THE EXCEPTIONS PROVE THE RULE: RECALIBRATING THE DISCOVERY RULE AND EQUITABLE FRAUD EXCEPTIONS TO THE LEGAL INJURY RULE

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This paper provides a jurisprudential catalogue of the Texas Supreme Court's treatment of the legal injury rule and its discovery rule and equitable fraud exceptions. The legal injury rule is applied to determine when a cause of action commences under a general accrual limitations statute, the most commonly enacted type of limitations statute. The exceptions operate in counterpose, deferring the accrual of limitations under the legal injury rule. No prior work has attempted to analyze the court's approach over time. This article is intended to fill that gap. Our analysis reveals that before the mid-1990s the court, with remarkable consistency, read the exceptions broadly. The result was that in most cases the court made reasonable efforts to balance the plaintiff's interest in a fair opportunity to seek relief with the defending party's interest in finality. By contrast, over the last two decades the court—again with remarkable consistency—has rarely found an exception to the legal injury rule sufficient to save the plaintiff's claim from being time-barred. It is always necessary to strike a balance between competing policies, but we argue that the pendulum has swung too far in one direction. The court's current application of the discovery rule and equitable fraud exceptions is badly in need of recalibration.

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I. INTRODUCTION

A feature of all civil justice systems is that claims for relief must be brought within a fixed period or they will be barred as untimely.[1] Legislatures decide how long these periods will be, mostly by enacting statutes of

[1] *See Devs. in the Law: Statutes of Limitation*, 63 HARV. L. REV. 1177, 1178 (1950) ("Limitations on actions to recover property were established in the Roman law from an early date, and have persisted throughout Continental Europe to this day."); Levy v. Stewart, 78 U.S. 244, 249 (1870) ("Statutes of limitations exist in all the States, and with few exceptions they have been copied from the one brought here by our ancestors in colonial times" and all "proceed upon the presumption that claims are extinguished whenever they are not litigated in the proper forum within the prescribed period.").

limitations, though they sometimes use a related regulatory tool, known as statutes of repose.[2]

At a basic level, both statutes of limitations and statutes of repose are meant to strike a balance between providing a fair opportunity to seek relief for the injured party and finality for the alleged wrongdoer.[3] As if to underline their common denominator, the Texas Supreme Court has put it this way, referring specifically to the more frequently used statutes of limitations, but nicely capturing the similar purpose of both statutory types: "Limitations statutes afford plaintiffs what the legislature deems a reasonable time to present their claims . . . . Limitations always bars some valid claims, but this is the price of repose."[4]

You usually can't tell them apart by name. Very few repose statutes expressly include the word "repose" and some even use limitations nomenclature.[5] A good example is the repose statute governing claims against building contractors, which refers to a "10-year limitations period."[6] Indeed, the legislature has grouped most limitations and repose statutes in chapter 16 of the Civil Practice and Remedies Code, which is simply titled "Limitations."[7]

But even as they share common language and serve the same essential function of establishing how long claimants have to seek relief, several consequential features distinguish them. Statutes of repose tend to allow for a longer period to bring a claim.[8] The trade-off for that additional time is that legislatures tend to be pretty inflexible and specific about when the repose period commences. For instance, someone suing a land surveyor must do so within ten years after "the survey is completed."[9] Relatedly, repose statutes

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[2] S.V. v. R.V., 933 S.W.2d 1, 3 (Tex. 1996) ("The enactment of statutes of limitations is, of course, the prerogative of the Legislature.").

[3] *See infra* text accompanying notes 8–16.

[4] *S.V.*, 933 S.W.2d at 3, 23 (internal citation omitted).

[5] One exception is Section 16.011 of the Civil Practice and Remedies Code, governing claims against surveyors, which specifically provides, "This section is a statute of repose and is independent of any other limitations period." TEX. CIV. PRAC. & REM. CODE ANN. § 16.011(c).

[6] *Id.* § 16.009(c).

[7] *See generally id.* § 16 *et seq.*

[8] *See* Methodist Healthcare Sys. of San Antonio, Ltd., v. Rankin, 307 S.W.3d 283, 286 (Tex. 2010) ("Generally, a statute of repose specifies a longer period than that found in the statute of limitations applicable to the same cause of action.").

[9] TEX. CIV. PRAC. & REM. CODE ANN. § 16.011(a)(1).

are intended to provide a definitive outermost date after which an action cannot be filed.[10] The whole idea of setting firm start-and-end points is "to create a final deadline for filing suit that is not subject to any exceptions."[11] Courts, thus, often refer to repose statutes as being "absolute."[12]

Statutes of limitations are different. With limitations statutes, it usually falls to courts to decide the date from which the time period begins to run. The reason for this is that although lawmakers could fix concrete starting points for the limitations statutes that they enact (and there are exceptions where they have), in practice they rarely do.[13] The law governing personal injury claims is an archetypal example. It directs that a person must bring an action for personal injury not later than two years after the cause of action "accrues."[14] Not surprisingly, we eponymously call these "accrual limitations" statutes because they use this trigger word to mark the start of the limitations period—but they say nothing else about how to determine when accrual occurs.

So, by legislative design, whenever an accrual statute is involved, it falls to courts to decide when the limitations clock starts.[15] Why do legislators usually leave it to courts to decide the date of commencement? Their choice recognizes that it is not always clear when wrongful conduct becomes legally actionable. Having judges decide when the limitations period commences in each individual case, based on the particular facts and law relevant in that case, makes more sense than for the legislature to try *ex ante* to come up with a one-size-fits-all starting date for whole classes of cases.[16]

[10] *See Rankin*, 307 S.W.3d at 286 ("Statutes of repose begin to run on a readily ascertainable date, and unlike statutes of limitations, a statute of repose is not subject to judicially crafted rules of tolling or deferral.").

[11] *Id.*

[12] *Id.*; *see, e.g.*, Holubec v. Brandenberger, 111 S.W.3d 32, 37 (Tex. 2003). The court has also attempted to distinguish the two different kinds of statutes by noting that "statutes of limitations operate procedurally to bar the enforcement of a right, [while] a statute of repose takes away the right altogether, creating a substantive right to be free of liability after a specified time." *Rankin*, 307 S.W.3d at 287.

[13] *See, e.g.*, TEX. CIV. PRAC. & REM. CODE ANN. § 16.003(b) (for wrongful death claims, the period of limitations begins to run from the date of "the death of the injured person").

[14] *Id.* § 16.003(a).

[15] Moreno v. Sterling Drug, Inc., 787 S.W.2d 348, 353 (Tex. 1990).

[16] *See* Gaddis v. Smith, 417 S.W.2d 577, 581 (Tex. 1967) ("In the absence of legislative definition and specification, the . . . courts have often been called upon to delineate the statute; they have conscientiously sought to apply it with due regard to the underlying statutory policy of repose,

To determine when causes of action accrue, courts have long used what is known as the "legal injury rule." One oft-used formulation of the rule is a claim accrues "when facts come into existence that authorize a claimant to seek a judicial remedy."[17] A less cumbersome phrasing is that a cause of action is said to accrue "when a wrongful act causes some legal injury."[18]

However precisely worded, a fundamental feature of the legal injury rule is that it is focused on the *defendant's* acts, not the *plaintiff's* awareness that those acts injured her. That is, the rule determines the accrual date of a limitations statute by looking at the defendant's allegedly wrongful conduct—these are the relevant "facts" that "authorize a claimant to seek a judicial remedy."[19] Thus, it has long been accepted that under the legal injury rule limitations begins to run when a wrongful act causes some legal injury, "even if the fact of injury is not discovered until later, and even if all resulting damages have not yet occurred."[20] This remains the accepted understanding of the legal injury rule today.[21]

At this point you may be saying to yourself: *but, wait; people do not always know right away that they've been injured*. That's a very understandable reaction—one we certainly share—and we'll return to this important issue in just a moment. But it bears saying that this problem only arises if the injury-producing wrongful act and the plaintiff's knowledge of it are asynchronous—and that's not how things usually play out. If one party to a contract fails to do what he promises to do, then the other party is likely to immediately realize the breach and resulting injury. When that happens,

without, however, permitting unnecessary individual injustices." (quoting Fernandi v. Strully, 35 N.J. 434, 173 A.2d 277, 286 (1961))); *cf.* Robert N. Clinton, *Judges Must Make Law: A Realistic Appraisal of the Judicial Function in a Democratic Society*, 67 IOWA L. REV. 711, 715 (1982) ("[L]egislatures sometimes use intentionally vague or broad language in order to delegate to judges the authority to refine the meaning of a statute in the context of applying it to specific cases.").

[17] Ehrig v. Germania Farm Mut. Ins. Ass'n, 84 S.W.3d 320, 323 (Tex. App.—Corpus Christi 2002, pet. denied).

[18] S.V v. R.V., 933 S.W.2d 1, 4 (Tex. 1996).

[19] *Ehrig*, 84 S.W.3d at 323.

[20] *S.V.*, 933 S.W.2d at 4 (citing Quinn v. Press, 140 S.W. 2d 438, 440 (1940)); *accord* Provident Life & Accident Ins. Co. v. Knott, 128 S.W.3d 211, 221 (Tex. 2003); Etan Indus., Inc. v. Lehmann, 359 S.W.3d 620, 623 (Tex. 2011) ("Generally, a cause of action accrues when a wrongful act causes a legal injury.").

[21] *See, e.g.*, Town of Dish v. Atmos Energy Corp., 519 S.W.3d 605, 609 (Tex. 2017).

there is nothing wrong with treating the claim as accruing on the date the contract was breached.[22]

In most negligence cases, it's also reasonable to ask the victim to sue within two years from when the defendant acted tortuously. Tort victims usually know when they are injured. Let's say that a patient goes in to have surgery on his left leg, but the doctor negligently operates on the patient's healthy right leg. Most would agree that the period of limitations ought to begin on the date of the procedure because that's when the surgeon injured the patient. Conveniently, it is also the same date that the plaintiff realized he was injured. Upon waking from the anesthesia and seeing that the surgeon had operated on the wrong leg, he knew right then and there that he likely had a claim against the surgeon. Or, to put it in terms of the formal language of the rule, the date of the surgery is when the essential facts "came into existence" that allowed the patient "to seek a judicial remedy."[23]

A great many other kinds of cases—sounding in both tort and contract—are similarly uncomplicated when we apply the legal injury rule to them. But the facts that give rise to a claim are not always readily apparent to the one who was injured. What if, instead of operating on the wrong leg, the surgeon had left a sponge inside the patient? In this situation, the doctor's mistake might not be discovered for quite a while after the surgery—perhaps not until it became infected and caused some physical discomfort, prompting the patient to investigate further. If a court were to follow the legal injury rule strictly, limitations would have to commence on the date when the sponge was left behind. That's when the wrongful act caused a legal injury, even if "the fact of injury is not discovered until later, and even if all resulting damages have not yet occurred."[24] But it doesn't seem fair, does it, to let the surgeon off scot-free when the patient did not know, or have any reason to suspect, during the entire limitations period that he'd been injured?

Medical malpractice cases are but one of many examples where a wrongdoer's conduct may not be immediately known to the victim. Sometimes, this is because the nature of the wrongdoing is hidden and undiscoverable; at other times, wrongdoers intentionally try to hide the evidence of their misdeeds. Whatever the cause, concern with the sort of gross unfairness that would result if claimants were routinely barred from

[22] Cosgrove v. Cade, 468 S.W.3d 32, 39 (Tex. 2015) ("A claim for breach of contract accrues when the contract is breached.").

[23] *Ehrig*, 84 S.W.3d at 323.

[24] *S.V.*, 933 S.W.2d at 4.

recovering when they neither knew nor reasonably should have known they were injured led courts decades ago to come up with an exception to the general rule. Indeed, courts applied this exception for years before they even got around to formally giving it a name: the "discovery rule" exception.

Employing this exception to the general rule, courts would delay the start of the limitations period until the plaintiff knew, or in the exercise of reasonable diligence should have known, that she was injured.[25] Indeed, for even longer courts have used another, related exception in fraud cases. When the plaintiff can show that the defendant intentionally tried to hide its wrongdoing, courts will defer the start of limitations until the plaintiff discovered the fraud or could have discovered it through reasonable diligence.[26]

From their inception, both the common law discovery rule and the even-older equitable fraud exception were animated by a common concern with avoiding unfairness. To be sure, these judicial exceptions were always treated as modest allowances from the general rule. And the courts have been fairly consistent in saying that, as exceptions, they were meant to be narrowly drawn.[27] The concern, of course, with applying the judicial exceptions too liberally is that they would swallow the rule, undermining the legislative effort to set time limits for seeking legal redress. But saying that the exceptions are narrow nevertheless acknowledges the need for their existence in at least some cases. For decades, the courts judiciously decided when deviations from the general rule were merited.

However, as the push for tort reform began to gain momentum in the late 1970s, the state's highest court began to pull back a bit in its application of the exceptions.[28] Greater hesitation to delay the commencement of limitations beyond the date of injury was informed by a perception of a frivolous litigation crisis that the tort reform movement fueled. Yet, even with this exogenous pressure, the court's decisions through the 1980s still can be read as reasonable efforts to balance the interest of affording the plaintiff a fair opportunity to seek relief with the defending party's interest in finality. That was not to last.

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[25] *See infra* Part IIC.

[26] *See infra* Part IIB.

[27] *S.V.*, 933 S.W.2d at 4.

[28] For a further discussion of the tort reform movement nationally and its impact on statutes of limitations, see Louise Weinberg, *Choosing Law: The Limitations Debates*, 1991 U. ILL. L. REV. 683 (1991).

By the mid-1990s, the Texas Supreme Court more fully moved to severely restrict the discovery rule and equitable fraud exceptions. Writing for the court in what has become one of its most significant discovery rule decisions, Justice Craig Enoch minimized the importance that the court had previously recognized of the fundamental unfairness—the "shocking results," as several of the early cases had put it—of applying the legal injury rule unremittingly:

> In the past, this Court has noted the "shocking results" of barring a plaintiff's suit before the injury has even been discovered. This rationale offers no principled basis for distinguishing between cases in which the [discovery] rule applies and those in which it does not. If carried to its logical conclusion, the rationale mandates applying the discovery rule exception to every case, thus eviscerating the whole notion of an absolute time bar to litigation.[29]

On the same day, the court decided *S.V. v. R.V.*, which followed apace in narrowing the scope of the discovery rule exception.[30]

Altai and *S.V.*, thus, mark the start of a profound shift that took place in the court's approach. From this point forward, the court began to follow a remarkably consistent pattern of restricting the scope of the equitable fraud and common law discovery rule exceptions. To be sure, there were decisions before *Altai* and *S.V.* that favored the defending party, just as there have been decisions after it that favored the claimant.[31] Nevertheless, a close examination of all of the cases that the court has decided reveals that in the

[29] Comput. Assocs. Intern., Inc. v. Altai, Inc., 918 S.W.2d 453, 457 (Tex. 1996), *superseded by statute*, Act of April 17, 1997, 75th Leg., R.S., ch. 26, §§ 1–4, 1997 Tex. Gen. Laws 68, *as recognized in* Allen v. Wilson, No. 06-15-00060-CV, 2016 WL 832780 (Tex. App.—Texarkana, March 4, 2016) (quoting Gaddis v. Smith, 417 S.W.2d 577, 581 (Tex. 1967)).

[30] 933 S.W.2d 1 (Tex. 1996). The court initially handed down its opinion in *Altai* on June 8, 1995, *see* 38 Tex. Sup. Ct. J. 740 (June 8,1995), but then withdrew that opinion after it overruled a rehearing motion and reissued it on March 14, 1996, the same day that it also announced *S.V. See* 39 Tex. Sup. Ct. J. 422 (Mar. 14, 1996).

[31] *Compare, e.g.*, Sherman v. Sipper, 152 S.W.2d 319 (Tex. 1941) (acknowledging that fraudulent concealment will toll the statute of limitations but holding on the facts of that case that the plaintiff should have discovered the claim through reasonable diligence) *with* Childs v. Haussecker, 974 S.W.2d 31 (Tex. 1998) (holding that the discovery rule could apply in latent occupational disease case); PNS Stores, Inc. v. Rivera, 379 S.W.3d 267 (Tex. 2012) (recognizing some evidence of extrinsic fraud that tolled limitations to make its bill of review timely).

decades before *Altai* and *S.V.* the exceptions were far more generously applied to save claims from being time-barred.

The trends are now too noticeable and longstanding to ignore. Before 1996, as Table 1 in the Appendix reflects, in the vast majority of cases the court read the exceptions broadly. The post-1996 period has been almost the mirror image of the earlier period. While plaintiffs usually avoided dismissal on limitations grounds in the earlier period, over the last two decades the court has usually found that an exception to the legal injury rule did not save the plaintiff's claim from being time-barred, as Table 2 catalogues. It is always necessary to strike a balance between competing policies, of course, but we argue that the pendulum has swung too far in one direction and that the equitable fraud and common law discovery rule exceptions are badly in need of recalibration.

The argument proceeds as follows. Part II begins by looking back to the early cases to identify the foundations of the equitable fraud exception and common law discovery rule doctrine in Texas. This part traces the Texas Supreme Court's decisions through the mid-1990s, which we mark as the end of the classical period in the court's discovery rule and equitable fraud jurisprudence. Part III then discusses and critiques how the exceptions have been applied by the state's highest court from *Altai* and *S.V.* to the present. Finally, Part IV proposes a series of concrete principles to guide the court back to a more balanced conception of the two exceptions to the legal injury rule.

II. FOUNDATIONS OF THE EQUITABLE FRAUD AND COMMON LAW DISCOVERY RULE EXCEPTIONS TO THE LEGAL INJURY RULE

At least as far back as the late-nineteenth century, the state's courts have taken some account of the plaintiff's knowledge in determining the commencement date for limitations.[32] Two overarching themes can be identified in the doctrines formed by the Texas Supreme Court in the early period, which we mark as running from the late-19th century through the mid-1990s.

The first broad theme during this formative period was a procedural inclination to conclude that what the plaintiff knew, or in the exercise of reasonable diligence should have known, were questions for the factfinder to

[32] Hous. Water-Works Co. v. Kennedy, 8 S.W. 36, 37 (Tex. 1888).

determine.[33] And the jury's factual determinations, in turn, were given a high degree of deference.[34] By this, we mean that the court applied a realistic standard regarding the plaintiff's reasonable diligence.[35] In so doing, it rarely ruled as a matter of law as to what plaintiffs knew or should have known of their injuries. Put bluntly, plaintiffs were not expected to have the omniscience of God.

The second broad theme during the early period was substantive. The court was unlikely to excuse a defendant's fraudulent attempts to cover up its tracks. When there was credible evidence of concealment, the court routinely applied an equitable fraud exception to defer the commencement of limitations.[36] Moreover, the court centrally recognized the equitable foundations of the fraudulent concealment exception.[37] Practically, this meant that the test for reasonable diligence that the court employed in the early period consistently took into account that the defendant's fraud could make it more difficult for the plaintiff to discover the defendant's wrongdoing.

A. *The General Legal Injury Rule*

To understand the foundations of the equitable fraud and common law discovery rule exceptions, it is necessary to begin with the general legal injury rule. Since most limitations statutes provide that a cause of action must be brought within a designated period of time after the cause of action "accrues," the first task—a judicial one—is to determine that date. The task falls to the courts because it has long been understood, both in Texas and elsewhere, that when the legislature uses an accrual limitations statute in lieu of providing a specific commencement date, courts must determine when the cause of action accrues.[38]

It's worth taking a moment to think about this word choice. Though it's doubtful that legislators have given this much thought, the common trigger word that limitations statutes use—*accrues*—requires a bit of unpacking. In

[33] Hawkins v. Safety Cas. Co., 207 S.W.2d 370, 372 (Tex. 1948).

[34] Ruebeck v. Hunt, 176 S.W.2d 738, 740 (Tex. 1943).

[35] *Id.*

[36] Smith v. Fly, 24 Tex. 345, 353 (1859).

[37] *Id.* at 352.

[38] *See, e.g.*, Gaddis v. Smith, 417 S.W.2d 577, 580–81 (Tex. 1967) (citing, inter alia, Fernandi v. Strully, 35 N.J. 434, 173 A.2d 277, 285 (1961)).

common parlance, when we say that something *accrues*, we may mean that it grows or comes about naturally, as when we say "the wisdom that accrues with age."[39] Interest also accrues, of course, which is another, if slightly different, way of using the word to refer to the quality of growing or increasing over time.[40] But its use in statutes of limitations does not have any of these meanings.

Although we might colloquially equate *accrues* with *commences* or *begins*, the statutes do not, precisely speaking, use these words synonymously. Instead, the date of accrual is meant to mean something like the date that the claim becomes legally enforceable, which is a meaning of the word that some lexicographers recognize.[41] As lawyers, we might more succinctly say that this refers to the date that the claim becomes actionable. Either way, it is necessary to keep straight the difference between *accrues*, which is a conception of the substantive law, and *commences* or *begins*, which is the provenance of limitations statutes.

The best way to think about it is this: we need to know when a claim first becomes actionable—which is to say, when the claim accrues—because that's when, under the legal injury rule, the statute of limitations begins to run. But the limitations inquiry is necessarily tied up with the substantive law. To ask when does a claim accrue is to ask when does it become legally enforceable. Put differently, the question of *when* a legal injury occurs is inherently tied to our understanding of *what* makes something actionable under the law.[42]

As it turns out, figuring out what makes a claim legally actionable is not always easy. It can depend on a number of variables. The nature, length, and degree of the defendant's invasion of the plaintiff's rights are important

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[39] Accrue, MERRIAM-WEBSTER DICTIONARY (last visited June 21, 2018), https://www.merriam-webster.com/dictionary/accrue (means "to come about as a natural growth, increase, or advantage; the wisdom that accrues with age").

[40] Accrue, OXFORD ENG. DICTIONARY (last visited June 21, 2018), https://en.oxforddictionaries.com/definition/accrue (means to "accumulate or receive (payments or benefits) over time").

[41] *See, e.g.*, Accrue, MERRIAM-WEBSTER DICTIONARY (last visited June 21, 2018), https://www.merriam-webster.com/dictionary/accrue (means "to come into existence as a legally enforceable claim").

[42] *Cf.* Willis v. Maverick, 760 S.W.2d 642, 644 (Tex. 1988) ("The phrase 'accrues' embodies a substantive law concept, and the courts are called upon to determine when a cause of action accrues and thus when the statute of limitations commences.").

considerations. For instance, if the defendant interferes with the plaintiff's use and enjoyment of her property, that interference only becomes actionable if it is "substantial."[43] This means that in some instances a court might have to decide the point at which a defendant's actions went from being "petty annoyances" to a "substantial" interference.[44]

Another dimension to the problem is that conduct will sometimes invade the plaintiff's rights but will not, at that same moment, produce any damages. This raises the question whether we should say a legally enforceable claim arises when the invasion occurs or whether it is better to treat the wrong as incomplete—*i.e.*, not yet actionable—until after actual damages result. The court wrestled with this problem in an early case, *Houston Water-Works Co. v. Kennedy*, which has become one of the most frequently cited.[45] Indeed, it is commonly said that the legal injury rule is traced to this decision.[46]

In *Houston Water-Works*, a tenant had a water pipe installed inside the home he rented. When the work was performed, the company that installed the pipe damaged one of the supporting arches, though that was not apparent at the time. After a few years, the weakened support caused the building's walls to crack. The case turned on whether the limitations period for the owner's claim against the construction company began to run on the date that the work was performed or only after the cracks became apparent.

To decide the case, the court constructed a formalistic distinction between acts that were originally lawful ("[w]hen an act is in itself lawful") and those that were originally unlawful (if "the act of which the injury was the natural sequence was a legal injury").[47] The apparent idea was that limitations would not begin to run on an originally lawful act until injury is sustained. By contrast, with unlawful acts "of which the injury was the natural sequence,"

[43] Crosstex N. Tex. Pipeline, L.P. v. Gardiner, 505 S.W.3d 580, 595 (Tex. 2016) ("By requiring a 'substantial' interference with the plaintiffs' use and enjoyment of their property, our precedent sets a minimum threshold that confirms that the law 'does not concern itself with trifles, or seek to remedy all of the petty annoyances and disturbances of every day life in a civilized community even from conduct committed with knowledge that annoyance and inconvenience will result.'" (internal citation omitted)).

[44] *Id.* at 595–96 ("Whether an interference is substantial or merely a 'trifle' or 'petty annoyance' necessarily depends on the particular facts at issue, including, for example, the nature and extent of the interference, and how long the interference lasts or how often it recurs.").

[45] 8 S.W. 36 (Tex. 1888).

[46] *See, e.g.*, Murphy v. Campbell, 964 S.W.2d 265, 270 (Tex. 1997) ("This 'legal injury' rule is often traced to *Hous. Water-Works*.").

[47] *Hous. Water-Works*, 8 S.W. at 36.

limitations was treated as commencing immediately after the wrongful act.[48] In *Houston Water-Works*, the court concluded that the damage to the arch was originally unlawful and so held that limitations began to run when the work was performed.[49] The upshot, then, was that the plaintiff's lawsuit was untimely.

If the attempted distinction that *Houston Water-Works* tried to draw between originally lawful and unlawful acts feels convoluted and unworkable, it certainly was. But the court kept citing the case—and still does, to this day, though it has largely paid only lip service to the antiquated distinction. Instead, the case has come to be understood more basically as articulating the modern conception of the legal injury rule—that a cause of action accrues when a wrongful act causes some legal injury.[50]

One thing that is clear about *Houston Water-Works* is that in determining when the claim accrued, the court kept its focus solely on the *defendant's* wrongful acts, not the *plaintiff's* knowledge of the wrongdoing. That is, in saying that the question of accrual turns solely on whether the original act was lawful or unlawful, the court considered only the defendant's conduct in deciding when limitations accrues. But when the date of accrual of a claim is tied only to the defendant's wrongful acts, not the plaintiff's awareness of the wrongdoing, this raises the problem—one that is of central concern to us here—that the facts that give rise to a claim may not always be readily apparent to the one who was injured.

B. Exceptions to the General Rule: The Early Cases

Although *Houston Water Works* purports to only take into account the defendant's acts in calculating when a claim accrues, even the court's earliest decisions rarely showed the kind of disregard for what the injured party knew that the case seems to insist upon. Indeed, going back centuries, the law in most jurisdictions has recognized that in cases of fraud the statute of limitations does not commence to run until the fraud was or might have been

[48] *Id.*

[49] *Id.*

[50] *See, e.g.*, S.V. v. R.V., 933 S.W.2d 1, 4 (Tex. 1996). (noting that "[a]s a rule, we have held that a cause of action accrues when a wrongful act causes some legal injury" (citations omitted)); Trinity River Auth. v. URS Consultants, Inc., 889 S.W.2d 259, 262 (Tex. 1994) (same).

discovered through reasonable diligence by the plaintiff.[51] Some of the earliest Texas cases acknowledged that fraud will defer the running of limitations until the underlying wrong is discovered, or by the use of reasonable diligence, might have been discovered by the party applying for relief.[52] The basic rationale that the cases articulated for delaying the start of the limitations period was put in terms of equity and fundamental fairness:

[51] *See* Sherwood v. Sutton, 21 F. Cas. 1303, 1305 (C.C.N.H. 1828) ("The inference deducible from this view of the cases is, that the construction adopted by these courts, that the concealment of the fraud avoids the bar of the statute of limitations, is founded in solid sense, and is a natural limitation upon the language of the statute."); Horace G. Wood, A TREATISE ON THE LIMITATIONS OF ACTIONS AT LAW AND IN EQUITY (Vol. II) 1363 (4th ed. 1916) ("[I]t is an established rule of equity that where relief is asked on the ground of actual fraud, especially if the fraud has been concealed, that time will not run in favor of the defendant until the discovery of the fraud, or until, with reasonable diligence, it might have been discovered."); *Devs. in the Law: Statutes of Limitations*, *supra* note 1 at 1220–22 (discussing fraudulent concealment cases).

