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Constitutional Law - Equal Protection of Laws: The Equal Protection Challenge to the Medical Malpractice Statute of Repose in North Dakota - Hoffner v. Johnson

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CONSTITUTIONAL LAW—EQUAL PROTECTION OF LAWS: THE EQUAL PROTECTION CHALLENGE TO THE MEDICAL MALPRACTICE STATUTE OF REPOSE IN NORTH DAKOTA

Hoffner v. Johnson, 2003 ND 79, 660 N.W.2d 909

I. FACTS

In 1988, fourteen-year-old Monte Hoffner was diagnosed by Dr. George M. Johnson with Type I diabetes.[1] At the time of the diagnosis, Hoffner was hospitalized for two days, placed on insulin, and instructed that to manage his diabetes he must test his blood sugar daily.[2] Hoffner next saw Dr. Johnson in March 1992 to undergo additional testing.[3] On May 28, 1992, Dr. Johnson wrote a letter to Hoffner advising him that he had "lost" his diabetes, and that he no longer needed to monitor his blood sugar.[4] Upon receipt of the letter, Hoffner discontinued his routine blood sugar testing.[5]

In December 1999, after experiencing flu-like symptoms and weight loss, Hoffner consulted with doctors and was advised that he was still diabetic.[6] Because his diabetic condition had been left untreated for more than

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1. Hoffner v. Johnson, 2003 ND 79, ¶ 2, 660 N.W.2d 909, 911. Type 1 diabetes is a chronic disease that occurs when the pancreas produces too little insulin to regulate blood sugar levels appropriately. *Medline Plus Medical Encyclopedia*, *at* http://nlm.nih.gov/medlineplus/ency (last visited Mar. 24, 2004). Type 1 diabetes is most common in children and young adults. *Children's Hospital and Regional Medical Center*, *at* http://www.cshcn.org (last visited Mar. 24, 2004).

2. Memorandum on Motions to Dismiss or in the Alternative for Summary Judgment, *County of Cass, East Central Judicial District*, at 1 [hereinafter Memorandum], Hoffner v. Johnson, 2003 ND 79, 660 N.W.2d 909 (No. 09-02-C-0026).

3. *Id.*

4. *Hoffner*, ¶ 2, 660 N.W.2d at 911. Dr. Johnson's May 28, 1992 letter specifically stated:

> Monte, I feel strongly you have had in the past Type II diabetes, rather than Type I diabetes. . . . All this means is that you have "lost" your diabetes because you lost a lot of weight following your original diagnosis of 1988. The stability of blood sugars and the very small doses of insulin ever since 1988 suggest you have a very unusual circumstance, Type II diabetes of youth (which in itself is rare) followed by "cure" of diabetes because you lost weight and have maintained a high activity level. You should not need to do blood sugars in the future unless you start to gain a lot of weight. Please be advised when you grow older that diabetes can "return" if you are not careful about what you eat and you gain weight. Insofar as I am concerned, there is absolutely no reason for insurance programs to cause difficulty for you during enrollment. Again, you have "lost" your Type II diabetes mellitus.

Id.

5. Memorandum at 2, *Hoffner* (No. 09-02-C-0026).

6. *Hoffner*, ¶ 3, 660 N.W.2d at 911.

seven years, Hoffner suffered a number of medical problems and complications, including loss of vision, severe peripheral neuropathy, and pancreas problems that required a transplant.[7]

Hoffner and his wife commenced a medical malpractice action against Dr. Johnson and Fargo Clinic/MeritCare (collectively "Johnson") on November 20, 2001.[8] In January 2002, Hoffner died at the age of twenty-seven from complications related to his misdiagnosed diabetic condition.[9] Johnson asserted that the claims were barred by section 28-01-18(3) of the North Dakota Century Code, which provides a six-year statute of repose for medical malpractice actions.[10] Hoffner in turn argued that section 28-01-18(3) violated North Dakota's guarantee of equal protection, and should therefore be found unconstitutional.[11]

On June 7, 2002, the Cass County District Court granted Johnson's motion for summary judgment, finding section 28-01-18(3) constitutional.[12] The trial court dismissed Hoffner's claim after finding that the applicable statute of repose barred the action, because it was filed more than six years from accrual of the claim.[13]

Hoffner raised three issues on appeal to the North Dakota Supreme Court.[14] The first and most important issue, the focus of this comment, was whether section 28-01-18(3) unconstitutionally violated Hoffner's right to equal protection under the law in North Dakota.[15] The court answered the question in the negative and affirmed the decision of the trial court, holding section 28-01-18(3) constitutional.[16] The other two issues on appeal related to equitable estoppel and the continuous treatment rule.[17] Neither issue was dispositive, and therefore neither will be addressed in this comment.[18]

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7. Appellant's Brief at 3-4, Hoffner v. Johnson, 2003 ND 79, 660 N.W.2d 909 (No. 20020208).

8. *Hoffner*, ¶ 4, 660 N.W.2d at 911.

9. Appellant's Brief at 4, *Hoffner* (No. 20020208).

10. *Id.*, *see* N.D. CENT. CODE § 28-01-18(3) (1991) (providing that medical malpractice claims must be filed within two years after the claim for relief has accrued, but in no event will claims be extended beyond six years of the act or omission of alleged malpractice).

11. Appellant's Brief at 19, *Hoffner* (No. 20020208).

12. Memorandum at 6, *Hoffner* (No. 09-02-C-0026).

13. *Id.*

14. *Hoffner*, ¶¶ 1, 24, 30, 660 N.W.2d at 911, 917-18.

15. *Id.* ¶ 1, 660 N.W.2d at 911.

16. *Id.* ¶ 23, 660 N.W.2d at 917.

17. *Id.* ¶¶ 1, 24, 30, 660 N.W.2d at 911, 917-18. The second issue on appeal was whether the doctrine of equitable estoppel precluded Johnson from relying on the statute of repose as a bar to Hoffner's claims. *Id.* ¶¶ 24-29, 660 N.W.2d at 917-18. The court answered this issue in the negative as well, finding that Johnson's statements in the letter to Hoffman did not constitute an affirmative deception intended to induce Hoffner to fail to timely commence an action for medical malpractice. *Id.* The third issue was whether the continuous treatment rule would act to toll the statute of repose. *Id.* ¶¶ 30-34, 660 N.W.2d at 918-19. The court declined to adopt the continuous

II. LEGAL BACKGROUND

North Dakota law establishes statutes of repose in claims resulting from defective products[19] and for deficiencies in the improvement of real estate.[20] Additionally, North Dakota, like most states, provides for a statute of repose regarding medical malpractice claims.[21] The North Dakota Supreme Court has set forth the definition of a statute of repose,[22] as well as its effects upon a plaintiff's claim.[23] Additionally, the court has ruled on the constitutionality of the North Dakota statutes of repose for defective products and improvements to real estate.[24] Other jurisdictions analyzing the constitutionality of medical malpractice statutes of repose are divided; some have found the respective state statutes constitutional, while others have held them unconstitutional on a variety of grounds.[25]

A. DEFINING "STATUTE OF REPOSE"

Statutes of repose "promote a policy of finality in legal relationships," and are the subject of legal writing and debate reaching "high levels of abstraction."[26] A statute of repose by definition differs significantly from the similar concept of a statute of limitation.[27] Although statutes of repose

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treatment rule and found that even if North Dakota recognized the continuous treatment rule, it would not apply to the facts of the case because Hoffner did not have a continuing physician-patient relationship with Dr. Johnson. *Id.*

18. *Id.* ¶¶ 1, 24, 30, 660 N.W.2d at 911, 917-18.

19. *See* N.D. CENT. CODE § 28-01.3-08 (Supp. 2003) (providing that there may be no recovery in products liability actions unless the injury or damage occurs within ten years from the date of initial purchase or eleven years from manufacture).

20. *See* N.D. CENT. CODE § 28-01-44 (1991) (providing that actions for deficiency in design, planning, supervision or observation of construction of an improvement to real property, or any injury arising from such deficiency may not be brought more than ten years after substantial completion of the improvement).

21. *See* N.D. CENT. CODE § 28-01-18(3) (1991) (providing that medical malpractice claims must be filed within two years after the claim for relief has accrued, but in no event will claims be extended beyond six years of the act or omission of alleged malpractice).

22. Hanson v. Williams Co., 389 N.W.2d 319, 321 (N.D. 1986).

23. *Id.*

24. *See id.* (resolving challenge to products liability statute of repose); *see also* Dickie v. Farmers Union Oil Co. of LaMoure, 2000 ND 111 ¶ 7, 611 N.W.2d 168, 171 (answering certified question regarding constitutionality of revised products liability statute of repose); Bellemare v. Gateway Builders, Inc., 420 N.W.2d 733, 739 (N.D. 1988) (resolving challenge to constitutionality of statute of repose for improvements to real estate).

25. Christopher J. Trombetta, *The Unconstitutionality of Medical Malpractice Statutes of Repose: Judicial Conscience Versus Legislative Will*, 34 VILL. L. REV. 397 n.4 (1989).

26. Francis E. McGovern, *The Variety, Policy and Constitutionality of Products Liability Statutes of Repose*, 30 AM. U. L. REV. 579, 581 (1980-81).

27. Hanson v. Williams Co., 389 N.W.2d 319, 321 (N.D. 1986). A statute of repose is defined as follows: "A statute that bars a suit a fixed number of years after the defendant acts in some way . . . even if this period ends before the plaintiff has suffered any injury." BLACK'S LAW DICTIONARY 1423 (7th ed. 1999). A statute of limitation on the other hand is defined as: "A

are conceptually different from statutes of limitation, they have comparable effects.[28] Both serve to bar a cause of action; however, the bar of a statute of repose is absolute, and the bar of a statute of limitations is conditional.[29]

A statute of limitation bars a right of action that is not filed within a specified time after the injury occurs.[30] The limitation period begins when the injury occurs or when the injury is discovered.[31] A reasonable time after the cause of action arises will be allowed for an injured party to file his or her lawsuit.[32] The general purpose behind the limitation period is to prevent "plaintiffs from sleeping on their legal rights to the detriment of defendants." [33]

In contrast, a statute of repose "terminates any right of action after a specified time has elapsed, regardless of whether or not there has as yet been an injury."[34] The statute of repose period begins to run upon the occurrence of an event.[35] For example, a products liability statute of repose typically begins running either on the date of purchase, the date of first use, or when the product leaves the manufacturer's control.[36] Statutes of repose for improvements to real property usually begin to run on either the date of substantial completion, the date of acceptance, or the date of the first use of the improvement.[37] A medical malpractice statute of repose generally begins to run from the date of injury, or the date of the act or omission that constitutes the alleged malpractice.[38] A person injured after the statutory period of repose is left without a remedy for her injury.[39]

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statute establishing a time limit for suing in a civil case, based on the date when the claim accrued . . . ." *Id.* at 1422.

