APPENDIX 2
BRIEF OF AMICUS CURIAE INDIANA STATE MEDICAL ASSOCIATION*

THE MEDICAL MALPRACTICE ACT STATUTE OF LIMITATIONS IS CONSTITUTIONAL

A. Procedural Background.

Since 1881, the Indiana General Assembly has provided that "actions for injuries to person or character shall be commenced within two years after the cause of action has accrued." The current general tort liability statute is found at Ind. Code 34-1-2-2. In 1941, to clear up confusion as to whether actions against physicians for malpractice sounded in contract or tort, the legislature amended Ind. Code 34-1-2-2 by providing a single limitations period for malpractice actions against physicians. It provided that "no action of any kind for damages based upon professional services rendered or which should have been rendered, shall be brought against physicians... unless said action is filed within two years from the date of the act, omission or neglect complained of." Ch. 116, § 1 (Acts 1941). This provision was retained and incorporated in Indiana's Medical Malpractice Act, as Ind. Code 34-4-19-1 (West. Annot. Code 1971), and is now found at Ind. Code 27-12-7-1. Thus, Indiana has had a two year occurrence statute of limitations for physicians for over 55 years.

Since it was enacted, the Indiana Supreme Court has repeatedly reviewed and affirmed the constitutionality of the Medical Malpractice Act, including its statute of limitations. In Johnson v. St. Vincent Hospital, 273 Ind. 374, 404 N.E.2d 585 (1980), as in other cases discussed below, Justice DeBruler upheld the statute's constitutionality, finding that it was enacted in response to critical problems affecting the public health and welfare. "Services of health care providers were being threatened and curtailed contrary to the health interests of the community because of the high cost and unavailability of liability insurance." Id. at 594. The legislative scheme includes a patient compensation fund, funded by physician surcharges and providing a government sponsored risk spreading mechanism for the benefit of malpractice claimants. Id. at 601.

Indiana courts are particularly reluctant to strike down statutes which courts have long held to be constitutional, Illinois Steel Co. v. Fuller, 216 Ind. 180, 23 N.E.2d 259 (1939); Strube v. Sumner, 385 N.E.2d 948, 950 (Ind. App. 1978), app. dismissed, 444 U.S. 1063, 100 S.Ct. 1002, 62 L.Ed.2d 745. Nevertheless, in amicus briefs filed in opposition to transfer in Martin v. Richey, 674 N.E.2d 1997 (Ind.Ct.App. 1997), the Indiana Trial Lawyers Association attacked the legitimacy of Johnson and its progeny. They argue that the statute as applied to persons who have not discovered their injuries within the 2-year period violates both Article I, 12 and I, 23 of the Indiana Constitution. Their arguments have no merit.

---

* In support of petition to transfer, Martin v. Richey, 674 N.E.2d 1015 (Ind. Ct. App. 1997). The *Indiana Law Review* editorial staff did not edit this Brief. It is printed here in its original form.

B. Martin v. Richey Ignores and Contravenes Case Law Interpreting Article I, § 12 of the Indiana Constitution.

Article I, § 12 provides as follows:

> All courts shall be open; and every person, for injury done to him in his person, property, or reputation, shall have remedy by due course of law. Justice shall be administered freely, and without purchase, completely, and without denial; speedily, without delay.

Prior decisions of the Indiana Supreme Court and Court of Appeals which have considered challenges to the constitutionality of I.C. 27-12-7-1 on the basis of Article I, § 12 have uniformly upheld its validity. See, Cha v. Warnick, 467 N.E.2d 109 (Ind. 1985); Johnson v. St. Vincent Hospital, supra; Ledbetter v. Hunter, 652 N.E.2d 543, 547-48 (Ind. App. 1995); and Toth v. Lenk, 164 Ind. App. 618, 330 N.E.2d 336 (1975). See, also, Carmichael v. Silbert, 422 N.E.2d 1330 (Ind.App. 1981), finding the statute of limitations does not violate the due process clause of the Fourteenth Amendment.

