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Austin v. Litvak, Colorado's Statute of Repose for Medical Malpractice Claims: An Uneasy Sleep

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AUSTIN V. LITVAK, COLORADO'S STATUTE OF REPOSE FOR MEDICAL MALPRACTICE CLAIMS: AN UNEASY SLEEP

INTRODUCTION

In the mid-1970s, the "medical malpractice crisis" received extensive media coverage and commanded the attention of state legislators as well.[1] Legislative response to the "crisis" resulted in substantive changes in the common-law tort system of compensation for injured patients.[2] One of the most popular reforms adopted was the reduction of time periods in statutes of limitation. In the years following their passage, these reforms faced constitutional challenges in the courts and dissatisfaction in the legal community engendered by their harsh effects on plaintiffs.[3] Consequently, many statutes were amended and refined;[4] legislative and judicially-created exceptions to the new laws arose. These exceptions have subsequently been challenged on constitutional grounds.[5]

In *Austin v. Litvak*,[6] the Supreme Court of Colorado found the limited exceptions to the state's statute of repose to be unconstitutional as applied to the plaintiffs. The court held that the classifications created by the exceptions were arbitrary, and that they denied certain groups of plaintiffs equal protection under both the Colorado and United States Constitutions.[7] Of paramount importance is the court's remedy, which extended the discovery rule beyond its former limitation to victims of fraudulent concealment and foreign objects claims,[8] and granted benefits to victims of negligent misdiagnosis as well.[9]

This comment will first examine the policy considerations behind statutes of limitation and repose and the social phenomena which triggered their recent evolution in Colorado. Next, this comment will focus on the decision in *Austin v. Litvak*, analyzing the court's reasoning and discussing the case's relationship to past landmark decisions in this state involving medical malpractice statutes of limitation. Finally, this com-

1. *See infra* text accompanying text 52-60.

2. Learner, *Restrictive Medical Malpractice Compensation Schemes: A Constitutional "Quid Pro Quo" Analysis to Safeguard Individual Liberties*, 18 HARV. J. ON LEGIS. 143, 146 (1981).

3. *See, e.g.*, Wright v. Central Du Page Hosp. Ass'n, 63 Ill. 2d 313, 347 N.E.2d 736 (1976); Carson v. Maurer, 120 N.H. 925, 424 A.2d 825 (1980); Graley v. Satayatham, 74 Ohio Op. 2d 316, 343 N.E.2d 832 (1976). *See generally* Redish, *Legislative Response to the Medical Malpractice Insurance Crisis: Constitutional Implications*, 55 TEX. L. REV. 759 (1977) (advocating judicial restraint in the controversial area of reform measures designed to alleviate the crisis).

4. White & McKenna, *Constitutionality of Recent Malpractice Legislation*, 13 FORUM 312 (1978).

5. *See id.* at 313-15.

6. 682 P.2d 41 (Colo. 1984).

7. *Id.* at 52; U.S. CONST. amend. XIV; COLO. CONST. art. II, § 25.

8. 682 P.2d at 53.

9. *Id.* at 44.

ment will examine the decision's impact on the medical malpractice crisis in Colorado.

I. BACKGROUND

A. *Statutes of Limitation: The Origin of the Constitutional Challenge*

Statutes of limitation have existed in common-law jurisprudence since the seventeenth century.[10] Rooted in public policy, they are designed to protect potential defendants from the burden of defending claims originating in the distant past.[11] This protection is accomplished by prescribing a period within which a plaintiff "must bring his cause of action to the courts or lose his right to assert it thereafter."[12] Thus, statutes of limitation relieve a defendant from having to defend a claim which he reasonably assumed was forgotten. Additionally, they eliminate the evidentiary problems that accompany "stale claims," such as the unavailability of evidence and witnesses, and the deterioration of memories over time.[13] Other recognized benefits of these statutes include the prevention of plaintiffs "sitting on their rights," and the elimination of fraudulent claims or claims brought merely to harass defendants.[14]

Statutes of limitation begin to run when a plaintiff's claim "accrues." The time of accrual varies according to statute and jurisdiction. Courts and legislatures commonly adopt one of two methods for determining time of accrual: date of the negligent act or omission which causes injury or time at which the plaintiff discovers or reasonably could have discovered his cause of action.[15]

B. *Absolute Statutes of Repose: A Stricter Limitation*

Absolute statutes of repose differ from statutes of limitation in that the time of the accrual of the cause of action is immaterial since "the prescriptive period of a statute of repose begins upon the occurrence of a specified event regardless of when the injuries result or when the cause

10. *See Developments in the Law: Statutes of Limitations*, 63 HARV. L. REV. 1177, 1177 (1950).

11. *See, e.g.*, Kelley, *The Discovery Rule for Personal Injury Statutes of Limitations: Reflections on the British Experience*, 24 WAYNE L. REV. 1641, 1645 (1978).

12. Note, *Medical Malpractice Statute of Repose: An Unconstitutional Denial of Access to the Courts*: Colton v. Dewey, 63 NEB. L. REV. 150, 153 (1983).

13. Note, *Preserving Causes of Action in Latent Disease Cases: The* Locke v. Johns-Manville Corp. *Date-of-the-Injury Accrual Rule*, 68 VA. L. REV. 615, 619 (1982). *See Recent Cases, Medical Malpractice: Ohio's Statute of Limitations*: Baird v. Loeffler, 16 AKRON L. REV. 302, 305 (1982).

14. Kelley, *supra* note 11, at 1645. *See* Schiffman v. Hospital for Joint Diseases, 36 A.D.2d 31, 35, 319 N.Y.S.2d 674, 678, *appeal denied*, 29 N.Y.2d 483 (1981). *See generally* Kubrick v. United States, 444 U.S. 111 (1979) (unjust to compel defendant to defend against state claims); Rosane v. Senger, 112 Colo. 363, 149 P.2d 372 (1944) (purpose of statute of limitations is discouraging unnecessary delay and avoiding the prosecution of stale claims); Raymond v. Eli Lilly & Co., 117 N.H. 164, 371 A.2d 170 (1977) (purpose of the statute of limitations is fairness to the defendant).

15. 1 D. LOUISELL & H. WILLIAMS, MEDICAL MALPRACTICE, ¶ 13.07 (1981).

of action accrues."[16] However, both statutes of limitation and absolute statutes of repose are designed to compel the exercise of a right of action within a reasonable time and to suppress stale or fraudulent claims.