28. *Hanson*, 389 N.W.2d at 321 (citing Berry v. Beech Aircraft Corp., 717 P.2d 670 (Utah 1985)); *see generally* McGovern, *supra* note 26, at 592-97 (discussing conceptual differences between statutes of repose and statutes of limitation).

29. 54 C.J.S. *Limitations of Actions* § 4 (1987).

30. *Hanson*, 389 N.W.2d at 321.

31. *Id.*

32. *Id.*

33. *Id.* (citing Thomas A. Dickson, *The Statute of Limitations in North Dakota's Products Liability Act: An Exercise in Futility?*, 59 N.D. L. REV. 551, 556 (1983); State v. Halverson, 285 N.W. 292, 293 (N.D. 1939)).

34. *Hanson*, 389 N.W.2d at 321 (citing Frumer and Friedman, *Products Liability*, § 16C(2)(i) (1985)).

35. *Id.*

36. N.D. CENT. CODE § 28-01.3-08 (Supp. 2003); *see generally* Josephine Herring Hicks, *The Constitutionality of Statutes of Repose: Federalism Reigns*, 38 VAND. L. REV. 627, 629-30 (1985) (discussing time when statute of repose begins to run).

37. N.D. CENT. CODE § 28-01-44 (1991); *see generally* Hicks, *supra* note 36, at 629-30 (discussing time when statute of repose begins to run).

38. *See, e.g.*, N.D. CENT. CODE § 28-01-18(3) (1991) (containing North Dakota's medical malpractice statute of repose); *see generally* Hicks, *supra* note 36, at 629-30.

39. Hanson v. Williams Co., 389 N.W.2d 319, 321 (N.D. 1986).

B. PUTTING IT IN PERSPECTIVE: THE CONSTITUTIONALITY OF STATUTES OF REPOSE IN NORTH DAKOTA

The North Dakota Supreme Court used an equal protection analysis to determine the constitutionality of both the products liability statute of repose, and the statute of repose for improvements to real property.[40] Analysis under equal protection requires a court to examine the legislature's purpose in enacting the challenged statute, and to determine whether the statute creates a distinction between classes of plaintiffs or classes of defendants.[41] Further, courts must articulate the standard by which the challenged statute's constitutional validity will be determined.[42] North Dakota generally follows the United States Supreme Court's three equal protection standards of review: (1) strict scrutiny, (2) rational basis scrutiny, and (3) intermediate scrutiny.[43] The North Dakota Supreme Court has determined that if a challenged statute does not affect a fundamental right or suspect class, rational basis scrutiny will be applied to statutes affecting economic or social matters.[44] The intermediate standard is applied to statutes affecting a plaintiff's right to recover for personal injuries.[45]

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40. *See id.* at 325 (finding statute of repose for products liability unconstitutional); *see also* Bellemare v. Gateway Builders, Inc., 420 N.W.2d 733, 739 (N.D. 1988) (upholding statute of repose for improvements to real property). North Dakota's equal protection clause provides: "[n]o special privileges or immunities shall ever be granted which may not be altered, revoked or repealed by the legislative assembly; nor shall any citizen or class of citizens be granted privileges or immunities which upon the same terms shall not be granted to all citizens." N.D. CONST. art. I, § 21.

41. *See Hanson*, 389 N.W.2d at 326-28 (examining the classification created by statute and the legislature's goals).

42. *See* Golden v. Johnson Mem'l Hosp., Inc., 785 A.2d 234, 247 (Conn. App. 2001) (noting requirement that court determine the appropriate standard).

43. *See* Johnson v. Hassett, 217 N.W.2d 771, 775 (N.D. 1974) (discussing standards of review and similarities to review by the United States Supreme Court). When a statute involves an "inherently suspect" class or a "fundamental right," it is subjected to strict judicial scrutiny. *Id.* To pass constitutional muster, the court must find that the legislation is necessary to further a compelling state interest. *E.g.*, *Golden*, 785 A.2d at 247. The rational basis test requires that the legislative classification be sustained "unless it is patently arbitrary and bears no rational relationship to a legitimate government interest." *Johnson*, 217 N.W.2d at 775 (citing Frontiero v. Richardson, 411 U.S. 677, 683 (1973)). Under the intermediate standard, the court must find a "close correspondence between [the] statutory classification and [the] legislative goals." *Johnson*, 217 N.W.2d at 775. The United States Supreme Court limits the use of the intermediate standard to distinctions based on illegitimacy or gender. Lalli v. Lalli, 439 U.S. 259, 265 (1979) (illegitimacy); Reed v. Reed, 404 U.S. 71, 76-77 (1971) (gender). North Dakota does not limit its application to those situations, but applies the standard whenever an "important substantive right" is involved. *E.g.*, *Hanson*, 389 N.W.2d at 325.

44. *Johnson*, 217 N.W.2d at 775. A statute affecting a fundamental right, or involving an inherently suspect class is subjected to strict judicial scrutiny. *Id.*

45. *Hanson*, 389 N.W.2d at 325.

1. *Statute of Repose for Products Liability*

In 1977, the North Dakota Legislature directed the Legislative Council to study insurance problems in North Dakota, specifically the availability and affordability of products liability insurance.[46] After receiving considerable testimony, the Legislative Council recommended the passage of two bills.[47] Together they formed the North Dakota Products Liability Act.[48]

The Products Liability Act provided a statute of repose provision requiring that an injury giving rise to the claim must have occurred within ten years of the date of purchase of the defective product, or eleven years from the date of manufacture in order for the action to lie.[49] Testimony received by the legislative committees, as well as the Act itself, indicated that the limitation period was essential in order to carry out the intent of the bill, which was to reduce the cost of products liability insurance in North Dakota.[50]

In 1986, the constitutionality of the Products Liability Act, specifically section 28-01.1-02 of the North Dakota Century Code, was determined by the North Dakota Supreme Court in *Hanson v. Williams Co.*[51] Bonny Hanson brought an action against the manufacturer of a multi-ton earth packer, after the packer "jumped backwards" running over and killing her twenty-two-year-old son.[52] The action was filed eight months after the incident, but more than twenty years after the earth packer was manufactured.[53] The trial court dismissed the action after concluding that it was time barred under section 28-01.1-02.[54]

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46. *Id.* at 320.

47. *Id.*

48. *Id.* The Act was initially codified at N.D. CENT. CODE Ch. 28-01.1 (1991 & Supp. 2003). Chapter 28-01.1 was repealed by the legislature in 1993, and the chapter entitled "Products Liability" is now located at N.D. CENT. CODE Ch. 28-01.3 (2003).

49. N.D. CENT. CODE § 28-01.1-02 (1991). The statute provided that:

> There may be no recovery of damages for personal injury, death, or damage to property caused by a defective product, . . . unless the injury, death, or damage occurred within ten years of the date of initial purchase for use or consumption, or within eleven years of the date of manufacture of a product . . . .

Id.

50. *Hanson*, 389 N.W.2d at 320-21; *see also* N.D. CENT. CODE § 28-01.1-01(1), (3) (1991) (indicating that recent trends of increased products liability claims as well as the increased cost of products liability insurance necessitated the Products Liability Act to "protect the public interest by enacting measures designed to encourage private insurance companies to continue to provide products liability insurance").

51. 389 N.W.2d 319 (N.D. 1986).

52. *Hanson*, 389 N.W.2d at 319-20.

53. *Id.* at 320.

54. *Id.* at 319.

On appeal, the North Dakota Supreme Court applied its equal protection analysis to Hanson's constitutional challenge of the statute.[55] After recognizing that an individual's right to recover for personal injuries was an "important substantive right,"[56] the court concluded that the appropriate standard of review for the constitutional challenge was the intermediate standard.[57] Additionally, the court identified the classification established by section 28-01.1-02 as a distinction between persons injured within the time frame articulated in the statute, and those whose injuries occurred later.[58] The court recognized the perceived "crisis" facing North Dakota manufacturers due to unaffordable products liability insurance and the "importance of legislative action . . . to alleviate the problem," but the court stated that because life and safety were involved, more justification than merely the economic interests of manufacturers and suppliers must be advanced for the selection of the repose period.[59] Therefore, the court determined that the classifications created by the statute bore no close correspondence to the legislature's goal of alleviating the insurance crisis faced by product manufacturers.[60] Thus, the statute was held unconstitutional.[61]

After the holding in *Hanson*, the North Dakota Legislature repealed the Products Liability Act in 1993.[62] A new chapter on products liability was enacted to replace the Products Liability Act; it contained a repose provision substantially similar to the one held unconstitutional in *Hanson*.[63] In its declaration of legislative findings and intent, the Legislature expressed, as the primary purposes for the repose period, a need for clarity and

55. *Id.* at 323.

56. *Id.* at 325 (citing Heath v. Sears, Roebuck & Co., 464 A.2d 288, 294 (N.H. 1983)).

57. *Id.*

58. *Id.* at 326-27.

59. *Id.* at 328.

60. *Id.*

61. *Id.*

62. *See* N.D. CENT. CODE Ch. 28-01.1 (Supp. 2003) (noting that the chapter was repealed by S.L. 1993, ch. 324, § 5).

63. N.D. CENT. CODE Ch. 28-01.3 (Supp. 2003). The repose provision of the updated chapter provides: "there may be no recovery of damages in a products liability action unless the injury, death, or property damage occurs within ten years of the date of initial purchase for use or consumption, or within eleven years of the date of manufacture of a product." N.D. CENT. CODE § 28-01.3-08 (Supp. 2003).

predictability[64] and a need to provide a reasonable period of time for the commencement of litigation.[65]

The constitutionality of the 1993 products liability statute of repose was challenged in *Dickie v. Farmers Union Oil Co. of LaMoure*.[66] The court in *Dickie* concluded that the appropriate standard of review applicable to the equal protection analysis was the intermediate standard.[67] Therefore, the court examined whether there was a close correspondence between the legislative goals and the classification created by the statute.[68] When comparing *Dickie* with the decision in *Hanson*, the court noted that the legislative goal of the 1993 statute, establishing clarity and predictability, was also articulated as a primary objective of the 1979 statute of repose.[69] The court noted the lack of testimony and evidence presented to the legislature that would have demonstrated any harm or prejudice to sellers and manufacturers if damages were to be imposed for injuries occurring more than ten years from the initial purchase of their product or eleven years from its manufacture.[70] Therefore, the court concluded that section 28-01.3-08 could not withstand an equal protection challenge, because no close correspondence existed between the legislative objectives and the classifications created thereunder.[71]

2. *Statute of Repose for Improvements to Real Property*

In 1967, the North Dakota Legislature enacted a ten-year statute of repose regarding claims arising out of a defect in the design, planning, supervision, or construction of improvements to real property.[72] Although

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64. *See* N.D. CENT. CODE § 28-01.3-07(2) (Supp. 2003) (stating that "there is an urgent need for additional legislation to establish clear and predictable rules with respect to certain matters relating to products liability actions").

