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LIMITATION OF ACTIONS — NEGLIGENCE: NORTH DAKOTA MALPRACTICE STATUTE OF LIMITATIONS IS LIMITED IN SCOPE

In 1980, Berger Electric, Inc., planned, constructed and installed an electrical heating system in the home of Wayne and Diane Jilek.¹ Approximately five years later, the Jileks discovered that the heating system had caused substantial damage to their home.² The Jileks commenced suit on June 27, 1986, against Berger Electric, claiming that Berger Electric violated the terms of its contract and breached the implied warranty of fitness for the purpose intended by failing to plan and install an adequate heating system.³ Berger Electric moved for summary judgment, asserting that the Jileks' claim was essentially a professional malpractice claim and was, therefore, barred by the two-year professional malpractice statute of limitations.⁴ The trial court granted summary judgment, reasoning that because Berger Electric's employee was licensed by the state as a master electrician, he was therefore a professional entitled to the protection of the two-year professional malpractice statute of limitations.⁵ The Jileks appealed from the

1. *Jilek v. Berger Elec., Inc.*, 441 N.W.2d 660, 661 (N.D. 1989). Berger Electric inserted "heat strips," an innovative new heating system, which was installed above the sheetrock ceilings to transfer heat into the rooms. Appellant's Brief at 2, *Jilek v. Berger Elec., Inc.*, 441 N.W.2d 660 (N.D. 1989) (No. 340CV86).

2. *Jilek*, 441 N.W.2d at 661. The heating strips operated at temperatures which were too high for the sheetrock to withstand. Appellant's Brief at 2-3, *Jilek v. Berger Elec., Inc.*, 441 N.W.2d 660 (N.D. 1989) (No. 340CV86). The extremely high temperatures eventually deteriorated the sheetrock, and the Jileks were forced to replace most of their ceiling. *Id.*

3. *Jilek*, 441 N.W.2d at 660-61. The Jileks also submitted a claim for mental anguish and suffering. *Id.*

4. *Id.* at 661. See N.D. CENT. CODE § 28-01-18(3) (Supp. 1989) (professional malpractice actions must generally be commenced within two years after the claim for relief has accrued). Berger Electric had previously moved for summary judgment on the grounds that claims for negligent breach of contract are not recognized under North Dakota law, that the contract claim was barred by a four-year statute of limitations, and that no basis for relief existed concerning the claim for mental anguish. *Jilek*, 441 N.W.2d at 661. Upon hearing argument, the trial court had granted summary judgment on the mental anguish claim. *Id.* However, the court had denied the motion for summary judgment regarding the breach of contract and negligence claims. *Id.*

5. *Id.* The trial court found that the duty of care for a master electrician was the same as the standard for an attorney or physician. *Jilek v. Berger Elec., Inc.*, No. 340CV86 slip op. at 4 (Stark County Dist. Ct. Nov. 1, 1988) (order granting summary judgment). The trial court therefore found that the two-year malpractice statute of limitations applied to master electricians. *Id.* See N.D. CENT. CODE § 28-01-18(3) (Supp. 1989) (professional malpractice statute of limitations). Section 28-01-18(3) of the North Dakota Century Code provides in relevant part:

The following actions must be commenced within two years after the claim for relief has accrued:

3. An action for the recovery of damages resulting from malpractice; provided, however, that the limitation of an action against a physician or licensed hospital will not be extended beyond six years of the act or omission of alleged malpractice by a nondiscovery thereof unless discovery was

summary judgment, contending that their claim was not barred by the two-year professional malpractice statute of limitations because that statute does not apply to electricians.⁶ The North Dakota Supreme Court reversed and remanded, *holding* that the Jileks' claim was not barred by the two-year professional malpractice statute of limitations because electricians are not professionals for purposes of the professional malpractice statute of limitations.⁷ *Jilek v. Berger Elec., Inc.* 441 N.W.2d 660 (N.D. 1989).

