

1992

James M. Aragon v. Clover Club Foods Company, a
Utah corporation, Borden, Inc., a New Jersey
corporation, Casa Herrera, Inc., a California
corporation, and John Does I thru X, inclusive :
Brief of Appellee

Utah Court of Appeals

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Allan T. Brinkerhoff; Ray, Quinney & Nebeker; Jay E. Jensen; M. Douglas Bayly; Christensen, Jensen & Powell; Attorneys for Defendants/Appellees.

Douglas M. Durbano; Paul H. Johnson; Durbano & Associates; Attorneys for Plaintiff/Appellant.

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COURT OF APPEALS

IN THE UTAH COURT OF APPEALS

JAMES M. ARAGON,)	
)	
Plaintiff/Appellant,)	
)	
v.)	
)	Case No. 920106-CA
CLOVER CLUB FOODS COMPANY, a)	Priority No. 16
Utah corporation, BORDEN, INC.,)	
a New Jersey corporation,)	
CASA HERRERA, INC., a California)	
corporation, and JOHN DOES)	
I thru X, inclusive)	
)	
Defendants/Appellees.)	

APPEAL FROM SUMMARY JUDGMENT ENTERED IN
THE SECOND JUDICIAL DISTRICT COURT OF DAVIS COUNTY

The Honorable Douglas L. Cornaby, Presiding

BRIEF OF APPELLEE CASA HERRERA, INC.

Jay E. Jensen, #1676
M. Douglas Bayly, #0251
CHRISTENSEN, JENSEN & POWELL, P.C.
175 South West Temple, Suite 510
Salt Lake City, UT 84101
Telephone: (801) 355-3431
Attorneys for Defendant/Appellee
Casa Herrera, Inc.

Douglas M. Durbano
Paul H. Johnson
DURBANO & ASSOCIATES
3340 Harrison Blvd., #200
Ogden, UT 84403
Telephone: (801) 621-4111
Attorneys for Plaintiff/Appellant
James M. Aragon

Allan T. Brinkerhoff
RAY, QUINNEY & NEBEKER
79 South Main, #400
Salt Lake City, UT 84111
Telephone: (801) 532-1500
Attorneys for Defendants/Appellees Clover
Club Foods Company and Borden, Inc.

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JURISDICTIONAL STATEMENT

After the trial court entered its final order, Mr. Aragon filed this appeal in the Utah Supreme Court pursuant to Utah Code § 78-2-2(j). In accordance with Utah Code § 78-2-2(4), the Utah Supreme Court transferred the appeal to this Court by order dated February 19, 1992. (Appendix A) This Court has jurisdiction under Utah Code § 78-2a-3(2)(j).

STATEMENT OF ISSUES

Mr. Aragon's claims arise from an industrial accident which occurred on December 16, 1985. Since Aragon failed to bring his action against Casa Herrera until October, 1990--nearly five years after the accident--the trial court granted summary judgment pursuant to the four year limitation of Utah Code § 78-12-25(3).

Aragon contends that the two-year limitation provision of the Utah Product Liability Act, Utah Code § 78-15-3, enacted in 1989, applies to this claim. The specific issues raised by this appeal are as follows:

A. Does the Utah Product Liability Act limitation commence to run when a claimant knows or should know of an injury caused by a product or does the limitation commence to run only when the claimant additionally knows or should know the identity of the product's manufacturer?

B. If the Utah Product Liability Act limitation commences to run when the claimant has notice of injury caused by a product, does the Utah Product Liability Act limitation apply to

Mr. Aragon's injury which occurred approximately three years and four months prior to the effective date of the legislation?

C. If the Utah Product Liability Act limitation requires knowledge of the identity of the manufacturer as well as the fact of injury caused by a product, did Mr. Aragon file his claim within two years of the time he should have known of Casa Herrera's identity?

STANDARD OF APPELLATE REVIEW

The trial court granted judgment as a matter of law. An appellate court accords no deference to the trial court's legal conclusions, reviewing them for correctness. Rollins v. Petersen, 813 P.2d 1156, 1159 (Utah 1991). However, even if the trial court's legal conclusions are erroneous, this Court may affirm the trial court on any proper legal basis. Taylor v. Estate of Taylor, 770 P.2d 163, 169 (Utah Ct. App. 1989).

DETERMINATIVE STATUTES

The statutes determinative of the issues are Utah Code § 78-12-25(3) and Utah Code § 78-15-1 et seq. which are reproduced in their entirety in Appendices B and C respectively.

STATEMENT OF CASE

A. Nature of Case.

This is a product liability action brought by Mr. Aragon seeking damages for injuries to his arm allegedly caused by a mixing machine manufactured by Casa Herrera, Inc.

B. Course of Proceedings.

Aragon originally brought an action against Clover Club Foods Company and Borden, Inc. in the United States District Court for the District of Utah on November 10, 1989. Due to lack of diversity jurisdiction, the federal court dismissed the action on April 20, 1990.

Aragon refiled the action in the Second Judicial District Court of Davis County on May 11, 1990. On August 14, 1990, Aragon moved to amend his complaint to name Casa Herrera, Inc. as a co-defendant. The trial court granted leave to amend on October 16, 1990, and Aragon served the amended complaint upon Casa Herrera on November 8, 1990.

On July 1, 1991, Casa Herrera moved for summary judgment, asserting that since more than four years had elapsed between the occurrence of the accident in December, 1985 and the filing of the complaint against Casa Herrera in October, 1990, Aragon's claims against Casa Herrera were barred by the terms of Utah Code § 78-12-25(3).

On July 23, 1991, the trial court heard argument on Casa Herrera's motion as well as a motion for summary judgment filed by defendants Clover Club Food Company and Borden, Inc. The trial court issued a memorandum decision granting Casa Herrera's motion on July 31, 1991. (Appendix D)

Aragon petitioned for a rehearing pursuant to Rule 59, Utah Rules of Civil Procedure. After a hearing on October 22, 1991, the trial court issued a ruling dated October 23, 1991

affirming its previous grant of summary judgment. (Appendix E)
The trial court executed its formal order on November 13, 1991.
(Appendix F)

Aragon filed his notice of appeal on December 13, 1991.
(Appendix G) The Utah Supreme Court transferred the appeal to this
Court by order dated February 19, 1992. (Appendix A)

C. Statement of Facts.

Insofar as they are material to Mr. Aragon's claims
against Casa Herrera, the facts as asserted by Aragon are as
follows:

1. Facts Regarding Accident.

Mr. Aragon commenced working for Clover Club Foods on
December 3, 1985. (Letter of Aragon's counsel dated October 5,
1989--Appendix H) On December 12, 1985, he was operating a dough
mixing machine (sometimes referred to as a masa feeder). (Ibid.)
At approximately 4:15 p.m., he shut the mixer off, but his super-
visor subsequently directed him to clean the machine. (Ibid.)
Aragon re-started the feeder, let it run for several minutes, and
then started to climb three steps next to the mixer with the
intention of looking into the top of the machine. (Ibid.) As he
mounted the steps, Aragon slipped on some grease and, while attem-
pting to steady himself, grabbed the edge of the feeder. (Ibid.)
A paddle swept his arm into the machine, injuring his left arm and
hand. (Ibid.)

2. Identification of the Mixer's
Manufacturer and Filing Against
Casa Herrera.

Aragon's first attempt to identify the manufacturer of the machine was his counsel's letter to Clover Club Foods and/or Borden, Inc. in October, 1989. (Appendix H)

When Clover Club did not respond, Aragon filed an action against Clover Club and Borden in the United States District Court for the District of Utah on November 10, 1989. (Affidavit of Paul Johnson, Appendix I) Aragon filed his first discovery requests seeking the identity of the machine's manufacturer on January 11, 1990--approximately four years and one month after the accident. (Ibid.) The district court dismissed the federal action for lack of diversity on April 20, 1990, and Aragon refiled the complaint in the Second Judicial District Court of Davis County on May 11, 1990. (Ibid.) On July 13, 1990, Clover Club and Borden identified Casa Herrera as the machine's manufacturer. (Ibid.) Aragon filed his action against Casa Herrera in or about October, 1990. (Ibid.)

SUMMARY OF ARGUMENT

Aragon argues that the two year limitation of the Utah Product Liability Act, effective April 24, 1989, governs his claims against Casa Herrera and that the limitation period commenced on July 13, 1990, the date Clover Club and Borden answered his discovery requests. Aragon must convince the Court that the Utah Product Liability Act limitation does not commence when a plaintiff becomes aware of an injury caused by a product--terms expressly stated in the statute--but only when the plaintiff additionally

acquires knowledge of the manufacturer's identity, a term Aragon petitions the Court to imply in the statute. Aragon's contentions are ill-founded on two bases.

This Court's function in interpreting statutes is to determine the legislature's intent. The Court should note in ascertaining this intent that (1) the language employed in a statute is used advisedly, (2) omissions are significant, and (3) words are to be given their natural and accepted meaning. In light of these criteria, the express language of the statute can only be interpreted to mean that the commencement of the limitation period is conditioned on two factors--knowledge of injury caused by a product.

The history of the Utah Product Liability Act demonstrates that the Utah Legislature intended to restrict rather than broaden a plaintiff's rights in a product liability action. This intent contrasts markedly with the intent of the Washington Legislature as determined by the Washington courts. Accordingly, the Orear decision cited by Aragon is distinguishable.

The Court should not imply a discovery term in light of the circumstances here since by due diligence Aragon could have learned Casa Herrera's identity in a timely fashion.

Because commencement of the Utah Product Liability Act limitation period is not conditioned on knowledge of the manufacturer's identity, the Court cannot constitutionally retroactively apply the two year limitation from the date of Aragon's accident. The Utah Legislature expressly provided that in the event that an

application of the limitation was invalid, the provision would not govern. Accordingly, Utah Code § 78-12-25(3), the four year limitation period, applies and bars Aragon's claims.

