

No. S-04-000096

IN THE SUPREME COURT OF NEBRASKA

JOHN BUDLER, et al., *Appellees*,

v.

GENERAL MOTORS CORPORATION, *Appellant*.

On Certification From The United States Court of Appeals
For the Eighth Circuit

**REPLY BRIEF
OF APPELLANT GENERAL MOTORS CORPORATION**

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INTRODUCTION AND SUMMARY OF ARGUMENT

In their reply, plaintiffs studiously ignore the one thing this Court needs to decide the certified question: the plain language of the statutes at issue. We observed in our opening brief that the phrase “notwithstanding * * * any other statutory provision to the contrary,” by its plain terms, overrides tolling statutes that would extend the repose period. In reply, plaintiffs offer no alternative interpretation of the phrase. Instead, plaintiffs merely contend that Section 25-213 on its face applies to all time limitations in Chapter 25 (Budler Br. 8); in other words, they simply state that — absent the “notwithstanding” phrase — Section 25-213 would extend the products liability repose period. Having read the “notwithstanding” phrase out of Section 25-224(2), they then contend that the two provisions (Sections 25-213 and 25-224(2)), each purporting to have “absolute” application, are on equal footing and urge the Court to consider the public policy of protecting minors as a tie-breaker. Budler Br. 4. As we explain below, plaintiffs’ approach violates a host of Nebraska canons of statutory construction, not the least of which are that statutory phrases must be interpreted consistent with their plain language and ought not be interpreted to be meaningless; statutes ought not be interpreted to create an otherwise non-existent conflict; and the Court does not resort to assessments of public policy unless the language of the statutes is ambiguous.

In our opening brief, we also pointed out that, even if the language of the statutes at issue were somehow ambiguous, necessitating resort to legislative history to ascertain the Nebraska Legislature’s intent, the legislative history here clearly forecloses tolling for infancy. The Legislature enacted Section 25-224(2) without modification after *specifically discussing the fact that it would cut off the claims of minors*. Plaintiffs are silent in reply.

Rather than grappling with the statutory language or relevant legislative history, plaintiffs simply contend that this case has already been decided by the Court in *Sacchi v. Blodig*, 215 Neb. 817 (1983). Plaintiffs’ reliance on *Sacchi* is misplaced. In *Sacchi*, the Court did not address the

products liability statute of repose. Nor did it rule or hint that “statutes of repose” in general are subject to tolling, as plaintiffs assert (Budler Br. 3) (contending that “[t]his Court has already ruled that statutes of repose are not absolute, and that § 25-213 ‘trumps’ such statutes”). Rather, *Sacchi* addressed the interplay of Section 25-213 with a single statute — Section 25-222, the professional malpractice statute — which is worded and structured very differently from Section 25-224(2). Indeed, Section 25-222, which the Court interpreted in *Sacchi*, is *so* different from Section 25-224(2), at issue here, that the Eighth Circuit has actually cited Section 25-224(2) as an instructive *contrast* to Section 25-222. Specifically, the Eighth Circuit observed that the “notwithstanding” clause contained in Section 25-224(2) illustrates how the Nebraska Legislature could have insulated the professional malpractice provision (Section 25-222) from tolling during legal disability pursuant to Section 25-213 if that was what it had intended to do. See *Hatfield v. Bishop Clarkson Mem’l Hosp.*, 679 F.2d 1258 (8th Cir. 1982), vacated and certified to this Court, 701 F.2d 1266 (8th Cir. 1983), dismissed following settlement and stipulation (Case #83-211, dismissed March 30, 1984). *Sacchi* thus not only does not foreclose, but actually is entirely consistent with, interpretation of Section 25-224(2) as an absolute override.

Plaintiffs attempt to dismiss the Eighth Circuit’s opinion in *Hatfield* on the ground that it was dicta (Budler Br. 9-10) — a point we noted in our opening brief (GM Br. 7). But the Second Circuit and Southern District of New York likewise clearly ruled, in final decisions interpreting precisely the Nebraska laws at issue here in precisely the same factual scenario, that Section 25-224(2) overrides Section 25-213. *Stuart v. Am. Cyanamid Co.*, 158 F.3d 622 (2d Cir. 1998), *aff’g Stuart v. Am. Home Prods. Corp.*, 1997 WL 695578 (S.D.N.Y. Nov. 6, 1997). The opinion of the district court in that case specifically discussed and distinguished *Sacchi* and *Macku v. Drackett Prods. Co.*, 216 Neb. 176 (1984), explaining that the statutes at issue in those cases were very different in relevant respects. See *infra*, p. 11.