At common law, there was generally no specified period of time within which a claimant was required to bring suit.⁸ However, courts did invoke a presumption that if the aggrieved party failed to file suit in a timely manner, the dispute has been settled or discharged by the parties themselves.⁹ Thus, in order to have a stale claim heard before a court, the aggrieved was required to provide good reason why the suit had not been brought with greater expediency.¹⁰ In an attempt to balance the need for fairness to aggrieved parties with the need for judicial efficiency, courts frequently barred cases which had not been timely filed.¹¹

Because the courts' justifications for barring stale claims resulted in a lack of uniformity, legislative intervention was needed to enact uniform statutes of limitation.¹² Considerations in enacting statutes of limitation revolve around issues of "fair-

prevented by the fraudulent conduct of the physician or licensed hospital. This limitation is subject to the provisions of section 28-01-25.

Id.

6. *Jilek*, 441 N.W.2d at 661. On appeal, the Jileks argued that the appropriate statute of limitations was the six-year statute of limitations for nonprofessional negligence. *Id.* See N.D. CENT. CODE § 28-01-16 (Supp. 1989) (general statute of limitations for contractual and negligence claims).

7. *Jilek*, 441 N.W.2d at 663. The North Dakota Supreme Court concluded that electricians are tradespersons, not professionals. *Id.* The court concluded that the two-year malpractice statute of limitations applies only to persons practicing professions. *Id.* See N.D. CENT. CODE § 28-01-18(3) (Supp. 1985) (for the text of section 28-01-18(3) of the North Dakota Century Code, see *supra* note 5). The court stated that because electricians practice a trade, the two-year malpractice statute of limitations does not apply to electricians. *Id.* Instead, the court stated, the six-year statute of limitations for nonprofessional negligence applies to electricians and other tradespersons. *Id.* See N.D. CENT. CODE § 28-01-18(3) (Supp. 1985) (for the full text of § 28-01-18(3), see *supra* note 5).

8. 51 AM. JUR. 2D *Limitation of Actions* § 1 (1970).

9. See *id.* (common time limitation actually imposed by the courts was the duration of the aggrieved party's life).

10. 51 AM. JUR. 2D *Limitation of Actions* § 7 (1970).

11. Annotation, *Limitations — Accountant's Negligence*, 26 A.L.R. 3d 1438, 1440 (1970). Professional negligence is governed by dual policy considerations. *Id.* Balance must be made between subjecting the professionals to stale lawsuits and protecting patients and clients from losing their respective rights by undiscoverable means. *Id.*

12. 51 AM. JUR. 2D *Limitation of Actions* § 9 (1970). Statutory enactments for shorter limitations periods are usually linked to particular actions or situations. *Id.* at § 11. For example, executors and administrators of estates are protected by a shorter statutory period to more expediently ascertain claims against the deceased. *Id.*

ness."¹³ Fairness requires that an aggrieved party have a reasonable time to bring a claim.¹⁴ Claims which, by their nature, are discovered longer after the injury has occurred require longer statutes of limitation than those claims which are realized almost immediately.¹⁵ However, fairness also requires that disputes be litigated while physical evidence is still available and testimonial evidence is still somewhat reliable.¹⁶

The North Dakota legislature has enacted a statute of limitations for malpractice actions.¹⁷ Section 28-01-18(3) of the North Dakota Century Code provides that malpractice actions must be brought within two years after the claim for relief has accrued.¹⁸ Although the malpractice statute makes specific references to physicians and licensed hospitals, the legislature did not specify who might be subject to malpractice actions.¹⁹

North Dakota has previously expanded the concept of "malpractice" beyond physicians for purposes of the professional malpractice statute of limitations.²⁰ In *Johnson v. Haugland*,²¹ the North Dakota Supreme Court had the opportunity to decide whether the malpractice statute of limitations applied to attorneys.²² The court first decided that the action in question must be professional in nature to be governed by the malpractice statute of limitations.²³ The court found that the term "malpractice" meant the failure of a person to perform professional services with the degree of skill and learning commonly applied by another reputable professional member of the community in the same or similar circumstances, resulting in loss or damage.²⁴ The court then

13. 51 AM. JUR. 2D *Limitation of Actions* § 17 (1970). The primary purpose of a statute of limitations is to require litigation within a reasonable time so that the defendant has an adequate opportunity to defend the suit. *Id.*

14. *Id.* Reasonable times vary with the reasonableness of the injured party ascertaining the injury, taking into consideration the difficulty of discovery of the cause of action. *Id.*

15. *See id.* at § 31-36.

