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James M. Aragon 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 :
Reply Brief

Utah Court of Appeals

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DOCKET NO. 920106CA IN THE UTAH COURT OF APPEALS

JAMES M. ARAGON,

Plaintiff/Appellant,

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/Appellees.

Case No: 920106-CA

Priority No. 16

APPEAL FROM AN ORDER OF SUMMARY JUDGMENT
OF THE SECOND JUDICIAL DISTRICT COURT,
DAVIS COUNTY, JUDGE DOULGAS L. CORNABY

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INTRODUCTION

Appellant takes this opportunity to respond to the arguments set forth in the respective briefs of the two Respondents. The remaining arguments of the Appellant are adequately covered in Appellant's original Appellate Brief.

SUMMARY OF ARGUMENT

A. Casa Herrera, Inc.'s Motion for Summary Judgment.

The intent of the Utah Legislature in adopting the amended version of U.C.A. §78-15-3 was to provide a claimant with a reasonable opportunity to discover the facts necessary for the accrual of a products liability cause of action, prior to the running of the statute of limitations period.

Accepted rules of statutory construction require that a statute be construed in conformance with relevant, existing tort law, and that a statute be given a reasonable and sensible construction, which will best promote the protection of the public. Aragon's interpretation of U.C.A. §78-15-3 is consistent with the intent of the legislature, as well as with common principles of statutory construction.

U.C.A. §78-15-3 is the statute of limitations provision that should govern the above entitled lawsuit. The legislature has incorporated the "discovery rule" into U.C.A. §78-15-3, mandating a common law requirement that the statute of limitations period be tolled until the Plaintiff discovers the identity of the manufacturer of the product causing the injury. There is a genuine issue

of material fact as to whether Plaintiff/Appellant James M. Aragon should have discovered the identity of Casa Herrera, Inc. more than two years prior to October 16, 1990.

Finally, because the trial court set aside James M. Aragon's default judgment against Casa Herrera, Inc., presumably, so that the lawsuit could proceed on its merits, it is now inequitable to allow Casa Herrera, Inc. to obtain the equivalent of a default judgment against Aragon--by granting its motion for summary judgment based on non-compliance with the the applicable statute of limitations provision--unless it is absolutely, unquestionably mandated.

B. Clover Club Foods Company/Borden, Inc.'s Motion for Summary Judgment.

The issue of whether Borden, Inc. paid any of James M. Aragon's worker's compensation award was not litigated in the worker's compensation proceedings before the Utah Industrial Commission. Therefore, the litigation of such issue in this lawsuit is not barred by the doctrine of res judicata.

A genuine issue of material fact exists concerning the issue of whether Borden, Inc. is the common law employer of Aragon, and concerning the issue of whether Borden, Inc. paid any of James M. Aragon's workers's compensation award. Accordingly, there exists a genuine issue of material fact as to whether Borden, Inc. is entitled to the protection of the exclusive remedy provisions of U.C.A. §35-1-60.

Finally, because the trial court, in arriving at its ruling on summary judgment, ultimately relied upon the exact same factual

allegations proffered by Defendant that Plaintiff wished to rebut, in requesting his Rule 56(f) motion for continuance to conduct further discovery, it was reversible error on the part of the trial court to deny Plaintiff's Rule 56(f) motion.

ARGUMENT

POINT I

ARAGON'S INTERPRETATION OF U.C.A. §78-15-3 IS CONSISTENT WITH THE LEGISLATURE'S INTENT AND WITH ACCEPTED PRINCIPLES OF STATUTORY CONSTRUCTION.

A. The complete history of U.C.A. §78-15-3 reflects the Legislature's intent to toll the running of the statute of limitations period until the injured party has discovered that a cause of action has accrued..

In the case of Berry v. Beech Aircraft, 717 P.2d 670, 684 (Utah 1985), the Utah Supreme Court held that the old version of U.C.A. §78-15-3, which set forth a statute of repose in product liability cases, was unconstitutional. This ruling was based on the fact that situations existed in which the statute of repose barred the filing of a lawsuit, even though the cause of action did not arise until after it was barred, and even when the injured person had been diligent in seeking a judicial remedy. Id. In April of 1989, the Utah State Legislature repealed U.C.A. §78-15-2 of the Product Liability Act, which code section originally stated the purpose of the Act, and also amended U.C.A. §78-15-3, the statute of limitations provision of the Act. The amended version of U.C.A. §78-15-3 states the following:

"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."

In the case of State v. Amador, 804 P.2d 1233, 1234 (Utah App. 1990), the Utah Appellate Court stated the following concerning the amendment of statutory law:

"Every amendment not expressly characterized as a clarification carries the rebuttable presumption that it is intended to change existing legal rights and liabilities."

Accordingly, because the Legislature repealed U.C.A. §78-15-2, there is a legal presumption that the Legislature, in drafting the Utah Product Liability Act, changed its intent from that stated in the original legislation.