For these reasons and those given below and in our opening brief, the Court should answer the certified question: “No, the ten-year statute of repose for products liability actions in Neb. Rev. Stat. § 25-224(2) is not tolled by a person’s status as a minor, pursuant to Neb. Rev. Stat. § 25-213.”

ARGUMENT

I. PLAINTIFFS FAIL TO OFFER A CREDIBLE PLAIN LANGUAGE ARGUMENT

In our opening brief (GM Br. 9), we observed that, when the Nebraska Legislature adopted the products liability statute of repose, Section 25-213 had been an integral part of Nebraska law for more than 100 years. Against that statutory background, the Legislature’s choice to use words declaring that the products liability statute of repose barred suit after ten years “notwithstanding * * * any other statutory provision to the contrary” clearly signifies that the Legislature meant the repose period to apply “notwithstanding” Section 25-213. In reply to this point, plaintiffs are silent.

We also observed that the only plausible interpretation of the phrase “notwithstanding * * * any other statute to the contrary” is as an override of tolling provisions like Section 25-213 that might otherwise apply. Unless the phrase is interpreted consistent with its plain terms — *i.e.*, to bar any suit after ten years “***notwithstanding*** * * * other statutory provision[s]” like Section 25-213 that would, but for the phrase, extend the time for filing a products liability claim — it would be meaningless. See GM Br. 5, 10-11.

The “notwithstanding” phrase cannot be construed, as was the language of the medical malpractice statute (Section 25-222) at issue in *Sacchi*, to function merely as a limit on the discovery rule. As explained in our opening brief (GM Br. 11-12), unlike the statute at issue in *Sacchi*, ***the immediately preceding clause in Section 25-224(2) already limits the discovery rule***, so it would make no sense to interpret the phrase “notwithstanding * * * any other statutory provision to the contrary” to repeat the point. Again, in reply to these several points, plaintiffs are silent.

Rather than contest Section 25-224(2)'s plain meaning, plaintiffs aver that Section 25-213, by its terms, is equally as "absolute, if interpreted literally" in that it purports generally to toll all time limitations within Chapter 25, where Section 25-224(2) appears. Budler Br. 16. Although Section 25-213 purports to apply to "times limited" elsewhere in the chapter, it does not address the possibility that another statute would forbid its operation in a particular, limited instance and dictate how such a potential conflict must be resolved. Only Section 25-224(2) does that: it dictates that the products liability repose period prevails.

Indeed, we know of *no* existing tolling statutes to which the Legislature could possibly have been referring in Section 25-224(2) in stating that the repose period overrides "any other statutory provision to the contrary," other than Section 25-213. Even if other potentially applicable tolling statutes exist, plaintiffs have offered no explanation how the phrase "notwithstanding * * * any other statutory provision to the contrary" could be interpreted to override solely those other tolling statutes, but not Section 25-213. And if the "notwithstanding" phrase is not interpreted to override tolling statutes like Section 25-213, what else could it mean? Plaintiffs offer no suggestions.

At bottom, to adopt plaintiffs' interpretation, the Court would be required to read the "notwithstanding" phrase out of Section 25-224(2): a proposal that violates the well established canon of construction that "[i]t is not within the province of a court * * * to read anything direct and plain out of a statute." *City of Elkhorn v. Haney*, 252 Neb. 788, 795 (1997). By contrast, construing Section 25-224(2) consistent with its plain terms would not nullify any phrase in Section 25-213; it would only forbid application of the section as a whole to one particular repose period. Section 25-213 would continue to toll "times limited" elsewhere in the chapter except insofar as the specific statutes at issue unequivocally declare, as does Section 25-224(2), that, notwithstanding any other provision, tolling of the particular repose period or time limitation contained therein is forbidden.

In sum, a plain language reading of Sections 25-224(2) and Section 25-213 compels the conclusion that the Budlers' claim is time-barred.

