10.01](#) controls. [904 S.W.2d at 758](#). However, it incorrectly applied [section 10.01](#)'s tolling provision for minors to an adult beneficiary's wrongful death claim. [904 S.W.2d at 760–61](#). [Section 10.01](#) states that “minors, under the age of twelve years shall have until their fourteenth birthday in which to file, or have filed on their behalf, the claim.”² [art. 4590i, § 10.01](#). This provision tolls a claim's accrual only when it is filed by a minor or on a minor's behalf. A statutory beneficiary files a wrongful death action to recover her own damages based on a minor's death. See [Landers v. B.F. Goodrich Co.](#), [369 S.W.2d 33, 35 \(Tex.1963\)](#). Therefore, the tolling provision of [section 10.01](#) that applies to a minor does not apply to an adult's wrongful death claims. Absent [section 10.01](#)'s tolling proviso, Arredondo's action accrued on July 17, 1991, the date of Alexander's treatment. Accordingly, [section 10.01](#) barred her claim before she filed suit on July 19, 1993.

Arredondo argues that [section 10.01](#) is unconstitutional as applied under [article I, sections 13 and 19 of the Texas Constitution](#). The court of appeals agreed, holding that “the two-year statute of limitations, if strictly applied, would unreasonably restrict *Alexander's* cognizable cause of action for medical malpractice.” [904 S.W.2d at 759](#) (emphasis added). Once again, the court of appeals confused Anna's wrongful death action with her survival

action for Alexander's medical malpractice claim still pending in the trial court.

[4] [5] [6] To establish an open courts violation, a plaintiff must satisfy a two-part test. *Moreno v. Sterling Drug, Inc.*, 787 S.W.2d 348, 355 (Tex.1990). First, she must prove that she has a well-recognized common law cause of action. *Moreno*, 787 S.W.2d at 355. Second, she must show that the restriction on her claim is unreasonable when balanced against the statute's purpose. *Moreno*, 787 S.W.2d at 355. At common law, a deceased's heirs did not have an action for their own losses. *Kramer v. Lewisville Memorial Hosp.*, 858 S.W.2d 397, 403 (Tex.1993). This type of action is now permitted solely by statute. SEE *122 TEX.CIV.PRAC. & REM.CODE §§ 71.002, 71.004, 71.021. Because Arredondo's claim is purely statutory, she cannot satisfy the first prong of this test. Therefore, the open courts provision does not save her wrongful death action.

Similarly, article I, section 19 is unavailable. In this case, Anna had twenty-three months and twenty-eight days to bring the wrongful death claim. Given these facts and the purposes behind the Medical Liability and Insurance Improvement Act³, Arredondo's due course of law challenge fails. See *Morrison v. Chan*, 699 S.W.2d 205 (Tex.1985) (holding eighteen months after discovery of a cause of action is a reasonable time to bring suit).

The court of appeals recognized fraudulent concealment may be a defense to the affirmative defense of limitations. 904 S.W.2d at 758. See *Borderlon v. Peck*, 661 S.W.2d 907, 908 (Tex.1983) (holding that article 4590i, section 10.01 does not abolish fraudulent concealment as an equitable estoppel to limitations). Yet, the court of appeals found that the summary judgment evidence did not show that the doctors or Hospital had actual knowledge of any wrong or negligence or that they had a fixed purpose to conceal any wrong or negligence. 904 S.W.2d at 759. Therefore, it concluded that Arredondo's fraudulent concealment defense did not toll limitations in this case. 904 S.W.2d at 759. We agree with the court of appeals' reasoning and result on this issue.

Arredondo's wrongful death claim is subject to section 10.01's limitations period. Because she is an adult beneficiary, section 10.01's tolling provision for minors does not apply. The two-year period expired on July 17, 1993. Therefore, Arredondo's wrongful death action was untimely. Accordingly, the Court grants all petitioners' applications for writ of error, and under Texas Rule of Appellate Procedure 170, without hearing oral argument, the Court reverses the judgment of the court of appeals and renders judgment that Arredondo take nothing on the wrongful death claim.

All Citations

922 S.W.2d 120, 39 Tex. Sup. Ct. J. 286

Footnotes

- 1 We recognize that the court of appeals did not have the benefit of our opinion in *Bala v. Maxwell*, 909 S.W.2d 889 (Tex.1995), when it issued its opinion in this case.
- 2 But see *Weiner v. Wasson*, 900 S.W.2d 316 (Tex.1995) (holding proviso unconstitutional as applied to minors and extending limitations period until minor's twentieth birthday).
- 3 The statute's purposes include: (1) reducing the excessive severity of health care claims; (2) decreasing the cost of those claims; and (3) making insurance and health care reasonably affordable and more accessible to the public. TEX.REV.CIV.STAT.ANN. art. 4590i, § 1.02(b).



KeyCite Yellow Flag - Negative Treatment

Not Followed as Dicta [Medina v. Lopez-Roman](#), Tex.App.-Austin,
November 30, 2000

900 S.W.2d 316

Supreme Court of Texas.

Bruce WEINER, M.D., Petitioner,

v.

Emmanuel WASSON, Respondent.

No. 94-0541.

Argued Jan. 5, 1995.

Decided June 8, 1995.

Rehearing Overruled July 21, 1995.

Patient who was 19 years old brought medical malpractice action against physician based on physician's treatment of patient while patient was a minor, and physician moved for summary judgment based on statute of limitations. The 125th District Court, Harris County, [Don E. Wittig](#), granted motion, and patient appealed. The Court of Appeals, [871 S.W.2d 542](#), reversed and remanded and held that medical malpractice statute of limitations was unconstitutional as applied to minors. Application for writ of error was granted, and the Supreme Court, Cornyn, J., held that: (1) provision of statute of limitations for medical malpractice claims which tolls action of minor until minor's 12th birthday impermissibly cuts off minor's cause of action and violates open courts provision of State Constitution, and (2) patient whose medical malpractice action accrues while patient is minor has until 20th birthday to bring action against treating physician.

Judgment of Court of Appeals affirmed, and remanded to District Court.

[Owen](#), J., dissented and filed opinion in which [Phillips](#), C.J., and [Hecht](#), J., joined.

West Headnotes (6)

[1] Appeal and Error

Scope and theory of case

When trial court grants summary judgment without specifying grounds, summary judgment must be affirmed on appeal if any of theories advanced are meritorious.

[40 Cases that cite this headnote](#)**[2] Constitutional Law**

Time for proceedings

Limitation of Actions

Constitutionality of statute

Medical malpractice statute of limitations which tolls claim of minor against health care provider until minor reaches 14 years of age violates open courts provision of State Constitution and is unconstitutional as applied to minors; statute impermissibly cuts off minor's cause of action before he reaches age at which he may lawfully sue on his own behalf. [Vernon's Ann.Texas Const. Art. 1, § 13](#); [Vernon's Ann.Texas Civ.St. art. 4590i, § 10.01](#).

[37 Cases that cite this headnote](#)**[3] Courts**

Decisions of Same Court or Co-Ordinate Court

For reasons of efficiency, fairness, and legitimacy, Supreme Court generally adheres to its own precedents.

[30 Cases that cite this headnote](#)**[4] Limitation of Actions**

Infancy

Patient whose medical malpractice action accrued while patient was a minor had until his 20th birthday to bring action against treating physician, even though physician contended that reasonable-time rule applied and limited time in which patient could bring action to a reasonable time after patient reached his 18th birthday. [Vernon's Ann.Texas Civ.St. art. 4590i, § 10.01](#); [V.T.C.A., Civil Practice & Remedies Code §§ 16.001, 16.003](#).

14 Cases that cite this headnote

[5] **Limitation of Actions**

🔑 **Health care professionals in general**

“Reasonable-time rule” is court-made standard under which statute of limitations is extended because patient, due to nature of claim, did not have reasonable opportunity to discover injuries and bring medical malpractice suit within prescribed limitations period; rule in effect allows certain plaintiffs two years plus reasonable time to bring suit. [Vernon's Ann. Texas Civ. St. art. 4590i, § 10.01.](#)

15 Cases that cite this headnote

[6] **Limitation of Actions**

🔑 **Infancy**

Provisions of Civil Practice and Remedies Code, which establish two-year limitations period but toll period until minor reaches age of 18, establish general statute of limitations for minors' personal injury claims; taken together, provisions require minor to file claim before reaching age 20 for personal injuries sustained during period of minority. [V.T.C.A., Civil Practice & Remedies Code §§ 16.001, 16.003.](#)

28 Cases that cite this headnote

Attorneys and Law Firms

*317 [Sam A. Houston](#), Houston, for petitioner.

[David W. Holman](#), [Richard P. Hogan, Jr.](#), [Kevin H. DuBose](#), [Richard W. Ewing](#), [W. James Kronzer, Jr.](#), Houston, for respondent.

Opinion

CORNYN, Justice, delivered the opinion of the Court, joined by [GONZALEZ](#), [HIGHTOWER](#), [GAMMAGE](#), [ENOCH](#) and [SPECTOR](#), Justices.

[OWEN](#), Justice, joined by [PHILLIPS](#), Chief Justice, and [HECHT](#), Justice, dissenting.

We granted the application for writ of error in this case to decide whether the statute of limitations contained in section 10.01 of the Medical Liability and Insurance Improvement Act (Medical Liability Act)¹ can be constitutionally applied to the malpractice claim of a minor under the open courts provision of the Texas Constitution. The court of appeals, relying on our decision in [Sax v. Votteler](#), 648 S.W.2d 661 (Tex.1983), held that section 10.01 of the Medical Liability Act is unconstitutional as applied to minors, who are under legal disability from bringing suit on their own behalf. [871 S.W.2d 542, 543.](#) We affirm the judgment of the court of appeals, and remand this cause to the trial court for further proceedings consistent with this opinion.

In May 1988, Dr. Bruce Weiner performed surgery on Emmanuel Wasson, who was then fifteen years old. The surgery required insertion of surgical pins into Wasson's right femur. On his last visit in June 1988, Wasson complained to Weiner of constant pain in his hip and of his need for crutches. In August 1988, Wasson saw another physician, who took [x-rays of his hip](#). The x-rays showed that one of the surgical pins was protruding into Wasson's right hip joint. Wasson later underwent two additional surgeries, but they did not relieve his constant pain. Wasson turned eighteen on December 16, 1990, and a few months later underwent surgery for the total replacement of his right hip.

[1] On August 25, 1992, Wasson filed suit against Weiner, alleging that Weiner's negligence caused the painful destruction of his right hip joint and necessitated the hip replacement surgery. Weiner moved for summary judgment on two grounds. Weiner first urged that section 10.01 of the Medical Liability Act, which establishes a two-year statute of limitations for health care liability claims, barred Wasson's claim. Weiner also argued that even if the limitations period was tolled during Wasson's minority, Wasson's claim was nevertheless barred because Wasson failed to file suit within a “reasonable time” after attaining majority. The trial court granted Weiner's motion for summary judgment without specifying the grounds. The court of appeals reversed the trial court's judgment and remanded the case for further proceedings, holding that our opinion in [Sax](#) compels the conclusion that section 10.01 of the Medical Liability Act is unconstitutional as applied to minors.²

I

We begin our inquiry by reviewing the history of the medical malpractice statute of limitations in Texas. In 1975, as part of the Professional Liability Insurance for Physicians, Podiatrists, and Hospitals Act, the Legislature enacted article 5.82, section 4, of the Texas Insurance Code, which purported to restrict the period available for minors to bring medical malpractice actions. See *Sax*, 648 S.W.2d at 663. Section 4 of article 5.82 provided:

Notwithstanding any other law, no claim against a [health care provider] ... may be commenced unless the action is filed within two years of the breach or the tort complained of or from the date the medical treatment that is the subject of the claim or the hospitalization for which the claim is made is completed, except that *minors under the age of six years shall have until their eighth birthday* in which to file, or *318 have filed on their behalf, such claim. Except as herein provided, this section applies to all persons regardless of minority or other legal disability.

TEX.INS.CODE art. 5.82, § 4 (emphasis added) (hereinafter, article 5.82). When article 5.82 was repealed on August 29, 1977, the Legislature replaced it with section 10.01 of the Medical Liability Act, which provides:

Notwithstanding any other law, no health care liability claim may be commenced unless the action is filed within two years from the occurrence of the breach or tort or from the date the medical or health care treatment that is the subject of the claim or the hospitalization for which the claim is made is completed; provided that, *minors under the age of 12 years shall have until their 14th birthday* in which to file, or have filed on their behalf, the claim. Except as herein provided, this subchapter applies to all persons

regardless of minority or other legal disability.

TEX.REV.CIV.STAT.ANN. art. 4590i, § 10.01 (emphasis added) (hereinafter, section 10.01). As we have observed before, other than specifying different ages by which minors must bring claims, section 10.01 and article 5.82 are substantially the same. See *Sax*, 648 S.W.2d at 663 n. 1; *Nelson v. Krusen*, 678 S.W.2d 918, 920 n. 1 (Tex.1984).

In 1983, this Court unanimously held that article 5.82 was unconstitutional as applied to minors under the open courts provision of article I, section 13 of the Texas Constitution.³ *Sax*, 648 S.W.2d at 665–667. We held that the open courts provision guarantees that “the right to bring a well-established common law cause of action cannot be effectively abrogated by the legislature absent a showing that the legislative basis for the statute outweighs the denial of the constitutionally-guaranteed right of redress.” *Sax*, 648 S.W.2d at 665–666.

Thus, we first considered whether article 5.82 “effectively abrogated” a child's right to bring a medical malpractice cause of action. Under article 5.82, the limitations period was tolled until a child reached age six, and upon reaching age six, a child, like an adult, was required to bring suit within two years. We observed, however, that a child lacks legal capacity to bring suit during minority unless the minor's legal disability has been removed. Although parents, guardians, or next friends may as adults be legally capable of bringing suit on a child's behalf during minority, we held that the possibility that an adult *might* act on the child's behalf did not vindicate the total abrogation of the child's cause of action. *Sax*, 648 S.W.2d at 667.

We then considered whether the legislative purpose of article 5.82 outweighed the deprivation of a child's rights under the open courts provision. Although the Legislature enacted article 5.82 for the legitimate purpose of restraining the escalating cost of liability insurance for health care providers, we concluded that the means used to achieve this purpose were not “reasonable when they [were] weighed against the effective abrogation of a child's right to redress.” *Sax*, 648 S.W.2d at 667. We accordingly held that, as applied to minors, article 5.82 violated article I, section 13 of the Texas Constitution.

II

[2] Applying the principles articulated in *Sax* to this case, the court of appeals held that [section 10.01](#), like its predecessor [article 5.82](#), is unconstitutional as applied to minors because it purports to cut off Wasson's cause of action before he reaches majority, an age at which he may lawfully sue on his own behalf. [871 S.W.2d at 543](#). We agree. As previously noted, the only significant difference between [article 5.82](#) and [section 10.01](#) is that [section 10.01](#) extends the tolling period from age six to age twelve. This one change in [section 10.01](#) does not cure the constitutional infirmity that we identified in [article 5.82](#) in *Sax*. Whether a statute compels a child to bring suit by age eight or by age fourteen is inconsequential because in either instance a minor child is legally disabled from pursuing a suit on his own. We do not doubt the Legislature's power to remove a [§319](#) minor's legal disabilities and thus lower below eighteen the age at which a person may sue on his or her own behalf, but the Court unanimously agrees that the Legislature did not do so in [section 10.01](#). [900 S.W.2d 326](#). Consistent with *Sax*, therefore, we hold that [section 10.01](#) is unconstitutional when applied to a minor because it violates [article I, section 13 of the Texas Constitution](#).

Weiner contends that *Sax* does not control this case, pointing to the following excerpt from the Court's opinion in an attempt to distinguish it:

If the parents, guardians, or next friends of the child negligently fail to take action in the child's behalf within the time provided by [article 5.82](#), the child is precluded from asserting his cause of action under that statute. Furthermore, the child is precluded from suing his parents on account of their negligence, due to the doctrine of parent-child immunity. *Felderhoff v. Felderhoff*, [473 S.W.2d 928](#) (Tex.1971).

Sax, [648 S.W.2d at 667](#). Weiner maintains that *Felderhoff v. Felderhoff* is no longer the law in Texas, and that this Court's subsequent decision in *Jilani v. Jilani*, [767 S.W.2d 671](#) (Tex.1988), expanded the exceptions to the parent-child immunity doctrine upon which *Felderhoff* was based. Under *Jilani*, Weiner argues that a child now has the

right to sue a parent who negligently fails to bring suit on the child's behalf within the prescribed limitations period. Therefore, the argument goes, a minor child whose parent fails to assert a medical malpractice claim within the limitations period provided by [section 10.01](#) may sue the parent for negligence. This, it is contended, provides the adequate substitute remedy we found lacking in *Sax*. We disagree.

Jilani did not change the law governing parent-child immunity articulated in *Felderhoff*. To the contrary, the *Jilani* court applied the *Felderhoff* test.⁴ The Court's opinion expressly states, "[w]e continue to adhere to the principles and policy expounded in *Felderhoff*." *Jilani*, [767 S.W.2d at 672](#). Furthermore, *Jilani* was expressly limited to automobile negligence cases. *Id.* at 673. Because *Felderhoff* remains Texas law, we reject Weiner's argument that *Sax* does not control this case.

Additionally, arguing that Wasson had a parent who was capable of bringing suit within the two-year limitations period. Weiner urges us to either overrule *Sax*, or limit the holding to its facts. We decline to do so.

In *Sax*, a unanimous Court explicitly considered and rejected the argument that the ability of child's parent to bring suit on behalf of the child was a reasonable substitute—the same argument made by Weiner in this case. See *Sax*, [648 S.W.2d at 667](#). Furthermore, standing for the premise that the Legislature has no power to make a remedy contingent upon an impossible condition, *Sax* has been frequently cited as authority by this Court, the courts of appeals, and even by the high courts of other states. *E.g.*, *Whitlow v. Board of Educ.*, [190 W.Va. 223](#), [438 S.E.2d 15](#), [22](#) (1993); *Mominee v. Scherbarth*, [28 Ohio St.3d 270](#), [28 OBR 346](#), [503 N.E.2d 717](#), [721](#) (1986); *Strahler v. St. Luke's Hosp.*, [706 S.W.2d 7](#), [10–11](#) (Mo.1986); *Barrio v. San Manuel Div. Hosp.*, [143 Ariz. 101](#), [692 P.2d 280](#), [286](#) (1984). Indeed, *Sax* has been the cornerstone of many of our subsequent decisions. *E.g.*, *Neagle v. Nelson*, [685 S.W.2d 11](#), [12](#) (Tex.1985) (holding that [section 10.01](#) could not cut off a cause of action before the plaintiff knew of the wrong's existence); *Nelson v. Krusen*, [678 S.W.2d 918](#) (Tex.1984) (holding that [article 5.82](#) could not cut off a cause of action before the plaintiff knew of the wrong's existence); see also *Tinkle v. Henderson*, [730 S.W.2d 163](#), [167](#) (Tex.App.—Tyler 1987, writ ref'd) (holding that [article 5.82](#) could not cut off the claim of a mental incompetent).

[3] In short, Weiner presents no arguments that were not considered in *Sax*, nor does he demonstrate that *Sax* was wrongly decided. Of course, we have, on occasion and *320 for compelling reasons, overruled our earlier decisions, but undeniably, *Sax* has become firmly ensconced in Texas jurisprudence. Generally, we adhere to our precedents for reasons of efficiency, fairness, and legitimacy. First, if we did not follow our own decisions, no issue could ever be considered resolved. The potential volume of speculative relitigation under such circumstances alone ought to persuade us that stare decisis is a sound policy. Secondly, we should give due consideration to the settled expectations of litigants like Emmanuel Wasson, who have justifiably relied on the principles articulated in *Sax*. See *Quill Corp. v. North Dakota*, 504 U.S. 298, 321, 112 S.Ct. 1904, 1916, 119 L.Ed.2d 91 (1992) (J. Scalia, concurring) (“[R]eliance on a square, unabandoned holding of the Supreme Court is *always* justifiable reliance....”). Finally, under our form of government, the legitimacy of the judiciary rests in large part upon a stable and predictable decisionmaking process that differs dramatically from that properly employed by the political branches of government. See *Vasquez v. Hillery*, 474 U.S. 254, 265–66, 106 S.Ct. 617, 624, 88 L.Ed.2d 598 (1986) (“[Stare decisis] permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact.”). Accordingly, we decline to overrule *Sax* or somehow limit the holding of that case to its facts.

Although the dissenting justices agree with Weiner that *Sax* can be limited to its facts, we are unpersuaded. Based on the same principles we relied upon in *Sax*, just two years ago this Court held that even the commencement of a lawsuit by a mental incompetent and his wife did not affect the tolling of limitations during the period of the mental incompetent's legal disability. *Ruiz v. Conoco, Inc.*, 868 S.W.2d 752, 756 (Tex.1993). In arriving at this holding, we relied upon a series of cases from this and other jurisdictions that treat tolling of limitations for minors and mental incompetents identically. We reasoned:

Access to the courts does not alone provide a legally incapacitated person a viable opportunity to protect his legal rights. The

disability of a person of unsound mind is not only the lack of access to the courts, but also the inability to participate in, control, or even understand the progression and disposition of their lawsuit.... [T]he purpose and scope of the tolling provision as applied to *minors* and persons of unsound mind, extends beyond merely ensuring their access to the courts.

Id. at 755 (citations omitted) (emphasis added). Thus, consistent application of our legal principles dictates that the failure of a parent to bring suit on behalf of a minor, a person under legal disability, does not affect the tolling of limitations. See *Ruiz* at 756 (“[I]f ... [the guardian ad litem,] having instituted an action within the statutory period, discontinues it, the rights of the infant are not prejudiced thereby, and he may still take advantage of his disability, the action not being barred until the lapse of the statutory period after he comes of age.”) (quoting M.C. Dransfield, Annotation, *Appointment of Guardian for Incompetent or for Infant as Affecting Running of Statute of Limitations Against Ward*, 86 A.L.R.2D 965, 976 (1962)).

Weiner notes that this Court has previously decided the constitutionality of section 10.01 on an “as applied” or case-by-case basis, see *Nelson v. Krusen*, 678 S.W.2d 918 (Tex.1984) (holding that section 10.01 was unconstitutional as applied to plaintiff because plaintiff had not discovered the cause of action within the two-year limitations period), and argues that we should do so here. We are of a contrary view. Weiner's argument leads to the unworkable standard contended for by the dissent, which would inquire whether the minor's parent was “incompetent” or had a “conflict of interest” that prevented the parent from acting in the minor's best interests. We fail to see any benefit in requiring a minor to show that his or her parent was incompetent or failed to act in the minor's best interests by not pursuing a medical malpractice claim, especially when the very failure of the parent to do so leaves the minor without any legal recourse. We accordingly decline the invitation to limit *Sax* to its facts.

*321 III

[4] Having determined that [section 10.01](#) is unconstitutional as applied to minors, we must now determine the limitations period that applies to a minor's medical malpractice claims. Wasson argues that he is entitled to pursue his lawsuit within two years after attaining majority under [sections 16.001 and 16.003 of the Texas Civil Practice and Remedies Code](#). Weiner, on the other hand, argues that a minor has only a "reasonable time" after attaining majority in which to file suit, relying in part on this Court's decision in [Nelson v. Krusen](#), 678 S.W.2d at 923. Because Wasson did not bring suit until eighteen months after he attained age eighteen, Weiner argues that Wasson failed, as a matter of law, to bring suit within a reasonable time.

[5] The reasonable-time rule is a court-made standard, which has heretofore been applied only in a limited number of cases involving adult plaintiffs who, because of the nature of their claim, did not have a reasonable opportunity to discover their injuries and bring suit within a prescribed limitations period. See [Nelson v. Krusen](#), 678 S.W.2d at 921–22. The reasonable-time rule, in effect, allows certain adult plaintiffs two years *plus* a reasonable time to bring suit. Despite the fact that we have never applied the reasonable-time rule to cases other than those involving claims that are by their nature exceedingly difficult or impossible to discover, Weiner urges us to hold that minors have only a reasonable time after attaining age eighteen to bring suit. We decline to do so.

[6] Rather than fashioning a rule of our own making and applying it to minor plaintiffs, we think it is more appropriate to look to the general limitations provisions enacted by the Legislature. [Sections 16.001 and 16.003 of the Texas Civil Practice and Remedies Code](#) together provide a general statute of limitations for minors' personal injury claims.⁵ [Section 16.003](#) establishes a two-year limitations period,⁶ but [section 16.001](#) tolls this period until the minor reaches age eighteen.⁷ Taken together, these sections require a minor to file a claim before reaching age twenty for personal injuries sustained during the period of minority. Because [section 10.01](#) of the Medical Liability Act is unconstitutional as it applies to minors, we conclude that the limitations period provided by the general tolling and limitations provisions of [Texas Civil Practice and Remedies Code sections 16.001 and 16.003](#) apply to Wasson's claim.⁸

We therefore hold that Wasson had two years after attaining age eighteen to bring suit for the acts of medical malpractice allegedly committed during his minority. We affirm the judgment of the court of appeals and remand this cause to the trial court for further proceedings consistent with this opinion.

OWEN, J., joined by PHILLIPS, C.J., and HECHT, J., dissents.

OWEN, Justice, joined by PHILLIPS, Chief Justice, and HECHT, Justice, dissenting.

I respectfully dissent. I would hold that as applied to the facts of this case, [section 10.01](#) of the Medical Liability and Insurance Improvement Act does not violate the open [*322](#) courts provision of the Texas Constitution. Requiring a medical malpractice suit to be brought on behalf of a minor within the time set forth in [article 4590i, section 10.01](#), is not unconstitutional where the minor is at least twelve years of age, his or her parent knew of the injury and potential claim within the limitations period, and the parent or legal guardian was competent and had no conflict of interest that would preclude him or her from acting in the best interest of the child.

My principal concern is that the Court has taken such an expansive view of the scope of the open courts provision that *no* statute of limitations aimed at limiting the claims of minors can pass constitutional muster. The Court has tied the hands of the Legislature far beyond what was ever envisioned by the drafters of our Texas Constitution. It does so based on what I believe is an incorrect application of [Sax v. Votteler](#), 648 S.W.2d 661 (Tex.1983).

The Legislature had the [Sax](#) decision before it in 1993 when it renewed and extended [section 10.01 of article 4590i](#) until the year 2009. See Medical Liability and Insurance Improvement Act, 73rd Leg., R.S., ch. 625, § 3, 1993 Tex.Gen.Laws 2347, 2347. When the Legislature enacted the changes to the statute held unconstitutional in [Sax](#), it articulated strong policy considerations underpinning those changes. We should not presume, because of the *result* in [Sax](#), that the newer statute is unconstitutional. Rather, we should apply the *principles* articulated in [Sax](#) and examine the newer statute and the rationale supporting its enactment, as applied to the facts of this case. Under the facts of this case, [section](#)

10.01 is constitutional. I would reverse the judgment of the court of appeals and remand the case to the trial court for any further development of facts in light of this holding.

I

At the time Weiner performed surgery on Emmanuel Wasson in May of 1988, Wasson was fifteen years old. Weiner last treated Wasson in June of 1988. In that same year, it is undisputed that Wasson was aware not only that the results of this treatment were unsatisfactory to him, *but that he had a claim against Weiner*. By August of 1988, Wasson was aware of each and every injury for which he now seeks recovery. Wasson and his mother knew that he would have to undergo [total hip replacement](#) and believed this was a direct result of negligent medical treatment by Weiner. In fact, Wasson's mother filed a grievance against Weiner with the Medical Grievance Committee in 1988. Prior to May of 1990, within the two-year limitation period prescribed by [section 10.01](#), Wasson's mother retained an attorney to represent her son. Yet suit was not filed until August of 1992, more than four years after Weiner last saw Wasson. No explanation has been provided for this delay.

Weiner invoked the statute of limitations applicable to claims for medical malpractice, [section 10.01 of article 4590i](#).

II

The Court's basis for striking down the statute before us is the open courts provision of the Texas Constitution. [TEX. CONST. art. I, § 13](#). Over the years our Court gradually has expanded the reach of this provision.

A detailed history of the origins of the open courts provision and of our earliest decisions construing it can be found in [LeCroy v. Hanlon](#), 713 S.W.2d 335, 338–41 (Tex.1986). The history available to us indicates that the open courts provision was not controversial when adopted as part of our constitutions. It dates back to the Magna Carta. [Id. at 339](#). Significantly, in the early decisions of our Court, the open courts provision was construed to ensure physical access to the courts or to preclude unreasonable bond requirements. [Dillingham v. Putnam](#), 109 Tex. 1, 14 S.W. 303, 304–05 (1890); [Runge & Co. v. Wyatt](#), 25 Tex.

291, 294 (1860); *see also* [LeCroy](#), 713 S.W.2d at 340 and cases cited therein in notes 5–7.

Just recently, this Court acknowledged that historically, the courts of Texas did not have an expansive view of the open courts provision. [Trinity River Auth. v. URS Consultants, Inc.](#), 889 S.W.2d 259 (Tex.1994). With respect to the discovery rule, for example, Texas decisions gave statutes of limitation effect even where the fact of injury was *323 unknown to the plaintiff, notwithstanding the open courts provision. [Id. at 262](#). We held in [Trinity](#) that the statute of repose applicable to architects and engineers did not violate the open courts provision because the common law recognized the validity of statutes of limitations, regardless of whether the injury had been discovered. [Id. at 263](#). (The question of whether the discovery rule should be adopted prospectively under the particular facts in [Trinity](#) was expressly reserved. [Id.](#)) We quoted from [Houston Water-Works Co. v. Kennedy](#), 70 Tex. 233, 8 S.W. 36, 37–38 (1888):

If ... the act of which the injury was the natural sequence was a legal injury,—by which is meant an injury giving cause of action by reason of its being an invasion of a plaintiff's right,—then, be the damage however slight, limitation will run from the time the wrongful act was committed, and will bar an action for any damages resulting from the act.... [A] mere want of knowledge by the owner of injury to his property does not prevent the running of the statute.

[Id. at 236](#), 8 S.W. 36.

The import of this recognition in [Trinity](#) is that there can be no doubt that the Texas courts in the [Kennedy](#) era never contemplated that the open courts provision of our Constitution precluded the Legislature from implementing a statute of limitations applicable to the claims of minors.

As an historical note, the 1869 Reconstruction Constitution contained not only the open courts provision (as is the case with all six Texas Constitutions), but also included article XII, section 14, which afforded express protection for the rights of infants, married women, and

insane persons. Limitations was not permitted to run until at least seven years after the removal of their “respective legal disabilities.” If the open courts provision was intended to provide essentially the same protection, the inclusion of this provision would have been unnecessary. However, I would not base the result in this case on such a slim reed, particularly in light of the subsequent decisions of our Court which have added more substance and contours to the open courts provision.

One of the earliest decisions of this Court to address the open courts provision in a context broader than physical access to the courts or unreasonable bond requirements was *Middleton v. Texas Power & Light Co.*, 108 Tex. 96, 185 S.W. 556, 560–61 (1916). The constitutionality of the Workmen's Compensation Act of 1913 was at issue. In addition to other state and federal constitutional challenges, the petitioner contended that because the statute abolished traditional common-law claims and defenses, it violated the open courts provision of the Texas Constitution. We recognized that “no one has a vested right in the continuance of present laws in relation to a particular subject.” *Id.* 185 S.W. at 560. Our Court then held that the Legislature has the power to change and even to repeal the common law. The Legislature is imbued with the authority to abrogate entirely the common-law rule of contributory negligence as to employees and to relieve the employer of the consequences of its negligence. *Id.* 185 S.W. at 561. In enacting the workmen's compensation statute under consideration in *Middleton*, the Legislature substituted a new scheme of compensation for the traditional common-law remedies and defenses, but our Court did not expressly base its holdings on the fact of or the adequacy of this substituted compensation. (We recently held the 1989 Workers' Compensation Act (codified in 1993) constitutional in the face of an open courts challenge, finding that the benefits available under the Act adequately replaced a common-law negligence cause of action. *Texas Workers' Compensation Comm'n v. Garcia*, 893 S.W.2d 504 (Tex.1995) (upholding Texas Workers' Compensation Act, 71st Leg., 2d C.S., ch. 1, 1989 Tex.Gen.Laws 1, now codified at [TEX.LAB.CODE § 401.001 et seq.](#))).

The United States Supreme Court affirmed *Middleton*, concluding that there had been no deprivation of due process or liberty under the United States Constitution. *Middleton v. Texas Power & Light Co.*, 249 U.S. 152, 162–63, 39 S.Ct. 227, 230–31, 63 L.Ed. 527 (1919). The

Supreme Court confirmed what this Court had held: that the rules of law, including imposition of liability without fault and exemption from liability, are subject *324 to legislative modification. *Id.* at 163, 39 S.Ct. at 231. The United States Supreme Court did, however, indicate that a common-law claim or right could not be abrogated in its entirety unless “a reasonable substitute for the legal measure of duty and responsibility previously existing” was established. *Id.*

This Court next had occasion to consider [article I, section 13](#), in two cases involving attempts by municipalities to limit their liability for defects in streets and sidewalks. The first was *Hanks v. City of Port Arthur*, 121 Tex. 202, 48 S.W.2d 944, 947 (1932), in which the city charter provision at issue required actual notice twenty-four hours prior to an accident as a prerequisite to making a claim. The notice provision was held to violate the “due process” rights accorded under [article I, section 13](#). The term “open courts” was not mentioned. In *City of Terrell v. Howard*, 130 Tex. 459, 111 S.W.2d 692 (1938), the city charter required a claimant to give notice of the injury within ninety days following the accident and to obtain the consent of a majority of the commissioners to bring suit. We held that the obvious effect was to deny the plaintiff recourse in the courts. The plaintiff's ability to sue depended on the will of the commissioners. *Id.* 111 S.W.2d at 694.

It was not until *Lebohm v. City of Galveston*, 154 Tex. 192, 275 S.W.2d 951 (1955), that this Court engaged in any extensive analysis of the substance of the “open courts” language in [article I, section 13](#), in the context of limiting common-law causes of action. As in *Hanks* and *City of Terrell*, the plaintiff was injured when she tripped on an obstruction in a street or sidewalk. The city charter contained an absolute defense: the city was not liable for injury caused by such defects. On rehearing in *Lebohm*, this Court reviewed the jurisprudence in our state and in other jurisdictions regarding the authority of a legislature to effect change in the common law. For the first time, this Court included in the open courts analysis the question of whether a substitute remedy had been provided in limiting a common-law cause of action. We emphasized that the United States Supreme Court in *Middleton, supra*, upheld the Workmen's Compensation Act on the basis that “a reasonable substitute” for the previous legal measure of duty and responsibility was established. *Id.* at 954 (emphasis omitted).

In *Lebohm*, we capsulized the import of the open courts section of our state constitution as follows:

Thus it may be seen that legislative action withdrawing common-law remedies for well established common-law causes of action for injuries to one's "lands, goods, person or reputation" is sustained only when it is reasonable in substituting other remedies, or when it is a reasonable exercise of the police power in the interest of the general welfare. Legislative action of this type is not sustained when it is arbitrary or unreasonable.

Id. at 955.

In applying these principles to the charter provision in *Lebohm*, we held that no broad policy or general welfare considerations were advanced to justify the city's complete bar of claims as a reasonable exercise of the police power. We observed that we "could think of none inasmuch as the effect of the provision extends only to the city limits of the City." Importantly, however, we noted:

In this connection, we are not to be understood as holding that the Legislature could not by general law abolish all causes of actions against cities for injuries growing out of simple negligence in the maintenance of streets.

Id.

We thus recognized in *Lebohm* that there may be instances in which the state can abolish common-law causes of action altogether if broad public policy or general welfare considerations exist. We adhered to this statement of the law in *Waites v. Sondock*, 561 S.W.2d 772, 774–75 (Tex.1977), but held that the Legislature could not constitutionally mandate a legislative continuance when the party opposing the continuance faced irreparable harm from the delay. In *Waites*, a mother in dire need of child support payments sought to compel her former husband to comply with the child support order. The trial court granted a legislative continuance,

deferring the contempt hearing for at least six months. This Court analyzed the legislative policy behind the mandatory *325 continuance and found it arbitrary and unreasonable as applied to the facts of the case before it, citing *Lebohm*, *supra*. 561 S.W.2d at 774.

The decision in *Sax*, which the Court today finds dispositive, likewise relied on *Lebohm*, and quoted the passage from *Lebohm* which recognizes that even if no reasonable remedy is substituted, the Legislature may nevertheless withdraw common-law remedies in the exercise of the police power for the general welfare as long as the legislative action is not arbitrary or unreasonable. *Sax*, 648 S.W.2d at 665. The Court in *Sax* specifically reaffirmed the interpretation of article I, section 13, set out in *Hanks*, *Lebohm*, and *Waites*, and stated:

We hold, therefore, that the right to bring a well-established common law cause of action cannot be effectively abrogated by the legislature *absent a showing that the legislative basis for the statute outweighs the denial of the constitutionally-guaranteed right of redress*. In applying this test, we consider both the general purpose of the statute and the extent to which the litigant's right to redress is affected.

Id. at 665–66 (emphasis added).

However, subsequent decisions have focused more on the last sentence of the foregoing passage, "the extent to which the litigant's right to redress is affected," rather than focusing on whether the abolition of a common-law cause of action was a reasonable exercise of police power. Most notably, in the case of *Lucas v. United States*, 757 S.W.2d 687, 702 (Tex.1988) (Phillips, C.J., dissenting), Chief Justice Phillips urged the Court to adhere to the test clearly articulated in *Lebohm*. *Id.* at 716. His opinion contains a thorough and thoughtful analysis of the open courts provision, including its historical roots and its development in this and other jurisdictions. The decision in *Sax* was considered at some length in that dissent. *Id.* at 716–17. In my view, Chief Justice Phillips correctly analyzed the open courts provision, and disapproved of the fact that

[w]hile *Sax* does not necessarily compel an incorrect analysis, in practice it has resulted in an almost exclusive focus on “the extent to which the litigant's right to redress is affected,” with an almost total disregard of “the general purpose of the statute.”

Id. at 716.

He noted that in *Sax* and its progeny, this Court has emphasized the nature and extent of the restriction on common-law causes of action to the virtual exclusion of other factors. “[T]he Court's ‘first concern’ has been the absence of adequate substitute remedies.” *Id.* at 717. The shortcoming of such an approach is that it leaves judges with unfettered discretion to rely on their own personal predilections in determining whether the substituted remedy is reasonable, without considering the right of the Legislature to exercise its police power and to weigh the competing considerations for itself. The reasonableness of the substituted remedy has been balanced against the reasonableness and necessity of the legislation and its underlying purposes. *See generally Lucas*, 757 S.W.2d at 717 (Phillips, C.J. dissenting); *see also Nelson v. Krusen*, 678 S.W.2d 918, 922 (Tex.1984).

Chief Justice Phillips advocated that the Court return to the language of *Lebohm* and separate the issue of a reasonable alternative remedy from the issue of a reasonable exercise of police power:

If the Legislature has provided or left in place a reasonable alternative remedy, judicial scrutiny is at an end, and properly so. The Legislature should have absolute discretion to substitute one adequate remedy for another, without its choice being subjected to judicial re-evaluation. If the Legislature has not provided or left in place a reasonable alternative remedy, however, the Constitution requires a second, separate inquiry. The courts must independently determine if the legislative action constitutes a reasonable exercise of the police power.

Lucas, 757 S.W.2d at 718.

Chief Justice Phillips correctly concluded that the determination of whether there had been a reasonable exercise of police power would not be satisfied by a mere finding that *326 the statute is rationally related to a legitimate state interest:

A “reasonable exercise of the police power in the interest of the general welfare” thus requires that the statute address an important, not merely a legitimate, state interest, that such interest be perceived and articulated by the state, and that the remedies provided bear a real relationship to the social evil being addressed.

Id.

I would apply the test found in *Lebohm* and in Chief Justice Phillips' dissent in *Lucas*, which is not at odds with the test set out in *Sax*. To do otherwise is to restrict the Legislature unduly in carrying out its obligations under our Constitution: to exercise its police power where necessary to “ameliorat[e] a rationally perceived social evil.” *Id.* Today's decision gives undue and overriding emphasis to the nature and extent of the restriction of common-law causes of action. The Court concludes that the minor's cause of action has been totally abrogated and that no reasonable substitute has been provided. The Court concludes without discussion that section 10.01 is not a reasonable exercise of the police power.

I turn to the questions to be answered under the test set forth in *Lebohm* and in *Sax*: 1) if a common-law cause of action has been restricted or withdrawn by the Legislature, does section 10.01 substitute a reasonable remedy, and 2) if no reasonable remedy was substituted, is section 10.01 nevertheless a reasonable exercise of police power by the Legislature.

III

A

The linchpin of the Court's holding today is that because of Wasson's legal disability as a minor, he could not bring suit in his own right until he reached majority. Accordingly, the Court concludes that the open courts provision would be violated if section 10.01 cut off his cause of action before he had the legal capacity to bring

suit. There is no contention that Wasson otherwise would have been incompetent to bring suit.

It is beyond dispute that the Legislature has the power to remove the legal disability of a minor such as Wasson. The legal disability is itself a statutory creation, [TEX.CIV.PRAC. & REM.CODE § 16.001](#), and in numerous areas, our laws recognize that even before legal majority is attained, older minors may be entrusted with certain decisions, and they are accountable for their actions. Children as young as fifteen may be certified for criminal punishment as adults. [TEX.FAM.CODE § 54.02](#). At age twelve, the Family Code allows a minor to choose his or her managing conservator “by writing filed with the court,” subject to court approval. [TEX.FAM.CODE § 14.07\(a\)](#). Similarly, a minor twelve years and older may select his or her own guardian of their person or estate subject to court approval. [TEX.PROB.CODE § 118\(a\)](#). In many instances, requiring a minor to bring a medical malpractice claim by age fourteen would not be unreasonable or arbitrary, particularly in light of the ways in which the law differentiates between children of various ages.

An argument can be mounted that [section 10.01](#) removed the legal disability of minors age twelve and over for purposes of bringing a medical malpractice action. The text of [section 10.01](#) suggests such a construction: “minors under the age of 12 years shall have until their 14th birthday *in which to file*, or have filed on their behalf, the claim.” [TEX.REV.CIV.STAT. art. 4590i, § 10.01](#) (Vernon Supp.1994) (emphasis added).

The Court in [Sax](#) did not consider whether there had been a removal of disability by the Legislature for purposes of instituting medical malpractice actions. [Sax](#) appears to have assumed that minors could not bring suit on their own behalf. See [Barlow v. Humana, Inc.](#), 495 So.2d 1048, 1051 (Ala.1986) (distinguishing [Sax](#) on the basis that in Alabama, a minor does not lack capacity to sue).

However, I do not believe it is reasonable to construe [section 10.01](#) as lowering the age of a minor's disability. The practical problems inherent in such a construction include the fact that the legal disability was not expressly removed for purposes of entering into a contract, which presumably would be necessary to enable a minor personally to ^{*327} engage counsel to bring suit. The statute should be construed, however, to require suit to be

brought on behalf of the minor, or in his or her name as the real party in interest.

Nevertheless, the fact that the Legislature *could have* removed the legal disability of a minor such as Wasson and accordingly, could have removed any open courts question is highly significant. The Legislature unmistakably indicated in [section 10.01](#) that as between the public policies underlying the disability statute, [TEX.CIV.PRAC. & REM.CODE § 16.001](#), and those leading to the passage of [section 10.01](#), the interests served by [section 10.01](#) are paramount. In view of the fact that the Legislature easily could have overridden its own disability statute, this Court should give considerable deference to the Legislature's determination that it is reasonable to require suit to be brought on behalf of a minor twelve years or older within the time specified in [section 10.01](#). We did not consider this point in [Sax](#).

Moreover, the statute before the Court in [Sax](#), article 5.82 of the Insurance Code, differs from [section 10.01](#) in at least one important respect. The age limit within which a minor or someone on his or her behalf was required to file suit was increased from eight to fourteen years of age. This age was not chosen at random by our Legislature. The Legislature considered the opinions of a number of experts as to when a minor could verbalize inner problems and could directly communicate that he or she was experiencing a health problem. The Legislature also considered the age by which an impairment to the development of the child could be recognized. See Debate on Tex.H.B. 1048 on the Floor of the House, 65th Leg., [R.S. 138–41](#) (March 22, 1977) (transcript available from House Committee Services) (statement of Representative Bock explaining expert opinions considered by the House State Affairs Committee in arriving at the age of fourteen). In enacting [section 10.01](#), the Legislature rejected the lower age of eight set forth in the [Sax](#) statute. In most cases, by the time a child attains the age of twelve, a competent parent or legal guardian should be able to determine if an injury to the child has occurred as a result of negligent medical treatment.

Requiring suit to be brought on behalf of the minor is a reasonable substitute for removing the right of a fifteen year old to bring suit in his or her own capacity after reaching majority, provided that the minor has a legally competent parent or legal guardian who has no conflict of interest that would preclude him or her from acting

in the best interests of the minor. Compare *Greathouse v. Fort Worth & Denver City Ry. Co.*, 65 S.W.2d 762, 765 (Tex.Comm'n App.1933, holding approved). The minor's rights are adequately safeguarded. See *Smith v. Cobb County–Kennestone Hosp. Auth.*, 262 Ga. 566, 423 S.E.2d 235, 239–40 (1992); *Thompson v. Franciscan Sisters Health Care Corp.*, 218 Ill.App.3d 406, 161 Ill.Dec. 162, 165, 578 N.E.2d 289, 292 (1991). The Family Code empowers parents to protect the legal interests of their child, recognizing their right “to represent the child in legal action and to make other decisions of substantial legal significance concerning the child.” TEX.FAM.CODE § 12.04(7). The Rules of Civil Procedure similarly enable parents as next friends to enter into settlement agreements on behalf of their minor children. TEX.R.CIV.P. 44. In addition to having the right to pursue a claim on behalf of their children, parents usually have a financial incentive to bring an action on behalf of a child who has been injured by medical malpractice. See *Mominee v. Scherbarth*, 28 Ohio St.3d 270, 28 OBR 346, 503 N.E.2d 717, 739 (1986) (Wright, J., dissenting).

I recognize that in *Sax*, the Court declined to accept suit by a parent or guardian as a reasonable substituted remedy. On this point, I fundamentally disagree with the assumption in *Sax* that competent parents cannot be trusted to act in the best interest of their child. 648 S.W.2d at 667. Society entrusts the care of children to their parents, and the Legislature was entitled to conclude that parents may be relied upon to bring a cause of action for injuries to their child resulting from medical malpractice. See *Strahler v. St. Luke's Hosp.*, 706 S.W.2d 7, 20 (Mo.1986) (Welliver, J., dissenting); *328 *Mominee*, 503 N.E.2d at 739 (Wright, J., dissenting). The law presumes that parents will take care of their children's needs in a variety of contexts. Parents are required by law to provide for the care, support, and nurture of their children. TEX.FAM.CODE § 12.04. In the area of child custody, this Court has explained that the presumption that a child is best served by awarding custody to his or her natural parents is

based upon a logical belief that the ties of the natural relationship of parent and child ordinarily furnish strong assurance of genuine efforts on the part of the custodians to provide the child with the best care and opportunities possible, and, as well, the best atmosphere for

the mental, moral and emotional development of the child.

Mumma v. Aguirre, 364 S.W.2d 220, 221 (Tex.1963). This expression stands in stark contrast to the portrayal of parents in *Sax* as potentially “ignorant, lethargic, or lack[ing] concern.” *Sax*, 648 S.W.2d at 667.

This conclusion in *Sax* is one aspect of our decision which should be reconsidered. In cases involving guardians for the mentally incompetent, this Court has intimated that the rights of one under a legal disability might be cut off by the action or inaction of a legal guardian. Most recently, in *Ruiz v. Conoco, Inc.*, 868 S.W.2d 752, 756 (Tex.1993), our Court held that two suits filed by Ruiz and his wife before Ruiz was adjudged incompetent and before his wife was appointed guardian of his estate and person did not commence the running of limitations under section 16.003 of the Texas Civil Practice & Remedies Code. Accord *Hopkins v. Spring Indep. Sch. Dist.*, 706 S.W.2d 325, 326 (Tex.App.—Houston [14th] 1986), *aff'd*, 736 S.W.2d 617 (Tex.1987). *Ruiz* did not involve a challenge under the open courts provision. It was decided solely on the basis of the statute's language and the policies underlying its adoption. In *Ruiz*, we gave considerable deference to a “considered legislative judgment that in enumerated circumstances the strong policy in favor of prompt disposition of disputes must give way to the need to protect a plaintiff who is unable to protect him or herself.” 868 S.W.2d at 756 (quoting *Tzolov v. International Jet Leasing, Inc.*, 232 Cal.App.3d 117, 283 Cal.Rptr. 314, 317–18 (1991)) (emphasis added). In *Ruiz*, we expressly left open the question of whether an action commenced on behalf of a legally disabled individual could operate as a bar:

This does not mean that an action commenced by, or on behalf of, a legally disabled individual can never be given preclusive effect.

868 S.W.2d at 756.

In *Tinkle v. Henderson*, 730 S.W.2d 163 (Tex.App.—Tyler 1987, writ ref'd), which was decided on an open courts issue, it was specifically noted that Tinkle, who became mentally incompetent following medical treatment, did not have a guardian at the time of the claimed injury. It was held that limitations had not run against him.

Earlier decisions in our state recognized that in some instances, rights of the mentally incompetent can be lost due to the passage of time, notwithstanding the legal disability. In *McLendon v. Comer*, 200 S.W.2d 427 (Tex.Civ.App.—Texarkana 1947, writ ref'd n.r.e.), Homer Prior was adjudged a person of unsound mind, and a guardian was appointed. The guardian brought suit on Prior's behalf, foreclosing on a vendor's lien and obtaining an additional award of \$1,200. The defendants in that suit deeded the tract at issue to the guardian in cancellation of the judgment. In later years, it was contended that title to this property had been obtained by the adverse possession of Comer and those claiming through him. It was held that limitations had run against Prior, in spite of his incapacity, because legal title previously had vested in his guardian following the foreclosure suit by the guardian on behalf of Homer. *Id.* at 430. This Court reached the same legal conclusion in *Broussard Trust v. Perryman*, 134 S.W.2d 308, 313 (Tex.Civ.App.—Beaumont 1939, writ ref'd).

Our Court indicated in *Latcholia v. Texas Employers Ins. Ass'n*, 140 Tex. 231, 167 S.W.2d 164 (1942) that a minor who was not totally and permanently incapacitated could be required to give the statutory notice under the Workmen's Compensation Act then in effect or have his claim barred. *Id.* at 168. In *Latcholia*, the Court found the plaintiff to be totally and permanently disabled. Based on a review of the language in the Act, the *329 Court held that under those circumstances, good cause had been shown for the minor's failure to give notice of the injury. However, the Court pointed out that the statute allowed a minor to appear before the board without being represented by a guardian or next friend in cases in which the disability was temporary or partial, and the board was authorized to pay the award directly to the minor in such cases. The statute prohibited such a procedure only in the case of total and permanent disabilities. *Id.* 167 S.W.2d at 167. We further noted that the plaintiff in this case had no guardian and that no one came forth to act as next friend until his father filed a claim. *Id.* 167 S.W.2d at 166.

More recently, at least one court of appeals has held that the notice provisions under our previous Workmen's Compensation Act applied to a minor, and the minor's claim for common-law negligence was barred because the minor did not give notice. *Whitehead v. American Indus. Transp., Inc.*, 746 S.W.2d 273, 274–75 (Tex.App.—Texarkana 1988, writ denied). In *Whitehead*, a minor was killed on the job. He had failed to give written notice to

his employer that he was reserving his rights to a common-law negligence action. As applied to the deceased minor, who was seventeen at the time he began his employment, the court held there was no constitutional violation:

[W]e would be required to find that persons under eighteen, regardless of their age or experience, are incapable as a matter of law of making an intelligent choice concerning their right to compensation for injuries. This we are unwilling to do. The Legislature may exempt all persons under eighteen years from the waiver provisions of the Act if it desires, but the Constitution, in our judgment, does not require it.

Id. at 275.

The notice requirements of the Texas Tort Claims Act, TEX.CIV.PRAC. & REM.CODE § 101.101(a)–(c), were likewise found applicable to a claimant rendered physically and mentally incompetent where a guardian of her estate had been appointed. *Rath v. State of Texas*, 788 S.W.2d 48, 51 (Tex.App.—Corpus Christi 1990, writ denied). Citing *McCrary v. Odessa*, 482 S.W.2d 151, 154–55 (Tex.1972), the court of appeals held: “[s]ince the appointment of a guardian with authority to file a claim or file suit removed [her] disability, her failure to comply with the notice requirement was not excused.” 788 S.W.2d at 51. *McCrary* held that a sixty-day notice requirement in a city charter violated the open courts provision as applied to a minor. *Rath* apparently relied on the statement in *McCrary* that the minor could not institute or settle a claim in court and was therefore excused from compliance with the notice provision until the disabilities were removed. *McCrary* did not explore the question of whether the appointment of a guardian constituted a removal of disabilities and consequently would have affected the result, but *McCrary* did cite *City of Houston v. Bergstrom*, 468 S.W.2d 588 (Tex.Civ.App.—Houston [14th Dist.] 1971, writ ref'd n.r.e.), as a “carefully considered case.” 482 S.W.2d at 154. *Bergstrom* held that a thirty-day notice requirement violated the open courts provision as applied to a minor, but its holding was based in part on the fact that the plaintiff had no court-appointed guardian or guardian ad litem, and no one

had established himself or herself as her next friend. 468 S.W.2d at 591.

In other jurisdictions, the general rule is that if the disability statute is a general one, and the statute of limitations is likewise a general one, limitations will not run against a minor or an incompetent simply because a parent or next friend could have brought suit. *See, e.g., Young v. Key Pharmaceuticals, Inc.*, 112 Wash.2d 216, 770 P.2d 182, 185 (1989). However, some courts have held that if a statute is specific or, in some cases, when a legal guardian is appointed by a court, limitations can commence to run. *Dye v. Fremont County Sch. Dist. No. 24*, 820 P.2d 982, 985–86 (Wy.1991) (parent's failure to give timely notice under tort claims statute did not bind minor; time for filing begins to run when guardian ad litem appointed); *Baker v. Binder*, 34 Mass.App.Ct. 287, 609 N.E.2d 1240, 1243 (1993) (father automatically appointed next friend when he filed suit on behalf of minor; limitations ran from that date as to minor's claims).

*330 Section 10.01 is not a general statute, and it is not merely permissive. It is very specific in directing that suit must be brought on behalf of a minor within certain time limits. It should be given effect by this Court.

A different result may obtain if a plaintiff demonstrates that he or she had no parent or legal guardian who was competent to bring suit, or that his or her parents or legal guardian had a conflict of interest that prevented them from acting in the minor's best interests. In such circumstances, the statute of limitations may well be unconstitutional as applied to such a plaintiff. But requiring a competent parent or legal guardian to bring suit does not constitute "an impossible condition" prohibited by the open courts provision.

The concept of an "impossible condition" was explained in *Nelson v. Krusen*, 678 S.W.2d 918 (Tex.1984). In that case, parents of a child born with *Duchenne muscular dystrophy* brought a "wrongful birth" suit, contending that the physician who treated the mother prior to and during pregnancy erroneously assured them that she was not a genetic carrier of the disease. (The cause of action asserted was that of the parents. They did not bring suit in a representative capacity as to this claim.) Suit was brought more than three years from the date the child was born, shortly after the parents alleged to have first discovered their child had the disease. Limitations under

former article 5.82, section 4 was asserted as a defense, and its constitutionality under the open courts provision was challenged. The Court in *Nelson* emphasized that the common theme of Texas open courts decisions is that the Legislature cannot impose an impossible condition upon a potential claimant. *Id.* at 922. In discussing *Sax*, the Court noted that the case for an open courts violation was even more compelling in this wrongful birth suit than in *Sax* because in *Sax* "it was possible for the parents to bring their children's suits in time...." *Id.* at 923. Far from creating an impossible condition, section 10.01 tolls the statute for up to twelve years to allow parents or a legal guardian to bring a medical malpractice claim. Similarly, in *Tinkle v. Henderson*, *supra*, which held section 10.01 unconstitutional as applied to a mentally incompetent person where no guardian had been appointed, it was recognized that children are more likely than the mentally incompetent to have someone intimately interested in their welfare and inclined to act on their behalf. 730 S.W.2d at 166.

Under standard principles of statutory construction, this Court must construe the statute to render it constitutional, if possible. *See Key Western Life Ins. Co. v. State Bd. of Ins.*, 163 Tex. 11, 350 S.W.2d 839, 849 (1961). It is to be presumed that the Legislature has not acted arbitrarily or unreasonably:

In passing upon the constitutionality of a statute, we begin with a presumption of validity. It is to be presumed that the Legislature has not acted unreasonably or arbitrarily; and a mere difference of opinion, where reasonable minds could differ, is not a sufficient basis for striking down legislation as arbitrary or unreasonable. The wisdom or expediency of the law is the Legislature's prerogative, not ours.

Garcia, 893 S.W.2d at 520 (quoting *Smith v. Davis*, 426 S.W.2d 827, 831 (Tex.1968)).

In the case before the Court today, Wasson was fully cognizant of his injury and of his potential claim, as was his mother. There is no indication that his mother or his father could not have instituted suit within the limitations period. Under these circumstances, the

substituted procedure in [section 10.01](#) which requires suit to be brought on behalf of Wasson within certain time limits is reasonable.

B

The inquiry is not at an end even if one were to conclude that the legislative scheme of allowing suit to be brought on behalf of a minor is not a reasonable substitute for limiting a minor's right to sue. The Legislature has the power to abrogate common-law causes of action altogether in the proper exercise of its police power. *See* discussion of *Middleton* and *Lebohm*, *supra*. I would hold that the exercise of legislative power was constitutional here.

The Legislature articulated its findings and the basic purposes of [article 4590i](#) in [*331](#) section 1. Those findings are lengthy and will not be quoted here. In sum, the Legislature found that there is a medical malpractice crisis in this state which has had a material adverse effect on the cost and availability of health care. The Legislature found it likely that there would be further reductions in the availability of health care in the future. These findings meet the test of an “important” state interest. The remedy, limiting the time over which physicians and health care providers face liability, is directly related to the crisis identified by the Legislature and bears a real relationship to the articulated legislative goal of making health care more affordable, and above all available, for all Texans. The Legislature reasonably concluded that reducing the potential of long-term liability would help to ease the strain on health care services. *See Thompson*, 578 N.E.2d at 291; *Rohrbaugh v. Wagoner*, 274 Ind. 661, 413 N.E.2d 891, 894 (1980); *Mominee*, 503 N.E.2d at 738 (Wright, J., dissenting). Without [section 10.01](#), a physician could be forced to defend a claim arising out of injuries incurred during childbirth up to twenty years after the occurrence. Page Keeton explained in his memorandum to the Texas Medical Professional Liability Study Commission that a medical malpractice statute of limitations is aimed at “the prevention of the bringing of stale claims or claims that are made so long after the so-called negligent event occurred as to make it virtually impossible to ascertain the facts.”

Significantly, the statute at issue in *Sax* contained no such findings. The Court in *Sax* did not consider these public policy concerns or whether the legislative scheme

bears a real relationship to the social evils being addressed. Taken in tandem with the Legislature's adoption of a higher threshold age at which limitations begins to run, the legislative findings support the constitutionality of this statute, and there is a valid basis for drawing distinctions between the statute under scrutiny in *Sax* and [section 10.01](#).

Admittedly, the findings and stated purposes of [article 4590i](#) are many of the same policy matters considered and rejected by the Court in *Lucas v. United States*, *supra*. In *Lucas*, our Court held that the caps on the dollar amounts recoverable under sections 11.02 and 11.03 of [article 4590i](#) violated the open courts provision. 757 S.W.2d at 692. Putting aside the question of whether the result in *Lucas* was correct, it is distinguishable. The principal infirmity of the damage caps was that it was unfair and unreasonable to impose the burden of supporting the medical care industry solely upon those persons who are most severely injured and most in need of compensation. *Id.* This Court held:

In the context of persons catastrophically injured by medical negligence, we believe it is unreasonable and arbitrary to limit their recovery in a speculative experiment to determine whether liability insurance rates will decrease.... In any event, we hold it is unreasonable and arbitrary for the legislature to conclude that arbitrary damages caps, applicable to all claimants no matter how seriously injured, will help assure a rational relationship between actual damages and amounts awarded.

757 S.W.2d at 691 (emphasis omitted).

The statute of limitations in [section 10.01](#) does not work such a hardship. The minor is entitled to recover for *all* injuries. There is a demonstrable nexus between limiting the time in which suit for malpractice must be brought and the goals articulated by the Legislature, which include availability and affordability of adequate professional liability insurance and hence, the availability and affordability of health care services. It is within the authority of the Legislature to make reasoned adjustments in the legal system, and we so held in *Morrison v. Chan*,

699 S.W.2d 205, 208 (Tex.1985). (*Morrison* held the intent of the Legislature in [section 10.01](#) was to abolish the discovery rule. There, the patient discovered a hole in her bladder six months before limitations ran, but the running of the statute was not extended.) Compare *Neagle v. Nelson*, 685 S.W.2d 11 (Tex.1985) ([section 10.01](#) did not cut off claim for sponge left in abdomen).

While a number of other decisions of our Court and the courts of appeals have considered whether a statute can cut off the claims of a minor, the propriety of Legislature's purported exercise of its police power was not presented. See, e.g., *332 *McCrary v. City of Odessa*, 482 S.W.2d 151, 153–54 (Tex.1972) (sixty-day notice requirement under city charter unconstitutional as to minors under open courts provision); *Ladehoff v. Ladehoff*, 436 S.W.2d 334, 337 (Tex.1968) (by virtue of specific probate code provision, minor not personally served may sue to set aside will ten years later when he attains majority); *Latcholia v. Texas Employers Ins. Ass'n*, 140 Tex. 231, 167 S.W.2d 164, 167 (1943) (minor totally and permanently disabled with no guardian not required to give thirty-day notice under the Workmen's Compensation Act); *City of Houston v. Bergstrom*, 468 S.W.2d 588, 591 (Tex.App.—Houston 1971, writ ref'd n.r.e.) (minority alone will excuse compliance with notice requirement).

Looking to other jurisdictions, many courts have upheld statutes of limitation applicable to the claims of minors against due process and open courts challenges. See *Barlow v. Humana, Inc.*, 495 So.2d 1048, 1052 (Ala.1986) (open courts); *Smith v. Cobb County–Kennestone Hosp.*, 262 Ga. 566, 423 S.E.2d 235, 239–40 (1992) (access to courts); *Maine Med. Ctr. v. Cote*, 577 A.2d 1173, 1175–76 (Me.1990) (open courts); *Bissell v. Kommareddi*, 202 Mich.App. 578, 509 N.W.2d 542, 544 (1993) (open courts); *Thompson v. Franciscan Sisters Health Care Corp.*, 218 Ill.App.3d 406, 161 Ill.Dec. 162, 578 N.E.2d 289 (1991) (due process); see also *Rohrbaugh*, 413 N.E.2d at 891; *Shaw v. Zabel*, 267 Or. 557, 517 P.2d 1187, 1188 (1974) (en banc); *Licano v. Krausnick*, 663 P.2d 1066 (Colo.Ct.App.1983) (all upholding statute against equal protection challenges). A number of other jurisdictions have struck down similar statutes on the basis of due process or open courts guarantees. See, e.g., *Barrio v. San Manuel Div. Hosp.*, 143 Ariz. 101, 692 P.2d 280, 286 (1984) (open courts); *Strahler*, 706 S.W.2d at 11–12 (access to courts); *Mominee*, 503 N.E.2d at 723 (due process); see

also *Whitlow v. Board of Educ.*, 190 W.Va. 223, 438 S.E.2d 15, 23 (1993) (equal protection).

Although I would not hold that [section 10.01](#) could never be unconstitutional in its application, it is not unconstitutional as applied in this case. A statute need not be declared unconstitutional simply because it might be unconstitutional as applied to the facts of another case. See *Nelson*, 678 S.W.2d at 923. Emmanuel Wasson knew of his claim as early as 1988, and his mother hired a lawyer to represent him before May of 1990, which was still within the two-year limitations period under [Section 10.01](#). Wasson was not the plaintiff the Court was concerned about in *Sax*. His right to pursue his claim was not precluded by the statute, but rather because he slept on his rights.

It is not necessary to decide whether the exercise of the Legislature's police power would be proper as applied to different facts, such as a case where the minor's parent was incompetent. In this regard, it should be noted that the result I would reach as to Wasson is not necessarily at odds with *Tinkle*, *supra*, which held [section 10.01](#) unconstitutional as applied to the mentally incompetent. It was noted in that decision that no guardian had been appointed, and the court did not engage in any analysis of the police power of the Legislature to abrogate common-law causes of action.

IV

A fundamental tenet in our jurisprudence is the recognition of the need for consistency and predictability in the decisions of our courts. This Court should be loath to overrule its prior decisions, particularly where an opinion has been cited and relied upon as frequently and as recently as has *Sax*. Our Court should not succumb to a temptation to continually revisit prior decisions as new fact situations arise or the concerns of the public shift. The Court similarly stresses the importance of stare decisis, but misapprehends the application of that doctrine to the case before us. The Court concludes that in order to uphold the constitutionality of [section 10.01](#), it is compelled to “overrule *Sax* or to somehow limit the holding of that case to its facts.” 900 S.W.2d 320. *Sax* should and must be limited to its facts in *some* respects because the Court had before it a different statute with a considerably different legislative history and different provisions. But the basic

principles of *Sax* are sound, with limited exceptions noted above. Those principles should lead this Court to uphold *333 section 10.01. The application of the rationale of *Sax* to this case leads only to a different *result*, not to a departure from the essence of *Sax* or from the decisions of this Court on which it was based.

The Court concludes that Wasson and his parents, and those similarly situated, may justifiably rely on *Sax* and wait well beyond the statutory limitation period before bringing suit. In support of this premise, the Court cites Justice Scalia's concurring opinion in *Quill Corp. v. North Dakota*, 504 U.S. 298, 319, 112 S.Ct. 1904, 1916, 119 L.Ed.2d 91 (1992), which states "reliance upon a square, unabandoned holding of the Supreme Court is *always* justifiable reliance." 504 U.S. at 321, 112 S.Ct. at 1916 (emphasis in original). The balance of that quote, omitted by the Court, notes "reliance alone may not always carry the day." The most important aspect of Justice Scalia's comment, however, is its context. Justice Scalia observed:

Congress has the final say over regulation of interstate commerce, and it can change the rule of *Bellas Hess* [the Supreme Court's longstanding decision] by simply saying so. We have recognized that the doctrine of *stare decisis* has "special force" where "Congress remains free to alter what we have done."

504 U.S. at 320, 112 S.Ct. at 1916.

That principle applies with force here. *Sax* was decided *before* section 10.01 was renewed and extended by the Texas Legislature. The statute of limitations at issue in *Sax* has been altered by the Texas Legislature. Under such circumstances, it is not reasonable for any party to ignore a statute on the basis of a *prior* decision of this Court. Section 10.01 has never been held unconstitutional as applied to minors by this or any other court since its enactment in 1977, until today's decision. It is dangerous precedent indeed to hold that reliance by a party on his or her extrapolation of what this Court has held in other cases is a justification for striking down an otherwise valid act of the Legislature.

* * * * *

Because I would conclude that section 10.01 of the Medical Liability Act does not violate the open courts provision of the Texas Constitution under the facts of this case, I respectfully dissent.

All Citations

900 S.W.2d 316, 38 Tex. Sup. Ct. J. 750

Footnotes

1 TEX.REV.CIV.STAT.ANN. art. 4590i, § 10.01 (Vernon Supp.1994).

2 When a trial court grants summary judgment without specifying the grounds, the summary judgment must be affirmed on appeal if any of the theories advanced are meritorious. *Carr v. Brasher*, 776 S.W.2d 567, 569 (Tex.1989). The court of appeals, however, did not address Weiner's second ground for summary judgment. We address both grounds below.

3 The open courts provision states:

All courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law.

TEX. CONST. art I, § 13.

4 Under both *Jilani* and *Felderhoff*, the parent-child immunity doctrine prevents suits by a child against a parent with respect to "alleged acts of ordinary negligence which involve a reasonable exercise of parental authority or the exercise of ordinary parental discretion with respect to provisions for the care and necessities of the child." *Jilani*, 767 S.W.2d at 672; *Felderhoff*, 473 S.W.2d at 933.

5 These provisions date back to at least 1911. See *Sax*, 648 S.W.2d at 663.

6 Section 16.003 provides:

(a) A person must bring suit for ... personal injury ... not later than two years after the day the cause of action accrues.

TEX.CIV.PRAC. & REM.CODE § 16.003.

7 Section 16.001 provides:

(a) For purposes of this subchapter, a person is under a legal disability if the person is:

(1) younger than 18 years of age, regardless of whether the person is married; or
(2) of unsound mind.

(b) If a person entitled to bring a personal action is under a legal disability when the cause of action accrues, the time of the disability is not included in a limitations period.

[TEX.CIV.PRAC. & REM.CODE § 16.001.](#)

- 8 We note that when faced with the unconstitutionality of medical malpractice statutes similar to [§ 10.01](#), several other states have also applied the general tolling statute. See [Whitlow v. Board of Educ.](#), 190 W.Va. 223, 438 S.E.2d 15, 23 (1993); [Strahler v. St. Luke's Hosp.](#), 706 S.W.2d 7, 11 (Mo.1986); [Mominee v. Scherbarth](#), 28 Ohio St.3d 270, 28 OBR 346, 503 N.E.2d 717, 723 (1986); [Barrio v. San Manuel Div. Hosp.](#), 143 Ariz. 101, 692 P.2d 280, 286 (1984).



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Declined to Extend by [LaGessee v. PrimaCare, Inc.](#), Tex.App.-Eastland,
May 18, 1995

685 S.W.2d 11
Supreme Court of Texas.

Bobby NEAGLE, Petitioner,
v.
George C. NELSON, M.D. et al., Respondents.

No. C-2576.

Jan. 30, 1985.

Rehearing Denied March 6, 1985.

Patient sued health care providers for medical malpractice. The 105th District Court, Kleberg County, Vernon D. Harville, J., granted defendants' motion for summary judgment on the ground that suit was barred by limitations, and patient appealed. The Court of Appeals, Nye, C.J., [658 S.W.2d 258](#), affirmed, and appeal was taken. The Supreme Court, Wallace, J., held that statute of limitations for health care liability claims, as applied to patient, who did not discover that sponge was left in his abdomen until more than two years after appendectomy, violated open courts provision.

Reversed and remanded.

Robertson, J., filed a concurring opinion.

Kilgarlin, J., filed a concurring opinion.

West Headnotes (1)

[1] Constitutional Law

🔑 Time for Proceedings

Limitation of Actions

🔑 Constitutionality of Statute

Statute of limitations for health care liability claims, as applied to plaintiff, who did not discover a sponge was left in his abdomen until more than two years after the appendectomy, violated the open courts provision. [Vernon's Ann.Texas Civ.St. art. 4590i, § 10.01](#); [Vernon's Ann.Texas Const. Art. 1, § 13](#).

107 Cases that cite this headnote

Attorneys and Law Firms

*11 Phillip Brown, Amarillo, for petitioner.

Paul M. Green, San Antonio, James H. Robichaux and Ben A. Donnell, Corpus Christi, for respondents.

Opinion

WALLACE, Justice.

This appeal presents an attack on the constitutionality of the limitations provision in the 1977 Medical Liability Act. Bobby Neagle filed this malpractice action against Dr. George C. Nelson, Dr. Roy J. Hotz and two nurses, Nancy S. Kieschnick and Linda N. White. He alleged that a [surgical sponge](#) had been left in his abdomen during an [appendectomy](#) in which the respondents had participated. Each respondent moved for summary judgment on the ground that *12 Neagle's claim was barred by a two-year statute of limitations. [TEX.REV.CIV.STAT.ANN. art. 4590i, § 10.01](#). The trial court granted their summary judgments and the court of appeals, with one justice dissenting, affirmed. [658 S.W.2d 258](#). We reverse the judgment of the court of appeals and remand this cause to the trial court.

Neagle's [appendectomy](#) was performed on December 9, 1977, at the Kleberg County Hospital, Kingsville, Texas. He was discharged from the hospital one week later. Dr. Nelson last examined Neagle within a few weeks of his discharge; however, the other respondents did not see Neagle after his discharge from the hospital. Discovery of the sponge occurred in January, 1980, more than two years after the [appendectomy](#), when, after feeling a mass in his abdomen, Neagle submitted to exploratory surgery.

Neagle alleged that the [surgical sponge](#) had been left in his abdomen during the operation and that it was impossible for him to discover the sponge until more than two years after the surgery. We presume for purposes of appellate review that Neagle's allegations are true. See, [Bayouth v. Lion Oil Co.](#), [671 S.W.2d 867](#) (Tex.1984).

The action of the trial court in granting Nelson's motion for summary judgment was based upon the two-year

statute of limitations set forth in [Art. 4590i, § 10.01](#). This statute provides:

Notwithstanding any other law, no health care liability claim may be commenced unless the action is filed within two years from the occurrence of the breach or tort or from the date the medical or health care treatment that is the subject of the claim or the hospitalization for which the claim is made is completed; provided that, minors under the age of 12 years shall have until their 14th birthday in which to file, or have filed on their behalf, the claim. Except as herein provided, this subchapter applies to all persons regardless of minority or other legal disability.

This statute purports to establish an absolute two-year statute of limitations for Neagle's claim. In [Nelson v. Krusen](#), 678 S.W.2d 918 (Tex.1984), we held that [TEX.INS.CODE ANN. art. 5.82, § 4 \(repealed\)](#), predecessor to [Art. 4590i, § 10.01](#), was unconstitutional insofar as it cut off a cause of action before the Nelsons could have known that their son had [Duchenne Muscular Dystrophy](#). We have likewise declared unconstitutional that part of [Art. 4.82, § 4](#) relating to minors. [Sax v. Votteler](#), 648 S.W.2d 661 (Tex.1983). Both cases were decided on the basis of the open courts provision of the Texas Constitution. [TEX. CONST. Art. I, § 13](#).

It is Neagle's contention that [Art. 4590i, § 10.01](#), as applied to his cause of action, also violates the open courts provision. We agree. The open courts provision of our Constitution protects a citizen, such as Neagle, from legislative acts that abridge his right to sue before he has a reasonable opportunity to discover the wrong and bring suit.

We reverse the judgment of the court of appeals and remand this cause to the trial court.

GONZALEZ, J., not sitting.

ROBERTSON, Justice, concurring.

I agree fully with the majority opinion of the court in this cause. I must, however, respectfully disagree with the conclusions stated in Justice Kilgarlin's concurrence.

A concurring opinion can perform a useful function in explaining or supplementing opinions, providing guidance for both bench and bar. I have used this vehicle before, when the majority opinion deserved further explanation or could be justified on different legal grounds. *See, e.g., Nelson v. Krusen*, 678 S.W.2d 918, 925 (Tex.1984) (Robertson, J., concurring); *Jensen v. Jensen*, 665 S.W.2d 107, 110 (Tex.1984) (Robertson, J., concurring).

It is certainly possible that the views so ably expressed in Justice Kilgarlin's concurrence may, in some future case, become the majority opinion of this court. The *13 questions addressed, however, are extremely complex. I fear that without additional explanation courts and litigants might mistakenly conclude that this court has already arrived at a firm consensus on these issues. The purpose of this concurrence is solely to demonstrate that there is at least one other plausible viewpoint. If and when the issues are raised directly in an appropriate case, further briefing and creative advocacy may reveal even more—and better—alternatives.

One question remaining for this court's future consideration is whether the legislature has abolished the “discovery rule” of *Gaddis v. Smith*, 417 S.W.2d 577 (Tex.1967). It is suggested that “the clear intent of the legislature” in passing [art. 5.82 Tex. Ins. Code Ann.](#) and [Tex. Rev. Civ. Stat. Ann. art. 4590i](#) was “to overrule *Gaddis v. Smith*.” 685 S.W.2d at 14 (Kilgarlin, J., concurring).

As I have pointed out once before, *Nelson v. Krusen*, 678 S.W.2d 918, 928 (Tex.1984) (Robertson, J. concurring), legislative history is not the beginning point for analysis of a statute. “It is the duty of courts to construe a law as written, and, if possible, ascertain its intention from the language used therein....” *Government Personnel Mut. Ins. Co. v. Wear*, 151 Tex. 454, 251 S.W.2d 525, 529 (1952). I am not convinced that the plain language of [art. 4590i](#) manifests any intent to abrogate the “discovery rule.” Without an initial showing of some ambiguity or conflict in statutory language, it is not appropriate to inquire into the possible motives the legislature might have had in drafting the act. *Board of Ins. Comm'rs v. Guardian Life Ins. Co.*, 142 Tex. 630, 180 S.W.2d 906, 909 (1944). For

this reason, I view the “discovery rule” issue as an open question, and remain amenable to persuasion.

I am even more troubled by the suggested use of an “analogy” to workers' compensation law to answer the question of what a permissible delay for a malpractice plaintiff might be. As a method of reasoning, analogy draws its strength from similarity. It is difficult to perceive any relevant similarity between development of the test in *Hawkins v. Safety Casualty Co.*, 146 Tex. 381, 207 S.W.2d 370, 372 (1948) and the task that would confront the Texas Supreme Court in medical malpractice.

On the other hand, there are numerous distinctions. For example, in *Hawkins* the court sought diligently to follow the letter of a limitation statute; this court has constitutionally invalidated the “analogous” malpractice statute. Further, the statute in *Hawkins* provided only thirty days for giving notice of injury, as opposed to two years under the “analogous” statute considered here, a factor that must surely have flavored decisions on “good cause” for delay in workers' compensation cases. Compare Tex.Rev.Civ.Stat. Ann. art. 8307 § 4a with Tex.Rev.Civ.Stat. Ann. art. 4590i §§ 4.01, 10.01. Perhaps most important, while the *Hawkins* court operated within the context of the workers' compensation system, a statutory alternative to the common law of torts, the court today, having invalidated the statute as it applies to a particular plaintiff, operates within the familiar arena of common law and equity.

The last observation suggests one easy alternative to a strained analogy to workers' compensation law. While the malpractice limitations period may be unconstitutional as applied to a particular case, principles of common law and equity remain. This court has previously recognized that even where a statutory limitation period is not applicable, the equitable doctrine of laches may nonetheless operate to prevent the assertion of a stale claim. See, e.g., *City of Fort Worth v. Johnson*, 388 S.W.2d 400 (Tex.1964).

A further alternative to the workers' compensation analogy would exist if this court were to find the language of the statute consistent with the continued existence of the “discovery rule.” Quite simply, the statutory two-year period would run from the date of discovery, since the statute would not be unconstitutional as applied.

Other and better legal and equitable theories may well exist. The purpose of this *14 concurrence was not to catalogue and weigh the merits of all possible answers, but rather to demonstrate that the questions, in my opinion, remain open.

KILGARLIN, Justice, concurring.

Because there are questions that the court opinion leaves unanswered, I find it necessary to write a concurring opinion. Hopefully, it will aid our state's bench and bar in resolving questions in what is now an imprecise area of the law.

We have held today that article 4590i, Tex.Rev.Civ.Stat. Ann., as applied in this case violates our Constitution's open courts provision. Tex. Const. art. I, § 13. Our holding is based upon the assumption that Neagle reasonably should not have known of his injury during the period of limitations. If, upon retrial, however, this fact is controverted, it should be Neagle's burden to establish this fact because he is the party challenging the constitutionality of this statute. *Robinson v. Hill*, 507 S.W.2d 521 (Tex.1974); *Smith v. Craddick*, 471 S.W.2d 375 (Tex.1971).

There is also a question of the length of time Neagle has in which to file suit after discovery of his injury. We did not discuss this in *Nelson v. Krusen*, 678 S.W.2d 918 (Tex.1984). Nor is this question discussed in the court's opinion. In *Gaddis v. Smith*, 417 S.W.2d 577 (Tex.1967), this court adopted the standard for medical malpractice cases involving a physician leaving a foreign object in a patient's body. We held that the statute of limitations did not begin to run until such time as the patient discovered, or reasonably should have discovered, the foreign object. But, is *Gaddis v. Smith* still viable? To answer that question, one must examine the language of the statute. A cursory reading of article 4590i, § 10.01, is subject to but one interpretation, and that is all malpractice actions shall be brought within two years of the tort or date of last treatment. But, if that language is unhelpful, we must look to the legislative intent behind the enactment of article 4590i. The Medical Professional Liability Study Commission, created by the 64th Legislature, found that one of the purposes of art. 5.82, Tex. Ins. Code Ann. (the predecessor legislation enacted as an interim measure pending the commission report) was to abolish all limitations exceptions “previously carved out by the courts.” Report at 11–12.

I must conclude, therefore, that the clear intent of the legislature was to overrule the *Gaddis v. Smith* holding that limitations did not begin to run until after discovery of the foreign object. To the extent that the legislative enactment is constitutional and remains unchallenged, this court must accommodate the legislative intent. Therefore, it is quite obvious that we cannot now reinstate a limitations period that would allow for suits to be filed within two years after the date of discovery.

But, if we do not allow two years after discovery in which to file suit, what is a permissible delay? The most apt analogy to discovery after limitations has run can be found in worker's compensation law, where if a claimant has good cause for a late filing of his claim, he is not barred from asserting that claim. Because "good cause" was not defined by statute, this court established a test for determining its existence. That test is whether the claimant prosecuted his claim with that degree of diligence that an ordinary prudent person would have exercised under the same or similar circumstances. The determination of diligence was held to be ordinarily a question of fact, only to be determined against a claimant as a matter of law, when the evidence, construed most favorably for the claimant, admitted no other conclusion. *Hawkins v. Safety Casualty Co.*, 146 Tex. 381, 384, 207 S.W.2d 370, 372 (1948). We also said in *Hawkins* that "a reasonable time should be allowed for the investigation, preparation and filing of a claim after the seriousness of the injuries is

suspected or determined. No set rule could be established for measuring diligence in this respect. Each case must rest upon its own facts." 207 S.W.2d at 373.

In my opinion, the standard used in worker's compensation cases is a proper *15 standard to adopt in medical malpractices cases where discovery could not occur within two years of the tort or last treatment. Therefore, where a question exists as to the reasonableness of delay before filing suit after discovery of the defect or injury, the following issue should be submitted to the jury: "Do you find from a preponderance of the evidence that after discovering the injury (defect), plaintiff prosecuted his claim and suit with that degree of diligence that an ordinary prudent person would have exercised under the same or similar circumstances?"

I agree with the majority that article 4590i as applied in this case violates the open court's provision. If a person could not have reasonably discovered his injury within the limitations period, then his action cannot be barred. The court has chosen not to discuss the length of time Neagle has in which to file suit after discovering the injury. I have attempted to provide an answer to that question. I join in reversing and remanding this case for further proceedings on the merits.

All Citations

685 S.W.2d 11



KeyCite Yellow Flag - Negative Treatment

Declined to Extend by [Lee v. Lee](#), Tex.App.-Hous. (14 Dist.), May 17, 2001

678 S.W.2d 918
Supreme Court of Texas.

Tom L. NELSON et al., Petitioners,
v.
Edward M. KRUSEN and Baylor
University Medical Center, Respondents.

No. C-1429.

|
Oct. 17, 1984.

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Rehearing Denied Nov. 21, 1984.

Parents and minor son sued doctor and medical center alleging that doctor was negligent in assuring them that mother was not a carrier of neuromuscular disease. The 116th District Court, Dallas County, James F. McCarthy, J., granted defendants' motion for summary judgment, and plaintiffs appealed. The Court of Appeals, Fifth Supreme Judicial District, A. Joe Fish, J., [635 S.W.2d 582](#), affirmed, and plaintiffs appealed. The Supreme Court, Spears, J., held that: (1) two-year statute of limitations for actions arising out of medical malpractice violates the open courts provision of the State Constitution by cutting off a cause of action before the party knows, or reasonably should know, that he is injured, and (2) there is no cause of action in Texas for wrongful life.

Affirmed in part; reversed in part and remanded.

Robertson, J., concurred in separate opinion.

Kilgarlin and Gonzalez, JJ., concurred in part and dissented in part with opinions.

Wallace, J., dissented with opinion joined by McGee, J.

West Headnotes (8)

[1] **Appeal and Error**

🔑 **Judgment**

In an appeal from a summary judgment, Supreme Court takes as true the uncontroverted evidence of the nonmovants.

[Cases that cite this headnote](#)

[2] **Limitation of Actions**

🔑 **Infancy**

Statute of limitations for actions arising out of medical malpractice cannot cut off a plaintiff's cause of action before he reaches the age of legal capacity. [V.A.T.S. Insurance Code, arts. 5.82, 5.82, §4 \(Repealed\)](#); [Vernon's Ann.Texas Civ.St. arts. 4590i, § 10.01, 5526](#).

[21 Cases that cite this headnote](#)

[3] **Constitutional Law**

🔑 **Rights to Open Courts, Remedies, and Justice**

Constitutional guarantee of a remedy by due course of law is a substantial right, independent of other constitutional provisions. [Vernon's Ann.Texas Const. Art. 1, § 13](#).

[6 Cases that cite this headnote](#)

[4] **Constitutional Law**

🔑 **Right of Access to the Courts and a Remedy for Injuries in General**

Constitutional Law

🔑 **Relationship to Other Constitutional Provisions; Incorporation**

The two due course of law provisions in Texas Constitution are not coterminous. [Vernon's Ann.Texas Const. Art. 1, §§ 13, 19](#).

[25 Cases that cite this headnote](#)

[5] **Constitutional Law**

🔑 **Conditions, Limitations, and Other Restrictions on Access and Remedies**

Legislature has no power to make a remedy by due course of law contingent on an impossible condition. [Vernon's Ann.Texas Const. Art. 1, § 13](#).

19 Cases that cite this headnote

[6] **Constitutional Law**

🔑 Time for Proceedings

Limitation of Actions

🔑 Constitutionality of Statute

Two-year statute of limitations for actions arising out of medical malpractice violates the open courts provision of the State Constitution by cutting off a cause of action before the party knows, or reasonably should know, that he is injured; therefore, parents' cause of action for wrongful birth was not barred. [Vernon's Ann.Texas Const. Art. 1, § 13](#); [V.A.T.S. Insurance Code, art. 5.82, § 4](#) (Repealed).

122 Cases that cite this headnote

[7] **Damages**

🔑 Mode of Estimating Damages in General

Basic rule of tort compensation is that the plaintiff is to be put in a position that he would have been in absent defendant's negligence; in a personal injury case, that standard requires a comparison of the condition that the plaintiff would have been in without the negligence with the plaintiff's actual condition as a result of defendant's negligence.

7 Cases that cite this headnote

[8] **Health**

🔑 Liability to Child

There is no cause of action in Texas for wrongful life.

21 Cases that cite this headnote

Attorneys and Law Firms

*919 Windle Turley, Paula Fisette-Sweeney, and Lee Steinberg, Dallas, for petitioners.

Thompson & Knight, Richard E. Gray, Burford & Ryburn, Wayne Pearson, Michael S. Holloway and Catherine A. Gerhauser, Dallas, for respondents.

ON MOTION FOR REHEARING

SPEARS, Justice.

We withdraw our opinion and judgment of November 16, 1983, and substitute the following.

Tom and Gloria Nelson brought a wrongful birth suit in their own behalf and a wrongful life suit as next friends of Mark Nelson, their minor son, against Dr. Edward Krusen and Baylor University Medical Center. The Nelsons' suits alleged that Dr. Krusen negligently advised them that Mrs. Nelson was not a genetic carrier of [Duchenne muscular dystrophy](#) and was no more likely than any other woman to have a child afflicted by the disease. The Nelsons further alleged that, had they known of the risk that their child would be born with the disease, they would have terminated the pregnancy. The Nelsons alternatively claimed that Baylor negligently conducted or reported certain tests thereby causing Dr. Krusen to misinform them.

The trial court rendered summary judgment for Dr. Krusen and Baylor on the grounds that the statute of limitations had run on the wrongful birth claim and that no cause of action for wrongful life exists in Texas. The court of appeals affirmed. [635 S.W.2d 582](#). We reverse the court of appeals insofar as it held the statute of limitations, [article 5.82, section 4 of the Insurance Code](#), barred the Nelsons' claims. We affirm the court of appeals holding that no cause of action for wrongful life exists in Texas.

[1] This is an appeal from a summary judgment; therefore, we take as true the uncontroverted evidence of the non-movants. [Swilley v. Hughes](#), 488 S.W.2d 64 (Tex.1972). The summary judgment evidence showed that the Nelsons already had one child with [Duchenne muscular dystrophy](#) *920 when they learned in 1976 that Mrs. Nelson was again pregnant. The Nelsons consulted Dr. Krusen to determine whether Mrs. Nelson was a genetic carrier of the disease. Dr. Krusen examined Mrs. Nelson on three separate occasions between April and June of 1976, and based on test results, assured Mrs. Nelson that she was not a carrier. In light of Dr. Krusen's opinion, the Nelsons chose not to terminate the pregnancy, and Mark Nelson was born November 24, 1976. On November 12, 1979, a nursery school examination revealed that Mark had tight heel cords

bilaterally. As a result, Mark was referred to a pediatric neurologist, who determined from an examination on February 20, 1980, that Mark had [Duchenne muscular dystrophy](#). Mark was three years and three months old at this time.

The neurologist based his diagnosis in part on Mark's "lordotic and clumsy gait." Although this clumsiness may have been evident during Mark's first two years, during that time these symptoms could be discounted as simply the result of being two years old and learning to walk. Only as the child grew older and continued to exhibit this clumsiness, however, did the possibility of a neuromuscular defect become detectable to the trained eye.

I. Statute of Limitations

Dr. Krusen and Baylor moved for summary judgment, claiming that the Nelsons' actions were barred because they were not brought within two years of the last examination by Dr. Krusen. The defendants relied on the limitations period prescribed by [article 5.82, section 4 of the Insurance Code](#), which provides:

Notwithstanding any other law, no claim ... for compensation for a medical treatment or hospitalization may be commenced unless the action is filed within two years of the breach or the tort complained of or from the date the medical treatment that is the subject of the claim or the hospitalization for which the claim is made is completed ¹

[2] The limitations period of [article 5.82](#), by its terms, arguably began running on the date of the last examination by Dr. Krusen or on the date of Mark's birth and barred the Nelsons' claims two years later. Under our holding in [Sax v. Votteler](#), 648 S.W.2d 661 (Tex.1983), the statute cannot cut off Mark's cause of action before he reaches the age of legal capacity. If applied literally, the statute would, however, operate to bar the parents' cause of action before they knew it existed, even though they did not discover, and could not reasonably have discovered, their injury within two years. The Nelsons contend that applying the statute in this manner is unconstitutional.

In [Gaddis v. Smith](#), 417 S.W.2d 577 (Tex.1967), a medical malpractice case, this court adopted the "discovery rule," providing that the statute of limitations did not begin to run until the patient learned of, or, in the exercise of reasonable care and diligence, should have learned of, the alleged malpractice. *Id.* at 580. The rule in *Gaddis* was adopted as a matter of statutory construction, because the limitations provision, [article 5526, Tex.Rev.Civ.Stat.Ann.](#),² provided that the suit must be brought within two years of the date the cause of action *accrued*. We held that a cause of action does not accrue until the plaintiff knows, or has reason to know, of his injury. In contrast, [article 5.82, section 4](#) contains no accrual language and thus imposes an absolute two-year statute of limitations, regardless of when the injury was discovered.

The Nelsons challenge the statute on several constitutional grounds. They claim that the statute denies them equal protection and due process under the fourteenth *921 amendment to the United States Constitution. Under the Texas Constitution, they claim that the statute violates the article I, section 3 prohibition against public emoluments, the [section 19](#) due process guarantee, and the [section 13](#) "open courts" provision. [Article I, section 13](#) provides in part:

... All courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law.

[Tex. Const. art. I, § 13](#). The Nelsons argue that this guarantee of a remedy by due course of law makes any legislative attempt to bar their cause of action prior to its discovery unconstitutional. Our disposition of the Nelsons' open courts argument makes consideration of the other constitutional claims unnecessary.

[3] [4] The numerous decisions of this court construing [article I, section 13](#) establish that the guarantee of a remedy by due course of law is a substantial right, independent of other constitutional provisions. Although [sections 13 and 19 of article I](#) both guarantee due process, [Sax v. Votteler](#), 648 S.W.2d 661, 664 (Tex.1983), the two Texas due course of law provisions are not coterminous. Separate due process and open courts guarantees were included in the seventh and eleventh declarations of rights in the first constitution of Texas as a sovereign

republic. These separate rights have been preserved in every constitution since. *See* Tex. Const. (1836); *see also* 1 G. Braden, *The Constitution of the State of Texas: An Annotated and Comparative Analysis* 47 (1977).

[5] The common thread of this court's decisions construing the open courts provision is that the legislature has no power to make a remedy by due course of law contingent on an impossible condition. In *H. Runge & Co. v. Wyatt*, 25 Tex. (Supp.) 291 (1860), the court was faced with the issue of whether a defendant had the right to be sued in his home county when that county was newly severed from an existing county and did not yet have courts. Relying on the open courts provision, the court concluded that the legislature could not have intended to force plaintiffs to sue in a county where there were no tribunals to provide a remedy by due course of law. *Id.* at 294; *accord Clark v. Goss*, 12 Tex. 395 (1854); *O'Shea v. Twohig*, 9 Tex. 336 (1852).

In *Dillingham v. Putnam*, 109 Tex. 1, 14 S.W. 303 (1890), this court stated, "A law which practically takes away from either party to litigation the right to a fair and impartial trial in the courts provided by the constitution for the determination of a given controversy, denies a remedy by due course of law." 14 S.W. at 304. The court went on to hold that a legislative act making the right of appeal depend on the giving of a supersedeas bond, without reference to the appellant's ability to pay, was unconstitutional. *Id.* 14 S.W. at 305. Of course, for those unable to pay, the bond was an impossible condition.

This principle was best illustrated in the case of *Hanks v. City of Port Arthur*, 121 Tex. 202, 48 S.W.2d 944 (1932). The city charter exempted the city from liability for injuries caused by street defects, unless the city had written notice of the defect at least twenty-four hours prior to the injury. In other words, the plaintiff, Mrs. Hanks, was required to give the city notice of the defect before she was injured. In posing the issue, the court asked,

Can it be "due process" to say that although she did not see the defect, and did not know of its existence, yet before she can recover for the city's wrongful act (if it was wrongful), she must have notified the city of the defect twenty-four hours before she received her injuries?

48 S.W.2d at 947–48. The court declared the notice provision unconstitutional, stating,

[I]t is obvious that notice of the defect, to be made by one ignorant of its existence, twenty-four hours before the subsequent injury, is unreasonable. *A different question would be presented if the notice requirement applied only to those who had knowledge of the defect which brought about the injury.* To *922 require notice of those who knew nothing of a defective condition is to impose an unreasonable condition precedent to recovery, and which is, we believe, beyond the legislative power.

Id. 48 S.W.2d at 948 (emphasis added). The court amplified its reasoning by pointing out that the notice provision, in addition to barring the claim of one who did not know of the defect, would cut off the rights of children or others who were prevented by incapacity from complying. The court stated,

Would that be reasonable? *Is the requirement of a thing impossible from an infant, or one incapacitated for any reason due process?* We think not; and yet it is a condition precedent to recovery Obviously the charter requirement in respect to the notice here involved is unreasonable, and, if unreasonable, it violates the due process clause of the Constitution.

Id. (emphasis added).

The court in *McCrary v. City of Odessa*, 482 S.W.2d 151 (Tex.1972), applied similar reasoning. A city charter provision requiring notice within sixty days of an accident was challenged as violating article I, section 13, to the extent the notice requirement applied to minors. The court reasoned that the notice provision presupposed the existence of a person capable of complying. In the case of minors, this presupposition was false, because minors were legally incapacitated from bringing suit and, hence, powerless to comply with the notice requirement. For

this reason, they, like those unable to comply because of physical or mental incapacity, were excused from compliance until their disabilities were removed. *See also* [Lebohm v. City of Galveston](#), 154 Tex. 192, 275 S.W.2d 951 (1955); [City of Terrell v. Howard](#), 130 Tex. 459, 111 S.W.2d 692 (1938).

The reasoning of these decisions was reaffirmed in [Sax v. Votteler](#), 648 S.W.2d 661 (Tex.1983), a medical malpractice case specifically addressing the constitutionality of [article 5.82, section 4 of the Insurance Code](#) as applied to minors. We recognized that [article I, section 13 of the Texas Constitution](#) guarantees that Texas citizens bringing common law causes of action will not unreasonably be denied access to the courts. 648 S.W.2d at 664. Based on [Hanks v. City of Port Arthur](#) and [McCrory v. City of Odessa](#), we held that “the right to bring a well-established common law cause of action cannot be effectively abrogated by the legislature absent a showing that the legislative basis for the statute outweighs the denial of the constitutionally-guaranteed right of redress.” 648 S.W.2d at 665–66. We concluded that the legislative basis for [article 5.82](#) was legitimate and adopted a two-step analysis for weighing the litigant's constitutional right to redress against the purpose of the statute.

The minor plaintiff, Lori Beth Sax, satisfied the first criterion, because she was denied an established common law cause of action for malpractice. *See, e.g., Texas & P. Ry. Co. v. Morin*, 66 Tex. 225, 18 S.W. 503 (1886). We held that Lori Beth Sax also satisfied the second criterion, which required that she show the restriction was unreasonable and arbitrary. Because [article 5.82](#) cut off forever her cause of action before she was legally able to sue, without providing a reasonable substitute, we held that the limitations provision unconstitutionally abrogated her right to redress. 648 S.W.2d at 667 (citing [Middleton v. Texas Power & Light Co.](#), 108 Tex. 96, 185 S.W. 556 (1916), *aff'd* 249 U.S. 152, 39 S.Ct. 227, 63 L.Ed. 527 (1919)).

[6] These decisions lead to the conclusion that [article 5.82](#) as applied here violates the open courts provision by cutting off a cause of action before the party knows, or reasonably should know, that he is injured. How is the impossible condition placed on the Nelsons any less onerous than requiring a party to sue where there are no courts? *See H. Runge & Co. v. Wyatt*, 25 Tex. (Supp.) 291 (1860). How is the condition less arbitrary than

requiring a bond from one unable to pay? *See Dillingham v. Putnam*, 109 Tex. 1, 14 S.W. 303 (1890). Is the Nelsons' position any *923 different from Mrs. Hanks, and others incapacitated for any reason, who likewise could not meet the impossible requirement of giving notice of that of which they were not aware? *See Hanks v. City of Port Arthur*, 121 Tex. 202, 48 S.W.2d 944 (1932). Is a person whose injuries are not immediately discoverable any more able to sue during the period of undiscoverability than are children during their period of legal disability? *See Sax v. Votteler*, 648 S.W.2d 661 (Tex.1983); [McCrory v. City of Odessa](#), 482 S.W.2d 151 (Tex.1972).

There is no qualitative difference between the unreasonable condition imposed on the Nelsons and those previously struck down by this court. In one respect, the circumstances in the present case are even more compelling than in *Sax* and *McCrory*. In those cases, it was possible for the parents to bring their children's suits in time, even if limitations were allowed to run. In the present case, if the Nelsons' assertions are true, the nature of the injury made it unreasonable to expect that anyone, parent or child, would be able to bring suit within two years.

The limitation period of [article 5.82, section 4](#), if applied as written, would require the Nelsons to do the impossible—to sue before they had any reason to know they should sue. Such a result is rightly described as “shocking” and is so absurd and so unjust that it ought not be possible. [Hays v. Hall](#), 488 S.W.2d 412, 414 (Tex.1972); [Gaddis v. Smith](#), 417 S.W.2d 577, 580, 581 (Tex.1967). Deferring to the legislative imposition of such an unreasonable condition would amount to an abdication of our judicial duty to protect the rights guaranteed by the Texas Constitution, the source and limit of legislative as well as judicial power. This, we cannot do. We hold that [article 5.82, section 4 of the Insurance Code](#) is unconstitutional, under the open courts provision, to the extent it purports to cut off an injured person's right to sue before the person has a reasonable opportunity to discover the wrong and bring suit.

Neither [Sax v. Votteler](#), 648 S.W.2d 661 (Tex.1983), nor [Robinson v. Weaver](#), 550 S.W.2d 18 (Tex.1977), is to the contrary. In both cases, the adult litigants discovered their injuries while there was still a reasonable time to sue. In both cases the parties had over one year from the date the injuries were discovered, even if the two

year limitations period was not tolled. The statutes of limitation were not unconstitutional as applied to the parties in *Sax* and *Robinson*; hence, there was no reason to strike down the statutes merely because they might operate in an unconstitutional manner in another case. See *City of Waco v. Landingham*, 138 Tex. 156, 157 S.W.2d 631 (Tex.1941); see also *Kentucky Union Co. v. Kentucky*, 219 U.S. 140, 31 S.Ct. 171, 55 L.Ed. 137 (1910). In stark contrast, the Nelsons were cut off well before they discovered Mark's condition. There was no time within two years of the last examination or of Mark's birth when they could have sued.

The legal issue in *Robinson v. Weaver* is distinguishable as well. *Robinson* involved the construction of article 5526, Tex.Rev.Civ.Stat.Ann. The question was whether in a misdiagnosis case the court should construe the accrual language of that statute to mean the date on which the injury was discovered, as had been done in *Gaddis v. Smith*, 417 S.W.2d 577 (Tex.1967). No constitutional issue was raised or decided in *Robinson*. Article 5.82, on the other hand, does not use the term "accrue" and simply counts the limitations period from a specific date. The constitutional question is squarely raised in the present case.

We hold that article 5.82, section 4 of the Insurance Code as applied in this case violates the open courts provision of article I, section 13 of the Texas Constitution. Therefore, the parents' cause of action for "wrongful birth" is not barred by limitations. In *Jacobs v. Theimer*, 519 S.W.2d 846 (Tex.1975), we approved a cause of action for "wrongful birth," under which parents may recover the expenses reasonably necessary for the care and treatment of their child's impairment from a physician *924 who has negligently failed to inform the parents of the risk of that impairment.

II. Wrongful Life

The remaining issue in this case is whether we should grant the child a cause of action for "wrongful life," a question not reached in *Jacobs*. Mark, through his next friend, asserts that but for Dr. Krusen's negligence in failing to inform the Nelsons of the risk of Duchenne muscular dystrophy, the Nelsons would have aborted the pregnancy. Therefore, the doctor's negligence was the proximate cause of Mark's being born, and having to live, in an impaired condition. The parents seek damages on Mark's behalf as compensation for the added medical

expenses and for the pain and suffering of having to live with muscular dystrophy.

The majority of states that have considered the issue have refused to adopt a cause of action for wrongful life. See *Elliott v. Brown*, 361 So.2d 546 (Ala.1978); *Moore v. Lucas*, 405 So.2d 1022 (Fla.Dist.Ct.App.1981); *Strohmaier v. Associates in Obstetrics & Gynecology*, 122 Mich.App. 116, 332 N.W.2d 432 (1982); *Becker v. Schwartz*, 46 N.Y.2d 401, 413 N.Y.S.2d 895, 386 N.E.2d 807 (1978); *Speck v. Finegold*, 268 Pa.Super. 342, 408 A.2d 496 (1979), *aff'd by an equally divided court*, 497 Pa. 77, 439 A.2d 110 (1981); *Dumer v. St. Michael's Hospital*, 69 Wis.2d 766, 233 N.W.2d 372 (1975). See also *Payton v. Abbott Labs*, 386 Mass. 540, 437 N.E.2d 171 (1982) (no cause of action for child for injuries resulting from administration of DES to mother, if child would not have been born but for use of DES).

These cases give two general reasons for denying a wrongful life cause of action. The first is the courts' unwillingness to hold that a plaintiff can recover damages for being alive. At heart, the reluctance of these courts is based on the "high value which the law and mankind has placed on human life, rather than its absence." *Becker v. Schwartz*, 386 N.E.2d at 812. The other rationale articulated by the courts is that, because in awarding damages the court must offset any special benefits to the plaintiff resulting from the negligence, see *Restatement (Second) of Torts* § 920 (1979), such a cause of action involves a weighing of life against non-life, a calculation that cannot rationally be made. See *Dumer v. St. Michael's Hospital*, 233 N.W.2d at 376. As Chief Justice Weintraub said in the landmark case of *Gleitman v. Cosgrove*, "[U]ltimately, the infant's complaint is that he would be better off not to have been born. Man, who knows nothing of death or nothingness, cannot possibly know whether this is so." 49 N.J. 22, 227 A.2d 689, 711 (1967) (concurring and dissenting).

In an effort to meet these objections, the highest courts in three states have adopted what might be called a limited wrongful life cause of action. In *Turpin v. Sortini*, 31 Cal.3d 220, 182 Cal.Rptr. 337, 643 P.2d 954 (1982), the Supreme Court of California held that the child could recover in his own behalf the extraordinary medical expenses not awarded to the parents. The court, recognizing that it would be impossible to measure the benefits of life against the detriments of an impaired

life, refused to allow general damages to the child. The court went on to hold, however, that awarding special damages for medical expenses and training did not require the court to weigh life against non-life, and thus these special damages could be compensated. A year later, in *Harbeson v. Parke-Davis Inc.*, 98 Wash.2d 460, 656 P.2d 483 (1983), the Supreme Court of Washington reached the same result, largely based on the *Turpin* case. In *Procanik v. Cillo*, 97 N.J. 339, 478 A.2d 755 (1984), the Supreme Court of New Jersey recently joined the California and Washington courts by allowing the child to recover his extraordinary medical expenses. The parents in *Procanik* were barred from any recovery on their own behalf by the statute of limitations.

[7] [8] Despite the efforts of the *Turpin*, *Harbeson* and *Procanik* courts, we do not believe that the issue can be so easily limited. The basic rule of tort compensation is *925 that the plaintiff is to be put in the position that he would have been in absent the defendant's negligence. In a personal injury case, that standard requires a comparison of the condition that the plaintiff would have been in without the negligence with the plaintiff's actual condition as a result of the defendant's negligence. In this, as in all wrongful life cases, however, there is no allegation that but for the defendant's negligence the child would have had a healthy, unimpaired life. Instead, the claim is that without the doctor's negligence the plaintiff never would have been born. Thus, the cause of action unavoidably involves the relative benefits of an impaired life as opposed to no life at all. All courts, even the ones recognizing a cause of action for wrongful life, have admitted that this calculation is impossible. We do not believe that the measure of damages can be circumscribed as the California, Washington and New Jersey courts have attempted. As was said by the Michigan court in *Strohmaier*, "The special damages that are claimed cannot be considered in a vacuum separate from the reality that, but for the alleged negligence, plaintiff would not exist." 332 N.W.2d at 435. We hold that there is no cause of action in Texas for wrongful life.

Our holding is not based on a mere difficulty in assessing a dollar amount of damages. It has long been held that imprecision of damages is not a bar to recovery. *Hindman v. Texas Lime Co.*, 157 Tex. 592, 305 S.W.2d 947 (1957); *Southwest Battery Corp. v. Owen*, 131 Tex. 423, 115 S.W.2d 1097 (1938). But this is not just a case in which the damages evade precise measurement. Here, it is impossible to rationally decide whether the plaintiff has

been damaged at all. That "is a mystery more properly to be left to the philosophers and the theologians." *Becker v. Schwartz*, 413 N.Y.S.2d 895, 386 N.E.2d at 812.

To summarize, we hold that article 5.82, section 4 of the Insurance Code as applied in this case violates the open courts provision, article I, section 13 of the Texas Constitution. We also hold that there is no cause of action in Texas for wrongful life. The judgments of the trial court and court of appeals are reversed in part and affirmed in part. The cause is remanded for trial on the parents' cause of action.

ROBERTSON, J., files a concurring opinion.

KILGARLIN and GONZALEZ, JJ., file concurring and dissenting opinions.

WALLACE, J., files a dissenting opinion in which McGEE, J., joins.

ROBERTSON, Justice, concurring.

I concur in the result reached by the majority.

I. WRONGFUL BIRTH

At first blush, the majority opinion appears to apply art. I, sec. 13 of the Texas Constitution in such a way as to sustain a judicial innovation, a "wrongful birth" cause of action, and strike down a well-recognized legislative prerogative, a statute of limitation. This is not the case. Rather, what we do today is sustain a well-established cause of action against a novel exercise of legislative power.

In *Jacobs v. Theimer*, 519 S.W.2d 846 (Tex.1975), this court first permitted the recovery by parents of the expenses necessary for the care and treatment of a child's physical impairment, when those expenses were proximately caused by negligent prenatal advice. Like many other courts, we found "wrongful birth" to be a convenient description for such a fact setting. The pleadings in *Jacobs*, however, as well as the pleadings of the Nelsons in the instant case, are couched in terms of negligence; the label in each case has been added by the courts.

This observation is neither academic nor trivial. Rather, recognition that we are dealing with nothing more nor less than the traditional elements of a negligence cause of action is pivotal to resolution of both the *926 “wrongful birth” and “wrongful life” facets of this appeal.¹

It naturally follows that I cannot agree with the majority opinion's statement that “[i]n *Jacobs v. Theimer*, 519 S.W.2d 846 (Tex.1975), we approved a cause of action for ‘wrongful birth,’ the suit that the parents have now brought in their own behalf.” 678 S.W.2d at 923 (emphasis added). Were this true, art. I, sec. 13 could not act as a constitutional bar to the application of art. 5.82, sec. 4 of the Insurance Code to the Nelsons' cause of action. This court has repeatedly stated that art. I, sec. 13 of the Texas Constitution protects “well-established common law” causes of action. See, e.g., *Sax v. Votteler*, 648 S.W.2d 661, 665 (Tex.1983); *Lebohm v. City of Galveston*, 154 Tex. 192, 275 S.W.2d 951, 955 (1955). The statute in question took effect less than four months after *Jacobs v. Theimer*. Four months cannot possibly be sufficient time for a new cause of action to become well-established at common law, to trigger the protection of the Texas Constitution. More precisely, the Nelsons' cause of action sounds in negligence and alleges medical malpractice; such a cause of action was well-established in this State long before *Jacobs v. Theimer* and fully merits the protection of art. I, sec. 13 of the Texas Constitution.

Art. 5.82, sec. 4 of the Insurance Code, although referred to as a “statute of limitation,” is by no means a traditional limitation act. In fact, a number of courts and commentators have begun to differentiate between such statutes and traditional limitation acts, and would term legislation such as art. 5.82, sec. 4 a “statute of repose.” See, e.g., Note, *Medical Malpractice Statute of Repose: An Unconstitutional Denial of Access to the Courts*, 63 Neb.L.Rev. 150, 153 (1983); Comment, *Statutes of Repose in Products Liability: Death Before Conception*, 37 Sw.L.J. 690–2 (1983) (classifying art. 5.82, sec. 4 as a “statute of repose”). Texas courts have traditionally used the terms “limitation” and “repose” interchangeably, since one purpose of a statute of limitation is to permit repose. See, e.g., *Davis v. Howe*, 213 S.W. 609, 611 (Tex.Comm'n App.1919, judgment adopted). The recent trend to categorize statutes as either “limitation” or “repose” is only an attempt to highlight by semantic distinction a number of very real differences in the

wording, purpose, and effect of many recent limitation statutes when compared with more traditional acts.

A traditional statute of limitation is usually intended to compel a plaintiff to bring a claim to court within a reasonable period of time after the cause of action arises. Such a statute encourages diligence, and has as its primary purpose the prevention of stale claims. *Robinson v. Weaver*, 550 S.W.2d 18, 20 (Tex.1977). A “statute of repose,” on the other hand, does not run from the time a cause of action arises, but from some other date or event selected by the legislature. This is so because it generally has some purpose other than encouragement of diligence on the part of plaintiffs. Art. 5.82, sec. 4, for example, was designed to promote stability in insurance rate-making. See Keith, *The Texas Liability and Insurance Improvement Act—A Survey and Analysis of Its History, Construction and Constitutionality*, 36 Baylor L.Rev. 265, 300–01 (1984). As a result, a “statute of repose” may operate—as in this case—to bar access to courts for the remedy of a legal wrong despite the exercise of all possible diligence by a plaintiff in prosecuting a claim.

Texas courts traditionally accord wide deference to the legislature's right to establish statutes of limitation, but even that deference has long had limits.

“The legislature may provide a shorter period of limitation for existing causes of action. It may make a statute of limitation for causes when none existed before, *927 but it cannot, by so abbreviating the time in which suit must be brought, take away the right of action altogether.”

Wright v. Hardie, 88 Tex. 653, 32 S.W. 885, 886 (1895) (emphasis added). When a statute, whether it be termed one of “limitation” or of “repose,” eliminates a plaintiff's access to the courts for redress of an injury, despite the exercise of all possible diligence, it is susceptible to constitutional challenge under art. I, sec. 13 of the Texas Constitution.

In the case at bar, the constitutional analysis is not difficult. This court need look no further than *Sax v. Votteler*, 648 S.W.2d 661 (Tex.1983), a decision scarcely one year old, involving the same statutory provision,

the same constitutional challenge, and decided by a unanimous court.

Sax set forth a two-pronged test for the constitutionality of a statute challenged as violating the Texas “Open Courts” provision. The first question is whether the litigant has a “cognizable cause of action that is being restricted.” *Sax*, 648 S.W.2d at 666. Lori Beth Sax’ cause of action in negligence for medical malpractice was sufficient to invoke the protection of the Texas Constitution; the Nelsons’ cause of action is of the same nature and so deserves the same protection.

The second prong requires the court to balance the purpose and basis of the statute against the restriction on the litigant’s rights. *Id.* This court recognized a legitimate legislative purpose for art. 5.82, sec. 4 of the Insurance Code in *Sax*, 648 S.W.2d at 667; the point requires no further discussion.

In determining the extent of the restriction on a litigant’s rights, a court must not examine the effect of the challenged statute in isolation. The legislature can avoid an otherwise unconstitutional result by providing a substitute remedy, *Lebohm v. City of Galveston*, 154 Tex. 192, 275 S.W.2d 951, 955 (1955), or by leaving a reasonable alternative at common law. *Sax*, 648 S.W.2d at 667.

In *Sax*, this court noted that the effect of the statute was to deny a minor plaintiff a remedy for a well-established common law wrong. Lori Beth Sax was prohibited by law from bringing suit on her own behalf during her minority, and was barred from suit upon coming of age by the language of art. 5.82, sec. 4. This court noted and rejected the alternative of a suit by parents on the child’s behalf, reasoning that this did not provide adequate protection for the child’s rights. *Sax*, 648 S.W.2d at 667. The statute was therefore unconstitutional, so far as it affected a minor plaintiff.

The parents’ cause of action in *Sax* stood on a different footing. Nothing prohibited them from suing on a known cause of action during the two years permitted by statute. The two-year period thus presented a reasonable alternative for the parents, and art. 5.82, sec. 4 was not unconstitutional as it applied to them.

In *Sax*, this court was not called upon to decide the constitutionality of the two-year provision as applied to an adult who—due to the undiscoverable nature of a medical problem—could not have brought suit within the statutory period. The answer is nonetheless clear. The restriction upon the rights of the Nelsons in this case are at least as severe as those upon the minor plaintiff in *Sax*. Lori Beth Sax was prohibited by statute from bringing suit even had she acted with utmost diligence at her first practical opportunity, the age of majority. The Nelsons were prohibited by the same statute from bringing suit even had they acted with utmost diligence at their first practical opportunity, discovery of the injury.

There is only one distinction between *Sax* and the instant case. Lori Beth Sax had an alternative, the possibility of suit by her parents on her behalf. That alternative was held to be inadequate to protect her rights. The Nelsons have no alternative, under the facts of this case. If art. 5.82, sec. 4 was unconstitutional as applied to Lori Beth Sax, it must equally be held unconstitutional here. As one student commentator has recently noted:

***928** “The effect of this restriction, like that on a minor’s cause of action in *Sax*, is not merely to place an outside limit on when a cause of action may be brought. Instead, it eliminates the right to bring a legal action. It is unreasonable to assert that this class of litigants must be sacrificed for lower malpractice rates. They, as much as any other victims of malpractice, are entitled to their day in court. *Sax* opens the courthouse doors for minors who were left unprotected by the statute. Its reasoning should ultimately do the same for injured parties who are prevented from bringing their claim because they could not discover the injury within the two-year limitation period.”

Note, *Sax v. Votteler*, 21 Hous.L.Rev. 295, 309 (1984).

Since *Sax v. Votteler* controls this case, I find it unnecessary to decide the issue of whether art. 5.82, sec. 4 has legislatively abolished the “discovery rule.” While this might well have been the legislature’s intent, the initial

question should be whether, considering the language of the statute itself, the legislature has in fact done so. I would reserve that question for an appropriate case.

II. WRONGFUL LIFE

Like the majority, I decline to recognize a legally cognizable claim in negligence for “wrongful life.” I differ, however, with the emphasis of the majority opinion. I would place no reliance whatever on a public policy placing a “high value ... on human life, rather than its absence,” 678 S.W.2d at 924, as courts are not equipped to place a value on non-existence. Nor do I feel that the difficulty of assessing or calculating damages deserves any consideration as a reason for declining to permit a “wrongful life” claim. It is well settled that

“There is ... no general requirement that the injured person should prove with ... definiteness the extent of harm that he has suffered as a result of the tort-feasor's conduct. It is desirable ... that there be definiteness of proof of the amount of damage as far as is reasonably possible. It is even more desirable, however, that an injured person not be deprived of substantial compensation merely because he cannot prove with complete certainty the extent of the harm he has suffered.”

Restatement (Second) of Torts § 912, comment a (1979).²

The reason for permitting the Nelsons a cause of action, but denying a similar cause of action to their son is simple: the claim of the parents arguably contains all the elements for a prima facie case in negligence; the claim of the child does not.

Viewing Dr. Krusen's alleged conduct from the standpoint of the parents, under the summary judgment evidence and pleadings a viable suit in negligence is presented. The elements of actionable negligence are duty, a breach of that duty, an injury to the person owed the duty, and proximate cause. *Pullman Co. v. Caviness*, 53 Tex.Civ.App. 540, 116 S.W. 410 (1909, writ ref'd). The duty to give accurate medical advice runs from the doctor

to the patient. That duty was arguably breached. Since the parents allege that they would have sought an abortion had they known Mrs. Nelson was a genetic carrier of *Duchenne muscular dystrophy*, proximate cause must be presumed. The injury consists of medical bills that would not have been incurred by the parents, but for the birth of Mark Nelson.

The “wrongful life” cause of action must be viewed from a different perspective, that of the child. With the child as a plaintiff, a suit in negligence is difficult to conceptualize. Courts examining “wrongful life” suits have had difficulty with virtually every element of the cause of action—the nature of the duty, if any, owed *929 to an unborn child under these circumstances, the concomitant question of breach, and the issue of proximate cause in a situation where both the child's life and his or her defective condition are due to the same negligent act.

I am most concerned by the element of injury. We cannot compare Mark Nelson's current condition, life as a victim of *muscular dystrophy*, with the alternative of a normal, healthy childhood. Were this so, the fact of injury would not be in issue, and the sole question would be the calculation of the extent of damages. Under the summary judgment evidence, the same medical advice that was the proximate cause of his affliction must be assumed to be the cause of his life itself. To determine whether Mark Nelson has suffered an injury in fact, then, his life with physical impairment must be compared to the alternative of nonexistence.

This calculation cannot rationally be made, as man knows nothing of nonexistence, and can assign it neither a positive nor a negative value. Unfortunately, the fact of injury is a prima facie element in a cause of action for negligence. *Johnson v. Sovereign Camp, W.O.W.*, 125 Tex. 329, 83 S.W.2d 605 (1935). It is not fatal to a cause of action in negligence that a plaintiff cannot prove the *quantum* of injury; but a plaintiff must always establish the *existence* of injury. This is an impossible burden for a “wrongful life” plaintiff to meet. Since the initial burden of proof of each element of a negligence cause of action is upon the plaintiff, and one element is rationally unprovable in a “wrongful life” setting, a negligence suit cannot be maintained. The absence of any injury in fact is also a primary factor in the refusal of New York courts to recognize a “wrongful life” cause of action. *See, e.g., Becker v. Schwartz*, 46 N.Y.2d 401, 413 N.Y.S.2d 895, 900,

386 N.E.2d 807 (1978); *Alquijay v. St. Luke's-Roosevelt Hospital Center*, 99 A.D.2d 704, 472 N.Y.S.2d 2, 3 (1984).

There is no inconsistency between permitting a cause of action for the parents, but not for the child. The difference is the identity of the parties. For the parents, the alternatives to be considered in determining whether there has been any injury in fact are no child, and no medical expenses, or a child with physical impairment resulting in medical expenses the parents are obligated to pay. The fact of injury is apparent. For the child, though, the alternatives are existence in an impaired state, or nonexistence. The fact of injury is not only not apparent, but unknowable.

The distinction between the parents' and child's cause of action has also been explained in a somewhat different fashion:

“When the plaintiff alleges that his own birth was wrongful, in effect he asks the court to judicially determine that he should not have been allowed to live, but when another person such as a parent alleges that the infant should not have been born, the parent does not seek to negate his own present existence. *The parent is in reality seeking damages for injuries causally related to the fact of birth, but not for the birth itself.* Thus, the parents are not placed in the anomalous position of trying to sue themselves into oblivion, as are the children.”

Comment, *Wrongful Birth: The Emerging Status of a New Tort*, 8 St. Mary's L.J. 140, 145 (1976) (emphasis added).

It is worth noting that most other jurisdictions make the same distinction as this court makes today, finding no logical inconsistency between permitting a cause of action for the parents, but not for children. As the Supreme Court of Georgia observed earlier this year:

“An action brought by a child against the parents or physician on the theory that because of his illegitimacy or birth defects he would have been better not born

has found almost no support in the law. However, most jurisdictions now allow an action by parents against the physician for wrongful pregnancy or wrongful conception.”

Fulton-DeKalb Hospital Authority v. Graves, 252 Ga. 441, 314 S.E.2d 653, 654 (1984); see also Annot., *930 83 A.L.R.3d 15 (1978). In at least three leading decisions, a cause of action for the parents has been permitted, but a similar cause of action for the child denied in the same decision. See *Becker v. Schwartz*, 46 N.Y.2d 401, 413 N.Y.S.2d 895, 386 N.E.2d 807 (1978); *Speck v. Finegold*, 268 Pa.Super. 342, 408 A.2d 496 (1979), *aff'd in part, rev'd in part*, 497 Pa. 77, 439 A.2d 110 (1981); *Dumer v. St. Michael's Hospital*, 69 Wis.2d 766, 233 N.W.2d 372 (1975).

Recently, California and Washington courts have permitted a limited right of recovery for a child presenting a “wrongful life” claim. See *Turpin v. Sortini*, 31 Cal.3d 220, 643 P.2d 954, 182 Cal.Rptr. 337 (1982); *Harbeson v. Parke-Davis, Inc.*, 98 Wash.2d 460, 656 P.2d 483 (1983). Even more recently, New Jersey has approved the same result—permitting a child's recovery of extraordinary medical expenses—albeit on a different rationale. *Procanik v. Cillo*, 97 N.J. 339, 478 A.2d 755 (1984). It is tempting to join these courts in fashioning some relief for a severely handicapped child, when that child may be burdened with crushing medical expenses for the remainder of his natural life.

A court should not, however, discard established principles of tort law sub silentio in an attempt to reach a “right” result. Close examination of the California and Washington opinions reveals such an unexplained gap in the decisional reasoning.

The California Supreme Court distinguished between general and special damages in a “wrongful life” setting, denying the former, yet permitting the latter. Explaining why general damages could not be assessed, the *Turpin* court observed that “the problem is not ... simply the fixing of damages for a conceded injury, but the threshold question of determining whether the plaintiff has in fact suffered an injury by being born with an ailment as opposed to not being born at all.” 643 P.2d at 963. The court also noted that “it is simply impossible to determine in any rational or reasoned fashion whether the plaintiff has in fact suffered an injury in being born impaired rather than not being born.” *Id.*

Thus, the California Supreme Court, in denying general damages, seems to have explicitly conceded that a prima facie element of the tort was not established. In deciding to award special damages, however, the *Turpin* court ignored the reasoning that prevented an award of general damages. The problem of establishing the fact of injury was simply passed over, and all discussion focused on the nonspeculative nature of a recovery for medical expenses.

The Washington decision suffers from the same logical weakness. In *Harbeson v. Parke-Davis, Inc.*, 98 Wash.2d 460, 656 P.2d 483 (1983), the Supreme Court of Washington adopted both the “wrongful birth” and “wrongful life” positions. The decision was explicitly treated as a negligence action, and the Washington court was at pains to place both theories in the traditional negligence framework, discussing each of the four elements of negligence in turn for both “wrongful birth” and “wrongful life.”

The Washington Supreme Court acknowledged that “[t]he most controversial element of the [wrongful life] analysis in other jurisdictions has been injury and the extent of damages,” and conceded that “measuring the value of an impaired life as compared to nonexistence is a task that is beyond mere mortals, whether judges or jurors.” *Harbeson*, 656 P.2d at 496. Nonetheless, the Washington Supreme Court simply proceeded to a discussion of the calculation of damages, without explanation of how the difficulty in determining the existence of the element of injury had been overcome.³

*931 A recent decision, *Procanik v. Cillo*, 97 N.J. 339, 478 A.2d 755 (1984), deserves particular attention, inasmuch as an earlier New Jersey case, *Gleitman v. Cosgrove*, 49 N.J. 22, 227 A.2d 689 (1967), was widely recognized as a leading decision on the “wrongful life” issue. Like California and Washington, the New Jersey Supreme Court recognized in denying a claim for general damages that “[t]he crux of the problem is that there is no rational way to measure nonexistence.” *Procanik*, 478 A.2d at 763.

Nonetheless, the New Jersey court awarded special damages. The reasoning of the court is explicit. Quoting a dissenting opinion in *Gleitman*, the New Jersey court observed that “while logical objection may be advanced to the child's standing and injury, logic is not the determinative factor” *Procanik*, 478 A.2d at 762.

The court added: “Whatever logic inheres in permitting parents to recover for the cost of extraordinary medical care incurred by a birth-defective child, but in denying the child's own right to recover those expenses, must yield to the inherent injustice of that result.” *Id.* 478 A.2d at 762. The conclusion is clear:

“We need not become preoccupied ... with ... metaphysical considerations. Our decision to allow the recovery of extraordinary medical expenses is not premised on the concept that non-life is preferable to an impaired life, but is predicated on the needs of the living. We seek only to respond to the call of the living for help in bearing the burden of their affliction.”

Id. 478 A.2d at 763.

While the sentiments of the New Jersey court may be laudable, this court is precluded from reaching such a result. To reiterate, the pleadings and briefs of plaintiffs in this case are based in negligence. While this court is not adverse to reexamining and modifying traditional negligence concepts to meet changing social needs, *see Otis Eng'g Corp. v. Clark*, 668 S.W.2d 307 (Tex.1983), it is properly unwilling to take the step required by a “wrongful life” plaintiff: complete *waiver* of the requirement of injury in a negligence cause of action. Once such a step is taken, it is difficult to envision any principled basis for refusing to extend the reasoning to other elements and other situations.

This court neither addresses nor decides the question of whether some day, under some different theory, a plaintiff might prevail under similar facts. “New and nameless torts are being recognized constantly, and the progress of the common law is marked by many cases of first impression, in which the court has struck out boldly to create a new cause of action, where none has been recognized before.” W. Prosser and W. Keeton, *The Law of Torts* § 1 (5th ed. 1984). The claim of Mark Nelson, however, simply fails to state a cause of action in negligence and must be denied.

KILGARLIN, Justice, concurring and dissenting.

I concur with that part of the majority opinion which would reverse the judgments of the courts below and remand Tom and Gloria Nelson's cause of action to the trial court. However, I respectfully dissent from that portion of the majority opinion which declines to recognize Mark Nelson's claim for medical expenses and special *932 training which he may reasonably incur after age eighteen. The holding in *Jacobs v. Theimer*, 519 S.W.2d 846 (Tex.1975), would support Mark's cause of action if damages were limited to "[t]he economic burden related solely to the physical defects of the child." *Id.* at 849. The life versus nonlife question posed by the majority should not preclude Mark, after he attains majority, from recovering medical and other expenses which "lie within the methods of proof by which the courts are accustomed to determine awards in personal injury cases. No public policy obstacle should be interposed to that recovery." *Id.*

In reality, the court's decision denying Mark's right to a negligence claim is contrary to fundamental policies and principles that have become the basis of tort law. Originally, forms of actions were rigidly prescribed, and the plaintiff had no cause of action unless he could fit his claim "into the form of some existing and recognized writ." Prosser, *Law of Torts* § 4 at 19 (4th ed. 1971). Since that small beginning about 150 years ago, tort law has become a dynamic and flexible system of law designed to properly allocate losses that arise out of human activities.

"The entire history of tort law shows a continuous tendency to recognize as worthy of legal protection interests which previously were not protected at all." *Restatement (Second) of Torts* § 1 comment e (1965). Although tort law's primary purpose is compensation for wronged plaintiffs, that has never been its only goal. Courts have always sought to reflect and adapt to changes in society acting to balance both individual and societal interests. Our courts have always recognized and used tort law's unique ability to deter wrongdoing as a means of social policy. *Restatement (Second) of Torts* § 901 (1965). This concept has in fact become a part of Texas law. See *McKisson v. Sales Affiliates, Inc.*, 416 S.W.2d 787 (Tex.1967) (recognition of strict products liability); *Leal v. C.C. Pitts Sand & Gravel, Inc.*, 419 S.W.2d 820 (Tex.1967) (an unborn child can recover); *Otis Engineering Corp. v. Clark*, 668 S.W.2d 307 (Tex.1983) (employer held potentially liable for negligence of drunken off-duty employee).

Today we are confronted with the compelling responsibility of imposing legal accountability upon an aspect of medicine that is rapidly becoming a predominant social force. Genetic knowledge and expertise have increased as fast as any other medical specialty in the last ten years. Estimates now indicate that 12 million Americans suffer a type of genetic disease. See H.R.Rep. No. 498, 94th Cong., 1st Sess. 18–19 (1975) reprinted in [1976] U.S.Code Cong. & Ad.News 709, 726–27. Over 40% of all childhood diseases are caused partly by genetic factors. Day & Holmes, *The Incident of Genetic Disease in a University Hospital Population*, 25 Am.J.Human Genetics 237 (1973). Downs' Syndrome alone costs society \$1.7 billion dollars. House Report at 727. The ability to predict genetic disorders prior to birth has improved to the extent that at least 66 different genetic diseases are presently diagnosable prior to birth. Milunsky, *Genetics and The Law*, 54 (1976).

Despite the rapidly expanding impact of genetic knowledge upon our society, the law has failed to keep pace. Capron, *Tort Liability in Genetic Counseling*, 79 Colum.L.Rev. 618 (1979). Although today's society is not the genetically controlled one anticipated in Aldous Huxley's *Brave New World*, a doctor's power to control genetic information, without restraint, may have subtle, far-reaching and devastating effects on family planning. Only by assuring a doctor's legal accountability can we guard against an abuse of such power.

The decision to have children is fundamental to the very existence of a family. Mark Nelson as a practical matter could not make that decision for himself. The right to make that decision belongs to no one other than his parents. Yet that right is only meaningful if it is an informed decision. The right to an informed decision with regard to future offspring emphasizes the need for legal safeguards in this area. The majority opinion, by refusing to impose *933 more than limited responsibility for negligent genetic counseling, fails to keep the law abreast of burgeoning knowledge and does not provide needed legal accountability. The court's inaction today merely postpones the necessity of acting in a medical area that will increasingly dominate our society. Moreover, the court entirely overlooks the real victim of the malpractice, Mark Nelson. Because the court allows recovery only when a child's parents are both willing and capable of bringing a timely suit, a child potentially will receive no redress at all. In *Sax v. Votteler*, 648 S.W.2d 661 (Tex.1983), although

we allowed Lori Beth Sax a claim in her own right, the parents, by waiting too long to bring suit, were denied recovery. Similarly, had the Nelsons waited more than two years after discovering Mark's condition, Mark's defects would go uncompensated, for he, unlike Lori Beth Sax, is denied a cause of action. This is exactly what would have happened had the court in *Procanik v. Cillo*, 97 N.J. 339, 478 A.2d 755 (1984), not allowed the minor a wrongful life claim. There, Peter Procanik's parents allowed limitations to run on their wrongful birth cause, and thus were denied recovery in their individual capacities.

No difficulty is created by permitting Mark to allege common law negligence. In a genetic malpractice or wrongful life action, the genetically impaired child alleges that the negligence of the physician or other genetic counselor, by failing to inform his parents of the risk of giving birth to an impaired child, caused his birth. Comment, "*Wrongful Life*": *The Right Not To Be Born*, 54 Tul.L.Rev. 480, 485 (1980); *Harbeson v. Parke-Davis*, 656 P.2d 483, 494 (Wash.1983). The cause may be determined by using the traditional negligence elements of duty, breach of duty, proximate cause and damages. *Turpin v. Sortini*, 31 Cal.3d 220, 643 P.2d 954, 965, 182 Cal.Rptr. 337, 348 (1982). Thus, this action is merely a form of medical malpractice. *Turpin*, 182 Cal.Rptr. at 342, 643 P.2d at 959; *Harbeson*, 656 P.2d at 495.

Mark alleges Dr. Krusen had a duty to provide the Nelsons with accurate information to enable them to make an informed decision of whether to give birth to Mark and that this duty flowed directly to him. I agree. But more importantly, neither Dr. Krusen nor the hospital deny that this duty was owed. This duty is within the Texas rule that a physician must properly inform a patient. See *Roark v. Allen*, 633 S.W.2d 804 (Tex.1982); *Wilson v. Scott*, 412 S.W.2d 299 (Tex.1967). It was foreseeable that Mark's parents would rely upon the information provided by Dr. Krusen in deciding whether it would be in Mark's best interest to be born with *Duchenne muscular dystrophy* since Mark was unable to make this decision. Their right to make such a decision is currently the law. *Jacobs*, 519 S.W.2d at 848. The failure to provide the Nelsons with correct information was a breach of duty owed directly to Mark. See, e.g., *Turpin*, 182 Cal.Rptr. at 339, 643 P.2d at 956; *Harbeson*, 656 P.2d at 496. The judgment of a parent or guardian may be substituted for that of the child when the child is incompetent and unable to decide whether he prefers nonlife to an impaired

existence. *In the Matter of Quinlan*, 70 N.J. 10, 355 A.2d 647 (1976); *Superintendent of Belchertown State School v. Saikewicz*, 373 Mass. 728, 370 N.E.2d 417 (1977).

However, merely because a child is born in an impaired condition does not mean that the physician has breached this duty. His conduct must be measured against the degree of skill, care and knowledge possessed and exercised by others engaged in genetic counseling. The child must show by affirmative proof that the defendant did not meet this standard.

In a genetic malpractice action, the child must prove not that the defendant's negligence caused his injuries but that it caused his birth. The child, like his parents in a wrongful birth action, must show that but for the defendant's negligence in adequately detecting and/or informing his parents of his condition or of the risk, he would never have been born. Note, *Wrongful Life: Should The Cause Of Action Be Recognized*, 70 Ky.L.J. 163, 177-78 (1982); *934 Comment, "*Wrongful Life*": *The Right Not To Be Born*, *supra*, at 485. The child, like his parents, must prove that had his parents been provided with accurate information relating to the risk, they would have prevented his birth. In this case there is no difficulty in showing causation. The Nelsons consulted Dr. Krusen, after Mark's conception, for the specific purpose of determining whether Mrs. Nelson was a carrier of the disease. After being informed that she was no more likely to have another child afflicted with *muscular dystrophy* than any other female, the pregnancy was permitted to continue and Mark was born with *muscular dystrophy*.

The majority opinion does not deny that Dr. Krusen owed a duty to Mark through his parents. Nor does the majority object to Mark's ability to prove either breach of that duty or proximate cause. Instead, the majority argues that as a matter of law, Mark is unable to prove injury, because in weighing life against nonlife, "it is impossible to rationally decide whether the plaintiff has been damaged at all."

Nonetheless, in reaching the decision that Mark can never prove injury, the majority has impliedly held that in a court of law, life, however defective, is preferable to nonexistence, a thing the majority contends is incapable of measurement. To reach this value decision, the court has relied upon case law resting on the "high value which the law and mankind has placed on human life, rather than

its absence. *Becker v. Schwartz*, 413 N.Y.S.2d 895, 386 N.E.2d at 812.”

Our decision in *Jacobs v. Theimer* and the decision today allow parents to recover for the “wrongful birth” of their child. By necessity this claim also requires a choice between competing values. A jury considers the intangible benefits of having a child, regardless of the child's defects, a measure of life versus nonlife. It is difficult to understand why the court allows recovery for the parents but not the child—why life versus nonlife is capable of measurement in one instance but not the other.

The absurdity of distinguishing between the two claims also is demonstrated by the practical effect of awarding damages to the parents. Since the child will be the real, if not formal, beneficiary of the parents' recovery for health care and other expenses, any remaining difficulty in allowing claims directly on behalf of an affected child seems shortsighted, especially if it is based on metaphysical refinements. See Capron, *supra*, at 639. Limiting recovery to the parents creates additional conceptual and legal problems. Because expenses in such cases were proximately caused by the doctor's negligence, denial of Mark's claim improperly allocates costs. Since the child is permitted no claim, unlike other suits brought by parents on behalf of their children, the child is not protected by a trust. Nor is the recovery placed in the registry of the court. Because some parents will be either unable or unwilling to support their child after adulthood, the child should have an “independent recovery to cover his extra costs of living with a genetic defect.” Comment, *A Preference for Non-Existence: Wrongful Life to a Proposed Tort of Genetic Malpractice*, 55 S.Cal.L.Rev. 477, 500 (1982). If a child is left without parents, the costs for support will be borne by someone else, often the state. Denial of a wrongful life claim could allow a doctor to be a wrongdoer without requiring him to compensate the person wronged most. As such, the court's action not only undermines a primary purpose of tort law, but it also weakens another policy, the deterrent function of imposing liability. Prosser, *supra*, § 4 at 23. See also Calabresi, *The Costs of Accidents* 73–75 (1970).

Finally, it must be noted that other courts have awarded special damages to children in Mark's condition. See *Turpin v. Sortini*, 182 Cal.Rptr. at 337, 643 P.2d at 954; *Harbeson v. Parke-Davis, Inc.*, 656 P.2d at 483. In awarding special damages, courts recognizing a suit based

upon genetic malpractice have not found it necessary to resolve questions comparing life to nonlife. *Procanik v. Cillo*; *Woodruff v. Hoffman*, Conn.Supp. (1983).

*935 In conclusion, recognition of Mark's claim would be consistent with the social objectives of preventing malpractice in genetic and prenatal counseling and act as a deterrent to negligent conduct. *Harbeson*, 656 P.2d at 496; *Turpin*, 182 Cal.Rptr. at 348, n. 15, 643 P.2d at 965, n. 15. Such a decision would place nonlife/life decisions in the proper hands, those of Mark's parents. Because genetic malpractice or wrongful life is a cognizable cause of action under Texas common law, the judgment of the court of appeals should in all things be reversed.

GONZALEZ, Justice, concurring and dissenting.

I concur with the holding of the majority that the statute of limitations in *Tex.Ins.Code Ann. art. 5.82 § 4* (currently *Tex.Rev.Civ.Stat.Ann. art. 4590i § 10.01*) is unconstitutional because of its violation of *Tex.Const. art. I, § 13*. I also agree with the court's holding that Mark has no cause of action for “wrongful life.” Moreover, for the reasons stated in Justice Wallace's dissenting opinion, I agree that Mark's parents have no cause of action for his “wrongful birth.” I respectfully dissent from this portion of the majority opinion.

This case presents some very difficult questions, both moral and legal. When courts are forced to contend with issues involving life and death such as those presented in this case, a merger of our concepts of morality and law is unavoidable.

Since the United States Supreme Court's decision in *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), we have witnessed a tremendous increase in the number of abortions in this country, all in the name of “free choice” or the “right of privacy.” Under this social policy, a parent or parents of a child are free to abort their child during the first trimester of pregnancy for any or no reason. This policy has contributed to a “disposable society.” If we do not like something, we get rid of it. Often, in abortions, this is done without regard for the sanctity of life.

Parents should not be given a legal entitlement to a perfect child. By recognizing the right of Mark's parents to abort him prior to his birth or the right to sue the doctor and the hospital for damages due to his birth, the majority of the court approaches this entitlement. It is my hope that the

courts and legislatures of this nation, and our society, will continue to ponder the meaning and value of life, even that of those yet unborn. Through this process of reflection and discussion, hopefully the pendulum of public opinion will swing toward the recognition of the rights of the unborn.

I too would overrule *Jacobs v. Theimer*, 519 S.W.2d 846 (Tex.1975.) I would affirm the judgment of the courts below holding that the Nelsons should take nothing.

WALLACE, Justice, dissenting.

I respectfully dissent from the court's opinion. It is not necessary for us to reach the question of whether TEX.INS.CODE ANN. art. 5.82 § 4 (1975) (now TEX.REV.CIV.STAT.ANN. art. 4590i § 10.01) (Vernon's Supp.1984) is unconstitutional because all issues can be disposed of on other grounds.

The court's opinion is inconsistent in holding that the parents have a cause of action for wrongful birth but that the child does not have a cause of action for wrongful life. The court's opinion is merely using the labels of “wrongful life” and “wrongful birth,” the meaning of which is the same, in an attempt to differentiate truly identical causes of action; one which is brought by the parents, and the

other which is brought by the child. On the one hand the court is saying that the child has no cause of action for wrongful life based upon the public policy that life, in whatever condition, is more valuable than non-life. On the other hand, the court does an about-face and holds that the parents have a cause of action for wrongful birth. In so doing, the court ignores the logical extension of its prior statement that courts are unable to make a comparison between life in whatever condition as opposed to non-life. If that is true, it must follow that the courts are in no better position to determine if the parents are better off with a child with physical defects requiring medical expense than with no child at all.

I would overrule *Jacobs v. Theimer*, 519 S.W.2d 846 (Tex.1975).

I would affirm the judgments of the courts below holding that the Plaintiffs Tom L. Nelson et al. take nothing.

McGEE, J., joins in this dissent.

All Citations

678 S.W.2d 918

Footnotes

- 1 Act of June 3, 1975, ch. 330, § 1, 1975 TEX.GEN.LAWS 864, *repealed by* Medical Liability and Insurance Improvement Act, ch. 817, pt. 4, § 41.03, 1977 TEX.GEN.LAWS 2039, 2064. Essentially the same provisions are now found in TEX.REV.CIV.STAT.ANN. art. 4590i, § 10.01 (Vernon Supp.1984).
- 2 Amended by Act of June 13, 1979, ch. 716, § 1, 1979 TEX.GEN.LAWS 1768.
- 1 Despite the fact that such labels occasionally obscure as much as they clarify, they will be used for convenience in this opinion, as they are in widespread use by courts and commentators. See discussion in *University of Ariz. Health Sciences Center v. Superior Court*, 136 Ariz. 579, 667 P.2d 1294, 1296 n.1 (1983); *Fassoulas v. Ramey*, 450 So.2d 822, 825 n. 1 (Fla.1984) (Ehrlich, J., dissenting); *Nanke v. Napier*, 346 N.W.2d 520, 521 (Iowa 1984).
- 2 For a similar reason, *Restatement (Second) of Torts* § 920 (1979) is irrelevant to my decision. Sec. 920 applies only when calculating damage awards; it presupposes that the plaintiff has established the element of harm. Since a “wrongful life” plaintiff cannot meet this initial burden, § 920 principles need never be considered.
- 3 The failure of the California and Washington courts to establish the logical basis for a “wrongful life” action—the existence of harm or injury—has not escaped the attention of commentators. With reference to the California decision in *Turpin*, it has been observed that “[t]he court's unsuccessful attempts to justify an award of special damages betray its failure to appreciate fully the fundamental flaw of a wrongful life claim. No wrongful life plaintiff, even with severe defects, can prove she has suffered harm, and the obstacle is not merely that damage calculations are speculative. The court acknowledged this fact, yet reached an inconsistent result. No damages of any kind can be awarded because it is impossible to know if the plaintiff is worse off as a result of the defendant's negligence.” Note, *Turpin v. Sortini: Recognizing the Unsupportable Cause of Action for Wrongful Life*, 71 Cal.L.Rev. 1278, 1292–93 (1983).
Likewise, *Harbeson v. Parke-Davis, Inc.* has drawn justified criticism because the Washington court's “logic does not support its conclusions. It failed to demonstrate that birth with defects is an injury to the child. Because this essential

premise is unsupported, no duty to the child should be imposed on the physician to prevent the child's birth with defects, and no damages for wrongful life should be allowed to compensate for the unproven injury." Note, [Washington Recognizes Wrongful Birth and Wrongful Life—A Critical Analysis](#), 58 Wash.L.Rev. 649, 677–78 (1983).

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Disagreement Recognized by [Cundiff by Cundiff v. Daviess County Hosp.](#), Ind.App., October 12, 1995

648 S.W.2d 661

Supreme Court of Texas.

Bernard SAX, et ux., a/n/
f of Lori Beth Sax, Petitioners,
v.
[T.P. VOTTELER](#), Respondent.

No. C-1457.

|
April 6, 1983.

|
Rehearing Denied May 4, 1983.

Parents brought a medical malpractice complaint alleging that physician mistakenly removed one of minor's fallopian tubes instead of her appendix. The District Court No. 101, Dallas County, Fair, J., granted physician's motion for summary judgment, and parents appealed. The Texarkana Court of Appeals, Sixth Supreme Judicial District, Cornelius, C.J., [636 S.W.2d 461](#), affirmed, and parents brought error. The Supreme Court, Kilgarlin, J., held that statute removing previously allowed tolling of two-year period of limitations in medical malpractice actions by minors after reaching age of six is violative of due process guarantee set forth in open courts provision of Texas Constitution insofar as it effectively abolishes a minor's right to bring a well-established common-law cause of action without providing a reasonable alternative.

Affirmed in part and reversed and remanded in part.

West Headnotes (18)

[1] States

🔑 [Operation Within States of Constitution and Laws of United States](#)

State constitutional protections cannot subtract from those rights guaranteed by the United States Constitution, but there is no prohibition against state providing additional rights for its citizens. [Vernon's Ann.Texas Const. Art. 1, § 13](#).

[1 Cases that cite this headnote](#)

[2] Appeal and Error

🔑 [Constitutional questions](#)

Response which was made by parents to physician's motion for summary judgment in medical malpractice action, to effect that statute providing a shorter statute of limitations for minor medical malpractice plaintiffs than other minor plaintiffs was violative of due process, was sufficient to preserve for review all allegations of unconstitutionality under due process guarantee set forth in open courts provision of the Texas Constitution. [V.A.T.S. Insurance Code, art. 5.82, § 4 \(Repealed\)](#); [Vernon's Ann.Texas Const. Art. 1, § 13](#).

[46 Cases that cite this headnote](#)

[3] Constitutional Law

🔑 [Presumptions and Construction as to Constitutionality](#)

There is a presumption of validity in passing upon the constitutionality of a statute. [Vernon's Ann.Texas Const. Art. 1, § 13](#).

[13 Cases that cite this headnote](#)

[4] Constitutional Law

🔑 [Presumptions and Construction as to Constitutionality](#)

A mere difference of opinion, where reasonable minds could differ, is not a sufficient basis for striking down legislation as arbitrary or unreasonable. [Vernon's Ann.Texas Const. Art. 1, § 13](#).

[11 Cases that cite this headnote](#)

[5] Constitutional Law

🔑 [Access to Courts; Right to Seek Remedy](#)

The due process guarantee set forth in the open courts provision of the Texas Constitution ensures that Texas citizens bringing common-law causes of action will not unreasonably be denied access to the

courts. [Vernon's Ann.Texas Const. Art. 1, § 13](#).

[28 Cases that cite this headnote](#)

[6] Constitutional Law

 [Access to Courts; Right to Seek Remedy](#)

A statute or ordinance that unreasonably abridges a judiciable right to obtain redress for injuries caused by the wrongful acts of another is void as amounting to a denial of due process. [Vernon's Ann.Texas Const. Art. 1, § 13](#).

[8 Cases that cite this headnote](#)

[7] Constitutional Law

 [Abrogation, modification, or recognition of remedies](#)

The right to bring a well-established common-law cause of action cannot be effectively abrogated by the legislature absent a showing that the legislative basis for the statute outweighs the denial of the constitutionally guaranteed right of redress. [Vernon's Ann.Texas Const. Art. 1, § 13](#).

[43 Cases that cite this headnote](#)

[8] Constitutional Law

 [Conditions, Limitations, and Other Restrictions on Access and Remedies](#)

In determining whether the legislative basis for the statute outweighs the denial of the constitutionally guaranteed right of redress, a court must consider both the general purpose of the statute and the extent to which the litigant's right to redress is affected. [Vernon's Ann.Texas Const. Art. 1, § 13](#).

[46 Cases that cite this headnote](#)

[9] Constitutional Law

 [Abrogation, modification, or recognition of remedies](#)

In establishing denial of a constitutionally guaranteed right of redress, the litigant must show that he has a cognizable common-

law cause of action that is being restricted and must also show that the restriction is unreasonable or arbitrary when balanced against the purpose and basis of the statute. [Vernon's Ann.Texas Const. Art. 1, § 13](#).

[149 Cases that cite this headnote](#)

[10] Infants

 [Tortious and Personal Injuries to Child](#)

A minor has a well-defined common-law cause of action to sue for injuries negligently inflicted by others.

[1 Cases that cite this headnote](#)

[11] Infants

 [Tortious and Personal Injuries to Child](#)

A child's cause of action is distinctly separate from the parent's right to recover damages for injuries to children.

[2 Cases that cite this headnote](#)

[12] Infants

 [Tortious and Personal Injuries to Child](#)

A child may recover damages for pain and suffering as well as other damages he may accrue after he reaches the age of majority.

[Cases that cite this headnote](#)

[13] Infants

 [Tortious and Personal Injuries to Child](#)

Since the services and earnings of an unemancipated minor belong to his parent, an infant may not recover for diminution of his earning capacity during the period intervening between the injury and his attainment of majority.

[3 Cases that cite this headnote](#)

[14] Parent and Child

 [Medical and other expenses](#)

The right to recover for medical costs incurred in behalf of the minor is a cause of action

belonging to the parents unless such costs are a liability as to the minor's estate.

[12 Cases that cite this headnote](#)

[15] **Infants**

[Right or capacity to sue and be sued](#)

A child has no right to bring a cause of action on his own unless disability has been removed and, if he does bring a cause of action in his own behalf, the action is subject to being abated upon a timely plea of the defendant.

[8 Cases that cite this headnote](#)

[16] **Constitutional Law**

[Time for proceedings; limitation or suspension of remedy](#)

Infants

[Torts](#)

Statute removing previously allowed tolling of two-year period of limitations in medical malpractice actions by minors after reaching age of six is violative of due process guarantee set forth in open courts provision of Texas Constitution insofar as it effectively abolishes a minor's right to bring a well-established common-law cause of action without providing a reasonable alternative. [V.A.T.S. Insurance Code, art. 5.82, § 4 \(Repealed\)](#); [Vernon's Ann. Texas Const. Art. 1, § 13](#).

[57 Cases that cite this headnote](#)

[17] **Damages**

[Mental Suffering and Emotional Distress Health](#)

[Measure and elements](#)

If minor could prove her case as to malpractice of physician, she would be entitled to an award for her physical pain and mental anguish, both past and future, disfigurement, loss-of-earning capacity after she attained age of 18 years, any medical expenses that she might in reasonable probability incur after her 18th birthday, and any other damages

peculiar to her. [V.A.T.S. Insurance Code, arts. 5.82, 5.82, § 4 \(Repealed\)](#).

[10 Cases that cite this headnote](#)

[18] **Parent and Child**

[Limitations and laches](#)

Since parents of minor injured because of physician's alleged medical malpractice had allowed statute of limitations to run on their own causes of action, parents were barred from recovering medical costs in the past or those which minor might in all reasonable probability incur prior to her 18th birthday, and were also precluded from recovering any loss-of-earning capacity that minor might have sustained between the time of injury and her 18th birthday. [V.A.T.S. Insurance Code, arts. 5.82, 5.82, § 4 \(Repealed\)](#).

[21 Cases that cite this headnote](#)

Attorneys and Law Firms

***662** John E. Collins and Joseph Jamail, Houston, for petitioners.

Thompson & Knight, John H. Martin, Dallas, for respondent.

Opinion

***663** KILGARLIN, Justice.

The parents of Lori Beth Sax brought a medical malpractice suit against Dr. T.P. Votteler, alleging that he mistakenly removed one of Lori Beth's fallopian tubes, instead of her appendix, during an operation that occurred on May 10, 1976. Dr. Votteler continued to treat Lori Beth until August 5, 1976, at which time she was eleven years of age. The Saxes' suit against Dr. Votteler was filed on February 20, 1979. Dr. Votteler filed a motion for summary judgment, claiming Lori Beth's cause of action was barred by the two-year statute of limitations contained in [Texas Insurance Code, article 5.82, section 4](#) (hereinafter referred to as [article 5.82, section 4](#)). The trial court granted the motion and the court of appeals affirmed. [636 S.W.2d 461 \(Tex.App.1982\)](#). We reverse in part and affirm in part the judgments of the courts below and remand this cause for trial on the merits.

Historically, in Texas, minors have had varying periods of time after reaching their majority to bring an action in tort. As early as pre-statehood, Texas tolled limitations for minors until two years after their attaining majority. Act of February 5, 1841, § 11, 1841 Laws of the Republic of Texas, at 166, 2 H. GAMMEL, Laws of Texas 630 (1898). Thereafter, for a brief time, the Texas Constitution tolled limitations for minors for seven years after removal of disabilities. Tex. Const. art. XII § 14 (1869). Prior to the enactment of [article 5.82, section 4](#), Texas law allowed for a tolling of limitations in all tort actions by minors until two years after attaining majority or removal of disabilities. [Tex.Rev.Civ.Stat.Ann. art. 5535](#) [derived from [Tex.Rev.Civ.Stat. art. 5708 \(1911\)](#)].

In 1975, however, by enacting the Professional Liability Insurance for Physicians, Podiatrists, and Hospitals Act (Ch. 330, 1975 Tex.Gen.Laws 864), the Texas Legislature amended Chapter 5 of the Insurance Code by adding [article 5.82](#), which changed the law with respect to limitations for minors in medical malpractice actions. [Section 4 of article 5.82](#) provided:

Notwithstanding any other law, no claim against a person or hospital covered by a policy of professional liability insurance covering a person licensed to practice medicine or podiatry or certified to administer anesthesia in this state or a hospital licensed under the Texas Hospital Licensing Law, as amended ([Art. 4437f, Vernon's Texas Civil Statutes](#)), whether for breach of express or implied contract or tort, for compensation for a medical treatment or hospitalization may be commenced unless the action is filed within two years of the breach or the tort complained of or from the date the medical treatment that is the subject of the claim or the hospitalization for which the claim is made is completed, except that minors under the age of six years shall have until their eighth birthday in which to file, or have filed on their behalf, such claim. Except as

herein provided, this section applies to all persons regardless of minority or other legal disability.¹

As the date of Lori Beth's last treatment from Dr. Votteler occurred in 1976, the statute of limitations in [article 5.82](#) is applicable to the filing of her suit. It is the constitutionality of that provision which is under attack here. The Saxes urge that by removing the tolling provision after age six Lori Beth is being denied her rights to due process and equal protection of the law as guaranteed her by the fourteenth amendment of the United States Constitution. Further, the Saxes urge that [article 5.82, section 4](#), violates the equal protection *664 guarantee, article I, section 3, and the due process guarantees, [article I, section 13](#), and [article I, section 19, of the Texas Constitution](#).

[1] While it is true that state constitutional protections cannot subtract from those rights guaranteed by the United States Constitution, there certainly is no prohibition against a state providing additional rights for its citizens. *See, e.g., PruneYard Shopping Center v. Robins*, 447 U.S. 74, 100 S.Ct. 2035, 64 L.Ed.2d 741 (1980). Because we are of the opinion that the [Texas Constitution, article I, section 13](#), does accord Texas citizens additional rights, we choose not to decide this case on the basis of the United States Constitution or the equal protection provision of the Texas Constitution.

What remains for our determination is whether [article 5.82, section 4](#), is violative of [article I, section 13, of the Texas Constitution](#). The court of appeals' opinion concluded that [article I, section 13](#), "was not raised as a ground of defense to the motion for summary judgment and cannot be considered." 636 S.W.2d at 465. We disagree. The Saxes' response to Dr. Votteler's motion for summary judgment states as follows:

Defendant relies upon section 4 of [art. 5.82 of the Insurance Code](#) of the State of Texas. Plaintiffs say that if that particular section does apply to this cause of action that said law is unconstitutional since it provides a shorter statute of limitations for minor medical malpractice plaintiffs than other minor plaintiffs and thus violates the equal protection and

due process provisions of the United States and Texas Constitutions.

[2] The Texas Constitution contains two separate due process provisions. [Article I, section 19](#), is the traditional due process guarantee, which states: “No citizen of this state shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land.” [Article I, section 13](#), provides: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted. All courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law.” While it is true that this provision is sometimes referred to as the “Open Courts Provision,” it is, quite plainly, a due process guarantee. See *Hanks v. City of Port Arthur*, 121 Tex. 202, 48 S.W.2d 944, 945 (1932); 1 Braden, *The Constitution of the State of Texas: An Annotated and Comparative Analysis* 50 (1977). Both provisions of the Texas Constitution have their origin in Magna Carta. See *Tex. Const. art. I, §§ 13, 19*, comment. In any event, the language in the Saxes' response is sufficient to preserve for review all allegations of unconstitutionality under the due process clauses of the Texas Constitution, and more particularly, [article I, section 13](#). See generally *The City of Houston v. Clear Creek Basin Authority*, 589 S.W.2d 671 (Tex.1979).

[3] [4] We recognize that “[i]n passing upon the constitutionality of a statute, we begin with a presumption of validity. It is to be presumed that the Legislature has not acted unreasonably or arbitrarily; and a mere difference of opinion, where reasonable minds could differ, is not a sufficient basis for striking down legislation as arbitrary or unreasonable.” *Smith v. Davis*, 426 S.W.2d 827, 831 (Tex.1968).

[5] [6] Legislative action, however, is not without bounds. As early as 1932, this Court recognized that [article I, section 13](#), of the Texas Constitution ensures that Texas citizens bringing common law causes of action will not unreasonably be denied access to the courts. *Hanks v. City of Port Arthur*, *supra*. In *Hanks*, this Court was confronted with an ordinance that exempted Port Arthur from liability for injuries caused by defective streets unless the city had received notice of the defect twenty-four hours prior to the accident. The ordinance was challenged as

being violative of [article I, section 13](#). In holding that the ordinance was unconstitutional, this Court reasoned:

***665** As written ... [the ordinance] applies to all persons who may be upon the streets; to children ... [who] have the right to use the sidewalks.... Are we to say that a small child running an errand, or a small boy selling newspapers to help make the family living, who is injured by reason of a defective sidewalk, due to the negligence of the city, or by reason of otherwise actionable negligence of the city, cannot recover because the infant, or some one for him, has not notified one of the city commissioners twenty-four hours before the accident of the existence of the defect? Would that be reasonable? *Is the requirement of a thing impossible from an infant, or one incapacitated for any other reason, due process?* We think not; and yet it is a condition precedent to a recovery....

Id. 48 S.W.2d at 948 (emphasis added). See *McCrary v. City of Odessa*, 482 S.W.2d 151 (Tex.1972). In conclusion, the Court set out the test for analyzing future violations of the open courts-due process provision: A statute or ordinance that unreasonably abridges a justiciable right to obtain redress for injuries caused by the wrongful acts of another amounts to a denial of due process under [article I, section 13](#), and is, therefore, void. 48 S.W.2d at 948.

The rule in *Hanks* has been considered dispositive in at least two other cases decided by this Court. In *Lebohm v. City of Galveston*, 154 Tex. 192, 275 S.W.2d 951 (1955), an ordinance similar to the one in *Hanks* exempted Galveston from liability for injuries caused by defective streets. In striking down the ordinance on the basis of [article I, section 13](#), this Court stated:

[L]egislative action withdrawing common-law remedies for well established common-law causes of action for injuries to one's “lands, goods, person or reputation” is sustained only when it is reasonable

in substituting other remedies, or when it is a reasonable exercise of the police power in the interest of the general welfare. Legislative action of this type is not sustained when it is arbitrary or unreasonable.

Id. 275 S.W.2d at 955. The Court additionally observed: “If the due process clause of our Constitution inhibits legislation unreasonably restricting the right to sue in a given field it also inhibits legislation arbitrarily abolishing the right to sue in the same field.” *Id.* 275 S.W.2d at 953.

Waites v. Sondock, 561 S.W.2d 772 (Tex.1977) is the most recent pronouncement of this Court involving [article I, section 13](#). In *Waites*, a mother seeking child support from her ex-husband had filed a motion for him to show cause why he should not be held in contempt for failure to pay child support as ordered by the court. The mother alleged that because the former husband had made no payments of child support for approximately two years, she was suffering irreparable harm. The hearing on her motion was set for a date shortly after the Texas Legislature had gone into session. Mr. Waites' attorney, who was a member of the legislature, filed a motion for continuance pursuant to [article 2168a, Texas Revised Civil Statutes](#), which provided continuances for legislator-lawyers until thirty days after the close of the session. The trial court granted the continuance and the mother filed a motion for leave to file a petition for mandamus to require the trial judge to hear her motion for contempt. After citing [article I, section 13](#) and *Lebohm v. City of Galveston*, *supra*, with approval, this Court held the statute was unconstitutional as applied to Mrs. Waites: “The legislative basis for withdrawing the mother's remedy—the presumption that the policy behind [article 2168a](#) outweighs a litigant's right of redress—is arbitrary and unreasonable when, in situations such as this, a party allegedly faces irreparable injury from inaction.” *Id.* at 775.

[7] [8] We reaffirm today the interpretation of [article I, section 13](#), set out in *Hanks*, *Lebohm*, and *Waites*. In doing so, we note that the basis for the Court's conclusion in these cases was that the litigant's right of redress outweighed the legislative basis for the respective ordinances and statute. We hold, therefore, that the right to bring a well-established common law cause *666 of action cannot be effectively abrogated by the legislature absent a showing that the legislative basis for the statute outweighs the denial of the constitutionally-guaranteed

right of redress. In applying this test, we consider both the general purpose of the statute and the extent to which the litigant's right to redress is affected.

[Article 5.82](#) was enacted to establish standards for setting liability insurance rates for physicians and other health care providers. See [Tex.Ins.Code.Ann. art. 5.82](#), caption; *Littlefield v. Hays*, 609 S.W.2d 627 (Tex.Civ.App.—Amarillo 1980, no writ). Specifically, the legislation's proponents argued that the number and amount of health care claims had increased to the point that it was indirectly affecting the availability and quality of health care. This effect was due to the higher costs of medical malpractice insurance and its unavailability. The general purpose of the statute, therefore, was to provide an insurance rate structure that would enable health care providers to secure liability insurance and thereby provide compensation for their patients who might have legitimate malpractice claims. The specific purpose of the provision in question was to limit the length of time that the insureds would be exposed to potential liability.

[9] In analyzing the litigant's right to redress, we first note that the litigant has two criteria to satisfy. First, it must be shown that the litigant has a cognizable common law cause of action that is being restricted. Second, the litigant must show that the restriction is unreasonable or arbitrary when balanced against the purpose and basis of the statute.

[10] [11] [12] [13] [14] Texas courts have long recognized that a minor has a well-defined common law cause of action to sue for injuries negligently inflicted by others. See *Texas & P. Ry. Co. v. Morin*, 66 Tex. 225, 18 S.W. 503 (1886); *Houston & Great Northern R.R. Co. v. Miller*, 51 Tex. 270 (1879); *Fall v. Webber*, 47 S.W.2d 365 (Tex.Civ.App.—Dallas 1932, writ ref'd). A child's cause of action, however, is distinctly separate from the parent's right to recover damages for injuries to children. In *Fall v. Webber*, *supra*, the court of appeals explained:

It is settled law in this state that, when a minor receives personal injuries proximately caused by the actionable negligence of another, a cause of action at once arises in favor of the injured minor for the damages resulting by reason of the injuries received.... It is also the settled law of this state that, on the infliction of a

wrongful injury on a minor, a cause of action at once arises in favor of the parents to recover the damages suffered by them by reason of such injury.

47 S.W.2d at 366. A child may recover damages for pain and suffering as well as other damages he may accrue after he reaches the age of majority. *Texas & P. Ry. Co. v. Malone*, 15 Tex.Civ.App. 56, 38 S.W. 538, 539 (Tex.Civ.App.1896, writ ref'd). For example, a child is entitled to recover loss of earning capacity, commencing upon the date of attaining majority or removal of disabilities. However, since the services and earnings of an unemancipated minor belong to his parents, an infant may not recover for diminution of his earning capacity during the period intervening between the injury and his attainment of majority. *Texas and P. Ry. Co. v. Morin*, *supra*. Historically, in Texas, the right to recover for medical costs incurred in behalf of the minor is a cause of action belonging to the parents, unless such costs are a liability as to the minor's estate. *Bering Mfg. Co. v. Peterson*, 28 Tex.Civ.App. 194, 67 S.W. 133, 135 (Tex.Civ.App.1902, writ dismiss'd).

[15] The second criterion we examine is the effect of the restriction on the child's right to bring his cause of action. A child has no right to bring a cause of action on his own unless disability has been removed. *Gulf, C. & S.F. Ry. Co. v. Styron*, 66 Tex. 421, 1 S.W. 161 (1886); *Moke v. Fellman*, 17 Tex. 367 (1856); *Dr. Pepper Bottling Co. v. Rainboldt*, 40 S.W.2d 827 (Tex.Civ.App.—Waco 1931, writ dismiss'd). If a minor does bring a cause of action in his own behalf, the action is subject to being abated upon a timely plea of the defendant. *Moke v. Fellman*, *667 17 Tex. 367 (1856); *Kaplan v. Kaplan*, 373 S.W.2d 271 (Tex.Civ.App.—Houston [1st Dist.] 1963, no writ). If the parents, guardians, or next friends of the child negligently fail to take action in the child's behalf within the time provided by article 5.82, the child is precluded from asserting his cause of action under that statute. Furthermore, the child is precluded from suing his parents on account of their negligence, due to the doctrine of parent-child immunity. See *Felderhoff v. Felderhoff*, 473 S.W.2d 928 (Tex.1971). The child, therefore, is effectively barred from any remedy if his parents fail to timely file suit. Respondents argue that parents will adequately protect the rights of their children. This Court, however, cannot assume that parents will act in such a manner. It is neither reasonable nor realistic to rely upon parents, who may themselves be minors, or

who may be ignorant, lethargic, or lack concern, to bring a malpractice lawsuit action within the time provided by article 5.82.

We agree with Dr. Votteler that both the purpose and basis for article 5.82 are legitimate. Additionally, we recognize that the length of time that insureds are exposed to potential liability has a bearing on the rates that insurers must charge. We cannot agree, however, that the means used by the legislature to achieve this purpose, article 5.82, section 4, are reasonable when they are weighed against the effective abrogation of a child's right to redress. Under the facts in this case, Lori Beth Sax is forever precluded from having her day in court to complain of an act of medical malpractice. Furthermore, the legislature has failed to provide her any adequate substitute to obtain redress for her injuries. See, e.g., *Middleton v. Texas Power & Light Co.*, 108 Tex. 96, 185 S.W. 556 (1916).

[16] We conclude that as to that part of the cause of action for medical malpractice unique to the minor, article 5.82, section 4, is unreasonable. This statute effectively abolishes a minor's right to bring a well-established common law cause of action without providing a reasonable alternative. Therefore, we declare the limitations provision of article 5.82, section 4, to be in violation of article I, section 13 of the Texas Constitution.

[17] [18] Having so concluded, we must now consider what claims in behalf of Lori Beth Sax remain viable. Upon remand, if she proves her case as to malpractice of Dr. Votteler, Lori Beth would be entitled to an award for her physical pain and mental anguish, both past and future, disfigurement, loss of earning capacity after she attains the age of eighteen years, any medical expenses that she may in reasonable probability incur after her eighteenth birthday, and any other damages peculiar to her. However, because the Saxes have allowed the statute of limitations to run on their causes of action, they are barred from recovering medical costs in the past or those which Lori Beth may in all reasonable probability incur prior to her eighteenth birthday. Likewise, the Saxes are not entitled to recover for any loss of earning capacity that Lori Beth may have sustained between the time of injury and her eighteenth birthday.

Having found the provision of the statute in question to be unconstitutional as it applies to a minor's cause of action,

we reverse in part and affirm in part the judgments of the courts below and remand this cause to the trial court.

All Citations

648 S.W.2d 661

Footnotes

- 1 [Article 5.82](#) became effective June 3, 1975, and expired by its own terms on December 31, 1977. The next regular session of the Texas Legislature enacted the Medical Liability and Insurance Improvement Act. [Tex.Rev.Civ.Stat.Ann. art. 4590i](#). Section 10.01 of that Act contains a statute of limitations provision that is substantially the same as [article 5.82, section 4](#), except under the amended law "... minors under the age of twelve years shall have until their fourteenth birthday in which to file, or have filed on their behalf, the claim." [Article 4590i](#) became effective August 29, 1977, and is to terminate of its own accord on August 31, 1993.



KeyCite Yellow Flag - Negative Treatment

Distinguished by [Durham v. Children's Medical Center of Dallas](#),
Tex.App.-Dallas, April 25, 2016

179 S.W.3d 101

Editor's Note: Additions are indicated by **Text** and
deletions by **Text**.Court of Appeals of Texas,
San Antonio.Jesse and Kathy ADAMS, Individually and as
Next Friends of Sage Adams, a Minor, Appellants,

v.

Donna GOTTWALD, D.D.S., P.C.
and Donna Gottwald, Appellees.

No. 04-04-00569-CV.

|
Aug. 17, 2005.|
Rehearing Overruled Sept. 26, 2005.**Synopsis****Background:** Parents, individually and as child's next
friends, brought medical malpractice action against child's
dentist. The 37th Judicial District Court, Bexar County,
[Michael P. Peden](#), J., entered take-nothing summary
judgment for dentist. Parents appealed.**[Holding:]** The Court of Appeals, [Sarah B. Duncan](#), J.,
held that two-year statute of limitations on health care
liability claims was unconstitutional on its face as applied
to minors.

Reversed and remanded.

West Headnotes (3)

[1] Appeal and Error **Constitutional questions**Parents of minor child did not waive their
claim that statute of limitations on health
care liability claims was unconstitutional on
its face as applied to all minors, where parents
raised challenge in response to dentist'smotion for summary judgment. [V.T.C.A.,
Civil Practice & Remedies Code § 74.251](#).

6 Cases that cite this headnote

[2] Appeal and Error **Constitutional questions**Although litigant must raise open-courts
challenge in trial court, this burden may be
met by raising challenge in response to motion
for summary judgment.

1 Cases that cite this headnote

[3] Constitutional Law **Time for proceedings****Limitation of Actions** **Constitutionality of statute**Two-year statute of limitations on health care
liability claims was unconstitutional on its
face as applied to minors, because it violated
open courts provision of Texas Constitution;
limitations statute required that minors under
age 12 may have until their fourteenth
birthday in which to file claim. [Vernon's
Ann.Texas Const. Art. 1, § 13; V.T.C.A., Civil
Practice & Remedies Code § 74.251](#).

6 Cases that cite this headnote

West Codenotes**Held Unconstitutional**[V.T.C.A., Civil Practice & Remedies Code § 74.251](#)**Attorneys and Law Firms*****101** [Kevin B. Miller](#), Mark A. Cevallos, Law Offices of
Miller & Associates, San Antonio, for appellants.[Steven D. Browne](#), [Jeff Jowers](#), Clemens & Spencer, P.C.,
San Antonio, for appellees.Sitting CATHERINE STONE, Justice, [SARAH B.
DUNCAN](#), Justice, [KAREN ANGELINI](#), Justice.**OPINION**

Opinion by SARAH B. DUNCAN, Justice.

Jesse and Kathy Adams, individually and as next friends of their daughter, Sage Adams, appeal the trial court's take-nothing summary judgment in their medical malpractice suit against Donna Gottwald, D.D.S., P.C., and Donna Gottwald. We reverse the trial court's judgment against the Adamses as next friends of Sage and *102 remand these claims to the trial court for further proceedings consistent with this opinion. In all other respects, we affirm the trial court's judgment.

FACTUAL AND PROCEDURAL BACKGROUND

On November 22, 2000, fourteen-year-old Sage Adams was treated by dentist Donna Gottwald. When Sage returned for a root canal on December 7, 2000, Dr. Gottwald broke or separated two files in Sage's tooth or jaw. On that same date, Sage and her mother Kathy were informed that the two files had separated or were broken and that the tooth might need to be re-treated. On December 18, 2000, Sage returned to Dr. Gottwald, who attempted to remove the broken or separated files. Unable to do so, Dr. Gottwald placed a temporary filling on the tooth and informed Sage and her mother that the tooth might need to be re-treated if complications developed. Although Sage was scheduled to return to Dr. Gottwald for a crown to be placed on the tooth, she never did.

In November 2003, Sage's parents, individually, and on Sage's behalf, sued Dr. Gottwald and her professional corporation for medical malpractice. In their answer, Dr. Gottwald and her professional corporation pleaded the affirmative defense of the limitations provision set forth in [section 74.251 of the Texas Civil Practice and Remedies Code](#); and it was on that basis that they subsequently moved for summary judgment. The Adamses responded, arguing that the limitations provision is unconstitutional as applied to a minor. The trial court granted the motion.

STANDARD OF REVIEW

"A defendant moving for summary judgment on an affirmative defense has the burden to conclusively establish that defense." *Long Distance Int'l, Inc. v. Telefonos de Mexico, S.A. de C.V.*, 49 S.W.3d 347, 350–

51 (Tex.2001). On appeal, we review the trial court's summary judgment de novo, viewing all the evidence in the respondent's favor to determine whether there is no genuine issue of material fact exists and the movant is entitled to judgment as a matter of law. See *Creditwatch, Inc. v. Jackson*, 157 S.W.3d 814, 816 n. 7 (Tex.2005); see also *TEX.R. CIV. P. 166a(c)*.

WAIVER

[1] [2] Gottwald argues the Adamses waived their "as-applied" challenge to the [section 74.251](#) limitations provision by failing to affirmatively plead that it is unconstitutional and by "fail[ing] to produce any summary judgment evidence that demonstrates that the legislative action was unreasonable in light of the determined state crisis which the legislature addressed." We disagree. Although "[a] litigant must raise an open-courts challenge in the trial court," this burden may be met—as it was here—by raising the challenge in a response to a motion for summary judgment. *Southwestern Elec. Power Co. v. Grant*, 73 S.W.3d 211, 222 (Tex.2002). And Gottwald is simply incorrect in characterizing the Adamses' challenge as an "as-applied" challenge. The Adamses do not argue the limitations provision in [section 74.251](#) is unconstitutional as applied to Sage and her circumstances; they argue it is unconstitutional on its face as applied to all minors. See *Weiner v. Wasson*, 900 S.W.2d 316, 320 (Tex.1995) (rejecting Weiner's argument that the court decided the constitutionality of [section 74.251](#)'s predecessor on an "as-applied" basis).

CONSTITUTIONALITY

[3] The Adamses argue the trial court erred in granting Gottwald's motion for summary judgment because the limitations period set forth in *103 [section 74.251 of the Texas Civil Practice and Remedies Code](#) violates the open courts provision contained in [article I, section 13 of the Texas Constitution](#) as applied to minors. We agree.

[Section 74.251 of the Texas Civil Practice and Remedies Code](#) provides as follows:

Notwithstanding any other law, and subject to subsection (b), no health care liability claim may be

commenced unless the action is filed within two years from the occurrence of the breach or tort or from the date the medical or health care treatment that is the subject of the claim or the hospitalization for which the claim is made is completed; provided that, minors under the age of 12 years may have until their 14th birthday in which to file, or have filed on their behalf, the claim. Except as herein provided, this section applies to all persons regardless of minority or any other legal disability.

TEX. CIV. PRAC. & REM.CODE § 74.251 (Vernon 2003). As demonstrated by the following redlined version, section 74.251 is virtually identical to its predecessor, section 10.01 of the Medical Liability Act:

Notwithstanding any other law, ~~and subject to subsection (b),~~ no health care liability claim may be commenced unless the action is filed within two years from the occurrence of the breach or tort or from the date the medical or health care treatment that is the subject of the claim or the hospitalization for which the claim is made is completed; provided that, minors under the age of 12 years ~~may~~ *shall* have until their 14th birthday in which to file, or have filed on their behalf, the claim. Except as herein provided, this section applies to all persons regardless of minority or any other legal disability.

Weiner, 900 S.W.2d at 318 (quoting former TEX.REV.CIV. STAT. ANN. art. 4590i, § 10.01); *see*

also *Sax v. Votteler*, 648 S.W.2d 661, 665–67 (Tex.1983) (holding section 10.01's predecessor unconstitutional). The Supreme Court of Texas held that “section 10.01[w]as unconstitutional when applied to a minor because it violate[d] [the open courts provision set forth in] article I, section 13 of the Texas Constitution.” *Weiner*, 900 S.W.2d at 319. However, Gottwald argues that, unlike its predecessor, the limitations provision applicable to minors in section 74.251 is saved because, in the accompanying legislative findings, “the legislature addressed *Weiner* and *Sax* by focusing on one part of the balancing test, detailing and demonstrating the important purpose of the statute.” However, a similar argument was considered and rejected in *Sax*. *See id.* (“Although the Legislature enacted article 5.82 for the legitimate purpose of restraining the escalating cost of liability insurance for health care providers, we concluded that the means used to achieve this purpose were not ‘reasonable when they [were] weighed against the effective abrogation of a child's right to redress.’” *Weiner*, 900 S.W.2d at 318 (quoting *Sax*, 648 S.W.2d at 667)). If this argument is to prevail, it must do so in the Supreme Court of Texas. We are bound by *Sax* and *Weiner*.

CONCLUSION

We hold that, as applied to minors like Sage Adams, section 74.251 of the Texas Civil Practice and Remedies is unconstitutional under the open courts provision contained in article I, section 13 of the Texas Constitution. We therefore reverse the trial court's summary judgment against Jesse and Kathy Adams as next friends of their daughter Sage and remand these claims to the trial court for further proceedings consistent with this opinion. In *104 all other respects, the trial court's judgment is affirmed.

All Citations

179 S.W.3d 101



KeyCite Yellow Flag - Negative Treatment

Distinguished by [Durham v. Children's Medical Center of Dallas](#),
Tex.App.-Dallas, April 25, 2016

3 S.W.3d 518

Supreme Court of Texas.

Sheldon GROSS, M.D., Petitioner,

v.

Timothy and Nancy KAHANEK, individually and
as personal representatives of the Estate of Kyndil
Kahanek, deceased minor child, Respondents.

No. 98–1156.

|

Sept. 16, 1999.

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Rehearing Overruled Nov. 18, 1999.

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Rehearing Overruled Dec. 16, 1999.

Parents, individually and on behalf of daughter's estate, brought survival and wrongful death actions against pediatric neurologist who treated daughter for seizures. The 150th Judicial District Court, Bexar County, [Michael Peden](#), J., granted summary judgment for neurologist. Parents appealed. The San Antonio Court of Appeals, [981 S.W.2d 271](#), reversed and remanded. Doctor petitioned for discretionary review. The Supreme Court held that: (1) wrongful death action, alleging that poisoning from neurologist's prescribed course of drug treatment contributed to daughter's death, accrued, and statute of limitations began to run on date family physician became responsible for refilling drug prescription, but (2) statute of limitations for survival claim was tolled until minor daughter's death.

Affirmed in part and reversed and rendered in part.

West Headnotes (6)

[1] Judgment **Weight and Sufficiency**

A defendant moving for summary judgment on the affirmative defense of limitations bears the burden of conclusively establishing that defense.

6 Cases that cite this headnote

[2] Limitation of Actions **Negligence in Performance of Professional Services**

The two-year limitation period for malpractice claims under the Medical Liability and Insurance Improvement Act begins to run from the date of the breach or tort if that date is ascertainable; however, when the patient's injury occurs during a course of treatment for a particular condition and the only readily ascertainable date is the last day of treatment, limitations begins to run on the last day of treatment. [Vernon's Ann.Texas Civ.St. art. 4590i, § 10.01](#).

7 Cases that cite this headnote

[3] Death **Computation of Period of Limitation**

Parents' wrongful death cause of action against pediatric neurologist, alleging that poisoning from neurologist's prescribed course of drug treatment for minor daughter's seizures contributed to her death, accrued, and statute of limitations began to run on date family physician became responsible for refilling drug prescription. [Vernon's Ann.Texas Civ.St. art. 4590i, § 10.01](#).

6 Cases that cite this headnote

[4] Limitation of Actions **Negligence in Performance of Professional Services**

The determination of when a course of drug treatment ends, such that the statute of limitations for medical malpractice for such treatment begins to run, requires consideration of such factors as: (1) whether the physician continues to examine or attend the patient, and (2) whether the condition requires further services from the physician. [Vernon's Ann.Texas Civ.St. art. 4590i, § 10.01](#).

7 Cases that cite this headnote

[5] Death **Computation of Period of Limitation**

Limitations on a wrongful death claim based on negligent health care is not tolled or extended because the decedent is a minor. [Vernon's Ann.Texas Civ.St. art. 4590i, § 10.01](#).

[2 Cases that cite this headnote](#)

[6] Death **Computation of Period of Limitation**

Parents' survival claim for medical malpractice was the same action their daughter had the day she died and was wholly derivative of daughter's rights, and thus statute of limitations for survival action was tolled until daughter's death, where daughter was a minor. [Vernon's Ann.Texas Civ.St. art. 4590i, § 10.01](#); [V.T.C.A., Civil Practice & Remedies Code § 71.021](#).

[2 Cases that cite this headnote](#)

Attorneys and Law Firms

***519** [Thad D. Spalding, Ruth G. Malinas, Brett B. Rowe, George F. Evans](#), San Antonio, for Petitioner.

[Valorie W. Davenport, Neda S. Yassaei](#), Houston, for Respondent.

Opinion

PER CURIAM.

Timothy and Nancy Kahanek, individually and on behalf of their daughter Kyndil's estate, sued Dr. Sheldon Gross, alleging that drug treatment prescribed by Dr. Gross caused Kyndil's death. Dr. Gross moved for summary judgment in part on grounds that their claims were barred by the two-year limitations period of [Texas Revised Civil Statute article 4590i, § 10.01](#). The trial court granted the motion. The court of appeals reversed and remanded, holding that limitations had not yet run. It concluded that Dr. Gross maintained a continuing course of treatment for Kyndil that ended the day she stopped taking Tegretol, and that Kyndil stopped taking the drug at the time of her death less than two years before suit was filed. [981 S.W.2d 271, 276](#). We conclude that Dr.

Gross's course of treatment ended when another doctor became responsible for refilling the Tegretol prescription. Although limitations ran from that date and bars the Kahaneks' wrongful death action, limitations on their survival action was tolled until Kyndil's death and does not bar that claim. We therefore affirm the court of appeals' judgment on the survival claim, but reverse the court of appeals' judgment on the wrongful death claim and render judgment that the Kahaneks take nothing on that claim.

Kyndil Kahanek was born in 1986 with a [congenital heart defect](#), and subsequently underwent successful heart surgery. In 1990 she suffered a seizure. Kyndil was referred to Dr. Sheldon Gross, a pediatric neurologist in San Antonio. Dr. Gross prescribed the medication Tegretol to control the seizures. The next month the Kahaneks took Kyndil back to Dr. Gross for a follow-up visit. After obtaining tests to determine Kyndil's blood count and Tegretol level, Dr. Gross advised the Kahaneks to continue giving her Tegretol.

On January 20, 1992, the Kahaneks again took Kyndil to Dr. Gross, reporting that she had suffered another seizure. Dr. Gross increased the Tegretol dosage and requested that Dr. Gordon Barth, Kyndil's family physician in Yorktown, conduct a Tegretol-level test. Dr. Gross did not examine Kyndil again, although he last ordered a refill of her Tegretol prescription on August 10, 1992. Dr. Barth began authorizing refills of the medication in September 1992, and Kyndil continued to take Tegretol. On June 12, 1993, Kyndil complained of nausea and abdominal pain. ***520** The Kahaneks took her to Santa Rosa Children's Hospital, where she died the next day after her liver and heart stopped functioning. Tegretol poisoning allegedly contributed to her death.

On June 13, 1995, the Kahaneks brought wrongful death and survival actions against Dr. Gross. The Kahaneks alleged that Dr. Gross was negligent and grossly negligent in failing to diagnose the severity of Kyndil's condition, failing to prescribe appropriate medication, failing to recommend an appropriate level of Tegretol, failing to monitor Kyndil properly while she was taking Tegretol, and failing to warn the Kahaneks of the risks associated with Tegretol. Dr. Gross moved for summary judgment, based in part on the Medical Liability and Insurance Improvement Act's two-year statute of limitations. The

trial court granted summary judgment for Dr. Gross, and the Kahaneks appealed.

The court of appeals reversed the summary judgment and remanded the case to the trial court. 981 S.W.2d at 278. The court concluded that Dr. Gross and Kyndil maintained a continuing course of treatment for controlling Kyndil's seizures, and that the course of treatment did not end until Kyndil stopped taking Tegretol on the date of her death. Accordingly, the court of appeals held that limitations did not bar the Kahaneks' claims. *Id.* at 276. Dr. Gross petitioned this Court for review, alleging that any course of treatment he maintained with Kyndil ended on January 20, 1992, when he last saw Kyndil, or alternatively, in September 1992, when he stopped refilling Kyndil's prescription.

[1] [2] A defendant moving for summary judgment on the affirmative defense of limitations bears the burden of conclusively establishing that defense. *See Jennings v. Burgess*, 917 S.W.2d 790, 793 (Tex.1996). The Medical Liability and Insurance Improvement Act defines the statute of limitations for all medical malpractice claims, including survival and wrongful death actions. *See* TEX.REV.CIV. STAT. art. 4590i, § 10.01; *Diaz v. Westphal*, 941 S.W.2d 96, 98 (Tex.1997). The statute also provides that giving presuit notice of a claim tolls limitations for seventy-five days. TEX.REV.CIV. STAT. ANN. 4590i, § 4.01. The two-year period begins to run from the date of the breach or tort if that date is ascertainable. *See Kimball v. Brothers*, 741 S.W.2d 370, 372 (Tex.1987). When, however, the "patient's injury occurs during a course of treatment for a particular condition and the only readily ascertainable date is the last day of treatment," limitations begins to run on the last day of treatment. *Id.* Neither party to this case disputes that Dr. Gross maintained a continuing course of treatment with Kyndil to combat her seizures, and that this course of treatment, rather than a single act of negligence, serves as the basis for the Kahaneks' suit. As such, the dispositive question is whether this course of treatment ended more than two years and seventy-five days before the Kahaneks filed their lawsuit.

Dr. Gross argues that his treatment of Kyndil ended in January 1992 and was not extended by the later refills of the Tegretol prescription. Thus, he urges that *Rowntree v. Hunsucker*, 833 S.W.2d 103 (Tex.1992), controls. Although we agree that limitations ran on the wrongful

death claim in this case, we disagree that *Rowntree* is dispositive. In *Rowntree*, the plaintiff sued her doctor for failure to diagnose, monitor, and treat the occluded arteries that caused her debilitating stroke. In response to the defendant's limitations argument, the plaintiff asserted that the defendant maintained a continuing course of treatment so long as she continued to take the high blood pressure medication he prescribed, or alternatively, until she obtained the last prescription from her pharmacist. The plaintiff, however, did not allege that the medication caused her injury. Under those circumstances, we held that a "single instance of prescription renewal does not demonstrate sufficient involvement by the physician to constitute a continuing course of treatment." *Id.* at 108. We reasoned *521 that a course of treatment could be established by the physician enlisting the aid of a patient to self-administer a medication only when the physician controls the medicine and continues to render medical services. *See id.*

[3] In contrast, the Kahaneks allege that Kyndil's death resulted from her taking the prescribed Tegretol. The Kahaneks further allege, and presented some supporting evidence, that Dr. Gross had a duty to monitor Kyndil more closely while she was taking Tegretol; Dr. Gross does not dispute that he maintained a duty to monitor her while she was taking the medication. Thus, this is not a suit in which Kyndil, or her parents, were entrusted to self-administer a medication. Rather, this case involves allegations that a physician was required to monitor the effects of a medication while it was being taken, and that the failure to do so contributed to the patient's death. In *Rowntree*, we recognized this difference: "There are some situations in which the statute would run from the date of the last drug treatment, if the course of that treatment is the direct cause of the injury." 833 S.W.2d at 105. As the Kahaneks alleged that the course of treatment with Tegretol was the cause of Kyndil's death, the statute of limitations began to run on the date of Dr. Gross's last drug treatment for Kyndil.

[4] In determining when a course of drug treatment ends, we consider such factors as: (1) whether the physician continues to examine or attend the patient, and (2) whether the condition requires further services from the physician. *See id.* at 106. The parties do not dispute that Dr. Gross last examined Kyndil on January 20, 1992. Nor do they disagree that he refilled the Tegretol prescription until August 10, 1992. As the Kahaneks presented

evidence to suggest that a physician who prescribes Tegretol must continually monitor the patient's blood Tegretol levels, Dr. Gross maintained a continuing course of treatment for Kyndil so long as he was prescribing Tegretol for her. Beginning in September 1992, still more than two years before the Kahaneks filed suit, Dr. Barth prescribed Kyndil's Tegretol and authorized her refills. Because Dr. Gross was no longer authorizing refills of Kyndil's Tegretol prescription as of September 1992, and was therefore no longer responsible for monitoring her blood Tegretol levels, Dr. Gross's course of treatment with Kyndil ended in September 1992.

[5] Limitations on a wrongful death claim based on negligent health care is not tolled or extended because the decedent is a minor. *Baptist Mem'l Hosp. Sys. v. Arredondo*, 922 S.W.2d 120, 121 (Tex.1996). Therefore, limitations ran from the completion of treatment in September 1992 and barred the Kahaneks' wrongful death claim when they filed it on June 13, 1995.

[6] The Kahaneks' survival claim, however, is not barred. That action is the same action Kyndil had the day she

died and is wholly derivative of Kyndil's rights; the injury is hers, and the damages are those she suffered while alive. See *TEX. CIV. PRAC. & REM.CODE* § 71.021; *Brown v. Shwartz*, 968 S.W.2d 331, 334 (Tex.1998); *Russell v. Ingersoll-Rand Co.*, 841 S.W.2d 343, 345 (Tex.1992). Because Kyndil was a minor, the limitations period was tolled for her claim until her death. See *Brown*, 968 S.W.2d at 334; *Weiner v. Wasson*, 900 S.W.2d 316, 321 (Tex.1995). Because the Kahaneks filed the survival action within two years and seventy-five days of Kyndil's death, that claim is not barred.

Accordingly, the Court grants Dr. Gross's petition for review, and without hearing oral argument, see *TEX.R.APP. P. 59.1*, affirms the court of appeals' judgment on the survival claim, reverses the court of appeals' judgment on the wrongful death claim, and renders judgment that the Kahaneks take nothing on their wrongful death claim.

All Citations

3 S.W.3d 518, 42 Tex. Sup. Ct. J. 1189



KeyCite Yellow Flag - Negative Treatment

Declined to Follow by [Brucker v. Mercola](#), Ill., December 28, 2007

968 S.W.2d 331

Supreme Court of Texas.

Christina Michelle BROWN and Cecil Ted Brown, individually and on behalf of The Estate of Dillon Ray Brown, deceased, Petitioners,

v.

Kalman Jay SHWARTS, M.D., and
[Navarro Memorial Hospital, Inc.](#) d/b/
 a Navarro Regional Hospital, Respondents.

No. 96–1224.

|
 Argued Oct. 7, 1997.

|
 Decided March 13, 1998.

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 Rehearing Overruled July 3, 1998.

Parents brought medical malpractice action against physician and hospital after death of newborn. The 13th District Court, Navarro County, [Kenneth A. Douglas](#), J., granted summary judgment for defendants, and parents appealed. The [Waco Court of Appeals](#), 929 S.W.2d 609, affirmed. Parents' writ of error was granted. The Supreme Court, [Hecht](#), J., held that wrongful death action brought two years and 76 days after alleged prenatal injury was barred by statute of limitations, but survival action was not barred.

Affirmed in part and reversed in part.

[Gonzalez](#), J., filed concurring opinion in which [Abbott](#), J., and [Baker](#), J., joined in part.

West Headnotes (13)

[1] Health

🔑 Limitations;time requirements

Medical malpractice statute of limitations, rather than separate statute of limitations otherwise applicable to wrongful death actions, governs wrongful death claims premised on negligent health or medical care.

[Vernon's Ann. Texas Civ. St. art. 4590i, § 10.01; V.T.C.A., Civil Practice & Remedies Code § 16.003\(b\).](#)

2 Cases that cite this headnote

[2] Death

🔑 Survival of right of action of person injured

Death

🔑 Application of general statutes of limitations

There is no separate statute of limitations for survival actions.

Cases that cite this headnote

[3] Health

🔑 Obstetrics, Gynecology, and Reproductive Health

Infants

🔑 Injuries prior to birth; wrongful life

Parent and Child

🔑 Existence, Nature, and Grounds of Action

Negligent treatment of a fetus is actionable if the child is born alive.

Cases that cite this headnote

[4] Health

🔑 Professional-patient relationship as requisite to duty

Physician cannot be liable for malpractice unless the physician breaches a duty flowing from a physician-patient relationship.

1 Cases that cite this headnote

[5] Death

🔑 Application of general statutes of limitations

Medical malpractice statute of limitations applied to parents' wrongful death and survival arising out of death of their newborn son who allegedly suffered prenatal injury; fetus later born alive could be a "patient"

within meaning of medical malpractice statute. [Vernon's Ann.Texas Civ.St. art. 4590i, §§ 1.03\(a\)\(4\), 10.01.](#)

6 Cases that cite this headnote

[6] Death

🔑 [Computation of period of limitation](#)

Limitations on a wrongful death action based on negligent health care is not tolled or extended because the decedent was a minor.