In the event that the Court determines that commencement of the Utah Product Liability Act limitation is conditioned on knowledge of the manufacturer's identity, the Court should still uphold the trial court. The limitation period commences when a claimant knows or should have known the requisite information. Even if this Court allowed Aragon a period equal to the length of the limitation to obtain the information, Aragon's action against Casa Herrera was still untimely.

ARGUMENT

I. ARAGON'S INTERPRETATION OF THE LIMITATION IS CONTRARY TO THE LEGISLATURE'S INTENT.

A. This Court's Duty Is to Determine the Legislature's Intent When Interpreting the Phrase "Both the Harm and Its Cause."

Utah Code § 78-15-3 states:

A civil action under this chapter shall be brought within two years from the time the individual who would be the claimant in such action discovered, or in the exercise of due diligence should have discovered, both the harm and its cause. [Emphasis added.]

According to Aragon, the two year limitation commenced once he knew of the harm, the cause of the harm, and the identity of the machine's manufacturer. In reaching this conclusion, Aragon relies on decisions of the Arizona and Washington appellate courts. Aragon ignores the fact that the limitation at issue is a Utah statute and that the Arizona and Washington courts were not

interpreting this statute when they reached their conclusions. The Utah Supreme Court has made it clear that:

The fundamental consideration which transcends all others in regard to the interpretation and application of a statute is: What was the intent of the legislature?

Johnson v. State Tax Commission, 411 P.2d 831, 832, 17 Utah 2d 337 (1966). Thus, this Court's duty is not to rely on decisions interpreting other states' statutes but to determine what the Utah Legislature meant when it enacted the two year limitation containing the phrase "both the harm and its cause."

B. The Utah Supreme Court Has Established the Criteria Which this Court Should Employ to Interpret the Limitation.

In interpreting the statute, the Court (1) must presume that each term was used advisedly (Board of Education of Granite School District v. Salt Lake County, 659 P.2d 1030, 1035 (Utah 1983)); (2) should note omissions and give them effect (Kennecott Copper Corp. v. Anderson, 514 P.2d 217, 219, 30 Utah 2d 102 (1973)); and (3) interpret each term in accord with its usually accepted meaning (Hector, Inc. v. United Savings and Loan Association, 741 P.2d 542, 546 (Utah 1987)). Where the statutory language is plain and unambiguous, the Court is to construe the statute according to its plain language. (Allisen v. American Legion of Post No. 134, 763 P.2d 806, 809 (Utah 1988)). Applying these aids to the interpretation of the two year limitation leads to the conclusion that knowledge of the manufacturer's identity is not required before the two year limitation period starts to run.

1. Each term used advisedly.

The limitations period starts to run when the injured party discovers "both the harm and its cause." Significantly, the legislature used the word "both" to preface the elements necessary to commence the limitation period. As defined by Webster's Seventh New Collegiate Dictionary, the term "both" means "the two: the one and the other." By using the word "both," the legislature was obviously referring to only two elements. By contrast, Aragon invites this Court to add a third element--the identity of the manufacturer. The word "both" is nonsensical when used in a context referring to three elements.

2. Significance of Omissions.

As noted above, the Supreme Court not only presumes that each term in a statute is used advisedly, but it also assumes that omissions are significant. Had the legislature intended to include knowledge of the manufacturer's identity as an element required to commence the limitation period, it would have expressly stated this intention.

3. Usually accepted meanings.

Neither Aragon nor Casa Herrera questions the meaning of the term "harm." The dispute is over the meaning of the phrase "its cause." As commonly used in a strict products liability action, the term "cause" refers to the connecting link between the injury and the alleged defective condition of the product.

4. Lack of ambiguity.

The language of the statute is unambiguous, and the Court need go no further than to apply this statute according to its terms, i.e. the limitation period in a product liability action commences when the plaintiff is aware of the harm done and the fact that a product caused that harm.

C. Even If One Assumes That the Statute is Ambiguous, the Utah Product Liability Act Reflects the Legislature's Intent to Restrict, Rather than to Expand, a Manufacturer's Liability in a Product Liability Action.

If a statute is susceptible to different interpretations, the Court must choose the meaning which best harmonizes with the legislative intent and purpose. Osuala v. Aetna Life & Casualty, 608 P.2d 242, 243 (Utah 1980). Even if this Court were to assume that the terms of the two year limitation are ambiguous, the history and provisions of the Utah Product Liability Act demonstrate the legislature's intent to restrict, rather than to expand, an individual's opportunity to bring an action against a product manufacturer.

The Utah Manufacturers Association sponsored the Utah Product Liability Act. (Berry v. Beach Aircraft, 717 P.2d 670, 681 (Utah 1985). The act included provisions which significantly limited the plaintiff's right to bring a product liability action--(1) a statute of repose, (2) a provision restricting the plaintiff's right to include a specific figure in the plaintiff's prayer for damages, (3) definitions of the terms "defect" and

"unreasonably dangerous," and (4) a rebuttable presumption of non-defectiveness if the product complied with government standards.

Although the Utah Supreme Court declared the entire Utah Product Liability Act unconstitutional in Berry v. Beach Aircraft, 717 P.2d 670 (Utah 1985), the Utah Legislature resurrected the act in 1989 by substituting the two year limitation statute for the statute of repose which the Supreme Court had invalidated. Obviously, the legislature's action in revitalizing the act bespoke the legislature's intent to again reimpose limitations on a plaintiff's right to bring an action against a product manufacturer. Given this history, it is apparent that if the language of the limitation is ambiguous, the Court must adopt the meaning consistent with the legislature's intent to restrict a plaintiff's cause against a manufacturer.

D. The Utah Legislature's Intent Is Clearly Distinguishable from that of the Washington Legislature as Interpreted by the Washington Courts.

Of all the cases cited by Aragon in support of his argument that the term "cause" includes the identity of the manufacturer, only one, Orear v. International Paint Co., 796 P.2d 759 (Wash. App. 1990), purports to interpret a statute with language similar--but not identical--to the Utah Product Liability Act. However, the issue of legislative intent sharply differentiates the Washington statute from the Utah statute.

In Orear, the Washington Court of Appeals interpreted RCW 7.72.060(3) which provides that a product liability claim accrues when "the claimant discovered or in the exercise of due diligence

should have discovered the harm and its cause." (As noted above, the Utah statute prefaces the word "harm" with the word "both.") The appellate court based its interpretation of the Washington act on a previous Washington Supreme Court decision. In that decision, the supreme court had held that the term "cause" as used in the statute was ambiguous and that it was appropriate to give the term a liberal meaning since the Washington Legislature had expressly declared that "its intent was to not unduly impair a claimant's right to recover." Orear, 796 P.2d at 763. Once the court in Orear had determined that it was appropriate to interpret the statute liberally, it held that the identity of the product manufacturer was part of the "cause" of the harm. Although the Washington Legislature may have declared its intent not to impair a claimant's right to recover, the same cannot be said of the Utah Legislature.

E. The More Restrictive Interpretation Achieves an Appropriate Balance Between Competing Objectives.

In Myers v. McDonald, 635 P.2d 84 (Utah 1981), the Utah Supreme Court noted the primary objective of a limitation statute:

The governing policy in this area, as declared by the United States Supreme Court, is that statutes of limitations "are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." [Citing Order of Railroad Telegraphers v. Railway Express Agency, Inc., 321 U.S. 342, 348-49, 64 S.Ct. 582, 586, 88 L.Ed. 788 (1944)]

Myers, 635 P.2d 86. Having stated the primary objective, the court judicially imposed a discovery rule in view of the facts of that

case. In reaching its decision, the court considered an Illinois case and noted that in any situation requiring the discovery rule, a balancing of interests is necessary:

This application of the discovery rule was apparently based on a balancing test. The hardship the statute of limitations would impose on the plaintiff in the circumstances of that case outweighed any prejudice to the defendant from difficulties of proof caused by the passage of time.

Myers, 635 P.2d 87.

In the case of the Utah Product Liability Act, the balance has been struck as follows. The period begins when a person is aware he or she has been injured and is aware that a product has caused the injury. This measure accommodates the interest of a person with a latent injury which may not manifest itself immediately or the interest of an individual who is aware of an injury but is not immediately aware that a product was the source of that injury. Accordingly, until the individual is aware of the harm and its source, the manufacturer's interest is put in abeyance. However, once the injured person is on notice that he or she must act to pursue a remedy, the law protects the manufacturer's interest in not having to defend stale claims.

The Illinois Appellate Court has well expressed the reasons why knowledge of the identity of a tortfeasor is not a factor in the balancing of these interests. In Guebard v. Jabaay, 381 N.E.2d 1164 (Ill. App. 1978), the plaintiff had brought a malpractice action against his personal physician and a hospital, claiming that the physician had negligently performed surgery on

his knee. The plaintiff learned after the limitation period had expired that a resident physician had actually performed the surgery. Plaintiff amended his complaint to include the resident, and the resident physician obtained summary judgment. On appeal, the plaintiff claimed that the discovery rule permitted the late amendment of his complaint. In refuting these contentions, the Illinois court stated:

In applying the discovery rule, the court will balance the hardship on the plaintiff caused by the bar of his suit against the increased burden of a defendant to obtain proof of his defense after the passage of time. The hardship imposed upon a party who is unaware he had an actionable injury until after the limitations period has run is much more severe than that imposed upon a party who knows, or reasonably should know, he has suffered an actionable injury but does not learn the identity of the person who injured him until after the limitations period has passed. The former is in no position to take advantage of the limitations period in which to determine the identity of the party injuring him. The latter, however, knows he has a cause of action, has the time given by the limitations period to attempt to learn the identity of the person who injured him and is not in the position of being barred before ever knowing of his right to sue. We find no basis upon which the extension of the discovery rule urged by plaintiff could be applied in this case. [Emphasis added.]

