MEDICAL MALPRACTICE
STATUTE OF LIMITATIONS
LATE DIAGNOSIS CASES

Bill Liebbe
Law Office of Bill Liebbe, P.C.
125 St. Francis Place
3455 Highland Road
Dallas, Texas 75228
(214) 321-6100
(214) 321-6176 - Facsimile
email: bliebbe@lobl.com

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I. SCOPE

This paper covers statute of limitations in medical malpractice late diagnosis cases in Texas. The paper applies to situations where the patient learns of the injury or harm months or years after the surgery or last date of treatment.

II. OVERVIEW

The applicable statute of limitations is found in Tex.Rev.Civ.Stat.Ann. art. 4590i, Section 10.01 (Vernon Supp. 1993) which provides:

> Notwithstanding any other law, no healthcare 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 healthcare treatment that is the subject of the claim or the hospitalization for which the claim is made is completed. . .

The period of limitations as set forth in this statute runs from any one of three events:

(i) The date the breach or tort occurred;

(ii) The date the treatment that is the *subject of the claim is completed*; or

(iii) The date the hospitalization *for which the claim is made is completed.*

Kimball v. Brothers, 741 S.W.2d 370, 372 (Tex. 1987).

The statute does not permit a plaintiff to simply choose the most favorable of the three dates that Section 10.01 specifies. See *Bala v. Maxwell*, 909 S.W.2d 889, 891 (Tex. 1995). The purpose of the provisions for measuring limitations from the last date of treatment or hospitalization is to aid a plaintiff who was injured during a period of hospitalization or course of medical treatment but has difficulty ascertaining the precise date of the injury. See *Kimball v. Brothers,* 741 S.W.2d 370, 372 (Tex. 1987). In such a situation, the statute resolves doubts about the time of accrual in the plaintiff's favor by using the last date of treatment or

hospitalization as a proxy for the actual date of the tort. But if the date of the negligence can be ascertained, then there are no doubts to resolve and limitations must be measured from the date of the tort. See, *id.*

NOTE: The date of the breach is determinative, not the date the injury or harm is discovered. **There is no discovery rule in medical malpractice cases.** *Morrison v. Chan,* 699 S.W.2d 204 (Tex. 1985).

III. COURSE OF TREATMENT

A. When "course of treatment" does not apply:

It is critically important for the practitioner to recognize that the "course of treatment" rule is a default provision that applies under limited fact situations. Most of the cases that are lost by plaintiffs on "course of treatment" grounds are lost because of two primary reasons:

1. If there is an ascertainable date of breach, "course of treatment" does not apply; and
2. If there is no "course of treatment" for the condition that is the subject of the claim, "course of treatment" does not apply.

1. Ascertainable date of breach.

a. Surgery/anesthesia cases – if the alleged negligence occurred before or during a surgical procedure, limitations begins no later than the date of surgery. Subsequent examinations and follow up with the defendant doctor does not constitute a "continuing course of treatment" so as to extend the statute of limitations to the last date the defendant saw the patient. *Earle v. Ratliff,* 998 S.W.2d 882 (Tex. 1999).

b. Failure to order tests/perform examinations – if it is alleged that the defendant was negligent in failing to order or perform tests or examinations on the date the patient was seen and the test or exam would have revealed the correct diagnosis, the dates the patient was seen are readily ascertainable and limitations runs from those specific dates. *Husain v. Khatib*, 964 S.W.2d 918 (Tex. 1998).

c. Misinterpreting/misreading tests – if the radiologist misreads the x-ray or the pathologist misreads the slide, limitations runs from the date the test was misread. *Holt v. Etley*, 894 S.W.2d 511 (Tex. App. – Amarillo 1995, writ den'd.).

2. No "course of treatment" for the condition that is the subject of the claim.

a. The statute clearly requires that the date "medical treatment is completed" provision applies only if a course of treatment has been established for the *condition that is the subject of the claim. Rowntree v. Hunsucker,* 833 S.W.2d 103, 105 (Tex. 1992).

b. Simply continuing the physician-patient relationship does not of its own accord, constitute a "course of treatment." *Rowntree v. Hunsucker*, supra at 105. In *Rowntree*, the patient was prescribed medical treatment for high blood pressure. Mrs. Hunsucker later suffered a stroke and sued Dr. Rowntree for failure to diagnose blocked arteries. The Texas Supreme Court stated that "if the blockage of the arteries is a condition discreet from high blood pressure, then ongoing treatment for high blood pressure

is not treatment for the condition that is the basis of the Hunsuckers' claim." *Rowntree*, supra at 106.

c. Refilling and taking medication as prescribed is not necessarily a "continuing course of treatment." A physician may establish a "course of treatment" by enlisting the aid of the patient to self-administer a medication, but only if the physician controls the treatment and continues to render medical services. *Rowntree*, supra at 107.

Rationale 1: Extending limitations every time a patient refills and takes the medicine prescribed is "an unworkable rule." It replaces the fixed period set by the legislature with a period that is determined by the patient. *Rowntree,* supra at 107.

Rationale 2: Extending limitations until all authorized prescription refills have been obtained is equally unworkable. "It would encourage physicians not to authorize refills and to insist upon an office visit for each prescription, increasing the cost of medical care." *Rowntree* at 107.

