

ORAL ARGUMENT REQUESTED

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 Petition for Review from the
Fourth District Court of Appeals at San Antonio, Texas
Cause No. 04-07-00305-CV**

**PETITION FOR REVIEW OF PETITIONERS
WENDELL C. SCHORLEMER, M.D., AND ROBERT SCHORLEMER, M.D.**

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STATEMENT OF THE CASE

Nature of the Case:

In this medical malpractice case, Respondent Emmalene Rankin (“Respondent”) asserted negligence claims against Methodist Healthcare System of San Antonio, Ltd., L.L.P. d/b/a Southwest Texas Methodist Hospital (the “Hospital”), Wendell C. Schorlemer, M.D. (“Dr. W.C. Schorlemer”), and Robert Schorlemer, M.D. (“Dr. R. Schorlemer”) (collectively “Petitioners”). (CR 44-54).¹ Respondent sought recovery of actual damages for her alleged negligent care and treatment, while she was a patient at the Hospital. (CR 49-50).

The Hospital and Petitioners filed their Motions for Summary Judgment on January 10, 2007, and March 12, 2007, respectively, stating they were entitled to summary judgment as a matter of law on the grounds that Respondent’s claims were barred under Texas Civil Practice & Remedies Code § 74.251(b), which establishes a ten-year statute of repose for health care liability claims. (CR 54-81, 107-17). On April 9, 2007, Respondent filed a Response to the motions for summary judgment (CR 124-49), and the Hospital filed a Reply to that Response. (CR 276-79). The trial court conducted a hearing on April 11, 2007, regarding the Hospital’s and Petitioners’ Motions for Summary Judgment. After hearing the arguments of counsel, the trial court signed an Order Granting Summary Judgment summarily dismissing Respondent’s claims with prejudice (CR 280), and this appeal followed (CR 281-83).

Trial Court:

The Hon. Gloria Saldana, 224th District Court, Bexar County, Texas.

¹ Petitioners will refer to the Clerk’s Record as ([vol. #] CR [page #]), and the Reporter’s Record as ([vol. #] RR [page #]).

Trial Court Disposition: April 11, 2007 Order granting Summary Judgment in favor of Petitioners.

Parties in the Court of Appeals: Emmaline Rankin – **Appellant**; 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. – **Appellees**.

Court of Appeals: Fourth District Court of Appeals at San Antonio, Texas.

Court of Appeals’ Disposition: Published opinion, by Justice Rebecca Simmons, with Justice Karen Angelini and Justice Steven C. Hilbig concurring, reversing and remanding the trial court’s judgment. *Rankin v. Methodist Healthcare System of San Antonio, Ltd., L.L.P.*, No. 04-07-00305-CV, ___ S.W.3d ___, 2008 Tex. App. LEXIS 1577, *1 (Tex. App.—San Antonio Mar. 5, 2008, pet. filed).

STATEMENT OF THE JURISDICTION

This Court has conflicts jurisdiction because the Court of Appeals’ decision here conflicts with this Court’s decision in *Trinity River Authority v. URS Consultants, Inc.*² The Court of Appeals’ decision also conflicts with opinions from sister courts of appeals holding that statutes of repose do not violate the open courts doctrine. These courts of appeals include *Hill v. Forrest & Cotton*,³ *Ellerbe v. Otis Elevator*,⁴ *Sowders v. M.W. Kellogg*,⁵ *McCulloch v. Fox & Jacobs*,⁶ *Nelson v. Metallic-Braden*,⁷ *Suburban Homes v.*

² 889 S.W.2d 259, 261 (Tex. 1994).

³ 555 S.W.2d 145 (Tex. Civ. App.—Eastland 1977, writ ref’d n.r.e.).

⁴ 618 S.W.2d 870 (Tex. App.—Houston [1st Dist.] 1981, writ ref’d n.r.e.).

⁵ 663 S.W.2d 644 (Tex. App.—Houston [1st Dist.] 1983, writ ref’d n.r.e.).

⁶ 696 S.W.2d 918 (Tex. App.—Dallas 1985, writ ref’d n.r.e.).

Austin Northwest Dev.,⁸ *Dubin v. Carrier Corp.*,⁹ *Barnes v. J.W. Bateson Co.*,¹⁰ *Dallas Market Ctr. v. Beran & Shelmire*,¹¹ *Gordon v. Western Steel*,¹² *Zaragosa v. Chemetron Investments, Inc.*,¹³ and *Brown v. M.W. Kellogg*.¹⁴ See TEX. GOV'T CODE § 22.001(a)(2).

