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SUPREME COURT

STATE OF COLORADO

Case No. 82SA236

JAN 19 1983

David W. Breiing

ROBERT L. AUSTIN AND
MARQUITA AUSTIN,

Plaintiffs-Appellants

vs.

JOHN LITVAK, M.D. AND
ST. ANTHONY'S HOSPITAL

Defendants-Appellees

AMICUS CURIAE BRIEF OF THE COLORADO DEFENSE LAWYERS ASSOCIATION

Appeal from the Denver District Court

The Honorable James C. Flanigan, Presiding

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Submitted: January 19, 1983

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COMES NOW the Colorado Defense Lawyers Association, as **amicus curiae,** by and through the law firms of HANSEN & BREIT, P.C., and PRYOR, CARNEY AND JOHNSON, P.C., and hereby submits its Brief in response to this Court's invitation and request.

I. STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the trial court properly apply the strict three-year limitation period in C.R.S. 1973 § 13-80-105 (1982 Cum. Supp.) in finding that plaintiffs' claims were barred?

2. Are plaintiffs' contentions of error that application of the strict three-year limitation period contained in C.R.S. 1973 § 13-80-105(1) (1982 Cum. Supp.) deprives them of constitutional rights properly before this Court?

3 Does the application of the strict three-year limitation period contained in C.R.S. 1973 § 13-80-105(1) (1982 Cum. Supp.) to this case deprive plaintiffs of their federal and state constitutional rights to due process of law?

4. Does the application of the strict three-year limitation period contained in C.R.S. 1973 § 13-80-105(1) (1982 Cum. Supp.) deprive plaintiffs to their right to equal protection of the laws guaranteed by the Fourteenth Amendment of the United States Constitution or their right to be free from special legislation guaranteed by Article V, Section 25 of the Colorado Constitution?

5. Can the "continuing tort" doctrine be applied to salvage plaintiffs' cause of action when only the claimed injury, and not any con-

duct of defendants, "continued" during the nearly 16-year interval from the last date of treatment to plaintiffs' discovery of the alleged negligence?

6. Was the trial court correct in finding that insertion of a metal wire screen in plaintiff's skull in October 1963 did not constitute the leaving of an unauthorized foreign object within the meaning of C.R.S. 1973 § 13-80-105(1)(a) (1982 Cum. Supp.)?

7. May the knowing concealment exception to C.R.S. 1973 § 13-80-105 (1982 Cum. Supp.) be raised in this Court since plaintiffs failed to plead or even to argue this theory at the trial court level, and if so, can the facts of record arguably support this theory?

II. STATEMENT OF THE CASE

A. Nature of the Case. This is an action in tort for medical malpractice arising out of care and treatment afforded plaintiff, Robert L. Austin, in September and October 1963 at St. Anthony's Hospital in Denver, Colorado. More specifically, plaintiff alleges the defendants, the hospital and one of his physicians, John Litvak, M.D., negligently diagnosed him as suffering from a parasagittal meningioma, a form of benign brain tumor, and that he suffered apprehension and anxiety as a result of this claimed misdiagnosis until June 1979, when he discovered from testing performed as a result of injuries he sustained in an automobile accident that he did not then have, and never had had, a parasagittal meningioma. Based upon the same allegations, plaintiff's spouse stated a derivative claim for loss of consortium. (A copy of plaintiffs' Complaint is attached in Appendix A).

Appeal is from the trial court's orders of September 9 and 11, 1981, both **nunc pro tunc** to September 8, 1981, entering summary judgment in favor of defendant John Litvak, M.D., and St. Anthony's Hospital, respectively, dismissing this action as time-barred pursuant to C.R.S. 1973 § 13-80-105(1) (1982 Cum. Supp.). (Copies of the Court's Orders are attached in Appendices D and E.)

B. Course of Proceedings. Plaintiffs filed this action on June 4, 1980. Both defendants answered and asserted, among others, the affirmative defense of the medical malpractice limitation of actions period, C.R.S. 1973 § 13-80-105 (1982 Cum. Supp.).

On July 25, 1980, defendant Litvak served by mail Interrogatories to the Plaintiffs. Plaintiffs provided answers to these Interrogatories on October 27, 1980. No discovery was conducted by plaintiffs. (Copies of the Interrogatories and Answers are attached in Appendices B and C.)

On November 7, 1980, defendant Litvak filed his Motion for Summary Judgment, requesting dismissal of the action for the reason that it was barred by the strict three-year limitation of action period set forth in C.R.S. 1973 § 13-80-105(1) (1982 Cum. Supp.). On June 1, 1981, defendant St. Anthony's Hospital filed a similar motion.

Plaintiffs resisted these motions, contending that although C.R.S. 1973 § 13-80-105(1) (1982 Cum. Supp.) was the proper statute of limitations to apply to this case, the action was timely brought since it was instituted within two years after the plaintiffs actually discovered, or in the exercise of reasonable diligence and concern should have dis-

covered, the alleged injury. Plaintiffs alleged that the fact of Mr. Austin's "injury" was not discovered until June 1979 when neurological and other testing necessitated by a May 1979 automobile accident in which he was involved revealed that he had never suffered from a parasagittal meningioma. Plaintiffs also contended that the foreign object exception to the strict three-year statute of limitation period, contained in C.R.S. 1973 § 13-80-105(1)(a) (1982 Cum. Supp.) applied to this case, asserting that the placement of a wire metal screen in Mr. Austin's head in connection with testing performed upon him in 1963 was unnecessary and thus "unauthorized." Plaintiffs did not, at the trial court level, challenge the constitutionality of C.R.S. 1973 § 13-80-105 (1982 Cum. Supp.), either as applied or on its face.

C. Disposition of Case by District Court. After hearing and argument, Judge Flanigan ruled that the strict three-year bar to medical malpractice actions contained in C.R.S. 1973 § 13-80-105(1) (1982 Cum. Supp.) was a complete bar to this action, and further, concluded that insertion of the metal wire screen in Mr. Austin's skull in October 1963 was known to the plaintiffs and thus did not constitute the leaving of an unauthorized foreign object within the meaning of the exception to the medical malpractice limitation of action statute.

On October 5, 1981, plaintiffs timely filed their Notice of Appeal. Due to constitutional issues raised in the briefs, this matter was transferred from the Court of Appeals to this Court.

III. STATEMENT OF FACTS

The Complaint, which must be taken as true for purposes of this appeal, except insofar as pierced by the written discovery on file with the Court, establishes the following:

In September 1963, plaintiff Robert L. Austin was admitted to St. Anthony's Hospital for treatment of kidney stones (Complaint, ¶ 2). During this admission, hospital personnel performed numerous tests, including x-rays, and informed the plaintiff that he was suffering from a parasagittal meningioma, a form of brain tumor, which diagnosis was false (Complaint ¶ 3). In September 1963, plaintiff retained Dr. Litvak who confirmed the hospital diagnosis of a parasagittal meningioma (Complaint ¶ 4). Plaintiff alleges, on information and belief, that tests were performed at Colorado General Hospital, the results of which "effectively" revealed to defendants that there was no tumor, and plaintiff remained unaware of the results of this testing. (Complaint, ¶ 6).

As part of the testing, a hole was bored in the skull of the plaintiff and a metal screen inserted in his head (Complaint, ¶ 7). Plaintiff was informed that the tumor was not operable without severe risk and was advised not to undergo a surgical procedure at that time to remove the tumor (Complaint, ¶ 8). When he was discharged from St. Anthony's Hospital in October 1963, plaintiff labored under the fear and apprehension that he suffered from an inoperable brain tumor (Complaint, ¶ 9).

In May 1979, plaintiff was involved in an auto accident and, as a result of injuries suffered in that accident, underwent extensive medi-

cal testing (Complaint, ¶ 10). On June 15, 1979, plaintiff learned that he did not then have, and could never have had, a parasagittal meningioma (Complaint, ¶ 11).

The diagnosis of the presence of the parasagittal meningioma was negligently reached and false (Complaint, ¶¶ 12 & 13) and caused plaintiff to suffer needless apprehension (Complaint, ¶ 14). Plaintiff sought $2,500,000.00 in compensatory damages and $2,500,000.00 in punitive damages against the defendants; and plaintiff's spouse, Marquita Austin, filed a claim for loss of consortium based upon the allegations above summarized (Complaint, ¶¶ 17-19).

The Complaint contained no allegations whatsoever as to why plaintiffs could not have discovered the alleged misdiagnosis at an earlier date. Nor did plaintiffs expressly allege that the defendants fraudulently concealed the fact that he did not suffer from a parasagittal meningioma. Rather, plaintiffs merely alleged that the defendants knew of test results which "effectively" showed that Mr. Austin did not suffer from this condition, and that these results were unknown to plaintiffs (Complaint, ¶ 6).

Plaintiffs' answers to the interrogatories served by defendant Litvak revealed the following additional information. Mr. Austin was 51 years old at the time of answering the interrogatories, and thus approximately 34 years of age at the time of the conduct of which he complains (Answer to Interrogatory No. 1, hereinafter referred to only by interrogatory number).

