

**ORAL ARGUMENT REQUESTED**

NO. 08-0316

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**IN THE SUPREME COURT OF TEXAS**

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**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.**

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

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**APPENDIX TO BRIEF ON THE MERITS OF PETITIONERS  
WENDELL C. SCHORLEMER, M.D., AND ROBERT SCHORLEMER, M.D.**

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In compliance with rule 53.2(k) of the Texas Rules of Appellate Procedure, Petitioners, Petitioners Wendell C. Schorlemer, M.D., and Robert Schorlemer, M.D. submit the Appendix to their Brief on the Merits containing the following items:

- Tab 1: Opinion and Judgment of the Court of Appeals: *Rankin v. Methodist Healthcare System of San Antonio, Ltd., LLP*, No. 04-07-00305-CV, 261 S.W.3d 93, 2008 Tex. App. LEXIS 1577, \*1 (Tex. App.—San Antonio Mar. 5, 2008, pet. filed) (copy and LEXIS version are included)
- Tab 2: June 19, 2008 Order denying Appellees' Motion for Rehearing
- Tab 3: June 19, 2008 Order denying Appellees' Motion for Rehearing En Banc

Tab 4: April 11, 2007 Order Granting Summary Judgment (CR 280)

Tab 5: Act of June 2, 2003, 78<sup>th</sup> Leg., R.S., Ch. 204, § 10.11, Tex. Gen. Laws 845, 884-85

Tab 6: TEX. CIV. PRAC. & REM. CODE § 74.251(b)

D/728193.5

1 of 1 DOCUMENT

**Emmalene RANKIN, Appellant v. METHODIST HEALTH-CARE SYSTEM OF SAN ANTONIO, LTD., LLP, d/b/a Methodist Hospital; Wendell C. Schorlemer, M.D. and Robert Schorlemer, M.D., Appellees**

**No. 04-07-00305-CV**

**COURT OF APPEALS OF TEXAS, FOURTH DISTRICT, SAN ANTONIO**

*2008 Tex. App. LEXIS 1577*

**March 5, 2008, Delivered  
March 5, 2008, Filed**

**PRIOR HISTORY:** [\*1]

From the 224th Judicial District Court, Bexar County, Texas. Trial Court No. 2006-CI-16732. Honorable Andy Mireles, Judge Presiding.

**DISPOSITION:** REVERSED AND REMANDED.

**COUNSEL:** For APPELLANT: Carl Robin Teague, Attorney At Law, San Antonio, TX; David M. Adkisson, Law Office of David M. Adkisson, P.C., San Antonio, TX.

For APPELLEE: Charles A. Deacon, Bertina B. York, Rosemarie Kanusky, Fulbright & Jaworski L.L.P, San Antonio, TX; R. Brent Cooper, Diana L. Faust, Devon J. Singh, Cooper & Scully, P.C., Dallas, TX; Tyler Scheuerman, Uzick, Oncken,

Scheuerman & Berger, P.C., San Antonio, TX.

**JUDGES:** Opinion by: Rebecca Simmons, Justice. Sitting: Karen Angelini, Justice, Rebecca Simmons, Justice, Steven C. Hilbig, Justice.

**OPINION BY:** Rebecca Simmons

**OPINION**

The primary issue in this appeal is whether the ten-year statute of repose under *Section 74.251(b) of the Texas Civil Practices and Remedies Code* violates the open courts provision of the Texas Constitution. The trial court granted summary judgment for Appellees Methodist Healthcare System (Methodist), Dr. W.C. Schorlemer, and Dr. Robert Schorlemer (collectively Physicians) on the basis that the statute of repose barred Appellant Emmalene Rankin's claim for

healthcare liability as to each [\*2] defendant. Because, as applied to Rankin, *Section 74.251(b)* unreasonably restricted her right to sue before she had a reasonable opportunity to discover the wrong and bring suit, we reverse the judgment of the trial court and remand the cause for further proceedings.

## BACKGROUND

On November 9, 1995, the Physicians performed a hysterectomy on Rankin at Methodist. In July 2006, Rankin experienced abdominal pains. After several visits to a number of doctors, Rankin underwent exploratory surgery and a surgical sponge was found and removed from her abdomen. On October 27, 2006, Rankin filed a lawsuit against Methodist. On January 8, 2007, Rankin filed a lawsuit against the Physicians. Each of the defendants separately moved for traditional summary judgment based on *Section 74.251(b)*, the ten-year statute of repose.

## THE LAW IN QUESTION

*Section 74.251 of the Texas Civil Practice and Remedies Code* provides as follows:

(a) Notwithstanding any other law and subject to Subsection (b), no health care liability claim may be commenced unless the action is filed within two years from the occurrence of the breach or tort or from the date the medical or health care treatment that is the subject of the claim [\*3] or hospitalization for which the claim is made is completed; provided that, mi-

nors under the age of 12 years shall have until their 14th birthday in which to file, or have filed on their behalf, the claim. Except as herein provided this section applies to all persons regardless of minority or other legal disability.

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

*TEX. CIV. PRAC. & REM. CODE ANN. § 74.251* (Vernon 2005).<sup>1</sup> Rankin challenges the constitutionality of subsection (b).

<sup>1</sup> *Section 74.251* was added in 2003. *Subsection 74.251(a)* was substantially the same as its predecessors *Article 4590i*, *Section 10.01* and *Article 5.82, Section 4*. *Subsection (b)*, however, was an addition.

The Texas Constitution's open courts provision provides that "[a]ll courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law." *TEX. CONST. art. I, § 13*. The purpose of this provision is to assure that [\*4] there are no unreasonable or arbitrary restrictions for a person bringing a well-established common-law claim. *Jennings v. Burgess*, 917 S.W.2d 790, 793 (Tex. 1996).

## STANDARD OF REVIEW

An appellate court reviews the trial court's summary judgment de novo, viewing all the evidence in the nonmovant's favor to determine whether there is no genuine issue of material fact and if the movant is entitled to judgment as a matter of law. *Nixon v. Mr. Property Management Co.*, 690 S.W.2d 546, 548-49 (Tex. 1985). "A defendant moving for summary judgment on an affirmative defense has the burden to conclusively establish that defense." *Long Distance Int'l, Inc. v. Telefonos de Mexico, S.A. de C.V.*, 49 S.W.3d 347, 350-51 (Tex. 2001).

As summary judgment evidence, Rankin submitted an affidavit stating that the surgical sponge found in her abdomen in July 2006 had been left during her operation on November 9, 1995 and that discovery of the sponge was impossible prior to the expiration of the ten-year period under the statute of repose contained in *Section 74.251(b)*. Pursuant to the summary judgment standard of review, we presume that Rankin's evidence is true.

Here, it is undisputed that *Section 74.251(b)* [\*5] applies and would bar Rankin's claims. Thus, the only inquiry is whether Rankin established the unconstitutionality of *Section 74.251(b)* as applied to her.

## ANALYSIS

To establish an open courts violation, Rankin must satisfy two requirements: (1) a cognizable, common-law claim that is statutorily restricted, and (2) the restriction is unreasonable or arbitrary when balanced against the statute's purpose and basis. *Yancy v. United Surgical Partners Int'l, Inc.*, 236 S.W.3d 778, 783 (Tex. 2007);

*Shah v. Moss*, 67 S.W.3d 836, 842 (Tex. 2001). In passing upon the constitutionality of a statute, we begin with a presumption of validity. It is to be presumed that the Legislature has not acted unreasonably or arbitrarily; and a mere difference in opinion, where reasonable minds could differ, is not a sufficient basis for striking down legislation as arbitrary or unreasonable." *Smith v. Davis*, 426 S.W.2d 827, 831 (Tex. 1968).

### A. Whether the statute of repose abrogates a well established common-law claim.

Methodist asserts Rankin has no historical cause of action that is being restricted. The Physicians claim that Rankin has no vested right to seek redress for her alleged injury and consequently the [\*6] statute of repose cannot violate the open courts provision.

#### 1. Common-Law Claim

In response to Methodist's argument, Rankin claims that, historically, a patient could have brought a cause of action for negligent failure to remove a surgical sponge more than ten years after surgery and, thus, a well established common-law claim exists. Much of the differences in the parties' arguments stem from the holding in *Trinity River Authority v. URS Consultants, Inc.*, 889 S.W.2d 259, 261 (Tex. 1994).

In *Trinity River*, the plaintiff alleged a cause of action against the designers of a sewage treatment basin wall which had collapsed. *Trinity River Auth.*, 889 S.W.2d at 260. The lower courts granted and affirmed a summary judgment because more than ten years had elapsed since the construction of the basin wall. *Id.* at 261. The question before the court was the constitutionality of

the statute of repose as set forth in *Section 16.008 of the Civil Practice and Remedies Code*. *Id.* at 260. Regardless of when the defect is discovered, *Section 16.008* barred suits against architects for design defects unless they were brought within ten years after the improvement was completed. *Id.* at 260.