[52] *See, e.g.*, McDonald v. McGuire, 8 Tex. 361, 370–71 (1852) (stating that "refrain[ing] from the expression of any opinion as to whether and under what circumstances fraud or fraudulent concealment of a cause of action on the part of a defendant, until discovery, could be set up to defeat the running of the statute," but noting that "if the exception of fraudulent concealment be allowed at all, it should be strictly and clearly proven, and also the time at which the fraud was, or, by reasonable diligence, might have been discovered"); Smith v. Talbot, 18 Tex. 774, 775 (1857) ("Where fraud is allowed as an exception to the statute, the rule is, that the right of action shall be deemed to have accrued to the plaintiff at the time when such fraud shall be, or by reasonable diligence might have been, discovered."); Ripley v. Withee, 27 Tex. 14, 17–18 (1863) (recognizing that "fraud, coupled with concealment by the defendant of the cause of action, from the plaintiffs, would suspend the running of the statute, or entitle the plaintiff to an action upon the discovery of the fraud, or at such time as he might have done so by the use of reasonable diligence"); Anding v. Perkins, 29 Tex. 348, 354–55 (1867) (stating that "fraud, coupled with concealment from the plaintiff by defendant of the cause of action, would suspend the running of the statute, or entitle the plaintiff to an action upon the discovery of the fraud, or at such time as he might have done so by the use of reasonable diligence"); Kuhlman v. Baker, 50 Tex. 630, 633 (1879) (observing that the statute of limitations commences to run when plaintiff discovered the fraud or "when the fraud might have been discovered by the use of reasonable diligence"); Tex. & P. Ry. v. Gay, 26 S.W. 599, 614–15 (Tex. 1894) ("The rule in this state is that the fraudulent concealment of a plaintiff's cause of action takes the case out of the bar of statutes of limitation. The limitation on this rule is that a plaintiff cannot excuse his delay in instituting suit on the ground of fraudulent concealment of his cause of action if his failure to discover is attributable to his own neglect, and whether such neglect existed in a given case must be determined from the facts of that case."); Port Arthur Rice Milling Co. v. Beaumont Rice Mills, 143 S.W. 926, 929 (Tex. 1912) ("[I]t is a definitely and well settled rule in this state that fraud prevents the running of the statute of limitation until it is discovered, or until, by the use of reasonable diligence, it might have been discovered."); Quinn v. Press, 140 S.W.2d 438, 440 (Tex. 1940) (same); Sherman v. Sipper, 152 S.W.2d 319, 321 (Tex. 1941) (same); Ruebeck v. Hunt, 176 S.W.2d 738, 740 (Tex. 1943).

"The law will not assist a man who is capable of taking care of his own interest, except in cases in which he has been imposed upon by deceit, against which ordinary precaution could not protect him."[53]

Moreover, the test for reasonable diligence consistently took into account that the defendant's fraud could make it more difficult for the plaintiff to discover the defendant's wrongdoing. For instance, in *Ruebeck v. Hunt*, a case that the court has cited frequently even into the modern era, homeowners sued their general contractor for not using the roofing material that the contract called for, and for its improper installation.[54] But the house was built eleven years before suit was filed and so the contractor argued that the suit was barred by limitations. The homeowners, in turn, replied that the contractor had fraudulently hid his wrongful actions and that this delayed the accrual of their claim. At trial, the jury found that the homeowners did not discover and could not have discovered the defects in the roof until years later, and the trial judge entered judgment against the contractor.[55]

On appeal, the court affirmed on limitations, upholding the jury's finding as to the homeowner's reasonable diligence.[56] It distinguished some of its earlier decisions in which it had disregarded the jury's findings by imposing earlier constructive knowledge on plaintiffs to bar their claims. One such case was *Sherman v. Sipper*, in which the court had held that the plaintiffs could have discovered a defect in the deed by checking the real property records that were publicly available.[57] The court in *Sipper* said that the existence of publicly available records constitutes constructive notice of their contents to all parties, but it also recognized that this constructive knowledge can be rebutted (and thus the limitations period tolled) if the plaintiff demonstrates that reasonable diligence would not have discovered the defect.[58] In *Sipper*, the plaintiff failed in both his pleadings and in his proffer of proof to demonstrate that he had been diligent or that reasonable diligence would not have led him to discover the defect. *Sipper* also pointed out that no fraud had concealed the underlying defect, emphasizing that the defendant "by no act or statement misled the [plaintiffs] about the title . . . or kept them or their

[53] *Kuhlman*, 50 Tex. at 633.

[54] *Ruebeck*, 176 S.W.2d at 738.

[55] *Id.* at 739.

[56] *Id.* at 740.

[57] 152 S.W.2d 319, 321 (Tex. 1941).

[58] *Id.* For a similar view, see Cherry v. Farmers Royalty Holding Co., 160 S.W.2d 908 (Tex. 1942).

attorneys from examining the records relating to the title to lands received by them."[59]

By contrast, *Ruebeck* characterized the contractor's actions as fraudulent and upheld the jury's findings that the homeowners could not have discovered the defects through the use of ordinary diligence.[60] The court also emphasized that the homeowners were laymen who were not expected to have inspected the roof themselves.[61] To the contrary, it was reasonable for them, the court said, to rely on their contractor to check it for them.[62] And the court never even considered that the homeowners should have hired an independent inspector, noting simply that "the jury could well have believed that, even if [the homeowners] had gone on the roof to examine it, [they] would not have known whether it was put on in compliance with the contract or not."[63]

What will constitute reasonable diligence to discover fraud, *Ruebeck* announced, "must be determined from all the facts and circumstances in evidence" and because "reasonable minds might differ on such issues, the finds of the jury thereon are binding on the appellate court."[64] In consequence, "[u]nless the evidence is such that reasonable minds may not differ as to its effect, the question as to whether a party has exercised reasonable diligence in discovering fraud is for the jury."[65]

Beyond fraud, in many of its early cases the court took the plaintiff's knowledge of her injuries into account in determining the date limitations

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[59] *Sipper*, 152 S.W.2d at 321.

[60] *Ruebeck*, 176 S.W.2d at 740.

[61] *Id.*

[62] *Id.*

[63] *Id.*

[64] *Id.*

[65] *Id.*; *accord* Nichols v. Smith, 507 S.W.2d 519 (Tex. 1974) (affirming summary judgment where plaintiff failed to raise a fact issue as to fraudulent concealment; evidence established that doctors had advised the plaintiff immediately after surgery of facts allegedly giving rise to claim but observing that "[w]hen the defendant is under a duty to make a disclosure but fraudulently conceals the existence of a cause of action from the one to whom it belongs, the guilty party will be estopped from relying on the defense of limitations until the right of action is, or in the exercise of reasonable diligence should be, discovered"); *cf.* Wise v. Anderson, 359 S.W.2d. 876, 882 (Tex. 1962) (refusing to toll limitations on basis of fraud where plaintiff had actual knowledge that the lessee had not commenced drilling within the promised 90-day period and that such knowledge put the plaintiff on notice of the existence of facts giving rise to claim; consequently, limitations began to run immediately after 90-day period).

commenced. Consider, for instance, suits to reform a deed, which are generally subject to a four-year statute of limitations.[66] In a number of decisions the court charged a party with knowledge of matters of public record and the contents of their own documents, but this constructive knowledge was rebuttable.[67] The rebuttable presumption could be overcome in situations where there was a mutual mistake of fact and the parties' subsequent conduct demonstrated their lack of knowledge as to the existence of a defect in the deed.[68]

Thus, even as *Houston Water-Works* continued to be cited as good law in the late-19th and early-20th century, along with its distinction between originally lawful and unlawful acts, courts rarely followed its lead in ignoring the plaintiff's knowledge of the defendant's wrongful acts. For example, in *Beck v. American Rio Grande Land & Irrigation Co.*, an intermediate appellate court held that a cause of action to recover damages to land from water seepage accrued only when the injury became apparent or should have been discovered by the plaintiff through due diligence, deferring to the jury's finding that the plaintiff could not have known more than two years before suit was filed.[69] In asserting that "limitation runs from the time the injury complained of becomes apparent, or should have been discovered by due diligence on the part of the party affected by it," *Beck* did not even cite or think it necessary to distinguish *Houston Water-Works*.[70] Later cases, like

[66] TEX. CIV. PRAC. & REM. CODE ANN. § 16.051.

[67] *See, e.g.*, McClung v. Lawrence, 430 S.W.2d 179 (Tex. 1968) (holding that the equitable remedy of reformation was available when parties to a deed were mistaken as to the legal effect of the deed language and remanding for a jury to decide when the mistake in the deed was or should have been discovered); Sullivan v. Barnett, 471 S.W.2d 39 (Tex. 1971) (accord); Miles v. Martin, 321 S.W.2d 62 (1959) (accord).

[68] *Sullivan*, 471 S.W.2d at 44–45. The law in Texas in this regard paralleled the development of the law in other states with respect to the commencement of the accrual of a limitations period where a mutual mistake existed. *See* John P. Dawson, *Mistake and Statutes of Limitations*, 20 MINN. L. REV. 481 (1936).

[69] 39 S.W. 2d 640, 641 (Tex. Civ. App.—San Antonio 1931, writ ref'd). *See* Gulf Oil Corp. v. Alexander, 291 S.W.2d 792 (Tex. Civ. App.—Amarillo 1956, writ denied) ("The rule as applied here as to pollution of appellee's subsurface strata of water is that limitation ran from the time the injury complained of became apparent or should have been discovered by due diligence on the part of the appellee.").

[70] *See Beck*, 39 S.W.2d at 640.

Crawford v. Yeatts[71] and *Geochemical Surveys v. Dietz*[72] expressly refused to follow *Houston Water-Works*, finding that the plaintiff's cause of action did not accrue until she discovered saltwater damage to her land or until she should have discovered it by reasonable diligence.

Some of the early cases also emphasized an important principle that the court has continued to recognize—at least in theory—into the modern era: when a fiduciary or special relationship of trust exists between the parties, less diligence is required than would be if it had been an arms'-length transaction. "By entering into fiduciary relations," the court said in *Courseview, Inc. v. Phillips Petroleum Co.*, "the parties consent as a matter of law to have their conduct measured by the standards of the finer loyalties exacted by courts of equity."[73] The fiduciary relationship is therefore "one of the circumstances to be considered in determining whether fraud might have been discovered by the exercise of reasonable diligence."[74]

The court did not say that such a relationship permits the plaintiff to "neglect every precaution" but it "may excuse the defrauded party from taking action that would be required in an arm's-length transaction or from making as prompt or searching investigation as might otherwise be expected."[75] "In some situations," the court concluded, "there is no legal duty to use means available for discovering the fraud[.]"[76] The court stressed that "[e]ach case must rest on its own facts" and concluded that, given the relations of the parties, the plaintiff had acted with reasonable diligence.[77]

And, perhaps most notably, despite all of the court's exhortations about the sacred duties that are owed in a fiduciary relationship, *Courseview* didn't actually involve one; it was just a dispute between disgruntled businessmen. Nevertheless, the court credited the jury's determination that there was a "special relationship of trust and confidence" between the parties that "excused" the plaintiff's failure to read the agreements, as well as his failure

[71] 395 S.W.2d 413 (Tex. Civ. App.—Eastland 1965, writ ref. n.r.e.).

[72] 340 S.W.2d 114 (Tex. Civ. App.—Austin 1960, writ ref. n.r.e.).

[73] 312 S.W.2d 197, 205 (Tex. 1957).

[74] *Id.*; *see* Slay v. Burnett Tr., 187 S.W.2d 377 (Tex. 1945) (stressing the fiduciary relations of the parties and holding that a suit brought by the trust beneficiary to recover profits wrongfully received by former trustees and other defendants was timely because the limitations period did not begin to run until the beneficiary knew of the alleged wrongful acts by the former trustee).

[75] *Courseview*, 312 S.W.2d at 205.

[76] *Id.*

[77] *Id.* at 205–06.

to "verify" what the defendant had told him by examining available public records."[78]

Another case, *Andretta v. West*, again emphasized that the relationship of the parties influenced why it refused to find that the plaintiff was on constructive notice, even though the contract lease document signed by the executive rights holder had been publicly available for years.[79] Because the holder of the executive right had the contractual right to amend the lease and was in a confidential relationship with the plaintiff, the court refused to find that the plaintiff was on constructive notice of the lease amendment.[80]

We are about to see that only a couple of months after *Andretta* the court finally gave a name to one of these judge-made exceptions to the legal injury rule that courts had been applying. But just before we get there, it is worth pointing out that judge-made exceptions are not the only mechanisms by which the period of limitations is temporarily deferred. However, nearly all other tolling of limitations results from express legislative choices.[81] Some of the most common include statutory provisions that suspend limitations when the claimant is absent from the state,[82] on active military duty,[83] or under a legal disability.[84] In Texas, being younger than 18, or of unsound

[78] *Id.*

[79] 415 S.W.2d 638 (Tex. 1967).

[80] *Id.* at 641–42. The court would later more fully discuss the fiduciary nature of the relationship between the executive right holder and the nonparticipating royalty interest owner in *Manges v. Guerra*, 673 S.W.2d 180 (Tex. 1984). The contours of this fiduciary duty have been a source of continuing interest in the literature for decades after *Manges*. *See e.g.*, Monika U. Ehrman, *One Oil and Gas Right to Rule Them All*, 55 HOUS. L. REV. 1064 (2018); Christopher S. Kulander, *Big Money vs. Grand Design: Revisiting the Executive Right to Lease Oil & Gas Interest*, 42 TEX. TECH. L. REV. 33 (2009); Ernest S. Smith, *Implications of a Fiduciary Standard of Conduct for the Holder of the Executive Right*, 64 TEX. L. REV. 371 (1985).

[81] *See, e.g.*, TEX. CIV. PRAC. & REM. CODE ANN. § 16.001; Ruiz v. Conoco, Inc., 868 S.W.2d 752, 756 (Tex. 1994) ("The tolling statute reflects a considered legislative judgment that in enumerated circumstances the strong policy in favor of prompt disposition of disputes must give way to the need to protect a plaintiff who is unable to protect himself or herself." (citation omitted)).

[82] TEX. CIV. PRAC. & REM. CODE ANN. § 16.063.

[83] Servicemember's Civil Relief Act, 50 U.S.C. §§ 3932–35 (2018).

[84] TEX. CIV. PRAC. & REM. CODE ANN. § 16.001(a)(1)–(2).

mind, are legal disabilities under the statute.[85] For a few kinds of cases, the discovery rule has been codified.[86]

Judicial exceptions to the legal injury rule have always functioned nearly identically to all of these statutory tolling provisions in that they keep the statute of limitations from running for some period of time. The *nearly* part is this: judicial exceptions can only delay the date that a cause of action first accrues under an accrual limitations statute. Statutory tolling provisions can also delay the start of limitations at the outset of the period if a basis for tolling then exists (*e.g.*, if the plaintiff is under a legal disability when the claim accrues).[87] They might also suspend the running of limitations after the period has already commenced (*e.g.*, if the legal disability arises after accrual), but this is something that judicially-created exceptions to the legal injury rule cannot do.[88]

C. Gaddis*: The Court Names the Discovery Rule*

In *Gaddis v. Smith*, the court finally got around to naming this doctrine that it and the lower courts had been applying for many years to justify delaying accrual of the limitations period under the legal injury rule.[89] *Gaddis* arose in what we now think of as a classic circumstance for applying the common law exception. Surgeons negligently left a sponge inside the patient after performing a Caesarian Section. She had no immediate complications but later began experiencing internal pain that continued to worsen. When she eventually underwent surgery years later for what was thought to likely

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[85] *Id.*

[86] *See, e.g.*, TEX. BUS. & COM. CODE ANN. § 17.565 ("All actions brought under this subchapter must be commenced within two years after the date on which the false, misleading, or deceptive act or practice occurred or within two years after the consumer discovered or in the exercise of reasonable diligence should have discovered the occurrence of the false, misleading, or deceptive act or practice.").

[87] TEX. CIV. PRAC. & REM. CODE ANN. § 16.001(a)(1)–(2).

[88] The court has made virtually the same point, though its distinction between the judicial exceptions to the legal injury rule and statutory tolling provisions neglects to say that the latter might apply at the start of the limitations period or after it has begun. *See* S.V. v. R.V., 933 S.W.2d 1, 2, 4 (Tex. 1996). ("Deferring accrual and thus delaying the commencement of the limitations period is distinct from suspending or tolling the running of limitations once the period has begun."); Apex Towing Co. v. Tolin, 41 S.W.3d 118, 122 (Tex. 2001) (noting that "tolling limitations is conceptually distinct from applying the discovery rule to delay commencement of limitations").

[89] 417 S.W.2d 577, 578 (Tex. 1967).

be a tumor, the left-behind surgical sponge was discovered. But because more than two years had expired since the initial procedure, her claim against the doctors for medical malpractice would have been time-barred under the legal injury rule.

The court acknowledged that its prior decisions had, on occasion, taken into account the plaintiff's knowledge of the claim in determining the date of its accrual: "We do not understand the *Houston Water Works* case as holding that inability to know of the act of negligence will not under any circumstances postpone the running of the statute of limitations."[90] To the contrary, "Texas Courts have not invariably ignored the inability to know of the existence of the cause of action in determining when such cause of action accrues."[91] However, the court also acknowledged that it had nevertheless previously felt bound to follow "settled principles of law" in barring similar claims against physicians as untimely.[92]

In *Gaddis*, however, the court joined a growing majority from other states in no longer tolerating "the hardships created by a strict adherence to the [legal injury] rule."[93] Thus, the court ruled, "[c]auses of action based upon the alleged negligence of a physician in leaving a foreign object in his patient's body are proper subjects for the 'discovery rule.'"[94] This exception to the general legal injury rule was needed in such cases, the court announced, "in order to do justice."[95] The court contrasted the superior knowledge of the surgeon ("all of the procedures for placing objects in and removing them from the body are in the control of the surgeon") with the patient's lack of knowledge ("It is a virtual certainty that the patient has no knowledge on the day following the surgery—nor for a long time thereafter—that a foreign object was left in the incision.").[96] And convinced by the reasoning of other courts that had named and adopted this exception for cases in which foreign substances or objects had been negligently left behind, the court emphasized that determining the date of accrual for statutes of limitations always involves

[90] *Id.* at 579.

[91] *Id.*

[92] Stewart v. Janes, 393 S.W.2d 428, 428 (Tex. Civ. App.—Amarillo 1965, writ ref'd n.r.e.); Carrell v. Denton, 157 S.W.2d 878, 878–79 (Tex. 1942).

[93] *Gaddis*, 417 S.W.2d at 579.

[94] *Id.* at 580.

[95] *Id.*

[96] *Id.*

balancing competing policies.[97] Whatever disadvantages may result from tolling the date of accrual, the court said, are:

> [O]verbalanced by the shocking results of the contrary rule which would bar a plaintiff from recovery when he could not know of the wrongful act until after the period of time prescribed by the statute of limitations had run.[98]

It followed, then, that the patient's claim in *Gaddis* did not accrue against the doctor for negligently leaving a foreign object in her body until "the patient learn[ed] of, or, in the exercise of reasonable care and diligence, should have learned of the presence of such foreign substance in his body."[99]

However, even as the court recognized the need to take some account of the plaintiff's knowledge in deciding when limitations begins, it was not clear what knowledge, exactly, is to be accounted for. At one point, in characterizing several prior cases, *Gaddis* said that they had taken into consideration when the plaintiff knew or should have known of an "apparent . . . injury," suggesting that the limitations clock will begin to run as soon as the plaintiff knows (or should know) that she was hurt.[100] Elsewhere, though, *Gaddis* spoke in terms of when the plaintiff had or should have had knowledge of the "act of negligence"[101] and of "the existence of the cause of action."[102] Both of these latter formulations imply that limitations might be tolled for even longer—that is, not just until the plaintiff is aware she has been injured, but until she knows or should know that the injury was caused by a wrongful act by the defendant for which the law entitles her to recover (*e.g.*, by asserting a cause of action for negligence). To be fair, the court in *Gaddis* did not have to address what knowledge matters under the discovery rule since, given the facts of the case, there was no difference between when the plaintiff learned that she had been injured and that her

[97] *Id.* at 581.

[98] *Id.*

[99] *Id.* at 578.

[100] *Id.* at 580 (noting that "[i]n an action for damage to plaintiff's land from water seepage, it has been held that the cause of action accrues when the injury becomes apparent, or should have been discovered by due diligence on the part of the party affected by it" (citing Beck v. Am. Rio Grande Land & Irrigation Co., 39 S.W.2d 640 (Tex. Civ. App.—San Antonio 1931, writ ref'd))).

[101] *Id.* at 579 ("We do not understand the *Hous. Water Works* case as holding that inability to know of the act of negligence will not under any circumstances postpone the running of the statute of limitations.").

[102] *Id.* at 579 ("Texas Courts have not invariably ignored the inability to know of the existence of the cause of action in determining when such cause of action accrues.").

injuries were caused by the defendant's wrongful conduct. It was indisputable that the defendant surgeon had left the sponge behind.

As we'll see, even to the present day the court has continued to be imprecise and inconsistent in describing what sort of information matters in applying the discovery rule. Before the mid-1990s those difficulties were usually harmless because, regardless of how the question was framed, the court consistently took an expansive view of the discovery rule's scope, resulting in few occasions when the plaintiff's claim was deemed time-barred as a matter of law. But, as we will see, the court's longstanding lack of clarity in precisely describing what knowledge is finally enough to trigger limitations is one critical reason why, in the later period, it has been able to severely restrict the reach of the discovery rule.

D. The Court Expands the Scope of the Exceptions

If *Gaddis*'s account was incomplete as to what precise knowledge a plaintiff needs to possess before limitations commences, it nevertheless fully embraced the core principle that what a plaintiff knows must sometimes be considered in determining when a cause of action accrues. Over the next two decades, the court continued to take account of the plaintiff's knowledge as it expanded the scope of both the discovery rule and equitable fraud exceptions.

With regard to the discovery rule, the court applied the common law exception to a wider range of cases. *Hays v. Hall* extended *Gaddis* to conclude that the discovery rule exception could delay limitations not just in foreign object negligence cases, but also in cases where the surgery itself did not go as planned.[103] *Hays* was about a botched vasectomy that left the plaintiff fertile. The procedure itself apparently went off without a hitch and right after the surgery the doctor checked the plaintiff and assured him that it had been a success: he was sterile. It must have come as quite a shock, then, for the plaintiff to learn a little over a year later that his wife was pregnant. The plaintiff returned to the doctor who conducted a physical exam and assured him that he was sterile. He explained away the pregnancy as the result of sperm cells left behind after the surgery. But ten months later his wife was pregnant again. So the plaintiff returned to the doctor who—as hard as this is to believe—again assured the plaintiff that he was sterile. (This last visit to the doctor was also within the limitations period, though just barely.)

[103] 488 S.W.2d 412, 412 (Tex. 1972).

The plaintiff then sued for malpractice, but his suit was filed more than two years after the surgery. Nevertheless, the court held that the discovery rule tolled the limitations period, reasoning that, as in *Gaddis*, the statute of limitations only commences to run from "discovery of the injury, or the time discovery should reasonably have been made."[104] To measure limitations from the date of the operation, the court intoned, would mean that "legal remedy is unavailable to the injured party before he can know that he is injured. A result so absurd and so unjust ought not to be possible."[105]

Three points about *Hays* are worth making. First, notice that the court in *Hays* was more precise than it was in *Gaddis* as to what knowledge matters; *Hays* spoke only in terms of considering the plaintiff's knowledge of the "injury." That's not surprising since, like *Gaddis*, the only relevant issue was the plaintiff's knowledge of being injured; there was no uncertainty as to causation because the doctor's negligence was the cause of the plaintiff's injury. As a general proposition, triggering limitations as soon as the plaintiff has actual or constructive awareness of being injured is probably the most defensible use of the discovery rule. It's a harder question to ask whether limitations should be delayed when the plaintiff is aware she has been injured but does not know that her injuries were caused by the defendant's wrongdoing. But in *Hays* and *Gaddis* the plaintiffs didn't even know that they had been injured at all for more than two years after the surgical procedures had been performed, which made it easier for the courts to conclude that it was only fair to delay commencement until they had (or should have had) knowledge of their injuries.

Well, it's not quite right to say that the plaintiff in *Hays* neither knew nor should have known he was injured during these first two years. Remember that his wife was found to be pregnant not once, but twice, within two years of the surgery. Which brings us to the next point to make about the case, which is this: given the facts of the case, it seems that the court was very generous in concluding that he neither knew nor should of known of his injuries before he filed suit. After all, the court might have pointed out that when he learned his wife was pregnant the first time, he had some knowledge that he wasn't sterile and so might have said that limitations would commence at that point. And surely after his wife became pregnant a second time the court could have charged him with at least constructive knowledge

[104] *Id.* at 414.

[105] *Id.*

of his injury. Indeed, the court even said, "One who undergoes a vasectomy operation, and then after tests is told that he is sterile, cannot know that he is still fertile, if that be the case, *until either his wife becomes pregnant or he is shown to be fertile by further testing*."[106] But his wife had become pregnant—twice—and so it's hard to understand why the court concluded that he lacked any knowledge of his injury during the two years after the procedure. Perhaps the fact that the doctor kept falsely assuring him that he was sterile, notwithstanding the evidence to the contrary, made a difference. But the decision did not talk in terms of the defendant's fraud.

Which brings us to the last point to make about *Hays*. It seems, then, that the best way to make sense of the decision is to recognize that at this point in its incipient discovery rule jurisprudence the court valued its conception of basic fairness to the plaintiff over concern with finality for the defendant. That certainly would explain the court's strong language—about "absurd" and "unjust" results—and the dire policy consequences it articulated of applying the legal injury rule without taking account of the plaintiff's knowledge.

To be sure, *Hays* was careful to say that it was holding only that the discovery rule exception could be used to avoid such an absurd and unjust result "in malpractice cases arising from vasectomy operations."[107] But any suggestion that the exception would be reserved only for this one case type would have been hard to defend. By the time the court decided *Hays*, there had been "a wave of decisions" in other jurisdictions adopting the discovery rule across a wide range of medical malpractice actions.[108] And in the years immediately following *Hays*, the court's trend of expanding the reach of the discovery rule and equitable fraud exceptions continued unabated. The court found no reversible error in an intermediate appellate court's decision to apply the discovery rule to a claim for negligent medical treatment.[109] In *Grady v. Faykus*, the appellate court had held that the claim did not accrue until after the patient learned that her injuries were caused by excessive

[106] *Id.* (emphasis added).

[107] *Id.*

[108] WILLIAM L. PROSSER, LAW OF TORTS, § 30 (4th ed. 1971).

[109] Robinson v. Weaver, 550 S.W.2d 18, 20 (Tex. 1977).

radiation from the x-ray therapy she received from the defendant doctor, rather than from a return of her cancer.[110]

Then, in *Kelley v. Rinkle*, the court held that the discovery rule exception applied to a cause of action for libel of one's credit reputation by publication of a defamatory report to a credit agency.[111] Reversing a grant of summary judgment for the defendant, the court held that limitations did not run when the report was published with the credit bureau, but only after the plaintiff learned or should have learned by reasonable diligence of the existence of the report.[112]

The reasons for applying the discovery rule exception in *Gaddis* and *Hays*, the court said in *Kelley*, were also "peculiarly applicable to the present case."[113] Just as the medical patients in the prior cases had no reason to suspect they had been injured, so too "[a] person will not ordinarily have any reason to suspect that he has been defamed by the publication of a false credit report to a credit agency until he makes application for credit to a concern which avails itself of the information furnished by the credit agency."[114] Note also that the court did not even consider that the plaintiff could have periodically checked his credit records to ensure there were no false reports. Once again, note that *Kelley*, like *Gaddis* and *Hays*, was a case in which the relevant issue was only the plaintiff's knowledge that he had been injured by the false report since causation was necessarily assumed.

