

1992

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

Utah Court of Appeals

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Allan T. Brinkerhoff; Steven J. Aeschbacher; 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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UTAH COURT OF APPEALS

BRIEF

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DOCKET NO. 920106CA IN THE UTAH COURT OF APPEALS

JAMES M. ARAGON,

:

Plaintiff-Appellant

:

v.

:

Case No. 920106-CA

Priority No. 16

CLOVER CLUB FOODS COMPANY, a
Utah corporation, BORDEN, INC. a
New Jersey corporation, CASA
HERRERA, INC., a California
corporation, and JOHN DOES I-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 APPELLEES BORDEN, INC.
AND CLOVER CLUB FOODS COMPANY

DOUGLAS M. DURBANO
PAUL H. JOHNSON
DURBANO & ASSOCIATES
Attorneys for Plaintiff/
Appellant James M. Aragon
3340 Harrison Blvd. #200
Ogden, Utah 84403
Telephone: (801) 621-4111

ALLAN T. BRINKERHOFF (A0439)
STEVEN J. AESCHBACHER (A4527)
RAY, QUINNEY & NEBEKER
Attorneys for Defendants/Appellees
Clover Club Foods Company and
Borden Inc.,
79 South Main Street
P. O. Box 45385
Salt Lake City, Utah 84145-0385
Telephone: (801) 532-1500

JAY E. JENSEN, ESQ.
M. DOUGLAS BAYLY, ESQ.
CHRISTENSEN, JENSEN & POWELL
Attorneys for Defendant/Appellee
Casa Herrera, Inc.
175 South West Temple, #510
Salt Lake City, Utah 84101

MAY 8 1992

IN THE UTAH COURT OF APPEALS

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 Plaintiff-Appellant :
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 v. : Case No. 920106-CA
 : Priority No. 16
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 CLOVER CLUB FOODS COMPANY, a :
 Utah corporation, BORDEN, INC. a :
 New Jersey corporation, CASA :
 HERRERA, INC., a California :
 corporation, and JOHN DOES I-X, :
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DOUGLAS M. DURBANO
PAUL H. JOHNSON
DURBANO & ASSOCIATES
Attorneys for Plaintiff/
Appellant James M. Aragon
3340 Harrison Blvd. #200
Ogden, Utah 84403
Telephone: (801) 621-4111

ALLAN T. BRINKERHOFF (A0439)
STEVEN J. AESCHBACHER (A4527)
RAY, QUINNEY & NEBEKER
Attorneys for Defendants/Appellees
Clover Club Foods Company and
Borden Inc.,
79 South Main Street
P. O. Box 45385
Salt Lake City, Utah 84145-0385
Telephone: (801) 532-1500

JAY E. JENSEN, ESQ.
M. DOUGLAS BAYLY, ESQ.
CHRISTENSEN, JENSEN & POWELL
Attorneys for Defendant/Appellee
Casa Herrera, Inc.
175 South West Temple, #510
Salt Lake City, Utah 84101

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JURISDICTIONAL STATEMENT

This is an appeal from the order of summary judgment entered by the trial court in favor of defendants. This appeal was originally filed with the Utah Supreme Court, pursuant to Utah Code Ann. § 78-2-2(3)(j). In accordance with Utah Code Ann. § 78-2-2(4) and Rule 42 of the Utah Rules of Appellate Procedure, this action was poured over to the Utah Court of Appeals on February 19, 1992. Accordingly, this Court has jurisdiction pursuant to Utah Code Ann. § 78-2a-3(2)(j).

STATEMENT OF ISSUES AND STANDARD OF REVIEW

This action arises out of injuries suffered by the appellant James Aragon ("Aragon") in an accident at work on December 16, 1985. Aragon sued Borden, Inc. ("Borden") and its wholly owned subsidiary Clover Club Foods Company ("Clover Club"). These claims are barred by the doctrine of res judicata and by the exclusive remedy provision of the Utah Workers' Compensation Act, Utah Code Ann. § 35-1-60 (the "exclusive remedy provision").

The issues raised in this appeal are: (1) Was the trial court correct as a matter of law in ruling that Aragon's claims against Borden are barred by res judicata? (2) Was the trial court correct as a matter of law in ruling that Aragon's claims against Borden are barred by operation of the exclusive remedy provision, Utah Code Ann. § 35-1-60? (3) Did the trial court abuse its discretion in refusing to continue the summary judgment motion to permit Aragon to conduct additional discovery as to some

issues, when there were independent grounds to permit the entry of summary judgment and Aragon had failed to conduct the discovery requested for the previous eight months since the issues were initially raised, and for more than a year since the lawsuit was filed?

The standard of review for the first two issues is a review of the trial court's legal conclusions on the basis of correctness. The standard of review for the third issue is whether the trial court abused its discretion. Reeves v. Geigy Pharmaceutical Inc., 764 P.2d 636, 639 (Utah App. 1988).

DETERMINATIVE STATUTES

This appeal may be resolved through application of the doctrine of res judicata. If the Court looks to additional grounds, Utah Code Ann. § 35-1-60, is determinative and is reproduced in Appendix A hereto.

STATEMENT OF THE CASE

A. NATURE OF CASE

This is an action for personal injuries arising out of an accident suffered by Aragon at Borden's Clover Club plant in Kaysville, Utah. Aragon asserts claims of negligence and strict liability against Clover Club, Borden and Casa Herrera, the manufacturer of the machine involved.

B. COURSE OF PROCEEDINGS BELOW

Aragon initially filed suit in federal court on November 10, 1989. (R. 512.) Clover Club and Borden filed a motion to dismiss for lack of diversity. (R. 512-513.) That

motion was granted and Aragon filed a new action on May 11, 1990, in state court, alleging the same causes of action. (R. 513). On August 28, 1990, Borden and Clover Club moved to dismiss on the grounds that the suit was barred by the exclusive remedy provision. (R. 83-85.) Aragon responded with a motion for continuance to permit further discovery pursuant to Utah Rule of Civil Procedure 56(f) which was supported by the Affidavit of Aragon's attorney, Paul Johnson. (R. 134-135, 119-121.) Aragon also moved to amend his complaint to eliminate the allegation that Borden and Clover Club were agents of each other. (R. 123-125.) Ultimately, the trial court granted Aragon's motion to amend and it was determined that Borden and Clover Club would convert their motion to dismiss to a summary judgment motion. (R. 226-228.) That summary judgment motion was filed on May 8, 1991.

(R. 235-236.) In response, Aragon again sought a continuance pursuant to Rule 56(f) and filed another affidavit of his attorney. (R. 254-256, 290-293.) Aragon simultaneously filed an extensive memorandum in opposition to the motion for summary judgment, but filed no motion or memorandum objecting to or seeking to strike any portion of the affidavits filed by Borden and Clover Club. (R. 306-404.)