In 1963, he was admitted twice to St. Anthony's Hospital. The first admission was September 1, 1963 to September 13, 1963 for treatment for kidney stones (Nos. 27 & 28). The second admission, from September 18, 1963 to October 15, 1963, was for neurological testing ordered by Dr. Litvak (No. 29).

Mr. Austin was originally admitted to St. Anthony's by Dr. Stanley M. Weiner and Dr. Schuldberg (deceased), his family physicians at the time (Nos. 30 and 32). During his stays at St. Anthony's in 1963, he was treated or examined by five physicians: Drs. Weiner, Schuldberg, Litvak, Dean, and Pfister.

His last contact with Dr. Litvak was on October 15, 1963 (No. 42, Schedule G). He was informed by Drs. Schuldberg and Weiner, in addition to Dr. Litvak, that he suffered from a brain tumor (No. 41, Schedule G).

Very interesting to note is what Dr. Litvak told plaintiffs in this regard. In answer to an interrogatory asking precisely what Dr. Litvak said when he confirmed the diagnosis of the parasagittal meningioma, plaintiffs responded as follows:

> Dr. Litvak told both of us [Mr. and Mrs. Austin] together "the tumor is benign and encapsulated with no vein or arterial involvement at this time, and I see no reason for surgery now. It is possible it could become active in six days, six months, six years, or never. No one knows when these things will decide to take off, but don't worry about it. I have the tumor located and if and when it does, it is a simple matter to go in and get it as long as we are both alive. Now, Bob, if you want to stay here in the hospital until Monday, I will remove the stitches from your head and dismiss you then or I will show your wife how to remove them and you may home today."

> Bob decided to go home that day and let his wife remove the stitches from his head.
>
> Then Dr. Litvak said: "Mrs. Austin, may I see you outside for a moment?"
>
> Dr. Litvak took Mrs. Austin into the hall outside Bob's room at St. Anthony's Hospital and said: "There are some signs you should watch for which could indicate the tumor is becoming active -- there could be some motor changes such as hands trembling -- weakness of the hands in grasping or gripping, walking difficulty -- stumbling, etc. Also you should watch for personality changes such as sudden unexplained temper flareups or any behavior changes that are different from Bob's normal past behavior. If you see or suspect any changes at all, call me immediately. Now please don't worry for I am as near to you as your phone and like I said before he may never have any problems."
>
> There was never any further contact with Dr. Litvak from that date until now.

No. 42(e), Schedule G. Thus, contrary to the bald allegations of the Complaint which give the impression that the plaintiff was informed he had a terminal, inoperable brain tumor, Dr. Litvak stated, at most, by the plaintiffs' own admission, that Mr. Austin had a benign tumor which might never become active, and if active, it was a simple matter to remove. Further, his spouse was advised to watch for certain signs and to contact Dr. Litvak immediately if these signs appeared, so the tumor could be removed if necessary.

Subsequent to his October 1963 discharge from St. Anthony's Hospital, Mr. Austin was treated by physicians on numerous occasions, including Dr. Weiner until the year 1969 (No. 34). He underwent two separate physical examinations by Dr. Charles Westrue of Greeley, Colorado, on October 19, 1972 and September 14, 1973 (No. 34).

Dr. Hutchins, a neurologist, examined Mr. Austin after a May 1979 automobile accident and determined from neurological evaluation and certain objective testing, that he did not have a brain tumor and had never had one, since tumors of this type do not spontaneously remit and disappear (Nos. 43-52, Schedule G). The facts established of record thus reveal that for a period of 15 years and 9 months, the plaintiff, despite numerous examinations by physicians, apparently took no steps whatsoever to ascertain whether he, in fact, did suffer from a parasagittal meningioma even though he was under the continuous care of various physicians, including two physical examinations conducted in 1972 and 1973 (No. 34). Indeed, the plaintiff only learned of the absence of a tumor fortuitously by virtue of his injury in an automobile accident.

Plaintiffs apparently sustained no monetary loss as a result of the conduct of defendants. In answer to an interrogatory requesting what financial losses he incurred, Mr. Austin merely stated the following:

> I believe what I was told changed my entire life. I thought I would die at any time. I considered myself permanently damaged, and would not and could not recover.

Nos. 23 and 24. The extent of Mr. Austin's damages are thus confined to the aforestated claim of apprehension.

IV. SUMMARY OF ARGUMENT

The trial court correctly applied the three-year strict bar contained in C.R.S. 1973 § 13-80-105(1) (1982 Cum. Supp.) in dismissing this action since the conduct of which plaintiffs complained occurred almost 16

years before a cause of action accrued in June 1979 when plaintiffs discovered the alleged misdiagnosis, and the appropriate statute of limitations to apply was that in effect on the date the cause of action accrued.

Although plaintiffs did not raise constitutional challenges to the statute, facially or as applied, at the trial court level, this Court can and should determine those issues here, involving, as they do, issues of great public importance.

This Court effectively disposed of the constitutional issues raised here in a case involving the predecessor to this statute which contained a strict six-year limitations period. **Mishek v. Stanton,** _____ Colo. _____, 616 P.2d 135 (1980). Given that decision, this Court need only determine whether reduction of the strict limitations period from six to three years is constitutionally permissible. A three-year period is period is reasonable in light of the one-year saving clause contained in the statute and persuasive authority from numerous other states upholding three-year, or shorter, strict limitations periods for medical malpractice actions. The legislative history underlying this amendment contains ample rational bases for the legislature's choice of a three-year period.

The foreign object exception to the statute, as the trial court correctly determined, simply cannot apply to a deliberately placed device, the insertion of which was known to the plaintiffs, and which was not a cause of any claimed injury or damage. Nor may plaintiffs avail themselves of the knowing concealment exception to the statute due to their failure to plead or raise it at the trial court level and its inapplicability to the facts presented.

Application of a "continuing tort" theory to this case in order to bring plaintiffs within the strict three-year limitation period has not raised by the parties to this action, and to apply such a theory would constitute an extreme distortion of that doctrine in a manner which would totally abrogate the fundamental purposes and utility of the statute of limitations.

V. ARGUMENT

A. STATUTES OF LIMITATION ARE FAVORED IN THE LAW AND PROVIDE A MERITORIOUS DEFENSE TO PROMOTE JUSTICE, DISCOURAGE UNNECESSARY DELAY, AND TO DISALLOW PROSECUTION OF STALE CLAIMS.

Statutes of limitation have long existed in the law, governments having historically recognized the propriety of extinguishing, after a certain point in time, the availability of a remedy for a particular wrong. "Statutes of limitation have been part of the law of every civilized nation from time immemorial." **Hargarves v. Brackett Stripping Machine Co,** 317 F.Supp. 676, 682 (E.D. Tenn. 1970), citing, **Hawkins v. Barney's Lessee,** 5 Pet. (30 U.S.) 457, 8 L.Ed. 190 (1831). The limitation of an action represents the balancing of the right of a plaintiff to seek a remedy for an injury caused by the wrongful act of another and the right of a defendant to be free from the specter of defending a lawsuit years after the event, when memories have faded and evidence and witnesses may be difficult or impossible to locate:

> The peace and good order of society, the opportunities for the commission of frauds, and the difficulty of defending against actions which had accrued many years

> before they were brought prompted a policy which resulted in the enactment of a statute of limitations which is now universally held to be one of repose prescribing a limit of time within which actions must be brought; otherwise, they cannot be maintained against parties who see fit to avail themselves of the privilege of the statute.

Patterson v. Fort Lyon Canal Co., 36 Colo. 175, 84 P. 807, 808-09 (1906). Statutes of limitations are meritorious defenses which themselves serve a public interest and are favored in the law:

> The statute of limitations is a statute of repose, designed to protect the citizens from stale and vexatious claims, and to make an end to the possibility of litigation after the lapse of a reasonable time.

Guaranty Trust Co. v. United States, 304 U.S. 126, 136 (1937). As stated by this Court:

> The modern tendencies to look with favor upon statutes of limitations, which are considered wise and beneficent in their purpose and tendency, are looked upon as statutes of repose, and are held to be rules of property vital to the welfare of society . . . , and while formerlly looked upon with disfavor and strictly construed, the present judicial attitude is that of liberal construction.

Van Diest v. Towle, 116 Colo. 204, 179 P.2d 984, 989 (1947) (citations omitted).

Statutes of limitation are unquestionably within the power of a state legislature to enact. **In re People in Interest of L.B.,** 179 Colo. 11, 498 P.2d 1157, 1161 (1972). Statutes of limitations embody considerations of public policy and provide meritorious, not merely technical, defenses. **Guaranty Trust Co. v. United States, supra,** at 136; **Van Diest v. Towle, supra,** 179 P.2d at 988.

Statutes of limitations thus promote justice by preventing surprise and unfair prejudice through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. Despite the fact that a plaintiff whose claim may be found time-barred under a statute of limitation may have had a just claim, his adversary is entitled to a correlative right to notice of the need to defend within the prescribed period. In other words, at some point in time, the right to be free of stale claims simply prevails over a would-be plaintiff's right to prosecute a claim which has languished.

