1983

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

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,

Appellant,

Case No. 19336

vs.

WINSTON STRATTON and TRACY STRATTON,

Respondents.

BRIEF OF RESPONDENTS

Appeal from the Judgment of the Fifth Judicial District Court of Washington County, The Honorable J. Harlan Burns, Judge

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ELLIOTT J. WILLIAMS
BRUCE H. JENSEN
SNOW, CHRISTENSEN & MARTINEAU
Attorneys for Respondents
10 Exchange Place, Eleventh Floor
P.O. Box 3000
Salt Lake City, Utah 84110
Telephone: 521-9000

JIM R. SCARTH
Attorney for Appellant
724 East St. George Boulevard
P.O. Box 577
St. George, Utah 84770
Telephone: 637-4839

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JIM R. SCARTH
Attorney for Appellant
724 East St. George Boulevard
P.O. Box 577
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Telephone: 637-4839

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STATEMENT OF THE CASE

This is an action for wrongful death arising from a single-car accident in Washington County, Utah. Plaintiff Timothy Leonard Wood is the father of Timothy Johnathan Wood, deceased, who died as a result of injuries sustained while riding as a passenger in a vehicle operated by respondent Tracy Stratton and owned by respondent Winston Stratton. The parties will be designated as they appeared below.

DISPOSITION IN THE LOWER COURT

The lower court granted the defendants' joint Motion for Summary Judgment. Judgment was entered in favor of defendants and against the plaintiff on June 16, 1983.

RELIEF SOUGHT ON APPEAL

Defendants ask this Court to affirm the judgment of the lower court.

QUESTION ON APPEAL

Has the plaintiff established, upon the record before this Court, that he presented to the lower court a timely and specific showing of the existence of a genuine issue of material fact as to whether defendants were guilty of willful misconduct which proximately caused the death of plaintiff's decedent.

STATEMENT OF FACTS

For the reasons stated in Point I of the Argument which follows, the only facts discernible from the record on appeal concern the procedural disposition of this case in the lower court.

The single-vehicle accident underlying this action occurred on or about April 23, 1982. [R. 1]. The plaintiff's Complaint was filed on August 6, 1982. [R. 1]. The defendants' Answer, raising inter alia the defense of the Utah Guest Statute, Utah Code Ann. §41-9-1 et seq. (1953), was filed with the lower court on September 23, 1982.

Following extensive discovery, including the taking of five depositions, the defendants filed a joint Motion for

Summary Judgment and Motion to Publish with a supporting Memorandum of Points and Authorities on May 26, 1983. [R. 9-12, 16-19]. The motion and memorandum were served upon counsel for plaintiff one day earlier, on May 25, 1983. [R. 11,20].

Under the calendaring procedures of the lower court, the defendants' motions came on for decision before the Honorable J. Harlan Burns on June 7, 1983.[1] Judge Burns continued the matter to the following day, June 8. [R. 21]. On June 8, Judge Burns took the matter under advisement for ruling; the plaintiff's time for responding to defendants' motions had run without plaintiff having filed any counter-affidavits or materials in opposition to defendants' motions. [R. 22].

The lower court subsequently granted defendants' motions and a proposed form of judgment was mailed by defense counsel to the court and counsel for plaintiff on June 9, 1983, pursuant to Rule 2.9 of the Rules of Practice in the District Courts and Circuit Courts of the State of Utah. [R. 36-38;

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[1] The procedure of the Fifth Judicial District Court is to call up all motions on the court calendar for review and decision at the expiration of the ten day period allowed by Rule 2.8, Rules of Practice in the District Courts of the State of Utah, for filing a response to the motion.

Appendix, p. 1]. No objection to the proposed form of judgment was filed by plaintiff. The lower court signed and entered the Summary Judgment on June 16, 1983. [R. 36-37].

Following receipt of notification of the lower court's decision, counsel for plaintiff belatedly filed a number of materials in opposition to defendants' Motion for Summary Judgment, including so-called "abstracts" of depositions. [R. 24-28]. At no time has counsel for plaintiff denied receipt of defendants' motion and memorandum or the proposed judgment.

The plaintiff's Notice of Appeal was filed July 15, 1983. [R. 63].

ARGUMENT

POINT I.

PLAINTIFF HAS FAILED TO CARRY HIS BURDEN OF SHOWING UPON THE RECORD ON APPEAL THAT THE LOWER COURT ERRED IN GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT.

