THE STATUTE OF LIMITATIONS UNDER CHAPTER 74

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Since the inception of legislative attempts to limit malpractice victims' access to the courts, there have been proposals and statutory restrictions on the statute of limitations for victims of health care negligence. The first attempt was Insurance Code Article 5.82, enacted in 1975, followed by Article 4590i, enacted in 1977, and, most recently, a third attack, Chapter 74,

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in 2003.[1] This Article traces the evolution of the legislative attempts to restrict the statute of limitations from 1975 to now.

I. THE ROAD TO CHAPTER 74 § 74.251—A BRIEF HISTORY

In 2003, the Texas Legislature attempted once again to impose an absolute time limit on the filing of health care liability claims in Texas.[2] Historical analysis reveals that this is the third attempt to pass constitutional muster for such a rigid limitation.[3]

The first attempt, Article 5.82 of the Insurance Code, enacted in 1975, provided:

> Notwithstanding any other law, no claim against a [health care provider] . . . 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.[4]

The Texas Supreme Court held this provision invalid in cases of undiscoverable injuries under the Open Courts Provision of the Texas Constitution in *Nelson v. Krusen*,[5] and as to minors in *Sax v. Votteler*.[6]

The second attempt, § 10.01 of Article 4590i, enacted in 1977, provided:

> Notwithstanding any other law, 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*

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1. Act of May 31, 1975, 64th Leg., R.S., ch. 330, § 1, 1975 Tex. Gen. Laws 864, 864, *repealed by* Act of May 30, 1977, 65th Leg., R.S., ch. 817, § 41.03, 1977 Tex. Gen Laws 2039, 2064; Act of May 30, 1977, 65th Leg., R.S., ch. 817, § 10.01, 1977 Tex. Gen Laws 2039, 2052, *repealed by* Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 10.01, sec. 74.251, 2003 Tex. Gen. Laws 847, 872 (codified at TEX. CIV. PRAC. & REM. CODE § 74.251).

2. *See* CIV. PRAC. & REM. § 74.251.

3. *See generally* Paula Sweeney, *The Effect of Chapter 74, Section 74.251 of the Texas Civil Practice and Remedies Code*, 38 TEX. TECH L. REV. 295 (2006) (providing a more lengthy, historical review of the statute of limitations in health care liability claims in Texas); Paula Sweeney, *Health Care Liability Update, 2018,* TEX. B. CLE, http://www.texasbarcle.com/cle/OLHome.asp (last visited Dec. 6, 2018).

4. *See generally* Rankin v. Methodist Healthcare Sys. of San Antonio, Ltd., 261 S.W.3d 93 (Tex. App.—San Antonio 2008, pet. granted, judgm't vacated w.r.m.) (emphasis added) (citing Act of May 31, 1975, 64th Leg., R.S., ch. 330, § 1, 1975 Tex. Gen Laws 864, 864 (repealed 1977)), *rev'd*, 307 S.W.3d 283 (Tex. 2010).

5. Nelson v. Krusen, 678 S.W.2d 918 (Tex. 1984).

6. Sax v. Votteler, 648 S.W.2d 661 (Tex. 1983).

> *have until their 14th birthday* in which to file, or have filed on their behalf, the claim. Except as herein provided, this subchapter applies to all persons regardless of minority or other legal disability.[7]

Not much was new in 4590i, with the exception that under Article 5.82 minors under six had until their eighth birthdays to file suit, and under Article 4590i minors injured before age twelve were required to file before age fourteen.[8] The Texas Supreme Court held this provision invalid on open courts grounds in discovery rule cases in *Neagle v. Nelson*,[9] and as to minors in *Weiner v. Wasson*.[10]

Now on its third attempt, in 2003, the legislature enacted § 74.251 of the Texas Civil Practice and Remedies Code.[11] Therein, it attempted to address the constitutional issues raised in *Nelson*, *Neagle*, *Sax, Weiner,* and a host of other cases by the addition of one short paragraph creating, in addition to the already existing statute of limitations, a ten-year statute of repose.[12]

The new sections are in *italics.*

> (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*.[13]

The new issue for Texas litigants and courts is whether a statute, now called a statute of repose, enjoys different constitutional weight and

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7. *See* Neagle v. Nelson, 685 S.W.2d 11, 12 (Tex. 1985) (emphasis added) (citing Act of May 30, 1977, 65th Leg., R.S., ch. 817, § 10.01, 1977 Tex. Gen. Laws 2039, 2052 (repealed 2003)).

8. *Compare* Act of May 31, 1975, 64th Leg., R.S., ch. 330, § 1, 1975 Tex. Gen. Laws 864, 864 (repealed 1977), *with* Act of May 30, 1977, 65th Leg., R.S., ch. 817, § 10.01, 1977 Tex. Gen. Laws 2039, 2052 (repealed 2003).

9. *Neagle*, 685 S.W.2d 11.

10. Weiner v. Wasson, 900 S.W.2d 316 (Tex. 1995).

11. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 74.251 (West 2017), *declared unconstitutional in part by* Adams v. Gottwald, 179 S.W.3d 101, 103 (Tex. App.—San Antonio, pet. denied).

12. *See id. See generally Weiner*, 900 S.W.2d 316; *Neagle*, 685 S.W.2d 11; Nelson v. Krusen, 678 S.W.2d 918 (Tex. 1984); Sax v. Votteler, 648 S.W.2d 661 (Tex. 1983).

13. CIV. PRAC. & REM. § 74.251 (emphasis added).

presumptions of validity than does a statute of limitations.[14] What do we know so far? We will discuss retained-sponge and discovery rule cases, followed by minority cases, and then mental incapacity and fraudulent concealment cases.