Furthermore, because the new statute of limitations provision, stated in U.C.A. §78-15-3, incorporates the "discovery rule," the revised statute itself shows a change in the Legislature's intent concerning the Utah Product Liability Act. It appears that the Legislature, in drafting the revised statute of limitations provision of U.C.A. §78-15-3, intended to toll the running of the statute of limitations period, until an injured party has had a reasonable opportunity to discover that a cause of action based on products liability has accrued.

If, in drafting the current Product liability Act statute of limitations provision, the Legislature intended to toll the running of the statute of limitations period until the claimant discovered or should have discovered that his cause of action had accrued, it is logical to make the discovery of the identity of the

manufacturer of the alleged harmful product a necessary element in the accrual of a products liability action. As a practical matter, a claimant in a products liability action cannot effectively pursue such an action until he has discovered the identity of the manufacturer of the harmful product, which product is an inanimate object.

It goes without saying that it would be absurd to require a Plaintiff to attempt to extract damages from the offending res--the product causing the injury. Therefore, Plaintiff's interpretation of U.C.A. §78-15-3 is consistent with the Utah State Legislature's intent to toll the running of the statute of limitations period until the injured party discovers that a cause of action has accrued.

B. Aragon's interpretation of U.C.A. §78-15-3 is consistent with accepted principles of statutory construction.

Aragon is requesting the Court of Appeals to interpret U.C.A. §78-15-3 to require that the two-year statute of limitations period for a products liability action be tolled until the claimant has discovered, or in the exercise of due diligence should have discovered, both the harm, and its cause. Additionally, Aragon is requesting the Court of Appeals to interpret the word "cause" to include an awareness of the product that caused the claimant's injury, as well as an awareness of the identity of the maker of that product. This interpretation is consistent with accepted principles of statutory construction.

U.C.A. §68-3-2 states in relevant part:

"The statutes establish the laws of this state respecting the subjects to which they relate, and their provisions and all proceedings under them are to be liberally construed with a view to effect the objects of the statutes and to promote justice."

The Utah Supreme Court has stated that U.C.A. §68-3-2 directs Utah appellate courts to construe statutes liberally, with a view to effect their objects and to promote justice, especially when an interpretation of a particular statute is a question of first impression before the appellate courts. Brickyard Homeowners' Ass'n v. Gibbons Realty, 668 P.2d 535, 538 (Utah 1983). Because the interpretation of the relevant statute in this case, U.C.A. §78-15-3, is an issue of first impression before the Utah appellate courts, the Court of Appeals is required to construe the statute liberally, with a view to effect its object and promote justice. As has been explained above, the object and intent of the subject statute is to toll the running of the statute of limitations period on products liability actions, until the claimant has discovered or should have discovered the facts necessary for the accrual of his cause of action.

Defendant has argued that the only facts necessary for the accrual of a products liability action in Utah are (1) that the Plaintiff has discovered that he has been harmed, and (2) that the Plaintiff has discovered the product that has caused his harm. However, Defendant ignores the fact that, until the Plaintiff has had a reasonable opportunity to discover the identity of the manufacturer of the product that has caused his harm, he cannot, as a practical matter, bring a cause of action to remedy his

situation, because he has no one to sue. Accordingly, an interpretation of U.C.A. §78-15-3 that requires a Plaintiff to bring a cause of action before he has had a reasonable opportunity to discover the identity of the proper Defendant (namely, the manufacturer of the product that has caused him harm) is unjust.

Moreover, such an interpretation does not accomplish the object of the statute of limitations provision found in U.C.A. §78-15-3. The whole purpose of legislating the amended version of U.C.A. §78-15-3 was to provide a person injured by a product with reasonable opportunity to discover that his cause of action against a products manufacturer had accrued, before the statute of limitations provision expired. If the identity of the manufacturer of the harmful product is not required to be an essential element in the accrual of a cause of action for products liability, the actual effect of the new products liability statute of limitations provision is the same as the effect of the old products liability statute of repose--it has the potential to bar a claimant's cause of action for products liability before the claimant is even aware of all facts necessary to properly pursue such a cause of action.

U.C.A. §68-3-11 states the following:

"Words and phrases are to be construed according to the context and the approved usage of the language; but technical words and phrases, and such others as have acquired a peculiar and appropriate meaning in law, or are defined by statute, are to be construed according to such peculiar and appropriate definition.

As was stated in Appellant's original Appellate Brief, in the context of a products liability statute of limitations provision,

the word "cause" has been given a definition by the majority of state jurisdictions to mean "both the product that caused the harm to the Plaintiff and the identity of the manufacturer of such product." The Utah Supreme Court has held that the Legislature is presumed to be aware of special legal definitions or meanings given to words used in legislation, and is presumed to have attached those meanings or definitions to such words, in a statute that becomes law. See, Greenhalgh v. Payson City, 530 P.2d 799, 801 (Utah 1975). Thus, it should be presumed that, at the time the Legislature created the amended version of U.C.A. §78-15-3, it was aware of how the courts of other jurisdictions interpreted the word "cause" in the context of statute of limitations provisions concerning products liability actions. It should also be presumed that the Legislature intended the word "cause" to be given the legal meaning applied to such word by the majority of other state jurisdictions in that context. Therefore, it should be presumed that the Legislature intended U.C.A. §78-15-3 to be given the interpretation requested by the Plaintiff in the above entitled matter.

