

No. 08-0316

IN THE SUPREME COURT OF TEXAS

**METHODIST HEALTHCARE SYSTEM OF SAN ANTONIO, LTD., L.L.P.,
D/B/A METHODIST HOSPITAL, WENDELL C. SCHORLEMER, M.D., AND ROBERT
SCHORLEMER, M.D.,
Petitioners,**

v.

**EMMALENE RANKIN,
Respondent.**

**On Petitions for Review of Case No. 04-07-00305-CV, from the
Fourth Court of Appeals, San Antonio, Texas**

MOTION FOR REHEARING BY RESPONDENT EMMALENE RANKIN

Carl Robin Teague
Attorney at Law
State Bar No. 19749500
115 E. Travis Street, Suite 1739
San Antonio, Texas 78205
Telephone: (210) 222-1739
Telefax: (210) 222-1729
Email: robin@teaguelaw.com

David M. Adkisson, Attorney at Law
State Bar No. 00921100
Begum & Tijerina, L.L.C.
6243 IH 10 West, Suite 970
San Antonio, Texas 78201
Telephone (210) 564-9854
Telefax: (210) 564-9857
Email: dadkisson@texaslegalgroup.com

ATTORNEYS FOR RESPONDENT EMMALENE RANKIN

Table of Contents

| | |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------|
| Index of Authorities _____ | iii, iv |
| Point Relied Upon for the Rehearing _____ | 1 |
| The Supreme Court of Texas erred in reversing the judgment by the Court of Appeals and in holding that the 10-year statute of repose, as applied to the cause of action by Emmalene Rankin, does not violate her rights under the Open Courts Provision of the Texas Constitution. | |
| The Constitutional Test of Whether a Statute is Arbitrary or Unreasonable _____ | 1-2 |
| Application of the Constitutional Test to Statutes of Repose and “Sponge Cases” | 2 |
| What is a “Reasonable Time?” A Question of Fact or of Law? _____ | 2-3 |
| Has Emmalene Rankin Raised a Question of Fact? _____ | 3-4 |
| Texas Precedent _____ | 4-6 |
| Out of State Precedent _____ | 6-7 |
| Statutory Construction or Constitutional Inquiry? _____ | 7-8 |
| The Discovery Rule and the Constitutional Test _____ | 8-9 |
| Conclusion and Prayer _____ | 9 |
| Certificate of Proof of Service _____ | 10 |

Index of Authorities

| <u>Cases</u> | <u>Page</u> |
|--------------------------------------------------------------------------------------------------------------------------------------|-------------|
| <i>Aicher v. Wis. Patients Comp. Fund</i> , 613 N.W. 2d 849 (Wis. 2000) _____ | 6 |
| <i>Barke v. Maeyens</i> , 31 P. 3d 1133, 1136 – 39 (Or. Ct. App. 2001)_____ | 6 |
| <i>Barlow v. Humana, Inc.</i> , 495 So. 2d 1048 (Ala. 1986) _____ | 6 |
| <i>Barnes v. J.W. Bateson Co.</i> , 755 S.W. 2d 520 (Tex. App. – Fort Worth 1988, no writ) _____ | 5 |
| <i>Brown v. M.W. Kellogg Co.</i> , 743 F. 2d 268 (5 th Cir. 1984) _____ | 5 |
| <i>Burlington N. & Santa Fe Ry. Co. v. Poole Chem. Co.</i> , 419 F. 3d at 361 (5 th Cir. 2005) _____ | 5 |
| <i>Cheek v. Metzger</i> , 291 S.W. 860 (Tex. 1927) _____ | 3 |
| <i>Choroszy v. Tso</i> , 647 A. 2d 803 (Me. 1994) _____ | 6 |
| <i>Crier v. Whitecloud</i> , 496 So. 2d 305, 309-10 (La. 1986)_____ | 6 |
| <i>Dallas Mkt. Ctr. Dev. Co. v. Beran & Shel mire</i> , 824 S.W. 2d 218 (Tex. – App. – Dallas 1991, writ denied) _____ | 5 |
| <i>Dubin v. Carrier Corp.</i> , 731 S.W. 2d 655 (Tex. App. – Houston [1 st Dist.] 1987, no writ) _____ | 5 |
| <i>Dunn v. St. Francis Hosp., Inc.</i> , 401 A. 2d 77, 80-81 (Del. 1979)_____ | 6 |
| <i>Earle v. Ratliff</i> , 998 S.W. 2d 882 (Tex. 1999) _____ | 1, 3 |
| <i>Ellerbe v. Otis Elevator Co.</i> , 618 S.W. 2d 873 (Tex. App. – Houston [1 st Dist.] 1981, writ ref'd n.r.e.) _____ | 5 |
| <i>Galbraith Eng. Consultants, Inc. v. Pochucha</i> , 290 S.W. 3d 863 (Tex. 2009) | 7, 8 |
| <i>Golden v. Johnson Mem'l Hosp., Inc.</i> , 785 A. 2d 234, 243-46 (Conn. App. Ct. 2001) _____ | 7 |
| <i>Gordon v. W. Steel Co.</i> , 950 S.W. 2d 743 (Tex. – App. Corpus Christ 1997, writ denied) _____ | 5 |
| <i>Hardy v. VerMeullen</i> , 513 N.E. 2d 626, 627 – 28 (Ohio 1987) _____ | 1 |
| <i>Harrison v. Schrader</i> , 569 S.W. 2d 922, 827 – 287 (Tenn. 1978) _____ | 6 |
| <i>Hawley v. Green</i> , 788 P. 2d 1321, 1323-24 (Idaho 1990) _____ | 6 |

