1978

Connie Lou Switzer et al v. Bryce C. Reynolds et al : Brief of Appellants

Utah Supreme Court

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John H. Allen; Richard H. Moffat; Attorneys for Respondents;

IN THE SUPREME COURT

IN THE SUPREME COURT OF THE STATE OF UTAH

CONNIE LOU SWITZER, RAYMONE GORDON SWITZER, DONALD EUGENE SWITZER, RODNEY DEAN SWITZER, and THEREASE JO SWITZER, minors, by and through their Guardian ad litem, LOUELLA R. BOWLES,	)	
Plaintiffs/Appellants,	)	Case No. 15712
v.	)	
BRYCE C. REYNOLDS, individually and formerly doing business as REYNOLDS SAND AND GRAVEL COMPANY; CLARK EQUIPMENT COMPANY, Construction Machinery Division, and FOULGER EQUIPMENT COMPANY,	)	
Defendants/Respondents.	)	

APPELLANTS' BRIEF

Appeal from Judgment of Third Judicial District Court
in and for Salt Lake County, Utah
Honorable Peter F. Leary, Judge

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STATEMENT OF KIND OF CASE

This action is for the wrongful death of Gordon Switzer who died as the result of an accident on June 24, 1963, and is brought pursuant to Section 78-11-7 Utah Code Annotated, 1953 as amended. Mr. Switzer was killed while operating a Model 175A, Clark Michigan Front End Loader (the loader). This suit was brought by Louella R. Switzer Bowles, the widow of the deceased on behalf of the five Switzer Children.

At the time of the death of their father, all five children were minors, ranging in age from one month to 6-1/2 years. Suit was brought against Bryce C. Reynolds, (Reynolds), formerly doing business as Reynolds Sand and Gravel, the employer of the decedent, and owner of the loader; Foulger Equipment Company, (Foulger) as the seller to Reynolds of the loader; and Clark Equipment Company, (Clark) the manufacturer of the loader. On September 7, 1977, plaintiffs and Foulger settled their differences and a stipulation and order of dismissal with prejudice was entered.

DISPOSITION IN LOWER COURT

Suit was filed on October 23, 1974. From that date until October 3, 1977, intensive discovery was conducted by the plaintiffs in preparing their case for trial. During that nearly three-year period, 17 depositions were taken, numerous motions were argued before the court and the case had been set for trial four times. the last of which was October 3, 1977. Plaintiff was ordered at one of those hearings to pay the full amount of defendant's costs and attorney's fees of $70.00 per hour in connection with certain discovery which effectively prevented plaintiffs' discovery and

notice of intent to appeal was filed. The court failed to rule on plaintiffs' motions for costs and attorney's fees in connecti with two motions to compel discovery against Clark Equipment Company. On August 15, 1977, Clark Equipment Company filed a Motion to Dismiss based on the ground that plaintiffs' cause of action expired by the Statute of Limitations, Section 78-12-28, U.C.A. (1953, as amended). On August 31, 1977 defendant Reynold filed a motion for summary judgment on the grounds that there wa no genuine issue as to any material fact. On September 7, 1977, defendant Reynolds filed a brief in support of his Motion to Dismiss alleging that the defendant committed no acts of negligence, that the claim was barred by the statute of limitations and that the plaintiffs' claim has been discharged in bankruptcy. Argume was had on thepending motions on September 16, 1977, and on Janu 17, 1978, the judge granted defendants' motions. Plaintiffs the appealed.

RELIEF SOUGHT ON APPEAL

Plaintiffs/Appellants seek reversal of the District Court' summary judgment and, ruling on motions and remand for trial on the merits.

STATEMENT OF FACTS

On June 24, 1963, Gordodon Switzer was an adult male, in g health and working for Bryce C. Reynolds, formerly doing busine as Reynolds Sand & Gravel Company. He was instructed to drive Clark Equipment Company front-end loader, Model 175A, (the load down the State Highway in Parley's Canyon from a point near Kimb Junction to Reynolds' main pit in Salt Lake City. Just above th

Mountain Dell Reservoir Dam the machine tipped over on Switzer, killing him almost instantaneously. The only eye witness to the incident, Mr. Jack Thompson, testified that he was driving slowly uphill at the time, that he saw the incident clearly and that Gordon Switzer appeared to have no problem with the machine but that he drove it across the highway and that the machine then tipped over.

Shortly after Switzer's death, a claim was filed with the Utah State Industrial Commission, Workmen's Compensation Division, but the Department determined that Bryce C.Reynolds, the employer, was not covered. Shortly before Switzer's death, the defendant Reynolds had been operating under Chapter 11 of the Bankruptcy Act. He subsequently amended his petition to include a claim by Louella R. Switzer. Suit was filed on October 23, 1974 by Louella R. Switzer Bowles as guardian ad litem for the five minor children of the decedent. Reynolds filed an answer alleging discharge in bankruptcy and the running of the statute of limitations, Section 70A-12-28, U.C.A. (1953, as amended). Clark filed an answer alleging the statute of limitations had run but did not allege any specific section of the Utah Code.

Motions were argued on September 16, 1977, and on January 17, 1978, the judge entered his order. Plaintiffs urged the court to consider the long-pending motion for the award of attorney's fees and expenses in connection with certain discovery compelled from Clark Equipment Company. The judge declined to rule on the motion, granted summary judgment for defendants, and this appeal was instituted.

ARGUMENT

POINT I.

THERE IS A GENUINE ISSUE OF MATERIAL FACT AND IT WAS ERROR TO GRANT DEFENDANT REYNOLDS' AND CLARK'S MOTION FOR SUMMARY JUDGMENT UNDER RULE 56(c) UTAH RULES OF CIVIL PROCEDURE.

Rule 56(c) Utah Rules of Civil Procedure provides in pertinent part:

> . . . the judgment sought shall be rendered forthwith if the pleadings, depositions, answers to Interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of fact and that the moving party is entitled to judgment as a matter of law.

Before summary judgment can be properly granted, it is necessary that judgment be free from doubt and that as a remedy, summary judgment should be granted with great caution. Green v. Garm, 11 Ut.2d 375, 359 P.2d 1050; Henry v. Washiki Club, Inc. 11 Ut. 2d 1138, 355 P.2d 973; Watkins v.Simmons, 11 Ut. 2d 46, P.2d 852.

The plaintiffs' theory of liability against defendants Cl and Reynolds specifically stated in their answers to Clark's an Reynolds' interrogatories supplemented answers which were serve on the 8th day of February, 1977, provides in pertinent part:

> Defects in the design of the brake system in providing inadequate brake capacity, failure to provide fail-safe system; design of the steering system in creating a vehicle which was apparently unstable under certain conditions; failure to provide fail safe power steering assist systems; failure to provide warnings to operators of the brake and steering defect design deficiency; failure to provide adequate roll-over protective structures....

The answer continues:

(a) Inadequate brake capacity or inadequate power brake assist for the tractor's shovels intended foreseeable and actual use.

(b) Inadequate power steering assist for excessive effort unless engine speed was kept up.

(c) Design of engine declutching mechanism which operates whenever brakes are applied. Effect of said mechanism is to: Eliminate engine braking, reduce power steering assist by reduction of engine speed, enhance power steering pump speed; reduce power brake assist by reduction in engine speed, enhance power brake vacuum speed, and . . .

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.

(g) Failure to provide warnings to the operator of the above defects;

(h) Failure to provide adequate instructions to the operator about emergency situations and in particular about defect (c) above.

