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Will Missouri's Open Courts Guarantee Open the Door to Adoption of the Discovery Rule in Medical Malpractice Cases

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WILL MISSOURI'S "OPEN COURTS" GUARANTEE OPEN THE DOOR TO ADOPTION OF THE "DISCOVERY RULE" IN MEDICAL MALPRACTICE CASES?

Strahler v. St. Luke's Hospital[1]

In 1982, fifteen year old Carol A. Strahler of Kansas City, Missouri, lost her leg to an above-the-knee amputation made necessary by allegedly negligent medical treatment from a Dr. Sandow and four others.[2] Because she had not yet reached the legal age of majority, Missouri law prevented Carol from filing suit on her own behalf at the time of the incident. When, at the age of nineteen, Carol did file suit against those responsible for her injury, the Circuit Court for Jackson County, Missouri, granted the defendants' motion to dismiss the case on the grounds that the applicable two-year statute of limitations had expired.[3] Despite the fact that she could not lawfully file suit until fully three years after the injury was inflicted, Carol found the doors of justice closed to her cause of action. A majority of the Missouri Supreme Court found this result violative of Article I, Section 14 of the Missouri Constitution, which guarantees that "the courts of this state shall be open to every person, and certain remedy afforded for every injury to person . . . ."[4] The implications of this holding have fueled the fire of controversy in the field of medical malpractice law and may signal important changes ahead in Missouri. The court may have laid the foundation for adopting the so-called "discovery rule" in medical malpractice cases.[5]

The statute of limitations for negligence actions against health care providers[6] has spawned a great deal of litigation in the past two decades.[7]

1. 706 S.W.2d 7 (Mo. 1986) (en banc).
2. *Id.* at 8.
3. *Id.* Four of the defendants settled their claims following plaintiff Strahler's filing of notice of appeal. Only defendant Sandow contested the issue in the appellate courts. *Id.* at 8 n.1.
4. MO. CONST. art. I, § 14.
5. See *infra* notes 55-57 and accompanying text.
6. MO. REV. STAT. § 516.105 (1978).
7. *See* Bartimus, Kavanaugh & Sullivan, *Plaintiff's Rights in the Medical Malpractice "Crisis,"* 53 UMKC L. REV. 27 (1984); Schwartz, *Medical Malpractice in Missouri*, 28 ST. LOUIS U.L.J. 397 (1984); Note, *Medical Malpractice: When Does the Statute of Limitations Begin to Run?*, 35 MO. L. REV. 559 (1970).

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The statute directs that a cause of action accrues at the time of the allegedly negligent act and that the claim must be asserted within two years.[8] There are some important exceptions to this general proposition. Two are contained in the statute itself. First, if the act complained of involves a foreign object left inside the plaintiff patient's body, the cause of action does not accrue until the plaintiff discovers, or reasonably should have discovered, the injury.[9] Second, the statute is tolled for minors under age ten, giving them until their twelfth birthdays to bring suit.[10] *Strahler v. St. Luke's Hospital* renders this latter exception moot, since the case requires application of Missouri's general tolling statute[11] to minors' medical malpractice claims.

Additionally, at least two other situations will toll the statute. One occurs when the defendant is alleged to have "fraudulently concealed" the cause of action. Such concealment tolls the statute until discovery.[12] Missouri courts have gradually liberalized the amount of evidence needed to establish such concealment in order to circumvent the concededly harsh statute of limita-

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8. Section 516.105 states:

> All actions against physicians, hospitals, dentists, registered or licensed practical nurses, optometrists, podiatrists, pharmacists, chiropractors, professional physical therapists, and any other entity providing health care services and all employees of any of the foregoing acting in the course and scope of their employment, for damages for malpractice, negligence, error or mistake related to health care shall be brought within two years from the date of occurrence of the act of neglect complained of. . . .

Mo. REV. STAT. § 516.105 (1986).

