

1988

James Sanchez v. Little America Hotel Corporation : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

JAMES SANCHEZ,

Plaintiff-Appellant,

v.

LITTLE AMERICA HOTEL
CORPORATION, a Utah
corporation, MARTIN STERN,
JR. AIA ARCHITECT & ASSOC.,
OKLAND CONSTRUCTION, a Utah
corporation, ROCKY MOUNTAIN
POOLS, INC., a Utah corpor-
ation, HIGHAM-HILTON
MECHANICAL CONTRACTORS,
INC, a Utah corporation
and JOHN DOES I THROUGH
III,

Defendant-Respondents.

BRIEF OF APPELLANT

Case No: 880316

#14b

APPEAL FROM A JUDGMENT OF THE THIRD JUDICIAL DISTRICT COURT
OF SALT LAKE COUNTY, STATE OF UTAH
HONORABLE DAVID S. YOUNG, JUDGE

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FILED

MAR 20 1989

Clerk, Supreme Court, Utah

JAMES SANCHEZ,
Plaintiff-Appellant,
v.
LITTLE AMERICA HOTEL
CORPORATION, a Utah
corporation, MARTIN STERN,
JR. AIA ARCHITECT & ASSOC.,
OKLAND CONSTRUCTION, a Utah
corporation, ROCKY MOUNTAIN
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Brief.

I

PARTIES TO THIS PROCEEDING

The parties to this proceeding are:

James Sanchez	Plaintiff/Appellant
Martin Stern, Jr., AIA Architects and Associates	Defendant/Respondent
Okland Construction	Defendant/Respondent
Rocky Mountain Pools, Inc.	Defendant/Respondent
Higham Hilton Mechanical Contractors Inc.,	Defendant/Respondent

Little America Hotel Corp., a defendant in the lower court proceedings is not a party in this proceeding but is the appellant in a related appeal.

II.

TABLE OF CONTENTS

I.	PARTIES TO THIS PROCEEDING	iv
III.	TABLE OF AUTHORITIES	vii
IV.	STATEMENT OF JURISDICTION AND DESCRIPTION OF THE PROCEEDINGS BELOW	1
V.	STATEMENT OF THE ISSUES PRESENTED FOR REVIEW	1
VI.	CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES AND RULES	2
VII.	STATEMENT OF THE CASE	4
VIII.	STATEMENT OF FACTS RELEVANT TO THE ISSUES PRESENTED FOR REVIEW	5
IX.	SUMMARY OF ARGUMENT	8
X.	ARGUMENT	10
A.	THE STATUTE OF REPOSE VIOLATES THE OPEN COURTS PROVISION OF THE UTAH CONSTITUTION	10
1.	Factual Background	10
2.	The Standard of Review	11
3.	The Standard of Repose	11
4.	Historical Context of Contractor Liability Law	14
5.	Utah Const. Article I Section 11 - Utah's Open Courts Provision	16
B.	THE STATUTE OF REPOSE VIOLATES EQUAL PROTECTION OF THE LAWS GUARANTEED BY THE UTAH CONSTITUTION AND THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION	20

1.	Introduction	20
2.	The Rights Impaired by the Statute of Repose	21
3.	The Standard of Scrutiny	22
4.	The Classifications Created by the Statute of Repose are not Reasonable, nor are they Reasonably Related to the Achievement of a legitimate Legislative Purpose.	23
a.	The classifications created by the statute of repose are not reasonable .	23
b.	The classification does not bear a reasonable relationship to the achievement of a legitimate legislative purpose	27
C.	THERE IS NOT A SUFFICIENT FACTUAL BASIS TO DETERMINE WHETHER UTAH CODE ANN. §78-12-25.5 APPLIES TO HIGHAM HILTON MECHANICAL CONTRACTORS, INC.	28
D.	THERE IS AN INSUFFICIENT FACTUAL RECORD TO DETERMINE IF UTAH CODE ANN. § 78-12-25.5, BARS PLAINTIFF'S CLAIMS AGAINST MARTIN STERN, JR., AIA ARCHITECT AND ASSOC.	30
E.	THE TRIAL COURT ERRED IN CERTIFYING THIS CASE FOR APPEAL.	30
XI.	CONCLUSION	34
XII.	ADDENDUM.	38

III.

TABLE OF AUTHORITIES

CASES

<u>Arneson v. Olson</u> , 270 N.W.2d 125 (N.D. 1978).	23
<u>Berry v. Beech Aircraft Corp.</u> , 717 P.2d 670 (Utah 1980).	8,13,14,16,17 18,19,22,27,28
<u>Bracken v. Dahle</u> , 251 P.16, 20 (Utah 1926).	22
<u>Broome v. Truluck</u> , 241 S.E.2d 739 (S.C. 1978).	19,22,24,25
<u>Carson v. Maurer</u> , 424 A.2d 825 (N.H. 1980).	23
<u>Clawson v. Boston Acme Mines Development Co.</u> , 72 Utah 137, 269 P. 147 (1928).	30
<u>Curtis-Wright Corp. v. General Electric Co.</u> , 446 U.S. 1 (1980).	32,34
<u>Daugaard v. Baltic Cooperative Building Supply Assoc.</u> , 349 N.W.2d 419, 425 (S.D. 1974)].	17
<u>Fujioka v. Kam</u> , 514 P.2d 568, 71 (1973).	11,25,27
<u>Good v. Christensen</u> , 527 P.2d 223, 224 (Utah 1974).	13,24
<u>Hayden v. McDonald</u> , 719 F.2d 266, 68 (8th Cir. 1983).	32,34
<u>Hooper Water Improvement District v. Reeve</u> , 642 P.2d 745 (Utah 1982).	13,19,22,28
<u>Kallas Millwork Corp. v. Square D Co.</u> , 225 N.W.2d 454 (Wis. 1978).	25,29
<u>Loyal Order of Moose Lodge 1785 v. Cavaness</u> , 563 P.2d 143 (Okla. 1977).	25
<u>Maisch v. United States Smelting and Refining and Mining Co.</u> , 113 U. 101, 191 P.2d 612, 624 (1984).	18