B. STATUTES OF REPOSE (which may bar a claim even before a plaintiff becomes aware of its existence), AS OPPOSED TO STATUTES OF LIMITATION (which specify the period of time in which suit must be filed after a party becomes aware of it), HAVE BEEN JUDICIALLY SANCTIONED IN THIS STATE WITH RESPECT TO MEDICAL MALPRACTICE AND OTHER CLAIMS

Strictly defined, a statute of limitation is a statute which places a time limit on when a claimant must institute litigation after his cause of action has accrued, and generally speaking, the cause does not "accrue" until the claimant becomes aware of it. A statute of repose, on the other hand:

> . . . limits the time within which an action may be brought and is not related to the accrual of any cause of action. The injury need not have occurred, much less have been discovered.

Klein v. Catalano, 386 Mass. 701, 437 N.E.2d 514, 516 (1982). Statutes of repose, unlike of statutes of limitation, thus may bar a cause of action before it accrues. **See, e.g., Kline v. J.I. Case Co.,** 520 F.Supp. 564, 566 (N.D.Ill. 1981). Statutes of repose are premised upon the principle

that an occasional harsh result in a situation where the plaintiff did not become aware of his cause of action until after the running of the applicable period of time is subordinate to society's interest in "complete respose after a certain number of years even at the sacrifice of a few unfortunate cases." **Schwartz v. Heyden Newport Chem. Corp.,** 12 N.Y.2d 212, 188 N.E.2d 142, 145 (1963), **amended on other grounds,** 12 N.Y.2d 1073, 190 N.E.2d 253 (1963), **cert. denied,** 374 U.S. 808 (1963) (upholding application of strict six-year statute of repose to medical malpractice action brought two years after discovering alleged negligence occurring thirteen years earlier).

In **Mishek v. Stanton, supra,** this Court upheld, against constitutional challenges similar, if not identical, to those presented in this case, C.R.S. 1973 § 13-80-105, the statute of limitations applicable to medical malpractice actions, which contained a two-year statute of limitations (the time during which a malpractice plaintiff had to institute suit once his cause was discovered and thus accrued) and a six-year strict statute of repose (prohibiting suits brought more than six years after the act or omission complained of with foreign object and knowing concealment exceptions). The conduct of which Mrs. Mishek complained occurred in March 1966, and she did not discover that the care provided may have been substandard until December 1975. The applicable statute of limitation operated to bar the case if not filed before March 1972, almost four years before she became aware of the existence of her cause of action. This Court held that the General Assembly's adoption of the "strict" rule or statute of repose which commences running upon the act or omission alleged

to be negligent was well within its discretion, one of its primary purposes being to forestall prosecution of "stale claims." **Id.** at 138.

The statute now under consideration also contains both a statute of limitations (suit must be brought two years after the claimant discovers or should have discovered his injury) and a statute of repose (in no event, with knowing concealment and unauthorized foreign object exceptions, may suit be brought more than three years after the act or omission complained of). A statute of repose strictly limits the time within which an action may be brought and is unrelated to the discovery or accrual of any cause of action. The injury need not have occurred, let alone be discovered. Quite simply, the legislature has determined that, after three years, causes of action should be eliminated against certain health care facilities and providers.

Although amended three times in the past twelve years, the Colorado statute of limitations for medical malpractice actions has contained, since 1971, a statute of repose provision. Between 1971 and 1976, actions were barred six years after the act or omission giving rise to the case, from 1976 to 1977, the strict period was five years, and currently, the absolute bar applies when three years have passed from the date of the negligent act or omission.

This Court has also approved, against constitutional challenges identical to those raised here, a strict statute of repose for actions brought against architects and engineers. **Yarbro v. Hilton Hotels Corp.,** ____ Colo. ____, ____ P.2d ____, VI **The Brief Times Rptr.** 1151 (Dec. 13, 1982) (ten-year period upheld, recognizing that statutes of repose may properly "bar a cause of action before it accrues." **Id.** at 1152).

C. THE PLAINTIFFS' CLAIMS IN THE INSTANT CASE ARE BARRED BY THE STATUTE OF LIMITATIONS, C.R.S. (1973) § 13-80-105.

In the trial court, plaintiffs alleged that the negligent acts of the defendants occurred in September or October 1963, but that plaintiffs did not discover, and, in the exercise of reasonable diligence, could not have discovered, their cause of action until June 15, 1979. The defendants have not, for the purposes of their motions for summary judgment, disputed plaintiffs' contention that they did not discover their cause of action until June 1979, nor that the action was commenced within two years of actual or subjective discovery. Therefore, just as in **Mishek v. Stanton,** no genuine issue of fact exists with respect to when the plaintiffs discovered their cause of action or whether they should have discovered it at an earlier date.

A cause of action for medical malpractice accrues on the date the plaintiff discovered, or should have discovered, the negligence. **Owens v. Brochner,** 172 Colo. 525, 474 P.2d 603 (1970). The statute of limitations in effect on the date the cause of action accrues governs the time within which an action may be commenced. **Valenzuela v. Mercy Hospital, Denver, Colorado,** 34 Colo. App. 5, 521 P.2d 1287 (1974); **Mishek v. Stanton, supra.**

The statute of limitations in effect in June 1979 was the present form of C.R.S. (1973) § 13-80-105 (1982 Cum. Supp.), which provides that in no event may an action be commenced more than three years after the act or omission which gave rise thereto, subject to the knowing con-

cealment and unauthorized foreign object exceptions, which are discussed below. Assuming that neither of these exceptions is applicable to the instant action, then, the plaintiffs' action has been barred at least since October 1966, three years after the alleged negligent acts. The plaintiffs' action, commenced June 4, 1980, is thus barred by the statute of respose.

In **Mishek**, the plaintiff alleged that the defendant physician was negligent in administering certain medications to her during childbirth on March 10, 1966. She alleged that despite diligent efforts, she had been unable to discover the nature of the medications administered and the connection between the medications and the injuries of which she complained until December 30, 1975. Her complaint was filed December 29, 1977, less than two years after she discovered her cause of action. The defendant did not, for for summary judgment purposes, dispute that the plaintiff had not discovered her cause of action until December 30, 1975.

The statute of limitations in effect on the date of discovery in **Mishek** was the version of C.R.S. (1973) § 13-80-105 which became effective May 22, 1971. The statute then provided that: "In no event may such action be instituted more than six years after the act or omission which gave rise thereto, except where the action arose out of the leaving of an unauthorized foreign object within the body of such person." Upon the facts presented, this Court held that Mishek's action was barred as of March 10, 1972, six years after the alleged acts of negligence. Her suit filed on December 29, 1977 was untimely.

To this extent, **Mishek** and the instant case are indistinguishable. In **Mishek,** the action was filed 11 years after the negligent acts, and in the instant case, the action was filed more than 16 years after the alleged negligence. In both cases, it was undisputed that the action was filed within two years of actual or subjective discovery of the cause of action. Finally, in both cases, the application of the strict rule would bar the cause of action years before the plaintiffs discovered their causes of action. Nevertheless, in **Mishek,** this Court held the action to be barred by the statute of limitations. The same result should be reached in the instant case.

D. ARE ISSUES CONCERNING THE CONSTITUTIONALITY OF THE MEDICAL MALPRACTICE STATUTE OF LIMITATIONS PROPERLY BEFORE THIS COURT?

Issues concerning the constitutionality, either facially or as applied, of C.R.S. 1973 § 13-80-105 were not raised by the parties or addressed by the Court at the trial court level. Further, no notice of constitutional challenge to the statute was given to the Office of the Attorney General as required by C.R.S. 1973 § 13-51-115. The question thus arises as to whether the constitutional issues may properly be decided by this court due to the failure of the parties to notify the Attorney General's Office of any claim of unconstitutionality of this statute and their failure to raise these issues at the trial court level? This question may and should be answered in the affirmative.

When a complaint contains no allegations that a statute is constitutional, the notice required by C.R.S. 1973 § 13-51-115 is not appli-

cable. **Howell v. Woodlin School Dist.,** 198 Colo. 40, 596 P.2d 56, 58-59 (1979).

The fact that a constitutional issue is not raised by the parties at the trial court level does not deprive this court of its inherent jurisdictional power to entertain it. As this Court has stated:

> "As a general rule, the court will not inquire into the constitutionality of a statute on its own motion; only those constitutional questions which are duly raised and insisted on, and are adequately argued, will be considered.
>
> * * *
>
> "This is not an inflexible rule, however, and in some instances constitutional questions inherently involved in the determination of the court may be considered even though they may not have been raised as required by orderly procedure."
>
> * * *
>
> Courts in many jurisdictions, including Colorado, have held that under circumstances such as we have here, it is proper for the court **sua sponte** or on motion of a person not aggrieved to pass on the constitutionality of a statute.

Mountain States T. & T. Co. v. Animas Mosquito Con. Dist., 152 Colo. 73, 380 P.2d 560, 563 (1963). **Accord, In Re Special Assessments for Paving Dist. No. 3,** 105 Colo. 158, 95 P.2d 806, 808 (1939).