B. When "course of treatment" applies:

1. Misdiagnosis cases: When the complaint is that the defendant instituted an improper course of treatment based upon a *misdiagnosis*, the last date of such mistreatment is the date the statute begins to run. *Kimball v. Brothers,* 741 S.W.2d at 372.

a. Failure to diagnose is not misdiagnosis.

Husain v. Khatib, 964 S.W.2d 918 (Tex. 1998), per curiam. The Texas

Supreme Court appears to distinguish *misdiagnosis* cases from *failure to diagnose* cases. If the defendant failed to diagnose because tests were not ordered or performed when indicated, limitations runs on the date the patient was seen because: (1) the date is readily ascertainable and (2) there was no "treatment" for the undiagnosed condition. If, however, the defendant made a misdiagnosis *and* treated the wrong condition, the "continuing course of treatment" rule applies.

b. Misdiagnosis without treatment.

Bala v. Maxwell, 909 S.W.2d 889 (Tex. 1995), per curiam. The Supreme Court stated "we have previously held that when a physician fails to diagnose a condition, the continuing nature of the diagnosis does not extend the tort for limitations purposes." Citing *Rowntree v. Hunsucker*. In *Bala*, there was a misdiagnosis but no course of treatment based on the misdiagnosis. The court explained that "while the failure to treat a condition may well be negligent, we cannot accept the self-contradictory proposition that the failure to establish a course of treatment is a course of treatment." Citing *Rowntree* at 105-106.

c. Last date of mistreatment.

Even if the complaint is that the defendant instituted an improper course of treatment based upon a misdiagnosis, limitations runs from the last date of mistreatment and not the date the patient learns of the misdiagnosis. See *DeRUY v. Garza,* 995 S.W.2d 748 (Tex. App. – San Antonio 1999, no

writ).

2. Prescription drug cases: Where it is alleged that a physician was required to monitor the effects of medication while it was being taken and the failure to do so contributed to the injury claimed, limitations begins on the date the medication was last taken. In determining when a course of drug treatment ends, the court considers such factors as (1) whether the physician continues to examine or attend the patient, and (2) whether the condition requires further services from the physician. *Gross v. Kahanek*, per curiam, 3 S.W.3rd 518 (Tex. 1999).

C. Rules

From the review of the law on the "continuing course of treatment" rule the following rules become clear:

1. **There is no discovery rule in medical malpractice cases.**
2. The date of breach provision of Section 10.01 applies if the date of negligence is ascertainable.
3. Failure to diagnose does not constitute a "course of treatment."
4. Failure to establish a course of treatment is not a "course of treatment."
5. The injury complained of must arise from the "course of treatment" for the "course of treatment" rule to apply.

IV. CONTINUING BREACH

In misdiagnosis cases, especially cancer cases, the earlier the diagnosis and initiation of treatment, the better the prognosis. In the "failure to diagnose" cases where the plaintiff was seen by the defendant doctor over a period of more than two years before the disease or condition was

diagnosed, limitations may not have expired as to the most recent office visit but causation becomes a problem since the best opportunity for a cure may have occurred more than two years before the condition was diagnosed. In such cases, the plaintiff's attorney should determine whether the "continuing breach" theory is applicable.

A. *Chambers v. Conaway*

Summary: Limitations on patient's cause of action against primary care physician for negligent failure to diagnose cancer does not begin to run until last appointment, where evidence tends to establish physician's duty -- to monitor and treat suspicious lump -- continues up to last appointment. *Chambers v. Conaway*, 883 S.W.2d 156 (Tex. 1993).

In *Conaway*, Chambers was Conaway's family practitioner. In October 1983, she discovered a lump in her breast. Chambers referred her for a mammogram. The report indicated the lump was benign. Between 1983 and 1986, she visited Chambers multiple times for complaints unrelated to her breast. In May 1986, on her own, she had a second mammogram followed by a sonogram. No malignancy was indicated. Chambers was provided the results and during an office visit, June 16, 1986, Chambers stated, "I saw the report – everything is fine." This was the last communication to Conaway about her breast. Between February 1987 and October 14, 1987, she saw Chambers six times for ailments unrelated to the breast. During this period, she experienced symptoms of breast cancer but did not advise the doctor. January 19, 1988 was her last visit to Dr. Chambers for an ailment unrelated to the lump in her breast. On March 16, 1988, she was diagnosed with breast cancer. Suit was filed January 30, 1989.

The Texas Supreme Court reversed summary judgment in favor of Dr. Chambers on limitations and remanded the case for trial. The Court noted that the controlling issue was

whether the summary judgment evidence revealed that any of the three events under Section 10.01 occurred after January 30, 1987, the date two years prior to suit being filed. If the evidence showed such an event occurred, then Dr. Chambers was not entitled to summary judgment.

The Court noted the plaintiffs' expert stated under oath that the defendant was negligent in "failing to perform any follow-up diagnostic tests. Under the circumstances, mammograms and sonograms are not conclusive and further diagnostic tests, i.e., biopsy, should have been performed or the doctor should have referred the patient to other physicians for such diagnostic tests. Further, a primary family care doctor was responsible for monitoring the health and medical needs of this patient including monitoring, examining and treating those conditions of which he had notice, i.e., Conaway's complaints of a lump in her left breast."

