

1986

# Larry Raithaus v. Saab-Scania of America, Inc. : Brief of Appellant

Utah Supreme Court

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BRIEF

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DOCKET NO. 860208

IN THE SUPREME COURT

OF THE

STATE OF UTAH

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LARRY RAITHAUS, M.D.,	)	
	)	
Plaintiff,	)	
	)	Case No. 860208
vs.	)	
	)	
SAAB-SCANIA OF AMERICA, INC.,	)	
a Connecticut corporation;	)	Priority No. 13b
and SAAB-SCANIA AB, a Swedish	)	
corporation, KEN GARFF FOREIGN	)	
CARS, a Utah corporation,	)	
	)	
Defendants.	)	

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BRIEF OF APPELLANT LARRY RAITHAUS, M.D.

---

APPEAL FROM A JUDGMENT OF THE THIRD JUDICIAL  
DISTRICT COURT OF SALT LAKE COUNTY  
HONORABLE JOHN A. ROKICH  
Date of Final Judgment 3/20/86  
Case No. C 82-9672

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JUN 20 1986

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### STATEMENT OF ISSUE PRESENTED ON APPEAL

The sole issue for decision in this appeal is whether the six-year statute of limitations contained in Utah's Product Liability Act (now declared unconstitutional) was the applicable period of limitation in which this action had to be brought.

### STATEMENT OF THE CASE

This is a product liability action filed by plaintiff for damages resulting from the death of his wife when their Saab automobile was destroyed in a fire. The action was filed over two years from the date of the accident, but less than six years from the date of sale of the automobile. Defendants filed a Motion for Summary Judgment claiming the wrongful death statute of limitations applied to the case and the case should be dismissed. The trial court found that the product liability statute was the more specific statute and was therefore applicable to this cause of action allowing plaintiff six years from the date of sale of the automobile in which to file an action. Subsequent to this court's decision in Berry v. Beech Aircraft Corporation, Utah P.2d 670 (1985), wherein the product liability act was found to be unconstitutional, defendants renewed their Motion for Summary Judgment, claiming the Product Liability Act statute of limitations was void ab initio due to the Act's unconstitutionality. As such, defendants argued that the wrongful death statute of limitations was applicable and that plaintiff's action was thereby barred. The trial court granted defendants' final Motion for Summary Judgment and plaintiff has appealed.

### STATEMENT OF FACTS

Ronda M. Luther Raithaus died on July 2, 1979 from injuries sustained when the Saab automobile she and her husband Dr. Larry Raithaus were traveling in, burst into flames after driving off the paved highway in Little Cottonwood Canyon, R. 3-4. The Complaint in this action was filed on November 29, 1982, claiming damages for the death of Ronda M. Luther Raithaus, plaintiff's wife, R. 6. The Saab automobile in question was a 1976 model, R.3, bought by Dr. Raithaus in February of 1977, R. 30, 64.

### SUMMARY OF ARGUMENT

It is plaintiff's position that the statute of limitations in the Utah Product Liability Act was the appropriate statute of limitations at the time this action was filed and became a component of plaintiff's vested cause of action. The void ab initio doctrine applied to unconstitutional statutes should not apply so as to deprive plaintiff of this cause of action.

### ARGUMENT

PLAINTIFF HAD A VESTED RIGHT TO COMMENCE A PRODUCT LIABILITY ACTION FOR THE DEATH OF HIS WIFE PRIOR TO FEBRUARY, 1983 AND SUBSEQUENT JUDICIAL ACTS CANNOT ARBITRARILY DIVEST THAT RIGHT.

The trial court in this case made rulings based upon the applicability of certain statutes of limitations in this action. In the first ruling Judge Leary denied defendants' motion for judgment on the pleading holding the product liability statute

applied. In the second ruling, Judge Billings held that the Utah Product Liability Act statute of limitations requiring that any product liability action be brought within six years of the date of the sale of a product or ten years from its date of manufacture, was applicable to this case rather than the Utah Wrongful Death statutes two year limitation, R. 50-52. In the third ruling Judge Rokich, dismissed plaintiff's Complaint based on defendants' Motion for Summary Judgment.

By finally granting defendants' Motion for Summary Judgment, the trial court clearly adopted defendants' position that under the void ab initio doctrine, this court's decision in Berry v. Beech Aircraft Corporation, Utah 717 P.2d 670, erased the Utah Product Liability Act from the statute books as though it had never existed. Defendants' cited cases such as Malan v. Lewis, Utah 639 P.2d, 661 (1984) concluding that an unconstitutional statute can neither confer nor take away the rights of individuals. The difficulty with this reasoning is it stops short of a logical and thorough analysis of the issues in this case. It is not sufficient to say an unconstitutional statute can neither confer nor take away individual rights. Clearly, this court in its Berry decision did not anticipate an absolute adherence to the void ab initio doctrine would result in a construction of Berry that would abrogate individual rights and causes of action, in the same way as the Berry court criticized the legislature for doing. It is plaintiff's position that such was not the intent of this court in Berry and a proper analysis



will result in this court overturning the lower court's Summary Judgment.