II. THE WHITTLED-DOWN EXCEPTIONS TO AN ABSOLUTE TWO-YEAR BAR

A. Retained-Sponge Cases and Others Formerly Known as "Discovery Rule" Cases

Two Texas Supreme Court cases, *Walters v. Cleveland Regional Medical Center*[15] and *Methodist Healthcare System of San Antonio, Ltd. v. Rankin*[16] have construed the statute of limitations and its interplay with the statute of repose as it relates to undiscovered retained surgical sponges. As will be elaborated below, the Court gave deference to the statute of repose that it has never accorded to the statute of limitations.[17] This is, without a doubt, reversal of long-standing Texas jurisprudence regarding undiscoverable injuries. Until 2003, a steady stream of Texas Supreme Court cases upheld the primacy of the Texas Constitution's Open Courts Provision in protecting litigants' access to the courts beginning with *Nelson v. Krusen*, construing the legislature's first attempt to limit litigations to an inviolable two-year statute of limitations in Article 5.82 of the Insurance Code.[18]

In *Nelson*, the plaintiffs' child suffered from a genetic disorder, Duchenne Muscular Dystrophy.[19] The plaintiffs sought prenatal diagnosis during the pregnancy to assure themselves that the child, unlike his older brother, did not carry the lethal and agonizing disease.[20] They alleged that the defendant negligently misdiagnosed their child, *in utero*, as being free of Duchenne's.[21] Therefore, they went on to have the second child and a third son as well.[22] Duchenne's is not diagnosable until after age two, when a child begins to walk and demonstrates a clumsy and lordotic gait.[23] Thus, "discovery" or "discoverability" of the second child's muscular dystrophy was not possible under those undisputed summary judgment facts until well beyond the two-year absolute rule purportedly set forth in Article 5.82.[24]

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14. *See id.*
15. Walters v. Cleveland Reg'l Med. Ctr., 307 S.W.3d 292, 294 (Tex. 2010).
16. Methodist Healthcare Sys. of San Antonio, Ltd. v. Rankin, 307 S.W.3d 283, 284–85 (Tex. 2010).
17. *See Walters*, 307 S.W.3d at 298; *Rankin*, 307 S.W.3d at 286–87.
18. Nelson v. Krusen, 678 S.W.2d 918 (Tex. 1984).
19. *Id.*
20. *Id.* at 920.
21. *Id.* at 920, 924.
22. *Id.* at 920.
23. *Id.*
24. *Id.*

> The limitation period of article 5.82, section 4, if applied as written, would require the [plaintiffs] 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.
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> . . . .
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> We hold that article 5.82, section 4 of the Insurance Code as applied in this case violates the [O]pen [C]ourts [P]rovision of article I, section 13 of the Texas Constitution. Therefore, the parents' cause of action for "wrongful birth" is not barred by limitations.[25]

Thus, *Krusen* marks the first reappearance of the discovery rule despite legislative attempts to abolish it.

Subsequently, in 1977, the Texas Legislature enacted Article 4590i, § 10.01 and repeated the "notwithstanding any other law" language of § 5.82:

> Notwithstanding any other law, 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 . . . .[26]

The constitutionality of Article 4590i was first tested in cases of undiscovered injury in a post-appendectomy, retained-sponge case.[27] The sponge was not detected until more than two years postoperatively.[28] Summary judgment based on § 10.01 was granted.[29] The Texas Supreme Court, with very little discussion, reaffirmed the extensive analysis of *Krusen*, which addressed Article 5.82 of the Texas Insurance Code and made it applicable to Article 4590i.[30] "The [O]pen [C]ourts [P]rovision of our Constitution 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."[31] Thus, via *Krusen* and *Neagle*, Article 4590i was modified by the "New Discovery Rule."[32]

Now construing Chapter 74, the Court has told us that, at least with regard to retained-sponge cases, which it characterizes as sui generis,[33] the

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25. *Id.* at 923.

26. Act of May 30, 1977, 65th Leg., R.S., ch. 817, § 10.01, 1977 Tex. Gen. Laws 2039, 2052 (repealed 2003).

27. *See generally* Neagle v. Nelson, 685 S.W.2d 11 (Tex. 1985).

28. *Id.* at 12.

29. *Id.* at 11.

30. *Id.* at 12.

31. *Id.*

32. *See id.*; Nelson v. Krusen, 678 S.W.2d 918, 923 (Tex. 1984).

33. Walters v. Cleveland Reg'l Med. Ctr., 307 S.W.3d 292, 298 (Tex. 2010) ("Sponge cases are *sui generis*. They rarely occur, they never occur absent negligence, and when they do occur, laypeople are

statute of repose *does* enjoy greater judicial deference than the statute of limitations.[34] In twin cases, *Walters v. Cleveland Regional Medical Center*[35] and *Methodist Healthcare System of San Antonio, Ltd. v. Rankin*,[36] the Court held that the two-year statute of limitations was (still) unconstitutional in cases of undiscoverable retained foreign objects, but the ten-year statute of repose was constitutional in factually identical cases.[37] Recognizing that the statute of repose would operate to unfairly cut off some claimants, the Court nevertheless gave judicial deference to the legislative choice, which places some absolute limitations on the ability to sue even when the injury is not discoverable.[38] Such a "shocking" result, previously characterized by the Court as "so absurd and so unjust that it ought not be possible,"[39] is in fact permissible in cases in which the "shocking" result is brought about by a statute of repose rather than a statute of limitations.[40] The Court defers to the legislative policy decision to put some absolute limitation on cases, even if such limitation, in fact, unfairly deprives the plaintiff of the ability to bring a well-established common law cause of action.[41]

Thus, with regard to retained-sponge cases and the interplay of the discoverability issue and the new statute of repose, there is some coherent guidance that at least addresses the relation of the ruling to established constitutional caselaw.[42] Suits for undiscoverable retained sponges may be brought outside of the two-year statute of limitations, but not outside of the ten-year statute of repose.[43]

Note, however, that because retained-sponge cases are sui generis, it is unknown what the court will rule in (1) other retained-object cases, and (2) other types of undiscoverable injuries—e.g., failure to diagnose cancer, failure to properly perform a surgery, failure to diagnose occult injuries, etc. The Court, by the sui generis language, has left these questions unanswered.

B. Minors

There is even less jurisprudential clarity, unfortunately, in the analysis of cases involving minors.

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hard-pressed to discover the wrong. Our cases recognize this, as do many legislatures, which exempt foreign-object claims from limitations and repose periods.").

34. *Id.*

35. *Id.*

36. Methodist Healthcare Sys. of San Antonio, Ltd. v. Rankin, 307 S.W.3d 283 (Tex. 2010).

37. *Id.* at 292.

38. *Id.* at 286–87.

