LEGAL INJURY: A More Reasoned Approach to the Discovery Rule

J. Jeffrey Springer
Denton

Recent advancements in medical technology have had an undeniable impact on legal thought. To some extent, Texas common law has failed to adequately address the legal issues raised by medical advancements. Nowhere is this failure more evident than in the current status of the statute of limitations in complex products liability litigation.

In Texas, the two-year limitations statute applies to tort cases, including products liability.[1] Historically, the two year clock began to run on the date of "legal injury"; that is, the date facts came into existence that would enable a tort victim to sue, regardless of whether the extent of the injury was actually known.[2] Under this rule, limitations could run on a tort victim before he knew he had been injured.[3] This harsh rule has been mitigated by the relatively recent advent of the "discovery rule,"[4] which states that the statute of limitations will not begin to run until the plaintiff discovers the "nature of his injury."[5] The rule has been applied in a number of fact situations. The supreme court, however, has been "less than precise in the terminology used to describe and classify the discovery rule."[6]

One result of the court's imprecise handling of the rule is that the phrase, "nature of the injury" has never been defined. Texas courts of appeal and federal courts construing it have been inconsistent in their treatment of the rule as a consequence. Some courts construe the phrase to mean that for limitations to accrue, the tort plaintiff must have notice of both his injury and its cause. Others begin the clock on the date a plaintiff has notice of his injury, and put the duty on the plaintiff to discover the cause and sue within the two-year period. To date, the Texas Supreme Court has not defined whether the phrase requires notice of the injury, its cause, or both.[7]

This article analyzes Texas pharmaceutical and toxic tort liability case law in which the discovery rule has been applied. It then categorizes the cases and examines factual differences in the cases to ascertain the current trend among Texas courts of appeal. Finally, it suggests that replacing the phrase "discovery of the nature of the injury" with the phrase "discovery of the legal injury" would resolve the inconsistent rationales occasioned by the current rule.

I. SUPREME COURT CASES

Only two Texas Supreme Court cases have dealt with the injury-cause anomaly of the discovery rule in the products liability context. The first was *Moreno v. Sterling Drug*.[8] There, the Fifth Circuit certified a question to the court concerning whether the discovery rule applied to the Texas Wrongful Death and Survival Statues.[9] The Morenos had sued Sterling Drug alleging that Bayer Children's Aspirin caused their daughter's Reye's syndrome, which resulted in her death. Although their child died on January 21, 1981, the Morenos did not file suit until October 22, 1985. They alleged that their suit was timely because it had been filed within two years of the discovery of the link between Reye's Syndrome and Bayer Children's Aspirin. The court began its analysis with the limitations statute, and found that although the legislature had not defined an accrual point in non-death cases,

> By contrast, section 16.003(b) specifically defines "accrual" as the date of death. The question here is whether the discovery rule should be applied to a limitations statute which has clearly and unequivocally prescribed that a cause of action accrues upon

> the occurrence of a specified event. For a number of reasons, we hold that it should not.[10]

Although the facts of the case did not require it, the court also volunteered that "in those cases which have applied the discovery rule the courts have held that limitations began to run *when the fact of injury is known.*"[11]

Unfortunately, the only other time the court addressed the issue it was also in dicta. Approximately two years later in *Russell v. Ingersoll Rand* the Ccourt decided a products liability death case on limitations grounds.[12] Donnon Russell (the "decedent") had sued Ingersoll Rand in 1982 alleging that his job-related exposure to silica had resulted in chronic obstructive pulmonary disease. In 1988, he died as the result of the disease, and his wife, children, and estate intervened in the suit. They also impleaded several defendants who the decedent had not previously sued.

The court reasoned that the wrongful death and survival claims of the wife and children were derivative. A decedent's beneficiaries are only entitled to bring their claims if the decedent would have been entitled to bring an action had he lived. By the time the decedent's beneficiaries brought their claims, limitations would have run on the decedent's claims against the new defendants. The court, therefore, held that a statute of limitations defense that could be asserted against the decedent also applies to his beneficiaries in a suit based upon his death.[13] Once again, although it did not apply to the decision made by it, the court commented upon the discovery rule. Citing *Moreno v. Sterling Drug*, it stated that "limitations begin to run when the fact of injury is known . . . not when the alleged wrongdoers are identified."[14]

II. COURTS OF APPEALS CASES

Several courts of appeals have examined the issue of whether the discovery rule requires discovery of an injury only or both an injury and its cause. A few of the cases are in the pharmaceutical drug or toxic tort context. The two earliest cases are *Coody v. A.H. Robbins*[15] and *Corder v. A.H. Robbins.*[16] Both cases involve the Dalkon Shield.