Another part of the court's reasoning that's worth flagging is that *Kelley* also invoked the "relatively short period of limitation for libel actions" as a further justification for applying the discovery rule.[115] Given the narrow window the legislature had given for libel plaintiffs to sue, "the occasion may often arise when the injured party cannot learn of the existence of his cause of action before the statutory limitation period has expired."[116] This is an important idea—that the length of a limitations period should influence

[110] Grady v. Faykus, 530 S.W.2d 151 (Tex. Civ. App.—Corpus Christi 1975, writ ref'd n.r.e.). The court later noted the significance of its own decision to refuse the writ in *Grady* in *Robinson*, 550 S.W.2d at 20.

[111] 532 S.W.2d 947, 949 (Tex. 1976).

[112] *Id.*

[113] *Id.*

[114] *Id.*

[115] *Id.*

[116] *Id.*

whether some account must be taken of the plaintiff's knowledge in determining accrual—and we'll return to it later.[117]

Ultimately persuaded, then, by the plaintiff's position of inferior knowledge, as well as by the relative policy values at stake, the court held that the discovery rule applied to the plaintiff's libel claim. And, on the record before it, the court concluded that the evidence did not establish that the plaintiff "knew or should have known of the existence of the credit report" more than a year before the suit was filed.[118]

The following year the court clarified in its *per curiam* opinion in *Weaver v. Witt* that if the discovery rule or equitable fraud exceptions is pleaded, then to obtain summary judgment the burden is on the defending party to prove that there is no genuine issue of fact concerning when the plaintiff discovered or should have discovered the nature of the injury.[119] In *Witt*, the court reversed a grant of summary judgment because the defendant's proof was inadequate to demonstrate no genuine issue of fact as to when the plaintiff knew or should have known of his injury.[120] This decision was consistent with other rulings in the period,[121] and it remains the law today, though the court has subsequently clarified some of what it said in *Witt*.[122]

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[117] *See infra* text accompanying notes 124–129.

[118] *Kelley*, 532 S.W.2d at 949.

[119] 561 S.W.2d 792, 793 (Tex. 1977).

[120] *Id.* at 794.

[121] Nichols v. Smith, 507 S.W.2d 518, 521 (Tex. 1974) (party asserting fraudulent concealment has the burden "to come forward with proof raising an issue of fact with respect to [that claim]"); City of Hous. v. Clear Creek Basin Auth., 589 S.W.2d 671, 678 (Tex. 1979); Burns v. Thomas, 786 S.W.2d 266, 267 (Tex. 1990); Am. Petrofina, Inc. v. Allen, 887 S.W.2d 829, 830 (Tex. 1994) ("Since plaintiffs' response was in the nature of an affirmative defense to Petrofina's limitations claim, they could only have defeated summary judgment with sufficient evidence to raise a fact question for each of the elements of fraudulent concealment."); KPMG Peat Marwick v. Harrison Cty. Hous. Fin. Corp., 988 S.W.2d 746, 748 (Tex. 1999).

[122] *Witt* distinguished fraudulent concealment from the discovery rule, noting that fraud is an "affirmative defense" to the statute of limitations for which the plaintiff has the burden of coming forward with proof (though not saying that it was likely only referring to the burden at *trial*, not at summary judgment). *Witt*, 561 S.W.2d at 793. By contrast, it characterized the discovery rule not as "a plea of confession and avoidance of the statute." *Id.* at 794. It also observed that the burden—specifically, the *summary judgment* burden—is on the defendant "to negate the pleading" of the discovery rule by proving as a matter of law that there is no genuine issue of fact regarding when the plaintiff discovered or should have discovered the injury. *Id.*

The court subsequently observed, in *Woods v. William M. Mercer, Inc.*, that *Witt* mischaracterized the discovery rule, clarifying that it is a plea in confession and avoidance (*i.e.*, like

E. Through the 1970s and mid-1980s

It was more than a full decade after *Gaddis*, and after decades in which the court had been taking account of the plaintiff's knowledge of the defendant's wrongdoing, that it first pulled back somewhat from the otherwise expanding trend of its decisions. The question before the court in *Robinson v. Weaver* was whether the discovery rule tolled the statute of limitations to save a claim for negligent misdiagnosis.[123] By a 5-4 margin, the court held that the common law discovery rule exception did not apply. Attempting to distinguish *Gaddis* and *Hays*, *Robinson* noted that when the plaintiff's claim turns on the correctness of a doctor's judgment, there will often be a lack of physical evidence.[124]

fraudulent concealment, the discovery rule is also, technically, an affirmative defense to the defendant's affirmative defense that limitations bars the claim). 769 S.W.2d 515, 517 (Tex. 1988). As such, the initial pleading burden is on the party seeking to avail itself of the discovery rule. *Id.* at 518. *Woods* further explained that if the case proceeds to trial, the plaintiff bears the burden of proving and securing favorable findings as to the discovery rule's application. *Id.*; *see also* Barker v. Eckman, 213 S.W.3d 306, 312 (Tex. 2006) (finding that plaintiffs failed to carry their burden at trial by failing to ask the jury a question on the discovery rule). By contrast, if the limitations defense is considered at the summary judgment stage (which is the far more likely procedural posture for limitations to be considered), then the burden remains on the summary judgment movant—the defendant—to negate the discovery rule by proving as a matter of law that there is no genuine issue of fact regarding when the plaintiff discovered or should have discovered the injury. *Woods*, 769 S.W.2d at 518. *Cf.* Yancy v. United Surgical Partners Int'l, Inc., 236 S.W.3d 778, 782 (Tex. 2007) ("Unlike the discovery rule, which a defendant must negate once the plaintiff has pleaded it, a plaintiff who asserts that the open courts provision [of the Texas Constitution] defeats limitations bears the burden of raising a fact issue.").

The court has also subsequently clarified that for the equitable fraud exception to the legal injury rule the plaintiff bears an equivalent pleading and evidentiary burden. *KPMG Peat Marwick*, 988 S.W.2d at 749 (noting that "a party asserting fraudulent concealment as an affirmative defense to the statute of limitations has the burden to raise it in response to the summary judgment motion and to come forward with summary judgment evidence raising a fact issue on each element of the fraudulent concealment defense"). Although the court has not yet expressly said, if the case proceeds to trial, then the plaintiff presumably also bears the burden of proving and securing favorable findings as to the equitable fraud exception's application, just as she does as to the discovery rule. *See, e.g.*, Jampole v. Matthews, No. 01-96-00028-CV, 1997 WL 414637 (Tex. App.—Houston [1st Dist.] July 24, 1997, no writ) (noting that the burden was on the plaintiff "at trial to prove the limitations period should be excused or tolled by the discovery rule or fraudulent concealment" (citing *Woods*, 769 S.W.2d at 515)).

[123] 550 S.W.2d 18, 19 (Tex. 1977).

[124] *Id.* at 21.

That cramped reading might have been defensible as to *Gaddis*, but it ignored that *Hays* had involved a negligent procedure without any comparable physical evidence—no left-behind foreign object. Nor did it acknowledge the court's own expansion in *Kelley* of the discovery rule's application beyond medical malpractice cases—to say nothing of the long line of cases that, for decades before *Gaddis* gave the exception a name, had taken the plaintiff's knowledge into account in deciding the date of accrual.

The *Robinson* majority did recognize that it was hard to distinguish the intermediate appellate court's decision in *Grady v. Faykus* for which the court had found no reversible error.[125] Both cases were "founded upon negligent *treatment*," the court conceded.[126] It further acknowledged that "[t]he line between negligent diagnosis and the negligent treatment in *Grady v. Faykus* may indeed be a fine one."[127] Nevertheless, the majority distinguished *Grady*. How it did so offers an important insight for understanding the majority's reasoning.

Critical to the distinction it drew with *Grady*—and, thus, critical to understanding the outcome in *Robinson*—is what the court said about the purposes that statutes of limitations serve. According to the majority, the lack of physical evidence was problematic in *Robinson* because the "primary purpose" of statutes of limitations is "to prevent litigation of stale or fraudulent claims[.]"[128] While there is certainly some historical support for the idea that limitations statutes were designed to avoid fraudulent claims,[129] that view hardly has widespread support.[130] We'll return to the difficulties with linking limitations statutes to reducing fraud,[131] but for present purposes it is notable that, as regards the court's own view, the court's earliest cases had identified a number of purposes that limitations statutes serve, including

[125] *Id.* at 22.

[126] *Id.* at 21.

[127] *Id.* at 22.

[128] *Id.* at 20.

[129] *See, e.g.*, Sherwood v. Sutton, 21 F. Cas. 1303, 1307 (C.C.N.H. 1828) ("The statute of limitations was mainly intended to suppress fraud, by preventing fraudulent and unjust claims from starting up at great distances of time, when the evidence might no longer be within the reach of the other party, by which they could be repelled.").

[130] *See* Tyler T. Ochoa & Andrew J. Wistrich, *The Puzzling Purposes of Statute of Limitations*, 28 PAC. L.J. 453 (1997) (noting that the avoidance of fraud is "a questionable ground on which to base limitations of actions").

[131] *See infra* text accompanying notes 136–141.

avoiding evidence deterioration, providing greater predictability, and insisting on reasonable efforts to actively assert rights; notably, avoiding fraud was never mentioned.[132] The court had divined similar purposes in numerous other decisions.[133] Even in *Gaddis* itself, the case that named the discovery rule exception in Texas, the court specifically noted that the "purpose of statutes of limitations is to compel the assertion of claims within a reasonable period after their origin, and while the evidence upon which their enforcement or resistance rest is yet fresh in the minds of the parties or their witnesses."[134] Indeed, with the exception of one intermediate appellate court decision[135] that the Supreme Court once briefly acknowledged,[136] no other Texas case before *Robinson* seems to have identified fraud avoidance as a primary purpose of limitations.

[132] *See, e.g.*, Sherman v. Sipper, 152 S.W.2d 319, 320–21 (Tex. 1941) ("Statutes of limitation have long been a part of our laws. They are regarded with favor. They compel the complaining party to assert his claim within a reasonable time. This rule is based upon sound public policy. It prevents a party from asserting a claim after a certain period of time, when perhaps the evidence to rebut such claim would be destroyed or lost . . . . They furnish the means of giving security and stability to human affairs, and are a protection of property rights. They compel a party to be active in asserting his rights; and punish him for his failure to do so within a reasonable time.").

[133] *See, e.g.*, Price v. Anderson's Estate, 522 S.W.2d 690, 692 (Tex. 1975) ("The primary purpose of a statute of limitations is to compel the exercise of a right of action within a reasonable time so that the opposing party has a fair opportunity to defend while witnesses are available and the evidence is fresh in their minds."); Hallaway v. Thompson, 226 S.W.2d 816, 820 (Tex. 1950) ("The purpose of statutes of limitation is 'to compel the settlement of claims within a reasonable period after their origin, and while the evidence upon which their enforcement or resistance rests is yet fresh in the minds of the parties or their witnesses.'" (quoting Harrison Mach. Works v. Reigor, 64 Tex. 89, 90 (1885))); Hanley v. Oil Capital Broad. Ass'n, 171 S.W.2d 864, 865 (Tex. 1943) (describing "the evil [the limitations statute] sought to remedy 'was to prevent demands originally invalid or which had been discharged from being enforced after such a lapse of time as would probably make it impossible for defendants to procure the evidence by which a just defense could be established'" (internal citation omitted)).

[134] Gaddis v. Smith, 417 S.W.2d 577, 578 (Tex. 1967).

[135] S. Sur. Co. of New York v. First State Bank, 54 S.W.2d 888, 892 (Tex. App.—Waco 1932, writ ref'd) ("The object of a statute of limitation in requiring the complaining party to assert his claim within a reasonable time is to suppress fraudulent and stale claims from springing up at great distances of time and surprising the other party after the evidence which would sustain a defense has been lost."); *see also* Gray v. Laketon Wheat Growers, 240 S.W.2d 353, 355 (Tex. App.—Amarillo 1951, no writ) (citation omitted).

[136] *Hallaway*, 226 S.W.2d at 820 (characterizing *Southern Surety*'s description of limitations as expressing "[s]ubstantially the same thought" as in *Reigor* and *Hanley*).

Nevertheless, in the *Robinson* majority's view, because fraudulent claims were a primary aim of limitations, it was concerning that the plaintiff's misdiagnosis claim was "subject to proof only by expert hindsight."[137] This concern led the majority to conclude that "the purpose of limitations would be furthered" by not allowing the discovery rule to extend the limitations period.[138] Though that meant drawing a "fine" distinction between negligent diagnosis and negligent treatment, the court thought the distinction "necessary in order to assure that the primary purpose" of limitations is met.[139] Though its *sui generis* emphasis on the avoidance of fraudulent claims was contestable, *Robinson* planted a seed that the court, almost twenty years later, would harvest.

But if *Robinson* reflected some modest reluctance by the court in the late-1970s to apply the discovery rule exception to all medical malpractice cases, the case hardly signaled any immediate fundamental shift in the court's approach to applying the general legal injury rule and its common law and equitable exceptions. To the contrary, through this decade and the next, the court continued to expand the scope of both the equitable fraud and discovery rule exceptions.

As to fraud, the court's next case, *Stonecipher v. Butts*, found the equitable exception applicable to a claim by a judgment creditor against his debtors for fraudulently preventing the collection of the judgment.[140] Citing several of its earlier decisions, including *Ruebeck*, the court reaffirmed that limitations only begins to run from the time that the fraud was discovered or could have been discovered through reasonable diligence.[141]

The court's expansive approach as to fraud was again reflected in its decision a few years later in *Borderlon v. Peck*, which has become one of the court's most frequently cited decisions on the equitable fraud exception.[142] *Borderlon* addressed whether the legislature had intended to abolish the equitable fraud exception when it enacted the then-existing limitations statute for medical malpractice cases.[143] The statute, Section 10.01 of Article 4590i,

[137] 550 S.W.2d at 22.

[138] *Id.*

[139] *Id.*

[140] 591 S.W.2d 806, 809 (Tex. 1979).

[141] *Id.*

[142] 661 S.W.2d 907 (Tex. 1983).

[143] *Id.* at 908.

required all medical malpractice claims to be brought within two years of the date the alleged wrong occurred and read as follows: "Notwithstanding any other law, no health care liability claim may be commenced unless the action is filed within two years from the occurrence of 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 . . . ."[144] The statute's language—including both its "Notwithstanding any other law" preamble and its use of "the occurrence of the breach or tort" or "completed" treatment, rather than the more familiar accrual language found in most limitations statutes—certainly suggested that the legislature may have intended no exceptions that could extend limitations. So too did its understood purpose of cutting back on malpractice suits against health care professionals. Indeed, in later cases the court would note these statutory features and characterize this same statutory section (and its successor) as imposing an "absolute two-year limitations period" that did not allow for tolling under the discovery rule exception.[145]

Nevertheless, in 1983, *Borderlon* construed the statute to find that the legislature did not intend to abolish equitable fraud as a basis for extending limitations.[146] In doing so, the court characterized its prior law on fraudulent concealment as "based upon the doctrine of equitable estoppel," and it pointed out that "invocation of fraudulent concealment estops a defendant from relying on the statute of limitations as an affirmative defense to plaintiff's claim."[147] If a defendant fraudulently conceals its wrongdoing, it "is estopped from relying on the defense of limitations until the party learns of the right of action or should have learned thereof through the exercise of reasonable diligence."[148] Despite the statutory language and the general intent of its drafters to curtail nonmeritorious malpractice claims, the court

[144] TEX. REV. CIV. STATS. ANN. art. 4590i, § 10.01.

[145] Nelson v. Krusen, 678 S.W.2d 918, 920 (Tex. 1984) (noting that a predecessor statute to Article 4590i "contains no accrual language and thus imposes an absolute two-year statute of limitations, regardless of when the injury was discovered"); Diaz v. Westphal, 941 S.W.2d 96, 99 (Tex. 1997) ("We have repeatedly held that section 10.01 establishes an absolute two-year statute of limitations for health care liability claims, thereby abolishing the discovery rule in cases governed by the Medical Liability Act.").

[146] 661 S.W.2d at 908.

[147] *Id.*

[148] *Id.*

emphasized the special status that the equitable fraud exception enjoys in the state's jurisprudence:

> Texas courts have long adhered to the view that fraud vitiates whatever it touches, and have consistently held that a party will not be permitted to avail himself of the protection of a limitations statute when by his own fraud he has prevented the other party from seeking redress within the period of limitations. To reward a wrongdoer for his own fraudulent contrivance would make the statute a means of encouraging rather than preventing fraud.[149]

As to the discovery rule, the court's next important case was *Brown v. Havard*.[150] In *Havard*, the plaintiff's claim, as in several of the court's earlier cases, turned on whether a deed should be reformed because of a mutual mistake by the parties. The jury found that Havard was entitled to have the deed reformed and that the defect in the deed was not discoverable through reasonable diligence.[151] The determination of when a reasonably diligent grantee in a deed "should have realized the mistake [was] a factual issue," the court concluded, and the mistake in the defective deed was not "so plainly evident as to charge [the grantee] with the legal effect of the words used."[152] The factual record in *Havard* provided sufficient evidence, the court said, to support the jury's determination that the mistake was inherently undiscoverable by a reasonably diligent party.[153]

Although we have seen the steady expansion in the court's application of the discovery rule and equitable fraud exceptions, there certainly were a few cases in which the court found the exceptions did not apply. Indeed, the court's next two decisions—both will contests against executors—affirmed grants of summary judgment for the defendants.[154] Both cases demonstrate that when there was undisputed evidence that the plaintiff knew or reasonably should have known of the facts giving rise to the claim, the court would refuse to delay commencement of the limitations statute.

[149] *Id.* at 908–09.

[150] 593 S.W.2d 939 (Tex. 1980).

[151] *Id.* at 944.

[152] *Id.*

[153] *Id.*

[154] Escontrias v. Apodaca, 629 S.W.2d 697 (Tex. 1982); Mooney v. Harlin, 622 S.W.2d 83 (Tex. 1981).

In one of them, *Escontrias v. Apodaca*, the undisputed evidence established that the plaintiff heirs had actual knowledge of the defendant's alleged undue and fraudulent influence on the testatrix.[155] That evidence, along with the plaintiffs' actual knowledge of the terms of the will when it was probated, led the court to easily conclude that no judicial exception saved their claim from being time-barred.[156] In the other, *Mooney v. Harlin*, the court held that publicly available probate records put the plaintiff on constructive notice of the facts giving rise to the injury.[157] *Mooney*, of course, was consistent with earlier decisions, like *Sipper*, in recognizing that when the facts at issue truly were publicly available and readily accessible by the plaintiff, then she was "charged with constructive notice of the actual knowledge that could have been acquired by examining public records."[158] The court applied this principle both to the discovery rule and equitable fraud exceptions.[159]

Thereafter, in a series of decisions spanning the 1980s to 1995, the court held that the exceptions to the legal injury rule were so essential that, in at least some circumstances, they were constitutionally required.

F. *Constitutional Requirements*

It began with *Sax v. Votteler*, a case that challenged the constitutionality, as it applied to minors, of a statute governing limitations in medical malpractice cases.[160] We already saw that in *Borderlon* (which was handed down just three months after *Sax*) the court construed this same statute as not abolishing the equitable fraud exception.[161] Fraudulent concealment was not at issue in *Sax*, however.

Sax held that a statute purporting to do away with all minority age tolling in medical malpractice cases (for children over six years old) violated article

[155] 629 S.W.2d 697.

[156] *Id.* at 698.

[157] 622 S.W.2d at 85.

[158] *Id.* at 85 (citing *Sipper*, 152 S.W.2d at 321).

[159] *Id.* ("When evidence of fraud may be disclosed by examination of public records this court has held limitations will begin to run from the time the fraud could have been discovered by the exercise of ordinary diligence.").

[160] 648 S.W.2d 661, 663 (Tex. 1983).

[161] *See supra* text accompanying notes 145–150.

I, section 13 of the state constitution, the open courts provision.[162] Because children have no right to bring a claim until they reach majority age, and because it is not reasonable to rely on parents to timely sue on their behalf, the statute, the court determined, "effectively abolishes a minor's right to bring a well-established common law cause of action without providing a reasonable alternative."[163] Consequently, the minor plaintiff's claim against the doctor for conducting a negligent surgical procedure was not barred by limitations.[164]

In a series of subsequent decisions, the court repeatedly held that the same statute and its successor were unconstitutional as applied to minors, noting that legislative efforts to raise the minority tolling age did not avoid the constitutional problem found by *Sax*,[165] and to adults who could not have known of their injuries during the limitations period.[166] It also held that an open courts violation could be based on evidence that the plaintiff offered on which a reasonable jury could conclude that his injuries were not discoverable during the limitations period.[167]

To be sure, not every constitutional challenge from this period was upheld, but those that were upheld were based on what seemed to be a balanced review of the evidence and were carefully crafted to reflect their narrow reach. Thus, in both *Morrison v. Chan*[168] and *Moreno v. Sterling*

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[162] 648 S.W.2d at 663. It is often said that the discovery rule and equitable fraud exceptions to the legal injury rule operate differently from the open courts provision. *See, e.g.*, Yancy v. United Surgical Partners Int'l, 236 S.W.3d 778, 784 (Tex. 2007). This is technically correct, but practically immaterial. To be sure, the discovery rule and equitable fraud exceptions suspend the accrual of the limitations period for a cause of action until the plaintiff knew, or in the exercise of reasonable diligence, should have known of the facts giving rise to the claim. By contrast, the state constitutional guarantee does not defer accrual of the limitations clock; instead, it ensures that litigants are given "a reasonable time to discover their injuries and file suit." *Id.* That said, the practical effect is the same. If a court finds that the claimant was not given a reasonable time to discover her injuries and file suit, then the court will not allow limitations to bar the claim. *Sax*, 648 S.W.2d at 667 (noting that the means the legislature used to address perceived insurance were not "reasonable when . . . weighed against the effective abrogation of a child's right to redress").

[163] *Sax*, 648 S.W.2d at 667.

[164] *Id.*

[165] Weiner v. Wasson, 900 S.W.2d 316, 317 (Tex. 1995).

[166] Nelson v. Krusen, 678 S.W.2d 918 (Tex. 1984); Neagle v. Nelson, 685 S.W.2d 11 (Tex. 1985); Bradford v. Sullivan, 683 S.W.2d 697 (Tex. 1985) (per curiam) (summary reversal of limitations dismissal in accordance with *Krusen*).

[167] Hellman v. Mateo, 772 S.W.2d 64, 66 (Tex. 1989).

[168] 699 S.W.2d 205, 207 (Tex. 1985).

Drug, Inc.,[169] the court held that there was no constitutional violation where the adult plaintiffs in those cases knew or could have known of their injuries during the limitations period.[170] And in *Trinity River Auth. v. URS Consultants, Inc.*, the court held, *inter alia*, that a repose statute that required suits against architects be brought within ten years "strikes a fair balance between the legislative purpose of protecting against stale claims and the rights of litigants to obtain redress for injuries."[171] In reaching this conclusion, the court cited a study showing that of 570 lawsuits against architects, 99.6% of them had been brought within a decade of the project completion date.[172] The court also narrowed its holding by expressly noting that it was not being asked whether to adopt the discovery rule in the case and so "we are expressing no opinion on whether, if squarely presented with the issue, we would adopt the discovery rule in a case such as this."[173] Finally, the court declined to reach whether the repose statute "would violate the open courts guarantee as applied to abrogate the claim of a third party who sustains damages from a defective structure after the ten year repose period."[174]

G. The End of the Early Period

Through the rest of the 1980s, the general thrust of the court's decisions continued to expand the scope of the discovery rule and equitable fraud exceptions. The central theme of the cases during this period was that whether the plaintiff acted with reasonable diligence is usually a question of fact for the jury to decide.[175]

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[169] 787 S.W.2d 348, 357 (Tex. 1990).

[170] Morrison v. Chan, 699 S.W.2d 205, 208 (Tex. 1985); Moreno v. Sterling Drug, Inc., 787 S.W.2d 348, 354 (Tex. 1990).

[171] 889 S.W.2d 259, 264 (Tex. 1994).

[172] *Id.* at 264 n.6.

[173] *Id.* at 263.

[174] *Id.* at 263 n.4.

[175] *See, e.g.*, Cherry v. Victoria Equip. & Supply, Inc., 645 S.W.2d 781, 782 (Tex. 1983) (overturning summary judgment where some evidence showed that the defendant's principal owner falsely testified in a deposition that the defendant was not involved with the well that injured the plaintiffs; noting that the plaintiffs could have reasonably relied on his fraudulent assertions that the defendant was uninvolved and that the "ultimate duty to weigh the evidence, determine credibility and decide if fraudulent concealment actually existed rests upon the trier of fact"); Hurlbut v. Gulf Atl. Life Ins. Co., 749 S.W.2d 762, 765–66 (Tex. 1987) (reversing appellate court and holding that a fact issue was raised by the evidence regarding when plaintiffs should have discovered defendants'

The court's last important discovery rule case in the decade was *Willis v. Maverick.*[176] The case continued the expansive theme of the past by extending the applicability of the discovery rule exception to legal malpractice cases. In *Willis*, the plaintiff sued her divorce lawyer after he deleted from an earlier draft of the settlement agreement a provision that would have allowed her to continue living in the marital home. The plaintiff testified that the lawyer assured her that she could not be kicked out without her consent, even though he had removed the provision. When she later sued him for malpractice, more than two years after the divorce decree, with the settlement agreement, was entered, the lawyer argued that her malpractice claim was barred by limitations. The court found that her claim was timely, extending the discovery rule to legal malpractice claims.[177]

The court noted that the policy reasons it had offered for adopting the discovery rule exception in other case contexts, including actions for fraud (*Quinn*), credit libel (*Kelley*), and medical malpractice (*Gaddis* and *Hays*), "are no less compelling in legal malpractice actions."[178] In all of these cases, "it is difficult for the injured party to learn of the negligent act or omission," and it went on to emphasize the contrast between the lawyer's skill and sophistication and the "inability of the layman" to detect the professional's negligence.[179] *Willis* also justified applying the discovery rule exception in legal malpractice cases by pointing out the special fiduciary relationship between attorney and client.[180]

Additionally, *Willis* rejected one of the defendant's arguments, relying on the court's prior decision in *Robinson*, that the discovery rule exception should not apply in any professional malpractice case involving "professional diagnosis, judgment, and discretion."[181] First noting the slim margin of victory in *Robinson*, *Willis* summarily dismissed the "logic relied upon by the majority in *Robinson*"—which, as will be recalled, was premised on the idea that late-filed medical misdiagnosis cases pose a greater danger of being

fraud); *but see id.* at 769 (Robertson, J., dissenting from denial of motion for rehearing) (criticizing majority for its decision to remand case for new trial).

[176] 760 S.W.2d 642, 646 (Tex. 1988).

[177] *Id.*

[178] *Id.* at 645.

[179] *Id.*

[180] *Id.*

[181] *Id.* at 646.

fraudulent—as "untenable" in the legal malpractice context.[182] Finally, *Willis* also stressed that in deciding the discovery rule's applicability it was appropriate to weigh the relative burden on the parties. "[W]e believe that any burden placed upon an attorney by application of the discovery rule is less onerous than the injustice of denying relief to unknowing victims."[183]

In sum, by the end of the early period we can see that the court had firmly held that, notwithstanding the legal injury rule, limitations should often be deferred until the plaintiff knew or, by the use of reasonable diligence, should have known of the relevant facts giving rise to her claim. The court was often unclear in explaining what knowledge, exactly, is relevant to the discovery rule and equitable fraud exceptions but, at a minimum, it always required at least knowledge by the plaintiff that she had suffered some injury.

As a result of the court's tendency to take an expansive approach in applying the discovery rule and equitable fraud exceptions, the question of reasonable diligence was usually left to the jury to decide. To be sure, when there was undisputed evidence that the plaintiff knew or reasonably should have known of the facts giving rise to the claim, the court would refuse to delay commencement of limitations. However, even before *Gaddis*, the court took into account not just whether the parties were in a fiduciary relationship but also, in all cases, the parties' relative knowledge and sophistication. And it weighed the relative burden on the defendant of delaying limitations against the impact on the plaintiff of strictly applying the legal injury rule. All of these nuanced considerations allowed the court to fairly balance the competing policy interests of affording plaintiffs a fair opportunity to seek relief and the defendant's interest in finality.