The plaintiff Dr. Raithaus had a vested right in a strict liability cause of action for the death of his wife due to a product defect in their Saab automobile. The cause of action against a manufacturer for damages resulting from a defective product is a common law cause of action. See Hahn v. Armcor Steel Company, Utah, 601 P.2d 152 (1979). In addition to the elements of the cause of action as defined under the common law, an important component of Dr. Raithaus's vested right was the statutory limitation period found in Utah's Product Liability Act, Utah Code Annotated, § 78-15-3 (1953) which provided:

No action shall be brought for the recovery of damages for personal injury, death or damaged property more than six years after the date of initial purchase for use or consumption, or ten years after the date of manufacture of a product where that action is based or arises out of . . . (b) defects in design, inspection, testing or manufacture; . . . (e) any other alleged defect or failure of whatsoever kind or nature in relation to a product.

This statutory provision contained a specific limitation in product liability actions separate and apart from the general statute of four years covering personal injuries, Utah Code Annotated, § 78-12-25 see Appendix A and the general statute governing wrongful death, Utah Code Annotated, § 78-12-28. See Appendix B. In the instant case the effect of the Product Liability Act was to extend Dr. Raithaus's period of limitation. The automobile he claims as defective was first sold in February of 1977 allowing

him until February 1983 to file a product liability cause of action. The action was filed in November 1982.

This court in Berry analyzed the above statute of limitations from its repose aspect, i.e., its arbitrary abrogation of causes of action because of the unrelated nature of the date of sale or date of manufacturer. In Berry this court also found the Act not to be severable and therefore, declared the entire act unconstitutional because it arbitrarily deprived individuals of their rights in violation of Utah's open courts constitutional provision, Utah Constitution, Article 1, § 11. In making that finding, this court made an important statement regarding the effect of Art. 1, § 11:

A plain reading of § 11, however, also establishes that framers of the constitution intended that an individual could not be arbitrarily deprived of effective remedies designed to protect basic individual rights. A constitutional guarantee of access to the courthouse was not intended by the founders to be an empty gesture; individuals are also entitled to a remedy by "due course of law" for injuries to "person, property, or reputation."

(Supra at 675) (footnote omitted). Little did this court realize a lower court would apply the void ab initio doctrine to the unconstitutional statute without recognizing the clear need for exceptions. The result arbitrarily deprives Dr. Raithaus of his rights to an effective remedy without providing an alternative. This court in Berry went one step further in emphasizing the importance of careful analysis when it stated:

. . . once a cause of action under a particular rule of law accrues to a person by

virtue of an injury to his rights, that person's interest in the cause of action and the law which is the basis for a legal action becomes vested, and a legislative repeal of the law cannot constitutionally divest the injured person of the right to litigate the cause of action to a judgment.

Supra at 676 (citations omitted) (emphasis added). It is difficult to believe that the constitution would place a limit on the legislature against divesting individuals of their rights and not place the same limitation on the judiciary. It is plaintiff's position that a judicial repeal of an unconstitutional statute of limitations which does not allow a reasonable period for those with an underlying vested cause of action to assert the action cannot be constitutionally valid.

The trial court completely missed the underlying policy in this court's Berry decision. The clear policy of Berry was that individuals had to be allowed a reasonable time to assert their rights in the courts of this state and the repose nature of the Product Liability Act's statute of limitations clearly denied that reasonable time to many persons whose rights accrued after the repose period. This court clearly didn't anticipate that the statute itself also extended the period of time for certain individuals to file causes of action based on product liability. It is plaintiff's position that had this court realized that implication it would clearly have held that the extended period of time was a component of the vested and accrued legal right of parties who had been injured prior to the decision.

The only case which plaintiff's counsel has been able

to find in which a court dealt with the subsequent application of a similiar judicially voided statute of limitations is McClure v. Middletown Hospital Association, 603 F.Supp. 1365 (E.D. Ohio 1985). The Ohio Supreme Court in Schwan v. Riverside Methodist Hospital, 452 N.E.2d 1337 (Ohio 1983) found that the statute of limitations contained in the Ohio Medical Malpractice Act providing different periods of limitation between minors under the age of 10 years and over the age of 10 years was unconstitutional. In a later decision, Opalko v. Marymount Hospital, Inc., 458 N.E.2d 847 (Ohio 1984) the same court in a rather convoluted decision determined that while its Schwan decision had found the distinction between minors under the age of 10 and over the age of 10 to be impermissible, that decision did not strike down the absolute four year statute of limitations as applied to minors. The Opalko court affirmed summary judgment for the defendants because the plaintiff, a minor, had failed to bring an action within the absolute four year statute of limitations. The McClure court in a diversity action was likewise asked to dismiss a malpractice claim brought under the Ohio medical malpractice Act prior to the Opalko decision. The defendant urged that because the court in Opalko had determined the absolute four year statute of limitations was applicable to minors and the fourteen year limitation previously provided for minors under the age of 10 had been declared unconstitutional, Sarah McClure had but four years from her birth (the date of alleged injury) in which to bring a malpractice action. The McClure court de-

clined to apply the Ohio Supreme Court cases retroactively and reasoned as follow:

We do not believe that Sarah McClure's malpractice claim is barred by the absolute four year limitation enunciated in Opalko. This conclusion is based upon the inappropriateness of retroactive application of the Opalko decision and upon an exception to the rule that unconstitutional statutes are entitled to no legal effect.

The McClure court stated two reasons for not applying the Opalko decision retroactively:

First the void ab initio doctrine does not apply to destroy contractual rights which have arisen or vested rights acquired under the prior state of the law. Sarah McClure's rights vested upon the existence of her right to sue, that is, upon her birth. At that time, § 2305.11(B) provided a 14-year limitation on Sarah McClure's exercise of that right. The subsequent declaration of unconstitutionality cannot divest Sarah McClure of that right.

The second reason that the void ab initio doctrine is inapplicable in this case is the peculiar nature of statutes of limitations. Such statutes derive their force by the mere fact of their enactment. They do not confer or extinguish substantive rights but extinguish the remedy for violation of independent substantive rights.

Id. at 1368-69 (citations omitted) (emphasis added).

The McClure court then concluded:

Plaintiffs are not relying on unconstitutional statutes for their creation of rights which would not have existed but for the enactment of unconstitutional statute. Rather, plaintiffs merely rely upon the arbitrary fixed interval for the assertion of previously existing rights as that fixed interval is written. The arbitrary fixed interval of fourteen years was initially set by the Ohio general assembly. That in-

terval was thought to adequately protect the interests of Ohio citizens. Sarah McClure's action was brought well within that interval so that defendants cannot claim surprise at being called upon to defend against her claim.

Id.

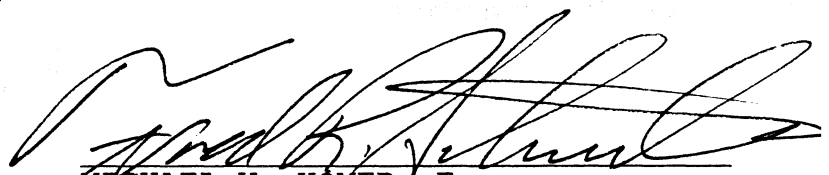
The McClure court relied on a earlier Ohio Supreme Court decision, Cook v. Matvejs, 383 N.E.2d, 608 (Ohio 1978). The Cook court dealing with the applicable limitation period applied to a minor after the state had amended its age of minority from 21 to 18, held that an amended statute of limitation which totally obliterates an existing substantive right is unconstitutional but an amended statute of limitation which provides a reasonable time in which the right may be enforced after the amendment, can be constitutionally justified. The Cook court spent considerable effort debunking the myth of a substantive/procedural dichotomy in the application of retroactive statutes. The Cook court concluded that a remedy is not a remedy where there is not a reasonable time to enforce it and further held that the statutory limitation period on a cause of action is an important substantive component of any cause of action. Certainly, application of judicial rules, whether written or common law cannot be applied in contravention of constitutional guarantees or to arbitrarily deprive individuals of previously vested rights any more than legislative enactments can. In the instant case the defense is asking the judicial system to abrogate Dr. Raithaus's previously vested right based on the decision in Berry. However, Berry instructed the legislature that under our state

constitution, the legislature did not have such authority. The irony of the defendants' reliance on Berry shows the absurdity of its position.

#### CONCLUSION

It is important that this court declare that while the Berry decision struck down Utah's Product Liability Act as unconstitutional and that Act is now void ab initio there is one important exception. For causes of action accruing prior to the Berry decision where the statute extended the time for filing an action based on product liability beyond either the two year wrongful death general statute of limitations or the four year tort general statute of limitations, the extended statute of limitations in the product liability act became a vested component of the accrued causes of action prior to this court's decision in Berry v. Beech and may be brought within that extended limitation period.

DATED this 20 day of June, 1986.



MICHAEL W. HOMER, Esq.

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of and for

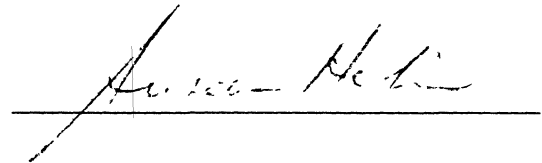
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Brief of Appellant Larry Raithaus, M.D. was mailed, postage prepaid thereon, this 30<sup>th</sup> day of June, 1986, to:

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