| | |
|--------------------------------------------------------------------------------------------------------------------------------------------|---------|
| <i>Hill v. Fitzgerald</i> , 501 A. 2d 27, 33-35 (Md. 1985) _____ | 6 |
| <i>Hill v. Forrest & Cotton, Inc.</i> , 555 S.W. 2d 145 (Tex. Civ. App. - Eastland 1977, writ ref'd n.r.e.) _____ | 5 |
| <i>Jennings v. Burgess</i> , 917 S.W. 2d 790 (Tex. 1996) _____ | 1 |
| <i>Kempner v. Heidenheimer</i> , 65 Tex. 587 (1886), 1885 WL 7312 _____ | 3 |
| <i>Kush v. Lloyd</i> , 616 So. 2d 415, 419-22 (Fla. 1992) _____ | 7 |
| <i>Lebohm v. City of Galveston</i> , 275 S.W. 2d 951(Tex. 1955) _____ | 1, 2 |
| <i>Mega v. Holy Cross Hosp.</i> , 490 N.E. 2d 664, 668-71 (Ill. 1986) _____ | 6 |
| <i>Methodist Healthcare System of San Antonio, Ltd., L.L.P. v. Rankin</i> , 2010 WL 852160 (Tex. 2010) _____ | 1 |
| <i>McCulloch v. Fox & Jacobs, Inc.</i> , 696 S.W. 2d 925 (Tex. App. – Dallas 1985, writ ref'd n.r.e.) _____ | 5 |
| <i>Neagle v. Nelson</i> , 685 S.W. 2d 11 (Tex. 1985) _____ | 1, 8 |
| <i>Nelson v. Krusen</i> , 678 S.W. 2d 918, 923 (Tex. 1984) _____ | 8 |
| <i>Nelson v. Metallic – Braden Bldg. Co.</i> , 695 S.W. 2d 213 (Tex. App. – Houston [1 st Dist.] 1985, writ ref'd n.r.e.) _____ | 5 |
| <i>Plummer v. Gillieson</i> , 692 N.E. 2d 528, 532 (Mass. App. Ct. 1998) _____ | 6 |
| <i>Schendt v. Dewey</i> , 520 N.W. 2d 541, 547 (Neb. 1994) _____ | 6 |
| <i>Shah v. Moss</i> , 67 S.W. 3d 836 (Tex. 2001) _____ | 1, 2, 3 |
| <i>Sowers v. M.W. Kellogg Co.</i> , 663 S.W. 2d 644 (Tex. App. – Houston [1 st Dist.] 1983, writ ref'd n.r.e.) _____ | 5 |
| <i>Suburban Homes v. Austin – Nw. Dev. Co.</i> , 734 S.W. 2d 89 (Tex.App. – Houston [1 st Dist.] 1987, no writ) _____ | 5 |
| <i>Trinity River Authority v. URS Consultants, Inc. – Tex.</i> , 889 S.W. 2d 259 (Tex. 1994) _____ | 4, 6, 7 |
| <i>Walters v. Cleveland Regional Medical Center</i> , 2010 WL 852162 (Tex. 2010) _____ | 2, 3 |
| <i>Yancy v. United Surgical Partners International, Inc.</i> , 246 S.W. 3d 778 (Tex. 2007) _____ | 1, 3, 8 |
| <i>Zaragosa v. Chemetron Invs., Inc.</i> , 122 S.W. 3d 341(Tex. App. – Fort Worth 2003, no pet.) _____ | 5 |