39. Nelson v. Krusen, 678 S.W.2d 918, 923 (Tex. 1984) (quoting Hays v. Hall, 488 S.W.2d 412, 414 (Tex. 1972)).

40. *Id.*; *see Rankin*, 307 S.W.3d at 284–85.

41. *Rankin*, 307 S.W.3d at 292.

42. *See id.*

43. *Id.*

1. The Three Competing Rules of Chapter 74

To start with the simple language of the statute, there are at least three rules as to the time for filing:

> (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 [Rule number one]; 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 [Rule number two]. 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 [Rule number three]. This subsection is intended as a statute of repose so that all claims must be brought within 10 years or they are time barred.[44]

Even well-established rules of statutory construction fail in the face of such confounding inconsistency. Which is it? Must minors file within two years of their injury (noting that this rule has already been held unconstitutional)? May they wait until their fourteenth birthday to file if the injury occurred before their twelfth birthday? Will a minor's suit be barred after her fourteenth birthday but before her twentieth birthday, though the Texas Supreme Court already held such a result unconstitutional in *Sax* and *Weiner*?[45] What is the effect of republishing a statute containing provisions already held to be unconstitutional? For a minor's claim older than ten years, but filed before the minor's fourteenth birthday, which provision applies? Does the newly added ten-year statute of repose trump the immediately preceding sentence? *No* cases so far have construed these conflicting provisions within the statute itself.[46] Leaving the statutory language and looking at caselaw is not much more helpful.

2. Stare Decisis

As to the purportedly absolute two-year statute of limitations, Texas's stare decisis is clear: it is unconstitutional as to minors (as well as to those with undiscoverable injuries).

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44. TEX. CIV. PRAC. & REM. CODE ANN. § 74.251 (West 2017) (bracketed "Rules" added), *declared unconstitutional in part by* Adams v. Gottwald, 179 S.W.3d 101, 103 (Tex. App.—San Antonio 2005, pet. denied).

45. *See generally* Weiner v. Wasson, 900 S.W.2d 316 (Tex. 1995); Sax. v. Votteler, 648 S.W.2d 661 (Tex. 1983).

46. *See generally supra* Section II.A (distinguishing that plaintiffs may bring retained-sponge claims outside the two-year statute of limitations but not the ten-year statute of repose).

Texas courts and caselaw have historically protected minors' access to the courts with some vigor.[47] The Texas Supreme Court in *Weiner v. Wasson* stated, "We do not doubt the Legislature's power to remove a minor's legal disabilities and thus lower below eighteen the age at which a person may sue on his or her own behalf, but the Court unanimously agrees that the Legislature did not do so in section 10.01."[48] Thus, the *Weiner* Court gave a view of the route by which the legislature might make inroads into minors' time for filing suit: remove the legal disability of minority.[49]

But the *Weiner* Court also suggested that the weight of stare decisis could prove to be a formidable impediment to legislative efforts to shorten the statute of limitations for the claims of minors:

> Of course, we have, on occasion and for compelling reasons, overruled our earlier decisions, but undeniably, *Sax* has become firmly ensconced in Texas jurisprudence. Generally, we adhere to our precedents for reasons of efficiency, fairness, and legitimacy. First, if we did not follow our own decisions, no issue could ever be considered resolved. The potential volume of speculative relitigation under such circumstances alone ought to persuade us that stare decisis is a sound policy. Secondly, we should give due consideration to the settled expectations of litigants like Emmanuel Wasson, who have justifiably relied on the principles articulated in *Sax*. Finally, under our form of government, the legitimacy of the judiciary rests in large part upon a stable and predictable decisionmaking [sic] process that differs dramatically from that properly employed by the political branches of government.[50]

And, in fact, one Texas appellate court has so held in a case involving a minor claimant.[51] In holding the Chapter 74 statute of repose unconstitutional as to the claims of minors, the San Antonio Court of Appeals held that, if the new law were to stand as to minors, *Sax* and *Weiner* would have to be overruled.[52] "If this argument [the unconstitutionality of Chapter 74] is to

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47. *See Weiner,* 900 S.W.2d at 318–19.

48. *Id. See generally Sax*, 648 S.W.2d 661 (holding that Article 5.82, § 4 is unreasonable because it effectively abolishes a minor's right to bring a well-established common law cause of action without providing a reasonable alternative).

49. *See generally Weiner*, 900 S.W.2d 316. Interestingly, one of the draft bills for what was eventually codified as Chapter 74 contained just such a proposed removal of disabilities. *See* Tex. H.B. 3, 78th Leg., R.S. (2003). Yet this language was stripped from the final bill and the statute of repose was inserted in its place. *See id.* The language was contained in proposed H.B. 3 and provided:

> (b) Notwithstanding any other law regarding the disability of persons under the age of 18 years to file and prosecute causes of action, *this section shall be construed as removing any disability of minority* that would otherwise prevent a minor from filing and prosecuting a cause of action for a health care liability claim to the extent that the other law is inconsistent with this section.

Id. (emphasis added).

50. *Weiner*, 900 S.W.2d at 319–20 (citations omitted).

51. *See generally* Adams v. Gottwald, 179 S.W.3d 101 (Tex. App.—San Antonio 2005, pet. denied).

52. *Id.* at 103.

prevail, it must do so in the Supreme Court of Texas. We are bound by *Sax* and *Weiner*."[53]

Later, however, the Texas Supreme Court ruled that the statute of repose does not violate the Open Courts Provision as applied to the next friend of a minor.[54] In *Tenet Hospitals Ltd. v. Rivera*, Rivera acted as the next friend for her child, and she sent the hospital notice of the minor's claim but waited over six-and-a-half years to bring suit.[55] Relying on prior precedent and noting that "the [O]pen [C]ourts [P]rovision merely gives litigants a reasonable time to discover their injuries and file suit," the Court in *Rivera* ruled that the open courts challenge, as applied to the plaintiff, failed for lack of due diligence.[56] Most noteworthy is that *no* prior precedent has ever required any due diligence on the part of next friends bringing suit on behalf of minors.[57] Federal courts construing Texas law recognized this in *Clyce v. Butler*, holding that even actual litigation brought by parents during the period of minority does *not* end the tolling effect of minority.[58]

And to further muddle the issue, in *Montalvo v. Lopez*, a noteworthy opinion rendered after the Supreme Court's ruling in *Tenet*, the San Antonio Court of Appeals held that a minor in a Chapter 74 case has until two years after his or her eighteenth birthday to file suit, with no reference of any kind to diligence, or lack thereof, of the next friend.[59] The general tolling provision of the Civil Practice and Remedies Code § 16.001 provides for tolling of minors' statute of limitations until two years after they reach adulthood, and this applies in the Chapter 74 context as well.[60] Additionally, the seventy-five day tolling provision of the notice requirement applies to minors' claims, so the effective statute of limitations is the now-adult's twentieth birthday plus seventy-five days.[61]

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53. *Id.*

54. Tenet Hosps. Ltd. v. Rivera, 445 S.W.3d 698, 704–06 (Tex. 2014).

55. *Id.*

56. *Id.* at 703–04 (quotations omitted).

