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Limitations on Medical Malpractice Damages Pursuant to the Medical Liability Act Are Constitutional in Wrongful Death Cases.

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HEALTH CARE - MEDICAL MALPRACTICE - LIMITATIONS ON MEDICAL MALPRACTICE DAMAGES PURSUANT TO THE MEDICAL LIABILITY ACT ARE CONSTITUTIONAL IN WRONGFUL DEATH CASES. *Rose v. Doctors Hosp.*, 801 S.W.2d 841 (Tex. 1990).

Rex Rose was admitted to Doctors Hospital and the next day was pronounced dead. According to his widow, Lisa Beth, and his parents, Alton and Francis, Rex Rose received a fatal dose of the drug Morphine while a patient at the hospital. Subsequently, Lisa Beth, Alton, and Francis Rose brought a wrongful death action against the hospital. The jury awarded $2,825,000.00 to Lisa Beth Rose and $815,000.00 each to Alton and Francis Rose. However, the trial court rendered judgment notwithstanding the verdict, and the Roses appealed. The court of appeals, in an unpublished opinion, held there was sufficient evidence to support the jury verdict, but ordered remitturs to reduce the damages awarded by the jury. The damages were reduced in accordance with the Texas Medical Liability and Insurance Improvement Act (the "Medical Liability Act"). TEX. REV. CIV. STAT. ANN. art. 4590i § 11.02-.03 (Vernon Supp. 1991).

The Texas Supreme Court affirmed the court of appeals decision, and held that, pursuant to the Medical Liability Act, the legislature may constitutionally limit medical malpractice damages in wrongful death cases. This decision comes two years after the Texas Supreme Court's decision in *Lucas v. United States* in which the court struck down a medical malpractice damages cap as unconstitutional in personal injury cases. 757 S.W.2d 687 (Tex. 1988). The majority, however, refused to extend their holding in *Lucas* to wrongful death actions.

In recent years, both the number of health care claims and the judgments awarded have increased by an inordinate amount. *See Rose v. Doctors Hosp.*, 735 S.W.2d 244, 250 (Tex. App.—Dallas 1987) (frequency of claims and amounts being paid jumped dramatically), *aff'd*, 801 S.W.2d 841 (Tex. 1990); *Sax v. Votteler*, 648 S.W.2d 661, 666 (Tex. 1983) (amount and number of health care claims directly affect quality of health care). *See generally* Powers, *Torts-Personal*, 38 SW. L.J. 1, 28 (1984) (legislative act was in response to spiraling medical malpractice costs). Due to this situation, a medical malpractice insurance crisis has developed. *See Fein v. Permanente Med. Group*, 695 P.2d 665, 682 (Cal. 1985). This crisis has had a dramatic, adverse effect on the availability and cost of medical and health care services to the public. *See* Witherspoon, *Constitutionality of the Texas Statute Limiting Liability for Medical Malpractice*, 10 TEX. TECH L. REV. 419, 419

(1979) (crisis manifested by decreased availability of medical care). In response to these problems, state legislatures have enacted statutes which limit the amount recoverable from physicians and medical facilities. *See, e.g.*, CAL. CIV. CODE § 3333-2 (West 1989) (limits non-economic damages to $250,000); TEX. REV. CIV. STAT. ANN. art. 4590i, § 11.02 (Vernon Supp. 1991) (recovery not to exceed $500,000); VA. CODE ANN. § 8.01-25 (1984) (medical malpractice recovery limited to $750,000). The common goal of these statutes is to maintain adequate medical and health care services at reasonable costs. *See Massachusetts Indem. Life Ins. Co. v. State Board of Ins.*, 685 S.W.2d 104, 112 (Tex. App.—Austin 1985, no writ) (legislature could enact provisions in attempt to ascertain certain goals). Though these limitations may prove effective for achieving such goals, their enactment raises important issues regarding the extent to which the legislatures may infringe upon due process rights.