(i) Failure to restrict use of vehicle to its safe uses.

In addition, as to Reynolds, the answers state:

(j) Violation of Utah Statute: 41-6-111, Coasting Prohibited; 41-6-117 Vehicle in Unsafe Condition; 41-6-144 Brake Equipment; 41-6-155 Requirement that Vehicle be in Safe Mechanical Condition; 35-1-12 Places of Employment to be Safe; 35-1-46 Failure to Secure compensation; and 35-1-57 Non-Compliance-Penalty.

The primary thrust of liability against defendant Reynolds is because of Reynolds' failure to have in effect at the time of Switzer's death workmen's compensation insurance. That failure reverses the normal burden of proof and makes the defendant prove he was not negligent. Section 35-1-57, U.C.A. (1953, as amended), above, states in pertinent part:

> In any such action the defendant shall not avail himself of any of the following defenses: Defense of the fellow servant rule; Defense of assumption of risk or the defense of contributory negligence. Proof of the injury shall constitute prima facie evidence of negligence on the part of the employer to show freedom from negligence resulting in such injury.

Reynolds has admitted that Gordon Switzer was employed by at the time of his death and that he was acting in the scope of employment. Based on the presumption created by failure to secure workmen's compensation, it is the duty of Reynolds to show that was not negligent. The affidavits which Reynolds submitted deal only with the operation of the machine subsequent to the accident. The affidavits submitted are not inconsistent with plaintiff's claim of design defects in the brake and steering system, and certainly not reach the standard of proof required for the granting of summary judgment. The evidence on file clearly shows, or indicates that the machine in question, even if properly maintained, could not comply with Utah statutes dealing with brake performance.

As specifically alleged, the brake equipment was not capable meeting the standard set by Section 41-6-144, U.C.A. (1953, as amended). The section provides that for any motor vehicle operated upon a highway shall be equipped with brakes adequate to control the movement of and to stop and hold vehicle. For the loader which weighed some 24,000 pounds, a stopping distance of 40 feet or a deceleration of 14 feet per second or the equivalent braking force in percentage of vehicle or combination weight of 43.5%. And yet, Walter Black, the chief safety engineer for Clark, testified that even at 1500 pounds per square inch in the braking system and 175 pounds on the brake pedal, the machine

would only stop at 8 feet per second, about half of the statutory minimum. Moreover, Clark's own information provided in response to discovery, namely, their Drawing No. KXB-76462 shows a 1500 pounds per square inch is the maximum which the brake system is capable. Thus, Clark's own expert has testified the brakes were only about half as good as the minimum legal requirement. Moreover, the defect in the brake system is corroborated by the deposition of Mr. Keith Perry. At the relevant period in time, Mr. Perry was a service manager of the defendant Foulger Equipment Company. Mr. Perry testified that he was in charge of maintaining this machine and that it was reconditioned. He testified further that the machine had all required service done on it and that Clark Equipment Company's parts and procedures and methods were used at all times. Mr. Perry further testified that he checked the brakes approximately one week before and one week after the accident and that everything on this machine appeared to be okay but that it was incapable of skidding the tires on dry pavement. The evidence on file further shows that there were no skid marks at the point where the machine tipped over.

Plaintiff has also alleged that the steering design was defective. The defects exist on all similar machines even if properly maintained. The loader had power steering which used an engine-driven pump to force hydraulic oil into a steering cylinder. One defect was a pump which was too small and used excessive steering effort to steer the loader at low vehicle speeds. A second and concealed defect is a declutching valve in

the transmission. When the brakes are used the brake pressure automatically shifts the machine into neutral, declutching the engine from the wheels. This is described in the Clark Operat: Manual No. 1169 in Section 200, pages 2 and 3:

> This valve is connected to the brake system master cylind by a hydraulic line. When the wheel brakes are applied, brake fluid enters the valve and overcomes the spring force. This force is to slide to shift over and block pressure from entering the directional clutches. In this manner a "neutral" is established without moving the control levers.

When Switzer stepped on the brakes as Jack Thompson's dep sition indicates, the steering effort became excessive, causin or contributing to Switzer's death. There is no evidence that defendant Reynolds furnished any warnings to Switzer of either these defects and since it is his duty under the presumption cr under the workmen's compensation law to prove he was free from negligence, it is improper to grant summary judgment.

It is a policy of law to favor trial on the merits and to afford both sides full opportunity to present their evidence an citations as to disputed issues so they may be disposed of on su stantial rather than technical grounds. McKean v. Mountain Vie Memorial Estates, 17 Ut.2d 323, 411 P.2d 129 (1966).

When the burden of proof is shifted to Reynolds, the stat stopping distance, the deposition of Clark's own expert, the dep sition of Keith Perry, and the inference that Switzer was free negligence, are construed together, it is apparent that a genui issue of material fact does exist for submission to the jury.

POINT II.

DEFENDANTS CLARK AND REYNOLDS ARE BARRED AND ESTOPPED FROM ASSERTING THE STATUTE OF LIMITATIONS BECAUSE OF FAILURE TO PLEAD THE PROPER SECTION OF THE UTAH CODE IN A TIMELY MANNER.

Neither defendant Clark nor defendant Reynolds have pleaded the appropriate statutory section in their answer. Defendant Clark in their answer pled only that the plaintiffs' claim was barred by the Utah Code and cited no statutory section. Defendant Reynolds pled specifically that plaintiffs' claim was barred by Section 70-12-28, U.C.A. (1953 as amended). If any statute of limitations applies it would be Section 78-12-28 U.C.A. (1953, as amended). Utah law is settled on this point. The statute must be pleaded. Tanner v. Provo Reservoir Co., 78 Ut. 158, 2 P.2d 107; Utah Delaware Mining Co., v. Industrial Commission, 76 Ut. 187, 289 P.94. Moreover, Utah holds that the statute must be pleaded in proper time and manner and that only the section pleaded is effective and further that if the statute is not pleaded correctly it cannot be relied on. American Theater Co. v. Glasmann, 95 Ut. 303, 80 P.2d 922.

Also in accord is In Re Linfords' Estate, 207 P.2d 1033, where the court overruled the lower court's sustention of a demurrer, stating at page 1034:

> It has long been the law in the state that a demurrer on the ground that the cause of action is barred by the statute of limitations which does not state the section of the code relied upon is insufficient.

Furthermore, neither defendant has not plead the statute of limitations with sufficient clarity to identify the section and subsection relied upon as required by Rule 9(h) Utah Rules

of Civil Procedure, because of the inadequate plea, it should not, therefore, be considered on appeal. Wasatch Mines Company v. Hopkinson, 465 P.2d 1007.

In pleading the statute of limitations, it is not necessa to state the facts showing the defense but it may be alleged ge ally that the cause of action is barred by the provisions of th statute relied upon, referring to or describing such statute sp fically and definitely by section number, subsection designati if any, or otherwise designating the provision relied upon suff clearly to identify it. If such allegation is controverted, th party pleading the statute must establish, on the trial, the fa showing that the cause of action is so barred.

From the foregoing, it is apparent that neither Clark nor Reynolds can rely upon the statute of limitations.

