

1953

Weenig Brothers, Inc. v. M. Nephi Manning : Petition for Rehearing

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc1



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

F. Robert Bayle; Attorney for Appellant and Petitioner;

Recommended Citation

Petition for Rehearing, *Weenig Brothers, Inc. v. Manning*, No. 7992 (Utah Supreme Court, 1953).
https://digitalcommons.law.byu.edu/uofu_sc1/1978

This Petition for Rehearing is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (pre-1965) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

In the Supreme Court of the State of Utah

WEENIG BROTHERS, INC., a Cor-
poration,
Plaintiff and Appellant,

vs.

M. NEPHI MANNING,
Defendant and Appellee.

Case No. 7992

PETITION FOR REHEARING

FILED
DEC 31 1953

Clerk, Supreme Court

F. ROBERT BAYLE

Attorney for Appellant and Petitioner

INDEX

	Page
PETITION FOR REHEARING	3
ARGUMENT OF POINTS RELIED UPON.....	5
Point I—That the court has misconstrued the record in this case by affirming that portion of the findings of fact of the District Court to the effect that the defendant was not negligent in the operation of his automobile at the time of the accident.	5
Point II—That the court has failed to properly evaluate the evidence in concluding that the defendant was not guilty of negligence as a matter of law in the operation of his automobile on the wrong or improper side of the highway and that such negligence was not the sole and proximate cause of the collision.....	8
Point III—That the decision of the court results in a dangerous precedent being established in the automobile law of this state pertaining to vehicles passing one another while traveling in opposite directions, and the decision therefore should be recalled and the case reheard.	10
CONCLUSION	12

CASES CITED

Cederloff vs. Whited (Utah) 169 Pac. 2d 777	9
North vs. Cartwright (Utah) 229 Pac. 2d 871	7
Skerl vs. Willow Creek Coal Company, 92 Utah 474, 69 Pac. 2d 502, 506	7

STATUTES CITED

Section 41-6-57, Utah Code Annotated 1953	6
---	---

In the Supreme Court of the State of Utah

WEENIG BROTHERS, INC., a Corporation,

Plaintiff and Appellant,

vs.

M. NEPHI MANNING,

Defendant and Appellee.

Case No. 7992

APPELLANT'S PETITION FOR REHEARING AND BRIEF IN SUPPORT THEREOF

Comes now the appellant, Weenig Brothers, Inc., a Corporation, and petitions the Court for a rehearing and reargument of the above-entitled cause upon the following grounds:

POINT I

THAT THE COURT HAS MISCONSTRUED THE RECORD IN THIS CASE BY AFFIRMING THAT PORTION OF THE FINDINGS OF FACT OF THE DISTRICT

COURT TO THE EFFECT THAT THE DEFENDANT WAS NOT NEGLIGENT IN THE OPERATION OF HIS AUTOMOBILE AT THE TIME OF THE ACCIDENT.

POINT II

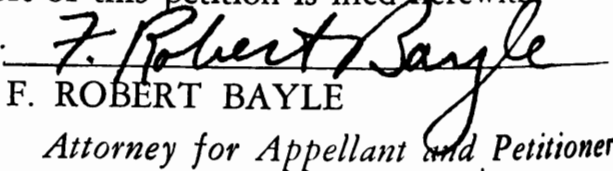
THAT THE COURT HAS FAILED TO PROPERLY EVALUATE THE EVIDENCE IN CONCLUDING THAT THE DEFENDANT WAS NOT GUILTY OF NEGLIGENCE AS A MATTER OF LAW IN THE OPERATION OF HIS AUTOMOBILE ON THE WRONG OR IMPROPER SIDE OF THE HIGHWAY AND THAT SUCH NEGLIGENCE WAS NOT THE SOLE AND PROXIMATE CAUSE OF THE COLLISION.

POINT III

THAT THE DECISION OF THE COURT RESULTS IN A DANGEROUS PRECEDENT BEING ESTABLISHED IN THE AUTOMOBILE LAW OF THIS STATE PERTAINING TO VEHICLES PASSING ONE ANOTHER WHILE TRAVELING IN OPPOSITE DIRECTIONS, AND THE DECISION THEREFORE SHOULD BE RECALLED AND THE CASE REHEARD.

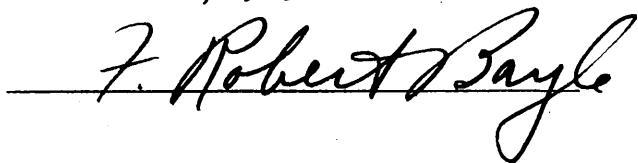
WHEREFORE, petitioner prays that the judgment and opinion of the Court be recalled and a reargument be permitted of the entire case.