57. *See* Clyce v. Butler, 876 F.3d 145, 149 (5th Cir. 2017) (per curiam).

58. *Id.*

59. Montalvo v. Lopez, 466 S.W.3d 290 (Tex. App.—San Antonio 2015, pet. denied). *But see* McCollum v. Parker, No. 07-17-00186-CV, 2018 WL 1177635 (Tex. App.—Amarillo Mar. 6, 2018, pet. denied) (holding that a minor who is thirteen at the time of negligent care of his mother, and fifteen at the time of her death, but who does not file suit for more than two years after both the anniversary of the negligence and more than two years after the anniversary of the death, is barred from his claim. The Amarillo court reasoned that because wrongful death is a statutory claim, not a common law claim, Chapter 74 limits the statute of limitations to two years, even in the case of minors).

60. *Lopez*, 466 S.W.3d at 293.

61. *Id.* at 294.

3. A Review of Diligence in the Context of Medical Malpractice Statutes of Limitations

The conflation of the diligence concept, which has only applied previously in the discovery context, threatens to hopelessly confuse decades of precedent in this area.[62] Once an unknown injury has been discovered, if the discovery has occurred beyond the two-year statute of limitations,[63] a claimant has a "reasonable time" to bring suit—not an additional two years from discovery.[64] This is (and has been) the only applicability of the diligence concept in this context. Another troublesome question concerning what constitutes a "reasonable" amount of time sufficient to permit the plaintiff to file suit arises when the plaintiff discovers the injury a short period of time prior to the running of the statute of limitations.[65]

A sampling of the widely divergent results reached in discovery cases shows utter inconsistency and unpredictability as to what will ultimately be considered a reasonable time for a claimant to file suit. If this "diligence" concept is now to be applied to the conduct of next friends in suits involving minors, it may be helpful to look at these prior results in "discovery rule" cases. The time periods listed are from discovery to sending notice.

Tsai v. Wells, **3 months,** timely, negligent use of surgical sutures.[66]

Del Rio v. Jinkins, **3 months**, timely, negligent radiation treatment.[67]

DeLuna v. Rizkallah, **4 months**, timely, misdiagnosed mitral valve stenosis as epilepsy.[68]

Nelson v. Krusen, **9 months**, timely, misdiagnosis of prenatal genetic defect.[69]

Gagnier v. Wichelhaus, **10 months**, timely, failure to find and remove IUD.[70]

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62. *Compare* Streich v. Lopez, No. 13-02-00704-CV, 2004 WL 1902116 (Tex. App.—Corpus Christi Aug. 26, 2004, no pet.) (holding that when a plaintiff discovers a negligent act within the limitations period and fails to file suit, recovery is barred), *with* Tsai v. Wells, 725 S.W.2d 271 (Tex. App.—Corpus Christi 1986, writ ref'd n.r.e.) (holding that if a plaintiff did not have an opportunity to discover wrong within two-year limitation period, the cause of action is not barred).

63. *See generally Streich*, 2004 WL 1902116; Radloff v. Dorman, 924 S.W.2d 416 (Tex. App.—Amarillo 1996, writ dism'd by agr.); Gomez v. Carreras, 904 S.W.2d 750 (Tex. App.—Corpus Christi 1995, no writ).

64. *See, e.g.*, *Tsai*, 725 S.W.2d at 271.

65. *See generally* Neagle v. Nelson, 685 S.W.2d 11 (Tex. 1985); Nelson v. Krusen, 678 S.W.2d 918 (Tex. 1984); Rivera v. Mitchell, 764 S.W.2d 393 (Tex. App.—El Paso 1989, no writ); Maddux v. Halipoto, 742 S.W.2d 59 (Tex. App.—Houston [14th Dist.] 1987, no writ).

66. *Tsai*, 725 S.W.2d 271.

67. Del Rio v. Jinkins, 730 S.W.2d 125 (Tex. App.— Corpus Christi 1987, writ ref'd n.r.e.).

68. DeLuna v. Rizkallah, 754 S.W.2d 366 (Tex. App.—Houston [1st Dist.] 1988, writ denied).

69. *Krusen*, 678 S.W.2d 918.

70. Gagnier v. Wichelhaus, 17 S.W.3d 739 (Tex. App.—Houston [1st Dist.] 2000, pet. denied).

Radloff v. Dorman, **11 months**, not timely, negligence in failure to remove entire fallopian tube at surgery.[71]

Melendez v. Beal, **11 months**, timely, retained surgical sponge.[72]

Bradford v. Sullivan, **11 months**, timely, retained surgical sponge.[73]

LaGesse v. PrimaCare, Inc., **2 weeks less than 1 year**, not timely, negligent administration of steroids.[74]

*DeRuy v. Garza***, 1 week less than 1 year**, fact issue was raised, false diagnosis of cancer.[75]

Voegtlin v. Perryman, **more than 1 year**, not timely, failure to diagnose fracture.[76]

Pech v. Estate of Tavarez, **14 months**, not timely, negligently performed surgery.[77]

Shah v. Moss, **17 months**, not timely, failure to diagnose fracture.[78]

Weiner v. Wasson, **18 months**, timely, negligent placement of screw.[79]

Work v. Duval, **21 months**, not timely, failure to diagnose fracture.[80]

Allen v. Tolon, **23 months**, not timely, failure to diagnose cancer.[81]

West v. Moore, **2 years**, not timely, failure to diagnose syphilis.[82]

Diaz v. Westphal, **just more than 2 years**, not timely, negligent prescription of drug for too long of a period causing cancer.[83]

