

1988

Karen Stilling v. Richard L. Skankey, Dba Olympus Hills Mall, and Timothy F. Thomas, William F. Thomas, Stephen G. Petersen, and John M. Hammond; dba Thomas, Petersen, Hammond & Associates : Brief of Respondent

Utah Supreme Court

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Recommended Citation

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UTAH SUPREME COURT
BRIEF

IN THE SUPREME COURT, STATE OF UTAH

KAREN STILLING	:	
Plaintiff	:	Supreme Court No. 880197
v.	:	
	:	
RICHARD L. SKANKEY, d/b/a	:	
OLYMPUS HILLS MALL,	:	Priority 14(b)
Defendant/Appellant	:	
and	:	
	:	
TIMOTHY F. THOMAS; WILLIAM F.	:	
THOMAS, STEPHEN G. PETERSEN, and	:	BRIEF OF RESPONDENTS
JOHN M. HAMMOND d/b/a/	:	
THOMAS, PETERSEN, HAMMOND &	:	
ASSOCIATES.	:	
Defendants/Respondents	:	

Appeal from the Order of Dismissal of the Third District Court
State of Utah, Salt Lake County,
The Honorable Richard H. Moffat.

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OTHER AUTHORITY

IN THE SUPREME COURT, STATE OF UTAH

KAREN STILLING,	:	
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v.	:	Supreme Court No. 880197
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OLYMPUS HILLS MALL,	:	Priority 14(b)
Defendant/Appellant.	:	
and	:	
TIMOTHY F. THOMAS;	:	
WILLIAM F. THOMAS;	:	BRIEF OF RESPONDENTS
STEPHEN G. PETERSEN; and	:	
JOHN M. HAMMOND d/b/a	:	
THOMAS, PETERSEN,	:	
HAMMOND & ASSOCIATES,	:	
Defendants/Respondents.	:	

PARTIES

Appellant: Richard L. Skankey, d/b/a Olympus Hills Mall

Respondents: Timothy F. Thomas, William F. Thomas, Stephen G. Petersen, and John M. Hammond d/b/a THOMAS, PETERSEN, HAMMOND & ASSOCIATES.

JURISDICTION

This Court is authorized pursuant to Utah Code Annotated Section 78-2-2(3)(i) (1953, as amended), to hear this appeal from the Third

District Court for the reason that the Utah Court of Appeals does not have original jurisdiction under Utah Code Annotated Section 78-2a-3 (1953, as amended).

ISSUES ON APPEAL

ISSUE NO. 1: Does the Utah Architects' and Builders' Statute of Repose, Utah Code Annotated Section 78-12-25.5 (1953 as amended) violate the Utah State Constitution, Article I, Section 11?

ISSUE NO. 2: Does the Utah Tort Reform Act, Utah Code Annotated Section 78-27-38, et. seq., (1953 as amended 1986) require the Respondents' presence in this case?

STATEMENT OF THE CASE

The Plaintiff, Karen Stilling, filed a Complaint against the Appellant on February 17, 1987, alleging that she was injured at the Olympus Hills Mall in Salt Lake City, Utah, on December 29, 1986. The Plaintiff filed an Amended Complaint, on November 16, 1987, naming the Respondents as Co-Defendants in that case. The Appellant filed a Cross-Claim against the Respondents on February 16, 1988.

The Respondents moved the Third District Court to dismiss, with prejudice, the Plaintiff's Complaint against the Respondents on December 30, 1987. The Third District Court granted the Respondents' Motion to Dismiss the Plaintiff's Complaint against the Respondents on February 19, 1988, and on April 25, 1988, Judge Moffat certified the Amended Order of Dismissal of the Plaintiff's Complaint as a Final

Judgment. The Plaintiff failed to appeal Judge Moffat's Order dismissing the Plaintiff's Complaint.

The Respondents moved the Third District Court to dismiss, with prejudice, the Appellant's Cross-Claim on March 8, 1988. Judge Moffat granted the Respondents' Motion to Dismiss the Appellant's Cross-Claim on April 8, 1988, and on April 25, 1988, Judge Moffat certified the Order of Dismissal as a Final Judgment. The Appellant filed a Notice of Appeal of Judge Moffat's dismissal of his Cross-Claim on or about May 12, 1988.

STATEMENT OF RELEVANT FACTS

Richard L. Skankey, d/b/a Olympus Hills Mall, (hereinafter "Appellant") retained the professional services of Timothy F. Thomas, William F. Thomas, Stephen G. Petersen, and John Hammond, d/b/a THOMAS, PETERSEN, HAMMOND & ASSOCIATES (hereinafter "Respondents") to render certain professional architectural design services regarding the remodeling of the Olympus Hills Mall which the Appellant owns.

On or about November 21, 1987, Respondents, through the issuance of a Certificate of Substantial Completion, certified that the Olympus Hills Mall remodeling project was substantially complete. See Addendum.