II. PLAINTIFFS' RELIANCE ON *SACCHI* AND *MACKU* IS MISPLACED

Plaintiffs insist that the Court has already decided the issue at bar and urge the Court simply to “apply” *Sacchi*. Budler Br. 4. But *Sacchi* is not controlling. In *Sacchi*, the Court did not address “statutes of repose” generally, as plaintiffs contend; and it assuredly did not hold that Section 25-213 “trumps” all such statutes. Budler Br. 7, 25. Instead, *Sacchi* addressed a single statute — Section 25-222, a professional liability statute whose language — to say nothing of its statutory and historical contexts and legislative history — is entirely different from that of Section 25-224(2).

Plaintiffs declare that “[t]he phrase ‘in no event’ * * * is the functional equivalent” of the phrase “notwithstanding * * * any other statutory provision to the contrary.” Budler Br. 16. That is incorrect. Unlike Section 25-224(2), Section 25-222 does not mention “other statutory provision[s],” let alone specifically override them. Put differently, the phrase “in no event” is comparatively general and hence susceptible to a broader range of constructions. As this Court held in *Sacchi*, the statutory and historical contexts of Section 25-222 — unlike those of Section 25-224(2) — indicate that the “in no event” phrase in Section 25-222 was designed only to curb tolling by virtue of the discovery doctrine — not, like the “notwithstanding” phrase in Section 25-224(2), to overcome “*any other statutory provision*” that might extend the time for filing a claim. Neb. Rev. Stat. § 25-224(2) (emphasis added). GM Br. 17-18.

Specifically, as the Court explained in *Sacchi*, the structure of the sentence in which the “in no event” phrase appears — a single run-on sentence with three interrelated clauses — indicates that the final “in no event” clause is intended only to limit the discovery doctrine articulated in the immediately preceding clause rather than to act as an absolute bar that overcomes any statutory provision to the contrary. *Sacchi*, 215 Neb. at 820 (“An examination of the statute discloses that

§ 25-222 consists of one sentence with three distinct but interrelated parts in reference to knowledge affecting a cause of action under our discovery rule.”).

The Court also observed that the historical context confirmed that the Legislature had adopted the “in no event” phrase in Section 25-222 only for the purpose of limiting the judicially created discovery doctrine. See *id.* at 819 (citing *Acker v. Sorensen*, 183 Neb. 866, 872 (1969); *Spath v. Morrow*, 174 Neb. 38, 43 (1962)). The Court concluded: “[Section] 25-222 is a codification of the judicially developed ‘discovery rule,’ with a legislated limit of a previously unspecified time for discovering a cause of action.” *Id.* at 821.

By contrast, nothing in the language, statutory structure, or historical context of the statute of repose in Section 25-224(2) similarly permits construction of its declaration of absolute primacy over “any other statutory provision” as a limitation solely on tolling due to belated discovery. Quite the opposite. Section 25-224(2)’s override of “any other statutory provision to the contrary” immediately follows a phrase whose only conceivable purpose is specifically to preclude filing due to discovery of a claim (or occurrence of injury) more than 10 years after the product was first sold; interpreting the phrase “any other statutory provision to the contrary” to do so again thus would be duplicative, as we explained in our opening brief. GM Br. 18. In reply to that point, plaintiffs again are silent.

After concluding its analysis of the language of Section 25-222 in *Sacchi*, the Court also noted that even if Section 25-222 could possibly have been construed as a more general statute of repose on professional malpractice actions rather than a limitation solely on the immediately preceding discovery provision, “the fact remains that a cause of action for professional negligence exists at common law.” *Sacchi*, 215 Neb. at 823. The court apparently was referring to the doctrine that “a construction which restricts or removes a common law right should not be adopted unless *the plain words of the act compel it.*” *Guzman v. Barth*, 250 Neb. 763, 767 (1996) (quotation marks

omitted) (emphasis added). The plain language of Section 25-222 did not clearly compel this result. Thus, confronted by ambiguous statutory language (and a dearth of any legislative history specifically addressing the effect of the malpractice statute on minors), the Court turned to the legislative policies underlying the two statutes at issue to ascertain the Legislature's intent and concluded that the Legislature intended the provision to allow tolling for legal disability during minor status. By contrast, as noted by the Second and Eighth Circuits and the Southern District of New York, Section 25-224(2) could not possibly be more specific or clear in overriding tolling provisions like Section 25-213 that would otherwise toll the statute of repose, declaring that the repose period will apply "notwithstanding * * * any other statutory provision to the contrary."

