

DATE: 2-23-93

TO: PAUL MERRELL

ATTN:

FROM: WM. SNYDER

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8

Paul - Need to review this
for^A letter to Steve Bruckner
and his subsequent visit to
L.V. — along w/ Bill Neal
in Home Atty. for Omaha
Pub. Serv.

Bill

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FROM: Stephen M. Bruckner SECRETARY: Diane Siler
DATE: 2/22/92 CLIENT # 4779 - 000 - 00 PAGES: 7 (including cover page)
CLIENT: OPD/Ret.
RE:

COMMENTS: Bill - I am enc. the statute of repose, Neb. Rev. Stat.
Sec. 25-224. There are 2 recent cases upholding the statute of repose:
Racke v. H. C. Davissons' Mf. Co., 241 Neb. 21, ___ NW2d (7/10/92) and
Stryker v. City of Lincoln, 238 Neb. 166, 409 NW2d 546 (1991).

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COMMENCEMENT AND LIMITATION OF ACTIONS § 25-225

(3) The limitations contained in subsection (1), (2), or (5) of this section shall not be applicable to indemnity or contribution actions brought by a manufacturer or seller of a product against a person who is or may be liable to such manufacturer or seller for all or any portion of any judgment rendered against a manufacturer or seller.

(4) Notwithstanding the provisions of subsections (1) and (2) of this section, any cause of action or claim which any person may have on July 22, 1978, may be brought not later than two years following such date.

(5) Any action to recover damages based on injury allegedly resulting from exposure to asbestos composed of chrysotile, amosite, crocidolite, tremolite, anthrophyllite, actinolite, or any combination thereof, shall be commenced within four years after the injured person has been informed of discovery of the injury by competent medical authority and that such injury was caused by exposure to asbestos as described herein, or within four years after the discovery of facts which would reasonably lead to such discovery, whichever is earlier. No action commenced under this subsection based on the doctrine of strict liability in tort shall be commenced or maintained against any seller of a product which is alleged to contain or possess a defective condition unreasonably dangerous to the buyer, user, or consumer unless such seller is also the manufacturer of such product or the manufacturer of the part thereof claimed to be defective. Nothing in this subsection shall be construed to permit an action to be brought based on an injury described in this subsection discovered more than two years prior to August 30, 1981.

Source: Laws 1978, LB 663, § 2; Laws 1981, LB 20, § 1.

Time periods for bringing suit are extended by section 25-213. *Lawson v. Ford Motor Co.*, 225 Neb. 725, 408 N.W.2d 258 (1987).

The statute of repose applicable to the manufacturer of an allegedly defective product is contained in this section and begins to run when possession of the product is first relinquished for ultimate use or consumption, not when it is first placed into the stream of commerce by the manufacturer. *Witherspoon v. Sides Constr. Co.*, 219 Neb. 117, 582 N.W.2d 35 (1988).

One who wrongfully conceals a material fact necessary to the accrual of a cause of action against him, and such concealment causes the opposite party to delay the filing of suit, cannot

avail himself of the statute of limitations as a defense. *MacMillan v. A. H. Robins Co.*, 217 Neb. 330, 348 N.W.2d 889 (1984).

The 4-year statute of limitations begins to run on the date on which the party who holds the cause of action discovers, or in the exercise of reasonable diligence should have discovered, the existence of the injury or damage. *Condon v. A. H. Robins Co.*, 217 Neb. 60, 349 N.W.2d 622 (1984).

Regarding an infant's cause of action for products liability, section 25-213 tolls the statute of limitations contained in subsection (4) of this section. *Macku v. Dreckett Products Co.*, 216 Neb. 170, 343 N.W.2d 58 (1984).

25-225. Repealed. Laws 1986, LB 529, § 58.

Regarding a claim of prejudice from an instruction given or a trial court's refusal to give a tendered instruction, the instructions given must be read conjunctively rather than in isolation. If the instructions given, when taken as a whole, correctly state the law, are not misleading, and adequately cover the issues submissible to a jury, there is no prejudicial error concerning the instructions necessitating a reversal. *Rose v. City of Lincoln, supra*.