In addition, equitable estoppel in a proper case may be invoked to prevent defendants from relying on the statute. Thro almost three years of discovery and court hearing, neither defe dant acted to have the plaintiffs' Complaint dismissed for runn of the statute of limitations. This case has been unduly compl costly, and time consuming. Through all of this, and after three trial settings, the defendants still did not act to asser their alleged right. In fact, it was not until six weeks befor the fourth trial date that defendants filed their motion and no until two weeks prior to trial that the motions were argued. Had the trial not been vacated for other problems with the docket, the two-week scheduled trial would have been had. Clear

this is not the purpose of the statute of limitations. Furthermore, previous orders of the court indicated that the parties were to take all proper steps to dispose of the case as soon as possible. Quoting in pertinent part from an order of the court dated April 29, 1976, almost a year and a half prior to the court trial setting:

> ". . . certain parties have not acted expeditiously to move this matter towards trial."

It is clear the statute of limitations is an affirmative defense which must be brought to the attention of the court in a timely and appropriate manner. The doctrine of equitable estoppel has been recognized in several cases. In the case of Weir v. Bauer, 75 Ut. 498, 286 P. 936, the court recognized the doctrine in a case of a corporation with a large stockholder. The doctrine was also recognized in the case of Rice v. Granite School District, 23 Ut.2d 22, 456 P.2d 159, involving the injury due to a fall from a bleacher. Reversing a motion for summary judgment for defendant the court said that plaintiff's failure to act in a timely manner was due to wrongful representations and misleading statements of the defendants. Again the doctrine was recognized in the case of Whitaker v. Salt Lake City Corp., 522 P.2d 1252. The court upheld the doctrine even though it was the plaintiff's attorney who was lulled into inaction. In this case, the plaintiffs have expended vast amounts of time and money in preparing their case for trial and through all of this in the numerous court hearings the defendants have not acted to move forward their motion based on the affirmative defense of the

statute of limitations. Clearly, where there is an affirmativ duty to bring the statute of limitations to the court's atten in a timely manner, the failure to do so should invoke the doctrine of equitable estoppel.

POINT III.

PLAINTIFFS' CLAIM HAS NOT BEEN DISCHARGED IN BANKRUPTCY

A. Statement of Facts:

Reynolds' petition in bankruptcy was filed on May 2, 196 and Reynolds was discharged in bankruptcy on August 30, 1968. Plaintiffs' claim arose on the date of Gordon Switzer's death a claim for benefits with Utah State Industrial Commission on July 6, 1963. Plaintiffs commenced this action against Reynol in October 1974.

Title II, Section 35 of the Bankruptcy Act provides that:

> A discharge in bankruptcy releases a bankrupt from all his provable debts.

Title II, Section 103 lists the debts which may be prove and allowed against a bankrupt's estate - said act provides in part as follows:

> A-1 "A fixed liability, as evidenced by a judgment or an instrument in writing absolutely owing at the time of the filing of the petition by or against him, whether then payable or not, with any interest thereon which would have been recoverable at the date or with a rebate of interest when such as were not then payable and did not bear interest . . .
>
> A-5 "Provable debts reduced to judgments after the filing of the petition and before the consideration of the bankrupt's application for a discharge, less costs incurred and interest accrued after the filing of the petition and before the consideration of the

bankrupt's application for a discharge, less costs incurred and interest accrued after the filing of the petition and up to the time of the entry of such judgments."

A-6 "An award of an industrial accident commission, body, or officer of any state having jurisdiction to make awards of workmen's compensation in case of injury or death from injury, if such injury occurred prior to adjudication."

A-7 "The right to recover damages in any action for negligence instituted prior to and pending at the time of the filing of the petitionin bankruptcy. . ."

On the date Reynolds filed a petition in bankruptcy and on the date of adjudication and discharge, no action had been commenced for the recovery of damages by plaintiffs. An unliquidated claim with the Industrial Commission was pending on the date of adjudication only.

Unliquidated claims for tort are not provable in bankruptcy.

Pindel v. Holgate (CA9) 221 F. 342; Talcott v. Friend (CA7) 179 F 676, affd 228 U.S. 27, 57 L. Ed. 718, 33 S. Ct. 505; Brown v. United Button Co. (CA 3) 149 F. 48; Poznanovic v. Gilardine, 174 Minn. 89, 218 N.W. 244, 57 A.L.R. 148; Winfree v. Jones, 104 Va 39, 51 SE 153; 10 A.L.R. 851.

Only provable debts are discharged in bankruptcy:

Crawford v. Burke, 195 U.S. 176, 49 L. Ed. 147, 25 S. Ct 9; Audubon v. Shufeldt, 181 U.S. 575, 45 L. Ed. 1009, 21 S. Ct 735.

Friend v. Talcott, 228 U.S. 27, 57 L. Ed. 718, 33 S. Ct 505, affd (CA 7) 179 F. 676; Crawford v. Burke, 195 U.S. 176, 49 L. Ed. 147, 25 S. Ct 9; Brookhaven Bank & Trust Co. v. Gwin (CA 5 Miss), 253 F. 2d 17; Eastman v. Hibbard, 54 NH 504.

Brown v. O'Keefe, 300 U.S. 598, 81 L. Ed. 827, 57 S. Ct 543.

As an exception thereto, the Bankruptcy Act, Section 63 makes provable debts of the bankrupt founded upon the right to damages in any action for negligence where the action is ins prior to and pending at the time of the filing of the petitio bankruptcy.

Neither this action, nor the claim filed with the Indus mission were instituted and pending prior or pending when Reynolds filed in bankruptcy on May 2, 1963. The earliest da a claim for damages in negligence could have been instituted June 24, 1963. The claim filed with the Industrial Commissio never processed to conclusion and no award was ever made and was unliquidated.

A tort claim is not provable (and therefore not dischar able) unless it falls within a specific statutory category (Se tion 63 (A)(7)).

Goldsmith v. Overseas Scientific Corp.
(DC N4) 188 F. Supp. 530.

A claim which is not provable because it is not in exist at the time of filing of the petition in bankruptcy is not dis charged.

Brown v. O'Keefe, 300 U.S. 598, 81 L. Ed. 827, 57 S. Ct 543.

In addition, the Switzers' claim was not discharged beca of Reynolds' failure to properly schedule the Switzers' addres and therefore give notice of the bankruptcy proceeding. Title II, Section 25 of the Bankruptcy Act provides in pertinent par

> . . . .(8) prepare, make oath to, and file in court within five days after adjudication, if an involuntary bankrupt, and with his petition, if a voluntary bankrupt, a schedule of his property, the location thereof

> and its money value, in detail; and a list of all his creditors, including all persons asserting contingent unliquidated, or disputed claims, showing their residence or places of business, if known, or if unknown that fact to be stated . . . . (emphasis added)

Yet in Reynolds' amended schedule of September 15, 1965, the address of the Switzers is given as:

> c/o Industrial Commission of Utah
> State Capitol Building
> Salt Lake City, Utah

While the address given may have been sufficient to discharge a claim by the Industrial Commission, it is not as to Switzers. In point of fact, Mrs. Switzer listed her address as 3211 South Second West, Salt Lake City, Utah in July 6, 1963, when she filed application with the Industrial Commission. Subsequent correspondence with the Industrial Commission indicates an address of 477 Moore, Pontiac, Michigan, on January 11, 1965. In September 1965 Reynolds did not send notice to either the correct city or state. Such defective notice is ineffective as to the Switzers.

> Bucci v. LaRocca, 21 N.J. 316, 33 ATL (2d) 878; Van Denburgh v. Goodfellow, 19 Col. (2d) 217, 120 P.2d 20; Salmon v. Sarno, 37 N.Y. 2d 870.

POINT IV.