Obviously, the question of the constitutionality of the statute in the instant case is of wide public importance. The trial court's ruling implicitly upheld its constitutionality. The parties have fully briefed the constitutional issues on appeal, and the Court has been further assisted by amicus curiae briefs. If not here decided, the con-

stitutional issues are bound to recur in the future, and therefore, policies favoring legal certainty and judicial economy will be furthered by addressing those issues here. Finally, Colorado Appellate Rule 1(d) provides that this Court ". . . may in its discretion notice any error appearing of record." Under these circumstances, this Court can and should exercise its discretion in favor of entertaining the constitutional challenges presented in this appeal.

E. THIS COURT HAS PREVIOUSLY DISPOSED OF THE CONSTITUTIONAL CHALLENGE RAISED BY PLAINTIFFS.

Mishek and **Yarbro** are dispositive of the constitutional challenges presented in this case. The Colorado General Assembly has the discretionary power to enact a strict statute of repose, the effect of which may be to bar a cause of action before the plaintiff becomes aware of its existence. **Mishek** rejected constitutional challenges to the strict statute of repose in medical malpractice cases, on due process, equal protection, and special legislation grounds. Thus, the only remaining question, expressly reserved by this Court in **Mishek,** (616 P.2d at 139 n.2), is whether a period of time shorter than six years comports with constitutional requirements. As will be demonstrated in the discussions which follow, reduction of the strict period from six to three years does not deprive plaintiffs of due process of law, is rationally based to legitimate legislative purposes, and may not be said to constitute special legislation.

Appendix K to this brief contains all cases located by this amicus dealing with strict statutes of repose shorter than six years for medical malpractice claims. Examination of that Appendix readily reveals that there are 28 states, in addition to Colorado, which have strict statutes of repose for medical malpractice claims. Including Colorado, 19 of those states have period of three years or shorter. In every single instance in which one of these statutes has been challenged on constitutional grounds, its constitionality has been judicially upheld. This persuasive body of authority, this Court's decision in **Mishek,** and the rational and legitimate basis for enactment of the strict period revealed in the legislative history attached hereto as appendices G through I compel the conclusion that C.R.S. 1973 § 13-80-105 (1982 Cum. Supp.) comports with all federal and state constitutional requirements.

F. DOES THE APPLICATION OF THE STRICT THREE-YEAR PERIOD CONTAINED IN C.R.S. 1973 § 13-80-105(1) (1982 CUM. SUPP.) TO THIS CASE DEPRIVE THE PLAINTIFFS OF THEIR FEDERAL AND STATE CONSTITUTIONAL RIGHTS TO DUE PROCESS OF LAW?

Plaintiffs can avoid the bar of C.R.S. 1973 § 13-80-105(1) (1982 Cum. Supp.) only if it is found to be an unconstitutional denial of due process under the 14th Amendment to the United States Constitution or under the Colorado Constitution, Article II, Section 25.

Statutes of limitations, generally, are enacted for the purpose of promoting justice, discouraging unnecessary delay and forestalling the prosecution of stale claims. **Rosane v. Senger,** 112 Colo. 363, 149 P.2d 372 (1944); **Klamm Shell v. Berg,** 165 Colo. 540, 441 P.2d 10 (1968); **Mishek**

v. Stanton, supra. A statute of limitations, including a statute which is to be applied retroactively, does not violate due process "unless the time fixed by the statute is manifestly so limited as to amount to a denial of justice." **Oberst v. Mays,** 148 Colo. 285, 292, 365 P.2d 902, 905 (1961); **Town of DeBeque v. Enewold, Colorado,** 606 P.2d 48 (1980); **Wichelman v. Messner,** 250 Minn. 88, 83 N.W.2d 800 (1975). "The legislature is the primary judge of whether the time allowed * * is reasonable." **Oberst v. Mays, supra,** 148 Colo. at 292, 365 P.2d at 905; **Weichelman v. Messner, supra.**

Mishek addressed the issue of whether the predecessor statute of limitations which imposed a six-year strict limitation period running from the act or omission complained of constituted a denial of due process because of the possibility that an injured party's cause of action might be barred at the end of the applicable six-year period even though she had not yet become aware of its existence.

By her complaint, the plaintiff in **Mishek** asserted that she had been "unsuccessful in discovering the nature of [the medications] [administered by the defendants] despite repeated and diligent efforts until on or about December 30, 1975," 616 P.2d at 136, almost four years ater her claim was barred.

By applying the general rule applicable to due process scrutiny, this Court determined that the trial court was correct in holding the plaintiff's suit to have been barred by the plain language of the final sentence of § 13-80-105, imposing the strict six-year rule, as of March 10, 1972. In applying the statute retroactively, this court effectively

barred plaintiff's claim three years and seven months before plaintiff discovered the existence of a cause of action.

While this Court expressly deferred answering the question whether a shorter statute of limitation would be violative of due process, 616 P.2d at 139, fn 2, the only proper test to apply is that set forth in **Mishek.** Therefore, the Colorado legislature is deemed to be the primary judge of whether the time allowed is reasonable. As stated in **Clark v. Gulesian,** 429 F.2d 405 (1st Cir. 1970), **cert. denied,** 400 U.S. 993 (1971), cited with approval in **Mishek:**

> [T]his is a policy decision. The rights are not one-sided * * * * [T]he state may reasonably recognize that a defendant has an interest in repose, and in the avoidance of stale claims, however free from fault the claimant's delay may be. Such a conclusion does not deprive plaintiff of any constitutional right to fair or equal treatment.

Id., 429 F.2d at 406.

Yarbro v. Hilton Hotels Corp., supra, concerned C.R.S. 1973 § 13-80-127, the statute of limitation pertaining to architects, which bars actions "more than ten years after the substantial completion of the improvement to the real property . . . . " Yarbro brought a wrongful death action nineteen years following the substantial completion of the Hilton Hotel and claimed that § 13-80-127 was void because it violated the constitutional provisions guaranteeing due process and equal protection as well as the prohibition against special legislation contained in Colorado Constitution Article V, Section 25.

Noting that statutes are presumed to be constitutional and that the plaintiff bore the burden of proving unconstitutionality beyond a

reasonable doubt, **People v. Smith,** 620 P.2d 232 (Colo. 1980); **Zaba v. Motor Vehicle Division,** 183 Colo. 335, 516 P.2d 634 (1973); § 2-4-201, C.R.S. 1973 (1980 Replacement Volume IB), this Court held that the plaintiff failed to carry the burden of proof for several reasons. VI **The Brief Times Rptr.** at 1152.

Citing **Mishek, supra,** and **Oberst v. Mays, supra,** the Court noted that it had previously upheld similar statutes of repose including C.R.S. 1973 § 13-80-105, the six-year strict limitation period for medical malpractice actions. Additionally, it was found not unreasonable for the general assembly to limit to ten years the period in which suits may be commenced against architects in view of the legislative intent to avoid stale claims and the likelihood that most types of defects would reasonably be discovered within ten years of substantial completion. Being not unreasonable and rationally related to a permissible state of objective, no violation of due process was found to exist.

Interestingly, the Court found that although plaintiff's claim against the architect was extinguished by the statute prior to discovery of the design defect, "the plaintiff had no claim and thus no vested right to sue at the time the immunity became effective and he therefore cannot assert that his property was taken without due process." [citations omitted]. **Id.,** at 1152.

Appellants and the Colorado Trial Lawyers Association, amicus curiae, assert that the three-year strict limitation period of 13-80-105(1) unconstitutionally operates to bar a medical malpractice remedy before the claim is discovered. However, **Yarbro** expressly holds

that no claim and thus no vested right arose until the injury occurred eight years subsequent to the enactment of the statute. The same is true for plaintiffs here. No cause of action existed until such time as plaintiff discovered the absence of the tumor in 1979, two years subsequent to the enactment of the strict three-year limitations period.

Additionally, the Colorado Trial Lawyers Association, amicus curiae, asserts that **Lamb v. Powder River Livestock Co.,** 132 F. 434 (1904) stands for the proposition that there must be a reasonable time within which the plaintiff may pursue a cause of action or, otherwise, retroactive effect of the statute is impermissible. Only this assertion may arguably distinguish this case from **Mishek.** The version of C.R.S. 1973 § 13-80-105 which contained the six-year limitation took effect May 22, 1971. The operation of this limitation would have barred Mishek's claim on March 10, 1972, six years after the alleged negligent acts. The Colorado Trial Lawyers Association argues that the reason the six-year strict limitation was not held unconstitutional as applied to Mishek is that there was a period, or "window" of ten months, after the statute took effect and before Mishek's claim became time-barred, during which Mishek could have filed her action, if she had been aware of her cause of action. By contrast, it is argued, the current three-year strict limitation became effective July 1, 1977. The operation of the three-year limitation would bar the claim in the instant case as of October 1966, nearly eleven years before the statute became effective. Therefore, it is argued that the three-year limitation is unconstitutional as applied in this case, because there was no time period after the effective date of

the statute during which the action could have been brought, even if the Austins had discovered their cause of action earlier.