<u>Malan v. Lewis</u> , 693 P.2d 661, 670 (Utah 1984).	21
<u>Morrison Knudsen Co. v. Archer</u> , 655 F.2d 962, 965 (9th Cir. 1981).	34
<u>Mountain Fuel Supply Co. v. Salt Lake City</u> , 752 P.2d 884 (Utah 1988).	9,11,21,23,24,27
<u>Olson v. Salt Lake City School District</u> , 724 P.2d 960, 65 (Utah 1986).	32,34
<u>Page v. Gulf Oil Corp.</u> , 775 F.2d 1311 (5th Cir. 1985).	32
<u>Pate v. Marathon Steel Co.</u> , P.2d 765, 67 (Utah 1984).	32
<u>Phillips v. ABC Builders, Inc.</u> , 611 P.2d 821 (Wyo. 1980).	13
<u>Plyer v. Doe</u> , 457 U.S. 202, 216, 217 (1982).	22
<u>Reed v. Reed</u> , 404 U.S. 71 (1971).	23
<u>Shibuya v. Architects Hawaii, Ltd.</u> , 647 P.2d 276 (Haw. 1982).	25,28
<u>Skinner v. Anderson</u> , 231 N.E.2d 588 (Ill. 1967).	24,26
<u>State v. Bishop</u> , 717 P.2d 261, 266 (Utah 1986).	21

OTHER AUTHORITIES:

<u>Federal Rules of Civil Procedure</u>	32
W.L. Prosser and W.P. Keeton, <u>The Law of Torts</u> , §104A at 722 (5 ed. 1984).	14,15
U.S. Const. amend. XIV § 1.	2,20
<u>Utah Code Ann.</u> §78-2-2(3)(j).	1

<u>Utah Code Ann.</u> §78-12-25.5.	1,2,5,6,8,19,22 24,27,28,29,30,34
<u>Utah Code Ann.</u> §78-12-35.	30
Utah Const. art. I § 2.	2,21
Utah Const. art I § 11.	3,16
Utah Const. art. I § 24.	3,21
Utah Const. art. VIII § 3.	1
<u>Utah Rules of Civil Procedure.</u>	5,32

IV.

STATEMENT OF JURISDICTION AND DESCRIPTION
OF THE PROCEEDINGS BELOW

This is an appeal from an order granting summary judgment in favor of defendants. The Utah Supreme Court has jurisdiction of this appeal pursuant to Utah Code Ann. §78-2-2 (3)(j) and Utah Const. art. VIII, § 3.

V.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether Utah Code Ann. §78-12-25.5, a statute of repose which bars actions against contractors, planners and designers, after seven years, violates Article I Section 11, the open courts provision of the Utah Constitution.

2. Whether Utah Code Ann. §78-12-25.5 violates equal protection of the laws as guaranteed by Article I Sections 2 & 24 of the Utah Constitution and the 14th Amendment of the United States Constitution.

3. Whether Utah Code Ann. §78-12-25.5 applies to a mechanical subcontractor who merely supplies a defective sauna heating unit to be plugged in.

4. Whether Utah Code Ann. §78-12-25.5 can be applied to an out of state architect when there is no factual record to determine whether the architect was present in Utah after it designed the pool.

5. Whether the lower court properly certified its summary judgment order for appeal.

VI.

CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES AND RULES

[N]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person in its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

All political power is inherent in the people and all free governments are founded on their authority for their equal protection and benefit, and they have the right to alter or reform their government as the public welfare may require.

Utah Const. art. I § 2.

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 trial in this State, by himself or counsel, in any civil cause to which he is a party.

Utah Const. art. I § 11.

All laws of a general nature shall have uniform operation.

Utah Const. art. I § 24.

The provisions of this Constitution are mandatory and prohibitory unless by express words they are declared to be otherwise.

Utah Const. art. I § 26.

Sec. 78-12-25.5 Injury due to defective design or construction of improvement to real property - within seven years

1(a). An action to recover damages for any injury to property, real or personal or for any injury to the person, or for bodily injury or wrongful death, arising out of the defective and unsafe condition of an improvement to real property, or any action for damages sustained on account of the injury, may not be brought against any person performing or furnishing the design, planning, surveying, supervising the construction of, or constructing the improvement to real property more than seven years after the completion of construction.

(b). * * *

2. 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.

3. This section does not extend or limit the period otherwise prescribed by state law for the bringing of any action.
4. As used in this section:
 - (a) Person means an individual corporation, partnership or other legal entity.
 - (b) "Completion of construction" means the date of issuance of the certificate of substantial completion by the owner, architect, engineer or other agent or the date of the owner's use or possession of the improvement on real property.

VII.

STATEMENT OF THE CASE

This is an appeal from an order granting summary judgment in favor of defendants Martin Stern, Jr.; AIA Architects and Associates; Rocky Mountain Pools, Inc.; Higham Hilton Mechanical Contractors, Inc.; and Okland Construction. The defendants negligently designed and constructed a swimming pool and sauna. Eight years later, plaintiff was injured while using the sauna and the pool.

The lower court granted the summary judgment solely because the accident occurred after the seven year period allowed by Utah Code Ann. §78-12-25.5 expired.

The order granting summary judgment was entered on August 4, 1988. On the same day, the lower court, pursuant to Rule 54(b) of the Utah Rules of Civil Procedure, certified its order for appeal.