Karen Stilling (hereinafter "Plaintiff") was allegedly shopping at the Olympus Hills Mall on the evening of December 29, 1986. That night, while walking in the northeast parking lot of the Mall, Plaintiff allegedly tripped over a curb and fell several feet to the driveway below, sustaining injuries. Record, p. 31. The Plaintiff filed

suit against the Appellant in the Third District Court of Salt Lake County, on February 17, 1987, charging t the Appellant with breaching his duty to warn business invitees of known dangers on the premises. Record, 2-6.

The Plaintiff amended her Complaint on November 16, 1987 and added the Respondents as Defendants in her suit. In her Amended Complaint, the Plaintiff alleged that the Respondents had not adequately designed the parking lot where her injuries had allegedly occurred.

On February 16, 1988, the Appellant filed his Answer to the Plaintiff's Amended Complaint, and included a Cross-Claim against the Respondents asserting that if, arguendo, the parking lot at the Olympus Hills Mall was unsafe, then Respondents should indemnify the Appellant for any damages the Court might assess against the Appellant. Record, pp. 85-90.

The Respondents filed Motions to Dismiss both the Plaintiff's Complaint and the Appellant's Cross-Claim based on the argument that the Architects' Statute of Repose barred both the Plaintiff and the Appellant from bringing actions against the Respondents more than seven years after the Date of Substantial Completion of the Olympus Hills Mall.

In separate Orders of Dismissal, granted on February 19, 1988 and April 8, 1988, Judge Moffat granted the Respondents' Motions to Dismiss both the Plaintiff's Complaint and the Appellant's Cross-Claim. Record pp. 190-195. On April 25, 1988, Judge Moffat certified those dismissals as Final Judgments. On May 12, 1988, the Appellant filed his Notice of Appeal from Judge Moffat's dismissal of his Cross-Claim.

The Plaintiff failed to appeal Judge Moffat's dismissal of her Complaint against the Respondents.

SUMMARY OF ARGUMENT

Respondents assert that Utah Code Annotated Section 78-12-25.5 (1953 as amended), (hereinafter "Architects' Statute of Repose",) in no way violates Article I, Section 11, of the Utah Constitution. See Addendum. The Respondents further argue that the Architects' Statute of Repose can be distinguished from Utah Code Annotated Section 78-15-3 (1953 as amended), (hereinafter the Product Liability Statute of Repose), which was recently ruled unconstitutional by this Court's decision of Berry v. Beech Aircraft Corp., 717 P. 2d 670 (Utah 1985) (hereinafter "Berry"). Additionally, the Respondents maintain that the Architects' Statute of Repose meets the constitutionality tests in Berry by: 1) providing an alternative remedy to an injured plaintiff; and 2) eliminating a clear and distinct social and economic evil.

The Respondents also argue that the Appellant is not entitled to indemnification from the Respondents for the reason that the Tort Reform Act only requires a party to be responsible for that proportion of the fault which can be fairly attributed to it. Since the Appellant is not responsible for the fault of any other party, it follows that the Appellant cannot sue the Respondents for indemnification.

INTRODUCTION

In addressing the potential liability of design professionals regarding structures for which they rendered design service, state

courts have refused to honor the historic, common-law contractual privity defense, but rather they have expanded the liability of design professionals and contractors to injured parties based on varying tort theories. However, such liability is not unlimited and is subject to specific restrictions under carefully defined circumstances.

The Utah State Legislature enacted Utah Code annotated Section 78-12-25.5 (1953 as amended) commonly known as the "Architect's Statute of Repose", which limits the time, following the formal completion of an improvement to real property, during which an allegedly aggrieved plaintiff may sue an architect or contractor with respect to an allegation that a defective design or faulty construction led to the plaintiff's injury. Additionally, the Utah Legislature has recently enacted the Tort Reform Act, Utah Code Annotated Section 78-27-38, et seq., (1953 as amended 1986) which limits any defendant's liability to that proportion of fault which can be attributed to that defendant.

This Court recently addressed the matter of the constitutionality of the Utah Product Liability Statute of Repose in Berry. In the Berry case, this Court declared that the Utah Product Liability Statute of Repose was unconstitutional for the reason that it violated, inter alia, Article I, Section 11, of the Utah State Constitution, Addendum, by denying the Plaintiffs a reasonable opportunity to bring a suit. In sum, this Court determined that the Utah Product Liability Statute of Repose did not provide the Plaintiffs, in Berry, with any alternative remedy against any party once the statutory period had run.

In the instant case, the Appellant argues, in Point 1 of his Brief, that the Berry ruling ought to extend beyond cases sounding in product liability theory to cases which are based, inter alia, upon an allegation of the negligent rendering of professional architectural design services. Appellant bases this argument on the grounds that there is otherwise no substitute remedy to which he, as Co-Defendant and property owner (but not as the injured party and plaintiff), may have access as he pursues the Respondents who, more than 10 years ago, rendered service to the Appellant. Appellant's Brief pp. 7-9. In response, the Respondents argue: 1) the facts of the Berry case are inapplicable to, and can be distinguished from, this case; 2) the Architects' Statute of Repose satisfies the two-pronged constitutionality test as enunciated in Berry; and 3) the Appellant is not legally entitled to pursue an indemnification claim against the Respondents.

