

1989

# John Wagner Associates, dba Grabber Utah v. Hercules, Inc. : Reply Brief

Utah Court of Appeals

Follow this and additional works at: [https://digitalcommons.law.byu.edu/byu\\_ca1](https://digitalcommons.law.byu.edu/byu_ca1)



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Robert F. Babcock; Darrel J. Bostwick; Walstad and Babcock; Attorneys for Appellant.

James M. Elegante; Mark S. Webber; Parsons, Behle and Latimer; Attorneys for Respondent.

---

## Recommended Citation

Reply Brief, *John Wagner Associates v. Hercules, Inc.*, No. 890017 (Utah Court of Appeals, 1989).  
[https://digitalcommons.law.byu.edu/byu\\_ca1/1515](https://digitalcommons.law.byu.edu/byu_ca1/1515)

This Reply Brief is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at [http://digitalcommons.law.byu.edu/utah\\_court\\_briefs/policies.html](http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html). Please contact the Repository Manager at [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu) with questions or feedback.

UTAH  
DOCUMENT  
KFU

50

**.A10**

DOCKET NO.

890017-CA

IN THE UTAH COURT OF APPEALS OF THE STATE OF UTAH

\* \* \* \* \*

JOHN WAGNER ASSOCIATES,  
d/b/a GRABBER UTAH,

Plaintiff - Appellant,

**VS.**

**HERCULES, INC.,**

**Defendants - Respondent.**

**HERCULES' REPLY TO  
PLAINTIFF'S RESPONSE  
TO DEFENDANT'S PETITION  
FOR REHEARING**

CASE NO. 890017-CA

\*\*\*\*\*

APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT OF  
SALT LAKE COUNTY, STATE OF UTAH  
Honorable Frank G. Noel, District Court Judge

JAMES M. ELEGANTE (0968)  
MARK S. WEBBER (4940)  
of and for  
PARSONS BEHLE & LATIMER  
185 South State St., Suite 700  
P.O. Box 11898  
Salt Lake City, Utah 84147-0898  
Telephone: (801) 532-1234

**ATTORNEYS FOR RESPONDENT**

Robert F. Babcock  
Darrel J. Bostwick  
WALSTAD & BABCOCK  
254 West 400 South, #200  
Salt Lake City, Utah 84101

ATTORNEYS FOR APPELLANT

NOV 16 1990

IN THE UTAH COURT OF APPEALS OF THE STATE OF UTAH

\* \* \* \* \*

JOHN WAGNER ASSOCIATES,	)	
d/b/a GRABBER UTAH,	)	HERCULES' REPLY TO
	)	PLAINTIFF'S RESPONSE
Plaintiff - Appellant,	)	TO DEFENDANT'S PETITION
	)	FOR REHEARING
vs.	)	
	)	
HERCULES, INC.,	)	CASE NO. 890017-CA
	)	
Defendants - Respondent.	)	

\*\*\*\*\*

APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT OF  
SALT LAKE COUNTY, STATE OF UTAH  
Honorable Frank G. Noel, District Court Judge

JAMES M. ELEGANTE (0968)  
MARK S. WEBBER (4940)  
of and for  
PARSONS BEHLE & LATIMER  
185 South State St., Suite 700  
P.O. Box 11898  
Salt Lake City, Utah 84147-0898  
Telephone: (801) 532-1234

ATTORNEYS FOR RESPONDENT

Robert F. Babcock  
Darrel J. Bostwick  
WALSTAD & BABCOCK  
254 West 400 South, #200  
Salt Lake City, Utah 84101

ATTORNEYS FOR APPELLANT

TABLE OF CONTENTS

	<u>Page</u>
PRELIMINARY STATEMENT.....	1
ARGUMENT.....	1
I.    THE ATTORNEYS' FEES PROVISION IS A SUBSTAN- TIVE AMENDMENT AND SHOULD NOT BE APPLIED RETROACTIVELY.....	2
CONCLUSION.....	9