O'Reilly v. Wiseman, **just more than 2 years**, not timely, misdiagnosis of cancer.[84]

Adkins v. Tafel, **after statute of limitations ran**, not timely, haldol-induced tardive dyskinesia.[85]

So, under what circumstances will courts analyze the diligence of the claimant in a Chapter 74 suit brought on behalf of a minor, or by a claimant who was a minor when injured? It remains to be seen, but one can only hope the circumstances will remain strictly curtailed to the facts of *Tenet Hospitals Ltd. v. Rivera*.[86]

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71. Radloff v. Dorman, 924 S.W.2d 416 (Tex. App.—Amarillo 1996, writ dism'd by agr.).
72. Melendez v. Beal, 683 S.W.2d 869 (Tex. App.—Houston [1st Dist.] 1984, no writ).
73. Bradford v. Sullivan, 683 S.W.2d 697 (Tex. 1985) (per curiam).
74. LaGesse v. PrimaCare, Inc., 899 S.W.2d 43 (Tex. App.—Eastland 1995, writ denied).
75. DeRuy v. Garza, 995 S.W.2d 748 (Tex. App.—San Antonio 1999, no pet.).
76. Voegtlin v. Perryman, 977 S.W.2d 806 (Tex. App.—Fort Worth 1998, no pet.).
77. Pech v. Estate of Tavarez, 112 S.W.3d 282 (Tex. App.—Corpus Christi 2003, no pet.).
78. Shah v. Moss, 67 S.W.3d 836 (Tex. 2001).
79. Weiner v. Wasson, 900 S.W.2d 316 (Tex. 1995). *But see* Tenet Hosps. Ltd. v. Rivera, 445 S.W.3d 698 (Tex. 2014) (holding the statute of repose was not unconstitutional as applied to a minor because it was not a violation of the Open Courts Provision).
80. Work v. Duval, 809 S.W.2d 351 (Tex. App.—Houston [14th Dist.] 1991, no writ).
81. Allen v. Tolon, 918 S.W.2d 605 (Tex. App.—Eastland 1996, no writ).
82. West v. Moore, 116 S.W.3d 101 (Tex. App.—Houston [14th Dist.] 2002, no pet.).
83. Diaz v. Westphal, 941 S.W.2d 96 (Tex. 1997).
84. O'Reilly v. Wiseman, 107 S.W.3d 699 (Tex. App.—Austin 2003, pet. denied).
85. Adkins v. Tafel, 871 S.W.2d 289 (Tex. App.—Fort Worth 1994, no writ).
86. *See generally* Tenet Hosps. Ltd. v. Rivera, 445 S.W.3d 698 (Tex. 2014).

For now, it is impossible in many fact patterns involving minors for lawyers to advise their clients, plaintiff or defense, what the statute of limitations may be. No such litigation will be final until after it has been to the Texas Supreme Court, where the justices may determine, factually, whether diligence was employed.

C. Mental Incompetents

Thus far, there are no cases construing statutory tolling for mental incompetents under Chapter 74. Prior caselaw has protected mental incompetents from the purportedly absolute statute of limitations.

In *Tinkle v. Henderson*, the Tyler Court of Appeals held that the absolute two-year limitation of Article 5.82, § 4 violated the Open Courts Provision of the Texas Constitution in a case in which it operated to bar a cause of action brought by one who was mentally incompetent from the time of injury until suit was filed.[87] The Corpus Christi Court of Appeals followed the *Tinkle* decision in *Felan v. Ramos*.[88] However, in *Desemo v. Gafford*, the Eastland Court of Appeals held that the tolling provisions for a "person of unsound mind" under Article 5535 are not applicable to Article 4590i, § 10.01.[89]

1. Mental Incompetents Under Article 4590i

In the application of Article 4590i, mentally incompetent persons were given special consideration. In *Felan v. Ramos*, the plaintiff alleged that the surgery performed on his wife left her mentally incompetent.[90] The surgery was performed on June 6, 1988.[91] On March 13, 1991, the plaintiff brought suit against the defendant as a next friend of his wife.[92] The plaintiff's wife died on July 26, 1991, never having regained consciousness or mental competency.[93] On October 17, 1991, the plaintiff amended his suit to allege survival and wrongful-death causes of action, and the trial court granted summary judgment for the defendant.[94] The Corpus Christi Court of Appeals, in reversing the trial court, relied on the rationale of *Tinkle v. Henderson*, which stated that mentally incompetent persons present an even more

87. Tinkle v. Henderson, 730 S.W.2d 163, 167 (Tex. App.—Tyler 1987, writ ref'd).
88. *Id.*; *see* Felan v. Ramos, 857 S.W.2d 113 (Tex. App.—Corpus Christi 1993, writ denied).
89. Desemo v. Gafford, 692 S.W.2d 571, 574 (Tex. App.—Eastland 1985, writ ref'd n.r.e.).
90. *Felan*, 857 S.W.2d at 115.
91. *See id.*
92. *See id.* at 116.
93. *See id.*
94. *See id.*

compelling case than minors for their legal protection because, "frequently, they are less communicative and more vulnerable than children."[95]

The Texas Supreme Court, in *Ruiz v. Conoco Inc.*, extended this constitutional protection even further in holding that protection will be afforded even in cases where an incompetent person has a legal representative through whom to file a personal-injury suit within the mandated two-year statute of limitations.[96] Since the cause of action belongs to the incompetent person himself, he should not be made to rely on any legal representative to bring it to court for him.[97] In a case subsequent to *Ruiz*, the Fourteenth Court of Appeals in Houston upheld the constitutional protection afforded to a plaintiff, even though that plaintiff had the reasonable mental faculties to enable him to employ legal counsel and identify the defendant.[98]

In an odd opinion, *Yancy v. United Surgical Partners International, Inc.*, the Texas Supreme Court conflated mental disability claims with discovery/discoverability claims, holding that a plaintiff who proves continuous mental disability through competent summary judgment evidence still does not benefit from the tolling provision as a result of that mental incompetence, unless she can also show some reason why a defendant was not named within the two-year statute.