65. *See* N.D. CENT. CODE § 28-01.3-07(3) (stating that the "purpose of [the products liability repose provision] . . . [is] to provide a reasonable period of time for the commencement of products liability litigation after a manufacturer or seller has parted with possession of its product").

66. 2000 ND 111, 611 N.W.2d 168.

67. *Dickie*, ¶ 5, 611 N.W.2d at 170. Lillian Dickie and her husband brought suit against defendant, who sold, delivered and installed an underground pipe, after the gas leaks in the pipe caused an explosion that resulted in serious burn injuries to Ms. Dickie. *Id.* ¶ 2, 611 N.W.2d at 169.

68. *Id.* ¶ 5, 611 N.W.2d at 170.

69. *Id.* ¶ 7, 611 N.W.2d at 171.

70. *Id.* ¶¶ 8-9, 611 N.W.2d at 171-72 (citing Hanson v. Williams, 389 N.W.2d 319, 329 (N.D. 1986) (Levine, J., concurring)).

71. *Id.* ¶ 9, 611 N.W.2d at 172.

72. N.D. CENT. CODE § 28-01-44(1) (1991). Subsection 1 provides:

> No action, whether in contract, oral or written, in tort or otherwise, to recover damages:

the legislative history regarding North Dakota Century Code section 28-01-44 is limited, it has been determined that the legislature's intention in enacting the statute was to "limit what would otherwise be virtually unlimited and perpetual exposure to liability for persons engaged in the design, planning . . . or construction of improvements to real property."[73] Unlike the legislative intent behind the Products Liability Act, there was no perceived insurance crisis affecting persons involved in making improvements to real property when section 28-01-44 was enacted.[74]

In 1988, the North Dakota Supreme Court addressed the constitutionality of section 28-01-44 in *Bellemare v. Gateway Builders, Inc.*[75] In *Bellemare*, the plaintiff's claim had been dismissed as a matter of law, because the claim had not been brought within the ten-year repose period provided for in section 28-01-44.[76] On appeal, the plaintiff challenged the constitutionality of section 28-01-44 on equal protection grounds.[77]

The court again articulated that the right to recover for personal injuries is an important substantive right.[78] Because the statute of repose contained in section 28-01-44 affected a person's right to recover for personal injuries, the court applied the intermediate standard of review to its equal protection analysis.[79] The court also recognized that section 28-01-44 created classification between (a) persons who are entitled to bring claims because their injuries occurred within ten years from the substantial completion of improvements to real property, and (b) those whose claims were barred because their injuries occurred more than ten years after substantial

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> a. For any deficiency in the design, planning, supervision, or observation of construction or construction of an improvement to real property;
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> b. For injury to property, real or personal, arising out of any such deficiency; or
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> c. For injury to the person or for wrongful death arising out of any such deficiency, may be brought against any person performing or furnishing the design, planning, supervision, or observation of construction, or construction of such an improvement more than ten years after substantial completion of such an improvement.

Id.

73. Bellemare v. Gateway Builders, 420 N.W.2d 733, 737 (N.D. 1988). Although the goals of the legislature in enacting section 28-01-44 were "unstated," the court in *Bellemare* determined the legislative intent from decisions in other jurisdictions construing similar statutes. *Id.* at 738 (citing Fritz v. Regents of Univ. of Colorado, 586 P.2d 23, 25 (Colo. 1978)).

74. *Bellemare*, 420 N.W.2d at 737.

75. 420 N.W.2d 733 (N.D. 1988).

76. *Bellemare*, 420 N.W.2d at 734. The plaintiff, Daniel Bellemare, was injured when he fell from a ladder attached to a grain bin that had been erected by defendant Gateway. *Id.* Completion of construction of the grain bin occurred in 1967, however the plaintiff's injuries did not occur until 1979. *Id.*

77. *Id.* at 734-35.

78. *Id.* at 736 (citing Hanson v. Williams Co., 389 N.W.2d 319, 325 (N.D. 1986)).

79. *Id.*

completion of improvements.[80] Under the intermediate scrutiny standard therefore, the court had to determine whether there was a close correspondence between the classifications and the Legislature's apparent intention in enacting section 28-01-44.[81]

The court stated that it could "discern no illegal purpose in the goal of obtaining finality resulting in financial security and peace of mind by restricting what would otherwise be virtually unlimited and perpetual exposure to persons engaged in the . . . improvements to real property." [82] The court ultimately concluded that a close correspondence between the permissible statutory classifications and the permissible legislative goals existed, so therefore, section 28-01-44 was constitutional.[83]

C. POLICY CONSIDERATIONS FOR THE ENACTMENT OF NORTH DAKOTA'S STATUTE OF REPOSE FOR MEDICAL MALPRACTICE

In 1975, the North Dakota Legislature created section 28-01-18 of the North Dakota Century Code, which imposed a six-year period of repose on medical malpractice claims.[84] The language of section 28-01-18(3) currently provides in pertinent part:

> The following actions must be commenced within two years after the claim for relief has accrued:
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> . . . .
>
> 3. An action for the recovery of damages resulting from malpractice; provided, however, that the limitation of an action against a physician or licensed hospital will not be extended

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80. *Id.*

81. *Id.*

82. *Id.* at 737-38.

83. *Id.* at 739. The Court relied upon a decision by the Colorado Supreme Court in determining that the legislative goals as well as the classification created by section 28-01-44 were permissible. *Id.* at 737; *see* Yarbro v. Hilton Hotels Corp., 655 P.2d 822, 825 (Colo. 1982) (finding goal permissive "[s]ince construction projects generally have expected useful lives of many years or decades, the possibilities for long-term liability for the professional architect or design engineer are enormous," and finding classification permissible since "over 99% of claims had been brought within ten years after completion").

84. N.D. CENT. CODE § 28-01-18(3) (1991). Initially, the proposed language of the bill would have imposed a four-year repose period. S.B. 2348, 44th Leg. (N.D. 1975). However, after testimony and debate in the Senate and House Judiciary Committees, the bill was passed with amendments making the period of repose six years. *See generally* 1975 Senate Standing Committee Minutes, Hearing on S.B. 2348 Before the Senate Judiciary Comm., 44th N.D. Legis. Sess. 2-3 (Feb. 5, 1975) [hereinafter Minutes (Feb. 5, 1975)]; 1975 Senate Standing Committee Minutes, Hearing on S.B. 2348 Before the Senate Judiciary Comm., 44th N.D. Legis. Sess. 1 (Feb. 10, 1975) [hereinafter Minutes (Feb. 10, 1975)]; 1975 Senate Standing Committee Minutes, Hearing on S.B. 2348 Before the House Judiciary Comm., 44th N.D. Legis. Sess. 1-4 (Mar. 4, 1975) [hereinafter Minutes (Mar. 4, 1975)].

> beyond six years of the act or omission of alleged malpractice by a nondiscovery thereof unless discovery was prevented by the fraudulent conduct of the physician or licensed hospital.[85]

The statute establishes a two-year limitation period for malpractice claims beginning at the time the cause of action accrues.[86] Subsection three creates a statue of repose.[87]

Section 28-01-18 does not specifically provide legislative findings setting forth the purposes of the legislation or the goals of the legislature in enacting the repose period.[88] However, the goals and purposes behind section 28-01-18 can be found in the testimony and debate in the Senate and House Judiciary Committees following the introduction of the bill.[89] The legislative history reveals that the legislature's purpose for enacting section 28-01-18 was to alleviate a perceived medical malpractice crisis and to make the climate more favorable for insurers.[90]

This legislation was one of three bills introduced at the same time that was designed to remedy the rising cost of malpractice insurance for physicians in North Dakota.[91] Testimony in favor of the amendment revealed that the expense and status of malpractice insurance was in a "crisis situation." [92] Reportedly, at least one company decided to go out of the malpractice insurance business and others were threatening to do the same.[93] At least one doctor testified as to the expense of malpractice insurance and the difficulty in obtaining coverage.[94] Additionally, supporters of the amendment expressed concern that North Dakota's discovery rule

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85. N.D. CENT. CODE § 28-01-18.

86. Anderson v. Shook, 333 N.W.2d 708, 709 (1983); N.D. CENT. CODE § 28-01-18.

87. N.D. CENT. CODE § 28-01-18(3). Additionally, as indicated in the statute, exceptions to repose period are given to infants, the insane and prisoners. N.D. CENT. CODE § 28-01-25 (1991).

88. N.D. CENT. CODE § 28-01-18.

89. Minutes (Feb. 5, 1975), *supra* note 84, at 2-3; Minutes (Feb. 10, 1975), *supra* note 84, at 1; Minutes (Mar. 4, 1975), *supra* note 84, at 1-4.

90. Minutes (Feb. 5, 1975), *supra* note 84, at 2-3; Minutes (Feb. 10, 1975), *supra* note 84, at 1; Minutes (Mar. 4, 1975), *supra* note 84, at 1-4. Additionally, other portions of the North Dakota Century Code reflect the medical malpractice insurance crisis. *See* N.D. CENT. CODE § 26.1-14-01 (2002) (stating "[t]here is a nationwide crisis in the field of medical malpractice insurance and physicians practicing medicine within the state of North Dakota are finding, or will find, it increasingly difficult, if not impossible, to obtain medical malpractice insurance").

91. Minutes (Feb. 5, 1975), *supra* note 84, at 2 (testimony of H.W. Wheeler, Counsel for the North Dakota Medical Association).

92. *Id.* at 3 (testimony of J.O. (Bud) Wigen, North Dakota State Insurance Commissioner).

93. *Id.* (testimony of J.O. (Bud) Wigen, North Dakota State Insurance Commissioner).

94. Minutes (Feb. 10, 1975), *supra* note 84, at 1 (testimony of Dr. Huntley, North Dakota Medical Association).

would allow claims to lie dormant for several years before a patient discovered the injury, thus allowing longer exposure to liability.[95]

Testimony in opposition to the proposed legislation expressed concern about putting a limitation on the filing of claims, "because years might go by before a person even discover[ed] the malpractice and he should still have some right of recourse if such is the case."[96] Concern was also expressed that too much burden would be placed on the patient, and that claims would be barred even though they could not have been discovered for fifteen to twenty years.[97]

D. COMPARING NORTH DAKOTA'S MEDICAL MALPRACTICE STATUTE OF REPOSE WITH PARALLEL STATUTES OF OTHER JURISDICTIONS

Historically, various state legislatures enacted statutes of repose in the early and mid-1970s in response to the adoption of the discovery rule.[98] A principal reason generally advanced for the enactment of statutes of repose for medical malpractice claims was the public policy of sheltering health-care professionals from the burden of potential liability after a reasonable time had passed.[99] Another justification for statutes of repose was the desire to alleviate insurance problems facing the medical profession.[100]

Twenty-five states currently have statutes similar to North Dakota's statute of repose for medical malpractice.[101] Each of those state's statutes

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95. Minutes (Feb. 5, 1975), *supra* note 84, at 2 (testimony of H.W. Wheeler, Counsel for the North Dakota Medical Association). The discovery rule states that a claimant's cause of action does not accrue until the claimant discovered, or through the exercise of reasonable diligence should have discovered, the injury caused by the defendant's negligence. *See* Anderson v. Shook, 333 N.W.2d 708, 712 (N.D. 1983) (holding discovery rule was applicable to claims alleging medical malpractice in North Dakota).