VIII.

STATEMENT OF FACTS RELEVANT TO THE ISSUES PRESENTED FOR REVIEW

Appellant, James Sanchez (Sanchez) commenced his action against Little America Hotel Corp. (Little America) seeking compensation for extensive neck and back injuries suffered when he used the Little America sauna and dove into the Little America swimming pool. (R. 2-18; Deposition of James Sanchez, 11/21/87 pp. 34-48.) The accident happened on July 4, 1986. Plaintiff, a guest at the Little America Hotel, filed suit against Little America on January 14, 1987 (R. 2-18). Through discovery, plaintiff learned the identity of the following parties:

1. The general contractor - Okland Construction;

2. The swimming pool subcontractor - Rocky Mountain Pools, Inc;
3. The mechanical contractor responsible for the sauna and pool - Higham Hilton Mechanical Contractors, Inc;
4. The pool architect - Martin Stern, Jr., and AIA Little America Hotel Corporation Answers to Interrogatories, copy attached as Exhibit A.

Architects and Associates, a California corporation. The amended complaint naming these defendants was filed on or about November 16, 1987. (R. 51-82, 89-90.)

The Little America pool and sauna were substantially completed and inspected by Salt Lake City by the end of 1978. More than seven years passed between the substantial completion of the pool and the plaintiff's accident. (R. 224-225.)

The general contractor, pool and mechanical subcontractors and architect all moved the trial court for summary judgment, stating that Utah Code Ann. §78-12-25.5, a statute of repose, bars plaintiff's claims. (R. 199-201, 219-221, 232-234, 248-250.)

At the summary judgment hearing, Sanchez argued:

1. the statute of repose violates the open courts provision of the Utah Constitution;

2. the statute of repose violates equal protection of the laws guaranteed by the Utah and Federal Constitution;
3. the statute does not apply to a mechanical contractor who provides a defective product instead of constructing a defective improvement; and
4. there is not a sufficient factual record to determine whether the statute of repose was tolled as to Martin Stern Architects Associates, a California corporation, because the corporation was absent from the State after it ceased doing business with Little America.

(R. 257-270; Transcript of Proceedings 7/18/88 pp. 6-15.)

The lower court granted defendants' motions for summary judgment solely because the seven year period allowed by the statute of repose lapsed, prior to Sanchez's accident. That left Little America Hotel Corp. as the only remaining defendant. Over the objection of the appellant, the court, as an after thought at the hearing, certified its order for appeal. (R. 366-367; Tr. 5-18.)

IX.

SUMMARY OF ARGUMENT

The lower court granted summary judgment against Sanchez solely because the diving accident occurred after the seven year period allowed by Utah Code Ann. §78-12-25.5 a statute of repose.

The statute has no purpose other than to immunize architects and contractors from their torts.

The statute violates the open court provision of Article I Section 24 of the Utah Constitution because:

1. The legislature, in taking away the injured person's right to sue, did not provide a substitute remedy.
2. There is no clear economic or social evil eliminated by the statute.
3. Even if there is some mystical evil to be eliminated, the statute is arbitrary and unreasonable.

Berry v. Beech Aircraft Corp., 717 P.2d 670 (Utah 1980).

Further, the statute fails even a minimum level of equal protection scrutiny. The statute, by singling out contractors and architects for immunization while ignoring suppliers, materialmen and owners creates unreasonable

classifications. Further, the classifications do not bear a reasonable relationship to the achievement of a legitimate legislative purpose. Mountain Fuel Supply Co. v. Salt Lake City, 752 P.2d 884 (Utah 1988). There is no legitimate legislative purpose. The statute's only purpose is to immunize architects and contractors from tort liability.

In addition, there is a factual issue as to whether the statute of repose applies to Higham-Hilton, the mechanical contractor. Higham-Hilton may be liable to Sanchez for supplying a defective product rather than creating a defective real property improvement.

Further, there is a factual question as to whether the statute of repose is tolled against the out-of-state architect. The record does not establish whether the architect was absent from the state after it ceased doing business with Little America.

Finally, the case should not have been certified for appeal. The issues on appeal and the issues remaining for trial are interrelated. The lower court's piecemeal approach to appeals and litigation should be discouraged.

For these reasons, the summary judgment of the lower court should be reversed and the case remanded for trial.

X.

ARGUMENT

A. THE STATUTE OF REPOSE VIOLATES THE OPEN COURTS PROVISION OF THE UTAH CONSTITUTION.

1. Factual Background

The Little America pool complex was completed toward the end of 1978.

Eight and one-half years later, Sanchez broke his neck when he dove into the Little America Hotel swimming pool. While a guest at the hotel, Sanchez had become lightheaded using the sauna. He dove into the pool to cool off. (Sanchez deposition p. 35.)

Within seven months of the accident Sanchez sued the hotel. Through discovery Sanchez learned the identities of (1) the general contractor, (2) the pool and sauna subcontractors, and (3) the architect. Sanchez then filed an amended complaint against the contractors and architect alleging negligence, strict liability and breach of express and implied warranty.

Sanchez's basic claim is that there were no timers or warning signs in the sauna, and no warning signs near the pool. Sanchez also alleged that there was inadequate pool illumination and depth markings, all of which caused Sanchez's extensive injuries. (R. 2-18.)

The trial court granted the general contractor's, subcontractor's and architect's motions for summary judgment. The sole basis of the ruling was that the seven year time period allowed by the statute of repose expired prior to Sanchez's claim.