Point Relied Upon for the Rehearing

The Supreme Court of Texas erred in reversing the judgment by the Court of Appeals and in holding that the 10-year statute of repose, as applied to the cause of action by Emmalene Rankin, does not violate her rights under the Open Courts Provision of the Texas Constitution.

The Constitutional Test of Whether a Statute is Arbitrary or Unreasonable

Legislative action [withdrawing common-law remedies for well-established common-law causes of action] is not sustained when it is arbitrary or unreasonable.

See *Lebohm v. City of Galveston*, 275 S.W. 2d 951, 955 (Tex. 1955); accord, *Methodist Healthcare System of San Antonio, Ltd., L.L.P. v. Rankin*, 2010 WL 852160 (Tex. 2010), at * 1-2.

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).

Shah v. Moss, 67 S.W. 3d 836, 842 (Tex. 2001) (emphasis added). There are, however, limits:

The Open Courts provision does not confer an open-ended and perpetual right to sue; it "merely give litigants a reasonable time to discover their injuries and file suit."

Rankin, at * 1 (quoting *Yancy v. United Surgical Partners International, Inc.*, 246 S.W. 3d 778, 784 (Tex. 2007)). As is clear from this Court's holdings, the constitutional test of whether the statute of repose unreasonably or arbitrarily restricts the claim is whether the statute "cut off [Emmalene Rankin's] right to sue before there [was] a reasonable opportunity to discover the wrong and bring suit." *Shah v. Moss*, 67 S.W. 3d at 842; see also *Yancy v. United Surgical*, 236 S.W. 3d at 784; cf. *Hardy v. VerMeulen*, 512 N.E. 2d 626, 627 – 628 (Ohio 1987) (holding that a statute of repose, "as applied to the facts in the case ... is in violation of [the Ohio open courts provision], "because the plaintiff had "no remedy when his claim is extinguished before he knew of the injury or could have reasonably discovered it"). This Court distinguishes *Hardy* on the

basis that the Ohio court did not make “an inquiry into the reasonableness of the statute.”
Rankin, at * 3 n. 32.

Application of the Constitutional Test to Statutes of Repose and “Sponge Cases”

Does this *constitutional* test apply to repose statutes? Of course it does: “Repose statutes are not exempt from Open Courts challenges....” *Rankin*, at * 4.

As this Court indicated as early as *Lebohm*, the constitutional rule applies not just to statutes of limitation, but to “legislative action,” which includes statutes of repose. See *Lebohm*, 275 S.W. 2d at 955; see also *Shah v. Moss*, 67 S.W. 3d at 842 (referring inclusively to “a statute” and “legislative acts”). But see *Walters v. Cleveland Regional Medical Center*, 2010 WL 852162 (Tex. 2010), at * 1 (“The Texas Constitution grants foreign-object claimants a reasonable opportunity to discover their injuries and file suit, even if the two-year limitations period has run (though not, as in today’s companion case [*Rankin*], if the ten-year *repose* period has run).”) (emphasis in original).

Does the constitutional test especially apply to statutes of repose in “sponge cases?” This Court provides a clear answer, which is just as applicable to *Rankin* as it is to *Walters*:

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....As a result, foreign-object cases often invite *res ipsa loquitur* treatment....

Walters, at * 3.

What is a “Reasonable Time?” A Question of Fact or of Law?

With little doubt, in the context of a statute of *limitations*, the question of whether (foreign object) claimants have had “a reasonable time to discover their injuries and file suit” is a *question of fact*. See *Shah v. Moss*, indicating that under the *constitutional* test, the question of whether the claimant had a reasonable opportunity is a fact question, and the burden in a summary judgment proceeding is on the claimant

to raise 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 applies. See *Earle*, 998 S.W. 2d at 889.

Shah v. Moss, 67 S.W. 3d at 846-847; accord, *Walters*, at * 2; *Yancy v. United Surgical*, 236 S.W. 3d at 782.