The motion for summary judgment was argued on July 23, 1991. (R. 472.) The trial court issued a Ruling dated July 31, 1991, which was entered August 2, 1991, granting summary judgment in favor of all defendants. (R. 504-509, a copy of that Ruling is also reproduced in Appendix B.) Judgment was entered in favor of

defendants on August 21, 1991. (R. 523-524.) Aragon sought a new trial concerning the Casa Herrera judgment, which was denied. (R. 526, 581-582.) The court heard further argument concerning the claims against Casa Herrera and on November 13, 1991, the court entered its order denying Aragon's motion and reaffirming the previous summary judgment order. (R. 586-588.) The notice of appeal was filed on December 12, 1991 (R. 595-596).

Aragon has appealed the summary judgment rulings as to Borden and Casa Herrera, but does not dispute the summary judgment as to Clover Club. He now argues that Clover Club was his employer and is immune from suit due to the exclusive remedy provision. (Appellant's Brief at 33.) However, respecting Borden, he argues that there is a factual issue as to whether Borden was his employer and is therefore immune.

C. STATEMENT OF FACTS

In 1983 Borden acquired Clover Club by purchasing all the issued and outstanding stock of Clover Club. (R. 267.) Since that time, Borden has totally directed and controlled the business operations at the Kaysville Clover Club facility. (R. 267.) On September 30, 1983, Borden, as sole shareholder of Clover Club, removed all of Clover Club's previous officers and directors and appointed officers and directors it selected. (R. 267, 271.) Borden also repealed all previous by-laws of Clover Club and adopted by-laws designated by Borden. (R. 267, 271.) Since September 30, 1983, all officers and directors of Clover Club have

been employees of Borden and have served at the absolute discretion of Borden. (R. 267.)

For reason of product name identification, especially within the State of Utah, Borden has preserved and used the Clover Club trade name and its associated good will. (R. 268.) However, since 1983, Borden has maintained and operated Clover Club solely as a Borden profit center. (R. 268.) The revenues of the Clover Club profit center are part of the total revenues reflected on Borden's consolidated financial statements. (R. 268.) Clover Club does not issue separate financial statements, but rather reports all of its operating costs, revenues and financial information to Borden's corporate offices. (R. 268.) Clover Club does not have any separate business location or separate books or records concerning the Kaysville facility apart from Borden. (R. 243.) Clover Club has not filed any separate state or federal income tax returns since 1983 and the income generated by the Clover Club profit center has been included in Borden consolidated tax returns and all income taxes are paid by Borden. (R. 268.) There is no functional separateness between Clover Club and Borden at the Kaysville facility. (R. 268.)

Since Borden purchased Clover Club, the payroll of the Clover Club profit center, including both hourly and salary payrolls, have been paid from bank accounts owned and controlled by Borden. (R. 268.) Borden pays the wages, salaries and benefits for all employees of the Clover Club profit center.

(R. 268.) All employees at the Kaysville facility participate in the same health insurance and other benefit plan program available to other Borden employees. (R. 268.)

Plaintiff Aragon was on the payroll of Borden's Clover Club profit center from December 3, 1985 to December 16, 1985.

(R. 269.) Like all other employees there, he was paid by Borden, and his benefits were paid for by Borden. (R. 268-269.)

At the time of Aragon's injury in December 1985, Borden had purchased Workers' Compensation coverage from Liberty Mutual Insurance Company. (R. 273.) Borden (not Clover Club) paid the insurance premiums to Liberty Mutual for its workers' compensation and employer's liability policy. (R. 269, 273.) Both Borden and Clover Club were named insureds on the policy. (R. 273.)

On December 16, 1985, plaintiff Aragon was injured while he operated a machine known as a masa feeder owned by Borden at the Kaysville facility. (R. 8.) Aragon filed a claim for workers' compensation benefits concerning that accident.

(R. 273.) As a result of that claim, plaintiff received compensation and other benefits from Liberty Mutual under the workers' compensation policy provided by Borden. (R. 273.)

The Industrial Commission approved a Compensation Agreement concerning Aragon's workers' compensation claim. (R. 490, a copy of that Compensation Agreement is reproduced in Appendix C hereto.) The parties to this Agreement were Aragon as applicant, Clover Club Foods Company/Borden as employer, and

Liberty Mutual Insurance Company as insurance carrier. (R. 490.) The Compensation Agreement specifically states that Aragon was employed by "Clover Club Foods Company/Borden." (R. 490.) The Compensation Agreement was signed by Aragon, and was approved by the Industrial Commission through Timothy C. Allen, Administrative Law Judge. (R. 490.) As part of the Compensation Agreement, Aragon's attorneys were paid an attorneys' fee, including his counsel in this action. (R. 490.) Aragon has never appealed that agreement, sought review of it, or in any way attempted to revoke his agreement or to challenge the Industrial Commission's finding that Borden was his employer at the time of his accident.

In response to Borden's motion for summary judgment, Aragon admitted that the facts were not in dispute. (R. 302, 328.)

SUMMARY OF ARGUMENT

The trial court's entry of summary judgment in favor of Borden was correct. Aragon has already asserted and recovered on his claim against Borden concerning this injury and is barred by res judicata from seeking additional damages. Alternatively, the issue of who were Aragon's employers for purposes of workers' compensation has already been determined through the workers' compensation action, and Aragon is precluded from re-litigating that issue now. Borden was determined to be his employer, and so the dismissal pursuant to the exclusive remedy provision Utah Code Ann. § 35-1-60, was correct.

Even if the determination in the workers' compensation action did not bar Aragon's claim, the trial court's decision was correct. Strong public policy reasons compel the determination that Borden, who paid for Aragon's wages and compensation benefits, and who continues to be liable for workers' compensation benefits to Aragon, be shielded from additional claims and liability. It is also clear that applying the common law test, Borden qualifies as a common law employer for Aragon, and so is immune from suit. It had the right to control Aragon, it paid his wages, it paid for his benefits, and it provided his workers' compensation benefits. Alternatively, Borden must at least be considered a statutory employer of the applicant, and since it actually provided his workers' compensation benefits, it should be entitled to the protection of the exclusive remedy provision.

Finally, since the trial court found that both Clover Club and Borden employed Aragon (and Aragon contends that only Clover Club was the employer), at a minimum, Borden should be considered the agent of Clover Club since it paid the wages, and obtained and provided the benefits package on behalf of the "employees" of Clover Club, including workers' compensation benefits. As Clover Club's agent, Borden is entitled to the protection of the exclusive remedy provision.

It is against public policy and the legislative intent of the exclusive remedy provision for an employer like Borden to pay the wages and pay for the workers' compensation benefits of

someone like Aragon and then be forced to be at risk for additional liability to Aragon concerning the same accident. This is exactly the type of case for which the exclusive remedy provision was intended to apply, and the summary judgment in favor of Borden should be affirmed.