Also, the Utah Supreme Court recently stated the following:

"It is also proper in construing a statute which deals with tort claims to interpret the statute in accord with relevant tort law. Finally, in dealing with an unclear statute, this court renders interpretations that will best promote the protection of the public."

Clover v. Snowbird Ski Resort, 808 P.2d 1037, 1045 (Utah 1991).

Appellant has encouraged the court to interpret U.C.A. §78-15-3 in accordance with the majority rule of common law set forth in the

tort case law of other jurisdictions. It is a correct principle of statutory construction to do so. By adopting the interpretation of U.C.A. §78-15-3 requested by Appellant, the Court of Appeals will best promote the protection of the public. Such an interpretation will not create the risk that some claimants will have their products liability claims barred before they have had a reasonable opportunity to discover all elements necessary to bring a valid products liability action in a court of law.

Plaintiff's interpretation of U.C.A. §78-15-3 is also consistent with the principle of statutory construction stated in the case of Curtis v. Harmon Electronics, Inc., 575 P.2d 1044, 1046 (Utah 1978), in which the Utah Supreme Court stated the following:

"A sound rule of statutory interpretation is that a statute is presumed not to be intended to produce absurd consequences and that where possible it will be given a reasonable and sensible construction. This Court recognizes its duty to render such interpretation of the laws as will best promote the protection of the public."

Certainly, an interpretation of U.C.A. §78-15-3 that would bar a plaintiff's cause of action before he had a reasonable opportunity to discover the identity of the proper defendant would produce absurd consequences.

Finally, the Respondent argues that the its restrictive interpretation of U.C.A. §78-15-3 achieves an appropriate balance between competing objectives. Respondent, however, ignores the fact that the severe hardship placed on a Plaintiff by having his claim absolutely barred by a restrictive statutory interpretation far exceeds any potential hardship that might be placed on a Defendant who may have some difficulty of proof caused by the

passage of time. In this case, the Defendant, Casa Herrera, Inc., has produced no evidence to show that passage of time has perceivably prejudiced or imposed any hardship on said Defendant.

POINT II

BY EXPRESSLY INCORPORATING THE "DISCOVERY RULE" INTO U.C.A. §78-15-3, THE LEGISLATURE HAS MANDATED A COMMON LAW REQUIREMENT THAT THE STATUTE OF LIMITATIONS PERIOD BE TOLLED UNTIL A PLAINTIFF DISCOVERS THE IDENTITY OF THE HARMFUL PRODUCT'S MANUFACTURER.

U.C.A. §78-15-3 expressly incorporates the "discovery rule" into the Utah Product Liability Act statute of limitations provision. U.C.A. §78-15-3 states the following:

"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.)

The Utah Supreme Court has stated that, when the "discovery rule" is specifically incorporated into a statute of limitations provision, the statute of limitations period does not begin to run until the facts forming the basis for the cause of action are discovered [or should have been discovered]. Becton Dickinson and Co. v. Reese, 668 P.2d 1254, 1257 (Utah 1983).

As was explained previously in this Reply Brief, in creating U.C.A. §78-15-3 the Legislature intended to guard the public against a perceived risk, namely, that a claimant might have his products liability claim barred before he has had a reasonable opportunity to discover all the facts forming the basis for a cause of action. One necessary element or fact forming the basis for the

accrual of a products liability action is the identity of the manufacturer of the product that harmed the Plaintiff. Accordingly, by incorporating the "discovery rule" into U.C.A. §78-15-3, the Legislature demonstrated its intent to allow a claimant a reasonable opportunity to discover all facts necessary to form the basis for a valid products liability cause of action, including the identity of the manufacturer of the product that caused the claimant's injury.

POINT III

BECAUSE U.C.A. §78-15-3 IS A MORE SPECIFIC AND MORE RECENTLY LEGISLATED STATUTE OF LIMITATIONS PROVISION, IT SHOULD GOVERN THIS LAWSUIT, RATHER THAN THE GENERAL FOUR-YEAR STATUTE OF LIMITATIONS PROVISION FOUND IN U.C.A. §78-12-25(3).

In the case of Perry v. Pioneer Wholesale Supply Co., 681 P.2d 214, 216 (Utah 1984), the Utah Supreme Court stated the following:

"When two statutory provisions appear to conflict, the more specific provision will govern over the more general provision. Thus . . . a limitation period for a specific type of action . . . controls over an older, more general statute of limitations." (Citations omitted.)

Obviously, U.C.A. §78-15-3 is both a more specific and a more recent statute of limitations provision than the general four-year statute of limitations provision found in U.C.A. §78-12-25(3). As was explained in Appellant's original Appellate Brief, because the general four-year statute of limitations provision of U.C.A. §78-12-25(3) had not yet expired on the effective date of the new products liability statute of limitations provision, U.C.A. §78-15-3 became the governing statute of limitations provision for the

above entitled case on its effective date (April 24, 1989). U.C.A. §12-25(3) would continue to be the applicable statute of limitations provision in the above entitled lawsuit, only if Aragon had discovered or should have discovered all facts forming the basis for his products liability cause of action more than two years prior to the effective date of the amended version of U.C.A. §78-15-3.