Statutes of repose were one of the legislative responses to the perceived medical malpractice crisis.[17] Between 1975 and 1977, absolute statutes of repose were instituted in twenty-five states.[18] The actual effectiveness of such statutes depends a great deal upon whether the prescriptive period may be tolled and, if so, the circumstances required for tolling. Many legislatures have instituted exceptions to their statutes of repose, the most prevalent of these being the "foreign object" exception.[19] Under this exception, the discovery rule applies and the statute is tolled until the plaintiff discovers his cause of action.[20]

C. *The Discovery Rule*

The primary purpose of the discovery rule is to prevent statutes of limitation from depriving injured patients of their causes of action before they are aware that they exist.[21] Under the rule, a plaintiff's cause of action does not accrue until he discovers, or has a reasonable opportunity to discover, his injury and its cause.[22] The rationale behind the widespread acceptance of the discovery rule is the unavoidable injustice and harsh results stemming from the imposition of the traditional theory of accrual,[23] under which the statutory period begins to run upon the occurrence of the negligent act or omission. Both legislators and judges have found the effects of the old theory on plaintiffs' rights to be unfair and unconscionable.[24] The discovery rule was first advocated in 1917 in *Hahn v. Claybrook*,[25] a medical malpractice case involving negligent treatment. It was not used again until 1936, in *Huysman v. Kirsch*,[26] another malpractice case in which a foreign object was left in a patient's body. Application of the rule spread with the rise in the number of latent disease actions brought to the courts.[27] The most well known of

16. Note, *supra* note 12 at 153. *See* McGovern, *The Variety, Policy and Constitutionality of Products Liability Statutes of Repose*, 30 AM. U.L. REV. 579, 584 (1981). *See, e.g.*, Howell v. Burk, 90 N.M. 688, 693, 568 P.2d 214, 225 (N.M. Ct. App. 1977) (Sutin, J., dissenting), *cert. denied*, 91 N.M. 3, 569 P.2d 413 (N.M. 1977).

17. Note, *supra* note 12 at 153.

18. *See id.* note 54 at 162.

19. *See supra* note 15.

20. 682 P.2d at 46.

21. U.S. DEP'T OF HEALTH, EDUCATION & WELFARE, PUB. NO. (OS) 73-88, MEDICAL MALPRACTICE REPORT OF THE SECRETARY'S COMM'N ON MEDICAL MALPRACTICE 22, 30 (1973) (hereinafter cited as HEW Report); Comment, *An Analysis of State Legislative Responses to the Medical Malpractice Crisis*, 1975 DUKE L.J. 1417, 1432 (1975).

22. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 31 (4th ed. 1971).

23. *See* Rosane v. Senger, 149 P.2d at 375-76; Comment, *Medical Malpractice Statute of Limitations as Special Legislation:* Woodward v. Burnham City Hospital, 55 CHI.-KENT L. REV. 519, 521 (1978).

24. *See id. See also supra* note 15.

25. 130 Md. 179, 100 A. 83 (1917).

26. 6 Cal. 2d 302, 57 P.2d 908 (1936).

27. *See* Note, *Preserving Causes of Action in Latent Disease Cases: The* Locke v. Johns-Manville Corp. *Date-of-the-Injury Accrual Rule*, 68 VA. L. REV. 615 (1982). *See infra* note 29.

these cases, *Urie v. Thompson*,[28] involving recovery under the Federal Tort Claims Act, has greatly influenced state courts in their adoption of the discovery rule.[29] Some states have extended the discovery rule to latent disease cases, finding it too difficult to distinguish such cases from foreign object cases.[30]

D. *Medical Malpractice Statutes of Limitation and Repose in Colorado*

From 1925 until 1971, Colorado plaintiffs had two years after their cause of action accrued to file a complaint.[31] Colorado courts construed "accrue" to mean the time at which a plaintiff discovered or could have discovered his cause of action;[32] a 1971 amendment to the statute explicitly adopted the discovery rule. The amendment also imposed, however, a strict six-year statute of repose on all claims with the exception of foreign object cases.[33] In 1976, that period was reduced to five years,[34] and in 1977 it was further reduced to the current three-year period.[35] At that time an exception for fraudulent concealment cases was added to the foreign object exception.[36] Currently in Colorado the statutory period begins to run on the date of the negligent act or omission giving rise to the injury, or upon the date of discovery if the claim involves fraudulent concealment of a foreign object.[37] Thus, a plaintiff whose claim does not come under either of the two exceptions must bring his cause of action to the courts within three years of the act or omission or forfeit his right to assert it.[38]

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28. 337 U.S. 163 (1949). In this case, the plaintiff had contracted silicosis as a result of inhaling silica dust for 30 years at his job. One year after retirement, he learned of his injury and filed a claim. Abandoning the traditional rule of accrual, the Court handed down a landmark decision declaring that the plaintiff's "blameless ignorance" should not bar his claim since the purpose of the statute of limitations is to require the assertion of a claim after notice of the invasion of legal rights. *Id.* at 170.

29. The rationale enunciated in *Urie* was first applied to a medical malpractice case under the Federal Tort Claims Act in Quinton v. United States, 304 F.2d 234 (5th Cir. 1962). In that case, injuries resulting from the transfusion of the wrong blood type at a VA Hospital did not manifest themselves until several years later. The court held that "a claim for medical malpractice accrues . . . when the claimant discovers, or in the exercise of reasonable diligence, should have discovered the acts constituting . . . malpractice." *Id.* at 240. The states of Kentucky, Maryland, New Hampshire, and Pennsylvania have carved out exceptions to their statutes of limitations for latent disease plaintiffs: Louisville Trust Co. v. Johns-Manville Prod. Corp., 580 S.W.2d 497, 499 (Ky. 1979) (mesothelioma); Harig v. Johns-Manville Prod. Corp., 284 Md. 70, 394 A.2d 299 (1978) (mesothelioma); Raymond v. Eli Lilly & Co., 117 N.H. 164, 371 A.2d 170 (1977) (blindness caused by oral contraceptive); Anthony v. Koppers Co., Inc., 284 Pa. Super. 81, 425 A.2d 428 (1980) (lung cancer from coke oven emissions), *rev'd*, 496 Pa. 119, 436 A.2d 181 (1981) (discovery rule does not prevent running of statute of limitations in wrongful death action and survival action brought more than two years after the death from cancer).

30. *See supra* note 29.

31. COLO. REV. STAT. § 87-1-6 (1953).

32. *See, e.g.*, Owens v. Brochner, 172 Colo. 525, 474 P.2d 603 (1970); Rosane v. Senger, 112 Colo. 363, 149 P.2d 372 (1944).

33. 1971 COLO. SESS. LAWS 232.

34. 1976 COLO. SESS. LAWS 90.