16. *Id.* at § 17. Limitation of actions are to insure repose and to require bringing suit before the evidence has deteriorated to the point of unusefulness. *Id.* (citing *Burnett v. New York Central R.R. Co.*, 380 U.S. 424, 428 (1965)).

17. N.D. CENT. CODE § 28-01-18(3) (Supp. 1989).

18. *Id.*

19. *See* N.D. CENT. CODE § 28-01-18(3) (Supp. 1989) (no definition for "malpractice" appears in the statute, although physicians and licensed hospitals are mentioned by name).

20. *See* *Johnson v. Haugland*, 303 N.W.2d 533, 539 (N.D. 1981) (holding that lawyers were professionals within the meaning of the professional malpractice statute of limitations).

21. 303 N.W.2d 533 (N.D. 1981).

22. *Johnson v. Haugland*, 303 N.W.2d 533, 536 (N.D. 1981).

23. *Id.* at 538. The court noted that the allegations were in the specific context of the attorney/client relationship. *Id.* Such action was professional in nature, resulting from a duty to exercise professional skill and judgment. *Id.*

24. *Id.* (citing *Websters Third New Int. Dictionary* (unabr. 1971)).

decided that the actual nature of the action, rather than the form of the remedy, is the appropriate inquiry in determining whether an act constitutes malpractice.²⁵ Therefore, whether the claim is made on a contractual basis or a tortious basis is of no consequence if the nature of the claim is breach of a professional duty.²⁶ The court stated that a breach of professional duty results in application of the two-year statute of limitations, accruing at the time the injurious act could reasonably be discovered.²⁷ The appellant's claim against the attorneys was found to be professional in nature and, therefore, was barred by the two-year malpractice statute of limitations.²⁸

Examining claims against "professionals" other than doctors and lawyers, the North Dakota Supreme Court decided in *Heimer v. Privratsky*²⁹ that optometrists were "professionals" under the scope of another statute, but had no occasion to decide whether optometrists were professionals within the meaning of the malpractice statute of limitations.³⁰ In *Heimer*, the court noted that optometrists and medical doctors must meet similar educational

25. *Id.* The court rejected the appellant's common law contention that where a conflict arises between statutes of limitation, the longer should apply. *Id.*

26. *Id.* See Lisenby, *Statute of Limitations For Suits Against Attorneys: Contract or Tort?*, J. LEGAL PROF. 205, 206 (1985) (the New York Supreme Court has encountered great difficulty in deciding whether contract or tort policies control the statute of limitations for attorney malpractice).

27. *Johnson v. Haugland*, 303 N.W.2d 533, 539 n.5 (N.D. 1981). The court in *Johnson* noted that no legislative history accurately predicted the interpretation of the malpractice statute of limitations. *Id.* It was further noted that the 1975 amendment to the malpractice statute of limitations gave new insight to the intentions of the legislature. *Id.* The amendment specifically gave the medical profession an extra protection via a maximum discovery time rule. *Id.* The court found that this explicit exception inferred that the legislature envisioned that more than just the medical profession would be covered by the statute and, therefore, needed to expressly single out the medical profession to be specifically addressed. *Id.* The 1893 statute had allowed only for a two year statute of limitations for an action for the recovery of damages resulting from malpractice. *Id.* The 1975 amendment expanded the concept to:

An action for the recovery of damages resulting from malpractice, provided, however, that the limitation of an action against a physician or licensed hospital will not be extended beyond six years of the act or omission of alleged malpractice by a nondiscovery thereof unless discovery was prevented by the fraudulent conduct of the physician or licensed hospital.

Actions having two-year limitations, Ch. 284 1975 N.D. LAWS 841.

28. *Johnson*, 303 N.W.2d at 539.

