

1953

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

Utah Supreme Court

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IN THE
SUPREME COURT
OF THE
State of Utah

WEENIG BROTHERS, INC.,
A CORPORATION,

Plaintiff and Appellant,

vs.

No. 7992

M. NEPHI MANNING,

Defendant and Appellee.

HUGGINS & HUGGINS

FILED

Attorney for Defendant and
Appellee.

AUG 14 1953

~~Brief of Appellant~~

Clerk, Supreme Court

Respondent

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(Tr. 79). Manning, the defendant, was the only person who measured it. There was no visible evidence marking the center of the highway. (Tr. 43). The barrow pit sloped down from the hard shoulders to a depth of about 2 feet at its deepest point. An automobile could safely be driven from the paved portion of the highway across the hard or compact shoulder about 7 feet in width into or across the barrow pit. The distance from 2nd Street, where appellant testified the fog became more dense, thereby reducing visibility to the point of impact, was one-half mile or more. (Tr. 47). The location of defendant's car when Weenig first saw it is in dispute. Weenig is the only witness who placed it parallel with the truck. All of the other evidence, including the physical facts, place defendant's car two or three car lengths to the rear of the truck (Tr. 69 to 71 inclusive). Weenig is the only witness who fixes his speed as 30 miles per hour and he admitted that he had not looked at his speedometer since he crossed 2nd Street, a half mile or more south of the scene of the accident, at which time he says he was travelling 35 miles per hour. (Tr. 60).

Manning fixed Weenig's speed in excess of 40 miles per hour (Tr. 74), and Professor Carter, the expert witness, considering the physical facts, computed Manning's speed at as high as 54 3/4 miles per hour. (Tr. 119-122).

He further testified that if visibility were as Weenig stated, that is, 50 feet, a safe driving speed would have been 23 miles per hour. If, as Manning testified, 84 feet, a safe driving speed would have been 30 miles per hour (Tr. 132). Manning at no time stated he had turned out to pass a south bound vehicle. What he did state was that he had swerved to the left far enough to ascer-

tain if it were safe to pass. The preponderance of the evidence is to the effect that the impact occurred less than 3 feet east of the center of the highway. (Tr. 41, 43, 52, 53, 61). The defendant was headed back onto his side of the highway and was struck by the Weenig car a glancing blow on the left side of the left front fender near the door of his car. (Tr. 71).

There was ample room on the paved portion of the highway east of the point of impact, (at least 8 feet), for Weenig to have passed the defendant's car safely, and 7 feet of hard shoulder on the same elevation east of that. (Tr. 58). Weenig's car was 5 feet 5½ inches wide. (Tr. 41, 43, 52, 59 and 105). Passing vehicles by other vehicles going in the same direction in the locality of the accident was a lawful movement and not prohibited.

Appellant relies on the following statement of points:

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."

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."

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."

POINT V

"THAT THERE IS NO EVIDENCE TO SUPPORT THE CONCLUSIONS OF LAW, AND THE JUDGEMENT OF NO CAUSE 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."

Appellant says at Page 8 of his brief:

***"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."

There was no unequivocal stipulation that plaintiff's

net loss was \$1,070.00 as stated in appellant's brief; there was, however, a stipulation that if plaintiff presented the witness who estimated the value of plaintiff's truck, at the time of the collision, at \$1,370.00, and fixed the value of the salvage at \$300.00, he would testify that these amounts were reasonable; that is the only stipulation with respect to values. Apparently, however, in the drafting of the findings, by typographical error, the net figure was written in finding No. 5 as \$1,020.00; since there was no contrary evidence, respondent readily ad-

mits that the net loss, in the finding, should probably have been stated as \$1,070.00, however, in view of the court's further findings, the difference in the amount is immaterial and does not constitute reversible error, thus the respondent was not harmed.

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."

There is ample, competent evidence in the record from which the trial court could find the speed of plaintiff's car was from 46 to 53 or even $54\frac{3}{4}$ miles per hour. Defendant not only testified that Weenig was coming "at a frightening speed" but added "in excess of 40 miles per hour" (Tr. 74). Admitting that defendant might not have been in position to accurately judge speed, yet his testimony is material in view of the sudden impact after first seeing Weenig's lights. To that, however, must be added all of the testimony of the Witness Carter, as shown in the Tr. pg. 119-122 inclusive, also Card (Tr. 64), to all of which we respectfully call this Honorable Court's attention.

Appellant most severely restricted the evidence on the number of times Weenig's car rolled. The investigating officer said "I would say the car rolled over several times" (Tr. 55). Upon further questioning by counsel for plaintiff, the following appears:

Q. "Did you measure the distance between the

physical evidence of where the car first tipped from the shoulder to where it came to rest on its top?"