35. COLO. REV. STAT. § 13-80-105 (Supp. 1984).

36. *Id.*

37. *Id.*

38. *Id.*

E. *The Medical Malpractice Crisis: Menace or Mirage?*

Peaking in notoriety in the mid-1970s,[39] the "medical malpractice crisis" was the phrase coined to describe a situation where physicians experienced on unprecedented, meteoric rise in their insurance premiums for medical malpractice coverage.[40] These escalating rates allegedly resulted in a movement of doctors to lower risk areas of medicine and lower risk areas of the country,[41] a scarcity of insurance companies willing to insure doctors,[42] and soaring health care costs. Reports of these problems generated concern in the public and in the medical profession which, in turn, pressured legislators to take remedial action. This resulted in the enactment of statutes which sacrificed the rights of plaintiffs in the interest of alleviating the "crisis" and thereby benefiting the community as a whole.[43]

The causes of the crisis most frequently cited are an increase in the size of awards,[44] the number of medical malpractice suits,[45] and the resulting practice of insurance companies maintaining huge reserves to cover the payment of judgments.[46] Various authorities, however, have noted the dearth of statistical data to support allegations that these are, in fact, the causes of the crisis.[47] Other critics of the purported crisis, among them members of the Colorado legislature, have laid the blame on insurance companies themselves, claiming that they reap huge profits from unduly high premiums.[48] Still others claim that insurance companies have been forced to charge high rates, not because of huge amounts

39. *See* HEW REPORT, *supra* note 21, at 73-78. *See generally* Note, *supra* note 12, at 160 n.37 (author examines the legislative reaction to the malpractice crisis and its results).

40. *See* HEW REPORT, *supra* note 21; Segar, *Is Malpractice Insurable?*, 51 IND. L.J. 128, 128 (1975); Redish, *supra* note 3, at 759-760 (between 1960 and 1970, insurance rates for some sectors of the medical profession increased tenfold).

41. Redish, *supra* note 3, at 760.

42. As with other facets of the "crisis," the unavailability of insurance is disputed. One source states that there has been a 90 per cent decrease nationally in the number of insurance companies writing medical malpractice insurance. Oregon Medical Ass'n v. Rawls, No. 421-496, slip. op. at 1 (Or. Cir. Ct. May 4, 1966), *rev'd on other grounds*, 276 Or. 1101, 557 P.2d 64 (1976). The HEW REPORT, on the other hand, reported that medical malpractice insurance was currently widely available. HEW REPORT, *supra* note 21, at 38-39.

43. *See* Note, *supra* note 12, at 160. *See generally* HEW REPORT, *supra* note 21, at 12-13.

44. HEW REPORT, *supra* note 21, at 6-12.

45. Redish, *supra* note 3, at 760-61.

46. Insurance companies often impose artificially high premiums to protect themselves against high damage awards in the future, a phenomenon termed by the industry as the "long tail problem." Learner, *supra* note 2, at 145. For a discussion of the "long tail problem" and the insurance scheme which makes it a problem, see Comment, *The "Claims-Made" Dilemma in Professional Liability Insurance*, 22 U.C.L.A. L. REV. 925, 926 (1975); *see also* Sepler, *Professional Malpractice Litigation Crisis: Danger or Distortion?*, 15 F. 493 (1980) (an in-depth statistical analysis of the data relied upon by lobbyists and legislators when claiming the existence of the malpractice crisis reveals serious discrepancies between data and conclusions).

47. *See, e.g.*, Note, *The Indiana Medical Malpractice Act: Legislative Surgery on Patient's Rights*, VAL. U.L. REV. 303, 344 (1976) (authorities cited therein).

48. HEW REPORT, *supra* note 21, at 6-12; S. Res. 150, 51st G.A., 1st Reg. Sess., H.R. Floor Debate, May 4, 1977, Colo., Tape No. 46A-M2T. The Colorado Senate Judiciary Committee Proceedings produced data indicating that 15.4 million dollars in premiums were paid annually by the states' physicians while only 200,000 dollars were paid out by

paid out in damages, but rather to cover poor investment practices.[49] Finally, the relationship between high premiums and rising health care costs has been questioned.[50]

Thus, the malpractice crisis may be in part a creation of the media,[51] and therefore grossly exaggerated.[52] The Supreme Court of Idaho has indeed questioned whether a medical malpractice crisis ever truly existed.[53] Many more critics have stated that the crisis, if it did exist, was not of national proportions and that the majority of states were not experiencing a malpractice crisis.[54] Colorado legislators opposing the most recent amendment to the statute of repose expressed the opinion that there was no medical malpractice crisis in Colorado.[55]

Although many factual issues have been raised regarding the "crisis," one thing is certain: it has generated on enormous amount of legislative activity. Almost every state responded with some sort of legislation aimed at eliminating the problem,[56] and numerous jurisdictions have enacted strict statutes of repose similar to Colorado's.[57] Again, the need for this flurry of activity has been questioned since sensational media coverage and extensive lobbying by medical associations and physicians' groups imposed intense pressure on state legislatures to enact remedial legislation.[58] Unfortunately, such legislation has failed to impede the escalation of insurance rates in states where it has been passed, and there are no guarantees that efforts on the part of Colorado lawmakers will fare any better.[59]

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insurance companies to cover medical malpractice liability. S. Judiciary Comm. Proceedings, March 9, 1977, Colo., Tape No. 20A-MIT.

49. *See* Aitken, *Medical Malpractice: The Alleged "Crisis" in Perspective*, 637 INS. L.J. 90, 96 (1976); Oster, *Medical Malpractice Insurance*, 45 INS. COUNS. J. 228, 231 (1978).

50. Kelaher, *The Legislative Immunization of the Florida Medical Community*, 56 FLA. B.J. 616, 616 (1982) (author suspects that rising costs of medical supplies and equipment is more to blame for increasing costs of medical care than escalating premiums to doctors).

51. *See* Wright v. Central Du Page Hosp. Ass'n, 63 Ill. 2d 313, 347 N.E.2d 736 (1976); Learner, *supra* note 2, at 143 (note cites "unprecedented news media coverage").

52. 2 D. LOUISELL & H. WILLIAMS, *supra* note 15, at ¶ 20.07 n.55 (Supp. 1979).

53. Jones v. State Bd. of Medicine, 97 Idaho 859, 555 P.2d 399, 414 (1976), *cert. denied*, 431 U.S. 914 (1977).

54. The trial court in Arneson v. Olson, 270 N.W.2d 125, 136 (N.D. 1978) concluded that there was no crisis in the state of North Dakota vís-a-vís the cost or availability of medical malpractice insurance. The North Dakota court's findings were echoed by the Supreme Court of Idaho in Jones v. State Bd. of Medicine, 97 Idaho 859, 555 P.2d 399, 414 (1976), *cert. denied*, 431 U.S. 914 (1977). *See Hearings Before the Subcomm. on Health of the Senate Comm. of Labor and Public Welfare*, 94th Cong., 1st Sess. 4 (statement of Dr. Roger Egeberg, Special Ass't to the Sec'y for Health Policy) (approximately 35 states are not experiencing a malpractice crisis).