During the same period, the Court upheld other occurrence statutes of limitations against Article I, § 12 challenges, including Bunker v. National Gypsum Company, 441 N.E.2d 8 (Ind. 1982)(three-year statute of repose from the date of exposure to asbestos); Woolworth v. Lilly Industrial Coatings, 446 N.E.2d 646 (Ind. App. 1983) (two year statute for latent diseases); Beecher v. White, 447 N.E.2d 622 (Ind. App. 1983)(ten year statute for deficiencies in improvements to real property); and Dague v. Piper Aircraft, 275 Ind. 520, 418 N.E.2d 207 (1981)(products liability ten year statute of repose).

The Court of Appeals decision in Martin v. Richey, supra, ignored this entire body of law, engaging instead in a flawed analysis of the "original intent" of its drafters.

C. Martin v. Richey Is Based Upon An Inaccurate and Incomplete Historical Review.

There is no record of what the 1850 convention delegates intended by enacting Article I, § 12 as part of the 1851 Constitution. A semi-colon to which the Martin opinion attributes great significance, was in fact a grammatical change made by the style committee. That committee reported that its changes did not affect the "sense" or substance of the article. There was no debate or comment made by the delegates regarding the revisions to Section 12.

The Martin decision also erroneously concludes that the addition of the language "justice shall be administered...completely and without denial" was intended to create a constitutional right to a "complete" remedy for all torts and was intended to prohibit any alteration of common law causes of action. There is no historic basis for such a surmise. No debates or reports exist which reveal the intent of the drafters of either the 1816 or 1851 versions of this provision. The original "open courts" clause (Article I, section 11 of the 1816 Constitution) copied similar language from founding documents of other states, including the Pennsylvania Declaration of Rights. Barnhart, Valley of Democracy 188-192

(1970); Bauman, Remedies Provisions in State Constitutions, 26 Wake Forest L.R. 237, 285-287 (1991).

Two committees of the 1850 constitutional convention drafted Article I, § 12, inserting language from Coke's seventeenth-century "reinterpretation" of Ch. 40 of the Magna Carta. Hoffman, By the Course of Law: The Origins of the Open Courts Clause of State Constitutions, 74 Oregon L.R. 1279, 1286-1298 (1995). Hoffman notes that Coke's language "does not support the interpretation that the court must fashion a remedy to vindicate every right. Rather, it describes how such remedies shall be administered by the courts: 'freely without sale, fully without any denial, and speedily without delay,' and 'by the course of the Law." Id. at 1294. "Nothing in [scholarly research has provided] any historical indication that Coke was concerned with the 'right to a remedy'...much less that such a concern ever entered the minds of the drafters of the state constitutions." Id. at 1290. The language of this clause of Article I, § 12 clearly applies to the "administration of justice" by the judiciary, not to regulation of legislative power.

D. Martin Erroneously Interprets Article I, § 12 To Prohibit the Legislature from Limiting Common Law Causes of Action.

Until the Martin decision, Indiana courts consistently upheld the authority of the legislature to alter common law rights and remedies. Cases dating from the last century, when judges would have been more familiar with the thinking of the Constitution's framers, uniformly reject the proposition that the Indiana Constitution hobbles the legislature's power to alter or abolish common law rights and remedies. See, e.g., Dinckerlocker v. Marsh, 75 Ind. 548 (1881); May v. State, 133 Ind. 567, 33 N.E. 352 (1892); and High, et al. v. Board of Commissioners of Shelby County, 92 Ind. 580, 590 (1883). This principle was recently reaffirmed in State v. Rendleman, 603 N.E.2d 1333, 1336-1337 (Ind. 1992).

The common law, created by successive judicial decisions in the context of specific cases, has been lauded for its adaptability. "It has always been understood that common law evolves over time to meet the demands of the day, in what Justice Brent E. Dickson has called: 'the march of Indiana common law.'" Shepard, The Importance of Legal History for Modern Lawyering, 30 Ind. Law Review 2 (1997). Had the delegates to the 1850 constitutional convention intended to preserve as inalienable the common law as it then existed, they surely would have done so clearly and unambiguously.[1]

Nelson v. Krusen, 678 S.W.2d 918 (Tex. 1984), which Martin makes its rule of decision, relies on a substantive due process analysis that both Indiana and the majority of other states have rejected. Nelson v. Krusen, at 921, holds that the Texas Constitution creates a "substantial right" to a remedy. However, Indiana

---

1. Instead, they were critical of the delay and expense caused by arcane forms of pleading, unpredictability of "judicial legislation," and the lack of access to judicial opinions. See, 2 Debates in Indiana Convention, 1850, 1715, 1737, 1741-2, 1747, 1750, 1759.

courts have consistently held to the contrary.