An appellant has the affirmative burden of showing, upon the record on appeal, how the lower court erred with respect to the order or judgment upon which the appeal is based. Holman v. Sorenson, 556 P.2d 499, 500 (Utah 1976); accord Hamid v. Sew Original, 645 P.2d 496, 497 (Okla. 1982) [Legal error is not presumed from a silent record]. Under Utah law, the judgment of the lower court is presumed correct until

this affirmative burden has been met. Tucker Realty, Inc. v. Nunley, 16 Utah 2d 97, 396 P.2d 410, 412-13 (1964).

An appellant's showing of error must be made solely upon the record before the reviewing court. This Court has consistently followed the well-recognized rule of appellate review that matters not a part of the record before the reviewing court need not, and indeed cannot, be considered in connection with the appeal. Uckerman v. Lincoln National Life Insurance Company, 588 P.2d 142, 144 (Utah 1978); In re Estate of Cluff, 587 P.2d 128, n. 1 (Utah 1978). This rule was most recently reaffirmed by this Court's opinion in Robinson & Wells, P.C. v. Warren, No. 18413 (Slip Opinion, July 28, 1983). Justice Oaks, for a unanimous court, wrote:

> Plaintiff does not contest these propositions, but maintains that the reasonableness of its fees is not before us on this appeal. In arguing this point, both parties encumber their briefs with assertions of facts about what went on in the hearing before the arbitrator for which there is no reference to the record and no support in the record. We ignore all such matters and base our decision solely upon the facts shown in the record.

No. 18413, at p. 2.

Where only a partial record is presented to the reviewing court, it is presumed that the remaining record below supports the judgment of the trial court. Tucker Realty, Inc. v. Nunley, 16 Utah 2d 97, 396 P.2d 410, 413 (1964); Bennett

Leasing Company v. Ellison, 15 Utah 2d 72, 387 P.2d 246, 247 (1963).

Utah law charges the appellant with the responsibility and burden of bringing before the reviewing court a record upon which the merit of his position can be ascertained. Bennett Leasing Company v. Ellison, supra. In the absence of an appellate record sufficient to document the alleged trial court error, the judgment of the lower court is presumed valid and must be sustained.

In Richards v. Anderson, 9 Utah 2d 17, 337 P.2d 59 (1959), this Court affirmed the trial court's summary judgment dismissing the plaintiff's claim for damages arising from an intersection collision. The Court wrote:

> When a summary judgment is granted against a party, he is entitled to have the trial court, and this court on review, consider all of the evidence and every inference fairly to be derived therefrom in the light most favorable to him. This rule, relied upon by the plaintiff, is not very helpful here because the only facts before us are contained in the above-mentioned documents and the recitals in the judgment signed by the trial court based upon the pretrial conference. In the absence of any other record it stands unassailed as reflecting the facts presented to the court. If the plaintiff contends to the contrary, he has the burden of bringing the record here to show otherwise, because the burden is upon the appellant to show error.

337 P.2d at 60 [Footnotes omitted].

Similarly, in Joseph, M.D. v. Markovitz, M.D., 551 P.2d 571 (Ariz. App. 1976), the appellate court was called upon to

review a summary judgment granted by the trial court in favor of the defendants. In affirming the judgment, the Arizona Court of Appeals followed the same rationale relied upon by the Utah court:

> We recognize that a summary judgment must be viewed in a light most favorable to the party against whom it was directed and that it is inappropriate if there is any doubt as to whether an issue of material fact exists. . . . However, when a motion for summary judgment is supported by proof of specific facts which would defeat plaintiff's claim, plaintiff must then come foward to show the existence of a genuine factual issue. . . .
>
> On appeal, an appellant must be able to point to an issue of fact in the record which renders the summary judgment improper. . . . The record here is void of any evidence [supporting plaintiff's allegations].

551 P.2d at 574 [Citations omitted].

In his brief, plaintiff relies upon four depositions taken by these defendants below for the proposition that there exists a material question of fact as to whether the defendants were guilty of willful misconduct in causing the accident. [Brief of Appellant, pp. 2-6]. Despite his alleged reliance on these depositions, plaintiff failed to designate them as a part of the record on appeal. [R. 65-66]. Plaintiff's belated attempt to supplement the record on appeal to include these depositions is not only untimely but ineffective. At this juncture of the proceedings, the record on appeal may only be modified by stipulation of the

parties or court order. Rule 75(h), Utah Rules of Civil Procedure; Tucker Realty, Inc. v. Nunley, 16 Utah 2d 97, 396 P.2d 410,413 (1964). Plaintiff has never obtained an appropriate order and, therefore, the depositions are not a part of the record before this Court.

