

1951

# Lawrence Migliaccio v. Frank Davis, Sally Davis and John B. Davis : Reply to Petition for Rehearing

Utah Supreme Court

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Lewis Larson; Attorney for Respondents;

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**IN THE SUPREME COURT  
of the  
STATE OF UTAH**

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**LAWRENCE MIGLIACCIO,**  
*Plaintiff and Appellant.*

**vs.**

Case No. 7412

**FRANK DAVIS, SALLY DAVIS, his  
wife, and JOHN B. DAVIS,**  
*Defendants and Respondents.*

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**REPLY TO PETITION FOR REHEARING**

**LEWIS LARSON,**  
Manti, Utah,  
*Attorney for Respondents,*  
**Frank Davis and Sally Davis**

**FILED**

**JUL 23 1951**

**Supreme Court, Utah**

## TABLE OF CONTENTS

*Reply To Petition for Rehearing*

*Reply Brief of Frank Davis and Sally Davis*

## INDEX OF CASES CITED

	Page
Cordner vs. Cordner, 91 Utah 474, 64 Pac. 2d. 828. ....	7
Cummings vs. Nielson, 42 Utah 157, 129 Pac. 619. ....	4
Furnstermaker vs. Tribune Publishing Co., 12 Utah 439, 43 Pac. 112. ....	3
Gas Products Co. vs. Rankin, 63 Mont. 372, 207 Pac. 993, 24 A. L. R. 294 ....	6
Re: Jessup, 81 Cal. 408, 21 Pac. 976, 22 Pac. 742, 1028; 6 L.R.A. 594. ....	3
Peabody Coal Co. vs. Northwestern El. R. Co., 230 Ill. 214, 82 NE 573. ....	6
Western Union Telegraph Co. vs. Green, 153 Tenn. 59, 281 SW 778, 48 A. L. R. 301 ....	3

## TEXTS CITED

3 Am. Jur. page 346, paragraph 798. ....	2 and 3
3 Am. Jur. page 349, paragraph 805. ....	6
4 C. J. page 632, paragraph 2498. ....	3
4 C. J. page 635, paragraph 2507. ....	4
4 C. J. page 641, paragraph 2527. ....	6
35 L.R.A. 618 ....	3
45 Pac. 1097 ....	3
13 Utah 532 ....	3

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**REPLY TO PETITION FOR REHEARING**

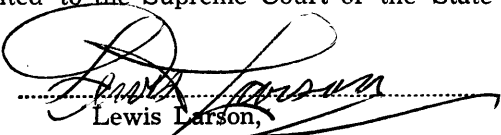
Come now Frank Davis and Sally Davis, his wife, and for Reply to Appellant's Petition for Rehearing, allege:

1. Respondents deny each and every allegation in said Petition for Rehearing contained.

**FOR FURTHER AND SEPARATE AFFIRMATIVE DEFENSE**, these Respondents allege:

1. That said Petition for Rehearing does not state facts sufficient to constitute valid grounds for a rehearing.

2. That the apparent purpose of said Petition is an attempt to gamble on the question of what a Court differently constituted from that of the Court that rendered the decision, might do, which is not permissible. The Justice who wrote the opinion in this particular case is George W. Latimer. He is no longer a member of this Court. Chief Justice Pratt is no longer a member of this court. J. Allan Crockett and F. Henri Henroid are new members, having been elected and appointed, respectively, since this case was presented to the Supreme Court of the State of Utah.

  
.....  
Lewis Larson,

Attorney for Respondents,  
Frank Davis and Sally Davis.

**IN THE SUPREME COURT  
of the  
STATE OF UTAH**

---

LAWRENCE MIGLIACCIO

*Plaintiff and Appellant,*

vs.

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REPLY BRIEF OF FRANK DAVIS and SALLY DAVIS

The Petition of Lawrence Migliaccio for Rehearing and the Brief in support thereof wholly fail to show that some question decisive of the case and duly submitted by counsel, has been overlooked, or that court has based the decision on a wrong principle of law, and said Petition and Brief wholly fail to show a case for rehearing. That is, it does not appear that the judgment was erroneous or that the Court made a mistake of law, or had a misunderstanding of the facts. But, on the contrary, it is a mere re-statement of the contentions made in the argument of the case before this Court heretofore and contained in the Brief of Appellant's counsel, prior to the submission of the case for argument to this Court. And even the statutory certificate of counsel is omitted.

GROUND FOR REHEARING. General Rule.

In 3 American Jurisprudence, title Appeal and Error,

page 346, paragraph 798, it is said:

“The general rule is that a rehearing will not be granted unless it is shown either that some question decisive of the case and duly submitted by counsel, has been overlooked, (Note 18, citing authorities,) or that the Court has based the decision on a wrong principle of law.” (Note 19, citing cases, among them *Furnstermaker vs. Tribune Publishing Company*, 12 Utah, 439; 43 Pac. 112.)