H. A Final Aside: Remembering the General Rule

One final point bears making before concluding this part. Throughout, we have been focusing on how the court developed its discovery rule and equitable fraud exceptions. But, at the same time, it is important to keep in

[182] *Id.*

[183] *Id.* at 648. Unfortunately for Ms. Willis, the court concluded that the discovery rule could not save her claim because the lawyer who represented her in the malpractice case failed to request a jury issue in substantially correct wording. The issue only asked the jury to determine when she actually discovered that the divorce agreement contained a provision allowing for the partition and sale of the marital home, failing to ask about reasonable diligence. As Justice Mauzy noted in his separate opinion, Ms. Willis thus again became "twice victimized" by legal malpractice. *Id.* (Mauzy, J., concurring and dissenting).

mind that the legal injury rule often can be applied sensibly and fairly so as to obviate the need to resort to the discovery rule or equitable fraud exceptions. To illustrate, it is useful to think about cases that are precipitated by some other underlying dispute or proceeding. For instance, in the leading case of *Linkenhoger v. American Fidelity & Casualty Company, Inc.*, the plaintiff brought a *Stowers* suit against his insurance company alleging that the carrier had negligently rejected offers within policy limits to settle a separate personal injury suit that had been brought against him.[184] On appeal, the court held that since the plaintiff's liability in the personal injury suit could not be determined until a final judgment was rendered in that case and all appeals exhausted, the statute of limitations did not begin to run until then—rather than when the insurer had last refused to settle.[185] The plaintiff "could not have maintained this present suit until such time as his liability and the extent thereof had been determined by a final judgment in the former case. Until then his rights had not been invaded by respondent's failure to accept the terms of settlement offered and the tort was not complete."[186]

One of *Linkenhoger*'s progeny that arose in a different context is also instructive. In *Atkins v. Crosland*, the plaintiff's suit against his accountant for using an improper accounting method was held not to have accrued when the improper method was employed, but only after a tax deficiency was finally assessed by the government.[187] The court's reasoning was very

[184] 260 S.W.2d 884, 887 (1953), *overruled in part on other grounds by* Hernandez v. Great Am. Ins. Co., 464 S.W.2d 91, 95 (Tex. 1971) (*Stowers* action accrues when the judgment against the insured becomes final rather than when the insured actually made an excess payment to the original plaintiff, as *Linkenhoger* had previously held) *and by* Street v. Second Court of Appeals, 756 S.W.2d 299, 301–02 (Tex. 1988) (clarifying that "a judgment is final for the purposes of bringing a *Stowers* action if it disposes of all issues and parties in the case, the trial court's power to alter the judgment has ended, and execution on the judgment, if appealed, has not been superseded" but reaffirming *Linkenhoger* "that the statute of limitations will not begin to run until all appeals have been exhausted").

[185] *Linkenhoger*, 260 S.W.2d at 887 (1953).

[186] *Id.*; *but cf.* Murray v. San Jacinto Agency, Inc., 800 S.W.2d 826, 829 (Tex. 1990) (holding that bad faith claim against insurer arises when coverage is wrongfully denied, not when underlying suit is resolved. The court noted that the "injury producing event in a *Stowers* third party case [such as *Linkenhoger*] . . . accrues *when* the insurer unreasonably fails to settle a claim against the insured within policy limits [as the] injury producing event is the underlying judgment in excess of policy limits," but that a first party claim [as in *Murray*] "accrues when an insurer unreasonably fails to pay an insured under the policy"); Johnson & Higgins v. Kenneco Energy, 962 S.W.2d 507 (Tex. 1997) (accord).

[187] 417 S.W.2d 150, 153 (Tex. 1967).

practical: the outcome of the underlying dispute necessarily impacted whether the plaintiff had a subsequent claim for professional negligence. As the court explained:

> Prior to assessment the plaintiff had not been injured. That is, assessment was the factor essential to consummate the wrong—only then was the tort complained of completed. If a deficiency had never been assessed, the plaintiff would not have been harmed and therefore would have had no cause of action.[188]

Notice that the core idea in these cases is entirely consistent with the accepted understanding of the legal injury rule. They do not depart from the traditional approach by taking account of the plaintiff's knowledge in determining accrual. That is, the discovery rule exception does not figure in these decisions. Rather, the court's focus in applying the legal injury rule remained on the *defendant's* act, not the *plaintiff's* awareness that those acts injured her. Focusing only on the question from the defendant's perspective, as courts must when they apply the general accrual rule, the court concluded that there was no actionable legal injury—and so no accrual of the claim under the general rule—until the underlying personal injury suit was finally resolved (in *Linkenhoger*) or the plaintiff's tax deficiency was finally assessed (in *Atkins*).

We have elected to end this part of the paper by highlighting *Linkenhoger* and its progeny because, as the next part discusses, the court has occasionally forgotten the sensible approach. In the later period, the court has occasionally conflated the test for when a cause of action accrues under the general legal injury rule with whether a plaintiff's lack of knowledge of their injuries tolls limitations under the discovery rule exception. We argue that instead of reaching the discovery rule's potential applicability, the court should have first considered when the claim accrued under the general legal injury rule. The reason this matters is that, as we are about to see, in the post-*S.V.* and -*Altai* period the court has significantly narrowed the scope of the judicial exceptions to the legal injury rule. Consequently, by deciding that a case turns on the discovery rule and then ruling that the discovery rule was unavailable, the court has more fully restricted the scope of the judicial exception to toll limitations.

[188] *Id.*

III. RESTRICTING THE EXCEPTIONS

We have seen that from its earliest cases all the way through the end of the 1980s, the Texas Supreme Court's decisions applying the common law discovery rule and equitable fraud exception followed a remarkably consistent trend of reading the exceptions expansively. But these longstanding trends were not to last. By the mid-1990s, it became apparent that the court had started to make a dramatic shift in its approach to applying the common law discovery rule and equitable fraud exceptions to the legal injury rule.

One aspect of the court's redirection has been a much greater willingness to treat the determination of what the plaintiff knew or should have known as a question to be determined as a matter of law. Additionally, in the later period the court has been much more likely to minimize a defendant's intentional efforts to fraudulently conceal its wrongdoing. We explore both of these trends below.

A. *Last Vestiges of the Early Period*

Although the court was about to shift direction dramatically, in one of its first discovery rule decisions of the 1990s, *Burns v. Thomas*, the court continued to follow its longstanding approach.[189] The issue in the case was when did a client's cause of action for legal malpractice accrue. The lawyer's negligence in *Burns* was his failure to appeal a *judgment non obstante veredicto* rendered against his client. The client argued that he only found out that his lawyer failed to appeal within two years of when he sued him for malpractice.

The court reversed the court of appeals' decision that had affirmed the trial court's grant of summary judgment. Following its earlier decision in *Willis*, *Burns* held that the statute of limitations does not begin to run on a legal malpractice claim until the former client discovers, or in the exercise of reasonable diligence should have discovered, the lawyer's negligent acts that establish a cause of action for malpractice.[190] What's especially notable about *Burns* is that the court did not even consider the possibility that the client might have been on constructive notice that the lawyer had failed to appeal. That's at least a little surprising, given that the underlying judgment and docket sheet were all publicly available. But it is only surprising to one

[189] 786 S.W.2d 266 (Tex. 1990).

[190] *Id.* at 267.

unfamiliar with the court's remarkably consistent approach throughout the earlier period of applying the discovery rule expansively and, more specifically, its willingness to take into account the relative knowledge and sophistication of the parties in deciding a plaintiff's reasonable diligence. Following the traditional approach, *Burns* held that the lawyer had not carried his burden of proving as a matter of law that there was no genuine issue of fact about when the plaintiff discovered or should have discovered the nature of the injury.[191]

As it turns out, the next case involving the discovery rule also concerned legal malpractice, but the nature of the lawyer's negligence differed in important ways from the legal malpractice that the court had previously considered. What *Hughes v. Mahaney & Higgins* shares in common with the earlier legal malpractice cases, however, is that the court also applied the discovery rule exception expansively, just as it had previously done in *Burns* and *Willis*.[192]

The most interesting part of *Hughes* is that while the court correctly held that the plaintiffs' claim was not time-barred, the decision failed to keep straight the difference between determining accrual under the general legal injury rule and the application of the discovery rule exception. In other words, the court reached the right result, but for the wrong reasons.

In *Hughes*, which has become one of the leading cases on the accrual date for legal malpractice claims, the clients hired a lawyer to help with an adoption. As part of the legal proceedings, the lawyer filed an affidavit in which he mistakenly named himself, rather than his clients, the child's temporary managing conservator. Ultimately, that mistake meant that the clients were unable to adopt the child after an appellate court held that they lacked standing to terminate the parental rights of the biological parents (who had a change of heart in the middle of the adoption process).[193]

The clients then sued their former lawyer for malpractice. The question in *Hughes* was when did their claim accrue for limitations purposes. Citing *Willis*, the court reiterated that a cause of action for legal malpractice accrues when the client sustains a legal injury or, in cases governed by the discovery

[191] *Id.* at 268 ("The summary judgment proof does not establish when Burns discovered or should have discovered the facts giving rise to his causes of action. The resolution of this fact question is material to whether Burns' suit against Thomas is barred by limitations.").

[192] 821 S.W.2d 154 (Tex. 1991).

[193] *Id.* at 155–56.

rule, when the client discovers or should have discovered the facts establishing the elements of a cause of action.[194] The court went on to articulate two policy concerns with commencing the limitations period before all appeals on the underlying claim were exhausted. The court first noted that when the claim is for legal malpractice, "the legal injury and discovery rules can force the client into adopting inherently inconsistent litigation postures in the underlying case and in the malpractice case."[195] Secondly, the court also pointed out that a legal malpractice action is inherently linked to what happens in the underlying matter in which the lawyer is accused of having acted negligently.[196] "[T]he viability of the second cause of action [for malpractice] depends on the outcome of the first."[197]

Conscious of these policy concerns, *Hughes* applied the discovery rule exception expansively to save the plaintiffs' claim. However, what is notable about the court's decision is that it could—and should—have followed its prior precedents, specifically, the *Linkenhoger* line of cases, which were squarely on point, to reach the same ultimate result. Just as the court had previously concluded in these earlier cases that the plaintiffs' claims did not accrue under the general legal injury rule until the underlying disputes were finally resolved, there was no actionable injury in *Hughes* until there was a final judicial determination in the underlying parental termination case.

[194] *Id.* at 156.

[195] *Id.*

[196] *Id.* at 157.

[197] *Id.* The court also further distinguished *Hughes* by noting that the earlier case was "expressly limited to claims against a lawyer arising out of litigation where the party must not only assert inconsistent positions but must also obtain new counsel." Murphy v. Campbell, 964 S.W.2d 265, 273 (Tex. 1997). This was a strange suggestion—that a client's malpractice claim might accrue even before the underlying litigation was finally resolved if the client replaced the allegedly negligent attorney during the pendency of the case—since hiring a new attorney would not avoid the problem of the client having to adopt inconsistent positions in the underlying case and the subsequent malpractice suit. The court later had to walk back this passage and clarify that *Murphy* had not added a continued-representation requirement to the *Hughes* tolling rule. *See* Apex Towing Co. v. Tolin, 41 S.W.3d 118, 121 (Tex. 2001) ("In this case, the court of appeals added a continued-representation requirement based on statements about *Hughes* drawn from *Murphy*. While we understand how that court could reach that conclusion, we reiterate that continued representation by the allegedly malpracticing attorney was not a requirement set out in *Hughes*. Hiring a new attorney would not necessarily eliminate the problem of a client having to adopt inconsistent positions in the underlying case and the malpractice case.").

What's most remarkable about the court's oversight in *Hughes* is that the reasoning it articulated for tolling limitations under the discovery rule was nearly identical to what it had said in the earlier cases. For instance, in holding that the plaintiff's cause of action in *Atkins* did not arise until the IRS Commissioner assessed the tax deficiency (which the plaintiff had not challenged in court), the court said: "[A]ssessment was the factor essential to consummate the wrong—only then was the tort complained of completed. If a deficiency had never been assessed, the plaintiff would not have been harmed and therefore would have had no cause of action."[198] That, of course, is identical to the reasoning *Hughes* employed in noting that "the viability of the second cause of action [for legal malpractice] depends on the outcome of the first."[199]

The older cases are also similar in that they were influenced by concern over the policy consequences of starting limitations before the underlying dispute was fully resolved. In *Hughes*, the expressed policy concern was that it would place legal malpractice plaintiffs in an untenable conflict if they had to sue before the underlying litigation was resolved. Similarly, in one of *Linkenhoger*'s progeny, the court affirmed the core holding of *Linkenhoger* and emphasized a similar practical rationale for its decision. Ruling that an insured who so wishes may still wait until the underlying action has been completely resolved before bringing a *Stowers* suit, the court in *Street v. Second Court of Appeals* said: "No valid public policy is served by forcing an insured to bring an action which may ultimately prove unnecessary."[200]

In a series of subsequent decisions, the court extended the tolling rule of *Hughes*.[201] In all of these cases, the court similarly found that the discovery rule saved the claims from being time-barred. But in none of these cases did it consider that the same result would have been reached if it had applied the general legal injury rule to find that the claims did not accrue—and, thus,

[198] 417 S.W.2d 150, 153 (Tex. 1967).

[199] 821 S.W.2d at 157.

[200] 756 S.W.2d 299, 302 (Tex. 1988).

[201] *See, e.g.*, Aduddel v. Parkhill, 821 S.W.2d 158 (Tex. 1991), *overruled by* Underkofler v. Vanasek, 53 S.W.3d 343 (Tex. 2001) (affirming that limitations tolled for common law legal malpractice claims under *Hughes*, but refusing to follow *Aduddel* in extending *Hughes* tolling to DTPA claims); Gulf Coast Inv. Corp. v. Brown, 821 S.W.2d 159 (Tex. 1991); Am. Centennial Ins. Co. v. Canal Ins. Co., 843 S.W.2d 480 (Tex. 1992); Sanchez v. Hastings, 898 S.W.2d 287 (Tex. 1995); Apex Towing Co. v. Tolin, 41 S.W.3d 118,119 (Tex. 2001) (reaffirming that "[w]hen an attorney commits malpractice in the prosecution or defense of a claim that results in litigation, the statute of limitations on a malpractice claim against that attorney is tolled until all appeals on the underlying claim are exhausted or the litigation is otherwise finally concluded").

limitations did not begin to run—until the client's underlying cases were finally resolved. While *Hughes* and its progeny did not cause any immediate problems because the cases reached the right result, the court's continued confusion about the difference between the legal injury rule and the discovery rule exception has enabled the court's stricter approach in the later period. And, as we will see, without overruling its prior decisions, the court's post-*Altai* and -*S.V.* decisions call into question whether the *Linkenhoger* line of cases has been overruled *sub silentio*. But before we get there, we must first turn to that pair of 1996 cases that mark a critical pivot point in the court's discovery rule and equitable fraud jurisprudence.

B. The Shift Begins: Altai *and* S.V.

As much as any single date can mark a shift in the Texas Supreme Court's jurisprudence, March 14, 1996 must be considered. Although these were not the first cases in the decade in which the court ruled that the discovery rule exception did not save a plaintiff's claim,[202] the court's decisions in *Computer Associates Int'l, Inc. v. Altai, Inc.*[203] and *S.V. v. R.V.*[204] dramatically mark the new direction that the court decided to take. These shifts were not immediate, but by the end of the 1990s, it would have been clear to keen-eyed observers that the court had initiated a radically different approach to applying the exceptions to the legal injury rule.

In both *Altai* and *S.V.*, the Texas Supreme Court held that the discovery rule exception did not apply, respectively, in trade secret misappropriation cases and as to claims relating to childhood abuse.[205] What's most significant about *Altai* and *S.V.* is their articulation of a two-part test governing the discovery rule exception's applicability. The court said that it distilled from its prior cases "a unifying principle" to help it balance the competing policies that are at stake whenever the discovery rule exception may be used to delay

[202] *See* Jennings v. Burgess, 917 S.W.2d 790, 794 (Tex. 1996) (holding that medical malpractice claim was barred by limitations because plaintiff had actual knowledge that claim for negligent referral to non-specialist was actionable on date that referral was made, which was more than two years before suit was filed); Baptist Mem. Hosp. Sys. v. Arredondo, 922 S.W.2d 120, 121 (Tex. 1996) (holding that intermediate court incorrectly applied statute's tolling provision for minors to an adult beneficiary's claim and upholding the statute against a constitutional challenge under article I, sections 13 (open courts provision) and 19 (due course of law provision)).

[203] 918 S.W.2d 453 (Tex. 1996).

[204] 933 S.W.2d 1 (Tex. 1996).

[205] *Altai*, 918 S.W.2d at 453; *S.V.*, 933 S.W.2d at 25.

accrual of the limitations period.[206] That unifying principle was articulated as two separate requirements for the discovery rule to apply: "Generally, application has been permitted in those cases where the nature of the injury is inherently undiscoverable and the evidence of injury is objectively verifiable."[207] The court in *Altai* also rejected a constitutional challenge to not applying the discovery rule, but the court's treatment was so superficial and unconvincing that it has literally been cited by only two other courts.[208] The court subsequently addressed the constitutional issue more thoroughly in a number of later cases; we'll return to this issue when we address those cases, below.[209] Here our focus remains on the court's articulation of the two-part test for the discovery rule.

1. Inherently Undiscoverable

While the Texas Supreme Court had never previously used the phrase, "inherently undiscoverable," a number of intermediate appellate courts had. And, in every instance, it was used to capture the core concept already firmly embedded in the Supreme Court's prior cases about the discovery rule. As one court put it, the discovery rule exception applies "where plaintiff possesses an inherently undiscoverable cause of action, which is not considered to accrue until plaintiff discovers or through the exercise of reasonable care and diligence should discover the nature of an injury."[210] At various places, *Altai* mirrored this established understanding.[211] It also said that the requirement of inherent undiscoverability "recognizes that the discovery rule exception should be permitted only in circumstances where 'it is difficult for the injured party to learn of the negligent act or omission,'" quoting *Willis*.[212]

Note that *Altai* spoke in terms of knowledge "of the facts giving rise to the cause of action," leaving unanswered whether those facts included

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[206] *Altai*, 918 S.W.2d at 456.

[207] *Id.*

[208] *See* Mitchell Energy Corp. v. Bartlett, 958 S.W.2d 430, 445 (Tex. App.—Fort Worth 1997, writ denied); Rogers v. Ricane Enters., Inc., 930 S.W.2d 157, 170 (Tex. App.—Amarillo 1996, writ denied).

[209] *See infra* Section III(C)1.

[210] Casarez v. NME Hosps., Inc., 883 S.W.2d 360, 364 (Tex. App.—El Paso 1994, writ dism'd by agr.) (citing *Moreno*, 787 S.W.2d at 351; *Weaver*, 561 S.W.2d at 794).

[211] 918 S.W.2d at 455.

[212] *Id.* at 456 (quoting *Willis*, 760 S.W.2d at 645).

knowledge of injury only or also of the causal connection between the injury and the defendant's wrongful actions.[213] By comparison, *S.V.* described the discovery rule as tolling limitations until there was actual or constructive knowledge of "the wrongful act and resulting injury," suggesting that mere knowledge of injury would not start the limitations clock.[214] This lack of consistency is notable, but not surprising, given that the court also struggled throughout the earlier period to more precisely describe the information that is relevant in applying the discovery rule.[215] What was surprising was how the court applied the inherently undiscoverable requirement in *Altai*.

Before he stopped working for the plaintiff, an employee secretly made copies of the source code for a product that contained trade secrets. It was undisputed that the plaintiff had no actual knowledge of the theft. What's more, even the defendant did not learn that the code had been copied until after suit had been filed. Promptly after it learned that its ex-employee had stolen the code, the plaintiff filed suit—but that was more than two years after the theft had occurred. In a certified question from a federal circuit, the court was asked whether the discovery rule applied to save the plaintiff's trade secret claim from being time barred under the legal injury rule. (The relevant limitations statute provided, as they usually do, that the plaintiff's claim had to be brought with two years after the cause of action "accrues.") The court answered that the discovery rule did not apply.[216]

Some parts of the court's opinion seemed to treat the inherently undiscoverable requirement as a straightforward extension of the familiar inquiry into what the plaintiff knew or should have known. The court wrote at length about the reasons why the plaintiff should have been more suspicious when its competitor came out with a similar product and how it then should have acted on those suspicions, such as by undertaking computer forensics work, to determine if its code had been stolen.[217] Note that, factually, these conclusions were highly dubious since even before the rogue employee left the plaintiff's employ the defendant had already developed a computer program that was similar to the program that the employee later

[213] *Id.* at 455.

[214] 933 S.W.2d 1, 4 (Tex. 1996).

[215] *See supra* text accompanying notes 168–180.

[216] *Altai*, 918 S.W.2d at 453.

[217] *Id.* at 457.

worked on using the plaintiff's stolen code.[218] Even more damningly, the defendant stipulated at trial that the plaintiff "did not know or have reason to know of [the defendant's] alleged misappropriation within the two-year statute of limitations."[219] But whatever its factual failings, conceptually this part of the court's opinion seemed to treat the inherently undiscoverable requirement as a straightforward inquiry into what the plaintiff knew or, in the exercise of due diligence, should have known.

Yet other critical parts of the court's opinion make clear that it had something else entirely different in mind. "Inherently undiscoverable," the court announced, quite unexpectedly, "encompasses the requirement that the existence of the injury is not ordinarily discoverable, *even though due diligence has been used*."[220] This statement was unexpected because, until *Altai*, the court had consistently framed the discovery rule's application solely in terms of what the plaintiff knew, "or, in the exercise of reasonable care and diligence," should have known.[221] As we just saw, even *Altai*—oddly—recited this same familiar standard at another part of the opinion. Certainly, the few decisions in the pre-1996 period that refused to apply the discovery rule always framed the relevant inquiry in terms of what the plaintiff knew or should have known through the exercise of ordinary diligence.[222] But *Altai* nevertheless asserted that we determine whether a claim is inherently undiscoverable without asking whether, on the facts and circumstances of the case, it was reasonable to expect the plaintiff in this case to have detected the misappropriation.

So how are courts supposed to decide whether the discovery rule applies? The answer *Altai* gave was peculiar, but clear: it decides by case category or type. "While some trade secret misappropriations might not be quickly discovered, this isolated fact does not alter the reality that, in most cases, trade secret misappropriation generally is capable of detection within the time allotted for bringing such suits."[223] But in *Altai* it was undisputed that the

[218] *Id.* at 454 ("Before Arney left Computer Associates, Altai developed ZEKE, a job scheduling program for IBM mainframe computers which was similar to CA-SCHEDULER.").

[219] *Id.* at 456.

[220] *Id.* (emphasis added).

[221] *See supra* Part IIC.

[222] *See, e.g.*, Robinson v. Weaver, 550 S.W.2d 18, 19–20 (Tex. 1977) (holding that tolling begins when the plaintiff learns of the existence or should have learned of the existence of the malpractice).

[223] *Altai*, 918 S.W.2d at 457.

misappropriation wasn't capable of detection within the limitations period. So the implication was unavoidable: the court chose to affirmatively ignore the actual facts and circumstances of the case in favor of its own view of the desirability of applying the discovery rule to any trade secret cases. The plaintiff's claim in *Altai* was barred by limitations not because it should have suspected that its code had been stolen but because the court simply decided that the discovery rule categorically should not be available. "Because misappropriation of trade secrets is not a cause of action that is inherently undiscoverable," the court concluded, the discovery rule did not apply.[224]

It ought to be evident that this kind of categorical approach to the discovery rule, one that ignores the actual facts of the case, is antithetical to reasons why the court had long ago embraced a discovery rule exception to the legal injury rule. Even *S.V.* recognized that in its prior cases "when the wrong and injury were unknown to the plaintiff because of their very nature and not because of any fault of the plaintiff, accrual of the cause of action was delayed."[225] The long-accepted rationale that the discovery rule should be applied when, based on the facts and circumstances of the case, an innocent plaintiff lacks any knowledge that she has been injured, is irreconcilable with *Altai*'s categorical approach.

It is also evident that *Altai*'s approach is fundamentally at odds with the core judicial responsibility to determine when a cause of action accrues. Courts are tasked with this responsibility by the legislature whenever it enacts an accrual statute; by definition, reliance on an accrual limitations statute assumes that courts are better positioned to decide when limitations should commence, based on the particular facts and circumstances of each case. By insisting that courts must ignore the particular facts and circumstances, *Altai* renders unrecognizable this conception of the court's delegated role. Indeed, the legislature apparently reached the same conclusion: only a year later, in response to the court's decision in *Altai*, it enacted a new statutory section that extended the limitations period from two to three years and adopted the discovery rule for determining the accrual of a trade secret claim.[226]

Finally, consider how *Altai*'s reformulation of the discovery rule shifts decision-making power from the trier of fact to the court. The plaintiff no

[224] *Id.*

[225] 933 S.W.2d 1, 7 (Tex. 1996).

[226] TEX. CIV. PRAC. & REM. CODE ANN. § 16.010; Baker Hughes, Inc. v. Keco R & D, Inc., 12 S.W.3d 1 (Tex. 1999) (acknowledging adoption of Section 16.010).

longer has an opportunity to have a jury decide whether it acted with reasonable diligence; instead, the court will now decide as a matter of law whether the discovery rule can be used to delay commencement of limitations. In this way, the court also departed from one of the central tenets of the early period: namely, that whether the plaintiff acted with reasonable diligence was usually treated as a question of fact for the jury to decide.[227]

2. Objectively Verifiable

As for the second requirement, of objective verifiability, *Altai* only briefly mentioned it, noting that application of the discovery rule has been permitted only when "the evidence of injury" was also objectively verifiable. Because *Altai* concluded on the facts of that case that the injury was not inherently undiscoverable, it did not reach this second requirement and so did not further elaborate on or explore it. The court did reach this second requirement in *S.V.* where it went into great detail in deciding whether the evidence—of repressed memory of childhood abuse—was sufficient to satisfy the objectively verifiable requirement.[228] We will limit our remarks about the objective verifiability requirement as articulated by *S.V.* to two main points.

The first thing to say is that the argument for objective verifiability as a discovery rule requirement necessarily assumes that a core purpose of having a statute of limitations is to avoid fraudulent claims. As we have already noted, *Robinson* was the first case in which the Texas Supreme Court asserted that preventing fraud was a "primary purpose" of statutes of limitations.[229] But while it is fair to say that the reasons why legislatures enact statutes of limitations require more careful explanation than is usually given—Justice Robert H. Jackson famously observed that limitations statutes "always have vexed the philosophical mind"[230]—the suggestion that limitations primarily are meant to reduce fraudulent claims is very weak.[231]

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[227] *See supra* Part IIC1.

[228] 933 S.W.2d at 6–8.

[229] *See supra* text accompanying notes 134–140; *see also S.V.*, 933 S.W.2d at 6.

[230] Chase Sec. Corp. v. Donaldson, 325 U.S. 304, 313 (1945).

[231] A discussion of the various policy goals sought to be furthered by a statute of limitations has been comprehensively addressed elsewhere. *See e.g.*, Andrew J. Wistrich, *Procrastination, Deadlines, and Statutes of Limitations*, WM. & MARY L. REV. 607 (2008); Ochoa & Wistrich, *supra* note 130.

Certainly, there is no reason to assume a correlation between the length of time it takes a claimant to bring a claim and the claim's merit, as Tyler Ochoa and Andrew Wistrich have persuasively shown.[232] Perhaps it might be said that as evidence gets older, it is harder for the defendant to rebut the plaintiff's claim. Yet, while limitations statutes "reduce the error costs associated with the use of stale evidence," as Richard Posner has noted, it is just as likely that those costs will hurt the plaintiff more than the defendant.[233] Given that it is the plaintiff who bears pleading and evidentiary burdens, we should expect that faded memories, lost documents, and other evidentiary impairments that result over time will fall more heavily on the party who bears the burden of proof.