The fourteenth amendment to the United States Constitution guarantees that "no state shall deprive any person of life, liberty, or property without due process of law." U.S. CONST. amend. XIV, § 1. Likewise, the Texas Constitution provides that "no citizen shall de deprived of life, liberty, property, privileges or immunities except by due course of law." TEX. CONST. art. I, § 19. Moreover, the Texas Constitution provides that "all courts shall be open, and every person for injury done to him in his lands, goods, person or reputation, shall have remedy by due course of law." TEX. CONST. art. I, § 13. This section of the Texas Constitution is generally referred to as the open courts provision. *See McCulloch v. Fox & Jacobs, Inc.*, 696 S.W.2d 918, 922 (Tex. App.—Dallas 1985, writ ref'd n.r.e.). The open courts provision removes the legislature's power to impose a condition that prevents any chance of recovery for an injury. *See Moreno v. Sterling Drug Co.*, 787 S.W.2d 348, 354-55 (Tex. 1990) (legislature lacks power to make remedy of due course of law dependent upon impossible situation); *Morrison v. Chan*, 699 S.W.2d 205, 207 (Tex. 1985) (underlying rationale that legislature has no power to make remedy impossible); *Hanks v. City of Port Arthur*, 8 S.W.2d 944, 946-47 (Tex. 1932) (common law causes of action cannot be denied). Thus, the legislature cannot abrogate a party's right to pursue a common law cause of action unless the legislative basis of the statute outweighs the guaranteed constitutional right of redress. *Sax*, 648 S.W.2d at 661, 665-66; *see also McCulloch*, 696 S.W.2d at 918, 924. In essence, the open courts provision is a component of due process because it is a declaration of the general principle that the courts will be open and provide a remedy to those injured. *See Sax*, 648 S.W.2d at 663-64.

In addition to due process, the United States Constitution guarantees that the states shall not deny any individual, within its jurisdiction, equal protection of the law. U.S. CONST. amend. XIV, § 1. Similarly, the Texas Constitution provides that "all free men . . . have equal rights, and no man, or set

of men, is entitled to exclusive separate public emoluments, or privileges . . . ." TEX. CONST. art. I, § 3. This constitutional guarantee of equal protection simply means that similarly situated individuals will receive similar treatment under the law. However, the equal protection analysis applied by the courts recognizes that a state cannot operate unless the legislature has discretion to pass laws that invariably treat some people differently than others. *See Parham v. Hughes*, 441 U.S. 347, 351 (1979) (laws have inevitable effect to treat people differently); *San Antonio I.S.D. v. Rodriquez*, 411 U.S. 1, 24 (1973) (equal protection does not demand absolute equality). Under federal equal protection analysis a statutory classification that does not infringe upon fundamental rights or burden a suspect class is valid, unless the classification is not rationally related to a legitimate state objective. *See Parham*, 441 U.S. at 351 (legislative classification valid unless no rational relation to legitimate state purpose). Because the Texas and federal equal protection clauses are similar in scope, the Texas courts have consistently followed federal equal protection analysis to determine whether statutory classifications violate equal protection. *See Rose*, 801 S.W.2d at 846; *Spring Branch I.S.D. v. Stamos*, 695 S.W.2d 556, 559 (Tex. 1985) ("no pass, no play" rule does not infringe upon fundamental rights); *Sullivan v. University Interscholastic League*, 616 S.W.2d 170, 172 (Tex. 1981) (equal protection determines whether classifications are reasonable based upon state purpose).

While at least eight states have addressed the constitutionality of limiting medical malpractice damages, they have come to differing results. California, Indiana, and Nebraska have all upheld medical malpractice damage limits against constitutional attack. *See Fein v. Permanente Med. Group*, 695 P.2d 665, 682 (Cal. 1985) ($250,000 limit for non-economic damages); *Johnson v. St. Vincent Hosp., Inc.*, 404 N.E.2d 585, 598 (Ind. 1980) ($500,000 limit as total recovery for injury or death to patient); *Prendergast v. Nelson*, 256 N.W.2d 657, 668 (Neb. 1977) (ceiling of recovery $500,000). However, other states have held that limits on medical malpractice damages are unconstitutional. *See, e.g., Jones v. State Board of Medicine*, 555 P.2d 399, 416 (Idaho 1976) (medical liability act offensive to constitutional prohibition against special legislation); *Wright v. Central DuPage Hosp. Ass'n*, 347 N.E.2d 736, 743 (Ill. 1976) ($500,000 limitation violated equal protection of state constitution); *Carson v. Maurer*, 424 A.2d 825, 837 (N.H. 1980) (recovery limitation does not give adequate compensation); *Arneson v. Olson*, 270 N.W.2d 125, 136 (N.D. 1978) ($300,000 limitation violates both state and federal equal protection provisions); *Simon v. St. Elizabeth Medical Center*, 355 N.E.2d 903, 905 (Ohio Misc. 1976) ($500,000 limitation violated equal protection of both state and federal constitutions). Texas appellate courts have also struck down as unconstitutional damage caps attempting to limit medical malpractice damages. *See Detar Hosp. v. Estrada*, 694 S.W.2d 359, 366 (Tex. App.—Corpus Christi 1985, no writ) (limitation on damages