Additionally, the Appellant argues, in Point II of his Brief, that even if the Architects' Statute of Repose is found constitutional, the dismissal of his Cross-Claim against the Respondents was precluded by operation of Utah Code Annotated Section 78-27-41 (1953 as amended 1986). Appellant's Brief, pp. 9-12. In reply, the Respondents maintain that the Utah Tort Reform Act does not permit the Appellant to sue the Respondents for indemnification because the Appellant is only liable for his own torts regarding injuries arising on his property due to unsafe conditions. Therefore, as a matter of law, the Appellant has no cause of action against the Respondents.

ARGUMENT

POINT ONE.

THE ARCHITECTS' STATUTE OF REPOSE DOES NOT VIOLATE
ARTICLE 1, SECTION 11, OF THE CONSTITUTION OF UTAH.

A. THIS COURT HAS RULED THAT THE ARCHITECTS'
STATUTE OF REPOSE IS CONSTITUTIONAL

On several occasions, this Court has addressed the validity of the Architects' Statute of Repose and found it to be constitutional. This Court, in the case of Good v. Christensen, 527 P.2d 223 (Utah 1974), specifically held that the seven-year limitation imposed by Utah Code Annotated Section 78-12-25.5 (1953 as amended) was constitutional. In so ruling, this Court found that the Architects' Statute of Repose prohibits any action against an architect or builder, with respect to their work regarding any improvement to real property alleged to be defective or unsafe, which is filed outside the statutory period. This Court, in the case of Good v. Christensen, 527 P.2d 223 (Utah 1974), specifically held that the seven-year limitation imposed by Utah Code Annotated Section 78-12-25.5 (1953 as amended) was constitutional. In so ruling, this Court found that the Architects' Statute of Repose prohibits any action against an architect or builder, with respect to their work regarding any improvement to real property alleged to be defective or unsafe, which is filed outside the statutory period. In Good v. Christensen, this Court declared:

The exception in the statute makes inapplicable the seven-year limitation period against the original owner, and it allows others to sue him for torts, if any,

within the regular statutes of limitations after the cause arises. It prevents the OWNER, as well as all others, from suing the designer, planner, supervisor or contractor after seven years from completion of the project. (emphasis added).

Id. at 224-225

In the case of Jackson v. Layton City, 743 P.2d 1196 (Utah 1987), the Architects' Statute of Repose once again withstood a constitutional challenge. In Jackson, this Court reaffirmed the constitutionality of the Architects' Statute of Repose previously upheld in Good v. Christensen. The Jackson Court found that the Architects' Statute of Repose, unlike the Product Liability Statute of Repose, did not arbitrarily deprive a plaintiff of a cause of action.

In a concurring opinion in the Jackson case, Justice Howe clearly set out the Court's intention regarding any challenge to the constitutionality of the Architects' Statute of Repose when he observed:

A cause of action for personal injury generally accrues when the accident occurs, and the four-year statute of limitations begins to run at that time on any action against the owner.

In contrast, when an action for personal injuries is brought by a third person against a designer, planner, or builder of an improvement, the four-year statute of limitations also commences to run on the date of the accident unless seven years have expired since the completion of the construction of the improvement. In that event, Section 78-12-25.5 provides that the third person has no cause of action at all against the designer, planner, or builder. However, if any part of the seven-year period remains at the time the accident occurs, the injured third person has the remainder of the seven-year period, but not to exceed four years, to bring his action for personal injuries. In other words, the seven-year statute provides the outer limit, but within that time frame, the four-year statute operates. O'Conner v. Altus, 67 N.J. 106, 335 A. 2d 545 (1975); Annot. 93 A.L. r 3d 1242, 1268 (1979) (emphasis added).

Id. at 1199.

For the reason that this Court has repeatedly declared that the Architects' Statute of Respose is constitutional, the Appellant is not entitled to pursue the Respondents merely because the Plaintiff has a surviving cause of action against the Appellant. As this Court declared in Good v. Christensen, no party may sue the architect once the statutory period has expired, no matter their position or description.

In the present case, the facts clearly demonstrate that the Appellant did not file his Cross-Complaint until nine years after the Date of Substantial Completion of the "addition/remodeling" project at the Olympus Hills Mall. See Addendum. By statute, the Appellant had only seven years, after the Date of Substantial Completion of the Olympus Hills Mall, to file an action against the Respondents based upon any alleged defective design; he failed to do so. Under well-established Utah law, the time during which the Respondents were amenable to any action, based upon any alleged defects in their design, began on November 21, 1978, and ended at midnight on November 20, 1985. Consequently, the Appellant is nearly two years too late in filing his Cross-Claim against the Respondents.

Appellant's arguments are tantamount to asking this Court to overrule its decisions in Good v. Christensen and Jackson v. Layton City. Since there are no compelling legal or factual reasons to overrule this Court's well-established precedents, this Court should dismiss Appellant's Appeal.

B. THE RULING IN BERRY IS INAPPLICABLE IN THIS CASE.

The Appellant urges this Court to extend its ruling in Berry to this case by arguing, inter alia, that the Open Courts provision of

the Utah State Constitution must overcome the effect and advisability of Utah's Architects' Statute of Repose - the same argument advanced by the Plaintiff in Jackson.

