

1983

Timothy Leonard Wood, Individually And
Timothyleonard Wood, As Guardian Ad Litem For
Timothy Johnathan Wood, A Minor : Brief of
Appellant

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IN THE SUPREME COURT OF THE
STATE OF UTAH

TIMOTHY LEONARD WOOD,)	
individually and TIMOTHY)	
LEONARD WOOD, as guardian)	
ad litem for TIMOTHY)	
JOHNATHAN WOOD, a minor,)	Supreme Court Docket No.
)	19336
Appellant,)	
vs.)	
WINSTON STRATTON and)	
TRACY STRATTON,)	
Respondents.)	
)	

BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

The Appellant, Timothy Leonard Wood, appeals from summary judgment entered in the Fifth Judicial District Court, State of Utah, in favor of Respondents and dismissing Appellant's Complaint.

DISPOSITION IN THE LOWER COURT

Appellant filed his Complaint and alleged an action in wrongful death. Respondents answered and raised the defense of the Utah Guest Statute. Discovery proceeded and five depositions were taken. On the 25th day of May, 1983,

Respondents filed a Motion for Summary Judgment asking the Court to dismiss Appellant's Complaint. Respondents did not support their motion with affidavits, but simultaneously with the filing of the Motion for Summary Judgment filed a Motion to Publish Depositions. Appellant did not file opposing affidavits, but did file Abstracts of Depositions in Opposition to the Motion for Summary Judgment.

The Court entered summary judgment in favor of Respondents and dismissed Appellant's Complaint.

RELIEF SOUGHT ON APPEAL

The Appellant seeks reversal of the summary judgment and seeks to have the case remanded for further proceedings.

STATEMENT OF THE FACTS

Inasmuch as this appeal is taken from summary ruling in the lower court, no transcript of testimony is available and this statement of facts is supported only by reference to documents in the Court file and depositions relied upon by both parties.

Appellant's minor son sustained personal injuries resulting in death in a one automobile accident which occurred on the 23rd day of April, 1982. (Ruesch depo.,

n. 27, l. 5-12). Respondent, Winston Stratton, was the owner of the automobile involved (Memorandum of Points and Authorities filed by Respondents on the 26th day of June, 1983) and his minor son, Tracy Stratton, was the driver of said automobile. (Gubler depo., p. 40, l. 6-8; Answer to Complaint).

Seven persons occupied the vehicle, one of which was the deceased, Timothy Johnathan Wood. Three in the front and four in the back. Dawnette Gubler was sitting on the console between the driver's seat and the passenger's seat in the front. (Gubler depo., p. 30-31).

The accident occurred on a curve in an asphalt covered road. The vehicle was traveling in a southerly direction in the right lane. (Gubler depo., p. 41, l. 53-54). In the middle of the curve is a depression in the asphalt roadway. The depression is 2½ - 3½ feet deep in the left lane of said road. (Gubler depo., p. 53, l. 2-13).

Respondent, Tracy Stratton, was familiar with said road and dip. (Ha depo., p. 21, l. 11-25; p. 22, l. 1-3; Glazier depo., p. 9, l. 1-14; p. 9, l. 24-25; p. 10, l. 1-4; p. 10, l. 11-17; p. 11, l. 1-11; p. 14, l. 7-11).

On the day of the accident and at the time of the

same, Respondent was driving a Ford Bronco at an estimated speed of 60 - 65 miles per hour (Gubler depo., p. 67, l. 14-22) and the speed limit was 40 miles per hour (Gubler depo., p. 42, l. 17-23).