A. "Approximately 23 steps, about 70 feet."

Q. "So that the Weenig car travelled on its wheels and rolled a total distance of 40 plus 70 or in the neighborhood of 120 feet?"

A. "Approximately."

Card testified it rolled $2\frac{1}{2}$ or 3 times (Tr. 64).

Defendant testified:

of "skid or tire marks made by the Weenig car plainly visible to the edge of the highway and gouges in the shoulders." (Tr. 77 & 80).

Carter testified that immediately after the impact the Weenig car started turning counterclockwise (Tr. 114) which would require the wheels of the car to go sidewise with the wheels skidding rather than straight forward with the wheels rolling. This testimony was brought out by Mr. Bayle in response to the following question:

Q. "Does this assume the brakes were applied all the time until it turned over?"

A. "According to the testimony this morning of Mr. Weenig and according to my deductions and reconstructing the accident, the car went in a counterclockwise spin, therefore, while in the spin would leave rubber pending the skid and that could be even more forcible or greater than actually locked wheels skidding, so this vehicle went through this position and went into a skid

in this manner, that is what put it in right angles to the center line of the highway so it was skidding, therefore, you would have a side skid.”
“If this was 40 feet or whatever it was measured, the vehicle actually, since the center of gravity was back here or here or whatever would be the center of gravity, the distance of three feet, therefore, you would have a side skid.”

Q. “It would make no difference how far the vehicle was turned to right angles to the momentum in the highway?”

A. “I don’t think it would make enough difference to give it any consideration or if the vehicle is going into a skid and moving forward, the center of gravity moving forward 30 feet, moving diagonally in that distance, whatever it is, all four wheels are skidding. It may not lay down rubber.”

Q. “Suppose the wheel is on loose gravel?”

A. “Yes, on loose gravel or sand, unless it is loose, it makes ball bearings; if solid and hard it would slow it up more. What is the condition?”

Q. “Assuming it is a hard graveled surface.”

A. “That kind could slow it down more than otherwise unless a volume of loose gravel. Most of our shoulders are pretty well compacted.”

MR. BAYLE: “The shoulder of the road up that way, the shoulder of the road was not a macadamized type of highway?”

- A. “Well, as I understand it, I have driven that many times, the pavement itself is solidified oil and gravel, that is why I call the shoulders pretty well stabilized. I don’t know whether there is any grass on it but there could be. We find in our tests on gravel between the skidding performance on gravel, we find the tires get into the hard surfaces and slow the vehicle down more than on the oil. That is the usual experience I have had with gravel such as the shoulders are.” (Tr. 114, 115, 116).

The defendant admitted the same as follows:

- Q. “At the time of the impact, after this accident, what happened to your vehicle in the way of swerving or at all changing directions? Can you state?”

- A. “Yes, I can. It seemed to turn sidewise, as Professor Carter stated, it just swerved that way.” (Tr. 126).

See also the testimony of the Deputy Sheriff Card as to skid marks (Tr. 53).

This evidence is certainly competent and considered together with the calculations of the expert Carter to the effect that the speed of Weenig’s car, based upon the physical facts could have been as much as $54\frac{3}{4}$ miles per hour was sufficient upon which the finding could be made. The findings of the court were based upon that evidence.

The testimony of H. B. Carter, the expert witness, is found in the transcript pages 100 to 126. In the interests of time and space, that evidence will not be set

out hec verba, but a summation only. The witness is professor of the Civil Engineering at the University of Utah. He was previously professor of highway engineering at the UAC. His qualifications are found at pages 107 and 108 in the transcript.

He testified that the panel truck of the plaintiffs was 23 feet in circumference; that if it rolled 70 feet that would mean $2\frac{1}{2}$ rolls (Tr. 116) which would mean a speed of $39\frac{1}{2}$ miles per hour without accounting for the 40 foot skid. $3\frac{1}{2}$ rolls would result from a $46\frac{3}{4}$ mile per hour speed (Tr. 117), and that taking into consideration the 40 foot skid before tipping over, as the evidence shows, and rolling $2\frac{1}{2}$ times, the speed would have been 48.8 miles per hour instead of $39\frac{1}{2}$. If the car had rolled $1\frac{1}{2}$ times with the skid, the car would have been traveling 42 miles per hour, but if it rolled $3\frac{1}{2}$ times, taking into consideration, the skid, it would have been traveling at $54\frac{3}{4}$ miles per hour (Tr. 119).

Carter's conclusions were based upon the testimony of other witnesses, including Weenig plaintiff's agent, and the physical facts and is the strongest kind of evidence.