The denial of the Rule 56(f) motion was clearly within the discretion of the trial court and in any event that motion only sought to discover evidence relating to one issue in the case, that of alter ego. The court was correct in ruling on alternate grounds that Borden is entitled to the protection of the exclusive remedy provision. (R. 507.) Additionally, the plaintiff's failure to conduct the additional discovery it requested for eight months despite having previously requested and received a continuance to conduct this very discovery permits the denial of the motion.

ARGUMENT

I. ARAGON'S CLAIMS ARE BARRED BY RES JUDICATA.

The fact that Aragon obtained workers' compensation benefits from Borden pursuant to the Compensation Agreement precludes any liability of Borden in this action. Aragon sought and obtained workers' compensation benefits from Borden as a result of the December 1985 accident. Aragon's claims in this action arise from the same accident. In 1986, in response to the application for hearing which Aragon filed with the Industrial

Commission, Liberty Mutual, Borden's insurance carrier, responded on behalf of both Clover Club and Borden. Subsequently, on August 14, 1989, the Industrial Commission approved a Compensation Agreement concerning this claim, which Agreement is attached as Appendix C. (R. 490.) In the caption of the Agreement, it recites that "Clover Club Foods/Borden" are Aragon's employers, and it again states in the body of the Agreement that Aragon was "employed by Clover Club Foods Company/Borden" at the time of the accident. As a result of the Compensation Agreement, Aragon was paid compensation benefits in excess of \$16,000 and received medical benefits in excess of \$45,000. All of these benefits were paid on behalf of Borden.

Aragon signed the 1987 Compensation Agreement, which in two places recited that Borden was his employer. At the time the Agreement was signed and approved by the Industrial Commission, Aragon additionally was represented by two different law firms in his workers' compensation action. In fact, pursuant to the Compensation Agreement, his two sets of attorneys received an award of attorneys' fees. One of those attorneys is his counsel in this action. The Compensation Agreement was approved by the Industrial Commission through Administrative Law Judge Timothy C. Allen. The Compensation Agreement was not effective unless it was approved by the Industrial Commission. (R. 490.)

Aragon agreed to the Compensation Agreement, and neither he nor his attorneys chose to dispute the determination that

Borden was his employer. Aragon never sought review or appeal of that determination, nor did he ever seek to have it changed. Indeed, even at the time he filed the complaint in this action, and in each amended complaint he has filed thereafter, he has alleged that he was employed by "Borden or Clover Club" (R. 8, 73, 113). He should not now be permitted to assert another claim against Borden arising out of his accident.

A. Aragon Is Asserting the Same Claim Against Borden Which Was Already Litigated.

As a result of Aragon's workers' compensation claim, he was awarded his statutory benefits against Borden, among others. It is undisputed that he received those benefits and that Borden paid the premium to provide those benefits.¹ By this action he is attempting to recover for a second time the same benefits against Borden for the same injuries. Utah Code Ann. § 35-1-62 shows that the tort remedies Aragon seeks in this case include everything recoverable under workers' compensation. That section

¹ While Aragon admitted to the trial court that no facts were in dispute, R. 302, 328, he now argues at pp. 36-39 of his Brief that there is a factual issue as to whether Borden paid the workers' compensation benefits. The undisputed facts in the record are that Borden paid the premium, R.273, and that Aragon was paid on behalf of Borden and Clover Club, R. 273, 416. Aragon argues that since he was paid on behalf of Clover Club, there is a question as to whether he was paid on behalf of Borden. This is incorrect since the only evidence is that he was paid on behalf of both. This is consistent with the determination of both the Industrial Commission and of the trial court that Clover Club and Borden were his employers. Aragon's reliance on "inferences" which have no basis in the record or which are based on claimed bias of affiants when no objection was preserved below cannot, as a matter of law, give rise to any question of fact.

permits the employer or insurance carrier to assert claims against a third-party tortfeasor on behalf of the injured worker, or to assert a lien against any recovery obtained by the worker in such a third-party action. The statute permits the employer or insurance carrier to recover in full all payments made pursuant to the workers' compensation claim, less its proportionate share of the attorneys' fees. It would certainly be anomalous for Borden to pay the premiums for its workers' compensation coverage, and then, if an action were permitted to be maintained against Borden and recovery granted, to have to reimburse its insurance carrier for the very damages for which it purchased insurance.

B. Res Judicata Applies to Acts of Administrative Agencies.

It is clear that principles of res judicata may apply to acts of administrative agencies. See, e.g., Kirk v. Division of Occupational and Professional Licensing, 815 P.2d 242, 243 (Utah App. 1991); Utah Department of Administrative Services v. Public Service Commission, 658 P.2d 601, 621 (Utah 1983); A. Larson, The Law of Workmen's Compensation Vol. 3, §§ 79.72(a), 79.72(d) (1989) (hereinafter "Larson") ("res judicata does apply to the decisions of compensation boards and commissions no less than to decisions of a court." § 79.72(a)).

The Utah Supreme Court made it clear in Utah Dept. of Administrative Services v. Public Service Commission that administrative orders entered by consent or stipulation may also be acts in a judicial capacity so that principles of res judicata

apply. 658 P.2d at 621. In this case the Industrial Commission's decision, which awarded compensation in favor of Aragon and against Borden, is conclusive that Aragon was Borden's employee and he may not now seek another avenue of relief against Borden.

Cases in other states support this result. For example, in Christian v. Dino De Laurentis Corp., 58 A.D.2d 752, 396 N.Y.S.2d 226 (N.Y. App. Div. 1977), the court held that:

. . . having submitted a claim against defendant pursuant to the Workmen's Compensation Law and having accepted the benefits provided by an award thereunder, plaintiff may not now maintain an action for negligence against defendant alleging that he was at the time of his injury the employee of another. Since a workmen's compensation award was made, such constitutes a finding that plaintiff's injuries arose out of and in the course of employment and is binding and conclusive until vacated or modified by direct proceedings under the Workmen's Compensation Law. (Citations omitted.)

396 N.Y.S.2d at 227.

Similarly, in Westman v. Dessellier, 459 N.W.2d 545 (N.D. 1990), the Supreme Court of North Dakota affirmed the dismissal of an action against plaintiff's employer on the grounds that it had been previously determined in a workers' compensation action that the defendant was the plaintiff's employer:

The decisions of administrative agencies, including those of the Bureau, may be res judicata even though administrative agencies are not courts. (Citations omitted.)

. . .

A prior decision of the Bureau is res judicata as to these same issues in a suit at law to recover for the same injury, whether the effect is to defeat the suit or to defeat a defense to the suit. 3A. Larson, Workmen's Compensation Law, § 79.72(d).

459 N.W.2d at 547.

Aragon has already received his remedy from Borden. He may not now assert another claim against Borden; it is barred by res judicata. The trial court should be affirmed.