This Court also has jurisdiction under Texas Government Code section 22.001(a)(3) because the issues presented involve matters of statutory interpretation and the Court of Appeals erred in interpreting section 74.251(b) of the Texas Civil Practice and Remedies Code. See TEX. GOV'T CODE § 22.001(a)(3).

Finally, this Court also has jurisdiction under Texas Government Code section 22.001(a)(6), because it appears that several errors of law have been committed by the Court of Appeals, and those errors are of such importance to the jurisprudence of the State that they require correction. If the Court of Appeals' decision is correct, then every statute of repose adopted by our Legislature, including, but not limited to, section 16.008, 16.009, 16.011, 16.007, and 16.012 of the Texas Civil Practice & Remedies Code and section 251.004(a) of the Texas Agriculture Code, will be subject to constitutional challenges. See TEX. GOV'T CODE § 22.001(a)(6).

⁷ 695 S.W.2d 213 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.).

⁸ 734 S.W.2d 89 (Tex. App.—Houston [1st Dist.] 1987, no writ).

⁹ 731 S.W.2d 651 (Tex. App.—Houston [1st Dist.] 1987, no writ).

¹⁰ 755 S.W.2d 518 (Tex. App.—Fort Worth 1988, no writ).

¹¹ 824 S.W.2d 218 (Tex. App.—Dallas 1991, writ denied).

¹² 950 S.W.2d 743 (Tex. App.—Corpus Christi 1997, writ denied).

¹³ 122 S.W.3d 341 (Tex. App.—Fort Worth 2003, no pet.).

¹⁴ 743 F.3d 265, 268-69 (5th Cir. 1984).

ISSUES PRESENTED

Briefed, Partially Briefed, and Unbriefed Issues¹⁵

1. Whether the Court of Appeals' opinion misinterprets this Court's instruction in *Trinity River Authority v. URS Consultants, Inc.*,¹⁶ to erroneously conclude the 10-year statute of repose for medical malpractice claims set forth in section 74.251(b) of the Texas Civil Practice & Remedies Code abrogates a well-established common-law claim?

2. Whether the Court of Appeals' opinion conflicts with opinions from sister courts of appeals including *Hill v. Forrest & Cotton*,¹⁷ *Ellerbe v. Otis Elevator*,¹⁸ *Sowders v. M.W. Kellogg*,¹⁹ *McCulloch v. Fox & Jacobs*,²⁰ *Nelson v. Metallic-Braden*,²¹ *Suburban Homes v. Austin Northwest Dev.*,²² *Dubin v. Carrier Corp.*,²³ *Barnes v. J.W. Bateson Co.*,²⁴ *Dallas Market Ctr. v. Beran & Shelmire*,²⁵ *Gordon v. Western Steel*,²⁶ *Zaragosa v.*

¹⁵ Petitioners reserve the right to present additional briefing on these issues presented if the Court so requests. Petitioners submit as much argument as possible with the page limitations for petitions for review imposed by the Texas Rules of Appellate Procedure. See TEX. R. APP. P. 53.2(i).

¹⁶ 889 S.W.2d 259, 261 (Tex. 1994).

¹⁷ 555 S.W.2d 145 (Tex. Civ. App.—Eastland 1977, writ ref'd n.r.e.).

¹⁸ 618 S.W.2d 870 (Tex. App.—Houston [1st Dist.] 1981, writ ref'd n.r.e.).

¹⁹ 663 S.W.2d 644 (Tex. App.—Houston [1st Dist.] 1983, writ ref'd n.r.e.).

²⁰ 696 S.W.2d 918 (Tex. App.—Dallas 1985, writ ref'd n.r.e.).

²¹ 695 S.W.2d 213 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.).

²² 734 S.W.2d 89 (Tex. App.—Houston [1st Dist.] 1987, no writ).

²³ 731 S.W.2d 651 (Tex. App.—Houston [1st Dist.] 1987, no writ).

²⁴ 755 S.W.2d 518 (Tex. App.—Fort Worth 1988, no writ).

²⁵ 824 S.W.2d 218 (Tex. App.—Dallas 1991, writ denied).