POINT IV

THERE EXISTS A GENUINE ISSUE OF MATERIAL FACT AS TO WHETHER ARAGON SHOULD HAVE DISCOVERED THE IDENTITY OF THE MANUFACTURER OF THE SUBJECT MASA FEEDER MACHINE PRIOR TO THE DATE ON WHICH SUCH IDENTITY WAS ACTUALLY DISCOVERED.

The fact that Plaintiff did not discover the identity of Casa Herrera, Inc. as the manufacturer of the subject masa feeder machine until July 13, 1990, is an undisputed fact in this matter. Nevertheless, Defendant/Respondent contends that the trial court could have determined, as a matter of law, that Plaintiff/Appellant should have discovered the identity of Casa Herrera, Inc. more than two years prior to October 16, 1990 (the date on which Casa Herrera, Inc. was joined to the action as a party Defendant).

Plaintiff/ Appellant believes that this court cannot determine that issue, as a matter of law, for two reasons. First, in the trial court hearings, the issue of Aragon's efforts to discover the identity of the masa feeder machine manufacturer was not an issue that was actively adjudicated. The trial court did not have the full set of facts on this issue in front of it at the time it granted Casa Herrera, Inc.'s motion for summary judgment.

Consequently, rather than making an informed decision based on facts, the trial court arbitrarily made an absolute determination, as a matter of law, that two years from the date of injury was ample time for any plaintiff to discover the identity of the manufacturer of an injurious product. Appellant is unaware of any law, either statutory or case law, that supports the trial court's legal conclusion.

Furthermore, the issue of whether a plaintiff has used reasonable diligence to discover all the facts necessary for a cause of action to accrue under a "discovery rule" statute of limitations provision is ordinarily an issue for the trier of fact. See, Jacoby v. Kaiser Foundation Hospital, 662 P.2d 613, 618 (Hawaii App. 1981); McCarroll v. Doctors General Hosp., 664 P.2d 382, 385 (Okla. 1983); See also, Yerkes v. Rockwood Clinic, 527 P.2d 689, 692-693 (Wash. App. 1974).

Moreover, the Utah Supreme Court has stated the following:

"It has long been established in our law that a court should not take the case from the jury where there is any substantial dispute in the evidence on issues of fact, but can properly do so only when the matter is so plain that there really is no conflict in the evidence upon which reasonable minds could differ [U]nless the question is free from doubt, the court cannot pass upon it as a matter of law--if the court is in doubt whether reasonable men might arrive at different conclusions, then this very doubt determines the question to be one of fact for the jury and not one of law for the court."

Flynn v. W.P. Harlin Construction Co., 509 P.2d 356, 361 (Utah 1973); See also, Cruz v. Montoya, 660 P.2d 723, 729 (Utah 1983) ("If the evidence and its inferences would cause reasonable men to arrive at different conclusions as to whether the essential facts

were or were not proved, then the question is one of fact for the jury."). The trial court made a supposed legal determination concerning the issue of whether the Plaintiff had been reasonably diligent in seeking the identity of Casa Herrera, Inc., even though the court was provided with only a semblance of evidence from either party concerning this issue.

Secondly, even based on the evidence in front of the trial court at the time of its decision, the court could not say, as a matter of law, that reasonable men could not arrive at different conclusions concerning whether Aragon was reasonably diligent. According to the evidence before the court at the time of its decision, Aragon made an attempt to discover the identity of the manufacturer of the subject masa feeder machine several months prior to the running of the original four-year statute of limitations (which statute of limitations initially governed this case). In addition, the owner of the masa feeder machine was extremely uncooperative in providing Aragon with such information. Therefore, Aragon had to rely on the slow, inefficient process of judicially supervised discovery in order to extract such information from the owner of the machine. Clearly, it is possible that a reasonable man would determine that Aragon exercised due diligence in attempting to discover the identity of the manufacturer of the masa feeder machine, based on these facts. Therefore, the trial court erred in determining, as a matter of law, that the Appellant/Plaintiff did not exercise due diligence in attempting to discover the identity of Casa Herrera, Inc.

POINT V

THE EQUITIES OF THIS CASE DICTATE THAT THE COURT SHOULD LIBERALLY CONSTRUE THE FACTS AND THE APPLICABLE STATUTE OF LIMITATIONS PROVISION TO ALLOW THE PLAINTIFF/APPELLANT TO PROCEED WITH HIS LAWSUIT AGAINST CASA HERRERRA, INC. ON ITS MERITS.

