

1953

Weenig Brothers, Inc. v. M. Nephi Manning : Brief of Appellant

Utah Supreme Court

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F. Robert Bayle; Attorney for Plaintiff and Appellant;

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In the Supreme Court
of the State of Utah **FILED**
JUL - 3 1953

Clerk, Supreme Court, Utah

WEENIG BROTHERS, INC., a Corporation,

Plaintiff and Appellant,

vs.

M. NEPHI MANNING.

Defendant and Appellee.

No. 7992

BRIEF OF APPELLANT

F. ROBERT BAYLE

Attorney for Plaintiff and Appellant

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In the Supreme Court of the State of Utah

WEENIG BROTHERS, INC., a Corporation,

Plaintiff and Appellant,

vs.

M. NEPHI MANNING.

Defendant and Appellee.

No. 7992

BRIEF OF APPELLANT

STATEMENT OF FACTS

This action was filed by the plaintiff, Weenig Brothers, Inc., hereinafter referred to as the "Corporation," against the defendant, M. Nephi Manning, for the recovery of damages arising from a collision occurring between the Corporation's truck and Manning's automobile.

On the early morning of November 27, 1950, Ronald Z. Weenig, an employee of the Corporation, reported for work and at about 7:00 o'clock A.M., left the Corporation's place of business in Ogden, Utah, on a doughnut delivery route

(Tr. 3). He made a few deliveries around Ogden, (Tr. 3) and then proceeded North on Wall Avenue (Tr. 4). He was driving the Corporation's 1948 Chevrolet station wagon (Tr. 4). Wall Avenue is a two-lane roadway, one lane for northbound traffic and one lane provided for southbound traffic. It is an improved hard-surfaced roadway and runs generally in a north-south direction (Tr. 4 and 5), the same being 21 feet in width and with shoulders of about 7 feet adjoining the concrete (Tr. 5 and 43). There is a barrow pit paralleling the easterly side of the highway, about 2 feet in depth (Tr. 5 and 45—Defendant's Exhibit 1).

On this morning, there was an intermittent fog spread over portions of Ogden and as Weenig drove north on Wall Street, he observed this atmospheric condition (Tr. 4, 14, 15 and 44). The roadway was dry (Tr. 11, 74 and 80—Defendant's Exhibit 1), and Weenig was familiar with the road, having driven it many times for the year and one-half previous (Tr. 4, 12 and 13). As he reached the 2nd Street intersection, the fog became quite thick and Weenig turned the lights on in plaintiff Corporation's truck. The speed limit for this area on Wall Avenue is 40 miles per hour (Tr. 6). Weenig continued north after passing 2nd Street, driving in his lane for northbound traffic. At this point the fog became more dense and visibility was reduced (Tr. 6, 14). A short time thereafter, Weenig suddenly saw two parallel sets of lights ahead of him, one set indicating a vehicle was approaching on his side of the highway (Tr. 16, 21, 22). The vehicle on Weenig's side of the highway was owned and being driven by M. Nephi Manning, defendant and appellee herein.

According to the testimony of Weenig and the investigating officer, Weenig was traveling at approximately 30 miles per hour when he suddenly saw Manning's vehicle coming directly toward him from out of the fog (Tr. 6, 16, 42). There is a conflict in the evidence regarding Weenig's speed at that time as Manning claims it was at a "frightening speed," (Tr. 73) while witness Carter, an expert called by the defense, testified it could have been 42 miles per hour or greater (Tr. 121). At the instant Weenig observed Manning's vehicle approaching, it was on his side of the highway, parallel with another automobile also proceeding south, and only about fifty feet away (Tr. 6, 21, 22). Defendant Manning estimated the distance between his automobile and the Weenig truck to have been between seventy-five and one hundred feet (Tr. 70 and 71), that he had turned out to pass this other southbound vehicle, and that he was traveling about 25 to 30 miles per hour (Tr. 42, 84). Apparently both Weenig and Manning attempted to avoid the impending collision by turning their respective vehicles to the right (Tr. 6 and 70). However, the vehicles were together before the drivers had time to do any more than merely sense the danger and react, and the left front of the Manning coupe collided with the left side of the Weenig truck as it veered to the northeast (Tr. 6 and 71—Defendant's Exhibit 1). The left front wheel of Manning's automobile was 3 feet to the east of the center of the roadway at the time of the impact, by his own testimony (Tr. 75), and he further testified that his vehicle was completely over on Weenig's one-half of the highway when he first observed its headlights some seventy-five to one hundred feet ahead (Tr. 81 and 82).