96. Minutes (Feb. 5, 1975), *supra* note 84, at 3 (testimony of Fred Saefke, Bismarck Attorney).

97. Minutes (Mar. 4, 1975), *supra* note 84, at 4 (testimony of Rep. Irving).

98. Trombetta, *supra* note 25, at 401 n.18.

99. Golden v. Johnson Mem'l Hosp., Inc., 785 A.2d 234, 241 (Conn. App. 2001); *see also* Sills v. Oakland Gen. Hosp., 559 N.W.2d 348 (Mich. App. 1996) (citing Lemmerman v. Fealk, 534 N.W.2d 695, 699 (Mich. 1995)) (stating that the purposes for Michigan's repose period included security against stale claims and the alleviation of prolonged threats of litigation).

100. *See* Kenyon v. Hammer, 688 P.2d 961, 976-77 (Ariz. 1984) (en banc) (examining the social costs of rising medical malpractice insurance premiums); *see also* Brubaker v. Cavanaugh, 741 F.2d 318, 321 (10th Cir. 1984) (noting that Kansas's statute of repose was an attempt by the legislature to combat the rising cost of medical malpractice insurance); Valentine v. Thomas, 433 So.2d 289, 292 (La. App. 1983) (stating that Louisiana's statute of repose was passed in response to increases in medical malpractice insurance rates); *see generally* Hicks, *supra* note 36, at 632 n.39 (discussing the alleviation of insurance problems as justification for statutes of repose).

101. *See e.g.*, ALA. CODE § 6-5-482(a) (1993) (providing action must be commenced within two years from the date of the act or omission, or if injury could not be discovered within two years, then action must be filed within six months of discovery; no claim more than four years

provide: first, a statute of limitation, requiring an action for medical malpractice be commenced within a prescribed time after discovering the injury or after the act or omission constituting the malpractice; and, second, a statute of repose, preventing plaintiffs from bringing claims within a separate prescribed time after the act or omission, even though the injuries may have not yet been discovered.[102] The other twenty-four states require

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from the act or omission). The other states with language similar to N.D. CENT. CODE § 28-01-18(3) include: Colorado, Connecticut, Florida, Hawaii, Illinois, Iowa, Kansas, Kentucky, Louisiana, Massachusetts, Michigan, Mississippi, Montana, Nebraska, North Carolina, Ohio, Oregon, South Carolina, Tennessee, Utah, Vermont, Washington, West Virginia and Wisconsin.

102. *See* ALA. CODE § 6-5-482(a) (1993) (providing action must be commenced within two years from the date of the act or omission, or if injury could not be discovered within two years, then action must be filed within six months of discovery; no claim more than four years from the act or omission); *see also* COLO. REV. STAT. ANN. § 13-80-102.5(1) (West 2002) (providing claim must be filed within two years after action "accrues"; no claim more than three years from act/omission); CONN. GEN. STAT. ANN. § 52-584 (West 1991) (requiring claim within two years after discovery of the injury; no claim more than three years from act or omission); FLA. STAT. ANN. § 95.11(4)(b) (West 2002) (requiring claim within two years from time of incident or two years from discovery; no claim more than four years from act or omission); HAW. REV. STAT. § 657-7.3 (1993) (requiring claim within two years after discovery; no claim more than six years from act or omission); 735 ILL. COMP. STAT. ANN. 5/13-212(a) (West 1992) (requiring claim within two years from discovery; no claim more than four years from act or omission); IOWA CODE § 614.1(9) (1999 & Supp. 2003) (requiring claim within two years from discovery; no claim more than six years from act or omission); KAN. STAT. ANN. § 60-513(a)(7), (c) (1994 & Supp. 2002) (requiring claim within two years from act or omission or two years from discovery; no claim more than four years from act or omission); KY. REV. STAT. ANN. § 413.140(1)(e), (2) (Michie 1992 & Supp. 2002) (requiring claim within one year of discovery; no claim more than five years from act or omission); LA. REV. STAT. ANN. § 9:5628(A) (West 1991 & Supp. 2003) (requiring claim within one year from discovery; no claim more than three years from act or omission); MASS. GEN. LAWS ANN. Ch. 260 § 4 (West 1992) (requiring claim within three years from "accrual;" no claim more than seven years from act or omission); MICH. COMP. LAWS ANN. §§ 600.5805 & 600.5838a(1)(2) (West 2000) (requiring claim within two years from act or omission or within six months of discovery whichever is later; no claim more than six years from act or omission); MISS. CODE ANN. § 15-1-36(2) (2003) (requiring claim within two years from discovery; no claim more than seven years from act or omission); MONT. CODE ANN. § 27-2-205(1) (2003) (requiring claim within three years from date of injury or three years from discovery whichever occurs last; no claim more than five years from act or omission); NEB. REV. STAT. § 44-2828 (1998) (requiring claim within two years from act or omission unless injury could not be discovered in that time, then one year from date of discovery; no claim more than ten years from act or omission); N.C. GEN. STAT. § 1-15 (2002) (requiring claim within two years from occurrence or if not discovered within two years, then one year from discovery; no claim more than four years from act or omission); OHIO REV. CODE ANN. § 2305.11.3(A), (C)(1), (D)(1) (Anderson Supp. 2002) (requiring claim within one year after cause of action "accrues;" no claim more than four years from act or omission, but if injury is discovered within those four years, plaintiff may commence action within one year from discovery); OR. REV. STAT. § 12.110(4) (2001) (requiring claim within two years from discovery; no claim more than five years from act or omission); S.C. CODE ANN. § 15-3-545(A) (Law. Co-op. Supp. 2002) (requiring claim within three years from date of treatment or omission or three years from date of discovery; no claim more than six years from act or omission); TENN. CODE ANN. § 29-26-116(a)(1)-(3) (2000) (requiring claim within one year from occurrence, but if not discovered in one year, then one year from discovery; no claim more than three years from act or omission); UTAH CODE ANN. § 78-14-4(1) (2002) (requiring claim within two years from discovery; no claim more than four years from act or omission); VT. STAT. ANN. tit. 12, § 521 (Supp. 2001) (requiring claim within three years from date of incident or two years from date the injury was discovered, whichever occurs later; no

that the plaintiff's action be commenced within one of four other general time periods.[103] First, some states require the action to be commenced within a prescribed time following the act or omission giving rise to the claim.[104] These statutes provide that the claim must be commenced within a certain time after the cause of action "accrues."[105] Case law in these jurisdictions indicates that an action accrues at the time of the negligent act.[106] Although these statutes are generally titled "statutes of limitation," they function like a statute of repose, as claims will be barred after the expiration of the applicable time period, even if the patient has not discovered the existence of an injury.[107]

Second, some states require an action to be commenced within a prescribed time following discovery of the injury.[108] These statutes

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claim more than seven years from act or omission); WASH. REV. CODE ANN. § 4.16.350(3) (West 1998 & Supp. 2003) (requiring claim be filed three years from act or omission or one year from discovery, whichever period expires later; no claim more than eight years from act or omission); W. VA. CODE ANN. § 55-7B-4(a) (Michie 2000) (providing claim may be filed within later of two years from date of injury or two years after discovery; no claim more than ten years from act or omission); WIS. STAT. ANN. § 893.55(1)(a)-(b) (West 1997) (requiring claim within later of three years from date of injury or one year from date of discovery; no claim more than five years from act or omission).

103. *See generally* ARK. CODE. ANN. § 16-114-203(a)-(b) (Michie 1987 & Supp. 2003) (providing action must be brought within two years after the date of wrongful act); ALASKA STAT. § 09.10.070 (Michie 2002) (requiring two years from accrual of action); CAL. CIV. PROC. CODE § 340.5 (West 1982) (providing action must be commenced within three years after the date of injury, or one year after discovery of the injury, whichever occurs first); Zagaros v. Erickson, 558 N.W.2d 516 (Minn. App. 1997) (interpreting MINN. STAT. ANN. § 541.07(1) (West 2000 & Supp. 2003) to require commencement of action within two years from time treatment for particular condition ceases).

104. *See* ARK. CODE. ANN. § 16-114-203(a)(b) (Michie 1987 & Supp. 2003) (providing action must be brought within two years after the date of wrongful act); *see also* GA. CODE ANN. § 9-3-71(a) (1998) (requiring two years from act or omission); IDAHO CODE ANN. § 5-219(4) (Michie 1998) (requiring two years from act or omission); IND. CODE ANN. § 34-18-7-1(b) (West 1998) (requiring two years from act or omission); ME. REV. STAT. ANN. tit. 24 § 2902 (West 2000) (requiring three years from act or omission); MO. STAT. ANN. § 516.105 (West 2002) (requiring two years from occurrence of act of neglect complained of); N.H. REV. STAT. ANN. § 507-C:4 (1997) (requiring two years from act or omission); N.J. STAT. ANN. § 2A:14-2 (West 2000) (requiring two years after action "accrues"); N.M. STAT. ANN. § 41-5-13 (Michie 1996) (requiring three years from date that act of malpractice occurred); S.D. CODIFIED LAWS § 15-2-14.1 (Michie 2001) (requiring two years after the alleged malpractice); TEX. CIV. PRAC. & REM. CODE ANN. § 16.003 (West 2002) (requiring two years from "accrual of action"); VA. CODE ANN. § 8.01-243(A)(2) (Michie 2000) (requiring two years after cause of action "accrues").

105. *See, e.g.*, TEX. CIV. PRAC. & REM. CODE ANN. § 16.003 (requiring action be commenced within two years from "accrual of action").

106. *See* Lamar v. Graham, 598 S.W.2d 727 (Tex. Civ. App. 1980) (finding discovery rule inapplicable in Texas, and cause of action accrues at time of negligent act); Smith v. Danek Med., Inc., 47 F. Supp.2d 698 (W.D. Va. 1998) (noting Virginia does not follow a discovery rule; statute of limitations begins to run on the date of injury).

107. *See generally* Hicks, *supra* note 36, at 628-31 (discussing differences between and effects of statutes of limitations and statutes of repose).