Guebard, 381 N.E.2d 1167.

The Massachusetts Appellate Court reached a similar result in Krasnow v. Allen, 562 N.E.2d 1375 (Mass. App. Ct. 1990). In Krasnow, a decedent's husband filed a wrongful death action against a psychiatrist who, unknown to the plaintiff, was an employee of a public entity. After learning the identity of the

psychiatrist's employer, the plaintiff amended his complaint to include the public entity. The amended complaint was dismissed due to the plaintiff's failure to give timely notice of his claim. In addressing the plaintiff's contention that the discovery rule should postpone the commencement of the limitation period, the Massachusetts court stated:

Determining how far to extend the discovery rule requires a balancing between competing policies: the policy of fairness to claimants who may have incomplete knowledge of the facts giving rise to their claim, which underlies the discovery rule; and the policies of repose and fairness to defendants, who may be disadvantaged by delay in defending themselves, which underlie time limitations on litigation. That balance seems to have been struck in Massachusetts in favor of a somewhat more limited discovery rule than exists in many other jurisdictions. In light of that reality, as well as the federal guidance, we decline to extend the rule to the facts of this case. The plaintiff knew of the harm and of Dr. Allen's likely causal involvement in October of 1979. From then on the claim against Dr. Allen's public employer, assuming Dr. Allen could be found to be a Commonwealth employee, was not inherently unknowable. The plaintiff's knowledge was sufficient to stimulate further inquiry on his part about the claim, including inquiry into the facts about Dr. Allen's employment status, and, thus, to start the running of the clock. [Citations omitted.]

Krasnow, 562 N.E.2d 1380.

It is apparent why the Utah Legislature would not include notice of the manufacturer's identity as an element necessary to commence the limitation period. A limitation statute requires diligence. Once a person is on notice that he or she has been injured and that a product has caused the injury, it is the injured

person's burden to diligently search for the identity of the manufacturer and file his action before the evidence grows stale.

II. THERE IS NO BASIS FOR THIS COURT TO MANDATE A COMMON LAW REQUIREMENT THAT A LIMITATION BE TOLLED UNTIL A PLAINTIFF KNOWS THE IDENTITY OF A PRODUCT'S MANUFACTURER.

As discussed in Point I, the Utah Product Liability Act limitation does not include the condition Aragon seeks. There is no reason for this Court to imply such a condition as a matter of common law.

In Becton Dickinson and Company v. Reese, 668 P.2d 1254 (Utah 1983), the Utah Supreme Court restated the basic rule regarding limitation statutes and listed those circumstances justifying the "discovery rule:"

The policy heretofore adopted by this Court is that statutes of limitations "are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." To further that policy, the general rule has been that a cause of action accrues upon the happening of the last event necessary to complete the cause of action. Under that general rule, "mere ignorance of the existence of a cause of action does not prevent the running of the statute of limitations."

There are several exceptions to this general rule in Utah. In some areas of the law, the discovery rule is incorporated into the statute whereby the statute does not begin to run until the facts forming the basis for the cause of action are discovered. In other circumstances, concealment or misleading by a party prevents that party from relying on the statute of limitations. Finally, where there are exceptional circumstances that would make application of the general rule irrational or unjust,

this Court has adopted the discovery rule by judicial action. [Citations omitted.]

Becton Dickinson, 668 P.2d at 1257. The three exceptions to the general rule are (1) statutory mandate, (2) concealment, and (3) inequity. As discussed above, the Utah Product Liability Act does not require knowledge of the manufacturer's identity. Under the circumstances of this case, Aragon cannot resort to the other two exceptions for a common law tolling of the limitation period. Becton Dickinson provides guidance as to when concealment or injustice would call for application of the discovery rule.

A. Concealment Does Not Provide a Basis for Requiring Knowledge of the Manufacturer's Identity.

In Becton Dickinson, Reese, the defendant, had filed a counterclaim against Becton Dickinson, the assignee of certain patent rights, asserting that Becton Dickinson had unlawfully deprived Reese of benefits under the patent. Becton Dickinson's predecessor had filed the patent without naming Reese as an inventor. When Becton Dickinson asserted the applicable limitation statute as an affirmative defense, Reese sought protection under the discovery rule.

Although Becton Dickinson's predecessor had allegedly concealed from Reese the fact that Reese was not named on the patent, the supreme court nonetheless rejected application of the discovery rule as to Becton Dickinson, stating:

Nor is this case premised on concealment of necessary facts or misleading of the defendant by the plaintiff. [Emphasis by the court.]

* * *

Defendant makes no allegations Becton Dickinson either concealed the details of the patent from him or misled him in any way.

Becton Dickinson, 668 P.2d at 1257 and fn. 13. Here, even though Clover Club and Borden delayed their responses to Aragon's inquiries for reasons known to them, their delay cannot be imputed to Casa Herrera.

B. Nothing in the Circumstances of This Case Constitutes Exceptional Circumstances Which Would Make Application of the General Rule Irrational or Unjust.

The Utah Supreme Court has emphasized the plaintiff's duty to diligently pursue information relative to the claim. In Becton Dickinson, Reese claimed the discovery rule applied to his situation since he was unaware he had been injured until he found that his name had been omitted from the patent. The supreme court rejected the argument stating:

The patent here in question was issued on July 27, 1975, almost five years before defendant filed his claim, and defendant admits he knew the patent had issued. In any event, due diligence on his part would have unearthed the inventor and his assignee as shown on the face of the patent. [Emphasis added.]

Becton Dickinson, 668 P.2d at 1257. The thrust of the supreme court's holding is clear--a claimant is duty-bound to ascertain the facts when those facts are available.

If anything Reese's claim to equity in Becton Dickinson was stronger than Aragon's position here. In Becton Dickinson, Reese claimed that he was unaware of the omission in the patent and that there was nothing to put him on notice that he should review

the patent. By contrast, Aragon was clearly on notice of his injury and its cause as of the day of the accident. Obviously, he knew he would have to identify the machine's manufacturer before filing an action. Yet, he made no effort to obtain this information for nearly three years and ten months. The circumstances here are certainly not extraordinary. In light of the record, there is no injustice in this Court refusing to toll the limitation until Aragon discovered Casa Herrera's identity.

III. THE UTAH LEGISLATURE EXPRESSLY PROVIDED DIRECTION REGARDING THE APPLICATION OF UTAH CODE § 78-15-3 TO PERSONS IN ARAGON'S SITUATION.

Since Aragon is not entitled to a tolling of the limitation based on his alleged ignorance of Casa Herrera's identity, the next issue the Court must address is the limitation applicable to Aragon's claims. Casa Herrera maintains that the four year limitation of Utah Code § 78-12-25 applies.

A. Evolution of Utah Product Liability Act Time Limitation.

The Utah Supreme Court has left no doubt that when originally enacted, Utah Code § 78-15-3 (1977) was a statute of repose and not a statute of limitation. (See Berry v. Beech Aircraft Corp., 717 P.2d 670 (Utah 1985) and Raithaus v. Saab-Scandia of America, 784 P.2d 1158 (Utah 1989)). The Utah Supreme Court declared the statute of repose unconstitutional in Berry v. Beech Aircraft, because the statute created a situation where a person's right of action was extinguished before it arose. In a 1989 response to Berry, the Utah Legislature repealed the statute

of repose and enacted the present two year statute, effective April 24, 1989. See Grundberg v. Upjohn Co., 813 P.2d 89, 97 fn. 7 (Utah 1991).

B. The Legislature, Aware That Some Applications of the Statute Might Otherwise Be Unconstitutional, Declared Its Intent That the Limitation Did Not Apply to Persons in Mr. Aragon's Position.

By its terms, the 1989 statute requires a plaintiff in a products liability action to file his or her complaint within two years after the plaintiff has discovered the harm and its cause. If this statute were applied to Aragon according to its literal terms, Aragon would have been required to file his complaint on or before December 16, 1987, a date which occurred long before the Legislature enacted the statute. The Utah Supreme Court stated in Toronto v. Sheffield, 222 P.2d 594, 596, 118 Utah 460 (1950) that:

The Legislature may bar a claim within a reasonable time within the effective date of a statute enacted for the purpose, but may not constitutionally bar such claim without allowing some time to elapse during which claimant may bring an action thereon after the effective date of the statute.

The legislature foresaw possible constitutional problems with the statute's implementation and took measures to obviate the difficulties.

Section 4 of the 1989 legislation amending the Utah Product Liability Act states:

If any provision of this Act, or the application of any provision to any person or circumstance, is held invalid, the remainder of this Act is given effect without the invalid provision or application. [Emphasis added.]

Chapter 119 of the Laws of Utah 1989. The legislature thus provided that the limitation would not be applied to persons whose rights would be cut off on a date prior to implementation of the statute. These persons were to be treated as though the limitation had not been enacted, and their claims would continue to be subject to the limitation governing the action prior to passage of the legislation.

On the date of the accident, the general four year limitation of Utah Code § 78-12-25(3) governed Aragon's claims. The legislative action nearly three and one-half years later had no effect on Aragon's claims. He had a full four years to file his action and his failure to timely file bars his claims against Casa Herrera.

IV. EVEN IF THIS COURT ACCEPTS ARAGON'S INTERPRETATION OF THE UTAH PRODUCT LIABILITY ACT LIMITATION, HIS CLAIM IS NONETHELESS BARRED AS A MATTER OF LAW.