29. 434 N.W.2d 357 (N.D. 1989).

30. See *Heimer v. Privratsky*, 434 N.W.2d 357, 360 (N.D. 1989) (the court noted that optometrists were professionals, because of the strict legal and educational prerequisites mandated by law in order for them to practice). The real question involved in *Heimer* was whether expert testimony should be allowed. *Id.* at 359. Cf. *Three Affiliated Tribes v. Wold Eng'g*, 419 N.W.2d 920, 922 (N.D. 1988) (North Dakota Supreme Court decided this case on lack of proximate cause, and therefore did not consider the trial court's determination that engineers were professionals within the meaning of the malpractice statute of limitations).

requirements to practice.³¹ The court noted that optometrists must also pass strict licensing and testing requirements.³² Concluding that the standard of care applicable to medical doctors was identical to that applicable to optometrists, the court found that the requirement that claimants against medical doctors procure expert witnesses should apply to claimants against optometrists as well.³³

The North Dakota Supreme Court further examined the scope of the malpractice statute of limitations in *Jilek v. Berger Electric, Inc.*³⁴ In *Jilek*, the defendant, Berger Electric, moved for summary judgment on the ground that the plaintiffs' action was barred by the two-year statute of limitations applicable to professional malpractice.³⁵ The trial court granted summary judgment to Berger Electric, reasoning that the statute of limitations for professional malpractice should apply to master electricians.³⁶ The North Dakota Supreme Court reversed, holding that master electricians practice a trade and, therefore, are not professionals for purposes of the two-year professional malpractice statute of limitations.³⁷

The North Dakota Supreme Court began its analysis by recognizing that three methods have been used by other courts to determine what occupations may be considered professions for

31. *Heimer*, 434 N.W.2d at 360.

32. *Id.* The legal prerequisites for practicing optometrists are outlined in Chapter 43-13 of the North Dakota Century Code. N.D. CENT. CODE Ch. 43-13 (Supp. 1989).

33. *Heimer*, 434 N.W.2d at 360. The court found that the underlying purpose of the statute requiring expert witnesses in medical malpractice claims was to prevent frivolous litigation. *Id.* at 359. This legislative purpose was found to be just as applicable to claims of optometrical malpractice claims as it was to medical malpractice claims. *Id.*

34. 441 N.W.2d 660, 661 (N.D. 1989).

35. *Jilek v. Berger Elec., Inc.*, 441 N.W.2d 660, 662 (N.D. 1989). Berger Electric contended that electricians should be considered professionals because there are three classes of electricians licensed in North Dakota. *Id.* at 662. The highest ranking electrician, known as a Class A Master Electrician, is a person with the qualification, training, experience, and technical knowledge to plan, lay out, and supervise the installation and repair of electrical wiring apparatus and equipment for electric light, heat, and power. *Id.* at 662, n.2 (citing N.D. CENT. CODE § 43-09-01 (Supp. 1989)).

36. *Jilek*, 441 N.W.2d at 661. The trial court relied heavily on Section 299A of the Second Restatement of Torts. *Id.* at 663. Section 299A of the Restatement (Second) of Torts provides in relevant part:

It applies to any person who undertakes to render services to another in the practice of a profession, such as that of physician or surgeon, dentist, pharmacist, oculist, attorney, accountant or engineer. It applies also to any person who undertakes to render services to others in the practice of a skilled trade, such as that of an airplane pilot, precision machinist, electrician, carpenter, blacksmith or plumber. This section states the minimum skill and knowledge which the actor undertakes to exercise, and therefore to have.

RESTATEMENT (SECOND) OF TORTS § 299A (1965). The trial court reasoned that because the standard of care was identical for tradespersons and professionals, the applicable statute of limitations should be as well. *Jilek*, 441 N.W.2d at 663.

