

1960

# Max E. Waddoups v. Richard F. Forbush and Ted Thuet : Brief of Respondent

Utah Supreme Court

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## Recommended Citation

Brief of Respondent, *Waddoups v. Forbush*, No. 9058 (Utah Supreme Court, 1960).  
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**IN THE SUPREME COURT  
of the  
STATE OF UTAH**

**FILED**

MAX E. WADDOUPS,

*Plaintiff and Appellant,*

—VS.—

RICHARD F. FORBUSH and  
TED THUET,

*Defendants and Respondents.*

SEP 8 - 1960

Clerk, Supreme Court, Utah

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**RESPONDENT'S BRIEF**

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# IN THE SUPREME COURT of the STATE OF UTAH

MAX E. WADDOUPS,

*Plaintiff and Appellant,*

—vs.—

RICHARD F. FORBUSH and  
TED THUET,

*Defendants and Respondents.*

Case No. 9058

Case No. 9091

## RESPONDENT'S BRIEF

### STATEMENT OF FACTS

The plaintiff filed an action against Richard F. Forbush and the respondent, Ted Thuet, in connection with an automobile accident that occurred at the intersection of State Street and 46th South in Salt Lake County, State of Utah, on April 13, 1958, (R. 1, 2).

At the pre-trial hearing and pursuant to stipulation of counsel the defendant Thuet made a motion for summary judgment in his favor and against the plaintiff

Waddoups on the ground and for the reason that it affirmatively appeared from the plaintiff's evidence and particularly by his deposition in the case that there was no negligence whatsoever on the part of the defendant Thuet which was or could be a proximate cause of any injury to the plaintiff or the basis of any recovery on his part, and on the further ground and for the further reason that the plaintiff's testimony as shown in his deposition conclusively indicated that the accident was entirely unavoidable on the part of the defendant Thuet, (R. 19). The plaintiff did not offer or ask leave to file any affidavits or to have any other evidence considered in addition to that contained in the plaintiff's deposition. After considering the deposition and statements of counsel, the motion for summary judgment was granted, (R. 22), and the case as to the defendant Thuet was formally dismissed on merits and with prejudice, (R. 27).

The defendant Thuet had filed a counterclaim against the plaintiff and a cross-complaint against the defendant Forbush for damages to his automobile in the accident, (R. 8, 9). At the pre-trial hearing it appeared that the defendant Forbush had taken a release from the defendant Thuet for any personal injuries and for his own deductible interest in the property damage claim, (R. 20, 21). Thereafter the defendant Forbush settled his case against the plaintiff by payment to the plaintiff in the sum of \$10,000.00, and the case as to the defendant Forbush was then dismissed, with rights reserved as against the defendant Thuet, (R. 29). Thereafter, the defendant Forbush paid to the defendant Thuet the

amount due under Thuet's cross-complaint and counter-claim, thus disposing of that phase of the matter.

This appeal is taken from the summary judgment entered in favor of the defendant Thuet and against the plaintiff, (R. 28).

According to the pleadings and the plaintiff's deposition, the plaintiff had been proceeding south on State Street for about a block and a half and during the last half of this distance had been traveling in the inside lane for southbound traffic, (D. 9, 15). The defendant Thuet was proceeding north along State Street in the inside lane for northbound traffic, (D. 15, 16). The plaintiff was probably traveling 40 miles per hour as he approached the intersection, which he stated was normal driving, (D. 13, 14). He intended to make a left turn at the intersection, (D. 15). He slowed down and came to a complete stop in the inside lane to permit the oncoming Thuet vehicle to pass, (D. 16). The plaintiff described the defendant Thuet's speed as being normal and would make no other statement concerning that phase:

"Q. Do you have any opinion or judgment at all, Mr. Waddoups, as to the speed of the Thuet automobile?

A. I wouldn't make a statement — I am a poor judge — if I say 45 miles I might be 20 miles off. I wouldn't make any statement of their speed, no, I couldn't. Normal traffic, I would describe it that way." (D. 18)

The plaintiff stopped because the defendant Thuet

vehicle was so close that in plaintiff's judgment he could not have completed the turn with safety.

"Q. Were you completely stopped when the impact occurred?

A. My foot was on the brake.

I was going south on State Street and signaling this turn, and *it was apparent I did have a tight squeeze, and decided to stop there*, and then I was just—it was so quick—well, seconds or minutes, I don't know, just bang, and I was shaken up, and bang again. (Italics ours.)

Q. The impact, as you remember, happened about the same time you brought your car to a stop; would that be a fair statement?

A. I would say very close. The time element in it, I wouldn't make a statement on that. It is just one of those things I do a thousand times a day. I signaled my turn, *and I couldn't quite make it, and I stopped and then I got hit in the rear.*" (D. 10) (Italics ours.)