This Court has heretofore noted that it may affirm the trial court "if the trial court's decision can be sustained on any proper legal basis." Taylor v. Estate of Taylor, 770 P.2d 163, 169 (Utah Ct. App. 1989). Even if this Court were to interpret the Utah Product Liability Act limitation as including the product manufacturer's identity, the Court should nonetheless affirm the trial court's grant of summary judgment.

Aragon maintains that he had two years from the time he actually discovered Casa Herrera's identity to file the action. Yet, the limitation states that a claimant has two years from the time the claimant discovered "or in the exercise of reasonable

diligence should have discovered" the requisite information. The undisputed facts demonstrate that Aragon should have discovered Casa Herrera's identity long before he allegedly did.

In Reiser v. Lohner, 641 P.2d 93 (Utah 1982), the Utah Supreme Court considered a discovery limitation embodied in Utah Code § 78-12-28(3) (1953). The supreme court held that the plaintiff's claims were barred as a matter of law despite the plaintiff's assertion that she was entitled to a trial to determine when she should have known of her cause of action. In response to the plaintiffs' argument, the Utah Supreme Court noted:

The statute therefore permits an independent trial on the limitation issue. It is, however, like all other issues, subject to summary judgment if no genuine issues of material fact are raised.

Reiser, 641 P.2d at 99-100. Here, because the material facts are not in dispute, this Court can determine as a matter of law that even under Aragon's interpretation of the Utah Product Liability Act limitation, Aragon did not timely file his complaint against Casa Herrera.

Aragon's problem does not actually arise from any difficulty in obtaining Casa Herrera's identity. It is undisputed that once he initiated his inquiry, Aragon acquired the information within eight months. Aragon's problem arises from his failure to start the search for nearly three years and ten months after the accident. Surely, with due diligence, Aragon should have known of Casa Herrera's identity within two years after the accident--a period equivalent to the limitation itself. Even if the Court were

to grant Aragon a two-year discovery period as well as the two year limitation period (a total of four years) Aragon's complaint against Casa Herrera was untimely by ten months.

CONCLUSION

Aragon's construction of the Utah Product Liability Act limitation is untenable, because it does not accord with the legislature's intent as manifested by the statutory language and legislative history. Furthermore, the circumstances of this case are such that the Court should not imply a common law requirement that the statute be tolled until Aragon identified the product manufacturer. Hence, it is the four year limitation of Utah Code § 78-12-25 which applies to this action. Notwithstanding the foregoing, even if the Court were to determine that the identity of the manufacturer is a necessary prerequisite to the commencement of the limitation, Aragon's lack of due diligence precludes this action against Casa Herrera as a matter of law. Accordingly, Casa Herrera respectfully requests this Court to affirm the trial court's grant of summary judgment.

DATED this 27th day of April, 1992.

CHRISTENSEN, JENSEN & POWELL, P.C.

By M. Douglas Bayly
Jay E. Jensen
M. Douglas Bayly
Attorneys for Defendant/Appellee
Casa Herrera, Inc.

CERTIFICATE OF SERVICE

This is to certify that on the 27th day of April, 1992,
four true and correct copies of the BRIEF OF APPELLEE CASA HERRERA
INC. were mailed, postage prepaid, to each of the following:

Douglas M. Durbano
Paul H. Johnson
DURBANO & ASSOCIATES
3340 Harrison Blvd., #200
Ogden, UT 84403

Allan T. Brinkerhoff
RAY, QUINNEY & NEBEKER
79 South Main, #400
Salt Lake City, UT 84111

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APPENDIX A

February 19, 1992 Order

SUPREME COURT OF UTAH

FEB 20 1992

STATE OF UTAH

SALT LAKE CITY, UTAH

February 19, 1992

OFFICE OF THE CLERK

M. Douglas Bayly
Jay E. Jensen
CHRISTENSEN, JENSEN & POWELL
Attorneys at Law
175 South West Temple
Suite 510
Salt Lake City, UT 84101

James M. Aragon,
Plaintiff and Appellant,
v.
Clover Club Foods Company, a Utah
corporation; Borden, Inc., a New
Jersey corporation, Casa Herrerra,
Inc., a California corporation,
and John Does I thru X, inclusive,
Defendants and Appellees.

No. 910553
900747717PI

Pursuant to the authority vested in this Court, this case is poured-over to the Court of Appeals for disposition. All further pleadings and correspondence should be directed to that Court. The address is 230 South 500 East, Suite 400, Salt Lake City, Utah 84102.

Geoffrey J. Butler
Clerk

APPENDIX B

Utah Code § 78-12-25(3)

78-12-24. Actions against public officers — Within six years.

An action by the state or any agency or public corporation thereof against any public officer for malfeasance, misfeasance, or nonfeasance in office or against any surety upon his official bond may be brought within six years after such officer ceases to hold his office, but not thereafter.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-12-24. Misconduct by public servants, §§ 76-8-201 et seq.

Cross-References. — Governmental Immunity Act, § 63-30-1 et seq.

COLLATERAL REFERENCES

C.J.S. — 54 C.J.S. Limitations of Actions § 33 et seq.

Key Numbers. — Limitation of Actions 58(2)

78-12-25. Within four years.

Within four years:

(1) An action upon a contract, obligation, or liability not founded upon an instrument in writing; also on an open account for goods, wares, and merchandise, and for any article charged on a store account; also on an open account for work, labor or services rendered, or materials furnished; provided, that action in all of the foregoing cases may be commenced at any time within four years after the last charge is made or the last payment is received.

(2) A claim for relief or a cause of action under the following sections of Title 25, Chapter 6, the Uniform Fraudulent Transfer Act:

- (a) Subsection 25-6-5(1)(a), which in specific situations limits the time for action to one year, under Section 25-6-10;
- (b) Subsection 25-6-5(1)(b); or
- (c) Subsection 25-6-6(1).

(3) An action for relief not otherwise provided for by law.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-12-25; L. 1988, ch. 59, § 14.

Amendment Notes. — The 1988 amendment, effective April 25, 1988, inserted Subsection (2); redesignated former Subsection (2) as

Subsection (3); and made minor stylistic changes in Subsection (1).

Cross-References. — Antitrust Act actions, § 76-10-925.

Product Liability Act, statute of limitations, § 78-15-3.

NOTES TO DECISIONS

ANALYSIS

Constitutionality.
Assigned cause of action.
Breach of fiduciary duty.
Conflict of laws.
Damage of private property for public use
Divorce actions.
Excessive freight charges.
Extension of period.

Federal civil rights actions.
Indemnity or guaranty bond.
Judgment lien.
Land contract.
Malpractice.
Mortgages.
Nuisances.
Open account.
Oral contract.
Oral modification of written contract.

APPENDIX C

Utah Code § 78-15-1 et seq.

78-14a-101. Definitions.

As used in this chapter, "therapist" means:

- (1) a psychiatrist licensed to practice medicine under Sections 58-12-26 through 58-12-43, the Utah Medical Practice Act;
- (2) a psychologist licensed to practice psychology under Title 58, Chapter 25a;
- (3) a marriage and family therapist licensed to practice marriage and family therapy under Title 58, Chapter 39;
- (4) a social worker licensed to practice social work under Title 58, Chapter 35; and
- (5) a psychiatric and mental health nurse specialist licensed to practice advanced psychiatric nursing under Title 58, Chapter 31.

History: C. 1953, 78-14a-101, enacted by L. 1988, ch. 89, § 1; 1989, ch. 42, § 15.

Amendment Notes. — The 1989 amendment, effective July 1, 1989, substituted "Sections 58-12-26 through 58-12-43" for "Chapter

12, Title 58" in Subsection (1) and "Chapter 25a" for "Chapter 25" in Subsection (2).

Effective Dates. — Laws 1988, ch. 89 became effective on April 25, 1988, pursuant to Utah Const., Art. VI, Sec. 25.

78-14a-102. Limitation of therapist's duty to warn.

(1) A therapist has no duty to warn or take precautions to provide protection from any violent behavior of his client or patient, except when that client or patient communicated to the therapist an actual threat of physical violence against a clearly identified or reasonably identifiable victim. That duty shall be discharged if the therapist makes reasonable efforts to communicate the threat to the victim, and notifies a law enforcement officer or agency of the threat.

(2) No cause of action arises against a therapist for breach of trust or privilege, or for disclosure of confidential information, based on a therapist's communication of information to a third party in an effort to discharge his duty in accordance with Subsection (1).

(3) This section does not limit or effect a therapist's duty to report child abuse or neglect in accordance with Section 62A-4-503.

History: C. 1953, 78-14a-102, enacted by L. 1988, ch. 89, § 2.

Effective Dates. — Laws 1988, ch. 89 be-

came effective on April 25, 1988, pursuant to Utah Const., Art. VI, Sec. 25.

CHAPTER 15

PRODUCT LIABILITY ACT

Section		Section	
78-15-1.	Short title of act.		tial contributing cause — Manufacturer or seller not liable.
78-15-2.	Repealed.	78-15-6.	Defect or defective condition making product unreasonably dangerous — Rebuttable presumption.
78-15-3.	Statute of limitations.		
78-15-4.	Prayer for damages.		
78-15-5.	Alteration or modification of product after sale as substan-		

78-15-1. Short title of act.

This act shall be known and may be cited as the "Utah Product Liability Act."

History: C. 1953, 78-15-1, enacted by L. 1977, ch. 149, § 1.

Meaning of "this act." — The phrase "this

act" means Laws 1977, ch. 149, which enacted this chapter.

NOTES TO DECISIONS

Constitutionality.

The Utah Product Liability Act is unconstitutional. *Berry ex rel. Berry v. Beech Aircraft*

Corp., 717 P.2d 670 (Utah 1985) (but see note under this catchline following § 78-15-3).

