

1953

Rulon M. Keller v. R. V. Wixom : Brief of Respondent

Utah Supreme Court

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CASE NO. 7778

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

RULON. M. KELLER,
Plaintiff and Respondent,

—vs.—

R. V. WIXOM,
Defendant and Appellant.

CASE NO. 7778

BRIEF OF RESPONDENT

**ON PETITION FOR REHEARING APPEAL
FROM THE
DISTRICT COURT OF SALT LAKE COUNTY**

HONORABLE A. H. ELLET, *District Judge*

NEWEL G. DAINES,
Cache Valley Bank Building
Logan, Utah

FILED

JUN 18 1953

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Clerk, Supreme Court, Utah

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IN THE SUPREME COURT of the STATE OF UTAH

RULON. M. KELLER,
Plaintiff and Respondent,

—vs.—

R. V. WIXOM,
Defendant and Appellant.

CASE NO. 7778

BRIEF OF RESPONDENT

STATEMENT OF FACTS

We do not desire to indulge in any extended statement of facts but we wish to call the Court's attention to the fact that the original brief of the appellant contained three points only and they are as follows:

"POINT I.

"The Court erred in its findings in this that said findings are indefinite, erroneous, prejudicial and unintelligible and not supported by the evidence for the reason that they do not specify particularly the items of expense and cost of Wixom and Keller, the items of purchase and the terms of their agreement, and an itemized account of how the amount of the judgment was arrived at."

“POINT II.

“That the Court erred in refusing Wixom the opportunity to introduce evidence in support of his claim for extra compensation for services and work required to be done for the benefit of Wixom and Keller in said operation.”

“Point III.

“That the Court erred in its mathematical calculations in arriving at said judgment.”

In the petition for rehearing there are seven points, none of which embrace anything that was presented, discussed, treated, or argued in the original hearing before this Honorable Court. In other words, the appellant seeks now to present an entirely new appeal and seeks now to urge contentions as if the case were for the first time being presented to this Honorable Court. Or differently stated, he has abandoned his points originally made and now urges on the Court seven entirely new positions embraced in his seven points which have not been heretofore presented to, urged upon, or argued before this Honorable Court.

We urge upon this Honorable Court on this petition for rehearing two points as hereinafter set out.

POINT I.

“An argument based upon a point not mentioned in original brief of petitioner is of no avail on

petitioner's demand for rehearing, under rule that judgments of appellate courts will not be upset in order to grant rehearing unless basis of petitioner's demand is included in petitioner's brief''.

In support of the foregoing position we invite the Court's attention to an unbroken line of authorities and undisturbed record of judicial decisions from all jurisdictions, including this Honorable Court. In other words, we can assert to this Honorable Court there is not an in-harmonious note in the entire body of authority that we have been able to encounter.

Sanders vs. Howard,
195 P. 2d 898. (Cal.)

Flores vs. Stone,
131 P. 351, 86 Cal. App. 721.

Flores vs. Stone,
131 P. 351, (Cal.)

3 Am. Jur. 350, Sec. 806

4 C. J., 629 Sec. 2495

4 CJS, 2032 Sec. 1421

2 Calif. Juris 790 Sec. 464

Farrell vs. Pingree,
5 Utah 530, 17 P. 453.

Harrison vs. Harker,
44 Utah 541, 142 P. 716.

POINT II.

The petitioner has utterly failed to comply with the rules of this Honorable Court in that the rules require that "The petition shall be supported by a brief of the authorities relied upon to sustain the points listed in such petition."

Utah Rule of Civil Procedure, 76 (e) (1).

CONCLUSION

We respectfully contend that the petition for rehearing in this case does not comply with the rules of this Honorable Court and seeks to retry the appeal on new and different grounds; that the original opinion is sustained by sound reasoning, principles of justice, and authority, and the petition for a rehearing is but an effort to prolong the litigation.

Respectfully submitted,

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