

1986

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

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_sc1

 Part of the [Law Commons](#)

Original Brief Submitted to the Utah Supreme Court; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

L. Rich Humpherys, Esq.; M. Douglas Bayly, Esq.; Christensen, Jensen and Powell; Attorneys for Defendants.

LeRoy S. Axland, Esq.; Michael W. Homer, Esq.; Fred R. Silvester, Esq.; Suttter Axland Arstrong and Hanson; Attorneys for Plaintiff.

Recommended Citation

Brief of Respondent, *Larry Raithaus v. Saab-Scania of America, Inc.*, No. 860208.00 (Utah Supreme Court, 1986).
https://digitalcommons.law.byu.edu/byu_sc1/1096

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

UTAH
DOCUMENT
K F U
45.9
.S9
DOCKET N

OF THE

STATE OF UTAH

vs.

SAAB-SCANIA OF AMERICA, INC.,
a Connecticut corporation;
SAAB-SCANIA AB, a Swedish
corporation; and KEN GARFF
FOREIGN CARS, a Utah
corporation,

Defendants.

Case No. 860208

Priority No. 13b

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

L. RICH HUMPHERYS, Esq. (#1582)
M. DOUGLAS BAYLY, Esq. (#0251)
CHRISTENSEN, JENSEN & POWELL
Attorneys for Defendants Saab
900 Kearns Building
136 South Main Street
Salt Lake City, Utah 84101
Telephone: (801) 355-3431

LeROY S. AXLAND, Esq. (#0153)
MICHAEL W. HOMER, Esq. (#1535)
FRED R. SILVESTER, Esq. (#3862)
SUITTER, AXLAND, ARMSTRONG & HANSON
Attorneys for Plaintiff
700 Clark Leaming Office Center
175 South West Temple Street
Salt Lake City, Utah 84101-1480
Telephone: (801) 532-7300

FILED

JUL 23 1986

Clerk, Supreme Court, Utah

IN THE SUPREME COURT
OF THE
STATE OF UTAH

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

BRIEF OF RESPONDENTS AND CROSS-APPELLANTS
SAAB-SCANIA OF AMERICA, INC. AND SAAB-SCANIA AB

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

L. RICH HUMPHERYS, Esq. (#1582)
M. DOUGLAS BAYLY, Esq. (#0251)
CHRISTENSEN, JENSEN & POWELL
Attorneys for Defendants Saab
900 Kearns Building
136 South Main Street
Salt Lake City, Utah 84101
Telephone: (801) 355-3431

LeROY S. AXLAND, Esq. (#0153)
MICHAEL W. HOMER, Esq. (#1535)
FRED R. SILVESTER, Esq. (#3862)
SUITTER, AXLAND, ARMSTRONG & HANSON
Attorneys for Plaintiff
700 Clark Leaming Office Center
175 South West Temple Street
Salt Lake City, Utah 84101-1480
Telephone: (801) 532-7300

TABLE OF CONTENTS

STATEMENT OF ISSUES PRESENTED ON CROSS-APPEAL AND APPEAL	1
STATEMENT OF THE CASE	1
STATEMENT OF FACTS	2
SUMMARY OF ARGUMENT	2
ARGUMENT	3
INTRODUCTION	3
POINT I: THE UTAH PRODUCT LIABILITY ACT STATUTE OF REPOSE IS NOT A STATUTE OF LIMITATION AND WAS NEVER INTENDED TO EXTEND THE PERIOD IN WHICH THE PLAINTIFF COULD FILE HIS WRONGFUL DEATH ACTION	4
A. This Court has recognized that a statute of repose is not a statute of limitation	4
B. This Court has implied, and courts in other jurisdictions have held that a statute of repose does not extend the limitation otherwise provided by the applicable statute of limitation	6
C. The Utah Legislature's intent in enacting the Utah Products Liability Act was to reduce, not extend, the period during which a manu- facturer would be exposed to liability	8
POINT II: EVEN IF PLAINTIFF'S CONSTRUCTION OF THE STATUTE OF REPOSE IS CORRECT, THERE IS NO REASON TO EXEMPT THE PLAINTIFF FROM RETROACTIVE APPLICATION OF THE <u>BERRY</u> DECISION, WHICH DECLARED THE UTAH PRODUCT LIABILITY ACT UNCONSTITUTIONAL	10
A. Decisions overruling prior law are normally given retroactive effect	10

B.	The plaintiff has not demonstrated that he justifiably relied on the Utah Product Liability Act statute of repose	11
C.	The plaintiff would burden the administration of justice by his proposal that this Court selectively apply the <u>Berry</u> decision	13
D.	The plaintiff has no vested right in an unconstitutional statute	16
CONCLUSION		18
APPENDICES		20
A.	Order Denying Motion of Defendants Saab-Scania of America and Saab-Scania of Sweden for Judgment on the Pleadings, dated April 20, 1983	20
B.	Order of Dismissal, dated March 20, 1986	24
C.	Utah Code Anno. Section 78-12-28 (1953)	26
D.	Utah Code Anno. Section 78-15-2 (1953)	27
E.	Utah Code Anno. Section 78-15-3 (1953)	28