Chemetron Investments, Inc.,²⁷ and *Brown v. M.W. Kellogg*²⁸ which have held that other statutes of repose adopted by the Legislature do not violate the open courts provisions of the Texas Constitution?

3. Even if section 74.251(b) of the Texas Civil Practice & Remedies Code violates the open courts provision of the Texas Constitution, as applied to Respondent, whether Respondent's health care liability claims are, nonetheless, barred as a valid exercise of the Texas Legislature where section 74.251(b) was enacted to accomplish an objective within the Legislature's inherent police power and a rational relationship exists between that statute and its purpose.

a. Whether the Court of Appeals erred in refusing to address these arguments in its original opinion or on rehearing.

²⁶950 S.W.2d 743 (Tex. App.—Corpus Christi 1997, writ denied).

²⁷122 S.W.3d 341 (Tex. App.—Fort Worth 2003, no pet.).

²⁸ 743 F.3d 265, 268-69 (5th Cir. 1984).

STATEMENT OF THE FACTS

A. Factual Background

On November 9, 1995, Respondent Emmalene Rankin was admitted to Methodist Healthcare System of San Antonio, Ltd., L.L.P. d/b/a Southwest Texas Methodist Hospital (“Methodist Hospital”), for a hysterectomy performed by Petitioners Wendell C. Schorlemer, M.D. and Robert Schorlemer, M.D. (“Petitioners”). (CR 48, 108). Respondent alleges that on July 6, 2006, doctors discovered a foreign mass in her abdomen that was later surgically removed. (CR 48, 108). Respondent alleges the mass was a surgical sponge and that the sponge was left in her body during the November 9, 1995 surgery at Methodist Hospital. (CR 48, 108). Petitioners reject and deny that their alleged negligence “in failing to remove the sponge during the 1995 surgery was a proximate cause of [Respondent’s] injury.” (Appellant’s Brief at 3).

B. Procedural Background

1. *Respondent Sues Petitioners Over Eleven Years After Alleged Occurrence of Medical Negligence*

Respondent filed a lawsuit against Methodist Hospital on October 27, 2006. (CR 1). On January 8, 2007, Respondent filed her Third Amended Petition and Jury Demand adding Petitioners as parties. (CR 44-53, 108).²⁹ This case against Petitioners was filed over eleven years after the date of the alleged occurrence of medical negligence. (CR 44-45, 53, 108). Respondent alleged Petitioners were negligent in treating her in November

²⁹ Petitioners’ Motion to Summary Judgment indicates Respondent’s claims are barred as a matter of law where she “did not file suit until January 22, 2007 [*i.e.*, Respondent’s Fourth Amended Petition].” (CR 107). However, the Clerk’s Record indicates Respondent first sued these Petitioners in her Third Amended Petition, filed January 8, 2007. (CR 44).

1995 and that they departed from accepted standards of medical or health care. (CR 48-49, 108-09). Respondent brought her lawsuit under the Medical Liability Act, Chapter 74 of the Texas Civil Practice & Remedies Code. (CR 46-47, 109).

2. *Petitioners File Motion for Summary Judgment Asserting Respondent's Claims are Barred as a Matter of Law Pursuant to Ten-Year Statute of Repose for Health Care Liability Claims, Section 74.251(b) of the Texas Civil Practice & Remedies Code*

On March 12, 2007, Petitioners filed a Motion for Summary Judgment asserting Respondent's claims are barred as a matter of law pursuant to the ten-year statute of repose for health care liability claims set forth in section 74.251(b) of the Texas Civil Practice & Remedies Code. (CR 107-10).³⁰ Respondent filed her Response on April 9, 2007. (CR 124-48).

3. *After Hearing, Trial Court Grants Petitioners' Motions for Summary Judgment Dismissing Respondent's Claims with Prejudice*

After hearing the arguments and considering the pleadings and summary judgment evidence, the trial court signed a written order on April 11, 2007 granting Defendants'/Petitioners' Motions for Summary Judgment and summarily dismissing Plaintiff's/Respondent's claims with prejudice. (CR 280). (Apx. Tab 4). Respondent perfected this appeal. (CR 281).

³⁰ That Motion for Summary Judgment adopts and incorporates by reference "all summary judgment evidence and argument asserted or offered by Defendant, Methodist Hospital[.]" (CR 115).