1 Cases that cite this headnote

[7] Death

🔑 [Computation of period of limitation](#)

Action for the wrongful death of a child who lives more than two years after a prenatal injury caused by negligent health care will as a rule be barred by limitations. [Vernon's Ann.Texas Civ.St. art. 4590i, § 10.01.](#)

1 Cases that cite this headnote

[8] Death

🔑 [Special limitations](#)

It is well within the legislature's prerogative to prescribe the limitations period for a wrongful death claim, which did not exist at common law and is a creature of statute.

2 Cases that cite this headnote

[9] Death

🔑 [Computation of period of limitation](#)

Wrongful death action brought by parents of newborn who died one day after his birth, alleging prenatal injury caused by medical malpractice, was barred by statute of limitations; statute of limitations began to run when physician treated fetus, four days prior to birth, by filing timely notice of claim, parents had two years and 75 days from that date to file action, and parents filed action one day too late. [Vernon's Ann.Texas Civ.St. art. 4590i, §§ 4.01\(c\), 10.01.](#)

5 Cases that cite this headnote

[10] Death

🔑 [Survival of right of action of person injured](#)

Parents' survival action was the same action child had the day he died; parents' rights were wholly derivative of child's, injury was that which he suffered, and damages were those he sustained while he was alive. [V.T.C.A., Civil Practice & Remedies Code § 71.021.](#)

1 Cases that cite this headnote

[11] Death

🔑 [Computation of period of limitation](#)

Statute of limitations on survival action, arising out of newborn's death and alleging prenatal injuries caused by negligent treatment, began to run day physician treated fetus. [Vernon's Ann.Texas Civ.St. art. 4590i, § 10.01.](#)

3 Cases that cite this headnote

[12] Death

🔑 [Computation of period of limitation](#)

Under medical malpractice statute of limitations providing that minors under age of 12 years had until their 14th birthday in which to file action, statute of limitations for survival action, arising out of newborn's death and alleging prenatal injuries caused by negligent treatment, was tolled until newborn's death, one day after his birth, rather than until 14th anniversary of birth. [Vernon's Ann.Texas Civ.St. art. 4590i, § 10.01.](#)

Cases that cite this headnote

[13] Death

🔑 [Computation of period of limitation](#)

Survival action brought by parents of newborn who died one day after his birth, alleging prenatal injury caused by medical malpractice, was not barred by statute of limitations, even though parents filed action

two years and 76 days after physician treated fetus, four days before birth; two-year limitations period was tolled until newborn's death, and was tolled again for 75 days when parents gave notice of their claim. [Vernon's Ann.Texas Civ.St. art. 4590i, §§ 4.01\(c\), 10.01.](#)

[2 Cases that cite this headnote](#)

Attorneys and Law Firms

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[Kevin J. Keith](#), [Jonathan B. Skidmore](#), [Gregory W. Curry](#), [Scott Patrick Stolley](#), [Robert P. Crumpler](#), [John H. Martin](#), Dallas, for Respondents.

Opinion

[HECHT](#), Justice, delivered the opinion of the Court, in which [PHILLIPS](#), Chief Justice, and [ENOCH](#), [SPECTOR](#), [OWEN](#), [BAKER](#) and [ABBOTT](#), Justices, join.

This case raises two questions concerning limitations on health care liability claims for negligent treatment of a child. *First*: if treatment occurred while the child was *in utero*, can limitations begin to run before birth? *Second*: if the child dies after being born, when does limitations run? The lower courts held that plaintiffs' wrongful death and survival claims were barred by limitations. [Brown v. Shwartz](#), 929 S.W.2d 609 (Tex.App.—Waco 1996). We hold that only the wrongful death claim is barred and thus reverse and remand the survival claim for further proceedings.

Christina Michelle Brown went to the Navarro Memorial Hospital emergency room during her third trimester of pregnancy, complaining of nausea and continuing headaches, [cough](#), and wetness in her pants. She was treated by Dr. Kalman Jay Shwartz, who ordered a [sonogram](#) and a [hepatitis](#) test and instructed Brown to return to the hospital if her symptoms worsened. Four days later Brown returned and was seen by another doctor. This time she was told that her membranes had ruptured and that she had been leaking amniotic fluid for several days, including when she saw Dr. Shwartz. She was admitted to the hospital and gave birth prematurely to a boy, Dillon, who died the next day. Two years and 76 days after Brown was treated by Shwartz, she and

her husband filed suit against Shwartz and the Hospital asserting wrongful death and survival claims based solely on the treatment Brown received the day she saw Shwartz. The district court granted summary judgment for both defendants, holding that limitations barred the Browns' actions. The court of appeals affirmed. 929 S.W.2d 609. We granted the Browns' application for writ of error. 40 TEX. SUP.CT. J. 470 (Apr. 18, 1997).

The Browns' pleadings assert health care liability claims as defined by the Medical Liability and Insurance Improvement Act, [TEX.REV.CIV. STAT. ANN.. art. 4590i, § 1.03\(a\)\(4\)](#) (Vernon Supp.1998). Section 10.01 of the Act states:

Notwithstanding any other law, no health care liability claim may be commenced unless the action is filed within two years from the occurrence of the breach or tort or from the date the medical or health care treatment that is the subject of the claim or the hospitalization for which the claim is made is completed; provided that, minors under the age of 12 years shall have until their 14th birthday in which to file, or have filed on their behalf, the claim. Except as herein provided, this subchapter applies to all persons regardless of minority or other legal disability.

Id. § 10.01. Giving notice of a claim as required by the Act tolls the running of limitations for 75 days. *Id.* § 4.01(c); [Thompson v. Community Health Inv. Corp.](#), 923 S.W.2d 569, 571 (Tex.1996) (per curiam); [De Checa v. Diagnostic Ctr. Hosp., Inc.](#), 852 S.W.2d 935, 937–938 (Tex.1993). Thus, a health care liability claim must be filed within two years and 75 days of the date prescribed by [Section 10.01](#).

[1] [2] Because [Section 10.01](#) applies “[n]otwithstanding any other law,” it governs wrongful death claims premised on negligent health or medical care, rather than the separate statute of limitations otherwise applicable to wrongful death actions, [Section 16.003\(b\) of the Civil Practice and Remedies Code](#). [Bala v. Maxwell](#), 909 S.W.2d 889, 892–893 (Tex.1995) (per curiam). There is no separate statute of limitations for survival actions. Thus, [Section 10.01](#) governs both claims the Browns assert.

[3] [4] [5] We have held that if the date a person is injured is known, limitations under Section 10.01 begins to run on that date. *334 *Jennings v. Burgess*, 917 S.W.2d 790, 793 (Tex.1996); *Kimball v. Brothers*, 741 S.W.2d 370, 372 (Tex.1987). The Browns argue that a different rule should apply for prenatal injuries. Pointing out that a health care liability claim is defined by the Act as an action for “injury to or death of the *patient*”, TEX.REV.CIV. STAT. ANN.. art. 4590i, § 1.03(a)(4) (emphasis added), the Browns contend that a fetus cannot be a patient, and that limitations therefore should not begin to run until the child is born. Were the Browns correct, their argument would defeat their action altogether. If a fetus could not be a patient, then there would be no cause of action for negligent treatment of the fetus because a health care liability claim is defined as one for injury to or death of the “*patient*”. But negligent treatment of a fetus is actionable if the child is born alive. *Russell v. Ingersoll-Rand Co.*, 841 S.W.2d 343, 346–347 (Tex.1992); *Yandell v. Delgado*, 471 S.W.2d 569 (Tex.1971) (per curiam); *Leal v. C.C. Pitts Sand and Gravel, Inc.*, 419 S.W.2d 820, 821 (Tex.1967). Since “a physician cannot be liable for malpractice unless the physician breaches a duty flowing from a physician-patient relationship”, *St. John v. Pope*, 901 S.W.2d 420, 423 (Tex.1995), and a physician can be liable for negligently injuring a fetus if the child is later born alive, it follows that a fetus can be a patient. Thus, the Browns' argument for applying Section 10.01 differently when injuries are prenatal fails.

[6] [7] [8] Limitations on a wrongful death action based on negligent health care is not tolled or extended because the decedent was a minor. *Baptist Memorial Hosp. Sys. v. Arredondo*, 922 S.W.2d 120, 121 (Tex.1996) (per curiam) (holding that “the tolling provision of section 10.01 that applies to a minor does not apply to an adult's wrongful death claims” for the death of a minor). This means that an action for the wrongful death of a child who lives more than two years after a prenatal injury will as a rule be barred by limitations, but the same result ensues when the decedent is an adult. *Russell*, 841 S.W.2d at 348. While there are circumstances when this result will seem harsh, it is well within the Legislature's prerogative to prescribe the limitations period for a wrongful death claim which, it must be remembered, did not exist at common law and is a creature of statute. *Bala*, 909 S.W.2d at 892–893.

[9] The Browns had two years from the date Dr. Shwartz treated Dillon—which was just five days short of two years from the date of Dillon's death—to give notice of their wrongful death claim, and they did so. This notice triggered the 75-day tolling period, effectively enabling the Browns to file suit within two years and 75 days of Shwartz's treatment. The Browns waited one day too long to file suit. We conclude that their wrongful death action is barred by limitations.

[10] [11] [12] The Browns' survival action is the same action Dillon had the day he died. TEX. CIV. PRAC. & REM.CODE § 71.021; *Russell*, 841 S.W.2d at 345. The Browns' rights are wholly derivative of Dillon's, the injury is that which he suffered, and the damages are those he sustained while he was alive. *Id.* As we have already explained, limitations on Dillon's action began to run the day Shwartz treated him. Section 10.01 provides, however, that “minors under the age of 12 years shall have until their 14th birthday in which to file, or have filed on their behalf, the[ir] claim.” The effect of this provision was to toll all running of limitations on Dillon's claim until his death. *Weiner v. Wasson*, 900 S.W.2d 316 (Tex.1995).

The Browns argue, however, that limitations continued to be tolled after Dillon's death, giving them at least until the fourteenth anniversary of Dillon's birth, TEX.REV.CIV. STAT. ANN.. art. 4590i, § 10.01 (Vernon Supp.1998), to file their survival action. We disagree. Once Dillon died, he ceased to be a minor under twelve years old and the tolling provision in Section 10.01 no longer applied. Thus, limitations began to run at his death. Nothing in Section 10.01 suggests that the parents of a deceased minor should have as long as fourteen years to file a survival action when they have only two years in which to file a wrongful death action complaining of the same treatment. The only two courts to have considered this matter have reached the same conclusion. See *335 *Campos v. Ysleta Gen. Hosp., Inc.*, 879 S.W.2d 67, 73 (Tex.App.—El Paso 1994, writ denied) (“[T]he tolling provisions for children under twelve was clearly not meant to apply in wrongful death or survival cases.”); see also *Cestro v. Medina*, 781 S.W.2d 640, 641 (Tex.App.—Eastland 1989, no writ). Moreover, the Browns' argument would apply equally to any survival action brought after the death of a minor, even if not based on a health care liability claim, tolling limitations as long as the decedent would have been a minor. The statutes of limitations do not indicate that a minor's survivors should

have longer to assert their claims than the survivors of an adult.

Our opinion in *Russell* is not to the contrary. There we held that a plaintiff's survival action was untimely filed because the decedent's action would have been barred had he brought suit immediately prior to his death. We also explained that had the decedent's action not been barred at the time of his death, limitations would simply continue to run, interrupted only by the one-year tolling provision of [Section 16.062 of the Civil Practice and Remedies Code](#).¹ Nothing in our opinion suggests, however, that a decedent's legal disability would continue to toll limitations after his death. No such issue was presented in *Russell*.

[13] Nevertheless, the Brown's survival action is not barred. Limitations on Dillon's cause of action was tolled until his death, then began to run, and was tolled again for 75 days when the Browns gave the notice of their claim required by statute. Thus, the Browns had two years and 75 days from the date of Dillon's death within which to file their survival action, and they did so.

There is no inconsistency, contrary to the concurring opinion's argument, between our holding that a fetus can be a patient if later born alive and our holding in *Witty v. American General Capital Distributors, Inc.*, 727 S.W.2d 503 (Tex.1987), and *Edinburg Hospital Authority v. Trevino*, 941 S.W.2d 76 (Tex.1997), that a fetus is not an "individual" under the Wrongful Death Act, [TEX. CIV. PRAC. & REM. CODE § 71.002](#). In fact, *Witty* recognized the same distinction, stating that "[t]he fetus has no cause of action for the injury, until subsequent live birth." 727 S.W.2d at 505.

Accordingly, we reverse the judgment of the court of appeals as to the Browns' survival action and remand that action to the district court for further proceedings.

[HANKINSON, J.](#), did not participate in the decision.

[GONZALEZ](#), Justice, concurring, joined by [ABBOTT](#), Justice, with respect to Part II, and [BAKER](#) and [ABBOTT](#), Justices, with respect to Part III.

I

There is ... no negligence cause of action arising out of the treatment or injury of a fetus.

....

... [T]his court declines to overrule its prior opinions and continues to hold that "there is no wrongful death or survival cause of action for the death of a fetus." [*Pietila v. Crites*, 851 S.W.2d 185 (Tex.1993); *Blackman v. Langford*, 795 S.W.2d 742 (Tex.1990); *Witty v. American Gen. Capital Distribs., Inc.*, 727 S.W.2d 503 (Tex.1987); *Tarrant County Hosp. Dist. v. Lobdell*, 726 S.W.2d 23 (Tex.1987)]. Furthermore, the Legislature has not amended the wrongful death and survival statutes to create a wrongful death or survival cause of action for loss of a fetus.

[Krishnan v. Sepulveda](#), 916 S.W.2d 478, 479–81 (Tex.1995).

*336 Without overruling any of the above cases, the Court today holds that the Browns, whose claims resulted from the alleged negligent treatment of their son in utero, "waited one day too long to file [the wrongful death] suit," 968 S.W.2d at 334, but that "the Browns' survival action is not barred." 968 S.W.2d at 335. In so holding, the Court finally recognizes that because "a physician can be liable for negligently injuring a fetus, it follows that a fetus can be a patient." 968 S.W.2d at 334. Unfortunately, when viewed alongside the Court's previous writings, today's opinion adds confusion to an already muddled area of the law and does nothing to resolve the tension in our opinions.

Nevertheless, while I cannot join the Court's writing, I concur in its judgment. It is clear that the statute of limitations on the Browns' survival action, which is wholly based on Dillon's injury and the damages Dillon suffered, was tolled until Dillon's death. [TEX. REV. CIV. STAT. ANN. art. 4590i, § 10.01](#) (Vernon Supp.1998) ("Medical Liability Act"). Therefore, the survival action is not barred.

I also agree that under sections 4.01(c) and 10.01 of the Medical Liability Act, a wrongful death action filed more than two years and 75 days after the occurrence of the breach or tort against an unborn *patient* is barred by limitations. I have consistently urged the Court to

recognize that such a *patient* should be able to recover for its injuries received in the womb, regardless of whether the *patient* is later born alive. See *Edinburg Hosp. Auth. v. Trevino*, 941 S.W.2d 76, 85–92 (Tex.1997) (Gonzalez, J., dissenting); *Krishnan*, 916 S.W.2d at 483–90 (Gonzalez, J., dissenting). Under the absolute statute of limitations of the Medical Liability Act, the clock starts running from the date of breach or tort against the *patient* whose injury or death forms the basis for the health care liability claim. Therefore, I agree with the Court's disposition of this case.

However, I am concerned with the inconsistency in holding that for the purposes of the statute of limitations of the Medical Liability Act, a fetus is a *patient*, when this Court has unwaveringly held that under the Wrongful Death Act, a fetus is not an *individual*, and therefore may not recover for its wrongful death if that fetus (*patient*) happens to die in utero. See *Trevino*, 941 S.W.2d at 78, 79 n. 1; *Witty*, 727 S.W.2d at 504 (stating that the Legislature did not intend the word “individual” to include an unborn fetus). The Medical Liability Act does not define “patient.” Still, the Court is willing to say that under that Act, a fetus is a patient, as a doctor/patient relationship clearly exists between a doctor and fetus. 968 S.W.2d at 334. But on the other hand, in *Witty*, 727 S.W.2d at 504, the Court faced a similar situation involving the absence of a legislative definition, yet reached a contrary result.

The Wrongful Death Act allows a cause of action for damages “arising from an injury that causes an individual's death.” TEX. CIV. PRAC. & REM.CODE § 71.002(a). But the Legislature did not define “individual” in the statute. Nonetheless, the Court held that when enacting the statute, the Legislature did not intend the word “individual” to include a fetus, *Witty*, 727 S.W.2d at 504, despite a complete absence of evidence of what the Legislature intended, and without any reasoning, discussion, or analysis of such intent. *Id.* at 507 (Kilgarlin, J., dissenting).

In fact, the Court's analysis in *Witty* centered around the fact that the Wrongful Death Act previously provided recovery for the death of any “person,” and substituting the word “individual” was intended to be a nonsubstantive change. See *Witty*, 727 S.W.2d at 504. Essentially the Court's summary conclusion was that a fetus is not an “individual” because a fetus is not a “person.” However, there are numerous sources that indicate that a patient is

a “person.” See TEX. HEALTH & SAFETY CODE § 313.002(8) (defining a patient as “a *person* who is admitted to a hospital ...”) (emphasis added); TEX.REV.CIV. STAT. ANN.. art. 4495b, § 5.08(m) (Vernon Supp.1998) (defining a patient as “any *person* who consults or is seen by a person licensed to practice medicine to receive medical care”) (emphasis added); TEX.R. CIV. EVID. 509(a)(1) (defining a patient as “any *person* who consults or is seen by a physician to receive medical care”) (emphasis added); BLACK'S LAW DICTIONARY 1126 (6th *337 ed.1990) (defining a patient as a “*Person* under medical or psychiatric treatment and care”) (emphasis added). If indeed a fetus is a patient, as the Court admits, how does it follow that a fetus is necessarily *not* a person or individual for the purposes of wrongful death jurisprudence?

The *Trevino* Court followed *Witty* and stated that it would be up to the Legislature to rewrite the Wrongful Death Act to include under the definition of *individual* a fetus, which according to the Court today, is a *patient*. Therefore, the Court finds itself in the following untenable position: it recognizes in the present case, with no guidance from the Legislature, that a fetus is a patient, while at the same time, *because* there has been no guidance from the Legislature, it adheres to the antiquated concept that a fetus is *not* an “individual” in the area of wrongful death jurisprudence. If the Court had simply recognized, at my urging in *Krishnan* and *Trevino*, that there is no limitation in the Wrongful Death Act that prevents us from construing the word “individual” to mean an unborn baby, the Court would not find itself in such a pickle.

II

Nevertheless, this predicament can be remedied by legislative action. Just over a year ago in *Trevino*, I called upon the Court to abandon the anachronistic rule of law that dictates that parents cannot recover for the wrongful death of their unborn child, and urged the Court to join the overwhelming majority of jurisdictions that allow such recovery. *Trevino*, 941 S.W.2d at 86 & n. 1 (Gonzalez, J., dissenting). As mentioned earlier, the *Trevino* Court deferred to the Legislature, stating, “If the law is to change, it would be up to the Legislature, not this Court, to rewrite [the Wrongful Death Act] to allow the cause of action that Justice Gonzalez seeks to create.” *Id.* at 79 n. 1.

I still adhere to the view that the Legislature, by providing a cause of action for the wrongful death of an “individual,” has done all that is necessary for us to recognize a tort for an unborn baby's wrongful death. The mistake, as I have reiterated time and again, was this Court's interpretation of the Wrongful Death Act in *Witty*. However, it is abundantly clear that my colleagues will not overrule *Witty* and its progeny.

III

Therefore, I now call on our Legislature to bring Texas in line with the vast majority of jurisdictions that recognize a wrongful death cause of action for the death of a fetus.

Id. at 86 n. 1 (Gonzalez, J., dissenting) (listing thirty-nine jurisdictions that recognize some form of action to recover damages for an unborn child's death); see *Santana v. Zilog, Inc.*, 95 F.3d 780, 783 n. 3 (9th Cir.1996) (pointing out that only nine jurisdictions do not allow wrongful death causes of action for any fetus, regardless of viability). The reasons to recognize such a claim are many, as I have exhaustively detailed in my previous dissents in *Trevino* and *Krishnan*. *Trevino*, 941 S.W.2d at 85–92 (Gonzalez, J., dissenting); *Krishnan*, 916 S.W.2d at 483–90 (Gonzalez, J., dissenting).

All Citations

968 S.W.2d 331, 41 Tex. Sup. Ct. J. 542

Footnotes

- 1 Section 16.062(a) of the Civil Practice and Remedies Code states that “[t]he death of a person against whom or in whose favor there may be a cause of action suspends the running of an applicable statute of limitations for 12 months after the death.” The Browns do not argue that Section 16.062(a) applies to health care liability claims, and the only two courts that have addressed the issue have held that Section 16.062(a) does not apply because of the “notwithstanding any other law” provision in Section 10.01. *Wilson v. Rudd*, 814 S.W.2d 818, 821 (Tex.App.—Houston [14th Dist.] 1991, writ denied); *Rascoe v. Anabtawi*, 730 S.W.2d 460, 461 (Tex.App.—Beaumont 1987, no writ).

 KeyCite Yellow Flag - Negative Treatment
Distinguished by [Marente v. Asah](#), Tex.App.-Texarkana, March 4, 2016
402 S.W.3d 391
Court of Appeals of Texas,
Dallas.

CHILDREN'S MEDICAL CENTER OF DALLAS,
Amy Holland, CPNP, David W. Kines, FNPC,
Lawson Copley, M.D., J. Patrick Hieber, M.D.,
Lori A. Thornton, RN, FNPC, and Timothy J.
Rupp, M.D., Appellants and Cross-Appellees,
v.

Sheri DURHAM and Denise Jenkins, as
Administrator of the Estate of Jessica Haley
Durham, Appellees and Cross-Appellants.

No. 05-12-00681-CV.

|
May 31, 2013.

Synopsis

Background: Estate of patient who died from a ruptured aortic dissection filed health care liability claims (HCLCs) against defendants including children's hospital, orthopedic surgeon, and nurse practitioners. The County Court at Law No. 4, Dallas County, [Ken Tapscott, J.](#), denied defendants' motions to dismiss claims for failure to file an expert report meeting statutory requirements and granted hospital's motion to dismiss all direct liability claims against it. Defendants appealed, and estate cross-appealed.

Holdings: The Court of Appeals, [Murphy, J.](#), held that:

[1] pediatrician was qualified to testify as an expert as to standards of care applicable to orthopedic surgeon and nurse practitioners in connection with their failure to obtain a cardiology consultation for patient before or after orthopedic surgery;

[2] pediatrician was qualified to give expert opinion that failure to obtain cardiology consultation caused patient's death over two years after surgery;

[3] expert report adequately described causation; and

[4] because expert report satisfied statutory requirements as to hospital's alleged vicarious liability for actions of nurse practitioners, direct liability claims against hospital could proceed as well.

Affirmed in part and reversed in part.

West Headnotes (13)

[1] Appeal and Error

 [Rulings on Motions Relating to Pleadings](#)

Appellate court reviews for abuse of discretion a trial court's ruling on a motion to dismiss a health care liability claim.

[3 Cases that cite this headnote](#)

[2] Health

 [Affidavits of merit or meritorious defense;expert affidavits](#)

The purpose of an expert report, as required in connection with a health care liability claim (HCLC), is to deter frivolous claims, not to dispose of claims regardless of their merits. [V.T.C.A., Civil Practice & Remedies Code § 74.351.](#)

[Cases that cite this headnote](#)

[3] Health

 [Affidavits of merit or meritorious defense;expert affidavits](#)

To constitute a good-faith effort to provide a fair summary of the expert's opinions, the expert report required in connection with a health care liability claim (HCLC) must satisfy two purposes: first, the report must inform the defendant of the specific conduct the plaintiff has called into question; second, the report must provide a basis for the trial court to conclude that the claims have merit; a report that merely states the expert's conclusions about the standard of care, breach, and causation does not fulfill

these two purposes. [V.T.C.A., Civil Practice & Remedies Code § 74.351](#).

[1 Cases that cite this headnote](#)

[4] Health

 [Affidavits of merit or meritorious defense;expert affidavits](#)

An expert report in support of a health care liability claim (HCLC) need not marshal all the plaintiff's proof, but it must include the expert's opinion on each of the elements identified in the Texas Medical Liability Act (TMLA). [V.T.C.A., Civil Practice & Remedies Code § 74.351\(r\)\(6\)](#).

[Cases that cite this headnote](#)

[5] Health

 [Affidavits of merit or meritorious defense;expert affidavits](#)

Trial court's inquiry is limited to the four corners of the expert report in determining whether report represents a good-faith effort to comply with statutory requirements for a health care liability claim (HCLC). [V.T.C.A., Civil Practice & Remedies Code § 74.351](#).

[Cases that cite this headnote](#)

[6] Health

 [Affidavits of merit or meritorious defense;expert affidavits](#)

An expert report that satisfies the elements for a valid expert report under the Texas Medical Liability Act (TMLA), even if as to one theory only, entitles the claimant to proceed with a suit against the physician or health care provider. [V.T.C.A., Civil Practice & Remedies Code § 74.351\(r\)\(6\)](#).

[1 Cases that cite this headnote](#)

[7] Evidence

 [Due care and proper conduct in general](#)

Pediatrician was qualified on health care liability claim (HCLC) to testify as an expert that standard of care required pediatric

orthopedic surgeon to ensure that patient received a pediatric cardiology consultation either before or after orthopedic surgery for leg injury sustained in car accident; pediatrician stated in expert report that he regularly participated in ensuring that patients needing surgery were medically clear for it, and that, as a medical doctor, orthopedic surgeon should or would have an appreciation of the significance of an enlarged aorta, with which patient had been diagnosed prior to her transfer to hospital where surgery was performed. [V.T.C.A., Civil Practice & Remedies Code § 74.401\(a\)](#); [Rules of Evid., Rule 702](#).

[2 Cases that cite this headnote](#)

[8] Evidence

 [Due care and proper conduct in general](#)

Pediatrician was qualified to testify as an expert to standard of care applicable to nurse practitioners on health care liability claim (HCLC) involving a failure to ensure that pediatric patient received cardiology consultation for a previously diagnosed enlarged aorta before or after surgery for leg injury sustained in car accident; pediatrician's expert report stated that he had trained and supervised nurse practitioners and was familiar with applicable standard of care, and he specified that he had experience with nurse practitioners in circumstances in which they had been called upon to evaluate a patient with complex medical issues. [V.T.C.A., Civil Practice & Remedies Code § 74.402\(b\)](#); [Rules of Evid., Rule 702](#).

[2 Cases that cite this headnote](#)

[9] Evidence

 [Due care and proper conduct in general](#)

Pediatrician was qualified on health care liability claim (HCLC) to give expert opinion that failure of defendant health care providers to obtain cardiology consultation in connection with a previously diagnosed enlarged aorta at time of surgery on pediatric

patient for leg injury caused her death from ruptured aortic dissection over two years after surgery; allegations of negligence related to failure to refer patient to a pediatric cardiologist, not to treatment given for an enlarged aorta, and pediatrician stated he was familiar with generally available diagnostic and treatment modalities for an enlarged aortic and the consequences of not diagnosing or treating an enlarged aorta. [V.T.C.A., Civil Practice & Remedies Code § 74.403\(a\), 74.351\(r\)\(5\)\(C\); Rules of Evid., Rule 702.](#)

Cases that cite this headnote

[10] Health

🔑 Affidavits of merit or meritorious defense;expert affidavits

To adequately establish causation, an expert report in support of health care liability claim (HCLC) must provide information linking the defendant's purported breach of the standard of care to the plaintiff's injury; report must contain sufficiently specific information to demonstrate causation beyond mere conjecture. [V.T.C.A., Civil Practice & Remedies Code § 74.351\(r\)\(6\).](#)

1 Cases that cite this headnote

[11] Health

🔑 Affidavits of merit or meritorious defense;expert affidavits

Expert report in support of health care liability claim (HCLC) arising from patient's death from ruptured aortic dissection adequately described causation by asserting that patient's aortic enlargement was a progressively worsening condition following its discovery while she was a patient at a Hawai'i hospital, that condition would have treatable had defendants at Texas hospital to which she was transferred arranged for a cardiology consultation before or after her surgery for leg injury, and that such treatment would have prevented patient's ultimate dissection and death over two years

after surgery. [V.T.C.A., Civil Practice & Remedies Code § 74.351\(r\)\(6\).](#)

Cases that cite this headnote

[12] Health

🔑 Affidavits of merit or meritorious defense;expert affidavits

Fact that a plaintiff asserting a health care liability claim (HCLC) may not be able to prove causation at trial does not make an expert report inadequate on causation issue. [V.T.C.A., Civil Practice & Remedies Code § 74.351\(r\)\(6\).](#)

Cases that cite this headnote

[13] Health

🔑 Affidavits of merit or meritorious defense;expert affidavits

Because expert report in support of health care liability claim (HCLC) satisfied statutory requirements as to hospital's alleged vicarious liability for the actions of three nurse practitioners, direct liability claims against hospital could proceed as well. [V.T.C.A., Civil Practice & Remedies Code § 74.351\(r\)\(6\).](#)

2 Cases that cite this headnote

Attorneys and Law Firms

*393 Charles Timothy Reynolds, Rockwall, TX, Laura Ann Russell, Michael K. Hurst, Katherine Khristine Elrich, David Michael Walsh IV, Jeffery Mark Kershaw, Stan Thiebaud, Russell G. Thornton, John A. Scully, Michelle E. Robberson, Eric W. Hines, John B. Kronenberger, Michael A. Yanof, Dallas, TX, for Appellants.

Robert L. Chaiken, Carrie Kitner, Kenneth B. Chaiken, Dallas, TX, for Appellees.

Before Justices FRANCIS, MURPHY, and EVANS.

OPINION

Opinion by Justice [MURPHY](#).

In this interlocutory appeal, appellants challenge the trial court's orders denying their motions to dismiss appellees' health care liability claims for failure to file an expert report complying with the requirements of chapter 74 of the Texas Civil Practice and Remedies Code. *See* [TEX. CIV. PRAC. & REM.CODE § 51.014\(a\)\(9\)](#) (West Supp.2012) (permitting interlocutory appeal from denial of all or part of relief under [section 74.351\(b\) of the Texas Civil Practice and Remedies Code](#)). In a cross-appeal, appellees challenge the trial court's order granting the motion of Children's Medical Center of Dallas (CMC) to dismiss all direct liability claims against it. We affirm the trial court's denial of appellees' motions to dismiss, and sustain appellees' sole issue in their cross-appeal. We therefore affirm the trial court's orders in part and reverse in part.

BACKGROUND

Jessica Haley Durham died on Christmas Day, 2008, from a ruptured [aortic dissection](#). In their operative petition, appellees/plaintiffs contend “Jessica's death was preventable had Defendants appropriately responded to Jessica's aortic issues on a timely basis.” Appellants Copley, Hieber, and Rupp are doctors. Appellants Holland, Kines, and Thornton are nurse practitioners employed by appellant CMC.

Jessica was injured in a car accident on July 26, 2006, on the island of Maui, Hawaii. According to appellees' petition, Jessica “suffered a left distal femur fracture, ***394** right radial and ulna fracture, a ruptured spleen, [pulmonary contusions](#), respiratory failure and lacerations, and chest trauma.” Jessica's father was killed in the accident. After initial treatment at a hospital in Maui, Jessica was transferred to Kapi'olani Medical Center for Women & Children in Honolulu. While at Kapi'olani, Jessica was diagnosed with an enlarged aorta. Her medical records from Kapi'olani reflected this diagnosis, as well as a recommendation for follow-up care by a pediatric cardiologist on her return to Texas. Jessica was treated at Kapi'olani until August 15, 2006, when she was transferred from Kapi'olani to the emergency room at CMC. She was evaluated at CMC and then discharged with instructions to return to the CMC orthopedic clinic on August 21, 2006, for follow-up care for her leg injury.

J. Patrick Hieber, M.D., a pediatrician, was Jessica's primary care doctor from her birth until her death. He communicated with physicians at Kapi'olani prior to Jessica's transfer to CMC. On her arrival at the CMC emergency department, Jessica was evaluated by Timothy J. Rupp, M.D., an emergency room physician, and by Thornton, an orthopedic nurse practitioner. Thornton elicited a medical history that included the recent finding of the enlarged aorta in an orthopedic consultation form completed by appellee Sheri Durham, Jessica's mother. Lawson Copley, M.D., a pediatric orthopedic surgeon, evaluated Jessica upon her return to CMC and was her surgeon and attending physician at all times during her admission to CMC between August 22 and 31, 2006. Copley operated on Jessica's leg on August 22, 2006. Nurse practitioners Holland and Kines worked in the orthopedic unit of CMC. Holland ordered a cardiology consultation for Jessica after Durham reported that doctors in Hawaii had determined that Jessica had an enlarged aorta. This request was cancelled thirty minutes later. An hour later, Kines placed a telephone order for a two-view [chest x-ray](#) to evaluate Jessica's aorta. The radiologist's report stated the x-ray showed no abnormality in Jessica's aorta. Jessica was transferred to Scottish Rite Hospital on August 31, 2006.

It is undisputed that before she died Jessica never received a cardiology consultation or treatment for her enlarged aorta. After her death, appellees filed this suit alleging negligence and other causes of action against appellants. Appellees filed an expert report by Ron Blair, M.D., P.A. to comply with the requirements of chapter 74. *See* [TEX. CIV. PRAC. & REM.CODE § 74.351\(a\)](#) (West 2011) (claimant in health care liability claim shall serve expert report). Appellants filed motions to dismiss appellees' claims for failure to file an expert report that complied with the requirements of chapter 74. *See id.* [§ 74.351\(b\)](#) (defendant may move to dismiss health care liability claim). The trial court granted the motions and gave appellees an opportunity to amend their expert report. *See id.* [§ 74.351\(c\)](#) (trial court may grant one 30-day extension to claimant to cure deficiency in expert report). Appellees filed an amended report, and the appellants filed new motions to dismiss. After hearings, the trial court denied the motions. This appeal followed.

ISSUES

All appellants filed separate briefs in which they argued the trial court erred by denying the motions to dismiss. Their issues are similar. Appellants challenge Blair's qualifications to render an expert opinion describing the causal relationship between any breach by any of the appellants in August 2006 and Jessica's death two years later. They challenge as conclusory and speculative Blair's opinions on the causal relationship between any breach *395 by any of the appellants and Jessica's death. They contend that because appellees have already been given an opportunity to cure the deficiencies in Blair's report, but have not done so, their claims should be dismissed.

In addition, Copley, Kines, Thornton, and Holland challenge Blair's qualifications to testify as to the standards of care applicable to them. CMC also contends the trial court erred by refusing to dismiss the vicarious liability claims against CMC because the expert report as to Kines, Thornton, and Holland, through whom CMC potentially would be liable, was inadequate. In their cross-appeal, appellees contend the trial court abused its discretion in dismissing their direct liability claims against CMC.

STANDARD OF REVIEW

[1] We review a trial court's ruling on a motion to dismiss a health care liability claim for an abuse of discretion. See *Jernigan v. Langley*, 195 S.W.3d 91, 93 (Tex.2006) (per curiam); *Whitfield v. Henson*, 385 S.W.3d 708, 710 (Tex.App.-Dallas 2012, no pet.) (citing *Jelinek v. Casas*, 328 S.W.3d 526, 539 (Tex.2010)). When we review a matter committed to a trial court's discretion, we may not substitute our judgment for that of the trial court. *Whitfield*, 385 S.W.3d at 710. A trial court has no discretion in determining what the law is or applying the law to the facts. *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex.1992) (orig. proceeding).

APPLICABLE LAW

[2] [3] Appellees were required to comply with the expert report requirements of chapter 74 of the Texas Civil Practice and Remedies Code. See *TEX. CIV. PRAC. &*

REM.CODE § 74.351; *Stockton v. Offenbach*, 336 S.W.3d 610, 614 (Tex.2011). Within 120 days of filing an original petition, a claimant must “serve on each party or the party's attorney one or more expert reports” that provide a fair summary of the expert's opinions regarding applicable standards of care; how the claimant's physician or health care provider failed to meet the standards; and the causal relationship between that failure and the injury, harm, or damages claimed. *TEX. CIV. PRAC. & REM.CODE* § 74.351(a), (r)(6); *Key v. Muse*, 352 S.W.3d 857, 859 (Tex.App.-Dallas 2011, no pet.). The Texas Supreme Court has recently described the three elements of a valid expert report. *Certified EMS, Inc. v. Potts*, 392 S.W.3d 625, 630 (Tex.2013). The report “must fairly summarize the applicable standard of care; it must explain how a physician or health care provider failed to meet that standard; and it must establish the causal relationship between the failure and the harm alleged.” *Id.* (citing *TEX. CIV. PRAC. & REM.CODE* § 74.351(r)(6), and *Scoresby v. Santillan*, 346 S.W.3d 546, 556 (Tex.2011)); see also *TTHR Ltd. P'ship v. Moreno*, 56 Tex. Sup.Ct. J. 467, 469 (Tex.2013). “The purpose of the expert report is to deter frivolous claims, not to dispose of claims regardless of their merits.” *Loaisiga v. Cerda*, 379 S.W.3d 248, 258 (Tex.2012) (quoting *Scoresby*, 346 S.W.3d at 554). The expert report “must represent only a good-faith effort to provide a fair summary of the expert's opinions.” *Id.* (quoting *Am. Transitional Care Ctrs. of Tex., Inc. v. Palacios*, 46 S.W.3d 873, 878 (Tex.2001)).

[4] [5] The report must satisfy two purposes to constitute a good-faith effort. See *Potts*, 392 S.W.3d at 630; *Palacios*, 46 S.W.3d at 878. First, the report must inform the defendant of the specific conduct the plaintiff has called into question. *Palacios*, 46 S.W.3d at 879. Second, the report must provide a basis for the trial court to conclude that the claims have merit. *Id.* “A report that merely states *396 the expert's conclusions about the standard of care, breach, and causation does not fulfill these two purposes.” *Id.* An expert's report must explain the basis of the expert's statements to link those conclusions to the facts. *Bowie Mem'l Hosp. v. Wright*, 79 S.W.3d 48, 52 (Tex.2002) (per curiam). “A report need not marshal all the plaintiff's proof, but it must include the expert's opinion on each of the elements identified in the statute.” *Loaisiga*, 379 S.W.3d at 258 (quoting *Palacios*, 46 S.W.3d at 878). In determining whether the expert report represents a good faith effort to comply with the statutory requirements, the trial court's inquiry is limited to the four

corners of the report. *Jelinek*, 328 S.W.3d at 539 (citing *Wright*, 79 S.W.3d at 52).

[6] When a plaintiff sues more than one defendant in connection with a health care liability claim, the expert report also must set forth the standard of care applicable to each defendant, show how that defendant's conduct failed to meet that standard, and explain the causal relationship between each defendant's individual acts and the injury, harm, or damages claimed. See *TEX. CIV. PRAC. & REM.CODE* § 74.351(a), (r)(6); see also *Eichelberger v. St. Paul Med. Ctr.*, 99 S.W.3d 636, 638 (Tex.App.-Dallas 2003, pet. denied) (citing *Palacios*, 46 S.W.3d at 878–79). But “[n]o provision of the Act requires an expert report to address each alleged liability theory.” *Potts*, 392 S.W.3d at 630. A report that satisfies the three elements for a valid expert report, “even if as to one theory only, entitles the claimant to proceed with a suit against the physician or health care provider.” *Id.*

DISCUSSION

Appellants complain that Blair's report is not sufficient to establish a causal connection between their individual actions and Jessica's death. They also challenge his qualifications to opine on causation, and contend his opinions are conclusory. As noted above, the nurse practitioners and Copley also challenge Blair's qualifications to opine as to the relevant standards of care.

Because the only information relevant to our inquiry regarding the adequacy of Blair's report is that information within the four corners of the document, we review the report in some detail. See *Palacios*, 46 S.W.3d at 878. Blair's twelve-page report addresses the role of each appellant in Jessica's treatment. He describes his qualifications, discusses the relevant standards of care and the role of each appellant, and offers his opinions regarding the link between appellants' actions or failures to act and Jessica's death. In sum, Blair opines that because Jessica was not referred to a pediatric cardiologist in Dallas for further evaluation and follow-up despite an express written recommendation to do so by a pediatric cardiologist in Hawaii, Jessica's enlarged aorta was never treated, and she died.

Blair begins the report by stating he was “asked to provide opinions regarding medical care Jessica Durham received

at Children's Medical Center in Dallas following her transfer from Kapi'olani Medical Center in Honolulu, Hawaii.” He explains that “[t]his case involves the standards of care applicable to: (1) a pediatrician; (2) an orthopedic surgeon acting in his role as an attending physician to a hospitalized patient needing, and having, orthopedic surgery; (3) an emergency room physician; and, (4) various nurse practitioners.”

Blair then discusses his qualifications to speak to the standards of care, the breaches of those standards, and the causal relationship between those breaches and Jessica's death. He explains that he has been a pediatrician for twenty years, describes his *397 education and professional work experience, and discusses his qualifications to speak to the standards of care in this case:

I routinely am engaged in caring for children with complex medical issues, both in the outpatient and inpatient settings. I am knowledgeable about the standards of care that are applicable to physicians and nurse practitioners who are involved in receiving a patient who has been transferred from one medical facility to another, which is something I have dealt with throughout my own practice. I also routinely interact with emergency room physicians when they have evaluated or treated patients or when they have requested a consultation from a pediatrician. I am familiar with the standard of care applicable to such physicians when they are involved in a hospital-to-hospital patient transfer, and when a patient has presented in the emergency room with a medical condition that is made known to the emergency room physician, that requires follow up evaluation and care.

Next, Blair discusses his qualifications for opining about the diagnosis and care of an enlarged aorta. He states that he directly diagnoses and treats medical conditions

in children, and explains that “when confronted with certain issues, [he] obtain[s] consultations, diagnoses, or confirmation of [his] own diagnoses, from other physicians having particular specializations.” He explains that while he may not be a specialist in that area of medicine, he is “knowledgeable about the same,” and will “collaborate with the specialists in the development and implementation of diagnostic and treatment strategies.” Specific to the issue here, he states, “[f]or example, I am not a pediatric cardiologist; however, I know what an enlarged aorta is, and I have been involved in the diagnosis and treatment of the same, even if a patient having that condition has been referred to a pediatric cardiologist for more specialized diagnosis and care.” He continues, “[a]s a diagnostic physician, I am familiar with the generally available diagnostic and treatment modalities for an enlarged aorta, and I am familiar with the consequences of not diagnosing or treating an enlarged aorta, in particular one that is progressively enlarging.” He concludes, “I either actively continue to follow my patients while under the consultative or direct care of cardiologists or I participate in the delivery of treatment.”

Next, Blair discusses his regular interaction and consultation with “surgeons and their supporting health care teams” when a patient requires surgical care. He states,

I am familiar with the standard of care applicable to the surgeon and other health care professionals (such as nurse practitioners) working with other surgeons and who are involved in the process of obtaining pre-surgical medical clearance for a patient, or who encounter an unexpected, incidental or reported finding of medical significance that requires further medical management or follow up evaluation and/or care.

He continues by explaining that he routinely interacts with nurse practitioners in a hospital setting, has supervised nurse practitioners in that setting, and “presently, and in the past, [has] served as a training and supervising preceptor for nurse practitioners in the clinical setting.” He describes his knowledge of the standard of care:

I have also interacted as a physician in the setting of a hospital, where ... nurse practitioners have been called upon to evaluate a patient who has complex medical issues or who has encountered a significant medical finding outside of his or her area of practice, and in *398 each of these contexts, and because of my experience in each, I am familiar with the standard of care applicable to their clinical responsibilities in reporting and/or managing such conditions.

He next speaks to his qualifications to discuss the standard of care for pediatricians. He states that he has been involved as a patient's primary care physician “in the process of coordinating or assisting in the coordination of care outside of my practice when circumstances, such as an accident or illness out of town, warrant the same.” He states, “I am familiar with the standard of care applicable to a pediatrician acting within the same or similar circumstances.”

After discussing these qualifications, he articulates the standards of care for each appellant. He then describes in detail how each appellant breached the applicable standard of care. The breaches include failure to review Jessica's medical records from Kapi'olani; failing to advise Jessica's mother and pediatrician of the need for a cardiology consultation; failing to arrange for a cardiology consultation; ordering a [chest x-ray](#), an “inadequate imaging modality,” to evaluate the enlarged aorta; requesting and then canceling a cardiology consultation; and failing to follow up and evaluate Jessica “after her acute care by Children's Medical Center was complete.” Blair concludes the report with a discussion of how the breaches or departures from the standards of care “caused or contributed to Jessica's injuries, and ultimately, her untimely death.”

Qualifications to opine on standards of care

We conclude Blair is qualified to opine as to the standards of care for each of the appellants, including Copley and the nurse practitioners who have specifically raised this

issue. Under [section 74.402\(b\)](#), a person may qualify as an expert witness on the issue of whether a health care provider such as a nurse practitioner departed from accepted standards of medical care if the person (1) is practicing in a field that involves the same type of care or treatment as that delivered by the defendant health care provider, (2) has knowledge of the accepted standards of care for the care or treatment of the illness, injury, or condition involved in the claim, and (3) is qualified on the basis of training or experience to offer an expert opinion regarding those accepted standards of health care. [TEX. CIV. PRAC. & REM.CODE § 74.402\(b\)](#). [Section 74.401](#) sets out similar requirements for an expert witness in a suit against a physician, with the additional requirement that the expert must be a physician who was practicing medicine at the time the claim arose. *See* [TEX. CIV. PRAC. & REM.CODE § 74.401\(a\)](#).

Relying on [Ehrlich v. Miles](#), 144 S.W.3d 620, 624–26 (Tex.App.-Fort Worth 2004, pet. denied), Copley argues that “Dr. Blair fails to demonstrate his qualifications to opine to ... preoperative, intraoperative, and postoperative issues” such as what steps should be taken “to assess a patient's stability or instability for surgery,” and “what should be considered in determining what, if any, consults from other specialties should be obtained.” In [Ehrlich](#), the court concluded a neurologist was not qualified to submit an expert report on the validity of surgical procedures used by a plastic surgeon for a face lift and cheek implants. *Id.* at 625. The court explained that “[n]othing in the expert report ... indicates that [the expert] is familiar with either the surgical procedures used by Appellee for the face lift and implants or with the preoperative procedures used by Appellee to prepare Appellant's face for the face lift and implants.” *Id.* at 625–26.

*399 In [Foster v. Richardson](#), 303 S.W.3d 833, 845 (Tex.App.-Fort Worth 2009, no pet.), the court distinguished its earlier opinion in [Ehrlich](#) in concluding that an internist was qualified to opine regarding an orthopedic surgeon. The court in [Foster](#) explained, “[t]his case is different from [Ehrlich](#) ... because [the expert] has shown experience with the exact issue involved” in the plaintiff's claim against the defendant doctor. *Id.* The report did not “assess blame on Dr. Foster for processes involved with an orthopedic surgery.” *Id.* Instead, the report addressed Dr. Foster's failure to follow orthopedic diagnostic procedures that would have allowed him to

correctly diagnose the plaintiffs broken ankle and thus avoid the continued pain associated with an incorrect diagnosis. *Id.* Because the expert's report established his qualifications to speak to orthopedic diagnostic procedures, he was qualified to provide an opinion on causation. *Id.*

[7] Similarly, Blair does not “assess blame” on Copley “for processes involved with an orthopedic surgery,” *see id.*, but rather speaks to Copley's actions as “an orthopedic surgeon acting in his role as an attending physician to a hospitalized patient needing, and having, orthopedic surgery.” Blair specifically states that as a pediatrician, he regularly interacts with surgeons when his patients require surgical care, participates in ensuring that patients needing surgery are medically clear for it, and consults with surgeons “when they have discovered or become aware that a patient has a medical condition outside of their area of specialization that requires further medical evaluation or consultation.” Blair explains, “I am familiar with the standard of care applicable to the surgeon ... involved in the process of obtaining pre-surgical medical clearance for a patient, or who encounter[s] an unexpected, incidental or reported finding of medical significance that requires further medical management or follow up evaluation or care.” Blair explicitly speaks to Copley's role “first and foremost [as] a medical doctor.” He states that “as a medical doctor, Dr. Copley should or would have an appreciation for the significance of an enlarged aorta, particularly in a case involving a patient who has suffered multiple focal, blunt trauma injuries.” Blair continues, “[Copley] would know that this is a serious and ominous finding and he would fully appreciate the significance of a prior, written recommendation for follow up by a pediatric cardiologist, as set forth in a prior hospitalization discharge summary.”

We conclude that as in [Foster](#), Blair has shown experience with the issue involved in appellees' claims against Copley, that is, the failure to ensure that Jessica received a pediatric cardiology consultation either before or after her orthopedic surgery. We overrule Copley's issue challenging Blair's qualifications to opine on the standard of care applicable to Copley.

[8] We also conclude that Blair is qualified to address the standard of care for the nurse practitioners. In [Baylor Medical Center at Waxahachie v. Wallace](#), 278 S.W.3d 552, 558 (Tex.App.-Dallas 2009, no pet.), we stated, “if

the physician states he is familiar with the standard of care for both nurses and physicians, and for the prevention and treatment of the illness, injury or condition involved in the claim, the physician is qualified on the issue of whether the health care provider departed from the accepted standards of care for health care providers.” As in *Baylor Medical Center*, Blair's report includes his specific statement that he has worked with nurse practitioners and is familiar with the standards of care that apply to nurse practitioners in similar situations. See *id.* at 559. He also states that he has trained *400 and supervised nurse practitioners. He specifies that he has experience with nurse practitioners in the same circumstances as presented here, in “a hospital, where ... nurse practitioners have been called upon to evaluate a patient who has complex medical issues or who has encountered a significant medical finding outside of his or her area of practice.” The trial court did not abuse its discretion when it concluded Blair was qualified to render a report against the nurse practitioner appellants. See *id.* We overrule the issues of Holland, Kines, and Thornton challenging Blair's qualifications to address the standards of care for nurse practitioners.

Qualifications to opine on causation

[9] We also conclude Blair sufficiently established his qualifications to opine regarding causation. Under Chapter 74, a person is qualified to give opinion testimony concerning the causal relationship between the injury, harm, or damages claimed and the alleged departure from the applicable standard of care only if the person is a physician and is otherwise qualified to render opinions on the causal relationship under the Texas Rules of Evidence. TEX. CIV. PRAC. & REM. CODE § 74.403(a); 74.351(r)(5)(C). To be qualified under the rules of evidence, an expert witness must have “knowledge, skill, experience, training or education regarding the specific issue before the court.” See TEX. R. EVID. 702. As stated in *Estorque v. Schafer*, 302 S.W.3d 19, 26 (Tex.App.-Fort Worth 2009, no pet.), “[t]he proper inquiry in assessing a doctor's qualifications to submit an expert report is not his area of expertise but his familiarity with the issues involved in the claim before the court.”

Appellants contend that because Blair is not an expert in the treatment of an enlarged aorta, he is not qualified to offer an opinion that failure to treat Jessica's enlarged aorta caused her death from an aortic dissection. Blair

concedes he is not a pediatric cardiologist. But he explains in his report that he “know[s] what an enlarged aorta is” and has “been involved in the diagnosis and treatment of the same.” He states that he is familiar with “the generally available diagnostic and treatment modalities for an enlarged aorta,” and “the consequences of not diagnosing or treating an enlarged aorta, in particular one that is progressively enlarging.” He explains that even when a patient having an enlarged aorta has been referred to a pediatric cardiologist for consultation or treatment, he actively continues to follow the patient or participates in the delivery of treatment. As will be discussed below, Blair's report further details his knowledge of the treatment available for an enlarged aorta and the consequences of failing to treat the condition.

We also observe that appellees' negligence issues against appellants relate to appellants' failure to refer Jessica to a pediatric cardiologist for treatment, not any injury relating to treatment they provided for an enlarged aorta. See *Estorque*, 302 S.W.3d at 26 (specialized branches of medicine not implicated by defendant's alleged negligence in failing to refer plaintiff to specialists for problems revealed in CT scan). Blair explains that he is routinely “engaged in caring for children with complex medical issues” and states he has “dealt with throughout my own practice” the transfer and receiving of patients from one medical facility to another. He explains he is familiar with the standards of care relating to hospital-to-hospital transfers such as Jessica's, as well as the standards of care for health care professionals “who encounter an unexpected, incidental or reported finding of medical significance that requires further medical management or follow up evaluation and/or care.” And for each appellant, *401 Blair identified the action that should have been taken and described the circumstances under which the opportunity arose for each appellant to ensure that Jessica obtained a consultation with a pediatric cardiologist.

We discussed whether an expert was qualified to render opinions on causation in *Pediatric Medical Group, Inc. v. Robinson*, 352 S.W.3d 879, 887–89 (Tex.App.-Dallas 2011, no pet.). In *Pediatric*, the plaintiffs alleged that a premature infant had become blind because his medical providers failed to conduct timely follow-up examinations or provide treatment for retinopathy of prematurity (ROP). See *id.* at 882. The defendants challenged the qualifications of a neonatologist to offer an opinion about causation. *Id.* at 887. They argued that her training

and experience as a neonatologist did not “provide her sufficient expertise to opine that the cause of [the infant's] blindness was the untimely diagnosis and treatment for ROP.” *Id.* They also argued that her report failed to establish that “she had knowledge, either from experience or study, concerning the effectiveness of ROP treatments in general or in [the infant's] particular case,” *Id.* We disagreed:

[W]e conclude [the expert's] report establishes her qualifications to opine on causation. While she is not a pediatric ophthalmologist specializing in the diagnosis and treatment of ROP, the causation issue here relates to the duty of the neonatologists to have recognized the potential for Ruben to develop ROP, to have worked closely with [the doctor who first examined Ruben's eyes] regarding Ruben's treatment, to have recognized the potential harm for a delay in follow-up appointments, and to have taken the appropriate actions to ensure Ruben was seen by an appropriate doctor during the critical time frame. Based on her treatment of small preterm babies like Ruben, her experience in requesting ophthalmologic consultations to screen preterm babies for ROP, and her familiarity with implementing policies and procedures to ensure proper care for babies at risk for ROP, she is qualified to provide her expert opinion.

Id. at 889.

We also addressed an expert's qualifications to opine on causation in *Mosely v. Mundine*, 249 S.W.3d 775, 779–80 (Tex.App.-Dallas 2008, no pet.). In *Mosely*, Mundine was evaluated in a hospital emergency room by a doctor after a car accident. *Id.* at 777. The doctor ordered a chest x-ray and evaluated it as normal. But a radiologist also reviewed the chest x-ray, noted a one-centimeter-sized nodule on Mundine's upper right lung, and informed the emergency department of the abnormality. Mundine was not notified. About two years later, another visit

to the hospital revealed a five- to six-centimeter-sized mass on her upper right lung that required surgery and chemotherapy. *Id.* Mundine's expert opined that “[h]ad this cancer been detected in [,] the likelihood of survival for Mrs. Mundine would have been significantly greater with a much less invasive treatment protocol.” *Id.* at 780. The doctor argued the expert was not qualified to render an opinion as to causation because he was an emergency physician and internist, not an oncologist. *Id.* at 779. We rejected this argument, explaining that “[t]he conduct causing the Mundines' injuries related to the ability of an emergency room physician to interpret a routine chest x-ray and identify an abnormality, not the diagnosis and treatment of cancer.” *Id.* We concluded, “[t]he record shows the trial court could have concluded the Mundines met their burden to prove [the expert] had the knowledge, skill, experience, training, or education regarding that specific *402 emergency room physician's scope of practice.” *Id.*

Appellants' challenges to Blair's qualifications to opine as to causation are very similar to those we addressed in *Pediatrix* and in *Mosely*. In both cases, as here, the expert in question was not a specialist in the disease or condition suffered by the patient. See *Pediatrix*, 352 S.W.3d at 889 (expert was neonatologist, not pediatric ophthalmologist, where patient suffered ROP); *Mosely*, 249 S.W.3d at 779 (expert was emergency physician and internist, not oncologist, where patient suffered cancer). In both cases, as here, the expert addressed failures to recognize potential harm and take appropriate actions. See *Pediatrix*, 352 S.W.3d at 889 (defendants should have recognized potential harm of delay in scheduling follow-up appointments); *Mosely*, 249 S.W.3d at 779 (failure to identify abnormality in routine x-ray). In both cases, as here, the expert opined that the delay caused by the defendants' failures resulted in greater injury to the patient. See *Pediatrix*, 352 S.W.3d at 889 (lack of treatment for ROP caused blindness); *Mosely*, 249 S.W.3d at 780 (expert opined that delayed diagnosis of cancer required invasive and aggressive treatment and shortened life expectancy). Here, as in *Pediatrix* and *Mosely*, the record is sufficient to establish Blair's qualifications to opine on causation. See *Pediatrix*, 352 S.W.3d at 889; *Mosely*, 249 S.W.3d at 780. We overrule appellants' issues challenging Blair's report on this ground.

Adequacy of report as to causation

[10] Appellants assert that Blair's report was impermissibly speculative and conclusory in describing any causal relationship between any breach by any appellant and Jessica's death. To meet the requirements of chapter 74, Blair's report must "provide information linking the defendant's purported breach of the standard of care to the plaintiff's injury." *Fagadau v. Wenkster*, 311 S.W.3d 132, 138 (Tex.App.-Dallas 2010, no pet.). The report "must contain sufficiently specific information to demonstrate causation beyond mere conjecture." *Id.*

[11] Appellants contend Blair fails to connect Jessica's 2006 condition, an enlarged aorta, with her death two years later from a different condition, a [ruptured aorta](#). Blair states, "it is my opinion that Jessica's aortic enlargement was a progressively worsening condition following its being discovered while she was a patient at Kapi'olani Medical Center.... [T]he [aortic rupture](#) ultimately occurred due to lack of intervention and available care. It is my opinion that the initial [dilatation of her aorta](#) and the apparent progressive worsening of that condition over time would have been treatable medically initially, and surgically subsequently, as the aorta continued to dilate." He opines that each appellant's breach of the standards of care, which he specifically details, caused or contributed to "the ultimate outcome of the [rupture of the aorta](#), and the otherwise preventable, untimely death of Jessica Durham." He explains the actions that should have been taken: "If a pediatric cardiology consultation and related evaluation and medical treatment (including but not limited to drug therapy and surgery) had been provided to Jessica or arranged for by any of the [appellants] ... all of whom were in a position to deliver or arrange for the timely delivery of same, the enlarged aorta would have been treatable, and Jessica's death would have been prevented." He explains the nature of the treatment that should have been provided: "if ... [appellants] had requested or arranged for consultation by a pediatric cardiologist, I am certain that *403 an echocardiographic study (and/or an MRI) would have been performed and appropriate follow up and potential treatment could and almost certainly would have been rendered to forestall further aortic dilation, mitigating the risk of rupture or tamponade, or surgical intervention (such as an aortic graft) to replace the [dilated segment](#) of the aorta, would have occurred,

which ultimately is the standard of care for children with progressive aortic dilation...." He concludes, "[t]his type of treatment and intervention (among others that might be available), in my opinion and in my experience, would have prevented Jessica's ultimate dissection and subsequent death."

[12] We conclude that Blair's report provides adequate information linking the appellants' purported breaches of the standards of care to Jessica's injury. See *Fagadau*, 311 S.W.3d at 138. Blair adequately explains the basis of his statements and links his conclusions to the facts. See *Bowie Mem'l Hosp.*, 79 S.W.3d at 52. He also links appellants' conduct to the harm alleged. See *Potts*, 392 S.W.3d at 630. He states that because Jessica's enlarged aorta was never treated, it ruptured and she died. He opines that the failure to obtain treatment was the result of appellants' breaches of the applicable standards of care. At trial, appellees may be unable to prove causation. Other experts may provide opposing opinions to support negative findings by a jury. But "the fact that [appellees] may not prove causation at trial does not make [Blair's] report inadequate." See *Fagadau*, 311 S.W.3d at 139. Blair's report is not conclusory. He describes what each appellant should have done and what happened because he or she failed to do it. *Id.* As we stated in *Fagadau*, "[a]s such, the report clearly constitutes a good faith effort to provide a fair summary of [the expert's] opinions on causation." *Id.* Blair states that he offers his opinions "with a reasonable degree of medical certainty and/or reasonable degree of medical probability," and opines that Jessica's "ultimate aortic dissection and subsequent death" would not have occurred absent appellants' breaches of the standards of care. We conclude the report sufficiently informs appellants of the specific conduct appellees have called into question. See *Palacios*, 46 S.W.3d at 879. We further conclude that the report provides a basis for the trial court to conclude that appellees' claims have merit. See *id.* We overrule appellants' issues.

Cross Appeal

[13] In one issue, appellees complain that the trial court erred by dismissing their direct claims against CMC because Blair's report "provided a fair and adequate summary of the deviations from the appropriate standard

of care” by CMC. The trial court's order granting CMC's motion to dismiss these claims recited:

Dr. Blair's opinions on pages 8 and 10 of his September 27, 2011 report allege multiple deviations from the appropriate standard of medical care by Children's Medical Center of Dallas. His opinions, though, are conclusory, with no attempt to explain the facts upon which he uses to arrive at these opinions. This is not the “fair summary” required of a Chapter 74 expert report. Dr. Blair's cursory treatment of the claims against Children's Medical Center of Dallas differs significantly from the more factually-detailed opinions he gave regarding other Defendants in this cause.

The trial court's order, however, provided that “[t]he respondeat superior claims of Plaintiffs against Defendant Children's Medical Center of Dallas are not affected by this dismissal.”

Since the date of the trial court's order, the Texas Supreme Court has issued opinions *404 in *Potts* and in *TTHR*. See *Potts*, 392 S.W.3d 625; *TTHR*, 56 Tex. Sup.Ct. J. 467. In these cases, the court “held that an expert report satisfying the requirements of the [Texas Medical Liability Act] as to a defendant, even if it addresses only one theory of liability alleged against that defendant, is sufficient for

the entire suit to proceed against the defendant.” *TTHR*, 56 Tex. Sup.Ct. J. at 467 (citing *Potts*, 392 S.W.3d at 630). Because Blair's report satisfied the requirements of chapter 74 as to CMC's vicarious liability for the allegedly negligent actions of the nurses, Holland, Kines, and Thornton, appellees' direct liability claims against CMC may proceed as well. See *id.* (because plaintiff's expert reports satisfied statutory requirements as to her claim that hospital was vicariously liable for actions of nurses, plaintiff's direct liability claims could proceed as well). In light of the court's holdings in *Potts* and *TTHR*, we sustain appellees' sole issue in its cross appeal, and reverse the portion of the trial court's order dismissing appellees' claims of negligence against CMC.

CONCLUSION

We overrule appellants' issues asserting that the trial court erred by denying their motions to dismiss. We sustain appellees' issue in their cross-appeal. We affirm the trial court's order of May 1, 2012, denying the motions to dismiss of nurses Holland, Thornton, and Kines, and doctors Rupp, Hieber, and Copley. We affirm the trial court's order of May 4, 2012, insofar as it denies CMC's motion to dismiss appellees' vicarious liability claims, and reverse the portion of the order granting CMC's motion to dismiss appellees' direct liability claims.

All Citations

402 S.W.3d 391

222 S.W.3d 79
Court of Appeals of Texas,
Eastland.

Mattie ARMES, Appellant,
v.
Jess and Peggy THOMPSON d/b/a J
& P Thompson Enterprises, Appellees.

No. 11-05-00209-CV.
|
April 20, 2006.

Synopsis

Background: Action alleging premises liability was filed, in name of deceased pedestrian, against business owner. The 385th District Court, Midland County, [Robin Malone Darr, J.](#), granted defendant's motion to dismiss for want of jurisdiction. Appeal was taken.

Holdings: The Court of Appeals, [Rick Strange, J.](#), held that:

[1] pedestrian, upon her death, lacked standing to assert a premises liability claim, and

[2] post-petition suggestion of death did not relate back to filing of petition.

Affirmed.

West Headnotes (17)

[1] Appeal and Error

🔑 [Cases Triable in Appellate Court](#)

The appellate court reviews an order, on a motion to dismiss for want of jurisdiction, de novo.

[Cases that cite this headnote](#)

[2] Action

🔑 [Persons entitled to sue](#)

A party has “standing” to sue when it is personally aggrieved, regardless of whether it is acting with legal authority in bringing the suit.

[1 Cases that cite this headnote](#)

[3] Parties

🔑 [Capacity and interest in general](#)

A party has “capacity” to sue when it has the legal authority to act, regardless of whether it has a justiciable interest in the controversy.

[2 Cases that cite this headnote](#)

[4] Action

🔑 [Persons entitled to sue](#)

Appeal and Error

🔑 [Capacity or right to sue or defend](#)

Standing is jurisdictional, and lack of standing may be raised for the first time on appeal.

[Cases that cite this headnote](#)

[5] Appeal and Error

🔑 [Capacity or right to sue or defend](#)

Parties

🔑 [Necessity and mode of objection, and effect of failure to object in general](#)

Lack of capacity to sue is a procedural defense that must be raised by a verified pleading in the trial court; the issue cannot be raised for the first time on appeal. [Vernon's Ann.Texas Rules Civ.Proc., Rule 93\(1\)](#).

[1 Cases that cite this headnote](#)

[6] Executors and Administrators

🔑 [Capacity to sue and be sued in general](#)

Infants

🔑 [Right or capacity to sue and be sued](#)

Examples of parties with standing to sue, but not capacity to sue, are minors and decedent's estates.

[1 Cases that cite this headnote](#)

[7] Infants

🔑 Right or capacity to sue and be sued

Infants

🔑 Purpose, grounds, and necessity

Minors may not sue or be sued, but must appear in court through a legal guardian, a next friend, or guardian ad litem.

1 Cases that cite this headnote

[8] Executors and Administrators

🔑 Capacity to sue and be sued in general

A decedent's estate is not a legal entity and may not properly sue or be sued as such.

2 Cases that cite this headnote

[9] Executors and Administrators

🔑 Personal or representative capacity

In general, only the estate's representative has the capacity to act on behalf of the estate.

2 Cases that cite this headnote

[10] Death

🔑 Survival of right of action of person injured

At common law, a person's personal injury claims did not survive his or her death.

Cases that cite this headnote

[11] Death

🔑 Survival of right of action of person injured

The survival statute, which authorizes heirs, legal representatives, or the estate to bring an action on behalf of the decedent, abrogates the common law rule that a person's personal injury claim does not survive his or her death. V.T.C.A., Civil Practice & Remedies Code § 71.021(b).

Cases that cite this headnote

[12] Death

🔑 Survival of right of action of person injured

The survival statute does not create a new cause of action; it is merely a mechanism to prevent a decedent's common law action from being abated because of his or her death.

Cases that cite this headnote

[13] Action

🔑 Persons entitled to sue

Parties

🔑 Capacity and interest in general

A plaintiff must have both standing and capacity to bring a lawsuit.

Cases that cite this headnote

[14] Death

🔑 Persons Entitled to Sue

Death

🔑 Heirs and next of kin

Pedestrian, upon her death, lacked standing to assert a premises liability claim against business owner; the deceased pedestrian no longer represented a legal entity for purposes of filing suit, and her claim passed to her heirs or devisees, subject to her estate's administration.

2 Cases that cite this headnote

[15] Death

🔑 Form and requisites in general

To bring a survival action, a party must plead the elements of the decedent's cause of action and his authority to prosecute the suit on the estate's behalf.

1 Cases that cite this headnote

[16] Limitation of Actions

🔑 Want of jurisdiction

Assuming rule regarding filing of suggestion of death could be applied in situation in which plaintiff died before rather than after suit was filed, and assuming that suggestion of death

could be construed as motion to substitute parties, suggestion of death, filed in premises liability action, did not relate back to original petition filed in name of deceased pedestrian, so as to create jurisdiction; original petition was a nullity because the deceased pedestrian had lacked standing to bring a premises liability action. [V.T.C.A., Civil Practice & Remedies Code § 16.068](#); [Vernon's Ann.Texas Rules Civ.Proc., Rule 151](#).

3 Cases that cite this headnote

[17] Limitation of Actions

🔑 Want of jurisdiction

The relation-back doctrine, which allows an amendment or supplement to pleadings without being subject to a plea of limitation as long as the amendments are not based on new, distinct, or different transactions, cannot retroactively create personal jurisdiction. [V.T.C.A., Civil Practice & Remedies Code § 16.068](#).

1 Cases that cite this headnote

Attorneys and Law Firms

*81 [Franklin H. McCallum](#), Midland, for appellant.

Johnna Bonds McArthur, [Russell C. Beard](#), Russell C. Beard, P.C., Abilene, for appellees.

Panel consists of WRIGHT, C.J., and [McCALL](#), J., and [STRANGE](#), J.

OPINION

[RICK STRANGE](#), Justice.

This is a survival action alleging a premises liability claim. The trial court dismissed the case for want of jurisdiction finding that the plaintiff lacked standing. We affirm.

Background Facts

On August 30, 2002, Mattie Armes tripped and fell over a concrete parking stop outside the Bingo Barn, a

business owned by Jess and Peggy Thompson d/b/a J & P Enterprises (appellees). She died almost two years later on July 18, 2004, from an unrelated illness. On August 27, 2004, a lawsuit was filed in Armes's name against the appellees. The petition did not indicate that Armes was deceased. Discovery for Armes's past and *future* medical expenses, physical pain and mental suffering, mental anguish, physical impairment, and loss of household services was prayed for, and punitive damages were sought.

Armes's daughter, Cindy Luna, was appointed temporary administratrix for her mother's estate on October 26, 2004. Appellant's counsel filed a suggestion of death on November 10, 2004, on behalf of Luna and requested that she be named as the plaintiff and that the suit proceed in her name. The appellees subsequently filed a motion to dismiss for want of jurisdiction contending that the original petition purportedly filed by Armes did not invoke the trial court's jurisdiction because it was not filed by Armes's heirs or her estate's personal representative. The trial *82 court granted that motion and dismissed Armes's litigation.

Issues

[1] Appellant contends that the trial court erred when it held that the decedent did not have standing to assert the claims made in the original petition. We review an order on a motion to dismiss de novo. See [Anderson v. City of San Antonio](#), 120 S.W.3d 5, 7 (Tex.App.-San Antonio 2003, pet. denied).

Standing versus Capacity

[2] [3] Appellant argues that the trial court confused standing with capacity and that it had jurisdiction because the decedent had standing but not capacity. A party has *standing* when it is personally aggrieved, regardless of whether it is acting with legal authority; a party has *capacity* when it has the legal authority to act, regardless of whether it has a justiciable interest in the controversy. [Nootsie, Ltd. v. Williamson County Appraisal Dist.](#), 925 S.W.2d 659, 661 (Tex.1996).

[4] [5] Standing is jurisdictional and may be raised for the first time on appeal. [Tex. Ass'n of Bus. v. Tex.](#)

Air Control Bd., 852 S.W.2d 440, 443–45 (Tex.1993). Capacity, however, is a procedural defense and must be raised by a verified pleading in the trial court. See *TEX.R. CIV. P.* 93(1); *Sixth RMA Partners, L.P. v. Sibley*, 111 S.W.3d 46, 56 (Tex.2003) (an opposing party's lack of capacity can be waived by the failure to properly raise the issue in the trial court).

[6] [7] [8] [9] Common examples of parties with standing, but not capacity, are minors and decedent's estates. Minors may not sue or be sued but must appear in court through a legal guardian, a next friend, or guardian ad litem. See *Sax v. Votteler*, 648 S.W.2d 661, 666–67 (Tex.1983) (minors have no right to bring an action on their own behalf unless their disability has been removed). Similarly, a decedent's estate is not a legal entity and may not properly sue or be sued as such. *Price v. Estate of Anderson*, 522 S.W.2d 690, 691 (Tex.1975). In general, only the estate's representative has the capacity to act on behalf of the estate. *Frazier v. Wynn*, 472 S.W.2d 750, 752 (Tex.1971).¹

Standing to File A Survival Claim

[10] [11] [12] At common law, a person's personal injury claims did not survive their death. *Rose v. Doctors Hosp.*, 801 S.W.2d 841, 845 (Tex.1990). The Texas Legislature abrogated this rule with a survival statute that authorizes heirs, legal representatives, or the estate to bring an action on behalf of the decedent. *TEX. CIV. PRAC. & REM.CODE ANN.* § 71.021(b) (Vernon 1997). The statute does not create a new cause of action. *Kramer v. Lewisville Mem'l Hosp.*, 858 S.W.2d 397, 404 (Tex.1993). It is merely a mechanism to prevent a decedent's common law action from being abated because of their death. *Russell v. Ingersoll–Rand Co.*, 841 S.W.2d 343, 345 (Tex.1992).

Appellant concedes that Armes did not have capacity to file suit and that the estate needed a representative to act on its behalf. But appellant contends that this was cured by the suggestion of death that Luna, as temporary administratrix of the estate, filed. The appellees argue that the survival statute vests the estate with standing and that a deceased person has no justiciable interest.

*83 The Texas Supreme Court recently addressed questions of standing and capacity in survival actions

in *Austin Nursing Ctr., Inc. v. Lovato*, 171 S.W.3d 845 (Tex.2005), and *Lorentz v. Dunn*, 171 S.W.3d 854 (Tex.2005). In *Lovato*, Pauline Wilson Lovato filed a survival action on behalf of her mother and asserted that she was the personal representative of her mother's estate. Her petition was filed within the statute of limitations, but she was not actually appointed independent executor until after the expiration of the statute of limitations. In *Lorentz*, Cynthia Lorentz filed a survival action on behalf of her sister. Lorentz asserted that she was administrator of her sister's estate. Her petition to be appointed administrator was, however, still pending in the county court; and she was not appointed administrator until after the expiration of limitations.

In both cases, the supreme court found that the plaintiff had standing and, therefore, that the trial courts had jurisdiction. *Lovato*, 171 S.W.3d at 853; *Lorentz*, 171 S.W.3d at 856. The issue was whether Lovato and Lorentz had capacity. Neither had capacity at the time they filed suit because neither had been authorized to act on behalf of the estate. In each instance, however, they acquired that authority within a reasonable time, and the court held that this authority related back to the original petitions. *Lovato*, 171 S.W.3d at 853; *Lorentz*, 171 S.W.3d at 856.

Both parties argue that the supreme court's decisions compel a finding in their favor. There are, however, critical factual distinctions between *Lovato* and *Lorentz* and the facts of this case. In *Lovato* and *Lorentz*, the original petitions clearly indicated that the injured person had died and that the case was being prosecuted by a representative of the estate. Here, the original petition was presumably filed by Armes.² There was no indication in the petition that Armes had died. In fact, by seeking future damages, the petition left the definite impression that Armes was very much alive and still suffering an ongoing injury because of her accident.

Under the Probate Code, when an individual passes away an estate is created. The estate is distinct from the individual. *Nguyen v. Morales*, 962 S.W.2d 93, 95 (Tex.App.-Houston [1st Dist.] 1997, no pet.). The estate includes all of the real and personal property, such as any actual or potential cause of action, owned by the decedent. *TEX. PROB.CODE ANN.* § 3(l), (z) (Vernon 2003). However, title to the property vests immediately in the decedent's heirs or devisees. *TEX. PROB.CODE ANN.* § 37 (Vernon 2003); see *Welder v. Hitchcock*, 617 S.W.2d

294, 297 (Tex.Civ.App.-Corpus Christi 1981, writ ref'd n.r.e.)(there is no shorter interval of time than between the death of a decedent and the vesting of his estate in his heirs). While title vests in the heirs or devisees, this is subject to the decedent's debts; and the personal representative retains legal title, possession, and control for the purpose of administering the estate. STANLEY M. JOHANSON, JOHANSON'S TEXAS PROBATE CODE ANN. § 37 (2005 ed.)(commentary on Section 37).

[13] [14] [15] A plaintiff must have both standing and capacity to bring a lawsuit. *Coastal Liquids Transp. v. Harris County Appraisal Dist.*, 46 S.W.3d 880, 884 (Tex.2001). When Armes passed away, she no longer represented a legal entity for purposes of filing suit and, therefore, did not have standing to assert a claim. *Stinson v. King*, 83 S.W.2d 398, 399 (Tex.Civ.App.-Dallas 1935, writ dismiss'd) ("suits can be maintained by and against only parties *84 having an actual or legal existence"). Any claim she owned before her death passed to her heirs or devisees, subject to her estate's administration. Because Armes individually had no standing and because the suit was purportedly filed on her behalf individually, the original petition did not invoke the trial court's jurisdiction.³

Does The Suggestion Of Death Relate Back?

[16] Appellant argues that any pleading deficiency was merely procedural and was cured with the suggestion of death. In effect, appellant asks us to treat the original petition filed in Armes's name individually as if it was filed on behalf of Armes's estate. The relation-back doctrine allows an amendment or supplement to pleadings without being subject to a plea of limitation, as long as the amendments are not based on new, distinct, or different transactions. TEX. CIV. PRAC. & REM.CODE ANN. § 16.068 (Vernon 1997).

[17] The relation-back doctrine has been applied to cure capacity issues,⁴ but it cannot retroactively create personal jurisdiction. The supreme court allowed the alleged personal representatives in *Lovato* and *Lorentz* to obtain the probate court's authority to represent the estates after they had filed litigation on behalf of the estates. That does not mean, however, that subsequent

pleadings can give the trial court jurisdiction over new parties retroactive to the original filing of the suit. See *Covington v. Sisters of Charity of the Incarnate Word*, 179 S.W.3d 583, 587–88 (Tex.App.-Amarillo 2005, pet. denied). In *Covington*, the decedent's sister filed a medical malpractice action individually and on behalf of the estate. The defendants challenged her standing and capacity, and she filed an amended petition adding the decedent's administrator as a plaintiff. *Id.* at 584–85. The trial court dismissed the suit; and the court of appeals affirmed, finding that the amended pleading did not relate back to the original petition. *Id.* at 587–88. The court distinguished *Lovato* and *Lorentz* by noting that they involved changes in the allegations of the capacity of the original plaintiff, not the addition of a new plaintiff. *Id.* at 588; see also *Stewart v. Hardie*, 978 S.W.2d 203, 207 (Tex.App.-Fort Worth 1998, pet. denied)(husband, who sued as community survivor of deceased spouse's estate, was not proper party to bring survival action and, therefore, dismissal of survival claim was appropriate).

*85 We believe a similar situation exists here. Because Armes passed away before this suit was filed, she did not have standing to assert a claim; and the original petition filed in her name individually did not invoke the trial court's jurisdiction. Appellant's reliance on TEX.R. CIV. P. 151 and the suggestion of death is questionable because the rule's language suggests that it applies when the plaintiff dies *after* suit is filed rather than before. Even if it is applicable and even if we construe the suggestion of death as a motion to substitute parties, Luna's suggestion of death did not relate back to the original petition because that pleading was a nullity.

Conclusion

The trial court correctly determined that it did not have jurisdiction. Armes individually did not have standing to assert a claim; and, consequently, any subsequent pleading would not relate back. Appellant's issue is overruled. The judgment of the trial court is affirmed.

All Citations

222 S.W.3d 79

Footnotes

- 1 There are exceptions to this requirement, such as when no administration is pending and none is necessary. See *Shepherd v. Ledford*, 962 S.W.2d 28, 31–32 (Tex.1998). Appellant does not rely upon any exception to the general rule.
- 2 The suit was filed approximately five weeks after Armes passed away. The record established that the suit was actually filed at Luna's request.
- 3 Armes's estate, in contrast, had standing, *Lovato*, 171 S.W.3d at 850, but not capacity. *Henson v. Estate of Crow*, 734 S.W.2d 648, 649 (Tex.1987)(the estate is not a legal entity and cannot sue as such). The Probate Code allows executors and administrators to prosecute suits such as a survival claim to recover estate property for the benefit of the heirs and devisees. TEX. PROB.CODE ANN. § 233A (Vernon 2003). This gives the representative the capacity to assert a survival claim on behalf of the estate. *Lorentz*, 171 S.W.3d at 856. To bring a survival action, then, a party must plead the elements of the decedent's cause of action *and* his authority to prosecute the suit on the estate's behalf. *Coffey v. Johnson*, 142 S.W.3d 414, 417 (Tex.App.-Eastland 2004, no pet.).
- 4 See, e.g., *Lovato*, 171 S.W.3d at 845; *Lorentz*, 171 S.W.3d at 854; *Price v. Estate of Anderson*, 522 S.W.2d 690 (Tex.1975) (defendant was dead at the time suit was filed, but limitations were tolled because the petition named the estate as the defendant and the estate's representative was served); *Davis v. Preston*, 118 Tex. 303, 16 S.W.2d 117 (1929)(widow's petition filed individually to recover damages resulting from her husband's death properly commenced suit as regards to limitations—even though she did not become the estate's administratrix until after limitations—because she was always the real party in interest).

962 S.W.2d 93
Court of Appeals of Texas,
Houston (1st Dist.).

The Estate of Thuy Nhu NGUYEN, Than Dinh
Nguyen, Tham Thi Nguyen, Vu Nguyen, Hung
Huy Nguyen, and Huy Tuong Nguyen, Appellants,
v.
Dan MORALES, State Attorney
General, State of Texas, Appellee.

No. 01-96-01249-CV.
|
Nov. 13, 1997.

Family of girlfriend whose death was ruled homicide in relation to boyfriend's suicide filed suit for compensation under Crime Victim's Compensation Act in name of deceased's estate. Attorney General moved to dismiss claiming individual claimants were not properly named as required, and family amended suit to name beneficiaries as parties. The 152nd District Court, Harris County, [Harvey Brown, J.](#), rejected amendment as untimely and dismissed for want to jurisdiction and denied family's motion for new trial. Family appealed. The Court of Appeals, [Taft, J.](#), held that: (1) as a matter of first impression, an estate is not a claimant under the Act, and (2) heirs' attempts to cure defect by joining as parties after expiration of statutory limit was nonjoinder, not misjoinder, and dismissal was proper.

Affirmed.

West Headnotes (7)

[1] Executors and Administrators

🔑 Capacity to sue and be sued in general

An estate is not a legal entity and cannot sue or be sued as such.

1 Cases that cite this headnote

[2] Executors and Administrators

🔑 Parties

Suit on behalf of a decedent's estate is a nullity unless the estate's personal representative appears in or participates in suit.

1 Cases that cite this headnote

[3] Statutes

🔑 Language and intent, will, purpose, or policy

Statutes

🔑 Construction as written

Court of Appeal's duty is to construe a statute as written and ascertain legislature's intent from act's language.

Cases that cite this headnote

[4] Statutes

🔑 Giving effect to statute or language; construction as written

When the language of a statute is unambiguous, it is given effect according to its terms.

Cases that cite this headnote

[5] Criminal Law

🔑 Civil liabilities to persons injured; reparation

Provisions of Crime Victim's Compensation Act applicable at time compensation was sought by decedent's estate excluded estates by plain language of Act which defined "claimant" as a victim or an authorized person acting on behalf of a victim and throughout Act, word "individual" was repeatedly used to describe who may qualify for compensation; even though estate was neither specifically included or excluded as a claimant, estate cannot be an individual. V.A.T.S. Probate Code, § 37; Vernon's Ann.Texas C.C.P. art. 56.31.

1 Cases that cite this headnote

[6] Criminal Law

🔑 Civil liabilities to persons injured;
reparation

By definition, an “estate” cannot be an “individual” under Crime Victim's Compensation Act and is not a claimant, as an estate is the total property a decedent owns at death and upon death, the property owned by the decedent immediately vests in the heirs. [Vernon's Ann.Texas C.C.P. art. 56.31](#); [V.A.T.S. Probate Code, § 37](#).

2 Cases that cite this headnote

[7] **Criminal Law**

🔑 Civil liabilities to persons injured;
reparation

Dismissal of attempt to cure pleading defect by joining heirs as parties after expiration of statutory 20-day limit was proper as rules concerning nonjoinder, not misjoinder, applied, where original petition under Crime Victim's Compensation Act incorrectly named estate as only plaintiff in caption, estate could not be claimant under Act, and even though body of pleading made reference to heirs who sought to cure defect by joinder, pleading referred to heirs in addition to plaintiff and did not individually identify them or address grounds upon which they sought compensation. [Vernon's Ann.Texas C.C.P. art. 56.31](#).

Cases that cite this headnote

Attorneys and Law Firms

*94 [James F. Andrews](#), Houston, for appellants.

Lucy E. Del Prado Dietz, Austin, for appellee.

Before [TAFT](#), [ANDELL](#) and [PRICE](#) *, JJ.

OPINION

[TAFT](#), Justice.

In this appeal, we are asked to decide whether an estate is a proper claimant under the Texas Crime

Victim's Compensation Act,¹ and therefore entitled to compensation under the Act. The trial court held it was not, and dismissed the appeal of a previous administrative hearing for want of jurisdiction. We affirm.

Facts

Thuy Nhu Nguyen and her boyfriend were found dead on January 6, 1995, lying intertwined on a bed. A single gunshot, fired through the boyfriend's mouth and through Nguyen's head as it rested atop his, killed them both. The police officer dispatched to the scene found a suicide note written by the boyfriend. The Houston police department concluded the two had committed suicide, but the medical examiner ruled Nguyen's death a homicide. After the Attorney General (AG) denied compensation to the family, they filed suit in the name of the deceased's estate. Seven months later, the AG moved to dismiss, because the individual claimants were not properly named within 20 days after exhausting their administrative remedies, as required by the Act.² The Nguyen family amended the suit to name the beneficiaries as parties, but the trial court rejected the amendment as untimely and dismissed the suit for want of jurisdiction. The trial court denied the family's motion for new trial, and this appeal ensued.

Is an Estate a “Claimant” Under the Act?

[1] [2] The family contends the estate was a proper claimant. They further argue that the trial court erred in its analogous application of law governing worker's compensation and wrongful death suits. The AG argues that interpreting the Act to exclude the estate as a claimant by looking to other law was proper. The determination of whether an estate is a claimant under the Act is an issue of first impression. As a threshold matter, we must determine whether the record reflects a fundamental error that must be noticed by this Court. An estate is not a legal entity and cannot sue or be sued as such. *See Dueitt v. Dueitt*, 802 S.W.2d 859, 861 (Tex.App.—Houston [1st Dist.] 1991, no writ.). Thus, a suit on behalf of a decedent's estate is a nullity unless the estate's personal representative appears in or participates in the suit. *Id.* Because Thanh Dinh Nguyen and Tham Thi Nguyen, the decedent's parents, applied for a declaration of heirship and participated in

this suit, we conclude the trial court's judgment is not a nullity and we have jurisdiction over the appeal.

A. Rules of Construction

[3] [4] This Court's duty is to construe a statute as written and ascertain the legislature's intent from the language of the act. *Morrison v. Chan*, 699 S.W.2d 205, 208 (Tex.1985). When the language of a statute is unambiguous, it is given effect according to its terms. See *Maley v. 7111 Southwest Freeway, Inc.*, 843 S.W.2d 229, 231 (Tex.App.—Houston [14th Dist.] 1992, writ denied.).

*95 The Code of Criminal Procedure instructs us to liberally construe its provisions so as to attain the objects intended by the legislature: prevention, suppression, and punishment of crime. See *TEX.CODE CRIM. P. ANN. art. 1.26* (Vernon 1984). All words used in the code are to be understood according to their customary usage, except where specially defined. *TEX.CODE CRIM. P. ANN. art. 3.01* (Vernon 1984). When we construe a statute, we may also take into account the law on similar subjects and the consequences of a particular construction, among other considerations. See *TEX. GOV'T CODE ANN. § 311.023* (Vernon 1988).

B. Application of Rules

[5] [6] The provisions of the Act applicable at the time compensation was sought defined a “claimant” as a victim or an authorized person acting on behalf of a victim.³ Throughout the Act, the word “individual” was repeatedly used to describe who may qualify for compensation by fulfilling various criteria.⁴ An “estate” is neither specifically included or excluded as a claimant. An estate is the total property a decedent owns at death. *BLACK'S LAW DICTIONARY* 491 (5th ed.1979). Upon death, the property owned by the decedent immediately vests in the heirs. See *TEX. PROB.CODE ANN. § 37* (Vernon Supp.1997). By definition, an estate cannot be an individual. By its plain language, therefore, the Act excludes estates.

To so hold would keep the Act in harmony with the Wrongful Death Act,⁵ which bars an action brought by an estate, and with the Worker's Compensation Act,⁶ which likewise bars an estate from recovering under its provisions. A holding that declines to expand the realm of recipients also preserves the limited nature of this resource

for those expressly included. Accordingly, we hold that an estate is not a “claimant” as envisioned by the Act.

Was this Misjoinder or Nonjoinder?

Having held the estate was not a proper claimant, we must determine whether the trial court properly dismissed as untimely appellant's attempt to cure the defect by joining the heirs as parties after the expiration of the statutory 20-day limit.

[7] The original petition named the estate as the only plaintiff in the caption. The body of the pleading made reference to the “heirs,” but referred to them in addition to the plaintiff, and did not individually identify them or address the grounds upon which they sought compensation. The family argues this was a misjoinder of parties, and they should have been permitted to add the individual beneficiaries when they moved to amend the petition. Relying principally upon *Tatum v. Second Injury Trust Fund*, 730 S.W.2d 351, 353 (Tex.App.—Dallas 1987, no writ), the AG calls this a nonjoinder, not a misjoinder of parties. The family contends *Tatum* is applicable only to worker's compensation cases. We are not so persuaded. The *Tatum* case is directly on point in that it deals with a petition filed naming only the estate of the deceased as the plaintiff, followed by an amendment to substitute the names of the deceased's beneficiaries as plaintiffs well after the expiration of the 20-day statutory period. *Id.*; cf. *Charter Oak Fire Ins. Co. v. Gorman*, 693 S.W.2d 686, 688 (Tex.App.—Houston [14th Dist.] 1985, writ ref'd n.r.e.) (after 20-day period expired, plaintiffs could not amend petition to name as defendants the beneficiaries instead of the deceased).

We have here a scenario that is virtually the same, and a statute employing identical procedural and administrative provisions. That the statute addresses a different subject matter does not alter the legal analysis employed by the Court. As such, the rules of civil procedure governing misjoinder of parties, cited by the family, are inapplicable here.

*96 Conclusion

We hold the trial court did not have jurisdiction.

We affirm the judgment.

All Citations

962 S.W.2d 93

Footnotes

- * Justice Frank C. Price, Former Justice, Court of Appeals, First District of Texas at Houston, sitting by assignment.
- 1 Act of May 4, 1993, 73d Leg., R.S., ch. 268, § 6, 1993 Tex. Gen. Laws 954 (current version at [TEX.CODE CRIM. P. ANN. art. 56.31](#) (Vernon Supp.1997)).
- 2 Act of May 4, 1993, 73d Leg., R.S., ch. 268, § 6, 1993 Tex. Gen. Laws 954 (amended 1995).
- 3 Act of May 4, 1993, 73d Leg., R.S., ch. 268, § 6, 1993 Tex. Gen. Laws 954 (amended 1995).
- 4 Act of May 4, 1993, 73d Leg., R.S., ch. 268, § 6, 1993 Tex. Gen. Laws 954 (amended 1995).
- 5 [TEX. CIV. PRAC. & REM.CODE § 71.004\(b\)](#) (Vernon 1987).
- 6 See [TEX. LABOR CODE ANN. § 408.182](#) (Vernon 1996).

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[Vernon's Texas Statutes and Codes Annotated](#)
[Estates Code \(Refs & Annos\)](#)
[Title. General Provisions \(Refs & Annos\)](#)
[Chapter 22. Definitions](#)

V.T.C.A., Estates Code § 22.012
Formerly cited as TX PROBATE §3(l).

§ 22.012. Estate

Effective: January 1, 2014

[Currentness](#)

“Estate” means a decedent's property, as that property:

- (1) exists originally and as the property changes in form by sale, reinvestment, or otherwise;
- (2) is augmented by any accretions and other additions to the property, including any property to be distributed to the decedent's representative by the trustee of a trust that terminates on the decedent's death, and substitutions for the property; and
- (3) is diminished by any decreases in or distributions from the property.

Credits

Added by [Acts 2009, 81st Leg., ch. 680, § 1, eff. Jan. 1, 2014](#).

Editors' Notes

REVISOR'S NOTE

2014 Main Volume

- (1) [Section 3\(l\), Texas Probate Code](#), refers to “real and personal property.” The revised law omits the reference to “real and personal” as unnecessary because [Section 311.005\(4\), Government Code](#) (Code Construction Act), applicable to the revised law, defines “property” to mean real and personal property.
- (2) [Section 3\(l\), Texas Probate Code](#), refers to property as it originally existed and as “from time to time” changed. The revised law omits the quoted phrase as unnecessary because without express limitation, the inclusion of changes in the property includes changes that occur from time to time.

[Notes of Decisions \(2\)](#)

V. T. C. A., Estates Code § 22.012, TX EST § 22.012

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Estates Code (Refs & Annos)
Title. General Provisions (Refs & Annos)
Chapter 22. Definitions

V.T.C.A., Estates Code § 22.027
Formerly cited as TX PROBATE §3(x).

§ 22.027. Person

Effective: September 1, 2015

[Currentness](#)

(a) “Person” includes a natural person and a corporation.

(b) Except as otherwise provided by this code, the definition of “person” assigned by [Section 311.005, Government Code](#), does not apply to any provision in this code.

Credits

Added by [Acts 2009, 81st Leg., ch. 680, § 1, eff. Jan. 1, 2014](#). Amended by [Acts 2015, 84th Leg., ch. 841 \(S.B. 462\), § 2, eff. Sept. 1, 2015](#).

Editors' Notes

REVISOR'S NOTE

2014 Main Volume

[Section 311.005\(2\), Government Code](#) (Code Construction Act), defines “person” to include a “corporation, organization, government or governmental subdivision or agency, business trust, estate, trust, partnership, association, and any other legal entity.” To ensure that no substantive change is made by revision of the definition of “person” in this code, the revised law adds a provision stating that the definition in [Section 311.005, Government Code](#), does not apply to any provision in the Estates Code.

V. T. C. A., Estates Code § 22.027, TX EST § 22.027

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KeyCite Yellow Flag - Negative Treatment

Unconstitutional or Preempted Negative Treatment Reconsidered by [Fort Worth Osteopathic Hosp., Inc. v. Reese](#), Tex., Aug. 27, 2004

[Vernon's Texas Statutes and Codes Annotated](#)

[Civil Practice and Remedies Code \(Refs & Annos\)](#)

[Title 4. Liability in Tort](#)

[Chapter 71. Wrongful Death; Survival; Injuries Occurring Out of State \(Refs & Annos\)](#)

[Subchapter B. Survival](#)

V.T.C.A., Civil Practice & Remedies Code § 71.021

§ 71.021. Survival of Cause of Action

[Currentness](#)

(a) A cause of action for personal injury to the health, reputation, or person of an injured person does not abate because of the death of the injured person or because of the death of a person liable for the injury.

(b) A personal injury action survives to and in favor of the heirs, legal representatives, and estate of the injured person. The action survives against the liable person and the person's legal representatives.

(c) The suit may be instituted and prosecuted as if the liable person were alive.

Credits

Acts 1985, 69th Leg., ch. 959, § 1, eff. Sept. 1, 1985.

[Notes of Decisions \(245\)](#)

V. T. C. A., Civil Practice & Remedies Code § 71.021, TX CIV PRAC & REM § 71.021

Current through the end of the 2015 Regular Session of the 84th Legislature



KeyCite Yellow Flag - Negative Treatment

Unconstitutional or Preempted Negative Treatment Reconsidered by [Fort Worth Osteopathic Hosp., Inc. v. Reese](#), Tex., Aug. 27, 2004

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[Title 4. Liability in Tort](#)

[Chapter 71. Wrongful Death; Survival; Injuries Occurring Out of State \(Refs & Annos\)](#)

[Subchapter A. Wrongful Death \(Refs & Annos\)](#)

V.T.C.A., Civil Practice & Remedies Code § 71.002

§ 71.002. Cause of Action

[Currentness](#)

(a) An action for actual damages arising from an injury that causes an individual's death may be brought if liability exists under this section.

(b) A person is liable for damages arising from an injury that causes an individual's death if the injury was caused by the person's or his agent's or servant's wrongful act, neglect, carelessness, unskillfulness, or default.

(c) A person is liable for damages arising from an injury that causes an individual's death if:

(1) the person is a proprietor, owner, charterer, or hirer of an industrial or public utility plant or of a railroad, street railway, steamboat, stagecoach, or other vehicle for the transportation of goods or passengers; and

(2) the injury was caused by the person's or his agent's or servant's wrongful act, neglect, carelessness, unskillfulness, or default.

(d) A person is liable for damages arising from an injury that causes an individual's death if:

(1) the person is a receiver, trustee, or other person in charge of or in control of a railroad, street railway, steamboat, stagecoach, or other vehicle for the transportation of goods or passengers, of an industrial or public utility plant, or of other machinery; and

(2) the injury was caused by:

(A) the person's wrongful act, neglect, carelessness, unskillfulness, or default;

(B) the person's servant's or agent's wrongful act, neglect, carelessness, unfitness, unskillfulness, or default; or

(C) a bad or unsafe condition of the railroad, street railway, or other machinery under the person's control or operation.

(e) A person is liable for damages arising from an injury that causes an individual's death if:

(1) the person is a receiver, trustee, or other person in charge of or in control of a railroad, street railway, steamboat, stagecoach, or other vehicle for the transportation of goods or passengers, of an industrial or public utility plant, or of other machinery; and

(2) the action could have been brought against the owner of the railroad, street railway, or other machinery if he had been acting as operator.

Credits

Acts 1985, 69th Leg., ch. 959, § 1, eff. Sept. 1, 1985.

Editors' Notes

REVISOR'S NOTE

2008 Main Volume

Because the definition of “person” in the Code Construction Act ([V.A.C.S. Article 5429b-2](#)) is broader than the meaning intended by the use of the word in the source law, the revised law substitutes the word “individual” where appropriate.

[Notes of Decisions \(536\)](#)

V. T. C. A., Civil Practice & Remedies Code § 71.002, TX CIV PRAC & REM § 71.002

Current through the end of the 2015 Regular Session of the 84th Legislature

Vernon's Texas Statutes and Codes Annotated

Civil Practice and Remedies Code (Refs & Annos)

Title 4. Liability in Tort

Chapter 71. Wrongful Death; Survival; Injuries Occurring Out of State (Refs & Annos)

Subchapter A. Wrongful Death (Refs & Annos)

V.T.C.A., Civil Practice & Remedies Code § 71.004

§ 71.004. Benefitting From and Bringing Action

[Currentness](#)

(a) An action to recover damages as provided by this subchapter is for the exclusive benefit of the surviving spouse, children, and parents of the deceased.

(b) The surviving spouse, children, and parents of the deceased may bring the action or one or more of those individuals may bring the action for the benefit of all.

(c) If none of the individuals entitled to bring an action have begun the action within three calendar months after the death of the injured individual, his executor or administrator shall bring and prosecute the action unless requested not to by all those individuals.

Credits

Acts 1985, 69th Leg., ch. 959, § 1, eff. Sept. 1, 1985.

[Notes of Decisions \(242\)](#)

V. T. C. A., Civil Practice & Remedies Code § 71.004, TX CIV PRAC & REM § 71.004

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KeyCite Yellow Flag - Negative Treatment

Declined to Extend by [Glenn v. L. Ray Calhoun & Co.](#), W.D.Tex.,
January 27, 2015

128 S.W.3d 211
Supreme Court of Texas.

PROVIDENT LIFE AND ACCIDENT
INSURANCE COMPANY

v.

James KNOTT, M.D.

No. 02-0485.

Argued March 19, 2003.

Decided Dec. 19, 2003.

Rehearing Denied Feb. 13, 2004.

Synopsis

Background: Doctor sued insurer and agent for benefits under his disability insurance policy. The 44th District Court, Dallas County, [Margaret Keliher, J.](#), entered summary judgment in favor of insurer and agent. Doctor appealed. The Court of Appeals, [70 S.W.3d 924](#), affirmed in part, reversed in part, and remanded.

Holdings: Doctor and insurer petitioned for review. The Supreme Court, [Wainwright, J.](#), held that:

[1] in order to be totally disabled under disability insurance policies, the doctor was required to be unable to perform all of the important and usual duties of his occupation, disapproving *Prudential Ins. Co. v. Tate*, 162 Tex. 369, 347 S.W.2d 556, *Commonwealth Bonding & Cas. Ins. Co. v. Bryant*, 113 Tex. 21, 240 S.W. 893, *Great S. Life Ins. Co. v. Johnson*, 25 S.W.2d 1093;

[2] insurer did not breach the contract by denying doctor's claim for total disability benefits under terms of the disability insurance policies; and

[3] doctor's extra-contractual causes of action accrued, and two-year limitations periods began to run, when insurer conveyed by letter its position that the doctor was not entitled to \$7500 it had issued to him for total disability coverage.

Reversed in part, and affirmed in part.

West Headnotes (17)

[1] Appeal and Error

[Cases Triable in Appellate Court](#)

The Supreme Court reviews the trial court's summary judgment de novo.

[949 Cases that cite this headnote](#)

[2] Appeal and Error

[Judgment](#)

When reviewing a summary judgment, the Supreme Court takes as true all evidence favorable to the nonmovant, and it indulges every reasonable inference and resolves any doubts in the nonmovant's favor.

[504 Cases that cite this headnote](#)

[3] Judgment

[Presumptions and Burden of Proof](#)

The party moving for summary judgment bears the burden to show that no genuine issue of material fact exists and that it is entitled to judgment as a matter of law. [Vernon's Ann.Texas Rules Civ.Proc., Rule 166a\(c\)](#).

[433 Cases that cite this headnote](#)

[4] Appeal and Error

[Scope and Theory of Case](#)

The Supreme Court would affirm the summary judgment entered in favor of disability insurer on insured's claim of entitlement to total disability benefits under the disability insurance policies if any of the theories presented to the trial court and preserved for appellate review were meritorious, given that trial court's order did not specify the grounds for summary judgment.

453 Cases that cite this headnote

[5] **Insurance**

🔑 **Substantial or Material Performance**

In order to be totally disabled under disability insurance policies, insured was required to be unable to perform all of the important and usual duties of his occupation; policies defined total disability as inability to perform duties of insured's occupation, and defined partial disability as inability to perform at least one important or usual duty of insured's business at least some of the time; disapproving *Prudential Ins. Co. v. Tate*, 162 Tex. 369, 347 S.W.2d 556, *Commonwealth Bonding & Cas. Ins. Co. v. Bryant*, 113 Tex. 21, 240 S.W. 893, *Great S. Life Ins. Co. v. Johnson*, 25 S.W.2d 1093.

3 Cases that cite this headnote

[6] **Insurance**

🔑 **Construction as a Whole**

Insurance

🔑 **Entire Contract**

In interpreting insurance policies, the Supreme Court must read all parts of each policy together and exercise caution not to isolate particular sections or provisions from the contract as a whole; viewing the policy in its entirety furthers Court's objective to give effect to the written expression of the parties' intent.

30 Cases that cite this headnote

[7] **Insurance**

🔑 **Entire Contract**

In interpreting insurance policies, the Supreme Court will give effect to the expressed intent of the parties in the policy as a whole, rather than interpret one provision in isolation.

21 Cases that cite this headnote

[8] **Insurance**

🔑 **Definitions in Policies**

When terms are defined in an insurance policy, those definitions control the interpretation of the policy; reliance on defined terms in insurance policies to construe those contracts is necessary to determine the intent of the parties and integral to the application of basic principles of contract interpretation to insurance policies.

21 Cases that cite this headnote

[9] **Insurance**

🔑 **Definitions in Policies**

The Supreme Court follows long-standing principles of contract interpretation and applies the definitions contained in the parties' agreement, construing them to give meaning to all of the terms of the insurance policy and adhere to the written expression of the parties' intent.

15 Cases that cite this headnote

[10] **Insurance**

🔑 **Substantial or Material Performance**

Insured was able to perform some of the important and usual duties of his occupation, as a physician, such as seeing and generally treating patients, performing administrative duties, performing some types of surgery, and consulting with other physicians, and, thus, was not totally disabled as result of his airplane crash, so as to hold insurer liable for breach of contract for its refusal to pay total disability benefits under terms of the disability insurance policies.

10 Cases that cite this headnote

[11] **Limitation of Actions**

🔑 **Demand for Performance of Contract**

Insured's extra-contractual causes of action against disability insurer for misrepresentation, breach of the duty of good faith and fair dealing, and violations of the Texas Insurance Code and the Deceptive Trade Practices Act (DTPA)

accrued, and two-year limitations periods began to run, when insurer conveyed by letter its position that insured was not entitled to the \$7500 it had issued to insured for total disability coverage and that it was seeking reimbursement of the overpayment of benefits. [V.A.T.S. Insurance Code, art. 21.21, § 16\(d\)](#); [V.T.C.A., Bus. & C. § 17.565](#); [V.T.C.A., Civil Practice & Remedies Code § 16.003\(a\)](#).

[11 Cases that cite this headnote](#)

[12] Limitation of Actions

 Demand for Performance of Contract

Insured's extra-contractual causes of action against disability insurer for misrepresentation, breach of the duty of good faith and fair dealing, and violations of the Texas Insurance Code and the Deceptive Trade Practices Act (DTPA) were governed by two-year statute of limitations that accrued upon the denial of insured's claim for total disability benefits under the policies. [V.A.T.S. Insurance Code, art. 21.21, § 16\(d\)](#); [V.T.C.A., Bus. & C. § 17.565](#); [V.T.C.A., Civil Practice & Remedies Code § 16.003\(a\)](#).

[18 Cases that cite this headnote](#)

[13] Limitation of Actions

 Questions for Jury

Generally, when a cause of action accrues is a question of law.

[64 Cases that cite this headnote](#)

[14] Limitation of Actions

 Causes of Action in General

As a general rule, a cause of action accrues and the statute of limitations begins to run when facts come into existence that authorize a party to seek a judicial remedy.

[87 Cases that cite this headnote](#)

[15] Limitation of Actions

 Causes of Action in General

Limitation of Actions

 In General; What Constitutes Discovery

In most cases, a cause of action accrues when a wrongful act causes a legal injury, regardless of when the plaintiff learns of that injury or if all resulting damages have yet to occur.

[79 Cases that cite this headnote](#)

[16] Limitation of Actions

 Questions for Jury

Although as a general rule, determining the accrual date of a cause of action is a question of law, the accrual date of a cause of action involving insurance coverage and based on violation of the Texas Insurance Code, bad-faith breach of an insurance contract, or violation of the Deceptive Trade Practices Act (DTPA), may present questions of fact to be determined on a case-by-case basis. [V.A.T.S. Insurance Code, art. 21.21, § 16\(d\)](#); [V.T.C.A., Bus. & C. § 17.565](#); [V.T.C.A., Civil Practice & Remedies Code § 16.003\(a\)](#).

[9 Cases that cite this headnote](#)

[17] Limitation of Actions

 Demand for Performance of Contract

The Supreme Court does not require an insurer to include “magic words” in its denial of insurance coverage in order to trigger running of statute of limitations based on causes of action for violation of the Texas Insurance Code, bad-faith breach of an insurance contract, and violation of the Deceptive Trade Practices Act (DTPA) if an insurer's determination regarding a claim and its reasons for the decision are contained in a clear writing to the insured. [V.A.T.S. Insurance Code, arts. 21.21, § 16\(d\), 21.55, § 3\(a, c\)](#); [V.T.C.A., Bus. & C. § 17.565](#); [V.T.C.A., Civil Practice & Remedies Code § 16.003\(a\)](#).

[17 Cases that cite this headnote](#)

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Opinion

Justice [WAINWRIGHT](#) delivered the opinion of the Court.

In this insurance coverage dispute, we construe the definition of total disability found in two insurance policies. Interpreting the policies as they are written, we hold that an insured is totally disabled when he is unable to perform all of the important and usual duties of his occupation. Because the insured in this case was able to perform some of the important and usual duties of his occupation as a physician, he was not totally disabled under the policies' terms. We also conclude that the insured's extra-contractual claims are barred by limitations. The trial court was correct in granting the motions for summary judgment. Accordingly, we reverse the judgment of the court of appeals in part and affirm in part.

I. Factual and Procedural Background

In 1968, Dr. James Knott began practicing obstetrics and gynecology with Dr. Robert Kuhne. Around 1970, the doctors formed a professional association, Kuhne & Knott Gynecological Associates, which was eventually renamed Richardson Women's Clinic.

In the early 1970s, Knott met with Ellis Garland Gatlin, an insurance agent, to discuss buying disability insurance. Knott eventually bought two policies: one issued in 1970 and a second policy issued in 1974. The policies, as amended, provided benefits *214 for total disability and partial disability, among other things.

In June 1985, Knott suffered a [spine fracture](#) in a plane crash and underwent surgery (a thoracolumbar fusion) to stabilize the fracture. Knott was unable to return to work until August 1985. On December 19, 1985, Knott submitted a claim to Provident for benefits for total disability under both policies. At the time of his claim, Knott acknowledged that he was working part-time seeing gynecological patients, conducting [pelvic exams](#), providing consulting services to other physicians, and performing administrative duties. However, he claimed that he was unable to perform operative obstetrics, prolonged gynecological procedures, [endoscopic procedures](#), and vaginal procedures because the bending and stress of these procedures aggravated his back injury. Within five days of receipt of Knott's claim, Provident issued Knott a check for \$7500 in total disability benefits. However, in a letter dated February 19, 1986, Provident requested repayment of the \$7500, less \$1250 in benefits, because Knott had failed to satisfy the "90-day elimination period," which was a condition of coverage. The ninety-day elimination period refers to a requirement that the total disability continue for more than ninety days, and benefits, if any, would commence on the ninety-first day of a covered disability. According to a November 20, 1985 medical report completed by Dr. George Wharton, Knott's treating physician, and submitted to Provident in support of Knott's claim, Knott was totally disabled from June 9, 1985 through August 4, 1985. The statement of claim that Knott submitted to Provident, dated December 19, 1985, indicates that Knott believed himself to be totally disabled from June 9, 1985 to the date of the claim.

The parties negotiated this dispute, which culminated in a solution described in Provident's March 21, 1986 letter to Knott. The March letter stated that Provident would treat Knott's claim "on a residual basis,"¹ waive Knott's premiums as long as he was disabled, and waive repayment of the \$7500. Under this arrangement, Knott continued to submit claims for benefits through 1989, and Provident continued to pay benefits.² In 1991, Provident informed Knott that he no longer qualified for residual benefits and that Provident planned to resume billing him for his premiums. Provident had discontinued billing for these premiums while Knott was receiving benefits under the policy. Knott retained an attorney who negotiated the payment of premiums with Provident, and, apparently, Provident agreed to continue to waive Knott's premium payments. Knott did not submit another claim

until December 1995. Provident did not pay Knott any additional benefits until 1996.

Except for a two-month period immediately following the 1985 plane crash, Knott worked as a physician from 1985 through 1995, performing all of his pre-accident duties except for certain surgical and office examination procedures. On August 20, 1995, Knott turned sixty-five. A few months later, on December 15, 1995, Knott submitted a claim for total disability to Provident. No new event or accident precipitated ***215** the claim. After the ninety-day elimination period was satisfied, Provident began to pay Knott benefits under the policies. Provident made total disability payments to Knott for twenty-four months. Then, in a letter dated March 11, 1998, Provident notified Knott that it was closing his claim because it had paid him the maximum benefits to which he was entitled.

Under the “policy schedule” in both disability insurance policies at issue, the maximum benefit period for total disability commencing on or after the insured’s sixty-fifth birthday is twenty-four months. An insured who has a total disability that commences prior to his sixty-fifth birthday is entitled to lifetime benefits under the policies. In August 1998, Knott sued Provident and the executrix of Gatlin’s estate³ for breach of contract, misrepresentation, breach of the duty of good faith and fair dealing, violations of the Texas Insurance Code and violations of the Texas Deceptive Trade Practices Act (“DTPA”).

Provident and Gatlin filed motions for summary judgment. Provident argued that it was entitled to summary judgment on Knott’s breach of contract claim under three alternative theories: (1) Provident did not breach the insurance contract because Knott’s disability commenced after his sixty-fifth birthday; (2) Knott is not totally disabled; and (3) federal law preempts the contract claim. Provident also argued that summary judgment was proper on Knott’s bad faith and statutory claims on several alternative bases: (1) Provident did not breach the policies; (2) Provident had a reasonable basis for its decision to close Knott’s claim; (3) the applicable statutes of limitation and the Dead Man’s Rule bar the claims; (4) federal law preempts Knott’s claims; and (5) Provident did not make any misrepresentations that were the producing cause of Knott’s damages. Gatlin sought summary judgment on several alternative grounds including statute of limitations, the Dead Man’s Rule,

no evidence that Gatlin violated the DTPA, and lack of privity of contract, among other defenses. Knott did not move for summary judgment.

The trial court granted Provident’s and Gatlin’s motions for summary judgment without specifying the grounds for its judgment. The court of appeals reversed the trial court’s judgment on Knott’s breach of contract claim against Provident,⁴ remanding the claim to the trial court, but affirmed the trial court’s judgment on the remaining claims (misrepresentation, breach of the duty of good faith and fair dealing, and violations of the Texas Insurance Code and the DTPA). **70 S.W.3d 924**. Provident and Knott petitioned this Court for review.

II. Standard of Review

[1] [2] [3] We review the trial court’s summary judgment de novo. See *FM Props. Operating Co. v. City of Austin*, **22 S.W.3d 868, 872 (Tex.2000)**. When reviewing a summary judgment, we take as true all evidence favorable to the nonmovant, and we indulge every reasonable inference and resolve any doubts in the nonmovant’s favor. *Southwestern Elec. Power Co. v. Grant*, **73 S.W.3d 211, 215 (Tex.2002)**; *Sci. Spectrum, Inc. v. Martinez*, **941 S.W.2d 910, 911 (Tex.1997)**. Under ***216 Texas Rule of Civil Procedure 166a(c)**, the party moving for summary judgment bears the burden to show that no genuine issue of material fact exists and that it is entitled to judgment as a matter of law. *Haase v. Glazner*, **62 S.W.3d 795, 797 (Tex.2001)**; *Rhone-Poulenc, Inc. v. Steel*, **997 S.W.2d 217, 223 (Tex.1999)**.

[4] Because the trial court’s order does not specify the grounds for its summary judgment, we must affirm the summary judgment if any of the theories presented to the trial court and preserved for appellate review are meritorious. *Cincinnati Life Ins. Co. v. Cates*, **927 S.W.2d 623, 626 (Tex.1996)**; *Carr v. Brasher*, **776 S.W.2d 567, 569 (Tex.1989)**.

III. Total Disability

We begin by reviewing the central issue in this case—the interpretation of total disability as defined in the insurance policies. Both of the policies contain the following definition of total disability: “Total Disability

means that due to Injuries or Sickness, you are unable to perform the duties of your occupation.”⁵ Provident argues that under this provision, Knott is totally disabled only when he is unable to perform all of the duties of his occupation. Provident explains that it did not breach its insurance contract with Knott because he was able to perform some of his duties as a physician and, therefore, was not totally disabled under the policies' definition as a matter of law. Knott argues that whether he is totally disabled is a fact question that depends on whether he is unable to do any substantial portion of the work connected with his occupation. Knott contends that this interpretation of total disability in an insurance contract was articulated by this Court in *Prudential Ins. Co. v. Tate*, 162 Tex. 369, 347 S.W.2d 556 (1961), and controls this case. The court of appeals relied on *Tate* to conclude that the determination of total disability in this case was “inherently a fact issue” and reversed the trial court's judgment on Knott's breach of contract claim. 70 S.W.3d at 931. For reasons explained below, we reverse the judgment of the court of appeals and conclude that Provident has met its summary judgment burden to establish that Knott was not totally disabled under the policies' language.

A. Applicable Law and Policy Provisions

[5] [6] In interpreting these insurance policies as any other contract, we must read all parts of each policy together and exercise caution not to isolate particular sections or provisions from the contract as a whole. *State Farm Life Ins. Co. v. Beaton*, 907 S.W.2d 430, 433 (Tex.1995); *Gen. Am. Indem. Co. v. Pepper*, 161 Tex. 263, 339 S.W.2d 660, 661 (1960); see *Am. Mfrs. Mut. Ins. Co. v. Schaefer*, 124 S.W.3d 154, 156, 157 (2003). Viewing the policy in its entirety furthers our objective to give effect to the written expression of the parties' intent. *Tex. Farmers Ins. Co. v. Murphy*, 996 S.W.2d 873, 879 (Tex.1999) (citing *Balandran v. Safeco Ins. Co. of Am.*, 972 S.W.2d 738, 741 (Tex.1998); *Forbau v. Aetna Life Ins. Co.*, 876 S.W.2d 132, 133 (Tex.1994)).

The definitions of partial disability in each policy are instructive in interpreting the total disability definition. The 1974 policy provides as follows:

DEFINITION OF PARTIAL DISABILITY: As used in this policy, the term “Partial Disability” means:

*217 (a) your inability to perform one or more of your important daily business duties, or

(b) your inability to perform your usual daily business duties for at least one-half of the time usually required for the performance of such duties.

The 1970 policy contains parallel language:

PART 4. PARTIAL DISABILITY

—ACCIDENT: If injuries shall either prevent the Insured from performing one or more, but not all, important daily business duties, or shall prevent the Insured from performing his usual daily business duties for at least one-half, but not all, of the time usually required for the performance of such duties, the Company will pay periodically during the continuance of such partial disability, indemnity at the rate of the Monthly Benefit for Partial Disability beginning on the day benefits for accident commence....

The policies define total disability as an inability “to perform the duties of your occupation.” Taking the total disability and partial disability provisions together, we conclude that under the Provident policies, an insured is totally disabled when he is unable to perform all of the important duties of his occupation.

[7] The partial disability clause provides defined benefits to an insured who (1) cannot perform some, but not all, of his important daily business duties or (2) is unable to perform his usual daily business duties for at least one-half, but not all of the time usually required. In these insurance policies, partial disability is defined by the inability to perform at least one important or usual duty of the insured's business at least some of the time. Under these policies, total disability exists when the insured is unable to perform all of the important daily duties of his occupation.⁶ This interpretation of the provisions harmonizes the definitions of partial and total disability and avoids inconsistent and redundant applications. See *Forbau*, 876 S.W.2d at 133–34. We also give effect to the expressed intent of the parties in the policy as a whole,

rather than interpret one provision in isolation. *Beaston*, 907 S.W.2d at 433.

Knott cites several cases for the proposition that a common law definition of total disability should override the parties' agreement. See *Tate*, 347 S.W.2d at 557–58; *Commonwealth Bonding & Cas. Ins. Co. v. Bryant*, 113 Tex. 21, 240 S.W. 893, 893 (1922); *Great S. Life Ins. Co. v. Johnson*, 25 S.W.2d 1093, 1097 (Tex. Comm'n App.1930, holding approved).⁷ Based on these cases, Knott argues that an insured is totally disabled whenever he is unable to perform any substantial portion of the work connected with his occupation. These cases are distinguishable on their facts or do not follow recognized rules of contract interpretation.

***218** In light of Knott's arguments and the court of appeals' reliance on these cases, we review the *Bryant*, *Johnson*, and *Tate* opinions. In *Bryant* the insurance policy provided for a weekly indemnity if bodily injuries “‘wholly disable and prevent the insured from performing any and every kind of duty pertaining to his occupation.’” 240 S.W. at 893. The policy provided one-half of the same weekly indemnity “‘if such injury should not wholly disable the insured, as above, but shall immediately (or immediately following total disability) and continuously disable and prevent him from performing one or more important daily duties pertaining to his occupation.’” *Id.* Concerned that “a literal interpretation to the language of this contract ... [would] practically relieve the insurer of all obligation thereunder,” the Court interpreted the total disability provision to mean that “the larger indemnity was promised if the injuries rendered the insured substantially unable, in the exercise of ordinary care, to perform every material duty pertaining to his occupation.” *Id.* The Court concluded that this interpretation reflected “the real intent and purpose of the contracting parties.” *Id.* at 894. However, the Court did not discuss or harmonize its interpretation of the total disability provision of the policy with the partial disability provision.

In *Johnson*, the policy at issue provided for a total disability payment if an insured's injuries rendered him “‘permanently, continuously and wholly prevented from performing any work for compensation or profit or from following any gainful occupation.’” 25 S.W.2d at 1097. First, we observe the substantial differences between the policy language in *Johnson* and this case. The

Johnson policy coverage hinged on an insured's ability to perform work in *any* occupation, and the Provident policy concerns the insured's occupation. Thus, the *Johnson* policy's broader language, taken literally, precluded total disability coverage if an insured was able to perform “‘any work for compensation or profit ... from ... any gainful occupation.’” *Id.* (emphasis added). The court in *Johnson* limited the breadth of the policy at issue, citing the reasoning in *Bryant*, by stating that total disability “does not mean absolute physical disability of the insured to transact any kind of business pertaining to his occupation, but exists if he is unable to do any substantial portion of the work connected therewith.” *Id.* Apparently, the court adopted this construction to avoid interpreting the policy as requiring a virtual impossibility, noting that “‘it would scarcely happen that one could live and bring himself within the literal language of the contract.’” *Id.* (quoting *Hefner v. Fid. & Cas. Co. of N. Y.*, 110 Tex. 596, 607, 222 S.W. 966 (1920)). The *Johnson* Court also addressed the policy language “gainful occupation”—a term not implicated in this case—and eventually concluded that a fact issue existed as to whether a once successful merchant who lost a leg in a shotgun accident was entitled to receive benefits for total disability even though he was able to function as a justice of the peace. *Id.* The Provident policies do not contain the broad language contained in the policies at issue in *Johnson*; the policies do not require Knott to be wholly unable to perform the duties of any occupation but instead are limited to Knott's ability to perform *his* occupation.

Finally, in *Tate*, the Court considered a total disability provision, similar in breadth to the provision in *Johnson*. The *Tate* provision provided total disability benefits if the insured was “wholly, continuously and permanently unable to engage in any occupation or perform any work for any kind of compensation of financial value during the remainder of his lifetime.” *Tate*, 347 S.W.2d at 558–59. The *Tate* ***219** Court stated that the construction of the provision was controlled by *Bryant* and *Johnson*. *Id.* at 559. However, because the provision at issue in *Tate* precludes coverage if an insured is able to engage in “any occupation or ... work for any kind of compensation of financial value,” *Tate*, like *Johnson*, is factually distinguishable from this case. *Id.* at 558–59 (emphasis added).

[8] [9] We disapprove of language in *Bryant*, *Johnson*, and *Tate* to the extent that the language suggests that

it is proper to disregard defined terms in a policy in favor of definitions not expressed in the parties' written agreements. When terms are defined in an insurance policy, those definitions control the interpretation of the policy. *Trinity Universal Ins. Co. v. Cowan*, 945 S.W.2d 819, 823 (Tex.1997); see *Schaefer*, 124 S.W.3d at 157, 159, (all provisions of a policy should be given effect so that none are rendered meaningless); *Beaston*, 907 S.W.2d at 433 (each part of the policy should be given effect and no single phrase, sentence, or section should be isolated and considered apart from the other provisions); accord *Forbau*, 876 S.W.2d at 133–34. Reliance on defined terms in insurance policies to construe those contracts is necessary to determine the intent of the parties and integral to the application of basic principles of contract interpretation to insurance policies. *Nat'l Union Fire Ins. Co. of Pittsburgh v. CBI Indus., Inc.*, 907 S.W.2d 517, 519, 522 (Tex.1995); *Iowa Mut. Ins. Co. v. Faulkner*, 157 Tex. 183, 300 S.W.2d 639, 642 (1957); see *Reconstruction Fin. Corp. v. Gossett*, 130 Tex. 535, 111 S.W.2d 1066, 1074 (1938) (“The object of construing any written instrument is to ascertain the intention of the parties, and this intention must be determined, if possible, from the language used in the instrument itself.”); see also *Ramsay v. Maryland Am. Gen. Ins. Co.*, 533 S.W.2d 344, 346 (Tex.1976); *Guardian Life Ins. Co. of Am. v. Scott*, 405 S.W.2d 64, 65 (Tex.1966). We follow long-standing principles of contract interpretation and apply the definitions contained in the parties' agreement, construing them to give meaning to all of the terms of the policy and adhere to the written expression of the parties' intent.

B. Analysis

[10] Viewing the evidence in the light most favorable to the nonmovant, Knott, we conclude that Provident established as a matter of law that Knott was not totally disabled from a disability that commenced prior to his sixty-fifth birthday. Knott identified his occupational duties for the time period preceding the 1985 plane crash through the time he made his claim for total disability in 1995 as including the following: seeing patients,⁸ performing surgery, consulting with other physicians, and performing certain administrative duties. The parties agree that Knott did not perform any of these duties for the two-month period immediately following the crash. Knott testified that he could perform some of these duties,

albeit on a part-time basis, when he made his claim for total disability in December 1985. Knott identified certain surgical and office examination procedures that involved bending and stress to his back that he was unable to perform at the time of his December 1985 claim. Likewise, Knott testified that he could perform some of his occupational duties on at least a part-time *220 basis when he made his claim in December 1995 and admitted that he continued to see patients, perform some types of surgeries, consult with other physicians, and perform certain administrative duties through the date of his deposition in this case. From no later than 1990 to 1995, Knott worked full-time seeing patients, performing some types of surgeries, consulting with physicians, and performing administrative duties. These facts place Knott's claim squarely within the partial disability provision of the policies, as an insured who was unable to perform some, but not all, of his important daily business duties, and outside the scope of the total disability provision. The evidence conclusively establishes that Knott could perform some of the duties of his occupation. Specifically, Knott could see and generally treat patients, perform administrative duties, perform some types of surgery, and consult with other physicians. Provident met its burden to show that Knott was not unable to perform all of the important daily duties of his occupation.

These policies constitute the allocation by market participants of risks and benefits regarding an insured's possible future disability. The Court's role is not to redistribute these risks and benefits but to enforce the allocation that the parties previously agreed upon. See 11 RICHARD A. LORD, WILLISTON ON CONTRACTS § 31.5 (4th ed.2003). Pursuant to the language of these policies, Knott was not unable to perform all of the important and usual duties of his occupation, and, therefore, he was not entitled to total disability benefits under the policies. Provident met its summary judgment burden on this defense to Knott's breach of contract claim.

IV. Statute of Limitations

[11] Provident and Gatlin also moved for summary judgment on Knott's extra-contractual claims (misrepresentation, breach of the duty of good faith and fair dealing, and violations of the Texas Insurance Code and the DTPA) on the basis that they were barred by

the applicable statute of limitations. Provident and Gatlin bear the burden to prove their affirmative defense by conclusively establishing the applicability of the statute of limitations, including the date on which the limitations commenced. *Zale Corp. v. Rosenbaum*, 520 S.W.2d 889, 891 (Tex.1975). The parties disagree on the date on which limitations began to run. Knott argues that Provident did not provide him with an outright denial of his claim for total disability until its March 11, 1998 letter or, in the alternative, that the accrual date is a question of fact. Provident and Gatlin argue that limitations began to run as of the letter dated February 19, 1986, to Knott from Provident. Provident's February letter to Knott reads as follows:

Dr. Wharton's office has forwarded attending physician statement that was signed and dated by Dr. Wharton on November 20, 1985. This form indicates dates of disability from June 9 to August 4, 1985 and partial from August 5 to present.

After a careful review of this information it has been determined that the 90 day elimination period was not satisfied, and according to our records we have overpaid your claim in the amount of \$7500.00.

However, you would have qualified for the treatment of injury under the provision of your policies in the amount of \$ 1250.00. [sic]

Since we have already paid \$7500.00 of benefits to you, we are subtracting the \$1250.00 from the \$7500.00 leaving an overpayment of \$6250.00.

***221** If you have any questions regarding the refunding of this amount, please contact Mr. Kerr or me. A self-stamped envelope is enclosed for returning the above payment.

[12] All of Knott's extra-contractual claims are subject to a two-year limitations period. The statute of limitations governing Knott's cause of action under [article 21.21 of the Texas Insurance Code](#) states that suit

must be commenced within two years after the date on which the unfair method of competition or unfair or deceptive act or practice occurred or within two years after the person bringing the action discovered or, in the exercise of

reasonable diligence, should have discovered the occurrence of the unfair method of competition or unfair or deceptive act or practice.

[TEX. INS.CODE art. 21.21, § 16\(d\)](#). Likewise, the statute of limitations governing Knott's misrepresentation cause of action under the DTPA requires that this claim "must be commenced within two years after the date on which the false, misleading, or deceptive act or practice occurred or within two years after the consumer discovered or in the exercise of reasonable diligence should have discovered the occurrence of the false, misleading, or deceptive act or practice."⁹ [TEX. BUS. & COM. CODE § 17.565](#). A plaintiff's cause of action under the Texas Insurance Code for unfair claims settlement practices or under the DTPA based on denial of insurance coverage accrues on the date that the insurer denies coverage. *Celtic Life Ins. Co. v. Coats*, 885 S.W.2d 96, 100 (Tex.1994). Knott's cause of action for breach of the duty of good faith and fair dealing must be brought within two years of the date on which the cause of action accrued. [TEX. CIV. PRAC. & REM. CODE § 16.003\(a\)](#). Under Texas law, a plaintiff's cause of action for bad-faith breach of a first-party insurance contract accrues at the time the insurer denies the insured's claim. *Murray v. San Jacinto Agency, Inc.*, 800 S.W.2d 826, 828 (Tex.1990). The fact that damage may continue to occur for an extended period after denial does not prevent limitations from starting to run. *Id.* Thus, all of Knott's extra-contractual claims are governed by a two-year statute of limitations that accrues upon the denial of Knott's claim for total disability benefits under the policies.

[13] [14] [15] Under the circumstances of this case, the question of when these causes of action accrued determines whether the statute of limitations has run. Generally, when a cause of action accrues is a question of law. *Moreno v. Sterling Drug, Inc.*, 787 S.W.2d 348, 351 (Tex.1990). As a general rule, a cause of action accrues and the statute of limitations begins to run when facts come into existence that authorize a party to seek a judicial remedy. *Johnson & Higgins of Tex., Inc. v. Kenneco Energy, Inc.*, 962 S.W.2d 507, 514 (Tex.1998) (citing *Murray*, 800 S.W.2d at 828). In most cases, a cause of action accrues when a wrongful act causes a legal injury, regardless of when the plaintiff learns of that injury or if all resulting damages have yet to occur. *S.V. v. R.V.*, 933 S.W.2d 1, 4 (Tex.1996). However, this Court has suggested

that when “there is no outright *222 denial of a claim, the exact date of accrual of a cause of action ... should be a question of fact to be determined on a case-by-case basis.” *Murray*, 800 S.W.2d at 828 n. 2. Here, Knott argues that Provident's February 1986 letter does not constitute an outright denial of Knott's claim for total disability and that the date on which his causes of action accrued is a question of fact. We disagree.

Several courts of appeals have determined what constitutes a denial of a claim in light of our decision in *Murray*. In *Ehrig v. Germania Farm Mut. Ins. Ass'n*, 84 S.W.3d 320, 325 (Tex.App.-Corpus Christi 2002, pet. denied), the court of appeals applied the reasoning in the *Murray* footnote and held that whether an insurer's oral denial of an insured's claim constituted an “outright denial” sufficient to trigger the commencement of limitations is a question of fact for the jury's determination, even though the insured does not dispute that the oral statement was made. The court decided that summary judgment was not proper “[w]hen the facts are arguably not clear enough to put the aggrieved party on notice of a legal injury.” *Id.* The Fourth District court of appeals limited the reasoning of the *Murray* footnote to scenarios in which the insurance company “ ‘strings an insured along without denying or paying a claim.’ ” *Kuzniar v. State Farm Lloyds*, 52 S.W.3d 759, 761 (Tex.App.-San Antonio 2001, pet. denied). In *Kuzniar*, the insureds filed a claim with State Farm in 1992 regarding a plumbing leak. *Id.* at 760. State Farm opened a claim file and sent an adjuster to investigate the claim, and the adjuster asked the insureds to hire a plumber to investigate the leak. *Id.* Neither State Farm nor the adjuster heard back from the insureds, and in January 1993 State Farm closed the claim file. *Id.* In August 1996, the insureds sued State Farm. *Id.* The court of appeals affirmed the trial court's summary judgment on the statute of limitations issue, concluding that “[t]he closing of the claim file was an objectively verifiable event that unambiguously demonstrated State Farm's intent not to pay the claim....” *Id.* Finally, in *Mangine v. State Farm Lloyds*, 73 S.W.3d 467, 468 (Tex.App.-Dallas 2002, pet. denied), the insured made a claim under their homeowner's insurance policy for alleged hail damage to their roof. In affirming the trial court's summary judgment based on a statute of limitations defense, the Fifth District court of appeals decided that the adjuster's completed building estimate form, stating that the adjuster found no evidence of hail damage, “conveyed in writing State Farm's determination

with respect to the [insureds'] claim for hail damage and the reasons for it,” even though the writing did not use the word “denial.” *Id.* at 471. The court ultimately concluded that although an insurer's denial of a claim must be in writing, “there are no magic words that must be used to deny a claim.” *Id.*

[16] [17] Although as a general rule, determining the accrual date of a cause of action is a question of law, we acknowledge that the accrual date of a cause of action based on a violation of the Texas Insurance Code, the bad-faith breach of an insurance contract, or a violation of the DTPA involving insurance coverage, may present questions of fact to be determined on a case-by-case basis. However, we are not faced with such a situation in this case. We do not require an insurer to include “magic words” in its denial of a claim if an insurer's determination regarding a claim and its reasons for the decision are contained in a clear writing to the insured. See *TEX. INS. CODE art. 21.55, § 3(a),(c)*. In this case, Provident's February 1986 letter conveyed its denial of *223 Knott's claim for total disability and the reasons for its decision to reject the claim.

As of the time of the February letter, Provident had paid Knott \$7500 in total disability benefits in response to Knott's claim under the policies. However, the letter also indicates that upon further review of new material received from Knott's treating physician, Dr. Wharton, Provident determined that Knott failed to meet the ninety-day elimination provision of the policy. Taken with Dr. Wharton's November 20, 1985 report, this letter establishes that Provident considered Knott totally disabled only from June 9, 1985 through August 4, 1985, and partially disabled through November 20, 1985, the date of Dr. Wharton's report. Although the letter does not use the word “deny,” the letter clearly conveys Provident's position that Knott was not entitled to the \$7500 for total disability coverage and that Provident was seeking a reimbursement of the overpayment of benefits. Provident denied Knott's claim for benefits for total disability and instead agreed to provide him with benefits “on a residual basis” in its February 1986 letter. Thus, we agree with the court of appeals that the statutes of limitations for Knott's extra-contractual claims against Provident and Gatlin expired long before he filed suit in August 1998.

V. Conclusion

Provident established as a matter of law that Knott was able to perform some of the important and usual duties of his occupation as a physician and, therefore, he was not totally disabled under the terms of the disability insurance policies. Because Knott was not totally disabled under the terms of the policy, Provident did not breach its insurance contract with Knott by paying him policy benefits for two years but denying lifetime benefits for total disability. Accordingly, it is not necessary to address the other defenses to Knott's breach of contract claim raised in the motions for summary judgment. Further,

Provident and Gatlin established that Knott's extra-contractual claims were barred by the applicable two-year statutes of limitations. Therefore, we conclude that the trial court's summary judgment in favor of Provident and Gatlin was proper. Accordingly, we reverse the court of appeals' judgment regarding Knott's breach of contract claim, affirm the court of appeals' judgment regarding the remaining extra-contractual claims, and render judgment that Knott take nothing.

All Citations

128 S.W.3d 211, 47 Tex. Sup. Ct. J. 174

Footnotes

- 1 Under the residual disability provision of the policies, a qualifying insured may receive benefits according to the following formula: (loss of monthly income divided by the prior monthly income) times the maximum monthly benefit for total disability available under the policy.
- 2 Because Knott's claims were handled on a residual basis, and were therefore based on Knott's income, Knott was required to submit periodic reports about his income to Provident for processing.
- 3 Gatlin died before Knott filed this lawsuit. Knott sued Debra Lucille Townley, as independent executrix of the Estate of Ellis Garland Gatlin.
- 4 Knott's petition does not challenge the court of appeals' disposition of his breach of contract claim against Gatlin. The court of appeals affirmed the trial court's summary judgment on this claim; therefore, this opinion does not address it.
- 5 This definition reflects amendments to the policies made in March 1982 which apply to all covered claims resulting from periods of disability originating on or after October 1, 1981. The plane crash that caused Knott's injuries occurred in June 1985.
- 6 The policy makes specific exceptions to provide total disability benefits for certain catastrophic disabilities, including the total and irrecoverable loss of sight, speech, hearing, both hands, both feet, or one hand and one foot, regardless of whether the insured otherwise qualifies for total disability under the policy. None of these catastrophic disabilities are at issue in this case.
- 7 We note that our previous approval of the holding of a Texas Commission of Appeals decision indicates the Court's approval of the judgment and each holding of the Commission but not necessarily the reasoning expressed in the decision. *McKenzie v. Withers*, 109 Tex. 255, 206 S.W. 503, 503 (1918). Thus, this Court's approval of the Texas Commission of Appeals' decision in *Johnson* did not indicate our agreement with its reasoning. Nevertheless, because the court of appeals and the Court in *Tate* analyzed *Johnson*, we discuss it also. 70 S.W.3d at 930–31.
- 8 Knott states that he saw patients as part of an office gynecology practice and as part of an office obstetrics practice relating to diagnosis of infertility issues. However, Knott also testified that he had not practiced general obstetrics since 1980, five years before the plane crash.
- 9 To the extent that Knott pursued a negligent misrepresentation claim against Gatlin for misrepresenting that Knott would receive total disability benefits if he became unable to perform any duty for which he was "duly trained," we conclude that this claim is barred by the applicable statute of limitations. See *HECI Exploration Co. v. Neel*, 982 S.W.2d 881, 885 (Tex.1998) (noting applicability of two-year statute of limitations for negligent misrepresentation).



KeyCite Yellow Flag - Negative Treatment

Declined to Extend by [Salinas v. Townsend](#), Tex.App.-Corpus Christi, January 6, 2011

891 S.W.2d 640
Supreme Court of Texas.

RANDALL'S FOOD MARKETS, INC.,
Vernon Frank Davis, Lewis Simmons,
and Gary Mike Seals, Petitioners,
v.
Mary Lynn JOHNSON, Respondent.

No. 94-0055.

Argued Oct. 19, 1994.

Decided Jan. 12, 1995.

Manager brought action for damages against store owner, its district manager, its director, and clerk, alleging conspiracy, slander, intentional infliction of emotional distress, breach of contract, tortious interference with contract, and false imprisonment. The 122th District Court, Galveston County, H.G. [Dalehite](#), J., granted summary judgment for defendants, and manager appealed. The Houston Court of Appeals, [Smith](#), J., (Retired), [869 S.W.2d 390](#), affirmed in part and reversed in part, and appeal was taken. The Supreme Court, Spector, J., held that: (1) store's questioning of manager about possible theft did not constitute extreme and outrageous conduct necessary to state claim for intentional infliction of emotional distress; (2) store's request that manager stay away from particular area of the business premises during work hours did not constitute false imprisonment; and (3) store did not slander manager because all of the statements made by store's employees were both true and qualifiedly privileged.

Reversed.

West Headnotes (23)

[1] **Courts**

🔑 **Ancillary and incidental jurisdiction**

Because Supreme Court had subject matter jurisdiction over plaintiff's claims for intentional infliction of emotional distress,

false imprisonment, and libel, it had jurisdiction over the entire case, including the slander issues.

[18 Cases that cite this headnote](#)

[2] **Judgment**

🔑 **Grounds for Summary Judgment**

Defendant who conclusively negates at least one of the essential elements of a cause of action is entitled to summary judgment as to that cause of action and likewise, defendant who conclusively establishes each element of an affirmative defense is entitled to summary judgment. [Vernon's Ann.Texas Rules Civ.Proc., Rule 166a\(c\)](#).

[557 Cases that cite this headnote](#)

[3] **Judgment**

🔑 **Presumptions and burden of proof**

In reviewing summary judgment, court must accept as true evidence in favor of nonmovant, indulging every reasonable inference and resolving all doubts in his favor. [Vernon's Ann.Texas Rules Civ.Proc., Rule 166a\(c\)](#).

[387 Cases that cite this headnote](#)

[4] **Damages**

🔑 **Elements in general**

To recover for intentional infliction of emotional distress, plaintiff must prove that defendant acted intentionally or recklessly, that defendant's conduct was extreme and outrageous, that defendant's actions caused plaintiff emotional distress, and that emotional distress suffered by plaintiff was severe.

[78 Cases that cite this headnote](#)

[5] **Damages**

🔑 **Other particular cases**

Employer's questioning of employee about possible theft did not constitute "extreme and outrageous conduct" necessary to state claim for intentional infliction of emotional

distress; employer's conduct was not beyond all possible bounds of decency, but rather was managerial function that was necessary to the ordinary operation of business organization.

[93 Cases that cite this headnote](#)

[6] Labor and Employment

 [Investigations](#)

Employers act within their legal rights in investigating reasonably credible allegations of dishonesty of their employees.

[5 Cases that cite this headnote](#)

[7] False Imprisonment

 [Nature and Elements of False Imprisonment](#)

Essential elements of false imprisonment are willful detention without consent and without authority of law.

[29 Cases that cite this headnote](#)

[8] False Imprisonment

 [Act or means of arrest or detention](#)

For purposes of false imprisonment, detention may be accomplished by violence, by threats, or by any other means that restrains person from moving from one place to another.

[24 Cases that cite this headnote](#)

[9] False Imprisonment

 [Act or means of arrest or detention](#)

Where it is alleged that detention, for purposes of false imprisonment claim, is effected by a threat, plaintiff must demonstrate that threat was such as would inspire in the threatened person a just fear of injury to her person, reputation, or property.

[23 Cases that cite this headnote](#)

[10] False Imprisonment

 [Act or means of arrest or detention](#)

When employer supervises its employees, it necessarily temporarily restricts employees' freedom to move from one place to another or in the direction that they wish to go, but, without more, such restriction is not a "willful detention" which is one of the elements for false imprisonment; however, this type of restriction could constitute "willful detention" where employer also uses physical force or threatens employee's person, reputation, or property.

[36 Cases that cite this headnote](#)

[11] Labor and Employment

 [Manner of conducting business](#)

Employer has the right, subject to certain limited exceptions, to instruct its employees regarding task that they are to perform during work hours; to effectively manage its business, employer must be able to suggest, and even insist, that employees perform certain tasks in certain locations at certain times.

[2 Cases that cite this headnote](#)

[12] False Imprisonment

 [Act or means of arrest or detention](#)

Employer's request that employee stay away from particular area of the business premises during work hours did not constitute "false imprisonment."

[Cases that cite this headnote](#)

[13] Libel and Slander

 [Nature and elements of defamation in general](#)

"Slander" is defamatory statement that is orally communicated or published to third person without legal excuse.

[106 Cases that cite this headnote](#)

[14] Libel and Slander

 [Truth as justification in general](#)

In suits brought by private individuals, truth is affirmative defense to slander.

[25 Cases that cite this headnote](#)

[15] Libel and Slander

🔑 [As to character of employee](#)

For purposes of slander action, employer has conditional or qualified privilege that attaches to communications made in course of investigation following report of employee wrongdoing and this privilege remains intact as long as communications pass only to persons having interest or duty in the matter to which the communications relate.

[58 Cases that cite this headnote](#)

[16] Libel and Slander

🔑 [Existence and Effect of Malice](#)

Proof that statement was motivated by actual malice existing at time of publication defeats employer's conditional or qualified privilege that attaches to communications made in course of investigation following report of employee wrongdoing.

[68 Cases that cite this headnote](#)

[17] Libel and Slander

🔑 [Malice](#)

In the defamation context, statement is made with actual malice when statement is made with knowledge of its falsity or with reckless disregard as to its truth.

[35 Cases that cite this headnote](#)

[18] Judgment

🔑 [Weight and sufficiency](#)

To invoke on summary judgment conditional or qualified privilege that attaches to communications made in course of investigation following report of employee wrongdoing, employer must conclusively establish that the allegedly defamatory statement was made with an absence of malice.

[92 Cases that cite this headnote](#)

[19] Libel and Slander

🔑 [As to character of employee](#)

Libel and Slander

🔑 [Truth as justification in general](#)

Store did not slander worker who did not pay for item because all of the statements made by store's employees were both true and qualifiedly privileged; store never accused worker of theft or of having the intent to steal, throughout investigation, store's employees merely communicated to each other that worker had left store without paying for item and worker did not dispute this fact but argued only that she did not have the intent to steal, store had right to investigate incident and could not have conducted investigation without communicating facts regarding worker's actions to each other, all of the store's employees who gave or received statements about incident had interest or duty in the matter, and store established absence of malice with regard to these statements by conclusively proving that its employees had reasonable grounds to believe that their statements were true.

[11 Cases that cite this headnote](#)

[20] Libel and Slander

🔑 [Truth as justification in general](#)

Truth is a complete defense to defamation.

[21 Cases that cite this headnote](#)

[21] Libel and Slander

🔑 [As to character of employee](#)

As employee of store, cosmetician was privileged to report alleged wrongdoing by his supervisor to store's management, but cosmetician stepped outside boundaries of this privilege by circulating petition about supervisor to ordinary employees and customers and, in so doing, cosmetician, as a matter of law, acted independently and outside scope of her authority and therefore,

store which did not authorize, condone, or ratify cosmetician's circulation of petition was not liable for any defamation claims that may have resulted from petition's circulation.

[4 Cases that cite this headnote](#)

[22] Libel and Slander

 **As to character of employee**

Store did not defame supervisor because all of the statements made by store employees about cosmetician's allegations, that supervisor used store merchandise without paying for it, were qualifiedly privileged; once store received cosmetician's complaints, it was privileged to investigate them, all of the employees who gave or received statements about cosmetician's allegations had interest or duty in the matter, and none of the employees repeated cosmetician's complaints with knowledge of their falsity or with reckless disregard as to their truth.

[24 Cases that cite this headnote](#)

[23] Libel and Slander

 **As to character of employee**

Store did not defame worker because all of its statements made by store employees regarding cosmetician's allegations that worker used store merchandise without paying for it were qualifiedly privileged; employees who gave or received statements about cosmetician's allegations had interest or duty in the matter and none of them repeated cosmetician's complaints with knowledge of their falsity or with reckless disregard as to their truth.

[39 Cases that cite this headnote](#)

Attorneys and Law Firms

***642** [Jay H. Henderson](#), [Holly H. Williamson](#), Houston, for petitioners.

[Mark W. Stevens](#), Galveston, for respondent.

Opinion

SPECTOR, Justice, delivered the opinion of the Court, in which PHILLIPS, Chief Justice, and [GONZALEZ](#), [HIGHTOWER](#), [HECHT](#), [CORNYN](#), [GAMMAGE](#), and [ENOCH](#), Justices, join.

This appeal presents three issues regarding an employer's treatment of an employee suspected of misconduct. The first is whether the employer's questioning of the employee about possible theft constitutes "extreme and outrageous conduct" necessary to state a claim for intentional infliction of emotional ***643** distress. The second is whether the employer's request that the employee stay away from a particular area of the business premises during work hours constitutes false imprisonment. The third is whether the employer's statements made in the course of its investigations of employee wrongdoing fall outside of its qualified privilege. For the reasons explained herein, we answer all three questions in the negative. We therefore render judgment that the employee take nothing.

Mary Lynn Johnson, a manager of a Randall's store, purchased several items from the store, but did not pay for a large Christmas wreath that she was holding. Vernon Davis, the check-out clerk, did not charge Johnson for the twenty-five dollar wreath because, after ringing up her other items, he asked her if there was anything else, and she replied that there was nothing else. Davis reported Johnson's failure to pay him for the wreath to management. The store's security guard was then requested to investigate the incident. The guard contacted Lewis Simmons (director of the store), and Simmons reported the incident to Mike Seals (the district manager for that store).

When Johnson returned to work two days later, Simmons escorted her to an office in the back of the store and questioned her about the wreath. Johnson admitted that she left the store without paying for the wreath, explaining that she had a lot on her mind at the time. With Johnson in the room, Simmons then called Seals and reported the results of this interview to him. Because Seals wanted to meet with Johnson later that day, Simmons asked her to stay at the store. Simmons told Johnson that he did not think it would be a good idea for her to be on the store's floor; he suggested that she either remain in the office or work on a volunteer project painting a booth for a parade. Johnson chose to wait for Seals in the office. While

she waited, Johnson left the office twice, once to use the restroom and the second time to visit a friend in the floral department and to pay for the wreath.

When Seals arrived at the store, he and Simmons questioned Johnson further. They asked how she could forget to pay for an item when she was checking out with several other items at the same time. This questioning caused Johnson to cry. At the end of this interview, Seals suspended Johnson for thirty days without pay and informed her that at the conclusion of the thirty days she would be transferred to another, nearby store. Johnson never reported to work at the other store. She subsequently sued Randall's, Seals, Simmons, and Davis (collectively, "Randall's"), alleging various claims, including intentional infliction of emotional distress, false imprisonment, and defamation.

Some of Johnson's defamation allegations stem from statements made by Scottie Ketner, a former Randall's employee who worked in the cosmetics section of the store and was a subordinate of Johnson's. While employed at Randall's, Ketner complained about Johnson's management style and alleged that Johnson used store merchandise without paying for it. Ketner documented her complaints in memoranda addressed to Randall's management. Randall's investigated this incident and concluded that the problem was essentially a personality conflict for which Ketner was largely responsible.

The trial court granted Randall's motion for summary judgment on all of Johnson's claims. The court of appeals affirmed in part and reversed in part, reversing the judgment of the trial court on the claims of intentional infliction of emotional distress, false imprisonment, and defamation.¹ 869 S.W.2d 390.

[1] This Court has jurisdiction of this case pursuant to sections 22.001(a)(1) and 22.001(a)(6) of the Texas Government Code. Because this Court has subject matter jurisdiction over the intentional infliction of emotional distress, false imprisonment, and libel actions, it has jurisdiction over the entire *644 case, including the slander issues.² *Stafford v. Stafford*, 726 S.W.2d 14, 15 (Tex.1987).

[2] [3] To prevail on a motion for summary judgment, a movant must establish that there is no genuine issue as to any material fact and that he or she is entitled

to judgment as a matter of law. TEX.R.CIV.P. 166a(c). A defendant who conclusively negates at least one of the essential elements of a cause of action is entitled to summary judgment as to that cause of action. *Wornick Co. v. Casas*, 856 S.W.2d 732, 733 (Tex.1993); *Gibbs v. General Motors Corp.*, 450 S.W.2d 827, 828 (Tex.1970). Likewise, a defendant who conclusively establishes each element of an affirmative defense is entitled to summary judgment. In reviewing a summary judgment, we must accept as true evidence in favor of the non-movant, indulging every reasonable inference and resolving all doubts in his or her favor. *El Chico Corp. v. Poole*, 732 S.W.2d 306, 315 (Tex.1987).

I.

[4] [5] To recover for intentional infliction of emotional distress, a plaintiff must prove that (1) the defendant acted intentionally or recklessly; (2) the defendant's conduct was extreme and outrageous; (3) the defendant's actions caused the plaintiff emotional distress; and (4) the emotional distress suffered by the plaintiff was severe. *Twyman v. Twyman*, 855 S.W.2d 619, 621–22 (Tex.1993). In *Twyman*, we adopted the Restatement's formulation of the tort of intentional infliction of emotional distress, including the definition of extreme and outrageous conduct as conduct that is “so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.” *Id.* at 621 (quoting RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1965)). We hold that the summary judgment evidence establishes as a matter of law that Randall's conduct was not “extreme and outrageous,” an essential element of the tort of intentional infliction of emotional distress.

The conduct that Johnson alleges was extreme and outrageous is Simmons and Seals' questioning of her regarding the wreath. Johnson maintains that during Simmons' telephone conversation with Seals, which occurred after Simmons' initial questioning of her, his tone and manner became severe and curt. She alleges that Simmons merely answered Seals' questions and did not explain the facts to him. During Simmons and Seals' subsequent meeting with Johnson, the summary judgment evidence establishes that Johnson explained her version of the wreath incident, and then she was asked how she could

forget to pay for an item when she was checking out with several other items at the same time.

[6] Accepting all evidence favorable to Johnson as true, we conclude that, as a matter of law, neither Randall's nor its agents engaged in extreme and outrageous conduct. Randall's merely asked a management-level employee to explain a report of wrongdoing. Employers act within their legal rights in investigating reasonably credible allegations of dishonesty of their employees. *See Johnson v. Merrell Dow Pharmaceuticals, Inc.*, 965 F.2d 31, 34 (5th Cir.1992). This conduct is not "beyond all possible bounds of decency," "atrocious," and "utterly intolerable in a civilized community"; rather, it is a managerial function that is necessary to the ordinary operation of a business organization. *See Wornick Co. v. Casas*, 856 S.W.2d 732, 735 (Tex.1993).

II.

[7] [8] [9] The essential elements of false imprisonment are: (1) willful detention; (2) without consent; and (3) without authority of law. *Sears, Roebuck & Co. v. Castillo*, 693 S.W.2d 374, 375 (Tex.1985). A detention *645 may be accomplished by violence, by threats, or by any other means that restrains a person from moving from one place to another. *Martinez v. Goodyear Tire & Rubber Co.*, 651 S.W.2d 18, 20 (Tex.App.—San Antonio 1983, no writ). Where it is alleged that a detention is effected by a threat, the plaintiff must demonstrate that the threat was such as would inspire in the threatened person a just fear of injury to her person, reputation, or property. *Id.* at 20–21; *Black v. Kroger Co.*, 527 S.W.2d 794, 796 (Tex.Civ.App.—Houston [1st Dist.] 1975, writ dismissed). We hold that, as a matter of law, Randall's did not willfully detain Johnson.

Johnson bases her false imprisonment claim on her alleged confinement in a back office for several hours while awaiting the arrival of Seals.³ According to Johnson's testimony, Simmons told Johnson that, while waiting for Seals, she could either paint a booth for a volunteer project or remain in the office, but he did not think it would be a good idea for her to be on the floor of the store. Johnson testified that she believed that Simmons would physically prevent her from leaving the back room had she wanted to leave. She based this belief on Simmons' "sternness, his tone of voice, [and] his insistence that I stay put."

Johnson does not contend that her detention was effected by actual physical force; rather, she alleges that Simmons detained her by sternly insisting that she stay put, which caused her to fear that he would physically prevent her from leaving had she attempted to leave. In effect, Johnson alleges that Simmons impliedly threatened her person. This allegation is conclusively negated by the fact that Johnson left the area that she was allegedly confined to twice, and no one tried to stop her from doing so. Neither Simmons nor anyone else guarded Johnson. Simmons never stated that he would physically restrain Johnson if she attempted to enter the floor of the store. Simmons did not even attempt to confine Johnson to a particular place; he merely suggested that she avoid one area of the store. In short, no threat was made to detain Johnson.

[10] [11] [12] Simmons' request that Johnson not work in one area of the workplace does not constitute false imprisonment. When an employer supervises its employees, it necessarily temporarily restricts the employees' freedom to move from place to place or in the direction that they wish to go. Without more, however, such a restriction is not a "willful detention."⁴ An employer has the right, subject to certain limited exceptions,⁵ to instruct its employees regarding the tasks that they are to perform during work hours. Johnson was compensated for the time that she spent waiting for Seals, and Simmons gave her the choice of passing this time working on a volunteer project or sitting and waiting in the office. In order to effectively *646 manage its business, an employer must be able to suggest, and even insist, that its employees perform certain tasks in certain locations at certain times. As a matter of law, Randall's did not falsely imprison Johnson.

III.

[13] [14] Johnson alleges that Randall's defamed her in the course of its investigations of the Christmas wreath incident and Ketner's allegations. Slander is a defamatory statement that is orally communicated or published to a third person without legal excuse. *Diaz v. Rankin*, 777 S.W.2d 496, 498 (Tex.App.—Corpus Christi 1989, no writ); *Ramos v. Henry C. Beck Co.*, 711 S.W.2d 331, 333 (Tex.App.—Dallas 1986, no writ). In suits brought by private individuals,⁶ truth is an affirmative defense to

slander. *Town of South Padre Island v. Jacobs*, 736 S.W.2d 134, 140 (Tex.App.—Corpus Christi 1986, writ denied).

[15] [16] [17] [18] In addition, an employer has a conditional or qualified privilege that attaches to communications made in the course of an investigation following a report of employee wrongdoing. *Southwestern Bell Telephone Co. v. Dixon*, 575 S.W.2d 596, 599 (Tex.Civ.App.—San Antonio 1978), writ dismissed, 607 S.W.2d 240 (Tex.1980). The privilege remains intact as long as communications pass only to persons having an interest or duty in the matter to which the communications relate. *Butler v. Central Bank & Trust Co.*, 458 S.W.2d 510, 514–15 (Tex.Civ.App.—Dallas 1970, writ dismissed); see also *Bergman v. Oshman's Sporting Goods, Inc.*, 594 S.W.2d 814, 816 (Tex.Civ.App.—Tyler 1980, no writ). Proof that a statement was motivated by actual malice existing at the time of publication defeats the privilege. See *Marathon Oil Co. v. Salazar*, 682 S.W.2d 624, 631 (Tex.App.—Houston [1st Dist.] 1984, writ refused n.r.e.); *Bergman*, 594 S.W.2d at 816 n. 1. In the defamation context, a statement is made with actual malice when the statement is made with knowledge of its falsity or with reckless disregard as to its truth. *Hagler v. Procter & Gamble Mfg. Co.*, 884 S.W.2d 771 (Tex.1994). To invoke the privilege on summary judgment, an employer must conclusively establish that the allegedly defamatory statement was made with an absence of malice. See *Jackson v. Cheatwood*, 445 S.W.2d 513, 514 (Tex.1969); *Goodman v. Gallerano*, 695 S.W.2d 286, 287–88 (Tex.App.—Dallas 1985, no writ).

[19] Johnson claims that she was slandered in the course of the wreath investigation when Davis, Simmons, and Seals orally published, falsely, that she had stolen a wreath from the store. However, Randall's proved that all of the statements that its agents made concerning Johnson's actions with respect to the wreath were true. Randall's never accused Johnson of theft or of having the intent to steal. Throughout the investigation, Randall's employees merely communicated to each other that Johnson had left the store without paying for a wreath. Johnson does not dispute this fact; she argues only that she did not have the intent to steal. The summary judgment evidence contains deposition testimony from the employees who allegedly made statements regarding the wreath incident, and this testimony establishes that these employees did not speculate or make accusations regarding Johnson's intent.

[20] Johnson incorrectly contends that, while the statements made by Randall's employees may be literally true, they are slanderous because those who hear the statements might infer that she is dishonest. Truth is a complete defense to defamation. Randall's had a right to investigate the wreath incident, and it could not have conducted the investigation without communicating the facts regarding Johnson's actions with respect to the wreath to each other.

Furthermore, all of the statements made by Randall's employees were qualifiedly privileged. Davis' report that Johnson left the store without paying him for a wreath triggered Randall's privilege to investigate. The employees who received communications regarding the wreath incident were: several managers on duty on the night of the wreath incident, the security guard who subsequently investigated the incident, the assistant store manager, the director of the store, the district manager for the store, and the vice president of Randall's human resources. In addition, the security guard interviewed employees with knowledge of facts relevant to his investigation.⁷ Thus, all of the employees who gave or received statements about the wreath incident had an interest or duty in the matter. Randall's established an absence of malice with regard to these statements by conclusively proving that its employees had reasonable grounds to believe that their statements were true. See *Casso v. Brand*, 776 S.W.2d 551, 558 (Tex.1989). In fact, as discussed previously, the truth of the statements is undisputed.

[21] The statements made by Randall's employees regarding Ketner's complaints are also qualifiedly privileged. Through both oral and written communications, Ketner complained to Randall's management that Johnson was a poor manager and that she used store merchandise without paying for it. As an employee of Randall's, Ketner was privileged to report this alleged wrongdoing to management. *Bergman*, 594 S.W.2d at 816. However, Ketner stepped outside the boundaries of this privilege by circulating a petition about Johnson to ordinary employees and customers. In so doing, Ketner, as a matter of law, acted independently and outside the scope of her authority as a cosmetician. See *Wagner v. Caprock Beef Packers Co.*, 540 S.W.2d 303, 304–05 (Tex.1976). The summary judgment evidence establishes that Randall's did not authorize, condone, or ratify Ketner's circulation of this petition; therefore,

Randall's is not liable for any defamation claims that may have resulted from the petition's circulation. *Id.*

[22] Once Randall's received Ketner's complaints, it was privileged to investigate them. The summary judgment evidence establishes that various members of Randall's management received complaints from Ketner and forwarded them to the vice president of human resources, who documented the complaints and placed them in Johnson's personnel file. The record also establishes that the managers who received complaints discussed the complaints with Johnson's supervisors in an attempt to resolve the matter. The vice president investigated the complaints and reported the results in two of his own memoranda. Ketner's allegations were not repeated in these memoranda. Instead, the memoranda described the problem as largely a personality conflict, and placed the blame of the conflict largely on Ketner. These memoranda were circulated to members of Randall's management who had received Ketner's complaints or who were supervisors of Johnson. Thus, all of the employees who gave or received statements about the Ketner allegations had an interest or duty in the matter.

[23] Randall's conclusively established an absence of malice with regard to statements made about Ketner's allegations. None of Randall's agents repeated Ketner's

complaints with knowledge of their falsity or with reckless disregard as to their truth. The complaints were merely forwarded to the appropriate managers for investigation and resolution.

* * * * *

We conclude that, as a matter of law, the conduct of Randall's in this case was not extreme and outrageous and did not constitute a willful detention of Johnson. On the subject of the wreath incident, we conclude that Randall's did not slander Johnson because all of the statements made by Randall's employees were both true and qualifiedly privileged. With regard to the Ketner allegations, we conclude that Randall's did not defame Johnson because all of the statements *648 made by Randall's employees were qualifiedly privileged. We accordingly reverse the judgment of the court of appeals and render judgment that Johnson take nothing.

OWEN, J., not sitting.

All Citations

891 S.W.2d 640, 129 Lab.Cas. P 57,855, 10 IER Cases 427, 38 Tex. Sup. Ct. J. 167

Footnotes

- 1 The court of appeals reversed the trial court's judgment on the slander claim regarding the alleged theft of the wreath and the defamation claim concerning Ketner's statements, but upheld the trial court's judgment rejecting a third slander claim. Johnson does not challenge the court of appeals' ruling on the third claim.
- 2 Although this Court now has jurisdiction over slander cases, it did not at the time that this litigation commenced. Act of May 17, 1985, 69th Leg., R.S., ch. 480, § 1, 1985 Tex.Gen.Laws 1720, 1731, *amended by* Act of May 25, 1993, 73rd Leg., R.S., ch. 855, §§ 2 & 3, 1993 Tex.Gen.Laws 3365, 3366 (amending § 22.225 of the Texas Government Code to provide this Court with subject matter jurisdiction over slander cases, excluding matters in litigation prior to Sept. 1, 1993, the effective date of the Act).
- 3 The court of appeals stated that Johnson's false imprisonment claim is based not only on the alleged detainment while waiting for Seals, but also on the length of time involved in the interviews. 869 S.W.2d at 398. However, Johnson did not present any legal or factual arguments supporting a false imprisonment claim stemming from her meetings with Simmons and Seals to the court of appeals or to this Court. Her pleadings also do not allege such a claim. On the issue of false imprisonment, Johnson pleaded, in full, that:

Plaintiff Mary Lynn Johnson would further show that her liberty was falsely and wrongly restrained by Defendant Lewis Simmons at the direction of Mike Seals and, upon information and belief, with the approval of Ron Barclay, by ordering and instructing her to remain within confined spaces prior to the arrival of Mike Seals on Thursday, November 29, 1991, for a period of approximately two to three hours.
- 4 This type of restriction could constitute a willful detention where the employer also uses physical force or threatens the employee's person, reputation, or property. See, e.g., *Black*, 527 S.W.2d at 801 (holding that the jury could reasonably conclude that threats of being taken to jail and of not seeing her daughter for a long time could have intimidated the plaintiff to the extent that she was unable to exercise her free will to leave the interview room); *Kroger Co. v. Warren*, 420 S.W.2d

218, 220–22 (Tex.Civ.App.—Houston [1st Dist.] 1967, no writ) (upholding trial court's finding of false imprisonment where the plaintiff was told that she could not leave the room until she signed a statement and was physically restrained when she attempted to leave).

5 See, e.g., *Sabine Pilot Service, Inc. v. Hauck*, 687 S.W.2d 733 (Tex.1985) (holding that an employer may not discharge an employee for the sole reason that the employee refused to perform an illegal act).

6 At this time, we need not and do not decide whether truth is an affirmative defense in slander cases brought by public officials or public figures. See *Casso v. Brand*, 776 S.W.2d 551, 555 n. 3 (Tex.1989).

7 In his concurring opinion, Justice Cohen concluded that Johnson's allegation that the security guard talked loud enough for others to hear him during these interviews was enough to defeat Randall's motion for summary judgment. 869 S.W.2d at 403. However, Randall's conclusively negated this allegation with the uncontroverted deposition testimony of the security guard, which established that the interviews were conducted in the back of the store restaurant, that no one was nearby while the interviews were conducted, and that if anyone walked by, the security guard and the interviewees stopped talking.

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899 S.W.2d 195
Supreme Court of Texas.

CENTEQ REALTY, INC., Petitioner,
v.
Karelyn SIEGLER, Respondent.

No. 94-0573.

Argued Jan. 19, 1995.

Decided May 25, 1995.

Resident of high-rise condominium who was attacked and kidnapped from condominium's parking garage brought premises liability action against realty company as alleged controller or agent of condominium. The 164th District Court, Harris County, [J. Bradley Smith, J.](#), entered summary judgment for company, and resident appealed. The Houston Court of Appeals, Fourteenth District, [Draughn, J.](#), reversed and remanded, [874 S.W.2d 304](#), and company appealed. The Supreme Court, [Cornyn, J.](#), held that: (1) company's power to elect majority of homeowners' association board which made security decisions did not give it specific control over the safety and security of the premises so as to warrant imposition of legal duty to protect resident from criminal acts of third party, and (2) in light of finding that company did not have specific control over security, issue of whether company was agent of condominium was immaterial.

Reversed.

[Gammage, J.](#), filed dissenting opinion.

West Headnotes (14)

[1] Judgment

Presumptions and burden of proof

To obtain summary judgment, movant must either negate at least one element of plaintiff's theory of recovery or plead and conclusively establish each element of an affirmative defense.

[306 Cases that cite this headnote](#)

[2] Judgment

Presumptions and burden of proof

Once defendant produces sufficient evidence to establish the right to summary judgment, plaintiff must present evidence sufficient to raise fact issue.

[441 Cases that cite this headnote](#)

[3] Judgment

Presumptions and burden of proof

In deciding motion for summary judgment, evidence favorable to nonmovant must be accepted as true and every reasonable inference indulged in nonmovant's favor.

[193 Cases that cite this headnote](#)

[4] Negligence

Necessity and Existence of Duty

Threshold inquiry in negligence case is whether defendant owes legal duty to plaintiff.

[86 Cases that cite this headnote](#)

[5] Negligence

Necessity and Existence of Duty

To establish liability in tort, plaintiff must establish both existence and violation of duty owed to plaintiff by defendant.

[33 Cases that cite this headnote](#)

[6] Negligence

Duty as question of fact or law generally

Existence of duty in tort case is question of law for the court to decide from the facts surrounding the occurrence in question.

[51 Cases that cite this headnote](#)

[7] Negligence

Protection against acts of third persons

Person generally has no legal duty to protect another from the criminal acts of third person.

[18 Cases that cite this headnote](#)

[8] Landlord and Tenant

 [Acts of third persons](#)

Landlord who retains control over security and safety of the premises owes duty to tenant's employee to use ordinary care to protect the employee against unreasonable and foreseeable risk of harm from the criminal acts of third parties.

[23 Cases that cite this headnote](#)

[9] Negligence

 [Ownership, custody and control](#)

Right to control the premises is one factor that determines whether legal duty to protect should be imposed on the owner or possessor of the premises.

[9 Cases that cite this headnote](#)

[10] Common Interest Communities

 [Nature of entity; purpose in general](#)

Just as corporation is distinct from its shareholders, condominium homeowners' association is separate legal entity from its unit owners.

[2 Cases that cite this headnote](#)

[11] Corporations and Business Organizations

 [Separate Corporations; Disregarding Separate Entities](#)

Supreme Court will disregard the corporate fiction under the alter ego theory when the corporation is organized and operated as mere tool or business conduit of another corporation.

[5 Cases that cite this headnote](#)

[12] Common Interest Communities

 [Control of association or its governing board](#)

Realty company did not have specific control over security at condominium for premises liability purposes, even though company had the power to elect majority of homeowners' association board and the board made security decisions, where there was no proof that board members would not have been elected but for company's exercise of its proxy votes and there was no evidence that company actually directed the board members' votes on security issues; company's influence was too attenuated to impose legal duty upon it to protect condominium resident from criminal acts of third parties.

[5 Cases that cite this headnote](#)

[13] Common Interest Communities

 [Responsibility of management/ maintenance contractor for condition of common areas](#)

Whether realty company was agent of condominium was immaterial to liability for criminal acts against resident where company did not have control over security decisions at condominium.

[Cases that cite this headnote](#)

[14] Negligence

 [Protection against acts of third persons in general](#)

Before Supreme Court will impose the duty to protect against the criminal acts of third parties, it must find that defendant had specific control over the security of the premises where the criminal act took place.

[27 Cases that cite this headnote](#)

Attorneys and Law Firms

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[John M. O'Quinn](#), Jacqueline Lucci, [Mark T. Croley](#), [Andrew S. Pikoff](#), for respondent.

Opinion

CORNYN, Justice, delivered the opinion of the Court, joined by PHILLIPS, Chief Justice, GONZALEZ, HIGHTOWER, HECHT, ENOCH, SPECTOR, and OWEN, Justices.

In this premises liability case, we consider whether Centeq Realty, Inc., (Centeq) owed Karelyn Siegler a duty of reasonable care to protect her from the criminal acts of a third party. The trial court granted Centeq's motion for summary judgment. The court of appeals reversed. 874 S.W.2d 304. Because we determine that Centeq owed no legal duty to Siegler, we reverse the judgment of the court of appeals and render judgment that Siegler take nothing from Centeq.

Through a number of foreclosures, United Savings (United) came to own a majority of the units at the Warwick Towers, a high-rise condominium complex in Houston. United contracted with Centeq to market all of its units and assigned Centeq all voting rights associated with those units. Although Centeq was not itself an owner, the assignment of United's voting rights gave Centeq the right to vote on all major decisions affecting unit owners at the Warwick Towers, including the right to nominate and vote for the board members of the Warwick Council of Co-Owners (Warwick Council), the homeowners' association charged with maintaining the areas owned in common by the unit owners. Furthermore, by virtue of an agreement executed between United and the Warwick Council, United was entitled to have a representative on the board of the Warwick Council, a position that United filled with Carla Van Over, the president of Centeq and a resident of the Warwick Towers.

On January 25, 1990, Siegler, a Warwick Towers resident, was attacked and kidnapped from the parking garage of the Warwick Towers. She later filed suit against the Warwick Council and Centeq, alleging that they were negligent in failing to provide adequate security on the premises. According to Siegler's first amended petition, Centeq owed her a legal duty to provide adequate security because (1) Centeq "owned, controlled, and/or managed" the premises on which Siegler was injured, and because (2) Centeq was "an agent and/or representative of Warwick Towers and/or Warwick Counsel [sic] relative to the daily operation of the [Warwick Towers] premises." Centeq filed a motion for summary judgment, supported by

the affidavit of Carla Van Over, who attested that (1) Centeq was not an agent or representative of Warwick Towers; (2) Centeq was not the agent of the Warwick Council, nor did it have a contractual relationship with the Warwick Council; (3) as a voting member of the Warwick Council, Van Over's obligations ran to the unit owners, not to Centeq; and (4) Centeq did not own, control, or manage the premises of the Warwick Towers. *197 In response, Siegler filed the affidavit of Donna Green, the General Manager of the Warwick Council, who asserted, in pertinent part, that (1) Centeq was the agent of United, (2) Centeq controlled, by proxy, the majority of unit owner votes, which gave Centeq the power to select the board of the Warwick Council, change the bylaws of the Warwick Council, and to approve or deny all large expenditures; (3) because Centeq controlled the majority of votes, Centeq was able to select a majority of the board of the Warwick Council that voted in the best interest of Centeq; and (4) Centeq held itself out as the agent of the Warwick Towers, as evidenced by advertisements, phone listings, and the fact that Centeq maintained a sales and leasing office on the Warwick Towers premises. The trial court granted Centeq's motion for summary judgment and severed Siegler's claims against Centeq.¹ A divided court of appeals reversed, holding that Siegler had raised a fact issue as to whether Centeq controlled the security at the Warwick Towers.

[1] [2] [3] To obtain summary judgment, a movant must either negate at least one element of the plaintiff's theory of recovery, "*Moore" Burger, Inc. v. Phillips Petroleum Co.*, 492 S.W.2d 934, 936 (Tex.1972), or plead and conclusively establish each element of an affirmative defense. *City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 678 (Tex.1979). Once the defendant produces sufficient evidence to establish the right to summary judgment, the plaintiff must present evidence sufficient to raise a fact issue. "*Moore" Burger*, 492 S.W.2d at 936-37. Evidence favorable to the non-movant must be accepted as true and every reasonable inference indulged in the non-movant's favor. *Nixon v. Mr. Property Management Co.*, 690 S.W.2d 546, 549 (Tex.1985).

[4] [5] [6] The threshold inquiry in a negligence case is whether the defendant owes a legal duty to the plaintiff. *Graff v. Beard*, 858 S.W.2d 918, 919 (Tex.1993); *Greater Houston Transp. Co. v. Phillips*, 801 S.W.2d 523, 525 (Tex.1990). The plaintiff must establish both the existence and the violation of a duty owed to the plaintiff by the

defendant to establish liability in tort. *Greater Houston Transp. Co.*, 801 S.W.2d at 525. The existence of duty is a question of law for the court to decide from the facts surrounding the occurrence in question. *Id.*

[7] [8] [9] Generally, a person has no legal duty to protect another from the criminal acts of a third person. *Greater Houston Transp. Co.*, 801 S.W.2d at 525; see also RESTATEMENT (SECOND) OF TORTS § 315 (1965) (noting that no general duty exists to control the conduct of others). There are, however, exceptions to this general rule. In the landlord-tenant relationship, for example, a landlord who retains control over the security and safety of the premises owes a duty to a tenant's employee to use ordinary care to protect the employee against an unreasonable and foreseeable risk of harm from the criminal acts of third parties. *Exxon Corp. v. Tidwell*, 867 S.W.2d 19, 23 (Tex.1993); cf. *Nixon v. Mr. Property Management Co.*, 690 S.W.2d 546, 549 (Tex.1985) (holding that apartment management had a duty to protect against foreseeable criminal activity); *Haight v. Savoy Apartments*, 814 S.W.2d 849, 853–54 (Tex.App.—Houston [1st Dist.] 1991, writ denied) (holding that apartment management had a duty to protect a tenant's guest). The right to control the premises is thus one of the factors that determines whether a legal duty should be imposed on the owner or possessor of the premises.

Siegler contends that there is a fact issue as to whether Centeq controlled the security of the parking garage at the Warwick Towers. Siegler's argument relies upon two premises: first, that the Warwick Council owed Siegler a duty to provide adequate security because it controlled the maintenance and security of the common areas, and, second, that Centeq, by holding a majority of the unit holder votes, controlled the actions of the Warwick Council, thus allowing it to control security at the Warwick Towers.

*198 We have never decided whether the exception to nonliability articulated in *Exxon* applies with equal force to the relationship between a condominium homeowners' association and its unit holders. In *Dutcher v. Owens*, 647 S.W.2d 948, 950 (Tex.1983), we implied but did not squarely hold that a homeowners' association owes a duty to its residents to use reasonable care in maintaining the safety of common areas. The sole issue before us in *Dutcher* was the *allocation* of liability, not the *existence*

of liability. *Id.* at 948. We note, though, that courts in other jurisdictions have imposed upon a homeowners' association the duty to exercise due care for the residents' safety in those areas under its control. See *Frances T. v. Village Green Owners Ass'n.*, 42 Cal.3d 490, 229 Cal.Rptr. 456, 459–60, 723 P.2d 573, 576–77 (1986) (comparing the role of a homeowners' association to a landlord and holding that a homeowners' association owes a duty to provide reasonable security in common areas); see also *Newell v. Best Sec. Syst., Inc.*, 560 So.2d 395, 397 (Fl.Dist.Ct.App.1990). But see, *Moody v. Cawdrey & Assoc., Inc.*, 68 Haw. 527, 721 P.2d 707 (1986), rev'g 6 Haw.App. 355, 721 P.2d 708 (1986). See generally, Eric Hollowell, Annotation, *Condominium Association's Liability to Unit Owner for Injuries Caused by Third Person's Criminal Conduct*, 59 A.L.R. 4th 489 (1988).

In this case, Siegler presented evidence that the Warwick Council controlled the security of the common areas, including the parking garage. Assuming without deciding that the Warwick Council owed a duty to its residents to provide adequate security in the parking garage, we turn to the second component of Siegler's cause of action against Centeq: whether Centeq's power to cast United's votes gave it the power to control the board of the Warwick Council and thereby control security at the Warwick Towers.

[10] [11] [12] We have previously noted the similarities between homeowners' associations and corporations, leading us to conclude that a homeowners' association is a separate legal entity from its unit owners, just as a corporation is distinct from its shareholders. *Dutcher*, 647 S.W.2d at 950 (citing *White v. Cox*, 17 Cal.App.3d 824, 95 Cal.Rptr. 259 (1971)). In the corporate context, we will disregard the corporate fiction under the “alter ego” theory when the corporation is “organized and operated as a mere tool or business conduit of another corporation.” *Castleberry v. Branscum*, 721 S.W.2d 270, 272 (Tex.1986). Applying the alter ego theory by analogy to the case at hand, Siegler's legal argument, in effect, asks us to disregard the separate legal existence of the Warwick Council and to view it as a mere conduit through which Centeq exercised power over all security decisions. Based on this record, we decline to do so.

Siegler submitted uncontested summary judgment proof that the proxy agreement between United and Centeq authorized Centeq to vote a majority of the total

homeowners' association votes in elections for the board of the Warwick Council. Siegler did not, however, present any proof that the board members would not have been elected but for Centeq's exercise of its proxy votes, nor did Siegler allege any facts tending to show that Centeq actually directed the board members' votes on security issues.² To the contrary, Carla Van Over attested that “[a]s a voting member of Warwick Counsel [sic] my obligations ran to the homeowners—not to Centeq.”

We conclude that Centeq's power to elect a majority of the board of the Warwick Council *199 was entirely distinct from the power to control security. The only “control” wielded by Centeq related to its majority vote in electing board members, not to the rendering of decisions affecting security measures. Centeq had no direct power to make security decisions, and consequently, its influence, if any, upon the Warwick Council was too attenuated to constitute “specific control over the safety and security of the premises.” See *Exxon*, 867 S.W.2d at 23. In short, Siegler asserts no facts that would tend to show that Centeq used the Warwick Council as a mere conduit to implement a policy of its own choosing. Given the evidence before us, we do not consider it a fair inference that Centeq had specific control over the security at the Warwick Towers.

[13] [14] Siegler also asserts that Centeq held itself out as an agent of the Warwick Towers through advertisements and the occupation of a sales and leasing office in the Warwick Towers, but this issue is immaterial to our resolution of this case.³ Even assuming that Centeq was a leasing agent for the Warwick Towers, that issue would not be dispositive. As we stated in *Exxon*, “the court's inquiry must focus on who had specific control over the safety and security of the premises, rather than on the more general right of control over operations.” *Exxon*, 867 S.W.2d at 23. The material issue is whether Centeq had control over security decisions. Before we will impose the duty to protect against the criminal acts of third parties, we must find that the defendant had specific control over the security of the premises where the criminal act took place. *Id.* (“If Exxon did not have any right to control the security of the station, it cannot have had any duty to provide the same.”). While the Warwick Council may have had specific control over the security of the parking garage at the Warwick Towers, Centeq did not. On this record, we conclude that Centeq had no legal

duty to protect Siegler from the criminal acts of a third party.

We accordingly reverse the judgment of the court of appeals and render judgment that Siegler take nothing from Centeq.

Justice **GAMMAGE**, dissenting.

The dispositive issue in this case is whether a material fact issue was raised that the condominium complex majority owner's proxy holder had effective control over the complex's board-directed security measures to such an extent that it can be held liable for the alleged negligence in security decisions made. Because I agree with the court of appeals that the plaintiff's summary judgment evidence raised a fact issue regarding actual control, I dissent.

In analyzing the elements of a negligence cause of action, the first inquiry is whether the defendant owed a duty to the plaintiff. *Graff v. Beard*, 858 S.W.2d 918, 919 (Tex.1993). As the court of appeals noted, duty is generally “a question of law for the court to decide from the undisputed facts surrounding the occurrence in question.” 874 S.W.2d at 308 (quoting *Otis Eng'g Corp. v. Clark*, 668 S.W.2d 307, 312 (Tex.1983)) (emphasis added). When facts are in dispute, however, the question of duty becomes one of fact for the fact finder. *Bennett v. Span Industries, Inc.*, 628 S.W.2d 470, 474 (Tex.App.—Texarkana 1981, writ ref'd n.r.e.).

Although a party generally has no duty to protect against the criminal acts of third parties who do not act under the party's supervision or control, *El Chico Corp. v. Poole*, 732 S.W.2d 306, 313 (Tex.1987), such parties sometimes may be held liable if the criminal act occurs on their premises. See, e.g., *Nixon v. Mr. Property Management*, 690 S.W.2d 546, 550; *Walkoviak v. Hilton Hotels Corp.*, 580 S.W.2d 623, 625 (Tex.Civ.App.—Houston [14th Dist.] 1979, writ ref'd n.r.e.); *Morris v. Barnette*, 553 S.W.2d 648, 649–50 (Tex.Civ.App.—Texarkana 1977, writ ref'd n.r.e.). The theory underlying these cases is that a party who has the power or right of control over a premises has a duty to provide protection against the foreseeable criminal acts of third persons on the premises. *200 *Exxon Corp. v. Tidwell*, 867 S.W.2d 19, 21 (Tex.1993); *Morris*, 553 S.W.2d at 649; *LaFleur v. Astrodome–Astrohall Stadium*, 751 S.W.2d 563 (Tex.App.—Houston [1st Dist.] 1988, no writ). “[W]hen the facts are disputed, the issue of control

is one of fact that must be decided by the trier of fact.” *Greater Houston Transp. Co. v. Phillips*, 801 S.W.2d 523, 526 (Tex.1990) (citations omitted).

To support its summary judgment motion, Centeq offered the affidavit of Carla Van Over, Centeq's president and member of the Warwick Council, stating that Centeq had no relationship with and did not own, control or manage Warwick Towers. Siegler's summary judgment evidence consisted of an affidavit from a person purporting to have personal knowledge of material facts, Donna Green. Green attested that Centeq acted as an agent of the majority homeowner of Warwick Towers, controlled the votes on the Warwick Council which controlled site security, and held itself out to be the agent or representative of Warwick Towers through advertisements, phone listings, and by maintaining an office in Warwick Towers. Because these facts are in dispute, the question of duty is one of fact, making the case inappropriate for disposition through summary judgment.

Petitioner Centeq maintains that *Dutcher v. Owens*, 647 S.W.2d 948 (Tex.1983), is dispositive on the liability of a condominium co-owner for injuries sustained in the “common areas” of the complex. *Dutcher*, however, is distinguishable from this case. First, the condominium co-owner in *Dutcher* stipulated to liability. “[T]he sole issue for determination on appeal was whether a condominium co-owner is jointly and severally liable or is liable only for a *pro rata* portion of the damages.” *Dutcher*, 647 S.W.2d at 949. No party has admitted liability in this case. Second, this Court acknowledged in *Dutcher* that “[g]iven the uniqueness of the type of ownership involved in condominiums, the onus of liability for injuries arising from the management of condominium projects should reflect the degree of control exercised by the defendants.” *Id.* at 950. We declined to find liability in the co-owner in *Dutcher* based upon the reasoning in a similar California case, *White v. Cox*, 17 Cal.App.3d 824, 95 Cal.Rptr. 259 (1971). We agreed with the court in *White*, when it held that “to rule that a condominium co-owner had any effective control over the operation of the common areas would be to sacrifice ‘reality to theoretical formalism,’ for in fact a co-owner has no more control over operations than he would have as a stockholder in a corporation which owned and operated the project.” *White*, 95 Cal.Rptr. at 263. Here, however, unlike the co-owner in *Dutcher*, co-owner United Savings owned a

majority interest in Warwick Towers and purportedly did exercise control over site operations and security with its majority vote. United Savings gave the power to vote its controlling interest in Warwick Towers to Centeq Realty, vesting *de facto* control of Warwick Towers and the Warwick Council in Centeq.

If a party with the “power of control or expulsion ... by reason of location, mode of doing business, or observation or past experiences should reasonably anticipate criminal conduct on the part of third persons ... [that party] has a duty to take precautions against it.” *Exxon Corp.*, 867 S.W.2d at 21; see also *Moody v. Cawdrey & Assoc., Inc.*, 6 Haw.App. 355, 721 P.2d 708, 713 (1986) (relying on *White v. Cox*). The party with control of security measures and other matters relating to Warwick Towers is Warwick Council. If the summary judgment evidence indicates that the Council is effectively controlled by Centeq, as the agent of the majority homeowner with the power to select a majority of the Warwick directors, Centeq has **potential** control over the directors and their votes on association matters such as security. The fact issue to be decided is whether or not Centeq exercised that control to influence security measures.

If Warwick Council, as a board of independent co-owners, could not exercise its independent judgment because the majority of directors were selected by one entity, the Council was not exercising its own judgment but that of the controlling entity. Under such circumstances the controlling entity should be liable for the Council's actions which it controlled, much as the shareholders *201 of a close corporation who have a controlling vote can be held personally liable. See TEX.CLOSE CORP.LAW, TEX.BUS.CORP. ACT art. 12.37(c); *Exxon Corp.*, 867 S.W.2d at 21.

The majority notes that this Court also recognizes the “alter ego” theory for disregarding the corporate fiction, but refuses to apply it in this case.

Alter ego applies when there is such unity between corporation and individual that the separateness of the corporation has ceased and holding only the corporation liable would result in injustice. *First Nat'l Bank in Canyon v. Gamble*, 134 Tex. 112, 132 S.W.2d 100, 103 (1939). It is shown from the total

dealings of the corporation and the individual, including the degree to which corporate formalities have been followed and corporate and individual property have been kept separately, the **amount of financial interest, ownership and control the individual maintains over the corporation**, and whether the corporation has been used for personal purposes. (citations omitted) (emphasis added).

Castleberry v. Branscum, 721 S.W.2d 270, 272 (Tex.1986). The “alter ego” doctrine was created as an equitable, fact-specific approach. When adherence to the corporate fiction creates an inequitable result, courts will disregard the corporate fiction. Before we can address the equity issue, we must determine if Centeq had control over the

Council. Whether the relationship between Centeq and the Council satisfies the test for “alter ego” is a fact question to be submitted to the jury. *Id.* at 273; *Airflow Houston, Inc. v. Theriot*, 849 S.W.2d 928 (Tex.App.—Houston [1st Dist.] 1993, no writ); *Gensco, Inc. v. Canco Equip., Inc.*, 737 S.W.2d 345 (Tex.App.—Amarillo 1987, no writ). The existence of this material fact issue also makes this case inappropriate for disposition by summary judgment.

Upon viewing the evidence in the light most favorable to the nonmovant, I believe that a fact issue exists whether Centeq, which had the majority votes for directors, exercised control over those directors and influenced their votes on security measures. For these reasons, I would affirm the court of appeals and remand the cause to trial.

All Citations

899 S.W.2d 195, 38 Tex. Sup. Ct. J. 658

Footnotes

- 1 Siegler also sued Warwick Towers, Inc., No. 2, and Smith Protective Services, Inc., asserting that they had also breached a duty to provide adequate security, but those claims are not before us.
- 2 Siegler suggests that Centeq was able to nominate and elect board members that were beholden to Centeq. Green, the general manager of the Warwick Council, testified by affidavit that:

Centeq was able to select a majority of the Board that voted in the best interest of Centeq and [United], to the detriment of Warwick Towers and inconsistent with the goals of the Warwick Counsel [sic]. This control contributed to Warwick Counsel's [sic] refusal to make the financial expenditures necessary in order to provide adequate security in the very parking garage at issue.

Siegler, however, fails to back up this conclusion with any facts. From Green's affidavit alone, we cannot reasonably infer that Centeq was electing representatives to the board of directors and then influencing them to vote against providing adequate security. See *Browning-Ferris, Inc. v. Reyna*, 865 S.W.2d 925, 928 (Tex.1993) (“[W]e are not empowered to convert mere suspicion or surmise into some evidence.”).
- 3 It is also undisputed that Centeq was not Siegler's leasing agent, nor did Siegler live in one of the United-owned units.

67 S.W.3d 836
Supreme Court of Texas.

Harshad G. SHAH, M.D., Petitioner,

v.

Ronald MOSS, Respondent.

No. 00–0091.

|
Argued Jan. 31, 2001.

|
Decided Dec. 20, 2001.

|
Rehearing Overruled March 21, 2002.

Patient sued physician, who was a retinal specialist, alleging medical negligence and breach of contract. Physician moved for summary judgment on statute of limitations grounds. The 385th District Court, Midland County, [Willie Dubose, J.](#), entered summary judgment for physician. Patient appealed. The El Paso Court of Appeals, [7 S.W.3d 690](#), affirmed in part and reversed and remanded in part. Review was granted. The Supreme Court, [James A. Baker, J.](#), held that: (1) limitations period for negligent surgery claim began to run on date of surgery; (2) limitations period for negligent follow-up treatment claim began to run on date of last re-check visit; (3) evidence did not establish fraudulent concealment, as basis for tolling limitations period; and (4) application of limitations period did not violate open courts provision of Texas Constitution.

Court of Appeals reversed; judgment rendered.

[O'Neill, J.](#), filed a dissenting opinion in which [Phillips, C.J.](#), and [Enoch](#) and [Hankinson, JJ.](#), joined.

West Headnotes (21)

[1] Limitation of Actions

🔑 Negligence in performance of professional services

A patient may not necessarily choose the most favorable date that falls within the Medical Liability and Insurance Improvement Act's three categories of dates for measuring the limitations period for medical negligence

claims; rather, if the date the alleged tort occurred is ascertainable, limitations must begin on that date. [Vernon's Ann.Texas Civ.St. art. 4590i, § 10.01](#).

[9 Cases that cite this headnote](#)

[2] Limitation of Actions

🔑 Negligence in performance of professional services

Before the last treatment date becomes relevant to determining when the limitations period for medical negligence claims begins, the patient must establish a course of treatment for the alleged injury. [Vernon's Ann.Texas Civ.St. art. 4590i, § 10.01](#).

[7 Cases that cite this headnote](#)

[3] Limitation of Actions

🔑 Negligence in performance of professional services

If the physician committed the alleged tort on an ascertainable date, whether the patient established a course of treatment is immaterial, because the limitations period for a medical negligence claim begins to run on the ascertainable date. [Vernon's Ann.Texas Civ.St. art. 4590i, § 10.01](#).

[9 Cases that cite this headnote](#)

[4] Limitation of Actions

🔑 Concealment of Cause of Action

Fraudulent concealment in medical-negligence cases estops a health-care provider from relying on limitations to bar a patient's claim.

[4 Cases that cite this headnote](#)

[5] Limitation of Actions

🔑 Concealment of Cause of Action

The patient must show the health-care provider actually knew a wrong occurred, had a fixed purpose to conceal the wrong, and did conceal the wrong from the patient, to establish fraudulent concealment, as basis

for estopping the health-care provider from asserting a limitations defense in a medical-negligence case.

[23 Cases that cite this headnote](#)

[6] Limitation of Actions

🔑 **Concealment of Cause of Action**

Fraudulent concealment tolls limitations in a medical-negligence case until the patient discovers the fraud or could have discovered the fraud with reasonable diligence.

[16 Cases that cite this headnote](#)

[7] Judgment

🔑 **Bar of statute of limitations**

A patient who asserts fraudulent concealment to avoid summary judgment on limitations grounds in a medical-negligence case must raise a fact issue that would support this assertion.

[9 Cases that cite this headnote](#)

[8] Constitutional Law

🔑 **Abrogation, modification, or recognition of remedies**

A statute that unreasonably or arbitrarily abridges a person's right to obtain redress for injuries another person's harmful act causes is an unconstitutional due-course-of-law violation, under the open courts provision of the Texas Constitution. [Vernon's Ann.Texas Const. Art. 1, § 13.](#)

[13 Cases that cite this headnote](#)

[9] Constitutional Law

🔑 **Time for proceedings**

Texas Constitution's open courts provision protects a person from legislative acts that cut off a person's right to sue before there is a reasonable opportunity to discover the wrong and bring suit. [Vernon's Ann.Texas Const. Art. 1, § 13.](#)

[18 Cases that cite this headnote](#)

[10] Action

🔑 **Nature and elements of cause of action and suspension of remedies**

Constitutional Law

🔑 **Abrogation, modification, or recognition of remedies**

The Legislature cannot abrogate the right to bring a well-established common-law claim without showing that the statute's objectives and purposes outweigh denying the constitutionally guaranteed right of redress under the Texas Constitution's open courts provision. [Vernon's Ann.Texas Const. Art. 1, § 13.](#)

[6 Cases that cite this headnote](#)

[11] Appeal and Error

🔑 **Extent of Review Dependent on Nature of Decision Appealed from**

The standard for reviewing a summary judgment is whether the moving party carried its burden of showing that there is no genuine issue of material fact and that judgment should be granted as a matter of law. [Vernon's Ann.Texas Rules Civ.Proc., Rule 166a\(c\).](#)

[35 Cases that cite this headnote](#)

[12] Judgment

🔑 **Presumptions and burden of proof**

A defendant moving for summary judgment on a statute of limitations affirmative defense must prove conclusively that defense's elements. [Vernon's Ann.Texas Rules Civ.Proc., Rule 166a\(c\).](#)

[37 Cases that cite this headnote](#)

[13] Appeal and Error

🔑 **Judgment**

In reviewing a trial court's summary judgment, the appellate court resolves all doubts against the movant, and views the

evidence in the light most favorable to the nonmovants. [Vernon's Ann.Texas Rules Civ.Proc., Rule 166a\(c\)](#).

[19 Cases that cite this headnote](#)

[14] **Appeal and Error**

Judgment

In determining whether a disputed material fact issue exists which precludes summary judgment, the appellate court takes as true evidence favorable to the nonmovant. [Vernon's Ann.Texas Rules Civ.Proc., Rule 166a\(c\)](#).