TABLE OF CASES

<u>Berry v. Beech Aircraft Corp.</u> , 717 P.2d 670 (Utah 1985)	1,2, 3,4,5,6,11,13,14,15,17,18
<u>Cadieux v. International Telephone & Telegraph Corp.</u> , 593 F.2d 142 (1st Cir. 1979).	8,9
<u>Comptroller of Virginia ex. rel. Virginia Military Institute v. King</u> , 232 S.E.2d 895 (Va. 1977).	8
<u>Critchley v. Vance</u> , 575 P.2d 187 (Utah 1978)	17
<u>Great Northern Railway Co. v. Sunburst Oil & Refining Co.</u> , 287 U.S. 358, 53 S.Ct.145, 77 L.Ed 360 (1932)	17

<u>Grissom v. North American Aviation, Inc.</u> , 326 F.Supp. 465 (M.D. Fla. 1971)	6
<u>Loyal Order of Moose No. 259 v. County Bd.</u> , 657 P.2d 257 (Utah 1982)	11
<u>Malan v. Lewis</u> , 693 P.2d 661 (Utah 1984)	10, 12,16
<u>McClure v. Middletown Hospital Association</u> , 603 F.Supp. 1365 (S.D. Ohio 1985)	16
<u>Meyers v. McDonald</u> , 635 P.2d 84 (Utah 1981)	5
<u>Millet v. Clark Clinic Corp.</u> , 609 P.2d 934 (Utah 1980)	8
<u>O'Connor v. Altus</u> , 335 A.2d 545 (N.J. 1975)	7
<u>Order of Railroad Telegraphers v. Railway Express Agency, Inc.</u> , 321 U.S. 342, 64 S.Ct. 582, 88 L.Ed. 788 (1944)	5
<u>Rio Algom Corp. v. San Juan County</u> , 681 P.2d 184 (Utah 1984)	12
<u>Smith v. American Radiator & Standard Sanitary Corp.</u> , 248 S.E.2d 462 (N.C.App. 1978)	8
<u>State Farm Mutual Insurance Co. v. Farmers Insurance Exchange</u> , 27 Utah 2d 166, 493 P.2d 1002 (1972)	11
<u>Timpanogos Planning & Water Management Agency v. Central Utah Water Conservancy District</u> , 690 P.2d 562 (Utah 1984)	12

STATUTES CITED

Utah Code Ann. Section 78-12-1 <u>et. seq.</u>	15
Utah Code Ann. Section 78-12-28 (1953) (Limitation on actions for wrongful death)	1,4
Utah Code Ann. Section 78-15-2 (1953)	1,4
Utah Code Ann. Section 78-15-3 (1953) (Utah Product Liability Act statute of repose)	5,8

STATEMENT OF ISSUES PRESENTED ON CROSS-APPEAL AND APPEAL

The issues before the Court on this Cross-Appeal and Appeal are twofold:

(1) Did the trial court err when it interpreted the Utah Product Liability Act statute of repose, Utah Code Ann., Section 78-15-3 (1953), to be a statute of limitation which extended the two-year limitation on wrongful death actions otherwise mandated by Utah Code Ann., Section 78-12-28 (1953)?

(2) Did the trial court err in retroactively applying this Court's decision in Berry v. Beech Aircraft Corp., 717 P.2d 670 (Utah 1985), which held the Utah Product Liability Act unconstitutional?

STATEMENT OF THE CASE

This is a wrongful death action filed by the plaintiff nearly three and one-half years after the death of his wife in an automobile fire. Defendants Saab answered plaintiff's Complaint and subsequently moved for Judgment on the Pleadings, asserting that plaintiff's action was barred by Utah's two-year limitation on wrongful death actions, Utah Code Ann., Section 78-12-28 (1953). The Honorable Judith M. Billings denied Saabs' motion, ruling that plaintiff's Complaint was timely filed because the Utah Product Liability Act statute of repose, Utah Code Ann., Section 78-15-3 (1953), was a statute of limitation which superseded the wrongful death limitation. (Appendix A)

Subsequently, defendant Ken Garff (dismissed from this action and not a party to this appeal) answered plaintiff's Complaint and moved for Summary Judgment, which the Honorable Peter F. Leary denied based on Judge Billings' prior ruling. Defendant Garff petitioned for an intermediate appeal which was denied.

After this Court declared the Utah Product Liability Act unconstitutional in Berry v. Beech Aircraft Corp., 717 P.2d 670 (Utah 1985), the Honorable John A. Rokich, ruling that the decision retroactively invalidated the statute of repose, granted defendants' Saab Motion for Summary Judgment. (Appendix B)

Plaintiff has appealed Judge Rokich's ruling on the retroactivity issue, and defendants Saab have cross-appealed Judge Billings' ruling on the applicability of the statute of repose.