108. *See* ALASKA STAT. § 09.10.070 (requiring two years from accrual of action); *see also* ARIZ. REV. STAT. ANN. § 12-542(1) (West 2003) (requiring two years after the cause of action

likewise may provide that the claim must be commenced within a certain time after the cause of action "accrues."[109] Case law in these jurisdictions indicates that an action does not accrue until the plaintiff discovers the injury, or in the exercise of reasonable diligence should have discovered the injury.[110]

Third, some states provide that an action must be commenced within a prescribed time after the date of injury, or a prescribed time after the discovery of the injury, whichever occurs first.[111] These statutes also function like a statute of repose, because they provide an ultimate limitation beyond which claims will be barred.[112] Finally, at least one state requires that the action for medical malpractice be commenced within a prescribed time after treatment by the defendant medical provider has ceased.[113] Therefore, a clear majority of states currently have statutes that are either expressly designated as statutes of repose, or function as a statute of repose by their ability to bar claims before they have accrued.[114]

"accrues"); OKLA. STAT. ANN. tit. 76, § 18 (West 2002 & Supp. 2003) (requiring two years from date plaintiff knew or should have known of the existence of the injury); 42 PA. CONS. STAT. ANN. § 5524(2) (West 1981 & Supp. 2003) (requiring two years after discovery).

109. *See, e.g.*, ALASKA STAT. § 09.10.070 (requiring two years from accrual of action).

110. *See,* Dalkovski v. Glad, 774 P.2d 202, 206 (Alaska 1989) (finding cause of action in Alaska accrues, and statute does not begin to run until plaintiff discovers injury); *see also* Kowske v. Life Care Ctrs. of Am., Inc., 863 P.2d 254 (Ariz. Ct. App. 1993) (finding "accrues" for purposes of statute is defined as the date when plaintiff knew or by exercise of reasonable diligence should have known of defendant's conduct).

111. *See* CAL. CIV. PROC. CODE § 340.5 (West 1982) (providing action must be commenced within three years after the date of injury, or one year after discovery of the injury, whichever occurs first); *see also* DEL. CODE. ANN. tit. 18, § 6856(1) (1999) (providing action must be brought within two years from date of injury, but where injury could not be discovered within two-year period, then action must be brought within three years from date injury occurred); MD. CODE ANN., CTS & JUD. PROC. § 5-109(a) (2002) (providing suit must be filed within the earlier of five years from injury or three years from discovery of injury); NEV. REV. STAT. ANN. § 41A.097(2) (Michie 2002) (providing action may not be commenced more than three years after the date of injury or two years after discovery, whichever occurs first); N.Y. C.P.L.R. 214-a (McKinney 2003) (providing action must be commenced within two years and six months); R.I. GEN. LAWS § 9-1-14.1(2) (1997) (providing action must be commenced within three years from occurrence of the incident, but if the injury could not be discovered at the time of occurrence, then within three years from the time that the malpractice should have been discovered); WYO. STAT. ANN. § 1-3-107(a)(i)(A)-(B) (Michie 2003) (providing action shall be brought within the greater of: two years from date of act or omission; or if claim cannot be discovered within two years, then must be brought within two years of discovery).

112. *See generally* Hicks, *supra* note 36, at 628-31 (discussing differences, between and effects of, statutes of limitations and statutes of repose).

113. MINN. STAT. ANN. § 541.07(1) (West 2000 & Supp. 2003). Minnesota's statute provides that actions must be commenced within two years. *Id.*; *see also* Zagaros v. Erickson, 558 N.W.2d 516, 520 (Minn. App. 1997) (noting medical malpractice cause of action generally accrues when treatment for a particular condition ceases).

114. *See generally* Hicks, *supra* note 36, at 628-31 (discussing differences between and effects of statutes of limitations and statutes of repose).

E. THE CONSTITUTIONALITY OF MEDICAL MALPRACTICE STATUTES OF REPOSE—EQUAL PROTECTION ANALYSIS

Since the enactment of medical malpractice statutes of repose, plaintiffs in many states have challenged the constitutionality of these statutes on various grounds.[115] Alleged violations of state or federal equal protection clauses are the most frequently cited basis for challenging the statute's constitutionality.[116] However, plaintiffs have cited various other constitutional provisions in alleging that an applicable medical malpractice statute of repose is unconstitutional.[117]

A plaintiff may challenge a medical malpractice statute of repose on equal protection grounds by arguing that the statute unconstitutionally distinguishes between classes of people.[118] One challenged classification often cited by plaintiffs involves a distinction between persons with latent malpractice injuries and persons with injuries that manifest themselves within the statutory time period.[119] Additionally, plaintiffs often challenge the distinction between persons whose injuries fall within one of the statutory exceptions and those whose injuries do not.[120]

When a medical malpractice statute of repose is challenged on equal protection grounds, the reviewing court must first determine the standard by which the challenged statute's constitutional validity will be determined.[121] State courts, regardless of whether the plaintiff is challenging a state or

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115. *See generally* Trombetta, *supra* note 25, at 407-12 (discussing various constitutional challenges to medical malpractice statutes of repose).

116. *See, e.g.*, Jewson v. Mayo Clinic, 691 F.2d 405, 411 (8th Cir. 1982) (resolving challenge to medical malpractice statute of repose on equal protection grounds).

117. *See, e.g.*, Golden v. Johnson Mem'l Hosp., Inc., 785 A.2d 234, 247-48 (Conn. App. 2001) (resolving challenge on equal protection grounds); *see also* Montagino v. Canale, 792 F.2d 554, 557-58 (5th Cir. 1986) (resolving challenge on due process grounds); Whigham v. Shands Teaching Hosp. & Clinics, Inc., 613 So.2d 110, 112-13 (Fla. App. 1993) (resolving challenge to open courts provision); Kanne v. Bulkley, 715 N.E.2d 784, 789 (Ill. App. 1999) (resolving challenge to special laws provision). *See generally* Trombetta, *supra* note 25, at 407-41 (discussing constitutional challenges to medical malpractice statutes of repose on grounds other than equal protection).

118. Jewson v. Mayo Clinic, 691 F.2d 405, 411 (8th Cir. 1982).

119. *Id.*

120. *See, e.g.*, Austin v. Litvak, 682 P.2d 41, 48 (Colo. 1984) (resolving equal protection challenge that allowed exception to the statute of repose for claimants who had foreign objects left in their bodies). Some states provide exceptions to the relevant statute of repose, which gives injured persons additional time to bring a claim. *See, e.g.*, OR. REV. STAT. § 12.110(4) (2001) (providing exception for fraud, deceit or misleading representation); FLA. STAT. ANN. § 95.11(4)(b) (West 2002) (providing exception for action brought on behalf of minor); 735 ILL. COMP. STAT. ANN. 5/13-212(c) (West 1992) (providing exception for persons under a "legal disability"); MISS. CODE ANN. § 15-1-36(2)(a) (2003) (providing exception for foreign objects left in patient's body).

121. Golden v. Johnson Mem'l Hosp. Inc., 785 A.2d 234, 247 (Conn. App. 2001).

federal constitutional provision, utilize one of three standards articulated by the United States Supreme Court.[122]

1. Analysis Under Rational Basis Scrutiny

The rational relationship test, which is the "most relaxed and tolerant form of judicial scrutiny,"[123] is used in equal protection analysis most frequently, because most courts find that the classifications created by a medical malpractice statute of repose do not impinge upon an inherently suspect class or affect a fundamental personal right.[124] The right to recover for personal injuries has not been regarded by the courts as a fundamental right.[125] In the absence of a suspect classification or a fundamental right, courts will not second-guess the legislature's wisdom or the necessity for legislation.[126] Courts will uphold a medical malpractice statute of repose challenged on equal protection grounds under the rational basis test if it determines that there is "a rational relationship between the classification and some legitimate governmental purpose."[127]

The majority of courts that have analyzed the constitutionality of their respective medical malpractice statute of repose have employed the rational basis standard of review.[128] Most courts recognize that statutes of repose may have the harsh effect of barring plaintiffs from bringing claims because their injuries are latent and could not be discovered prior to the expiration

122. *See, e.g., id.* (applying rational basis scrutiny); Carson v. Maurer, 424 A.2d 825, 831 (N.H. 1980) (applying intermediate scrutiny); Kenyon v. Hammer, 688 P.2d 961, 975 (Ariz. 1984) (applying strict scrutiny).

123. DeYoung v. Providence Med. Ctr., 960 P.2d 919, 923 (Wash. 1998).

124. *Golden*, 785 A.2d at 247. Suspect classifications include distinctions made on the basis of race, national origin, religion, or status as a resident alien. Cummings v. X-Ray Assoc. of N.M., 918 P.2d 1321, 1328 (N.M. 1996). A right is fundamental if it is explicitly, or implicitly, guaranteed by the constitution. *Id.* These rights include "amendment rights, freedom of association, voting, interstate travel, privacy, and fairness in the deprivation of life, liberty or property." *Id.*

125. *Golden*, 785 A.2d at 247; *see* Valentine v. Thomas, 433 So.2d 289, 292 (La. App. 1983) (noting that the right to recover in tort is not a fundamental right); *Cummings*, 918 P.2d at 1332 (stating that malpractice claim is attempt to possess something the patient does not yet possess, and as such, a malpractice claim does not implicate any fundamental right).

126. Carson v. Maurer, 424 A.2d 825, 933 (N.H. 1980). North Dakota recognizes the well-established principle that an enactment by the legislature is presumed to be valid. Hanson v. Williams Co., 389 N.W.2d 319, 324 (N.D. 1986). Courts should exercise their power to declare a statute unconstitutional with caution. Golden v. Johnson Mem'l Hosp., Inc., 785 A.2d 234, 248 (Conn. App. 2001).

127. Brubaker v. Cavanaugh, 741 F.2d 318, 321 (8th Cir. 1984).

128. *Brubaker*, 741 F.2d at 321; *Golden*, 785 A.2d at 247; *Valentine*, 433 So.2d at 293; Sills v. Oakland Gen. Hosp., 559 N.W.2d 348, 353 (Mich. App. 1996); Hoffman v. Powell, 380 S.E.2d 821, 822 (S.C. 1989).

of the repose period.[129] However, the courts also recognize the state's legitimate interest in enacting statutes designed to cut off claims, even before they can be discovered.[130] Statutes that were enacted with the legislative purpose of barring stale claims have been found rationally related to the classifications created by the statute between persons whose injuries are latent and those whose injuries are discovered within the repose period.[131] Likewise, where the legislative purpose of the statute was to alleviate the insurance crisis facing the medical profession, thereby lowering healthcare costs, courts have found the purposes to be rationally related to the classifications created by the statute.[132] Under the relaxed standard of rational basis, the majority of courts faced with the issue have found the relevant medical malpractice statute of repose to be constitutional.[133]

At least one court, however, found that although the legislature's goals in enacting the statute of repose were legitimate, the relationship between the goal of alleviating a perceived medical insurance crisis and the class of persons affected by the statute was too attenuated to survive even rational basis scrutiny.[134] In *DeYoung v. Providence Medical Center*,[135] the statute of repose provided that claims must be commenced within three years of the act or omission giving rise to the claim or within one year of discovering the injury, but in no event was a claim allowed more than eight years after the act or omission.[136] The Washington Supreme Court

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129. *See* Burris v. Ikard, 798 S.W.2d 246, 250 (Tenn. App. 1990) (recognizing harshness of result of barring plaintiffs' right to seek redress before they even know about the injury).