This rule, indicating “reasonable time” is a question of fact, is consistent with rules long ago established by this Court in other contexts:

What is a reasonable time is a question of fact which must be determined by the circumstances in evidence surrounding the situation of the parties and the subject matter under which the contract was executed.

Cheek v. Metzger, 291 S.W. 860, 863-864 (Tex. 1927) (citations omitted); accord *Kempner v. Heidenheimer*, 65 Tex. 587 (1886), 1885 WL 7312 at * 4.

Since repose statutes are not exempt from open courts challenges, and since “reasonable time” is a question of fact in a *constitutional* challenge to a statute of limitations, should “reasonable time” also be a question of fact in a *constitutional* challenge to the application of a statute of repose? The answer should be yes. If the Court answers no, then the holding that “[r]epose statutes are not exempt from open courts challenges” seems meaningless.

Has Emmalene Rankin Raised a Question of Fact?

This Court acknowledges:

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.

Rankin at * 1. Emmalene Rankin does not ask for “an open-ended and perpetual right to sue,” *Rankin* at *1, but only a reasonable opportunity. If *Walters* raised a question of fact (and this Court holds she did), then clearly Rankin raised a question of fact demonstrating that she did not have a reasonable opportunity to discover the alleged wrong and bring suit before the end of the repose period.

Is Emmalene Rankin “myopic”, as indicated by the Court and defense? Is “myopic” an appropriate characterization of a 75 year old woman who absolutely is not to blame for her

injury, who could not discover her injury before the end of the period of repose, and who has exercised diligence in seeking medical care and complying with every rule previously established by this Court as a requirement for compensation? A woman who, under the Court's judgment, may not recover *any* compensation for her injury from anyone, including from those whose negligence caused the injury, leaving them unaccountable and her without any remedy? A woman who, moreover, has survived one surgery made necessary by that negligence, and hopes to survive the next one? And has to pay for them, since under this Court's opinion the defendants will not have to?

Does this Court's judgment provide a "fair balance?" Considering the small number of patients injured by sponges and other foreign objects, considering the even smaller number who will discover their injury only after the ten-year period of repose has run, and considering that "foreign-object cases often invite *res ipsa loquitur* treatment," *Walters*, at * 3, is this case such a great burden on the healthcare and insurance business? Considering this Court's description of "sponge cases," does the loss fall unjustly and unreasonably on the person who sustained the injury, and not on the persons *who caused it*?

Texas Precedent

The Court cites *Trinity River Authority v. URS Consultants, Inc. – Tex.*, 889 S.W. 2d 259 (Tex. 1994), stating that in that case, the Court "rejected an Open Courts challenge to [a] ten-year statute of repose...." *Rankin*, at * 4. The Court notes, however, in a footnote, one of the distinguishing features of that case: "*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...." *Rankin*, at * 4 n. 37. The applicable statute of repose quite clearly abrogated *Rankin*'s well-established common-law course of action. *Trinity River Authority* is thus not precedent in *Rankin* on the question of a reasonable time under the Open Courts provision, or on whether a reasonable time is a question of fact.

The Court also states that “numerous court of appeals’ decisions have addressed the constitutionality of various Texas statutes of repose, and have upheld them every time.” The opinions are cited in footnote 38 of the opinion.¹ In *Dallas Mkt. Ctr.*, 824 S.W. 2d at 223, and in *Dubin v. Carrier*, 731 S.W. 2d at 655, the courts of appeals held that plaintiff *waived the right* to bring a constitutional challenge because the challenge was not raised in the trial court. The opinion in *Nelson v. Metallic*, 695 S.W. 2d at 215, indicates that the court of appeals overruled the constitutional challenge because plaintiff was not

effectively denied a cause of action for his [personal] injuries....His claims for damages against the other named defendants, including the owner or lessee and the operator of the building [under a theory of premises liability], are still viable, so that the provisions of [the statute of repose] have not abrogated his right to redress for his injuries.

695 S.W. 2d at 215. A similar holding was made in *McCulloch*, 696 S.W. 2d at 925. The only question in *Gordon* was one of statutory construction. 950 S.W. 2d at 746 -47, 748-49.