37. *Id.* at 663.

purposes of malpractice statutes of limitations.³⁸ The North Dakota Supreme Court declined to adopt the method of limiting the definition of "professionals" to those professions recognized at common law: medicine, law, and theology.³⁹ The court noted that there are occupations other than those recognized at common law which fall within the ordinary meaning of "profession," such as optometrists.⁴⁰ The court stated that the common law professions were a reasonable starting point, but declined to limit the definition of profession to the degree espoused by common law.⁴¹

The North Dakota Supreme Court also declined to adopt the method of including all occupations licensed by the state within the definition of professions.⁴² The court stated that including all licensed occupations within the definition of professions would encompass a vast group of occupations beyond those the legislature intended, thus contradicting the limited scope of "professions."⁴³ The court noted that if all licensed occupations were considered professions, vocations such as cosmetology, embalming, and plumbing would potentially be considered professions for purposes of the professional malpractice statute of limitations.⁴⁴

38. *Id.* at 662. See Head, *Florida's Professional Malpractice Statute of Limitation: To Whom Does it Apply?*, 1975 FLA. B. J. 63, 64 (discussing problems raised by the absence of a statutory definition of malpractice).

39. *Jilek*, 441 N.W.2d at 662. See *United States v. Laws*, 163 U.S. 258, 266 (1895) (even in 1895, the Supreme Court recognized that as knowledge and training became increasingly important, the number of occupations considered professional might be greatly expanded). See also *Dennis v. Robbins Funeral Home*, 411 N.W.2d 156, 157-58 (Mich. 1987) (court refused to include morticians within the professional malpractice statute of limitations; court could not find any legislative intent to include morticians and therefore adopted the narrower common law approach); *Hocking Conservancy Dist. v. Dodson-Lindblom*, 404 N.E.2d 164, 166 (Ohio 1980) (court denied extending the professional malpractice statute of limitations to nurses; court found that nurses did not exercise enough independent judgment to qualify as professionals and, therefore, limited its view of the extension of the malpractice statute only to those professions recognized at common law).

40. *Jilek*, 441 N.W.2d at 662. The court noted that they had previously recognized optometrists as professionals in *Heimer v. Privratsky*, 434 N.W.2d 357 (N.D. 1989). *Jilek*, 441 N.W.2d at 662. For a full discussion of *Heimer v. Privratsky*, see *supra* notes 29-33 and accompanying text.

41. *Jilek*, 441 N.W.2d at 662.

42. See also *Owyhee County v. Rife*, 593 P.2d 995, 1000 (Idaho 1979). (The Idaho Supreme Court found that a licensure was a minimum requirement for professionals and denied extension of the professional malpractice statute of limitations to non-certified public accountants.)

43. *Jilek*, 441 N.W.2d at 662. The North Dakota Supreme Court noted that in *Johnson v. Haugland*, the court declined to limit the term "professional" to only those occupations recognized at common law. *Id.* See *Johnson v. Haugland*, 303 N.W.2d 533 (N.D. 1981) (holding that lawyers are subject to the two-year malpractice statute of limitations). For a discussion of *Johnson v. Haugland*, see *supra* notes 20-28 and accompanying text.

44. *Jilek*, 441 N.W.2d at 662. The North Dakota Supreme Court noted that such a broad interpretation would encompass all those occupations licensed under chapter 43 of the North Dakota Century Code, thus being much more expansive than the court believed the legislature intended. *Id.* See generally N.D. CENT. CODE Ch. 43-01 to 43-40 (Supp. 1989) (listing all of the licensed trades and professions in North Dakota and briefly describing the rules governing each of them).

The court adopted the third method which expounded on the dictionary definition of "profession."⁴⁵ This method focuses on specialized knowledge, intensive preparation of skills, and the scholarly principles underlying preparation of those skills.⁴⁶ The court noted that the *Johnson* decision was primarily based on the dictionary definition of "malpractice" and again looked to that source for guidance.⁴⁷ The court recognized that there was a distinction between a "trade" and a "profession"; while a profession encompasses primarily mental processes, a trade encompasses primarily physical processes.⁴⁸ The court found that a profession required a minimum of a college degree in a specific field.⁴⁹ Following the lead of the Florida Supreme Court, the North Dakota Supreme Court held that a college degree prerequisite is the intrinsic characteristic of a "professional."⁵⁰ Therefore, the court found that because an electrician is not required to obtain a college degree, an electrician is a tradesperson rather than a professional.⁵¹ The court also noted that the Restatement (Second) of Torts recognizes a distinction between trades and professions, and that comment b of the Restatement lists electricians as an example of one who practices a trade.⁵² Thus, the court disagreed with the trial court's finding that because the standard of care was similar between professions and trades, the statute of limitations should be the same as well.⁵³ Therefore, the court concluded that a trade is not included within the protection of the malpractice statute of limitations.⁵⁴ Electricians, being tradespersons, were subject to the six-year statute of limitations applicable to general claims