Since the evidence relied upon by the appellant for his showing of error by the lower court is not a proper part of the record on appeal, Utah case law dictates that the judgment granted these defendants by the trial court be presumed correct, that the record below be presumed to support the trial court's ruling, and that the judgment of the trial court be affirmed.

POINT II.

THE JUDGMENT OF THE LOWER COURT WAS PROPER, GIVEN PLAINTIFF'S FAILURE TO MAKE A SPECIFIC SHOWING TO THE LOWER COURT OF AN ISSUE OF MATERIAL FACT WHICH WOULD PRECLUDE SUMMARY JUDGMENT FOR DEFENDANTS.

Summary judgment is the appropriate remedy to avoid the time, effort and expense of trial, for both the parties and court, where the pleadings, depositions and admissions on file, together with affidavits, if any, show that there is no genuine dispute regarding any material fact and the moving party is entitled to judgment as a matter of law. Holbrook Company v. Adams, 542 P.2d 191 (Utah 1975).

Plaintiff contends on appeal that the lower court erred in granting defendants' Motion for Summary Judgment for three reasons: (1) the motion was premature given the posture of the case [Brief of Appellant, p. 13]; (2) the motion was defective because it was not supported by affidavits [Brief of Appellant, pp. 5-7]; and (3) the case record before the lower court contained material questions of fact on the issue of defendants' willful misconduct [Brief of Appellant, p. 7].

Rule 56, Utah Rules of Civil Procedure, governs the timing and procedure for summary judgment motions. Rule 56(a) provides:

> A party seeking to recover upon a claim, counterclaim or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of twenty days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof. [Emphasis added].

The underscored language refutes plaintiff's first two allegations of error.

A. The Defendants' Motion for Summary Judgment was Timely.

The defendants' Motion for Summary Judgment was not filed until the plaintiff's Complaint had been on file for over nine months, a much longer time period than the twenty days required by Rule 56(a). The motion was therefore timely filed.

The plaintiff impliedly argues that the defendants' motion was also premature because the plaintiff still contemplated doing additional discovery. [Brief of Appellant, pp. 12-13]. Plaintiff's desire to pursue further discovery is not a sufficient ground for denying defendants' motion. Only when an adverse party indicates to the court that he is unable to respond to a motion for summary judgment because of a lack of discovery need further discovery be allowed prior to the trial court ruling on the motion. Strand v. Assoc. Students of the Univ. of Utah, 561 P.2d 191, 193-94 (Utah 1977). If that is the case, the proper procedure is for the adverse party to file with the court an affidavit setting out the reasons why he needs further discovery to oppose the motion. Rule 56(f), Utah Rules of Civil Procedure. No affidavit was filed by counsel for plaintiff in this case. Even where a proper affidavit is filed, it is not an abuse of the court's discretion to deny the party's request for further time to do discovery where the party has had ample time to initiate discovery but has done little or nothing. Kimbley v. City of Green River, 642 P.2d 443, 444, n. 2 (Wyo. 1982) [Plaintiff did not pursue discovery during three months between filing of complaint and defendants' motions for summary judgment]. Plaintiff had ample opportunity to depose defendants or whomever he wished prior to the filing of

defendants' motion, or to file an affidavit telling the trial court why additional time was needed.

B. Defendants' Motion for Summary Judgment was Properly Supported.

The language of Rule 56(a), Utah Rules of Civil Procedure, specifically recognizes that a party may move for summary judgment with or without supporting affidavits. Contrary to plaintiff's assertion, summary judgment may still be appropriate where the moving party relies, as in this case, upon depositions and not affidavits in support of his motion. Clegg v. Lee, 30 Utah 2d 242, 516 P.2d 348, 352 (1973) [Citing United American Life Ins. Co. v. Willey, 21 Utah 2d 279, 444 P.2d 755 (1968)].