The Court held: "If plaintiffs' expert's opinions and conclusions are to be accepted, they tend to establish that Dr. Chambers was ***negligent in his care of the patient up to the last appointment*** between them on January 19, 1988, a date less than two years before she commenced her claim." Consequently, she was within two years from the purported occurrence of a breach and her claim was not barred." *Id.* at 158.

Justice Gonzalez, writing for the majority, focused exclusively on the "date the breach or tort occurred" provision in Section 10.01. The Court reasoned that since the testimony of plaintiff's experts tended to establish that Dr. Chambers had a ***continuing responsibility to monitor and treat, "the breach or tort" occurred <u>up to the last appointment</u>.*** " *Id.* at 158.

B. Analysis of "Continuing Breach" v. "Continuing Course of Treatment"

In *Husain v. Khatib*, 964 S.W.2d 918 (Tex. 1998) per curiam, theTexas Supreme Court reversed and rendered judgment for the defendant under facts similar to *Chambers v. Conaway*.

To understand *Husain*, it is necessary to review historically the Texas Supreme Court opinions interpreting Tex.Rev.Stat.Ann. art. 4590i, Section 10.01.

a. *Kimball v. Brothers* – 1987

In 1987, the Texas Supreme Court made it clear that the three dates specified in the statute are distinct and the "date of breach" (Type I) provision applies if the precise date of the specific breach or tort is ascertainable from the facts. *Kimball v. Brothers*, at 372. The "date treatment is completed" provision (Type II) is to be resorted to if there is no readily ascertainable date because the "injury occurs during a course of treatment for a particular condition and the only readily ascertainable date is the last day of treatment. Such a situation often arises in suits alleging misdiagnosis or mistreatment." *Id.*

b. *Rowntree v. Hunsucker* – 1992

Five years later, the Texas Supreme Court revisited Section 10.01 in *Rowntree v. Hunsucker*, 833 S.W.2d 103 (Tex. 1992) and further delineated the circumstances when the "date treatment is completed" (Type II) provision applies. In *Rowntree*, plaintiffs asserted that their case was a "date treatment is completed" (Type II) case and suit was timely filed because limitations began to run from the date the "treatment ended" which plaintiffs alleged was the date she last filled her prescription. Dr. Rowntree asserted it was a "date of breach" (Type I) case and that the "occurrence or breach" ran from the date of last examination which was more than two years plus 75 days before suit was filed.

The *Rowntree* court rejected both arguments. The court noted that the "date treatment is completed" provision (Type II) is relevant only if a "course of treatment" has been established *for the condition that is the subject of the claim.* *Rowntree* at 105. Therefore, if the course of

treatment established was <u>not</u> for the condition misdiagnosed, the Type II provision does not apply.

c. *Chambers v. Conaway*

The following year, the Texas Supreme Court decided *Chambers v. Conaway*, 883 S.W.2d 156 (Tex. 1994) discussed at length supra. In *Chambers*, the Court of Appeals had reversed summary judgment in favor of the defendant because a fact issue was raised by plaintiff's expert as to whether there was a "continuing course of treatment" (Type II) for her breast lump up to the last date the defendant examined her for an unrelated illness. The Supreme Court reversed the trial court's summary judgment but in doing so, disagreed with the appellate court's reasoning that *Chambers* was a "date treatment is completed" (Type II) case. *Chambers* is a "date of breach" (Type I) case.

In applying the "date the breach or tort occurred" provision (Type I), the Texas Supreme Court accepted "as true the evidence and reasonable inferences therefrom favorable to plaintiff, non-movant," as they were required to do. *Nixon v. Mr. Property Management*, 690 S.W.2d 546, 548-49 (Tex. 1985). After considering plaintiff's expert's affidavit stating that defendant had a *continuing duty* to follow up with exams and diagnostic tests *on each occasion he saw the plaintiff*, the Texas Supreme Court concluded that if the expert's opinions and conclusions were to be accepted, "they tend to establish that Dr. Chambers was negligent in his care of Mrs. Conaway *up to the last appointment between them* on January 19, 1998, a date less than two years before Mrs. Conaway commenced her claim. Consequently, when Mrs. Conaway filed her action on January 30, 1989, it was within two years of the *purported 'occurrence of the breach,'* and her claim was not barred by limitations." *Chambers* at 158. Thus, the court recognized that

in a "continuing breach" (Type I) case, the ascertainable date of the breach or tort is the last date the patient saw the doctor.

DISCUSSION

Following *Chambers*, two similar but separate rules had been established regarding limitations in misdiagnosis cases where there were multiple doctor visits: "Continuing course of treatment" (Type II) and "continuing breach" (Type I).

"Continuing course of treatment" (Type II) is used when the "injury occurs during a course of treatment for a particular condition and the only readily ascertainable date is the last date of treatment." *Kimball v. Brothers*, supra.