The speed at which said Respondent was operating said vehicle was such, as the vehicle entered the curve, that the passenger, Gail Ann Ruesch, exclaimed, "Stop, let me out. Let me out." (Ruesch depo., p. 24, l. 16-19). Immediately prior to entering said depression in the roadway, the vehicle was being driven on the right side of the road and then swerved over to the left side and hit the depression at an angle. (Gubler depo., p. 47, l. 12-17). The driver, Tracy Stratton, turned the vehicle into the left lane of traffic while negotiating the curve. (Gubler depo., p. 51, l. 8-25). It is the testimony of Dawnette Gubler that the driver, Respondent, switched lanes to get a better angle on the depression to facilitate greater lift of the vehicle. (Gubler depo., p. 47, l. 12-17; p. 52, l. 1-2). The Bronco then became airborne. (Gubler depo., p. 58, l. 9-17).

After leaving the depression the vehicle traveled the length of a football field. (Gubler depo., p. 67, l. 23-24). The vehicle was swerving from side to side and

and rolled several times. (Gubler depo., p. 43, l. 7-20).

There is some evidence that the young men involved, including the driver, intended to frighten the girls and made plans to do so shortly prior to entering the Bronco vehicle for the drive which resulted in the injuries and death complained of. (Ha depo., p. 16, l. 17-25; p. 17, l. 1-8). That the drive was intended by the boys to frighten the girls is further supported by the testimony of one of the female passengers, Gail Ann Ruesch. (Ruesch depo., p. 36, l. 2-9).

ARGUMENT

POINT I

THE COURT ERRED IN GRANTING RESPONDENTS' MOTION FOR SUMMARY JUDGMENT WHERE GENUINE ISSUES OF FACT EXIST.

Respondents did not support their Motion for Summary Judgment with affidavits and did submit a memorandum in support of the motion and relied upon the depositions of four of the surviving occupants to support their position that the Complaint should be dismissed. Respondents also submitted the Motion for Summary Judgment pursuant to local rule 2.8 and at no time prior to entry of summary judgment requested a hearing on the motion.

Appellant relied upon the depositions to oppose

the motion.

Rule 56(e) of the Utah Rules of Civil Procedure, states in part,

... when a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him. (emphasis added).

Respondents did not support their Motion for Summary Judgment with affidavits. Respondents relied upon the depositions of witnesses to support their motion. A reading of those depositions indicates that there is sufficient evidence for reasonable minds to conclude that Respondent, Tracy Stratton, engaged in willful misconduct which was a proximate cause of the death of Timothy Johnathan Wood.

Rule 56(e), provides that if a Motion for Summary Judgment is supported as provided for by said rule, and if the other parties fail to respond and raise issues of material fact, the Court shall, if appropriate, enter summary judgment against the nonresponding party.

The Respondents, having failed to support their Motion for Summary Judgment with affidavits and having relied upon depositions of witnesses, which will be called by Appellant, summary judgment for Respondents is not appropriate. Those depositions contained testimony and evidence which could allow reasonable minds to conclude that Respondent, Tracy Stratton, engaged in willful misconduct.

As a result of Respondents failing to support their motion with affidavits and indicating their intention to rely upon said depositions, Appellant could reasonably rely upon those depositions to oppose the summary judgment that had been submitted by Respondents.

If the depositions contain testimony which is sufficient to raise material issues of fact, the summary judgment granted to Respondents is inappropriate.

Respondents relied upon the standard of "Willful Misconduct" as set forth by the Utah Supreme Court in Stack vs. Kearnes, Utah, 221 P.2d 594 (1950), at page 597, which is as follows:

The intentional doing of an act or intentional failing to do an act, with knowledge that serious injury is a probable and not merely possible result, or

the intentional doing of an act with wanton and reckless disregard of the possible consequences. It involves deliberate, intentional or wanton conduct in doing or omitting to do an act with knowledge or appreciation that injury is likely to result therefrom.

Appellant agrees with the standard set forth in the Stack case. In that case, at the close of the trial, the jury rendered a verdict of "no cause of action" against the plaintiff. Thereafter, the trial court granted the plaintiff's Motion for a New Trial. At the second trial the jury verdict was in favor of plaintiff.

The Supreme Court concluded that the evidence was sufficient that "... the jury might well infer that the defendant was driving much too fast for existing conditions and further found that the jury had acted properly and sufficient evidence was before the same to conclude that defendant had engaged in willful misconduct.