\* \* \*

Q. As I understand your testimony, when you neared the intersection there of 46th South, you were going to make a left turn?

A. That is right. That was my intention.

Q. But you said there was a *tight squeeze* and *you had to stop*? (Italics ours.)

A. That is right.

Q. By that, I presume you meant there was northbound cars coming which you thought were too close?

A. That is right.

Q. That is the reason you came to a stop?

A. Yes.

Q. Of course, one of these northbound cars was the Thuet automobile, wasn't it?

A. As I understand.

Q. Do you remember seeing the Thuet automobile before the accident?

A. Yes, I saw it oncoming, in the normal things. To identify the make, and what not, it was just another car coming toward me.

Q. Was there anything about its movements or speed, or anything of that nature —

A. Just the thought struck me there, "*I would play hell getting across the street.*" Because he appeared to step on it to come on through. (Italics ours.)

Q. You figured *he was too close for you to make the turn?*

A. *I felt that, definitely.*" (Italics ours.) (D. 15, 16)

\* \* \*

"Q. When you saw him you figured he was too close for you to go on?

A. Yes. I felt at the ime—it may not have materialized—but *I felt at the time I didn't have time to get across there without a broadside hit, that was it.*" (D. 19) (Italics ours.)

The plaintiff testified after he had brought his car to a stop, he couldn't possibly have made a turn in front



of the Thuet automobile, (D. 19)

“Q. After you had stopped, of course you wouldn’t have any chance to get across?”

A. No, and I didn’t think I was going to get hit from the rear.

\* \* \*

Q. After you once made your stop, you know definitely you couldn’t have gotten across in front of the oncoming vehicle?

A. No, I couldn’t have stopped and gone down to a lower gear. It was just tight.” (D. 19, 20)

It is stated at page 3 of appellant’s brief that the plaintiff observed the defendant’s vehicle when it was approximately a quarter of a block away and decided to stop. However, plaintiff also said when he first observed the Thuet car, “it was just coming into the intersection,” and “I wouldn’t make a statement as to just exactly when I did see him. It was just that subconscious oncoming traffic, a quick *decision I couldn’t make it, so I stopped.*” (D. 16). (Italics ours.)

The plaintiff had signaled for his left turn prior to stopping, (D. 10) After the plaintiff was completely stopped, with his foot on the brake, he was struck from the rear by the Forbush vehicle which had been traveling south on State Street, (D. 10).

It was the force of the impact from the rear that propelled plaintiffs vehicle across the street into the lane of the oncoming Thuet automobile.

“Q. The thing that propelled you across the street was the impact from the rear?

A. That is as I understand it. The right foot was on the brake and I just pulled up to this stop, and it hit me in the back, then hit me in front.” (D. 20)

This was conceded at the pre-trial hearing and also by appellants in their brief because it is stated at page 6 thereof: “The Forbush vehicle struck plaintiff from the rear, thereby moving him into defendant’s lane of traffic.” From the time the plaintiff’s vehicle was struck from the rear by the Forbush vehicle until it was knocked into Thuet’s lane of traffic and the collision with the Thuet vehicle occurred was almost instantaneous. The plaintiff repeatedly in his deposition described the two impacts as “Bang, bang.” (D. 10, 18)

“Q. Let’s see if this describes it: I want to see if I am getting the reaction of what you mean by this ‘bang, bang.’ *You stopped?* (Italics ours)

A. Yes.

Q. You were struck from the rear?

A. Yes.

Q. That is one bang?

A. That is right.

Q. And almost simultaneously with that, you were struck from the front by the other car?

A. That is the way it seemed. The two bangs were one immediately following the other, close—I couldn’t say whether two seconds

afterwards, but I was hit from the rear. I vaguely remember bouncing around in the car, in the front end. \*\*\*" (D. 18)

It is also conceded by the plaintiff in his brief at page 7 that the sequence of the two impacts was simultaneous.

In addition to the Thuet automobile, the plaintiff admitted that there were other northbound cars in the immediate area, (D. 15, 16), but he did not know whether there were any northbound cars to the right of the Thuet automobile and would prefer not to make any statement as to that, (D. 17).

## STATEMENT OF POINTS

### POINT I.

THE COURT PROPERLY GRANTED THE DEFENDANT THUET'S MOTION FOR SUMMARY JUDGMENT.

### POINT II.

THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE PLAINTIFF SUPPORTED AND REQUIRED THE GRANTING OF THE SUMMARY JUDGMENT.

### POINT III.

THE COURT PROPERLY ABSOLVED DEFENDANT AS A MATTER OF LAW FROM ANY NEGLIGENCE WHICH WAS THE PROXIMATE CAUSE OF THE PLAINTIFF'S ACCIDENT.