"Continuing breach" (Type I) is used when the defendant has a "continuing duty" to monitor, follow up with diagnostic tests and treat but fails to do so up to the last appointment. In such cases, the "date of the breach or tort" occurs on the date of the last appointment. *Chambers v. Conaway*, supra. In other words, if there is a continuing failure to monitor, test, and treat (i.e., the breach of duty continues over a period of time) the "date the breach or tort occurred" is the last date of treatment and limitations begins to run from that date.

d. *Bala v. Maxwell*

Many lawyers, trial judges and appellate courts, however, continued to fail to appreciate the subtle difference between "continuing course of treatment" (Type II) and "continuing breach" (Type I) as evidenced by *Bala v. Maxwell*, 892 S.W.2d 146 (Tex.App.–Houston [14th Dist.] 1994), reversed 909 S.W.2d 889 (Tex. 1995). In that case, Maxwell had seen Dr. Bala beginning in December, 1986 for anemia. A biopsy of a stomach lesion was benign. The following year, in December, 1987, a second biopsy was reported as "inconclusive." Over two years later, in July,

1989, a third biopsy revealed cancer. In reversing the trial court's summary judgment, the Court of Appeals relied on *Chambers* in holding that Maxwell's claim was based on *Bala's* "continuing treatment" and there was no ascertainable date of tort. In reversing the Court of Appeals, the Texas Supreme Court factually distinguished *Bala* and pointed out that in *Chambers*:

> "In response to the doctor's summary judgment motion, the plaintiff presented an affidavit from a doctor who stated that, if a patient complains of a lump in her breast, a family physician has a duty to follow-up on this condition during subsequent visits. This evidence tended to establish that the defendant (Dr. Chambers) was negligent in each office visit after the plaintiff's initial complaint about her breast. Thus, the limitations period did not begin until the last of these office visits. Id. at 158.
>
> Unlike *Chambers*, this case does not involve multiple failures to perform follow-up tests. The Maxwells allege that Dr. Bala was negligent in 1987 because he failed to order additional tests after the biopsy report stated malignancy could not be ruled out. The next time Dr. Bala examined Maxwell was in 1989. During the 1989 examination, Dr. Bala ordered the third EGD, and the results of this test led to the diagnosis of cancer. Thus, any negligence could only have occurred in 1987." *Bala* at 891-892.

Bala was therefore distinguishable from *Chambers* because unlike *Chambers*:

a. Plaintiffs alleged negligence on only one specific date and any negligence could have occurred only on that date whereas in *Chambers*, plaintiffs alleged that the defendant was continuously negligent during multiple dates of examination; and

b. In *Bala,* unlike *Chambers*, plaintiffs failed to allege and offer summary judgment proof that the defendant had a "continuing duty to examine, monitor, and follow up with diagnostic testing" i.e., they failed to offer summary judgment evidence of a "continuing breach."

e. *King v. Sullivan*

The distinction between "continuing breach" and "continuing course of treatment" was recognized in *King v. Sullivan*, 961 S.W.2d 287 (Tex.App. – Houston [1st Dist.] 1997, writ denied). The plaintiff brought a medical malpractice claim against her physician for misdiagnosing her with HIV on two occasions and breaching the doctor/patient confidentiality when he disclosed

the results to family members without specific authorization from the plaintiff. The trial court granted summary judgment for the defendant on grounds that the statute of limitations began on the ascertainable date of the plaintiff's initial test results. The defendant alleged that the subsequent misdiagnosis and unauthorized disclosure could not affect the statute of limitations. The court, however, held that plaintiff alleged and presented evidence of different torts occurring on different dates and that the statute of limitations began to run at different times with regard to the different torts. Thus, while partial summary judgment barring suit for the plaintiff's initial misdiagnosis was proper, complete summary judgment was not, and the court remanded the case to the trial court for further proceedings.

The importance of *King* lies in the Court of Appeals' ruling rejecting plaintiff's argument that under *Chambers* the defendant had engaged in a "continuing course of treatment" based on a misdiagnosis. The Court of Appeals in *King* correctly noted that "*Chambers* is not a 'continuing course of treatment' case." The plaintiff (in *Chambers*) presented an affidavit from a doctor who stated that, if a patient complains of a lump in her breast, a family physician has a *duty to follow up on this condition during subsequent visits.* This evidence tended to establish that the defendant was negligent in each subsequent office visit up to the last office visit, precise dates of breach. Therefore, [Conaway's] suit was timely filed because it was filed within two years *of a purported "occurrence of the breach" -- the first element of Section 10.01.* In *Chambers*, the Texas Supreme Court had specifically not based its ruling on the "continuing course of treatment" element of Section 10.01. *King* at 291.

The Texas Supreme Court approved the reasoning in *King* by denying the petition for review and overruling the petition for rehearing on February 13, 1998, exactly one month before

handing down its *per curiam* opinion in *Husain v. Khatib.*

f. *Husain v. Khatib*

In *Husain,* the Court of Appeals reversed summary judgment for the defendant under a "continuing course of treatment" (Type II) analysis. Plaintiffs had alleged that Mrs. Khatib was examined by and had mammograms ordered by Dr. Husain on three occasions between 1989 and September 1991 during which period she was told she did not have cancer. On August 25, 1992, Dr. Husain examined Mrs. Khatib's breast and ordered another mammogram. On September 8, 1992, she was informed she had breast cancer. Suit was filed in November 1994.