130. *See Golden*, 785 A.2d at 244 (stating that "[s]tatutes of repose are constitutional enactments that involve a balancing of the hardship caused by the potential bar of a just claim with the advantage of barring stale claims").

131. *See id.* at 248 (finding rational relationship between goal of barring stale claims and the repose provision); *see also* Craven v. Lowndes County Med. Auth., 437 S.E.2d 308, 309-10 (Ga. 1993) (holding that a statute that functions like statute of repose by having potential of barring claims before they are discovered is rationally related to legislature's goal of eliminating stale claims).

132. *See* Valentine v. Thomas, 433 So.2d 289, 292 (La. App. 1983) (finding classification rationally related to the state objective of responding to increasing malpractice insurance rates and reducing cost of healthcare); *see also Burris*, 798 S.W.2d at 250 (giving deference to legislature's enactment of statute and goal of reducing insurance costs).

133. *See* DeYoung v. Providence Med. Ctr., 960 P.2d 919, 922-23 (Wash. 1998) (utilizing a rational basis standard, and noting that "clear majority of courts have upheld such statutes"). The following cases employed the rational basis standard and upheld the relevant medical malpractice statute of repose against an equal protection constitutional attack. *See* Brubaker v. Cavanaugh, 741 F.2d 318, 322 (10th Cir. 1984); Jewson v. Mayo Clinic, 691 F.2d 405, 411 (8th Cir. 1982); Golden v. Johnson Mem'l Hosp., Inc., 785 A.2d 234, 248 (Conn. App. 2001); *Craven*, 437 S.E.2d at 310; *Valentine*, 433 So.2d at 293; *Sills*, 559 N.W.2d at 353; Cummings v. X-Ray Assocs. of N.M., 918 P.2d 1321, 1333 (N.M. 1996).

134. *DeYoung*, 960 P.2d at 925.

135. 960 P.2d 919 (Wash. 1998).

136. *DeYoung*, 960 P.2d at 921.

acknowledged that the statute had been enacted in response to a perceived insurance crisis.[137] The court did not challenge the legitimacy of the legislature's purposes in enacting the statute of repose.[138] However, the court had difficulty with the legislation's lack of a showing that an eight-year repose period would have any chance of stabilizing the perceived insurance crisis in Washington.[139] Reports presented to the legislature in consideration of the statute revealed that less than one percent of malpractice claims prior to the statute were made eight years or more after the incident of malpractice.[140] The court found the relationship to be too attenuated between the legislative goal and the class of persons affected.[141] The court concluded that since the statute affected so few claimants, the repose period could not avert or resolve the insurance crisis.[142] Therefore, the statute was held unconstitutional.[143]

2. *Analysis Under Intermediate Scrutiny*

Although rational basis is the most common standard for analyzing challenges to medical malpractice statutes of repose, some courts have found the intermediate standard appropriate in resolving equal protection challenges.[144] The intermediate standard requires a "close correspondence between statutory classification and legislative goals."[145] For a statute to be held constitutional, the court must determine that the challenged classifications are reasonable and have a fair and substantial relation to the object of the legislation.[146]

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137. *See id.* at 924 (noting that legislative history revealed that "[b]y enacting [a] . . . statute of repose, the Legislature intended to protect insurance companies while 'hopefully not resulting in too many individuals not getting compensated'").

138. *See id.* at 926 (stating the goal is legitimate).

139. *Id.* at 925.

140. *Id.*

141. *Id.*

142. *Id.* at 926.

143. *Id.* Although the Washington court held that the statute violated the "privileges and immunities clause," this constitutional provision is equivalent to the equal protection clauses in most states. *Id.* The Washington privileges and immunities clause, provides that "'[n]o law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations.'" *Id.* at 921 (citing WASH. CONST. art. I, § 12).

144. *See, e.g.*, Carson v. Maurer, 424 A.2d 825, 831 (N.H. 1980) (applying intermediate scrutiny).

145. Hanson v. Williams Co., 389 N.W.2d 319, 323 (N.D. 1986) (citing Johnson v. Hassett, 217 N.W.2d 771 (N.D. 1974)).

146. *Carson*, 424 A.2d at 831.

In *Carson v. Maurer*,[147] the plaintiff challenged the constitutionality of certain provisions of New Hampshire's medical malpractice statute, including the provision creating a two-year "statute of limitation."[148] The court recognized that the statute impinged on a person's right to recover for personal injuries.[149] Although the court determined that "the right to recover for personal injuries [was] not a fundamental right," it held that the right "[was] nevertheless an important substantive right."[150] Therefore, the court concluded that the rights involved were sufficiently important to require that the restrictions imposed on those rights be subjected to a more rigorous judicial scrutiny than allowed under the rational basis test.[151] Using a heightened level of scrutiny, the court concluded that the statute unreasonably distinguished between persons whose claims fell within one of the statutory exceptions, and those whose claims did not.[152] Therefore, the court held the statute unconstitutional, determining that the legislature could not deny claims to one class of people while allowing claims for others, in pursuit of the legislative goal of providing effective healthcare at a reasonable cost.[153]

North Dakota has followed the jurisprudence of New Hampshire, holding that the intermediate standard of review is appropriate when resolving a challenge to a statute of repose on equal protection grounds.[154] The rational basis test is most often applied in North Dakota cases involving economic and social matters.[155] Although there are some economic consequences behind statutes of repose, North Dakota has taken the

147. 424 A.2d 825 (N.H. 1980).

148. *Carson*, 424 A.2d at 829. Although the court referred to the challenged provision as a "statute of limitation," the function of the provision is as a statute of repose. *Id.* The statute "requires that a medical malpractice plaintiff bring his action within two years of the alleged negligence" absent exceptions for claims based on the discovery of foreign objects in the body and claims by minors. *Id.* at 833. The statute therefore bars claims by plaintiffs who do not fall within one of the exceptions, and whose injuries are undiscoverable before the expiration of the two-year period. *Id.*

149. *Id.* at 830.

150. *Id.*

151. *Id.* The court recognized that the United States Supreme Court only applies intermediate scrutiny to cases involving gender and illegitimacy, and not to cases like this one involving the right to recover for personal injuries. *Id.* at 831. However, the court stated that they were allowed to grant more rights under the state constitution than are required under the federal constitution. *Id.*

152. *Id.* at 833.

153. *Id.* The court discussed the legislature's purpose in enacting the statute. *Id.* at 831.

154. *See* Hanson v. Williams Co., 389 N.W.2d 319, 325 (N.D. 1986) (applying the intermediate standard to challenge to products liability statute of repose); *see also* Bellemare v. Gateway Builders, 420 N.W.2d 733, 736 (N.D. 1988) (applying intermediate standard to challenge to statute of repose for improvements to real property).

155. *Hanson*, 389 N.W.2d at 325.

position that the focus must be on the individuals affected by the statute, as "human life and safety [cannot be regarded] as simply a matter of economics."[156] North Dakota has determined that the right to recover for personal injuries is an important substantive right.[157] Therefore, North Dakota utilizes the heightened intermediate standard when a challenged statute involves the right to recover for personal injuries, including challenges to statutes of repose.[158]

3. Analysis Under Strict Judicial Scrutiny

Most courts agree that the third standard of review, strict scrutiny, is inapplicable to an equal protection analysis of a challenged statute of repose, because most courts find that the classifications created by medical malpractice statutes of repose do not impinge upon an inherently suspect class or affect a fundamental personal right.[159] Strict scrutiny analysis requires that a statutory classification must be necessary to serve a compelling state interest.[160] However, the Arizona Supreme Court in *Kenyon v. Hammer*[161] applied strict scrutiny to an equal protection challenge to a medical malpractice statute of repose.[162] The court determined that the right to recover for personal injuries was guaranteed by a state constitutional provision, and therefore, was a "fundamental" right requiring any statute that infringed on that right to be examined under strict scrutiny.[163]

The challenged Arizona statute provided that an action for medical malpractice was barred if not commenced within three years from the date of injury.[164] The court in *Kenyon* recognized that the Arizona medical malpractice statute was enacted in response to a perceived malpractice crisis.[165]

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156. *Id.*

157. *Id.*

158. *Id.* (citing Heath v. Sears, Roebuck & Co., 464 A.2d 288, 294 (N.H. 1983)).

159. Golden v. Johnson Mem'l Hosp., Inc., 785 A.2d 234, 247 (Conn. App. 2001); *see also* Valentine v. Thomas, 433 So.2d 289, 292 (La. App. 1983) (refusing to apply strict scrutiny and noting that the right to recover in tort is not a fundamental right); Cummings v. X-Ray Assocs. of N.M., 918 P.2d 1321,1332 (N.M. 1996) (stating strict scrutiny was inappropriate, as a malpractice claim does not implicate any fundamental right).

160. *See Golden*, 785 A.2d at 247 (stating that under strict scrutiny, the defendant has burden of demonstrating that repose section "is necessary to advance a compelling state interest").

161. 688 P.2d 961 (Ariz. 1984).

162. *Kenyon*, 688 P.2d at 975.

163. *Id.* The court held that the right to pursue the medical malpractice action was a fundamental right guaranteed by the Arizona constitution. *Id.* (citing ARIZ. CONST. Art. 18, § 6). That constitutional provision provides: "The right of action to recover damages for injuries shall never be abrogated, and the amount recovered shall not be subject to any statutory limitation." *Id.* at 966 (quoting ARIZ. CONST. Art. 18, § 6).

164. *Id.* at 964.