Coody was fitted with the Dalkon Shield intrauterine device (the "IUD") in 1972. She began to experience abdominal pains a few months later and was told she had pelvic inflammatory disease as a result of the IUD. She was hospitalized, and eventually underwent a hysterectomy. In 1980 she filed suit against A.H. Robbins alleging, among other things, that the IUD was defective. The trial court granted a summary judgment against her on limitations grounds, and she appealed, arguing that she did not discover that her IUD was a Dalkon Shield until after she read a newspaper article concerning suits against A.H. Robbins. After reading the article she spoke to her doctor, who told her that the IUD she had used was a Dalkon Shield. She filed suit within two years after the discovery.

The San Antonio Court of Appeals held that her claim was, nevertheless, barred by limitations.[17] The court did not attempt to determine whether the discovery rule applied. Instead, it held that even under the discovery rule, Coody's claim was barred. She had discovered her injury (pelvic inflammatory disease) in 1972, and her doctor told her at that time it was because of her IUD. Although she did not know she had used a Dalkon Shield, the court held that this general knowledge was enough, stating that, "The discovery rule speaks only of discovery of the injury. It does not operate to toll the running of the limitation period until such time as plaintiff discovers all of the elements of a cause of action."[18]

The Eastland Court of Appeals decided *Corder* the same month. Ironically, the Eastland court applied a completely different rationale. Corder was fitted with her IUD in 1971. It was removed a year later because of cramping and bleeding. From then until 1980, the Corders tried unsuccessfully to conceive a child. Finally, in April of 1980, she was told by a doctor that her infertility had probably resulted from her use of the IUD. She and her husband sued A.H. Robbins in September of 1981, less than two years later.

The trial court rendered a summary judgment against the Corders on limitations grounds. The Corders appealed, arguing that they had not discovered that Mrs. Corder's infertility problem was related to the IUD until her doctor had notified her of that in 1980. The Eastland court acknowledged that Mrs. Corder knew of her infertility long before 1980. It noted, however, that in several federal cases and a few Texas medical malpractice cases in which a disease had been previously diagnosed, the courts had held that notice of the cause of the disease was also required before limitations accrued. Ultimately it focused on the concept of legal injury. It held that a legal injury occurs "by reason of its being an invasion of a plaintiff's right."[19] Analyzed in that fashion, the court concluded that the Corders could not have discovered their legal injury until her doctor told her that her infertility was probably caused by her use of the IUD.[20]

Four years passed before the injury/cause controversy was mentioned in a reported toxic tort or pharmaceutical liability decision in Texas, and in that case there was little or no discussion of the problem or the court's rationale. In 1988, the First Court of Appeals in Houston decided *Alfaro v. Dow Chemical*.[21] In that case, several plaintiffs sued Dow alleging that they had been injured as the result of exposure to a toxic chemical while working on a banana plantation in Costa Rica. The trial court dismissed the case based upon forum non conveniens grounds. The workers appealed, and argued that the court was precluded by statute from dismissing a case on these grounds.[22] Under the code section, the workers were required to prove that they had filed suit within the applicable limitations period.[23] The court found the suit timely, stating that "a cause of action in tort arises when the injury and its cause are discovered."[24] The supreme court affirmed the decision without discussing its limitations aspect.[25]

The next time the issue ripened, however, it was also in the toxic tort arena.[26] The Allen family sued several defendants as the result of health problems they had sustained after the completion of construction on their house. They were notified on August 10, 1984, that their health problems were the result of exposure to abnormally high levels of formaldehyde in the house. They filed suit on August 8, 1986, less than two years later. The trial court rendered summary judgment against the Allens, in part based upon the running of the statute, and they appealed.[27]

The Corpus Christi Court of Appeals, in *Allen v. Roddis Lumber and Veneer*, reversed the trial court's judgment.[28] The court noted that the Allens began to suspect that something in the house was causing their problems soon after they moved into it in 1979. Although their suspicions became stronger during the early eighties, the Allens were unable to confirm the cause of their problems until August of 1984, when they received the results of an air test that confirmed abnormally high levels of formaldehyde in their house. The court cited both the *Corder* and *Coody* decisions as establishing a conflict in the interpretation of the discovery rule. However, it sided with the Eastland court, holding that "the correct rule is that the cause of action accrues when the plaintiff discovers the injury and its cause."[29]