[15 Cases that cite this headnote](#)

[15] **Limitation of Actions**

Negligence in performance of professional services

Retinal specialist's alleged tort or breach regarding surgery to remove scleral buckle from patient's eye occurred on an ascertainable date, which was the date of the surgery, and thus, the limitations period for patient's negligent surgery claim, relating to detached retina and loss of sight in one eye, began to run on that date. [Vernon's Ann.Texas Civ.St. art. 4590i, § 10.01](#).

[3 Cases that cite this headnote](#)

[16] **Limitation of Actions**

Negligence in performance of professional services

When the date of the alleged tort or breach is ascertainable, the limitations period for a medical negligence claim begins to run from that date, even if the exact date on which the injury occurred is unknown. [Vernon's Ann.Texas Civ.St. art. 4590i, § 10.01](#).

[6 Cases that cite this headnote](#)

[17] **Limitation of Actions**

Negligence in performance of professional services

Limitations period for patient's negligent follow-up treatment claim against retinal specialist, alleging breach of alleged standard of care of providing weekly or monthly follow-up treatment after surgical removal of scleral buckle from eye, which allegedly would have revealed the detached retina that led to loss of sight in one eye, began to run on date of patient's last post-surgery re-check visit, rather than on date of later "yearly exam," regardless of whether the "yearly exam" was part of a course of treatment; the date the alleged negligence occurred was readily ascertainable. [Vernon's Ann.Texas Civ.St. art. 4590i, § 10.01](#).

[21 Cases that cite this headnote](#)

[18] **Limitation of Actions**

What constitutes concealment

Patient's summary judgment affidavit and his deposition testimony, stating that after retinal-detachment surgery the retinal specialist told him that he needed time to heal and his blurred vision should improve, did not establish the retinal specialist made such assurances to conceal a known wrong or to deceive the patient, as elements of fraudulent concealment which would toll the statute of limitations for negligent surgery and negligent follow-up treatment claims. [Vernon's Ann.Texas Civ.St. art. 4590i, § 10.01](#).

[21 Cases that cite this headnote](#)

[19] **Constitutional Law**

Time for proceedings

Limitation of Actions

Constitutionality of statute

Limitation of Actions

Health care professionals in general

Patient had reasonable opportunity to discover retinal specialist's alleged medical negligence, relating to surgery to remove scleral buckle from patient's eye and failure to provide weekly or monthly follow-up treatment which allegedly would have revealed the detached retina that led to loss of

sight in one eye, before two-year limitations period for medical negligence and negligent follow-up treatment claims expired, and thus, application of the limitations period to patient's claims did not violate the open courts provision of the Texas Constitution; patient knew before surgery that removing scleral buckle could result in another detached retina, patient had post-surgery vision problems indicating possibility of another detached retina, and vision problems continued into limitations period, which had not commenced until patient's last post-surgery re-check visit. [Vernon's Ann.Texas Const. Art. 1, § 13](#); [Vernon's Ann.Texas Civ.St. art. 4590i, § 10.01](#).

14 Cases that cite this headnote

[20] **Constitutional Law**

🔑 Time for proceedings

Limitation of Actions

🔑 Constitutionality of statute

Limitation of Actions

🔑 Health care professionals in general

Patient, by not bringing medical negligence and negligent follow-up treatment claims against retinal specialist until 17 months after learning of the alleged wrongs relating to surgery to remove scleral buckle from patient's eye, did not act with due diligence, and thus, open courts provision of Texas Constitution did not provide relief from patient's failure to bring the claims within two-year limitations period. [Vernon's Ann.Texas Const. Art. 1, § 13](#); [Vernon's Ann.Texas Civ.St. art. 4590i, § 10.01](#).

21 Cases that cite this headnote

[21] **Constitutional Law**

🔑 Time for proceedings

A plaintiff may not obtain relief under the open courts provision of the Texas Constitution if he does not use due diligence and sue within a reasonable time after learning about the alleged wrong. [Vernon's Ann.Texas Const. Art. 1, § 13](#).

12 Cases that cite this headnote

Attorneys and Law Firms

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[Drew Mouton](#), Bancroft, Mouton & Wolf, Big Spring, [Denice Smith](#), Cash Allen, L.L.P., Houston, for respondent.

Opinion

Justice BAKER delivered the opinion of the Court, in which Justice [HECHT](#), Justice [OWEN](#), Justice [JEFFERSON](#) and Justice RODRIGUEZ joined.

The issue in this case is whether limitations bars the plaintiff's medical malpractice *839 claims. Ronald Moss sued Dr. Harshad G. Shah, claiming Dr. Shah negligently performed surgery on Moss's right eye and neglected to provide adequate follow-up treatment. The trial court granted Dr. Shah's summary-judgment motion, which alleged that Moss did not file suit within two years of the tort or breach, as the Medical Liability and Insurance Improvement Act requires. *See* [TEX.REV.CIV. STAT. art. 4590i, § 10.01](#). The court of appeals held that Moss's claims were not barred, reversed the judgment, and remanded the cause to the trial court. [7 S.W.3d 690, 694](#). We disagree and hold that [article 4590i section 10.01](#) bars both Moss's negligent surgery and negligent follow-up treatment claims. Accordingly, we reverse the court of appeals' judgment and render judgment for Dr. Shah.

I. BACKGROUND

On May 9, 1991, Moss first saw Dr. Shah after another eye doctor diagnosed a [detached retina](#) in Moss's right eye. On June 21, 1991, Dr. Shah surgically implanted a [scleral buckle](#) to keep Moss's retina in place. Moss continued to have problems with his vision after the surgery, but Dr. Shah warned him that removing the [scleral buckle](#) could result in another [retinal detachment](#). Moss visited another specialist for an opinion about his blurred vision. And, based on that specialist's recommendation, Dr. Shah removed the [scleral buckle](#) on November 28, 1992.

Moss saw Dr. Shah five times for post-surgery “recheck” visits, the first visit occurring two weeks after the November 1992 surgery. Moss then saw Dr. Shah twice in January 1993 for “one month recheck” visits and once in May 1993 for a “three month recheck” visit. Finally, Moss visited Dr. Shah on October 21, 1993, for a final recheck visit.

Moss did not visit Dr. Shah again until a “yearly exam” on November 22, 1994. At that time, Moss complained about a “new floater” in his vision that appeared since the last recheck visit. Dr. Shah discovered that Moss's retina had again detached. Consequently, Dr. Shah repaired the second [detached retina](#) on December 12, 1994. But Moss still complained about blurred vision after that surgery. And, despite several other procedures and eventual [cataract surgery](#), Moss eventually lost sight in his right eye. Moss visited Dr. Shah for the last time on July 24, 1995, when Dr. Shah told Moss he could do nothing more to improve his vision.

Moss notified Dr. Shah about his malpractice claims on April 19, 1996, and filed suit on June 28, 1996. In his petition, Moss claims Dr. Shah, in November 1992, negligently removed the [scleral buckle](#) that Dr. Shah previously implanted to repair Moss's [detached retina](#). He further alleges that Dr. Shah did not adequately monitor Moss's eye following the surgery. Specifically, Moss claims that Dr. Shah's negligent surgery and failure to carefully monitor Moss's condition on a weekly or monthly basis to detect and prevent further [retina detachments](#) caused the eventual blindness in his right eye.

Dr. Shah moved for summary judgment, claiming that the two-year statute of limitations in [article 4590i section 10.01](#) bars Moss's claims. Dr. Shah alleged that Moss should have filed suit within two years after November 28, 1992, the date Dr. Shah surgically removed the [scleral buckle](#). In response, Moss presented Dr. Conrad Moore's affidavit as expert summary-judgment evidence. Dr. Moore opined that Moss's past experiences with a [retinal detachment](#) and tears required Dr. Shah to provide Moss with careful and continuous follow-up treatment. He stated that the “[removal of the scleral buckle](#), *840 without careful follow-up on a weekly or monthly basis thereafter” was a deviation from the standard of care and caused Moss's second [retinal detachment](#). Dr. Shah then supplemented his summary-judgment evidence with

his own affidavit wherein he stated that he did not provide Moss with a continuing course of treatment after the November 1992 surgery. He explained that Moss's retina was attached after that surgery and thus further continuous treatment was unnecessary. Dr. Shah also claimed that Moss's visits from November 1992 through November 1994 were routine periodic checkups. The trial court granted summary judgment for Dr. Shah.

Moss appealed, arguing that his claims are not time-barred because Dr. Shah engaged in a negligent course of treatment for Moss's eye problem that continued until his last office visit on July 24, 1995. The court of appeals agreed and reversed the trial court's judgment, holding that limitations did not bar Moss's negligence claims. [7 S.W.3d at 694](#). The court relied on the part of [section 10.01](#) that provides that limitations begins to run from the date the medical treatment that is the subject of the claim is completed. [TEX.REV.CIV. STAT. art. 4590i, § 10.01](#).

We granted Dr. Shah's petition for review to determine if [article 4590i section 10.01](#) bars Moss's medical negligence claims.

II. THE PARTIES' CONTENTIONS

Dr. Shah argues that Moss's two medical-negligence claims are time-barred under [article 4590i section 10.01](#). First, he argues that limitations bars Moss's negligent-surgery claim because the surgery occurred on an ascertainable date and thus limitations runs from that date for any resulting injuries. *See Earle v. Ratliff*, 998 S.W.2d 882, 887 (Tex.1999) (holding that limitations began on surgery date because the plaintiff did not allege post-surgical negligence); *Gormley v. Stover*, 907 S.W.2d 448, 449–50 (Tex.1995) (same). Specifically, Dr. Shah contends, Moss's negligent-surgery claim is barred because his suit was not brought within two years after the November 1992 surgery.

Second, Dr. Shah argues that limitations also bars Moss's negligent follow-up treatment claim. He contends that Moss's allegation that Dr. Shah should have ordered weekly or monthly exams after the surgery does not establish a course of treatment, because this Court has held that “[w]hile the failure to treat a condition may well be negligent, we cannot accept the self-contradictory proposition that the failure to establish a course of

treatment is a course of treatment.’ ” *Bala v. Maxwell*, 909 S.W.2d 889, 892 (Tex.1995) (quoting *Rowntree v. Hunsucker*, 833 S.W.2d 103, 108 (Tex.1992)). Dr. Shah urges that limitations could run only from dates Moss actually visited the office. Therefore, the last date Dr. Shah could have breached any duty to provide additional follow-up care was on October 21, 1993, the last recheck visit. Dr. Shah further maintains that the November 22, 1994, visit when he discovered Moss's second [retinal detachment](#) was not part of any course of treatment because it was only a yearly exam.

In response, Moss argues that limitations runs from the last day Dr. Shah treated Moss for eye problems and not the November 1992 surgery date. He contends that Dr. Shah engaged in a course of treatment for Moss's retinal problems from the November 1992 surgery date until July 24, 1995, the last time Dr. Shah saw Moss. Moss maintains that the November 1992 surgery removing the [scleral buckle](#), coupled with the inadequate follow-up care and monitoring, caused his injury. Therefore, the two-year limitations period [*841](#) did not begin to run until the last date Dr. Shah saw Moss. See [TEX.REV.CIV. STAT. art. 4590i, § 10.01](#).

Additionally, Moss contends that Dr. Shah was not entitled to summary judgment on Moss's fraudulent-concealment claim because Dr. Shah's summary-judgment motion did not discuss this allegation. Moss also argues that applying [section 10.01](#) to bar his claims violates the Texas Constitution's open courts provision. See [TEX. CONST. art. I, § 13](#).

III. APPLICABLE LAW

A. LIMITATIONS FOR MEDICAL NEGLIGENCE CLAIMS

[1] [Article 4590i section 10.01](#) measures the limitations period for medical negligence claims from one of three dates: (1) the occurrence of the breach or tort, (2) the last date of the relevant course of treatment, or (3) the last date of the relevant hospitalization. [TEX.REV.CIV. STAT. art. 4590i, § 10.01](#); *Husain v. Khatib*, 964 S.W.2d 918, 919 (Tex.1998). A plaintiff may not choose the most favorable date that falls within [section 10.01](#) 's three categories. *Husain*, 964 S.W.2d at 919. Rather, if the date the alleged tort occurred is ascertainable, limitations must begin on

that date. *Earle*, 998 S.W.2d at 886. And if the date is ascertainable, further inquiry into the second and third categories is unnecessary. *Husain*, 964 S.W.2d at 919; *Kimball v. Brothers*, 741 S.W.2d 370, 372 (Tex.1987).

[2] [3] However, there may be instances when the exact date the alleged tort occurred cannot be ascertained. The second category in [section 10.01](#) contemplates such a situation “wherein the patient's injury occurs during a course of treatment for a particular condition and the only readily ascertainable date is the last day of treatment.” *Kimball*, 741 S.W.2d at 372. But before the last treatment date becomes relevant to determining when limitations begins, the plaintiff must establish a course of treatment for the alleged injury. *Rowntree v. Hunsucker*, 833 S.W.2d 103, 105 (Tex.1992). Moreover, if the defendant committed the alleged tort on an ascertainable date, whether the plaintiff established a course of treatment is immaterial because limitations begins to run on the ascertainable date. *Husain*, 964 S.W.2d at 919–20.

B. FRAUDULENT CONCEALMENT

[4] [5] [6] Fraudulent concealment in medical-negligence cases estops a health-care provider from relying on limitations to bar a plaintiff's claim. *Borderlon v. Peck*, 661 S.W.2d 907, 909 (Tex.1983). The plaintiff must show the health-care provider actually knew a wrong occurred, had a fixed purpose to conceal the wrong, and did conceal the wrong from the patient. *Earle*, 998 S.W.2d at 887. Fraudulent concealment tolls limitations until the plaintiff discovers the fraud or could have discovered the fraud with reasonable diligence. *Velsicol Chem. Corp. v. Winograd*, 956 S.W.2d 529, 531 (Tex.1997).

[7] In *Borderlon*, this Court held that [article 4590i section 10.01](#) “does not abolish fraudulent concealment as an equitable estoppel to the affirmative defense of limitations.” *Borderlon*, 661 S.W.2d at 909. A plaintiff who asserts fraudulent concealment to avoid summary judgment on limitations grounds must raise a fact issue that would support this assertion. *Earle*, 998 S.W.2d at 888.

C. THE TEXAS CONSTITUTION'S OPEN COURTS PROVISION

[8] [9] [10] The Texas Constitution guarantees that persons bringing common-law claims will not unreasonably or arbitrarily be denied access to the courts. TEX. CONST. art. 1, § 13 (“All courts shall be *842 open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law.”); *Earle*, 998 S.W.2d at 889; *Jennings v. Burgess*, 917 S.W.2d 790, 793 (Tex.1996). A statute that unreasonably or arbitrarily abridges a person's right to obtain redress for injuries another person's harmful act causes is an unconstitutional due-course-of-law violation. *Earle*, 998 S.W.2d at 889; *Jennings*, 917 S.W.2d at 793. Consequently, our Constitution's open courts provision protects a person from legislative acts that cut off a person's right to sue before there is a reasonable opportunity to discover the wrong and bring suit. *Neagle v. Nelson*, 685 S.W.2d 11, 12 (Tex.1985). And the Legislature cannot abrogate the right to bring a well-established common-law claim without showing that the statute's objectives and purposes outweigh denying the constitutionally guaranteed right of redress. *Weiner v. Wasson*, 900 S.W.2d 316, 318 (Tex.1995); *Sax v. Votteler*, 648 S.W.2d 661, 665–66 (Tex.1983).

To establish an open courts violation in an article 4590i case, a litigant must first show a cognizable, common-law claim that article 4590i's limitations provision restricts. See *Jennings*, 917 S.W.2d at 793. Then, the litigant must show the restriction is unreasonable or arbitrary when balanced against the statute's purpose and basis. *Jennings*, 917 S.W.2d at 793; *Sax*, 648 S.W.2d at 666. The limitations provision in article 4590i section 10.01 does not violate the open courts guarantee if the plaintiff had a reasonable opportunity to discover the alleged wrong and bring suit before the limitations period expired. *Earle*, 998 S.W.2d at 888; *Jennings*, 917 S.W.2d at 794.

D. SUMMARY–JUDGMENT STANDARD OF REVIEW

[11] [12] [13] [14] The standard for reviewing a summary judgment under Texas Rule of Civil Procedure 166a(c) is whether the moving party carried its burden of showing that there is no genuine issue of material fact and that judgment should be granted as a matter of law. *Lear Siegler, Inc. v. Perez*, 819 S.W.2d 470, 471 (Tex.1991). A defendant moving for summary judgment on a statute of limitations affirmative defense must prove

conclusively that defense's elements. *Velsicol Chem. Corp.*, 956 S.W.2d at 530. In reviewing a trial court's summary judgment, we resolve all doubts against the movant, and we view the evidence in the light most favorable to the nonmovants. *KPMG Peat Marwick v. Harrison County Hous. Fin. Corp.*, 988 S.W.2d 746, 748 (Tex.1999); *Lear*, 819 S.W.2d at 471. Additionally, in determining whether a disputed material fact issue exists, we take as true evidence favorable to the nonmovant. *American Tobacco Co., Inc. v. Grinnell*, 951 S.W.2d 420, 425 (Tex.1997).

IV. ANALYSIS

A. NEGLIGENCE SURGERY CLAIM

[15] The court of appeals determined that the second retinal detachment occurred some time between the November 1992 surgery and Moss's yearly office visit in November 1994. 7 S.W.3d at 692. Consequently, the court of appeals concluded that the tort date is unascertainable, and thus, it applied section 10.01 's course-of-treatment completion doctrine to determine the date when limitations began to run. 7 S.W.3d at 692. We disagree with the court of appeals' analysis.

Moss's petition alleges two claims: negligent surgery and negligent follow-up treatment. The date Dr. Shah removed the scleral buckle is known—November 28, 1992. Thus, the court of appeals erroneously *843 applied a course-of-treatment analysis to conclude that limitations does not bar Moss's negligent-surgery claim. See 7 S.W.3d at 692.

[16] When the date of the alleged tort or breach is ascertainable, limitations begins to run from that date. *Husain*, 964 S.W.2d at 919; *Kimball*, 741 S.W.2d at 372. This rule applies even if the exact date on which the injury occurred is unknown. *Husain*, 964 S.W.2d at 919. If the date the doctor's alleged negligence took place can be ascertained, then there are no doubts to resolve and we must measure limitations from that date. *Husain*, 964 S.W.2d at 919. Here, because the alleged negligent-surgery tort date is ascertainable, and because Moss did not file suit within two years of that date, article 4590i section 10.01 bars Moss's negligent surgery claim.

B. NEGLIGENT FOLLOW-UP TREATMENT CLAIM

The court of appeals determined that the summary-judgment evidence demonstrated a course of treatment that Dr. Shah administered for Moss's retina problems. 7 S.W.3d at 693. It further concluded that, because there was some evidence that the November 1994 visit related to the continuing relationship between Dr. Shah and Moss to treat Moss's retinal problems, there was a fact issue about when the course of treatment ended. 7 S.W.3d at 694. It thus rejected Dr. Shah's argument that the last date on which limitations could begin for Moss's negligent follow-up treatment claim was October 21, 1993, the last recheck visit. 7 S.W.3d at 694. Again, we disagree with the court of appeal's analysis.

The court of appeals dismissed Dr. Shah's argument that the same analysis we applied to the plaintiffs' claims in *Husain* and *Rowntree* applies to Moss's negligent follow-up treatment claim. 7 S.W.3d at 694. Instead, it concluded these cases are distinguishable because they involved an alleged duty to perform specific tests during specific office visits rather than an alleged duty to monitor or continue treatment. 7 S.W.3d at 694. The dissent also concludes that *Husain* and *Rowntree* do not apply for the same reason. 67 S.W.3d at 849. But the court of appeals' and dissent's distinction ignores the rule applied in those cases; that is, if the date the alleged tort or breach took place is ascertainable, a course-of-treatment analysis is immaterial to determining when limitations begins to run.

In *Rowntree*, the plaintiff alleged that the doctor did not diagnose, monitor, and otherwise properly treat her occluded artery when he treated and prescribed medication for her high blood pressure. 833 S.W.2d at 104. This Court had to determine if the plaintiff's taking the prescribed medication created a course of treatment absent any other office visits or medical services. *Rowntree*, 833 S.W.2d at 104. We concluded there was no course of treatment because the plaintiff's allegation was her doctor breached a duty to perform certain exams that would have detected the occluded artery. *Rowntree*, 833 S.W.2d at 108. Thus, we held that limitations began to run on the last date the doctor actually saw the plaintiff and had the opportunity to perform his alleged duties. *Rowntree*, 833 S.W.2d at 108.

Further, in *Husain*, the plaintiff alleged that her doctor was negligent in not performing certain medical exams, after she complained about a lump in her breast, to detect her breast cancer. 964 S.W.2d at 919. We concluded that the dates on which the doctor's alleged negligence took place were readily ascertainable because the doctor did not perform the necessary exams during specific office visits. *Husain*, *844 964 S.W.2d at 919. Moreover, we held that, because the doctor's alleged negligence occurred on ascertainable dates, "it [was] therefore immaterial whether [the doctor] established a course of treatment for [the patient's condition]." *Husain*, 964 S.W.2d at 919.

This Court's holding in *Kimball* is also instructive. 741 S.W.2d at 372. In that case, the plaintiff was admitted into the hospital for chest pains. His surgery was postponed, however, because the defendant doctor was unable to intubate and the plaintiff suffered respiratory and cardiac failure. After this incident, the doctor performed no other procedures on the plaintiff and did not see him again though the plaintiff stayed in the hospital for six more days. *Kimball*, 741 S.W.2d at 372. The plaintiff sued the doctor for negligence two years after the last day he stayed in the hospital. This Court affirmed the trial court's summary judgment for the doctor on limitations grounds, concluding that the precise date of the alleged tort was ascertainable from the case's facts. That is, the alleged tort occurred on the only date the doctor had contact with the plaintiff. Accordingly, we held that the plaintiff could not invoke the second or third categories in section 10.01 to measure the limitations period and, therefore, the claims were time-barred. *Kimball*, 741 S.W.2d at 372.

That a course-of-treatment analysis is immaterial if the tort date is ascertainable is further exemplified in *Chambers v. Conaway*, a case upon which Moss relies. See 883 S.W.2d 156 (Tex.1993). There, the plaintiff alleged that her doctor did not diagnose her breast cancer despite her complaint about a lump in her breast and her numerous visits to the doctor for ailments unrelated to that complaint. *Chambers*, 883 S.W.2d at 159. The plaintiff presented summary-judgment evidence establishing that her doctor had a duty to perform follow-up tests and to monitor any conditions of which he had notice—including a lump in the plaintiff's breast. *Chambers*, 883 S.W.2d at 158. We concluded that the doctor allegedly breached this duty on the specific dates when the plaintiff visited the doctor. *Chambers*, 883 S.W.2d at 159. Because the tort dates were ascertainable,

we refused to apply a course-of-treatment analysis, and we held that limitations began to run from the date the plaintiff last saw the doctor. *Chambers*, 883 S.W.2d at 159; see also *Bala*, 909 S.W.2d at 892 (holding that doctor could have breached duty to conduct follow-up medical tests only when he examined the plaintiff on specific dates and thus limitations ran from the plaintiff's last office visit).

[17] Here, Moss's expert's affidavit opines that Dr. Shah had a duty to provide careful follow-up treatment on a weekly or monthly basis after he surgically removed the scleral buckle in November 1992. We must take this evidence as true. See *American Tobacco Co.*, 951 S.W.2d at 425. Accordingly, we assume that the proper standard of care was as Moss's expert opined—weekly or monthly follow-up visits after the November 1992 surgery. Applying the duty the alleged standard of care imposes, we would conclude that limitations began to run each time Dr. Shah saw Moss, beginning with the first post-surgery visit in November 1992. This is because Dr. Shah breached the alleged duty to provide weekly or monthly follow-up treatment on every date he actually saw Moss. See *Husain*, 964 S.W.2d at 919; *Rowntree*, 833 S.W.2d at 108. But we view the summary-judgment evidence in the light most favorable to Moss. See *KPMG Peat Marwick*, 988 S.W.2d at 748; *Lear*, 819 S.W.2d at 471. Therefore, the last date Dr. Shah could have ordered *845 additional weekly or monthly office visits was during the last recheck visit on October 21, 1993.

The court of appeals and the dissent arrive at a contrary conclusion and hold that the yearly exam in November 1994 was part of Dr. Shah's course of treatment for Moss's retina problems. 67 S.W.3d at 848, 7 S.W.3d at 694. However, the court of appeals' and the dissent's course-of-treatment analysis ignores the rule that, if the date the alleged negligence occurred is readily ascertainable, whether a course of treatment existed is immaterial. *Husain*, 964 S.W.2d at 919–20; *Chambers*, 883 S.W.2d at 159. And it ignores that it is the breach of the duty the alleged standard of care imposes—weekly or monthly follow-up treatment—which, when applied to this case's facts, dictates when limitations began to run. See *Husain*, 964 S.W.2d at 919–20; *Chambers*, 883 S.W.2d at 159. Moss's medical records demonstrate that Moss's last “recheck” visit was on October 23, 1993, and Dr. Shah did not diagnose the second detached retina until Moss visited Dr. Shah more than twelve months later on November 22, 1994. Because of the standard of care alleged, the last

date Dr. Shah could have breached the alleged duty to provide weekly or monthly visits was on October 23, 1993. Consequently, the November 22, 1994 visit is immaterial to our statute-of-limitations analysis.

Additionally, the dissent incorrectly suggests that *Kimball's* language supports the conclusion that limitations runs from the completion of Moss's alleged course of treatment. 67 S.W.3d at 848. But that language expressly states that article 4590i's course-of-treatment limitations prong applies only if “the patient's injury occurs during a course of treatment for a particular condition and the only readily ascertainable date is the last day of treatment.” *Kimball*, 741 S.W.2d at 372 (emphasis added). Here, because we must assume Moss's alleged standard of care is true and apply the duty that arises from it to the facts, we can identify an ascertainable tort date—October 23, 1993. Therefore, we do not apply a course-of-treatment limitations analysis.

Similarly, the dissent mistakenly contends that *Chambers* supports the notion “that, if the applicable standard of care requires follow-up treatment for a particular condition, a physician may breach an ongoing duty to monitor that condition without doing so on any single date.” 67 S.W.3d at 850. But the dissent's conclusion disregards that we declined to apply a course-of-treatment analysis in *Chambers* because, based on the duty the plaintiff alleged, we could ascertain the tort date. *Chambers*, 883 S.W.2d at 159. Thus, even if the standard of care requires an ongoing duty to monitor, we do not apply the course-of-treatment limitations provision if we can ascertain the tort date.

Accordingly, we conclude that the last date on which Dr. Shah could have breached his alleged duty to provide more frequent follow-up treatment was on October 23, 1993. Because Moss filed suit in June 1996, more than two years after Dr. Shah allegedly neglected to provide the proper follow-up care, limitations bars this claim. See TEX.REV.CIV. STAT. art. 4590i, § 10.01.

C. FRAUDULENT CONCEALMENT

[18] Moss argues that limitations does not bar his claims because Dr. Shah fraudulently concealed the negligent nature of the November 1992 surgery and the follow-up treatment. Moss claims that when Dr. Shah diagnosed

the second [retinal detachment](#) in November 1994, Dr. Shah actually knew he committed malpractice in removing the [scleral buckle](#). And Moss contends that Dr. Shah's explanations *846 about Moss's blurred vision after the surgery for the second [retinal detachment](#) were designed to conceal this negligence. Moreover, Moss argues that Dr. Shah's summary-judgment motion did not consider his fraudulent-concealment allegations, and therefore, the court of appeals' decision to remand the case should stand.

Moss's contention that Dr. Shah's summary-judgment motion did not consider his fraudulent-concealment claim is without merit. To avoid summary judgment on limitations grounds, Moss must have raised a fact issue to support his fraudulent-concealment assertion. *See Earle*, 998 S.W.2d at 888; *Baptist Mem'l Hosp. Sys. v. Arredondo*, 922 S.W.2d 120, 122 (Tex.1996). Moss had to raise a fact issue showing Dr. Shah knew Moss had been wronged and concealed that fact to deceive him. *See Earle*, 998 S.W.2d at 888.

Here, the only summary-judgment evidence Moss relies upon to support his fraudulent-concealment allegation is his affidavit and parts of his deposition testimony. The affidavit, however, does not allege any facts suggesting that Dr. Shah knew, after the November 1992 surgery, that he was negligent and that he concealed this known wrong to deceive Moss. The affidavit only states that Dr. Shah told Moss, before the November 1992 surgery, that Moss's eye had healed and the [scleral buckle](#) could be removed. Moreover, Dr. Shah's deposition testimony indicates that before the November 1992 surgery, Dr. Shah told Moss about the risks in removing the [scleral buckle](#). Both the affidavit and the deposition testimony indicate that after the second [retinal-detachment](#) surgery in 1994, Dr. Shah told Moss that he needed time to heal and his blurred vision should improve. But this evidence does not show, or even suggest, that Dr. Shah made these assurances to conceal a known wrong or to deceive Moss. *See Earle*, 998 S.W.2d at 889 (holding affidavit stating that the doctor told the patient surgery would improve his condition and was needed for reasons that later showed not to be true was not evidence that the doctor knew the statements were false when he made them and intended to conceal a known wrong).

Accordingly, Moss's summary-judgment evidence did not raise a fact issue demonstrating that Dr. Shah knew about the alleged negligence and that he concealed this wrong to

deceive Moss. Because Moss did not raise a fact issue to support his fraudulent-concealment claim, the limitations period was not tolled and limitations bars Moss's claims. *See Earle*, 998 S.W.2d at 889.

D. OPEN COURTS CHALLENGE

[19] Moss also argues that our Constitution's open courts provision precludes [article 4590i section 10.01](#) from barring his negligence claims. *See* TEX. CONST. art. I, § 13. Moss did not learn about the second [retinal detachment](#) until almost two years after Dr. Shah removed the [scleral buckle](#). He then waited an additional seventeen months before filing suit. But Moss contends that the two-year limitations period should not bar his claims, because he did not know there was a causal connection between Dr. Shah's conduct and Moss's eventual blindness until after his final office visit with Dr. Shah in July 1995.

Moss's negligence claims against Dr. Shah reflect well-established medical malpractice common-law claims. *See Jennings*, 917 S.W.2d at 793. We have already concluded that [article 4590i section 10.01](#) bars these claims. Therefore, it was Moss's burden to raise a fact issue demonstrating that he did not have a reasonable opportunity to discover the alleged wrong before the limitations period expired so *847 that the open courts guarantee applies. *See Earle*, 998 S.W.2d at 889.

The summary-judgment evidence shows Moss knew, even before the November 1992 surgery, that removing the [scleral buckle](#) could result in another [detached retina](#). It also establishes that Moss had post-surgery vision problems indicating the possibility of another [detached retina](#). The summary-judgment evidence further demonstrates that Moss continued to have vision problems from October 1993, when Moss had his last recheck visit and limitations began to run on his negligent follow-up treatment claim, to November 1994, when Dr. Shah diagnosed the second [retinal detachment](#). And those vision problems remained even after the second [retinal-detachment](#) surgery. Accordingly, the summary-judgment evidence demonstrates Moss had a reasonable opportunity to discover the alleged wrong and bring suit within the two year limitations period.

[20] [21] Additionally, even if we take as true Moss's assertion that he could not have sued within the two-year

limitations period because he did not discover Dr. Shah's negligence until his last office visit in July 1995, the open courts provision does not save Moss's claims. A plaintiff may not obtain relief under the open courts provision if he does not use due diligence and sue within a reasonable time after learning about the alleged wrong. *Voegtlin v. Perryman*, 977 S.W.2d 806, 812 (Tex.App.-Fort Worth 1998, no pet.); *Fiore v. HCA Health Servs. of Tex., Inc.*, 915 S.W.2d 233, 237 (Tex.App.-Fort Worth 1996, writ denied).

Here, the summary-judgment evidence shows Moss knew about his alleged injury, the second **detached retina** resulting in Moss's loss of sight, at least seventeen months before he brought suit. Moss offers no explanation, other than Dr. Shah's alleged fraudulent concealment, about why he delayed in bringing suit. And, we have already rejected Moss's fraudulent-concealment claim. Accordingly, we conclude that, as a matter of law, Moss did not file suit within a reasonable time after discovering his injury. See *Fiore*, 915 S.W.2d at 237 (holding open courts provision did not save claims because the plaintiffs waited a year, without explanation, to bring suit after discovering the doctor's misdiagnosis); see also *Hall v. Dow Corning Corp.*, 114 F.3d 73, 77 (5th Cir.1997) (applying Texas law to hold that a fifteen-month delay was excessive as a matter of law).

Moss did not raise a fact issue establishing that he did not have a reasonable opportunity to discover the alleged wrong and bring suit within the limitations period or that he sued within a reasonable time after discovering the alleged wrong. See *Earle*, 998 S.W.2d at 889. Thus, the open courts provision does not apply to save Moss's time-barred negligence claims.

V. CONCLUSION

We conclude that **article 4590i section 10.01** bars Moss's negligent surgery claim and negligent follow-up treatment claim. Dr. Shah's alleged negligence occurred on ascertainable dates and, therefore, the court of appeals improperly applied a course-of-treatment analysis. Additionally, we conclude that Moss did not raise a fact issue to support his fraudulent-concealment allegation or his contention that our open courts provision saves his negligence claims. We therefore reverse the court of appeals' judgment and render judgment for Dr. Shah.

Justice **O'NEILL** filed a dissenting opinion, in which Chief Justice **PHILLIPS**, Justice **Enoch**, and Justice **HANKINSON** joined.

***848** Justice **O'NEILL**, joined by Chief Justice **PHILLIPS**, Justice **ENOCH**, and Justice **HANKINSON**, dissenting.

Moss was referred by another ophthalmologist to Dr. Shah in 1991 for the specific purpose of treating Moss's **detached retina**. To keep the retina in place, Shah surgically installed a **scleral buckle**. Moss experienced vision problems after the surgery, and Shah surgically removed the buckle in November 1992. Shah saw Moss five times between December 1992 and October 1993, confirming on each occasion that the retina was in place. But by the time Shah saw Moss on November 22, 1994, the **retina had detached**. Despite further surgery, Shah was unable to prevent Moss from losing sight in his right eye. Moss gave notice of suit on April 19, 1996.

The Court concludes that a course-of-treatment limitations analysis does not apply to Moss's negligent follow-up claim because the date of Shah's negligent follow-up is readily ascertainable, that being October 21, 1993, the last date on which Dr. Shah could have scheduled a recheck visit within the alleged standard of care. But the Court's reasoning ignores the summary judgment proof that the November 22, 1994 exam was a part of Shah's follow-up treatment for Moss's retinal condition; thus, the Court starts limitations running on Moss's alleged negligent follow-up claim while the follow-up treatment itself is ongoing. Even more troubling is the anomalous result that the Court's reasoning produces—*limitations began to run on Moss's claim before he suffered an injury*.

To the extent Moss alleges that Shah negligently performed the buckle-removal surgery, I agree with the Court that limitations has run because the date of the breach or tort is readily ascertainable. But considering the nature of Moss's negligent follow-up claim and the facts presented, I cannot agree that the date of this alleged breach or tort is readily ascertainable. Accordingly, limitations began to run from the date the course of treatment that is the subject of Moss's claim was completed. Because Shah did not prove as a matter of

law that Moss's course of treatment ended more than two years before suit was filed, summary judgment in Shah's favor was improper, as the court of appeals held. 7 S.W.3d 690, 695. Because the Court holds otherwise, I respectfully dissent.

I Statute of Limitations

The Medical Liability and Insurance Improvement Act provides that a medical negligence suit must be filed

within two years from the occurrence of the breach or tort or from the date the medical or health care treatment that is the subject of the claim or the hospitalization for which the claim is made is completed.

TEX.REV.CIV. STAT. ANN. art. 4590i, § 10.01. Thus, the Act provides that the statute of limitations for medical malpractice claims runs from one of three dates: (1) when the breach or tort occurs; (2) when the health care treatment that is the subject of the claim is completed; or (3) when the hospitalization for which the claim is made ends. See *Earle v. Ratliff*, 998 S.W.2d 882, 886 (Tex.1999).

A plaintiff may not simply choose which of these three dates is the most favorable. See *id.* If the date of the alleged negligence can be ascertained, limitations must run from the date of the tort whether or not the patient continues to see the doctor. See *id.* On the other hand, if the injury occurs during a course of treatment for a particular condition and the date of the alleged breach or tort is not readily ascertainable, limitations runs from the date the *849 course of treatment ends. See *Kimball v. Brothers*, 741 S.W.2d 370, 372 (Tex.1987). Which limitations period applies depends upon the facts of the case and the nature of the claims asserted. See *Rowntree v. Hunsucker*, 833 S.W.2d 103, 106 (Tex.1992).

II Standard of Review

As a defendant moving for summary judgment on the affirmative defense of limitations, Shah bore the burden of conclusively establishing his defense. See *Jennings v. Burgess*, 917 S.W.2d 790, 793 (Tex.1996). Unless the

summary-judgment record shows as a matter of law that the limitations period began and ended before Moss initiated his suit, Shah has not met this burden. See *Delgado v. Burns*, 656 S.W.2d 428, 429 (Tex.1983). We review the record in the light most favorable to the non-movant, Moss, resolving any factual disputes in his favor. See *Chambers v. Conaway*, 883 S.W.2d 156, 157 (Tex.1993).

III Discussion

Under the facts presented, the exact date of the alleged breach or tort is not ascertainable. Shah acknowledges that he cannot pinpoint the date between October 1993 and November 1994 when Moss's right retina re-detached. But more importantly, for limitations purposes, Shah did not conclusively establish a single, discrete date when he allegedly breached his duty to provide medically acceptable care, because Moss's expert characterizes the entirety of Shah's treatment as a breach of the standard of care. This situation is precisely what the course-of-treatment doctrine was intended to cover. See *Husain v. Khatib*, 964 S.W.2d 918, 919 (Tex.1998).

The Court concludes that a course-of-treatment analysis is immaterial because Shah breached a duty to provide follow-up treatment on a readily ascertainable date, October 21, 1993, the last date expressly labeled a “re-check” visit in Shah's records. In reaching that conclusion, the Court assumes that Shah could only have breached a duty to schedule follow-up visits to monitor Moss's retinal condition on the dates of Moss's office visits, relying on *Husain*, *Bala*, *Kimball*, *Chambers*, and *Rowntree*. See *Husain*, 964 S.W.2d 918; *Bala v. Maxwell*, 909 S.W.2d 889 (Tex.1995); *Chambers*, 883 S.W.2d 156; *Rowntree*, 833 S.W.2d 103; *Kimball*, 741 S.W.2d 370. That reliance is misplaced.

In *Husain*, *Bala*, and *Rowntree*, the plaintiffs alleged that the defendant doctors breached duties to perform tests or take specific actions that could have prevented or diagnosed illness; the plaintiffs complained, essentially, that the doctors were negligent in failing to take diagnostic measures that would have revealed the need to establish a course of treatment for the illness that was the subject of the plaintiffs' claims. See *Husain*, 964 S.W.2d at 920; *Bala*, 909 S.W.2d at 891–92; *Rowntree*, 833 S.W.2d at 108. In each case, the plaintiff was already suffering the

malady that should have been discovered had the test been timely given. *See id.* Thus, the tort was complete. Because a doctor's failure to order a test or perform a specific evaluation on a particular date is readily ascertainable, and because the defendants could have breached a duty only when they had an opportunity to perform the examinations, the limitations period began to run each time the defendants failed to order tests or perform evaluations. *See id.*

Here, though, Moss has not alleged that Shah failed to diagnose an existing condition. Instead, Moss alleges that Shah, by removing the buckle when he did, assumed a standard of care indicating a different course of follow-up treatment. Shah allegedly *850 breached this standard of care, causing Moss's injury, by failing to perform appropriate follow-up to monitor Moss's retinal condition after the buckle was removed. *Cf. Gross v. Kahane*, 3 S.W.3d 518, 521 (Tex.1999) (noting that medical standards may require a physician who prescribes powerful medication to monitor closely the patient's reaction to the medication). Because Shah's inappropriate follow-up treatment was ongoing and constituted the breach, the precise date of the tort alleged in this case is not readily ascertainable. When, as here, (1) the date of the alleged breach or tort is not readily ascertainable, (2) a continuous course of treatment has been established with respect to the specific condition that forms the basis of the lawsuit, and (3) the standard of care requires periodic follow-up examinations for that condition, the statute of limitations begins to run when the course of treatment is completed. *See Rowntree*, 833 S.W.2d at 106 (citing *Nykorchuck v. Henriques*, 78 N.Y.2d 255, 573 N.Y.S.2d 434, 577 N.E.2d 1026, 1029 (1991)).

The Court's reliance on *Kimball* is similarly misplaced. In *Kimball*, the plaintiff was taken to surgery on March 11, 1982, but the anesthesiologist defendant had trouble intubating him and the surgery was postponed. 741 S.W.2d at 371. The defendant had no further contact with the plaintiff, who was discharged from the hospital on March 17, 1982. *Id.* Although it was undisputed that the alleged breach or tort causing the injury occurred on March 11th, plaintiff argued that limitations did not begin to run until the last day of his hospitalization. *Id.* at 372. We rejected Kimball's argument because the statute expressly limited that option to claims based upon the hospitalization itself, rather than discrete, identifiable, negligent acts. *Id.* But we also noted that the statutory

provision allowing limitations to run from the completion of medical or health care treatment contemplates a situation like the present one, in which "the patient's injury occurs during a course of treatment for a particular condition and the only readily ascertainable date is the last day of treatment." *Id.*

Neither does *Chambers* support the Court's analysis. There, the plaintiff sued her doctor for failing to diagnose her breast cancer. 883 S.W.2d at 157. She presented summary-judgment proof that the doctor, as her primary care physician, had a continuing duty to monitor and treat complaints of which he had notice, including her breast lump. *Id.* at 158. Because the physician had continually breached this duty up to and including her final appointment, and the patient had sued within two years of that date, we held that the claim was not time-barred. *Id.* Thus, *Chambers* actually supports the notion that, if the applicable standard of care requires follow-up for a particular condition, a physician may breach an ongoing duty to monitor that condition without doing so on any single date, as Moss alleges in this case.

The Court's analysis is also flawed because it applies an inappropriate review standard. We must review the summary-judgment record and resolve any factual disputes in the non-movant's favor. *Chambers*, 883 S.W.2d at 157. The Court concludes that the court of appeals erred in applying a course-of-treatment analysis because "Moss's medical records demonstrate that Moss's last 'recheck' visit was on October 23, 1993, and Dr. Shah did not diagnose the second detached retina until Moss visited Dr. Shah more than twelve months later on November 22, 1994." 67 S.W.3d at 845. But viewed in the light most favorable to Moss, the summary-judgment evidence creates a fact issue whether the November 22, 1994 visit was part of Moss's retinal course of treatment. *851 Moss was specifically referred to Shah to treat his retinal condition, and the buckle-removal surgery and any necessary follow-up were part of the course of treatment for that condition. Moss went to other eye specialists about problems with his visual acuity and his eye muscles, but the nature of the specific problem for which Shah treated Moss—retinal detachment—never changed.

I agree that neither the mere continuing relationship between a physician and a patient nor the continuing nature of a diagnosis will alone support a finding that a course of treatment was established for a particular

condition. *Rowntree*, 833 S.W.2d at 105–06. If an examination does not relate to treatment of the condition that gives rise to the litigation but is “discrete and complete,” it does not constitute continuous treatment. *Nykorchuck*, 573 N.Y.S.2d 434, 577 N.E.2d at 1028. Here, though, Shah testified that Moss continued to see Shah for “routine periodic checkups” after the buckle-removal surgery. And, contrary to the Court's conclusion that the November 22, 1994 visit was not a recheck for the buckle-removal surgery, Shah's notes from Moss's October 1993 recheck visit specifically note that Moss's condition should be rechecked in one year. The November 1994 visit was originally scheduled for October 20, 1994, almost exactly one year after the October 21, 1993 visit. Although the Court implies that the November 1994 appointment did not relate to a follow-up course of treatment, the

summary-judgment posture of this case requires us to resolve this dispute in Moss's favor.

IV Conclusion

Because Shah did not conclusively establish that the November 1994 visit was “discrete and complete” and unrelated to a follow-up course of treatment for Moss's [retinal detachment](#), summary judgment in his favor was improper. Accordingly, the court of appeals' judgment should be affirmed. Because the Court concludes otherwise, I respectfully dissent.

All Citations

67 S.W.3d 836, 45 Tex. Sup. Ct. J. 247

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152 S.W.3d 670
Court of Appeals of Texas,
Fort Worth.

Sharon BOYD, Appellant,

v.

G. Byron KALLAM, M.D.; Mary Angeline
Finke, M.D.; The Medical Clinic of North
Texas, P.A.; Gerald Thompson, M.D.;
Family Healthcare Associates, Appellees.

No. 2-03-362-CV.

|
Nov. 24, 2004.

Synopsis

Background: Patient filed a medical malpractice case against physicians and medical clinics alleging that they misdiagnosed patient, failed to diagnose patient's colorectal cancer, and failed to order diagnostic testing that would have revealed the cancer. The Seventeenth District Court, Tarrant County, [Fred Davis, J.](#), granted defendants' motions for partial summary judgment. Patient appealed.

Holdings: The Court of Appeals, [Sue Walker, J.](#), held that:

[1] patient failed to establish that she did not have a reasonable opportunity to discover that physicians breached the standard of care due to their failure to screen patient for colorectal cancer after patient turned 50, and

[2] genuine issue of material fact as to whether patient had a reasonable opportunity to discover physicians' alleged negligent failure to diagnose or order diagnostic testing for patient precluded summary judgment on patient's claim that application of limitations statute to her malpractice claim would violate constitutional open courts provision.

Affirmed in part; reversed in part; remanded.

West Headnotes (28)

[1] **Judgment**
🔑 Particular Defenses

A defendant moving for summary judgment on a statute of limitations affirmative defense must prove conclusively that defense's elements. [Vernon's Ann. Texas Rules Civ.Proc., Rule 94.](#)

[Cases that cite this headnote](#)

[2] **Appeal and Error**
🔑 Judgment

In reviewing a trial court's summary judgment, the Court of Appeals resolves all doubts against the movant, and it views the evidence in the light most favorable to the nonmovants.

[Cases that cite this headnote](#)

[3] **Appeal and Error**
🔑 Judgment

In determining whether a disputed material fact issue exists, as would preclude summary judgment, the Court of Appeals takes as true evidence favorable to the nonmovant.

[Cases that cite this headnote](#)

[4] **Judgment**
🔑 Particular Defenses

When moving for summary judgment on the basis of limitations, the burden is on the movant to conclusively establish as a matter of law that limitations is a bar to the action.

[1 Cases that cite this headnote](#)

[5] **Judgment**
🔑 Particular Defenses

If a movant seeking summary judgment establishes that the statute of limitations bars the action, the nonmovant must then adduce summary judgment proof raising a fact issue in avoidance of the statute of limitations.

[Cases that cite this headnote](#)

[6] **Pleading**

🔑 Nature and Office of Pleading in Confession and Avoidance

A “plea in confession and avoidance” is one that avows and confesses the truth in the averments of fact, either expressly or by implication, but then proceeds to allege a new matter which tends to deprive the facts admitted of their ordinary legal effect, or to obviate, neutralize, or avoid them.

[1 Cases that cite this headnote](#)

[7] Pleading

🔑 Form and Requisites of Plea in General

A plea in confession and avoidance must be raised by pleadings.

[1 Cases that cite this headnote](#)

[8] Evidence

🔑 Matters of Defense and Rebuttal

The party seeking to benefit from plea in avoidance bears the burden of proof on the matter because that party will generally have greater access to the facts necessary to establish the matter.

[2 Cases that cite this headnote](#)

[9] Constitutional Law

🔑 Particular Issues and Applications

A plaintiff seeking to avoid a limitations summary judgment on the ground that application of the statutory limitations period violates the Texas Constitution's open courts provision has the burden of pleading and proof on the as-applied unconstitutionality of the statute. [Vernon's Ann.Texas Const. Art. 1, § 13](#); [Vernon's Ann.Texas Rules Civ.Proc., Rule 94](#).

[Cases that cite this headnote](#)

[10] Judgment

🔑 Particular Defenses

A plaintiff raising an as-applied open courts challenge to the constitutionality of the statute

of limitations for a health care liability claim in response to a defendant's summary judgment motion conclusively establishing the affirmative defense of limitations bears the burden of raising a fact issue showing no reasonable opportunity to discover the alleged wrong and to bring suit before the limitations period expired. [Vernon's Ann.Texas Const. Art. 1, § 13](#); [Vernon's Ann.Texas Civ.St. art. 4590i, § 10.01](#) (Repealed).

[2 Cases that cite this headnote](#)

[11] Constitutional Law

🔑 Right of Access to the Courts and a Remedy for Injuries in General

The constitutional open courts provision specifically guarantees all litigants the right to redress their grievances, that is, the right to their day in court. [Vernon's Ann.Texas Const. Art. 1, § 13](#).

[Cases that cite this headnote](#)

[12] Constitutional Law

🔑 Right of Access to the Courts and a Remedy for Injuries in General

The open courts provision acts as an additional due process guarantee granted in the Texas Constitution. [Vernon's Ann.Texas Const. Art. 1, § 13](#).

[Cases that cite this headnote](#)

[13] Constitutional Law

🔑 Abrogation, Modification, or Recognition of Remedies

Constitutional Law

🔑 Conditions, Limitations, and Other Restrictions on Access and Remedies

Because the Texas Constitution's open courts provision confers substantial rights to Texas citizens, the legislature cannot arbitrarily or unreasonably interfere with that right. [Vernon's Ann.Texas Const. Art. 1, § 13](#).

[Cases that cite this headnote](#)

[14] Constitutional Law**🔑 Conditions, Limitations, and Other Restrictions on Access and Remedies**

A statute or ordinance that unreasonably abridges a justiciable right to obtain redress for injuries caused by the wrongful acts of another amounts to a denial of due process under the open courts provision. [Vernon's Ann.Texas Const. Art. 1, § 13](#).

[Cases that cite this headnote](#)

[15] Constitutional Law**🔑 Conditions, Limitations, and Other Restrictions on Access and Remedies**

To establish that a statute violates the constitutional open courts provision and thereby denies him due process, a plaintiff must satisfy a two-part test: (1) he must show he has a well recognized common-law cause of action that is being statutorily restricted; and (2) he must show the restriction is unreasonable or arbitrary when balanced against the legislature's actual purpose in enacting the statute. [Vernon's Ann.Texas Const. Art. 1, § 13](#).

[1 Cases that cite this headnote](#)

[16] Constitutional Law**🔑 Time for Proceedings****Limitation of Actions****🔑 Constitutionality of Statute**

The restriction imposed in health care liability claims by the statute of limitations is reasonable and does not violate the constitutional open courts guarantee if the plaintiff had a reasonable opportunity to discover the alleged wrong and to bring suit before the limitations period expired; the restriction is unreasonable if it makes a plaintiff's remedy by due course of law contingent on an impossible condition, and being required to file suit before having a reasonable opportunity to learn of the alleged injury is an impossible condition. [Vernon's Ann.Texas Const. Art. 1, § 13](#);

[Vernon's Ann.Texas Civ.St. art. 4590i, § 10.01 \(Repealed\)](#).

[2 Cases that cite this headnote](#)

[17] Constitutional Law**🔑 Time for Proceedings**

The open courts provision is violated only when a statute requires a plaintiff to do the impossible—to sue before having any reason to know they should sue. [Vernon's Ann.Texas Const. Art. 1, § 13](#).

[Cases that cite this headnote](#)

[18] Constitutional Law**🔑 Time for Proceedings****Limitation of Actions****🔑 Constitutionality of Statute**

Patient alleging that application of limitations statute for malpractice claims would violate her rights under constitutional open courts provision was required to show she had no reasonable opportunity to discover the wrong before limitations expired; there was no additional requirement that patient show it was impossible or exceedingly difficult for her to discover physicians' negligence during the limitations period, which was merely another way of stating the “no-reasonable-opportunity” requirement. [Vernon's Ann.Texas Const. Art. 1, § 13](#); [Vernon's Ann.Texas Civ.St. art. 4590i, § 10.01 \(Repealed\)](#).

[1 Cases that cite this headnote](#)

[19] Constitutional Law**🔑 Arbitrariness****Constitutional Law****🔑 Reasonableness, Rationality, and Relationship to Object**

Fundamental constitutional law requires a party claiming a denial of due process because particular legislation abrogates one of its constitutional rights to establish (1) the legislative encroachment and (2) that the encroachment is arbitrary or unreasonable

when balanced against the purpose of the legislation. [U.S.C.A. Const.Amend. 14](#).

[Cases that cite this headnote](#)

[20] Constitutional Law

🔑 [Right of Access to the Courts and a Remedy for Injuries in General](#)

Constitutional Law

🔑 [Relationship to Other Constitutions](#)

The Texas Constitution's due course of law open courts provision provides rights in addition to those provided by the Fourteenth Amendment of the United States Constitution; the Fourteenth Amendment provides the floor for Texas citizens' due process rights while the Texas Constitution provides the ceiling. [U.S.C.A. Const.Amend. 14](#); [Vernon's Ann.Texas Const. Art. 1, § 13](#).

[Cases that cite this headnote](#)

[21] Limitation of Actions

🔑 [Negligence in Performance of Professional Services](#)

The limitations period provided a health care liability claim runs from one of three possible dates: (1) the date of the tort; (2) the last date of the relevant course of treatment; or (3) the last date of the relevant hospitalization. [Vernon's Ann.Texas Civ.St. art. 4590i, § 10.01](#) (Repealed).

[Cases that cite this headnote](#)

[22] Limitation of Actions

🔑 [Negligence in Performance of Professional Services](#)

Although the limitations statute for a health care liability claim specifies three possible dates on which the statute of limitations may start running, when the precise date of the tort is known, the statutory two-year period begins on that date. [Vernon's Ann.Texas Civ.St. art. 4590i, § 10.01](#) (Repealed).

[Cases that cite this headnote](#)

[23] Limitation of Actions

🔑 [Negligence in Performance of Professional Services](#)

The time in which patient's health care liability claims against physicians and nurse accrued, and two-year limitations period began to run, was from the dates that patient was seen by physicians and nurse for her well-woman and physical examinations and failed to perform or order colorectal cancer screening, misdiagnosed her rectal bleeding, and failed to order diagnostic testing. [Vernon's Ann.Texas Civ.St. art. 4590i, § 10.01](#) (Repealed).

[Cases that cite this headnote](#)

[24] Constitutional Law

🔑 [Time for Proceedings](#)

Limitation of Actions

🔑 [Constitutionality of Statute](#)

Patient failed to establish that she did not have a reasonable opportunity to discover that physicians breached the standard of care due to their failure to screen patient for colorectal cancer after patient turned 50, as required to establish that the two-year health care limitations period violated the open courts doctrine; patient knew, at the time of her office visits with physicians, that she was 50 years old and that physicians had failed to order colorectal cancer screening. [Vernon's Ann.Texas Const. Art. 1, § 13](#); [Vernon's Ann.Texas Civ.St. art. 4590i, § 10.01](#) (Repealed).

[Cases that cite this headnote](#)

[25] Judgment

🔑 [Bar of Statute of Limitations](#)

Genuine issue of material fact as to whether patient had a reasonable opportunity to discover physicians' alleged negligent failure to diagnose or order diagnostic testing for patient after she complained of rectal bleeding and constipation precluded summary judgment in favor of physicians, on patient's claim that application of limitations

statute to her malpractice claim would violate constitutional open courts provision. [Vernon's Ann.Texas Const. Art. 1, § 13](#); [Vernon's Ann.Texas Civ.St. art. 4590i, § 10.01](#) (Repealed).

[Cases that cite this headnote](#)

[26] **Constitutional Law**

🔑 [Time for Proceedings](#)

Limitation of Actions

🔑 [Constitutionality of Statute](#)

Patient's four-month delay between the time she discovered she had colorectal cancer and when she filed her medical negligence suit against physicians was reasonable, for purpose of patient's claim that application of limitations statute to her malpractice claim would violate constitutional open courts provision. [Vernon's Ann.Texas Const. Art. 1, § 13](#); [Vernon's Ann.Texas Civ.St. art. 4590i, § 10.01](#) (Repealed).

[1 Cases that cite this headnote](#)

[27] **Constitutional Law**

🔑 [Time for Proceedings](#)

Limitation of Actions

🔑 [Constitutionality of Statute](#)

A plaintiff who raises a genuine issue of material fact as to the applicability of the open courts provision to avoid limitations may nonetheless fail to obtain relief under the open courts provision if he does not use due diligence and sue within a reasonable time after learning about the alleged wrong. [Vernon's Ann.Texas Const. Art. 1, § 13](#).

[Cases that cite this headnote](#)

[28] **Constitutional Law**

🔑 [Time for Proceedings](#)

For the purpose of the open courts provision to avoid limitations, a reasonable delay is allowed for investigation, preparation and filing the claim after the injury is discovered. [Vernon's Ann.Texas Const. Art. 1, § 13](#).

[Cases that cite this headnote](#)

Attorneys and Law Firms

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[Wallach, Andrews & Stouffer, P.C.](#), [J. Wade Birdwell](#), [D. Michael Wallach](#), and [Jennifer M. Andrews](#), for G. Byron Kallam, M.D., Mary Angeline Finke, M.D., The Medical Clinic of North Texas, P.A.

Panel A: [GARDNER](#), [WALKER](#), and [McCOY](#), JJ.

OPINION

[SUE WALKER](#), Justice.

I. INTRODUCTION

The trial court granted a partial summary judgment for Appellees on statute of limitations grounds in this medical malpractice case. Because Appellant Sharon Boyd pleaded the open courts provision of the Texas Constitution and also produced summary judgment evidence raising a genuine issue of material fact concerning whether she had a reasonable opportunity to learn of Appellees' alleged wrongs or her alleged injury within the limitations period, we reverse the trial court's partial limitations summary judgment for Appellees G. Byron Kallam, M.D., Mary Angeline Finke, M.D., and Gerald Thompson, M.D. on Boyd's negligent failure to diagnose claims, misdiagnosis claims, and negligent failure to order diagnostic testing claims. We also reverse the trial court's partial summary judgment for Appellees Family Healthcare Associates and the Medical Clinic of North Texas, P.A. on Boyd's claims that these entities are vicariously liable for alleged negligence in failing to diagnose Boyd's [cancer](#), misdiagnosing her [cancer](#), and failing to order diagnostic testing. We remand these claims to the trial court.

We affirm the trial court's partial summary judgment for Appellees G. Byron Kallam, M.D., Mary Angeline Finke,

M.D., the Medical Clinic of North Texas, P.A., Gerald Thompson, M.D., and Family Healthcare Associates on Boyd's failure-to-screen-based-on-age claims. We also affirm the trial court's partial summary judgment for Family Healthcare Associates on Boyd's direct negligence theories of recovery.¹

*675 II. FACTUAL AND PROCEDURAL BACKGROUND

An April 11, 2002 colonoscopy performed on Boyd revealed that she had stage IV colorectal cancer. The doctor who performed the colonoscopy told Boyd that she had a large, cancerous tumor in her sigmoid colon and that either this tumor or some precursor abnormality, probably in the form of an adenomatous polyp, had been present and growing in her colon since 1996. Boyd filed suit on August 30, 2002, alleging that Appellees' treatment of her, including treatment as early as 1996, was negligent in several respects, including failing to screen her for colorectal cancer after she became fifty years old, misdiagnosing her rectal bleeding as stemming from hemorrhoids, failing to diagnose her colorectal cancer, and failing to order diagnostic testing that would have revealed the cancer. Boyd pleaded that the open courts provision of the Texas Constitution precluded the application of the statute of limitations to her claims because she did not have a reasonable opportunity to learn of Appellees' alleged wrongs or her alleged injury prior to the expiration of limitations. Appellees filed motions for partial summary judgment on the affirmative defense of limitations.² Appellees asserted that Boyd's claims alleging negligence occurring more than two years before Boyd filed suit—that is, prior to August 30, 2000—were barred by the statute of limitations.³ Boyd responded, filing summary judgment evidence that she claims raises a genuine issue of material fact concerning whether she had a reasonable opportunity to discover the Appellees' alleged wrongs or her alleged injury within the limitations period. The trial court granted Appellees' motions for partial summary judgment and signed an order severing these claims. Boyd perfected this appeal.

III. STANDARD OF REVIEW

A. Summary Judgment for Defendants Based on Limitations

[1] [2] [3] [4] [5] The statute of limitations is an affirmative defense. *TEX.R. CIV. P. 94*; *Woods v. William M. Mercer, Inc.*, 769 S.W.2d 515, 517 (Tex.1988). A defendant moving for summary judgment on a statute of limitations affirmative defense must prove conclusively that defense's elements. *Shah v. Moss*, 67 S.W.3d 836, 842 (Tex.2001); *Velsicol Chem. Corp. v. Winograd*, 956 S.W.2d 529, 530 (Tex.1997). In reviewing a trial court's summary judgment, we resolve all doubts against the movant, and we view the evidence in the light most favorable to the nonmovants. *KPMG Peat Marwick v. Harrison County Hous. Fin. Corp.*, 988 S.W.2d 746, 748 (Tex.1999). Additionally, in determining whether a disputed material fact issue exists, we take as true evidence favorable to the nonmovant. *Am. Tobacco Co. v. Grinnell*, 951 S.W.2d 420, 425 (Tex.1997). Accordingly, the burden is on the movant to conclusively establish *676 as a matter of law that limitations is a bar to the action. See *Rowntree v. Hunsucker*, 833 S.W.2d 103, 104 (Tex.1992); *Lovato v. Austin Nursing Ctr., Inc.*, 113 S.W.3d 45, 50–51 (Tex.App.-Austin 2003, pet. granted) (op. on reh'g). If a movant does establish that the statute of limitations bars the action, the nonmovant must then adduce summary judgment proof raising a fact issue in avoidance of the statute of limitations. *Woods*, 769 S.W.2d at 518; *Zale Corp. v. Rosenbaum*, 520 S.W.2d 889, 891 (Tex.1975); see generally *City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 678 (Tex.1979) (holding that when movant establishes right to summary judgment, burden shifts to nonmovant to raise fact issue precluding judgment).

B. Avoidance of Limitations Via Open Courts Provision

[6] [7] [8] A plea in confession and avoidance is one that avows and confesses the truth in the averments of fact, either expressly or by implication, but then proceeds to allege a new matter which tends to deprive the facts admitted of their ordinary legal effect, or to obviate, neutralize, or avoid them. *Woods*, 769 S.W.2d at 517. A plea in confession and avoidance must be raised by pleadings. *Id.* at 518. The party seeking to benefit from the plea in avoidance also bears the burden of proof on the matter because that party will generally have greater access to the facts necessary to establish the matter. *Id.*

[9] An assertion that the open courts provision of the Texas Constitution renders application of a statute

of limitations to a particular plaintiff unconstitutional is a plea in confession and avoidance: confessing that the claims are brought outside the statutory limitations period, but asserting that the limitations statute, as applied to the particular plaintiff's claims, is unconstitutional as violative of the Texas Constitution's open courts provision. See [TEX.R. CIV. P. 94](#) ("In pleading to a preceding pleading, a party shall set forth ... any other matter constituting an avoidance...."). Thus, a plaintiff seeking to avoid a limitations summary judgment on the ground that application of the statutory limitations period violates the Texas Constitution's open courts provision has the burden of pleading and proof on the as-applied unconstitutionality of the statute. Accord [Walker v. Gutierrez](#), 111 S.W.3d 56, 66 (Tex.2003) (recognizing that party challenging statute has burden to prove unconstitutionality); [Southwestern Elec. Power Co. v. Grant](#), 73 S.W.3d 211, 222 (Tex.2002) (refusing to consider constitutional open-courts claim not pleaded in trial court); [In re Doe 2](#), 19 S.W.3d 278, 284 (Tex.2000) (recognizing that absent a pleading raising issue of unconstitutionality, trial court is generally without authority to reach the issue).

[10] A plaintiff raising an as-applied open courts challenge to the constitutionality of [article 4590i, section 10.01](#) in response to a defendant's summary judgment motion conclusively establishing the affirmative defense of limitations bears the burden of raising a fact issue showing no reasonable opportunity to discover the alleged wrong and to bring suit before the limitations period expired. [Shah](#), 67 S.W.3d at 846 (recognizing that "it was [the plaintiff's] burden to raise a fact issue demonstrating that he did not have a reasonable opportunity to discover the alleged wrong before the limitations period expired so that the open courts guarantee applies"); [Earle](#), 998 S.W.2d at 889 (recognizing that "plaintiff must raise a fact issue concerning the applicability" of the open courts provision to avoid summary judgment *677 on limitations).⁴

[11] [12] [13] [14] The open courts provision of the Texas Constitution provides, "All courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law." TEX. CONST. art. I, § 13. The open courts provision specifically guarantees all litigants the right to redress their grievances—to use a popular and correct phrase, the right to their day in court. [LeCroy v. Hanlon](#), 713 S.W.2d 335, 341 (Tex.1986). The open courts

provision acts as an additional due process guarantee granted in the Texas Constitution. See *id.* at 340–41; [McGlothlin v. Cullington](#), 989 S.W.2d 449, 452 (Tex.App.-Austin 1999, pet. denied), cert. denied, 528 U.S. 1062, 120 S.Ct. 616, 145 L.Ed.2d 511 (1999); see also [Sax v. Votteler](#), 648 S.W.2d 661, 664 (Tex.1983) (recognizing open courts provision is "quite plainly a due process guarantee"). Because the Texas Constitution's open courts provision confers substantial rights to Texas citizens, the legislature cannot arbitrarily or unreasonably interfere with this right. [LeCroy](#), 713 S.W.2d at 341. Accordingly, a statute or ordinance that unreasonably abridges a justiciable right to obtain redress for injuries caused by the wrongful acts of another amounts to a denial of due process under the open courts provision. [Shah](#), 67 S.W.3d at 842; [Sax](#), 648 S.W.2d at 665.

[15] To establish that a statute violates the open courts provision and thereby denies him due process, a plaintiff must satisfy a two-part test: (1) he must show he has a well recognized common-law cause of action that is being statutorily restricted; and (2) he must show the restriction is unreasonable or arbitrary when balanced against the legislature's actual purpose in enacting the statute. [Sax](#), 648 S.W.2d at 665; [In re Hinterlong](#), 109 S.W.3d 611, 626 (Tex.App.-Fort Worth 2003, orig. proceeding); see also [Owens Corning v. Carter](#), 997 S.W.2d 560, 573 (Tex.), cert. denied, 528 U.S. 1005, 120 S.Ct. 500, 145 L.Ed.2d 386 (1999). Concerning the first prong, Texas courts have long recognized that medical negligence claims are well-defined common-law causes of action. [Lucas v. United States](#), 757 S.W.2d 687, 690 (Tex.1988). And a statute of limitations provision clearly statutorily restricts this common-law medical negligence cause of action by limiting the time for bringing a suit. See, e.g., [Sax](#), 648 S.W.2d at 666. Thus, a medical negligence statute of limitations provision operating to bar a plaintiff's medical negligence claim satisfies the first prong of the open courts analysis.

[16] [17] Concerning the second prong, the legislature's actual purpose in enacting statute of limitations provisions limiting the time for bringing a medical negligence suit is legitimate: to limit the length of time that medical professionals will be exposed to potential liability and thereby reduce medical malpractice insurance rates. *Id.*; see also [TEX.REV.CIV. STAT. ANN. art. 4590i, § 1.02](#). The only undecided issue, therefore, is whether the restriction—the proscription of the plaintiff's medical negligence *678 suit—is reasonable when balanced

against the legislature's purpose in enacting the statute—to limit the time that medical professionals will be exposed to liability. See *Lucas*, 757 S.W.2d at 690 (recognizing medical negligence claim was common-law cause of action and damage cap restricted plaintiff's right to redress on this common-law claim, so “the remaining inquiry is whether the restriction on [the plaintiffs'] right of recovery ‘is unreasonable or arbitrary when balanced against the purpose and basis of the statute’”). The law is well settled on this issue: The restriction imposed in health care liability claims by article 4590i, section 10.01's statute of limitations is reasonable and does not violate the open courts guarantee if the plaintiff had a reasonable opportunity to discover the alleged wrong and to bring suit before the limitations period expired. *Shah*, 67 S.W.3d at 842; *Earle v. Ratliff*, 998 S.W.2d 882, 889 (Tex.1999); *Morrison v. Chan*, 699 S.W.2d 205, 207 (Tex.1985). The restriction is unreasonable if it makes a plaintiff's remedy by due course of law contingent on an impossible condition, and being required to file suit before having a reasonable opportunity to learn of the alleged injury is an impossible condition. See, e.g., *Nelson v. Krusen*, 678 S.W.2d 918, 921 (Tex.1984) (discussing how requiring a plaintiff whose injuries are not discoverable during the limitations period to nonetheless sue during the limitations period is equivalent to an impossible condition); *Neagle v. Nelson*, 685 S.W.2d 11, 12 (Tex.1985) (discussing how article 4590i, section 10.01 cannot operate to cut off a cause of action before the plaintiff knew of the wrong's existence); *Sax*, 648 S.W.2d at 667 (discussing how insurance code section 5.82 [the predecessor to article 4590i] cannot operate to make a minor's right to redress contingent on his parents' timely filing suit). In other words, the open courts provision is violated only when a statute requires a plaintiff to do the impossible—to sue before having any reason to know they should sue. See *Krusen*, 678 S.W.2d at 923.

[18] Appellees urge us, however, to apply a different requirement to Boyd's open courts challenge. Appellees contend that to raise a genuine issue of material fact concerning application of the open courts provision, Boyd was not required to establish that she lacked a reasonable opportunity to discover the alleged wrong and to bring suit before the limitations period expired, but instead that “it was impossible or exceedingly difficult” for her to discover the wrong during limitations. Appellees cite *O'Reilly v. Wiseman* for this proposition. 107 S.W.3d 699, 706 (Tex.App.-Austin 2003, pet. denied).⁵

We hold that no distinction, other than semantical, exists between an impossible-or-exceedingly-difficult-to-discover-the-wrong open courts requirement and the more traditional no-reasonable-opportunity-to-discover-the-wrong-before-limitations-expired requirement.

We decline Appellees' invitation to apply the impossible-or-exceedingly-difficult-to-discover-the-wrong open courts requirement mentioned in *O'Reilly* to the present facts for four main reasons. The first two reasons are straightforward and will be discussed together. First, *O'Reilly* itself recognizes that the two requirements are the same: the long-used reasonable-opportunity-to-discover-the-wrong-before-limitations-expired requirement was simply renamed by the *O'Reilly* court as the impossible-or-exceedingly-difficult-to-discover-the-wrong *679 requirement for purposes of clarity. *Id.* at 706 n. 10 (“We will use the language ‘impossible or exceedingly difficult to discover the wrong’ rather than ‘reasonable opportunity to discover the wrong’ in describing what a plaintiff must show in an open-courts challenge.”). Second, because Mrs. O'Reilly learned of her cancer diagnosis while four months remained before limitations expired, it was not exceedingly difficult for her to discover the wrong before limitations ran nor did she lack a reasonable opportunity to discover the wrong before limitations ran. *Id.* at 708. Thus, Appellees' contention that, under *O'Reilly*, a substantive distinction exists between an impossible-or-exceedingly-difficult-to-discover-the-wrong requirement and the traditional reasonable-opportunity-to-discover-the-wrong-before-limitations-expired requirement is not factually supported. *Id.* at 708; see also *Radloff v. Dorman*, 924 S.W.2d 416, 419 (Tex.App.-Amarillo 1996, writ dismissed by agr.) (holding that absent evidence raising issue that four months was not reasonable time to bring suit, plaintiffs who learned of injury with four months remaining in limitations period failed to rebut defendant's established affirmative defense of limitations).

Third, Appellees argue that, based on *O'Reilly*, the supreme court's opinion in *Hellman v. Mateo*, 772 S.W.2d 64, 66 (Tex.1989) (op. on reh'g) is an anomaly and is no longer good law; we cannot agree. Appellees claim that *Hellman* is no longer good law because in *Hellman* the supreme court placed the burden on the defendant doctor to prove that the plaintiff should have known of her injury within limitations, while the supreme court's

more recent decision in *Shah v. Moss* places the burden of proof on this issue on the plaintiff. The supreme court in *Hellman* did not, however, misplace the burden of proof, nor is *Hellman* inconsistent with *Shah*. In *Hellman*, the plaintiff pleaded and raised a genuine issue of material fact as to whether she had a reasonable opportunity to learn of her injury during limitations. 772 S.W.2d at 66 (“Having determined that Hellman alleged and expressly presented the facts [i.e., summary judgment evidence] necessary to challenge the constitutionality of article 4590i, we must now consider whether [the defendant] ... conclusively established that there is no genuine issue of material fact concerning the time when Hellman ... should have discovered ... the injury”). Thus, Hellman satisfied her initial summary judgment burden of pleading and proof on her open courts challenge; this initial burden is the same burden discussed in *Shah*. *Shah*, 67 S.W.3d at 846–47 (recognizing that “it was [the plaintiff’s] burden to raise a fact issue demonstrating that he did not have a reasonable opportunity to discover the alleged wrong before the limitations period expired so that the open courts guarantee applies”). After recognizing that Hellman had satisfied her summary judgment burden of raising a fact issue demonstrating that she did not have a reasonable opportunity to discover the alleged wrong before the limitations period expired so that the open courts guarantee applied, the supreme court then simply noted that in light of Hellman’s open courts pleading and summary judgment evidence, the defendant was not entitled to summary judgment on limitations unless he conclusively negated this matter in avoidance; that is, conclusively established that Hellman had a reasonable opportunity to discover the alleged wrong. *Hellman*, 772 S.W.2d at 66. Thus, the initial burden of pleading and proof on the open courts challenge was placed on the plaintiff in *Hellman*, just as it was in *Shah*. We cannot agree with Appellees’ contention that *Hellman* is bad law.

*680 And finally, to the extent Appellees interpret *O’Reilly* as creating a substantive distinction between the impossible-or-exceedingly-difficult-to-discover-the-wrong open courts requirement and the reasonable-opportunity-to-discover-the-wrong-before-limitations-expired requirement, the distinction is premised upon the perception that the supreme court at one time abandoned its historic two-pronged open courts analysis—that to establish an open courts violation, a plaintiff must show (1) that he has a well-recognized common-law cause of action that is being statutorily restricted

and (2) that the restriction is unreasonable or arbitrary when balanced against the legislature’s actual purpose in enacting the statute—then moved to an impossible-or-exceedingly-difficult-to-discover-the-wrong test, and then moved again back to its forgotten two-prong balancing test. 107 S.W.3d at 706–07.

[19] [20] We cannot agree that the Texas Supreme Court previously departed from its well-established, two-pronged open courts analysis. See, e.g., *Owens Corning*, 997 S.W.2d at 573–74 (applying two-prong test in facial open courts challenge to Texas’s borrowing statute); *St. Luke’s Episcopal Hosp. v. Agbor*, 952 S.W.2d 503, 508 (Tex.1997) (applying two-prong test in as-applied open courts challenge to statutorily granted immunity to hospital allegedly cutting off negligent credentialing claim); *Diaz v. Westphal*, 941 S.W.2d 96, 100 (Tex.1997) (applying two-prong test in as-applied open courts challenge to wrongful death and survival actions statute of limitations); *Weiner v. Wasson*, 900 S.W.2d 316, 318–19 (Tex.1995) (applying two-prong test in as-applied open courts challenge to article 4590i’s statute of limitations application to minors); *Moreno v. Sterling Drug, Inc.*, 787 S.W.2d 348, 355 (Tex.1990) (applying two-prong test in as-applied open courts challenge to wrongful death statute of limitations); *Lucas*, 757 S.W.2d at 690 (applying two-prong test in as-applied open courts challenge to article 4590i’s damage caps); *LeCroy*, 713 S.W.2d at 341 (applying two-prong test in open courts challenge to statute requiring filing fee that was paid into state’s general revenue fund); *Lebohm v. City of Galveston*, 154 Tex. 192, 195–96, 275 S.W.2d 951, 955 (1955) (op. on reh’g) (applying two-prong test in facial open courts challenge to legislatively approved city charter provision exempting city from all liability for injuries caused by defective streets); *Hanks v. City of Port Arthur*, 121 Tex. 202, 205, 48 S.W.2d 944, 945 (1932) (applying two-prong test in facial open courts challenge to ordinance exempting Port Arthur from all liability for injuries caused by defective streets). Indeed, departure from the two-prong test is unlikely because it is dictated by fundamental constitutional law. Fundamental constitutional law requires a party claiming a denial of due process because particular legislation abrogates one of its constitutional rights, here the open courts guarantee, to establish (1) the legislative encroachment and (2) that the encroachment is arbitrary or unreasonable when balanced against the purpose of the legislation. See, e.g., *Zinerman v. Burch*, 494 U.S. 113, 125, 110 S.Ct. 975, 983, 108

L.Ed.2d 100 (1990) (recognizing Federal Due Process Clause contains a substantive component that bars certain arbitrary, wrongful government actions regardless of the fairness of the procedures used to implement them);⁶ accord *Mayhew v. *681 Town of Sunnyvale*, 964 S.W.2d 922, 938 (Tex.1998) (explaining that “[a] generally applicable zoning ordinance will survive a substantive due process challenge if it is designed to accomplish an objective within the government's police power and if a rational relationship exists between the ordinance and its purpose”), cert. denied, 526 U.S. 1144, 119 S.Ct. 2018, 143 L.Ed.2d 1030 (1999); *Parvin v. Dean*, 7 S.W.3d 264, 276 (Tex.App.-Fort Worth 1999, no pet.) (“The objective of due process is to restrain the government from arbitrary and unreasonable exercises of power and to prevent excessive governmental encroachment.”). Thus, we cannot agree with Appellees' suggestion that a distinction exists in the open courts test employed by the Texas Supreme Court over the years that would trigger a modification of the traditional open courts analysis. We examine the summary judgment evidence before us to determine whether Appellees conclusively established the affirmative defense of limitations, and if so, whether Boyd raised a genuine issue of material fact that she had no reasonable opportunity to discover Appellee's alleged wrongs and her alleged injury prior to the expiration of article 4590i, section 10.01's limitations period.

IV. SUMMARY JUDGMENT EVIDENCE

Viewing only the summary judgment evidence favorable to Boyd, and taking that evidence as true, the summary judgment record shows that Boyd had office visits with Appellees on specific dates and that she claims that Appellees were negligent on those dates.⁷ Boyd began seeing Dr. Kallam, a gynecologist, in October 1995. Boyd considered Dr. Kallam to be her primary doctor; accordingly, she saw him for minor ailments and for yearly well-woman examinations. Boyd saw Dr. Kallam for well woman examinations on December 4, 1996 and November 16, 1998. During both of these examinations Dr. Kallam performed a rectal examination and took a fecal occult stool sample, and these studies showed no evidence of blood. Due to a change in her health insurance, Boyd began seeing Dr. Thompson in October 1999. She designated Dr. Thompson as her primary care physician and saw him for yearly physical examinations, but she also continued to see Dr. Kallam and his partner, Dr. Finke,

for well woman checkups. She saw Barbara Jeffries, R.N., N.P., a nurse practitioner with Dr. Kallam and Dr. Finke's office, for a well woman examination on March 3, 2000. Nurse Jeffries obtained a fecal occult stool sample, and again, it was negative. Neither Dr. Kallam nor Dr. Finke saw Boyd during this examination, but Dr. Finke read over and signed off on Nurse Jefferies' examination.⁸

According to Boyd, beginning in 1998, during each of the well woman and physical examinations, she complained of rectal bleeding and, on occasion, constipation. *682 Each of the Appellees examined Boyd and assured her that her rectal bleeding stemmed from her hemorrhoids. According to Boyd, when she saw Dr. Kallam on February 21, 2001, he “not only did a digital rectal examination, but also used ... an Anoscope” to examine her rectum and informed Boyd that she had “a little fissure present ... that was causing the bleeding.” Despite Boyd's continued complaints, Appellees attributed Boyd's rectal bleeding to hemorrhoids. During a February 12, 2002 office visit with Dr. Thompson, Boyd demanded a colonoscopy, Dr. Thompson ordered one, and it revealed Boyd's stage IV colorectal cancer.

Boyd filed numerous expert affidavits as summary judgment evidence. Boyd's own affidavit explains that the doctor who performed her colonoscopy told her that the large, cancerous tumor in her sigmoid colon or some precursor abnormality, probably in the form of an adenomatous polyp, had been present and growing in Boyd's colon since 1996. The thirty-page affidavit of Rhett Fredric, M.D., an oncologist, likewise explained as follows:

Had Ms. Boyd been properly screened prior to March 2000, or properly worked up beginning in March 2000, some abnormality would have been detectable, probably an adenomatous polyp. If an adenomatous polyp or cancer had been detected by screening, colonoscopy or lower GI studies, standard medical care would have been to remove the polyp or cancer, or biopsy the abnormality, and then institute surgery and/or chemotherapy if the tumor was malignant. The delay in diagnosing

Ms. Boyd's tumor occurred from 1996 to 2002, and resulted in, at a minimum, an approximate two[-]year delay in diagnosis. This delay in diagnosis in reasonable medical probability, based upon the medical literature, resulted in Ms. Boyd going from a Stage II or early Stage III to a Stage IV.

Boyd also filed expert affidavits opining that each of the Appellees was negligent and that their negligence proximately caused her injuries.

V. APPLICATION OF STANDARDS OF REVIEW TO SUMMARY JUDGMENT EVIDENCE

A. Boyd's Negligence Allegations

Boyd alleges two general categories of negligence against the doctors and Nurse Jefferies in this case. First, she alleges that they were all negligent by failing at each visit after she turned fifty years old to recommend that she undergo [colorectal cancer screening](#). Second, she alleges that they were all negligent by misdiagnosing or misinterpreting her [rectal bleeding](#) and symptoms as [hemorrhoids](#) and telling her that she suffered only from this nonthreatening condition, by not performing diagnostic testing concerning her [rectal bleeding](#), and by failing to diagnose her [cancer](#).

B. Appellees Conclusively Established the Affirmative Defense of Limitations

[21] [22] [Article 4590i, section 10.01](#) provides that notwithstanding any other law, a person may not bring a health care liability claim unless the person files the action within two years from the occurrence of the tort. [TEX.REV.CIV. STAT. ANN. art. 4590i, § 10.01](#). The limitations period provided in [article 4590i, section 10.01](#) runs from one of three possible dates: (1) the date of the tort; (2) the last date of the relevant course of treatment; or (3) the last date of the relevant hospitalization. [Husain v. Khatib](#), 964 S.W.2d 918, 919 (Tex.1998). Although the statute specifies three possible dates on which the statute of limitations may start running, when the precise date of the tort is known, the statutory two-year period begins on that date. See [Earle](#), 998 S.W.2d at 886; [Husain](#), *683 964 S.W.2d at 919; [Kimball v. Brothers](#), 741 S.W.2d 370, 372 (Tex.1987).

[23] Here, Boyd claims that Appellees were negligent on the specific dates when one of them saw her and did not perform or order [colorectal cancer screening](#) because of her age, misdiagnosed her [rectal bleeding](#) as [hemorrhoids](#), and failed to perform or order diagnostic testing: December 4, 1996, November 16, 1998, October 25, 1999, January 12, 2000, and March 3, 2000. Because the precise dates of the alleged torts by Appellees are known, the statutory limitations period began on those dates and expired two years later.⁹ See [Earle](#), 998 S.W.2d at 886; [Husain](#), 964 S.W.2d at 919; [Kimball](#), 741 S.W.2d at 372; [Karley v. Bell](#), 24 S.W.3d 516, 521 (Tex.App.-Fort Worth 2000, pet. denied); [Voegtlin](#), 977 S.W.2d at 810–11. Boyd did not file suit until August 30, 2002. Thus, Appellees conclusively established their affirmative defense of limitations as to Boyd's claims of negligence occurring prior to August 30, 2000, and the burden shifted to Boyd to raise a genuine issue of material fact demonstrating that she did not have a reasonable opportunity to learn of Appellees' alleged wrongs or her alleged injury before limitations expired. See [Shah](#), 67 S.W.3d at 836; [Earle](#), 998 S.W.2d at 889; see also [Clear Creek Basin Auth.](#), 589 S.W.2d at 678 (holding that when movant establishes right to summary judgment burden shifts to nonmovant to raise issue of fact precluding judgment).

C. Open Courts Analysis

1. No Fact Issue on Negligent–Failure–to–Screen–Based–on–Age Claims

[24] Boyd produced summary judgment evidence establishing that the standard of care requires [colorectal cancer screening](#) to be performed on all patients over fifty years old. She complains that Appellees breached this standard of care on multiple occasions by failing to order [colorectal cancer screening](#) on her after she became fifty years old. Boyd knew, however, at the time of each of her office visits with Appellees that she was fifty years old and that they had failed to order [colorectal cancer screening](#). See [Jennings v. Burgess](#), 917 S.W.2d 790, 794 (Tex.1996) (holding negligent referral claim barred because plaintiff knew at each visit that defendant did not refer her to plastic surgeon). She produced no summary judgment evidence demonstrating that she did not have a reasonable opportunity to learn of Appellees' failure to order age-based [screening for colorectal cancer](#). See [Shah](#), 67 S.W.3d at 846–47 (holding plaintiff failed to raise

fact issue demonstrating that he did not have reasonable opportunity to discover alleged negligent performance of his back surgery). Thus, we hold that Boyd has failed to raise a genuine issue of material fact that she did not have a reasonable opportunity to learn of the alleged wrong—the failure to perform [colorectal cancer screening](#) simply because she was more than fifty years old—within the limitations period for each of her office visits with Appellees occurring prior to August 30, 2000.¹⁰ Because the failure to conduct [colorectal cancer screening](#) based on age is the only negligence claim Boyd alleges with respect to the December 4, 1996 visit with Dr. Kallam, the trial court properly concluded that Boyd's negligence *684 claim concerning this visit is barred by the statute of limitations.

2. Fact Issues Exist on Negligent Failure to Diagnose Claims, Misdiagnosis Claims, and Negligent Failure to Order Diagnostic Testing Claims

[25] According to Boyd, whose testimony we must take as true for purposes of this summary judgment proceeding, beginning in 1998, she complained to Appellees on each office visit of [rectal bleeding](#) and occasional constipation. Boyd claims that Appellees repeatedly told her that she suffered from [hemorrhoids](#) and attributed her symptoms to [hemorrhoids](#). Boyd's experts opined in their affidavits that changes in bowel habits and [rectal bleeding](#) are possible symptoms of [colorectal cancer](#), that the standard of care required Appellees to take steps to “rule out a possible lower bowel etiology of her symptoms,” and that their failure to do so constituted negligence.

Boyd's summary judgment evidence viewed in the light most favorable to her raises an issue of fact concerning whether she had a reasonable opportunity to discover Appellees' alleged wrongs or her alleged injury.¹¹ See [Hellman](#), 772 S.W.2d at 65–66 (holding plaintiff alleging pathologist negligently diagnosed lymph node as benign raised fact issue concerning whether she had reasonable opportunity to discover her injury during limitations); [Thompson v. Pate](#), 69 S.W.3d 743, 748 (Tex.App.-El Paso 2002, no pet.) (holding plaintiff who had gallbladder removal surgery and was told gallbladder had been removed raised fact issue concerning whether she had reasonable opportunity to learn gallbladder had not been removed when she was symptom free for five years after surgery); [Gagnier v. Wichelhaus](#), 17 S.W.3d 739, 744

(Tex.App.-Houston [1st Dist.] 2000, pet. denied) (holding plaintiff who was told she no longer had an IUD and underwent years of fertility treatment raised fact issue concerning whether she had no reasonable opportunity to learn that IUD was still in her uterus during limitations); [Del Rio v. Jenkins](#), 730 S.W.2d 125, 126–27 (Tex.App.-Corpus Christi 1987, writ ref'd n.r.e.) (holding plaintiff who alleged negligence in performing radiation for [testicular cancer](#) raised issue of fact concerning whether he had a reasonable opportunity to discover that his stomach pain stemmed from alleged negligent treatment for [testicular cancer](#)). Boyd allegedly repeatedly reported [rectal bleeding](#) and occasional constipation and, according to her testimony, was repeatedly told that she was suffering only from [hemorrhoids](#). The difference between this case and the cases relied upon by Appellees is that Boyd's [hemorrhoids](#) diagnosis made it impossible for her to learn of Appellees' alleged wrongs, or her alleged injury, [colon cancer](#): doctors attributed her symptoms to [hemorrhoids](#), not [cancer](#). Accord, [Thompson](#), 69 S.W.3d at 748 (believing plaintiff's gallbladder had been removed, doctors attributed her symptoms to other parts of her gastrointestinal system). In the cases relied upon by Appellees, the plaintiffs had some known injury or medical procedure and could or should have related their symptoms to the prior injury or procedure to learn of the present alleged wrong. See, e.g., *685 [Batten v. Hunt](#), 18 S.W.3d 235, 239 (Tex.App.-Austin 1999, pet. denied); [Ericson v. Roberts](#), 910 S.W.2d 608, 613 (Tex.App.-Tyler 1995, no writ).

In [Batten](#), the plaintiff's open courts challenge did not save his 1997 claim against Dr. Hunt alleging the negligent failure to recommend follow-up testing after the 1989 removal of a precancerous tumor from the plaintiff's colon because the plaintiff produced no summary judgment evidence that he ever saw Dr. Hunt between the 1989 surgery and the 1997 suit. 18 S.W.3d at 239. The court of appeals also noted, “Even if it were unreasonable to require [the plaintiff] to know in May 1989 that Hunt should have told him to have follow-up examinations, [the plaintiff's] continuing symptoms certainly provided the impetus to seek further examinations well before 1996.” *Id.* Thus, following the removal of a precancerous colon tumor, the plaintiff in [Batten](#) suffered for several years from unexplained, continuing symptoms related to [colon cancer](#). *Id.* Likewise, in [Ericson](#), the plaintiff's open courts challenge did not save his claim that Dr. Roberts negligently performed a June 14, 1990 [circumcision](#). 910

S.W.2d at 613. From the date of the surgery, Mr. Ericson experienced pain, discomfort, and redness. *Id.* Thus, Mr. Ericson possessed a reasonable opportunity to discover the alleged wrong within limitations. *Id.*

Here, unlike in *Batten* and *Ericson*, on the dates Appellees examined Boyd, and thereafter throughout the limitations period as to those visits, Appellees allegedly provided Boyd with a benign explanation for her **rectal bleeding: hemorrhoids**. Viewing the summary judgment evidence in the light most favorable to Boyd, she, unlike Mr. Batten and Mr. Ericson, was not aware during limitations of symptoms she reasonably should have attributed to the wrong she now alleges. The summary judgment evidence at least raises a genuine issue of material fact concerning whether Boyd reasonably should have disbelieved two doctors' **hemorrhoids** diagnosis and attributed her symptoms to some other cause, perhaps **colorectal cancer**, which she would have had to do in order to learn of her **cancer** within limitations.

Appellees also claim that Boyd had a reasonable opportunity to learn of her **cancer** and of their alleged wrongs within the limitations period because in a January 16, 2001 office visit with Dr. Thompson, he gave her a take-home **fecal occult blood test**. Viewing the summary judgment evidence in the light most favorable to Boyd, she took the test home and read the directions.¹² The directions told users not to take the test during a menstrual cycle, if they were suffering from **bleeding hemorrhoids**, or if they had cuts on their hands. The directions stated that **bleeding hemorrhoids** would render the test inaccurate. Boyd claims that after reading the directions, because she was told she had **bleeding hemorrhoids**, she called Dr. Thompson's office and was told not to take the test because it would be inaccurate and that Dr. Thompson would call her if she was to do anything different. Appellees claim that if Boyd had completed this test, she would have learned of her **cancer**. We are required to take Boyd's affidavit testimony as true. *See, e.g., Am. Tobacco Co.*, 951 S.W.2d at 425. Taking as true Boyd's statements that Dr. Thompson's office told her not to take the test, Appellees' argument fails. Boyd cannot be faulted for following a doctor's instructions—that is, we cannot say that Boyd had a reasonable opportunity to learn of Appellees' alleged wrongs or to learn of her **cancer** if only she *686 would have disregarded instructions given to her by her doctor's office.

Appellees also claim that Boyd should have known of her **cancer** because she is a nurse and because her family has a history of **colon cancer**. The summary judgment record before us reflects that Boyd is a psychiatric nurse and that she was concerned about her **rectal bleeding**, so she discussed it with her doctors. One of Boyd's expert's affidavit provides as follows:

Furthermore, both Dr. Kallam and Dr. Thompson deny knowing that Ms. Boyd had **colon cancer** or other serious disease prior to April 2002. If two doctors did not know about a serious disease in a patient after seeing a patient multiple times, it is absurd to hold a patient to a higher level of knowledge in this regard. Accordingly, Ms. Boyd had no reason to seek a third opinion or institute additional investigation into the cause of her complaints on her own until she did in 2002.

Appellees have cited no authority for the proposition that we should hold a patient who is a nurse or a patient with a family history of a certain type of injury to the level of knowledge of the doctor caring for the patient. Nor have we located any such authority. Moreover, it seems illogical to hold that Boyd, a psychiatric nurse, had a reasonable opportunity to learn of her **colon cancer** when Appellees, who possessed superior medical training concerning **cancer** and who also possessed the same information as Boyd concerning her family history, did not learn of her **cancer**. Consequently, we decline to hold that as a matter of law Boyd's psychiatric nursing experience and family history of **colon cancer** somehow provided her with a reasonable opportunity to learn of her **cancer** or of Appellees' alleged wrongs.

Appellees further argue that Boyd possessed a reasonable opportunity to learn of her **cancer** because she could have demanded a colonoscopy—which she ultimately did, and which led to her **colorectal cancer** diagnosis—sooner. We decline to hold that a patient's ongoing ability to request or demand any diagnostic test translates to a reasonable opportunity to learn of an undiagnosed medical condition. To hold otherwise would put a patient in charge of her own medical care, demanding for herself whatever diagnostic testing she desired.

Finally, applying the *Sax* balancing test to the present facts, because Boyd's claims against Appellees for negligence occurring after August 30, 2000, remain pending in the trial court, application of [article 4590i, section 10.01's](#) limitations provision to Boyd's pre-August 30, 2000 negligent failure to diagnose claims, misdiagnosis claims, and negligent failure to order diagnostic testing claims is arbitrary when balanced against the purpose of the statute. Application of the statute of limitations to these claims does not dispose of Boyd's entire lawsuit, does not prevent Appellees from possible exposure to liability on Boyd's timely filed claims, and therefore does not appear to promote the statute's purpose of lowering medical malpractice insurance premiums. Compare *Shah*, 67 S.W.3d at 846 (application of limitations provision barred all plaintiff's claims); *Earle*, 998 S.W.2d at 889 (same); *Batten*, 18 S.W.3d at 239 (same); *Ericson*, 910 S.W.2d at 613 (same).

Having concluded that, viewing the summary judgment evidence in the light most favorable to Boyd, a fact issue exists concerning whether she had a reasonable opportunity to discover her injury and Appellees' alleged wrongs—the failure to diagnose her [cancer](#), the misdiagnosis that her symptoms were attributable to [hemorrhoids](#) *687, and the failure to order diagnostic testing based on her symptoms—during the limitations periods for the November 16, 1998, October 25, 1999, January 12, 2000, and March 3, 2000 office visits, we hold that the Texas Constitution's open courts guarantee precludes application of [article 4590i, section 10.01's](#) limitations provision to cut off these claims as a matter of law.¹³ We sustain Boyd's first issue as to her negligent failure to diagnose claims, misdiagnosis claims, and negligent failure to order diagnostic testing claims. We overrule Boyd's first issue as to her negligent failure-to-screen-based-on-age claims.

3. Boyd Filed Suit Within a Reasonable Time

[26] [27] [28] In her second issue, Boyd claims that she filed suit against Appellees within a reasonable time after learning of her alleged injury. A plaintiff who raises a genuine issue of material fact as to the applicability of the open courts provision to avoid limitations may nonetheless fail to obtain relief under the open courts provision if he does not use due diligence and sue within a reasonable time after learning about

the alleged wrong. See *Shah*, 67 S.W.3d at 847 (holding unexplained seventeen-month delay between learning of injury and filing suit unreasonable); *Pech v. Estate of Tavaréz*, 112 S.W.3d 282, 287 (Tex.App.-Corpus Christi 2003, no pet.) (holding fourteen-month delay unreasonable when attributable to family matters rather than investigation of and filing of claim); *Thompson*, 69 S.W.3d at 749 (holding seventeen-month delay unreasonable); *Fiore v. HCA Health Servs. of Tex., Inc.*, 915 S.W.2d 233, 237 (Tex.App.-Fort Worth 1996, writ denied) (holding thirteen-month delay unreasonable); *LaGessee v. PrimaCare, Inc.*, 899 S.W.2d 43, 47 (Tex.App.-Eastland 1995, writ denied) (holding twelve-month delay excessive where only reasons given for delay was attorney's busyness). A reasonable delay is allowed for investigation, preparation and filing the claim after the injury is discovered. *Gagnier*, 17 S.W.3d at 745; *DeRuy v. Garza*, 995 S.W.2d 748, 752 (Tex.App.-San Antonio 1999, no pet.).

Here, Boyd filed suit approximately four months after she learned of her injury—colorectal [cancer](#). We have not located, and Appellees have not cited, any authority for the proposition that Boyd's four-month delay in filing suit is unreasonable. We sustain Boyd's second issue.

VI. CONCLUSION

Having sustained Boyd's second issue and her first issue in part, we reverse the trial court's partial summary judgment for Appellees on Boyd's negligent failure to diagnose claims, misdiagnosis claims, and negligent failure to order diagnostic testing claims based on the November 16, 1998, October 25, 1999, January 12, 2000, and March 3, 2000 office visits. We remand those claims to the trial court.

We affirm the trial court's partial summary judgment concerning Boyd's negligent-failure-to-screen-based-on-age claims and concerning the December 4, 1996 office visit because the negligent failure to screen based on age is the only negligence alleged to have occurred at that office visit. We also affirm the trial court's partial *688 summary judgment for Family Healthcare Associates on Boyd's direct negligence theories of recovery.

All Citations

152 S.W.3d 670

Footnotes

- 1 The trial court also previously granted a partial summary judgment for Obstetrical and Gynecological Associates of Arlington on the ground that Drs. Kallam and Finke and Nurse Jefferies were no longer employed by this entity at the time of their alleged negligence and issued an order severing this claim. That partial summary judgment is not challenged here. Accordingly, Obstetrical and Gynecological Associates of Arlington is, and shall hereinafter be, omitted from the style of this appeal.
- 2 Appellees moved for summary judgment based on [article 4590i, section 10.01](#), which was subsequently repealed. See Act of May 5, 1995, 74th Leg., R.S., ch. 140, [§ 10.01](#), *repealed by* Act of June 2, 2003, 78th Leg., R.S., ch. 204, [§ 10.09](#), 2003 Tex. Gen. Laws 847, 884 (current version at TEX. CIV. PRAC. & REM.CODE ANN. [§ 74](#) (Vernon 2004)). The old law continues in effect for application to cases like this one, filed before the new Act's September 1, 2003 effective date. We hereinafter cite the old law as [article 4590i](#).
- 3 Appellees did not move for summary judgment on Boyd's claims alleging negligence occurring after August 30, 2000.
- 4 We disagree with the cases holding that a plaintiff bears the burden of pleading, but not of proof, concerning an open courts violation. See, e.g., [Simmons v. Healthcare Ctrs. of Tex., Inc.](#), 55 S.W.3d 674, 678 (Tex.App.-Texarkana 2001, no pet.) (holding plaintiff must only allege facts setting up open courts defense); [Voegtlin v. Perryman](#), 977 S.W.2d 806, 811 (Tex.App.-Fort Worth 1998, no pet.) (same: holding plaintiff has only burden of pleading violation of open courts provision); [Krueger v. Gol](#), 787 S.W.2d 138, 140 (Tex.App.-Houston [14th Dist.] 1990, writ denied) (op. on reh'g) (holding defendant doctor bore burden of proof to establish no genuine issue of fact existed concerning when the plaintiff should have learned of the alleged malpractice).
- 5 Because Appellees premise most of the arguments in their briefs on the [O'Reilly](#) opinion, we address it in detail.
- 6 The Texas Constitution's due course of law open courts provision provides rights in addition to those provided by the Fourteenth Amendment of the United States Constitution. [Lucas](#), 757 S.W.2d at 690; [Sax](#), 648 S.W.2d at 661. The Fourteenth Amendment provides the floor for Texas citizen's due process rights while the Texas Constitution provides the ceiling. [LeCroy](#), 713 S.W.2d at 338. Thus, federal due process analysis is relevant as articulating a due process floor, even though the Texas Constitution's open courts provision provides more due process protection.
- 7 Boyd claims Appellees were negligent on the following dates: Dr. Kallam—December 4, 1996 and November 16, 1998; Dr. Thompson—October 25, 1999 and January 12, 2000; Dr. Finke and Nurse Jefferies—March 3, 2000.
- 8 Boyd's pleadings allege that Dr. Finke was negligent in her approval of and supervision of Nurse Jefferies' negligent misdiagnoses or misinterpretation of Boyd's rectal bleeding and symptoms as hemorrhoids, including conveying to Boyd that she suffered only from this nonthreatening condition. Boyd's pleadings also allege that Dr. Finke was negligent in failing to order diagnostic testing.
- 9 The tolling provision of [article 4590i, section 4.01](#) is not at issue here.
- 10 Boyd's contentions that Appellees should have ordered colorectal cancer screening for reasons other than that she was over fifty years old, i.e., based on her symptoms, fall within her negligent failure to diagnose claims and negligent failure to order diagnostic testing claims. These claims are discussed in section V.C.2 *infra*.
- 11 The parties do not draw a distinction, if one exists, between a "reasonable opportunity to discover *the alleged wrong*" and a "reasonable opportunity to discover *the alleged injury*," and none is necessary in this case because Boyd's summary judgment evidence raises genuine issues of material fact concerning both. See, e.g., [Shah](#), 67 S.W.3d at 842 (alleged wrong); [Earle](#), 998 S.W.2d at 889 (alleged wrong); [Krusen](#), 678 S.W.2d at 921 (alleged injury).
- 12 Because Appellees moved for summary judgment strictly on limitations grounds, we consider the summary judgment evidence as it pertains to only that issue.
- 13 Although Boyd has raised a fact issue in this summary judgment proceeding on the reasonable -opportunity-to-discover-the-wrong-before-limitations-expired open courts requirement, she still bears the burden of proof on this issue at trial. See [Edgewood Indep. Sch. Dist. v. Meno](#), 917 S.W.2d 717, 725 (Tex.1995) (recognizing that any party alleging unconstitutionality of statute has evidentiary burden of proving all facts necessary to show unconstitutionality).

278 S.W.3d 39
Court of Appeals of Texas,
Houston (1st Dist.).

Raymon POLAND, Individually and as Independent
Administrator of the Estate of Jessie Poland,
Robert Martin, and Frank Martin, Appellants,

v.

David OTT, Appellee.

No. 01-07-00199-CV.

|
Dec. 19, 2008.

|
Substituted Opinion Dissenting from the
Denial of En Banc Consideration
Jan. 22, 2009.

Synopsis

Background: Husband, individually and as independent administrator of estate of patient, who bled internally during elective surgical procedure to repair her heart's mitral valve, and relatives brought medical malpractice action against doctors and hospital. The 152nd District Court, Harris County, [Kenneth P. Wise, J.](#), dismissed action against doctor, and husband and relatives appealed.

[Holding:] The Court of Appeals, [Tim Taft, J.](#), held that provision of an expert report before a health-care-liability claim is filed in court against physician or health-care provider does not meet service requirements under health care liability statute.

Affirmed; request for en banc consideration denied.

[Taft, J.](#), concurred in the denial of en banc consideration and filed opinion.

[Jennings, J.](#), joined by [Bland, J.](#), dissented from the denial of en banc consideration and filed opinion.

West Headnotes (11)

[1] Appeal and Error

🔑 Rulings on Motions Relating to Pleadings

Appellate court generally reviews a trial court's ruling on a motion to dismiss a health care liability claim based on failure to timely file an expert report for an abuse of discretion. [V.T.C.A., Civil Practice & Remedies Code § 74.351\(b\)](#) (2004).

3 Cases that cite this headnote

[2] Appeal and Error

🔑 Cases Triable in Appellate Court

A de novo standard of review generally applies to questions of law.

1 Cases that cite this headnote

[3] Appeal and Error

🔑 Cases Triable in Appellate Court

Appeal and Error

🔑 Nature and Extent of Discretionary Power

Appeal and Error

🔑 Abuse of discretion

A trial court has no discretion in determining what the law is, which law governs, or how to apply the law, and accordingly, the standard of review is the same regardless of whether it is described as abuse of discretion or de novo.

6 Cases that cite this headnote

[4] Statutes

🔑 Language and intent, will, purpose, or policy

Statutes must be construed as written, and legislative intent determined, if possible, from their express terms.

Cases that cite this headnote

[5] Health

🔑 Constitutional and Statutory Provisions

Health care liability act, in its entirety, rather than provisions in isolation, must be considered, and meaning given to each

provision consistent with all others. [V.T.C.A., Civil Practice & Remedies Code § 74.351](#) (2004).

[Cases that cite this headnote](#)

[6] Statutes

🔑 [Giving effect to entire statute and its parts; harmony and superfluity](#)

Statutes

🔑 [Presumptions, inferences, and burden of proof](#)

Courts presume that the entire statute is to be effective and a just and reasonable result is intended.

[Cases that cite this headnote](#)

[7] Statutes

🔑 [Purpose and intent; unambiguously expressed intent](#)

Statutes

🔑 [Contemporary and Historical Circumstances](#)

Statutes

🔑 [Plain, literal, or clear meaning; ambiguity](#)

Statutes

🔑 [Relation to plain, literal, or clear meaning; ambiguity](#)

Even if a statute is unambiguous, courts may consider the statute's objective, circumstances of its enactment, its legislative history, and consequences of a particular construction.

[Cases that cite this headnote](#)

[8] Statutes

🔑 [Express mention and implied exclusion; *expressio unius est exclusio alterius*](#)

All words used and omitted in statute are presumed used and omitted purposefully.

[Cases that cite this headnote](#)

[9] Health

🔑 [Affidavits of merit or meritorious defense; expert affidavits](#)

Provision of an expert report before a health-care-liability claim is filed in court against physician or health-care provider does not meet service requirements under health care liability statute, which implicitly incorporates rule of procedure governing service of process. [V.T.C.A., Civil Practice & Remedies Code § 74.351\(a\)](#) (2004); [Vernon's Ann. Texas Rules Civ. Proc., Rule 21a](#).

[9 Cases that cite this headnote](#)

[10] Health

🔑 [Affidavits of merit or meritorious defense; expert affidavits](#)

Health care liability statute, which implicitly incorporates rule of procedure governing service of process, does not contemplate "service" of the expert's report on a physician or health-care provider until after a claim has been filed in court against that person or entity. [V.T.C.A., Civil Practice & Remedies Code § 74.351\(a\)](#) (2004); [Vernon's Ann. Texas Rules Civ. Proc., Rule 21a](#).

[8 Cases that cite this headnote](#)

[11] Health

🔑 [Notice](#)

Health care liability statute does not require that every person or entity who is given presuit notice actually be sued. [V.T.C.A., Civil Practice & Remedies Code § 74.351\(a\)](#) (2004).

[1 Cases that cite this headnote](#)

Attorneys and Law Firms

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LLP, Dale Burrus Frisby, Leah Ann Greene, Kroger, Myers, Frisby & Hirsch, Houston, for appellee.

Panel consists of Justices TAFT, KEYES, and ALCALA.

OPINION

TIM TAFT, Justice.

Appellants, Raymon Poland, individually and as independent administrator of the estate of Jessie Poland, Robert Martin, and Frank Martin (“the Poland parties”), timely moved for rehearing to the panel and for en banc reconsideration to the Court. On March 5, 2008, the Court denied the Poland parties' rehearing motion, but their motion for en banc reconsideration remained pending, thus maintaining our plenary power over the appeal. *See* TEX.R.APP. P. 19.1; *see also City of San Antonio v. Hartman*, 201 S.W.3d 667, 670–71 (Tex.2006) (in holding that motion for en banc reconsideration extends time in which to file petition for review, noting that rule 19.1 treats motions for en banc reconsideration as subset of rehearing motions *41 for purpose of determining court of appeals' plenary power). During that plenary power, we now *sua sponte* withdraw our opinion and judgment issued January 31, 2008 and issue this opinion and judgment in their stead. *See Univ. of Tex. Health Sci. Ctr. at Houston v. Gutierrez*, 237 S.W.3d 869, 870 (Tex.App.-Houston [1st Dist.] 2007, *pet. denied*) (citing rule 19.1 as authority for withdrawing opinion and judgment *sua sponte* within Court's plenary power and reissuing new opinion and judgment). Nonetheless, we do not change the disposition of the appeal. The Poland parties' motion for en banc reconsideration is rendered moot by our withdrawing and reissuing our opinion and judgment.¹ *Cf. Brookshire Bros., Inc. v. Smith*, 176 S.W.3d 30, 41 n. 4 (Tex.App.-Houston [1st Dist.] 2004, *pet. denied*) (op. on reh'g) (noting that motion for en banc reconsideration becomes moot when motion for rehearing is granted and new opinion and judgment issue).

The Poland parties appeal from a judgment dismissing their health-care-liability and related claims against appellee, Dr. David Ott. We determine whether the trial court erred in granting Dr. Ott's motion to dismiss the claims against him for the Poland parties' failure timely to serve an expert report on Dr. Ott. We affirm.

Background

The factual recitations come from the Poland parties' petitions. Appellant Raymon Poland was the husband of Jessie Poland; the remaining appellants were his natural children. In August 2003, Jessie Poland, under the care of Dr. James Willerson (an appellee in a related appeal) and Dr. Ott, was hospitalized at St. Luke's Episcopal Hospital and the Texas Heart Institute (both appellees in another related appeal) for an elective surgical procedure to repair her heart's mitral valve. Dr. Alina Grigore, who was employed by Dr. Arthur S. Keats & Associates (both of whom are appellees in another related appeal), was the anesthesiologist for the surgical procedure. The Poland parties alleged that, at the time of surgery, Jessie Poland's blood contained a level of Coumadin that the health-care providers should have known rendered her blood fully anti-coagulated and, thus, rendered surgery dangerous. The surgery was nonetheless performed; Jessie Poland bled internally; and she died several days later of multi-system organ failure.

The Poland parties sued, among other defendants, St. Luke's Episcopal Hospital, the Texas Heart Institute, the University of Texas Health Science Center at Houston, Arthur S. Keats & Associates, and Drs. Ott, Grigore, and Willerson on October 24, 2005 for Jessie Poland's wrongful death, for her pain and suffering and medical costs before her death, and for her burial expenses. By the time of the trial court's complained-of ruling, the Poland parties had amended their petition to allege the following causes of action or theories of recovery against all defendants, including Dr. Ott: (1) negligence, (2) gross negligence, (3) actual and constructive *42 fraud, (4) intentional infliction of emotional distress, (5) assault and battery, (6) intentional and negligent abandonment, (7) breach of fiduciary duties, (8) “negligent breach of fiduciary duties,” (9) malpractice, (10) “lack of proper informed consent,” (11) “tampering with official medical records,” (12) “forgery,” (13) violations of the Texas Deceptive Trade Practices–Consumer Protection Act (“DTPA”),² and (14) conspiracy among all defendants. This “live” petition also added allegations that the defendants had altered Jessie Poland's medical records and forged Raymon Poland's signature on unspecified hospital documents. They sought actual and exemplary damages.

On June 20, 2006, Dr. Ott moved, under [Texas Civil Practice and Remedies Code section 74.351\(b\)](#), to dismiss the Poland parties' health-care-liability claims against him for failure to serve an expert report upon him or his attorney within 120 days of the filing of those claims.³ See [TEX. CIV. PRAC. & REM.CODE ANN. § 74.351\(b\)](#) (Vernon Supp.2008) (providing that trial court must dismiss health-care-liability claim against defendant if claimant fails to serve expert's report and *curriculum vitae* on that defendant within period specified by [section 74.351\(a\)](#)); Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 10.01, 2003 Tex. Gen. Laws 847, 875 (providing that claimant must serve each defendant against whom health-care-liability claim is asserted with expert's report and *curriculum vitae* not later than 120 days of claim's filing) [hereinafter, "former [section 74.351\(a\)](#)"],⁴ amended by Act of May 18, 2005, 79th Leg., R.S., ch. 635, § 1, 2005 Tex. Gen. Laws 1590, 1590 (current version at [TEX. CIV. PRAC. & REM.CODE ANN. § 74.351\(a\)](#) (Vernon Supp.2008)). The motion alleged that the Poland parties had served the report of their expert, Dr. Dennis Moritz, on Dr. Ott's attorney 123 days after their health-care-liability claims had been filed against him.⁵

The Poland parties did not deny that they had served Dr. Moritz's May 2, 2005 report on Dr. Ott's counsel 123 days after their claims had been filed against Dr. Ott, but in their response, they alleged that they had "served" that same report on Gary McLeod, a representative of Dr. Ott's professional liability carrier (APMC Insurance Services), whom they described in their response as Dr. Ott's "designated representative" for receipt of the report, on July 29, 2005—nearly three months before suit was filed.⁶ The Poland parties *43 produced evidence that they alleged supported their response's allegation. For example, they attached a letter, dated July 13, 2005, from McLeod to the Poland parties' attorneys, which in pertinent part read:

Your letter of June 30, 2005 to David Alan Ott, M.D. has been referred to us for response, as we are his professional liability carrier. We will be investigating this case on behalf of Dr. Ott.

...

I also request that you provide me with your medical expert's specific criticisms of our member's care so

that we might share those concerns with David Alan Ott, M.D.

They also attached their attorney's July 29, 2005 response to McLeod's letter:

Additionally, you will find enclosed the information that you requested regarding the opinion of our expert witness.

...

I will also fax you some additional information shortly.

Attached to the Poland parties' attorney's July 29 letter was the unsigned expert report of Dr. Moritz and his *curriculum vitae* ("CV"). Finally, the Poland parties attached the affidavit of their counsel, who averred in pertinent part as follows:

I received notice from APMC Insurance Services on behalf of Dr. Ott. They [sic] requested the "medical expert's specific criticisms of our member's care so that we might share those concerns with David Alan Ott, M.D." I then replied ... by sending Mr. Gary McLeod the Expert Report with Resume. I discussed wanting to look at possible settlement of this claim.... Mr. McLeod stated that he would have to send for the medical records from the hospital, to which I returned to him the medical authorization he had previously sent me, along with a copy of the Expert Report with Resume.... The Defendants have had the Expert report with Resume since May 2005.

(Emphasis added.)

The hearing on Dr. Ott's motion to dismiss and his motion to strike the live petition occurred on July 14, 2006. Other defendants' motions to dismiss, objections to the expert report, and objections to the live petition were heard simultaneously. No additional evidence was presented at the hearing, but the following discussion between the trial court and Dr. Ott's attorney transpired:

Court: Who got the [expert] report beforehand [before suit's filing]?

...

Dr. Ott's attorney: Dr. Ott received it through—he was served with it through his carrier pre suit notification. We, as the attorneys did not—we did not have

communications with the plaintiffs before the lawsuit was filed.

...

Court: ... Heart Institute and St. Luke's gets [sic] pre suit report, [Dr.] Grigore gets no report before or after.... Willerson, gets—is not a part of this lawsuit. [Dr.] Ott gets report pre suit, directly from his insurance carrier. Attorneys never—

Dr. Ott's attorney: The insurance carrier, yes. The insurance carrier gets them.

On October 30, 2006, the trial court rendered an interlocutory order that, among doing other things, dismissed the claims against Dr. Ott with prejudice:

On July 14, 2006 ... CAME TO BE HEARD all parties, by and through counsel, ... Dr. David Ott's Motion to Dismiss and Dr. David Ott's Motion to Strike & Objections to Plaintiff's [sic] *44 Third Amended Petition.... The Court, having considered such Motions and Objections, having reviewed the file herein, and heard the argument of counsel, makes the following FINDINGS OF FACTS and ORDERS:

1. Plaintiffs ... filed their Original Petition on October 24, 2005. The 120-day deadline by which Plaintiffs were required to serve their expert reports pursuant to [Section 74.351 of the TEX. CIV. PRAC. & REM.CODE](#) was February 21, 2006. The earliest date that Plaintiffs served an expert report to any Defendant, after the filing of their lawsuit, was on February 24, 2006.

...

5. With respect to Defendant Dr. David Ott, Plaintiffs mailed Defendant Dr. David Ott's insurance agent with an unsigned expert report from Dennis Moritz, M.D. on July 29, 2005. Plaintiffs provided no evidence that Dr. Ott or his counsel received said unsigned expert report. The suit was filed by Plaintiffs against Dr. Ott on October 24, 2005. The deadline to serve the expert report was February 21, 2006. Plaintiffs served upon Dr. Ott's counsel the unsigned expert report on February 24, 2006, three days after the 120 day deadline, pursuant to [Section 74.351 of the TEX. CIV. PRAC. & REM.CODE](#). It is therefore ORDERED that Defendant Dr. David

Ott's Motion to Dismiss and Motion to Strike and Objections to Plaintiff's [sic] Third Amended Petition [be] GRANTED, and all claims against Dr. David Ott [be] DISMISSED with prejudice.

...

7. It is further ORDERED that pursuant to [Section 74.351 of the TEX. CIV. PRAC. & REM.CODE](#) that ... Dr. David Ott [be] awarded attorney's fees in the amount of \$14,893.00. The collection of these attorney's fees is stayed pending outcome of any interlocutory appeal.

This same order also (1) denied St. Luke's Episcopal Hospital and the Texas Heart Institute's joint motion to dismiss under [Texas Civil Practice and Remedies Code section 74.351](#) and (2) granted Dr. Grigore and Arthur S. Keats & Associates' motion to dismiss under [section 74.351\(b\)](#). Finally, the trial court signed a separate interlocutory order that granted Dr. Willerson's motion to dismiss based upon [Texas Civil Practice and Remedies Code section 101.106](#). See [TEX. CIV. PRAC. & REM.CODE ANN. § 101.106](#) (Vernon 2005).

The Poland parties appealed the adverse rulings dismissing all of their claims against Drs. Ott, Willerson, and Grigore and Arthur S. Keats & Associates, and St. Luke's Episcopal Hospital and the Texas Heart Institute appealed the denial of their motion to dismiss—all under the same appellate cause number. Although the interlocutory order appealed by St. Luke's Episcopal Hospital and the Texas Heart Institute was permitted by statute, this was not true of every appealed order. See [TEX. CIV. PRAC. & REM.CODE ANN. § 51.014\(a\)](#) (Vernon 1997 & Supp.2008). On December 18, 2006, upon the parties' motion, this Court abated the appeal and remanded the cause for the trial court—upon various parties' motions, filed in the trial court after appeal, to sever the interlocutory orders rendered in favor of Dr. Ott, of Dr. Willerson, and of Dr. Grigore and Dr. Arthur S. Keats & Associates—to render final and appealable those interlocutory rulings that had not been appealable on an interlocutory basis. Upon remand, the trial court severed the rulings against the specified defendants from the underlying cause, rendering a final judgment in the newly severed cause numbers involving *45 Dr. Ott, Dr. Willerson, and Dr. Grigore and Dr. Arthur S. Keats & Associates. On March 15, 2007, this Court reinstated the appeal, assigning different appellate cause numbers to the

appeal of what had by then become four separate rulings in four separate trial-court cause numbers. This opinion and judgment concern the Poland parties' appeal of the dismissal order rendered in favor of Dr. Ott.

The Parties' Arguments

In one issue, the Poland parties argue that the trial court erred in granting Dr. Ott's dismissal motion and dismissing their claims against him with prejudice because they "served" their expert's report and CV on McLeod, Dr. Ott's "designated representative and duly authorized agent" for service of the report, about five months before they filed suit against Dr. Ott, rendering the report timely filed under former [section 74.351\(a\)](#). They argue that service in this fashion was "equivalent to serving" Dr. Ott himself and thus satisfied "the spirit of [former] [section 74.351\(a\)](#)." This argument is grounded in the implicit understanding that former [section 74.351\(a\)](#) can be satisfied by provision of an expert's report to a physician or health-care provider before a claim has been asserted against that person or entity in a lawsuit (here, presuit, because Dr. Ott was made a defendant by the original petition), so that the same report need not be served again within 120 days of the claim's filing against that defendant. Dr. Ott disputes (1) that McLeod was Dr. Ott's agent for purposes of service of the expert report, as a matter of fact; (2) that former [section 74.351\(a\)](#) allows for service on any person other than the defendant or his attorney, as a matter of law; and (3) that provision of an expert report before a claim is filed in court against the physician or health-care provider complies with former [section 74.351\(a\)](#).

The Standard of Review

[1] [2] [3] "We generally review rulings on a motion to dismiss under [section 74.351\(b\)](#) for abuse of discretion." *Gutierrez*, 237 S.W.3d at 871. Some of the issues that we consider in this appeal involve questions of law, to which a *de novo* standard of review generally applies. *Id.* "Nonetheless, a trial court has no discretion in determining what the law is, which law governs, or how to apply the law." *Id.* at 871 n. 1. Accordingly, to the extent that we consider questions of law, the standard of review is the same "regardless of whether it is described as abuse of discretion or *de novo*." *Id.*; accord *Intracare Hosp. N.*

v. Campbell, 222 S.W.3d 790, 795 (Tex.App.-Houston [1st Dist.] 2007, no pet.).

The Applicable Law

Former [section 74.351\(a\)](#) provides as follows concerning service of the expert report and CV:

§ 74.351. Expert Report

(a) In a health care liability claim, a claimant shall, not later than the 120th day after the date the claim was filed, serve on each party or the party's attorney one or more expert reports, with a curriculum vitae of each expert listed in the report for each physician or health care provider against whom a liability claim is asserted. The date for serving the report may be extended by written agreement of the affected parties. Each defendant physician or health care provider whose conduct is implicated in a report must file and serve any objection to the sufficiency of the report not later than the 21st day after the date it was served, failing which all objections are waived.

See Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 10.01, 2003 Tex. Gen. Laws 847, *46 875, amended by Act of May 18, 2005, 79th Leg., ch. 635, § 1, 2005 Tex. Gen. Laws 1590, 1590 (current version at [TEX. CIV. PRAC. & REM.CODE ANN. § 74.351\(a\)](#) (Vernon Supp.2008)). The section continues:

(b) If, as to a defendant physician or health care provider, an expert report has not been served within the period specified by Subsection (a), the court, on the motion of the affected physician or health care provider, shall, subject to Subsection (c), enter an order that:

- (1) awards to the affected physician or health care provider reasonable attorney's fees and costs of court incurred by the physician or health care provider; and
- (2) dismisses the claim with respect to the physician or health care provider, with prejudice to the refile of the claim.

[TEX. CIV. PRAC. & REM.CODE ANN. § 74.351\(b\)](#).

[4] [5] [6] [7] [8] "Statutes must be construed as written, and legislative intent determined, if possible, from their express terms." *Gutierrez*, 237 S.W.3d at 873.

“Chapter 74, in its entirety, rather than provisions in isolation, must be considered, and meaning given to each provision consistent with all others.” *Id.* “Courts presume that the entire statute is to be effective and a just and reasonable result is intended.” *Id.* “Even if a statute is unambiguous, courts may consider the statute’s objective; circumstances of its enactment; its legislative history; ... [and] consequences of a particular construction....” *Id.* “All words used and omitted are presumed used and omitted purposefully.” *Id.*

Provision of the Expert Report Before a Claim’s Filing

[9] We need not determine whether former [section 74.351\(a\)](#) allows designated representatives of a defendant or his attorney to receive service of an expert’s report: even if the answer to this question is “yes,” we must nonetheless affirm because provision of an expert report before a health-care-liability claim is filed in court against the physician or health-care provider does not meet former [section 74.351\(a\)](#)’s service requirements.

A. What the Term “Serve” in Former [Section 74.351\(a\)](#) Means

Although former [section 74.351\(a\)](#) does not define the term “serve,” this Court has recently held that “the Legislature intended for [health-care-liability] claimants to comply with [rule 21a](#) [of the [Texas Rules of Civil Procedure](#)] to fulfill the requirements of [section 74.351\(a\)](#).” *Gutierrez*, 237 S.W.3d at 872. In *Gutierrez*, we relied on *Herrera v. Seton Northwest Hospital*⁷ for the latter’s conclusion that the term “serve” as used in former [section 74.351\(a\)](#) has the same meaning as it does in [rule 21a](#). See *Gutierrez*, 237 S.W.3d at 872. As the *Herrera* court explained:

The distinction between filing and serving an expert report and *curriculum vitae* is amplified for claims governed by chapter 74 because [former [Texas Revised Civil Statute](#)] [article 4590i](#) claimants were merely required to “furnish” expert reports, but chapter 74 claimants must “serve” them.

“Serve” is not defined in [section 74.351\(a\)](#). The code construction act provides guidance, however. It states that “words and phrases that have acquired a technical or particular meaning, whether by

legislative definition or otherwise, shall be construed accordingly.” “Serve” and “served” have distinct and familiar legal meanings under our *47 rules of civil procedure. See [TEX.R. CIV. P. 21a](#). The rules of civil procedure govern all actions of a civil nature in Texas courts unless a specific exception applies. We agree with our sister court’s conclusion that, given the applicability of the rules of civil procedure to health care liability claims and the use of “serve” and “served” in the statute, the legislature intended for claimants to comply with [Texas Rule of Civil Procedure 21a](#) to fulfill the requirements of [section 74.351\(a\)](#).

This construction comports with the legislature’s change of the word “furnish” in [former [article 4590i](#),] [section 13.01\(d\)](#) to “serve” in [section 74.351\(a\)](#). We presume that the legislature enacted the statutory change with knowledge of existing law. Therefore, we may also presume its awareness of the meaning attached to the word “serve” in [rule 21a](#).

Herrera, 212 S.W.3d 452, 458–59 (Tex.App.-Austin 2006, no pet.) (footnotes and most citations omitted, emphasis added by underlining). Four courts of appeals—including this Court twice since *Gutierrez*—have concluded that the term “serve” in former and current [section 74.351\(a\)](#) refers to [rule 21a](#).⁸ Indeed, this is the meaning that the Poland parties argue that we adopt: in citing [rule 21a](#), they argue, “This court should conclude that the legislature intended the term ‘serve’ [in former [section 74.351\(a\)](#)] to have the same meaning that it carries in the rules of civil procedure.”

B. Why Presuit Provision of an Expert Report Does Not Satisfy the Requirement in Former [Section 74.351\(a\)](#) to “Serve” the Report

[10] The plain language of former [section 74.351\(a\)](#) and [rule 21a](#), which it implicitly incorporates by use of the term “serve,” simply does not contemplate “service” *48 of the expert’s report and CV on a physician or health-care provider until after a claim has been filed in court against that person or entity. We reach this conclusion despite the fact that, as the Poland parties note, the section requires service “not later than” 120 days after a claim is filed, rather than requiring service within 120 days after the claim is filed. (Emphasis added.) Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 10.01, 2003 Tex. Gen. Laws 847, 875, amended by Act of May 18, 2005, 79th Leg., ch. 635, § 1, 2005 Tex. Gen. Laws 1590, 1590.

1. First Reason: The Language of Chapter 74

First, former [section 74.351\(a\)](#) speaks in terms of service on a *party* or the *party's* attorney, and it uses the term “defendant” for the physicians and health-care providers whom the expert report implicates. *See id.* One is not a “party” or a “defendant” until a claim is asserted against one in a suit. That the Legislature knew what it was saying when it employed the terms “party” and “defendant” in former [section 74.351\(a\)](#) can be seen from other provisions of chapter 74. For example, section 74.051, concerning notice of a health-care-liability claims, provides:

§ 74.051. Notice

(a) Any person or his authorized agent asserting a health care liability claim shall give written notice of such claim by certified mail, return receipt requested, *to each physician or health care provider against whom such claim is being made at least 60 days before the filing of a suit in any court of this state based upon a health care liability claim. ...*

(b) In such pleadings as are *subsequently filed in any court*, each *party* shall state that it has fully complied with the provisions of this section ... and shall provide such evidence thereof as the judge of the court may require to determine if the provisions of this chapter have been met.

(c) Notice given as provided in this chapter shall toll the applicable statute of limitations to and including a period of 75 days following the giving of the notice, and this tolling shall apply to all *parties* and *potential parties*.

TEX. CIV. PRAC. & REM.CODE ANN. § 74.051(a)-(c) (Vernon 2005) (emphasis added). [Section 74.051\(a\)](#)'s notice requirements necessarily apply before a health-care-liability claim is asserted in a suit (“Any person ... asserting a ... claim ... shall give written notice ... at least 60 days *before the filing of a suit in any court....*”). Thus, when the Legislature drafted [section 74.051\(a\)](#), it (1) used neither “party” nor “defendant,” but instead spoke only of persons, claimants, physicians, and health-care providers; (2) spoke of claims that “are being *made*,” rather than of claims that are “*filed*”; and (3) provided that written notice be “give[n],” rather than that it be “served.” *See id.* (emphasis added). In contrast, [section 74.051\(b\)](#), which necessarily establishes requirements applying only after court claims have been filed (“In such pleadings as are *subsequently filed in any court*, each party shall”),

the Legislature employed the term “party.” *See id.* § [74.051\(b\)](#). And throughout chapter 74, the Legislature employs the terms “party,” “plaintiff,” and “defendant” only in those sections that clearly concern actions, events, or requirements that necessarily follow the filing of a health-care-liability claim in court.⁹

*49 In sum, when the Legislature intended that chapter 74's requirements would or could occur before the filing of a claim in court, it did not employ terms like “party” or “defendant”; in contrast, only those sections of chapter 74 that necessarily concern actions, events, or requirements occurring after the filing of a court claim employ these terms. Therefore, the use of the terms “party” and “defendant” in former [section 74.351\(a\)](#) indicates that the Legislature intended for this section's service requirements to apply only after the assertion of a claim in court. *See Gutierrez, 237 S.W.3d at 873* (“Chapter 74, in its entirety, rather than provisions in isolation, must be considered, and meaning given to each provision consistent with all others.”).

2. Second Reason: the Procedure for the Defendant's Objection

Second, by its plain language, former [section 74.351\(a\)](#) ties the deadline for the physician or health-care provider's filing and serving an objection to the expert report to the date of service of the report. *See* Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 10.01, 2003 Tex. Gen. Laws 847, 875 (emphasis added), *amended by* Act of May 18, 2005, 79th Leg., R.S., ch. 635, § 1, 2005 Tex. Gen. Laws 1590, 1590 (current version at [TEX. CIV. PRAC. & REM.CODE ANN. § 74.351\(a\)](#)). “Each defendant physician or health care provider whose conduct is implicated in a report must *file* and *serve* any objection to the sufficiency of the report not later than the 21st day after the date it was served, failing which all objections are waived.” *Id.* (emphasis added). There is no proceeding in which to “file” the objection until a claim is asserted in court and the physician or health-care provider has become an actual defendant (which also explains why the section uses the term “defendant” to describe the physician or health-care provider). A good illustration is a case like this one, in which the health-care-liability claimants purport to have provided the physician with the expert report more than 21 days before the filing of a court claim against him. The result of the Poland parties' interpretation in this case is that Dr. Ott could never have timely filed an

objection to the expert report with the court because the 21-day deadline to do so would have expired before a proceeding existed in which that objection could have been filed. In sum, the 21-day deadline for a defendant's objections makes no sense unless a court claim has already been filed against the defendant. We cannot presume that the Legislature intended the nonsensical result that could occur under the Poland parties' interpretation. See *Gutierrez*, 237 S.W.3d at 873 (“Courts presume that the entire *50 statute is to be effective and a ... reasonable result is intended.”).

3. Third Reason: the Language of Rule 21a and Related Rule 21

Third, the plain language of rule 21a, which former section 74.351(a) implicitly incorporates through the use of the term “serve,” generally concerns postsuit notice. Rule 21a provides (1) that “[e]very notice required by these rules, and every pleading, plea, motion, or other form or request to be served under Rule 21, other than the citation ... may be served” in one of four ways upon “the party” or “the party's duly authorized agent or attorney of record”; (2) that one of those four methods is any manner “as the court ... may direct”; (3) that “[n]otice may be served by a party to the suit” or “an attorney of record,” among others; and (4) that “[t]he party or attorney of record shall certify to the court compliance with this rule in writing over signature and on the filed instrument.” TEX.R. CIV. P. 21a. Texas Rule of Civil Procedure 21, to which rule 21a's service provisions refer, is entitled “Filing and Serving Pleadings and Motions” and concerns “[e]very pleading, plea, motion or application to the court”; the rule also employs language clearly indicating its application to pending suits. TEX.R. CIV. P. 21. The fact that former section 74.351(a) implicitly incorporates by reference rule 21a—which concerns service of pleadings, pleas, motions, and requests in the context of lawsuits—further indicates the Legislature's intent that former section 74.351(a)'s service requirements apply after the filing of a health-care-liability claim in court.

4. Fourth Reason: the Possibility that a Potential Party May Not Become an Actual Party

[11] Fourth, a physician or health-care provider may not know the details of the allegations against him—or even be assured that he or it will be sued—until the filing of a petition asserting a health-care-liability claim. Chapter 74 requires that the claimant give presuit notice of his health-

care-liability claim before the filing of a court claim, but the purpose of the notice provision is simply “to encourage pre-suit negotiations so as to avoid excessive cost of litigation.” *Schepps v. Presbyterian Hosp. of Dallas*, 652 S.W.2d 934, 938 (Tex.1983); accord *Phillips v. Sharpstown Gen. Hosp.*, 664 S.W.2d 162, 168 (Tex.App.-Houston [1st Dist.] 1983, no writ) (indicating that purpose of predecessor to section 74.051(a) is “to facilitate discussion of the merits of a potential health care claim and thereby initiate amicable settlement negotiations”). If a court claim is later filed, the petition's allegations could, theoretically, differ somewhat from whatever the presuit notice stated. Furthermore, chapter 74 does not require that every person or entity who is given presuit notice actually be sued. See *Thompson v. Community Health Inv. Corp.*, 923 S.W.2d 569, 572 (Tex.1996) (providing that predecessor to section 74.051(a) does not require “that all those receiving presuit notice be joined in any subsequent suit”). If, as the Poland parties contend, former section 74.351(a)'s service requirement can be fulfilled by providing the expert report to a physician or health-care provider before a health-care-liability claim is filed against him or it in court, then the physician or health-care provider will be put in the position of having to object to the report—and likely of having to hire counsel to do so—before having a petition's allegations against which to compare the expert's report or even knowing if they will be sued at all. The Legislature surely did not intend this result.

5. Fifth Reason: Former Section 74.351(a)'s Purposes

Fifth and finally, “the purposes behind former section 74.351(a)'s adoption were, *51 among other things, to remove unwarranted delay and expense, to accelerate the disposition of non-meritorious cases, and to give hard-and-fast deadlines for the serving of expert reports.” *Intracare Hosp. N.*, 222 S.W.3d at 797 (emphasis added). Section 74.351(a)'s expert-report deadline is hard-and-fast only if it is triggered by the filing of a health-care-liability claim against the particular physician or health-care provider in court. Allowing the provision of an expert report that occurs before a court claim is filed to suffice for section 74.351(a) service potentially allows for ambiguity and confusion, rather than promoting certainty.

For example, there is no guarantee that whatever report may be provided during presuit negotiations will be the report on which the claimant relies to satisfy section 74.351(a). If the Poland parties' interpretation of former

section 74.351(a) were correct, then a physician or health-care provider who receives an expert report from the claimant before a claim is filed against him or it will have to guess whether the document is intended to satisfy chapter 74 or instead intended simply to be a negotiation tool.¹⁰ And this raises a related question (although not in this case): what if a document from a medical expert that is provided during the presuit negotiation period is patently insufficient, not containing all of the basic criteria that would make it a valid section 74.351(a) report? If the Poland parties' interpretation is correct, then must a physician or health-care provider assume that the document is an attempted (albeit deficient) section 74.351(a) report and object to its deficiencies, for fear of waiving any objections, or should the potential defendant instead assume that the document is not intended to be a report, with a true report to follow if that potential defendant is eventually sued?

The potential ambiguity that could arise from these predicaments is obvious and does not comport with the purposes of former section 74.351(a). Because the Poland parties' interpretation would contravene the Legislature's intent in adopting former section 74.351(a), we do not deem the Legislature to have intended it. See *Gutierrez*, 237 S.W.3d at 873 (“Even if a statute is unambiguous, courts may consider the statute's objective; circumstances of its enactment; its legislative history; ... [and] consequences of a particular construction....”).

C. How the Poland Parties Respond

The Poland parties nonetheless contend that (1) McLeod was Dr. Ott's “designated representative and duly authorized agent” to receive the report; (2) McLeod “requested that the report be served upon the insurance carrier”¹¹; (3) thus, “the serving of the report on [McLeod] is equivalent to serving the report upon Dr. Ott or his counsel”; and (4) they therefore “served Dr. Ott [with the report] *in the manner that he requested*.” (Emphasis added.)

To the extent that the Poland parties mean that Dr. Ott (through his alleged agent) agreed that presuit provision of the expert report would substitute for section 74.351(a) service (or like estoppel argument), *52 we first note that the statement by Dr. Ott's counsel upon which the Poland parties rely does not say what Dr. Ott or McLeod agreed or did not agree to. Additionally, McLeod's July

13 letter to the Poland parties' counsel requested only that the Poland parties' counsel “provide [him] with [the] medical expert's specific criticisms of our member's care,” without indicating how or when those criticisms should be sent—or even that those criticisms be sent in the form of a section 74.351(a) report and CV. (Emphasis added.) McLeod's July 13 letter is thus no evidence that McLeod (even if he could act as Dr. Ott's representative for service of an expert report) agreed that presuit provision of the expert report would substitute for post-suit service of it—assuming without deciding that a potential party can validly agree to this.

Conclusion

We hold that the trial court did not err in granting Dr. Ott's motion to dismiss under section 74.351(b) and in dismissing with prejudice all claims against him.¹²

We affirm the judgment of the trial court.¹³

Appellants moved for rehearing to the panel and for en banc reconsideration to the Court. See TEX.R.APP. P. 49.1, 49.7.

The panel denied the motion for rehearing addressed to it, leaving pending the motion for en banc reconsideration, which maintained the Court's plenary power over the case. See TEX.R.APP. P. 19.1, 49.3.

During the pendency of the motion for en banc reconsideration, the Court *sua sponte* withdrew its opinion and judgment issued January 31, 2008, thus rendering moot the motion for en banc reconsideration. Cf. *Brookshire Bros., Inc. v. Smith*, 176 S.W.3d 30, 41 n. 4 (Tex.App.-Houston [1 Dist.] 2004, pet. denied) (op. on reh'g).

After the Court's withdrawal of its January 31, 2008 opinion and judgment, during the pendency of the Court's plenary power over the case, and before another opinion and judgment had issued in the case, en banc consideration was requested from within the Court. See TEX.R.APP. P. 41.2(c).

Chief Justice RADACK and Justices TAFT, NUCHIA, JENNINGS, KEYES, ALCALA, HANKS, HIGLEY,

and [BLAND](#), participated in the vote to determine en banc consideration.

A majority of the Justices of the Court voted to deny en banc consideration. *See id.*

Justice [TAFT](#), concurring in the denial of en banc consideration. *See* TEX.R.APP. P. 47.5.

*53 Justice [JENNINGS](#), joined by Justice [BLAND](#), dissenting from the denial of en banc consideration. *See id.*

OPINION CONCURRING IN THE DENIAL OF EN BANC CONSIDERATION

Most of the arguments raised in the opinion dissenting from the denial of en banc consideration have already been addressed in the Court's opinion of December 19, 2008, and I refer the reader to the Court's discussion of those issues in that opinion. *See Poland v. Ott*, 278 S.W.3d 39 (Tex.App.-Houston [1st Dist.] 2008, no pet. h.). I write briefly to address two specific arguments raised in the dissenting opinion.

First, the dissenting opinion opines that the term “serve” in former [section 74.351\(a\)](#)¹ means only “to ‘make legal delivery of (a notice or process)’ and to ‘present (a person) with a notice or process as required by law.’ ” *Poland*, 278 S.W.3d at 59 (Jennings, J., dissenting) (quoting BLACK'S LAW DICTIONARY 1372 (7th ed.1999)). However, as explained in the Court's opinion, that definition would in effect take us back to the language of former [section 74.351\(a\)](#)'s predecessor, which does not apply to this case. Former [section 74.351\(a\)](#)'s predecessor required only that the claimant “furnish” the expert report. *See* Act of May 5, 1995, 74th Leg., R.S., ch. 140, § 1, 1995 Tex. Gen. Laws 985, 986, *repealed and recodified as amended* by Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 10.01, 2003 Tex. Gen. Laws 847, 875. Of course, as the [Herrera](#) and [Gutierrez](#) courts concluded, we should presume that in changing the requirement from “furnish” to “serve,” the Legislature intended to require something more than simply the provision of the expert report by any means whatsoever. *See Univ. of Tex. Health Sci. Ctr. at Houston v. Gutierrez*, 237 S.W.3d 869, 872 (Tex.App.-Houston [1st Dist.] 2007, pet. denied); *Herrera v. Seton Northwest Hosp.*, 212 S.W.3d 452, 458–59 (Tex.App.-Austin 2006, no pet.).

Second, the dissenting opinion reasons:

Nothing in former [section 74.351\(a\)](#) precludes a claimant from serving an implicated physician or health care provider with her expert report and curriculum vitae along with an original petition² or prior to the actual filing of such a *54 claim in court in an effort to reach a settlement. *When a claimant does serve her expert report on an implicated physician or health care provider along with the filing of her health care liability claims prior to filing those claims in court, then a defendant certainly can object to the report not later than 21 days after being served with the petition.*

Poland, 278 S.W.3d at 60 (Jennings, J., dissenting) (emphasis added). The problem with this reasoning is that the plain language of former [section 74.351\(a\)](#) does not allow it. Former [section 74.351\(a\)](#) provides:

§ 74.351. Expert Report

(a) In a health care liability claim, a claimant shall, not later than the 120th day after the date the claim was filed, serve on each party or the party's attorney one or more expert reports, with a curriculum vitae of each expert listed in the report for each physician or health care provider against whom a liability claim is asserted. The date for serving the report may be extended by written agreement of the affected parties. Each defendant physician or health care provider whose conduct is implicated in a report must file and serve any objection to the sufficiency of the report not later than the 21st day *after the date it was served*, failing which all objections are waived.

See Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 10.01, 2003 Tex. Gen. Laws 847, 875 (emphasis added), *amended* by Act of May 18, 2005, 79th Leg., R.S., ch. 635, § 1, 2005 Tex. Gen. Laws 1590, 1590 (current version at [TEX. CIV. PRAC. & REM.CODE ANN. § 74.351\(a\)](#)). By its plain language, former [section 74.351\(a\)](#) thus ties the deadline for the defendant's filing and serving its objection to the expert report *to the date of service of the report on the defendant*, not to the date that the defendant is served with the petition that alleges a claim against him. *See id.*

Accordingly, even if former [section 74.351\(a\)](#) allowed the provision of an expert report to a defendant before the filing of a claim against him to suffice as “service” (which it does not), the defendant would have to “file and serve” his objections to that report not later than 21 days after that report was “served” on him presuit. The potential ambiguity arising from this predicament, as well as the fact that no cause exists presuit in which to file anything, are two of the reasons that the Court has held in this case that [section 74.351\(a\)](#) does not contemplate presuit provision of an expert report to suffice as “serv[ice]” of the report.

With these comments, I concur in the decision of the Court to deny en banc consideration in this case.

TERRY JENNINGS, Justice, dissenting from the denial of en banc consideration.

I withdraw my dissent that issued on December 19, 2008 and substitute the following opinion in its stead.

In its opinion, the panel erroneously concludes that appellants, Raymon Poland, Individually and as Independent Administrator of the Estate of Jessie Poland, Robert Martin, and Frank Martin (“the Polands”), untimely served their medical liability expert report on appellee, Dr. David Ott, MD. *See* Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 10.01, 2003 Tex. Gen. Laws 847, 875 [hereinafter “former [section 74.351\(a\)](#)”] (amended 2005) (current version at [TEX. CIV. PRAC. & REM.CODE ANN. § 74.351\(a\)](#) (Vernon Supp.2008)).

In fact, the Polands, on July 29, 2005, had, upon request, mailed their expert's report to Gary McLeod of APMC Insurance *55 Services (“APMC”), Dr. Ott's insurance carrier. It is undisputed that the Polands' attorneys served the expert report on APMC, and Dr. Ott in no way denies the fact that McLeod actually received the report.

Regardless, the panel reasons that because the Polands did not, after filing their health care liability claims in court, serve yet another copy of the expert report directly on Dr. Ott or his attorneys, the Polands' claims for the wrongful death of Mrs. Poland must be dismissed with prejudice and the Polands must pay the attorneys' fees of Dr. Ott. *See* [TEX. CIV. PRAC. & REM.CODE ANN. § 74.351\(b\)](#). In doing so, the panel misinterprets the plain language of former [section 74.351\(a\)](#), disregards the legislative purposes of the statute, disregards the

fundamental purpose of [rule 21a](#), and misapplies the rule, resulting in a serious error, requiring en banc consideration of the case. *See* TEX.R.APP. P. 41.2(c).

Factual and Procedural Background

The pertinent facts of the case are straightforward and undisputed. St. Luke's Episcopal Hospital (“St.Luke's”), on August 11, 2003, admitted Mrs. Poland for elective mitral valve ¹ replacement surgery. Although Mrs. Poland had been taking [Coumadin](#) for [mitral valve regurgitation](#), she stopped taking [Coumadin](#) on August 9, 2003 in preparation for the surgery. Dr. Ott, the attending cardiac surgeon, performed the surgery on August 12, 2003. Due to bleeding complications that occurred during the surgery, Mrs. Poland was twice taken back into surgery, and she died as a result of the complications on August 20, 2003.

Thereafter, the Polands' attorneys complied with the notice provision of chapter 74 of the Texas Civil Practice and Remedies Code. ² Having received the Polands' notice (presumably from Dr. Ott), McLeod, on July 13, 2005, wrote a letter to the Polands' attorney informing them that their notice had been referred to APMC “for response, as we are [Dr. Ott's] professional liability carrier. We will be investigating this case on behalf of Dr. Ott.” McLeod also requested the Polands' “medical expert's specific criticisms of our member's care so that we might share those concerns with David Alan Ott, M.D.” Fulfilling McLeod's request, the Polands' attorneys, on July 29, 2005, mailed him “the information you requested regarding the opinion of our *expert witness*,” enclosing their expert report, written by Dr. Dennis Moritz, M.D., a Board Certified Cardiac Surgeon. (Emphasis Added). Attached to Dr. Moritz's report was his lengthy curriculum vitae.

In sum, Dr. Moritz, in his expert report, stated that the pertinent standard of care in regard to surgery on a patient on [Coumadin](#) “is to stop the [Coumadin](#) and allow the [coagulation profile](#) to return to normal.” He also stated, “Performing any elective surgery on a fully anticoagulated patient is a breach of the standard of care. This is particularly true for operations such as heart surgery in which bleeding is always a potential hazard.” Dr. Moritz *56 noted that it “is essential to check the [Prothrombin Time (“PT”) and [International Normalized Ratio](#) (“INR”)] before surgery and defer surgery until it

returns to near normal,” and that Mrs. Poland's PT/INR “was not only elevated, but was well above the therapeutic range at the time of admission.” He emphasized that “[t]he dangerous [PT/INR] level was confirmed ..., but the operation proceeded nonetheless. The attending surgeon, Dr. Ott, as well as the Anesthesiologists involved should have seen these levels on INR and immediately cancelled the case.” Dr. Moritz concluded,

It is my opinion based on a reasonable degree of medical probability that proceeding with this operation in a patient who was fully anticoagulated with [Coumadin](#) led to bleeding, multiple [transfusions of blood](#) products, multiple organ failure, and finally death.

The principle of not doing elective surgery on a fully anticoagulated patient is so basic to surgical principles, that I feel this breach of the standard of care must also reflect a serious system failure at this hospital. Many people had knowledge, or should have had knowledge of Mrs. Poland's PT/INR. Any of these could have and should have initiated action to cancel the case. This failure resulted in Mrs. Poland's death.

On October 24, 2005, the Polands filed their original petition, alleging, as noted by the panel,

that, at the time of surgery, [Mrs.] Poland's blood contained a level of [Coumadin](#) that the health-care providers should have known rendered her blood fully anti-coagulated and, thus, rendered surgery dangerous. The surgery was nonetheless performed; Mrs. Poland bled internally; and she died several days later of multi-system organ failure.

Poland v. Ott, 278 S.W.3d 39, 41 (Tex.App.-Houston [1st Dist.] 2008, no pet. h.).

Subsequently, Dr. Ott moved to dismiss the Polands' health care liability claims on the ground that the Polands had failed to timely serve him or his attorneys with Dr. Moritz's expert report. *See* Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 10.01, 2003 Tex. Gen. Laws 847, 875 (amended 2005); [TEX. CIV. PRAC. & REM.CODE ANN. § 74.351\(b\)](#). Concluding that the Polands had untimely served Dr. Ott with Dr. Moritz's expert report,

the trial court entered its October 30, 2006 interlocutory order granting Dr. Ott's motion to dismiss the Polands' health care liability claims against him.

Section 74.351(a)

In their sole issue concerning Dr. Ott, the Polands argue that the trial court erred in dismissing their health care liability claims against Dr. Ott on the ground that they did not comply with former [section 74.351\(a\)](#) because they, in fact, timely “served [their expert's] report on Dr. Ott's designated representative and duly authorized agent, his insurance carrier, who initiated contact with [the Polands'] counsel and requested the report be sent to him so that he could share those concerns with Dr. David Ott.” The Polands assert that they “satisfied the spirit of [former] [section 74.351\(a\)](#) by serving the report on Dr. Ott's designated representative instead of serving it upon Dr. Ott's attorneys because Dr. Ott's designated representative and duly authorized agent requested that the report be served upon the insurance carrier.”

In fact, the trial court, during the hearing on Dr. Ott's motion to dismiss, asked all of the defendants present, “[W]ho got the report beforehand?” Counsel for Dr. Ott answered:

**57 Dr. Ott received it through—he was served with it through his carrier, presuit notification.*

(Emphasis added.)

Dr. Ott argues that the trial court did not err in dismissing the Polands' health care liability claims because the Polands “did not satisfy the requirements of [section] 74.351 by mailing Dr. Ott's insurance carrier an unsigned expert report prior to filing their health care liability claim.” Dr. Ott does not claim that he and his attorneys did not actually receive the report. Rather, he emphasizes that [section 74.351](#) “provides that the expert report must be served upon the party or the party's attorney. It does not indicate that the report may be mailed to the party's insurance carrier or any agent of the party.” Thus, Dr. Ott asserts that neither “service” on his “insurance adjuster” nor “pre-suit service” can “satisfy” the requirements of [section 74.351](#).

The panel, without determining whether the Polands' service of their expert report on McLeod at APMC was effective, holds:

[P]rovision of an expert report before a health-care-liability claim is filed in court against the physician or health-care provider does not meet former [section 74.351\(a\)](#)'s service requirements.

Poland, 278 S.W.3d at 47–48. The panel reasons:

The plain language of former [section 74.351\(a\)](#) and [Texas Rule of Civil Procedure] 21a, which it implicitly incorporates by use of the term “serve,” simply does not contemplate “service” of the expert's report and [curriculum vitae] on a physician or health-care provider until after a claim has been filed in court against that person or entity.

See *id.* The panel's erroneous holding and reasoning is based on another panel's holding in *University of Texas Health Science Center at Houston v. Gutierrez*, 237 S.W.3d 869, 873 (Tex.App.-Houston [1st Dist.] 2007, pet. denied). In *Gutierrez*, this Court held that:

Given the express legislative intent of Chapter 74 and the intentional legislative act of replacing the word “furnish” with “serve” in [section 74.351\(a\)](#), we determine that *proper service under rule 21a must occur* to effectuate the intent of Chapter 74 as a whole, and [section 74.351\(a\)](#) specifically.³

*58 *Id.* (emphasis added). The panel concedes:

We reach this conclusion despite the fact that, as the [Polands] note, the section requires service “*not later than*” 120 days after a claim is filed, *rather than requiring service within 120 days after the claim is filed*.

Poland, 278 S.W.3d at 48 (emphasis added).

Although Dr. Ott and the panel state that the “plain language” of former [section 74.351\(a\)](#) actually requires that a medical liability expert report be served only after the filing of a lawsuit asserting a health care liability claim, nothing in the plain language of the statute so states. Former [section 74.351\(a\)](#) provides:

In a health care liability claim, a claimant shall, *not later than* the 120th day after the date the claim was filed, serve on each party or the party's attorney one or more expert reports, with a curriculum vitae of each expert listed in the report for each physician or health care provider against whom a liability claim is asserted. The date for serving the report may be extended by written agreement of the affected parties.

See Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 10.01, 2003 Tex. Gen. Laws 847, 875 (amended 2005) (emphasis added). Thus, as conceded by the panel, former [section 74.351\(a\)](#) actually requires service “*not later than*” 120 days after a claim is filed,” not “*within 120 days* after the claim is filed.” (Emphasis added.)

The Texas Supreme Court has explained,

When interpreting statutes, we try to give effect to legislative intent. “Legislative intent remains the polestar of statutory construction.” However, it is a cardinal law in Texas that a court construes a statute, “first by looking to the plain and common meaning of the statute's words.” If the meaning of the statutory language is unambiguous, we adopt, with few exceptions, the interpretation supported by the plain meaning of the provision's words and terms. Further, if a statute is unambiguous, rules of construction or other extrinsic aids cannot be used to create an ambiguity.

Fitzgerald v. Advanced Spine Fixation, Sys., Inc., 996 S.W.2d 864, 865–66 (Tex.1999) (citations omitted).

Here, the panel turns to [Texas Rule of Civil Procedure 21a](#) and creates such an ambiguity. See [TEX.R. CIV. P. 21a](#). Rather than focus on the plain and common meaning of the word “serve,” the panel reasons that former [section 74.351\(a\)](#) “implicitly incorporates” [rule 21a](#), which does

not, in the words of the panel, “contemplate ‘service’ ” of any pleading, plea, motion, *59 or other form of request required to be served under [rule 21](#) until after a claim has been filed in a court. The panel also notes that each defendant whose conduct is implicated in an expert's report “must file and serve any objection to the sufficiency of the report not later than the 21st day after the date it was served, failing which all objections are waived.” Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 10.01, 2003 Tex. Gen. Laws 847, 875 (amended 2005). Thus, the panel concludes that delivery of an expert report to a defendant physician or health care provider “before a health-care-liability claim is filed in court against the physician or health-care provider does not meet former [section 74.351\(a\)](#)'s service requirements.” *Poland*, 278 S.W.3d at 46.

The word “serve,” as a verb, is defined simply as to “make legal delivery of (a notice or process)” and to “present (a person) with a notice or process as required by law.” BLACK'S LAW DICTIONARY 1372 (7th ed.1999). Thus, all that former [section 74.351\(a\)](#) requires is that a health care liability claimant “deliver” or “present” each party or their attorney with an expert report and curriculum vitae of each expert listed in the report for each physician or health care provider against whom a liability claim is asserted by the hard-and-fast deadline. *See* Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 10.01, 2003 Tex. Gen. Laws 847, 875 (amended 2005). Only if a defendant physician or health care provider “has not been served” with an expert report by the deadline, “shall” a trial court then order the claim dismissed with prejudice and award attorney's fees and costs to the pertinent defendants. *See* [TEX. CIV. PRAC. & REM.CODE ANN. § 74.351\(b\)](#).

[Rule 21a](#) does not define the word “serve,” which, as noted above, simply means to “deliver”; rather, it provides:

Every notice required by these rules, and every pleading, plea, motion or other form of request required to be served under [Rule 21](#), other than the citation to be served by the filing of a cause of action and except as otherwise expressly provided in these rules, *may be served by delivering a copy to the party to be served, or the party's duly authorized agent or attorney of record*, as the case may be, either [1]

in person or by agent or by courier receipted delivery or [2] by certified or registered mail, to the party's last known address, or [3] by telephonic document transfer to the recipient's current telecopier number, or [4] by such other manner as the court in its discretion may direct.

[TEX.R. CIV. P. 21a](#) (emphasis added). The plain purpose of [rule 21a](#) is to ensure that parties receive, by delivery, “notice” and “every pleading, plea, motion or other form of request required to be served under [Rule 21](#).” *Id.* It clearly gives trial courts discretion to direct other methods of delivery. *Id.* More importantly, as explained by the Fort Worth Court of Appeals:

The purpose of the rules relating to service and notice is to make reasonably certain that all parties to a suit are notified as to the date and time the court has set their matter down for hearing and determination. This is in order that the parties, individually or by counsel may appear, and present their side of the case and to take such action as is deemed appropriate to protect their interest. Thus, *service and notice in a technical sense is incidental where the main purpose of obtaining the appearance of all parties and their participation is accomplished.*

Hill v. W.E. Brittain, Inc., 405 S.W.2d 803, 807 (Tex.App.-Fort Worth 1966, no writ) (emphasis added).

*60 In *Hill*, although the Hills did not deny that they were actually “served with” a copy of a motion for judgment notwithstanding the verdict and notice of a hearing on the motion, they complained because it was not sent to them “by registered mail as provided by [Rule 21a](#).” *Id.* The court concluded that “prima facie evidence of service” and the appearance and participation of the Hills at the hearing demonstrated that the Brittain's notice by mail was adequate. *Id.* The court explained that the Hills “were in no way prejudiced.” *Id.* Moreover, the Hills made “no showing that they were denied any rights or privileges or that had service been proper, assuming it was

not, that a different result would have obtained.” *Id.* In sum, nothing suggested that the Hills “could or would have made a better showing or presented a stronger case had they received notice by registered or certified mail rather than by regular mail.” *Id.*

Here, likewise, although Dr. Ott complains that neither he nor his attorneys received the Polands' expert report directly from the Polands after they had filed their lawsuit, the Polands' service of the expert report upon Dr. Ott's insurance carrier prior to the filing of their lawsuit, as requested by McLeod, was adequate. Dr. Ott makes no showing of any prejudice. In fact, APMC is presumably fulfilling its duty to defend him.

Relying on [rule 21a](#) to fault the Polands for not serving yet another copy of their expert report on Dr. Ott after filing suit not only results in a miscarriage of justice, but actually goes against the very purpose of our rules of civil procedure upon which the panel relies to reach its holding. We are to “liberally” construe the rules because “[t]he proper objective of rules of civil procedure is to obtain a just, fair, equitable and impartial adjudication of the rights of litigants under established rules of substantive law.” [TEX.R. CIV. P. 1](#). The general commentary to [rule 1](#) expressly warns:

Any procedural device or rule therefore, which impedes the investigation or the evaluation of the facts or the awarding of the just consequences thereon, is incompatible with an ideal procedure. No mere rule of procedural form or courtesy should be allowed to delay or control the disposition of the litigation upon its merits.

No judgment should ever be rendered in the trial court which is based upon mere procedural technicalities.... There is no vested right in rules of procedure; much less is there any vested right in procedural errors.

[TEX.R. CIV. P. 1](#)—General Commentary—1966 (Vernon 2003). This is especially true when a litigant like Dr. Ott has not shown any prejudice due to receiving the expert report pre-suit.

Nothing in former [section 74.351\(a\)](#) precludes a claimant from serving an implicated physician or health care provider with her expert report and curriculum vitae along with an original petition or prior to the actual filing of such a claim in court in an effort to reach a settlement.

When a claimant serves her expert report on an implicated physician or health care provider along with the filing of her health care liability claims or prior to the filing of those claims in court, then the defendant can object to the report suit is filed. Here, regardless, the plain language of former [section 74.351\(a\)](#) simply does not render untimely the Polands' delivery of their expert's report on APMC upon its request. It certainly does not evidence a legislative intent that a claimant's failure to serve yet another copy of the same expert report after the filing of a claim *61 requires that the trial court dismiss the claim.

The purpose behind the Legislature's requirement of “early expert reports” is not to create a “gotcha”; it is to “stem frivolous suits against health care providers.” [Lewis v. Funderburk](#), 253 S.W.3d 204, 205 (Tex.2008). As recently noted by our sister court, in enacting Chapter 74, the Legislature sought to “ ‘(1) reduce excessive frequency and severity of health care liability claims through reasonable improvements and modifications in Texas insurance, tort, and medical practice systems;’ and ‘(2) decrease the cost of those claims and ensure that awards are rationally related to actual damages.’ ” [Mokkala v. Mead](#), 178 S.W.3d 66, 74 (Tex.App.-Houston [14th Dist.] 2005, no pet.) (quoting Act of June 2, 2003, 78th Leg., R.S. ch. 204, § 10.11(b), 2003 Tex. Gen. Laws 847, 884). In presenting House Bill 4, which included the pertinent language in [section 74.351](#), Representative Joe Nixon, Chair of the House Committee on Civil Practices, explained,

House Bill 4 ... is designed to *promote fairness and efficiency* in civil lawsuits, *protect Texas citizens and Texas courts from abusive litigation tactics*, remove incentives in the system that are causing unwarranted delay and expense. House Bill 4—its purpose is to restore the needed balance in our court system so that it can operate more efficiently and more fairly and less costly.

Id. (citing *Hearings on Tex. H.B. 4 Before the House Comm. on Civil Practices*, 78th Leg., [R.S. 1](#) (Feb. 26, 2003)) (statement of Rep. Nixon) (transcript available from Capitol Research Services, Austin, Texas) (emphasis added). Representative Nixon emphasized that “the hard reality is we just need to make a *hard and fast deadline*,

like we do on statute [sic] of limitations—as we do on other requirements.” *Id.* (citing Debate on Tex. H.B. 4 on the Floor of the House, 78th Leg., R.S. 317 (March 19, 2003) (statement of Rep. Nixon) (transcript available from Capitol Research Services, Austin, Texas) (emphasis added)).

Here, not only did the Polands meet former [section 74.351\(a\)](#)'s deadline, they, by providing, upon the direct request of McLeod, APMC with the expert report of Dr. Moritz prior to filing their health care liability claims, essentially placed all of their cards on the table to effectuate an early settlement of the case. As noted by the trial court when addressing the Polands' attorneys at the hearing on the motion to dismiss:

What I will do is I will issue an order one way or the other.... Because this issue needs to be decided. Because lawyers usually don't do what you have done. And *I feel like plaintiffs were attempting to do what the statute attempts to require of them.* And usually the case is plaintiffs are trying to do the least, and defendants file a motion to dismiss in that situation.

(Emphasis added.)

Dismissing the Polands' claims with prejudice and making them pay the attorney's fees of Dr. Ott under these circumstances constitutes a misapplication of former [section 74.351\(a\)](#). In doing so, the panel misinterprets the plain language of the statute and goes against its purpose to stem frivolous lawsuits against health care providers while promoting fairness and efficiency in such lawsuits.

Footnotes

- 1 After the Poland parties' motion for en banc reconsideration was rendered moot by the withdrawal of our January 31, 2008 opinion and judgment, during the Court's plenary power over this case, and before today's opinion and judgment had issued, en banc consideration of the case was requested from within the Court. See TEX.R.APP. P. 41.2(c). A majority of the Justices of the Court voted to deny en banc consideration of the case. See *id.* Along with the Court's opinion that issues today, Justice Jennings, joined by Justice Bland, issues an opinion dissenting from the denial of en banc consideration, and Justice Taft issues an opinion concurring in the denial of en banc consideration. TEX.R.APP. P. 47.5.
- 2 See TEX. BUS. & COM.CODE ANN. §§ 17.41–.63 (Vernon 2002 & Supp.2008).
- 3 Dr. Ott, like several other defendants, also objected to and moved to strike the Poland parties' live petition to the extent that it attempted to recast health-care-liability claims as other causes of action.

Certainly, a health care liability claimant's certification of compliance with [rule 21a](#) in delivering an expert report to a defendant doctor or health care provider would entitle the claimant to “a presumption of delivery” of the report. However, the bottom line is that the claimant need not rely on such “a presumption of delivery” *62 after the defendant's attorney acknowledges that the defendant “was served with it.”⁴ Accordingly, this panel's statement in the instant case that former [section 74.351\(a\)](#) implicitly incorporates the requirements of [rule 21a](#) and the panel's statement in [Gutierrez](#) that “proper service under [rule 21a](#) must occur to effectuate the intent of Chapter 74 as a whole, and [section 74.351](#) specifically” are in serious error. See *Poland*, 278 S.W.3d at 58; [Gutierrez](#), 237 S.W.3d at 873.

Conclusion

In sum, the En Banc Court should hold that the Polands timely served Dr. Ott with the health care liability expert report of Dr. Moritz, sustain their sole issue, and remand the case to the trial court for further proceedings. Moreover, the En Banc Court should overrule this Court's holding in [Gutierrez](#) that “proper service under [rule 21a](#) must occur to effectuate the intent of Chapter 74 as a whole, and [section 74.351](#) specifically.” [Gutierrez](#), 237 S.W.3d at 873. Accordingly, I respectfully dissent from the denial of en banc consideration of the case.

All Citations

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- 4 The current version of [section 74.351\(a\)](#) applies to causes of action that accrued after September 1, 2005, the current act's effective date. See Act of May 18, 2005, 79th Leg., R.S., ch. 635, §§ 2–3, 2005 Tex. Gen. Laws 1590, 1590. Because the Poland parties' causes of action accrued before September 1, 2005, the prior statutory version applies.
- 5 This first unsigned report of Dr. Moritz was dated May 2, 2005.
- 6 In May 2006, more than half a year after suit had been filed, the Poland parties served a second unsigned report of Dr. Moritz, dated May 19, 2006, along with a May 2006 report of a nurse, Rachel Cartwright, on at least some of the defendants in their lawsuit. The trial court struck the May 19, 2006 expert report of Dr. Moritz and the May 2006 expert report of Cartwright for their having been untimely served. The Poland parties do not complain on appeal of the striking of Dr. Moritz's or Cartwright's 2006 reports. Because the only report of significance to our discussion is the May 2, 2005 expert report of Dr. Moritz, we refer only to that report in our discussion.
- 7 See *id.*, 212 S.W.3d 452 (Tex.App.-Austin 2006, no pet.).
- 8 See *Eikenhorst v. Wellbrock*, No. 01–07–00459–CV, 2008 WL 2339735, at *6–7 (Tex.App.-Houston [1st Dist.] June 5, 2008, no pet.) (memo.op.) (citing *Herrera* and *Gutierrez* for proposition that “[r]ule 21a applies to the statutory requirements contained in the Texas Civil Practice and Remedies Code for medical malpractice cases” and holding, based thereon, that defendants were entitled to [rule 21a](#)'s 3–day “mailbox” rule, rendering timely their objections to expert report); *Acosta v. Chheda*, No. 01–07–00398–CV, 2007 WL 3227650, at *2 n. 6 (Tex.App.-Houston [1st Dist.] Nov. 1, 2007, pet. denied) (memo.op.) (citing *Gutierrez*); *Jain v. Stafford*, No. 02–06–00450–CV, 2007 WL 1502084, at *3–4 (Tex.App.-Fort Worth May 24, 2007, no pet.) (memo.op.) (in case in which issue was whether defendant had timely complied with [section 74.351\(a\)](#)'s requirement that objection to expert report be “filed and served” within 21 days after he was served with report, relying on *Herrera* and reasoning, “[Plaintiff-appellee] takes the position that [rule 21a](#) ..., regarding the three-day grace period, is inapplicable because the rule applies only to deadlines covered by the rules of civil procedure and not to the Texas Civil Practice and Remedies Code. We disagree and agree with our sister courts that have held that [rule 21a](#) also applies to the statutory requirements contained in the Texas Civil Practice and Remedies Code for medical malpractice cases.”); *Herrera*, 212 S.W.3d at 458–59; *Kendrick v. Garcia*, 171 S.W.3d 698, 703–04 (Tex.App.-Eastland 2005, pet. denied); *Quint v. Alexander*, No. 03–04–00819–CV, 2005 WL 2805576, at *2–3 (Tex.App.-Austin, Oct. 28, 2005, pet. denied) (memo.op.); see also *Prestwood v. Settle*, No. 03–07–00111–CV, 2008 WL 537159, at *4, 5 (Tex.App.-Austin Feb. 28, 2008, pet. denied) (memo.op.) (in dictum, following *Herrera* for this proposition). But see *Spiegel v. Strother*, 262 S.W.3d 481, 483–84, 486 (Tex.App.-Beaumont 2008, no pet.) (indicating that “[Rules 21, 21a](#), and [21b](#) do not reference service of a report required by statute” but that “these rules provide an approach” that court “may” follow when “resolving disputes over actual and timely receipt” of expert report; also noting that “[s]ome courts have applied [Rule 21a](#) to the statutory service requirement for expert reports,” while at same time noting, based on dictionary definition, that “serve” refers generally to delivery of document in manner that provides reasonable, sufficient notice).
- 9 See TEX. CIV. PRAC. & REM.CODE ANN. § 74.053 (Vernon 2003) (employing terms “defendant” and “plaintiff” in context of damages alleged in pleadings); *id.* § 74.154(b)(3) (Vernon 2005) (employing term “defendant” in context of jury instructions); *id.* § 74.301(a) (Vernon 2005) (employing term “defendant” in context of limitation on noneconomic damages rendered upon final judgment); *id.* § 74.302(a)(1) (Vernon 2005) (same); *id.* § 74.303(a) (Vernon 2005) (same); *id.* § 74.352 (Vernon 2005) (employing terms “plaintiff,” “defendant,” and “party” in context of postsuit discovery procedures); *id.* § 74.401(e) (Vernon 2005) (employing term “party” in context of pretrial objections to expert-witness qualifications and court consideration of same); *id.* § 74.402 (Vernon 2005) (employing terms “defendant” and “party” in context of qualification of and objections to expert witnesses “in a suit involving a health care liability claim”); *id.* § 74.403 (Vernon 2005) (employing term “defendant” in context of pretrial objections to expert-witness qualifications and court consideration of same); *id.* § 74.503 (Vernon 2005) (employing term “defendant” in context of periodic payments upon award to claimant); *id.* § 74.505 (Vernon 2005) (employing term “defendant” in context of showing of financial responsibility associated with periodic payments for award of future damages); *id.* § 74.506 (Vernon 2005) (employing term “defendant” in context of effect of death of recipient on certain damages awards).
- 10 Here, for example, the Poland parties argued at one point below that Dr. Ott had waived any objection to Dr. Moritz's expert report for not having objected to it within 21 days of its having been sent to McLeod, even though Dr. Ott had not yet been sued.
- 11 The Poland parties contend that Dr. Ott's counsel acknowledged this fact below by advising the trial court that “Dr. Ott received it [the expert report] through—he was served with it through his carrier presuit notification.” We note, however, that counsel later clarified this statement: “The insurance carrier gets [the expert report and CV].”
- 12 The trial court dismissed or struck all of the Poland parties' claims against Dr. Ott, even those couched as something other than health-care-liability claims. However, the Poland parties do not complain on appeal of the dismissal of these

additional claims. Additionally, the Poland parties do not challenge on appeal the award of attorney's fees to Dr. Ott. Even were we to construe the Poland parties' brief to complain that no attorney's fees should have been awarded because the motion to dismiss should have been denied, we would overrule that challenge for the same reasons discussed in our opinion.

13 On July 17, 2008, the Court issued its opinion and judgment in *Yilmaz v. McGregor*, 265 S.W.3d 631 (Tex.App.-Houston [1st Dist.] 2008, pet. denied). In *Yilmaz*, we relied on the original opinion in *Poland v. Ott*, which is withdrawn by today's opinion. See *Yilmaz*, 265 S.W.3d at 637. We note, however, that the holding and reasoning of the first *Poland* opinion on which we relied in *Yilmaz* has been retained in today's *Poland* opinion. Accordingly, our holding and reasoning in *Yilmaz* is not affected by the withdrawal of our prior opinion and judgment, and the issuance of today's opinion and judgment, in this case.

1 See Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 10.01, 2003 Tex. Gen. Laws 847, 875 [hereinafter "former [TEX. CIV. PRAC. & REM.CODE ANN. § 74.351](#)"], amended by Act of May 18, 2005, 79th Leg., R.S., ch. 635, § 1, 2005 Tex. Gen. Laws 1590, 1590 (current version at [TEX. CIV. PRAC. & REM.CODE ANN. § 74.351\(a\)](#) (Vernon Supp.2008)).

2 I do not construe our holding in this case to preclude the service of an expert report on the same day that the petition asserting the claim against that defendant is filed in court. The point of the relevant holding is simply that a claimant cannot serve an expert report on a defendant before a case against that defendant exists. A plaintiff will sometimes serve certain documents (e.g., requests for disclosure or other discovery requests) on a defendant, along with a copy of the petition, on the same day that the plaintiff instigates the suit against that defendant, and the served document will still be considered part of the proceedings if the document references the lawsuit. See *In re Arden*, No. 08–03–00269–CV, 2004 WL 576064, at *3 (Tex.App.-El Paso Mar.24, 2004, orig. proceeding) (memo.op.) (noting that plaintiff had served discovery requests on defendant along with service of original petition); see also [TEX.R. CIV. P. 21](#) (requiring that pleadings, pleas, motions, and applications filed in court be served on all other parties "at the same time"). I see no reason why this same construct would not apply to the service of an expert report under former [section 74.351\(a\)](#) when that service occurs on the same day as the filing of a pleading alleging a claim against the same defendant; however, the facts of this case did not present this issue for the Court to determine.

1 The mitral valve is "[a] valve of the heart, composed of two triangular flaps, that is located between the left atrium and left ventricle and regulates blood flow between these chambers." THE AMERICAN HERITAGE MEDICAL DICTIONARY 523 (2d ed.2002).

2 See [TEX. CIV. PRAC. & REM.CODE ANN. § 74.051\(a\)](#) (Vernon 2005) ("Any person or his authorized agent asserting a health care liability claim shall give written notice of such claim by certified mail, return receipt requested, to each physician or health care provider against whom such claim is being made at least 60 days before the filing of a suit in any court of this state based upon a health care liability claim....").

3 In reaching this holding, the panel in *University of Texas Health Science Center at Houston v. Gutierrez* relied in large part on *Herrera v. Seton Northwest Hospital*, 212 S.W.3d 452, 459 (Tex.App.-Austin 2006, no pet.). *University of Texas Health Science Center at Houston v. Gutierrez*, 237 S.W.3d 869, 872–73 (Tex.App.-Houston [1st Dist.] 2007, pet. denied). Unfortunately, the reliance upon *Herrera*, which is substantively distinguishable, by both the panel in *Gutierrez* and the panel here is misplaced.

In *Herrera*, Herrera's attorneys claimed that they had timely sent, by regular mail, a copy of Herrera's medical liability expert report to the defendant doctor and hospital. *Herrera*, 212 S.W.3d at 456. Significantly, both the doctor and the hospital alleged that they did not receive the report until Herrera's attorneys subsequently sent them, outside of [section 74.351\(a\)](#)'s deadline, the report by facsimile transmission. *Id.* Herrera argued that under the "mailbox rule" in [Texas Rule of Civil Procedure 5](#), he "constructively delivered" the report to the defendants when he placed it into the control of the United States Postal Service. *Id.* The Austin Court of Appeals concluded that Herrera's reliance upon [rule 5](#) was misplaced because it concerns the filing of documents with a court clerk, not service on a party. *Id.* at 458 (citing [TEX.R. CIV. P. 5](#)). The court also concluded that the Legislature intended for health care liability claimants to comply with [rule 21a](#) "to fulfill the requirements of [section 74.351\(a\)](#)." *Id.* at 459. However, in doing so, the court noted that a "party who accomplishes service under [rule 21a](#) is entitled to a presumption of delivery":

A certificate by a party or an attorney of record, or the return of the officer, or the affidavit of any other person showing service of a notice shall be prima facie evidence of the fact of service.

Id. (quoting [TEX.R. CIV. P. 21a](#)) (emphasis added).

The Austin Court of Appeals did not hold, as did this Court in *Gutierrez*, that proper service under [rule 21a](#) "must occur to effectuate the intent of Chapter 74 as a whole, and [section 74.351](#) specifically," even if the defendant health care provider has admitted to actually having received an expert report. See *Gutierrez*, 237 S.W.3d at 873

(emphasis added). Rather, the Austin Court of Appeals merely held that Herrera “was not entitled to any presumption of delivery.” 212 S.W.3d at 460. It noted that section 74.351(a) “contemplates service to parties consistent with the rules of civil procedure” and that Herrera did not “use any method of service authorized by rule 21a to deliver copies of his expert report and curriculum vitae.” *Id.* Thus, the Austin Court of Appeals concluded that “Herrera [had] failed to prove compliance with the statutory deadline.” *Id.* Given that the defendant doctor and hospital actually denied receiving the report mailed by Herrera’s attorneys, the court’s conclusion makes sense.

4 As noted above, when the trial court, during the hearing on Dr. Ott’s motion to dismiss, asked all of the defendants present, “[W]ho got the report beforehand?” Counsel for Dr. Ott answered:

Dr. Ott received it through—*he was served with it* through his carrier, presuit notification.

(Emphasis added.) Again, this fulfilled the direct request of Dr. Ott’s insurance carrier, which, presumably, had a duty to defend him.

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Limitation of Holding Recognized by [Gatling v. Perna](#), Tex.App.-Dallas, February 12, 1990

741 S.W.2d 370
Supreme Court of Texas.

Frank D. KIMBALL, Petitioner,
v.
Joe F. BROTHERS, M.D., Respondent.

No. C-5569.

Dec. 9, 1987.

Rehearing Denied Jan. 20, 1988.

Patient brought medical malpractice action against anesthesiologist. The 170th Judicial District Court, McLennan County, Raymond R. Mormino, J., granted anesthesiologist's motion for summary judgment, and patient appealed. The Waco Court of Appeals, [712 S.W.2d 538](#), affirmed, and patient appealed. The Supreme Court, Spears, J., held that medical malpractice action which was brought more than two years after anesthesiologist treated patient was time barred, even though notice of claim was given within two years from date medical treatment and hospitalization were completed.

Affirmed.

West Headnotes (2)

[1] **Limitation of Actions**

Negligence in Performance of Professional Services

When precise date of specific breach or tort by medical professional is ascertainable from facts of case, statutory period commences from date of breach or tort, and not from date medical or health care treatment is completed. [Vernon's Ann.Texas Civ.St. art. 4590i, § 10.01](#).

[113 Cases that cite this headnote](#)

[2] **Limitation of Actions**

Negligence in Performance of Professional Services

Medical malpractice action against anesthesiologist which was brought more than two years after anesthesiologist treated patient was time barred, even if patient's medical treatment and hospitalization was not completed until less than two years after notice was given. [Vernon's Ann.Tex.Civ.St. art. 4590i, § 10.01](#).

[99 Cases that cite this headnote](#)

Attorneys and Law Firms

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James E. Wren, Susan Kelley-Claybrook, Haley, Davis Wren, Bristow & Rasner, Waco, for respondent.

Opinion

SPEARS, Justice.

This case involves construction of the statute of limitations in medical malpractice actions. Petitioner Frank Kimball sued various health care providers, including Respondent Dr. Joe Brothers, alleging that Dr. Brothers' negligence caused Kimball to suffer respiratory failure and cardiac insufficiency. The trial court granted Dr. Brothers' summary judgment on the basis of the statute of limitations as provided in [TEX.REV.CIV.STAT.ANN. art. 4590i, § 10.01](#) (Vernon Supp.1987). The court of appeals affirmed the judgment of the trial court. [712 S.W.2d 538](#). We affirm the judgment of the court of appeals.

On March 7, 1982, Frank Kimball was admitted as a patient to Providence Hospital in Waco, Texas, complaining of chest pain. Following diagnostic testing, surgery was recommended, and on March 11, 1982, Kimball was taken to surgery. Because of a jaw deformity, Kimball was unable to fully open his mouth, and Dr. Brothers, the anesthesiologist, had difficulty inserting a tube into his throat, or "intubating," him. The surgery was postponed when Kimball suffered respiratory failure and cardiac insufficiency during the prolonged intubation procedure, which lasted approximately an hour and a half. No further surgical procedures were performed on

Kimball during the remainder of his hospitalization. The only day Dr. Brothers had any contact with Kimball was March 11, 1982. Kimball was discharged from the hospital on March 17, 1982.

On March 16, 1984, Kimball sent “notice of claim” letters to Dr. Brothers and other health care providers. Suit was filed against the multiple defendants on May 30, 1984.

Dr. Brothers filed a motion for summary judgment based on the statute of limitations. The relevant undisputed dates that determine the applicable limitations period are as follows:

March 7, 1982—Kimball admitted to hospital.

March 11, 1982—Intubation procedure attempted on Kimball.

March 17, 1982—Discharge of Kimball from Providence Hospital.

March 16, 1984—Statutory “notice of claim” letter sent to Dr. Brothers.

May 30, 1984—Suit filed by Kimball.

The trial court severed the cause of action against Dr. Brothers and granted summary judgment against Kimball on the basis of [TEX.REV.CIV.STAT.ANN. art. 4590i, § 10.01](#) (Vernon Supp.1987), which provides:

Notwithstanding any other law, no health care liability claim may be commenced unless the action is filed within two years from the occurrence of the breach or tort or from the date the medical or health care treatment that is the subject of the claim or the hospitalization for which the claim is made is completed....

The court of appeals, in affirming the granting of summary judgment, held that ***372** because the notice of claim was sent more than two years from the date of the alleged tort, which occurred on March 11, 1982, the suit was barred by limitations.

Kimball contends that the period of limitations as set forth in section 10.01 runs from any one of three events: (1) the

occurrence of the breach or tort; (2) the date the health care treatment that is the subject of the claim is completed; or (3) the date the hospitalization for which the claim is made is completed. Kimball asserts that the suit is timely filed if the statutory notice of claim is filed within two years of *any* of the above three dates. Under Kimball's analysis, his notice of claim was timely filed because the limitations period did not begin to run until March 17, 1982, the date Kimball's hospitalization was completed.

The legislature enacted the Medical Liability and Insurance Improvement Act to alleviate a perceived medical malpractice insurance crisis in the State of Texas. [TEX.REV.CIV.STAT.ANN. art 4590i, § 1.02\(a\) \(5\)](#) (Vernon Supp.1987). In an effort to accomplish this goal, an absolute two-year period of limitations was adopted. The three-date scheme contained in section 10.01 of Article 4590i was intended to aid the plaintiff who had difficulty ascertaining a precise date on which his injury occurred, specifically in circumstances where the claim arose from a course of treatment or a period of hospitalization that extended for a period of time. [Morrison v. Chan](#), 668 S.W.2d 483, 485 (Tex.App.—Fort Worth 1984), *aff'd*, 699 S.W.2d 205 (Tex.1985).

The provision in section 10.01 that permits the limitations period to run “from the date the medical or health care treatment that is the subject of the claim ... is completed” contemplates a situation wherein the patient's injury occurs during a course of treatment for a particular condition and the only readily ascertainable date is the last day of treatment. Such a situation often arises in suits alleging misdiagnosis or mistreatment. *See Vinklerek v. Cane*, 691 S.W.2d 108, 109–10 (Tex.App.—Austin 1985, writ ref'd n.r.e.); *Morrison v. Chan*, 668 S.W.2d 483, 485 (Tex.App.—Fort Worth 1984), *aff'd*, 699 S.W.2d 205 (Tex.1985); *Atha v. Polsky*, 667 S.W.2d 307, 308 (Tex.App.—Austin 1984, writ ref'd n.r.e.); *Wallace v. Smith*, 658 S.W.2d 328, 329 (Tex.App.—Fort Worth 1983, no writ).

[1] [2] When the precise date of the specific breach or tort is ascertainable from the facts of the case, however, section 10.01 requires the limitations period to run from the date of the breach or tort. It is undisputed that Dr. Brothers' only contact with Kimball was on March 11, 1982. Therefore, any breach or tort by Dr. Brothers had to occur on that date. Under section 10.01, Kimball was required to file the statutory notice of claim within two years of March 11, 1982, the date of the breach or tort.

Kimball argues that the statute of limitations did not begin to run until he was released from the hospital on March 17, 1982. The third provision of section 10.01 permits the limitations period to run from the date “the hospitalization *for which the claim is made* is completed.” (emphasis added). The express language of the statute clearly limits this provision to claims based on the hospitalization itself, such as when a hospital is sued for negligent treatment of a patient. In this case, Kimball made no claim against the hospital that the care he received during his hospitalization was negligent in any way. Kimball's claim against Dr. Brothers relates solely to Dr. Brothers' allegedly negligent actions on March

11, 1982. Thus, the last date of hospitalization has no relevance to the period of limitations in this situation.

The statutory notice of claim was not given until March 16, 1984. Inasmuch as the breach or tort that is the basis of this suit occurred on March 11, 1982, the two-year statute of limitations expired on March 11, 1984.

The judgment of the court of appeals is affirmed.

All Citations

741 S.W.2d 370

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236 S.W.3d 778
Supreme Court of Texas.

Eula YANCY, as Guardian of the Person
and the Estate of Carletha Yates,
an Incapacitated Adult, Petitioner,
v.

UNITED SURGICAL PARTNERS
INTERNATIONAL, INC., Valley View Surgical
Center, Inc., and Judith Smith, R.N., Respondents.

No. 05–0925.

|
Argued Feb. 14, 2007.

|
Decided Oct. 19, 2007.

Synopsis

Background: Mother of patient who, during surgery, suffered cardio-pulmonary arrest resulting in permanent brain injury, filed medical malpractice suit against surgical center and nurse. The County Court at Law No. 5, Dallas County, Mark Greenburg, J., entered summary judgment in favor of center and nurse on ground that claims had been filed outside limitations period. Mother appealed. The Court of Appeals, 170 S.W.3d 185, affirmed. Mother petitioned for review.

Holdings: The Supreme Court, Jefferson, J., held that:

[1] affidavits submitted by registered nurse and certified rehabilitation registered nurse, along with patient's medical records, were sufficient to raise a genuine issue of material fact as to whether patient had been continuously mentally incapacitated since her surgery, and

[2] the Medical Liability Insurance Improvement Act's (MLIIA) two-year limitations provision for medical malpractice complaints did not violate the open courts guarantee as applied to patient.

Affirmed.

West Headnotes (5)

[1] Judgment

🔑 Particular defenses

Summary judgment affidavits submitted by registered nurse and certified rehabilitation registered nurse, along with patient's medical records, were sufficient to raise a genuine issue of material fact as to whether patient had been continuously mentally incapacitated since her surgery, for the purpose of determining whether the two-years limitations period for medical malpractice lawsuit filed by patient's mother was tolled due to patient being in a continuous vegetative state.

6 Cases that cite this headnote

[2] Appeal and Error

🔑 Judgment

When reviewing a summary judgment, the Supreme Court must examine the entire record in the light most favorable to the nonmovant, indulging every reasonable inference and resolving any doubts against the motion.

37 Cases that cite this headnote

[3] Constitutional Law

🔑 Conditions, Limitations, and Other Restrictions on Access and Remedies

A statute has the effect of denying access to the courts if it unreasonably abridges a plaintiff's right to obtain redress for injuries caused by the wrongful acts of another.

12 Cases that cite this headnote

[4] Constitutional Law

🔑 Abrogation, modification, or recognition of remedies

Proof of an open courts violation requires two elements: (1) a cognizable, common-law claim that is statutorily restricted, and (2) the restriction is unreasonable or arbitrary when

balanced against the statute's purpose and basis. [Vernon's Ann.Texas Const. Art. 1, § 13](#).

[17 Cases that cite this headnote](#)

[5] Constitutional Law

🔑 Time for proceedings

Limitation of Actions

🔑 Constitutionality of statute

The Medical Liability Insurance Improvement Act's (MLIIA) two-year limitations provision for medical malpractice complaints did not violate the open courts guarantee as applied to patient; patient suffered cardio-pulmonary arrest resulting in permanent brain injury during surgery, patient's mother was informed of her condition on the date of the surgery, patient's mother offered no explanation for her failure to name certain defendants until 22 months after filing her original malpractice complaint, which was filed 19 months after patient's surgery, and mother was able to retain a lawyer and timely file her original malpractice complaint. [Vernon's Ann.Texas Const. Art. 1, § 13](#); [Vernon's Ann.Texas Civ.St. Art. 4590i, § 10.01](#) (Repealed).

[11 Cases that cite this headnote](#)

Attorneys and Law Firms

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*780 [Walter A. Herring](#), O. Rey Rodriguez, Fulbright & Jaworski L.L.P., [Vernon L. Krueger](#), [David M. Walsh IV](#), Chamblee & Ryan, P.C., Dallas, TX, for Respondents.

Opinion

Chief Justice [JEFFERSON](#) delivered the opinion of the Court.

We must decide whether the two-year statute of limitations found in former [article 4590i, section 10.01 of the Texas Revised Civil Statutes](#)¹, violates the Texas Constitution's open courts guarantee as applied to an incapacitated plaintiff whose guardian timely filed suit against some defendants but not others. We conclude,

contrary to the court of appeals, that the plaintiff presented competent summary judgment evidence of her continuous mental incapacity but nonetheless hold that the open courts guarantee has not been violated here.

I

Background

On May 3, 2000, Carletha Yates underwent a lithotripsy—a surgical procedure to remove [kidney stones](#)—at Valley View Surgical Center. During the procedure, Yates suffered a [cardiac arrest](#)—allegedly caused by the medical personnel's failure to monitor her oxygen while she was under general [anesthesia](#)—and is now comatose. On December 10, 2001, Eula Yancy, Yates's mother and guardian of her estate and person, sued Manuel Ramirez, M.D. and Dallas Pain & [Anesthesia](#) Associates for negligence. Almost two years later, on September 2, 2003, Yancy added United Surgical Partners International, Inc.² (United Surgical), Valley View Surgical Center, Inc., and Judith Smith, R.N., (collectively, Valley View) as defendants.

United Surgical and Valley View asserted that limitations barred Yates's claims, and they moved for summary judgment on that basis. In response, Yancy conceded that she filed Yates's claims outside of the two-year statute of limitations but contended that because Yates has “been continuously in a vegetative, comatose state since May 3, 2000 ... limitations ... has been tolled and any statutory attempt to void the tolling violates the Texas Open Courts provisions.” Yancy attached two affidavits to the summary-judgment response. Anaise “Sis” Theuerkauf, a “certified rehabilitation registered nurse, certified case manager, and life care planner,” testified that she visited and assessed Yates at her home and reviewed her medical records. Theuerkauf concluded:

It is my opinion based upon personal observations, assessment, interviews and review of her medical records and diagnoses of her treating physicians that Carletha Yates is in a comatose, vegetative state, and, based on my review of her medical records, she has been in such a condition consistently and

uninterrupted since her [anoxic brain injury](#) suffered on May 3, 2000, while a patient at Valley View Surgery [sic] Center. She has been totally disabled continuously since May 3, 2000.

Yancy also filed an affidavit and accompanying report from Cindy Sacker, a registered nurse. Sacker's report noted that *781 the monitor record from Yates's surgery reflected a ten-minute period during which Yates had "no respirations," leading Sacker to conclude that Valley View's nursing staff breached its duty of care and "[a]s a result ... Yates, has suffered a catastrophic, irreversible, [brain injury](#), rendering her comatose and totally unresponsive, requiring her family to assume responsibility for her care."

Yancy also attached the 137-page deposition transcript of Dr. Manuel Ramirez, the anesthesiologist who attended Yates during the lithrotripsy. Based on his review of the records, Dr. Ramirez testified that near the end of the procedure, Yates's blood-oxygen levels dropped, and she developed "brady [and] [asystole](#)." Ultimately, Yates suffered a [cardiac arrest](#), requiring [cardiopulmonary resuscitation](#). Dr. Ramirez intubated Yates and administered epinephrin. Yates's vital signs returned and, accompanied by Dr. Ramirez, she was transferred to Medical City Dallas. Dr. Ramirez recalled speaking with Yancy that day and explaining that Yates had suffered a [cardiac arrest](#), had been resuscitated and had demonstrated good vital signs on transfer, but remained unconscious. While Dr. Ramirez had not seen Yates since the transfer, he had no reason to believe her condition had changed.

On the day of the summary judgment hearing, Valley View challenged Yancy's summary judgment evidence, asserting that Theuerkauf's affidavit testimony was vague, ambiguous, misleading, and conclusory, and that Sacker's testimony was uncorroborated. United Surgical did not object to Yancy's proof. The trial court granted the motions.³ Yancy settled with and dismissed Ramirez and the Dallas Pain & Anesthesia Associates from the suit, making the summary judgments final.

Yancy appealed, and the court of appeals affirmed. [170 S.W.3d 185](#). The court examined the summary judgment evidence and objections and concluded that, because the

objections raised matters of substance, not form, "the failure to obtain a ruling did not waive the objections" because "[o]bjections to the substance of an affidavit may be raised for the first time on appeal." *Id.* at 191. The court held that both affidavits were conclusory, and that neither Theuerkauf nor Sacker were qualified to testify to Yates's medical condition. The court did not mention Dr. Ramirez's testimony nor any other summary judgment evidence. The court of appeals affirmed, holding that Yancy failed to present competent evidence of Yates's alleged continuous mental incapacity and, therefore, failed to raise a fact issue about the constitutionality of the statute of limitations for health care liability claims as applied to her. *Id.* at 192–93. We granted Yancy's petition for review. [50 Tex. Sup.Ct. J. 65 \(Oct. 27, 2006\)](#).

II

Summary Judgment Burden of Proof

[I] Yancy argues that, as the movants, the respondents bore the burden of conclusively negating an open courts violation, and that because their motions did not address the open courts provision, they failed to meet their burden. To support her position, she relies on authority requiring a defendant to negate the discovery rule as a matter of law once the plaintiff has pleaded it. *See Pustejovsky v. Rapid-American Corp.*, [35 S.W.3d 643, 646 \(Tex.2000\)](#); *Velsicol Chem. Corp. v. Winograd*, [956 S.W.2d 529, 530 \(Tex.1997\)](#).