165. *Id.*

The court did not find the state's interest in providing economic relief to one segment of society to be a compelling interest.[166] The court noted that if the state also had an interest in providing quality healthcare at a reasonable price, the goal of reducing insurance rates might be considered compelling.[167]

The court also recognized that the statute created several classifications, including a distinction between plaintiffs whose injures fell within one of the statutory exceptions, which would allow them to bring claims upon discovery of the injury, and those whose injuries did not fall within an exception.[168] Noting the lack of statistical evidence, the court found this classification was not a necessary step to achieve the goal of reducing the cost and/or availability of healthcare.[169] The court held that even assuming the existence of a compelling interest, the classification created by the statute was not necessary to further that interest.[170] Therefore, Arizona's medical malpractice statute of repose was held to violate equal protection, and was therefore unconstitutional.[171]

III. ANALYSIS

Hoffner was decided by a three-to-two majority.[172] The court held that North Dakota Century Code section 28-01-18(3) was constitutional, even though its effect was to foreclose a cause of action to a plaintiff before his injuries had been discovered.[173] Chief Justice VandeWalle wrote the majority opinion, in which Justices Sandstrom and Schmalenberger, District Judge joined.[174] Justice Maring dissented, and Justice Neumann concurred in the dissent.[175]

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166. *Id.* at 976.

167. *Id.*

168. *Id.* at 968-69. The Arizona medical malpractice statute provided that if the claim was based on a foreign object left in the body, the claim would be tolled until the object was discovered. *Id.* at 969. Additionally, plaintiffs would be allowed to file claims upon discovering the injury, if it was concealed or misrepresented, or where the plaintiff was a minor. *Id.*

169. *Id.* at 979.

170. *Id.*

171. *Id.*

172. Hoffner v. Johnson, 2003 ND 79, ¶¶ 36, 52, 660 N.W.2d 909, 919, 926.

173. *Id.* ¶ 23, 660 N.W.2d 909, 917.

174. *Id.* ¶¶ 1, 36, 660 N.W.2d at 911, 919. The Honorable Alan L. Schmalenberger, District Judge sat in place of Justice Kapsner who was disqualified. *Id.* ¶ 37, 660 N.W.2d at 920.

175. *Id.* ¶¶ 38, 52, 660 N.W.2d at 920, 926.

A. THE MAJORITY OPINION

The majority began its analysis of the constitutionality of section 28-01-18 by first examining whether subsection three created a statute of limitation or a statute of repose.[176] The court analyzed its previous decision in *Hanson*, which made a distinction between a statute of repose and a statute of limitation.[177] The first portion of section 28-01-18(3), which provides that actions for malpractice must be commenced within two years, was deemed a statute of limitation.[178] Because the six-year period under section 28-01-18(3) begins to run when the negligent act or omission occurs, the court determined that this portion was a statute of repose.[179]

In holding this provision a statute of repose, the court recognized that the occurrence of the negligent act or omission and the injury were not always concurrent, and this case provided an example of that.[180] The court held that Dr. Johnson's letter to Hoffman constituted the negligent act, and began the running of the statute.[181] However, the court acknowledged that the exact date of Hoffner's "injury" was unknown, and could have occurred sometime after he had received the letter.[182] The majority concluded that the negligent act in this case was not concurrent with Hoffner's injuries, but that the statute had begun running even before Hoffner discovered he had been injured.[183]

The court then examined Hoffner's claim that section 28-01-18(3) violated the equal protection clause[184] by creating an unconstitutional classification between "plaintiffs whose injuries were discoverable within six years of the negligent act or omission," and those whose injuries did not manifest themselves within six years.[185] The court noted the effect of the

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176. *Id.* ¶ 9, 660 N.W.2d at 913-14.

177. *Id.* (citing Hanson v. Williams Co., 389 N.W.2d 319, 321 (N.D. 1986)).

178. *Id.* ¶ 10, 660 N.W.2d at 914.

179. *Id.* ¶¶ 11, 13, 660 N.W.2d at 914-15. The court also noted that other jurisdictions construe similar statutes as statutes of repose. *Id.* ¶ 12, 660 N.W.2d at 914 (citing Siler v. Block, 420 S.E.2d 306, 307 (Ga. App. 1992); Ferrara v. Wall, 753 N.E.2d 1179, 1181 (Ill. App. 2001); Sills v. Oakland Gen. Hosp., 559 N.W.2d 348, 351-52 (Mich. App. 1996); Garcia ex rel. Garcia v. LaFarge, 893 P.2d 428, 433 (N.M. 1995)).

180. Hoffner v. Johnson, 2003 ND 79, ¶ 11, 660 N.W.2d 909, 914.

181. *Id.* ¶ 7, 660 N.W.2d at 913.

182. *Id.* ¶ 11, 660 N.W.2d at 914.

183. *Id.*

184. *Id.* ¶ 14, 660 N.W.2d at 915. The opinion does not specify whether Hoffner challenged the constitutionality of the North Dakota Constitution or the Federal Constitution, as it does not cite to the provision referred to as "equal protection clause." *Id.* However, in reviewing Appellant's Brief, it is evident that Hoffner's challenge was to North Dakota's constitutional guarantee of equal protection. *See* Appellant's Brief at 19, 21, Hoffner v. Johnson, 2003 ND 79, 660 N.W.2d 909 (No. 20020208).

185. Hoffner v. Johnson, 2003 ND 79, ¶ 14, 660 N.W.2d 909, 915.

classification was to allow claims by plaintiffs whose injuries were discoverable, while barring malpractice claims by plaintiffs whose injuries were not.[186] The court determined that the challenged statute, affecting the plaintiff's ability to recover for personal injuries, involved an important substantive right.[187] Therefore, the court held that an intermediate standard of review was appropriate in assessing the statute's constitutionality.[188] The intermediate standard in North Dakota requires "a close correspondence between the statutory classification and the legislative goals."[189] Because the court had already identified the classification created by the statute, its focus turned to determining the legislature's goals in enacting section 28-01-18(3).[190]

The majority noted that in an equal protection analysis, the court "may consider unarticulated as well as articulated legislative purposes and goals."[191] Accordingly, the court examined the legislative history of the statute for its articulated goals.[192] The court also examined prior decisions to find unarticulated goals for the enactment of the statute of repose.[193] The legislative history, particularly the testimony presented to the legislature during debates over the proposed statute of repose, indicated a concern with a perceived insurance crisis.[194] This articulated legislative purpose is nearly identical to the articulated purpose behind the products liability statute of repose, analyzed by the court in *Hanson*.[195] The court found that the legislature in enacting section 28-01-18(3) did so with a second purpose of restricting what would otherwise be virtually unlimited and perpetual exposure to liability for medical providers.[196] The court held that this second purpose was not articulated in the legislative history, but instead was found by the court to be a general purpose of a statute of repose, as articulated previously in *Bellemare*.[197]

The court additionally examined Hoffner's argument that the court's decision should be controlled by the previous decision in *Hanson*, because the legislative purpose for the medical malpractice statute of repose was

186. *Id.*
187. *Id.* ¶ 15.
188. *Id.*
189. *Id.*
190. *Id.* ¶¶ 15-20, 660 N.W.2d at 915-16.
191. *Id.* ¶ 15, 660 N.W.2d at 915.
192. *Id.*
193. *Id.* ¶¶ 15-20, 660 N.W.2d at 915-16.
194. *Id.* ¶ 17, 660 N.W.2d at 915-16.
195. *Id.*
196. *Id.* ¶ 18, 660 N.W.2d at 916.
197. *Id.* (citing Bellemare v. Gateway Builders, 420 N.W.2d 733 (N.D. 1988)).

similar to the purpose for the products liability statute of repose.[198] The court also examined Johnson's opposing argument that the court's decision should be guided by its previous decision in *Bellemare*, in which the court upheld a statute of repose for actions involving improvements to real property.[199] Because there were conflicting arguments regarding which line of authority controlled the issue, the court attempted to resolve the differences and similarities between its prior jurisprudence in *Hanson* and *Bellemare* in *Hoffner*.[200]

In comparing the *Hanson* decision with the present case, the court found that there were "important distinctions" between the two cases.[201] The first distinction was the North Dakota State Insurance Commissioner's reception of the proposed products liability statute compared with his reception of the medical malpractice statute of repose.[202] Testimony before the legislature revealed that the Commissioner had opposed the products liability statute of repose, yet he had supported the medical malpractice statute of repose.[203] A second distinction the court made was to the substance and subject matter upon which products liability and medical malpractice claims are based.[204] The court noted that defective products "normally have a limited useful life," while "a person [who has been injured by the malpractice of a medical provider] may live for years or decades before an act of medical malpractice manifests itself."[205] The court reasoned that a person's potential for longevity raised "the possibility of 'long-term liability' for the physician or hospital" more so than does the

198. *Id.* ¶ 16, 660 N.W.2d at 915. In *Hanson*, the court held the statute of repose for products liability actions violated equal protection because there was no close correspondence between the goal of alleviating the perceived insurance crisis, and the requirement that claims be brought within the specified time period. Hanson v. Williams Co., 389 N.W.2d 319, 328 (N.D. 1986).

199. Hoffner v. Johnson, 2003 ND 79, ¶ 16, 660 N.W.2d 909, 915. The *Bellemare* court found that the legislative purpose of obtaining finality to potential claims closely corresponded to the classification that allowed claims brought within the statutory time period while barring those occurring or discovered after the expiration of the prescribed time. Bellemare v. Gateway Builders, 420 N.W.2d 733, 737-38 (N.D. 1988).

200. *Hoffner*, ¶¶ 16-20, 660 N.W.2d at 915-16.

201. *Id.* ¶ 17, 660 N.W.2d at 915.

202. *Id.* at 915-16.

203. *Id.* The court indicated that the Insurance Commissioner opposed the products liability bill, specifically testifying that "the statute of repose would not alleviate the problem of increasing insurance premiums for manufacturers in the state." *Id.* at 915. By contrast, "the Insurance Commissioner supported enactment of the medical malpractice statute of repose, testifying that there was a crisis situation, that insurers were discontinuing writing malpractice coverage, that claims paid were exceeding premiums collected, and that new doctors were unable to purchase malpractice insurance." *Id.* at 915-16.

204. *Id.* ¶¶ 19, 20, 660 N.W.2d at 916.

205. *Id.*

potential for long-term liability for defective products.[206] Likewise, in reviewing it's previous decision in *Bellemare*, the court determined that similarities existed between that case and the case presently before it.[207]

The court concluded its previous assumption about the legislature's purpose for the statute of repose for improvements to real property could be assumed about the legislature's purpose in enacting the medical malpractice statute.[208] Additionally, the court likened a person's potential longevity to the virtually unlimited exposure to liability faced by physicians to the potential for unlimited exposure to liability faced by persons involved with improvements to real estate.[209]

The court relied on the unarticulated goal of the need to create reasonable limits on the legal consequences of a wrong, and it held that a close correspondence existed between that goal and the classification created by the six-year medical malpractice statute of repose.[210] Although the court acknowledged the similarities in the stated legislative goals of the medical malpractice statute of repose and the statute at issue in *Hanson*, the court simply pushed those similarities aside and focused on the stated differences: that the Insurance Commissioner spoke in favor of one and not the other; and that a person has a potential for longevity while defective products normally have a limited life.[211] Therefore, the court found that North Dakota Century Code section 28-01-18(3) was constitutional, and did not violate the Equal Protection Clause.[212]

B. JUSTICE MARING'S DISSENT

Justice Maring dissented for two reasons.[213] First, she argued that the majority incorrectly determined that unarticulated legislative goals should be considered in assessing the constitutionality of statutory classifications

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206. *Id.* ¶ 20.