COLLATERAL REFERENCES

Utah Law Review. — The Utah Product Liability Limitation of Action: An Unfair Resolution of Competing Concerns, 1979 Utah L. Rev. 149.

Strict Products Liability in Utah Following *Ernest W. Hahn, Inc. v. Armco Steel Co.*, 1980 Utah L. Rev. 577.

Some Thoughts on the Use of Comparisons in Products Liability Cases, 1981 Utah L. Rev. 3.

A New Perspective — Has Utah Entered the Twentieth Century in Tort Law?, 1981 Utah L. Rev. 495, 496.

Mulherin v. Ingersoll: Utah Adopts Comparative Principles in Strict Products Liability Cases, 1982 Utah L. Rev. 461.

Brigham Young Law Review. — Used Products and Strict Liability: A Practical Approach to a Complex Problem, 1981 B.Y.U. L. Rev. 154.

The Merger of Comparative Fault Principles with Strict Liability in Utah: *Mulherin v. Ingersoll-Rand Co.*, 1981 B.Y.U. L. Rev. 964.

A.L.R. — Handgun manufacturer's or seller's liability for injuries caused to another by use of gun in committing crime, 44 A.L.R.4th 595.

Products liability: construction materials or insulation containing formaldehyde, 45 A.L.R.4th 751.

Products liability: liability of manufacturer or seller as affected by failure of subsequent party in distribution chain to remedy or warn against defect of which he knew, 45 A.L.R.4th 777.

Products liability: perfumes, colognes, or deodorants, 46 A.L.R.4th 1197.

Products liability: admissibility of defendant's evidence of industry custom or practice in strict liability action, 47 A.L.R.4th 621.

Future disease or condition, or anxiety relating thereto, as element of recovery, 50 A.L.R.4th 13.

Products liability: sufficiency of evidence to support product misuse defense in actions concerning athletic, exercise, or recreational equipment, 50 A.L.R.4th 1226.

Products liability: admissibility of evidence of absence of other accidents, 51 A.L.R.4th 1186.

Products liability: sufficiency of evidence to support product misuse defense in actions concerning wearing apparel, 52 A.L.R.4th 276.

Attorneys' fees in products liability suits, 53 A.L.R.4th 414.

Products liability: personal soap, 54 A.L.R.4th 574.

Duty and liability of subcontractor to employee of another contractor using equipment or apparatus of former, 55 A.L.R.4th 725.

Products liability: sufficiency of evidence to support product misuse defense in actions concerning electrical generation and transmission equipment, 55 A.L.R.4th 1010.

Products liability: sufficiency of evidence to support product misuse defense in actions concerning lawnmowers, 55 A.L.R.4th 1062.

Products liability: pertussis vaccine manufacturers, 57 A.L.R.4th 911.

Products liability: sufficiency of evidence to support product misuse defense in actions concerning food, drugs, and other products intended for ingestion, 58 A.L.R.4th 7.

Products liability: sufficiency of evidence to support product misuse defense in actions concerning cosmetics and other personal care products, 58 A.L.R.4th 40.

Products liability: sufficiency of evidence to support product misuse defense in actions concerning paint, cleaners, or other chemicals, 58 A.L.R.4th 76.

Products liability: sufficiency of evidence to support product misuse defense in actions concerning gas and electric appliances, 58 A.L.R.4th 131.

Products liability: sufficiency of evidence to

78-15-2. Repealed.

Repeals. — Laws 1989, ch. 119, § 3 repeals § 78-15-2, as enacted by L. 1977, ch. 149, § 2, containing legislative findings and declara-

tions and stating the purpose of the chapter, effective April 24, 1989.

78-15-3. Statute of limitations.

A civil action under this chapter shall be brought within two years from the time the individual who would be the claimant in such action discovered, or in the exercise of due diligence should have discovered, both the harm and its cause.

History: C. 1953, 78-15-3, enacted by L. 1989, ch. 119, § 1.

Repeals and Reenactments. — Laws 1989, ch. 119, § 1 repeals former § 78-15-3, as enacted by L. 1977, ch. 149, § 3, providing a stat-

ute of limitations, and enacts the present section, effective April 24, 1989.

Cross-References. — Effect of disability on limitations generally, § 78-12-36.

NOTES TO DECISIONS

ANALYSIS

Constitutionality.
Former statute.
Cited.

Constitutionality.

Former section was held unconstitutional and chapter invalid accordingly in *Berry ex rel. Berry v. Beech Aircraft Corp.*, 717 P.2d 670 (Utah 1985).

Former statute.

Six-year time period in former version of this section was a statute of repose and could not therefore function as a statute of limitations. *Raithaus v. Saab-Scandia of Am., Inc.*, 784 P.2d 1158 (Utah 1989).

Cited in *Whitehead v. American Motors Sales Corp.*, 801 P.2d 920 (Utah 1990).

COLLATERAL REFERENCES

A.L.R. — When cause of action arises on action against manufacturer or seller of product causing injury or death, 4 A.L.R.3d 821.

Running of statute of limitations on products liability claim against manufacturer as affected by plaintiff's lack of knowledge of defect allegedly causing personal injury or disease, 91 A.L.R.3d 991.

What statute of limitations applies to actions for personal injuries based on breach of implied

warranty under UCC provisions governing sales, 20 A.L.R.4th 915.

Validity and construction of statute terminating right of action for product-caused injury at fixed period after manufacture, sale, or delivery, 25 A.L.R.4th 641.

Liability of auctioneer under doctrine of strict products liability, 83 A.L.R.4th 1188.

78-15-4. Prayer for damages.

No dollar amount shall be specified in the prayer of a complaint filed in a product liability action against a product manufacturer, wholesaler or retailer. The complaint shall merely pray for such damages as are reasonable in the premises.

History: C. 1953, 78-15-4, enacted by L. 1977, ch. 149, § 4.

Cross-References. — Claim in complaint of

interest on special damages in personal injury action, § 78-27-44.

COLLATERAL REFERENCES

A.L.R. — Allowance of punitive damages, 13 A.L.R.4th 52.
 Consequential loss of profits from injury to property as element of damages in products liability, 89 A.L.R.4th 11.

78-15-5. Alteration or modification of product after sale as substantial contributing cause — Manufacturer or seller not liable.

For purposes of Section 78-27-38, fault shall include an alteration or modification of the product, which occurred subsequent to the sale by the manufacturer or seller to the initial user or consumer, and which changed the purpose, use, function, design, or intended use or manner of use of the product from that for which the product was originally designed, tested, or intended.

History: C. 1953, 78-15-5, enacted by L. 1977, ch. 149, § 5; 1989, ch. 119, § 2.

Amendment Notes. — The 1989 amendment, effective April 24, 1989, substituted "For purpose of Section 78-27-38, fault shall include" for "No manufacturer or seller of a product shall be held liable for any injury, death or damage to property sustained as a result of an alleged defect, failure to warn or protect or failure to properly instruct, in the use or misuse of that product, where a substantial contributing

cause of the injury, death or damage to property was" at the beginning of the section and made minor stylistic changes.

Severability Clauses. — Laws 1989, ch. 119, § 4 provides that if any provision of the act, or the application of any provision to any person or circumstance, is held invalid, the remainder of the act is to be given effect without the invalid provision or application.

Cross-References. — Comparative negligence, §§ 78-27-37, 78-27-38.

NOTES TO DECISIONS

Alteration or modification required.

This section did not apply where there was no alteration or modification of the product which changed its purpose or use from that for which it was designed. *Mulherin v. Ingersoll-Rand Co.*, 628 P.2d 1301 (Utah 1981).

This section requires some sort of physical alteration or modification of the product itself which leaves the product in a different condition or form than it was in when it left the manufacturer's or seller's hands. *Beacham v. Lee-Norse*, 714 F.2d 1010 (10th Cir. 1983).

COLLATERAL REFERENCES

A.L.R. — Statute precluding or limiting recovery where product has been altered or modified after leaving hands of manufacturer or seller, 41 A.L.R.4th 47.

Alteration of product after it leaves hands of manufacturer or seller as affecting liability for product-caused harm, 41 A.L.R.4th 1251.

Products liability: product misuse defense, 65 A.L.R.4th 263.

Products liability: injury caused by product as a result of being tampered with, 67 A.L.R.4th 964.

Liability for injury or death allegedly caused by spoilage or contamination of beverage, 87 A.L.R.4th 804.

78-15-6. Defect or defective condition making product unreasonably dangerous — Rebuttable presumption.

In any action for damages for personal injury, death, or property damage allegedly caused by a defect in a product:

(1) No product shall be considered to have a defect or to be in a defective condition, unless at the time the product was sold by the manufacturer or other initial seller, there was a defect or defective condition in the product which made the product unreasonably dangerous to the user or consumer.

(2) As used in this act, "unreasonably dangerous" means that the product was dangerous to an extent beyond which would be contemplated by the ordinary and prudent buyer, consumer or user of that product in that community considering the product's characteristics, propensities, risks, dangers and uses together with any actual knowledge, training, or experience possessed by that particular buyer, user or consumer.

(3) There is a rebuttable presumption that a product is free from any defect or defective condition where the alleged defect in the plans or designs for the product or the methods and techniques of manufacturing, inspecting and testing the product were in conformity with government standards established for that industry which were in existence at the time the plans or designs for the product or the methods and techniques of manufacturing, inspecting and testing the product were adopted.

History: C. 1953, 78-15-6, enacted by L. 1977, ch. 149, § 6.

Meaning of "this act." — The phrase "this

act" in Subsection (2) means Laws 1977, Chapter 149, which enacted this chapter

NOTES TO DECISIONS

Drugs.