As was stated in the Statement of Facts in Plaintiff's original Appellate Brief, Casa Herrerra, Inc. failed to file an answer to Plaintiff's Amended Complaint. Consequently, on January 31, 1991, a Default Certificate and Default Judgment were entered against it and in favor of James M. Aragon, on the issue of liability, on Plaintiff's First and Second Claims for Relief (R.171-173). Casa Herrerra, Inc. then made a motion to set aside the Default, and the court granted that motion. The trial court entered its Order Setting Aside the Default on April 9, 1991 (R.183-185, 195). Thereafter, the trial court allowed Casa Herrerra, Inc. to file a motion for summary judgment against the Plaintiff, based on a defense of failure to comply with the applicable statute of limitations (R. 443). That motion for summary judgment was ultimately granted on November 13, 1991 (R. 523-525, 586-589).

Thus, the trial court decided to set aside Plaintiff's Default Judgment against Casa Herrerra, Inc., although Plaintiff was clearly entitled to such Default Judgment. Then, without exhibiting any sense of fairness or equity, the trial court allowed Casa Herrerra, Inc. to obtain the equivalent of a default judgment against Plaintiff--by granting its motion for summary judgment

based on Plaintiff's alleged non-compliance with the statute of limitations. The trial court's actions fly in the face of the fundamental legal principle that one who seeks equity must do equity. Therefore, if it is necessary to weigh equitable determinations in order for the Appellate Court to render a decision in this matter, all such equities should be decided in favor of the Plaintiff/Appellant. After all, James M. Aragon at one time actually had a Default Judgment against Casa Herrerra, Inc. in this case, which Default Judgment was set aside by the trial court as an equitable measure, presumably, so that the case could be tried on its merits.

POINT VI

THE ISSUE OF WHETHER BORDEN, INC. PAID ARAGON'S WORKER'S COMPENSATION AWARD WAS NOT LITIGATED IN THE WORKER'S COMPENSATION PROCEEDINGS, AND LITIGATION OF SUCH ISSUE IS NOT BARRED BY THE DOCTRINE OF RES JUDICATA.

Respondents, Clover Club Foods Company and Borden, Inc., argue that because the document filed with the Utah State Industrial Commission entitled "Compensation Agreement" listed both Clover Club Foods Company and "Borden" (R. 490) in the heading of such document as the employer, the issue of who paid James M. Aragon's worker's compensation award is res judicata, and cannot be litigated in the above entitled lawsuit.

Preliminarily, it should be pointed out that such "Compensation Agreement" lists "Borden" as James M. Aragon's employer, rather than "Borden, Inc." (R. 490). (It is "Borden, Inc." who is a party to this lawsuit, rather than "Borden.")

Certainly, "Borden" is not the same legal entity as "Borden, Inc."

The doctrine of res judicata is stated as follows:

"[A] claim once litigated cannot be relitigated in a subsequent case between the same parties or their privies."

Church v. Meadow Springs Ranch Corp., Inc., 659 P.2d 1045, 1048 (Utah 1983). "Borden, Inc." was never a party to the Industrial Commission proceedings, although for some unexplained reason an entity by the name of "Borden" was listed as a party (R.487-490). Accordingly, all of Respondents' sophisticated arguments concerning res judicata are not applicable in this case.

In addition, the doctrine of res judicata bars only the relitigation of claims that have once been adjudicated, or the litigation of claims that should have been adjudicated in the initial proceeding but were not. Church v. Meadow Springs Ranch Corp., Inc., 659 P.2d at 1048. In this case, Aragon's obvious common law employer, Clover Club Foods Company, had primary responsibility to pay Aragon's worker's compensation claim and was covered by worker's compensation insurance. Thus, there was never any need to adjudicate the issue of whether Borden, Inc. was also secondarily liable for Aragon's worker's compensation claim as Aragon's statutory employer. Furthermore, there is no evidence in the record to indicate that the issue of whether Borden, Inc. was Aragon's statutory employer was ever litigated. Moreover, there is no evidence in the record to indicate that it was ever necessary to litigate this issue. Accordingly, because this issue was neither an issue that was adjudicated nor an issue that should have been

adjudicated in the Industrial Commission proceedings, the litigation of such issue is not barred by the doctrine of res judicata.

Finally, even if for the sake of argument this Court assumes that "Borden, Inc." was listed as a party on the "Compensation Agreement" (as a party who was jointly and severally liable to Aragon for his worker's compensation award), that fact alone does not establish that it was Borden, Inc. who actually paid such award. The only evidence in the record to indicate that Borden, Inc. may have actually paid any of James M. Aragon's worker's compensation award is the Affidavit of Rex J. Ballinger, which indicates the following:

"Pursuant to the terms of the policy, Liberty Mutual on behalf of Borden and Clover Club paid James Aragon \$17,537.40." (R.273).

Mr. Ballinger does not indicate whether only one dollar of such amount was paid on behalf of Borden, Inc. and whether \$17,536.40 was paid on behalf of Clover Club Foods Company, or just what proportion of the money, if any, was paid by each party. At the very least, there is a factual issue in this case concerning the percentage of the worker's compensation award of James M. Aragon that was actually paid by Clover Club Foods Company, and the percentage of such worker's compensation award that was actually paid by Borden, Inc. If Borden, Inc. actually paid only a de minimis amount of such worker's compensation award, there would be no reason to give Borden, Inc. the benefit of the protection of the exclusive remedy provisions of U.C.A. §35-1-60. Therefore, such

issue is a material issue of fact, and precludes the granting of a summary judgment in this matter.