9. Section 516.105 states:

> [I]n cases in which the act of neglect complained of [is] introducing and negligently permitting any foreign object to remain within the body of a living person, the action shall be brought within two years from the date of the discovery of such alleged negligence, or from the date on which the patient in the exercise of ordinary care should have discovered such alleged negligence. . . .

Id. This exception was written into the statute after the Missouri Supreme Court's "distasteful" ruling in Laughlin v. Forgrave, 432 S.W.2d 308 (Mo. 1968) (en banc), which is discussed *infra*, at notes 55-64 and accompanying text.

10. "[A] minor under the full age of ten years shall have until his twelfth birthday to bring action. . . ." Mo. REV. STAT. § 516.105 (1986).

11. Section 516.170 states:

> [I]f any person entitled to bring an action in sections 516.100 through 516.370 specified, at the time the cause of action accrued be either within the age of twenty-one years . . . such person shall be at liberty to bring such action within the respective times in sections 516.100-516.370 limited after such disability is removed.

Mo. REV. STAT. § 516.170 (1986).

12. "If any person . . . by any . . . improper act, prevent[s] the commencement of an action, such action may be commenced within the time herein limited, after the commencement of such actions shall have ceased to be so prevented." Mo. REV. STAT. § 516.280 (1986); *see, e.g.*, Clair v. Reproductive Health Servs., 720 S.W.2d 793 (Mo. Ct. App. 1986).

tions. Traditionally, a plaintiff had to produce evidence of all of the elements of common law fraud, including actual knowledge of the negligence and a subjective intent to conceal, in order to invoke this exception.[13] More recently, however, circumstantial evidence based on expert opinion has been sufficient to create a jury question on this issue.[14] The courts have also created the so-called "continuing treatment" exception, whereby the statute is tolled until the end of the physician-patient relationship giving rise to the cause of action.[15]

The majority's holding in *Strahler* is based on the court's previous construction of Article I, Section 14 in *State ex rel. Cardinal Glennon v. Gaertner*,[16] where the court found unconstitutional a statute requiring all plaintiffs to submit their medical malpractice claims to the state's Professional Liability Review Board as a precondition to filing suit.[17] In that case, the court held that "[Article I, Section 14] is a part of this State's organic law and that it was intended to give constitutional protection to a litigant's ability to gain access to Missouri courts."[18] Thus, Article I, Section 14 not only gives Missouri citizens a right of access to the courts above and beyond those provided in the federal constitution,[19]—as is the prerogative of a state constitution[20]—but also more specific rights than those provided by the due process clause of Missouri's constitution.[21]

Writing for the plurality in *Strahler*, Judge Billings stated that, under the rule of *Cardinal Glennon*, Article I, Section 14 is "not simply advisory in nature; it gives express constitutional protection to a litigant's right of access to our court system."[22] Under this broad view, it is not surprising that the majority found that the medical malpractice statute of limitations, as applied to minors, ran afoul of the state constitution.

Defendant Sandow argued that minors' rights of access to Missouri courts were adequately protected by Missouri Rule of Civil Procedure 52.02, which allows minors to overcome their legal disability by suing through a legal guardian[23] or court-appointed "next friend."[24] It is well established in

13. *See, e.g.*, Kauchik v. Williams, 435 S.W.2d 342 (Mo. 1968) (en banc); Smile v. Lawson, 435 S.W.2d 325 (Mo. 1968) (en banc).
14. *See, e.g.*, Martin v. Barbour, 558 S.W.2d 200 (Mo. Ct. App. 1977).
15. *See, e.g.*, Thatcher v. DeTar, 351 Mo. 603, 173 S.W.2d 760 (1943); Shaw v. Clough, 597 S.W.2d 212 (Mo. Ct. App. 1980).
16. 583 S.W.2d 107 (Mo. 1979) (en banc).
17. Mo. REV. STAT. §§ 538.010-.080 (1978).
18. *Strahler*, 706 S.W.2d at 9.
19. U.S. CONST. amend. XIV.
20. *See, e.g.*, Sax v. Voettler, 648 S.W.2d 661, 664 (Tex. 1984).
21. Mo. CONST. art. I, § 10.
22. *Strahler*, 706 S.W.2d at 9.
23. Mo. R. CIV. P. 52.02(a).
24. Mo. R. CIV. P. 52.02(b); *cf.* Mo. REV. STAT. §§ 507.110-.120 (1986):

