

No. 08-0316

*In The Supreme Court Of Texas
Austin, 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

CASE No. 04-07-00305-CV
FROM THE FOURTH COURT OF APPEALS, SAN ANTONIO, TEXAS

**METHODIST HEALTHCARE SYSTEM OF SAN ANTONIO, LTD., L.L.P.'S
PETITION FOR REVIEW**

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incorrectly sued as
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STATEMENT OF THE CASE

Nature of the Case:

Emmalene Rankin filed this health care liability claim against two physicians and the Methodist Hospital 11 years after a surgical sponge was allegedly left in her body. CR:1-8.

Defendants moved for summary judgment based on the 10-year statute of repose applicable to health care liability claims (Civil Practice & Remedies Code § 74.251(b), attached at Tab C). CR:54, 107. In response, Rankin argued that the statute of repose violated the Open Courts provision of the Texas Constitution. CR:124.

Trial Court Information:

Judge Andy Mireles, 224th Judicial District Court, Bexar County.

Trial Court Disposition:

The trial court granted the Defendants' motions for summary judgment. CR:280 (attached at Tab A).

Court of Appeals Information:

Justices Karen Angelini, Rebecca Simmons (writing for the court), and Steven Hilbig of the Fourth Court of Appeals.

The parties are identified at pages i-ii.

Court of Appeals Disposition:

The court of appeals reversed the trial court's judgment and remanded for further proceedings, holding that the statute of repose violated the Open Courts provision because it unreasonably restricted Rankin's right to sue. *See Rankin v. Methodist Healthcare Sys.*, __ S.W.3d __, 2008 WL 587444 (Tex. App.—San Antonio March 5, 2008, pets. filed) (attached at Tab B).

The appeals court denied the physicians' motions for rehearing and rehearing en banc on June 19, 2008. This Court granted additional time to file petitions for review. Thus, this petition is timely filed.

WHY THIS PETITION SHOULD BE GRANTED

For more than 30 years, the Texas Legislature has labored to reduce insurance rates and to make health care more accessible. In 2003, after carefully balancing the competing interests of litigants, the Legislature enacted a ten-year statute of repose for health care liability claims that was designed to avoid the constitutional infirmities of prior statutes of limitations. The statute of repose does not abrogate a well-established common law right, nor does it operate unreasonably or irrationally. Therefore, the appeals court erred in holding that the statute violated the Open Courts provision of the Texas Constitution. The court of appeals' judgment should be reversed because it rejects 30 years of legislative effort and confuses this Court's precedents.

STATEMENT OF JURISDICTION

This Court has jurisdiction because (1) the court of appeals' decision conflicts with prior decisions of this Court on a determinative question of law; (2) the case involves the constitutional validity of a controlling statute; and (3) the court of appeals' error significantly and negatively impacts the jurisprudence of the state. *See* TEX. GOV'T CODE ANN. § 22.001(a).

ISSUE PRESENTED

Does the statute of repose for health care liability claims (Section 74.251(b) of the Civil Practice and Remedies Code) violate the Open Courts provision of the Texas Constitution?

STATEMENT OF FACTS

On November 9, 1995, Doctors Wendell and Robert Schorlemer performed a hysterectomy on Emmalene Rankin at Methodist Hospital. CR:164. Almost 11 years later, a surgical sponge was removed from Rankin's abdomen. CR:166. On October 27, 2006, Rankin sued Methodist Hospital. CR:1. She then sued the two physicians. CR:167.

The defendants separately moved for summary judgment based on the ten-year statute of repose applicable to health care liability claims. CR:54, 107. In response, Rankin argued that the statute of repose, as applied to her, was unconstitutional under the Open Courts provision of the Texas Constitution. CR:124. The trial court granted summary judgment in favor of the defendants, and the court of appeals reversed.

SUMMARY OF THE ARGUMENT

The court of appeals recognized that the Legislature may set any reasonable time frame for a litigant to discover and bring suit. Yet the appeals court concluded that the ten years provided by the statute of repose for health care liability claims was *not* reasonable because Rankin did not discover her alleged injury within ten years.

The court of appeals' analysis fails to recognize that the Legislature already determined that ten years was a reasonable time frame for bringing a health care liability claim. The Legislature knew — based on this Court's analysis of prior medical malpractice statutes — that some litigants, like Rankin, would lose the right to sue, but the Legislature properly balanced private and public interests in enacting the statute of repose. The Open Courts provision demands nothing more.