amount infringes on constitutional right to obtain full redress); *Malone & Hyde, Inc. v. Hobrecht*, 685 S.W.2d 739, 753 (Tex. App.—San Antonio 1985, writ dism'd by agr.) (limits on recovery deny adequate compensation and are void); *Baptist Hosp. v. Baber*, 672 S.W.2d 296, 298 (Tex. App.—Beaumont 1984, writ ref'd n.r.e.) ($500,000.00 limitation violates constitutional equal protection).

In 1988, the Texas Supreme Court considered the constitutionality of the damage limitations of the Medical Liability Act. *See Lucas v. United States*, 757 S.W.2d 687 (Tex. 1988). In *Lucas*, the parents of fourteen month old Christopher took him to a medical facility for diagnosis and treatment of a fever and swollen neck. *Id.* at 688. Christopher was diagnosed as having a thyroglossal duct, and a Penicillin injection was ordered. A hospital nurse gave the injection to Christopher in his buttock. Within moments, Christopher's legs became mottled and, although he was treated for an allergic reaction, his legs later became paralyzed. Subsequent tests showed that the paralysis was due to a lack of blood to the nerves caused by the Penicillin being incorrectly injected directly into an artery. *Id.*

Christopher and his parents sued under the Federal Tort Claims Act. Although they were awarded damages in the district court, the court reduced the award. On appeal, the Dallas Court of Appeals held that the Medical Liability Act was consistent with the equal protection and due process clauses of the United States Constitution and affirmed the district court. *Id.* at 688. The Texas Supreme Court, however, after considering arguments both for and against the constitutionality of a damages cap, held that the liability limits under the Medical Liability Act were unconstitutional as applied to malpractice victims pursing a "remedy by due course of law." *Id.* at 689; *see also* TEX. CONST. art. I, § 13. The court in *Lucas* observed that Texas courts have long recognized that medical negligence victims have a common law cause of action to sue for their injuries. *Id.* at 690. Because the Medical Liability Act attempted to limit the common law right to recovery and fails to provide an adequate substitute for the right, the Medical Liability Act violated the constitutional open courts provision.

Justice Gonzalez, joined by Chief Justice Phillips, dissented. *Id.* at 693. Justice Gonzalez stated that the open courts provision provides two distinct guarantees: 1) the right of access to the courts, and 2) the right of redress for injuries. *Id.* at 696. Justice Gonzalez noted, however, that the question in *Lucas* only involved the right of redress and there was no precedent for interpreting the open courts provision so as to independently protect only one of the two guarantees. *Id.* Chief Justice Phillips, in his dissent, stressed that not every constitutional right triggers equal protection review. *Id.* at 708. More specifically, he stated that the right to recover damages for tortious injury was not a fundamental right, thus, because medical liability limits

were rationally related to state interests, the Medical Liability Act did not violate equal protection. *Id.* at 708-09.

In contrast, the Texas Supreme Court examined a similar situation in *Rose*, in which it decided, in a 5-4 decision, that Texas' statutory cap on medical malpractice damages does not violate the open courts provision when applied to a wrongful death cause of action. Thus, the court refused to apply its previous ruling in *Lucas*, notwithstanding that both state and federal courts have applied the *Lucas* holding to wrongful death, as well as injury causes of actions. *See Wheat v. United States*, 860 F.2d 256, 259 (5th Cir. 1988) (damages awarded to survivors not excessive); *Mercy Hosp. v. Rios*, 775 S.W.2d 626, 637 (Tex. App.—San Antonio 1989, writ denied) (wrongful death medical malpractice suit court held exemplary damages of $1,000,000 reasonable).