We confronted this very question in *Shah v. Moss*, [67 S.W.3d 836, 846–47 \(Tex.2001\)](#). In that case Moss sued Shah for *782 medical negligence, and Shah moved for summary judgment based on [section 10.01](#) 's limitations provision. *Id.* at 839. Moss countered that [section 10.01](#) violated the open courts guarantee. *Id.* at 841. We said, "it was Moss's burden to raise a fact issue demonstrating that ... the open courts guarantee applies." *Id.* at 846–47. Unlike the discovery rule, which a defendant must negate once the plaintiff has pleaded it, a plaintiff who asserts that the open courts provision defeats limitations bears the burden of raising a fact issue. *See also Brown v. Shores*, [77 S.W.3d 884, 888–89 \(Tex.App.-Houston \[14th Dist.\] 2002, no pet.\)](#) (Brister, C.J., concurring).

Thus, Yancy had the burden to present evidence of Yates's continuous mental incapacity. *See Tinkle v. Henderson*, [730 S.W.2d 163, 167 \(Tex.App.-Tyler 1987, writ ref'd\)](#).

The court of appeals held that Yancy failed to provide competent summary judgment evidence regarding Yates's mental capacity and, therefore, failed to meet that burden. 170 S.W.3d at 192–93. We disagree.

[2] When reviewing a summary judgment, we “must examine the *entire record* in the light most favorable to the nonmovant, indulging every reasonable inference and resolving any doubts against the motion.” *City of Keller v. Wilson*, 168 S.W.3d 802, 824–25 (Tex.2005) (emphasis added). Here, the evidence included not only the two affidavits discussed by the court of appeals, but the anesthesiologist's deposition testimony and Yates's medical records.⁴ Theuerkauf averred that she “personally visited and assessed Carletha Yates in her home,” and it was her opinion “based upon personal observations, assessment, interviews and review of her medical records and diagnoses of her treating physicians that Carletha Yates is in a comatose, vegetative state, and, based on [her] review of [Yates's] medical records, she has been in such a condition consistently and uninterrupted since ... May 3, 2000.”

The court of appeals concluded that the affidavit was not competent evidence because Theuerkauf did not show herself qualified to render an opinion on Yates's medical diagnosis, and Theuerkauf's statement that Yates had been in a “comatose, vegetative state” consistently since her surgery was “wholly conclusory in nature.” 170 S.W.3d at 191–92. Theuerkauf's qualifications consisted of a statement that she is “a certified rehabilitation registered nurse, certified case manager, and life care planner who has been duly licensed in nursing in Louisiana, Texas, Mississippi, Arkansas, Alabama, and Tennessee.” Even assuming that she was not qualified as an expert, she was still free to offer testimony of her personal observations. The lower court recognized that Theuerkauf, a registered nurse, would have been competent to testify that “the plaintiff was unresponsive, uncommunicative, and incapable of caring for herself.”⁵ 170 S.W.3d at 192. We see no meaningful distinction between that description *783 and Theuerkauf's actual testimony that Yates was “comatose” and in a “vegetative state.” Theuerkauf's affidavit supports an inference that Yates is currently mentally incapacitated.

Also included in the summary judgment evidence were Valley View's medical records of Yates's lithotripsy procedure. Those records show that, during surgery,

Yates suffered a [cardiac arrest](#) during which her blood-oxygen levels dropped, necessitating [cardiopulmonary resuscitation](#). Sacker's affidavit describes a ten-minute period during which Yates had “no respirations.” The records further reflect that when Yates was transferred from the surgery center by ambulance she was “unresponsive,” with pupils fixed and dilated. Dr. Ramirez, who rode with Yates during the transfer to Medical City, testified that Yates had not regained consciousness when he last saw her and that it was his understanding she was “incapacitated.” While these facts alone may not absolutely exclude the possibility that Yates regained consciousness after she was transferred from the surgery center, her current comatose condition supports a reasonable inference that she never recovered. The affidavits, taken in conjunction with the medical records and Dr. Ramirez's testimony, raise a fact issue as to whether Yates has been continuously mentally incapacitated since the surgery, and the court of appeals erred in concluding otherwise.

III

The Open Courts Guarantee

A

Applicable Law

The Texas Constitution's open courts guarantee provides that “[a]ll courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law.” TEX. CONST. art. I, § 13. This provision assures that a person bringing a well-established common-law cause of action will not suffer unreasonable or arbitrary denial of access to the courts. *Jennings v. Burgess*, 917 S.W.2d 790, 793 (Tex.1996). “[I]t is, quite plainly, a due process guarantee.” *Sax v. Votteler*, 648 S.W.2d 661, 664 (Tex.1983); *Hanks v. City of Port Arthur*, 121 Tex. 202, 48 S.W.2d 944, 946–48 (1932).

[3] [4] A statute has the effect of denying access to the courts if it unreasonably abridges a plaintiff's right to obtain redress for injuries caused by the wrongful acts of another. *Sax*, 648 S.W.2d at 665. Proof of an open courts violation requires two elements: (1) a cognizable,

common-law claim that is statutorily restricted, and (2) the restriction is unreasonable or arbitrary when balanced against the statute's purpose and basis. *Shah*, 67 S.W.3d at 842; *Jennings*, 917 S.W.2d at 793; *Sax*, 648 S.W.2d at 665–66.

B

The Parties' Arguments

Yancy contends that the Medical Liability Insurance Improvement Act's (MLIIA) limitations provision violates the open courts guarantee as applied to Yates. The statute at issue prescribes a two-year limit in which to file medical malpractice claims and prohibits tolling based on minority or incapacity; it provides:

*Notwithstanding any other law, no healthcare liability claim may be commenced unless the action is filed within two-years from the occurrence of the breach or tort or from the date the medical or healthcare treatment that is the subject of the claim or the hospitalization for which the claim is made is completed; provided that, minors under the age of 12 shall have until their 14th *784 birthday in which to file, or have filed on their behalf, the claim. Except as herein provided, this subchapter applies to all persons regardless of minority or other legal disability.*

Act of May 30, 1977, 65th Leg., R.S., ch. 817, § 10.01, 1977 Tex. Gen. Laws 2039, 2052 (repealed 2003) (emphasis added). Yancy's argument is precise: this Court has already held that section 10.01 violates the open courts guarantee as applied to minors, see *Weiner v. Wasson*, 900 S.W.2d 316 (Tex.1995), and there is no rational basis for allowing a plaintiff's minority but not her mental incapacity to toll limitations for a health care liability claim. United Surgical and Valley View contend, however, that Yancy cannot establish either element of an open courts claim. We conclude that the open courts guarantee is not violated as applied to Yates.

C

Analysis

[5] In *Ruiz v. Conoco, Inc.*, we acknowledged that “the mere commencement of a lawsuit by, or on behalf of, a legally incapacitated individual is, considered alone, insufficient to deny the protection of [the Civil Practice and Remedies Code's] tolling provision.” *Ruiz*, 868 S.W.2d 752, 756 (Tex.1994). *Ruiz*, however, did not involve an open courts challenge, but rather the statutory tolling provision applicable to persons who were legally disabled. See TEX. CIV. PRAC. & REM. CODE § 16.001. We observed “[t]he tolling statute reflects a considered legislative judgment that in enumerated circumstances the strong policy in favor of prompt disposition of disputes must give way to the need to protect a plaintiff who is unable to protect himself or herself.” *Ruiz*, 868 S.W.2d at 756. But section 10.01 expressly makes the tolling statute inapplicable to health care liability claims, Act of May 30, 1977, 65th Leg., R.S., ch. 817, § 10.01, 1977 Tex. Gen. Laws 2039, 2052 (repealed 2003) (applying two-year statute of limitations “[n]otwithstanding any other law” and stating that subchapter “applies to all persons regardless of minority or other legal disability”), reflecting a considered legislative judgment in favor of the prompt resolution of such claims.

Instead, Yancy's claim is based on the open courts guarantee, which is premised on the notion that “the Legislature has no power to make a remedy by due course of law contingent on an impossible condition.” *Morrison v. Chan*, 699 S.W.2d 205, 207 (Tex.1985). This guarantee differs from tolling provisions. Unlike the discovery rule, which defers accrual of a cause of action until the plaintiff knew or, exercising reasonable diligence, should have known of the facts giving rise to the claim, *HECI Exploration Co. v. Neel*, 982 S.W.2d 881, 886 (Tex.1998), the open courts provision merely gives litigants a reasonable time to discover their injuries and file suit, *Hall v. Dow Corning Corp.*, 114 F.3d 73, 77 (5th Cir.1997) (applying Texas law). Because the open courts guarantee does not toll limitations, courts must determine what constitutes a reasonable time for a claimant to discover her injuries and file suit. *Hall*, 114 F.3d at 77.

Once again, *Shah v. Moss* is instructive. There, we considered whether applying section 10.01 to the plaintiff's health care liability claim, allegedly resulting from a negligent course of treatment, would violate the open courts guarantee. *Shah*, 67 S.W.3d at 846–47. Moss sued Dr. Shah, alleging that his medical negligence ultimately caused Moss's loss of sight in his right eye. *Id.* at 839.

Dr. Shah moved for summary judgment, claiming [section 10.01](#) 's two-year statute of limitations [*785](#) barred Moss's claims, which were filed more than two years after Dr. Shah performed surgery on Moss's eye. *Id.* The trial court granted Dr. Shah's motion, and Moss appealed. *Id.* at 840. The court of appeals reversed, and we granted Dr. Shah's petition for review.

Moss argued, among other things, that applying [section 10.01](#) to bar his claims violated the open courts provision. *Id.* at 841. We rejected that proposition:

... [E]ven if we take as true Moss's assertion that he could not have sued within the two-year limitations period because he did not discover Dr. Shah's negligence until his last office visit in July 1995, the open courts provision does not save Moss's claims. *A plaintiff may not obtain relief under the open courts provision if he does not use due diligence and sue within a reasonable time after learning about the alleged wrong.*

Here, the summary-judgment evidence shows Moss knew about his alleged injury, the second [detached retina](#) resulting in Moss's loss of sight, at least seventeen months before he brought suit. Moss offers no explanation, other than Dr. Shah's alleged fraudulent concealment, about why he delayed in bringing suit. And, we have already rejected Moss's fraudulent-concealment claim. Accordingly, we conclude that, as a matter of law, Moss did not file suit within a reasonable time after discovery his injury.

Moss did not raise a fact issue establishing that he did not have a reasonable opportunity to discover the alleged wrong and bring suit within the limitations period or that he sued within a reasonable time after discovering the alleged wrong. Thus, the open courts provision does not apply to save Moss's time-barred negligence claims.

Id. at 847 (citations omitted) (emphasis added).

Such is the case here. The allegedly negligent treatment occurred on a single day—May 3, 2000—the date of Yates's lithotripsy at Valley View. Yancy's original petition, filed some nineteen months later, “specifically reserve[d] the right to obtain discovery to obtain more information regarding the procedure in question and the events which transpired on May 3, 2000 and to thereafter

name additional persons or entities as Defendants based on future discovery.”

Yancy has offered no explanation for failing to name Valley View and United Surgical for almost twenty-two months after filing the original petition. The record does not establish when Yancy was appointed Yates's guardian nor when Yancy retained a lawyer, but neither event was later than December 10, 2001, the day Yancy, on Yates's behalf, filed suit against Dr. Ramirez and Dallas Pain and Anesthesia. The summary judgment evidence demonstrates that Dr. Ramirez spoke with Yancy on May 3, 2000 and informed her of Yates's post-surgery condition. If, as Yancy alleges, Yates has been continuously incapacitated since that time, Yancy knew of her condition and retained a lawyer well within the limitations period. On this record, there is no fact issue establishing that Yancy (on Yates's behalf) did not have a reasonable opportunity to discover the alleged wrong and bring suit within the limitations period or that she sued within a reasonable time after discovering the alleged wrong. Thus, the open courts provision does not save Yates's time-barred negligence claims. *Shah*, 67 S.W.3d at 847.

In [*786 Tinkle v. Henderson](#), 730 S.W.2d 163, 167 (Tex.App.-Tyler 1987, writ ref'd),⁶ the court recognized that requiring an incapacitated plaintiff to comply with the Tort Claims Act's notice provision would “require an impossible thing” and violate the due process guarantees of the Texas Constitution. Here, requiring Yates to comply with [section 10.01](#) 's limitations period does not “require an impossible thing”; she had a guardian, retained a lawyer, and filed suit, all within the applicable period. That Yancy chose, for unknown reasons, to sue some defendants but not others does not raise due process concerns. Because [section 10.01](#) is constitutional as applied to Yates, there is no need to strike it down because it might operate unconstitutionally in another case. See *Morrison v. Chan*, 699 S.W.2d 205, 207 (Tex.1985).

IV

Conclusion

We affirm the court of appeals' judgment. [TEX.R.APP. P. 60.2\(a\)](#).

All Citations

236 S.W.3d 778, 51 Tex. Sup. Ct. J. 63

Footnotes

- 1 Act of May 30, 1977, 65th Leg., R.S., ch. 817, [§ 10.01](#), 1977 Tex. Gen. Laws 2039, 2052, *repealed by* Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 10.09, 2003 Tex. Gen. Laws 847, 884 (current version at [TEX. CIV. PRAC. & REM. CODEE § 74.251](#)). The prior law continues in effect for cases like this one, filed before the new Act's September 1, 2003 effective date. Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 23.02(d), 2003 Tex. Gen. Laws 847, 899.
- 2 Yancy alleged that United Surgical owned and operated Valley View Surgical Center, where Yates's lithrotripsy was performed.
- 3 The trial court's order was silent on the objections.
- 4 We assume, without deciding, that the court of appeals correctly concluded that the objections raised matters of substance, not form, and, therefore, that the failure to obtain an explicit ruling from the trial court did not waive the objections.
- 5 See [TEX.R. EVID. 701](#) ("If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness...."); see also [Lee v. Lee](#), 424 S.W.2d 609, 611 (Tex.1968) (holding that where there was "no direct testimony in the record of acts, demeanor or condition indicating that testator lacked testamentary capacity on [a certain date], testator's mental condition on that date may be determined from lay opinion testimony based upon the witnesses' observations of testator's conduct either prior or subsequent to the execution").
- 6 [Tinkle](#) has the weight of our own precedent. See [Hyundai Motor Co. v. Vasquez](#), 189 S.W.3d 743, 754 n. 52 (Tex.2006)(citing TEXAS RULES OF FORM (Texas Law Review Ass'n et al. eds., 10th ed.2005) (In cases decided after 1927, "writ refused" denotes that the "[j]udgment of the court of civil appeals is correct," with "[s]uch cases hav[ing] equal precedential value with the Texas Supreme Court's own opinions.")).



KeyCite Yellow Flag - Negative Treatment

Declined to Extend by [USPPS, Ltd. v. Avery Dennison Corp.](#), 5th Cir. (Tex.), June 17, 2009

988 S.W.2d 746

Supreme Court of Texas.

KPMG PEAT MARWICK, Petitioner,

v.

HARRISON COUNTY HOUSING
FINANCE CORP., Respondent.

No. 97-0729.

|

Argued Oct. 20, 1998.

|

Decided March 25, 1999.

County housing finance corporation brought action against accounting firm providing auditing services for bond issues, asserting negligence, breach of warranty, and Deceptive Trade Practices Act (DTPA) claims. The 71st Judicial District Court, Harrison County, Bonnie Leggat, J., granted summary judgment to accounting firm based on statute of limitations. County housing finance corporation appealed. The Court of Appeals reversed in part, [948 S.W.2d 941](#), and accounting firm petitioned for review. The Supreme Court, [Enoch, J.](#), held that DTPA and negligence claims, relating to financial irregularities that resulted in bond trustee's premature sale of reserve fund assets, accrued by date that county housing finance corporation first sued trustee.

Court of appeals reversed and judgment rendered.

West Headnotes (9)

[1] Appeal and Error

[Extent of Review Dependent on Nature of Decision Appealed from](#)

The standard for reviewing a summary judgment is whether the successful movant at the trial level carried its burden of showing that there is no genuine issue of material fact and that judgment should be granted as a matter of law. [Vernon's Ann.Texas Rules Civ.Proc., Rule 166a\(c\)](#).

[298 Cases that cite this headnote](#)

[2] Appeal and Error

[Judgment](#)

In conducting review of summary judgment, appellate court takes as true all evidence favorable to the nonmovant, and makes all reasonable inferences in the nonmovant's favor. [Vernon's Ann.Texas Rules Civ.Proc., Rule 166a\(c\)](#).

[171 Cases that cite this headnote](#)

[3] Judgment

[Presumptions and Burden of Proof](#)

A defendant moving for summary judgment on the affirmative defense of limitations has the burden to conclusively establish that defense; thus, the defendant must (1) conclusively prove when the cause of action accrued, and (2) negate the discovery rule, if it applies and has been pleaded or otherwise raised, by proving as a matter of law that there is no genuine issue of material fact about when the plaintiff discovered, or in the exercise of reasonable diligence should have discovered the nature of its injury. [Vernon's Ann.Texas Rules Civ.Proc., Rule 166a\(c\)](#).

[460 Cases that cite this headnote](#)

[4] Judgment

[Presumptions and Burden of Proof](#)

If summary judgment movant establishes that the statute of limitations bars action, the nonmovant must then adduce summary judgment proof raising a fact issue in avoidance of the statute of limitations. [Vernon's Ann.Texas Rules Civ.Proc., Rule 166a\(c\)](#).

[209 Cases that cite this headnote](#)

[5] Limitation of Actions

[Nature of Harm or Damage, in General](#)

County housing finance corporation's Deceptive Trade Practices Act (DTPA)

claim against accounting firm that provided auditing services for bond issue, relating to financial irregularities that resulted in bond trustee's premature sale of reserve fund assets, accrued by date that county housing finance corporation first sued trustee, when it was indisputably aware that it was injured and that its injury was caused by the wrongful conduct of another, rather than when it thereafter specifically learned during discovery that accounting firm knew about financial irregularities. [V.T.C.A., Bus. & C. § 17.565](#).

[28 Cases that cite this headnote](#)

[6] Limitation of Actions

 In General; What Constitutes Discovery

Under discovery rule, cause of action accrues when the plaintiff knew or should have known of the wrongfully caused injury; plaintiff need not know the specific nature of each wrongful act that may have caused the injury.

[42 Cases that cite this headnote](#)

[7] Judgment

 Presumptions and Burden of Proof

Party asserting fraudulent concealment as an affirmative defense to the statute of limitations has the burden to raise it in response to the summary judgment motion and to come forward with summary judgment evidence raising a fact issue on each element of the fraudulent concealment defense; mere pleading does not satisfy either burden.

[193 Cases that cite this headnote](#)

[8] Limitation of Actions

 Concealment of Cause of Action

When a defendant has fraudulently concealed the facts forming the basis of the plaintiff's claim, limitations does not begin to run until the claimant, using reasonable diligence, discovered or should have discovered the injury.

[71 Cases that cite this headnote](#)

[9] Limitation of Actions

 Professional Negligence or Malpractice

County housing finance corporation's negligence claim against accounting firm that provided auditing services for bond issue, relating to financial irregularities that resulted in bond trustee's premature sale of reserve fund assets, accrued, at very latest, by date that county housing finance corporation first sued trustee, when it was indisputably aware that it was injured and that its injury was caused by the wrongful conduct of another, rather than when it thereafter specifically learned during discovery that accounting firm knew about financial irregularities. [V.T.C.A., Civil Practice & Remedies Code § 16.003\(a\)](#).

[21 Cases that cite this headnote](#)

Attorneys and Law Firms

***747 Timothy W. Mountz**, Dallas, Jane A. Nenniger, **Macey Reasoner Stokes**, Houston, for Petitioner.

Gregory P. Grajczyk, Milbank, SD, James W. Hill, Longview, for Respondent.

Opinion

Justice **ENOCH** delivered the opinion of the Court.

We are asked to decide whether Harrison County Housing Finance Corporation's (HCH) claims against KPMG Peat Marwick, LLP for violations of the Deceptive Trade Practices Act and negligence are barred by the two-year statute of limitations. The trial court granted summary judgment for Peat Marwick on all of HCH's claims. But the court of appeals reversed the trial court's summary judgment on the DTPA and negligence claims and remanded these for trial.¹

Applying the discovery rule, the court of appeals held that neither claim was time-barred. It reasoned that Peat Marwick had not presented conclusive evidence that HCH discovered or in the exercise of reasonable diligence should have discovered the wrongful act which allegedly caused its injury more than two years before HCH filed suit.²

To the contrary, we conclude that Peat Marwick has conclusively established that HCH's claims against Peat Marwick accrued more than two years before suit was filed. Accordingly, we reverse the court of appeals' judgment on both the DTPA and negligence claims and render judgment that HCH take nothing.

From 1980 to 1990, Peat Marwick provided accounting and auditing services to HCH for a series of bonds HCH had issued. In addition, Peat Marwick was to ensure that the trustee for the bonds, First Interstate Bank of California, complied with the trust indenture.

Under the trust indenture, one of First Interstate's duties as trustee was overseeing a capital reserve fund established to pay principal or to redeem bonds. And during the period of the auditing services, specifically in 1985, First Interstate hired, on its own behalf, a partner from Peat Marwick to prepare a special procedures report about the trust assets. But Peat Marwick did not tell HCH about this dual representation.

On February 1, 1993, HCH filed suit against First Interstate and one of its shareholders, alleging breach of fiduciary duty, breach of contract, negligence, and gross negligence. HCH alleged that in February 1989, First Interstate prematurely sold assets in the capital reserve fund, resulting in a loss in excess of \$621,000 when the bonds were refunded in December 1991. First Interstate and its shareholder moved for summary judgment on several grounds, including that the bank had not mismanaged the trust funds, that HCH was well informed of the bank's actions through monthly reports, and that HCH's claims were barred by the applicable *748 statutes of limitations. Without specifying the grounds, the trial court granted First Interstate's motion for summary judgment. HCH did not appeal.

On October 1, 1993, while the First Interstate lawsuit was still pending, HCH learned about Peat Marwick's 1985 agreement with First Interstate and that Peat Marwick's 1985 audit of First Interstate's records had revealed irregularities in First Interstate's accounting of the trust assets. According to HCH, Peat Marwick informed First Interstate but not HCH of the irregularities. HCH further claims it then discovered that Peat Marwick had advised First Interstate that the capital reserve fund could be set at an amount lower than what the trust indenture required.

And HCH asserts that Peat Marwick did not report that advice to HCH.

HCH sued Peat Marwick in federal court on July 14, 1995, but the case was dismissed for lack of subject matter jurisdiction. HCH then filed suit in state court. For this appeal, Peat Marwick concedes that July 14, 1995, is the applicable date to determine whether HCH's claims were barred when filed.³

In this case, HCH alleged that Peat Marwick, as the trust's auditor, either negligently or intentionally failed to disclose First Interstate's mismanagement of the trust. HCH further alleged causes of action for breach of warranty (which is not part of this appeal) and violations of the DTPA.

In support of its motion for summary judgment on limitations grounds, Peat Marwick attached HCH's original petition in the suit against First Interstate. That petition sought recovery for the same injury—the premature selling of the fund assets in 1989 resulting in a loss in excess of \$621,000—that HCH alleges in this suit was caused by Peat Marwick's wrongful conduct. Peat Marwick contends that the petition against First Interstate demonstrates that HCH knew of its claim no later than February 1, 1993. Apparently in response, HCH amended its petition to allege that not until October 1, 1993, did it learn of Peat Marwick's role in the disputed financial irregularities. But it does not appear that HCH filed a formal response to Peat Marwick's motion for summary judgment or produced any evidence to defeat the motion. As mentioned, the trial court granted summary judgment.

I. Summary Judgment Standard of Review

[1] [2] The standard for reviewing a summary judgment under [Texas Rule of Civil Procedure 166a\(c\)](#) is whether the successful movant at the trial level carried its burden of showing that there is no genuine issue of material fact and that judgment should be granted as a matter of law.⁴ In conducting our review, we take as true all evidence favorable to the nonmovant, and we make all reasonable inferences in the nonmovant's favor.⁵

[3] [4] A defendant moving for summary judgment on the affirmative defense of limitations has the burden to conclusively establish that defense.⁶ Thus, the defendant must (1) conclusively prove when the cause of action accrued, and (2) negate the discovery rule, if it applies and has been pleaded or otherwise raised, by proving as a matter of law that there is no genuine issue of material fact about when the plaintiff discovered, or in the exercise of reasonable diligence should have discovered the nature of its injury.⁷ If the movant establishes that the statute of limitations bars the action, the nonmovant must then adduce summary judgment proof raising a fact issue in avoidance of the statute of limitations.⁸

*749 II. Accrual of HCH's DTPA Claim

[5] A DTPA claim is subject to a two-year statute of limitations. The claim accrues when “the consumer discovered or in the exercise of reasonable diligence should have discovered the occurrence of the false, misleading, or deceptive act or practice.”⁹ Thus, the discovery rule applies to HCH's DTPA claim.¹⁰ We note that effective September 1, 1995, the Legislature amended the DTPA to exempt professional services with some exceptions. But because this suit was originally filed before that date, the 1995 amendments do not apply.¹¹

[6] Contending that during the relevant time period Peat Marwick had worked for First Interstate independently as well as for HCH, HCH argues that its claims against Peat Marwick did not accrue until October 1, 1993, when it learned through discovery in the First Interstate suit that Peat Marwick knew of financial irregularities in the bond issue but failed to report them to HCH. In agreeing with HCH, the court of appeals erroneously concluded that in recent decisions this Court employed a “new formulation” of the discovery rule.¹² The court of appeals held that under this “new formulation,” a claim does not accrue until plaintiff knows not only of the injury, but the specific nature of each wrongful act that may have caused the injury.¹³ This is incorrect. The rule in those cases was, as it is in this one, that accrual occurs when the plaintiff knew or should have known of the wrongfully caused injury.¹⁴

The summary judgment evidence established that the wrongful injury HCH alleges it suffered is the loss of over

\$621,000 in December 1991 when it refunded the bonds following the premature sale in 1989 of the reserve fund assets. Significantly, HCH sued First Interstate over this precise injury in early 1993, less than two years later. Indisputably, HCH was aware by then of its injury and that its injury was caused by the wrongful conduct of another.

The loss from the premature sale of the fund assets should have caused HCH to investigate not only the possibility that First Interstate had mismanaged the fund assets, as HCH apparently did because it sued First Interstate, but also Peat Marwick's possible involvement in the mismanagement and loss. HCH had hired Peat Marwick to do annual trust asset audits, including the reserve fund, to ensure compliance with the trust indenture. Therefore, the loss should have caused HCH to also investigate why its auditor, Peat Marwick, did not discover or report the mismanagement.

As an independent ground to defeat summary judgment, HCH asserts that Peat Marwick fraudulently concealed its wrongful conduct, and limitations did not begin to run until HCH knew or should have known of its injury. HCH also asserts that its pleading is sufficient summary judgment evidence of the affirmative defense of fraudulent concealment to defeat Peat Marwick's summary judgment motion. In both respects, HCH is incorrect.

[7] First, a party asserting fraudulent concealment as an affirmative defense to the statute of limitations has the burden to raise it in response to the summary judgment motion¹⁵ and to come forward with summary judgment evidence raising a fact issue on each element of the fraudulent concealment defense.¹⁶ A mere pleading does not satisfy *750 either burden.¹⁷ Thus, even assuming that HCH pled fraudulent concealment as an affirmative defense to Peat Marwick's answer pleading limitations, HCH still had to respond to Peat Marwick's summary judgment motion. There is no such response in the record. Therefore, HCH did not carry its burden to both plead the defense and support it with summary judgment evidence.

[8] Second, when a defendant has fraudulently concealed the facts forming the basis of the plaintiff's claim, limitations does not begin to run until the claimant, using reasonable diligence, discovered or should have discovered the injury.¹⁸ Because Peat Marwick's

summary judgment evidence conclusively established that HCH discovered its injury more than two years before it sued Peat Marwick, Peat Marwick is entitled to summary judgment. As with the discovery rule, once HCH knew that it had been injured by fund mismanagement, it should have investigated why its auditor, Peat Marwick, had failed to discover or report the mismanagement to HCH. Accordingly, fraudulent concealment pleadings do not rescue HCH's DTPA claim.

III. Accrual of HCH's Negligence Claim

[9] Under [Section 16.003 of the Civil Practice and Remedies Code](#), negligence claims, including accounting malpractice, must be brought “not later than two years after the day the cause of action accrues.”¹⁹ Because the statute does not define or specify when accrual occurs, we look to the common law to determine when a cause of action accrues.²⁰

HCH argues that its negligence claim against Peat Marwick did not accrue until it learned through discovery in the First Interstate suit of Peat Marwick's wrongful conduct. We disagree.

This Court has never considered whether the discovery rule applies to auditing malpractice claims. Assuming without deciding that it does, however, the summary judgment evidence establishes that HCH knew or should have known of its negligence claim more than two years before it filed suit. HCH relies on the same wrongfully caused injury asserted in the DTPA cause of action to claim that Peat Marwick was negligent. And as we have mentioned, the evidence conclusively establishes that HCH knew of the reserve fund's mismanagement, at least, no later than when it filed the first suit against First Interstate, February 1, 1993. Consequently, HCH's negligence claim is also time-barred. Furthermore, as with HCH's DTPA claims, its fraudulent concealment pleadings do not rescue the negligence claim.

Peat Marwick has established the affirmative defense of limitations by conclusively showing that HCH's causes of action accrued more than two years before HCH filed suit. As a result, limitations bars HCH's claims for DTPA violations and negligence and Peat Marwick is entitled to summary judgment. Therefore, we reverse the court of appeals' judgment and render judgment that HCH take nothing.

All Citations

988 S.W.2d 746, 42 Tex. Sup. Ct. J. 429

Footnotes

- 1 948 S.W.2d 941.
- 2 *Id.* at 947.
- 3 See [TEX. CIV. PRAC. & REM.CODE § 16.064\(a\)](#).
- 4 See, e.g., *Lear Siegler, Inc. v. Perez*, 819 S.W.2d 470, 471 (Tex.1991); *Nixon v. Mr. Property Management Co.*, 690 S.W.2d 546, 548–49 (Tex.1985).
- 5 See *Nixon*, 690 S.W.2d at 548–49.
- 6 See *Velsicol Chem. Corp. v. Winograd*, 956 S.W.2d 529, 530 (Tex.1997).
- 7 See *Burns v. Thomas*, 786 S.W.2d 266, 267 (Tex.1990); *Woods v. William M. Mercer, Inc.*, 769 S.W.2d 515, 518 n. 2 (Tex.1988).
- 8 See *City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 678 (Tex.1979).
- 9 [TEX. BUS. & COM.CODE § 17.565](#).
- 10 See *Burns*, 786 S.W.2d at 267; see also *Murphy v. Campbell*, 964 S.W.2d 265, 271 (Tex.1997).
- 11 See [TEX. BUS. & COM.CODE § 17.49\(c\)](#).
- 12 See 948 S.W.2d at 946 (citing *Diaz v. Westphal*, 941 S.W.2d 96, 99 (Tex.1997); *S.V. v. R.V.*, 933 S.W.2d 1, 4 (Tex.1996)).
- 13 See *id.* at 947.
- 14 See *Murphy*, 964 S.W.2d at 271; *Diaz*, 941 S.W.2d at 99; *S.V.*, 933 S.W.2d at 4; see also *Childs v. Haussecker*, 974 S.W.2d 31, 40 (Tex.1998); *Russell v. Ingersoll–Rand Co.*, 841 S.W.2d 343, 344 n. 3 (Tex.1992); *Moreno v. Sterling Drug, Inc.*, 787 S.W.2d 348, 351 (Tex.1990).

- 15 See TEX.R. CIV. P. 166a(c); *Hudson v. Wakefield*, 711 S.W.2d 628, 630 n. 1 (Tex.1986); *City of Houston*, 589 S.W.2d at 679.
- 16 See *American Petrofina, Inc. v. Allen* 887 S.W.2d 829, 830 (Tex.1994); *Nichols v. Smith*, 507 S.W.2d 518, 521 (Tex.1974).
- 17 See *City of Houston*, 589 S.W.2d at 678.
- 18 See *Computer Assocs. Int'l, Inc. v. Altai, Inc.*, 918 S.W.2d 453, 455 (Tex.1994); *Estate of Stonecipher v. Estate of Butts*, 591 S.W.2d 806, 809 (Tex.1979).
- 19 TEX. CIV. PRAC. & REM.CODE § 16.003(a); see also *Murphy*, 964 S.W.2d at 270.
- 20 See *Childs*, 974 S.W.2d at 36; *Murphy*, 964 S.W.2d at 270.



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Not Followed as Dicta [Russell v. Ingersoll-Rand Co.](#), Tex.App.-Hous. (1 Dist.), August 2, 1990

787 S.W.2d 348

Supreme Court of Texas.

Alfred MORENO et al., Appellants,

v.

STERLING DRUG, INC., Appellees.

No. C-7744.

|

March 28, 1990.

|

Rehearing Overruled May 9, 1990.

The Court of Appeals for the Fifth Circuit, [850 F.2d 1047](#), certified questions to the Texas Supreme Court. The Supreme Court, [Spears, J.](#), held that: (1) discovery rule does not apply to statute of limitations for actions for injury resulting in death, and (2) statute of limitations does not violate open courts provision of State Constitution.

Questions answered.

Doggett, J., filed a dissenting opinion in which [Ray](#) and [Mauzy, JJ.](#), joined.

West Headnotes (7)

[1] Death

🔑 Computation of period of limitation

Discovery rule does not apply to statute of limitations for actions for injury resulting in death where statute specifically provides that such a cause of action accrues on death of injured person. [V.T.C.A., Civil Practice & Remedies Code § 16.003\(b\)](#).

[33 Cases that cite this headnote](#)

[2] Limitation of Actions

🔑 In general;what constitutes discovery

For purposes of application of limitations statute, cause of action can generally be said to accrue when wrongful act effects injury, regardless of when plaintiff learned of injury.

[119 Cases that cite this headnote](#)

[3] Limitation of Actions

🔑 In general;what constitutes discovery

When applied, discovery rule operates to toll running of period of limitations until time that plaintiff discovers, or through exercise of reasonable care and diligence should have discovered, nature of his injury.

[188 Cases that cite this headnote](#)

[4] Limitation of Actions

🔑 Concealment of Cause of Action

“Doctrine of fraudulent concealment” provides that where defendant is under duty to make disclosure but fraudulently conceals existence of cause of action from party to whom it belongs, defendant is estopped from relying on defense of limitations until party learns of right of action or should have learned thereof through the exercise of reasonable diligence.

[38 Cases that cite this headnote](#)

[5] Statutes

🔑 Plain language;plain, ordinary, common, or literal meaning

Where language in statute is unambiguous, Supreme Court must seek intent of legislature as found in plain and common meaning of words and terms used.

[64 Cases that cite this headnote](#)

[6] Constitutional Law

🔑 Conditions, Limitations, and Other Restrictions on Access and Remedies

To establish “open courts” violation, litigant must show that he has well-recognized common law cause of action that is being restricted and must show that restriction is unreasonable or arbitrary when balanced against purpose and basis of statute. [Vernon's Ann.Texas Const. Art. 1, § 13](#).

[77 Cases that cite this headnote](#)

[7] **Constitutional Law**

🔑 Time for proceedings

Limitation of Actions

🔑 Constitutionality of statute

Statute of limitations requiring that action for injury resulting in death be brought not later than two years after day cause of action accrues does not violate open courts provision of State Constitution inasmuch as wrongful death cause of action was statutory and not a common law cause of action. [V.T.C.A., Civil Practice & Remedies Code § 16.003\(b\)](#); [Vernon's Ann.Texas Const. Art. 1, § 13](#).

[155 Cases that cite this headnote](#)

Attorneys and Law Firms

*349 [Les Mendelsohn](#), [Randall C. Jackson, Jr.](#), San Antonio, for appellants.

[P. Michael Jung](#), [Mark Donheiser](#), Dallas, for appellees.

OPINION

[SPEARS](#), Justice.

This case is before us upon certified questions from the United States Court of Appeals for the Fifth Circuit. Pursuant to [TEX. CONST. art. V § 3–c](#), we have jurisdiction to answer the following certified questions:

1. Does the “discovery rule” apply to the Texas Statute of Limitations, [TEX.CIV.PRAC. & REM.CODE § 16.003\(b\)](#), in an action brought pursuant to the Texas Wrongful Death and Survival Statutes, [TEX.CIV.PRAC. & REM CODE § 71.001 et seq.](#) and [§ 71.021](#), respectively?
2. If the discovery rule does not apply to the Texas Statute of Limitations in wrongful death and survival actions, does that statute of limitations as applied to the plaintiffs herein, violate the open courts provision of the Constitution of the State of Texas, [TEX. CONST. art. I § 13](#)?

For the reasons stated in this opinion, we answer that the discovery rule does not apply to the wrongful death statute of limitations found in [section 16.003\(b\)](#), and, that [section 16.003\(b\)](#) as applied to the plaintiffs in this case does not violate [article I, section 13 of the Texas Constitution](#).

For clarity, we emphasize that these issues are before us on certified questions from the Fifth Circuit. This is a very limited procedural device; we answer only the questions certified and nothing more. *See* [Tex.R.App.P. 114](#). Thus, the whole case is not before this court as it would be in an ordinary appeal.

The essential facts of this case have been certified to this court. On January 21, 1981, Alfred Moreno, Jr., the infant son of Alfred and Emma Moreno, died of [Reye's syndrome](#). On September 19, 1981, Shawna Rae Sloan, the infant daughter of James and Camilla Sloan, died of [Reye's syndrome](#). In the days preceding their deaths, *350 the infants had been administered doses of Bayer Children's [Aspirin](#), manufactured by Sterling Drug, Inc. Sometime after the deaths of the infants the parents were informed that in some instances the use of [aspirin](#) factored into [Reye's syndrome](#) deaths. On October 22, 1985, the parents filed separate wrongful death suits against Sterling Drug in state district court. Sterling Drug removed the actions to the United States District Court for the Western District of Texas.

Following removal, Sterling Drug moved for summary judgment in both suits, claiming that the actions were barred by the Texas Wrongful Death Statute of Limitations, [TEX.CIV.PRAC. & REM.CODE ANN. § 16.003\(b\)](#)(Vernon 1986). The federal district court dismissed the suits, citing the recent Fifth Circuit decision of [Tennimon v. Bell Helicopter Textron, Inc.](#), 823 F.2d 68 (5th Cir.1987), wherein that court held the discovery rule does not apply to [section 16.003\(b\)](#). The cases were consolidated on appeal, and Moreno and Sloan (collectively “Moreno”) moved for certification of the legal questions to this court. A panel of the Fifth Circuit denied the motion to certify and affirmed in an unpublished opinion on the basis of [Tennimon](#). On rehearing and after en banc reconsideration of the certification question, the Fifth Circuit granted the motion to certify.

[1] The first question is whether the “discovery rule” applies to the statute of limitations for actions based on

injuries resulting in death. The relevant limitations statute, [section 16.003, TEX.CIV.PRAC. & REM.CODE ANN.](#), provides as follows:

(a) A person must bring suit for ... personal injury ... not later than two years after the cause of action accrued.

(b) A person must bring suit not later than two years after the day the cause of action accrues in an action for injury resulting in death. The cause of action accrues on the death of the injured person.

The only courts to construe [section 16.003\(b\)](#) have found it clear and unambiguous in prescribing an absolute two-year limitation period for bringing a wrongful death case. [Tennimon v. Bell Helicopter Textron, Inc.](#), 823 F.2d 68, 73 (5th Cir.1987); [Stiles v. Union Carbide Corp.](#), 520 F.Supp. 865, 867 (S.D.Tex.1981). Those decisions, along with a literal reading of [section 16.003\(b\)](#), would suggest that Moreno's wrongful death action is barred because it was brought after the two-year limitations period had expired. Moreno, however, argues that the "discovery" rule should apply to [section 16.003\(b\)](#), because he neither knew nor could have known the cause of his injury within the two-year limitation period. Specifically, he asserts that his suit was timely brought because it was filed within two years of the discovery of the link between aspirin and [Reye's syndrome](#).

Moreno offers a number of arguments for why this court should disregard the plain language of [section 16.003\(b\)](#) and apply the discovery rule to the limitations period for wrongful death actions. First, he points out that this court has applied the discovery rule in determining the limitations period under the statutory predecessor to [section 16.003\(a\)](#), which governs actions for personal injury *not* resulting in death. Citing [Ex parte Pruitt](#), 551 S.W.2d 706, 709 (Tex.1977) for the proposition that statutes should be read as a whole and construed to give purpose and meaning to every part, Moreno argues that the underlying purpose of [section 16.003](#) is to authorize application of the discovery rule to subparts (a) and (b). Second, Moreno contends that the second sentence of [section 16.003\(b\)](#) only fixes the *earliest* time the cause of action may accrue and was intended to "save" the cause of action from being barred when more than two years elapse between injury and death. See [DeHarn v. Mexican Nat'l Ry. Co.](#), 86 Tex. 68, 23 S.W. 381 (1893). Moreno argues that this court should set the *latest* date of accrual beyond death (i.e. at discovery of cause of action) because the

purpose of [section 16.003\(b\)](#) is to expand the time in which a wrongful death action can be brought. Finally, Moreno maintains that if subparts (a) and (b) are not interpreted consistently it will result in the absurdity of allowing a defendant to be exonerated for conduct which *351 kills but held liable for conduct which merely maims. See [Hanebuth v. Bell Helicopter International](#), 694 P.2d 143, 147 (Alaska 1984). Moreno argues that this court should avoid this absurdity by construing subpart (b) to allow application of the discovery rule.

We begin our analysis by observing that the primary purpose of [section 16.003](#), as with all limitation statutes, is to compel the exercise of a right of action within a reasonable time so that the opposing party has a fair opportunity to defend while witnesses are available. [Willis v. Maverick](#), 760 S.W.2d 642, 644 (Tex.1988). [Section 16.003](#) embodies a legislative determination of what a "reasonable time" is for bringing both an action for injuries not resulting in death (subpart a), and one for injuries resulting in death (subpart b). Under both subparts (a) and (b), an action must be brought within two years of the date the cause of action "accrues." Only subpart (b), however, goes on to specify that a cause of action "accrues" at a certain time—the date of death. When the legislature employs the term "accrues" without an accompanying definition, the courts must determine when that cause of action accrues and thus when the statute of limitations commences to run. Indeed, on three previous occasions this court has adopted and relied upon the following language from [Fernandi v. Strully](#), 35 N.J. 434, 173 A.2d 277, 285 (1961):

[T]he question when a cause of action accrues is a judicial one, and to determine it in any particular case is to establish a general rule of law for a class of cases, which rule must be founded on reason and justice.... In the absence of legislative definition and specification, the ... courts have often been called upon to delineate the statute; they have consciously sought to apply it with due regard to the underlying statutory policy of repose, without, however, permitting unnecessary individual injustices.

Willis, 760 S.W.2d at 644; *Robinson v. Weaver*, 550 S.W.2d 18, 20 (Tex.1977); *Gaddis v. Smith*, 417 S.W.2d 577, 580–81 (Tex.1967).

[2] [3] [4] For purposes of the application of limitation statutes, a cause of action can generally be said to accrue when the wrongful act effects an injury, regardless of when the plaintiff learned of such injury. *Robinson*, 550 S.W.2d at 19. The discovery rule represents an exception to this general rule of accrual. *Id.* The discovery rule is a judicially constructed test which is used to determine when a plaintiff's cause of action accrued. *Weaver v. Witt*, 561 S.W.2d 792, 794 (Tex.1977). When applied, the rule operates to toll the running of the period of limitations until the time that the plaintiff discovers, or through the exercise of reasonable care and diligence should discover, the nature of his injury. *Id.* at 793–94. This court has applied the discovery rule to medical malpractice cases in which the plaintiff did not, and could not, know of the injury at the time it occurred. See *Gaddis v. Smith*, 417 S.W.2d 577, 580 (Tex.1967) (negligence action against physician for leaving sponge in patient's body accrues when patient learns of, or in exercise of reasonable care and diligence, should have learned of presence of sponge); *Hays v. Hall*, 488 S.W.2d 412 (Tex.1972) (action for negligent performance of vasectomy accrues when plaintiff discovers or should have discovered that he remains fertile). Similarly, this court has applied the discovery rule in a limited number of other cases when the injured party did not, and could not, know of his injury at the time it occurred. See e.g., *Bayouth v. Lion Oil Co.*, 671 S.W.2d 867 (Tex.1984); *Kelley v. Rinkle*, 532 S.W.2d 947 (Tex.1976); *Quinn v. Press*, 135 Tex. 60, 140 S.W.2d 438 (1940). In each of these cases, this court applied the discovery rule to a statute of limitations which left the phrase “accrual” undefined. By contrast, section 16.003(b) specifically defines “accrual” as the date of death. The question here is whether the discovery rule should be applied to a limitations statute which has clearly and unequivocally prescribed that a cause of action accrues upon the occurrence of a specified event. For a number of reasons, we *352 hold that it should not.¹

Plain Meaning of Section 16.003(b).

[5] Moreno's argument that the discovery rule should be applied to section 16.003(b) as a matter of statutory construction ignores the plain language of the statute. Where language in a statute is unambiguous, this court

must seek the intent of the legislature as found in the plain and common meaning of the words and terms used. *RepublicBank Dallas, N.A. v. Interkal, Inc.*, 691 S.W.2d 605, 607 (Tex.1985); *Cail v. Service Motors, Inc.*, 660 S.W.2d 814, 815 (Tex.1983). Section 16.003(b) specifically provides that in a wrongful death action “a person must bring suit not later than two years after the day the cause of action accrues” and goes on to fix “accrual” at the injured person's death. The express language of the statute, therefore, evidences the legislative intent to fix the only date of accrual, and not merely the earliest, as Moreno contends.²

Moreno's reliance on our decision in *DeHarn* is also misguided. In *DeHarn*, this court interpreted the accrual language in TEX.REV.CIV.STAT. art. 3202 (1879), which was the statutory predecessor to section 16.003(b). The opinion describes the reason for Article 3202 as follows:

Since no action could be brought by the relatives of the injured person until death had ensued, and since a great deal of time might elapse between the injury and the death, it was reasonable that the time of death should be taken as the point from which limitation should begin to run.

DeHarn, 23 S.W. at 381–82. Moreno construes this single passage as evidencing a legislative purpose to extend the beginning of the running of the statute beyond the date of death. But Article 3202 was meant solely to prevent the potential anomaly of limitations running *before* death. Its purpose was not to extend the beginning of the running of the statute *beyond* the date of death. Nothing in the wording of Article 3202 or our discussion in *DeHarn* indicates such a purpose. Moreover, to engraft such a purpose on to section 16.003(b) would be to ignore our oft-repeated pronouncement that the “purpose” of all limitation statutes is to compel the exercise of a right of action within a reasonable time so that the opposing party has a fair opportunity to defend while witnesses are available. See e.g., *Willis*, 760 S.W.2d at 644; *Robinson*, 550 S.W.2d at 20; *Price v. Estate of Anderson*, 522 S.W.2d 690, 692 (Tex.1975); see also *United States v. Kubrick*, 444 U.S. 111, 117, 100 S.Ct. 352, 356, 62 L.Ed.2d 259 (1979) (“[s]tatutes of limitation ... afford plaintiffs what the legislature deems a reasonable time to present their

claims [and] ... protect defendants and courts from having to deal with cases in which the search for truth may be seriously *353 impaired by loss of evidence, memory, or disappearance of witnesses.”).

The Discovery Rule.

Notwithstanding the plain language of [section 16.003\(b\)](#), Moreno argues that the discovery rule should be applied to the statute because our past decisions have applied the rule to [section 16.003\(a\)](#) involving injuries and, in the interest of consistency, [section 16.003\(b\)](#) should be similarly construed. This argument, however, misconceives both the function of the discovery rule and the power of this court to craft exceptions to legislative enactments.

As we have said, the discovery rule is a judicially conceived exception to statutes of limitation to be used by courts to determine when a cause of action accrues. This court has only applied the rule to “accrual” limitation statutes—i.e. statutes which have failed to define when a cause of action accrues. Because these statutes did not specify a time of “accrual,” this court did not violate a specific legislative directive when it interpreted them to allow for application of the discovery rule. [Section 16.003\(b\)](#), however, prescribes an absolute limitations period by expressly specifying that “accrual” is the date of death. Since [section 16.003\(b\)](#) specifies death as the accrual date for wrongful death actions, there is no need for this court to employ the discovery rule—the legislature has completed the task.³ Furthermore, when faced with other absolute statutes of limitations in which the legislature has specifically defined the date or event which triggers accrual, this court has enforced the literal terms of the statute and refused to engraft a discovery rule. *See e.g., Safeway Stores, Inc. v. Certainteed Corp.*, 710 S.W.2d 544, 546–48 (Tex.1986); *Morrison v. Chan*, 699 S.W.2d 205, 208 (Tex.1985).

Other Jurisdictions.

The overwhelming majority of states construing absolute statutes with similar or identical language to that found in [section 16.003\(b\)](#) have held that the discovery rule does not apply.⁴ These courts offer several rationales for refusing to apply the discovery rule, including: (1) that the rule applies only to accrual statutes but not absolute statutes, *see, e.g., Presslaff*, 403 A.2d at 940; *White*, 693

P.2d at 692; (2) that the fact of death itself is an event which should trigger any and all relevant inquiry, *see, e.g., DeCosse*, 319 N.W.2d at 51; (3) that there is a substantial state interest in promoting the prompt settlement of the affairs of the deceased, *see, e.g., Cadieux*, 593 F.2d at 145; *Pastierik*, 526 A.2d at 323; and (4) that the clear language of the statute cannot be judicially rewritten under the “guise of statutory construction,” *see, e.g., Trimper*, 501 A.2d at 449; *Morano*, 420 N.Y.S.2d at 95. In many of these decisions, the factors suggested *354 by Moreno—“fairness of result” and “legislative purpose”—were, in fact, considered and weighed by the court.

The only case cited by Moreno that directly supports his position is *Hanebuth v. Bell Helicopter International*, 694 P.2d 143 (Alaska 1984). In *Hanebuth*, the majority applied the discovery rule to an absolute limitations statute on the basis that failure to do so would result in injustice and would make it more profitable for a tortfeasor to kill rather than scratch a plaintiff. *Id.* at 146–47. However, as the dissent in *Hanebuth* points out, the majority reached its decision only after it ignored its own recent and controlling precedent, the plain language of the statute, and the vast majority of decisions to the contrary from other jurisdictions. *Id.* at 147 (Moore, J., dissenting). We decline to follow *Hanebuth* for these reasons, and because the decision both relies on distinguishable cases⁵ and fails to recognize the distinction between personal injury and death actions.⁶

Summary.

The language used in [section 16.003\(b\)](#) reflects a clear legislative intent to adopt an absolute two-year limitations period for wrongful death actions. The legislature could have either left “accrual” undefined in [section 16.003\(b\)](#) or could have stated that the cause of action accrues “on the death of the injured person or upon discovery of the cause of death”; either route would have allowed the discovery rule to be applied to [section 16.003\(b\)](#). Instead, the statute unambiguously specifies one event—death—and only that one event as the date upon which the action accrues. By specifying that date, the legislature has foreclosed judicial application of the discovery rule. If we concluded otherwise, we would be disregarding the plain meaning of [section 16.003\(b\)](#), distorting the clear function of the discovery rule, frustrating *355 the legitimate purposes of limitation statutes, and ignoring the well-reasoned opinions of most other jurisdictions.

“Open Courts”.

[6] [7] Article I, section 13 of the Texas Constitution provides:

All courts shall be open, and every person for an injury done him, and his lands, goods, person or reputation, shall have remedy by due course of law.

This provision, known as the “open courts” provision, is premised upon the rationale that the legislature has no power to make a remedy by due course of law contingent upon an impossible condition. *Morrison*, 699 S.W.2d at 207; *Nelson v. Krusen*, 678 S.W.2d 918, 921 (Tex.1984). In order to establish an “open courts” violation, a litigant must satisfy a two-part test: first, he must show that he has a well-recognized common-law cause of action that is being restricted; and second, he must show that the restriction is unreasonable or arbitrary when balanced against the purpose and basis of the statute. *Lucas v. United States*, 757 S.W.2d 687, 690 (Tex.1988); *Sax v. Votteler*, 648 S.W.2d 661, 666 (Tex.1983).

Moreno contends that if section 16.003(b) does not provide for application of the discovery rule, it is unconstitutional because he neither discovered, nor could have discovered through the exercise of reasonable diligence, his cause of action within the two-year limitations period. In other words, Moreno contends that section 16.003(b) is unconstitutional because it makes his remedy contingent on an impossible condition, namely, the discovery of the connection between aspirin and *Reye's syndrome* within two years after his child's death. Moreno argues that the “open courts” provision applies because Texas recognizes a common-law right to assert a wrongful death action. See *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 90 S.Ct. 1772, 26 L.Ed.2d 339 (1970). Alternatively, Moreno argues that wrongful death *should* be accorded common-law status for purposes of review under the “open courts” provision because a death action incorporates common-law elements and because there is no fundamental distinction between a common-law action for non-fatal personal injuries and a statutory action for wrongful death. See *Vassallo v. Nederl–Amerik Stoomy Maats Holland*, 162 Tex. 52, 344 S.W.2d 421, 423 (1961). Finally, Moreno contends that section 16.003(b) is unreasonable and arbitrary because it denies him a remedy

that would have been available to him had his child lived instead of died.

Common-law Requirement.

We first consider the question of whether Moreno is asserting a common-law cause of action. See *Waites v. Sondock*, 561 S.W.2d 772, 774 (Tex.1977); *Lebohm v. City of Galveston*, 154 Tex. 192, 275 S.W.2d 951, 954–55 (1955); *Hanks v. City of Port Arthur*, 121 Tex. 202, 48 S.W.2d 944 (1932). In *Hanks*, this court applied the “open courts” provision to a municipal ordinance which required notice to a municipality of a defective condition prior to the filing of suit. Essential to this court's holding in that case—that the ordinance violated the “open courts” provision—was a determination that the cause of action at issue, municipal liability, was common law rather than statutory. Implicit in the opinion was a recognition of the distinction between a court's power to apply “open courts” protection to common-law causes of action on the one hand, and statutorily created actions on the other. A common-law cause of action exists without a legislative enactment. As such, article I, section 13 of the Texas Constitution mandates that the courts be open to pursuing such claims. The legislature is not entitled to restrict or abrogate a common-law cause of action without a reasonable basis and without providing an adequate substitute. If, however, a cause of action was not recognized at common law, but was itself created by the legislature, any legislative abrogation of the cause of action would not be a true abrogation of a constitutional right. Rather, the legislature would simply not have granted as extensive a right as it might have. See *Castillo v. Hidalgo County Water Dist. 1*, 771 S.W.2d 633, 636 (Tex.App.—Corpus Christi 1989, no writ) (“Open Courts” provision does not apply to wrongful *356 death action, which is a statutory cause of action “that expands the rights of an individual beyond those granted by the common law”); see also *Stout v. Grand Prairie Indep. School Dist.*, 733 S.W.2d 290, 295 (Tex.App.—Dallas 1987, writ ref'd n.r.e.); *Tarrant County Hosp. Dist. v. Ray*, 712 S.W.2d 271, 273 (Tex.App.—Fort Worth 1986, writ ref'd n.r.e.).

This court has repeatedly said there was no recognized common-law cause of action for wrongful death. See *Witty*, 727 S.W.2d at 505–06; *Duhart v. State*, 610 S.W.2d 740, 742 n. 2 (Tex.1980); *Marmon v. Mustang Aviation, Inc.*, 430 S.W.2d 182, 186 (Tex.1968); *Elliott v. City of Brownwood*, 106 Tex. 292, 166 S.W. 1129

(1914); *Galveston, Harrisburg and San Antonio R.R. Co. v. Le Gierse*, 51 Tex. 189, 199 (1879). Wrongful death causes of action owe their existence to statutes changing this common-law rule. [TEX.CIV.PRAC. & REM.CODE ANN. § 71.002](#); *Duhart*, 610 S.W.2d at 742 n. 2; *Marmon*, 430 S.W.2d at 182.⁷ Moreno relies on *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 90 S.Ct. 1772, 26 L.Ed.2d 339 (1970) to support his argument that the common law recognized an action for wrongful death. In *Moragne*, however, while the majority recognized a common-law action for wrongful death in maritime law, it readily acknowledged that no such action existed at common law. 398 U.S. at 382, 384, 90 S.Ct. at 1778, 1779. Similarly, Moreno's argument that a wrongful death action is really a common-law action because it incorporates common-law elements ignores the fact that it is the Wrongful Death Act itself which incorporates and sets forth the "elements" of the cause of action. [TEX.CIV.PRAC. & REM.CODE § 71.002\(b\)](#)(1986). The fact that common-law elements are required is the result of an express statutory provision and does not change the fact that the underlying right to bring the action is statutory.⁸

Summary.

Our most recent open courts decisions have consistently required that the cause *357 of action restricted be one that is well defined in the common law. *Lucas v. U.S.*, 757 S.W.2d 687, 690 (Tex.1988); *Nelson v. Krusen*, 678 S.W.2d 918, 922 (Tex.1984). Moreno's constitutional attack on [section 16.003\(b\)](#) is not premised upon restriction of a common-law cause of action, and, therefore, necessarily fails the first prong of the open courts test. See *Castillo v. Hidalgo County Water Dist. 1*, 771 S.W.2d 633, 636 (Tex.App.—Corpus Christi 1989, no writ) (wrongful death action did not exist at common law, and it is only by virtue of statutory authority that such suits can be maintained; therefore, "open courts" provision simply does not apply).

Finally, and notwithstanding the dissent's argument to the contrary, we believe today's decision is entirely reconcilable with our decision in *Nelson*, 678 S.W.2d at 918. First, *Nelson* involved limitations on a malpractice action—a well-established common law cause of action. See, e.g., *Sax v. Votteler*, 648 S.W.2d 661, 664–666; *Texas & P. Ry. Co. v. Morin*, 66 Tex. 225, 18 S.W. 503 (1886). Second, because the injury complained of in *Nelson* did not manifest itself until *after* limitations had run, the

Nelsons had no reason to know of their injury, and thus their ability to bring suit, until after limitations had expired. In the instant case, the injury—i.e. death—was immediately known. Even in those Texas cases which have applied the discovery rule the courts have held that limitations begin to run *when the fact of injury is known*. See, e.g., *Rascoe v. Anabtawi*, 730 S.W.2d 460, 463 (Tex.App.—Beaumont 1987, no writ) (injury evident and limitations commenced on day plaintiff died); *Love v. Zales Corp.*, 689 S.W.2d 282, 285 (Tex.App.—Eastland 1985, writ ref'd n.r.e.) (discovery rule does not apply in wrongful death cases to toll running of limitations until plaintiff discovers that he has a cause of action); cf. *Coody v. A.H. Robins Co.*, 696 S.W.2d 154, 156 (Tex.App.—San Antonio 1985, no writ) ("The discovery rule speaks only of discovery of the injury [and] does not operate to toll the running of the limitations period until such time as plaintiff discovers all of the elements of a cause of action."); *Otis v. Scientific Atlanta, Inc.*, 612 S.W.2d 665, 666 (Tex.Civ.App.—Dallas 1981, writ ref'd n.r.e.) (limitations run from date injury is discovered, not from date of discovery of responsible party).⁹

For the reasons stated, our answer to the first certified question is that the discovery rule does not apply to [TEX.CIV.PRAC. & REM.CODE § 16.003\(b\)](#). In response to the second certified question, we answer that [§ 16.003\(b\)](#), as interpreted, is not inconsistent with and violative of [Article I, section 13 of the Texas Constitution](#).¹⁰

DOGGETT, J., joined by RAY and MAUZY, JJ., dissenting.

*358 DOGGETT, Justice, dissenting.

Tortfeasors take heart. Today this court grants you absolution—provided, of course, that you inflict only mortal wounds. Treating our century-old statute of limitations for wrongful death like some Strasbourg goose, the court's opinion crams it full of fictional legislative intent, and then ties to it the baggage of ancient English common law which a number of American courts, including the United States Supreme Court, have rejected as totally lacking in logical or historical justification. In this process, the opinion conveniently ignores or superficially distinguishes opinions from this

court. Because I cannot join in this broad grant of a license to kill, I dissent.

Today's decision is irreconcilable with *Nelson v. Krusen*, 678 S.W.2d 918 (Tex.1984), in which this court held unconstitutional a similar “absolute” statute of limitations. Justice Spears, writing for the majority, condemned that statute in no uncertain terms, stating:

The limitation period of [the medical malpractice statute], if applied as written, would require the Nelsons to do the impossible—to sue before they had any reason to know they should sue. *Such a result is rightly described as “shocking” and is so absurd and so unjust that it ought not to be possible.* *Hays v. Hall*, 488 S.W.2d 412, 414 (Tex.1972); *Gaddis v. Smith*, 417 S.W.2d 577, 580, 581 (Tex.1967).

678 S.W.2d at 923 (emphasis supplied). Yet today's decision reaches such an equally shocking and unjust result. The limited facts of this case, certified to this court by the Fifth Circuit, are no less compelling than those in *Nelson*. The Morenos and the Sloans both had infant children who died of *Reye's Syndrome* after being administered doses of Bayer's *Childrens Chewable Aspirin*, manufactured by Sterling Drug, Inc. After the death of the infants, the parents were informed that the use of *aspirin* sometimes contributed to *Reye's Syndrome*. The only real difference between this case and *Nelson* is that here the injured parties had the bad luck to die.¹ *359 The court's opinion thus provides a perverse incentive for a tortfeasor to kill rather than merely maim.

The asserted rationale to support this untenable result is two-fold. First, the court examines the “plain meaning” of the “unambiguous” limitations statute and concludes that the legislature has intentionally foreclosed application of the discovery rule. This approach directly conflicts with the instruction given to us in the Code Construction Act that “*whether or not the statute is considered ambiguous on its face,*” we must consider both the object sought to be obtained and the consequences of a particular construction. *Tex. Gov't Code Ann. § 311.023 (Vernon 1988)* (emphasis supplied).² We are further mandated that in construing this enactment “a just and reasonable

result is intended.” *Id.* § 311.021; *see also Witty v. American General Capital Distributors, Inc.*, 727 S.W.2d 503, 504 (Tex.1987) (the Texas “wrongful death statute is remedial in nature and must be liberally construed ...”).³ As conceded in *Nelson*, what the court has achieved in foreclosing the discovery rule is the converse—a totally unjust and unreasonable result. The parents are permanently denied an opportunity to have their claims for the infants' deaths considered on the merits. The court twists the statute to achieve an artificial, but complete bar to these families recovering by requiring that they bring a cause of action before they could reasonably have discovered its existence.

Any careful analysis of the legislative intent and history of *Section 16.003(b)* contradicts the court's conclusion. An action for wrongful death has been tied to the date of death since the first passage of a death act in Texas and has survived in virtually identical form to this date.⁴ Given this background, the legislature cannot be charged with the intent to abolish the discovery rule in wrongful death actions. *360 It was not until 1967 that this court recognized the application of the discovery rule in an action for personal injuries. *Gaddis v. Smith*, 417 S.W.2d 577 (Tex.1967). While the 1879 Texas Legislature no doubt had its strong points, it cannot be said that it was sufficiently foresighted to have as its objective the abolition of a doctrine that did not exist in either name or substance until almost a century later.⁵

This court examined the applicable legislative purpose many years ago in *De Harn v. Mexican National Ry.*, 86 Tex. 68, 70, 23 S.W. 381, 381–82 (1893):

The reason of the provision is obvious. Since no cause of action could be brought by the relatives of the injured person until death had ensued, and since a great length of time might elapse between the injury and the death, it is reasonable that the time of the death should be taken as the point from which limitation should begin to run.

The court completely misapplies this case. The question is not whether *De Harn* deals with the issue of the application of the discovery rule—as stated above, it could not. The issue is rather to determine the general legislative

intent in setting the date of death as the commencement point for the running of limitations. As *De Harn* states in unmistakable terms, that purpose was solely to protect the beneficiaries of one who lingered after receiving a lethal injury; the statute is designed to preserve, not to destroy, a cause of action. The result reached by today's opinion stands in clear contradiction of this legislative objective.

As evidenced by previous decisions of this court, labelling a statute of limitations “absolute” does not, as the opinion asserts, make it impenetrable to tolling principles. For example, in *Borderlon v. Peck*, 661 S.W.2d 907 (Tex.1983), we tolled an “absolute” statute of limitations on the basis of the common-law doctrine of fraudulent concealment. That doctrine has been held applicable by this court to toll the statute of limitations in actions for wrongful death. *Texas & P. Ry. v. Gay*, 86 Tex. 571, 576, 26 S.W. 599, 614 (Tex.1894).⁶

As a review of the cases cited by the court evidences, tolling of limitations to permit discovery is the rule rather than the exception. See, e.g., *Willis v. Maverick*, 760 S.W.2d 642 (Tex.1988) (discovery rule applicable in legal malpractice action); *Weaver v. Witt*, 561 S.W.2d 792 (Tex.1977) (medical malpractice); *Kelley v. Rinkle*, 532 S.W.2d 947 (Tex.1976) (action for libel of credit reputation). These cases are not limited, as the court's opinion concludes, to tolling limitations until the fact of the injury is known. In *Willis*, we held that:

[T]he statute of limitations for legal malpractice does not begin to run until the claimant discovers or should have discovered through the exercise of reasonable care and diligence the facts establishing the elements of his cause of action.

760 S.W.2d at 646 (emphasis supplied).⁷ Knowledge of Petitioners' causes of action was not complete upon discovery of the injury (*i.e.*, death) as the opinion suggests; *361 the element of the causative link between the use of aspirin and *Reye's Syndrome* was equally critical.⁸

Rather than following the great weight of our own precedent, the court instead relies on two cases in which the court refused to apply the discovery rule. Yet in those cases, unlike here, the legislature had taken more than ample steps to bar application of the rule. In the

first of these two cases construing the “absolute” statute of limitations applicable to health care liability claims, this court had before it abundant materials reflecting the legislative intent underlying the Medical Liability and Insurance Improvement Act. *Morrison v. Chan*, 699 S.W.2d 205, 208 (Tex.1985). At the time that limitation provision was passed, the discovery rule was well known to the Texas Legislature. A key legislative objective was to: “*reduce excessive frequency and severity of health care liability claims.*” *Tex.Rev.Civ.Stat.Ann. art. 4590i, §§ 1.02(a)(5) and 1.02(b)(1)* (Vernon Supp.1989). As evidenced by *De Harn, supra*, the objective in defining the accrual date for wrongful death as the date of death was to *expand* and not to contract the cause of action. Unlike the statute applicable to actions for wrongful death, the health care liability limitation provision makes no reference to an “accrual” of a cause of action and disclaims the effect of other laws that would toll the time period for bringing suits, including for minority and other disabilities. The limitations statute for wrongful death is markedly different in this regard; that statute is subject to tolling for minority and other disabilities. *Tex.Civ.Prac. & Rem.Code Ann. § 16.001* (Vernon 1986 & Supp.1990).

The other cited case, *Safeway Stores, Inc. v. Certainteed Corp.*, 710 S.W.2d 544 (Tex.1986), is even more persuasive authority to construe the statute before us to permit application of the discovery rule. The issue presented in that case was whether the statute of limitations for breach of warranty ran from the date of the breach or that of discovery. The statute sets the date of accrual and explicitly disclaims the applicability of the discovery rule, providing that a “cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach.” *Tex.Bus. & Comm.Code Ann. § 2.725* (Vernon 1968) (emphasis supplied). Thus, in adopting *Section 2.725*, the legislature determined that more was needed to bar the discovery rule than just referring to the date of accrual; *that rule needed to be expressly disclaimed*. This statute demonstrates an appropriate way to preclude application of the discovery rule. The court ignores the fact that the legislature is quite capable of expressly disclaiming the discovery rule but has not done so in the context of wrongful death.

To support its improbable position the court resorts to case law from other jurisdictions which have little comparability to the Texas statute. Most if not all of these cases appear to involve a limitations provision contained

within the wrongful death statute itself and not one, like ours, that is part of a general limitations statute. The courts thus viewed the limitations as a condition upon the right, not merely the remedy, subject to strict construction in derogation of the common law. No such interpretation is applicable in this state. Because the Texas statutes concerning wrongful death and limitations are separate, the latter is procedural rather than a substantive qualification or condition restricting the right to bring an action for death. *Franco v. Allstate Ins. Co.*, 505 S.W.2d 789, 792–93 (Tex.1974).

An approach far superior to that taken by today's opinion is contained in *Hanebuth v. Bell Helicopter International*, 694 P.2d 143, 144 (Alaska 1984). In considering *362 a requirement that a wrongful death action be “commenced within two years after the death,” that court's considerations tracked the same concerns delineated under Texas law. Echoing *Nelson*, the Alaskan court applied the discovery rule to comport with principles of “fundamental fairness,” to be “consistent with the purposes of the act,” and to avoid “unjust and absurd results.” 694 P.2d at 146. The court said it was “profoundly unfair to deprive a litigant of his right to bring a lawsuit before he has any reasonable opportunity to do so.” *Id.* at 147. Further, “a tortfeasor whose conduct has been so grievous as to cause death would be exonerated, while another tortfeasor, guilty of the same conduct except for the fortuity that it merely caused injury, would be held responsible.” *Id.*⁹ The reasoning of today's opinion in rejecting *Hanebuth* is insightful. One who is only maimed, we are told at note 5, may be “in need of time to recover before beginning an investigation.” Why shouldn't parents whose child has been wrongfully taken from them be in need of time to recover and discover as well? Solely because an insensitive court refuses Texas families that right.

The statute before us for interpretation contains only two sentences:

A person must bring suit not later than two years after the day the cause of action accrues for injury resulting in death. The cause of action accrues on the death of the injured person.

Tex.Civ.Prac. & Rem.Code Ann. § 16.003(b) (1986). In today's opinion, the court determines from the “plain

language” of this minimal statute that the legislature intended to bar the yet-to-be-judicially-created discovery rule even though this statute *permits tolling* under exceptions not just grounded in statute, such as for minors, but also those judicially-created, such as for fraudulent concealment. I cannot concur in such a complete manipulation of legislative intent.

The second asserted basis for the decision today is its refusal to extend constitutional protection to a cause of action for wrongful death which it conveniently pigeonholes as “wholly statutory.” Because it is claimed that the “open courts” provision of [article I, section 13 of the Texas Constitution](#) protects only common-law causes of action, the court concludes that it is powerless to review a restriction on the exercise of a statutory wrongful death action. This conclusion is based on two flawed assumptions.

First, the distinction between common law and statutory causes of action for purposes of review under the “open courts” provision is more honored in the breach than the observance. *LeCroy v. Hanlon*, 713 S.W.2d 335 (Tex.1986), authored by Justice Spears, is a prime example. There this court struck as unconstitutional under the “open courts” provision a filing fee that went to state general revenues. The effect of the fee with respect to the individual plaintiff in that case was to bar his filing of suit under the Texas Deceptive Trade Practices Act and the Texas Insurance Code, *i.e.*, *wholly statutory causes of action*. 713 S.W.2d at 336. For reasons indiscernible, the court in *LeCroy* was not troubled by today's controlling distinction between common law and statutory causes of action. Yet the failure to apply the discovery rule so as to prohibit completely a family's exercise of its legal rights closes the door to the Texas courts far more permanently than charging the extra forty dollar filing fee rejected in *LeCroy*. The constitutional guarantee that “[a]ll courts shall be open” to “every person” is a hollow one to families like the Morenos and the Sloans.

Second, this injustice cannot simply be defined away by claiming a wrongful death action is “wholly statutory.” While a *363 wrongful death action may have once been considered a creature of statute, it has evolved into a complex hybrid—part constitutional, part statutory and part judicially-developed common law. An early decision of this court recognized the multi-faceted nature of a

wrongful death action. While noting the statutory nature of the action, this court nonetheless stated:

In our own state, this right of action is wisely recognized by the organic law, supplemented by guarded legislative provisions enacted for the purposes of securing to the beneficiaries just compensation in a case meriting it....

Nelson v. Galveston, H. & S.A. Ry., 78 Tex. 621, 624, 14 S.W. 1021, 1022 (1890) (emphasis supplied).¹⁰

Even the most cursory examination of the history of the Texas Wrongful Death Act reveals its tripartite nature. As first adopted in Texas in 1860, the statute was a mere four paragraphs in length, setting out the beneficiaries, the potential defendants (basically providers of public transport) and the basis of the cause of action (negligence or carelessness), permitting the recovery of damages and requiring suit to be brought within one year after death. Law of February 2, 1860, ch. 35, 1860 Tex.Gen.Laws 32. While the statute has been amended several times over the last 129 years, primarily to expand the class of potential defendants and to permit recovery of exemplary damages, it remains a “bare bones” enactment. Over that lengthy time period, many interstices of the statute have been left to the courts to fill, relying on common-law concepts.¹¹ In fact, writing for the court in *Sanchez v. Schindler*, 651 S.W.2d 249, 252 (Tex.1983), Justice Spears indicated a strong preference for this judicial development of the wrongful death statute. Because of the symbiotic relationship between the common law and statute, an action for wrongful death merits review under the “open courts” provision of [article I, section 13 of the Texas Constitution](#). Labelling this action “statutory” rather than engaging in thoughtful analysis provides a convenient escape mechanism from the Houdini-defying task of reconciling this opinion with *Nelson v. Krusen*.

A cause of action for wrongful death is also in part constitutionally given. As initially adopted, the Texas Wrongful Death Act made no provision for exemplary damages. To correct this omission, the Texas Constitution of 1869 included a provision permitting recovery of exemplary damages for “homicide, through wilful act, or omission.” [Tex.Const. art. XVI, § 26](#), interp. commentary (Vernon 1955). The provision was amended in 1879

to expand the grounds for recovery to include “gross neglect.” *Id.*; see also Demarest, *The History of Punitive Damages in Texas*, 28 S.Tex.L.J. 535, 540 (1987).

This constitutional right may not be legislatively abolished or restricted. In [*364 Morton Salt Co. v. Wells](#), 123 Tex. 151, 70 S.W.2d 409, 410 (1934), the issue presented was whether the plaintiffs in a death action covered by the worker's compensation statute were first required to present a claim for exemplary damages to the Industrial Accident Board prior to recovery in court. This court stated:

We agree with the Court of Civil Appeals that the district court had original jurisdiction, without the presentation of the claim for exemplary damages to the Industrial Accident Board. *The cause of action here asserted is one given by the Constitution, and the Legislature was without power to add to or take from the conditions under which, by virtue of the Constitution, it could be maintained, nor did it attempt to do so.*

[70 S.W.2d at 410](#). A similar unconditional analysis was employed in *Hanks v. City of Port Arthur*, 121 Tex. 202, 48 S.W.2d 944 (1932), a case cited with frequency in today's opinion. Port Arthur's attempt to preclude liability through its municipal charter by requiring it be notified of a defective condition prior to the occurrence of an injury was held unconstitutional under *both* the “open courts” provision, [article I, section 13 of the Texas Constitution](#), and [article I, section 17](#), guaranteeing just compensation for a taking of property for public use. [121 Tex. at 206, 48 S.W.2d at 945](#). In examining the question of whether the charter could condition the constitutional right to bring suit for compensation, this court stated:

The Constitution admits of no such limitation.

When a city violates the Constitution to the damage or injury of a complaining party, a constitutional cause of action arises, and the Legislature is powerless to make provision for a notice of the type here involved. The Constitution, sec. 17, art. 1, having fixed the method by which a city may take or damage private property without liability for tort, the constitutional method

is exclusive, and the Legislature is without power to prescribe any other method to accomplish the same purpose.

121 Tex. at 208, 48 S.W.2d at 946 (emphasis supplied). The court is content to ignore this well-entrenched principle of constitutional law.¹²

An exercise in [sommambulism](#), today's opinion merely sleepwalks through the law, reciting the rule that there was no cause of action for death at common law but not engaging in conscious thought. Of the five cases cited as authority for the proposition that there was no action for death at common law, not one of them engages in any in-depth analysis. Only two reference the rule's origin as dictum in Lord Ellenborough's decision in *Baker v. Bolton* in England in 1808. [Marmon v. Mustang Aviation, Inc.](#), 430 S.W.2d 182, 184 n. 4 (Tex.1968); [Galveston, H. & S.A. Ry. v. Le Gierse](#), 51 Tex. 189, 198–99 (1879). One commentator has described the rule as “a magical intoned incantation recited by rote,” followed by courts without analysis of the validity of its historical origins or current applicability. S. Speiser, *Recovery for Wrongful Death* 2d §§ 1:1 and 1:5 (1975). That criticism accurately describes today's opinion and the precedent it cites.

A hard look at this common-law prohibition reveals that it lacks any rational basis and should not be blindly followed by this court. The *Baker v. Bolton* case was a *nisi prius* case (*i.e.*, a case tried in the local court before a single judge rather than en banc in the superior court at Westminster) without authority or supporting reasoning for its statement that the common law barred redress for a fatal injury. *365 [Moragne v. States Marine Lines, Inc.](#), 398 U.S. 375, 382–83, 90 S.Ct. 1772, 1778–79, 26 L.Ed.2d 339 (1970).¹³ Contrary to the importance it later achieved, the decision in *Baker v. Bolton* went unnoticed by the English courts until 1873.¹⁴ See Malone, *The Genesis of Wrongful Death*, 17 Stan.L.Rev. 1043, 1059 (1965). In fact, the first court anywhere to treat it as precedent was an American one, [Carey v. Berkshire R.R.](#), 55 Mass. (1 Cush.) 475, 48 Am.Dec. 616 (1848), some 40 years after *Baker v. Bolton* was decided.¹⁵ During that interval, there was no reported opinion denying a wrongful death claim in this country, while several early decisions expressly recognized such a common-law action. Malone, *The Genesis of Wrongful Death*, *supra*, at 1066–67; [Crofs v. Guthery](#), 2 Root 90, 1

[Am.Dec. 61 \(Conn.1794\)](#); [Ford v. Monroe](#), 20 Wend. 210 (N.Y.Sup.Ct.1838); [James v. Christy](#), 18 Mo. 162 (1853).

This historical timeline suggests that the English common-law prohibition was never truly part of the common law of Texas. In 1840, the Congress of the Republic of Texas enacted a law which adopted the common law of England to the extent consistent with the Constitution and laws of this state. This law has been interpreted by this court to mean the common law of England *as “declared by the courts of the different states of the United States.”* [Grigsby v. Reib](#), 105 Tex. 597, 600, 153 S.W. 1124, 1125 (1913) (emphasis supplied). As discussed above, in 1840 the American courts recognized a common-law action for wrongful death.

Building on virtually universal commentary critical of the English common-law rule barring actions for wrongful death¹⁶ and the questionable historical basis for the rule's adoption, the United States Supreme Court in the landmark *Moragne* decision recognized a common law action for wrongful death in maritime cases. Writing for the unanimous court, Justice Harlan engaged in a scholarly examination of the three asserted justifications of the common law prohibition and soundly rejected them all. The first, deemed the “sole substantial basis,” is the felony-merger doctrine:

According to this doctrine, the common law did not allow civil recovery for an act that constituted both a tort and a felony. The tort was treated as less important than the offense against the Crown, and was merged into, or pre-empted by, the felony. The doctrine found practical justification in the fact that the punishment for the felony was the death of the felon and the forfeiture of his property to the Crown; thus, after the crime had been punished, nothing remained of the felon or his property on which to base a civil action.

*366 [Moragne](#), 398 U.S. at 381, 90 S.Ct. at 1778 (citations omitted); *see also* [Le Gierse](#), 51 Tex. at 198–99. The *Moragne* opinion rejected the applicability of this historical justification in the United States, noting that American law never recognized forfeiture of property as felony punishment. [Moragne](#), 398 U.S. at 384, 90 S.Ct. at 1779. Texas law is in accord; the early laws of the Republic of Texas do not appear to recognize forfeiture, and this sanction was expressly barred by the Texas Constitution of 1876. [Tex. Const. art. I, § 21.](#)

The second basis for the rule reviewed in *Moragne* is the asserted difficulty of computing damages because of a “repugnance ... to setting a price upon human life.” *Moragne*, 398 U.S. at 385, 90 S.Ct. at 1779 (citations omitted). Recognizing that damages are regularly determined in statutory wrongful death actions and such calculation poses no greater difficulty than awarding damages for nonfatal injuries, the Court found this basis of the rule unpersuasive. The third basis is the ancient common-law rule that a personal cause of action did not survive the death of its possessor. The Court noted that rule applies only to the victim's personal claims and has no bearing on whether a dependent should be permitted recovery for the injury he suffers because of the victim's death. *Id.* at 385, 90 S.Ct. at 1779. The Court then concluded that:

The American courts never made the inquiry whether this particular English rule, bitterly criticized in England, “was applicable to their situation,” and it is difficult to imagine on what basis they might have concluded that it was.

Id. at 386, 90 S.Ct. at 1780.¹⁷

The *Moragne* decision noted the prevalence of statutes permitting recovery for wrongful death, adopted in all fifty states and by numerous federal statutes, and concluded:

These numerous and broadly applicable statutes, taken as a whole, make it clear that there is no present public policy against allowing recovery for wrongful death. The statutes evidence a wide rejection by the legislatures of whatever justifications may have once existed for a general refusal to allow such recovery.... The policy thus established has become itself a part of our law, to be given its appropriate weight not only in matters of statutory construction but also those of decisional law.

398 U.S. at 390–91, 90 S.Ct. at 1782.¹⁸ Although this analysis in *Moragne* was employed in an opinion by Justice Spears to justify extending comparative causation to a products liability action, *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 427 (Tex.1984), today *Moragne* is curiously limited to its facts.

The facts of the case before us differ vastly from the stagecoach and railway accidents for which, over a century ago, the scope of the wrongful death statute was originally envisioned. We are in an age of more insidious, less obvious causes of death, many of which are simply not discoverable within the two-year limitations period. Thus, not simply the occasional family, *but an entire class of families will be deprived of their claims* by the court's decision. This deprivation cannot be justified on the traditional ground that these victims “slept on their rights,” because they could not have been aware of the basis of their cause of action until after their claims were barred. The opinion thus defies the very purpose of the discovery rule—to prevent legislation from merely affording “a delusive remedy.” *Urie v. Thompson*, 337 U.S. 163, 169, 69 S.Ct. 1018, 1024, 93 L.Ed. 1282 (1949).

*367 The court's opinion can rightly be recorded as one of the most anti-family decisions in recent memory. It says to a wife who has lost a husband, to a child who has lost its parents, to the parents whose lives have been torn apart by the death of a child, your rights are denied; the merits of your claim against a hidden killer will never be considered by a Texas judge and jury.¹⁹

The goose is fattened and the table set, compliments of today's opinion. Pull up a chair, tortfeasors, and dine on pâté de foie gras. You have been absolved from the infliction of lethal wounds, at least in the forum of the Texas courts. I dissent.

RAY and MAUZY, JJ., join in this dissent.

All Citations

787 S.W.2d 348, 58 USLW 2664, Prod.Liab.Rep. (CCH) P 12,427

Footnotes

- 1 Moreno has not argued that the doctrine of fraudulent concealment operates to toll the running of limitations in this case; nor has the Fifth Circuit requested that we address this issue. The doctrine of fraudulent concealment provides that where a defendant is under a duty to make disclosure but fraudulently conceals the existence of a cause of action from the party to whom it belongs, the defendant is estopped from relying on the defense of limitations until the party learns of the right of action or should have learned thereof through the exercise of reasonable diligence. *Borderlon v. Peck*, 661 S.W.2d 907, 908 (Tex.1983). Because the question of the doctrine's applicability in the present case is not properly before us, we express no opinion on the issue.
- 2 A number of other states construing absolute statutes with similar or identical language to that found in section 16.003(b) have held that the clear language of the statute precluded application of the discovery rule. See, e.g., *Trimper v. Porter-Hayden*, 305 Md. 31, 501 A.2d 446, 449 (1985) (clear language of statute could not be rewritten under the "guise of statutory construction"); *Presslaff v. Robins*, 168 N.J.Super. 543, 403 A.2d 939, 941 (App.Div.1979) ("The court may not strain on policy grounds to manufacture a signification of the statutory language to achieve a result obviously not intended by the legislature and in direct conflict with the unequivocal proscription in [the statute]."); *Morano v. St. Francis Hospital*, 100 Misc.2d 621, 420 N.Y.S.2d 92, 95 (N.Y.Sup.Ct.1979) ("The language leaves no room for judicial construction and there are no statutory spaces to be filled."); *Cadieux v. International Tel. & Tel. Corp.*, 593 F.2d 142, 144 (1st Cir.1979) (applying Rhode Island law) ("date of death" cannot be construed to mean "date of discovery of the cause of death").
- 3 This is the exact position taken by the court in *Stiles v. Union Carbide Corp.*, 520 F.Supp. 865, 867 (S.D.Tex.1981) ("When the legislature has clearly and unequivocally prescribed that a cause of action accrues on the occurrence of a specified event," the courts have neither the necessity nor the authority to invoke the discovery rule.). A good argument can be made that the legislature has adopted this interpretation by recodifying the statute in 1985 without adding any substantive changes. See *Cunningham v. Cunningham*, 120 Tex. 491, 40 S.W.2d 46, 51 (1931) ("Nothing is better settled than that the legislature must be regarded as intending statutes, when repeatedly re-enacted, ... to be given that interpretation which has been settled by the courts.").
- 4 See, e.g., *With v. General Electric Co.*, 653 P.2d 764 (Colo.App.1982); *Farmers Bank & Trust Co. of Bardstown v. Rice*, 674 S.W.2d 510, 512 (Ky.1984); *Trimper v. Porter-Hayden*, 305 Md. 31, 501 A.2d 446, 449 (1985); *Szlinis v. Moulded Fiber Glass Cos.*, 80 Mich.App. 55, 263 N.W.2d 282 (1977); *DeCosse v. Armstrong Cork Co.*, 319 N.W.2d 45 (Minn.1982); *Morano v. St. Francis Hospital*, 100 Misc.2d 621, 420 N.Y.S.2d 92, 95 (N.Y.Sup.Ct.1979); *Cadieux v. Inter. Tel. & Tel. Corp.*, 593 F.2d 142, 144 (1st Cir.1979) (applying Rhode Island law); *Presslaff v. Robins*, 168 N.J.Super. 543, 403 A.2d 939, 942 (App.Div.1979); *Anthony v. Koppers*, 436 A.2d 181, 183 (1981); *Pastierik v. Duquesne Light Co.*, 514 Pa. 517, 526 A.2d 323 (1987); *White v. Johns-Manville Corp.*, 103 Wash.2d 344, 693 P.2d 687, 692 (1985); see also W. Keeton, D. Dobbs, R. Keeton & D. Owen, *Prosser and Keeton on the Law of Torts* § 127, at 957 (5th ed. 1984) (noting that majority rule is that limitations in wrongful death actions begin to run on date of death and that courts have rejected applying discovery rule to wrongful death actions).
- 5 The few cases relied on by the *Hanebuth* majority are distinguishable. See *Hanebuth*, 694 P.2d at 147. In *Frederick v. Calbio Pharmaceuticals*, 89 Cal.App.3d 49, 152 Cal.Rptr. 292 (1979), the court was interpreting an "accrual" statute and not an "absolute" statute like § 16.003(b). In *Myers v. McDonald*, 635 P.2d 84 (Utah 1981), the plaintiff did not become aware of the decedent's death until 3 years after it had occurred, whereas in the present case death was known immediately. Indeed, the *Myers* court expressly distinguished its decision from other decisions holding that limitations begin to run when the fact of death is known even if its cause is not. The decision in *Shaughnessy v. Spray*, 55 Or.App. 42, 637 P.2d 182 (1981) provides no support because that case was interpreting a statute which required an action to be commenced within 3 years after the occurrence "of the injury causing the death," rather than within 2 years after "death." Finally, it is not so clear that the discovery rule applies to the Illinois absolute statute; the *Hanebuth* majority omitted cases which have held that it does not, see *Greenock v. Rush Presbyterian St. Luke's Med. Center*, 65 Ill.App.3d 266, 22 Ill.Dec. 1, 3, 382 N.E.2d 321, 323 (1978), and the Illinois Supreme Court has not yet resolved the conflict.
- 6 The *Hanebuth* decision concludes that it is "absurd" and arbitrary to only allow application of the discovery rule in personal injury cases, and not in wrongful death actions. Yet, application of the discovery rule in personal injury cases is reasonable because the live plaintiff may either be unaware of an injury at the time of its occurrence, or in need of time to recover before beginning an investigation. Neither of these considerations, however, are present in wrongful death actions because survivors are put on immediate notice by the event of death that an investigation into the cause of action must occur to preserve the claim. This definitive notice is what differentiates wrongful death and survival actions from personal injury actions. By disallowing application of the discovery rule to § 16.003(b), our opinion recognizes this distinction and effectuates the state interest in the prompt settlement of a decedent's affairs. See *Pastierik v. Duquesne Light Co.*, 514 Pa. 517, 526 A.2d 323 (1987); *Cadieux*, 593 F.2d at 144-45. Moreover, the dissent's argument that the Morenos were

unaware of their ability to assert a cause of action is undermined by the fact that the Morenos, after receiving presumptive certificates of death describing Reye's syndrome as the cause of death, hired a "medical expert" who reviewed the file and determined that no medical malpractice had occurred. Faced with similar facts, the United States Supreme Court denied relief to a tardy plaintiff under the Federal Torts Claim Act, stating:

If [the plaintiff] fails to bring suit because he is incompetently or mistakenly told that he does not have a case, we discern no sound reason for visiting the consequences of such error on the defendant by delaying the accrual of the claim until the plaintiff is otherwise informed or himself determines to bring suit, even though more than two years have passed from the plaintiff's discovery of the relevant facts about injury.

United States v. Kubrick, 444 U.S. 111, 100 S.Ct. 352, 62 L.Ed.2d 259 (1979).

7 The common-law not only "denied a tort recovery for injury once the tort victim had died, it also refused to recognize any new and independent cause of action in the victim's dependents or heirs for their own loss at his death." W. Keeton, D. Dobbs, R. Keeton & D. Owen, *Prosser and Keeton on the Law of Torts* § 127, at 945 (5th ed. 1984). (citations omitted). This rule denying a common-law right to assert a wrongful death action was confirmed in *Baker v. Bolton*, 1 Camp. 493, 170 Eng. Reprint 1033 (1808). In response to *Baker*, the English Parliament, in 1846, enacted "an Act for Compensating the Families of Persons Killed by Accident," otherwise known as Lord Campbell's Act. 9 & 10 Vict., ch. 93 § 2 (1846). See *Witty v. American General Distrib., Inc.*, 727 S.W.2d 503, 504 (Tex.1987) ("Prior the passage of Lord Campbell's Act, there was no statutory or common-law cause of action for wrongful death.") This statute served as the pattern for Texas' first wrongful death statute, enacted in 1860. Tex.Gen.Laws 32; *March v. Walker*, 48 Tex. 372, 375 (1877); *Sanchez v. Schindler*, 651 S.W.2d 249, 251 (Tex.1983).

8 The dissent attempts to establish that Texas recognizes a common law action for wrongful death despite the fact that every reported Texas decision considering the issue has held otherwise. For support, the dissent cites commentary and cases from other jurisdictions which argue that a wrongful death action *should* be recognized in the common law, and *not* that it was. The dissent also argues that Texas, in 1840, implicitly adopted two cases from other jurisdictions which recognized the common-law right to assert a wrongful death action. See *Crofs v. Guthery*, 2 Root 90, 1 Am.Dec. 61 (Conn.1794); *Ford v. Monroe*, 20 Wend. 210 (N.Y.Sup.Ct.1838). *Crofs* was decided fourteen years prior to *Baker v. Bolton* and "could not withstand the greater weight" of the latter decision, *Green, The Texas Death Act*, 26 Tex.L.Rev. 133, 136 n. 9 (1947), and *Ford* apparently recognized the action without comment. Neither *Crofs* nor *Ford*, however, was mentioned in *Carey v. Berkshire R.R.*, 55 Mass. (1 Cush.) 475, 48 Am.Dec. 616 (1848), where a leading American jurisdiction, the Supreme Judicial Court of Massachusetts, confirmed the rule set out in *Baker v. Bolton* (and universally accepted law ever since) that no action existed at common law for wrongful death. See W. Malone, *The Genesis of Wrongful Death*, 17 Stanford L.Rev. 1043, 1066–68 (1965). Finally, the dissent's argument does not answer the question of why the Texas Legislature would find it necessary to pass a wrongful death act in 1860 if there already was in existence a Texas common-law right to assert such an action. The dissent's approach would suggest that the 1860 act was superfluous. On the contrary, the 1860 act was designed to fulfill the same purpose as Lord Campbell's act: "... to fill the gap in the common law which had been created by the failure of the courts ... to provide a remedy for injuries resulting in death." *Green, The Texas Death Act*, 26 Tex.L.R. 133, 136 (1947).

9 The dissent proposes not only that the discovery rule should apply to § 16.003(b), but also that the rule should operate to toll limitations until a plaintiff discovers a specific cause of action against a specific defendant. More specifically, the dissent proposes that courts allow wrongful death claims to be maintained whenever new scientific evidence links a particular disease with exposure to a particular substance, even though the death had occurred years, or even decades, earlier. This approach, however, would effectively "expand ... to infinity the time period during which wrongful death actions could be brought." *Pastierik*, 526 A.2d at 325. No cause of action would ever accrue until the plaintiff learned or should have learned of that specific cause of action, and no case would be concluded until every potential cause of action was discovered. This approach is also questionable from a public policy standpoint. It is hardly in the public interest "to encourage, literally, the unearthing of wrongful death causes of action long after death has occurred because there is some suspicion that death was caused by a wrongful act." *DeCosse*, 319 N.W.2d at 52.

10 Art. 16, § 26 of the Texas Constitution provides as follows:

Every person, corporation, or company, that may commit a homicide, through wilful act, or omission, or gross neglect, shall be responsible, in exemplary damages, to the surviving husband, widow, heirs of his or her body, or such of them as there may be, without regard to any criminal proceeding that may or may not be had in relation to the homicide.

Tex.Const. Ann. art. 16, § 26 (Vernon 1955). The dissent suggests that § 16.003(b) unduly restricts this constitutional right to exemplary damages by placing an "impossible condition" upon the assertion of the underlying statutory wrongful

death action, and, therefore, it is unconstitutional, or, at the very least, subject to an “open courts” challenge. This argument fails for two separate reasons.

First, as parents of a deceased child, the Morenos have no constitutional right to recover exemplary damages under [art. 16, § 26](#). See [Hofer v. Lavender](#), 679 S.W.2d 470, 475 (Tex.1984) (Supreme Court has consistently held that class of beneficiaries listed in [art. 16, § 26](#) does not include parents of deceased child). Indeed, even if this court (or the legislature) wanted to *broaden* the class of persons entitled to recover exemplary damages to include parents of deceased children, we would be without authority to do so. *Id.*; see also [Scoggins v. Southwestern Electric Service Co.](#), 434 S.W.2d 376 (Tex.Civ.App.—Tyler 1968, writ ref’d n.r.e.) (holding that provision in Wrongful Death Act that allowed parents to recover exemplary damages was invalid under [art. 16, § 26](#), since legislature could not enlarge on exemplary damages).

Second, the question of whether [§ 16.003\(b\)](#) would operate *in other cases* to unduly restrict the constitutional right to exemplary damages is not properly before this court because the second certified question only asks whether [§ 16.003\(b\)](#) “as applied to the plaintiffs herein violate[s] the open courts provision....” Since it cannot be shown that [§ 16.003\(b\)](#) violates Moreno’s rights under [art. 16, § 26](#), the statute’s application to *other plaintiffs* in other cases is, according to the terms of the certified question, irrelevant. Moreover, this court has repeatedly reaffirmed the rule that if a plaintiff cannot prove the unconstitutionality of a limitations statute as applied to him, the statute will not be struck down merely because it might operate in an unconstitutional manner in another case. See [Morrison v. Chan](#), 699 S.W.2d 205, 207 (Tex.1985); [Nelson v. Krusen](#), 678 S.W.2d 918, 923 (Tex.1984).

- 1 Relying upon facts taken from the summary judgment record of the federal district court, rather than those certified by the Fifth Circuit, the court asserts at footnote 6 that even if the discovery rule were applied, the Petitioners’ wrongful death actions would still be barred by limitations. If that analysis were correct, the proper disposition of this case would be to return the certified questions to the Fifth Circuit unanswered. Further, the court ignores an affidavit stating that, although the ability to bring suit for *medical malpractice* against the doctors and the hospitals treating the infant children was investigated and found wanting, no investigation of the possibility of a link between the use of aspirin and Reye’s Syndrome (which would serve as a basis of a *products liability* action) was made at that time. Moreno Record 284–85; Sloan Record 62–63. The facts of this case are not similar to those in [United States v. Kubrick](#), 444 U.S. 111, 100 S.Ct. 352, 62 L.Ed.2d 259 (1979), as the opinion states. In [Kubrick](#), the Court held that the statute of limitations began to run when the plaintiff had knowledge of the injury *and* its causative link to use of a particular drug.
- 2 The opinion cites [RepublicBank Dallas, N.A. v. Interkal, Inc.](#), 691 S.W.2d 605, 607 (Tex.1985), for the proposition that rules of statutory construction may not be applied when a statute is unambiguous. That case stands in clear conflict with the dictates of the Code Construction Act, quoted above. [Interkal](#), however, involved interpretation of a statute and not a code provision to which the Code Construction Act is applicable. 691 S.W.2d at 607 n. 1. Nor did the court in [Cail v. Service Motors, Inc.](#), 660 S.W.2d 814 (Tex.1983), consider the effect of the Code Construction Act.
- 3 Further, “[t]his court has always endeavored to interpret the laws of Texas to avoid inequity.” [Sanchez v. Schindler](#), 651 S.W.2d 249, 252 (Tex.1983) (opinion construing Wrongful Death Act by Spears, J.).
- 4 That act provided: “The action shall be brought within one year after the death of the deceased.” Law of February 2, 1860, ch. 35, § 3, 1860 Tex.Gen.Laws 33. The limitations provision was subsequently moved from the wrongful death act to be included as part of a general limitations statute. [Tex.Rev.Civ.Stat.Ann. art. 3202 \(Vernon 1879\)](#) provided: “There shall be commenced and prosecuted within one year after the cause of action shall have accrued 4. Actions for injuries done to the person of another where death ensued from such injuries; and the cause of action shall be considered as having accrued at the death of the party injured.” See also [Tex.Rev.Civ.Stat.Ann. art. 3353](#) (same language). The time for bringing an action for death was later expanded to two years. Law of March 4, 1897, ch. 14, § 1, 1897 Tex.Gen.Laws 12. Other than replacing the plural “injuries” with the singular “injury,” the accrual language was unchanged. The statute was amended in 1979 to delete the two-year limitations period for actions for debts and accounts, but the limitations provision for a wrongful death action was not changed. Act of June 13, 1979, ch. 716, § 1, 1979 Tex.Gen.Laws 1768–69; see also [Tex.Rev.Civ.Stat.Ann. art. 5526 \(Vernon 1958\)](#) (repealed 1985). The statute was repealed and codified, with no substantive change intended, as part of the Texas Civil Practice and Remedies Code. Act of June 16, 1985, ch. 959, §§ 1 (new provision), 9 (repealer), and 10 (no substantive change intended).

The court asserts that this reenactment and codification after the decision of [Stiles v. Union Carbide Corp.](#), 520 F.Supp. 865 (S.D.Tex.1981), refusing to apply the discovery rule in a wrongful death action, worked a legislative adoption of that interpretation. While the legislature may indeed adopt a judicial interpretation by reenacting a statute, see [Robinson v. Central Texas MHMR Center](#), 780 S.W.2d 169, 170–71 (Tex.1989), that interpretation must be by a court of last resort. See [Texas Employer’s Ins. Ass’n v. Lightfoot](#), 139 Tex. 304, 162 S.W.2d 929 (1942). [Cunningham v. Cunningham](#),

120 Tex. 491, 40 S.W.2d 46, 51 (1931), cited in the opinion refers to an “interpretation which has been settled by the courts.” The fact that this question has been certified to this court by the Fifth Circuit indicates that there is no well-settled interpretation by the Texas courts.

5 This situation is fundamentally different from that presented to the court today in *Dow Chemical Co. v. Alfaro*, 786 S.W.2d 674 (Tex.1990). Unlike the discovery rule, the concept underlying the doctrine of *forum non conveniens* was in existence and being applied on the date the statute was enacted. That this old concept later acquired a new label—“forum non conveniens”—did not affect the original legislative action in abolishing it.

6 The court miscomprehends this argument. The question is not whether the doctrine of fraudulent concealment applies to the facts of this case. Rather, the question is whether statutes of limitations labelled “absolute” are subject to common-law tolling principles such as the doctrine of fraudulent concealment and the discovery rule. Our decisions in *Borderlon* and *Gay* indicate that they are.

7 See also *Gaddis v. Smith*, 417 S.W.2d 577, 581 (Tex.1967) (discovery of the “wrongful act” triggers limitations); *Neagle v. Nelson*, 685 S.W.2d 11, 12 (Tex.1985) (discovery of the “wrong”). The cases cited in the court’s opinion addressed factual situations where the plaintiff was aware of both the injury and its cause. See, e.g., *Coody v. A.H. Robins Co.*, 696 S.W.2d 154, 156 (Tex.App.—San Antonio 1985, no writ) (stating that plaintiff learned of injury and its cause simultaneously); *Otis v. Scientific Atlanta, Inc.*, 612 S.W.2d 665, 666 (Tex.Civ.App.—Dallas 1981, writ ref’d n.r.e.) (plaintiffs do not assert that they did not know the cause of their injury).

8 In *Willis*, we concluded that “any burden placed upon an attorney by application of the discovery rule is less onerous than the injustice of denying relief to unknowing victims.” 760 S.W.2d at 646. Yet the injury worked in that case was much less severe than the deaths that occurred here allegedly due to distributing a dangerous pharmaceutical product to the Texas public. Surely the burden placed upon the drug manufacturer is equally less onerous than the injustice of denying relief to unknowing families, like the Morenos and the Sloans, whose children have died.

9 A similar result has been reached as to an Illinois statute requiring that actions be commenced within two years after death. See *Eisenmann v. Cantor Brothers, Inc.*, 567 F.Supp. 1347 (N.D.Ill.1983) (to deny application of discovery rule would produce absurd result); *Matter of Johns–Manville Asbestosis Cases*, 511 F.Supp. 1235 (N.D.Ill.1981); *Fure v. Sherman Hospital*, 64 Ill.App.3d 259, 21 Ill.Dec. 50, 380 N.E.2d 1376 (1978); *Praznik v. Sport Aero, Inc.*, 42 Ill.App.3d 330, 355 N.E.2d 686 (1976).

10 A number of our sister states have recognized this hybridization to permit application of common-law principles in a wrongful death action. See, e.g., *Summerfield v. Superior Court*, 144 Ariz. 467, 698 P.2d 712, 718 (1985) (en banc) (the wrongful death “statute and precedent have combined to produce a cause of action with common law attributes”); *Hanebuth v. Bell Helicopter Int’l*, 694 P.2d 143, 146 (Alaska 1984) (wrongful death statute treated like other common law tort actions, finding discovery rule applies to “absolute” statute of limitations); *O’Grady v. Brown*, 654 S.W.2d 904, 908, 911 (Mo.1983) (en banc) (wrongful death statute “mends the fabric of the common law” and incorporates common law principles); *Haakanson v. Wakefield Seafoods, Inc.*, 600 P.2d 1087, 1091–92 (Alaska 1979) (no legislative intent to treat wrongful death action different from other common law tort actions, thus limitations statute tolled for minors); *Gaudette v. Webb*, 362 Mass. 60, 284 N.E.2d 222, 229–30 (1972) (declaring existence of common-law wrongful death action and tolling limitations provision for minors). See also *Restatement (Second) of Torts* § 925 comment k (1979) (noting trend to “allow ameliorating common-law principles to apply” to wrongful death actions).

11 See, e.g., *Clifton v. Southern Pacific Transp. Co.*, 709 S.W.2d 636, 640 (Tex.1986) (gross negligence standard of *Burk Royalty* applied to wrongful death action); *Yowell v. Piper Aircraft Corp.*, 703 S.W.2d 630, 632–33 (Tex.1986) (loss of inheritance damages recoverable in wrongful death action); *Sanchez v. Schindler*, 651 S.W.2d 249, 252–54 (Tex.1983) (damages for loss of society and mental anguish recoverable). See generally *Tex.Civ.Prac. & Rem.Code Ann.* §§ 71.001–011 (Vernon 1986 and 1989 Supp.) (extensive annotations).

12 The majority dismisses the problem of a conflict with the constitutional right to exemplary damages in a wrongful death action on the grounds that no such damages are allowed to a parent for the death of a child. A similar argument in *Hanks* was found unpersuasive:

It is true that in the case before us the question of taking property in violation of the Constitution is not in issue, but the validity of the charter section may be raised, and, if void for any reason, it cannot be enforced in this case.

121 Tex. at 208–09, 48 S.W.2d at 947.

13 One commentator has pointed out that *Baker v. Bolton* was not extensively argued, that the reported opinion is very brief and that the controversial rule was “laid down without either sustaining reasoning or supporting authority.” S. Speiser, *Recovery for Wrongful Death* 2d § 1:2 (1975); see also Smedley, *Wrongful Death—Bases of the Common Law Rule*, 13 Vand.L.Rev. 605 (1960) (concluding the case was wrongly decided as well as overbroad). Even Dean Prosser has

condemned the trial judge in *Baker v. Bolton*, stating that Lord Ellenborough's "forte was never common sense." W. Prosser, *Law of Torts* § 127 (4th ed. 1971).

- 14 This rule never even made it as far as Scotland; that country recognized a common-law action for wrongful death. *Moragne, supra*, 398 U.S. at 398 n. 13, 90 S.Ct. at 1786 n. 13.
- 15 The *Carey* case was subsequently overruled by the Massachusetts Supreme Court in *Gaudette v. Webb*, 362 Mass. 60, 284 N.E.2d 222, 229 (1972).
- 16 The common-law prohibition against maintaining an action for wrongful death has been universally denounced by commentators as having no logical or historical basis and as unfairly differentiating between wrongful conduct resulting in mere injury and that resulting in death. See, e.g., F. Pollock, *Law of Torts* 55 (Landon ed. 1951) (terming rule "barbarous"); Smedley, *Wrongful Death—Bases of the Common Law Rules*, 13 Vand.L.Rev. 605 (1960) (rule has outlived its usefulness); Holdsworth, *The Origin Of the Rule in Baker v. Bolton*, 12 Law Q.Rev. 431, 437 (1916) (rule cannot be justified on precedential or technical grounds); F. Tiffany, *Death by Wrongful Act* § 12 (2d ed. 1913) ("[n]o satisfactory reason for the rule has ever been suggested"); P. Keeton, *Prosser and Keeton on Torts* § 125 (5th ed. 1984) (criticizing rule on basis that "it was cheaper to kill a person than to injure him").
- 17 The compelling logic of *Moragne* has given rise to state court cases that recognize in some manner a common law action for wrongful death. See, e.g., *Haakanson v. Wakefield Seafoods, Inc.*, 600 P.2d 1087, 1092, n. 11 (Alaska 1979); *Gaudette v. Webb*, 362 Mass. 60, 284 N.E.2d 222, 229 (1972); see also *Restatement (Second) of Torts* § 925 comment k (1979).
- 18 *Accord* Pound, *Comments on Recent Important Admiralty Cases*, 13 NACCA L.J. 188–89 (1954) ("[t]oday we should be thinking of the death statutes as part of the general law"); *Panama Railroad Co. v. Rock*, 266 U.S. 209, 216, 45 S.Ct. 58, 60, 69 L.Ed. 250 (1924) (Holmes, J., dissenting) (pervasive legislation indicates no public policy bar to common-law cause of action for wrongful death).
- 19 We have not been asked by the Fifth Circuit to answer in this case the question of whether the statute of limitations for wrongful death, interpreted to bar application of the discovery rule, conflicts with our state constitutional due process provision, [article I, section 19 of the Texas Constitution](#). This court in *Nelson v. Krusen*, while recognizing that the due process and "open courts" provision are not coterminous, specifically left that question unanswered. *Nelson*, 678 S.W.2d at 921. Another unexplored question is whether the legislative distinction between the quick and the dead passes muster under [article I, section 3 of the Texas Constitution](#), our state guarantee of equal protection, or the federal equivalent, U.S. Const. amend. XIV, § 1.



KeyCite Yellow Flag - Negative Treatment

Declined to Follow by [Mummert v. Alizadeh](#), Md., October 18, 2013

841 S.W.2d 343

Supreme Court of Texas.

Betty Parr RUSSELL, Individually and as
Independent Executrix of the Estate of Donnon
O'Neal Russell, Deceased, et al., Petitioners,

v.

INGERSOLL-RAND
COMPANY, et al., Respondents.

No. D-0489.

|

Oct. 14, 1992.

|

Rehearing Overruled Dec. 9, 1992.

Surviving family members of sandblaster-painter who died of silicosis asserted claims against companies that had manufactured or distributed products containing silica. The 61st District Court, Harris County, [Shearn Smith, J.](#), granted defendants' motions for summary judgment on statute of limitations grounds, and plaintiffs appealed. The Court of Appeals, [795 S.W.2d 243](#), affirmed, and plaintiffs applied for writ of error. The Supreme Court, [Hecht, J.](#), held that if decedent's action for injuries would have been barred by limitations had it been asserted immediately prior to his death, survival action and wrongful death actions based on same alleged wrong are likewise barred.

Affirmed.

Doggett, J., filed opinion concurring and dissenting, in which Mauzy, J., joined.

[Gammage, J.](#), filed opinion concurring and dissenting.

West Headnotes (5)

[1] Death

🔑 Compensation for Loss or Injury
Resulting from Death in General

Death

🔑 Medical and Funeral Expenses

Damages recoverable in survival action are those which decedent himself sustained while he was alive and not any damages claimed independently by survival action plaintiffs, except that funeral expenses may also be recovered if they were not awarded in wrongful death action. [V.T.C.A., Civil Practice & Remedies Code § 71.021](#).

58 Cases that cite this headnote

[2] Death

🔑 Apportionment and Distribution of Amount Recovered

Any recovery obtained in survival action flows to those who would have received it had decedent obtained recovery immediately prior to death, i.e., to decedent's heirs, legal representatives and estate. [V.T.C.A., Civil Practice & Remedies Code § 71.021](#).

42 Cases that cite this headnote

[3] Death

🔑 Defenses

Defenses that could have been raised against claim by injured person may also be raised against same claim asserted by person's heirs and estate.

6 Cases that cite this headnote

[4] Death

🔑 Right of Action of Person Injured

If decedent's action for injuries would have been barred by limitations had it been asserted immediately prior to his death, survival action based on same alleged wrong is likewise barred. [V.T.C.A., Civil Practice & Remedies Code §§ 16.003\(b\), 16.062](#).

55 Cases that cite this headnote

[5] Death

🔑 Right of Action of Person Injured

If injured person's action to recover for injuries would have been barred by limitations at time of his death, wrongful death action

based on same conduct is also barred.
[V.T.C.A., Civil Practice & Remedies Code §§ 16.003\(b\), 71.003\(a\).](#)

[23 Cases that cite this headnote](#)

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OPINION

[HECHT](#), Justice.

If an individual's action for personal injuries would have been barred by limitations ***344** at the time of his death, are actions based upon the same wrongful conduct, brought by his heirs, legal representatives or estate under the Survival Statute, [TEX.CIV.PRAC. & REM.CODE § 71.021](#), and by his beneficiaries under the Wrongful Death Statute, [TEX.CIV.PRAC. & REM.CODE §§ 71.001–.011](#), also barred by limitations? Both the district court and the court of appeals answered this question affirmatively. [795 S.W.2d 243](#). We agree.

I

In 1981, Donnon Russell was diagnosed as suffering from [chronic obstructive pulmonary disease](#) caused by exposure to silica during his employment for many years as a sandblaster and painter. In 1982, Russell filed suit to recover damages for his injuries. In amended pleadings, Russell named a total of 14 defendants who he alleged manufactured and distributed products containing silica that he had used in his work. In 1988, before the case could come to trial, Russell died. Five weeks later, Russell's

widow and four children¹ filed an amended petition naming themselves as plaintiffs and claiming damages on behalf of Russell's estate and for his death. Plaintiffs also added seven defendants whom Russell had never sued himself, who are respondents in this Court.²

Respondents moved for summary judgment on the ground that plaintiffs' claims against them are barred by limitations. In their last amended petition in the trial court plaintiffs asserted claims based on strict liability, negligence, gross negligence, misrepresentation, and breach of warranty. Respondents argue that the causes of action against them accrued either in 1981 when Russell's condition was first diagnosed, or no later than 1982 when he filed suit. Had Russell sued respondents immediately before his death, his claims would have been barred by limitations.³ Respondents contend that plaintiffs' actions are derivative of Russell's and are therefore likewise barred.

Plaintiffs argue that while their actions are in some sense derivative of Russell's, the sole statute of limitations applicable to their claims under the survival and wrongful death statutes is [TEX.CIV.PRAC. & REM.CODE § 16.003\(b\)](#), which states: "A person must bring suit not later than two years after the day the cause of action accrues in an action for injury resulting in death. The cause of action accrues on the death of the injured person." Based upon this statute, plaintiffs argue that they had two years from Russell's death to file their claims, even if Russell's own claims for the same injury would have been barred at the time he died.

The district court granted summary judgment for respondents and severed it from plaintiffs' claims against the defendants which Russell timely sued. The court of appeals affirmed. [795 S.W.2d 243](#).

II

[1] [2] [3] [4] At common law, an individual's action for personal injuries did not survive his death. [Rose v. Doctors Hosp.](#), 801 S.W.2d 841, 845 (Tex.1990); [Landers v. B.F. Goodrich Co.](#), 369 S.W.2d 33, 35 (Tex.1963). The Legislature has abrogated this rule by [TEX.CIV.PRAC. & REM.CODE § 71.021](#), which states:

***345** Survival of Cause of Action

(a) A cause of action for personal injury to the health, reputation, or person of an injured person does not abate because of the death of the injured person or because of the death of a person liable for the injury.

(b) A personal injury action survives to and in favor of the heirs, legal representatives, and estate of the injured person. The action survives against the liable person and the person's legal representatives.

(c) The suit may be instituted and prosecuted as if the liable person were alive.

By this statute, a decedent's action survives his death and may be prosecuted in his behalf. The survival action, as it is sometimes called, is wholly derivative of the decedent's rights. The actionable wrong is that which the decedent suffered before his death. The damages recoverable are those which he himself sustained while he was alive and not any damages claimed independently by the survival action plaintiffs (except that funeral expenses may also be recovered if they were not awarded in a wrongful death action). *Landers*, 369 S.W.2d at 35. Any recovery obtained flows to those who would have received it had he obtained it immediately prior to his death—that is, his heirs, legal representatives and estate. *Id.* Defenses that could have been raised against a claim by the injured person may also be raised against the same claim asserted by the person's heirs and estate. See *Castleberry v. Goolsby Bldg. Corp.*, 617 S.W.2d 665 (Tex.1981).

It follows from these general principles that if a decedent's action would have been barred by limitations had it been asserted immediately prior to his death, a survival action based upon the same alleged wrong is likewise barred. If the decedent's action would not have been barred, the running of the limitations period is tolled by the decedent's death for up to one year. **TEX.CIV.PRAC. & REM.CODE § 16.062.** ⁴ Had Russell sued respondents immediately prior to his death, alleging the same causes of action plaintiffs now assert in their survival action, those actions would have been barred by limitations. Accordingly, we hold that plaintiffs' survival action against respondents is likewise barred by limitations.

III

[5] Wrongful death actions are also derivative of the decedent's rights. Such actions are creatures of statute abrogating the common law rule that no cause of action may be brought for the death of another person. *Rose v. Doctors Hosp.*, 801 S.W.2d at 845; *Farmers & Mechanics' Nat'l Bank v. Hanks*, 104 Tex. 320, 137 S.W. 1120, 1122 (1911). As initially passed, our Wrongful Death Statute provided in part:

Sec. 1. [W]hensoever the death of any person may be caused by wrongful act, neglect, unskillfulness or default, and the act, neglect, unskillfulness or default is such as would (if death had not ensued) have entitled the party, injured, to maintain an action for such injury, then and in every such case the person who would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured....

.....

Sec. 3. The action shall be brought within one year after the death of such deceased.

Act approved Feb. 2, 1860, 8th Leg., R.S., ch. 35, § 1, 1860 Tex.Gen.Laws 32, 4 H. GAMMEL, LAWS OF TEXAS 1394 (1898). Sections 1 and 3 were amended and separated in 1879. Section 1 was changed to read in part: "The wrongful act, negligence, carelessness, unskillfulness or default mentioned ... must be of such character as would, if death had not ensued, have entitled the party injured to maintain an action *346 for such injury." Tex.Rev.Civ.Stat. art. 2900 (1879). Section 3 was moved from the wrongful death provisions to a general limitations provision which prescribed that certain actions be brought within one year, including: "Actions for injuries done to the person of another where death ensued from such injuries". **Tex.Rev.Civ.Stat. art. 3202(4) (1879).** The 1879 provision added: "the cause of action shall be considered as having accrued at the death of the party injured." *Id.* In 1897, the limitations period was changed from one to two years. Act approved Mar. 4, 1897, 25th Leg., R.S., ch. 14, 1897 Tex.Gen.Laws 12, 12; 10 H. GAMMEL, LAWS OF TEXAS 1066, 1066 (1898). The language establishing the cause of action remained in substantially the same form, becoming **article 4672 of the Texas Revised Civil Statutes of 1925**, and in 1985, **section 71.003(a) of the Texas Civil Practice and Remedies Code**, Act of May 17, 1985, 69th Leg., R.S., ch. 959, § 1, 1985 Tex.Gen.Laws 3242, 3296, which is in effect today. The

two-year limitations period has also remained constant, and is now codified at [Tex.Civ.Prac. & Rem.Code § 16.003\(b\)](#).

Currently, the Wrongful Death Statute allows an action by a decedent's beneficiaries "only if the individual injured would have been entitled to bring an action for the injury if he had lived." [TEX.CIV.PRAC. & REM.CODE § 71.003\(a\)](#). As can be seen from the history of the statute recited above, this language is not a recent innovation but merely a recodification of language which has always been part of the Wrongful Death Statute.⁵ From the earlier language, it could have been argued, and in fact was, that a wrong "such as would (if death had not ensued) have entitled the party, injured, to maintain an action for such injury then" meant only a wrong of an actionable *nature*, not one for which the injured party could actually have succeeded in recovering damages. In other words, the earlier language may be read to allow a decedent's beneficiaries to recover for a wrong which caused his death, even if he could not have recovered himself, as long as it was "such as would" have allowed action—that is, the *type* of wrong for which he could have recovered. We long ago rejected this argument that the statute did not condition allowance of a wrongful death action upon the decedent's right to maintain suit for his injuries immediately prior to his death. In [Magnolia Coca Cola Bottling Co. v. Jordan](#), 124 Tex. 347, 78 S.W.2d 944, 945 (Tex.Com.App.1935), we wrote that the statute:

has not been construed literally as having reference only to the character of the wrongful or negligent act, but it has been construed and applied as meaning that the right of action given by the ... article exists only in cases wherein the injured person could himself have maintained an action for damages had he lived.

In [[Wilson v. Brown](#), 154 S.W. 322, 326 (Tex.Civ.App. Austin 1912, writ ref'd)], the contention was made that the words "of such character" used in the statute should be construed as descriptive of the act or acts of the defendant in and of themselves and separate and apart from the surrounding circumstances. The court, in holding that such construction was not sound, said: "The authorities show that the reasonable and sound construction to be placed upon that article is that it was the intention of the Legislature to declare that, unless the deceased could, at the time of his death, have maintained an action

for the injury, such right of action should not exist in favor of the beneficiaries mentioned in the statute.

In [Magnolia](#) we held that parents could not sue for the death of a child from prenatal injuries because the child could not have sued for such injuries had he lived. We later overruled this holding in [Leal v. C.C. Pitts Sand & Gravel, Inc.](#), 419 S.W.2d 820, 822 (Tex.1967), recognizing for the first time that prenatal injuries were actionable. Even so, however, [Leal](#) reaffirmed the reading of the statute upon which [Magnolia](#) *347 was based, that "[a] right of action exists under the Wrongful Death Statute only where the injured party could have maintained an action for damages had death not ensued." *Id.* at 821.

We have never departed from this construction of our Wrongful Death Statute. We have consistently held that the right of statutory beneficiaries to maintain a wrongful death action is entirely derivative of the decedent's right to have sued for his own injuries immediately prior to his death, and is subject to the same defenses to which the decedent's action would have been subject. In short, wrongful death action plaintiffs stand in the legal shoes of the decedent. As we said in [Vassallo v. Nederl–Amerik Stoomv Maats Holland](#), 162 Tex. 52, 344 S.W.2d 421, 424 (1961):

It is our opinion that under the express provisions of the Wrongful Death Act, the plaintiff is permitted to assert any basis for recovery that the decedent could have asserted if he were alive, and no other; and that the defendant can assert any defense to that cause of action that it could have asserted if the decedent had survived, and no other. The statutory beneficiaries of a deceased ... have the same substantive rights to recover as the deceased would have had had his injury been less than death.

Accordingly, we have recognized that a wrongful death action is not allowed if the decedent could not, immediately prior to his death, have maintained an action because of: governmental immunity, [Duhart v. State](#), 610 S.W.2d 740, 742 (Tex.1980); interspousal immunity, [Bounds v. Caudle](#), 560 S.W.2d 925, 926 (Tex.1977), [Wilson](#), 154 S.W. at 326–327; a spouse's contributory negligence,

Schwing v. Bluebonnet Express, Inc., 489 S.W.2d 279, 280 (Tex.1973), *Dallas Ry. & Terminal Co. v. High*, 129 Tex. 219, 103 S.W.2d 735, 736 (1937); contributory negligence, *Vassallo*, 344 S.W.2d at 424; absence of a cause of action for prenatal injury, *Magnolia*, 78 S.W.2d at 945, *Leal*, 419 S.W.2d at 821; the Texas Guest Statute, *Bowman v. Puckett*, 188 S.W.2d 571, 572 (Tex.1945); contractual limitation of liability, *Sullivan-Sanford Lumber Co. v. Watson*, 106 Tex. 4, 155 S.W. 179, 180 (1913); release, *Thompson v. Ft. Worth & R.G. Ry. Co.*, 97 Tex. 590, 80 S.W. 990, 991 (1904); a fellow servant's negligence, *Texas & N.O.R. Co. v. Berry*, 67 Tex. 238, 5 S.W. 817, 818 (Tex.1887). Not all of these defenses remain viable, and thus the rule that a wrongful death claim is derivative of the decedent's rights would be applied differently in many of these situations today.⁶ The rule itself, however, remains unassailed. For 132 years, since Texas first created an action for wrongful death, this Court has allowed the action only if the decedent could have maintained suit for his injuries immediately prior to his death. Our intermediate appellate courts have consistently followed this same rule, as have the federal courts constrained to apply Texas law.⁷

*348 Plaintiffs, however, argue that the defense of limitations is an exception to the rule that a wrongful death action is derivative. They base this argument on the second sentence of the statute of limitations for wrongful death actions, which states that “[t]he cause of action accrues on the death of the injured person.” TEX.CIV.PRAC. & REM.CODE § 16.003(b). Because a wrongful death action does not accrue until the death of the injured person, plaintiffs argue, even if the decedent's own cause of action is then barred, the wrongful death action is not.

We do not agree that section 16.003(b) must be read as an exception to section 71.003(a). Section 16.003(b) sets the time when a wrongful death action accrues, if it exists. It does not, however, provide that there is always an action to accrue. The Wrongful Death Statute allows an action by a decedent's beneficiaries “only if the individual injured would have been entitled to bring an action for the injury if he had lived.” TEX.CIV.PRAC. & REM.CODE § 71.003(a). If a wrongful death action exists, it accrues, not when the decedent was injured, but at his death, and the limitations period on that action begins to run at death. But if a wrongful death action does not exist because the decedent could not maintain an action in his own right

immediately prior to his death, for whatever reason, then no wrongful death action ever accrues. If a decedent's own cause of action were barred by governmental immunity, or statute, or release, or res judicata, or any other affirmative defense, there is no wrongful death action to accrue. Thus, if a decedent settles his own cause of action for his injuries and then dies, his statutory beneficiaries never have a wrongful death cause of action. The action does not accrue at decedent's death, despite section 16.003(b), because decedent already settled his own cause of action. Similarly, if a decedent litigates his own cause of action to a final judgment and then dies, no wrongful death action accrues, despite section 16.003(b), because decedent would have been barred by res judicata from asserting any further claims for his injuries immediately prior to his death. Section 16.003(b) does not create a cause of action, or resurrect one that has expired with the decedent; it only defines the period within which statutory beneficiaries must sue if they have a claim. See also *Francis v. Herrin Transp. Co.*, 432 S.W.2d 710, 713 (Tex.1968) (wherein the Court stated in a related context: “If by ... law or statute the right to maintain the action and recover damages, although once given, no longer exists, our statute of limitation does not confer the right.”)

Plaintiffs contend that sections 71.003(a) and 16.003(b) must be read in conjunction with one another. These sections, however, do not conflict with each other under our analysis. Sections 71.003(a) and 16.003(b) must indeed be read together, but they can be so read without reaching a result inconsistent with the derivative nature of wrongful death actions. If a decedent may maintain suit for personal injuries at his death, his statutory beneficiaries may sue for wrongful death, their cause of action accrues at the decedent's death, and the limitations period begins to run against them from that point. Under section 16.003(b), the time for suit never begins to run against statutory beneficiaries prior to decedent's death.⁸ But if a decedent may not *349 maintain suit because of some defense—release, res judicata, limitations, etc.—which may be properly interposed by defendants, there is no wrongful death action to accrue. The action is not barred by limitations before it accrues; it never accrues because the decedent could not maintain an action at his death.⁹

It is wrong to say, as one of the dissents does, that our decision penalizes the families of people who die lingering deaths. A person whose injuries result in death is entitled, while he is alive, to sue and recover damages

from those liable for his injuries. The defendant against whom judgment is rendered is not required to respond again in damages to the family of the injured person after he dies. And the defendant who is exonerated of liability to the injured person is not required to defend against the same claims by the person's family following his death. The families of injured persons are not penalized in such circumstances. Neither are they penalized when they are precluded from suing because a decedent, in his lifetime, chose not to sue until his own claims were barred by limitations. We have not, as one of the dissent states, placed wrongful death beneficiaries in the impossible situation of being required to file suit before the death of which they complain. We hold only, in the words of [section 71.003\(a\)](#), that they are entitled to sue “only if the individual injured would have been entitled to bring an action for the injury if he had lived.”

To adopt the plaintiffs' position in this case would greatly relax the statute of limitations for death cases. By their reading of [section 16.003\(b\)](#), statutory beneficiaries are allowed to sue within two years of a death, even if the action which allegedly caused the death occurred five, ten, twenty or more years earlier. This would thwart the very purpose of limitations, which is to require that actions be brought within a reasonable, prescribed period after a wrong occurs.

The dissents would find support for their contrary conclusion in their reading of two of our prior decisions, *DeHam v. Mexican Nat'l Ry. Co.*, 86 Tex. 68, 23 S.W. 381 (1893), and *Moreno v. Sterling Drug, Inc.*, 787 S.W.2d 348 (Tex.1990). But these cases do not provide such support. In *DeHam*, the decedent was injured in Mexico but died in Texas. Decedent's beneficiaries argued that because a wrongful death action does not accrue until the decedent's death, as provided by the precursor of [section 16.003\(b\)](#), their action arose under the law of Texas, where the decedent died. The Court rejected this contention:

But this is merely a statute of limitation, and not a statute defining what shall constitute a cause of action. The reason of the provision is obvious. Since no action could be brought by the relatives of the injured person until death had ensued, and since a great length of time might elapse between the injury and the death, it was reasonable that the time of the death should be taken as the point from which limitation should begin to run. The article which gives an action in this class of cases reads: “An action for actual damages on account of

injuries causing the death of any person may be brought in the following cases,” etc.... Although the right of action does not accrue to the beneficiaries named in the statute unless death ensues, the wrong for which the action is allowed is the injury which causes the death.

23 S.W. at 381–382. In holding that no action arose under Texas law, the Court did not use the limitations statute to create an exception to the general rule that a wrongful death action is derivative of a decedent's rights. Rather, the Court went on to explain that if a person were injured by a fellow servant in a jurisdiction which barred recovery in such circumstances, his beneficiaries would not be entitled to recover, even if he died in a jurisdiction which did not bar recovery in such circumstances. *350 Thus, the Court acknowledged the derivative nature of wrongful death actions.

In *Moreno*, two infants died of [Reye's syndrome](#) shortly after birth. Not until later did their parents learn that the children had been given [aspirin](#), which might have contributed to the reaction resulting in their deaths. The parents did not bring their wrongful death actions until more than four years after the death of the children. Citing the language quoted from *DeHam* above, the parents argued that [section 16.003\(b\)](#) sets only the earliest date that a wrongful death action can accrue. We rejected this argument, observing that the statute “was meant solely to prevent the potential anomaly of limitations running *before* death. Its purpose was not to extend the beginning of the running of the statute *beyond* the date of death.” 787 S.W.2d at 352. From this context, and from the fact that the injured persons were infants who died shortly after their injuries, the limitations to which we referred was that applicable to beneficiaries' actions. We did not address the situation in which a decedent's own action might be barred by limitations. If a decedent's action is not barred by limitations at the time of his death, [section 16.003\(b\)](#) does not preclude his beneficiaries from suing until two years have elapsed. The time that may have elapsed from injury to death is not subtracted from the two years under [section 16.003\(b\)](#).¹⁰ This does not affect the general rule, however, that if the decedent's action is barred by limitations, no wrongful death action accrues.

To try to show that the defense of limitations is different from other defenses to wrongful death actions, the dissents rely on two commentators, who purport only to state the majority rule in American jurisdictions,¹¹

the Restatement (Second) of Torts, which conflicts with the first Restatement of Torts,¹² and a few cases.¹³ But the more authoritative view, and probably the more prevalent, is that if a decedent's action would be barred by limitations, then so would a wrongful death action.¹⁴ Construing a federal statute, the *352 United States Supreme Court stated in *Michigan Central R.R. v. Vreeland*, 227 U.S. 59, 70, 33 S.Ct. 192, 196, 57 L.Ed. 417 (1913):

[A]s the foundation of the right of action [for wrongful death] is the original wrongful injury to the decedent, it has been generally held that the new action is a right dependent upon the existence of a right in the decedent immediately before his death to have maintained an action for his wrongful injury.

Settled precedent of this Court and other courts in Texas, representing consistent statutory construction for more than a century, supports our conclusion that there should be no exception for limitations to the general rule providing that our statutory wrongful death claim is essentially derivative in nature. The weight of authority in other jurisdictions, unsurprisingly, reaches the same result. A single exception for limitations is logically inconsistent, in fact, with the principle underlying limitations—that actions should be timely asserted or not at all—since it would permit wrongful death beneficiaries to sue within two years of the death of their family member, regardless of how long before his death he may have been injured.

For all these reasons, we hold that the defense of limitations bars the wrongful death action against the respondents in this case as a matter of law.

* * * * *

We therefore affirm the judgment of the court of appeals.

Concurring and dissenting opinion by DOGGETT, J., joined by MAUZY, J.

Concurring and dissenting opinion by GAMAGE, J.

DOGGETT, Justice, concurring and dissenting

Henceforth any action for the death of a loved one can be barred before it accrues; a family's rights can be terminated before they can be exercised. That is the objective of another injustice committed by a majority that is not slowed in the slightest either by a statute that has been on the books since 1860 or its own recent writing to the contrary. Today a family is told that they should have filed an action for damages from the death of their husband and father *five years before he died*. Prophets and palm readers would have done them more good than an attorney.

The enactment at issue here is terse, clear and unqualified:

A person must bring suit not later than two years after the day the cause of action accrues in an action for injury resulting in death. The cause of action accrues on the death of the injured person.

Tex.Civ.Prac. & Rem.Code § 16.003(b). If this statute means what it says, the family of a dead worker may have the merits of its claims considered by a jury of twelve Texans. To deny them that right, the majority must declare the applicable statute inapplicable, revising the law to provide that a death action must be brought not two years after death, as *section 16.003(b)* so clearly provides, but two years after injury.

The harm caused by this judicial stratagem will extend to not a few Texas families. In the real world, carcinogens and other toxic substances often produce a death that is creeping rather than one that neatly fits within the constraints of a two-year deadline. Millions of people suffer the demise of which Edna St. Vincent Millay so poignantly wrote in another context:

And so beneath the weight lay I

And suffered death, but could not die.¹

Today's decision provides an abrupt answer to the families of those who linger—the parties responsible for such deaths will never be held accountable in any Texas court. Because the imposition of an impossible condition on the rights of families of those who do not die quickly is

not supported *353 by statute and is directly counter to recent precedent of this court, I dissent.²

The facts here are simple. Donnon Russell died on January 28, 1988 from *silicosis*, a lung disease alleged to have developed as a result of his exposure to certain products during his 19 years as a sandblaster. On March 4, 1988, his widow and children filed suit under the Texas Wrongful Death Act. This action having been filed thirty-six days after Russell's death, it was without question timely filed according to the specific words of [section 16.003\(b\)](#).

The majority nonetheless concludes that Petitioners' wrongful death action is time-barred. To do so, it looks not to the statute of limitations which has been specifically applicable to death actions for more than a century.³ Instead, the majority turns to a totally different statute and expands the limitations provision for personal injury to include death actions. Hence, Petitioners are now told they should have filed suit for death two years after Russell discovered he suffered from silicosis—*i.e., five years before Russell died*.

This court only recently stated that the statute of limitations applicable to death actions was designed to avoid this precise result:

In *DeHarn* [... 86 Tex. 68, 23 S.W. 381 (1893)], this court interpreted the accrual language in [Tex.Rev.Civ.Stat. art. 3202 \(1879\)](#), which was the statutory predecessor to [section 16.003\(b\)](#). The opinion describes the reason for [Article 3202](#) as follows:

Since no action could be brought by the relatives of the injured person until death had ensued, and since a great deal of time might elapse between the injury and the death, it was reasonable that the time of death should be taken as the point from which limitation should begin to run.

DeHarn, 23 S.W. at 381–82. [Petitioner] construes this single passage as evidencing a legislative purpose to extend the beginning of the running of the statute beyond the date of death. But [Article 3202](#) was meant solely to prevent the potential anomaly of limitations running before death.

Moreno v. Sterling Drug, Inc., 787 S.W.2d 348, 352 (Tex.1990) (emphasis supplied). Both *DeHam*⁴ and *Moreno* made clear that limitations runs from the date of death and not the date of injury. In *Moreno*, the court went

so far as to label [section 16.003\(b\)](#) an “absolute” statute of limitations, 787 S.W.2d at 354, meaning one “free from conditional limitation; ... free from qualification.” Webster's New International Dictionary 6 (3d ed. 1966).

*354 The majority glibly sidesteps this precedent, the reasoning of which was required to block the Morenos' suit but never intended to justify recovery by any other family. The limitations statute is now made “absolute for defendants only” by reference to that part of the death act limiting the grounds upon which suit may be predicated. [Tex.Civ.Prac. & Rem.Code § 71.003\(a\)](#). This provision originated as part of the first Wrongful Death Act passed in Texas in 1860, which provided:

[W]hensoever the death of any person may be caused by wrongful act, neglect, unskillfulness or default, *and the act, neglect, unskillfulness or default is such as would (if death had not ensued) have entitled the party, injured, to maintain an action for such injury*, then and in every such case the person who would have been liable if death had not ensued, shall be liable to an action for damages....

Law of Feb. 2, 1860, ch. 35, 1860 Tex.Gen.Laws 32, 4 H. Gammel, Laws of Texas 1934 (1898) (emphasis supplied). It was revised by the Legislature in 1879:

The wrongful act, negligence, carelessness and unskillfulness or default mentioned in the preceding article *must be of such character as would, if death had not ensued, have entitled the party injured to maintain an action for such injury*.

[Tex.Rev.Civ.Stat. art. 2900 \(1879\)](#) (emphasis added). While the death act was amended many times in the ensuing years,⁵ this provision, although renumbered, remained unchanged until 1985. At that time it was included as part of the new Civil Practice and Remedies Code,⁶ “without substantive change.” [Tex.Civ.Prac. & Rem.Code § 1.001\(a\)](#); Act of June 16, 1985, 69th Leg., R.S., ch. 959, § 10, 1985 Tex.Gen. Laws 3242, 3322 (“This Act is intended as a recodification only, and no substantive change is intended by the Act.”).

This provision, based on its clear wording at the time of its initial adoption, limited death actions to those cases in which *the character of the injurious act* permitted suit for injury under existing law. Not all wrongful conduct was actionable at the time the death act was first passed and revised. For example, the “fellow servant” rule barred suit in many jurisdictions and, thus, fatal injury inflicted by a co-worker would not give rise to a death action against the employer. *Price v. Houston Direct Navigation Co.*, 46 Tex. 535, 537–38 (1877); *see also DeHam v. Mexican Nat'l Ry. Co.*, 86 Tex. 68, 70, 23 S.W. 381, 382 (1893). Contributory negligence on the part of the person injured also at one time barred suit in Texas. *McDonald v. International & Great N. Ry.*, 86 Tex. 1, 12–13, 22 S.W. 939, 944 (1893). Additionally, no cause of action was recognized for prenatal injuries to a child subsequently born alive, *Magnolia Coca Cola Bottling Co. v. Jordan*, 124 Tex. 347, 360, 78 S.W.2d 944, 950 (1935), nor for injuries to a woman whose husband's negligence was a contributing factor. *Dallas Ry. & Terminal Co. v. High*, 129 Tex. 219, 222, 103 S.W.2d 735, 736 (1937). All of these bars to recovery have been removed by statute or judicial decision; and, almost without exception,⁷ *355 these cases involved situations in which the *character* of the wrongful act barred suit. Here there is no question that the character of the alleged wrongful act would give rise to a cause of action for Russell's injuries under existing law. The majority nonetheless interprets [section 71.003\(a\)](#) as requiring that death actions be subject to all defenses which might have been urged against the personal injury action at the time of the death.

The majority dwells on the allegedly “consistent interpretation” of of this irrelevant provision because this court has never previously had need to construe the unequivocal wording of the applicable statute, [section 16.003](#). No justification has or can be provided as to how the interpretation of one provision dictates an unconscionable reading that deliberately misconstrues another.⁸

In adopting the Wrongful Death Act, the Legislature crafted a unique limitations statute. The time for filing suit is not determined by the date of the wrongful conduct or the date of injury—rather limitations begins to run at death without regard to when the injury occurred. This court has, until today, accepted the statute as written. *See DeHam*, 23 S.W. at 381–82 (although “a great deal of time

might elapse between the injury and death ... death [is] the point from which limitation should begin to run”).

A federal court, grappling with this same problem, refused to bar a death claim under the Federal Tort Claims Act even though the statute of limitations on the underlying injury action had expired. A holding to the contrary, the appeals court concluded, would promote inequity and supplant lawyers with fortunetellers:

To hold that a claim for wrongful death somehow accrues before the date of death would place the class protected by the statute in the legally untenable position of speculating about hypothetical or potential future injuries, for the damages awarded survivors under the wrongful death act, which include funeral and burial expenses, are not identical with those available in a personal injury action to the one actually injured, and remain indeterminate until death has occurred. Clearly no such claim would ever be justiciable even were an astucious plaintiff to lodge such a clairvoyant complaint, for courts simply cannot protect rights against “assumed potential invasions” ... until they are presented with an actual case or controversy.

Fisk v. United States, 657 F.2d 167, 171 (7th Cir.1981) (citations omitted).⁹

There is a split of authority in other jurisdictions as to whether death actions are barred when the statute of limitations has passed as to the underlying personal injury claim. *See* *356 *Adams v. Armstrong World Indus., Inc.*, 596 F.Supp. 1407, 1414, 1415 (D.Idaho 1984) (listing cases), *appealed sub. nom. Waters v. Armstrong World Indus., Inc.*, 773 F.2d 248 (9th Cir.1985) (certifying question to Idaho Supreme Court), *aff'd in part, rev'd in part* 790 F.2d 893 (9th Cir.1986) (mem.) (decision after certified question refused). The decisions, though, are dependent upon the wording of the applicable state death act provision. *See* Annot., 167 A.L.R. 894, 895–96 (1947) (“The problem here is manifestly one of statutory construction.”). The Restatement concludes that, in most

states, a death action is not barred by the passage of limitations as to the decedent's personal injury claim:

Under most wrongful death statutes, the cause of action is a new and independent one, accruing to the representative or to surviving relatives of the decedent only upon his death; and since the cause of action does not come into existence until the death, it is not barred by prior lapse of time, even though the decedent's own cause of action for the injuries resulting in death would be barred.

Restatement (Second) of Torts § 899 comment c, at 442 (1965). See also William L. Prosser, Prosser and Keeton on the Law of Torts § 127 at 957 (W. Page Keeton, ed. 5th ed. 1984) (“[T]he considerable majority of the courts have held that the statute [of limitations] runs against the death action only from the date of death, even though at that time the decedent's own action would have been barred while he was living.”).¹⁰

Several preeminent commentators in the field of tort law would draw a distinction between defenses that go to the merits or existence of a cause of action, and procedural objections such as limitations.¹¹ An expert on the Texas Wrongful Death Act, Dean Leon Green,¹² urged differing treatment of these two classes of defenses:

[T]his interposition of the personal injury defenses is maintainable as to contributory negligence, assumption of the risk, fellow servant rule and other defenses which constitute a limitation on a cause of action. But it is not maintainable as to ... statute of limitations and such other defenses as expressly recognize that the deceased did have a cause of action which he either has, or could have, successfully maintained. The statute does not say that he must have had a cause of action at the moment of his death.... These defenses give implicit recognition to the injured person's cause of action and they should operate against it alone. Their force is fully spent before the death action arises.

Leon Green, *The Texas Death Act*, 26 Tex.L.Rev. 461, 461, 463 (1948).¹³ Similarly, reviewing death acts nationwide, Dean Prosser concluded:

It is not at all clear, however, that such provisions of the death acts ever were intended to prevent recovery where the deceased once had a cause of action, but it has terminated before his death. The more reasonable interpretation would seem to be that they are directed at the necessity of some original tort on the part of the defendant, under circumstances giving rise to liability in the first instance, rather than to subsequent changes in the situation affecting only the interest of the decedent. W. Prosser, *The Law of Torts* § 127 at 911 (4th ed. 1971). These views comport with the express language of the Texas statute.

*357 Moreover, the distinction between substantive and procedural defenses better fits within the bounds of statutory construction. First, this distinction properly recognizes the “object sought to be obtained” in enacting wrongful death legislation. Tex. Gov't Code § 311.023(1). The purpose of the death act was recently identified by the court as “ ‘provid[ing] a remedy for injuries resulting in death.’ ” *Moreno*, 787 S.W.2d at 356 n. 8 (quoting Leon Green, *The Texas Death Act*, 26 Tex.L.Rev. 133, 136 (1947)). The majority's interpretation today is inconsistent with this objective, as it deprives Petitioners of a remedy for Russell's death. Second, our previous decisions advise that the “wrongful death statute is remedial in nature and must be liberally construed....” *Witty v. American General Capital Distributors, Inc.*, 727 S.W.2d 503, 504 (Tex.1987). In construing section 71.003(a), the remedial purpose of the statute is thwarted in cases of lingering illness followed by death. Third, “a just and reasonable result is intended.” Tex. Gov't Code § 311.021(3). It is both unreasonable and unjust to conclude that a wrongful death suit is barred before the date on which the action accrues. Fourth, the construction imposed by the majority creates a conflict between section 71.003(a) and section 16.003(b). It must be remembered that these provisions were enacted as a part of the original wrongful death act and were intended to be construed together.¹⁴ Law of Feb. 2, 1860, ch. 35, 1860 Tex.Gen.Laws 32, 4 H. Gammel, *Laws of Texas* 1934 (1898). A specific statutory provision is ordinarily controlling over a more general one. Hence, the explicit provision as to limitations should preclude the implication of a more restrictive time period for filing suit by interpreting a more general provision. Fifth, differentiating between substantive and procedural defenses is consistent with the nature of a wrongful death action. A majority of this court concluded in *Moreno* that no action for death existed at common law,¹⁵ and the

death statute created a new cause of action. 787 S.W.2d at 356. The recovery permitted is not for the injury to the deceased, but for harm inflicted upon the survivors by destruction of the "familial relationship." See *Sanchez v. Schindler*, 651 S.W.2d 249, 251 (Tex.1983). Different damages may be recovered in each; statutory beneficiaries may recover their own pecuniary losses, mental anguish and loss of companionship and society suffered *as a result of the death*, as well as funeral expenses. These damages are not recoverable in a personal injury action filed by the deceased. A death action is thus separate and distinct from the injury action and should be made subject to its own separate and distinct statute of limitations. This court, consistent with rules of construction discussed above, and the better-reasoned cases from other jurisdictions, could and should interpret our state death act to allow Petitioners' suit.¹⁶

The majority today forms a triptych of tragedy denying to bereaved families compensation for their loss. First those suffering from the death of a family member are instructed to file suit within two years after death, even if the cause of death cannot with diligence be discovered in that time *358 period. *Moreno v. Sterling Drug, Inc.*, 787 S.W.2d 348 (Tex.1990). Next they are told that, if medical malpractice causes merely injury, the denial of full compensation rises to the level of a constitutional violation, but if the medical error is fatal, damages can be limited to whatever the legislature might permit. *Rose v. Doctors Hosp.*, 801 S.W.2d 841 (Tex.1990). These grief-stricken relatives are now burdened with the impossible task of filing an action for wrongful death before death has occurred. This continued deprivation of the rights of bereaved families is inconsistent with the purpose and language of the wrongful death statute.

The action for wrongful death, created by the Texas Legislature, has been taken away from the families of those who linger in death. The majority has mandated that death be swift, or reckoning for wrongful conduct will not be made in the Texas courts. Families, after the slow and often painful illness and death of a loved one, are left with nothing:

The Bustle in a House

The Morning after Death

Is solemnest of industries

Enacted upon Earth—

The Sweeping up the Heart

And putting Love away

We shall not want to use again

Until Eternity.¹⁷

MAUZY, J., joins in this concurring and dissenting opinion.

GAMMAGE, Justice, concurring and dissenting.

I agree that the Russells' cause of action under the Survival Statute, TEX.CIV.PRAC. & REM.CODE § 71.021, is barred by limitations, but I do not believe their claim under the Wrongful Death Statute, TEX.CIV.PRAC. & REM.CODE § 71.001–.011, is likewise barred. Consequently, I join in Parts I and II of the majority opinion, but I dissent in part from the judgment and remainder of the majority opinion.

The majority maintains that no beneficiary can sue under the Wrongful Death Statute unless the decedent had, at the time of death, a right to sue for his or her own injuries. The majority reasons, because Donnon Russell's suit for injuries against the seven respondents in this cause was barred by limitations when he died, the subsequent action by his widow and children for his wrongful death as a result of those injuries is barred as well. The majority concedes this result is not mandated by the literal terms of the Wrongful Death Statute, but argues it based on judicial interpretation of the statute as applied to other situations. This Court has never before addressed the precise question whether the limitations defense is sufficiently analogous to other defenses that it should receive the same treatment.

The limitations defense should be treated differently from other defenses for three reasons: the text of the governing

statutes, the peculiar nature of the limitations defense, and conformity with the law in other jurisdictions. Each of these considerations suggests distinct treatment for limitations, and combined they compel the conclusion that the beneficiaries' action in this cause is not time-barred.

The statute governing limitations in wrongful death actions provides as follows:

A person must bring suit not later than two years after the day a cause of action accrues in an action for injury resulting in death. The cause of action accrues on the death of the injured person.

TEX.CIV.PRAC. & REM.CODE § 16.003(b). I agree with the majority that a limitations statute, in and of itself, cannot create a right of action. See *Francis v. Herrin Transp. Co.*, 432 S.W.2d 710, 712–13 (Tex.1968)¹; *359 *De Ham v. Mexican National Ry. Co.*, 86 Tex. 68, 70, 23 S.W. 381, 381 (1893). It can, however, provide evidence of legislative intent. A wrongful death action, by definition, cannot exist until a person dies. As we noted in *Moreno v. Sterling Drug, Inc.*, 787 S.W.2d 348, 352 (Tex.1990), the last sentence of section 16.003(b) “was meant solely to prevent the potential anomaly of limitations running before death.” No statutory language casts doubt on any other potential defense to a wrongful death action. Construing the section 16.003(b) limitations provision (that the wrongful death “cause of action accrues on the death of the injured person) together with the provision in the Wrongful Death Statute permitting actions “only if the individual injured would have been entitled to bring an action for the injury if he had lived,” TEX.CIV.PRAC. & REM.CODE § 71.003(a), it is apparent the legislature intended the express limitations language to control. Damages for wrongful death are different from those recoverable for the underlying tort that caused the death. The parties entitled to bring the action are different. When the legislature provided that the Wrongful Death Action “accrues on the death of the injured person,” it acknowledged those differences with respect to the limitations defense. The legislature intended to exclude limitations from the class of defenses that prevent one from being “entitled” to bring the action, because the parties entitled to bring the action and the recoverable elements of damage are different.

Limitations is unlike other defenses that may be asserted against the decedent's cause of action. The limitations defense does not challenge the merits of the decedent's underlying cause of action, as do contributory negligence, interspousal immunity, governmental immunity, the fellow servant rule, the Guest Statute, or any other defenses (whether currently existing or not) that we historically have recognized as a bar. Limitations denies a right to recovery, but does not extinguish substantive rights. See, e.g., *City of Dallas v. Etheridge*, 152 Tex. 9, 14, 253 S.W.2d 640, 643 (1953) (“statutes of limitation do not affect the substantive rights of parties; they merely bar the remedy by which one party seeks to enforce his substantive rights”).

This reasoning was applied to the expiration of a decedent's personal injury limitations period in *Hoover's Administratrix v. Chesapeake & Ohio Railway Co.*, 46 W.Va. 268, 33 S.E. 224, 224 (1899):

It is claimed that, the injured having lost his right to sue by reason of the bar of the statute of limitations at the time of this death, the cause of action is thereby destroyed, both as to himself and his administratrix; that death must find him with a cause of action legally enforceable, or she has none. This is undoubtedly true where the cause of action never existed, or is defeated by contributory negligence, or it has been compromised or released; for in such cases there is a complete want of, or destruction by, satisfaction of the cause, not merely of the right of action or remedy.... Generally speaking, however, the statute of limitations acts on the remedy, and takes away the right of action, and while it prevents relief, it does not destroy the cause of action, or the moral obligation on the negligent party to make good the injury caused by his default or neglect.... In personal actions for injury the bar of the statute precludes the remedy, but it does not satisfy the wrong.

Moreover, the defense of limitations does not, like some other defenses, involve the danger of double compensation. At least theoretically, a release, settlement, or judgment provides compensation or the opportunity to be heard on a claim for compensation for the decedent; not so when a claim is barred by limitations. See WILLIAM L. PROSSER & W. PAGE KEETON, PROSSER AND KEETON ON THE LAW OF TORTS § 127 at 957 (5th ed. 1984).

Finally, permitting the Russell beneficiaries to bring this action would accord with the result, if not the exact rationale, in most other jurisdictions. Prosser writes that “the considerable majority of the *360 courts have held that the statute runs against the death action only from the date of death, even though at that time the decedent's own action would have been barred while he was living.” *Id.* Other treatises merely note there is a division of authority.² The American Law Institute recognizes Prosser's statement as the majority rule in the RESTATEMENT (SECOND) OF TORTS,³ and other scholarly commentators urge it as the better rule.⁴ The rule is followed in a number of jurisdictions with statutes based on Lord Campbell's Act. See *Western*

& Atlantic Railroad Co. v. Bass, 104 Ga. 390, 30 S.E. 874 (1898); *In re Estate of Pickens*, 255 Ind. 119, 263 N.E.2d 151 (1970); *Farmer's Bank & Trust Co. v. Rice*, 674 S.W.2d 510 (Ky.1984); *Gramlich v. Traveller's Ins. Co.*, 640 S.W.2d 180 (Mo.App.1982); *Nestelle v. Northern Pacific Railroad Co.*, 56 F. 261, 262 (C.C.D.Wash 1893); *Hoover's Administratrix v. Chesapeake & Ohio Ry. Co.*, 46 W.Va. 268, 33 S.E. 224 (1899); see generally *Louisville, Evansville & St. Louis RR. Co. v. Clarke*, 152 U.S. 230, 14 S.Ct. 579, 38 L.Ed. 422 (1893) (interpreting an Indiana statute).⁵

Wrongful death actions should be permitted within two years of the decedent's death, whether or not the decedent's own action for his or her injuries would have been time barred on the date of death. I would affirm in part the judgment of the court of appeals but reverse with regard to the wrongful death action and remand the cause to the trial court for further proceedings on that portion of the claim by Russell's widow and children.

All Citations

841 S.W.2d 343, 61 USLW 2265, Prod.Liab.Rep. (CCH) P 13,345

Footnotes

- 1 Russell's widow is Betty Parr Russell. His four children are Norma Lynn Coker, Gail Lee Harrah, Jeannie Marie Bourgoins and Dennis O'Neal Russell.
- 2 Respondents are Ingersoll-Rand Co., McKenzie Equipment Co., Schramm, Inc., Cooper Industries, Inc., Joy Manufacturing Co., IC Group Inc., and Sullair Corp.
- 3 The statutes of limitations applicable to these causes of actions are two or four years. [TEX.CIV.PRAC. & REM.CODE §§ 16.003\(a\), 16.004](#); [TEX.BUS. & COM.CODE § 2.725](#). Plaintiffs contend that fact issues remain as to when the causes of action against respondents accrued, precluding summary judgment. More specifically, plaintiffs argue that the discovery rule operates to delay accrual of the causes of action against respondents until Russell could reasonably have determined that they were among the parties at fault. Generally, however, “limitations begin to run when the fact of injury is known”, *Moreno v. Sterling Drug, Inc.*, 787 S.W.2d 348, 351 (Tex.1990), not when the alleged wrongdoers are identified. There is no question on the record before us that Russell's actions accrued no later than 1982, when he filed suit.
- 4 “(a) The death of a person against whom or in whose favor there may be a cause of action suspends the running of an applicable statute of limitations for 12 months after the death.
 “(b) If an executor or administrator of a decedent's estate qualifies before the expiration of the period provided by this section, the statute of limitations begins to run at the time of the qualification.”
- 5 The Legislature expressly intended the last recodification to be without substantive change. [TEX.CIV.PRAC. & REM.CODE § 1.001](#).
- 6 For example, *Bounds* abolished interspousal immunity and *Schwing* abandoned the rule that a person's negligence precluded recovery by the person's spouse.
- 7 See, e.g., *Slaughter v. Southern Talc Co.*, 949 F.2d 167, 173–74 (5th Cir.1991) (beneficiaries wrongful death action related back to filing of decedent's action); *Mayo v. Tri-Bell Indus., Inc.*, 787 F.2d 1007, 1009 (5th Cir.1986) (wrongful death recovery precluded by Texas comparative negligence statute because decedent's negligence greater than

tortfeasor's, observing that "the Texas courts have, in an undeviating line, characterized the action on behalf of the decedent's family as a purely derivative one"); *Graffagnino v. Fibreboard Corp.*, 781 F.2d 1111, 1113 (5th Cir.1986) (per curiam), *on reh'g following* 776 F.2d 1307 (5th Cir.1985) (release by deceased and beneficiary barred subsequent suit by beneficiary, even where disease was not previously diagnosed); *Delesma v. City of Dallas*, 770 F.2d 1334, 1338–39 (5th Cir.1985) (wrongful death action barred by res judicata), *aff'g* 588 F.Supp. 35, 36–37 (N.D.Tex.1984) (action barred by limitations); *Terry v. Tyler Pipe Indus.*, 645 F.Supp. 1194, 1196–98 (E.D.Tex.1986) (action barred by limitations); *Garza-Vale v. Kwiecien*, 796 S.W.2d 500, 502–04 (Tex.App.—San Antonio 1990, writ denied) (action barred by Texas Smoke Detectors Statute); *Maderazo v. Archem Co.*, 788 S.W.2d 395, 397 (Tex.App.—Houston [14th Dist.] 1990, no writ) (action against decedent's employer barred by Workers' Compensation Act); *Davenport v. Phillip Morris, Inc.*, 761 S.W.2d 70, 72 (Tex.App.—Houston [14th Dist.] 1988, no writ) (action barred by limitations); *Pastor v. Champs Restaurant, Inc.*, 750 S.W.2d 335, 336 (Tex.App.—Houston [14th Dist.] 1988, no writ) (decedent's negligence a defense); *Washam v. Hughes*, 638 S.W.2d 646, 648 (Tex.App.—Austin 1982, writ ref'd n.r.e.) (action derivative); *Velasquez v. Livingston*, 598 S.W.2d 346, 349 (Tex.Civ.App.—Corpus Christi 1980, no writ) (recovery precluded by Texas comparative negligence statute because decedent's negligence greater than tortfeasor's); *Donsbach v. Offield*, 488 S.W.2d 494, 495 (Tex.Civ.App.—Austin 1972, no writ) (action barred by interspousal immunity); *Wentzel v. Neurenberg*, 314 S.W.2d 855, 860–61 (Tex.Civ.App.—Waco 1958, no writ) (action barred by contributory negligence of deceased's spouse); *Karling v. Lower Colo. River Auth.*, 303 S.W.2d 495, 498–99 (Tex.Civ.App.—Austin 1957, writ ref'd n.r.e.) (action barred by governmental immunity); *Kelley v. City of Austin*, 268 S.W.2d 773, 775 (Tex.Civ.App.—Austin 1954, no writ) (action barred by governmental immunity); *Childs v. Childs*, 107 S.W.2d 703, 704 (Tex.Civ.App.—Beaumont 1937, no writ) (action barred by interspousal immunity).

8 We do not decide here whether, under other statutes, a limitations period may begin to run against wrongful death beneficiaries prior to decedent's death. See *Wilson v. Rudd*, 814 S.W.2d 818 (Tex.App.—Houston [14th Dist.] 1991, writ pending).

9 We do not, contrary to the dissents' charges, hold that limitations affects the substantive rights of the parties. It is a defense to an action which, like other defenses such as res judicata, collateral estoppel, and release, is waived if not interposed by the defendant in a wrongful death action.

10 We do not comment upon the effect of any statute other than section 16.003(b). See note 8, *supra*.

11 W. PAGE KEETON ET. AL., PROSSER AND KEETON ON THE LAW OF TORTS § 127, at 957 (5th ed. 1984); WILLIAM L. PROSSER, THE LAW OF TORTS § 127, at 911 (4th ed. 1971); Leon Green, *The Texas Death Act*, 26 TEX.L.REV. 461, 461, 463 (1948).

12 RESTATEMENT (SECOND) OF TORTS § 899 cmt. c, at 442 (1979) ("Under most wrongful death statutes, the cause of action is a new and independent one, accruing to the representative or to surviving relatives of the decedent only upon his death; and since the cause of action does not come into existence until the death, it is not barred by prior lapse of time, even though the decedent's own cause of action for the injuries resulting in death would be barred."); RESTATEMENT OF TORTS § 899 cmt. c, at 524–26 (1939) ("A cause of action for death is complete when death occurs; since, however, the decedent in his lifetime had a cause of action, the cause of action for death does not come into existence if before the death the action for the tortious conduct has been barred by the lapse of time.").

13 *Fisk v. United States*, 657 F.2d 167, 171 (7th Cir.1981) (applying federal law); *Western Union Tel. Co. v. Preston*, 254 F. 229, 234 (3rd Cir.1918) (applying Pennsylvania law), *cert. denied*, 248 U.S. 585, 39 S.Ct. 182, 63 L.Ed. 433 (1919); *Adams v. Armstrong World Indus., Inc.*, 596 F.Supp. 1407, 1414, 1415 (D.Idaho 1984) (listing cases), *appealed sub. nom. Waters v. Armstrong World Indus., Inc.*, 773 F.2d 248 (9th Cir.1985) (certification to Idaho Supreme Court), *aff'd in part, rev'd in part*, 790 F.2d 893 (9th Cir.1986) (mem.) (decision after Idaho Court refused certified question), *after remand*, 664 F.Supp. 463 (D.Idaho 1987), *judgment on limitations vacated on other grounds* 847 F.2d 589 (9th Cir.1988); *Larcher v. Wanless*, 18 Cal.3d 646, 135 Cal.Rptr. 75, 80, 81, 557 P.2d 507, 513, 514 (1976); *N.O. Nelson Mfg. Corp. v. Dickson*, 114 Ind.App. 668, 53 N.E.2d 640, 641 (1944); *Farmers Bank & Trust Co. v. Rice*, 674 S.W.2d 510, 512 (Ky.1984); *Smith v. McComb Infirmary Ass'n*, 196 So.2d 91, 93 (Miss.1967); *Gramlich v. Travelers Ins. Co.*, 640 S.W.2d 180, 186 (Mo.Ct.App.1982); *Brosse v. Cumming*, 20 Ohio App.3d 260, 20 OBR 322, 485 N.E.2d 803, 807 (1984); *DeHart v. Ohio Fuel Gas Co.*, 84 Ohio App. 62, 39 O.O. 101, 85 N.E.2d 586, 590 (1948); see also *James v. Phoenix Gen. Hosp., Inc.*, 154 Ariz. 594, 744 P.2d 695, 704 (1987); *Carroll v. W.R. Grace & Co.*, 830 P.2d 1253 (Mont.1992); *Gilloon v. Humana, Inc.*, 100 Nev. 518, 687 P.2d 80, 81 (1984); *Hoover's Adm'x v. Chesapeake & Ohio Ry. Co.*, 46 W.Va. 268, 269, 33 S.E. 224, 225 (1899).

14 *Northington v. Carey-Canada, Inc.*, 432 So.2d 1231, 1232 (Ala.1983), citing *Ellis v. Black Diamond Mining Co.*, 268 Ala. 576, 109 So.2d 699, 702 (1959); *Matthews v. Travelers Indem. Ins. Co.*, 245 Ark. 247, 432 S.W.2d 485, 488 (1968) (action

not barred at time of death), adopting the holding in *Hicks v. Missouri Pac. R.R. Co.*, 181 F.Supp. 648 (W.D.Ark.1960); *Drake v. St. Francis Hosp.*, 560 A.2d 1059, 1060 (Del.1989), citing *Milford Memorial Hosp. Inc. v. Elliott*, 58 Del. 480, 210 A.2d 858, 860–61 (1965); *Lambert v. Village of Summit*, 104 Ill.App.3d 1034, 60 Ill.Dec. 778, 433 N.E.2d 1016 (1982) (*Lambert*'s argument was noted but not reached in *Wyness v. Armstrong World Indus.*, 131 Ill.2d 403, 137 Ill.Dec. 623, 546 N.E.2d 568, 573–74 (1989), holding that limitations was not triggered by the discovery, a few months before death, of lung cancer and its causation); *Mason v. Gerin Corp.*, 231 Kan. 718, 647 P.2d 1340, 1344–45 (1982); *Ogden v. Berry*, 572 A.2d 1082 (Me.1990); *Mills v. International Harvester Co.*, 554 F.Supp. 611, 613 (D.Md.1982); *Larson v. Johns–Manville Sales Corp.*, 427 Mich. 301, 399 N.W.2d 1, 7 (1986); *Regie de l'assurance Auto. du Quebec v. Jensen*, 399 N.W.2d 85 (Minn.1987), citing *Rugland v. Anderson*, 30 Minn. 386, 15 N.W. 676 (1883); *DeRogatis v. Mayo Clinic*, 390 N.W.2d 773 (Minn.1986) (statute providing that, with certain exceptions, wrongful death actions may be commenced within three years of death and within six years after act or omission); *Stang v. Hertz Corp.*, 81 N.M. 69, 463 P.2d 45, 54–55 (App.1969), *aff'd*, 81 N.M. 348, 467 P.2d 14 (1970); *Natseway v. Jojola*, 56 N.M. 793, 251 P.2d 274, 276 (1952); *Kelliher v. New York Cent. & H. R.R. Co.*, 212 N.Y. 207, 105 N.E. 824, 825–26 (1914); *Phelps v. Greco*, 177 A.D.2d 559, 576 N.Y.S.2d 158, 159 (N.Y.App.Div.1991); *Eldridge v. Eastmoreland Gen. Hosp.*, 307 Or. 500, 769 P.2d 775 (1989) (under 1967 statute, wrongful death actions are to be brought within three years of occurrence of the injury causing death; court, in holding that discovery rule was inapplicable, noted that legislators observed that action could be barred before death under revised statute); *Piukkula v. Pillsbury Astoria Flouring Mills Co.*, 150 Or. 304, 42 P.2d 921, 929–31 (1935) (Oregon Employers' Liability Act); *Howard v. Bell Tel. Co.*, 306 Pa. 518, 160 A. 613, 615 (1932), relied on in *Cowgill v. Raymark Indus., Inc.*, 780 F.2d 324, 331 (3rd Cir.1985); *Whaley v. Catlett*, 103 Tenn. 347, 53 S.W. 131, 133 (1899) (cause of action accrues at time of injury; injury and death simultaneous); *Craig v. R.R. Street & Co.*, 794 S.W.2d 351, 355 (Tenn.App.1990) (period began running when decedent's knowledge of causal connection between his illness and defendants' chemicals put him on inquiry of sources); *Street v. Consumers Mining Corp.*, 185 Va. 561, 39 S.E.2d 271, 277 (1946); *Miller v. United States*, 932 F.2d 301, 303 (4th Cir.1991) (applying Virginia law); *Calhoun v. Washington Veneer Co.*, 170 Wash. 152, 15 P.2d 943, 946 (1932); *Holifield v. Setco Indus., Inc.*, 42 Wis.2d 750, 168 N.W.2d 177 (1969) (cause of action accrued at time of accident, not at time of product's sale); *but see Fisk v. United States*, 657 F.2d 167, 171 (7th Cir.1981) (applying federal law); *Frongillo v. Grimmer*, 163 Ariz. 369, 788 P.2d 102 (App.1989) (review denied by Arizona Supreme Court), *citing James v. Phoenix Gen. Hosp., Inc.*, 154 Ariz. 594, 744 P.2d 695, 704 (1987); *Larcher v. Wanless*, 18 Cal.3d 646, 135 Cal.Rptr. 75, 557 P.2d 507, 511–13 (1976) (under the medical malpractice limitations statute, "injury" occurs at time of death; see discussion of wrongful death limitations); *Rauschenberger v. Radetsky*, 745 P.2d 640 (Colo.1987) (noting that *Crownover v. Gleichman*, 194 Colo. 48, 574 P.2d 497, 498–99 (1977) was legislatively overruled by Act approved June 7, 1979, ch. 134 § 1, 1979 Colo.Sess.Laws 615); *Glover v. Savannah Fla. & W. R.R. Co.*, 107 Ga. 34, 32 S.E. 876 (1899), *cited in Clark v. Singer*, 250 Ga. 470, 298 S.E.2d 484, 485 (1983) (medical malpractice limitations period unconstitutional as applied to medical practice wrongful death case), *Western & Atlantic R.R. Co. v. Bass*, 104 Ga. 390, 30 S.E. 874 (1898); *Chapman v. Cardiac Pacemakers, Inc.*, 105 Idaho 785, 673 P.2d 385 (1983); *Louisville, Evansville & St. Louis R.R. Co. v. Clarke*, 152 U.S. 230, 14 S.Ct. 579, 38 L.Ed. 422 (1893) (applying Indiana statute) and *Wilson v. Jackson Hill Coal & Coke Co.*, 48 Ind.App. 150, 95 N.E. 589 (1911), *cited in re Estate of Pickens*, 255 Ind. 119, 263 N.E.2d 151, 155 (1970) (interspousal immunity does not bar wrongful death action for father's killing on behalf of minor children); *Farmers Bank & Trust Co. v. Rice*, 674 S.W.2d 510, 512 (Ky.1984); *Smith v. McComb Infirmary Ass'n*, 196 So.2d 91, 93 (Miss.1967); *Gramlich v. Travelers Ins. Co.*, 640 S.W.2d 180, 186 (Mo.Ct.App.1982); *Carroll v. W.R. Grace & Co.*, 830 P.2d 1253 (Mont.1992); *Gilloon v. Humana, Inc.*, 100 Nev. 518, 687 P.2d 80, 81 (1984) (under the limitations period for health care claims, "injury" occurs at death); *Alfone v. Sarno*, 87 N.J. 99, 432 A.2d 857, 860–63 (1981) (wrongful death action did not require that availability of an action to decedent at his death, only a tortious, fatal injury; action not precluded by previous personal injury judgment for damages, although issue-preclusion principles applied to liability and damages that could have recovered in first suit); *Silverman v. Lathrop*, 168 N.J.Super. 333, 403 A.2d 18, 22–23 (Ct.App.Div.1979); *Brosse v. Cumming*, 20 Ohio App.3d 260, 20 OBR 322, 485 N.E.2d 803, 807 (1984); *Kimberly v. DeWitt*, 606 P.2d 612, 616 (Okla.App.1980), *citing Hugh Breeding, Inc. v. Daniel*, 373 P.2d 75, 76 (Okla.1962), *overruled in part on other grounds, Haws v. Luethje*, 503 P.2d 871, 875 (Okla.1972) (release); *Hoover's Adm'x v. Chesapeake & Ohio Ry. Co.*, 46 W.Va. 268, 33 S.E. 224, 225 (1899). See generally W.W. Allen, Annotation, *Limitation Applicable to Action for Personal Injury as Affecting Action for Death Resulting From Injury*, 167 A.L.R. 894 (1947); M.C. Dransfield, Annotation, *Time From Which Statute of Limitations Begins to Run Against Cause of Action for Wrongful Death*, 97 A.L.R.2d 1151 (1964); *Adams v. Armstrong World Indus.*, 596 F.Supp. 1407, 1414–15 (D.Idaho 1984) (cases cited), *appealed sub nom. Waters v. Armstrong World Indus., Inc.*, 773 F.2d 248 (9th Cir.1985) (certification to Idaho Supreme Court), *aff'd in part, rev'd*

in part, 790 F.2d 893 (9th Cir.1986) (mem.) (decision after Idaho court refused certified question), after remand, 664 F.Supp. 463, judgment on limitations vacated on other grounds, 847 F.2d 589 (9th Cir.1988).

1 Edna St. Vincent Millay, *Renascence*, in *Collected Poems* 3, 7 (N. Millay ed. 1956).

2 I concur in that part of the judgment upholding the dismissal of Petitioners' survival action as barred by the statute of limitations. Prior to the adoption of the survival statute, any cause of action accrued or pending was automatically extinguished by death. The purpose of the legislation was to permit an estate to continue to prosecute the decedent's claim. It is thus subject to all defenses that would defeat the decedent's recovery, including limitations. Cf. *Tex.Civ.Prac. & Rem.Code* § 16.062 (tolling limitations for specified time period after death). As discussed below, however, the wrongful death statute gave rise to a new and independent claim allowing recovery of damages not recoverable in a personal injury action.

3 *Tex.Civ.Prac. & Rem.Code* § 16.003(b) provides:

A person must bring suit not later than two years after the day the cause of action accrues in an action for injury resulting in death. The cause of action accrues on the death of the injured person.

An action for wrongful death has been tied to the date of death since the passage in 1860 of the first death act in Texas and has survived in virtually identical form to this date. See *Moreno v. Sterling Drug, Inc.*, 787 S.W.2d 348, 359 n. 4 (Tex.1990) (Doggett, J., dissenting)(tracing history of statute of limitations applicable to death actions).

4 This case is cited as *DeHam v. Mexican Nat'l Ry. Co.* in the Southwestern Reporter, but as *DeHarn v. Mexican Nat'l Ry. Co.* in the official Texas Reports. Although normally controlling, the latter source is incorrect. The original opinion, at the Lorenzo de Zavala Archives in Austin, is handwritten by Justice Gaines. The penmanship is at times difficult to interpret, and the separation of the first loop from the second and third in the letter "m" in the Petitioner's name was understandably transcribed by the reporter as "r n." A review of the full record of that decision leaves no doubt that the bereaved mother's name was Elizabeth DeHam and not DeHarn.

5 These amendments were largely necessitated by decisions of this court narrowly interpreting the death act despite legislative intent to the contrary. See generally Leon Green, *The Texas Death Act*, 26 *Tex.L.Rev.* 133 (1947).

6 Despite the statement of the legislature that the codification was made "without substantive change," the language of section 71.003(a) differs in many respects from its predecessor. The statute now reads:

This subchapter applies only if the individual injured would have been entitled to bring an action for the injury if he had lived.

Tex.Civ.Prac. & Rem.Code § 71.003(a).

7 In *Thompson v. Fort Worth & Rio Grande Ry. Co.*, 97 Tex. 590, 80 S.W. 990 (1904), the court held that the deceased's execution of a release for his injuries barred a subsequent wrongful death action. This case was decided prior to recognition of a survival suit in Texas and was grounded expressly on the premise that the "right of action given to the injured person does not, in the event of his death, survive under our statutes, but an action by the dependent relatives named is substituted for that which was lost by death." 97 Tex. at 594; 80 S.W. at 992. The court in essence treated the death action as if it were a survival claim, and applied the "one recovery" rule. As discussed below, damages recoverable in a death action are now recognized by this court as differing from those in an injury action. Similar considerations apply to the court's decision in *Sullivan-Sanford Lumber Co. v. Watson*, 106 Tex. 4, 155 S.W. 179 (1913), in which a family was denied recovery because of the release of liability contained in the pass permitting the deceased to ride on a private carrier.

8 The majority relies on *Francis v. Herrin Transp. Co.* 432 S.W.2d 710, 713 (Tex.1968), as vaguely supportive of today's statutory cross-pollination. That case, however, considered whether an action could be brought in Texas when the death and injury had occurred in Louisiana, and the limitations provision for death actions expressly contained in that state's statutes would bar suit. This court was not presented with the question of whether limitations applicable to injury actions could preclude a subsequent wrongful death suit.

9 Accord *Western Union Tel. Co. v. Preston*, 254 F. 229, 234 (3rd Cir.1918) (applying Pennsylvania law), cert. denied, 248 U.S. 585, 39 S.Ct. 182, 63 L.Ed. 433 (1919); *Larcher v. Wanless*, 18 Cal.3d 646, 135 Cal.Rptr. 75, 81, 82, 557 P.2d 507, 513, 514 (1976); *N.O. Nelson Mfg. Corp. v. Dickson*, 114 Ind.App. 668, 53 N.E.2d 640, 641 (1944); *Farmers Bank & Trust Co. v. Rice*, 674 S.W.2d 510, 512 (Ky.1984); *Smith v. McComb Infirmary Ass'n*, 196 So.2d 91, 93 (Miss.1967); *Gramlich v. Travelers Ins. Co.*, 640 S.W.2d 180, 186 (Mo.Ct.App.1982); *DeHart v. Ohio Fuel Gas Co.*, 84 Ohio App. 62, 85 N.E.2d 586, 590 (1948); *Brosse v. Cumming*, 20 Ohio App.3d 260, 485 N.E.2d 803, 807 (1984); see also *James v. Phoenix General Hosp., Inc.*, 154 Ariz. 594, 603, 744 P.2d 695, 704 (1989); *Carroll v. W.R. Grace & Co.*, 252 Mont. 485, 830 P.2d 1253 (1992); *Gilloon v. Humana, Inc.*, 100 Nev. 518, 687 P.2d 80 (1984); *Hoover's Administratrix v. Chesapeake & Ohio Railway Co.*, 46 W.Va. 268, 33 S.E. 224 (1899).

- 10 Taking the contrary view, that "probably the more prevalent" authority would bar such an action, the majority fails to compare the statutory language construed in the cited cases with that of the Texas Death Act. 841 S.W.2d at 350 n. 14.
- 11 In Texas, limitations is viewed as a procedural as opposed to a substantive condition restricting the right to bring an action for death. *Franco v. Allstate Ins. Co.*, 505 S.W.2d 789, 792–93 (Tex.1974).
- 12 Dean Green's extensive two-part analysis of the Texas Death Act was recently relied upon by the court in *Moreno v. Sterling Drug, Inc.*, 787 S.W.2d 348, 356 n. 8 (1990).
- 13 One purpose of Dean Green's article was to urge reversal of decisions of this court barring suit by the statutory beneficiaries of a woman whose husband's negligence contributed to the injuries resulting in her death. This recommendation was adopted, although belatedly. See *Schwing v. Bluebonnet Express*, 489 S.W.2d 279, 281 (Tex.1973).
- 14 The majority suggests that the two provisions do not pose a conflict under the circumstances of this case because the Petitioners' wrongful death action never accrued since Russell's personal injury action was barred by limitations at the time of his death. 841 S.W.2d at 348. Yet this analysis fails to resolve what would have happened if the defendants had not pleaded limitations. In essence, limitations are used in this case to bar substantive rights, contrary to our prior writings. *City of Dallas v. Etheridge*, 253 S.W.2d 640, 643 (Tex.1953) ("[S]tatutes of limitations do not affect the substantive rights of parties; they merely bar the remedy by which one party seeks to enforce his substantive rights.").
- 15 There undoubtedly is a common law action for death which the majority's continued irrational refusal to recognize is antithetical to Texas families. See *Moreno*, 787 S.W.2d at 358, 364, 367 (Doggett, J., dissenting) (majority's opinion on this subject "can rightly be recorded as one of the most anti-family decisions in recent memory.").
- 16 Instead, to avoid "thwart[ing] the very purpose of limitations," 841 S.W.2d at 349, both the rather plain language of the limitations provision is overridden and these many principles of statutory construction ignored.
- 17 Emily Dickinson, *The Bustle in the House*, *The Complete Poems of Emily Dickinson* (T.H. Johnson 1960).
- 1 In *Francis* the injury and death occurred in Louisiana, and the limitations provision for death actions under Louisiana law barred suit. This court held the Texas limitations statute could not create a cause of action that under choice of law rules did not exist.
- 2 See, e.g., STUART M. SPEISER, 2 RECOVERY FOR WRONGFUL DEATH § 11:17 at 193–94 (2d ed. 1975); 22A AM.JUR.2d *Death*, § 62 at 174–75 (1988).
- 3 "Under most wrongful death statutes, the cause of action is a new and independent one, accruing to the representative or to surviving relatives of the decedent only upon his death; and since the cause of action does not come into existence until the death, it is not barred by prior lapse of time, even though the decedent's own cause of action for the injuries resulting in death would be barred." RESTATEMENT (SECOND) OF TORTS § 899 cmt. c, at 442 (1965). But see RESTATEMENT OF TORTS § 899 cmt. c, at 525 (1939) ("A cause of action for death is complete when death occurs; since, however, the decedent in his lifetime had a cause of action, the cause of action for death does not come into existence if before the death that action for the tortious conduct has been barred by lapse of time.")
- 4 See, e.g., Leon Green, *The Texas Death Act*, 26 TEXAS L.REV. 133, 461–62 (1947).
- 5 Courts in some states also reach this result by holding their wrongful death statutes are not derivative. See *James v. Phoenix General Hospital, Inc.*, 154 Ariz. 594, 603, 744 P.2d 695, 704 (1989); *Gramlich v. Traveller's Ins. Co.*, 640 S.W.2d 180 (Mo.App.1982); *Silverman v. Lathrop*, 168 N.J.Super. 333, 403 A.2d 18 (App.Div.1979) (citing *Lawlor v. Cloverleaf Memorial Park, Inc.*, 56 N.J. 326, 266 A.2d 569 (1968)); *Brosse v. Cumming*, 20 Ohio App.3d 260, 485 N.E.2d 803 (1984).



KeyCite Yellow Flag - Negative Treatment

Superseded by Statute as Stated in [Handwerker Hren Legal Search, Inc. v. Recruiting Partners GP, Inc.](#), Tex.App.-Austin, August 19, 2015

801 S.W.2d 841

Supreme Court of Texas.

Lisa Beth ROSE et al., Petitioners,

v.

DOCTORS HOSPITAL et al., Respondents.

No. C-6535.

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Dec. 19, 1990.

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Dissenting Opinions of Chief Justice
Phillips and Justice Doggett from
Original Opinion Filed Sept. 6, 1990.

Patient's widow and parents filed wrongful death action against hospital after patient received fatal dose of morphine. The 44th District Court, Dallas County, [H. Dee Johnson](#), J., entered judgment notwithstanding the verdict after the jury awarded damages to the widow and parents. Appeal was taken. The Court of Appeals, [735 S.W.2d 244](#), reversed. Hospital, widow, and parents brought error. The Supreme Court, Cook, J., held that: (1) the Medical Liability and Insurance Improvement Act's damages cap for wrongful death actions does not violate the open courts provision of the State Constitution; (2) damages are to be calculated on a "per defendant" basis; and (3) the reservation of a right to appeal contained in the remittitur did not amount to a rejection of the remittitur and did not destroy the right to appeal.

Judgment of Court of Appeals affirmed in part and reversed in part; judgment rendered.

Phillips, C.J., dissented with opinion.

Doggett, J., dissented with opinion in which [Ray](#) and [Mauzy, JJ.](#), joined.

West Headnotes (8)

[1] Statutes

🔑 Tort or financial liabilities

Provision of Medical Liability and Insurance Improvement Act limiting damages in common-law medical malpractice actions could be severed from balance of statute and, therefore, prior determination on certified question that application of Act to medical malpractice actions violated open court provision of State Constitution did not invalidate statute as applied to statutory wrongful death claims. [Vernon's Ann.Texas Civ.St. art. 4590i, §§ 11.02, 11.03](#); [Vernon's Ann.Texas Const. Art. 1, § 13](#).

[24 Cases that cite this headnote](#)

[2] Constitutional Law

🔑 Conditions, Limitations, and Other Restrictions on Access and Remedies

Health

🔑 Limitation of amount of liability

Open court provision of State Constitution did not apply to statutory wrongful death action commenced by patient's widow and parents and, therefore, limitation on damages contained in Medical Liability and Insurance Improvement Act did not violate widow's and parents' right to redress. [Vernon's Ann.Texas Civ.St. art. 4590i, §§ 11.02, 11.03](#); [Vernon's Ann.Texas Const. Art. 1, § 13](#).

[26 Cases that cite this headnote](#)

[3] Constitutional Law

🔑 Medical malpractice

Health

🔑 Limitation of amount of liability

Provisions of Medical Liability and Insurance Improvement Act that differentiate damages recoverable in medical malpractice actions and in wrongful death actions do not infringe upon fundamental rights or burden inherently suspect class, for purposes of determining whether classification violates equal protection. [Vernon's Ann.Texas Civ.St. art. 4590i, §§ 11.02, 11.03](#); [Vernon's Ann.Texas Const. Art. 1, § 3](#); [U.S.C.A. Const.Amend. 14, § 1](#).

10 Cases that cite this headnote

[4] Constitutional Law

🔑 Medical malpractice

Health

🔑 Limitation of amount of liability

Medical Liability and Insurance Improvement Act provisions differentiating damages available in common-law medical malpractice actions and statutory wrongful death actions are rationally related to state's interest of reducing excessive severity of health care liability claims, decreasing cost of those claims, making insurance available to health care providers at reasonably affordable rates, and making affordable health care more accessible and available to the public and, thus, classification does not violate equal protection. [Vernon's Ann.Texas Civ.St. art. 4590i, §§ 11.02, 11.03](#); [Vernon's Ann.Texas Const. Art. 1, § 3](#); [U.S.C.A. Const.Amend. 14, § 1](#).

21 Cases that cite this headnote

[5] Health

🔑 Wrongful death

Damages cap under Medical Liability and Insurance Improvement Act applies to recovery against individual defendants, not award to individual plaintiff in statutory wrongful death action and, therefore, damages cap amount is to be calculated on “per defendant” basis. [Vernon's Ann.Texas Civ.St. art. 4590i, §§ 11.02, 11.02\(a\), 11.04](#).

11 Cases that cite this headnote

[6] Appeal and Error

🔑 Dismissal, affirmance, or reversal

Remittiturs suggested by Court of Appeals may be appealed to Supreme Court; Supreme Court has power to review suggestions of remittitur, which are predicated on conclusion by Court of Appeals that evidence is insufficient to sustain trial court's judgment. Rules App.Proc., Rule 85(c).

3 Cases that cite this headnote

[7] Appeal and Error

🔑 Decisions of intermediate courts

Reservation of right to appeal contained an otherwise valid remittitur does not amount to rejection of remittitur and does not destroy right to appeal from Court of Appeals' suggestion of remittitur. Rules App.Proc., Rule 85(c).

3 Cases that cite this headnote

[8] Appeal and Error

🔑 Remission of Part of Recovery

Court of Appeals applied proper standard in arriving at remittitur suggested to reduce damages in wrongful death action against hospital by widow and parents of patient who received fatal dose of morphine.

15 Cases that cite this headnote

Attorneys and Law Firms

***842** [Douglas D. Mulder, John H. Hagler, Ronald D. Krist, W. James Kronzer](#), Houston, for petitioners.

[R. Brent Cooper, Robert A. Gwinn, Kenneth C. Stone, Michael W. Huddleston](#), Dallas, [C.J. Francisco](#), Austin, for respondents.

OPINION ON MOTION FOR REHEARING

COOK, Justice.

The motions for rehearing are granted in part and overruled in part. This court's opinion and judgment of September 6, 1990, are withdrawn, and the following is substituted in its place.

In this case, we once again consider the constitutionality of the damages provisions of the Medical Liability and Insurance Improvement Act, [TEX.REV.CIV.STAT.ANN. art. 4590i, §§ 11.02 and 11.03](#) (Vernon Supp.1991) (“Medical Liability Act”), this time in the context of a wrongful death action. The court

of appeals decided that the statutory damages limitations provisions are constitutional. 735 S.W.2d 244.¹ We decided subsequently to the court of appeals opinion that statutory damages limitations are unconstitutional when applied to damages in common law medical malpractice actions. *Lucas v. United States*, 757 S.W.2d 687, 692 (Tex.1988). Our holding in *Lucas*, however, did not extend to wrongful death actions. We now hold that the legislature may, through the Medical Liability Act, constitutionally curtail damages in wrongful death actions.

The case also presents procedural issues. We are asked to decide whether a remittitur becomes fatally defective when the party filing it in the court of appeals reserves the right to complain of the standard used in arriving at the remittitur. If such a remittitur is not defective, we must *843 consider whether, in this particular case, the court of appeals did apply the wrong standard in arriving at the remittitur. We hold that a remittitur filed in the court of appeals is unaffected by a reservation of the right to appeal the standard used in arriving at the remittitur. We further hold that the court of appeals applied the correct standard in arriving at the remittiturs in this case.

I. FACTS

The convoluted history of this case is partly explained in the original opinion of the court of appeals and in our opinion on application for writ of mandamus. 735 S.W.2d 244; 750 S.W.2d 177. For purposes of this opinion, we confine ourselves to a summary of the circumstances which brought to this court the issues we must decide today.

Rex Rose was admitted to Doctors Hospital and died there the next day. His widow, Lisa Beth, and his parents, Alton and Frances, brought a wrongful death action against the hospital, contending that Rex Rose had received a fatal dose of morphine while a patient at the hospital. The jury awarded \$2,825,000 to Lisa Beth Rose and \$815,000 each to Alton and Frances Rose, but the trial court rendered judgment notwithstanding the verdict.

The court of appeals reversed, holding that there was some evidence that the hospital caused Rex Rose's death. The court did, however, suggest remittiturs to reduce the damages awarded by the jury. Lisa Beth Rose's damages were reduced in accordance with § 11.02 of the

Medical Liability Act. The court suggested a remittitur reducing Alton and Frances Rose's damages to the amount supported by the evidence.

The Roses responded by filing remittiturs within the time period prescribed by the court of appeals. However, the Roses expressly reserved the right to complain of the ruling requiring the remittiturs.

The Roses argue that the court of appeals was prohibited by the Texas Constitution and our decision in *Lucas* from reducing the damages awarded to Lisa Beth Rose. They also contend that the court of appeals applied an erroneous standard in reviewing the evidence to arrive at the remittitur. Doctors Hospital complains that the Roses filed a "conditional" remittitur, one which was defective because it amounted to a non-acceptance of the judgment of the court of appeals. We address each issue in turn.

II. STATUTORY VALIDITY

[1] In *Lucas*, the United States Court of Appeals for the Fifth Circuit asked this court to decide whether the limitation on medical malpractice damages in the Medical Liability Act is consistent with the Texas Constitution. We looked to the open courts provision of our constitution to determine whether that provision thwarted application of the damages limitations. The provision states:

All courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law.

TEX. CONST. art. I, § 13.

We noted that, in analyzing the litigant's right to redress under this provision, the litigant must satisfy two criteria. First, the litigant must have a cognizable common law cause of action that is being restricted. Second, the litigant must show that the restriction is unreasonable or arbitrary when balanced against the purpose and basis of the statute. *Lucas*, 757 S.W.2d at 690; *Sax v. Votteler*, 648 S.W.2d 661, 666 (Tex.1983).

The court initially acknowledged that victims of medical negligence have a well-defined common law cause of action to sue for injuries. *Lucas*, 757 S.W.2d at 690. The court then concluded that the statutory damages

limitations provisions at issue met the second criterion, that is, they were unreasonable and arbitrary when balanced against the purpose and basis of the statute. *Id.* at 690–92. Having reached these *844 conclusions, the court decided that the damages limitations provisions were unconstitutional “as applied to catastrophically damaged malpractice victims seeking a ‘remedy by due course of law.’” *Id.* at 690.

Notwithstanding the specific application of the *Lucas* holding to catastrophically damaged malpractice victims, the Roses argue that the holding voids the statute in all respects and for all applications. We disagree.

We note initially that *Lucas* was a certified question. We were authorized by TEX. CONST. art. V § 3–c and the implementing rules of appellate procedure to answer the question, which was in part “[w]hether the limitation on medical malpractice damages in TEX.REV.CIV.STAT.ANN. art. 4590i, §§ 11.02 and 11.03 (Vernon Supp.1991) is consistent with the Texas Constitution.” *Lucas*, 757 S.W.2d at 687. Any response other than that necessary to answer the question authorized by the Constitution or the enabling rules would be dicta. Rule 114 makes clear that answers to certified questions are allowed only as long as “there are involved in the proceedings before the certifying court questions of law of this state which may be determinative of the cause then pending.” Tex.R.App.P. 114(a). Under that rule, we did not decide, as the Roses contend we did decide, that the limitation on wrongful death—rather than medical malpractice—damages—is inconsistent with the Texas Constitution. To do so would have been to decide a “cause not then pending before the certifying court,” a cause involving wrongful death rather than common law medical malpractice.

For further support for the proposition that the statute is not void, we turn to the statute's severability clause. It states in part that if the application of the statute to any person or circumstance is held unconstitutional, then the effect of the invalidation shall be confined to the portion of the statute adjudged to be unconstitutional. Act of Aug. 29, 1977, ch. 817, § 41.04. In *Lucas*, it was the “application” of the statute to the “circumstance” of a common law medical malpractice claim which was held to be unconstitutional. The “effect” of that holding is the inapplicability of §§ 11.02 and 11.03 to common law medical malpractice claims. According to the severability

clause, this effect—and this effect only—is confined to §§ 11.02 and 11.03.

The goal of this severability clause, to retain valid portions and applications of the statute whenever possible, reflects the case law's reminder that “[i]n the construction of statutes, if it can be lawfully done, it is the duty of the court to construe a statute so as to render it valid.” *Sharber v. Florence*, 131 Tex. 341, 345, 115 S.W.2d 604, 606 (1938). In *Western Union Telegraph Co. v. State*, 62 Tex. 630 (1884), we acknowledged that some statutes are severable while others are not and stated the test for determining when a finding of unconstitutionality of one portion of a statute invalidates the whole statute:

When, therefore, a part of a statute is unconstitutional, that fact does not authorize the courts to declare the remainder void also, unless all the provisions are connected in subject-matter, dependent on each other, operating together for the same purpose, or otherwise so connected in meaning that it cannot be presumed the legislature would have passed the one without the other. The constitutional and unconstitutional provisions may even be contained in the same section, and yet be perfectly distinct and separable, so that the first may stand though the last fall. The point is not whether they are contained in the same section, for the distribution into sections is purely artificial; but whether they are essentially and inseparably connected in substance. If, when the unconstitutional portion is stricken out, that which remains is complete in itself, and capable of being executed in accordance with the apparent legislative intent, wholly independent of that which was rejected, it must stand.

Id. at 634.

When we consider the *Western Union* test in the context of §§ 11.02 and 11.03, *845 we recognize the statute's

validity. These sections cover “health care liability claims.” The statutory definition of such claims expressly mentions both common law personal injury and wrongful death claims. [TEX.REV.CIV.STAT.ANN. art. 4590i, § 1.03\(4\)](#) (Vernon Supp.1991). According to the *Western Union* test, if, when we strike the statute's application to the common law claims, we are left with something which “remains complete in itself, and capable of being executed in accordance with the legislative intent, wholly independent of that which was rejected, it must stand.” *Western Union*, 62 Tex. at 634. The application of §§ 11.02 and 11.03 to wrongful death claims remains complete in itself, capable of execution in accord with the legislature's intent, and independent of any application to common law claims. The statute, therefore, can be severed, leaving a valid law.

To reach any other conclusion would be to ignore not only the intent of the legislature and the specific holding in *Lucas*, but also our traditional distinction between common law personal injury and statutory wrongful death claims. We recognized this distinction in *Lucas*, restating the traditional rule that the open courts provision of our constitution applies only to common law claims. We relied upon this distinction to strike application of §§ 11.02 and 11.03 to common law medical malpractice claims. Had we faced a wrongful death claim in *Lucas*, we could not have reached the same conclusion, for the open courts provision does not apply to statutory claims. Can we now rely upon *Lucas* to do something we may not do under the law as delineated in *Lucas* itself, that is, declare the statute unconstitutional in the context of wrongful death claims? We think not. For this and all the other reasons discussed, we conclude that we are construing a statute which may be validly applied to all but common law claims.

III. CONSTITUTIONALITY OF STATUTORY DAMAGES PROVISIONS

To determine whether the open courts provision prevents constitutional application of the Medical Liability Act in the case before us today, we are guided by the two-prong analysis in *Lucas*. We ask first whether the Roses' remedy is based upon a cognizable common law cause of action. If the remedy was so grounded, then the open courts provision prevents application of the Medical Liability Act in this case.

[2] Like all actions based upon theories of negligence, the Roses' cause of action was a common law claim.

It would have died with Rex Rose had it not been preserved by the legislature in the wrongful death statute. See [TEX.CIV.PRAC. & REM.CODE ANN. § 71.001 et seq.](#) (Vernon 1986). The Roses' remedy, therefore, was conferred by statute, not by the common law. Because the Roses do not seek a common law remedy, the open courts provision does not apply to their wrongful death claim. Accordingly, we hold that the open courts provision may not bar the application of the damages provisions of the Medical Liability Act in wrongful death cases.