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Missouri that the legal disability of minority prevents citizens under the full age of eighteen years from suing on their own behalf in Missouri courts.[25] If forced to wait until their eighteenth birthdays to assert their claims, many minors would be met with an unbeatable defense of expiration of the applicable statute of limitations. To mitigate the harshness of this situation, the legislature created the guardian and next friend procedures in Rule 52 to assure minors an opportunity to sue through a third party before their claims became stale. A process for allowing minors to gain access to the courts indirectly was necessary because it was inevitable that minors would be the subject of litigation.

However, the alternative procedures provided by Missouri law were insufficient to salvage the constitutionality of the medical malpractice statute of limitations as applied to minors. The *Strahler* majority was unwilling to leave injured children dependent upon the "diligence and willingness of their parents to act in a responsible and timely manner."[26] To do so would be to ignore "the disabilities and limitations that childhood, familial relations, and our legal system place upon a minor of tender years . . . ."[27]

Judge Billings noted four other jurisdictions—Arizona, New Hampshire, Ohio and Texas—which, when faced with the same problem of reconciling their states' medical malpractice statutes of limitations with their respective tolling provisions for minors, found that the statutes ran afoul of their state constitutions' "open courts" guarantees or equivalent provisions.[28] Signifi-

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"Suits by infants may only be commenced and prosecuted, either: First, by a duly appointed guardian or conservator of such infant; or, second, by a next friend appointed for him in such suit. . . ."

25. Mo. REV. STAT. § 507.115 (1986), provides that: "the term 'infant' means any person who has not attained the age of eighteen years." Access to the courts is an incident of majority. *See, e.g.*, Scott v. Royston, 233 Mo. 568, 123 S.W. 454 (1909); Martin v. Martin, 539 S.W.2d 756 (Mo. Ct. App. 1976).

26. *Strahler*, 706 S.W.2d at 10.

27. *Id.* The statutes of limitation are already tolled for minors in most personal injury suits. *See supra* note 11 (MO. REV. STAT. § 516.170 (1986)); *Strahler*, 706 S.W.2d at 11.

28. *Strahler*, 706 S.W.2d at 10-11 & n.7. Judge Billings cited the following cases: Arizona: Barrio v. San Manuel Div., Magma Copper, 143 Ariz. 101, 692 P.2d 280 (1984) (ARIZ. REV. STAT. ANN. § 12-5640 unconstitutional as an abrogation of the "right of action to recover damages" under ARIZ. CONST. art. 18, § 6); New Hampshire: Carson v. Maurer, 120 N.H. 925, 424 A.2d 825 (1980) (N.H. REV. STAT. ANN. § 507-C (Supp. 1979) struck down as a violation of New Hampshire's equal protection clause, N.H. CONST. pt. I, arts., 2, 12); Ohio: Schuan v. Riverside Methodist Hosp., 6 Ohio St. 3d 300, 452 N.E.2d 1337 (1983) (OHIO REV. CODE ANN. § 2305.11 (B) (1976) struck down as a violation of OHIO CONST. art. I, § 2); Texas: Sax v. Votteler, 648 S.W.2d 661 (Tex. 1983) (holding TEX. INS. CODE ANN. art. 5.82 (Vernon 1975), unconstitutional as denying access under Texas' "open courts" provision, TEX. CONST. art. I, § 13). Each of the states' statutes of limitations were identical to Missouri's in that they contained specific tolling provisions for minors, albeit at different ages. In each case, the court held that the general tolling statute should control.