PLAINTIFFS WERE PREVENTED NECESSARY DISCOVERY BY THE TRIAL COURT'S ORDER AND BY FAILURE OF THE TRIAL COURT TO RULE ON MOTIONS TO AWARD PLAINTIFFS THEIR COSTS AND ATTORNEY'S FEES.

A. Statement of Facts:

On August 27, 1976, plaintiffs served upon defendant Clark interrogatories and a request for production numbered 18 through 23. On October 14, 1976, Clark served its answers and partial

response to plaintiffs' request for production. In answer to No. 19, Clark objected to the production for inspection and copying of records on all loaders similar to the one involved in this lawsuit on the grounds that the request for production was too burdensome. Pursuant to motion and notice of hearing served December 10, 1976, hearing was had before the Honorable Marcellus K. Snow on December 17, 1976 on request No. 19 and several other matters. Due to the length of the file, Judge Sno declined to rule on plaintiffs' motion. Clark did furnish certa other information which resolved the other problems. Plaintiffs motion was again noticed for hearing on February 11, 1977 at a scheduled pretrial conference. The pretrial conference was not had. The unresolved motion was again brought to the court's attention on March 30, 1977, and on May 7, 1977. On May 25, 1977, plaintiffs' motion was finally denied with leave to resubmit. On May 27, 1977 the motion was argued again and plaintiff was pe mitted the inspection provided that they pay to Clark their attc ney's fees in advance - $70.00 an hour. On June 16, 1977, plain tiffs filed notice of preservation of rights on appeal. In addi on September 16, 1977, plaintiffs served upon defendant Clark a demand for production of certain documents which would include records referred to above. Clark objected to the demand for pro duction and argument was had on the demand on that date. The court considered the matter but did not rule on it.

A second matter relating to discovery concerns the depositions of Walter L. Black and M. L. Conrad, the former being a

present employee of Clark and the latter being a former employee of Clark. Plaintiffs noticed up the depositions of the two individuals at Benton Harbor, Michigan, the home office of Clark, for June 27, 1977. On May 12, 1977, Clark filed a motion for protective order asking for, among other things, that said discovery may be had only upon plaintiffs paying the cost of transportation and per diem for the defendant Clark Equipment Company's attorney to attend a taping of said deposition in Benton Harbor, Michigan. The motion was noticed up for May 25, 1977, and at the hearing on that date, plaintiffs were ordered to pay Clark that travel expense in advance. Following the hearing of May 27, 1977, the protective order was modified but not in any respect altering the payment of travel expenses. On June 20, 1977, plaintiffs amended the notice of taking of depositions of Black and Conrad to June 30, 1977. On June 29, 1977, ex parte and without notice, Clark Equipment applied to the court for a modification of the protective order and that modification was granted. The modification prevented plaintiff from asking any opinions or conclusions of the witnesses on the basis they were not discoverable. That modification is not a subject of this appeal. The depositions were taken on June 30, 1977 pursuant to the amended notice.

The third subject dealing with discovery is the award of certain costs and attorney's fees to the plaintiffs for Clark's failure to comply with discovery. On September 12, 1975, plaintiffs served upon Clark their set of interrogatories. Clark filed a general objection in October 1975. On April 27, 1976, the interrogatories were stricken on Rule 11 motion made by defendant Clark.

On April 28, 1976, Clark stipulated it would answer or object to the stricken interrogatories within 30 days without requiring re-service of those interrogatories. On May 24, 1976, Clark served its answers but its objections were not signed by the attorney as required by Rule 33A. On June 10, 1976, plaintiffs served their motion, notice and memorandum to compel defendant Clark to answer the interrogatories propounded by plaintiffs and, more specifically, to compel answers over the objections previously filed by Clark. Hearing was had on June 18, 1976. Plaintiffs submitted a 7-page memorandum in support of their motion. On the day scheduled for hearing, defendant Clark did not appear and plaintiffs obtained an order requiring Clark to supplement their answers within 30 days.

On July 12, 1976, Clark filed a motion to extend time to answer the interrogatories and noticed that up for hearing on August 12, 1976. That motion being supported by a 7-page memorandum. Pursuant to agreement between the parties, the August 12, 1976 hearing was continued without date and Clark subsequently filed a second supplemental answers to interrogatories.

Plaintiff served another set of interrogatories on Clark on March 18, 1977, and when the 30 days to answer or object expired Plaintiffs filed its motion and 9-page memorandum for an order compelling Clark to answer those interrogatories on April 21, 1977. The matter was noticed up for hearing on May 9, 1977, and at that time Clark stipulated it would answer the interrogatories to the extent information was available and the pretrial order of that date so reflects.

On the 18th day of July, 1977, plaintiffs filed a motion to determine unresolved questions prior to trial and a motion for protective order on their expert witness, Dr. Rudolf Limpert of the University of Utah. The motions were noticed for July 27, 1977. Pursuant to the further pretrial hearings held on July 27, 1977, the court heard arguments on plaintiffs' motions for costs and expenses and in paragraph 10 of that order, the court took under advisement its judgment on plaintiffs' motion. The trial court never rules on that motion.

B. Argument:

The general rule is that each party pay their own expenses unless there are some unusual circumstances which dictate transfer of expenses from one party to another. The court abused its discretion in awarding Clark its expenses for travel, lodging, reproduction and use of viewer, plus $70.00 per hour legal fees prior to taking the depositions of their experts in Benton Harbor, Michigan on June 30, 1977. While it is proper in certain instances that protective orders issued under Rule 26(c-2) may provide for the transfer of such expenses, exceptional circumstances are required before that is justified. In this case, these were the only true people the court had designated as having any knowledge of the subject machine. They had been requested to furnish the names of witnesses which would be called to trial but at that time and even subsequent to that time, Mr. Conrad and Mr. Black were the only two witnesses known to plaintiffs. Benton Harbor, Michigan is Clark's home office. To require plaintiffs to pay both their own expenses and Clark's attorney's expenses in connection with that motion was an abuse of discretion.

Stated in Continental Casualty Company v. Houdry Process Corp., 18 Frd 75 (1955) at page 76:

> ". . . this court has generally been reluctant to impose charges of this kind upon the party taking the depositions and will usually rule that the parties should bear their own expenses unless the circumstances are such as to indicate strongly that discretion should be exercised to the opposite effect."

In making the ruling the court noted that both sides required the testimony of the witnesses. That certainly is the case here since these were the only witnesses known by Clark having direct or inside information on these particular machines. In the argument, Clark advanced no reasons why such expenses should be paid other than the fact that these witnesses did, in fact, reside in Benton Harbor, Michigan, but it was Clark's choice to do business in Utah and to submit to the jurisdiction of the Utah courts. Weighing the burden against a large corporation such as Clark Equipment against plaintiffs' financial resources, clearly there is no reason in equity why plaintiffs should have to bear the burden of Clark's expenses also. Since Rule 26(c) provides that the motion of the party requiring a protective order shall show good cause, the court abused its discretion where Clark submitted no logical, reasonable or equitable reason why plaintiffs should pay their travel expenses. The court below should be ordered to reverse its prior order.

Second point is that plaintiffs were effectively prevented discovery of the only known records dealing with th is kind of machine by being ordered by the trial court to pay Clark's attorney $70.00 an hour in advance to inspect certain business records of Clar,. Plaintiffs made numerous efforts through interrogatories

to discover information reasonably relevant to the brake and steering defects claimed on the type of machine in question. Discovery indicated that only a machine made during a relatively limited period of time had brake and steering systems sufficiently similar to the one involved in this case to be relevant to the type of defects claimed.