STATEMENT OF FACTS

Plaintiff's wife, Rhonda Luther Raithaus, died in an automobile fire on July 2, 1979. (R.3-4) Plaintiff filed this wrongful death action on November 29, 1982. (R.6)

SUMMARY OF ARGUMENT

A statute of limitation prescribes the period of time during which a plaintiff must bring his (her) action after the cause of action has accrued or waive his (her) remedy. By

contrast, a statute of repose immunizes a defendant from liability after a given period of time commencing with an event unrelated to the accrual of the cause of action. This Court has implied and courts in other jurisdictions have specifically held that a statute of repose does not extend the period prescribed by the statute of limitation applicable to the cause of action. To hold otherwise would fly in the face of the Utah Legislature's manifest intent.

Even if the Utah Product Liability Act statute of repose did supersede the wrongful death limitations statute, this Court's decision in Berry v. Beech Aircraft Corp., 717 P.2d 670 (Utah 1985), declaring the Utah Product Liability Act unconstitutional, retroactively applies to the plaintiff, because he neither relied on the statute of repose nor demonstrated that the inequities of applying the decision to him outweigh the burdens created by only selective retroactive application.

ARGUMENT

INTRODUCTION

The parties' respective positions on plaintiff's appeal demonstrate the ironic nature of this case. Contrary to what one might expect, the defendant manufacturers maintain that this Court's decision in Berry v. Beech Aircraft Corp., 717 P.2d 670 (Utah 1985), declaring the Utah Product Liability Act unconstitutional, should be applied retroactively to all cases in litigation at the time of the decision. By contrast, the

plaintiff consumer asserts that the Utah Product Liability Act statute of repose has continuing viability after Berry.

This curious situation evolved as a result of the plaintiff's delay in filing his action and the trial court's novel construction of the Utah Product Liability Act's statute of repose. Plaintiff filed his action three and one-half years after the death of his wife--one and one-half years beyond the two-year statute of limitation applicable to wrongful death actions, Utah Code Ann., Section 78-12-28 (1953). Plaintiff's legal premise, which the trial court accepted, is that the Utah Product Liability Act's statute of repose, Utah Code Ann., Section 78-15-3 (1953), is a statute of limitation which extended the time in which plaintiff could file his action.

Plaintiff's appeal is dependent on the validity of his premise, and if this premise is incorrect, the plaintiff's appeal is moot. Accordingly, defendants Saab will first address the issue presented by their cross-appeal and thereafter respond to the arguments plaintiff has presented on his appeal.

POINT I. THE UTAH PRODUCT LIABILITY ACT STATUTE OF REPOSE IS NOT A STATUTE OF LIMITATION AND WAS NEVER INTENDED TO EXTEND THE PERIOD IN WHICH THE PLAINTIFF COULD FILE HIS WRONGFUL DEATH ACTION.

- A. This Court has recognized that a statute of repose is not a statute of limitation.

In Berry v. Beech Aircraft Corp., 717 P.2d 670 (Utah 1985), the Court noted that there are critical differences between statutes of limitation and statutes of repose:

Statutes of repose, such as section 3 of the Products Liability Act, are different from statutes of limitations, although to some extent they serve the same ends.

Id. at 672. A statute of limitation is designed to provide a reasonable period of time in which a plaintiff must bring an action after his (her) cause of action has accrued or waive his (her) remedy. Id. Further, statutes of limitation "are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." Meyers v. McDonald, 635 P.2d 84, 86 (Utah 1981) (citing Order of Railroad Telegraphers v. Railway Express Agency, Inc., 321 U.S. 342, 348-49, 64 S. Ct. 582, 586, 88 L.Ed. 788, 792 (1944)). By contrast, statutes of repose are not designed to provide a reasonable time for the filing of an action once it arises. Berry, 717 P.2d at 672. Specifically, the Utah Product liability Act statute of repose was designed to immunize manufacturers and persons in the manufacturers' chain of distribution six years after sale or ten years after manufacture of the product regardless of when an injury occurred. Id. at 673. The policies undergirding the statute of repose were the availability and cost of liability insurance. See, Utah Code Ann., Section 78-15-2 (1953). Because the goals and functions of the two types of statutes differ, the statutes are not interchangeable.

- B. This Court has implied and courts in other jurisdictions have held that a statute of repose does not extend the limitation otherwise provided by the applicable statute of limitation.

By implication, this Court has already indicated that the Utah Product Liability Act's statute of repose must be construed together with the applicable statute of limitation:

Section 3 of the Utah Product Liability Act bars actions without regard to when an injury occurs and is not designed to provide a reasonable time within which to file a lawsuit. Indeed, a statute of repose may cut off a cause of action even though it is filed within the period allowed by the relevant statute of limitations.

Berry, 717 P.2d at p. 672. (Emphasis added.)

If indeed, as plaintiff contends, the statute of repose doubles as a statute of limitation in product liability actions, the emphasized portion of the quote has no meaning. Although the quoted language is dicta, it does accord with decisions of courts in other jurisdictions which have specifically considered the issue.

