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Gene Wheadon and Deane Wheadon v. George B. Pearson and Sarah K. Pearson : Petition for Rehearing

Utah Supreme Court

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Dean E. Conder; Attorney for Respondents;

IN THE SUPREME COURT OF THE STATE OF UTAH

GENE WHEADON and
DEANE WHEADON, his wife,
Plaintiffs and Appellants,

vs.

GEORGE B. PEARSON and
SARAH K. PEARSON, his wife,
Defendants and Respondents.

PETITION FOR REHEARING

Appeal from a judgment of the Third District Court
for Salt Lake County
HONORABLE MARCELLUS K. SNOW, Judge

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PRINTERS INC. - SUGAR HOUSE

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IN THE SUPREME COURT OF THE STATE OF UTAH

GENE WHEADON and
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GEORGE B. PEARSON and
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Defendants and Respondents.

Case
No. 9696

PETITION FOR REHEARING

The plaintiffs respectfully petition the Court for a rehearing of the issues presented to the Court on this appeal, for the reasons hereafter set forth.

I

THE PLAINTIFFS WERE NOT REQUIRED TO JOIN THE CLAIMS IN QUESTION AND SHOULD NOT BE PENALIZED FOR NOT DOING SO.

The underlying rationale of the Court's opinion on this appeal apparently is that because plaintiffs were *permitted* under our rules to join both of the causes of action in question in one lawsuit, they were *required* to do so. It is respectfully submitted that the decisions from other jurisdictions, including those whose rules are similar to ours, are to the contrary.

For example, the annotation at 86 ALR 2d 1385 collects a number of cases in which courts have held that an action for malicious prosecution and an action for false arrest involve different causes of action and that a plaintiff, having either succeeded or failed in the one, may maintain the other in a separate suit. The case which leads the annotation is an especially strong holding to that effect. Two of the decisions collected are from federal district courts, operating under rules substantially identical to ours.

In one of these, *Gore v. Gorman's, Inc.* (1956, DC Mo) 148 F Supp 241, the defendant had procured plaintiff's arrest on an alleged insufficient funds check in an effort to collect an account which plaintiff owed defendant. Plaintiff then sued defendant on a malicious prosecution cause of action and recovered judgment, which was satisfied. Plaintiff then brought the above-cited action, a second and separate suit, on an abuse of process cause of

action. The defendant claimed the former suit was a bar. The court held that it was not, stating (at p. 244):

> As to contention "2"—that the action is *res judicata* —or barred by the judgment heretofore entered, it is the opinion of the court that the action sought to be maintained against the defendants at this time is entirely separate and distinct from the cause of action heretofore prosecuted against the defendants, although some of the relevant facts were considered in that case. Certainly there is a distinction between an action for malicious prosecution, and an action for abuse of process, for even false arrest, *and the plaintiff had a right to maintain the actions separate and distinct from each other*. That contention must be ruled against the said defendants. (Emphasis added)

The second such case is *Robinson v. Chicago Great Western R. Co.* (1956, DC Mo) 144 F Supp 713, where the plaintiff brought a second suit for false imprisonment, having previously secured judgment against the same defendant for malicious prosecution. The court first pointed out that the causes of action for malicious prosecution and false imprisonment were quite different, comprised of different elements and, among other things, subject to different defenses. After some discussion of election of remedies, the court stated (at p. 716):

> If plaintiff, through misconception or mistake, pursues an action for false imprisonment, and ultimately loses, he should not be barred from prosecuting an action based upon the correct theory. There is no substantial reason why plaintiff in good faith cannot pursue two apparent, but inconsistent, theories up to such time as all reasonable uncertainty disappears as to which theory or cause of action is the correct one. The reason given in

> support of this rule is that the prosecution of a wrong remedy to defeat will not estop a party from subsequently pursuing the right one to victory.

