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Willard R. Wood v. Strevell-Paterson Hardware Co. : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT
of the

STATE OF UTAH FILED

MAY 6 - 1957

Clerk, Supreme Court, Utah

WILLARD R. WOOD,
Plaintiff and Respondent,

vs.

STREVELL-PATERSON HARDWARE
COMPANY, a corporation,
Defendant and Appellant

Case No.
8632

UNIVERSITY UTAH

SEP 10 1957

APPELLANT'S BRIEF

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APPELLANT'S BRIEF

STATEMENT OF FACTS

This is an appeal from a judgment rendered on December 18, 1956, in favor of the Plaintiff and against the Defendant, after a trial before the Court without a jury. With one exception, there is no dispute or conflict in the evidence.

On the evening of October 13, 1954, one Richard E. Gore, an employee of Plaintiff, was operating Plaintiff's station wagon and supposedly was on his way from Salt Lake City toward Dugway, Utah, carrying with him a load of supplies for a restaurant operated by the Plaintiff when he was involved in an automobile collision with an automobile owned and being operated by Wayne N. Stoker, who had earlier been seen at Dugway, Utah, and supposedly was pro-

ceeding toward Salt Lake City, where he lived. (R. 10)) The accident occurred shortly before 9:00 p.m. near the turn-off to Salt Air on U. S. Highway 40 between Salt Lake City and Tooele, Utah. (R 5.3-56) Both drivers were killed in the crash; and as far as is known, there are no eye witnesses. The cars apparently met head-on and were both practically demolished. The point of impact was determined by the investigating officers to be three feet to the left of the center line of the highway in respect to vehicles traveling toward Salt Lake City. (Exh. P8).

Wayne N. Stoker was employed as a salesman for Strevell-Paterson Hardware Company and was paid a salary for his services, plus mileage for the use of his car in connection with the employer's business. (R. 40-41) His duties and responsibilities were to call upon government installations in Utah including Dugway Proving Grounds, Tooele Ordnance Depot, and the Deseret Chemical Supply. (R. 43-44) However, on the day of the accident, he had not made any calls at any of the government installations. (R. 8) Nor did he have with him the Company catalogue which contained a list of the some 30,000 odd items offered for sale by Strevells. (R. 45, 46, 72) It would have been extremely difficult to have conducted any business without this catalogue. (R. 48, 49, 72)

There is no evidence as to his activities in the forepart of the day. The first evidence of his whereabouts was given by Mr. Howard Rich, the owner and operator of Los Ricos Station (located about 10 miles east of Dugway) who testified that Mr. Stoker came to his place of business about 4:00 p.m. in the afternoon. Mr. Stoker remained at the Los Ricos Station for approximately an hour during which time he demonstrated a 22-caliber revolver to a sergeant who

purchased the weapon from Mr. Rich. Mr. Rich also testified that he placed an order for merchandise with Mr. Stoker. This is the evidence which is in dispute, Appellant claiming that no order for merchandise was in fact placed with or accepted by Strevell-Paterson Hardware Company. The evidence showed that Mr. Stoker had no responsibility or duty to call upon the Los Ricos Station or to solicit business therefrom, (R. 47, 73) although Appellant Company had accepted orders previously placed by Rich with Stoker and had during the year 1954 filled approximately six such orders from the Los Ricos Station which had been taken by Mr. Stoker. (R. 76) Mr. Rich also testified that he loaned Mr. Stoker \$10.00 (R. 26), (\$8.25 of which was found on Mr. Stoker's person after the collision). (R. 98) The evidence further discloses that Mr. Stoker stopped at a place called Penney's about 20 miles closer to Salt Lake City, where he ate his supper. (R. 8)

Mr. Stoker apparently left the Los Ricos Station between 4:30 and 5:00 p.m. (R. 34) In addition to stopping at Penney's for supper he had traveled approximately 55 - 60 miles toward Salt Lake City when the accident occurred. There is no evidence as to what other activities he engaged in either during the day or in the evening other than what is indicated above.