Further arguments concerning the application of the open courts provisions to statutory wrongful death actions are effectively deflected by our recent holding in *Moreno v. Sterling Drug, Inc.*, 787 S.W.2d 348 (1990). In that decision, we followed a steady line of Texas Supreme Court decisions holding that there is no common-law cause of action for wrongful death. *Id.* at 366. *Moreno* establishes that it is the actions of the legislature itself, not the open courts provision, which modify wrongful death actions.

The Rose petitioners further argue that the Medical Liability Act's damages provisions violate the equal protection clauses of the federal and our state constitutions. This is so, argue the Roses, because application of the statute differentiates between classes of litigants asserting common law medical malpractice claims and those asserting wrongful death claims. To prevail upon this claim the Roses must overcome the longstanding presumption in favor of an act of the legislature. See *Sax v. Votteler*, *846 648 S.W.2d 661, 664 (Tex.1983). The Roses have not met this burden with regard to either the Medical Liability Act or the wrongful death statute.

[3] The United States Constitution provides that no state shall deny any person within its jurisdiction the equal protection of the laws. [U.S. CONST. amend XIV, § 1](#). Our state constitution provides that all free men have equal rights. [TEX. CONST. art. I, § 3](#). Texas cases echo federal standards when determining whether a statute violates equal protection under either provision. See, e.g., *Spring Branch I.S.D. v. Stamos*, 695 S.W.2d 556, 559–60 (Tex.1985).

Those standards dictate that, when the classification created by a state statute does not infringe upon fundamental rights or does not burden an inherently

suspect class, equal protection requires only that the statutory classification be rationally related to a legitimate state interest. *Id.* at 559. No fundamental rights or suspect classes are involved in this case. Equal protection requires, therefore, that the Wrongful Death Statute and the Medical Liability Act merely be rationally related to a legitimate state interest.

[4] The wrongful death statute confers a cause of action only upon the surviving spouse, children, and parents of the deceased. [TEX.CIV.PRAC. & REM.CODE ANN. § 71.004 \(Vernon 1986\)](#). The restriction on class of beneficiaries reflects the state's interest in ensuring compensation for only those persons who normally have had the closest relationship to the deceased and who suffer the most from his death. See *Castillo v. Hidalgo County Water Dist. No. 1*, 771 S.W.2d 633, 635 (Tex.App.—Corpus Christi 1989, no writ). The restrictive terms of the statute, therefore, relate rationally to an interest of the state. Equal protection is not violated.

The Medical Liability Act delineates the interests of the state in a list of purposes found at the beginning of the statute. [TEX.REV.CIV.STAT. art. 4590i, § 1.02\(b\)](#) (Vernon Supp.1991). These purposes include the reduction of excessive severity of health care liability claims, decreasing the cost of those claims, making insurance at reasonably affordable rates available to health care providers, and making affordable health care more accessible and available to the public. *Id.* The method by which the legislature chose to effect those purposes is outlined in §§ 11.02 and 11.03, the damages provisions. The damages provisions rationally relate to the interests of the state as stated in the statute's list of purposes. The statute, therefore, does not violate equal protection.

IV. DAMAGES CALCULATION

[5] Each party suggests a different method for calculation of damages in a wrongful death damages cap case. We hold that the amount of damages under § 11.02 is to be calculated on a “per defendant” basis.

The damages cap provision of [article 4590i](#) provides:

In an action on a health care liability claim where final judgment is rendered against a physician or health care provider, the limit of

civil liability for damages of the physician or health care provider shall be limited to an amount not to exceed \$500,000.

[Tex.Rev.Civ.Stat.Ann. art. 4590i § 11.02\(a\)](#) (Vernon Supp.1991).

This court indicated in *Baptist Hospital of Southeast Texas, Inc. v. Baber*, 714 S.W.2d 310 (Tex.1986), that the damages cap provision is to be applied on a “per defendant” basis. In *Baber*, we stated that the court of appeals need not have decided the case on constitutional grounds since the judgment in the case did not exceed “the combined statutory liability of both defendants.” *Id.* The judgment in that case was \$1.3 million for Mrs. Baber and other wrongful death and survival statute claimants against Baptist Hospital and Dr. Campbell jointly and severally. The damages cap amount, as adjusted under [article 4590i § 11.04](#), was \$804,419. The *847 judgment in the case did not exceed \$804,419 multiplied by two—the number of culpable defendants in the case.

It is clear that the damages cap amounts should be calculated on a “per defendant” basis because the language of § 11.02(a) clearly applies to the recovery against the individual defendant, not the award to the individual plaintiff. Plaintiffs who recover against more than one defendant may therefore obtain a judgment in excess of the cap, so long as the combined statutory liability of all defendants is not exceeded.

Thus, the amount of damages in this case is the damages cap of \$500,000, plus a consumer price index adjustment to the present (see [Tex.Rev.Civ.Stat.Ann. art. 4590i § 11.04](#)), multiplied by two since there are two culpable defendants in this case.² Judgment is hereby rendered accordingly.

V. REMITTITURS

The remittitur dispute in this case highlights opposing perceptions of the nature and purpose of remittiturs. Doctors Hospital argues that a remittitur is a “take-it-or-leave-it” offer, one which allows a party no options other than straightforward acceptance or rejection. Once a party accepts the remittitur, he consents to the judgment and may not reserve a right to complain of it later. Doctors Hospital's position is that any response to a remittitur other than outright acceptance, including reservation of

the right to appeal the remittitur, makes the remittitur conditional and constitutes rejection of the judgment. Under these circumstances, argues Doctors Hospital, a court of appeals has no choice but to remand for a new trial.

The Roses argue that a party may file a remittitur in the court of appeals but expressly reserve the right to complain of it on motion for rehearing and in application for writ of error to this court. The Roses not only reserved but exercised that right in this case. They argue that Doctors Hospital's rigid notion of the options available to a remitting party would deprive a litigant of his right to appeal and deprive this court of jurisdiction to decide on appeal certain issues which have traditionally come within the power of this court to address.

Critical to the Rose position is the assumption that a party complaining of a court of appeals' suggestion of remittitur has the right to appeal the imposition of the remittitur, irrespective of whether he reserves rights in the remittitur. If a party does not have that right, then a reservation of the right to appeal is meaningless. Only if the party has the right to appeal a remittitur can the question arise whether a reservation of rights contained within the remittitur filing itself destroys the right to appeal.

[6] Rule 85(c) of the Texas Rules of Appellate Procedure addresses the function of remittiturs on appeal. The rule provides that, if a court of appeals believes that a trial court should have suggested a remittitur, the court of appeals may suggest one. Texas case law instructs that the standard of review is one of factual sufficiency. *Larson v. Cactus Util. Co.*, 730 S.W.2d 640, 641 (Tex.1987). If the remitting party files the remittitur, then judgment is reformed and affirmed in accordance with the remittitur. If the party declines to file the remittitur, then judgment is reversed. Tex.R.App.P. 85(c).

Rule 85(c) does not contain restrictions upon the remitting party's right to appeal. We find no Texas authorities to support the contention that the right to appeal the court of appeals' final judgment, whether a reversal or a reformation and affirmation, is in any way affected by the terms of Rule 85(c). On the contrary, this court is unquestionably empowered to review judgments *848 resulting from the imposition of Rule 85(c) because those judgments are predicated upon the court of appeals' conclusion that the evidence is insufficient to sustain the

trial court's judgment. *Larson*, 730 S.W.2d at 641. Like all legal and factual sufficiency determinations, the standards used in arriving at suggestions of remittitur are subject to examination by this court and may form the basis of a party's appeal. See *Herbert v. Herbert*, 754 S.W.2d 141, 144 (Tex.1988), citing *Pool v. Ford Motor Co.*, 715 S.W.2d 629, 634–35 (Tex.1986).

[7] We now turn to the question whether the reservation of a right to appeal contained within the remittitur destroys the right to appeal. We believe that a litigant's right to appeal and the obligations of this court to review a remittitur suggestion outweigh any confusion that may be caused by the remitting party's reservation of rights. The party including such a reservation has stated nothing more than the obvious, that is, that he has a right to appeal the judgment. As long as the remitting party makes it clear to the court of appeals that he is accepting the suggestion of remittitur and the consequent reformation of the judgment, additional language reserving the right to appeal amounts to mere surplusage. Accordingly, we hold that a reservation of the right to appeal contained in an otherwise valid remittitur does not amount to a rejection of the remittitur.

[8] Our final inquiry focuses on the standard used by the court of appeals in this case to arrive at the remittitur. As we have stated, the standard is factual sufficiency. *Larson*, 730 S.W.2d at 641. To enable this court to determine whether the standard has been properly applied, the court of appeals is obligated to detail and analyze the evidence. See *Pool*, 715 S.W.2d at 633–35 (Tex.1986). In this case, the court of appeals has dutifully accomplished the task of analyzing the evidence. We are thus able to conclude that the court of appeals applied the proper standard in arriving at the remittitur.

In conclusion, we hold that the damages provisions of the Medical Liability Act are constitutional when applied to wrongful death actions. We hold that damages under the damages cap provisions are to be calculated on a “per defendant” basis. And finally, we hold that a reservation of rights in a remittitur filed in a court of appeals does not deprive a remitting party of the right to appeal. The judgment of the court of appeals is reversed insofar as it remands for a new trial and affirmed in all other respects. Judgment is rendered for the Roses in accordance with this opinion.

PHILLIPS, C.J., and DOGGETT, J., dissent joined by RAY and MAUZY, JJ.

PHILLIPS, Chief Justice, dissenting.

The basic issue in this case is whether the legislative limits on medical malpractice liability, [Tex.Rev.Civ.Stat.Ann. art. 4590i §§ 11.02, 11.03](#) (Vernon Supp.1990), are unconstitutional as applied to statutory causes of action as well as common-law actions. I believe we resolved this question by our holding in [Lucas v. United States](#), 757 S.W.2d 687 (Tex.1988). Therefore, I am compelled to dissent.

In [Lucas](#), the United States Court of Appeals for the Fifth Circuit certified the following questions to us:

Whether the limitation on medical malpractice damages in [Tex.Rev.Civ.Stat.Ann. art. 4590i §§ 11.02 and 11.03](#) (Vernon Supp.1986) is consistent with the Texas Constitution, and if so, whether it applies to limit the liability of each defendant rather than the recovery of each claimant.

[Lucas v. United States](#), 811 F.2d 270, 271 (5th Cir.1987). By answering the first question in the negative, we struck down the medical malpractice “caps” without regard to the type of action being asserted.

Today, however, the court states: “Our holding in [Lucas](#) ... did not extend to wrongful death actions.” At 842. To support *849 this proposition, the court relies on selected language from [Lucas](#) that seemingly limits its scope to actions by injured persons as opposed to survivors.¹ Ignored are different portions of the opinion indicating that the entire provision was struck down, not just its application to personal injury claims.² While this ambiguity is unfortunate, both federal and state courts have applied [Lucas](#) to wrongful death as well as injury actions. See, e.g., [Wheat v. United States](#), 860 F.2d 1256, 1259 (5th Cir.1988); [Mercy Hospital of Laredo v. Rios](#), 776 S.W.2d 626, 637 (Tex.App.—San Antonio 1989, writ denied). I too would read our holding more broadly.

Perhaps because of this conflict, the court also holds that under Texas Rule of Appellate Procedure 114, which implemented our certified question procedure, our response in [Lucas](#) was dicta insofar as it applies to wrongful death rather than common-law malpractice actions. At 844. This holding, I fear, may seriously undermine the effectiveness of our certified question procedure.

The Texas Constitution removes the case or controversy restriction on our jurisdiction so that, when both federal and state courts are willing, federal appellate courts will not have to undertake an “*Erie* guess” on unresolved questions of state law. [Tex.Const. art. V, § 3–c](#). Our rule, promulgated pursuant to this constitutional authority, provides that we may answer questions certified to us “if there are involved in any proceedings before the certifying court questions of law of this state which may be determinative of the cause then pending and as to which it appears to the certifying court that there is no controlling precedent in the decisions of the Supreme Court of Texas.” [Tex.R.App.P. 114\(a\)](#).

The court concludes today that the first question posed in [Lucas](#) was not “determinative of the cause then pending” because it could have been framed more narrowly. I agree that the question could have been asked differently, but I strongly disagree that it had to be.³ Our answer to the question as posed was sufficient to enable the federal court to apply state law in deciding the case before it. That a narrower question would also have been determinative does not deprive us of the authority to answer the question as asked, nor does it deprive our response of precedential value. If no answer to a certified question *850 can have precedential value if the question could have been framed with greater specificity or precision, our decisions in such cases will be of little use beyond the federal case in which our assistance was invoked.⁴

Even if the court is correct that the [Lucas](#) holding does not extend to actions for wrongful death, however, I still believe that [Lucas](#) controls this case. In striking down the caps in common-law causes of action, we of necessity also struck them down in statutory proceedings unless the statute is severable.

In embarking upon a severability analysis, the primary focus must be on the intention of the legislature. See N. Sanger, *Sutherland Statutory Construction* § 44.03 (Sands

4th ed. 1986 rev.). Indeed, it is the “duty of a court to ascertain and give effect to legislative intent concerning severability of a statute.” [Tex.Gov’t.Code Ann. § 312.013](#) (Vernon 1988). “The test for severability in the absence of an express severability clause is one of legislative intent.” *The Association of Texas Professional Educators v. The State Commissioner of Education*, 788 S.W.2d 827, 830 (Tex.1990). Conversely, the existence of a severability clause is an aid to finding such a legislative intent. It is not, however, conclusive. As Justice Brandeis said in *Dorchy v. State of Kansas*, 264 U.S. 286, 290, 44 S.Ct. 323, 324–25, 68 L.Ed. 686 (1924), a savings clause provides a rule of construction which may aid in determining legislative intent, but “it is an aid merely; not an inexorable command.”

In this instance, I find the language of the severability clause singularly unhelpful. While it provides that the unconstitutionality of one “application” of a provision does not affect other “applications” thereof, it also provides that the “effect” of striking down a provision shall be confined “to the clause, sentence, subsection, section, article or provision” held invalid.⁵ If the legislature had used “application” in both portions of the clause, its intent would probably be clear. As it is, however, I find neither an aid nor a command in this confusing language.

The inquiry, therefore, is whether “the invalid part is so intermingled with all parts of the act as to make it impossible to separate them, and so preclude the presumption that the Legislature would have passed the act anyhow.” *Sharber v. Florence*, 131 Tex. 341, 345, 115 S.W.2d 604, 606 (1938). *See also*, *Western Union Telegraph Co. v. State*, 62 Tex. 630, 634 (1884). While the issue is close, I cannot conclude that in the absence of any limitation on actions for personal injury, the legislature nonetheless would have provided a ceiling on claims for wrongful death.

Two separate factors suggest that the legislature never intended for [section 11.02](#) to be severable. First, the internal “severability clause” in [section 11.03](#) indicates that the legislature never contemplated the *851 severance of different applications of the damages cap in [section 11.02](#). The wording and legislative history of [section 11.03](#) suggest that the legislature only intended it to be severable from the entirety of the [section 11.02\(a\)](#) limitations, as opposed to a particular application thereof:

[Sec. 11.03](#). In the event that [Section 11.02\(a\)](#) of this subchapter is stricken from this subchapter or is otherwise invalidated by a method other than through legislative means, the following shall become effective:

[Tex.Rev.Civ.Stat.Ann. art. 4590i, § 11.03](#) (Vernon Supp.1990). This language was included after the legislature approved Representative Powers' proposed amendment to H.B. 1048. Representative Powers explained the amendment to the House:

If the rest of this section, in other words, the limit or cap of \$500,000 were to be declared unconstitutional or invalid for any reason by a court, [by] some other means [other] than the legislature, then just pain and suffering limitations of \$150,000 would stay in the Bill, except in a case of disfigurement.

Representative Henderson, speaking against the amendment, described it in similar terms:

UNIDENTIFIED SPEAKER: Mr. Henderson, there is, already, an internal cap under the Bill, is there not? Is there not a provision that if the Court finds the \$500,000 cap which the study commission did not recommend, but which we placed in there for the physicians, is found to be unconstitutional, we would revert to \$150,000 pain and suffering cap, do we not?

REP. HENDERSON: That's correct, we provide that as a contingent.

Transcription of Tapes of Formal Meeting of House Committee on State Affairs, March 14, 1977, at 183.

Thus, there is no indication of a legislative intent to sever the liability caps in [section 11.02](#) into distinct applications. The legislature only contemplated that the \$500,000 cap might be struck down, in which case only the \$150,000 pain and suffering cap in [section 11.03](#) would remain.

Second, in 1977, high damage awards in common-law personal injury cases were of much greater concern to the legislature than awards in wrongful death cases. There

is nothing in the findings of the Keeton Commission Report,⁶ upon which the Act was based, to suggest that the legislature would or should impose damages limitations in wrongful death cases alone. Although the Keeton Commission recommended only a cap on damages recoverable for pain and suffering, it cited large recoveries in personal injury cases as a factor contributing to the escalating health insurance costs in Texas in the 1970s. The Commission found it “apparent that substantial reductions in settlements and judgments in those cases involving severe injuries will have a significant impact on insurance costs and the pure premium rate.” Keeton Commission Report, at 6.

Further, when the legislature enacted the Medical Liability and Insurance Improvement Act in 1977, damages recoverable under the Wrongful Death Act were very limited in comparison to those recoverable in common-law personal injury actions. Prior to our decision in *Sanchez v. Schindler*, 651 S.W.2d 249 (Tex.1983), damages recoverable under the Wrongful Death Act were limited by the pecuniary loss rule. See *852 *March v. Walker*, 48 Tex. 372, 375 (1877). The large recoveries achieved in common-law personal injury cases in the 1970s, therefore, were the primary focus of the legislature's concerns. Indeed, the initial draft of the Medical Liability and Insurance Improvement Act provided for a damages cap of \$500,000 only in personal injury cases and for no cap in wrongful death cases.⁷

Undoubtedly, the legislature could have enacted a separate cap for wrongful death actions, and such a cap would not have violated the open courts provision of our constitution. See *Moreno v. Sterling Drug*, 787 S.W.2d 348, 355–57 (Tex.1990). The language of sections 11.02 and 11.03, and the circumstances surrounding their passage, however, demonstrate that the legislature did not intend for section 11.02 to be severable and would not, in 1977, have passed a liability cap on wrongful death claims without a cap on personal injury claims.

As the statutory provisions are not severable, our holding in *Lucas*, even if limited to common-law actions, compels a similar result in the case at bar. While I strongly and extensively disagreed with *Lucas*, see 757 S.W.2d at 702–21 (Phillips, C.J., dissenting), I would not disturb so recent a constitutional decision by our court. I am also unwilling, as I believe the court has done, to restrict the scope of the

decision by imposing a retroactive qualification upon our answer to the certified question.

Before it applied the Medical Liability and Insurance Improvement Act, the court of appeals found sufficient evidence to support the jury's verdict, subject to suggested common-law remittiturs. The petitioners each filed remittiturs in the suggested amounts. I agree that the court of appeals applied the correct standard in deriving its suggested common-law remittiturs. I would therefore affirm the judgment of the court of appeals in part and reverse it in part, rendering judgment that Alton Rose and Frances Rose each recover \$815,000 from Doctors Hospital, less remittiturs of \$230,000 and \$315,000, respectively, and that Lisa Rose recover \$2,825,000 from Doctors Hospital, less a remittitur of \$500,000 plus interest and costs.

DOGGETT, Justice, dissenting.

Once again eagerness to implement a desired social policy has produced a result both inconsistent with established jurisprudence and incongruent with the appropriate role of the judiciary. Masquerading as a defender of judicial restraint, the court trespasses upon the function of the redrafting of legislation, a power reserved to another branch of government. The court's surgical dissection of provisions of the Medical Liability and Insurance Improvement Act, *Tex.Rev.Civ.Stat.Ann. art. 4590i* (Vernon Supp.1990), in an effort to preserve damage limitations in wrongful death actions contravenes both the clear language of the statute and over a century of compelling Texas precedent.

The court's strategy in this endeavor is to ask and answer questions not relevant to our inquiry. The fundamental question presented by this appeal is not, as the court suggests, the applicability of the “open courts” provision, article 1, section 13 of the Texas Constitution, as considered in *Lucas v. United States*, 757 S.W.2d 687 (Tex.1988), or the appropriateness of a statutory distinction between personal injury and death, before us in *Moreno v. Sterling Drug, Inc.*, 787 S.W.2d 348 (Tex.1990). Nor need we consider whether the legislature should or could, consistent with our constitution, limit damages recoverable in actions for wrongful death based upon medical malpractice. Rather, the only question presented is one of constitutional law and statutory construction: whether the partial unconstitutionality of a statute *853 invalidates the remainder. Today's decision, in answering

this question, misapplies over a century of precedent written by this court.

We first addressed the issue of the effect of the invalidity of a statutory provision in *Western Union Telegraph Co. v. State*, 62 Tex. 630 (1884). There we considered whether a statute purporting to tax telegraph messages, which was held unconstitutional by the United States Supreme Court to the extent imposed on interstate messages, could be constitutionally applied to intrastate messages only. We held that it could not, stating that the partial invalidity of a statute voids the remainder when the provisions are so interdependent and connected in subject-matter as to be inseparable:

The point is ... whether they are essentially and inseparably connected in substance. If, when the unconstitutional portion is stricken out, that which remains is complete in itself, and capable of being executed in accordance with the apparent legislative intent, wholly independent of that which was rejected, it must stand.

62 Tex. at 634 (quoting from Cooley's Const. Lim., 215). Unlike today's opinion, in *Western Union* the proper standard was not only enunciated but also applied. We held that, because the statutory provisions could not be separated between interstate and intrastate messages, "the different parts of the act are so intimately connected that the invalidity of a part of the law renders the entire law invalid." *Id.* at 636.

Similarly, in *Sharber v. Florence*, 131 Tex. 341, 115 S.W.2d 604 (1938), also cited by the court today, we considered the effect of partial unconstitutionality of a moratorium statute and held the entire statute invalid. The act postponed sales of property under executions or orders of sale, or under deeds of trust, mortgages or other contracts giving any power of sale of real property, and annulled other similar sales. The statute had been repeatedly held unconstitutional to the extent it purported to change the method or time of sale with respect to purely private contracts prescribing the mode of enforcement. The issue before the court was whether the statute was constitutional as to those contracts not prescribing a method of enforcement, *i.e.*, those in which no valuable

rights were affected. Echoing the test set forth in *Western Union*, we stated:

This Court has repeatedly held that if part of an act is declared invalid it does not destroy the entire act, unless the invalid part is so intermingled with all parts of the act as to make it impossible to separate them, and so preclude the presumption that the Legislature would have passed the act anyhow.... It is also clear that, where a statute contains provisions which are legal, and others which are not, effect may be given to the legal provisions by separating them from the illegal. *But this rule applies only to a statute where the provisions are separable and not dependent one upon the other; and does not support the contention that that which is inseparable may be separated.*

131 Tex. at 345-46, 115 S.W.2d at 606 (emphasis supplied).¹ Examining the statute and applying the formulated rule of partial invalidity, we concluded that:

its parts are so intermingled that, if any of the parts are valid, they cannot be separated from the invalid. In the form that this law was enacted, when its purposes are analyzed there is no possibility of separating them so that each part remains as complete in itself and capable of being executed in accordance with the legislative intent, wholly independent of those parts which are rejected as being unconstitutional.

Id., 131 Tex. at 346, 115 S.W.2d at 607.

This same analysis has been applied to strike an entire notice provision held to be ***854** unconstitutional when applied in certain situations. In *Hanks v. City of Port Arthur*, 48 S.W.2d 944 (Tex.1932), we determined that Port Arthur's attempt to preclude liability through its municipal charter by requiring that it be notified of a defective condition prior to the occurrence of an injury was unconstitutional under the "open courts" provision to the extent notice of defects was required from those who had no knowledge of them. The enactment did not remain valid under the more limited circumstances when the injured party had actual knowledge of a defective

condition, but rather this court was compelled to void the notice provision in toto. Because no distinction was made in the charter language between valid and invalid applications, we refused to rewrite it, concluding that “*the plain terms, however, of the notice section do not permit us to make these eliminations*” of situations in which applying the notice provision would be unconstitutional. 48 S.W.2d at 950 (emphasis supplied).

These cases establish a well-recognized set of statutory and constitutional rules that have been consistently followed in our jurisprudence. In fact, not but a few months ago this court, in a unanimous decision, applied them to strike an entire legislative act when one provision was found invalid. *Association of Texas Professional Educators v. State Commissioner of Education*, 788 S.W.2d 827 (Tex.1990). Intermediate appellate Texas courts have relied upon and consistently applied these well-established rules by looking to the language of the particular statute to determine severability. See, e.g., *City of Taylor v. Taylor Bedding Manufacturing Co.*, 215 S.W.2d 215 (Tex.Civ.App.—Austin 1948, writ ref’d); *San Antonio Independent School District v. State*, 173 S.W. 525 (Tex.Civ.App.—San Antonio 1915, writ ref’d); *City of Forney v. Estate of Pinson*, 575 S.W.2d 58, 61 (Tex.Civ.App.—Texarkana 1978, writ ref’d n.r.e.) (“after the invalid parts have been severed, there must remain an intelligible and valid ordinance capable of being placed in execution and conforming to the *general purpose* and *intent* of the enacting body.”). Today’s opinion stands in stark contrast to this venerable body of law, as it superficially recognizes controlling principles but completely fails to apply them in any meaningful or logical manner.

In evaluating whether any portions of sections 11.02 and 11.03 of the Act, held unconstitutional in *Lucas*, remain valid, our focus is not what the legislature could or might have done in drafting the statute, but what it has done and the extent to which the invalid and valid portions of the statute are severable. If the unconstitutional and constitutional provisions are inseparably connected, we cannot engage in judicial legislation by rewriting the statute as the legislature could or might, but must strike the statutory provisions in their entirety. *Ex parte Levinson*, 160 Tex.Crim. 606, 274 S.W.2d 76, 78 (1955) (court may strike portions of the statute but may not rewrite, change or add to the law).

Sections 11.02 and 11.03 purport to limit damages in “an action on a *health care liability claim*.” The term “health care liability claim” is used throughout the statute, appearing some twenty-three times, and encompasses *both* statutory and common-law causes of action.² Based on the Act’s common treatment of actions for injury and those for death, the court of appeals concluded, in effect, that the two were inseparable for the purpose of determining unconstitutionality. 735 S.W.2d at 247. Nothing has been brought to our attention in the legislative history of the Act to suggest that any consideration was ever given to separating actions for death and those for injury. Because the term “health care liability claim” inseparably includes both *855 actions for injury and those for death, sections 11.02 and 11.03 are not partially invalid, but invalid in their entirety.

To uphold the damage limitations in this cause, the court strikes no word or words, but must rewrite the statute to redefine the term “health care liability claim” in sections 11.02 and 11.03 of the Act to mean only actions for wrongful death. As in *Hanks*, “the plain terms” of the statute do not permit this judicial intrusion into the legislative arena. The court’s contrary interpretation blatantly conflicts with the legislature’s intent that the term encompass both actions for injury and death throughout the Act’s many sections, not just those limiting damages, but those relating to notice of the claim to the health care provider or physician, informed consent and disclosure, the applicability of the doctrine of *res ipsa loquitur*, and expert witnesses. These provisions, important to the Act’s passage, were designed to benefit health care providers by reducing the number of frivolous suits against them and by placing controls on the type of testimony and witnesses offered at trial. If the court’s decision today is to be applied with some measure of consistency, and is not just result oriented, the term “health care liability claim” throughout the statute now means only actions for death. This rash legislative choice by the court substantially weakens these provisions benefitting our state medical community.

The court’s discussion confuses the terms “health care liability claim” and “medical malpractice claim” to draw the distinction between wrongful death and personal injury actions.³ Sections 11.02 and 11.03 refer to only a single class of damages—those awarded in a health care liability action, whether for personal injury *or* death. The focus of the statute is not on the type of harm inflicted but

on the nature of the defendant—a provider of health care services. The term “medical malpractice” similarly has never been employed previously in either case or statute to describe the extent of the injury inflicted; rather, it is a term synonymous with “health care liability.”

A review of the statute confirms this conclusion. The term “medical malpractice” is used only once, in the findings and purposes section of the statute. There the legislature states that “the number of health care liability claims”—*inclusive of actions whether for personal injury and death*—“has increased since 1972 inordinately; [that] the filing of legitimate health care liability claims”—*inclusive of actions whether for personal injury and death*—“is a contributing factor affecting medical professional liability rates....” [Tex.Rev.Civ.Stat. Ann. art 4590i § 1.02\(a\)\(1\), \(2\)](#) (Vernon Supp.1990). The legislature found that this “situation”—of increased claims *whether for personal injury or death*—“has created a *medical malpractice* insurance crisis in the State of Texas....” [Id. § 1.02\(a\)\(5\)](#) (emphasis supplied). Surely the insurance referred to was not limited to coverage for personal injury inflicted by medical professionals, but also extended to death as well. Simply put the statute employed the term “medical malpractice” interchangeably with the term “health care liability.” Neither of these terms differentiates between personal injury *and* death.⁴

The court further places great emphasis on the fact that the Act, when passed, *856 included a “savings clause” common to legislative enactments.⁵ But such a clause is not a cure-all: “A separability clause does not clothe the valid parts with immunity from the invalidating effect the law gives to the inseparable blending of the bad with the good.” E. Crawford, *The Construction of Statutes* § 145 (1940); see also *Sutherland Statutory Construction*, *supra*, at § 44.08.

The legislature recognized the limitation on damages contained in [section 11.02](#) might very well be found unconstitutional by this court, and made provision for that contingency in [section 11.03](#) which commences:

In the event that [Section 11.02\(a\)](#) of this subchapter is stricken from this subchapter or is otherwise invalidated by a method other than through legislative means, the following shall become effective....

Rather than contemplating a partial striking of [Section 11.02](#), the legislature enacted a special and unique mechanism to replace the provision in its entirety if held invalid in any respect.

Moreover, given this concern as to unconstitutionality, it is particularly appropriate to assume that the legislature purposely chose the specific wording included in the severability clause as well as the other provisions of this Act. The language of the severability clause at issue here instructs the court to limit the effect of partial invalidity to the “*clause, sentence, subsection, section, article or provision*” held unconstitutional. In its rush to a result, the court has ignored this clear legislative directive. There is no one clause, sentence, section, article or provision that can be excised from [sections 11.02](#) and [11.03](#) and still leave a workable remainder. Rather, the court has viewed the “savings clause” as a legislative delegation to the judiciary of the power to write statutes. If the legislature had chosen different language for these sections, a different question would be presented. But it did not and the court must take the provisions of the Act as written, not as it might prefer to see the statute drafted.

The court's decision injects an unworkable uncertainty into Texas jurisprudence. Imagine portions of statutes long ago declared unconstitutional arising one by one from the grave. For having resuscitated an unconstitutional statute in this cause, what limit is there to revivification of others? What would prevent the City of Port Arthur from invoking the notice provision, held unconstitutional in [Hanks](#), to actions for wrongful death? Or, similarly, why would the filing fees held unconstitutional in [LeCroy v. Hanlon](#), 713 S.W.2d 335 (Tex.1986), not now be argued as applying to death cases? These and other numerous possible examples highlight the error of carving out an exception to a long-standing rule of constitutional law and statutory construction in an attempt to validate [sections 11.02](#) and [11.03](#) in this cause.

The court further distinguishes our holding in [Lucas](#) on the basis that it arose in answer to a certified question from a federal *857 appellate court. In so doing, the court seriously erodes our authority to answer certified questions. Under [article V, section 3–c of the Texas Constitution](#), we are empowered to “answer questions of state law certified from a federal appellate court.” The only limitation imposed by Rule 114(a), Texas Rules of Appellate Procedure, is that state law be determinative

of the cause then pending. Nowhere is there the remotest suggestion that a decision of this court on certified question is any less a controlling state precedent than a decision made on appeal from a state appellate court. This is simply not the law:

Certification would be a pointless exercise unless the state court's answers are regarded as an authoritative and binding statement of state law. Thus the Fifth Circuit's early suggestion that answers to certified questions are "merely advisory and entitled, like dicta, to be given persuasive but not binding effect as a precedent," has long since been forgotten and it is now accepted that the state answers are binding.

C. Wright, A. Miller and E. Cooper, 17A *Federal Practice and Procedure* § 4248 at 179 (2d ed. 1988).⁶ To hold otherwise would undermine the very purpose of the certification process—to ensure that the same state law is applied to litigants, whether in state or federal court. The federal courts are clearly bound by our decision in *Lucas*, see Wright, *supra*, and, in fact, have so held. *Wheat v. United States*, 860 F.2d 1256, 1259 (5th Cir.1988).⁷

Nor can I concur in the court's equal protection analysis. Unlike the rather unauthoritative opinion relied upon by the court today concerning the constitutionality of a statutorily limited class of beneficiaries in an action for wrongful death, *Castillo v. Hidalgo County Water District No. 1*, 771 S.W.2d 633 (Tex.App.—Corpus Christi 1989, no writ), the issue here is the distinction created between tort victims who are injured by a certain class of defendant—*i.e.*, health care providers—and those injured by others. Put another way, is it constitutional to create a favored class of tortfeasors—only health care providers—who are not required to pay full damages for the injuries they inflict? The court appears to find a basis for this distinction in the recited purposes of the Medical Liability and Insurance Improvement Act to reduce excessive

claims, decrease insurance costs and making health care more affordable. That Act, however, was based upon the recommendations of the Texas Medical Professional Liability Study Commission, frequently referred to as the "Keeton Report," which could not conclude that there was any correlation between an arbitrary damage limitation and the Act's stated purposes.⁸ Moreover, this court has previously recognized the absence of such a rational relationship.⁹ By both disregarding this and providing only an extraordinarily superficial equal protection analysis, the court works a serious injustice both to those who are killed and to the meaning of a vital constitutional guarantee.

*858 Today's decision will no doubt come as a great shock to the many parties, lawyers and judges who have operated on the well-founded belief that the effect of *Lucas* was to render liability limitations unconstitutional in all cases. See, *e.g.*, *Mercy Hospital v. Rios*, 776 S.W.2d 626, 637 (Tex.App.—San Antonio 1989, writ denied) (upholding, in a wrongful death action, trial court's refusal to order remittitur of damages awarded by jury in excess of statutory limit because "[t]he Texas Supreme Court in *Lucas v. United States* ... has held that the limitation on medical malpractice damages as set out in the above statute is unconstitutional."); *Wheat v. United States*, 860 F.2d at 1259 ("[a]s the parties agree, the *Lucas* decision moots the constitutional question in this [wrongful death] appeal."). Because I do not approve of the court's rejection of controlling precedent to become self-appointed legislative drafters, I dissent.

RAY and MAUZY, JJ., join in this dissent.

All Citations

801 S.W.2d 841

Footnotes

¹ The court of appeals reversed the trial court's judgment notwithstanding the verdict and rendered judgment for the Roses subject to suggested remittiturs. The Roses filed remittiturs in the amounts suggested by the court, but they reserved the right to complain of having been erroneously required to do so.

Doctors Hospital then filed a motion for rehearing complaining of the court of appeals' reversal and rendition; the hospital claimed the court of appeals should have remanded for a new trial since the remittiturs had been conditionally filed. The court of appeals agreed, and wrote an unpublished opinion which remanded the cause for a new trial.

The Roses and the hospital filed applications for writ of error complaining of all opinions written by the court of appeals. Our opinion in this case addresses the issues in all court of appeals opinions.

- 2 We do not address the applicability of this damages calculation to the comparative negligence situation. This case does not involve a situation in which any defendant is less than completely liable.
- 1 The court in *Lucas* said: “[W]e ... conclude that the liability limits ... are unconstitutional as applied to catastrophically damaged malpractice victims seeking a ‘remedy by due course of law.’ ” 757 S.W.2d at 690. The Court further stated: “Texas courts have long recognized that victims of medical negligence have a well-defined common law cause of action to sue for injuries negligently inflicted upon them.” *Id.* Moreover, the court said: “In the context of persons catastrophically injured by medical negligence, we believe it is unreasonable *and* arbitrary to limit their recovery in a speculative experiment to determine whether liability insurance rates will decrease.” *Id.* at 691. Finally, the court held: “[W]e hold it is unreasonable and arbitrary for the legislature to conclude that arbitrary damage caps, applicable to all claimants no matter how seriously injured, will help assure a rational relationship between actual damages and amounts awarded.” *Id.*
- 2 At the beginning of its opinion, the court stated the certified questions and answered unequivocally “that the damages limitations contained in Sections 11.02 and 11.03 of article 4590i violate article I, § 13 of the Texas Constitution.” 757 S.W.2d at 687. Likewise, at the end of its opinion, the court held: “[O]ur answer to the certified question is that the limitation on medical malpractice damages in Tex.Rev.Civ.Stat. Ann. art. 4590i, §§ 11.02 and 11.03, is inconsistent with and violative of article I, section 13, of the Texas Constitution.” *Id.* at 692.
- 3 I also question whether this court, at this late date, has any right to inquire whether the question posed by the Fifth Circuit in *Lucas* was appropriate. As we said in *Moreno v. Sterling Drug, Inc.*, 787 S.W.2d 348 (Tex.1990), the certified question process “is a very limited procedural device; we answer only the questions certified and nothing more.” *Id.* at 349. We also noted that “the whole case is not before this court as it would be in an ordinary appeal.” *Id.* While this court has an obligation to ensure that the certified question is asked in good faith and is capable of resolution as a matter of law, we must ordinarily rely on the expertise of the certifying court to frame correctly the precise issue for our determination.
- 4 The problem with *Lucas*, if any, did not arise from the way the Fifth Circuit framed the question, but from the fact that we answered it without reservation or qualification. Before we handed down *Lucas*, on May 11, 1988, this court had already heard oral arguments for the first time in this case. The arguments and briefs of the parties, as supplemented by post-submission briefs, dealt extensively with the constitutional significance of whether a cause of action is legislatively or judicially created. If we found this distinction arguably persuasive, we should have raised it in our various *Lucas* opinions. Instead, we answered the question without restriction, and that answer controls the case at bar unless we choose to modify *Lucas*.
- 5 The complete severability clause is as follows:
- If any provision of this statute or its application to any person or circumstance is held invalid or unconstitutional, such invalidity does not affect other provisions or applications of this statute which can be given effect without the invalid clause, sentence, subsection, section, article, or provision or application, and shall not affect, impair, invalidate, or nullify the remainder of this Act, but the effect thereof shall be confined to the clause, sentence, subsection, section, article or provision of the Act so adjudged to be invalid or unconstitutional and to this end the above are declared to be severable.
- Tex.Rev.Civ.Stat. Ann. art. 4590i note, Acts 1977, ch. 817, § 41.04 (Vernon Supp.1990).
- 6 In 1975, the 64th Legislature created the Medical Professional Liability Study Commission, known as “the Keeton Commission” in reference to its chairman, W. Page Keeton. See Note following Tex.Ins.Code, Tex.Rev.Civ.Stat. Ann. art. 21.49–3 (Vernon 1981). For twenty-two months the Commission studied the causes of the alleged “medical malpractice crisis.” It made recommendations to the 65th Legislature in its report entitled “Final Report of the Texas Medical Professional Liability Study Commission to the 65th Texas Legislature.” In enacting the Medical Liability and Insurance Improvement Act in 1977, the legislature explicitly adopted the findings of this commission. See Tex.Rev.Civ.Stat. Ann. art. 4590, § 1.02(13) (Vernon Supp.1990).
- 7 Representative Tom Uher offered the amendment to House Bill 1048 which applied the caps to both injury and death cases. The amendment was approved by the House and was incorporated into the Act. See Transcription of Tapes of Formal Meeting of House Committee on State Affairs, March 14, 1977, at 35, 36, 205.
- 1 Accord N. Sanger, *Sutherland Statutory Construction* § 44.03 (Sands 4th ed. 1986 rev.) (test whether the legislature intended the act to be separable *and* whether the act is separable *in fact*). The second prong of this test is dispositive in this cause.
- 2 See Tex.Rev.Civ.Stat. Ann. art. 4590i § 1.03(a)(4) (defining “health care liability claim” as a “cause of action against a health care provider or physician for treatment, lack of treatment, or other claimed departure from accepted standards of medical care or health care or safety which proximately results in *injury to or death of the patient*”) (emphasis supplied).

- 3 Contrary to the analysis in today's opinion, the holding in [Lucas](#) drew no distinction between personal injury and wrongful death. The court noted that writ had been granted in this cause yet failed to differentiate it in any respect. [757 S.W.2d at 690](#). Nor can the use of the term "medical malpractice damages" in [Lucas](#) be interpreted as a reference solely to personal injury damages, as the court's opinion concludes. The question certified in [Lucas](#), in pertinent part, asked:
- Whether the limitation on medical malpractice damages in [Tex.Rev.Civ.Stat.Ann. art. 4590i §§ 11.02 and 11.03](#) (Vernon Supp.1986) is consistent with the Texas Constitution....
- [757 S.W.2d at 687](#). We held that it was not. Neither the Fifth Circuit's use of the term "medical malpractice damages" nor our answer was limited to damages recoverable for personal injury.
- 4 The four opinions handed down in [Lucas](#) employ the terms interchangeably as well. See, e.g., [Lucas](#), [757 S.W.2d at 689](#) (discussing damage limitations in "medical malpractice" statutes of other states); [695](#) (Gonzalez, J., dissenting) (statute distinguishes "medical malpractice claimants" from "other tort claimants"); [698, 699, 700](#) (Gonzalez, J., dissenting) (referring to the "medical malpractice" claimant, the "medical malpractice" plaintiff, "medical malpractice" actions and the "medical malpractice" insurance crisis); [701](#) (Culver, J., concurring) (discussing "medical malpractice" awards); [702](#) (Phillips, C.J., dissenting) (statute differentiates between persons suing for "medical malpractice" and those who sue for other torts); [709 n. 7](#) (Phillips, C.J., dissenting) (referencing "medical malpractice" damage limitations statutorily imposed in other states).
- 5 That clause provides:
- If any provision of this statute or its application to any person or circumstance is held invalid or unconstitutional, such invalidity does not affect other provisions or applications of this statute which can be given effect without the invalid clause, sentence, subsection, section, article or provision or application, and shall not affect, impair, invalidate, or nullify the remainder of this Act, but the effect thereof shall be confined to the clause, sentence, subsection, section, article, or provision of the Act so adjudged to be invalid or unconstitutional and to this end the above are declared to be severable.
- Act of Aug. 29, 1977, ch. 817, § 41.04.
- 6 Accord [Penn Mutual Life Insurance Co. v. Abramson](#), [530 A.2d 1202, 1207 \(D.C.App.1987\)](#) (opinion on certified question "is *stare decisis* of this court, as well as *res judicata* as to the same parties in local courts"); [In re Elliott](#), [74 Wash.2d 600, 610–11, 446 P.2d 347, 354 \(1968\)](#) (decision on certified question "legal precedent applicable in all future controversies involving the same legal question until and unless the court overrules its opinion"); [In re Richards](#), [223 A.2d 827, 832 \(Me.1966\)](#) (judgment in certified proceedings treated "as having the force of decided case law within the courts of this state").
- 7 Today's decision may create a bifurcated standard of unconstitutionality of [sections 11.02 and 11.03](#) dependent upon the nature of the forum, state or federal. If, however, there had been no certification process available to the federal appellate court in [Lucas](#), abstention would have been required, placing the parties before our state courts and resulting in the same answer to the same question. See Lillich and Mundy, *Federal Court Certification of Doubtful State Law Questions*, 18 U.C.L.A.L.Rev. 888, 907 (1971). The fact that certification avoids the abstention process should not alter the binding nature of the result.
- 8 [Lucas](#), [757 S.W.2d at 691](#), citing Keeton Report at 7, 38.
- 9 *Id.*

106 Tex. 292
Supreme Court of Texas.

ELLIOTT et al.
v.
CITY OF BROWNWOOD.

No. 2335.
|
May 6, 1914.

Certificate of Dissent from Court of Civil Appeals of
Third Supreme Judicial District.

Action by Mary B. Elliott and another against the City
of Brownwood. There was a judgment for defendant,
rendered on sustaining a general demurrer to the petition,
and plaintiffs appeal to the Court of Civil Appeals, which
certified the facts to the Supreme Court. Question certified
(166 S. W. 932) answered.

West Headnotes (2)

[1] **Death**

 Creation of New Cause of Action

Under the common law, in force until
changed by Rev.St.1911, art. 4694, Vernon's
Ann.Civ.St. art. 4671, damages were not
recoverable for death by wrongful act.

[11 Cases that cite this headnote](#)

[2] **Death**

 Persons Liable

Under Rev.St.1911, art. 4694, Vernon's
Ann.Civ.St. art. 4671, a municipal
corporation is not liable for the death of
a person caused by its negligent failure to
maintain its streets.

[8 Cases that cite this headnote](#)

Attorneys and Law Firms

***293 **1129** Fisher & Allison, of Georgetown, and
Arch Grinnan, of Brownwood, for appellants.

C. L. McCartney, of Brownwood, and W. F. Ramsey and
C. L. Black, both of Austin, for appellee.

Opinion

BROWN, C. J.

The Court of Civil Appeals of the Third Supreme Judicial
District has certified the following facts to this court:

‘In this case the plaintiffs seek to recover damages from
the defendant, the city of Brownwood, on account of the
death of Otho S. Elliott, the husband of one and the father
of the other plaintiffs. They predicate their cause of action
upon alleged negligence of the defendant in maintaining a
certain street and bridge or culvert across the same. The
trial court sustained a general demurrer to the plaintiffs’
petition. The latter appealed to this court, and we affirmed
the judgment of the trial court; Special Associate Justice
John M. Furman dissenting.

‘A motion for a rehearing is now pending in this court, and
we have granted a motion made by appellants to certify
the question of dissent. As shown by the majority opinion,
a copy of which is hereto attached and made a part hereof,
it was held that a municipal corporation is not liable for
injuries resulting in death, although such death may have
been caused by such corporation's negligence in reference
to its streets; and that ruling was based upon what was said
and done by the Supreme Court in [Ritz v. City of Austin](#),
[1 Tex. Civ. App. 455, 20 S. W. 1029](#); [Flemming v. Texas
Loan Agency](#), [87 Tex. 238, 27 S. W. 126, 26 L. R. A. 250](#);
and [Searight v. City of Austin](#), [42 S. W. 857](#). The views
of the dissenting judge are stated in the opinion filed by
him, a copy of which is also hereto attached and made a
part hereof. The opinion of the majority of the court and
the dissenting opinion clearly ***294** disclose the question
of law as to which the dissent exists, and that question is
hereby certified to the Supreme Court for decision.’

This question of law is presented by the facts. Is the city of
Brownwood liable to appellants, in damages, for the death
of Otho S. Elliott?

[1] [2] Prior to the enactment of article 4694, R. S. 1911,
the common law was in force in Texas, and damages could
not be recovered for the death of any one. The portion of
said article pertinent to this question reads:

‘An action for actual damages on account of injuries causing the death of any person may be brought in the following cases: * * *

‘2. When the death of any person is caused by the wrongful act, negligence, unskillfulness, or default of another.’

The word ‘another’ means ‘another person,’ and it is claimed by appellants that a municipal corporation is a person within the meaning of the word ‘another,’ person being understood; thus construed it would read ‘another person.’

The issue has been decided by this court in the following cases by refusing application for writs of error: [Ritz v. City of Austin](#), 1 Tex. Civ. App. 455, 20 S. W. 1029; [Searight v. City of Austin](#), 42 S. W. 857. In each case the Court of Civil Appeals held that damages could not be recovered against a municipal corporation when the injury resulted in death. Application was made in each case to this court

for writ of error, which was refused. In the case of [Searight v. City of Austin](#), the sole question presented to this court was by assignment of error distinctly claiming that the error consisted in holding that a recovery could not be had against a municipal corporation for death occasioned by its negligence. Able counsel with earnestness and ability urged upon this court the proposition that municipal corporations were embraced in the statute. This court could not have refused that application without passing upon and overruling the assignment. Since that decision was made, and application refused, it has been considered settled in this court.

We answer that there could be no recovery against the city of Brownwood on the facts stated.

All Citations

106 Tex. 292, 166 S.W. 1129

89 Tex. 610
Supreme Court of Texas.

JOHNSON
v.
FARMER et al.

May 28, 1896.

Certified questions from court of civil appeals of Second supreme judicial district.

Action by Clarissa Farmer and others against C. W. Johnson, administrator of the estate of H. A. McComber, deceased, to recover for the death of the husband and father of plaintiffs, who was killed by defendant's intestate. There was a judgment in favor of plaintiffs, and defendant appealed to the court of civil appeals, which certified certain questions to the supreme court for its determination. Opinion delivered.

West Headnotes (1)

[1] **Death**

 Death of Defendant

Rev.St.1895, arts. 3021-3026, see [Vernon's Ann.Civ.St. art. 4675](#), provide that an action for death by wrongful act shall be for the sole benefit of the surviving husband, wife, children, and parents of deceased, and the sum recovered will not be liable for deceased's debts; that it may be brought by all of the parties entitled, or by any one or more of them for the benefit of all; that, in case suit has been brought, and defendant dies while it is pending, it may be revived, and prosecuted to judgment against his executor or administrator; and that, if the sole plaintiff die pending the suit, and he is the only party entitled to the money recovered, the suit shall abate. *Held*, that a cause of action for death by wrongful act does not survive the death of the wrongdoer, where suit is not brought before his death; there being no statute expressly providing therefor.

[7 Cases that cite this headnote](#)

Attorneys and Law Firms

***610 **1062** Johnson & Akin and R. F. Arnold, for appellant.

Phlete A. Martin, for appellees.

Opinion

***611** GAINES, C. J.

In this case the following questions are certified for our determination:

‘H. A. McComber shot and killed George W. Farmer while the latter was attempting to take, under claim of right, from the possession of the former, a lot of corn to which they had conflicting claims. About an hour afterwards McComber shot and killed himself. This suit was brought against the administrator of his estate by the widow and children of Farmer. The question thus arising, and which we deem it proper to certify to your honors for decision, is whether an action thus brought against the administrator in the first instance is maintainable, no suit pending at the death of McComber. In the event of affirmative answer to this question, we deem it proper to certify the further question, whether the attempt to take the corn from the possession of McComber against his consent would preclude a recovery, upon the ground that Farmer was engaged in an illegal act at the time of his death.’

We are of opinion that the suit cannot be maintained. Statutes giving an action for personal injuries resulting in death have been enacted in most, if not all, of the states of our Union. In eight only has any provision been made for a survival of the cause of action in case of the death of the wrongdoer. In every state in which the statute gives the right of action, and does not expressly provide that it continue in case of the death of the person causing the injury, and in the courts in which the question has arisen for adjudication, it has been held that the cause of action does not survive. [Hegerich v. Keddie](#), 99 N. Y. 258, 1 N. E. 787; [Moe v. Smiley](#), 125 Pa. St. 136, 17 Atl. 228; [Russell v. Sunbury](#), 37 Ohio St. 372; [Hamilton v. Jones](#), 125 Ind. 176, 25 N. E. 192; [Green v. Thompson](#), 26 Minn. 500, 5 N. W. 376. Our statute upon the subject is peculiar, not to say anomalous. Articles 3021, 3022, 3024-3026 of our Revised Statutes read as follows:

‘Art. 3021. The action shall be for the sole and exclusive benefit of the surviving husband, wife, children and parents of the person whose death shall have been so caused, and the amount recovered therein shall not be liable for the debts of the deceased.

‘Art. 3022. The action may be brought by all of the parties entitled thereto, or by any one or more of them for the benefit of all.’

‘Art. 3024. The action shall not abate by the death of either party to the record if any person entitled to the benefit of the action survives. If the plaintiff die pending the suit, when there is only one plaintiff, *612 some one or more of the parties entitled to the money recovered may, by order of the court, be made plaintiff and the suit be prosecuted to judgment in the name of such plaintiff for the benefit of the persons entitled.

‘Art. 3025. If the sole plaintiff die pending the suit, and he is the only party entitled to the money recovered, the suit shall abate.

‘Art. 3026. If the defendant die pending the suit, his executor or administrator may be made a party and the suit be prosecuted to judgment as though such defendant had continued alive. The judgment in such case, if **1063 rendered in favor of the plaintiff, shall be, to be paid in due course of administration.’

Articles 3024 and 3026 very clearly provide that, in case suit has been brought, and the defendant dies while it is pending, it may be revived and prosecuted to judgment against his executor or administrator. This necessarily keeps alive the cause of action in such a case. But our statutes contain no provision for the continuance of the cause of action in the event of the death of the wrongdoer before the suit is brought. The cases cited hold, in effect, that the cause of action belongs to that class which, under the rules of the common law, die with the tortfeasor, and that, in the absence of some provision to the contrary, the right of action expires at his death. Besides, article 3018 provides: ‘The wrongful act, negligence, carelessness, unskillfulness or default mentioned in the preceding article must be of such a character as would, if death had not ensued, have entitled the party injured to maintain an action for such injury.’ Until the passage of the act of May 4, 1895, which changes the rule of the common law as to the survival of causes of action, the injured party,

if he had lived, could not have maintained a suit against the legal representatives of the person inflicting the injury, after the death of the latter. [Watson v. Loop, 12 Tex. 11](#). Hence, in the absence of some other provision in the statute, when the injured party dies, the beneficiaries under the act could not, under the same circumstances, maintain the action. The statute does expressly provide for the continuation of the suit in case the defendant dies while it is pending, but it does not provide for the contingency of the death of the wrongdoer before any suit is brought. That, in enacting article 3026, it was intended only to provide against the abatement of a suit already brought, is further indicated by the fact that, in chapter 7 of title 30 of the Revised Statutes, which is devoted to the subject of the abatement and discontinuance of suits, the provisions of articles 3024, 3025, and 3026 are repeated in language almost precisely the same. Rev. St. 1895, art. 1255. If it had been intended that the cause of action should in any case survive the death of the wrongdoer, article 3026 and the corresponding portion of article 1255 were wholly unnecessary, because it had already been provided, in article 1248, that ‘where in any suit the defendant shall die before verdict, if the cause of action be one which survives, the suit *613 shall not abate by reason of such death,’ and that the executor, or administrator should be made a party.

We confess our inability to see any satisfactory reason why the legislature should provide that the cause of action should survive when the death occurs after suit brought, and should not make a like provision in case the wrongdoer should die before suit; but reasons deemed satisfactory may have suggested themselves to the lawmakers which do not occur to us. It may be that, while it was not deemed proper to provide for the survival of the cause of action when the death occurred before suit, it was considered that the expense incurred by the beneficiaries in bringing the action was a sufficient ground for making a different rule in case of a pending suit. But, whether the omission was intentional or not, there is still an omission. The statutes fail to provide that the cause of action shall continue in case the wrongdoer dies before suit. It is *casus omissus*. Bish. Writ. Law, § 136. Although the reason for the survival in case of death before suit may be in every particular as cogent as for a nonabatement of the action after suit brought, this does not justify us in extending the provision to the former class of cases, when by no fair construction can the terms of the statute be made to embrace such class. That this cannot be done has been

frequently decided in this court. [Turner v. Cross](#), 83 Tex. 218, 18 S. W. 578; [Campbell v. Cook](#), 86 tex. 630, 26 S. W. 486.

We have in this opinion cited the Revised Statutes of 1895, though, at the time the cause of action arose, as we infer from the briefs, they were not in force. The provisions are

the same as in the former revision, nor had the act of May 4, 1895, been passed when the death in this case occurred.

All Citations

89 Tex. 610, 35 S.W. 1062

83 Tex. 607
Supreme Court of Texas.

YOAKUM *et al.*

v.

SELPH *et al.*

March 8, 1892.

Commissioners' decision. Section A. Appeal from district court, Harris county.

Action by Mary I. and Asa Selph against B. F. Yoakum and J. S. McNamara, receivers. Judgment for plaintiffs. Defendants appeal. Reversed.

West Headnotes (3)

[1] **Appeal and Error**

 Errors on Face of Record

Where the statute did not give a right of action against the receiver of a railroad for death of an employee by wrongful act, even if plaintiff's right to maintain the action was not raised at trial or by assignments of error, it necessarily arises on the face of the record and the court must take notice of plaintiff's failure to show a cause of action.

[6 Cases that cite this headnote](#)

[2] **Railroads**

 Effect of Operation of Road by Receiver

A receiver is not a "proprietor, owner, charterer, or hirer," within Rev.St.Tex. art. 2899 [Vernon's Ann.Civ.St. art. 4671], giving a right of action for injuries resulting in death caused by the negligence of the proprietor, owner, charterer, or hirer of a railroad, etc., or by the negligence of their servants or agents.

[4 Cases that cite this headnote](#)

[3] **Railroads**

 Effect of Operation of Road by Receiver

A receiver of a railway company is not liable for injuries causing the death of an employee of the company.

[1 Cases that cite this headnote](#)

Attorneys and Law Firms

***607 **145** *O. T. Holt*, for appellants.

G. W. Tharp, for appellees.

Opinion

HOBBY, P. J.

The appellees, Mary I. Selph and Asa Selph, sued the appellants, B. F. Yoakum and J. S. McNamara, as receivers of the San Antonio & Aransas Pass Railway Company, in the district court of Harris county, alleging that the deceased, M. Z. Selph, was the husband and father of the appellees, and that on ***608** the 3d day of February, A. D. 1891, while the said M. Z. Selph was attempting to cross the San Antonio & Aransas Pass Railway track where the public road crosses the same, and driving over said road-bed, the front wheels of the said M. Z. Selph's vehicle or wagon passed over the first track when they dropped into a mud-hole between defendant's tracks, about three feet deep, with such force that said spring wagon was broken, and said Selph was hurled from his driver's seat forward upon the dashboard, and his driver's seat was thrown upon him, and he was pinned fast to the dashboard. By reason aforesaid he was mortally injured in his body and legs, so that he died from the injuries so received on the 15th day of February, 1891. The cause was tried by a jury, and a verdict and judgment was rendered for appellees, from which this appeal is prosecuted on several assignments of error. None of these assignments raise the question of the right of appellees to recover judgment against the appellants as receivers under our statute. But, as it is a question going to the foundation of the action, and is fundamental in its nature, it necessarily arises on the face of the record without reference to its formal presentation by assignments. It has been repeatedly said, and is well recognized, that in suits of this class no right of action at common law survived the decease of the person injured, but it abated with his death. Suits for damages for injuries resulting from the death of a person are exclusively statutory. *Nelson v. Railway Co.*, 78 Tex. 624, 14 S. W. Rep. 1021. If the statute does not give

the right in this case, the judgment would be unauthorized by law. That the right does not exist in the present case is settled in the case of [Turner v. Cross, 18 S. W. Rep. 578](#), (decided at the present term of the supreme court,) where it was held, after an exhaustive discussion of the question, that a 'receiver of a railroad, operating it, was not within the enumeration of the statute, (article 2899,) either as proprietor, owner, charterer, or hirer,' and was not under that article, which alone gives the right of action, liable for damages for injuries resulting in the death of a person. In that case, the deceased was an employee; in this, he was

not. But under the authority of the case cited we think the judgment should be reversed and remanded.

PER CURIAM.

Reversed and remanded, as per opinion of commission of appeals.

All Citations

83 Tex. 607, 19 S.W. 145

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Abrogation Recognized by [Dubai Petroleum Co. v. Kazi](#), Tex., February 10, 2000

68 Tex. 375
Supreme Court of Texas.

TEXAS & P. RY. Co.

v.

RICHARDS.

May 30, 1887.

Appeal from Grayson county.

West Headnotes (1)

[1] Courts [Actions under laws of other state](#)**Death** [Actions under laws of other state or foreign country](#)

A statute of one state, by which a right of action for personal injuries survives, will not be enforced by the courts of another state, where the common law, by which such cause of action dies with the person, is unchanged.

[27 Cases that cite this headnote](#)**Attorneys and Law Firms*****375** ****627** *Brown & Gunter*, for appellant.***376** *G. G. Randall, W. W. Wilkins, and Woods & Cunningham*, for appellee.**Opinion**

STAYTON, J.

This action was brought by Grace Richards, a minor, through her next friend, to recover damages for an injury done to her father in the state of Louisiana, from which, in that state, he died within a few hours after he received the hurt. The action is brought to recover such damages as the father of the plaintiff might have recovered had his death not resulted from the injury, and not to recover damages for injury resulting to the plaintiff from the death

of her father, which, under the statutes of this and many of the other states, may be recovered by those sustaining given relations to a person whose death results from the negligent or wrongful act of another. The statute in force in the state of Louisiana at the time the father of the plaintiff was injured and died was pleaded, and was as follows: 'Every act whatever of man, that causes damage to another, obliges him by whose fault it happened to repair it. The right of this action shall survive, in case of death, in favor of the minor children and widow of deceased, or either of them, and, in default of these, to the surviving father and mother, or either ****628** of them, for the space of one year from the death. Every person is responsible for the damage he occasions, not merely by his acts, but by his negligence, his imprudence, or want of skill. We are responsible not only for the damages occasioned by our own act, but that which is caused by the act of persons for whom we are answerable, or other things we have in custody.' It is alleged that this provision of the Louisiana law applies to corporations, and of this there can be no reasonable doubt. It is further alleged that the persons in whose favor the cause of action survives, under the statute, may recover such damages as ***377** the person injured might have recovered had death not ensued, and none other.

There can be no doubt of the correctness of this construction of the Louisiana statute. That statute does not give a cause of action to the person immediately injured where none existed before; and the first clause simply asserts a rule well recognized, we may say, by the laws of all civilized nations, under which the injured person would be given relief by the courts of any country having jurisdiction over the person of the offending party. The second clause of the statute, however, makes this cause of action to survive the death of the injured person, and subrogates the persons sustaining the relationships named to the right which the injured person had during his life to enforce that cause of action. This is illustrated by the decisions made before and since the second clause of the statute was added. [Hubgh v. Railroad Co.](#), 6 La. Ann. 495; [Hermann v. Railroad Co.](#), 11 La. Ann. 22; [Earhart v. Railroad Co.](#), 17 La. Ann. 244; [Frank v. Railroad Co.](#), 20 La. Ann. 26; [Van Amburg v. Railroad Co.](#), 37 La. Ann. 651. The sole right the appellee has to enforce the cause of action which accrued to her father is based on the statute of Louisiana. That statute confers a right which before its passage did not exist even in that state, as may be seen by an examination of the cases to which we have referred. As

that statute cannot be operative here, can the right which it gives be enforced in this state?

There are three classes of cases in which the question may arise as to whether a right given solely by the statutes of one state will be enforced in the courts of another. (1) Cases in which a right given by the statute of one state is sought to be enforced in the court of another, in which laws exist giving a like right under the same facts; and in this class of cases, while there is some conflict of decision, it seems to be generally held that courts of the latter state will recognize and enforce the right given by the statutes of another state. *Dennick v. Railroad Co.*, 103 U. S. 17; *Boyce v. Railroad Co.*, 63 Iowa, 72, 18 N. W. Rep. 673; *Leonard v. Navigation Co.*, 84 N. Y. 48. The facts of the case before us do not bring it within this rule, and it becomes necessary to consider what, if any, qualifications ought to be made to it. (2) When facts transpire in a state whose facts is brought in another state under *378 them, and an action based on those facts is brought in another state under whose laws a right of action would exist had the facts transpired within its jurisdiction. In this class of cases it is held that no action can be maintained. Within this class fall the following cases: *Willis v. Railroad Co.*, 61 Tex. 432; *Whitford v. Railroad Co.*, 23 N. Y. 465; *Needham v. Railroad Co.*, 38 Vt. 295; *State v. Railroad Co.*, 45 Md. 41; *Le Forest v. Tolman*, 117 Mass. 109. (3) Cases in which a right of action given by the statutes of one state is sought to be enforced in a state whose laws deny the right given by the statutes of another; and in this class of cases it would seem necessarily to follow that the courts of the state in which the action is brought would be compelled to follow the law of the state in which it sits, whose laws only it has the power to enforce. This would seem to be true whether the law of such state affected the right or only the remedy.

Under the statutes of Louisiana the cause of action which the father of appellee had, survived to her for the period of one year. That she seeks to assert a right of action which existed before her father's death renders it none **629 the less, as to her, a right conferred by the statutes

of Louisiana, and without which she could not have maintained an action even in that state. In this state the common law is in force in so far as not inconsistent with the constitution and laws of this state. Rev. St. art. 3128. Under the common law, as well as the civil law, the cause of action which the appellee now seeks to assert would not survive her father's death, and there is no statute in this state changing this rule. *Watson v. Loop*, 12 Tex. 12; *Taney v. Edwards*, 27 Tex. 224; *Gibbs v. Belcher*, 30 Tex. 81. The rule of the common law upon the question under consideration is as imperative here as though it had been expressly enacted by statute; and it denies to the appellee the right to assert and maintain the claim set up in her petition.

We know of no rule of law which would authorize a court of this state to give effect to the laws of another state conferring such right as is claimed in this case, when the laws of this state declare that the same facts, transpiring here, as are made the basis of the appellee's claim, could confer no right whatever to the relief sought. The most liberal state to enforce the laws of to such a matter as that before us, require our state *379 to enforce the laws of another when in conflict with its own law. The appellant questioned the right of the appellee to maintain this action by demurrer and by plea, and the demurrer was overruled, and a charge refused which would have properly submitted the defense urged by the plea. We are of opinion that this was error which requires the reversal of the judgment, and as no cause of action, which the courts of this state can enforce, can be set up by any legitimate amendment, it will be unnecessary to remand the cause.

The judgment will therefore be reversed, and the cause dismissed, the appellant to recover all costs incurred in this court and the court below. It is so ordered.

All Citations

68 Tex. 375, 4 S.W. 627



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Declined to Extend by [Randol Mill Pharmacy v. Miller](#), Tex., April 24, 2015

34 S.W.3d 887
Supreme Court of Texas.

HORIZON/CMS HEALTHCARE
CORPORATION d/b/a Heritage
Western Hills Nursing Home, Petitioner,
v.
Lexa AULD, administratrix of the Estate
of Martha Hary, deceased, Respondent.

No. 99–0169.
|
Decided Aug. 24, 2000.
|
Argued Nov. 17, 1999.

Action was brought on behalf of nursing home resident to recover damages allegedly caused by negligence and gross negligence of nursing home, where she was a bedridden patient. Upon resident's death during pendency of action, administratrix of her estate, took the case forward as a survival action. The 48th District Court, Tarrant County, [Bob McCoy](#), J., entered judgment reducing actual damages awarded by jury from \$2.371 million to \$1,541,203.13, and punitive damages from \$90 million to \$9,483,766.92. Both parties appealed. The Fort Worth Court of Appeals, [985 S.W.2d 216](#), affirmed. Discretionary review was sought. The Supreme Court, [Abbott](#), J., held that: (1) punitive damages against nursing home were not subject to statutory cap on “civil liability for damages” under the Medical Liability and Insurance Improvement Act (MLIIA); but (2) punitive damages were subject to general punitive-damages-cap provision; (3) nursing home's answer was sufficiently specific to provide notice to plaintiff that nursing home intended to rely on general punitive-damages-cap provision; (4) prejudgment interest was subject to MLIIA statutory cap; and (5) application of MLIIA cap did not violate open-courts provision of State Constitution.

Affirmed in part and reversed and remanded in part.

[Hankinson](#), J., filed an opinion concurring in part and dissenting in part in which [Phillips](#), C.J., [Baker](#), and [O'Neil](#), JJ., joined.

West Headnotes (29)

[1] Health **Statutory Limits on Damages Awards**

Punitive damages, assessed against nursing home in survival action for injuries caused by its gross negligence in caring for resident, were not subject to statutory cap on “civil liability for damages” assessed against a health care provider under the Medical Liability and Insurance Improvement Act. [Vernon's Ann.Texas Civ.St. art. 4590i, § 11.02\(a, b\)](#).

[2 Cases that cite this headnote](#)

[2] Statutes **Language and intent, will, purpose, or policy**

The Supreme Court's ultimate goal in construing a statute is to give effect to the Legislature's intent as expressed in the language of the statute.

[9 Cases that cite this headnote](#)

[3] Statutes **Express mention and implied exclusion; *expressio unius est exclusio alterius***

The doctrine of *expressio unius est exclusio alterius* is simply an aid to determine legislative intent, not an absolute rule in interpreting statutes.

[3 Cases that cite this headnote](#)

[4] Health **Medical judgment**

Statutory \$500,000 cap, as adjusted to reflect changes in consumer price index, on “civil liability for damages” assessed against physician or health care provider under the Medical Liability and Insurance Improvement Act does not cap punitive damages awarded in a health-care-liability claim. [Vernon's Ann.Texas Civ.St. art. 4590i, § 11.02\(a, b\)](#).

3 Cases that cite this headnote

[5] Health

🔑 **Statutory Limits on Damages Awards**

Punitive damages award, assessed against nursing home in survival action for injuries caused by its gross negligence in caring for resident, was subject to general punitive-damages-cap provision in effect when action accrued. [V.T.C.A., Civil Practice & Remedies Code § 41.007](#) (1995).

4 Cases that cite this headnote

[6] Damages

🔑 **Defenses in general**

Nursing home's answer to negligence action on behalf of former resident, pleading version of general punitive-damages-cap provision that took effect after action accrued, rather than previous version applicable to case, was sufficiently specific to provide notice to plaintiff that nursing home intended to rely on general statutory cap as a defense, considering that general statute always had only one punitive-damages-cap provision, and plaintiff did not specially except to nursing home's misidentification of the applicable statutory provision. [V.T.C.A., Civil Practice & Remedies Code § 41.008; § 41.007](#) (1995).

17 Cases that cite this headnote

[7] Pleading

🔑 **Sufficiency of allegations in general**

Texas follows a “fair notice standard for pleading,” which looks to whether the opposing party can ascertain from the pleading the nature and basic issues of the controversy and what testimony will be relevant.

212 Cases that cite this headnote

[8] Pleading

🔑 **Statement of cause of action in general**

A petition is sufficient if it gives fair and adequate notice of the facts upon which the pleader bases his claim.

69 Cases that cite this headnote

[9] Pleading

🔑 **Statement of cause of action in general**

The purpose of rule providing fair notice standard for pleadings is to give the opposing party information sufficient to enable him to prepare a defense.

168 Cases that cite this headnote

[10] Pleading

🔑 **Construction in General**

When a party fails to specially except, courts should construe the pleadings liberally in favor of the pleader.

86 Cases that cite this headnote

[11] Pleading

🔑 **Exceptions to pleadings in general**

An opposing party should use special exceptions to identify defects in a pleading so that they may be cured, if possible, by amendment.

22 Cases that cite this headnote

[12] Interest

🔑 **Torts; wrongful death**

Prejudgment interest, assessed against nursing home in survival action for injuries caused by its negligence in caring for resident, was subject to statutory cap on “civil liability for damages” assessed against a health care provider under the Medical Liability and Insurance Improvement Act only up to the amount of the cap. [Vernon's Ann. Texas Civ.St. art. 4590i, § 11.02\(a\)](#).

6 Cases that cite this headnote

[13] Damages

 [Element of damages in general](#)

Prejudgment interest falls within the common-law meaning of “damages.”

[9 Cases that cite this headnote](#)

[14] Interest [Torts;wrongful death](#)

Statutory \$500,000 cap, as adjusted to reflect changes in consumer price index, on “civil liability for damages” assessed against physician or health care provider under the Medical Liability and Insurance Improvement Act mandates that prejudgment interest is subject to the cap. [Vernon's Ann.Texas Civ.St. art. 4590i, § 11.02\(a\)](#).

[4 Cases that cite this headnote](#)

[15] Common Law [Application and operation](#)

The law is not static; and the courts, whenever reason and equity demand, have been the primary instruments for changing the common law through a continual re-evaluation of common law concepts in light of current conditions.

[1 Cases that cite this headnote](#)

[16] Statutes [General and specific statutes](#)

The more specific statute controls over the more general.

[21 Cases that cite this headnote](#)

[17] Interest [Torts;wrongful death](#)

Statutory cap on “civil liability for damages” assessed under the Medical Liability and Insurance Improvement Act applies only to health-care liability claims, and thus prevails over the general prejudgment-interest statute to allow prejudgment interest up to the amount of the cap. [Vernon's Ann.Texas](#)

[Civ.St. art. 4590i, § 11.02\(a\)](#); [art. 5069-1.05, § 6\(a\)](#) (Repealed).

[10 Cases that cite this headnote](#)

[18] Constitutional Law [Conditions, Limitations, and Other Restrictions on Access and Remedies](#)**Health** [Statutory Limits on Damages Awards](#)**Statutes** [Tort or financial liabilities](#)

Administratrix's survival claim against nursing home on behalf of former resident's estate was wholly statutory in nature, and thus complete unto itself and severable from any unconstitutional application of statutory cap on damages under Medical Liability and Insurance Improvement Act to common-law claims, such that application of the cap to this survival claim did not violate open-courts provision of the State Constitution, even though resident's claims were common-law when she filed negligence action before her death. [Vernon's Ann.Texas Const. Art. 1, § 13](#); [Vernon's Ann.Texas Civ.St. art. 4590i, §§ 11.02, 11.03](#); [V.T.C.A., Civil Practice & Remedies Code § 71.021](#).

[7 Cases that cite this headnote](#)

[19] Statutes [Effect of Partial Invalidity;Severability](#)

If, when the Supreme Court strikes a statute's application to common law claims under the open-courts provision of the State Constitution, the court is left with something which remains complete in itself, and capable of being executed in accordance with the legislative intent, wholly independent of that which was rejected, it must stand. [Vernon's Ann.Texas Const. Art. 1, § 13](#).

[1 Cases that cite this headnote](#)

[20] Constitutional Law [Conditions, Limitations, and Other Restrictions on Access and Remedies](#)

For open-courts provision of State Constitution to apply, the litigant must (1) have a cognizable common-law cause of action that is being restricted, and (2) show that the restriction is unreasonable or arbitrary when balanced against the statute's purpose. [Vernon's Ann.Texas Const. Art. 1, § 13](#).

[3 Cases that cite this headnote](#)

[21] Constitutional Law

 [Conditions, Limitations, and Other Restrictions on Access and Remedies](#)

Wrongful-death and survival claimants cannot establish an open-courts violation under State Constitution because they have no common law right to bring either claim. [Vernon's Ann.Texas Const. Art. 1, § 13](#); [V.T.C.A., Civil Practice & Remedies Code §§ 71.002, 71.004, 71.021](#).

[8 Cases that cite this headnote](#)

[22] Evidence

 [Judicial Admissions](#)

Evidence

 [Judicial admissions in general](#)

A “judicial admission” must be a clear, deliberate, and unequivocal statement, and occurs when an assertion of fact is conclusively established in live pleadings, making the introduction of other pleadings or evidence unnecessary.

[46 Cases that cite this headnote](#)

[23] Evidence

 [Judicial admissions in general](#)

A judicial admission not only relieves an adversary from making proof of the fact admitted but also bars the party himself from disputing it.

[12 Cases that cite this headnote](#)

[24] Evidence

 [Judicial admissions in general](#)

Once a fact is conclusively established by judicial admission, jury questions concerning the fact need not be submitted.

[11 Cases that cite this headnote](#)

[25] Evidence

 [Pleadings](#)

Unequivocal assertions of fact in administratrix's petition against nursing home corporation on behalf of former resident's estate, stating that corporation was a “health care provider” and that claim was a “health care liability claim” as those terms are defined in the Medical Liability and Insurance Improvement Act amounted to judicial admission of such fact, relieving corporation of producing evidence that it met Act's definition in order to avail itself of Act's cap on damages. [Vernon's Ann.Texas Civ.St. art. 4590i, § 1.03\(a\)](#).

[8 Cases that cite this headnote](#)

[26] Witnesses

 [Competency of contradictory evidence](#)

Nursing-home-survey reports produced by Department of Human Services and indicating defendant nursing home's repeated failure to provide basic care to its residents were admissible, in survival action by estate of former resident, to impeach testimony of nursing home witnesses giving false impression that home had not been cited for rendering improper care, even if reports were admitted under statute that was not in effect at time resident's original negligence suit was filed, where nursing home did not request a limiting instruction at time of admission. [Rules of Evid., Rule 105\(a\)](#); [V.T.C.A., Human Resources Code § 32.021\(j\)\(3\)](#).

[6 Cases that cite this headnote](#)

[27] Appeal and Error

 [Rulings on admissibility of evidence in general](#)

The Supreme Court reviews a trial court's evidentiary rulings for abuse of discretion.

[86 Cases that cite this headnote](#)

[28] Appeal and Error

 Rulings as to Evidence in General

Unless the trial court's erroneous evidentiary ruling probably caused the rendition of an improper judgment, the Supreme Court will not reverse the ruling.

[80 Cases that cite this headnote](#)

[29] Appeal and Error

 Particular cases

Even assuming nursing-home-survey reports produced by Department of Human Services and indicating defendant nursing home's repeated failure to provide basic care to its residents were not admissible in survival action by estate of former resident, such error probably did not cause rendition of an improper judgment, and thus was not reversible error, where both sides produced evidence regarding nursing home's treatment of resident.

[12 Cases that cite this headnote](#)

Attorneys and Law Firms

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Opinion

Justice [ABBOTT](#) delivered the opinion of the Court, in which Justice [HECHT](#), Justice [ENOCH](#), Justice [OWEN](#), and Justice [GONZALES](#) join.

The focus of this case is whether [Texas Revised Civil Statutes article 4590i, section 11.02\(a\)](#) (part of the Medical Liability and Insurance Improvement Act), or [Texas Civil](#)

[Practice and Remedies Code section 41.007](#), provides a statutory basis for capping punitive damages that are awarded in cases involving health-care-liability claims. We hold that the latter provision, [section 41.007](#), provides the basis for capping the punitive damages that were awarded in this case, and that [article 4590i, section 11.02\(a\)](#), does not. We also hold that [article 4590i, section 11.02](#) does, however, cap the amount of prejudgment interest awarded on Auld's actual damages falling within [section 11.02\(a\)](#)'s cap. As a result, Auld is not entitled to the entire prejudgment interest award in this case. Other issues raised by the parties include the constitutionality of [article 4590i, section 11.02](#), and evidentiary and procedural concerns. We agree with the court of appeals' judgment on these matters. Accordingly, we affirm the court of appeals' judgment in part. With regard to that portion of the judgment affirming the trial court's award of prejudgment interest to Auld, we hold that Auld may recover prejudgment interest awarded on the damages specifically excluded from [article 4590i's](#) damages cap by [section 11.02\(b\)](#), but that Auld may recover prejudgment interest on damages subject to the cap only to the extent that such interest does not exceed the cap. Accordingly, we reverse in part and remand to the trial court to render judgment in accordance with this opinion.

I

Martha Hary became a resident at Heritage Western Hills Nursing Home (Heritage) in August 1994. When she arrived at Heritage, Hary suffered from, among other things, [Alzheimer's disease](#), anxiety, malnutrition, [emphysema](#), and [spinal arthritis](#). She resided at Heritage for about one year before she was hospitalized in Fort Worth, where she was treated for ten days. After her hospitalization, Hary was transferred to a different nursing home that is not a party to this suit.

Through her next friend Francis Orr, Hary filed suit against Horizon/CMS Healthcare Corporation (Horizon) alleging that its nursing home—Heritage—was ***891** negligent and grossly negligent by failing to provide her with medical care and treatment within the acceptable standard of care. Hary alleged that substandard nursing care proximately caused her to develop pressure sores, that she suffered from contractures in all extremities, that not all the wound-care treatments and pressure-relieving devices that had been ordered were provided to her, and

that the care actually administered for her pressure sores was painful. While the case was pending, Hary died from a [heart attack](#). Hary's administratrix, Lexa Auld, continued the suit through a survival action, which was tried to a jury.

The jury returned a verdict of \$2,371,000 in actual damages, which included \$1,750,000 for physical pain and mental anguish, \$150,000 for disfigurement, \$250,000 for impairment, and \$221,000¹ for medical care. The jury also awarded \$90,000,000 in punitive damages, based on its finding that the nursing home engaged in grossly negligent conduct toward Hary. The trial court reduced both the actual and punitive damages awards. The court applied the [article 4590i](#) cap to the actual damages award and reduced it to \$1,541,203.13, which represented the capped limit, adjusted for changes in the consumer price index,² plus medical expenses, which the statute specifically excludes from the cap. *See* [TEX.REV.CIV. STAT. art. 4590i, §§ 11.02\(a\),\(b\), 11.04](#).

The court also reduced the punitive damages award from \$90,000,000 to \$9,483,766.92, based on the statutory cap on punitive damages awarded in personal injury suits found in [Texas Civil Practices and Remedies Code section 41.007](#). This reduction was based on the version of the Texas Civil Practice and Remedies Code cap applicable at the time Hary's cause of action accrued. It provided that “exemplary damages awarded against a defendant may not exceed four times the amount of actual damages or \$200,000, whichever is greater.” Act of June 3, 1987, 70th Leg., 1st C.S., ch. 2, § 2.12, [sec. 41.007](#), 1987 Tex. Gen. Laws 37, 46, *amended and renumbered by* Act of April 11, 1995, 74th Leg., R.S., ch. 19, § 1, 1995 Tex. Gen. Laws 108, 111 (current version at [TEX. CIV. PRAC. & REM.CODE § 41.008](#)). Using this formula, the court multiplied the jury's uncapped actual damages award³ by four to calculate the punitive damage total of \$9,483,766.92.⁴ The trial court further awarded prejudgment interest on the capped actual damages at the rate of ten percent per annum, totaling \$211,968.21. Both parties appealed. The court of appeals affirmed, finding no reversible error. [985 S.W.2d 216](#). We affirm all parts of the court of appeals' judgment, except for the award of prejudgment interest on the capped amount of actual damages.

II

Punitive Damages

[1] The court of appeals held that punitive damages awards in health-care-liability [*892](#) claims are not capped by [article 4590i, section 11.02\(a\)](#). [985 S.W.2d at 224](#). Instead, the court of appeals affirmed the trial court's application of the punitive damages cap found in [Texas Civil Practice and Remedies Code section 41.007](#). *Id.* at [224, 234](#).

A

Article 4590i

Texas Revised Civil Statute [article 4590i, section 11.02](#) provides:

(a) In an action on a health care liability claim where final judgment is rendered against a physician or health care provider, the limit of civil liability for damages of the physician or health care provider shall be limited to an amount not to exceed \$500,000.

(b) Subsection (a) of this section does not apply to the amount of damages awarded on a health care liability claim for the expenses of necessary medical, hospital, and custodial care received before judgment or required in the future for treatment of the injury.

[TEX.REV.CIV. STAT. art. 4590i, § 11.02\(a\),\(b\)](#). Horizon argues that [article 4590i](#) should cap punitive damages in this case because the phrase “civil liability for damages” necessarily includes all obligations to pay damages in a civil case, without distinction between actual damages and punitive damages. Horizon focuses on the Legislature's specific exclusion of certain types of medical expenses from [section 11.02\(a\)](#)'s application. Auld contends the opposite—that punitive damages are not capped under [article 4590i](#) because the term “damages,” as used in the statute, means “compensation for injury or loss,” which would not include punitive damages.

[2] This Court's ultimate goal in construing a statute is to give effect to the Legislature's intent as expressed in the language of the statute. *See* [Crimmins v. Lowry](#), [691](#)

S.W.2d 582, 584 (Tex.1985). Article 4590i does not define “damages.” It does, however, provide that “[a]ny legal term or word of art used in this part, not otherwise defined in this part, shall have such meaning as is consistent with the common law.” See TEX.REV.CIV. STAT. art. 4590i, § 1.03(b). After exploring the common law to ascertain the common-law meaning of “civil liability for damages,” we reach the conclusion that the common law provides no meaningful guidance regarding whether punitive damages should be included in a common-law definition of “civil liability for damages.” Compare, e.g., *City of Dallas v. Cox*, 793 S.W.2d 701, 733 (Tex.App.-Dallas 1990, no writ) (citing *McRae v. Lindale Indep. Sch. Dist.*, 450 S.W.2d 118, 124 (Tex.Civ.App.-Tyler 1970, writ ref’d n.r.e.), which defines the term “damages” as “the sum of money the law awards as pecuniary compensation, recompense, or satisfaction for an injury done or a wrong sustained as a consequence of either a breach of a contractual obligation or a tortious act”); and *Dalby v. Lyle*, 105 S.W.2d 764, 766 (Tex.Civ.App.-Amarillo 1937, no writ) (“Damages are compensation for loss”) with *Azar Nut Co. v. Caille*, 734 S.W.2d 667, 668–69 (Tex.1987) (affirming the court of appeals’ conclusion that the term “damages,” as used in the retaliatory-discharge provision of the workers’ compensation statute, included punitive damages); *American Home Assurance Co. v. Safway Steel Prods. Co.*, 743 S.W.2d 693, 701–02 (Tex.App.-Austin 1987, writ denied) (interpreting two insurance policies that obligated an insurer to pay all sums the insured became legally obligated to pay as damages to encompass both actual and punitive damages); *Castleberry v. Frost–Johnson Lumber Co.*, 283 S.W. 141, 142 (Tex. Comm’n App.1926, judgment adopted) (holding that “the word ‘damages,’ unless limited, as is not done [in the Workmen’s Compensation Act,] covers exemplary as well as actual damages”). Nevertheless, any ambiguity concerning the scope of the meaning of “civil liability for damages” is clarified by the statute’s legislative history.

*893 Horizon and amici curiae⁵ in support of Horizon’s position argue that the statute’s legislative history evinces a legislative intent to include both punitive and compensatory damages within article 4590i’s cap, primarily focusing on the specific exclusion of certain damages in section 11.02(b). On the other hand, Auld and supporting amici curiae⁶ assert that article 4590i’s legislative history demonstrates the Legislature’s intent not to include punitive damages within the cap. We agree

with Auld that article 4590i’s legislative history indicates that the Legislature did not intend to include punitive damages within article 4590i’s cap.

The Legislature enacted article 4590i with the express recognition that Texas faced “a serious public problem in availability of and affordability of adequate medical professional liability insurance,” which in turn had “a material adverse effect on the delivery of medical and health care in Texas.” TEX.REV.CIV. STAT. art. 4590i, § 1.02(a)(4), (6). The Legislature determined that the lack of affordable professional liability insurance was due to the frequency and severity of recent health-care-liability claims. See *id.* § 1.02(a)(1), (3), and (5). In addressing this problem, the Legislature capped the amount of damages a physician or health-care provider could be required to pay. See *id.* § 11.02. The underlying theory was that a medical-liability insurer could offer lower malpractice rates, which, in turn, would increase the availability of medical care for Texans.

Additional support for this legislative intent is derived from the Medical Professional Liability Study Commission’s findings, which were expressly adopted by the Legislature in article 4590i. See *id.* § 1.02(a)(13). While discussing the “damages” at the root of the health-care crisis that prompted the Legislature to enact article 4590i, the Commission addressed compensatory, but not punitive, damages:

In general those who suffer personal injury as a consequence of the negligence of another can recover two general kinds of damages: first, damages for non-economic losses that go by the name of physical pain and mental suffering; second, economic losses, such as expenses and loss of earnings. The Study Commission has for convenience lumped damages into three categories: (1) pain and suffering, (2) expenses, and (3) loss of earnings.

TEXAS MEDICAL PROFESSIONAL LIABILITY STUDY COMMISSION, FINAL REPORT TO THE 65TH LEGISLATURE 5 (Dec.1976). This definition of damages makes no mention of punitive damages. Moreover, none of the report’s recommendations

mentions punitive damages, except for recommending that insurance carriers be restricted from covering punitive damages. Because the Commission's definition of punitive damages does not reference punitive damages awards and the Commission's findings were expressly adopted by the Legislature, it is unlikely that this same Legislature would have intended "damages" to mean something other than what the Commission envisioned. If it intended otherwise, the Legislature provided no indication of that intent.

Even the Texas Medical Association (TMA), one of the leading proponents of [article 4590i](#), has repeatedly stated that the cap in [article 4590i, section 11.02\(a\)](#), does not include punitive damages. The *894 final version of [article 4590i](#) that the Legislature passed, House Bill 1048, was a compromise measure between two companion bills, Senate Bill 103 and House Bill 370. *See* Tex. H.B. 1048, 65th Leg., R.S. (1977), Tex. S.B. 103, 65th Leg., R.S. (1977) & Tex. H.B. 370, 65th Leg., R.S. (1977). The cap on damages was taken from these two companion bills, and most of the testimony relating to the cap occurred during the hearings on these bills. In support of these two bills, the TMA submitted its own report discussing the findings and recommendations of the Commission. The TMA's report, like the Commission's report, did not mention punitive damages as a cause of the insurance crisis. *See generally* TEX. MED. ASS'N, REPORT ON THE MALPRACTICE INSURANCE CRISIS (1977). If the TMA desired punitive damages awards to be included in the cap, it certainly provided no hint of that desire.

Furthermore, Senate Bill 103 was referred to the Senate Jurisprudence Committee, where it was considered in a public hearing. At the hearing, a TMA representative, Jack Maroney, testified regarding the specifics of the proposed \$500,000 cap, stating that "noneconomic losses, commonly denominated as pain and suffering[.]" would be capped at \$100,000⁷ and that "the total award" would be capped at \$500,000 "except for future medical." Hearings on Tex. S.B. 103 Before the Senate Jurisprudence Comm., 65th Leg., R.S. (Feb. 9, 1977) (testimony of Jack Maroney). Maroney followed with an example of how these caps would operate:

Assuming that a jury awarded eight hundred thousand dollars, including a hundred thousand limitation on the pain and suffering, four hundred for economic losses, a hundred and fifty for past medical and a hundred and

fifty thousand for future medical, that plaintiff would be entitled to receive six hundred and fifty thousand dollars.

Id. And, in defining the "total award," he testified:

I would like to call your attention to the fact that four hundred thousand dollars of economic award placed in a savings and loan or in a C.D. would realize some twenty five to thirty thousand dollars a year without invading the corpus. And I submit to you that this protects the very large, large percent of the population of this state.

Id. At no time did Maroney mention punitive damages. Although the TMA did not endorse the final version of the bill,⁸ House Bill 1048 borrowed the \$500,000 cap directly from the TMA-backed companion bills discussed above, and the legislative history of those two bills contains no reference to punitive damages, much less any reference to including punitive damages in the cap.

When the constitutionality of the cap was later questioned, the TMA attempted to obtain a constitutional amendment to make the [article 4590i](#) cap constitutional and increase its limit from \$500,000 to \$1 million. *See TMA Postpones Push for Medical Liability Legislation, TMA ACTION*, July/Aug. 1987, at 1. Representative Brad Wright, who sponsored the amendment, stated that the \$1 million limitation is "\$1 million, ... plus medical care, plus hospital care, plus custodial care. It's \$1 million, plus all that care, *plus punitive damages*. *The limitation will not be a limitation on punitive damages*. [The amendment is] not [an] innovative piece[] *895 of legislation. [It is] not visionary. [It's] simply an attempt to validate *what we did ten years ago*." Hearings on Tex. H.J.R. 3 & H.B. 5 Before the House Comm. on State Affairs, 70th Leg., 2nd C.S. (June 29, 1987) (statement of Rep. Wright) (emphasis added). Given the TMA's role as active proponent of [article 4590i's](#) cap, the TMA's statements and those of its bill sponsor provide revealing insight that even the statute's proponents did not expect the [article 4590i](#) cap to include punitive damages. It is noteworthy that in its amicus brief filed in this case, the Texas Medical Association did not disavow any of the statements that have been attributed to it.

[3] Despite this legislative history, Horizon and its supporting amici curiae, including the TMA, contend that the Legislature implicitly included punitive damages in the cap by failing to include them in [section 11.02\(b\)](#)'s specific exclusion of certain damages. But this reliance on [section 11.02\(b\)](#) is misplaced. The Legislature's exclusion of certain types of compensatory damages from the cap does not give rise to an inference that the Legislature intended to include punitive damages within the cap. Not only does the foregoing legislative history refute this inference, but [section 11.02\(b\)](#)'s exclusion of certain medical expenses from the cap also gives rise to a much narrower inference than the one drawn by Horizon. Furthermore, the Legislature's specific exclusion of medical expenses does not compel the conclusion that the Legislature intended to include *all* damages—even non-compensatory damages—within the cap. “The doctrine of *expressio unius est exclusio alterius* is simply an aid to determine legislative intent, not an absolute rule.” *Mid-Century Ins. Co. of Tex. v. Kidd*, 997 S.W.2d 265, 274 (Tex.1999).

In addition to [article 4590i](#)'s legislative history and statements made by the TMA suggesting that punitive damages are not included in the cap, [Texas Insurance Code article 5.15–1, section 8](#)—passed during the same session as [article 4590i](#)—and its legislative history also point to the same conclusion. [Article 5.15–1, section 8](#), provides that professional medical liability insurance policies cannot include coverage for punitive damages that may be assessed against a physician or health-care provider.⁹ See [TEX. INS.CODE art. 5.15–1, § 8](#). This provision made punitive damages uninsurable so that the intentional or grossly negligent wrongdoer would be penalized and hopefully deterred. See TEXAS MEDICAL PROFESSIONAL LIABILITY STUDY COMMISSION, FINAL REPORT TO THE 65TH LEGISLATURE 25 (Dec.1976); see also Hearings on Tex. H.B. 722 Before the House Comm. on State Affairs, 65th Leg., R.S. (Feb. 14, 1977) (Rep. Davis's statement in reference to the proposed prohibition in the Insurance Code that “it's against social policy to permit someone to insure against their own gross negligence or a willful injury of another”).

This statutory mandate coincides with [article 4590i](#)'s underlying purpose, which is to make insurance coverage affordable. Defining damages in the statutory cap to

include punitive damages would not have the effect of lowering insurance rates or increasing the availability of medical care in Texas since insurers cannot insure against punitive damages anyway. See [TEX. INS.CODE art. 5.15–1, § 8](#). A contrary conclusion that included punitive damages in the damages to be capped would not promote the purpose of [article 4590i](#)—to *896 make insurance coverage affordable—and would conflict with the purposes of awarding punitive damages, which are to deter and punish culpable conduct.

[4] In conclusion, the common-law meaning of damages is not readily ascertainable. However, [article 4590i](#)'s legislative history leads to the conclusion that [article 4590i](#) does not cap punitive damages awarded in a health-care-liability claim. Therefore, the court of appeals properly affirmed the trial court's decision not to include punitive damages when capping part of Auld's damage award under [article 4590i](#).

B

Section 41.007

[5] The court of appeals held that [section 41.007 of the Texas Civil Practice and Remedies Code](#) capped the punitive damages awarded to Auld. 985 S.W.2d at 233. That provision—as it existed when Auld's cause of action accrued—provided that “exemplary damages awarded against a defendant may not exceed four times the amount of actual damages or \$200,000, whichever is greater.” See Act of June 3, 1987, 70th Leg., 1st C.S., ch. 2, § 2.12, [sec. 41.007](#), 1987 Tex. Gen. Laws 37, 46, *amended and renumbered by* Act of April 11, 1995, 74th Leg., R.S., ch. 19, § 1, 1995 Tex. Gen. Laws 108, 111. As a result, the court of appeals affirmed the trial court's reduction of punitive damages from \$90,000,000 to \$9,483,766.92 (four times the amount of Auld's uncapped actual damages). 985 S.W.2d at 234.

[6] Auld challenges this holding and argues that the trial court was not authorized to reduce the jury's punitive damages award because (1) Horizon pleaded [section 41.008](#) (the version of the statute effective beginning September 1, 1995) rather than [section 41.007](#) (the previous version that is applicable in this case),¹⁰ and (2) Horizon did not plead any facts that would provide notice

to Auld that Horizon intended to rely on [section 41.007](#). Auld states that Horizon specifically pleaded the punitive-damages cap applicable to causes of action accruing on or after September 1, 1995 ([section 41.008](#)), and Hary's cause of action accrued prior to this date. Thus, Auld argues, [section 41.007](#) cannot apply, and, as such, there should be no cap on her punitive damages award.

Auld is correct that Horizon's first amended original answer did not mention [section 41.007](#). Instead, Horizon pleaded that sections 41.003 (regarding recovery of punitive damages), 41.008 (a revised and renumbered version of [section 41.007](#) that did not become effective until after Hary's cause of action accrued), and 41.009 (regarding bifurcating the trial of the punitive damages issue) applied to this suit. Horizon's pleading stated: "Defendant affirmatively asserts and pleads that Plaintiff's claim for exemplary and punitive damages is controlled and limited by [section 41.008 of the Texas Civil Practice and Remedies Code](#)." Horizon also denied any allegations of "gross negligence, knowing conduct, intentional and wanton behavior, malice, and other conduct which may form the legal basis for entitlement to the exemplary or punitive damages requested by Plaintiff." Consequently, we must determine if the court of appeals erred in relying on [section 41.007's](#) capping provisions in light of Horizon's pleadings.

[7] [8] [9] Texas follows a "fair notice" standard for pleading, which looks to whether the opposing party can ascertain from the pleading the nature and basic issues of the controversy and what testimony will be relevant. See [Broom v. Brookshire Bros., Inc.](#), 923 S.W.2d 57, 60 (Tex.App.—Tyler 1995, writ denied). Horizon's *897 first amended answer pleaded sufficient facts to give adequate and fair notice to Auld and the trial court of Horizon's intent to invoke the punitive-damages cap found in the Texas Civil Practice and Remedies Code, even though the pleading referred to an incorrect version of the statute. See, e.g., [CKB & Assocs., Inc. v. Moore McCormack Petroleum, Inc.](#), 809 S.W.2d 577, 586 (Tex.App.—Dallas 1991, writ denied) ("A pleading that gives adequate notice will not fail merely because the draftsman named it improperly."). "A petition is sufficient if it gives fair and adequate notice of the facts upon which the pleader bases his claim. The purpose of this rule is to give the opposing party information sufficient to enable him to prepare a defense." [Roark v. Allen](#), 633 S.W.2d 804, 810 (Tex.1982). Horizon satisfied this standard. Being

that there was, and is, only one punitive-damages cap provision in Chapter 41, it is hard to imagine that Auld was unaware of exactly what Horizon was claiming.

[10] [11] In addition, Auld did not specially except to Horizon's misidentification of the applicable statutory provision. When a party fails to specially except, courts should construe the pleadings liberally in favor of the pleader. See [Boyles v. Kerr](#), 855 S.W.2d 593, 601 (Tex.1993). An opposing party should use special exceptions to identify defects in a pleading so that they may be cured, if possible, by amendment. See [Cameron v. University of Houston](#), 598 S.W.2d 344, 345 (Tex.Civ.App.—Houston [14th Dist.] 1980, writ ref'd n.r.e.). Auld did not specially except to Horizon's pleading of the incorrect version of the statute; therefore, Horizon had no opportunity to correct it. Because we must construe Horizon's pleading in Horizon's favor, and because Horizon pleaded information specific enough to provide Auld with notice of its intent to rely on the punitive damages cap found in Chapter 41 of the Texas Civil Practice and Remedies Code, we conclude that the court of appeals did not err in affirming the trial court's application of [section 41.007](#).

III

Prejudgment Interest

[12] The trial court awarded prejudgment interest on the capped amount of actual damages, and the court of appeals affirmed, relying on former [Texas Revised Civil Statute article 5069-1.05, section 6\(a\)](#), which mandates that "judgments in wrongful death, personal injury, or property damage cases must include prejudgment interest." See Act of June 3, 1987, 70th Leg., 1st C.S., ch. 3, § 1, 1987 Tex. Gen. Laws 51, 51, *repealed by* Act of May 24, 1997, 75th Leg., R.S., ch. 1008, § 6(a), 1997 Tex. Gen. Laws 3091, 3602 (now codified at [TEX. FIN.CODE § 304.102](#)). Horizon argues, however, that prejudgment interest should be included in [article 4590i, section 11.02\(a\)](#)'s cap because, at a minimum, [section 11.02\(a\)](#) caps all damages not specifically excluded by [section 11.02\(b\)](#), and [section 11.02\(b\)](#) does not exclude prejudgment interest from the cap. Horizon bases this argument on case law establishing prejudgment interest

as a type of damages. *See, e.g., Cavnar v. Quality Control Parking, Inc.*, 696 S.W.2d 549, 552–54 (Tex.1985).

It is clear—from the language used in the statute and the legislative intent—that the Legislature placed an unequivocal limit on the amount that a health-care provider must pay in a final judgment under [article 4590i](#). [Section 11.02\(a\)](#) states:

In an action on a health care liability claim where final judgment is rendered against a physician or health care provider, the limit of civil liability for damages of the physician or health care provider shall be limited to an amount not to exceed \$500,000.¹¹

***898** TEX.REV.CIV. STAT. art. 4590i, § 11.02(a). The Legislature expressly provided only one exception to that cap, [section 11.02\(b\)](#), which states:

Subsection (a) of this section does not apply to the amount of damages awarded on a health care liability claim for the expenses of necessary medical, hospital, and custodial care received before judgment or required in the future for treatment of the injury.

See id. § 11.02(b).

[13] [14] Is prejudgment interest excepted from the cap? Obviously not. Is prejudgment interest included in the cap? Because [section 11.02\(a\)](#) mandates that the cap applies to a health-care provider's "civil liability for damages," the definition of that phrase governs the answer to the question. [Section 1.03\(b\)](#) directs that "[a]ny legal term or word of art used in this part, not otherwise defined in this part, shall have such meaning as is consistent with the common law." *See id.* § 1.03(b). Prejudgment interest falls within the common-law meaning of "damages." *See Cavnar*, 696 S.W.2d at 552–54. As such, [section 11.02\(a\)](#) mandates that prejudgment interest is subject to the cap.

Auld agrees that, after *Cavnar*, there is no question that the common law includes prejudgment interest as an element of damages recoverable in a personal-injury case but argues, nevertheless, that [article 4590i's](#) cap

does not include prejudgment interest. Auld contends that prejudgment interest cannot be subject to the cap on damages because prejudgment interest was not recoverable in a personal-injury action in 1977, when [article 4590i](#) was first enacted. Prejudgment interest in personal-injury suits first became recoverable in 1985, when this Court decided *Cavnar*. Auld argues that it is untenable to suggest that the Legislature intended to cap something that was not recoverable in healthcare-liability claims when the Legislature originally passed [article 4590i](#). Auld's contention suffers several flaws.

First, the conclusion that prejudgment interest is uncapped is contrary to the clear legislative intent of [section 11.02\(a\)](#) to cap all liability for "damages," as that term is defined in the common law, except for those medical expenses excepted from the cap in [section 11.02\(b\)](#). This intent has never been altered or diminished by the Legislature despite the fact that the Legislature has revisited and amended [article 4590i](#) on three occasions between the time *Cavnar* was issued and Auld filed her lawsuit. In 1989, 1991, and 1993, the Legislature amended various parts of 4590i.¹² This was on the heels of the 1987 legislative session during which the Legislature specifically considered the *Cavnar* decision and its implications. *See* SENATE COMM. ON STATE AFFAIRS, BILL ANALYSIS, Tex. S.B. 6, 70th Leg., 1st C.S. (1987) (discussing *Cavnar* and noting that "the Texas Supreme Court, in 1985, reviewed prior case law concerning the award of prejudgment interest ... [and] allowed prejudgment interest in personal injury cases and overruled all cases to the contrary"). Notably, and despite its express knowledge of *Cavnar* and that decision's impact on the common-law definition of damages, the Legislature made no change to [section 11.02\(a\)](#), [11.02\(b\)](#), or [1.03\(b\)](#).

[15] Second, Auld's contention pretends that the Legislature intended the phrase "[a]ny legal term ... shall have such meaning as is consistent with the common law" to lock in the common law as ***899** it existed in 1977. That contention is inconsistent with the inherent meaning of common law and would lead to anomalous results for the common law, for other statutes enacted by the Legislature, and, most relevant here, for [article 4590i](#). As we noted in *Whittlesey v. Miller*, "[t]he law is not static; and the courts, whenever reason and equity demand, have been the primary instruments for changing the common law through a continual re-evaluation of common law

concepts in light of current conditions.” 572 S.W.2d 665, 668 (Tex.1978); *see also Reagan v. Vaughn*, 804 S.W.2d 463, 465–66 (Tex.1990) (“‘The common law is not frozen or stagnant, but evolving, and it is the duty of this court to recognize the evolution.’” (quoting *El Chico Corp. v. Poole*, 732 S.W.2d 306, 309–10 (Tex.1987))).

Since article 4590i's original enactment in 1977, this Court has recognized a number of new and different elements of common-law “damages” that are recoverable in personal-injury actions. *See, e.g., Krishnan v. Sepulveda*, 916 S.W.2d 478, 479–82 (Tex.1995) (recognizing for the first time that “parents may recover damages from the birth of a stillborn fetus resulting from injury to the mother caused by the allegedly negligent diagnosis, prenatal supervision and treatment of the mother by her physician”); *Reagan*, 804 S.W.2d at 467 (recognizing that a child may recover damages for loss of parental consortium when a third party causes a serious, permanent, and disabling injury to a parent); *Cavnar*, 696 S.W.2d at 551 (in addition to recognizing that a personal-injury plaintiff is entitled to prejudgment interest as an element of common-law damages, the Court recognized that a decedent's children in a wrongful-death case can recover damages for mental anguish and loss of companionship) (citing *Sanchez v. Schindler*, 651 S.W.2d 249, 252 (Tex.1983)); and *Whittlesey*, 572 S.W.2d at 668 (recognizing a derivative claim for damages by a spouse for loss of consortium caused by a tortfeasor's negligently causing injury to other spouse). If section 1.03(b) froze the common law as it pertains to section 11.02(a), then the following anomaly would result: the newly recognized damages would not be capped because they were not recoverable in 1977. Stated differently, if prejudgment interest is not capped under section 11.02(a) because it did not exist as a form of common-law damages when article 4590i was originally enacted, then, similarly, the common-law damages recognized in *Krishnan*, *Reagan*, and *Cavnar*, as well as any other new common-law damages that may be recognized in the future, will be uncapped. That result obviously is contrary to the legislative intent and mandate of article 4590i.

Auld provides no support for the notion that the Legislature intended this result. Indeed, this result would be inconsistent with the express legislative intent behind article 4590i. If subsequently recognized common-law damages are not included within the scope of the cap, the cap is eviscerated for all practical

purposes. Plaintiffs would obviously channel their damage claims to the uncapped areas, leading to the uncertainty, unpredictability, and uncapped damages that the Legislature sought to achieve by enacting article 4590i.

Moreover, Auld's position could compromise the Legislature's true intent with numerous other statutes that contain provisions similar to 1.03(b). *See, e.g., TEX.REV.CIV. STAT. art. 1396–2.22A(Q)* (“A corporation may indemnify and advance expenses to an officer, employee, [or] agent ... to such further extent, consistent with law, as may be provided by its articles of incorporation, bylaws, general or specific action of its board of directors, or contract or *as permitted or required by common law*.”); *id.* art. 6132a–1, § 11.17 (“A limited partnership may further indemnify and advance expenses to a limited partner, employee, [or] agent ... to the extent, consistent with law, provided by its partnership agreement, by general or specific action of its general partner, by contract, *900 or *as permitted or required by common law*.”); TEX. GOV'T CODE § 2007.002(4) (“‘*Private real property*’ means an interest in real property recognized by common law ”); *id.* § 305.0011(e) (“The commission may adopt rules for the implementation of this section *consistent with this chapter, the Code of Professional Responsibility, and the common law of agency*.”); TEX. PROP.CODE § 92.061 (noting that “this subchapter does not affect any other right of a landlord or tenant under contract, statutory law, or *common law* that is consistent with the purposes of this subchapter”) (emphasis added in all).

To summarize, interpreting the section 11.02(a) cap to include prejudgment interest is “consistent with the common law” as dictated by section 1.03(b).

Next, Auld contends that if the section 11.02(a) cap on damages includes prejudgment interest, then that statutory provision conflicts with former article 5069–1.05, section 6(a), which provides that “a judgment in a wrongful death, personal injury, or property damage case must include prejudgment interest.”¹³ *See* Act of June 3, 1987, 70th Leg., 1st C.S., ch. 3, § 1, 1987 Tex. Gen. Laws 51, 51, *repealed by* Act of May 24, 1997, 75th Leg., R.S., ch. 1008, § 6(a), 1997 Tex. Gen. Laws 3091, 3602 (now codified as TEX. FIN.CODE § 304.102 with a change in language: “A judgment in a wrongful death, personal injury, or property damage case

earns prejudgment interest”). That conflict, Auld argues, must be resolved by awarding prejudgment interest under [article 5069–1.05](#), even if it exceeds the cap. Despite these contentions, applying [article 5069–1.05, section 6\(a\)](#) to [article 4590i](#) claims without deferring to [sections 11.02\(a\)](#) or [1.03\(b\)](#) produces a result inconsistent with legislative intent and statutory construction rules.

The purpose of [article 4590i](#) is to limit, not expand, a health-care provider's “civil liability for damages.” See, e.g., [TEX.REV.CIV. STAT. art. 4590i, § 1.02\(b\)\(2\)](#) (stating that one of the purposes of [article 4590i](#) is to “decrease the cost of” health-care-liability claims); *id.* [§ 1.02\(b\)\(4\)](#) (stating that another purpose of [article 4590i](#) is to make available to health-care providers insurance at “reasonably affordable rates”); see also SENATE COMM. ON STATE AFFAIRS, BILL ANALYSIS, Tex. S.B. 1409, 73rd Leg., R.S. (1993) (noting that [article 4590i](#) is intended to “reduce the expenses of trying medical liability lawsuits”) (emphasis added). To clarify the uniqueness of the liability-limiting provisions of [article 4590i](#) and to ensure their distinction from other liability laws, the Legislature added [section 1.02\(b\)\(7\)](#) to the “Findings and Purposes” part of the Act. [Section 1.02\(b\)\(7\)](#) illustrates that one purpose of [article 4590i](#) is to modify “liability laws as they relate to health care liability claims only.” See [TEX.REV.CIV. STAT. art. 4590i, § 1.02\(b\)\(7\)](#).¹⁴ *901 This demonstrates that the Legislature understood that [article 4590i](#) is intended to limit liability in ways that are unique to 4590i and to be a self-contained structure for determining a health-care provider's liability and damages. Reading [section 11.02\(a\)](#) to prevail over [article 5069–1.05](#) effectuates this legislative intent.

[16] [17] This conclusion is consistent with the traditional statutory construction principle that the more specific statute controls over the more general. See *Lufkin v. City of Galveston*, 63 Tex. 437, 439 (1885); see also *Bala v. Maxwell*, 909 S.W.2d 889, 892 (Tex.1995) (holding that [article 4590i, section 10.01](#) prevails over the conflicting general limitations statute); cf. [TEX. GOV'T CODE § 311.026](#) (providing that, when construing code provisions that are irreconcilable, “the special or local provision prevails as an exception to the general provision”). With regard to the cap in [article 4590i, section 11.02](#) and the general prejudgment-interest statute in [article 5069–1.05](#), the former is the more specific statute in that it applies only to health-care liability claims, while the latter is more

general because it applies to broader categories of claims, including all types of personal injury, property damage, and wrongful death. Thus, the cap in [article 4590i](#) prevails over the general prejudgment-interest statute.

This, of course, does not mean that [article 5069–1.05, section 6\(a\)](#) is wholly inapplicable in [article 4590i](#) cases. There will be many instances when the [section 11.02\(a\)](#) damages do not exceed—or even come close to—the cap. In those instances, [article 5069–1.05, section 6\(a\)](#) requires that prejudgment interest be added as damages up to the amount of the cap. Thus, the statutes can be harmonized to the extent that damages—including prejudgment interest—do not exceed the cap. By allowing prejudgment interest up to the amount of the cap, the parties retain their rights under [article 5069–1.05](#) while, at the same time, the stated purpose of [section 11.02\(a\)](#)—to limit a health-care provider's “civil liability for damages”—is fulfilled.

Finally, Auld also relies on *Rose v. Doctors Hospital*, in which the final judgment included a prejudgment-interest award exceeding the statutory cap. See *Rose v. Doctors Hosp.*, 801 S.W.2d 841 (Tex.1990). *Rose* involved a claim for wrongful death based on medical malpractice under [article 4590i](#). *Rose* 's primary holding was that [article 4590i](#)'s cap on damages could be constitutionally applied to a wrongful-death claim. See *id.* at 845–46. The Court did not analyze or discuss whether the cap included prejudgment interest yet included it in the judgment; therefore, *Rose* has no precedential effect on this issue.

In sum, Auld may recover prejudgment interest on those damages specifically excluded from the cap by [section 11.02\(b\)](#), but Auld may recover prejudgment interest on damages subject to the cap only up to the amount of the cap. Accordingly, that portion of the court of appeals' judgment affirming the trial court's award of prejudgment interest to Auld on damages subject to the cap is reversed to the extent it exceeds the cap.

IV

Constitutionality of Applying [Article 4590i](#) to a Survival Claim

[18] Auld asserts that the court of appeals erred in reducing her recovery because the cap in [article 4590i](#) does

not apply to claims for a malpractice victim's personal injuries, citing *Lucas v. United States*, 757 S.W.2d 687 (Tex.1988). In *Lucas* we held that article 4590i's cap on *902 damages was unconstitutional when applied to a common-law claim. See *id.* at 690. Auld argues that the cap's unconstitutional application to common-law personal-injury claims cannot be severed from its arguably constitutional application to survival claims, thereby rendering the cap void as to both types of personal injury claims. Horizon argues that Auld's complaint is an open-courts challenge, and, because she cannot satisfy the open-courts test, her constitutional arguments against the cap's application fail.

A

Severability

Auld urges that, even if her claim is statutory in nature and therefore not subject to an open-courts challenge, the unconstitutional application of the cap to a common-law claim for injury to a patient cannot be severed from the arguably constitutional application of the cap to the parallel statutory claim for injury to a patient; therefore, under *Lucas*, the entire cap is void. *Lucas*'s holding, however, was very limited and only invalidated that portion of the article 4590i cap applicable to a common-law medical-malpractice claim. See *Rose v. Doctors Hosp.*, 801 S.W.2d 841, 844 (Tex.1990).

[19] In *Rose* we held that the severability clause in article 4590i enabled the Court to strike unconstitutional portions of the statute, such as the portion found unconstitutional in *Lucas*, while retaining valid portions. See *id.* (construing the statute's severability clause, found in Act of Aug. 29, 1977, ch. 817, § 41.04). “[I]f, when we strike the statute's application to the common law claims, we are left with something which ‘remains complete in itself, and capable of being executed in accordance with the legislative intent, wholly independent of that which was rejected, it must stand.’ ” *Rose*, 801 S.W.2d at 845 (quoting *Western Union Tel. Co. v. State*, 62 Tex. 630, 634 (1884)). Under that test, we held that “[t]he application of [sections] 11.02 and 11.03 to wrongful death claims remains complete in itself, capable of execution in accord with the legislature's intent, and independent of any application to common law claims.” *Id.* (noting also that “the open courts provision does not apply to statutory

claims,” and that the statute “may be validly applied to all but common law claims”).

Using this test, we reach a similar conclusion with regard to Auld's survival claim. Because her survival claim is wholly statutory in nature—based on *Texas Civil Practice and Remedies Code* section 71.021—“[t]he application of [sections] 11.02 and 11.03 to [survival claims] remains complete in itself, capable of execution in accord with the legislature's intent, and independent of any application to common law claims.” *Id.* This result is consistent with legislative intent since the Legislature expressly provided that the provisions of the subchapter containing the cap “shall apply notwithstanding the provisions in” the wrongful-death and survival statutes. See *TEX.REV.CIV. STAT. art. 4590i, § 11.05*. Thus, application of the cap to common-law claims can be severed from application of the cap to statutory claims. The court of appeals did not err in affirming the trial court's application of the article 4590i cap to reduce a portion of Auld's damages.

B

Common-law versus Statutory Claims

[20] Auld presents a second constitutional challenge to the cap based on our opinion in *Lucas*, which stated that, under the open-courts provision of the Texas Constitution, the cap in article 4590i could not be constitutionally applied to a common-law claim for personal injuries resulting from medical negligence. See *Lucas*, 757 S.W.2d at 690. Article I, section 13 guarantees that “[a]ll courts shall be open, and every person for any injury done him ... shall have remedy by due course of law.” *TEX. CONST. art. I, § 13*. For this *903 provision to apply, however, the litigant must: (1) have a cognizable common-law cause of action that is being restricted; and (2) show that the restriction is unreasonable or arbitrary when balanced against the statute's purpose. See *Lucas*, 757 S.W.2d at 690 (quoting *Sax v. Votteler*, 648 S.W.2d 661, 666 (Tex.1983)).

For Auld's argument to prevail, we must initially determine whether Auld's claim for Hary's personal injuries, although prosecuted under the survival statute, is cognizable as a common-law claim. As we stated in *Rose v. Doctors Hospital*, 801 S.W.2d 841, 845 (Tex.1990), all negligence actions are common-law claims. At common

law, however, no personal injury cause of action survived a victim's death. See *Diaz v. Westphal*, 941 S.W.2d 96, 100 (Tex.1997); *Russell v. Ingersoll-Rand Co.*, 841 S.W.2d 343, 344–45 (Tex.1992). The victim's heirs could not sue on behalf of the victim or for their own losses due to the tortious act. See *Diaz*, 941 S.W.2d at 100. Because wrongful-death and survival actions would not exist absent legislative enactment, they are derived not from the common law but from a statute. See TEX. CIV. PRAC. & REM.CODE §§ 71.002, 71.004, 71.021; see also *Diaz*, 941 S.W.2d at 98, 101 (survival claim); *Rose*, 801 S.W.2d at 845 (wrongful-death claim). Auld argues that, although her claims may be statutory in nature today, when Hary first filed suit and when the negligence occurred, Hary's claims were common-law, not statutory, claims; therefore, the common-law rights of those claims did not expire when Hary died. Auld finds support for this position in a recent appellate court opinion involving a survival action in which the court upheld an open-courts challenge to the limitations provision in article 4590i, section 10.01. See *Martin v. Catterson*, 981 S.W.2d 222 (Tex.App.—Houston [1st Dist.] 1998), *pet. denied*, 2 S.W.3d 249 (Tex.1999) (per curiam). Although the *Catterson* court of appeals admitted that the survival claims were statutory at the time of appeal, the court noted that the claims were still common-law claims when the negligence occurred and when the suit was filed. See *id.* at 226. Thus, the court concluded that section 10.01 violated the open-courts provision and held that section 10.01 could not bar the plaintiff's survival action. See *id.*

[21] We denied the petition for review in a per curiam opinion, stating that we “neither approve nor disapprove” of the court of appeals' conclusion that “‘the claims were cognizable common-law causes of action when filed and at all times before Mr. Martin died[; therefore], we hold that the open courts doctrine applies and these claims are not barred by limitations.’” *Catterson*, 2 S.W.3d at 249 (quoting *Martin v. Catterson*, 981 S.W.2d at 226). By denying the petition in *Catterson*, we did not decide whether the court of appeals correctly applied the open-courts provision to a purely statutory claim. Our holding in *Bala v. Maxwell*, however, answers that question: wrongful-death and survival claimants cannot establish an open-courts violation because they “have no common law right to bring either.” See *Bala v. Maxwell*, 909 S.W.2d 889, 893 (Tex.1995). The court of appeals in *Catterson*, therefore, misstated the law when it held that a statutory claim can withstand an open-courts challenge.¹⁵

We noted in *Bala* that a claimant in a common-law personal-injury action loses any right to recover on that claim when he dies. The representative of the decedent's estate may continue prosecuting the claim on the decedent's behalf; however, that right is statutory and not based in the common law. See *Bala*, 909 S.W.2d at 893 (the plaintiffs sued under both the survival and wrongful-death statutes but could not bring an open-courts challenge to the limitations provision in article 4590i because their claims were purely statutory); cf. *904 *Baptist Mem'l Hosp. Sys. v. Arredondo*, 922 S.W.2d 120, 121–22 (Tex.1996) (first prong of open-courts test was not satisfied by a wrongful-death plaintiff whose suit was based on medical malpractice because the claim was purely statutory). In other words, survival claims exist only because the Legislature provided for them. If the Legislature desires to provide survival claimants with the same rights as common-law claimants, the Legislature has the prerogative to do so. As the law stands now, though, survival claims are not derived from the common law and should not be treated by the courts as if they were.

Auld also argues that the survival statute precludes defenses against a survival plaintiff that could not have been asserted against the deceased plaintiff had she survived, citing *Vassallo v. Nederl–Amerik Stoomv Maats Holland*, 337 S.W.2d 309, 313 (Tex.Civ.App.—Eastland 1960), *aff'd in part, rev'd in part on other grounds*, 162 Tex. 52, 344 S.W.2d 421 (Tex.1961). Based on this premise, Auld asserts that *Vassallo* prevents Horizon from asserting an affirmative defense against Auld that it could not have asserted in the suit against the decedent, Martha Hary. In *Vassallo*, a longshoreman was killed while working on a vessel owned by one of the defendants. Although the defense of contributory negligence applied to the heirs' survival claim, the decedent's claim, had he survived, would have fallen under general maritime law and been subject only to comparative negligence, not contributory negligence. See *id.* at 311–12. The heirs argued that the survival statute provided them the same cause of action available to the decedent had he lived; therefore, the defendants were entitled only to those defenses they could have asserted against the decedent. See *id.* at 310–11. The court held that the heirs were entitled to recover whatever the decedent could have recovered had he survived; thus, the defendants could assert comparative negligence as a defense but not contributory negligence. See *id.* at 313.

Auld compares her claim to *Vassallo* and argues that because article 4590i's liability limitation is an affirmative defense that could not have been asserted against Hary, it may not be asserted against Auld. This argument might warrant further discussion had the Legislature not enacted section 11.05 along with the cap in section 11.02. Section 11.05 states that the "provisions of this subchapter shall apply notwithstanding the provisions" in the wrongful-death and survival statutes. See TEX.REV.CIV. STAT. art. 4590i, § 11.05. The Legislature clearly intended the cap to apply to statutory survival claims notwithstanding the fact that the survival statute itself preserves the decedent's cause of action and the rights she possessed at the time of her death. Under the plain language of article 4590i, then, the cap can be pleaded and proved against Auld even though she is suing on Hary's behalf.

V

Horizon's Status as a "Health Care Provider"

Auld also challenges the cap's application to her claim by arguing that Horizon failed to conclusively prove or obtain a jury finding that it was a "health care provider" as defined in the statute. The court of appeals held that Auld's fourth amended petition alleging that her suit is a "health care liability claim," and that Horizon is a "nursing home" and a "health care provider" as those terms are defined in article 4590i, section 1.03(a), relieved Horizon of any burden to either plead its affirmative defense of entitlement to the article 4590i cap, to prove that defense, or ask for a jury finding on that defense.

Auld argues that because Horizon did not offer any evidence or obtain a jury finding that it was licensed or chartered by the State of Texas to provide health care to Hary during her residency at the nursing home, Horizon failed to meet the statute's definition of "health care provider." See TEX.REV.CIV. STAT. art. 4590i, § 1.03(a)(3) (defining "health care provider" *905 as a "corporation ... duly licensed or chartered by the State of Texas to provide health care as a ... nursing home"). Even though Auld's pleadings referred to Horizon's negligent operation of the "nursing home," Auld disagrees with the court of appeals' "implied holding that claims against nursing home operators are 'health care liability claims' against 'health care providers,' regardless of whether the

operator was licensed or chartered by the State." Horizon responds that Auld's judicial admissions and evidence at trial established Horizon's status as a health care provider under article 4590i, relieving Horizon of any burden to introduce evidence or obtain a jury finding that it was a health care provider under the statute.

[22] [23] [24] "A judicial admission must be a clear, deliberate, and unequivocal statement," see *Regency Advantage Ltd. Partnership v. Bingo Idea-Watauga, Inc.*, 936 S.W.2d 275, 278 (Tex.1996), and "occurs when an assertion of fact is conclusively established in live pleadings, making the introduction of other pleadings or evidence unnecessary," see *Chilton Ins. Co. v. Pate & Pate Enters., Inc.*, 930 S.W.2d 877, 884 (Tex.App.—San Antonio 1996, writ denied). A judicial admission " 'not only relieves [an] adversary from making proof of the fact admitted but also bars the party himself from disputing it.' " See *id.* (quoting *Gevinson v. Manhattan Constr. Co.*, 449 S.W.2d 458, 466 (Tex.1969)). Once a fact is conclusively established by judicial admission, jury questions concerning the fact need not be submitted. See *id.* at 886.

[25] Auld's Fourth Amended Petition contained numerous clear and unequivocal assertions of fact constituting judicial admissions that Horizon (by owning and operating Heritage) was a "health care provider" and that Auld's claim was a "health care liability claim" as those terms are defined in article 4590i. For example, in that petition, she incorporated portions of Hary's original petition, including a statement that Hary had complied with article 4590i's notice and expert-report provisions found in sections 4.01 and 13.01, respectively. Article 4590i requires the plaintiff to give presuit notice "to each health care provider against whom such claim is being made." TEX.REV.CIV. STAT. ANN. art. 4590i, § 4.01(a). The section 13.01 expert-report provisions apply to every "health care liability claim" and require the plaintiff to file an expert report for each defendant "health care provider." See *id.* § 13.01(a)(3). Certainly Hary's statements in her original petition alleging she had met the conditions precedent would not have been incorporated by reference into Auld's live pleading if Auld were avoiding the application of article 4590i to her case.

VI

Admissibility of the Survey Reports

[26] Horizon challenges the admission into evidence of the nursing-home-survey reports produced by the Texas Department of Human Services. These reports evidenced Horizon's staffing problems and its repeated failure to provide basic care to its residents, such as providing proper nutrition to and maintaining the personal hygiene of some of its residents. Horizon identifies two reasons why the reports' admission resulted in harmful error. First, the trial court admitted the surveys based on a statute that was ineffective at the time the claim accrued and that only applied prospectively. *Compare TEX. HUMAN RESOURCES CODE § 32.021(i), (j)* (as amended in 1997) (providing that survey reports are inadmissible for the purpose of proving that an institution committed a violation, but the prohibition does not bar their admission if offered to establish warning or notice to the institution of a relevant finding) *with* *TEX. HUMAN RESOURCES CODE § 32.021(i), (j)* (as enacted at the time Hary filed suit)¹⁶ (providing that *906 findings that an institution violated a standard for participation in the Medicaid program are not admissible to prove that the institution has committed a violation). Second, assuming arguendo that the 1997 version applied, the surveys were nevertheless inadmissible because they were not relevant to the standard of care; and, even if they were relevant, any relevance was substantially outweighed by the prejudicial impact of the reports. Auld counters that because Horizon did not request a limiting instruction at the time the trial court admitted the reports, Horizon waived any complaint concerning their admission. *See TEX.R. EVID. 105(a); Birchfield v. Texarkana Mem'l Hosp.*, 747 S.W.2d 361, 365 (Tex.1987).

[27] [28] We review a trial court's evidentiary rulings for abuse of discretion. *See Owens-Corning Fiberglas Corp. v. Malone*, 972 S.W.2d 35, 43 (Tex.1998). Unless the trial court's erroneous evidentiary ruling probably caused the rendition of an improper judgment, we will not reverse the ruling. *See id.* *Texas Rule of Evidence 105(a)* provides:

When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its

proper scope and instruct the jury accordingly; but, in the absence of such request the court's action in admitting such evidence without limitation shall not be a ground for complaint on appeal.

TEX.R. EVID. 105(a). Horizon did not request a limiting instruction as to the general admission of the survey reports. Thus, if the survey reports were admissible by any party or for any purpose, the court of appeals did not err in affirming the trial court's admission of the reports. We therefore must determine whether the survey reports were admissible by any party or for any purpose.

We need not address whether *Texas Human Resources Code section 32.021(j)(3)* applies retroactively or whether the survey reports were admissible under that section because Horizon "opened the door" for the survey reports' admission into evidence. Horizon witnesses testified that the care provided to Hary was not inadequate because, if it had been, TDHS would have cited the nursing home for not rendering proper care. The following exchange occurred between Auld's counsel and one of Horizon's witnesses, Mary Ellen Posthauer:

Q: And you also—Mr. King asked you—I believe you stated an opinion that [Hary] was provided 1,000 calories a day.

A: She was provided more than 1,000 calories.

Q: Okay. And I assume you're talking your—that opinion is based on the medical chart?

A: That opinion is based on the standard regulations for nursing homes.

Q: Okay. So you're assuming, simply because there is a regulation, that the nursing home complied with the regulation?

A: Correct.

Q: Well, let's—But you really don't know, do you? You really don't know whether they did or not, do you?

A: They would be—*They would have been cited. By the nursing home standard, they would have had a deficiency had they not.*

Two other Horizon witnesses offered similar testimony. If the trial court did not allow the survey reports into evidence after Horizon's witnesses testified in this manner, the jury would be left with a false impression that Horizon had not been cited for rendering improper care when, in fact, it had.

[29] Finally, even if admitting the reports was erroneous, it cannot be said that *907 admitting them into evidence probably caused the rendition of an improper judgment. Auld presented evidence through expert medical testimony regarding the allegedly improper manner in which the nursing home treated Hary. The jury had sufficient evidence on which to base its verdict even disregarding the survey reports. And, Horizon presented controverting expert medical testimony that the nursing home provided adequate care to its residents, including Hary. Considering the entire record except for the survey reports, both sides presented evidence regarding how the nursing home treated Hary. Therefore, the reports probably did not cause the rendition of an improper judgment.

* * * * *

In sum, we hold that [article 4590i, section 11.02\(a\)](#) 's cap on damages was not intended to and does not include punitive damages but does include prejudgment interest for cases in which [article 4590i, section 16.02](#) does not apply. The cap in [Texas Civil Practice and Remedies Code section 41.007](#) applies to Auld's punitive damage award. We agree with the court of appeals' conclusions with regard to the constitutional, procedural, and evidentiary matters raised by the parties. Accordingly, we affirm those parts of the court of appeals' judgment, but reverse and remand with regard to the prejudgment interest award on the damages subject to the cap.

Justice [HANKINSON](#) filed a concurring and dissenting opinion, in which Chief Justice [PHILLIPS](#), Justice [BAKER](#), and Justice [O'NEILL](#) joined.

Justice [HANKINSON](#) concurring and dissenting opinion, in which Chief Justice [PHILLIPS](#), Justice [BAKER](#), and Justice [O'NEILL](#) join.

I join the Court's opinion and judgment on all issues except prejudgment interest. As far as I can tell, at best all the Court has done is cap prejudgment interest from 1985 to 1995, for the few plaintiffs that may be left with unresolved claims whose injury was severe enough to cause nonmedical damages exceeding the cap. At worst the Court creates an unnecessary conflict between [article 4590i](#) and [article 5069–1.05](#), the prejudgment-interest statute, and an internal conflict between the [article 4590i](#)'s cap and its new prejudgment-interest provision. I would hold that prejudgment interest is not subject to [article 4590i](#)'s cap, and that in accord with the mandate of [article 5069–1.05, section 6\(a\)](#), Martha Hary's estate is entitled to its full and uncapped measure of prejudgment interest.

First, the Court's reading of [article 4590i](#) ignores the context and history of [article 4590i](#) and the prejudgment-interest statute. As the Court appears to agree, the Legislature could not have intended to include prejudgment interest in the cap on medical-malpractice damages when it enacted [article 4590i](#) in 1977 because at that time, prejudgment interest was not considered part of damages at common law. Prejudgment interest was not recoverable as damages in personal-injury actions until 1985, when this Court decided [Cavnar v. Quality Control Parking, Inc.](#), 696 S.W.2d 549 (Tex.1985). Plainly the Legislature could not have intended to include in the cap an element of damages not recoverable at the time it enacted the cap. Likewise, our decision in [Cavnar](#) could not have changed the meaning of [article 4590i](#), or in any way changed what the Legislature intended to include in the cap when it drafted [article 4590i](#) eight years before we decided [Cavnar](#). Even if prejudgment interest were subject to the cap once it became available as common-law damages under [Cavnar](#) in 1985, the Legislature changed the law when it added [section 6](#) to the prejudgment-interest statute in response to [Cavnar](#) two years later in 1987.

In [article 5069–1.05, section 6](#), the Legislature mandated that all “[j]udgments in wrongful death, personal injury, and property damage cases must include prejudgment *908 interest.” TEX.REV.CIV. STAT. ANN.. [art. 5069–1.05, § 6\(a\)](#). The Legislature could not have made its directive more plain. *Judgments* in wrongful death, personal injury, and property damage cases *must include* prejudgment interest. The Legislature did not exempt judgments in medical-malpractice cases from this statute. It also did not express any intent to exempt medical-

malpractice judgments or to cap prejudgment interest on medical-malpractice judgments when it amended [article 4590i](#) several times after enacting the prejudgment-interest statute. Indeed, the Court cites part of the legislative history of the prejudgment-interest statute, but then refuses to give effect to the statute's clear mandatory language.

My conclusion that prejudgment interest should not be capped is further supported by the Legislature's 1995 enactment of [article 4590i](#), subchapter P, entitled "Prejudgment Interest," which mandates that a health-care liability judgment "must include prejudgment interest on past damages found by the trier of fact, but shall not include prejudgment interest on future damages found by the trier of fact." TEX.REV.CIV. STAT. ANN.. [art. 4590i, § 16.02](#). Although that section does not apply to this case because the claim at issue accrued before its enactment, that section does confirm that prejudgment interest is not subject to the cap or surely the Legislature would have mentioned or referred to the cap in that new subchapter. Moreover, in [section 16.02](#), the Legislature specifically mandates prejudgment interest on past damages, but forbids it on future damages. TEX.REV.CIV. STAT. ANN.. [art. 4590i, § 16.02\(b\)](#). This distinction further suggests that the Legislature did not intend to uncap previously capped prejudgment interest, but rather, working from the basis that prejudgment interest is fully available, determined to limit it to past damages. The Court's application of the cap in this case unnecessarily casts doubt on the provision's effect despite its clear language, and creates an inconsistency within [article 4590i](#) despite the Legislature's apparent efforts at careful drafting.

The Court's view that my reading of the statutes somehow "freezes" the common law is incorrect. The Court cites cases permitting a mother to recover damages from the birth of a stillborn fetus and permitting plaintiffs in varying relationships to an injured person to recover for loss of consortium. None of the cases (other than [Cavnar](#)) were followed by the Legislature's enactment of a statute mandating awards of those kinds of damages. Moreover, these cases seem to recognize or extend types of claims, not establish new elements of common-law damages. My disagreement with the Court is not over whether prejudgment interest was subject to the cap as an element of common-law damages once [Cavnar](#) issued in 1985. My disagreement is with the Court's refusal to follow the

mandatory language of the prejudgment-interest statute that governs this case.

Second, the Court's reliance on the canons of statutory construction is misplaced because they can be used to support either result in this case. While the Court concludes that [article 4590i](#) is more specific than the prejudgment-interest statute, one could just as easily argue that the prejudgment-interest statute is more specific because it mandates a specific type of interest on judgments for specific types of claims. Moreover, [Government Code § 312.014\(a\)](#) directs that if statutes "are irreconcilable, the statute latest in date of enactment prevails." TEX. GOVT CODE § 312.014(a). The prejudgment-interest statute was enacted ten years after 4590i was enacted, and two years after prejudgment interest became available under [Cavnar](#). Thus the canons of construction are of little help in resolving this case, and cannot outweigh the context and history of these statutes when attempting to divine and follow legislative intent. As Justice Frankfurter cautioned, canons of construction cannot "save us from the anguish of judgment. Such canons give an air of *909 abstract intellectual compulsion to what is in fact a delicate judgment, concluding a complicated process of balancing subtle and elusive elements." Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L.REV. 527, 544 (1947). In this case, the Court sacrifices that balance in favor of rote recitation, while I would look to a larger frame of reference in an effort to reconcile the statutes for all claims and to comport with the legislative intent of both [article 4590i](#) and the prejudgment-interest statute.

If the statutes are reconciled as I propose, the Legislature's overriding goal of keeping health-care liability damages reasonably determinable and predictable in an effort to ameliorate the costs of the health-care system is still met. If one knows the amount of damages to be awarded under the cap and the prejudgment-interest rate, one can simply calculate the amount of prejudgment interest owed. Damages remain capped as dictated by [article 4590i, section 11.02](#), but prejudgment interest can also be awarded as dictated by [article 5069-1.05, section 6\(a\)](#).

Finally, I must agree with Auld's counsel that the Court has in effect granted a third motion for rehearing in [Rose v. Doctors Hospital](#), 801 S.W.2d 841 (Tex.1990). Prejudgment interest was awarded by the court of appeals in that case, and in its application for writ of error,

the hospital's counsel, the same attorney who represents Horizon in this case, made the same argument that prejudgment interest had to be capped. The hospital explicitly repeated its argument that prejudgment interest had to be capped in its two motions for rehearing following this Court's opinions in *Rose*. Although the argument was not addressed by the Court in *Rose*, it was implicitly rejected by the Court's judgment that the plaintiffs "shall each recover from Doctors Hospital Facilities ... prejudgment and postjudgment interest thereon at the legal rate."

Thus, instead of harmonizing [article 4590i](#) and the prejudgment-interest statute so as to give effect to both, the Court's reading at best ignores the mandatory

language of the prejudgment-interest statute and at worst creates an unnecessary conflict between that statute and [article 4590i](#), and an internal conflict between [article 4590i's](#) cap and its new prejudgment-interest section. If prejudgment interest is not included in the cap, all parts of both statutes can be given full effect for all claims; actual damages remain capped under [article 4590i](#), and prejudgment interest is awarded on the judgment, with no violence done to the Legislature's express purpose and language in [article 4590i](#). Accordingly, I dissent from the Court's resolution of the prejudgment-interest issue.

All Citations

34 S.W.3d 887, 43 Tex. Sup. Ct. J. 1151

Footnotes

- 1 Although the evidence with regard to medical expenses indicated \$220,941.73 in damages, the jury awarded \$221,000. The trial court reduced the judgment accordingly.
- 2 The statute requires an adjustment of the \$500,000 cap listed in the statute to reflect changes in the consumer price index. See [TEX.REV.CIV. STAT. art. 4590i, § 11.04](#). At the time of judgment in this case, the adjusted cap was \$1,320,261.40.
- 3 Neither party challenges the trial court's use of the uncapped actual damages, rather than the capped actual damages, as the multiplier in this case.
- 4 The court of appeals opinion explains how the trial court arrived at the final punitive damages figure:
To reduce the jury's \$90,000,000 exemplary damages finding under the 1994 version of [section 41.007 of the civil practice and remedies code](#), the trial court quadrupled the jury's *uncapped* finding of actual damages (\$2,371,941.71 corrected). Although *de minimis*, we notice that four times \$2,370,941.71 = \$9,483,766.84, not the \$9,483,766.92 figure recited in the judgment.
[985 S.W.2d at 221 n. 3](#).
- 5 The following amici curiae filed briefs in support of Horizon: Columbia/HCA Healthcare Corp.; Texas Health Resources; Charter Behavioral Health Systems, Inc.; Texas Health Care Association; Texas Association of Homes for the Aging; Southwest Risk Advisors, LLC; and the Texas Medical Association.
- 6 The following amici curiae filed briefs in support of Auld: Victims of HMO Medical Negligence; United People for Better Nursing Home Care; American Jewish Congress; American Association of Retired Persons; Texas Advocates for Nursing Home Residents; and State Representative Tom Uher, former State Senator A.R. Schwartz, and former State Representative Don Henderson.
- 7 This subcap was part of an amendment to Senate Bill 103 that did not become part of the final version of the bill. In discussing this subcap, the sponsor of this proposed amendment conceded that the subcap was arbitrary but observed that "[i]n addition to [pain and suffering], the jury can award [damages] *for lost wages and other economic type losses* for a total of five hundred thousand or a half-million dollars." Debate on Tex. H.B. 1048 on the Floor of the Senate, 65th Leg., R.S. (Apr. 18, 1977) (statement of Senator Farabee) (emphasis added).
- 8 The TMA objected to the final version because the bill did not include provisions abrogating the collateral-source rule and providing for periodic rather than lump-sum payments of judgments.
- 9 Since [article 5.15–1's](#) enactment, for-profit nursing homes have been exempt from [section 8's](#) prohibition of insuring against punitive damages. See Act of May 30, 1977, 65th Leg., R.S., ch. 817, § 31.01, 1977 Tex. Gen. Laws 2039, 2054–56 (amending [TEX. INS.CODE art. 5.15–1](#)), *amended by* Act of June 3, 1987, 70th Leg., 1st C.S., ch.1, § 7.01, 1987 Tex. Gen. Laws 1, 36 (allowing hospitals to obtain an endorsement that would provide coverage for punitive damages), *amended by* Act of May 21, 1997, 75th Leg., R.S., ch.746, § 1, 1997 Tex. Gen. Laws 2451, 2451 (allowing not-for-profit nursing homes to obtain coverage for punitive damages).

- 10 The two statutes differ in their calculations of the maximum amount recoverable, and the newer version—[section 41.008](#)—renders the punitive damages cap wholly inapplicable to causes of action in which a party knowingly or intentionally violates one of fifteen enumerated criminal statutes.
- 11 The cap is adjusted when there is an increase or decrease in the consumer price index. See [TEX.REV.CIV. STAT. art. 4590i, § 11.04](#).
- 12 See Act of May 26, 1989, 71st Leg., R.S., ch. 1027, § 27, sec. 14.01, 1989 Tex. Gen. Laws 4128, 4145; Act of May 26, 1989, 71st Leg., R.S., ch. 1027, § 28, sec. 7.02, 1989 Tex. Gen. Laws 4128, 4145; Act of Mar. 21, 1991, 72nd Leg., R.S., ch. 14, [§ 284\(15\)](#), [sec. 1.03\(a\)\(5\)](#), 1991 Tex. Gen. Laws 42, 222; Act of May 25, 1993, 73rd Leg., R.S., ch. 625, § 2, sec. 41.02, 1993 Tex. Gen. Laws 2347, 2347; Act of May 25, 1993, 73rd Leg., R.S., ch. 625, § 3, sec. 13.01–.02, 1993 Tex. Gen. Laws 2347, 2347–48; Act of May 25, 1993, 73rd Leg., R.S., ch. 625, § 4, sec. 15.01, 1993 Tex. Gen. Laws 2347, 2349–50; Act of May 25, 1993, 73rd Leg., R.S., ch. 625, § 5, sec. 4.01, 1993 Tex. Gen. Laws 2347, 2350.
- 13 Separately, Auld contends that our interpretation of [article 4590i, sections 1.03\(b\)](#) and [11.02\(a\)](#) poses a potential conflict with the recently enacted [section 16 of article 4590i](#). Sections 16.01 and 16.02 provide:
- Sec. 16.01. Notwithstanding [the mandatory prejudgment-interest statute in former [article 5069–1.05](#)], prejudgment interest in a health care liability claim shall be awarded in accordance with this subchapter.
- Sec. 16.02. (a) In a health care liability claim, prejudgment interest may not be charged with respect to a defendant physician or health care provider who has settled the claim before the 181st day after the date notice of the claim was first mailed to the physician or health care provider.
- (b) In a health care liability claim that is not settled within the period specified by Subsection (a) of this section, the judgment must include prejudgment interest on past damages found by the trier of fact, but shall not include prejudgment interest on future damages found by the trier of fact.
- TEX.REV.CIV. STAT. art. 4590i, §§ 16.01, 16.02. Auld concedes that [section 16.02](#) does not apply to her claim because Hary's cause of action accrued a few weeks before its enactment. See *id.* (effective for claims accruing on or after September 1, 1995). Because neither party disputes that [section 16.02](#) does not apply in this case, it is unnecessary for us to decide this issue.
- 14 [Section 1.02\(b\)\(7\)](#) states:
- Because of the conditions stated in Subsection (a) of this section, it is the purpose of this Act to improve and modify the system by which health care liability claims are determined in order to: ... make certain modifications to the liability laws as they relate to health care liability claims only and with an intention of the legislature to not extend or apply such modifications of liability laws to any other area of the Texas legal system or tort law.
- See [TEX.REV.CIV. STAT. art. 4590i, § 1.02\(b\)\(7\)](#).
- 15 Because we denied the petition for review in [Catterson](#), we express no opinion here concerning the other holdings of the court of appeals in that case.
- 16 See Act of May 26, 1995, 74th Leg., R.S., ch. 1049, § 1, 1995 Tex. Gen. Laws 5199, 5199 *amended by* Act of May 28, 1997, 75th Leg., R.S., ch. 1159, § 2.01, 1997 Tex. Gen. Laws 4363, 4387.



KeyCite Yellow Flag - Negative Treatment

Superseded by Rule as Stated in [Landers v. State Farm Lloyds](#), Tex.App.-Hous. (1 Dist.), March 27, 2008

858 S.W.2d 337

Supreme Court of Texas.

John S. McCONNELL, Petitioner,

v.

SOUTHSIDE INDEPENDENT SCHOOL DISTRICT,

Dr. David S. Smith, Miguel M. Fernandez, Sammie Kerby, Joe L. Weiss, Mack C. Stallcup, Gilbert P. Arredondo, and Julian Gonzales, Respondents.

No. D-1659.

|

April 21, 1993.

|

Rehearing Overruled Sept. 10, 1993.

Terminated school teacher brought action against school district, alleging violation of due process rights. The 345th Judicial District Court, Travis County, F. Scott McCown, J., granted summary judgment for school district, and appeal was taken. The Court of Appeals, [814 S.W.2d 247](#), affirmed, and further appeal was taken. The Supreme Court, Hightower, J., held that specific grounds for summary judgment must be expressly presented in motion for summary judgment itself and not in brief filed contemporaneously with motion or in summary judgment evidence.

Reversed and remanded.

[Gonzalez](#), J., concurred and filed opinion.

[Hecht](#), J., dissented and filed opinion in which Cornyn, J., joined.

[Enoch](#), J., dissented and filed opinion in which [Phillips](#), C.J., joined.

West Headnotes (8)

[1] Judgment

[Motion or Other Application](#)

Specific grounds for summary judgment must be expressly presented in motion for

summary judgment itself and not in brief filed contemporaneously with motion or in summary judgment evidence. [Vernon's Ann.Texas Rules Civ.Proc., Rule 166a\(c\)](#).

[298 Cases that cite this headnote](#)

[2] Judgment

[Motion or Other Application](#)

Issues nonmovant contends avoids movant's entitlement to summary judgment must be expressly presented by written answer to motion or by other written response to motion, and are not expressly presented by mere reference to summary judgment evidence. [Vernon's Ann.Texas Rules Civ.Proc., Rule 166a\(c\)](#).

[356 Cases that cite this headnote](#)

[3] Judgment

[Motion or Other Application](#)

Judgment

[Defects and Objections](#)

When grounds for summary judgment are not expressly presented in motion for summary judgment itself, any confusion may and should be resolved by exception in trial court; however, even if nonmovant fails to except or respond, if grounds for summary judgment are not expressly presented in motion for summary judgment itself, motion is legally insufficient as matter of law and must be denied. [Vernon's Ann.Texas Rules Civ.Proc., Rule 166a\(c\)](#).

[339 Cases that cite this headnote](#)

[4] Judgment

[Defects and Objections](#)

When motion for summary judgment clearly presents certain grounds but not others, nonmovant is not required to except. [Vernon's Ann.Texas Rules Civ.Proc., Rule 166a\(c\)](#).

[56 Cases that cite this headnote](#)

[5] Appeal and Error

🔑 **Exceptions to Judgment**

Exception in trial court is required should nonmovant wish to complain on appeal that grounds relied upon by summary judgment movant were unclear or ambiguous.

[53 Cases that cite this headnote](#)

[6] Appeal and Error

🔑 **Extent of Review Dependent on Nature of Decision Appealed from**

Appellate court cannot read between the lines, infer or glean from pleadings or proof any grounds for granting summary judgment other than those grounds expressly set forth before trial court in motion for summary judgment. [Vernon's Ann.Texas Rules Civ.Proc., Rule 166a\(c\)](#).

[263 Cases that cite this headnote](#)

[7] Judgment

🔑 **Defects and Objections**

Any confusion regarding what issues are expressly presented by party opposing summary judgment can be resolved by exception.

[8 Cases that cite this headnote](#)

[8] Appeal and Error

🔑 **Nature or Subject-Matter in General**

If party opposing summary judgment fails to present any issues in its response or answer, party is limited on appeal to arguing legal sufficiency of grounds presented by movant.

[83 Cases that cite this headnote](#)

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OPINION

HIGHTOWER, Justice.

This case presents the question whether grounds for summary judgment must be expressly presented in the motion for summary judgment itself or whether such grounds may be presented in either a brief filed contemporaneously with the motion or in the summary judgment evidence. We conclude that grounds for summary judgment must be expressly presented in the summary judgment motion itself. Consequently, we reverse the judgment of the court of appeals and remand this cause to the trial court for further proceedings consistent with this opinion.

John S. McConnell (McConnell) sued Southside Independent School District (Southside) after Southside failed to renew his contract of employment. Southside moved for summary judgment, stating in its motion only that there were “no genuine issues as to any material facts”.¹ Southside *339 also filed a twelve page brief in support of the motion in which it expressly presented the grounds allegedly establishing its entitlement to summary judgment. McConnell filed a written exception to the motion, arguing that the motion was defective in that it failed to present any grounds. The trial court overruled McConnell's exception and rendered summary judgment for Southside. The court of appeals affirmed, holding that “Rule 166a allows a summary judgment movant to set out the specific grounds for summary judgment in a brief served on all parties contemporaneously with the motion itself.” 814 S.W.2d 247.

I.

[1] McConnell argues that the specific grounds for summary judgment must be expressly presented in the motion for summary judgment itself and not in a brief filed contemporaneously with the motion or in the summary judgment evidence. We agree.

Motion For Summary Judgment

The first sentence of [Rule 166a\(c\)](#), added in 1971, plainly provides: “The motion for summary judgment shall state the specific grounds therefor.” [Tex.R.Civ.P. 166a\(c\)](#).² Several cases have paraphrased this requirement as follows:

The motion for summary judgment must **itself** state specific grounds on which judgment is sought.... **The motion** for summary judgment must stand or fall on the grounds **it** specifically and expressly sets forth.... There is authority to the effect that a summary judgment cannot be sustained on a ground not specifically **set forth in the motion**.

[Westbrook Const. Co. v. Fidelity Bank of Dallas](#), 813 S.W.2d 752, 754–55 (Tex.App.—Fort Worth 1991, writ denied) (emphasis added). See, e.g., [Roark v. Stallworth Oil and Gas, Inc.](#), 813 S.W.2d 492, 494–95 (Tex. 1991) (“[A]n unpleaded affirmative defense may also serve as the basis for a summary judgment when it is raised in the summary judgment motion....”); [410 West Ave. Ltd. v. Texas Trust Savings Bank, F.S.B.](#), 810 S.W.2d 422, 424 (Tex.App.—San Antonio 1991, no writ) (“Motions for summary judgment ‘stand or fall on the grounds specifically set forth in the motions.’ ”); [Hall v. Harris County Water Control & Improvement Dist.](#), 683 S.W.2d 863, 867 (Tex.App.—Houston [14th Dist.] 1984, no writ). Consequently, a literal reading of [Rule 166a\(c\)](#) and these authorities indicate that the motion **itself** must state the grounds.

Other cases have considered the same language of [Rule 166a\(c\)](#) when the motion for summary judgment presented no grounds. In [Boney v. Harris](#), 557 S.W.2d 376 (Tex.Civ.App.—Houston [1st Dist.] 1977, no writ), the motion for summary judgment stated only that the defendant's answer was “insufficient in law to constitute a defense....” *Id.* at 378. The court held that such a motion failed to satisfy the requirements of [Rule 166a\(c\)](#). *Id.* In another case in which the motion presented absolutely no grounds, the court held:

The motion, however, does not state any grounds, specific or otherwise, upon which it is based, and, as a result, it is not in compliance with Rule 166–A(c) as amended.

[Moody v. Temple National Bank](#), 545 S.W.2d 289, 290 (Tex.Civ.App.—Austin 1977, no writ). See also *340 [Mallory v. Dorothy Prinzhorn Real Estate, Inc.](#), 535

[S.W.2d 371, 372 \(Tex.Civ.App.—Eastland 1976, no writ\)](#) (motion stating that “original answer is insufficient to raise a controverted fact issue” insufficient under [rule 166a\(c\)](#)).³

Finally, there are cases, such as the one before the court today, in which summary judgment grounds were expressly presented, but only in a brief in support of the motion. In [Shade v. City of Dallas](#), 819 S.W.2d 578 (Tex.App.—Dallas 1991, no writ), the court held:

Although it raised these other grounds in a brief in support of the motion, we hold that this is not sufficient. **A brief in support is not a motion, answer, or response as contemplated by rule 166a.** The City's motion does not incorporate the brief, and the trial court's judgment does not state that the brief was considered. The right to summary judgment exists only where there is compliance with the rule.... Because those grounds were not contained in the City's motion, we hold that summary judgment was improper if granted on those grounds.

Id. at 583 (emphasis added). Additionally, in [Watkins v. Hammerman & Gainer](#), 814 S.W.2d 867 (Tex.App.—Austin 1991, no writ), the court held:

H & G argued in its **trial and appellate briefs** that additional grounds entitled it to summary judgment, but failed to raise the other grounds in its motion for summary judgment. **The judgment must stand or fall on the grounds expressly alleged in the motion.**

Id. at 869 n. 1 (emphasis added). The same result was reached in [Roberts v. Southwest Texas Methodist Hospital](#), 811 S.W.2d 141 (Tex.App.—San Antonio 1991, writ denied). In [Roberts](#), the movant identified two grounds in his motion and discussed two additional grounds in his brief. The court of appeals, holding that the grounds discussed in the brief could not provide the basis for summary judgment, stated:

It did make these arguments later in a brief, but its motion said only that limitations barred the suit and that hospitals have no duty to give informed consent. Apart from limitations, the motion simply did not address the cause of action for battery. The trial court could not have granted summary judgment on grounds that were not included in the motion, and likewise, we cannot uphold it on unstated grounds.

Id. at 145. On motion for rehearing, the court added:

There is nothing onerous or unreasonable about requiring the movant to state the grounds upon which he seeks to win a lawsuit without a trial. If the grounds are so obvious from the summary judgment proof, what is burdensome about requiring the movant to state them in the motion? Grounds may be stated concisely, without detail and argument. But they must at least be listed in the motion.

Id. at 146. If this court intended Rule 166a(c) to permit a summary judgment movant to place, or possibly hide, grounds *341 for summary judgment in a brief filed in support of the motion or in accompanying summary judgment evidence, the Rule could have easily provided: “The motion for summary judgment or the brief in support thereof or the summary judgment evidence shall state the specific grounds therefor.” Rule 166a(c), however, does not so provide. “[W]e are not free to disregard ... [the rule’s] plain language. Nor should we revise the rule by opinion.” *Alvarado v. Farah Mfg. Co., Inc.*, 830 S.W.2d 911, 915 (Tex.1992).⁴ Although Rule 166a(c) is an admittedly rigorous rule, it must be applied as written.

Consistent with the precise language of Rule 166a(c), we hold that a motion for summary judgment must itself expressly present the grounds upon which it is made. A motion must stand or fall on the grounds expressly presented in the motion. In determining whether grounds

are expressly presented, reliance may not be placed on briefs or summary judgment evidence.

Non-Movant's Answer or Response

[2] Likewise, issues a non-movant contends avoid the movant's entitlement to summary judgment must be expressly presented by written answer to the motion or by other written response to the motion and are not expressly presented by mere reference to summary judgment evidence. See *City of Houston v. Clear Creek Basin Authority*, 589 S.W.2d 671, 678 (Tex.1979) (“the non-movant must expressly present to the trial court any reasons seeking to avoid movant's entitlement ...”).

The summary judgment pleading rules we announce today are consistent with the express language of Rule 166a(c) requiring that the motion for summary judgment state the specific grounds therefor and further the purpose of Rule 166a(c) to provide adequate information for opposing the motion, and to define the issues. See *Weaver v. Stewart*, 825 S.W.2d 183, 184–85 (Tex.App.—Houston [14th Dist.] 1992, writ denied) (“[Rule 166a(c)] is important because it provides the opposing party with notice of all matters expected to be asserted in arguing the motion.”). Carving exceptions to this simple requirement that the motion for summary judgment state the specific grounds frustrates the purpose of Rule 166a(c). Eventually the exceptions would consume the rule, and inject uncertainty into summary judgment proceedings concerning what issues were presented for consideration. Furthermore, it is certainly not unduly burdensome to require the movant to state the specific grounds in the motion for summary judgment. These rules also permit the trial court to consider a brief in support of a motion for summary judgment as guidance in making its determination whether the summary judgment evidence demonstrates that the moving party is “entitled to judgment”, see Tex.R.Civ.P. 166a(c), but not in determining whether summary judgment grounds and issues are expressly presented. Finally, these rules further the policy of seeking clarity and simplicity in summary judgment practice. See, e.g., *342 *Black v. Victoria Lloyds Ins. Co.*, 797 S.W.2d 20, 27 (Tex.1990) (“[T]he motion [for summary judgment] must identify or address the cause of action or defense and its elements.” (emphasis added)).

II.

A corollary question concerns whether a burden exists to except or object to a defective motion for summary judgment or response. In certain situations, we conclude that such a burden exists.

Motion Presenting No Grounds

[3] When the grounds for summary judgment are not expressly presented in the motion for summary judgment itself, any confusion may and should be resolved by exception in the trial court. However, summary judgments must stand or fall on their own merits, and the non-movant's failure to except or respond cannot supply by default the grounds for summary judgment or the summary judgment proof necessary to establish the movant's right—the movant's right is not established and the movant must still assert grounds in the motion for summary judgment itself and establish its entitlement to summary judgment. See *Clear Creek*, 589 S.W.2d at 678.

While it would be prudent and helpful to the trial court for the non-movant always to file an [exception,] answer or response, the non-movant needs no [exception,] answer or response to the motion to contend on appeal that the grounds expressly presented to the trial court by the movant's motion are insufficient *as a matter of law* to support the summary judgment.

Id. (emphasis in original). Even if the non-movant fails to except or respond, if the grounds for summary judgment are not expressly presented in the motion for summary judgment itself, the motion is legally insufficient as a matter of law. Consequently, we conclude that [Rule 166a\(c\)](#) does not require a non-movant to except in this situation.⁵

Motion Presenting Only Certain Grounds

[4] When the motion for summary judgment clearly presents certain grounds but not others, a non-movant is

not required to except. This distinction was recognized and correctly resolved in *Roberts v. Southwest Texas Methodist Hospital*, when the court held:

When a motion for summary judgment asserts grounds A and B, it cannot be upheld on grounds C and D, which were not asserted, even if the summary judgment proof supports them and the responding party did not except to the motion.

[811 S.W.2d at 146](#). Why should a non-movant be required to except to a motion expressly presenting certain grounds and not others? The only effect of such a rule would be to alert the movant to additional unasserted grounds for summary judgment. Consequently, we conclude that [Rule 166a\(c\)](#) does not require a non-movant to except in this situation.

Grounds Unclear from Motion

[5] [6] An exception is required should a non-movant wish to complain on appeal that the grounds relied on by the movant were unclear or ambiguous. See *Lochabay v. Southwestern Bell Media, Inc.*, 828 S.W.2d 167, 170 n. 2 (Tex.App.—Austin 1992, no writ) (“Lochabay did not except to the motion for summary judgment, as he was required to do if he wished to claim lack of specificity.”). Prudent trial practice dictates that such an exception should be lodged to ensure that the parties, as well as *343 the trial court, are focused on the same grounds.⁶ This prevents the non-movant from having to argue on appeal each and every ground vaguely referred to in the motion. The practical effect of failure to except is that the non-movant loses his right to have the grounds for summary judgment narrowly focused, thereby running the risk of having an appellate court determine the grounds it believes were expressly presented in the summary judgment. Even in this situation, however, “[a]n appellate court cannot ‘read between the lines, infer or glean from the pleadings or the proof’ any grounds for granting the summary judgment other than those grounds expressly set forth before the trial court [in the motion for summary judgment].” *Clark v. First National Bank of Highlands*, 794 S.W.2d 953, 956 (Tex.App.—Houston [1st Dist.] 1990, no writ) (quoting *Great-Ness Professional Serv., Inc. v. First*

Nat'l Bank of Louisville, 704 S.W.2d 916, 918 (Tex.App.—Houston [14th Dist.] 1986, no writ)).

Non-Movant's Answer or Response

[7] [8] With one exception, the above rules apply equally to a non-movant's response. The non-movant must expressly present to the trial court, by written answer or response, any issues defeating the movant's entitlement. *Clear Creek*, 589 S.W.2d at 678 (“The written answer or response to the motion must fairly apprise the movant and the court of the issues the non-movant contends should defeat the motion.”). If it is clear what issues the non-movant contends should defeat the movant's entitlement, the movant should be able to reply only to these issues. See *Tex.R.Civ.P.* 166a(c) (“Issues not expressly presented to the trial court by written motion, answer or other response shall not be considered on appeal as grounds for reversal.”). Any confusion regarding what issues are expressly presented by the non-movant can also be resolved by exception.⁷ However, summary judgments must stand or fall on their own merits, and the non-movant's failure to answer or respond cannot supply by default the summary judgment proof necessary to establish the movant's right. *Clear Creek*, 589 S.W.2d at 678. If a non-movant fails to present any issues in its response or answer, the movant's right is not established and the movant must still establish its entitlement to summary judgment. The effect of such a failure is that the non-movant is limited on appeal to arguing the legal sufficiency of the grounds presented by the movant. *Id.* at 678.

III.

The summary judgment pleading rules we announce today are simple, equitable, and prevent the confusion that results when parties fail to expressly present grounds and issues entitling or defeating entitlement to summary judgment.⁸ They *344 also prevent parties from arguing that grounds and issues were presented in lengthy briefs or voluminous summary judgment evidence. Finally, these rules ultimately prevent the controversies that result when appellate courts are forced to ascertain whether grounds and issues were expressly presented to the trial court.

Because Southside's motion for summary judgment stated no grounds and because McConnell properly excepted to this defect, the court of appeals erred in affirming the trial court's rendition of summary judgment for Southside. For these reasons, we reverse the judgment of the court of appeals and remand this cause to the trial court for further proceedings consistent with this opinion.

GONZALEZ, J., concurring.

HECHT, J., joined by CORNYN, J., dissenting.

ENOCH, J., joined by PHILLIPS, C.J., dissenting.

GONZALEZ, Justice, concurring.

I agree with the Court that [Rule 166a\(c\) of the Texas Rules of Civil Procedure](#) mandates that the grounds for a motion for summary judgment must be set out **in the motion itself** and cannot be furnished by an accompanying brief. If the Rule does not mean what it says, we ought to change it. Because I would not reach the other issues addressed by the Court, I join only in the judgment and not the majority opinion.

HECHT, Justice, dissenting.

Despite the discursive plurality opinion, the actual holding in this case is a narrow one. It is that the grounds for a motion for summary judgment must be set out in the motion itself and cannot be supplied by an accompanying brief on which the motion is expressly based. Because the motion in this case does not comport with this rule, the Court reverses the judgment for the movant, even though any error in granting the motion is made entirely harmless by the non-movant's concession that he was fully apprised of the grounds on which it was based. I disagree with the Court's rule; it is a rigid formality incongruent with the more basic principle it is meant to effectuate, which is, that the grounds for a summary judgment motion should be clear to the non-movant and the trial court. The Court's rule is concerned only with *where* the grounds for summary judgment are stated, and not with whether they are stated clearly. I also disagree that a violation of the rule requires reversal even when it has caused no prejudice. Finally, I do not join in the plurality opinion's extensive discussions of various other subjects, all obiter dicta, which are in some respects wrong and in all respects

completely unnecessary to a decision of the dispute before us.

Defendants filed a motion for summary judgment stating as its only grounds “that there are no genuine issues as to any material facts and that these Defendants are entitled to judgment dismissing Plaintiff’s amended complaint as a matter of law.” The motion also recited, however, that it was based on a supporting brief. That brief accompanied the motion (plaintiff does not contradict defendants’ assertion that the two instruments were actually attached to each other), was 12 pages long, and clearly set out the grounds for granting summary judgment. Plaintiff concedes that he understood the basis for defendants’ motion but made a tactical choice not to respond to it on the merits. Instead, plaintiff excepted to the motion because it did not *itself*, apart from the accompanying brief, state the grounds for summary judgment. *345 Plaintiff’s sole contention in this Court is that it was reversible error for the trial court to grant defendants’ motion in the face of his exception.

Plaintiff’s exception to defendants’ motion for summary judgment is based upon the first sentence of [Rule 166a\(c\), TEX.R.CIV.P.](#), which provides simply: “The motion for summary judgment shall state the specific grounds therefor.” In *Westchester Fire Ins. Co. v. Alvarez*, 576 S.W.2d 771, 772 (Tex.1978), we stated: “The purpose of this requirement is to provide the opposing party with adequate information for opposing the motion, and to define the issues for the purpose of summary judgment.” There is no question that the purpose of [Rule 166a\(c\)](#) was fully served in this case by the brief accompanying defendants’ motion. Plaintiff concedes as much. Nevertheless, the Court holds that the summary judgment must be reversed because defendants did not comply with the rule.

The plurality opinion reasons that [Rule 166a\(c\)](#) “plainly” requires that the grounds for a motion for summary judgment must actually be set out in the motion itself. The alternative, according to the plurality opinion, would be to permit the grounds to be stated anywhere in the summary judgment record. This procedure would fail to provide a cogent statement of the issues in a particular place and thus would defeat the purpose of the rule. Since this procedure is unacceptable, the plurality opinion concludes that its reading of the rule must be correct.

The fallacy in the plurality opinion’s reasoning lies in its misapplication of the law of the excluded middle. It is just not true that the only alternatives are either to require that the grounds for summary judgment be recited in the motion, or to permit them to be raised anywhere in the record. There is a middle position more flexible than the Court’s rule and still fully consistent with the underlying purpose: the motion may state the grounds for summary judgment by reference to other documents as long as the opposing party is provided with adequate information to oppose the motion, and the summary judgment issues are defined. That is precisely what happened in this case. Defendants’ motion expressly stated that it was based upon a supporting brief, which accompanied the motion. From the motion and brief, plaintiff knew exactly what defendants’ contentions were. Both the rule and its purpose were thus fully satisfied. The motion stated “the specific grounds therefor” by reference to the accompanying brief, giving plaintiff full notice of defendants’ contentions and defining the issues for resolution.

This is not a less than literal reading of the rule. As long as the purpose of the rule is met, its precise language does not preclude specification of the grounds for summary judgment in documents accompanying or referenced in the motion. We have never suggested that the rule is as restrictive as the Court views it. In *Chessher v. Southwestern Bell Telephone Co.*, 658 S.W.2d 563, 564 (Tex.1983) (per curiam), we wrote: “It is axiomatic that one may not be granted judgment as a matter of law on a cause of action not addressed in a summary judgment *proceeding*.” (Emphasis added.) In *Black v. Victoria Lloyds Ins. Co.*, 797 S.W.2d 20, 27 (Tex.1990), we reiterated: “A summary judgment movant may not be granted judgment as a matter of law on a cause of action not addressed in a summary judgment *proceeding*.” (Emphasis added.) In both instances we insisted that the issues determined by summary judgment must actually be raised, but only in the *proceeding*. In neither case did we suggest that those issues must always be recited in the motion.

No reported Texas case addresses the specific issue before us. Most of the cases cited by the plurality opinion stand only for the general proposition that the grounds for summary judgment must be stated and do not specify where or how. One court of appeals has held that issues in *opposition* to a motion for summary judgment may

be raised in a brief incorporated in the non-movant's response. In *Resolution Trust Corp. v. Ammons*, 836 S.W.2d 705, 708–709 (Tex.App.—Houston [1st Dist. 1992, no writ]), the court explained:

***346** The RTC filed a response to Ammons' motion for summary judgment and incorporated a memorandum of law in support of its response that was served on all parties and the trial court contemporaneously with its response. It is undisputed that the RTC's motion in response and memorandum of law in support of the response were in 'writing' and 'before' the trial court at the summary judgment hearing. Moreover, the motion itself, by its language, expressly incorporated the memorandum of law. We find the RTC's motion in response and supporting memorandum of law constitutes the type of 'written motion, answer or other response' contemplated by rule 166a(c). See *S. McConnell v. Southside Indep. School Dist.*, 814 S.W.2d 247, 248 (Tex.App.—Austin 1991, writ granted) (Rule 166a allows a summary judgment movant to set out the specific grounds for summary judgment in a brief served on all parties contemporaneously with the motion itself); see also TEX.R.CIV.P. 1 (rules are to be given liberal construction).

Other courts have uniformly refused to consider grounds for summary judgment raised only in a brief not accompanying the motion. *Shade v. City of Dallas*, 819 S.W.2d 578, 583 (Tex.App.—Dallas 1991, no writ) (the "motion does not incorporate the brief, and the trial court's judgment does not state that the brief was considered"); *Roberts v. Southwest Texas Methodist Hosp.*, 811 S.W.2d 141, 144–146 (Tex.App.—San Antonio 1991, writ denied) (arguments not raised in motion were made "later in a brief"); *Avinger v. Campbell*, 499 S.W.2d 698, 702 (Tex.Civ.App.—Dallas 1973) (grounds cannot be raised for the first time in appellate briefs), *writ ref'd n.r.e.*, 505 S.W.2d 788 (Tex. 1974) (per curiam). The holding in each of these cases, as distinct from desultory language in some of the opinions, is correct. Raising issues in a brief which is filed separately and not referenced in the summary judgment motion or response may not comply with Rule 166a(c). Still, no Texas court has ever held that the grounds for or against a summary judgment cannot be stated in a brief accompanying the motion or response.

The plurality opinion argues that its rule promotes clarity and simplicity in summary judgment practice. Actually, however, a rigid rule requiring recitation of the grounds

for summary judgment in the motion itself does not make for clearer, simpler motions; to the contrary, such a rule simply encourages prudent counsel to incorporate any supporting briefing and affidavits in the body of the motion when it is possible to do so. As defendants' counsel in this case observed in oral argument: "Had I served this motion and left off the title of the third page which begins, 'Brief in Support', the entire document would have been deemed a motion, and I wouldn't be here today." Under the Court's rule, counsel is correct. But merely deleting the caption on defendants' brief so that its text is inside the motion itself instead of attached to it does not make the issues in this case clearer or simpler. No such purely formal requirement can serve the purpose of clarifying the issues. In this case, the Court's clearer, simpler rule requires a remand so that the parties and lower courts can all reconsider the very same issues they have already considered. The needless delay and expense in this case will be multiplied in others.

The Court's objectives of clarity and simplicity are not achieved by its rule. A 1–page motion which does not state the grounds for summary judgment, attached to a 99–page brief which does, is not made clearer or simpler merely by combining the two documents into a single 100–page motion which states the grounds for summary judgment amid supporting arguments. Yet the 100–page motion in this example complies with the Court's rule while the 1–page motion does not. This sort of nonsense results when the application of a rule becomes divorced from its purpose. What is essential for summary judgment, as we explained in *Westchester*, is that the issues be set out with sufficient specificity to assure that they are fairly addressed by the parties and trial court. *How* that is achieved, while not totally immaterial, should certainly be of far less importance ***347** than *whether* it is achieved. A motion which does not serve the purpose of the rule should not be preferred to a motion and brief which, together, do.

Rules of procedure are not written to define a perverse game of legal hopscotch to test the adroitness of lawyers; they are devised to provide a logical, predictable, simple, sensible structure for achieving justice. When rules are divorced from the basic principles they effectuate, the resulting structure is deformed and arbitrary, and its purpose—achieving justice—is thwarted. A rule that does not simply restate the basic principle on which it is based, but instead prescribes a guideline which tends to further that principle, must be applied consistent with

its principle. Rule 166a, for example, does not restate its purpose (fair notice and definition of issues), but prescribes a guideline (motion shall state grounds). The words of the rule are defined by its purpose. A motion which does not provide fair notice of the issues raised is not proper simply because somewhere in its ramblings the grounds are stated; a motion which does define the issues is not improper simply because the grounds are stated in an attachment. The plain language of the rule itself cannot be disregarded, but it does not supplant the purpose and cannot properly be construed to reach a result incongruent with that purpose.

There are many other examples of such rules. The “in anticipation of litigation” standard of Rule 166b is not a basic legal principle but an abbreviation to describe the balance struck among the conflicting purposes of privilege and discovery. The standard is intended to achieve in application the balance desired in the abstract. If the standard is applied without regard to its purpose, it may mean anything from the remotest speculation that litigation may be an eventuality to service of summons. Application of the standard is defined not by the dictionary meaning of its words but by its underlying purposes. See *National Tank Co. v. Brotherton*, 851 S.W.2d 193 (Tex.1993). Likewise, the rules governing preservation of error in the jury charge are meant to assure that a party's position is fully communicated to the trial court and ruled upon. Application of those rules apart from their purpose leads to an endless development of arcane distinctions. See *State v. Payne*, 838 S.W.2d 235 (Tex.1992). There are many other similar examples. All such rules can be applied under the rubric of literal construction to defeat their own purposes unless those purposes govern and define the rules. The underlying principles must control.

I do not doubt that the Court's decision today is motivated by the very legitimate desire to clarify summary judgment procedure with a bright-line rule. I do not believe, however, that that desire is fulfilled. Rule 166a should be applied to serve its purpose; it should not be an end in itself.

At least as troubling as the rule the Court adopts is its conclusion that the judgment in this case must be reversed. Rule 184(b), TEX.R.APP.P., states:

No judgment shall be reversed on appeal and a new trial ordered in

any cause on the ground that an error of law has been committed by the trial court in the course of the trial, unless the Supreme Court shall be of the opinion that the error complained of amounted to such a denial of the rights of the petitioner as was reasonably calculated to cause and probably did cause the rendition of an improper judgment in the case, or was such as probably prevented the petitioner from making a proper presentation of his case to the appellate courts....

The plurality opinion does not apply or mention this rule. Even if it be conceded that the trial court erred, reversal is not proper except under Rule 184. Petitioner does not argue that the trial court's alleged error “amounted to such a denial of the rights of the petitioner as was reasonably calculated to cause and probably did cause the rendition of an improper judgment”. Nor does petitioner argue that the trial court's action “probably prevented the petitioner from making a proper presentation of his case to the appellate courts”. The Court does not explain why reversal is necessary in these circumstances. The only logical alternatives are that the trial court *348 committed fundamental error, or that Rule 184 does not apply to this case. Both alternatives are clearly wrong.

In very similar circumstances, the court in *McCloud v. Knapp*, 507 S.W.2d 644 (Tex.Civ.App.—Dallas 1974, no writ), refused to reverse the judgment. In that case, as in this one, the trial court granted a motion for summary judgment which did not state specific grounds, although the grounds were stated in a supporting brief. The court reasoned:

Appellee cannot say that she was misled or misinformed concerning appellee's position; her only complaint is that there was technical noncompliance with the Rule.

We do not wish to be understood as holding that strict compliance with Rule 166–A is unnecessary, but it is our holding that in this particular factual situation it appears that no harm or prejudice was suffered by appellant and that she presents no proper ground for reversal. Rule 434. [Tex.R.Civ.P. 434, now TEX.R.APP.P. 81(b)(1), counterpart to TEX.R.APP.P. 184.]

Id. at 645. The Court should adopt the same reasoning in this case.

Finally, most of the plurality opinion is a discourse on summary judgment procedure unnecessary to a decision in this case. There has not been one word of argument in this Court or in the court of appeals concerning whether the grounds for summary judgment may be stated in the evidence, yet the plurality opinion undertakes not only to resolve this issue but to disapprove the three other cases which mention it. Two of those cases did hold that the grounds for summary judgment may be found in the evidence in at least some circumstances. *City of Asherton v. Trigo*, 714 S.W.2d 90, 92 (Tex.App.—San Antonio 1986, no writ) (grounds for motion may be found in affidavit even though not stated in the motion); *Sparks v. Cameron Employees Credit Union*, 678 S.W.2d 600, 602 (Tex.App.—Houston [14th Dist.] 1984, no writ) (grounds readily apparent from the evidence in suit on a note). In the other case, however, the issue appears, as in this case, only in dicta. *Albritton v. Henry S. Miller Co.*, 608 S.W.2d 693, 695 (Tex.Civ.App.—Dallas 1980, writ ref'd n.r.e.) (non-movant's complaint was not that motion failed to state grounds, but that it should have stated each element of the movant's cause of action). The plurality opinion also addresses when issues may be raised by the summary judgment evidence offered in response to a motion, another matter not involved in this case.

The plurality opinion indicates the level of specificity required of motions for summary judgment by disapproving *Bado Equip. Co. v. Ryder Truck Lines, Inc.*, 612 S.W.2d 81 (Tex.Civ.App.—Houston [14th Dist.] 1981, writ ref'd n.r.e.). There the court held that summary judgment was properly granted in a sworn account suit on a motion which stated only that defendant's answer was "insufficient in law to constitute a defense" and did not refer specifically to TEX.R.CIV.P. 185. *Id.* at 82. Whether *Bado* was correctly decided has nothing to do with the issues in the case before us.

The plurality opinion also decides what it euphemistically refers to as a "corollary question": in what circumstances must a non-movant except to a summary judgment motion which does not state grounds in order to preserve error. The plurality opinion suggests, among other things, that if the motion states no grounds at all, no exception is required. That is directly contrary to our decision in *Westchester*. There we wrote:

The question in this case is whether the specificity requirement in Texas Rules of Civil Procedure 166–A(c) is waived by failure to except to the motion for summary judgment prior to rendition of judgment....

Rule 166–A(c) states that "the motion for summary judgment shall state the specific grounds therefor." The purpose of this requirement is to provide the opposing party with adequate information for opposing the motion, and to define the issues for the purpose of summary judgment. In this respect, the specificity requirement in Rule 166–A(c) parallels the *349 pleading requirements of Rule 45(b) and Rule 47(a) [TEX.R.CIV.P.]. Although Rule 90 [TEX.R.CIV.P.] does not specifically refer to summary judgment pleadings, the same considerations apply. Just as defects in pleadings are waived unless specifically pointed out by motion or exception in writing before the charge to the jury or rendition of judgment, we hold that the failure of a motion for summary judgment to specify grounds is a defect of form that is waived unless excepted to prior to rendition of judgment.

576 S.W.2d at 772–773. The plurality opinion states that this holding in *Westchester* was "effectively" overruled in *City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 678 (Tex.1979). By use of the word "effectively", the plurality opinion avoids pointing out that *Clear Creek* did not actually say it was overruling *Westchester*. In fact, *Clear Creek* does not even cite *Westchester*. The plurality opinion's reliance on a part of a sentence from *Clear Creek* is very misleading. What *Clear Creek* says is a non-movant may assert that a motion for summary judgment lacks legal substance without filing a response. *Clear Creek* does not suggest that a procedural deficiency, such as the failure to state grounds in the motion itself, can be asserted without some objection in the trial court. The relevant passage from *Clear Creek* makes this clear:

We are not to be understood, however, as shifting the burden of proof that exists in summary judgment proceedings. The trial court may not grant a summary judgment by default for lack of an answer or response to the motion by the non-movant when the movant's summary judgment proof is legally insufficient. The movant still must establish his entitlement to a summary judgment on the issues expressly presented to the trial court by conclusively proving all essential elements of his cause of action or defense as a matter of law.

See *Swilley v. Hughes*, 488 S.W.2d 64, 67 (Tex.1972). Summary judgments must stand on their own merits, and the non-movant's failure to answer or respond cannot supply by default the summary judgment proof necessary to establish the movant's right.

While it would be prudent and helpful to the trial court for the non-movant always to file an answer or response, the non-movant needs no answer or response to the motion to contend on appeal that the grounds expressly presented to the trial court by the movant's motion are insufficient *as a matter of law* to support summary judgment. The non-movant, however, may not raise any *other* issues as grounds for reversal. Under the new rule, the non-movant may not urge on appeal as reason for reversal of the summary judgment any and every *new* ground that he can think of, nor can he resurrect grounds that he abandoned at the hearing.

Id. at 678 (footnote omitted) (emphasis added). A fair reading of this passage does not support the plurality opinion's position that *Westchester* was silently overruled and its rule abandoned. Nor *should Westchester* be overruled. A rule requiring the non-movant to object to procedural deficiencies in the trial court operates to assure a decision on the merits in the trial court, thereby minimizing unnecessary appeals.

However, the propriety of the *Westchester* rule is outside the proper scope of the issues in this case. The plurality opinion's discussion of these and other "corollary" questions comprises the bulk of its opinion. Some of it is

wrong—such as the treatment of *Westchester*—most of it is ill-advised, and all of it is dicta entitled to no regard.

* * * * *

For the reasons I have explained, I would affirm the judgment of the court of appeals. I therefore respectfully dissent.

CORNYN, J., joins in this dissenting opinion.

ENOCH, Justice, dissenting.

I agree with the Court that the plain words of [Rule 166a\(c\) of the Texas Rules of Civil Procedure](#) establish a bright line rule. The grounds for the granting of a motion for summary judgment must be ***350** stated *in the motion*.¹ However, I would not address any of the other issues, nor can I agree that in this case the failure to include the grounds in the motion itself is harmful. The evidence in the record establishes that neither the court nor the non-movant was unaware, confused or mislead as to the specific grounds being relied upon by the movant. Therefore, I would affirm the judgment of the court of appeals.

PHILLIPS, C.J., joins in this dissenting opinion.

All Citations

858 S.W.2d 337, 84 Ed. Law Rep. 1182

Footnotes

- 1 Southside's motion for summary judgment, in its entirety, stated:
Defendants, SOUTHSIDE ..., in accordance with [Rule 166a of the Texas Rules of Civil Procedure](#), move this Court for summary judgment in the above entitled action on the grounds that there are no genuine issues as to any material facts and that these Defendants are entitled to a judgment dismissing Plaintiff's amended complaint as a matter of law. The Defendants respectfully request this Court to enter a summary judgment based on the pleadings in file, this Brief in Support [sic], containing the undisputed facts and conclusions of law as required by the Local Rules, and transcripts, together with affidavits submitted along with this motion, or in the alternative to specify what, if any, facts remain to be determined.
- 2 Consistent with [Rule 166a](#), we use the term "grounds" to refer to the reasons entitling the movant to summary judgment. Likewise, we use the term "issues" to refer to the reasons the non-movant contends defeat the movant's entitlement to summary judgment.
- 3 Ignoring the plain language of [Rule 166a\(c\)](#), some courts of appeals have reached the opposite result. In *City of Asherton v. Trigo*, 714 S.W.2d 90 (Tex.App.—San Antonio 1986, no writ), the motion stated only that "[t]he pleadings and affidavits on file in this cause show that there is no genuine issue of material fact and that Counter-Defendant is entitled to judgment on the Counterclaim as a matter of law." *Id.* at 92. Holding that the movant sufficiently presented the grounds to the trial

court, the court stated that “[i]ssues may be expressly presented by considering all of the summary judgment evidence presented in the case.” *Id.* Furthermore, in *Bado Equipment Co. v. Ryder Truck Lines Inc.*, 612 S.W.2d 81 (Tex.Civ.App.—Houston [14th Dist.] 1981, writ ref’d n.r.e.), the court held that a motion stating only that the answer filed was “insufficient in law to constitute a defense ...” “was sufficiently specific under rule 166a(c).” *Id.* at 82. See also *Sparks v. Cameron Emp. Credit Union*, 678 S.W.2d 600, 602 (Tex.App.—Houston [14th Dist.] 1984, no writ) (construing summary judgment motion stating no grounds, court holds that “the specific issues were readily apparent from this [summary judgment] evidence....”); *Albritton v. Henry S. Miller Co.*, 608 S.W.2d 693, 695 (Tex.Civ.App.—Dallas 1980, writ ref’d n.r.e.) (“It is clear, therefore, that issues are ‘expressly presented’ by all of the summary judgment evidence presented to and considered by the court.”). To the extent that they conflict with our opinion today, we disapprove *City of Asherton v. Trigo*, *Bado Equipment Co. v. Ryder Truck Lines Inc.*, *Sparks v. Cameron Emp. Credit Union* and *Albritton v. Henry S. Miller Co.*.

4 In arguing that the grounds for summary judgment may be specified “in documents accompanying or referenced in the motion ...,” the dissent consistently relies upon the “basic principle it [Rule 166a(c)] is meant to effectuate” and its “underlying purpose.” 858 S.W.2d 344, 347 (Hecht, J., dissenting). The dissent further states:

A rule [of procedure] that does not simply restate the basic principle on which it is based, but instead prescribes a guideline which tends to further that principle, must be applied consistent with its principle. * * * The words of the rule [Rule 166a] are defined by its purpose.

* * * * *

All such rules [of procedure] can be applied under the rubric of literal construction to defeat their own purposes unless those purposes govern and define the rules. The underlying principles must control.

858 S.W.2d 344, 347 (Hecht, J., dissenting). The Texas Rules of Civil Procedure including Rule 166a(c) should be clearly understandable and be applied in a predictable and consistent manner. In an attempt to avoid the effect of Rule 166a(c), the dissent would do a great disservice to the litigants whom we serve by rewriting the unambiguous text of Rule 166a(c) in light of the dissent’s perceptions concerning Rule 166a(c)’s “underlying purpose and principles.” This approach would inject an element of uncertainty into every rule, no matter how clearly stated.

5 The dissent suggests that we have overruled *Westchester Fire Ins. Co. v. Alvarez*, 576 S.W.2d 771 (Tex.1978) when we allegedly state “that if the motion states no grounds at all, no exception is required.” 858 S.W.2d 344, 348 (Hecht, J., dissenting). The statement in *Westchester*, 576 S.W.2d at 773, “that the failure of a motion for summary judgment to specify grounds is a defect of form that is waived unless excepted to prior to rendition of judgment,” was effectively overruled fourteen years ago by *Clear Creek*, 589 S.W.2d at 678 (“the non-movant needs no answer or response to the motion to contend on appeal that the grounds expressly presented to the trial court by the movant’s motion are insufficient as a matter of law to support the summary judgment.”).

6 When the non-movant files a proper exception to the motion stating that the movant’s grounds are uncertain or ambiguous, and such an exception is overruled, the non-movant may have a valid complaint on appeal. See *Jones v. McSpedden*, 560 S.W.2d 177, 179 (Tex.Civ.App.—Dallas 1977, no writ).

7 Concerning the form and time of exceptions, *Clear Creek* held that both the grounds for summary judgment and the issues defeating entitlement thereto must be in writing and before the trial court at the hearing. *Id.* at 677. We stated that to permit grounds and issues to be presented orally would encourage parties to request that a court reporter record summary judgment hearings, a practice neither necessary nor appropriate to the purposes of such a hearing. *Id.* This rationale compels the conclusion that exceptions to a motion or response must also be in writing. Furthermore, the requirement that a written response must be filed and served not later than seven days prior to the hearing applies equally to the non-movant’s exceptions. See Tex.R.Civ.P. 166a(c). Similarly, any exceptions filed by the movant to the non-movant’s response must be filed and served not less than three days prior to the hearing. See Tex.R.Civ.P. 21. Finally, a party asserting exceptions must obtain a ruling at or prior to the hearing of the motion for summary judgment. Tex.R.App.P. 52(a).

8 We do not believe that our holding presents a trap for the unwary practitioner. For example, the *Texas Litigation Guide* provides a standard motion for summary judgment form consistent with our holding today. See W. Dorsaneo, 4 *Texas Litigation Guide* § 101.101[2] (1992). Additionally, in an effort to avoid any resulting confusion, we point out that the oft-cited commentators on Texas summary judgment practice have recently changed positions on this issue in response to the incorrect opinion of the court of appeals in this case. Compare L. Liberato & D. Hittner, *Summary Judgments in State and Federal Courts*, in 1 State Bar of Texas, Fourth Annual Advanced Appellate Practice Course G–2 (1990) (“Rule 166a(c) unequivocally requires that the motion shall state with specificity the grounds upon which the movant is relying.”) with D. Hittner, L. Liberato, B. Ramage, *Summary Judgments and Defaults in the State Courts of Texas*, 1:13.1 (1992)

(“The movant may set out the specific grounds for a summary judgment in a *brief* served on all parties contemporaneously with the motion itself.”). As our opinion indicates, the rule expressed in 1990 is correct.

- 1 Responding to Justice Hecht's criticism that requiring the grounds for summary judgment to be stated in the motion is a technicality without a purpose, at least one court of appeals has stated “... the trial brief is neither in the record before us nor would it properly be part of the appellate record.” *Concrete Constr. Supply v. M.F.C., Inc.*, 636 S.W.2d 475, 483–84 (Tex.App.—Dallas 1982, no writ) (citing TEX.R.CIV.P. 376a, now found in TEX.R.APP.P. 51 and 52 (emphasis added)).

Vernon's Texas Rules Annotated
Texas Rules of Civil Procedure
Part II. Rules of Practice in District and County Courts
Section 8. Pre-Trial Procedure (Refs & Annos)

TX Rules of Civil Procedure, Rule 166a

Rule 166a. Summary Judgment

Currentness

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the adverse party has appeared or answered, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to amount of damages.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion for summary judgment shall state the specific grounds therefor. Except on leave of court, with notice to opposing counsel, the motion and any supporting affidavits shall be filed and served at least twenty-one days before the time specified for hearing. Except on leave of court, the adverse party, not later than seven days prior to the day of hearing may file and serve opposing affidavits or other written response. No oral testimony shall be received at the hearing. The judgment sought shall be rendered forthwith if (i) the deposition transcripts, interrogatory answers, and other discovery responses referenced or set forth in the motion or response, and (ii) the pleadings, admissions, affidavits, stipulations of the parties, and authenticated or certified public records, if any, on file at the time of the hearing, or filed thereafter and before judgment with permission of the court, show that, except as to the amount of damages, there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law on the issues expressly set out in the motion or in an answer or any other response. Issues not expressly presented to the trial court by written motion, answer or other response shall not be considered on appeal as grounds for reversal. A summary judgment may be based on uncontroverted testimonial evidence of an interested witness, or of an expert witness as to subject matter concerning which the trier of fact must be guided solely by the opinion testimony of experts, if the evidence is clear, positive and direct, otherwise credible and free from contradictions and inconsistencies, and could have been readily controverted.

(d) Appendices, References and Other Use of Discovery Not Otherwise on File. Discovery products not on file with the clerk may be used as summary judgment evidence if copies of the material, appendices containing the evidence, or a notice containing specific references to the discovery or specific references to other instruments, are filed and served on all parties together with a statement of intent to use the specified discovery as summary judgment proofs: (i) at least twenty-one days before the hearing if such proofs are to be used to support the summary judgment; or (ii) at least seven days before the hearing if such proofs are to be used to oppose the summary judgment.

(e) Case not Fully Adjudicated on Motion. If summary judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the judge may at the hearing examine the pleadings and the evidence on file, interrogate

counsel, ascertain what material fact issues exist and make an order specifying the facts that are established as a matter of law, and directing such further proceedings in the action as are just.

(f) Form of Affidavits; Further Testimony. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits. Defects in the form of affidavits or attachments will not be grounds for reversal unless specifically pointed out by objection by an opposing party with opportunity, but refusal, to amend.

(g) When Affidavits Are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(h) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

(i) No-Evidence Motion. After adequate time for discovery, a party without presenting summary judgment evidence may move for summary judgment on the ground that there is no evidence of one or more essential elements of a claim or defense on which an adverse party would have the burden of proof at trial. The motion must state the elements as to which there is no evidence. The court must grant the motion unless the respondent produces summary judgment evidence raising a genuine issue of material fact.

Credits

Oct. 12, 1949, eff. March 1, 1950. Amended by orders of Oct. 1, 1951, eff. March 1, 1952; July 20, 1966, eff. Jan. 1, 1967; July 21, 1970, eff. Jan. 1, 1971; July 11, 1977, eff. Jan. 1, 1978; June 10, 1980, eff. Jan. 1, 1981; Dec. 5, 1983, eff. April 1, 1984; July 15, 1987, eff. Jan. 1, 1988; April 24, 1990, eff. Sept. 1, 1990; Aug. 15, 1997, eff. Sept. 1, 1997.

Editors' Notes

COMMENT--1990

This amendment provides a mechanism for using previously non-filed discovery in summary judgment practice. Such proofs must all be filed in advance of the hearing in accordance with Rule 166a. Paragraphs (d) through (g) are renumbered (e) through (h).

COMMENT--1997

This comment is intended to inform the construction and application of the rule. Paragraph (i) authorizes a motion for summary judgment based on the assertion that, after adequate opportunity for discovery, there is no evidence to support one or more specified elements of an adverse party's claim or defense. A discovery period set by pretrial order should be adequate opportunity for discovery unless there is a showing to the contrary,

and ordinarily a motion under paragraph (i) would be permitted after the period but not before. The motion must be specific in challenging the evidentiary support for an element of a claim or defense; paragraph (i) does not authorize conclusory motions or general no-evidence challenges to an opponent's case. Paragraph (i) does not apply to ordinary motions for summary judgment under paragraphs (a) or (b), in which the movant must prove it is entitled to judgment by establishing each element of its own claim or defense as a matter of law or by negating an element of the respondent's claim or defense as a matter of law. To defeat a motion made under paragraph (i), the respondent is not required to marshal its proof; its response need only point out evidence that raises a fact issue on the challenged elements. The existing rules continue to govern the general requirements of summary judgment practice. A motion under paragraph (i) is subject to sanctions provided by existing law ([Tex Civ.Prac. & Rem. Code §§ 9.001-10.006](#)) and rules ([Tex.R.Civ.P. 13](#)). The denial of a motion under paragraph (i) is no more reviewable by appeal or mandamus than the denial of a motion under paragraph (c).

[Notes of Decisions \(8315\)](#)

Vernon's Ann. Texas Rules Civ. Proc., Rule 166a, TX R RCP Rule 166a
Current with amendments received through March 1, 2017

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Disagreed With by [Colony Ins. Co. v. Peachtree Const., Ltd.](#), 5th Cir. (Tex.), July 19, 2011

300 S.W.3d 740

Supreme Court of Texas.

D.R. HORTON–TEXAS, LTD., Petitioner,

v.

MARKEL INTERNATIONAL INSURANCE
COMPANY, LTD., Respondent.

No. 06–1018.

|
Argued Sept. 8, 2009.|
Decided Dec. 11, 2009.|
Rehearing Denied Feb. 12, 2010.**Synopsis**

Background: Homebuilder brought action against subcontractor's insurers, seeking reimbursement of settlement funds and defense costs incurred in action brought against it by homeowners for construction defects. The 281st District Court, Harris County, [David J. Bernal, J.](#), granted summary judgment to insurers. Homebuilder appealed. The Houston Court of Appeals, 14th District, [300 S.W.3d 773, 2006 WL 3040756](#), affirmed in part, reversed in part, and remanded. Review was granted.

