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*In The Supreme Court Of Texas  
Austin, Texas*

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**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*

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

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**REPLY OF METHODIST HEALTHCARE SYSTEM TO  
RESPONDENT'S BRIEF ON THE MERITS**

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## INTRODUCTION

The court of appeals found that the ten-year statute of repose for healthcare liability claims violated the Open Courts provision of the Texas Constitution, at least as to Emmalene Rankin's allegedly impossible-to-discover injury. While the appeals court recognized Rankin's rights, the court failed to properly balance those rights against the societal benefits the Legislature considered in enacting the statute of repose. As a result, the court of appeals guarantees a perpetual right of access to the courts. Because this perpetual guarantee is not found in the Open Courts provision of the Texas Constitution, the lower court's judgment should be reversed.

## ARGUMENT

### **I. Rankin's Multi-Part Test For An Open Courts Violation Conflicts With This Court's Two-Part Test.**

Rankin argues that she has shown an Open Courts violation, but equivocates about the number of "elements" she must show. *Compare* Response on the Merits at x (issue 1 states a two-part test) *with id.* at xi (issue 6 states a seven-part test). The test previously endorsed by this Court includes two straight-forward elements.

First, "it must be shown that the litigant has a cognizable common law cause of action that is being restricted." *Sax v. Votteler*, 648 S.W.2d 661, 666 (Tex. 1983). Second, "the litigant must show that the restriction is unreasonable or arbitrary when balanced against the purpose and basis of the statute." *Id.* Rankin cannot satisfy either of these criteria, and it is not necessary to explicate any other "elements."

**A. Rankin — like the court of appeals — ignores the balancing component of the Open Courts test.**

Rankin complains that petitioners are trying to exempt statutes of repose from the Open Courts provision. Response on the Merits at 2, 15. To the contrary, statutes that limit a litigant's right to sue are subject to Open Courts analysis. But that analysis involves a balancing test that Rankin largely ignores.

Rankin acknowledges the Legislature can abrogate well-established common law causes of action *if its reasons for doing so outweigh* the litigant's constitutional right of redress. *Id.* at 3 (citing *Texas Ass'n of Bus. v. Texas Air Control Bd.*, 852 S.W.2d 440, 448 (Tex. 1993)). Although she acknowledges this balancing test, Rankin does not apply it. Instead, she myopically focuses on herself and whether she could have discovered her alleged injury within the ten years permitted by the statute of repose for her healthcare liability claim. *See, e.g.*, Response on the Merits at 1, 16. Neither Rankin nor the court of appeals seriously considers the broader legislative concerns outlined in the petitions. *See Rankin v. Methodist Healthcare Sys.*, 261 S.W.3d 93, 99-101 (Tex. App.—San Antonio 2008, pets. filed).

For example, Rankin does not deny that the Legislature perceived a crisis regarding healthcare insurance and delivery. Nor does she deny that the statute of repose will actually address these concerns. *Compare Bonin v. Vannaman*, 929 P.2d 754, 767-68 (Kan. 1996) (plaintiff challenged validity of legislative findings, but court declined to second guess the legislature and held that the eight-year statute of repose for minors did not violate open courts, due process, or equal protection clauses). Rankin simply argues

that because she could not discover her alleged injury, she must be entitled to her day in court.

In contrast, the court of appeals found the legislative concerns “legitimate,” but they simply did not outweigh Rankin’s right to sue within a reasonable time of discovering her alleged injury. *Rankin v. Methodist Healthcare Sys.*, 261 S.W.3d at 100-01. The appeals court suggested the legislative concerns carried less weight in cases, like Rankin’s, that involve *res ipsa loquitur*. *Rankin v. Methodist Healthcare Sys.*, 261 S.W.3d at 100-01. The doctrine of *res ipsa loquitur*, however, merely permits a jury to base an inference of negligence on circumstantial evidence. *Mobil Chem. Co. v. Bell*, 517 S.W.2d 245, 251 (Tex. 1974). “The plaintiff continues to have the burden of persuading the jury by a preponderance of all the evidence that the defendant was negligent.” *Id.* Even in such cases, ten years is a reasonable limit. *See, e.g.*, N.C. GEN. STAT. ANN. § 1-15(c) (four-year repose period extended to ten years for foreign objects); *Roberts v. Durham County Hospital Corp.*, 289 S.E.2d 875 (N.C. Ct. App. 1982) (holding statute does not violate equal protection), *aff’d per curiam*, 298 S.E.2d 384 (N.C. 1983).