> There is no vested or property right in any rule of the common law, and the right to bring a common law action is not a fundamental right.

Scalf v. Berkel, 448 N.E.2d 1201, 1203 (Ind. App. 1993). See, also, Sidle v. Majors, 264 Ind. 206, 341 N.E.2d 763, 774 (1976); and Jamerson v. Anderson Newspapers, 469 N.E.2d 1243 (Ind.App. 1984).

Soundly reasoned decisions in other jurisdictions have rejected the rationale borrowed from Texas by the Martin court. See, Green v. Siegel, Barnett & Schultz, 557 N.W.2d 396 (S.D. 1996); Sanborn v. Greenwald, 39 Conn.App. 289, 664 A.2d 803 (1995), cert.denied; Choroszy v. Tso, 647 A.2d 803 (Me. 1994); and cases found in Appendix A attached hereto. If a "more fair method" for a limitations period would be to lengthen the period of time or adopt a discovery rule, the legislature should make this determination, as these arguments are "public policy considerations within the domain of the Legislature to address and modify if it deems such action to be in the public welfare." Green v. Siegel, Barnett & Schultz, supra, 557 N.W. 2d at 404.

E. Martin v. Richey Violates Canons of Constitutional Interpretation.

> It is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers, and its acts to be considered as void. The opposition between the constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other.

Fletcher v. Peck, 6 U.S. (Cranch.) 87 (Marshall, C. J.), quoted in Lafayette, Muncie & Bloomington R.R. Co. v. Geiger, 34 Ind. 185, 199-200 (1870). See, also Warren v. Indiana Telephone Co., 217 Ind. 93, 26 N.E.2d 399, 403 (1940)(modification of common law rights is a matter of legislative, not judicial wisdom).

The Martin v. Richey majority ignores this rule of deference, going out of its way to declare the statute unconstitutional. It pays lip service to rules of self-restraint requiring resolution of appeals on non-constitutional grounds, id. at 1022, but then finds the presence of factual issues regarding fraudulent concealment--which would toll the statute of limitations, render the constitutional issues moot, and dictate reversal of summary judgment on those grounds. Id. at 1027-1029. Since it could resolve the appeal on that narrow basis, it was unnecessary and improper for the Martin court to reach any constitutional issues.

F. Martin Misapplies Collins v. Day in Finding a Violation of the Privileges and Immunities Clause.

Article I, § 23 of the Indiana Constitution provides:

> The general assembly shall not grant to any citizen, or class of citizens,

> privileges or immunities which, upon the same terms, shall not equally belong to all citizens.

The analytical framework articulated in Collins v. Day, 644 N.E.2d 72 (Ind. 1994) focuses on classifications based on a group's "inherent characteristics." Historically, statutory classifications based on race, gender, illegitimacy, and other "inherent" group characteristics have been challenged under the Fourteenth Amendment to the federal constitution. Such classifications triggered a heightened scrutiny, while economic and other types of legislative classification were analyzed using a rational basis test. See, e.g., Kadrimas v. Dickinson Public Schools, 487 U.S. 450, 459 (1988); Bowers v. Hardwick, 478 U.S. 186, 189 (1986).

In Collins v. Day, this court articulated a two-prong test for measuring statutory classifications against Indiana's privilege and immunities clause:

> First, the disparate treatment accorded by the legislature must be reasonably related to inherent characteristics which distinguish the unequally treated classes. Second, the preferential treatment must be uniformly applicable and equally available to all persons similarly situated. Id. at 80.

Appellate decisions applying the Collins tests, except for Martin and Harris v. Raymond, 680 N.E.2d 551 have not found violations of Article I, § 23. See, e.g., American Legion Post #113 v. State, 656 N.E.2d 1190 (Ind.App. 1995), trans. denied; Indiana High School Athletic Ass'n v. Avant, 650 N.E.2d 1164 (Ind.App. 1995), trans. denied; Dillon v. Chicago South Shore & South Bend Ry. Co., 654 N.E.2d 1137 (Ind.App. 1995), reh. denied, trans. denied; and McIntosh v. Melroe Co., (Ind.App. 1997), trans. denied.