2. The Standard of Review.

Because this appeal presents only questions of law, the Utah Supreme court reviews the trial court's rulings for correctness and accords them no particular deference. Mountain Fuel Supply Co. v. Salt Lake City, 752 P.2d 884 (Utah 1988). For purposes of the record, it must be assumed that both the contractor and the architect were negligent in designing and constructing the pool and sauna. see, Fujioka v. Kam, 514 P.2d 568, 71 (1973).

3. The Standard of Repose.

The applicable statute of repose reads:
Sec. 78-12-25.5 Injury due to defective design or construction of improvements or real property - within seven years:

- (1)(a) An action to recover damages for any injury to property, real or personal, or for any injury to the person, or for bodily injury or wrongful death, arising out of the defective and unsafe condition of an

improvement to real property, or any action for damages sustained on account of such injury, may not be brought against any person performing or furnishing the design, planning, supervision of construction or construction of such improvement to real property more than seven years after the completion of construction.

* * *

- (2) The limitation imposed by this provision shall not apply to any person in actual possession and control as owner, tenant or otherwise, of the improvement at the time of defective and unsafe condition of such improvement constitutes the proximate cause of the injury for which it is proposed to bring an action.

* * *

- (4) As used in this section,
 - (1) "Person" shall mean an individual, corporation, partnership, or any other legal entity.
 - (2) Completion of construction for the purposes of this act shall mean the date of issuance of a certificate of substantial completion by the owner, architect, engineer or other agents, or the date of the owner's use or possession of the improvement on real property.

The statute applies to all actions seeking damages for injury to real or personal property, bodily injury or

wrongful death. Hooper Water Improvement District v. Reeve, 642 P.2d 745 (Utah 1982).

The statute of repose is sweeping and absolute once the seven year statutory period lapses. The statute prevents the injured, the owner and all others from suing the designer, planner, or contractor. Good v. Christensen, 527 P.2d 223, 224 (Utah 1974). It grants a special immunity from future liability to the contractors and architects. Hooper, at 747; see, Phillips v. ABC Builders, Inc., 611 P.2d 821 (Wyo. 1980). Since the statute begins to run from a date unrelated to the injury, it is not designed to allow a reasonable time for filing of an action once a person is injured. see, Berry v. Beech Aircraft, 717 P.2d 670, 672 (Utah 1985).

The lower court ruled that the statute bars plaintiff's lawsuit even though the cause of action did not arise until after it was barred. The statute cuts off Sanchez's action even though it was filed within the applicable four year statute of limitations.

The statute is not designed to abolish minimal claims. On the contrary, "Its obvious intent was to protect persons performing or furnishing the design, planning, supervision of construction or construction of improvements from indefinite future liability." Hooper, supra at 747.

This immunity is not related to culpability. It applies regardless of whether the conduct is intentional. It applies whether there is negligence or strict liability. Further, neither the apparent danger of the construction nor the expected useful life of the construction affects the immunity conferred. The immunity protects the contractor, planner or designer whether the building has a useful life of ten or one hundred years. Contractors and architects are protected even if the defect is not detectable by the owner or user so the injured is wholly unable to protect himself. c.f. Berry at 673.

4. Historical Context of Contractor Liability Law

The liability of contractors, architects, and engineers engaged in the construction of buildings follows the general path of product liability law but lags behind product liability law by some twenty years. W.L. Prosser and W.P. Keeton, The Law of Torts, §104A at 722 (5 ed. 1984).

Originally, the courts held that a contractor, architect or engineer could not be liable once the structure was completed and accepted by the owner. Id. As in the case of products liability law, the change in the law began with a

series of exceptions. These exceptions permitted lawsuits directly against the contractor or architect where:

1. The contractor knew it was dangerous and defective; or
2. The individual plaintiff's use was intended or anticipated; or
3. The construction was imminently dangerous; or
4. The construction was a nuisance infringing on the rights of land owners or the public.

Prosser, at 723.

As in the case of products liability law, the exceptions swallowed up the rule until the analogy of McPherson v. Buick Motor Co. was presently and finally accepted. Prosser, at 723. The contractor is now liable to all those who may foreseeably be injured by the structure, not only when he fails to disclose known dangerous conditions, but also when the work is negligently done. This applies not only to contractors doing original work, but also to those who make repairs or install parts, architects and engineers. There is liability for negligent design as well as for negligent construction. Prosser, at 723.

5. Utah Const. Article I Section 11 - Utah's Open Courts Provision

Article I Section 11 of the Utah Constitution is part of the declaration of rights contained in our State's constitution. It declares that an individual shall have a right to a remedy by due course of law, for injury to person, property or reputation. Its purpose is directly contrary to that of the statute of repose.

Utah Const. art. I § 11 reads:

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. . . .

Thirty-seven states have similar constitutional provisions. The concept of the open courts provision originated with the Magna Carta. Berry v. Beech Aircraft Corp., 717 P.2d 670, 674 (Utah 1985).

Utah's constitutional guarantee of access to the court is not an empty gesture. Rather it:

[I]s solid core upon which all our state laws must be premised. Clearly and unequivocally our constitution directs that the courts of this state shall be open to the injured and oppressed. We are unable to view this constitutional mandate as a faint echo to be skirted or ignored. Our constitution is free to provide greater protection for our citizens than are required under the federal constitution. . . .Our

constitution has spoken and it is our duty to listen.

Berry, at p. 676-677 quoting Daugaard v. Baltic Cooperative Building Supply Assoc., 349 N.W.2d 419, 425 (S.D. 1974].

Individuals are entitled to a remedy by due course of law for injuries to person, property or reputation. The purpose of Article I Section 11 is to limit the legislature's power to change laws when the changes are detrimental to the persons who are injured. The injured are generally isolated in society, belong to no identifiable group and rarely are able to rally the political process to their aid. Berry, at p. 676.