The Dallas Court of Appeals narrowly avoided addressing the issue next in the blood products context in *J.K. and Susie L. Wadley Research Institute and Blood Bank v. Beeson*.[30] Then, in *Martinez v. Humble Sand & Gravel, Inc.*,[31] the El Paso Court of Appeals became the last court to specifically address the issue. Martinez was a sandblaster who acquired silicosis as the result of his occupation. He had filed a Workers' Compensation claim in 1985, alleging the occupational injury, but did not file his products liability claim until 1988. The trial court granted a summary judgment against Martinez and he appealed, arguing that although he knew of his occupational injury in 1985, he did not know the exact cause or responsible parties.

The court held that Martinez's construction of the rule was too broad: "All that is required to commence the running of limitations is that the injured party has discovered . . . that he has been injured and in general terms, the cause of the injury."[32] Since he had general knowledge of both the injury and its relationship with his occupation more than three years before filing suit, the court held that his claim was barred by the two-year limitations period.[33]

III. CATEGORIZATION OF CASES

The conflict in the application of the discovery rule which began with the San Antonio and Eastland courts has spread to other courts of appeals since the publication of the decisions in *Coody* and *Corder*. Although the courts' analyses differ, a clear trend has developed along the factual distinctions in the cases outlined in this article. This trend makes those cases easy to categorize for analysis.

In the first group the courts have held that limitations has run. These cases are exemplified by the facts in *Coody*. The rationales of the courts in this group have uniformly been the same. According to them, notice of the injury alone is sufficient to begin the running of the limitations period.

The second group is exemplified by *Corder*. In those cases, the plaintiffs have been diagnosed with a disease or have experienced symptoms. However, they have not acquired notice that these symptoms relate to a toxin or pharmaceutical. The rationales of the courts in these cases have followed two distinct lines: In the first, notice of the specific cause of the injury is required; in the second, notice of the injury, and in general terms, notice of the cause, is required.

Certain factual characteristics of the cases deserve to be classified as well. In each of the cases in Group I, the plaintiffs had some notice of the cause of their injuries, even though the courts stated that notice of cause was not required. None of the cases in Group II required that a specific defective product, toxin, or culpable defendant is specifically identified, even though some required

notice of the specific cause.[34] Therefore, although their rationales are quite different, the factual results desired by the courts of appeals appear to be fairly consistent.

IV. ANALYSIS OF THE ISSUE

The discovery rule will postpone the accrual of the statute of limitations until the plaintiff has discovered, or in the exercise of reasonable diligence should have discovered, the nature of his injury. What is meant by "nature of the injury" is unclear. The supreme court painted with a broad brush in *Moreno* and *Russell*, using sweeping language which is significantly broader than, and inapplicable to, the facts of those cases. In *Moreno* the court even stated that the rule had been uniformly interpreted as requiring only notice of the injury and not its cause.[35] As is apparent in the examples cited above, the rule has not been so uniformly interpreted.

The *Coody*, *Corder* and *Martinez* courts all also cited federal cases in support of their decisions. Without exception, every federal case cited by those courts interpreted the Texas discovery rule as tolling the discovery period until the plaintiff has notice of both injury and cause.[36] Since 1974, federal courts interpreting Texas case law have all concluded that the discovery rule tolls the running of the statute until the plaintiff has notice of both injury and cause.[37]

Other cases in Texas courts and the writings of legal commentators also evidence the inaccuracy of the supreme court's statement. In several contexts, Texas courts have consistently required notice of both injury and cause in discovery rule cases.[38] Comments in Texas law review articles have consistently stated the rule as requiring notice of both injury and cause.[39] The supreme court, itself, has written opinions in which the rule was recited as requiring either notice of the cause of the injury or notice of facts establishing a cause of action.[40]

Whether it is because the supreme court has painted so broadly, because of its apparent inconsistency, or because the courts of appeal differ in their interpretation of the rule, the broad language used in *Moreno* and *Russell* has not been followed.[41] As a result, the question of whether the discovery rule encompasses both injury and cause is still at issue. The court had the opportunity to resolve the controversy recently, but declined to do so.[42] Because medical advancement is continually providing new explanations for longstanding diseases, the court will be required to provide a rationale for applying the discovery rule to those cases in the near future. When it does decide the issue, there are at least four different analyses it could use in resolving it.