## AUTHORITIES CITED

### Cases

	<u>Page</u>
<u>Allchurch v. Project Unicorn, Ltd.</u> , 516 P.2d 441 (Colo. Ct. App. 1973).....	7
<u>American Fed. of Musicians v. Reno's Riverside Hotel, Inc.</u> , 475 P.2d 220 (Nev. 1970).....	7
<u>Archer v. Utah State Land Bd.</u> , 15 Utah 2d 321, 324, 392 P.2d 622, 624 (1964).....	3
<u>Bahr v., Ettinger</u> , 88 Or.App. 419, 745 P.2d 807 (1987).....	7
<u>Bouldin v. Turek</u> , 125 Ariz. 77, 607 P.2d 954 (1979).....	6
<u>Cady v. Johnson</u> , 671 P.2d 149 (Utah 1983).....	2
<u>Camer v. Seattle School Dist. No. 1</u> , 52 Wash.App. 531, 762 P.2d 356 (1988).....	8
<u>Carlucci v. Industrial Comm'n</u> , 725 P.2d 1335 (Utah 1986).....	3, 4
<u>Circle K Corp. v. Rosenthal</u> , 118 Ariz. 63, 574 P.2d 856 (Ct. App. 1977).....	5, 6
<u>Dept. of Social Servs. v. Higgs</u> , 656 P.2d 998 (Utah 1982).....	9
<u>Eriksen v. Blue Cross of Idaho</u> , 116 Idaho 693, 778 P.2d 815 (Ct. App. 1989).....	7, 8
<u>Jensen v. Shank</u> , 99 Idaho 565, 585 P.2d 1276 (1978).....	7, 8
<u>Pilcher v. Department of Social Servs.</u> , 663 P.2d 450 (Utah 1983).....	3, 4, 5
<u>Sallomi v. Phoenix Newspapers, Inc.</u> , 160 Ariz. 144, 771 P.2d 469 (App. Ct. 1989).....	6
<u>Seattle-First Nat'l Bank v. Schriber</u> , 51 Or.App. 441, 625 P.2d 1370 (1981).....	7
<u>Stubbs v. Hemmert</u> , 567 P.2d 168, 171 (Utah 1977).....	2

	<u>Page</u>
<u>USLife Title Co. v. Soule Steel Co.</u> , 122 Ariz. 79, 593 P.2d 302 (Ct. App. 1979).....	6
<u>Woodland Hills v. City Council of Los Angeles</u> , 154 Cal. Rptr. 503, 593 P.2d 200, 208 (1979).....	9
<u>Zaik/Miller v. Hedrick</u> , 72 Or.App. 20, 695 P.2d 88 (1985)....	6, 7

#### **STATUTES**

Utah Code Ann. § 14-2-2 (as amended 1989).....	Passim
Utah Code Ann. § 68-3-3 (1990).....	3
Utah Code Ann. § 78-27-56 (1990).....	2

#### **COURT RULES**

Rules of the Utah Court of Appeals, Rule 35.....	1
--	---

### PRELIMINARY STATEMENT

Pursuant to Rule 35 and the request of the Clerk, Hercules, Inc. submits this Reply to Plaintiff's Response to Defendant's Petition for Rehearing.

### ARGUMENT

The relevant statute in effect when Wagner initiated this action in 1986 did not authorize an award of attorneys' fees to the prevailing party. In 1989, during the pendency of this case, the statute was amended to include a provision for awarding attorneys' fees. To apply the amendment retroactively against Hercules would be unfair and inconsistent with policies articulated by the courts of Utah and of neighboring jurisdictions. The amendment is substantive in nature because it creates new rights and liabilities and it changes the measure of damages. Substantive changes in statutes which occur during the pendency of an action are not given retroactive effect.

Furthermore, there is no reason to award attorneys' fees to Wagner in this action. Hercules defended at trial in good faith and made no counterclaims. There is no evidence or allegation that Hercules engaged in frivolous, vexatious or oppressive conduct.

**I. THE ATTORNEYS' FEES PROVISION IS A SUBSTANTIVE AMENDMENT AND SHOULD NOT BE APPLIED RETROACTIVELY.**

In Utah, "[a]ttorney's fees are chargeable to an opposing party only if there is a contractual or statutory liability therefor." Stubbs v. Hemmert, 567 P.2d 168, 171 (Utah 1977).<sup>1</sup> Contractual liability for attorneys' fees is not at issue in this action; the only issue is whether there is statutory liability.