A drug approved by the United States Food and Drug Administration (FDA), properly prepared, compounded, packaged, and distributed, cannot as a matter of law be "defective" in the absence of proof of inaccurate, incomplete, misleading, or fraudulent information furnished by the manufacturer in connection with FDA

approval. *Grundberg v. Upjohn Co.*, 813 P.2d 89 (Utah 1991).

A broad grant of immunity from strict liability claims based on design defects should be extended to FDA-approved prescription drugs in Utah. *Grundberg v. Upjohn Co.*, 813 P.2d 89 (Utah 1991).

COLLATERAL REFERENCES

A.L.R. — Manufacturer's duty to test or inspect as affecting his liability for product-caused injury, 6 A.L.R.3d 12.

Liability of owner or operator of self-service laundry for personal injury or damages to patron or frequenter of premises from defect in premises or appliances, 23 A.L.R.3d 1246.

Extension of strict liability in tort to permit recovery by third person who was neither purchaser nor user of product, 33 A.L.R.3d 415.

Liability of product endorser or certifier for product-caused injury, 39 A.L.R.3d 181.

Liability of owner or operator of motor vehi-

cle for injury, death, or property damage resulting from defective brakes, 40 A.L.R.3d 9.

Liability of one selling or distributing liquid or bottled fuel gas, for personal injury, death, or property damage, 41 A.L.R.3d 782.

Liability of manufacturer or seller of power lawnmower for injuries to user, 41 A.L.R.3d 986.

Necessity and sufficiency of identification of defendant as manufacturer or seller of product alleged to have caused injury, 51 A.L.R.3d 1344.

Failure to warn as basis of liability under

APPENDIX D

Memorandum Decision

AUG 05 1991

IN THE SECOND JUDICIAL DISTRICT COURT
IN AND FOR THE
COUNTY OF DAVIS, STATE OF UTAH

JAMES M. ARAGON,)
Plaintiffs,) RULING ON MOTION
vs.) FOR SUMMARY JUDGMENT
) Civil No. 900747717
CLOVER CLUB FOODS, et al.,)
Defendants.)

The defendants' motions for summary judgment came before the Court on a notice to submit for decision. The Court has received written memoranda from the defendants in support of their motions for summary judgment and from the plaintiff in opposition. The plaintiff is represented by Douglas M. Durbano and Paul H. Johnson and the defendants by Allan T. Brinkerhoff and Steven W. Call for Clover Club Foods Company and Borden, Inc., along with Jay E. Jensen for Casa Herrera, Inc.

Defendants' two motions for summary judgment are granted. There are no genuine issues of material fact in either motion.

The facts in the case are not complicated. Plaintiff James M. Aragon, ("Aragon") began working for Clover Club Foods Company ("Clover Club"), a subsidiary of Borden, Inc. ("Borden"), on December 3, 1985. Aragon was assigned to clean a mesa feeder machine on his first day of work. Aragon cleaned the mesa feeder machine each day from December 3, 1985, through December 16, 1985. On December 16, 1985, Aragon began to clean the mesa feeder. Aragon suffered a double compound fracture to his left arm, having since undergone significant medical care and treatment. Aragon's employers, Clover Club and Borden relied on an insurance premium and Worker's Compensation to

cover Aragon's medical and disability expenses. Aragon sued his employers, claiming that Borden is a third party tortfeasor who acted negligently in supplying the mesa feeder machine to Clover Club.

The issue in this case concerns whether defendants, Borden and Clover Club were the common law employers of Aragon under the Utah Code Annotated, Section 35-1-60 of the Worker's Compensation Act on December 16, 1985. If Clover Club and Borden were the common law employers of Aragon on December 16, 1985, then Aragon's exclusive remedy is confined to Worker's Compensation. However, if Clover Club and Borden were not the common law employers of Aragon on December 16, 1985, Aragon may attempt to sue Clover Club or Borden as a third party tortfeasor according to Utah Code Annotated, Section 35-1-62(a) of the Worker's Compensation Act.

The Utah Supreme Court clarified the plain meaning of Utah Code Annotated, Section 35-1-60 of the Worker's Compensation Act, on back-to-back cases in 1989. In *Pate v. Marathon Steel Co.*, 777 P.2d 428, 431 (Utah 1988), the Utah Supreme Court deemed the legislative language of Section 35-1-60 to be clear and unequivocal. The language of Section 35-1-60 permits suits by injured workers against statutory employers but not immediate common law employers. *Id.* The Pate court defined a common law employer as the one who actually pays the wages of the employee. *Id.*

In the second case decided on the same date, *Bosch v. Bursch Development, Inc.*, 777 P.2d 431, 432 (Utah 1989), the Utah Supreme Court further defined what constitutes a common law employer. A common law employer is required to pay the employee's Worker's Compensation benefits. *Id.* at 432. An employer who does not pay the employee's Worker's Compensation benefits is deemed a statutory employer. *Id.* A statutory employer who fails to pay the employee's Worker's Compensation

benefits is denied statutory immunity from an employee's suit as provided for in Utah Code Annotated, Section 35-1-42(2) of the Workers's Compensation Act. Id.

The rule of law which clarifies Utah legislation in Pate and Bosch defines a common law employer as one who pays the employee's wages and Worker's Compensation benefits. Applying this common law employer rule to the facts in the instant case, Clover Club and Borden constitute a common law employer. On December 17, 1985, Aragon submitted his initial worker's compensation claim to his employer's claims adjuster. The claim prepared by Aragon listed both defendants Clover Club and Borden as his employers. The insurance carrier which handles claims for Clover Club and Borden listed both Clover Club and Borden as Aragon's employers in filing an answer to the Utah State Industrial Commission on September 2, 1986. Lastly, Aragon's final compensation agreement approved by an administrative law judge on August 14, 1987, for the Utah State Industrial Commission listed both Clover Club and Borden as Aragon's employers. The administrative law judge ordered Clover Club and Borden, as Aragon's employers, to pay disability wages of more than \$16,000 and medical expenses in excess of \$45,000 to Aragon. Thus, for having paid Aragon's wages and Worker's Compensation benefits, both Clover Club and Borden constitute the common law employers of Aragon.

Because Clover Club and Borden are Aragon's common law employers, Aragon is limited to the exclusive remedy of Utah Code Annotated of the Worker's Compensation Act as provided for in Section 35-1-60. Since Aragon already has received wages and medical expenses as his remedy from the Utah State Industrial Commission, no factual issue remains. To permit Aragon to continue to seek relief from his employers, Clover Club and Borden, would preclude a finality to litigation. More significantly, plaintiff's employer is entitled to relief on the basis of res judicata. The matter already has been adjudicated.

Aragon, while conceding no genuine fact is materially disputed, nonetheless argues that the undisputed facts are subject to divergent interpretations. On the basis of such divergent interpretations, the motion for summary judgment by Clover Club and Borden, should be denied. However, no reasonable inference other than that Clover Club and Borden acted as Aragon's common law employer can be drawn from the facts. Furthermore, the Utah Supreme Court in *Helgar Ranch, Inc. v. Stillmen*, 619 P.2d 1390, 1391 (Utah 1980), made clear that a motion for summary judgment is denied only when a material fact is genuinely controverted. No facts in the instant case are uncontroverted by either party. For example, Aragon received a letter from Clover Club in May 20, 1987, that contained an offer to buy health insurance from Borden. Throughout the letter, Clover Club made clear that the insurance offer came from Borden. This May 20, 1987, letter was supplied by Aragon. Aragon knew or had reason to know that both Clover Club and Borden had acted as his employers.

The tangential question of piercing the corporate veil need not be addressed. The Utah Supreme Court in *Page and Bosch* made clear that the sole question on whether Clover Club or Borden are third party tortfeasors or the employee's common law employers turns on whether the defendants pay the employee's wages and Worker's Compensation benefits. The facts in this case clearly indicate that Clover Club and Borden are common law employers and further actions by Aragon is barred. Thus, as a matter of law, the motion for summary judgment, made by Clover Club and Borden is granted.

Regarding the motion for summary judgment made by defendant, Casa Herrera, Inc., the facts are uncontroverted. James Aragon sustained a serious injury on December 16, 1985, while cleaning a mesa feeder at Clover Club in Davis County. Aragon commenced

a cause of action against Casa Herrera on September 24, 1990. In other words, Aragon did not exercise his right to seek a remedy against Casa Herrera, Inc., until approximately four and three-fourth years after he sustained serious injuries while working at Clover Club.

The lapse of more than four years in filing a complaint raises the question as to what statutory section governs the commencing of a personal injury tort action. Aragon claims to have six years to file from the date of purchase of the allegedly defective machine or up to ten years from the date of manufacture. Aragon relies on Utah Code Annotated, Section 78-15-3 which in fact provided from six to ten years for filing a complaint. However, the Utah Supreme Court in *Berry v. Beech Aircraft Corp.*, 727 P.2d 670, 683 (Utah 1985) found Utah Code Annotated, Section 78-15-3 to be a statute of repose. *Id.* at 672. A statute of repose is per se unconstitutional for violating Article I, Section 11 of the Utah State Constitution. *Id.* The Berry court reasoned that Section 78-15-3 would deny a plaintiff a cause of action merely because the plane which had crashed and caused the death of its passengers was more than ten years old. *Id.* Any statute that bars a plaintiff a cause of action without regard to when the injury occurs is a statute of repose and hence unconstitutional. *Id.* at 679. Thus, Aragon may not use a statute of repose as a basis for determining when his right of action may toll.

Casa Herrera, Inc., correctly refers to Utah Code, Section 78-12-25 (1953 & Supp. 1975), for determining when a cause of action tolls. Section 78-12-25, in effect in 1985, covers tort actions for personal injuries and grants plaintiffs up to four years to file a complaint with the courts. Section 78-12-25 meets the constitutional requirements set out by the Utah

Supreme Court in Berry. For, the section takes into account when the injury occurs as a basis for determining how long a plaintiff has to file a cause of action.