In Grissom v. North American Aviation, Inc., 325 F.Supp. 465 (M.D. Fla 1971), a case similar to the case at bar, the widow of Astronaut Virgil "Gus" Grissom filed a wrongful death action against the defendant engineer nearly four years after the death of her husband. The applicable Florida statute of limitation provided that a wrongful death action had to be brought within two years of the decedent's death. Nonetheless, Mrs. Grissom maintained that her action was timely, citing a Florida statute of repose which stated that no action against a

professional engineer could be maintained after twelve years following the date of substantial completion of construction. After examining analogous statutes in other jurisdictions, the court stated:

This Court believes the more reasonable application of [section] 95.11(10) [statute of repose] and the only correct interpretation is that a professional engineer or architect is susceptible to suit for a period of only twelve (12) years, and that a plaintiff, once death occurs, has not more than two (2) years in which to bring suit or have the action barred. If death occurs or the defect is found more than twelve (12) years after completion of the work, no wrongful death suit could be maintained.

Id. 468.

The Supreme Court of New Jersey reached a similar conclusion in O'Connor v. Altus, 335 A.2d 545 (N.J. 1975) while interpreting an analogous architect's statute of repose:

As do many of its counterparts in other states, N.J.S.A. 2A: 14-1.1 [statute of repose] impliedly incorporates the tort limitation act generally applying to all personal injury actions. Hence, this state's two-year statute of limitations, N.J.S.A. 2A: 14-2, does operate to restrict the period in which actions can be initiated for accidents occurring within ten years after construction; but it does not serve to extend beyond ten years from the date construction was completed the time within which suit may be filed.

For example, an action for personal injuries sustained by an adult in an accident occurring, say, five years after the completion of construction still must be brought within two years thereafter--or seven years after construction. This statute does not preserve the remedy, in that instance, for an additional five years or until the full ten years from construction has elapsed. As

indicated, both the two-year and ten-year statutes are at work in that situation. The latter does not expand the two-year period of the personal injury statute. It simply provides that in any event the suit must be started within ten years of the construction, regardless of when the cause of action accrues. (Citations omitted.)

Id. at 553. Other cases reaching the same result include Cadieux v. International Telephone & Telegraph Corp., 593 F.2d 142 (1st Cir. 1979); Comptroller of Virginia ex. rel. Virginia Military Institute v. King, 232 S.E.2d 895 (Va. 1977); Smith v. American Radiator & Standard Sanitary Corporation, 248 S.E.2d 462 (N.C. App. 1978) (overruled on other grounds).

C. The Utah Legislature's intent in enacting the Utah Products Liability Act was to reduce, not extend, the period during which a manufacturer would be exposed to liability.

As stated in Millett v. Clark Clinic Corporation, 609 P.2d 934 (Utah 1980), a case interpreting the Utah Health Care Malpractice Act, "[t]his Court's primary responsibility in construing legislative enactments is to give effect to the legislature's underlying intent." Id. at 936. Even a cursory review of the Utah Product Liability Act reveals that the legislature intended to enact a statute which would limit the liability of product manufacturers and other persons in the manufacturers' chain of distribution. In its declaration of intent, Utah Code Ann., Section 78-15-2 (1953), the legislature specifically referred to (1) the rising number of product liability suits, (2) the amount of judgments and settlements in these actions, (3) the rising cost of insurance premiums, and

(4) the availability of product insurance. Clearly, the legislature intended to provide means to limit or otherwise narrow the exposure faced by manufacturers and other persons in the distribution chain. It would be anomalous indeed to interpret the Utah Product Liability Act's statute of repose as enlarging, rather than narrowing, the time in which a prospective plaintiff could bring an action against the very parties the act sought to protect.

The court in Cadieux v. International Telephone & Telegraph Corp., 593 F.2d 142 (1st Cir. 1979), while examining a statute very similar to the Utah Products Liability Act, had no illusions regarding the Rhode Island legislature's intent:

Finally, appellant's argument based on the "solicitude of the Rhode Island Legislature for the unique burdens of the products liability victim", allegedly demonstrated in the 1978 amendment of R.I.G.L. [section] 9-1-13, does not impress us. The amendment provides that products liability cases shall be brought "within ten (10) years after the date the product was first purchased for use or consumption." We do not read this amendment as creating a new ten year period to bring products liability suits. Rather, the amendment clearly provides that the ten year period after the sale of the offending product is an additional limit on suits brought within the existing statutes that relate to the date of the injury. If R.I.G.L. [section] 9-1-13 demonstrates solicitude for any group, it is for the manufacturers who, prior to July 1, 1978, had no statutory protection from suit that was related to the date of original sale of a product.

Id. at 144-145.

The Utah Product Liability Act statute of repose does nothing more or less than confer an immunity upon a manufacturer and the persons in the manufacturer's chain of distribution six years after the date of initial purchase of the product or ten years after manufacture of the product regardless of the time of injury. This statute of repose does not pretend to designate the time within which a plaintiff must bring an action once it has accrued. This is the function of the statute of limitation. The applicable limitation in this instance is the two-year limitation on actions for wrongful death, and since the plaintiff did not file his action within two years of his wife's death, his action is barred as a matter of law.