In any event, judicial systems already manage the risk that weaker evidence will enable nonmeritorious claims by imposing procedural,[234] evidentiary,[235] and substantive[236] hurdles to ensure that the proof offered is sufficiently reliable to be considered by the fact finder. These pleading- and merits-assessing tools are designed to address spurious claims—and the courts have strengthened them considerably over the years.[237]

By contrast, as Michael Sean Quinn has pointed out in his penetrating dissection of *S.V.*, an inquiry into the quality of evidentiary proof has no functional relevance to whether a claim has been timely filed.[238] Consider that if a claimant brings suit within the period prescribed by the legislature, she is "entitled to prosecute her claim despite any weaknesses in her proof," as the court in *S.V.* even acknowledged.[239] That doesn't provide any reasoned basis for insisting on greater verifiability if the claim is filed after limitations. To the contrary, it underscores the disjunction between evidentiary proof of a claim and a claim's timeliness. After all, consider the converse of the point

[232] Ochoa & Wistrich, *supra* note 130, at 497.

[233] RICHARD A. POSNER, ECONOMIC ANALYSIS OF THE LAW at 98 (Aspen 9th ed. 2011).

[234] *See, e.g.*, Tex. R. Civ. P. 91a (motion to challenge pleading sufficiency); Fed. R. Civ. P. 12(b)(6) (same); Tex. R. Civ. P. 166a (motion for summary judgment); Fed. R. Civ. P. 56 (same).

[235] *See, e.g.*, TEX. BUS. & COM. CODE ANN. § 26.01 (statute of frauds).

[236] *See, e.g.*, Hubacek v. Ennis State Bank, 317 S.W.2d 30 (Tex. 1958) ("The parol evidence rule is not a rule of evidence, but a rule of substantive law.").

[237] *See, e.g.*, Ashcroft v. Iqbal, 556 U.S. 662 (2009) (addressing pleading sufficiency challenges); *see generally* Lonny Hoffman, *Twombly and Iqbal's Measure: An Assessment of the Federal Judicial Ctr's Study of Motions to Dismiss*, 6 FED. COURTS L. REV. 1 (2012).

[238] Michael Sean Quinn, *Memory, Repression and Expertise: Civilly Actionable Sexual Misconduct in Texas and Individual Rights*, 3 TEX. F. CIV. RTS. & CIV. LIBERTIES 1, 60 (1997).

[239] 933 S.W.2d 1, 25 (Tex. 1996).

made by the *S.V.* majority: even if a plaintiff did come forward with the most convincing, objectively rock-solid evidence possible, we would not allow an untimely claim to be filed if the plaintiff knew or should have known of her injury before limitations expired. Put simply, demanding a higher level of proof in order to invoke the discovery rule exception to the legal injury rule does not advance any policy purposes behind statutes of limitations that are indifferent to the merits of claims.

What does advance the true policy purposes behind limitations statutes is the inherently undiscoverable requirement. It ensures that the limitations period affords a reasonable time for claims to be presented but is not extended for one who cannot justify his delay in bringing suit. The inherently undiscoverable requirement speaks directly to what we care most about in balancing policy interests in the application of arbitrary time limitations: providing a reasonable opportunity for the exercise of legal rights without sacrificing the defending party's rights to prepare an adequate defense and to finality. In its more perspicacious moments, the court has better articulated, and confined itself to, these central policy considerations, avoiding any temptation to suggest that the quantum and nature of the plaintiff's proof bears relevance to whether her claim should be barred by limitations.[240]

Which brings us to the other point to make about *S.V.*'s poorly fashioned objective verifiability requirement. Even if one were convinced that the policies underpinning limitations could be linked to having a verifiability of proof requirement, the question then would be how high the evidentiary bar should be set. And, on this basis alone, the majority's decision is contestable. The court simply imposed the highest and most difficult level imaginable

[240] *See, e.g.*, Moreno v. Sterling Drug, Inc., 787 S.W.2d 348, 352 (Tex. 1990) (referring to "our oft-repeated pronouncement that the 'purpose' of all limitation statutes is to compel the exercise of a right of action within a reasonable time so that the opposing party has a fair opportunity to defend while witnesses are available" (citing Willis v. Maverick, 760 S.W.2d 642, 644 (Tex. 1988))); Robinson v. Weaver, 550 S.W.2d 18, 20 (Tex. 1977); Price v. Anderson's Estate, 522 S.W.2d 690, 692 (Tex. 1975); United States v. Kubrick, 444 U.S. 111, 117 (1979)); Murray v. San Jacinto Agency, Inc., 800 S.W.2d 826, 828 (Tex. 1990) ("Limitations statutes afford plaintiffs what the legislature deems a reasonable time to present their claims and protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents or otherwise. The purpose of a statute of limitations is to establish a point of repose and to terminate stale claims."); Comput. Assocs. Int'l, Inc. v. Altai, Inc., 918 S.W.2d 453, 455 (Tex. 1994) ("The purpose of statutes of limitations is to compel the assertion of claims within a reasonable period while the evidence is fresh in the minds of the parties and witnesses").

without even trying to defend why it did so. This was Justice Owen's principal complaint in her dissent. The majority could have said that the objectively verifiable requirement is met if the plaintiff offers credible lay testimony, along with well-qualified expert testimony, that her claim was plausible.[241] This would still have disallowed late-filing plaintiffs from benefitting from any exception to the legal injury rule if their proof of their claim would be insufficient to support a jury's verdict if the claim had been timely filed. Such a standard would not have made it virtually impossible to meet the evidentiary standard in a case dependent on the application of the discovery rule. Yet, that is exactly what the majority opinion in *S.V.* did, for no obvious reason related to limitations policies.

Because the *S.V.* case involved the most sympathetic of plaintiffs, the lesson it offers to litigants and the lower courts could not have been clearer: the court's newly-crafted objective verifiability standard was meant to be as high as it can possibly be. That is, since the evidence that the abused child offered in *S.V.* was deemed insufficient to allow her the benefit of the discovery rule, it is hard to imagine very many that will be able to meet such an exacting evidentiary standard.

The good news is that objective verifiability has played a pretty minor role in the discovery rule cases since *Altai* and *S.V.* This is mostly because both the Supreme Court and lower courts have realized, consciously or not, that the inherently undiscoverable requirement adequately—and directly—addresses the core issues at stake in the application of the discovery rule.

The bad news is that the court has never disavowed its objective verifiability requirement. In consequence, the results in the lower courts have been exactly what you would expect. In those (thankfully, relatively rare) instances when it has been invoked, the objective verifiability requirement has proven an almost insurmountable barrier for claimants to overcome.[242]

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[241] *S.V.*, 933 S.W.2d at 29.

[242] *See, e.g.*, Moczygemba v. Moczygemba, 466 S.W.3d 212, 218 (Tex. App.—San Antonio 2015, pet. denied) (rejecting application of discovery rule based on lack of objectively verifiable evidence); Austin Indep. Sch. Dist. v. Lofters, No. 03-14-00071-CV, 2015 WL 1546083, at *4 (Tex. App.—Austin, Apr. 1, 2015, no pet.) (finding claim not to be "objectively verifiable," as well as not inherently undiscoverable).

C. The Court Cements its Stricter Approach

In the post-1996 period, the vast majority of the court's discovery rule and equitable fraud decisions have followed the constrictive approach that the court adopted in *Altai* and *S.V.*, as Table 2 reflects. One way it has done so is by rejecting the application of the discovery rule or equitable fraud exceptions to whole classes of cases.[243] The court has also held that its prior cases that repeatedly found constitutional violations in the earlier period (in *Sax*, *Krusen*, *Neagle*, *Hellman*, and *Weiner*[244]) were only describing constitutional limits on limitations statutes and that, by contrast, the legislature can use a repose statute to cut off an adult plaintiff's right to sue, regardless of whether the injury could have been discovered during the repose period.[245] Finally, and most commonly, the court's narrowing of the exceptions to the legal injury rule has played out along the two main dimensions that we saw above and now more fully explore below.

[243] Frost Nat'l Bank v. Fernandez, 315 S.W.3d 494, 511 (Tex. 2010) (holding that the discovery rule does not apply to bills of review in which non-marital children seek to set aside probate judgments); Little v. Smith, 943 S.W.2d 414, 420 (Tex. 1997) (ruling that the discovery rule does not apply to an adoptee's claim for share of assets of decedent's estate and noting that "Texas courts have refused to apply the discovery rule to claims arising out of probate proceedings in most instances . . . ."); Diaz v. Westphal, 941 S.W.2d 96, 99 (Tex. 1997) (recognizing that the legislature abolished the discovery rule in medical malpractice cases); Schneider Nat'l Carriers, Inc. v. Bates, 147 S.W.3d 264, 279 (Tex. 2004) (affirming summary judgment for defendant on limitations grounds and noting that discovery rule tolling in nuisance cases is "rare"); Gonzales v. Sw. Olshan Found. Repair Co., LLC, 400 S.W.3d 52, 58 (Tex. 2013) (equitable fraudulent concealment does not apply to toll limitations for DTPA claims); Exxon v. Lazy R Ranch, 511 S.W.3d 538, 544 (Tex. 2017) (reiterating that discovery rule tolling in nuisance cases is rare because "plaintiffs typically learn of unreasonable discomfort or annoyance promptly").

[244] *See supra* Part IIF.

[245] *See* Methodist Healthcare Sys. v. Rankin, 307 S.W.3d 283 (Tex. 2010); Tenet Hosps. Ltd. v. Rivera, 445 S.W.3d 698 (Tex. 2014); *cf. also* Walters v. Cleveland Reg'l Med. Ctr., 307 S.W.3d 292, 297 (Tex. 2010) (upholding open courts challenge to two-year limitations statute that did not provide adult plaintiff reasonable opportunity to discover her injuries resulting from surgical sponge negligently left inside her, but emphasizing the "singularity of sponge cases" without noting that it had also similarly found constitutional violations in *Sax*, *Krusen*, and *Hellman*, even though none involved sponges).

1. Discovery Rule: What the Plaintiff Knew or Reasonably Should Have Known Decided as a Matter of Law

As we have seen, in the earlier period the court usually considered the plaintiff's knowledge and reasonable diligence in learning of a potential claim as questions to be determined by the fact-finder.[246] The court had stressed that the discovery rule exception properly applies when "it is difficult for the injured party to learn of the negligent act or omission" and that in deciding the discovery rule's applicability it is necessary to weigh the relative burden on the parties in accessing information.[247] Even in *S.V.*, the court had said that to be inherently undiscoverable "an injury need not be absolutely impossible to discover, else suit would never be filed and the question whether to apply the discovery rule would never arise."[248]

By contrast, in the later period the court has been far more likely to decide these questions as a matter of law. Of course, there are some exceptions,[249] but in the overwhelming majority of cases in the post-1996 period, the court held, as a matter of law, that the plaintiff was not diligent enough—*i.e.*, the inherently undiscoverable requirement could not be satisfied. We discuss a number of the court's most significant decisions below.

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[246] Willis v. Maverick, 760 S.W.2d 642, 644 (Tex. 1988).

[247] *Id.* at 645.

[248] 933 S.W.2d 1, 7 (Tex. 1996).

[249] Childs v. Haussecker, 974 S.W.2d 31, 40 (Tex. 1998) (holding that the discovery rule defers accrual of a cause of action based on a latent occupational disease "until a plaintiff's symptoms manifest themselves to a degree or for a duration that would put a reasonable person on notice that he or she suffers from some injury and he or she knows, or in the exercise of reasonable diligence should have known, that the injury is likely work-related"); Rhone-Poulenc, Inc. v. Steel, 997 S.W.2d 217 (Tex. 1999) (holding that defendant did not carry its summary judgment burden to show that, as a matter of law, plaintiff knew or in the exercise of reasonable diligence should have known of injuries and that they were related to defendant's negligence); Pustejovsky v. Rapid-Am. Corp., 35 S.W.3d 643 (Tex. 2000) (holding that fact issue precluded summary judgment and extending its application of discovery rule for latent occupational diseases in *Childs* to mesothelioma case); Apex Towing Co. v. Tolin, 41 S.W.3d 118 (Tex. 2001) (holding that injury not inherently undiscoverable); Lesley v. Veterans Land Bd. of State, 352 S.W.3d 479 (Tex. 2011) (holding that whether plaintiff knew or should have known of mistake in deed involves disputed facts for jury); Sw. Energy v. Berry-Helfand, 491 S.W.3d 699 (Tex. 2016) (holding that plaintiff's reasonable diligence in case could not be determined as a matter of law).

a. *HECI v. Neel*

One of the most significant of the court's cases in the post-1996 period has been *HECI v. Neel.*[250] Subsequent decisions, both in the oil and gas context and outside of that context, testify to its influence on the Supreme Court's limitations jurisprudence[251] and, as would be expected, among the lower courts.[252]

In *HECI*, after the lessee discovered that an adjacent operator had been illegally draining a common reservoir beneath the property, it complained to the Railroad Commission and then later sued the other operator.[253] But the lessee never told its lessors about the illegal drainage or that it had sued the other operator.[254] And here's the real kicker: even after HECI recovered a multimillion-dollar judgment, it still didn't say anything to its royalty owners, even though the judgment awarded damages for the loss of *all* revenues in the wells, of which the royalty owners had a 1/6 royalty interest.[255] Instead, it reached a post-judgment settlement with the other operator, pocketed all of the money, and said nothing.

The lessors discovered all of this years later and brought their own action against the lessee for failing to inform them of the illegal drainage and for not telling them that it had sued the other operator.[256] The Texas Supreme Court ultimately held in *HECI* that the claim by the royalty owners against its lessee for failing to notify them of the adjacent operator's illegal drainage was not inherently undiscoverable.[257] According to the court, the royalty

[250] 982 S.W.2d 881 (Tex. 1998).

[251] *See, e.g.*, Conoco, Inc. v. Amarillo Nat'l Bank, 996 S.W.2d 853 (Tex 1999) (mem op) (civil conversion of accounts receivable case remanded for reconsideration in light of *HECI*); Union Pac. Res. Co. v. Hutchinson, 986 S.W.2d 610 (Tex. 1999) (mem op) (royalty interest case also remanded to consider *HECI*); Wagner & Brown, Ltd. v. Horwood, 58 S.W.3d 732 (Tex. 2001); Via Net v. TIG Ins. Co., 211 S.W.3d 310 (Tex. 2006) (contractual indemnity case); Kerlin v. Sauceda, 263 S.W.3d 920 (Tex. 2008) (oil and gas royalty dispute involving claims for breach of contract, breach of fiduciary duty, fraud, and conspiracy); BP Am. Prod. Co. v. Marshall, 342 S.W.3d 59 (Tex. 2011) (oil and gas mineral lease dispute); Cosgrove v. Cade, 468 S.W.3d 32 (Tex. 2015) (deed reformation case).

[252] In a search of published cases in the Westlaw database, *HECI* has been cited more than 400 times by other courts (Westlaw search performed December 2, 2018).

[253] *HECI*, 982 S.W.2d at 884.

[254] *Id.*

[255] *Id.* at 889.

[256] *Id.* at 884.

[257] *Id.* at 887.

owners could have ascertained the other operator's malfeasance by consulting publicly available records at the Railroad Commission.[258] In reaching this conclusion, the court said it was following *Altai* in deciding the case "categorically"—meaning, as the court put it, that while the royalty owner's particular injury may not have been discovered, "it was the type of injury that generally is discoverable by the exercise of reasonable diligence."[259] Separately, as to the lessee's failure to inform the royalty owners that it had sued the other operator, the court said that the lessee had no duty to inform them as this duty was not one "that was so clearly in the parties' contemplation that they thought it unnecessary to express."[260]

Certainly, the lessor's relationship to the lessee is an arm's length contractual relationship, not a fiduciary one,[261] where the lessor retains an affirmative obligation to protect his own interests,[262] as the court so asserted.[263] And the court was right to say that royalty owners of ordinary prudence should make inquiries of their lessees about information that might be relevant to protecting their own property interest, something that the court noted that the Neels had failed to do.[264]

But it blinks reality to leap from these uncontroversial premises to the conclusion that reasonable diligence requires all lessors in all cases to independently determine whether adjoining operators have inflicted damage on a common reservoir. As John Burritt McArthur has trenchantly pointed out, given how small the average royalty interest is, and how lessors rarely possess the level of expertise or the right to engage in the type of on-site investigations that would aid in these determinations, the court's assertion that "landowners should routinely monitor invisible underground reservoir

[258] *Id.*

[259] *Id.* at 886.

[260] *Id.* at 891.

[261] *Id.* at 888 (distinguishing its prior decisions in *Andretta* and *Willis* as involving a fiduciary relationship where the beneficiary had an expectation that it could rely on the diligence of the fiduciary to protect the beneficiary's interest).

[262] *See* Harrison v. Bass Enter. Prod. Co., 888 S.W.2d 532, 538 (Tex. App.—Corpus Christi-Edinburg 1994, no writ).

[263] *HECI*, 982 S.W.2d at 887–88.

[264] *Id.* at 886 (stating "[o]ne source of information about the existence of a common reservoir and operations in it would be the lessee" and "HECI gave the Neels whatever information they wanted when asked").

damage is grossly unreasonable."[265] Note also that *HECI*'s failure to take into account the relative knowledge and sophistication of the parties is fundamentally at odds with one of the key insights about the discovery rule that the court accepted throughout the earlier period: sometimes injuries occur to ordinary people who, lacking any special knowledge or expertise, are unaware that they have been injured. When this happens, the court had long held that it would not be fair to bar their claim as untimely simply because they lacked the special expertise to realize that they had been injured.[266] Even when the underlying arrangement is a contractual one in which the parties have an obligation to defend their own interests, the court repeatedly recognized in the earlier period that the relative knowledge and sophistication of the parties bears on whether the discovery rule applies.[267]

As owners of a royalty interest, the Neels had a nonpossessory interest in the mineral estate that did not authorize them to inspect or develop the mineral estate.[268] The lessee, by contrast, as the executive right holder, had the affirmative contractual right and obligation to manage and protect the leasehold for the benefit of itself and the nonpossessory interest.[269] So, while the lessors certainly had a duty of diligence to protect their own interests, to say that they need to be diligent is not to say that they should be expected to have the same kind of diligence and level of engineering expertise that an oil and gas operator is expected to have.

Yet, instead of fashioning a standard of diligence that realistically fits with what can be expected to be performed by an ordinarily prudent royalty owner, the court instead insisted that all royalty interest owners must independently discover all publicly available information that might reveal

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[265] John Burritt McArthur, *How the Texas Supreme Court Lost its Position as a Leading Oil and Gas Royalty Court: A Tale of 18 Cases*, 49 TEX. TECH. L. REV. 263, 344–45 (2017).

[266] *See, e.g.*, Andretta v. W., 415 S.W.2d 638, 641 (Tex. 1967) (describing the relationship between the nonparticipating royalty interest owner and the executive right holder as a relationship that is fiduciary in nature given "the power entrusted to [the executive right holder] and their superior knowledge"); Willis v. Maverick, 760 S.W.2d 642, 645 (Tex. 1988) (noting that the discovery rule exception is salutary in cases "in which it is difficult for the injured party to learn of the negligent act or omission"); *see supra* text accompanying notes 79–80, 182–184.

[267] *See, e.g.*, Ruebeck v. Hunt, 176 S.W.2d 738, 740 (Tex. 1943); Courseview v. Phillips Petroleum Co., 312 S.W.2d 197, 205 (Tex. 1958); *see supra* text accompanying notes 60–64, 74–75.

[268] *See* Luckel v. White, 819 S.W.2d 459, 463 (Tex. 1991); *see also* Smith & Weaver, TEXAS LAW OF OIL AND GAS § 2.4.E.

[269] McArthur, *supra* note 265, at 329.

evidence of injury to their leasehold interest.[270] In reaching this conclusion, the court ignored how hard it was for the particular injury in HECI to be discovered. As McArthur has also noted, the overproduction in *HECI* was not easy to detect as it "led to a damaging mixing of unproduced oil into the overhanging gas cap, where it became unrecoverable.[271] "The mere observation of activity next door, a routine oil field occurrence, or a pool in pressure communication does not give *any* information that damage is occurring underground."[272] The court was equally unmoved by the disquieting facts of the case, including that the lessee never told the royalty owners of the reservoir damage or that it had sued the other operator and, eventually, prevailed in its case.

And even if the royalty owners had thought to regularly check the records to see if any other operators were illegally producing from their reservoir, the court's opinion in *HECI* also failed to recognize that there was not a single document within the Commission's files that indicated another operator was damaging the reservoir.[273] The records addressed a number of related issues but none provided any "inquiry-triggering information" as to the overproduction.[274]

Strangely, the court refused to find that Railroad Commission records *always* put royalty owners on notice. "We do not suggest, as urged by HECI, that all records maintained by the Railroad Commission constitute constructive notice to royalty owners of their content, as is the case with recorded instruments in a grantee's chain of title."[275] What is even more puzzling is that the court conceded that the records *in this case* did not put the Neels on constructive notice: "While some records of the Railroad Commission in certain circumstances may provide constructive notice, the records regarding illegal production by [the other operator] are not of that character in the context of the Neels' claims against HECI."[276] Nevertheless, the court somehow also described the records as "a ready source of

[270] HECI v. Neel, 982 S.W.2d 881, 888 (Tex. 1998).

[271] *Id.* at 884; McArthur, *supra* note 265, at 345.

[272] McArthur, *supra* note 265, at 345.

[273] Amicus Curiae Brief in Support of Respondents' Motion for Rehearing (submitted by Michael Silva and Paul Simpson), in *HECI Exploration Co. v. Neel*, No. 97-0403, Jan. 22, 1999 at 4–6.

[274] *Id.* at 6.

[275] *HECI*, 982 S.W.2d at 886.

[276] *Id.* at 887.

information" such that the Neels' failure-to-notify claim was not inherently undiscoverable.[277]

It is hard to make sense of these conflicting portions of the court's opinion, especially when one also recalls the court's insistence that it was deciding the case "categorically," *i.e.*, that it was the type of injury that "generally is discoverable by the exercise of reasonable diligence."[278] So convoluted is this portion of the court's decision in *HECI* that, years later, the San Antonio court of appeals took the remarkable step, rarely seen, of openly criticizing the higher court.[279]

Perhaps the worst part of the court's decision is that it perversely incentivizes operators to hide from royalty owners any litigation they bring affecting the leasehold.[280] If the claims had not been found to be time-barred, the lessors would not have been prejudiced as a result of the lessee's recovery since they could have separately sued to obtain their rightful share.[281] Instead, the court allowed the lessee to keep its entire recovery against the other operator—even that portion of lost revenues that indisputably did not belong to them—because they were able to hide their recovery from the royalty owners.

In sum, *HECI* furthered the procedural shift begun with *Altai* and *S.V.* by making it much harder for plaintiffs to show inherent undiscoverability. Predictably, oil and gas industry groups hailed *HECI* as establishing that virtually all injuries arising from oil and gas claims are discoverable.[282] The

[277] *Id.*

[278] *Id.* at 886.

[279] Advent Tr. Co. v. Hyder, 12 S.W.3d 534, 539 n.1 (Tex. App.–San Antonio 1999, pet. denied) ("We admit to being somewhat bewildered by this language . . . . Rather than bringing predictability and consistency to this area of the law, we fear that placing the onus on royalty owners to hire the experts necessary to investigate whether the Railroad Commission records reveal they are being cheated is inherently unfair and unworkable in the oil and gas business environment we have come to know.").

[280] McArthur, *supra* note 265 at 328.

[281] HECI had no right to sue for damages on behalf of the royalty interest owner absent an assignment. *See* Pape Equip. Co. v. I.C.S., Inc., 737 S.W.2d 397, 402 (Tex. App.—Houston [14th Dist.] 1987, writ ref'd n.r.e.). However, because the Neels had a separate interest in the mineral estate, they had a right to sue on their own behalf. *See* Eliff v. Texon Drilling Co., 210 S.W.2d 558, 561 (Tex. 1948); Apache Corp. v. Moore, 891 S.W.2d 671, 678–680 (Tex. App.—Amarillo 1994, writ denied).

[282] *See The History of TLMA*, TEXAS LAND & MINERAL OWNER ASS'N (last visited Feb. 21, 2019), http://www.tlma.org/content.aspx?page_id=22&club_id=56856&module_id=226068; *see*

decision's impact in the lower courts has been significant in oil and gas cases[283] and in many other contexts.[284]

b. Murphy v. Campbell

In *Murphy v. Campbell*, the court held that limitations commenced on a claim against the plaintiffs' accountant for malpractice when the IRS first sent a deficiency notice to the plaintiffs.[285] The court recognized that injuries resulting from faulty tax advice from an accountant can, in theory, be inherently undiscoverable but insisted that the plaintiffs in *Murphy* knew of their injury, at latest, by the date that the government sent them the tax deficiency notice.[286] The court also considered, but rejected, applying the tolling rule it had adopted in *Hughes* for legal malpractice actions.[287] Recall that in in *Hughes* the court had said that limitations is tolled on a client's legal malpractice claim until the underlying litigation, in which the lawyer was alleged to have acted negligently, was finally resolved and all appeals

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also Jennifer N. Cooper, *The Discovery Rule: Should Oil and Gas Leases Be Different?*, 38 HOUS. L. REV. 1283, 1294 (2001) (citing Information Sheet, Texas Land & Mineral Owners Assoc. 1 (1999) (describing HECI as having "wiped out the 'discovery rule'")).

[283] *See e.g.*, Tipton v. Brock, 431 S.W.3d 673 (Tex. App.—El Paso 2014, pet. denied) (holding that a deed that failed to reserve mineral rights was time barred as the deed's defect was unambiguous as a matter of law); Holland v. Thompson, 338 S.W.3d 588 (Tex. App.—El Paso 2010, pet. denied) (relying on *HECI* and rejecting concern over an operator's special and superior knowledge and its fraudulent concealment of material facts).

[284] *See e.g.*, Bergeron v. Select Comfort Corp., A-15-CV-00657-LY-ML, 2016 WL 155088 (W.D. Tex., Jan. 11, 2016) (citing *HECI* and concluding that internet posting on company website put plaintiff on constructive notice of defect); Pham v. Carrier, No. 07-15-00031-CV, 2017 WL 1291660 (Tex. App.—Amarillo, Apr. 3, 2017, no pet.) (relying on *HECI* to conclude that injury to limited liability company member not inherently undiscoverable); Bruning v. Hollowell, No. 05-13-01033-CV, 2015 WL 1291378 (Tex. App.—Dallas, Mar. 23, 2015, pet. denied) (relying on *HECI* to conclude that publicly available filings at tax appraisal district put plaintiff on constructive notice to bar claim); Clark v. Dillard's, Inc., 460 S.W.3d 714 (Tex. App.—Dallas 2015, no pet.) (relying on HECI and concluding that use of model's image without permission or compensation was not inherently undiscoverable).

[285] 964 S.W.2d 265, 272 (Tex. 1997).

[286] *Id.* at 271–72 ("The same rule should apply whether the advisor is a lawyer or an accountant. It is most unlikely that a client would know that tax advice was faulty at the time he received it. Indeed, the very reason to seek expert advice is that tax matters are often not within the average person's common knowledge. We thus conclude that accounting malpractice involving tax advice is inherently undiscoverable.").

[287] *Id.* at 272.

concluded.[288] Yet, in *Murphy*, the court refused to extend the *Hughes* tolling rule to accounting malpractice cases.