The supreme court [\*7] concluded "that, because the discovery rule had not 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." *Id.* at 263. As a result, the supreme court held that *Section 16.008*, as applied, could not violate the Texas open courts guarantee. *Id.* In contrast, the supreme court has recognized the discovery rule in the context of certain medical malpractice cases.

Prior to *Trinity River*, the supreme court held in *Gaddis v. Smith*, 417 S.W.2d 577, 580 (Tex. 1967), that "causes of action based upon the alleged negligence of a physician in leaving a foreign object in his patient's body are proper subjects for the 'discovery rule.'" However, in 1975, the 64th Legislature amended Chapter 5 of the Texas Insurance Code by adding *Article 5.82, Section 4*, which provided:

[n]otwithstanding any other law, no claim against a person or hospital covered by a policy of professional liability insurance covering a person licensed to practice medicine or podiatry or certified to administer anesthesia in this state or a hospital licensed under the Texas Hospital Licensing Law, as [\*8]

amended (Article 4437f, Vernon's Texas Civil Statutes), whether for breach of express or implied contract or tort, for compensation for a medical treatment or hospitalization may be commenced unless the action is filed within two years of the breach or the tort complained of or from the date the medical treatment that is the subject of the claim or the hospitalization for which the claim is made is completed, except that minors under the age of six years shall have until their eighth birthday in which to file, or have filed on their behalf, such claim. Except as herein provided, this section applies to all persons regardless of minority or other legal disability.<sup>2</sup>

*Sax v. Votteler*, 648 S.W.2d 661, 663 (Tex. 1983). Methodist argues that because the discovery rule was abolished in 1975, *Section 74.251* does not abrogate a well established common-law claim. We disagree.<sup>3</sup>

<sup>2</sup> *Article 5.82* became effective on June 3, 1975. *Sax v. Votteler*, 648 S.W.2d 661, 663 n.1 (Tex. 1983).

<sup>3</sup> Both Methodist and the Physicians assert that cases involving statute of limitations should not be used as authority in assessing the constitutionality of a statute of repose. The differences that Methodist and the Physicians [\*9] articulate are based on the purpose and basis of each statute. If there was no discovery rule in place

when a statute of limitations or statute of repose was enacted, both would warrant the same result. As a result, for purpose of determining if there is a common-law claim, cases analyzing the constitutionality of statutes of limitations under the open courts guarantee are instructive. The alleged differences would appear relevant and material in the second criterion and of minimal significance in first criterion.

The Texas Supreme Court implicitly addressed whether a plaintiff had a well-established common-law claim after the legislative amendments of the statutory predecessors of *Section 74.251*. *Neagle v. Nelson*, 685 S.W.2d 11, 12 (Tex. 1985); *Nelson v. Krusen*, 678 S.W.2d 918, 919 (Tex. 1984). This court recently concluded that *Section 74.251*, as applied to minors, was unconstitutional under the open courts provision of the Texas Constitution. *Adams v. Gottwald*, 179 S.W.3d 101, 103 (Tex. App.--San Antonio 2005, pet. denied). Because in each case the courts held the statute in question violated the open courts provision, the courts necessarily concluded that the plaintiffs held a well [\*10] established common-law claim. We similarly conclude Rankin has established a common-law claim that would be abrogated by *Section 74.251(b)*.

## 2. Vested Rights

Even if Rankin establishes a common-law claim, the Physicians argue Rankin lacks a vested right, and as a result, her claim that *Section 74.251(b)* is unconstitutional under the open courts provision must fail. Because the open courts provision is "quite plainly, a due process guarantee," we agree with the Physicians that Rankin must

have a vested right at stake. *Sax*, 648 S.W.2d at 664; see also *City of Univ. Park v. Benners*, 485 S.W.2d 773, 778 (Tex. 1972) (requiring a vested right in order to establish a due process claim).

In support, the Physicians refer to a number of cases wherein the courts held that other statutes of repose were constitutional. *Zaragosa v. Chemetron Invs., Inc.*, 122 S.W.3d 341, 346 (Tex. App.--Fort Worth 2003, no pet.); *Barnes v. J.W. Bateson Co.*, 755 S.W.2d 518, 521-22 (Tex. App.--Fort Worth 1988, no writ); *McCulloch v. Fox & Jacobs, Inc.*, 696 S.W.2d 918, 921 (Tex. App.--Dallas 1985, writ ref'd n.r.e.); *Sowders v. M.W. Kellogg Co.*, 663 S.W.2d 644, 648 (Tex. App.--Houston [1st Dist.] 1983, writ ref'd n.r.e.). [\*11] In each of these cases, the plaintiff's injury occurred after the expiration of the repose period, and thus, the courts concluded the plaintiff lacked a vested right in a common law claim. Here, the event giving rise to the cause of action occurred within the ten-year-repose period. The Physicians' argument fails to take this crucial distinction into account and we therefore find their argument unpersuasive.

## **B. Whether the restriction is unreasonable or arbitrary when balanced against the purpose and basis of the statute of repose.**

In the second prong, we must determine whether there is a showing that the legislative basis for *Section 74.251(b)* outweighs the denial of Rankin's constitutionally-guaranteed right of redress. *Sax*, 648 S.W.2d at 666. In making this determination, "we consider both the general purpose of the statute and the extent to which the litigant's right to redress is affected." *Id.*

### 1. Findings and Purposes of Section 74.251(b)

The concerns over insurance rates and the cost of healthcare supporting the statutory predecessors of Section 74.251, as argued by appellees, are similarly the basis for Section 74.251(b). The supreme court has acknowledged that the basis for the [\*12] predecessors of Section 74.251 is legitimate, as were concerns over insurance rates and the cost of healthcare. For purposes of this balancing task, we presume that the basis for Section 74.251 is also legitimate.

### 2. Restrictions on Rankin's Access to the Courts

In at least two cases after the amendment of 1975 to the Texas Insurance Code, the Texas Supreme Court addressed constitutional challenges, based on the open courts provision, to the statute of limitations of medical malpractice claims. The supreme court considered Article 5.82, Section 4 of the Insurance Code and its restrictions on a claim for wrongful birth in *Nelson v. Krusen*, 678 S.W.2d 918 (Tex. 1984). In *Nelson*, Mr. and Mrs. Nelson consulted with Dr. Krusen to determine whether Mrs. Nelson was a genetic carrier of Duchenne muscular dystrophy. *Nelson*, 678 S.W.2d at 920. At the time, the Nelsons had a child with Duchenne muscular dystrophy and Mrs. Nelson was pregnant. *Id.* Dr. Krusen examined Mrs. Nelson on several occasions and assured the Nelsons that she was not a carrier. *Id.* at 921. Over three years after her delivery, the Nelsons discovered that their son had Duchenne muscular dystrophy. *Id.*

The court found that Article 5.82, Section 4 [\*13] would "operate to bar the parents' cause of action before they knew it ex-

isted, even though they did not discover, and could not reasonably have discovered, their injury within two years." *Id.* at 920. As applied to the Nelsons, the limitations provision "violat[ed] the open-courts provision by cutting off a cause of action before the party knows, or reasonably should know, that he is injured." *Id.*

In *Neagle v. Nelson*, 685 S.W.2d 11, 12 (Tex. 1985), the supreme court dealt with a constitutional challenge to the statutory predecessor of Section 74.251, Art. 4590i, Section 10.01.<sup>4</sup> In *Neagle*, a surgical sponge was left in the abdomen of the plaintiff and discovered more than two years later. The court assumed that it was impossible for Neagle to have known about the injury prior to the expiration of the two year statutory period. *Id.* The supreme court held that "[t]he open-courts provision . . . protects a citizen, such as Neagle, from legislative acts that abridge his right to sue before he has a reasonable opportunity to discover the wrong and bring suit." *Id.*

<sup>4</sup> See *Adams*, 179 S.W.3d at 104 (Tex. App.--San Antonio 2005, pet. denied) (stating "[a]s demonstrated by the following redlined [\*14] version, section 74.251 is virtually identical to its predecessor, section 10.01 of the Medical Liability Act").

Rankin's restriction is similar to that in *Nelson* and *Neagle*--it requires Rankin to bring a claim before she had any reason to do so. Further, Section 74.251(b) effectively abolishes Rankin's right to bring a well-established common law cause of action without providing a reasonable alternative.