Wagner initiated this action on January 16, 1986, when the relevant statute did not authorize an award of attorneys' fees. Utah Code Ann. § 14-2-3 (1953 as enacted 1963). During the pendency of this case, § 14-2-3 was repealed in 1987, and then in 1989, § 14-2-2 was amended to include a provision for awarding attorneys' fees to the prevailing party. Utah Code Ann. § 14-2-2(3) (as amended 1989). The issue which this Court has raised through its opinion and rehearing order is whether the amended statute should be given retroactive effect to permit an award of attorneys' fees. Utah law, as well as persuasive authority from other jurisdictions, counsels that § 14-2-2(3) should not be applied retroactively.

Although § 14-2-2 is silent regarding its application to pending actions, its effective date is April 24, 1989. The standing rule of statutory construction, as codified, is that

---

<sup>1</sup> In Utah, courts have equitable power to award attorneys' fees to the prevailing party if the court determines that the action or defense was without merit and not asserted in good faith. Utah Code Ann. § 78-27-56 (1990); Cady v. Johnson, 671 P.2d 149 (Utah 1983). Hercules' conduct in this case would not warrant assessing Wagner's attorneys' fees against Hercules.



"[n]o part of these revised statutes is retroactive, unless expressly so declared." Id. § 68-3-3 (1990) (emphasis added).

Retroactive application of statutory enactments is disfavored because it is unfair to the parties. "The general rule is that the law establishing substantive rights and liabilities when a cause of action arises, and not a subsequently enacted statute, governs the resolution of the dispute." Carlucci v. Industrial Comm'n, 725 P.2d 1335, 1336 (Utah 1986). Fairness implies that litigants should be able to order their conduct according to the law in effect at the time litigation decisions are made, especially when the controlling law is statutory. For this reason, Utah courts have recognized that "ordinarily the facts and the law in a given lawsuit are to be applied as of the date of the filing of the original complaint." Archer v. Utah State Land Bd., 15 Utah 2d 321, 324, 392 P.2d 622, 624 (1964).

The courts have recognized certain exceptions to the rule against applying a statute retroactively. The exception to the rule of nonretroactivity most significant in this dispute is that intervening amendments which are remedial or procedural only, and which do not enlarge, eliminate or destroy vested or contractual rights, may be applied retroactively to pending actions. Pilcher v. Department of Social Servs., 663 P.2d 450, 455 (Utah 1983). It appears that no Utah court has ever addressed the issue of whether an amendment authorizing an award of attorneys' fees fits within the remedial/procedural exception.

In the absence of Utah case law directly on point, there are two sources to guide the Court in determining whether

an amendment authorizing an award of attorneys' fees is remedial or procedural. Both recommend against applying § 14-2-2(3) retroactively. The first source is Utah cases addressing whether other kinds of amendments (not involving attorneys' fees) are remedial or procedural. The second is cases from other jurisdictions directly addressing the issue of whether statutory amendments authorizing attorneys' fees are substantive or procedural.

In Carlucci, supra, the court addressed the issue of whether the statute creating the Default Indemnity Fund was substantive or merely remedial and procedural. The Fund was created to pay workers or their dependents compensation benefits when their employers are unable to pay. The plaintiff argued that the statute creating the Fund was remedial and that it therefore could be applied retroactively to cover the death of her husband, who had died five months before the statute's effective date. The Utah Supreme Court ruled that the statute was substantive and therefore could not be applied retroactively. The court determined that the statute was substantive because it created new rights and liabilities. Carlucci, 725 P.2d at 1337.

The attorneys' fees provision in § 14-2-2 is like the statute in Carlucci in that it also creates new rights (for prevailing parties) and new liabilities (for losing parties). This similarity between the statutes indicates that the amendment authorizing attorneys' fees is substantive in nature, and should not be applied retroactively.