cantly, in each case the state supreme court chose to strike down the provision relating to minors based on the *state* constitution's open courts guarantee, rather than on equal protection or due process grounds under the federal constitution. This was because the federal courts have routinely upheld states' medical malpractice statutes of limitations when attacked on federal constitutional grounds.[29]

Two states have since considered the same issue raised in *Strahler*. Faced with the identical problem of reconciling the medical malpractice statute of limitations' tolling provision for minors with the state constitution's open courts guarantee, the Oklahoma Supreme Court followed *Strahler*,[30] while the Louisiana Supreme Court refused.[31]

In his dissent, Judge Welliver attempted to explain away these results from other jurisdictions by pointing out that in each case the court applied a "strict scrutiny" standard of review rather than the "rational basis" standard which he viewed as more appropriate.[32] Under rational basis review, the statute must be upheld if it was enacted for a "legitimate" legislative purpose and bears a "rational relationship" to the achievement of that purpose; under strict scrutiny, the statute will not survive unless it was enacted pursuant to a "compelling" governmental purpose and was the "least restrictive means" of achieving that purpose.[33] Because the other states' courts found that their respective medical malpractice statutes of limitations burdened the fundamental right of access to the state courts guaranteed to minors by their state constitutions, the higher standard of review was appropriate in those cases.[34]

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29. *Strahler*, 706 S.W.2d at 18-19 (Welliver, J., dissenting).

30. Hamilton v. Vaden, 721 P.2d 412, 417 n.17 (Okla. 1986).

31. Crier v. Whitecloud, 496 So. 2d 305 (La. 1986). In *Whitecloud*, a dissenting judge cited *Strahler* with approval. *Id.* at 314 (Dennis, J., dissenting).

32. *Strahler*, 706 S.W.2d at 18-19 (Welliver, J., dissenting). The "rational basis" test is applied to legislation which burdens neither a "fundamental right" nor the rights of a "suspect class," while "strict scrutiny" is the test when such rights are involved. *See* Schuan v. Riverside Methodist Hosp., 6 Ohio St. 3d 300, 301-02, 452 N.E.2d 1337, 1338-39 (1983).

33. Skinner v. Oklahoma, 316 U.S. 535 (1942); *Schuan*, 6 Ohio St. 3d at 301-02,
452 N.E.2d at 1338-39; Note, *California's Medical Injury Compensation Reform Act: An Equal Protection Challenge*, 52 S. CAL. L. REV. 829, 864 (1979).

34. Actually, this reading of the cases is incorrect. In fact, the other jurisdictions split on the issue of whether an "open courts" guarantee amounted to a fundamental right. Texas found that it did, as did Arizona. Ohio held that the right involved was not fundamental, but that the statute nonetheless failed under rational basis review. New Hampshire also found no fundamental right, but at the same time felt that the right involved was too important to merit the lowest level of review, so they created a third, intermediate standard, which they called the "substantial relation" test. *See supra* note 28 and cases cited therein. New Hampshire's creative approach is based on Lalli v. Lalli, 439 U.S. 259 (1979), and Reed v. Reed, 404 U.S. 71 (1971).

This analysis begs the question. *Cardinal Glennon*, which Judge Welliver concedes is "the law" in Missouri,[35] clearly establishes that the right of access to the state courts is a fundamental right guaranteed by Article I, Section 14 of the Missouri Constitution. Since the statute in question restricted a Missouri citizen's exercise of that fundamental right, strict scrutiny was the correct standard of review. This fundamental rights analysis is familiar to Anglo-American law. It is well recognized that "a chose in action is a form of personal property that without question now belongs to the injured" party.[36] Running the statute of limitations against the cause of action while the plaintiff could not lawfully pursue the claim would amount to the state arbitrarily "destroying" that intangible property interest without redress, which seems inconsistent with notions of due process.