55. S. Res. 150, 52nd G.A., 1st Reg. Sess., S. Floor Debate, March 18, 1977, Colo., Tape No. 27A-M2T.

56. Note, *supra* note 12, at 150 n.51 (between 1975 and 1977, 52 states and territories enacted remedial legislation).

57. Twenty-four states, including Colorado, Kansas, Utah, California, and Illinois, currently have an absolute period of repose in their malpractice statutes of limitation. *See generally id.* at 150 n.54.

58. Learner, *supra* note 2, at 143.

59. *See* 2 D. LOUISELL & H. WILLIAMS, *supra* note 15, at ¶ 20.07 n.55 (Supp. 1981); T. LOMBARDI, JR., MEDICAL MALPRACTICE INSURANCE, *FOREWORD* at *xi*, 92-93 (1978); Note, *The Indiana Medical Malpractice Act: Legislative Surgery on Patient's Rights*, VAL. U.L. REV. 303, 350

II. *AUSTIN V. LITVAK*

A. *Factual Setting*

In September, 1963, Richard L. Austin checked into St. Anthony's Hospital in Denver for the treatment of kidney stones.[60] While at St. Anthony's, he underwent various tests and examinations. At that time, John Litvak, M.D., informed the plaintiffs, Mr. and Mrs. Austin, that the test results showed that Mr. Austin had a type of brain tumor known as a parasagital meningioma. Richard Austin retained Dr. Litvak to take charge of his care. In pursuit of his duties, Dr. Litvak performed additional tests including exploratory surgery which involved placing a metal screen in the plaintiff's skull. Following the results of these procedures, Dr. Litvak confirmed his earlier diagnosis and advised the Austins that the tumor was not operable without a severe risk, and that Mr. Austin should not undergo surgery. During Richard Austin's hospitalization at St. Anthony's, he was taken to Colorado General Hospital where additional tests were performed at Dr. Litvak's direction. It is alleged that unbeknownst to the plaintiffs, these tests conclusively established that Richard Austin did not have a brain tumor. It is further alleged that Dr. Litvak knew of these test results but did not inform the plaintiffs. Sixteen years later, in May of 1979, Mr. Austin underwent another series of medical tests and examinations necessitated by injuries received in an automobile accident. Tests indicated that Richard Austin did not have, and never could have had a brain tumor, since they do not disappear by remission. Eleven months after this discovery, Mr. and Mrs. Austin filed a lawsuit alleging medical malpractice and naming Dr. Litvak and St. Anthony's Hospital as co-defendants.

B. *Holding and Rationale*

Reversing the trial court's Order of Summary Judgment in favor of the defendants, the Supreme Court of Colorado determined in *Austin* that the state's statute of repose for medical malpractice claims was unconstitutional.[61] Justice Neighbors, joined by Justices Quinn and

(1976). "[E]ven though a large number of states have already adopted one or more of the [various] malpractice proposals, insurance premiums continue to increase. . . ." Whether legislative reforms can reduce the number of malpractice actions is questionable. Redish, *supra* note 3, at 761-62. This scenario may be repeated in Colorado. During the House floor debates leading to the most recent amendment to Colorado's statute of repose, 1977 Colo. Sess. Laws 198, evidence was presented that 97 per cent of all medical malpractice claims are brought within the first two years. S. Res. 150, 51st G.A., 1st Reg. Sess., H.R. Floor Debate, May 4, 1977, Colo., Tape No. 46A-M2T. Thus, lowering the period of the statute of repose to three years would have little impact on reducing the number of medical malpractice suits and, in turn, alleviating the "crisis." In addition, legislators' conferences with the Insurance Commissioner for the state of Colorado yielded no assurances that the proposed legislation would lower or even stabilize insurance rates. S. Judiciary Comm. Proceedings, March 9, 1977, Colo., Tape No. 20A-M1T. Finally, even the representative of the Colorado Medical Association conceded that of the 12 states which he had surveyed that had shortened their statutes of limitations, none had experienced decreases in insurance premium rates. *Id.*

60. 682 P.2d at 44.

61. *Supra* note 35.

Kirshbaum, concluded that the Colorado statute violated the equal protection provisions of both the United States and Colorado Constitutions because it impermissibly distinguished between different classes of plaintiffs. So finding, the court extended the benefits granted by the exceptions to include the plaintiff's negligent misdiagnosis claim.[62]

The major issue addressed by the court was whether a statute of repose governing medical malpractice claims which excepted foreign object and knowing concealment claimants, but did not except negligent misdiagnosis claimants,[63] denied plaintiffs of the latter class equal protection guarantees. Applying the rational basis standard, the court concluded that it was a denial.[64]

The defendants contended that the court had decided the principal issue in *Mishek v. Stanton*[65] three years earlier.[66] The court disagreed, and distinguished the plaintiff's equal protection challenge in *Mishek* from the one at bar.[67] In *Mishek*, the plaintiffs attacked the statute of limitations as a whole, claiming that by distinguishing members of the medical profession from the rest of society, the statute violated equal protection principles.[68] In the instant case, the court stated that this was not the issue in question.[69] In determining the appropriate standard to apply, the court rejected both the strict and intermediate scrutiny tests. It rejected the former by relying on United States Supreme Court and state appellate court cases holding that the recovery of damages in tort does not constitute a fundamental right and that, therefore, the strict scrutiny standard may not be applied.[70] The court decided against the latter test as well, declining to address its application to the instant case

62. 682 P.2d at 53.

63. 682 P.2d 41, 52 (Colo. 1984); U.S. CONST. amend. XIV; COLO. CONST. art. II, § 25. "Foreign object" plaintiffs are those whose cause of action centers around a physician's negligent act of leaving a foreign object in the plaintiff's body, usually subsequent to surgery. *See* Rosane v. Senger, 112 Colo. 363, 149 P.2d 372 (1944). This exception is probably the most widely accepted basis for application of the discovery rule and exception to state medical malpractice statutes of repose and statutes of limitations. *Supra* note 5. Its widespread adoption stems from the belief that foreign object cases do not pose the evidentiary disadvantages to the defendant posed by other "stale claims" and, that in many cases, the plaintiff is truly unaware of his or her injury until several years after the negligent act of the doctor. *See* Allrid v. Emory University, 249 Ga. 35, 285 S.E.2d 521 (1982). Cases of knowing concealment, also called fraudulent concealment cases, arise when health care professionals are aware of their negligent infliction of injury on the plaintiff but intentionally conceal that fact from the victim. Such claimants are often favored by state legislatures with exceptions to the statute of repose on the ground that "one should not profit from his wrongful acts." *See* Davis v. Bonebrake, 135 Colo. 506, 313 P.2d 982 (1957).