In Pilcher v. Dept. of Social Servs., supra, the issue was whether a statute enacted in 1975, authorizing the State to

recover past due child support payments, could be applied retroactively to the payments owed under a 1965 divorce decree. The Utah Supreme Court stated that although retroactive application of statutes is disfavored, "an exception is made for remedial procedural statutes." Pilcher, 663 P.2d at 455. The court concluded that the statutory provisions at issue were remedial and procedural because they provided a means for enforcing existing child support payments, creating no new obligations, and destroying no vested interests. 663 P.2d at 455-56.

By contrast, requiring Hercules to pay Wagner's attorneys' fees pursuant to § 14-2-2(3) would impose a new obligation which did not exist before the amendment. Thus, § 14-2-2(3) does not possess the characteristics of a remedial or procedural amendment, and should not be applied retroactively.

The second source of guidance for determining whether an amendment authorizing an award of attorneys' fees is remedial or procedural is the body of case law from neighboring jurisdictions addressing the issue. The jurisdictions are split over this issue, but the majority of Utah's neighboring states which have addressed the issue have held that amendments authorizing attorneys' fees are substantive, and thus courts refuse to apply them retroactively. However, it is the reasoning of the cases, not the number of them, which is most persuasive.

The Arizona courts have addressed the issue of whether statutes authorizing attorneys' fees are substantive in the context of deciding whether retroactive application is appropriate. Wagner cites Circle K Corp. v. Rosenthal, 118 Ariz. 63, 574 P.2d

856 (Ct. App. 1977), but Hercules believes that a more informative case is Bouldin v. Turek, 125 Ariz. 77, 607 P.2d 954 (1979), decided by the Arizona Supreme Court one year after the Arizona Court of Appeals' decision in Circle K.

In Bouldin, the issue was whether a statute providing for an award of attorneys' fees to the prevailing party in a contract dispute applies retroactively to suits commenced before the effective date of the statute. Like Utah, Arizona recognizes the exception for remedial or procedural statutes. 607 P.2d at 955. The court specifically examined the attorneys' fees provision and held that "such a provision is substantive and not procedural." Id. Most importantly, the court explained why a statute awarding attorneys' fees is substantive: because it changes the measure of damages. Id.; see also, Sallomi v. Phoenix Newspapers, Inc., 160 Ariz. 144, 771 P.2d 469 (App. Ct. 1989) (statute awarding attorneys' fees is not procedural and may not be applied retroactively to pending libel cases); USLife Title Co. v. Soule Steel Co., 122 Ariz. 79, 593 P.2d 302 (Ct. App. 1979) (statute granting discretion to award attorneys' fees in contract actions is substantive and may not be applied retroactively).

The Oregon courts have also addressed the issue of retroactivity of a statute awarding attorneys' fees. In Zaik/Miller v. Hedrick, 72 Or.App. 20, 695 P.2d 88 (1985), a statute awarding attorneys' fees took effect while the trial court proceeding was pending. Plaintiffs argued that the statute was remedial or procedural rather than substantive but the court held that the attorneys' fees provisions were substantive, and

refused to apply the statute retroactively. The court explained that because attorneys' fees "are not merely costs incidental to judicial administration, awarding them is a matter of substantive, rather than procedural, right." Zaik/Miller, 695 P.2d at 89 (quoting Seattle-First Nat'l Bank v. Schriber, 51 Or.App. 441, 448, 625 P.2d 1370, 1373 (1981)). See also, Bahr v., Ettinger, 88 Or.App. 419, 745 P.2d 807 (1987) (statute authorizing attorneys' fees against party who acted in bad faith is substantive and may not be applied retroactively).

Courts in Colorado and Nevada have also held that statutes authorizing attorneys' fees may not be applied retroactively to actions pending on the statute's effective date. See Allchurch v. Project Unicorn, Ltd., 516 P.2d 441 (Colo. Ct. App. 1973)(statute authorizing recovery of attorneys' fees in unearned wage claim may not be applied retroactively); American Fed. of Musicians v. Reno's Riverside Hotel, Inc., 475 P.2d 220 (Nev. 1970)(striking an award of attorneys' fees pursuant to statute amended after the commencement of the law suit).