The *Rose* court admitted being guided by the analysis of the *Lucas* court, however, the majority noted that the Rose's cause of action was conferred by the wrongful death statute as opposed to the common law injury cause of action in *Lucas*. *See Rose*, 801 S.W.2d at 843; *see also*, TEX. CIV. PRAC. & REM. CODE ANN. § 71.001 (Vernon 1988). The court in *Rose* reasoned that all causes of action based upon a theory of negligence are common law claims, but a negligence action would have died with the decedent, Rex Rose, had it not been kept alive by the legislature in the wrongful death statute. *See Rose*, 801 S.W.2d at 845. Reiterating its recent decision in *Moreno v. Sterling Drug Co.*, the court emphasized that wrongful death actions did not exist at common law. *Rose*, 801 S.W.2d at 845; *Moreno*, 787 S.W.2d at 366; *see also*, *Witty v. American Gen. Capital Dist., Inc.*, 727 S.W.2d 503, 504 (Tex. 1987) (wrongful death claim purely creature of statute); *Duhart v. State*, 610 S.W.2d 740, 742 n.2 (Tex. 1980) (wrongful death cause of action does not exist at common law). Accordingly, because the legislature created wrongful death actions, the power to modify such actions is not abrogated by the open courts provision. *See Rose*, 801 S.W.2d at 845; *Moreno*, 787 S.W. at 355-56. Since the Roses did not pursue a common law remedy, the open courts provision did not bar the limitation of damages imposed by the Medical Liability Act. *Id.* Thus, the court in *Rose* put to rest any attempt to apply the open courts provision to a wrongful death action.

After discussing the open courts challenge to the Medical Liability Act, the court turned its attention to the equal protection issue. The court began by noting that the purpose of the Medical Liability Act, reducing the cost of health care, was a valid state interest. *Rose*, 810 S.W.2d at 846. Although the Medical Liability Act creates a classification, limiting damages for those individuals injured by medical malpractice, the court found that no fundamental right or suspect classes were involved. *See id.* Consequently, the court found that because the limitation of damages was rationally related to

reducing the cost of health care, the Medical Liability Act did not violate equal protection. *See id.*; *see also State v. Project Principle, Inc.*, 724 S.W.2d 387, 391 (Tex. 1987) (rational relationship test for equal protection); *San Antonio Retail Grocers v. Lafferty*, 297 S.W.2d 813, 816 (Tex. 1957) (applying rational relationship standard); *Stout v. Grand Prairie I.S.D.*, 733 S.W.2d 290, 295 (Tex. App.—Dallas 1987, writ ref'd n.r.e.) (statute must have rational relation to state purpose).

Additionally, the court noted that the Medical Liability Act had been struck down in *Lucas*, but explained that in *Lucas* the statute was applied to the circumstance of a common law medical malpractice cause of action. *Rose*, 801 S.W.2d at 844. The *Rose* majority rationalized that the effect of *Lucas* upon the Medical Liability Act's damages cap was limited solely to common law medical malpractice claims. *Id.* Therefore, when the *Lucas* court struck the statute's application to a common law cause of action, the remainder of the statute was still complete and capable of being executed against wrongful death claims. *See id.* at 844-45; *see also Sharber v. Florence*, 115 S.W.2d 604, 606 (Tex. 1938) (courts duty to construe statute and render it valid); *Western Union Telegraph Co. v. State*, 62 Tex. 630, 633-34 (1884) (what remains independent of what was rejected must stand); TEX. GOV'T CODE ANN. § 312.013 (Vernon 1988) (court is to ascertain and give effect to legislative intent).

Chief Justice Phillips, with Justices Doggett, Ray and Mauzy dissented. *See Rose*, 801 S.W.2d at 848. Chief Justice Phillips suggested that there was no legislative intent that the Medical Liability Act's damage limitation provision be severable. *Id.* at 850; TEX. REV. CIV. STAT. ANN. art. 4590i, § 11.02 (Vernon Supp. 1991) (statute does not distinguish between injury and death). Furthermore, Chief Justice Phillips noted that the Medical Liability Act had its own internal severability clause, implying that the legislature did not intent a different application of the damage limitation provision for injury and wrongful death actions. *Rose*, 801 S.W.2d at 851; *see also Hanks v. City of Port Arthur*, 48 S.W.2d 944, 947 (Tex. 1932) (statute's plain terms do not permit judicial intrusion).

The Texas Supreme Court, in *Rose*, held that Texas' statutory cap on medical malpractice damages is constitutional as applied to wrongful death claims. In doing so, the court refused to broaden its previous ruling in *Lucas* which held that a cap on medical malpractice damages violated the constitutional open courts provision in personal injury cases. The court distinguished the two decisions by emphasizing that the open courts provision is only applicable to common law causes of action, and because wrongful death did not exist at common law, the open courts provision is not applicable. The court further found that the classification created by the Medical Liability Act does not involve fundamental rights, hence does not violate equal protection. Thus, after the *Rose* decision, Texas is left with another legal

irony: damages can be limited where medical malpractice results in death, but not where it results only in injury.

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