Whether a claim is discoverable or not, the Legislature’s concerns are significant and rational. Its reasons in enacting the statute of repose outweigh any infringement of Rankin’s rights, especially given the ten-year length of the statute. *Compare Dunn v. St. Francis Hosp., Inc.*, 401 A.2d 77 (Del. Super. Ct. 1979) (upholding three-year statute of repose for medical negligence under Open Courts provision); *Partin v. St. Francis Hosp.*, 694 N.E.2d 574 (Ill. App. Ct. 1988) (same), *rev. denied*, 705 N.E.2d 440 (Ill. 1989); *Crier v. Whitecloud*, 496 So. 2d 305 (La. 1986) (same).

Taken to its logical extreme, the court of appeals guarantees a cause of action for any party that did not discover her cause of action within the applicable statute of repose, regardless of the legislative concerns addressed by that statute. The Open Courts provision offers no such guarantee.

**B. Rankin — like the court of appeals — misconstrues the common law component of the Open Courts test.**

The court of appeals held that the healthcare statute of repose abrogated Rankin's common law rights under the discovery rule, which briefly existed for medical negligence claims between 1967 and 1975. *Rankin v. Methodist Healthcare Sys.*, 261 S.W.3d at 97-99. If the proper focus of the Open Courts analysis is whether the historic cause of action is being restricted, as Rankin herself suggests (Response on the Merits at 5-7), then Rankin must compare the statute of repose with her common law rights *before* the discovery rule was enacted. Cf. BLACK'S LAW DICT. 276 (6th ed. West 1990) (defining "common law" as the body of principles that "derive their authority solely from usages and customs of immemorial antiquity"). Yet that is not what Rankin or the court of appeals has done.

The irony of the court of appeals' holding is that the discovery rule is hardly a custom of immemorial antiquity. Instead, it represents judicial construction of accrual language in statutes of limitations. *Moreno v. Sterling Drug, Inc.*, 787 S.W.2d 348, 351 (Tex. 1990). The Legislature was free to change its statutes without running afoul of the Texas Constitution. See *Lebohm v. City of Galveston*, 275 S.W.2d 951, 955 (Tex. 1955). To hold otherwise, as did the court of appeals, is error this Court should correct.

## II. Rankin Concedes The Importance Of This Case.

While Rankin may debate the exact basis of this Court's jurisdiction, she explicitly concedes the Court has jurisdiction over this matter. *See* Response on the Merits at ix-x. Likewise, she does not contest the significant impact this case will have on the jurisprudence of the State. *Id.*

The court of appeals' holding elevates the discovery rule to constitutional status. Rankin defends this position by citing authority that every litigant must be given a reasonable time to discover their alleged injuries and file suit. Response on the Merits at 11-13. While some cases appear to support Rankin's position, other cases clearly allow statutes of repose to "cut off" a litigant's cause of action without violating the Open Courts provision. *See, e.g., Dubin v. Carrier Corp.*, 798 S.W.2d 1, 3 (Tex. App.—Houston [14th Dist.] 1989, writ dism'd by agrmt.) (validating 10-year statute of repose for builders); *Zaragosa v. Chemetron Invests., Inc.*, 122 S.W.3d 341, 346-47 (Tex. App.—Fort Worth 2003, no pet.) (validating 15-year statute of repose for product liability claims). This Court's clarification of existing case law is vital to the healthcare industry and to other industries and professions protected by statutes of repose.

The court of appeals' holding is also out of step with the nation. While not all states have enacted statutes of repose for medical negligence,<sup>1</sup> those that do have not

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<sup>1</sup> Ten jurisdictions currently do not have absolute outer limits for asserting medical negligence claims. *See* ARK. CODE ANN. § 16-114-203; ARIZ. STAT. § 12-564; D.C. CODE § 12-301; MINN. STAT. ANN. § 541.076; NEV. REV. STAT. § 41A.097; N.H. REV. STAT. § 508:4; N.J. STAT. ANN. § 2A:14-2.2; OKLA. STAT. ANN. tit. 76, § 18; R.I. GEN. LAWS § 9-1-14.1.

faced Open Courts challenges<sup>2</sup> or they have upheld the validity of their statutes,<sup>3</sup> at least for the claims of adults like Rankin.<sup>4</sup> Most state courts recognize, consistent with *Lebohm* and other precedent from this Court, that the state legislatures may curtail common-law rights when — as is the case here — the needs of society outweigh individual rights. The court of appeals' judgment should be reversed, and a take nothing judgment should be rendered in favor of Methodist and the defendant physicians.