This argument obviously raises a distinction without a difference, which would not create a means of providing relief to either Mishek or plaintiffs here. As a practical matter, both Mishek and the Austins specifically alleged that they did not discover and could not have discovered their causes of action any earlier. Whether the statute provides a "window" after its effective date during which existing actions may be brought is irrelevant, since neither Mishek nor the Austins had a vested and existing cause of action on the effective date of the applicable statute. For this reason, the instant case does not present an issue of retroactive application of the statute of limitations.

More importantly, this attempted distinction fails because the Colorado legislature specifically did, in fact, provide a "due process savings clause" at the time of enactment of the 1977 amendment to C.R.S. 1973 § 13-80-105. This savings clause states:

> §5. **Effective date - Applicability.** This act shall take effect July 1, 1977, and shall apply to all civil actions defined herein; except that all causes of action which are existing on the effective date of this act shall not be barred until one year after the effective date of this act or until the expiration of the period of limitations, whichever is longer.

Colo. Sess. Laws, Ch. 198 [1977] at 818. See Appendix F.

Therefore, if plaintiff's had claim accrued on or after July 1, 1975, his action would still have existed on July 1, 1977, and the limitations period would not have expired until July 1, 1978. **DiChellis v. Peterson Chiroporactic Clinic,** ___Colo.App. ___, 630 P.2d 103 (1981).

In light of the savings clause, the attempt to distinguish this case from **Mishek** on the basis that plaintiff in that case, had a ten-month window within which to have filed her case (had she discovered her cause in time) fails. Here, plaintiffs had a twelve-month window and thus may not take comfort in the **Mishek** dictim.

1. THE NATIONAL MEDICAL MALPRACTICE CRISIS STIMULATED THE COLORADO GENERAL ASSEMBLY TO ACTION CONCERNING THE MEDICAL STATUTE OF LIMITATIONS THREE TIMES DURING THE 1970'S.

The Colorado statue of limitations for medical malpractice actions has been amended three times in the past twelve years. Between 1925 and 1963, the statute provided that actions sounding in tort or contract to recover damages from certain persons in the medical professional could not be maintained unless such action "be instituted within two years after such cause of action accrued." In **McCarty v. Goldstein,** 151 Colo. 154, 376 P.2d 691 (1962), C.R.S. 1953 § 87-1-6 was upheld against constitutional challenges as special legislation and violative of rights to equal protection.

In 1963 and 1967, the Colorado General Assembly amended the statute adding additional classes of defendants to which it pertained.

Prior to 1971, the medical malpractice statute of limitations was judicially construed to be one of discovery, commencing to run when the patient discovered or, in the exercise of reasonable diligence, should have discovered the doctor's negligence. **Owens v. Brochner, supra.**

In 1971, the Colorado General Assembly reenacted C.R.S. 1963 § 87-1-6 deleting the language pertaining to accrual and adopting the lan-

guage this Court set forth in **Owens** pertaining to discovery of the negligence. However, the legislature saw fit to impose a strict six-year limitation period running from the act or omission giving rise to the cause of action except in circumstances concerning the leaving of an unauthorized foreign object within the body. The Constitutionality of the six-year limitation period was upheld in **Mishek, supra.**

In 1976, the Colorado General Assembly again amended the applicable statute, C.R.S. 1973 § 13-80-105 reducing the six-year strict limitation period to five years.

In 1977, the General Assembly enacted the present version of § 13-80-105 modifying the discovery provision to provide for discovery of the "injury." Additionally, the former five year strict limitation period was reduced to three years after the act or omission with exceptions provided for knowing concealment and unauthorized foreign objects. In the event the exceptions are applicable, an unlimited two year discovery rule is applied.

The 1977 amendments to the statute were presented to the General Assembly as part of a comprehensive package concerning Colorado medical legislation in several areas. Supported by the Colorado Medical Society and modeled after legislative changes sought in other states, the package addressed itself to legislative enactments deemed to be helpful in slowing the effects of the so-called medical malpractice crisis.

The medical malpractice crisis stemmed from the fact that the number of medical malpractice claims were increasing at an alarming rate; between 1966 and 1970, alone, the rate of increase was 81% for pending

medical malpractice claims. Library of Congress Congressional Research Service, **Medical Malpractice; A Survey of Associated Problems and Proposed Remedies,** 7-8, 1975. As a natural corollary to the increasing claims made was an increase in professional liability insurance premiums for physicians. For example, in 1977, the California Medical Association claimed that California rates had increased 400% since 1970. Blaut, "The medical malpractice crisis--its causes and future," Ins. Coun. J., n.3 at 114 (Jan. 1977).

The Illinois Supreme Court in **Anderson v. Wagner,** 79 Ill. 2d 295, 402 N.E.2d 560 (1979) set forth the various methods for managing the medical malpractice crisis, including legislative efforts which affected basic tort law principles such as the use of screening and medical review panels, arbitration, and procedural changes such as altering the statute of limitations, and discusses the present status of Illinois law concerning enactments. (A copy of this case is attached, Appendix J.)

The Colorado Defense Lawyers Association, amicus curiae, submits that this opinion recognizing the propriety of legislative response to the medical malpractice crisis be adopted by this Court. Colorado has frequently turned to Illinois precedent under circumstances similar to those presented here.

> Colorado is known to have adopted into its relm of statutory law provisions from the Illinois statutes, and consequently when an occasion arises, our Court frequently gives prime consideration to Illinois precedent when necessary to interpret such a statutory provision.

Vandermee v. District Court, 164 Colo. 117, 433 P.2d 335 (1967).

In 1977, the Illinois General Assembly adopted a discovery statute similar to that enacted the same year in Colorado. A two year discovery limitations period was provided for with a strict four year limitation period running from the date of the act or omission. Ill. Rev. Stat. 1977, ch. 83, par. 22.1.

Faced with inconsistent appellate court decisions concerning the constitutionality of the statute, the Illinois Supreme Court granted petitions for leave to appeal in two cases and consolidated them for hearing and opinion. The Illinois Hospital Association appeared as amicus curiae. The decision of the Illinois Supreme Court was reported in **Anderson v. Wagner, supra.**

Following examination of the medical malpractice crisis, its effects and legislative remedies, the court held the statute to be consistent with United States and Illinois constitutional provisions pertaining to due process, equal protection and special legislation, the same issues presented on this appeal.

Although **Anderson** concerns a strict four-year limitations period, amicus curiae submits that it was well within the discretion of the Colorado General Assembly to determine that a three year strict limitation period is rationally related to a legitimate legislative purpose perceived at the time of amending the Colorado statute.

Amicus curiae for the Colorado Defense Lawyers Association respectfully submits that this Court consider **Anderson** as persuasive in its consideration of this appeal.

2. THE COLORADO GENERAL ASSEMBLY HAD A RATIONAL BASIS FOR ENACTING A STRICT THREE-YEAR PERIOD OF REPOSE.

On March 18, 1977, Senate Bill 150 was before the full Senate of the Colorado General Assembly for reading and full debate.

Senator Allshouse presented and moved for adoption of Senate Bill 150. In support of his motion for adoption, he presented factual justification for imposition of a three-year strict statute of limitations running from the date of the act or omission complained of.

Specifically, Senator Allshouse presented the following facts:

1. Health Care costs are a major contributor towards inflation, "the blot on our economy and our free enterprise system." (Appendix G, p. 1).

2. Increasing cost of health care to Colorado citizens is due to rising malpractice premiums. **(Id.)**

3. Increased exposure of physicians to lawsuits is due in part to the fact people have more contact with physicians than with other professionals such as architects or attorneys. (Appendix G, p. 2).

4. There is only one company in the State of Colorado that is writing malpractice insurance for physicians in the amount of $1,000,000/$3,000,000 limits. **(Id.)**

5. The fact that the Hartford Insurance Company, the major professional liability insurer of Colorado physicians, showed 95% of their claims to fall within the first three years after an event or occurrence. **(Id.)**

6. Only 6% [sic] of malpractice claims remain unreported longer than three years. **(Id.)**

7. Discovery of foreign objects and fraudulent concealment claims will be exceptions to limitations period in the proposed statute. (Appendix G, p. 3).

Senator Phelps participated in the Senate floor debate and addressed his own concerns as a physician as well as those of certain medical witnesses testifying about health care in rural areas. Senator Phelps noted that physicians in a rural area earn a significantly lower incomes than those in metropolitan areas and, as such, could not afford to pay malpractice insurance premiums and to continue to practice in a rural area. The choice left to these physicians was to drop malpractice coverage or move from the rural area to the cities where they could increase their incomes. (Appendix G, pp. 7-8). Additionally, it was noted that rural areas frequently do not have the number of attorneys and architects, professionals treated differently under other statutes, as they do physicians. **(Id.)**

Senator Decker noted that a legislative attack on the major medical liability insurer, the Hartford, in lieu of a statute of limitations change would be counterproductive.