45. *Jilek*, 441 N.W.2d at 662.

46. See *Tylle v. Zoucha*, 412 N.W.2d 438, 440-41 (Neb. 1987) (court found a profession to be a vocation requiring specialized knowledge, long and intensive preparation, instruction in skills and methods, organizational minimum conduct standards, and continuing education).

47. *Jilek*, 441 N.W.2d at 661. See *Johnson v. Haugland*, 303 N.W.2d 533 (N.D. 1981) (relying on the dictionary to define malpractice). For a full discussion of *Johnson v. Haugland*, see *supra* notes 20-28 and accompanying text.

48. *Jilek*, 441 N.W.2d at 662-63.

49. *Jilek*, 441 N.W.2d at 663.

50. See also *Pierce v. AALL Ins. Inc.*, 531 So.2d 84, 86-87 (Fla. 1988) (professions are denoted by a four-year degree in a specific field and ethical considerations are governed by an organized body of professional colleagues). The court in *Pierce* refused to accept the premise that insurance agents were professionals within the meaning of the professional malpractice statute of limitations. *Id.*

51. *Jilek*, 441 N.W.2d at 663.

52. *Id.* For the full text of the Restatement, see *supra* note 36. The North Dakota Supreme Court looked at the passage from the point of view of distinction of occupational classifications, rather than the trial court's view of similarity in duty of care. *Id.*

53. *Id.* The trial court reasoned that because the electricians are subject to the same standard of care as doctors and lawyers, it would be absurd not to allow them use of the same statute of limitations. *Id.*

54. *Jilek*, 441 N.W.2d at 663.

based on negligence or on contract theories.⁵⁵

The decision in *Jilek* sheds some light on the definition of professional malpractice, but leaves the door open for most educated, restrictive-entry occupations to make a sound argument for inclusion within the malpractice statute of limitations.⁵⁶ The court's definition certainly seems to ratify inclusion of what several authorities have deemed the five most often included "professions" for malpractice statute purposes: attorneys, architects, accountants, engineers, and physicians.⁵⁷ These professions clearly require a college degree in a specific field of specialized training.⁵⁸ The problem arises when a court facing a malpractice claim is confronted with those occupations which involve licenses, college degrees, and specialized training, but are not commonly viewed as classic "professions."⁵⁹ Absent any legislative clarification, courts will be faced with the question of who might be subject to the two-year statute of limitations for years to come, despite the guidance the *Jilek* court offers.⁶⁰

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55. *Id.* The court noted the Restatement's separation of trade and profession in concluding that only those occupations which were considered professionals (and not tradesman) should be given the protection of the professional malpractice statute of limitations. *Id.*

56. *Id.*

57. Landry, *A Prescription to Fill: Limitations on Accounting and Legal Malpractice in Louisiana*, 30 LOY. L. REV. 101, 101 n.1 (1984).

58. See, e.g., N.D. CENT. CODE §§ 43-01 to 43-40 (Supp. 1989) (lawyers must have a college degree and pass a standardized test).

59. See, e.g., N.D. CENT. CODE § 43-10 (Supp. 1989) (embalmers must be licensed and specifically trained, yet are not generally thought of as professionals).

60. See, e.g., *Wall v. Lewis*, 366 N.W.2d 471, 473 (1985) (perhaps complications may erupt concerning newly included professions in deciding "time of discovery" or extensions in time allotted for discovery when caused by fraudulent acts of the professional).