After the impact, the Weenig truck left the easterly edge of the roadway and rolled over in the barrow pit, coming to a stop with its wheels in the air and resting on its top (Tr. Defendant's Exhibit 1). The place where it came to a stop was on the east side of the highway, some 115 feet northeast of the point of impact (Tr. 43 and 75). The Manning automobile skidded south some 40 feet from the point of the impact and stopped, facing south, still on the concrete portion of the highway (Tr. 72 and 73).

As a result of this collision, the Weenig truck sustained extensive damage (Plaintiff's Exhibit A and Defendant's Exhibit 1), requiring the Corporation to dispose of the truck, receiving \$300.00 for its salvage value (Tr. 2 and 65—Plaintiff's Exhibit B). The reasonable value of the truck at the time of the accident was \$1370.00, making a net loss to the Corporation of \$1070.00 (Tr. 2 and 65). The Corporation incurred further damage in the sum of \$17.50, for wrecker and storage charges (Tr. 2—Plaintiff's Exhibit C).

At the conclusion of the trial, the court took the case under advisement (Tr. 126) and on November 10, 1952, rendered judgment in favor of defendant and against the plaintiff corporation, no cause for action, on the grounds that plaintiff was guilty of contributory negligence (R. 020). Plaintiff Corporation's counsel then filed and thereafter argued a motion to set aside the decision for defendant and to enter judgment for the plaintiff Corporation, or in the alternative for a new trial (R. 015), which motion was ultimately denied by the trial court (R. 016). The court thereafter signed and filed its findings of fact and conclusions of law and entered judgment

in accordance therewith on February 26, 1953 (R. 009 through 012).

STATEMENT OF POINTS

The plaintiff Corporation filed this appeal, and has designated and included the entire record and all of the proceedings and evidence in the action, and in its appeal relies upon the following points:

I. The trial court erred in making and entering Finding of Fact No. 5 to the effect that the plaintiff corporation's truck automobile was of the reasonable value of \$1,020.00 at the time of the accident for the reason that it was stipulated by counsel for the defendant at trial that said truck's reasonable value was \$1,370.00 and that the salvage value thereof was \$300.00, making a net loss to the plaintiff of \$1,070.00 for the truck as a result of the accident with defendant.

II. The trial court erred in finding that plaintiff corporation's employee was driving its truck at a speed of between 46 and 53 miles per hour at the time of the accident with defendant on the ground and for the reason that said finding is wholly unsupported by the evidence.

III. The trial court erred in finding that the damages sustained to plaintiff corporation's truck were not the result of any carelessness or negligence on the part of the defendant for the reason that such a finding is unsupported by the evidence and contrary to law.

IV. The trial court erred in finding that the speed of plaintiff corporation's truck was negligence on the part of its driver which contributed to the damages sustained by plaintiff on the ground and for the reason that such a finding is unsupported by the evidence and contrary to law.

V. That there is no evidence to support the Conclusions of Law, and the Judgment of no causes of action is contrary to law.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN MAKING AND ENTERING FINDING OF FACT NO. 5 TO THE EFFECT THAT THE PLAINTIFF CORPORATION'S TRUCK AUTOMOBILE WAS OF THE REASONABLE VALUE OF \$1,020.00 AT THE TIME OF THE ACCIDENT FOR THE REASON THAT IT WAS STIPULATED BY COUNSEL FOR THE DEFENDANT AT TRIAL THAT SAID TRUCK'S REASONABLE VALUE WAS \$1,370.00 AND THAT THE SALVAGE VALUE THEREOF WAS \$300.00 MAKING A NET LOSS TO THE PLAINTIFF OF \$1,070.00 AS A RESULT OF THE ACCIDENT WITH DEFENDANT.