Insofar as the driver of Plaintiff's automobile is concerned, the evidence discloses that at approximately five minutes to seven on the evening of October 13th, the day of the accident, Richard Gore came to the trailer apartment of Wanda Ball, his cousin. At that time he drove up to the trailer at a great rate of speed. Mrs. Ball testified that his eyes were very bloodshot; that he stammered a little bit; and that she could smell the odor of alcohol on his breath. He

asked her for something to eat and she gave him three cups of black coffee. Thereafter, he advised her that he had to get back to Dugway whereupon she urged him to remain so that her husband could take him out and he said that he would not do so, "If your husband took me back to Dugway, then I would probably lose my job." When he got into the station wagon she observed an empty bottle of whiskey on the seat by him which he tossed out as he drove away. His driving "was quite jumpy" as he left. It was nearly 7:30 p.m. and he was "definitely intoxicated" when he left. (Stipulation of Mrs. Ball's testimony, pp. 1-2).

The parties stipulated that if Plaintiff was entitled to recover the sum of \$1,700.00 was the reasonable value of the station wagon which was demolished in the accident. The Trial Court determined the issues in favor of the Plaintiff and against the Defendant and awarded judgment in that amount. It is from this judgment and the Findings and Conclusions of the Trial Court in favor of the Plaintiff, that the Defendant has appealed.

STATEMENT OF POINTS

Both at the trial and in connection with this appeal, Defendant and Appellant has raised two points to be determined by the Court:

1. Whether the evidence is sufficient to sustain a finding that Wayne N. Stoker was negligent in the operation of his vehicle, which negligence proximately caused the collision; and
2. Whether the evidence is sufficient to sustain a finding that at the time of the accident the deceased, Wayne N.

Stoker was driving an automobile in the course of his employment with the Defendant, Strevell-Paterson Hardware Company.

ARGUMENT

I

THE EVIDENCE IS INSUFFICIENT TO ESTABLISH THAT WAYNE N. STOKER WAS NEGLIGENT PROXIMATELY CAUSING THE COLLISION.

The only evidence which Plaintiff introduced tending to establish any negligence on the part of Wayne N. Stoker was the evidence of the police officers who made the investigation and determined from the debris on the highway that the point of impact was three feet to the left of the center line of the highway considered from the standpoint of cars proceeding eastwardly toward Salt Lake City. Actually, there is no concrete evidence to establish in which direction either car was traveling. It is apparently assumed that because earlier in the evening Stoker was some distance west of the place of the accident and lived in Salt Lake City, while Gore was in Salt Lake City and indicated he was intending to return to Dugway that the Stoker car was proceeding eastwardly toward Salt Lake City while the Plaintiff's station wagon was proceeding westerly toward Dugway when the two vehicles met. Actually, the physical evidence would more forcibly point to the conclusion that Gore was traveling easterly and Stoker westerly since the vehicles were facing generally in such directions after the impact. (Exh. P8) There was no evidence as to the conduct or manner of operation of the automobile driven by Mr. Stoker prior to or at the time of collision.

The Plaintiff at the trial relied upon an alleged presumption that where an accident occurs, the person whose vehicle is proved to have been on the wrong side of the road is presumed to have been negligent until the contrary is shown. There is also a presumption which arises where there are no eye witnesses to an accident that a deceased person was acting reasonably and with due care for his own safety: *Bechard v. Lake*, 136 Me. 385, 11 Atl. 2d 265; *Edwards v. Perley*, 223 Ia. 1119, 274 NW 910.

This rule was recognized by this Court in the case of *Mingus v. Olsson*, (1949) 114 Utah 505, 201 P.2d 495, where the court stated that the presumption that a decedent was in the exercise of due care for his own safety did not apply where "there was positive evidence not only as to the fatal accident itself, but to the conduct of decedent leading up to the fatal accident."