Relatedly, plaintiffs contend that dissenting Justice Boslaugh made arguments in *Sacchi* based on principles of statutory construction, legislative history, and case law similar to some of the arguments GM makes here, and argue that this signifies that the Court implicitly rejected GM's arguments in *Sacchi*. Budler Br. 4, 15-17, 24. Plaintiffs' contention misses the mark. First, arguments based on principles of statutory construction apply differently to differently worded statutes. Second, the legislative history of Section 25-224(2) is dramatically different from that of Section 25-222 in that the Legislature specifically considered the effect of Section 25-224(2) on minors prior to adopting it and appears not to have done so prior to adopting Section 25-222. Finally, the case law cited is completely different with the exception of a single case, which applies differently here.

Specifically, GM explained in its opening brief that the U.S. district court below resolved what it perceived to be a conflict between Sections 25-224(2) and 25-213 in a manner that violated the well-established principle of Nebraska statutory construction that a later-enacted specific statute must be construed as creating an exception to, and thus controlling, an earlier statute of general application with which it would otherwise conflict. See GM Br. 19-20. Plaintiffs argue that this

“‘later-enacted statute/exception’ argument was * * * considered and rejected by the *Sacchi* court.” Budler Br. 8; see also *id.* at 14-15. To the contrary, in *Sacchi*, the Court did not need to resort to this canon of statutory construction (cited by Justice Boslaugh in dissent) because it construed the “in no event” clause of Section 25-222 in a limited manner that eliminated the conflict between Sections 25-222 and 25-213. As just explained, the language of Section 25-224(2) is not similarly susceptible to narrow construction.

In any event, as we also explained (GM Br. 21-22), recourse to a principle of statutory construction that directs how to resolve a conflict between two statutes, absent statutory direction on the question, is unnecessary here because the plain language of Section 25-224(2) ***explicitly directs that Section 25-224(2) trumps “any other statutory provision” — it thereby avoids any conflict.*** Only if this direction were absent or could somehow be construed as ambiguous would recourse to any other principles of statutory construction be necessary.

The legislative history arguments GM made in its opening brief (GM Br. 25) are also dissimilar from those cited by the dissent in *Sacchi* in this critical respect: in adopting the products liability statute of repose in Section 25-224(2), the Nebraska Legislature ***specifically considered the fact that the products liability statute of repose would cut off the claims of minors*** and chose nonetheless to adopt the provision without relevant modification. See *infra*, p. 13. In reply to this point, plaintiffs are silent. In *Sacchi*, Justice Boslaugh cited no similarly specific evidence of legislative intent to override the infancy tolling statute, presumably because it did not exist.

As for the purported similarity of the cases relied on by GM and those cited by the dissent in *Sacchi*, plaintiffs grossly exaggerate it; Justice Boslaugh’s dissent and GM’s brief share only a single case in common: *O’Connor v. Altus*, 335 A.2d 545 (N.J. 1975). The language of the statute at issue in that case, like the language at issue here, was not susceptible to the limiting construction as a discovery provision this Court placed on the language at issue in *Sacchi*; *O’Connor* thus

remains persuasive supportive authority notwithstanding its citation by the dissent in *Sacchi*. In sum, *Sacchi* not only does not control, but is not particularly helpful, in deciding the question at bar because the statutory language, history, and purpose of the provision at issue were quite different.

The only other case plaintiffs invoke in support of their argument that Section 25-213 should be interpreted to override Section 25-224(2) is *Macku* — a case in which, like *Sacchi*, Section 25-224(2) was not at issue. Rather, *Macku* interpreted Section 25-224(4), which provides a statute of limitation not a statute of repose, and contains no override language whatsoever. See GM Addendum 2a-3a; GM Br. 16-17. As the Court explained in *Macku*, “[t]here is nothing in the language of § 25-224(4) indicating its 2-year limitation is given significance greater than, or effect different from, any other statute of limitations mentioned in chapter 25.” 216 Neb. at 181. The Court concluded that “[t]here must be more than silence in the legislation before we can infer an intent in § 25-224(4) to extinguish preservation of an infant’s cause of action protected by § 25-213.” *Id.* Section 25-224(4) is hardly silent: it could not be any more explicit in indicating that the ten-year products liability statute of repose has “significance greater than, or effect different from, * * * other statute[s] * * * mentioned in chapter 25 of the Nebraska statutes” (*id.*): it explicitly overrides them. Plaintiffs’ query whether there “[i]s * * * any possible logical argument * * * that the same language in the same statute permits § 25-213 to apply to subsection (4) and subsection (1), but not to subsection (2)?” (Budler Br. 19), thus is predicated upon a patently false assumption: the language of Sections 25-224(2) and 25-224(4) is not remotely “the same” or even similar. *Macku* thus has no bearing here.