The majority found that the public policy served by the two-year statute of limitations was insufficient to justify barring minors' medical malpractice claims. Responding to skyrocketing insurance and health care costs caused by the so-called "malpractice crisis" did not fulfill strict scrutiny's requirement of a compelling governmental interest. "[T]he method employed by the legislature to battle any escalating economic and social costs connected with medical malpractice litigation exacts far too high a price from minor plaintiffs . . . . the cure selected by the legislature would prove no less pernicious than the disease it was intended to remedy."[37]

Further, arbitrarily barring minors' causes of action was not the least restrictive means of achieving this goal. The risk of defeating otherwise valid claims outweighed the state's interest, since Rule 52.02 provided minors' exclusive means of access to the courts.[38] Moreover, it has been persuasively argued that tolling the limitations period for minors will have little impact on insurance rates because the number of malpractice claims by minors is small.[39] In sum, Article I, Section 14 required application of Missouri's general tolling statute[40] to minors' medical malpractice actions. The Missouri Court of Appeals for the Eastern District has applied *Strahler* in two recent cases. In *Ventimiglia v. Cutter Laboratories*,[41] the appellate court reversed the trial court's dismissal and remanded for trial on the grounds that the plaintiff's minority tolled the statute of limitations in that medical malpractice action.[42] In *Bregant v. Fink*,[43] the Eastern District held, however, that

35. *Strahler*, 706 S.W.2d at 17 n.4. (Welliver, J., dissenting).
36. DeSantis v. Yaw, 290 Pa. Super. 535, ____, 434 A.2d 1273, 1276 (1981).
37. *Strahler*, 706 S.W.2d at 11.
38. *See id.* at 12.
39. Fewer than one-seventh of all medical malpractice claims are brought by plaintiffs under the age of twenty. *See* Note, *supra* note 33, at 960.
40. Mo. Rev. Stat. § 516.170 (1986) (set out in part *supra*, note 11).
41. 708 S.W.2d 772 (Mo. Ct. App. 1986).
42. *Id.* at 774.
43. 724 S.W.2d 337 (Mo. Ct. App. 1987).

Strahler did not require tolling for a minor's wrongful death action where medical malpractice was the cause of the decedent's death. Rather, the wrongful death statute controlled.[44]

Strahler drew three dissents. Judge Blackmar felt that Rule 52.02, combined with the tolling provision through age twelve already contained in the statute, adequately protected the rights of minors in medical cases.[45] He reasoned that the General Assembly's decision to establish age ten as a "ceiling" for tolling of children's malpractice claims was based on the common sense view that, by that age, children have mastered sufficient verbal skills to inform their parents or guardians of injuries which might give rise to such actions.[46] Given this analysis, Judge Blackmar felt that it was within the legislature's reasonable exercise of "police power" to protect potential health care defendants from possibly stale claims, concededly at the expense of some victims either ignorant of or unable to assert their rights.[47] Judge Donnelly's analysis is essentially the same.[48]

Judge Welliver's dissent, the longest and most vehement, accuses the majority of the ultimate judicial sin—"Lochnerizing."[49] He asserts that Article I, Section 14 is nothing more than a restatement of the due process clauses of the federal and state constitutions, and therefore gives Missouri citizens no additional rights.[50] Tracing the history of the due process clause from the Magna Charta through each of Missouri's prior constitutions, Judge Welliver concludes that a guarantee of access to the courts included in any state's constitution is a mere redundancy, since that right of access is inherent in the Anglo-American notion of due process already secured through the fourteenth amendment to the U.S. Constitution.[51]

The problem with this analysis is that it flies in the face of traditional constitutional law. The court of last resort in each state gives meaning to the provisions of that state's constitution,[52] and part of that process is reconciling the statutes enacted by the state's legislature with the language found in that document.[53] In *Cardinal Glennon*, the Missouri Supreme Court "gave meaning" to Article I, Section 14, determining that it assured all Missouri citizens a fundamental right of access to the courts above and beyond that