In *Husain*, the plaintiffs did not allege and present evidence of a "duty to follow up during subsequent visits" or "continuing breach" (Type I) as was the case in *Chambers.* Instead, the plaintiffs argued and the Court of Appeals applied a "continuing course of treatment" (Type II) analysis. Citing *Chambers*, the Court of Appeals held that the alleged negligence "occurred during an ongoing course of consultation with and treatment by the doctor." 964 S.W.2d at 919.

In reversing the Court of Appeals in a *per curiam* opinion, the Texas Supreme Court never discussed *Chambers* for an obvious reason: Plaintiffs did not urge a "continuing breach" (Type I) analysis or offer evidence of a "continuing breach" but relied solely on a "continuous course of treatment"(Type II) allegation. Therefore, the Texas Supreme Court in *Husain* simply applied the rule in *Kimball v. Brothers* that the "continuing course of treatment" (Type II) rule does not apply if there are precise ascertainable dates of the tort.

g. *Earle v. Ratliff*

If, after *Husain,* there were any concerns about the viability and applicability of *Chambers* and how *Chambers* is to be analyzed, those concerns were laid to rest in *Earle v. Ratliff*, 998

S.W.2d 882 (Tex. 1999). *Earle* was decided July 1, 1999 and the rehearing was overruled October 7, 1999. Justice Hecht, writing for a unanimous court, wrote as follows:

> "Our conclusion does not suggest that limitations is not affected when a physician who can correct a misdiagnosis or lessen its consequences fails to do so. On the contrary, we suggested in *Rowntree v. Hunsucker* that a claim for continued mistreatment is not barred simply because treatment was based on a much earlier diagnosis. *Rowntree* did not present such a situation, but *Chambers v. Conaway*, the case on which the Court of Appeals relied did. Conaway claimed that Chambers, her family physician, failed to diagnose cancer on two occasions when she complained of a lump in her breast and on several other visits to him for general health care. Based on evidence that Chambers had a duty to follow up on Conaway's complaints each time he saw her, we held that the tort Conaway complained of did not occur, and limitations did not begin to run, until the last time Chambers failed to diagnose her cancer, which was her last visit. *We did not apply the course-of-treatment limitations provisions of Section 10.01 to allow Conaway to complain of the initial misdiagnosis, but neither did we allow the first misdiagnosis to bar Conaway's complaints about later visits."* *Earle* at 887.

C. CONCLUSION

In failure to diagnose cases, you will not defeat the limitations defense with a "course of treatment" argument. If however, there was a continuing duty to monitor, test and follow-up on each visit then there is a "continuing breach" up to the last appointment. Be aware, though, that the breach may not continue up to the last appointment if the defendant ordered or performed the test that finally lead to the diagnosis on that date. See *Bala v. Maxwell*, 909 S.W.2d at 891-892 (Tex. 1995) and *Husain v. Khatib*, 964 S.W.2d at 920 (Tex. 1998).

V. OPEN COURTS

There is no discovery rule in medical malpractice cases. *Morrison v. Chan*, 699 S.w.2d 204 (Tex. 1985).

The so called "new discovery rule" in medical malpractice cases brought under Article 4590i is derived from the Texas Constitution which mandates that "all courts shall be open, and

every person for an injury done to him, in his lands, goods, person, or reputation, shall have remedy by due course of law." Tex. Const. art. I, Section 13. In *Neagle v. Nelson*, 685 S.W.2d 11 (Tex. 1985), the Texas Supreme Court declared Article 4590i, Section 10.01, requiring healthcare liability claims to be brought within two years of the breach or tort, unconstitutional as applied because this "open courts provision" protects a citizen from legislative acts that "abridge his right to sue before he has a reasonable opportunity to discover the wrong and bring suit." *Id.*at 12. citing *Nelson v. Krusen*, 678 S.W.2d 918 (Tex. 1984). A week earlier, in *Bradford v. Sullivan, per curiam*, 683 S.W.2 697 (Tex. 1985), a summary judgment was reversed and the cause remanded where a sponge left during surgery in 1975 was discovered November 1, 1980 and suit was filed eleven months later.

Following *Neagle v. Nelson*, a few rules and some major problems have developed in applying the open courts analysis to medical malpractice cases.

Rule No. 1: The constitutionality of the article 4590i statute of limitations, as applied to a particular situation, turns on when the plaintiff acquired knowledge of:

(1) the injury;

(2) its cause; and

(3) the identity of the potentially culpable party.

LaGesse v. Primacare, Inc., 899 S.W.2d 43 (Tex. App. – Eastland 1995, writ den'd.).

Rule No. 2: If the injury, its cause and the identity of the potentially culpable party are known before the limitations period expires, the two year limitations provisions of article 4590i do not violate the "open courts" provision. *Kimball v. Brothers,* 741 S.W.2d 370, 372 (Tex. 1987); *Allen v. Tolon*, 918 S.W.2d 605 (Tex. App. – Eastland 1996, no writ).