Both foregoing cases were decided by courts operating under Rule 18(a), Federal Rules of Civil Procedure, and its provisions are identical with the provisions of Rule 18(a), U.R.C.P. It is respectfully submitted that since we are dealing in this case with separate and distinct causes of action rather than with different statements of the same cause of action, Rule 18(a) is the one more directly in point.

By comparison with the foregoing, the facts of the instant case are *a fortiori* in favor of the plaintiffs. In those cases, the causes of action arose out of the same identical transaction or occurrence; in this case the facts giving rise to the causes of action are distinct, and separated in time.

II

THE DECISION DEPARTS FROM THE FORMER HOLDINGS OF THIS COURT.

In the opinion filed in this case, the Court quotes and emphasizes certain language from its decision in the *East Mill Creek Water Co. v. Salt Lake City* case, 108 U. 315, 159 P. 2d 863. Within the same quote, but not emphasized, is the language which seems to reach the heart of this case. In stating that res judicata "applies not only to points and issues which are actually raised and decided therein, but also to such as could have been therein adju-

dicated," did not the Court mean points and issues pertaining to *that cause of action,* as stated by *those pleadings?*

If not, why the following language ". . . *but it only applies where the claim, demand, or cause of action is the same in both cases.*"?

In a 1955 case, *Ray v. Consolidated Freightways,* 4 U. 2d 137, 289 P. 2d 196, this Court, through Mr. Justice Crockett, adopted the following statement from a case decided by the United States Supreme Court:

> But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, *the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined.* Only upon such matters is the judgment conclusive in another action. (Emphasis added)

To say that a judgment is res judicata as to all matters that could have been adjudicated, without limiting it to those points relevant to the cause of action stated in the pleadings, amounts to compulsory joinder and makes a shambles of Rule 18(a).

Mr. Cleary makes this point in his article, cited by

the court. Cleary, *Res Judicata Re-examined,* 57 Yale L.J. 339, He says, at p. 346:

> Here it is important to distinguish compulsory joinder from permissive joinder of the subject matter of litigation. A literal reading of the rule that res judicata applies not only to what was litigated but to what might have been litigated, as well, would mean that all procedurally joinable matters between the parties at the time of the former action would now be res judicata, regardless of how unrelated such matters might be in fact. Courts have not gone to that length. They have said that what might have been litigated in the first action is res judicata only to the extent that it constituted a part of the cause of action involved in the first action. If the causes of action are different, it is immaterial then that plaintiff might have joined them under rules governing permissive joinder. Now the purpose of liberality in joinder rules is the same as the anti-vexatious-litigation purpose of the rule of res judicata, i.e. to encourage litigants to reduce the numerical volume of lawsuits by bringing more disputed matters into the same action. Yet when plaintiff seeks to make two lawsuits do the work of one, the rule of res judicata applies too harsh a penalty (complete loss of plaintiff's right of recovery), and permissive joinder too slight a penalty (some added inconvenience and expense to plaintiff, which he incurs voluntarily). And so we find a deserving plaintiff denied recovery of very apparent damages for breach of contract because the contract was "entire," and in a former action he had not included damages for anticipatory breach, thus "splitting his cause of action," while in another case plaintiff is permitted to bring as many actions as he holds bonds and coupons of the same identical issue, because each bond and coupon "constitutes a separate cause of action."

SUMMARY

The facts, transactions, occurrences, or whatever they might be called, which gave rise to plaintiffs' cause of action as asserted in this suit were wholly prior in time and separate from those which gave rise to the prescriptive right cause of action set forth in their first suit. The defendants have not been troubled by "vexatious litigation" since the matter was first disposed of by summary judgment in the trial court. To hold that res judicata is a bar against plaintiffs in this present suit is to depart from the prior holdings of this Court and from the almost unanimous weight of authority from other jurisdictions.

It is sincerely urged that this Court should reexamine the principles underlying its prior holding herein, and grant the re-hearing now prayed for.

Respectfully submitted,

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