64. 682 P.2d at 53.

65. 200 Colo. 514, 616 P.2d 135 (1981).

66. 682 P.2d at 48.

67. *Id.*

68. *Id. See also* Mishek v. Stanton, 616 P.2d at 139.

69. 682 P.2d at 53.

70. 682 P.2d at 49-50 (citing Duke Power Co. v. Carolina Envtl. Study Group, 438 U.S. 59 (1978)); *e.g.*, American Bank & Trust Co. v. Community Hosp., 33 Cal. 3d 674, 660 P.2d 829, 190 Cal. Rptr. 371 (1983); Jones v. State Bd. of Medicine, 97 Idaho 859, 555 P.2d 399 (1976), *cert. denied*, 431 U.S. 914 (1977); Johnson v. St. Vincent Hosp., Inc., 273 Ind. 374, 404 N.E.2d 585 (1980); Carson v. Maurer, 424 A.2d 825 (N.H. 1980); State *ex rel.* Strykowsky v. Wilkie, 261 N.W.2d 434 (Wis. 1978).

on the basis that the legislative classification failed under the rational basis test.[71]

In *Austin*, the Colorado Supreme Court identified two distinct prongs in the rational basis test.[72] The first requires that the statutory classification be reasonable and not arbitrary, and that it possess some rational basis in fact.[73] To pass the second prong of the test, the classification must either "bear a rational relationship to legitimate state objectives," or be "reasonably related to a legitimate governmental interest."[74] The majority's in-depth examination of the correlation between legislative goals and classifications resulted in the conclusion that the statute failed to meet either prong.[75]

Following its decision in *Owens v. Brockner*,[76] the court found the distinctions made between knowing concealment and foreign object claimants and the claimants of misdiagnosis to be arbitrary for lack of a reasonable basis in fact.[77] To support its conclusion, the court observed that knowing concealment claims are much more likely to pose the evidentiary problems of stale evidence and frivolous claims than are misdiagnosis cases.[78] The court also identified a governmental interest in preserving the causes of action of claimants who have had no reasonable opportunity to discover the negligence which caused their injury.[79] Thus, the court concluded that since the statute failed to further a legitimate governmental interest, no rational relationship existed.[80]

The court supported its equal protection analysis with the New Hampshire case of *Carson v. Maurer*.[81] In *Carson*, the New Hampshire Supreme Court held that restricting application of the discovery rule to foreign object claimants violated the equal protection provision of that state's constitution, and was not in keeping with the equitable considerations underlying the discovery rule.[82] The Supreme Court of Oregon similarly recognized the inherent unfairness of refusing to extend the

71. 682 P.2d at 50.

72. *Id.* (citing Hurricane v. Kanover, Ltd., 651 P.2d 1218, 1222 (Colo. 1982) and Smith v. Charnes, 649 P.2d 1089, 1091 (Colo. 1982)).

73. 682 P.2d at 49.

74. *Id.*

75. *Id.* at 50.

76. In *Owens*, 172 Colo. 525, 474 P.2d 603 (1970), a case decided before the institution of a statute of repose in Colorado, the plaintiffs alleged that the defendant doctors had misdiagnosed a brain tumor as malignant when it was, in fact, benign. The plaintiffs' claim was barred by the statute of limitations. The court held that the discovery rule, already allowed in cases of concealment and foreign objects, should be extended to cases of misdiagnosis and all other cases regardless of the type of negligence involved.

77. 682 P.2d at 50.

78. *Id.* The court cites *Owens*, 474 P.2d at 607, and notes that a course of treatment prescribed by the physician usually follows a diagnosis. Treatment, therefore, is an objective fact, the veracity of which can be proved or disproved by persons other than the plaintiff.

79. 682 P.2d at 50.

80. *Id.*

81. 120 N.H. 925, 424 A.2d 825 (1980) (plaintiffs challenged several portions of New Hampshire's statute governing actions for medical injury including provisions regarding the statute of limitations).

82. *Id.* at 833.

benefits of the discovery rule to misdiagnosis cases in *Frohs v. Greene*.[83] While the *Austin* court also noted contrary decisions[84] from the Supreme Courts of Georgia[85] and Missouri,[86] it chose to follow its own precedent established in *Owens v. Brochner*.[87]

The *Austin* court chose to remedy the statute's constitutional defects by extending the discovery rule to the plaintiff's negligent misdiagnosis claim rather than striking the two exceptions already provided by the statute of repose.[88] Again, in view of earlier decisions, the court determined the former remedy to be the more appropriate choice.[89]

In addition to the equal protection question addressed by the court, four issues of lesser importance were addressed in a more summary fashion. The plaintiffs and amicus curiae proposed that the Austins' claim came under both the knowing concealment and the foreign object exceptions to the statute of repose. The court declined to entertain either of these theories,[90] stating that negligent misdiagnosis was the gravamen of the plaintiffs' case.[91] The contention that Mr. Austin had a foreign object in his skull was rejected on the basis that the object was placed there for therapeutic purposes with the patient's knowledge and consent.[92] The second contention, based on the defendant's knowledge of tests which indicated that there was no tumor, was based on the knowing concealment exception to the statute. The court disposed of this issue on procedural grounds.[93] The court also refused to address the

83. 253 Or. 1, 452 P.2d 564, 564-65 (1969) (court held that a cause of action based on misdiagnosis or negligent treatment accrues when discovered or reasonably discoverable).

84. 682 P.2d at 51-52.

85. Allrid v. Emory University, 249 Ga. 35, 285 S.E.2d 521 (1982) (medical malpractice action involving negligent treatment with substance poisonous to the deceased patient. Plaintiff sued after statutory period had elapsed and suit was barred since it did not come under an exception. Constitutionality of exclusive foreign object exception upheld).

86. Ross v. Kansas City General Hospital and Medical Center, 608 S.W.2d 397 (Mo. 1980) (surgeon negligently performed sterilization and plaintiff's discovery of the malpractice (subsequent pregnancy) occurred after the termination of the statutory period. Constitutionality of exclusive foreign object exception upheld.).