However, the Berry case is distinguishable from the present case and therefore irrelevant to the matter at hand. A careful reading and analysis of Berry clearly establishes that the operant facts of Berry are in no way analogous to the facts of this matter. The Berry case involved a product liability claim against the Defendant after one of the Defendant's aircraft disintegrated in flight, killing several people. The Product Liability Statute of Repose did not provide the Plaintiffs, in Berry, with an alternative remedy if the filing deadline was missed. Unlike the provisions of the Architects' Statute of Repose, the Product Liability Statute of Repose precluded any action from being filed against any person or party once the statutory period of repose had expired. Therefore, this Court declared, the "Open Courts" provisions of the Utah Constitution had been violated by the statute's prohibitions against the filing of any action once the statutory limitation period had passed.

If this Court had intended to extend its ruling in Berry to cases other than those sounding in products liability theory, it could have expressly declared its intention to do so in the Berry case. No language in Berry, either in the ruling or in dicta, suggests that this Court intended to hold, or even suggest, that the statutes of limitations, as the same apply to architects, are unconstitutional. In fact, this Court made it clear that the Berry decision was strictly limited Utah Code Annotated Sections 78-15-1, et seq. ("Utah Product

Liability Act"), and was not intended to invalidate all statutes of repose, by declaring:

In sum, Section 11 does not recede before every legislative enactment, but neither may it be applied in a mechanical fashion to strike every statute with which there may be a conflict. To hold every statute of repose unconstitutional without regard to the legislative purpose could result in a legislative inability to cope with widespread social or economic evils (emphasis added).

Id., at 680.

In Berry, this Court observed, in relevant and significant dicta, that the Architects' Statute of Repose was constitutional in application if only those persons who rendered professional design services, or who performed construction, were exempt from a plaintiff's suit once the statutory period had run. Citing its earlier decision in Good v. Christensen, the Berry Court stated:

Good v. Christensen, Utah, 527 P. 2d 223 (1974), sustained the constitutionality of a seven year statute of repose intended to protect architects and builders. The court observed that a person injured by a defect in a building would still have a remedy against an owner of the building and perhaps others. (emphasis added).

Id. at 683.

This Court has not extended the "Open Courts" constitutionality test in Berry to any case which did not involve an allegation sounding in products liability law, even when the opportunity to do so arose in a subsequent case. In fact, in Berry, this Court specifically addressed the question of whether the unconstitutionality of the Product Liability Statute of Repose could be applied to other statutes of repose. After reviewing a wide array of cases, in which statutes of repose involving liability, medical malpractice and claims arising out

of the services of architects and builders were discussed, this Court clearly declared that, in Utah, products liability cases were the only sort of claim under which they would declare a statute of repose unconstitutional as violative of the "Open Courts" provisions of the Utah State Constitution. Id. at 678-680.

In the Jackson case, which was subsequent to Berry, this Court was presented with an opportunity to extend the constitutional test of Berry to Architects' Statute of Repose. In Jackson, the Plaintiff had been injured in an accident sustained on Layton City's sleigh riding and tubing hill. In upholding the District Court's dismissal of the Plaintiff's Complaint, this Court declared that the seven-year limitation imposed by the Architects' Statute of Repose was enforceable as it applied to the Defendant municipality. The Jackson Court had every opportunity to apply the Berry ruling to the Jackson facts: there was a grievously injured plaintiff, an Owner who designed and performed the improvements and was still in possession of the property at the time of the injury, a "deep pocket", and the possible denial of a remedy to the Plaintiff if the dismissal of the case was upheld.

However, in spite of that legally and emotionally charged atmosphere, this Court refused to declare the Architects' Statute of Repose unconstitutional. In fact, this Court specifically addressed the applicability of the Berry ruling to the facts in Jackson, and found the Architects' Statute of Respose constitutional. In so doing, this Court rejected the Plaintiff's claim that Architects' Statute of Repose was unconstitutional because it had the effect of barring an action before the events giving rise to the cause of action actually occurred (exactly the argument raised by the Plaintiffs in Berry).

In refusing to find the Architects' Statute of Repose unconstitutional, this Court observed that the Plaintiffs would have had an effective remedy against the City of Layton had they not been dilatory in their conduct. By not extending the Berry ruling to the Jackson facts, the Court understood that its ruling effectively denied the Plaintiffs any remedy against any party, specifically the City of Layton which was both the designer/builder and owner-in-possession.

In the instant case, the Appellant's Cross-Claim alleges that he is entitled to pursue an action against the Respondents for indemnification for any of the Plaintiff's injuries for which the Appellant may be assessed. However, neither in his Cross-Claim nor in his Appellant's Brief, does the Appellant argue that the facts of this case are legally equivalent to the products liability claim brought by the Plaintiffs in Berry. Moreover, the Appellant did not plead his case against the Respondents based upon negligent design, but only plead an indemnification theory.