There were no eye witnesses to the accident in the instant case, and therefore the presumption that decedent Wayne N. Stoker acted with due care for his own safety should outweigh or at least negative any alleged presumption that he was negligent by reason of the physical evidence indicating the point of impact to have been on the wrong side of the road if he was traveling easterly.

However, we do not need to argue this point since the matter has been recently determined by this Court in the case of *Fretz v. Anderson* (1956) 5 Utah 2d 200, 300 P.2d 642. There the decedent's automobile was turned over lying on the wrong side of the road when the Plaintiff operating an automobile along the highway in her proper lane collided with it. In discussing the question of whether a presumption exists where the person involved is dead and not available to testify this court held:

“Thus, the questions raised, although not new to our law, present considerations beyond those normal to a situation where the defendant, as driver of an automobile, is alive, and testifies in his own behalf. For example, *respondent cites a number of Utah cases holding that there is a presumption of negligence where the defendant encroaches on the portion of the street reserved for traffic from the opposite direction. Clearly, such a presumption is inapplicable to cases such as this, where the defendant is unable to rebut the presumption, even though the driver of the automobile had he lived, might have been able to produce evidence to show that he was not negligent.*” (Italics added.)

In the light of the foregoing statement of law, it would appear that the trial court could not find that the decedent Wayne N. Stoker was negligent in the operation of his vehicle which proximately caused the collision. As heretofore pointed out there is a total lack of direct evidence of the manner or direction in which Wayne N. Stoker drove his automobile prior to the collision on the day in question. However, the evidence does disclose that at least until approximately 4:30 to 5:00 p.m. when he left the Los Ricos Station he had not had anything intoxicating to drink. (R. 25, 26) Too, the fact that the amount of change in his pocket would be approximately the amount of the loan made to him by Mr. Rich less the cost of his dinner meal which he had at Penney's, would indicate that he had made no other purchases from the time he left Los Ricos Station until the time of the accident some four hours later. On the other hand, we have testimony in the record which might very well indicate that the Plaintiff's employee was negligent in the operation of Plaintiff's station wagon. The fact that Mr. Gore was intoxicated approximately an hour prior to the time of the impact and that he appeared to be in a hurry

when he left the home of his cousin in Salt Lake City would be sufficient evidence from which the court should have determined that Gore was negligent which proximately caused the accident.

Defendant's testimony, while not establishing in which direction either car was proceeding, would negative any presumption which the trial court might attempt to invoke that the Stoker automobile was on the wrong side of the road and therefore that the driver thereof was negligent. The testimony of Mr. Jack Nell was to the effect that as an investigator he went out to the scene of the accident on the morning after it occurred, and observed that at the railroad crossing (approximately 259 feet south of the point of impact) there was a large depression in the highway at a point approximately one foot to the right of the center line for traffic proceeding in an easterly direction. (R. 88, Exh. D 4) This indentation was sufficient to deflect vehicles traveling along the highway at about 50 miles per hour onto the wrong side of the road. (R.89) At the same time, Mr. Nell observed other cars traveling to Salt Lake City and what happened when they struck the rut. He also made tests with his own vehicle traveling at a speed of approximately 50 miles per hour and found that as the left front wheel of the vehicle would hit the depression immediately north of the track, the vehicle would be deflected onto the wrong side of the road a distance of two to four feet. (R. 89-91)

In view of these facts, Appellant contends that even if this Court were to indulge in a presumption that Stoker's vehicle was proceeding easterly and was on the wrong side of the road at the time of impact, such presumption would not justify the further presumption that Stoker was negligent in view of the uncontradicted evidence as to the character-

istics of the highway, the physical condition of the operators of both vehicles, and the general circumstances under which the accident occurred. Certainly, the measurement of three feet from the center line of the highway to the point where the officers determined the impact to have occurred was not a sufficient distance to justify the Court in determining that the driver of either car was any more negligent than the other. The lane for west bound traffic at that point was ten and one-half feet wide so that there still would have been more than six feet of clearance from the point of impact to the edge of the hard surface, plus a width of six feet of solid shoulder onto which the west bound vehicle could have been operated if in fact the other car was proceeding along the wrong side of the road. (Exh. P 8)