> On this record, there is no fact issue establishing that Yancy (on Yates's behalf) did not have a reasonable opportunity to discover the alleged wrong and bring suit within the limitations period or that she sued within a reasonable time after discovering the alleged wrong. Thus, the [O]pen [C]ourts [P]rovision does not save Yates's time-barred negligence claims.[99]

2. Mental Incompetents Under Chapter 74

We have no holding as to the effect of Chapter 74 on the claims of mental incompetents as of the date of this Article. As noted, we know that the statute of limitations is unconstitutional as to minors as a result of *Adams v. Gottwald*.[100] We also know that the statute of limitations is unconstitutional as it relates to undiscoverable injuries,[101] but the statute of repose is

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95. *Id.* at 117 (citing Tinkle v. Henderson, 730 S.W.2d 163, 166 (Tex. App.—Tyler 1987, writ ref'd)).

96. *See* Ruiz v. Conoco, Inc., 868 S.W.2d 752, 756 (Tex. 1993).

97. *See id.*

98. *See* Casu v. CBI Na-Con, Inc., 881 S.W.2d 32, 34 (Tex. App.—Houston [14th Dist.] 1994, no writ).

99. Yancy v. United Surgical Partners Int'l, Inc., 236 S.W.3d 778, 785 (Tex. 2007).

100. *See* Adams v. Gottwald, 179 S.W.3d 101, 102 (Tex. App.—San Antonio 2005, pet. denied).

101. *See* Walters v. Cleveland Reg'l Med. Ctr., 307 S.W.3d 292, 297–98 (Tex. 2010).

constitutional as to undiscoverable injuries.[102] It seems likely that mental incompetents will be treated similarly to claimants with undiscoverable injuries, but the Supreme Court in both *Walters* and *Rankin* went out of its way to describe retained-sponge cases as sui generis when it carved out this constitutional exception to the two-year statute of limitations.[103] It remains unclear what direction the Court will go as to either the statute of limitations or the statute of repose with regard to mental incompetents under Chapter 74.

However, it seems possible that mental incompetents could receive the same treatment as minors under the statute of repose. Citing *Yancy* for the proposition that "a guardian's lack of diligence may operate to bar a legally incompetent person's open courts challenge," the Supreme Court in *Rivera* held that the statute of repose does not violate the Open Courts Provision as applied to the next friend of a minor who failed to exercise due diligence when she sent the hospital notice of the minor's claim but waited over six-and-a-half years to bring suit.[104] Amid its reasoning, the Court noted: "The law, our precedent, and our rules of procedure all treat minors and legally incompetent persons alike as lacking the legal capacity to sue, such that they must appear in court through a legal guardian, a next friend, or a guardian ad litem."[105]

D. Fraudulent Concealment

Thus far, although there are a handful of cases construing fraudulent concealment and the statute of limitations under Chapter 74, none address the effect of the newly added statute of repose. The tolling of the statute of limitations due to proven fraud is well established, though exceedingly difficult for a plaintiff to successfully prove.

1. The Fraudulent Concealment Doctrine

In *Borderlon v. Peck*, the Supreme Court held that Article 4590i, § 10.01 does not abolish the common law concept of fraudulent concealment as an equitable basis for tolling limitations.[106] The Court ruled that, where a physician or health care provider actively conceals the malpractice from a person for more than two years after the date of malpractice or the last treatment at issue, the person may bring suit after he or she learns of facts, conditions, or circumstances that would cause a reasonable person to inquire

102. *See* Methodist Healthcare Sys. of San Antonio, Ltd. v. Rankin, 307 S.W.3d 283, 291–92 (Tex. 2010).

103. *See Walters*, 307 S.W.3d at 298; *Rankin*, 307 S.W.3d at 291–92.

104. *See* Tenet Hosps. Ltd. v. Rivera, 445 S.W.3d 698, 701, 704 (Tex. 2014).

105. *Id.* at 705. *But see* Clyce v. Butler, 876 F.3d 145, 150 (5th Cir. 2017) (per curiam) (holding that actual litigation by parents during the period of minority does not end the tolling effect of minority).

106. Borderlon v. Peck, 661 S.W.2d 907 (Tex. 1983).

and discover the concealed conduct.[107] The Court did not treat this fraudulent concealment exception as an application of the discovery rule, but rather as an estoppel of the defendant from claiming the protection of the statute of limitations.[108]

In a case out of the Texarkana Court of Appeals, the plaintiff prevailed on a claim of fraudulent concealment of a defendant's identity, which prevented joinder until after the statute of limitations had expired.[109] In this case, the defendant performed all of the pathology work for the hospital where the plaintiff was diagnosed.[110] The defendant sent a report, which incorrectly diagnosed the plaintiff as having malignant cancer.[111] The defendant's name was on the pathology report, the defendant billed the plaintiff for its services, and the defendant prepared an addendum to the report after the error was discovered.[112] However, the defendant did not disclose to the plaintiff that the pathology work had been done by another physician until after the statute of limitations had expired.[113] The court of appeals held there was sufficient evidence to support the jury's finding of fraudulent concealment.[114] The defendant knew of the other physician's involvement, and since a physician–patient relationship existed between the defendant and plaintiff, the defendant had a duty to disclose.[115] The Texarkana Court of Appeals held that silence in the face of a duty to disclose may be an act of concealment.[116]

2. Plaintiff's Proof

Fraudulent concealment is a subcategory of the doctrine of equitable estoppel.[117] It prevents a defendant from availing himself of the protection of the affirmative defense of statute of limitations when the defendant actively conceals a cause of action from the plaintiff.[118] In the medical negligence context, a physician has a duty to disclose a negligent act or injury when he or she has a physician–patient relationship with the potential claimant.[119] This special relationship dictates that a physician must not conceal the true nature of the patient's injuries.[120]

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107. *Id.* at 908–09.
108. *Id.*; *see* Warner v. Sunkavalli, 795 S.W.2d 326, 328 (Tex. App.—Eastland 1990, no writ).
109. *See generally* Dougherty v. Gifford, 826 S.W.2d 668 (Tex. App.—Texarkana 1992, no writ).
110. *Id.* at 672.
111. *Id.* at 672–73.
112. *Id.*
113. *Id.*
114. *Id.* at 673–74.
115. *Id.* at 674–75.
116. *Id.* at 675.
117. *See* Borderlon v. Peck, 661 S.W.2d 907, 908 (Tex. 1983).
118. *Id.*
119. *Id.*
120. Evans v. Conlee, 741 S.W.2d 504, 506 (Tex. App.—Corpus Christi 1987, no writ).

