

1954

# Weenig Brothers, Inc. v. M. Nephi Manning : Motion to Dismiss Petition for Rehearing and Opposing Brief of Defendant and Respondent

Utah Supreme Court

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Huggins & Huggins; Attorney for Defendant and Appellee;

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Manning

IN THE SUPREME COURT

of the

STATE OF UTAH

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WEENIG BROTHERS, INC., a  
Corporation,  
*Plaintiff and Appellant,*

— vs. —

M. NEPHI MANNING,  
*Defendant and Respondent.*

} Case No. 7992

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MOTION TO DISMISS PETITION FOR  
REHEARING AND OPPOSING BRIEF OF  
DEFENDANT AND RESPONDENT

**FILED**

JAN 20 1954 HUGGINS & HUGGINS

*Attorneys for Defendant and*  
*Clerk, Supreme Court, Utah Respondent.*

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IN THE SUPREME COURT  
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WEENIG BROTHERS, INC., a  
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*Plaintiff and Appellant,*

— vs. —

M. NEPHI MANNING,  
*Defendant and Respondent.*

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RESPONDENT'S MOTION FOR DISMISSAL OF  
PETITION FOR REHEARING AND BRIEF IN  
OPPOSITION TO SAID PETITION

Comes now the respondent, M. Nephi Manning and  
moves this Honorable Court to dismiss appellant's peti-  
for rehearing upon the following grounds:

POINT I

THAT SAID PETITION FOR REHEARING WAS  
NOT FILED OR SERVED WITHIN THE TIME RE-  
QUIRED BY LAW, WHEREFORE, RESPONDENT  
PRAYS THAT SAID PETITION FOR REHEARING  
BE DISMISSED.

HUGGINS & HUGGINS

By

*Attorneys for Respondent*

# BRIEF IN SUPPORT OF MOTION FOR DISMISSAL OF PETITION FOR REHEARING

## POINT I

THAT THE PETITION FOR REHEARING WAS NOT SERVED OR FILED WITHIN THE TIME REQUIRED BY STATUTE.

The decision in this case was filed in the Supreme Court November 2, 1953. Rule 76 U. R. C. P. Subdivision (e) (1) provides:

“within 20 days after the filing of the decision of the Supreme Court, either party may petition the court for a rehearing”\* “and shall be served upon the adverse party prior to filing”

Rule 76 U. R. C. P. Subdivision (e) (4) provides that:

\*“for good cause shown the Supreme Court or any Justice thereof may extend the time for filing any papers or matter required to be filed in the Supreme Court by these rules; provided that only one ex parte extension for not to exceed two weeks shall be granted; if additional time is required it shall be granted only upon written stipulation or upon two days notice to the adverse party\*”

Petition for rehearing and brief were served upon respondent, through his attorney, December 31, 1953, by mail, but was not received until January 2, 1954, two months after filing the decision of the court. In the interim no stipulation was entered into between the parties or their counsel for a greater enlargement of time, and no motion or notice of motion for a greater enlargement of time was served upon or called to the attention of the respondent, so that the time between

filing of this court's decision and serving of the petition for rehearing upon respondent exceeded the 20 days plus two weeks ex parte extension by at least 25 days and, hence, said petition should be dismissed.

Dated this 18th day of January, 1954.

HUGGINS & HUGGINS

By

*Attorneys for Respondent*

## BRIEF IN OPPOSITION TO PETITION FOR REHEARING

### POINT I

THIS COURT DID NOT MISCONSTRUE 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, AND THE TRIAL COURT DID NOT SO FIND.

All of the facts in this case, as well as the law pertinent thereto, were before this court and were fully briefed and fully argued upon appeal. The trial court found that the damage to plaintiff's car was not caused by any negligence of the defendant but from plaintiff's own negligence, another way of stating proximate cause, (Finding No. 8).

There is nothing new or novel in the petition for rehearing or the arguments of counsel not fully covered and gone into in arguments and considered by this court.

There is competent, (even though some contradictory), evidence in this record upon which the trial court, as trier of the facts, as well as judge of the law, made each and every finding in its Finding of Fact. This court will not disturb a finding of the lower court if based upon substantial evidence and not being unreasonable. This court fully considered Section 41-6-57 UCA 53 upon which appellant relies for a rehearing. The section was fully briefed and argued as will appear from pages 15 and 16 of its original brief and was discussed by this court at the bottom of page 1 and the top of page 2 of the green sheet. The evidence was conflicting, plaintiff contending that defendant was passing the truck and the defendant claiming that he was engaged in an exploratory maneuver to determine whether it was safe to pass. The physical facts support the defendant because he immediately turned back into his lane of traffic and the impact occurred less than three feet east of the center of the highway, involving the left side of defendant's car. Had he been abreast of the truck, he could not have turned back onto the west side of the highway.