The testimony of the police officer was to the effect that the impact between the automobiles was head-on indicating that the vehicles were traveling in opposite directions at 180 degree angles. Therefore, this was not a case where at the last moment either driver had turned abruptly to one side or the other. If the eastbound vehicle had been caused to deviate from a direct course along the highway by the depression in the road at the railroad tracks it would have been traveling on the wrong side of the road for approximately 259 feet, during all of which time it would have been in clear view of the other vehicle proceeding in the opposite direction. On the other hand, if the west bound vehicle was being operated by an intoxicated driver it might well have been weaving from one side of the road to the other so that the other driver in attempting to get out of the way may have turned to the wrong side of the road at a time when the intoxicated driver was making a similar movement with his vehicle thereby causing the two vehicles to crash from

opposite positions. At all events, if the decedent Stoker had been traveling on the wrong side of the road for any appreciable length of time, the decedent Gore would have been negligent in failing to move or to otherwise change the course of his travel so as to avoid the collision. See, *Farrell v. Cameron*, 98 Utah 68, 94 P.2d 1068.

II

THE EVIDENCE IS INSUFFICIENT TO SUSTAIN A FINDING THAT WAYNE N. STOKER WAS OPERATING HIS AUTOMOBILE WITHIN THE COURSE OF HIS EMPLOYMENT AT THE TIME OF THE COLLISION.

The burden was upon the Plaintiff to prove by a preponderance of the evidence that Wayne N. Stoker was, at the time of the accident, operating his motor vehicle within the course and scope of his employment with the Defendant Strevell-Paterson Hardware Company. This we believe the Plaintiff has failed to do. The evidence is wholly lacking as to any services which Stoker performed for and on behalf of his employer on the day of the accident, at least prior to the time he entered the Los Ricos Station at about 4:00 p.m. in the afternoon. The testimony is that it was left primarily to Mr. Stoker's judgment as when and under what circumstances he contacted the government installations to which he was assigned. He might very well be away from his work part of a day. (R. 72) However, the only customers on which he had any duty or responsibility to call were government installations; and the evidence is uncontradicted that he made no contact with or call upon either of those agencies on the day in question. (R. 8) Where he was prior to the time he came to Los Ricos is not known,

but the testimony is that the company would never have authorized a trip from Salt Lake to Willow Springs to make a contact with the Los Ricos Station. (R. 77) In other words, the value of any contact with the Los Ricos Station or any order which might be obtained would not have justified the expense of travel from Salt Lake City to Willow Springs (a distance of approximately 68 miles). As a matter of fact, the evidence discloses that neither Mr. Kuhre the sales manager, nor Mr. Mansell the treasurer of the company had any knowledge that Stoker was calling at the Los Ricos Station or that any orders were being taken by him from Mr. Rich the owner and manager of the station. (R. 44, 73) Only six orders had been taken by Mr. Stoker during the year prior to October 13, 1954, which had been accepted by the company at the time they were turned in without, however, any of the management knowing anything concerning the orders. (R. 76, 77)

While it is true that there is some testimony in the record that an order was actually placed by Mr. Rich at the Los Ricos Station with Mr. Stoker on the afternoon in question, the evidence on this matter is in conflict.