At the trial of this case, counsel for defendant, M. Nephi Manning, stipulated in the record that the reasonable value of the plaintiff corporation's truck at the time of the collision with the defendant was \$1,370.00, and that the sum of \$300.00 was received by the plaintiff as salvage, making a total or net

loss of \$1,070.00 (Tr. 2 and 65). This was an unequivocal stipulation on the part of defendant's counsel, with no evidence contrary thereto in the record. We believe this error in figures was an oversight on the part of defendant's counsel in his preparation of the findings of fact and will be confessed in his responding brief.

POINT II

THE TRIAL COURT ERRED IN FINDING THAT PLAINTIFF CORPORATION'S EMPLOYEE WAS DRIVING ITS TRUCK AT A SPEED OF BETWEEN 46 AND 53 MILES PER HOUR AT THE TIME OF THE ACCIDENT WITH DEFENDANT ON THE GROUND AND FOR THE REASON THAT SAID FINDING IS WHOLLY UNSUPPORTED BY THE EVIDENCE.

The only evidence before the court touching upon the speed of plaintiff's truck in excess of 30 miles per hour was that the defendant said it was coming at "a frightening speed," (Tr. 73) and that of expert witness Carter who stated that *it could have been* 42 miles per hour or greater (Tr. 121). It will be readily appreciated that the defendant's testimony would be of little value as he was not in a position to make any worthwhile observation of the speed of a vehicle approaching directly in front of him and when he himself was traveling approximately the same speed. His statement would be self-serving at best because he had created the perilous situation and would be attempting to justify his position by placing the blame for the impending collision upon the plaintiff's

driver and explain away his own culpability. We accordingly turn to expert witness Carter's testimony for a review of exactly what he said concerning the speed of plaintiff's truck based upon the distance it traveled after the impact coupled with the fact that it turned over. His testimony is covered in the record beginning with page 107. We might say here that we do not wish to belabor the court with a review of this evidence as we fail to see wherein the speed of plaintiff's truck in any way contributed to this accident, but we do wish to clarify the situation so that this court will not be misled into believing that the truck was traveling anywhere near as fast as is indicated in the trial court's findings. Much of this witness's testimony goes to laying a foundation for his qualifications and then at page 117 of the record, the witness concludes that "*apparently from what I deduct it rolled one and a half.*" The witness then said in response to the trial court's question concerning the speed for one and a half rolls of the truck (Tr. 117):

Q. "Now, one and a half rolls?

A. *One and a half rolls would be thirty and six-tenths miles per hour . . . "*

Witness Carter did not know at what place, after the point of impact, that the truck began to roll as he stated that he didn't know where it started to roll (Tr. 118). On this same page of the transcript, defendant's counsel asked concerning the speed after a forty-foot skid but there was no evidence in the record to show that plaintiff's truck skidded forty feet prior to its rolling over. In fact all of the evidence is to the effect that after the impact with defendant's vehicle, the truck veered to

the northeast and left the highway some forty feet north of the point of impact (Tr. 102) and it likely traveled some distance on the shoulder of the highway before it even began rolling. The defendant and his witness Ross H. Johnson took measurements by tape from the point of impact on the highway to the place where the truck came to rest on its top, and they both testified the distance was 113 feet (Tr. 43, 55, 75 and 103). The investigating officer arrived at the scene of the collision immediately after the accident occurred and in testifying about the visible markings on the roadway made by the plaintiff's truck, said (Tr. 61):

By Mr. Bayle: "You said you saw forty feet here, the marks of the tires of Weenig's car or vehicle, what kind of marks were they?