4. *Court of Appeals Reversed Judgment and Remanded Cause Concluding 10-Year Statute of Repose Violates Open Courts Provision of the Texas Constitution as Applied to Respondent*

On appeal to the Fourth Court of Appeals at San Antonio, that court reversed the judgment and remanded the cause for further proceedings, concluding the 10-year statute of repose for health care liability claims set forth in section 74.251(b) of the Texas Civil Practice & Remedies Code violates the open courts provision contain in Article I, Section 13 of the Texas Constitution as applied to Respondent. *See Rankin v. Methodist Healthcare System of San Antonio, Ltd., LLP*, No. 04-07-00305-CV, __ S.W.3d __, 2008 Tex. App. LEXIS 1577, *5-24 (Tex. App.—San Antonio Mar. 5, 2008) (Apx. Tab 1). Petitioners' Motion for Rehearing and Motion for Rehearing En Banc were summarily denied without further comment. (*See* Apx. Tabs 2 & 3).

SUMMARY OF THE ARGUMENT

The Court of Appeals misapplied this Court's earlier decision in *Trinity River Authority v. URS Consultants, Inc.*³¹ which held there was no open courts violation by a statute of repose where there was no well-established common law right to the discovery rule. In the case at hand, at the time Respondent filed this lawsuit, the discovery rule in Texas had been abrogated in medical malpractice cases for approximately thirty years.

Moreover, the Court of Appeals' decision conflicts with at least twelve other decisions of sister courts of appeals which have found that other statutes of repose adopted by the legislature do not violate the open courts provision of the Texas Constitution.

³¹ 889 S.W.2d 259, 261 (Tex. 1994).

Finally, even if the ten-year statute of repose set forth in section 74.251(b) violates the open court's provision as applied to Respondent, which Petitioners reject and do not concede, the provisions of section 74.251(b) must be upheld as a valid exercise of the Legislature's inherent police power. The Legislature's police power is an attribute of sovereignty, not granted by nor derived from the state's written constitution, by which the legislative body may enact laws to protect the peace, health, morals, happiness, comfort, convenience, prosperity, safety, good order, or general welfare of the people.³² The police power is a broad and wide-ranging power, and the judiciary cannot review whether a legislative act is for the benefit of the general welfare and find the converse unless the legislation is manifestly arbitrary and autocratic.³³ Here, section 74.251(b) was crafted to accomplish an objective within the Legislature's inherent police power and a rational relationship exists between that statute and its purpose: to rein in the health care crisis that existed in this State at the time of enactment. Thus, the Court of Appeals erred in determining the statute of repose is unconstitutional where it is a valid exercise of the Legislature's inherent police powers. This issue was fully briefed below but was not addressed in the Court of Appeals' Opinion. This issue again was raised in Petitioner's Motion for Rehearing and for Rehearing En Banc but the Court of Appeals failed and refused to address this issue.

³² See, e.g., *State v. Richards*, 301 S.W.2d 597, 602 (Tex. 1957); *Lombardo v. Dallas*, 73 S.W.2d 475, 478 (Tex. 1934); *Spann v. Dallas*, 235 S.W. 513, 515 (Tex. 1921).

³³ *Martin v. Wholesome Dairy, Inc.*, 437 S.W.2d 586, 590-91 (Tex. Civ. App.—Austin 1969, writ ref'd n.r.e.).

ARGUMENT AND AUTHORITIES

I. **This Court Should Exercise Jurisdiction to Consider Conflicts Between Court of Appeals' Opinion and This Court's Authority and Opinions from Sister Courts of Appeals on Decisions of Law Material to this Case, Matters of Statutory Interpretation, and Issues of Importance to Jurisprudence of the State**

A. **Summary Judgment in Favor of Petitioners is Proper Where Respondent's Claims are Barred as a Matter of Law Pursuant to Ten-Year Statute of Repose for Health Care Liability Claims Set Forth in Section 74.251(b) of the Texas Civil Practice & Remedies Code**

1. *Court of Appeals' Opinion Erred in Concluding that, As Applied to Respondent, Ten-Year Statute of Repose Under Section 74.251(b) Violates Open Courts Provision of Texas Constitution*

a. **Court of Appeals' Decision Misapplies this Court's Instruction in *Trinity River Authority v. URS Consultants, Inc.*, to Erroneously Conclude Discovery Rule Applies and Respondent Established Common-Law Claim that Would Be Abrogated by Ten-Year Statute of Repose Set Forth in Section 74.251(b)**