The Open Courts provision does not guarantee a right to sue. But that is the effect of the court of appeals' holding, which allows health care liability claimants to sue 15, 20, or 25 years after an alleged injury. In fact, under the court of appeals' holding, a claimant has an indefinite period of time to sue as long as she claims she could not have discovered her alleged injury any earlier.

The court of appeals sanctions its super-constitutional guarantee by citing opinions from this Court that suggest the Legislature cannot make a remedy contingent "on an impossible condition." Discovery issues, however, are not pertinent to the Open Courts analysis.

This Court's seminal opinions on the Open Courts provision recognize that the Legislature may, in fact, restrict common law rights in the legitimate exercise of its police powers, as long as the restriction is not arbitrary. Rankin cannot show that the statute of repose is arbitrary or that it restricts a well-established common law cause of action because medical negligence claims have been restricted by the Legislature since early statehood. Even if Rankin could show a restricted and well-recognized cause of action, the Legislature's goals in enacting the statute of repose outweigh her ability to file suit more than ten years after the alleged negligent act or omission. The Legislature's enactment is reasonable, rationale, and legitimate.

The Court's review in this case is necessary to address the tension created by its own opinions that led the court of appeals to its erroneous conclusion. This Court's review is necessary to acknowledge the Legislature's 30-year quest to find a

constitutionally acceptable statute of repose for health care liability claims. This Court's review is necessary to reverse the court of appeals' judgment.

ARGUMENT

The Open Courts provision provides that “[a]ll courts shall be open, and every person for an injury done to him, in his lands, goods, person or reputation, shall have remedy by due course of law.” TEX. CONST. art. I, § 13. To establish an Open Courts violation, Rankin must show that (1) Section 74.251(b)'s statute of repose restricts a well-recognized common law cause of action; and (2) the restriction is unreasonable or arbitrary when balanced against the purpose and basis of the statute. *Sax v. Votteler*, 648 S.W.2d 661, 666 (Tex. 1983). Rankin satisfied neither element, and the court of appeals' holding to the contrary negatively impacts the state's jurisprudence.

I. The Court Of Appeals Erroneously Concluded That The Legislature's Statute Of Repose Was Unreasonable.

The court of appeals faithfully restated the two-part test for finding an Open Courts violation, citing opinions from this Court. *Rankin*, 2008 WL 587444 at *2. But the court of appeals' analysis ignores the original holdings from which the later citations spring. Neither those opinions nor the Open Courts provision guarantee a right of recovery as the court of appeals suggests. *See Rankin*, 2008 WL 587444 at *7.

In *Middleton v. Texas Power & Light Co.*, 185 S.W. 556, 559 (Tex. 1916), *aff'd*, 249 U.S. 152 (1919), this Court observed that the “the liberty of the citizen does not include among its incidents any vested right to have the rules of law remain unchanged for his benefit.” The Open Courts provision does not prevent the Legislature from

“withdrawing common-law remedies for well established common law causes of action ... *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.” *Lebohm v. City of Galveston*, 275 S.W.2d 951, 955 (Tex. 1955) (emphasis added); *see also Lucas v. United States*, 757 S.W.2d 687, 697 (Tex. 1988) (Gonzalez, J., dissenting) (explaining that the Legislature “could entirely abolish negligence”).

The core focus of the Open Courts provision is whether the Legislature acted “arbitrarily.” *Lebohm v. City of Galveston*, 275 S.W.2d at 954. This focus considers “*both* the general purpose of the statute and the extent to which the litigant’s rights to redress is affected.” *Sax v. Votteler*, 648 S.W.2d at 666 (emphasis added); *see also Lucas v. United States*, 757 S.W.2d at 716-17 (Phillips, C.J., dissenting) (cautioning courts to avoid exclusive focus on individual rights). The Legislature’s own findings are entitled to great deference. *McCulloch v. Fox & Jacobs, Inc.*, 696 S.W.2d 918, 923 (Tex. App.—Dallas 1985, writ ref’d n.r.e.).

Rankin’s inability to pursue a health care liability claim under Section 74.251(b) must be weighed against the history and purpose of the statute of repose and the entire tort reform package of which it was a part. The Open Courts provision requires a thorough examination, but the court of appeals gave this legislative history short thrift. *Rankin*, 2008 WL 587444 at *6.