A brief in support of this petition is filed herewith


F. ROBERT BAYLE
Attorney for Appellant and Petitioner

F. ROBERT BAYLE hereby certifies that he is attorney of record for the appellant and petitioner herein, and that in his opinion there is good cause to believe that the judgment and decision of the Court is erroneous and that the case should be reheard and reargued as prayed for in said petition.

Dated this 31st day of December, 1953.



BRIEF IN SUPPORT OF PETITION FOR REHEARING
POINT I

THAT THE COURT HAS MISCONSTRUED THE RECORD IN THIS CASE BY AFFIRMING THAT PORTION OF THE FINDINGS OF FACT OF THE DISTRICT COURT TO THE EFFECT THAT THE DEFENDANT WAS NOT NEGLIGENT IN THE OPERATION OF HIS AUTOMOBILE AT THE TIME OF THE ACCIDENT.

There would appear to be no necessity for again setting forth the facts involved in this case as they were thoroughly outlined in the original briefs and fully discussed upon oral argument. However, it would appear from the decision of the Court that certain of these facts have been minimized in their application to the questions of law involved in this case.

In the Court's opinion on file herein, Mr. Justice Crockett holds in the first instance that defendant was guilty of no conduct in the operation of his automobile which could be considered negligence as a matter of law. The evidence is undis-

puted concerning the distance the defendant's vehicle traveled onto the plaintiff's side of the highway. The plaintiff testified that the defendant was completely over onto his side of the highway and was in the act of passing another vehicle. The defendant testified that he swung his vehicle onto the other or left side of the highway six or seven feet and was in that position when he first observed the headlights on the plaintiff's truck approaching him. Section 41-6-57, Utah Code Annotated 1953, prescribes the conditions under which vehicles traveling in the same direction may pass one another on a two-lane roadway:

"No vehicle shall be driven to the left side of the center of the roadway in overtaking and passing another vehicle proceeding in the same direction unless such left side is clearly visible and free from 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.*"

We have italicized the last sentence of the foregoing statute to emphasize the defendant's acts as a violation of this legislative enactment. There is, and was, an absolute duty imposed upon the defendant under the language of this statute to require that when he decided to turn to the left side of the highway and attempt to pass the truck which he said was ahead of him, he should not do so without being able to return to his own right-hand side of the highway before coming

within 100 feet of the plaintiff's truck which was approaching from the opposite direction. The defendant said that visibility was limited and that when he turned to the left-hand side of the highway, he could see the headlights of a vehicle which he later determined to be that of the plaintiff, and which were seventy-five to one hundred feet away. There could be absolutely no conclusion other than that defendant was guilty of violating this statute. There is no conflict in the evidence with respect to this aspect of the case as the defendant's own testimony placed his automobile six or seven feet over onto plaintiff's side of the highway and as his vehicle was a little less than six feet in width, this meant that he was traveling wholly upon plaintiff's side of the highway when he observed the headlights of plaintiff's truck some seventy-five to one hundred feet ahead of him. As this Court said in the case of *North vs. Cartwright*, 229 Pac. 2d 871, in construing this same statute:

"This statute was promulgated for the protection of the public and to safeguard property, life and limb of persons using the highways, from accidents of the type here involved. Violation of this statute then, constitutes negligence in law. This doctrine of the law has been steadfastly adhered to by this court and generally in other courts throughout the United States."

The test appears to be that when a standard of duty or care is fixed by law or ordinance, and such law or ordinance has reference to the safety of life, limb, or property, then, as a matter of necessity, a violation of such law or ordinance constitutes negligence. *Skerl vs. Willow Creek Coal Company*, 92 Utah 474, 69 Pac. 2d 502, 506.

Applying the foregoing principles to our instant case, it

is difficult to conceive how this Court concluded that defendant Manning was not negligent as a matter of law. Had this been a jury case, the evidence would have required the trial court to withhold from the jury's consideration the question of defendant's negligence as that evidence showed with conclusive certainty that reasonable minds could reach no other conclusion than that defendant Manning had violated the law. The trial court erred in not finding the defendant negligent and we respectfully submit that this Court should reconsider its decision in the light of the foregoing and adopt a clear and positive doctrine in this case which will be in conformity with decisions heretofore rendered interpreting the aforementioned statute.

POINT II

THAT THE COURT HAS FAILED TO PROPERLY EVALUATE THE EVIDENCE IN CONCLUDING THAT THE DEFENDANT WAS NOT GUILTY OF NEGLIGENCE AS A MATTER OF LAW IN THE OPERATION OF HIS AUTOMOBILE ON THE WRONG OR IMPROPER SIDE OF THE HIGHWAY AND THAT SUCH NEGLIGENCE WAS NOT THE SOLE AND PROXIMATE CAUSE OF THE COLLISION.