### 3. Balancing

In *Trinity River*, the supreme court stated with reference to the statute of repose "[w]e believe that the ten year repose period chosen by the Legislature strikes a fair balance between the legislative purpose of protecting against stale claims and the rights of litigants to obtain redress for injuries." *Trinity River Auth.*, 889 S.W.2d at 264. In so holding, the supreme court noted its decision in *Robinson v. Weaver*, 550 S.W.2d 18 (Tex. 1977). Specifically, the supreme court stated:

[t]his Court's decision in [*Robinson*], illustrates the important public purpose underlying statutes of repose. We held in that case that the discovery rule does not apply to cases of medical misdiagnosis. *Unlike malpractice based on leaving a foreign object in the patient's body, or negligently [\*15] performing a vasectomy, there is often no physical evidence establishing a misdiagnosis, thus increasing the risk of stale or fraudulent claims.*

*Id.* at 263-64 (emphasis added). Although the court in *Trinity River* upheld a ten year statute of repose as to design defects, there are several distinctions from the present case: (1) *Trinity River* did not involve an inherently undiscoverable claim; (2) the court noted that, unlike medical malpractice cases based on leaving a foreign object in the patient's body, there was no discovery rule for negligent design cases; and (3) the articulated public policy supporting the constitutionality of the statute in repose--

protecting against stale or fraudulent claims--would either be inapplicable or of less significance. Indeed, Texas jurisprudence considers medical malpractice claims involving a foreign object left inside of the plaintiff's body subject to the doctrine of res ipsa loquitor, which would make the concerns about the availability of witnesses or evidence less significant. *Haddock v. Arnspiger*, 793 S.W.2d 948, 951 (Tex. 1990).

Methodist and the Physicians argue that statutes of limitations and statutes of repose have different purposes and, [\*16] therefore, cases like *Nelson* and *Neagle* are inapplicable. The main distinction between a statute of repose and statute of limitations is the triggering event commencing the statutory period. Statutes of limitations begin to run from when the cause of action accrues, while statutes of repose run independently from when the cause of action accrues. Compare TEX. CIV. PRAC. & REM. CODE §§ 16.002, 16.003 (Vernon 2002) (providing that the limitations period begins to run the day after the cause of action accrues) with TEX. CIV. PRAC. & REM. CODE §§ 16.008, 16.009, 16.011, 16.012 (Vernon 2002) (providing that the repose period begins to run after substantial completion or the sale of the product).

While we generally agree that a statute of repose and statute of limitations are distinct and serve different purposes, those distinctions are not shared by *Section 74.251(a)* and *Section 74.251(b)*--each is written as an absolute bar on claims brought after the statutory period and run concurrently after the cause of action accrues. *Id.* § 74.251. The only substantive differences between *Section 74.251(a)* and *(b)* is the length of the time period and title.

We recognize that there is likely a relationship [\*17] between insurance rates for providers of medical care and a fixed period which thereafter bars all claims. This effect on insurance rates by a two-year statute of limitations under the statutory predecessors of *Section 74.251(a)*, however, was not sufficient to outweigh the constitutional right of redress for minors. In *Sax v. Votteler*, 648 S.W.2d 661 (Tex. 1983), the Texas Supreme Court addressed the issue as to whether *Article 5.82, Section 4, of the Texas Insurance Code*, was unconstitutional under the open courts provision of the Texas Constitution. The parents of Lori Beth Sax--a minor who was eleven years old at the time--brought suit against Dr. T. P. Votteler alleging medical malpractice during an operation that occurred on May 10, 1976.

Because the parents filed the suit over two years from the last date of treatment, Dr. Votteler filed a motion for summary judgment based on *Article 5.82*, the two-year statute of limitations. The court noted that "[t]he specific purpose of the provision in question was to limit the length of time that the insureds would be exposed to potential liability." *Id. at 666*. In analyzing whether the purpose of *Article 5.82* outweighed the constitutional [\*18] right of redress for Lori Beth Sax, the Texas Supreme Court stated:

[w]e agree with Dr. Votteler that both the purpose and basis for *article 5.82* are legitimate. Additionally, we recognize that the length of time that insureds are exposed to potential liability has a bearing on the rates that insurers must charge. We cannot agree, however, that the means

used by the legislature to achieve this purpose, *article 5.82, section 4*, are reasonable when they are weighed against the effective abrogation of a child's right to redress. Under the facts in this case, Lori Beth Sax is forever precluded from having her day in court to complain of an act of medical malpractice. Furthermore, the legislature has failed to provide her any adequate substitute to obtain redress for her injuries.

*Id. at 667.*

Here, the more substantive difference is that the ten-year limit generously provides more time to bring a claim than the two-year limit. In *Weiner v. Wasson*, 900 S.W.2d 316, 319 (Tex. 1995), the Texas Supreme Court held that *Section 10.01*, a subsequent version of *Article 5.82*, was in violation of the open courts provision of the Texas Constitution. The court reasoned that *Section 10.01*, much like the [\*19] provision in *Sax*, unreasonably restricted a child's right to bring a medical malpractice claim. *Id. at 318-19*. The court noted that the only difference between *Article 5.82* and *Section 10.01* was that *Section 10.01* extended the tolling period for an additional six years. *Id. at 318*. With regards to this additional time, the court stated:

[t]his one change in *section 10.01* does not cure the constitutional infirmity that we identified in *article 5.82* in *Sax*. Whether a statute compels a child to bring suit by age eight

or by age fourteen is inconsequential because in either instance a minor child is legally disabled from pursuing a suit on his own.

*Id.* at 318.

Prior to *Weiner*, the supreme court intimated that there was no distinction between a restriction requiring a child to bring a claim during a period of legal disability and a restriction requiring a plaintiff to bring a claim when the injuries are not discoverable. With regard to statutory restrictions making it impossible for a party to bring a lawsuit, the *Nelson* supreme court noted:

[i]s a person whose injuries are not immediately discoverable any more able to sue during the period of undiscoverability than are children during their [\*20] period of legal disability?

....

The limitation period of *article 5.82, section 4*, if applied as written, would require the Nelsons to do the impossible-to sue before they had any reason to know they should sue. Such a result is rightly described as "shocking" and is so absurd and so unjust that it ought not be possible. Deferring to the legislative imposition of such an unreasonable condition would amount to an abdication of our judicial duty to protect the rights guaranteed by the Texas Constitution, the source and limit of

legislative as well as judicial power. This, we cannot do.

*Nelson*, 678 S.W.2d at 923 (internal citations omitted).

From *Nelson*, *Sax*, and *Neagle* we gather a number of instructive principles. First, the purpose of a two-year absolute bar on medical malpractice claims does not outweigh the constitutional-guarantee right of redress for plaintiffs who would be required to fulfill an impossible condition. Second, the purpose and basis of a statute restricting a child's ability to bring a claim during a period of legal disability, while supported by legitimate legislative purposes and tailored to reduce the time of exposure to liability, does not outweigh the constitutional [\*21] right of redress for minors. Finally, a person who has suffered an inherently undiscoverable injury is in no greater position to bring a claim than a child during legal disability. The issue then is whether the ten-year absolute bar on health care claims should suffer the same fate as the provisions in *Sax*, *Nelson*, and *Neagle*.

Prior to the enactment of *Section 74.251(b)*, minors under the holding in *Sax* and *Weiner* could bring their claim beyond ten years and perhaps plaintiffs like Rankin beyond the two-year limit for an unspecified amount of time. Arguably, *Section 74.251(b)* was meant to preclude these situations. Indeed, if a child's health care liability claim accrues before age eight, then *Section 74.251(b)* would bar the child's claim during the period of legal disability. In such circumstance, however, *Sax* and *Weiner* would indicate that *Section 74.251(b)* would violate the open courts provision despite the more generous ten

year period. We are unable to reconcile a holding wherein *Section 74.251(b)*'s restriction on Rankin is reasonable and a child's restriction under *Section 74.251(a)* is not. Much like in *Weiner*, whether Rankin has two years, five years, or fifteen years to bring [\*22] a claim is inconsequential if Rankin is required to fulfill an impossible condition.

The Legislature is certainly entitled to set a period of time within which claims must be brought, but it may not deny a plaintiff a reasonable opportunity to discover the alleged wrong and bring suit. *Shah*, 67 S.W.3d at 842. What the *Sax* and *Neagle* court were unwilling to accept was an absolute bar on a claim that a plaintiff could not have initiated prior to the expiration of the statutory period. A ten-year period, whether as a statute of limitations or repose, barring all claims regardless of when and if the act or omission giving rise to the claim could have been discovered, does not cure the constitutional infirmities pronounced in *Sax*, *Nelson*, and *Neagle*.