In reaching its conclusion that the ten-year statute of repose set forth in Section 73.251(b), as applied to Respondent, violates the open courts provision of the Texas Constitution, the Court of Appeals' Opinion misapplies this Court's instruction in *Trinity River Authority v. URS Consultants, Inc.* Compare *Rankin*, 2008 Tex. App. LEXIS 1577 at *6-7, *14-15, with *Trinity River Authority*, 889 S.W.2d at 263. Specifically, in *Trinity River Authority*, this Court concluded that the statute of repose for negligence actions against architects and engineers³⁴ did not violate the open courts provision, concluding:

We emphasize that we are expressing no opinion on whether, if squarely presented with the issue, we would adopt the discovery rule in a case such as this. Rather, we hold that, because the discovery rule had not

³⁴ See TEX. CIV. PRAC. & REM. CODE § 16.008 (barring claims against architect or engineer after ten years even if the alleged design defect was undiscoverable before that time).

been adopted for negligent design cases at the time section 16.008 was enacted, that statute did not abrogate the right to bring a common law cause of action under these circumstances. As applied in this case, therefore, section 16.008 does not violate the Texas open courts guarantee.[]

Trinity River Authority, 889 S.W.2d at 263 (emphasis added) (footnote omitted). Here, although the Opinion discusses and attempts to distinguish this Court's instruction in *Trinity River Authority*, the Opinion nevertheless concludes the ten-year statute of repose in Section 74.251(b) violates the open courts provision as applied to Respondent even though the discovery rule was not adopted for medical malpractice claims at the time section 74.251(b) was enacted in 2003. *See Rankin*, 2008 Tex. App. LEXIS 1577 at *15, *23.

Briefly, Petitioners acknowledge that before the enactment of article 5.82 of the Insurance Code, and its successor, article 4590i of the Texas Revised Civil Statutes, this Court adopted the discovery rule in open courts analysis for cases involving foreign objects left in the patient's body. *See Gaddis v. Smith*, 417 S.W.2d 577, 581 (Tex. 1967). However, application of the discovery rule to medical malpractice claims was abolished in 1975 through enactment of former article 5.82 of the Texas Insurance Code, its successor former Article 4590i of the Texas Revised Civil Statutes Annotated, and its subsequent successor section 74.251(b) of the Texas Civil Practice & Remedies Code, enacted in 2003.³⁵ At the time the legislature enacted section 74.251(b) in 2003, the

³⁵ *See Diaz v. Westphal*, 941 S.W.2d 96, 99 (Tex. 1997) (recognizing that limitations provisions of these statutes, including article 4590i, which is same as that at issue here, abolished the discovery rule); *Morrison v. Chan*, 699 S.W.2d 205, 208 (Tex. 1985) (instructing discovery of tortious action is not date on which plaintiff discovers her injury because statute of limitations would never run until injury was discovered or reasonably should have been discovered, and such an interpretation would reinstate the discovery rule, which legislature intended to abolish with passing of statute of limitations).

discovery rule in Texas for medical malpractice cases had been abrogated for almost thirty years. In fact, the discovery rule was only recognized by this Court in medical negligence cases involving retained foreign objects for a period of approximately eight years before it was abrogated by the legislature. The test applied by this Court in *Trinity River Authority*, as set forth above, was whether or not at the time the statute was passed there existed a common law right to have the statute of limitations extended under the discovery rule. *See Trinity River Authority*, 889 S.W.2d at 263. In the case at hand, in 2003, when chapter 74.251(b) was adopted, there was no common law right under the discovery rule and such a right had not existed for almost thirty years.³⁶ Therefore, consistent with this Court's decision in *Trinity River Authority*, there is no violation of the Texas open courts guarantee.

b. Court of Appeals' Opinion Fails to Recognize Distinction Between Statutes of Limitation and Statutes of Repose, Conflicting with Authority from This Court and with Authority from Sister Courts of Appeals Instructing Statutes of Limitations Bar Enforcement of a Right While Statutes of Repose Take Away Right Altogether

Next, the Court of Appeals' analysis fails to recognize a distinction between statutes of limitations and statutes of repose, as recognized by controlling authority from this Court and by authority from sister courts of appeals. *See generally Rankin*, 2008 Tex. App. LEXIS 1577 at *5-24.