Rule No. 3: The requirement of expert testimony does not toll the statute of limitations. *Allen v. Tolon*, supra.

Rule No. 4: While article 4590i, Section 10.01 is unconstitutional as it applies to minors, *Weiner v. Wasson*, 900 S.W.2d 316 (Tex. 1995) a minor's claim for wrongful death of a parent is barred if limitations would have barred the parents' claim. *Diaz v. Westphal*, 941 S.W.2d 96 (Tex. 1997).

Rule No. 5: While generally, wrongful death claims are subject to a two year limitations period that begins on the date of death, the "notwithstanding any other law" provision of article 4590i, Section 10.01 overrides Tex.Civ.Prac. & Rem.Code, Section 16.003(e). As a result, a wrongful death plaintiff suing on a medical negligence theory does not have two years from the time of death to bring a lawsuit. The statute of limitations expires at the same time it would have for the decedent, i.e., two years after the alleged breach or tort occurred. *Bala v. Maxwell*, 909 S.W.2d 889 (Tex. 1995).

To establish an open courts violation, a plaintiff must (1) establish that he has a well-recognized common law cause of action and (2) show that the restriction of his claim is unreasonable when balanced against the purpose of the statute. *Moreno v. Sterling Drug, Inc.*, 787 S.W.2d 348 (Tex. 1990). Since wrongful death and survival actions are statutory and there is no "common law action" for either a wrongful death or survival action, the open courts provision of the Texas Constitution does not apply to death cases. *Bala v. Maxwell*, supra.

Rule No. 6: On the other hand, if the personal injury case is filed before the patient dies, the transformation of the common law claims to statutory claims because of the plaintiff's death "does not suddenly end their protection under the open courts doctrine." *Martin v. Catterson*,

981 S.W.2d 222, (Tex. App. – Houston [1st Dist.] 1998). In denying defendant's petition for review, the Texas Supreme Court said "we neither approve nor disapprove of this language in the court of appeals' opinion. 2 S.W.2d 249 (Tex. 1999).

Rule No. 7: The open courts provision of the Texas Constitution applies to common law causes of action where the plaintiff did not know and should not have known of the misdiagnosis within the two years following the date of negligence. *Hellman v. Mateo, M.D.*, 772 S.W.2d 64 (Tex. 1989). The burden is on the defendant to conclusively establish as a matter of law that the plaintiff knew or should have known of the misdiagnosis within the two year period. *Hellman v. Mateo,* supra.

Rule No. 8: The limitations provisions of Section 10.01 do not violate the open courts guarantee if a plaintiff has had a reasonable opportunity to discover the alleged wrong and bring suit before the limitations period expires. *Jennings v. Burgess*, 917 S.W.2d 790 (Tex. 1996). If the plaintiff's condition is not latent, then failure to take reasonable steps to determine the cause of the injury may establish that the plaintiff had the opportunity to learn of the negligence within the period of limitations. See *Earle v. Ratliff*, 998 S.W.2d 882 (Tex. 1999). But see *Gagnier v. Wichelhaus, M.D.* ____ S.W.3rd ______, 2000 W.L. 330190 (Tex. App. – Houston [1st Dist.] March 30, 2000.). Although plaintiff knew of her underlying condition, i.e., her inability to get pregnant, the issue was whether she had a reasonable opportunity to discover that the cause of her infertility was the defendant's alleged negligence.

Rule No. 9: When the open courts challenges preserves a plaintiff's claim for an exception to the two year statute of limitations, the plaintiff has a "reasonable time" to investigate, prepare and file suit after discovering the injury. *Neagle v. Nelson,* 685 S.W.2d 11, 14 (Tex. 1985) (J.

Kilgarin concurring); *Lagesse v. Primacare, Inc.*, 899 S.W.2d 43, 47 (Tex. App. – Eastland 1995, writ den'd.); *Fiore v. HCA Health Services of Texas, Inc.*, 915 S.W.2d 233, 237 (Tex. App. – Fort Worth 1996, writ den'd.). Reasonableness is a question of fact unless the evidence, "construed most favorably for the claimant, admits no other conclusion." *Neagle*, supra; *DeRUY v. Garza*, 995 S.W.2d 748, 752-53 (Tex. App. – San Antonio 1999, n.w.h.).

Rule No. 10: What is a "reasonable time?" The answer depends on the facts of the case. See collection of summary of open courts cases attached. As a practical matter, keep in mind that:

a. You do not have two years.

b. It is the plaintiff's burden to raise a fact issue showing suit was filed in a "reasonable time."

c. Document, document, doocument – Be prepared to prove through affidavits, depositions, and other summary judgment evidence what you and the plaintiff were doing between the date of learning of the malpractice and the date suit was filed so that you can raise a fact issue showing why the time spent to investigate, prepare and file suit after discovering the injury was "a reasonable time." Factors the court may consider are:

   1. The time for recovery;
   2. Delays in obtaining medical records;
   3. Consultation with the attorney; and
   4. Investigation of the claim.