Further, the purpose of having some limit on claims is, to some extent, served by the "discovery rule" and the "reasonable-time rule." The open courts provision does not toll limitations rather it provides litigants with a reasonable time to discover their injuries and file suit. *Yancy*, 236 S.W.3d at 784. If the plaintiff fails to bring the claim within a reasonable time, then there will be no violation of the open courts provision. *Id.* at 785. [\*23] The discovery rule requires due diligence. *See Gaddis*, 417

*S.W.2d* at 580 (providing that the statute of limitations did not begin to run until the patient learned of, or, in the exercise of reasonable care and diligence, should have learned of, the alleged malpractice). The reasonable-time rule and the discovery rule preclude claims from existing indefinitely.

Because the statutes in *Sax*, *Nelson*, and *Neagle*, have the same prohibitive effect as that of *Section 74.251(b)* and were each supported by similar legislative purposes to *Section 74.251(b)*, we disagree with the appellees that the titular and time period differences between a statute of limitations and a statute of repose warrant a different outcome. *Section 74.251(b)* bars Rankin's claims against the appellee before there is a reasonable opportunity to discover the wrong and bring suit in violation of the open courts provision of the Texas Constitution. Accordingly, we sustain Rankin's issue on appeal.

## CONCLUSION

Having met the two prong test, we hold that, as applied to Rankin, *Section 74.251(b)* of the *Texas Civil Practices and Remedies Code* is unconstitutional under the open courts provision contained in *Article I, Section 13* of the *Texas Constitution*. [\*24] Accordingly, we reverse the trial court's summary judgments and remand these claims to the trial court for further proceedings.

Rebecca Simmons, Justice

*Court of Appeals  
Fourth Court of Appeals District of Texas  
San Antonio*



**JUDGMENT**

No. 04-07-00305-CV

Emmalene RANKIN,  
Appellant

v.


**METHODIST HEALTHCARE SYSTEM OF SAN ANTONIO, LTD., LLP,**  
d/b/a Methodist Hospital; Wendell C. Schorlemer, M.D. and Robert Schorlemer, M.D.,  
Appellees

From the 224th Judicial District Court, Bexar County, Texas  
Trial Court No. 2006-CI-16732  
Honorable Andy Mireles, Judge Presiding

BEFORE JUSTICE ANGELINI, JUSTICE SIMMONS, AND JUSTICE HILBIG

In accordance with this court's opinion of this date, the judge of the trial court is REVERSED and the cause is REMANDED for further proceedings consistent with this opinion. Costs of appeal are taxed against the Appellees.

SIGNED March 5, 2008.

  
Rebecca Simmons, Justice

*Court of Appeals  
Fourth Court of Appeals District of Texas  
San Antonio*



OPINION

No. 04-07-00305-CV

Emmalene RANKIN,  
Appellant

v.

**METHODIST HEALTHCARE SYSTEM OF SAN ANTONIO, LTD., LLP,**  
d/b/a Methodist Hospital; Wendell C. Schorlemer, M.D. and Robert Schorlemer, M.D.,  
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From the 224th Judicial District Court, Bexar County, Texas  
Trial Court No. 2006-CI-16732  
Honorable Andy Mireles, Judge Presiding

Opinion by: Rebecca Simmons, Justice

Sitting: Karen Angelini, Justice  
Rebecca Simmons, Justice  
Steven C. Hilbig, Justice

Delivered and Filed: March 5, 2008

REVERSED AND REMANDED

The primary issue in this appeal is whether the ten-year statute of repose under Section 74.251(b) of the Texas Civil Practices and Remedies Code violates the open courts provision of the Texas Constitution. The trial court granted summary judgment for Appellees Methodist Healthcare System (Methodist), Dr. W.C. Schorlemer, and Dr. Robert Schorlemer (collectively

Physicians) on the basis that the statute of repose barred Appellant Emmalene Rankin's claim for healthcare liability as to each defendant. Because, as applied to Rankin, Section 73.251(b) unreasonably restricted her right to sue before she had a reasonable opportunity to discover the wrong and bring suit, we reverse the judgment of the trial court and remand the cause for further proceedings.

### BACKGROUND

On November 9, 1995, the Physicians performed a hysterectomy on Rankin at Methodist. In July 2006, Rankin experienced abdominal pains. After several visits to a number of doctors, Rankin underwent exploratory surgery and a surgical sponge was found and removed from her abdomen. On October 27, 2006, Rankin filed a lawsuit against Methodist. On January 8, 2007, Rankin filed a lawsuit against the Physicians. Each of the defendants separately moved for traditional summary judgment based on Section 74.251(b), the ten-year statute of repose.

### THE LAW IN QUESTION

Section 74.251 of the Texas Civil Practice and Remedies Code provides as follows:

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

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

TEX. CIV. PRAC. & REM. CODE ANN. § 74.251 (Vernon 2005).<sup>1</sup> Rankin challenges the constitutionality of subsection (b).

The Texas Constitution's open courts provision provides that "[a]ll courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law." TEX. CONST. art. I, § 13. The purpose of this provision is to assure that there are no unreasonable or arbitrary restrictions for a person bringing a well-established common-law claim. *Jennings v. Burgess*, 917 S.W.2d 790, 793 (Tex. 1996).

#### STANDARD OF REVIEW

An appellate court reviews the trial court's summary judgment de novo, viewing all the evidence in the nonmovant's favor to determine whether there is no genuine issue of material fact and if the movant is entitled to judgment as a matter of law. *Nixon v. Mr. Property Management Co.*, 690 S.W.2d 546, 548-49 (Tex. 1985). "A defendant moving for summary judgment on an affirmative defense has the burden to conclusively establish that defense." *Long Distance Int'l, Inc. v. Telefonos de Mexico, S.A. de C.V.*, 49 S.W.3d 347, 350-51 (Tex. 2001).

As summary judgment evidence, Rankin submitted an affidavit stating that the surgical sponge found in her abdomen in July 2006 had been left during her operation on November 9, 1995 and that discovery of the sponge was impossible prior to the expiration of the ten-year period under the statute of repose contained in Section 74.251(b). Pursuant to the summary judgment standard of review, we presume that Rankin's evidence is true.

Here, it is undisputed that Section 74.251(b) applies and would bar Rankin's claims. Thus, the only inquiry is whether Rankin established the unconstitutionality of Section 74.251(b) as applied to her.

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<sup>1</sup> Section 74.251 was added in 2003. Subsection 74.251(a) was substantially the same as its predecessors Article 4590i, Section 10.01 and Article 5.82, Section 4. Subsection (b), however, was an addition.

## ANALYSIS

To establish an open courts violation, Rankin must satisfy two requirements: (1) a cognizable, common-law claim that is statutorily restricted, and (2) the restriction is unreasonable or arbitrary when balanced against the statute's purpose and basis. *Yancy v. United Surgical Partners Int'l, Inc.*, 236 S.W.3d 778, 783 (Tex. 2007); *Shah v. Moss*, 67 S.W.3d 836, 842 (Tex. 2001). In passing upon the constitutionality of a statute, we begin with a presumption of validity. It is to be presumed that the Legislature has not acted unreasonably or arbitrarily; and a mere difference in opinion, where reasonable minds could differ, is not a sufficient basis for striking down legislation as arbitrary or unreasonable." *Smith v. Davis*, 426 S.W.2d 827, 831 (Tex. 1968).

**A. Whether the statute of repose abrogates a well established common-law claim.**

Methodist asserts Rankin has no historical cause of action that is being restricted. The Physicians claim that Rankin has no vested right to seek redress for her alleged injury and consequently the statute of repose cannot violate the open courts provision.

*1. Common-Law Claim*

In response to Methodist's argument, Rankin claims that, historically, a patient could have brought a cause of action for negligent failure to remove a surgical sponge more than ten years after surgery and, thus, a well established common-law claim exists. Much of the differences in the parties' arguments stem from the holding in *Trinity River Authority v. URS Consultants, Inc.*, 889 S.W.2d 259, 261 (Tex. 1994).

In *Trinity River*, the plaintiff alleged a cause of action against the designers of a sewage treatment basin wall which had collapsed. *Trinity River Auth.*, 889 S.W.2d at 260. The lower courts granted and affirmed a summary judgment because more than ten years had elapsed since the construction of the basin wall. *Id.* at 261. The question before the court was the

constitutionality of the statute of repose as set forth in Section 16.008 of the Civil Practice and Remedies Code. *Id.* at 260. Regardless of when the defect is discovered, Section 16.008 barred suits against architects for design defects unless they were brought within ten years after the improvement was completed. *Id.* at 260.

The supreme court concluded “that, because the discovery rule had not 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.” *Id.* at 263. As a result, the supreme court held that Section 16.008, as applied, could not violate the Texas open courts guarantee. *Id.* In contrast, the supreme court has recognized the discovery rule in the context of certain medical malpractice cases.

