

1983

Kay J. Larsen v. Judy Larsen (Thomas) : Brief of Plaintiff-Respondent

Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

KAY J. LARSEN, :
 :
 Plaintiff & Respondent, :
 :
 vs. : Case No. 18198
 :
 JUDY LARSEN (THOMAS), :
 :
 Defendant & Appellant. :

BRIEF OF PLAINTIFF-RESPONDENT
KAY J. LARSEN

RESPONSE TO DEFENDANT-APPELLANT'S PETITION FOR REHEARING

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IN THE SUPREME COURT
OF THE STATE OF UTAH

KAY J. LARSEN, :
Plaintiff & Respondent, :
vs. : Case No. 18198
JUDY LARSEN (THOMAS), :
Defendant & Appellant. :

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Defendant & Appellant. :

PLAINTIFF-RESPONDENT'S RESPONSE TO PETITION
FOR REHEARING OF THE DEFENDANT-APPELLANT

DISPOSITION BY THE SUPREME COURT

The Supreme Court in its PER CURIAM decision entered January 21st, 1983 dismissed the appeal of the defendant-appellant for failure to file her Notice of Appeal in a timely manner.

RELIEF SOUGHT BY PLAINTIFF-RESPONDENT

Plaintiff-Respondent prays the court to deny the defendant-appellant's petition for rehearing.

STATEMENT OF FACTS

Facts in this case are as stated in the plaintiff-respondent's original brief except that in addition thereto it should be noted that the failure to file a timely Notice of Appeal was raised in the plaintiff-

respondent's brief filed in response to the defendant-appellant's brief on appeal and the defendant-appellant failed to file a reply brief raising any defenses therein as is required by Rule 75(p)1(1) and (2) Utah Rules of Civil Procedure.

ARGUMENT

POINT I

NEW POINTS OR ISSUES BROUGHT TO THE SUPREME COURT'S ATTENTION FOR THE FIRST TIME ON APPLICATION FOR RE-HEARING MAY NOT BE CONSIDERED.

The plaintiff-respondent in Point 1 of his brief filed in answer to the defendant-appellant's brief on appeal raised the issue of failure to file notice of appeal in a timely manner. Rule 75(p)1 states in pertinent part "...a reply brief may likewise be served and filed by the appellant at any time before the first day of session of the court at which the case is set for hearing." In the 3rd paragraph of sub-paragraph (2) thereof " the reply brief, if any, shall be limited to answering any new matters set forth in repondent's brief, and shall conform generally to the requirements of other briefs."

The facts setting forth the untimeliness of the defendant-appellant's notice of appeal were set forth clearly and explicitly on pages 3 and 4 of the brief of respondent. The matters around the entry of the various judgments were argued to the court orally when the court heard the respondent's motion to dismiss and the appellant's motion for summary disposition and the matters attempted to be raised by the

appellant's petition for rehearing were not raised at that time. Therefore the appellant has had adequate time to raise any and all pertinent matters in support of her position and in opposition to the matters raised by the appellant in the appellant's brief and appellant has chosen not to raise the issues until now.

Respondent would proffer to the court that the present procedure in the Third District Court in and for Salt Lake County , State of Utah is for the clerk to presently microfilm the pleadings and orders that are submitted after having been signed by the judge and that the date of legal effect in such matters is the date which is stamped on each document as filed in the clerk's office. The Register of actions now consists of a sheet of microfilmed pleadings Whether or not there was an oversight by the clerk in entering the Order signed by Judge Baldwin on November, 17th and stamped as being filed on November 18th in 1981 is a matter that should have been raised in a reply brief in order that the court then have all the issues before it and it is now improper to attempt to raise the issue at this late date. The appellant has waived any right she may have had to waive that issue and her petition for rehearing should be denied.


This court has held on many occasions that new points first brought to the Supreme Court's attention by means of an application or petition for rehearing could not be considered where they were just as available to be heard on the original hearing. Harrison vs. Harker, 44 U. 541, 142 P.716; Swanson vs. Simms, 51 U. 45, 180 P. 774; Dahlquist vs. Denver & R.G. CO., 52 U. 438, 174 P. 833, Pingree National Bank of Ogden

vs. Weber County, 54 U. 599, 183 P. 334, Kayser vs. Erickson, 61 U. 179, 211 P. 6098; Bert vs. Odis Elevator, 64 U. 518, 231 P. 832; in re: Lowes Estate, 68 U. 49, 249 P. 128.

CONCLUSION

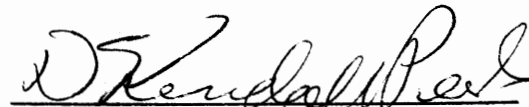
Respondent respectfully submits that the appellant had ample opportunity to raise the questions she attempts to raise in her brief in support of petition for rehearing by means of a reply brief which should have been submitted in response to the matters raised in respondent's brief on appeal and having failed to do so has waived that right. Therefore her petition for rehearing should be denied.

Respectfully submitted this 15 day of *May*, 1983.


D. Kendall Perkins
Attorney for Plaintiff-Respondent

DELIVERY CERTIFICATE

I hereby certify that I delivered two copies of the foregoing Reply Brief to Appellant's Petition for Rehearing this 15 day of *May*, 1983 to Phillip A. Harding, attorney for appellant, at 175 South West Temple, Suite 500, Salt Lake City, Utah 84101.


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