[Holding:] The Supreme Court, [Wainwright, J.](#), held that even if insurer had no duty to defend homebuilder, fact issues precluded summary judgment for insurer in the coverage action.

Court of Appeals affirmed in part and reversed in part; remanded.

West Headnotes (10)

[1] Insurance

🔑 **Insurer's Duty to Indemnify in General**

Liability insurer's duty to indemnify is not dependent on the duty to defend, and, thus,

insurer may have a duty to indemnify its insured even if the duty to defend never arises.

[117 Cases that cite this headnote](#)

[2] Appeal and Error

🔑 **Sufficiency of Presentation of Questions**

Appeal and Error

🔑 **Considering questions not raised or passed upon in intermediate court**

Plaintiff general contractor, on appeal from decision of Court of Appeals, could not raise in the Supreme Court a claim challenging the eight-corners doctrine or requesting an exception to it, with respect to general contractor's action against masonry subcontractor's commercial general liability (CGL) insurer seeking reimbursement of settlement funds and defense costs incurred by general contractor in underlying construction-defect action brought by homeowners, where general contractor had not raised such a claim in the trial court in its response to the insurer's summary judgment motion and had not raised such a claim in the Court of Appeals until its second motion for rehearing. [Vernon's Ann.Texas Rules Civ.Proc., Rule 166a\(c\); Rules App.Proc., Rule 33.1\(a\)\(1\).](#)

[8 Cases that cite this headnote](#)

[3] Appeal and Error

🔑 **Judgment**

A non-movant must present its objections to a summary judgment motion expressly by written answer or other written response to the motion in the trial court, or that objection is waived, for purposes of appellate review. [Vernon's Ann.Texas Rules Civ.Proc., Rule 166a\(c\); Rules App.Proc., Rule 33.1\(a\)\(1\).](#)

[20 Cases that cite this headnote](#)

[4] Insurance

🔑 **Insurer's Duty to Indemnify in General**

Insurance

🔑 **In general;nature and source of duty**

An insurer's duty to defend and duty to indemnify are distinct and separate duties.

[107 Cases that cite this headnote](#)

[5] Insurance

🔑 **Insurer's Duty to Indemnify in General**

Insurance

🔑 **In general;nature and source of duty**

With respect to an insurer's duty to defend and duty to indemnify, one duty may exist without the other, and to that extent, the duties enjoy a degree of independence from each other.

[75 Cases that cite this headnote](#)

[6] Insurance

🔑 **Insurer's Duty to Indemnify in General**

Facts actually established in the underlying suit control the insurer's duty to indemnify.

[47 Cases that cite this headnote](#)

[7] Insurance

🔑 **Pleading**

As with any other contract, breach or compliance with the terms of an insurance policy is determined not by pleadings, but by proof.

[5 Cases that cite this headnote](#)

[8] Insurance

🔑 **Pleadings**

An insurer's duty to defend is established according to the eight-corners doctrine, considering only the factual allegations in the pleadings and the terms of the policy.

[10 Cases that cite this headnote](#)

[9] Insurance

🔑 **Insurer's Duty to Indemnify in General**

The failure of an insurer's duty to defend to arise from the pleadings in the underlying action does not necessarily preclude a duty to indemnify from arising from proof of the

allegations in the petition in the underlying action.

[18 Cases that cite this headnote](#)

[10] Judgment

🔑 **Insurance cases**

Genuine issues of material fact as to whether masonry subcontractor's acts or omissions contributed to the alleged construction defects precluded summary judgment for masonry subcontractor's commercial general liability (CGL) insurer, in coverage action brought by general contractor, which was an additional insured under the CGL policy, against insurer after general contractor, which had not been defended by insurer in homeowners' underlying construction defect action, had settled that underlying action.

[1 Cases that cite this headnote](#)

Attorneys and Law Firms

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[Lee H. Shidlofsky](#), Visser Shidlofsky LLP, Austin TX, for Amici Curiae Texas Association of Builders and Associated General Contractors of America.

Opinion

Justice [WAINWRIGHT](#) delivered the opinion of the Court.

[1] In this dispute, a general contractor, as an additional insured on its subcontractor's commercial general liability (CGL) insurance policy, seeks a defense and coverage from the CGL insurer for alleged construction defects. The insurer claims that it has no duty, under the eight-corners doctrine, to provide a defense because the homeowners' petition in the underlying liability action did not implicate the insured, the subcontractor that performed the allegedly defective work. Further, because it has no duty to provide a defense, it claims it has no duty to indemnify the general contractor as well. We hold that the duty to indemnify is not dependent on the duty to defend and that an insurer may have a duty to indemnify its insured even if the duty to defend never arises. In determining coverage, a matter dependent on the facts and circumstances of the alleged injury-causing event, parties may introduce evidence during coverage litigation to establish or refute the duty to indemnify. We accordingly reverse the court of appeals' judgment in part and affirm in part and remand to the trial court for proceedings consistent with this opinion.

***742 I. FACTUAL AND PROCEDURAL BACKGROUND**

James and Cicely Holmes purchased a house built by D.R. Horton–Texas Ltd. The Holmeses claim that, soon after moving in, they discovered that mold had infested their home, and they sued D.R. Horton for remedial costs. They alleged that latent defects in the chimney, roof, vent pipes, windows, window frames, and flashing around the roof and chimney allowed water to enter the house, eventually causing mold damage. Their petition only identified D.R. Horton as responsible for the defects and negligent attempts to repair them. D.R. Horton claims that one of its subcontractors, Rosendo Ramirez, performed masonry work on the home as well as some of the repairs contributing to the alleged defects. He was neither sued in the lawsuit nor implicated by the pleadings.

Ramirez obtained a CGL policy from Markel International Insurance Company, Ltd. that named D.R. Horton as an additional insured entitled to coverage for claims against it arising from Ramirez's work. After the Holmeses sued D.R. Horton, D.R. Horton sought coverage from Markel. Markel refused to defend D.R. Horton because the underlying plaintiffs' petition did not plead facts indicating that Ramirez's work was defective

and, therefore, did not invoke coverage under Ramirez's CGL policy for D.R. Horton. D.R. Horton obtained counsel at its own expense for the Holmeses' lawsuit and settled with the Holmeses during voir dire.

D.R. Horton sued Markel for reimbursement of defense costs and the settlement payment.¹ Markel moved for summary judgment, arguing it had no duty to defend D.R. Horton in the underlying litigation because the Holmeses' petition did not contain allegations triggering coverage. D.R. Horton responded to the motion by arguing that, although the eight-corners doctrine may limit Markel's duty to defend and indemnify D.R. Horton, the Holmeses' pleadings should be liberally construed in favor of a defense and coverage. It attached evidence to its response including affidavits, inspection reports, Ramirez's contract with D.R. Horton, Ramirez's insurance contracts and policies, depositions from the Holmeses' case, and mold investigation reports. Markel objected to some of the evidence D.R. Horton offered. The trial court overruled Markel's objections to the evidence, but granted summary judgment in Markel's favor on both grounds. The court of appeals affirmed the trial court's ruling that Markel did not owe D.R. Horton a duty to defend or indemnify it against the claims brought by the Holmeses. It further explained that the eight-corners doctrine precluded D.R. Horton's claim that Markel owed it a duty to defend because there were no allegations on the face of the Holmeses' petition that implicated Ramirez's work. The court of appeals reasoned that because Markel had no duty to defend, it also had no duty to indemnify D.R. Horton. See [300 S.W.3d 773](#) (citing *Farmers Tex. County Mut. Ins. Co. v. Griffin*, [955 S.W.2d 81, 84 \(Tex.1997\)](#)). D.R. Horton appeals to this Court, challenging the court of appeals' judgment on Markel's duty to defend and duty to indemnify it against the Holmeses' lawsuit.

II. PRESERVATION

[2] D.R. Horton argues that the court of appeals erred by not recognizing an exception to the eight-corners doctrine, also known as the complaint allegation *743 rule, to allow parties to introduce extrinsic evidence relating to coverage-only facts in the duty to defend analysis. Markel argues that D.R. Horton waived this issue, and we agree.

We do not decide D.R. Horton's argument for this Court to recognize an exception to the eight-corners doctrine because it did not raise this argument in the trial court or in the court of appeals until its second motion for rehearing, after our opinion issued in *GuideOne Elite Insurance Co. v. Fielder Road Baptist Church*, 197 S.W.3d 305 (Tex.2006).

[3] In summary judgment practice, “[i]ssues not expressly presented to the trial court by written motion, answer or other response shall not be considered on appeal as grounds for reversal.” TEX.R. CIV. P. 166a(c); see also TEX.R.APP. P. 33.1(a)(1) (requiring that the record show that a claim was raised in the trial court in order to present it for appellate review); *McConnell v. Southside Indep. Sch. Dist.*, 858 S.W.2d 337, 341 (Tex.1993) (explaining that summary judgment motions and responses, or answers to those motions, must stand or fall on the grounds expressly presented to the trial court). A non-movant must present its objections to a summary judgment motion expressly by written answer or other written response to the motion in the trial court or that objection is waived. See *City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 677–79 (Tex.1979); see also *James v. Brown*, 637 S.W.2d 914, 917 (Tex.1982).

D.R. Horton, in its response to Markel's summary judgment motion, argued that the eight-corners doctrine governs the analysis and that the Holmeses' petition should be liberally construed. Arguing for a liberal construction of the plaintiff's pleadings is not equivalent to challenging the eight-corners doctrine or to requesting an exception to it. See TEX.R. CIV. P. 166a(c). Therefore, we do not disturb the court of appeals' judgment on the duty to defend and only address D.R. Horton's second issue: Whether the court of appeals erred in affirming the trial court's grant of Markel's motion for summary judgment on the duty to indemnify, even though D.R. Horton submitted evidence with its summary judgment response that raised fact questions as to whether Markel had an independent duty to provide coverage for D.R. Horton under Ramirez's CGL policy. We review a trial court's grant of summary judgment de novo. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex.2005).

III. DISCUSSION—DUTY TO INDEMNIFY

[4] [5] “In liability insurance policies generally, an insurer assumes both the duty to indemnify the insured,

that is, to pay all covered claims and judgments against an insured, and the duty to defend any lawsuit brought against the insured that alleges and seeks damages for an event potentially covered by the policy, even if groundless, false or fraudulent,” subject to the terms of the policy. 14 LEE R. RUSS & THOMAS F. SEGALLA, *COUCH ON INSURANCE* § 200:3 (3d ed.2009); see also *Zurich Am. Ins. Co. v. Nokia, Inc.*, 268 S.W.3d 487, 490 (Tex.2008). However, the duty to defend and the duty to indemnify “are distinct and separate duties.” *Utica Nat'l Ins. Co. v. Am. Indem. Co.*, 141 S.W.3d 198, 203 (Tex.2004) (quoting *King v. Dallas Fire Ins. Co.*, 85 S.W.3d 185, 187 (Tex.2002)). We noted in *Farmers Texas County Mutual Insurance Co. v. Griffin* that one duty may exist without the other. 955 S.W.2d at 82. To that extent, the duties enjoy a degree of independence *744 from each other.² See *Trinity Universal Ins. Co. v. Cowan*, 945 S.W.2d 819, 821–22 (Tex.1997).

[6] [7] [8] While analysis of the duty to defend has been strictly circumscribed by the eight-corners doctrine, it is well settled that the “facts actually established in the underlying suit control the duty to indemnify.” *Pine Oak Builders, Inc. v. Great Am. Lloyds Ins. Co.*, 279 S.W.3d 650, 656 (Tex.2009); *GuideOne*, 197 S.W.3d at 310; *Cowan*, 945 S.W.2d at 821. As with any other contract, breach or compliance with the terms of an insurance policy is determined not by pleadings, but by proof. See, e.g., *Progressive County Mut. Ins. Co. v. Sink*, 107 S.W.3d 547, 551 (Tex.2003); *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 216 (Tex.2003); *State Farm Life Ins. Co. v. Beaton*, 907 S.W.2d 430, 433 (Tex.1995). The duty to defend, however, is established according to the eight-corners doctrine, considering only the factual allegations in the pleadings and the terms of the policy. *Pine Oak*, 279 S.W.3d at 654; *Cowan*, 945 S.W.2d at 821.

The insurer's duty to indemnify depends on the facts proven and whether the damages caused by the actions or omissions proven are covered by the terms of the policy. Evidence is usually necessary in the coverage litigation to establish or refute an insurer's duty to indemnify. This is especially true when the underlying liability dispute is resolved before a trial on the merits and there was no opportunity to develop the evidence, as in this case. We hold that even if Markel has no duty to defend D.R. Horton, it may still have a duty to indemnify D.R. Horton as an additional insured under Ramirez's CGL insurance

policy. That determination hinges on the facts established and the terms and conditions of the CGL policy.³

[9] Markel reasons that if the terms of the policy, when read in light of the allegations asserted in the petition, do not give rise to a duty to defend, then proof of all of those allegations could not give rise to a duty to indemnify. It relies on *Griffin* for this proposition,⁴ but the holding in *Griffin* was fact-specific and cannot be construed so broadly. See 955 S.W.2d at 84. In *Griffin*, the issue was whether facts developed in the underlying tort suit for injuries *745 caused by a drive-by shooting could form the basis for coverage under an automobile insurance policy. *Id.* We explained in that case that no “facts can be developed in the underlying tort suit that can transform a drive-by shooting into an ‘auto accident.’” *Id.* In that scenario, “the duty to indemnify is justiciable before the insured’s liability is determined in the liability lawsuit when the insurer has no duty to defend and the same reasons that negate the duty to defend will likewise negate any possibility the insurer will ever have a duty to indemnify.” *Id.* This conclusion was grounded on the impossibility that the drive-by shooting in that case could be transformed by proof of any conceivable set of facts into an auto accident covered by the insurance policy. It was not based on a rationale that if a duty to defend does not arise from the pleadings, no duty to indemnify could arise from proof of the allegations in the petition. These duties are independent, and the existence of one does not necessarily depend on the existence or proof of the other.

In *Griffin*, in fact, we recognized that it may be necessary to defer resolution of indemnity issues until after the underlying third-party litigation is resolved because coverage may turn on facts actually proven in the underlying lawsuit. See *id.*; see also *GuideOne*, 197 S.W.3d at 310 (explaining that “the facts actually established in the underlying suit control the duty to indemnify”); *Utica*, 141 S.W.3d at 204–05 (affirming an insurer’s duty to defend, but reversing and remanding on the duty to indemnify

issue because whether indemnification under the policy was triggered required a “factual resolution”); *Cowan*, 945 S.W.2d at 821 (explaining that the “the duty to indemnify is triggered by the actual facts establishing liability in the underlying suit”).

[10] In this case, unlike *Griffin*, D.R. Horton presented evidence with its response to Markel’s summary judgment motion that showed Ramirez was a subcontractor for D.R. Horton for the home, Ramirez performed masonry work and repairs allegedly contributing to the defects, and Markel’s CGL policy for Ramirez named D.R. Horton as an additional insured. This evidence raises fact questions that defeat Markel’s motion for summary judgment in this case on the duty to indemnify claim. Of course, other terms, conditions, exclusions, or exceptions in the policy or other proof may establish or refute, before or during trial, the existence of CGL coverage for D.R. Horton. The insurer and the putative insured may introduce evidence in coverage litigation to establish or refute the insurer’s duty to indemnify. Where disputed facts are proven in the liability case, whether none, some, or most of the material coverage facts will have been established in that underlying suit depends on the circumstances of the case and other legal and equitable principles.

IV. CONCLUSION

We affirm the court of appeals’ judgment on the duty to defend, for different reasons, and reverse the court of appeals’ judgment on the duty to indemnify. Accordingly, we remand the duty to indemnify issue to the trial court for proceedings consistent with this opinion.

Justice GUZMAN did not participate in this decision.

All Citations

300 S.W.3d 740, 53 Tex. Sup. Ct. J. 170

Footnotes

¹ D.R. Horton also sued Sphere Drake Insurance, Ltd., seeking coverage for the Holmeses’ claims, but Sphere Drake is not a party to this appeal.

² *Couch on Insurance* explains the distinction in this manner:

The distinction between the duty to defend and the duty to indemnify is based upon the time when the duties are determined. The duty to defend arises prior to the completion of litigation, and therefore insurers are required to meet their defense obligation before the scope of the insured’s liability has been determined. In contrast, the duty

to indemnify arises only once liability has been conclusively determined. In other words, because the duty to defend arises whenever an insurer ascertains facts that give rise to the possibility or the potential of liability to indemnify, the duty to defend must be assessed at the very outset of a case, unlike the duty to indemnify, which arises only when the insured's underlying liability is established.

14 COUCH ON INSURANCE § 200:3.

- 3 Federal courts have predicted this outcome under Texas law. See *Nat'l Union Fire Ins. Co. v. Puget Plastics Corp.*, 532 F.3d 398, 404 (5th Cir.2008); *Swicegood v. Med. Prot. Co.*, No. Civ.A.3:95–CV–0335–D, 2003 WL 22234928, at *14 (N.D.Tex. Sept. 19, 2003).
- 4 Several authorities have mistakenly cited *Griffin* for this proposition. See, e.g., *Reser v. State Farm Fire & Cas. Co.*, 981 S.W.2d 260, 263 (Tex.App.-San Antonio 1998, no pet.); see also 14 COUCH ON INSURANCE § 200:3 (citing *Grimes Constr., Inc. v. Great Am. Lloyds Ins. Co.*, 188 S.W.3d 805, 818 (Tex.App.-Fort Worth 2006) (“The duty to defend is thus broader than the duty to indemnify; if an insurer has no duty to defend, it has no duty to indemnify.”), *rev'd on other grounds*, 248 S.W.3d 171 (Tex.2008)).

135 S.W.3d 162
Court of Appeals of Texas,
Tyler.

Diana BANKHEAD, M.D., Appellant
v.
Tim MADDUX d/b/a Maddox Homes, Appellee.

No. 12-03-00025-CV.

|
March 17, 2004.

Synopsis

Background: Homeowner brought action against homebuilders alleging breach of contract, among other claims. The 241st Judicial District Court, Smith County, [Diane V. Devasto](#), J., entered judgment on a jury verdict in favor of homeowner. Homeowner appealed.

[Holding:] The Court of Appeals, James T. Worthen, J., held that homeowner waived for purposes of appeal her argument that she was entitled to attorney fees under Residential Construction Liability Act (RCLA).

Affirmed.

West Headnotes (5)

[1] Appeal and Error

🔑 Failure to Urge Objections

Homeowner who prevailed in breach of contract action against homebuilders waived for purposes of appeal her argument that she was entitled to attorney fees under Residential Construction Liability Act (RCLA); homeowner's initial brief on appeal asserted only her entitlement to attorney fees under general statute governing attorney fees, homeowner did not raise the RCLA until her reply brief, and homeowner did not establish special circumstances permitting Court of Appeals to consider the issue despite the waiver. [V.T.C.A., Civil Practice & Remedies Code § 38.001](#); [V.T.C.A., Property Code §](#)

[27.001 et seq.](#); [Rules App.Proc., Rule 38.1\(e, h\)](#).

[6 Cases that cite this headnote](#)

[2] Appeal and Error

🔑 Form and Requisites in General

The Rules of Appellate Procedure set forth the required contents and organization of an appellant's brief. [Rules App.Proc., Rule 38.1](#).

[2 Cases that cite this headnote](#)

[3] Appeal and Error

🔑 Requisites and Sufficiency

An issue presented in an appellant's brief is sufficient if it directs the attention of the appellate court to the error about which complaint is made. [Rules App.Proc., Rule 38.1\(e\)](#).

[11 Cases that cite this headnote](#)

[4] Appeal and Error

🔑 Defects, Objections, and Amendments

In its review of a civil matter, an appellate court has no discretion to fabricate an issue not raised in the appellant's brief, even though the court may perceive that the ends of justice require such a course.

[19 Cases that cite this headnote](#)

[5] Appeal and Error

🔑 Reply Briefs

Issues raised for the first time in a reply brief may not be considered, except perhaps in exceptional cases.

[12 Cases that cite this headnote](#)

Attorneys and Law Firms

*163 Gregory D. Smith, Ken W. Good, for appellant.

Tim Maddox, pro se.

Panel consisted of WORTHEN, C.J. and [GRIFFITH, J.](#)

OPINION

JAMES T. WORTHEN, Chief Justice.

Diana Bankhead, M.D. (“Bankhead”) appeals the trial court's judgment, which failed to award her reasonable attorney's fees despite the jury's finding Tim Maddox liable for breach of contract. Bankhead raises one issue on appeal. We affirm.

BACKGROUND

Bankhead filed suit against Tim and Kim Maddox d/b/a Maddox Homes (“Maddox”) alleging breach of contract and other claims arising out of the construction of her home. The jury found Tim Maddox liable for breach of contract and awarded damages. However, in response to the charge question concerning the amount Bankhead should be awarded to compensate her for reasonable attorney's fees she incurred, the jury answered zero. This appeal followed.

FAILURE TO AWARD ATTORNEY'S FEES

In her sole issue, Bankhead argues that, having found Tim Maddox liable for breach of contract, and considering the evidence supporting the award of reasonable attorney's fees, the jury was prohibited from awarding a zero amount in attorney's fees. In support of her argument, Bankhead cites to the provisions of [Texas Civil Practice and Remedies Code section 38.001](#) (Vernon 1997). However, as Maddox points out, in any action to recover damages arising from a construction defect, except a claim for personal injury, survival, or wrongful death or for damage to goods, the Residential Construction Liability Act (“RCLA”) applies to the extent that there is any conflict between it and any other law. See [TEX. PROP.CODE ANN. § 27.002](#) (Vernon Supp.2004).¹ Bankhead's pleadings reflect that she sought to recover damages arising from construction defects under a breach of contract theory. Therefore, the matter is governed, to the extent that there is a conflict of law, by the RCLA. *Id.*

[1] [2] [3] Maddox argues that Bankhead has waived the issue by inadequately briefing it. The Texas Rules

of Appellate Procedure set forth the required contents and organization of an appellant's brief. See [TEX.R.APP. P. 38.1](#). The appellant's brief must state concisely all issues or points presented for review. [TEX.R.APP. P. 38.1\(e\)](#). An issue presented in an appellant's brief is sufficient if it directs the attention of the appellate court to the error about which complaint is made. [Maida v. Fire Ins. Exchange](#), 990 S.W.2d 836, 839 (Tex.App.-Fort Worth 1999, no pet.). Moreover, in support of an issue, the appellant's brief must contain a clear and concise argument containing appropriate citations to authority and to the record. See [TEX.R.APP. P. 38.1\(h\)](#).

[4] [5] In its review of a civil matter, an appellate court has no discretion to fabricate an issue not raised in the appellant's *164 brief, even though the court may perceive that the ends of justice require such a course. See [Krumb v. Porter](#), 152 S.W.2d 495, 496 (Tex.Civ.App.-San Antonio 1941, writ ref'd). Moreover, issues raised for the first time in a reply brief may not be considered, except perhaps in exceptional cases. *Id.* at 496–97; see also [Anderson Producing Inc. v. Koch Oil Co.](#), 929 S.W.2d 416, 424 (Tex.1996) (court declined to consider issue first raised in reply brief); [López v. Montemayor](#), No. 04–03–00174–CV, 2003 WL 22714742, *6, 131 S.W.3d 54, 61 (Tex.App.-San Antonio 2003, no pet.) (not yet released for publication) (reply brief is not intended to allow an appellant to raise new issues); [Green Light Co. v. Moore](#), 485 S.W.2d 360, 364 (Tex.Civ.App.-Houston [14th Dist.] 1972, no writ) (new grounds for reversal set forth in appellants' second brief may not be considered); [Colorado River Western Ry. v. Texas & N.O.R. Co.](#), 283 S.W.2d 768, 771, n. 2 (Tex.Civ.App.-Austin 1955, writ ref'd n.r.e.) (issues not made in appellant's original brief are waived and will not be considered by appellate court, though raised in appendix to appellants' amended and reply brief).

The totality of Bankhead's argument in support of her sole issue concerns the application of [Texas Civil Practice and Remedies Code, section 38.001](#). Bankhead contends that “once the jury finds that a party should prevail on a claim upon which attorneys' fees are mandated, the only question remaining for the jury is the reasonable value of the attorney's fees and not whether they should be awarded.” In further support of her issue, Bankhead cites [Jackson Law Office, P.C. v. Chappell](#), 37 S.W.3d 15 (Tex.App.-Tyler 2000, pet. denied), [Holland v. Wal-Mart Stores](#), 1 S.W.3d 91 (Tex.1999), [Satellite Earth Stations East v. Davis](#), 756 S.W.2d 385 (Tex.App.-Eastland 1988,

writ denied), and *First Texas Sav. Ass'n of Dallas v. Dicker Center, Inc.*, 631 S.W.2d 179, 188 (Tex.App.-Tyler 1982, no writ).

The RCLA conflicts with [Texas Civil Practice and Remedies Code, section 38.001](#) in that the RCLA contains limitations to the recovery of attorney's fees.² None of the cases cited by Bankhead in her brief concern the recovery of attorney's fees under the RCLA. In her sole issue, Bankhead claims, generally, an entitlement to attorney's fees in an amount greater than the “zero” amount awarded by the jury. But Bankhead's claim for attorney's fees on appeal can only be understood when read in conjunction with her supporting argument. Bankhead's argument and supporting authorities in her original brief ignore controlling law and proceed under the theory that, given the evidence concerning the reasonableness and necessity of Bankhead's attorneys' fees, once the jury found liability, the attorneys' fees she sought “were mandated.”

Once Maddox addressed the limitations on attorney's fees pursuant to the RCLA, Bankhead sought to salvage the issue in her reply brief. However, as Bankhead neglected to raise the issue and address the controlling authority

related thereto in her original brief, we hold that she has waived the issue of her entitlement to attorney's fees under the RCLA. See, e.g., *Anderson Producing Inc.*, 929 S.W.2d at 424; *López*, 2003 WL 22714742 at *6, 131 S.W.3d at 60; *Moore*, 485 S.W.2d at 364; *165 *Colorado River Western Ry.*, 283 S.W.2d at 771 n. 2; see also [TEX.R.APP. P. 38.1\(e\) and \(h\)](#). Bankhead has not directed us to any authority concerning exceptional circumstances applicable to this case, the possibility of which was referenced by the court in *Krumb*. Moreover, we are unaware of the existence of any such exceptional circumstances. Bankhead's sole issue is overruled.

CONCLUSION

Having overruled Bankhead's sole issue, we **affirm** the trial court's judgment.

[DeVASTO, J.](#), not participating.

All Citations

135 S.W.3d 162

Footnotes

- 1 The RCLA was amended in 2003. To the extent that there is no substantive change of law germane to this appeal, for ease of reference, we will cite to the current statute.
- 2 Compare Acts 1989, 71st Leg., ch. 1072, § 1, eff. Sept. 1, 1989. Amended by Acts 1993, 73rd Leg., ch. 797, § 5, eff. Aug. 30, 1993; Acts 1995, 74th Leg., ch. 414, § 10, eff. Sept. 1, 1995; Acts 1999, 76th Leg., ch. 189, § 5, eff. Sept. 1, 1999, with [TEX. CIV. PRAC. & REM.CODE ANN. § 38.001](#) (Vernon 1997); see also [TEX. PROP.CODE ANN. § 27.004\(b\)](#) (Vernon Supp.2004).



KeyCite Yellow Flag - Negative Treatment

Distinguished by [Bidner v. Hill](#), Tex.App.-Dallas, July 26, 2007

131 S.W.3d 54

Court of Appeals of Texas,
San Antonio.

Alonso E. LÓPEZ, Jr. and Ofelia Sylvia Jenkins,
Individually and As Personal Representatives of
the Estate of Alonso E. López, Sr., Deceased, Sylvia
A. López, Rosie Sprague, Gloria A. San Miguel,
Yolanda López, and Hector F. López, Appellants,
v.

Oscar J. MONTEMAYOR, D.D.S, Douglas
Caceres, M.D., Individually and d/b/a Star
Anesthesia, P.A., Star Anesthesia, P.A., Leo
Cuello, M.D., and Baptist Health System
d/b/a Baptist Medical Center, Appellees.

No. 04-03-00174-CV.

|
Nov. 19, 2003.

|
Rehearing Overruled Feb. 4, 2004.

Synopsis

Background: Family and personal representatives of deceased patient brought medical malpractice action against dentist, physician who performed bronchoscopy and his professional association, anesthesiologist, and hospital, alleging that patient died from aspiration of dental bridge that was being removed. The 407th Judicial District Court, Bexar County, [David A. Berchermann, Jr.](#), J., dismissed action for failure to file an adequate expert report. Family and personal representatives appealed.

Holdings: The Court of Appeals, [Catherine Stone](#), J., held that:

[1] dentist's expert report was deficient on issue of causation, and

[2] plaintiffs were not entitled to 30-day grace period to file amended expert report.

Affirmed.

West Headnotes (13)

[1] Health

🔑 Affidavits of merit or meritorious defense;expert affidavits

To constitute a “good-faith effort,” an expert medical report in a malpractice action must fulfill the dual purpose of informing the defendant of the conduct the plaintiff has called into question and providing a basis for the trial court to conclude that the plaintiff's claims have merit. Vernon's Ann.Texas Civ.St. art. 4509i, § 13.01(r)(6) (Repealed).

1 Cases that cite this headnote

[2] Health

🔑 Affidavits of merit or meritorious defense;expert affidavits

In deciding whether the statutory standard for an expert medical report in a malpractice action is met, a trial court must stay within the four corners of the expert report. Vernon's Ann.Texas Civ.St. art. 4509i, § 13.01(r)(6) (Repealed).

Cases that cite this headnote

[3] Health

🔑 Affidavits of merit or meritorious defense;expert affidavits

An expert medical report in a malpractice action does not need to marshal all of the plaintiff's proof, but it must include the expert's opinion on standard of care, breach, and causal relationship; a report cannot merely state the expert's conclusions about these elements. Vernon's Ann.Texas Civ.St. art. 4509i, § 13.01(r)(6)(Repealed).

Cases that cite this headnote

[4] Health

🔑 Affidavits of merit or meritorious defense;expert affidavits

It is imperative that a medical expert providing a report in a malpractice action explain the basis of his statements to link his conclusions to the facts. Vernon's Ann.Texas Civ.St. art. 4509i, § 13.01(r)(6)(Repealed).

[2 Cases that cite this headnote](#)

[5] Appeal and Error

🔑 [Rulings on Motions Relating to Pleadings](#)

An appellate court reviews a trial court's ruling as to the adequacy of an expert report in a medical malpractice action under an abuse-of-discretion standard; a trial court abuses its discretion if it acts in an arbitrary or unreasonable manner without reference to any guiding rules or principles. Vernon's Ann.Texas Civ.St. art. 4509i, § 13.01(r)(6) (Repealed).

[2 Cases that cite this headnote](#)

[6] Appeal and Error

🔑 [Power to Review](#)

When reviewing matters committed to the trial court's discretion, an appellate court may not substitute its own judgment for that of the trial court.

[1 Cases that cite this headnote](#)

[7] Health

🔑 [Affidavits of merit or meritorious defense;expert affidavits](#)

Dentist's expert report was insufficient, in malpractice action brought against defendant dentist and physicians; dentist was not qualified to provide expert opinion on causation of patient's death by aspiration of dental bridge and subsequent bronchoscopy, and dentist offered only conclusions on the issue of causation. Vernon's Ann.Texas Civ.St. art. 4509i, § 13.01(r)(6)(Repealed).

[5 Cases that cite this headnote](#)

[8] Appeal and Error

🔑 [Reply briefs](#)

A reply brief is not intended to allow an appellant to raise new issues. [Rules App.Proc., Rule 38.3.](#)

[29 Cases that cite this headnote](#)

[9] Health

🔑 [Affidavits of merit or meritorious defense;expert affidavits](#)

When determining whether the failure to file an adequate expert report in a medical malpractice action was due not to intentional disregard or conscious indifference but to accident or mistake, thereby entitling claimant to 30-day grace period to file, an appellate court looks to the knowledge and acts of the claimant. Vernon's Ann.Texas Civ.St. art. 4509i, § 13.01(g)(Repealed).

[Cases that cite this headnote](#)

[10] Health

🔑 [Affidavits of merit or meritorious defense;expert affidavits](#)

If the opposing party fails to controvert the factual assertions in the testimony of a plaintiff requesting 30-day grace period to file amended expert report in medical malpractice action, the plaintiff satisfies his or her burden if the testimony sets forth facts that, if true, negate intentional or consciously indifferent conduct by the plaintiff. Vernon's Ann.Texas Civ.St. art. 4509i, § 13.01(g)(Repealed).

[Cases that cite this headnote](#)

[11] Appeal and Error

🔑 [Matters or Evidence Considered in Determining Question](#)

When determining whether a plaintiff's factual assertions supporting claim for 30-day grace period to file amended expert report in medical malpractice action are controverted, an appellate court may consider all the evidence in the record. Vernon's Ann.Texas Civ.St. art. 4509i, § 13.01(g)(Repealed).

[Cases that cite this headnote](#)

[12] Appeal and Error

 **Rulings on Motions Relating to Pleadings**

An appellate court reviews a trial court's ruling on a motion for 30-day grace period to file amended expert report in medical malpractice action under an abuse-of-discretion standard. Vernon's Ann.Texas Civ.St. art. 4509i, § 13.01(g)(Repealed)).

[2 Cases that cite this headnote](#)

[13] Health

 **Affidavits of merit or meritorious defense;expert affidavits**

Deceased patient's family and personal representatives of his estate were not entitled to 30-day grace period to file an amended expert report, in malpractice action against dentist and physicians, although they asserted that delay in filing occurred because of their attorney's illness, not intentionally or because of conscious indifference; attorney did not become ill until the day before filing deadline. Vernon's Ann.Texas Civ.St. art. 4509i, § 13.01(g)(Repealed).

[Cases that cite this headnote](#)

Attorneys and Law Firms

*56 [Sonia M. Rodriguez](#), [James L. Branton](#) and [Jason P. Hoelscher](#), Branton & Hall, P.C., San Antonio, for Appellant.

[Paul M. Green](#), Green & DuBois, P.C., San Antonio, for Appellee.

Sitting: [CATHERINE STONE](#), Justice, [PAUL W. GREEN](#), Justice, [KAREN ANGELINI](#), Justice.

OPINION

Opinion by [CATHERINE STONE](#), Justice.

This is an appeal from the dismissal of a medical malpractice claim for failure to timely file an expert report pursuant to section 13.01 of the Medical Liability and Insurance Improvement Act. *See* [TEX.REV.CIV. STAT. ANN. art. 4590i, § 13.01](#) (Vernon Supp.2003). Alonso López, Jr., and Ofelia Jenkins, individually and as personal representatives of the estate of Alonso López, Sr., deceased, together with Sylvia López, Rosie Sprague, Gloria San Miguel, Yolanda López, and Hector López (collectively “the López Family”) challenge the trial court's dismissal of their claims against Oscar Montemayor, D.D.S., Douglas Caceres, M.D., individually and d/b/a Star Anesthesia, P.A., Star Anesthesia, P.A., Leo Cuello, M.D., and Baptist Health System d/b/a Baptist Medical Center. The López family argues the trial court abused its discretion in dismissing the family's claims for failure to file an adequate expert report. In the alternative, the López family contends the trial court should have granted them a grace period to file an adequate report. We hold that the López family's report from Ashley Goodman, D.D.S., DABFD does not meet the requirements of [article 4590i](#). We further hold that the López family was not entitled to a [section 13.01\(g\)](#) grace period to cure the deficient report.

BACKGROUND

On December 2, 1999, Oscar Montemayor performed a dental procedure on Alonso López, Sr. which required the removal of a dental bridge.¹ During the course of the procedure, López appeared to have swallowed the dental bridge Montemayor was removing. Unbeknownst to Montemayor, however, López had in fact aspirated the dental bridge to his right lung. Montemayor was unaware López aspirated the dental bridge because Montemayor did not order any X-rays to ascertain the true location of the bridge. Because Montemayor believed López had swallowed the dental bridge, he merely instructed López to allow the bridge to pass through his intestinal system naturally. López, believing he had simply swallowed the dental bridge, did not seek medical attention following his procedure. López, however, soon grew concerned about his health when he developed a fever and did not excrete the dental bridge. López subsequently sought medical attention. López soon learned he had aspirated his dental bridge into his right lung. On December 11, 1999, López was admitted to Baptist Medical Center where physicians performed a [bronchoscopy](#). López's

physicians were unsuccessful in their attempt to remove the dental bridge from López's lung. During the surgery, López suffered a severe drop in his blood pressure and heart rate. As a result of these changes, López became comatose. López eventually died on January 17, 2000.

On October 4, 2001, the López family, represented by attorney Carol Lomax, *57 sued Montemayor; Baptist Medical Center, the place where López's [bronchoscopy](#) occurred; Leo Cuello, M.D., the doctor who performed the [bronchoscopy](#); and Douglas Caceres, M.D., López's anesthesiologist. In accordance with [article 4590i section 13.01](#), Lomax attached an expert report from Ashley Goodman, D.D.S., DABFD to the López family's petition. Goodman, a dentist, stated that Montemayor deviated from the accepted standard of care for dentists in his care of López and that it was the aspiration of the dental bridge that caused López's demise.

On January 31, 2002, Lomax appended three additional reports to the López's petition: a report by a hospital administrator, who opined that Baptist Medical Center did not adequately document López's medical chart; a report by a physician regarding Dr. Cuello's conduct during López's [bronchoscopy](#); and a report from an anesthesiologist, who opined that the preoperative care López received from Dr. Caceres fell below the reasonable standard of care. The López family did not file any other reports in support of their cause before the April 2, 2002 deadline for filing such reports.

In April of 2002, the López family's attorney became ill and was hospitalized. Lomax was not discharged from the hospital until May of 2002. Although Lomax was discharged from the hospital, she was unable to practice law on a full-time basis after her release. By late August 2002, Lomax was immobile and unable to leave her home. On August 29, 2002, Lomax was admitted to a hospital for a second time. Shortly thereafter, another attorney from Lomax's firm, Jason Hoelscher, undertook representation of the López family.

In January and February of 2003, appellees filed motions to dismiss the underlying lawsuit, arguing that the López family's reports did not meet the requirements of [article 4590i section 13.01\(r\)\(6\)](#). In response, the López's new attorney argued that the reports adequately set forth the relevant standards of care, the manner in which appellees deviated from such standards, and the causal

relationship between the appellees' failure to meet the applicable standards of care and the deceased's injury. The López's attorney also requested a 30-day grace period under [article 4590i section 13.01\(g\)](#) to file amended expert reports in the event the court determined the López family's reports were deficient. The López's attorney claimed that the Lópezes were entitled to a grace period because Lomax's failure to file adequate expert reports before [article 4590i's](#) deadline was not intentional or the result of conscious indifference; rather, it was the result of Lomax's unexpected physical and mental deterioration brought about by her illness.

The trial court dismissed the López family's causes of action with prejudice on February 24, 2003 after determining the family's reports did not meet the requirements of [article 4590i section 13.01\(r\)\(6\)](#) and that they were not entitled to a [section 13.01\(g\)](#) grace period to amend their reports. The López family subsequently brought this appeal, challenging the trial court's ruling as to each of the appellees. Soon after the López family filed their notice of appeal, however, the parties filed an agreed motion to dismiss the appeal as to appellees Douglas Caceres, M.D., individually and d/b/a Star Anesthesia, P.A., Star Anesthesia, P.A., Leo Cuello, M.D., and Baptist Health System d/b/a Baptist Medical Center. We granted the motion and dismissed the appeal as to all of the appellees except appellee Montemayor.²

*58 DISCUSSION

On appeal, the López family raises two issues. First, the López family complains that the trial court erred by concluding the report of Ashley Goodman, D.D.S., DABFD failed to meet the requirements of [article 4590i section 13.01\(r\)\(6\)](#). Second, the López family argues that even if Goodman's report is inadequate, they demonstrated sufficient grounds for the court to grant them a [section 13.01\(g\)](#) grace period within which to file an amended expert report.

Expert Reports Under the Act

[1] The López family argues Goodman's report was sufficient to meet the requirements of [article 4590i section 13.01](#). Medical malpractice plaintiffs are required to provide each defendant physician and health care provider an expert report with the expert's curriculum vitae, or they

must voluntarily non-suit the action within 180 days of filing suit. TEX.REV.CIV. STAT. ANN.. art. 4509i, § 13.01(d) (Vernon Supp.2003); *Am. Transitional Care Ctrs. of Tex., Inc. v. Palacios*, 46 S.W.3d 873, 877 (Tex.2001). The expert report must provide “a fair summary of the expert's opinions as of the date of the report regarding applicable standards of care, the manner in which the care rendered by the physician or health care provider failed to meet the standards, and the causal relationship between that failure and the injury, harm, or damages claimed.” TEX.REV.CIV. STAT. ANN.. art. 4509i, § 13.01(r)(6). If a plaintiff timely files an expert report, the defendant may move to challenge the adequacy of the report. *Id.* § 13.01(l). The trial court must grant the defendant's motion if it determines, after hearing, that the report does not represent a good faith effort to comply with the definition of an expert report found in subsection (r)(6). *Id.* To constitute a “good faith effort,” the report must fulfill the dual purpose of informing the defendant of the conduct the plaintiff has called into question and providing a basis for the trial court to conclude that the plaintiff's claims have merit. *Palacios*, 46 S.W.3d at 879.

[2] [3] [4] In deciding whether the statutory standard is met, a trial court must stay within the four corners of the expert report. *Id.* at 878. The report does not need to marshal all of the plaintiff's proof, but it must include the expert's opinion on each of the elements identified in article 4590i: standard of care, breach, and causal relationship. *Id.* “A report cannot merely state the expert's conclusions about these elements.” *Bowie Mem'l Hosp. v. Wright*, 79 S.W.3d 48, 52 (Tex.2002). It is imperative that the expert “explain the basis of his statements to link his conclusions to the facts.” *Id.* (citing *Earle v. Ratliff*, 998 S.W.2d 882, 890 (Tex.1999)).

[5] [6] We review a trial court's ruling as to the adequacy of an expert report under an abuse of discretion standard. *Palacios*, 46 S.W.3d at 878. A trial court abuses its discretion if it acts in an arbitrary or unreasonable manner without reference to any guiding rules or principles. *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241–42 (Tex.1985). When reviewing matters committed to the trial court's discretion, we may not substitute our own judgment for that of the trial court's. See *Flores v. Fourth Court of Appeals*, 777 S.W.2d 38, 41 (Tex.1989).

*59 Goodman's Report

[7] Montemayor argues we should affirm the trial court's ruling because Goodman is not qualified to render an expert opinion as to causation. Moreover, Montemayor claims that even if Goodman is qualified to render an opinion on each of the elements identified in article 4590i, Goodman's report is deficient regarding the element of causation. We agree.

Montemayor contends that Goodman is qualified to render an opinion only as to the applicable standard of care and whether Montemayor breached that standard. He argues Goodman is not qualified to render an opinion as to causation because López's “alleged damages resulted from a medical rather than a dental condition.” The López family does not dispute Montemayor's contention that López's damages resulted from a medical condition. Nevertheless, the López family believes Goodman, a dental expert, is qualified to render an opinion on causation because she is on staff at three hospitals and is a former member of the Dental Professional Liability Division of an insurance company. Goodman, however, concedes in her report that despite her past professional experience, she is not qualified to express an opinion on all of the issues addressed within her report. Goodman specifically states “[t]hese opinions are per a dental expert's conclusions and should be confirmed with a medical expert's opinion in all areas not within this dental examiner's area of expertise.” From the plain language of Goodman's report, it is clear that Goodman does not consider herself qualified to render an opinion on the specific medical matter involved in this case. Consequently, the trial court could have properly concluded that Goodman is not qualified to render an opinion as to causation.

In any event, even if we were to assume Goodman is qualified, her report merely states her conclusion about causation. As noted by the supreme court in *American Transitional Care Centers of Texas, Inc. v. Palacios*, “[a] report that merely states the expert's conclusions about the standard of care, breach, and causation does not” fulfill the dual purpose of informing the defendant of the conduct the plaintiff has called into question and providing a basis for the trial court to conclude that the claims have merit. *Palacios*, 46 S.W.3d at 879.

Goodman's report provides in pertinent part:

Conclusion:

It is my considered expert opinion, based upon a reasonable degree of dental certainty, that Dr. Montemayor deviated from the accepted standard of care (December 1999) by not requesting the patient receive a [chest x-ray](#) to evaluate for aspiration. Whenever a dental appliance is swallowed/aspirated, and there is any doubt as to ingestion v. aspiration, an evaluation by radiographic means is mandatory.

Peer reviewed and professional published studies and reviews indicate that [aspiration of foreign bodies](#) may take place without coughing, wheezing, etc. The absence of such symptoms does not indicate ingestion to the alimentary tract versus possible [aspiration to the lungs](#). Whenever a possible aspiration during dental treatment may be reasonably anticipated, a prudent dental practitioner should use means such as a throat pack and/or ligation of the object to prevent aspiration and possible grave consequences.

A reasonably prudent dentist in the same or similar locality and at the same period of time would have provided for radiographic evaluation along with medical referral for any possible chance of aspiration. Additionally, it is the aspiration of the bridge section which caused [*60](#) and precipitated the medical circumstances leading to the patient's demise. These opinions are per a dental expert's conclusions and should be confirmed with a medical expert's opinion in all areas not within this dental examiner's area of expertise.

To establish a causal relationship between Montemayor's alleged breach of the standard of care and López's injury, the López family relies on the following statement from Goodman's report: "Additionally, it is the aspiration of the bridge section which caused and precipitated the medical circumstances leading to the patient's demise." They argue that this statement is not conclusory because it explains "the causal relationship between [Montemayor's] failure [to meet the applicable standard of care] and Mr. López's injury."

In [Bowie Memorial Hospital v. Wright](#), Barbara Wright suffered fractures in her right knee and foot during a car accident and sued for damages after a Bowie Memorial Hospital physician's assistant misplaced or misread her x-rays and, therefore, did not discover the fracture in the right foot. [Wright, 79 S.W.3d at 50](#). The fracture

was discovered a month later and required Wright to undergo two surgeries over a ten-month period. [Id.](#) Wright complained that if the physician's assistant had diagnosed her [fractured foot](#) earlier she "probably would have had a better outcome." [Id. at 51](#). To establish a causal relationship between the breach of the standard of care and her injury, Wright relied on the following statement from her expert report: "if the x-rays would have been correctly read and the appropriate medical personnel acted upon those findings then [Wright] would have had the possibility of a better outcome." [Id. at 52–53](#). Wright argued that this statement "explains why [her] damages were caused by the [defendant's] breach." [Id. at 53](#). The [Wright](#) court held that the report's conclusory statement that Wright might have had "the possibility of a better outcome" did not constitute a good faith effort to comply with the statute's causation requirement because it did not provide information linking the expert's conclusion that Wright might have had a better outcome to the defendant's failure to correctly read and act upon the x-rays. [Id.](#) The court determined the report was conclusory and held "[a] conclusory report does not meet [\[Article 4590i's\]](#) requirements, because it does not satisfy the [Palacios](#) test." [Id.](#)

Like the statement in [Wright](#), Goodman's statement that "it is the aspiration of the bridge section which caused and precipitated the medical circumstances leading to the patient's demise" is conclusory, and does not constitute a good faith effort to comply with the statute's causation requirement. Goodman's statement simply does not provide information linking Montemayor's actions to López's death.³ See [id.](#) The López family's first issue is therefore overruled.

The López family asserts for the first time in their reply brief that even if Goodman's report is deficient regarding causation, they may, pursuant to [article 4590i section 13.01\(i\)](#),⁴ rely on the expert report [*61](#) of Donald Patrick, M.D. to prove causation. The López family believes Dr. Patrick's report adequately sets forth his opinion on the causal relationship between Montemayor's alleged breach and López's demise. The López family focuses on the following excerpt from Dr. Patrick's report:

[a]lthough I am not qualified to serve as a dental expert, I can state that the failure to promptly identify the presence of the foreign body at the

time of aspiration made it impossible to remove by bronchoscopy. This is the result of edema that develops in the irritated bronchial tissue; thereby narrowing the orifice and actually obscuring the foreign object from bronchoscopic view. The delay in treatment violates the standard of care of medicine. It is highly probable that the bridge could have been removed within several hours by bronchoscopy and no untoward events would have occurred.

The López family further argues that because they can satisfy all of 4590i's requirements through the reports of Dr. Patrick and Goodman, the trial court erred by dismissing their claims.

[8] We need not address the merits of the López family's contention because their argument is not properly before the court. The López family attempts in their reply brief to raise new issues not addressed in either their original brief or the appellee's brief. *Texas Rule of Appellate Procedure* 38.3 merely permits an appellant to address "any matter in the appellee's brief." *TEX.R.APP. P. 38.3*. A reply brief is not intended to allow an appellant to raise new issues. Nowhere in appellants' original brief is there any argument pertaining to *section 13.01(i)* or the adequacy of Dr. Patrick's report. Likewise, Montemayor's brief lacks any reference to *section 13.01(i)* or Dr. Patrick's report.

Thirty Day Grace Period Under *Section 13.01(g)*

As an alternative to arguing that Goodman's report complied with the requirements of *article 4590i*, the López family contends the trial court erred by refusing to grant them a 30-day grace period within which to file an amended expert report. *Article 4590i section 13.01(g)* provides that a trial court shall give a plaintiff a 30-day grace period to file sufficient expert reports where the plaintiff's failure to file the reports was not intentional or the result of conscious indifference but was the result of an accident or mistake. *TEX.REV.CIV. STAT. ANN., art. 4590i, § 13.01(g)* (Vernon Supp.2003). As the supreme court noted in *Walker v. Gutierrez*, this standard mirrors the standard that governs setting aside a default judgment or reinstating a case dismissed for want of prosecution. 111 S.W.3d 56, 63 (Tex.2003).

[9] [10] [11] [12] When "determining whether the failure to file an adequate report was due not to intentional disregard or conscious indifference but to accident or mistake," we look to the knowledge and acts of the claimant. *Id.* at 64. If the opposing party fails to controvert the factual assertions in the claimant's

testimony, "the claimant satisfies his or her burden if the testimony sets forth facts that, if true, negate intentional or consciously indifferent conduct by the claimant." *Id.* When determining whether a claimant's factual assertions are *62 controverted, we may consider all the evidence in the record. *Id.* We review a trial court's ruling on a *section 13.01(g)* motion for relief under an abuse of discretion standard. *Id.* at 62.

[13] The López family contends they were entitled to a *section 13.01(g)* grace period because their failure to file adequate expert reports in this instance was not due to intentional conduct or the result of conscious indifference, but was the result of an accident or mistake on the part of their attorney. Specifically, the López family claims that they were entitled to a *section 13.01(g)* grace period because their attorney became severely ill during the course of her representation of the family and that this unexpected illness prevented the attorney from filing adequate expert reports.⁵

At the hearing on appellees' motions to dismiss, Thomas Crosley, a member of attorney Lomax's firm, stated:

A brief synopsis of my testimony would be that from April of 2002 on [.] Carol's health was such that she was not able to practice law on a full-time basis as she was hospitalized through much of April and that she worked only sporadically through the summer and that it was not until September that the rest of us at our firm knew the true nature of her condition because she had, for her own personal privacy reasons, kept that to herself. But that during that time period from April forward she was not mentally or physically capable of practicing law as she had before and as—as one would expect her to have done. And that ... was a—a part of the reason for her not being able to get discovery and scheduling depositions and things of that nature and had she not had health problems we wouldn't be here now arguing about this because we would have been able to more fully

to conduct discovery in this case and would have gotten all the records.

Crosley again repeated at the hearing that:

In April of [2002], Carol Lomax who was lead attorney on this case became ill and was hospitalized. From that point forward her condition was such that she was not able to practice law on a full-time basis. In fact, she—when she did get out of the hospital in May of [2002], she—she would come to the office a few times a week for a short amount of time, but she was not able at that point to continue taking depositions and fully participating in discovery and doing all the things that an attorney needs to do to continue in active practice.

After reviewing Crosley's testimony, we do not believe the trial court abused its discretion when it denied the López family's request for a [section 13.01\(g\)](#) grace period. The López family filed their medical malpractice action on October 4, 2001. Thus, the Lópezes had 180–days from

this date, or until April 2, 2002, to file their expert reports. Liberally construing Crosley's testimony, the trial court could *63 have concluded that Lomax did not have health problems until April 1, 2002—the day before the deadline for filing adequate expert reports in this case. Nothing about Crosley's testimony suggests Lomax was ill or unable to adequately function as the López family's attorney for any duration of time during the 178–day period following the filing of their original petition. While this court may have reached a different conclusion under the facts presented, we must be guided by the abuse of discretion standard, and we cannot say the trial court abused its discretion by concluding the Lópezes' failure to file adequate expert reports was the result of intentional or consciously indifferent conduct. Accordingly, the López family's second issue overruled.

CONCLUSION

Based on the foregoing, the trial court's judgment is affirmed.

All Citations

131 S.W.3d 54

Footnotes

- 1 A dental bridge is “a partial denture anchored to adjacent teeth.” WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 179 (9th ed.1991).
- 2 See *Jenkins v. Montemayor*, No. 04–03–00174–CV, 2003 WL 21653881, *1 (Tex.App.-San Antonio July 16, 2003, no pet.). In our opinion, we noted that we would assess costs against the López family regarding appellees Douglas Caceres, M.D., individually and d/b/a Star Anesthesia, P.A., Star Anesthesia, P.A., Leo Cuello, M.D., and Baptist Health System d/b/a Baptist Medical Center upon the final disposition of the appeal.
- 3 We express no opinion as to whether Goodman's report adequately sets forth the elements of applicable standard of care and breach.
- 4 [Article 4590i section 13.01\(i\)](#) provides:
[n]otwithstanding any other provision of this section, a claimant may satisfy any requirement of this section for filing an expert report by filing reports of separate experts regarding different physicians or health care providers or regarding different issues arising from the conduct of a physician or health care provider, such as issues of liability and causation. Nothing in this section shall be construed to mean that a single expert must address all liability and causation issues with respect to all physicians or health care providers or with respect to both liability and causation issues for a physician or health care provider.
[TEX.REV.CIV. STAT. ANN. art. 4590i, § 13.01\(i\)](#) (Vernon Supp.2003).
- 5 In support of their position, the López family cites *City of Houston v. Cantwell*, No. 01–90–01045–CV, 1993 WL 271029, *1 (Tex.App.-Houston [1st Dist.] July 22, 1993, no writ)(not designated for publication) (holding assessment of death penalty sanction for failing to respond to discovery request was excessive where party's failure to respond to discovery was not the result of flagrant bad faith or counsel's callous disregard for his responsibilities of discovery under the rules; rather, the party's failure was related to counsel's illness and subsequent death) and *Tischler v. Watts*, 177 N.J. 243, 827

[A.2d 1036, 1038 \(2003\)](#) (holding extraordinary circumstances existed so as to justify an attorney's failure to file adequate expert report where attorney learned he had advanced stage lung cancer during the course of his representation of client).

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KeyCite Yellow Flag - Negative Treatment

Distinguished by [Chilkewitz v. Hyson](#), Tex., October 21, 1999

686 S.W.2d 610

Supreme Court of Texas.

Wiley E. HILL, Petitioner,

v.

Dr. John C. MILANI, Jr., Respondent.

No. C-3612.

|

March 13, 1985.

Patient brought malpractice action alleging negligent treatment of snake bite. The 207th District Court, Comal County, Robert T. Pfeuffer, J., entered summary judgment for physician, and patient appealed. The Court of Appeals, [678 S.W.2d 203](#), affirmed, and patient sought further review. The Supreme Court, Robertson, J., held that two-year limitation period applicable to medical malpractice action was not tolled by physician's temporary absence from state.

Affirmed.

West Headnotes (1)

[1] Limitation of Actions **Person Liable in General**

Two-year limitation period applicable to action against physician for negligent treatment of a snake bite was not tolled by physician's temporary absence from state. [Vernon's Ann.Texas Civ.St. arts. 4590i, § 10.01, 5537](#).

[29 Cases that cite this headnote](#)**Attorneys and Law Firms**

***610** Gibbins, Burrow & Bratton, R. Louis Bratton, Austin, for petitioner.

Pierre A. Kleff, Jr., Killeen, for respondent.

Opinion

ROBERTSON, Justice.

This is an appeal from a summary judgment construing the two-year limitations provision of the Medical Liability and Insurance Improvement Act of Texas, [Tex.Rev.Civ.Stat.Ann. art. 4590i § 10.01](#) (Vernon Supp.1985).

On August 24, 1980, Wiley E. Hill was bitten by a rattlesnake and treated by Dr. John C. Milani, Jr. Hill filed suit on November 2, 1982, alleging that Dr. Milani was negligent in treating the snakebite. ***611** Dr. Milani moved for summary judgment, alleging that Hill's action was barred by limitations.

At the summary judgment hearing, argument focused on the question of whether [Tex.Rev.Civ.Stat.Ann. art. 5537](#) (Vernon 1958) tolled the limitations period while Dr. Milani was absent from the state. The judgment, in fact, recites a stipulation that the interaction of [art. 5537](#) and [art. 4590i § 10.01](#) was the sole issue in dispute. This stipulation was facially valid as a Rule 11 agreement, under this court's decision in [City of Houston v. Clear Creek Basin Authority](#), [589 S.W.2d 671, 677](#) (Tex.1979), and its validity is not questioned by point of error in this court. *See* [Tex.R.Civ.P. 11](#). In view of this stipulation, the trial court declined to consider, on motion for rehearing of the summary judgment, the new question of whether the limitations period was tolled for a period of 75 days by the timely sending of a notice letter. [Tex.Rev.Civ.Stat.Ann. art. 4590i § 4.01\(a\), \(c\)](#) (Vernon Supp.1985). Petitioner does not complain of this action.

The sole issue thus presented for this court's consideration is whether the tolling provision of [art. 5537](#) affects the two-year limitation provision of [art. 4590i § 10.01](#). The trial court held that it does not, and granted defendant's motion for summary judgment. The court of appeals affirmed. [678 S.W.2d 203](#). We affirm the judgments of the courts below.

Article 4590i § 10.01 provides, in relevant part, that

“Notwithstanding any other law, no health care liability claim may be commenced unless the action is filed within two years from the occurrence of the breach or tort or

from the date the medical or health care treatment that is the subject of the claim or the hospitalization for which the claim is made is completed....”

(emphasis added) The language of the statute is clear and exclusive. Elsewhere in the Medical Liability and Insurance Improvement Act, limited tolling provisions are contained, suspending the statute during minority, § 10.01, and upon the giving of notice. § 4.01(c). [Article 5537](#) is

not part of the statutory scheme for medical malpractice claims envisioned by the legislature, and is part of the “other law” expressly made inapplicable by operation of statute.

For the foregoing reasons, the judgments of the courts below are affirmed.

All Citations

686 S.W.2d 610

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Vernon's Texas Statutes and Codes Annotated
Civil Practice and Remedies Code (Refs & Annos)
Title 4. Liability in Tort
Chapter 74. Medical Liability (Refs & Annos)
Subchapter B. Notice and Pleadings

V.T.C.A., Civil Practice & Remedies Code § 74.051

§ 74.051. Notice

Effective: September 1, 2003

[Currentness](#)

(a) Any person or his authorized agent asserting a health care liability claim shall give written notice of such claim by certified mail, return receipt requested, to each physician or health care provider against whom such claim is being made at least 60 days before the filing of a suit in any court of this state based upon a health care liability claim. The notice must be accompanied by the authorization form for release of protected health information as required under [Section 74.052](#).

(b) In such pleadings as are subsequently filed in any court, each party shall state that it has fully complied with the provisions of this section and [Section 74.052](#) and shall provide such evidence thereof as the judge of the court may require to determine if the provisions of this chapter have been met.

(c) Notice given as provided in this chapter shall toll the applicable statute of limitations to and including a period of 75 days following the giving of the notice, and this tolling shall apply to all parties and potential parties.

(d) All parties shall be entitled to obtain complete and unaltered copies of the patient's medical records from any other party within 45 days from the date of receipt of a written request for such records; provided, however, that the receipt of a medical authorization in the form required by [Section 74.052](#) executed by the claimant herein shall be considered compliance by the claimant with this subsection.

(e) For the purposes of this section, and notwithstanding Chapter 159, Occupations Code, or any other law, a request for the medical records of a deceased person or a person who is incompetent shall be deemed to be valid if accompanied by an authorization in the form required by [Section 74.052](#) signed by a parent, spouse, or adult child of the deceased or incompetent person.

Credits

Added by [Acts 2003, 78th Leg., ch. 204, § 10.01, eff. Sept. 1, 2003](#).

[Notes of Decisions \(60\)](#)

V. T. C. A., Civil Practice & Remedies Code § 74.051, TX CIV PRAC & REM § 74.051

Current through the end of the 2015 Regular Session of the 84th Legislature



KeyCite Yellow Flag - Negative Treatment

Declined to Extend by [College Station Medical Center, LLC v. Kilaspa](#),
Tex.App.-Waco, July 23, 2015

339 S.W.3d 68

Supreme Court of Texas.

JOSE CARRERAS, M.D., P.A., Petitioner,

v.

Carlos Francisco MARROQUIN, et al., Respondents.

No. 09–0857.

|

Argued Oct. 14, 2010.

|

Decided April 1, 2011.

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Rehearing Denied June 10, 2011.

Synopsis

Background: Parents brought medical malpractice action against physician who allegedly caused their adult child's death by providing insufficient post-surgery treatment. The 206th District Court, Hidalgo County, [Rose Guerra Reyna, J.](#), denied physician's motion for summary judgment, which claimed that action was barred by applicable statute of limitations. Physician filed interlocutory appeal. The Corpus Christi–Edinburg Court of Appeals, [297 S.W.3d 420](#), affirmed. Physician petitioned for review.

[Holding:] The Supreme Court, [Wainwright, J.](#), held that notice of claim given to physician without statutorily required authorization form did not toll the limitations period, abrogating [Hill v. Russell](#), [247 S.W.3d 356](#).

Judgment of Court of Appeals reversed and rendered.

West Headnotes (7)

[1] Courts

🔑 Review by or certificate to Supreme Court by Court of Civil Appeals of questions where its decision conflicts with or overrules that of another Court of Civil Appeals or that of the Supreme Court

Supreme Court had jurisdiction over appeal of opinion of Court of Appeals holding that failing to accompany notice with an authorization form does not prevent tolling of the statute of limitations, but merely allows the defendant to obtain an abatement until 60 days after the authorization form is received, as opinion conflicted with two other appellate courts' opinions. [V.T.C.A., Government Code §§ 22.001\(e\), 22.225\(e\)](#).

[5 Cases that cite this headnote](#)

[2] Appeal and Error

🔑 Cases Triable in Appellate Court

Supreme Court reviews issues of statutory construction and summary judgments de novo.

[2 Cases that cite this headnote](#)

[3] Limitation of Actions

🔑 Pendency of Action or Other Proceeding

Notice of health care liability claim given to health care provider without statutorily required authorization form for release of protected health information did not toll the two-year limitations period applicable to claim; abrogating [Hill v. Russell](#), [247 S.W.3d 356](#). [V.T.C.A., Civil Practice & Remedies Code §§ 74.051\(a, c\), 74.052\(a, b\), 74.251\(a\)](#).

[14 Cases that cite this headnote](#)

[4] Statutes

🔑 Language

Statutory interpretation begins by examining the text of the statute.

[1 Cases that cite this headnote](#)

[5] Health

🔑 Notice

The purpose of statute requiring that written notice of a health care liability claim be given to the health care provider is to encourage negotiations and settlement of disputes prior to suit, thereby reducing litigation costs.

V.T.C.A., Civil Practice & Remedies Code § 74.051(a).

9 Cases that cite this headnote

[6] Statutes

🔑 Unintended or unreasonable results; absurdity

Statutes are interpreted to avoid an absurd result.

10 Cases that cite this headnote

[7] Limitation of Actions

🔑 Pendency of Action or Other Proceeding

For the statute of limitations to be tolled in a health care liability claim pursuant to statute providing for tolling if notice of the claim is given as statutorily provided to the health care provider, a plaintiff must provide both the statutorily required notice and the statutorily required authorization form for release of protected health information. V.T.C.A., Civil Practice & Remedies Code §§ 74.051(a, c), 74.052(a, b), 74.251(a).

15 Cases that cite this headnote

Attorneys and Law Firms

*69 [Ida Cecilia Garza](#), [Ronald G. Hole](#), Hole & Alvarez, L.L.P., McAllen, for Jose Carreras M.D., P.A.

[Fernando G. Mancias](#), Law Office of Fernando G. Mancias, PLLC, [Fabian Guerrero](#), Edinburg, for Carlos Francisco Marroquin.

Opinion

Justice [WAINWRIGHT](#) delivered the opinion of the Court.

In this dispute, parents brought wrongful death claims against a physician who allegedly caused their adult child's death. The parents attempted to toll the statute of limitations by sending pre-suit notice of their health care liability claims to the physician shortly before the statute of limitations ran, but failed to accompany it with an authorization form for the release of their daughter's medical information as required by Chapter 74 of the

Texas Civil Practice and Remedies Code. After the parents filed suit, the doctor moved for summary judgment, arguing that the notice alone did not toll the statute of limitations, and the suit therefore was untimely. The trial court denied the motion and entered an agreed order permitting appeal. *See* [TEX. CIV. PRAC. & REM. CODE § 51.014\(d\)](#). The court of appeals affirmed the denial. [297 S.W.3d 420, 424 \(Tex.App.-Corpus Christi-Edinburg 2009, pet. granted\)](#). Because we hold that Chapter 74 requires that an authorization form accompany the provision of notice for the statute of limitations to be tolled, we reverse and render.

I. FACTUAL AND PROCEDURAL BACKGROUND

Twenty-three-year-old Priscilla Marroquin fell off a bicycle and broke her leg on December 16, 2001. Priscilla was treated at Starr County Hospital in Rio Grande City, Texas, and then transferred to Mission Hospital in Mission, Texas. At Mission Hospital, Dr. Jose Carreras operated on Priscilla's leg on December 18, 2001. Priscilla died on December 20, 2001 due to bilateral [pulmonary embolisms](#), bilateral [fat embolisms](#),¹ [respiratory depression](#), and [cardiac arrest](#) allegedly resulting from insufficient post-surgery treatment. Priscilla's parents, Carlos and Cynthia Marroquin (the Marroquins), prosecuted claims for damages resulting from Priscilla's wrongful death.

Health care liability claims are governed by special procedures in Chapter 74 of the Texas Civil Practice and Remedies Code. One of these is pre-suit notice; health care liability plaintiffs must provide written notice of a health care liability claim “by certified mail, return receipt requested, to each physician or health care provider against whom such claim is being made at least 60 days before the filing of a suit....” [TEX. CIV. PRAC. & REM. CODE § 74.051\(a\)](#). Providing notice of a health care liability claim will toll the statute of limitations for seventy-five days, if the notice is “given as provided” in Chapter 74. *Id.* [§ 74.051\(c\)](#). Chapter 74 requires that “notice must be accompanied by [an] authorization form for release of protected health information....” *Id.* [§ 74.051\(a\)](#). [Section 74.052](#) provides that failure to accompany notice with such an authorization results in an abatement of sixty days from the date an authorization is received. *Id.* [§ 74.052](#). The statute prescribes the form

*70 and content of the required authorization form. *Id.* § 74.052(c).

On December 17, 2003, two days before the two-year statute of limitations would have expired, the Marroquins provided Dr. Carreras with notice of their health care liability claims. However, the Marroquins did not send an authorization form to Dr. Carreras at that time. On February 26, 2004, the Marroquins filed suit in Hidalgo County. After his counsel refused to accept service on his behalf because of the possibility that the statute of limitations had run, Dr. Carreras was served personally. He filed a plea in abatement and answer objecting to the case proceeding because he had not received the statutorily required authorization and requesting an abatement under section 74.052. The trial court granted Dr. Carreras's plea in abatement on June 2, 2004.

Two weeks later, the Marroquins provided Dr. Carreras with another notice including a list of medical providers and an authorization form that complied with the federal Health Insurance Portability and Accountability Act of 1996 (HIPAA), but not with the state requirements under Chapter 74.² Counsel for Dr. Carreras sent a letter to the Marroquins on September 7, 2004 advising them that the authorization provided was not in the form specified by section 74.052. The Marroquins responded by providing Dr. Carreras with an authorization form on September 10, 2004 that complied with sections 74.051 and 74.052, approximately nine months after the Marroquins provided their original notice unaccompanied by an authorization and almost seven months after they filed suit.

Dr. Carreras moved for summary judgment, claiming that the Marroquins' claims were barred by the applicable statute of limitations. The Marroquins argued that notice was provided and the suit was filed within the statute of limitations as tolled by Chapter 74, and contended that the uncooperative nature of the defense counsel was responsible for the confusion regarding the authorization form. In a letter ruling, the trial court held that the requirement for notice and an authorization form under sections 74.051 and 74.052 were separate. Because notice had been given, the statute of limitations was tolled, notwithstanding the Marroquins' failure to simultaneously provide the statutorily required authorization. The trial court therefore denied Dr. Carreras's motion for summary judgment.³ The court

issued a written order for interlocutory appeal, and Dr. Carreras appealed. See TEX. CIV. PRAC. & REM.CODE § 51.014(d).⁴ The court of *71 appeals affirmed the trial court. 297 S.W.3d at 424. Dr. Carreras filed a petition for review with this Court, which we granted.

II. JURISDICTION AND STANDARD OF REVIEW

[1] Our jurisdiction over interlocutory appeals is limited. One ground for our jurisdiction is for cases in which “one court holds differently from another” on a question of law material to a decision of the case such that “there is inconsistency in their respective decisions that should be clarified to remove unnecessary uncertainty in the law and unfairness to litigants.” TEX. GOV'T CODE §§ 22.001(e), .225(e). We have jurisdiction over this petition as there are two courts of appeals opinions that conflict with two other appellate courts' opinions in interpreting the effect of sections 74.051 and 74.052 on tolling of the statute of limitations when a medical authorization form has not been provided as required under the statute. In *Nicholson v. Shimm*, the Houston First Court of Appeals held that “notice is not proper, and the statute of limitations [is] not tolled” when notice is provided without an authorization form or with a deficient authorization form. No. 01-07-00973-CV, 2009 WL 3152111, at *4 (Tex.App.-Houston [1st Dist.] Oct. 1, 2009, no pet.). A similar conclusion was reached by the El Paso Court of Appeals in *Rabatin v. Kidd*, where the court held that both notice and an authorization form were required to toll the statute of limitations. 281 S.W.3d 558, 562 (Tex.App.-El Paso 2008, no pet.). On the other hand, two courts of appeals—including the court of appeals in this case—have held that failing to accompany notice with an authorization form does not prevent tolling of the statute of limitations, but merely allows the defendant to obtain an abatement until sixty days after the authorization form is received. *Hill v. Russell*, 247 S.W.3d 356, 360 (Tex.App.-Austin 2008, no pet.); *Carreras*, 297 S.W.3d at 423–24.

[2] This is an interlocutory appeal certified by the trial court after denial of a motion for summary judgment. We review issues of statutory construction and summary judgments de novo. *McIntyre v. Ramirez*, 109 S.W.3d 741, 745 (Tex.2003); *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 215 (Tex.2003).

III. LAW AND ANALYSIS

[3] Health care liability claims have a two-year limitations period. [TEX. CIV. PRAC. & REM.CODE § 74.251\(a\)](#). There is no dispute that the Marroquins filed suit more than two years after their causes of action against Dr. Carreras accrued. However, the Civil Practice and Remedies Code provides for tolling of the statute of limitations for a health care liability claim if notice of the claim is “given as provided” in Chapter 74 to the health care provider. *Id.* §§ 74.051, .052. [Section 74.051\(a\)](#) requires that “notice must be accompanied by [an] authorization form for release of protected health information as required under [Section 74.052](#),” permitting the health care provider access to the claimant’s pertinent medical records. *Id.* § 74.051(a). The question before us is whether notice provided without an authorization form is considered to be given “as provided” in Chapter 74 and effective to toll the statute of limitations, or whether notice given without an authorization form is insufficient to toll limitations.

[4] Statutory interpretation begins by examining the text of the statute. [McIntyre](#), 109 S.W.3d at 745. [Section 74.051](#) provides:

(a) Any person or his authorized agent asserting a health care liability claim shall give written notice of such claim by *72 certified mail, return receipt requested, to each physician or health care provider against whom such claim is being made at least 60 days before the filing of a suit in any court of this state based upon a health care liability claim. *The notice must be accompanied by the authorization form for release of protected health information as required under [Section 74.052](#).*

(c) *Notice given as provided in this chapter shall toll the applicable statute of limitations to and including a period of 75 days following the giving of the notice, and this tolling shall apply to all parties and potential parties.*

[TEX. CIV. PRAC. & REM.CODE § 74.051\(a\)](#), (c) (emphasis added). In addition, [section 74.052](#) provides:

(a) Notice of a health care claim under [Section 74.051](#) must be accompanied by a medical authorization in the form specified by this section. Failure to provide this authorization along with the notice of health care claim shall abate all further proceedings against the physician

or health care provider receiving the notice until 60 days following receipt by the physician or health care provider of the required authorization.

(b) If the authorization required by this section is modified or revoked, the physician or health care provider to whom the authorization has been given shall have the option to abate all further proceedings until 60 days following receipt of a replacement authorization that must comply with the form specified by this section.

Id. § 74.052(a),(b).

The text of [section 74.051\(c\)](#), which states that notice must be “given as provided,” does not provide a facial definition of notice. Both [sections 74.051\(a\)](#) and [74.052\(a\)](#) specify that the notice “must be accompanied by” an authorization form, and [section 74.052\(a\)](#) provides for abatement if an authorization form is not provided “along with” notice. *Id.* §§ 74.051(a), .052(a). “Must accompany” is a directive that creates a mandatory condition precedent. See [Helena Chem. Co. v. Wilkins](#), 47 S.W.3d 486, 494 (Tex.2001) (holding that the legislated requirement that a person “must” perform an act creates a condition precedent (citing [TEX. GOVT CODE § 311.016\(3\)\)](#)). If the authorization does not accompany the notice, then the benefit of the notice—tolling—may not be utilized.

The statutory history of these two sections bolsters our interpretation. The Legislature originally introduced the notice requirement provision in [section 74.051](#) as part of the Medical Liability and Insurance Improvement Act (MLIIA) in 1977. Medical Liability and Insurance Improvement Act, 65th Leg., R. S., ch. 817, § 4.01, 1977 Tex. Gen. Laws 2039, 2047–48, *repealed by* Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 10.09, 2003 Tex. Gen. Laws 847, 884. The original language of the statute provided, as it does now, that any person asserting a health care liability claim must give written notice to the health care provider at least sixty days before filing suit. *Id.* However, it did not include the last sentence in the successor provision, [section 74.051\(a\)](#). At that time, written notice of a claim would trigger tolling. The notice requirement remained unchanged until 2003. In House Bill 4 in 2003, the MLIIA was codified in Chapter 74 of the Civil Practice and Remedies Code, and the Legislature added specific language to [section 74.051\(a\)](#) requiring that notice of a health care liability claim “must be accompanied” by a medical authorization *73 form.⁵

TEX. CIV. PRAC. & REM.CODE § 74.051(a). Although notice and a medical authorization are treated separately for some purposes, after the 2003 amendment to the text, both are required to constitute notice “as provided” by Chapter 74.

[5] This interpretation also follows from the purpose of the notice provision, which is to encourage negotiations and settlement of disputes prior to suit, thereby reducing litigation costs. *Garcia v. Gomez*, 319 S.W.3d 638, 643 (Tex.2010). The Legislature intended that “by requiring a potential claimant to authorize the disclosure of otherwise privileged information sixty days before suit is filed, the statute [would] provide[] an opportunity for health care providers to investigate claims and possibly settle those with merit at an early stage.” *In re Collins*, 286 S.W.3d 911, 916–17 (Tex.2009). By encouraging pre-suit negotiation and settlement, the authorization requirement furthers an original goal of the MLIIA, resolving claims before suit is filed. Conversely, allowing the advantages of tolling the statute of limitations without provision of an authorization form would undermine the Legislature's intention to provide a method for quick, efficient settlement of claims and to identify non-meritorious claims early. If an authorization form is not provided pre-suit, the pre-suit negotiation period triggered by the notice requirement would become meaningless, as doctors receiving notice without an authorization form could not procure medical records from other physicians or institutions to investigate the claims asserted against them. The statute of limitations is tolled only if both notice and an authorization form are provided.

[6] We also interpret statutes to avoid an absurd result. *City of Rockwall v. Hughes*, 246 S.W.3d 621, 625–26 (Tex.2008) (“[W]e construe the statute's words according to their plain and common meaning ... unless such a construction leads to absurd results.”). If the authorization form was not considered a part of the notice requirement, an absurd result would be possible under Chapter 74. Section 74.052(a) provides that “[f]ailure to provide [the] authorization along with the notice of health care claim shall abate all further proceedings ... until 60 days following receipt by the physician or health care provider of the required authorization.” TEX. CIV. PRAC. & REM.CODE § 74.052(a). This language does

not set a deadline by which plaintiffs must abide. Instead, the abatement could continue at the plaintiff's leisure until sixty days after the plaintiff chooses to provide the defendant with an authorization. It is not reasonable to interpret a statute which is meant to provide speedy resolution of meritorious health care liability claims and quick dismissal of nonmeritorious claims to allow a lengthy or indefinite delay of the resolution of a health care liability claim.

The Marroquins argue, and the court of appeals held, that service of an authorization form is unnecessary to toll the statute of limitations because a separate remedy—abatement—is provided for failure to accompany notice with an authorization form. See *id.* § 74.052(b). However, the abatement has a use in situations in which the tolling provision is not at issue. If notice is provided without an authorization well within the statute of limitations, and the case could be filed sixty days later and still fall within the limitations period, the *74 defendant's statutory remedy is to halt proceedings until an authorization form is received. The abatement remedy fulfills that purpose.

IV. CONCLUSION

[7] Accordingly, considering the text, history, and purpose of the statutes at issue, we conclude that for the statute of limitations to be tolled in a health care liability claim pursuant to Chapter 74, a plaintiff must provide both the statutorily required notice and the statutorily required authorization form. The Marroquins did not provide the statutorily required authorization form until after the statute of limitations expired, their claims were untimely, and the court of appeals erred in holding that Chapter 74 does not bar tolling of limitations when a plaintiff provides the required pre-suit notice without also providing the required medical authorization form. Accordingly, we reverse the judgment of the court of appeals and render judgment that the Marroquins take nothing.

All Citations

339 S.W.3d 68, 54 Tex. Sup. Ct. J. 788

Footnotes

- 1 A pulmonary embolism is “the closure of the pulmonary artery or one of its branches by an embolus.” DORLAND’S ILLUSTRATED MEDICAL DICTIONARY 614 (31st ed.2007). An embolus is “a mass, which may be a blood clot or some other material, that is brought by the bloodstream through the vasculature, lodging in a vessel or bifurcation too small to allow it to pass, obstructing the circulation.” *Id.* A fat embolism is “an embolism caused by fat that has entered the circulation, especially after fractures of large bones.” *Id.* at 613.
- 2 The HIPAA authorization form was signed by Cynthia Marroquin, Priscilla’s mother, and witnessed on November 10, 2003, over a month before the Marroquins gave Dr. Carreras notice of their claims. The Marroquins do not explain why it was not sent to Dr. Carreras with the original notice.
- 3 Prior to the interlocutory appeal at issue here, Dr. Carreras also brought an interlocutory appeal pursuant to [Texas Civil Practice and Remedies Code section 51.014\(a\)\(9\)](#) challenging the trial court’s denial of Dr. Carreras’s motion for dismissal and sanctions, in which he claimed the Marroquins’ expert report was untimely and insufficient. The court of appeals affirmed the trial court’s ruling, and we denied the petition for review. [Carreras v. Marroquin, No. 13–05–082–CV, 2005 WL 2461744 \(Tex.App.-Corpus Christi–Edinburg Oct. 6, 2005, pet. denied\)](#).
- 4 In 2005, the Legislature amended [section 51.014](#) (“Appeal from Interlocutory Order”) to allow a trial court, with agreement of the parties, by written order to certify an interlocutory appeal on a “controlling question of law as to which there is substantial ground for difference of opinion.” Act of May 27, 2005, 79th Leg., R.S., ch. 1051 § 1, 2005 Tex. Gen Laws 3512, 3512–13 (current version at [TEX. CIV. PRAC. & REM.CODE § 51.014\(d\)](#)).
- 5 HIPAA, enacted in 1996, includes a general rule requiring authorization prior to use or disclosure of medical records. Health Insurance Portability and Accountability Act of 1996, [Pub.L. No. 104–191, § 262, 110 Stat.1936](#), 2021–31 (codified as amended at [42 U.S.C. §§ 1320d to 1320d–8 \(2006\)](#)).

923 S.W.2d 569
Supreme Court of Texas.

Kenny THOMPSON, individually and on
Behalf of the Estate of Youlanda Thompson,
an adult now deceased, Melissa Lay, Alicia
Pitts and Mary Johnson, Petitioners,

v.

COMMUNITY HEALTH INVESTMENT
CORPORATION d/b/a Colonial Hospital,
Community Health Systems of Texas, Inc. and
CHS Management Corporation, Respondents.

No. 95-0335.

|
April 12, 1996.

|
Rehearing Overruled July 8, 1996.

In health care provider liability case, the 86th District Court, Kaufman County, [Glen M. Ashworth, J.](#), granted corporate defendant's motion for summary judgment based on two-year statute of limitations. Plaintiffs appealed. The Court of Appeals, [892 S.W.2d 440](#), affirmed, and application for writ of error was filed. The Supreme Court held that presuit notice letter sent to administrator at physical address of hospital facility at which patient was treated satisfied presuit notice requirement and tolled statute of limitations with respect to former owner of hospital.

Application granted; reversed and remanded.

West Headnotes (8)

[1] **Health**

🔑 **Notice**

Under Medical Liability and Insurance Improvement Act, claimant must send notice to each physician or health care provider against whom health care liability claim is being made at least 60 days before filing of suit. [Vernon's Ann.Texas Civ.St. art. 4590i, § 4.01\(a\)](#).

[1 Cases that cite this headnote](#)

[2] **Health**

🔑 **Limitations; Time Requirements**

Two-year statute of limitations applies to all health care liability claims. [Vernon's Ann.Texas Civ.St. art. 4590i, § 10.01](#).

[Cases that cite this headnote](#)

[3] **Limitation of Actions**

🔑 **Pendency of Action or Other Proceeding**

Proper presuit notice provided by claimant within two-year statute of limitations applicable to health care liability claims tolls limitations period for 75 days not only as to health care provider who actually received notice before limitations ran but as to all parties and potential parties as well. [Vernon's Ann.Texas Civ.St. art. 4590i, § 4.01\(c\)](#).

[3 Cases that cite this headnote](#)

[4] **Limitation of Actions**

🔑 **Pendency of Action or Other Proceeding**

After expiration of 75-day tolling period triggered by claimant's proper presuit notice, remaining portion of two-year statute of limitations governing health care liability claims continues to run. [Vernon's Ann.Texas Civ.St. art. 4590i, §§ 4.01\(c\), 10.01](#).

[2 Cases that cite this headnote](#)

[5] **Limitation of Actions**

🔑 **Pendency of Action or Other Proceeding**

Presuit notice letter sent to administrator at physical address of hospital facility at which patient was treated was notice to "physician or health care provider against whom such claim is being made" within meaning of tolling provision of Medical Liability and Insurance Improvement Act, and letter tolled statute of limitations with respect to former corporate owner of hospital. [Vernon's Ann.Texas Civ.St. art. 4590i, § 4.01\(a\)](#).

[2 Cases that cite this headnote](#)

[6] Health **Notice**

Medical Liability and Insurance Improvement Act does not provide that presuit notice is operative only if those receiving it are ultimately found to have liability, and does not even require that all those receiving notice be joined in any subsequent suit; rather, Act only requires that notice be sent to each physician or health care provider against whom such claim is being made 60 days before filing of suit in any court. [Vernon's Ann.Texas Civ.St. art. 4590i, § 4.01\(a\)](#).

[3 Cases that cite this headnote](#)

[7] Courts **Grounds**

Application for writ of error to state Supreme Court was not subject to dismissal for want of jurisdiction due to fact that point of error submitted in application differed from point of error contained in motion for rehearing filed with Court of Appeals; there was no material difference in points of error.

[Cases that cite this headnote](#)

[8] Appeal and Error **Nature or Subject-Matter in General****Appeal and Error** **Estoppel to Allege Error**

Defendant could not argue on appeal that plaintiffs voluntarily nonsuited defendant by omitting it from their amended petition where defendant never raised such argument at trial level and in fact invoked power of trial court several times after plaintiffs filed amended petition.

[Cases that cite this headnote](#)

***570** Appeal from Dallas Court of Appeals, Fifth Judicial District; [James A. Baker](#), Justice.

Attorneys and Law Firms

[Charles H. Clark](#), Tyler, for Petitioners.

[Roger S. Lenox](#), [Ben Taylor](#), [Jonathan B. Skidmore](#), [Walter A. Herring](#), Dallas, for Respondents.

Opinion

PER CURIAM.

This case presents the question of whether presuit notice to a hospital tolls the statute of limitations with respect to a former owner of the hospital under section 4.01 of the Medical Liability and Insurance Improvement Act. [TEX.REV.CIV.STAT.ANN. art. 4590i, § 4.01\(c\)](#). Because we conclude under the facts of this case that the notice was sufficient, we reverse the judgment of the court of appeals, [892 S.W.2d 440](#), and remand this case for trial.

Youlanda Thompson died on September 21, 1990, at Colonial Hospital in Terrell, Texas. Kenny Thompson, individually and on behalf of the estate of Youlanda Thompson, Melissa Lay, Alicia Pitts, and Mary Johnson ***571** (collectively, the Thompsons) brought a health care liability action. At the time of Youlanda Thompson's death, CHS Management Corporation owned Colonial Hospital.

In August 1991, prior to the time that the Thompsons filed suit, CHS Management Corporation transferred the assets of Colonial Hospital to a subsidiary called Colonial Hospital, Inc. In September 1991, CHS Management Corporation sold Colonial Hospital, Inc. to Epic Health Care Management (Epic). In October 1991, CHS Management Corporation changed its name to Community Health Investment Corporation (CHIC). The summary judgment evidence indicates that the hospital facility at which Youlanda Thompson was treated continues to operate as "Colonial Hospital."

In preparing a presuit notice letter, an employee of the Thompsons' counsel called Colonial Hospital and was given the name of Lee Brown as its administrator. She also called the Secretary of State's office and inquired about the corporate status of Colonial Hospital of Terrell, Texas. She was told that Colonial Hospital had merged with Community Health Systems of Texas, Inc., that this entity had changed its name to CHS Management Corporation, and that there had been a further name change to

Community Health Investment Corporation. She was unaware that the hospital facility, formerly an asset of CHIC, was no longer owned by CHIC. The initial notice letter under [section 4.01](#) was sent within the two-year limitations period to “Lee Brown, Colonial Hospital,” at the physical address of the hospital facility. CHIC was located in Houston. Lee Brown at Colonial Hospital received the notice, and it was forwarded to CHIC. CHIC received this notice on October 5, 1992, more than two years after the death of Youlanda Thompson.

The Thompsons filed suit on October 28, 1992, against CHIC, alleging that CHIC was doing business as Colonial Hospital; Community Health Systems of Texas, Inc.; and CHS Management Corporation. CHIC moved for summary judgment, contending that the Thompsons' presuit notice to Colonial Hospital did not toll the limitations period with respect to CHIC. The trial court granted CHIC's motion. On appeal, the court of appeals affirmed, concluding that Lee Brown was not a proper party for notice purposes under [section 4.01\(a\)](#). [892 S.W.2d at 444](#). Only Melissa Lay and Mary Johnson have perfected an application for writ of error to this Court.

[1] [2] [3] [4] The Medical Liability and Insurance Improvement Act (the Act) provides that a claimant must send notice to each physician or health care provider against whom a health care liability claim is being made at least sixty days before the filing of suit. [TEX.REV.CIV.STAT.ANN. art. 4590i, § 4.01\(a\)](#).¹ A two-year statute of limitations applies to all health care liability claims. *Id.* § 10.01. Proper presuit notice provided by the claimant within this initial two-year period tolls the two-year limitations period for seventy-five days not only as to the health care provider who actually received the notice before limitations ran, but “to all parties and potential parties” as well. *Id.* § 4.01(c); *De Checa v. Diagnostic Ctr. Hosp., Inc.*, [852 S.W.2d 935, 937–38 \(Tex.1993\)](#). After the expiration of seventy-five days, the remaining portion of the limitations period continues to run. *De Checa*, [852 S.W.2d at 937](#).

*572 [5] The limitations period applicable to petitioners' claims would be tolled under [section 4.01](#) if either the notice sent to “Colonial Hospital” but forwarded and actually received by CHIC constitutes adequate notice under the statute to CHIC, or if notice to “Colonial Hospital” is notice to a “physician or health care provider against whom such claim is being made” within the

meaning of [section 4.01\(a\)](#). We conclude that at a minimum, the presuit letter sent to “Colonial Hospital” meets the latter notice requirement.

[6] Youlanda Thompson was treated at the physical facility to which notice was sent. At the time of the presuit notice, petitioners were asserting a claim against that health care provider, although they mistakenly believed it to be one and the same as CHIC. They were unaware that the facility itself had been conveyed through various corporate transactions to another entity. The notice sent to “Colonial Hospital” was received by a health care provider conducting business at the physical location of the facility in which Youlanda Thompson was treated. The Act does not require that presuit notice is operative only if those receiving it are ultimately found to have liability. The Act does not even require that all those receiving presuit notice be joined in any subsequent suit. The Act only requires that presuit notice be sent “to each physician or health care provider against whom such claim is being made” sixty days before the filing of suit in any court. [TEX.REV.CIV.STAT.ANN. art. 4590i, § 4.01\(a\)](#).

As a practical matter, plaintiffs who find themselves in a situation similar to the petitioners may not be able to determine readily with which entity a potential liability rests. The filing of suit and discovery may be required to determine if particular liabilities have been assigned, assumed or retained in corporate transactions. CHIC was actually notified and made a party to the suit within the two year and seventy-five day period.

There is no contention that the notice sent to the administrator of “Colonial Hospital” was collusive or fraudulent. The requirements of [section 4.01\(a\) and \(c\)](#) are met under these circumstances.

Because notice to one health care provider tolls the statute with respect to all health care providers against whom a claim is being made, *De Checa*, [852 S.W.2d at 937–38](#), the statute of limitations was tolled as to CHIC. Summary judgment in favor of CHIC was improper.

[7] In its motion to dismiss for want of jurisdiction, CHIC argues that the petitioners failed to preserve error in this Court because they submitted a point of error in their application that differs from the point of error contained in the motion for rehearing filed with the court of appeals.² This Court has asserted jurisdiction where

a petitioner articulates its point of error in this Court differently from its point of error in the court of appeals on the grounds that no material difference existed between the two points of error. See *Thomas v. Oldham*, 895 S.W.2d 352, 358 (Tex.1995).

We find that the point of error raised by Melissa Lay and Mary Johnson in their motion for rehearing in the court of appeals does not materially differ from the point of error raised in this Court. For this reason, we overrule CHIC's motion.

[8] We note that CHIC argues the Thompsons voluntarily nonsuited CHIC by omitting it from their Second Amended Petition. However, CHIC never raised this argument in the trial court. In fact, CHIC invoked

the power of the trial court several *573 times after the Thompsons filed their second amended petition, including moving for summary judgment on the basis of limitations. On these facts, we decline to conclude that CHIC was nonsuited.

Accordingly, pursuant to TEX.R.APP.P. 170, this Court grants the application for writ of error; and, without hearing oral argument, we reverse the judgment of the court of appeals as to Melissa Lay and Mary Johnson and remand this case for further proceedings.

All Citations

923 S.W.2d 569, 39 Tex. Sup. Ct. J. 477

Footnotes

1 The relevant sections of the Act provide:

Sec. 4.01. (a) Any person or his authorized agent asserting a health care liability claim shall give written notice of such claim by certified mail, return receipt requested, to each physician or health care provider against whom such claim is being made at least 60 days before the filing of a suit in any court of this state based upon a health care liability claim.

.....

(c) Notice given as provided in this Act shall toll the applicable statute of limitations to and including a period of 75 days following the giving of the notice, and this tolling shall apply to all parties and potential parties.

.....

Sec. 10.01. Notwithstanding any other law, no health care liability claim may be commenced unless the action is filed within two years from the occurrence of the breach or tort or from the date the medical or health care treatment that is the subject of the claim or the hospitalization for which the claim is made is completed.... Except as herein provided, this subchapter applies to all persons regardless of minority or other legal disability.

TEX.REV.CIV.STAT.ANN. art. 4590i.

2 Melissa Lay and Mary Johnson assigned the following point of error in their motion for rehearing in the court of appeals: The court of appeals erred in overruling point of error one because no evidence or, in the alternative, insufficient evidence, supports the trial court's granting of Defendants' Motion for Summary Judgment on the basis that the two (2) year statute of limitations had expired because there are questions of fact as to whether or not Plaintiffs' cause of action was barred by the two year statute of limitations.

Melissa Lay and Mary Johnson assigned the following point of error in their application to this Court:

The Court of Appeals erred in holding that no genuine issue of material fact was present as to whether limitations barred Plaintiffs' claim of negligence brought under the Texas Survival Statute.



KeyCite Yellow Flag - Negative Treatment

Declined to Follow by [Mummert v. Alizadeh](#), Md., October 18, 2013

841 S.W.2d 343

Supreme Court of Texas.

Betty Parr RUSSELL, Individually and as
Independent Executrix of the Estate of Donnon
O'Neal Russell, Deceased, et al., Petitioners,

v.

INGERSOLL-RAND
COMPANY, et al., Respondents.

No. D-0489.

|

Oct. 14, 1992.

|

Rehearing Overruled Dec. 9, 1992.

Surviving family members of sandblaster-painter who died of silicosis asserted claims against companies that had manufactured or distributed products containing silica. The 61st District Court, Harris County, [Shearn Smith, J.](#), granted defendants' motions for summary judgment on statute of limitations grounds, and plaintiffs appealed. The Court of Appeals, [795 S.W.2d 243](#), affirmed, and plaintiffs applied for writ of error. The Supreme Court, [Hecht, J.](#), held that if decedent's action for injuries would have been barred by limitations had it been asserted immediately prior to his death, survival action and wrongful death actions based on same alleged wrong are likewise barred.

Affirmed.

Doggett, J., filed opinion concurring and dissenting, in which Mauzy, J., joined.

[Gammage, J.](#), filed opinion concurring and dissenting.

West Headnotes (5)

[1] **Death**

🔑 Compensation for Loss or Injury
Resulting from Death in General

Death

🔑 Medical and Funeral Expenses

Damages recoverable in survival action are those which decedent himself sustained while he was alive and not any damages claimed independently by survival action plaintiffs, except that funeral expenses may also be recovered if they were not awarded in wrongful death action. [V.T.C.A., Civil Practice & Remedies Code § 71.021](#).

58 Cases that cite this headnote

[2] **Death**

🔑 Apportionment and Distribution of Amount Recovered

Any recovery obtained in survival action flows to those who would have received it had decedent obtained recovery immediately prior to death, i.e., to decedent's heirs, legal representatives and estate. [V.T.C.A., Civil Practice & Remedies Code § 71.021](#).

42 Cases that cite this headnote

[3] **Death**

🔑 Defenses

Defenses that could have been raised against claim by injured person may also be raised against same claim asserted by person's heirs and estate.

6 Cases that cite this headnote

[4] **Death**

🔑 Right of Action of Person Injured

If decedent's action for injuries would have been barred by limitations had it been asserted immediately prior to his death, survival action based on same alleged wrong is likewise barred. [V.T.C.A., Civil Practice & Remedies Code §§ 16.003\(b\), 16.062](#).

55 Cases that cite this headnote

[5] **Death**

🔑 Right of Action of Person Injured

If injured person's action to recover for injuries would have been barred by limitations at time of his death, wrongful death action

based on same conduct is also barred.
[V.T.C.A., Civil Practice & Remedies Code §§ 16.003\(b\), 71.003\(a\).](#)

[23 Cases that cite this headnote](#)

Attorneys and Law Firms

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OPINION

[HECHT](#), Justice.

If an individual's action for personal injuries would have been barred by limitations ***344** at the time of his death, are actions based upon the same wrongful conduct, brought by his heirs, legal representatives or estate under the Survival Statute, [TEX.CIV.PRAC. & REM.CODE § 71.021](#), and by his beneficiaries under the Wrongful Death Statute, [TEX.CIV.PRAC. & REM.CODE §§ 71.001–.011](#), also barred by limitations? Both the district court and the court of appeals answered this question affirmatively. [795 S.W.2d 243](#). We agree.

I

In 1981, Donnon Russell was diagnosed as suffering from [chronic obstructive pulmonary disease](#) caused by exposure to silica during his employment for many years as a sandblaster and painter. In 1982, Russell filed suit to recover damages for his injuries. In amended pleadings, Russell named a total of 14 defendants who he alleged manufactured and distributed products containing silica that he had used in his work. In 1988, before the case could come to trial, Russell died. Five weeks later, Russell's

widow and four children¹ filed an amended petition naming themselves as plaintiffs and claiming damages on behalf of Russell's estate and for his death. Plaintiffs also added seven defendants whom Russell had never sued himself, who are respondents in this Court.²

Respondents moved for summary judgment on the ground that plaintiffs' claims against them are barred by limitations. In their last amended petition in the trial court plaintiffs asserted claims based on strict liability, negligence, gross negligence, misrepresentation, and breach of warranty. Respondents argue that the causes of action against them accrued either in 1981 when Russell's condition was first diagnosed, or no later than 1982 when he filed suit. Had Russell sued respondents immediately before his death, his claims would have been barred by limitations.³ Respondents contend that plaintiffs' actions are derivative of Russell's and are therefore likewise barred.

Plaintiffs argue that while their actions are in some sense derivative of Russell's, the sole statute of limitations applicable to their claims under the survival and wrongful death statutes is [TEX.CIV.PRAC. & REM.CODE § 16.003\(b\)](#), which states: "A person must bring suit not later than two years after the day the cause of action accrues in an action for injury resulting in death. The cause of action accrues on the death of the injured person." Based upon this statute, plaintiffs argue that they had two years from Russell's death to file their claims, even if Russell's own claims for the same injury would have been barred at the time he died.

The district court granted summary judgment for respondents and severed it from plaintiffs' claims against the defendants which Russell timely sued. The court of appeals affirmed. [795 S.W.2d 243](#).

II

[1] [2] [3] [4] At common law, an individual's action for personal injuries did not survive his death. [Rose v. Doctors Hosp.](#), 801 S.W.2d 841, 845 (Tex.1990); [Landers v. B.F. Goodrich Co.](#), 369 S.W.2d 33, 35 (Tex.1963). The Legislature has abrogated this rule by [TEX.CIV.PRAC. & REM.CODE § 71.021](#), which states:

***345** Survival of Cause of Action

(a) A cause of action for personal injury to the health, reputation, or person of an injured person does not abate because of the death of the injured person or because of the death of a person liable for the injury.

(b) A personal injury action survives to and in favor of the heirs, legal representatives, and estate of the injured person. The action survives against the liable person and the person's legal representatives.

(c) The suit may be instituted and prosecuted as if the liable person were alive.

By this statute, a decedent's action survives his death and may be prosecuted in his behalf. The survival action, as it is sometimes called, is wholly derivative of the decedent's rights. The actionable wrong is that which the decedent suffered before his death. The damages recoverable are those which he himself sustained while he was alive and not any damages claimed independently by the survival action plaintiffs (except that funeral expenses may also be recovered if they were not awarded in a wrongful death action). *Landers*, 369 S.W.2d at 35. Any recovery obtained flows to those who would have received it had he obtained it immediately prior to his death—that is, his heirs, legal representatives and estate. *Id.* Defenses that could have been raised against a claim by the injured person may also be raised against the same claim asserted by the person's heirs and estate. See *Castleberry v. Goolsby Bldg. Corp.*, 617 S.W.2d 665 (Tex.1981).

It follows from these general principles that if a decedent's action would have been barred by limitations had it been asserted immediately prior to his death, a survival action based upon the same alleged wrong is likewise barred. If the decedent's action would not have been barred, the running of the limitations period is tolled by the decedent's death for up to one year. **TEX.CIV.PRAC. & REM.CODE § 16.062.** ⁴ Had Russell sued respondents immediately prior to his death, alleging the same causes of action plaintiffs now assert in their survival action, those actions would have been barred by limitations. Accordingly, we hold that plaintiffs' survival action against respondents is likewise barred by limitations.

III

[5] Wrongful death actions are also derivative of the decedent's rights. Such actions are creatures of statute abrogating the common law rule that no cause of action may be brought for the death of another person. *Rose v. Doctors Hosp.*, 801 S.W.2d at 845; *Farmers & Mechanics' Nat'l Bank v. Hanks*, 104 Tex. 320, 137 S.W. 1120, 1122 (1911). As initially passed, our Wrongful Death Statute provided in part:

Sec. 1. [W]hensoever the death of any person may be caused by wrongful act, neglect, unskillfulness or default, and the act, neglect, unskillfulness or default is such as would (if death had not ensued) have entitled the party, injured, to maintain an action for such injury, then and in every such case the person who would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured....

.....

Sec. 3. The action shall be brought within one year after the death of such deceased.

Act approved Feb. 2, 1860, 8th Leg., R.S., ch. 35, § 1, 1860 Tex.Gen.Laws 32, 4 H. GAMMEL, LAWS OF TEXAS 1394 (1898). Sections 1 and 3 were amended and separated in 1879. Section 1 was changed to read in part: "The wrongful act, negligence, carelessness, unskillfulness or default mentioned ... must be of such character as would, if death had not ensued, have entitled the party injured to maintain an action *346 for such injury." Tex.Rev.Civ.Stat. art. 2900 (1879). Section 3 was moved from the wrongful death provisions to a general limitations provision which prescribed that certain actions be brought within one year, including: "Actions for injuries done to the person of another where death ensued from such injuries". **Tex.Rev.Civ.Stat. art. 3202(4) (1879).** The 1879 provision added: "the cause of action shall be considered as having accrued at the death of the party injured." *Id.* In 1897, the limitations period was changed from one to two years. Act approved Mar. 4, 1897, 25th Leg., R.S., ch. 14, 1897 Tex.Gen.Laws 12, 12; 10 H. GAMMEL, LAWS OF TEXAS 1066, 1066 (1898). The language establishing the cause of action remained in substantially the same form, becoming **article 4672 of the Texas Revised Civil Statutes of 1925**, and in 1985, **section 71.003(a) of the Texas Civil Practice and Remedies Code**, Act of May 17, 1985, 69th Leg., R.S., ch. 959, § 1, 1985 Tex.Gen.Laws 3242, 3296, which is in effect today. The

two-year limitations period has also remained constant, and is now codified at [Tex.Civ.Prac. & Rem.Code § 16.003\(b\)](#).

Currently, the Wrongful Death Statute allows an action by a decedent's beneficiaries "only if the individual injured would have been entitled to bring an action for the injury if he had lived." [TEX.CIV.PRAC. & REM.CODE § 71.003\(a\)](#). As can be seen from the history of the statute recited above, this language is not a recent innovation but merely a recodification of language which has always been part of the Wrongful Death Statute.⁵ From the earlier language, it could have been argued, and in fact was, that a wrong "such as would (if death had not ensued) have entitled the party, injured, to maintain an action for such injury then" meant only a wrong of an actionable *nature*, not one for which the injured party could actually have succeeded in recovering damages. In other words, the earlier language may be read to allow a decedent's beneficiaries to recover for a wrong which caused his death, even if he could not have recovered himself, as long as it was "such as would" have allowed action—that is, the *type* of wrong for which he could have recovered. We long ago rejected this argument that the statute did not condition allowance of a wrongful death action upon the decedent's right to maintain suit for his injuries immediately prior to his death. In [Magnolia Coca Cola Bottling Co. v. Jordan](#), 124 Tex. 347, 78 S.W.2d 944, 945 (Tex.Com.App.1935), we wrote that the statute:

has not been construed literally as having reference only to the character of the wrongful or negligent act, but it has been construed and applied as meaning that the right of action given by the ... article exists only in cases wherein the injured person could himself have maintained an action for damages had he lived.

In [[Wilson v. Brown](#), 154 S.W. 322, 326 (Tex.Civ.App. Austin 1912, writ ref'd)], the contention was made that the words "of such character" used in the statute should be construed as descriptive of the act or acts of the defendant in and of themselves and separate and apart from the surrounding circumstances. The court, in holding that such construction was not sound, said: "The authorities show that the reasonable and sound construction to be placed upon that article is that it was the intention of the Legislature to declare that, unless the deceased could, at the time of his death, have maintained an action

for the injury, such right of action should not exist in favor of the beneficiaries mentioned in the statute.

In [Magnolia](#) we held that parents could not sue for the death of a child from prenatal injuries because the child could not have sued for such injuries had he lived. We later overruled this holding in [Leal v. C.C. Pitts Sand & Gravel, Inc.](#), 419 S.W.2d 820, 822 (Tex.1967), recognizing for the first time that prenatal injuries were actionable. Even so, however, [Leal](#) reaffirmed the reading of the statute upon which [Magnolia](#) *347 was based, that "[a] right of action exists under the Wrongful Death Statute only where the injured party could have maintained an action for damages had death not ensued." *Id.* at 821.

We have never departed from this construction of our Wrongful Death Statute. We have consistently held that the right of statutory beneficiaries to maintain a wrongful death action is entirely derivative of the decedent's right to have sued for his own injuries immediately prior to his death, and is subject to the same defenses to which the decedent's action would have been subject. In short, wrongful death action plaintiffs stand in the legal shoes of the decedent. As we said in [Vassallo v. Nederl–Amerik Stoomv Maats Holland](#), 162 Tex. 52, 344 S.W.2d 421, 424 (1961):

It is our opinion that under the express provisions of the Wrongful Death Act, the plaintiff is permitted to assert any basis for recovery that the decedent could have asserted if he were alive, and no other; and that the defendant can assert any defense to that cause of action that it could have asserted if the decedent had survived, and no other. The statutory beneficiaries of a deceased ... have the same substantive rights to recover as the deceased would have had had his injury been less than death.

Accordingly, we have recognized that a wrongful death action is not allowed if the decedent could not, immediately prior to his death, have maintained an action because of: governmental immunity, [Duhart v. State](#), 610 S.W.2d 740, 742 (Tex.1980); interspousal immunity, [Bounds v. Caudle](#), 560 S.W.2d 925, 926 (Tex.1977), [Wilson](#), 154 S.W. at 326–327; a spouse's contributory negligence,

Schwing v. Bluebonnet Express, Inc., 489 S.W.2d 279, 280 (Tex.1973), *Dallas Ry. & Terminal Co. v. High*, 129 Tex. 219, 103 S.W.2d 735, 736 (1937); contributory negligence, *Vassallo*, 344 S.W.2d at 424; absence of a cause of action for prenatal injury, *Magnolia*, 78 S.W.2d at 945, *Leal*, 419 S.W.2d at 821; the Texas Guest Statute, *Bowman v. Puckett*, 188 S.W.2d 571, 572 (Tex.1945); contractual limitation of liability, *Sullivan-Sanford Lumber Co. v. Watson*, 106 Tex. 4, 155 S.W. 179, 180 (1913); release, *Thompson v. Ft. Worth & R.G. Ry. Co.*, 97 Tex. 590, 80 S.W. 990, 991 (1904); a fellow servant's negligence, *Texas & N.O.R. Co. v. Berry*, 67 Tex. 238, 5 S.W. 817, 818 (Tex.1887). Not all of these defenses remain viable, and thus the rule that a wrongful death claim is derivative of the decedent's rights would be applied differently in many of these situations today.⁶ The rule itself, however, remains unassailed. For 132 years, since Texas first created an action for wrongful death, this Court has allowed the action only if the decedent could have maintained suit for his injuries immediately prior to his death. Our intermediate appellate courts have consistently followed this same rule, as have the federal courts constrained to apply Texas law.⁷

*348 Plaintiffs, however, argue that the defense of limitations is an exception to the rule that a wrongful death action is derivative. They base this argument on the second sentence of the statute of limitations for wrongful death actions, which states that “[t]he cause of action accrues on the death of the injured person.” TEX.CIV.PRAC. & REM.CODE § 16.003(b). Because a wrongful death action does not accrue until the death of the injured person, plaintiffs argue, even if the decedent's own cause of action is then barred, the wrongful death action is not.

We do not agree that section 16.003(b) must be read as an exception to section 71.003(a). Section 16.003(b) sets the time when a wrongful death action accrues, if it exists. It does not, however, provide that there is always an action to accrue. The Wrongful Death Statute allows an action by a decedent's beneficiaries “only if the individual injured would have been entitled to bring an action for the injury if he had lived.” TEX.CIV.PRAC. & REM.CODE § 71.003(a). If a wrongful death action exists, it accrues, not when the decedent was injured, but at his death, and the limitations period on that action begins to run at death. But if a wrongful death action does not exist because the decedent could not maintain an action in his own right

immediately prior to his death, for whatever reason, then no wrongful death action ever accrues. If a decedent's own cause of action were barred by governmental immunity, or statute, or release, or res judicata, or any other affirmative defense, there is no wrongful death action to accrue. Thus, if a decedent settles his own cause of action for his injuries and then dies, his statutory beneficiaries never have a wrongful death cause of action. The action does not accrue at decedent's death, despite section 16.003(b), because decedent already settled his own cause of action. Similarly, if a decedent litigates his own cause of action to a final judgment and then dies, no wrongful death action accrues, despite section 16.003(b), because decedent would have been barred by res judicata from asserting any further claims for his injuries immediately prior to his death. Section 16.003(b) does not create a cause of action, or resurrect one that has expired with the decedent; it only defines the period within which statutory beneficiaries must sue if they have a claim. See also *Francis v. Herrin Transp. Co.*, 432 S.W.2d 710, 713 (Tex.1968) (wherein the Court stated in a related context: “If by ... law or statute the right to maintain the action and recover damages, although once given, no longer exists, our statute of limitation does not confer the right.”)

Plaintiffs contend that sections 71.003(a) and 16.003(b) must be read in conjunction with one another. These sections, however, do not conflict with each other under our analysis. Sections 71.003(a) and 16.003(b) must indeed be read together, but they can be so read without reaching a result inconsistent with the derivative nature of wrongful death actions. If a decedent may maintain suit for personal injuries at his death, his statutory beneficiaries may sue for wrongful death, their cause of action accrues at the decedent's death, and the limitations period begins to run against them from that point. Under section 16.003(b), the time for suit never begins to run against statutory beneficiaries prior to decedent's death.⁸ But if a decedent may not *349 maintain suit because of some defense—release, res judicata, limitations, etc.—which may be properly interposed by defendants, there is no wrongful death action to accrue. The action is not barred by limitations before it accrues; it never accrues because the decedent could not maintain an action at his death.⁹

It is wrong to say, as one of the dissents does, that our decision penalizes the families of people who die lingering deaths. A person whose injuries result in death is entitled, while he is alive, to sue and recover damages

from those liable for his injuries. The defendant against whom judgment is rendered is not required to respond again in damages to the family of the injured person after he dies. And the defendant who is exonerated of liability to the injured person is not required to defend against the same claims by the person's family following his death. The families of injured persons are not penalized in such circumstances. Neither are they penalized when they are precluded from suing because a decedent, in his lifetime, chose not to sue until his own claims were barred by limitations. We have not, as one of the dissent states, placed wrongful death beneficiaries in the impossible situation of being required to file suit before the death of which they complain. We hold only, in the words of [section 71.003\(a\)](#), that they are entitled to sue “only if the individual injured would have been entitled to bring an action for the injury if he had lived.”

To adopt the plaintiffs' position in this case would greatly relax the statute of limitations for death cases. By their reading of [section 16.003\(b\)](#), statutory beneficiaries are allowed to sue within two years of a death, even if the action which allegedly caused the death occurred five, ten, twenty or more years earlier. This would thwart the very purpose of limitations, which is to require that actions be brought within a reasonable, prescribed period after a wrong occurs.

The dissents would find support for their contrary conclusion in their reading of two of our prior decisions, *DeHam v. Mexican Nat'l Ry. Co.*, 86 Tex. 68, 23 S.W. 381 (1893), and *Moreno v. Sterling Drug, Inc.*, 787 S.W.2d 348 (Tex.1990). But these cases do not provide such support. In *DeHam*, the decedent was injured in Mexico but died in Texas. Decedent's beneficiaries argued that because a wrongful death action does not accrue until the decedent's death, as provided by the precursor of [section 16.003\(b\)](#), their action arose under the law of Texas, where the decedent died. The Court rejected this contention:

But this is merely a statute of limitation, and not a statute defining what shall constitute a cause of action. The reason of the provision is obvious. Since no action could be brought by the relatives of the injured person until death had ensued, and since a great length of time might elapse between the injury and the death, it was reasonable that the time of the death should be taken as the point from which limitation should begin to run. The article which gives an action in this class of cases reads: “An action for actual damages on account of

injuries causing the death of any person may be brought in the following cases,” etc.... Although the right of action does not accrue to the beneficiaries named in the statute unless death ensues, the wrong for which the action is allowed is the injury which causes the death.

23 S.W. at 381–382. In holding that no action arose under Texas law, the Court did not use the limitations statute to create an exception to the general rule that a wrongful death action is derivative of a decedent's rights. Rather, the Court went on to explain that if a person were injured by a fellow servant in a jurisdiction which barred recovery in such circumstances, his beneficiaries would not be entitled to recover, even if he died in a jurisdiction which did not bar recovery in such circumstances. *350 Thus, the Court acknowledged the derivative nature of wrongful death actions.

In *Moreno*, two infants died of [Reye's syndrome](#) shortly after birth. Not until later did their parents learn that the children had been given [aspirin](#), which might have contributed to the reaction resulting in their deaths. The parents did not bring their wrongful death actions until more than four years after the death of the children. Citing the language quoted from *DeHam* above, the parents argued that [section 16.003\(b\)](#) sets only the earliest date that a wrongful death action can accrue. We rejected this argument, observing that the statute “was meant solely to prevent the potential anomaly of limitations running *before* death. Its purpose was not to extend the beginning of the running of the statute *beyond* the date of death.” 787 S.W.2d at 352. From this context, and from the fact that the injured persons were infants who died shortly after their injuries, the limitations to which we referred was that applicable to beneficiaries' actions. We did not address the situation in which a decedent's own action might be barred by limitations. If a decedent's action is not barred by limitations at the time of his death, [section 16.003\(b\)](#) does not preclude his beneficiaries from suing until two years have elapsed. The time that may have elapsed from injury to death is not subtracted from the two years under [section 16.003\(b\)](#).¹⁰ This does not affect the general rule, however, that if the decedent's action is barred by limitations, no wrongful death action accrues.

To try to show that the defense of limitations is different from other defenses to wrongful death actions, the dissents rely on two commentators, who purport only to state the majority rule in American jurisdictions,¹¹

the Restatement (Second) of Torts, which conflicts with the first Restatement of Torts,¹² and a few cases.¹³ But the more authoritative view, and probably the more prevalent, is that if a decedent's action would be barred by limitations, then so would a wrongful death action.¹⁴ Construing a federal statute, the *352 United States Supreme Court stated in *Michigan Central R.R. v. Vreeland*, 227 U.S. 59, 70, 33 S.Ct. 192, 196, 57 L.Ed. 417 (1913):

[A]s the foundation of the right of action [for wrongful death] is the original wrongful injury to the decedent, it has been generally held that the new action is a right dependent upon the existence of a right in the decedent immediately before his death to have maintained an action for his wrongful injury.

Settled precedent of this Court and other courts in Texas, representing consistent statutory construction for more than a century, supports our conclusion that there should be no exception for limitations to the general rule providing that our statutory wrongful death claim is essentially derivative in nature. The weight of authority in other jurisdictions, unsurprisingly, reaches the same result. A single exception for limitations is logically inconsistent, in fact, with the principle underlying limitations—that actions should be timely asserted or not at all—since it would permit wrongful death beneficiaries to sue within two years of the death of their family member, regardless of how long before his death he may have been injured.

For all these reasons, we hold that the defense of limitations bars the wrongful death action against the respondents in this case as a matter of law.

* * * * *

We therefore affirm the judgment of the court of appeals.

Concurring and dissenting opinion by DOGGETT, J., joined by MAUZY, J.

Concurring and dissenting opinion by GAMMAGE, J.

DOGGETT, Justice, concurring and dissenting

Henceforth any action for the death of a loved one can be barred before it accrues; a family's rights can be terminated before they can be exercised. That is the objective of another injustice committed by a majority that is not slowed in the slightest either by a statute that has been on the books since 1860 or its own recent writing to the contrary. Today a family is told that they should have filed an action for damages from the death of their husband and father *five years before he died*. Prophets and palm readers would have done them more good than an attorney.

The enactment at issue here is terse, clear and unqualified:

A person must bring suit not later than two years after the day the cause of action accrues in an action for injury resulting in death. The cause of action accrues on the death of the injured person.

Tex.Civ.Prac. & Rem.Code § 16.003(b). If this statute means what it says, the family of a dead worker may have the merits of its claims considered by a jury of twelve Texans. To deny them that right, the majority must declare the applicable statute inapplicable, revising the law to provide that a death action must be brought not two years after death, as *section 16.003(b)* so clearly provides, but two years after injury.

The harm caused by this judicial stratagem will extend to not a few Texas families. In the real world, carcinogens and other toxic substances often produce a death that is creeping rather than one that neatly fits within the constraints of a two-year deadline. Millions of people suffer the demise of which Edna St. Vincent Millay so poignantly wrote in another context:

And so beneath the weight lay I

And suffered death, but could not die.¹

Today's decision provides an abrupt answer to the families of those who linger—the parties responsible for such deaths will never be held accountable in any Texas court. Because the imposition of an impossible condition on the rights of families of those who do not die quickly is

not supported *353 by statute and is directly counter to recent precedent of this court, I dissent.²

The facts here are simple. Donnon Russell died on January 28, 1988 from *silicosis*, a lung disease alleged to have developed as a result of his exposure to certain products during his 19 years as a sandblaster. On March 4, 1988, his widow and children filed suit under the Texas Wrongful Death Act. This action having been filed thirty-six days after Russell's death, it was without question timely filed according to the specific words of [section 16.003\(b\)](#).

The majority nonetheless concludes that Petitioners' wrongful death action is time-barred. To do so, it looks not to the statute of limitations which has been specifically applicable to death actions for more than a century.³ Instead, the majority turns to a totally different statute and expands the limitations provision for personal injury to include death actions. Hence, Petitioners are now told they should have filed suit for death two years after Russell discovered he suffered from silicosis—*i.e., five years before Russell died*.

This court only recently stated that the statute of limitations applicable to death actions was designed to avoid this precise result:

In *DeHarn* [... 86 Tex. 68, 23 S.W. 381 (1893)], this court interpreted the accrual language in [Tex.Rev.Civ.Stat. art. 3202 \(1879\)](#), which was the statutory predecessor to [section 16.003\(b\)](#). The opinion describes the reason for [Article 3202](#) as follows:

Since no action could be brought by the relatives of the injured person until death had ensued, and since a great deal of time might elapse between the injury and the death, it was reasonable that the time of death should be taken as the point from which limitation should begin to run.

DeHarn, 23 S.W. at 381–82. [Petitioner] construes this single passage as evidencing a legislative purpose to extend the beginning of the running of the statute beyond the date of death. But [Article 3202](#) was meant solely to prevent the potential anomaly of limitations running before death.

Moreno v. Sterling Drug, Inc., 787 S.W.2d 348, 352 (Tex.1990) (emphasis supplied). Both *DeHam*⁴ and *Moreno* made clear that limitations runs from the date of death and not the date of injury. In *Moreno*, the court went

so far as to label [section 16.003\(b\)](#) an “absolute” statute of limitations, 787 S.W.2d at 354, meaning one “free from conditional limitation; ... free from qualification.” Webster's New International Dictionary 6 (3d ed. 1966).

*354 The majority glibly sidesteps this precedent, the reasoning of which was required to block the Morenos' suit but never intended to justify recovery by any other family. The limitations statute is now made “absolute for defendants only” by reference to that part of the death act limiting the grounds upon which suit may be predicated. [Tex.Civ.Prac. & Rem.Code § 71.003\(a\)](#). This provision originated as part of the first Wrongful Death Act passed in Texas in 1860, which provided:

[W]hensoever the death of any person may be caused by wrongful act, neglect, unskillfulness or default, *and the act, neglect, unskillfulness or default is such as would (if death had not ensued) have entitled the party, injured, to maintain an action for such injury*, then and in every such case the person who would have been liable if death had not ensued, shall be liable to an action for damages....

Law of Feb. 2, 1860, ch. 35, 1860 Tex.Gen.Laws 32, 4 H. Gammel, Laws of Texas 1934 (1898) (emphasis supplied). It was revised by the Legislature in 1879:

The wrongful act, negligence, carelessness and unskillfulness or default mentioned in the preceding article *must be of such character as would, if death had not ensued, have entitled the party injured to maintain an action for such injury*.

[Tex.Rev.Civ.Stat. art. 2900 \(1879\)](#) (emphasis added). While the death act was amended many times in the ensuing years,⁵ this provision, although renumbered, remained unchanged until 1985. At that time it was included as part of the new Civil Practice and Remedies Code,⁶ “without substantive change.” [Tex.Civ.Prac. & Rem.Code § 1.001\(a\)](#); Act of June 16, 1985, 69th Leg., R.S., ch. 959, § 10, 1985 Tex.Gen. Laws 3242, 3322 (“This Act is intended as a recodification only, and no substantive change is intended by the Act.”).

This provision, based on its clear wording at the time of its initial adoption, limited death actions to those cases in which *the character of the injurious act* permitted suit for injury under existing law. Not all wrongful conduct was actionable at the time the death act was first passed and revised. For example, the “fellow servant” rule barred suit in many jurisdictions and, thus, fatal injury inflicted by a co-worker would not give rise to a death action against the employer. *Price v. Houston Direct Navigation Co.*, 46 Tex. 535, 537–38 (1877); *see also DeHam v. Mexican Nat'l Ry. Co.*, 86 Tex. 68, 70, 23 S.W. 381, 382 (1893). Contributory negligence on the part of the person injured also at one time barred suit in Texas. *McDonald v. International & Great N. Ry.*, 86 Tex. 1, 12–13, 22 S.W. 939, 944 (1893). Additionally, no cause of action was recognized for prenatal injuries to a child subsequently born alive, *Magnolia Coca Cola Bottling Co. v. Jordan*, 124 Tex. 347, 360, 78 S.W.2d 944, 950 (1935), nor for injuries to a woman whose husband's negligence was a contributing factor. *Dallas Ry. & Terminal Co. v. High*, 129 Tex. 219, 222, 103 S.W.2d 735, 736 (1937). All of these bars to recovery have been removed by statute or judicial decision; and, almost without exception,⁷ *355 these cases involved situations in which the *character* of the wrongful act barred suit. Here there is no question that the character of the alleged wrongful act would give rise to a cause of action for Russell's injuries under existing law. The majority nonetheless interprets [section 71.003\(a\)](#) as requiring that death actions be subject to all defenses which might have been urged against the personal injury action at the time of the death.

The majority dwells on the allegedly “consistent interpretation” of of this irrelevant provision because this court has never previously had need to construe the unequivocal wording of the applicable statute, [section 16.003](#). No justification has or can be provided as to how the interpretation of one provision dictates an unconscionable reading that deliberately misconstrues another.⁸

In adopting the Wrongful Death Act, the Legislature crafted a unique limitations statute. The time for filing suit is not determined by the date of the wrongful conduct or the date of injury—rather limitations begins to run at death without regard to when the injury occurred. This court has, until today, accepted the statute as written. *See DeHam*, 23 S.W. at 381–82 (although “a great deal of time

might elapse between the injury and death ... death [is] the point from which limitation should begin to run”).

A federal court, grappling with this same problem, refused to bar a death claim under the Federal Tort Claims Act even though the statute of limitations on the underlying injury action had expired. A holding to the contrary, the appeals court concluded, would promote inequity and supplant lawyers with fortunetellers:

To hold that a claim for wrongful death somehow accrues before the date of death would place the class protected by the statute in the legally untenable position of speculating about hypothetical or potential future injuries, for the damages awarded survivors under the wrongful death act, which include funeral and burial expenses, are not identical with those available in a personal injury action to the one actually injured, and remain indeterminate until death has occurred. Clearly no such claim would ever be justiciable even were an astucious plaintiff to lodge such a clairvoyant complaint, for courts simply cannot protect rights against “assumed potential invasions” ... until they are presented with an actual case or controversy.

Fisk v. United States, 657 F.2d 167, 171 (7th Cir.1981) (citations omitted).⁹

There is a split of authority in other jurisdictions as to whether death actions are barred when the statute of limitations has passed as to the underlying personal injury claim. *See* *356 *Adams v. Armstrong World Indus., Inc.*, 596 F.Supp. 1407, 1414, 1415 (D.Idaho 1984) (listing cases), *appealed sub. nom. Waters v. Armstrong World Indus., Inc.*, 773 F.2d 248 (9th Cir.1985) (certifying question to Idaho Supreme Court), *aff'd in part, rev'd in part* 790 F.2d 893 (9th Cir.1986) (mem.) (decision after certified question refused). The decisions, though, are dependent upon the wording of the applicable state death act provision. *See* Annot., 167 A.L.R. 894, 895–96 (1947) (“The problem here is manifestly one of statutory construction.”). The Restatement concludes that, in most

states, a death action is not barred by the passage of limitations as to the decedent's personal injury claim:

Under most wrongful death statutes, the cause of action is a new and independent one, accruing to the representative or to surviving relatives of the decedent only upon his death; and since the cause of action does not come into existence until the death, it is not barred by prior lapse of time, even though the decedent's own cause of action for the injuries resulting in death would be barred.

Restatement (Second) of Torts § 899 comment c, at 442 (1965). See also William L. Prosser, Prosser and Keeton on the Law of Torts § 127 at 957 (W. Page Keeton, ed. 5th ed. 1984) (“[T]he considerable majority of the courts have held that the statute [of limitations] runs against the death action only from the date of death, even though at that time the decedent's own action would have been barred while he was living.”).¹⁰

Several preeminent commentators in the field of tort law would draw a distinction between defenses that go to the merits or existence of a cause of action, and procedural objections such as limitations.¹¹ An expert on the Texas Wrongful Death Act, Dean Leon Green,¹² urged differing treatment of these two classes of defenses:

[T]his interposition of the personal injury defenses is maintainable as to contributory negligence, assumption of the risk, fellow servant rule and other defenses which constitute a limitation on a cause of action. But it is not maintainable as to ... statute of limitations and such other defenses as expressly recognize that the deceased did have a cause of action which he either has, or could have, successfully maintained. The statute does not say that he must have had a cause of action at the moment of his death.... These defenses give implicit recognition to the injured person's cause of action and they should operate against it alone. Their force is fully spent before the death action arises.

Leon Green, *The Texas Death Act*, 26 Tex.L.Rev. 461, 461, 463 (1948).¹³ Similarly, reviewing death acts nationwide, Dean Prosser concluded:

It is not at all clear, however, that such provisions of the death acts ever were intended to prevent recovery where the deceased once had a cause of action, but it has terminated before his death. The more reasonable interpretation would seem to be that they are directed at the necessity of some original tort on the part of the defendant, under circumstances giving rise to liability in the first instance, rather than to subsequent changes in the situation affecting only the interest of the decedent. W. Prosser, *The Law of Torts* § 127 at 911 (4th ed. 1971). These views comport with the express language of the Texas statute.

*357 Moreover, the distinction between substantive and procedural defenses better fits within the bounds of statutory construction. First, this distinction properly recognizes the “object sought to be obtained” in enacting wrongful death legislation. Tex. Gov't Code § 311.023(1). The purpose of the death act was recently identified by the court as “ ‘provid[ing] a remedy for injuries resulting in death.’ ” *Moreno*, 787 S.W.2d at 356 n. 8 (quoting Leon Green, *The Texas Death Act*, 26 Tex.L.Rev. 133, 136 (1947)). The majority's interpretation today is inconsistent with this objective, as it deprives Petitioners of a remedy for Russell's death. Second, our previous decisions advise that the “wrongful death statute is remedial in nature and must be liberally construed....” *Witty v. American General Capital Distributors, Inc.*, 727 S.W.2d 503, 504 (Tex.1987). In construing section 71.003(a), the remedial purpose of the statute is thwarted in cases of lingering illness followed by death. Third, “a just and reasonable result is intended.” Tex. Gov't Code § 311.021(3). It is both unreasonable and unjust to conclude that a wrongful death suit is barred before the date on which the action accrues. Fourth, the construction imposed by the majority creates a conflict between section 71.003(a) and section 16.003(b). It must be remembered that these provisions were enacted as a part of the original wrongful death act and were intended to be construed together.¹⁴ Law of Feb. 2, 1860, ch. 35, 1860 Tex.Gen.Laws 32, 4 H. Gammel, *Laws of Texas* 1934 (1898). A specific statutory provision is ordinarily controlling over a more general one. Hence, the explicit provision as to limitations should preclude the implication of a more restrictive time period for filing suit by interpreting a more general provision. Fifth, differentiating between substantive and procedural defenses is consistent with the nature of a wrongful death action. A majority of this court concluded in *Moreno* that no action for death existed at common law,¹⁵ and the

death statute created a new cause of action. 787 S.W.2d at 356. The recovery permitted is not for the injury to the deceased, but for harm inflicted upon the survivors by destruction of the "familial relationship." See *Sanchez v. Schindler*, 651 S.W.2d 249, 251 (Tex.1983). Different damages may be recovered in each; statutory beneficiaries may recover their own pecuniary losses, mental anguish and loss of companionship and society suffered *as a result of the death*, as well as funeral expenses. These damages are not recoverable in a personal injury action filed by the deceased. A death action is thus separate and distinct from the injury action and should be made subject to its own separate and distinct statute of limitations. This court, consistent with rules of construction discussed above, and the better-reasoned cases from other jurisdictions, could and should interpret our state death act to allow Petitioners' suit.¹⁶

The majority today forms a triptych of tragedy denying to bereaved families compensation for their loss. First those suffering from the death of a family member are instructed to file suit within two years after death, even if the cause of death cannot with diligence be discovered in that time *358 period. *Moreno v. Sterling Drug, Inc.*, 787 S.W.2d 348 (Tex.1990). Next they are told that, if medical malpractice causes merely injury, the denial of full compensation rises to the level of a constitutional violation, but if the medical error is fatal, damages can be limited to whatever the legislature might permit. *Rose v. Doctors Hosp.*, 801 S.W.2d 841 (Tex.1990). These grief-stricken relatives are now burdened with the impossible task of filing an action for wrongful death before death has occurred. This continued deprivation of the rights of bereaved families is inconsistent with the purpose and language of the wrongful death statute.

The action for wrongful death, created by the Texas Legislature, has been taken away from the families of those who linger in death. The majority has mandated that death be swift, or reckoning for wrongful conduct will not be made in the Texas courts. Families, after the slow and often painful illness and death of a loved one, are left with nothing:

The Bustle in a House

The Morning after Death

Is solemnest of industries

Enacted upon Earth—

The Sweeping up the Heart

And putting Love away

We shall not want to use again

Until Eternity.¹⁷

MAUZY, J., joins in this concurring and dissenting opinion.

GAMMAGE, Justice, concurring and dissenting.

I agree that the Russells' cause of action under the Survival Statute, TEX.CIV.PRAC. & REM.CODE § 71.021, is barred by limitations, but I do not believe their claim under the Wrongful Death Statute, TEX.CIV.PRAC. & REM.CODE § 71.001–.011, is likewise barred. Consequently, I join in Parts I and II of the majority opinion, but I dissent in part from the judgment and remainder of the majority opinion.

The majority maintains that no beneficiary can sue under the Wrongful Death Statute unless the decedent had, at the time of death, a right to sue for his or her own injuries. The majority reasons, because Donnon Russell's suit for injuries against the seven respondents in this cause was barred by limitations when he died, the subsequent action by his widow and children for his wrongful death as a result of those injuries is barred as well. The majority concedes this result is not mandated by the literal terms of the Wrongful Death Statute, but argues it based on judicial interpretation of the statute as applied to other situations. This Court has never before addressed the precise question whether the limitations defense is sufficiently analogous to other defenses that it should receive the same treatment.

The limitations defense should be treated differently from other defenses for three reasons: the text of the governing

statutes, the peculiar nature of the limitations defense, and conformity with the law in other jurisdictions. Each of these considerations suggests distinct treatment for limitations, and combined they compel the conclusion that the beneficiaries' action in this cause is not time-barred.

The statute governing limitations in wrongful death actions provides as follows:

A person must bring suit not later than two years after the day a cause of action accrues in an action for injury resulting in death. The cause of action accrues on the death of the injured person.

TEX.CIV.PRAC. & REM.CODE § 16.003(b). I agree with the majority that a limitations statute, in and of itself, cannot create a right of action. See *Francis v. Herrin Transp. Co.*, 432 S.W.2d 710, 712–13 (Tex.1968)¹; *359 *De Ham v. Mexican National Ry. Co.*, 86 Tex. 68, 70, 23 S.W. 381, 381 (1893). It can, however, provide evidence of legislative intent. A wrongful death action, by definition, cannot exist until a person dies. As we noted in *Moreno v. Sterling Drug, Inc.*, 787 S.W.2d 348, 352 (Tex.1990), the last sentence of section 16.003(b) “was meant solely to prevent the potential anomaly of limitations running before death.” No statutory language casts doubt on any other potential defense to a wrongful death action. Construing the section 16.003(b) limitations provision (that the wrongful death “cause of action accrues on the death of the injured person) together with the provision in the Wrongful Death Statute permitting actions “only if the individual injured would have been entitled to bring an action for the injury if he had lived,” TEX.CIV.PRAC. & REM.CODE § 71.003(a), it is apparent the legislature intended the express limitations language to control. Damages for wrongful death are different from those recoverable for the underlying tort that caused the death. The parties entitled to bring the action are different. When the legislature provided that the Wrongful Death Action “accrues on the death of the injured person,” it acknowledged those differences with respect to the limitations defense. The legislature intended to exclude limitations from the class of defenses that prevent one from being “entitled” to bring the action, because the parties entitled to bring the action and the recoverable elements of damage are different.

Limitations is unlike other defenses that may be asserted against the decedent's cause of action. The limitations defense does not challenge the merits of the decedent's underlying cause of action, as do contributory negligence, interspousal immunity, governmental immunity, the fellow servant rule, the Guest Statute, or any other defenses (whether currently existing or not) that we historically have recognized as a bar. Limitations denies a right to recovery, but does not extinguish substantive rights. See, e.g., *City of Dallas v. Etheridge*, 152 Tex. 9, 14, 253 S.W.2d 640, 643 (1953) (“statutes of limitation do not affect the substantive rights of parties; they merely bar the remedy by which one party seeks to enforce his substantive rights”).

This reasoning was applied to the expiration of a decedent's personal injury limitations period in *Hoover's Administratrix v. Chesapeake & Ohio Railway Co.*, 46 W.Va. 268, 33 S.E. 224, 224 (1899):

It is claimed that, the injured having lost his right to sue by reason of the bar of the statute of limitations at the time of this death, the cause of action is thereby destroyed, both as to himself and his administratrix; that death must find him with a cause of action legally enforceable, or she has none. This is undoubtedly true where the cause of action never existed, or is defeated by contributory negligence, or it has been compromised or released; for in such cases there is a complete want of, or destruction by, satisfaction of the cause, not merely of the right of action or remedy.... Generally speaking, however, the statute of limitations acts on the remedy, and takes away the right of action, and while it prevents relief, it does not destroy the cause of action, or the moral obligation on the negligent party to make good the injury caused by his default or neglect.... In personal actions for injury the bar of the statute precludes the remedy, but it does not satisfy the wrong.

Moreover, the defense of limitations does not, like some other defenses, involve the danger of double compensation. At least theoretically, a release, settlement, or judgment provides compensation or the opportunity to be heard on a claim for compensation for the decedent; not so when a claim is barred by limitations. See WILLIAM L. PROSSER & W. PAGE KEETON, PROSSER AND KEETON ON THE LAW OF TORTS § 127 at 957 (5th ed. 1984).

Finally, permitting the Russell beneficiaries to bring this action would accord with the result, if not the exact rationale, in most other jurisdictions. Prosser writes that “the considerable majority of the *360 courts have held that the statute runs against the death action only from the date of death, even though at that time the decedent's own action would have been barred while he was living.” *Id.* Other treatises merely note there is a division of authority.² The American Law Institute recognizes Prosser's statement as the majority rule in the RESTATEMENT (SECOND) OF TORTS,³ and other scholarly commentators urge it as the better rule.⁴ The rule is followed in a number of jurisdictions with statutes based on Lord Campbell's Act. See *Western*

& *Atlantic Railroad Co. v. Bass*, 104 Ga. 390, 30 S.E. 874 (1898); *In re Estate of Pickens*, 255 Ind. 119, 263 N.E.2d 151 (1970); *Farmer's Bank & Trust Co. v. Rice*, 674 S.W.2d 510 (Ky.1984); *Gramlich v. Traveller's Ins. Co.*, 640 S.W.2d 180 (Mo.App.1982); *Nestelle v. Northern Pacific Railroad Co.*, 56 F. 261, 262 (C.C.D.Wash 1893); *Hoover's Administratrix v. Chesapeake & Ohio Ry. Co.*, 46 W.Va. 268, 33 S.E. 224 (1899); see generally *Louisville, Evansville & St. Louis RR. Co. v. Clarke*, 152 U.S. 230, 14 S.Ct. 579, 38 L.Ed. 422 (1893) (interpreting an Indiana statute).⁵

Wrongful death actions should be permitted within two years of the decedent's death, whether or not the decedent's own action for his or her injuries would have been time barred on the date of death. I would affirm in part the judgment of the court of appeals but reverse with regard to the wrongful death action and remand the cause to the trial court for further proceedings on that portion of the claim by Russell's widow and children.

All Citations

841 S.W.2d 343, 61 USLW 2265, Prod.Liab.Rep. (CCH) P 13,345

Footnotes

- 1 Russell's widow is Betty Parr Russell. His four children are Norma Lynn Coker, Gail Lee Harrah, Jeannie Marie Bourgoins and Dennis O'Neal Russell.
- 2 Respondents are Ingersoll-Rand Co., McKenzie Equipment Co., Schramm, Inc., Cooper Industries, Inc., Joy Manufacturing Co., IC Group Inc., and Sullair Corp.
- 3 The statutes of limitations applicable to these causes of actions are two or four years. [TEX.CIV.PRAC. & REM.CODE §§ 16.003\(a\), 16.004](#); [TEX.BUS. & COM.CODE § 2.725](#). Plaintiffs contend that fact issues remain as to when the causes of action against respondents accrued, precluding summary judgment. More specifically, plaintiffs argue that the discovery rule operates to delay accrual of the causes of action against respondents until Russell could reasonably have determined that they were among the parties at fault. Generally, however, “limitations begin to run when the fact of injury is known”, *Moreno v. Sterling Drug, Inc.*, 787 S.W.2d 348, 351 (Tex.1990), not when the alleged wrongdoers are identified. There is no question on the record before us that Russell's actions accrued no later than 1982, when he filed suit.
- 4 “(a) The death of a person against whom or in whose favor there may be a cause of action suspends the running of an applicable statute of limitations for 12 months after the death.
 “(b) If an executor or administrator of a decedent's estate qualifies before the expiration of the period provided by this section, the statute of limitations begins to run at the time of the qualification.”
- 5 The Legislature expressly intended the last recodification to be without substantive change. [TEX.CIV.PRAC. & REM.CODE § 1.001](#).
- 6 For example, *Bounds* abolished interspousal immunity and *Schwinn* abandoned the rule that a person's negligence precluded recovery by the person's spouse.
- 7 See, e.g., *Slaughter v. Southern Talc Co.*, 949 F.2d 167, 173–74 (5th Cir.1991) (beneficiaries wrongful death action related back to filing of decedent's action); *Mayo v. Tri-Bell Indus., Inc.*, 787 F.2d 1007, 1009 (5th Cir.1986) (wrongful death recovery precluded by Texas comparative negligence statute because decedent's negligence greater than

tortfeasor's, observing that "the Texas courts have, in an undeviating line, characterized the action on behalf of the decedent's family as a purely derivative one"); *Graffagnino v. Fibreboard Corp.*, 781 F.2d 1111, 1113 (5th Cir.1986) (per curiam), *on reh'g following* 776 F.2d 1307 (5th Cir.1985) (release by deceased and beneficiary barred subsequent suit by beneficiary, even where disease was not previously diagnosed); *Delesma v. City of Dallas*, 770 F.2d 1334, 1338–39 (5th Cir.1985) (wrongful death action barred by res judicata), *aff'g* 588 F.Supp. 35, 36–37 (N.D.Tex.1984) (action barred by limitations); *Terry v. Tyler Pipe Indus.*, 645 F.Supp. 1194, 1196–98 (E.D.Tex.1986) (action barred by limitations); *Garza-Vale v. Kwiecien*, 796 S.W.2d 500, 502–04 (Tex.App.—San Antonio 1990, writ denied) (action barred by Texas Smoke Detectors Statute); *Maderazo v. Archem Co.*, 788 S.W.2d 395, 397 (Tex.App.—Houston [14th Dist.] 1990, no writ) (action against decedent's employer barred by Workers' Compensation Act); *Davenport v. Phillip Morris, Inc.*, 761 S.W.2d 70, 72 (Tex.App.—Houston [14th Dist.] 1988, no writ) (action barred by limitations); *Pastor v. Champs Restaurant, Inc.*, 750 S.W.2d 335, 336 (Tex.App.—Houston [14th Dist.] 1988, no writ) (decedent's negligence a defense); *Washam v. Hughes*, 638 S.W.2d 646, 648 (Tex.App.—Austin 1982, writ ref'd n.r.e.) (action derivative); *Velasquez v. Livingston*, 598 S.W.2d 346, 349 (Tex.Civ.App.—Corpus Christi 1980, no writ) (recovery precluded by Texas comparative negligence statute because decedent's negligence greater than tortfeasor's); *Donsbach v. Offield*, 488 S.W.2d 494, 495 (Tex.Civ.App.—Austin 1972, no writ) (action barred by interspousal immunity); *Wentzel v. Neurenberg*, 314 S.W.2d 855, 860–61 (Tex.Civ.App.—Waco 1958, no writ) (action barred by contributory negligence of deceased's spouse); *Karling v. Lower Colo. River Auth.*, 303 S.W.2d 495, 498–99 (Tex.Civ.App.—Austin 1957, writ ref'd n.r.e.) (action barred by governmental immunity); *Kelley v. City of Austin*, 268 S.W.2d 773, 775 (Tex.Civ.App.—Austin 1954, no writ) (action barred by governmental immunity); *Childs v. Childs*, 107 S.W.2d 703, 704 (Tex.Civ.App.—Beaumont 1937, no writ) (action barred by interspousal immunity).

8 We do not decide here whether, under other statutes, a limitations period may begin to run against wrongful death beneficiaries prior to decedent's death. See *Wilson v. Rudd*, 814 S.W.2d 818 (Tex.App.—Houston [14th Dist.] 1991, writ pending).

9 We do not, contrary to the dissents' charges, hold that limitations affects the substantive rights of the parties. It is a defense to an action which, like other defenses such as res judicata, collateral estoppel, and release, is waived if not interposed by the defendant in a wrongful death action.

10 We do not comment upon the effect of any statute other than section 16.003(b). See note 8, *supra*.

11 W. PAGE KEETON ET. AL., PROSSER AND KEETON ON THE LAW OF TORTS § 127, at 957 (5th ed. 1984); WILLIAM L. PROSSER, THE LAW OF TORTS § 127, at 911 (4th ed. 1971); Leon Green, *The Texas Death Act*, 26 TEX.L.REV. 461, 461, 463 (1948).

12 RESTATEMENT (SECOND) OF TORTS § 899 cmt. c, at 442 (1979) ("Under most wrongful death statutes, the cause of action is a new and independent one, accruing to the representative or to surviving relatives of the decedent only upon his death; and since the cause of action does not come into existence until the death, it is not barred by prior lapse of time, even though the decedent's own cause of action for the injuries resulting in death would be barred."); RESTATEMENT OF TORTS § 899 cmt. c, at 524–26 (1939) ("A cause of action for death is complete when death occurs; since, however, the decedent in his lifetime had a cause of action, the cause of action for death does not come into existence if before the death the action for the tortious conduct has been barred by the lapse of time.").

13 *Fisk v. United States*, 657 F.2d 167, 171 (7th Cir.1981) (applying federal law); *Western Union Tel. Co. v. Preston*, 254 F. 229, 234 (3rd Cir.1918) (applying Pennsylvania law), *cert. denied*, 248 U.S. 585, 39 S.Ct. 182, 63 L.Ed. 433 (1919); *Adams v. Armstrong World Indus., Inc.*, 596 F.Supp. 1407, 1414, 1415 (D.Idaho 1984) (listing cases), *appealed sub. nom. Waters v. Armstrong World Indus., Inc.*, 773 F.2d 248 (9th Cir.1985) (certification to Idaho Supreme Court), *aff'd in part, rev'd in part*, 790 F.2d 893 (9th Cir.1986) (mem.) (decision after Idaho Court refused certified question), *after remand*, 664 F.Supp. 463 (D.Idaho 1987), *judgment on limitations vacated on other grounds* 847 F.2d 589 (9th Cir.1988); *Larcher v. Wanless*, 18 Cal.3d 646, 135 Cal.Rptr. 75, 80, 81, 557 P.2d 507, 513, 514 (1976); *N.O. Nelson Mfg. Corp. v. Dickson*, 114 Ind.App. 668, 53 N.E.2d 640, 641 (1944); *Farmers Bank & Trust Co. v. Rice*, 674 S.W.2d 510, 512 (Ky.1984); *Smith v. McComb Infirmary Ass'n*, 196 So.2d 91, 93 (Miss.1967); *Gramlich v. Travelers Ins. Co.*, 640 S.W.2d 180, 186 (Mo.Ct.App.1982); *Brosse v. Cumming*, 20 Ohio App.3d 260, 20 OBR 322, 485 N.E.2d 803, 807 (1984); *DeHart v. Ohio Fuel Gas Co.*, 84 Ohio App. 62, 39 O.O. 101, 85 N.E.2d 586, 590 (1948); see also *James v. Phoenix Gen. Hosp., Inc.*, 154 Ariz. 594, 744 P.2d 695, 704 (1987); *Carroll v. W.R. Grace & Co.*, 830 P.2d 1253 (Mont.1992); *Gilloon v. Humana, Inc.*, 100 Nev. 518, 687 P.2d 80, 81 (1984); *Hoover's Adm'x v. Chesapeake & Ohio Ry. Co.*, 46 W.Va. 268, 269, 33 S.E. 224, 225 (1899).

14 *Northington v. Carey-Canada, Inc.*, 432 So.2d 1231, 1232 (Ala.1983), citing *Ellis v. Black Diamond Mining Co.*, 268 Ala. 576, 109 So.2d 699, 702 (1959); *Matthews v. Travelers Indem. Ins. Co.*, 245 Ark. 247, 432 S.W.2d 485, 488 (1968) (action

not barred at time of death), adopting the holding in *Hicks v. Missouri Pac. R.R. Co.*, 181 F.Supp. 648 (W.D.Ark.1960); *Drake v. St. Francis Hosp.*, 560 A.2d 1059, 1060 (Del.1989), citing *Milford Memorial Hosp. Inc. v. Elliott*, 58 Del. 480, 210 A.2d 858, 860–61 (1965); *Lambert v. Village of Summit*, 104 Ill.App.3d 1034, 60 Ill.Dec. 778, 433 N.E.2d 1016 (1982) (*Lambert*'s argument was noted but not reached in *Wyness v. Armstrong World Indus.*, 131 Ill.2d 403, 137 Ill.Dec. 623, 546 N.E.2d 568, 573–74 (1989), holding that limitations was not triggered by the discovery, a few months before death, of lung cancer and its causation); *Mason v. Gerin Corp.*, 231 Kan. 718, 647 P.2d 1340, 1344–45 (1982); *Ogden v. Berry*, 572 A.2d 1082 (Me.1990); *Mills v. International Harvester Co.*, 554 F.Supp. 611, 613 (D.Md.1982); *Larson v. Johns–Manville Sales Corp.*, 427 Mich. 301, 399 N.W.2d 1, 7 (1986); *Regie de l'assurance Auto. du Quebec v. Jensen*, 399 N.W.2d 85 (Minn.1987), citing *Rugland v. Anderson*, 30 Minn. 386, 15 N.W. 676 (1883); *DeRogatis v. Mayo Clinic*, 390 N.W.2d 773 (Minn.1986) (statute providing that, with certain exceptions, wrongful death actions may be commenced within three years of death and within six years after act or omission); *Stang v. Hertz Corp.*, 81 N.M. 69, 463 P.2d 45, 54–55 (App.1969), *aff'd*, 81 N.M. 348, 467 P.2d 14 (1970); *Natseway v. Jojola*, 56 N.M. 793, 251 P.2d 274, 276 (1952); *Kelliher v. New York Cent. & H. R.R. Co.*, 212 N.Y. 207, 105 N.E. 824, 825–26 (1914); *Phelps v. Greco*, 177 A.D.2d 559, 576 N.Y.S.2d 158, 159 (N.Y.App.Div.1991); *Eldridge v. Eastmoreland Gen. Hosp.*, 307 Or. 500, 769 P.2d 775 (1989) (under 1967 statute, wrongful death actions are to be brought within three years of occurrence of the injury causing death; court, in holding that discovery rule was inapplicable, noted that legislators observed that action could be barred before death under revised statute); *Piukkula v. Pillsbury Astoria Flouring Mills Co.*, 150 Or. 304, 42 P.2d 921, 929–31 (1935) (Oregon Employers' Liability Act); *Howard v. Bell Tel. Co.*, 306 Pa. 518, 160 A. 613, 615 (1932), relied on in *Cowgill v. Raymark Indus., Inc.*, 780 F.2d 324, 331 (3rd Cir.1985); *Whaley v. Catlett*, 103 Tenn. 347, 53 S.W. 131, 133 (1899) (cause of action accrues at time of injury; injury and death simultaneous); *Craig v. R.R. Street & Co.*, 794 S.W.2d 351, 355 (Tenn.App.1990) (period began running when decedent's knowledge of causal connection between his illness and defendants' chemicals put him on inquiry of sources); *Street v. Consumers Mining Corp.*, 185 Va. 561, 39 S.E.2d 271, 277 (1946); *Miller v. United States*, 932 F.2d 301, 303 (4th Cir.1991) (applying Virginia law); *Calhoun v. Washington Veneer Co.*, 170 Wash. 152, 15 P.2d 943, 946 (1932); *Holifield v. Setco Indus., Inc.*, 42 Wis.2d 750, 168 N.W.2d 177 (1969) (cause of action accrued at time of accident, not at time of product's sale); *but see Fisk v. United States*, 657 F.2d 167, 171 (7th Cir.1981) (applying federal law); *Frongillo v. Grimmer*, 163 Ariz. 369, 788 P.2d 102 (App.1989) (review denied by Arizona Supreme Court), *citing James v. Phoenix Gen. Hosp., Inc.*, 154 Ariz. 594, 744 P.2d 695, 704 (1987); *Larcher v. Wanless*, 18 Cal.3d 646, 135 Cal.Rptr. 75, 557 P.2d 507, 511–13 (1976) (under the medical malpractice limitations statute, "injury" occurs at time of death; see discussion of wrongful death limitations); *Rauschenberger v. Radetsky*, 745 P.2d 640 (Colo.1987) (noting that *Crownover v. Gleichman*, 194 Colo. 48, 574 P.2d 497, 498–99 (1977) was legislatively overruled by Act approved June 7, 1979, ch. 134 § 1, 1979 Colo.Sess.Laws 615); *Glover v. Savannah Fla. & W. R.R. Co.*, 107 Ga. 34, 32 S.E. 876 (1899), *cited in Clark v. Singer*, 250 Ga. 470, 298 S.E.2d 484, 485 (1983) (medical malpractice limitations period unconstitutional as applied to medical practice wrongful death case), *Western & Atlantic R.R. Co. v. Bass*, 104 Ga. 390, 30 S.E. 874 (1898); *Chapman v. Cardiac Pacemakers, Inc.*, 105 Idaho 785, 673 P.2d 385 (1983); *Louisville, Evansville & St. Louis R.R. Co. v. Clarke*, 152 U.S. 230, 14 S.Ct. 579, 38 L.Ed. 422 (1893) (applying Indiana statute) and *Wilson v. Jackson Hill Coal & Coke Co.*, 48 Ind.App. 150, 95 N.E. 589 (1911), *cited in re Estate of Pickens*, 255 Ind. 119, 263 N.E.2d 151, 155 (1970) (interspousal immunity does not bar wrongful death action for father's killing on behalf of minor children); *Farmers Bank & Trust Co. v. Rice*, 674 S.W.2d 510, 512 (Ky.1984); *Smith v. McComb Infirmary Ass'n*, 196 So.2d 91, 93 (Miss.1967); *Gramlich v. Travelers Ins. Co.*, 640 S.W.2d 180, 186 (Mo.Ct.App.1982); *Carroll v. W.R. Grace & Co.*, 830 P.2d 1253 (Mont.1992); *Gilloon v. Humana, Inc.*, 100 Nev. 518, 687 P.2d 80, 81 (1984) (under the limitations period for health care claims, "injury" occurs at death); *Alfone v. Sarno*, 87 N.J. 99, 432 A.2d 857, 860–63 (1981) (wrongful death action did not require that availability of an action to decedent at his death, only a tortious, fatal injury; action not precluded by previous personal injury judgment for damages, although issue-preclusion principles applied to liability and damages that could have recovered in first suit); *Silverman v. Lathrop*, 168 N.J.Super. 333, 403 A.2d 18, 22–23 (Ct.App.Div.1979); *Brosse v. Cumming*, 20 Ohio App.3d 260, 20 OBR 322, 485 N.E.2d 803, 807 (1984); *Kimberly v. DeWitt*, 606 P.2d 612, 616 (Okla.App.1980), *citing Hugh Breeding, Inc. v. Daniel*, 373 P.2d 75, 76 (Okla.1962), *overruled in part on other grounds, Haws v. Luethje*, 503 P.2d 871, 875 (Okla.1972) (release); *Hoover's Adm'x v. Chesapeake & Ohio Ry. Co.*, 46 W.Va. 268, 33 S.E. 224, 225 (1899). See generally W.W. Allen, Annotation, *Limitation Applicable to Action for Personal Injury as Affecting Action for Death Resulting From Injury*, 167 A.L.R. 894 (1947); M.C. Dransfield, Annotation, *Time From Which Statute of Limitations Begins to Run Against Cause of Action for Wrongful Death*, 97 A.L.R.2d 1151 (1964); *Adams v. Armstrong World Indus.*, 596 F.Supp. 1407, 1414–15 (D.Idaho 1984) (cases cited), *appealed sub nom. Waters v. Armstrong World Indus., Inc.*, 773 F.2d 248 (9th Cir.1985) (certification to Idaho Supreme Court), *aff'd in part, rev'd*

in part, 790 F.2d 893 (9th Cir.1986) (mem.) (decision after Idaho court refused certified question), after remand, 664 F.Supp. 463, judgment on limitations vacated on other grounds, 847 F.2d 589 (9th Cir.1988).

1 Edna St. Vincent Millay, *Renascence*, in *Collected Poems* 3, 7 (N. Millay ed. 1956).

2 I concur in that part of the judgment upholding the dismissal of Petitioners' survival action as barred by the statute of limitations. Prior to the adoption of the survival statute, any cause of action accrued or pending was automatically extinguished by death. The purpose of the legislation was to permit an estate to continue to prosecute the decedent's claim. It is thus subject to all defenses that would defeat the decedent's recovery, including limitations. Cf. *Tex.Civ.Prac. & Rem.Code* § 16.062 (tolling limitations for specified time period after death). As discussed below, however, the wrongful death statute gave rise to a new and independent claim allowing recovery of damages not recoverable in a personal injury action.

3 *Tex.Civ.Prac. & Rem.Code* § 16.003(b) provides:

A person must bring suit not later than two years after the day the cause of action accrues in an action for injury resulting in death. The cause of action accrues on the death of the injured person.

An action for wrongful death has been tied to the date of death since the passage in 1860 of the first death act in Texas and has survived in virtually identical form to this date. See *Moreno v. Sterling Drug, Inc.*, 787 S.W.2d 348, 359 n. 4 (Tex.1990) (Doggett, J., dissenting)(tracing history of statute of limitations applicable to death actions).

4 This case is cited as *DeHam v. Mexican Nat'l Ry. Co.* in the Southwestern Reporter, but as *DeHarn v. Mexican Nat'l Ry. Co.* in the official Texas Reports. Although normally controlling, the latter source is incorrect. The original opinion, at the Lorenzo de Zavala Archives in Austin, is handwritten by Justice Gaines. The penmanship is at times difficult to interpret, and the separation of the first loop from the second and third in the letter "m" in the Petitioner's name was understandably transcribed by the reporter as "r n." A review of the full record of that decision leaves no doubt that the bereaved mother's name was Elizabeth DeHam and not DeHarn.

5 These amendments were largely necessitated by decisions of this court narrowly interpreting the death act despite legislative intent to the contrary. See generally Leon Green, *The Texas Death Act*, 26 *Tex.L.Rev.* 133 (1947).

6 Despite the statement of the legislature that the codification was made "without substantive change," the language of section 71.003(a) differs in many respects from its predecessor. The statute now reads:

This subchapter applies only if the individual injured would have been entitled to bring an action for the injury if he had lived.

Tex.Civ.Prac. & Rem.Code § 71.003(a).

7 In *Thompson v. Fort Worth & Rio Grande Ry. Co.*, 97 Tex. 590, 80 S.W. 990 (1904), the court held that the deceased's execution of a release for his injuries barred a subsequent wrongful death action. This case was decided prior to recognition of a survival suit in Texas and was grounded expressly on the premise that the "right of action given to the injured person does not, in the event of his death, survive under our statutes, but an action by the dependent relatives named is substituted for that which was lost by death." 97 Tex. at 594; 80 S.W. at 992. The court in essence treated the death action as if it were a survival claim, and applied the "one recovery" rule. As discussed below, damages recoverable in a death action are now recognized by this court as differing from those in an injury action. Similar considerations apply to the court's decision in *Sullivan-Sanford Lumber Co. v. Watson*, 106 Tex. 4, 155 S.W. 179 (1913), in which a family was denied recovery because of the release of liability contained in the pass permitting the deceased to ride on a private carrier.

8 The majority relies on *Francis v. Herrin Transp. Co.* 432 S.W.2d 710, 713 (Tex.1968), as vaguely supportive of today's statutory cross-pollination. That case, however, considered whether an action could be brought in Texas when the death and injury had occurred in Louisiana, and the limitations provision for death actions expressly contained in that state's statutes would bar suit. This court was not presented with the question of whether limitations applicable to injury actions could preclude a subsequent wrongful death suit.

9 Accord *Western Union Tel. Co. v. Preston*, 254 F. 229, 234 (3rd Cir.1918) (applying Pennsylvania law), cert. denied, 248 U.S. 585, 39 S.Ct. 182, 63 L.Ed. 433 (1919); *Larcher v. Wanless*, 18 Cal.3d 646, 135 Cal.Rptr. 75, 81, 82, 557 P.2d 507, 513, 514 (1976); *N.O. Nelson Mfg. Corp. v. Dickson*, 114 Ind.App. 668, 53 N.E.2d 640, 641 (1944); *Farmers Bank & Trust Co. v. Rice*, 674 S.W.2d 510, 512 (Ky.1984); *Smith v. McComb Infirmary Ass'n*, 196 So.2d 91, 93 (Miss.1967); *Gramlich v. Travelers Ins. Co.*, 640 S.W.2d 180, 186 (Mo.Ct.App.1982); *DeHart v. Ohio Fuel Gas Co.*, 84 Ohio App. 62, 85 N.E.2d 586, 590 (1948); *Brosse v. Cumming*, 20 Ohio App.3d 260, 485 N.E.2d 803, 807 (1984); see also *James v. Phoenix General Hosp., Inc.*, 154 Ariz. 594, 603, 744 P.2d 695, 704 (1989); *Carroll v. W.R. Grace & Co.*, 252 Mont. 485, 830 P.2d 1253 (1992); *Gilloon v. Humana, Inc.*, 100 Nev. 518, 687 P.2d 80 (1984); *Hoover's Administratrix v. Chesapeake & Ohio Railway Co.*, 46 W.Va. 268, 33 S.E. 224 (1899).

- 10 Taking the contrary view, that "probably the more prevalent" authority would bar such an action, the majority fails to compare the statutory language construed in the cited cases with that of the Texas Death Act. 841 S.W.2d at 350 n. 14.
- 11 In Texas, limitations is viewed as a procedural as opposed to a substantive condition restricting the right to bring an action for death. *Franco v. Allstate Ins. Co.*, 505 S.W.2d 789, 792–93 (Tex.1974).
- 12 Dean Green's extensive two-part analysis of the Texas Death Act was recently relied upon by the court in *Moreno v. Sterling Drug, Inc.*, 787 S.W.2d 348, 356 n. 8 (1990).
- 13 One purpose of Dean Green's article was to urge reversal of decisions of this court barring suit by the statutory beneficiaries of a woman whose husband's negligence contributed to the injuries resulting in her death. This recommendation was adopted, although belatedly. See *Schwing v. Bluebonnet Express*, 489 S.W.2d 279, 281 (Tex.1973).
- 14 The majority suggests that the two provisions do not pose a conflict under the circumstances of this case because the Petitioners' wrongful death action never accrued since Russell's personal injury action was barred by limitations at the time of his death. 841 S.W.2d at 348. Yet this analysis fails to resolve what would have happened if the defendants had not pleaded limitations. In essence, limitations are used in this case to bar substantive rights, contrary to our prior writings. *City of Dallas v. Etheridge*, 253 S.W.2d 640, 643 (Tex.1953) ("[S]tatutes of limitations do not affect the substantive rights of parties; they merely bar the remedy by which one party seeks to enforce his substantive rights.").
- 15 There undoubtedly is a common law action for death which the majority's continued irrational refusal to recognize is antithetical to Texas families. See *Moreno*, 787 S.W.2d at 358, 364, 367 (Doggett, J., dissenting) (majority's opinion on this subject "can rightly be recorded as one of the most anti-family decisions in recent memory.").
- 16 Instead, to avoid "thwart[ing] the very purpose of limitations," 841 S.W.2d at 349, both the rather plain language of the limitations provision is overridden and these many principles of statutory construction ignored.
- 17 Emily Dickinson, *The Bustle in the House*, *The Complete Poems of Emily Dickinson* (T.H. Johnson 1960).
- 1 In *Francis* the injury and death occurred in Louisiana, and the limitations provision for death actions under Louisiana law barred suit. This court held the Texas limitations statute could not create a cause of action that under choice of law rules did not exist.
- 2 See, e.g., STUART M. SPEISER, 2 RECOVERY FOR WRONGFUL DEATH § 11:17 at 193–94 (2d ed. 1975); 22A AM.JUR.2d *Death*, § 62 at 174–75 (1988).
- 3 "Under most wrongful death statutes, the cause of action is a new and independent one, accruing to the representative or to surviving relatives of the decedent only upon his death; and since the cause of action does not come into existence until the death, it is not barred by prior lapse of time, even though the decedent's own cause of action for the injuries resulting in death would be barred." RESTATEMENT (SECOND) OF TORTS § 899 cmt. c, at 442 (1965). But see RESTATEMENT OF TORTS § 899 cmt. c, at 525 (1939) ("A cause of action for death is complete when death occurs; since, however, the decedent in his lifetime had a cause of action, the cause of action for death does not come into existence if before the death that action for the tortious conduct has been barred by lapse of time.")
- 4 See, e.g., Leon Green, *The Texas Death Act*, 26 TEXAS L.REV. 133, 461–62 (1947).
- 5 Courts in some states also reach this result by holding their wrongful death statutes are not derivative. See *James v. Phoenix General Hospital, Inc.*, 154 Ariz. 594, 603, 744 P.2d 695, 704 (1989); *Gramlich v. Traveller's Ins. Co.*, 640 S.W.2d 180 (Mo.App.1982); *Silverman v. Lathrop*, 168 N.J.Super. 333, 403 A.2d 18 (App.Div.1979) (citing *Lawlor v. Cloverleaf Memorial Park, Inc.*, 56 N.J. 326, 266 A.2d 569 (1968)); *Brosse v. Cumming*, 20 Ohio App.3d 260, 485 N.E.2d 803 (1984).

373 S.W.3d 605
Court of Appeals of Texas,
San Antonio.

West Headnotes (10)

Mary ZWEIG, Individually and as Representative
of the Estate of Stuart Zweig, Appellant

v.

SOUTH TEXAS CARDIOTHORACIC AND
VASCULAR SURGICAL ASSOCIATES, PLLC;
Dr. James R. Garrison, Jr., M.D.; Methodist
Texsan Heart Hospital, fka Texsan Heart
Hospital; Methodist Healthcare System of
San Antonio, Ltd.; and Methodist Healthcare
Ministries of South Texas, Inc., Appellees.

No. 04–11–00590–CV.

|
April 11, 2012.

Synopsis

Background: Patient's daughter brought wrongful death and survival actions against doctor and his employers following patient's death 127 days after heart surgery. Doctor and employers moved for summary judgment based on two year statute of limitations for medical liability claims. The 45th Judicial District Court, Bexar County, [Barbara Hanson Nellermeoe](#), P.J., granted the motion. Daughter appealed.

Holdings: The Court of Appeals, [Sandee Bryan Marion](#), J., held that:

[1] the two year statute of limitations governing healthcare liability claims and not the statute of limitations for wrongful death applied;

[2] application of statute of limitations for healthcare liability claims did not violate “open courts” provision of state constitution; and

[3] statute of repose governing healthcare liability claims did not preclude application of statute of limitations governing healthcare liability claims.

Affirmed

[1] Death

🔑 [Application of general statutes of limitations](#)

Death

🔑 [Computation of period of limitation](#)

The two year limitations period under the statute governing healthcare liability claims applied to wrongful death and survival actions arising from patient's death following heart surgery, and began to run on the date of the surgery that allegedly lead to the death of patient, rather than the actual date of patient's death; the limitations period did not begin to run on the date of the patient's death under the wrongful death statute because of the “notwithstanding any other law” language provided in the healthcare liability claims statute. [V.T.C.A., Civil Practice & Remedies Code § 16.003\(b\), 74.251.](#)

[Cases that cite this headnote](#)

[2] Constitutional Law

🔑 [Conditions, Limitations, and Other Restrictions on Access and Remedies](#)

The open courts provision, is premised upon the rationale that the Legislature has no power to create a remedy by due course of law that is contingent upon an impossible condition. [Vernon's Ann.Texas Const. Art. 1, § 13.](#)

[1 Cases that cite this headnote](#)

[3] Constitutional Law

🔑 [Conditions, Limitations, and Other Restrictions on Access and Remedies](#)

In order to establish an “open courts” violation, a litigant must satisfy a two-part test: (1) she must show that she has a well-recognized common-law cause of action that is being restricted by a statute and (2) she must show that the restriction is unreasonable or arbitrary when balanced against the purpose and basis of the statute.

[2 Cases that cite this headnote](#)

[4] Constitutional Law

🔑 [Time for proceedings](#)

Limitation of Actions

🔑 [Constitutionality of statute](#)

Application of the statute of limitations for healthcare liability claims to plaintiff's wrongful death and survival claims did not violate the "open courts" provision of the state constitution; its application did not create a legislatively imposed condition upon a common-law cause of action that was impossible to meet, and plaintiff had no cause of action at common law. [V.T.C.A., Civil Practice & Remedies Code §§ 71.002, 71.004, 71.021](#).

[3 Cases that cite this headnote](#)

[5] Death

🔑 [Application of general statutes of limitations](#)

Existence of a ten year statute of repose for healthcare liability claims did not preclude application of the two year statute of limitations for healthcare liability claims to patient's daughter's wrongful death and survival actions arising from death of patient following heart surgery, although daughter alleged that the impossibility of filing the actions while patient was mentally incompetent as a result of the surgery warranted application of only the statute of repose. [V.T.C.A., Civil Practice & Remedies Code § 74.251\(a, b\)](#).

[Cases that cite this headnote](#)

[6] Limitation of Actions

🔑 [Operation as to rights or remedies in general](#)

There are significant differences between a statute of limitations and a statute of repose; generally, a statute of repose specifies a longer period than that found in the statute of

limitations applicable to the same cause of action.

[1 Cases that cite this headnote](#)

[7] Limitation of Actions

🔑 [Causes of action in general](#)

Limitation of Actions

🔑 [Suspension or stay in general; equitable tolling](#)

Statutes of repose begin to run on a readily ascertainable date, and unlike statutes of limitations, a statute of repose is not subject to judicially crafted rules of tolling or deferral.

[1 Cases that cite this headnote](#)

[8] Limitation of Actions

🔑 [Operation as to rights or remedies in general](#)

The key purpose of a repose statute is to eliminate uncertainties under the related statute of limitations and to create a final deadline for filing suit that is not subject to any exceptions, except perhaps those clear exceptions in the statute itself.

[1 Cases that cite this headnote](#)

[9] Limitation of Actions

🔑 [Operation as to rights or remedies in general](#)

Statutes of limitations operate procedurally to bar the enforcement of a right while a statute of repose takes away the right altogether thereby creating a substantive right to be free of liability after a specified time.

[1 Cases that cite this headnote](#)

[10] Limitation of Actions

🔑 [Torts](#)

If the date the alleged tort occurred is ascertainable, limitations must begin on that date.

[Cases that cite this headnote](#)

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Attorneys and Law Firms

Bruce E. Anderson, Brin & Brin, P.C., Stephen R. Darling, Gonzales Hoblit Ferguson L.L.P., Robinson C. Ramsey, Langley & Banack, Inc., San Antonio, TX, for Appellee.

Sitting: KAREN ANGELINI, Justice, SANDEE BRYAN MARION, Justice, PHYLIS J. SPEEDLIN, Justice.

***607 OPINION**

Opinion by: SANDEE BRYAN MARION, Justice.

This is an appeal from summary judgments rendered in favor of appellees, South Texas Cardiothoracic and Vascular Surgical Associates, PLLC; Dr. James R. Garrison, Jr., M.D.; San Antonio Hospital Management, Inc.; Heart Hospital of San Antonio, L.P. d/b/a TexSan Heart Hospital; Methodist Healthcare System of San Antonio, Ltd.; and Methodist Healthcare Ministries of South Texas, Inc. We affirm.

BACKGROUND

Appellee, Mary Zweig, is the daughter of Stuart Zweig, deceased. On December 8, 2008, Dr. James Garrison performed aortic valve replacement and bypass surgery on Mr. Zweig at TexSan Heart Hospital. Mr. Zweig remained a patient at TexSan Heart Hospital until December 23, 2008 when he was transferred to a long-term care facility at Kindred Hospital. Mr. Zweig died while at Kindred Hospital on April 29, 2009. Mary filed suit, individually and as personal representative of her father's estate, against all the appellees on April 29, 2011. Mary asserted Dr. Garrison was an employee and agent of all other appellees.

Each of the appellees alleged that all of the claims asserted by Mary arose from the care and treatment provided to Mr. Zweig from December 8, 2008 through (at the latest) December 23, 2008 in connection with his coronary artery occlusive disease, aortic stenosis, hypertension, and probable underlying chronic obstructive pulmonary

disease. The Texas Civil Practice and Remedies Code requires a health care liability claim to be commenced “within two years from the occurrence of the breach or tort or from the date the medical or health care treatment that is the subject of the claim or the hospitalization for which the claim is made is completed.” TEX. CIV. PRAC. & REM.CODE ANN. § 74.251(a) (West 2011). Civil Practice and Remedies Code section 74.051 provides that “[n]otice given as provided in this chapter shall toll the applicable statute of limitations to and including a period of 75 days following the giving of the notice and this tolling shall apply to all parties and potential parties.” *Id.* § 74.051(c).

In their motion for summary judgment, Dr. Garrison and South Texas Cardiothoracic and Vascular Surgical Associates, PLLC (“the Garrison appellees”) asserted Mary's claims accrued on December 8, 2008, the date Dr. Garrison performed the surgery; therefore, even applying the tolling period of section 74.051, limitations expired on February 21, 2011. Alternatively, the Garrison appellees argued that if Mary's claims accrued on December 23, 2008 (the date he was discharged from the hospital) and if proper notice was provided, limitations ran on March 8, 2011. The Garrison appellees asserted Mary did not provide the statutory notice until April 28, 2011 and she filed her suit on April 29, 2011; therefore, her claims were time-barred. The Garrison appellees also argued the open courts provision of the Texas Constitution did not apply because (1) this provision is applicable only to common law causes of action and Mary's wrongful death and survival claims based on medical malpractice are purely statutory in nature, and (2) Mary did not use due diligence in bringing her claims. Finally, the Garrison appellees argued Mary's fraudulent concealment defense to limitations failed because Dr. Garrison had no duty to disclose after the patient-physician relationship ended on December 23, 2008 and Mary knew before that date about any mental disability suffered by her father.

All other appellees asserted in their motions for summary judgment, that Mary's ***608** claims accrued on December 23, 2008, the date Mr. Zweig was discharged and ceased to be under their care. Therefore, according to these appellees, Mary was required to file her claims on or before December 23, 2010, but she did not do so until more than two years after any alleged negligence occurred. These appellees also argued that because Mary did not provide the required statutory notice of her claims until

after limitations had expired, limitations was not tolled by [section 74.051](#).

Mary responded to the motions for summary judgment by arguing limitations were tolled because her father was mentally incapacitated for a period of 127 days from the date of his December 8, 2008 surgery to the date of his April 29, 2009 death.¹ Mary argued [section 74.251](#) created an “impossible” condition in conflict with the open courts provision because [section 74.251](#) required a mentally incompetent person to file suit when that person was incapable of doing so. The trial court agreed with the appellees and rendered take-nothing judgments in their favor. This appeal by Mary ensued.

DISCUSSION

[1] We first address Mary's argument that her father was unable to file suit during the 127 days following his surgery because of his mental incompetence and requiring her, as his survivor, to file suit in the remaining time based on the date of his surgery, rather than on the date of his death, contradicts the statute of limitations for a wrongful death claim. See [TEX. CIV. PRAC. & REM.CODE ANN. § 16.003\(b\)](#) (West 2002) (generally, wrongful death claims are subject to a two-year limitations period that begins on the date of death). This argument was considered and rejected by the Texas Supreme Court in [Bala v. Maxwell](#), 909 S.W.2d 889 (Tex.1995). In [Bala](#), at issue were two statutes of limitations, one governing wrongful death actions and the other [section 74.251](#)'s predecessor governing healthcare liability claims. *Id.* at 892. When, in a wrongful death action based on medical negligence, there arose a question as to when the limitations period began—from the date of death or the date of the alleged breach—the Texas Supreme Court cited the “notwithstanding any other law” language in [section 74.251](#)'s predecessor and concluded it governed, meaning that the limitations period commenced on the date of the alleged breach and not on the date of death. *Id.* at 892–93. Therefore, [section 74.251](#)'s limitations period began to run from the date of Mr. Zweig's surgery and applies to Mary's wrongful death claim, as well as her survivor claim. Accordingly, as to both claims, we next address Mary's open courts challenge.

[2] The Texas Constitution provides that “[a]ll courts shall be open, and every person for an injury done him,

and his lands, goods, person or reputation, shall have remedy by due course of law.” [TEX. CONST. art. I, § 13](#). This provision, known as the “open courts” provision, is premised upon the rationale that the Legislature has no power to create a remedy by due course of law that is contingent upon an “impossible condition.” [Moreno v. Sterling Drug, Inc.](#), 787 S.W.2d 348, 355 (Tex.1990).

[3] Mary argues the limitations period contained in [section 74.251](#) conflicts with the open courts provision because it creates an “impossible condition” by requiring an individual who lacks mental capacity and has no legal guardian to file suit within ***609** two years of the date of surgery. In order to establish an “open courts” violation, a litigant must satisfy a two-part test: (1) she must show that she has a well-recognized common-law cause of action that is being restricted by a statute and (2) she must show that the restriction is unreasonable or arbitrary when balanced against the purpose and basis of the statute. [Lucas v. United States](#), 757 S.W.2d 687, 690 (Tex.1988); [Sax v. Votteler](#), 648 S.W.2d 661, 666 (Tex.1983).

[4] Mary's underlying wrongful-death and survival actions would not exist absent legislative enactment; therefore, they are derived not from the common law but from a statute. See [TEX. CIV. PRAC. & REM.CODE ANN. §§ 71.002, 71.004, 71.021](#) (West 2008); see also [Bala](#), 909 S.W.2d at 893. Thus, Mary cannot prove at least one element of her open courts argument—*i.e.*, that she is pursuing common-law claims. “Because [Mary has] have no common law right to bring either a wrongful death or survival action, [she] cannot establish an open courts violation.” [Bala](#), 909 S.W.2d at 893.

[5] Finally, in an effort to save her claims from being barred by the two-year-limitations period, Mary points to the ten-year statute of repose contained in [subsection \(b\) of section 74.251](#) as support for her argument that her suit was timely filed.² [Section 74.251](#)'s statute of repose requires a claimant to “bring a health care liability claim not later than 10 years after the date of the act or omission that gives rise to the claim. This subsection is intended as a statute of repose so that all claims must be brought within 10 years or they are time barred.” [TEX. CIV. PRAC. & REM.CODE § 74.251\(b\)](#). Mary's reliance on subsection (b) is misplaced because she is confusing a statute of limitations with a statute of repose.

[6] [7] [8] [9] Section 74.251(b) is a statute of repose, not a statute of limitations, and “there are significant differences between the two.” *Galbraith Eng’g Consultants, Inc. v. Pochucha*, 290 S.W.3d 863, 866 (Tex.2009). “Generally, a statute of repose specifies a longer period than that found in the statute of limitations applicable to the same cause of action.” *Methodist Healthcare Sys. of San Antonio, Ltd., L.L.P. v. Rankin*, 307 S.W.3d 283, 286 (Tex.2010). “Statutes of repose begin to run on a readily ascertainable date, and unlike statutes of limitations, a statute of repose is not subject to judicially crafted rules of tolling or deferral.” *Id.* “[T]he key purpose of a repose statute is to eliminate uncertainties under the related statute of limitations and to create a final deadline for filing suit that is not subject to any exceptions, except perhaps those clear exceptions in the statute itself.” *Id.*; *Galbraith Eng’g*, 290 S.W.3d at 866 (purpose of a statute of repose is to provide “absolute protection to certain parties from the burden of indefinite potential liability”). Thus, statutes of limitations operate procedurally to bar the enforcement of a right while a statute of repose takes away the right altogether thereby creating a substantive right to be free of liability after a specified time. *Rankin*, 307 S.W.3d at 287.

*610 [10] Section 74.251(a)'s two-year statute of limitations mandates that all health care claims be brought within two years. Subsection (b)'s statute of repose merely provides a point in time at which potential defendants are free of liability. Mary argues that performance of the “impossible act” of filing suit while incompetent is “unreasonable,” and the limitations of ten years contained in the statute of repose applies. We disagree. As stated above, a plaintiff may not choose the most favorable date that falls within section 74.251's three categories. *Shah*, 67 S.W.3d at 841; *Bala*, 909 S.W.2d at 891. Rather, if the date the alleged tort occurred is ascertainable, limitations must begin on that date. *Shah*, 67 S.W.3d at 841. Therefore, limitations began to run on December 8, 2008 and expired two years, not ten years, later.

CONCLUSION

We overrule Mary's issues on appeal and affirm the trial court's summary judgments in favor of the appellees.

All Citations

373 S.W.3d 605

Footnotes

- 1 Appellees raised a variety of objections to allegations in Mary's summary judgment affidavit regarding Mr. Zweig's mental condition following his surgery. The trial court sustained the objections on only one basis: “At most, this assertion is no more than a factual conclusion without underlying factual support.”
- 2 In her response to the motions for summary judgment, Mary also raised the seventy-five days provided in section 74.051, but she does not raise this argument on appeal. In her response, Mary states only as follows: “Section 74.051 provides an additional seventy five (75) days of tolling beyond the ultimate statute of limitations. As there is a dispute here as to the final date, either 74.051 provides an additional time period or it does not. This examination is irrelevant to the primary determination and need not be addressed.” Mary provided the statutory notice on April 28, 2011, long after limitations had expired.

 KeyCite Yellow Flag - Negative Treatment
 Rejected by [Bolton v. Caine](#), Me., May 25, 1988
 550 S.W.2d 18
 Supreme Court of Texas.

Cecil A. ROBINSON, Petitioner,
 v.
 C. W. WEAVER et al., Respondents.

No. B-6072.

|
 April 6, 1977.

|
 Rehearing Denied May 18, 1977.

Patient, who had sustained on-the-job injury, brought malpractice action against doctor on basis of theory of improper diagnosis. The District Court, No. 109, Winkler County, Ken G. Spencer, J., entered summary judgment for doctor on plea of two-year statute of limitations, and patient appealed. The El Paso Court of Civil Appeals, Eighth Supreme Judicial District, Osborn, J., [536 S.W.2d 243](#), reversed and remanded. The Supreme Court, Denton, J., held that “discovery rule” did not apply to action based upon defendant physician's alleged misdiagnosis and consequently action was barred by two-year statute of limitations.

Judgment of the Court of Civil Appeals reversed; judgment of trial court affirmed.

Pope, J., filed dissenting opinion in which McGee, Johnson and Yarbrough, JJ., joined.

West Headnotes (6)

[1] Limitation of Actions

 Causes of Action in General

Limitation of Actions

 Injuries to Person

For purposes of application of statutes of limitation, cause of action generally can be said to accrue at time when facts come into existence which authorize claimant to seek judicial remedy and, in personal injury actions, this means when wrongful act effects an injury, regardless of when claimant learned

of such injury; however, “discovery rule” constitutes exception to this rule in some situations. [Vernon's Ann.Civ.St. art. 5526](#).

[137 Cases that cite this headnote](#)

[2] Limitation of Actions

 Nature of Statutory Limitation

Primary purpose of statute of limitations is to compel exercise of right of action within reasonable time so that opposing party has fair opportunity to defend while witnesses are available and evidence is fresh in their minds and preclusion of legal remedy alone is not enough to justify judicial exception to statute.

[40 Cases that cite this headnote](#)

[3] Health

 Diagnosis in General

Health

 Particular Procedures

Plaintiff, to prove his cause of action for medical malpractice based on alleged misdiagnosis, faced burden of proving both mistake in professional judgment and that such mistake was negligent, and expert testimony was required.

[13 Cases that cite this headnote](#)

[4] Negligence

 Necessity of Expert Testimony

Physical evidence generally is not available when primary issue relevant to liability concerns correctness of past judgment, thus necessitating introduction of expert testimony.

[3 Cases that cite this headnote](#)

[5] Health

 Particular Procedures

Health

 Obstetrics, Gynecology, and Reproductive Health

Sterility is establishable in medical malpractice action by physical proof; negligently erroneous judgment by expert testimony.

[3 Cases that cite this headnote](#)

[6] Limitation of Actions

🔑 Health Care Professionals in General

“Discovery rule” did not apply to medical malpractice action based upon physician's alleged misdiagnosis and accordingly, plaintiff's cause of action, which was filed more than two years after defendant physician allegedly misdiagnosed plaintiff's condition and operated on wrong intervertebral disc, but less than two years after alleged actual discovery of misdiagnosis, was barred by two-year statute of limitations. [Vernon's Ann.Civ.St. art. 5526](#).

[62 Cases that cite this headnote](#)

Attorneys and Law Firms

*19 Shafer, Gilliland, Davis, Bunton & McCollum, W. O. Shafer and James M. O'Leary, Odessa, Finley & Scogin, Robert Scogin, Kermit, for petitioner.

James D. Cunningham, Odessa, Little & Little, Jack N. Little, Big Spring, for respondents.

Opinion

DENTON, Justice.

The trial judge has rendered a summary judgment in this medical malpractice case, holding that the plaintiff's cause of action for damages due to misdiagnosis is barred by the two-year statute of limitations. The court of civil appeals has reversed and remanded, holding that the “discovery rule” applies and that a question of fact exists concerning when the plaintiff knew or should have known of his injury. [536 S.W.2d 243](#). We reverse the judgment of the court of civil appeals and affirm that of the trial court.

The plaintiff injured his back on July 26, 1971. On August 6, 1971, the defendant performed radiographic and other tests upon the plaintiff, and concluded that plaintiff had a herniated disc between his fourth and

fifth lumbar vertebrae. Four days later, the defendant surgically repaired the disc diagnosed as herniated. The plaintiff remained in the defendant's care until late December of 1971, during which time he continued to have back pains. On January 26, 1972, the plaintiff saw another physician, who prescribed a back brace, and later on April 25, 1972, performed radiographic tests which resulted in a diagnosis of a herniated disc. The following day, April 26, 1972, a herniated disc between the third and fourth lumbar, vertebrae was excised. The gravamen of plaintiff's claim is, therefore, that defendant erroneously diagnosed plaintiff's condition and operated on the wrong intervertebral disc.

This action was filed by plaintiff on April 4, 1974, more than two years after plaintiff had changed physicians, but less than two years after the alleged actual discovery of an injury different from that diagnosed and treated by defendant in August of 1971. The applicable statute of limitations is [Article 5526 of the revised civil statutes](#), providing:

There shall be commenced and prosecuted within two years after the cause of action shall have accrued, and not afterwards, all actions or suits in court of the following description:

6. Action for injury done to the person of another.

The defendant asserts that plaintiff's action is barred by limitations. The plaintiff claims he did not actually discover, nor in the exercise of ordinary care should he have discovered, that there was a misdiagnosis until the results of the second operation were known to him, and that his cause of action did not, therefore, accrue until such time.

[1] For the purposes of application of statutes of limitations, a cause of action generally can be said to accrue at the time when facts come into existence which authorize a claimant to seek a judicial remedy. [Williams v. Pure Oil Company, 124 Tex. 341, 78 S.W.2d 929 \(1935\)](#). In personal injury actions, this means when the wrongful act effects an injury, regardless of when the claimant learned of such injury. An exception to this rule of accrual has been applied by this and many other courts in some situations in which a claimant was unable to know of his injury at the time of actual accrual; the exception is known as the “discovery rule.” The issue in this case is whether this “discovery rule” will be applied to an action founded upon a misdiagnosis.

In *Gaddis v. Smith*, 417 S.W.2d 577 (Tex.1967), we held that a “cause of action for negligent leaving of a foreign object in a patient's body by a physician accrues when the patient learns of, or, in the exercise of reasonable care and diligence, should have learned of the presence of such foreign object in his body.” 417 S.W.2d at 580. *Gaddis* is representative of what now may be considered the majority rule in the United States. Annot., *20 *When Statute of Limitations Commences to Run against Malpractice Action Based on Leaving Foreign Substance in Patient's Body*, 70 A.L.R.3d 7 (1976). The statute of limitations in a cause of action for negligent performance of a vasectomy operation was held in *Hays v. Hall*, 488 S.W.2d 412 (Tex.1972), to have commenced to run “on the date of discovery of the true facts concerning the failure of the operation, or from the date it should, in the exercise of ordinary care and diligence, have been discovered.” 488 S.W.2d at 414. And we found no reversible error in the court of civil appeals' holding that a cause of action for excessive treatment with X-rays did not “accrue” for limitations purposes until the plaintiff, a cancer patient, had learned that excessive radiation, and not a recurrence of cancer, was the cause of her ulcerated epidermis. *Grady v. Faykus*, 530 S.W.2d 151 (Tex.Civ.App. Corpus Christi 1975, writ ref'd n.r.e.).

[2] The result in “discovery rule” cases like *Gaddis*, *Hays v. Hall* and *Grady v. Faykus* stems from the recognition of the purposes of statutes of limitations; and, at the same time, recognition of what is not the statutes' purpose, but an unfortunate, occasional by-product. The primary purpose of a statute of limitations is to compel the exercise of a right of action within a reasonable time so that the opposing party has a fair opportunity to defend while witnesses are available and the evidence is fresh in their minds. *Price v. Estate of Anderson*, 522 S.W.2d 690 (Tex.1975); *Hallaway v. Thompson*, 148 Tex. 471, 226 S.W.2d 816 (1950). Statutes of limitations are not directed to the merits of any individual case, they are a result of the legislative assessment of the merits of cases in general. The fact that a meritorious claim might thereby be rendered nonassertible is an unfortunate, occasional by-product of the operation of limitations. All statutes of limitations provide some time period during which the cause of action is assertible. However, preclusion of a legal remedy alone is not enough to justify a judicial exception to the statute. The primary purpose of limitations, to prevent litigation of stale or fraudulent claims, must be kept in mind. See Note, 30 Sw.L.J. 950 (1976).

This Court has specifically limited its prior holdings regarding this discovery rule in malpractice cases. In *Gaddis v. Smith*, 417 S.W.2d 577 (Tex.1967), this Court limited its holding to causes of action in which a foreign object is left in the body of a patient, noting that in this type of case there is an “inability to know of the negligent act” and that it is a “peculiar type of case which is not particularly susceptible to fraudulent prosecution.” This same rationale was also expressed in the “vasectomy” case, *Hays v. Hall*, 488 S.W.2d 412 (Tex.1973). There this Court held “that in malpractice cases arising from vasectomy operations the Statute of Limitations commences to run on the date of the discovery of the true facts concerning the failure of the operation, or from the date it should, in the exercise of ordinary care and diligence, have been discovered.” 488 S.W.2d at 414. In *Gaddis v. Smith*, supra this Court quoted with approval, the following language from *Fernandi v. Strully*, 35 N.J. 434, 173 A.2d 277 (1961):

(T)he question when a cause of action accrues is a judicial one, and to determine it in any particular case is to establish a general rule of law for a class of cases, which rule must be founded on reason and justice. . . .

In the absence of legislative definition and specification, the . . . courts have often been called upon to delineate the statute; they have conscientiously sought to apply it with due regard to the underlying statutory policy of repose, without, however, permitting unnecessary injustices. . . . (I)n still other instances they have declined to find the bar inequitable though the plaintiff admittedly knew nothing about the cause of action until shortly before the institution of his action; in reaching this result they were not unaware of the individual injustice to the plaintiff but presumably determined that, on balance, it was outweighed by the need for repose and the *21 danger that a different approach might undermine the statutory goal.

173 A.2d at 285.

Immediately following the above quoted language, the New Jersey Court in *Fernandi v. Strully* distinguished the “foreign object” case from other types of medical malpractice cases, noting that it “does not raise questions as to (plaintiff's) credibility nor does it rest on matters of professional diagnosis, judgment or discretion.” In such

a case, “the lapse of time does not entail the danger of a false or frivolous claim nor the danger of a speculative or uncertain claim.”

The case before us however does “rest on matters of professional diagnosis, judgment or discretion.” This distinction between an “alleged misdiagnosis” case and a “foreign object” case was also clearly drawn in [Owens v. White, 380 F.2d 310 \(9th Cir. 1967\)](#), in the following language:

Extension of the discovery rule to encompass a case of the type involved here would subject physicians to the possibility of liability, or at least to the embarrassment and expense of litigation, upon claims of mistaken diagnosis of any illness, however great may have been the lapse of time between the date of cessation of the doctor-patient relationship and the formal prosecution of the claim. The danger of “fraudulent and stale” claims, which the Idaho court recognized to be diminished in foreign object cases, is obviously enhanced when the claim of medical malpractice is predicated upon alleged misdiagnosis. In such a case, unlike the foreign object situations, not even the fact of injury can always be clear. Even in its present stage of advanced development, medicine is not an exact science. Symptoms and diseases thought at one time, even recently, to fall into one category are later discovered, through the evolution of the science, to fall into another. If the trier of fact should be convinced, upon the basis of new knowledge, that a mistaken diagnosis was made, the defendant's task of establishing that his conduct did not fall below the standard of care which prevailed in his profession at the time and place of the alleged error could prove insurmountable in the event of sufficient lapse of time.

[380 F.2d at p. 316](#) (emphasis supplied).

[3] [4] The cause of action alleged in the present case is founded upon an alleged misdiagnosis in August of 1971. Plaintiff, to prove his cause of action, faces the burden of proving both a mistake in professional judgment and that such mistake was negligent. Expert testimony would be required. Physical evidence generally is not available when the primary issue relevant to liability concerns correctness of past judgment. Unlike *Gaddis v. Smith* there exists in the present case no physical evidence which in-and-of-itself establishes the negligence of some person. What physical evidence was to the cause of action alleged in *Gaddis v. Smith*, expert testimony is to the cause of action in the present case. Even the fact of injury is a matter of expert testimony.

[5] Likewise in *Hays v. Hall* the defendant doctor's error was established by the physical fact that plaintiff's wife became pregnant and was also subject to proof by performance of fertility tests upon the plaintiff. Sterility vel non involved a wholly different line of inquiry from the erroneous judgment vel non involved in the present case. Sterility is establishable by physical proof; negligently erroneous judgment by expert testimony.

Grady v. Faykus goes somewhat further than did this Court in *Hays v. Hall* and *Gaddis v. Smith*, in that the court of civil appeals applied the “discovery rule” to a cause of action founded upon negligent treatment. Mrs. Grady, following a radical mastectomy for breast cancer, was referred by her surgeon to the defendant physicians for administration of X-ray therapy. Such therapy was concluded by the defendants in November of 1969. Ten months later, in September of 1970, Mrs. Grady was informed by a plastic surgeon that skin ulcers in areas exposed to radiation were the result of excessive doses of radiation. Suit was filed against the therapist-doctors in June of 1972, more than two years after the *22 termination of treatments by the defendants, but less than two years following the date on which she became apprised of the cause of her pain. The “discovery rule” was applied, and this Court found no reversible error. It must be pointed out that Mrs. Grady's claim was not against her surgeon for recommending X-ray therapy; it was for the negligent administration of such therapy. If she in fact received excessive doses of radiation, such could be established by proof of her present bodily condition.

[6] Assuming for the moment that strict application of limitations would have an unintended effect in the present case, in that plaintiff's claim would be held barred less than two years after he knew of his injury, it is nevertheless clear that the purpose of limitations would be furthered by such application. Proof of plaintiff's cause of action would demand expert testimony concerning the interpretation of tests made in 1971. While present physical evidence might exist which proves that plaintiff's disc was excised in 1971, the main issue of negligent exercise of judgment is subject to proof only by expert hindsight. The line between negligent diagnosis and the negligent treatment in *Grady v. Faykus* may indeed be a fine one, but the distinction is necessary in order to assure that the primary purpose of statute, of limitations is met. We decline to apply the discovery rule to encompass a case of the type involved here.