Prior to *Trinity River*, the supreme court held in *Gaddis v. Smith*, 417 S.W.2d 577, 580 (Tex. 1967), that “causes of action based upon the alleged negligence of a physician in leaving a foreign object in his patient’s body are proper subjects for the ‘discovery rule.’” However, in 1975, the 64th Legislature amended Chapter 5 of the Texas Insurance Code by adding Article 5.82, Section 4, which provided:

[n]otwithstanding any other law, no claim against a person or hospital covered by a policy of professional liability insurance covering a person licensed to practice medicine or podiatry or certified to administer anesthesia in this state or a hospital licensed under the Texas Hospital Licensing Law, as amended (Article 4437f, Vernon’s Texas Civil Statutes), whether for breach of express or implied contract or tort, for compensation for a medical treatment or hospitalization may be commenced unless the action is filed within two years of the breach or the tort complained of or from the date the medical treatment that is the subject of the claim or the hospitalization for which the claim is made is completed, except that minors under the age of six years shall have until their eighth birthday in which to file, or have filed on their behalf, such claim. Except as herein provided, this section applies to all persons regardless of minority or other legal disability.<sup>2</sup>

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<sup>2</sup> Article 5.82 became effective on June 3, 1975. *Sax v. Votteler*, 648 S.W.2d 661, 663 n.1 (Tex. 1983).

*Sax v. Votteler*, 648 S.W.2d 661, 663 (Tex. 1983). Methodist argues that because the discovery rule was abolished in 1975, Section 74.251 does not abrogate a well established common-law claim. We disagree.<sup>3</sup>

The Texas Supreme Court implicitly addressed whether a plaintiff had a well-established common-law claim after the legislative amendments of the statutory predecessors of Section 74.251. *Neagle v. Nelson*, 685 S.W.2d 11, 12 (Tex. 1985); *Nelson v. Krusen*, 678 S.W.2d 918, 919 (Tex. 1984). This court recently concluded that Section 74.251, as applied to minors, was unconstitutional under the open courts provision of the Texas Constitution. *Adams v. Gottwald*, 179 S.W.3d 101, 103 (Tex. App.—San Antonio 2005, pet. denied). Because in each case the courts held the statute in question violated the open courts provision, the courts necessarily concluded that the plaintiffs held a well established common-law claim. We similarly conclude Rankin has established a common-law claim that would be abrogated by Section 74.251(b).

## 2. *Vested Rights*

Even if Rankin establishes a common-law claim, the Physicians argue Rankin lacks a vested right, and as a result, her claim that Section 74.251(b) is unconstitutional under the open courts provision must fail. Because the open courts provision is “quite plainly, a due process guarantee,” we agree with the Physicians that Rankin must have a vested right at stake. *Sax*, 648 S.W.2d at 664; *see also City of Univ. Park v. Benners*, 485 S.W.2d 773, 778 (Tex. 1972) (requiring a vested right in order to establish a due process claim).

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<sup>3</sup> Both Methodist and the Physicians assert that cases involving statute of limitations should not be used as authority in assessing the constitutionality of a statute of repose. The differences that Methodist and the Physicians articulate are based on the purpose and basis of each statute. If there was no discovery rule in place when a statute of limitations or statute of repose was enacted, both would warrant the same result. As a result, for purpose of determining if there is a common-law claim, cases analyzing the constitutionality of statutes of limitations under the open courts guarantee are instructive. The alleged differences would appear relevant and material in the second criterion and of minimal significance in first criterion.

In support, the Physicians refer to a number of cases wherein the courts held that other statutes of repose were constitutional. *Zaragosa v. Chemetron Invs., Inc.*, 122 S.W.3d 341, 346 (Tex. App.—Fort Worth 2003, no pet.); *Barnes v. J.W. Bateson Co.*, 755 S.W.2d 518, 521-22 (Tex. App.—Fort Worth 1988, no writ); *McCulloch v. Fox & Jacobs, Inc.*, 696 S.W.2d 918, 921 (Tex. App.—Dallas 1985, writ ref'd n.r.e.); *Sowers v. M.W. Kellogg Co.*, 663 S.W.2d 644, 648 (Tex. App.—Houston [1st Dist.] 1983, writ ref'd n.r.e.). In each of these cases, the plaintiff's injury occurred after the expiration of the repose period, and thus, the courts concluded the plaintiff lacked a vested right in a common law claim. Here, the event giving rise to the cause of action occurred within the ten-year-repose period. The Physicians' argument fails to take this crucial distinction into account and we therefore find their argument unpersuasive.

**B. Whether the restriction is unreasonable or arbitrary when balanced against the purpose and basis of the statute of repose.**

In the second prong, we must determine whether there is a showing that the legislative basis for Section 74.251(b) outweighs the denial of Rankin's constitutionally-guaranteed right of redress. *Sax*, 648 S.W.2d at 666. In making this determination, "we consider both the general purpose of the statute and the extent to which the litigant's right to redress is affected." *Id.*

1. *Findings and Purposes of Section 74.251(b)*

The concerns over insurance rates and the cost of healthcare supporting the statutory predecessors of Section 74.251, as argued by appellees, are similarly the basis for Section 74.251(b). The supreme court has acknowledged that the basis for the predecessors of Section 74.251 is legitimate, as were concerns over insurance rates and the cost of healthcare. For purposes of this balancing task, we presume that the basis for Section 74.251 is also legitimate.

2. *Restrictions on Rankin's Access to the Courts*

In at least two cases after the amendment of 1975 to the Texas Insurance Code, the Texas Supreme Court addressed constitutional challenges, based on the open courts provision, to the

statute of limitations of medical malpractice claims. The supreme court considered Article 5.82, Section 4 of the Insurance Code and its restrictions on a claim for wrongful birth in *Nelson v. Krusen*, 678 S.W.2d 918 (Tex. 1984). In *Nelson*, Mr. and Mrs. Nelson consulted with Dr. Krusen to determine whether Mrs. Nelson was a genetic carrier of Duchenne muscular dystrophy. *Nelson*, 678 S.W.2d at 920. At the time, the Nelsons had a child with Duchenne muscular dystrophy and Mrs. Nelson was pregnant. *Id.* Dr. Krusen examined Mrs. Nelson on several occasions and assured the Nelsons that she was not a carrier. *Id.* at 921. Over three years after her delivery, the Nelsons discovered that their son had Duchenne muscular dystrophy. *Id.*

The court found that Article 5.82, Section 4 would “operate to bar the parents’ cause of action before they knew it existed, even though they did not discover, and could not reasonably have discovered, their injury within two years.” *Id.* at 920. As applied to the Nelsons, the limitations provision “violat[ed] the open-courts provision by cutting off a cause of action before the party knows, or reasonably should know, that he is injured.” *Id.*

In *Neagle v. Nelson*, 685 S.W.2d 11, 12 (Tex. 1985), the supreme court dealt with a constitutional challenge to the statutory predecessor of Section 74.251, Art. 4590i, Section 10.01.<sup>4</sup> In *Neagle*, a surgical sponge was left in the abdomen of the plaintiff and discovered more than two years later. The court assumed that it was impossible for Neagle to have known about the injury prior to the expiration of the two year statutory period. *Id.* The supreme court held that “[t]he open-courts provision . . . protects a citizen, such as Neagle, from legislative acts that abridge his right to sue before he has a reasonable opportunity to discover the wrong and bring suit.” *Id.*

Rankin’s restriction is similar to that in *Nelson* and *Neagle*—it requires Rankin to bring a claim before she had any reason to do so. Further, Section 74.251(b) effectively abolishes

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<sup>4</sup> See *Adams*, 179 S.W.3d at 104 (Tex. App.—San Antonio 2005, pet. denied) (stating “[a]s demonstrated by the following redlined version, section 74.251 is virtually identical to its predecessor, section 10.01 of the Medical Liability Act”).

Rankin's right to bring a well-established common law cause of action without providing a reasonable alternative.

### 3. *Balancing*

In *Trinity River*, the supreme court stated with reference to the statute of repose "[w]e believe that the ten year repose period chosen by the Legislature strikes a fair balance between the legislative purpose of protecting against stale claims and the rights of litigants to obtain redress for injuries." *Trinity River Auth.*, 889 S.W.2d at 264. In so holding, the supreme court noted its decision in *Robinson v. Weaver*, 550 S.W.2d 18 (Tex. 1977). Specifically, the supreme court stated:

[t]his Court's decision in [*Robinson*], illustrates the important public purpose underlying statutes of repose. We held in that case that the discovery rule does not apply to cases of medical misdiagnosis. *Unlike malpractice based on leaving a foreign object in the patient's body, or negligently performing a vasectomy, there is often no physical evidence establishing a misdiagnosis, thus increasing the risk of stale or fraudulent claims.*

*Id.* at 263-64 (emphasis added). Although the court in *Trinity River* upheld a ten year statute of repose as to design defects, there are several distinctions from the present case: (1) *Trinity River* did not involve an inherently undiscoverable claim; (2) the court noted that, unlike medical malpractice cases based on leaving a foreign object in the patient's body, there was no discovery rule for negligent design cases; and (3) the articulated public policy supporting the constitutionality of the statute in repose—protecting against stale or fraudulent claims—would either be inapplicable or of less significance. Indeed, Texas jurisprudence considers medical malpractice claims involving a foreign object left inside of the plaintiff's body subject to the doctrine of *res ipsa loquitor*, which would make the concerns about the availability of witnesses or evidence less significant. *Haddock v. Arnspiger*, 793 S.W.2d 948, 951 (Tex. 1990).