87. 474 P.2d 603. *Owens* is particularly authoritative in Colorado, as it followed Rosane v. Senger, 112 Colo. 363, 149 P.2d 372 (1949) and Davis v. Bonebrake, 135 Colo. 506, 313 P.2d 982 (1954), both landmark cases in extending the bounds of the discovery rule. With the *Rosane* decision, Colorado became one of the first states in the nation to apply the discovery rule to medical malpractice cases. The foreign object claim, which would have been barred under the case and statute law of the day, yielded a judicial rationale which has been quoted in a plethora of subsequent cases and law review articles: "What a mockery to say to one, grievously wronged, 'certainly you had a remedy but while your debtor concealed from you the fact that you had a right the law stripped you of your remedy.' " *Rosane*, 149 P.2d at 376. In *Bonebrake*, a foreign object case coupled with a claim of negligent concealment, the court followed *Rosane* and permitted application of the discovery rule.

88. 682 P.2d at 53.

89. *Id.*

90. *Id.* at 46-47.

91. *Id.* at 47.

92. *Id.* The court supported its decision with Shannon v. Thornton, 155 Ga. App. 670, 272 S.E.2d 535 (1980) and Cooper v. Edinbergh, 75 A.D.2d 757, 427 N.Y.S.2d 810 (Ct. App. 1980).

93. 682 P.2d at 47. The knowing concealment argument was not supported in either the plaintiffs' trial court brief or in their opening brief to the Colorado Supreme Court. Plaintiffs failed to come forward with facts supporting their theory in response to defend-

plaintiffs' due process arguments, choosing to save that issue for another day.[94] In so doing, the majority followed the *Mishek* opinion in which the court expressly reserved the question of whether Colorado's statute of repose was in violation of the due process guarantees of both the Colorado and United States Constitutions.[95]

A final issue in the case was whether the trial court's Summary Judgment Order dismissing St. Anthony's Hospital from the case was proper.[96] The court affirmed the lower court on this question, stating that since the hospital was not itself licensed to practice medicine and no allegations were made that it was negligent in granting the defendant staff privileges, there existed no cause of action against St. Anthony's Hospital.[97]

Justice Dubofsky, writing a special concurrence, disagreed with the majority that the statute of repose violated the equal protection guarantees of the Colorado Constitution,[98] but did not reveal the reasons for her difference of opinion. Justice Dubofsky did, however, express her opinion on whether the statute's strict three-year statute of repose violated constitutional due process guarantees, an issue reserved by the majority.[99] Examination of the court's earlier decision in *Rosane v. Senger*,[100] as well as cases from other jurisdictions,[101] led her to conclude that a vested cause of action could not be barred by the legislature absent some compelling justification.[102] In her view, there existed no such justification.[103]

Justice Rovira concurred with the majority opinion, but he disagreed with the conclusion that the exceptions to the statute of repose were a violation of the equal protection guarantees of the Colorado Constitution.[104] His opinion was joined by Chief Justice Erickson and Justice Lohr. The thrust of his dissent was that the majority wrongly identified the constitutional issue in the case. After reframing the issue, Justice Rovira cited prior decisions of the court which upheld the legislative classification in question. He further stated that the determination of the classes of plaintiffs for whom the statute of repose should be tolled is within the purview of the legislature and that their decision should not be disturbed.[105]

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ants' affirmative defense of the statute of limitations. Thus, in compliance with Colorado law governing summary judgments, the Colorado Supreme Court upheld the trial court.

94. 682 P.2d at 48.
95. *Id.* (citing Mishek v. Stanton, 200 Colo. 514, 616 P.2d 135 (1981)).
96. 682 P.2d at 53-54.
97. *Id.* at 54.
98. *Id.*; COLO. CONST. art. II, § 25.
99. 682 P.2d at 55.
100. 112 Colo. 363, 149 P.2d 372 (1940).
101. 682 P.2d at 55.
102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.*

III. ANALYSIS

In choosing the rational basis test as its standard of review, the *Austin* court applied the correct level of scrutiny for two reasons. From a purely legal standpoint, it was the appropriate test given the fact that neither a fundamental right[106] nor a suspect class[107] was involved; thus, strict scrutiny was not applicable. From a tactical standpoint, because rational basis was the most deferential test the court could apply while still reviewing the legislation, it is impervious to criticism for being too stringent. The decision to use the rational basis test, therefore, strengthened the opinion against later attack against the appropriateness of the level of scrutiny chosen.

Additionally, the court's analysis under the rational basis test was, on the whole, sound. The majority validly concluded that the distinction made between knowing concealment and foreign object cases and misdiagnosis cases, allegedly on the grounds that the former two classes pose fewer evidentiary problems than the latter class, had no reasonable basis in fact.[108]

The court's reasoning on the second prong was somewhat flawed,

106. The recovery of damages in tort is not a fundamental right. 682 P.2d at 49-50 (citing Duke Power Co. v. Carolina Envtl. Study Group, 438 U.S. 59 (1978)). The *Duke* court held that limitations imposed by the Price-Anderson Act on the amount of damages recoverable in tort by nuclear power plant accident victims was not a violation of the Equal Protection Clause of the United States Constitution. Courts in California, Idaho, Indiana and New Hampshire have determined that the right to recover for injuries is not a fundamental right when considering equal protection challenges to their states' medical malpractice statutes. *See e.g.*, American Bank & Trust v. Community Hosp., 33 Cal. 3d 674, 660 P.2d 829, 190 Cal. Rptr. 371 (1983), *aff'd* 36 Cal. 3d 359, 683 P.2d 670, 204 Cal. Rptr. 671 (1984); Jones v. State Bd. of Med., 97 Idaho 859, 555 P.2d 399 (1976), *cert. denied* 431 U.S. 914 (1977); Johnson v. St. Vincent Hosp., Inc., 273 Ind. 374, 404 N.E.2d 585 (1980); Carson v. Maurer, 120 N.H. 925, 424 A.2d 825 (1980).

107. In determining that the exceptions to Colorado's statute of repose did not create a suspect classification of misdiagnosed plaintiffs, the *Austin* court followed its holdings in Lujan v. Colorado State Bd. of Ed., 649 P.2d 1005 (Colo. 1982) and Pollack v. City and County of Denver, 194 Colo. 380, 572 P.2d 828 (1977). In both cases, the court held that "a classification is considered 'suspect' if it singles out religious, racial, or other discrete and insular minorities such as those based on lineage or alienage." *Lujan* at 1015 n.8; *see also Pollack* at 829. Misdiagnosed claimants, as a group, are not distinguishable from other medical malpractice claimants on the basis of race, religion, lineage or alienage, and thus the Austins would not be members of a suspect class.