Shortly after the accident in question, Mr. Rich had a conversation with a Mr. David Ellis who was employed as an investigator for the insurance company carrying workmen's compensation insurance for Strevell-Paterson Hardware Company. It was stipulated between the parties that Mr. Ellis, if called as a witness, would testify at the time he talked to Mr. Rich, Mr. Rich told him that on the afternoon of October 13, 1954, Mr. Stoker came to the Los Ricos Station and talked awhile, visiting in the place of business; that during the time he was there Rich gave Mr. Stoker \$57.72 and placed an order for a Smith & Wesson

K-22 revolver which Mr. Stoker agreed to deliver the following day. However, Mr. Rich made no mention to Mr. Ellis about any other items of merchandise being purchased or ordered from Mr. Stoker. The only item referred to and claimed to have been ordered was the Smith & Wesson revolver. (R. 95) However, at the time Mr. Stoker's body was examined immediately following the accident the only money found on his person was the sum of \$8.25, (R. 98). Neither was the purported order for the Smith & Wesson K-22 revolver ever honored or accepted by Strevell-Pater-son Hardware Company nor pressed by Mr. Rich at the Los Ricos Station. (R. 26, 28, 35, 36) It is significant that when Mr. Rich was called as a witness in the instant matter and testified on direct examination, he stated that he had ordered several items of merchandise from Mr. Stoker on the afternoon of October 13th but in no way mentioned that he had ordered the Smith & Wesson K-22 revolver. (R. 18, 23) The reason that Mr. Rich testified he ordered various items of merchandise from Mr. Stoker on the afternoon of the 13th might very well be explained on the basis that in fact the next day following the accident he did place an order by telephone with Strevells which was accepted and filled. (R. 18) Peculiarly enough, this telephoned order did not include any order for a K-22 Smith & Wesson revolver. (Exh. P 5) If Mr. Rich was so anxious to get the revolver immediately that he paid Mr. Stoker for it on the afternoon of the 13th, certainly he would have been just as anxious to have the company send out the revolver the next morning when he telephoned in an order for shells and other merchandise. Likewise, if he had placed the order with Mr. Stoker for the shells and other merchandise on the afternoon of the 13th, and had mentioned that fact the next day in repeating the order, Mr. Boyd who received the telephoned

order would have made some notation to check to see that the alleged order given to Stoker the preceding day had not been filled or turned in. (R. 83) Mr. Boyd testified there was nothing on the written order (Exh. D 10) to indicate, nor could he remember any reference by Mr. Rich to, a previous order. In fact,, Mr. Boyd wrote the order up in the name of Howard Rich whereas Stoker had previously taken orders under the name of Los Ricos Station. If Mr. Rich had told Mr. Boyd about alleged order to Stoker, Mr. Boyd would have in turn placed the telephoned order in the same name. Actually the order from Mr. Rich on October 14th did not come in the morning but came in too late in the day to be filled that day. (R. 84)

The numerous inconsistencies above pointed out make it hard to believe that any order for merchandise was placed by Mr. Rich with Mr. Stoker on the afternoon of the 13th of October. However, even though such an order was placed can it be said that by reason of the isolated, incidental contact by Stoker with an account he had no responsibility or right to contact, under the circumstances here presented resulted in Mr. Stoker being within the course and acting within the scope of his employment not only then but thereafter until he had returned to his home. Mr. Stoker was free to use his own discretion as to when he called upon the customers of the company; but Los Ricos Station was not a known or even recognized customer. When the evidence is undisputed that he made no calls upon his assigned customers on the day in question there can be no presumption arise that he was acting within the course or scope of his employment in driving his vehicle about the country side. Nor did the company pay him or his estate anything on account of the mileage which may have been run on his

automobile on the day in question. (R. 49)

Whether an individual who is operating his own car, is acting in the course of his employment for another must depend upon the circumstances in each individual case. However, certain standards have been laid down by the courts to assist in making this determination. In *P. F. Collier & Son v. Drinkwater*, 81 F2d 200, the court discussed the matter as follows:

“The ground of liability of the master for the negligent act of the servant is not that the servant represents the master in such act of negligence, but that he is conducting his master’s affairs and that the master is bound to see that his affairs are so conducted that others are not injured. *Philadelphia & R. Coal & Iron Co. v. Barrie* (CCA 8th) 179 F. 50, 52, 53. As said by Chief Justice Shaw of Massachusetts in the leading case of *Farwell v. Boston & Worcester R. R. Corp.*, 4 Metc. 49, 38 Am. Dec. 339, 340; ‘It is laid down by Blackstone, that if a servant, by his negligence, does any damage to a stranger, the master shall be answerable for his neglect. But the damage must be done while he is actually employed in the master’s service; otherwise, the servant shall answer for his own misbehavior. 1 Bl. Com. 431; *McManus v. Crickett*, 1 East, 106. This rule is obviously founded on the great principle of social duty, that every man, in the management of his own affairs, whether by himself or by his agents or servants, shall so conduct them as not to injure another; and if he does not, and another there by sustains damage, he shall answer for it.’

“It is in application of this principle that the doctrine respondeat superior is held to apply ‘only when the relation of master and servant is shown to exist between the wrongdoer and the person sought to be charged for the result of some neglect or wrong at the

time and in respect to the very transaction out of which the injury arose." *Wyllie v. Palmer*, 137 N.Y. 248, 33 N.E. 381, 383, 19 L.R.A. 285; *Martin v. Greensboro-Fayetteville Bus Line*, 197 N.C. 720, 150 S.E. 501; *Wilkie v. Stancil*, 196 N.C. 794, 147 S.E. 296.

"And in *Standard Oil Co. v. Parkinson* (CCA 8th) 152 F. 681, 682, the late Judge Walter H. Sanborn laid down a test for the application of the rule respondeat superior, which is an aid to clear thinking in a case such as this. He said: 'The test of one's liability for the act or omission of his alleged servant is his right and power to direct and control his imputed agent in the performance of the causal act or omission at the very instant of the act or neglect. There can be no recovery of a person for the act or omission of his alleged servant under the maxim, "respondeat superior," in the absence of the right and power in the former to command or direct the latter in the performance of the act or omission charged, because in such a case there is no superior to respond.' "

In the case of *Preferred Accident Insurance Company v. Alfred Grasso*, CCA (2) 186 F2d 987, the court held that an employee while driving to work in the garage owned by the employer was not within the course of his employment, although the car was being used for the purpose of enabling the employee to better serve the employer.

In *Cain v. Marguez*, 31 Cal. App. 2d 430, 88 P.2d 200, the court held that an employee driving the employer's automobile to lunch "is not engaged in furthering any end of the employer, and that therefore under such circumstances the servant is not acting within the scope of his employment."

In *Allen v. Ross*, 200 Ark. 104, 138 S.W. 2d 409, the court held that a salesman who was driving the employer's

automobile up and down a street looking for his lady companion was not engaged in the course of his employment even though he had immediately before made a collection for the employer.

In *Postal Telegram-Cable Company v. Thomas*, 83 F.2d 608, the court held that a messenger boy who was driving his mother's automobile to his place of employment to advise his employer that he could not come to work because his bicycle was in the repair shop being repaired (after the boy had driven the car to the bicycle shop to check on the bicycle) was not engaged in the course of his employment. See, also, *McCauley v. Steward*, 63 Ariz. 534, 164 P.2d 465.

In *Blank v. Coffin*, 20 Cal. 2d 457, 117 P.2d 53, (later opinion 126 P.2d 868) the court answered the argument that if the employee had a right to drive the car as he desired and turned in his expense account and mileage to the company, the company would be liable for his acts in operating the company vehicle, as follows:

“Respondent's employees to whom cars were assigned were obligated to turn in weekly reports showing the total mileage travelled and the amount of gasoline and oil consumed for which reimbursement was sought by the employee. They were not required to set forth in said reports where or between which points the car had been driven, and Coffin carefully avoided making any charge against the company for gasoline and oil which he might have consumed for his own pleasure. Appellant argues in effect that nevertheless it would have been feasible for the company to have ascertained the number of miles per gallon of gasoline the coupe made and then to have checked the total mileage as shown by the weekly report with the number of gallons of gasoline charged against the company and

that if it had done so it could have discovered that Coffin was using the car for some purpose other than in the company's business. But admittedly this was not done; and no such discovery was made; nor has appellant called attention to any statutory or judicial rule requiring an employer, in order to protect himself from liability in cases of this type, to adopt or carry on any minute checking system of the kind here suggested. Therefore, since admittedly no such discovery was made, there is nothing upon which to base an inference of permissive use."

In *Bayless v. Mull*, 50 Cal. App. 2d 66, 122 P.2d 608, the employee was a salesman authorized to take the employer's car to show and demonstrate to prospective purchasers. "No restrictions were imposed upon him as to the locality to which he might drive the car nor the manner in which or the length of time he could use it; except that where he expected to be gone for some period of time it was his duty to indicate on the company's bulletin board such fact. On the day of the accident he took the car here involved at 4:30 in the afternoon and made notation of the necessary facts on the bulletin board. As he had a prospective purchaser on 61st Street just off Broadway he drove the car to the prospect's home. There he learned the prospect was not at home but would return later in the evening. He then drove down town and had dinner with a friend who lived on 79th Street just off Broadway. As he planned to return to his prospect's home he offered to take his friend to her home. Accompanied by his passenger he drove down Broadway and passed 61st Street, on which the prospect lived, in order to take his friend to her home on 79th Street before proceeding to the home of his prospect. The accident occurred at 79th Street before proceeding to the home of his prospect. The accident occurred at 79th Street and Broadway, where, as hereto-

fore stated, the Plaintiff was run down in a pedestrian lane crossing Broadway.”

Upon the foregoing facts, the court held that the evidence failed to show a master-servant relationship at the time of the accident.

The most prominent Utah case on the subject is *Saltas v. Affleck*, 99 Utah 65, 102 P.2d 493 where the court held:

“The trial court was not in error in directing the verdict in favor of the defendant because the doctrine of respondeat superior is not applicable. Appellant argues that the question of whether the agent was within the scope of his employment should be submitted to the jury. The employee’s action resulting in the accident was not a mere deviation from the course of the employment as was involved in *Carter v. Bessey*, 97 Utah 427, 93 P.2d 490, in which case this court held that the question should properly be submitted to the jury. See also *Burton v. LaDuke*, 61 Utah 78, 210 P. 978. Here there was a departure from the course of the employment and the employer’s responsibility for the acts of his employee had ceased. When the employee has clearly departed from the scope of his employment there is no question to be submitted to the jury. *Cannon v. Goodyear Tire & Rubber Co.*, 60 Utah 346, 208 P. 519; *Fowkes v. J. I. Case Threshing Machine Co.*, 46 Utah 502, 151 P. 53; *Wright v. Inter-mountain Motorcar Company*, 53 Utah 176, 177 P. 237.”

Defendant respectfully submits that the Plaintiff has failed to sustain the burden of proof devolving upon him to prove by a preponderance of the evidence that the decedent, Wayne N. Stoker, was operating his car within the scope of his employment with the Defendant Company.

CONCLUSION

The burden of proof being upon Plaintiff and Respondent to prove by a preponderance of the evidence not only that Wayne N. Stoker was negligent in the operation of his vehicle, which negligence was the proximate cause of the collision, but also that at the time and place of the accident the said Wayne N. Stoker was acting within the scope of and that the accident arose out of the course of employment of the said Wayne N. Stoker with the Defendant Strevell-Paterson Hardware Company, we submit that the Findings, Conclusions and Judgment of the trial court should be reversed and set aside on the ground that the Plaintiff has failed to sustain such burden either as to the agency or the negligence of the decedent Wayne N. Stoker.

Respectfully submitted,

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