Methodist and the Physicians argue that statutes of limitations and statutes of repose have different purposes and, therefore, cases like *Nelson* and *Neagle* are inapplicable. The main

distinction between a statute of repose and statute of limitations is the triggering event commencing the statutory period. Statutes of limitations begin to run from when the cause of action accrues, while statutes of repose run independently from when the cause of action accrues. *Compare* TEX. CIV. PRAC. & REM. CODE §§ 16.002, 16.003 (Vernon 2002) (providing that the limitations period begins to run the day after the cause of action accrues) *with* TEX. CIV. PRAC. & REM. CODE §§ 16.008, 16.009, 16.011, 16.012 (Vernon 2002) (providing that the repose period begins to run after substantial completion or the sale of the product).

While we generally agree that a statute of repose and statute of limitations are distinct and serve different purposes, those distinctions are not shared by Section 74.251(a) and Section 74.251(b)—each is written as an absolute bar on claims brought after the statutory period and run concurrently after the cause of action accrues. *Id.* § 74.251. The only substantive differences between Section 74.251(a) and (b) is the length of the time period and title.

We recognize that there is likely a relationship between insurance rates for providers of medical care and a fixed period which thereafter bars all claims. This effect on insurance rates by a two-year statute of limitations under the statutory predecessors of Section 74.251(a), however, was not sufficient to outweigh the constitutional right of redress for minors. In *Sax v. Votteler*, 648 S.W.2d 661 (Tex. 1983), the Texas Supreme Court addressed the issue as to whether Article 5.82, Section 4, of the Texas Insurance Code, was unconstitutional under the open courts provision of the Texas Constitution. The parents of Lori Beth Sax—a minor who was eleven years old at the time—brought suit against Dr. T. P. Votteler alleging medical malpractice during an operation that occurred on May 10, 1976.

Because the parents filed the suit over two years from the last date of treatment, Dr. Votteler filed a motion for summary judgment based on Article 5.82, the two-year statute of limitations. The court noted that “[t]he specific purpose of the provision in question was to limit

the length of time that the insureds would be exposed to potential liability.” *Id.* at 666. In analyzing whether the purpose of Article 5.82 outweighed the constitutional right of redress for

Lori Beth Sax, the Texas Supreme Court stated:

[w]e agree with Dr. Votteler that both the purpose and basis for article 5.82 are legitimate. Additionally, we recognize that the length of time that insureds are exposed to potential liability has a bearing on the rates that insurers must charge. We cannot agree, however, that the means used by the legislature to achieve this purpose, article 5.82, section 4, are reasonable when they are weighed against the effective abrogation of a child’s right to redress. Under the facts in this case, Lori Beth Sax is forever precluded from having her day in court to complain of an act of medical malpractice. Furthermore, the legislature has failed to provide her any adequate substitute to obtain redress for her injuries.

*Id.* at 667.

Here, the more substantive difference is that the ten-year limit generously provides more time to bring a claim than the two-year limit. In *Weiner v. Wasson*, 900 S.W.2d 316, 319 (Tex. 1995), the Texas Supreme Court held that Section 10.01, a subsequent version of Article 5.82, was in violation of the open courts provision of the Texas Constitution. The court reasoned that Section 10.01, much like the provision in *Sax*, unreasonably restricted a child’s right to bring a medical malpractice claim. *Id.* at 318-19. The court noted that the only difference between Article 5.82 and Section 10.01 was that Section 10.01 extended the tolling period for an additional six years. *Id.* at 318. With regards to this additional time, the court stated:

[t]his one change in section 10.01 does not cure the constitutional infirmity that we identified in article 5.82 in *Sax*. Whether a statute compels a child to bring suit by age eight or by age fourteen is inconsequential because in either instance a minor child is legally disabled from pursuing a suit on his own.

*Id.* at 318.

Prior to *Weiner*, the supreme court intimated that there was no distinction between a restriction requiring a child to bring a claim during a period of legal disability and a restriction requiring a plaintiff to bring a claim when the injuries are not discoverable. With regard to

statutory restrictions making it impossible for a party to bring a lawsuit, the *Nelson* supreme court noted:

[i]s a person whose injuries are not immediately discoverable any more able to sue during the period of undiscoverability than are children during their period of legal disability?

.....

The limitation period of article 5.82, section 4, if applied as written, would require the Nelsons to do the impossible-to sue before they had any reason to know they should sue. Such a result is rightly described as “shocking” and is so absurd and so unjust that it ought not be possible. Deferring to the legislative imposition of such an unreasonable condition would amount to an abdication of our judicial duty to protect the rights guaranteed by the Texas Constitution, the source and limit of legislative as well as judicial power. This, we cannot do.

*Nelson*, 678 S.W.2d at 923 (internal citations omitted).

From *Nelson*, *Sax*, and *Neagle* we gather a number of instructive principles. First, the purpose of a two-year absolute bar on medical malpractice claims does not outweigh the constitutional-guarantee right of redress for plaintiffs who would be required to fulfill an impossible condition. Second, the purpose and basis of a statute restricting a child’s ability to bring a claim during a period of legal disability, while supported by legitimate legislative purposes and tailored to reduce the time of exposure to liability, does not outweigh the constitutional right of redress for minors. Finally, a person who has suffered an inherently undiscoverable injury is in no greater position to bring a claim than a child during legal disability. The issue then is whether the ten-year absolute bar on health care claims should suffer the same fate as the provisions in *Sax*, *Nelson*, and *Neagle*.

Prior to the enactment of Section 74.151(b), minors under the holding in *Sax* and *Weiner* could bring their claim beyond ten years and perhaps plaintiffs like Rankin beyond the two-year limit for an unspecified amount of time. Arguably, Section 74.251(b) was meant to preclude these situations. Indeed, if a child’s health care liability claim accrues before age eight, then

Section 74.251(b) would bar the child's claim during the period of legal disability. In such circumstance, however, *Sax* and *Weiner* would indicate that Section 74.251(b) would violate the open courts provision despite the more generous ten year period. We are unable to reconcile a holding wherein Section 74.251(b)'s restriction on Rankin is reasonable and a child's restriction under Section 74.251(a) is not. Much like in *Weiner*, whether Rankin has two years, five years, or fifteen years to bring a claim is inconsequential if Rankin is required to fulfill an impossible condition.

The Legislature is certainly entitled to set a period of time within which claims must be brought, but it may not deny a plaintiff a reasonable opportunity to discover the alleged wrong and bring suit. *Shah*, 67 S.W.3d at 842. What the *Sax* and *Neagle* court were unwilling to accept was an absolute bar on a claim that a plaintiff could not have initiated prior to the expiration of the statutory period. A ten-year period, whether as a statute of limitations or repose, barring all claims regardless of when and if the act or omission giving rise to the claim could have been discovered, does not cure the constitutional infirmities pronounced in *Sax*, *Nelson*, and *Neagle*.

Further, the purpose of having some limit on claims is, to some extent, served by the "discovery rule" and the "reasonable-time rule." The open courts provision does not toll limitations rather it provides litigants with a reasonable time to discover their injuries and file suit. *Yancy*, 236 S.W.3d at 784. If the plaintiff fails to bring the claim within a reasonable time, then there will be no violation of the open courts provision. *Id.* at 785. The discovery rule requires due diligence. *See Gaddis*, 417 S.W.2d at 580 (providing that the statute of limitations did not begin to run until the patient learned of, or, in the exercise of reasonable care and diligence, should have learned of, the alleged malpractice). The reasonable-time rule and the discovery rule preclude claims from existing indefinitely.

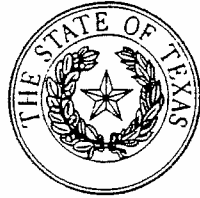
Because the statutes in *Sax*, *Nelson*, and *Neagle*, have the same prohibitive effect as that of Section 74.251(b) and were each supported by similar legislative purposes to Section 74.251(b), we disagree with the appellees that the titular and time period differences between a statute of limitations and a statute of repose warrant a different outcome. Section 74.251(b) bars Rankin's claims against the appellee before there is a reasonable opportunity to discover the wrong and bring suit in violation of the open courts provision of the Texas Constitution. Accordingly, we sustain Rankin's issue on appeal.