The great difficulty of proof comes from the Texas Supreme Court's directive that there must be evidence demonstrating that the defendant intended to fraudulently conceal or deceive the plaintiff.[121] Absence of such evidence precludes a fraudulent concealment argument.[122] Thus, a plaintiff must offer some proof of the defendant's awareness of the concealed diagnosis, symptoms, or injury.[123] A plaintiff's evidence of fraudulent concealment must show that the defendant "had a fixed purpose to conceal the alleged wrong," or the plaintiff will not be able to sustain a tolling argument based on fraudulent concealment.[124]

Why is this difficult? Because absent a confession, how is the plaintiff to come by proof of the defendant's "fixed" intent? Further, once the plaintiff becomes "aware that something [is] amiss," the tolling effect of fraudulent concealment ends.[125] For these reasons, such cases are vanishingly rare.

III. OTHER ISSUES

A. The Notice Letter and Authorization

The legislature kept Article 4590i's notice requirement virtually intact with the important addition of § 74.052, which now requires potential claimants to submit a medical authorization in the form prescribed by statute, with their notice letter.[126]

> § 74.051. Notice
>
> (a) Any person or his authorized agent asserting a health care liability claim shall give written notice of such claim by certified mail, return receipt requested, to each physician or health care provider against whom such claim is being made at least 60 days before the filing of a suit in any court of this state based upon a health care liability claim. The notice must be accompanied by the authorization form for release of protected health information as required under Section 74.052.
>
> (b) In such pleadings as are subsequently filed in any court, each party shall state that it has fully complied with the provisions of this section and Section 74.052 and shall provide such evidence thereof as the judge of the court may require to determine if the provisions of this chapter have been met.

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121. *See, e.g.*, Shah v. Moss, 67 S.W.3d 836, 846 (Tex. 2001).

122. *Id.* (citing Earle v. Ratliff, 998 S.W.2d 882, 889 (Tex. 1999)).

123. *See* West v. Moore, 116 S.W.3d 101, 107 (Tex. App.—Houston [14th Dist.] 2002, no pet.).

124. Mills v. Pate, 225 S.W.3d 277, 286 (Tex. App.—El Paso 2006, no pet.) (citing *Shah*, 67 S.W.3d at 846).

125. Davenport v. Adu-Lartey, 526 S.W.3d 544, 556 (Tex. App.—Houston [1st Dist.] 2017, pet. denied) (citing Etan Indus., Inc. v. Lehmann, 359 S.W.3d 620, 623–24 (Tex. 2011) (per curiam)).

126. TEX. CIV. PRAC. & REM. CODE ANN. § 74.052 (West 2017).

> (c) Notice given as provided in this chapter shall toll the applicable statute of limitations to and including a period of 75 days following the giving of the notice, and this tolling shall apply to all parties and potential parties.
> (d) All parties shall be entitled to obtain complete and unaltered copies of the patient's medical records from any other party within 45 days from the date of receipt of a written request for such records; provided, however, that the receipt of a medical authorization in the form required by Section 74.052 executed by the claimant herein shall be considered compliance by the claimant with this subsection.
> (e) For the purposes of this section, and notwithstanding Chapter 159, Occupations Code, or any other law, a request for the medical records of a deceased person or a person who is incompetent shall be deemed to be valid if accompanied by an authorization in the form required by Section 74.052 signed by a parent, spouse, or adult child of the deceased or incompetent person. [127]
>
> § 74.052. Authorization Form for Release of Protected Health Information
> (a) Notice of a health care claim under Section 74.051 must be accompanied by a medical authorization in the form specified by this section. Failure to provide this authorization along with the notice of health care claim shall abate all further proceedings against the physician or health care provider receiving the notice until 60 days following receipt by the physician or health care provider of the required authorization.
> (b) If the authorization required by this section is modified or revoked, the physician or health care provider to whom the authorization has been given shall have the option to abate all further proceedings until 60 days following receipt of a replacement authorization that must comply with the form specified by this section.
> (c) The medical authorization required by this section shall be in the following form and shall be construed in accordance with the "Standards for Privacy of Individually Identifiable Health Information" (45 C.F.R. Parts 160 and 164). [128]

1. Effect of Failure to Serve Authorization

A significant new trap was created in Chapter 74 with the advent of the mandatory authorization.[129] If the plaintiff fails to include the required

127. *Id.* § 74.051.
128. *Id.* § 74.052. The lengthy authorization is then set forth verbatim, but it is omitted herein for the sake of brevity. *Id.*
129. *See id.*

medical release, then his notice letter will *not* toll the statute for the automatic seventy-five-day period.[130] In *Jose Carreras, P.A. v. Marroquin*, the Texas Supreme Court held: "The statute of limitations is tolled only if *both* notice and an authorization form are provided."[131] Thus far, notice to one defendant has been notice to all defendants, even if the authorization sent with the notice letter is defective.[132] But it is unknown what effect the *Marroquin* holding will have on this rule or on whether constructive notice to the other defendants continues to operate to toll the statute of limitations as to all, noticed or not.[133] In *College Station Medical Center, LLC v. Kilaspa*, the Waco Court of Appeals re-emphasized that valid notice is effective when sent and that notice to one is notice to all for all purposes, including tolling limitations (assuming a proper notice letter and authorization).[134] In *Kilaspa*, notice to a defendant-physician was effective when sent, even though he never picked up the certified mail, and tolled the statute of limitations as to all defendants, including the hospital, which was not put on notice.[135]

2. Effect of Defective Authorization or Authorizations Not Sent with Notice

A cottage industry of billable time has sprung up around medical authorization and the effect of any purported defects therein.[136] This replaces the similar billing opportunity that surrounded the sufficiency of the 120-day expert report, since the Texas Supreme Court has made clear in the past few years that the standard for curing deficiencies in the report is a lenient one[137] and that a single, valid theory of negligence and causation can support a plaintiff's entire claim.[138]

a. Mistakes on the Authorization—Serious

There are several possible results in cases where a mistake or defect in the authorization is found. A daughter who had a general power of attorney, but not a health care power of attorney, filed a "defective" authorization because she did not have the authority to release her mother's health care information.[139] Additionally, all the prior health care providers for the

130. *Id.* § 74.051.