A statute of limitations is a procedural device operating as a defense to limit the remedy available from an existing cause of action; a statute of repose creates a

³⁶ *See, e.g., Diaz*, 941 S.W.2d at 99-100.

substantive right to be free from liability after a legislatively determined period. *Cadle Co. v. Wilson*, 136 S.W.3d 345, 350 (Tex. App.—Austin 2004, no pet.). As this Court instructed in *Holubec v. Brandenberger*, the purpose of repose statutes is to give absolute protection to certain parties from the burden of indefinite potential liability. *Holubec v. Brandenberger*, 111 S.W.3d 32, 37 (Tex. 2003) (reviewing one-year statute of repose regarding nuisance claims set forth in section 251.004(a) of the Texas Agriculture Code). And, importantly, 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*, 111 S.W.3d at 37³⁷; *Johnson v. City of Fort Worth*, 774 S.W.2d 653, 654 n.1 (Tex. 1989); *Borth v. Saadeh*, No. 07-05-0094-CV, 2006 Tex. App. LEXIS 2115, *4 (Tex. App.—Amarillo Mar. 16, 2006, no pet.) (mem. op.) (not designated for publication). While statutes of limitations operate to bar enforcement of a right, a statute of repose takes away the right altogether. *Cadle Co.*, 136 S.W.3d at 350; *Aguilar v. Trujillo*, 162 S.W.3d 839, 853 (Tex. App.—El Paso 2005, pet. denied); *Borth*, 2006 Tex. App. LEXIS 2115 at *4. Thus, it follows that if statutes of repose may cut off the rights of action before they accrue, they may also cut off those rights before they are discovered. Indeed, the repose period sets an outer limit beyond which no action can be maintained. *Holubec*, 111 S.W.3d at 37; *Borth*, 2006 Tex. App. LEXIS 2115 at *5.

³⁷ A separate panel of the San Antonio Court of Appeals acknowledged this Court’s instruction in *Holubec* and noted that “the period set under a statute of repose is independent of the claim’s accrual or discovery” and, therefore, that “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.” *Pochucha v. Galbraith Eng’g Consultants, Inc.*, 243 S.W.3d 138, 140 n.2 (Tex. App.—San Antonio 2007, reh’g and reh’g en banc denied, pet. filed) (quoting *Holubec*, 111 S.W.3d at 37). (Cf. Appellees’ Brief at 8-9, 28-30).

In Texas, eleven courts have examined the application of the open courts provision to a statute of repose.³⁸ At least six of those courts examined the statute of repose in light of this Court's instruction in *Nelson v. Krusen*. See *Nelson v. Krusen*, 678 S.W.2d 918, 927 (Tex. 1984) (instructing that when a statute, whether termed one of "limitation" or of "repose," eliminates plaintiff's access to courts for redress of an injury, despite exercise of all possible diligence, it is susceptible to constitutional challenge under article I, section 13 of the Texas Constitution).³⁹ Notably, every single court that has reviewed the issue has failed to find the statute of repose violated the open courts provision of the Texas Constitution.⁴⁰ And, the Fifth Circuit Court of Appeals has held the statute of repose is constitutional. See *Brown v. M.W. Kellogg*, 743 F.3d 265, 268-69 (5th Cir. 1984) (instructing TEX. REV. CIV. STAT. ANN. art. 5536a, the ultimate statute of repose for architects, engineers, and builders, does not violate TEX. CONST. art. I, § 13, which assures access to the courts or offend due process and equal protection clauses of state and federal constitutions). Finally, in five of the cases that have examined the application

³⁸ See *Zaragosa v. Chemetron Investments, Inc.*, 122 S.W.3d 341 (Tex. App.—Fort Worth 2003, no pet.); *Gordon v. Western Steel*, 950 S.W.2d 743 (Tex. App.—Corpus Christi 1997, writ denied); *Dallas Market Ctr. 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 Northwest Dev.*, 734 S.W.2d 89 (Tex. App.—Houston [1st Dist.] 1987, no writ); *Nelson v. Metallic-Braden*, 695 S.W.2d 213 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.); *McCulloch v. Fox & Jacobs*, 696 S.W.2d 918 (Tex. App.—Dallas 1985, writ ref'd n.r.e.); *Sowers v. M.W. Kellogg*, 663 S.W.2d 644 (Tex. App.—Houston [1st Dist.] 1983, writ ref'd n.r.e.); *Ellerbe v. Otis Elevator*, 618 S.W.2d 870 (Tex. App.—Houston [1st Dist.] 1981, writ ref'd n.r.e.); *Hill v. Forrest & Cotton*, 555 S.W.2d 145 (Tex. Civ. App.—Eastland 1977, writ ref'd n.r.e.).