The North vs. Cartwright case, 229 P 2d, cited by petitioner, adds nothing new to the cases already cited by appellant and considered by the court. In fact, it is very much in line with the cases cited in the original brief, all of them—cases where the party in the position of the defendant in this case brought an action to recover damages, and those cases resulting favorably to appellant's contention simply found that the moving party, the party seeking to recover damages, was guilty of contributory negligence, and, the law in this state with respect to contributory negligence, is so well established that there is no need to cite cases to this court.



Even if it were found that the respondent was guilty of negligence, certainly the finding of the trial court that plaintiff was guilty of contributory negligence, under the circumstances, would bar a recovery.

The Skirl vs. Willow Creek Coal Company 92 Ut 474, 69 P 2d 502, is not in conflict with the decision in the instant case. It can as well be argued and with as much propriety that the statute and the law fixing speed limits and making it unlawful to operate a vehicle in excess of those limits fixes a standard of duty or care for the safety of life, limb or property as certainly as the section upon which appellant relies. „

## POINT II

, THIS COURT DID NOT FAIL 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.

Counsel's argument under point II completely overlooks the reckless disregard that plaintiff exhibited for the safety of other persons and property upon the highway in his failure to drive at such a rate of speed and in his failure to keep his car under such control that he could have brought it to a stop within the distance of his vision. His argument completely overlooks the fact that there is competent evidence upon which the court found plaintiff was driving at a speed in excess of that fixed by law under circumstances which required extreme



caution, and that by reason of his own negligence found himself in a position from which the evidence shows he made very little effort to extricate himself. Using the definition of proximate cause fixed by the court in *Snook vs. Long* 21 ALR (1) as follows:

“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”\*.

There is no doubt in the instant case but that if plaintiff had been driving his vehicle at a lawful speed, 23 miles per hour as testified to by the expert witness, Carter, if the visibility was 50 feet, and 30 miles per hour if the visibility was 84 feet, there would have been no accident and hence, no damage because at the reduced speed the physical facts make it amply clear, defendant would have had time to have gotten completely over on his side of the highway and plaintiff could have continued on unobstructed or plaintiff could have turned far enough to avoid the impact. In other words, plaintiff created his own condition of peril and did very little, if anything, to overcome it. With respect to counsel's statement on page 10, and we quote:

“we are sure this explanation was conjured up by Manning as a defense measure”\*

it is not justified in any degree. Disregarding plaintiff's testimony and defendant's testimony the physical facts bear defendant's contention out. In any event the trial court saw the witnesses, heard their testimony and it cannot be said that his finding in that regard is not based upon substantial evidence. Respondent's whole

argument with respect to traffic casualties points up the reason why plaintiff should have driven carefully and cautiously on the occasion in question.

### POINT III

THE DECISION OF THIS COURT DID NOT RESULT IN A DANGEROUS PRECEDENT BEING ESTABLISHED IN THE AUTOMOBILE LAW OF THIS STATE PERTAINING TO VEHICLES PASSING ONE ANOTHER WHILE DRIVING IN AN OPPOSITE DIRECTION AND THE DECISION NEED NOT BE RECALLED NOR THE CASE REHEARD.

Appellant's argument on Point III, other than its statement with respect to members of the bar expressing surprise and the lecture on the bottom of page 11 with respect to highway accidents, is nothing more than a reiteration of the arguments contained in its original brief and made before this court on the original hearing. We see no reason for the concern or surprise, indicated by members of the bar, since the original decision simply follows the law in this state as it has existed for many years. The position of appellant, if we understand it correctly, is untenable in that the provisions of the Statute with respect to passing other vehicles travelling in the same direction must of necessity be construed in connection with the other statutes regulating highway traffic. In this instance, the statutes regulating speed, and keeping vehicles under control.

Following appellant's argument to its logical conclusion, the operator of a vehicle travelling at any speed, regardless of how excessive, could never be found guilty of any negligence against the operator of

another vehicle lawfully and carefully passing a third vehicle travelling in the same direction or determining if safe to pass. We are not impressed that appellant's lecture on traffic accidents adds anything to this case since it does not change the facts in the case or the law of the state and presents a consideration for the legislature rather than this court. Added to that, as we understand the statistics, appellant simply makes a case against himself because from our information, the greatest single cause of highway casualties is excessive speed, the very manner in which appellant itself violated the statute.

We, therefore, submit that there is nothing here to justify a rehearing under the decisions of this court. In re: McKnight 4 Ut., 237, 9 P 299, Browning vs. Pickard 4 Ut. 292, 9 P 573, 11 P 512, Ducheneau vs. House 4 Ut. 483, 11 P 618 Cummings vs. Neilson 42 Ut. 157, 129 P 619. Many other cases could be cited.

### CONCLUSION

The petition for rehearing should be dismissed:

(1) For the reason that it was not filed or served within the time and manner provided by Rule 76 (e) (1) and 76 (e) (4) U. R. C. P.

(2) There is nothing presented in the petition for rehearing which is new or showing that this court misconstrued the facts or erred in its application of the law to those facts and that all matters offered in the petition for rehearing and attached brief were fully considered and discussed and acted upon by this court.

Respectfully submitted,

HUGGINS & HUGGINS

Attorneys for Respondent