The plaintiff has failed to show that the instructions given to the jury, when taken as a whole, were misleading, contained incorrect statements of law, or failed to cover the issues of the case. The plaintiff was not prejudiced by the trial court's refusal to instruct on future damages.

As to the plaintiff's argument that the evidence is insufficient to support the jury's verdict, this court has stated:

A civil jury verdict will not be disturbed on appeal unless clearly wrong. . . . A verdict is not to be set aside where the evidence is in conflict or where reasonable minds may reach different conclusions or inferences, as it is within the jury's province to decide issues of fact. . . .

. . . It is for the jury, as trier of the facts, to resolve conflicts in the evidence and to determine the weight and credibility to be given to the testimony of the witnesses. . . .
Chadron Energy Corp. v. First Nat. Bank, 216 Neb. 173, 182, 459 N.W2d 718, 721 (1990).

Furthermore, a jury's verdict will not be reversed on appeal as inadequate unless it is so clearly against the weight and reasonableness of the evidence and so disproportionate to the injury proved as to demonstrate that it was the result of passion, prejudice, mistake, or some other means not apparent in the record, or that the jury disregarded the evidence or rules of law. *Day v. House*, 226 Neb. 521, 412 N.W2d 466 (1987).

The evidence in this case justified the jury's award to the plaintiff because she had not complied with the requirements of the defendant's benefit contracts and later abandoned her employment. The plaintiff was not eligible for health insurance benefits until she was examined by the defendant's physician. When the defendant offered the plaintiff a teaching position on

Nebraska Advance Sheets
RADKE v. H. C. DAVIS SONS' MFG. CO.
Cite as 261 Neb. 21

21

August 18, 1983, she refused to consider the offer. The jury could reasonably conclude that the plaintiff had abandoned her employment with the defendant and was not entitled to any further benefits under her contract of employment.

The judgment is affirmed.

AFFIRMED.

GRANT, J., not participating.

TERRY R. RADKE, APPELLANT, v. H. C. DAVIS SONS' MANUFACTURING CO., INC., A KANSAS CORPORATION, AND THE BOARD OF REGENTS OF THE UNIVERSITY OF NEBRASKA, A PUBLIC BODY CORPORATE, APPELLEES.

N.W.2d

Filed July 10, 1992. No. S-89-1473.

Constitutional Law; Limitations of Actions; Products Liability; Due Process; Equal Protection. Nebraska's 10-year statute of repose for products liability actions found in Neb. Rev. Stat. § 25-224(2) (Reissue 1989) does not violate the Due Process Clause, the Equal Protection Clause, or the open courts provision of the Nebraska or U.S. Constitutions.

Appeal from the District Court for Lancaster County: EARL J. WITTHOFF, Judge. Affirmed.

William A. Wieland, of The Healy Wieland Law Firm, as on brief, Anne E. Winner, of Bruckner, O'Gara, Keating, Sievers & Hendry, P.C., for appellant.

Mark R. Scherer and Waldine H. Olson, of Schmid, Mooney & Frederick, P.C., for appellee H. C. Davis Sons' Manufacturing Co.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPOKALE, SHANAHAN, GRANT, and FAHRNERBUCH, JJ.

PER CURIAM.

This is a civil suit in which the plaintiff-appellant, Terry R. Radke, seeks damages for injuries allegedly sustained when he fell into a mixing machine designed and manufactured by the

FEB-22-1993 17:07 FROM

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defendant-appellee H. C. Davis Sons' Manufacturing Co., Inc. (H. C. Davis). The Board of Regents of the University of Nebraska is also a named defendant, though its only interest is in subrogation for workers' compensation benefits paid by the university to the plaintiff. See Neb. Rev. Stat. § 43-118 (Reissue 1988).

The plaintiff's negligence and strict liability theories of recovery are both premised upon H. C. Davis' failure to equip the mixer in question with certain safety features which would allegedly have prevented the accident. H. C. Davis filed a motion for summary judgment which the trial court sustained based upon Nebraska's 10-year statute of repose for products liability actions. See Neb. Rev. Stat. § 25-224(2) (Reissue 1989). This appeal followed.