Interrogatories were unsuccessful and the depositions of Messrs. Black and Conrad were also unsuccessful. It should be noted that the discovery of Clark on that particular machine in question indicated several brake defects including one prior to the time the machine was sold brand new where the local dealer changed the brake linings to a softer lining, stating that he was doing that on all 175A machines. Clark's only objection in their answers to interrogatories were that such production and inspection would be unduly burdensome. Yet, plaintiffs offered to inspect those records, they offered to rent or provide their own microfilm viewer since Clark claimed they only had one; rent or provide their own office space, since Clark claimed they had no space; and further offered to pay the burden of all costs of reproducing those materials. It was further pointed out to the court that reservations as to the admissibility on any documents discovered would be reserved for later decision by the trial court.

Clark offered no other explanation why they had to be there other than if plaintiff was going to be there, counsel for Clark was going to be there also. Nor were there any reasons advanced why plaintiffs should not only bear the expense of their own agents

inspecting those records but also attorney for Clark being there since the records disclosed were voluminous. A considerable period of time, perhaps a week or more, would be required to inspect all of the records. The expense involved - that is, paying Clark $70.00 an hour for their attorney, effectively prevented plaintiffs' discovery of these records.

Limitations, if any, on discovery are made in the form of a protective order pursuant to Rule 26(c) which provides in pertinent part as follows:

> ....Upon motion by a party or by the person from whom discovery is sought, and for good cause upon the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (emphasis added)
>
> 2. That the discovery may be had only on specified terms and conditions, including designation of the time or place.

Nor is the discretion provided in Rule 26 to be exercised light. In Blankenship v. Hearst Corporation, 519 F.2d 418 (Ca 9th, 19 at 429, the court stated:

> Under the liberal discovery principles of the Federal Rules defendants were required to carry a heavy burden of showing why discovery was denied.

Under the facts of the present case, the defendants made showing whatsoever.

In re Penn. Cent. Securities Litigation, 560 F.2d 1128 (Ca 3, 1977) the court found it was not an abuse of discretion to order the defendant to call out names and addresses even tho the computer program which would do that would cost the defend

some $16,000.00. The court declined to shift the burden of that program to the plaintiffs. In the present case,both plaintiffs and defendants would share the burden. Under the court's ruling plaintiffs would carry the entire burden including $70.00 per hour for Clark's attorneys. There were no grounds advanced why that should be done.

The trial court refused to rule on plaintiffs' motion for attorney's fees and expenses in connection with several discovery motions. Neither of these discovery motions were opposed. In one, Clark did not appear at all and the order was granted. In the second, Clark merely stipulated they would answer and made no objection.

Rule 37(a-4) provides in pertinent part as follows:

> 4. Award of Expenses of Motion. If the motion is granted, the court may, after opportunity for hearing, require the party or the opponent whose conduct necessitated the motion, or the party or attorney advising such conduct, or both of them, to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances made an award of expenses unjust.

In plaintiffs' motion of July 18, 1977, they moved for an award of $171.38 expenses plus $258.00 attorney's fees in connection with the motion of June 18, 1976, and for the sum of $250.00 attorney's fees in connection with the motion of May 9, 1977. There was no opposition to either motion nor was there any rebuttal to argument that those expenses were not reasonably incurred and in fact the memorandums in support of the two motions took substantially longer than those attorney's fees would justify.

In Humphries Exterminating Co., Inc. v. Poulter, 62 Frd. 392, the district court of Maryland awarded $250.00 attorney's fees of $25.00 an hour plus $17.00 train fare to attend the motion and stated that the expenses would be awarded unless the opposition was just. Since there was no opposition the court erred in failing to rule on plaintiffs' motion. For the reasons stated above, the district court's ruling should be amended.

The court's failure to rule on plaintiffs' demand for production made September 16, 1977, is analogous to the prevention of discovery described above and relates to some of the same documents and also prevented plaintiffs from access to the only records available and relevant to the defects in the machine involved in this case.

POINT V.

THE DISTRICT COURT'S GRANTING OF SUMMARY JUDGMENT BASED ON THE RUNNING OF THE STATUTE OF LIMITATIONS IS IMPROPER AND SHOULD BE REVERSED SINCE FILING THE ACTION WITHIN TWO YEARS AS PROVIDED BY THE UTAH STATUTE OF LIMITATIONS, SECTION 78-12-28, U.C.A. (1953 AS AMENDED) IS NOT A CONDITION PRECEDENT, NOR A LIMITATION UPON THE RIGHT TO MAINTAIN AN ACTION FOR WRONGFUL DEATH, BUT IS MERELY A LIMITATION UPON THE REMEDY WHICH IS TOLLED BY REASON OF INFANCY OR OTHER DISABILITY.

As previously pointed out, defendants Clark and Reynolds are barred from asserting the statute of limitations for failure to properly bring the matter to the court's attention in a timely and appropriate manner. Even had they done so, would be to ask the court to accept new and sweeping doctrine which is inconsistent with the general laws of the United States, the laws of the

State of Utah, and in particular, recent decisions of this Court. To hold that the statute of limitations ran against the five minor Switzer children two years after their father's death when the respective ages were between two years and eight and one-half years, and when there had never been a guardian ad litem or a general guardian appointed in their behalf, would deprive each of them of a vested right in this cause of action, resulting in a denial of due process and equal protection and would be contrary to the clear and unambiguous language of Section 78-12-36(1), U.C.A. (1953, as amended) which provides:

> Effect of Disability. If the person entitled to bring an action other than for the recovery of real property is at the time the cause of action accrued either:
>
> (1) Under the age of majority; or . . .
>
> The time of such disability is not a part of the time limited for the commencement of the action.

The simple, complete and conclusive answer to this contention is found in the very recent decision of this court in Scott v. School Board of Granite School District, 568 P. 2d 746 (Utah 1977). That case involved a high school student who was injured during a shop class while a minor. The student by and through his guardian ad litem brought suit against the school district but the district court granted summary judgment because the student failed to meet the 90-day notice requirements of 63-30-13. In that case, this court cited the infant-tolling provision in Section 78-12-36(1) and stated that:

> A minor is incapable of giving notice by the very virtue of his minority, nor may he bring an action in his own behalf while a minor.

> He simply has no standing by statute and an action by or against a minor requires the appointment of a guardian ad litem.
>
> The parents, or natural guardians, have no specific legal duty to perform and have no responsibility to their minor off-spring other than their moral obligation. Consequently, in matters of this kind, when a parent, natural guardian, fails for one reason or another to give notice, file suit, or otherwise protect the minor's legal interests, the minor is left completely without a remedy. This was undoubtedly one of the prime considerations which prompted the legislature to toll the statute during the minority of a claimant against municipalities. Their reason for not so providing in governmental immunity cases as we are faced with here is entirely unclear However, the general legislative intent to protect the causes of minors is abundantly clear by said amendment and the specific provisions of the general statute of limitations. (568 P.2d at 747-8) (emphasis added).

Then, with a 4 to 1 majority held that:

> Notwithstanding the prior pronouncements of this court, a minor claimant is justly entitled to the protection afforded by said Section 78-12-36(1) U.C.A., 1953, in all cases including notice requirements of the type contained in the Utah Governmental Immunity Act. To hold otherwise is a denial of due process and equal protection.