II. THERE ARE NO DISPUTED ISSUES OF MATERIAL FACT.

The res judicata argument in Point I is conclusive. There are also a number of other grounds to affirm the trial court's ruling based on the application of the exclusive remedy provision to Borden. Before examining them, it should be noted that there are no material facts in dispute which could preclude summary judgment. Aragon admitted as much to the trial court in his Summary of Memorandum contained in his Motion for Leave to File Overlength Memorandum, R. 302 ("the facts themselves are not in conflict . . .") and in his Memorandum in Opposition to Summary Judgment, R. 328 ("none of the facts presented to the court are disputed . . ."). The trial judge noted the same thing in his Ruling, R. 504, 507.

Aragon now argues that inferences drawn from the undisputed facts give rise to a dispute which precludes summary judgment. Aragon's alleged "inferences" are based on assumptions

which have no basis in the record, e.g., that Clover Club reimbursed Borden for the workers' compensation premium, Appellant's Brief at 38. That simply is not supported by any facts, and is not an "inference" which creates a question of fact.

Aragon also attacks the undisputed testimony of the affidavits submitted by Borden. This is clearly improper and cannot give rise to any question or concern regarding the evidence set forth in those affidavits. No objection to the affidavits or any motion to strike was ever made. Accordingly, any objection to the affidavits has been waived. D & L Supply v. Saurini, 775 P.2d 420, 421 (Utah 1989); Franklin Financial v. New Empire Dev. Co., 659 P.2d 1040 1044 (Utah 1983) (even if affidavits in support of summary judgment were defective, party opposing summary judgment motion failed to move to strike and was deemed to have waived his opposition to evidentiary defects). Accordingly, any argument raised by Aragon concerning the facts set forth in the affidavits is irrelevant because any objection as to claimed problems with foundation, opinions, conclusions, or bias in those statements has been waived, and at this point those statements are undisputed facts. As Aragon admitted below to the court, there are no facts in dispute. As stated in Heglar Ranch, Inc. v. Stillman, 619 P.2d 1390 (Utah 1980), summary judgment may be precluded only if a material fact is genuinely controverted.

III. BORDEN IS ENTITLED TO THE PROTECTION OF THE EXCLUSIVE REMEDY PROVISION

Utah Code Ann. § 35-1-60 provides that workers' compensation benefits are:

. . . the exclusive remedy against the employer and . . . against any officer, agent or employee of the employer and the liabilities . . . imposed shall be in place of any and all other civil liability whatsoever . . . on account of any accident or injury . . . incurred by such employee in the course of . . . employment, and no action at law may be maintained against an employer based upon any accident, injury or death of an employee.

There is no dispute in this case that Aragon seeks to impose civil liability on Borden on account of injuries he suffered in the course of his employment. The undisputed facts show that Borden is entitled to the protection of § 35-1-60, which requires affirming the trial court's summary judgment.

A. Aragon is Precluded From Re-litigating the Determination that Borden is His Employer.

If the Court were to determine for some reason that res judicata does not apply here, it is clear that collateral estoppel or issue preclusion does apply and compels the conclusion that Borden was Aragon's employer and is therefore entitled to the protection of the exclusive remedy provision.

The elements of collateral estoppel have been set forth by the Supreme Court as follows:

The party invoking this doctrine must demonstrate the following: (1) the issue involved in the subsequent action is identical to the issue decided in the previous action;

(2) the issue is decided in a final judgment on the merits; (3) the issue was competently, fully, and fairly litigated in the first action; and (4) the party against whom the doctrine is invoked must be either a party to the first action or in privity with that party.

Malone v. Parker, 826 P.2d 132, 136 (Utah 1992).

The relevant issue here is the identity of Aragon's employer(s). That same issue was crucial to the determination of Aragon's workers' compensation claim, as it is in every workers' compensation claim. Without a determination of who the employer is, there is no way to tell who is responsible for compensation benefits. The employment issue was decided in the workers' compensation action as reflected by the Compensation Agreement, which states twice that his employer was "Clover Club/Borden." R. 490.

The Compensation Agreement constitutes a final judgment on the merits. It has the same effect as a final, unappealed from, decision of the Industrial Commission.² This is consistent with the Supreme Court's decision in Utah Dept. of Admin. Serv. v. Public Service Comm., 658 P.2d at 621 (a consent order may be an act in a judicial capacity so as to give rise to res judicata effect). It is also consistent with the leading treatise in the

² The fact that the Industrial Commission retains continuing jurisdiction over a workers' compensation claim in no way takes away from its status as a final judgment. See, e.g., Utah Dept. of Admin. Serv., 658 P.2d at 21, note 31.

area. Professor Larson states that: "[i]f the settlement is approved, it takes on the quality of an award . . ." 3 Larson, § 82.62 (footnotes omitted). If Aragon or either of his two sets of attorneys felt that Borden or Clover Club should not properly have been deemed Aragon's employer, they could have and should have litigated the issue before the Industrial Commission. To the contrary, they all agreed.

The issue was fully adjudicated. It was clearly addressed in the Compensation Agreement and was agreed to by the parties and approved by the Industrial Commission. If Aragon had wished to dispute the determination as to his employer, he had every opportunity to do so. Instead, the dispute was resolved and the issue was conclusively decided.

Finally, it is obvious that Aragon, the plaintiff in this action, is the same as the applicant in the workers' compensation action. There is an absolute identity of parties. Each element of collateral estoppel is met here, and Aragon should be precluded from re-litigating the fact that Borden is his employer.

This result is also supported by decisions elsewhere. In Langdon v. WEN Mgmt. Co., 147 A.D.2d 450, 537 N.Y.S.2d 603 (N.Y. App. Div. 1989) the court concluded that the workers' compensation board's determination as to the identity of plaintiff's decedent's employer must be given collateral estoppel effect in the tort case. Langdon is strikingly similar to this action. There the Industrial Commission found that the deceased worker had been the

employee of two businesses. That determination was collateral estoppel to prevent the widow from seeking damages against either business. Similarly, Aragon should be precluded from proceeding against either Clover Club or Borden. Conversely, in Crawford v. Allied Container Corp., 561 A.2d 1027 (Me. 1989), the Maine Supreme Court affirmed the judgment in favor of the injured worker, stating that the defendant was collaterally estopped from claiming to be the injured worker's employer when the plaintiff's workers' compensation claim had been denied on the grounds that no employer/employee relationship existed between the parties.

For the foregoing reasons, it is appropriate to find that Aragon is precluded from re-litigating the identity of his employers. Summary judgment was correctly entered by the trial court.

B. Public Policy Requires that Borden Be Given the Protection of the Exclusive Remedy Provision.

Aragon's lawsuit raises the specter that Borden, who has already been determined to be Aragon's employer by the Industrial Commission, and who actually paid for Aragon's workers' compensation benefits, will also be subject to claims for damages arising out of the same accident, and to the expense of litigation over those claims. The purpose of the exclusive remedy provision, Utah Code Ann. § 35-1-60, is precisely to avoid such double exposure, and to permit the parties who are liable under workers' compensation to avoid the expense and uncertainty of tort claims.