FACTUAL BACKGROUND

On November 20, 1984, during the course of his employment in a work-study program at the University of Nebraska at Lincoln, the plaintiff fell into a "Davis Precision Mix Batch Mixer, Model No. S-20," designed and manufactured by H. C. Davis. The plaintiff became so entangled in the shaft and agitator paddles that use of an acetylene torch was required to extricate him.

The university purchased two model S-20 mixing machines from H. C. Davis in 1966, which machines were delivered on June 8 and 21, respectively. There is no record of H. C. Davis selling the university any other mixers than the two sold in 1966. From this evidence H. C. Davis concludes, and the plaintiff does not contest the conclusion, that the mixer involved in the November 20, 1984, accident is one of the two sold to the university in 1966.

CONSTITUTIONALITY OF § 25-224(2)

Section 25-224(2) provides:

Notwithstanding subsection (1) of this section or any other statutory provision to the contrary, any product liability action, except one governed by section 2-725, Uniform Commercial Code or by subsection (5) of this section, shall be commenced within ten years after the date when the product which allegedly caused the personal injury,

death, or damage was first sold or leased for use or consumption.

The plaintiff does not contest the fact that this case involves a "product liability action," see Neb. Rev. Stat. § 25-21,180 (Reissue 1989), nor that the period of repose began to run in June 1966, see *Witherspoon v. Sides Constr. Co.*, 219 Neb. 117, 362 N.W.2d 35 (1985) (statute of repose applicable to an allegedly defective product begins to run when possession of the product is first relinquished for ultimate use or consumption, not when it is placed into the stream of commerce by the manufacturer). Instead, the plaintiff bases his appeal solely on the alleged unconstitutionality of § 25-224(2).

The plaintiff argues that § 25-224(2) violates the Due Process and Equal Protection Clauses of the Nebraska and U.S. Constitutions, Neb. Const. art. I, § 3, and art. III, § 18, and U.S. Const. amend. XIV, as well as the open courts provision of the Nebraska Constitution, Neb. Const. art. I, § 13. Recently, this court considered and rejected the same arguments.

In *Spilker v. City of Lincoln*, 238 Neb. 188, 469 N.W.2d 546 (1991), the court reasoned that

"[t]he immunity afforded by a statute of repose is a right which is as valuable to a defendant as the right to recover on a judgment is to a plaintiff; the two are but different sides of the same coin. . . . These are substantive rights recognized by Nebraska law and protected by its Constitution."

Id. at 191, 469 N.W.2d at 548, quoting *Givens v. Anchor Packing*, 237 Neb. 565, 466 N.W.2d 771 (1991). Because "the Legislature is free to create and abolish rights so long as no vested right is disturbed," and the plaintiffs failed to show that the 10-year repose period is either unreasonable or arbitrary, we upheld the constitutionality of § 25-224(2) in that case. *Spilker*, 238 Neb. at 192, 469 N.W.2d at 548. Today, we adhere to our previous decision.

Summary judgment is proper when the evidence in the record discloses that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *West Neb. Gen. Hosp. v. Farmers Ins. Exch.*, 239 Neb. 281, 475 N.W.2d 901 (1991). Having resolved the legal issues adversely to

Nebraska Advance Sheets

STATE v. BREWER

Cite as 201 Neb. 24

35

product of any promise or inducement—direct, indirect, or implied—no matter how slight. However, this rule is not to be applied as a strict, yet subtle, barrier, determinations of voluntariness are based upon an assessment of all of the circumstances and factors surrounding the occurrence when the statement is made.

Appeal from the District Court for Douglas County; ROBERT V. BURKHARD, Judge. Affirmed.

Thomas P. McKeeney and Deborah D. Cunningham for appellant.

Don Stenberg, Attorney General, and J. Kirk Brown for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FARRINGTON, JJ.

CAPORALE, J.