The court could follow its broad language in *Moreno* and *Russell* and hold that "nature of the injury" means injury, itself, and nothing more. This rule, however, would have the effect of barring those cases in which there is a legitimate claim that the cause of any injury was not discovered until after limitations had already barred the claim. In the pharmaceutical and toxic tort context, this might even emasculate the effect of the discovery rule altogether. In those cases where the onset of symptoms or diseases are latent, discovery by a layman of the cause of the disease, even it is suspected in the medical field, is often difficult or impossible.[43]

Alternatively, the court could decide that the word "nature" in the phrase should be given greater weight. "Nature" is defined as "the essential quality of a thing; essence."[44] If the court uses this rationale, then its decision would be to begin the period of limitations when the plaintiff discovers both the injury and its cause. This rule is equally unworkable, because it would allow a plaintiff who had notice that his injury was caused by a certain procedure or event to postpone the accrual of the statute until every potential injury and liable party had been identified. Under this scenario, the only time a defendant would be assured of repose would be two years after the death of the potential plaintiff.

The supreme court could use the rationale of the El Paso Court of Appeals.[45] This rationale would require notice of the injury and in general terms, the cause of the injury, for limitations to accrue. The problem with this rule is its lack of definition. It is true that the courts' holdings should be broad enough to apply to many fact situations. However, reasonable boundaries and definitions should not be sacrified for breadth of application. The phrase "general terms" is not a standard or test, and it would not give trial courts any basis upon which to determine the extent of the knowledge required to limitations to accrue. The controversy regarding the discovery rule would not be resolved, and inconsistent rationales and results would continue in the courts of appeals.

The one line of reasoning that would solve each of the problems is to revert back to the "legal injury" rule. In each of the cases cited above except *Corder*, the courts have effectively abandoned the concept of legal injury. This is disturbing, since "legal injury" has been a part of Texas jurisprudence for more than one-hundred years.[46]

A more reasoned approach to the discovery

rule would be to define it as follows: Limitations begins to run when the plaintiff discovers, or in the exercise of reasonable care should have discovered, the legal injury. Rather than focusing on the date physical symptoms were evident, this rule would focus on the date of the act which sequentially resulted in the symptoms.

The supreme court once summarized the legal injury rule like this: Limitations begins to run when "the wrongful act effects an injury, regardless of when the claimant learned of such injury."[47] According to this old rule, a "legal injury" occurs when a tort is committed, even if the damages, or their extent, are not discernable.[48] The entire focus is on when the act occurred that caused the harm: If the act, itself, caused harm, then limitations accrues on the date of the act; if the act, itself, was lawful or did not cause harm, limitations accrued when the injury occurred.[49] Therefore, even under the legal injury rule, limitations would not run in a products liability case until "the forces wrongfully put in motion produce the injury."[50]

Instead of focusing on when the invasion of legal rights occurred, most courts applying the discovery rule have focused on the onset of physical symptoms.[51] In cases where the discovery rule has been held to apply, the courts have either held that the statute of limitations begins to run when the injury is discovered, or when the injury and its cause are discovered. Somehow, even though the discovery rule and the legal injury rule are not mutually exclusive, the concept legal injury was abandoned in discovery rule cases. Were the courts to focus instead on the discovery of the legal injury, the controversy would be resolved without abandoning a century of Texas law.

In *Corder*, the Eastland Court of Appeals rightfully began its analysis with the common law concept of legal injury. It focused on when Corder discovered the legal injury, not when she discovered her symptoms or received a diagnosis.[52] Using that analysis, the legal injury occurred when Corder's legally protected right had been invaded. Since the insertion of the IUD was consensual, a legal injury could not have occurred at that time.[53] In this situation, the legal injury occurred when the IUD caused injury. Although she began to experience fertility problems years after insertion, she did not become aware of her legal injury (that the IUD had caused an injury) until she was told her infertility was caused by the IUD. She then had two years to identify the manufacturer and sellers of the IUD, and to file suit. The jury question required under a "legal injury" analysis could be worded as follows:

> Question No. ___:
>
> Did [Jane Doe] prove, by a preponderance of the evidence, that she did not discover, and in the exercise of reasonable care that she should not have discovered, that [her IUD] had caused an injury [prior to January 1, 1994?]
>
> Answer "yes" or "no." "Yes" means that she did not discover and should not have discovered; "no" means that she did discover or should have discovered.