Recently, this Court determined whether a similar statute of repose violates Article I Section II. In Berry, supra, the court, after using a two part analysis, held that a products liability statute of repose violates Utah's open courts provision. The Berry analysis dictates the same result in this case. The statute of repose violates Article I, Section 11 of the Utah Constitution.

In Berry, this court said:

Section 11 is satisfied if the law provides an injured person an effective and reasonable alternative by due cause of law.

* * *

The benefit provided by the substitute must be substantially equal in value or other benefit to the remedy abrogated. . .

although the form of the remedy may be different.

Berry, at 680; see generally, Maisch v. United States Smelting and Refining and Mining Co., 113 U. 101, 191 P.2d 612, 624 (1984).

In the present case, the legislature did not provide a substitute remedy. Prior to the statute of repose, injured persons like Sanchez, could sue the owner, the contractors and the architect for injury compensation. Because of the statute, Sanchez can only sue the owner.

In Berry, the court explained that if there is no substitute remedy provided, (and in this case there is none), the statute of repose may be justified only if there is a clear, social or economic evil to be eliminated, and elimination of the existing legal remedy is not an arbitrary or unreasonable means for achieving the objective. Berry, at 680. In Berry, the legislature's purpose, as set forth in the statute, was to reduce the evil of high insurance premiums. This Court rejected the statute's purpose.

In this case, unlike Berry, the statute does not set forth any clear social or economic evil to be eliminated. It is apparent from the statute itself, that the sole object, purpose and scope of the statute is to grant designers, planners and contractors immunity from lawsuits for their

tortious conduct. Hooper, supra; see, Broome v. Truluck, 241 S.E.2d 739 (S.C. 1978). The statute has no other purpose. There is no social or economic evil to be eliminated.

Even if there is some mystical social or economic evil to be eliminated by Utah Code Ann. §78-12-25.5, summary judgment is inappropriate because the court is required to make a factual finding as to whether the statute is an arbitrary and unreasonable means for achieving the objective. Berry, at 682.

In Berry, this court found a product's liability statute of repose to be unreasonable, arbitrary and unconstitutional on the following facts:

a. The statute applied to all kinds of products irrespective of the product's useful life;

b. The record did not establish any significant increase in product's liability litigation in Utah;

c. The statute could not reduce premiums because insurance companies set premiums on nationwide data;

d. The number of claims barred would not be sufficient to affect insurance premiums rates.

e. The statute would provide less incentive to manufacturers to make their products safe.

Berry, at 681-83.

In the present case, the identical facts set forth above, so far as they are known, establish that this statute is unreasonable, arbitrary and unconstitutional. The statute applies to all kinds of construction irrespective of its useful life. The record does not establish any increase in construction liability litigation. There is nothing suggesting insurance premiums are lowered. The statute provides less incentive to make real property improvements safe.

B. THE STATUTE OF REPOSE VIOLATES EQUAL PROTECTION OF THE LAWS GUARANTEED BY THE UTAH CONSTITUTION AND THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

1. Introduction.

Equal protection of the laws is guaranteed by Article I Section 2 & 24 of the Utah Constitution and the 14th Amendment of the United States Constitution. They read as follows:

[N]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of laws; nor deny to any person in its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

All political power is inherent in the people and all three governments are founded on their authority for their equal

protection and benefit and they have the right to alter or reform their government as the public welfare may require.

Utah Const. art. I § 2.

All laws of a general nature shall have uniform operation.

Utah Const. art. I § 24.

The fundamental principle of both state and federal equal protection provisions is that legislative classifications resulting in differing treatment for different persons must be based on actual differences that are reasonably related to the legitimate purposes of the legislation. Mountain Fuel Supply Co. v. Salt Lake City, 752 P.2d 884 (Utah 1988); Malan v. Lewis, 693 P.2d 661, 670 (Utah 1984); State v. Bishop, 717 P.2d 261, 266 (Utah 1986). The latitude granted the legislature in making the classification depends upon the subject matter of the statute and the statute's objective. If the statute infringes on sensitive constitutional rights or if the statute is based on a suspect classification, the legislature's power to classify is substantially narrowed. Bishop, at 266.

2. The Rights Impaired by the Statute of Repose.

The sole object, purpose and scope of the statute of repose is to prevent injured persons, like Sanchez, from suing architects and contractors for their torts once seven years

pass after the real estate improvement is substantially completed. Hooper, supra; see, Broome v. Truluck, 241 S.E.2d 739, 740 (S.C. 1978).

As stated in part "A" of this argument, the appellant's right to seek compensation through the courts is a right protected by the state constitution. It is part of the "declaration of rights" set forth in the Utah Constitution. Berry, at 674.

The Utah Supreme Court, in Bracken v. Dahle, 251 P.16, 20 (Utah 1926), characterized the right to apply to the courts for redress of wrongs as a "substantial right".

3. The Standard of Scrutiny.

A threshold issue in this case is to determine the standard of equal protection scrutiny that should be applied to Utah Code Ann. §78-12-25.5

If this court decides that Sanchez's "substantial right", a right protected by our constitution, is a fundamental right, then this court should apply a "strict scrutiny standard". A strict scrutiny standard requires the statute to advance or protect a compelling state interest in order to sustain the classification. e.g.) Plyer v. Doe, 457 U.S. 202, 216, 217 (1982).

If this court determines that appellant's right to sue is not a fundamental right, but a right that is entitled to more protection than economic rights, the court should choose to apply a more rigorous review than the traditional rational basis test. The test is whether the classification is substantially related to a legitimate governmental interest. Reed v. Reed, 404 U.S. 71 (1971).

Cases striking down statutes of limitation or statutes of repose after applying an intermediate level of review are: Carson v. Maurer, 424 A.2d 825 (N.H. 1980), and Arneson v. Olson, 270 N.W.2d 125 (N.D. 1978).