108. This observation has been noted by courts of several jurisdictions, including Colorado, and by legal scholars as well. In Yoshizaki v. Hilo Hospital, 50 Hawaii 150, 433 P.2d 220 (1967), the Supreme Court of Hawaii rejected the distinction purported to exist between foreign object cases and misdiagnosis cases. The majority determined that misdiagnosis claims are neither more difficult to defend nor more prone to be fraudulent since,

> as in the instant case, treatment generally follows diagnosis. The treatment is an objective fact which may be proved or disproved by people other than the plaintiff. The fact that the treatment is the kind normally administered for the ailment the doctor allegedly improperly diagnosed is strong evidence of the diagnosis.

Id. at 223-24.

This portion of the *Yoshizaki* opinion was quoted by the Supreme Court of Colorado in Owens v. Brochner, 172 Colo. 525, 474 P.2d 603 (1970), a case remarkably similar to *Austin*. In *Owens*, the court held that the discovery rule should be extended to all medical malpractice claims, rather than to foreign object cases exclusively. 474 P.2d at 607.

Other courts have found no valid reason for distinguishing fraudulent concealment and foreign object claimants from misdiagnosis claimants, stating that it is both unrealistic and unfair to do so when applying the discovery rule. Lipsey v. Michael Reese Hosp., 46

however. Although it is true that the exceptions reveal a governmental interest in preserving claims where the claimant had no opportunity to discover his cause of action, the exceptions also manifest the legitimate governmental interest which is the basis of the statute itself: alleviation, at least in part, of the "medical malpractice crisis."[109] Limiting the exceptions to the statute of repose ensured that that statute will achieve its remedial purpose. Thus, it can be argued that the limitation of the number of exceptions furthers the legitimate governmental objective of maintaining the availability of health care for all of society.[110] The majority's opinion failed to address this argument in its analysis of the correlation between the classifications created by the exceptions and the legitimate governmental objectives.

Even so, the course chosen by the court to remedy the equal protection dilemma posed by the exception was appropriate and in keeping with its past decisions.[111] And, although it may seem sweeping in some respects, the decision is actually an example of judicial restraint. For example, the majority chose to adhere to the conservative stance it took in *Mishek*[112] rather than decide whether Colorado's unusually strict statute of repose violated the due process provisions of the constitution.[113] The court did not throw open the floodgates and decide that any distinction between classes of medical malpractice plaintiffs violated equal protection guarantees, thus making the discovery rule available to all medical malpractice plaintiffs, as has been done in other jurisdictions.[114]

Ill.2d 32, 262 N.E.2d 450 (1970); Raymond v. Eli Lilly & Co., 117 N.H. 164, 371 A.2d 170 (1977); Frohs v. Greene, 253 Or. 1, 452 P.2d 564 (1969).

In addition, "most of the evidence necessary to prove or defend against liability is likely to be documentary in nature. It is not the kind of evidence that is lost or becomes unreliable as time passes. . . . Certainly, doctors and hospitals meticulously maintain and store records of patient treatments." *Raymond*, 371 A.2d 170 at 176 relying on, Note, *Recent Developments in Wisconsin Medical Malpractice Law*, 1974 WIS. L. REV. 893, 897 (1974). *See* Comment, *Medical Malpractice Statutes of Limitation: Uniform Extension of the Discovery Rule*, 55 IOWA L. REV. 486 at 492 (1969); *see also* Note, *Discovery Rule*, Hays v. Hall, Gaddis v. Smith, 25 BAYLOR L. REV. 536 at 541 (1973). *See generally* D. LOUISELL & H. WILLIAMS, *supra* note 15, at ¶ 7.10 n.48.

Finally, it has been noted that passage of time creates just as many evidentiary difficulties for plaintiffs who have the burden of presenting a prima facie case as for defendants. *Yoshizaki*, 433 P.2d at 223; Drill & Hambleton, *Applying Statutes of Limitations and Statutes of Repose*, 19 TRIAL 106 (1983).

109. *Supra* note 55.

110. S. Res. Bill 150, 51st G.A., 1st Reg. Sess., H.R. Floor Debate, May 4, 1977, Colo., Tape No. 20A-M1T.

111. In both People v. Bramlett, 194 Colo. 205, 573 P.2d 94 (1977) and R. McG. v. J.W., 200 Colo. 345, 615 P.2d 666 (1980), the Colorado Supreme Court chose to remedy statutory provisions which violated equal protection guarantees by affording the petitioners the benefits conferred upon the group favored by the classification, rather than correct the violation by abrogating the benefits of the statute for all classes.

112. 200 Colo. 514, 616 P.2d 135 (Colo. 1981).

113. 682 P.2d at 53. *See* 1 D. LOUISELL & H. WILLIAMS, *supra* note 15, at ¶ 13.14 (survey of the statutes of limitation and repose of all the states in the country reveals that the three year Colorado statute is one of the shortest); legislators speaking at the floor debates in the Colorado Senate also noticed that the proposed amendment would take Colorado out of the mainstream, making its statute of limitations one of the shortest in the country. S. Res. 150, 52nd G.A. 1st Reg. Sess., S. Floor Debate, March 18, 1977, Colo., Tape No. 27A-M2T.

114. *E.g.*, Carson v. Maurer, 120 N.H. 925, 424 A.2d 825 (1980).

Furthermore, the majority stressed throughout its opinion that it was making a narrow ruling on a narrow issue and that its inquiry was limited to the statute as applied to the facts of the case at bar.[115] The remedy is in keeping with this approach and is thereby deferential to the legislature. Rather than tolling the statute for all medical malpractice claimants, it only does so for those claiming misdiagnosis.

The court's decision in *Austin* reflects a trend toward plaintiffs' rights, not only in Colorado but in the nation as a whole.[116] Other Colorado decisions, such as *Bonfils v. Public Utilities Commission*[117] and *Lamb v. Powder River Livestock Company*,[118] illustrate the state's longstanding commitment to plaintiffs' rights and its view that claimants should not be denied access to the court.[119] Additionally, another statute of limitation favoring some groups at the expense of others has been challenged and found unconstitutional on equal protection grounds.[120] Thus, the court's decision in *Austin v. Litvak* is consistent with the jurisprudential direction of this state.

Several states have promulgated remedial legislation in response to the perceived malpractice crisis; most of the legislation has not withstood constitutional challenges.[121] Thirty-six states have declared, either by legislation or in the courts, that the statute of limitations does not begin to run until the plaintiff discovers or has an opportunity to discover his cause of action.[122] Furthermore, courts in California, Illi-

115. 682 P.2d at 53.

116. *See supra* note 108.

117. 67 Colo. 563, 189 P.2d 775 (1920).

118. 132 F. 434 (8th Cir. 1904).