> Well, I think this problem is the same as almost all problems that we have in a community organized like it is today and that is there are multiple facets in the cause of rising costs, all of which have to be attacked. In other words, you can't direct -- if we sat around and directed our attention to Hartford Insurance, I can readily assure you that virtually nothing will be done, so we have to attack it on a broad front. But we have to show evidence that we are doing something so that if we do eventually -- can get the Insurance Commissioner and others to deal with the Hartford, we have something to go on, but the big problem is, with the Hartford, it's very easy for them

> to say -- Well, we will just not insure in Colorado anymore, and then what do we do? We have no insurance at all, and so we are hung up, and these physicians out in these rural areas are hung up because they are depending on the Medical Society and other various organizations to help them control this cost of malpractice insurance that's killing them, and there has to be some evidence that something is being done about it. And we can't direct it all in one direction. We have to attack it from a broad front.

Appendix G, p. 10.

Senator Allshouse also discussed the effect of insurance company reserves, the increase in the number of physician policyholders in this state, and the effect of increasing claims on reserve requirements. The Senator also addressed the Insurance Commissioner's testimony in committee concerning his doubts that the Hartford's incurred but not reported reserve figures were excessive due to the increasing amount of claims that had been added on in the last six years. (Appendix G, p. 12).

Senator McCormick noted with respect to the effect of rising malpractice premiums:

> It's a blessing that at least we can buy some kind of malpractice insurance, and the testimony that we have had continuing this year in the Hewey Committee as to the continuing steep rise in premiums indicates that the very length of the tail that we are talking about does expose them to an extraordinary risk, and that, therefore, what I am saying is that I agree with Senator Allshouse's contention.

(Appendix G, p. 18).

On May 4, 1977, Senate Bill 150 was before the full House of Representatives of the Colorado General Assembly for reading and full debate.

Representative Dittemore moved the bill for passage without committee amendments. In support of the bill, Representative Dittemore stated:

> The limitations, of course, is subject to the discovery of a foreign body and the foreign object in the body, such as a sponge or whatever, or if the physician knowingly conceals a malpractice situation that has entered discussion. This comes down to one of the problems that we have been having nationally with regard to the high cost for medical malpractice suits and at the present time there are only two companies writing medical malpractice in Colorado. One of those is Hartford and the other Empire Casualty. Only Hartford can obtain reinsurance for claims in excess of $100,000 per incident and $300,000 aggregate per year. Because of the specter of large money judgments rendered in other states and increasing claims throughout the United States, both nationwide and in Colorado, the other insurance carriers have been basically driven from the medical malpractice market. Indiana recently did institute a statute of limitations of two years. They have limited it from the time that the alleged malpractice occurred. Since that time, Indiana has indicated their costs have gone down for medical malpractice and it is a sign that perhaps because of some of the limitations that are being placed that medical malpractice costs show signs of abatement.

Appendix H, p. 2.

Representative Herzberger spoke in opposition to an amendment striking the enacting clause.

> I hope you will oppose this amendment. I think in many places now, we are trying to do many things to try and stop the escalation of medical costs. This is one small way we can start to help that. As you know, the costs are getting so that a lot of people are not even able to be taken care of serviceably anymore. There is no reason that two years isn't plenty of time, and I do hope that you will oppose this amendment.

Appendix H, p. 7.

Representative Bledsoe also opposed the amendment stating:

> They [physicians] were on the horns of dilemma, and I think the nation, as well as the state, is on the horns of dilemma because a lot of people can't afford health insurance any more, and part of what contributes to the health insurance is a malpractice insurance. I am not sure which side is right on this, but I'd like to give you one example from what my personal physician told me. The reason he does not carry malpractice insurance is this man told me it would cost him so many more dollars, I believe he said something like $6.00 per person, per patient, that he would have to charge that patient in order to pay his malpractice insurance. And, therefore, he didn't have it, and yet in this last year, in conjunction with another doctor in another hospital in a different town, he is a party to a malpractice suit. Now this man sincerely felt that his patients could not afford the extra costs, and this is why he did it. What worries the physician here is that a lot of people don't feel they can afford two things: they can't afford the medical care, and they can't afford the insurance, so we are getting very serious problems from this.

Appendix H, pp. 8-9.

Additionally, Representative Traylor noted that in states with shorter limitations periods, the insurance companies could close their books after the limitation period finished affecting the reserves required for incurred but not reported claims. Appendix H, pp. 10-11.

In spite of a vigorous debate concerning the malpractice crisis and equal protection considerations, the House of Representatives refused to adopt a compromise four-year strict limitation period (Appendix H, p. 25) and favorably passed Senate Bill 150 as proposed.

From the legislative history cited above, it is clear that the Colorado General Assembly had before it facts and figures concerning the national medical malpractice crisis and the effect of the malpractice crisis of physicians and consumers in Colorado, especially those in the rural

areas, and made a policy decision reflecting its recognition that the people of this state would benefit from a three-year medical malpractice statute of repose. The legislature is as the primary judge of whether the time allowed is reasonable. This principle, coupled with a presumption of constitutionality and the acceptable legislative intention to avoid stale claims, compels the conclusion that the Colorado General Assembly's enactment of the 1977 amendment to § 13-80-105(1) was reasonable and, therefore, not a denial of due process of law under the United States or Colorado Constitutions.

G. THE APPLICATION OF THE STRICT THREE-YEAR PERIOD CONTAINED IN C.R.S. 1973 § 13-80-105(1) (1982 CUM. SUPP.) DOES NOT DEPRIVE THE PLAINTIFF OF HIS RIGHT TO EQUAL PROTECTION UNDER THE LAWS GUARANTEED BY THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND THE COLORADO CONSTITUTION NOR DOES IT CONSTITUTE SPECIAL LEGISLATION WITHIN THE MEANING OF THE COLORADO CONSTITUTION ARTICLE V, SECTION 25.

In **McCarty v. Goldstein, supra,** this Court addressed the issue whether C.R.S. 1953 § 87-1-6, the two-year medical statute of limitations pertaining only to persons licensed to practice medicine, chiropractic, osteopathy, chiropody, midwifery and dentistry violated the Fourteenth Amendment to the United States Constitution and Article V, Section 25 of the Constitution of the State of Colorado as a denial of equal protection and constituting special legislation. Plaintiff contended that the two-year statute was discriminatory as it failed to provide equal protection to other professionals including other professional persons in the health sciences.

In holding the statute to be both constitutional and valid, this Court cited **Champlin Refining Co. v. Cruse, Director of Revenue,** 115 Colo. 329, 173 P.2d 213 (1946) as stating the applicable rule of law.

> Equal protection and its guarantee of like treatment to all similarly situated permits classification which is reasonable and not arbitrary and which is based upon substantial differences having a reasonable realtion to objects or persons dealt with and to the public purpose sought to be achieved by the legislation involved.

173 P.2d at 215.

This Court found that:

> The professions included within the coverage of the statute here in question are readily distinguishable from those occupations mentioned by counsel for plaintiffs not included therein. The classification of occupations and professions for limitation or regulation is a matter for legislative determination, and when based upon reasonable grounds will not be interfered with by the judiciary. We direct attention to the following to be found in **Journeyman Barbers, Etc., International Union v. Industrial Commission,** 128 Colo. 121, 260 P.2d 941, 42 ALR2d 700:
>
> "* * * As stated by Mr. Cooley in his work on constitutional limitations (201, 202) it is not within the province of the judiciary to 'run a race of opinions upon points of right, reason and expedience with the lawmaking power.' In the construction of statutes courts are not guardians of rights of people except as those rights are secured by constitutional provisions, and if a statute does not offend the Constitution it is the duty of courts to carry it into execution according to its true intent and purpose. 'We cannot pass upon its expediency or policy; those are questions upon which the legislature has passed, and its judgment cannot be reviewed by the courts.' **People ex rel. Rhodes v. Fleming,** 10 Colo. 553, 16 P. 298, 304."

376 P.2d at 693. (emphasis added) See **also, Dunbar v. Hoffman,** 171 Colo. 481, 468 P.2d 742 (1970).

With respect to Article V, Section 25 of the Colorado Constitution, this court has consistently applied the test whether the statute was general and uniform in its operation upon all in like situations. **Rosenbaum v. City and County of Denver,** 102 Colo. 530, 81 P.2d 760; **Denver v. Bach,** 26 Colo. 530, 58 P. 1089; **Dunbar v. Hoffman, supra; Champlin Refining Co. v. Cruse, supra.** Thus, the test for uniformity under the Colorado Constitution Article V, Section 25 is the same as for equal protection challenges.

Fritz v. Regents of the University of Colorado, 196 Colo. 333, 586 P.2d 23 (1978), sets forth the proper test to apply in examination of equal protection challenges under both the Colorado and United States Constitutions.

> Absent a 'suspect' classification or infringement upon a fundamental right, both of which are absent here, our analysis of a statute attacked on equal protection grounds depends on whether the statute rationally furthers a legitimate state interest. **San Antonio Independent School District v. Rodriguez,** 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973); **McGowan v. Maryland,** 366 U.S. 420, 81 S.Ct. 1101, 6 L.Ed.2d 393 (1961).