We should like to now consider that portion of the Court's decision affirming the trial court's findings that plaintiff's driver was guilty of negligence which proximately contributed to the accident. It is respectfully submitted that a portion of this Court's opinion is particularly alarming to

counsel when applied to the practicalities of the situation. It is that portion of the decision dealing with the relative distances and speeds of the respective vehicles and wherein the Court says that Weenig had 15 feet in which he could have turned to his right sufficient to have missed defendant Manning. In practically every situation, the driver who turns to the left or improper side of the highway in anticipation of passing a vehicle proceeding in the same direction ahead of him, has control of the situation. Manning had control of the situation in our instant case. It was necessary for Weenig to discover Manning after he turned onto the easterly side of the roadway. It was the chance that Manning took that created the hazardous situation for he himself testified that he was completely over on Weenig's side of the road when he saw the approaching headlights some seventy-five to one hundred feet away. The excessive speed of Weenig, if any, may have constituted negligent driving but that negligence did not contribute to the accident. We believe that a person driving a motor vehicle on a highway has a right to rely upon observance of the law by other persons driving motor vehicles thereon, and one cannot be charged with negligence in failing to anticipate that the other may violate the law governing the use of the highway. Particularly is this true where vehicles are approaching each other from opposite directions and the turning driver has control of the situation. *Cederloff vs. Whited*, Utah, 169 Pac. 2d 777.

In our instant case, Manning attempted to explain away his negligence by testifying on direct examination that he had merely turned to his left to see if it was safe to pass the truck

ahead of him. We are sure this explanation was conjured up by Manning as a defensive measure but certainly doesn't answer the question of why it was necessary for him to completely cross the center of the roadway in order to see if a passing could be made. We submit that the only reasonable inference to be drawn from all of the evidence is that Manning's negligence was the sole and proximate cause of the collision. It might be said that Weenig had a chance to avoid the collision, but that chance was remote and certainly not a clear one. Manning's rights were inferior to those of Weenig and the former's culpable negligence created an alarming situation which required instantaneous action on the part of Weenig. He had little more than a second to react and try to turn away from a disastrous head-on collision which would have surely occurred had not both drivers been able to slightly veer to the right thus resulting in only a sideswiping of their respective vehicles. We urge the Court to reexamine the facts of this case in order to avert an injustice to the appellant which will surely occur if the judgment of the trial court is affirmed.

POINT III

THAT THE DECISION OF THE COURT RESULTS IN A DANGEROUS PRECEDENT BEING ESTABLISHED IN THE AUTOMOBILE LAW OF THIS STATE PERTAINING TO VEHICLES PASSING ONE ANOTHER WHILE TRAVELING IN OPPOSITE DIRECTIONS, AND THE DECISION THEREFORE SHOULD BE RECALLED AND THE CASE REHEARD.

Since this case has appeared in the advanced sheets of the Pacific Reporter, counsel for the petitioner herein has heard many members of the Bar express surprise and concernment over the principles enunciated and counsel is sincerely apprehensive that this Court's decision, if permitted to stand unchanged, will establish a dangerous precedent in the automobile law of this state. With our highways becoming increasingly dangerous due to the rapid growth of automobile travel, one may easily visualize that reckless drivers who are prone to take a chance by passing others when the oncoming traffic is too close for reasonable safety, will find comfort and protection by merely saying they had turned out to see if it was safe for passing; or such drivers may well claim that the oncoming vehicle was traveling too fast and thereby contributed to the collision. We can visualize situations where a driver on his own side of the roadway may be negligent in not having his vehicle under reasonable control or by not keeping a reasonable lookout to avert an impending collision, but those situations would not be applicable to facts analogous to our instant case where the disfavored driver creates the hazardous condition and the favored driver has only a second or two to extricate himself from a situation which to say the least is terrifying. We respectfully submit that reasonable minds could not differ on that subject and this Court has set forth rules in this decision which will likely plague it and the automobile law in cases to come. Head-on collisions are ever increasing. They are for the most part largely responsible for the serious and tragic accidents daily killing and maiming our citizenry. Sometimes an entire family is wiped out. Highway departments throughout the United States are annually spending millions

of dollars to divide our highways and thereby eliminate the cause for this tragic waste of life. These were the compelling reasons for your petitioner to urge this Court to rehear this case and re-examine the decision in order that the law of this State will not provide a recluse of safety for those drivers who clearly violate the rules of the road as the respondent herein did.

CONCLUSION

In conclusion your petitioner sincerely urges that this Court should grant a rehearing and reargument of this case and thereby review the entire matter in the light of the importance of the aspects of the law presented in the foregoing argument, and that upon such review it is sincerely felt that the Court will be compelled to find that the trial court should be reversed.

Respectfully submitted,

F. ROBERT BAYLE

Attorney for Appellant and Petitioner