131. Jose Carreras, P.A. v. Marroquin, 339 S.W.3d 68, 73 (Tex. 2011) (emphasis added).

132. Rabatin v. Chavez, 281 S.W.3d 567, 571 (Tex. App.—El Paso 2008, no pet.).

133. *See, e.g.*, *id.*; Rabatin v. Vazquez, 281 S.W.3d 563, 567 (Tex. App.—El Paso 2008, no pet.); Rabatin v. Kidd, 281 S.W.3d 558 (Tex. App.—El Paso 2008, no pet.).

134. *See* Coll. Station Med. Ctr., LLC v. Kilaspa, 494 S.W.3d 307, 312 (Tex. App.—Waco 2015, pet. denied).

135. *Id.*

136. *See generally Marroquin*, 339 S.W.3d 68; *Chavez*, 281 S.W.3d 567.

137. Scoresby v. Santillan, 346 S.W.3d 546, 556 (Tex. 2011).

138. Certified EMS, Inc. v. Potts, 392 S.W.3d 625, 630 (Tex. 2013).

139. Johnson v. PHCC-Westwood Rehab. & Health Care Ctr., LLC, 501 S.W.3d 245, 252 (Tex. App.—Houston [1st Dist.] 2016, no pet.).

condition in question (decubitus ulcers) were not listed.[140] In that instance, *there was no tolling of the statute of limitations as a result of the Chapter 74 notice letter*.[141] Further, an authorization that omitted prior physicians who had treated the plaintiff for the same condition was held to be so defective that "it did no more to aid a presuit investigation than if it had not disclosed any physicians" at all, and thus did not toll the statute of limitations.[142]

b. Mistakes on the Authorization—Less Serious

In two other cases, however, mistakes with the authorization did not vitiate the tolling effect of the notice letter. "[W]hen a notice letter and medical authorization form, albeit a[n] improperly filled out form, gives fair warning of a claim and an opportunity to abate the proceedings for negotiations and evaluation of the claim, [this fulfills] the Legislature's intent in enacting the statute."[143] Thus, despite the defects, the statute was tolled.[144] Similarly, in a case in which the correct medical authorization was timely provided but had one incorrectly filled out blank, the statute of limitations was tolled.[145]

c. The Wrong Authorization or No Authorization

When an authorization other than the one specified in Chapter 74 is used, the statute is *not* tolled.[146] Similarly, if *no* authorization is enclosed with the notice letter, there is no tolling of the statute of limitations.[147]

d. Some Physicians Omitted

There are now cases in which defendants have sought dismissal for failure to include the name of *every* physician who treated the decedent in the applicable time period.[148] This is notably true in death cases when the surviving parties may not know, or be able to learn, the identity of all of the physicians who treated the decedent.[149] It is also an issue in long hospitalization cases where defendants have taken the position that failure to

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140. *Id.* at 245.

141. *Id.* at 252.

142. Davenport v. Adu-Lartey, 526 S.W.3d 544, 554 (Tex. App.—Houston [1st Dist.] 2017, pet. denied).

143. Rabatin v. Kidd, 281 S.W.3d 558, 562 (Tex. App.—El Paso 2008, no pet.).

144. *See id.*

145. Mock v. Presbyterian Hosp. of Plano, 379 S.W.3d 391, 395 (Tex. App.—Dallas 2012, pet. denied).

146. *See generally* Nicholson v. Shinn, No. 01-07-00973-CV, 2009 WL 3152111 (Tex. App.—Houston [1st Dist.] Oct. 1, 2009, no pet.).

147. Jose Carreras, P.A. v. Marroquin, 339 S.W.3d 68, 73 (Tex. 2011).

148. *See, e.g.*, Borowski v. Ayers, 524 S.W.3d 292, 294 (Tex. App.—Waco 2016, pet. denied).

149. *See, e.g.*, *id.*

serially list *every* physician whose name appears, however tangentially, in the record, invalidates the medical authorization and, therefore, defeats tolling.[150]

B. Unique Effect on Wrongful Death and Survival Cases

The complexity in the area of the wrongful death and survival causes of action arises from the interplay between the wrongful death statute and Chapter 74. The wrongful death statute provides that the cause of action for wrongful death "accrues" at the time of death.[151] Thus, the statute of limitations does not begin to run until the death has occurred, even if that is more than two years from the negligent cause of the death.[152] Chapter 74, however, provides:

> [n]otwithstanding 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 . . . .[153]

After several years of conflicting appellate court decisions, the Texas Supreme Court finally addressed the issue of which statute of limitations applies in a wrongful death case where the death was caused by medical negligence.[154] The Court held that, by including the language notwithstanding any other law,[155] "the Legislature unequivocally expressed its intent that, when the time limitations of section 10.01 conflict with another law, section 10.01 governs."[156] The Court also held that this provision does not violate the Open Courts Provision of the Texas Constitution because plaintiffs have no common law right to bring either a wrongful death or survival cause of action.[157] Therefore, the legislature may limit those statutory rights that it creates.[158]

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150. *See, e.g.*, *id.*

151. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 71.002(a) (West 2017).

152. *See id.*

153. *Id.*

154. *See* Bala v. Maxwell, 909 S.W.2d 889, 893 (Tex. 1995) (per curiam).

155. *Id.* The language the Court cites to, Article 4590i, § 10.01, which is now repealed, states that "[n]otwithstanding any other law, no health care liability claim may be commenced unless the action is filed within two years." *Id.* at 891.

155. *Id.* at 892–93.

156. *Id.*

157. *See id.* at 893.

158. *See id.*

IV. CONCLUSION

Under Chapter 74, the legal field of the statute of limitations is littered with landmines, pitfalls, and traps. It is hard to believe that the lack of consistent results and predictability works very well for health care defendants, as perhaps distinguished from their insurers and legal counsel. It is certain that it does not work for health care claimants, i.e. patients. The Texas Supreme Court, historically a relative voice of reason counterbalancing legislative caprice, has, since this latest round of attack and over the past fifteen years, permitted Chapter 74's statute of repose to dilute the predictable and protective power of the Open Courts Provision of the Texas Constitution. A great principle has thus been wounded, and we are further than ever down an unfortunate and slippery slope.