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."

The court's finding No. 8 that the damage to the plaintiff's car did not result from the carelessness and negligence of the defendant but resulted from the careless, negligent and unlawful manner in which plaintiff's automobile was operated at said time and place "*and that said damages resulted proximately from the careless, negligent and unlawful manner in which its said automobile was being driven" is adequately, fully and completely supported by the evidence in the case.

The expert witness Carter testified that the reacting time, after the driver sensed his peril, was $\frac{3}{4}$ of a second. At 42 miles per hour, plaintiff's car would travel 46.2 feet before the brakes would apply. At 48.8 miles per hour, the car would travel 53.7 feet, a greater distance than plaintiff's witness testified to as the distance of visibility; at $54\frac{3}{4}$ miles per hour, the car would travel 60.3 feet before the brakes would apply. He further testified that the stopping distance, under the conditions testified to, that is, a possible $54\frac{3}{4}$ miles per hour, was 214 feet. At 40.45 miles per hour, 131 feet, at 48.8 miles per hour 169 feet. (Tr. 119-122). He further testified that a safe driving speed with 50 feet visibility, as testified to by plaintiff's agent, was 23 miles per hour. If the visibility was 84 feet, which is approximately the testimony of the defendant, a safe driving speed was 30 miles per hour. (Tr. 122).

There is no evidence in the record of a substantial nature, considering all the physical facts, that the speed of the Weenig car was as little as 30 miles per hour. The posted speed limit in the area where the accident occurred, under ideal conditions, was 40 miles per hour. (Tr. 74).

All of the evidence is to the effect that the defendant turned to his left to determine if he could safely pass the large truck immediately preceding him in the same direction. Immediately upon seeing the headlights from plaintiff's car he turned to the right and was traveling in a southwesterly direction when struck by plaintiff's car midway between the front of his car and the door on his left side. The evidence puts the left side of defendant's car, where hit, at less than three feet east of the center of the highway (Tr. 41, 43, 52, 53) with no physical evidence that plaintiff's car swerved at all until just about the moment of the impact in any effort to avoid the collision which resulted undoubtedly, from (a) plaintiff's driver failing to keep a proper or any lookout for objects upon the highway in front of him, or (b) Traveling at such a rapid rate of speed that his reacting time did not allow him to swerve. The latter case, under all the facts and the evidence, being more than likely. That being so, his speed was the proximate cause of the collision. Had he been driving at a lawful and safe speed, defendant would have had ample time to get back in his own lane of traffic and plaintiff would have had ample time to avoid the accident by swerving, and the evidence shows he had ample room, at least 8 feet on the macadamized surface of the highway, within which to pass safely even with defendant's car in the position where plaintiff came upon it with an additional 7 foot

shoulder. Plaintiff apparently relies wholly upon Section 41-6-53 UCA 1953, with respect to overtaking and passing another motor vehicle proceeding in the same direction. He ignores completely the provisions of 41-6-46 with respect to speed regulations which reads in part as follows:

- (a) “No person shall drive a vehicle on 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. In every event 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.” * * *
- (c) “The driver of every vehicle shall consistent with the requirements of subdivision (a) of this Section, drive at an appropriate reduced speed” * * “when special hazard exists, with respect to pedestrians or other traffic *or by reason of weather or highway conditions.*” (italics ours).

The duty to use caution in the speed of his driving bore just as heavily upon the plaintiff under the conditions of limited visibility as the duty to use caution in passing other vehicles traveling in the same direction weighed upon the defendant. Under the state of the evidence there was no apparent effort on the part of the plaintiff to use caution except his own uncorroborated testimony which, even if there were no evidence to the contrary, proves conclusively that he was not using due

caution since he himself admitted he was travelling 35 miles per hour when he last looked at his speedometer, a half mile away.

As the writer recalls it, there is no testimony by anyone that he reduced speed, but all of the physical facts indicate that he increased his speed, notwithstanding his admission that the fog grew thicker and more dense and the visibility decreased. Contrasted with that, the preponderance of the evidence is to the effect that the defendant carefully and cautiously investigated while he was 3 or 4 lengths behind the truck to determine if, under the circumstances, it was safe for him to pass. (Tr. 70) He did everything a prudent man would have done, under the circumstances, to avoid the accident, but because of the speed of the plaintiff's car, he was unable to escape, not because he was where he was, but because of the failure of plaintiff's agent to keep a lookout or because of the speed of the plaintiff's car or both. No reasonable person would say that had plaintiff's car been driven at a safe speed under the circumstances, to-wit, about 23 miles per hour, that the accident would not have been avoided.