#### CONCLUSION

Having met the two prong test, we hold that, as applied to Rankin, Section 74.251(b) of the Texas Civil Practices and Remedies Code is unconstitutional under the open courts provision contained in Article I, Section 13 of the Texas Constitution. Accordingly, we reverse the trial court's summary judgments and remand these claims to the trial court for further proceedings.

Rebecca Simmons, Justice

*Court of Appeals  
Fourth Court of Appeals District of Texas  
San Antonio*



June 19, 2008

No. 04-07-00305-CV

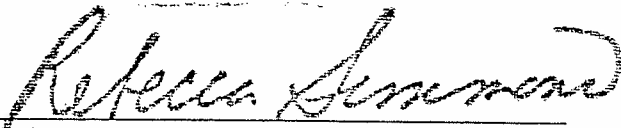
**Emmalene Rankin**  
Appellant  
v.

**Methodist Healthcare System of San Antonio, Ltd., LLP, d/b/a Methodist Hospital; Wendell  
C. Schorlemer, M.D. and Robert Schorlemer, M.D.**  
Appellees

From the 224th District Court, Bexar County, Texas  
Trial Court No. 2006-CI-16732  
Honorable Andy Mireles, Judge Presiding

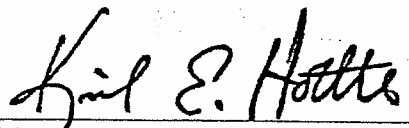
**O R D E R**

Motion for Rehearing of Appellees Wendell C. Schorlemer, M.D. and Robert  
Schorlemer, M.D. is DENIED.

  
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Rebecca Simmons, Justice

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said  
court on this 19<sup>th</sup> day of June, 2008.



  
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Keith E. Hottle, Clerk

*Court of Appeals  
Fourth Court of Appeals District of Texas  
San Antonio*



June 19, 2008

No. 04-07-00305-CV

Emmalene Rankin

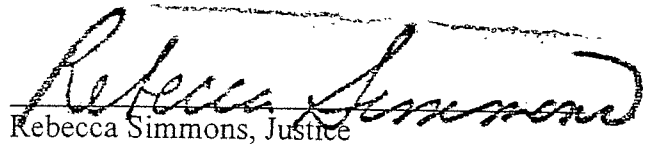
v.

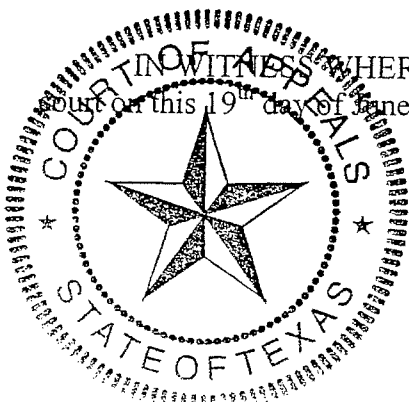
**Methodist Healthcare System of San Antonio, Ltd., LLP, d/b/a Methodist Hospital; Wendell C. Schorlemer, M.D. and Robert Schorlemer, M.D.**

From the 224th District Court, Bexar County, Texas  
Trial Court No. 2006-CI-16732  
Honorable Andy Mireles, Judge Presiding

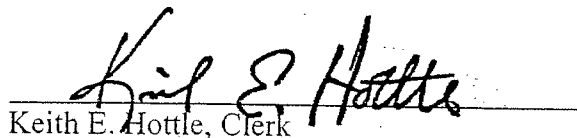
**O R D E R**

Motion for Rehearing En Banc of Appellees Wendell C. Schorlemer, M.D. and Robert Schorlemer, M.D.

  
Rebecca Simmons, Justice



WHEREOF, I have hereunto set my hand and affixed the seal of the said Court on this 19<sup>th</sup> day of June, 2008.

  
Keith E. Hottle, Clerk

EMMALENE RANKIN,  
Plaintiff,

v.

METHODIST HEALTH CARE SYSTEM  
OF SAN ANTONIO, LTD. D/B/A  
SOUTHWEST TEXAS METHODIST  
HOSPITAL, et al.  
Defendants.

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IN THE DISTRICT COURT

224<sup>TH</sup> JUDICIAL DISTRICT

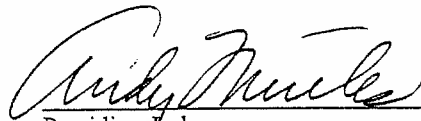
BEXAR COUNTY, TEXAS


**ORDER GRANTING SUMMARY JUDGMENT**

On April 12, 2007, came on for consideration Defendant, Methodist Healthcare System of San Antonio, Ltd., L.L.P. d/b/a Methodist Hospital's (incorrectly sued as Methodist Health Care System of San Antonio, Ltd., L.L.P. d/b/a Southwest Texas Methodist Hospital) Motion for Summary Judgment and Defendants, Wendell Schorlemer, M.D. and Robert Schorlemer, M.D.'s Motion for Summary Judgment. All parties appeared by and through their respective attorneys of record. The Court determined that proper notice had been provided to the Plaintiff. The Court, after considering the pleadings, summary judgment evidence, and arguments of counsel, enters the following Order:

IT IS ORDERED, ADJUDGED and DECREED that the Defendants' Motions for Summary Judgment are GRANTED. Plaintiff's claims are summarily dismissed with prejudice. All relief not expressly granted herein is denied.

SIGNED this 11 day of April 2007.

  
Presiding Judge



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1 AN ACT

2 relating to reform of certain procedures and remedies in civil  
3 actions.

4 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

5 ARTICLE 1. CLASS ACTIONS

6 SECTION 1.01. Subtitle B, Title 2, Civil Practice and  
7 Remedies Code, is amended by adding Chapter 26 to read as follows:

8 CHAPTER 26. CLASS ACTIONS

9 SUBCHAPTER A. SUPREME COURT RULES

10 Sec. 26.001. ADOPTION OF RULES BY SUPREME COURT. (a) The  
11 supreme court shall adopt rules to provide for the fair and  
12 efficient resolution of class actions.

13 (b) The supreme court shall adopt rules under this chapter  
14 on or before December 31, 2003.

15 Sec. 26.002. MANDATORY GUIDELINES. Rules adopted under  
16 Section 26.001 must comply with the mandatory guidelines  
17 established by this chapter.

18 Sec. 26.003. ATTORNEY'S FEES. (a) If an award of  
19 attorney's fees is available under applicable substantive law, the  
20 rules adopted under this chapter must provide that the trial court  
21 shall use the Lodestar method to calculate the amount of attorney's  
22 fees to be awarded class counsel. The rules may give the trial  
23 court discretion to increase or decrease the fee award calculated  
24 by using the Lodestar method by no more than four times based on

1 reasonably available to sign the acknowledgment statement required  
2 by that subsection.

3 SECTION 10.07. Section 242.0372, Health and Safety Code, is  
4 amended by adding Subsection (f) to read as follows:

5 (f) An institution is not required to comply with this  
6 section before September 1, 2005. This subsection expires  
7 September 2, 2005.

8 SECTION 10.08. Article 5.15-1, Insurance Code, is amended  
9 by adding Section 11 to read as follows:

10 Sec. 11. VENDOR'S ENDORSEMENT. An insurer may not exclude  
11 or otherwise limit coverage for physicians or health care providers  
12 under a vendor's endorsement issued to a manufacturer, as that term  
13 is defined by Section 82.001, Civil Practice and Remedies Code. A  
14 physician or health care provider shall be considered a vendor for  
15 purposes of coverage under a vendor's endorsement or a  
16 manufacturer's general liability or products liability policy.

17 SECTION 10.09. The Medical Liability and Insurance  
18 Improvement Act of Texas (Article 4590i, Vernon's Texas Civil  
19 Statutes) is repealed.

20 SECTION 10.10. Unless otherwise removed as provided by law,  
21 a member of the Texas Medical Disclosure Panel serving on the  
22 effective date of this Act continues to serve for the term to which  
23 the member was appointed.