The judgment of the court of civil appeals is reversed, and the judgment of the trial court is affirmed.

Dissenting Opinion by POPE, J., in which McGEE, JOHNSON and YARBROUGH, JJ., join.

POPE, Justice, dissenting.

I respectfully dissent. The case presents a single question: Does the "discovery rule" apply to an action based upon a medical doctor's misdiagnosis? The majority answers no. By so holding, the majority treats misdiagnosis differently than we have treated other types of medical malpractice. I disagree with the majority holding. I believe that we should be consistent with our prior holdings and apply the "discovery rule" to a doctor's misdiagnosis.

In *Gaddis v. Smith*, 417 S.W.2d 577 (Tex.1967), this court applied the "discovery rule" to a foreign object negligently left in a patient's body. In *Hays v. Hall*, 488 S.W.2d 412 (Tex.1973), we extended the "discovery rule's" coverage to an unsuccessful vasectomy operation. The Corpus Christi Court of Civil Appeals, in *Grady v. Faykus*, 530 S.W.2d 151 (Tex.Civ.App.1975, writ ref'd n.r.e.), applied the rule to negligently administered X-ray treatments. In *Nichols v. Smith*, 507 S.W.2d 518 (Tex.1974), both vagus nerves were severed during a hernia operation. This court noted the discovery rule issue was not raised and stated:

In so far as Mrs. Nichols bases her claim on the alleged severance (sic)

of . . . the vagus nerve, it could be argued that the case is governed by the discovery rule Our action in affirming . . . is not to be understood, therefore, as holding that the discovery rule has no application here. *Id.* at 521.

In *Sanchez v. Wade*, 514 S.W.2d 812 (Tex.Civ.App.1974, no writ), the El Paso Court of Civil Appeals applied the "discovery rule" to a doctor's negligent and incorrect diagnosis. The El Paso court made the same holding in the case now before us. The "discovery rule" has also been applied in other areas of Texas law.¹

*23 As Professor Prosser explains, there has been a "wave of decisions" adopting the "discovery rule" for all medical malpractice actions. PROSSER, LAW OF TORTS, s 30 (4th ed. 1971).² The decision of *Yoshizaki v. Hilo Hospital*, 50 Haw. 150, 433 P.2d 220 (1967), is the most frequently cited opinion in this line of cases. In *Yoshizaki*, the court recognizes that there are two conflicting public policies at issue. There is the policy of protecting the practitioner from stale demands, and there is the conflicting policy favoring the adjudication of meritorious claims. Balancing these two policies, the Hawaii Supreme Court concluded that the burden placed upon the doctor is less than the injustice the plaintiff would suffer if the discovery rule was not applied. The Hawaii court explained that, "A basic reason underlying statutes of limitation is nonexistent; the plaintiff has not delayed voluntarily in asserting her claim." In reaching the same conclusion, the Oregon Supreme Court noted that it is impossible on a theoretical basis to apply the discovery rule to one kind of malpractice and not to other types of malpractice. *Frohs v. Greene*, 253 Or. 1, 452 P.2d 564 (1969). The Oregon court explained that in all malpractice, "it is unfair to say a person can maintain an action before he knows he has one." We explained in *Hays v. Hall* that it is unjust to hold that a "legal remedy is unavailable to the injured party before he can know that he is injured." I agree with the Oregon Supreme Court that this reasoning is as equally applicable to a misdiagnosis action as it is to a foreign object or vasectomy action.

It is important to note that Mr. Weaver remained under Dr. Robinson's treatment from August, 1971, through December, 1971. During this period, he continually complained of persistent pain and infection around

the incision area. Dr. Robinson responded to these complaints by telling Mr. Weaver that he was “worrying too much.” The majority opinion in effect says that a patient trusts his physician's advice at his own risk. In a similar situation, the Michigan Supreme Court explained that:

(I)t would be “illogical and unintelligent” to require a patient to determine on the date he last consults a physician that malpractice has taken place, when he in fact relies upon the advice that constitutes the malpractice. So to hold would punish the patient who relies upon his doctor's advice and places a premium on skepticism and distrust. *Johnson v. Caldwell*, 371 Mich. 368, 123 N.W.2d 785 (1963).

The California Supreme Court has long recognized that due to a doctor and patient's fiduciary relationship, “facts which would ordinarily require investigation may not excite suspicion, and that the same degree of diligence is not required of the injured person.” *Stafford v. Shultz*, 42 Cal.2d 767, 270 P.2d 1 (1954); *Hobart v. Hobart Estate Co.*, 26 Cal.2d 412, 159 P.2d 958 (1945). The Oklahoma Supreme Court has stated that “justice would often be defeated” if victims of medical malpractice must diagnose their injuries where “special knowledge not possessed by an ordinary layman” is required. *Seitz v. Jones*, 370 P.2d 300, 302 (Okla. 1961). The Supreme Court of Rhode Island reasoned that where the discovery rule is not allowed, a patient could only protect his legal rights against a doctor's malpractice by submitting to a complete examination by an independent doctor after every treatment or operation. *Wilkinson v. Harrington*, 104 R.I. 224, 243 A.2d 745 (1968). In the case at hand, Mr. Weaver only discovered the misdiagnosis when he finally did submit to an examination by an independent doctor. His delay in making this discovery resulted from his trust and reliance upon Dr. Robinson's advice. To hold that his cause accrued when the misdiagnosis occurred encourages patients to distrust their doctors. As we stated in *Hays*, “A result so absurd and so unjust ought not be possible.”

The steps in the discovery of Mr. Weaver's cause of action are closely akin to the steps taken in *Gaddis*. Like *Gaddis*, Weaver had knowledge of internal pain but had no knowledge of cause. Only after the second myelogram,

on April 25, 1972, which revealed the ruptured disc, did Weaver reasonably know of the existence of his cause of action. As in *Gaddis* and *Hays*, the statute of limitations in this case should run from the date of discovery.

It is true that in a misdiagnosis case, a physical object is not involved, but this does not mean that a fraudulent claim may be more easily asserted. As the Hawaii Supreme Court stated in *Yoshizaki v. Hilo Hospital*:

(T)reatment generally follows diagnosis. The treatment is an objective fact which may be proved or disproved by people other than plaintiff. The fact that the treatment is the kind normally administered for the ailment the doctor allegedly improperly diagnosed is strong evidence of the diagnosis. 50 Haw. 150, 433 P.2d 220 (1967).

We have already applied the discovery rule in cases which did not involve physical objects. See, *Hays v. Hall*, *supra*; *Grady v. Faykus*, *supra*. In our facts, the care and treatment that Dr. Robinson prescribed for Mr. Weaver are safe indicia of the misdiagnosis. In addition to the treatment, the office and hospital records supply further reliable evidence of misdiagnosis.

The New York courts have not limited the discovery rule to foreign object cases. In *Murphy v. St. Charles Hospital*, 35 A.D.2d 64, 312 N.Y.S.2d 978 (1970), a prosthesis was inserted in a patient's hip. Four years later the prosthesis broke, and surgery was required to remove it. In *Dobbins v. Clifford*, 39 A.D.2d 1, 330 N.Y.S.2d 743 (1972), a patient's spleen was severely damaged during a pancreas operation. In both cases, the discovery rule was applied. The court in each case reasoned that discovery was difficult because the malpractice was committed internally. The same reasoning applies to Dr. Robinson's myelogram of Mr. Weaver which was also performed internally.

I would affirm the judgment of the court of civil appeals and make the Texas law consistent with our other malpractice decisions instead of applying the “discovery rule” sometimes and sometimes denying its applicability. The rule announced by the majority encourages a spirit of distrust of one's doctor, it unfairly denies a cause of action before one learns that he has a cause, and it is

contrary to the leading cases throughout the country. The rule denies protection to the uninformed victim of the malpractitioner.

I would affirm the judgment of the court of civil appeals.

McGEE, JOHNSON and YARBROUGH, JJ., join in this dissent.

All Citations

550 S.W.2d 18

Footnotes

- 1 The "discovery rule" applies in actions based on fraud, [Ellison v. McGlaun](#), 482 S.W.2d 304 (Tex.Civ.App.1972, writ ref'd n.r.e.), and fraudulent concealment in medical malpractice cases, [Thompson v. Barnard](#), 142 S.W.2d 238 (Tex.Civ.App.1940), aff'd, 138 Tex. 277, 158 S.W.2d 486 (1942). In an action for breach of contract, or implied warranty, the statute of limitations runs from the time plaintiff knew or should have known of the breach. [Rothman v. Gulf Coast Investment Corp.](#), 497 S.W.2d 792 (Tex.Civ.App.1973), rev'd on other grounds, 506 S.W.2d 856 (Tex.1974). Recently, the rule was applied in a suit for defamation. [Kelley v. Rinkle](#), 532 S.W.2d 947 (Tex.1976).
- 2 Courts now more generally applying the discovery rule to medical malpractice cases are: [Mayer v. Good Samaritan Hospital](#), 14 Ariz.App. 248, 482 P.2d 497 (1971); [Stafford v. Shultz](#), 42 Cal.2d 767, 270 P.2d 1 (1954); [Owens v. Brochner](#), 172 Colo. 525, 474 P.2d 603 (1970); [City of Miami v. Brooks](#), 70 So.2d 306 (Fla.1954); [Yoshizaki v. Hilo Hospital](#), 50 Haw. 150, 433 P.2d 220 (1967); [Renner v. Edwards](#), 93 Idaho 836, 475 P.2d 530 (1970); [Lipsey v. Michael Reese Hospital](#), 46 Ill.2d 32, 262 N.E.2d 450 (1970); [Baines v. Blenderman](#), 223 N.W.2d 199 (Iowa 1974); [Tomlinson v. Siehl](#), 459 S.W.2d 166 (Ky.1970); [Springer v. Aetna Casualty and Surety Company](#), 169 So.2d 171 (La.App.1964); [Waldman v. Rohrbaugh](#), 241 Md. 137, 215 A.2d 825 (1966); [Johnson v. Caldwell](#), 371 Mich. 368, 123 N.W.2d 785 (1963); [Acker v. Sorensen](#), 183 Neb. 866, 165 N.W.2d 74 (1969); [Iverson v. Lancaster](#), 158 N.W.2d 507 (N.D.1969); [Frohs v. Greene](#), 253 Or. 1, 452 P.2d 564 (1969); [Wilkinson v. Harrington](#), 104 R.I. 224, 243 A.2d 745 (1968); [Teeters v. Currey](#), 518 S.W.2d 512 (Tenn.1974); [Janisch v. Mullins](#), 1 Wash.App. 393, 461 P.2d 895 (1969). Six states, including Texas and three of the above jurisdictions, have enacted special statutes of limitation placing a maximum limitation on the time allowed for discovery. 7 St. Mary's L.J. 770 (1976).

445 S.W.3d 698
Supreme Court of Texas.

TENET HOSPITALS LIMITED, A Texas Limited
Partnership d/b/a Providence Memorial Hospital,
and Michael D. Compton, M.D., Petitioners

v.

Elizabeth RIVERA, as Next
Friend for M.R., Respondent.

No. 13–0096.

|
Argued Feb. 4, 2014.

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Decided Aug. 22, 2014.

|
Rehearing Denied Nov. 21, 2014.

Synopsis

Background: Mother, on behalf of minor child, brought action against hospital and physician for medical negligence, arising from emergency cesarean section allegedly resulting in minor's permanent neurological injury and disability. The 120th Judicial District Court, El Paso County, Maria Salas–Mendoza, J., granted summary judgment in favor of hospital and physician. Mother appealed. The Court of Appeals, Guadalupe Rivera, J., 392 S.W.3d 326, reversed and remanded. Hospital sought review.

Holdings: The Supreme Court, [Guzman, J.](#), held that:

[1] statute of repose for the Medical Liability Act did not violate open courts provision as applied to mother, and

[2] statute was not unconstitutionally retroactive as applied.

Reversed and rendered.

[Lehrmann, J.](#), dissented and filed opinion.

West Headnotes (17)

[1] Constitutional Law

🔑 Facial invalidity

Constitutional Law

🔑 Invalidity as applied

A “facial challenge” claims that a statute, by its terms, always operates unconstitutionally; by contrast, an “as-applied challenge” asserts that a statute, while generally constitutional, operates unconstitutionally as to the claimant because of her particular circumstances.

4 Cases that cite this headnote

[2] Constitutional Law

🔑 Conditions, Limitations, and Other Restrictions on Access and Remedies

Open courts provision of Constitution guarantees that a common law remedy will not be unreasonably abridged. [Vernon's Ann.Texas Const. Art. 1, § 13](#).

1 Cases that cite this headnote

[3] Limitation of Actions

🔑 In general;what constitutes discovery

Tolling provisions generally defer accrual of a claim until the plaintiff knew, or in the exercise of reasonable diligence should have known, the facts giving rise to the claim.

Cases that cite this headnote

[4] Constitutional Law

🔑 Time for proceedings

In contrast to tolling statutes, the open courts provision of the Constitution merely gives litigants a reasonable time to discover their injuries and file suit; courts must determine what constitutes a reasonable time frame. [Vernon's Ann.Texas Const. Art. 1, § 13](#).

2 Cases that cite this headnote

[5] Constitutional Law

🔑 Time for proceedings;limitation or suspension of remedy

An open courts challenge is a due process complaint and requires the party to use

due diligence. U.S.C.A. Const.Amend. 14; Vernon's Ann.Texas Const. Art. 1, § 13.

2 Cases that cite this headnote

[6] Constitutional Law

🔑 Right of access to the courts and a remedy for injuries in general

The party raising the open courts challenge must raise a fact issue establishing that he did not have a reasonable opportunity to be heard. Vernon's Ann.Texas Const. Art. 1, § 13.

1 Cases that cite this headnote

[7] Constitutional Law

🔑 Delay in assertion of rights;laches

A guardian's lack of diligence may operate to bar a legally incompetent person's open courts challenge. Vernon's Ann.Texas Const. Art. 1, § 13.

1 Cases that cite this headnote

[8] Constitutional Law

🔑 Delay in assertion of rights;laches

A next friend's lack of due diligence may operate to bar a minor child's open courts challenge. Vernon's Ann.Texas Const. Art. 1, § 13.

1 Cases that cite this headnote

[9] Constitutional Law

🔑 Time for proceedings

Limitation of Actions

🔑 Constitutionality of statute

Ten-year statute of repose for the Medical Liability Act did not violate open courts provision as applied to mother, who brought action as next friend of her child against hospital and physician for medical negligence, arising from emergency cesarean section allegedly resulting in child's permanent neurological injury and disability, where an attorney sent the hospital and physician the statutorily required notice of child's health

care liability claim two years before the statute of repose barred it, but then waited over six-and-a-half years to file suit. Vernon's Ann.Texas Const. Art. 1, § 13; V.T.C.A., Civil Practice & Remedies Code § 74.251(b).

2 Cases that cite this headnote

[10] Constitutional Law

🔑 Abrogation, modification, or recognition of remedies

Test for whether a law violates the open courts provision is if the law: (1) imposes substitute remedies, whether those remedies are reasonable, or (2) extinguishes remedies, whether such action is a reasonable exercise of the police power. Vernon's Ann.Texas Const. Art. 1, § 13.

Cases that cite this headnote

[11] Statutes

🔑 Nature and definition of retroactive statute

A "retroactive law" is one that extends to matters that occurred in the past.

1 Cases that cite this headnote

[12] Statutes

🔑 Power to enact;validity

Not all retroactive statutes are unconstitutional.

Cases that cite this headnote

[13] Statutes

🔑 Power to enact;validity

The test for examining whether retroactive laws are constitutional considers the nature and strength of the public interest served by the statute as evidenced by the Legislature's factual findings, the nature of the prior right impaired by the statute, and the extent of the impairment.

Cases that cite this headnote

[14] Statutes **Power to enact; validity**

In retroactivity inquiry, Supreme Court must balance a compelling public interest against the nature of the prior right and the extent to which the statute impairs that right.

[Cases that cite this headnote](#)

[15] Limitation of Actions **Retroactive Operation****Statutes** **Statutes of limitations**

Ten-year statute of repose for the Medical Liability Act was not unconstitutionally retroactive as applied in action by mother as next friend of child against hospital and physician for medical negligence, arising from emergency cesarean section allegedly resulting in child's permanent neurological injury and disability; Medical Liability Act demonstrated its compelling public purpose in lowering the cost of medical malpractice premiums and broadening access to health care, and mother had a three-year grace period to bring the claim. [V.T.C.A., Civil Practice & Remedies Code § 74.251\(b\)](#).

[2 Cases that cite this headnote](#)

[16] Constitutional Law **Third-party standing in general**

The more difficult plight of a different or hypothetical litigant will not save a litigant's as-applied challenge to the constitutionality of a statute.

[3 Cases that cite this headnote](#)

[17] Constitutional Law **Judicial Authority and Duty in General**

There is no need to strike a statute down because it might operate unconstitutionally in another case.

[1 Cases that cite this headnote](#)

West Codenotes**Negative Treatment Vacated**

***700** [V.T.C.A., Civil Practice & Remedies Code § 74.251\(b\)](#)

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Opinion

Justice [GUZMAN](#) delivered the opinion of the Court in which Chief Justice [HECHT](#), Justice [GREEN](#), Justice [JOHNSON](#), Justice [WILLETT](#), Justice [BOYD](#), Justice [DEVINE](#), and Justice [BROWN](#) joined.

Our Constitution must strike a delicate balance between the pre-existing rights of individuals and the state's need to abridge those rights to achieve important public policy objectives. This appeal raises such questions of balance through a challenge to the statute of repose in the Medical Liability Act. In 2003, the Legislature enacted the Medical Liability Act to lower the escalating cost of medical malpractice insurance premiums and increase access to health care. The Act contains a statute of repose that operates to bar claims not brought within ten years of the date of the medical treatment.

Here, alleged negligence occurred during the birth of a child in 1996. Under the 2003 repose statute, a suit on this negligence claim must be filed by 2006. In 2004, an attorney for the mother notified the hospital of the minor's claim, but no suit was filed until 2011, five years after the repose statute's deadline. The hospital moved for summary judgment on the ground that the repose statute barred the claim, and the mother responded that the

repose statute violates the open courts and retroactivity provisions of the Texas Constitution. We overrule both constitutional challenges.

The open courts challenge fails due to the mother's lack of diligence in filing suit. In this context, an open courts challenge contends that the claimant had an insufficient opportunity to bring suit. It is well-established in our jurisprudence that such open-courts challengers must themselves be diligent in bringing suit. The mother cannot meet this requirement because she was aware of the claim one year into her three-year period to bring the claim but waited over six additional years to file suit. The mother's retroactivity challenge also fails because a compelling public purpose justified the legislation and granted her a three-year grace period to file suit. Because the court of appeals found in the mother's favor on her open courts challenge, we reverse the court of appeals' judgment and render judgment that the plaintiff take nothing.

I. Background

In 1996, Elizabeth Rivera was nine months pregnant with her daughter, M.R., when she visited the emergency room of *701 Providence Hospital¹ with a cough and fever. Dr. Michael Compton assessed Rivera and discharged her. The following day, Rivera noticed decreased fetal movement and returned to the hospital, where M.R. was delivered via emergency C-section. M.R. lacked oxygen and has permanent neurological disabilities. Rivera claims this injury resulted from the hospital and Dr. Compton's failure to properly assess and monitor her and notify her OB/GYN.

Seven years after the medical treatment at issue (in 2003), the Legislature enacted a ten-year statute of repose for the Medical Liability Act, which provides:

A claimant must bring a health care liability claim not later than 10 years after the date of the act or omission that gives rise to the claim. This subsection is intended as a statute of repose so that all claims must be brought within 10 years or they are time barred.

Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 10.01, 2003 Tex. Gen. Laws 847, 872 (current version at [TEX. CIV. PRAC. & REM.CODE § 74.251\(b\)](#)). Thus, when the repose statute became law, M.R.'s claim needed to be brought within three years to avoid the claim being barred by the statute of repose.²

In August 2004, Rivera's lawyer sent the hospital the statutorily required notice of a health care liability claim,³ but only filed suit (on M.R.'s behalf) in March 2011—five years after the repose statute barred the claim and six-and-a-half years after Rivera sent pre-suit notice of the claim. The hospital and Dr. Compton moved for summary judgment based on the statute of repose and the trial court granted the motion. The court of appeals reversed, holding that the statute of repose violated the open courts provision as applied to [M.R. 392 S.W.3d 326, 333 \(Tex.App.—El Paso 2012\)](#). We granted the hospital and Dr. Compton's petitions for review.⁴

II. Discussion

Rivera poses open courts and retroactivity challenges to the repose statute as independent bases for affirming the court of appeals. Regarding the open courts challenge, Rivera claims the repose statute is similar to previous statutes of limitations we held to be unconstitutional as applied to minors. Regarding the retroactivity challenge, Rivera contends the repose statute is unconstitutionally retroactive because it extinguished M.R.'s claim before she could reach the age of majority. We address each constitutional challenge in turn. In doing so, we are mindful that we begin assessing a constitutional challenge with a presumption that the statute is valid⁵ and *702 do not defer to lower court constructions of statutes.⁶

[1] The distinction between facial and as-applied challenges also bears mentioning because we consider both Rivera's challenges to be as-applied challenges. A facial challenge claims that a statute, by its terms, always operates unconstitutionally. [United States v. Salerno](#), 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987); [Tex. Workers' Comp. Comm'n v. Garcia](#), 893 S.W.2d 504, 518 (Tex.1995). By contrast, an as-applied challenge asserts that a statute, while generally constitutional, operates unconstitutionally as to the claimant because of her

particular circumstances.⁷ *City of Corpus Christi v. Pub. Util. Comm'n of Tex.*, 51 S.W.3d 231, 240 (Tex.2001); *Garcia*, 893 S.W.2d at 518 n. 16.

Both of Rivera's constitutional challenges here (open courts and retroactivity) are as-applied challenges. Her open courts challenge does not claim the repose statute operates unconstitutionally as to all persons, and we have previously held open courts applied constitutionally to an adult who could not discover her claim before the repose statute barred it.⁸ *Methodist Healthcare Sys., Ltd., L.L.P. v. Rankin*, 307 S.W.3d 283, 292 (Tex.2010); see *Yancy v. United Surgical Partners Int'l, Inc.*, 236 S.W.3d 778, 786 (Tex.2007) (treating an open courts challenge as an as-applied challenge). Likewise, Rivera's retroactivity challenge is an as-applied challenge because it contends the repose statute is unconstitutionally retroactive as to M.R.'s claim based upon the particular circumstances of her situation. See *Robinson v. Crown Cork & Seal Co.*, 335 S.W.3d 126, 147 (Tex.2010) (treating a retroactivity challenge as an as-applied challenge). With this background in mind, we turn to the substance of Rivera's constitutional challenges.

A. Open Courts

In *Weiner v. Wasson*⁹ and *Sax v. Votteler*¹⁰, we held statutes of limitations requiring minors to bring medical malpractice suits by a certain age violated the open courts provision. Rivera argues these decisions compel the conclusion that this repose statute is unconstitutional as applied to M.R., who is also a minor. The hospital primarily counters that, because we upheld this repose statute against an open courts challenge in *Rankin*, we likewise must do so here.¹¹ We agree with the hospital's conclusion that the repose statute does not violate the open courts provision as applied to M.R., but rely on different reasons.

*703 [2] [3] [4] [5] [6] The open courts provision of the Texas Constitution provides: "All courts shall be open and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law." TEX. CONST. art. I, § 13. This requirement "guarantees that a common law remedy will not be unreasonably abridged." *Garcia*, 893 S.W.2d at 521. This guarantee operates quite differently from

a tolling provision. *Yancy*, 236 S.W.3d at 784. Tolling provisions generally defer accrual of a claim until the plaintiff knew, or in the exercise of reasonable diligence should have known, the facts giving rise to the claim. *Id.* (citing *HECI Exploration Co. v. Neel*, 982 S.W.2d 881, 886 (Tex.1998)). By contrast, "the open courts provision merely gives litigants a reasonable time to discover their injuries and file suit," and courts must determine what constitutes a reasonable time frame. See *id.* In short, an open courts challenge is a due process complaint and requires the party to use due diligence. *Id.* at 785. Procedurally, the party raising the open courts challenge "must raise 'a fact issue establishing that he did not have a reasonable opportunity' to be heard." *Stockton v. Offenbach*, 336 S.W.3d 610, 618 (Tex.2011) (quoting *Yancy*, 236 S.W.3d at 785).

We have interpreted this due diligence requirement three times in the past two decades, and these precedents guide our analysis here. First, in *Shah v. Moss*, Moss sued Shah for negligence in performing eye surgery and neglecting to provide adequate post-surgical treatment. 67 S.W.3d 836, 839 (Tex.2001). When Shah moved for summary judgment on limitations, Moss asserted that the limitations statute violated the open courts provision. *Id.* at 840–41. Moss knew about the alleged injury at least seventeen months before he filed suit but offered no explanation for his delay. *Id.* at 847. Thus, we concluded that, as a matter of law, Moss failed to file suit within a reasonable time after discovering his injury. *Id.*

Six years after we decided *Shah*, we addressed a case with facts more closely aligned with those presented here. In *Yancy*, Yates suffered cardiac arrest when undergoing a procedure to remove kidney stones. 236 S.W.3d at 780. She was resuscitated but remained comatose after the procedure. *Id.* Some nineteen months later, Yates's guardian sued two defendants and waited another twenty-two months to sue two additional defendants. *Id.* The additional defendants moved for summary judgment on limitations, to which the guardian raised an open courts challenge. *Id.* Relying on *Shah*, we overruled the open courts challenge because the guardian offered no explanation for waiting twenty-two months after filing her petition to sue the additional defendants. *Id.* at 785. Specifically, we observed that the guardian

knew of [Yates's] condition and retained a lawyer well within the limitations period. On this record,

there is no fact issue establishing that [the guardian] ... sued within a reasonable time after discovering the alleged wrong. Thus, the open courts provision does not save Yates's time-barred negligence claims.

Id. We acknowledged precedent indicating that a statute requiring an incapacitated plaintiff to give pre-suit notice would “require an impossible thing.” *Id.* at 786 (citing *Tinkle v. Henderson*, 730 S.W.2d 163, 167 (Tex.App.-Tyler 1987, writ ref’d)). But we concluded the limitations statute there did not require an impossible thing of Yates, who had a guardian, retained a lawyer, and filed suit within the limitations period. *Id.* We opined that, because the limitations statute was constitutional as applied to Yates, “there is no need to strike it down because it might operate unconstitutionally in another case.” *Id.*

*704 Most recently, in *Stockton*, a mother of a minor with a health care liability claim raised an open courts challenge to the Medical Liability Act's 120-day deadline to serve an expert report. 336 S.W.3d at 617–18. There, *Stockton* was unable to serve the report on a defendant and filed a motion forty days after filing suit to request substituted service for the report. *Id.* at 618. However, *Stockton* did not alert the trial court to the impending expert report deadline, and the court granted the motion four months later after requesting additional information. *Id.* at 617. We held that *Stockton* did not raise a fact issue concerning her due diligence and overruled her open courts challenge. *Id.* at 617–18. Notably, the fact that she was a next friend of her minor child did not prevent this Court from imputing her lack of diligence to her child. *Id.*

[7] [8] In sum, we have found delays of four months,¹² seventeen months,¹³ and twenty-two months¹⁴ to constitute a lack of due diligence as a matter of law—such that an open courts challenge must fail at summary judgment. Additionally, a guardian's lack of diligence may operate to bar a legally incompetent person's open courts challenge. *Yancy*, 236 S.W.3d at 785. And a next friend's lack of due diligence may operate to bar a minor child's open courts challenge. *Stockton*, 336 S.W.3d at 617–18.

[9] Here, Rivera acted as the M.R.'s next friend. In 2004, a lawyer for Rivera sent the hospital the statutorily required notice of M.R.'s health care liability claim, but Rivera waited over six-and-a-half years to file suit

(represented by the same lawyer). This period of time is fifteen times the four months we found constituted a lack of diligence in *Stockton*,¹⁵ over five times the seventeen months in *Shah*,¹⁶ and almost three times the twenty-two months in *Yancy*.¹⁷ And as in *Stockton*, *Yancy*, and *Shah*, the plaintiff has offered no explanation for her delay in filing suit. Moreover, similar to *Yancy*, the repose statute did not deprive M.R. of her opportunity to be heard because she gave statutory pre-suit notice of her claim two years before the repose statute barred it.¹⁸ See *Yancy*, 236 S.W.3d at 785–86 (concluding that a statute did not deprive a legally incompetent person of her opportunity to be heard because she had a guardian, retained a lawyer, and filed suit against some defendants within the limitations period). Accordingly, on this record, there is no fact issue establishing that Rivera (on M.R.'s behalf) “did not have a reasonable opportunity to discover the alleged wrong and bring suit before the repose statute barred her claim or that she sued within a reasonable time after discovering the alleged wrong.” *Id.* at 785. Accordingly, the open courts provision cannot revive M.R.'s time-barred claim. See *id.*

Rivera argues we should not impute any lack of diligence on her part to M.R. But our precedents have required due diligence of a next friend raising an open courts challenge on behalf of a minor in *Stockton*, 336 S.W.3d at 617–18, as well as of the guardian of a legally incompetent person raising an open courts challenge in *705 *Yancy*, 236 S.W.3d at 785–86. Rivera offers us no compelling reason to overturn either decision. And the consistency of these decisions is well-founded. The law, our precedent, and our rules of procedure all treat minors and legally incompetent persons alike as lacking the legal capacity to sue, such that they must appear in court through a legal guardian, a next friend, or a guardian ad litem. See TEX. CIV. PRAC. & REM.CODE § 16.001 (classifying persons under 18 years of age and persons of unsound mind as being under a legal disability); TEX.R. CIV. P. 44, 173; *Austin Nursing Center v. Lovato*, 171 S.W.3d 845, 849 (Tex.2005).¹⁹ Indeed, our precedent reveals only one instance discussing minors and incompetent persons differently, and it poignantly observed that minors and legally incompetent persons are treated comparably, but that incompetent persons are deserving of perhaps even greater protections. *Tinkle*, 730 S.W.2d at 166.²⁰

We must note the fact that the similar treatment of minors and legally incompetent persons does not necessarily mean next friends or parents and guardians are treated similarly. There are specific procedures for guardians that do not apply to next friends. For example, guardians: are court-appointed,²¹ act as fiduciaries on behalf of the legally incompetent person,²² need not post security for costs in suits brought on behalf of the legally incompetent person,²³ generally must post a bond,²⁴ and must annually report on the guardianship to the court that appointed them.²⁵ But if anything, these technical requirements simply bring guardians in line with the powers and duties that parents possess. Unlike a guardian, a parent as next friend need not post a bond until possessing *706 money from a judgment on behalf of a minor.²⁶ But such disparate treatment is largely attributable to the presumption that fit parents act in the best interest of their children. See *In re Derzapf*, 219 S.W.3d 327, 333 (Tex.2007). As a whole, our statutes, rules, and precedent treat guardians and next friends similarly. See, e.g., TEX.R. CIV. P. 44 (granting next friends the same rights as guardians except that they must give security for costs). We see no reason today to depart from our requirement that guardians and next friends use due diligence in bringing suit to sustain an open courts challenge.²⁷

[10] Rivera and the hospital both contend that different precedents regarding the reasonableness of statutory limits to common-law recovery should govern our analysis of the open courts challenge. Substantively, our longstanding test for whether a law violates the open courts provision is (1) if the law imposes substitute remedies, whether those remedies are reasonable, or (2) if the law extinguishes remedies, whether such action is a reasonable exercise of the police power. *Lebohm v. City of Galveston*, 154 Tex. 192, 275 S.W.2d 951, 955 (1955). Rivera contends that under *Weiner* and *Sax*, requiring a minor to sue through a next friend is unreasonable. The hospital asserts that under *Rankin*, extinguishing the claim altogether if not filed within ten years is a reasonable exercise of the police power. Rivera's assertion that *Sax* and *Weiner* control fails for two reasons. First, we need not assess whether the law was reasonable if the party challenging the law was not diligent. We never reached the question of whether the statute was reasonable as applied to the claimants in *Stockton*, *Yancy*, and *Shah* because the claimants in those cases demonstrated a lack

of due diligence. *Stockton*, 336 S.W.3d at 617–18; *Yancy*, 236 S.W.3d at 785; *Shah*, 67 S.W.3d at 847. Second, *Sax* and *Weiner* involved statutes of limitations that expressly applied to minors (that minors must bring health care claims by age twelve in *Sax* and age fourteen in *Weiner*). We held that those statutes were facially unconstitutional. See *Weiner*, 900 S.W.2d at 320 (expressly declining to invalidate statute of limitations for minors on an as-applied basis). By contrast, this statute does not only affect minors, and Rivera's constitutional challenge is necessarily an as-applied attack. Thus, we must consider the circumstances of Rivera's representation of M.R., including the fact that she hired a lawyer to send pre-suit notice of the claim two years before the repose statute barred it.

We likewise disagree with the hospital that *Rankin* controls this case. Had Rivera exercised due diligence and the repose statute still barred her claim, we would then be required to assess the reasonableness of the law. See *Rankin*, 307 S.W.3d at 285 (assessing the reasonableness of the repose statute when the plaintiff's diligence in bringing suit was not at issue). The absence of due diligence means we need not reach this issue.

B. Retroactivity

Rivera also challenges the repose statute as unconstitutionally retroactive because it required M.R. to bring her previously accrued claim before she reached the age of majority. The hospital counters *707 that the repose statute is not unconstitutionally retroactive because it allowed M.R. three years after the statute took effect to bring her claim through her next friend. We agree with the hospital.

[11] A retroactive law is one that extends to matters that occurred in the past. *Robinson*, 335 S.W.3d at 138 (“A retrospective law literally means a law which looks backwards, or on things that are past; or if it be taken to be the same as retroactive, it means to act on things that are past.” (quoting *DeCordova v. City of Galveston*, 4 Tex. 470, 475–76 (1849))); *Subaru of Am., Inc. v. David McDavid Nissan, Inc.*, 84 S.W.3d 212, 219 (Tex.2002); see also *Landgraf v. USI Film Prods.*, 511 U.S. 244, 270, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994) (determining for purposes of retroactivity “whether the new provision attaches new legal consequences to events completed

before its enactment.”). Here, the parties concede the statute is retroactive as applied to M.R. because it established a date to bar her already-accrued claim.

[12] [13] But not all retroactive statutes are unconstitutional. *Robinson*, 335 S.W.3d at 138. In *Robinson*, we established a three-part test for examining whether retroactive laws are constitutional: “the nature and strength of the public interest served by the statute as evidenced by the Legislature’s factual findings; the nature of the prior right impaired by the statute; and the extent of the impairment.” *Id.* at 145. This test acknowledges the heavy presumption against retroactive laws by requiring a compelling public interest to overcome the presumption. *Id.* at 146. But it also appropriately encompasses the notion that “statutes are not to be set aside lightly.” *Id.* We examine each of the three factors in turn with respect to the repose statute.

Regarding the public interest, the statute at issue in *Robinson* was enacted solely to benefit a single company by reducing its liability in asbestos litigation, which we determined constituted only a slight public interest. *Id.* at 146, 150. By contrast, the repose statute here was part of the 2003 Medical Liability Act, which was a comprehensive overhaul of Texas medical malpractice law to “make affordable medical and health care more accessible and available to the citizens of Texas,”²⁸ and to “do so in a manner that will not unduly restrict a claimant’s rights any more than necessary to deal with the crisis.”²⁹ The Legislature conducted hearings and gathered evidence of the increasing costs of malpractice insurance resulting from claims that endured indeterminately. As a result, the Legislature expressly found that a spike in healthcare liability claims was causing a malpractice insurance crisis that adversely affected the provision of healthcare services in Texas.³⁰ Unlike the statute in *Robinson*, there is no indication the statute here was to benefit only a particular entity; rather, it was aimed at broadening access to health care by lowering malpractice insurance premiums. We previously concluded this public interest was sufficient to overcome a different constitutional challenge to this statute. *Rankin*, 307 S.W.3d at 288 (holding that public interest in lowering malpractice insurance premiums and increasing access to health care by implementing this repose statute was a valid exercise of the police power sufficient to overcome an open

courts challenge). It is likewise a compelling public *708 interest with respect to Rivera’s retroactivity challenge.

[14] But a compelling public interest does not end the retroactivity inquiry. We must balance that purpose against the nature of the prior right and the extent to which the statute impairs that right. Regarding the nature of the prior right, we held in *Robinson* that the personal injury claim at issue (for *mesothelioma*) was a mature tort that had a substantial basis in fact due to the discovery in the case. 335 S.W.3d at 148. Here, M.R.’s claim is mature because claims for medical negligence in utero are established causes of action in Texas, *Brown v. Shwartz*, 968 S.W.2d 331, 334 (Tex.1998), and M.R.’s injury has allegedly come to fruition. But unlike in *Robinson*, the sparse record before us fails to provide any indication of the strength of M.R.’s claim. Thus, though the type of claim M.R. has is clearly established, the strength of her individual claim is unclear.

Finally, we assess the extent to which the repose statute impaired M.R.’s claim. Before 1996, when the injury allegedly occurred, there was no statute of repose for medical negligence claims and a minor had until age twenty to sue before limitations would run (the age of majority plus two years for limitations). *Weiner*, 900 S.W.2d at 318–19. Thus, M.R. reasonably had settled expectations in 1996 that she would have until age twenty to file suit, and the repose statute impaired these settled expectations. But we have long recognized that the impairment of such a right may be lessened when a statute affords a plaintiff a grace period to bring her claim, and we observed in *Robinson* that “a change in the law need not provide a grace period to prevent an impairment of vested rights.” 335 S.W.3d at 141. We noted that grace periods of two months to sue,³¹ four years to sue,³² and seven years to resume pumping water³³ had all previously been upheld over retroactivity challenges. *Id.*

We have only upheld constitutional retroactivity challenges four times. In two of those cases, we upheld retroactivity challenges because amendments to statutes of limitations revived claims the previous statutes barred.³⁴ And in one case, the Legislature extinguished a taxpayer’s valid limitations defense to a governmental property tax claim by enacting legislation that prevented taxpayers from raising limitations defenses. *Mellinger v. City of Houston*, 68 Tex. 37, 3 S.W. 249, 254–

55 (1887). Finally, in *Robinson*, the statute operated to extinguish Robinson's mature tort claim against a particular defendant, despite discovery showing a substantial basis in fact for the claim. 335 S.W.3d at 148. When balanced against a statute that contained no findings and affected only one defendant, we concluded the “slight” public interest did not justify the impairment to the claims at issue. *Id.* at 149.

[15] Here, M.R. possessed a three-year grace period from the time the repose statute took effect until it extinguished her claim. We have upheld statutes with shorter grace periods, and we cannot say the three-year grace period M.R. possessed rendered the statute unconstitutional as applied in light of its compelling public interest.

*709 Rivera counters that this grace period is meaningless because M.R. could not sue during the time she was under a legal disability and would have to sue through her next friend. But we cannot ignore that Rivera brings an as-applied challenge. Thus, the inquiry must be Rivera representing M.R.—not parents representing children generally. Two facts in this case compel us to reject Rivera's retroactivity challenge. First, Rivera knew of M.R.'s claim one year into the three-year grace period. She demonstrated that knowledge by sending the statutorily-required notice of M.R.'s claim to the hospital through her lawyer. Thus, Rivera cannot rightfully contend that a three-year grace period unconstitutionally deprived her of the ability to bring M.R.'s claim when she knew of the claim long before the period expired. Second, Rivera actually brought M.R.'s claim, albeit after the repose statute barred it. She brought the claim on M.R.'s behalf while M.R. was still a minor. While one may conceive of a scenario where a parent fails to bring her child's claim due to legal incompetence or a conflict of interest with the child, Rivera's as-applied challenge requires us to consider only her circumstances. See *Weiner*, 900 S.W.2d at 327 (Owen, J., dissenting). There is no indication in the record that Rivera is legally incompetent or possesses a conflict of interest with M.R. And sending pre-suit notice of M.R.'s claim and filing suit on her behalf demonstrates Rivera's capability of representing M.R.

In short, the Legislature's findings in enacting the Medical Liability Act demonstrate its compelling public purpose in lowering the cost of medical malpractice premiums and broadening access to health care. And although the record

gives no indication of the strength of M.R.'s claim, the repose statute gave M.R. a three-year grace period to bring her claim. In light of the compelling public purpose and the three-year grace period, we overrule Rivera's challenge that the statute is unconstitutionally retroactive as applied.

C. Response to the Dissent

The dissent would hold that the repose statute violates the open courts provision and is unconstitutionally retroactive. Regarding the open courts challenge, the dissent correctly observes that the open courts provision requires a “reasonable opportunity” to sue and may not make a remedy contingent on “an impossible condition.” 445 S.W.3d 698, 711 (Lehrmann, J., dissenting) (quoting *Stockton*, 336 S.W.3d at 617–18, and *Shah*, 67 S.W.3d at 842). But here, M.R. had three years to sue through Rivera, who hired a lawyer and sent pre-suit notice of the claim two years before the repose statute barred it. The statute afforded M.R. a reasonable opportunity to sue through her parent and did not impose an impossible condition. Thus, we disagree with the dissent that the as-applied challenge prevails.

The dissent also raises two additional arguments regarding the open courts challenge, neither of which is persuasive. First, the dissent contends we have never imputed a parent's due diligence to the minor child she represents. But we did precisely that three years ago in *Stockton*.³⁵ The dissent claims *Stockton* was different in that the parent there argued the statute was unconstitutional as applied “to her” because it was impossible for her to comply with the statutory deadline at issue. 445 S.W.3d at 713 (Lehrmann, J., dissenting) (quoting *Stockton*, 336 S.W.3d at 612). But in *Stockton*, the parent's failure to use due diligence to comply with the statutory procedure barred her minor *710 child's claim. 336 S.W.3d at 612. Here, the parent's failure to use due diligence to comply with the statute's procedure barred her minor child's claim. There is no legal difference between *Stockton* and this case.

Second, the dissent believes that imputing a guardian's lack of diligence to a ward in *Yancy* is materially different from imputing a parent's lack of diligence to a minor child and warrants a different result. But the dissent cites no authority for that proposition, and for a good

reason. We have previously observed that “[t]raditionally the interests of minors, incompetents, and other helpless persons are viewed in law as substantially similar, and both the substantive law and the rules of procedure accord them comparable treatment.” *Tinkle*, 730 S.W.2d at 166. We see no reason to treat parents of minor children differently than guardians of wards in this circumstance.

[16] [17] Finally, the dissent concludes that the repose statute is unconstitutionally retroactive as applied to M.R. This conclusion stems from its interpretation of *Weiner* that inquiring into whether a particular parent was incompetent or possessed a conflict of interest is an unworkable standard. *Weiner* did not involve a retroactivity challenge, and retroactivity challenges are, by definition, as-applied constitutional challenges. They examine only the position of the party raising the challenge. The more difficult plight of a different or hypothetical litigant will not save a litigant's as-applied challenge. Or as we observed in *Yancy*, “there is no need to strike [a statute] down because it might operate unconstitutionally in another case.” 236 S.W.3d at 786. Our courts have had little difficulty examining the particular circumstances of those raising retroactivity challenges, and we are confident in their ability to continue to do so.

III. Conclusion

In sum, we uphold the Medical Liability Act's ten-year statute of repose against Rivera's as-applied constitutional challenges on open courts and retroactivity grounds. Rivera fails to meet this requirement because she was aware of M.R.'s claim one year into her three-year period to bring the claim but waited over six-and-a-half additional years to file suit. Rivera's retroactivity challenge also fails because a compelling public purpose justified the legislation and granted Rivera a three-year grace period to file suit. Because the court of appeals found in favor of Rivera on her open courts challenge, we reverse the court of appeals' judgment and render judgment that Rivera take nothing.

Justice **LEHRMANN** filed a dissenting opinion.

Justice **LEHRMANN**, dissenting.

Statutes of repose present harsh barriers to the administration of justice. Today the Court extends this obstacle to situations involving the most vulnerable amongst us—our children. And it does so under the false notion that all parents can and do adequately protect their children. However, the sad reality is that the needs of too many children—our most valuable resource—are not satisfactorily addressed by their parents. While the Texas Medical Liability Act's repose statute requires a health care liability claim to be brought within ten years of the date medical treatment is provided, we have never held that this statute may properly apply to bar the claims of innocent children. To the contrary, we have consistently held that statutes of limitations that similarly purport to bar a child's claim violate the Texas Constitution.

In the underlying suit, M.R. was injured during childbirth, allegedly as a result of *711 the negligence of the treating physician and hospital. M.R.'s mother, Elizabeth Rivera, filed suit on M.R.'s behalf more than ten years later. M.R. was seven years old when the repose statute took effect. The Court holds today that, as applied to M.R., the statute violates neither the Texas Constitution's open courts provision nor its prohibition against retroactive laws. In so holding, the Court attributes Rivera's apparent lack of diligence to her daughter and concludes that M.R. had a reasonable opportunity to sue through Rivera before the statute took effect. Because this holding contradicts well-settled precedent in which we refused to bar a minor's claim because of the action (or, more accurately, inaction) of a parent, I am compelled to respectfully express my dissent.

I. Open Courts

The Texas Constitution's open courts provision¹ “protects a person from legislative acts that cut off a person's right to sue before there is a reasonable opportunity to discover the wrong and bring suit.” *Shah v. Moss*, 67 S.W.3d 836, 842 (Tex.2001). Stated another way, the Legislature may not “mak[e] a remedy by due course of law contingent upon an impossible condition.” *Stockton v. Offenbach*, 336 S.W.3d 610, 617–18 (Tex.2011) (citation and internal quotation marks omitted). A statute violates the open courts provision when a litigant shows (1) he “has a cognizable common law cause of action that is being restricted,” and (2) “the restriction is unreasonable or arbitrary when balanced against the purpose and basis

of the statute.” *Trinity River Auth. v. URS Consultants, Inc.*, 889 S.W.2d 259, 262 (Tex.1994) (citation and internal quotation marks omitted). We have also noted that a plaintiff is not entitled to relief under the open courts provision “if he does not use due diligence and sue within a reasonable time after learning about the alleged wrong.” *Shah*, 67 S.W.3d at 847.

The Court holds that Rivera failed to use due diligence in filing the underlying suit on M.R.'s behalf, thereby foreclosing her open courts challenge to the statute of repose.² In my view, attributing Rivera's lack of due diligence to her daughter is both fundamentally unfair and contrary to our decisions in *Sax v. Votteler*, 648 S.W.2d 661 (Tex.1983), and *Weiner v. Wasson*, 900 S.W.2d 316 (Tex.1995).

In *Sax*, we evaluated the two-year statute of limitations on medical malpractice claims contained in a prior version of the *Medical Liability Act*.³ 648 S.W.2d at 663. Before that statute was enacted, the limitations period on all tort actions by minors was tolled until two years after they reached the age of majority. *Id.* The challenged statute removed that tolling provision in medical malpractice cases, with the exception that minors under the age of six had until their eighth birthday to file such claims. *Id.* The plaintiffs in *Sax* sued a doctor for malpractice on behalf of their minor daughter more than two years after she was treated, and the defendant argued that the statute of limitations barred their *712 claim. *Id.* We held that the admittedly legitimate purpose of the statute of limitations—generally, to increase the availability of medical practice insurance and, more specifically, to limit the length of time insureds are exposed to potential liability—did not justify “the effective abrogation of a child's right to redress.” *Id.* at 666–67.

In holding that the statute violated the open courts provision, we expressly considered, and rejected, a parent's ability to sue on behalf of his child as adequately protecting the child's rights. We held:

If the parents, guardians, or next friends of the child negligently fail to take action in the child's behalf within the time provided by article 5.82, the child is precluded from asserting his cause of action under that statute. Furthermore,

the child is precluded from suing his parents on account of their negligence, due to the doctrine of parent-child immunity. The child, therefore, is effectively barred from any remedy if his parents fail to timely file suit. Respondents argue that parents will adequately protect the rights of their children. *This Court, however, cannot assume that parents will act in such a manner. It is neither reasonable nor realistic to rely upon parents, who may themselves be minors, or who may be ignorant, lethargic, or lack concern, to bring a malpractice lawsuit action within the time provided by article 5.82.*

Id. at 667 (emphasis added) (internal citation omitted). We concluded that “[u]nder the facts in [that] case, [the child was] forever precluded from having her day in court to complain of an act of medical malpractice,” that “the [L]egislature [had] failed to provide her any adequate substitute to obtain redress,” and that former article 5.82 was therefore “unconstitutional as it applie[d] to a minor's cause of action.” *Id.*

Twelve years after deciding *Sax*, we reaffirmed the opinion and applied its reasoning in *Weiner*. In that case, we considered an open courts challenge to the statute that replaced article 5.82. 900 S.W.2d at 317–18. Section 10.01 of the Medical Liability and Insurance Improvement Act maintained the two-year statute of limitations for medical malpractice claims contained in article 5.82, but broadened the exception for minors to allow those under the age of twelve until their fourteenth birthday to file suit. Act of May 30, 1977, 65th Leg., R.S., ch. 817, § 10.01, 1977 Tex. Gen. Laws 2039, 2052 (former TEX.REV.CIV. STAT. art. 4590i, § 10.01), *repealed by* Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 10.09, 2003 Tex. Gen. Laws 884. Notwithstanding this “inconsequential” change, we held that “section 10.01, like its predecessor article 5.82, is unconstitutional as applied to minors because it purports to cut off [the minor plaintiff's] cause of action before he reaches majority, an age at which he may lawfully sue on his own behalf.” *Weiner*, 900 S.W.2d at 318. In so holding, we confirmed that “*Sax* has become firmly ensconced in Texas jurisprudence.” *Id.* at 320.

Our analysis in *Sax* and *Weiner* confirms that a parent's failure to use due diligence in pursuing his minor child's health care liability claim should not and does not foreclose pursuit of that claim. However, the Court concludes that these cases do not control for two reasons, neither of which is persuasive. First, the Court notes that in *Sax* and *Weiner* we evaluated the reasonableness of the statute in question, while the issue here is the diligence of the party challenging the law. 445 S.W.3d at 706. But the basis of our holding that the statutes of limitations in *713 *Sax* and *Weiner* were unreasonable—and in turn unconstitutional—was that it was “neither reasonable nor realistic to rely upon parents, who may themselves be minors, or who may be ignorant, lethargic, or lack concern, to bring a malpractice lawsuit action” within the limitations period. *Sax*, 648 S.W.2d at 667; see also *Weiner*, 900 S.W.2d at 320 (“We fail to see any benefit in requiring a minor to show that his or her parent was incompetent or failed to act in the minor's best interests by not pursuing a medical malpractice claim, especially when the very failure of the parent to do so leaves the minor without any legal recourse.”). For the same reason, we may not rely on parents to pursue their child's health care liability claim with due diligence. As in *Sax* and *Weiner*, their failure to do so leaves the minor with no legal recourse.

Second, the Court distinguishes *Sax* and *Weiner* on the grounds that they presented facial open courts challenges to the statutes at issue, while the underlying case presents an as-applied challenge that must take into account “the circumstances of Rivera's representation of M.R.” 445 S.W.3d at 706. I disagree. In *Sax* and *Weiner*, the plaintiffs contended, and we held, that the statutes at issue were unconstitutional as applied to minors whose claims were cut off before they reached the age of majority and had the legal capacity to sue. See *Sax*, 648 S.W.2d at 667 (holding article 5.82 unconstitutional “as it applies to a minor's cause of action”); *Weiner*, 900 S.W.2d at 318 (holding section 10.01 “unconstitutional as applied to minors”). Similarly, in this case Rivera challenges the constitutionality of the Medical Liability Act's statute of repose as applied to minor plaintiffs whose claims are cut off before they reach the age of majority. See *Adams v. Gottwald*, 179 S.W.3d 101, 102 (Tex.App.-San Antonio 2005, pet. denied) (noting that the plaintiffs challenged the constitutionality of the Medical Liability Act's statute of limitations “on its face as applied to all minors,” not “as applied to [the minor at issue] and her circumstances”).

The Court also relies on three distinguishable cases in which we rejected open courts challenges based on a lack of due diligence. *Shah* provides no guidance because it involved a plaintiff who failed to use due diligence in asserting his own claim. 67 S.W.3d at 846–47. The Court also relies on *Stockton*, in which a parent sued on behalf of her minor child and challenged the Medical Liability Act's expert-report requirement, with which she had failed to comply. 336 S.W.3d at 612. The parent argued that the statute was “unconstitutional as applied to her because it was impossible for her to comply with its deadline.” *Id.* (emphasis added). The parent did not argue that her failures should not extinguish her child's claim, and we did not address the issue.

Finally, the Court relies on *Yancy v. United Surgical Partners International, Inc.*, in which the guardian of an incapacitated adult filed health care liability claims on behalf of her ward against some defendants within the limitations period, but against others after the limitations period had expired. 236 S.W.3d 778, 780 (Tex.2007). We held that the guardian's lack of diligence in pursuing claims against the latter defendants precluded the open courts provision from saving the ward's time-barred claims. *Id.* at 785. The Court applies this reasoning to a parent's lack of diligence in pursuing a minor child's claims; I would not. The Court recognizes the strict legal procedures applicable to guardians, such as the fact that they are court-appointed, act as fiduciaries on behalf of their wards, must post a bond, and must report annually to the court. 445 S.W.3d at 705. These statutory requirements *714 are significant and do more than simply “bring guardians in line with the powers and duties that parents possess.” *Id.* at 705. They also help minimize the possibility that guardians “may be ignorant, lethargic, or lack concern,” the very concern that led us in *Sax* to reject the presumption that parents will act diligently in pursuing claims on their child's behalf. 648 S.W.2d at 667.

For these reasons, I would not extend *Yancy's* reasoning to the underlying case. Confining *Yancy* to the situation in which a court-appointed guardian fails to act with due diligence reconciles that case with *Sax* and *Weiner*, and properly recognizes the significant differences between such guardians and parents acting as next friends. I would hold that, under *Sax* and *Weiner*, an open courts challenge to the Medical Liability Act's statute of repose brought by

or on behalf of a minor may not be foreclosed by a parent's lack of diligence in bringing the suit.

I would further hold that *Sax* and *Weiner* compel a holding that the Medical Liability Act's ten-year statute of repose violates the open courts provision as applied to minors like M.R. because (1) she has a cognizable common law cause of action that is being restricted, and (2) the restriction is unreasonable when balanced against the statute's purpose. *See id.* at 666. As noted above, in those cases we held that the Act's statute of limitations was unconstitutional as applied to a minor's cause of action that the statute “purports to cut off ... before [the minor] reaches majority.” *Weiner*, 900 S.W.2d at 318; *see also Sax*, 648 S.W.2d at 667. To the extent the Act's statute of repose leads to the same result, it too violates the open courts provision.

The hospital in this case contends that our opinion in *Methodist Healthcare System of San Antonio, Ltd. v. Rankin*, 307 S.W.3d 283 (Tex.2010), which also involved an open courts challenge to the Act's statute of repose, forecloses Rivera's claim. In *Rankin*, the plaintiff presented evidence that she did not know and could not have reasonably discovered prior to the repose period's expiration that a surgical sponge had been left inside her during surgery. *Id.* at 285. Rejecting the plaintiff's open courts challenge, we held that the statute of repose was a reasonable exercise of the Legislature's police power, noting that “the key purpose of a repose statute is to eliminate uncertainties under the related statute of limitations and to create a final deadline for filing suit that is not subject to any exceptions.” *Id.* at 286, 290.

Although *Rankin* involved the Medical Liability Act's statute of repose, while *Sax* and *Weiner* involved the Act's statute of limitations, I would hold that *Sax* and *Weiner*, rather than *Rankin*, control the outcome of this case. First, the statutes of limitations we considered in *Sax* and *Weiner*, as applied to minors, had the effect of a repose statute in that they removed the tolling provision otherwise applicable to minors, at least once the minors reached a certain age (six in *Sax*; twelve in *Weiner*). As to such plaintiffs, the statutes served as a “definitive cut-off” just as statutes of repose do. *Id.* at 288. And the purpose underlying the Medical Liability Act that was passed in 2003 as part of House Bill 4, which contains the applicable statute of repose, is the same as that underlying the statutes that were at issue in *Sax* and *Weiner*: to limit

the length of time malpractice insureds are exposed to potential liability in order to increase the availability of medical practice insurance and affordable health care. *See id.* at 287; *Sax*, 648 S.W.2d at 666. While this purpose remains legitimate, it does not alter the analyses or the conclusions reached in *Sax* and *Weiner*.

*715 Finally, in *Rankin* we found it significant that allowing a constitutional exception to the statute of repose for undiscoverable injuries “means never-ending exposure to liability, which in turn injects actuarial uncertainty into the insurance market [that] wholly undermines the purpose of House Bill 4 and of statutes of repose generally: to declare a no-exceptions cut-off point and grant a substantive right to be free of liability.” 307 S.W.3d at 291. This concern is unfounded when the basis of the open courts violation is that minors' claims will be foreclosed before they reach the age of majority. A malpractice insured's exposure is not “never-ending” in this context; a definite “cutoff point” exists at which the insured will “be free of liability.” *Id.*

“Under the facts in this case, [M.R.] is forever precluded from having her day in court to complain of an act of medical malpractice.” *Sax*, 648 S.W.2d at 667. Because I cannot conclude that this results from a reasonable use of the police power, I depart from the Court and would hold that the Medical Liability Act's ten-year statute of repose violates Article I, Section 13 of the Texas Constitution as applied to minors.

II. Retroactivity

As the Court notes, M.R.'s malpractice claim accrued in 1996, and the ten-year statute of repose went into effect in 2003. Prior to the repose statute's enactment, a minor had until the age of twenty to assert a health care liability claim. *Weiner*, 900 S.W.2d at 321. After its enactment, a minor had no more than ten years from the date of medical treatment. In a case like M.R.'s, the statute's effect is to cut off a minor's previously accrued claim before she has the legal capacity to sue. The Court concludes that the repose statute, while retroactive as applied to M.R., is not unconstitutionally so. I disagree.

A retroactive law is presumed unconstitutional,⁴ requiring “a compelling public interest to overcome” that presumption. *Robinson v. Crown Cork & Seal Co.*, 335

S.W.3d 126, 146 (Tex.2010). In *Robinson*, we developed a three-factor test to utilize in evaluating a retroactive law. *Id.* at 145. Under that test, we consider: “the nature and strength of the public interest served by the statute as evidenced by the Legislature’s factual findings; the nature of the prior right impaired by the statute; and the extent of the impairment.” *Id.*

I do not disagree with the Court’s analysis of the first factor. We have already recognized that the Legislature’s purpose in limiting the length of exposure to medical malpractice cases is a legitimate one. *Rankin*, 307 S.W.3d at 287–88; *Sax*, 648 S.W.2d at 667. As to the second factor, the Court recognizes that M.R.’s claim for medical negligence in utero is an “established cause[] of action in Texas.” 445 S.W.3d at 708. Because these factors weigh in opposing directions, the third factor is the crux of the Court’s conclusion. As to that factor, the Court holds that the extent of the impairment to M.R.’s rights is significantly lessened by the fact that she had a three-year grace period following the statute’s enactment to pursue her claim before the repose period expired, despite the fact that she could not do so on her own behalf. *Id.* at 709. Because there is evidence that Rivera knew of the claim but failed to timely assert it, and finding “no indication in the record that Rivera is legally incompetent or possesses a conflict of interest with [M.R.],” the *716 Court finds this grace period persuasive. *Id.* at 709.

This conclusion is at odds with our recognition in *Weiner* that a parent’s failure to sue on behalf of a minor affects neither the tolling of the limitations period nor the constitutionality of the Medical Liability Act’s statute of

limitations under the open courts provision. 900 S.W.2d at 318–19. We criticized as “unworkable” a standard that “would inquire whether the minor’s parent was ‘incompetent’ or had a ‘conflict of interest’ that prevented the parent from acting in the minor’s best interests.” *Id.* at 320. For the same reason a parent’s right to take action on his child’s behalf is irrelevant to an open courts challenge, it has no bearing on the extent of a retroactive statute’s impairment of a minor’s rights. In other words, while Rivera had a three-year grace period to assert M.R.’s claims, M.R. herself had no grace period at all because the statute of repose absolutely extinguished her negligence claim before she was legally capable of asserting it. I would therefore hold that the presumption against the statute’s constitutionality was not overcome.

III. Conclusion

However legitimate a statute’s purpose, the Legislature may not abrogate a child’s established common law cause of action before that child reaches the age of majority. The Medical Liability Act’s statute of repose does exactly that in this case, violating the Texas Constitution’s open courts guarantee as well as its prohibition against retroactive laws. Because the Court holds otherwise, I respectfully dissent.

All Citations

445 S.W.3d 698, 57 Tex. Sup. Ct. J. 1238

Footnotes

- 1 Providence Hospital is the d/b/a for Tenet Hospitals Limited, LP. The hospital and Dr. Michael Compton are collectively referred to in this opinion as “the hospital.”
- 2 Neither party discusses the effect of limitations on M.R.’s claim, and we therefore express no opinion on that issue.
- 3 Under the Medical Liability Act, anyone asserting a health care liability claim must give written notice to the physician or health care provider at least sixty days before filing suit. TEX. CIV. PRAC. & REM.CODE § 74.051(a).
- 4 At the petition stage, the Texas Alliance for Patient Access, the Texas Medical Association, the Texas Hospital Association, the American Congress of Obstetricians and Gynecologists, the Texas Children’s Hospital, and the Texas Osteopathic Medical Association jointly submitted an amicus brief supporting the hospital.
- 5 See *Robinson v. Crown Cork & Seal Co.*, 335 S.W.3d 126, 146 (Tex.2010) (“To be sure, courts must be mindful that statutes are not to be set aside lightly.”); *Sax v. Votteler*, 648 S.W.2d 661, 664 (Tex.1983) (“We recognize that ‘[i]n passing upon the constitutionality of a statute, we begin with a presumption of validity.’” (quoting *Smith v. Davis*, 426 S.W.2d 827, 831 (Tex.1968)) (alteration in original)).
- 6 *City of San Antonio v. City of Boerne*, 111 S.W.3d 22, 25 (Tex.2003).

- 7 As we have observed previously, “the line between facial and as-applied challenges is not so well defined that it has some automatic effect.” *In re Nestle USA, Inc.*, 387 S.W.3d 610, 617 (Tex.2012) (quotation marks omitted); see also *id.* at 617 n. 76 (observing that “ ‘courts remain hopelessly befuddled in this area’ ” (quoting Scott A. Keller & Misha Tseytlin, *Applying Constitutional Decision Rules Versus Invalidating Statutes in Toto*, 98 VA. L.REV. 301, 312 (2012))).
- 8 Rivera asserts that the repose statute is unconstitutional “as applied to children injured by medical negligence before their eighth birthday.” This framing unnecessarily blurs the line between facial and as-applied challenges. Because Rivera contends in neither constitutional challenge that the repose statute always operates unconstitutionally, her challenges are as-applied to her circumstances only.
- 9 900 S.W.2d 316 (Tex.1995).
- 10 648 S.W.2d 661 (Tex.1983).
- 11 307 S.W.3d 283 (Tex.2010).
- 12 *Stockton*, 336 S.W.3d at 617–18.
- 13 *Shah*, 67 S.W.3d at 847.
- 14 *Yancy*, 236 S.W.3d at 785.
- 15 336 S.W.3d at 617–18.
- 16 67 S.W.3d at 847.
- 17 336 S.W.3d at 785.
- 18 Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 10.01, 2003 Tex. Gen. Laws 847, 872 (current version at [TEX. CIV. PRAC. & REM.CODE § 74.251\(b\)](#)).
- 19 See also [TEX. HEALTH & SAFETY CODE § 611.004\(a\)\(4\)](#) (treating minor’s and legally incompetent persons similarly for purposes of disclosing certain confidential information); [TEX. LAB.CODE § 403.007](#) (treating workers’ compensation death benefits payable to minors and legally incompetent persons similarly).
- 20 *Tinkle*, 730 S.W.2d at 166 (“It is impossible to avoid the analogy between the situation of the child plaintiff in *Sax* and the arguably incompetent plaintiff in this case. Traditionally the interests of minors, incompetents, and other helpless persons are viewed in law as substantially similar, and both the substantive law and the rules of procedure accord them comparable treatment. In many respects, mentally incompetent persons present a more compelling case for legal protection. They are frequently less communicative, more vulnerable and dependent than children.... The mentally incompetent are less likely than children to have someone intimately interested in their welfare and inclined to act in their behalf.”). We note that the record here describes M.R.’s condition as such that she might need a guardian when she reaches the age of majority. Because the law treats minors and legally incompetent persons similarly, such a change in legal status would not affect our holding.
- 21 TEX. EST.CODE § 1001.001 (formerly [TEX. PROB.CODE § 602](#)) (“A court may appoint a guardian with full authority over an incapacitated person....”).
- 22 *Id.* §§ 1053.052 (formerly [TEX. PROB.CODE § 622](#)) (discussing guardian’s fiduciary capacity), 1105.051 (formerly [TEX. PROB.CODE § 700](#)) (establishing oath to faithfully discharge duties to a legally incompetent person).
- 23 *Id.* § 1053.052 (formerly [TEX. PROB.CODE § 622](#)) (“No security for costs shall be required of a guardian ... in any suit brought by the guardian ... in [her] respective fiduciary capacit[y].”). [Rule of Civil Procedure 44](#) grants next friends “the same rights concerning such suits as guardians have, but shall give security for costs, or affidavits in lieu thereof, when required.”
- 24 *Id.* §§ 1105.101 (formerly [TEX. PROB.CODE § 702](#)), 1105.102 (formerly [TEX. PROB.CODE § 702A](#)).
- 25 *Id.* § 1163.101 (formerly [TEX. PROB.CODE § 743](#)).
- 26 [TEX. PROP.CODE § 142.002](#) (formerly TEX. PROB.CODE § 142.002(a)) (providing for next friend to take possession of money recovered from a judgment for the minor only after posting a bond).
- 27 For these reasons, we disagree with the court of appeals that any lack of diligence on Rivera’s part could not be imputed to M.R. 392 S.W.3d at 334.
- 28 Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 10.11(b)(5), 2003 Tex. Gen. Laws 847, 884–85.
- 29 *Id.* § 10.11(b)(3).
- 30 *Id.* § 10.11(a).
- 31 *City of Tyler v. Likes*, 962 S.W.2d 489, 502 (Tex.1997).
- 32 *DeCordova*, 4 Tex. at 470–71.
- 33 *Tex. Water Rights Comm’n v. Wright*, 464 S.W.2d 642, 644 (Tex.1971).

- 34 *Baker Hughes, Inc. v. Keco R. & D., Inc.*, 12 S.W.3d 1, 4 (Tex.1999); *Wilson v. Work*, 122 Tex. 545, 62 S.W.2d 490, 490–91 (1933) (per curiam) (original proceeding).
- 35 336 S.W.3d at 612.
- 1 “All courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law.” TEX. CONST. art. I, § 13.
- 2 The statute of repose at issue provides that “[a] claimant must bring a health care liability claim not later than 10 years after the date of the act or omission that gives rise to the claim.” [TEX. CIV. PRAC. & REM.CODE § 74.251\(b\)](#).
- 3 See Act of May 29, 1975, 64th Leg., R.S., ch. 330, § 4, 1975 Tex. Gen. Laws 864, 865 (former TEX.REV.CIV. STAT. art. 582), *repealed by* Act of May 30, 1977, 65th Leg., R.S., ch. 817, § 41.03, 1977 Tex. Gen. Laws 2064.
- 4 “No bill of attainder, ex post facto law, retroactive law, or any law impairing the obligation of contracts, shall be made.” TEX. CONST. art. I, § 16.



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336 S.W.3d 610

Supreme Court of Texas.

Debbie STOCKTON, as Parent and Next Friend
of William Stockton, a Minor, Petitioner,

v.

Howard A. OFFENBACH, M.D., Respondent.

No. 09–0446.

Argued March 25, 2010.

Decided Feb. 25, 2011.

Rehearing Denied May 27, 2011.

Synopsis

Background: Mother, as parent and next friend of child, filed health care liability claim against physician, alleging that he was negligent in failing to recommend and perform a caesarian section based on mother's risk factors for vaginal delivery, causing permanent injury to child's arm at birth. The 298th Judicial District Court, Dallas County, [2008 WL 8158877](#), [Emily Tobolowsky](#), J., denied doctor's motion to dismiss based on mother's failure to timely serve an expert report. Physician appealed. The Court of Appeals, [285 S.W.3d 517](#), reversed. Mother filed petition for review.

Holdings: The Supreme Court, David M. Medina, J., held that:

[1] de novo standard of review, rather than abuse of discretion standard, applied to Supreme Court's review of issues mother raised on appeal;

[2] even assuming that a due diligence exception applied to statute requiring a health care liability claimant to serve expert report on physician or physician's attorney within 120 days of filing claim, such exception did not apply to interrupt running of statutory 120-day deadline with respect to mother; and

[3] statute setting forth 120-day deadline for claimant to serve expert report on physician, as applied to mother, did not violate open courts provision of State Constitution.

Affirmed.

West Headnotes (13)

[1] Appeal and Error

🔑 [Reversal of order or judgment](#)

Court of Appeals' judgment, on physician's appeal from trial court's interlocutory order denying his motion to dismiss health care liability claim filed against him, reversing trial court's decision, was essentially the final judgment in the case, and, thus, Supreme Court had jurisdiction over patient's appeal of Court of Appeals' decision, absent patient's satisfaction of statutory jurisdictional requirements for interlocutory appeals. [V.T.C.A., Government Code § 22.225](#).

[1 Cases that cite this headnote](#)

[2] Courts

🔑 [Certificate of dissent from Court of Civil Appeals to Supreme Court](#)

Courts

🔑 [Review by or certificate to Supreme Court by Court of Civil Appeals of questions where its decision conflicts with or overrules that of another Court of Civil Appeals or that of the Supreme Court](#)

Generally, a Court of Appeals' decision in an interlocutory appeal is final unless an exception applies, such as a dissent or conflict of decisions. [V.T.C.A., Government Code §§ 22.001\(a\)\(1, 2\), 22.225\(b, c\)](#).

[Cases that cite this headnote](#)

[3] Appeal and Error

🔑 [Cases Triable in Appellate Court](#)

Appeal and Error

🔑 [Rulings on Motions Relating to Pleadings](#)

De novo standard of review, rather than abuse of discretion standard, applied to Supreme Court's review of issues of whether health care liability statute requiring trial court to dismiss a health care liability claim if claimant fails to serve an expert report on each physician or health care provider against whom a claim is asserted within 120 days of the suit's filing permitted additional time beyond the 120-day deadline for claimant to serve expert report and whether statute, as applied to claimant, was unconstitutional, as these issues were legal ones.

[26 Cases that cite this headnote](#)

[4] **Appeal and Error**

[Cases Triable in Appellate Court](#)

Under an abuse of discretion standard, the appellate court defers to the trial court's factual determinations if they are supported by evidence, but reviews the trial court's legal determinations de novo.

[20 Cases that cite this headnote](#)

[5] **Health**

[Affidavits of merit or meritorious defense; expert affidavits](#)

Even assuming that a due diligence exception applied to statute requiring a health care liability claimant to serve expert report on physician or physician's attorney within 120 days of filing the claim, such an exception did not apply to interrupt running of statutory 120-day deadline with respect to claimant, who failed to serve expert report on physician against whom she had brought suit within the 120-day deadline; claimant filed motion for substituted service about 40 days after filing her claim, seeking court's permission to serve physician, whom she had been unable to locate, by publication, but then nothing was done on case for four-month period, during which deadline for serving expert report passed, and the lack of action on the case was due in significant part to claimant's failure to inform trial court of the 120-day

deadline or its significance to the pending motion. [V.T.C.A., Civil Practice & Remedies Code § 74.351\(a\)](#).

[12 Cases that cite this headnote](#)

[6] **Limitation of Actions**

[Service of process](#)

Under the “due diligence doctrine,” a plaintiff, who files a petition within the limitations period but does not complete service until after the statutory period has expired, is entitled to have the date of service relate back to the date of filing, if the plaintiff has exercised diligence in effecting service.

[3 Cases that cite this headnote](#)

[7] **Constitutional Law**

[Time for proceedings](#)

Health

[Validity](#)

Statute requiring health care liability claimants to serve expert report on physician within 120 days of filing suit did not violate open courts provision of State Constitution as applied to health care liability claimant who had been unable to locate and serve physician within the 120-day period; claimant had failed to exercise due diligence in attempting to serve physician with the expert report, given that she had filed motion for substituted service about 40 days after filing her claim, but then acquiesced in nothing being done on the case for four months, during which time the 120-day deadline passed. [Vernon's Ann. Texas Const. Art. 1, § 13](#); [V.T.C.A., Civil Practice & Remedies Code § 74.351\(a, b\)](#).

[16 Cases that cite this headnote](#)

[8] **Constitutional Law**

[Conditions, Limitations, and Other Restrictions on Access and Remedies](#)

The open courts provision of the State Constitution prohibits the legislature from making a remedy by due course of law

contingent upon an impossible condition.
[Vernon's Ann.Texas Const. Art. 1, § 13.](#)

[6 Cases that cite this headnote](#)

[9] Constitutional Law

🔑 Presumptions and Construction as to
 Constitutionality

Constitutional Law

🔑 Avoidance of constitutional questions

Courts presume that when enacting legislation, the legislature intends to comply with the Federal and State Constitutions, and courts are obligated to avoid constitutional problems if possible. [V.T.C.A., Government Code § 311.021\(1\).](#)

[Cases that cite this headnote](#)

[10] Constitutional Law

🔑 Access to Courts; Right to Seek Remedy

The open courts provision of the State Constitution assures that a person bringing a well-established common law cause of action will not suffer unreasonable or arbitrary denial of access to the courts; it is, quite plainly, a due process guarantee. [Vernon's Ann.Texas Const. Art. 1, § 13.](#)

[3 Cases that cite this headnote](#)

[11] Constitutional Law

🔑 Right of access to the courts and a
 remedy for injuries in general

To claim a violation of the open courts provision of the State Constitution, the claimant must raise a fact issue establishing that he did not have a reasonable opportunity to be heard. [Vernon's Ann.Texas Const. Art. 1, § 13.](#)

[4 Cases that cite this headnote](#)

[12] Constitutional Law

🔑 Time for proceedings

Plaintiff may not obtain relief under the open courts provision of the State Constitution if

he does not use due diligence in pursuing his claim. [Vernon's Ann.Texas Const. Art. 1, § 13.](#)

[7 Cases that cite this headnote](#)

[13] Statutes

🔑 Giving effect to statute or language;
 construction as written

When a statute is unambiguous, the court's role is to apply it as written despite its imperfections.

[2 Cases that cite this headnote](#)

Attorneys and Law Firms

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Opinion

Justice MEDINA delivered the opinion of the Court.

[Texas Civil Practice and Remedies Code section 74.351](#) requires that an expert report be served on each physician or health care provider against whom a health care liability claim is asserted. [TEX. CIV. PRAC. & REM.CODE § 74.351\(a\)](#). The statute further directs the trial court to dismiss the health care liability claim if this report is not served within 120 days of the suit's filing. [Id. § 74.351\(a\), \(b\)](#). In this appeal, the claimant argues that she was not able to serve the expert report within 120 days because the defendant physician could not be found. She further contends that she diligently searched for the physician and that a due diligence exception should apply to extend the statutory deadline or, alternatively, that the statute is unconstitutional as applied to her because it was impossible for her to comply with its deadline. The court of appeals concluded that the statute did not provide for an exception to its deadline under these circumstances and was not unconstitutional as applied to her. [285 S.W.3d 517](#). We agree and affirm.

I

Debbie Stockton filed a health care liability claim against Howard A. Offenbach, M.D., alleging malpractice during the delivery of her son, William. She attached an expert report and curriculum vitae to the petition when it was filed. In her expert's opinion, Offenbach's failure to recommend and perform a [caesarian section](#) based on Stockton's risk factors for vaginal delivery resulted in permanent injury to William's left arm at birth.

Stockton alleges that Offenbach was an addict when William was born in July 1989, and the record reflects that he abused prescription drugs for many years. Offenbach subsequently lost his medical license in 2001, and he probably left the state sometime after that. His whereabouts are unknown.

When Stockton filed this claim, she had been looking for Offenbach for several months. She had hired a private investigator and searched various public records to no avail. She had initiated a Rule 202 proceeding seeking information from the hospital where her son was born, but the hospital could not help in locating Offenbach. Stockton also contacted Offenbach's last known liability insurance carrier and provided its adjuster with a copy of the expert report she later attached to her original petition. The carrier also had no information on Offenbach's whereabouts.

Although Stockton did not know where Offenbach might be found, she nevertheless filed her claim on June 13, 2007, and attempted to serve Offenbach at his last known address. That failed, of course, and Stockton filed a motion for citation by publication on July 24. *See* [TEX.R. CIV. P. 109](#). In a verified motion, Stockton stated that Offenbach no longer resided at his *613 last known address and after "diligent inquiry and reasonable effort" could not be found.

The court, however, did not immediately grant the motion, and several months passed before the court requested additional information. On November 28, 2007, Stockton filed a supplemental motion adding additional detail regarding her efforts to locate Offenbach, and the court granted the motion about three weeks later. Citation by publication finally issued on March 13, 2008, and

service was completed on April 9. *See* [TEX.R. CIV. P. 116](#) (requiring publication for four consecutive weeks with first publication to occur at least 28 days before the return day of the citation). The citation advised Offenbach to answer by April 28.

Although Offenbach was still missing, his insurance carrier hired an attorney to defend the suit. This attorney filed Offenbach's answer and later a motion to dismiss. Because Stockton had filed a health care liability claim, she was required by statute to serve Offenbach or his attorney with an expert report within 120 days of filing suit, which in this case was on or before October 11, 2007. *See* [TEX. CIV. PRAC. & REM.CODE § 74.351\(a\)](#). Her expert report therefore was due about two months before the trial court authorized service by publication and about six months before such service was completed.

At the hearing on the motion to dismiss, Offenbach's attorney argued that the statute required dismissal because Stockton had not served the expert report within the required 120 days. *See id.* [§ 74.351\(b\)](#). Stockton responded that an exception should be made because of the extraordinary difficulty in locating Offenbach. She maintained that it was impossible to serve Offenbach personally during the 120-day period because he could not be found, pointing out further that the trial court had not granted her motion for substituted service until after the expiration of the 120-day deadline. The trial court agreed that the 120-day deadline should not apply under these circumstances and denied Offenbach's motion to dismiss. At the hearing's conclusion, the court stated that "the intent of the Legislature was fulfilled by both sending the report to the insurance carrier before she filed suit and by filing the report at the time the petition was filed."

II

Offenbach was allowed to appeal the order denying his motion to dismiss, even though the order was interlocutory. *See* [TEX. CIV. PRAC. & REM.CODE § 51.014\(a\)\(9\)](#) (providing for an interlocutory appeal from an order refusing to dismiss under [§ 74.351\(b\)](#)). In this appeal, Stockton argued that it was impossible to serve Offenbach within 120 days of filing her claim, that [section 74.351](#) unreasonably prevented her from pursuing her claim, and that if there were no exception to the statutory deadline, the statute was unconstitutional as applied

to her. The court of appeals rejected her arguments, concluding that the statute required the dismissal of her case. The court accordingly reversed the trial court's order and remanded the case with instructions to render judgment in accordance with [section 74.351\(b\)](#). 285 S.W.3d at 524.

[1] [2] Stockton next appealed to this Court. Generally, a court of appeals' decision in an interlocutory appeal is final unless an exception applies, such as a dissent or conflict of decisions. [TEX. GOV'T CODE §§ 22.225\(b\), \(c\)](#); 22.001(a)(1)(2); *County of Dallas v. Sempe*, 262 S.W.3d 315, 315 (Tex.2008) (per curiam). Stockton, however, does not need a dissent or conflict in this instance because the court of appeals disposition of the interlocutory appeal is *614 essentially the final judgment in the case. Stockton therefore does not have to satisfy the jurisdictional requirements for interlocutory appeals in [section 22.225 of the Texas Government Code](#). *Colquitt v. Brazoria Cnty.*, 324 S.W.3d 539, 542 (Tex.2010) (per curiam). We have jurisdiction in the appeal and have granted her petition for review.

III

Stockton argues that the court of appeals erred in three respects and that each error is a separate and distinct ground for reversal. First, she contends that the court applied the wrong standard of review. She submits that abuse of discretion is the appropriate standard when reviewing an order, which denies a motion to dismiss under [section 74.351\(b\)](#), and that the court of appeals therefore erred in applying a de novo standard. Next, Stockton argues that the court of appeals erred in construing the statute's 120-day deadline to be absolute and should have instead recognized a “due diligence” exception to the deadline. Finally, she complains that if the deadline is not subject to such an exception, it is unconstitutional, as applied to her, because it was not possible to comply with the deadline in this case. Although we consider her three grounds to be interrelated, we consider each in turn as she has presented the argument.

A

[3] Stockton contends that the trial court had discretion to extend the time for serving the expert report beyond the

120-day deadline and that its decision should therefore be reviewed for abuse of discretion. She further maintains that all of the evidence supports the trial court's decision to extend the expert report deadline, but does not otherwise elaborate on the conclusive nature of this evidence. Offenbach, on the other hand, argues that de novo is the appropriate standard because the trial court did not have discretion to misapply [section 74.351](#), which under the circumstances of this case did not permit the trial court discretion to extend the 120-day deadline.

A claimant must comply with Chapter 74 of the Civil Practice and Remedies Code, when asserting a health care liability claim. Among the statute's requirements is the expert report requirement, which directs a claimant to “serve” an expert report and the expert's curriculum vitae on each party or party's attorney within 120 days of filing suit. [TEX. CIV. PRAC. & REM.CODE § 74.351\(a\)](#).¹ Compliance with this provision is mandatory; the claimant must serve an expert report to proceed with a health care liability claim. *Id.* § [74.351\(b\)](#). If the claimant has not served the expert report by the statutory deadline and the parties have not agreed to extend that deadline,² “the court, on the motion of the *615 affected physician or health care provider, shall, subject to [an exception³ not relevant here],” dismiss the claim with prejudice. *Id.* § [74.351\(b\)](#).

Chapter 74 replaced the Medical Liability Insurance Improvement Act, formerly found in [article 4590i of the Texas Revised Civil Statutes](#). Article 4590i required that the expert report be “furnished” to opposing counsel within 180 days of filing suit, but Chapter 74 shortened the deadline to 120 days and now requires the claimant to “serve” (rather than “furnish”) the expert report “on each party or the party's attorney.” Compare [TEX. CIV. PRAC. & REM.CODE § 74.351\(a\)](#) with [TEX.REV.CIV. STAT. art. 4590i, § 13.01\(d\)\(1\)](#) (repealed). Several courts have interpreted the Legislature's use of the word “serve” to require compliance with [Texas Rule of Civil Procedure 21a](#). *Univ. of Tex. Health Science Ctr. at Houston v. Gutierrez*, 237 S.W.3d 869, 872 (Tex.App.-Houston [1st Dist.] 2007, pet. denied); *Herrera v. Seton Nw. Hosp.*, 212 S.W.3d 452, 459 (Tex.App.-Austin 2006, no pet.); *Kendrick v. Garcia*, 171 S.W.3d 698, 703–04 (Tex.App.-Eastland 2005, pet. denied). Rule 21a authorizes service by one of four methods: (1) in person, by agent, or by courier receipted delivery, (2) by certified or registered mail to the

party's last known address, (3) by telephonic document transfer to the recipient's current telecopier number, or (4) by such other manner as the court in its discretion may direct. [TEX.R. CIV. P. 21a](#).

[4] Under an abuse of discretion standard, the appellate court defers to the trial court's factual determinations if they are supported by evidence, but reviews the trial court's legal determinations de novo. *In re Labatt Food Serv., L.P.*, 279 S.W.3d 640, 643 (Tex.2009). Whether the statute permits additional time beyond the 120-day deadline or is unconstitutional, as applied, are legal questions. See *Galbraith Eng'g Consultants, Inc. v. Pochucha*, 290 S.W.3d 863, 867 (Tex.2009) (noting that statutory construction is a legal question). The court of appeals therefore appropriately reviewed the case de novo.

B

[5] [6] Stockton next argues that if the service requirement in Chapter 74 incorporates [Rule 21a](#), it should also incorporate the due diligence doctrine that courts have attached to that rule. Under this doctrine, a plaintiff, who files a petition within the limitations period but does not complete service until after the statutory period has expired, is entitled to have the date of service relate back to the date of filing, if the plaintiff has exercised diligence in effecting service. *Proulx v. Wells*, 235 S.W.3d 213, 214 (Tex.2007) (per curiam); *Ricker v. Shoemaker*, 81 Tex. 22, 16 S.W. 645, 646–47 (1891). Stockton submits that in the same way due diligence in the service of process can interrupt the running of the statute of limitations, so too should due diligence in the service of the expert report interrupt the running of the statutory 120-day expert report deadline.

Offenbach responds that Chapter 74's 120-day deadline may be extended under only two circumstances: (1) "by written agreement of the affected parties" or (2) by a court order, which permits the claimant to cure a deficient, but otherwise timely served, expert report. [TEX. CIV. PRAC. & REM.CODE § 74.351\(a\), \(c\)](#). Neither circumstance *616 applies here. Offenbach concludes therefore that the trial court had no authority or discretion to extend the expert report deadline. Moreover, he submits that a comparison of Chapter 74 to its predecessor, [article 4590i](#), confirms the Legislature's intent to limit trial court discretion over the expert report deadline because the

predecessor statute was more lenient in extending that deadline.

Under [article 4590i](#), a plaintiff could obtain an extension, even when no report was provided by the deadline, if the plaintiff could show an "accident or mistake" in failing to furnish a timely report. See [TEX.REV.CIV. STAT. art. 4590i, § 13.01\(g\)](#) (repealed). Chapter 74 eliminated this provision, and Offenbach submits that the only basis for obtaining a court-ordered extension under the current statute is through a motion to cure a timely served, but deficient, expert report. [TEX. CIV. PRAC. & REM.CODE § 74.351\(c\)](#). Moreover, Offenbach submits that implying a due diligence exception to the statutory deadline ignores another part of Chapter 74, which provides that "[i]n the event of a conflict between this chapter and another law, including a rule of procedure or evidence or court rule, this chapter controls to the extent of the conflict." *Id.* § 74.002.

Section 74.001 provides, however, that "[a]ny legal term or word of art used in this chapter, not otherwise defined in this chapter, shall have such meaning as is consistent with the common law." *Id.* § 74.001(b). The word "served" is not defined in Chapter 74, but its meaning under common law includes the notions of due diligence and relation back. And if Chapter 74 incorporates these concepts through its use of the word "served", no conflict, as prohibited by section 74.002, would exist. But even assuming that a due diligence exception applies to service completed after Chapter 74's expert report deadline, we are not persuaded that the evidence here is legally sufficient to raise the issue. See *Gant v. DeLeon*, 786 S.W.2d 259, 260 (Tex.1990) (per curiam) (holding that due diligence may be lacking as a matter of law based on unexplained lapses in activity).

Stockton knew of the difficulty in serving Offenbach personally, when she filed her claim on June 13, 2007. She accordingly filed a motion for substituted service about 40 days later, seeking the court's permission to cite Offenbach by publication. Had citation promptly issued, sufficient time remained for service by publication before the expiration of the 120-day deadline. See [TEX.R. CIV. P. 116](#) (requiring first publication to commence at least 28 days before the return day of the citation).

The record reflects, however, that after filing the motion for substituted service on July 24, nothing was done

in the case until November 28, at which time Stockton supplemented her motion. During this four month period, the deadline for serving the expert report passed.

Stockton asks that we view the 120-day period for serving the expert report like a limitations period to which the due diligence doctrine should apply. But using Stockton's analogy to limitations and the due diligence doctrine, her four month inactivity here would be analogous to a plaintiff in a tort action waiting two years for the court to act on a pending motion for substituted service. Recently, we concluded in a tort case that an unexplained eight-month gap in service activity established a lack of diligence as a matter of law. *Ashley v. Hawkins*, 293 S.W.3d 175, 180–81 (Tex.2009).

Stockton asserts, however, that something was done during this four-month period of apparent inaction. She submits that her attorney's office repeatedly called the trial court clerk to inquire about the order. As proof, Stockton points to the *617 affidavit of Sandra Rylee,⁴ who is not identified but presumably is an employee of Stockton's attorney. Rylee avers that she had repeated phone conversations with the court's clerk during and after the 120-day period. The affidavit provides the following explanation of those calls:

After filing the motion for substitute service's (sic) citation on July 19, 2007, I had repeated phone conversations with the Clerk of the 298th Court over the next several months, following up with the court to see when our order would be signed. It wasn't until November 2007, when we received notice from the court that additional information needed to be provided regarding locating Dr. Offenbach in a supplemental motion, before the judge would sign the order. We provided the additional information in a supplemental motion for substitute service's (sic) citation on November 20, 2007.

After filing out (sic) supplemental motion, I then followed up on numerous occasions with the court by phone to see when the order would be signed. We received the order saying we could serve by publication on January 24, 2008.

Neither the pending motion nor this affidavit indicate that the trial court was apprised of the 120-day deadline or its significance to the pending motion. Acting under no apparent sense of urgency, the trial court granted the

motion for substituted service on December 20, 2007, more than two months after the expiration of the expert report deadline on October 11. And according to Rylee's affidavit, Stockton's attorney did not receive the court's order for over a month after it was signed.

Stockton suggests that the trial court was at fault for the delay, stating that she “was essentially at the mercy of the trial court” and further “that it was the trial court's extended 4-month delay in granting an order for substitute service that prevented Petitioner from serving Respondent by publication.” But the record indicates that to be only a part of the problem.

Equally significant is the fact that the motion for substituted service did not convey any sense of urgency by referencing the expert report deadline and requesting immediate relief. Nor is there any evidence that the trial court was otherwise apprised of the service deadline. Moreover, the record does not suggest any obstinance on the trial court's part. To the contrary, once the problem was called to the court's attention, it declined to dismiss Stockton's claim even though the expert report had not been served timely.⁵ Had the deadline been called to the court's attention sooner, we might reasonably assume that it would have acted on the motion promptly. We thus reject the notion that the trial court was solely to blame for the delay in service or that a fact issue was raised concerning Stockton's due diligence in the matter.

C

[7] [8] Finally, Stockton argues that the expert report deadline, as applied to her, violates the open courts provision in the Texas Constitution. *TEX. CONST. art. I, § 13*. The open courts provision prohibits the Legislature from making “a remedy by due course of law contingent upon an impossible *618 condition.” *Diaz v. Westphal*, 941 S.W.2d 96, 100 (Tex.1997) (quoting *Moreno v. Sterling Drug, Inc.*, 787 S.W.2d 348, 355 (Tex.1990)). Stockton submits that it was not possible to comply with the statute's deadline because there was no one to serve with the expert report during the first 120 days of her lawsuit. The statute directs that the expert report is to be served on the “party or the party's attorney,” *TEX. CIV. PRAC. & REM.CODE § 74.351(a)*, and Stockton submits that a defendant named in a lawsuit does not become a party before service or appearance. See *Mapco, Inc. v. Carter*,

817 S.W.2d 686, 687 (Tex.1991) (per curiam) (stating that merely being named as a defendant does not make one a party to the lawsuit). Stockton concludes that it was impossible to serve the expert report within 120 days because of the doctor's disappearance and the trial court's delay.

Offenbach responds that there is no evidence that Chapter 74, as applied to Stockton, presented an impossible condition to the pursuit of her claim. Eighty days remained to serve the expert report after she filed her motion for substituted service, yet nothing was done. Offenbach suggests that Stockton's inaction during this period, rather than the statute, caused her to miss the deadline. The court of appeals agreed, concluding there was neither evidence that compliance with [section 74.351\(a\)](#) was impossible nor evidence that the statute prevented Stockton from pursuing her claim. [285 S.W.3d at 524](#).

[9] We presume that when enacting legislation, the Legislature intends to comply with the state and federal constitutions, [TEX. GOV'T CODE § 311.021\(1\)](#), and “we are obligated to avoid constitutional problems if possible.” [Brooks v. Northglen Ass'n](#), [141 S.W.3d 158, 169 \(Tex.2004\)](#). Thus, if presented with a choice between an impossible condition and a due diligence exception we would, of course, choose the latter. Stockton's argument that the statute is unconstitutional as applied to her then is merely a variation of her preceding argument for a due diligence exception to the expert report deadline. See [Yancy v. United Surgical Partners Int'l, Inc.](#), [236 S.W.3d 778, 785–86 \(Tex.2007\)](#) (holding that due diligence is a component of an open courts complaint); [Shah v. Moss](#), [67 S.W.3d 836, 847 \(Tex.2001\)](#) (same). Despite the statute's apparent inflexible deadline, it cannot apply to create an impossible condition to the pursuit of a health care liability claim. [Diaz](#), [941 S.W.2d at 100](#).

[10] [11] [12] The open court's provision “assures that a person bringing a well-established common-law cause of action will not suffer unreasonable or arbitrary denial of access to the courts.” [Yancy](#), [236 S.W.3d at 783](#). “[I]t is, quite plainly, a due process guarantee.” [Sax v. Votteler](#), [648 S.W.2d 661, 664 \(Tex.1983\)](#). But to claim an open court's violation, the person must raise “a fact issue establishing that he did not have a reasonable opportunity” to be heard. [Yancy](#), [236 S.W.3d at 785](#). And “[a] plaintiff may not obtain relief under the open

courts provision if he does not use due diligence [in pursuing his claim].” [Shah](#), [67 S.W.3d at 847](#). Our analysis of Stockton's preceding due diligence issue accordingly forecloses her related open courts challenge.

The application of the statute in this case, however, is unfortunate and, in part, a consequence of the Legislature's decision to calculate the 120-day expert report deadline from the date of filing the suit rather than its service on the defendant. The statute appears to assume that serving a physician or other health care provider will be simple and straightforward. That, however, is not always the case, and when complications arise, as here, [*619 section 74.351\(a\)](#) presents a very small window through which to serve both the lawsuit and the expert report.

[13] We understand that the deadline is intended to weed out frivolous health care liability claims early in the proceeding. See [Lewis v. Funderburk](#), [253 S.W.3d 204, 205 \(Tex.2008\)](#) (noting efforts of Legislature “to stem frivolous suits against health care providers”); [Am. Transitional Care Cntrs. of Tex., Inc. v. Palacios](#), [46 S.W.3d 873, 878 \(Tex.2001\)](#) (noting that one purpose of the expert-report requirement is to deter frivolous claims). That purpose would not be sacrificed, however, by calculating the expert report deadline from the date the physician or other health care provider becomes a party to the proceeding through service or appearance. Calculating the deadline from that date would also better fit the statute's requirement that the expert report is to be served on “each party or the party's attorney.” [TEX. CIV. PRAC. & REM.CODE § 74.351\(a\)](#). The Legislature, however, has chosen to commence the 120-day period from the date of filing, and “we are not free to rewrite the statutes to reach a result we might consider more desirable, in the name of statutory construction.” [Public Utility Comm'n of Tex. v. Cofer](#), [754 S.W.2d 121, 124 \(Tex.1988\)](#). When a statute is unambiguous, our role is to apply it as written despite its imperfections. [Leland v. Brandal](#), [257 S.W.3d 204, 206 \(Tex.2008\)](#); see also [Simmons v. Arnim](#), [110 Tex. 309, 220 S.W. 66, 70 \(1920\)](#) (noting that “[c]ourts must take statutes as they find them”); but see [Univ. of Tex. S.W. Med. Ctr. v. Loutzenhiser](#), [140 S.W.3d 351, 356 \(Tex.2004\)](#) (noting that statutes should not be read to create absurdities).

* * * * *

The court of appeals concluded that there was no evidence that [section 74.351\(a\)](#)'s expert report requirement prevented Stockton from pursuing her claim or that the statute was unconstitutional as applied to her. We agree and affirm the court of appeals' judgment.

All Citations

336 S.W.3d 610, 54 Tex. Sup. Ct. J. 590

Footnotes

- 1 Before September 1, 2005, [section 74.351](#) required an expert report to be served "not later than the 120th day after the date the *claim* was filed." Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 10.01, 2003 Tex. Gen. Laws 847, 875, (emphasis added), *amended by* Act of May 18, 2005, 79th Leg., R.S., ch. 635, § 1, 2005 Tex. Gen. Laws 1590, 1590. This version applies in this case because the underlying cause of action accrued before September 1, 2005. See Act of May 18, 2005, 79th Leg., R.S., ch. 635, § 2, 2005 Tex. Gen. Laws 1590, 1590. The current version requires the expert report to be served "not later than the 120th day after the date the *original petition* was filed." [TEX. CIV. PRAC. & REM.CODE § 74.351](#) (emphasis added). This change is of no practical significance to the issues before us and thus we refer to the current statute even though the previous version applies in this case.
- 2 The statute authorizes an extension of the 120-day period "by written agreement of the affected parties." [TEX. CIV. PRAC. & REM.CODE § 74.351\(a\)](#).
- 3 [Section 74.351\(c\)](#) authorizes the trial court to grant the claimant one 30-day extension to cure a deficient expert report, if the deficient report is served by the statutory deadline. [TEX. CIV. PRAC. & REM.CODE § 74.351\(c\)](#). The exception does not apply here because Stockton did not serve a deficient expert report on or before the expiration of the 120-day period.
- 4 Stockton included this affidavit as an exhibit to her response to Offenbach's motion to dismiss.
- 5 The trial court had these words at the conclusion of the hearing on the motion to dismiss: "I know the statute says what it says. The Dallas Court probably is going to tell me, nice try, Judge Tobolowsky; we are not going to agree with you. But I am going to deny the motion."

2013 WL 4769264

Only the Westlaw citation is currently available.

SEE TX R RAP RULE 47.2 FOR
DESIGNATION AND SIGNING OF OPINIONS.

**MEMORANDUM OPINION
(PUBLISH)**

Court of Appeals of Texas,
Tyler.

Kevin O'CONNOR and
Saundra O'Connor, Appellants

v.

C. Winston BOLLINGER, M.D.; Dawn Barnes,
FNP; and Tenet Healthcare Corporation, Appellees.

No. 12–12–00351–CV.

|

Sept. 4, 2013.

Appeal from the 145th Judicial District Court,
Nacogdoches County, Texas.

Attorneys and Law Firms

Kelly W. Kelly, Attorney at Law, The Woodlands, TX,
for Appellant.

Russell W. Schell, Addison, TX, Curry L. Cooksey,
Cooksey & Marcin, PLLC, The Woodlands, TX, for
Appellees.

Panel consisted of WORTHEN, C.J., GRIFFITH, J., and
HOYLE, J.

MEMORANDUM OPINION

SAM GRIFFITH, Justice.

*1 Kevin and Saundra O'Connor appeal from summary judgments in favor of C. Winston Bollinger, M.D.; Dawn Barnes, FNP; and Tenet Healthcare Corporation in this medical malpractice lawsuit. In their sole issue, the O'Connors contend they raised a fact issue concerning the applicability of a limitations bar to their cause of action. We affirm.

BACKGROUND

Kevin O'Connor sought treatment for chest pain on May 25, 2008, at Nacogdoches Medical Center emergency room. He was examined by Dawn Barnes, a nurse, under the direction of Dr. C. Winston Bollinger. He was quickly diagnosed with a [bronchial infection](#) and discharged, but continued to experience shortness of breath and lack of energy over the next several months. In mid-2010, he underwent testing, and in late 2010, he experienced cardiac related symptoms. Further testing showed he had suffered a severe [heart attack](#) at some point in the past. In 2011, his cardiologist surmised that the [heart attack](#) occurred on May 25, 2008. The O'Connors sued Barnes, Bollinger, and Tenet Healthcare Corporation, which they asserted was the operator of Nacogdoches Medical Center. All three defendants moved for summary judgment based on limitations. The trial court granted the motions and rendered an order dismissing, with prejudice, the O'Connors' claims against Barnes and Bollinger, and an order that the O'Connors take nothing against Tenet Healthcare. This appeal ensued.

SUMMARY JUDGMENT

In their sole issue, the O'Connors assert that application of the two year medical malpractice limitations period to their suit violates the open courts provision of the Texas Constitution. They argue that they presented evidence raising a material fact issue regarding whether they had a reasonable opportunity to discover the cause of action within two years from Kevin's emergency room visit. They assert that a ten month time period elapsed between discovery of the wrong and filing of suit and contend that is not an unreasonable time.

Standard of Review

We review the trial court's decision to grant summary judgment de novo. *Tex. Mun. Power Agency v. IPub. Util. Comm'n*, 253 S.W.3d 184, 192 (Tex.2007). A defendant who moves for traditional summary judgment has the burden of showing that there is no genuine issue of material fact concerning one or more essential elements of the plaintiff's claims or plead and conclusively establish each essential element of any affirmative defense, establishing that it is entitled to judgment as a matter of

law. [TEX.R. CIV. P. 166a\(c\)](#); [Cathey v. Booth](#), 900 S.W.2d 339, 341 (Tex.1995); [Nixon v. Mr. Prop. Mgmt. Co.](#), 690 S.W.2d 546, 548 (Tex.1985).

A defendant moving for summary judgment on the affirmative defense of limitations has the burden to conclusively establish that defense. [KPMG Peat Marwick v. Harrison Cnty. Hous. Fin. Corp.](#), 988 S.W.2d 746, 748 (Tex.1999). If the movant establishes that the statute of limitations bars the action, the nonmovant must then adduce summary judgment proof raising a fact issue in avoidance of the statute of limitations. *Id.* Then, the movant must conclusively negate the tolling provision's application to show his entitlement to summary judgment. [Jennings v. Burgess](#), 917 S.W.2d 790, 793 (Tex.1996). Review of a summary judgment requires that the evidence presented by both the motion and the response be viewed in the light most favorable to the party against whom the judgment was rendered, crediting evidence favorable to that party if reasonable jurors could and disregarding all contrary evidence and inferences unless reasonable jurors could not. [Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding](#), 289 S.W.3d 844, 848 (Tex.2009).

Applicable Law

*2 Texas law imposes a two year limitations period and abolished the discovery rule in health care liability claims. [TEX. CIV. PRAC. & REM.CODE ANN. § 74.251](#) (West 2011); [Kimball v. Brothers](#), 741 S.W.2d 370, 372 (Tex.1987). When a plaintiff's cause of action accrues for limitations purposes under [Section 74.251](#) is a question of law. [Chambers v. Conaway](#), 883 S.W.2d 156, 159 (Tex.1993). If the date the alleged tort occurred is ascertainable, limitations must begin on that date. [Shah v. Moss](#), 67 S.W.3d 836, 841 (Tex.2001).

The Texas Constitution guarantees that persons bringing common law claims will not unreasonably or arbitrarily be denied access to the courts. [TEX. CONST. art. I, § 13](#). A statute that unreasonably or arbitrarily abridges a person's right to obtain redress for injuries another person's harmful act causes is an unconstitutional due course of law violation. [Shah](#), 67 S.W.3d at 842. Consequently, our constitution's open courts provision protects a person from legislative acts that cut off a person's right to sue before there is a reasonable opportunity to discover the wrong and bring suit. *Id.* However, a plaintiff may not obtain relief under the open courts provision if he does not

use due diligence and sue within a reasonable time after learning about the alleged wrong. *Id.* at 847.

Analysis

The O'Connors allege that the defendants committed negligence on May 25, 2008. Their original petition was filed on February 6, 2012, clearly outside the two year limitation period. The O'Connors argue that they did not know of the prior heart attack until March 29, 2011, almost a year after the limitations period ended. To trigger the open court's guarantee, it was the O'Connors' burden to raise a fact issue demonstrating that they did not have a reasonable opportunity to discover the alleged wrong before the limitations period expired. *See Shah*, 67 S.W.3d at 846–47.

In his affidavit, Kevin stated that he experienced increasingly worsening shortness of breath and lack of energy over the next several months after the emergency room visit. During that time period, he saw his family doctor. He apparently continued to experience similar problems because, in June 2010, he had a nuclear medicine stress test. The results of the test showed a “prior myocardial insult in the inferior wall and a substantial left ventricular systolic dysfunction.” Further testing in November 2010 showed severe coronary artery disease, abnormal cardiac function, and significant left ventricular dysfunction. The second cardiologist, seen in March 2011, confirmed that Kevin had previously had a heart attack and surmised that it occurred on May 25, 2008. The summary judgment evidence shows that the first time anyone told the O'Connors that Kevin likely had a heart attack on May 25, 2008, was outside the limitations period. However, the law does not ask for the date of actual knowledge or of a good guess. The open courts provision protects Kevin from a statute that cuts off his right to sue before he has a reasonable opportunity to discover the wrong. *Id.* at 842. The evidence shows that, in 2008, the O'Connors had a reasonable opportunity to discover that Kevin had been misdiagnosed on May 25, 2008, since he was experiencing symptoms and seeing a doctor in the “next several months” after the emergency room visit. Therefore, the open courts provision cannot apply to protect the O'Connors from having filed their suit too late. *See Ericson v. Roberts*, 910 S.W.2d 608, 613 (Tex.App.-Tyler 1995, no writ).

*3 Even if the O'Connors had established a prima facie open courts violation, summary judgment was proper. If

they established a prima facie open courts violation, the O'Connors were then required to show that diligence was used to bring suit within a reasonable time following the discovery of injury. *Shah*, 67 S.W.3d at 847. Although they argue that they did not have a reasonable opportunity to discover the wrong until March 2011, the record shows that, in addition to the several months of symptoms Kevin experienced in 2008, they had notice of pertinent facts in June 2010, but did not file suit until February 2012. The O'Connors have not explained why the information they obtained in June 2010 and November 2010 was not sufficient to lead to discovery of the wrong. Absent a valid explanation for delay that shows the plaintiff was exercising due diligence, at least a one year delay is likely to be considered unreasonable as a matter of law. *See id*; *O'Reilly v. Wiseman*, 107 S.W.3d 699, 707 n. 13 (Tex.App.-Austin 2003, pet. denied). The O'Connors did not raise a fact issue establishing that they did not have a reasonable opportunity to discover the alleged wrong and bring suit within the limitations period or that they sued within a reasonable time after the 2010 testing. *See Shah*, 67

S.W.3d at 847. Thus, the open courts provision does not apply to save the O'Connors' time-barred negligence claim. *Id*.

The trial court did not err in granting the defendants' motions for summary judgment. *See Nixon*, 690 S.W.2d at 548. We overrule the O'Connors' sole issue.

DISPOSITION

Having held that [Texas Civil Practice and Remedies Code Section 74.251](#) bars the O'Connors' claims, and that they did not raise a fact issue to support their contention that the open courts provision saves their claims, we *affirm* the trial court's judgment.

All Citations

Not Reported in S.W.3d, 2013 WL 4769264

112 S.W.3d 282
Court of Appeals of Texas,
Corpus Christi–Edinburg.

Mary Ann Barnes PECH, Appellant,
v.
The ESTATE OF Vicente
TAVAREZ, Jr., Deceased, Appellee.

No. 13–01–841–CV.

|
July 31, 2003.

Patient brought medical malpractice action against estate of her doctor. The 92nd District Court, Hidalgo County, [Edward G. Aparicio](#), J., granted estate's motion for summary judgment, and patient appealed. The Court of Appeals, [Rodriguez](#), J., held that, because patient's medical malpractice suit against doctor's estate was filed almost 4 years after the surgery, this suit was time-barred based on 2–year statute of limitations set forth in Medical Liability Insurance Improvement Act, and open courts provision of State Constitution did not save patient's claim.

Affirmed.

West Headnotes (10)

[1] Limitation of Actions

🔑 [Health Care Professionals in General](#)

The discovery rule, which tolls the beginning of the statute of limitations in tort cases until the plaintiff has learned or should have learned of the incident that gave rise to his claim, does not apply under the Medical Liability Insurance Improvement Act. [Vernon's Ann.Texas Civ.St. art. 4590i](#).

[Cases that cite this headnote](#)

[2] Constitutional Law

🔑 [Abrogation, Modification, or Recognition of Remedies](#)

Limitation of Actions

🔑 [Constitutionality of Statute](#)

Under the Texas Constitution's open courts provision, Medical Liability Insurance Improvement Act may not operate as a complete bar to a claim that is otherwise assertable under common law. [Vernon's Ann.Texas Const. Art. 1, § 13](#); [Vernon's Ann.Texas Civ.St. art. 4590i](#).

[Cases that cite this headnote](#)

[3] Constitutional Law

🔑 [Time for Proceedings](#)

Limitation of Actions

🔑 [Constitutionality of Statute](#)

Limitation of Actions

🔑 [Negligence in Performance of Professional Services](#)

Because patient's medical malpractice suit against doctor's estate was filed almost 4 years after the surgery, this suit was time-barred based on 2–year statute of limitations set forth in Medical Liability Insurance Improvement Act, and open courts provision of State Constitution did not save patient's claim because patient waited 14 months after discovering that the lump in her breast was the same lump that doctor had reportedly removed two years earlier and this 14–month delay was unreasonable, given that patient had used this 14–month period to attend to family matters and not to investigate and prepare the claim. [Vernon's Ann.Texas Const. Art. 1, § 13](#); [Vernon's Ann.Texas Civ.St. art. 4590i](#).

[Cases that cite this headnote](#)

[4] Constitutional Law

🔑 [Conditions, Limitations, and Other Restrictions on Access and Remedies](#)

A prima facie case under the open courts provision of the State Constitution may be successfully established upon a showing that the litigant has a cognizable common-law cause of action, and the restriction of the claim is unreasonable or arbitrary when balanced against the statute's purpose. [Vernon's Ann.Texas Const. Art. 1, § 13](#).

Cases that cite this headnote

[5] Constitutional Law Time for Proceedings

Once a plaintiff establishes a prima facie violation of open courts provision of State Constitution, she must show she used due diligence in bringing the suit within a reasonable time after learning about the alleged wrong, and the reasonable time is given in order to allow plaintiff to investigate, prepare and file suit after discovering her injury. [Vernon's Ann.Texas Const. Art. 1, § 13](#).

1 Cases that cite this headnote

[6] Civil Rights Questions of Law or Fact**Constitutional Law** Questions of Law or Fact

Whether a plaintiff, who has established prima facie violation of open courts provision of State Constitution, has used due diligence in bringing the suit within a reasonable time after learning about the alleged wrong is ordinarily a question of fact to be determined by the trier of fact; however, it may be determined as a matter of law when the evidence, construed most favorably for the claimant, admits no other conclusion. [Vernon's Ann.Texas Const. Art. 1, § 13](#).

5 Cases that cite this headnote

[7] Constitutional Law Time for Proceedings**Limitation of Actions** Constitutionality of Statute**Limitation of Actions** Health Care Professionals in General

As a matter of law, discovery of doctor's alleged malpractice occurred no later than date when patient learned from physician that the lump in her breast was the same lump that doctor had reportedly removed two years

earlier, and not on subsequent date when patient ordered copies of her medical records from doctor's clinic, in connection with determining whether open courts provision of State Constitution was applicable so as to save patient's medical malpractice claim from being time barred as patient's malpractice suit against doctor's estate was filed outside of the 2-year statute of limitations set forth in Medical Liability Insurance Improvement Act. [Vernon's Ann.Texas Const. Art. 1, § 13](#); [Vernon's Ann.Texas Civ.St. art. 4590i](#).

Cases that cite this headnote

[8] Executors and Administrators Capacity to Sue and Be Sued in General

An estate of a decedent is not a legal entity and may not sue or be sued as such.

Cases that cite this headnote

[9] Executors and Administrators Parties

If the estate's personal representative participates in case, judgment involving the estate may be valid.

1 Cases that cite this headnote

[10] Judgment Motion or Other Application

Although motion for summary judgment identified doctor's estate as the movant for summary judgment, the grant of summary judgment with respect to patient's medical malpractice claim was valid as to the personal representative.

5 Cases that cite this headnote

Attorneys and Law Firms

*283 [William Kimball](#), Harlingen, for Appellant.

[Chris Franz](#), Sweetman, Skaggs, Lawler & Franz, Edinburg, [Marion R. Lawler III](#), Sweetman, Skaggs, Lawler & Franz, Brownsville, for Appellee.

Before Chief Justice VALDEZ and Justices RODRIGUEZ and AMIDEI.¹

OPINION

Opinion by Justice RODRIGUEZ.

This is a medical malpractice action. Appellant, Mary Ann Barnes Pech, sued appellee, the Estate of Dr. Vicente Tavaréz, Jr., deceased (the Estate), for malpractice arising from a surgery performed by Dr. Tavaréz. The Estate moved for traditional summary judgment asserting Pech was barred by limitations under the *284 two-year statute on medical malpractice actions, and, alternately, under the open courts doctrine. The trial court granted the Estate's motion and dismissed the case. By three points, Pech contends the trial court erred in dismissing the suit in its entirety because: (1) issues of material fact remain regarding the Estate's limitations defense; (2) Joan Tavaréz, as executrix or personal representative of the Estate, was not a moving party for summary judgment; and (3) the judgment was based on abandoned claims. We affirm.

I. Background

In April 1996, a mammogram revealed a lump in Pech's left breast. Pech was referred to Dr. Tavaréz, a surgeon. A sonogram, ordered by Dr. Tavaréz, confirmed the results of the mammogram. Prior to surgery, Pech was under the impression that Dr. Tavaréz would do a non-radical biopsy, that the pathologist would examine the tissue, and that Dr. Tavaréz would do semi-radical surgery only if the tissue were cancerous. Dr. Tavaréz performed the surgery on May 20, 1996. When the bandages were removed during a follow-up visit on May 24, 1996, Pech was "shocked and horrified by the radical nature of the surgery." During the May 24 visit, Dr. Tavaréz informed Pech he had removed the lump and it was benign. After several follow-up visits to Dr. Tavaréz's office, Pech did not see the doctor again. Dr. Tavaréz died thereafter.

On November 3, 1998, approximately two and one-half years after the surgery, Pech had a routine mammogram that was ordered by Dr. Andrew de la Garza. This mammogram again revealed a lump in her left breast.

The lump was the same size and in approximately the same location as the lump Dr. Tavaréz had reportedly removed in May 1996. Pech assumed that the lump was a new one. Pech testified at her deposition that some time before December 30, 1998, Dr. de la Garza told her it was the same lump. On April 23, 1999, Dr. Ramesh G. Shah biopsied the lump using a non-radical needle biopsy method, and on April 27, 1999, Dr. Shah informed Pech that the biopsied lump was not a new lump. It was Dr. Shah's opinion that it was not necessary to remove the biopsied lump because it was determined to be benign.

Because of personal matters, including her own health concerns and those of family and friends as well as the death of her father and the care of her mother, Pech did not begin inquiring into legal services until late October 1999. Pech filed suit alleging negligence against the Estate on March 13, 2000. On April 19, 2000, Pech amended her petition identifying the Estate and Joan Tavaréz, executrix, or alternately, personal representative of the Estate, as defendants.

On June 22, 2001, the Estate filed its amended motion for summary judgment asserting a limitations defense based on (1) an absolute bar because Pech learned of her injury and the alleged malpractice within the two year limitations period, and (2) alternately, the open courts doctrine because Pech did not use diligence in filing her lawsuit. Pech filed her second amended petition on July 13, 2001, noting that "Mrs. Tavaréz and the Estate have already made their general appearance in the case." In this amended petition, Pech alleged Dr. Tavaréz was negligent in the following respects:

1. In failing to remove the lump from her left breast in 1996;
2. In failing to disclose to her the fact that he had not removed the lump even after performing the surgery; and
3. In telling her the lump was removed and was benign.

*285 Absent from this amended petition was Pech's claim that Dr. Tavaréz was negligent in performing a more radical surgical procedure than was required.

On August 24, 2001, the trial court granted the Estate's motion for summary judgment on the limitations defense

and dismissed the entire case with prejudice. This appeal ensued.

II. Standard of Review

We must determine whether the summary judgment proof establishes as a matter of law that there is no genuine issue of material fact as to one or more of the essential elements of the plaintiff's cause of action or whether the defendant has conclusively established all elements of his affirmative defense. *Velsicol Chem. Corp. v. Winograd*, 956 S.W.2d 529, 530 (Tex.1997); *Walker v. Harris*, 924 S.W.2d 375, 377 (Tex.1996); *Crain v. Smith*, 22 S.W.3d 58, 59 (Tex.App.-Corpus Christi 2000, no pet.); see *City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 678 (Tex.1979). When reviewing a summary judgment, we take as true all evidence favorable to the non-movant and indulge every reasonable inference in the non-movant's favor. See *Cathey v. Booth*, 900 S.W.2d 339, 341 (Tex.1995); *Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 549 (Tex.1985). The propriety of a summary judgment is a question of law; therefore, we review the trial court's granting of a motion for summary judgment de novo. *Natividad v. Alexsis, Inc.*, 875 S.W.2d 695, 699 (Tex.1994); *Tex. Commerce Bank–Rio Grande Valley v. Correa*, 28 S.W.3d 723, 726 (Tex.App.-Corpus Christi 2000, pet. denied).

III. Limitations Defense

By her first issue, Pech claims the trial court erred in issuing summary judgment against her on the basis of the Estate's limitations defense.

A. The Law

[1] [2] [3] The discovery rule, which tolls the beginning of the statute of limitations in tort cases until the plaintiff has learned or should have learned of the incident that gave rise to his claim, does not apply under article 4590i of the Medical Liability Insurance Improvement Act. TEX.REV.CIV. STAT. ANN. art. 4590i, § 10.01 (Vernon Supp 2003) (absolute bar); *Jennings v. Burgess*, 917 S.W.2d 790, 794 (Tex.1996). Therefore, because the present suit was filed almost four years after the surgery at issue in this case, this suit would be time-barred based

on the two year statute of limitations. However, under the Texas Constitution's open courts provision, article 4590i may not operate as a complete bar to a claim that is otherwise assertable under common law. TEX. CONST. art. I, § 13 (persons bringing common-law claims will not unreasonably or arbitrarily be denied access to courts); see *Shah v. Moss*, 67 S.W.3d 836, 842 (Tex.2001) (citing *Neagle v. Nelson*, 685 S.W.2d 11, 12 (Tex.1985)).

[4] [5] A prima facie case under the open courts provision may be successfully established upon a showing that the litigant has a cognizable common-law cause of action, and the restriction of the claim is unreasonable or arbitrary when balanced against the statute's purpose. *Shah*, 67 S.W.3d at 842; *Diaz v. Westphal*, 941 S.W.2d 96, 100 (Tex.1997). Once a plaintiff establishes a prima facie violation, she must show she used due diligence in bringing the suit within a reasonable time after learning about the alleged wrong. *Shah*, 67 S.W.3d at 847; *Nelson v. Krusen*, 678 S.W.2d 918, 921–22 (Tex.1984); *DeRuy v. Garza*, 995 S.W.2d 748, 752 (Tex.App.-San Antonio 1999, no pet.). The reasonable time is given in order to allow a claimant to investigate, prepare and file suit after *286 discovering her injury. *Gagnier v. Wichelhaus*, 17 S.W.3d 739, 745 (Tex.App.-Houston [1st Dist.] 2000, pet. denied); see *DeRuy*, 995 S.W.2d at 752.

[6] “In health care liability claims, there is no clear authority as to what is a ‘reasonable time’ within which to file suit after discovering an injury outside the statute of limitations.” *Gagnier*, 17 S.W.3d at 745. Whether a plaintiff has used the degree of diligence required is ordinarily a question of fact to be determined by the trier of fact; however, it may be “determined as a matter of law when the evidence, construed most favorably for the claimant, admits no other conclusion.” *DeRuy*, 995 S.W.2d at 752–53 (quoting *Neagle*, 685 S.W.2d at 14 (Kilgarlin, J., concurring)). Compare *Gagnier*, 17 S.W.3d at 745 (holding ten months not per se unreasonable when defendants delayed in providing plaintiff with medical records, and plaintiff was recovering, consulting with an attorney, and investigating her claim), and *DeRuy*, 995 S.W.2d at 753 (Tex.App.-San Antonio 1999, no pet.) (holding slightly less than one year not per se unreasonable when plaintiff was recuperating for three months, consulted an attorney six months later, and filed suit three months later), with *Shah*, 67 S.W.3d at 847 (holding seventeen month delay was unreasonable as a matter of law when plaintiff offered no legitimate

explanation accounting for delay), and *Voegtlin v. Perryman*, 977 S.W.2d 806, 813 (Tex.App.-Fort Worth 1998, no pet.) (delay of more than one year unreasonable when plaintiff offered no explanation for delay), and *Fiore v. HCA Health Servs. of Tex., Inc.*, 915 S.W.2d 233, 237 (Tex.App.-Fort Worth 1996, writ denied) (thirteen month delay in bringing suit excessive as matter of law when plaintiff offered no explanation for delay), and *LaGesse v. PrimaCare, Inc.*, 899 S.W.2d 43, 47 (Tex.App.-Eastland 1995, writ denied) (holding twelve month delay excessive as a matter of law where only reasons given were attorney delay), and *Work v. Duval*, 809 S.W.2d 351, 353–354 (Tex.App.-Houston [14th Dist.] 1991, no writ) (injury discovered four months prior to expiration of two-year limitations period irrelevant because plaintiff unreasonably delayed in filing suit for twenty-one months following discovery of injury).

The Estate urges that it is entitled to summary judgment even if Pech established a prima facie open courts violation because Pech, as a matter of law, did not bring her lawsuit within a reasonable time after she learned of the potential claim, and, therefore, is not entitled to relief from the open courts provision. We agree.

B. Pech Learned of Potential Claim

[7] Pech's surgery was performed on May 20, 1996. Pech contends she did not discover the alleged injury until sometime between April 9, 1999 and April 23, 1999, almost three years after the surgery, when she was told that the lump was the same lump that Dr. Tavaréz had reportedly removed in 1996. However, from our de novo review of the summary judgment evidence, we conclude the evidence establishes that discovery occurred no later than December 30, 1998.

The summary judgment evidence provides that in November 1998 Pech had a routine [mammogram](#) while under the care of Dr. de la Garza. The radiologist reported that, as compared with the April 12, 1996 [mammogram](#), the November 1998 [mammogram](#) showed no change in size and appearance of the lump in the left breast. Sometime between the November 1998 [mammogram](#) and December 30, 1998, when Pech saw Dr. Rodríguez-Aguero for a follow-up [sonogram](#), she talked with Dr. de la Garza. During the telephone conversation *287 he informed her that the lump was the same lump. Pech

testified at her deposition that when Dr. de la Garza first told her, she “almost lost it,” “[i]t had been there for two years,” and she was shocked and angry at Dr. Tavaréz because he had left the lump. The evidence also establishes that in March 23, 1999, Pech discussed the possibility of this being the same lump with Dr. Hunter, and, in early April 1999, Pech ordered copies of her medical records from the Tavaréz Clinic.

Based on the above, taking as true all evidence favorable to Pech and indulging every reasonable inference in Pech's favor, see *Cathey*, 900 S.W.2d at 341; *Nixon*, 690 S.W.2d at 549, we conclude, as a matter of law, that discovery occurred no later than December 30, 1998. Pech's claim in response to the motion for summary judgment that she did not discover the purported wrongful conduct until sometime between April 9, 1999 and April 23, 1999 when a physician informed her that the lump was the same lump that Dr. Tavaréz was to have removed in 1996, is not supported by the summary judgment evidence.

C. Due Diligence in Filing Lawsuit

Based on a discovery date of December 30, 1998, and a filing date of March 13, 2000, Pech waited fourteen months after discovery to file her lawsuit. She asserts that her delay was reasonable. We disagree.

While we sympathize with Pech about her personal and family concerns, we conclude that, as a matter of law, Pech did not file her suit against the Estate within a reasonable period of time. A reasonable delay is allowed for investigation, preparation and filing the claim after the injury is discovered. *Gagnier*, 17 S.W.3d at 745; see *DeRuy*, 995 S.W.2d at 752. The fourteen month delay was not for that purpose. During that interval Pech helped with family matters, a friend's health concerns, and personal health problems. After discovery, Pech briefly cared for her parents. Her father died a few months later, and Pech attended to the preparation of various services for him in Texas and in his home state of Minnesota. During this fourteen month delay, Pech also experienced health problems of her own unrelated to the surgery at issue, including a broken arm and [sprained ankle](#) that occurred while playing tennis. Pech also asserts the delay was reasonable because of health concerns of other family members and a friend.

We cannot conclude ordinary life experiences can be argued as legitimate bases for delaying the filing of a lawsuit. Moreover, Pech spent the summer months at her home in Minnesota, waiting until she returned to her winter home in Texas, nine months after discovery, before seeking the assistance of an attorney. Pech does not complain that any part of the delay was because she was recovering from the surgery at issue. See *Gagnier*, 17 S.W.3d at 745; *DeRuy*, 995 S.W.2d at 753. Also, her medical records were provided to her immediately upon request. See *Gagnier*, 17 S.W.3d at 745.

Pech knew about her alleged injury on December 30, 1998, fourteen months before she brought suit on March 13, 2000. She offered no valid explanation for the delay; the unreasonableness of the delay admits no other conclusion. See *DeRuy*, 995 S.W.2d at 752–53. Pech failed to use due diligence when she delayed fourteen months after she learned the lump had not been removed to file her claim. Therefore, even taking as true Pech's assertion that she could not have sued within the two-year limitations period, the open courts provision does not save her claim.

*288 Accordingly, we overrule appellant's first issue.²

IV. Summary Judgment Valid as to Personal Representative

[8] [9] [10] Pech contends by her second point of error that the trial court erred in dismissing this case in its entirety because Joan Tavarez, as executrix or personal representative of the Estate was not a moving party for the summary judgment. An estate of a decedent is not a legal entity and may not sue or be sued as such. *Price v. Estate of Anderson*, 522 S.W.2d 690, 691(Tex.1975). However, if the estate's personal representative participates in the case, the judgment involving the estate may be valid. See *Embrey v. Royal Ins. Co. Of Am.*, 22 S.W.3d 414, 415 n. 2 (Tex.2000) (citing *Bernstein v. Portland Sav. & Loan Ass'n*, 850 S.W.2d 694, 699 (Tex.App.-

Corpus Christi 1993, writ denied)) (*disapproved on other grounds by Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378, 388–89 (Tex.2000)). In this case, Pech filed suit against both the Estate and Joan Tavarez, its executrix or personal representative. Mrs. Tavarez and the Estate made general appearances in this case. It is undisputed that Mrs. Tavarez, the personal representative of the Estate, participated in the case. Thus, we conclude that, although the motion for summary judgment identified the Estate as the movant, the summary judgment is valid as to the personal representative, Mrs. Tavarez.³ Pech's second point is overruled.

V. Fraud Claim Not Raised

Finally, by her third point of error, Pech contends that the trial court erroneously failed to consider her second amended original petition in rendering its decision. In her briefing, Pech describes one of Dr. Tavarez's acts as negligence or fraud. However, we have reviewed Pech's second amended petition and find no mention of fraud or the elements of fraud in the petition. Her factual recitation is expanded in her amended petition; however, the facts support her claim for negligence, a cause of action mentioned repeatedly throughout the document. The Estate's motion for summary judgment addressed Pech's negligence claim. See *TEX.R. CIV. P. 166a(c)* (motion shall state specific grounds therefor). Accordingly, we overrule Pech's third point of error.

VI. Conclusion

The judgment of the trial court is affirmed.

All Citations

112 S.W.3d 282

Footnotes

- 1 Former Justice Maurice Amidei assigned to this Court by the Chief Justice of the Supreme Court of Texas pursuant to *TEX. GOV'T CODE ANN. § 74.003* (Vernon 1998).
- 2 We also overrule the third point of error to the extent Pech contends she did not discover the alleged claims until more than two years after surgery and treatment, thus, her claim should not be barred.
- 3 We note Pech did not sue Mrs. Tavarez in her individual capacity and did not assert claims against her individually; allegations of malpractice were asserted only against Dr. Tavarez.

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915 S.W.2d 233
Court of Appeals of Texas,
Fort Worth.

Yvonne FIORE and Charles Fiore, Appellants,
v.
HCA HEALTH SERVICES OF TEXAS,
INC. d/b/a North Hills Medical Center
and Michael Rogers, M.D., Appellees.

No. 2–95–063–CV.

Feb. 1, 1996.

Rehearing Overruled Feb. 29, 1996.

Patient who had been treated for neck pain by physician following automobile accident and who suffered from pain for over six years until fracture in neck was ultimately diagnosed brought medical malpractice action against physician and medical center based on alleged failure to diagnose fracture. Physician moved for summary judgment based on statute of limitations, and the 348th District Court, Tarrant County, [Maryellen Hicks, J.](#), granted motion. Patient appealed, and the Court of Appeals, [Dauphinot, J.](#), held that: (1) action was barred under statute of limitations applicable under Medical Liability and Insurance Improvement Act, and (2) patient's contention that operation of limitations period violated open courts provision of State Constitution would not be addressed as patient had waited over one year to bring action against physician after learning of fracture and did not bring action within reasonable period of time.

Affirmed.

West Headnotes (12)

[1] Appeal and Error

🔑 [Extent of Review Dependent on Nature of Decision Appealed from](#)

In summary judgment case, issue on appeal is whether movant met his, her, or its summary judgment burden by establishing that no genuine issue of material fact exists and that movant is entitled to judgment as matter

of law. [Vernon's Ann.Texas Rules Civ.Proc., Rule 166a\(c\)](#).

[Cases that cite this headnote](#)

[2] Appeal and Error

🔑 [Burden of showing error](#)

Appeal and Error

🔑 [Judgment](#)

On appeal from grant of summary judgment, burden of proof is on movant and all doubts about existence of genuine issue of material fact are resolved against movant, and reviewing court accordingly views evidence and its reasonable inferences in light most favorable to nonmovant. [Vernon's Ann.Texas Rules Civ.Proc., Rule 166a\(c\)](#).

[Cases that cite this headnote](#)

[3] Limitation of Actions

🔑 [Health care professionals in general](#)

Adoption of Medical Liability and Insurance Improvement Act created absolute two-year limitations period and abolished discovery rule for health care liability claims; in other words, statute of limitations for health care liability claim now runs regardless of date injured party discovered or should have discovered cause of action. [Vernon's Ann.Texas Civ.St. art. 4590i, § 10.01](#).

[1 Cases that cite this headnote](#)

[4] Limitation of Actions

🔑 [Negligence in performance of professional services](#)

Under Medical Liability and Insurance Improvement Act, statute of limitations on health care liability claims begins to run from one of three possible dates: occurrence of breach or tort, date health care treatment that is subject of claim is completed, or date hospitalization for which claim is made is completed. [Vernon's Ann.Texas Civ.St. art. 4590i, § 10.01](#).

2 Cases that cite this headnote

[5] Limitation of Actions

🔑 Negligence in performance of professional services

Under Medical Liability and Insurance Improvement Act, cause of action for medical malpractice premised upon alleged misdiagnosis and mistreatment accrues on last date of treatment. [Vernon's Ann.Texas Civ.St. art. 4590i, § 10.01.](#)

1 Cases that cite this headnote

[6] Limitation of Actions

🔑 Negligence in performance of professional services

Under Medical Liability and Insurance Improvement Act, when precise date of specific breach or tort is ascertainable from facts of case, Medical Liability and Insurance Improvement Act requires limitations period on health care liability claim to run from date of breach or tort. [Vernon's Ann.Texas Civ.St. art. 4590i, § 10.01.](#)

1 Cases that cite this headnote

[7] Limitation of Actions

🔑 Negligence in performance of professional services

Medical malpractice claim based on alleged failure of physician to diagnose fracture in patient's neck was barred by statute of limitations under Medical Liability and Insurance Improvement Act where suit was not filed until over seven years after physician's single visit with patient, even though patient contended that misdiagnosis was not discovered until over six years after visit. [Vernon's Ann.Texas Civ.St. art. 4590i, § 10.01.](#)

Cases that cite this headnote

[8] Statutes

🔑 Remedial Statutes

Constitutional Law

🔑 Abrogation, modification, or recognition of remedies

Constitutional Law

🔑 Conditions, Limitations, and Other Restrictions on Access and Remedies

Open courts provision of State Constitution mandates that legislature has no power to make remedy by due course of law contingent on impossible condition, and prevents legislature from unreasonably restricting or abrogating common-law cause of action. [Vernon's Ann.Texas Const. Art. 1, § 13.](#)

Cases that cite this headnote

[9] Constitutional Law

🔑 Abrogation, modification, or recognition of remedies

Constitutional Law

🔑 Time for proceedings

Limitation of Actions

🔑 Constitutionality of statute

Open courts provision of State Constitution guarantees that right to bring well-established common-law cause of action cannot be effectively abrogated by legislature absent showing that legislative basis for statute outweighs denial of constitutionally guaranteed right of redress, and application of statute of limitations will violate open courts provision when it bars common law cause of action before litigant has reasonable opportunity to discover wrong and bring suit. [Vernon's Ann.Texas Const. Art. 1, § 13.](#)

3 Cases that cite this headnote

[10] Constitutional Law

🔑 Time for proceedings

Limitation of Actions

🔑 Constitutionality of statute

Open courts provision of State Constitution does not toll statute of limitations until injured party discovers cause of action, but merely requires that litigant have reasonable time to discover cause of action and bring suit before

two-year statute bars claim; if injured person discovers his or her injury while there is still reasonable time to sue within statutory period, statute of limitations is not unconstitutional as applied to that individual, but statute is rendered unconstitutional if it cuts off cause of action before action is known to exist or before suit can be brought. [Vernon's Ann.Texas Const. Art. 1, § 13](#).

14 Cases that cite this headnote

[11] **Constitutional Law**

🔑 Presumptions and Construction as to Constitutionality

Under standard principles of statutory construction, court must construe statute to render it constitutional, if possible; it is presumed that legislature has not acted arbitrarily or unreasonably, and where reasonable minds may differ, difference of opinion does not provide sufficient basis to strike down application of statute as arbitrary or unreasonable.

Cases that cite this headnote

[12] **Constitutional Law**

🔑 Time for proceedings

Limitation of Actions

🔑 Constitutionality of statute

Limitation of Actions

🔑 Health care professionals in general

Patient did not bring medical malpractice action against physician based on alleged failure to diagnose fracture in patient's neck, which was barred by statute of limitations, within reasonable time after discovering injury, and open courts provision of State Constitution did not operate to save action, where patient did not sue physician until over one year after neck fracture was properly diagnosed, even though diagnosis had occurred over six years after physician had treated patient. [Vernon's Ann.Texas Const. Art. 1, § 13](#); [Vernon's Ann.Texas Civ.St. art. 4590i, § 10.01](#).

3 Cases that cite this headnote

*234 Appeal from the 348th District Court of Tarrant County; [Maryellen Hicks](#), Judge.

Attorneys and Law Firms

[John W. Donovan](#), Houston, for appellant.

[Jennifer M. Andrews](#), [D. Michael Wallach](#), Wallach & Moore, Fort Worth, [Dennis L. Roossien, Jr.](#), Strasburger & Price, Dallas, [Brett C. Govett](#), Fulbright & Jaworski, Dallas, for appellee.

Before [DAY](#), [LIVINGSTON](#) and [DAUPHINOT](#), JJ.

OPINION

[DAUPHINOT](#), Justice.

Yvonne and Charles Fiore sued three doctors and a medical center on May 4, 1994, alleging that the defendants had committed medical malpractice by failing to properly diagnose and treat Yvonne's fractured odontoid process (vertebrae in the neck). Charles's claim for mental anguish and loss of consortium is derivative of Yvonne's claim. Two of the defendants, HCA Health Services of Texas d/b/a North Hills Medical Center and Dr. Michael Rogers, filed motions for summary judgment asserting that the statute of limitations barred the Fiores' claims. On *235 January 20, 1995, the trial judge granted the motions of North Hills and Dr. Rogers and severed them from the remaining claims and defendants. On appeal, the Fiores argue that the trial court erred in summarily dismissing their lawsuit because the open courts provision of the Texas Constitution saves their claims against HCA and Dr. Rogers from the absolute two-year statute of limitations imposed by [TEX.REV.CIV.STAT.ANN. art. 4590i, § 10.01](#) ([Vernon Pamph.1996](#)) on all health care liability claims. Because the Fiores waited to sue for more than a year after learning of the misdiagnosis, the open courts provision is inapplicable and we affirm the judgment of the trial court.

FACTUAL AND PROCEDURAL HISTORY

Yvonne was injured in a car accident on December 26, 1986 and taken by ambulance to North Hills for emergency diagnosis and treatment. After x-rays were taken of Yvonne's neck, she was released from North Hills. The next day, Dr. Rogers reviewed and interpreted the x-rays. The summary judgment evidence is uncontroverted that this was the extent of Yvonne's treatment by North Hills and Dr. Rogers. Despite North Hills and Dr. Rogers's diagnosis that Yvonne was uninjured by the accident, Yvonne continued to complain of neck and shoulder pain.

The pain began immediately upon Yvonne's release from North Hills because she stated that she "will never forget the pain during the ride home." Two weeks later, Yvonne saw her primary physician, Dr. Larry Burrows, for neck pain. From the beginning of 1987 through 1990, Yvonne saw Dr. Burrows approximately thirty times, each time complaining of neck and back pain. Dr. Burrows even had Yvonne briefly hospitalized in 1989 for her neck condition, yet the fracture remained undiagnosed. In early 1991, Yvonne started seeing some other health care providers in search of what was ailing her, stating that although she "didn't know what to think of [her] physical condition but [she] knew there must be something causing the disabling pain." Yvonne persevered for two more years with no relief and with accusations from doctors that the pain was merely in her head. Finally, in April 1993, a proper diagnosis was made of the fractured odontoid process, which most likely had occurred in the car accident of December 26, 1986. Yvonne underwent the corrective surgery. This ended what Yvonne has described as seven years of "extreme pain." The pain from the undiagnosed fractured vertebrae prevented Yvonne from working during this entire period of time and caused her severe depression.

SUMMARY JUDGMENT

[1] [2] In a summary judgment case, the issue on appeal is whether the movant met his, her, or its summary judgment burden by establishing that no genuine issue of material fact exists and that movant is entitled to judgment as a matter of law.¹ The burden of proof is on the movant,² and all doubts about the existence of a genuine issue of a material fact are resolved against movant.³

Therefore, we must view the evidence and its reasonable inferences in the light most favorable to the nonmovant.⁴

North Hills and Dr. Rogers asserted that they were entitled to summary judgment because the Fiores' suit was barred by limitations. They are not, then, entitled to summary judgment unless they conclusively establish that the statute of limitations barred the lawsuit.⁵

STATUTE OF LIMITATIONS

[3] The Medical Liability and Insurance Improvement Act establishes the statute of limitations for medical malpractice claims:

***236** Notwithstanding any other law, no health care liability claim may be commenced unless the action is filed within two years from the occurrence of the breach or tort or from the date the medical or health care treatment that is the subject of the claim or the hospitalization for which the claim is made is completed; ...⁶

Before the Act became effective, the discovery rule tolled the applicable statute of limitations until the patient discovered, or should have discovered, the alleged malpractice.⁷ The Act created an absolute two-year limitations period and abolished the discovery rule in health care liability claims.⁸ In other words, the statute of limitations for a health care claim now runs regardless of the date the injured party discovered or should have discovered the cause of action.⁹

[4] [5] [6] The statute begins to run from one of three possible dates: (1) the occurrence of the breach or tort; (2) the date the health care treatment that is the subject of the claim is completed; or (3) the date the hospitalization for which the claim is made is completed.¹⁰ The Texas Supreme Court, in interpreting the statute of limitations found in the Act, has held that a cause of action for medical malpractice premised upon an alleged misdiagnosis and mistreatment, as in the case before us, accrues on the last date of treatment.¹¹ And,

the Court further explained, when the precise date of the specific breach or tort is ascertainable from the facts of the case, the Act requires the limitations period to run from the date of the breach or tort.¹²

[7] It is undisputed that Yvonne's only visit to North Hills occurred on December 26, 1986 and that the only contact that she had with Dr. Rogers was limited to his review and interpretation of her x-rays on December 27, 1986. Under section 10.01 of the Act, then, the Fiores were required to sue North Hills by December 26, 1988 and Dr. Rogers by December 27, 1988. The Fiores did not sue for the misdiagnosis until May 4, 1994, over seven years from the date Yvonne visited the hospital and Dr. Rogers reviewed her x-rays and over five years from the date the two-year statute of limitations expired. Thus, under the Act's statute of limitations, the Fiores' lawsuit is barred.

OPEN COURTS PROVISION

[8] Yet, our inquiry does not end there because the Act's statute of limitations remains subject to challenge under the open courts provision of [article I, section 13 of the Texas Constitution](#).¹³ That provision mandates that the legislature has no power to make a remedy by due course of law contingent on an impossible condition¹⁴:

All courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law.¹⁵

The open courts provision, then, prevents the legislature from unreasonably restricting or abrogating a common-law cause of action.¹⁶

The Fiores contend that their lawsuit is not barred by the statute of limitations because the open courts provision renders the statute unconstitutional as applied to their lawsuit. The Fiores essentially argue that because they did not learn of the misdiagnosis until April of 1993, it would be “shocking *237 and absurd” to demand that they file their claims against North Hills and Dr. Rogers within two years of the misdiagnosis:

[T]o state that Appellants should have filed their lawsuit within two years of the December 26,

1986 motor vehicle accident would charge the Appellants with medical expertise and even better medical knowledge than the numerous doctors, physicians or health care personal she saw between December 1986 and April 1993.

The Fiores argue and the open courts provision acknowledges that the very nature of some medical malpractice cases may make it inherently impossible for an injured plaintiff to discover his injury within two years of the actual act of malpractice.¹⁷

[9] [10] The Texas Supreme Court has held that the open courts provision guarantees that “the right to bring a well-established common law cause of action cannot be effectively abrogated by the legislature absent a showing that the legislative basis for the statute outweighs the denial of the constitutionally-guaranteed right of redress.”¹⁸ More specifically, the Court has further held that the statute's application violates the open courts provision when it bars a common-law cause of action before the litigant has a reasonable opportunity to discover the wrong and bring suit.¹⁹ Importantly, the provision does not toll the statute of limitations until the injured party discovers her cause of action.²⁰ Instead, it merely requires that the litigant have a reasonable time to discover the cause of action and bring suit before the two-year statute bars the claim.²¹ And if an injured person discovers his or her injury while there is still a reasonable time to sue within the statutory period, the statute of limitations is not unconstitutional as applied to that individual.²² Conversely, the statute is rendered unconstitutional if it cuts off a cause of action before the action is known to exist or before suit can be brought.²³

[11] Under the standard principles of statutory construction, this court must construe the statute to render it constitutional, if possible.²⁴ It is presumed that the legislature has not acted arbitrarily or unreasonably.²⁵ Therefore, where reasonable minds may differ, a difference of opinion does not provide a sufficient basis to strike down the statute's application as arbitrary or unreasonable.²⁶

In this case, we never reach the question of whether the Fiores had a reasonable opportunity to discover the wrong and bring suit before the statute barred the claim. North Hills and Dr. Rogers urge that they are entitled to summary judgment even if the Fiores are correct in their assertion that did not have a reasonable opportunity to bring suit during the statutory period because the Fiores as a matter of law did not bring their lawsuit within a reasonable time after they learned of the misdiagnosis and, therefore, are not entitled to relief from the open courts provision. We agree.

[12] The Fiores contend that they did not discover Yvonne's injury until the fracture was finally properly diagnosed in April of 1993. The Fiores did not sue North Hills and Dr. Rogers until May of 1994. Although the Supreme Court has not directly answered the question of when a plaintiff must file suit after discovering the wrong outside the limitations period under the open courts *238 provision,²⁷ the courts that have addressed the issue have concluded that a plaintiff is entitled to a

“reasonable time” for investigating, preparing, and filing a suit following the discovery.²⁸ In failing to tack on a full two-year limitations period following the discovery of the misdiagnosis or mistreatment outside the limitations period, the Eastland Court of Appeals noted the clear intent of the legislature in drafting the Act to abolish the discovery rule and require that health care liability claims be timely filed.²⁹ In the case before us, the Fiores failed to sue for more than a year after learning of the misdiagnosis. The Fiores offer no explanation for this delay in filing suit. We hold that, as a matter of law, the Fiores did not file their suit against North Hills and Dr. Rogers within a reasonable time after discovering Yvonne's injury.³⁰ Therefore, the open courts provision does not save the Fiores' lawsuit from the statute of limitations and we affirm the trial court's summary judgment.

All Citations

915 S.W.2d 233

Footnotes

- 1 See *TEX.R.CIV.P.* 166a(c); *Cate v. Dover Corp.*, 790 S.W.2d 559, 562 (Tex.1990); *City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 678 (Tex.1979).
- 2 *Acker v. Texas Water Comm'n*, 790 S.W.2d 299, 301–02 (Tex.1990).
- 3 *Cate*, 790 S.W.2d at 562; *Great Am. Reserve Ins. Co. v. San Antonio Plumbing Supply Co.*, 391 S.W.2d 41, 47 (Tex.1965).
- 4 *Great Am.*, 391 S.W.2d at 47.
- 5 *Rowntree v. Hunsucker*, 833 S.W.2d 103, 104 (Tex.1992).
- 6 *TEX.REV.CIV.STAT.ANN.* art. 4590i, § 10.01 (Vernon Pamph.1996).
- 7 See *Gaddis v. Smith*, 417 S.W.2d 577, 580 (Tex.1967).
- 8 See *Morrison v. Chan*, 699 S.W.2d 205, 208 (Tex.1985); *LaGessee v. PrimaCare Inc.*, 899 S.W.2d 43, 45 (Tex.App.—Eastland 1995, writ filed).
- 9 See *Morrison*, 699 S.W.2d at 208.
- 10 *Rowntree*, 833 S.W.2d at 104.
- 11 *Kimball v. Brothers*, 741 S.W.2d 370, 372 (Tex.1987); see *Gomez v. Carreras*, 904 S.W.2d 750, 753 (Tex.App.—Corpus Christi 1995, no writ).
- 12 See *Kimball*, 741 S.W.2d at 372.
- 13 See *Adkins v. Tafel*, 871 S.W.2d 289, 292 (Tex.App.—Fort Worth 1994, no writ).
- 14 *Morrison*, 699 S.W.2d at 207.
- 15 *TEX. CONST.* Art. I, § 13.
- 16 See *Moreno v. Sterling Drug, Inc.*, 787 S.W.2d 348, 355 (Tex.1990).
- 17 See *Desiga v. Scheffey*, 874 S.W.2d 244, 247 (Tex.App.—Houston [14th Dist] 1994, no writ).
- 18 *Weiner v. Wasson*, 900 S.W.2d 316, 318 (Tex.1995) (quoting *Sax v. Votteler*, 648 S.W.2d 661, 665–66 (Tex.1983)).
- 19 See *Neagle v. Nelson*, 685 S.W.2d 11 (Tex.1985); *Nelson v. Krusen*, 678 S.W.2d 918 (Tex.1984).
- 20 *Morrison*, 699 S.W.2d at 208; *Work v. Duval*, 809 S.W.2d 351, 354 (Tex.App.—Houston [14th Dist.] 1991, no writ).
- 21 *Morrison*, 699 S.W.2d at 207; *Work*, 809 S.W.2d at 354.
- 22 *Morrison*, 699 S.W.2d at 207; *Adkins*, 871 S.W.2d at 292.

23 See *Krusen*, 678 S.W.2d at 923.

24 *Weiner*, 900 S.W.2d at 330.

25 *Id.*

26 *Sax*, 648 S.W.2d at 666.

27 On November 16, 1995, the Supreme Court granted a writ of error on this issue in *Burgess v. Jennings*, 903 S.W.2d 388 (Tex.App.—Dallas 1995, writ granted). In *Burgess*, the Dallas Court of Appeals ruled that the issue was not before them because it was not a ground for summary judgment. *Id.* at 394. Also, in *LaGessee* a writ of error was filed with the Supreme Court on September 1, 1995 and is still pending. *LaGessee*, 899 S.W.2d 43.

28 *Neagle*, 685 S.W.2d at 14 (Kilgarlin, J., concurring); *LaGessee*, 899 S.W.2d at 47.

29 See *LaGessee*, 899 S.W.2d at 47.

30 See *id.* (holding a one year delay in filing after discovery unreasonable as a matter of law); *Work*, 809 S.W.2d at 354 (holding that “regardless of whether Ms. Work was required to file her action in the four months prior to the expiration of the limitations period, she was not entitled to wait more than twenty-one months after discovering her cause of action before filing suit”).

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899 S.W.2d 43
Court of Appeals of Texas,
Eastland.

Paula LaGESSE, Appellant,
v.
PRIMACARE, INC. et al., Appellees.

No. 11-94-086-CV.

|
May 18, 1995.

|
Rehearing Overruled June 15, 1995.

Patient sued physicians for medical malpractice, alleging that their negligent administration of systemic steroid treatment caused patient's hip injury. The 106th District Court, Dallas County, [Lynn Skipworth Hunt, J.](#), granted physicians' motions for summary judgment. Patient appealed. The Court of Appeals, [McCloud, C.J. \(Retired\)](#), held that: (1) statute of limitations barred action as against four physicians, and (2) although "open courts" provision of Texas Constitution protected plaintiff from statute of limitations bar as against fifth physician, she failed to sue him in "reasonable time" after discovering her injury.

Affirmed.

West Headnotes (4)

[1] Judgment

 Presumptions and burden of proof

In moving for summary judgment upon affirmative defense of statute of limitations, defendants have burden of establishing that, as matter of law, there is no material question of fact as to essential elements of that defense.

[Cases that cite this headnote](#)

[2] Limitation of Actions

 Health care professionals in general

"Injury" or "wrong," when used in context of discovery period applicable to medical malpractice actions, require both discovery of injury and its cause. [Vernon's Ann.Texas Civ.St. art. 4590i, § 10.01.](#)

[4 Cases that cite this headnote](#)

[3] Limitation of Actions

 Health care professionals in general

Medical malpractice plaintiff's cause of action against defendant physicians accrued when she consulted different physician who told her that her hip problem was probably caused by steroids prescribed by defendants; thus, two-year limitations period began to run at that time, rather than date some nine months later when medical expert rendered written opinion that administration of steroids to patient violated accepted standard of care. [Vernon's Ann.Texas Civ.St. art. 4590i, § 10.01.](#)

[4 Cases that cite this headnote](#)

[4] Limitation of Actions

 Health care professionals in general

Even though "open courts" provision of Texas Constitution protected medical malpractice plaintiff from statutory two-year limitations period on ground that she did not have reasonable opportunity to discover her injury until after limitations period had expired, her action was nonetheless barred, as she did not file suit against physician within "reasonable time" after discovering her injury; although plaintiff was entitled to reasonable time for investigating, preparing, and filing suit after discovering injury, she did not file suit until approximately one year after she discovered her injury and retained her attorney. [Vernon's Ann.Texas Const. Art. 1, § 13; Vernon's Ann.Texas Civ.St. art. 4590i, § 10.01.](#)

[21 Cases that cite this headnote](#)

Attorneys and Law Firms

*44 [Tom Needham](#), Needham, Johnson, Lovelace & Johnson, Dallas, for appellant.

[Robert H. Frost](#), Gwinn & Roby, & [Margaret N. Masters](#), Stephen P. Amis, [Robert C. Brown](#), Bailey &

Williams, [Dorothy Prengler](#), Johnson & Sylvan, Dallas, for appellees.

Opinion

[McCLOUD](#), Chief Justice (Retired).

This medical malpractice case involves the two-year statute of limitations. The trial court granted the defendants' motions for summary judgment. Plaintiff appeals. We affirm.

Paula LaGessee sued Doctors Eugene R. Osborn, George Mekker, Sara L. Chapman, Daniel K. Leong, Michael Dr. Osborn

December 31, 1988

Dr. Mekker

October 13, 20, 1989, and December 1, 1989

Dr. Chapman

November 13, 1989, and January 23, 1990

Dr. Leong

March 4, 1990

Dr. Nolen

March 12, 1990

Plaintiff first started experiencing hip pain in January of 1991. In the summer of 1991, she saw Dr. Ralph Rashbaum for the pain and a “pronounced limp” that had developed. Dr. Rashbaum referred her to Dr. Neal Small. According to her deposition testimony, Dr. Small told plaintiff sometime between August 7, 1991, and September 9, 1991, that the problem with her hips was probably caused by the steroids. Plaintiff stated that Dr. Small told her that steroids were the “most common cause” for the condition that she had with her hips. After her visit with Dr. Small, there was no question in “her mind” that her hip problems were related to the injection or the oral intake of steroids over a period of time. On September 10, 1991, Dr. Small performed a hip replacement on plaintiff's left hip. Plaintiff was discharged from the hospital on September 15, 1991. Following her discharge, plaintiff first contacted her lawyer on September 16, 1991. On July 28, 1992, Dr. Small performed a hip *45 replacement on plaintiff's right hip. Plaintiff filed the present suit against the defendants on September 10, 1992.

[1] In moving for summary judgment upon the affirmative defense of the statute of limitations, the defendants had the burden of establishing that, as a matter of law, there were no material questions of fact as to the

C. Nolen, and PrimaCare, Inc. alleging negligent medical treatment. Plaintiff alleged that Doctors Osborn, Leong, and Nolen were employees or agents of PrimaCare. Plaintiff contended that the individual doctors, at different times, negligently administered systemic steroid treatment for a rash which caused bilateral [avascular necrosis](#) involving the femoral heads that required bilateral hip replacement.

Steroids were administered to plaintiff for treatment of her rash by the doctors on the dates indicated:

essential elements of the defense. [Rowntree v. Hunsucker](#), 833 S.W.2d 103 (Tex.1992).

The Medical Liability and Insurance Improvement Act, [TEX.REV.CIV.STAT.ANN. art. 4590i, § 10.01](#) (Vernon Pamph.Supp.1995) provides that, notwithstanding any other law, no health care liability claim may be commenced unless suit is filed within two years from the occurrence of the breach or tort or from the date the medical or health care treatment that is the subject of the claim is completed. [Kimball v. Brothers](#), 741 S.W.2d 370, 372 (Tex.1987). This statute adopted an absolute two-year limitations period and abolished the “discovery rule” in health care liability claims. [Morrison v. Chan](#), 699 S.W.2d 205 (Tex.1985).

Our supreme court in [Neagle v. Nelson](#), 685 S.W.2d 11 (Tex.1985) and [Nelson v. Krusen](#), 678 S.W.2d 918 (Tex.1984), held that the statutory two-year limitations period was unconstitutional under the “open courts” provision of the Texas Constitution, [TEX. CONST. art. I, § 13](#), to the extent that it purports to cut off an injured person's right to sue before the person has a reasonable opportunity to discover the “wrong” and bring suit. Later, in [Morrison v. Chan](#), *supra*, the supreme court stated that [Neagle v. Nelson](#), *supra*, and [Nelson v. Krusen](#), *supra*, were

premised on the fact that it was not possible for the parties to discover the “injury” within the two-year period.

The two-year limitations period ran against the different doctors on the dates indicated:

Dr. Osborn	December 31, 1990;
Dr. Mekker	December 1, 1991;
Dr. Chapman	January 23, 1992;
Dr. Leong	March 4, 1992;
Dr. Nolen	March 12, 1992.

Doctors Mekker, Chapman, Leong, and Nolen maintain that, since plaintiff did not file her lawsuit until September 10, 1992, long after the two-year limitations period had run, plaintiff's suit is time-barred. Plaintiff argues that the uncontroverted affidavit of her attorney in response to defendants' motions for summary judgment raises a material question of fact as to whether plaintiff had a reasonable opportunity to discover the wrong and file her suit prior to the expiration of the limitations period. Plaintiff also contends that the two-year limitations period, as applied to plaintiff, violates the “open courts” provision of [Article I, section 13 of the Texas Constitution](#). In his affidavit, plaintiff's attorney described in detail his procedure in handling medical negligence cases. He discussed the time-consuming investigations that are required. Part of the procedure was locating and consulting with appropriate medical experts. The attorney stated that it was his usual custom and practice not to file a medical negligence case until at least one board certified medical expert had rendered a written report stating that, in the expert's opinion, there had been a violation of the accepted standard of care. The attorney further stated in his affidavit:

I have read the Defendants' Motions for Summary Judgment, and I am familiar with the legal and factual issues presented therein relating to the statute of limitations defenses asserted by the Defendants. During my practice as an attorney, I have accepted and handled approximately 100 medical negligence cases. In addition, I have reviewed over 1,000 other potential medical negligence claims which our firm declined or the potential Plaintiff elected not to pursue.

By September 9, 1991, Ms. LaGessee had reason to believe that systemic steroids could have caused her bilateral [avascular femoral head necrosis](#). A medical expert rendered a written opinion on June 24, 1992, that

the administration of systemic steroids to Ms. LaGessee had been a violation of the accepted standard of care with respect to the health care rendered to the Plaintiff by Defendants herein which resulted in damages to Plaintiff. Suit was filed against such Defendants on September 10, 1992.

***46** In my opinion, Plaintiff did not have a reasonable opportunity to discover the wrong and bring suit against any of the Defendants herein within the two year limitations period prescribed by [§ 10.01 of Article 4590i](#) applicable to any of the Defendants herein.

It is my opinion that Plaintiff's lawsuit was filed within a reasonable amount of time after Plaintiff first had a reasonable opportunity to discover the nature of Plaintiff's injury.

[2] Plaintiff maintains that she did not discover the “wrong” until the medical expert in “June of 1992” determined that the defendants' acts in administering steroids to plaintiff violated accepted standards of medical care. The critical inquiry is when did the plaintiff discover the “injury.” This court held in [Corder v. A.H. Robins Company, Inc.](#), 692 S.W.2d 194 (Tex.App.—Eastland 1985, no writ), a “discovery rule” case involving the use of the “Dalkon Shield,” that Mrs. Corder's cause of action did not accrue until she discovered her injury and the “cause.” We think that the words “injury” or “wrong,” when used in the context of the discovery period, require both the discovery of the injury and its cause.

[3] Plaintiff discovered several months before the two-year limitations period had run against Doctors Mekker, Chapman, Leong, and Nolen that her injury was probably caused by the steroids the doctors had administered to her. Furthermore, she knew the identity of the doctors who caused her injury.

The court in *Adkins v. Tafel*, 871 S.W.2d 289 (Tex.App.—Fort Worth 1994, no writ), stated:

Our examination of Texas case law reveals that the constitutionality of the [article 4590i](#) statute of limitations, as applied to a particular situation, turns on when the plaintiff acquired knowledge of: (1) the injury; (2) its cause; and (3) the identity of the potentially culpable party.

* * * * *

The Adkins' knowledge of each of these three matters well within the statutory period is what distinguishes their situation from the cases on which they rely. They cannot avoid summary judgment merely by alleging they did not know they had a lawsuit against Tafel until their lawyer's expert informed them Tafel had committed malpractice. Adherence to this line of reasoning would discourage due diligence by prospective plaintiffs, and it would allow litigants to bring suits for an indefinite period of time, even if they discovered their injuries well within the statutory period. We do not believe the legislature intended such a result when it enacted the Medical Liability Act.

We point out that the supreme court in *Moreno v. Sterling Drug, Inc.*, 787 S.W.2d 348 (Tex.1990), while discussing the “discovery rule,” cited with approval *Otis v. Scientific Atlanta, Inc.*, 612 S.W.2d 665, 666 (Tex.Civ.App.—Dallas 1981, writ ref'd n.r.e.), which held that limitations run from the date the “injury” is discovered, not from the date of the discovery of the responsible party.

Plaintiff cites *Hellman v. Mateo*, 772 S.W.2d 64 (Tex.1989), and *Gatling v. Perna*, 788 S.W.2d 44 (Tex.App.—Dallas 1990, writ den'd), to support her contention that the critical inquiry is when did plaintiff discover her cause of action. Both *Hellman* and *Gatling* were properly distinguished in *Adkins*. The *Adkins* court stated that *Hellman* held that [Article 4590i](#) cannot be applied to cut off a cause of action before the plaintiff knew of the injury or “of the facts giving rise to her cause of action.” The *Adkins* court distinguished *Gatling* because it was essentially a fraudulent concealment case. The court in *Desiga v. Scheffey*, 874 S.W.2d 244 (Tex.App.—Houston [14th Dist.] 1994, no writ), further distinguished *Gatling* by pointing out that the court made special allowances for the fact that the injured party was

a psychiatric patient whom the court could not fault for giving greater credibility to her psychiatrist's lack of concern for the symptoms she complained of than to another physician she had only seen once who told her the drugs prescribed by her psychiatrist had resulted in her having [tardive dyskinesia](#).

Plaintiff discovered several months before the two-year statute of limitations had run against Doctors Mekker, Chapman, Leong, *47 and Nolen that her injury was probably caused by the steroids the doctors had administered to her. We hold that the summary judgment evidence, notwithstanding the attorney's affidavit, established that plaintiff discovered her injury and had a reasonable opportunity to file her suit against these doctors within the statutory limitations period.

The attorney's internal operating procedures and professional decisions should not determine whether the plaintiff had a “reasonable opportunity” to file her suit within the two-year period. This is not a case where the discovery of the injury occurred just before limitations ran and the plaintiff was unable to retain a lawyer and get her case filed within the limitations period. Here, plaintiff discovered her injury and its cause and retained her attorney several months before limitations ran.

[4] Dr. Osborn administered steroids to plaintiff on December 31, 1988. The two-year limitations period ran as to Dr. Osborn on December 31, 1990. The summary judgment proof does not establish that plaintiff had a reasonable opportunity to discover her injury and to bring suit against him within the two-year period. The summary judgment proof was that plaintiff discovered her injury between August 7, 1991, and September 9, 1991, after limitations had run. Therefore, the “open courts” provision of the Texas Constitution protects plaintiff from the statutory two-year limitations period which would cut off plaintiff's right to sue Dr. Osborn before she had a reasonable opportunity to discover her injury. *Neagle v. Nelson*, *supra*; *Nelson v. Krusen*, *supra*.

The question now presented was raised in a concurring opinion by Justice Kilgarlin in *Neagle*: When must plaintiff file her suit after discovering her injury? Justice Kilgarlin cited *Hawkins v. Safety Casualty Co.*, 207 S.W.2d 370 (Tex.1948), where the workers' compensation claimant had not timely filed his compensation claim, and

stated that “reasonableness” of delay before filing suit after discovery of the injury would ordinarily be a question of fact. *Hawkins* involved a 9–day delay in filing the claim after discovering the injury. The case cited in *Hawkins*, *Texas Employers Ins. Ass'n v. Fowler*, 140 S.W.2d 545 (Tex.Civ.App.—Amarillo 1940, writ ref'd), involved a 23–day delay in filing the claim. It is apparent from the Medical Liability and Insurance Improvement Act that the legislature intended that health care liability claims be timely filed.

In the present case, the plaintiff did not file her suit against Dr. Osborn until approximately one year after she had discovered her injury and retained her attorney. As stated in *Hawkins*, a reasonable time should be allowed for investigating, preparing, and filing a suit after discovering

the injury. We hold that, as a matter of law, plaintiff did not file her suit against Dr. Osborn within a reasonable time after discovering her injury. All of plaintiff's points of error are overruled.

The judgment of the trial court is affirmed.

McCLOUD, C.J., Retired, Court of Appeals, Eastland, sitting by assignment pursuant to **TEX.GOV'T CODE ANN. 74.003(b)** (Vernon 1988).

WRIGHT, J., not participating.

All Citations

899 S.W.2d 43

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307 S.W.3d 283

Supreme Court of Texas.

METHODIST HEALTHCARE SYSTEM OF
SAN ANTONIO, LTD., L.L.P., W.C. Schorlemer,
M.D., and Robert Schorlemer, M.D., Petitioners,

v.

Emmalene RANKIN, Respondent.

No. 08–0316.

|

Argued Sept. 9, 2009.

|

Decided March 12, 2010.

|

Rehearing Denied May 7, 2010.

Synopsis

Background: Hysterectomy patient brought health care liability action against hospital and two surgeons after surgical sponge was found in her abdomen 11 years after the hysterectomy. The 224th Judicial District Court, Bexar County, [Andy Mireles, J.](#), granted surgeons summary judgment, and patient appealed. The [San Antonio Court of Appeals](#), 261 S.W.3d 93, reversed and remanded. Review was granted.

[Holding:] The Supreme Court, [Willett, J.](#), held that as a matter of first impression, the Legislature did not act unreasonably or arbitrarily in using its police power to enact a ten-year statute of repose for medical malpractice actions with no exception for foreign-object claims, and thus, the statute of repose does not violate the Open Courts provision of the state Constitution.

Court of Appeals reversed; judgment rendered.

West Headnotes (11)

[1] Constitutional Law

🔑 Time for proceedings

The Open Courts provision of the state Constitution does not confer an open-ended and perpetual right to sue; it merely gives litigants a reasonable time to discover their injuries and file suit. [Vernon's Ann.Texas Const. Art. 1, § 13](#).

2 Cases that cite this headnote

[2] Limitation of Actions

🔑 Validity of Statutes

The Legislature may set an absolute cut-off point for health care liability suits, as it has for other suits, so long as the repose period is a reasonable exercise of the Legislature's police power to act in the interest of the general welfare. [V.T.C.A., Civil Practice & Remedies Code § 74.251\(b\)](#).

3 Cases that cite this headnote

[3] Constitutional Law

🔑 Presumptions and Construction as to Constitutionality

Constitutional Law

🔑 Reasonableness or rationality

Constitutional Law

🔑 Arbitrariness

When reviewing the constitutionality of a statute, the court presumes that the Legislature has not acted unreasonably or arbitrarily, and a mere difference of opinion, where reasonable minds could differ, is not a sufficient basis for striking down legislation as arbitrary or unreasonable.

1 Cases that cite this headnote

[4] Constitutional Law

🔑 Presumptions and Construction as to Constitutionality

Constitutional Law

🔑 Burden of Proof

The burden is on the party who attacks a law for unconstitutionality, and courts need not exert their ingenuity to find reasons for holding the law invalid.

[Cases that cite this headnote](#)

[5] Constitutional Law

🔑 [Abrogation, modification, or recognition of remedies](#)

Legislative action withdrawing common-law remedies for well established common-law causes of action for injuries to one's lands, goods, person, or reputation is sustained, when challenged under the Open Courts provision of the state Constitution, only when it is reasonable in substituting other remedies or when it is a reasonable exercise of the police power in the interest of the general welfare, and legislative action of this type is not sustained when it is arbitrary or unreasonable. [Vernon's Ann.Texas Const. Art. 1, § 13.](#)

[3 Cases that cite this headnote](#)

[6] Limitation of Actions

🔑 [Operation as to rights or remedies in general](#)

Generally, a statute of repose specifies a longer period than that found in the statute of limitations applicable to the same cause of action.

[4 Cases that cite this headnote](#)

[7] Limitation of Actions

🔑 [Operation as to rights or remedies in general](#)

Statutes of repose begin to run on a readily ascertainable date, and unlike statutes of limitations, a statute of repose is not subject to judicially crafted rules of tolling or deferral.

[10 Cases that cite this headnote](#)

[8] Limitation of Actions

🔑 [Operation as to rights or remedies in general](#)

The key purpose of a statute of repose is to eliminate uncertainties under the related statute of limitations and to create a final deadline for filing suit that is not subject to

any exceptions, except perhaps those clear exceptions in the statute itself.

[6 Cases that cite this headnote](#)

[9] Limitation of Actions

🔑 [Operation as to rights or remedies in general](#)

While statutes of limitations operate procedurally to bar the enforcement of a right, a statute of repose takes away the right altogether, creating a substantive right to be free of liability after a specified time.

[8 Cases that cite this headnote](#)

[10] Constitutional Law

🔑 [Time for proceedings](#)

Limitation of Actions

🔑 [Constitutionality of statute](#)

The Legislature did not act unreasonably or arbitrarily in using its police power to enact a ten-year statute of repose for medical malpractice actions with no exception for foreign-object claims, and thus, the statute of repose does not violate the Open Courts provision of the state Constitution. [Vernon's Ann.Texas Const. Art. 1, § 13; V.T.C.A., Civil Practice & Remedies Code § 74.251\(b\).](#)

[8 Cases that cite this headnote](#)

[11] Limitation of Actions

🔑 [Operation as to rights or remedies in general](#)

To hold that a statute of repose must yield to the plaintiff's inability to discover her injury would treat a statute of repose like a statute of limitations, and would effectively repeal the statute of repose.

[15 Cases that cite this headnote](#)

West Codenotes

Negative Treatment Reconsidered

[V.T.C.A., Civil Practice & Remedies Code § 74.251\(b\)](#)

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Opinion

Justice WILLETT delivered the opinion of the Court.

This case pits the ten-year statute of repose for healthcare-liability claims¹ against the Texas Constitution's Open Courts provision.² We examine for the first time whether the latter saves a malpractice claim if the former has expired. The answer is no.

[1] [2] The Open Courts provision does not confer an open-ended and perpetual right to sue; it “merely gives litigants a reasonable time to discover their injuries and file suit.”³ The Legislature may set an absolute cut-off point for healthcare *285 suits, as it has for other suits,⁴ so long as the repose period is a reasonable exercise of the Legislature's police power to act in the interest of the general welfare. The ten-year statute of repose at issue adopts a constitutionally permissible policymaking judgment of the Legislature. Accordingly, we reverse the judgment of the court of appeals and render judgment for the petitioners.

I. Background

After experiencing abdominal pain, Emmalene Rankin consulted a physician in July 2006 and learned that a surgical sponge had been left inside her during a November 1995 hysterectomy. Rankin sued the hospital where the operation was performed, Southwest Texas Methodist Hospital, and two physicians, Robert and Wendell Schorlemer.

Rankin filed her suit, however, in October 2006, almost eleven years after the alleged negligence. The defendants moved for summary judgment, arguing that Rankin's claim was barred by section 74.251(b) of the Civil Practice and Remedies Code, the ten-year statute of repose for healthcare-liability claims. Rankin submitted evidence that she did not know of the sponge and could not have discovered it in the exercise of reasonable care prior to expiration of the ten-year repose period.

Section 74.251(b) provides:

A claimant must bring a health care liability claim not later than 10 years after the date of the act or omission that gives rise to the claim. This subsection is intended as a statute of repose so that all claims must be brought within 10 years or they are time barred.⁵

The trial court granted summary judgment, but the court of appeals reversed, holding the statute unconstitutional under the Open Courts provision.⁶ This appeal followed.

II. Analysis

[3] [4] When reviewing the constitutionality of a statute, we presume “that the Legislature has not acted unreasonably or arbitrarily; and a mere difference of opinion, where reasonable minds could differ, is not a sufficient basis for striking down legislation as arbitrary or unreasonable.”⁷ “The burden is on him who attacks a law for unconstitutionality and courts need not exert their ingenuity to find reasons for holding the law invalid.”⁸

[5] Under the Open Courts provision, “[a]ll courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law.”⁹ In *Lebohm v. City of Galveston*,¹⁰ the Court undertook its first in-depth analysis of the Open Courts provision. Justice Calvert, writing for a unanimous Court, formulated the test that we follow today:

***286** [L]egislative action withdrawing common-law remedies for well established common-law causes of action for injuries to one's “lands, goods, person or reputation” is sustained only when it is reasonable in substituting other remedies, or when it is a reasonable exercise of the police power in the interest of the general welfare. Legislative action of this type is not sustained when it is arbitrary or unreasonable.¹¹

We have quoted this language with approval in later decisions.¹²

The statute at issue is a statute of repose, not a statute of limitations, and our analysis must appreciate that the two are not synonymous. We recently recognized that “there are significant differences between the two.”¹³ The Legislature stated explicitly that [section 74.251\(b\)](#) “is intended as a statute of repose” applicable to “all claims.”

[6] [7] The term “statute of repose” may not submit to a simple, universal definition. Generally, a statute of repose specifies a longer period than that found in the statute of limitations applicable to the same cause of action.¹⁴ Statutes of repose begin to run on a readily ascertainable date, and unlike statutes of limitations, a statute of repose is not subject to judicially crafted rules of tolling or deferral.¹⁵

[8] [9] Indeed, the key purpose of a repose statute is to eliminate uncertainties under the related statute of limitations and to create a final deadline for filing suit that is not subject to any exceptions,¹⁶ except perhaps those clear exceptions in the statute itself.¹⁷ Without a statute of repose, professionals, contractors, and other actors would face never-ending uncertainty as to liability for their work. Insurance coverage and retirement planning would always remain problematic, as would the unending anxiety facing potential defendants.¹⁸ In ***287** recognizing the absolute nature of a statute of repose, we

have explained that “while statutes of limitations operate procedurally to bar the enforcement of a right, a statute of repose takes away the right altogether, creating a substantive right to be free of liability after a specified time.”¹⁹ The Legislature could reasonably conclude that the general welfare of society, and various trades and professions that serve society, are best served with statutes of repose that do not submit to exceptions even if a small number of claims²⁰ are barred through no fault of the plaintiff, since “the purpose of a statute of repose is to provide ‘absolute protection to certain parties from the burden of indefinite potential liability.’ ”²¹ The whole point of layering a statute of repose over the statute of limitations is to “fix an outer limit beyond which no action can be maintained.”²² One practical upside of curbing open-ended exposure is to prevent defendants from answering claims where evidence may prove elusive due to unavailable witnesses (perhaps deceased), faded memories, lost or destroyed records, and institutions that no longer exist.

Rankin argues that the statute is unreasonable, and thus unconstitutional, because it cut off her right to sue before she had an opportunity to discover her injury. But Open Courts analysis is not quite this myopic; focusing solely on Rankin's lost right to sue ignores the broader societal concerns that spurred the Legislature to act.

[Section 74.251\(b\)](#) was enacted in 2003 as part of House Bill 4, a top-to-bottom overhaul of Texas malpractice law to “make affordable medical and health care more accessible and available to the citizens of Texas,”²³ and to “do so in a manner that will not unduly restrict a claimant's rights any more than necessary to deal with the crisis.”²⁴ The omnibus bill makes explicit findings describing the Legislature's concern that a spike in healthcare-liability claims had fueled an insurance crisis that was harming healthcare delivery in Texas.²⁵ The Legislature specifically found that the crisis had often made insurance unavailable at any price.²⁶ The Legislature made these findings after conducting hearings and amassing evidence of the problems facing healthcare providers as a result of enduring liability claims for indeterminate periods of time. We have recognized “that the length of time that insureds are exposed to potential liability ***288** has a bearing on the rates that insurers must charge.”²⁷

[10] In enacting the repose piece of House Bill 4, lawmakers made a fundamental policy choice: the collective benefits of a definitive cut-off are more important than a particular plaintiff's right to sue more than a decade after the alleged malpractice. A few plaintiffs such as Rankin will encounter the Legislature's statutory roadblock, unable to bring claims through no fault of their own, but some defendants would likewise suffer unfortunate consequences were potential liability left indeterminate. The constitutional inquiry is whether the Legislature acted unreasonably or arbitrarily. We cannot brand as arbitrary lawmakers' policy rationales for granting healthcare providers a substantive right to be free from liability after ten years, even if a plaintiff could have discovered her injury no sooner.

Surveying legislation around the nation, repose statutes for medical-negligence cases are commonplace. Many jurisdictions have enacted such statutes for malpractice claims,²⁸ and Texas' ten-year period is the longest of them all. Fourteen of these repose statutes are expressly inapplicable to foreign-object claims²⁹—not true of [section 74.251\(b\)](#)—and of twenty other statutes that apply equally to “sponge cases,” no statute gives plaintiffs more time to sue than the Texas statute.³⁰

Other jurisdictions have rejected constitutional challenges to repose statutes in medical-malpractice cases premised on open courts provisions or similar provisions guaranteeing the right to a remedy,³¹ ***289** with two inapposite exceptions.³² And most of the failed challenges were to statutes with much shorter repose periods than in Texas.³³ Rankin acknowledges there is no statutory exception in [section 74.251\(b\)](#) for foreign-object cases, but argues “the Legislature appropriately deferred to this Court to make an exception under the open courts provision on a case-by-case basis.” The Texas Legislature, unlike legislatures in other states,³⁴ has not enacted an exception to its repose statute for foreign-body cases, nor is there any indication that it intended to give this Court authority to adopt such an exception on a case-by-case basis. On the contrary, the Legislature expressly characterized the ten-year statute as a statute of repose, and as explained above a statute of repose by its nature and purpose admits to no implied exceptions. This construction is particularly prudent given that the Texas repose statute for defective-product cases explicitly makes

an exception for latent diseases that may stay hidden until after the repose period expires.³⁵ By contrast, lawmakers made clear in [section 74.251\(b\)](#) that the ten-year period for medical-negligence claims applies to “all claims.”³⁶

And of course, there is our own precedent, which rejected an Open Courts challenge to the ten-year statute of repose covering claims against architects and engineers, an area of law where injuries may also be difficult to discover.³⁷ Before today's ***290** case, numerous courts of appeals' decisions have addressed the constitutionality of various Texas statutes of repose, and have upheld them every time.³⁸

[Section 74.251\(b\)](#) is a reasonable exercise of the Legislature's police power to provide a certain cutoff to claims after an ample period of ten years, five times longer than the general limitations period for bringing a negligence action,³⁹ and five times longer than the general limitations period for bringing a healthcare-liability claim.⁴⁰ As one court of appeals has noted in a decision where we found no reversible error, and as is apparent, “the ten-year limit is substantially more protective of individual rights than the two-year limit” found in the corresponding statute of limitations.⁴¹ We presume that the Legislature's judgment was not an arbitrary or unreasonable exercise of its police power, and Rankin has offered no compelling argument or proof to the contrary.

The court of appeals held [section 74.251\(b\)](#) unconstitutional because it restricted Rankin's right to sue “before she had a reasonable opportunity to discover the wrong and bring suit,”⁴² but the essential function of all statutes of repose is to abrogate the discovery rule and similar exceptions to the statute of limitations. The court of appeals saw little to distinguish statutes of limitations and statutes of repose.

[11] A statute of repose, by design, creates a right to repose precisely where the applicable statute of limitations would be tolled or deferred. More to the point, a statute of repose serves no purpose *unless* it has this effect. To hold that a statute of repose must yield to the plaintiff's inability to discover her injury would treat a statute of repose like a statute of limitations, and would effectively repeal this and

all other statutes of repose. To quote our recent discussion in *Galbraith Engineering Consultants, Inc. v. Pochucha*:

Such a construction would defeat the recognized purpose for statutes of repose, ... unaffected by rules of discovery or accrual. As already observed, *291 statutes of repose create a substantive right to be free from liability after a legislatively determined period. In contrast, statutes of limitations are procedural devices operating as a defense to limit the remedy available from an existing cause of action. A statute of repose thus represents the Legislature's considered judgment as to the inadequacy of the traditional statutes of limitations for some types of claims.⁴³

Under the court of appeals' decision, all plaintiffs have a "reasonable time" to discover their injuries,⁴⁴ a holding that means never-ending exposure to liability, which in turn injects actuarial uncertainty into the insurance market. This indefiniteness wholly undermines the purpose of House Bill 4 and of statutes of repose generally: to declare a no-exceptions cut-off point and grant a substantive right to be free of liability. Repose statutes are not exempt from Open Courts challenges, but the reviewing court cannot ignore the Legislature's broader reasons for limiting a litigant's rights and its considered judgment in exercising its police power in the interest of the general welfare.

The court of appeals also relied on language from *Trinity River Authority v. URS Consultants, Inc.-Texas*,⁴⁵ where we upheld a statute of repose, but noted:

[T]his Court's decision in [*Robinson v. Weaver*, 550 S.W.2d 18 (Tex.1977)], illustrates the important public purpose underlying statutes of repose. We held in that case that the discovery rule does not apply to cases of medical misdiagnosis. Unlike malpractice based on leaving a foreign object in the patient's body, or negligently performing a *vasectomy*, there is often no physical evidence establishing a misdiagnosis, thus increasing the risk of stale or even fraudulent claims.⁴⁶

This language does not compel us to rule that foreign-object cases cannot constitutionally be subjected to a statute of repose in light of the Open Courts provision. First, while we referred generically to "statutes of repose" in the quotation, *Robinson* did not in fact concern a statute of repose at all, but a two-year statute of limitations. Second, *Robinson* did not involve a constitutional challenge; it did not decide whether the statute of limitations in issue could survive a challenge under the Open Courts provision or any other constitutional provision. *Robinson* held that the discovery rule applicable to sponge cases was not applicable to a medical misdiagnosis case. Third, our discussion of *Robinson* was in a section of *Trinity River Authority* discussing the constitutionality of the statute of repose under federal and state substantive due process requirements. The Court had already finished its analysis under the Open Courts provision and ultimately rejected all constitutional challenges to the statute. In short, the quotation, read in context, does not hold or fairly imply that the Court would view a ten-year statute of repose in foreign-object cases as necessarily vulnerable to an Open Courts challenge.

The Legislature could have excepted foreign-body cases from the statute of repose, as some states have done.⁴⁷ But such an exception would introduce its own form of arbitrariness, since it would apply *292 even to those foreign-body cases, such as needle cases, where the surgeon's error is not particularly likely to go undetected for long periods. Regardless, the fact that the Legislature could have excepted foreign-body cases does not render the statute that was enacted unconstitutional. Our constitutional review asks only if the statute represents "a reasonable exercise of the police power in the interest of the general welfare,"⁴⁸ a review that focuses on whether the legislation is "arbitrary or unreasonable."⁴⁹ As detailed above, the statute survives this test.

III. Conclusion

We have never declared a statute of repose unconstitutional and decline to do so today. Section 74.251(b)'s grant of absolute protection against indefinite potential liability does not violate the Texas Constitution. The Open Courts provision confers a constitutional right of access but not an everlasting one. Texas' ten-year repose

period will weigh heavily on a small number of plaintiffs like Rankin, who belatedly discover a *res-ipsa*-like injury. A statute of repose, by design, will always bar some otherwise-valid claims, but that result is the whole point of a statute of repose, and “is the price of repose.”⁵⁰

The Legislature considered competing public and private interests and determined that ten years, the most generous repose period in the nation, is a reasonable final deadline regardless of accrual or discovery issues. Giving wide

berth to the Legislature's policy judgments, as we must, we cannot say lawmakers offended the Constitution by cutting off malpractice claims after giving claimants a decade to bring suit. We thus reverse the court of appeals' judgment and render a take-nothing judgment in favor of the petitioners.

All Citations

307 S.W.3d 283, 53 Tex. Sup. Ct. J. 455

Footnotes

- 1 [TEX. CIV. PRAC. & REM.CODE § 74.251\(b\)](#).
- 2 [TEX. CONST. art. I, § 13](#).
- 3 [Yancy v. United Surgical Partners Int'l, Inc.](#), 236 S.W.3d 778, 784 (Tex.2007).
- 4 See [TEX. CIV. PRAC. & REM.CODE §§ 16.008](#) (repose for actions against architects, engineers, interior designers, and landscape architects), 16.009 (repose for actions against a person who constructs or repairs an improvement to real property), and 16.011 (repose for actions against a registered public surveyor or a licensed state land surveyor).
- 5 [TEX. CIV. PRAC. & REM.CODE § 74.251\(b\)](#).
- 6 261 S.W.3d 93, 103.
- 7 [Smith v. Davis](#), 426 S.W.2d 827, 831 (Tex.1968).
- 8 [Tex. Nat'l Guard Armory Bd. v. McCraw](#), 132 Tex. 613, 126 S.W.2d 627, 634 (1939).
- 9 [TEX. CONST. art. I, § 13](#).
- 10 154 Tex. 192, 275 S.W.2d 951 (1955).
- 11 *Id.* at 955 (on rehearing).
- 12 [Trinity River Auth. v. URS Consultants, Inc.-Tex.](#), 889 S.W.2d 259, 262 (Tex.1994); [Sax v. Votteler](#), 648 S.W.2d 661, 665 (Tex.1983); [Waites v. Sondock](#), 561 S.W.2d 772, 774 (Tex.1977).
- 13 [Galbraith Eng'g Consultants, Inc. v. Pochucha](#), 290 S.W.3d 863, 866 (Tex.2009).
- 14 See [TEX. CIV. PRAC. & REM.CODE §§ 16.008](#) (ten-year repose statute for actions against architects, engineers, interior designers, and landscape architects), 16.009 (ten-year repose statute for actions against a person who constructs or repairs an improvement to real property), and 16.011 (ten-year repose statute for actions against a registered public surveyor or a licensed state land surveyor).
- 15 *E.g.*, [TEX. CIV. PRAC. & REM.CODE § 16.011\(a\)](#) (ten-year repose statute for actions against a registered public surveyor or a licensed state land surveyor begins to run on “the date the survey is completed” for surveys completed on or after September 1, 1989); see also 51 AM. JUR.2D [Limitation of Actions § 12](#) (2000) (“[A] statute of repose extinguishes a cause of action after a fixed period of time (usually measured from the delivery of the product, the completion of the work, or some other action of the defendant), regardless of when the cause of action accrued.”); [Trinity River Auth.](#), 889 S.W.2d at 261 (“Unlike traditional limitations provisions, which begin running upon accrual of a cause of action, a statute of repose runs from a specified date without regard to accrual of any cause of action.”).
- 16 See 51 AM. JUR.2D [Limitation of Actions §§ 12, 18](#) (2000) (explaining that unlike statutes of limitations, repose statutes “reflect the legislative conclusion that a point in time arrives beyond which a potential defendant should be immune from liability for past conduct”).
- 17 *E.g.*, [TEX. CIV. PRAC. & REM.CODE § 16.011\(b\)](#) (providing that if the claimant presents a written claim during the 10–year repose period, the period is extended for two years from the date the claim is presented).
- 18 See [Goad v. Celotex Corp.](#), 831 F.2d 508, 511 (4th Cir.1987) (“In contrast to statutes of limitation, statutes of repose serve primarily to relieve potential defendants from anxiety over liability for acts committed long ago.”).
- 19 [Galbraith Eng'g](#), 290 S.W.3d at 866.
- 20 Rankin offered no evidence that a significant number of claims are barred by the operation of the repose statute in issue. One study has determined that ninety-nine percent of claims brought against OB–GYNs are reported within nine years. Michael S. Hull et al., [House Bill 4 and Proposition 12: An Analysis with Legislative History, Part Three](#), 36 TEX. TECH.

L.REV. 169, 188 (2005). In upholding a ten-year statute of repose applicable to architects and engineers as striking “a fair balance between the legislative purpose of protecting against stale claims and the rights of litigants to obtain redress for injuries,” we cited a study finding that 99.6 percent of claims against architects were brought within ten years. *Trinity River Auth. v. URS Consultants, Inc.-Tex.*, 889 S.W.2d 259, 264 & n. 6 (Tex.1994).

21 *Galbraith Eng'g*, 290 S.W.3d at 866 (quoting *Holubec v. Brandenberger*, 111 S.W.3d 32, 37 (Tex.2003)).

22 *Holubec*, 111 S.W.3d at 37.

23 Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 10.11(b)(5), 2003 Tex. Gen. Laws 847, 884–85.

24 *Id.* § 10.11(b)(3).

25 *Id.* § 10.11(a).

26 *Id.* § 10.11(a)(10).

27 *Sax v. Votteler*, 648 S.W.2d 661, 667 (Tex.1983).

28 See *infra* notes 29–30.

29 CAL.CIV.PROC.CODE § 340.5 (West 2010); COLO.REV.STAT. § 13–80–102.5(3)(b) (2009); GA.CODE ANN. § 9–3–72 (2009); IOWA CODE ANN. § 614.1(9)(a) (West 2010); MASS. GEN. LAWS ANN. ch. 260, § 4 (West 2010); MISS.CODE ANN. § 15–1–36(2)(a) (2009); OHIO REV.CODE ANN. § 2305.113(D)(2) (LexisNexis 2010); 40 PA. STAT. ANN. § 1303.513(b) (West 2009); S.C. CODE ANN. § 15–3–545(B) (2009); TENN.CODE ANN. § 29–26–116(a)(4) (2009); UTAH CODE ANN. § 78B–3–404(2)(a) (2009); VT. STAT. ANN. . tit. 12, § 521 (2009); WASH. REV.CODE ANN. § 4.16.350 (West 2010); WIS. STAT. ANN. § 893.55(1m)(3) (West 2009).

30 Three states and one territory have a three-year statute of repose. CONN. GEN.STAT. ANN. § 52–584 (West 2005); LA.REV.STAT. ANN. § 9:5628(a) (2010); NEV.REV.STAT. ANN. § 41A.097(2) (LexisNexis 2009); GUAM CODE ANN. tit. 7, § 11308 (2009). Four states have a four-year statute of repose. ALA.CODE § 6–5–482 (2009); FLA. STAT. ANN. § 95.11(4)(b) (West 2009); 735 ILL. COMP. STAT. ANN.N. 5/13–212(a) (West 2010); KAN. STAT. ANN. § 60–513(c) (2010). Four states have a five-year statute of repose. KY.REV.STAT. ANN. § 413.140(2) (LexisNexis 2010); MD.CODE ANN., CTS. & JUD. PROC. § 5–109(a)(1) (LexisNexis 2010); MONT.CODE ANN. § 27–2–205(1) (2009); OR.REV.STAT. § 12.110(4) (2007). Three states have a six-year statute of repose. HAW REV. STAT. ANN. . § 657–7.3 (LexisNexis 2009); MICH. COMP. LAWS ANN. § 600.5838a(2) (West 2000); N.D. CENT.CODE § 28–01–18(3) (2009). Five states other than Texas have a ten-year statute of repose. MO. ANN. STAT. § 516.105(3) (West 2009); N.C. GEN.STAT. § 1–15(c) (2009); NEB.REV.STAT. ANN. § 44–2828 (LexisNexis 2009); VA.CODE ANN. § 8.01–243(C) (2009); W. VA.CODE ANN. § 55–7B–4(a) (LexisNexis 2009).

31 See *Aicher v. Wis. Patients Comp. Fund*, 237 Wis.2d 99, 613 N.W.2d 849 (2000); *Schendt v. Dewey*, 246 Neb. 573, 520 N.W.2d 541, 547 (1994); *Choroszy v. Tso*, 647 A.2d 803 (Me.1994); *Kush v. Lloyd*, 616 So.2d 415, 419–22 (Fla.1992); *Hawley v. Green*, 117 Idaho 498, 788 P.2d 1321, 1323–24 (1990); *Mega v. Holy Cross Hosp.*, 111 Ill.2d 416, 95 Ill.Dec. 812, 490 N.E.2d 665, 668–71 (1986); *Barlow v. Humana, Inc.*, 495 So.2d 1048 (Ala.1986); *Crier v. Whitecloud*, 496 So.2d 305, 309–10 (La.1986); *Hill v. Fitzgerald*, 304 Md. 689, 501 A.2d 27, 33–35 (1985); *Dunn v. St. Francis Hosp., Inc.*, 401 A.2d 77, 80–81 (Del.1979); *Harrison v. Schrader*, 569 S.W.2d 822, 827–28 (Tenn.1978); *Barke v. Maeyens*, 176 Or.App. 471, 31 P.3d 1133, 1136–39 (2001); *Golden v. Johnson Mem'l Hosp., Inc.*, 66 Conn.App. 518, 785 A.2d 234, 243–46 (2001); *Plummer v. Gillieson*, 44 Mass.App.Ct. 578, 692 N.E.2d 528, 532 (1998). See also Robin D. Miller, Annotation, *Validity of Medical Malpractice Statutes of Repose*, 5 A.L.R.6th 133, 161–63 (2005).

We note that in some states, the statute of repose provides minors a longer period to bring claims; they may sometimes bring claims even after the period of repose has elapsed. See, e.g., HAW REV. STAT. ANN. § 657–7.3 (LexisNexis 2009) (providing that minors may bring claims up until six years after their tenth birthday, regardless of the normal six-year repose period).

32 *McCullum v. Sisters of Charity of Nazareth Health Corp.*, 799 S.W.2d 15, 18–19 (Ky.1990) (examining only whether a common-law right of action existed prior to the passage of adoption of the Kentucky Constitution, but not examining whether the statute was reasonable, as Texas does); *Hardy v. VerMeulen*, 32 Ohio St.3d 45, 512 N.E.2d 626, 627–28 (1987) (examining solely whether the plaintiff had a remedy at the time he discovered his injury without an inquiry into the reasonableness of the statute).

33 See, e.g., *Aicher v. Wis. Patients Comp. Fund*, 237 Wis.2d 99, 613 N.W.2d 849 (2000) (five-year statute); *Schendt v. Dewey*, 246 Neb. 573, 520 N.W.2d 541, 547 (1994) (ten-year statute); *Choroszy v. Tso*, 647 A.2d 803 (Me.1994) (three-year statute); *Kush v. Lloyd*, 616 So.2d 415, 419–22 (Fla.1992) (four-year statute); *Hawley v. Green*, 117 Idaho 498, 788 P.2d 1321, 1323–24 (1990) (two-year statute); *Mega v. Holy Cross Hosp.*, 111 Ill.2d 416, 95 Ill.Dec. 812, 490 N.E.2d 665, 668–71 (1986) (four-year statute); *Barlow v. Humana, Inc.*, 495 So.2d 1048 (Ala.1986) (four-year statute); *Crier v. Whitecloud*, 496 So.2d 305, 309–10 (La.1986) (three-year statute); *Hill v. Fitzgerald*, 304 Md. 689, 501 A.2d 27, 33–35

(1985) (five-year statute); *Dunn v. St. Francis Hosp., Inc.*, 401 A.2d 77, 80–81 (Del.1979) (three-year statute); *Harrison v. Schrader*, 569 S.W.2d 822, 827–28 (Tenn.1978) (three-year statute); *Barke v. Maeyens*, 176 Or.App. 471, 31 P.3d 1133, 1136–39 (2001) (five-year statute); *Golden v. Johnson Mem'l Hosp., Inc.*, 66 Conn.App. 518, 785 A.2d 234, 243–46 (2001) (three-year statute); *Plummer v. Gillieson*, 44 Mass.App.Ct. 578, 692 N.E.2d 528, 532 (1998) (seven-year statute).

34 See *supra* note 29.

35 TEX. CIV. PRAC. & REM.CODE § 16.012(d)(3).

36 TEX. CIV. PRAC. & REM.CODE § 74.251(b) (“This subsection is intended as a statute of repose so that all claims must be brought within 10 years or they are time barred.”).

37 *Trinity River Auth. v. URS Consultants, Inc.-Tex.*, 889 S.W.2d 259, 261–63 (Tex.1994). However, *Trinity River Authority* held that the statute of repose did not violate the Open Courts provision because it did not abrogate a well-established common-law cause of action, an issue we do not reach. *Id.* at 262–63.