Workers' compensation was enacted as a trade-off where the employer gave up the right to defend against certain claims, such as injuries caused by a worker's own negligence, and in turn pay statutorily established benefits through a relatively inexpensive administrative procedure. To permit Aragon's claim against Borden would undermine the purpose and intent of the law.

The fundamental unfairness of what Aragon is attempting to do is shown by the fact that Borden continues to be liable to Aragon for workers' compensation benefits. The Compensation Agreement explicitly states that the Industrial Commission "shall retain continuing jurisdiction to modify awards as provided by law." R. 490. After a compensation agreement is entered into it is not at all uncommon for the insurance carrier and employers to be obligated to pay additional medical expenses, additional permanent partial impairment awards, temporary total disability due to subsequent surgeries or aggravations, and even permanent total compensation awards. Borden is a named employer on Aragon's workers' compensation claim, and thus remains exposed to further adjustments. Merely considering the fact that Borden, whether directly or through its insurance carrier, would have to pay Aragon's ongoing medical expenses related to his industrial accident while at the same time defending itself against Aragon's tort claim to recover those same medical expenses, as well as other damages, demonstrates the impropriety of Aragon being permitted to go forward with this action.

This public policy embodied in the Workers' Compensation Act was recognized by the Utah Supreme Court in Cook v. Peter Kiewit Sons Co., 15 Utah 2d 20, 386 P.2d 616, where the Court stated:

The other important purpose of the Workmen's Compensation Act, which must be given recognition and effect, is that it permits employers to pay fees for workmen's compensation insurance thereby safeguarding themselves against possible disastrous claims for injuries which they may not be able to bear. This allows employers to so plan and manage their affairs as to make the wheels of industry run, with its resulting benefits, including jobs for employees. Both the giving of full effect to the act, and doing justice to the employer, require that it be so interpreted and applied as to afford the employer the intended protection as well as conferring the advantages it does upon the employee.

386 P.2d at 618.

In Chatterly v. Omnico, Inc., 26 Utah 2d 88, 485 P.2d 667 (Utah 1971), the Utah Supreme Court imposed liability on a parent corporation for payment of wages due to employees of a subsidiary on the grounds that a controlling corporation "should not be permitted to manage and operate a business from which it stands to gain whatever profit may be made, have the advantage of the efforts of those who serve it, and then use the nomenclature of another corporation as a facade to insulate it from responsibility from paying for such services." 485 P.2d at 670. Surely that sword should cut both ways, and Borden as the parent corporation which actually provided the benefits in this case should be

entitled to the protection intended by the exclusive remedy provision. As stated in Adamson v. Okland Const. Co., 29 Utah 2d 286, 508 P.2d 805, 807 (1983):

The same liberal test whereby a person in the position of an employee may claim benefits from an employer should also be applied to provide a shield of protection for that statutory employer against any asserted liability beyond the discharge of obligations under the Workers' Compensation statute.

508 P.2d at 807. See also, Cook v. Peter Kiewit Sons Company, 15 Utah 2d 20, 286 P.2d 616 (1963) (The Workmen's Compensation "Act should be liberally construed and applied to afford coverage to the employee and give effect to the purposes of the Act." 386 P.2d at 617, holding that two companies were a joint venture, and so the plaintiff, as employee of one, could not sue the other in tort.)

Other courts have agreed that it is inappropriate to impose double liability on a parent corporation in this type of situation. In Wells v. Firestone Tire & Rubber Co., 364 N.W.2d 670 (Mich. 1984), the Michigan Supreme Court affirmed judgment prior to trial in favor of the defendant Firestone. In that case the plaintiff had been an employee of a Firestone retail store owned and operated by "Muskegon Firestone" which was a wholly owned subsidiary of Firestone. As here, Firestone carried the workers' compensation coverage for the employees of Muskegon, and the plaintiff had filed for and received benefits from Firestone's carrier. All of Muskegon Firestone's directors were employees of

Firestone. While, unlike here, Muskegon filed separate tax returns, those returns were processed at Firestone's central tax department. Additionally, Muskegon Firestone's employees received paychecks from Firestone through its central accounting office. Here, Aragon and the other Kaysville employees received paychecks from Borden's bank account. Balancing all these factors, the court found that Firestone, the parent corporation, was the plaintiff's employer and was therefore entitled to the protection of the exclusive remedy provision. The same result should be reached in this case.

The court in Wells also discussed the important public policy basis for its determination:

The statutory workers' compensation scheme was enacted for the protection of both employees and employers who work and do business in this state. The system assures covered employees that they will be compensated in the event of employment-related injuries. In addition, employers are assured of the parameters of their liability for such injuries. By agreeing to assume responsibility for all employment-related injuries, employers protect themselves from the possibility of potentially excessive damage awards. In order to effectuate these policies, the statute has been broadly construed to provide broad coverage for injured workers. (Citation omitted.)

If a statute is to be construed liberally when an employee seeks benefits, it should not be construed differently when the employer asserts it as a defense to a tort action brought by the employee who claimed and accepted benefits arising from that employment relationship. There is absolutely no evidence that defendant maintained Muskegon Firestone for the purpose of insulating itself from its workers' compensation liabilities. Defendant

supplied workers' compensation benefits through its insurance company and accepted responsibility for the work-related injuries of its Muskegon employees. Indeed, under the facts and circumstances of this case, we would not have permitted Firestone to shield itself behind its wholly owned subsidiary in order to avoid payment of workers' compensation benefits to plaintiff. (Citation omitted.)

364 N.W.2d at 674-675 (Emphasis added).

The same analysis applies in this case. Borden paid the wages, provided the workers' compensation benefits, and controlled the work at the Kaysville facility. It should be entitled to its end of the workers' compensation bargain. It has already incurred the expense of paying for Aragon's workers' compensation benefits. It should not also be forced to incur further liability on this tort claim.

C. Borden is Aragon's Common Law Employer.

As the Utah Supreme Court held in Pate v. Marathon Steel Co., 777 P.2d 428 (Utah 1989), the "immediate, or common law employer, who actually pays compensation and its officers, agents, and employees are shielded by the exclusive remedy immunity conferred by § 35-1-60." Id. at 431. In this case, there is no dispute that the party which paid for the compensation is Borden.³ Paragraph 4 of the Affidavit of Rex Bollinger and

³ As discussed earlier, Aragon's attempts to undermine the undisputed testimony concerning the source of payment of the premiums to Liberty Mutual is of no avail. The testimony is proper, and in any event no objection was made to the affidavits so as to preserve any objection to the testimony contained in the affidavits.