The "reasonable time" arguments were not successful, however, where:

a. The plaintiff offered no explanation for a delay of 13 months – *Fiore v. HCA*, 915 S.W.2d (Tex. App. – Fort Worth 1996, writ den'd.).

b. A detailed affidavit stating why it took a year to investigate the claim and secure an expert witness was not adequate in *LeGesse v. Primacare*, 899 S.W.2d 43 (Tex. App. – Eastland 1995, writ den'd.). Note that this case seems to be inconsistent with *DeRUY, Del Rio,* and *Melendez.*

STATUTE OF LIMITATIONS – MEDICAL MALPRACTICE CASES

<u>SUMMARY OF OPEN COURTS CASES</u>

1. *Allen v. Tolon,* 918 S.W.2d 605 (Tex. App. – Eastland, 1996, no writ). Since plaintiff discovered their claim for medical malpractice more than a year before the limitations period expired, the two year limitations did not violate the "open courts" provision. Court rejected argument that cause of action could not arise until services of expert witness was secured. The requirement of expert testimony does not toll the statute of limitations.

2. *Hellman v. Mateo, M.D.*, 772 S.W.2d 64 (Tex. 1989). Since plaintiff testified she had no concern about the accuracy of the report until January, 1985 (when she contacted a lawyer), and moreover, she did not obtain conclusive information about the misdiagnosis until March 1985, the doctor's contention that she could have discovered the diagnosis in September 1984 did not conclusively establish as a matter of law that Hellman knew or should have known of the misdiagnosis on or before January 10, 1985.

   NOTE: What the court is saying here is that there was a fact issue as to when she knew or should have known of her cause of action and since plaintiff alleged it was January 10, 1985 when she first learned and the first time she knew or should have known it was incumbent upon the defendant to prove and establish as a matter of law that she knew or should have known prior to the date that she alleged. Nevertheless, under the facts of the case, she could not have known until at the earliest August 24, 1984, when she was rehospitalized and found out she had Hodgkins' disease. I think, therefore, that the result is correct and the reasoning is correct but the court could have reached the same conclusion in a different way.

3. *DeRUY v. Garza, M.D.*, 995 S.W.2d 748 (Tex. App. – San Antonio 1999, no writ). Plaintiff learned of misdiagnosis a year and a half <u>after</u> her limitations ran. If non-movant asserts a tolling provision, the movant must *conclusively negate the tolling provisions' application to show his entitlement to summary judgment. Jennings*, 917 S.W.2d at 793; *Woods v. William M. Mercer, Inc.*, 769 S.W.2d 515, 518n.2 (Tex. 1988).

   Here, the non-movant plaintiff showed on the record that: She was recuperating from surgery for three months after her surgery, went to see an attorney six months later, and suit was filed three months after consulting with an attorney. The reasonableness of this delay is an issue upon which reasonable minds could differ. Dr. Garza offered no argument that the time frame was unreasonable. The court concluded the "reasonableness" of the delay was a question of fact precluding summary judgment.

   In a concurring opinion, Justice Duncan noted that there is absolutely no guidance from the Supreme Court as to what is a reasonable time to file a medical malpractice suit after discovery and after limitations has expired.

4. *Del Rio v. Jinkins, M.D.*, 730 S.W.2d 125 (Tex. App. -- Corpus Christi 1987, writ ref'd. n.r.e.). Open Courts – a fact issue existed as to whether Del Rio knew or should have known that his injury was caused by the radiation treatments. He filed suit two years and six months after the radiation treatment and three months after he claims he discovered that the radiation treatments caused his stomach problems.

5. *Fiore v. HCA*, 915 S.W.2d (Tex. App. -- Fort Worth 1996, writ denied). The very nature of some medical malpractice cases may make it inherently impossible for an injured plaintiff to discover the injury within two years of the actual act of malpractice. The open courts provision, however, merely requires that the litigant have a reasonable time to discover the cause of action and bring suit before the statute bars the claim. The defendants argued that even if plaintiff was correct in that she did not have a reasonable opportunity to bring suit during the statutory period, as a matter of law, she did not bring her lawsuit within a "reasonable time" after learning of the misdiagnosis. The court agreed. The court noted that the plaintiff offered no explanation for the delay of 13 months (May 1993 to May 4, 1994) and held as a matter of law that they did not file their suit within a reasonable time after discovering the injury. Therefore, the open court's provision did not save the lawsuit. The court noted that they are required to construe the statute to render it constitutional, if possible.

6. *LaGesse v. PrimaCare*, 899 S.W.2d 43 (Tex. App. -- Eastland 1995, writ denied).

    1. Discovery during limitations period. The court rejected the plaintiff's argument that she did not discover the "wrong" until the medical expert in June, 1992 determined that there was a violation of the standard of care. Critical inquiry is when did the plaintiff discover the "injury." Here, the court determined that she discovered on September 9, 1991, that her injury was probably caused by the steroids. This was within two years of treatment by Dr. M, C, L, and N. Therefore, she knew within the two year statute of limitations period of time: (1) the injury, (2) its cause, and (3) the identity of the potentially culpable party. She also contacted her lawyer first on September 16, 1991, and the court held that she had a "reasonable time" before the expiration of limitations.