In the present case, the Plaintiff can maintain her action against the Appellant for damages; therefore, the Plaintiff has a significant remedy which she is presently pursuing. In fact, the Plaintiff's ability to pursue the Appellant exists independently of whether or not the Appellant can sue the Respondents. Merely because the Plaintiff is able to pursue her claim against the Plaintiff, it does not follow that the Appellant is legally entitled to maintain his action against the Respondents.

The Appellant is not entitled to assume the legal status and position of the Plaintiff by arguing that legal standards that enable

the Plaintiff to sue the Appellant entitle the Appellant, as owner of the premises, to bring an action against the Respondents. Therefore, the Appellant is not entitled to raise the arguments that the Plaintiffs raised in Berry. By parity of reasoning, the Appellant is not entitled to apply the Berry ruling to these facts of this case simply because that the Architects' Statute of Repose provides the Plaintiff with a remedy.

C. THE ARCHITECTS' STATUTE OF RESPOSE DOES NOT ARBITRARILY DEPRIVE A PLAINTIFF OF ALL REMEDIES.

The Appellant has argued that if the Respondents are dismissed from this suit, a fundamental offense to commonly held notions of justice and fairness would occur by placing the "...defendant land-owner in an untenable and inequitable legal quagmire." Appellants' Brief, p. 8. The Appellant, as Co-Defendant, wishes to convince this Court that he is in the same position as the Plaintiffs were in Berry.

In part, Berry turned on whether the Plaintiffs were arbitrarily deprived of a remedy, not whether the Defendant was deprived of a claim for indemnification. In his Brief, the Appellant, rather than discussing the factual similarities between Berry and the case at hand, merely treats this Court to a cursory restatement of the general principles of equitable law.

In Berry, this Court observed that a statute of repose will meet the test of Article 1, Section 11 of the Utah Constitution "if the law provides an injured person an effective and reasonable alternative remedy 'by due course of law' for vindication of his constitutional interests." Berry at 680; See Also Addendum. The Berry Court went on

to declare that the substituted remedy must be substantially equal in value to the remedy abrogated and must equivalently protect a party's physical integrity, property or reputation "although the form of the remedy may be different." Id.

The provisions of the Architects' Statute of Repose do not deprive a plaintiff of a remedy to redress a personal injury which arose on the site of a real property improvement. The Architects' Statute of Repose only prohibits a suit against an architect or builder (but not an owner) more than seven years following the Date of Substantial Completion. Unlike the Product Liability Statute of Repose, and the Berry case upon which the Appellant mistakenly rests his arguments, the Architects' Statute of Repose does not act as a bar to all efforts of a plaintiff to recover for an injury, real or imagined.

The Architects' Statute of Repose only limits its protection to those entities or persons who actually design or perform the construction work regarding the improvement to real property, and not to others. The provisions of the Architects' Statute of Repose do not arbitrarily deprive a plaintiff from pursuing the owner-in-possession once the architect is insulated from a lawsuit by operation of the Architects' Statute of Repose.

Since the Appellant, as owner-in-possession, has a continuing common law and statutory duty to maintain the safe condition of his property, he is obliged to meet those legal obligations to the Plaintiff. Those obligations exist even if the Respondents had never been named in the suit. At this point in time, only the Appellant is prevented from pursuing the Respondents whose services were rendered

more than seven years prior to date of the alleged injury. Such a limitation is not the sort of event which can reasonably support the assertion that the Architects' Statute of Repose is unconstitutional.

In this case, the Plaintiff's right to pursue the Appellant for damages is expressly preserved in the provisions of Section 78-12-25.5 which, in subsection 2, provides:

The time limitation imposed by this section does not apply to any person in actual possession and control as owner, tenant, or otherwise, of the improvement at the time the defective and unsafe condition of the improvement constitutes the proximate cause of the injury for which an action is brought. (emphasis added).

Clearly, the Plaintiff in the instant matter is not deprived of all causes of action by the operation of the Architects' Statute of Repose. The Plaintiff can fully recover for her injuries against the Appellant if this Court upholds the provisions of Architects' Statute of Repose. Therefore, the real issue before this Court is whether or not the Appellant, who may be required to compensate the Plaintiff for her injuries, can apply the Berry constitutionality test to the Respondents' presence in this case.

D. THE ENFORCEABILITY OF THE ARCHITECTS' STATUTE OF REPOSE
AVOIDS THE OCCURENCE OF AN ECONOMIC EVIL.

Under the law, an injured plaintiff is entitled to file an action against a property owner for failing to discover a latent or patent defect in a construction project. The release of an architect from liability, after seven years following the Date of Substantial Completion, serves to avoid the economic evil of subjecting an architect to unlimited liability. Because the nature and identity of

an alleged design defect may be significantly altered by events which occur subsequent to the completion of a building project, an architect ought to be released from any further liability at such time as the legislature determines such a release is sensible and equitable.

The Architects' Statute of Repose does not only limit an architect's protection to only suits from injured plaintiffs, but covers all suits against architects which are based upon allegations of defective design when filed past the statutory deadline. The public policy behind protecting design professionals after a certain point acquires greater force when an architect is sued by a party who was in actual, uninterrupted ownership, management and occupancy of the property from the time of the completion of the project through the date of the injury and the subsequent suit.