586 P.2d at 25.

Bailey v. Clausen, 192 Colo. 297, 557 P.2d 1207 (1976) examined C.R.S. 1963 § 87-1-3, the one-year statute of limitations applicable to sheriffs and coroners. Plaintiff below challenged the statute on constitutional grounds, specifically, Article V, Section 25 of the Colorado Constitution, as special legislation.

Affirming its holding in **McCarty v. Goldstein, supra,** this Court stated: "The classification of occupations and professions for limitation

or regulation is a matter for legislative determination." **Id.** at 1210. Additionally, the Court cited **People v. Kramer,** 15 Colo. 155, 25 P. 302 (1890) holding that a one-year statute of limitations was proper when its purpose was to prevent annoyance and injustice through the prosecution against officers of stale demands predicated upon official neglect or other misconduct.

By the holdings above, this Court has indicated its willingness to follow the general rule, allowing the Colorado legislature to impose short and class specific statutes of limitations when rationally based upon legitimate reasons and have found such statutes to withstand constitutional scrutiny when so rationally based.

Amicus curiae for the Colorado Trial Lawyers Association contends that the 1977 amendment to C.R.S. 1973 § 13-80-105(1) impermissibly discriminates between medical malpractice plaintiffs by allowing those plaintiffs with unauthorized foreign objects to be excepted from the strict three-year limitations period but not to plaintiffs' who claim negligent misdiagnosis, and that it discriminates between physician defendants on the basis of the nature the alleged wrongdoing.

On the basis of **McCarty** and other cases cited by the Colorado Trial Lawyers Association, a classification is reasonable, not arbitrary, when it is based upon substantial differences having a reasonable relation to the persons or objects dealt with.

Owens v. Brochner, supra held that the discovery rule should not be limited to foreign object and fraudulent concealment claims as asserted by the defendants in order to bar malpractice claims arising from routine

medical care and treatment including routine diagnosis. However, **Owens** arose under C.R.S. 1963 § 87-1-6 which provided only that "such action be instituted within two years after such cause of action accrued."

In 1971, the Colorado General Assembly adopted a clear discovery statute of limitations (Appendix F, p. 6) and imposed a strict six year limit running from the act or omission except for foreign objects and concealment. **(Id.)** The 1971 amendment has been upheld as constitutional in **Mishek, supra.**

It was well within the judgment of the legislature to impose an exception to the strict bar limitation period for foreign objects. The leaving of an unauthorized foreign object in a patient is not the sort of event subject to fraudulent claims. The defendant is easily identifiable, and the very event is the type of thing which does not occur in the absence of negligence most significantly, the patient has no easy means of discovering the foreign object without additional surgery, in contrast to a misdiagnosis case where a "second opinion" is easily obtainable and frequently a recommended course of treatment.

Foreign object cases are almost always settled between the parties. Reliance on medical records which have been destroyed or lost is not necessary, since only proof of the surgery, the physician and the presence of the foreign object is required.

As long as exceptions to the strict three year bar have a rational basis, are not arbitrary and are based upon substantial differences, discriminatory impact of C.R.S. 1973 § 13-80-105(1) (1982 Cum. Supp.) is permissable whether it concerns plaintiffs or defendants.

Amicus submits the legislature had ample evidence of difference before it concerning patients and physicians involving unauthorized foreign objects to enact a specific exception to the strict three year bar.

H. THE "CONTINUING TORT" DOCTRINE MAY NOT BE APPLIED TO TOLL THE RUNNING OF THE STATUTE OF LIMITATIONS IN A MISDIAGNOSIS CASE AND TO DO SO WOULD TOTALY EMASCULATE THE GENERAL ASSEMBLY'S DETERMINATION THAT A STRICT STATUTE OF REPOSE IS NECESSARY AND REASONABLE FOR CLAIMS AGINST HEALTH CARE PROVIDERS.

Amicus curiae for the Colorado Trial Lawyers Association suggests that this court should apply the "continuing tort" doctrine for purposes of tolling the running of C.R.S. 1973 § 13-80-105 (1982 Cum. Supp.) to avoid questions concerning the constitutionality of the statute in this case. This suggestion should be summarily rejected. First, to do so is wholly unnecessary since application of the statute in this case is constitutional for the reasons discussed above. Second, to do so would eviscerate the statute through a tortured application of the doctrine.

Plaintiffs' last contact with Dr. Litvak or St. Anthony's Hospital was on October 15, 1963 (No. 42, Schedule G). The continuing tort doctrine is now invoked in an attempt to show the occurrence of a wrongful act or omission within the three-year strict period. Other courts have consistently rejected this doctrine in the medical malpractice context insofar as it is invoked in an effort to avoid the running of a strict statute of limitations after termination of the physician-patient relationship.

The Washington Court of Appeals rejected this argument in **Doyle v. Planned Parenthood,** 31 Wash.App. 126, 639 P.2d 240, 241-42 (1982).

Washington's medical malpractice statute of limitations is similar to Colorado's in that it has, in effect, two applicable periods: a one-year limitations period from discovery and a three-year strict statute of repose. Plaintiff argued that the defendant (whom she last saw eight years before the filing of a lawsuit) committed a continuing tort, for statute of limitations purposes, by its failure to contact the plaintiff and warn her that an IUD inserted by the defendant should be removed. The court simply held that "[a] wrongful act cannot occur after the termination of the physician-patient relationship." **Id.,** at 242. A similar argument was rejected in both the federal and state courts of Maine. See **Clark v. Gulesian,** 429 F.2d 405 (1st Cir. 1970); **Tantisch v. Szendey,** 158 Me. 228, 182 A.2d 660 (1962).

In a false imprisonment case, the plaintiff's allegation that his continuing wrongful incarceration was a "continuing tort" for purposes of tolling the statute of limitations was rejected in **Sandutch v. Muroski,** 684 F.2d 252 (3rd Cir. 1982). Citing **Ward v. Caulk,** 650 F.2d 11444 (9th Cir. 1981), the Third Circuit Court of Appeals held:

> . . . that a "continuing violation is occasioned by continual unlawful acts, not continual ill effects from an original violation." Sandutch has not alleged unlawful acts by appellees within the limitations; rather, he has alleged continuing ill effects from pre-conviction acts. We do not think that the violation of constitutional right that Sandutch alleges is a continuing tort.

Sandutch v. Muroski, supra, at 254. The same argument was rejected by the Fourth Circuit Court of Appeals in a case involving unfair labor practices. **West v. ITT Continental Baking Co.,** 683 F.2d 845 (4th Cir. 1982).

As pointed out by the court, to apply the continuing violation doctrine would literally keep the plaintiffs' claim alive forever, and "[t]his, of course, would destroy the policies of finality and repose underlying the statute of limitations." **Id.**, at 846.

In this case, plaintiffs merely allege continuing ill effects from the alleged September/October 1963 misdiagnosis, and to allow plaintiffs to argue that their claim remained viable for each and every day during the almost sixteen-year-long period from the time Mr. Austin last saw the defendant until he actually discovered the absence of a brain tumor in June 1979 would totally undermine the interest of the public, in general, and the defendants, in particular, in the statutes of limitation and repose and render nugatory the General Assembly's legislative determination that a three-year outside limit for ascertaining the existence of medical malpractice claims, with certain narrow exceptions, is reasonable.

I. THE ISSUE OF KNOWING CONCEALMENT HAS NOT BEEN PROPERLY RAISED BY THE PARTIES TO THIS ACTION, AND IN ANY EVENT, IS INAPPLICABLE TO THE FACTS PRESENT.

The only allegation in the Complaint in this action which might conceivably raise a question of knowing concealment appears at paragraph 6:

> That upon information and belief, plaintiff was, while a patient at said Hospital and under the care of and direction of Litvak, administered certain tests at Colorado General Hospital, and which test results unknown to plaintiff, but known to both defendants, effectively established that plaintiff did not have a parasagittal meningeoma.

The allegations contained in paragraph 6 clearly fall far short of stating a claim for concealment of facts which would have led the plaintiffs to discover their cause of action. Most importantly, however, the plaintiffs have not raised the issue of knowing concealment, either in resisting the motions for summary judgment in the trial court, or before this Court.