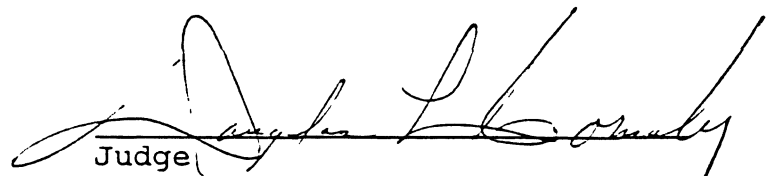
The Utah Supreme Court reaffirmed its Berry litmus test for determining the constitutionality of statute code sections in Riathaus v. Saab-Scandia of America, 789 P.2d 1158, 1160 (Utah 1989). The Riathaus court noted how statutes of limitations prevent plaintiffs from sleeping on their rights to the detriment of defendants. Id. at 1160. As a statute of limitation, Section 78-12-25 gives plaintiff four years to commence a cause of action.

Applying the Berry and Riathaus holdings along with the proper code Section 78-12-25 to the instant case, Aragon was injured on December 16, 1985. Aragon sued Casa Herrera, Inc., on September 24, 1990, which exceeds the statutory limit by approximately nine months. Aragon's suit against defendant Casa Herrera, Inc., is time barred. As a matter of law, then Casa Herrera, Inc.'s motion for summary judgment is granted.

The defendants, Clover Club and Borden, are ordered to draw a formal order based on this opinion.

Dated July 31, 1991.

BY THE COURT:


Judge

Certificate of Mailing:

This is to certify that the undersigned mailed a true and correct copy of the foregoing Ruling to:

Paul H. Johnson
Douglas M. Durbano
3340 Harrison Blvd., #200
Ogden, Utah 84403

Allan T. Brinkerhoff
Steven W. Call
310 So Main St, 12th Floor
SLC, Utah 84101

Jay E. Jensen
M. Douglas Bayly
175 So West Temple, Suite 510
SLC, Utah 84101

Dated this 2nd day of August 1991.

Kathy Potts
Deputy Clerk

APPENDIX E

October 22, 1991 Ruling

IN THE SECOND JUDICIAL DISTRICT COURT
IN AND FOR THE
COUNTY OF DAVIS, STATE OF UTAH

JAMES M. ARAGON,)
Plaintiff,) RULING ON MOTION
vs.) FOR RECONSIDERATION
CLOVER CLUB, et al.,) Civil No. 900747717
Defendants.)

The plaintiff's motion for reconsideration came before the Court for oral argument on October 22, 1991, with Douglas M. Durbano appearing for the plaintiff and M. Douglas Bayl appearing for the defendant. After oral argument the Court took the motion under advisement.

The defendant, Casa Herrera, presents two basic arguments. First, the Court should not grant a Rule 59 motion premised on an argument which could and should have been presented at the initial hearing. Second, plaintiff's argument is contrary to the legislative intent in enacting the Utah Product Liability Act.

As to the first argument, this Court believes that a review is at times more efficient than an appeal.

This Court has not been persuaded that it was wrong in its original ruling of July 31, 1991. The Court will, however, reflect further on the case.

The now products liability statute, Utah Code 78-15-3 limits actions to those "brought within two years from the time the individual who would be the claimant in such action discovered or in the exercise of due diligence should have discovered, both the harm and its cause." In this case, James M. Aragon discovered both "the harm" and "its cause" on December 16, 1985.

the day of the accident. The harm was the injury to his arm. The cause was the machine used by Clover Club Foods Company. The plaintiff cited to the Court Orear v. International Paper Co., 796 P.2d 756 (Wash. App. 1990). This case involved a statute similar to the Utah statute, but the Washington court added an additional element. "A person injured by a defective product simply cannot be said to have discovered the cause of injury in a legally enforceable sense until he or she discovers who manufactured or supplied the product or is otherwise responsible for the injury." (page 764). The plaintiff argues that it conceivably could require several years beyond the statutory two years to learn the name of the responsible manufacturer. It is almost like saying the statutory two years is meaningless.

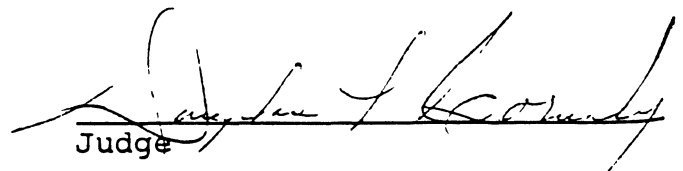
This Court believes that under the new Utah statute if the plaintiff commenced the suit within two years, he would have had a "reasonable" time to discover the name of the manufacturer and make him a party to the action. In actual fact, the plaintiff did not file this suit until May 11, 1990, four years and five months after the injury. That time frame is not within the spirit of either the old law or the new law.

The motion to set aside the granting of summary judgment in favor of Casa Herrera is denied.

Defendant, Casa Herrera is directed to draw a formal order based on this ruling.

Dated October 23, 1991.

BY THE COURT:


Judge

APPENDIX F

November 13, 1991 Order

RECEIVED JUL 21 1991

Jay E. Jensen, #1676
M. Douglas Bayly, #0251
CHRISTENSEN, JENSEN & POWELL, P.C.
Attorneys for Defendant Casa Herrera
175 South West Temple, Suite 510
Salt Lake City, UT 84101
Telephone: (801) 355-3431

IN THE SECOND JUDICIAL DISTRICT COURT OF DAVIS COUNTY

STATE OF UTAH

JAMES M. ARAGON,)	
)	
Plaintiff,)	ORDER AND JUDGMENT
)	
v.)	
)	
CLOVER CLUB FOODS COMPANY, a)	
Utah corporation, BORDEN, INC.,)	
a New Jersey corporation,)	
CASA HERRERA, INC., a California)	Civil No. 900747717 PI
corporation, and JOHN DOES)	
I through X, inclusive,)	Judge Douglas L. Cornaby
)	
Defendants.)	

This matter came before the Court on defendants' motions for summary judgment and plaintiff's objection and motion for new trial or to alter or amend judgment.

A hearing on defendants' motions for summary judgment was held on July 23, 1991. Plaintiff was represented by Douglas M. Durbano, Esq. and Paul Johnson, Esq. Borden and Clover Club were represented by Allan T. Brinkerhoff and Steven W. Call Esq. Casa Herrera was represented by M. Douglas Bayly, Esq.

The Court, having considered the matter fully, signed and entered a Ruling on Motions for Summary Judgment dated July 31, 1991, granting both motions, which was served on counsel for

the parties by mail on August 2, 1991. Counsel for defendants Clover Club Foods Company and Borden, Inc. prepared and served a proposed Order and Judgment on August 6, 1991.

The plaintiff subsequently filed an objection to the proposed order and a motion for new trial or to alter or amend the judgment as to the Court's ruling on Casa Herrera's motion. The Court heard arguments on plaintiff's objection and motion on October 22, 1991. Douglas M. Durbano, Esq. appeared on behalf of the plaintiff, and M. Douglas Bayly, Esq. appeared on behalf of defendant Casa Herrera. The Court, having considered plaintiff's arguments, signed and entered a Ruling on Motion for Reconsideration dated October 23, 1991 denying plaintiff's motion.

With good cause now appearing, the Court enters the following judgment and order pursuant to Rule 58A(b) of the Utah Rules of Civil Procedure:

IT IS HEREBY ORDERED AND ADJUDGED as follows:

1. Summary Judgment is hereby entered in favor of defendants Borden, Inc. and Clover Club Foods Company and against plaintiff James M. Aragon for the reasons set forth in this Court's Ruling dated July 31, 1991.

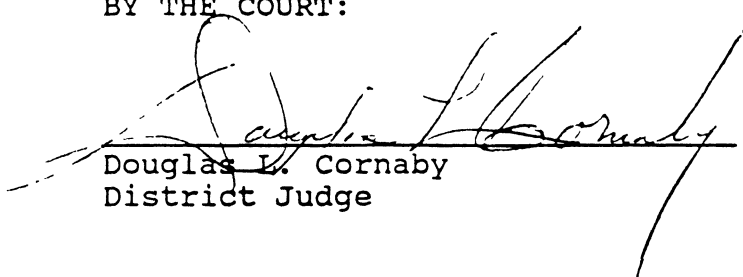
2. Summary Judgment is hereby entered in favor of defendant Casa Herrera, Inc. and against plaintiff James M. Aragon for the reasons set forth in this Court's Ruling dated July 31, 1991.

3. Plaintiff's Objection to Proposed Order and Judgment and Motion for a New Trial or to Alter or Amend Judgment is hereby denied for the reasons set forth in this Court's Ruling dated October 23, 1991.

4. The action is hereby dismissed with prejudice.

DATED AND ENTERED this 15 day of November, 1991.

BY THE COURT:



Douglas L. Cornaby
District Judge

APPENDIX G

Notice of Appeal dated November 13, 1991

DEC 16 1991

Douglas M. Durbano (#4209)
Paul H. Johnson (#4856)
DURBANO & ASSOCIATES
Attorneys for Plaintiff
3340 Harrison Boulevard, #200
Ogden, Utah 84403
Telephone: (801) 621-4111

IN THE SECOND JUDICIAL DISTRICT COURT

DAVIS COUNTY, STATE OF UTAH

JAMES M. ARAGON,

Plaintiff,

vs.

CLOVER CLUB FOODS COMPANY, a Utah
corporation; BORDEN, INC., a New
Jersey corporation, CASA HERRERRA,
INC., a California Corporation,
and JOHN DOES I thru X, inclusive,

Defendants.