38 See *Zaragoza v. Chemetron Invs., Inc.*, 122 S.W.3d 341 (Tex.App.-Fort Worth 2003, no pet.); *Gordon v. W. Steel Co.*, 950 S.W.2d 743 (Tex.App.-Corpus Christi 1997, writ denied); *Dallas Mkt. Ctr. Dev. Co. v. Beran & Shelmire*, 824 S.W.2d 218 (Tex.App.-Dallas 1991, writ denied); *Barnes v. J.W. Bateson Co.*, 755 S.W.2d 518 (Tex.App.-Fort Worth 1988, no writ); *Dubin v. Carrier Corp.*, 731 S.W.2d 651 (Tex.App.-Houston [1st Dist.] 1987, no writ); *Suburban Homes v. Austin-Nw. Dev. Co.*, 734 S.W.2d 89 (Tex.App.-Houston [1st Dist.] 1987, no writ); *Nelson v. Metallic-Braden Bldg. Co.*, 695 S.W.2d 213 (Tex.App.-Houston [1st Dist.] 1985, writ ref'd n.r.e.); *McCulloch v. Fox & Jacobs, Inc.*, 696 S.W.2d 918 (Tex.App.-Dallas 1985, writ ref'd n.r.e.); *Sowders v. M.W. Kellogg Co.*, 663 S.W.2d 644 (Tex.App.-Houston [1st Dist.] 1983, writ ref'd n.r.e.); *Ellerbe v. Otis Elevator Co.*, 618 S.W.2d 870 (Tex.App.-Houston [1st Dist.] 1981, writ ref'd n.r.e.); *Hill v. Forrest & Cotton, Inc.*, 555 S.W.2d 145 (Tex.Civ.App.-Eastland 1977, writ ref'd n.r.e). In addition, the United States Court of Appeals for the Fifth Circuit has at least twice upheld other Texas statutes of repose against Open Courts challenges. See *Burlington N. & Santa Fe Ry. Co. v. Poole Chem. Co.*, 419 F.3d 355, 361 (5th Cir.2005) (holding fifteen-year statute of repose for certain defective-products claims does not violate Open Courts provision); *Brown v. M.W. Kellogg Co.*, 743 F.2d 265, 268 (5th Cir.1984) (holding that the ten-year statute of repose for architects, engineers, and builders does not violate the Open Courts provision).

39 TEX. CIV. PRAC. & REM.CODE § 16.003.

40 *Id.* § 74.251(a).

41 *McCulloch*, 696 S.W.2d at 925.

42 261 S.W.3d at 96.

43 290 S.W.3d 863, 868 (Tex.2009) (citations omitted).

44 261 S.W.3d at 103.

45 889 S.W.2d 259 (Tex.1994).

46 261 S.W.3d at 100 (emphasis omitted) (quoting *Trinity River Auth.*, 889 S.W.2d at 263–64) (citations omitted).

47 See *supra* note 29.

48 *Lebohm v. City of Galveston*, 154 Tex. 192, 275 S.W.2d 951, 955 (1955) (on rehearing).

49 *Id.*

50 *S.V. v. R.V.*, 933 S.W.2d 1, 23 (Tex.1996).



KeyCite Yellow Flag - Negative Treatment

Declined to Extend by [Whittington v. Nathan](#), Tex.App.-Hous. (1 Dist.),
April 12, 2012

290 S.W.3d 863

Supreme Court of Texas.

GALBRAITH ENGINEERING
CONSULTANTS, INC., Petitioner,
v.

Sam POCHUCHA and Jean Pochucha, Respondents.

No. 07–1051.

Argued Dec. 11, 2008.

Delivered June 26, 2009.

Synopsis

Background: Homeowners brought action against builder, claiming damages resulting from alleged improper design and installation of drainage system under the foundation of their home, and later joined engineering firm as defendant. The County Court at Law, Bexar County, [Karen Crouch](#), J., entered summary judgment in favor of engineering firm on limitations grounds, and homeowners appealed. The San Antonio Court of Appeals, [243 S.W.3d 138](#), reversed.

[Holding:] On petition for review, the Supreme Court, Medina, J., held that joinder statute providing that a claimant may designate a party as a responsible third party, even though such joinder would otherwise be “barred by limitations,” does not act to revive a claim otherwise barred by a statute of repose.

Reversed and rendered.

West Headnotes (9)

[1] Limitation of Actions

Intervention or bringing in new parties

Joinder statute providing that a claimant may designate a party as a responsible third party in tort and deceptive trade practice actions, even though such joinder would otherwise

be “barred by limitations,” does not act to revive a claim otherwise barred by a statute of repose. [V.T.C.A., Civil Practice & Remedies Code § 33.004\(e\)](#).

[18 Cases that cite this headnote](#)**[2] Limitation of Actions**

Operation as to rights or remedies in general

Statutes of repose not only cuts off rights of action after they accrue, but can cut off rights of action before they accrue.

[5 Cases that cite this headnote](#)**[3] Limitation of Actions**

Operation as to rights or remedies in general

While statutes of limitations operate procedurally to bar the enforcement of a right, a statute of repose takes away the right altogether, creating a substantive right to be free of liability after a specified time.

[10 Cases that cite this headnote](#)**[4] Limitation of Actions**

Operation as to rights or remedies in general

The purpose of a statute of repose is to provide absolute protection to certain parties from the burden of indefinite potential liability.

[10 Cases that cite this headnote](#)**[5] Limitation of Actions**

Amendment or repeal of statutes

Limitation of Actions

Operation as to rights or remedies in general

Statutes of repose are created by the Legislature, and the Legislature may amend them or make exceptions to them.

[2 Cases that cite this headnote](#)

[6] Appeal and Error**🔑 Cases Triable in Appellate Court**

Statutory construction is a question of law reviewed de novo.

51 Cases that cite this headnote

[7] Statutes**🔑 Plain language; plain, ordinary, common, or literal meaning**

If the words of a statute are clear and unambiguous, the court applies them according to their plain and common meaning.

16 Cases that cite this headnote

[8] Statutes**🔑 Relation to plain, literal, or clear meaning; ambiguity****Statutes****🔑 Construction based on multiple factors****Statutes****🔑 Plain, literal, or clear meaning; ambiguity****Statutes****🔑 Common or Civil Law****Statutes****🔑 Other Statutes**

When the plain language of a statute does not convey the Legislature's apparent intent, courts may resort to additional construction aids, such as the objective of the law, the legislative history, the common law or former statutory provisions, including laws on the same or similar subject, and the consequences of a particular construction.

39 Cases that cite this headnote

[9] Limitation of Actions**🔑 Particular forms of action**

Statute of repose barring a claim for damages relating to the design, plan, or inspection of the construction of an improvement to real property ten years after the substantial

completion of the improvement has the purposes of eliminating "unlimited time liability" against engineers, architects, interior designers and landscape architects. [V.T.C.A., Civil Practice & Remedies Code § 16.008](#).

3 Cases that cite this headnote

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Opinion

Justice MEDINA delivered the opinion of the Court.

[Section 33.004\(e\) of the Civil Practice and Remedies Code](#) purports to revive claims otherwise "barred by limitations" under certain limited circumstances. The issue in this summary judgment appeal is whether this statute applies to revive a claim otherwise barred by a statute of repose, as distinguished from a statute of limitations. The court of appeals concluded that the statute was capable of reviving claims barred by either statutes of limitations or statutes of repose. [243 S.W.3d 138, 141](#). We conclude that the Legislature did not intend for this statute to revive claims extinguished by a statute of repose. Accordingly, we reverse the court of appeals' judgment and render judgment dismissing the plaintiffs' claim in this case.

The underlying litigation concerns the design and construction of a house. Sam and Jean Pochucha purchased the house from Chase Manhattan Mortgage Corporation in April 2003. Bill Cox Constructors, Inc. had built the house about eight years before the Pochuchas' purchase. After moving into their new home, the Pochuchas noticed that moderate to heavy rainfall would cause water damage in the lower rooms. An investigation revealed a problem with the french drain system.

The Pochuchas thereafter sued the builder, Bill Cox, for negligence and violations *865 of the Texas Deceptive Trade Practices Act. In response, the builder answered and filed a motion for leave to designate Galbraith Engineering Consultants, Inc. and Swientek Construction Company as responsible third parties for purposes of proportionate responsibility under chapter 33 of the Civil Practice and Remedies Code. According to the builder, Galbraith had designed and inspected the installation of the french drain system, while Swientek had performed the actual installation.

After the trial court approved Galbraith and Swientek's designation as responsible third parties, the Pochuchas amended their pleadings to join them as defendants. *See* [TEX. CIV. PRAC. & REM.CODE § 33.004\(e\)](#). Galbraith responded by moving for summary judgment under the applicable statute of repose, contesting its joinder because more than ten years had elapsed since the completion of the improvement. *See id.* § 16.008 (barring suits against engineers for their design, plan, or inspection of the construction of an improvement to real property ten years after its substantial completion). The trial court granted Galbraith's motion, severed the Pochuchas' claims against Galbraith, and dismissed that part of the case with prejudice. The court of appeals, however, reversed the summary judgment and remanded the case against Galbraith for further proceedings. [243 S.W.3d 138](#).

II

[1] [Section 16.008 of the Civil Practice and Remedies Code](#) is a statute of repose. *Johnson v. City of Fort Worth*, [774 S.W.2d 653, 654 \(Tex.1989\)](#) (per curiam). It bars a claim for damages relating to the design, plan, or inspection of the construction of an improvement to real property ten years after the substantial completion of the

improvement by an engineer, among others.¹ Because the Pochuchas joined Galbraith as a defendant in this suit more than ten years after the completion of the improvement, Galbraith argues that the statute must be applied to foreclose the Pochuchas' claims against it.

The court of appeals concluded, however, that the claim was not foreclosed, but rather had been revived under [section 33.004\(e\)² of the Civil Practice and Remedies Code](#). [243 S. W.3d at 141](#). [Section 33.004\(e\)](#) is a part of chapter 33, the statutory scheme for the apportionment of responsibility in tort and deceptive trade practice actions. *See* [TEX. CIV. PRAC. & REM.CODE § 33.001–.017](#).

Chapter 33 provides, among other things, that a defendant in such an action may seek to designate a person, who has not been sued by a claimant, as a responsible third party. [Id. § 33.004\(a\)](#). A responsible third party may include any person who is alleged to have caused in any way the harm for which the claimant seeks damages. *Id.* § 33.011(6). When such a designation is made, a claimant may also be able to join that person as a defendant, and, if joinder is sought within sixty days of the designation, limitations cannot be raised as a bar. [Id. § 33.004\(e\)](#). Because the Pochuchas joined Galbraith as a defendant *866 within the sixty-day window provided under [section 33.004\(e\)](#), the court of appeals concluded that the claim had been revived. [243 S.W.3d at 141](#).

Galbraith argues, however, that [section 33.004\(e\)](#) only revives claims “barred by limitations.” Because the revival statute does not mention repose, Galbraith contends that it cannot be used to revive a claim extinguished by a statute of repose. The court of appeals concluded, however, that the revival statute applied both to statutes of repose and statutes of limitations, reasoning that the Legislature had used the term “limitations” to refer to both types of statutes. [243 S.W.3d at 141](#) (noting that Civil Practice and Remedies Code chapter 16, entitled “Limitations,” contains both statutes of limitations and statutes of repose). Although the Legislature has grouped statutes of limitation and statutes of repose together in chapter 16 of the Civil Practice and Remedies Code under the general heading of “Limitations,” there are significant differences between the two.

[2] [3] [4] Statutes of repose typically provide a definitive date beyond which an action cannot be filed. *Holubec v. Brandenberger*, [111 S.W.3d 32, 37 \(Tex.2003\)](#).

“Unlike traditional limitations provisions, which begin running upon accrual of a cause of action, a statute of repose runs from a specified date without regard to accrual of any cause of action.” *Trinity River Auth. v. URS Consultants, Inc.*, 889 S.W.2d 259, 261 (Tex.1994). Repose then differs from limitations in that repose not only cuts off rights of action after they accrue, but can cut off rights of action before they accrue. *Holubec*, 111 S.W.3d at 37. And while statutes of limitations operate procedurally to bar the enforcement of a right, a statute of repose takes away the right altogether, creating a substantive right to be free of liability after a specified time. See *Trinity River Auth.*, 889 S.W.2d at 261. Thus, the purpose of a statute of repose is to provide “absolute protection to certain parties from the burden of indefinite potential liability.” *Holubec*, 111 S.W.3d at 37.

The court of appeals has concluded, however, that reviving a claim otherwise barred by a statute of repose is not essentially contrary to this purpose because the revival statute in this instance merely provides for a limited sixty-day extension. 243 S.W.3d at 141. The Legislature can, of course, provide for the extension of a period of repose. See, e.g., TEX. CIV. PRAC. & REM.CODE § 16.008(c) (providing that presenting a written claim for damages to an engineer within the ten-year period extends the period “for two years from the day the claim is presented”). But applying the revival statute to revive a period of repose does more than merely extend the period for two months. It effectively renders the period of repose indefinite by attaching the claim's revival to the existence of some other claim and party that may not be subject to the same or similar period of repose.

Here, both the original defendant, Bill Cox, and the subsequently designated responsible third party, Galbraith, worked on the same improvement to real property and were subject to similar ten-year statutes of repose.³ Hence, the court of appeals viewed section 33.004(e) as extending the period only by sixty days. But in *867 other cases a responsible third party may be subject to a longer period of repose or none at all, creating an opportunity for revival many months or years beyond the ten-year period of repose prescribed by section 16.008. A products liability claim would be an example of this.

We have held that section 16.008 was not intended to grant repose to manufacturers in product liability suits and only precludes suits against persons or entities in

the construction industry that annex personalty to realty. *Sonnier v. Chisholm–Ryder Co.*, 909 S.W.2d 475, 478–83 (Tex.1995). Moreover, products claims now have their own statute of repose, a fifteen-year period to which exception is made for products with longer warranties and for products that cause latent diseases. See TEX. CIV. PRAC. & REM.CODE § 16.012(b)–(e). Thus, a manufacturer or seller of a defective product can be sued years after the ten-year period of repose at issue here. Assuming that this product was used in an improvement to real property, the seller or manufacturer named as a defendant might years later designate the party who installed its product as a responsible third party, and, under the court of appeals' view, invoke the sixty-day window in section 33.004(e) to revive a claim otherwise subject to section 16.008 many years after the running of the ten-year statute of repose.

III

[5] Statutes of repose are created by the Legislature, and the Legislature may, of course, amend them or make exceptions to them. The question here, however, is whether the Legislature intended to make such an exception when it enacted section 33.004(e) as part of its proportionate responsibility scheme, that is, did the Legislature intend for the revival statute to operate as a general exception to periods of repose.

[6] [7] Statutory construction is a question of law we review de novo. *First Am. Title Ins. Co. v. Combs*, 258 S.W.3d 627, 631 (Tex.2008). In construing statutes, our primary objective is to give effect to the Legislature's intent as expressed in the statute's language. TEX. GOV'T CODE § 312.005; *First Am. Title*, 258 S.W.3d at 631–32. If the words of a statute are clear and unambiguous, we apply them according to their plain and common meaning. *City of Rockwall v. Hughes*, 246 S.W.3d 621, 625–26 (Tex.2008).

[8] It is unclear here, however, whether the Legislature intended the term “limitations” in section 33.004(e) to apply narrowly to statutes of limitations or more broadly to include statutes of repose because the term has been used in both contexts.⁴ When the plain language of a statute does not convey the Legislature's apparent intent, we may resort to additional construction aids, such as the objective of the law, the legislative history, the common

law or former statutory provisions, ***868** including laws on the same or similar subject, and the consequences of a particular construction. *Hughes*, 246 S.W.3d at 626; *TEX. GOV'T CODE* § 311.023.⁵

The consequence of construing “limitations” broadly here informs our decision. Such a construction would defeat the recognized purpose for statutes of repose, that is, the establishment of a definite end to the potential for liability, unaffected by rules of discovery or accrual. *Holubec*, 111 S.W.3d at 37; *Trinity River Auth.*, 889 S.W.2d at 261; *Johnson*, 774 S.W.2d at 654 n. 1. As already observed, statutes of repose create a substantive right to be free from liability after a legislatively determined period. *Trinity River Auth.*, 889 S.W.2d at 261; *see also Cadle Co. v. Wilson*, 136 S.W.3d 345, 350 (Tex.App.-Austin 2004, no pet.). In contrast, statutes of limitations are procedural devices operating as a defense to limit the remedy available from an existing cause of action. *Cadle Co.*, 136 S.W.3d at 350. A statute of repose thus represents the Legislature's considered judgment as to the inadequacy of the traditional statutes of limitations for some types of claims. *Sowers v. M.W. Kellogg Co.*, 663 S.W.2d 644, 647 (Tex.App.-Houston [1st Dist.] 1983, writ ref'd n.r.e.). The statute of repose at issue here is no different.

[9] When first enacted in 1969, the stated purpose of this statute of repose was to eliminate “unlimited time liability” against engineers or architects. Act of May 27, 1969, 61st Leg., R.S., ch. 418, § 2, 1969 Tex. Gen. Laws 1379, 1379 (amended 1985) (current version at *TEX. CIV. PRAC. & REM.CODE* § 16.008). The statute has been amended since 1969 to extend protection to interior designers and landscape architects, but its purpose of defining a definite period for liability to attach has not changed. Act of May 17, 1985, 69th Leg., R.S., ch. 959, § 1, 1985 Tex. Gen. Laws 3242, 3253 (amended 1997) (current version at *TEX. CIV. PRAC. & REM.CODE* § 16.008); Act of May 26, 1997, 75th Leg., R.S., ch. 860, § 1, 1997 Tex. Gen. Laws 2738, 2738 (current version at *TEX. CIV. PRAC. & REM.CODE* § 16.008).

The proportionate responsibility scheme of chapter 33, on the other hand, is a complex statutory scheme for the comparative apportionment of responsibility among parties in most tort actions in Texas. Although the scheme initially equated responsibility with liability to the plaintiff or claimant, this is no longer the case.⁶ Thus, a defendant may designate a responsible third party even though that party possesses a defense to liability, or cannot ***869** be formally joined as a defendant, or both. Chapter 33 then is apparently unconcerned with the substantive defenses of responsible third parties, who are defined to include “any person who is alleged to have caused or contributed to causing in any way the harm for which recovery of damages is sought, whether by negligent act or omission, by any defective or unreasonably dangerous product, by other conduct or activity that violates an applicable legal standard, or by any combination of these.” *TEX. CIV. PRAC. & REM.CODE* § 33.011(6). But we have found nothing in *section 33.004* or the proportionate responsibility scheme to convince us that the Legislature intended to revive claims extinguished by a statute of repose. *Cf. Shirley v. Reif*, 260 Kan. 514, 920 P.2d 405, 412 (1996) (holding that a claim barred by a statute of repose cannot be revived by legislation enacted after the period of repose); *Farber v. Lok-N-Logs, Inc.*, 270 Neb. 356, 701 N.W.2d 368, 377–78 (2005) (holding amendment to product liability statute of repose could not resurrect action which prior version of statute of repose had already extinguished). Because application of the revival statute in this instance effectively renders the period of repose indefinite, a consequence clearly incompatible with the purpose for such statutes, we conclude that the Legislature intended for the term “limitations” in *section 33.004(e)* to refer only to statutes of limitations.

The judgment of the court of appeals is reversed and judgment is rendered dismissing the Pochuchas' claim against Galbraith because it is barred by the applicable ten-year statute of repose.

All Citations

290 S.W.3d 863, 52 Tex. Sup. Ct. J. 974

Footnotes

- ¹ The statute also applies to architects, interior designers, and landscape architects.
- ² “If a person is designated under this section as a responsible third party, a claimant is not barred by limitations from seeking to join that person, even though such joinder would otherwise be barred by limitations, if the claimant seeks to

join that person not later than 60 days after that person is designated as a responsible third party.” [TEX. CIV. PRAC. & REM.CODE § 33.004\(e\)](#).

- 3 There is a separate ten-year statute of repose for contractors who make improvements to real property. See [TEX. CIV. PRAC. & REM.CODE § 16.009](#); see also *Ryland Group, Inc. v. Hood*, 924 S.W.2d 120, 121 (Tex.1996) (per curiam). Whether the Pochuchas timely filed suit against Bill Cox is not at issue in this appeal.
- 4 The statutes of repose in chapter 16 of the Civil Practices and Remedies Code refer to limitations rather than a period of repose. See [TEX. CIV. PRAC. & REM.CODE § 16.008\(c\)](#) (mentioning “10–year limitations period”); *id.* [§ 16.009\(c\)](#) (same); *id.* [§ 16.011\(b\)](#) (same); *id.* [§ 16.012\(d–1\)](#) (mentioning “limitations period under this section”). Only section 16.011 mentions repose. *Id.* [§ 16.011\(c\)](#) (“This section is a statute of repose and is independent of any other limitations period.”). Elsewhere in the Code the Legislature has used the phrase “limitations and repose” when referencing both statutes of limitations and statutes of repose rather than simply using the term “limitations” as it did in [section 33.004\(e\)](#). See *id.* [§ 150.002\(f\)](#) (relating to a “certificate of merit” in actions against design professionals, such as architects and engineers, and stating: “This statute shall not be construed to extend any applicable period of limitation or repose.”); see also *id.* [§ 147.043](#) (regarding the effect of legal disability, and explaining its application to “periods of limitation and repose”); *id.* [§ 147.044\(b\)](#) (mentioning the “period of limitation or repose” under this section); [TEX. INS.CODE § 462.309\(c\)](#) (concerning “Stay of Proceedings” and stating: “Statutes of limitation or repose are not tolled during the stay, and any action filed during the stay is stayed upon the filing of the action.”).
- 5 While the language in today’s statute is somewhat unclear, thus justifying cautious use of secondary construction aids, we recently reaffirmed that such aids “cannot override a statute’s plain words.” *In re Collins*, 286 S.W.3d 911, 918 (Tex.2009) (citing *Alex Sheshunoff Mgmt.Servs., L.P. v. Johnson*, 209 S.W.3d 644, 652 (Tex.2006) (“Wherever possible, we construe statutes as written, but where enacted language is nebulous, we may cautiously consult legislative history to help divine legislative intent.”)).
- 6 The proportionate responsibility chapter was enacted in 1995 and amended in 2003. The 1995 legislation contained a number of limitations on who might be named a responsible third party, such as a requirement for personal jurisdiction and a potential for liability to the claimant. Act of May 8, 1995, 74th Leg., R.S., ch. 136, § 1, 1995 Tex. Gen. Laws 971, 973 (amended 2003) (current version at [TEX. CIV. PRAC. & REM.CODE § 33.011](#)). Certain potential parties, such as the claimant’s employer and the bankrupt were expressly excluded. *Id.* The 2003 amendments substantially broadened the meaning of the term “responsible third party” to eliminate these restrictions. As one commentator has observed: “The thrust of the 2003 statute is that the jury should allocate responsibility among all persons who are responsible for the claimant’s injury, regardless of whether they are subject to the court’s jurisdiction or whether there is some other impediment to the imposition of liability on them, such as a statutory immunity.” 19 WILLIAM V. DORSANEO III, TEXAS LITIGATION GUIDE § 291.03[2][b][i] at 291–24.1 (2009).



KeyCite Yellow Flag - Negative Treatment

Declined to Extend by [Hunton v. Guardian Life Ins. Co. of America](#),
S.D.Tex., November 16, 2002

800 S.W.2d 826

Supreme Court of Texas.

Debra Kay MURRAY, Petitioner,

v.

SAN JACINTO AGENCY, INC., d/b/a/
SJA Brokerage, Inc., et al., Respondents.

No. C-8299.

|
April 18, 1990.

|

Rehearing Overruled Jan. 23, 1991.

Insured brought action against health insurer for breach of duty to deal fairly and in good faith with insured in processing and payment of claims. The 358th District Court, Ector County, [Bill McCoy](#), J., entered summary judgment in favor of insurer, and insured appealed. The El Paso Court of Appeals, [759 S.W.2d 778](#), affirmed, and insured petitioned for review. The Supreme Court, [Gonzalez](#), J., held that: (1) claim accrued on date coverage was denied rather than on date that insurer admitted its denial of coverage was unwarranted, and (2) matter would be remanded in interest of justice to permit insured to demonstrate diligence in serving citation.

Reversed and remanded.

Spears, J., filed dissenting opinion, joined by Ray, Mauzy,
and Doggett, JJ.

West Headnotes (9)

[1] Limitation of Actions **Nature of Statutory Limitation**

Limitations statutes afford plaintiffs what legislature deems reasonable time to present their claims and protect defendants and courts from having to deal with cases in which search for truth may be seriously impaired by loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise.

[25 Cases that cite this headnote](#)**[2] Limitation of Actions** **Nature of Statutory Limitation**

Purpose of statute of limitations is to establish point of repose and to terminate stale claims.

[19 Cases that cite this headnote](#)**[3] Limitation of Actions** **Causes of Action in General**

Cause of action generally accrues at time when facts come into existence which authorize claimant to seek judicial remedy, for purposes of application of statute of limitations.

[93 Cases that cite this headnote](#)**[4] Limitation of Actions** **Continuing Injury in General**

Limitations commences when wrongful act occurs resulting in some damage to plaintiff; fact that damage may continue to occur for extended period thereafter does not prevent limitations from starting to run.

[30 Cases that cite this headnote](#)**[5] Limitation of Actions** **Breach of Contract in General****Limitation of Actions** **Torts**

Claim against insurer for breach of duty to deal fairly and in good faith with its insured in processing and payment of claims accrued for limitations purposes on date coverage was denied, rather than on date that insurer admitted its denial was unwarranted. [V.T.C.A., Civil Practice & Remedies Code § 16.003\(a\)](#).

[52 Cases that cite this headnote](#)**[6] Limitation of Actions** **Pendency of Action on Different Cause or in Different Forum**

First-party claim against insurer for breach of duty to deal fairly and in good faith with its insured in processing and payment of claims appropriately begins to run at denial, not date separate suit to determine coverage under insurance contract is resolved. *V.T.C.A., Civil Practice & Remedies Code* § 16.003(a).

70 Cases that cite this headnote

[7] **Limitation of Actions**

🔑 **Service of Process**

Mere filing of suit will not interrupt running of limitations unless due diligence is exercised in issuance and service of citation.

71 Cases that cite this headnote

[8] **Limitation of Actions**

🔑 **Burden of Proof in General**

When defendant has affirmatively pleaded defense of limitations, and when failure to timely serve defendant has been shown, burden shifts to plaintiff to explain delay.

62 Cases that cite this headnote

[9] **Appeal and Error**

🔑 **Issues Not Passed on Below**

Insured's action against insurer for breach of its duty to deal fairly and in good faith with insured in processing and payment of claims would be remanded in interest of justice, upon modification of prior caselaw so that limitations on claim commenced on day insurer denied coverage, to give insured opportunity to show diligence in serving citation and, if successful, to assert good faith claim, where insured filed original petition within limitations period, but service of citation was outside limitations period. *Rules App.Proc., Rule 180; V.T.C.A., Civil Practice & Remedies Code* § 16.003(a).

70 Cases that cite this headnote

Attorneys and Law Firms

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Walter A. Locker, III, Jack Q. Tidwell, Randal Patterson and Daniel J. Hollmann, Odessa, for respondents.

Opinion

GONZALEZ, Justice.

This appeal involves limitations on claims against an insurer for breach of the duty of good faith and fair dealing.

Debra Kay Murray brought this action against San Jacinto Agency (SJA) and Ector County Independent School District (ECISD) alleging wrongful denial of insurance coverage. SJA and ECISD moved separately for summary judgment. The trial court granted ECISD's motion for summary judgment on the ground that governmental immunity precluded suit against the school district. The trial court granted SJA's motion on the ground that Murray's suit was barred by limitations. The court of appeals affirmed. *759 S.W.2d 778*. Murray did not appeal as to ECISD so we address only the summary judgment in favor of SJA. We reverse the judgment of the court of appeals and in so doing, modify the limitations holding announced in *Arnold v. National County Mut. Fire Ins. Co.*, *725 S.W.2d 165, 168 (Tex.1987)*. Because we have modified the law, this cause is remanded to the trial court in the interest of justice.

Facts

ECISD established a self-funded group medical insurance program for its employees and their dependents. Under this program, ECISD paid premiums into a trust that was administered by SJA for a fee. Murray was covered under the plan as a dependent of her husband, Alvin Murray. She filed for divorce in the spring of 1984; she remained married, however, throughout the calendar year 1984. Three days after Murray filed for divorce, her husband requested that ECISD and SJA drop her from the insurance coverage.

In the summer of 1984, Murray learned that she had developed chronic pancreatitis. She sought coverage for

treatment of her condition under the health insurance policy. Due to her husband's request that she be taken off the insurance program, SJA refused to verify coverage on September 5, 1984. This refusal to verify coverage, essentially a denial of coverage, left Murray unable to obtain much-needed medical treatment. On March 15, 1985, however, SJA admitted that its denial was unwarranted and reinstated coverage retroactive to spring 1984.

Murray filed suit against SJA on March 27, 1986, alleging only *negligent* denial of coverage. Citation was not successfully served until January 21, 1987, 10 months later. Murray subsequently amended her petition on September 2, 1987 to plead her good faith claim for the first time.¹

Commencement of Limitations

The issue presented is whether Murray's good faith claim is barred by limitations as a matter of law. The statute of limitations governing this cause of action is set forth in [Tex.Civ.Prac. & Rem.Code Ann. § 16.003\(a\)](#) (Vernon 1986):

A person must bring suit for trespass for injury to the estate or to the property of another, conversion of personal property, taking or detaining the personal property of another, personal injury, forcible entry and detainer, and forcible detainer not later than two years after the day the cause of action accrues.

Thus, we must determine the date Murray's cause of action accrued. The parties dispute whether this should be the date coverage was denied (September 5, 1984) or *828 the date SJA admitted its denial was unwarranted (March 15, 1985).

In [Arnold](#), we recognized the duty of an insurer to deal fairly and in good faith with its insured in the processing and payment of claims and that breach of that duty is compensable in tort. [725 S.W.2d at 167](#); see also [Aranda v. Insurance Co. of N. America](#), [748 S.W.2d 210, 212](#) (Tex.1988); [Chitsey v. National Lloyds Ins. Co.](#),

[738 S.W.2d 641, 643](#) (Tex.1987). We further held that limitations on a good faith claim does not begin to run until the underlying contract claims are finally resolved. [Arnold](#), [725 S.W.2d at 168](#); see also [Street v. Second Court of Appeals](#), [756 S.W.2d 299, 302](#) (Tex.1988).

Murray contends that her underlying contract claims were not “finally resolved,” and limitations did not begin to run, until SJA admitted on March 15, 1985, that its September 5, 1984 denial of coverage was unwarranted. This argument must fail. SJA voluntarily admitted that it had made a mistake in denying coverage. Under this theory, if SJA had never admitted coverage, the contract claim would never have been “finally resolved,” and limitations would never have begun to run. Such a result was not intended in [Arnold](#).

[1] [2] Limitations statutes afford plaintiffs what the legislature deems a reasonable time to present their claims and protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents or otherwise. The purpose of a statute of limitations is to establish a point of repose and to terminate stale claims. [Safeway Stores, Inc. v. Certaineed Corp.](#), [710 S.W.2d 544, 545–546](#) (Tex.1986); see also [Moreno v. Sterling Drug, Inc.](#), [787 S.W.2d 348](#) (Tex.1990); [United States v. Kubrick](#), [444 U.S. 111, 117, 100 S.Ct. 352, 356, 62 L.Ed.2d 259](#) (1979).

[3] [4] [5] We hold that Murray's good faith claim accrued and limitations commenced on the day SJA wrongfully denied coverage (September 5, 1984). This holding comports with well-established precedent and other authorities. See, e.g., S. Ashley, *Bad Faith Liability: A State-By-State Review* § 4.05 (1987) (one would expect that in a first party case the insured's bad faith “cause of action accrues the moment an insurer should pay a claim but fails to do so. At that moment, the insurer's wrongful conduct first causes harm to the insured.”).

For the purposes of application of statute of limitations, a cause of action generally accrues at the time when facts come into existence which authorize a claimant to seek a judicial remedy. [Robinson v. Weaver](#), [550 S.W.2d 18, 19](#) (Tex.1977). Put another way, “a cause of action can generally be said to accrue when the wrongful act effects an injury.” [Moreno](#), [787 S.W.2d at 351](#). Murray was

unable to obtain much-needed medical attention because of SJA's September 5, 1984 denial and had sufficient facts that day to assert her good faith claim. See *Arnold*, 725 S.W.2d at 167 (“A cause of action for breach of the duty of good faith and fair dealing is stated when it is alleged that there is no reasonable basis for denial of a claim ...”).

The fact that damage may continue to occur for an extended period after denial does not prevent limitations from starting to run. Limitations commences when the wrongful act occurs resulting in some damage to the plaintiff. *Atkins v. Crosland*, 417 S.W.2d 150, 153 (Tex.1967); *First Nat. Bank v. Nu-Way Transports, Inc.*, 585 S.W.2d 813, 816 (Tex.Civ.App.—Fort Worth 1979, writ ref'd n.r.e.).

When, as SJA has done, an insurance company denies a claim, other jurisdictions have decided that the good faith cause of action accrues on the date of denial.² See, *829 e.g., *Frazier v. Metropolitan Life Ins. Co.*, 169 Cal.App.3d 90, 103, 214 Cal Rptr. 883, 890 (1985); *Safeco Ins. Co. of America v. Sims*, 435 So.2d 1219, 1222 (Ala.1983). The Alabama Supreme Court, in *Farmers & Merchants Bank v. Home Ins. Co.*, 514 So.2d 825, 831–832 (Ala.1987), determined that a cause of action for bad faith refusal to pay insurance benefits accrues when the insured has actual knowledge of facts which would put a reasonable mind on notice of the possible existence of bad faith. The court, however, went on to decide that, as a matter of law, the bad faith cause of action in that case accrued on the date insurance coverage was denied. *Id.*; see also *Alfa Mut. Ins. Co. v. Smith*, 540 So.2d 691, 692–93 (Ala.1988).

Modification of Arnold

[6] Our decision today modifies the limitations holding in *Arnold* because in retrospect it cannot withstand critical scrutiny. In *Arnold*, a motorcyclist, Arnold, was injured in an accident involving an uninsured driver. Arnold was insured by National County Mutual under a policy that included “uninsured motorist” protection up to \$10,000. Although no specific date is known, denial of coverage occurred no later than June 1974, because in that month, Arnold sued both National County and the uninsured motorist. Evidence before the trial court showed that National County was relying on the opinion of an inexperienced lawyer and did not conduct an investigation to determine the merits of the claim. Arnold obtained

a favorable judgment in excess of the policy limit in December 1977. One year later, in December 1978, Arnold filed his good faith claim against National County. This was over four years after denial. We held, nevertheless, that the two year statute of limitations did not bar this claim. Because Arnold had filed the initial or “underlying” suit to determine coverage, we analogized to *Linkenhoger v. American Fidelity & Casualty Co.*, 152 Tex. 534, 260 S.W.2d 884 (Tex.1953), *overruled in part on other grounds in Street*, 756 S.W.2d at 301, and in *Hernandez v. Great American Ins. Co.*, 464 S.W.2d 91, 95 (Tex.1971), to determine that limitations did not run until Arnold's underlying contract claims were finally resolved. Arnold's contract claim was resolved with a favorable judgment in December 1977. His good faith claim, filed one year later, was therefore held to be timely.

Our limitations holding in *Arnold* is not consistent with the rule that limitations commences at the time facts come into existence which authorize a claimant to seek a judicial remedy. *Robinson*, 550 S.W.2d at 19; *Moreno*, 787 S.W.2d at 357; *Linkenhoger*, 260 S.W.2d at 886. In *Arnold*, it is not clear when the facts indicating a breach of the duty of good faith and fair dealing came to light. In the instant case, however, the insured had sufficient facts to seek a judicial remedy on the date that coverage was denied.

Moreover, *Arnold* incorrectly analogized to the reasoning used in *Linkenhoger*, which was a *Stowers* case.³ The injury producing event in a *Stowers* third party case is not the same as it is in a first party case. A *Stowers* third party claim accrues when the insurer unreasonably fails to settle a claim against the insured within policy limits. The injury producing event is the underlying judgment in excess of policy limits. *Linkenhoger*, 260 S.W.2d at 887. A first party claim, such as *Arnold* and this case, accrues when an insurer unreasonably fails to pay an insured under the policy. The injury producing event is the denial of coverage. See Note, *Arnold v. National County Mutual Fire Ins. Co.: Texas Adopts First-Party Bad Faith*, 39 Baylor L.Rev. 835, 853–854 (1987). Limitations on a first party claim appropriately begins to run at denial, not the date a separate suit to determine coverage under the contract is resolved.

Expiration of Limitations

[7] Whether Murray's claim is barred under the facts of this case depends on ***830** whether she interrupted the running of limitations. Murray filed her original petition on March 27, 1986, well within the two-year limitations period. Mere filing of suit, however, will not interrupt the running of limitations unless due diligence is exercised in the issuance and service of citation. *Rigo Mfg. Co. v. Thomas*, 458 S.W.2d 180, 182 (Tex.1970). Citation was first issued and returned unserved in September 1986. Citation was issued a second time and successfully served on January 21, 1987, outside the limitations period. The court of appeals held that, as a matter of law, Murray did not exercise due diligence. We disagree with the court of appeals.

[8] When a defendant (SJA) has affirmatively pleaded the defense of limitations, and when failure to timely serve the defendant has been shown, the burden shifts to the plaintiff (Murray) to explain the delay. *See Liles v. Phillips*, 677 S.W.2d 802, 809 (Tex.App.—Fort Worth 1984, writ ref'd n.r.e.); *Williams v. Houston—Citizens Bank & Trust Co.*, 531 S.W.2d 434, 436 (Tex.Civ.App.—Houston [14th Dist.] 1975, writ ref'd n.r.e.).

[9] It is reasonable to assume that Murray, relying on *Arnold*, concluded that her cause of action accrued on the date SJA admitted its denial was unwarranted (March 15, 1985); thus, she could have believed that even if there was no diligence and limitations was not interrupted until the date of service (January 21, 1987), her claim would be timely. In preparing her response to the motion for summary judgment, Murray could have relied on this interpretation of *Arnold* and thus would not have felt compelled to argue diligence in the service of process.

Our decision today, however, modifies *Arnold* so that limitations on Murray's good faith claim commenced on the day SJA denied coverage. Her claim is therefore barred unless she exercised diligence in serving citation. Since we have modified the law, we will remand this case in the interest of justice to the trial court. Tex.R.App.P. 180; *see also L.M.B. Corp. v. Gurecky*, 501 S.W.2d 300, 303 (Tex.1973). This will give Murray an opportunity to show diligence in serving citation and if successful, to assert her good faith claim. *See Texas Real Estate Comm'n v. Nagle*, 767 S.W.2d 691, 695 (Tex.1989).

For the reasons stated, the judgment of the court of appeals is reversed and this cause is remanded to the trial court.

SPEARS, J., files a dissenting opinion, joined by RAY, MAUZY and DOGGETT, JJ.

SPEARS, Justice, dissenting.

I respectfully dissent. In *Arnold v. National County Mutual Fire Ins. Co.*, 725 S.W.2d 165 (Tex.1987), this court considered the same question as is presented here and held “that the statute of limitations does not begin to run on a good faith and fair dealing claim until the underlying insurance contract claims are finally resolved.” 725 S.W.2d at 168. This is binding precedent and I would continue to adhere to it.

In reaching our decision in *Arnold*, we analogized to *Linkenhoger v. American Fidelity & Casualty Co.*, 152 Tex. 534, 260 S.W.2d 884 (1953), where we held in a *Stowers* suit that limitations did not begin to run until the underlying judgment was final. The court now views this as an “incorrect” analogy and implies that the court simply made a mistake by failing to recognize the difference between a third-party claim such as *Linkenhoger* and a first-party claim such as was involved in *Arnold*. However, it is clear that the court did not simply make a mistake; we expressly recognized that the running of limitations in *Arnold* should be the same “as in *Stowers* cases.” 725 S.W.2d at 168. Thus, *Arnold* ruled on the exact question now before the court and rejected the very argument that the court now chooses to adopt.

The court not only overrules *Arnold* but also overrules implicitly the even more recent decision of *Street v. Second Court of Appeals*, 756 S.W.2d 299 (Tex.1988). In *Street*, we reconsidered *Linkenhoger* to hold that, when a trial court renders final ***831** judgment on a third-party's contract claim, the insured may immediately bring a *Stowers* action even though the insured's appeal from the excess judgment is still pending. Nevertheless, *Street* reaffirmed that part of *Linkenhoger* which held that limitations will not begin to run on the insured's bad faith claim until all appeals have been exhausted and “until the underlying action has been completely resolved.” 756 S.W.2d at 302. Thus, for purposes of limitations, *Street* effectively rejected any rigid application of the injury

based rule of accrual and instead adopted a practical approach similar to the one announced in *Arnold*. An insured *may* bring a *Stowers* action upon the occurrence of the “injury-producing event”—i.e., the final trial court judgment exceeding policy limits—but “an insured who so wishes may still wait” and limitations will *not* begin to run on the action until the underlying claim is *completely* resolved. *Id.*

Rather than continuing with this practical approach for bad-faith causes of action, the court blindly adheres to a strict injury based rule of accrual as though there were no exceptions. In doing so, it cites *Robinson v. Weaver*, 550 S.W.2d 18 (Tex.1977) for the proposition that a cause of action accrues when facts that authorize a claimant to seek a judicial remedy first come into existence. While this is certainly a fair statement of the *general* rule, there are exceptions, and *Robinson* itself discussed one such exception—the discovery rule. 550 S.W.2d at 20. Under this exception, a cause of action does not accrue at the time an injury comes into existence, but rather at the time the claimant discovers or, in the exercise of reasonable diligence, should have discovered the facts giving rise to the cause of action. See *Willis v. Maverick*, 760 S.W.2d 642 (Tex.1988); *Gaddis v. Smith*, 417 S.W.2d 577 (Tex.1967). Fraudulent concealment gives rise to another such practical exception to the injury based rule of accrual. See *Borderlon v. Peck*, 661 S.W.2d 907 (Tex.1983); see also *Christian v. American Home Assurance Co.*, 577 P.2d 899 (Okla.1977) (Based on allegation that insurer had fraudulently concealed its bad faith, court allowed plaintiff to try bad faith claim after contract claim was already litigated.). Thus, the injury based rule of accrual is a *general* rule, not an absolute. Moreover, the *Robinson* decision itself was limited to medical misdiagnosis cases. In a subsequent medical malpractice case, we expressly recognized that *Robinson* was so limited and refused to strictly adhere to the injury based rule of accrual. *Nelson v. Krusen*, 678 S.W.2d 918, 923 (Tex.1984). Thus, *Robinson* is not controlling even in all medical cases much less in other areas such as insurance bad faith litigation.

In explaining our holding in *Street*, we analogized to *Arnold* and reasoned that “[n]o valid public policy is served by forcing an insured to bring an action which may ultimately prove unnecessary.” 756 S.W.2d at 302. We implicitly recognized that it is unjust to require an insured to pursue a *Stowers* action before he can determine whether there is any basis or necessity for doing so.

Similarly, in first-party bad faith claims, it is unjust to require the insured to pursue a cause of action before he can determine whether there is any basis or necessity for doing so.

Limitations should begin to run when the insured's underlying contract claim is finally resolved rather than when the claim is initially wrongfully denied. Both *Arnold* and *Street* mandate this result, and it is a result that comports with common sense. It is not the mere denial of a claim that gives rise to a bad faith cause of action; it must be a denial without a reasonable basis. *Arnold*, 725 S.W.2d at 167. Often, the evidence suggestive of bad faith settlement practices will not surface until discovery is complete or trial has begun. See, e.g., *Chavers v. National Security Fire & Casualty Co.*, 456 So.2d 293 (Ala.1984) (During trial of contract claim, plaintiff learned that sole basis for insurer's denial of claim was uncorroborated hearsay statement of a convicted felon.); *Christian v. American Home Assurance Co.*, 577 P.2d 899 (Okla.1977) (Plaintiff did not discover insurer's bad faith until contract claim was submitted to jury.). By setting the denial date as the date a cause of action accrues, *832 the court requires insureds to file lawsuits before they may even know of the facts giving rise to a cause of action.

By forcing the insured to bring his bad faith action at the time a claim is denied, the court presents the insured with a dilemma. On the one hand, if an insured does not bring his bad faith claim within two years of the date of denial, he will face a limitations bar to his claim regardless of whether he had any real basis for ascertaining bad faith within that time period. On the other hand, if an insured brings the bad faith claim immediately in order to avoid the limitations bar, he has in effect been forced to bring a claim that may later prove unnecessary. This result conflicts with our decision in *Street* and will result in a proliferation of premature bad faith lawsuits as insureds attempt to avoid the possibility of a limitations bar. It will impede the expeditious settlement of contract claims because plaintiffs will now automatically assert a bad faith claim regardless of whether there are any facts to indicate that the denial was without some reasonable basis.

This is a bad result even when it is clear on the date of denial that the insurer acted in bad faith. Both the insured and the insurer will face a protracted pretrial discovery dispute on the bad faith claim. Courts may allow broader discovery when the bad faith claim is joined with the

contract claim. *See, e.g., Lunsford v. Morris*, 746 S.W.2d 471 (Tex.1988) (with a tort claim that seeks punitive damages, court may allow discovery of defendant's net worth). This discovery phase will delay the resolution of the insured's underlying contract claim, and this delay will then bring about the very economic hardship that the insured sought to avoid by purchase of the policy.

On what powerfully persuasive authority does the majority rely as justification for its decision to reject the rule of *stare decisis* and to break with prior precedent? The only bad faith cases it cites are three cases from the Alabama Supreme Court and one case from a California appeals court. In addition, the majority cites to the book *Bad Faith Liability* in which author Stephen Ashley stated that “one would expect” an insured's bad-faith cause of action to accrue “the moment an insurer should pay a claim but fails to do so.” S. Ashley, *Bad Faith Liability* § 4.05 at 148 (1987). However, Ashley made clear that this statement represented nothing more than his own expectation because in the immediately preceding sentence he said: “There are *no* cases clearly raising the issue of when a cause of action for bad faith accrues in a first-party case.” *Id.* at 147–148. Perhaps Stephen Ashley would have expected the result the majority now reaches but it is not what this court held in *Arnold*. Surely this court's own precedent should carry more weight than one commentator's “expectation.”

As for the cases in other jurisdictions, they are either distinguishable or inapposite. *Frazier v. Metropolitan Life Ins. Co.*, 169 Cal.App.3d 90, 214 Cal.Rptr. 883 (1985) involved the construction of a time limitations provision contained *within an insurance policy*; *Frazier* did not address the running of limitations on a common-law bad faith cause of action. The Alabama cases merely hold that a bad faith cause of action accrues when the insured gains knowledge of facts which would reasonably lead him to

discover the bad faith, and that this is a question of fact in each case. *Farmers and Merchants Bank v. Home Ins. Co.*, 514 So.2d 825, 831–832 (Ala.1987); *Safeco Ins. Co. of America v. Sims*, 435 So.2d 1219, 1222 (Ala.1983); *see also Alfa Mut. Ins. Co. v. Smith*, 540 So.2d 691 (Ala.1988). As already noted, an insured often will not gain this knowledge until long after the claim has been denied.

The rule of *stare decisis* is not inviolable. *See, e.g., Sanchez v. Schindler*, 651 S.W.2d 249 (Tex.1983). However, when confronted with nothing more than the “expectation” of one commentator and a few inapposite decisions from other jurisdictions, I would choose to adhere to *stare decisis* and to follow this court's precedent of only three years past. *See Hill v. Mobile Auto Trim, Inc.*, 725 S.W.2d 168, 175 (Tex.1987) (Gonzalez, J., dissenting) (criticizing court for refusal to follow precedent); *see also Magro v. Ragsdale Bros., Inc.*, 721 S.W.2d 832, 838 (Tex.1986) (Gonzalez, J., dissenting).

In accordance with *Arnold*, I would hold that Murray's bad faith cause of action did not accrue until the underlying contract claim was “finally resolved.” Murray's contract claim was not “finally resolved” until San Jacinto Agency acknowledged coverage on March 15, 1985. Therefore, Murray was still within the two-year limitations period on January 21, 1987 when service of citation was made on San Jacinto Agency. Murray's claim is not barred by limitations. I would reverse the judgment of the court of appeals and remand the cause to the trial court for trial on the merits of Murray's cause of action.

RAY, MAUZY and DOGETT, JJ., join in this dissent.

All Citations

800 S.W.2d 826, 58 USLW 2645

Footnotes

- 1 “Good faith” is occasionally used in this opinion to encompass the tort duty of good faith and fair dealing.
- 2 When, unlike this case, there is no outright denial of a claim, the exact date of accrual of a cause of action becomes more difficult to ascertain and should be a question of fact to be determined on a case-by-case basis. *See Safeco Ins. Co. of America v. Sims*, 435 So.2d 1219, 1222 (Ala.1983). Clearly, though, if an insurance company strings an insured along without denying or paying a claim, limitations will be tolled.
- 3 *G.A. Stowers Furniture Co. v. American Indemnity Co.*, 15 S.W.2d 544 (Tex.Comm'n App.1929, holding approved) (action by an insured against automobile indemnity insurer based on failure to accept reasonable settlement offer when defending action against insured).

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307 S.W.3d 292

Supreme Court of Texas.

Tangie WALTERS, Petitioner,

v.

CLEVELAND REGIONAL MEDICAL
CENTER, Shirley Kiefer, and Keith
Spooner, M.D., Respondents.

No. 08–0169.

Argued Sept. 9, 2009.

Decided March 12, 2010.

Synopsis

Background: Patient brought foreign-object medical malpractice action against hospital, surgeon, and surgical assistant, alleging that surgical sponge was left in patient after tubal ligation immediately following the birth of patient's child. The 125th Judicial District Court, Harris County, [John A. Coselli, J.](#), granted summary judgment to defendants. Patient appealed. The Houston Court of Appeals, First District, [264 S.W.3d 154](#), affirmed. Review was granted.

[Holding:] The Supreme Court, [Willett, J.](#), held that genuine issue of material fact as to whether patient discovered the surgical sponge and brought her suit within a reasonable time precluded a determination on summary judgment that Open Courts provision of state Constitution did not apply as an exception to two-year statute of limitations for medical malpractice action.

Reversed and remanded.

West Headnotes (5)

[1] Judgment

🔑 Bar of statute of limitations

Genuine issue of material fact as to whether patient discovered the surgical sponge and

brought her suit within a reasonable time precluded a determination on summary judgment that Open Courts provision of state Constitution did not apply as an exception to two-year statute of limitations for medical malpractice action, in patient's foreign-object medical malpractice action against hospital, surgeon, and surgical assistant, alleging that surgical sponge was left in patient after tubal ligation immediately following the birth of patient's child. [Vernon's Ann.Texas Const. Art. 1, § 13](#); [V.T.C.A., Civil Practice & Remedies Code § 74.251\(a\)](#).

8 Cases that cite this headnote

[2] Constitutional Law

🔑 Time for proceedings

Unlike the discovery rule, which defers accrual of a cause of action for limitations purposes until the plaintiff knew or, exercising reasonable diligence, should have known of the facts giving rise to the claim, the Open Courts provision of the state Constitution merely gives litigants a reasonable time to discover their injuries and file suit, and because the open courts guarantee does not toll limitations, courts must determine what constitutes a reasonable time for a claimant to discover her injuries and file suit. [Vernon's Ann.Texas Const. Art. 1, § 13](#).

5 Cases that cite this headnote

[3] Judgment

🔑 Particular defenses

In the summary judgment context, the burden is on the plaintiff asserting an exception to the statute of limitations, under the Open Courts provision of the state Constitution, to raise a fact issue demonstrating that she did not have a reasonable opportunity to discover the alleged wrong and bring suit before the limitations period expired. [Vernon's Ann.Texas Const. Art. 1, § 13](#).

9 Cases that cite this headnote

[4] Appeal and Error **Judgment**

The appellate court must review the summary judgment record in the light most favorable to the nonmovant, indulging reasonable inferences and resolving doubts in nonmovant's favor.

[6 Cases that cite this headnote](#)

[5] Constitutional Law **Time for proceedings**

A plaintiff may not obtain relief from a statute of limitations, under the Open Courts provision of the state Constitution, if he does not use due diligence and sue within a reasonable time after learning about the alleged wrong. [Vernon's Ann.Texas Const. Art. 1, § 13](#).

[3 Cases that cite this headnote](#)

Attorneys and Law Firms

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Opinion

Justice [WILLETT](#) delivered the opinion of the Court.

[1] This is one of two “[surgical sponge](#)” cases decided today regarding the time limits placed on medical-malpractice suits.¹ The issue here: did Tangie Walters raise a fact issue as to whether she could avail herself of the Open Courts provision² as ***294** an exception to the two-year statute of limitations?³ We answer the same way we did twenty-five years ago with regard

to the claimant in [Neagle v. Nelson](#): yes.⁴ The Texas Constitution grants foreign-object claimants a reasonable opportunity to discover their injuries and file suit,⁵ even if the two-year limitations period has run (though not, as in today's companion case,⁶ if the ten-year *repose* period has run). And here, Walters has raised a fact issue as to whether the Open Courts provision applies.

Sponge cases constitute a unique class of malpractice claims, thus meriting unique Open Courts treatment: (1) such injuries are notoriously hard to discover; (2) the existence of wrongdoing (and the identity of the wrongdoer) are usually undisputed; and (3) an absolute two-year cutoff would render superfluous the Legislature's ten-year statute of repose.

Today's result is consistent not only with [Neagle](#), which held that the Open Courts provision barred application of a two-year statute of limitations in a sponge case, but also with the later-enacted repose statute, which declares ten years as the last-chance deadline for *all* malpractice cases, including, we hold today, foreign-object cases.⁷ This outer-boundary deadline would be surplusage if the limitations statute were itself a no-exceptions cutoff.

Accordingly, we reverse the court of appeals' judgment and return this case to the trial court for further proceedings.

I. Background

In December 1995, Dr. Keith Spooner performed a [tubal ligation](#) on Tangie Walters immediately following the birth of a child. Dr. Spooner performed the procedure at Cleveland Regional Medical Center with the help of Shirley Kiefer, a surgical assistant. The official count of surgical items indicated that all sponges were accounted for, but a sponge of the type used in the procedure was found inside Walters some nine-and-a-half years later.

Following the surgery, Walters experienced abdominal cramping. A nurse told her the pain was from childbirth and having gas pumped into her abdomen. At her follow-up appointments with Dr. Spooner a few weeks after surgery, he told her the cramping she continued to experience resulted from uterine contractions that accompany nursing. Walters experienced intermittent

pain thereafter, which she attributed to a preexisting health problem that had troubled her periodically. Her next doctor's visit, prompted by abdominal pain, came in March 1998, approximately twenty-seven months after her surgery. From that point on, Walters visited family physicians for a litany of ailments: severe fatigue, insomnia, headaches, infections, uterine problems, bladder problems, urination issues, cysts, and chronic and increasingly severe pain in the area where the sponge was ultimately discovered. For those and other problems, Walters received a host of different *295 diagnoses: *cystitis*, an *aphthous ulcer*, boils, *pharyngitis*, fatigue, *stomatitis*, *cholecystitis*, and so on. Her doctors ordered numerous tests, including an x-ray, urine tests, and blood tests. The record indicates that while Walters endured intermittent pain during the years following her operation, especially during menstruation, the pain became progressively worse until the sponge was discovered.

In April 2005, Walters visited Dr. Mary Garnepudi, a gynecologist. Garnepudi discovered an unusual lump while examining Walters. Garnepudi referred Walters to a surgeon, who, with the help of a second surgeon, operated on Walters and found the sponge. It was lodged against Walters's small intestine and encapsulated in fibrous tissue, suggesting the sponge had been there for years.

In August 2005, less than two months after the sponge was discovered, Walters sued Cleveland Regional Medical Center, Dr. Spooner, and Shirley Kiefer. Walters alleges the sponge was responsible for the near-decade of medical problems she experienced since the 1995 tubal ligation. The three defendants moved for summary judgment, contending Walters's claim was barred by *section 74.251(a) of the Civil Practice and Remedies Code*, the two-year statute of limitations for healthcare-liability claims. The trial court agreed and granted summary judgment. The court of appeals affirmed, holding that Walters had not established that the limitations statute violated Open Courts.⁸

II. Analysis

[2] [3] Under the Open Courts provision, “[a]ll courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law.”⁹ In *Yancy v. United Surgical*

Partners International, Inc., we elaborated on what a claimant must show to establish an Open Courts violation:

Unlike the discovery rule, which defers accrual of a cause of action until the plaintiff knew or, exercising reasonable diligence, should have known of the facts giving rise to the claim, the open courts provision merely gives litigants a reasonable time to discover their injuries and file suit. Because the open courts guarantee does not toll limitations, courts must determine what constitutes a reasonable time for a claimant to discover her injuries and file suit.¹⁰

In the summary judgment context, the burden is on the plaintiff asserting an Open Courts exception to the statute of limitations to raise a fact issue demonstrating that she did not have a reasonable opportunity to discover the alleged wrong and bring suit before the limitations period expired.¹¹

Following *Neagle*, our 1985 sponge case that upheld an Open Courts challenge to the two-year limitations period, we hold that Walters has at least raised a fact issue as to whether she discovered the sponge and brought her suit within a reasonable time.

A. *Neagle v. Nelson*

Neagle addressed errant sponges and the Open Courts guarantee, and nothing dispositive distinguishes *Neagle* from today's case. The two cases share the same procedural posture: the claimant lost on summary judgment at the trial court, lost *296 again at the court of appeals, and appealed here. They also involve substantially the same statute of limitations.¹² There are other similarities: (1) the sponge was discovered after the limitations period had expired; and (2) only after someone found a lump and performed exploratory surgery.¹³

B. Walters Raised a Fact Issue

The court of appeals focused on two facts, namely that (1) Walters experienced pain and various ailments immediately after her surgery and for years thereafter, well before the sponge was discovered; and (2) she did not see a

doctor for more than two years after her surgery,¹⁴ which may have also been true of the claimant in *Neagle*.¹⁵

[4] [5] We must review the summary judgment record in the light most favorable to Walters, indulging reasonable inferences and resolving doubts in her favor.¹⁶ Walters raised a genuine issue of material fact as to whether she discovered the sponge and brought her suit within a reasonable time. Walters did not rebuff providers' attempts to discover her injury (for example, by rejecting efforts to diagnose the cause of her pain and various ailments) nor did she unreasonably delay filing suit once the sponge was discovered.¹⁷ There is record evidence that Walters experienced pain in the years following her surgery, but this evidence does not necessarily show that Walters should have discovered the sponge within the limitations period. In this case, the pain may have been related to a prior condition, and regardless, Walters sought medical help as the pain got worse. Moreover, the record indicates that (1) a nurse and Dr. Spooner told Walters her abdominal pain was not indicative of a problem with her surgery, but was instead caused by gas used to inflate her abdomen during surgery and later by nursing, and (2) years later, and in the course of her worsening condition, at least one other physician was repeatedly apprised of her complaints of abdominal cramping and related symptoms and did not diagnose a foreign object or recommend further testing or referral to a specialist. On Walters's own initiative she eventually went to a gynecologist, who referred her to the surgeons who discovered the sponge. As we have noted in another sponge case:

All of the procedures for placing objects in and removing them from the body are in the control of the surgeon. It is a virtual certainty that the patient has no knowledge on the day following the surgery—nor for a long time thereafter—that a foreign object was left in the incision.¹⁸

*297 C. The Singularity of Sponge Cases

Sponge cases stand alone in the healthcare-liability context. First, they are rare. Second, surgical instruments do not remain inside patients absent negligence. Third, errant items like sponges are exceedingly difficult to discover.¹⁹ In three of our sponge cases—*Neagle*,

Rankin, and this case the sponge was only discovered after a lump was noticed on the—claimant's body.²⁰ As a result, foreign-object cases often invite *res ipsa loquitur* treatment, and some legislatures explicitly exempt such cases from statutes of limitations and repose.²¹ Sometimes, these cases are the *lone* exception, while a few states also give special treatment to claims involving fraudulent concealment²² or minors²³ (as in Texas).²⁴ The Texas limitations statute does not explicitly save sponge cases, but, as explained below, the Texas repose statute implicitly urges us to.

D. Giving Meaning to the Statute of Repose

By its terms, the repose statute is a final-is-final deadline for medical-malpractice claims: “This subsection is intended as a statute of repose so that all claims must be brought within 10 years or they *298 are time barred.”²⁵ Texas, unlike some other states,²⁶ does not expressly exempt foreign-body claims from its limitations statute; perhaps lawmakers thought it unnecessary given our holding in *Neagle*. Regardless, Texas does have a catch-all repose statute that contemplates it is at least possible for certain claims to be brought up to eight years after limitations expires.

In 2003, eighteen years after *Neagle*, the Legislature took a fresh look at the healthcare-liability landscape and, among other things, revisited time limits in malpractice suits.²⁷ Although lawmakers did not address *Neagle*, they added a new ten-year repose period, and did so even though the limitations period itself seems absolute: “Notwithstanding any other law,” actions must be filed within two years.²⁸

The repose statute, however, indicates that the limitations statute—notwithstanding its “[n]otwithstanding any other law” preamble—is not totally exception-free. The Legislature in 2003 was attempting a top-to-bottom overhaul of the State's tort system²⁹ against a legal backdrop that included *Neagle*, where we held two years can be too short for sponge cases. The repose statute appears to be a legislative recognition that while two years may be constitutionally too short for some claims, ten years may be constitutionally enough for all claims.

Put simply, a ten-year repose period has no purpose unless the two-year limitations period has exceptions, as for *Neagle*-like claims. There is no need for repose *unless* there exists a narrow class of claims that reach beyond the two-year limitations period.

III. Conclusion

Sponge cases are *sui generis*. They rarely occur, they never occur absent negligence, and when they do occur, laypeople are hard-pressed to discover the wrong. Our cases recognize this, as do many legislatures, which exempt foreign-object claims from limitations and repose periods. Our own Legislature imposed a reasonable ten-year repose period on *all* malpractice claims—with no carve-out for sponge cases—a statute we uphold today in

Rankin against an Open Courts challenge. The Legislature did nothing to alter courts' treatment of late-filed sponge cases following *Neagle*, where we allowed an Open Courts challenge to limitations. Treating the two-year limitations period as absolute in all circumstances would render the new statute of repose meaningless. *299 And on this record, we are unwilling to conclude that Walters failed to raise a fact issue as to whether she discovered the sponge and brought suit within a reasonable time.

Accordingly, we reverse the court of appeals' judgment and return this case to the trial court for further proceedings.

All Citations

307 S.W.3d 292, 53 Tex. Sup. Ct. J. 450

Footnotes

- 1 The companion case, an Open Courts challenge to the ten-year statute of repose, is *Methodist Healthcare Sys. of San Antonio, Ltd. v. Rankin*, 307 S.W.3d 283 (Tex.2010).
- 2 TEX. CONST. art. I, § 13.
- 3 TEX. CIV. PRAC. & REM.CODE § 74.251(a) (requiring medical-malpractice claims to be brought within two years of the date of the tort).
- 4 685 S.W.2d 11, 12 (Tex.1985).
- 5 *Id.*; see also *Yancy v. United Surgical Partners Int'l, Inc.*, 236 S.W.3d 778, 785 (Tex.2007); *Shah v. Moss*, 67 S.W.3d 836, 842 (Tex.2001); *Morrison v. Chan*, 699 S.W.2d 205, 207 (Tex.1985) (quoting *Nelson v. Krusen*, 678 S.W.2d 918, 923 (Tex.1984)).
- 6 *Rankin*, 307 S.W.3d at 283.
- 7 *Id.*; TEX. CIV. PRAC. & REM.CODE § 74.251(b) ("A claimant must bring a health care liability claim not later than 10 years after the date of the act or omission that gives rise to the claim.").
- 8 264 S.W.3d 154, 159.
- 9 TEX. CONST. art. I, § 13.
- 10 236 S.W.3d at 784 (internal citations omitted).
- 11 *Shah*, 67 S.W.3d at 846–47.
- 12 See *Neagle*, 685 S.W.2d at 12 (quoting statute of limitations).
- 13 *Id.* ("Discovery of the sponge occurred ... more than two years after the appendectomy, when, after feeling a mass in his abdomen, [the claimant] submitted to exploratory surgery.").
- 14 264 S.W.3d at 156, 159.
- 15 See *Neagle*, 685 S.W.2d at 12.
- 16 *Goodyear Tire & Rubber Co. v. Mayes*, 236 S.W.3d 754, 756 (Tex.2007).
- 17 "A plaintiff may not obtain relief under the open courts provision if he does not use due diligence and sue within a reasonable time after learning about the alleged wrong." *Yancy*, 236 S.W.3d at 785 (emphasis omitted) (quoting *Shah*, 67 S.W.3d at 847).
- 18 *Gaddis v. Smith*, 417 S.W.2d 577, 580 (Tex.1967), superseded by statute, Professional Liability Insurance for Physicians, Podiatrists, and Hospitals Act of 1975, 64th Leg., R.S., ch. 330, § 1, 1975 Tex. Gen. Laws 864, 865, as stated in *Morrison v. Chan*, 699 S.W.2d 205, 208 (Tex.1985).
- 19 See *id.*

- 20 We have decided two other sponge cases. In *Gaddis*, where we created the discovery rule, a sponge was discovered after exploratory surgery for what was believed to be a tumor but turned out to be a sponge (perhaps because a lump was perceived; it is unclear). *Id.* at 578. In *Bradford v. Sullivan*, 683 S.W.2d 697 (Tex.1985) (per curiam), we reversed a summary judgment in a sponge case that had been granted on limitations grounds, but we gave few details about the discovery of the sponge.
- 21 See, e.g., CAL.CIV.PROC.CODE § 340.5 (West 2010) (excepting foreign-object claims from the repose period); COLO.REV.STAT. § 13–80–102.5(3)(b) (2009) (excepting foreign-object claims from the repose period and giving claimant two years after discovery to file suit); MASS. GEN. LAWS ANN. ch. 260, § 4 (West 2010) (excepting foreign-object claims from a seven-year statute of repose); MISS.CODE ANN. § 15–1–36(2)(a) (2009) (excepting foreign-object claims from statute of limitations and also from seven-year repose limit); OHIO REV.CODE ANN. § 2305.113(D) (2) (LexisNexis 2010) (excepting foreign-object claims from repose period); S.C.CODE ANN. § 15–3–545(B) (2009) (excepting foreign-object claims from repose limit); TENN.CODE ANN. § 29–26–116(a)(4) (2009) (excepting foreign-object claims from repose period); VT. STAT. ANN.. tit. 12, § 521 (2009) (excepting foreign-object claims from repose period); WASH. REV.CODE ANN.. § 4.16.350 (West 2010) (excepting foreign-object cases from the statute of limitations and repose). The Texas Legislature has not expressly addressed sponge cases, but *Neagle* was issued before the current statute of repose was enacted.
- 22 See, e.g., CAL.CIV.PROC.CODE § 340.5 (West 2010) (excepting from the healthcare-liability repose period claims involving fraud, intentional concealment, and presence of a foreign body); COLO.REV.STAT. § 13–80–102.5(3)(a) (2009) (excepting actions that were knowingly concealed from the repose period); MISS.CODE ANN. § 15–1–36(2)(a)–(b) (2009) (excepting only claims where there was fraudulent concealment and foreign-object claims); TENN.CODE ANN. 29–26–116(a)(3)–(4) (2009) (excepting only claims where there was fraudulent concealment and foreign-object claims); VT. STAT. ANN.. tit. 12, § 521 (2009) (excepting only claims where there was fraudulent concealment and foreign-object claims); WASH. REV.CODE ANN.. § 4.16.350 (West 2010) (excepting only claims involving fraud, intentional concealment, and presence of a foreign body); WIS. STAT. ANN.. § 893.55(1m)(2)–(3) (West 2009) (excepting only claims where there was fraudulent concealment and foreign-object claims).
- 23 See, e.g., 40 PA. STAT. ANN.. § 1303.513(b)–(c) (West 2009) (excepting only claims by minors and foreign-object claims).
- 24 See TEX. CIV. PRAC. & REM.CODE § 74.251(a) (giving minors under the age of twelve years old until their fourteenth birthday to file claim).
- 25 TEX. CIV. PRAC. & REM.CODE § 74.251(b).
- 26 See, e.g., *supra* note 21.
- 27 See *Rankin*, 307 S.W.3d at 286 (discussing the addition of a repose limit in 2003).
- 28 See TEX. CIV. PRAC. & REM.CODE § 74.251. It is undeniable that the statute of limitations contains no discovery rule. We fashioned such a rule in a 1967 sponge case to suspend an earlier limitations provision. *Gaddis v. Smith*, 417 S.W.2d 577, 580 (Tex.1967). The Legislature in 1975 abrogated the court-fashioned discovery rule. See *Sax v. Votteler*, 648 S.W.2d 661, 663 n. 1 (Tex.1983) (discussing the Professional Liability Insurance for Physicians, Podiatrists, and Hospitals Act of 1975, 64th Leg., R.S., ch. 330, § 1, 1975 Tex. Gen. Laws 864, 865, which removed the “accrual” language that had led the Court to find a discovery rule embedded within the statute). Accordingly, in a 1985 case, this Court acknowledged that the Legislature had abrogated the discovery rule. *Morrison v. Chan*, 699 S.W.2d 205, 208 (“[In *Gaddis*, we] held that a cause of action does not accrue until the plaintiff knows, or has reason to know, of his injury. In contrast, article 5.82, section 4 contains no accrual language and thus imposes an absolute two-year statute of limitations regardless of when the injury was discovered.”) (emphasis omitted) (quoting *Nelson v. Krusen*, 678 S.W.2d 918, 920 (Tex.1984)).
- 29 See *Rankin*, 307 S.W.3d at 287.

2008 WL 4308406

Only the Westlaw citation is currently available.

SEE TX R RAP RULE 47.2 FOR
DESIGNATION AND SIGNING OF OPINIONS.

MEMORANDUM OPINION

Court of Appeals of Texas,
Houston (14th Dist.).

Sharon HECKEL, Appellant

v.

ALLEN SAMUELS CHEVROLET and
General Motors Corporation, Appellees.

No. 14-07-00254-CV.

|
Aug. 28, 2008.

West KeySummary

1 [Products Liability](#)

 [Seat Belts and Occupant Restraint Systems](#)

[Products Liability](#)

 [Time to Sue and Limitations](#)

An automobile owner's products liability claim against an automobile manufacturer, based on injuries sustained when her airbag deployed, was governed by the two-year limitations period applicable to suits for personal injury, and not the 15-year statute of repose applicable to products liability actions. The statute of repose still required that the suit be brought within two years of the owner's injury that formed the basis for her suit against the manufacturer. [TEX. CIV. PRAC. & REM.CODE § 16.003](#).

[Cases that cite this headnote](#)

On Appeal from the 333rd District Court, Harris County, Texas, Trial Court Cause No.2005-64644.

Attorneys and Law Firms

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[Dale Marett Holiday](#), [Jim Mitchell Smith](#), for Allen Samuels Chevrolet.

[J. Karl Viehman](#), [Suzanne Hero Swaner](#), [Holly Joy Draper](#), for General Motors Corporation.

Panel consists of Justices [YATES](#), [GUZMAN](#), and [BROWN](#).

MEMORANDUM OPINION

[EVA M. GUZMAN](#), Justice.

*1 In this appeal from a final summary judgment, appellant asserts that the statute of limitations does not bar her product-liability claim against an automobile manufacturer. She further contends that her contract and warranty claims against an automobile dealership are not subject to the two-year statute of limitations. Finally, she argues that she presented more than a scintilla of evidence regarding her contract and warranty claims. Because we conclude that summary judgment was appropriate on all her claims against the manufacturer and her contract claims against the dealership, we affirm that portion of the judgment. Because the dealership failed to conclusively establish that appellant's warranty claims were time-barred, however, we reverse that portion of the judgment and remand the case for further proceedings.

I. FACTUAL AND PROCEDURAL BACKGROUND

In 2000, the National Highway Transportation Safety Administration ("NHTSA") issued a recall bulletin to General Motors Corp. ("GM") for all 1995 Oldsmobile Cutlass Supremes. This bulletin reported that corrosion of the airbag deflator's internal wiring for the Cutlass Supreme could cause the inadvertent deployment of the driver's side airbag when the vehicle was started, while it was parked or idling, or while it was in operation. The recall bulletin directed GM to provide notice of the recall to all customers in July 2000. Sharon Heckel purchased a 1995 Oldsmobile Cutlass Supreme in early 2001. According to Heckel, she never received notice of the recall, and the airbag system in her car was never repaired.

In February 2003, Heckel took her Cutlass Supreme to Allen Samuels Chevrolet ("Allen Samuels") because

it was “running rough .” Heckel requested that Allen Samuels perform a tune-up, an oil change, and a lube job, and provide estimates for some minor repairs. She did not inquire about any warranty or recall work, but did request that Allen Samuels determine why her vehicle was “running rough.” Allen Samuels neither repaired the airbag system nor warned Heckel that a recall bulletin had been issued for the vehicle. Heckel paid for the repairs and took her vehicle. According to Heckel, she started her Cutlass Supreme in September 2003 and the airbag deployed, striking her in the head and causing her to suffer a variety of injuries.

On October 12, 2005, Heckel sued Allen Samuels for breach of contract. After Allen Samuels filed a third-party petition against GM, Heckel amended her petition to assert negligence, breach-of-contract, and warranties claims against Allen Samuels and a product-liability claim against GM. Both GM and Allen Samuels asserted the statute of limitations as affirmative defenses in their answers.

GM filed a motion for traditional summary judgment on the ground that Heckel's suit was time-barred because she filed it more than two years after her injury. Allen Samuels filed a motion for traditional and no-evidence summary judgment, asserting the following five grounds: (1) Heckel's personal-injury and Deceptive Trade Practices Act warranties claims are barred by the statute of limitations; (2) implied warranties for services are not actionable under the Uniform Commercial Code; (3) Heckel is not entitled to personal-injury damages based upon a breach-of-contract claim; (4) there is no evidence of an express warranty; and (5) there is no evidence of breach of contract. The trial court granted both GM and Allen Samuels's motions and rendered final summary judgment in February 2007.¹ This appeal timely ensued.

II. ISSUES PRESENTED

*2 In her first issue, Heckel asserts that the trial court erred in rendering summary judgment in favor of GM because the 15-year statute of repose governs limitations for product-liability claims against a manufacturer or seller. In her second and third issues, Heckel contends the trial court erred in rendering summary judgment in favor of Allen Samuels because her breach-of-contract and warranties claims were timely filed within the four-

year statute of limitations for bringing such claims,² and she produced more than a scintilla of evidence to support these claims.

III. ANALYSIS

A. Standard of Review

We review summary judgments de novo,³ and where the trial court grants the judgment without specifying the grounds, we will affirm if any of the grounds presented are meritorious. *FM Props. Operating Co. v. City of Austin*, 22 S.W.3d 868, 872-73 (Tex.2000). Here, the appellees moved for summary judgment on both traditional and no-evidence grounds; thus, we apply the familiar standard of review appropriate for each type of motion, taking as true all evidence favorable to the nonmovant, and indulging every reasonable inference and resolving any doubts in the nonmovant's favor. See *Joe v. Two Thirty Nine Joint Venture*, 145 S.W.3d 150, 157 (Tex.2004) (traditional summary judgment); *King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 751 (Tex.2003) (no-evidence summary judgment).

In a motion for traditional summary judgment, the movant has the burden of showing that there is no genuine issue of material fact and it is entitled to judgment as a matter of law. *TEX.R. CIV. P. 166a(c)*; *Am. Tobacco Co. v. Grinnell*, 951 S.W.2d 420, 425 (Tex.1997). To be entitled to traditional summary judgment, a defendant must conclusively negate at least one essential element of each of the plaintiff's causes of action or conclusively establish each element of an affirmative defense. *Sci. Spectrum, Inc. v. Martinez*, 941 S.W.2d 910, 911 (Tex.1997). Evidence is conclusive only if reasonable people could not differ in their conclusions. *City of Keller v. Wilson*, 168 S.W.3d 802, 816 (Tex.2005). Once the defendant establishes its right to summary judgment as a matter of law, the burden shifts to the plaintiff to present evidence raising a genuine issue of material fact. *Dias v. Goodman Mfg. Co., L.P.*, 214 S.W.3d 672, 676 (Tex.App.-Houston [14th Dist.] 2007, pet. denied) (citing *City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 678-79 (Tex.1979)).

In a motion for no-evidence summary-judgment, the movant represents that there is no evidence of one or more essential elements of the claims for which the non-movant bears the burden of proof at trial. *TEX.R. CIV. P. 166a(i)*; *Dias*, 214 S.W.3d at 676. A no-evidence summary

judgment is improper if the respondent brings forth more than a scintilla of probative evidence that raises a genuine issue of material fact. *King Ranch, Inc.*, 118 S.W.3d at 751. “Less than a scintilla of evidence exists when the evidence is ‘so weak as to do no more than create a mere surmise or suspicion’ of a fact.” *Id.* (quoting *Kindred v. Con/Chem, Inc.*, 650 S.W.2d 61, 63 (Tex.1983)). On the other hand, more than a scintilla of evidence exists when reasonable and fair-minded people could differ in their conclusions based on the evidence. *Id.*

B. GM's Summary Judgment

*3 As noted above, GM sought summary judgment on the affirmative defense of limitations. With exceptions not applicable here, “a person must bring suit for ... personal injury ... not later than two years after the day the cause of action accrues.” TEX. CIV. PRAC. & REM.CODE § 16.003(a); *Childs v. Haussecker*, 974 S.W.2d 31, 36 (Tex.1998). Generally, a cause of action accrues when a wrongful act causes an injury. *Childs*, 974 S.W.2d at 36. Here, it is undisputed that Heckel filed suit more than two years after she allegedly was injured. Heckel, however, argues that her product-liability claim is not barred because it is governed by the 15-year statute of repose related to product-liability claims rather than the two-year statute of limitations applicable to personal-injury claims. Compare TEX. CIV. PRAC. & REM.CODE § 16.012(b) (requiring that “a claimant must commence a product-liability action against a manufacturer or seller of a product before the end of 15 years after the date of the sale of the product by the defendant”) with *id.* § 16.003(a) (requiring a personal-injury suit to be filed within two years of accrual of the cause of action).

Heckel misapprehends the distinction between a statute of repose, on the one hand, and a statute of limitations, on the other. See, e.g., *Styers v. Harris County*, 838 S.W.2d 955, 956 (Tex.App.-Houston [14th Dist.] 1992, writ ref'd) (“This is not the first time a party has attempted to use a statute of repose to pursue a cause of action otherwise barred by the statute of limitations.”). A statute of repose is designed to protect certain classes of actors, such as manufacturers, from the threat of claims arising years after a product is manufactured. *Zaragoza v. Chemetron Invs., Inc.*, 122 S.W.3d 341, 346 (Tex.App.-Fort Worth 2003, no pet.). A statute of repose differs from traditional statutes of limitations because it may potentially eliminate a right of action before it even accrues. *Trinity River Auth. v. URS Consultants, Inc.-Tex.*, 889 S.W.2d 259, 263

(Tex.1994). “Statutes of repose do not typically shorten an existing limitations period; instead, they fix an outer limit beyond which no action can be maintained.” *Holubec v. Brandenberger*, 111 S.W.3d 32, 37 (Tex.2003). Just as a statute of repose does not generally shorten any existing limitations period, this particular statute of repose “does not extend the limitations period within which a products liability action involving the product may be commenced under any other law.” TEX. CIV. PRAC. & REM.CODE § 16.012(e).

Thus, sections 16.003 and 16.012 of the Civil Practice and Remedies Code must be considered together. Cf. *Styers*, 838 S.W.2d at 957. If an injury occurs more than 15 years after the product's sale, the suit is barred by section 16.012(b). TEX. CIV. PRAC. & REM.CODE § 16.012(b). If the injury occurs during the 15-year period, a claimant must pursue her claim within that time period. Cf. *Styers*, 838 S.W.2d at 957. But, to fulfill the requirements of section 16.003, the lawsuit also must be filed within two years from the accrual of the cause of action. TEX. CIV. PRAC. & REM.CODE § 16.003(a); *Styers*, 838 S.W.2d at 957. Thus, “[a] plaintiff's injury may be actionable under [a statute of repose], but nevertheless, barred by limitations under [the statute of limitations] if not prosecuted within two years.” *Klafehn v. Fain*, 643 S.W.2d 227, 228 (Tex.App.-Fort Worth 1982, writ ref'd n.r.e.).

*4 Here, Heckel filed her claim against GM more than two years after she suffered the injury that forms the basis of her claim against GM, i.e., more than two years after her claim accrued. See TEX. CIV. PRAC. & REM.CODE § 16.003(a). Accordingly, although Heckel's product-liability claim against GM is not barred by the statute of repose, the applicable two-year statute of limitations nonetheless cuts off this claim. Because GM has established as a matter of law that Heckel's claim against it is barred by the statute of limitations, we overrule her first issue.

C. Allen Samuel's Summary-Judgment Motion

1. Traditional Summary Judgment: Contract Claim

In its traditional motion for summary judgment, Allen Samuels noted that Heckel sought to recover damages for medical expenses, mental anguish, disfigurement, physical impairment, pain and suffering, lost wages, loss of earning capacity, and exemplary damages as a result of its alleged breach of contract. Allen Samuels argued that such

damages are time-barred under the two-year limitations period set forth in [section 16.003\(a\) of the Civil Practice and Remedies Code](#) and are not recoverable as damages for breach of contract, a cause of action for which the statute of limitations is four years.⁴ See, e.g., *Stewart Title Guar. Co. v. Aiello*, 941 S.W.2d 68, 72 (Tex.1997) (mental-anguish damages not normally available for breach of contract); *Jim Walter Homes, Inc. v. Reed*, 711 S.W.2d 617, 618 (Tex.1986) (exemplary damages are not available for breach of contract). Thus, as Heckel summarized the arguments in her response to the motion, “[t]he real issue ... is whether some of the personal[-]injury type of remedies sought by the Plaintiff can be asserted under the four[-]year limitations period” applicable to contract claims.

On appeal, Heckel argues only that “[a]s a result of the failure to either fix the airbag system, or warn of the recall, the airbag prematurely deployed and struck Appellant in her face, neck, arms, and upper torso. That clearly constitutes evidence of injuries.”⁵ This argument does not address “the real issue” presented in the motion for summary judgment. Because Heckel does not contend on appeal that the trial court erred in granting summary judgment on her contract claims on the grounds that personal-injury damages are not recoverable for breach of contract, she has waived error as to that claim. See *Ontiveros v. Flores*, 218 S.W.3d 70, 71 (Tex.2007) (per curiam); *Jacobs v. Satterwhite*, 65 S.W.3d 653, 655-56 (Tex.2001) (per curiam).⁶ We therefore overrule Heckel's second and third issues as they pertain to her claims for breach of contract.

2. Traditional Summary Judgment: Implied Warranty Claim

Regarding Heckel's claim for breach of implied warranty, Allen Samuels moved for summary judgment on the ground that (a) if the cause of action is asserted under the Uniform Commercial Code, then it is without merit because the UCC does not apply to a contract for services, and (b) if the claim is asserted under the Deceptive Trade Practices Act, then it is time-barred. Both at trial and on appeal, however, Heckel has maintained that her warranty claims are based on the common law rather than statute. Because the grounds on which Allen Samuels moved for traditional summary judgment do not apply to a common-law claim for breach of implied warranty, we sustain Heckel's second issue with regard to that claim.

3. No-Evidence Summary Judgment: Express Warranty Claim

*5 Allen Samuels also asserted there was no evidence that it made an express warranty to Heckel, but it did not challenge any other specific element of an express warranty cause of action. Heckel responded by claiming that Allen Samuels made a representation to her about the services it would provide. To overcome Allen Samuels' no-evidence claim, she provided a copy of her deposition testimony, in which the following colloquy occurred:

Q. Who did you speak to at the dealership?

A. I don't know exactly his name.

Q. What did he tell you that he was going to do to the vehicle?

A. That he would inspect the vehicle and let me know if there is [sic] any problems with it besides-because I brought it in thinking it would be just a tune-up or any other problems that was [sic] wrong with the vehicle, that he would inform me and let me know.

She also provided a copy of the invoice Allen Samuels provided to her, on which it is noted that Heckel was charged for a “factory inspection.” Taking this evidence as true, reasonable and fair-minded people could conclude that Allen Samuels represented to Heckel that it would conduct a factory inspection of her vehicle, and thus, would address any matters that were the subject of a recall. Because Heckel brought forth more than a scintilla of probative evidence raising a genuine issue of material fact, a no-evidence summary judgment was improper on her claim for breach of an express warranty. We therefore sustain that portion of her third issue.

IV. CONCLUSION

In sum, we conclude that the applicable statute of limitations bars Heckel's claims against GM for products liability and therefore affirm summary judgment as to Heckel's claims against GM. We also affirm summary judgment on Heckel's breach-of-contract claim against Allen Samuels. But, because Allen Samuels did not establish that Heckel's warranties claims are barred by limitations and Heckel brought forth more than a scintilla of probative evidence in support of these claims, we

reverse summary judgment as to her warranties claims against Allen Samuels, and we remand the case for further proceedings consistent with this opinion.

All Citations

Not Reported in S.W.3d, 2008 WL 4308406

Footnotes

- 1 Allen Samuels voluntarily non-suited its third-party claims against GM on March 12, 2007.
- 2 Heckel acknowledges in her brief that her negligence claims against Allen Samuels are barred by limitations.
- 3 [Valence Operating Co. v. Dorsett](#), 164 S.W.3d 656, 661 (Tex.2005).
- 4 See [TEX. CIV. PRAC & REM.CODE § 16.051](#); [Stine v. Stewart](#), 80 S.W.3d 586, 592 (Tex.2002) (per curiam).
- 5 Appellant's Br. at 26 (record citations omitted).
- 6 In the trial court, Heckel argued that her injuries presented a claim for a "contort," *i.e.*, damages arising from the breach of a duty that arose from a contract. *But see* [JCW Elecs., Inc. v. Garza](#), 257 S.W.3d 701, 51 Tex. Sup.Ct. J. 1104, 2008 WL 2554942, at *3 (Tex. June 27, 2008) (noting that to determine whether a claim sounds in tort or in contract, the court examines the damages alleged: if the damages are purely economic, the claim sounds in contract, but a claim for personal-injury damages generally sounds in tort). Heckel does not reurge this argument on appeal.

2006 WL 684490

Only the Westlaw citation is currently available.

SEE TX R RAP RULE 47.2 FOR
DESIGNATION AND SIGNING OF OPINIONS.**MEMORANDUM OPINION**Court of Appeals of Texas,
Amarillo.

Shawna Lynn BORTH, Appellant

v.

Constantine SAADEH, M.D., Appellee.

No. 07-05-0094-CV.

March 16, 2006.

Rehearing Overruled April 20, 2006.

From the 251st District Court of Randall County, No.
55248c; Patrick A. Pirtle, Presiding.**Attorneys and Law Firms**

Shawna Lyn Borth, pro se.

Thomas C. Riney, for Constantine Saadeh.

Before QUINN, C.J., HANCOCK, J., and BOYD, S.J.¹**MEMORANDUM OPINION**

JOHN T. BOYD, Senior Justice.

*1 Appellant Shawna Lynn Borth (Borth), acting *pro se*, appeals from a take-nothing summary judgment entered in favor of appellee Constantine Saadeh, M.D. (Saadeh) with respect to her health care liability claim. Summary judgment was sought and granted on the basis that Borth's claims were barred by the statute of limitations. On appeal, Borth contends the two-year statute of limitations is not applicable to her claims because she discovered Saadeh's negligence and/or fraudulent concealment within ten years.² We affirm the judgment of the trial court.

Borth filed her lawsuit on November 10, 2004, alleging various acts of negligence on the part of Saadeh, a rheumatologist, in failing to diagnose her conditions of Ehler's Danlos Syndrome, migraines, low blood

sugar, hormone imbalance, ortho-static hypotension, and depression, in failing to recognize chronic sinusitis as a serious and debilitating medical condition, in allowing her iatrogenic illnesses to continue, and in violating the Hippocratic oath. It is undisputed that Saadeh treated Borth from November 11, 1997, to October 5, 1999.³ Saadeh contends that Borth was required to file her lawsuit within two years of October 5, 1999.

The standard by which we review a traditional motion for summary judgment is set forth in *Kimber v. Sideris*, 8 S.W.3d 672, 674-75 (Tex.App.-Amarillo 1999, no pet.). We refer the parties to that case for a description of the standard.

Health care liability claims must be brought within two years from the occurrence of the tort or from the date the medical treatment that is the subject of the claim is completed. Tex. Civ. Prac. & Rem.Code Ann. § 74.251(a) (Vernon 2005). The limitations period is measured by one of three dates: 1) the occurrence of the tort, 2) the last date of the relevant course of treatment, or 3) the last date of the relevant hospitalization. *Shah v. Moss*, 67 S.W.3d 836, 841 (Tex.2001).⁴ If the date of the alleged tort is ascertainable, the limitations period begins on that date, not on whichever of the three dates happens to be most favorable to the plaintiff. *Id.* As a result of the statute, the discovery rule is no longer applicable in medical care liability claims.⁵ *Diaz v. Westphal*, 941 S.W.2d 96, 99 (Tex.1997). Therefore, at the latest, the statute of limitations would have started to run on the date of last treatment, which was October 5, 1999.

Borth relies on section 74.251(b) of the Civil Practice and Remedies Code as authority that she actually had ten years to bring her claim. That subsection provides:

A claimant must bring a health care liability claim not later than 10 years after the date of the act or omission that gives rise to the claim. This subsection is intended as a statute of repose so that all claims must be brought within 10 years or they are time barred.

Tex. Civ. Prac. & Rem.Code Ann. § 74.251(b) (Vernon 2005). A statute of limitations bars enforcement of a right while a statute of repose takes the right away altogether.

Johnson v. City of Fort Worth, 774 S.W.2d 653, 654 n. 1 (Tex.1989); *Aguilar v. Trujillo*, 162 S.W.3d 839, 853 (Tex.App.-El Paso 2005, pet. denied); *Cadle Co. v. Wilson*, 136 S.W.3d 345, 350 (Tex.App.-Austin 2004, no pet.). The period set out in a statute of repose is independent of the claim's accrual or discovery and may cut off a right even before it accrues. *Holubec v. Brandenberger*, 111 S.W.3d 32, 37 (Tex.2003). It sets an outer limit beyond which no action can be maintained. *Id.* Thus, if the discovery rule applied (as it does not here) or there is a legal basis for tolling the period of limitations, the ten-year statute of repose would serve as an outer limit after which no cause of action could be brought.

*2 Borth contends that the fraudulent concealment of Saadeh should toll the statute of limitations. When the plaintiff resists summary judgment by asserting fraudulent concealment, the burden is on the plaintiff to raise a fact issue on each element of fraudulent concealment. *American Petrofina, Inc. v. Allen*, 887 S.W.2d 829, 830 (Tex.1994); *Malone v. Sewell*, 168 S.W.3d 243, 252 (Tex.App.-Fort Worth 2005, pet. denied). The elements of fraudulent concealment are 1) existence of an underlying tort, 2) the defendant's knowledge of the tort, 3) the defendant's use of deception to conceal the tort, and 4) the plaintiff's reasonable reliance on the deception. *Malone v. Sewell*, 168 S.W.3d at 252. Borth's evidence in support of her response to the motion for summary judgment is her own affidavit.⁶ She does not attempt therein to address each element of fraudulent concealment and the allegations in her response do not constitute proof of the same. *See Laidlaw Waste Sys., Inc. v. City of Wilmer*, 904 S.W.2d 656, 660 (Tex.1995) (holding that pleadings are not competent summary judgment evidence even if sworn or verified); *American Petrofina, Inc. v. Allen*, 887 S.W.2d at 830 (holding that a mere pleading or response to a summary judgment motion does not satisfy the burden of coming forward with sufficient

evidence to prevent summary judgment). Consequently, fraudulent concealment does not suspend the limitations period based on the record before us.

Finally, Borth raised an issue that the statute of limitations violates the open courts provision of the Texas Constitution.⁷ To establish the same, she is required to show 1) that she has a cognizable common-law cause of action, and 2) that restriction of the claim is unreasonable or arbitrary when balanced against the statute's purpose. *Shah v. Moss*, 67 S.W.3d at 842; *Diaz v. Westphal*, 941 S.W.2d at 100. Borth also has the burden of raising a fact issue demonstrating she did not have a reasonable opportunity to discover any alleged wrongs before the limitations period expired. *Shah v. Moss*, 67 S.W.3d at 846-47. Borth's affidavit in support of her response to the motion for summary judgment does not raise a fact issue that she did not have a reasonable opportunity to discover Saadeh's alleged negligence. Further, she waited one year and eleven months after allegedly discovering Saadeh's negligence with respect to one of her medical problems before bringing suit. A plaintiff may not obtain relief under the open courts provision if she does not use due diligence and sue within a reasonable time after learning of the alleged wrong. *Shah v. Moss*, 67 S.W.3d at 847. We find that she waited an unreasonable time to file suit after discovering her injury. *See id.* (holding that, as a matter of law, 17 months was an unreasonable time to wait to bring suit).

Because the two-year statute of limitations is applicable to Borth's causes of action, the trial court did not err in granting summary judgment to Saadeh. Accordingly, the summary judgment is affirmed.

All Citations

Not Reported in S.W.3d, 2006 WL 684490

Footnotes

- 1 John T. Boyd, Chief Justice (Ret.), Seventh Court of Appeals, sitting by assignment. [Tex. Gov't Code Ann. § 75.002\(a\) \(1\)](#) (Vernon 2005).
- 2 Borth raises other issues related to Saadeh's negligence, whether a witness lied in his affidavit, and whether she has a valid lawsuit against Dr. John Kelleher. These issues are not material to whether the statute of limitations bars her claims against Saadeh except to the extent that Borth must prove an underlying tort to prove fraudulent concealment.
- 3 Borth avers that she called Saadeh's office on November 4, 2004, and again on November 8, 2004, speaking to Michael Gaylor both times. However, she was informed by Gaylor that Saadeh would not treat her as a patient.
- 4 The three dates discussed in *Shah* were based on [article 4590i § 10.01 of the Revised Civil Statutes](#), which is in relevant part the same as the current version of the statute at [section 74.251 of the Civil Practice and Remedies Code](#).

- 5 Borth claims she “discovered” Saadeh’s negligence on December 10, 2002, when she was finally diagnosed with Ehler’s-Danlos Syndrome. She does not specifically address when she “discovered” the other medical problems which she claims Saadeh failed to diagnose or treat.
- 6 While Borth refers to testimony from a hearing, we do not have a reporter’s record of that hearing. Borth sought to obtain a free reporter’s record on the basis she was indigent and that request was denied.
- 7 The open courts provision protects a person from legislative acts that cut off a person’s right to sue before there is a reasonable opportunity to discover the wrong and bring suit. [Shah v. Moss](#), 67 S.W.3d 836, 842 (Tex.2001).

838 S.W.2d 955
Court of Appeals of Texas,
Houston (14th Dist.).

Clara STYERS, et al., Appellants,
v.
HARRIS COUNTY, Texas, et al., Appellees.

No. A14-92-00079-CV.

|
Oct. 15, 1992.

|
Rehearing Denied Oct. 29, 1992.

Plaintiffs brought suit against county and county engineer's office alleging that their negligent construction proximately caused death of one individual, and severely injured another. The 333rd District Court, Harris County, Richard P. Bianchi, J., granted defendants' motion for summary judgment asserting two-year statute of limitations for personal injury suits, and plaintiffs appealed. The Court of Appeals, J. Curtiss Brown, C.J., held that ten-year statute of repose for suits against registered or licensed architects and engineers did not extend applicable two-year statute of limitations.

Affirmed.

West Headnotes (1)

[1] Limitation of Actions

 Particular Forms of Action

Ten-year statute of repose under which registered or licensed architects or engineers are not subject to liability for suits filed more than ten years after substantial completion of a project does not extend two-year statute of limitations for personal injury suit; if injury occurs during ten-year period, suit must be filed within two years from accrual of cause of action. [V.T.C.A., Civil Practice & Remedies Code §§ 16.003, 16.008](#).

[3 Cases that cite this headnote](#)

Attorneys and Law Firms

*[955 Marshall B. Brown](#), Houston, for appellants.

[Frank E. Sanders](#), Houston, for appellees.

Before J. CURTISS BROWN, C.J., and [SEARS](#) and ELLIS, JJ.

OPINION

J. CURTISS BROWN, Chief Justice.

This is an appeal from a summary judgment. Appellants filed this lawsuit against Harris County and the Harris County Engineers Office alleging that their negligent construction of Red Bud Circle proximately caused the death of Michael Lee Wagner, and severely injured Forrest Gay. The accident *[956](#) occurred on October 2, 1982. Appellants filed this lawsuit on July 21, 1991, almost nine years after the date of injury.

Appellees filed a motion for summary judgment asserting the two year statute of limitations. [TEX.CIV.PRAC. & REM.CODE ANN. § 16.003](#) (Vernon 1986). The trial court granted the motion. In three points of error, the appellants complain that the trial court erred by applying the two year statute of limitations. We affirm.

Appellants contend that [TEX.CIV.PRAC. & REM.CODE ANN. § 16.008](#) (Vernon 1986) provides a ten year limitations period for suits against registered or licensed architects and engineers. We find this proposition untenable. [Section 16.008](#) was enacted to limit the duration of architects' and engineers' potential liability. Under the statute, they are not subject to liability for lawsuits filed more than ten years after substantial completion of the project. The section was never intended to extend the applicable statute of limitations. A suit for personal injury must be filed not later than two years after the cause of action accrues. [TEX.CIV.PRAC. & REM.CODE ANN. § 16.003](#) (Vernon 1986). We cannot accept the contention that the same statute which was enacted to protect architects and engineers should be applied to increase the duration of their potential liability.

This is not the first time a party has attempted to use a statute of repose to pursue a cause of action otherwise barred by the statute of limitations. A practically identical

argument was rejected by the Fort Worth Court of Appeals. *Klafehn v. Fain*, 643 S.W.2d 227, 228 (Tex.App.—Fort Worth 1982, writ ref'd n.r.e.). In *Klafehn*, the plaintiff sued his employer, a roofing company, more than two years after he was injured. The trial court granted an uncontested summary judgment in the defendant's favor. On appeal the plaintiff argued the suit was timely filed under TEX.REV.CIV.STAT.ANN. art. 5536a (1982) (now codified as TEX.CIV.PRAC. & REM.CODE ANN. §§ 16.008, 16.009). The court of appeals rejected the argument. It stated that a plaintiff's claim may be actionable under art. 5536a, but still be barred by the two year statute of limitations. *Klafehn* at 228.

The Dallas Court of Appeals also rejected a similar argument in *Lambert v. Wansbrough*, 783 S.W.2d 5 (Tex.App.—Dallas 1989, writ denied). In *Lambert*, a homeowner sued his building contractor, for installing a defective roof, more than six years after the roof began leaking. The homeowner obtained a judgment against the contractor. On appeal, the contractor argued the suit was barred by the statute of limitations. The homeowner argued that § 16.009 provided him with a ten year limitations period. The court of appeals reversed and rendered judgment in favor of the contractor. *Id.* at 7. In reversing the trial court's judgment, the court of appeals quoted § 16.009(f) which reads, "This section does not extend or affect a period prescribed for bringing an action under any other law of this state." *Id.*

Appellants contend this subsection only applies to § 16.009, not § 16.008. Section 16.008 was originally enacted in 1969.¹ It was published as art. 5536a § 1. In 1975, the legislature amended art. 5536a by adding § 2.² Article 5536a § 1 was codified as § 16.008 of the Civil Practice and Remedies Code. Article 5536a § 2 was codified as § 16.009. Neither art. 5536a § 1 nor § 16.008 contains language similar to § 16.009(f) quoted above. For this reason, appellant argues the legislature intended § 16.008 to deprive architects and engineers of the protection of statutes of limitations, while persons other than architects and engineers who construct or repair improvements to real property are protected under § 16.009(f). While several cases have held that the statute of repose does

not extend the statute of limitations, they have all relied *957 upon or at least considered the language in § 16.009(f). *Klafehn v. Fain*, 643 S.W.2d 227, 228 (Tex.App.—Fort Worth 1982, writ ref'd n.r.e.); *Sowers v. M.W. Kellogg Co.*, 663 S.W.2d 644, 648 (Tex.App.—Houston [1st Dist.] 1983, writ ref'd n.r.e.); *Lambert v. Wansbrough*, 783 S.W.2d 5, 7 (Tex.App.—Dallas 1989, writ denied); *Tumminello v. U.S. Home Corp.*, 801 S.W.2d 186, 187–188 (Tex.App.—Houston [1st Dist.] 1990, writ denied).

Even without the benefit of the language in § 16.009(f), we find that the two year statute of limitations applies to personal injury causes of actions arising under § 16.008. Section 16.008 was enacted to protect architects and engineers from extended liability. Appellants' attempt to use § 16.008 to extend the statute of limitations is illogical and absurd. Sections 16.003 and 16.008 must be considered together. If an injury occurs more than ten years after substantial completion of the improvement, the suit is barred by § 16.008. If the injury occurs during the ten year period, the claimant must file suit, or present a written claim for damages, within the ten year period.³ Additionally, the lawsuit must be filed within two years from the accrual of the cause of action to be within § 16.003.

Appellants filed this lawsuit almost nine years after the cause accrued. Prosecution of the lawsuit was barred by the statute of limitations for almost seven years before suit was filed. TEX.CIV.PRAC. & REM.CODE ANN. § 16.003 (Vernon 1986). The trial court properly granted summary judgment because there was no issue of material fact, and the appellees were entitled to judgment as matter of law. *Nixon v. Mr. Property Management Company, Inc.*, 690 S.W.2d 546, 548 (Tex.1985).

We have considered all points raised by the appellants, and find them to be without merit.

AFFIRMED.

All Citations

838 S.W.2d 955

Footnotes

¹ Act of May 27, 1969, 61st Leg., R.S., ch. 418, 1969 Tex.Gen.Laws 1379.

² Act of May 20, 1975, 64th Leg., R.S., ch. 269, 1975 Tex.Gen.Laws 649.

- 3 By presenting the architect or engineer with a written claim for damages before the ten year period expires, the time within which the injured party must file suit is extended for two years from the date the claim is presented. [§ 16.008\(c\)](#). By adding two years from the date the claim is presented, rather than two years from the date of injury, subpart (c) may provide more time to file suit than the statute of limitations. This provision is not involved in this case.

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111 S.W.3d 32
Supreme Court of Texas.

David HOLUBEC and Mary Holubec, Petitioners,
v.

Carl BRANDENBERGER, Individually and as
Next Friend of Payton Brandenberger and Carson
Brandenberger, Kathy Brandenberger, William R.
Lee, Laverne Lee, and R & J Livestock Company
and Batesville Farming Company, Respondents.

No. 01–1214.

|
Argued Dec. 4, 2002.

|
Decided May 22, 2003.

|
Rehearing Denied Aug. 21, 2003.

Ranch owners and ranch foreman who lived on the ranch brought nuisance action against owners of adjacent feedlot for sheep. The 198th Judicial District Court, McCulloch County, Charles E. Sherrill, Jr., J., entered judgment on jury's verdict restraining feedlot owners from certain acts and requiring or permitting other acts. Feedlot owners appealed. The Court of Appeals affirmed, 58 S.W.3d 201. Feedlot owners appealed. The Supreme Court, Phillips, C.J., held that: (1) under Right to Farm Act, nuisance action against agriculture operation is prohibited if nuisance is substantially unchanged for one year; (2) feedlot owners preserved objection to jury instruction asking whether conditions had remained unchanged since date they first began feeding animals; and (3) failure to submit issue of whether feedlot operations had remained substantially unchanged for more than one year required reversal.

Reversed and remanded; injunction dissolved.

West Headnotes (12)

[1] **Limitation of Actions**

🔑 Causes of action in general

Limitation of Actions

🔑 In general; what constitutes discovery

Period set under a statute of repose is independent of the claim's accrual or discovery.

[7 Cases that cite this headnote](#)

[2] **Limitation of Actions**

🔑 Operation as to rights or remedies in general

Statutes of repose not only cut off rights of action within a specified time after they accrue, but also they may even cut off rights of action before they accrue at all.

[6 Cases that cite this headnote](#)

[3] **Nuisance**

🔑 Nature and extent of injury or danger

A “nuisance” is a condition that substantially interferes with the use and enjoyment of land by causing unreasonable discomfort or annoyance to persons of ordinary sensibilities attempting to use and enjoy it.

[17 Cases that cite this headnote](#)

[4] **Limitation of Actions**

🔑 Nature of statutory limitation

The purpose of repose statutes is to give absolute protection to certain parties from the burden of indefinite potential liability.

[7 Cases that cite this headnote](#)

[5] **Limitation of Actions**

🔑 Nature of statutory limitation

Statutes of repose do not typically shorten an existing limitations period; instead, they fix an outer limit beyond which no action can be maintained.

[5 Cases that cite this headnote](#)

[6] **Limitation of Actions**

🔑 Injuries to property in general

Right to Farm Act's proviso prohibiting a nuisance action against an agricultural

operation that has been in operation for one year or more if the nuisance condition is substantially unchanged from established date of operation bars a nuisance action against a lawful agricultural operation one year after the commencement of the conditions or circumstances providing the basis for that action. [V.T.C.A., Agriculture Code § 251.004\(a\)](#).

4 Cases that cite this headnote

[7] Limitation of Actions

🔑 **Injuries to property**

Under the Right to Farm Act's proviso prohibiting a nuisance action against an agricultural operation that has been in operation for one year or more, it does not matter when the complaining party discovers the conditions or circumstances constituting the basis for the nuisance action; instead, the relevant inquiry is whether the conditions or circumstances constituting the basis for the nuisance action have existed for more than a year. [V.T.C.A., Agriculture Code § 251.004\(a\)](#).

3 Cases that cite this headnote

[8] Appeal and Error

🔑 **Failure or refusal to submit issues**

Nuisance

🔑 **Trial or hearing**

Failure to submit to jury affirmative defense issue of whether conditions or circumstances complained of as constituting the basis for nuisance action against feedlot owner remained substantially unchanged from date one year before complaint was brought required reversal of ranch owners' nuisance action against feedlot owners. [V.T.C.A., Agriculture Code § 251.004\(a\)](#).

7 Cases that cite this headnote

[9] Appeal and Error

🔑 **Instructions**

Feedlot owners's objection preserved alleged error in jury instruction which asked whether conditions or circumstances complained of as basis for nuisance action against feedlot owners remained substantially unchanged from date on which feedlot owners first began feeding sheep on unimproved twenty-acre tract, although owners failed to specify why their suggested date of one year prior to date nuisance action was filed was correct date; owners had previously asserted affirmative defense of one-year statutory bar in summary judgment motion, and jury instruction submitted was defective. [V.T.C.A., Agriculture Code § 251.004\(a\)](#); [Vernon's Ann.Texas Rules Civ.Proc., Rule 274](#).

5 Cases that cite this headnote

[10] Injunction

🔑 **Scope of Relief in General**

Injunction

🔑 **Sufficiency in general**

Injunction

🔑 **Issues, proof, and variance**

In general, a permanent injunction must not grant relief which is not prayed for nor be more comprehensive or restrictive than justified by the pleadings, the evidence, and the usages of equity.

11 Cases that cite this headnote

[11] Injunction

🔑 **Specificity, vagueness, overbreadth, and narrowly-tailored relief**

A decree of injunction should not be so broad as to enjoin a defendant from activities which are a lawful and proper exercise of his rights.

10 Cases that cite this headnote

[12] Injunction

🔑 **Specificity, vagueness, overbreadth, and narrowly-tailored relief**

Injunctions must be narrowly drawn and precise.

1 Cases that cite this headnote

Attorneys and Law Firms

*33 Ed Small, Matt Dow, Zachary Stone Brady, Jackson Walker LLP, Austin, Terry R. Norman, Kyle Rodney Sikes, Brady, for petitioners.

*34 Jack W. Lee, Mason, Richard T. Miller, Law Office of Richard T. Miller, San Saba, for respondents.

Opinion

Chief Justice PHILLIPS delivered the Opinion of the Court.

In this appeal, we explore the contours of the Right to Farm Act's affirmative defense against claims that agricultural operations are a nuisance. The Act provides that "[n]o nuisance action may be brought against an agricultural operation" that has been in lawful operation for more than a year "if the conditions or circumstances complained of as constituting the basis for the nuisance action have existed substantially unchanged since the established date of operation." [TEX. AGRIC. CODE § 251.004\(a\)](#). The petitioners here are agricultural operators who complain that a defective jury charge denied them the protection of this defense. They also complain that the court of appeals erred in holding that they waived their complaints of charge error. They finally complain that no evidence or pleadings support the permanent injunction issued by the trial court and affirmed by the court of appeals. Because we conclude that the jury charge in this case is erroneous and that this error is harmful and has been preserved, we reverse the court of appeals' judgment, dissolve the injunction, and remand the case to the trial court for further proceedings.

I

David and Mary Holubec own a 450-acre ranch in McCulloch County, Texas, on which they have conducted a sheep operation for well over a decade. In addition to this ranch, they own or lease an additional 4,500 acres on which they farm and raise sheep. The remainder of their livelihood comes from operating a fertilizer and seed business.

Since 1994, Robin Lee and his mother Laverne have owned the property to the south and west of the Holubec ranch. Near the eastern boundary of the Lees' property is the home of their ranch foreman, Carl Brandenberger, who has lived there with his wife and children since the Lees purchased the property.

At the end of 1996, the Holubecs began clearing land to construct a ten-acre feedlot on the western boundary of their ranch. The new feedlot contained twenty sheep pens and other improvements to accommodate about 6000 lambs. The Holubecs began using the new feedlot in March 1997, by which time most of the improvements had been completed. The nearest pen is about 160 feet from the Brandenbergers' home.

The feedlot's ten acres were taken from a twenty-acre area of fenced pasture the Holubecs had used since 1987 to wean lambs and fatten them for sale. Before being cleared, this pasture was thick with mesquite and brush, although lanes had been cut to permit the sheep to reach feeders placed on the property. While the Holubecs kept no written records of how many sheep they fed on this tract, they testified variously that it was as few as a thousand to as many as three thousand. After the feedlot was completed, however, the numbers definitely increased. Within a year of completing the improvements, the Holubecs had about 5800 sheep on the ten-acre feedlot.

By August 1997, the Brandenbergers began noticing foul odors. About this same time, they also began experiencing swarms of flies, increased dust, and noise from bleating lambs being weaned from their mothers. Robin Lee complained to the Holubecs about these problems to no avail. In February 1998, the Holubecs added elevated lights to the feedlot to permit night work. The Brandenbergers *35 claim that these lights illuminated their home and disturbed their sleep.

On July 31, 1998, the Brandenbergers and Lees filed suit, complaining that the foul odors, flies, dust, noise, and light constituted a nuisance. The Lees sought damages for the diminished market value of their property, while the Brandenbergers sought damages for their clean-up costs, medical expenses, and pain and suffering. Both families also sought permanent injunctive relief against the continued operation of the feedlot. The Holubecs denied all allegations and asserted [section 251.004\(a\) of the Texas](#)

[Agriculture Code](#) as a bar to all the plaintiffs' claims. The trial court denied their motion for summary judgment on the statutory defense.

The case proceeded to trial before a jury, which found that the feedlot was a nuisance and that the Holubecs were negligent in its operation or construction. The jury awarded damages to the Lees for loss of market value to their ranch, but it awarded no personal damages to the Brandenbergs. After the verdict, the plaintiffs filed a motion for judgment, seeking injunctive relief rather than damages. The trial court signed a judgment conforming to this motion, granting only a permanent injunction which enjoined the Holubecs from:

1. Operating a sheep feedlot or stabling, confining, feeding or maintaining on the [450 acres] any animals in confinement areas that do not sustain such animals on the crops, vegetation, forage growth, or post harvest residues produced in such areas in the normal growing season;
2. Feeding hay or other feed within 1750 feet of the [Brandenbergs'] residence;
3. Weaning lambs or other livestock in areas within 1750 feet of the [Brandenbergs' residence] during the period of time that such livestock is bleating or bawling because of the weaning process;
4. Maintaining lights on the [450 acres] that shine directly on the [Brandenbergs'] property;
5. Disposing of dead animals on the [450 acres].

The injunction also directed the Holubecs to dismantle their feedlot and clean up the area. The Holubecs appealed, and the court of appeals affirmed the trial court's judgment. [58 S.W.3d 201](#). We granted the Holubecs' petition to consider how the Right to Farm Act applies to these facts.

II

In order “to conserve, protect, and encourage the development and improvement of [Texas] agricultural land for the production of food and other agricultural products,” the Legislature passed the Right to Farm Act in 1981 “limiting the circumstances under which agricultural operations may be regulated or considered

to be a nuisance.” [TEX. AGRIC. CODE § 251.001](#). To further this policy, the Legislature in [section 251.004\(a\)](#) of the Act shortened the period for bringing a nuisance action against an agricultural operation to one year. That section provides:

No nuisance action may be brought against an agricultural operation that has lawfully been in operation for one year or more prior to the date on which the action is brought, if the conditions or circumstances complained of as constituting the basis for the nuisance action have existed substantially unchanged since the established date of operation. This subsection does not restrict or impede the authority of this state to protect the public health, safety, and welfare or the authority of a municipality to enforce state law.

[TEX. AGRIC. CODE § 251.004\(a\)](#). The Act defines “agricultural operation” to include [*36](#) “raising or keeping livestock.” *Id.* § 251.002(1). The “established date of operation” means “the date on which an agricultural operation commenced operation.” *Id.* § 251.003. If the “physical facilities of an agricultural operation are subsequently expanded,” the expanded operation acquires “a separate and independent established date of operation,” which is the date the expanded operation commences. *Id.* The commencement of an expanded operation, however, “does not divest the agricultural operation of a previously established date of operation.” *Id.*

At different times in this litigation, the Holubecs took varying positions about when they commenced sheep feeding operations. In their original answer, the Holubecs maintained that they commenced operations in 1987 when they first began feeding sheep on the twenty acres. A few days before trial, however, they amended their pleadings to suggest a second commencement date, asserting that the nuisance action was barred because it had been filed “more than ten years after Defendants' operation was begun and more than one year after Defendants remodeled their physical facilities.” By the charge conference, the Holubecs had concluded that their defense should be tied solely to the commencement of

operations at the new feedlot in early 1997. While the new feedlot arguably used less acreage than before, it expanded the “physical facilities of the agricultural operation,” [TEX. AGRIC. CODE § 251.003](#), by adding twenty sheep pens and other improvements. The court of appeals concluded that March 19, 1997, was the undisputed date on which the Holubecs commenced operations at their new feedlot. [58 S.W.3d at 207](#).

A

The parties' principal disagreement in this case is about how to calculate the statute's one-year bar. This disagreement is based on conflicting interpretations of the statute's proviso highlighted below:

No nuisance action may be brought against an agricultural operation that has lawfully been in operation for one year or more prior to the date on which the action is brought, *if the conditions or circumstances complained of as constituting the basis for the nuisance action have existed substantially unchanged since the established date of operation.*

[TEX. AGRIC. CODE § 251.004\(a\)](#) (emphasis added).

The Holubecs argue that the “conditions or circumstances complained of as constituting the basis for the nuisance action” are the confinement of sheep in their newly constructed feeding facility, a condition that began in March 1997 and has existed substantially unchanged since then. They conclude that since the plaintiffs did not file suit until July 31, 1998, more than a year later, the plaintiffs' nuisance action is barred under [section 251.004\(a\)](#).

The Brandenbergers and Lees maintain that neither the Holubecs' new feeding facility nor the introduction of sheep into it in March 1997 are the “conditions or circumstances complained of as constituting the basis for the nuisance action.” Rather, they complain about the odor, flies, dust, noise, and light which invaded their property no earlier than August 1997, less than one year before they filed suit. An entomologist testifying on their behalf explained that a feedlot without adequate sanitation would develop a fly and odor problem after

several months of operation. By August 1997, but not before, the Brandenbergers and Lees say that the Holubecs' failure to clean rotting manure and moldy hay from the pens and to properly dispose of their dead animals caused the flies and odors. They further point out [*37](#) that the lights that disturb the Brandenbergers' sleep were not installed until 1998, thus being clearly outside the statutory bar.

The Holubecs denied that their feeding facility produced either foul odors or flies. David Holubec testified that his feeding facility had a sweet organic smell like that of a nursery. Acknowledging that he expected about a two per cent sheep mortality rate, he nevertheless insisted that all dead sheep were promptly buried. And far from being a nuisance, he explained that the manure pack accumulating in the pens was in fact a benefit because it helped control the dust. In sum, Holubec concluded that his feeding facility was operated in a reasonably sanitary manner and was not the cause of the Brandenbergers' fly, dust or odor problems.

B

[\[1\]](#) [\[2\]](#) The parties' disagreement about the proviso's meaning also causes them to disagree about the nature of the statutory bar. The Holubecs maintain that [section 251.004\(a\)](#) is a one-year statute of repose, while the Brandenbergers and Lees maintain that it is merely a statute of limitations. While either statute sets deadlines for plaintiffs to file claims, the period set under a statute of repose is independent of the claim's accrual or discovery. [Trinity River Auth. v. URS Consultants](#), 889 S.W.2d 259, 261 (Tex.1994); 2 ROY W. MCDONALD & ELAINE G. CARLSON, TEXAS CIVIL PRACTICE § 9.71 at 649 (2d ed.2002). Thus, statutes of repose not only cut off rights of action within a specified time after they accrue, but also they may even cut off rights of action before they accrue at all. See [Johnson v. City of Fort Worth](#), 774 S.W.2d 653, 654 n. 1 (Tex.1989) (per curiam).

[\[3\]](#) The Brandenbergers and Lees counter that [section 251.004\(a\)](#) cannot be a statute of repose because its proviso precludes a nuisance action from being cut off before it accrues. A “nuisance” is a condition that substantially interferes with the use and enjoyment of land by causing unreasonable discomfort or annoyance to persons of ordinary sensibilities attempting to use and

enjoy it. *Texas Ass'n of Bus. v. Texas Air Control Bd.*, 852 S.W.2d 440, 461–62 (Tex.1993); *Burditt v. Swenson*, 17 Tex. 489, 503 (1856); *Maranatha Temple, Inc. v. Enter. Prods. Co.*, 893 S.W.2d 92, 98–99 (Tex.App.-Houston [1st Dist.] 1994, writ denied). Because there can be no nuisance without offending conditions, the Brandenbergs submit that there can be no bar to an action after the one-year period provided by [section 251.004\(a\)](#) unless the offending conditions commence simultaneously with the start of operations. Otherwise, the offending conditions “constituting the basis of for the nuisance action [will not] have existed substantially unchanged” since the commencement of operations.

[4] [5] The purpose of repose statutes is to give absolute protection to certain parties from the burden of indefinite potential liability. See *Sowers v. M.W. Kellogg Co.*, 663 S.W.2d 644, 647 (Tex.App.-Houston [1st Dist.] 1983, writ ref'd n.r.e.). Statutes of repose do not typically shorten an existing limitations period; instead, they fix an outer limit beyond which no action can be maintained. See, e.g., [TEX. CIV. PRAC. & REM.CODE § 16.008\(a\)](#) (ten-year statute of repose for construction industry); *id.* § 16.011(a) (ten-year statute for surveyors); *id.* § 16.07 (five-year statute for public officials); *id.* § 16.012 (fifteen-year statute for certain products liability actions). Thus, if the one-year period prescribed in [section 251.004\(a\)](#) is a statute of repose, it is unique both because it is conditional and because it is so short.

*38 [6] [7] According to the statute, the one-year bar applies on proof of two conditions: (1) the agricultural operation was in business lawfully for more than a year before the nuisance action was filed; and (2) the “conditions and circumstances complained of as constituting the basis for the nuisance action have existed substantially unchanged” since then. Legislative history suggests that this defense was provided in response to concern about “the state [] losing productive agricultural land due to nuisance suits filed by individuals and organizations who have moved next to preexisting and heretofore successful agricultural operations....” HOUSE COMM. ON AGRIC. & LIVESTOCK, Bill Analysis, Tex. S.B. 488, 67th Leg., R.S. (1981). In light of this history and the Act's stated purpose, we conclude that the defense in [section 251.004\(a\)](#) was intended to bar a nuisance action against a lawful agricultural operation one year after the commencement of the conditions or circumstances providing the basis for

that action. Thus, under the Act it does not matter when the complaining party discovers the conditions or circumstances constituting the basis for the nuisance action. Cf. *Vann v. Bowie Sewerage Co.*, 127 Tex. 97, 90 S.W.2d 561, 563 (1936) (party who moves next to a nuisance, without knowledge of its existence, is not estopped to seek damages for personal injury). Instead, the relevant inquiry is whether the conditions or circumstances constituting the basis for the nuisance action have existed for more than a year.

III

[8] The court of appeals concluded that the Holubecs had not established their defense because they failed to obtain a jury finding meeting the requirements of [section 251.004\(a\)](#). 58 S.W.3d at 208. The Holubecs respond, however, that they were denied the opportunity to establish their defense because the trial court submitted the wrong question. The trial court submitted the statutory defense as follows:

QUESTION 8

Have the conditions or circumstances complained of as constituting the basis for the nuisance action ... remained substantially unchanged since December 31, 1986?

To this, the jury answered, “No.” The Holubecs objected to the question, “particularly [to] the date on there of December 31, 1986,” which was when the Holubecs first began feeding sheep on the unimproved twenty-acre tract. Instead, the Holubecs requested this version of the question:

Do you find that the agricultural operation of [the Holubecs] had been in operation and existed substantially unchanged since on or before July 30, 1997?

The trial court refused this question and overruled the Holubecs' objection.

[9] The court of appeals concluded that the Holubecs' objection and tender did not preserve error. 58 S.W.3d at 209–10. The court observed that the Holubecs' “naked objection” failed to explain why July 30, 1997, was the

correct date rather than December 31, 1986. *Id.* at 209. The court further observed that the Holubecs' requested question was not a substantially correct inquiry under the statute because it asked about "agricultural operations" rather than, as the statute required, the "conditions or circumstances complained of as constituting the basis for the nuisance action." *Id.* at 210.

The Holubecs respond that the trial court was well aware of the significance of the July date and their position because they had previously asserted the one-year statutory bar in a motion for summary judgment. The Holubecs concede that *39 their requested question may not have precisely tracked the statutory language, but they submit that any defect in their tendered question does not excuse the court's charge error. Had the trial court merely replaced the date in Jury Question 8 with "July 30, 1997," the Holubecs submit they would have no complaint. Instead, the Holubecs complain that they were denied their statutory defense by a defective question, proposed by their opponent and submitted over their objection.

We agree that Question 8 was a defective submission of the Holubecs' affirmative defense under section 251.004(a). As we have already concluded, the Legislature intended for this statute to protect agricultural operators from nuisance actions based on conditions or circumstances existing for more than a year before suit. The dispute in this case is over when these conditions or circumstances commenced. The Brandenbergs and Lees contend that they commenced in August 1997 at the earliest; while the Holubecs maintain that any basis for the plaintiffs' nuisance action existed before July 30, 1997, more than a year before suit was filed. Rather than submit that question to the jury, the trial court posed another: whether the conditions and circumstances constituting the basis for the nuisance action had remained substantially unchanged since the Holubecs first began feeding sheep on the unimproved pasture land in 1987. The issue submitted was not in dispute by the close of evidence and was no longer germane to whether the feedlot constituted a nuisance.

The Holubecs specifically objected to the date submission. Although their requested submission was not specifically tied to "the conditions or circumstances complained of as constituting the basis for the nuisance action", they plainly sought the submission of their statutory defense. See *Southeastern Pipe Line Co. v. Tichacek*, 997 S.W.2d 166,

172 (Tex.1999) (one kind of defective question "plainly attempts to request a finding on a recognized cause of action, but does so improperly"). Because the question actually submitted was defective, however, the Holubecs did not have to submit their own substantially correct question. See *Religious of Sacred Heart v. City of Houston*, 836 S.W.2d 606, 613-14 (Tex.1992) (objection is proper method of preserving complaint about defective issue submission regardless of who has burden of proof). The Holubecs' objection was sufficient to preserve error. TEX. R. CIV. P. 274. They are entitled to a remand because the trial court did not fairly submit the factual issue that could have established their defense under the Right to Farm Act.

IV

The Holubecs additionally complain that the trial court abused its discretion by granting injunctive relief because the jury's damages award provided the plaintiffs an adequate remedy at law. They argue further that the permanent injunction was an abuse of the trial court's discretion because the relief awarded went beyond that requested in the pleadings or supported by the evidence. The Holubecs argue that the permanent restrictions imposed on their ability to feed and maintain sheep elsewhere on their ranch is an unreasonable and arbitrary restraint unrelated to plaintiffs' nuisance complaint.

[10] [11] [12] In general, a permanent injunction "must not grant relief which is not prayed for nor be more comprehensive or restrictive than justified by the pleadings, the evidence, and the usages of equity." 6 L. HAMILTON LOWE, TEXAS PRACTICE: REMEDIES § 244 at 237 (2d ed.1973). Nor should a decree of injunction be so broad as to enjoin a defendant from activities *40 which are a lawful and proper exercise of his rights. *Villalobos v. Holguin*, 146 Tex. 474, 208 S.W.2d 871, 875 (1948). Rather, "injunctions must be narrowly drawn and precise." *Brown v. Petrolite Corp.*, 965 F.2d 38, 51 (5th Cir.1992). We do not apply these principles to the injunction at bar because we have already determined that it must be vacated.

Because of the error in submitting the Holubecs' defense, the judgment of the court of appeals is reversed, and the case is remanded to the trial court for further proceedings.

All Citations

111 S.W.3d 32, 33 Env'tl. L. Rep. 20,202, 46 Tex. Sup. Ct.
J. 702

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998 S.W.2d 882

Supreme Court of Texas.

Stephen EARLE, M.D., Petitioner,

v.

Michael RATLIFF and Shirley Ratliff, Respondents.

No. 98-0115.

Argued April 7, 1999.

Decided July 1, 1999.

Rehearing Overruled Oct. 7, 1999.

Patient sued surgeon who performed two back surgeries involving metal bone plates and pedicle screws, asserting medical malpractice and lack of informed consent. The 288th Judicial District Court, Bexar County, [David Peeples, J.](#), granted summary judgment for surgeon on statute of limitations grounds. Patient appealed. The San Antonio Court of Appeals, [961 S.W.2d 591](#), reversed and remanded. Surgeon filed petition for review. The Supreme Court, [Hecht, J.](#), held that: (1) any negligence by surgeon concerning initial surgery occurred on or before date of that surgery, and limitations period thus began to run on that date rather than when surgeon quit treating patient; (2) surgeon did not fraudulently conceal known wrong, so as to toll limitations periods for medical malpractice claim; (3) open courts provision of state constitution did not preclude limitations bar of patients' claims relating to initial back surgery; (4) genuine issue of material fact existed, precluding summary judgment for surgeon, on whether he was negligent concerning second surgical implant of devices in patient's back; (5) surgeon could not be held negligent concerning disclosure of risks attendant to second spinal implant surgery, where surgeon disclosed all risks identified by Texas Medical Disclosure Panel and thus complied with Medical Liability Insurance Improvement Act; and (6) Medical Liability and Insurance Improvement Act barred patient's Deceptive Trade Practices-Consumer Protection Act (DTPA) claims that surgeon misrepresented and concealed truth concerning back surgeries.

Judgment of the Court of Appeals affirmed in part and reversed in part, and case remanded.

West Headnotes (12)

[1] Limitation of Actions**🔑 Negligence in Performance of Professional Services**

Any negligence by surgeon as to initial surgery occurred on or before date of surgery, and limitations period thus began to run on that date rather than when he quit treating patient, where patient claimed misdiagnosis of need for surgery, failure to disclose risks of surgery, and performance of unwarranted surgery; patient did not claim misdiagnosis or mistreatment after surgery or that surgeon failed to do anything after surgery to ameliorate earlier misdiagnosis. [Vernon's Ann. Texas Civ. St. art. 4590i, § 10.01.](#)

[15 Cases that cite this headnote](#)**[2] Limitation of Actions****🔑 Concealment of Cause of Action**

Proof of fraudulent concealment to suspend the running of limitations in the medical malpractice context requires more than evidence that the physician failed to use ordinary care, by also requiring evidence that the defendant actually knew the plaintiff was in fact wronged and concealed that fact to deceive the plaintiff.

[45 Cases that cite this headnote](#)**[3] Judgment****🔑 Bar of Statute of Limitations**

Person who asserts fraudulent concealment to avoid summary judgment on limitations must raise a genuine issue of material fact that would support his assertion.

[15 Cases that cite this headnote](#)**[4] Limitation of Actions****🔑 Ignorance, Trust, Fraud, and Concealment of Cause of Action**

Fraudulent concealment, tolling the running of limitations, may be shown by circumstantial evidence as well as direct evidence.

[7 Cases that cite this headnote](#)

[5] Limitation of Actions

 [What Constitutes Concealment](#)

Surgeon did not fraudulently conceal known wrong, so as to toll limitations periods for medical malpractice claim, even if surgeon might have been negligent in assuring patient that second surgery would allow him to return to work and was necessary because of broken screws in his back, where no evidence demonstrated that surgeon actually knew his statements were in fact false when he made them, let alone that his purpose in making them was deceit.

[36 Cases that cite this headnote](#)

[6] Constitutional Law

 [Time for Proceedings](#)

Limitation of Actions

 [Constitutionality of Statute](#)

Open courts provision of State Constitution did not preclude limitations bar of patient's claims relating to initial back surgery, where patient had opportunity to learn of any negligence by surgeon in performing initial back surgery and bring suit within limitations period; patient's condition was not latent, patient did not assert that risks of surgery were generally unknown to medical practitioners, and patient made repeated visits to surgeon complaining of pain and lack of improvement following surgery.

[7 Cases that cite this headnote](#)

[7] Constitutional Law

 [Conditions, Limitations, and Other Restrictions on Access and Remedies](#)

Open courts provision of the Texas Constitution does not permit a well-established common-law cause of action to

be restricted by statute in a way that is unreasonable or arbitrary in view of the statute's purpose. [Vernon's Ann.Texas Const. Art. 1, § 13.](#)

[6 Cases that cite this headnote](#)

[8] Judgment

 [Tort Cases in General](#)

Genuine issue of material fact existed, precluding summary judgment for surgeon, on whether he was negligent in determining second surgical implant of devices in patient's back was medically warranted given lack of improvement after first implant surgery and increased spinal instability.

[3 Cases that cite this headnote](#)

[9] Judgment

 [Matters of Fact or Conclusions](#)

Summary judgment can be granted on the affidavit of an interested expert witness, but the affidavit must not be conclusory.

[119 Cases that cite this headnote](#)

[10] Health

 [Surgical Procedures](#)

Surgeon could not be held negligent concerning disclosure of risks attendant to second spinal implant surgery, where surgeon disclosed all risks identified by Texas Medical Disclosure Panel and thus complied with Medical Liability Insurance Improvement Act in absence of any evidence that patient's written consent was ineffective. [Vernon's Ann.Texas Civ.St. art. 4590i, §§ 6.01–6.08.](#)

[9 Cases that cite this headnote](#)

[11] Health

 [Presumptions](#)

Provision of Medical Liability Insurance Improvement Act stating that disclosure of the risks of treatments and procedures as identified by the Texas Medical Disclosure Panel creates a rebuttable presumption that

the requirements of the Act have been complied with, when considered in light of other provisions of the Act, allows the presumption to be rebutted only by a showing that the patient's consent was invalid, such as by proof that the patient's signature was forged or that the patient lacked capacity to sign. [Vernon's Ann. Texas Civ. St. art. 4590i, §§ 6.05, 6.06, 6.07\(a\)\(1\)](#).

[10 Cases that cite this headnote](#)

[12] Antitrust and Trade Regulation

 [Medical Professionals; Doctor and Patient](#)

Provision of Medical Liability and Insurance Improvement Act precluding application of Deceptive Trade Practices-Consumer Protection Act (DTPA) to physicians with respect to personal injury claims resulting from negligence barred patient's DTPA claims that surgeon misrepresented and concealed truth concerning back surgeries, where surgeon's representations all related to treatment and surgeries performed, and where gist of all of patient's claims thus was that surgeon did not hold to applicable standard of care. [Vernon's Ann. Texas Civ. St. art. 4590i, § 12.01\(a\)](#).

[22 Cases that cite this headnote](#)

Attorneys and Law Firms

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Opinion

*[884](#) Justice [HECHT](#) delivered the opinion of the Court.

This medical malpractice case raises several issues, but our attention centers on whether the plaintiff's claim that the defendant negligently performed surgery on him is barred by limitations. The plaintiff contends that limitations did not begin to run on his claim until his post-surgical course of treatment by the defendant ended, and until he became

aware that the defendant had fraudulently concealed from him the truth about the surgery and the treatment that followed. Further, the plaintiff asserts, to bar his claim would violate the Open Courts provision of the Texas Constitution.¹ On each of these matters we disagree with the plaintiff, but on other claims described below, we believe the plaintiff is correct. The district court granted defendant summary judgment on all plaintiff's claims. The court of appeals reversed summary judgment on all claims.² We partially affirm, and partially reverse, the judgment of the court of appeals and remand the case to the district court for further proceedings.

I

Michael Ratliff, a thirty-eight-year-old freight handler in good health, sustained a work-related back injury in June 1991, for which he was treated by Dr. Stephen Earle. On November 21, 1991, Earle operated on Ratliff, fusing his lumbar spine at three levels, decompressing nerves at four levels, and inserting metal [bone plates](#) and screws manufactured by AcroMed Corporation. Unfortunately, Ratliff's condition gradually worsened. Earle continued to treat Ratliff, and on November 16, 1993, Earle operated again to remove and replace the instrumentation implanted in the first surgery. Following this surgery, Ratliff's condition deteriorated even further, to the point where he was in constant pain and unable to walk, talk, or care for himself. A month later, Ratliff saw a television report on the risks associated with the AcroMed instrumentation that had been surgically implanted in him and removed. Ratliff contends that this was his first inkling that Earle's treatment had been improper. Ratliff returned to Earle on January 4, 1994, for a final visit, and not quite two months later, on February 28, he and his wife (collectively, "Ratliff") sued Earle and others. We are concerned only with Ratliff's action against Earle.

Ratliff sued Earle for negligence, fraudulent concealment, strict liability, and violations of the Deceptive Trade Practices-Consumer Protection Act.³ Ratliff alleged that Earle was negligent in:

- misdiagnosing his condition;
- performing unwarranted and unnecessary surgeries on him;

- implanting in his back pedicle devices not approved by the Federal Food and Drug Administration;
- failing to warn him of the risks of the surgery and the causes of his subsequent pain; and
- misrepresenting throughout the entire course of treatment the risks of pedicle instrumentation and the problems experienced by other patients from such a procedure.

Ratliff further alleged that Earle had fraudulently concealed:

- that the surgeries were unwarranted and unnecessary;
- that objective reports did not support Earle's diagnosis and recommendation of surgery;
- that statements Earle made to induce Ratliff to have surgery were incorrect;
- that assurances Earle gave Ratliff about his condition and the reasons ***885** for his continuing pain were misleading, incomplete, and inaccurate; and
- the risks of using spinal fixation devices, some of which were printed on an insert in the packaging of the instrumentation Earle implanted in Ratliff.

Finally, Ratliff alleged that Earle violated the DTPA by telling him that:

- he needed surgery;
- he would get “95% better” and would be able to return to work;
- the devices implanted in Ratliff were safe, approved for such use, and permanent; and
- the pain he endured was to be expected and would get better.

(Ratliff has dismissed his strict liability claim in order to participate in a settlement reached in *In re Orthopedic Bone Screw Products Liability Litigation (Fanning v. Acromed Corp.)*.⁴)

Earle moved for summary judgment on several grounds, including: that Ratliff's claims relating to his 1991 surgery were barred by limitations; that with respect to the 1993 surgery, Earle did not breach the standard of care owed Ratliff or cause him any injury; that Earle obtained from Ratliff the consent to treatment and surgery required by statute;⁵ and that Earle did not knowingly make any misrepresentation to Ratliff. In connection with the last ground, Earle argued that Ratliff's health care liability claims could not be recast as DTPA violations. Earle supported his motion with his own affidavit and certain medical records. Ratliff responded, relying on his own affidavit and that of an expert witness, Dr. Vert Mooney, as well as other medical records. The district court granted Earle's motion “on all grounds”, and Ratliff appealed.

The court of appeals reversed, holding that Earle was not entitled to summary judgment on any ground raised in his motion.⁶ Concerning limitations, the court concluded “that the allegations of this case [involving] elements of both misdiagnosis and mistreatment mak[e] it difficult to ascertain a specific date when the malpractice claim arose.”⁷ Under the circumstances, the court found that limitations did not begin to run on Ratliff's claims until the date of Earle's last treatment,⁸ which, as we have said, was less than two months before Ratliff filed suit.

We granted Earle's petition for review.⁹ We first consider whether Ratliff's claims relating to the 1991 surgery are barred by limitations, and then whether Earle was entitled to summary judgment on Ratliff's other claims.

II

Ratliff's negligence claims are “health care liability claims” within the meaning of the Medical Liability and Insurance Improvement Act.¹⁰ Section 10.01 of the Act provides in pertinent part that

no health care liability claim may be commenced unless the action is filed within two years from the occurrence of the breach or tort or from the date the medical or health care treatment that is the subject of the claim or the hospitalization ***886** for which the claim is made is completed....¹¹

Thus, under this statute limitations is to run from one of three dates: the date of the breach or tort, the completion of treatment, or the completion of hospitalization. We have repeatedly held that a plaintiff cannot choose the most favorable of the three dates specified, and that “if the date of the negligence can be ascertained, ... limitations must be measured from the date of the tort.” ¹²

Ratliff contends, and the court of appeals agreed, that limitations did not begin to run on his claims regarding the 1991 surgery until Earle quit treating him, shortly before he filed suit. Earle asserts that limitations began to run on those claims the date surgery was performed. Ratliff also contends that the running of limitations was suspended by Earle's fraudulent concealment of certain facts about the surgery and his prognosis. Earle responds that Ratliff has failed to raise a genuine issue of material fact on the elements of fraudulent concealment. Finally, Ratliff argues that his claims cannot be barred by limitations without violating the Open Courts provision of the Texas Constitution. Earle responds that Ratliff has failed to raise a fact issue that he did not have a reasonable opportunity to sue, and thus he is not entitled to the protection of the Open Courts provision. We address each of these issues—when limitations began to run, fraudulent concealment, and Open Courts—in turn.

A

[1] Ratliff neither complains nor offers evidence of any negligence by Earle in the treatment following the 1991 surgery. Ratliff does not contend, for example, that Earle should have done something after the surgery to relieve his pain or improve his back. Ratliff alleges that Earle did not tell him the truth about the surgery, the reasons for his continued pain afterward, or his prognosis, but he does not assert that Earle's alleged post-surgical statements or concealments affected his treatment or his condition.

Rather, Ratliff contends that Earle was negligent in misdiagnosing the need for surgery, in failing to disclose the attendant risks of surgery beforehand, and in performing unwarranted surgery. Assuming Ratliff is correct, Earle's negligence occurred on or before the date he performed surgery, and limitations on Ratliff's claim began to run on that date. We reached the same conclusion in similar circumstances in *Gormley v. Stover*.¹³ There, Stover complained that Gormley was

negligent in performing [skin graft surgery](#) to improve her ability to wear dentures, but she argued that limitations did not begin to run until Gormley quit treating her. We explained:

Gormley's motion for summary judgment stated that the health care of which Stover complained occurred before or during surgery. None of the excerpts of Stover's and her expert witness' deposition testimony, attached to Gormley's motion, mentioned any negligence occurring after surgery. Gormley's affidavit stated that if Stover was injured at all, it was during surgery. Stover's affidavit did not assert that Gormley was negligent following surgery. Her affidavit did assert that Gormley represented to her after her surgery that her pain would shortly subside, but she does not claim that her continued pain was attributable to his post-surgical treatment of her. In short, Gormley's affidavit established as a matter of law that no actionable negligence occurred after surgical treatment was completed, and nothing else in the ***887** summary judgment record raises a fact issue on the matter. The trial court correctly granted summary judgment for Gormley on Stover's negligence claims in their entirety.¹⁴

As far as we have been able to determine, the only courts of appeals to consider this issue have reached the same conclusion.¹⁵

The court of appeals in the present case was concerned about the lingering effects of Earle's alleged misdiagnosis, leading to unnecessary surgery, continued pain and complications, and finally another surgery. But if the running of limitations on negligent surgery were deferred while the patient continued to experience the effects of that surgery, then the first clause of [section 10.01](#) pegging the date of the breach or tort as the beginning of the limitations period would seldom apply to surgery.

Our conclusion does not suggest that limitations is not affected when a physician who can correct a misdiagnosis or lessen its consequences fails to do so. On the contrary, we suggested in *Rowntree v. Hunsucker* that a claim for continued mistreatment is not barred simply because treatment was based on a much earlier misdiagnosis.¹⁶ *Rowntree* did not present such a situation,¹⁷ but *Chambers v. Conaway*,¹⁸ the case on which the court

of appeals relied, did. Conaway claimed that Chambers, her family physician, failed to diagnose cancer on two occasions when she complained of a lump in her breast and on several other visits to him for general health care. Based on evidence that Chambers had a duty to follow up on Conaway's complaints each time he saw her, we held that the tort Conaway complained of did not occur, and limitations did not begin to run, until the last time Chambers failed to diagnose her cancer, which was her last visit.¹⁹ We did not apply the course-of-treatment limitations provisions of section 10.01 to allow Conaway to complain of the initial misdiagnosis, but neither did we allow that first misdiagnosis to bar Conaway's complaints about later visits.

Nor does our conclusion suggest that limitations on claims of post-surgical negligence runs from the date of surgery. If treatment is negligent following surgery, then section 10.01 provides that limitations begins to run from the date of the breach or tort or from the date that treatment was completed. Thus, limitations on a claim that a physician has improperly treated a patient's infection following surgery does not begin to run on the date of surgery merely because the infection would not have occurred but for the surgery.

Ratliff does not allege that Earle misdiagnosed or mistreated his condition after surgery or that he failed to do anything following surgery to rectify or ameliorate his earlier misdiagnosis that surgery was appropriate. Under these circumstances, limitations began to run on Ratliff's complaints concerning the 1991 surgery the date it was performed.

B

Although section 10.01 prescribes the limitations period for all health care liability claims "[n]otwithstanding any other *888 law,"²⁰ we held in *Borderlon v. Peck* that the statute "does not abolish fraudulent concealment as an equitable estoppel to the affirmative defense of limitations".²¹ Proof of fraudulent concealment, we added, does not prohibit an assertion of limitations altogether, but does suspend the running of limitations until such time as the plaintiff learned of, or should have discovered, the deceitful conduct or the facts giving rise to the cause of action.²² Ratliff contends that because

Earle fraudulently concealed that the 1991 surgery was unnecessary and risky, limitations on claims concerning that surgery did not begin to run until he learned the truth in a television broadcast more than two years later, a few months before he filed suit.

[2] We considered the effect of fraudulent concealment in the medical malpractice context in *Carrell v. Denton*.²³ There the defendant physician had left a gauze sponge in plaintiff's body after surgery. To avoid having his negligence claim barred by limitations, plaintiff asserted fraudulent concealment. We rejected plaintiff's argument, explaining:

The proposition which lies at the bottom of this contention is to the effect that the relation between a surgeon and his patient involves trust and confidence, therefore fraudulent concealment is imputed to Dr. Carrell because of his failure to inform the plaintiff that the gauze sponge had been left inside the plaintiff's body. The proposition is essentially unsound. In conducting a surgical operation on his patient, and in respect to any treatment he may administer, a surgeon is under the duty to exercise due care. His failure to discharge this duty constitutes negligence and therefore is wrongful—but the failure does not, of itself, constitute fraud or expose the surgeon to the imputation of fraudulent concealment. Among other essential ingredients, a fraudulent concealment in cases of this sort includes, first, actual knowledge of the fact that a wrong has occurred, and, second a fixed purpose to conceal the wrong from the patient. Neither of these ingredients appears from the allegations of the plaintiff's petition. The trial court did not err in sustaining the special exception in question and in dismissing the suit.²⁴

In other words, proof of fraudulent concealment requires more than evidence that the physician failed to use ordinary care; it also requires evidence that the defendant actually knew the plaintiff was in fact wronged, and concealed that fact to deceive the plaintiff.²⁵

[3] [4] [5] A person who asserts fraudulent concealment to avoid summary judgment on limitations must raise a genuine issue of material fact that would support his assertion.²⁶ Of course, fraudulent concealment may be shown by circumstantial evidence as

well as direct evidence.²⁷ We therefore must examine the evidence Ratliff offered to support his claim of fraudulent concealment: Ratliff's affidavit and that of his expert, Dr. Mooney.

Mooney's affidavit focuses on whether Earle was negligent, not whether Earle deliberately concealed facts from Ratliff to deceive him. Mooney states that Earle *889 must have known that his recommendation of surgery was negligent because it was contraindicated by the objective test results set out in Ratliff's medical records and because information available to Earle concerning pedicle implementation showed that surgery should not have been attempted. While this evidence certainly shows a difference of opinion between Mooney and Earle and raises a question whether Earle was negligent, it falls short of showing Earle's "actual knowledge of the fact that a wrong ... occurred" necessary for fraudulent concealment. In addition, Mooney refers to portions of Earle's deposition testimony as evidence that Earle knew about, but did not inform Ratliff of, certain serious risks associated with spinal fixation surgery. This testimony, too, reflects a difference of professional opinion and does not show that Earle intended to deceive Ratliff.

Ratliff's affidavit does not show that Earle fraudulently concealed facts from him. Ratliff states that Earle "assur[ed] me that I would be '95 %tter' and would return back to work soon", that Earle "did not inform me that my surgery could make my condition even worse" and "never explained the permanency and severity of my condition", and that Earle "told me the [1993] surgery was necessary because I had four broken screws" when in fact the surgery was necessitated by loose, not broken, screws. But Ratliff offers no evidence, direct or circumstantial, that Earle actually knew these statements were in fact false when he made them, let alone that Earle's purpose in making them was deceit. Earle may have been negligent in what he said to Ratliff, just as he may have been negligent in performing the 1991 surgery, but Ratliff has offered no summary judgment evidence that Earle acted fraudulently by concealing a known wrong.

Because Ratliff has failed to raise an issue of fact concerning fraudulent concealment, we conclude that he cannot thereby avoid the bar of limitations.

C

[6] [7] The Open Courts provision of the Texas Constitution²⁸ does not permit a well-established common-law cause of action to be restricted by statute in a way that is unreasonable or arbitrary in view of the statute's purpose.²⁹ In *Jennings v. Burgess*, we held that the limitations provisions of [section 10.01](#) do not violate the Open Courts guarantee if a plaintiff has had a reasonable opportunity to discover the alleged wrong and bring suit before the limitations period expired.³⁰ We assumed in *Jennings*, without expressly explaining our reasons, that the plaintiff must raise a fact issue concerning the applicability of the provision to avoid a summary judgment on limitations.³¹ We believe that the same rule should apply for asserting the Open Courts guarantee in response to a motion for summary judgment on limitations as is applied in asserting fraudulent concealment.

Ratliff's affidavit establishes that he did not learn of the risks of pedicle implantation until he saw a television broadcast about a month after his second surgery. However, the only evidence Ratliff has offered to show that he could not have learned of the risks sooner consists of statements in Mooney's affidavit that he was justified in trusting Earle and the following statement: "From the information that I have reviewed, there is no evidence that Mr. Ratliff could have known that his care and continued treatment by Dr. Earle was negligent and had caused the problems he was experiencing until, at the earliest, in December 1993 when he saw the [television broadcast]." The district court correctly struck this latter *890 statement as being conclusory. Even if the sentence had not been struck, neither it nor Mooney's broad statements about justified reliance on a physician's advice would support Ratliff's constitutional claim. Mooney's statement that *he* had seen no evidence that Ratliff could have discovered Earle's alleged negligence sooner is not conclusive of the record. Between the 1991 and 1993 surgeries, Ratliff made twenty-four visits to Earle's office. Medical records establish that he repeatedly complained of pain and a lack of improvement in his condition. In his own affidavit, Ratliff reiterates that his pain persisted during that period and that there was little improvement in his condition. Ratliff's condition was not latent, nor does

he assert that the risks associated with his surgery were generally unknown to medical practitioners.

The record establishes that Ratliff had an opportunity to learn of any negligence by Earle in performing the 1991 surgery, and the fact that he waited more than two years to do so does not raise constitutional concerns. Accordingly, we conclude that Ratliff's claims concerning the 1991 surgery are barred by limitations.

III

We now turn to three additional claims Ratliff makes: that Earle was negligent in performing the 1993 surgery, that Earle failed to disclose the risks attendant to that surgery, and that statements Earle made violated the DTPA.

A

[8] Ratliff claims that Earle was negligent in performing the 1993 surgery. In his affidavit supporting his motion for summary judgment, Earle states that he did not breach the applicable standard of care in performing the 1993 surgery. "Both in 1991 and 1993," Earle's affidavit states, "use of Steffe [pedicle screws](#) and plates met the standard of care." Mooney's affidavit states with respect to the 1993 surgery: "Considering the degree of [spinal instability](#) created by Mr. Ratliff's first surgery, and the fact that Mr. Ratliff's first set of AcroMed screws and plates resulted in hardware failure with loosening, the insertion of another device was medically unwarranted." The district court struck this statement in Mooney's affidavit as being conclusory, but we do not regard it as any more conclusory than statements in Earle's affidavit. Mooney's statement raises the question whether, given Ratliff's failure to improve following the first surgical implantation and his increased [spinal instability](#), a second implant was warranted. Earle's affidavit and other summary judgment evidence do not address this issue.

[9] Summary judgment can be granted on the affidavit of an interested expert witness, like Earle, but the affidavit must not be conclusory.³² An expert's simple *ipse dixit* is insufficient to establish a matter; rather, the expert must explain the basis of his statements to link his conclusions to the facts.³³ Earle's affidavit does not explain why

implantation of additional devices in the 1993 surgery was medically warranted, given Ratliff's history; the affidavit states only the conclusion that Earle met the applicable standard of care.

Accordingly, the court of appeals did not err in reversing summary judgment on this claim.

B

[10] Ratliff contends that Earle was negligent in failing to disclose the risks attendant to the 1993 surgery. This claim ***891** is governed by the Medical Liability and Insurance Improvement Act.³⁴ The Act creates the Texas Medical Disclosure Panel and gives it the responsibility to "identify and make a thorough examination of all medical treatments and surgical procedures ... to determine which ... do and do not require disclosure of the risks and hazards to the patient".³⁵ The Panel prepares and publishes two lists, one (List A) of treatments and procedures for which the risks must be disclosed, and the other (List B) of treatments and procedures for which disclosure of risks is not required.³⁶ For all List A procedures, the Panel must also state what risks must be disclosed and the form in which disclosure must be made.³⁷ The Act then provides that a physician who discloses to a patient the risks of a List A procedure in the substance and form prescribed by the Panel "shall be considered to have complied" with the Act,³⁸ and that a patient's consent to a List A procedure obtained as prescribed "shall be considered effective".³⁹ It is undisputed that both of Ratliff's surgeries were List A procedures.⁴⁰ Earle's affidavit states in effect that he disclosed all risks identified by the Texas Medical Disclosure Panel in the manner required, and Ratliff's signed consent form shows that Earle is correct.

[11] The court of appeals held, however, that Earle's affidavit only raised a rebuttable presumption that he was not negligent in disclosing the risks of surgery to Ratliff, a presumption Ratliff could and did rebut with Mooney's affidavit stating that Earle should have disclosed certain risks beyond those enumerated by the Texas Medical Disclosure Panel.⁴¹ The court relied on another court of appeals' decision, [Penick v. Christensen](#),⁴² which concluded that a physician who makes disclosure for a List

A procedure or treatment as prescribed by the Panel can nevertheless be negligent for failing to make additional disclosures. *Penick* based its conclusion on section 6.07(a)(1) of the Act, which provides that disclosure made as prescribed for a List A procedure “shall create a rebuttable presumption that the requirements of [the Act] have been complied with”.⁴³

We do not agree that the Act permits a finding that a physician who made disclosures as prescribed by the Panel was negligent for not disclosing other risks and hazards associated with the recommended procedure. Were it so, the Act would afford a physician who complied with Panel directives no protection from liability for nondisclosure if there were any evidence that additional disclosure was appropriate. The entire purpose of the Panel decisions would thus be thwarted. Section 6.07(a)(1) is not entirely clear, but we agree with the weight of scholarly authority that, read in the light of the other provisions of the Act, it permits the presumption of proper disclosure to be rebutted only by showing the *892 invalidity of the consent form, such as by proof that the patient's signature was forged, or that the patient lacked capacity to sign.⁴⁴

Ratliff produced no evidence that his written consent was ineffective due to incapacity or was otherwise invalid, and thus he has raised no issue that Earle was negligent in disclosing the risks of surgery. Accordingly, we hold that the court of appeals erred in reversing summary judgment on this claim, and we disapprove *Penick* to the extent its reasoning is contrary to ours.

C

[12] Finally, Ratliff claims that Earle misrepresented and concealed the truth concerning both the 1991 and the 1993 surgeries in violation of the DTPA. Section 12.01(a) of the Medical Liability and Insurance Improvement Act precludes application of the DTPA to physicians “with respect to claims for damages for personal injury or death resulting, or alleged to have resulted, from negligence”.⁴⁵ Ratliff and Earle both argue whether Ratliff's DTPA claims are thus precluded.

In *Sorokolit v. Rhodes*, we held that section 12.01(a) does not preclude a DTPA claim that is not based on a physician's breach of the accepted standard of

medical care.⁴⁶ We added, however, that “[c]laims that a physician or health care provider was negligent may not be recast as DTPA actions” to avoid the provisions of the Act.⁴⁷ We held that a physician's promise that his patient's appearance following cosmetic surgery would be identical to a specific photograph was actionable under the DTPA.⁴⁸

In *Gormley v. Stover*, however, we held that a dentist's statements that he could perform surgery on the plaintiff with no problems, that a skin graft would work as well as a bone graft, that after surgery the plaintiff could wear dentures with no problems, and that her pain and numbness would subside following surgery were not actionable under the DTPA.⁴⁹ All these statements, we concluded, related to whether the dentist's choice of surgical procedure and his performance of it met the applicable standard of care.⁵⁰ In *Walden v. Jeffery*, we held that a dentist's failure to provide the plaintiff dentures that fit was a negligence claim, not a DTPA claim.⁵¹ More recently, we held in *MacGregor Medical Ass'n v. Campbell* *893 that a clinic's statements in its HMO literature that it provided qualified personnel and resources, the best services possible, and emergency service twenty-four hours a day were not actionable under the DTPA when the plaintiff's complaint was that her deceased husband had been negligently treated.⁵²

The representations Ratliff alleges Earle made are all related to Earle's treatment of him and the surgeries performed, as in *Gormley*, *Walden*, and *MacGregor*, and do not resemble the representations that were possible DTPA violations in *Sorokolit*. The gist of all of Ratliff's claims, variously phrased and labeled, is that Earle did not hold to the applicable standard of care. Such a claim sounds only in negligence. Summary judgment on these claims was therefore proper.

* * * * *

Accordingly, the court of appeals' judgment is affirmed in part and reversed in part, and the case is remanded to the district court for further proceedings.

All Citations

998 S.W.2d 882, 42 Tex. Sup. Ct. J. 919

Footnotes

- 1 TEX. CONST. art. I, § 13 (“All courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law.”).
- 2 961 S.W.2d 591.
- 3 TEX. BUS. & COM.CODE §§ 17.41–.63.
- 4 176 F.R.D. 158, 165–166 (E.D.Pa.1997).
- 5 TEX.REV.CIV. STAT. ANN. art. 4590i, §§ 6.05–.06 (Vernon Supp.1999).
- 6 961 S.W.2d 591.
- 7 *Id.* at 597.
- 8 *Id.*
- 9 42 TEX. SUP.CT. J. 335 (Feb. 4, 1999).
- 10 “ ‘Health care liability claim’ means a cause of action against a health care provider or physician for treatment, lack of treatment, or other claimed departure from accepted standards of medical care or health care or safety which proximately results in injury to or death of the patient, whether the patient’s claim or cause of action sounds in tort or contract.” TEX.REV.CIV. STAT. ANN. art. 4590i, § 1.03(4) (Vernon Supp.1999).
- 11 *Id.* § 10.01.
- 12 *Husain v. Khatib*, 964 S.W.2d 918, 919 (Tex.1998) (per curiam); *accord Bala v. Maxwell*, 909 S.W.2d 889, 891 (Tex.1995) (per curiam); *Kimball v. Brothers*, 741 S.W.2d 370, 372 (Tex.1987).
- 13 907 S.W.2d 448 (Tex.1995) (per curiam).
- 14 *Id.* at 449–450.
- 15 See *Winkle v. Tullos*, 917 S.W.2d 304, 310 (Tex.App.—Houston [14th Dist.] 1995, writ denied); *Desiga v. Scheffey*, 874 S.W.2d 244, 248–249 (Tex.App.—Houston [14th Dist.] 1994, no writ); *Shook v. Herman*, 759 S.W.2d 743, 745–746 (Tex.App.—Dallas 1988, writ denied). *Cf. Jones v. Cross*, 773 S.W.2d 41, 43 (Tex.App.—Houston [1st Dist.] 1989, writ denied) (holding that limitations began to run from the last date of treatment rather than the date of the last of two eye surgeries because plaintiff alleged negligence in the follow-up treatment).
- 16 833 S.W.2d 103, 105 (Tex.1992).
- 17 *Id.* at 108.
- 18 883 S.W.2d 156 (Tex.1993).
- 19 *Id.* at 158–159.
- 20 TEX.REV.CIV. STAT. ANN. art. 4590i, § 10.01 (Vernon Supp.1999).
- 21 661 S.W.2d 907, 909 (Tex.1983).
- 22 *Id.*; *Nichols v. Smith*, 507 S.W.2d 518, 519 (Tex.1974).
- 23 138 Tex. 145, 157 S.W.2d 878 (1942).
- 24 *Id.* at 879.
- 25 See *Borderlon*, 661 S.W.2d at 908 (holding that a physician has a duty to disclose a negligent act or the fact that an injury has occurred).
- 26 *Ryland Group, Inc. v. Hood*, 924 S.W.2d 120, 121 (Tex.1996) (per curiam); *American Petrofina, Inc. v. Allen*, 887 S.W.2d 829, 830 (Tex.1994).
- 27 See *Spoljaric v. Percival Tours, Inc.*, 708 S.W.2d 432, 435 (Tex.1986).
- 28 TEX. CONST. art. I, § 13.
- 29 See *Diaz v. Westphal*, 941 S.W.2d 96, 100 (Tex.1997).
- 30 917 S.W.2d 790, 794 (Tex.1996).
- 31 See *id.*
- 32 *Anderson v. Snider*, 808 S.W.2d 54, 55 (Tex.1991) (per curiam).

- 33 *Gammill v. Jack Williams Chevrolet, Inc.*, 972 S.W.2d 713, 726–727 (Tex.1998) (quoting *General Elec. Co. v. Joiner*, 522 U.S. 136, 146, 118 S.Ct. 512, 523, 139 L.Ed.2d 508 (1997); *Merrell Dow Pharm., Inc. v. Havner*, 953 S.W.2d 706, 711–712 (Tex.1997); *Schaefer v. Texas Employers' Ins. Ass'n*, 612 S.W.2d 199, 202–204 (Tex.1980)).
- 34 TEX. REV. CIV. STAT. ANN. art. 4590i, §§ 6.01–.08 (Vernon Supp.1999).
- 35 *Id.* § 6.04(a).
- 36 *Id.* § 6.04(b), (c).
- 37 *Id.* § 6.04(b).
- 38 *Id.* § 6.05.
- 39 *Id.* § 6.06.
- 40 The Texas Medical Disclosure Panel lists “spine operation” as a procedure requiring written disclosure, and defines the procedure as including “laminectomy, decompression, fusion, internal fixation or procedures for nerve root or spinal cord compression”. 25 TEX. ADMIN. CODE § 601.2(m)(3) (1998). The Panel has identified six risks which must be disclosed prior to a spine operation: “pain, numbness or clumsiness”, “impaired muscle function”, “incontinence or impotence”, “unstable spine”, “recurrence or continuation of the condition that required the operation”, and “injury to major blood vessels”. *Id.*
- 41 961 S.W.2d at 597.
- 42 912 S.W.2d 276, 285–286 (Tex.App.—Houston [14th Dist.] 1995, writ denied).
- 43 TEX. REV. CIV. STAT. ANN. art. 4590i, § 6.07(a)(1) (Vernon Supp.1999).
- 44 See Jim M. Perdue, *The Law of Texas Medical Malpractice, Chapter X: Informed Consent*, 22 HOUS. L. REV. 399, 426 n. 190 (1985) (observing “[t]here appears to be no avenue for disputing th[e] presumption” of sections 6.05 and 6.06, that written disclosure of the panel’s enumerated risks is sufficient for List A procedures); Frank W. Elliott, *The Impact of the Texas Medical Liability and Insurance Improvement Act on Informed Consent Recovery in Medical Malpractice Litigation*, 10 TEX. TECH L. REV. 381, 387 (1979) (“[I]t appears that evidence that could rebut the presumption of disclosure under Section 6.07(a)(1) is evidence that would attack the validity of the consent.”); COMM. ON PATTERN JURY CHARGES, STATE BAR OF TEX., TEXAS PATTERN JURY CHARGES—MALPRACTICE, PREMISES & PRODUCTS PJC 51.15, cmt. (1997) (“If the physician has obtained the patient’s signature on a consent form ... containing the risks enumerated on list A, the only means by which the patient may recover for failure to obtain informed consent is to prove the invalidity of the form and that the risks had not otherwise been disclosed to him.”); see also *Crundwell v. Becker*, 981 S.W.2d 880 (Tex.App.—Houston [1st Dist.] 1998, pet. denied) (holding that the trial court’s directed verdict on an informed consent claim was not error when the patient who signed the consent form offered no evidence of incapacity).
- 45 TEX. REV. CIV. STAT. ANN. art. 4590i, § 12.01(a) (Vernon Supp.1999).
- 46 889 S.W.2d 239, 242 (Tex.1994).
- 47 *Id.*
- 48 *Id.* at 242–243.
- 49 907 S.W.2d 448, 449–450 (Tex.1995) (per curiam).
- 50 *Id.* at 450.
- 51 907 S.W.2d 446, 447–448 (Tex.1995) (per curiam).
- 52 985 S.W.2d 38, 40–41 (Tex.1998) (per curiam).

2012 WL 3133804

Only the Westlaw citation is currently available.

SEE TX R RAP RULE 47.2 FOR
DESIGNATION AND SIGNING OF OPINIONS.**MEMORANDUM OPINION**Court of Appeals of Texas,
Corpus Christi–Edinburg.

Olga A. LIMON, Appellant,

v.

Yusuke M. YAHAGI, M.D., Appellee.

No. 13–12–00019–CV.

|
Aug. 2, 2012.On appeal from the 377th District Court of Victoria
County, Texas. Robert C Cheshire, Judge.**Attorneys and Law Firms**[Robert D. O'Connor](#), Houston, TX, for Olga A. Limon.[W. Richard Wagner](#), Patterson & Wagner, San Antonio,
TX, for Yusuke M. Yahagi, M.D.Before Chief Justice [VALDEZ](#) and Justices GARZA and
[VELA](#).**MEMORANDUM OPINION**[ROGELIO VALDEZ](#), Chief Justice.

*1 By one issue, appellant, Olga L. Limon, appeals the trial court's summary judgment in favor of appellee, Yusuke M. Yahagi, M.D. We affirm.

I. BACKGROUND

This case involves a healthcare liability claim brought under Chapter 74 of the Texas Civil Practice and Remedies Code. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 74.000–.507 (West 2011). At issue in this case is a surgical procedure (specifically, a stent placement), which was performed on May 7, 2008 and which, according to appellant, should not have been performed.

Appellee performed the procedure after a [CT scan](#) showed a small [aneurysm](#) (i.e., dilation) of appellant's aorta and a “crescentric [thrombus](#)” (i.e., clot) or [obstruction of the aorta](#). The [thrombus](#) caused the aorta to be severely narrowed or occluded (up to 70%). Appellee concluded that the obstruction was causing appellant to experience [intermittent claudication](#) (i.e., pain when walking caused by inadequate blood supply). Appellee advised appellant that the safest treatment for the obstruction was to place a [stent](#) endovascularly (i.e., inside the aorta) through the obstructed area to open it and prevent clots from traveling downstream to small arteries, particularly the bilateral lower extremities, which would prevent reduced blood flow or ischemia.

The [stent](#) placement was successful in relieving the obstruction in appellant's aorta and in opening the aorta. Appellant experienced no complications from the procedure. On November 4, 2009, appellant had a follow-up appointment with her cardiologist, Harish Chandna, M.D., who told her that appellee had performed the [stent](#) placement unnecessarily because the [aneurysm](#) was not wide enough to require surgery.

On May 3, 2010, appellant sent a notice letter to appellee, advising him of her potential healthcare liability claim. On July 22, 2010, appellant filed suit against appellee, alleging that no procedure was indicated because her [abdominal aortic aneurysm](#) was uncomplicated and measured only 2.2 centimeters in diameter. Appellant alleged that, according to accepted medical literature and the [stent's](#) product insert, no surgery should have been performed unless the [aneurysm](#) measured at least 4.5 to 5.0 centimeters in diameter. Appellant further alleged that the standard of care for an [aneurysm](#) measuring 2.2 centimeters is to monitor the patient every 6–12 months to determine whether the [aneurysm](#) is getting bigger.

Appellee moved for summary judgment on the basis that appellant filed suit one day outside the relevant limitations period. Appellant asserted fraudulent concealment to avoid appellee's limitations defense and attached evidence in support thereof to her response to appellee's motion for summary judgment. The trial court granted appellee's motion for summary judgment, and this appeal ensued.

II. ANALYSIS

A. Applicable Law

Healthcare liability claims have a two-year limitations period. [TEX. CIV. PRAC. & REM.CODE § 74.251\(a\)](#) (West 2011). The limitations period for a healthcare liability claim begins on one of three dates: (1) the occurrence of the breach or tort; (2) the last date of the relevant course of treatment; or (3) the last date of the relevant hospitalization. See [Shah v. Moss](#), 67 S.W.3d 836, 841 (Tex.2001). If the date the alleged tort occurred is ascertainable, limitations must begin on that date. *Id.* And if the date is ascertainable, further inquiry into the second and third categories is unnecessary. *Id.*

*2 Notice given as provided in chapter 74 tolls the applicable statute of limitations to and including a period of 75 days following the giving of the notice, and the tolling applies to all parties and potential parties. [TEX. CIV. PRAC. & REM.CODE § 74.051\(c\)](#) (West 2011).

Fraudulent concealment estops a defendant from relying on the statute of limitations as an affirmative defense to the plaintiff's claim. [Malone v. Sewell](#), 168 S.W.3d 243, 251 (Tex.App.-Fort Worth 2005, pet. denied). Fraudulent concealment tolls limitations until the plaintiff discovers the fraud or could have discovered the fraud with reasonable diligence. [Shah](#), 67 S.W.3d at 841. Fraudulent concealment consists of four elements: (1) the existence of the underlying tort; (2) the defendant's knowledge of the tort; (3) the defendant's use of deception to conceal the tort; and (4) the plaintiff's reasonable reliance on the deception. [Malone](#), 168 S.W.3d at 252.

B. Standard of Review

In a summary judgment case, the issue on appeal is whether the movant met his summary judgment burden by establishing that no genuine issue of material fact exists and that the movant is entitled to judgment as a matter of law. [TEX.R. CIV. P. 166a\(c\)](#); [S.W. Elec. Power Co. v. Grant](#), 73 S.W.3d 211, 215 (Tex.2002); [City of Houston v. Clear Creek Basin Auth.](#), 589 S.W.2d 671, 678 (Tex.1979). The burden of proof is on the movant, and all doubts about the existence of a genuine issue of material fact are resolved against the movant. [S.W. Elec. Power Co.](#), 73 S.W.3d at 215; [Sci. Spectrum, Inc. v. Martinez](#), 941 S.W.2d 910, 911 (Tex.1997); [Great Am. Reserve Ins. Co. v. San Antonio Plumbing Supply Co.](#), 391 S.W.2d 41, 47 (Tex.1965). Therefore, we must view the evidence and its

reasonable inferences in the light most favorable to the nonmovant. [Great Am.](#), 391 S.W.2d at 47.

In deciding whether there is a material fact issue precluding summary judgment, all conflicts in the evidence are disregarded and the evidence favorable to the nonmovant is accepted as true. [Harwell v. State Farm Mut. Auto. Ins. Co.](#), 896 S.W.2d 170, 173 (Tex.1995). Evidence that favors the movant's position will not be considered unless it is uncontroverted. [Great Am.](#), 391 S.W.2d at 47.

A defendant is entitled to summary judgment on an affirmative defense if the defendant conclusively proves all the elements of the affirmative defense. [Rhône-Poulenc, Inc. v. Ramirez](#), 997 S.W.2d 217, 223 (Tex.1999). To accomplish this, the defendant-movant must present summary judgment evidence that establishes each element of the affirmative defense as a matter of law. [Ryland Group, Inc. v. Hood](#), 924 S.W.2d 120, 121 (Tex.1996).

Once the defense of limitations is conclusively established, and the plaintiff resists summary judgment by asserting fraudulent concealment, the burden is on the plaintiff to raise a fact issue on each element of fraudulent concealment. [Shah](#), 67 S.W.3d at 841 (citing [Am. Petrofina, Inc. v. Allen](#), 887 S.W.2d 829, 830 (Tex.1994)).

C. Discussion

*3 Appellant pled several causes of action against appellee; however, there is no dispute that each of the causes of action is a healthcare liability claim subject to the two-year limitations period in [section 74.251\(a\)](#). See [TEX. CIV. PRAC. & REM.CODE § 74.251\(a\)](#). Appellant argues that the trial court erred in granting summary judgment in favor of appellee because she produced evidence that raised a genuine issue of material fact as to each element of fraudulent concealment.

We agree with appellee that, unless the statute of limitations was tolled by fraudulent concealment, the limitations period commenced on May 7, 2008, the date of the surgery. See [Morrison v. Chan](#), 699 S.W.2d 205, 208 (Tex.1985) (“We hold that the Legislature's intent in passing Art. 4590i, § 10.01, was to abolish the discovery rule in cases governed by the Medical Liability Act.”); see also [Earle v. Ratliff](#), 998 S.W.2d 882, 887 (Tex.1999) (holding that limitations began on surgery date because the plaintiff did not allege post-surgical negligence); [Gormley v. Stover](#), 907 S.W.2d 448, 449–

50 (Tex.1995) (same). Appellant's notice letter tolled the limitations period for 75 days, extending it to July 21, 2010. Thus, unless appellant produced evidence raising a genuine issue of material fact on each element of fraudulent concealment, her lawsuit, filed July 22, 2010, was barred by limitations.

The basis of appellant's lawsuit is that appellee deceived her into undergoing an unnecessary surgical procedure. To establish fraudulent concealment, appellant was required to prove the following: (1) the existence of a tort based on appellee performing an unnecessary surgical procedure; (2) appellee's knowledge of the tort; (3) appellee's use of deception to conceal the tort; and (4) appellant's reasonable reliance on the deception. *See Malone*, 168 S.W.3d at 252.

1. An Underlying Tort

Appellant's summary judgment evidence included an affidavit from her expert, Devinder S. Bhatia, M.D., a general surgeon who has performed [abdominal aortic aneurysm](#) (“AAA”) [stent](#) procedures and is knowledgeable about the standard of care:

In treating AAA, it is the standard of care that intervention, i.e., surgery, is not recommended for asymptomatic infrarenal or juxtarenal AAAs if they measure less than 5.0–5.5 cm in diameter in men or less than 4.5–5.0 cm in diameter in women, absent certain circumstances that do not exist in this case. If an AAA is measured at less than these diameters, the practice protocol requires one to monitor the progression in size of the AAA every 6–12 months.

Dr. Bhatia reviewed appellant's care records from appellee and her hospital chart. In addition, his affidavit included and discussed medical literature on the topic of the standard of care for the treatment of AAA and the product insert for the AAA [stent](#) that appellee used on appellant. Based on the foregoing, Dr. Bhatia opined that appellant was not only negligent, but also grossly negligent:

*4 Based upon my review of these records and my experience as a Cardiovascular and Thoracic Surgeon

who has undergone the training reflected in my CV attached as Exhibit A, it is my opinion that [appellee] failed to follow the standard of care for the treatment of [appellant's] AAA as reflected in the medical records attached to this affidavit as Exhibits B–F. In this case, objective studies showed that [appellant's] [aortic aneurysm](#) was measured at 2.2 cm. This study performed by radiologist, Dr. Steven C. Schnicker, M.D., was the only one available to [appellant] before he made the decision to place the [aortic stent graft](#) into [appellant]. The standard of care for an [aortic aneurysm](#) of this size does not require emergent intervention as [appellant] was lead to believe by [appellee]. In fact, no intervention of any kind is called for with an [aneurysm](#) of this size. The standard of care only calls for management of these [aneurysms](#) by performing serial examinations with either ultrasound of the abdomen or [CT scan](#) of the abdomen every six months to a year.

...

Despite this clear contraindication to any surgical intervention, [appellee] proceeded with AAA [stent](#) graft placement. This action was inappropriate and violated the standard of care for treatment of a 2.2 cm aortic aneurism. No intervention should have been performed as recommended by the guidelines of the American College of Cardiology, American Heart Association and other reputable Society guidelines mentioned below.

...

If negligence is defined as [not] exercising the care that a Cardiovascular and Thoracic Surgeon of ordinary prudence would have done under the same or similar circumstances, it is my opinion that [appellee] was certainly negligent in his care and treatment of [appellant]. If “gross negligence” means more than momentary thoughtlessness, inadvertence or error in judgment such that there is such an entire want of care as to establish that the act or omission complained of was the result of actual conscious indifference to the rights, safety, and welfare of [appellant], then it is my opinion that [appellee] was also grossly negligent. In other words, by performing surgery under these circumstances, [appellee] departed from the ordinary standard of care to such an extent that it created an extreme risk of harming [appellant], especially considering the probability and magnitude of the costs

of surgery and the complete lack of indication for same with respect to [appellant].

Dr. Bhatia also addressed the standard of care with regard to the condition of “crescentric [thrombus](#),” which, according to appellee, was an additional reason for the surgery:

[Appellee] has suggested that the crescentric [thrombus](#) noted in Dr. Schnicker's report called for intervention even if the size of the [aneurysm](#) did not. He's also suggested that [appellant's] bilateral lower extremity pain complaints justify surgery. I disagree with both of these suggestions. With respect to the crescentric [thrombus](#), and as reflected in Dr. Schnicker's report, this was a small “uncomplicated” infrarenal [abdominal aortic aneurysm](#). No surgical intervention should have been performed based upon the presence of [thrombus](#). As to the presence of pain, [appellee] failed to exclude a neurological basis for [appellant's] bilateral lower extremity pain. He ordered no test, such as an MRI, to determine the genesis of her pain complaints. As such, if pain was the reason he performed surgery, he didn't do his job to determine the cause of her pain before surgery and should not have performed it on that basis.

*5 Elsewhere in his affidavit, Dr. Bhatia elaborated further on his opinion regarding the crescentric [thrombus](#), which was based on an article attached as Exhibit K to his affidavit:

This study shows that [thrombus](#) in the aorta actually may reduce wall stress in an [aortic aneurysm](#) and thereby reduce the threat of rupture, which is why surgical interventions in the aorta are performed. Thus, the presence of [thrombus](#) noted by [appellee] to have

served as a basis for intervention argues against surgical intervention in uncomplicated [aneurysms](#) as [appellant] had.

Appellant's summary judgment evidence also tended to prove that, as a result of the unnecessary surgical procedure, appellant suffered economic damages in the amount of \$2,528.17 for a surgical fee charged by appellee and \$80,246.10 in hospital charges payable to a hospital with which appellee had an exclusive relationship.

For purposes of fraudulent concealment, we conclude that appellant's summary judgment evidence was sufficient to raise a fact issue on the element of an underlying tort based on appellee's performance of an unnecessary surgery. *See id.*

2. Appellee's Knowledge of the Underlying Tort

To successfully assert fraudulent concealment, appellant was also required to create a fact issue on appellee's “actual knowledge of the fact that a wrong ha [d] occurred.” *See Earle, 998 S.W.2d at 888.* In other words, proof of fraudulent concealment requires more than evidence that the physician failed to use ordinary care; it also requires evidence that the defendant actually knew the plaintiff was in fact wronged. *Id.*

As set forth above, appellant's summary judgment evidence was sufficient to raise a fact issue on appellee failing to use ordinary care insofar as he performed a surgical procedure that was unnecessary. Appellant's summary judgment evidence also showed that appellee either knew or reasonably should have known that the surgical procedure was unnecessary. Specifically, the affidavit of Dr. Bhatia provided circumstantial evidence tending to establish appellee's actual knowledge of the wrong:

The product insert, which [appellee] should've seen prior to the implantation of the ... [Stent Graft](#) into [appellant], establishes [appellee] knew that even the manufacturer of this graft could not establish an indication for implantation of this device into [appellant].¹ This is significant

because manufacturers spend millions of dollars to test products for use to determine the safety and efficacy of medical devices. Despite these significant expenditures and the studies performed during clinical trials, the manufacturer could not establish that this device was safe and effective for [appellant's] condition. This certainly supports my opinions about [appellee's] grossly negligent conduct. It also establishes that [appellee] should have told [appellant] that any representation he had previously made about needing surgery was mistakenly made if that was the case. His failure to do so makes me believe that he intentionally wanted to alarm [appellant] into having surgery.

*6 For purposes of fraudulent concealment, we conclude that appellant's summary judgment evidence was sufficient to raise a fact issue on the element of appellee's actual knowledge of the underlying tort or wrong involving appellee's performance of an unnecessary surgery. *See Malone*, 168 S.W.3d at 252.

3. Appellee's Use of Deception to Conceal the Tort

The third element for fraudulent concealment requires proof that appellee used deception to conceal his wrongdoing. Here, we conclude appellant's summary judgment evidence was insufficient to raise a fact issue.

There is a distinction between an underlying tort, such as fraud, and the doctrine of fraudulent concealment, which “may toll the statute of limitations *after* the cause of action accrues.” *BP Am. Prod. Co. v. Marshall*, 342 S.W.3d 59, 67 (Tex.2011) (emphasis added). A cause of action for a tort, including a tort involving deception, such as what appellant has alleged in this case, is said to accrue at the time of the occurrence of the breach

or tort. *See Shah*, 67 S.W.3d at 841. As the party asserting fraudulent concealment, appellant was required to establish not only the underlying wrong (i.e., the tort involving an unnecessary surgery), but also that “the defendant actually knew the plaintiff was in fact wronged, and concealed that fact to deceive the plaintiff.” *See Earle*, 998 S.W.2d at 888.

In this case, this standard required appellant to establish that appellee concealed the fact that he had wronged her by performing an unnecessary surgery. *See S.V. v. R.V.*, 933 S.W.2d 1, 6 (Tex.1996) (explaining that the fraudulent concealment doctrine defers accrual because “a person cannot be permitted to avoid liability for his actions by deceitfully concealing wrongdoing until limitations has run”). Appellant did not meet this burden. She failed to produce any evidence that appellee committed any deceptive conduct *after* he had committed the underlying tort involving the unnecessary surgery. *See Malone*, 168 S.W.3d at 252. We also note that appellant failed to produce evidence on the fourth element for fraudulent concealment: her reasonable reliance on the deception. *See id.* There was no evidence offered by appellant that tended to prove that any deceptive conduct was committed by appellee after the surgery or that appellant reasonably relied on any such conduct. *See id.*

Accordingly, the trial court did not err in concluding that appellant's claims brought under Chapter 74 of the Texas Civil Practice and Remedies Code were barred by the two-year statute of limitations and its granting of summary judgment in favor of appellee was not error. *See TEX. CIV. PRAC. & REM.CODE* § 74.251(a).

Appellant's issue is overruled.

III. CONCLUSION

The judgment of the trial court is affirmed.

All Citations

Not Reported in S.W.3d, 2012 WL 3133804

Footnotes

- 1 The product insert for the stent in question stated the manufacturer's criteria to establish an indication for implantation as any one of the following: (1) an aneurysm with a diameter greater than 5 centimeters; (2) an aneurysm with a diameter

of 4–5 centimeters, which has increased in size by 0.5 centimeters or more in the last six months; or (3) an aneurysm with a diameter twice the size of an normal infrarenal aorta.

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2016 WL 1719261

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SEE TX R RAP RULE 47.2 FOR
DESIGNATION AND SIGNING OF OPINIONS.Court of Appeals of Texas,
Texarkana.Donal Turner, Appellant
v.

Christus St. Michael Health System, Appellee

No. 06–15–00068–CV

Submitted: April 7, 2016

Decided: April 28, 2016

Synopsis

Background: Patient brought action against hospital for medical malpractice more than two years after he was treated for his broken wrist in the emergency department. The 102nd District Court, Bowie County, entered summary judgment in favor of hospital. Patient appealed.

Holdings: The Court of Appeals, [Morris](#), C.J., held that:

[1] fraudulent concealment did not toll two-year statute of limitations for patient's health care liability claim;

[2] date of hospital's alleged wrong was readily ascertainable, and thus continuing treatment rule did not allow extension of limitations period; and

[3] patient had a reasonable opportunity to discover hospital's alleged wrong and bring claim against it before the limitations period expired, and thus patient could not establish Open Courts violation allowing him to extend limitations period.

Affirmed.

West Headnotes (3)

[1] Limitation of Actions **What constitutes concealment**

Fraudulent concealment did not toll two-year statute of limitations for patient's health care liability claim against hospital alleging that he received improper treatment for his broken wrist in the emergency room and improper instructions at the time of his discharge from hospital, absent any evidence that hospital knew of its alleged malpractice in its treatment or instruction of patient or that it concealed those alleged facts from him. [Tex. Civ. Prac. & Rem. Code Ann. § 74.251\(a\)](#).

[Cases that cite this headnote](#)

[2] Limitation of Actions **Negligence in performance of professional services**

Date of hospital's alleged wrong in its treatment of patient's broken wrist was readily ascertainable, and thus continuing treatment rule did not allow extension of two-year statute of limitations for health care liability claims, where hospital only treated patient on one date. [Tex. Civ. Prac. & Rem. Code Ann. § 74.251\(a\)](#).

[Cases that cite this headnote](#)

[3] Constitutional Law **Time for proceedings****Limitation of Actions** **Constitutionality of statute**

Patient had a reasonable opportunity to discover hospital's alleged wrong in treating his broken wrist and bring medical malpractice claim before the two-year limitations period applicable to health care liability claims expired, and thus patient could not establish a violation under the Open Courts provision of the State Constitution allowing him to extend limitations period, where patient had five months before the

limitations period ran from his admitted discovery of the alleged problem with his treatment, and he may have discovered the problem as much as 17 or even 23 and $\frac{2}{3}$ months before the limitations period ran. Tex. Const. art. 1, § 13; [Tex. Civ. Prac. & Rem. Code Ann. § 74.251](#).

[Cases that cite this headnote](#)

On Appeal from the 102nd District Court, Bowie County, Texas, Trial Court No. 15C0448–102. Bobby Lockhart, Judge.

Attorneys and Law Firms

[Michael L. Bernoudy Jr.](#), The Bernoudy Law Firm, PLLC, Marshall, TX, for appellant.

[Michelle E. Robberson](#), [Cory M. Sutker](#), Cooper & Scully, PC, Dallas, TX, for appellee.

Before [Morriss](#), C.J., Moseley and [Burgess](#), JJ.

MEMORANDUM OPINION

Memorandum Opinion by Chief Justice [Morriss](#)

*1 On September 1, 2012, in the emergency department of Christus St. Michael Health System (“Hospital”), Donal Turner's broken left wrist was placed in a splint, and he was released. Turner filed suit against the Hospital April 6, 2015, after admittedly discovering, on March 28, 2014, that his treatment was allegedly improper and he had allegedly received improper instructions at the time of his discharge by the Hospital. From a summary judgment premised on limitations, Turner appeals. We affirm the judgment of the trial court, because (1) the discovery rule does not extend limitations of a health care liability claim, (2) no summary judgment evidence of fraudulent concealment exists to extend limitations, (3) continuing treatment does not extend limitations on Turner's claim, and (4) as a matter of law, Texas' Open Courts provision was not violated.

In our review of a summary judgment, we must resolve any doubts against the moving party, viewing the evidence in the light most favorable to the nonmoving party and taking that evidence as true. [Shah v. Moss](#), 67 S.W.3d

836, 842 (Tex.2001). The Hospital, to obtain a summary judgment, was required to demonstrate its entitlement to summary judgment as a matter of law, that is, it had to establish that no genuine issues of material fact existed. See [TEX.R. CIV. P. 166a\(c\)](#); [Provident Life & Acc. Ins. Co. v. Knott](#), 128 S.W.3d 211, 215–16 (Tex.2003). The Hospital's burden also included conclusively establishing its limitations defense. [Knott](#), 128 S.W.3d at 220; [Delgado v. Burns](#), 656 S.W.2d 428 (Tex.1983). We conclude that it did so.

(1) The Discovery Rule Does Not Extend Limitations of a Health Care Liability Claim

While Turner claims that a fact issue exists concerning when he knew or reasonably should have known of his cause of action, the Hospital asserts that health care liability claims do not support the discovery rule. Here, the applicable statute of limitations excludes application of the discovery rule.

The summary judgment evidence establishes, without dispute, that Turner's claim is a health care liability claim and that the Hospital began and ended its treatment of Turner September 1, 2012.

Here, the controlling statutory language is that “no health care liability claim may be commenced unless the action is filed within two years from the occurrence of the breach or tort....” [TEX. CIV. PRAC. & REM.CODE ANN § 74.251\(a\)](#) (West 2011). Given that the Hospital's malpractice occurred, if at all, September 1, 2012, the two-year limitations period began to run at that time. See [Shah](#), 67 S.W.3d at 841. No discovery rule operates to extend limitations under [Section 74.251](#). [Walters v. Cleveland Reg'l Med. Ctr.](#), 307 S.W.3d 292, 298 n.28 (Tex.2010); see [Morrison v. Chan](#), 699 S.W.2d 205, 207–08 (Tex.1985) (absent violation of open courts provision, discovery rule not available in medical negligence suits).

Therefore, limitations would bar Turner's claim filed more than two years after his visit to the Hospital, unless he can succeed on one or more of his arguments discussed below.

(2) No Summary Judgment Evidence of Fraudulent Concealment Exists To Extend Limitations

*2 [1] Turner asserts that there was a fact issue that the Hospital fraudulently concealed its wrong. The Hospital responds that Turner never pled fraudulent

concealment and never presented any evidence of fraudulent concealment sufficient to extend limitations.

Fraudulent concealment of medical negligence can relieve a claimant of a limitations problem. *Shah*, 67 S.W.3d at 841. To establish a fraudulent-concealment claim, Turner must show that the Hospital actually knew a wrong occurred, had a “fixed purpose” to conceal it, and did conceal it from Turner. *See id.*; *Earle v. Ratliff*, 998 S.W.2d 882, 887 (Tex.1999).

For Turner to avoid summary judgment on limitations grounds on his fraudulent-concealment claim, he must have raised a fact issue that would support the claim. *See Shah*, 67 S.W.3d at 841; *Earle*, 998 S.W.2d at 888. To raise a fact issue on fraudulent concealment, Turner must have submitted summary judgment evidence that the Hospital knew Turner had received substandard medical care or that he had been misinformed and that it had concealed one or both of those failures with a purpose to deceive him. *See Shah*, 67 S.W.3d at 846; *Earle*, 998 S.W.2d at 888. While Turner claims to have argued fraudulent concealment to the trial court, he cites no evidence that the Hospital knew of its alleged malpractice in treatment or in instruction of its patient or that it concealed those alleged facts from Turner. We find no such evidence.

Fraudulent concealment fails as a bar to the summary judgment.

(3) Continuing Treatment Does Not Extend Limitations on Turner's Claim

[2] Turner claims that limitations was extended, under the statute, because the record demonstrates that Turner's wrist was still being treated until March 2014. He reasons that Section 74.251(a) of the Texas Civil Practice and Remedies Code explicitly allows such an extension of the limitations period in his case. We disagree.

Turner's argument seeks to make use of the statutory language allowing suit to be filed “within two years from the occurrence of the breach or tort or from the date the medical or health care treatment that is the subject of the claim or the hospitalization for which the claim is made is completed....” TEX. CIV. PRAC. & REM.CODE ANN § 74.251(a). That language has been interpreted to mean that limitations runs from the end of treatment or hospitalization if the date of the wrong cannot be ascertained, but that, if the date of the wrong

is ascertainable, the date of the wrong will control and will forestall any extension by that later treatment or hospitalization. *Shah*, 67 S.W.3d at 841, 842–43; *Earle*, 998 S.W.2d at 886.

Here, the evidence is clear that the Hospital was involved on only one date, September 1, 2012, the only day of its treatment of Turner. Because that date is readily ascertainable, the two-year limitations period ran from that date and expired September 1, 2014.

(4) As a Matter of Law, Texas' Open Courts Provision Was Not Violated

[3] Turner also claims that the two-year limitations period set up by Section 74.251 denied him a reasonable opportunity to discover the wrong and bring suit and therefore violates the Open Courts provision in the Texas Constitution. The Hospital responds that the summary judgment evidence demonstrates that Turner had a reasonable opportunity to discover the alleged wrong and sue within the limitations period.

*3 Persons that bring common-law claims will not unreasonably or arbitrarily be denied access to the courts. TEX. CONST. art. 1, § 13. If a statute unreasonably or arbitrarily abridges a right to pursue a claim, it is unconstitutional in denying the claimant the open courts of this state. *Earle*, 998 S.W.2d at 889; *Jennings v. Burgess*, 917 S.W.2d 790, 793 (Tex.App.—San Antonio 1996, writ granted). To be constitutional, the statutory scheme must afford a claimant a reasonable opportunity to discover the wrong and bring suit. *Neagle v. Nelson*, 685 S.W.2d 11, 12 (Tex.1985).

To pursue an Open Courts claim in a health care liability case, the claimant must first show a common-law claim that the statute restricts. *See Jennings*, 917 S.W.2d at 793. He or she must then show that the restriction is unreasonable or arbitrary when balanced against the statute's purpose and basis. *Jennings*, 917 S.W.2d at 793; *Sax v. Vottler*, 648 S.W.2d 661, 666 (Tex.1983). Here, there is no Open Courts violation if Turner had a reasonable opportunity to discover the alleged wrong and bring suit before the limitations period expired. *See Shah*, 67 S.W.3d at 841–42.

The Texas Supreme Court's discussion in *Shah* is instructive regarding the due diligence that must be present to support a successful Open Courts claim. *Shah*,

67 S.W.3d at 847. There, after eye surgery, the claimant's vision problems developed and continued for more than a year, even after a second surgery. *Id.* The high court held that the summary-judgment evidence established the claimant's failure to seize the reasonable opportunity he had to discover the alleged wrong and bring suit within the two-year limitations period. *Id.* Therefore, ruled the court, the claimant raised no fact issue "that he did not have a reasonable opportunity to discover the alleged wrong and bring suit within the limitations period or that he sued within a reasonable time after discovering the alleged wrong." *Id.*

On this series of events, Turner bore the burden to raise a fact issue demonstrating that he was denied such a reasonable opportunity to discover the Hospital's alleged wrong and bring suit before September 1, 2014. *See Walters*, 307 S.W.3d at 295; *Shah*, 67 S.W.3d at 846–47.

The summary-judgment evidence establishes three dates that are relevant to our analysis of Turner's Open Courts claim, September 10, 2012, March 25, 2013, and March 28, 2014.

The first two dates come from a letter of Dr. Jeffrey T. DeHaan, who saw Turner September 10, 2012, just nine days after Turner's visit to the Hospital. DeHaan's letter reports that his examination that day revealed a "very tight splint" on Turner's arm resulting in what DeHaan observed to be gross swelling and blistering of his hand and extreme bruising of the radial nerve, prompting DeHaan to do prompt surgery to repair the [displaced fracture](#) and to decompress Turner's median nerve. The DeHaan diagnosis and surgery occurred almost two full years before limitations ran on Turner's claim against the Hospital. While there is nothing explicit in the evidence that Turner knew then that there was something wrong with his treatment by the Hospital, it is difficult to imagine that he was not then on notice of a problem. DeHaan's follow-up letter was produced some seventeen months before limitations ran, pretty clearly setting out the problem.

DeHaan's letter noted that, after an accident in late August or early September, Turner was seen in the

emergency room "where a very tight splint was placed." DeHaan observed that Turner's September 10 condition included "a grossly swollen hand and blistering in the ulnar and 1st web space of the hand," that his "median nerve was extremely ecchymotic [bruised,]" but "not disrupted," and that Turner also had "a displaced distal [radius fracture](#)." The letter noted that Turner was taken to surgery where the "fracture was repaired" and the "median nerve was decompressed." The letter added that, on follow up, Turner's bone and the "blistering and ulcers" have healed but that Turner still has "significant median and ulnar nerve deficits" resulting in "a fairly stiff hand." Finally, DeHaan noted in the letter that Turner was referred to a "hand specialist" in Tyler, Texas, who had the capability of doing "reconstructive hand surgery and/or median or ulnar nerve grafting."

*4 Turner admitted that, on the third date, March 28, 2014, he was informed that the Hospital's "improper cast placement could have contributed to [his] injuries." That date was five months before limitations ran.

Delays of four months, seventeen months, and twenty-two months have been held, as a matter of law, to preclude the finding of due diligence essential to a successful Open Courts claim in a pre-deadline discovery of a claim. *Tenet Hosps., Ltd. v. Rivera*, 445 S.W.3d 698, 704 (Tex.2014).

At the very least, Turner had five months from his admitted discovery of the problem with his treatment by the Hospital—and may have discovered the problem as much as seventeen or even twenty-three and two-thirds months—before limitations ran, to file his claim within the limitations period. That information, as a matter of law, precludes an Open Courts challenge to the two-year limitations period applicable to his health care liability claim against the Hospital. *See id.*

The summary judgment was proper. We affirm the trial court's judgment.

All Citations

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