The facts in the Stack case were that the defendant driver had three (3) other persons in his vehicle initially and started up fast. A passenger remarked "take it easy" and the defendant slowed the vehicle down. Later in the journey defendant was driving "pretty fast" as the car went over a dip, it seemed that defendant temporarily lost control.

of the car. Plaintiff noticed that a female passenger was frightened and requested that defendant slow down. Defendant slowed the vehicle. After discharging a female passenger the defendant drove at a moderate speed and then began to pick up speed as he approached a curve and he accelerated and braked the car at the same time as the car started around the curve. The car skidded around the curve and left the oiled surface. No accident resulted. Again a male passenger asked defendant to slow down. Defendant laughed it off and increased his speed as approaching another curve. As defendant entered the second curve he again braked and accelerated at the same time, the car swerved sideways around the curve, went out of control, swerved to the other side of the road, skidded, hit the bridge abutment and turned over.

The facts in the instant case are similar if not mere egregious. Within a week prior to the accident, respondent, Tracy Stratton, had driven said road and negotiated said depression.

Seven persons were in the automobile at the time of the accident, three in the front seat and four in the back. (Gubler depo., p. 30-31). Dawnette Gubler was

sitting on the console between the driver's seat and the passenger seat in the front. (A seating arrangement which is prohibited by section 41-6-108, U.C.A., (1953, as amended). The driver was exceeding the speed limit by some 20 - 25 miles per hour. One female asked the driver to stop and let her out. In the curve and just before the depression in the road, the driver turned the vehicle into the opposite lane of traffic, passed through the depression and the vehicle became airborne. The driver then lost control and the vehicle rolled several times resulting in the death of Timothy Johnathan Wood and Diane Gubler.

The standard of willful misconduct is set forth in the Stack case in the alternative. The second alternative definition is "... the intentional doing of an act with wanton and reckless disregard of the possible consequences." p. 597.

The intentional acts of the driver, Tracy Stratton, were as follows:

1. Improper loading the vehicle with passengers.
2. Driving on a known curved and dangerous road in excess of a posted speed limit.
3. Switching lanes in a curve.

There is a fourth point which is implicit in the

testimony of the witnesses and that is the driver accelerated and switched lanes intentionally to hit the depression at such an angle as to give his vehicle the greatest lift possible in an attempt to make the vehicle airborne. In other words, the actions of the driver were intended by the driver to cause him to become airborne, i.e. loose control of the vehicle.

Even if the evidence cited from the depositions is disputed, there is sufficient evidence therein, that reasonable minds could conclude that the driver engaged in willful misconduct resulting in death.

POINT II

THE COURT ERRED PROCEDURALLY IN GRANTING SUMMARY JUDGMENT TO RESPONDENTS.

Respondents filed their Motion for Summary Judgment on the 26th day of May, 1983, together with their Memorandum in Support thereof. The motion was submitted under Rule 2.8 and without affidavits.

Respondents' motion was not noticed for hearing by either counsel. On the 7th day of June, 1983, the Court called the matter before the Court. No counsel was present and the matter was passed. On the 8th day of June, 1983,

the Court again called the matter and with no counsel being present a minute entry was made stating, "Court to review and rule."

Prior to the Court ruling thereon, and on the 14th day of June, 1983, in opposition to Respondents' Motion for Summary Judgment, Appellant filed an Abstract of Deposition. On the following day Appellant filed a Request for Hearing. On the 16th day of June, 1983, Appellant filed two more Abstracts of Depositions in opposition. Also on the 16th day of June, 1983, the Court entered summary judgment on behalf of Respondents.

Appellant being unaware that summary judgment had been entered against him, continued to file documents relating to his opposition to Respondents' motion and filed said documents on the 17th day of June, the 21st day of June, and the 22nd day of June, 1983.

The Appellant gives the above recitation to indicate that the file has sufficient documentation therein to establish issues of material fact.