The court of appeals in *McCulloch* also held that plaintiff had no vested right, because he “sustained injuries *after* the expiration of the statutory period [of repose].” 696 S.W. 2d at 925 (emphasis in original). The same holding was made about the same fact situation in *Zaragosa*, 122 S.W. 3d at 346 – 347; *Barnes*, 755 S.W. 2d at 520; *Suburban Homes*, 734 S.W. 2d at 91, 92; *Sowders*, 663 S.W. 2d at 648; *Ellerbe*, 618 S.W. 2d at 873; *Hill v. Forrest & Cotton*, 555 S.W. 2d at 150; and in the cases decided by the U.S. Court of Appeals for the 5th Circuit, *Burlington*, 419 F. 3d at 361; *Brown*, 743 F. 2d at 268. In those cases, because the injury was sustained *after* the end of the period of repose, there was no vested right, which is required for a constitutional challenge.

¹ *Zaragosa 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 Court cites two cases from the United States Court of Appeals for the Fifth Circuit: *Burlington N. & Santa Fe Ry. Co. v. Poole Chem. Co.*, 419 F. 3d 355 (5th Cir. 2005); *Brown v. M.W. Kellogg Co.*, 743 F. 2d 265 (5th Cir. 1984).

The fundamental difference between statutes of repose in those cases, and the statute of repose in the *Rankin* case, is that in the latter the injury occurs *at the same time* the period of repose begins, but in the former the injury occurs *after* the period of repose ends. Thus in those “no vested right” opinions, the cause of action was “dead upon arrival.”

Not so for Rankin’s cause of action. Her injury occurred ten years *before* the restriction. The statute abrogated her well-established common law cause of action. See *Trinity River Authority*, 889 S.W. 2d at 262 (indicating the circumstances under which a statute of repose abrogates or restricts a common law cause of action). She has a vested right. With all due respect to the Court, those decisions do not support the decision in this case.

Out of State Precedent

The Court cites several out of state opinions in footnote 31 of the opinion². None of those opinions address these questions, which are presented in the *Rankin* case:

1. Whether the state’s open courts provision gives litigants a reasonable time to discover their injuries and bring suit.
2. Whether that right under the open courts provision applies to statutes of repose.
3. Whether under the constitution reasonable time is a question of fact.

None of those opinions involves a foreign-object case like *Rankin*, which the Court considers to be exceptional. Three opinions are by courts in states which provide for a statutory foreign-object exception. *Choroszy*, 647 A. 2d at 807; *Plummer*, 692 N.E. 2d at 529 n. 3; *Harrison*, 569 S.W. 2d at 824.

In two of the opinions, the courts held that the state open courts provision is *not even a limitation* on the legislature. *Crier*, 496 So. 2d at 205; *Harrison*, 569 S.W. 2d at 827. In another, the Supreme Court of Illinois held the state open courts provision is just “an expression of

² *Aicher v. Wis. Patients Comp. Fund*, 613 N.W. 2d 849 (Wis. 2000); *Schendt v. Dewey*, 520 N.W. 2d 541, 547 (Neb. 1994); *Choroszy v. Tso*, 647 A. 2d 803 (Me. 1994); *Kush v. Lloyd*, 616 So. 2d 415, 419-22 (Fla. 1992); *Hawley v. Green*, 788 P. 2d 1321, 1323-24 (Idaho 1990); *Mega v. Holy Cross Hosp.*, 490 N.E. 2d 664, 668-71 (Ill. 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*, 501 A. 2d 27, 33-35 (Md. 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*, 31 P. 3d 1133, 1136-39 (Or. Ct. App. 2001); *Golden v. Johnson Mem’l Hosp., Inc.*, 785 A. 2d 234, 243-46 (Conn. App. Ct. 2001); *Plummer v. Gillieson*, 692 N.E. 2d 528, 532 (Mass. App. Ct. 1998).

philosophy....” 490 N.E. 2d at 669. Those holdings are clearly contrary to the holding by this Court.

In *Barke*, the intermediate appellate court of Oregon held that the Oregon courts had not adopted the discovery rule at the time the legislature enacted the wrongful death and survival statutes. 31 P. 3d at 1137-38. Thus the open courts provision did not apply. *Id.* This is the same holding by this Court in *Trinity River Authority*. Those holdings do not apply to the *Rankin* case.

The intermediate appellate court of Connecticut notes the advantage of a statute of repose is that it bars “stale claims.” *Golden*, 785 A. 2d at 244. There is no contention that Rankin’s claim is stale. As this Court has recognized, it may be proved by the doctrine of *res ipsa loquitur*.