C. Plaintiff did not Present Timely Opposition to Defendants' Motion in the Lower Court.

Once a defendant files a motion for summary judgment with supporting evidence challenging the allegations of the complaint, a plaintiff may not rest on his pleading but must respond and set forth specific facts which show that there is a genuine issue for trial. Thornock v. Cook, 604 P.2d 934, 939 (Utah 1979); Rule 56(e), Utah Rules of Civil Procedure. If he fails to so respond, judgment may be entered against him. Id.

The practice of the lower court with respect to motions for summary judgment is governed not only by Rule 56, Utah

Rules of Civil Procedure, but by Rule 2.8, Rules of Practice in the District Courts and Circuit Courts of the State of Utah. Rule 2.8 provides:

> (a) All motions, except in uncontested or ex-parte matters, shall be accompanied by a statement of points and authorities and any affidavits relied upon in support thereof.
>
> (b) The responding party shall file and serve upon all parties within ten (10) days after service of the motion, a statement of answering points and authorities and counter affidavits.
>
> (c) The moving party may serve and file reply points and authorities within five (5) days after service of responding party's points and authorities. Upon the expiration of such five (5) day period to file reply points and authorities, either party may notify the clerk to submit the matter for decision.
>
> (d) Decision shall be rendered without oral argument unless oral argument is requested by the court, in which event the clerk shall set a date and time for argument.
>
> (e) In all cases where the granting of a motion whould dispose of the action on the merits, with prejudice, the party resisting the motion may request oral argument, and such request shall be granted unless the motion has been summarily denied. If no such request is made, oral argument shall be deemed to have been waived.
>
> (f) Provided, however, that any District Court and any Circuit Court by order of the Judge or Judges of the court may exclude that court from the operation of this rule 2.8 in which case an alternative procedure shall be prescribed by written administrative order or rule.

Defendants' Motion for Summary Judgment and Motion to Publish, along with the required supporting Memorandum of

points and Authorities, was served upon counsel for plaintiff by mail on May 25, 1983. Plaintiff has never denied receipt of these documents. Allowing time for mailing, plaintiff's response to the motion and any request for oral argument were due on or before June 7, 1983. Judge Burns calculated the same timetable and placed the matter on his calendar for that day. Judge Burns called the matter on June 7. No response had been filed. Judge Burns then continued the matter to the following day's calendar, by which time any written response would have to have been filed. Plaintiff did not appear on June 8 and no opposing memorandum or counter-affidavits were on file. Judge Burns then took the matter under advisement.

The following day, June 9, 1983, defense counsel was notified that their Motion for Summary Judgment was granted. A form of judgment was prepared and mailed to Judge Burns and plaintiff's counsel that same day. Counsel for plaintiff claims he did not know the motion had been granted, although he has never denied receipt of the proposed form of Judgment with transmittal letter. [Brief of Appellant, p. 12]. Despite this denial, it seems more than a coincidence that plaintiff submitted deposition abstracts, memoranda, notices of deposition, and other materials in opposition to defendants' motion just after he received the summary judgment and transmittal letter.

Plaintiff argues in his brief that, even though he failed to file timely opposition to defendants' motion, Judge Burns erred in granting the motion because a question of material fact concerning the issue of defendants' willful misconduct can be found in the deposition testimony available for review by the lower court. Even assuming arguendo that (1) a question of fact exists upon the deposition testimony, and (2) the depositions are part of the appellate record, plaintiff has still not shown that the lower court erred in granting defendants' motion. The plaintiff, not the trial court, has the responsibility to search the record below and set out, by timely opposition, the facts which show a material issue for trial which precludes summary judgment. A trial court's crowded calendar does not permit it to do the lawyer's work as well as its own, searching hundreds of pages of deposition testimony for evidence to support a plaintiff's case prior to ruling. Plaintiff's argued position not only reads Rule 56(e) out of the Utah Rules of Civil Procedure, but rewards indolence rather than diligence.

POINT III.

UNDER PRESENT UTAH LAW, THE JUDGMENT OF THE LOWER COURT WAS PROPER UPON ANY VIEW OF THE RECORD.