Without some statutory protection for an architect, the liability that the design professional now accepts for the first seven years of a construction project's life would extend indefinitely. The possibility of unrestrained liability would have a chilling effect on the contributions of architects to society, thus denying society the value and benefit of their services. Several courts have recognized the need to protect architects and builders from unlimited liability through the enactment of sensible statutes of repose. See Barnhouse v. Pinote, 183 Cal. Rptr. 881 (Cal. App. 1982); Chesworld Volunteer Fire Co. v. Lambertson Construction Co. 489 A. 2d 413 (Del. 1984); Beecher v. White, 417 N.E. 2d 622 (Ind. App. 1983).

By arguing that "the cutting off of the landowner's right of indemnification against the allegedly negligent architect furthers no

compelling social policy and eliminates no social or economic evil..." Appellant's Brief, p.8, the Appellant attempts to make use of the 2-pronged Berry case to assert that the Architects' Statute of Repose also does not serve any justifiable social or economic policy. For the reason that the Appellant, as the landowner, has a duty to maintain the premises in a safe condition, the Appellant cannot place itself in the position of the Plaintiffs in Berry. Consequently, affirming the dismissal of the Appellant's Cross-Claim will not burden the Appellant with any duty not arising independently, and will further the broad social interest in insulating architects from suits after the seven year statutory period.

POINT TWO

UTAH CODE ANNOTATED SECTION 78-27-41 (1953 AS AMENDED 1986) DOES NOT REQUIRE THE PRESENCE OF RESPONDENTS IN THIS CASE.

In his Brief, the Appellant asserts that the Utah Tort Reform Act requires the Respondents' presence in this case in order for the Third District Court to determine how the percentage or portion of the alleged negligence should be distributed between the Appellant and the Respondent. See Appellant's Brief, pp. 10-11. However, a careful analysis of the relevant Utah Code sections, which define the parameters of tort liability, reveal that the Appellant's position is without legal justification.

Utah Code Annotated Section 78-27-38 (1953 as amended 1986) provides:

The fault of any person seeking recovery shall not alone bar recovery by that person. He may recover from any defendant or group of defendants whose fault exceeds his own. However, no

defendant is liable to any person seeking recovery for any amount in excess of the portion of fault attributable to that defendant. (emphasis added).

In pertinent part, Utah Code Annotated Section 78-27-40 (1953 as amended 1986), declares:

Subject to Section 78-27-38, the maximum amount for which a defendant may be liable to any person seeking recovery is that percentage or proportion of the damages equivalent to the percentage or proportion of fault attributed to the defendant. No defendant is entitled to contribution from any other person. (emphasis added).

Utah Code Annotated Section 78-27-41 (1953 as amended 1986) further states:

A person seeking recovery, or any defendant who is a party to the litigation, may join as parties any defendants who may have caused or contributed to the injury or damage for which recovery is sought, for the purpose of having determined their respective portion of fault. (emphasis added).

As the Appellant correctly asserts in his Brief, "the fundamental premise of the Tort Reform Act of 1986 is that each defendant is only liable for that portion of damages attributable to the fault of that defendant." See Appellant's Brief, p. 9. However, the Appellant totally misunderstands the application of that premise to the facts of this case.

The Appellant mistakenly asserts that all parties who may have potential liability to a plaintiff must be joined as defendants in a case in order that the liability of any of the defendants may be determined. See Appellant's Brief, pp. 10-11. Such a result clearly was not the intent of the legislature when it passed the Tort Reform Act. Furthermore, the express language of Section 78-27-41 is in direct opposition to the Appellant's assertion.

In pertinent part, Section 78-21-41, states: "A person seeking recovery or any defendant who is a party to the litigation, may join

as parties any defendants who may have caused or contributed to the injury...." (emphasis added). The term "shall" does not appear in Section 78-21-41, as it does in other sections of the Utah Code; therefore, it is reasonable to conclude that Section 78-21-41 does not mandate that all persons who may have potentially liability to a plaintiff must be joined in an action. Section 78-21-41 correctly recognizes the litigants' right to determine the parties to an action. Section 78-21-41 also does not require, as the Appellant argues, that "all fault contributing to an injury would have to be concurrently analyzed by the jury". See Appellant's Brief, p. 10. Section 78-21-41 only sets out a discretionary standard.

The Appellant cannot properly ask this Court to accept the assertion that the Appellant's potential liability to the Plaintiff will incrementally increase or decrease relative to the number of litigants present in the case. See Appellant's Brief pp. 10-11. Such an assertion is an absurdity. The facts of the case will determine the Appellant's percentage or portion of negligence, not the number of litigants present in the case. Any liability the Appellant may have to the Plaintiff will then be determined by multiplying the Plaintiff's total damages by the percentage or portion of negligence attributable to the Appellant.

In his Brief, the Appellant assumes that the finder of fact in an action must allocate all fault among the parties to that action. Appellant's Brief, p. 10. Such an assumption is incorrect. The finder of fact is not prohibited from determining that a percentage or portion of liability should be properly assigned to a person or per-

sons not named as defendants in the action. Proper jury instructions and Special Verdict Forms are regularly used to allocate liability to persons who, for a variety of reasons, are not parties to the litigation. Consequently, and contrary to the Appellant's assertion, the absence of the Respondents from this case will not result in a proportional shift of the Respondents' potential liability to the Appellant.