Plaintiffs nonetheless insist that the language of Section 25-224(2) is similar to that of Section 25-224(4) in that, although Section 25-224(2) does state that it operates “notwithstanding * * * any other statute to the contrary” (Neb. Rev. Stat. § 25-224(2)), it “nevertheless * * * makes no *express* reference to overriding § 25-213” (Budler Br. 19 (emphasis in original)). But Section

25-224(2) explicitly overrides *any* other statute that would otherwise “toll” or nullify the ten-year period of repose, thus *including* Section 25-213. An itemized laundry list of statutes so overridden would be duplicative and could be interpreted as indicating that the Legislature did not believe that the phrase “notwithstanding * * * any other statutory provision to the contrary” was a comprehensive override of any existing or subsequently enacted tolling provision. See GM Br. 13. Further, if the Legislature had specifically enumerated the tolling statutes it was overriding, it would have had to be sure to amend that enumeration upon subsequent adoption of any new, otherwise generally applicable, tolling statute. The “notwithstanding” clause, by contrast, has the advantages of clear and general application.

Finally, plaintiffs cite *Lawson v. Ford Motor Co.*, 225 Neb. 725 (1987), and *Brown v. Kindred*, 259 Neb. 95 (2000). Budler Br. 23-24. Both addressed the question of how to interpret Section 25-213’s reference to “within twenty years.” Neither case is remotely relevant here.

III. PLAINTIFFS FAIL TO DISTINGUISH CONTRARY CASE LAW

Having argued that two decisions by this Court, *Sacchi* and *Macku*, neither of which involved Section 25-224(2) nor a provision similar to it, control here, plaintiffs next dispute the relevance of the several cases we cited that *do* address the interplay of Sections 25-224(2) and 25-213, and the many cases we cited that address virtually identically worded statutes in other states.

Plaintiffs endeavor to dismiss the Second Circuit’s decision on the ground that its analysis was brief and cited a treatise as authority. Budler Br. 5. But the Second Circuit found extended discussion of case law unnecessary because, as it explained, the plain language of Section 25-224(2), “which was adopted well after the infancy tolling provision was enacted,” is “unambiguous.” *Stuart*, 158 F.3d at 628-629. The Second Circuit concluded that the Legislature’s choice to use language specifically overriding “any other statutory provision to the contrary” despite its presumed

awareness of the pre-existing infancy tolling statute made “clear that the Nebraska legislature did not intend to toll the statute of repose during a claimant’s infancy.” *Id.* (citations omitted).

Of course, the Second Circuit was reviewing, and ultimately affirmed, a decision that did cite and distinguish exactly the same Nebraska cases on which plaintiffs rely, *Sacchi* and *Macku*. *Id.* (affirming 1997 WL 695578, at *4 & n.5). The district court explained that “[b]oth of the cases on which the plaintiffs rely address the interplay between the infancy tolling statute and other statutes which do not contain the broad exclusion of the statute of repose.” 1997 WL 695578, at *4.

Plaintiffs argue that the absence in *Sacchi* of dicta like that which appeared in *Hatfield*, contrasting Section 25-222 with Section 25-224(2), indicates that the Court implicitly rejected the *Hatfield* panel’s analysis. But there is no evidence for such a leap. As plaintiffs themselves note, the Eighth Circuit’s observation was dicta, unnecessary to interpretation of Section 25-222, and hence it is not surprising that this Court did not include similar dicta in its opinion in *Sacchi*.

Plaintiffs also argue that the Eighth Circuit’s decision in *Nesladek v. Ford Motor Co.*, 46 F.3d 734 (8th Cir. 1995), and *Peterson v. Fuller Co.*, 807 F.2d 151 (8th Cir. 1986); the Iowa Supreme Court’s decision in *Albrecht v. General Motors Corp.*, 648 N.W.2d 87 (Iowa 2002); and this Court’s decisions in *Gillam v. Firestone Tire & Rubber Co.*, 241 Neb. 414 (1992), and *Spilker v. City of Lincoln*, 238 Neb. 188 (1991), are irrelevant because in those cases the plaintiff’s cause of action accrued *after* expiration of the repose period. As we pointed out (GM Br. 28-29), however, there is no basis under the plain language of Section 25-224(2) for such a distinction. The repose period extinguishes claims based on the time expired since the date of first sale, not the time expired since the date of accrual of a cause of action. GM Br. 16. Thus, if, as the Eighth Circuit held in *Nesladek*, the infancy tolling provision cannot save a claim of an infant filed more than ten years after the date of first sale, whose cause of action accrued after the date on which the expiration of repose expired, it likewise cannot save a claim of an infant filed more than ten years after the date