Following a jury trial, the defendant-appellant, Wayne K. Brewer, was adjudged guilty of first degree murder, in violation of Neb. Rev. Stat. § 28-303 (Reissue 1989). He asserts that the trial court erred in (1) overruling his motion to suppress his statements to the interrogating officers and (2) admitting those statements into evidence. We affirm.

In view of the narrow scope of the inquiry presented by the summarized assignments of error, a detailed recitation of the facts surrounding the murder giving rise to this appeal is not required.

We thus turn immediately to Brewer's contentions in connection with the first assignment of error, that his various statements to the interrogating officers should have been suppressed because he was denied counsel and because the statements were in any event not given intelligently, knowingly, and voluntarily.

The murder had taken place in the early morning hours of March 21, 1990, and a search for Brewer had begun. Brewer arrived at an office of the Douglas County sheriff with his mother at approximately 11 o'clock that night. He was not then under arrest; in fact, as Officer Gary Kratina, Brewer's mother, and Brewer himself testified, Brewer was told he could leave at any time. Even though Brewer was not then in custody, he was

Nebraska Advance Sheets

MINNEBRASKA REPORTS

24

the plaintiff, and in the absence of any dispute as to the expiration of the 10-year period in 1976, we affirm the trial court's action sustaining H. C. Davis' motion for summary judgment.

AFFIRMED.

WHITE, J., dissenting.

Nebraska's statute of repose for products liability actions separately classifies persons injured by a defective product more than 10 years after its purchase or lease and persons injured by a defective product less than 10 years after its purchase or lease. In the absence of provisions somehow relating the period of repose to the useful life of the product or discovery of the defect, the Legislature's classification satisfies neither the special legislation provision of the Nebraska Constitution nor the Equal Protection Clause of the U.S. Constitution. See, Neb. Const. art. III, § 18; U.S. Const. amend. XIV.

STATE OF NEBRASKA, APPELLATE, v. WAYNE K. BREWER, APPELLANT.

N.W.2d

Filed July 10, 1992. No. S-91-204.

1. Motions to Suppress Appointed Error. In determining the correctness of a trial court's ruling on a motion to suppress, an appellate court will uphold the trial court's findings of fact unless the findings are manifestly erroneous.
2. Confessions: Appeal and Error. A confession by a trial court that a statement was made voluntarily will not be disturbed on appeal unless clearly wrong.
3. Motions to Suppress Appointed Error. In deciding whether a trial court's ruling on a motion to suppress is erroneous, an appellate court does not reweigh the evidence or resolve conflicts in the evidence, but, rather, recognizes the trial court as the finder of fact and takes into consideration that the trial court has observed the witnesses testifying in regard to such motion.
4. Motions to Suppress: Confessions: Proof. Although the burden of showing a confession to have been voluntary is upon the State, at a suppression hearing a need establish such only by a preponderance of the evidence.
5. Confessions: Evidence: Proof. In order to be ruled voluntary, it must be shown at a suppression hearing that a statement, admission, or confession was not the

228 Neb. 121

JOSEPH SPILKER, Personal Representative of the Estate of Wilfred P. Spilker, Deceased, et al., Appellants,
v.
CITY OF LINCOLN, Nebraska, doing business as Lincoln Water System, et al., Appellees.

No. 85-189.

Supreme Court of Nebraska.

May 21, 1991.

In products liability action brought against manufacturer of outdoor switchgear equipment, arising from worker's insertion of testing equipment in high voltage energized receptacle and death from resulting fire, manufacturer's motion for dismissal on limitations ground was granted by the District Court, Lancaster County. **Earl J. Winkoff, J.** On appeal, the Supreme Court, **Colwell, D.J.**, Retired, held that Nebraska's ten-year statute of repose for products liability actions does not violate due process and equal protection provisions of the State and Federal Constitutions or the state access to courts provision.

Affirmed.

1. Limitation of Actions §-1

"Statute of repose" is a type of statute of limitation. It prevents recovery on state demands and its effect is that it may prevent what otherwise might be a cause from ever arising.