This analysis eliminates all of the problems presented by the alternative rationales. First, it acknowledges that because of the chronic onset of symptoms and late medical discoveries, some plaintiffs will have been diagnosed with diseases which they have legitimately failed to connect with a toxin or pharmaceutical product. Second, it provides defendants with repose, because under the concept of legal injury, once either the product or the event causing physical injury is identified, limitations would begin to accrue, regardless of whether a specific product, toxin or defect is discovered or a specific defendant is identified. A plaintiff will then have two years to determine the potential toxins or devices causing the injury, determine whether they are defective, and identify the potential parties liable. Third, it gives the trial courts and courts of appeal a legal principle that is well-defined, and one to which many years of judicial refinement and explanation have already been devoted.

It would also leave intact the results apparently desired by every court of appeals case which has considered the question, thereby preserving the clear trend that has developed in the courts to require notice of more than injury alone, but less than the identify of every defendant. Had this rule been used in the cases cited in this article, the result in each case would have remained exactly the same. The difference, however, would be that the courts would have used a consistent rule in reaching those results, rather than applying different definitions to the phrase "nature of the injury."

SUMMARY

The discovery rule postpones the accrual of limitations until a plaintiff discovers the "nature of his injury." What is meant by "nature of the injury" is still unclear. Although the supreme court has spoken on the issue in dicta, the language it has used is overly broad and inconsistent with prior case law.

This broad language has not been followed by the Texas courts of appeal.

Two groups of cases have developed in construing "nature of the injury." One group has two lines of rationale. The first line requires notice of the injury only, and the second line requires notice of the injury and, in general terms, its cause. The other group of cases required notice of both the injury and its cause. The rationales used in these lines are inconsistent, and none offers a good rule for future application.

An alternative analysis focuses on the concept of legal injury. Under this rationale, the limitations period would not begin to accrue until a plaintiff has discovered, or in the exercise of reasonable care should have discovered, his legal injury. This analysis, by focusing on the discovery of the event which gave rise to an invasion of legal rights rather than focusing on when symptoms are experienced and associated with a product or defendant, eliminates the problems of the other lines of cases. It also provides years of judicial interpretation upon which courts can rely, and leaves intact the results apparently desired according to the trend in the courts of appeal.

ENDNOTES

1. TEX. CIV. PRAC. & REM. CODE ANN. § 16.003 (Vernon 1986).
2. *Atkins v. Crossland*, 417 S.W.2d 150, 153 (Tex. 1967).
3. *See e.g., Robinson v. Weaver*, 550 S.W.2d 18, 22 (Tex. 1977).
4. *See, Gaddis v. Smith*, 417 S.W.2d 577, 578-79 (Tex. 1967).
5. *Weaver v. Witt*, 561 S.W.2d 792, 795 (Tex 1977).
6. *Woods v. William M. Mercer, Inc.*, 769 S.W.2d 515, 517 (Tex. 1988).
7. In a case in which I am currently handling involving the issue, Judge Bruce Auld of the 352nd District Court in Tarrant County, in denying a Motion for Summary Judgment filed on this issue, stated that "the law in this area is in flux." Auld, Letter to Counsel, Cause No. 91-111111-352 (March 22, 1994).
8. 787 S.W.2d 348 (Tex. 1990).
9. The question certified by the Fifth Circuit was as follows: "Does the 'discovery rule' apply to the Texas Statute of Limitations, TEX. CIV. PRAC. & REM. CODE § 71.001 *et. seq.* and § 71.021, respectively?" *Id.* at 349.
10. *Moreno*, 787 S.W.2d at 351-52.
11. *Id.* at 357. This is not an accurate statement. As of the date of the court's opinion, a controversy already existed in the courts of appeals concerning whether the rule encompassed both injury and cause or injury only.
12. 841 S.W.2d 343 (Tex. 1992)
13. *Id.* at 350.
14. *Id.* at 344.
15. 696 S.W.2d 154 (Tex. App.—San Antonio 1985, writ dism'd by agreement).
16. 692 S.W.2d 194 (Tex. App.—Eastland 1985, no writ).
17. *Coody* at 156.
18. *Id.* at 156.
19. *Id.* at 196.
20. *Id.* at 197.
21. 751 S.W.2d 208 (Tex. App.—Houston [1st Dist.] 1988) *affirmed* 786 S.W.2d 674 (Tex. 1990).
22. *See* TEX. CIV. PRAC. & REM CODE § 71.031 (Vernon 1986).
23 TEX. CIV. PRAC. & REM. CODE ANNOT. § 71.031 provides: (a) An action for damages for the death or personal injury of a citizen of ... a foreign country may be enforced in the courts of this state, although the wrongful act, neglect, or default causing the death or injury takes place in a foreign state or country, if:

* * *

(e) the action is begun in this state within the time provided by the laws of this state for beginning the action . . . .

24. *Alfaro*, 751 S.W.2d at 209.
25. *See Dow Chemical Co. v. Alfaro*, 786 S.W.2d 674 (Tex. 1990).
26. *See Allen v. Roddis Lumber and Veneer Co.*, 796 S.W.2d 758 (Tex. App.—Corpus Christi 1990, writ denied).
27. The judgment was also based in part on liability as to two of the parties. The court of appeals affirmed that part of the judgment as to those parties. *See Allen v. Roddis Lumber*,

796 S.W.2d at 762-63. This paper purposely excludes discussion of that aspect of the case.

28 *Id.* at 763.

29. *Id.* at 761.

30. *See J.K. and Susie Wadley Research Institute v. Beeson*, 835 S.W.2d 689 (Tex. App.—Dallas 1992, writ denied). In that case, the Beesons had been exposed to the AIDS virus as the result of a blood transfusion given to Mr. Beeson in 1983. Both Mr. and Mrs. Beeson began experiencing symptoms of AIDS in 1987. They had known and discussed beforehand the possibility that he had obtained AIDS tainted blood, but were not tested until May of 1987. They discovered that they both had AIDS in June when their positive test results were reported to them. The Dallas Court rejected a limitations argument on appeal, holding that "the Beesons conclusively proved under the discovery rule that their cause of action accrued at the earliest in May 1987 when they were first put on notice by Tom's symptoms of the nature of his injury."

31. 860 S.W.2d 467 (Tex. App.—El Paso 1993) *rev'd, appeal dism'd Martinez v. Humble Sand & Gravel, Inc.*, 37 Tex. Sup. Ct. J. 703 (April 20, 1994).

32. *Id.* at 471.

33. *Id.* at 472.

34. *See also Seibert v. General Motors Corp.*, 853 S.W.2d 773 (Tex. App.—Houston [14th Dist.] 1993, no writ)(Limitations began to run on the date of the plaintiff's automobile collision, not the date he discovered that products liability claims were being based upon the lack of shoulder straps on the back seat-belts of similar vehicles).

35. *Moreno v. Sterling Drug*, 787 S.W.2d 348, 357 (Tex. 1990).

36. One federal case cited by the San Antonio Court of Appeals in *Coody v. A.H. Robbins* held that the rule did not encompass notice of causation. It was an Eleventh Circuit case interpreting Alabama law. *See Sellers v. A.H. Robbins*, 715 F.2d 1559 (5th Cir. 1983).

37. *See Glasscock v. Armstrong Cork Co.*, 946 F.2d 1085 . . . (5th Cir. 1991)(products case involving an asbestos product); *Woodruff v. A.H. Robbins Co.*, 742 F.2d 228, 230 (5th Cir. 1984)(products case involving the Dalkon Shield); *Mann v. A.H. Robbins Co.*, 741 F.2d 79, 81 (5th Cir. 1984)(products case involving the Dalkon Shield); *Timberlake v. A.H. Robbins Co.*, 727 F.2d 1363, 1366 (5th Cir. 1984)(products case involving the Dalkon Shield); *Thrift v. Tenneco Chemicals, Inc.*, 381 F.Supp. 543, 546 (N.D. Tex. 1974)(products case involving Thorium Oxide)