The minimum level of review that any classification statute must pass is whether the classification is a reasonable one and bears a reasonable relationship to the achievement of a legitimate legislative purpose. Mountain Fuel, *supra* at 890.

Because the appellant's right to bring an action is protected by our constitution, and is a "substantial right", this court should apply a heightened standard of review.

4. The Classifications Created by the Statute of Repose are not Reasonable, nor are they Reasonably Related to the Achievement of a legitimate Legislative Purpose.

a. The classifications created by the statute of repose are not reasonable.

Equal protection, at a minimum, requires that the statutory classification be reasonable and have a reasonable relationship to the achievement of a legitimate legislative purpose. Mountain Fuel, at 889.

It is a two part test, the first part requires that there be a reasonable classification. Id. The classification cannot be arbitrary. Broome, at 740. The classification fails if the benefits granted to some are denied to others. Id.

Although Utah Code Ann. §78-12-25.5 is sweeping and absolute, it is not all encompassing in its application. The statute benefits only planners, architects and contractors. It does not apply to others whose negligence in the improvement of real property causes damage or injury to others. Materialmen, suppliers and manufacturers of building components are unprotected, so are owners. In fact, the owner is specifically excluded from the protection of the statute. Utah Code Ann. §78-12-25.5; Good v. Christensen, 527 P.2d 223 (Utah 1974).

Only architects, planners and contractors are singled out for preferential treatment. There is no distinction which justifies granting immunity to one group; the architects, engineers and contractors on one hand, and not granting immunity to owners and manufacturers. No rational basis appears for making the distinction. Broome, at 740. Skinner

v. Anderson, 231 N.E.2d 588 (Ill. 1967). Fujioka v. Kam, 514 P.2d 568 (Haw. 1973).

Several courts have considered whether similar construction statutes of repose establish unreasonable classifications. The overwhelming majority conclude that the statute violates equal protection. Skinner v. Anderson, 231 N.E.2d 588 (Ill. 1967). Broome v. Truluck, 241 S.E.2d 739 (S.C. 1978); Fujioka v. Kam, 514 P.2d 568 (Haw. 1973); Shibuya v. Architects Hawaii, Ltd., 647 P.2d 276 (Haw. 1982); Loyal Order of Moose Lodge 1785 v. Cavaness, 563 P.2d 143 (Okla. 1977); Kallas Millwork Corp. v. Square D Co., 225 N.W.2d 454 (Wis. 1978).

The first and leading case to consider whether there is a rational basis for treating architects and contractors engaged in the improvement of real property differently than others similarly situated was Skinner v. Anderson, 231 N.E.2d 588 (Ill. 1967). In Skinner, the court persuasively reasoned:

More important is the fact that of all of those whose negligence in connection with the construction of an improvement to real estate resulting in damage to property or injury to person more than four years after construction is completed, the statute singles out the architect and the contractor and grants them immunity. It is not at all inconceivable that the owner or person in control of such an improvement might be held liable for damage or injury that results from a defective condition

for which the architect or contractor is in fact responsible. Not only is the owner or person in control given no immunity, the statute takes away his action for indemnity against the architect or contractor.

The arbitrary quality of the statute clearly appears when we consider that architects and contractors are not the only persons whose negligence in the construction of a building or other improvement may cause damage to property or injury to persons. Skinner, at p. 591.

Such is the present case. Sanchez, sued the architect, the contractor, the subcontractors and the owner. Ordinarily, the owner would have a claim for indemnification against the responsible contractor. Little America crossclaimed against the contractors. However, the summary judgment order entered by the lower court grants immunity to the contractors and takes away Little America's right to indemnity.

A statute which grants immunity to the architect and the contractors who should and would be, but for the statute primarily responsible for the injuries, and burdens the owner with liability for the damages proximately caused by the negligence of the architect and contractors is clearly unfair, unreasonable and arbitrary. The classification is not founded upon a reasonable distinction or difference necessitated by

state policy. The statute violates equal protection of the laws. Fujioka, at p. 571.

- b. The classification does not bear a reasonable relationship to the achievement of a legitimate legislative purpose.

The statute of repose also flunks the second part of the minimum equal protection test; that is, the classification does not bear a reasonable relationship to the achievement of a legitimate legislative purpose. See generally, Mountain Fuel Supply Co. v. Salt Lake City, 752 P.2d 884, 890 (Utah 1988).

The equal protection analysis for determining whether a classification bears a reasonable relationship to the achievement of a legislative purpose is essentially identical to the analysis used by this court in deciding open courts provision cases, that is whether there is "a clear social or economic evil to be eliminated and the elimination of an existing legal remedy is not an arbitrary or unreasonable means for achieving the objective". Compare Berry, at 680-683 with Mountain Fuel, at 890-891.

Utah Code Ann. §78-12-25.5 does not set forth its purpose, but it is obvious that its only purpose is to protect architects and contractors from future liability for their

torts. Hooper, supra; Shibuya v. Architects Hawaii, Ltd., 647 P.2d 276 (Haw. 1912). The same argument contained on pages 18-19 of this brief applies in equal protection analysis. If immunizing persons from their torts, standing alone, is a legitimate legislative purpose, all statutes of repose would be constitutional. Furthermore, the equal protection and open courts guarantees would be useless appendages to our constitution. That kind of analysis could result in allowing the legislature to abolish any or all remedies for injured persons. It is an analysis specifically rejected in Berry. see, Berry, at 676-678.

In summary, the statute of repose creates unreasonable classifications and the classifications are not related to achieving a legitimate state purpose. For both of these reasons, the statute fails any minimum equal protection scrutiny.