POINT II: EVEN IF PLAINTIFF'S CONSTRUCTION OF THE STATUTE OF REPOSE IS CORRECT, THERE IS NO REASON TO EXEMPT THE PLAINTIFF FROM RETROACTIVE APPLICATION OF THE BERRY DECISION WHICH DECLARED THE UTAH PRODUCT LIABILITY STATUTE UNCONSTITUTIONAL.

A. Decisions overruling prior law are normally given retrospective effect.

In Malan v. Lewis, 693 P.2d 661 (Utah 1984), a case declaring the Utah Guest Statute unconstitutional, this court noted:

The general rule from time immemorial is that the ruling of a court is deemed to state the true nature of the law both retrospectively and prospectively. In civil cases, at least, constitutional law neither requires nor prohibits retroactive operation of an overruling decision, but in the vast majority of cases a decision is effective both prospectively and retrospectively,

even an overruling decision. (Emphasis added, citations omitted.)

Id. at 676. The general rule is abrogated only in those circumstances where a class of actual or potential litigants has justifiably relied on the prior law or where the burden dictates only prospective application. State Farm Mutual Insurance Co. v. Farmers Insurance Exchange, 27 Utah 2d 166, 493 P.2d 1002 (1972) and Loyal Order of Moose No. 259 v. County Bd., 657 P.2d 257 (Utah 1982). Under the standards previously set by this Court, the Berry decision should be retroactively applied.

B. The plaintiff has not demonstrated that he justifiably relied on the Utah Product Liability Act statute of repose.

In State Farm Mutual Insurance Co. v. Farmers Insurance Exchange, 27 Utah 2d 166, 493 P.2d 1002, (1972), the Court stated the following with respect to retroactive application of a ruling concerning subrogation rights:

The rule [of prospective application] is based upon the proposition that where persons had entered into contracts and other business relationships based upon justifiable reliance on the prior decisions of courts, those persons would be substantially harmed if retroactive effect were given to overruling decisions. An additional factor was that retroactive operation might greatly burden the administration of justice.

Id. at 168-169, 493 P.2d at 1003. It is clear from the foregoing language that prospective application applies where persons have consciously entered into relationships based on express reliance on prior law or decisions. Further cases supporting this proposition are as follows: Loyal Order of Moose No. 259 v.

County Bd., 657 P.2d 257 (Utah 1982)--organizations relied on criteria for tax exempt property established by prior court decision; Timpanogos Planning & Water Management Agency v. Central Utah Water Conservancy District, 690 P.2d 562 (Utah 1984)--water district conducted business for decades on basis of unconstitutional selection of board members; and Rio Algom Corp. v. San Juan County, 681 P.2d 184 (Utah 1984)--taxing authorities set mill levies in reliance on unconstitutional statute.

In contrast to the above cases, however, the Court has not accepted the reliance argument in absence of evidence of actual reliance, especially when the claimed reliance would not appear to accord with everyday experience. For example, in Malan v. Lewis, 693 P.2d 661 (Utah 1984), the Guest Statute case, the defendants petitioned for rehearing, claiming that this Court's ruling declaring the Guest Statute unconstitutional should not be retroactively applied to them. In analyzing the issue, this Court stated:

There is no evidence that the defendants knew of the Guest Statute and relied upon it in offering a ride to the plaintiff. The bare assertion by defendants that our decision overrules prior cases sustaining the constitutionality of the Guest Statute, is insufficient to prohibit its retroactive application.

Id. at 676. The plaintiff in this action has made absolutely no showing that he relied in any way on the Utah Product Liability Act statute of repose. The plaintiff has not asserted, nor would one expect him to reasonably assert: either (1) that he

first consulted the Utah Product Liability Act before purchasing the Saab automobile at issue here in order to determine the amount of years he would have after the purchase of the automobile to bring a cause of action or (2) that he rejected one automobile in favor of the Saab automobile because of an extended period of limitation. Furthermore, the plaintiff has not asserted that even after his cause of action arose, he consulted the Utah Product Liability Act and consciously forebore bringing this action within two years after the death of his wife because of the act. Of course, plaintiff is asserting here that he relied on the limitation once he filed this action. However, that type of reliance is obviously an insufficient basis to preclude retroactive application of the Berry decision. Otherwise, the defendants in Malan who were relying on the Guest Statute defense would have prevailed. Since the plaintiff has made no showing of his conscious reliance on the Utah Product Liability Act statute of repose in either purchasing his automobile or delaying the filing of this action, he has no basis to assert that the Berry decision should have only prospective effect.

C. The plaintiff would burden the administration of justice by his proposal that this Court selectively apply the Berry decision.

Under the plaintiff's construction of the Utah Product Liability Act statute of repose, each person injured by a product would have a time limitation which differed from time

periods applicable to other persons with similar injuries depending on the fortuitous combination of circumstance dictated by the product's date of purchase, the product's date of manufacture, and the date of the person's injury. For example, the person injured on the date of purchase of a new product would have six years to bring his (her) action. By contrast, a person such as the plaintiff in Berry who was injured by a 23-year old product would have absolutely no time to bring his (her) cause of action. Between these extremes are approximately 2190 possible limitation periods (6 years x 365 days per year).