³⁹ See *Zaragosa*, 122 S.W.3d at 346-47; *Gordon v. Western Steel*, 950 S.W.2d 743 (Tex. App.—Corpus Christi 1997, writ denied); *Dallas Market Ctr. v. Beran & Shelmire*, 824 S.W.2d 218 (Tex. App.—Dallas 1991, writ denied); *Barnes*, 755 S.W.2d at 521-22; *Dubin v. Carrier*, 731 S.W.2d 651 (Tex. App.—Houston [1st Dist.] 1987, no writ); *Suburban Homes*, 734 S.W.2d at 92; *McCulloch*, 696 S.W.2d at 925-26; *Metallic-Braden*, 695 S.W.2d at 215.

⁴⁰ See footnote 35, *supra*.

of the open courts provision to a statute of repose, this Court declined review, noting it found no reversible error.⁴¹

Thus, as set forth above, the Court of Appeals' Opinion fails to recognize the important distinction between statutes of repose and statutes of limitations well-recognized by this Court and sister courts of appeals. Simply put, to allow, as a reasonable time for bringing suit, a period greater than the repose period itself would defeat the purpose of the statute. *See Mega v. Holy Cross Hosp.*, 490 N.E.2d 665, 668 (Ill. 1986). (Brief of Appellees at 10). Accordingly, if this Court denies review or grants review and concludes the Opinion is correct, based on the Court of Appeals' analysis therein, this Court will be forced to hold as unconstitutional every statute of repose under Texas law to the extent that the Opinion fails to distinguish the statute of repose from the statute of limitations and interprets the statute of repose as more broad than "the outer limit beyond which no action can be maintained." *Holubec*, 111 S.W.3d at 37; *Borth*, 2006 Tex. App. LEXIS 2115 at *5.⁴²

⁴¹ See generally *Metallic-Braden*, 695 S.W.2d at 213; *McCulloch*, 696 S.W.2d at 918; *Sowers*, 663 S.W.2d at 644 ; *Ellerbe*, 618 S.W.2d at 870; *Hill*, 555 S.W.2d at 145.

⁴² See, e.g., TEX. CIV. PRAC. & REM. CODE §§ 16.008(a) (ten-year statute of repose applicable to claims against architects, engineers, interior designers, and landscape architects), 16.009(a) (ten-year statute of repose applicable to claims against "a person who constructs or repairs an improvement to real property"), 16.011(a) (ten-year statute of repose applicable to claims against surveyors), 16.012(b), (c) (15-year statute of repose applicable to certain products liability claims against manufacturers or sellers), 147.042 (15-year statute of repose applicable to certain claims against manufacturers or sellers of computer products or computer service products); TEX. AGRIC. CODE § 251.004(a) (statute of repose applicable to nuisance claims against agricultural operations).

2. *Even if Section 74.251(b) Violates Open Courts Provision, Same is Valid Exercise of Legislature’s Inherent Police Power and Court of Appeals’ Opinion Erred in Failing to Consider This Issue*

a. **This Court Should Grant Petition for Review to Address Whether Section 74.251(b) Statute of Repose is Valid Exercise of Legislature’s Police Power**

Additionally, even if the Court of Appeals correctly concluded that section 74.251(b) violates the open courts provision of the Texas Constitution (as applied to Respondent), which Petitioners reject and do not concede, the ten-year statute of repose set forth in section 74.251(b) of the Texas Civil Practice & Remedies Code is a valid exercise of the Legislature’s police power, and the Court of Appeals erred in failing to consider this issue. (See Brief of Appellees at 20-30). See *Sax v. Votteler*, 648 S.W.2d 661, 665-66 (Tex. 1983); *Lebohm v. City of Galveston*, 275 S.W. 951 (Tex. 1955). Although discussed in Petitioners’ prior briefing and at oral argument, the Court of Appeals’ Opinion fails to consider this issue. See generally *Rankin*, 2008 Tex. App. LEXIS 1577, *1-24. (Brief of Appellees Wendell C. Schorlemer, M.D. and Robert Schorlemer, M.D. [“Brief of Appellees”] at 20-30).⁴³ Petitioners request this Court grant review to consider this issue.