44. *Id.* at 337-38.
45. *Strahler*, 706 S.W.2d at 13 (Blackmar, J., dissenting).
46. *Id.*
47. *Id.* at 14.
48. *See infra* note 62 and accompanying text.
49. *Strahler*, 706 S.W.2d at 15 (Welliver, J., dissenting).
50. *Id.* (Welliver, J., dissenting).
51. *See id.* at 15-18 (Welliver, J., dissenting).
52. 16 AM. JUR. 2D *Constitutional Law* § 308 (1986).
53. *See, e.g.*, Laughlin v. Forgrave, 432 S.W.2d 308 (Mo. 1968) (en banc); City of Moline Acres v. Heidbreder, 367 S.W.2d 568 (Mo. 1963); Forgrave v. Buchanan County, 282 Mo. 599, 222 S.W. 755 (1920).

secured by the due process clause. To this extent, the traditional equal protection and due process analysis simply will not do. Under the rule of *Cardinal Glennon*, Article I, Section 14's open courts guarantee is plenary and may not be burdened by the General Assembly without a compelling governmental interest achieved by the least restrictive means,[54] which the defendant in *Strahler* failed to show.

Judge Welliver posits that following *Cardinal Glennon* to its logical extreme in the medical malpractice area will require the court to overrule *Laughlin v. Forgrave*,[55] and adopt the "discovery rule" in all medical cases.[56] The discovery rule provides that a cause of action accrues at the time a plaintiff discovers, or reasonably should have discovered, the injury, rather than at the time of the negligent act[57] as the Missouri statute now provides. Some twenty-six states apply this rule to medical malpractice claims,[58] suspending the statute of limitations in cases where an injured patient could not possibly have known of his injury at the time it was inflicted because the symptoms did not appear until years later.

The purpose of the discovery rule is to prevent "the manifest unfairness of foreclosing an injured person's cause of action before he has even had a reasonable opportunity to discover its existence."[59] The Missouri Supreme Court rejected the discovery rule in *Laughlin*, but the General Assembly later amended section 516.105 to include the rule for cases involving foreign objects left in the body,[60] presumably because such an exception served the evidentiary policy justifying a shorter limitations period for medical cases.[61]

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54. Judge Welliver concedes, in line with the cases from other jurisdictions, that strict scrutiny is the proper standard of review when a fundamental right is involved. *Strahler*, 706 S.W.2d at 19 (Welliver, J., dissenting).

55. 432 S.W.2d 308 (Mo. 1968) (en banc).

56. *Strahler*, 706 S.W.2d at 19-20 (Welliver, J., dissenting).

57. *See generally Laughlin*, 432 S.W.2d at 315 (Donnelly, J., dissenting); Note, *supra* note 7. "Discovery of the injury" is generally defined as awareness of "facts sufficient to put a reasonable person on inquiry that negligence was the cause of the injury; plaintiff need not, however, be aware that a legal cause of action exists before the statute of limitations begins to run." Timmel v. Moss, 803 F.2d 519, 521 (9th Cir. 1986) (applying California's medical malpractice statute of limitations, which contains a discovery provision).

58. Annotation, *When the Statute of Limitations Commences to Run Against Malpractice Action Against Physician, Surgeon, Dentist, or Similar Practitioner*, 80 A.L.R.2d (Later Case Service) 118 (Supp. 1987). *See generally* Note, *Reaffirming the Discovery Rule in Medical Malpractice Actions*, 28 S. TEX. L. REV. 139, 142-43 & n.15 (1987).

59. Brown v. Mary Hitchcock Memorial Hosp., 117 N.H. 739, 741-42; 378 A.2d 1138, 1139-40 (1977).

60. *See supra* note 9 and accompanying text.