Obviously, the plaintiff recognizes that the Berry decision must be retroactively applied to permit potential plaintiffs in Berry's position to maintain their actions. Accordingly, plaintiff blithely asserts that there should be selective retroactive application of the Berry decision exempting those parties who have "vested rights." Although there are cases in which various courts have limited their decisions to operate prospectively or limited their decisions retroactively only to the parties who brought about the overruling decision, defendants are unaware of any precedent by which a court has retroactively applied the decision to only selected parties among the parties in litigation at the time the overruling decision was issued.

Plaintiff's seemingly innocuous solution to his retroactivity problem invites the Court to engage in an ad hoc legislative effort. Plaintiff maintains that each injured party

having a cause of action at the time the Berry decision was issued has a vested right in the period mandated by the statute of repose at the time the cause of action accrued. For an injured party in plaintiff's position, the statute would allow the party nearly three and one-half years to bring his (her) action. However, for parties who were injured by products which had been purchased between five and six years before the cause of action accrued, the limitation period would be less than one year. Since this Court has stated that a valid statute of limitation must provide a reasonable time in which an injured party has an opportunity to assert his (her) cause of action, Berry, 717 P.2d at 672, the courts would be left with the burden of determining at what point prior to the expiration of the six-year period an injured party had had that reasonable opportunity. In essence, the plaintiff invites the Court to abandon its role as arbiter of the constitution and rewrite the statute to accommodate the vagaries of a "limitations statute" which commences on a date completely independent of the date of injury.

In contrast to the chaotic situation a selective retrospective application would cause, a full retroactive application of the Berry decision would simplify and stabilize the law. Under full retroactive application, each injured party would have the same amount of time after his (her) cause of action accrued in which to bring his (her) action under the limitations statutes prescribed in Utah Code Ann. Section

78-12-1 et. seq. (1953). The benefits of certainty in the judicial process engendered by a fully retroactive application of the Berry decision far outweigh the prejudice to the plaintiff who delayed three and one-half years after his cause of action accrued before filing his complaint.

D. The plaintiff has no vested right in an unconstitutional statute.

The plaintiff has cited McClure v. Middletown Hospital Association, 603 F.Supp. 1365 (S.D. Ohio 1985). This, of course, is a federal district court decision interpreting Ohio state law and is not binding precedent in this action. In fact, McClure's approach conflicts with the analysis which this Court has used in its prior decisions.

The court in McClure based its decision on the plaintiff's claim to vested rights, asserting that the minor plaintiff should have the benefit of the law as it stood at the time of her birth. However, in nearly every instance where a statute is declared unconstitutional, one of the contesting parties can claim "vested rights" accorded by the statute. If the state of the law as it existed when the cause of action accrued always confers a vested interest in one of the parties litigant, it follows that the Court must always confine its decisions to prospective application. This is clearly a result which the Court has eschewed. For example, the defendants in Malan v. Lewis, 693 P.2d 661 (Utah 1984) asserted that this Court's

decision declaring the Guest Statute unconstitutional should be given only prospective effect, because at the time of the accident giving rise to the plaintiff's cause of action, the Guest Statute had been held to be constitutionally sound in Critchley v. Vance, 575 P.2d 187 (Utah 1978). Although Critchley was the law applicable to the party litigants when the plaintiff's action accrued, this Court employed a reasoned analysis to determine that its decision should be retroactively applied. This approach is within the broad discretion accorded state courts and does not contravene the United States Constitution.

In Great Northern Railway Co. v. Sunburst Oil & Refining Co., 287 U.S. 358, 53 S. Ct. 145, 77 L Ed. 360 (1932), the foundation case regarding retroactivity, the United States Supreme Court speaking through Justice Cardozo stated:

A state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward. It may say that decisions of its highest court, though later overruled, are law none the less for intermediate transactions. . . . On the other hand, it may hold to the ancient dogma that the law declared by its courts had a Platonic or ideal existence before the act of declaration, in which event the discredited declaration will be viewed as if it had never been, and the reconsidered declaration as the law from the beginning. The alternative is the same whether the subject of the new decision is common law or statute. The choice for any state may be determined by the juristic philosophy of the judges of her courts, their conceptions of law, its origin and nature. We review, not the wisdom of their philosophies, but the legality of their acts. (Citations omitted.)

Id. at 364-65, 53 S.Ct. at 148-49, 77 L. Ed. at 366-67. This court's approach to retroactive application of its decisions is valid under the United States Constitution and defendants respectfully submit that such analysis impels the Court in this instance to retroactively apply Berry without exception.