38. *See, e.g., Clade v. Larson*, 838 S.W.2d 277, 284 (Tex. App.—Dallas 1992, writ denied) (fraud); *Hofland v. Elgin-Butler Brick Co.*, 834 S.W.2d 409, 414 (Tex. App.—Corpus Christi 1992, no writ)(conversion); *Arabian Shield Development Co. v. Hunt*, 808 S.W.2d 577, 583 (Tex. App.—Dallas 1991 writ denied)(tortious interference with business relations); *Medical Protective Co. v. Groce, Locke & Hebdon*, 814 S.W.2d 124, 127 (Tex. App.—Corpus Christi 1991, writ denied)(legal malpractice); *Gatling v. Perna*, 788 S.W.2d 44, 46 (Tex. App.—Dallas 1990, writ denied)(medical malpractice); *Turner v. PV International Corp.*, 765 S.W.2d 455, 468-69 (Tex. App.—Dallas 1988) writ denied 778 S.W.2d 865 (Tex. 1989)(alienation of affections); and *Langston v. Eagle Publishing Co.*, 719 S.W.2d 612, 615 (Tex. App.—Waco 1986, writ ref'd n.r.e.)(libel).

39. *See* WOODS, DEADLY BLOOD: LITIGATION OF TRANSFUSION-ASSOCIATED AIDS CASES IN TEXAS, 21 TECH. L. REV. 667, 723 (1990) [causes of action do not accrue until "discovery of the negligent cause"]; Comment, EXTENDING THE APPLICATION OF THE DISCOVERY RULE TO WRONGFUL DEATH ACTIONS: WHERE WILL TEXAS DRAW THE LINE?, 38 BAYLOR L. REV. 151, 152 (1986)[tolls commencement of the period until discovery of "the facts and cause of injury for which he seeks relief"].

40. *See Burns v. Thomas*, 786 S.W.2d 266, 267 (Tex. 1990); *Willis v. Maverick*, 760 S.W.2d 642, 645 (Tex. 1988); *Kelley v. Rinkle*, 532 S.W.2d 947, 948 (Tex. 1976); and *Gaddis v. Smith*, 417 S.W.2d 577, 580 (Tex. 1967).

41. For example, the El Paso Court of Appeals cited *Moreno*, but still held that some notice of the cause of injury is required for limitations to begin running. *Martinez v. Humble Sand & Gravel*, 860 S.W.2d 467, 472 (Tex. App.—El Paso 1993) rev'd, appeal dism'd 37 Tex. Sup. Ct. J. 703 (April 20, 1994).

42. An application for writ of error was pending in *Martinez v. Humble Sand & Gravel* when the

Supreme Court reversed the court of appeals and dismissed the appeal on jurisdictional grounds. *Martinez v. Humble Sand & Gravel, Inc.*, 37 Tex. Sup. Ct. J. 703 (April 20, 1994). Even had the Court granted the writ and decided the issue, it could have avoided resolving the controversy. The facts presented would not necessarily require resolving the issue, since Martinez knew both of his injury and its cause. The only fact scenario which would require resolution would be one in which the injury was diagnosed but the cause was not known.

43. In a recent case I handled, a physician did not notify the patient that the cause of his disease was a pharmaceutical product because he did not want to promote litigation.

44. WEBSTERS NEW WORLD DICTIONARY (1983).

45. *See Martinez v. Humble Sand & Gravel*, 860 S.W.2d at 471.

46. *See Houston Water-Works v. Kennedy*, 70 Tex. 233, 8 S.W. 36 (1888).

47. *Robinson v. Weaver*, 550 S.W.2d 18, 19 (Tex. 1977).

48. *Atkins v. Crossland*, 417 S.W.2d at 153.

49. *Atkins v. Crossland*, 417 S.W.2d at 153; *Ziddel v. Bird*, 692 S.W.2d 550, 555 (Tex. App.—Austin 1985, no writ).

50. *Id.*; *Martinez v. Humble Sand*, 860 S.W.2d at 470. Since under the legal injury rule, limitations does not begin to run until the injury occurs, those courts which state that the discovery rule tolls limitations only until discovery of the injury, not discovery of its cause, are in reality doing nothing but applying the old doctrine of legal injury. If this were the rule, the discovery doctrine would have no practical purpose.

51. *See, e.g., Albertson v. T.J. Stevenson & Co.*, 749 F.2d 223, 228-29 (5th Cir. 1984).

52. *Corder*, 692 S.W.2d at 196.

53. *Baker v. City of Fort Worth*, 210 S.W.2d 564, 565-56 (Tex. 1948).

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J. Jeffrey Springer *is a Partner with the firm of Wood, Springer & Lyle in Denton*