Paragraph 7 of the Affidavit of Raymond Barkley both state that Borden paid the premium. (R. 273, 269.) Since Borden paid the premium, it should be shielded by the exclusive remedy provision. Aragon argues that who paid the premium is irrelevant. This totally misses the mark. Borden purchased the policy to cover its operations. R. 273, 416. It is strong evidence that Borden was Aragon's employer. The fact that Borden was a party-defendant before the Industrial Commission also shows the true intention of the parties -- Aragon was employed by both Borden and Clover Club. The "inference" that Liberty Mutual would not do an unnecessary act in paying benefits on behalf of Borden which Aragon argues for at page 37 of his Brief actually cuts in favor of Borden's position. The fact that Liberty Mutual acquiesced in the Industrial Commission's determination in the Compensation Agreement that Borden was an employer of Aragon reflects reality -- Borden was in fact Aragon's employer.

It is clear that Borden was his common law employer, as shown by: (1) its payment of salary to Aragon; (2) its provision of benefits on his behalf; (3) its provision of workers' compensation benefits for him; (4) its employment and selection of Clover Club's directors; (5) its control over Aragon; and (6) its 100% ownership of Clover Club. As the trial court stated, "no reasonable inference can be drawn from the facts other than that Clover Club and Borden acted as Aragon's common law employer. (R. 507.)

Plaintiff's efforts to raise a question of fact on this matter fail because plaintiff is intent on drawing a distinction between Borden and Clover Club which simply does not exist. Clover Club, as shown by the undisputed evidence, is operated as a profit center of Borden. (R. 268.) While the corporation Clover Club Foods Company has continued to have an independent existence, owns property, and has a board of directors, in terms of the day-to-day operations of the Kaysville plant, all employees are paid by Borden and supervised by Borden. (R. 267-269.) The fact that Borden uses the name "Clover Club" to identify the Kaysville operation does not mean that the corporation Clover Club Food Company has a particular involvement in the operation of the plant other than as a wholly-owned subsidiary of Borden.

Aragon attempts to argue that because Clover Club was his employer therefore Borden cannot be his employer. This ignores the fact that there are many instances of multiple, common law employers. Professor Larson in his treatise on workmen's compensation spends significant time discussing lent employees, joint employment, joint business arrangements producing joint employment, dual employment, general versus special employment and other matters. See e.g., 1C. Larson, § 14.40 et seq. Similarly, Utah cases have recognized that there are a variety of circumstances where more than one entity is the employer for workers' compensation purposes. See, e.g., Hammer v. Gibbons & Reed, 29 Utah 2d 415, 510 P.2d 1104 (1973) (joint venturers and

partners are both considered agents of the joint venture and therefore immune from suit); Cook v. Peter Kiewit & Sons Co., 15 Utah 2d 20, 386 P.2d 616 (1963). Similarly, there are many cases in other states where businesses have been found to be joint employers of injured workers. See, e.g., Dildine v. Hunt Transportation, Inc., 553 N.E.2d 801 (Ill. App. 1990) (two wholly owned subsidiaries of the same holding company were joint employers of injured worker); Robertson v. Stroup, 180 S.2d 617 (Miss. 1965) (injured worker employed both by filling station operator and automobile rental business who employed filling station operator). See generally 1C. Larson, § 48.42 (1991). There is no legal barrier to the determination that, as the Industrial Commission found, and as the trial court determined the undisputed facts compelled, Borden and Clover Club were the employers of the plaintiff in this case. As the facts stated, there is no functional separateness between the corporations, and therefore no reason to distinguish one of them as the employer of Aragon to the exclusion of the other.

Aragon's discussion of his intention when he hired on at the Kaysville plant is misplaced. The intention to form an employee/employer relationship is a relevant issue when trying to determine if a person is an employee or an independent contractor. It is not significant, however, when there is no dispute that an employment relationship was formed and the only question is whether one or more of related corporate entities are

the employer. It is telling that Aragon did not refuse the award of the Industrial Commission against Borden.

As Aragon's common law employer, Borden is entitled to the protection of the exclusive remedy provision.

D. Borden is Aragon's Statutory Employer and Actually Paid for the Workers' Compensation Benefits, and So It Should be Entitled to the Protection of the Exclusive Remedy Provision.

At the least, it is clear that Borden qualifies as Aragon's "statutory employer" since Borden "retained supervision or control" over him, and the work he performed was a part or process in the trade or business of Borden. Utah Code Ann. § 35-1-42(5)(1). Since Aragon's wages, benefits, and overhead came out of Borden's funds, and since the income generated by Aragon's activities were reported in Borden's consolidated financial statements, and were taxed through Borden's tax returns, it is clear that Aragon's activities were part of Borden's business.

The question of whether immunity is available for a statutory employer who actually paid for workers' compensation benefits was left open in Pate v. Marathon Steel Co., 777 P.2d 428, 431 (Utah 1989). If the Court here determines that Borden is properly considered only a statutory employer rather than a common law employer, despite the prior determination of the Industrial Commission, it is appropriate to rule here that Borden is entitled to the exclusive remedy protection. The purpose of the broad definition of statutory employer in § 35-1-42 is to ensure that

there are adequate employers available to be liable for payment of workers' compensation benefits. The teaching of Pate, supra, and Bosch v. Busch Development, Inc., 777 P.2d 431 (Utah 1989), is that when in fact the workers' compensation benefits were provided by the subcontractor/employer there is no reason to extend immunity to the unrelated general contractor who did not provide the workers' compensation benefits. Conversely, here Borden was intimately wrapped up in the work Aragon did, paid his wages, and actually paid for the workers' compensation benefits. Borden should not also be exposed to tort liability arising out of the same work-related injury.

E. Borden is at Least the Agent of Clover Club and Therefore Entitled to Protection of the Exclusive Remedy Provision.

The trial court found that both Borden and Clover Club were the common law employers of Aragon. Aragon has not appealed the court's decision as to Clover Club, and in fact argues in his brief that Clover Club was his employer.⁴ While the existence of Clover Club as Aragon's employer does not preclude finding that Borden also qualifies as Aragon's employer, see Parts B and C supra, it provides another compelling reason which mandates affirmance of the trial court's ruling.

⁴ This fact coupled with the fact that he alleged that Borden or Clover Club was his employer in all of the complaints in this case give rise to questions as to the appropriateness of the plaintiff having ever named these defendants.

It is clear that workers' compensation is the exclusive remedy against an employer and "against any officer, agent or employee of the employer . . ." Utah Code Ann. § 35-1-60 (emphasis added). While Aragon argues that Borden is not his employer, how can he seriously contend that Borden, at the very least, is not Clover Club's agent?

If the Court were to determine that the employees of the Kaysville facility were exclusively Clover Club employees and not employees of Borden (which finding would be totally unsupported by the undisputed facts) then the legal relationship between Borden and Clover Club must be one of agency as well as of parent corporation and subsidiary. The undisputed facts show that Borden paid the wages of the employees at the Kaysville facility.