C. THERE IS NOT A SUFFICIENT FACTUAL BASIS TO DETERMINE WHETHER UTAH CODE ANN. §78-12-25.5 APPLIES TO HIGHAM HILTON MECHANICAL CONTRACTORS, INC.

Utah Code Ann. §78-12-25.5 applies only to improvements to real property. An improvement to real property is "a permanent addition to or a betterment of real property that enhances its capital value and it involves the

expenditure of labor or money and is designed to make the property more useful or valuable as distinguished from ordering repairs." Kallas Millwork Corp. v. Square D Co., 225 N.W.2d 454, 456 (Wis. 1975).

Higham-Hilton, the mechanical subcontractor, contests the allegation that it constructed or installed the sauna at Little America. Vice President, Stanley Nakamura, in a deposition taken June 20, 1988 testified that Higham-Hilton delivered a heating unit to be plugged in:

Q: Who installed the heating unit in the sauna?

A: What do you mean, "Who installed it?" There's nothing to install.

Q: Just plug it in and it works?

A: Just plug it in and it works.

(Deposition of Stanley Nakamura, 6/28/88 pp. 20.)

In other words, Higham-Hilton may have furnished a defective product rather than constructing a defective improvement. If Higham-Hilton delivered a defective product, then Utah Code Ann. §78-12-25.5 is not applicable. It is simply too early to tell in this litigation whether Utah Code Ann. §78-12-25.5 prohibits Sanchez's claim against Higham-Hilton.

D. THERE IS AN INSUFFICIENT FACTUAL RECORD TO DETERMINE IF UTAH CODE ANN. § 78-12-25.5, BARS SANCHEZ'S CLAIMS AGAINST MARTIN STERN, JR., AIA ARCHITECT AND ASSOC.

Martin Stern, Jr., AIA Architect and Assoc., is a California corporation. Utah Code Ann. §78-12-35 provides:

Where a cause of action accrues against a person when he is out of the state, the action may be commenced within the term that is limited by this chapter after his return to the state. If after a cause of action accrues he departs from the state, the time of his absence is not part of the time limited for the commencement of the action.

Section 7-12-35 applies to foreign corporations. Clawson v. Boston Acme Mines Development Co., 72 Utah 137, 269 P. 147 (1928). It is simply too early to tell in this litigation, whether Martin Stern, ceased doing business within the State of Utah after it completed its work for Little America on the swimming pool and sauna. If it did, the time limitations contained in §78-12-25.5 would be tolled and Sanchez's complaint was timely filed against the architect.

E. THE TRIAL COURT ERRED IN CERTIFYING THIS CASE FOR APPEAL.

As an apparent afterthought, the lower court, over the objections of the appellant, certified Sanchez's claims against the general contractor, the subcontractor, and the architect for appeal.

Mr. Kanell: Your Honor, in light of the fact this case will be ongoing, and I have not presented this by way of pleadings, I think it might be appropriate to have this matter certified as a final order under 54 (b).

* * *

Judge Young: Consistent with the need and the statute of repose desire to resolve issues, it would appear appropriate this request of Mr. Kanell should be granted and that will be certified as a final order for the purpose of 54(b).

(R. Tr. pp. 17-18.)

The lower court reasoned that because there was nothing remaining as to these defendants, the appeal should be certified for review. Unfortunately, whether there remains anything to do, as to certain defendants is not the criteria for deciding whether to certify a case for appeal. It is only one element of a three element test.

Before the lower court can certify the claims for appeal, it must make three findings:

- (1) There must be multiple claims for relief;
- (2) The judgment appealed from must have been entered in an order that would be appealable but for the fact that other claims or parties remained in the action;

(3) There must be a finding that there is no just reason for delay of the appeal.

Pate v. Marathon Steel Co., P.2d 765, 67 (Utah 1984). All of these requirements must be met before the judgment can be certified for appeal. Id. at 768. Rule 54(b) certifications ". . . should not be entered routinely or as a courtesy to counsel." Hayden v. McDonald, 719 F.2d 266, 68 (8th Cir. 1983). Certification should be used only in the infrequent harsh case. Page v. Gulf Oil Corp., 775 F.2d 1311 (5th Cir. 1985).

Elements (1) and (2) are present in this case, but element (3) is not. The appeal should have been delayed.

Utah Rules of Civil Procedure 54(b) is modeled after and is essentially identical to Rule 54(b) of the Federal Rule of Civil Procedure. Therefore, Utah courts often rely heavily upon federal court decisions interpreting Federal Rule of Civil Procedure 54(b) to explain the operation of Utah's Rule 54(b). Olson v. Salt Lake City School District, 724 P.2d 960, 65 (Utah 1986).

In Curtis-Wright Corp. v. General Electric Co., 446 U.S. 1 (1980), the United States Supreme Court outlined the factors a trial court must use in determining whether there is no just reason for delay. They are:

1. whether the certification will result in unnecessary appellant review;
2. whether the adjudicated claims are separate, distinct and independent of any of the other claims to be tried;
3. whether the adjudicated claims would be mooted by any future development in the case;
4. whether the nature of the adjudicated claims is such that no appellate court would have to decide similar issues more than once, even if there were subsequent appeals.

Curtis-Wright Corp., at 8, 9. The foregoing factors show that this case should not have been certified for appellate review.

If Sanchez wins a substantial verdict against Little America, fully compensating his injuries, there is no need to appeal the lower court's dismissal. Sanchez's claim would be moot.

On the other hand, if Sanchez loses the litigation against Little America, there will be two appeals doubling the workload of this court on inter-related issues.

If the appellant court will be required to address legal or factual issues that are similar to the pending claims, the adjudicated claims should not be certified for appeal.