A. From the point of the accident?

Q. Yes.

A. I don't recall saying I saw it.

Q. Did you see any from the point of the accident to the shoulder of the highway?

A. The shoulder of the highway is where I noticed the first impression of a tire that would attach to the Weenig car."

This witness also testified that the Weenig vehicle made tire marks on the highway after the point of impact but denied they were skid marks as defense counsel's questions attempted to have shown (Tr. 55-56). These tire marks apparently merely indicated the direction of travel of the plaintiff's truck to the easterly edge of the highway. The only conclusion to be drawn is that Witness Carter was apparently using the 40 feet of skid

marks layed down by *defendant's automobile* after the impact, rather than any skid marks by the plaintiff's truck, of which there were none. Thus the calculations made by Witness Carter that plaintiff's truck could have been going between 42 and 54 $\frac{3}{4}$ miles per hour were all deduced from conjecture, and assumed that plaintiff's truck left 40 feet of skid marks and then immediately began to roll (Tr. 118 and 119—Blackboard Chart and Diagram at R. 018 and 019). Thus his conclusions are speculative and assumed upon a given set of facts which were not in evidence at the time of his testimony.

We respectfully urge that this court reject any conclusions drawn by Witness Carter concerning plaintiff truck's speed at the time of the collision as being unsupported by the evidence and conjectural in nature.

POINTS III and IV

POINT III

THE TRIAL COURT ERRED IN FINDING THAT THE DAMAGES SUSTAINED TO PLAINTIFF CORPORATION'S TRUCK WERE NOT THE RESULT OF ANY CARELESSNESS OR NEGLIGENCE ON THE PART OF THE DEFENDANT FOR THE REASON THAT SUCH A FINDING IS UNSUPPORTED BY THE EVIDENCE AND CONTRARY TO LAW.

POINT IV

THE TRIAL COURT ERRED IN FINDING THAT THE SPEED OF PLAINTIFF CORPORATION'S TRUCK

WAS NEGLIGENCE ON THE PART OF ITS DRIVER WHICH CONTRIBUTED TO THE DAMAGES SUSTAINED BY PLAINTIFF ON THE GROUND AND FOR THE REASON THAT SUCH A FINDING IS UNSUPPORTED BY THE EVIDENCE AND CONTRARY TO LAW.

It is the contention of the plaintiff corporation that the trial court erred in making and entering findings of fact to the effect that the acts of the defendant in no measure caused the accident and resulting damages to plaintiff's truck, and that the collision was the responsibility of plaintiff's driver. These findings are wholly contrary to the decision of the trial court rendered after taking the case under advisement, and as indicated by the order of the court by minute entry on November 10, 1952 (R. 020) wherein the court found the issue in favor of the defendant, no cause for action, on the grounds that plaintiff was guilty of contributory negligence. We do not know why the findings of fact eventually signed by the trial court were not in accord with the previous decision as the written findings were silent as to defendant's negligence, and made no mention of a finding of contributory negligence on the part of plaintiff's driver.

We believe the essential question to be disposed of on this appeal is whether or not from the facts at hand the defendant was negligent and if so, was the plaintiff's driver contributorily negligent.

The evidence shows, without dispute or contradiction, that at the time of the collision occurring between defendant's automobile and the plaintiff corporation's truck, the defend-

ant was traveling on the wrong or improper side of the highway for his direction of travel. We need only consider the defendant's own testimony in this respect to establish that he turned his automobile to the improper side of the highway in an attempt to pass another vehicle, and at the time he could only see between 75 and 100 feet ahead (Tr. 70 and 71). The court's attention is respectfully invited to the testimony on cross examination of the defendant, wherein the question of defendant's position on the highway is clearly established (Tr. 81):

By Mr. Bayle: "So you had been on Weenig's side of the highway and were swinging back to get out of the way, were you not?

A. That is correct.

Q. How long had you been over on that side of his highway?

A. Only a matter of a second. Just got out there and was dropping back.

Q. You said you saw his headlights seventy-five to one hundred feet away, didn't you?

A. Well, I suppose, that is about right.

Q. And what did you do as soon as you saw his headlights?

A. I started to turn back.

Q. Where was your car at that time?

A. Oh, possibly another three or four feet farther east than it was at the point of impact.

Q. So that your car was completely over on the easterly side of the highway when you first saw the headlights of the Weenig truck, is that right?