The issue of whether Borden, Inc. actually paid any of the worker's compensation award assessed against Clover Club Foods Company (and possibly against Borden, Inc.) and in favor of Aragon was never adjudicated in the Industrial Commission proceeding, or otherwise. Based on the foregoing, because the issue of whether Borden, Inc. paid any of Aragon's worker's compensation award has never been litigated, it cannot be barred by the doctrine of res judicata.

POINT VII

THERE EXISTS A GENUINE ISSUE OF MATERIAL FACT AS TO WHETHER BORDEN, INC. IS ENTITLED TO THE PROTECTION OF THE EXCLUSIVE REMEDY PROVISIONS OF U.C.A. §35-1-60.

As was stated in Respondent's brief, Appellant is not contesting the fact that Clover Club Foods Company is a common law employer of Appellant, who paid the worker's compensation award of Appellant, and who is, therefore, entitled to the protection of the exclusive remedy provisions of U.C.A. §35-1-60. Accordingly, Appellant does not oppose the trial court's grant of summary judgment in this matter concerning Clover Club Foods Company. However, as was stated in Appellant's original Appellate Brief, there is a genuine issue of material fact as to whether Borden, Inc. is also a common law employer of Appellant, who also paid the worker's compensation award of Appellant, and who is also, therefore, entitled to the protection of the exclusive remedy provisions of U.C.A. §35-1-60.

Respondents are mistaken in asserting that the issue of whether Borden, Inc. was James M. Aragon's common law employer was litigated in the Industrial Commission proceedings. The fact that the name "Borden" appears in the heading of the pleading entitled "Compensation Agreement" does not magically bar Appellant from litigating the issue of whether Borden, Inc. is Appellant's common law employer. Even if "Borden, Inc." (rather than "Borden") was listed as an employer of Aragon on the "Compensation Agreement," no distinction was made in such "Compensation Agreement" concerning whether "Borden" was Aragon's common law employer or Aragon's statutory employer. Furthermore, as was set forth previously in this Reply Brief, the issue of whether Borden, Inc. actually paid Aragon's worker's compensation award has never been litigated. Thus, such issue is not barred from litigation by the doctrine of res judicata. Finally, a genuine issue of material fact exists concerning the extent of which, if any, Borden, Inc. paid Aragon's worker's compensation award.

A genuine issue of material fact as to whether Borden, Inc. was James M. Aragon's common law employer is created by the following facts:

1. There is no evidence in the record to indicate that Borden, Inc. exercised control over the every day work activities of James M. Aragon, other than in some indirect capacity as the 100% stockholder of Clover Club Foods Company.

2. At the time James M. Aragon applied for his job at Clover Club Foods Company, his employment application was submitted on a

Clover Club Foods Company form (R. 342, 343). When Aragon was terminated by Clover Club Foods Company, the termination document stated that Aragon was terminating employment with Clover Club Foods Company, with no mention of Borden, Inc. (R.345). In addition, when Aragon applied for a job and went to work for Clover Club Foods Company, he believed that he was working for Clover Club Foods Company, not Borden, Inc. (R.287, 288).

A genuine issue of material fact as to whether Borden, Inc. actually paid any portion of Aragon's worker's compensation claim is created by the following facts:

1. The Industrial Commission document entitled "Compensation Agreement" does not list "Borden, Inc." as the employer of Aragon, but only lists "Borden" (R. 490). Normally, an entity named "Borden" would not be the legal equivalent of an entity named "Borden, Inc." when listed as a party to a pleading.

2. Even if the court were to assume that the so-called "Compensation Agreement" assessed joint and several liability against both Clover Club Foods Company and "Borden, Inc.," there is no indication on such pleading as to who actually paid such worker's compensation award.

3. Even though Rex J. Ballinger states in his Affidavit (R. 273) that Liberty Mutual paid James Aragon \$17,537.40 on behalf of "Borden and Clover Club," there is no indication as to what portion of such \$17,537.40 paid by Liberty Mutual to Aragon was paid on behalf of "Borden, Inc." and what portion was paid on behalf of Clover Club Foods Company. Certainly, if only one dollar (or some

other de minimis amount) was paid on behalf of Borden, Inc., it would be inequitable to determine as a matter of law that Borden, Inc. was entitled to immunity under the provisions of U.C.A. §35-1-60, because it had paid Aragon's workers compensation award.

POINT VIII

IT WAS REVERSIBLE ERROR ON THE PART OF THE TRIAL COURT TO DENY PLAINTIFF'S RULE 56(f) MOTION.

Respondent contends that Aragon filed two strikingly similar Rule 56(f) motions in this case. An examination of those motions show that this contention is a misrepresentation. Plaintiff's first Rule 56(f) motion sought a continuance to obtain Defendants' answers to the discovery requests that had already been served on Defendants, so that Plaintiff could answer Defendants' U.R.C.P. Rule 12(b)(6) motion to dismiss (R. 134,135). Plaintiff's second Rule 56(f) motion sought to depose Rex J. Ballinger and Raymond E. Barkley, so that Plaintiff could rebut the statements made in the affidavits of Rex J. Ballinger and Raymond E. Barkley (R. 290-297, 445-456).