A. The statute of repose is reasonable and equitably balances personal and public rights.

The Legislature enacted Section 74.251(b)'s statute of repose in 2003, after many years of attempting to address an insurance and health care crisis. In 1975, the Legislature abolished the discovery rule, which this Court had adopted in 1967 for certain cases. *See* Tab C; Act of May 30, 1975, 64th Leg., R.S., ch. 330, § 1, 1975 Tex. Gen. Laws 864, 865-66; *Gaddis v. Smith*, 417 S.W.2d 577, 580 (Tex. 1967). The Legislature's efforts were rebuffed by the Court when it found that the limitations period in Article 5.82 of the Insurance Code violated the Open Courts provision. *Sax v. Votteler*, 648 S.W.2d at 663 n.1 & 665-666; *Nelson v. Krusen*, 678 S.W.2d 918, 923 (Tex. 1984).

In 1977, the Legislature enacted Article 4590i of the Revised Civil Statutes to further address the health care crisis. *See* Act of May 30, 1977, 65th Leg., R.S., ch. 817, § 1.02, 1977 Tex. Gen. Laws 2039, 2039-41. Like its predecessor, Article 4590i contained a two-year statute of limitations with no discovery rule. *See* Tab C; *Morrison v. Chan*, 699 S.W.2d 205, 208 (Tex. 1985). This Court later held that the limitations period violated the Open Courts provision. *Neagle v. Nelson*, 685 S.W.2d 11, 12 (Tex. 1985); *Weiner v. Wasson*, 900 S.W.2d 316, 320 (Tex. 1995).

When the Legislature met in 2003, it again found that an explosion of health care liability claims had created an insurance crisis which was adversely affecting the delivery of health care in Texas. *See* Act of June 2, 2003, 78th Leg., R.S., ch. 204, §10.01, § 10.11, 2003 Tex. Gen. Laws 847, 864, 884. In response, the Legislature designed Chapter 74 of the Civil Practice and Remedies Code to reduce the frequency and severity

of health care liability claims, to make insurance affordable and accessible to both patients and health care providers, and to do so in a manner that would not unduly restrict a claimant's rights any more than necessary to deal with the crisis. *See* Act of June 2, 2003, § 10.11, 2003 Tex. Gen. Laws at 884.

The Legislature was acutely aware that its prior attempts to address the health care crisis through statutes of limitations had been rejected by this Court. HEARINGS ON H.B. 4 BEFORE THE SENATE COMM. ON STATE AFFAIRS, 78th Leg., R.S. (May 5, 2003) (discussing “sponge cases” in particular). At the same time, the Legislature was aware that this Court had upheld the constitutionality of at least one statute of repose and had embraced the “unassailable premise” that statutes of repose serve important public purposes. Michael S. Hull et al., *House Bill 4 & Proposition 12: An Analysis with Legislative History, Part Three*, 36 TEX. TECH L. REV. 169, 187-91 (2005); *Trinity River Auth. v. URS Consultants, Inc.*, 889 S.W.2d 259, 263 (Tex. 1994).

Accordingly, the Legislature enacted both a ten-year statute of repose (Section 74.251(b)) and a two-year statute of limitations (Section 74.251(a)) for health care liability claims. *See* Tab C. Both statutes contain “absolute” accrual dates, rather than a discovery rule. The statute of repose was designed to address the health care crisis but avoid the constitutional infirmities of the prior statutes of limitations. *See* Hull, 36 TEX. TECH L. REV. at 191; HOUSE RESEARCH ORGANIZATION, BILL ANALYSIS, Tex. H.B. 4, 78TH LEG., R.S. (March 25, 2003); *see also* *Sowers v. M.W. Kellogg Co.*, 663 S.W.2d 644, 647 (Tex. App.—Houston [1st Dist.] 1983, writ ref'd n.r.e.) (observing that statutes of repose address the inadequacy of statutes of limitation).