A. I wouldn't say 'completely'.

Q. Well, you said it was about three feet plus another four, that is seven feet?

A. Well, the car is six feet wide, it could have been six feet.

Q. So it could have been six feet over on his side of the road?

A. That is right."

The investigating officer and all other witnesses who testified concerning the place of impact, determined that it occurred 3 feet to the east of the center of the highway. This point marked the left wheel of the defendant's automobile, so inasmuch as the left fender of his vehicle extended beyond the wheel, his automobile was at least 4 feet into the plaintiff truck's lane of traffic when the collision occurred. The law imposes a duty on motorists to drive on the right side of highways. Title 41-6-53, Utah Code Annotated, 1953, provides as follows:

"Upon all roadways of sufficient width a vehicle shall be driven upon the right half of the roadway, except as follows:

- (1) When overtaking and passing another vehicle proceeding in the same direction *under the rules governing such movement.*"

Title 41-6-57 of the same Utah Code places a limitation upon drivers who undertake to pass vehicles on a two-lane roadway, providing as follows:

"No vehicle shall be driven to the left side of the center of the roadway in overtaking and passing an-

other vehicle proceeding in the same direction unless such left side is clearly visible and is free of oncoming traffic for a sufficient distance ahead to permit such overtaking and passing to be completely made without interfering with the safe operation of any vehicle approaching from the opposite direction or any vehicle overtaken. In every event the overtaking vehicle must return to the right-hand side of the roadway before coming within 100 feet of any vehicle approaching from the opposite direction.”

It will be observed that the last sentence of this latter statute places an absolute duty upon the driver of the overtaking vehicle to return to his side of the highway before coming within 100 feet of any vehicle approaching from the opposite direction. In the instant case, defendant Manning didn't give the driver of the corporation's truck anywhere near 100 feet as the defendant testified at the trial that he could only see from 75 to 100 feet when he attempted to pass the vehicle proceeding ahead of him (Tr. 70, 71 and 81). As was said in the case of *Maragakis vs. United States*, 172 F. 2d 393:

“The rule whether statutory or decisional, which requires driver of vehicle overtaking another proceeding in same direction to pass to the left at a safe distance, imposes a high degree of care commensurate with the circumstances involved. The driver attempts to pass at his peril, and the situation facing him must be such as to reasonably assure an ordinary prudent driver *that the passing can be accomplished with safety to all occupants of the road.*”

We believe this principle applies with even greater degree to the oncoming motorist who is traveling on his own side of the highway and is suddenly faced with the peril of meeting

a driver who has thrown caution to the winds and is bent upon passing regardless of the situation. As this court has said in the case of Staton vs. Western Macaroni Manufacturing Company, 52 Utah 426, 174 P. 821:

“The strongest kind of presumption of negligence prevails against party driving on wrong side of road.”

In the light of the facts of our instant case wherein defendant Manning clearly admits that he turned onto the improper side of the highway when he could only see ahead between 75 and 100 feet, and in view of the foregoing principles, one can come to no other conclusion than to say that the trial court erred in its finding in failing to adjudge the defendant guilty of the grossest kind of negligence. Turrietta vs. Wyche, New Mexico, 54 N. M. 5, 212 P. 2d 1041.

We pass now to the question of whether or not plaintiff corporation's driver, Weenig, was guilty of negligent conduct which in any way contributed to the cause of the accident. At the conclusion of plaintiff's case, defendant's counsel made a motion to dismiss plaintiff's complaint on the ground that plaintiff had shown no right to relief because of Title 57-7-113, Utah Code Annotated, 1943, which is presently designated in the 1953 Code revision as Title 41-6-46 (Tr. 66 and 77). The court overruled defendant's motion, and rightly so. The aforementioned statute requires that a motorist shall not drive a vehicle upon a highway at a speed greater than is reasonable and prudent under the conditions and having regard to the actual and potential hazards then existing; that in every event the speed shall be so controlled as may be necessary to avoid

colliding with any person, vehicle or other conveyance on or entering the highway in compliance with legal requirements and the duty of all persons to use due care. This statute is applicable only to objects, persons or vehicles lawfully on the highway, either stationary or proceeding in the same direction as the motorist charged with such duty. It has no application to the situation of drivers approaching one another from opposite directions. As was said in the case of *Snook vs. Long* (Iowa-1950) 241 Iowa 665, 42 NW 2d 76, 21 ALR 2d 1, at page 5:

“In the instant case, appellee was in his rightful place on the highway. He was entitled to assume that anyone approaching him from the opposite direction would observe the law which prohibits one from passing another car on the left unless it can be done without interference with cars approaching from the opposite direction. Appellant’s driver clearly violated this law and created a situation which would not reasonably be anticipated by Appellee. As we said in *Coon vs. Rieke*, 232 Iowa 859, 6. N. W. 2d 309, this statute is a speed statute and where a driver of a motor vehicle, in his proper place on the highway, meets an oncoming car which does not give way to the right, there is no clear distance ahead in which to determine the proper speed at which he should drive.”

We believe that the duty of drivers approaching from opposite directions is not to stop *but to comply with the law and yield one-half of the traveled way*. To permit defendant Manning herein to escape liability for his culpable negligence by complaining of the speed of defendant corporation’s truck which was proceeding on its own right and proper side of the highway would be manifestly unjust. It would establish a rule of

law which would invite slaughter and mayhem upon our highways and give the driver proceeding upon the wrong side of the roadway an opportunity to avoid responsibility for his negligence in suddenly turning into the path of an oncoming vehicle. We do not believe the law or this court would approve of a tendency to develop such a principle. The law requires that drivers of vehicles proceeding in opposite directions shall pass each other to the right and that where there is width for not more than one line of traffic in each direction, each driver shall give to the other at least one-half of the main traveled portion of the roadway, Title 41-6-54, Utah Code Annotated, 1953. It is recognized that one may drive upon any part of the highway when it does not violate the law or interfere with its use by others. But as this court said in the case of *Richards vs. Palace Laundry Company*, 55 Utah 409, 186 Pac. 439:

“While in case the street or highway is not used by others one may drive on any part thereof, yet, when a motorist or bicyclist passes from right to left of the center of the street, he loses some of his rights, and may not be heard to complain of the conduct of those who are on the proper side of the street to the same extent as though he also were on the proper side.”

In the instant case, defendant Manning was on the wrong side of the highway; however, he contends that while that may have been so, the defendant's driver was traveling too fast for the foggy conditions then prevailing. Speed only becomes important when it is a contributing factor to the proximate cause of the accident. Defendant Manning created a sudden and perilous emergency by turning his vehicle to the improper side

of the highway in violation of law and when he could see less than 100 feet ahead (Tr. 122). Assuming both vehicles were traveling approximately 30 miles an hour, each would travel about 45 feet per second (Tr. 124 and 125). The reaction time of each driver would be $\frac{3}{4}$ of one second (Tr. 125). Giving defendant Manning the benefit of the doubt by saying he saw the plaintiff's truck when it was 90 feet distant from him, and applying the reaction time of each driver, it would mean that the two vehicles would have collided before either driver could do more than merely recognize the danger, start to apply the brakes, and begin to turn to the right to avoid the accident. At the speed of each vehicle traveling 30 miles per hour, and approaching each other head on, the collision would occur within one (1) second, as each vehicle would travel 45 feet, or one-half of the 90-foot distance, within that short period of time. If either vehicle were traveling faster than this speed of 30 miles per hour, the time would be proportionately lessened as the speed increased.