Applying the decision reached in Scott to the facts of our case, it would be hard not to conclude that the infant toll provisions of Section 78-12-36(1) tolled the statute of limitations as against the minor Switzer children. (Emphasis added)

Moreover, there was no general guardian or guardian ad litem appointed for the minor children until this action was commenced. Therefore, there was no person who could properly bring the action on their behalf.

There are several classifications of guardians. Traditio the natural parent has been referred to as a natural guardian

inherent rights to custody and with certain parental rights and duties with regard to the care of their children. Natural guardians, however, have no right to interfere with the infant's person or property or to bring an action for and in behalf of a minor without statutory court approval.

Title 75-13-3, Utah Code Annotated, before amendment, provided in pertinent part as follows:

> Guardians of property must be appointed by court. No person whether a parent or other person, shall have any power as a guardian of property except by appointment as hereinafter provided.

The statute then provided for appointment of general guardians of the personal property of minors and guardian ad litem to defend the interests of any minor interested in any suit or matter pending therein. See Titles 75-13-5, 75-13-8, 75-13-12, Utah Code Annotated 1953.

Clearly, a general guardian or guardian ad litem would have the necessary statutory authority to bring an action for and in behalf of minor children for the recovery of damages for the wrongful death of their father under Title 78-11-7, Utah Code Annotated 1953.

The state of law in this regard has been preserved in the Utah Uniform Probate Code, Title 75-5-201, which provides in pertinent part as follows:

> Status of Guardian of Minor. - General. A person becomes a guardian of a minor by acceptance of a testamentary appointment or upon appointment by the court. The guardianship status continues until terminated, without regard to the location from time to time of the guardian and minor ward. (Emphasis added)

It is clear that Mrs. Bowles was a natural mother, a nat or parental guardian with rights of custody and control, but w not appointed a general guardian or guardian ad litem with aut to bring an action in behalf of the minor children until Octob 1974, when this action was commenced. She clearly had no righ bring an action on the children's behalf for damages for the w death of their father.

Moreover, it is clear that without specific legislative the right to commence an action vested in the minor children s not be abrogated. Utah Constitution, Article XVI, Sec. 5, read pertinent part as follows:

> The right of action to recover damages for injuries resulting in death shall never be abrogated. . .

With specific regard to wrongful death actions, this cour has held in Seely v. Cowley, 12 Ut.2d 252; 365 P.2d 63, and Pla v. International Smelting Corporation, 61 Ut. 342, 213 P. 187. that the statute of limitations for wrongful death cases is not limitation upon liability but only a limitation upon the remedy and that consequently an action for wrongful death may be broug after the two-year period when there is an applicable statute tolling the running of the limitation period. (Emphasis added)

In Platz, supra, the court held that the statute of limitations was tolled in a wrongful death case where the heir a resident of the Kingdom of Hungary, pursuant to the tolling statute, Section 78-12-39 U.C.A. (1953, as amended), which pro- vides that the statute of limitations is tolled when the perso is an alien subject or a citaizen of another country at war wi the United States. In Seely, supra, the court held that the

statute of limitations in a wrongful death case was tolled by Section 78-12-35 U.C.A. (1953, as amended), which provides that absence of a defendant from the state tolls the statute. In Seely the court stated:

> The question to be determined is whether respondent's absence from the state tolled the provision of Section 78-12-28, since there is no doubt the only action by appellant not heretofore voluntarily dismissed by her was commenced more than two years after the death of appellant's husband.
>
> It is respondent's contention that the provisions of Section 78-12-35 do not apply to a personal representative because the limitation of Section 78-12-28(2) commences to run even though no administrator is appointed for the wrongdoer's estate. These cases held that the limitation of the time in which an action in wrongful death could be commenced was a limitation upon the liability as well as upon the remedy, and, therefore, the period of time in which the action could be commenced could not be extended even though no administrator had been appointed. . . .
>
> It is the appellant's contention that since an administratrix was appointed for the wrongdoer's estate that her absence from the state tolled the limitations of the statute just as such absence would have if the suit was against the wrongdoer instead of his estate. As authority that our court has not held like the authorities upon which respondent relies, that the liability as well as the remedy is limited to a two year period. Appellant cites Platz v. International Smelting Company. In that case, the court held that the statute which tolled the running of the statute of limitations in favor of an alien enemy likewise tolled it against the personal representative of the deceased.
>
> We are, therefor, inclined to view that that respondent's authorities are of no aid in determining our question. Had the two-year limitation in a wrongful death action been considered by this court to be a limitation upon the liability as well as the remedy, the alien heir would have been precluded from bringing her action after the two-year period even though there was a statute tolling the running of the time in favor of an alien enemy. (365 P.2d at p 64). (Emphasis added)

The Platz and Seely cases make it abundantly clear that the commencement of a wrongful death action in the two-year period is not a condition precedent nor a limitation upon the right to maintain such an action and the statute of limitations in Section 78-12-28(2) can be tolled by applicable tolling provisions.

The Platz and Seely decisions are amply supported by analysis of the pertinent Utah statutes and the weight of authority elsewhere.

The Utah wrongful death statute is found in Chapter 11 of the Utah Code Annotated (1953) being Section 78-11-7. This section does not set forth any time within which the action must be commenced.

The statute of limitations is set forth in a separate statute, which is Section 78-12-28, in Chapter 12 of the Utah Code Annotated (1953). Chapter 12 is headed "Limitation of Actions," and Section 78-12-1 of that chapter reads as follows:

> Time for commencement of actions generally. Civil actions can be commenced only within the periods prescribed in this chapter, after the cause of action shall have accrued, except where in special cases a different limitation is prescribed by statute.

Section 78-12-28 of Chapter 12 provides in pertinent part as follows:

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

Therefore, it is clear that the two year limitation period for the commencement of wrongful death actions appears in the chapter of the Code which prescribes the time for commencement of actions generally. The section also applies to

actions other than those for wrongful death. It is purely a statute of limitations which affects the remedy and does not condition or limit the right to recover for wrongful death which is created by Section 78-11-7 of Chapter 11. Hence, Section 78-12-28 is subject to another statute set forth in Chapter 12, which tolls the limitation period in favor of minors, viz. Section 78-12-36, U.C.A. (Emphasis added)

Appellant contends that since the statute of limitations is found at present and in its previous form in the same chapter as the disability tolling statute for minors, they should be construed together. Thus, the remedy is controlled by the statute of limitations but includes and is controlled by the tolling provisions relating to the disability of minors. The Utah Supreme Court has previously held other tolling provisions of Title 78, Chapter 12, U.C.A. (1953, as amended) to apply to the wrongful death statute of limitations. (See Seely v. Cowley, 365 P.2d 63 (Ut 1961) and Platz v. International Smelting Company, 213 P. 187 (Utah 1922). (Emphasis added)

Since the tolling section (78-12-36 U.C.A.) specifically provides that it applies to all types of action other than for the recovery of real property, it must follow that it also applies to a wrongful death action.

Through clear, unambiguous language, the legislature provided that the statute of limitations is tolled for a person who was a minor at the time and when the cause of action accrued.