POINT THREE

APPELLANT'S ASSERTION OF A CLAIM OF INDEMNIFICATION AGAINST THE RESPONDENTS ARE NOT A SUFFICIENT GROUND FOR REQUIRING THE RESPONDENTS' PRESENCE IN THIS CASE.

In his Cross-Claim, the Appellant has demanded "judgment of indemnification against Respondents with respect to any liability adjudged against the Appellant in this action, together with any costs." Record, pp. 88-89. However, in his Cross-Claim, as well as in his Brief to this Court, the Appellant has failed to allege any factual basis, or to cite any authority, which would entitle the Appellant to an award of indemnification against the Respondents.

As previously set forth in this Brief, Section 78-27-38, et seq. in pertinent part, declares: "[N]o defendant is liable to any person seeking recovery for any amount in excess of the portion of fault attributable to that defendant." In relevant part, Section 78-27-40 also provides that: "No defendant is entitled to contribution from any other person." Therefore, the Appellant is not legally entitled to be indemnified by the Respondents for any liability which the Plaintiff may be able to prove against the Appellant. Furthermore, the Appellant is, by statute, prohibited from obtaining indemnifi-

cation from the Respondents, the very relief which the Appellant seeks by way of his Cross-Claim filed in the Third District Court.

The Plaintiff can only sue the Appellant for the negligence of the Appellant, not the negligence of the Respondents. Since the Appellant is not entitled to be indemnified for his own negligence, and cannot be held liable for any alleged negligence of the part of the Respondents, the Respondents, as a matter of law, are not obligated to indemnify the Appellant.

If the Appellant had sought to keep the Respondents in this case, regardless of the actions or inactions of the Plaintiff, the Appellant could have framed the totality of his pleadings to sound in professional negligence. But even if the Appellant's Cross-Claim had alleged defective design, the Tort Reform Act only obliges a party to be responsible for his own negligence, and not for the supposed negligence of another.

Because the Plaintiff failed to appeal the dismissal of her Complaint against the Respondents, the Respondents have no potential liability to the Plaintiff. Surely, when the Utah Legislature passed the Tort Reform Act, it did not intend that a person with no potential liability in an action must be a party to that action simply because another defendant argues that its case will be made easier if the person with no potential liability is present in the case. Such a position would lead to untenable results.

For instance, if the Appellant and Respondents were willing to make a deal, the Respondents could conceivably admit to all negligence associated with the Plaintiff's injuries. Yet, because the Plaintiff

has failed to appeal the dismissal of her claim against the Respondents, the Plaintiff could collect nothing from the Respondents. This strategy would also eliminate any concern the Respondents might have concerning the Appellant's Cross-Claim, as the Appellant would not be adjudged liable for any of the Plaintiff's injuries. Therefore, the Appellant's claim for indemnification for any negligence adjudged against him would also evaporate.

Alternatively, because the Respondents have no potential liability to the Plaintiff, the Respondents could merely choose to ignore the District Court proceeding altogether and allow the finder of fact to assign any percentage or portion of negligence, and the resultant liability, to the Respondents. Again, because the Respondents have no potential liability to the Plaintiff, the Plaintiff could collect nothing from the Respondents. Absent a sweetheart deal between the Appellant and Respondents, there is simply no reason for the Respondents to participate in the Third District Court proceeding.

Consequently, if the Respondents are required to participate in the District Court proceeding, the Respondents' presence will simply increase the time and cost of litigation. Such increases will adversely affect the Plaintiff, the Appellant and Respondents, as well as result in an increase in the cost and in the work load on an already overburdened judicial system. Furthermore, no legal advantage would inure to any party in consideration of this additional cost and judicial inefficiency.

Therefore, simple logic as well as the interests of justice and judicial economy dictate that the Respondents not be forced to remain

in an action in which they have no real interests nor any potential liability. To construe the provisions of the Tort Reform Act otherwise would introduce chaos in the judicial system.

CONCLUSION

This Court has repeatedly held that the Architects' Statute of Repose does not violate Article 1, Section 11, of the Utah Constitution. See Addendum. Section 78-27-41 does not require the Respondents' presence in this case. The Third Judicial District Court properly dismissed the Appellant's Cross-Claim.

Therefore, this Court must deny the Appellant's Appeal, and, pursuant to the provisions of Rule 34 of the Utah Rules of Appellate Procedure, Addendum, this Court should award the Respondents their costs incurred in this Appeal.

Dated this 29th day of October, 1988.

GUSTAVSON, SCHULTZ, HALL & WILLIAMS



Mark S. Gustavson


Charles A. Schultz
Counsel for Respondents

MAILING CERTIFICATE

I hereby certify that on the ____ day of October, 1988, I caused four (4) true and correct copies of the foregoing Brief of Respondents to be mailed, postage prepaid, to the following:

John D. Parken
PARKEN AND KECK
Attorneys for Defendant/Appellant
Suite 808 Boston Building
#9 Exchange Place
Salt Lake City, Utah 84111



Mark S. Gustafson
Counsel for Respondents

ADDENDUM

Sec. 11. [Courts open—Redress of injuries.]