How could it then be said that the speed of plaintiff's driver, Weenig, contributed to this accident or had any bearing upon the collision. He was faced with a sudden and perilous situation and he reacted as any reasonably prudent person would have done under the circumstances. Experience has demonstrated that accidents are constantly occurring at curves on the highways, and on straight roads in bad weather, because drivers persist in turning onto the improper side of the highway when their vision is obscured, in attempts to pass other vehicles. But for these acts of culpable negligence, accidents such as the one occurring in the instant case would never

happen. Speed on the part of plaintiff's driver had nothing to do with the proximate cause of this accident. As a matter of law, the defendant's acts of negligence were the sole and proximate cause of the collision. In the case of *Bragdon vs. Kellog (Maine)*, 105 Atlantic 433, and annotated in 6 A.L.R. 669, the court in passing upon this question of speed in situations of this nature said:

"It is, then, a matter of common knowledge, the 'usual experience' that automobiles are more often driven without reference to legal speed than in observance of it. It is the usual experience of operators that they are not authorized to rely on the legal presumption that an approaching car is coming at a legal rate of speed, but must exercise due care in the operation of their own car, especially in approaching corners, curves and turns in the road, where their vision may be wholly or partially obscured."

And as is said by the author in 5 American Jurisprudence, paragraph 272, page 654:

"It has been asserted that a driver of a motor truck on a public highway who voluntarily turns his vehicle from the right-hand side of the road to the left, where vehicles going in the opposite direction are expected to travel, at a time when he cannot see the road for dust, without giving a reasonable warning signal, is grossly negligent."

and the same author at paragraph 286, page 661, of the same text book, says:

"The rights of one on his left-hand side of the road are inferior to the rights of another coming from the

opposite direction. A driver on his right-hand side of the road has a right to assume that another driver coming from the opposite direction will obey the law of the road, at least until such time as he sees or should see that he has no intention of so doing."

Berry on Automobiles (5th Ed.), paragraph 252.

Purdie vs. Brunswick et al (Wash.) 146 P. 2d 809.

Carma C. O'Mally vs. Dan Eagan et al (Wyo.) 2 P. 2d 1063, 77 A.L.R. 582.

In the recent decision of Ankeny vs. Talbot et al (Colo-1952) 250 P. 2d 1019, the plaintiff therein had some 450 feet to avoid the oncoming defendant who was angling over onto plaintiff's side of the highway. The Supreme Court of Colorado in that case held that the trial court erred in denying plaintiff's motion for a directed verdict in his favor and against the defendant Talbot upon the issue of liability and that as between plaintiff and defendant, the only issue to be determined by the jury was the amount of damages to be awarded plaintiff.

Applying the foregoing principles to the instant case, it is difficult to perceive how the trial court concluded that the plaintiff corporation was not entitled to judgment as a matter of law. What could plaintiff's driver have done other than what he did do? He was on his own proper side of the highway and the sole and proximate cause of the accident was defendant's culpable negligence in turning directly into his path. The trial court apparently concluded that plaintiff's speed was a contributing factor. We respectfully submit that the trial court erred in this respect and that as a matter of law, it cannot be said that plaintiff's driver was negligent under the particular

circumstances of this case. Before the defense of contributory negligence will prove availing, it must be shown that the acts alleged as constituting such defense *directly contributed to the injury*. 5 American Jurisprudence, Para. 407, page 739.

POINT V

THAT THERE IS NO EVIDENCE TO SUPPORT THE CONCLUSIONS OF LAW, AND THE JUDGMENT OF NO CAUSE OF ACTION IS CONTRARY TO LAW.

Considering what we believe to be the fifth point of error, we take the position that the trial court's judgment, of no cause of action, is unsupported by the evidence and contrary to law. A thorough and careful perusal of the evidence fails to justify a conclusion that the corporation's driver was guilty of conduct which in any way contributed to the accident. He acted as any other reasonably prudent person would have done under the circumstances. The *sole proximate cause* of this collision and the resulting damages to plaintiff corporation's motor vehicle was the negligence of the defendant in failing to keep or maintain a proper lookout, and in driving to the left and improper side of the highway when such movement could not be made in safety.

CONCLUSION

We respectfully submit that each of the points of error is well taken and should be sustained, and that the judgment

of the trial court should be reversed with direction to enter judgment in favor of the plaintiff corporation for the amount of damages as prayed in its complaint, and for costs.

Respectfully submitted,

F. ROBERT BAYLE

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