These defendants contend, as argued in the foregoing points, that the plaintiff has waived his right to rely upon

the deposition testimony taken below to contest the lower court's ruling because: (1) the depositions are not properly a part of the record on appeal; and (2) the plaintiff did not rely upon the depositions to formulate a timely opposition to defendants' motion in the lower court. While reasserting this position, defendants feel it is appropriate, given the plaintiff's reference in his brief to selected parts of the deposition testimony, to refer to the depositions to show the Court that Judge Burns' decision is proper and should be affirmed upon any state of the record. The Statement of Facts with accompanying deposition references set forth in plaintiff's brief is incomplete and, as to several matters, inaccurate and misleading. The following is offered to supplement and correct the plaintiff's recitation of the facts.

The accident occurred on Friday, April 23, 1982. At the time of the accident, defendant Tracy Stratton and Timothy Johnathan Wood were students at Hurricane High School. The two boys were good friends. They lifted weights together and belonged to a close circle of friends which included Donette Gubler, Diane Gubler, Gail Ruesch, Hein Ha and Paul Keene. [Deposition of Paul Keene, taken October 18, 1982, pp. 6-7 (hereinafter "Keene"); deposition of Donette Gubler, taken October 18, 1982, pp. 7, 9, 11 (hereinafter "Gubler");

deposition of Gail Ruesch, taken October 18, 1982, pp. 5-6, 8 (hereinafter "Ruesch")].

The day of the accident, Friday, was a slow day at the high school; most of the students were away at a track meet and there was little going on. [Keene, pp. 9-10]. As Tracy Stratton returned from eating lunch at home, Diane Gubler asked him to give her, Donette and Gail a ride in his father's Bronco. Tracy obliged and the group took a short drive down Main Street in Hurricane. [Gubler, pp. 24-27; Ruesch, pp. 10-13]. When they returned to the school, Tracy parked the vehicle and got out to talk to Tim Wood, Paul Keene, Hein Ha and some other boys standing nearby; the girls remained in the Bronco listening to music. [Gubler, p. 29]. The group was bored and so decided to go for a ride. [Keene, pp. 9-10; Gubler, p. 30; Ruesch, p. 11]. Tracy, Tim, Paul and Hein got in the Bronco with the girls and the group of seven teenagers left the high school headed out nearby "airport road." Tracy was driving and Tim was seated in the rear on the passenger side next to his girlfriend, Gail Ruesch. [Ruesch, p. 18].

Airport road is a common place for Hurricane teenagers and other local residents to go for a drive. [Keene, p. 14]. The road runs to the airport through an open, rural area outside the city limits. Out past the airport is an

area known as the "boneyard" where animal carcasses are discarded. [Keene, pp. 9-10]. Many students drive around the dirt roads in the area and it is a popular hunting place. The "boneyard" is also the home of a local legend, the "devil worshipers," and is reputed to be a "scary" place. [Gubler, pp. 22-23, 74; Ruesch, pp. 31-32].

Some distance along the road, out past the city limits, is a gentle S-shaped curve. [Gubler, Ex. 1]. In the middle of the curve lies a depression in the asphalt roadway caused by water runoff and soil erosion. The depression is 2-3 feet deep on the left side (as one drives towards the airport) and tapers off towards the right. [Gubler, pp. 41, 53-54]. The depression or "bump" had been in the roadway sometime prior to April 23, 1982, and both students and community residents have been known to "bounce" their cars a little as they went through it. [Gubler, pp. 20-21, 48, 73; Deposition of Hein Ha, taken October 18, 1982, pp. 15, 20 (hereinafter "Ha")]. There were several such depressions along this road, some worse than the one involved in the accident. [Gubler, p. 73]. All of the passengers in the Bronco, with the exception of Donette Gubler and Gail Ruesch, were familiar with the road and had been through the bump prior to April 23, 1982. [Keene, p. 12; Ha, p. 13; Gubler, pp. 20-21; Ruesch, p. 19].

The accident occurred as Tracy Stratton drove the Bronco through the bump in the curve. The weight of the fully loaded vehicle and its speed caused it to bounce as it came out of the depression and the vehicle slid into gravel on the shoulder of the road. Tracy tried to regain control of the vehicle and successfully pulled it back onto the road surface, but the vehicle then skidded again and rolled over, finally stopping some distance from the curve. Tracy was not intoxicated at the time, and none of the passengers had paid him for the ride. [Keene, p. 25; Gubler, p. 38].

The depositions do not support several assertions made in plaintiff's Statement of Facts. Contrary to plaintiff's representation, Donette Gubler's deposition testimony does not actually establish a speed estimate of 60-65 miles per hour. [Brief of Appellant, p. 4].