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<sup>2</sup> Nine states do not have Open Courts provisions, although they have statutes of repose for the medical negligence claims of adults. See ALASKA STAT. § 09.10.055; CAL. CIV. PRAC. CODE § 340.5; GA. CODE ANN. § 9-3-73; HAW. REV. STAT. ANN. § 657-7.3; IOWA CODE § 614.1(9); MICH. COMP. LAW SERVS. § 600.5838a; N.M. STAT. ANN. § 41-5-13; N.Y. CIVIL PROC. LAW § 214-a; VA. CODE ANN. § 8.01-243. Of these, the states have generally upheld their statutes of repose when challenged under other constitutional grounds, such as due process. See, e.g., *Sills v. Oakland Gen. Hosp.*, 559 N.W.2d 348 (Mich. Ct. App. 1996), *rev. denied*, 572 N.W.2d 661 (Mich. 1997); *Cummings v. X-Ray Assocs. of N.M.*, 918 P.2d 1321 (N.M. 1996); *Young v. Community Health Plan*, 287 A.D.2d 914 (N.Y. App. Div. 2001). Due process challenges have likewise been rejected in states with both statutes of repose and Open Courts provisions. See, e.g., *Ross v. Kansas City Gen. Hosp. & Med. Ctr.*, 608 S.W.2d 397 (Mo. 1980).

<sup>3</sup> Fifteen states have upheld their statutes of repose for medical negligence under their Open Courts provisions. See, e.g., *Barlow v. Humana, Inc.*, 495 So.2d 1048 (Ala. 1986) (four years); *Golden v. Johnson Mem'l Hosp., Inc.*, 785 A.2d 234 (Conn. App. Ct. 2001) (three years); *Dunn v. St. Francis Hosp., Inc.*, 401 A.2d 77 (Del. Super. Ct. 1979) (three years); *Kush v. Lloyd*, 616 So.2d 415 (Fla. 1992) (four years); *Hawley v. Green*, 788 P.2d 1321 (Idaho 1990) (two years); *Partin v. St. Francis Hosp.*, 694 N.E.2d 574 (Ill. App. Ct. 1998), *rev. denied*, 705 N.E.2d 440 (Ill. 1989) (four years); *Crier v. Whitecloud*, 496 So. 2d 305 (La. 1986) (three years); *Choroszy v. Tso*, 647 A.2d 803 (Me. 1994) (three years); *Hill v. Fitzgerald*, 501 A.2d 27 (Md. Ct. App. 1985) (five years); *Plummer v. Gillieson*, 692 N.E.2d 528 (Mass. App. Ct. 1998) (seven years); *Schendt v. Dewey*, 520 N.W.2d 541 (Neb. 1994) (ten years); *Barwick v. Celotex Corp.*, 736 F.2d 946 (4th Cir. 1984) (ten-year North Carolina statute); *Jones v. Salem Hosp.*, 762 P.2d 303 (Or. Ct. App. 1988), *rev. denied*, 770 P.2d 595 (Or. 1989) (five years); *Harrison v. Schrader*, 569 S.W.2d 822 (Tenn. 1978) (three years); *Aicher v. Wisconsin Patients Comp. Fund*, 613 N.W.2d 849 (Wis. 2000) (five years). Three states have invalidated their statutes of repose on Open Courts grounds. See, e.g., *Martin v. Richey*, 711 N.E.2d 1273 (Ind. 1999) (two years); *McCullum v. Sisters of Charity of Nazareth Health Corp.*, 799 S.W.2d 15 (Ky. 1990) (five years); *Hardy v. VerMeulen*, 512 N.E.2d 626 (Ohio 1987) (four years). Two other statutes of repose were unconstitutional on other grounds. See *Kenyon v. Hammer*, 688 P.2d 961 (1984) (discussing former three-year statute); *DeYoung v. Providence Med. Ctr.*, 960 P.2d 919 (Wash. 1998) (eight years).

<sup>4</sup> Some states grant minors greater protections than adults under their Open Courts provisions. See, e.g., *Piselli v. 75th Street Medical*, 808 A.2d 508 (Md. 2002).


## CONCLUSION AND PRAYER FOR RELIEF

Methodist joins the briefing prepared by the defendant physicians. TEX. R. APP. P. 9.7. Methodist suggests that the Texas Open Courts provision does not create "absolute" access to the courts. Instead, it permits reasonable restrictions on access to the courts.

In this case, the Legislature reasonably addressed 30 years of crisis within the insurance and healthcare industries with a ten-year statute of repose. The court of appeals erred in concluding that the statute of repose violated the Open Courts provision. Accordingly, Methodist Hospital asks the Court to grant the pending petitions and reverse the court of appeals' judgment.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

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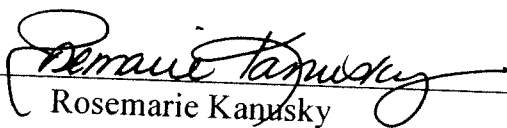
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