There are three core difficulties with *Murphy*.[289] The first is that the court erred in concluding that the plaintiffs were injured as soon as they received the notice of tax deficiency. Just because the IRS believes that a tax is owed does not make it so, and the taxpayers timely challenged that administrative determination in court. Thus, their accounting malpractice claim cannot have accrued before their legal challenges in the tax dispute were finally resolved because if the courts had ruled in their favor and found that no additional taxes were owed, then of course they would have no claim for professional negligence. This reasoning is squarely in line with the court's prior cases, especially *Hughes* itself.[290] As the court put it in *Hughes*, "the viability of the second cause of action [for malpractice] depends on the outcome of the first."[291]

Second (and ironically, given the court's refusal to apply *Hughes*), the court in *Murphy* made the same foundational mistake that the court previously made in *Hughes* when it failed to keep straight the difference between determining accrual under the general legal injury rule and the application of the discovery rule exception. While the error was harmless in *Hughes*, in *Murphy* this same conflation of the general rule and its exception led the court to reach the wrong result. *Murphy* should not have even reached the discovery rule exception because the question of accrual was answered by application of the general rule, as cases like *Linkenhoger* and *Atkins* make plain. In those cases, the court had held that there was no actionable legal injury—and so no claim accrued under the legal injury rule—until the plaintiffs' tax deficiency was finally assessed (in *Atkins*) or a final judgment

[288] *See supra* text accompanying notes 198–201.

[289] It also bears noting in the margin that, as to the court's specific holding that *Hughes* tolling does not apply to accounting malpractice cases, its reasoning was not well articulated and remains obscure. *See* Apex Towing Co. v. Tolin, 41 S.W.3d 118, 122 (Tex. 2001) (acknowledging that in *Murphy* "we did combine the [*Hughes*] rule and the explanation [about difficulties caused by continued-representation by the same lawyer later sued for legal malpractice] into one statement, but that does not change the fact that *Murphy* plainly states, '[w]e restricted [the *Hughes* rule] to the circumstances presented.' Those circumstances did not include continued representation by the allegedly malpracticing lawyer" (internal citations omitted)). We have also previously noted that the court later had to walk back some of what it said in *Murphy* to clarify how the *Hughes* tolling rule is applied in legal malpractice cases. *See supra* text accompanying notes 201–205.

[290] *See supra* text accompanying note 197.

[291] Hughes v. Mahaney & Higgins, 821 S.W.2d 154, 157 (Tex. 1991).

obtained in the underlying personal injury suit (in *Linkenhoger*). When the plaintiffs learned or could have learned of their injuries was irrelevant because there was no actionable legal injury until the underlying disputes were finally resolved.

Finally, beyond failing to keep straight the difference between the legal injury rule and its common law exception and, in so doing, misconstruing the relevant test for determining the accrual of plaintiffs' claim, the majority in *Murphy* ignored the policy consequences of its decision. Justice Spector wisely recognized in dissent that "by forcing taxpayers to sue their accountants before it is possible to determine whether a wrong has been committed, the court's decision will have the practical effect of encouraging needless litigation and wasting valuable court resources on suits that will ultimately be abandoned."[292] Moreover, the concerns that led the court in *Hughes* not to bar the plaintiff's legal malpractice claim apply equally to accounting malpractice. In both instances, the law should not force clients to take inconsistent positions by having to argue in their malpractice suits that the professional who did work for them was negligent, while simultaneously defending the professional's conduct in the underlying litigation on which their malpractice suits are based.[293]

In sum, the majority's decision in *Murphy* does more than just narrow the scope of inherent undiscoverability. By blurring the distinction between the legal injury rule and the discovery rule exception, *Murphy* effectively expands the pernicious effects of the court's stricter application of the exception in the post-*S.V.* and *Altai* period. Thus, without overruling its prior decisions, the court has called into question the continued vitality of cases like *Linkenhoger* and *Atkins* and the practical, sensible approach that the court had previously taken in first determining when any actionable injury took place under the general legal injury rule.

c. *Velsicol Chem. Corp. v. Winograd*

Another decision from the late-1990s is noteworthy. In *Velsicol Chem. Corp. v. Winograd*, the plaintiff owned several apartment complexes.[294] After a number of news stories raised concern about a hazardous pesticide that the plaintiff had used at several of its properties, the state's Department of

[292] *Murphy*, 964 S.W.2d at 275.

[293] *Hughes*, 821 S.W.2d at 157.

[294] 956 S.W.2d 529, 530 (Tex. 1997).

Agriculture investigated.[295] They determined that the levels of contamination on the exterior of the buildings were high enough to warrant remediation but because interior readings did not exceed regulatory limits, they did not order remediation inside the buildings.[296]

At this point a lawsuit was brought by tenants against the property owner and the pesticide manufacturer.[297] As part of that case, the owner asserted cross-claims against the manufacturer for damages resulting from the exterior contamination.[298] After subsequent regulatory tests, performed years later, found interior levels of contamination high enough to require remediation, the property owner then asserted claims against the chemical manufacturer seeking damages for lost business income and the diminished property values.[299] The manufacturer sought dismissal of the new claims on limitations grounds, but the property owner argued that the accrual date for its claims was tolled by the discovery rule, citing cases in which courts had held that limitations does not begin to run for property damage to a building from asbestos until the owner discovers high enough concentrations to require abatement.[300]

The court held that the discovery rule did not toll limitations on the property owner's claim.[301] The court thought that the property owner was seeking damages for injuries that could have been discovered years earlier.[302] It distinguished the asbestos cases by noting that those claimants did not have to abate the interiors of their buildings until contamination levels were found to be high enough to require abatement.[303] But that distinction only makes sense if it could be shown that the owner's damages resulting from interior contamination were no different from the damages it sustained from the earlier findings of exterior contamination. For instance, if its properties had been condemned after the exterior contamination, then all of the owner's damages would have accrued at that point. The apartments would have been unrentable to anyone and so the property owner would have lost 100% of its

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[295] *Id.*
[296] *Id.*
[297] *Id.*
[298] *Id.*
[299] *Id.*
[300] *Id.* at 530–31.
[301] *Id.* at 531.
[302] *Id.*
[303] *Id.*

business income, as well as the property's value (at least the improved portion of it, assuming the land still had some value).

But that is not what actually happened. Because the exterior contamination had only required the owner to do exterior remediation, they were able to continue renting apartments. The owner had previously sought damages in terms of some loss in business income (claiming that there was less demand for its apartments as a result of the exterior contamination) and for some diminution in property value. But back then it did not claim—and could not have claimed—any further damage resulting from interior contamination because there wasn't any.[304]

What all of this really reflects is that the court again confused the test for when a cause of action accrues under the general legal injury rule and whether a plaintiff's lack of knowledge of their injuries tolls limitations under the discovery rule exception to the general rule. The property owner's claim in *Velsicol* for damages resulting from interior contamination did not accrue until the regulators found that internal contamination existed. Until that point, under the general legal injury rule no wrongful act had caused them an injury.[305]

Practically, the court's decision in *Velsciol* puts a property owner in a Catch-22. It must seek to recover all possible damages from an injury or its claim will be barred as untimely, but if it tries to recover future damages that have not yet been sustained, and for which it cannot show there is a reasonable probability will be sustained, it will not be able to do so. The net effect of intermixing the court's modern approach to inherent undiscoverability into its legal injury analysis is to sometimes cause the period for limitations to accrue before the plaintiff's claim is even actionable. That makes no sense at all.

[304] *See* MCI Telecomms. Corp. v. Tex. Utils. Elec. Co., 995 S.W.2d 647, 654–55 (Tex. 1999) ("With respect to recovery of future damages, Texas follows the reasonable probability rule. To meet the reasonable probability test, [the plaintiff] must: (1) present evidence that, in reasonable probability, it will incur expenses in the future, and (2) prove the probable reasonable amount of the future expenses." (internal citation omitted)).

[305] *See, e.g.*, Etan Indus. Inc. v. Lehmann, 359 S.W.3d 620, 623 (Tex. 2011); *see supra* text accompanying note 20.

d. Town of Dish v. Atmos Energy Corp.

Fast forward to one of the court's most recent cases and it is possible to observe how it has continued in the later period to treat what the plaintiff knew or should have known as questions to be determined as a matter of law. In *Town of Dish v. Atmos Energy Corp.*, the limitations question turned on when the plaintiffs knew or should have known that they were injured by emissions from defendants' plant.[306] To be sure, there was evidence in the record that residents began complaining some years earlier, which led the court to conclude that their claims accrued no later than February 2009.[307] Notably, however, the court refused to credit other evidence that the plaintiffs were unaware of the noises, fumes and odors coming from the defendants' plant until the summer of 2009, when changes to some of the plant facilities caused the emissions to become substantially worse.[308] The court also did not credit the evidence that plaintiffs were unaware of the hazardous nature of the emissions until a report was issued that summer from an independent environmental group.[309] According to the court, the report documents "do not amount to proof of when a legal injury occurred. At most they are allegations that the residents did not yet comprehend the full extent of their injury."[310]

This approach is poles apart from the court's traditional approach in the early period. Indeed, *Town of Dish* is even at odds with the court's less strident approach taken only a few years earlier in *Natural Gas Pipeline Company of America v. Justiss* in which the court credited "objective" evidence that corroborated the plaintiffs' claims that conditions worsened at a later date, and thus permitted the jury to conclude that the plaintiffs did not know or have reason to know that they had been injured until then.[311] Insisting that there was no comparable objective evidence of worsening conditions in *Town of Dish*, the court found that the plaintiffs' claims were barred by limitations.

But the court's attempt to distinguish *Justiss* misses that there were early subjective complaints of emissions in both cases. Yet, in *Justiss*, the court deferred the inquiry to the jury, just as it had consistently done in the pre-

[306] 519 S.W.3d 605, 609 (Tex. 2017).

[307] *Id.*

[308] Response to Brief on the Merits, *Atmos Energy Corp. v. Town of Dish*, No. 15-0613 (Nov. 1, 2016) at 13.

[309] *Id.* at 8.

[310] *Town of Dish*, 519 S.W.3d at 612.

[311] 397 S.W.3d 150, 155 (Tex. 2012).

1996 period. In contrast, the court had no similar hesitation in *Town of Dish*, even though the plaintiffs offered evidence that they did not know or have reason to know they were injured until the emissions from the plants significantly worsened. In this way, *Town of Dish* provides an unmistakable precendent of the court's tendency in the post-1996 period to decide inherent undiscoverability as a matter of law.

e. *Wagner & Brown v. Horwood*

The last case that we want to discuss with regard to the court's inherently undiscoverable requirement is *Wagner & Brown, Ltd. v. Horwood*.[312] We have saved *Wagner & Brown* for the end of this section because it lies at the intersection of the court's discovery rule jurisprudence and its equitable fraud decisions. *Wagner & Brown* reflects how the court in the post-1996 period has tried to marginalize evidence of fraud as irrelevant to the determination of when, for purposes of the discovery rule, the plaintiff should have known of her injuries.

In *Wagner & Brown*, royalty owners brought suit against their lessee for underpaying royalties.[313] They claimed that the lessee had improperly reduced the royalty amounts for costs associated with gas gathering and compression.[314] Years earlier, the royalty owners had asked the lessee about the charges, after receiving a report from an independent investigative firm which suggested that the charges might be excessive.[315] When confronted, the lessee represented to the royalty owners that the actual deductions for compression costs were far less—about half as much per MCF.[316] Based on the lessee's representations, the royalty owners were reassured that the charges were reasonable.

But several years later, inexplicable changes in compression charges set forth on the royalty statements made it indisputable that the royalty owners had been overcharged all along.[317] They then brought suit but, as it turned

[312] 58 S.W.3d 732 (Tex. 2001).
[313] *Id.* at 734.
[314] *Id.*
[315] *Id.* at 733–34.
[316] *Id.* at 734.
[317] *Id.*

out, the Supreme Court ultimately held that they waited too long and their claims were barred by limitations.[318]

The royalty owners tried to argue that accrual of their claims had been tolled by the discovery rule and/or the equitable fraud exception.[319] The court did not reach the latter exception, but it held that the discovery rule did not defer accrual because there were means available for the royalty owners to determine whether charges made against their royalty payments were proper and reasonable.[320] And what were those means? The court's primary answer was that they could have asked the lessee for information.[321]

But what about the fact that when they had previously asked the lessee about this exact issue regarding the charges, the evidence indicated that the lessee affirmatively misrepresented the truth?[322] The court's answer was incredibly revealing. It said that while the lessee's misrepresentations could be relevant under the equitable fraud doctrine, they have no relevance to the discovery rule. "[T]his alleged misrepresentation is irrelevant to our discovery-rule analysis, which, as we have stated, is categorical, not case-specific."[323]

Presented as a basis for ignoring evidence of the defendant's fraudulent acts, the assertion that the discovery rule is applied categorically repeats the same fatal mistake that *Altai* made. As we have argued above, *Altai*'s reformulation of the inherently undiscoverable requirement wrongly removed any inquiry into the plaintiff's knowledge based on the specific facts of the case. Its reformulation was wrong because the whole point of having a discovery rule exception is that it is not be fair to allow claims to be time-barred in cases where the plaintiff neither knew nor should have known they were injured until after limitations had expired. Like *Altai*, *Wagner & Brown* could only conclude that the discovery rule should not be applied by ignoring the actual facts of the case.

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[318] *Id.* at 737.

[319] *Id.* at 734.

[320] *Id.* at 737.

[321] *Id.* at 736.

[322] *Id.*

[323] *Id.* (internal citation omitted); *see also* Via Net v. TIG Ins. Co., 211 S.W.3d 310, 314 (Tex. 2006) (whether an injury is inherently undiscoverable "is decided on a categorical rather than case-specific basis; the focus is on whether a *type* of injury rather than a *particular* injury was discoverable").

But when a defendant fraudulently hides evidence of its wrongdoing, then it seems self-evident that a reasonable person will usually not have known of the wrongdoing.[324] At the least, a plaintiff who relies on a defendant's affirmative misrepresentations should be found presumptively to have acted reasonably in not investigating further; the burden would then be on the defendant to show otherwise. This is surely the right approach when the only source of the correct information is the wrongdoer—which was the case in *Wagner & Brown*.

What makes all this talk of a "categorical, not case-specific" approach all the more absurd is that the court, even in its post-1996 jurisprudence, has repeatedly said that the facts and circumstances of a case must be considered in evaluating what the plaintiff knew or should have known. Indeed, when the court first described its approach as "categorical" in discovery rule cases, it nevertheless proceeded to judge whether the plaintiff knew or should have known of its injuries by looking to the particular facts of the case.[325] That first time was in *HECI* when the court, referring to its earlier decision in *Altai*, wrote: "We explained in *Altai* that the applicability of the discovery rule is determined categorically."[326] But there was nothing categorical about HECI's analysis, which, as we have seen, walked through the specific facts before concluding that the plaintiffs "knew or should have known that they had a cause of action against [the other operator]."[327] And, of course, as we saw earlier, in *Altai* itself the court went to considerable lengths to explain why the plaintiff should have suspected that its code had been stolen.[328] It is hard to insist that your approach to applying the discovery rule is "not case-specific" when you keep looking to the particular facts of the case in determining if the discovery rule is applicable.

Until *Wagner & Brown*, the court had never held that a "categorical" approach to the discovery rule meant that a defendant's affirmative misrepresentations were irrelevant to whether a reasonable person should

[324] Comput. Assocs. Int'l Inc. v. Altai, 918 S.W.2d 453, 456 (Tex. 1996) ("The requirement of inherent undiscoverability recognizes that the discovery rule exception should be permitted only in circumstances where 'it is difficult for the injured party to learn of the negligent act or omission.'" (quoting Willis v. Maverick, 760 S.W.2d 642, 645 (Tex. 1988))).

[325] HECI v. Neel, 982 S.W.2d 881, 886 (Tex. 1998).

[326] *Id.* (citing *Altai*, 981 S.W.2d at 457).

[327] *Id.*

[328] *Altai*, 918 S.W.2d at 456 ("Inherently undiscoverable encompasses the requirement that the existence of the injury is not ordinarily discoverable, even though due diligence has been used.").

have known of the facts giving rise to the claim. Yet, that conclusion was as inevitable as it was indefensible, given what *Altai* had instructed about ignoring the particular facts of a case in applying the discovery rule (despite *Altai*'s own consideration of the very facts that it insisted should be ignored).[329] And while *Wagner & Brown* recognized that such concealment may toll limitations under the separate equitable fraud exception to the legal injury rule, the court has coincidentally also been curtailing the reach of that other exception, as we are about to see.

2. Equitable Fraud Exception: Impact of Defendants Hiding of Facts on the "Inherently Undiscoverable" Inquiry

We have demonstrated the court's greater willingness in its post-1996 discovery rule jurisprudence to treat as a matter of law the determination of the plaintiff's reasonable diligence. Reasonable diligence is also at issue when the plaintiff pleads the equitable fraud exception since the core question is whether the plaintiff knew or should have known of the fraudulent concealment.[330] But the fraud cases need to be treated separately from the court's discovery rule jurisprudence because the nature of the defendant's wrongdoing is distinctly different. Indeed, the court has repeatedly recognized the special status of the equitable fraud exception. To use one example, the court has not required "objective verification" in fraudulent concealment cases.[331]

To be sure, there were cases in the early period where the court declined to toll limitations under the equitable fraud exception.[332] Nevertheless, the general trend and approach that the court previously took was clear. The court in the formative period consistently took into account that the defendant's fraud could make it more difficult for the plaintiff to discover the defendant's wrongdoing.[333] The court's approach was, as we have noted, broadly protective against fraud.

By contrast, in the later period the court has been much more likely to place little weight on a defendant's fraudulent acts and to reject any inquiry

[329] *Id.* at 463.

[330] Shell Oil Co. v. Ross, 356 S.W.3d 924, 928 (Tex. 2011).

[331] S.V. v. R.V., 933 S.W.2d 1, 31 ("We have not required 'objective verification' in fraudulent concealment cases . . . . The very existence of the wrongful act . . . turned on whether the finder of fact believed [the plaintiff].").

[332] *See supra* text accompanying notes 46–50.

[333] *See supra* text accompanying notes 61–71.

into how its actions may have frustrated a plaintiff's ability to timely sue. Although it has decided far fewer fraud cases than discovery rule cases (this was true in the earlier period as well), the overall trends have been the same—with the vast majority of cases ruling against tolling under the equitable fraud exception. We break down the court's post-1996 cases in which fraudulent concealment was a significant issue into three main categories.

a. Cases that refuse to toll limitations because the plaintiff's summary judgment proof was inadequate or nonexistent

The first category comprises the cases in which the court has readily declined to toll limitations either because the plaintiff's summary judgment proof was inadequate or nonexistent, at least based on the court's recitation of the available evidence.

For some of these cases, equitable fraud was only a minor issue. In *Shah v. Moss* the plaintiff's principal argument was that the relevant statute authorized measuring limitations from the last date of the course-of-treatment.[334] By contrast, the plaintiff devoted less than a page in his brief to fraudulent concealment—and his argument there was that the defendant's summary judgment motion had not been properly amended after the plaintiff added allegations of fraudulent concealment.[335] Likewise, we saw earlier that in *Velsicol* the discovery rule was the plaintiff's primary argument for delaying limitations, and the court readily dismissed fraudulent concealment as an alternative basis for tolling.[336]

When the fraud argument has been more central to the plaintiff's attempt to avoid limitations, a number of decisions in the post-1996 period have disposed of the equitable tolling argument on the basis that the plaintiff's

[334] 67 S.W.3d 836, 840 (Tex. 2001).

[335] *See* Respondent's Full-Briefing Response to Petition for Review, Shah v. Moss, No. 00-0091, July 17, 2000, at 21–22.

[336] Velsicol Chem. Corp. v. Winograd, 956 S.W.2d 529, 531 (Tex. 1997). ("The undisputed summary judgment evidence shows that Judwin became acutely aware of chlordane's 'hazardous nature' in 1987, when health concerns regarding cholordane use at the Apartments prompted extensive media coverage and tenant lawsuits.").

evidence was inadequate to avoid dismissal.[337] In addition to the cases cited in the margin, we think that *Kerlin v. Sauceda*[338] also belongs in this first category, though it should be said that unlike the previously discussed cases, *Kerlin* certainly was a far more factually complex decision. But the court's lengthy disposition of the case was due more to the unusual facts (the dispute concerned ownership of land and mineral estates in Padre Island and involved facts dating back to the early-19th century) than to any difficult application of its prior precedents. Indeed, the court rejected equitable tolling of limitations in just three paragraphs, emphasizing that the 275 *pro se* plaintiffs who had not received any royalties for many years, "are not entitled to 'make no inquiry for years on end,' and then sue for contractual breaches that could have been discovered within the limitations period through the exercise of reasonable diligence."[339]

b. *Statutory construction cases in which the court minimized the significance of the defendant's fraudulent concealment*

The second category covers statutory construction cases in which the court has construed the statute as reflecting the legislature's intent to abolish equitable fraud as a basis for tolling. *Little v. Smith* held that neither the discovery rule nor the equitable fraud exception applied to an adoptee's claim for share of assets of decedent's estate.[340] Acknowledging that its prior decisions had allowed equitable tolling for fraudulent concealment in other contexts, the court concluded the statutory scheme—which shields the

[337] ExxonMobil Corp. v. Lazy R. Ranch, LP, 511 S.W.3d 538, 544–45 (Tex. 2017) (summarily refusing to toll limitations, noting that there was no evidence of fraudulent concealment); ExxonMobil v. Rincones, 520 S.W.3d 572, 594 (Tex. 2017) (holding that the plaintiff failed to offer any evidence of fraudulent misrepresentations—and that the record established that plaintiff had actual knowledge of proper party to sue); Earle v. Ratliff, 998 S.W.2d 882, 889 (Tex. 1999) (finding that the plaintiff's summary judgment evidence raised, at most, questions of the doctor's negligence but did not show any intent to deceive); KPMG v. Harrison Cty. Hous. Fin. Corp., 988 S.W.2d 747, 749 (Tex. 1999) (holding that the plaintiff had failed to come forward with any summary evidence to raise a fact issue as to the defendant's fraud, noting that "[a] mere pleading does not satisfy [the plaintiff's] burden").

[338] 263 S.W.3d 920 (Tex. 2008).

[339] *Id.* at 925 (quoting HECI v. Neel, 982 S.W.2d 881, 887–88 (Tex. 1998)).

[340] 943 S.W.2d 414, 422 (Tex. 1997).

identity of the natural parents from adoptees—did not leave room for tolling of limitations, even in cases involving fraud.[341]

Johnson & Higgins v. Kenneco Energy mostly turned on the plaintiff's failure to submit a proper jury issue.[342] However, the court did suggest that even if the question had been properly submitted, the equitable fraud doctrine was not available to toll limitations beyond the Deceptive Trade Practices Act's (DTPA's) express 180-day extension for fraudulent concealment.[343] Later, in *Underkofler v. Vanasek*, the court made clear that both the common law discovery rule and equitable fraud exceptions had been displaced by the DTPA's legislative scheme.[344] Similarly, in *Gonzales v. Southwest Olshan Foundation Repair Co., LLC*,[345] the court reiterated that the equitable fraud doctrine could not extend limitations beyond the 180-day period that the legislature had codified in the DTPA.[346]

Notably, all of these later period decisions stand in stark contrast to the court's earlier approach, such as in cases like *Borderlon*, where the court held that the legislature had not abolished equitable fraud in passing the limitations statute governing medical malpractice cases, despite language and a legislature purpose that could have been read to foreclose judicial exceptions to save claims from dismissal.[347] That is, even as it concluded that the legislature had intended to abolish discovery rule tolling in a statute that it construed as establishing "an absolute two-year statute of limitations" for medical malpractice claims, it found no comparable intent to do away with fraudulent concealment.[348] *Borderlon* emphasized that fraudulent concealment "is based upon the doctrine of equitable estoppel" and Texas courts, which have "long adhered to the view that fraud vitiates whatever it touches, have consistently held that a party will not be permitted to avail

[341] *Id.* at 420 ("Texas courts have refused to apply the discovery rule to claims arising out of probate proceedings in most instances, however, even in the face of allegations of fraud.").

[342] 962 S.W.2d 507, 523 (Tex. 1998).

[343] *Id.* at 516.

[344] 53 S.W.3d 343, 346 (Tex. 2001) ("We defer to the Legislature's explicit policy determination that only two exceptions apply to the statute of limitations for these statutory claims [one of which is the 180-extension for fraudulent concealment], and we will not rewrite the statute to add the *Hughes* tolling rule as a third.").

[345] 400 S.W.3d 52 (Tex. 2013).

[346] *Id.* at 58.

[347] *See supra* text accompanying notes 146–149.

[348] *See supra* text accompanying notes 145–146.

himself of the protection of a limitations statute when by his own fraud he has prevented the other party from seeking redress within the period of limitations."[349] "To reward a wrongdoer for his own fraudulent contrivance," the court noted further, "would make the statute a means of encouraging rather than preventing fraud."[350] Even *Altai* recognized the special equitable estoppel foundation of fraudulent concealment.[351]

c. *All other cases in which the court minimized the significance of the fraudulent concealment*

The last category includes all cases in which the court held that the plaintiff's injuries were not inherently undiscoverable and, in so ruling, placed little weight on the defendant's fraudulent acts and how they may have frustrated the plaintiff's ability to timely sue.[352]

For example, in *BP America Production Co. v. Marshall*· the court ruled that an injury is not inherently undiscoverable when it can be uncovered by searching public records filed by the lessee with the Railroad Commission.[353] In the court's estimation, the lessee's fraud and fraudulent concealment were irrelevant because it was incumbent upon the royalty owners "to make themselves aware of pertinent information available in the public record."[354] There is much that is wrong with the court's reasoning in *Marshall,* and John Burritt McArthur has a thorough account of its core difficulties.[355] In the

[349] 661 S.W.2d 907, 908–09 (Tex. 1983).

[350] *Id.* at 909.

[351] 918 S.W.2d 453, 456 (Tex. 1996) (stating "[u]nlike the discovery rule exception, deferral in the context of fraud or concealment resembles equitable estoppel" and quoting *Borderlon* approvingly); *see also, e.g.*, Hooks v. Samson Lone Star, L.P., 457 S.W.3d 52, 60 (Tex. 2015) (accord); *cf. also* Molinet v. Kimbrell, 356 S.W.3d 407, 416 (Tex. 2011) (recognizing *Borderlon*'s equitable fraud exception to predecessor statute but construing statutory conflict that arose after statute was amended to bar plaintiff's claims on grounds unrelated to fraudulent concealment).

[352] *See, e.g.*, Valdez v. Hollenbeck, 465 S.W.3d 217, 230 (Tex. 2015); Etan Indus., Inc. v. Lehmann, 359 S.W.3d 620, 623 (Tex. 2011) (per curiam); Ford v. Exxon, 235 S.W.3d 615, 617–18 (Tex. 2007).

[353] 342 S.W.3d 59, 65–67 (Tex. 2011).

[354] *Id.* at 67–69.

[355] McArthur, *supra* note 265 at 327–29, 342–48, 395–96.

interest of time, and to avoid retreading ground already well covered, we refer the reader to his work.

The other significant case to note is *Shell Oil Co. v. Ross*, where the court again refused to toll limitations despite clear evidence of the defendant's fraudulent attempts to conceal its wrongdoing.[356] The court's decision also reflects the astonishingly high diligence burden that the court places on plaintiffs, a standard that is relevant for both fraudulent concealment and discovery rule cases.[357]

Let's start with what was undisputed in the case. The court—and all parties—agreed that the lease required Shell to pay the Rosses royalties based on third-party sales prices—*i.e.*, the amounts that Shell was actually paid for the gas that it produced.[358] Also not in dispute: Shell did not pay based on the actual prices it received. Instead, for several years it based royalties for gas produced from some of the wells (referred to as the "Lease Wells") on a different price formula—one that resulted in lower royalties for the Rosses. At trial, Shell even admitted that it "could not explain how or why it used this price" and that the price it paid during these years was a "mistake."[359]

Also not in dispute (but making matters more complicated): in other years, for gas produced from other wells covered by the lease (referred to as the "Unit Wells"), Shell used an entirely different method to calculate the price on which it paid royalties. The prices that Shell represented it paid on the Unit Wells were significantly higher than the prices it represented that it paid for the Lease Wells—but the prices were still lower than what it actually received for the gas it had sold.[360] Shell did argue that the method it used to calculate the price for the Unit Wells was not a breach of the contract, though, as noted, it conceded that the price it used was not the actual sales price that the contract required it to use. Rejecting that argument, the lower courts found that the method Shell used to calculate royalties for the Unit Wells was a breach.[361]

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[356] 356 S.W.3d 924, 930 (Tex. 2011).