    2. Discovery after the two years has expired. This is very, very disturbing. As to Dr. Osborne, limitations had expired after she discovered her injury. (December 31, 1988 – Steroid injection. Discovered injury September 9, 1991) Her lawyer submitted an affidavit detailing why it took a year to investigate the claim and secure an expert witness. The court looked at the Supreme Court opinion in *Neagle v. Nelson*, 685 S.W.2d 11 (Tex. 1985) and noted that Justice Kilgarin cited *Hawkins*, a nine day delay and *Fowler*, a 23-day delay involving worker's compensation claims. Despite the attorney's affidavit and citing with approval the concept that "a reasonable time should be allowed for investigating, preparing, and

filing a suit after discovery of the injury" they held that "as a matter of law, plaintiff did not file her suit against Dr. Osborne within a reasonable time after discovering her injury."

The problem here is that the Court of Appeals made a determination that the evidence presented by the plaintiff's attorney in the affidavit established as a matter of law that suit had not been filed within a reasonable time. The issue on a summary judgment is whether a fact issue has been raised as to whether suit has been filed within a reasonable time. This opinion is inconsistent with *DeRUY, Del Rio,* and Melendez.

7. *Melendez v. Beal,* 683 S.W.2d 869 (Tex. App. – Houston [1st Dist.] 1984, writ ref'd., n.r.e.). This case is interesting in that the court stated that "the filing of suit within two years of discovery is timely."

8. *Neal-Moreno v. Kittrell, M.D.*, 1999 CVL 343778 (Tex. App. -- San Antonio, May 1999, n.w.h.).

If plaintiff has a reasonable opportunity to discover and bring suit within the statutory period, "open courts" provisions do not apply. Even if "open courts" provisions apply, it does not save the plaintiff unless he used "due diligence and sued within a reasonable time after learning of the wrong." Citing *Voegtlin.*

Moreno had until May 1, 1997 to file suit. She learned of the injury and facts giving rise to her case July 30, 1996. She did not file suit until three months after limitations, although she had approximately 10 months before the statute ran. As a matter of law, the court held she had a reasonable amount of time to bring suit within the statute of limitations. Citing *LaGesse.*

Dissent:

Justice Richoff found the consequences of this strict two year limitations to be "too disturbing." He also believed that a material issue of fact existed as to when the statute began to run. He duly noted:

1. This gives doctors a loophole to avoid liability. It would be human nature for doctors to not inform patients of their own malpractice. For matters of public policy, the legislative loophole needs to be revisited.

2. Fact issues were raised because the plaintiff filed a response supported by competent summary judgment evidence as to when limitations began to run. The burden then shifted to Kittrell to establish as a matter of law that limitations began to run on May 1, 1995 and to negate the application of the open courts exception.

Citing *Jennings* and *Gatling.* Since the defendant did not file a response and produced no summary judgment evidence to refute plaintiff's contentions, Moreno's claim cannot be precluded.

9. *Voegtlin v. Perryman* – Fort Worth 1998

Plaintiffs discovered cancer May 13, 1993. Perryman's last exam was March 13, 1992. They had until March 12, 1994 to file suit. In other words, they had nine months to file within the statutory period. They waited 19 months after learning of the injury and almost one year after limitations had expired to file suit and offered no competent summary judgment evidence in support of their contention that misdiagnosis cases require more extensive preparation than other medical malpractice lawsuits. Accordingly, it was held they failed to file suit within a reasonable time after discovering the injury and thus were not entitled to relief under the open courts provision.

10. *Gagnier v. Wichelhaus, M.D.,* ____ S.W.3rd _____, 2000 W.L. 330190 (Tex. App. – Hous. [1st Dist.] March 30, 2000.)

Summary Judgment in favor of the defendant was reversed and case remanded.

The only date of alleged malpractice was February 23, 1995, the date Wichelhaus performed exploratory surgery and did not find or remove the IUD. The IUD was found in 1997. Suit was filed in 1998. The defendant claimed that the plaintiff could have discovered the wrong within the limitations, i.e., in 1995 when another doctor suggested aggressive fertility treatment. Plaintiff did not choose to begin the aggressive fertility treatment in 1995 and therefore missed the opportunity to "discover the wrong." This argument was rejected because to so hold would essentially be requiring the plaintiff to endure aggressive fertility treatment within two years of her surgery to discover whether defendant had been negligent. The two-year statute of limitations should not be used when "the results would be unreasonable, absurd, and unjust." Citing *Melendez v. Beal,* 683 S.W.2d 869 (Tex. App. – Houston [1st Dist.] 1984, no writ). The issue is whether she had a reasonable opportunity to discover the cause of her infertility was the defendant's alleged negligence. Although her infertility may have been evident during the limitations period, her infertility during that time could have been due to other causes. The limitations provisions of Article 4590i were held unconstitutional as applied because *she did not have a reasonable opportunity to discover the injury and bring suit within the statute of limitations.*

Ten month delay from discovery (May 1997) to filing of suit (March 1998). Reasonableness of this delay was a question of fact precluding summary judgment. The delay in providing medical records, the time for recovery, consultation with an attorney, and investigation should be considered when determining whether plaintiff's delay in filing suit was reasonable. Citing *DeRuy,* 995 S.W.2d at 753.