119. In Bonfils v. Public Util. Comm'n, 67 Colo. 563, 189 P.2d 775 (1920), the court held that a statute of limitations providing no time whatsoever in which to bring an action is not a "reasonable time" as recognized by the Colorado Constitution. The court in Lamb v. Powder River Livestock Company, 132 F. 434 (8th Cir. 1904) held that statutes of limitation are subject to the fundamental principle that a reasonable time must be given for the plaintiff to exercise his right of action.

120. The court in McClanahan v. American Gilsonite Co., 494 F. Supp. 1334 (D. Colo. 1980) ruled that COLO. REV. STAT. § 13-80-127 (1973), a statute of limitation applying only to contractors, violated the equal protection provisions of both the federal and state constitutions because it created classifications with no reasonable relation to the government objectives of the statute.

121. Redish, *supra* note 3, at 762 (several state courts have already invalidated legislative malpractice proposals on the basis of federal and state constitutional objections); *see* Lankford v. Sullivan, Long & Haggerty, 416 So. 2d 996 (Ala. 1982); *see also* Diamond v. E.R. Squibb & Sons, Inc., 397 So. 2d 671 (Fla. 1981). *See generally* McGovern, *The Variety, Policy and Constitutionality of Product Liability Statutes of Repose*, 30 AM. U.L. REV. 579 (1981); Taylor & Shields, *Limitation on Recovery in Medical Negligence Cases in Virginia*, 16 U. RICH. L. REV. 799, 836 (1982); Note, *Ohio's Attempts to Halt the Medical Malpractice Crisis: Effective or Meaningless?*, 9 U. DAYTON L. REV. 361, 374 (1984).

122. Note, *Denial of a Remedy*, 8 COLUM. J. OF ENVTL. L. 161, 170 n.55 (1982). In Oliver v. Kaiser Community Health Found., 449 N.E.2d 438 (Ohio 1983), the court held that the discovery rule applied to all medical malpractice claims, overruling cases to the contrary. Courts in the following states have handed down similar decisions: California, Hawaii, Illinois, Nebraska, New Hampshire, New Jersey, North Dakota, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Texas, Utah, Washington, and West Virginia. *See* Note, *Ohio's Attempts to Halt the Medical Malpractice Crisis: Effective or Meaningless?*, 9 U. DAYTON L. REV. 361, 367 (1984). *See generally* S. SPEISER, C. KRAUSE & A. GANS, THE AMERICAN LAW OF TORTS 1022-47 (1983).

nois, New York, Washington, and Idaho have specifically found that legislative classifications which disfavor misdiagnosis claimants while benefiting others are in violation of equal protection guarantees.[123] Indeed, the outcome of *Austin v. Litvak* was foreshadowed not only by events in other states, but also by the legislative debates preceding the passage of Colorado's statute of repose. Tapes of the floor debate indicate that certain senators warned that the statute would never withstand the scrutiny of the supreme court due to its equal protection violations.[124] It must be noted, however, that at least one observer has noted a recent trend in the opposite direction, away from the discovery rule.[125]

The *Austin* decision is likely to affect the relatively small segment of society made up of negligent misdiagnosis claimants much more heavily than society as a whole. Despite forecasts of the unavailability of health care which resulted in the enactment of Colorado's strict three-year statute of repose and the truncation of the discovery rule, extending the benefits of the statute's exceptions to one additional class of plaintiffs should not have a significant effect on either the availability or the cost of health care in this state for several reasons. First, as discussed earlier in this comment, the very existence of a malpractice crisis in the nation in general, and in Colorado in particular, has been questioned by courts, legal scholars, and legislators.[126] Second, even assuming such a crisis exists in the state of Colorado, the ability of this statute to have any positive remedial effect is questionable both in theory and in fact.[127] Third, because of the narrowness of the court's holding and its remedy, the *Austin* decision's greatest significance is its precedent. *Austin* could conceivably foreshadow a holding that the discovery rule must apply across the board as was the case in New Hampshire.[128] This would, in effect, abrogate the entire statute of repose in this area. The fact that the court has thus far refused to address the due process issue[129] indicates its current uneasiness with extending the holding of *Austin*.

CONCLUSION

In future years, historians may characterize the flurry of legislative

123. Valdez v. Percy, 35 Cal. 2d 338, 217 P.2d 422 (1950) (brain tumor erroneously diagnosed as malignant and breast removed unnecessarily as result); Lipsey v. Michael Reese Hosp., 46 Ill. 2d 32, 262 N.E.2d 450 (1970) (malignant tumor wrongly diagnosed as benign—discovery rule extended); Oliver v. Kaiser Community Health Found., 5 Ohio St. 3d 111, 449 N.E.2d 438 (1983) (cancer misdiagnosis case, discovery rule extended); Janisch v. Mullins, 1 Wash. App. 393, 461 P.2d 895 (1969), *review dismissed by stipulation*, 78 Wash. 2d 997 (1970) (negligent diagnosis, negligent reading of X-ray caused blindness, discovery rule extended); *see* Renner v. Edwards, 93 Idaho 836, 475 P.2d 530 (1970); *see also* Camire v. United States, 535 F.2d 749 (2nd Cir. 1976).

124. *See supra* note 55.

125. Note, *The Fairness and Constitutionality of Statutes of Limitations for Toxic Tort Suits*, 96 HARV. L. REV. 1683, 1683 (1983).

126. *See supra* notes 51-55 and accompanying text.

127. *See supra* note 59.

128. Carson v. Maurer, 120 N.H. 925, 424 A.2d 825 (1980).

129. *Austin*, 682 P.2d at 48.

activity surrounding medical malpractice statutes of limitation and repose across the country and in Colorado as a well-intentioned but misguided overreaction to a phantom crisis.

In *Austin v. Litvak*, the Supreme Court of Colorado functions in its most important and traditional capacity as the mediator between the current demands of society and the time-honored principles of the constitution. The court held that the narrow exceptions to the state statute of repose created constitutionally invalid classifications and were violative of the plaintiff's equal protection rights as guaranteed by the Colorado and United States Constitutions. The law in question tolled the statutory period for foreign object and concealment cases but granted no such exception for misdiagnosis claimants. The court wisely chose the most deferential standard of review for its examination of this statute, although it inaccurately identified the legitimate governmental purpose. Even so, the legislative classification at issue bears no rational correlation to the true legislative objective of the statute.

Before enacting further legislation in this area, Colorado lawmakers must strive to obtain verifiable and unbiased data regarding the extent of the medical malpractice crisis in this state and the effectiveness of different legislative schemes purporting to solve the problem. Only then will legislators be in a position to truly benefit the community with laws that both serve society and respect the rights of its individual members.

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