of first sale, whose cause of action accrued prior to expiration of the repose period. Again, the reason is that Section 25-224(2) cuts off claims without regard to the date of *accrual* — whether before or after the expiration of the repose period: it cuts off claims if they are “*commenced*” more than ten years after date of first sale. Neb. Rev. Stat. § 25-224(2) (“any product liability action * * * shall be *commenced* within ten years after the date when the product * * * was first sold”) (emphasis added). Plaintiffs offer no explanation why this would not be so. Budler Br. 6.

Plaintiffs also attempt to distinguish the Tennessee Supreme Court’s decision in *Penley v. Honda Motor Co.*, 31 S.W.3d 181 (Tenn. 2000). *Penley* held that Tennessee’s legal disability statute did not “toll” Tennessee’s products liability statute of repose even though, as in the case at bar, the plaintiff’s cause of action accrued *before* the repose period expired. In a strange argument, plaintiffs point to the fact that dissenting Justice Boslaugh in *Sacchi* cited an entirely different Tennessee case as evidence that the *Sacchi* majority must have considered and rejected *Penley*’s reasoning. Budler Br. 14. But *Penley* had not been decided when the *Sacchi* opinion was issued, and the case Justice Boslaugh did cite, *Mathis v. Eli Lilly & Co.*, 719 F.2d 134 (6th Cir. 1983), did not telegraph the eventual decision in *Penley*. The Court’s implicit rejection of *Mathis* as persuasive authority in *Sacchi* thus does not suggest the Court’s view of the *Penley* case. Further, *Mathis* was wholly irrelevant to the statutory interpretation question at issue in *Sacchi* and is equally irrelevant to the statutory interpretation question at issue in *Penley* and the case at bar. (*Mathis* addressed not whether Tennessee’s products liability statute of repose should be interpreted to override that state’s legal disability statute, but instead whether the statute of repose’s termination of claims before they arise violates due process. See *Sacchi*, 215 Neb. at 828 (Boslaugh, J., dissenting); see also *Mathis*, 719 F.2d at 141). The fact that *Mathis* failed to persuade the *Sacchi* majority to interpret Section 25-222 differently thus has no significance. Nor can *Penley* be distinguished, as plaintiffs endeavor to do (Budler Br. 6), on the ground that the legal disability for which the tolling provision was

invoked in *Penley* was mental incompetence rather than infancy. Which particular disability was at issue in *Penley* is irrelevant; the case is instructive because of its analysis of the interplay between two statutes whose operation is similar to that of the two statutes at bar. The fact that “the plaintiff alleged that the mental incompetence occurred *after and as a result of* her injury” — cited by plaintiffs as yet another distinction (Budler Br. 6 (emphasis in original)) — is similarly irrelevant under the terms of the statutes at issue.

IV. THE LEGISLATIVE HISTORY SUPPORTS GM’S INTERPRETATION

We observed in our opening brief that, prior to adopting the products liability statute of repose, *Nebraska senators specifically discussed that it would bar the claims of minors*. GM Br. 25 (citing legislative history); Hearing on LB 665, Comm. on Banking, 85th Leg., 2d Sess. 24 (Jan. 23, 1978) (testimony of George Moyer) (explaining that the statute of repose would cut off the claim of a “two year old child” injured by a “defective stroller” even if the child’s “parent or guardian” failed “to bring [a] cause of action”) (Rec. Tab 3B, 20400). Plaintiffs do not dispute this point.