Morrison Knudsen Co. v. Archer, 655 F.2d 962, 965 (9th Cir. 1981). The test is simply whether the appellate court must familiarize itself with or review the same set of facts twice. Hayden v. McDonald, 719 F.2d, 270 (8th Cir. 1981).

The lower court certification almost guarantees at least two trials and three appeals increasing the workload for this court and the trial court. First, the Little America claim will be tried. The court will try the accident. If Sanchez is not fully compensated, there will be an appeal of the Little America trial and subsequent trial against the contractors and architects. The trial court will again try the accident. If Little America wins, it will appeal its claims for indemnification against the contractor and architect.

It is this piecemeal approach to appeals and litigation that Rule 54(b) was designed to prevent. e.g. Curtis-Wright Corp., supra; Page v. Gulf Oil Corp., 775 F.2d 1311 (5th Cir. 1985).

XI.

CONCLUSION

Utah Code Ann. §78-12-25.5 bars appellant's claim against the contractor and architect solely because the diving accident occurred eight years instead of seven years after the

swimming pool was constructed. The statute violates appellant's access to the courts guaranteed by Article I Section 11 of the Utah Constitution.

Because the statute also singles out architects and contractors for immunity from their torts while ignoring materialmen, suppliers and owners, the statute also creates unreasonable classifications. Further, the classification does not achieve a legitimate legislative purpose. In short, the statute violates equal protection of the laws guaranteed by the Utah and United States Constitution.

The summary judgment entered by the lower court should be reversed and the case remanded for trial.

DATED this 24th day of March, 1989.

ROBERT J. DEBRY & ASSOCIATES
Attorney for Plaintiff

By 

CERTIFICATE OF MAILING

I certify that on the 20th day of March,
1989, I mailed four true and correct copies of the foregoing
APPELLANT'S BRIEF, (Sanchez v. Little America, et al), postage
prepaid, by depositing copies of the same in the U.S. Mail to:

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IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY
STATE OF UTAH

JAMES SANCHEZ,	:	ORDER GRANTING SUMMARY
	:	JUDGMENT OF DEFENDANTS MARTIN
Plaintiff,	:	STERN, JR. AND AIA ARCHITECT AND
	:	ASSOCIATES, ROCKY MOUNTAIN POOL,
v.	:	INC., HIGHAM-HILTON MECHANICAL
	:	CONTRACTORS, INC. AND OKLAND
LITTLE AMERICA MOTEL, INC.,	:	CONSTRUCTION COMPANY
a Utah corporation; LITTLE	:	
AMERICA REFINING CO., INC.,	:	
a Utah corporation, d/b/a	:	
LITTLE AMERICA HOTEL; MARTIN	:	
STERN, JR. & ASSOCIATES;	:	
OKLAND CONSTRUCTION CO., a	:	
Utah corporation; ROCKY	:	
MOUNTAIN POOLS, INC.; a Utah	:	
corporation; HIGHAM-HILTON	:	
MECHANICAL CONTRACTORS, INC.,	:	Civil No. C87-268
a Utah corporation and JOHN	:	(Judge David S. Young)
DOES I through III,	:	
	:	
Defendants.	:	

Defendants' motions for summary judgment came on for hearing on July 18, 1988, the Honorable David S. Young, District Court Judge, presiding. All named parties in the action made

appearances and were represented by counsel. The Court heard argument and found that more than seven years had elapsed from the time that the construction of Little America Hotel was substantially complete and the date that the present action was filed;

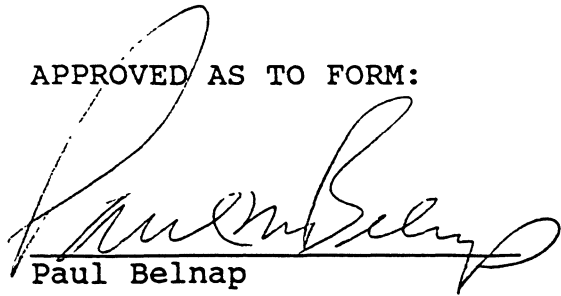
Wherefore, for good cause appearing, and pursuant to 78-12-25.5 Utah Code Annotated, it is hereby ordered that summary judgment is granted in favor of Defendants Martin Stern, Jr. and AIA Architect & Associates, Inc., Rocky Mountain Pool, Inc., Higham-Hilton Mechanical Contractors, Inc., and Okland Construction Company, and pursuant to Rule 54(b), Utah Rules of Civil Procedure, the Court further expressly determines that there is no just reason for delay and therefore directs the entry of final judgment dismissing with prejudice each and every claim and cause of action of the Plaintiff against Defendants Martin Stern, Jr. and AIA Architect & Associates, Inc., Rocky Mountain Pool, Inc., Higham-Hilton Mechanical Contractors, Inc., and Okland Construction Company.

DATED this ____ day of August, 1988.

BY THE COURT:

DAVID S. YOUNG
District Court Judge

APPROVED AS TO FORM:



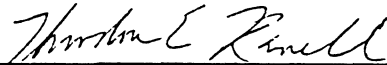
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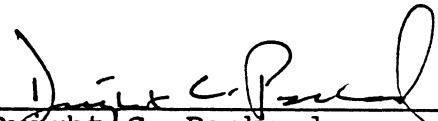
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CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of August, 1988, a true and correct copy of the foregoing ORDER GRANTING SUMMARY JUDGMENT OF DEFENDANTS MARTIN STERN, JR. AND AIA ARCHITECT AND ASSOCIATES, ROCKY MOUNTAIN POOL, INC., HIGHAM-HILTON MECHANICAL CONTRACTORS, INC. AND OKLAND CONSTRUCTION COMPANY was served upon the following parties by placing the same in the United States mails, postage prepaid, and addressed as follows:

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