CONCLUSION

The Utah Product Liability Act statute of repose was intended to confer an immunity on manufacturers and the persons in the manufacturers' chain of distribution six years after purchase and ten years after manufacture of the product. The statute was never intended nor has it ever functioned as a statute prescribing the period during which an injured party must bring his cause of action after it accrues. Because the fundamental premise upon which the plaintiff bases his appeal is erroneous, the trial court's order of April 20, ¹⁹⁸³ 1983, denying the defendants' Motion for Judgment on the Pleadings (Appendix A) should be reversed. However, even if the statute of repose is considered to be the applicable statute of limitation, the plaintiff has demonstrated no rational basis for his contention that this Court's decision in Berry should not be retroactively applied to him and therefore the trial court's Order of Dismissal entered March 20, 1986 (Appendix B) should be affirmed.

DATED this 23rd day of July, 1986.

CHRISTENSEN, JENSEN & POWELL

By M. Douglas Bayly
L. Rich Humpherys
M. Douglas Bayly
Attorneys for Defendants Saab

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing BRIEF OF RESPONDENTS AND CROSS-APPELLANTS SAAB-SCANIA, INC. AND SAAB-SCANIA AB was mailed, postage prepaid, this 23rd day of July, 1986, to the following:

LeRoy S. Axland,
Michael W. Homer
Fred R. Silvester
SUITTER, AXLAND, ARMSTRONG & HANSON
Attorneys for Plaintiff
700 Clark Leaming Office Center
175 South West Temple Street
Salt Lake City, Utah 84101-1480

M. Douglas Bayly

Apr 20 1 14 PM '83

H. DIXON HILL, CLERK

BY *Barbara Schaefer*

LARRY G. REED, Esq.
of and for
SUITTER AXLAND ARMSTRONG & HANSON
Attorneys for Plaintiff
700 Clark Leaming Office Center
175 South West Temple
Salt Lake City, Utah 84101
Telephone: (801) 532-7300

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY
STATE OF UTAH

LARRY RAITHAUS, M.D.,)	
)	
Plaintiff,	)	ORDER DENYING MOTION OF
	)	DEFENDANTS SAAB-SCANIA OF
vs.	)	AMERICA AND SAAB-SCANIA OF
	)	SWEDEN FOR JUDGMENT ON THE
SAAB-SCANIA OF AMERICA, INC.,	)	PLEADINGS
a Connecticut corporation;)	
KEN GARFF FOREGIN CARS, INC.;)	
a Utah corporation; and SAAB-)	
SCANIA OF SWEDEN, a Swedish)	
corporation,	)	Civil No. C 82-9672
)	
Defendants.)	

The Motion of Defendants Saab-Scania of America, Inc. and Saab-Scania of Sweden, having come on regularly for hearing before the above-entitled Court on the 11th day of April, 1983, the Honorable Judith M. Billings presiding, and the Court having reviewed the pleadings on file in this matter, including the Memoranda of Points and Authorities filed by plaintiff and said defendants, and having heard the arguments and representations of counsel, M. Douglas Bayley, Esq., attorney for said defendants and Larry G.

Reed, Esq., attorney for plaintiff, and it appearing to the Court that:

(a) The two-year statute of limitations applicable to actions to recover damages for wrongful death found at Section 78-12-28(2), Utah Code Ann. (Replacement Vol. 9A, 1977), is limited in its application by Section 78-12-1, Utah Code Ann. (Replacement Vol. 9A, 1977) in that it is applicable ". . . except where in special cases a different limitation is prescribed by statute". This "product liability" action is such a special case. The applicable statute of limitations is found at Section 78-15-3(1), Utah Code Ann. (Replacement Vol. 9A, 1977). That Section, a portion of the Utah Product Liability Act, Section 78-15-1 et. seq., Utah Code Ann. (Replacement Vol. 9A, 1977), applies specifically and exclusively to causes of action of the type asserted in plaintiff's complaint and is applicable to actions to recover damages for wrongful death which are based on those causes of action.

(b) Principles of statutory construction, specifically the preference for the application of the longer of two arguably applicable statutes of limitations, the principle that should two statutes relating to the same general subject matter be in conflict, the more specific of the two will control, and

the principle that a later enacted statute will take precedence over a prior enacted statute which pertains to the same general subject matter all indicate that the statute of limitations contained in the Utah Product Liability Act, rather than Section 78-12-28(2), is applicable.

(c) The intent of the Legislature, as set forth in Section 78-15-2, Utah Code Ann. (Replacement Vol. 9A, 1977) is consistent with application of the six-year statute of limitations which is found at Section 78-15-3(1) and a contrary ruling would be inconsistent with the clear language of the statute.

Based upon the foregoing, and good cause appearing therefor, the Motion of Defendants Saab-Scania of America, Inc. and Saab-Scania of Sweden be, and the same hereby is, denied.

DATED this 28 day of April, 1983.

ATTEST
H. D. WENNINGLEY
Clerk
By Barbara Lohr Deputy Clerk
The Honorable Judith M. Billings
Judge

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Order Denying Motion of Defendants Saab-Scania of America, Inc. and Saab-Scania of Sweden for Judgment on the

Pleadings was mailed, this 20 day of April, 1983, pursuant to
the provisions of Rule 2.9, Rules of Practice in the District
Courts of the State of Utah, to:

M. Douglas Bayly, Esq.
Attorney for Defendants
CHRISTENSEN, JENSEN & POWELL
900 Kearns Building
Salt Lake City, Utah 84101



A handwritten signature in dark ink, appearing to read "M. Douglas Bayly", is written over a horizontal line. The signature is stylized with large, flowing letters and a long, sweeping underline that extends to the right.