On Rehearing, in 13 Utah, 532, 45 Pac. 1097, 35 L. R. A. 618:

“A case for action must be shown. (Note 20, citing *Western Union Telegraph Company vs Green*, 153 Tenn. 59, 281 SW 778, 48 A. L. R. 301.) That is, it must appear that the judgment was erroneous.” (Note 1, citing cases in support thereof). “The Court must be satisfied that owing to a mistake of law or misunderstanding of facts, its decision has done an injustice in the particular case, or that the case is one where the principle involved is important and a serious doubt exists as to the correctness of the decision.” (Note 2, citing cases in support thereof.)

Re: Jessup,  
81 Cal. 408,  
21 Pac. 976,  
22 Pac. 742, 1028,  
6 L. R. A. 594.

In 4 C. J. page 632, paragraph 2498, it is said:

“A rehearing will be granted if the Court has overlooked material points or decisive authorities duly submitted by counsel, (Note 7, citing among others,

Utah cases,) or has failed to consider a statute controlling the case, (Note 8) which would have required a different judgment from that rendered. (Note 9) But a petition for a rehearing, suggesting nothing that has not been fully considered by the court in rendering its decision, (Note 10) or which suggests merely immaterial questions as having been overlooked (Note 11) will be denied."

In 4 C. J. page 635, paragraph 2507, it is said:

"In stating the facts the petition should not proceed to give further reasons in support of the case made in the original brief, and an application which is in form a mere argument or brief cannot be considered by the court. (Note 33, citing many cases.) However, while the power to rehear appeals is comparatively seldom exercised, the Appellate Courts in most jurisdictions undoubtedly have power to grant rehearings and will do so under proper circumstances. (Note 2, citing many cases. Among them the case of Cummings vs. Nielson, 42 Utah 157, 129 Pac. 619, in which case Judge Frick, on page 624, under syllabus 11, discusses the question of applications for rehearing.)

He says:

"We desire to add a word in conclusion respecting the numerous applications for rehearing in this court. To make an application for a rehearing is a matter of right, and we have no desire to discourage the practice of filing petitions for rehearings in proper

cases. When this court, however, has considered and decided all of the material questions involved in a case, a rehearing should not be applied for, unless we have misconstrued or overlooked some material fact or facts, or have overlooked some statute or decision which may affect the result, or that we have based the decision on some wrong principle of law, or have either misapplied or overlooked something which materially affects the result. In this case nothing was done or attempted by counsel, except to reargue the very propositions we had fully considered and decided. If we should write opinions on all the petitions for rehearings filed, we would have to devote a very large portion of our time in answering counsel's contentions a second time, and, if we should grant rehearings because they are demanded, we should do nothing else save to write and rewrite opinions in a few cases. Let it again be said that it is conceded, as a matter of course, that we cannot convince losing counsel that their contentions should not prevail, but in making this concession let it also be remembered that we, and not counsel, must ultimately assume all responsibility with respect to whether our conclusions are sound or unsound. Our endeavor is to determine all cases correctly upon the law and the facts, and, if we fail in this, it is because we are incapable of arriving at just conclusions. As a general rule, therefore, merely to reargue the grounds originally presented can be of little, if any,



aid to us. If there are some reasons, however such as we have indicated above, or other good reasons, a petition for a rehearing should be promptly filed, and, if it is meritorious, its form will in no case be scrutinized by this court."

In 4 C. J. page 641, paragraph 2527, it is said:

"A petition or application for rehearing may be dismissed or stricken from the files for cause shown. (Note 96, citing among other cases the case of Peabody Coal Co. vs. Northwestern El. R. Co., 230 Ill. 214, 82 NE 573, which involved an application for a rehearing such as we have in the case at bar, to-wit: an application presenting points already covered.)"

## HEARING AND DETERMINATION IN GENERAL

In volume 3, American Jurisprudence, at page 349, paragraph 805, it is said:

"A petition for a rehearing must be considered not only by the justice who writes the opinion, but by all the justices who participated in the decision. (Note 20) Obviously, a rehearing will not be granted unless some member of the court who concurred in the judgment so desires. (Note 1) Where the original decision was rendered by a bare majority of the court, a new member will not be permitted to participate in the consideration of a petition for rehearing, since he might be required to consider the case on its merits." (Note 2) citing Gas Products Co. v. Rankin, 63 Mont. 372, 207 Pac. 993, 24 A. L. R. 294.

And especially see the case of CORDNER vs. CORDNER, 91 Utah 474, 64 Pac. 2d. 828. In said case the matters here involved are fully briefed and considered by the Supreme Court of the State of Utah.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Lewis Larson", is written over a horizontal dotted line.

Lewis Larson,

Attorney for Respondents,  
Frank Davis and Sally Davis.