The United States Supreme Court seems to recognize this fact in Stanton v. Stanton, 421 U.S. 7 (1975) describing the effects

of Section 15-2-1 U.C.A. 1953 amended upon Utah law. The court said:

> This is not to say that § 15-1-1 does not have important effect in application. A "minor" may disaffirm his contracts. §15-2-2. An "infant" must appear in courr by guardian or guardian ad litem. Utah Rule Civ Proc 17(b). A parent has a right of action for injury to, or wrongful death of, " a minor child." §78-11-6. A person "[u]nder the age of majority" is not competent or entitled to serve as an administrator of a decedent's estate, §75-4-4, or as the executor of a decedent's will. §75-3-15(1). The statute of limitations is tolled while a person entitled to bring an action is "[u]nder the age of majority." §78-12-36. Thus, the distinction drawn by §15-2-1 affects other rights and duties. It has pervasive effect, both direct and collateral. (421 U.S. at 17) (emphasis added)

It is evident that as the legislature approached Section 78-12-36 they had the intent to treat a person who is under the age of majority as having a disability and specifically provided for the tolling of the statute of limitations. (See Scott, supra) The statute is not just a random section of the code, but is part of an entire chapter which deals exclusively with the laws governing the statute of limitations for causes of action in the State of Utah. There has been no significant amendments to Title 78, Chapter 12, in the period from 1953 to the present indicating the legislature's approval and satisfaction with the statute.

However, in 1973, the Utah Legislature amended Section 10-7-77, U.C.A., 1953, as it pertains to minors by adding the following:

> If the person for whom a claim is made is a minor, then the claims covered by this section may be so presented within the time limits specified above or within one year after the person reaching the age of majority, whichever is longer. (See 568 P.2d at 747).

The Platz and Seely cases are not only sound decisions but are in accord with the weight of authority. In holding that limitation of action is subject to all exceptions, 132 A.L.R. 292 provides in pertinent part at page 310:

> . . .where the limitation applicable to a wrongful death statute or a survival statute allowing damages for death is a provision of the general statute of limitations, it is subject to all the implied and express exceptions applicable thereto. (emphasis added)

This annotation collects and cites cases from many jurisdictions and includes the Platz case.

The general law on this point is also well stated in Corpus Juris Secundum:

> In many jurisdictions by express statutory enactment, or by judicial construction, where the statute excepts persons laboring under disabilities from its operation, even if not mentioning infants specifically, infants are within the saving clause of the statute, if it is purely a statute of limitations, affecting the remedy and not the right, and the statute does not run against them during such disability, even where such infant has a guardian or trustee who might maintain the action in the infant's name, provided the title or right of action is in the infant. (54 C.J.S., Limitations of Actions, Section 235) (emphasis added)

This reasoning is further strengthened by the reasoning of the long-standing precedent case of Brookshire v. Burkhart, 283 P. 571 (Oklahoma 1929). In that case the court held that since the death statute was in the same chapter with the limitation of actions in general, which was created by the same legislature at the same time, the limitation period prescribed by the death statute was an ordinary statute of limitations and that a general saving provision pertaining to legal disability was applicable to extend the time limitation.

This argument under the Utah statutes is even stronger because of the fact that the right to sue for wrongful death is in an entirely different chapter than the statute of limitations and the disability provisions which are in the same chapter.

In Texas Utilities Co. v. West, 59 S.W. 2d 459 (Tex. Civ. App. 1933) the court considered a case similar to the one at ha In that case the plaintiff brought suit individually and as the legally appointed guardian on behalf of her two children for the wrongful death of their father, D. F. West. Mr. West died on September 30, 1927 and the suit was not brought until January 2 1931. The lower court held the two-year statute of limitations had run against the mother individually, but regarding the suit on behalf of the minors, the court held:

> The cause of action arising from the death of their father was a property right or an asset belonging to the minor plaintiffs, and the trial court held correctly that the suit of the minor plaintiffs was not barred by the limitation. (59 S.W. 2d at 461) (Emphasis added)

Thus the Texas Supreme Court viewed the right of the mino plaintiffs to sue through a guardian ad litem as a vested prope right or asset and was not barred by the statute of limitations.

See also Buss v. Robison, 255 S.W. 2d 339 (Tex. Civ. App. 1952) which cites Texas Utilities Co., supra, and holds that the Texas 2-year statute of limitations for wrongful death actions not bar the cause of action of the minors in that case.

There are other state supreme court decisions which also support to the Utah Supreme Court decisions in Scott, Seely, an Platz, which appellants submit are controlling on this issue.

In Cross v. Pacific Gas & Electric Co., 388 P.2d 353 (Cal. 1964) the California Supreme Court reversed a lower court decision upon facts, statutes, and issues very similar to the present case. (Emphasis added)

In Cross, supra, a mother who had been appointed as guardian for her three minor children, brought suit for the wrongful death of their father, George Cross. Mr. Cross died February 1956 and the suit was not brought until November 1961. In California at that time, there was a one-year statute of limitations for wrongful death actions contained in the wrongful death act which was in Section 377 of the California Code of Civil Procedure and the infant tolling provision was found in Section 340. In answer to the question:

> Was the running of the statute of limitations for wrongful death suspended during the period of plaintiff's minority? (388 P.2d at 345)

the court simply quoted the pertinent sections of their code noted above, and held, yes. Later, in the opinion, the court also held:

> The running of the statute of limitations against adult heirs, therefore, does not effect the rights of minor plaintiffs in a wrongful death action. (388 P.2d at 354)

In Parker v. Chrysler Motors Corporation, 501 P.2d 111, (Nev. 1972), the Supreme Court of Nevada followed the reasoning of the California Supreme Court in Cross, supra. The issue before the court was whether the two-year statute of limitations for wrongful death actions was a bar to an action commenced by the decedent's widow as guardian ad litem for the minor heirs of the decedent in view of the infant disability provision. The court

reversed the lower court's decision and in reference to the min that:

> . . .It is equally clear that the running of the statute of limitations is suspended during the period of their minority. (NRS 11.250(1),(3)) (Emphasis added)

> The California Supreme Court in Cross v. Pac. G. & E. Co., 60 Cal. 2d 690, 36 Cal. Rptr. 321, 388 P.2d 353 (1964) rules on the very poings here presented and contrary to the view taken by our district court. We choose to adopt the reasoning of the Cross decision.

In Sprecher v. Magstadt, 213 N.W.2d 881 (North Dakota 197 the plaintiff filed suit for the wrongful death of her husband, Virgil Sprecher, for herself and as guardian ad litem in behalf her daughter, Kimberly, a minor. Mr. Sprecher died on December 1969, and the suit was not commenced until November 18, 1972. T trial court held that the two-year statute of limitations for wrongful death actions took precedence over the infant tolling provisions and barred recovery of both the mother and child but the Supreme Court of North Dakota reversed, stating:

> We conclude that the provisions of Section 28-01-15 prevail over the provisions of Section 28-01-18(4) and that accordingly the time limitation prescribed in the latter section is suspended during Kimerly's minority.

> The summary judgment of the trial court dismissing the complaint as it relates to Kimberly Dawn Sprecher is reversed and the case is remanded for disposition consistent with this opinion. (213 N.W.2d at 885) (Emphasis added)

In Gaudette v. Webb, 284 N.E.2d 222 (Mass. 1972), the Supreme Court of Massachusetts faced a case similar to the pres one. There the husband died on April 15, 1967, the action of t surviving widow and three minor children was filed May 4, 1970, and the statute of limitations was 2 years. Although Massachus had always interpreted its wrongful death statute of limitation as a limitation upon the right and not merely the remedy, the Court held:

> Upon consideration of the Moragne decision (Moragne v. States Marine Lines, Inc., 398 U.S. 375) and the sound reasoning upon which it is based, we are convinced that the law in this Commonwealth has also evolved to the point where it may now be held that the right to recovery for wrongful death is of common law origin, and we so hold. (Emphasis added)
>
> . . . .
>
> Consequently, our wrongful death statutes will no longer be regarded as "creating the right" to recovery for wrongful death.
>
> . . . .
>
> We further hold that statutes limiting the period for bringing actions for death are to be construed in the same manner as the limitations contained in G.L. c. 260, the general statute of limitations, and that in appropriate cases they may be tolled by the various provisions of G.L. c. 260.
>
> 284 N.E. 2d at 229, 331 - (Citation added)

The court using the above reasoning held that the infant tolling provision found in G. L. c 260 §7, tolled the statute of limitations for the minors in that case and therefore reversed the lower court's dismissal.