MAR 20 1986

L. Rich Humpherys, A1582
M. Douglas Bayly, A0251
Christensen, Jensen & Powell
ATTORNEYS FOR DEFENDANTS SAAB
900 Kearns Building
Salt Lake City, UT 84101
Telephone: (801) 355-3431

H. Dixon Hindley, Clerk 3rd Dist. Ct.
By [Signature] Deputy Clerk

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

LARRY RAITHAUS, M.D.,	)	ORDER OF DISMISSAL
)	
Plaintiffs,)	
v.)	
)	
SAAB-SCANIA OF AMERICA, INC.,	)	Civil No. C82-9672
a Connecticut corporation;	)	Judge John A. Rokich
KEN GARFF FOREIGN CARS, INC.,)	
a Utah corporation; and)	
SAAB-SCANIA AB, a Swedish)	
corporation,)	
)	
Defendants.)	

Defendant Saab's Motion for Summary Judgment came on regularly before the court on the 7th day of March, 1986, at the hour of 8:30 a.m. Plaintiff was represented by his counsel, Fred Silvester defendant Saab was represented by its counsel, L. Rich Humpherys; defendant Ken Garff Foreign Cars did not appear, it having previously settled its claim with the plaintiff. The court, having heard argument of counsel and having considered the memoranda of counsel, together with all other information contained in the court's file granted the Motion for Summary Judgment in favor of defendant Saab.

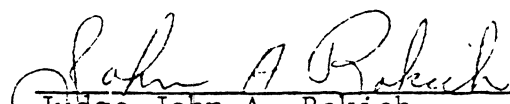
IT IS HEREBY ORDERED, ADJUDGED AND DECREED that plaintiff's

Complaint shall be and the same is hereby dismissed with prejudice.

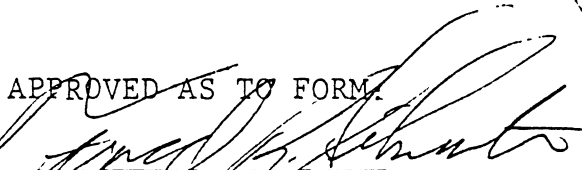
Defendant Saab shall be awarded its costs incurred herein.

DATED this 20 day of March, 1986.

BY THE COURT:


Judge John A. Rokich
District Judge

APPROVED AS TO FORM:


Fred R. Silvester

ATTEST
H. DIXON HINDLEY
Clerk

By 
Deputy Clerk

78-12-23. Within two years.—Within two years:

(1) An action against a marshal, sheriff, constable or other officer upon a liability incurred by the doing of an act in his official capacity, and in virtue of his office, or by the omission of an official duty, including the nonpayment of money collected upon an execution; but this section shall not apply to an action for an escape.

(2) An action to recover damages for the death of one caused by the wrongful act or neglect of another.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 10-12-23; L. 1971, ch. 212, § 1; 1976, ch. 23, § 13.

78-15-2. Legislative findings and declarations—Purpose of act.—(1) The legislature finds and declares that the number of suits and claims for damages and the amount of judgments and settlements arising from defective products has increased greatly in recent years. Because of these increases, the insurance industry has substantially increased the cost of product liability insurance. The effect of increased insurance premiums and increased claims has increased product cost through manufacturers, wholesalers and retailers passing the cost of premiums to the consumer. Further, certain product manufacturers are discouraged from continuing to provide and manufacture such products because of the high cost and possible unavailability of product liability insurance.

(2) In view of these recent trends, and for the purpose of alleviating the adverse effects which these trends are producing in the manufacturing industry, it is necessary to protect the public interest by enacting measures designed to encourage private insurance companies to continue to provide product liability insurance.

(3) In enacting this act, it is the purpose of the legislature to provide a reasonable time within which actions may be commenced against manufacturers, while limiting the time to a specific period for which product liability insurance premiums can be reasonably and accurately calculated; and to provide other procedural changes to expedite early evaluation and settlement of claims.

History: C. 1953, 78-15-2, enacted by L.
1977, ch. 149, § 2

78-15-3. Statute of limitations—Application.—(1) No action shall be brought for the recovery of damages for personal injury, death or damage to 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 upon, or arises out of, any of the following:

- (a) Breach of any implied warranties;
- (b) Defects in design, inspection, testing or manufacture;
- (c) Failure to warn;
- (d) Failure to properly instruct in the use of a product; or
- (e) Any other alleged defect or failure of whatsoever kind or nature in relation to a product.

(2) The provisions of this section shall apply to all persons, regardless of minority or other legal disability, but shall not apply to any cause of action where the personal injury, death or damage to property occurs within two years after the effective date of this act.

History: C. 1953, 78-15-3, enacted by
L. 1977, ch. 149, § 3.