Rather than addressing what the legislators and their witnesses did say regarding the effect of the products liability statute of repose on minors before adopting that statute, plaintiffs rely on what the Legislature did not say following the Court’s interpretation five years later of a completely different statute in *Sacchi*. Specifically, plaintiffs argue that the Legislature’s failure to amend Section 25-213 following *Sacchi* indicates that it “was content to have the tolling statute supersede * * * both statutes of limitation and statutes of repose.” Budler Br. 21. Plaintiffs cite the Legislature’s discussion of *Sacchi* in 1984 in connection with a different bill — the Hospital-Medical Liability Act (“HMLA”). Budler Br. 19-20. The errors in plaintiffs’ reasoning are manifest. First, the Court neither held nor suggested in *Sacchi* that the repose period in **Section 25-224(2)** would be waived or extended by Section 25-213: it interpreted only Section 25-222. The Legislature thus had absolutely no reason following *Sacchi* to amend Section 25-213 to emphasize

that it did not supersede Section 25-224(2). That is especially true because Section 25-224(2) already says that it is not superseded by “any other statutory provision to the contrary,” which includes Section 25-213. Indeed, if the Legislature considered the issue at all following *Sacchi*, it most likely thought, as did the Eighth Circuit in *Hatfield* and the courts in *Stuart*, that Section 25-224(2)’s override of Section 25-213 was a model of specificity in comparison with Section 25-222, at issue in *Sacchi*, and thus saw no need for action.

Nor does the legislative history of the HMLA, which plaintiffs quote (Budler Br. 20), have any other relevance here. The issue being debated was whether to add the HMLA to the list of statutes subject to Section 25-213. Senator DeCamp suggested adding it because the Court had held in *Sacchi* that medical malpractice suits are subject to tolling under Section 25-213, and the amendment thus would bring Section 25-213 into conformance with the Supreme Court’s decision. See Floor Debate on LB 692, 88th Leg., 2d. Sess. (Feb. 29, 1984) (Rec. Tab 1J, 20111); see also *id.* at 20118, 20125. Ultimately, the words “the Nebraska Hospital-Medical Liability Act” were added to Section 25-213. See LB 692, 88th Leg., 2d Sess. (April 3, 1984) (Rec. Tab. 1I, 20052) (underscoring the words “the Nebraska Hospital-Medical Liability Act” in Section 25-213, as amended). This ministerial amendment to Section 25-213 in 1984 simply has no bearing here.

By contrast to these arguments, a persuasive “silence signifies acquiescence” argument arises from the Legislature’s amendment of Section 25-224(2) following the *Stuart* decision. In amending the statute in 2001, the Legislature made no change to override *Stuart*’s holding that Section 25-224(2) applies to the claims of minors. This silence signifies that the Legislature was indeed content to allow the *Stuart* holding to stand. Plaintiffs dispute this, contending without citation that the doctrine of legislative acquiescence in a judicial decision does not apply to federal decisions directly construing Nebraska laws. Budler Br. 6. Contrary to plaintiffs’ suggestion, the reenactment rule is not so limited: “[i]t is a settled rule of statutory construction that when a statute or a clause or

provision thereof has been construed by a court of last resort, and the same is substantially reenacted, the Legislature may be regarded as adopting such construction.” *Misle v. Miller*, 176 Neb. 113, 122 (1963). The Second Circuit, of course, *is* a court of last resort. See BLACK’S LAW DICTIONARY 358 (7th ed. 1999) (defining “court of last resort” as the “court having the authority to handle the final appeal of a case”). Cf., e.g., *Smolin v. First Fidelity Sav. & Loan Ass’n*, 209 A.2d 546, 549 nn. 2, 3, 4 (Md. Ct. App. 1965) (U.S. Congress is presumed to be aware of constructions of federal statutes rendered by state courts).

Finally, plaintiffs assert, without citation, that “the purpose of the statutes of repose for professional negligence and products liability was to codify the discovery rule, and to put an outer limit on discovery of an injury.” Budler Br. 22. Although it is true, as the Court held in *Sacchi*, that this was the purpose of the professional malpractice statute (Section 25-222), plaintiffs have cited and can cite nothing to support their assertion that the Legislature’s purpose in adopting Section 25-224(2) was similarly limited. The Legislature’s purpose in adopting Section 25-224(2) — to impose a 10-year repose period “notwithstanding * * * *any* other statutory provision to the contrary” (Neb. Rev. Stat. § 25-224(2) (emphasis added)) — is evident from the language it chose to use in the provision. See *Lawson*, 225 Neb. at 728 (holding that courts should determine a statute’s purpose by reference first to its language); *In re Zoellner Trust*, 212 Neb. 674, 678 (1982) (same). Moreover, the references in the legislative history to the Legislature’s concern about late-filed products liability claims are not limited to claims filed late due to belated discovery. See GM Br. 23-28.