All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party.

CERTIFICATE OF SUBSTANTIAL COMPLETION

DATE OF ISSUANCE: ⁸⁻⁴ August 20, 1978
PROJECT: Old Bus Hills Mall
OWNER: Richard L. Stanley
CONTRACTOR: Bud Bailey Construction Company

The work performed under this contract has been reviewed on this date and found to be substantially completed.

DEFINITION OF SUBSTANTIAL COMPLETION

The date of substantial completion of a project or specified area of a project is the date when the construction is sufficiently completed in accordance with the contract documents, as modified by any change orders agreed to by the parties, so that the Owner can occupy the project or specified area of the project for the use for which it was intended.

A list of items to be completed or corrected, prepared by Richard L. Stanley and verified by the Architect is appended hereto. This list may not be exhaustive, and the failure to include an item on it does not alter the responsibility of the Contractor to complete all the work in accordance with the contract documents, including authorized changes thereof.

John M. Hammond
ARCHITECT

John M. Hammond 8-20-78
AUTHORIZED REPRESENTATIVE DATE

The Contractor will complete or correct the work on the list of items appended hereto within _____ days from the above date of issuance of this certificate.

Bud Bailey Construction Co.
CONTRACTOR

Bud Bailey Dec 26, 1978
AUTHORIZED REPRESENTATIVE DATE

The Owner accepts the project or specified area of the project as substantially complete and will assume full responsibility of the project or specified area of the project at _____ (date) on _____ (date). The responsibility for heat, utilities and insurance under the contract documents shall be assumed by the Owner henceforth:

Richard L. Stanley
OWNER

Richard L. Stanley 12-21-78
AUTHORIZED REPRESENTATIVE DATE

Rule 34. Award of costs.

(a) **To whom allowed.** Except as otherwise provided by law, if an appeal is dismissed, costs shall be taxed against the appellant unless otherwise agreed by the parties or ordered by the court; if a judgment or order is affirmed, costs shall be taxed against appellant unless otherwise ordered; if a judgment or order is reversed, costs shall be taxed against the respondent unless otherwise ordered; if a judgment or order is affirmed or reversed in part, or is vacated, costs shall be allowed as ordered by the court. Costs shall not be allowed or taxed in a criminal case.

(b) **Costs for and against the state of Utah.** In cases involving the state of Utah or an agency or officer thereof, an award of costs for or against the state shall be at the discretion of the court unless specifically required or prohibited by law.

(c) **Costs of briefs and attachments, record, bonds and other expenses on appeal.** The following may be taxed as costs in favor of the prevailing party in the appeal: The actual costs of a printed or typewritten brief and attachments not to exceed \$3.00 for each page; actual costs incurred in the preparation and transmission of the record including costs of the reporter's transcript unless otherwise ordered by the court; premiums paid for supersedeas or cost bonds to preserve rights pending appeal; and the fees for filing and docketing the appeal.

(d) **Bill of costs taxes after remittitur.** When costs are awarded to a party in an appeal from a lower court, a party claiming costs shall, within 15 days after the remittitur is filed with the clerk of the court below, serve upon the adverse party and file with the clerk of the court an itemized and verified bill of costs. The adverse party may, within 5 days of service of the bill of costs, serve and file a notice of objection together with a motion to have the costs taxed by the court below. If there is no objection to the cost bill within the allotted time, the clerk of the court shall tax the costs as filed and enter judgment for the party entitled thereto, which judgment shall be entered in the judgment docket with the same force and effect as in the case of other judgments of record. If the cost bill of the prevailing party is timely opposed, the clerk, upon reasonable notice and hearing, shall tax the costs and enter a final determination and judgment which shall thereupon be entered in the judgment docket with the same force and effect as in the case of other judgments of record. The determination of the clerk shall be reviewable by the district court upon the request of either party made within 5 days of the entry of the judgment.

(e) **Costs in other proceedings and agency appeals.** In all other matters before the court, including appeals from an agency, costs may be allowed as in cases on appeal from a lower court. Within 15 days after the expiration of the time in which a petition for rehearing may be filed or within 15 days after an order denying such a petition, the party to whom costs have been awarded may file with the clerk of the court and serve upon the adverse party an itemized and verified bill of costs. The adverse party may, within 5 days after the service of the bill of costs file a notice of objection and a motion to have the costs taxed by the clerk. If no objection to the cost bill is filed within the allotted time, the clerk shall thereupon tax the costs and enter judgment against the adverse party. If the adverse party timely objects to the cost bill, the clerk, upon reasonable notice and hearing, shall determine and settle the costs, tax the same, and a judgment shall be entered thereon against the adverse party. The determination by the clerk shall be reviewable by the court upon the request of either party made within 5 days of the entry of judgment; unless otherwise ordered, oral argument shall not be permitted. A judgment under this section may be filed with the clerk of any district court in the state who shall docket a certified copy of the same in the manner and with the same force and effect as judgments of the district court.