Martin reluctantly upholds the validity and rationality of the Medical Malpractice statute of limitations, finding that "the classification is reasonably related to the goal of maintaining sufficient medical treatment and controlling malpractice insurance costs." Id. at 1022. However, it misapplies the second part of the Collins test, that the "preferential treatment must be uniformly applicable and equally available to all persons similarly situated." In Person v. State, 661 N.E.2d 587, 592 (Ind. App. 1996), trans. denied, Judge Riley for the court correctly applied this test in considering challenges to two different criminal statutes. Both laws prohibit carrying weapons without a license; however, the punishment for those under 18 is automatic and more severe than the adult penalty. The Person court found no disparate treatment: one law applied to all those under 18 and the other applied to those 18 and over. Similarly, the medical malpractice statute of limitations does not distinguish between medical malpractice and other tort plaintiffs or defendants. Rather, it establishes a two-year time after which, absent equitable tolling, causes of action for medical malpractice are time-barred for everyone.

> It has been argued that all members of the class are not treated equally because those who do not discover the malpractice within the two years are barred from filing claims while those who do dis cover the malpractice within two years are allowed to proceed with their claims.

> This is not different treatment because all malpractice claimants have two years from the date of the occurrence to file a claim.

Johnson v. Gupta, 682 N.E.2d 827, 831 (Ind. Ct. App. 1997)(reaffirming that Ind. Code 27-12-7-1 is consistent with both Article I, 12 and Article I, 23 of the Indiana Constitution). Similarly, the ten-year statute of repose for product liability actions, Ind. Code 33-2-2.5-5(b) was recently found to satisfy the second prong of the Collins test in McIntosh v. Melroe Co., 682 N.E.2d 822 (Ind. Ct. App. 1997), trans. denied.

Even assuming that the two different statutes of limitations for health care providers and other potential tortfeasors creates a "privilege" or "immunity," it is reasonably related to the purpose of the classification. Health care providers possess the inherent distinguishing characteristic of working in the field of medicine, thus exposing themselves to professional malpractice claims, and requiring expensive malpractice insurance in order to continue their work. Providing a clear cut-off date for filing claims against such providers is rationally related to the Act's purpose of making affordable malpractice insurance available, so that physicians can continue to provide services to the public.

Conclusion

Recognizing that "considerable deference should be accorded the manner in which the legislature has balanced the competing interests involved," Johnson v. St. Vincent Hospital held the medical malpractice two year statute of limitations was consistent with both section 12 and 23 of Article I. Subsequent decisions have confirmed that the statute is consistent with due process and equal protection.

EICHHORN & EICHHORN

By: _____

David C. Jensen (#4893-45)
Sherry L. Clarke (#3928-45)
200 Russell Street
Hammond, Indiana 46320
Telephone: (219) 931-0560

OTHER JURISDICTIONS - CASES HOLDING STATUTES CONSTITUTIONAL

Alabama - Bowlin Horn v. Citizens Hospital, 425 So.2d 1065 (Ala. 1982); Reese v. Rankin Fite Memorial Hospital, 403 So.2d 158 (Ala. 1981); Sellers v. Edwards, 265 So.2d 438 (Ala. 1972).

Arkansas - Owen v. Wilson, 260 Ark. 21, 537 S.W.2d 543 (1976).

California - Kite v. Campbell, 142 Cal. App. 3d 793, 191 Cal. Rptr. 363 (1983).

Colorado - Adams v. Richardson, 714 P.2d 921 (Col. App. 1986); McCarty v. Goldstein, 151 Col. 154, 376 P.2d 691 (1962).

Delaware - Dunn v. St. Francis Hospital, 401 A.2d 77 (Del. 1979); Reyes v. Kent General Hospital, 487 A.2d 1142 (Del. 1984).

Florida - Doe v. Shands Teaching Hospital & Clinics, Inc., 614 So.2d 1170 (Fla. App. 1993), cert. den., 626 So.2d 204 (Fla.); Kush v. Lloyd, 616 So.2d 415 (Fla. 1992); Public Health Trust of Dade County v. Menendez, 584 So.2d 567 (Fla. 1991).