For other cases holding that there is a common law right to a wrongful death action, see Barnette v. Butler Aviation International, Inc., 39 N.Y.S. 2d 348 (1977) and Weinraub v. International Banknote Company, Inc., 422 Fed. Sup. 856 (1976).

In Wilbon v. D. F. Bast Company, Inc., 365 N.E. 2d 498 (App. Crt. Ill 1977) the court in a wrongful death action held that the two minor children were to be considered wards of the court whose interest should be specifically protected. The court noted that the 2-year wrongful death statute of limitations is found in Chapter 70, Section 2, and the infant tolling provision

is found in Chapter 83, Section 11.

Then the court held:

> It is an exercise in illogic to assume the legislature enacted section 22 of chapter 83 and then intended to negate it in chapter 70, section 2 . . . (Emphasis added)
>
> In order to be consistent, we must conclude it is necessary for us to read chapter 83, section 11, together with chapter 70 to reach a decision. We believe the intent of the legislature to extend the time to bring an action for persons under 18 years of age, as set forth in section 22 of the Limitations Act, is controlling and overrides section 2 of Chapter 70, for reasons previously discussed. Therefore, we conclude the intent of the legislature, the case law and the public policy of Illinois, require that we reverse the decision of the trial court and remand this case for trial on the merits for the benefit of the two minor children.

These rulings of the California Supreme Court, North Dakota Supreme Court, Nevada Supreme Court and the Supreme Court of Massachusetts, are consistent with the Utah cases of Scott, Seely and Platz in support of the proposition that the wrongful death statute of limitations is tolled by the plaintiff cause of action for recovery.

From the foregoing reasons, the conclusion is inescapable that the Utah Statute of Limitations for wrongful death is an ordinary statute of limitations. It is not a condition of limitation of the right and is tolled during the minority of a plaintiff by the provision of Section 78-12-36, Utah Code Annotated 1953.

POINT VI.

PLAINTIFFS NEED NOT PLEAD FAILURE TO KEEP WORKMEN'S COMPENSATION IN EFFECT, BUT NEED ONLY PLEAD NEGLIGENCE GENERALLY.

In Plaintiffs' complaint it was never specifically alleged that Reynolds failed to keep workmen's compensation insurance in effect as provided by 35-1-46 U.C.A. (1953 as amended).

Plaintiffs did allege, however, that Gordon J. Switzer was employed by Reynolds and that his death occurred in the course of his employment. Plaintiffs' complaint in the first cause of action provides in pertinent part, as follows:

> 3. That defendant BRYCE C. REYNOLDS is a resident of Salt Lake County, State of Utah, and was formerly doing business as Reynolds Sand and Gravel Company at 7600 South 20th East, Salt Lake County, Utah.
>
> 4. That said defendant employed Gordon J. Switzer, now deceased, who was on the 24th day of June, 1963, in the course of his employment, operating a 175A Michigan tractor shovel machine in a westerly direction in Parley's Canyon approximately 15 miles East of Wasatch Boulevard in Salt Lake County, Utah. (Emphasis added).
>
> 5. That the equipment furnished to the said Gordon J. Switzer by the defendant Bryce C. Reynolds was defective, unsafe, inadequately designed, manufactured, maintained and repaired, and said employee was directed to drive the same on a steep downgrade over a distance of approximately 20 miles and on a public highway, contrary to the laws of the State of Utah.

In the answer of Reynolds served January 17, 1975, the pertinent admissions to the first cause of action are as follows:

> 3. Admits the allegations of paragraph 3.
>
> 4. Admits that Gordon J. Switzer, now deceased, was, on the 24th day of June, 1963, employed by said defendant, and that on said date he operated a 175A Michigan tractor shovel machine, but denies each and every other allegation of paragraph 4.

In October 1975 defendant Reynolds served certain interro-
atories on the plaintiffs. Interrogatory No. 1 provided:

> 1. State with particularity the exact act or acts of negligence you claim were committed by defendant Bryce C. Reynolds which resulted in the liability claimed in your complaint.

Plaintiff served answers to said interrogatories and supp-
mented those answers on February 8, 1977. Plaintiffs' answer t-
Interrogatory No. 1, above, was more than a page. Subsection "
of that answer specifically states as follows:

> J. Violation of Utah statute 41-6-111- Coasting Prohibited; 41-6-144 - Vehicle in Unsafe Condition; 41-6-144 - Brake Equipment; 41-6-155 - Requirement That Vehicle be in Safe Mechanical Condition; 35-1-12 - Places of Employment to be Safe; 35-1-46 - Failure to Secure Compensation; 35-1-57 - Non-Compliance - Penalty.

In view of the specific allegation in the complaint that
the injuries arose in the course of Gordon J. Switzer's employ-
and the specific answers to interrogatories referred to above,
Reynolds can hardly state that workmen's compensation was not a
issue in this case.

In view of the provision of Rule 8(a) which provides onl-
that a claim shall state a short and plain statement of the cla-
and in view of the obvious knowledge of the parties that workme-
compensation was an issue, the plaintiffs ought not to be requi-
to plead more fully and Reynolds can hardly claim surprise at t-
late date.

Through an abundence of caution, plaintiffs at the hearin-
of September 16, 1977, moved to amend their complaint to speci-
cally allege failure of defendant Reynolds to secure compensat-
The trial judge never denied that motion.

The provision of Rule 15(a) which provides that leave to amend "shall be freely given when justice so requires" made it a clear abuse of discretion for the trial judge to fail to rule on that motion.

CONCLUSION

Appellants respectfully submit that:

1. There is a genuine issue of fact and the summary judgment granted by the trial court should be set aside.

2. The defendants should be estopped from raising the defense of statute of limitations because of their failure to raise and plead said defense in a timely manner and the judgment of dismissal should be set aside.

3. Plaintiffs' claim has not been discharged in bankruptcy as to defendant Reynolds and the judgment of dismissal should be set aside.

4. Plaintiffs should be allowed reasonable discovery without repressive payment of costs, expenses and counsel fees and the court abused its discretion in failing to award plaintiffs costs and expenses in the depositions of its experts. The trial court's judgment of dismissal should be set aside with appropriate instructions.

5. The plaintiffs' cause of action was tolled by reason of their infancy and the judgment of summary judgment based upon the statute of limitations is improper and should be reversed, since the statute of limitations is not a condition precedent nor a limitation upon the right to maintain an action for wrongful

death and is merely a limitation upon the remedy which is tolled by reason of infancy or other disability.

6. Plaintiffs should not be required to plead failure to maintain workmen's compensation in effect, but rather should only be required to plead negligence generally, but when a motion to amend the complaint by the plaintiffs is made to alleviate any question, it was an abuse of discretion for the trial court to fail to rule upon said motion.

Respectfully Submitted,

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Dated this 6 day of July, 1977.

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