See publication Words and Phrases for other judicial construction and definitions.

2. Constitutional Law §-1

Legislature is free to create and abolish rights so long as no vested right is disturbed.

3. Constitutional Law §-1(1)

Party claiming statute is unconstitutional has burden to clearly demonstrate that questioned statute is unconstitutional.

4. Constitutional Law §-1(1)(1)

Wisdom, justice, policy, or expediency of statute is for legislature alone.

5. Constitutional Law §-2(3)(3), 304, 218
Limitation of Actions §-1(1)

Nebraska's ten-year statute of repose for products liability actions does not violate due process and equal protection provisions of the State and Federal Constitutions or the state's access to courts provision. *U.S.C.A. Const. Amend. 1, 14; Const. Art. 1, §§ 1, 3; Neb. Rev. Stat. § 25-224(2).*

6. Limitation of Actions §-1(1)

Upon passage of ten-year period under statute of repose for products liability actions, manufacturer of outdoor switch gear equipment acquired substantive vested right protected by statute, thus barring products liability suit brought by estate of worker who died after inserting testing equipment in receptacle identified by instruction book as being safe repair receptacle. *Neb. Rev. Stat. §§ 25-224, 25-224(2), 51.*

Opinion by the Court

1. **Legislature.** The Legislature is free to create and abolish rights so long as no vested right is disturbed.

2. **Legislature: Statutes.** The wisdom, justice, policy, or expediency of a statute is for the Legislature alone.

3. **Constitutional Law: Statutes: Proof.** A party claiming a statute is unconstitutional has the burden to show and clearly demonstrate that the questioned statute is unconstitutional.

4. **Constitutional Law: Limitations of Actions.** *Neb. Rev. Stat. § 25-224(2)* (Nebraska 1983) is constitutional.

5. **Limitation of Actions.** A statute of repose is a type of statute of limitation. It prevents recovery on state demands. Its effect is that it may prevent what otherwise might be a cause from ever arising.

Gordon D. Ehrlich, of Cobb, Hallens & Ehrlich, P.C., and co-brief, John V. Hendry and Anne E. Wanser, of Bruckner, O'Garra,

SPILKER v. CITY OF LINCOLN

Case No. 85-189, 2d Series, 1991

Neb. 547

Resting, Stevens & Henley, P.C., Lincoln, for appellants.

Donald R. Witt and **Michael A. Englund**, of Baylor, Evers, Curtis, Grubbs & Watt, Lincoln, for appellee Westinghouse Elec. Corp.

HASTINGS, C.J., WHITE, CAPORALE, SHANAHAN, GRANT, and FAHNERBRUCH, JJ., and COLWELL, District Judge, Retired.

COLWELL, District Judge, Retired.

In this products liability case, plaintiff's amended petition was dismissed as to defendant Westinghouse Electric Corporation, upon its sustained demurrer that charged the suit was barred by the statute of limitations. See *Neb. Rev. Stat. § 25-224(2)* (Nebraska 1983). The main issue here is the constitutionality of § 25-224, which provides in part:

(1) All product liability actions, except one governed by subsection (5) of this section, shall be commenced within four years next after the date on which the death, injury, or damage complained of occurs.

(2) Notwithstanding subsection (1) of this section or any other statutory provision to the contrary, any product liability action, except one governed by section 2-725, Uniform Commercial Code or by subsection (3) of this section, shall be commenced within ten years after the date when the product which allegedly caused the personal injury, death, or damage was first sold or leased for use or consumption.

Section 25-224 was originally enacted in 1974. It was amended in 1981 to include a provision (subsection (3)) which relates to injuries caused by exposure to asbestos.