Five depositions have been taken in this case. The deposition of Tracy Stratton was scheduled for June 27, 1983, and had been arranged with the Court Reporter since the last week in April. The deposition of Winston

Stratton is yet to be taken and other discovery may be necessary. The case is not at issue and summary judgment is premature and inappropriate.

When a moving party relies solely upon the depositions of witnesses to support a Motion for Summary Judgment and the depositions themselves contain testimony and evidence sufficient to raise issues of fact, the moving parties are not entitled to summary judgment and summary judgment is not appropriate as contemplated by Rule 56(e) of the Utah Rules of Civil Procedure.

POINT III

THE PARENT, AUTOMOBILE OWNER, HEREIN
IS LIABLE UNDER SECTION 41-2-22 UTAH
CODE ANNOTATED (1953, AS AMENDED).

The Respondents' Answer and Memorandum admits that Winston Stratton is the father of Tracy Stratton and the owner of the automobile in question. In Strange v. Ostlund, (Utah) 594 P.2d 881, the Utah Supreme Court held that Section 41-2-22 does apply in a situation where the willful misconduct of the minor driver is in issue. As indicated by the Strange case, a parent can be found liable for the willful misconduct of the minor driver. Respondents rely on Eckols vs. Anderson, 27 U 2d

74, 493 P.2d 304 to support it's proposition that willful misconduct of a minor driver is not sufficient to impose liability upon the owner. The Eckols opinion was rendered in 1972, whereas the Strange vs. Ostlund opinion was rendered in 1979. The Utah Supreme Court discusses the Eckols opinion in the Strange case and distinguishes the same.

The files and records herein contain sufficient admissions by Respondent, Winston Stratton, to establish that he is the father of Tracy Stratton and the owner of the automobile in question.

Section 41-2-22, U.C.A. (1953, as amended) provides for parental liability under the facts admitted to by Respondent, Winston Stratton, in the event it is found that his son, Tracy Stratton, committed wilful misconduct.

SUMMARY

At the time the District Court entered summary judgment for Respondents, they had submitted only a memorandum and depositions of four witnesses to support their motion. Those depositions contain testimony of witnesses sufficient to allow the trier of fact to reasonably conclude:

that Respondent, Tracy Stratton, while operating a motor vehicle, intentionally engaged in acts or intentionally failed to act, with knowledge that serious injury was the probable and not merely a possible result of his actions. Further, the testimony from those depositions is sufficient to raise material issues of fact as to whether or not Tracy Stratton intentionally acted with wanton and reckless misconduct of the possible consequences. Also reasonable persons could conclude that Tracy Stratton, while driving the vehicle, engaged in activities deliberately, intentionally and with wanton conduct with knowledge or appreciation that injuries were likely to result therefrom.

Rule 56(e) contemplates that the Court, when considering a Motion for Summary Judgment, will review the documents submitted by the moving parties and will grant summary judgment only if said documents support that party's position. When a party moves for summary judgment and supports the same with depositions that contain testimony that will defeat the motion, it is inappropriate for the Court to grant summary judgment. The depositions submitted by respondents were replete with testimony of the willful misconduct of the minor driver.

The Court erred in granting summary judgment when one Abstract of Deposition was filed two days prior to the Court having ruled on the Respondents' motion and when a Request for Hearing was filed one day prior to the ruling.

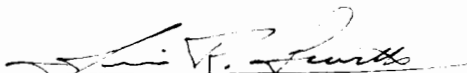
In a wrongful death action extensive discovery is usually in order. With discovery having not been complete at the time the Court entered summary judgment, said ruling was inappropriate.

The parent, automobile owner, is not entitled to summary judgment when testimony was before the Court, which was sufficient to raise material issues of fact regarding the willful misconduct of the minor driver.

CONCLUSION

Based on the foregoing arguments, Appellant respectfully submits that the summary judgment should be reversed and the case remanded to the lower court for further proceedings.

RESPECTFULLY SUBMITTED


Jim R. Scarth
Attorney for Appellant