All of the cases cited by appellant are clearly and readily distinguishable from the instant case. If, in the instant case, the defendant had sued the plaintiff for damages resulting to his car by reason of the accident, (which he did not), the court might have found against his recovery because of some contributory negligence, however, that is not the case here. Plaintiff sued the defendant.

As the writer remembers appellant's cases, most if not all of them turned on the question of (1) contributory

negligence, or (2) that the jury was the sole judges of the evidence and it was their province to determine which of the parties was guilty of negligence. It must be further remembered that the instant case was not tried before a jury and so the learned trial judge was the trier both of the facts and the law and his judgment upon all questions of fact, (and the question of negligence is one of fact), *Sweet vs. Salt Lake City*, 43 U. 306 134 P. 1167, and if supported by any competent evidence, will not be disturbed by this court. *Stangle vs. Smith*, 10 Wash. 2nd 461 170 P. (2) 207.

We do not wish to lengthen respondent's brief by long quotations from appellant's cases. A brief statement, we assume, will be sufficient since the court will undoubtedly peruse all cases cited.

Bragdon vs. Kellogg, 105 Atl. 433 6 ALR 669, involved two cars approaching each other from opposite directions on a road of ample width to allow two cars to pass each other without any danger of interference. The case occurred prior to the advent of the automobile and the accident happened as the two vehicles involved were approaching an intersection of two streets running at right angles with each other, each of them intending to turn. The one vehicle was on the wrong side of the road with no explanation and claimed he had the right to drive on any part of the street. He sued and the court found that he was guilty of contributory negligence, and the court so found even though the defendant may also have been guilty of negligence.

In the *O'Malley vs. Egan* case (Wyo.) 77 ALR 582, the court laid down the rule that

“plaintiff, in action for personal injuries, must

show not only that defendant was negligent but also that such negligence was the proximate cause of the injury”.

The court further said:

“The question of proximate cause is ordinarily for the jury”.

In that case plaintiff turned abruptly onto the wrong side of the street in front of the defendant and the court found that there was no evidence that driving at any speed the defendant could have avoided the accident. There was no apparent reason for the plaintiff turning in front of the defendant and he made no attempt to turn back to avoid the accident.

In Snook vs. Long, 21 ALR 1, the driver of plaintiff's car made no effort to turn to the right and thus avoid the collision, and the court in that case, said

“Negligence is the proximate cause of an injury which follows such negligent act if it can fairly be said that in the absence of such negligence, the injury or damage complained of, would not have occurred.”

With cited case. The court said further, where there is evidence of a legal excuse for the violation of Statute if one is violated the question is one for the jury to determine. The trial court directed a verdict in favor of defendant who had the right of way. The judgment of the trial court was reversed, notwithstanding the plaintiff was on the wrong side of the road. This, too, is a head on collision case.

Staten vs. Western Macaroni Company, 52 U. 426

174 P. 821, involved a delivery wagon being drawn by a horse driven by defendant's agent along the wrong side of the street, not momentarily or for any apparent reason, and with no shown effort to avoid oncoming traffic. His horse became frightened and suddenly lunged into the motorcycle ridden by plaintiff. This court held and properly so, that under the evidence, the jury, as trier of the facts, was clothed with authority to determine whether plaintiff's agent was guilty of negligence. The court further held that, the Statute cited, Section 11-43-C3 compiled laws of Utah 1907, did not forbid one from traveling upon any part of the road

“which best suits his pleasure and convenience, but one doing so must, at all times, be regardful of those who are passing or seeking to pass in the opposite direction or seasonably turn to the right”.

as defendant did in the instant case.

Richards vs. Palace Laundry Company 186 P. 439, involved a plaintiff who was riding a bicycle so close to the center of the highway with no apparent reason for being there, that when one wheel of the vehicle came in contact with the street car track groove, he fell and was thrown over the center of the highway and into the path of an oncoming automobile from the opposite direction. He sued to recover damages. There was no question of speed on the part of either party. Visibility was perfect and the accident resulted from a sudden emergency when the defendant was not more than 5 to 6 feet away. The case involved the “last clear chance or discovered peril doctrine”. This court said in quoting with approval from Presser vs. Dougherty 239 P. 312 86 ATL. 854,

“the mere fact that plaintiff collided with this auto-

mobile does not raise any presumption of negligence, especially where plaintiff was riding on the wrong side of the street and there was no evidence that the automobile was being operated *at a dangerous rate of speed*''*. (Italics ours).