(R. 268.) Additionally, Borden paid for and provided the benefits package. Borden also provided and paid for workers' compensation protection. (R. 268, 269.) Moreover, Borden prepared tax returns and paid for Clover Club's tax liabilities. (R. 268.) All of these items are tasks usually performed by the employer. Where, as here, another entity performs them, that entity (Borden) must be considered the agent of the principal (Clover Club). While certainly Clover Club acts as Borden's agent in some instances, there is nothing to prevent Borden acting as Clover Club's agent at the same time. In this case the undisputed facts show that Borden has provided substantial services and benefits to Clover Club and acts on Clover Club's behalf in many ways that are

closely related to its relations with its employees. These substantial benefits and services related very specifically to Aragon. The record clearly permits a finding as a matter of law that Borden was acting as an agent of Clover Club, and therefore Borden is entitled to the protection of the exclusive remedy provision.

IV. PLAINTIFF'S RULE 56(f) MOTION WAS CORRECTLY DECIDED AND IS NOT A BAR TO AFFIRMING THE TRIAL COURT'S DECISION.

Rule 56(f) of the Utah Rules of Civil Procedure provides an avenue for parties to obtain additional time to conduct discovery in response to a summary judgment motion. Generally speaking, the Rule 56(f) requests "should be liberally treated, unless dilatory or lacking in merit. (Citations omitted.) It is for the trial court in the exercise of its sound discretion, to determine if the reasons stated in the Rule 56(f) affidavit are adequate." Reeves v. Geigy Pharmaceutical Inc., 764 P.2d 636, 639 (Utah App. 1988).

In this case, Aragon filed two strikingly similar Rule 56(f) motions. The first was in response to the motion to dismiss Borden and Clover Club filed in September 1990. In the first Rule 56(f) affidavit plaintiff's attorney stated that plaintiff believes "he needs further information relating to the legal relationship between Clover Club Foods and Borden, Inc." That motion and affidavit were dated September 13, 1990. (R. 134-135, 119-121.) Ultimately, Clover Club's motion to dismiss was not

ruled upon. The court's scheduling order dated April 26, 1991, which was prepared by Aragon's counsel (R. 226-228), stated that defendants would withdraw their motion to dismiss, Aragaon would withdraw his Rule 56(f) motion, and defendants would file a motion for summary judgment by May 1, 1991. Borden subsequently got an extension until May 8, 1991, to file its motion for summary judgment. It filed this motion, and Aragon filed a memorandum in opposition on June 4, 1991. Aragon also filed another Rule 56(f) motion together with another affidavit from his attorney also dated June 4, 1991. (R 290-292, 293, 294-297.) In that Rule 56(f) affidavit, Aragon's attorney stated that they needed five items of information. All of those items related to the issues concerning the alter ego claim. See R. 291, 295. The trial court stated in its Ruling that the "tangential question of piercing the corporate veil need not be addressed." (R. 507.) Clearly no alleged fact question or discovery dispute related to an issue which was not addressed in the lower court's decision can give rise to grounds for reversal.

Essentially, the information sought related to the same general issue raised in plaintiff's first Rule 56(f) motion, which had been filed more than eight months earlier. Even after the second Rule 56(f) motion was filed, plaintiff did not do any of the discovery sought in the motion in the nearly two months prior to the hearing date set for the summary judgment motion.

In Hunt v. Hurst, 785 P.2d 414 (Utah 1990), the Supreme Court affirmed summary judgment in favor of the defendant and found that the trial court did not abuse its discretion in denying a second motion for continuance under Rule 56(f). The Court noted that in that case:

Ample time was allowed after commencement of the lawsuit to utilize discovery procedures. (Citations omitted.) Moreover the trial court vacated one summary judgment thereby giving the plaintiff an additional five months to gather additional evidence. Hunt clearly had time to conduct the necessary discovery. Given the fact that the trial court vacated the first summary judgment and allowed five months for additional discovery, the trial court did not abuse its discretion in denying Hunt's motion.

785 P.2d at 416.

In this case, Borden's summary judgment motion was filed approximately a year after the complaint was filed in state court, and about 18 months after the case was initially filed in federal court. Moreover, the second Rule 56(f) motion was filed approximately nine months after Borden's previous motion to dismiss was filed, which also raised the exclusive remedy issue, and which also elicited a Rule 56(f) request for additional time. Clearly Aragon had ample time between May of 1990 and the hearing in late July of 1991 to conduct whatever discovery he wished concerning the relationship between Borden and Clover Club. The trial court did not abuse its discretion in denying the Rule 56(f) motion.

More importantly, the court also did not abuse its discretion in denying the motion where, as here, there was no connection between the information sought in the Rule 56(f) motion and the grounds for the ruling. Numerous Utah cases have held that Rule 56(f) motions should be denied if they are dilatory or without merit. See e.g., Callioux v. Progressive Ins. Co., 745 P.2d 838, 840 (Utah App. 1987); Strand v. Associated Students of the University of Utah, 561 P.2d 191, 194 (Utah 1977). First, nothing in the Rule 56(f) motion was directed at anything relating to the assertions of res judicata and collateral estoppel caused by the determination in the Compensation Agreement that Borden and Clover Club were Aragon's employers. None of the information described in the Rule 56(f) motion would have any impact on the determination as to whether plaintiff is precluded from asserting either a claim against Borden or re-litigating the issue of his employment with Borden. Second, none of that information raises a dispute to the undisputed and unobjected to evidence provided by Borden that it paid the wages of Aragon and others at the Kaysville facility, and that it had control over him. Therefore, the requested information would not impact the determination that Borden was a common law employer of Aragon. Third, it does not impact the determination that Borden at least acts as an agent for Clover Club in some respects and therefore is entitled to protection of the exclusive remedy provision.

Where the Rule 56(f) motion was made months after plaintiff should have been aware of whatever issues he wished to pursue, and there were multiple grounds for granting summary judgment unrelated to the facts plaintiff sought to discover, the trial court did not abuse its discretion in denying the motion and in granting summary judgment in favor of Borden. Accordingly, the denial of that motion provides no basis for reversal in this case.

CONCLUSION

The trial court's decision should be affirmed. The record clearly compels the conclusion that Borden is entitled to the protection of the exclusive remedy provision, and that Aragon's claims against it must be dismissed. Aragon has asserted and obtained relief against Borden through the workers' compensation system, and the issue of the identity of his employer has been determined through an award of the Industrial Commission which was not disputed. This alone is fatal to Aragon's claims.

Additionally, it is clear that Borden qualifies in fact as Aragon's common law employer, or alternatively as the agent of his common law employer. The denial of the Rule 56(f) motion was not an abuse of discretion, and in any event cannot be a harmful error due to the independent grounds on which the summary judgment may be granted and affirmed.

Appellees Borden and Clover Club respectfully requests
that the Court affirm the order of the trial court granting
summary judgment in favor of the defendants.

DATED this 8th day of May, 1992.

RAY, QUINNEY & NEBEKER


Allan T. Brinkerhoff


Steven J. Aeschbacher

Attorneys for
Defendants-Respondents Clover
Club Foods Co. and Borden Inc.