## ARGUMENT

### POINT I.

THE COURT PROPERLY GRANTED THE DEFENDANT THUET'S MOTION FOR SUMMARY JUDGMENT.

The plaintiff's complaint as against the defendant Thuet had claimed three items of negligence: (a) That said defendant failed to keep a proper lookout; (b) That said defendant drove his vehicle at a speed which was not reasonable under the circumstances then and there existing; (c) That said defendant failed to yield the right of way to plaintiff, (R. 1, 2). It is claimed that no evidence was elicited from the plaintiff regarding the three allegations of negligence alleged in the complaint and that the motion was unsupported by affidavit. However, plaintiff concedes that the deposition is superior to an affidavit because the deponent was subject to cross-examination, and also concedes that the testimony obtained by deposition is competent, relevant and material and may be used in support of or in opposition to a motion for summary judgment. This court has had occasion to hold that the plaintiff's deposition is a proper basis on which to base a motion for summary judgment. See *Tempest v. Richardson*, 299 Pac. (2d) 124, 5 Utah (2d) 174, wherein this court in affirming a summary judgment based upon the plaintiff's deposition, said:

"From what we have said it follows that the court did not err in granting the summary judgment in favor of respondents because appellant's own deposition establishes that respondents did no act which could be reasonably found to have actively contributed towards her injury, but that on the contrary appellant's own act in failing to pay attention to the information vouchsafed that the bathroom was lighted and in spite of that information entering a darkened area without first observing whether it was safe to do so was a

failure on her part to exercise reasonable care to discover and avoid any danger to herself."

The plaintiff did not file or ask leave to file any affidavits or other evidence in opposition to the deposition and was therefore content to have the motion decided upon the basis of the deposition alone. This deposition established that the defendant Thuet did no act which could reasonably have contributed to the plaintiff's injury, and furthermore, conclusively showed that the accident as to the defendant Thuet was wholly unavoidable.

On the question of right of way the deposition conclusively established that the defendant Thuet not only had the right of way, but that the plaintiff recognized this fact and actually stopped and yielded the right of way to the defendant Thuet. The plaintiff testified that he came to a stop because he realized he would have "a tight squeeze"; that he "couldn't quite make it"; that he "would play hell getting across the street"; that he figured the defendant Thuet "was too close for" him "to make the turn"; that he "felt at the time I didn't have time to get across there without a broadside hit." The plaintiff further conceded that after he had stopped, he could not possibly have got across in front of the Thuet vehicle. These facts were all established in the plaintiff's deposition and for the purpose of this motion are uncontroverted. In our opinion it would be impossible to have a more conclusive demonstration from the plaintiff's own testimony that the defendant Thuet had the right of way. Therefore, the plaintiff's own deposition conclusively

refuted one of the three claims of negligence on Thuet's part.

With reference to the allegation in the complaint that Thuet was traveling too fast for existing circumstances, the plaintiff's deposition conclusively established that there was no excessive speed on Thuet's part. Plaintiff admitted he was a poor judge of speed. He wouldn't make any statement as to Thuet's speed except to say: "Normal traffic, I would describe it that way." This testimony, coming from the plaintiff's own mouth, indicates that the defendant was traveling at a normal speed. This is the record on which the plaintiff chose to rely. No contrary affidavits were filed, and the record before this court on appeal conclusively establishes that the defendant Thuet was traveling at a normal rate of speed.

The third allegation in the complaint concerning Thuet's negligence was that he failed to keep a proper lookout. Plaintiff's deposition shows that plaintiff in fact stopped at the intersection to yield the right of way to the defendant Thuet; that after he got stopped, he was struck from the rear and propelled into the path of Thuet. His deposition further conclusively established that from the time the plaintiff was struck in the rear and propelled into Thuet's path was just an instant as the two impacts were simultaneous. Thuet had no warning of any danger until the plaintiff was struck from the rear and propelled into his path. As Thuet proceeded north along the highway, based upon the plaintiff's own testimony, he would have observed the plaintiff stop and

yield the right of way to him and, therefore, had the right to proceed on. By plaintiff's own admission the defendant Thuet could have done nothing thereafter to have avoided the accident because plaintiff was instantaneously propelled into the path of Thuet's car at a time when plaintiff admitted that after having stopped, he could not possibly have gone in front of Thuet's vehicle. We believe that the only inference to be drawn from this testimony is that Thuet was keeping a proper lookout but had no opportunity to avoid the accident. Certainly there is nothing in the plaintiff's deposition to indicate that Thuet was not keeping a proper lookout. Furthermore, from plaintiff's own testimony, improper lookout in any event could not have been the proximate cause of the plaintiff's injury because after plaintiff was struck from the rear and knocked into Thuet's path, the plaintiff concedes that his vehicle could not possibly have gone in front of the Thuet vehicle without being hit.