In **Mishek,** the plaintiff specifically alleged in her complaint that the defendant had knowingly and willfully concealed from her the type and extent of medication administered to her prior to and during the birth of her child. However, she did not, in any pleadings, discovery or arguments in opposition to the defendant's moton for summary judgment, set forth specific facts showing that there was a genuine issue for trial as to the alleged concealment. In the instant case, the plaintiffs have not pleaded or argued the proposition that the defendants concealed any facts which would have led plaintiffs to discover their cause of action. Specifically, the plaintiffs have not suggested that the defendants withheld or in any way prevented the plaintiffs from obtaning the test results which they believe would have revealed that Mr. Austin did not have a parasagittal meningioma. Moreover, plaintiffs have not suggested that either defendant ever had actual knowledge that the results of certain tests which plaintiff believes were done at another hospital revealed the absence of a tumor. To the contrary, the essential allegation of this action is a negligent failure by the defendants to reach a correct diagnosis on the basis of the available information. Surely, the same allegations which charge the defendants which, in essence, a <u>negligent</u> failure

to know the true facts (misdiagnosis) for purposes of establishing liability cannot be construed to plead a knowing, intentional or willful concealment of the unknown facts for purposes of tolling the statute of limitations. If such were the case, the knowing concealment exception would apply in virtually every malpractice case if the plaintiff merely pleaded that the doctor or hospital knew what it did was wrong and failed to so inform the plaintiff. Such an interpretation would amount to judicial repeal of the statute of repose. This issue was discussed in **Schiffman v. Hospital for Joint Diseases,** 36 A.D.2d 31, 319 N.Y.S.2d 674 (1971), where the plaintiff alleged defendants had misread biopsy slides, resulting in injury from unnecessary radiation therapy. Plaintiff did not contend that the biopsy slides were inaccessible to him or that they were knowingly concealed. The Court emphasized the presumption that the lapse of time indicates a party's disinclination to pursue an action, "since the fair intendment of the complaint is that defendants were ignorant of the negligence charged." 319 N.Y.S.2d at 678.

This Court held in **Mishek** that the mere allegatons of concealment in the complaint were insufficient to raise an issue of fact which would preclude the summary judgment. The plaintiffs in this action have not raised even a "mere allegation" of knowing concealment.

The Colorado Trial Lawyers Association, amicus curiae, argues that the allegations contained in paragraph 6 of the Complaint must be accepted as true for the purposes of this motion for summary judgment, and that these allegations raise an issue of material fact for trial. This contention obviously contravenes the holding in **Mishek,** but more impor-

tantly, it sets forth an issue which has not been properly raised by the parties to this action. The appellate courts consider only questions properly raised by the appealing parties, and additional issues presented in an amicus curiae brief are not considered. **Denver United States National Bank v. People ex rel. Dunbar,** 29 Colo. App. 93, 480 P.2d 849 (1970). The plaintiffs here have at no time alleged or argued that the defendants knowingly concealed their cause of action from them. As such, this issue is not properly presented on review.

For all the foregoing reasons, the bar of the statute of limitations is not affected in this case by any allegation of knowing concealment.

J. THE FOREIGN OBJECT EXCEPTION TO C.R.S. 1973 § 13-80-105 (1982 CUM. SUPP.) IS INAPPLICABLE IN THIS ACTION.

The plaintiffs have raised the defense to the bar of the statute of limitations that an unauthorized foreign object was left in Mr. Austin's body. In their Complaint, plaintiffs alleged that defendant Litvak carried out a diagnostic surgical procedure, in the course of which it was necessary to drill an opening in Mr. Austin's skull, and then to replace the bone so removed with a metal screen. In the plaintiffs' view, this fact calls into play the exception to the strict rule of the statute of limitations, which provides that if the negligent act or omission consisted of leaving an unauthorized foreign object in the body of the patient, then the action may be instituted within two years after the person bringing the action discovered, or in the exercise of reasonable dili-

gence and concern should have discovered, the act or omission. At the very least, plaintiffs contend a question of fact is raised as to whether the placement of the metal screen was "unauthorized" by reason of the plaintiffs' argument that this procedure was unnecessary because plaintiff did not in fact have a parasagittal meningeoma.

This statutory exception applies only where the negligent act of which the plaintiff complains is the act of leaving an unauthorized foreign object in the patient's body. In that event, the action may be instituted within two years after the plaintiff discovered the act of placing the unauthorized foreign object. In the first instance, the negligence complained of in this action is not the replacement of bone removed for the testing procedure with a metal screen, but the alleged misdiagnosis of a brain tumor. Furthermore, the record in this case contains no indication whatsoever that the plaintiff was unaware in October 1963 that the metal screen had been placed in his skull. Therefore, even if the discovery rule were applied to this "foreign object," the plaintiff's action would have been barred two years after he discovered the existence of the metal screen in his body, or in October 1965.

The district court specifically found in granting summary judgment to defendant Litvak that the insertion of the metal screen in the plaintiff's head in 1963 was not the leaving of an unauthorized foreign object, and that the insertion of the metal screen was known to the plaintiff in 1963.

It is submitted that the trial court was correct in determining that the placement of the metal screen did not constitute the leaving of

an unauthorized foreign object, as a matter of law. Although no Colorado case law is found defining "an unauthorized foreign object," the cases and statutes which do discuss this issue uniformly hold that the discovery occurs, and the two year statute of limitations begins to run, at the time when the patient discovers that a foreign object has been left in his body. **Rosane v. Senger, supra; Davis v. Bonebrake,** 135 Colo. 506, 313 P.2d 982 (1957); **Hill v. Clarke,** 241 S.E.2d 572 (W. Va. 1978); **Myrick v. James,** 444 A.2d 987 (Me. 1982); **Landgraff v. Wagner,** 26 Ariz. App. 49, 546 P.2d 26 (1976).

Several states define the term "foreign object" within their statutes of limitations. For example, Wisconsin and California refer to a "foreign object which has no therapeutic or diagnostic purpose or effect". Wis. Stats. § 893.55; Cal. Code Civ. Proc. § 340.5. In New York, for the purpose of the statute of limitations, foreign objects do not include chemical compounds, fixation devices or prosthetic aids or devices. N.Y. C.P.L.R. § 214a.

It is clear that the foreign object exception is intended to apply to the inadvertent, accidental or unintentional leaving of an object in the body. The foreign objects typically involved in such cases include surgical gauze, surgical clamps, injection needles, surgical tubing and the like. The metal screen in the plaintiffs' case was in no sense inadvertently left in his body, but was necessarily and deliberately placed to replace bone that had been drilled during the surgical diagnostic procedure.

Objects intended to be left in a patient's body are neither "unauthorized" nor "foreign" objects within the meaning of C.R.S. 1973 § 13-80-105(1) (1982) Cum. Supp.) **Weber v. Scheer,** 395 N.Y.S.2d 183 (N.Y. App. 1977). A fixation device, intentionally placed, does not constitute an unauthorized foreign object for purposes of tolling the statute of limitations. **Cooper v. Edinbergh,** 427 N.Y.S.2d 810 (N.Y. App. 1980); **Shannon v. Tornton,** 155 Ga.App. 670, 272 S.W.2d 535 (1980).

When the gravamen of the complaint is negligent misdiagnosis, the foreign object exception is inapplicable. In **Soto v. Greenpoint Hospital,** 429 N.Y.S.2d 723 (1980), the action was based on the physician's failure to detect a small toy which had been aspirated into a child's esophagus. The New York court held that the foreign object exception does not apply in cases where the action is based exclusively on diagnostic judgment or discretion.

Schiffman v. Hospital for Joint Diseases, supra similarly held the foreign object discovery rule not applicable to a case in which the misreading of biopsy slides caused a mistaken diagnosis of a maglignancy and damage from unnecessary radiation therapy.

Clearly, an object such as the metal screen placed in the plaintiff's head as part of the diagnostic surgery and known to the plaintiff from the time of its insertion is not an "unauthorized foreign object" for purposes of the exception to the strict rule in the Colorado statute of limitations.

Additionally, the plaintiff has not alleged in the complaint, answers to interrogatories or the briefs that the existence of the metal

screen has caused him damage. The damages alleged in the Complaint at paragraph 14, needless harm, apprehension, damages, loss of earnings, and a total change of living, are claimed to result from the misdiagnosis of the brain tumor. Finally, it should be mentioned that amicus for the Colorado Trial Lawyers Association, suggests that there is a genuine issue of fact whether the metal screen was an unauthorized foreign object because defendant Litvak failed to obtain informed consent for its placement. This, again, is an issue raised for the first time in the amicus brief, and nowhere in the record has the plaintiff alleged that he did not consent to this surgical procedure at the time it was done, or that lack of informed consent is an element of this action.

Further, the suggestion of amicus that the misdiagnosis claim may be construed to state a claim of failure to obtain an informed consent thereby making the placement of the screen "unauthorized" is contrary to law. Misdiagnosis allegations only state claims of negligence and have not been construed to fit within the narrow limits of an informed consent claim. **Gates v. Jenson,** 20 Wash. App. 81, 579 P.2d 374 (1978). To allow otherwise would be to require a physician to disclose every conceivable risk and alternative associated with his diagnosis including the risk of misdiagnosis. This standard has been expressly rejected by the Colorado Court of Appeals. **Stauffer v. Karabin,** 30 Colo. App. 357, 492 P.2d 861 (1971).

CONCLUSION

For the reasons above-stated, Amicus Curiae for the Colorado Defense Lawyers Association respectfully requests this Honorable Court to affirm the constitutionality of the three-year strict bar contained in C.R.S. 1973 § 13-80-105, to hold that neither of the exceptions to that bar applies to this case, and to enter its Order affirming the trial court's rulings with respect to defendants' Motions for Summary Judgment.

Respectfully submitted,

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CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing Amicus Curiae Brief of the Colorado Defense Lawyers Association was sent by United States mail, postage prepaid, this 9th day of January, 1983, to:

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