24 SECTION 10.11. (a) The Legislature of the State of Texas  
25 finds that:

26 (1) the number of health care liability claims  
27 (frequency) has increased since 1995 inordinately;

1           (2) the filing of legitimate health care liability  
2 claims in Texas is a contributing factor affecting medical  
3 professional liability rates;

4           (3) the amounts being paid out by insurers in  
5 judgments and settlements (severity) have likewise increased  
6 inordinately in the same short period;

7           (4) the effect of the above has caused a serious public  
8 problem in availability of and affordability of adequate medical  
9 professional liability insurance;

10           (5) the situation has created a medical malpractice  
11 insurance crisis in Texas;

12           (6) this crisis has had a material adverse effect on  
13 the delivery of medical and health care in Texas, including  
14 significant reductions of availability of medical and health care  
15 services to the people of Texas and a likelihood of further  
16 reductions in the future;

17           (7) the crisis has had a substantial impact on the  
18 physicians and hospitals of Texas and the cost to physicians and  
19 hospitals for adequate medical malpractice insurance has  
20 dramatically risen, with cost impact on patients and the public;

21           (8) the direct cost of medical care to the patient and  
22 public of Texas has materially increased due to the rising cost of  
23 malpractice insurance protection for physicians and hospitals in  
24 Texas;

25           (9) the crisis has increased the cost of medical care  
26 both directly through fees and indirectly through additional  
27 services provided for protection against future suits or claims,

1 and defensive medicine has resulted in increasing cost to patients,  
2 private insurers, and Texas and has contributed to the general  
3 inflation that has marked health care in recent years;

4 (10) satisfactory insurance coverage for adequate  
5 amounts of insurance in this area is often not available at any  
6 price;

7 (11) the combined effect of the defects in the  
8 medical, insurance, and legal systems has caused a serious public  
9 problem both with respect to the availability of coverage and to the  
10 high rates being charged by insurers for medical professional  
11 liability insurance to some physicians, health care providers, and  
12 hospitals; and

13 (12) the adoption of certain modifications in the  
14 medical, insurance, and legal systems, the total effect of which is  
15 currently undetermined, will have a positive effect on the rates  
16 charged by insurers for medical professional liability insurance.

17 (b) Because of the conditions stated in Subsection (a) of  
18 this section, it is the purpose of this article to improve and  
19 modify the system by which health care liability claims are  
20 determined in order to:

21 (1) reduce excessive frequency and severity of health  
22 care liability claims through reasonable improvements and  
23 modifications in the Texas insurance, tort, and medical practice  
24 systems;

25 (2) decrease the cost of those claims and ensure that  
26 awards are rationally related to actual damages;

27 (3) do so in a manner that will not unduly restrict a

1 claimant's rights any more than necessary to deal with the crisis;

2 (4) make available to physicians, hospitals, and other  
3 health care providers protection against potential liability  
4 through the insurance mechanism at reasonably affordable rates;

5 (5) make affordable medical and health care more  
6 accessible and available to the citizens of Texas;

7 (6) make certain modifications in the medical,  
8 insurance, and legal systems in order to determine whether or not  
9 there will be an effect on rates charged by insurers for medical  
10 professional liability insurance; and

11 (7) make certain modifications to the liability laws  
12 as they relate to health care liability claims only and with an  
13 intention of the legislature to not extend or apply such  
14 modifications of liability laws to any other area of the Texas legal  
15 system or tort law.

16 ARTICLE 11. CLAIMS AGAINST EMPLOYEES OR VOLUNTEERS OF A  
17 GOVERNMENTAL UNIT

18 SECTION 11.01. Sections 108.002(a) and (b), Civil Practice  
19 and Remedies Code, are amended to read as follows:

20 (a) Except in an action arising under the constitution or  
21 laws of the United States, a public servant [~~other than a provider~~  
22 ~~of health care as that term is defined in Section 108.002(c),~~] is  
23 not personally liable for damages in excess of \$100,000 arising  
24 from personal injury, death, or deprivation of a right, privilege,  
25 or immunity if:

26 (1) the damages are the result of an act or omission by  
27 the public servant in the course and scope of the public servant's

H.B. No. 4

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President of the Senate

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Speaker of the House

I certify that H.B. No. 4 was passed by the House on March 28, 2003, by the following vote: Yeas 94, Nays 46, 2 present, not voting; that the House refused to concur in Senate amendments to H.B. No. 4 on May 21, 2003, and requested the appointment of a conference committee to consider the differences between the two houses; and that the House adopted the conference committee report on H.B. No. 4 on June 1, 2003, by the following vote: Yeas 110, Nays 34, 2 present, not voting; and that the House adopted H.C.R. No. 299 authorizing certain corrections in H.B. No. 4 on June 2, 2003, by a non-record vote.

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Chief Clerk of the House

H.B. No. 4

I certify that H.B. No. 4 was passed by the Senate, with amendments, on May 16, 2003, by the following vote: Yeas 28, Nays 3; at the request of the House, the Senate appointed a conference committee to consider the differences between the two houses; and that the Senate adopted the conference committee report on H.B. No. 4 on June 1, 2003, by the following vote: Yeas 27, Nays 4; and that the Senate adopted H.C.R. No. 299 authorizing certain corrections in H.B. No. 4 on June 2, 2003, by a viva-voce vote.

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Secretary of the Senate

APPROVED: \_\_\_\_\_

Date

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Governor

## CIVIL PRACTICE &amp; REMEDIES CODE

## CHAPTER 74. MEDICAL LIABILITY

## §§74.201 - 74.251



Sections 74.155-74.200 reserved for expansion

## SUBCHAPTER E. RES IPSA LOQUITUR

## CPRC §74.201. APPLICATION OF RES IPSA LOQUITUR

The common law doctrine of res ipsa loquitur shall only apply to health care liability claims against health care providers or physicians in those cases to which it has been applied by the appellate courts of this state as of August 29, 1977.

History of CPRC §74.201: Acts 2003, 78th Leg., ch. 204, §10.01, eff. Sept. 1, 2003. Source: TRCS 4590i, §7.01.

See also *O'Connor's COA*, "Res ipsa loquitur," ch. 20-A, §9.2, p. 569.

## ANNOTATIONS

*Traut v. Beatty*, 75 S.W.3d 661, 667 (Tex.App.—Texarkana 2002, no pet.). "[R]es ipsa loquitur cannot be applied in every case in which an object is left in a patient's body." Held: Although P used the theory of res ipsa loquitur, expert testimony was needed to establish a causal connection between D's negligence and P's pain.

*Pack v. Crossroads, Inc.*, 53 S.W.3d 492, 509 (Tex. App.—Fort Worth 2001, pet. denied). "[T]he only exception to the general rule that medical expert testimony is required for a plaintiff to satisfy its burden of proof is when the nature of the alleged malpractice and injuries are plainly within the common knowledge of laymen, and res ipsa loquitur is applicable."

Sections 74.202-74.250 reserved for expansion

## SUBCHAPTER F. STATUTE OF LIMITATIONS

## CPRC §74.251. STATUTE OF LIMITATIONS ON HEALTH CARE LIABILITY CLAIMS

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

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

**Editor's note:** A minor is not legally capable of bringing suit until she reaches the age of 18. *Weiner v. Wasson*, 900 S.W.2d 316, 318 (Tex.1995). Thus, a minor has until her 20th birthday to file suit. *Id.* at 321; see also *Adams v. Gottwald*, 179 S.W.3d 101, 103 (Tex.App.—San Antonio 2005, pet. denied) (applying open-courts provision of Texas Constitution to §74.251).

History of CPRC §74.251: Acts 2003, 78th Leg., ch. 204, §10.01, eff. Sept. 1, 2003. Source: TRCS 4590i, §10.01.

See also *O'Connor's COA*, "Limitations," ch. 20-A, §5, p. 545.

## ANNOTATIONS

## Generally

*Shah v. Moss*, 67 S.W.3d 836, 841 (Tex.2001). TRCS art. 4590i, §10.01, now CPRC §74.251(a), "measures the limitations period for medical negligence claims from one of three dates: (1) the occurrence of the breach or tort, (2) the last date of the relevant course of treatment, or (3) the last date of the relevant hospitalization. A plaintiff may not choose the most favorable date that falls within §10.01's three categories. Rather, if the date the alleged tort occurred is ascertainable, limitations must begin on that date. And if the date is ascertainable, further inquiry into the second and third categories is unnecessary. [¶] However, there may be instances when the exact date the alleged tort occurred cannot be ascertained. The second category in §10.01 contemplates such a situation 'wherein the patient's injury occurs during a course of treatment for a particular condition and the only readily ascertainable date is the last day of treatment.' But before the last treatment date becomes relevant to determining when limitations begins, the plaintiff must establish a course of treatment for the alleged injury. Moreover, if the defendant committed the alleged tort on an ascertainable date, whether the plaintiff established a course of treatment is immaterial because limitations begins to run on the ascertainable date." See also *Yancy v. United Surgical Partners*, 236 S.W.3d 778, 782 (Tex.2007).

*Chambers v. Conaway*, 883 S.W.2d 156, 159 (Tex. 1993). "[D]etermining when treatment has concluded for purposes of [TRCS art. 4590i, §10.01, now CPRC §74.251(a)] simply amounts to deciding when a plaintiff's cause of action accrues, and the question of when a claim accrues is one of law and not fact."