It is rather unusual in our minds for the plaintiff to contend that the deposition is silent on the items of negligence in view of the admissions made by the plaintiff on page 6 of his brief. Therein it is stated that the deposition established four facts:

- "1. Plaintiff's deposition tended to show that he believed defendant's vehicle was sufficiently close to the intersection to involve an immediate hazard.
2. Plaintiff concluded that he would therefore stop his vehicle before entering the intersection.

3. The Forbush vehicle struck Plaintiff from the rear, thereby moving him into Defendant's lane of traffic.
4. The sequence of impact from both vehicles colliding with Plaintiff was simultaneous."

These conceded facts in and of themselves would require a determination, as a matter of law, that there was no negligence on the part of the defendant Thuet which was or could have been a proximate cause of the plaintiff's injury. Any reading of the plaintiff's deposition would require a determination that the accident as to the defendant Thuet was entirely unavoidable. He was a victim of circumstance. The plaintiff's automobile, through the negligence of another, was suddenly propelled into Thuet's path when by plaintiff's own admission the Thuet automobile was too close to avoid the impact.

Plaintiff complains that summary judgment is a drastic remedy and only to be used sparingly. This may be true, but, as indicated by Judge Crockett in *Richards v. Anderson*, 9 Utah (2d) 17, 337 Pac. (2d) 59:

"\*\*\* It is true that summary judgment is a severe measure which courts should be reluctant to use, and that doubts should be resolved in favor of allowing a full trial of the case. *Yet it does have the salutary purpose of not requiring the time, trouble and expense of trial, when the best showing the plaintiff could make would not entitle him to recover under the law.*" (Italics ours.)

The best showing made by the plaintiff in his deposition against the defendant Thuet would not entitle the



plaintiff to recover against Thuet. This was not only a proper case for the exercise of summary judgment, but seldom could a case be found wherein the plaintiff's own deposition more clearly showed that there was no negligence on the part of Thuet which could be a proximate cause of any damage to the plaintiff.

#### POINT II.

THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE PLAINTIFF SUPPORTED AND REQUIRED THE GRANTING OF THE SUMMARY JUDGMENT.

The plaintiff contends that the court failed to view the evidence in the light most favorable to the plaintiff. With this statement we cannot agree. The court viewed the evidence on the basis of the plaintiff's own testimony as given in his deposition. In fact, as heretofore noted, the plaintiff concedes that his deposition showed the defendant's vehicle was sufficiently close to the intersection to constitute an immediate hazard and that by reason thereof the plaintiff stopped and yielded the right of way to the defendant; that the plaintiff's vehicle was then struck from the rear and moved into Thuet's lane of traffic and was almost instantaneously struck thereafter. This has been our position in the case throughout, and considered with the plaintiff's testimony that after he stopped he definitely couldn't have gotten across in front of the Thuet vehicle, conclusively establishes that the accident as to the defendant Thuet was wholly unavoidable. When a court takes the plaintiff's own version of the accident and gives to it full force and effect, it cannot be said that it failed to view the evidence in the light most

favorable to the plaintiff. This is particularly so when the plaintiff did not see fit to file any affidavits or to have anything considered on the motion other than his own deposition.

### POINT III.

THE COURT PROPERLY ABSOLVED DEFENDANT AS A MATTER OF LAW FROM ANY NEGLIGENCE WHICH WAS THE PROXIMATE CAUSE OF THE PLAINTIFF'S ACCIDENT.

The evidence in the light most favorable to the plaintiff simply showed that the plaintiff recognized Thuet had the right of way, stopped to yield the right of way to Thuet, and after having stopped, was struck from the rear and propelled into Thuet's path; that the two impacts were almost simultaneous, and that after the plaintiff had stopped, his vehicle could not possibly have gone in front of the oncoming Thuet vehicle. This is plaintiff's own testimony. It, therefore, conclusively established that from the time Thuet would have any notice of any danger he had absolutely no opportunity whatsoever to avoid the accident. Here again we see that the plaintiff's testimony conclusively shows that the defendant was not negligent. This was recognized by the plaintiff when he stopped to yield the right of way to Thuet, when he said that Thuet was traveling in a normal manner and at a normal speed, and when he admitted that after having stopped, Thuet could not have avoided hitting him. The deposition conclusively established that there was no negligence on the part of Thuet which was or possibly could have been a proximate cause of the plaintiff's

accident, and furthermore that the accident as to Thuet was entirely unavoidable.

### CONCLUSION

The evidence before the court on Thuet's motion for a summary judgment demanded that a summary judgment be entered in favor of Thuet and against the plaintiff. It is therefore respectfully submitted that the decision of the district court should be affirmed.

Respectfully submitted,

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