207. *Id.* ¶ 18.

208. *Id.* ¶¶ 18-20.

209. *Id.* ¶ 20.

210. *Id.* ¶¶ 22, 23, 660 N.W.2d at 917.

211. *Id.* ¶¶ 17, 19, 20, 660 N.W.2d at 915-16.

212. *Id.* ¶ 23, 660 N.W.2d at 917. In holding the statute constitutional, the court noted that other jurisdictions have found similar statutes constitutional. *Id.* (citing Brubaker v. Cavanaugh, 741 F.2d 318, 321-22 (10th Cir. 1984); Jewson v. Mayo Clinic, 691 F.2d 405, 411 (8th Cir. 1982); Golden v. Johnson Mem'l Hosp., Inc., 785 A.2d 234, 246-48 (Conn. App. 2001); Craven v. Lowndes County Hosp. Auth., 437 S.E.2d 308, 309-10 (Ga. 1993); Valentine v. Thomas, 433 So.2d 289, 292-93 (La. Ct. App. 1983); Sills v. Oakland Gen. Hosp., 559 N.W.2d 348, 353 (Mich. Ct. App. 1996); Cummings v. X-Ray Assocs. of N.M., 918 P.2d 1321, 1331-33 (N.M. 1996); Hoffman v. Powell, 380 S.E.2d 821, 822 (S.C. 1989); Burris v. Ikard, 798 S.W.2d 246, 249-50 (Tenn. Ct. App. 1990)).

213. Hoffner v. Johnson, 2003 ND 79, ¶ 38, 660 N.W.2d 909, 920 (Maring, J., dissenting).

under an equal protection analysis when applying the intermediate standard.[214] Second, she argued that *Hanson* correctly applied the intermediate standard by examining only the articulated legislative goals.[215] Justice Maring argued that because *Hoffner* was more like *Hanson*, the court should have questioned the close correspondence between the legislative goal and the statutory classification.[216] Justice Maring concluded that section 28-01-18(3) was unconstitutional.[217]

Justice Maring argued that because the majority relied on unarticulated goals, it had in effect applied a rational basis standard of review rather than the professed intermediate standard.[218] The United States Supreme Court, when applying the intermediate standard, requires defendants to present a genuine justification for the challenged statute.[219] The justification cannot be "hypothesized or invented *post hoc* in response to litigation."[220] Justice Maring stated that in *Hoffner*, the testimony before the legislature in contemplation of the medical malpractice statute of repose made it "crystal clear" that the purpose was to "remedy the rising cost of malpractice insurance."[221] She argued that the majority, apparently recognizing the weakness of this goal pursuant to the holding in *Hanson*, incorrectly professed to have the authority to rely on an unarticulated goal to find the statute constitutional.[222]

Justice Maring concluded that by applying the intermediate standard and relying on the articulated goals, the court's decisions in *Hanson* and *Dickie* provide the correct application of the standard, and should have been relied on by the majority.[223] Justice Maring determined that the case was "devoid of any showing" that claims brought by persons whose injuries were discovered more than six years from the initial act or omission of the alleged malpractice, as compared to persons injured within that time frame,

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214. *Id.* ¶ 39.

215. *Id.* ¶ 43, 660 N.W.2d at 921.

216. *Id.* ¶ 46, 660 N.W.2d at 924.

217. *Id.* ¶ 51, 660 N.W.2d at 926.

218. *Id.* ¶ 41, 660 N.W.2d at 921. Justice Maring acknowledged that the court may consider unarticulated goals, but concluded that the court may do so only under the more relaxed rational basis standard. *Id.* She further argued that the court should no longer use the intermediate standard if it is going to rely on unarticulated goals, since the standard is really masquerading as rational basis. *Id.*

219. *Id.* ¶ 42, 660 N.W.2d at 921 (citing United States v. Virginia, 518 U.S. 515, 533 (1996)).

220. *Id.* (quoting United States v. Virginia, 518 U.S. 515 (1996)) (emphasis in original).

221. *Id.*

222. *Id.*

223. *Id.* ¶ 43, 660 N.W.2d at 921-22. Justice Maring states at the beginning of the dissent that she too would apply the intermediate standard. *Id.* ¶ 38, 660 N.W.2d at 920.

has "caused inequity, unfairness, or unreasonable exposure and unpredictability."[224] Justice Maring concluded that the majority's reliance on the Insurance Commissioner's support of the medical malpractice statute missed the point.[225] Justice Maring concluded that no close correspondence existed between the statutory classification and the articulated legislative goals.[226]

Finally, Justice Maring was similarly unimpressed with the majority's simulation between the longevity of human life, and the longer life of an improvement to real property as opposed to that of a defective product.[227] She argued that while persons involved with the improvements to real property generally do not maintain continuing control over the improvement after construction, manufacturers are charged with maintaining high quality control standards.[228] Based on the degree of control and quality expected of the classes of defendants, Justice Maring disagreed with the majority's placement of physicians in the same category as architects who design improvements to real property.[229]

Justice Maring concluded that the court's analysis in *Hanson* was correct, and that the majority should have required some rational basis other than the economic interests of insurance companies to be advanced for the selection of the time period in the medical malpractice statute of repose.[230] Justice Maring concluded there was no close correspondence between the legislative goals and the statutory classifications.[231] Therefore, Justice Maring would have concluded that section 28-01-18(3) was unconstitutional.[232]

IV. IMPACT

The most obvious consequence of the court's decision in *Hoffner* is the definitive determination that medical malpractice claims in North Dakota will be barred after six years from the date of the malpractice, even if the injuries are latent and the plaintiff has not yet discovered their existence.[233] By holding section 28-18-01 to be constitutional, the court has determined

224. *Id.* ¶ 44, 660 N.W.2d at 923.
225. *Id.* ¶ 47, 660 N.W.2d at 924.
226. *Id.* ¶ 44, 660 N.W.2d at 923.
227. *Id.* ¶ 48, 660 N.W.2d at 924-25.
228. *Id.*
229. *Id.*
230. *Id.* ¶ 51, 660 N.W.2d at 926.
231. *Id.*
232. *Id.*
233. *Id.* ¶ 23, 660 N.W.2d at 917.

that the interests of alleviating rising insurance costs and providing finality to potential claims outweighs the harsh effects placed on innocent victims.[234]

The insurance crisis of 1975 appears to continue today.[235] The cost of medical malpractice insurance continues to rise, with medical providers around the nation faced with rates that have doubled or tripled from previous years.[236] The St. Paul Companies, a large provider in the medical malpractice insurance market in North Dakota, recently announced that it is getting out of providing medical malpractice coverage due to heavy losses, despite increased rates.[237] The effect of these developments in North Dakota is unknown at this time.[238] It seems evident, however, that patients will ultimately bear this burden by being left without remedies for latent injuries that were undiscoverable within six years.[239]

Aside from barring potential claims, the holding in *Hoffner* created obvious inconsistencies with the court's prior jurisprudence in *Hanson* and *Bellemare*.[240] In the realm of products liability, the court had determined that legislation with the purpose of alleviating an insurance crisis, absent evidence that the purpose closely corresponds to eliminating claims of persons injured after the statutory period, was unconstitutional.[241] Faced with the same legislative purpose and the same effect of barring claims in the medical malpractice context, the court determined that a statute of repose for medical malpractice was constitutional.[242] The court avoided these correlations by relying instead on goals that the North Dakota legislature gave no indication it possessed at the time it passed the medical malpractice statute of repose.[243] The court's reasoning, that the long life of a human

234. *See id.* ¶¶ 17-18, 660 N.W.2d at 915-16 (discussing legislative goals); *see also* Burris v. Ikard, 798 S.W.2d 246, 250 (Tenn. App. 1990) (recognizing harshness of result of barring plaintiffs' right to seek redress before they even know about the injury).

235. NGA Center for Best Practices, *Issue Brief: Addressing the Medical Malpractice Insurance Crisis*, at 1, *available at* http://www.nga.org (last visited Mar. 24, 2004).

236. *Id.*

237. *Id.* at 2; *see also* Brief of Appellees at 22, Hoffner v. Johnson, 2003 ND 79, 660 N.W.2d 909 (No. 20020208).

238. Appellees' Brief at 22, *Hoffner* (No. 20020208).

239. *See* Burris, 798 S.W.2d at 250 (noting harsh effect); see also Minutes (Mar. 4, 1975), *supra* note 84, at 4 (testimony of Rep. Irving expressing concern with placing burden of malpractice damages on patient).

240. *See generally* Hanson v. Williams Co., 389 N.W.2d 319, 325-28 (N.D. 1986) (holding products liability statute of repose unconstitutional); Bellemare v. Gateway Builders, 420 N.W.2d 733, 736-38 (N.D. 1988) (upholding statute of limitation for improvements to real estate).

241. *Hanson*, 389 N.W.2d at 328.

242. Hoffner v. Johnson, 2003 ND 79 ¶ 23, 660 N.W.2d 909, 917.

243. *See id.* ¶ 18, 660 N.W.2d at 916 (relying on legislative goals inferred previously by the court).

being is analogous with the long life of real property to justify the need to limit long term liability, is at best weak.[244] In the future it is quite likely that the court will find itself resolving these inconsistencies.

V. CONCLUSION

In *Hoffner*, the North Dakota Supreme Court upheld the constitutionality of North Dakota's medical malpractice statute of repose, section 28-01-18 of the North Dakota Century Code.[245] The plaintiff in *Hoffner* alleged that the medical malpractice statute of repose violated his constitutional right to equal protection.[246] In upholding the constitutionality of section 28-01-18, the court determined that even though a plaintiff's injuries may not be apparent and discoverable, any claim for damage based on those injuries was barred if not brought within six years from the date of the act or omission constituting the alleged malpractice.[247]

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244. *Id.* ¶ 20, 660 N.W.2d at 916. The court made this correlation in an attempt to relate the *Hoffner* case to the holding in *Bellemare* that the statute of repose was constitutional. *Id.* (citing *Hanson*, 389 N.W.2d at 321; *Bellemare*, 420 N.W.2d at 733).

245. *Hoffner*, ¶ 23, 660 N.W.2d at 917.

246. *See id.* (holding no violation of equal protection clause); see also Appellant's Brief at 19, 21, Hoffner v. Johnson, 2003 ND 79, 660 N.W.2d 909 (No. 20020208) (citing North Dakota equal protection clause as basis for appeal).

247. *Hoffner*, ¶ 23, 660 N.W.2d at 917.