At the time Plaintiff filed his second Rule 56(f) motion, he had already expended significant efforts in an attempt to discover relevant corporate information from the Defendants. However, many of Defendants' answers to Plaintiff's discovery requests were non-responsive. Therefore, at the time Plaintiff was required to respond to Defendant's motion for summary judgment (and to the affidavits of Rex J. Ballinger and Raymond E. Barkley), the only effective way for Plaintiff to explore the veracity of the

affidavits of Rex J. Ballinger and Raymond E. Barkley was to depose them. The affidavit testimony of Rex J. Ballinger and Raymond E. Barkley was critical information in relation to Defendants' motion for summary judgment. This affidavit testimony was relied upon heavily by the trial court in arriving at its decision to grant summary judgment. Without deposing Rex Ballinger and Raymond E. Barkley, Plaintiff had no way to either verify or contradict the information contained in their affidavits. Defendants refused to make Mr. Barkley and Mr. Ballinger available for depositions until the court had made a ruling on Plaintiff's Rule 56(f) motion.

Ultimately, even though it was obvious that Plaintiff would be unable to present facts essential to justify his opposition to Defendants' motion for summary judgment, unless he was granted a continuance in order to depose Rex J. Ballinger and Raymond E. Barkley, the court failed to grant Plaintiff's Rule 56(f) motion. Then, the trial court relied upon the very information Plaintiff desired to rebut (the affidavits of Rex J. Ballinger and Raymond E. Barkley) as the primary basis for its ruling on Defendant's motion for summary judgment. This is the very type of unfair, inequitable treatment that constitutes arbitrary and capricious behavior on the part of a trial court. Clearly, such action constitutes reversible error in the exercise of the trial court's judicial discretion.

CONCLUSION

Based on the foregoing, the trial court's order of summary judgment concerning both Casa Herrerra, Inc. and Borden, Inc. should be reversed, and this case should be remanded to the trial

court to be tried on its merits. Accordingly, Plaintiff/Appellant James M. Aragon respectfully requests the court to reverse the order of the trial court granting summary judgment in favor of Defendant Casa Herrera, Inc. and Borden, Inc.

DATED this 12th day of June, 1992.

DURBANO & ASSOCIATES



DOUGLAS M. DURBANO
PAUL H. JOHNSON
Attorney for Plaintiff/Appellant
James M. Aragon

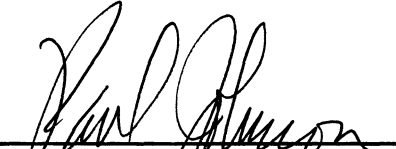
CERTIFICATE OF MAILING

I DO HEREBY CERTIFY that I mailed a true and correct copy of the foregoing REPLY BRIEF OF APPELLANT to the following, postage pre-paid on this 12th day of June, 1992.

Allan T. Brinkerhoff, Esq.
Steven J. Aeschbacher, Esq.
RAY, QUINNEY & NEBEKER
Attorneys for Defendants/
Appellees, Clover Club Foods
Company, Inc.
79 South Main Street
P.O. Box 45385
Salt Lake City, Utah 84145-0385

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

DURBANO & ASSOCIATES



DOUGLAS M. DURBANO
PAUL H. JOHNSON
Attorneys for Appellant,
James M. Aragon

APPENDIX A

Douglas M. Durbano (#4209)
Paul H. Johnson (#4856)
Attorneys for
4185 Harrison Boulevard, #320
Ogden, Utah 84403
Telephone: (801) 621-4111

FILED IN CLERK'S OFFICE
DAVIS COUNTY, UTAH

FEB 1 8 57 AM '91

CLERK OF THE COURT

BY _____

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.

DEFAULT CERTIFICATE

Civil No. 900747717PI

Judge Douglas L. Cornaby

It appearing from the file and records in the above-entitled cause that the Defendant, Casa Herrerra, Inc., a California corporation, has been duly and properly served with Summons and Complaint, and said Defendant having failed to answer or otherwise plead to said Summons within the period of time permitted therefore by law,

THE DEFAULT OF THE DEFENDANT IN THE PREMISES IS HEREWITH ENTERED.

WITNESS: My hand and seal this 31 day of January, 1991.