Section 74.251(b)'s statute of repose reflects the Legislature's determination that ten years is a reasonable time to commence an action, regardless of accrual or discovery issues. *See Trinity River Auth. v. URS Consultants, Inc.*, 889 S.W.2d at 264 ("We believe that the ten year repose period chosen by the Legislature [TEX. CIV. PRAC. & REM. CODE ANN. § 16.008] strikes a fair balance between the legislative purpose of protecting against stale claims and the rights of litigants to obtain redress for injuries."). Although "sponge cases" like Rankin's may be less likely to be frivolous or fraudulent compared to other cases, no lawsuit is immune from the effects of time, as records are lost or destroyed, memories fade, and witnesses die or move away. In addition to these practical reasons, the needs served by the justice system — deterrence, retribution, and even compensation — tend to lessen over time. *See* David G. Owen, *Special Defenses in Modern Products Liability Law*, 70 MO. L. REV. 1, 26 (2005). The statute of repose compromises the competing interests of potential plaintiffs and defendants.

The Legislature's goals in addressing the health care crisis are not merely legitimate, as this Court acknowledged when they were first enacted in 1975. *Sax v. Votteler*, 648 S.W.2d at 667. By repeatedly visiting these goals since that time, the Legislature has strongly declared that its goals advance significant state interests. These goals and the resulting statute of repose represent a reasonable exercise of police power in the interest of the general welfare. *See* Hull, 36 TEX. TECH L. REV. at 188 & 189 n.88. This reasonable exercise of police power is permitted by the Open Courts provision. *Lebohm v. City of Galveston*, 275 S.W.2d at 955. Thus, the statute of repose contained in

Section 74.251(b), which is neither arbitrary nor unreasonable, does not violate the Open Courts provision.

B. The Court of Appeals improperly linked impossible conditions and the discovery rule with the statute of repose.

The court of appeals, relying on this Court's precedent, found that Rankin's claims were "inherently undiscoverable" and that the Legislature could not make a remedy contingent on an impossible condition. *Rankin*, 2008 WL 587444 at *7 (citing *Nelson v. Krusen*, 678 S.W.2d at 923, *Sax v. Votteler*, 648 S.W.2d at 666-67, and *Neagle v. Nelson*, 685 S.W.2d at 12). What is "inherently undiscoverable" is pertinent only to the discovery rule, a concept that has no application to statutes of repose and their constitutional validity under the Open Courts provision.

The test for what is required by the Open Courts provision is not the same as the test for what is "inherently undiscoverable" under the discovery rule. *Diaz v. Westphal*, 941 S.W.2d 96, 99 (Tex. 1997); *see also Weiner v. Wasson*, 900 S.W.2d at 322-23 (Owen, J., dissenting) (observing that statutes of limitations had been followed for many years in the medical malpractice context *without* a discovery rule and *without* an Open Courts violation). "[T]he period set under a statute of repose is independent of the claim's accrual *or discovery*." *Holubec v. Brandenberger*, 111 S.W.3d 32, 37 (Tex. 2003).

By their very nature, statutes of repose set the outer limit of what the Legislature considers to be the reasonable time to "discover" and bring suit. *See Trinity River Auth. v. URS Consultants, Inc.*, 889 S.W.2d at 261. Statutes of repose define rights, rather than procedurally limit rights, as do statutes of limitations. *Id.*; *see also Adams v. Children's*

Mercy Hosp., 832 S.W.2d 898, 906 (Mo. 1992) (holding that Open Courts assures the right to pursue the causes of action the substantive law recognizes). Cases involving statutes of limitations, like those from this Court discussing “impossible conditions,” have no application to statutes of repose.

In discussing the statute of limitations for health care liability claims, this Court recently held that the Open Courts provision “merely gives litigants a reasonable time to discover their injuries and file suit.” *Yancy v. United Surgical Partners Int’l, Inc.*, 236 S.W.3d 778, 784 (Tex. 2007). Assuming *Yancy* applies here, the Legislature has determined that the reasonable time to sue for a health care injury is ten years, nothing more. A statute of repose like Section 74.251(b) simply states the Legislature’s finding of what is reasonable. As explained above, this finding in the health care context is entitled to particular deference.

The court of appeals’ analysis rejects any substantive difference between the statute of repose and statute of limitations for health care liability claims. *Rankin*, 2008 WL 587444 at *6. Whether the two statutes can be conflated here because they both involve “absolute time frames,” the simple fact remains that both remain operative in any given case. A sponge case like *Rankin*’s might involve an Open Courts violation with a two-year limitations period, but not with a ten-year limitations period. That hypothetical is not an issue here, where *Rankin* conceded in her lower court briefing that Section 74.251(b) bars her claim if the statute is constitutional.