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NOTICE OF APPEAL

Civil No. 900747717PI

Judge Douglas L. Cornaby

Notice is hereby given that Plaintiff in the above entitled matter, James M. Aragon, hereby appeals to the Supreme Court of the State of Utah from the Order and Judgment granting Summary Judgment to Defendants Clover Club Foods Company, Borden, Inc., and Casa Herrerra, Inc., and dismissing Plaintiff's Complaint with prejudice, entered in this action on November 13, 1991, by the Second Judicial District Court of Davis County, State of Utah.

DATED this 12th day of December, 1991.

DURBANO & ASSOCIATES



Douglas M. Durbano
Paul H. Johnson
Attorneys for Plaintiff

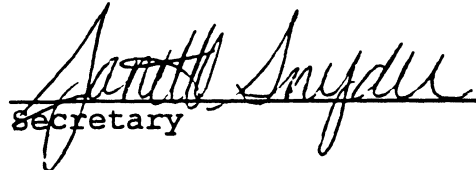
CERTIFICATE OF MAILING

I DO HEREBY CERTIFY, that I mailed a true and correct copy of
the foregoing Notice of Appeal to the following:

Jay E. Jensen, Esq.
M. Douglas Bayly, Esq.
CHRISTENSEN, JENSEN & POWELL
Attorney for Defendant
Casa Herrerra, Inc.
175 South West Temple, Suite 510
Salt Lake City, Utah, 84101

Allan T. Brinkerhoff, Esq.
Steven W. Call, Esq.
WATKISS & SAPERSTEIN
Attorneys for Defendants Clover Club
Foods Company and Borden, Inc.
310 South Main Street, Suite 1200
Salt Lake City, Utah, 84101

postage pre-paid on this 12th day of December, 1991.


Secretary

(1\pldgs\870570.)

APPENDIX H

October 5, 1989 Letter

DOUGLAS M. DURBANO
ATTORNEY AT LAW
UNITED SAVINGS PLAZA
4185 HARRISON BOULEVARD • SUITE 320
OGDEN, UTAH 84403
TELEPHONE (801) 621-4111

EXHIBIT A

October 5, 1989

-CERTIFIED MAIL-
Borden, Inc. and/or
Clover Club Foods Company
C/O Prentice Hall Corporate Systems
Registered Corporate Agent
185 South State
Salt Lake City, Utah 84111

ALL COPY

Re: James Aragon
My File: 87-0570

NOTICE OF INTENT TO COMMENCE PRODUCT LIABILITY ACTION

To Whom It May Concern:

Please let this letter serve as formal notice, pursuant to the Utah Products Liability Act, U.C.A. Section 78-15-1, et seq., that James M. Aragon intends to commence a products liability action against the designers, manufacturers, owners and/or operators of a certain dough-mixing machine, which caused him personal injury while employed by Clover Club Foods Company, Kaysville, Utah, on or about December 16, 1985.

The general nature of the claim is that on the above date, while in the course of his employment, James M. Aragon was operating for the first time the dough-mixing machine from which taco shells were made. Mr. Aragon had been working for Clover Club Foods only since December 3, 1985, and had received no instructions about the operation or cleaning of the dough-mixing machine. At approximately 4:15 p.m., he shut the machine off, but was then instructed by his supervisor to plug the machine back in and to clean it. Aragon turned the machine on, letting it operate for a few minutes. Then, he walked up the three steps next to the machine to look in the top of the machine to see if the dough was churned out of it. While ascending these steps he slipped on some grease covering the steps. He grabbed hold of the edge of the dough-mixing machine in an attempt to steady himself, whereupon the paddle at the top of the machine, which pushed dough down into the auger at the bottom of the machine, swept his left hand and arm into the machine. It took paramedics approximately one hour to free Mr. Aragon's arm and hand from the machine.

As a result of the accident, Mr. Aragon sustained to his

NOTICE OF INTENT

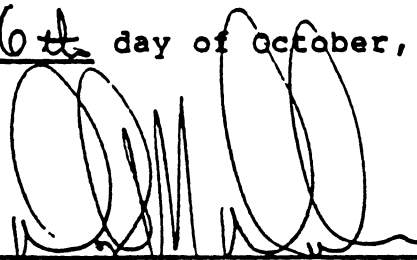
October 5, 1989

Page 2

left arm and hand significant damage, open fractures of the radius and ulna bones, and nerve damage to the ulnar nerve. Although there has been some improvement following several surgeries and almost 4 years of recovery, Mr. Aragon continues to have a permanent partial disability and impairment based upon loss of function and range of motion in his upper extremity, his left arm and hand, equivalent to 41%. The 41% impairment to such upper extremity translates to a 25% impairment to the whole person.

With the cooperation of Clover Club Foods Company and Borden, Inc. in obtaining information about the dough-mixing machine involved in this accident, it is possible that neither Clover Club nor Borden would suffer any liability. Without such cooperation, however, both Clover Club and Borden would need to be named as co-defendants. Therefore, I would hope you would cooperate with us in obtaining this information, to everyone's mutual benefit. If you have any questions or comments regarding this matter, please have your legal counsel, insurance company or other representative contact me as soon as possible.

This Notice is given this 6th day of October, 1989.



DOUGLAS M. DURBANO
Attorney for James M. Aragon

DMD/nac

APPENDIX I

Affidavit of Paul Johnson

AUG 14 1991

Douglas M. Durbano (#4209)
Paul H. Johnson (#4856)
DURBANO & ASSOCIATES
Attorneys for Plaintiff
3340 Harrison Boulevard, #200
Ogden, Utah 84403
Telephone: (801) 621-4111

IN THE SECOND JUDICIAL DISTRICT COURT

DAVIS COUNTY, STATE OF UTAH

JAMES M. ARAGON,

Plaintiff,

vs.

CLOVER CLUB FOODS COMPANY, a Utah
corporation; BORDEN, INC., a New
Jersey corporation, CASA HERRERRA,
INC., a California Corporation,
and JOHN DOES I thru X, inclusive,

Defendants.

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**AFFIDAVIT OF
PAUL H. JOHNSON**

Civil No. 900747717PI

Judge Douglas L. Cornaby

STATE OF UTAH)
)SS
COUNTY OF WEBER)

Paul H. Johnson, being first duly sworn upon his oath
deposes and says:

1. I am over the age of 21 and competent to be a witness
herein, and as attorney for the Plaintiff in this matter, I am
personally familiar with this matter, and all statements made
herein are made upon personal knowledge, unless otherwise stated
that such statement is upon information and belief.

2. On October 6, 1989, the Plaintiff sent a Notice of Intent to Commence Product Liability Action to Borden, Inc. (hereinafter "Borden") and Clover Club Foods Company (hereinafter "Clover Club"). A copy of such Notice of Intent to Commence Product Liability Action is attached hereto as Exhibit "A." In such Notice, the Plaintiff requested information from Clover Club or Borden concerning the manufacturer of the masa feeder machine. Plaintiff stated in such notice that if Borden and Clover Club cooperated with the Plaintiff in ascertaining the manufacturer of the subject masa feeder machine, the Plaintiff would be inclined to refrain from naming either Clover Club or Borden as a party to the action.

5. Because Clover Club and Borden did not cooperate with the Plaintiff in providing the Plaintiff with the name of the manufacturer of the subject masa feeder machine, on November 10, 1989, the Plaintiff filed a Complaint for Damages in Federal District Court for the Northern District of Utah. Such complaint listed Clover Club, Borden and John Does I through X as party defendants. It was recognized by both parties that the Federal District Court would have diversity jurisdiction in this case, if the parties could agree to dismiss Clover Club from the action. Because the parties could not agree to dismiss Clover Club, and pursuant to motion by Clover Club and Borden, the Complaint in the Federal District Court was dismissed for lack of diversity

jurisdiction on April 20, 1990. On May 11, 1990, the Plaintiff refiled his Complaint in the Second District Court, in and for Davis County, State of Utah, naming the same party defendants.


6. Plaintiff originally served his First Set of Discovery on Clover Club and Borden on January 11, 1990, in the Federal District Court case. Although the Defendants, Borden and Clover Club, originally agreed to informally answer Plaintiff's discovery in the Federal case, they did not follow through on such promise. Following the dismissal of the Federal case for lack of jurisdiction and the refiling of Plaintiff's Complaint in State Court, Plaintiff again served Plaintiff's First Set of Discovery requests on Borden and Clover Club. Finally, on July 13, 1990, Clover Club's and Borden's Answers to Plaintiff's First Set of Discovery were received by Plaintiff. In such Answers, the Defendants identified the manufacturer of the subject masa feeder machine as Casa Herrerra, Inc. of 5860 South Mettler Street, Los Angeles, California.

7. On August 14, 1990, Plaintiff filed a motion for leave to name and join Casa Herrerra to the action as one of the "John Doe" defendants. On October 16, 1990, the Order granting leave to join

Casa Herrera to the action as a party defendant was entered. On November 8, 1990, Casa Herrera was served with a Summons and Complaint in this matter.

FURTHER AFFIANT SAYETH NOT.

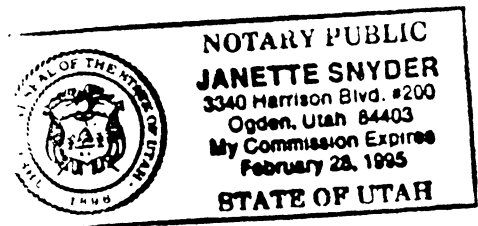
DATED this 13th day of August, 1991.


Paul H. Johnson

Sworn to and subscribed before me this 13th day of August, 1991.


Notary Public

Residing in: Ogden
My Commission Expires: 2/95



AFFIDAVIT OF PAUL H. JOHNSON
ARAGON v. CLOVER CLUB, et al
Civil No. 90074771PI