> Q. When you testified with respect to a speed estimate of 60 to 65, that is just a guess isn't it?
>
> A. Yes. It's from what other people say, because personally, myself I really don't know.
>
> Q. You have no idea whatsoever of what his speed was just prior to the time he hit the dip?
>
> A. Right. So it doesn't give me the right to say how fast. I don't know.
>
> Q. In fact, from the time you crossed the bridge up until the moment that you crashed, you really have no recollection of your own whatsoever, do you?
>
> A. No, I don't. [Gubler, p. 76, ll. 18-25, p. 77, ll. 1-4].

Plaintiff correctly states Gail Ruesch's claim that she asked to be let out of the Bronco as they approached the bump. [Brief of Appellant, p. 4]. However, plaintiff omits Tim Wood's calm response to his girlfriend's alleged hysterics.

> Only Tim heard that, I think. Donette said she heard something about that too. And he goes, It's okay.
>
> Q. Who said, It's okay?
>
> A. Tim said, It's okay. It's okay. Then we hit the bump, and everybody was laughing, like.
>
> * * *
>
> Q. Did he say it in an excited manner, or did he say it to calm you down, or what was the tone of his voice.
>
> A. Like, It's okay. Now what does that mean?
>
> Q. It was a no-big-deal "It's okay"?
>
> A. Yes.

[Ruesch, p. 24, ll. 20-24, p. 26, ll. 11-15].

Most importantly, there is no evidence, nor any permissible inference from the evidence, that Tracy Stratton intended to frighten anyone, least of all Tim Wood, by trying to get his vehicle airborne through the dip. Plaintiff states in his brief: "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." [Brief of Appellant, p. 5]. The testimony cited in support of this statement says nothing more than that the football players at Hurricane High School had talked during the preceding week about scaring new cheerleaders by taking them out to the "boneyard" at night to visit the "devil worshippers." [Ha, p. 16-17]. That hardly equates with a plan conceived by Tracy, Tim, Hein and Paul, just before the accident to frighten these particular girls by flying the Bronco through the dip in the airport road. Plaintiff's stretch to prove an intent to harm on Tracy's part is, however, understandable. As will be shown, without such proof plaintiff's claim fails as a matter of law under the Utah Guest Statute and its supporting case law.

The Utah Guest Statute, Utah Code Ann. §41-9-1 et seq. (1953), bars any right of recovery against the driver or owner of a motor vehicle for the death or injury of a non-paying passenger, unless the claimant can establish the driver was intoxicated or guilty of willful misconduct and that such was the proximate cause of the injury or death. The guest statute has been repeatedly upheld as constitutional by both the Utah and United States Supreme Courts. Cannon v. Oviatt, 520 P.2d 883 (Utah 1974), cert. den. 419 U.S. 810, reh. den. 419 U.S. 1060. It is undisputed that

Timothy Johnathan Wood was a "guest" in the Stratton vehicle at the time of the accident and that Tracy Stratton was not intoxicated. Therefore, unless the plaintiffs can establish that Tracy Stratton was guilty of "willful misconduct" the defendants are entitled to judgment as a matter of law.

The Utah Guest Statute is the established law of this state and any exceptions to its general application are to be narrowly construed. Utah Code Ann. §68-3-2 (1953). Consistent with this policy, the Utah Supreme Court has interpreted the "willful misconduct" exception of the Guest Statute as having a very limited application. The standard for determining what acts constitute "willful misconduct" was set forth by the Utah Supreme Court in Stack v. Kearnes, 221 P.2d 594 (Utah 1950), and has been consistently followed since. In that case the court approved instructions defining "willful misconduct" as:

> [T]he 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.

221 P.2d at 597.

The stated test requires that the act be intentional and done with actual knowledge that the probable result will be

serious injury. Gross negligence will not suffice, nor will even a "rash inadvertence to consequences." State v. Berchtold, 11 Utah 2d 208, 357 P.2d 183, 187 (1960).