Furthermore, the present action can be distinguished from the cases cited by Wagner. In Jensen v. Shank, 99 Idaho 565, 585 P.2d 1276 (1978), the statute allowing attorneys' fees was in effect before the cause of action was tried. In Eriksen v. Blue Cross of Idaho, 116 Idaho 693, 778 P.2d 815 (Ct. App. 1989), the statute allowing attorneys' fees was in effect before the lawsuit was even filed. However, the situation in the present case is significantly different from Jensen and Erickson in that § 14-2-2(3) became effective after the law suit was

tried. Applying § 14-2-2(3) retroactively would work a greater unfairness to Hercules because, compared to Jensen and Eriksen, the amendment in this action became effective at a significantly later stage of the litigation.<sup>2</sup>

The present action can also be distinguished from Camer v. Seattle School Dist. No. 1, 52 Wash.App. 531, 762 P.2d 356 (1988). In Camer, the court awarded attorneys' fees because it found the plaintiff's claims to be frivolous. 762 P.2d at 361. By contrast, there is no evidence or allegation that Hercules made frivolous defenses.

In sum, § 14-2-2(3) is substantive because it changes the measure of damages, it creates new rights and liabilities, and the attorneys' fees are not incidental to judicial administration. The amendment should, therefore, not be applied retroactively.

In addition to the remedial/procedural exception, the courts have recognized certain other exceptions to the rule of nonretroactivity. One such exception exists for private attorney general statutes. Wagner cites cases upholding the retroactivity of private attorney general statutes, such as the Civil Rights Act and the Voting Rights Act, as though these cases add support to the claim that the remedial/procedural exception should apply. See Plaintiff's Response to Defendant's Petition for Rehearing at 10-11. These cases do not support Wagner's

---

<sup>2</sup> In the trial court proceedings, where Hercules was the prevailing party, Wagner correctly argued that § 14-2-2 could not be applied retroactively to this action. The trial court appropriately ruled that the amendment does not apply retroactively.

argument because the objective of the private attorney general doctrine is to encourage public policy suits which benefit a broad class of citizens. Woodland Hills v. City Council of Los Angeles, 154 Cal. Rptr. 503, 593 P.2d 200, 208 (1979). By contrast, § 14-2-2(3) is a section in a chapter of the code entitled "Private Contracts," and deals solely with private contracts between owners and contractors.

There is also an exception to the general rule for amendments intended to clarify or amplify existing law. See, e.g., Dept. of Social Servs. v. Higgs, 656 P.2d 998 (Utah 1982). However, § 14-2-2(3) does not fit within that exception because, rather than merely clarifying or amplifying an existing statute, the amendment adds an entirely new dimension to it.

Thus, § 14-2-2(3) does not fit within any recognized exception to the general rule against retroactivity, and should not be retroactively applied in this action.

#### CONCLUSION

In Utah, the general rule is that the law creating substantive rights and liabilities when a cause of action arises, rather than a subsequent amendment thereto, governs the resolution of the dispute. An amendment authorizing an award of attorneys' fees changes the measure of damages, thereby altering the rights and liabilities of the parties, and thus is a substantive

change. Substantive amendments are not given retroactive effect to pending litigation because to do so would be unfair. Moreover, awarding attorneys' fees in this action would not be appropriate because Hercules' defense was made in good faith, and was neither frivolous nor oppressive.

For the reasons stated herein, Hercules requests the Court to deny Wagner's request for attorneys' fees.

DATED this 16<sup>th</sup> day of November, 1990.

  
\_\_\_\_\_  
JAMES M. ELEGANTE

of and for  
PARSONS BEHLE & LATIMER  
Attorneys for Defendant Hercules

MAILING CERTIFICATE

I hereby certify that I caused to be mailed, postage prepaid, a true and correct copy of the foregoing HERCULES' REPLY TO PLAINTIFF'S RESPONSE TO DEFENDANT'S PETITION FOR REHEARING to the following on this 16<sup>th</sup> day of November, 1990:

Robert F. Babcock  
Darrel J. Bostwick  
Walstad & Babcock  
254 West 400 South, 2nd Floor  
Salt Lake City, Utah 84101

336:111490A