[357] We principally discuss *Ross* for its treatment of the equitable fraud exception but the court, for similar reasons, also rejected the plaintiff's attempt to toll limitation under the discovery rule.

[358] *Ross*, 356 S.W.3d at 926.

[359] *Id.*

[360] *Id.*

[361] *Id.*

What Shell didn't admit—and what the Supreme Court failed to even mention—is that there was evidence in the record that Shell's various means of underpaying the Rosses were not unique to them. There was evidence that Shell underpaid at least nine other royalty owners in these same ways, suggesting a systemic and intentional effort by Shell to underpay its lessors.[362] There was still other evidence in the record that the court likewise ignored of a separate fraud by Shell where it paid royalties to the Rosses, and perhaps thousands of other royalty owners, based on a transfer price to its own in-house affiliate—a price that, no surprise, was lower than the price that Shell obtained from subsequent third-party sales.[363]

In any event, the evidence was undisputed that for more than a decade Shell made payments based on these different methods, which in every instance resulted in lower royalties. To make matters worse, throughout this entire period Shell represented to the Rosses that the royalties it paid them were based off of the gross proceeds it actually received for the gas it produced. Each month, with the royalty statements it sent, Shell also enclosed check stubs that purported to list the third-party sales price—though, in fact, these were not the actual amounts that Shell had received.[364]

So those are the basic facts. The question in the case was whether it was reasonable for the Rosses to rely on Shell's representations or whether ordinary diligence required that they investigate further. The jury found that the lessee had fraudulently concealed its failure to pay royalties in the correct amount and that the Rosses, through reasonable diligence, could not have discovered Shell's wrongful actions until years later.[365] The intermediate appellate court agreed, noting that the evidence amply supported the jury's findings.[366]

The Supreme Court reversed. It began by observing that the Rosses should have noticed that the price listed from gas sold from the Lease Wells

[362] *See* Respondent's Brief on the Merits, *Shell Oil Co. v. Ross*, No. 10-0429, May 4, 2011, at 6; *see also* Shell Oil Co. v. Ross, 357 S.W.3d 8, 19 (Tex. App.—Houston [1st Dist.] 2010), *rev'd*, 356 S.W.3d 924 (Tex. 2011) ("There is evidence that Shell engaged in a practice of underpaying royalties by paying an arbitrary price, which was even different than an internal transfer price that Shell may have intended to base the price upon.").

[363] Shell Oil Co. v. Ross, 357 S.W.3d 8, 19 (Tex. App.—Houston [1st Dist.] 2010), *rev'd*, 356 S.W.3d 924 (Tex. 2011).

[364] *Ross*, 356 S.W.3d at 927–28.

[365] *Id.* at 927.

[366] *Id.*

was much higher than the price listed for gas sold from the Unit Wells.[367] The discrepancy in the prices paid for these different wells "should have alerted the Rosses to potential royalty underpayments," the court said.[368]

Notably, however, the court did not discredit the court of appeals' finding (based on testimony from both parties) that different heating values could explain the differences in the royalties paid on the different wells.[369] The court also ignored other evidence in the record that there could have been different purchase contracts for the gas from each well, leading the Rosses to reasonably believe that the differences in the prices for the different wells was entirely legitimate.[370] Nevertheless, the court ruled that "a royalty owner cannot avoid making a diligent investigation just because there might be a legitimate explanation for a suspicious royalty payment."[371] Of course, this kind of unabashed hindsight is remarkable since none of the royalty payments were "suspicious" if the Rosses could have reasonably concluded that legitimate reasons accounted for the different royalties they received.

Nevertheless, the court reasoned that, having been put on notice by the discrepancy in the prices from the different wells, the Rosses should have consulted "readily accessible and publicly available" sources of information that could have led the Rosses to discover that Shell was underpaying royalties.[372]

What were these readily accessible and publicly available sources of information? The court mentioned two. One was the El Paso Permian Basin Index.[373] But, while the prices in the index certainly were "publicly available," it is far less clear that they could be called "readily-accessible."[374]

[367] *Id.* at 929.

[368] *Id.*

[369] *Id.*; Shell Oil Co. v. Ross, 357 S.W.3d 8, 23 (Tex. App.—Houston [1st Dist.] 2010), *rev'd*, 356 S.W.3d 924 (Tex. 2011) (noting that the Ross's expert testified that "the price of the natural gas could have been affected by the heat value, *i.e.*, BTU, of the gas. Although the royalty statements contained Shell's representations about the amount of gas produced, they did not state the BTU of the gas. Graham testified that without knowing the BTU of the gas, an ordinary royalty owner would have no reason to believe that the unit price is incorrect."); *id.* (noting that Shell's expert "also testified that 'you would need the BTU to do an accurate comparison'").

[370] *See* Respondent's Brief on the Merits, *Shell Oil Co. v. Ross*, No. 10-0429, May 4, 2011, at 9.

[371] *Ross*, 356 S.W.3d at 929.

[372] *Id.* at 925.

[373] *Id.* at 928.

[374] *Id.* at 925.

In a footnote, the court acknowledged that the prices on the index were provided on a "heat-adjusted, MMBTU basis" but that the royalty statement prices were listed on a "volumetric, MCF basis."[375] Moreover, the Ross's expert testified that the public index only offered "an estimated of gas prices on average during a period of time and would not reflect the selling price that Shell actually received for its gas."[376] The court did not credit this evidence either.

The other public records that the Rosses could have consulted were from the General Land Office because, according to the court, under the terms of the lease Shell was supposed to pay the same royalties to the state as it paid to the Rosses. Had they checked the records, they would have discovered that the state had been getting higher royalties, the court concluded.[377]

But that conclusion was contradicted by the record. The court failed to credit evidence—from the Ross's expert,[378] as well as Shell's own witnesses[379]—that the Rosses were not required to be paid the same as the General Land Office, as the intermediate appellate court found. The Ross's expert further testified that the only documents which would have indicated that they were underpaid were internal company documents that were not publicly available.[380] The court did not consider any of this evidence either.

The takeaways from *Ross* are clear. The court imposed an extraordinarily high diligence burden on plaintiffs, beginning with the plaintiff's duty to assume that representations that appear on their face to be accurate may in fact be false, triggering a duty to investigate further. Once on notice of potential errors or fraud, a plaintiff is not reasonably diligent if she fails to consult all available public records, even if those records do not readily reveal the errors or fraud.

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[375] *Id.* at 929 n.5.

[376] Shell Oil Co. v. Ross, 357 S.W.3d 8, 14 (Tex. App.—Houston [1st Dist.] 2010), *rev'd*, 356 S.W.3d 924 (Tex. 2011).

[377] *Ross*, 356 S.W.3d at 929.

[378] *Ross*, 357 S.W.3d at 14 (noting that the Ross's expert testified that would not have known that their royalty payments were incorrect even had they known that the Land Office's royalty payments differed from the Rosses' payments because the Land Office is "free to negotiate a different royalty obligation with Shell").

[379] *Id.* at 12 (quoting Shell's witness at trial who acknowledged that the "amount paid to the State can very well be quite different than . . . what the [] landowners were entitled to").

[380] *Id.* at 14.

And because the jury could very well have relied on evidence that the records would not have readily revealed the errors or fraud in finding that the plaintiffs acted with reasonable diligence, *Ross* further suggests that an appellate court need not credit all evidence supporting the jury's finding. (However, it bears saying that this point seems so plainly incorrect that, to the extent the court did ignore evidence in support of the jury's verdict, *Ross* arguably should be treated as an aberration, not as any indication that the court intended to depart from its firmly established law on verdict review.)[381]

Finally, one can more confidently conclude that *Ross* departs from the court's longstanding insistence on the estoppel effects of fraudulent concealment. Even *HECI* and *Wagner & Brown*, though holding that the discovery rule was unavailable, recognized that if there had been evidence of fraudulent concealment it could have changed the outcomes in those cases.[382] *HECI* was, perhaps, even more direct: "Of course, if an operator fraudulently concealed information from a lessee, decisions of this and other courts indicate that limitations may be tolled."[383]

Ross's approach is also, of course, inconsistent with the court's longstanding view that "fraud vitiates whatever it touches" and the broadly protective approach it has previously taken in cases like *Borderlon* in tolling limitations when a defendant fraudulently concealed its wrongdoing.[384] Yet, instead of concluding that Shell's misrepresentations may have made it at least presumptively reasonable for the Rosses to rely on what Shell told them, *Ross* makes clear that a defendant may not be estopped from arguing that a plaintiff acted unreasonably in relying on its false representations.

Having called out *Marshall* and *Ross* for criticism, it is incumbent on us to explain why the court's subsequent decision in *Hooks v. Samson Lone Star L.P.* did not ameliorate these prior cases. To be sure, *Hooks* at first appears to be an encouraging sign that the court was trying to reintroduce greater

[381] *See, e.g.*, Bustamante v. Ponte, 529 S.W.3d 447, 456 (Tex. 2017) ("'In determining whether there is no evidence of probative force to support a jury's finding, all the record evidence must be considered in the light most favorable to the party in whose favor the verdict has been rendered,' including evidence offered by the opposing party that supports the verdict. Courts 'must credit favorable evidence if reasonable jurors could, and disregard contrary evidence unless reasonable jurors could not,' and 'every reasonable inference deducible from the evidence is to be indulged in that party's favor.'" (quoting Merrell Dow Pharms., Inc. v. Havner, 953 S.W.2d 706, 711 (Tex. 1997) and City of Keller v. Wilson, 168 S.W.3d 802, 827 (Tex. 2005))).

[382] Wagner & Brown, Ltd. v. Horwood, 58 S.W.3d 732, 736 (Tex. 2001).

[383] HECI v. Neel, 982 S.W.2d 881, 886 (Tex. 1998).

[384] Borderlon v. Peck, 661 S.W.2d 907, 909 (Tex. 1983).

balance into the decisions in this area. However, the decision's muddled attempt to distinguish its prior cases—especially *Marshall* and *Ross*—has weakened the positive effect the case might otherwise have had. Far from backing off of the restrictive approach that the court has adopted throughout the later period, *Hooks* ends up serving as a powerful reminder of how strictly the court has applied the equitable fraud exception in the overwhelming majority of its post-1996 decisions.

In *Hooks*, the court let stand a jury's determination that the discovery rule tolled limitations because the defendant had affirmatively misled the plaintiff by creating false documents that fraudulently concealed their misdeeds. But in doing so, the court left unexplained how its decision to uphold the jury's verdict in *Hooks* could be squared with its prior decisions. The result was an uncertain dividing line between questions of fact and issues of law: The determination of whether a royalty owner's conduct constituted "reasonable diligence" represented an inquiry that was partly one of law and partly one of fact, stating that "reasonable diligence is an issue of fact. Nevertheless, in some instances, we can still determine as a matter of law that reasonable diligence would have uncovered the wrong."[385]

How does one determine when some publicly available information is inconsistent enough to cause the inquiry to shift to a factual determination for a jury instead of a determination by a judge through a summary judgment ruling? In each of the prior cases dating back to *HECI*, the royalty owners had some partial information and reacted reasonably on that partial information, but the court nevertheless said they were on constructive notice with respect to publicly available information. It is also not clear why the existence of inconsistent information at the Railroad Commission did not provide clear constructive notice to the lessors in *Hooks* of their need to immediately investigate further.[386] The court took pains to say that the later-in-time fraudulent filings tainted the public record, but would the result have been different if the defendant's fraudulently filed documents had been filed earlier-in-time and if corrected documents had been filed afterwards? Does the falsity in a public filing of any import remove the constructive notice of

[385] Hooks v. Samson Lone Star L.P., 457 S.W.3d 52, 58 (Tex. 2015) (citations omitted).

[386] Samson's Response Brief On the Merits, *Hooks v. Samson Lone Star*, No. 12-0920 (Nov. 4, 2013), at 25–26; Samson's Response to Amicus Briefs of Texas Land and Mineral Ass'n and Cardwell, Hart & Bennett, LLP, in *Hooks v. Samson Lone Star*, No. 12-0920 (May 30, 2013), at 7–8; Brief of Amicus Curiae the Texas Oil and Gas Ass'n Urging Denial of Petition for Review, *Hooks v. Samson Lone Star*, No. 12-0920 (Dec. 3, 2013), at 7.

all publicly available information from the legal determination and move it into the realm of a jury's factual determination?

The import of the *Hooks* decision is to create the following hard-to-decipher dichotomy under Texas law. If a lessee prepares false documents and provides them directly to the royalty owner, then this affirmative misrepresentation is given no weight even though the royalty owner has actual knowledge of these false statements and detrimentally relied on them. Yet, false statements filed with the Railroad Commission create a taint for the constructive notice of technical information that is available at the Railroad Commission and causes the application of the discovery rule to be a question of fact for a jury to decide. *Hooks* fails to indicate why the false statements that are filed with someone other than the royalty owner is given more weight than the actual fraudulent information provided directly to the royalty owner. The court's attempt at explaining when intentional misrepresentations raise a fact question for the jury and when they can be ignored as a matter of law limits the ameliorative effect of the case. And, as we would have expected, post-*Hooks* the lower courts are divided as to how much weight to give to a defendant's intentional falsehoods.[387]

[387] *Compare* Montana Trucks LLC v. UD Trucks N. Am., No. CV 12-23-M-DWM, 2017 WL 2166966 (D. Ct. Montana-Missoula Div., May 16, 2017) (applying Texas law, district court held that falsified public records created a fact question even though those records were not consulted by defendant and defendant had actual information from test center reports put the defendant on notice of the potential fraud); Quintel Tech. Ltd. v. Huawei Tech., Inc., No. 4:15-CV-307, 2017 WL 9286991 (E.D. Tex., Dec. 13, 2017) (same); Tech Pharmacy Servs. LLC v. Alixa Rx LLC, No. 4:15-CV-766, 2017 WL 3167652 (E.D. Tex., July 25, 2017) (without citing *Altai* or seeking to distinguish that case, the district court stated that a fact issue existed as to whether plaintiff could have discovered the theft of plaintiff's intellectual property or the wrongful use of that property by another company);; Slack v. Prudential Ins. Co. of Am., No. 6:14-CV-576-JDL, 2015 WL 11118070 (E.D. Tex., Oct. 29, 2015) (fact issue of when plaintiff could have discovered bad faith disallowance of insurance claim); with Bergeron v. Select Comfort Corp., No. 15-CV-657-LY, 2016 WL 155088 (W.D. Tex., Jan. 11, 2016) (internet posting on company website put plaintiff on constructive notice of defect such that discovery rule was inapplicable from at least that date forward); Teel v. Subrow, No. 05-16-00840-CV, 2017 WL 5559149 (Dist. Ct.—Rockway, Nov. 13, 2017) (plaintiff, while incarcerated, was on notice of things mailed to him during his imprisonment as plaintiff could have asked family members to review the information or provide it to him while in prison); Pham v. Carrier, No. D-1-GN-13-003813, 2017 WL 1291660 (126th Dist. Ct., Travis County, Tex., April 3, 2017) (member of an LLC could have known that LLC no longer owned and had conveyed assets of the limited liability company to another entity through investigation of publicly available franchise tax reports filed on behalf of the limited liability company with the consequence that the statute of limitations was not tolled as a matter of law);; *and* Bruning v. Hollowell, No. DC-12-09326-D, 2015 WL 1291378 (95th Dist. Ct., Dallas County, Tex., March 23, 2015) (stating publicly

IV. ARTICULATING PRINCIPLES FOR THE PATH FORWARD

We have seen that in the formative period the court consistently read the judicial exceptions to the legal injury rule broadly. The court did not always side with the plaintiff, of course, but it took seriously the need to consider what the injured party knew or, in the exercise of ordinary diligence, should have known.

We also saw that the later period has been a complete reversal of the earlier period. Over the last two decades the court has usually found that an exception to the legal injury rule did not save the plaintiff's claim from being time-barred. Where the court once seemed to reasonably balance the competing principles of access and repose, in the latter period we have seen very little evidence of an equivalent commitment to responsibly weighing these opposing policy values.

Given the history and doctrinal developments we have explored, in this final part we briefly summarize our view of how the court should alter its approach to applying the discovery rule and equitable fraud exceptions to the legal injury rule.

A. Principles for the Application of the Discovery Rule Exception

1. Initial presumption that reasonable diligence is a question of fact

The first principle we urge the court to adopt is to return to a starting presumption that what the plaintiff knew, or in the exercise of reasonable diligence should have known, are questions for the factfinder to determine. That would still leave plenty of room for the court to rule as a matter of law whenever the evidence conclusively demonstrates that the plaintiff knew or should have known of her injuries during the limitations period. That is, even with this starting presumption, there will be cases when that showing cannot be made, just as there have always been.[388]

But as the tally of cases from the earlier period reflects, when a reasonable level of diligence is applied the court is likely to rarely find that it can rule

available filings at tax appraisal district put plaintiff on constructive notice such that discovery rule did not toll the statute of limitations).

[388] *See e.g.*, Sherman v. Sipper, 152 S.W.2d 319 (Tex. 1941); *see also supra* text accompanying notes 53–58.

on the plaintiff's diligence as a matter of law. Practically, the application of this first principle will mean that summary judgments should be rarely granted for the defendant. It also means that if a case does reach trial and the jury finds that the plaintiff was reasonably diligent, that factual determination is entitled to a high degree of deference.

2. Relative knowledge and sophistication should be taken into account

Second, in evaluating the plaintiff's reasonable diligence, the court should take into account the relative knowledge and sophistication of the parties, as it did throughout the earlier period. This awareness began at least as far back as *Gaddis*, which emphasized the surgeon's superior knowledge, in contrast with that of the patient's, to justify tolling the commencement of limitations.[389]

Even with contractual relationships that do not rise to the level of a fiduciary relationship, the court should still consider the context of those relationships, especially when the very reason the contractually arrangement was entered into was because one party has specialized expertise that the other party is relying upon. When homeowners hire a roofer to repair their roof, it is because they need someone with specialized roofing experience. Patients who need medical care go to doctors for their expertise and, in the ordinary exercise of diligence, may have no way to know that they have been injured. Even in commercial arm's-length transactions, one party will sometimes have specialized knowledge that may excuse the other, especially if they have been defrauded, from discovering the facts underlying their claim. So too with nonpossessory royalty interest owners who convey the working interest to an operator, as in *HECI*. The injured parties in all of these situations are engaged in an arm's length contractual arrangement and certainly all have an affirmative duty of reasonable due diligence to protect their own interests. But the level of diligence that is expected of a party in these postures must appropriately match what could ordinarily and reasonably be expected of injured parties in their position.

By heightening what counts as reasonable diligence and imposing constructive knowledge that far exceeds what is reasonably accessible to persons of ordinary prudence, the court has made it much harder for plaintiffs to have a fair opportunity for legal redress of valid claims. The court should seek to balance the competing interests so that reasonably prudent plaintiffs

[389] Gaddis v. Smith, 417 S.W.2d 577, 581 (Tex. 1967).

are not denied access to justice by a wooden application of the legal injury rule.

Accounting for the relative knowledge and sophistication of the parties more faithfully honors the court's prior recognition that the disadvantages from delaying limitations will often be outweighed by the unfairness of barring a plaintiff from recovery when she could not have known of the defendant's wrongful acts until after limitations expired. In balancing the defendant's desire for repose with the plaintiff's legitimate interest to have their valid claims heard, the court should expect that ordinary citizens must be diligent; it should not, however, expect more than is reasonable. If the plaintiff has been as diligent as one can reasonably expect, taking into account their level of knowledge and sophistication as compared with that of the defendant, then the failure to toll the accrual of the statute of limitations in that specific situation effectively converts an accrual limitations statute into a statute of repose.

3. Fiduciary and other special relationships also should bear relevance to a plaintiff's reasonable diligence

The court should also recognize that when a fiduciary or other special relation of trust exists between the parties, less diligence is required than would be if it had been an arm's length transaction. The court recognized this principle consistently throughout the earlier period,[390] and it has also continued to recognize it, at least in theory, in the later period.[391] Even *S.V.*, acknowledging that some of the court's prior cases had held a fiduciary's conduct to be inherently undiscoverable, noted that "[t]he reason underlying [the] decisions is that a person to whom a fiduciary duty is owed is either unable to inquire into the fiduciary's actions or unaware of the need to do so" and that "a person to whom a fiduciary duty is owed is relieved of the responsibility of diligent inquiry into the fiduciary's conduct[.]"[392]

Going forward, the court should more firmly recognize that one to whom a fiduciary or special relation of trust is owed may be unable to inquire into

[390] *See, e.g.*, Courseview, Inc. v. Phillips Petroleum Co. 312 S.W.2d 197 (Tex. 1957); Slay v. Burnett Tr., 187 S.W.2d 377 (1945); Andretta v. W., 415 S.W.2d 638 (Tex. 1967); Willis v. Maverick, 760 S.W.2d 642 (Tex. 1988).

[391] *See, e.g.*, HECI v. Neel, 982 S.W.2d 881 (Tex. 1998); Valdez v. Hollenbeck, 465 S.W.3d 217 (Tex. 2015); Lesley v. Veterans Land Bd. of State, 352 S.W.3d 479 (Tex. 2011).

[392] S.V. v. R.V., 933 S.W.2d 1, 8 (Tex. 1996).

the other's actions or may be unaware of the need to do so[393] and that, "even if inquiry is made, '[f]acts which might ordinarily require investigation likely may not excite suspicion'" when a fiduciary or special relationship is involved.[394]

4. Remember to distinguish between legal injury accrual and the discovery rule

Separate from how the court should evaluate reasonable diligence for discovery rule purposes, the court should also keep straight the difference between accrual under the legal injury rule and the application of the common law discovery rule exception. This principle is particularly relevant when the plaintiff's claim depends on the resolution of some underlying dispute. Exemplary cases here are *Linkenhoger* and *Atkins*.

The court need not only look to the distant past. In *American Star Energy & Minerals v. Stowers*, the court held that under the legal injury rule a claim against a partner liable for a partnership debt does not accrue until after final judgment against the partnership is entered.[395] To be sure, the court emphasized that its decision was driven by the statutory language and its objectives—but there was nothing remarkable or unusual about the substantive law in this statutory regime.[396] As we observed at the outset, the limitations inquiry is necessarily tied up with the substantive law. In *American Star Energy*, the judgment creditor's claim against the partner accrued when it became actionable against the partner—and under the governing law, that did not occur until after final judgment against the partnership.[397] Fundamentally, *American Star Energy* is entirely consistent with *Linkenhoger* and *Atkins*. So, as it has in these other cases, the court should remember that before it is even necessary to reach the discovery rule or equitable fraud exception, it must first determine that a claim has accrued under the general rule.

5. Do away with objective verifiability. Disavow that limitations

[393] *Valdez*, 465 S.W.3d at 231.
[394] *Id.* (citing *Willis*, 760 S.W.2d at 645).
[395] 457 S.W.3d 427, 433–34 (Tex. 2015).
[396] *Id.* at 430–31.
[397] *Id.* at 428.

statutes are primarily meant to avoid fraud

Finally, the court should do away with objective verifiability as a requirement for the discovery rule. As we saw, this second requirement that *Altai* and *S.V.* imposed derives from the court's mistaken assumption that limitations statutes are primarily meant to avoid fraud. Even if legislators were to subsequently assert that they were trying to address a perceived problem with fraudulent claims by enacting a statute of limitation, this is not an effective vehicle for doing so; by comparison, existing procedural law already contains multiple filters that robustly check for merit. By contrast, whether the plaintiff knew, or could have known through reasonable diligence, of her injuries—in other words, the inherently undiscoverable requirement—speaks directly to the true policy purposes that should guide the question of when does a claim accrue for limitations purposes.

B. Principles for the Application of the Equitable Fraud Exception

1. Reasonable diligence principles #1-3, above, should also be applied as to equitable fraud

Because reasonable diligence is also relevant to the equitable fraud exception, the first three principles that we outline above for discovery rule cases apply equally here as well. Indeed, they apply with even greater force when a defendant has concealed its wrongdoing.

Taken together, the court's post-1996 fraud cases demonstrate that it has gotten off track and that it should again recognize, as it used to consistently, that if a defendant's misdeeds are a contributing factor in the delayed commencement of the plaintiff's claims, then it would be inequitable to allow a defendant to complain about the untimeliness of the litigation. This state of affairs is even harsher because Texas law is unclear on whether and to what extent a plaintiff can contractually require a defendant to waive the affirmative defense of the statute of limitations in situations where they hid the facts.[398] Although some have suggested that it might be possible to insist on a waiver of a limitations defense based on a defendant's knowing concealment of wrongdoing, the need to have the waiver be broad enough to cover unknown future situations creates significant risk that a waiver would

[398] *See* Am. Alloy Steel, Inc. v. Armco, Inc., 777 S.W.2d 173 (Tex. App.—Houston [14th Dist.] 1989, no writ).

not survive judicial scrutiny.[399] In any event, contractual protections will not be available for most tort claims. Given the inability, then, of most prospective claimants to protect themselves from undiscoverable claims, the court's restriction of the discovery rule and equitable fraud exceptions to the legal injury rule means that claimants may end up with no reasonable means of redress.

2. Recollect that the fraud exception is based on equitable estoppel

In the early period, the court did not fail to recognize what it apparently has frequently forgotten in the later period: that the fraud exception is based on the doctrine of equitable estoppel. Practically, recognition of this principle would mean that the court should not minimize or excuse a defendant's intentional efforts to conceal its wrongdoing. Additionally, it also would mean that the court ought to acknowledge, as it did in cases like *Borderlon*, that fraud can be relevant to the determination of whether a plaintiff acted with reasonable diligence in discovering the facts giving rise to her injury.

Perhaps the worst consequence of the court's restriction of the equitable fraud exception is that wrongdoers are incentivized to hide their misdeeds. The court's decisions in the post-1996 period have made clear that potential defendants can intentionally sabotage, mislead, or induce other parties to detrimentally rely on their fraudulent statements, create false documents, and outright lie and retain the benefit of the ill-gotten delay caused by these tactics by running out the statute of limitations clock.[400] Few instances of wrongdoing actually proceed to litigation, which makes the consequence of such a signaling effect all the greater. A legal norm that rewards deceitful business practices has obvious—and profound—public policy implications.

[399] *See* Calhoun Bobbit, *How to Migitate the Results: Natural Gas Pipeline of Am. vs. Pool and Other Contentious Issues*, 23rd Annual Advanced Oil, Gas and Energy Resources Course (September 15–16, 2005).

[400] *See* Amicus Curiae Brief in Support of Petitioner's Petition for Review, *Hooks v. Samson Lone Star*, No. 12-0920 (March 7, 2013), at 2−8; *see also* Samson Lone Star v. Hooks, 389 S.W.3d 409, 441–42 (Tex. App.—Houston [1st Dist.] 2011) (Sharp, J., concurring and dissenting) (expressing concern with the policy results of *Marshall* and its progeny).

3. Stop distinguishing a "categorical" approach for discovery rule cases from a fact specific approach in fraud cases

The court should also stop making the mistake—one that it has often repeated—of distinguishing a "categorical" approach for discovery rule cases from a case-specific approach in fraud cases. If the plaintiff, through no fault of her own, is unaware of her injury, then it would be fundamentally fair to say she is barred by limitations from seeking relief.[401] But we cannot decide if the plaintiff, through reasonable diligence, should have known of her injury if we ignore the actual facts of the case. The crazy thing is that although the court has repeatedly described its approach in discovery rule cases as categorical, and not case-specific, it almost always—*Altai* and *Wagner & Brown* are two notable exceptions—considers case-specific facts. We disagree with how the court has applied the facts in a great many of its post-1996 cases, but it is simply incorrect to say that it has ignored them.