II. The Court Of Appeals Erroneously Concluded That Rankin’s Claims Were Subject To The Open Courts Provision.

As the court of appeals noted, the Open Courts provision applies only to a cause of action well-recognized at common law. *Rankin*, 2008 WL 587444 at *2. But when does a cause of action become “well recognized”? In other words, does the Open Courts inquiry begin when the disputed statute was enacted or some other point in time? The court of appeals effectively said the answer does not matter, citing cases from this Court, neither of which expressly addressed the question. *Id.* at *3 (citing *Neagle* and *Nelson*).

“The open courts provision guarantees that a common law remedy will not be unreasonably abridged, not that the Legislature will not amend or replace a statute.” *Texas Workers’ Comp. Comm’n v. Garcia*, 893 S.W.2d 504, 521 (Tex. 1995). Since early statehood, a claim for medical negligence was subject to a two-year statute of limitations, accruing on the last date of treatment. *Carrell v. Denton*, 157 S.W.2d 878, 879 (Tex. 1942) (citing *Houston Waterworks Co. v. Kennedy*, 8 S.W. 36, 37 (Tex. 1888)). The concept of “accrual” for statutes of limitations has acquired a common-law definition **during Rankin’s lifetime**. See *Gaddis v. Smith*, 417 S.W.2d at 580 (adopting discovery rule for sponge cases); *but see Robinson v. Weaver*, 550 S.W.2d 18, 22 (Tex. 1977) (rejecting discovery rule for misdiagnosis cases).

For purposes of determining whether a cause of action is well recognized at common law, the focus should remain on the historical cause of action, not the cause of action as it exists when the disputed statute is enacted. *Trinity River Auth. v. URS Consultants, Inc.*, 889 S.W.2d. at 262-63 (focusing Open Courts analysis on early

common law); *see also Hill v. Fitzgerald*, 501 A.2d 27, 35 (Md. Ct. App. 1985) (finding no constitutional violation when a five-year limitations period for medical malpractice was longer than the three-year period existing when the Open Courts provision was adopted). In Rankin's case, Section 74.251(b)'s statute of repose provides greater protection than historically existed. Thus, there is no Open Courts violation.

III. This Appeal Is Important To The Jurisprudence Of The State.

Most states have found no conflict between their Open Courts provisions and their statutes of repose for health care liability claims. *See* Robin D. Miller, *Validity of Medical Malpractice Statutes of Repose*, 5 A.L.R.6th 133, 161-63 (2005). The contrary decision of the court of appeals here has been recognized by members of this state's appellate bar as significant. *See* Ben Mesches & Jeremy D. Kernodle, "Texas Courts of Appeals Update—Procedural," 20 THE APPELLATE ADVOCATE 223, 226 (Spring 2008); Jerry D. Bullard & David F. Johnson, "Texas Courts of Appeals Update—Substantive," 20 THE APPELLATE ADVOCATE 317, 321 (Summer 2008). Because the decision below injects uncertainty into the law, it should be addressed by this Court. *See* Thomas R. Phillips, *The Constitutional Right to a Remedy*, 78 N.Y.U. L. Rev. 1309, 1345 (2003) (urging courts to develop a coherent doctrine for Open Courts).

If the Open Courts provision allows an open-ended "reasonable time" to discover one's injury, then every action of every health care provider will be questioned, indefinitely. The entire history and purpose of the statute of repose will be undermined, without applying the balancing test mandated by the Open Courts analysis. In the interest of the state's jurisprudence, the Court should grant this petition for review.

CONCLUSION AND PRAYER FOR RELIEF

Rankin's historical cause of action for medical negligence was barred by a two-year limitations period, without a discovery rule. Accordingly, she has no well-established cause of action at common law to which the Open Courts provision applies. Regardless, when the Legislature enacted the statute of repose found in Section 74.251(b), it did so to address 30 years of unresolved health care crisis. The legislature carefully balanced the competing interests of plaintiffs and defendants and therefore did *not* act arbitrarily or unreasonably. There is no Open Courts violation, despite Rankin's inability to sue after ten years. To paraphrase Justice Hecht, "[Repose] always bars some valid claims, but this is the price of repose." *S.V. v. R.V.*, 933 S.W.2d 1, 23 (Tex. 1996).

For the foregoing reasons, Methodist Hospital asks the Court to grant this petition and, after full briefing and oral argument, reverse the court of appeals' judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on September 2, 2008, this document was sent to the Court via Federal Express and copies were delivered by email and regular mail to the following:

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