

1952

Robert T. Wagner and Rebecca L. Wagner v. Joseph A. Anderson : Reply Brief of Appellants

Utah Supreme Court

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IN THE SUPREME COURT

OF THE

STATE OF UTAH

**ROBERT T. WAGNER and
REBECCA L. WAGNER, his
wife,**

Appellants,

-vs-

JOSEPH A. ANDERSON,

Respondent.

Civil No. 7761

REPLY BRIEF OF APPELLANTS

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Clerk, Supreme Court, Utah

CASES CITED 3

Erie Railroad Co. v. C. Callahan Co.
(Ind.) 184 N.E. 264, 87 A.L.R. 778;
Annotation 87 A.L.R. 781 et seq.

Yaple v. New York O. & W. R. Co. 57
App. Div. 265, 68 N.Y. Supp. 292.

Bliss v. New York C. & H. R. R. Co.
160 Mass. 447, 36 N.E. 65.

Barrett v. Montgomery County 109 Kan.
685, 201 P. 1098.

Goodson v. National Masonic Ass.
Asso. 91 Mo. App. 339.

Cunningham v. Union Casualty & Surety
Co. 82 Mo. App. 607.

Morgan v. St. Louis & S. F. R. Co. 111
Mo. App. 721, 86 S.W. 590.

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Respondent's main contention is that when appellants conveyed their property and respondent paid the purchase price, the appellants' rights to attorneys' fees and special damages were extinguished "being mere incidents" to the right of specific performance.

That attorneys' fees and special damages were part of appellants' lawsuit is a matter of record. That the lawsuit was not dismissed because respondent was unwilling to settle the matters of attorneys' fees and special damages and appellants were unwilling to settle the lawsuit for specific performance alone is undisputed.

The cases cited by respondent which involve suits to recover costs are not applicable here. It may well be true that once the cause of action is gone the court will not entertain an action for costs. However, the right to attorneys' fees which arise by contract and special damages which the law may recognize as flowing from a breach of contract are entirely different rights.

The other cases cited by respondent in which the court clearly states there was a settlement of the lawsuit between the parties are likewise inapplicable because here there has been no settlement of the lawsuit.

The appellants respectfully submit that the

preposition before the court is this: can there be a partial settlement of an action for specific performance, attorneys fees and special damages?

The answer to this preposition is in the affirmative. It is well settled that where a cause of action contains several elements or claims, settlement of less than all the elements or claims, unless intended as settlement of the entire cause of action, does not extinguish the other elements or claims. *Erie Railroad Co. v. C. Callahan Co.* (Ind.) 184 N.E. 264, 87 A.L.R. 778; Annotation 87 A.L.R. 781, et seq.; *Yaple v. New York O. & W. R. Co.* 57 App. Div. 265, 68 N.Y. Supp. 292; *Bliss v. New York C. & H. R. R. Co.*, 160 Mass. 447, 36 N.E. 65; *Barrett v. Montgomery County* 109 Kan. 685, 201 P. 1098; *Goodson v. National Masonic Acc. Asso.* 91 Mo. App. 339; *Cunningham v. Union Casualty & Surety Co.* 82 Mo. App. 607; *Morgan v. St. Louis & S. F. R. CO.* 111 Mo. App. 721, 86 S.W. 590. It was contended in each of the cases cited above, that when part of an entire cause of action was settled, the

entire cause was extinguished. The reason urged was that the plaintiff was splitting his cause of action. The court in each case held that although an entire claim or contract may not be divided or split up and made the subject of several suits, when an action is prosecuted on an entire cause of action made up of several elements or claims, if the parties cannot make a full settlement but can make a partial one, one element of the controversy thus eliminated is no bar to prosecution of the elements or claims of the suit in dispute. It is said that the reason for the rule against splitting causes of action, viz., the minimization of litigation, does not exist under the circumstances. Instead the parties have actually eliminated part of the lawsuit, thus reducing the amount of litigation.

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