There is no dispute in these material facts alleged in the amended petition: Defendant City of Lincoln, Nebraska (City), purchased outdoor switchgear equipment from defendant Westinghouse which equipment was delivered to the City in November 1963, together with blueprints and an instruction book. The switchgear was installed in the City's pumping station no

later than March 1964. On October 14, 1986, Wilfred P. Spilker, a regular employee of plaintiff City's Electric Motor Service, in Lincoln, Nebraska, pursuant to a request made by the City, was sent to the pumping station to investigate and service a reported short in the electrical wiring of the switchgear. An employee of the City, after having reviewed the instruction book and blueprints, identified the location of the safe repair receptacles in the switchgear, and Spilker, as directed by the employee, inserted testing equipment therein, resulting in a fire caused by a clear error in the instruction book, which improperly designated a live high-voltage energized receptacle as deenergized. The resulting fire caused burns and injuries to Spilker resulting in his death approximately 2 weeks later. Ruth Spilker, as the personal representative of the estate of Spilker, filed her petition alleging product liability against and praying for damages.

These basic facts are clear: The City came into possession of the switchgear, blueprints, and the instruction book no later than March 1964, and Spilker was fatally injured more than 22 years later, on October 14, 1986. When Westinghouse's demurrer was sustained and the amended petition was dismissed as to Westinghouse, plaintiff's elected to appeal.

The parties agree that these proceedings are allegations of product liability defined in *Neb. Rev. Stat. § 25-21.187* (Nebraska 1983):

As used in sections 25-224, 25-224(2), and 25-21.180 to 25-21.182, unless the context otherwise requires: Product liability action shall mean any action brought against a manufacturer, seller, or lessor of a product, regardless of the substantive legal theory or theories upon which the action is brought, for or on account of personal injury, death, or property damage caused by or resulting from the manufacture, construction, design, formulation, installation, preparation, assembly, testing, packaging, or labeling of any product, or the failure to warn or protect against a danger or hazard in the use, misuse, or intended

548 N.D.

400 NORTH WESTERN PETROLEUM, 24 SERIES

can, of my product, or the failure to provide proper instructions for the use of my product.

See, also, *Merrie v. Chrysler Corp.*, 203 Neb. 841, 203 N.W.2d 808 (1984). It is apparent that, and they argue without objection, that the plaintiffs' and intervenor's book was published as items of "labeling" under § 25-21,100, the same as if they were labeled upon the sweater.

[1] In simple terms, these proceedings, and the cases have discussed, present a legal question of the general rule that "for each injury sustained the law provides a remedy," as follows: The City received a complaint in March 1964, and Spiller's liability on October 14, 1986, was a type of a product liability cause of action, as described in § 25-21,100. However, as claimed by Westinghouse and sustained by the trial court, the 10-year statute of limitations, § 25-22,02, began to run in favor of Westinghouse in March 1964, when the complaint was received by the City, see *Brakerson v. Siles County, Co.*, 219 Neb. 111, 202 N.W.2d 95 (1985), and may preclude remedy for Spiller's death, as barred 30 years after March 1964. We have said that a statute of repose is a type of statute of limitations, id., it prevents recovery on such demands, *Spiller v. Westinghouse*, 214 Neb. 311, 215 N.W.2d 681 (1983), and, as to Neb. Rev. Stat. § 25-222 (1983), its effect is that it may prevent when otherwise might be a cause from ever arising. That is, there may be a wrong for which the law affords no redress, see *Chapman v. Depp*, 212 Neb. 116, 211 N.W.2d 913 (1982). Recently, we said:

The immunity afforded by a statute of repose is a right which is as valuable to a defendant as the right to recover, as a judgment is to a plaintiff; the two are but different sides of the same coin. . . . These are substantive rights, recognized by Nebraska law and protected by its Constitution.

Chapman v. Depp, 227 Neb. 683, 606 N.W.2d 771, 773-74 (1990).

Appellate's even assigned error as enumerated as follows: Section 25-22,02 is unconstitutional as violating the due pro-

cess clauses and the equal protection provisions in the U.S. and Nebraska Constitutions and the "access to courts" provision of the Nebraska Constitution, and it was contrary to law and an error to sustain Westinghouse's demurrer and dismiss plaintiff's amended petition as to Westinghouse.

