

1940

# Mary A. Harman v. Albert Yeager and May C. Yeager : Petition for Rehearing

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

MARY A. HARMAN,

Plaintiff and Respondent,

-vs-

ALBERT YEAGER and MAY C. YEAGER,  
his wife, et al.,  
Defendants and Appellants.

PETITION FOR REINSTATEMENT  
OF APPEAL.

FILED  
JUN 10 1940  
6244  
CLERK OF SUPREME COURT

Come now the defendants and appellants in the above entitled cause and respectfully petition the above entitled court to reinstate the appeal which was heretofore and on the 31st day of May, 1940, dismissed by said court on motion of plaintiff and respondent, and respectfully represents as follows, to-wit:

1. That the motion upon which the order dismissing said appeal was made, was not served and filed in accordance with the statutes of Utah and the rules of the Supreme Court in this: that the notice of motion was served upon counsel for defendants and appellants on the afternoon of Saturday, May 25th, 1940, and said motion was set for hearing on Monday, the 27th day of May, 1940, being a one (1) day notice, whereas said notice purported to be a two (2) day notice.
2. That the assignments of error which the plaintiff and respondent were not served and filed within the time prescribed by the rules of the Supreme Court, were served and filed within said time and that said plaintiff and respondent through counsel acknowledged receipt of said assignments of error within said period.
3. That the plaintiff and respondent has waived any objection to the assignments of error and the time for filing thereof by failing to make timely objection thereto, and by waiting approximately two and one-half (2½) months after filing of said assignments of error, within which to object thereto and by waiting until the defendants and appellants were put to the expense of writing and filing a written brief before making objections thereto.

4. That the defendants and appellants are desirous of presenting authorities in support of their position that the assignments of error were filed within the proper time and in support of their position that no proper notice was given to defendants and appellants of the motion to dismiss the appeal.

5. That the files and records of the above entitled cause show on their face that said assignments of error were served and filed within the proper time.

6. That the plaintiff and respondent in serving and filing said notice of motion to dismiss the appeal did not comply with the rules of the above entitled court and particularly rule number fourteen (14) thereof, paragraph two (2) thereof, in this: that said motion to dismiss was not made upon five (5) days notice to opposing counsel and the same was not heard on the first day of any session of said court, and that said motion and copy of notice thereof was not filed with the clerk five (5) days before the opening day of the session at which the motion is to be presented.

7. That defendants and appellants are anxious to have said cause heard on the merits thereof and that if any violation of a rule of the above entitled court has occurred that said defendants and appellants be granted leave to amend and rectify any such error as provided in the rules of said court.

The defendants and appellants will base their petition for reinstatement of said appeal on the files and records of the above entitled cause and upon authorities to be presented and upon affidavits, and hereby tender any costs incident to the reinstatement of said appeal.

WHEREFORE, defendants and appellants pray that the above entitled court set a day certain for the hearing of this petition, and that upon the hearing thereof, said appeal be reinstated and that the court enter its further orders in said cause as will be just, reasonable and equitable in the premises.

Dated this 8th day of June, 1940.

CERTIFICATE OF MERITS

Comes now F. Henri Henried, counsel for defendants and appellants, and states that he has examined the record and authorities and rules governing in the above cause; that he verily believes that defendants and appellants have meritorious cause and grounds for reinstatement of appeal; that he and his clients are desirous of having said cause heard on its merits; that this petition is not filed for the purpose of delay.

F. Henri Henried



IN THE SUPREME COURT OF THE STATE OF UTAH

MARY A. HANMAN,

Plaintiff and Respondent,

- vs -

ALBERT YEAGER and MAY C. YEAGER,  
his wife, et al,

Defendants and Appellants.

AFFIDAVIT

STATE OF UTAH )  
                  )SS  
COUNTY OF SALT LAKE)

P. HENRI HENRIOD, being first duly sworn deposes and says:  
That he is attorney for defendants and appellants; that on  
March 12, 1940, he personally loaned to Mr. P. G. Ellis, counsel  
for plaintiff and respondent, the transcript which defendants and  
appellants, at their expense, had prepared; that at said time af-  
fiant left a copy of the assignments of error with Mr. Ellis, less  
interlineations in ink in line 2 and in Judge's certificate; that  
thereafter and on March 30, 1940, said assignments of error were  
filed with the transcript in the above cause in the Supreme Court  
of Utah and are now on file therein.

Subscribed and sworn to before me this \_\_\_\_\_ day,

Notary Public residing at \_\_\_\_\_

My Commission Expires:

Verified

The undersigned recollects that the foregoing bill of exception  
was served upon him on March 12, 1940, and to his best recollection  
and moral certainty the last page numbered 38 was contained therein,  
except he believes that the interlineation in ink in line 2 thereof,  
and those in the Judge's certificate at the bottom of said page  
were then not contained therein.

June 7th, 1940.

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P. G. Ellis