Moreover, a categorical approach that actually ignores the facts cannot be squared with the responsibility that the legislature has delegated to the courts to determine when a cause of action accrues. As we noted at the outset, legislatures enact these accrual statutes—which, by far, are the most common type of limitations statute that they employ—because it is not always clear when wrongful conduct becomes legally actionable. So, by design, when it enacts an accrual statute, the legislature is leaving it up to courts to decide when the limitations period commences based on the particular facts and law relevant in that case. Thus, to say, as *Wagner & Brown* does, that the court's approach to discovery rule cases is "categorical, not case-specific" ignores the intended linkage between the legislature's decision to enact an accrual statute and its delegation to courts of the task of determining the date of accrual.

This mischaracterization has real world consequences. For instance, it led the court in *Wagner & Brown* to conclude that a defendant's affirmative misrepresentations are irrelevant to whether a reasonable person should have known of the facts giving rise to the claim. As we have said, the effect of *Wagner & Brown* is to foreclose reliance on evidence of a defendant's attempts to fraudulently conceal its wrongdoing as a basis for tolling limitations under the discovery rule. Thus, we urge the court to stop distinguishing a categorical approach for discovery rule and to clarify that the facts and circumstances in a case are always relevant in both discovery rule and equitable fraud cases.

[401] S.V. v. R.V., 933 S.W.2d 1, 7 (Tex. 1996).

4. Revisit the formalistic distinction the court has drawn for constitutional purposes between statutes of limitations and statutes of repose

Finally, we suggest that the court should revisit the muddled distinction that it has drawn between statutes of limitations and statutes of repose for state constitutional law purposes. As the law currently stands, statutes of limitations cannot constitutionally bar a common law claim if a plaintiff had no reason to know of her injuries during the limitations period.[402] However, the court has also held that the legislature can constitutionally enact a statute of repose—as distinct from a limitations statute—that sets a definitive outermost date after which an adult plaintiff cannot sue, regardless of when the plaintiff first learned of her injuries.[403] The court has not addressed whether the open courts provision still protects minors or others who are under a disability when they did not have any reason to know of their claim during the entire period of repose.

It is certainly reasonable for the court to accept the legislative desire to value finality after a decade, such as in cases like *Rankin* and *Trinity River*, but the decisions leave the misimpression that constitutional rights turn on a formalistic distinction between limitations and repose statutes. The court should clarify that what matters is not semantic labels but whether lawmakers have truly sought to balance judicial access with finality. The court was clearest when it emphasized, in a pair of decisions handed down on the same day, that a ten-year repose period was critical to its determination that the legislature acted reasonably (in *Rankin*) and that, by contrast, a 2-year limitation statute was too short to abrogate the constitutional protection (in *Walters*).[404]

Left unanswered, of course, is what happens if the limitations period is longer than two years, or the repose statute is shorter than ten years. Our view is that there isn't an exact cut off. Instead, the court must assure itself that the legislative effort reflects a sincere attempt to strike a fair balance. To do so, the court should recall that the pre-1996 cases finding constitutional

[402] *See, e.g.*, Nelson v. Krusen, 678 S.W.2d 918 (Tex. 1984); Neagle v. Nelson, 685 S.W.2d 11 (Tex. 1985); Hellman v. Mateo, 772 S.W.2d 64 (Tex. 1989); Walters v. Cleveland Reg'l Med. Ctr., 307 S.W.3d 292 (Tex. 2010).

[403] *See* Methodist Healthcare Sys. v. Rankin, 307 S.W.3d 283 (Tex. 2010); Tenet Hosps. Ltd. v. Rivera, 445 S.W.3d 698 (Tex. 2014).

[404] *Rankin*, 307 S.W.3d at 288; *Walters*, 307 S.W.3d at 298.

violations drew on the same basic rationale adopted in *Gaddis* and *Hays* when the court first recognized the reasons for making a judicial exception to the legal injury rule. Thus, the idea that the court rejected as shocking in *Krusen* was, as in *Gaddis*, that a plaintiff would be barred "from recovery when he could not know of the wrongful act until after the period of time prescribed by the statute of limitations had run."[405] Or, as the *Hays* court put it, to rule that no legal remedy is available even though the injured person does not know he has been injured is a "result so absurd and unjust [as] ought not to be possible."[406]

To be sure, all of these decisions were specifically addressed to statutes of limitations, not repose statutes, but the basic rationale of the court's early cases certainly invites the conclusion that mere semantic differences in the two kinds of statutory vehicles cannot cure the fundamental constitutional infirmity. That is, whether we call them limitations or repose, a statute that sets an unreasonably short deadline to file suit should be equally "shocking" and "so absurd and unjust [as] ought not to be possible" for the legislature to be able to cut off an injured party's claim before they even knew they had been injured. For these reasons, we urge the court to revisit the distinction it has drawn between statutes of limitations and statutes of repose and to clarify that any statute that purports to cut off rights after a certain period of time is only constitutional if the legislature has truly balanced access with finality.

V. CONCLUSION

Our ambition in this paper has been to demonstrate that the discovery rule and fraudulent concealment exceptions are in serious need of recalibration. We have attempted to demonstrate this by comparing the court's approach to the legal injury rule and its exceptions in the early period with its treatment of these issues after *Altai* and *S.V.* The court's discovery rule and equitable fraudulent jurisprudence has had far-reaching impacts across a broad spectrum of parties in this state, with real world consequential effects on the administration of justice. In the later period, the court has too often eschewed a meaningful effort to balance competing interests on a case-specific basis. Our hope is that the court will reconsider the path it has taken so that it better harmonizes the plaintiff's opportunity to obtain legal redress with the defendant's interest in repose.

[405] *Krusen*, 678 S.W.2d at 923.

[406] Hays v. Hall, 488 S.W.2d 412, 414 (Tex. 1972).

VI. APPENDIX

Table 1
Discovery Rule and Equitable Fraud Cases
(1852-1995)

Case Name	Ruling for:	Notes
McDonald v. McGuire, 8 Tex. 361 (1852)	D	Involved equitable fraud only. Early case that acknowledged, without adopting, possible exception to statute of limitations for equitable fraud.
Smith v. Talbot, 18 Tex. 774 (1857)	D	Involved equitable fraud only. Held that fraud will defer the running of limitations until the underlying wrong is discovered, or by the use of reasonable diligence, might have been discovered, but found on facts of case that plaintiff could have discovered fraud during limitations period.
Ripley v. Withee, 27 Tex. 14 (1863)	P	Involved equitable fraud only. Held that fraud will defer the running of limitations until the underlying wrong is discovered, or by the use of reasonable diligence, might have been discovered.
Anding v. Perkins, 29 Tex. 348 (1867)	P	Involved equitable fraud only. Held that fraud will defer the running of limitations until the underlying wrong is discovered, or by the use of reasonable diligence, might have been discovered.
Kuhlman v. Baker, 50	D	Involved equitable fraud only. Held

Tex. 630 (1879)		that fraud will defer the running of limitations until the underlying wrong is discovered, or by the use of reasonable diligence, might have been discovered but found on facts of case that plaintiff could have discovered fraud during limitations period.
Hous. Water-Works Co. v. Kennedy, 70 Tex. 233 (1888)	D	Involved legal injury rule. Held that limitations accrued at time of injury.
Tex. & P. Ry. Co. v. Gay, 26 S.W. 599 (Tex. 1894)	P	Involvement equitable fraud only. Held that fraudulent concealment defers accrual of limitations.
Port Arthur Rice Milling Co. v. Beaumont Rice Mills, 143 S.W.926 (Tex. 1912)	P	Involved equitable fraud only. Held that sufficient evidence existed to affirm jury determination that plaintiff did not know or in the exercise of reasonable diligence should have known of the claim.
Quinn v. Press, 140 S.W.2d 438 (Tex. 1940)	P	Involved equitable fraud only. Held that plaintiff had actual knowledge of facts that gave rise to the claim during the limitations period.
Sherman v. Sipper 152 S.W.2d 319 (Tex. 1941)	D	Involved equitable fraud only. Held that while fraudulent concealment will toll the statute of limitations, on the facts of case the plaintiff should discovered the claim through reasonable diligence.
Carrell v. Denton, 157 S.W.2d 878 (Tex. 1942)	D	Involved non-fraud issues concerning plaintiff's knowledge. Held that the discovery rule did not apply to medical malpractice claim.
Cherry v. Farmers Royalty Holding Co.,	P	Involved equitable fraud only. Held that case properly remanded to allow

160 S.W.2d 908 (Tex. 1942)		jury to determine when plaintiff knew or should have known of injuries.
Ruebeck v. Hunt, 176 S.W.2d 738 (Tex. 1943)	P	Involved non-fraud issues concerning plaintiff's knowledge and equitable fraud. Held that jury had sufficient evidence to find that plaintiff did not know or in the exercise of reasonable diligence should have known of facts giving rise to claim.
Slay v. Burnett, 187 S.W.2d 377 (Tex. 1945)	P	Involved non-fraud issues concerning plaintiff's knowledge and equitable fraud. Held that fiduciary relationship relevant to reasonable diligence.
Linkenhoger v. Am. Fid. & Cas. Co., 260 S.W.2d 884 (Tex. 1953)	P	Involved legal injury rule. Held that *Stower's* claim against insurance carrier did not accrue under the legal injury rule until plaintiff's liability was finally resolved.
Courseview v. Phillips Petroleum Co., 312 S.W.2d 197 (Tex. 1958)	P	Involved equitable fraud only. Held that genuine issue fact issues existed as to when mistake was known or could be discovered through reasonable diligence.
Miles v. Martin, 321 S.W.2d 62 (Tex. 1959)	P	Involved non-fraud issues concerning plaintiff's knowledge. Held, in a deed reformation case, that a genuine fact issues existed as to when mistake was known or could be discovered through reasonable diligence.
Wise v. Anderson, 359 S.W.2d 876 (Tex. 1962)	D	Involved non-fraud issues concerning plaintiff's knowledge. Held that plaintiff had actual knowledge of facts giving rise to the claim.

Atkins v. Crosland, 417 S.W.2d 150 (Tex. 1967)	P	Involved legal injury rule. Held that in an accounting malpractice the plaintiff's claim did not accrue until the IRS assessment was final.
Andretta v. W., 415 S.W.2d 638 (Tex. 1967)	P	Involved non-fraud issues concerning plaintiff's knowledge. Held that, given fiduciary relationship, plaintiff was not on constructive notice of public agreements executed by the fiduciary.
Gaddis v. Smith, 417 S.W.2d 577 (Tex. 1967)	P	Involves discovery rule only. Held that discovery rule applies to medical malpractice claim.
McClung v. Lawrence, 430 S.W.2d 179 (Tex. 1968)	P	Involved non-fraud issues concerning plaintiff's knowledge of mutual mistake. Held that the equitable remedy of reformation was available when parties to a deed were mistaken as to the legal effect of the deed language and remanding for a jury to decide when the mistake in the deed was or should have been discovered.
Sullivan v. Barnett, 471 S.W.2d 39 (Tex. 1971)	P	Involved non-fraud issues concerning plaintiff's knowledge of mutual mistake. Held that the equitable remedy of reformation was available when parties to a deed were mistaken as to the legal effect of the deed language and remanding for a jury to decide when the mistake in the deed was or should have been discovered.
Hays v. Hall, 488 S.W.2d 412 (Tex. 1972)	P	Involved discovery rule. Held that discovery rule saved plaintiff's claims as to negligent medical procedure.
Nichols v. Smith, 507 S.W.2d 518	D	Involved equitable fraud only. Held that plaintiff failed to raise sufficient

(Tex.1974)		evidence for a fact issue.
Kelley v. Rinkle, 532 S.W.2d 947 (Tex. 1976)	P	Involved discovery rule. Held that discovery rule saved plaintiff's libel to credit reputation claim.
Robinson v. Weaver, 550 S.W.2d 18 (Tex. 1977)	D	Involved discovery rule. Held that discovery rule not applicable as to medical misdiagnosis claim.
Weaver v. Witt, 561 S.W.2d 792 (Tex. 1977)	P	Involved equitable fraud and discovery rule. Held that defendant did not carry its summary judgment burden to show plaintiff knew or should have known of legal malpractice.
Estate of Stonecipher v Butts, 591 S.W.2d 806 (Tex. 1979)	P	Involved equitable fraud only. Held that that plaintiff did not know or in the exercise of reasonable diligence should have known of claim.
Brown v. Havard, 593 S.W.2d 939 (Tex. 1980)	P	Involved discovery rule. Held that plaintiff rebutted constructive notice of public information in context of a mutual mistake in a deed reformation case.
Mooney v. Harlin, 622 S.W.2d 83 (Tex. 1981)	D	Involved discovery rule. Held that reasonable diligence of the probate records would have disclosed the claim.
Escontrias v. Apodaca, 629 S.W.2d 697 (Tex. 1982)	D	Involved discovery rule. Held that plaintiff had actual knowledge of sufficient facts about fraud claim during limitations period.
Sax v. Vottler, 648 S.W.2d 661 (Tex. 1983)	P	Involved discovery rule only. Held constitutional violation for limitations statute that did not toll for minor plaintiffs.

Borderlon v. Peck, 661 S.W.2d 907 (Tex. 1983)	P	Involved equitable fraud only. Held that statute did not abolish fraudulent concealment as equitable defense of limitations.
Cherry v. Victoria Equip. & Supply, Inc., 645 S.W.2d 781 (Tex. 1983)	P	Involved equitable fraud only. Plaintiff alleged sufficient facts to avoid summary judgment.
Nelson v. Krusen, 678 S.W.2d 918 (Tex. 1984)	P	Involved discovery rule only. Held that statute unconstitutional as to minor plaintiffs.
Bradford v. Sullivan, 683 S.W.2d 697 (Tex. 1985)	P	Involved discovery rule only. Held that statute unconstitutional as to minor plaintiffs.
Neagle v. Nelson, 685 S.W.2d 11 (Tex. 1985)	P	Involved discovery rule only. Held statute unconstitutional as to minor plaintiffs.
Morrison v. Chan, 699 S.W.2d 205 (Tex. 1985)	D	Involved discovery rule only. Held no constitutional violation because adult plaintiffs could have known of their injuries during the limitations period.
Street v. Second Court of Appeals, 756 S.W.2d 299 (Tex. 1988)	P	Involved legal injury rule. Held that a claim did not accrue in a *Stowers* suit until underlying case following *Linkenhoger*.
Willis v. Maverick, 760 S.W.2d 642 (Tex. 1988)	D	Involved discovery rule only. Held that the discovery rule applied to legal malpractice cases, but found that plaintiff's lawyer failed to request proper jury instruction.
Woods v. William M.	D	Involved discovery rule only. Plaintiff

Mercer, 769 S.W.2d 515 (Tex. 1988)		failed to plead or provide proof to avoid summary judgment.
Burns v. Thomas, 786 S.W.2d 266 (Tex. 1990)	P	Involved discovery rule only. Held that defendant did not carry its summary judgment burden to show that plaintiff knew or in the exercise of reasonable diligence should have known of legal malpractice.
Moreno v. Sterling Drug, Inc., 787 S.W.2d 348 (Tex. 1990)	D	Involved discovery rule only. Held no constitutional violation because adult plaintiffs knew or could have known of their injuries during the limitations period.
Hughes v. Mahaney & Higgins, 821 S.W.2d 154 (Tex. 1991)	P	Involved discovery rule only. Held legal malpractice claim tolled until underlying case finally resolved.
Aduddel v. Parkhill, 821 S.W.2d 158 (Tex. 1991)	P	Involved discovery rule only. Held claim timely under tolling rule from *Hughes*.
Gulf Coast Inv. Corp. v. Brown, 821 S.W.2d 159 (Tex. 1991)	P	Involved discovery rule only. Held claim timely under tolling rule from *Hughes*.
Am. Centennial Ins. Co. v. Canal Ins. Co., 843 S.W.2d 480 (Tex. 1992)	P	Involved discovery rule only. Held claim timely under tolling rule from *Hughes*.
Am. Petrofina, Inc v. Allen, 887 S.W.2d 829 (Tex. 1994)	D	Involved equitable fraud only. Held that plaintiffs failed to come forward with any summary evidence to raise a fact issue as to the defendant's fraud.
Trinity River Auth. v. URS Consultants, Inc., 889 S.W.2d 2262 (Tex.	D	Involved discovery rule only. Held repose statute constitutional, but not deciding whether discovery rule

1994)		applied to negligent design case.
Sanchez v. Hastings, 898 S.W.2d 287 (Tex. 1995)	P	Involved discovery rule only. Held claim timely under tolling rule from *Hughes*.
Weiner v. Wasson, 900 S.W.2d 316 (Tex. 1995)	P	Involved discovery rule only. Held, following *Sax*, that statute unconstitutional as to minor plaintiffs

Table 2
Discovery Rule and Equitable Fraud Cases
(1996-2018)

Case Name	Ruling for	Notes
Comput. Assocs. v. Altai, 918 S.W.2d 453 (Tex. 1996)	D	Involved discovery rule only. Held that claim not inherently undiscoverable.
S.V. v. R.V., 933 S.W.2d 1 (Tex. 1996)	D	Involved discovery rule only. Held that claim not objectively verifiable.
Jennings v. Burgess, 917 S.W.2d 790 (Tex. 1996)	D	Involved discovery rule only. Held that plaintiff had actual knowledge of facts giving rise to claim.
Baptist Mem. Hosp. Sys. v. Arredondo, 922 S.W.2d 120 (Tex. 1996)	D	Involved discovery rule only. Held that intermediate court incorrectly applied statute's tolling provision for minors to an adult beneficiary's claim and upholding the statute against constitutional challenges
Little v. Smith, 943 S.W.2d 414 (Tex. 1997)	D	Involved discovery rule and equitable fraud. Held that neither the discovery rule nor the equitable fraud exception applied to an adoptee's claim for share of assets of decedent's estate
Diaz v. Westphal, 941	D	Involved discovery rule only. Held that

S.W.2d 96 (Tex. 1997)		discovery rule exception abolished by statute in medical liability cases
Murphy v. Campbell, 964 S.W.2d 265 (Tex. 1997)	D	Involved discovery rule only. Held injury not inherently undiscoverable.
Velsicol Chem. Corp. v. Winograd, 956 S.W.2d 529 (Tex. 1997)	D	Involved discovery rule and equitable fraud. Held injury not inherently undiscoverable.
Johnson & Higgins v. Kenneco Energy, 962 S.W.2d 507 (Tex. 1997)	D	Involved equitable fraud only. Refused to apply equitable fraud because improper jury issue presented and because equitable exception held not to trump limited period authorized by statute.
Husain v. Khatib, 964 S.W.2d 918 (Tex. 1998)	D	Involved discovery rule only. Held injury not inherently undiscoverable.
Childs v. Haussecker, 974 S.W.2d 31 (Tex. 1998)	P	Involved discovery rule only. Held holding that the discovery rule defers accrual of a cause of action based on a latent occupational disease
HECI v. Neel, 982 S.W.2d 881 (Tex. 1998)	D	Involved discovery rule only. Held injury not inherently undiscoverable.
KPMG Peat Marwick v. Harrison Cty. Hous. Fin. Corp., 988 S.W.2d 746 (Tex. 1999)	D	Involved discovery rule and equitable fraud. Held that during entire limitations period plaintiff had actual knowledge of facts giving rise to claim and that plaintiff failed to come forward with any summary evidence to raise a fact issue as to the defendant's fraud.
Conoco, Inc. v. Amarillo Nat'l Bank,	D	Involved discovery rule only. Held that trial court's denial of summary judgment

996 S.W.2d 853 (Tex. 1999) (mem op)		improper and remanding for reconsideration in light of *HECI*.
Rhone-Poulenc, Inc. v. Steel, 997 S.W.2d 217 (Tex. 1999)	P	Involved discovery rule only. Held that defendant did not carry its summary judgment burden to show that, as a matter of law, plaintiff knew or in the exercise of reasonable diligence should have known of injuries and that they were related to defendant's negligence.
Owens Corning v. Carter, 997 S.W.2d 560 (Tex. 1999)	D	Involved discovery rule only. Held that under borrowing statute a foreign plaintiff must file within the limitations period prescribed by foreign state's law even if other jurisdiction did not provide for a discovery rule tolling of statute.
Earle v. Ratliff, 998 S.W.2d 882 (Tex. 1999)	D	Involved equitable fraud only. Held trial court's grant of summary judgment proper where plaintiff's summary judgment evidence raised, at most, questions of the doctor's negligence but did not show any fraud.
Baker Hughes, Inc. v. Keco R & D, Inc., 12 S.W.3d 1 (Tex. 1999)	D	Involved discovery rule only. Held that statutory amendments adopting the discovery rule for determining the accrual of a trade secrets claim do not apply retroactively to revive claim dismissed as barred by limitations.
Pustejovsky v. Rapid-Am. Corp., 35 S.W.3d 643 (Tex. 2000)	P	Involved discovery rule only. Held that fact issue precluded summary judgment and extended its application of discovery rule for latent occupational diseases in *Childs* to mesothelioma case
Shah v. Moss, 67 S.W.3d 836 (Tex. 2001)	D	Involved equitable fraud only. Held limitations not tolled for equitable fraud

		in case where issue was only superficially raised.
Underkofler v. Vanasek, 53 S.W.3d 343 (Tex. 2001)	P/D	Involved discovery rule only. Held that plaintiff's common law claims for legal malpractice timely, applying *Hughes*, but that limitations barred DTPA claims to which the common law discovery rule is not applicable
Apex Towing Co. v. Tolin, 41 S.W.3d 118 (Tex. 2001)	P	Involved discovery rule only. Held injury not inherently undiscoverable.
Wagner & Brown, Ltd. v. Horwood, 58 S.W.3d 732 (Tex. 2001)	D	Involved discovery rule only (plaintiff also plead equitable fraud but court did not reach issue). Held injury not inherently undiscoverable.
Schneider Nat. Carriers, Inc. v. Bates, 147 S.W.3d 264 (Tex. 2004)	D	Involved discovery rule only. Held that plaintiffs had actual knowledge of facts giving rise to claim.
PPG Indus., Inc. v. JMB/Hous. Centers Partners Ltd., 146 S.W.3d 79 (Tex. 2004)	D	Involved discovery rule only. Held that plaintiff had actual knowledge of facts giving rise to claim.
Via Net v. TIG Ins. Co., 211 S.W.3d 310 (Tex. 2006)	D	Involved discovery rule only. Held that plaintiff had actual knowledge or should have known of facts giving rise to claim.
Barker v. Eckman, 213 S.W.3d 306 (Tex. 2006)	D	Involved discovery rule only. Held that plaintiff did not carry its burden at trial by failing to ask jury question on the discovery rule
Ford v. ExxonMobil Chem. Co., 235	D	Involved equitable fraud only. Held injury not inherently undiscoverable.

S.W.3d 615 (Tex. 2007)		
Yancy v. Surgical Partners Int'l, 236 S.W.3d 778 (Tex. 2007)	D	Involved discovery rule only. Held that statute of repose not subject to common law tolling.
Kerlin v. Sauceda, 263 S.W.3d 920 (Tex. 2008)	D	Involved discovery rule and equitable fraud. Held injury not inherently undiscoverable.
Walters v. Cleveland, 307 S.W.3d 292 (Tex. 2010)	P	Involved discovery rule only. Held that discovery rule constitutionally required for applicable statute of limitation, reaffirming *Neagle*.
Frost Nat'l Bank v. Fernandez, 315 S.W.3d 494 (Tex. 2010)	D	Involved discovery rule only. Holding that the discovery rule does not apply to bills of review in which non-marital children seek to set aside probate judgments.
John G. & Marie Stella Kennedy Mem'l Found. v. Fernandez, 315 S.W.3d 515 (Tex. 2010)	D	Involved discovery rule only. Holding, in this companion case to *Fernandez*, that the discovery rule does not apply to bills of review in which non-marital children seek to set aside probate judgments.
Exxon Corp. v. Emerald Oil & Gas Co., L.C., 348 S.W.3d 194 (Tex. 2011)	D	Involved discovery rule and equitable fraud. Held that plaintiffs had actual knowledge of facts giving rise to claim.
BP Am. Prod. Co. v. Marshall, 342 S.W.3d 59 (Tex. 2011)	D	Involved discovery rule and equitable fraud. Held injury not inherently undiscoverable.
Lesley v. Veterans Land Bd. of State, 352	P	Involved discovery rule only. Held that whether plaintiff knew or should have

S.W.3d 479 (Tex. 2011)		known of mistake in deed involves disputed facts for jury.
Shell Oil Co. v. Ross, 356 S.W.3d 924 (Tex 2011)	D	Involved discovery rule and equitable fraud. Held injury not inherently undiscoverable.
Etan Indus., Inc. v. Lehmann, 359 S.W.3d 620 (Tex. 2011)	D	Involved equitable fraud only. Held that plaintiff had actual knowledge or should have known of facts giving rise to claim.
Nat. Gas Pipeline v. Justiss, 397 S.W.3d 150 (Tex. 2012)	P	Involved discovery rule only. Held that jury reasonably concluded that plaintiffs did not know or have reason to know of their injuries during limitations period.
Gonzales v. Sw. Olshan Found. Repair Co., LLC, 400 S.W.3d 52 (Tex. 2013)	D	Involved equitable fraud only. Held that equitable fraud not apply to DTPA claims
Tenet Hosps. Ltd. v. Rivera, 445 S.W.3d 698 (Tex. 2014)	D	Involved discovery rule only. Held, reaffirming *Yancy*, that statute of repose not subject to common law tolling.
Hooks v. Samson Lone Star, LP, 457 S.W.3d 52 (Tex. 2015)	P	Involved equitable fraud only. Held that plaintiff's reasonable diligence in case could not be determined as a matter of law
Am. Star Energy & Minerals v. Stowers, 457 S.W.3d 427 (Tex. 2015)	P	Not involving discovery rule or equitable fraud. Held that under legal injury rule claim against partner liable for a partnership debt not accrue until after final judgment against the partnership is entered.
Cosgrove v. Cade, 468 S.W.3d 32 (Tex. 2015)	D	Involved discovery rule only. Held injury not inherently undiscoverable.
Valdez v. Hollenbeck,	D	Involved discovery rule and equitable

465 S.W.3d 217 (Tex. 2015)		fraud. Held injury not inherently undiscoverable.
BNSF Ry. Co. v. Phillips, 485 S.W.3d 908 (Tex. 2015)	D	Involved discovery rule only. Held that plaintiff had actual knowledge or should have known of facts giving rise to claim.
SW Energy v Berry-Helfand, 491 S.W.3d 699 (Tex. 2016)	P	Involved discovery rule only. Held that plaintiff's reasonable diligence in case could not be determined as a matter of law.
Exxon v. Lazy R Ranch, 511 S.W.3d 538 (Tex. 2017)	D	Involved discovery rule and equitable fraud. Held injury not inherently undiscoverable.
Town of Dish v. Atmos, 519 S.W.3d 605 (Tex. 2017)	D	Involved discovery rule only. Held injury not inherently undiscoverable.
ExxonMobil v. Rincones, 520 S.W.3d 572 (Tex. 2017)	D	Involved equitable fraud only. Held that plaintiff failed to offer any evidence of fraudulent misrepresentations and record established that plaintiff had actual knowledge of proper party to sue
Schlumberger Tech. Corp. v. Pasko, 544 S.W.3d 830 (Tex. 2018)	D	Involved discovery rule and equitable fraud. Held that plaintiff had actual knowledge or should have known of facts giving rise to claim and that plaintiff failed to preserve equitable fraud argument.
Archer Tr, No. Three v. Tregellas, __ S.W.3d __, 2018 WL 6005071 (Tex. 2018)	P	Involved discovery rule. Held that plaintiff with right of first refusal and contractual right to be notified prior to sale of a mineral interest would not have discovered its sale through ordinary diligence.