V. PLAINTIFFS’ POLICY ARGUMENTS ARE UNPERSUASIVE

In our opening brief, we pointed out that waiving the statute of repose for minors whose causes of action arise prior to expiration of the repose period would create a significant exception to the ten-year statute of repose, and would thereby raise precisely the concerns about increasing insurance premiums and driving Nebraska manufacturers out of state that motivated the Nebraska

Legislature to adopt the statute of repose in the first instance. GM Br. 26-28. In response, plaintiffs suggest that any impact of creating an exception for minors (and presumably other persons with legal disabilities) would likely be small. In support, plaintiffs assert, without evidence or citation, that no such consequences followed the Court’s application of Section 25-213 to professional malpractice claims in *Sacchi*. Budler Br. 7 (asserting that, despite reaching the “twentieth anniversary of *Sacchi*,” there “has been no flood nor even a trickle” of late-filed claims).

Even assuming that was true following *Sacchi* (and there is no evidence in the record that it was), it is irrelevant. It is obvious that a *single* defect in a product regularly used by or near minors could, in any given instance, affect a significant number of minors and hence result in a large number of sizable verdicts against a manufacturer and sellers. See GM Br. 28. Under plaintiffs’ urged interpretation of Section 25-224(2), these suits all could be filed many decades after the repose period had expired. By contrast, one instance of professional malpractice — at issue in *Sacchi* — typically affects only the particular individual receiving the professional services or medical care. Elimination of the products liability repose period for minors’ claims thus likely would result in a much greater proportionate increase in the number of belatedly filed claims than did tolling of the malpractice statute of limitations. In any event, it is the possibility of such long-delayed suits that reduces security and increases insurance premiums, results the Legislature sought to avoid.

Plaintiffs contend that the 2001 amendments to Section 25-224(2), which limited application of Nebraska’s products liability statute of repose to products manufactured in Nebraska or in states that have repose periods shorter than ten years, indicate that the Legislature no longer intends the repose period to be absolute and infer from this that the Legislature must not have intended to override tolling statutes like Section 25-213. Budler Br. 21-22. This argument is flawed. As amended, Section 25-224(2) continues to apply “absolutely” to all products to which it applies at all, including, most importantly, products manufactured in Nebraska. It thus continues to accomplish

the Legislature's original stated policy aim of protecting Nebraska manufacturers from increasing insurance premiums that might otherwise drive them out of state. See GM Br. 23-24, 26-28.

Finally, plaintiffs contend that our argument misunderstands the policy behind Section 25-213. Budler Br. 9. In our opening brief, we pointed out that Section 25-224(2), on its face, reflects a clear legislative policy choice that, after a product has been on the market more than ten years, claims related to the product's safety will be extinguished without reference to fairness toward the plaintiff. See GM Br. 28-30. Thus, for example, the statute of repose eliminates adults' causes of action before they even accrue, let alone are discovered, if they accrue or are discovered after the period of repose expires. See, e.g., *Peterson*, 807 F.2d at 152-153; *Spilker*, 238 Neb. at 191. We noted that it would have been an odd policy choice for the Legislature to cut off the claims of individuals who had not yet even suffered injury and hence could not possibly bring suit within the repose period while extending the repose period for minors whose parents or legal guardians could have brought suit on their behalf during the repose period. More likely, as the plain language of Section 25-224(2) dictates, the Legislature intended to give manufacturers to whom the statute of repose applied true immunity after the expiration of ten years. We also noted, and plaintiffs do not dispute, that interpreting the repose statute consistent with its explicit terms would not leave minors without a remedy. GM Br. 29. The parents or legal guardians of a minor whose cause of action accrued prior to the expiration of the repose period could file suit on the minor's behalf within the repose period, as John and Linda Budler did (albeit belatedly) in this case.

CONCLUSION

For these and the reasons given in our opening brief, the Court should answer the certified question: "No, the ten-year statute of repose for products liability actions in Neb. Rev. Stat. § 25-224(2) (1995) is not tolled by a person's status as a minor, pursuant to Neb. Rev. Stat. § 25-213."

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PROOF OF SERVICE

I hereby certify that, on this 19th day of June 2004, pursuant to Nebraska Supreme Court Rule 9.B(7), I caused the original and 16 copies of the foregoing Reply Brief of General Motors Corporation to be filed by United Parcel Service, overnight delivery, postage prepaid, with:

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