Georgia - Craven v. Lowndes County Hospital Authority, 263 Ga. 656, 437 S.E.2d 308 (1993); Hanflik v. Ratchford, 848 F. Supp. 1539 (N.D. Ga. 1994), aff'd, 56 F.3d 1391 (11th Cir. 1995).

Idaho - Holmes v. Iwasa, 104 Idaho 179, 657 P.2d 476 (1983); Hawley v. Green, 117 Ida. 498, 788 P.2d 1321 (1990).

Illinois - Anderson v. Wagner, 79 Ill.2d 295, 402 N.E.2d 560 (1979); Mega v. Holy Cross Hospital, 111 Ill. 2d 416, 490 N.E.2d 665 (1986).

Iowa - Koppes v. Pearson, 384 N.W.2d 381 (Iowa 1986); Fitz v. Dolyak, 712 F.2d 330 (8th Cir. 1983).

Kansas - Stephens v. Snyder Clinic Ass'n, 230 Kan. 115, 631 P.2d 222 (1981); Wheeler v. Lenski, 658 P.2d 1056 (Kan. App. 1983); Marzolf v. Gilgore, 924 F. Supp. 127 (D. Kan. 1996).

Louisiana - Crier v. Whitecloud, 496 So.2d 305 (La. 1986); Whitnell v. Silverman, 686 So.2d 23 (La. 1996); Montajino v. Canale, 792 F.2d 554 (5th Cir. 1986).

Maine - Choroszy v. Tso, 647 A.2d 803 (Maine 1994); Dasha v. Maine Medical Center, 918 F. Supp. 25 (D. Me. 1996).

Maryland - Hill v. Fitzgerald, 304 Md. 689, 501 A.2d 27 (1985).

Minnesota - Willette v. The Mayo Foundation, 458 N.W.2d 120 (Minn. App. 1990); Jewson v. Mayo Clinic, 691 F.2d 405 (8th Cir. 1982).

Missouri - Wheeler v. Briggs, 941 S.W.2d 512 (Mo. 1997); Ross v. Kansas City Gen Hospital & Medical Center, 608 S.W.2d 397 (Mo. 1980); Laughlin v. Forgrave, 432 S.W.2d 308 (Mo. 1968); Miguel v. Lehman, 902 S.W.2d 327 (Mo. App. 1995); Green v. Washington University Medical Center, 761 S.W.2d 688 (Mo. App. 1988).

Nebraska - Colton v. Dewey, 212 Neb. 126, 321 N.W.2d 913 (1982); Schendt v. Dewey, 246 Neb. 573, 520 N.W.2d 541 (Neb. 1994).

New Mexico - Armijo v. Tandysh, 98 N.M. 181, 646 P.2d 1245 (App. 1981), cert. quashed, 98 N.M. 336, 648 P.2d 794; cert. denied, 459 U.S. 1016 (1982).

North Carolina - Roberts v. Durham County Hospital Corp., 56 N.C.App. 533, 289 S.E.2d 875 (1982), cert. denied, 307 N.C. App. 465, 298 S.E.2d 384 (1983); Walker v. Santos, 70 N.C. App. 623, 320 S.E.2d 407 (1984); Barwick v. Celotex Corp., 736 F.2d 946 (4th Cir. 1984).

Oklahoma - Rosson v. Coburn, 876 P.2d 731 (Oka. App. 1994).

Rhode Island - Dowd v. Rayner, 655 A.2d 679 (R.I. 1995).

South Carolina - Hoffman v. Powell, 298 S.C. 338, 380 S.E.2d 821 (1989); Smith v. Smith, 291 S.C. 420, 354 S.E.2d 36 (1987).

Tennessee - Harrison v. Schrader, 569 S.W.2d 822 (Tenn. 1978); Burris v. Ikard, 798 S.W. 2d 246 (Tenn. App. 1990).

Utah - Allen v. Intermountain Health Care, 635 P.2d 30 (Utah 1981).

Washington - Duffy v. King Chiropractic Clinic, 17 Wash. App. 693, 565 P.2d 435 (1977).

Wisconsin - Mill by Sommer v. Kretz, 191 Wis.2d 574, 531 N.W.2d 93 (1995); Halverson v. Tydrich, 156 Wis.2d 202, 456 N.W.2d 852 (1990).