There was no circumstance in that case requiring the defendant to exercise extraordinary care, reasonable care was all that was required. This court said:

“Nevertheless the driver (defendant on his own side of the street) (ours), was required to exercise reasonable care under all the circumstances, that is to keep such a lookout as the conditions surrounding him required’’*.

and further said:

““or that his (defendant) conduct in operating the truck was such that from which negligence could be inferred, this case would be different.’’*“

Purdie vs. Brunswick, Wash., 146 P. (2) 809; was a case under a provision of the Wash. Rem. Rev. Stat 17A Section 6360-75, Substantially the same as our Statute, Section 41-6-63 UCA 43 the Washington Statute is perhaps even more restrictive than our section above quoted. The facts of the case are set forth in the memorandum of the trial court in the center paragraph, first column, Page 811. The weather was clear, the pavement was dry, the general visibility was good. Respondent was driving as an ordinary prudent person upon the occasion in question. Appellant was driving at an excessive rate of speed under the existing circumstances. His *continued* invasion of his left hand side of the road was at a point where he had no right or occasion then to be.

Immediately before the impact appellant was driving in an erratic course across the center line of the highway confusing to the respondent. He failed to observe respondent's car although he had ample opportunity to do so. Of course, under those circumstances, he could not recover and we fail to see how appellant can take any comfort from the rules of law laid down in that case.

In *Turrietto vs. Wyche* 54 N.M. 5, 212 P. (2) 1041, the court held

“question as to whether defendant's negligence was proximate cause of plaintiff's injury was for the jury.” Syllibus (3) (7).

In that case plaintiff was on his lawful side of the street, there were no obstructions, visibility was good and the defendant was driving down the highway with the left wheels generally left of the center of the highway and the body of the truck which was 8 feet wide protruding out further. Plaintiff pulled his car to the right but was unable to pull off the highway far enough to avoid being sideswiped by defendant's car. The New Mexico Statute was Section 68 511 N.M. Stat. 1941, with respect to passing to the right and contained no exceptions. There was no claim that defendant could not have turned to the right far enough to avoid the accident. No excuse was shown for his encroachment on plaintiff's half, yet the Supreme Court held that whether his negligence was the proximate cause of the accident was for the jury. Pg. 1043.

In *Ankenny vs. Talbot* (Colo.) 250 P. (2) 1019, defendant was driving north on the highway at a hill, he started to angle off to the left side in the lane of on-coming traffic to reach a mail box on the opposite side

tance at which operator of said car is able to see objects upon the highway in front of him.”

See also *Hanson vs. Clyde* 89 U. 31, 56 P. (2) 1366 104 ALR 943, the latter case particularly involved visibility as in the instant case, where this court held that it has long been the rule in this state that it is negligence, as a matter of law, to drive an automobile upon a traveled public highway at such rate of speed that said automobile cannot be stopped within distance at which operator of said car is able to see. In the latter case, this court held that when a driver upon a public highway, with his light equipment, cannot see more than 50 feet ahead of him, it is his duty to drive at such speed as will enable him to stop within that distance. As the evidence clearly shows, in this case, plaintiff could not possibly have stopped his car within 50 feet, the range of his visibility as testified to by him, at the speed he was going, or even at the speed he admitted he was going. *O'Brien vs. Allston et al* 61 Ut. 368, 213 P. 791.

In *Sweet vs. Salt Lake City* 43 U. 306 134 P. 1167, this court held that whether the speed at which a vehicle was going at the time, was the proximate cause of the accident, is a question of fact.

O'Brien vs. Allston case *supra* contributory negligence and proximate cause are discussed. See also *Horseley vs. Robinson* 112 U. 227, 186 P. (2) 592. *Nickleropoelas vs. Ramsey* 61 U. 465, 214 P. 304. *Fisher vs. O'Brien* 99 Kan. 621, 162 P. 317. *Lawson vs. Fondelac* 141 Wis. 57, 123 NW 629.

In the *O'Brien* case *supra*, plaintiff, the operator of the motor vehicle sued the defendant for negligence for

placing a barricade across the highway, this court held that plaintiff was driving at an unreasonable rate of speed (27 miles per hour). Under the circumstances (visibility poor)) and hence was guilty of contributory negligence and could not recover.

POINT V

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

In view of the foregoing analysis of the evidence and the law, we assume there is no need for further comment under point 5, except to say that there is absolutely no evidence in the record that the defendant failed to keep or maintain a proper lookout, all of the evidence on the contrary is to the effect that he did just that, but that the failure was on the part of the plaintiff.

We respectfully submit, therefore, under the law and the facts, in this case, that the findings and judgment of the learned trial court are amply supported by the evidence and should be affirmed.

Respectfully submitted,

HUGGINS & HUGGINS
Attorneys for Respondent