61. Ross v. Kansas City Gen. Hosp., 608 S.W.2d 397 (Mo. 1980) (en banc). In *Ross*, Judge Seiler notes that the evidentiary policy is based on the notion that "there is less likely to be as great a problem with stale evidence when a foreign object

Judge Donnelly's dissent in *Strahler*, though short on paper, is of great interest in the matter of the discovery rule. Like the other dissenters, he would have given the statute rational basis review and upheld it as a reasonable exercise of legislative authority.[62] The significance of Donnelly's vote with the minority comes not from the reasoning of his dissenting opinion, but rather because he is the only current member of the court who participated in both *Laughlin* and *Strahler*. In *Laughlin*, he led the dissenters advocating adoption of the discovery rule as the only way to assure justice in that case because the plaintiff "certainly could not have known the cause of her injury and damage or that she had a cause of action against defendants before" the limitations period had already expired.[63] Moreover, Judge Donnelly concluded in *Laughlin* that "plaintiff is entitled to her day in court under these circumstances."[64] This view seems consonant with the court's application of Article I, Section 14 in *Strahler*, a medical malpractice case similar to *Laughlin* in that both involved plaintiffs who were unable to assert their rights, albeit for different reasons. Thus, his dissent in *Strahler* is most interesting in light of his previously expressed views on the medical malpractice statute of limitations.

Given the change in the court's composition since *Laughlin*,[65] wholesale adoption of the discovery rule is possible. Judge Billings hinted at the limited precedential value of *Laughlin* for constitutional challenges to the statute of limitations in *Strahler*, noting that the decision was based on "the statute of limitations in effect at that time."[66] Moreover, *Laughlin* was decided long before the court's construction of Missouri's open courts guarantee in *Cardinal Glennon*. Although the plaintiff in *Laughlin* included Article I, Section 14 in her constitutional attack, the opinion is phrased chiefly in terms of fourteenth amendment due process and equal protection under the federal constitution. The analysis used in that opinion is thus more or less obsolete after *Cardinal Glennon*.[67] Since *Strahler* is the court's first attempt to reconcile the malpractice statute of limitations with the plenary right of access to the courts provided by Article I, Section 14—as interpreted by *Cardinal*

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is left in the body than in the other types of malpractice cases. There are likely to be greater certainties of proof in a foreign object case." *Id.* at 399. This evidentiary policy is also discussed in Note, *supra* note 58, at 146.

62. *Strahler*, 706 S.W.2d at 14-15 (Donnelly, J., dissenting).

63. Laughlin v. Forgrave, 432 S.W.2d 308, 315 (Mo. 1968) (en banc) (Donnelly, J., dissenting).

64. *Id.*

65. The *Laughlin* court consisted of Judges Henley, Finch, Eager and Storckman in the majority, with Chief Justice Holman and Judge Seiler joining in Donnelly's dissent. The *Strahler* court contained Judges Billings, Rendlen, Robertson and Chief Justice Higgins in the majority, with Judges Blackmar, Welliver and Donnelly dissenting.

66. *Strahler*, 706 S.W.2d at 11 n.8.

67. *See supra* notes 50-52 and accompanying text.

Glennon—the *Strahler* majority, possibly bolstered by Donnelly, the original discovery rule advocate, might well be amenable to a new offer of the discovery rule based upon the open courts guarantee.

The most recent Missouri case considering the discovery rule was *Miller v. Duhart*,[68] a "wrongful birth" case. In *Miller*, the Eastern District Court of Appeals—citing *Laughlin* and its progeny as controlling—rejected the rule, while making an "urgent plea" for the General Assembly to reconsider the issue in light of the injustice inherent in the current statute of limitations.[69] Although the supreme court's refusal to transfer *Miller* might be perceived as a tacit reaffirmation of Missouri's "non-discovery" view, such is probably not the case. This is because *Miller* was a so-called "wrongful birth" case, and the court's refusal might well have been more of a rebuke of that cause of action than any definite statement on the discovery rule.[70]

Section 516.105 was recently struck another blow in *Poling v. Moitra*,[71] where the court held that the statute of limitations was tolled by the defendant doctor's absence from the jurisdiction even though he was subject to service of process under Missouri's long-arm statute. This decision is apparently a reversal of previous Missouri law.[72] Interestingly, the court in *Poling* divided exactly as it did in *Strahler*—majority written by Billings, joined by Higgins, Rendlen and Robertson; Blackmar, Donnelly and Welliver dissenting. The Missouri Supreme Court has not yet considered the discovery rule as a constitutionally required protection of citizens' rights of access to Missouri courts under Article I, Section 14 and the rule of *Cardinal Glennon*.