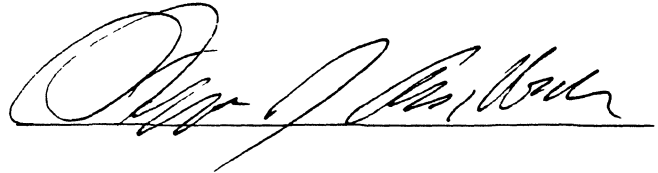
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CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of May, 1992, four true and correct copies of the foregoing BRIEF OF APPELLEE BORDEN, INC. were mailed, postage prepaid, to the following:

DOUGLAS M. DURBANO
PAUL H. JOHNSON
DURBANO & ASSOCIATES
3340 Harrison Blvd. #200
Ogden, Utah 84403

JAY E. JENSEN, ESQ.
M. DOUGLAS BAYLY, ESQ.
CHRISTENSEN, JENSEN & POWELL
175 South West Temple, #510
Salt Lake City, Utah 84101

A handwritten signature in dark ink, appearing to read "Douglas M. Durbano", is written over a horizontal line.

SJA+1240

APPENDIX "A"

35-1-60. Exclusive remedy against employer, or officer, agent or employee — Occupational disease excepted.

The right to recover compensation pursuant to the provisions of this title for injuries sustained by an employee, whether resulting in death or not, shall be the exclusive remedy against the employer and shall be the exclusive remedy against any officer, agent or employee of the employer and the liabilities of the employer imposed by this act shall be in place of any and all other civil liability whatsoever, at common law or otherwise, to such employee or to his spouse, widow, children, parents, dependents, next of kin, heirs, personal representatives, guardian, or any other person whomsoever, on account of any accident or injury or death, in any way contracted, sustained, aggravated or incurred by such employee in the course of or because of or arising out of his employment, and no action at law may be maintained against an employer or against any officer, agent or employee of the employer based upon any accident, injury or death of an employee. Nothing in this section, however, shall prevent an employee (or his dependents) from filing a claim with the industrial commission of Utah for compensation in those cases within the provisions of the Utah Occupational Disease Disability Act, as amended.

History: L. 1917, ch. 100, § 76; C.L. 1917, § 3132; L. 1921, ch. 67, § 1; R.S. 1933 & C. 1943, 42-1-57; L. 1949, ch. 52, § 1.

Cross-References. — Employment of children, § 34-23-1 et seq.

Utah Occupational Disease Disability Law, § 35-2-1 et seq.

Meaning of "this act". — See the note under the same catchline following § 35-1-46.

APPENDIX "B"

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.

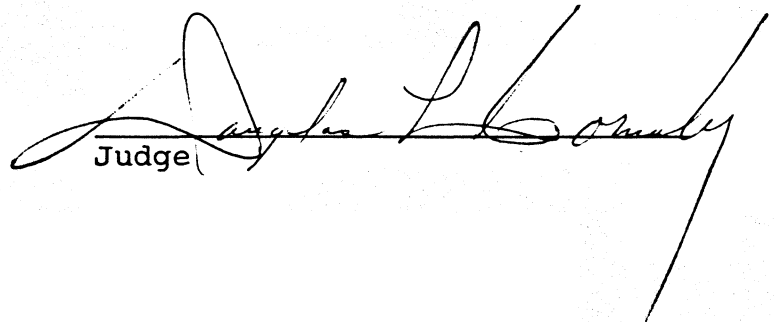
The Utah Supreme Court reaffirmed its Berry litmus test for determining the constitutionality of statute code sections in Riathaus v. Saab-Scandia of America, 789 P.2d 1158, 1160 (Utah 1989). The Riathaus court noted how statutes of limitations prevent plaintiffs from sleeping on their rights to the 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 "C"

James Aragon
Applicant)
vs.
Clover Club Foods Co. / Borden
(Employer)
Liberty Mutual Insurance Co.
(Insurance Carrier) (C667-24386 R)
Defendants.

COMPENSATION
AGREEMENT

WHEREAS, James Aragon sustained a personal injury by accident arising out of or in the course of employment on the 16th day of December, 1985 while employed by Clover Club Foods Co. / Borden; which accident has been duly reported to the Industrial Commission of the State of Utah. According to the physician's reports and agreement between the parties hereto, said Applicant sustained, as a result of said accident, temporary total disability and/or permanent partial disability, as well as incurring medical and/or hospital expenses, as hereinafter set forth:

1. Temporary total disability from 12/17/85 to 5/5/87; payable at the rate of \$128.00 per week for a total of \$6290.29. has been incurred and the carrier/employer has paid a total of \$6290.29 of which the following amount was taxed: \$0.**.
2. *Permanent partial disability based on 78 weeks payable at the rate of \$128.00 per week beginning 6/15/87 for a total of \$9984.00 and \$512.00 has been advanced thereunto, of which \$0 was taxed**. Said permanent partial disability consists of the specific loss as follows:
25% whole man
3. Recapitulation of compensation benefits paid in connection with this claim:
(a) Medical--Hospital and Miscellaneous incurred \$45,057.14
Paid to date \$45,057.14
Balance (if any) due \$0
(b) Total Weekly Compensation Benefits due \$16,274.29
Paid to date \$6,802.29
Balance (if any) due \$9472.00
(c) Total Medical and Compensation due per this Compensation Agreement: \$9472.00

Pursuant to UCA 35-1-69, the Second Injury Fund will reimburse the carrier/employer, N/A, % of all temporary total disability compensation and medical expenses paid on this claim and will pay the applicant weeks of compensation at the rate of \$ for an impairment of weeks of compensation for a total of \$.

NOW THEREFORE, in consideration of the payment of the amounts stated in Section 3 above -- as provided by law -- the Applicant hereby accepts the compensation and Medical payments paid to date and agrees with the permanent partial disability rating shown above. However, the Industrial Commission of Utah shall retain continuing jurisdiction to modify awards as provided by law. Medical expenses incurred as a result of the industrial accident are the continuing obligation of the insurance carrier or employer.

It is understood that this agreement becomes binding and effective only when it is approved by the Industrial Commission.

525-21-3125
Employee's Social Security Number.

James M. Aragon
Signature of Applicant James Aragon
Tacey Birdson
Signature of Insurance Carrier/Employer
N/A
Signature of Second Injury Fund Administrator

The above Compensation has been reviewed and is approved by the Industrial Commission of Utah. Attorney's fees of \$1420.80 should be deducted from the amounts owing and paid by the carrier/employer to Douglas M. Durbano-\$180; Pete Vlahos-\$240.80. TCA

Approved this 14 day of August, 1986, By Timothy Allen
ADMINISTRATIVE LAW JUDGE

NOTE: COMPENSATION IS TAX EXEMPT PER SECTION 6334 (A) (7) OF SECTION 26, U. S. CODE.

Original will be returned to carrier/employer and signed copy to employee. Remember enclosures of Forms 122, 123, 141, and documents showing rating(s) by doctor(s).