Texas case law defines police power as an “attribute of sovereignty not derived from the Constitution but is the inherent power of the State” *Martin v. Wholesome Dairy, Inc.*, 437 S.W.2d 586, 590-91 (Tex. Civ. App.–Austin 1969, writ ref’d n.r.e.).⁴⁴

⁴³ Petitioners also raised this issue in their Motion for Rehearing and Motion for Rehearing En Banc, but the Court of Appeals denied both motions without further comment. (See Motion for Rehearing at 4-13; Motion for Rehearing En Banc at 3-15; Apx. Tabs 2 & 3).

⁴⁴ Each state possesses police power, an attribute of sovereignty, not granted by nor derived from its written constitution by which its legislative body may enact laws to protect the peace, health, morals, happiness, comfort,

Whether an act of the legislature is for the benefit of the general welfare is an inquiry for the legislature's determination and cannot be reviewed, with the judiciary finding the converse, unless the legislation is manifestly arbitrary and autocratic. *Id.* at 591. Police power is authority conferred from the people to their governmental agents. *Spann*, 235 S.W. at 515. It is a broad and wide-ranging power. *Id.* at 515.

This Court should consider the validity of the exercise of police power for several reasons. First, police power is an inherent power of the Texas Legislature which affords the legislative body the authority "to ensure the public health, the public safety, the public comfort, or welfare" of the state's citizens. *Id.* Second, section 74.251(b) is a valid exercise of the Texas Legislature's police power. Third, a valid exercise of police power validates the constitutional integrity of an enactment of law, even in the face of Respondent's alleged open-courts complaint. Finally, section 74.251(b) was crafted to accomplish an objective within the legislature's inherent police power; and a rational relationship exists between that statute and its purpose: that is, to rein in the health care crisis that existed within the State of Texas at the time of enactment. Considering these factors, the Court of Appeals erred in determining the statute of repose is unconstitutional where same is a valid exercise of the Legislature's inherent police powers, and Petitioners request this Court grant review to consider this additional issue important to the jurisprudence of the State.

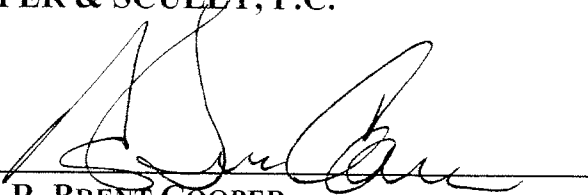
convenience, prosperity, safety, good order, or general welfare of the people. *See, e.g., State v. Richards*, 301 S.W.2d 597, 602 (Tex. 1957); *Lombardo v. Dallas*, 73 S.W.2d 475, 478 (Tex. 1934); *Spann*, 235 S.W. at 515. Police power is a necessary and beneficial power; without it society would be at the beck and call of individual interests and there would exist neither public order nor security. *Spann v. Dallas*, 235 S.W. 513, 515 (Tex. 1921).

WHEREFORE, PREMISES CONSIDERED, Petitioners Wendell C. Schorlemer, M.D., and Robert Schorlemer, M.D., respectfully urge this Court grant their Petition for Review, order full briefing on the merits, set this matter for oral argument, and upon submission or within a per curiam opinion, reverse the Court of Appeals' Opinion and render judgment that the case against Petitioners be dismissed with prejudice or reverse and remand the case to the trial court with instructions to dismiss the case with prejudice. Petitioners also pray for such other and further relief, general or special, at law or in equity, as this Court deems just.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of this Petition for Review on the following counsel of record on the 3rd day of September 2008 by the method indicated:

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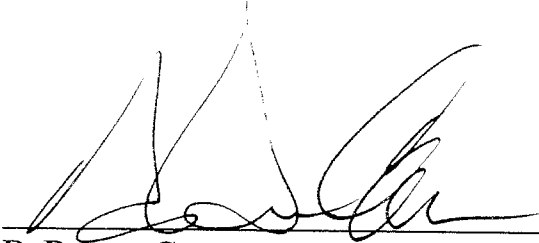
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