Strahler is only a small step toward adoption of the discovery rule. The holding is narrow and based as much upon the unique interrelationship between minors' rights and the open courts guarantee as it is upon the inequity of running the statute of limitations on a claim which the plaintiff is unable to assert. Moreover, though plaintiffs' attorneys have achieved some recent success in their efforts to erode the two-year statute of limitations,[73] the current political climate in Missouri clearly favors restricting, rather than broadening, plaintiffs' rights in the medical malpractice area.[74]

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68. 637 S.W.2d 183 (Mo. Ct. App. 1982).

69. *Id.* at 190.

70. For a discussion of *Miller* and its statute of limitations implications, see Terry, *Missouri's Statute of Limitations and Wrongful Birth*, 29 ST. L. BAR J. 24, 26-27 (Winter 1982).

71. 717 S.W.2d 520 (Mo. 1986) (en banc).

72. *See* Vetter, 42 J. Mo. BAR 435, 435 (Oct.-Nov. 1986).

73. *See supra* notes 8-10 and accompanying text.

74. This pro-defense bias has not been limited to the General Assembly. Consider Rowland v. Skaggs Cos., 666 S.W.2d 770 (Mo. 1984) (en banc), which held that the general statute of limitations, rather than the shorter section 516.105, governs actions in contribution among multiple defendant healthcare providers. The logic of applying the longer limitations period to such actions is elusive, given the evidentiary

Commentators in this state have advocated adoption of the discovery rule for years.[75] Much empirical data indicates that the rule does not work against the public policy of controlling health care costs and insurance rates because the vast majority of injured patients discover their conditions within three years after the allegedly negligent treatment.[76] Thus, the discovery rule actually changes little the scope of liability, despite what the insurance and health care industries maintain.

Perhaps *Strahler* and its application of Article I, Section 14 signals an opportunity to achieve the long awaited goal of striking down the current statute of limitations and invoking the discovery rule for medical malpractice cases. The Texas Supreme Court has said that refusal to adopt the discovery rule requires plaintiffs "to do the impossible—to sue before they ha[ve] any reason to know they should sue. Such a result is rightly described as 'shocking' and is so absurd and unjust that it ought not be possible."[77]

The current law in Missouri is not only "shocking," but also probably unconstitutional under the holdings of *Strahler* and *Cardinal Glennon*. Adoption of the discovery rule is the only way of insuring that Missouri citizens who are unaware of their latent injuries will not be denied the access to the courts guaranteed by our state's constitution.

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policy underlying the two-year statute, discussed *supra* at note 61. It makes little sense to run the risk of stale evidence in order to preserve a cause of action for a health care provider, while not doing the same for injured patients, such as in *Laughlin* and *Strahler*.

75. *See, e.g.*, Bartimus, Kavanaugh & Sullivan, *Plaintiff's Rights in the Medical Malpractice "Crisis,"* 53 UMKC L. REV. 27 (1984); Davis, *Tort Liability and the Statute of Limitations*, 33 MO. L. REV. 171 (1968); McCleary, *Malpractice — When Statute of Limitations Commences in Malpractice Actions*, 9 MO. L. REV. 102 (1944).

76. Approximately 94 percent of such claims are reported within three years. AMERICAN BAR ASSOCIATION, INTERIM REPORT OF THE COMMITTEE ON MEDICAL PROFESSIONAL LIABILITY 19 n.8 (1976); Note, *A Four-Year Statute of Limitations for Medical Malpractice Cases: Will Plaintiff's Case be Barred?*, 2 PAC. L.J. 663, 672 (1971); Note, *supra* note 33, at 961 n.803.

77. Nelson v. Krusen, 678 S.W.2d 918, 923 (Tex. 1984).