[2] In making their constitutional challenges, appellants admit that the Legislature in 1964 created and abolished rights so long as no vested right is disturbed, see *Comptroller v. City of Lincoln*, 195 Neb. 713, 240 N.W.2d 203 (1976), and this power includes imposing reasonable time limitations upon actions. . . . However, they argue that the 10-year period of limitations in § 25-22,02 is arbitrary and unreasonably short in time because it fails to take into account the average, useful and expected life of the broad array of manufactured products. They advocate as reasonable § 100 of the Model Uniform Product Liability Act, see 44 Fed. Reg. 43714, 62702 (1979), which would make the 10-year statute of limitations subject to a rebuttable presumption that the harm occurred after the product's "normal life expectancy."

[3] A party claiming a statute is unconstitutional has the burden to show and clearly demonstrate that the questioned statute is unconstitutional. See *State v. LaChapelle*, 214 Neb. 683, 431 N.W.2d 693 (1980). The wisdom, justice, policy, or expediency of a statute is for the Legislature alone. In every constitutional challenge there attaches the presumption that all acts of the Legislature are constitutional, with all reasonable doubts resolved in favor of constitutionality. *Dispositive Financing v. Pendergast Co. v. Co.*, 232 Neb. 846, 441 N.W.2d 565 (1989).

[4] Although this court has not directly considered the constitutionality of § 25-22,02, other similar statutes of repose, § 25-222 and Neb. Rev. Stat. § 25-223, (Section 2523), have been reviewed. In *Chapman v. Depp*, supra, a medical malpractice case, this court upheld as constitutional the 10-year statute of repose for § 25-222 against challenges that it vio-

COLLECTION SPECIALISTS v. YESSLEY

Neb. 549

Case No. 92-241 2d Div. 1993

affirmed special legislation, that it violated the due process clause of the Nebraska Constitution and the equal protection clause of the U.S. Constitution, that it violated the open court provision of the Nebraska Constitution, and that it was an invalid exercise of legislative power. See, also, *Smith v. Depp*, 216 Neb. 805, 385 N.W.2d 830 (1986). Later, in *Williams v. Jack-Kirby Coin-Op Co.*, 226 Neb. 206, 404 N.W.2d 22 (1987), a suit relating to the building industry, the 10-year statute of repose found in both §§ 25-222 and 25-223 were declared unconstitutional, citing *Chapman, supra*, and *Smith, supra*.

The constitutionality of § 25-22,02 has been upheld in the following federal cases: *Grady v. Scudler, Inc.*, 591 F.Supp. 463 (D.Neb.1984); *Brakerson v. Siles County and Co.*, 680 F.Supp. 387 (D.Neb.1988) (holding that the classification made by § 25-22,02 was neither unreasonable nor arbitrary); and *Peterson v. Parker Co.*, 807 F.2d 151 (8th Cir.1986).

Westinghouse failed to show that the 10-year time limitation in § 25-22,02 was either unreasonable or arbitrary. Whatever the case may be in their claim that the 10-year limitation is unreasonably short, may be a matter for legislative consideration.

(5) The relative reasoning and analysis by previously expressed by this court in *Chapman v. Depp*, 212 Neb. 116, 211 N.W.2d 913 (1982), *Smith, supra*, and *Williams, supra*, are adopted as controlling in the case at bar. Upon the passing of the 10-year period following March 1964, Westinghouse acquired a substantive vested right protected by statute, and § 25-22,02 is unconstitutional as against all challenges made by plaintiffs.

The order sustaining Westinghouse's demurrer and dismissing plaintiff's amended petition against Westinghouse was proper. See *Field v. Nelson*, 108 Neb. 220, 137 N.W. 772 (1927).

Affirmed.



Hospital's employee filed action against patient's alleged guarantor to recover amounts owed for medical services provided by hospital. The District Court, Sarpy County, Ronald E. Reagen, J., reversed and remanded a decision of the County Court, Albert C. Wabbe, J., allowing the employee to file his petition without prejudice to assign appeal. The Supreme Court, Grant, J., held that: (1) employee had no right to dismiss without prejudice after guarantor's motion for dismissal verdict was made; (2) county court improperly intervened to case when, after directed verdict motion, court suggested that employee amend its petition to introduce theory of recovery not shown by evidence and employee granted dismissal without prejudice; and (3) employee was entitled to affirm verdict absent any evidence of legal responsibility for amounts owed by hospital.