Benjamin E. Sims
CLERK OF THE COURT

By Vickie Hart
Deputy Clerk

(2\pldgs\85070.dec)

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APPENDIX B

Douglas M. Durbano (#4209)
Paul H. Johnson (#4856)
Attorneys for
4185 Harrison Boulevard, #320
Ogden, Utah 84403
Telephone: (801) 621-4111

FILED IN CLERK'S OFFICE
FEB 1 8 53 AM '91
CLERK
BY

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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DEFAULT JUDGMENT

Civil No. 900747717PI

Judge Douglas L. Cornaby

It appearing from the file and records in the above-entitled cause that the Defendant, Casa Herrerra, Inc., a California corporation, has been duly and properly served with Summons and Complaint, and said Defendant having failed to answer or otherwise plead to said Summons within the period of time permitted therefore by law, and the Clerk of the Court having heretofore entered the Default of the said Defendant in the premises, and it appearing to the Court that the Plaintiff is entitled to Judgment in accordance with the pleadings, it is now by the Court Ordered that:

JUDGMENT IN FAVOR OF THE PLAINTIFF AND AGAINST THE DEFENDANT, CASA HERRERRA, INC., IS GRANTED AS FOLLOWS:

JUDGMENT ENTERED

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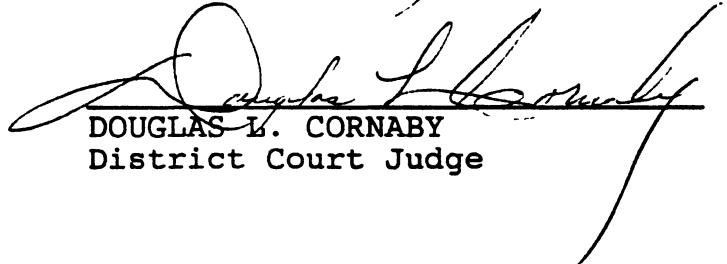
1. Judgment is entered against the Defendant, Casa Herrera, Inc., on the issue of liability on Plaintiff's First and Second Claims for Relief.

2. Defendant, Casa Herrera, Inc., is liable to the Plaintiff for damages suffered by the Plaintiff as set forth in Plaintiff's Complaint, in an amount to be established pursuant to evidentiary hearing, which will be scheduled by the court.

3. For costs of court in a sum to be established by Affidavit of the Plaintiff.

4. Interest at the rate of twelve percent (12%) per annum on the judgment amount, from the time of the entry of judgment until paid in full.

DATED AND ENTERED this 31 day of January, 1991.


DOUGLAS L. CORNABY
District Court Judge

(2\pldgs\850570.dej)

APPENDIX C

FILED IN CLERK'S OFFICE
DAVIS COUNTY

Apr 10 12 55 PM '91

CLERK, DISTRICT COURT

BY
DEPT.

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

IN THE SECOND JUDICIAL DISTRICT COURT OF DAVIS COUNTY

STATE OF UTAH

JAMES M. ARAGON,

Plaintiff,

v.

CLOVER CLUB FOODS COMPANY, a
Utah corporation, BORDEN, INC.,
a New Jersey corporation,
CASA HERRERA, INC., a California
corporation, and JOHN DOES
I through X, inclusive,

Defendants.

ORDER SETTING ASIDE DEFAULT
AND DEFAULT JUDGMENT

Civil No. 900747717 PI

Judge Douglas L. Cornaby

The motion of the defendant Casa Herrera to set aside default and default judgment was heard during the pre-trial on Monday, April 8, 1991 at 9:00 a.m. before the Honorable Douglas L. Cornaby in the above-entitled Court. The parties were represented as follows: Paul H. Johnson for plaintiff, Allan T. Brinkerhoff for the defendants Clover Club Foods Company and Borden, Inc., and Jay E. Jensen for defendant Casa Herrera, Inc. The Court having considered the affidavits accompanying the motion and based upon the records herein, and good cause appearing,

The motion of defendant Casa Herrera for an order setting aside the default and default judgment is hereby granted and said default and default judgment are hereby set aside. The

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0010978

JUDGMENT ENTERED

defendant Casa Herrera, Inc. is ordered to respond to the amended complaint dated August 14, 1990 by April 13, 1991.

DATED the 9 day of April, 1991.

BY THE COURT:

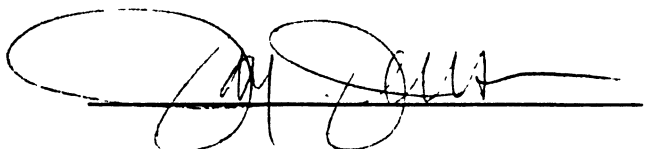

Douglas L. Cornaby
District Court Judge

CERTIFICATE OF SERVICE

This is to certify that on the ____ day of April, 1991,
a true and correct copy of ORDER SETTING ASIDE DEFAULT AND DEFAULT
JUDGMENT was mailed, postage prepaid, to:

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

Allan T. Brinkerhoff
WATKISS & SAPERSTEIN
310 South Main, #1200
Salt Lake City, UT 84101



APPENDIX D

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

COMPENSATION
AGREEMENT

667-8721.6 7777

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 \$6390.20. Has been incurred and the carrier/employer has paid a total of \$6390.20 of which the following amount was taxed: \$0.00.
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 \$0.00 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 \$0.00
(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 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
Douglas M. Durban
Signature of Insurance Carrier/Employer/Terry Birdson,

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. Durban-\$180; Pete Vlahos-\$240.80. TCA

Approved this 14 day of August, 1985 by Timothy J. Allen
ADMINISTRATIVE LAW JUDGE

NOTE: COMPENSATION IS TAX EXEMPT PER SECTION 6334 (A) 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).