The application of this strict standard is best demonstrated by Mukasey v. Aaron, 20 Utah 2d 383, 438 P.2d 702 (1968), a case which closely parallels the case at hand. In Mukasey, the plaintiff-passenger was injured when the car in which he was riding failed to negotiate a curve and overturned. Weather conditions and visibility were good. The plaintiff claimed that the defendant-driver was guilty of willful misconduct in approaching the curve at 50 miles per hour without maintaining a proper lookout and in failing to observe that the curve could not be negotiated at that rate of speed. 483 P.2d at 703. The Supreme Court affirmed the summary judgment granted the defendant by the lower court, agreeing that the evidence demonstrated nothing more than simple negligence and that there was no issue of willful misconduct for the jury. 438 P.2d at 704.

Similarly, there is no evidence in this case which would support a finding of willful misconduct against Tracy Stratton under the standards enunciated by the Utah Supreme Court. Nothing in the record suggests that Tracy was even aware that driving through the depression with a loaded vehicle might result in serious injury to his passengers; he

had been along that part of the road before and through the bump without accident or injury. He certainly did not intend or wish to harm anyone, least of all these close school friends. At most, he is guilty of a mistake of judgment in failing to realize that the added weight of his additional passengers would cause a problem while going through the depression. This oversight, although regrettable, certainly does not rise above the level of simple negligence.[2]

CONCLUSION

The plaintiff has not met his affirmative burden of demonstrating, upon the record properly before this Court, that the lower court erred in granting judgment in favor of these defendants. Indeed, plaintiff did not even attempt to make a timely showing to the lower court of a remaining issue of material fact which would preclude summary judgment for the defendants. Justice is not served by allowing the plain-

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[2] The plaintiff's reliance upon Stack v. Kearnes, supra, to suggest otherwise is misplaced. The defendant's conduct in that case included a late-night, high-speed race through a residential section of Salt Lake City, "stunt-driving", and "laughing off" repeated requests from his passengers to slow his speed, choosing instead to "pour it on". 221 P.2d at 596-97.

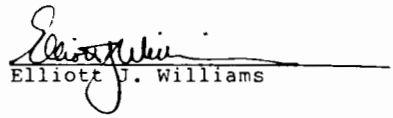
tiff to repeatedly ignore the procedural rules established by this Court to the prejudice of the defendants.

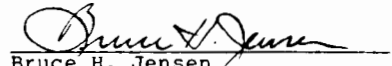
For the foregoing reasons, respondents Winston Stratton and Tracy Stratton requestfully urge this Court to affirm the judgment of the lower court.

DATED this 13TH day of October, 1983.

Respectfully submitted,

SNOW, CHRISTENSEN & MARTINEAU

By 
Elliott J. Williams

By 
Bruce H. Jensen
Attorneys for Respondents

APPENDIX

LAW OFFICES
SNOW, CHRISTENSEN & MARTINEAU
10 EXCHANGE PLACE ELEVENTH FLOOR
POST OFFICE BOX 3000
SALT LAKE CITY UTAH 84110
TELEPHONE (801) 521-9000
TELECOPIER (801) 363-0400

HAROLD G. CHRISTENSEN
REED L. MARTINEAU
STUART L. POELMAN
RAYMOND M. BERRY
H. JAMES CLEGG
MERLIN R. LYBBERT
DAVID W. SLAGLE
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PAMELA G. HEFFERNAN
DAVID W. SLAUGHTER
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PATRICIA ARENT MUCHEEN

June 9, 1983

The Honorable J. Harlan Burns
District Judge
Fifth Judicial District Court
220 North 200 East
St. George, Utah 84770

Re: Timothy Leonard Wood, et al. v. Winston Stratton, et al.
Civil No. 8594, Washington County

Dear Judge Burns:

Enclosed please find the Summary Judgment which we have prepared in the above-capitioned matter, pursuant to your directions. A copy has been submitted to Mr. Scarth pursuant to Rule 2.9. We would appreciate it if the Clerk's office would notify us as to the date the Summary Judgment is entered; a self-addressed postcard is enclosed for that purpose.

We appreciate your cooperation in this matter.

Very truly yours,

SNOW, CHRISTENSEN & MARTINEAU

Bruce H. Jensen

Bruce H. Jensen

BHJ:pw

Enclosure

cc: Jim R. Scarth, Esq.

APPENDIX

CERTIFICATE OF MAILING

I hereby certify that I mailed two (2) true and correct copies of the foregoing Brief of Respondent, postage pre-paid to:

Jim R. Scarth
Attorney for Appellant
724 East St. George Boulevard
P.O. Box 577
St. George, Utah 84770

On the 13th day of October, 1983.

Jill Robison