Affirmed.

1. Trial 4-101

A plaintiff may dismiss an action without prejudice as a matter of right any time before final submission of the case to the fact finder. Neb. Rev. Stat. § 25-211.

2. Trial 4-102

Plaintiff had no right to dismiss without prejudice after defendant's motion for directed verdict was made and argument of both counsel on directed verdict motion had been completed. Neb. Rev. Stat. § 25-211.

§ 25-224

COURTS; CIVIL PROCEDURE

warranty on improvements to real property or based on any alleged deficiency in the design, planning, supervision, or observation of construction, or construction of an improvement to real property shall be commenced within four years after any alleged act or omission constituting such breach of warranty or deficiency. If such cause of action is not discovered and could not be reasonably discovered within such four-year period, or within one year preceding the expiration of such four-year period, then the cause of action may be commenced within two years from the date of such discovery or from the date of discovery of facts which would reasonably lead to such discovery, whichever is earlier. In no event may any action be commenced to recover damages for an alleged breach of warranty on improvements to real property or deficiency in the design, planning, supervision, or observation of construction, or construction of an improvement to real property more than ten years beyond the time of the act giving rise to the cause of action.

Source: Laws 1976, LB 495, § 1.

Under the discovery principle, a cause of action accrues and the 2-year discovery provision of this section begins to run when there has been discovery of facts constituting the basis of the cause of action or the existence of facts sufficient to put a person of ordinary intelligence and prudence on inquiry which, if pursued, would lead to the discovery. It is not necessary that the plaintiff have knowledge of the exact nature or source of the problem, but only knowledge that the problem existed. *Board of Regents v. Lueder Constr. Co.*, 230 Neb. 434, 435 N.W.2d 493 (1982).

Under this section, a cause of action accrues, and the statute of limitations begins to run, when there has been discovery of facts constituting the basis of the cause of action or the existence of facts sufficient to put a person of ordinary intelligence and prudence on inquiry which, if pursued, would lead to the discovery. *Smith v. Butler Mfg. Co.*, 330 Neb. 734, 433 N.W.2d 493 (1982).

The 10-year period of repose contained in this

section is constitutional. *Williams v. Kingery Constr. Co.*, 225 Neb. 233, 404 N.W.2d 32 (1987).

This section applies to an action in tort for personal injuries caused by the negligent construction of a building. *Williams v. Kingery Constr. Co.*, 225 Neb. 233, 404 N.W.2d 32 (1987).

The period of repose applicable to a general contractor is found in this section and begins to run when construction of the structure is completed. *Witherspoon v. Eides Constr. Co.*, 219 Neb. 117, 363 N.W.2d 88 (1985).

Where the plaintiff knew of a leaky roof problem more than four years before bringing suit, the cause of action was barred. *Kearney Clinic Bldg. Corp. v. Weaver*, 211 Neb. 494, 319 N.W.2d 83 (1982).

The statute of limitation for an action based on alleged deficiencies in improvements to real property does not run during the time when the plaintiff reasonably could not discover the existence of the cause of action. *Grand Island School Dist. #2 v. Calotex Corp.*, 203 Neb. 834, 279 N.W.2d 603.

25-224. Actions on product liability. (1) All product liability actions, except one governed by subsection (5) of this section, shall be commenced within four years next after the date on which the death, injury, or damage complained of occurs.

(2) Notwithstanding subsection (1) of this section or any other statutory provision to the contrary, any product liability action, except one governed by section 2-725, Uniform Commercial Code or by subsection (5) of this section, shall be commenced within ten years after the date when the product which allegedly caused the personal injury, death, or damage was first sold or leased for use or consumption.

(Reissue 1989)

2-23-93

Paul,

Re: Omaha Pub Serv.

See MacKittlen v. A.H. Robbins

in footnotes to # 25-225 —

may help.

Bill

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