Two of the opinions are in “no vested rights” cases, similar to several of the cases decided by the Texas courts of appeals. *Golden*, 785 A. 2d at 244; *Kush*, 616 So. 2d at 421. The Court errs in relying upon them.

This Court should take another look at the opinions upon which it has relied in deciding this case against Emmalene Rankin. After doing so the Court should grant the motion for rehearing, vacate the judgment, and affirm the judgment by the Court of Appeals.

Statutory Construction or Constitutional Inquiry?

The Court cites *Galbraith Eng. Consultants, Inc. v. Pochucha*, 290 S.W. 3d 863 (Tex. 2009), several times. In *Galbraith*, “[t]he question...[was] whether the Legislature intended to make an exception [to a statute of repose] when it enacted [another section]....” 290 S.W. 3d at 867. Since the legislative intent was unclear, the Court provided “statutory construction.” *Id.* at 867 – 868.

The questions in *Rankin* are different. *Rankin* involves a “constitutional inquiry.” See *Rankin*, at * 3. The *constitutional* inquiry does not involve a question about statutory construction or legislative intent.

Moreover, the question here is not whether Rankin's constitutional challenge "would effectively repeal this and all other statutes of repose." *Id.* at . 4. Her challenge is an "as applied," not a facial constitutional attack, on a single statute, not on all statutes. The question here is whether the application of the statute to Rankin's claim would violate *her* constitutional rights, not the rights of other claimants. The discussion in *Galbraith* about statutory construction, cited by this Court in *Rankin*, at * 4, is not on point in Rankin's "as applied" constitutional challenge.

The questions here are about, first, the *constitutional* test, second, the application of that test to the repose statute, since "[r]epose statutes are not exempt from Open Courts challenges..." *Rankin* at * 4, and third, whether, under the *constitutional* test, reasonable time is a question of *fact*. *Galbraith* does not answer those questions. The answers are in this Court's rulings, beginning with *Nelson v. Krusen*, 678 S.W. 2d 918, 923 (Tex. 1984), and *Neagle v. Nelson*, 685 S.W. 2d 11, 12 (Tex. 1985), where this Court has indicated over and over that the question of whether a foreign-object claimant has had a reasonable opportunity to discover the injury and file suit is a question of fact, not of law. Again, with all due respect, this Court's ruling to the contrary, and the ruling that the Court needs authority from the Legislature to apply the Open Courts provision to the statute, *see Rankin* at * 3, improperly subject an established and applicable *constitutional* rule to a *statutory* rule.

The Discovery Rule and the Constitutional Test

This Court criticizes the court of appeals for holding the statute unconstitutional because it restricted Rankin's right to sue "before she had a reasonable opportunity to discover the wrong and bring suit"....

Rankin, at * 4. The basis of the criticism is that

the essential function of all statutes of repose is to abrogate the discovery rule and similar exceptions to the statute of limitations.

Id. That criticism seems unfair, considering the first sentence of the second paragraph of *this Court's* opinion:

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.”

Rankin, at * 1 (quoting *Yancy v. United Surgical*) (emphasis added). Thus even though the “statute of repose is not subject to judicially crafted rules of tolling or deferral,” *id.* at * 2, it *is* subject to the *constitution*, and the constitution “gives litigants a reasonable time to discover their injuries and file suit.” *Id.*

Conclusion and Prayer

Emmalene Rankin requests that this Court vacate its judgment and render an new judgment and issue a different opinion, consistent with the point she relies upon for rehearing.

Respectfully submitted,

By: _____ /s/
Carl Robin Teague, Attorney at Law
Milam Building, Suite 1739
115 E. Travis Street
San Antonio, Texas 78205-2383
Telephone: (210) 222-1739
Telefax: (210) 222-1729
E-mail: robin@teaguelaw.com
SBN: 19749500

LEAD COUNSEL FOR RESPONDENT

David M. Adkisson, Attorney at Law
Begum & Tijerina, L.L.C.
6243 IH 10 West, Suite 970
San Antonio, Texas 78201
Telephone: (210) 564-9854
Telefax: (210) 564-9857
Email: dadkisson@texaslegalgroup.com
SBN: 00921100

CO-COUNSEL FOR RESPONDENT

