

2000

Max J. Bishop; Richard L. Warner Harold H. Holley; Richard J. Price and Max N. Lunt, Trustees of the Utah Automobile Dealers Association Group Insurance Plan v. J. E. Crofts and Sons, a Utah Corporation : Petition for Rehearing

Utah Supreme Court

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BRIGHAM YOUNG UNIVERSITY
J. Reuben Clark Law School

IN THE SUPREME COURT OF THE STATE OF UTAH

MAX J. BISHOP; RICHARD L. WARNER)
HAROLD H. HOLLEY; RICHARD J.)
PRICE and MAX N. LUNT, Trustees)
of the UTAH AUTOMOBILE DEALERS)
ASSOCIATION GROUP INSURANCE PLAN,)
Plaintiffs,)

-vs-

J. E. CROFTS & SONS, A Utah)
Corporation,)
Defendant-Appellant,)

-vs-

KAIBAB INDUSTRIES, A Utah)
Corporation,)
Defendant-Respondent.)

CASE NO.
13957

DEFENDANT-APPELLANT J. E. CROFTS & SONS
PETITION FOR REHEARING AND BRIEF IN
SUPPORT THEREOF

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FEB 27 1976

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IN THE SUPREME COURT OF THE STATE OF UTAH

MAX J. BISHOP; RICHARD L. WARNER)	
HAROLD H. HOLLEY; RICHARD J.	:	
PRICE and MAX N. LUNT, Trustees	:	
of the UTAH AUTOMOBILE DEALERS)	
ASSOCIATION GROUP INSURANCE PLAN,	:	
	:	
Plaintiffs,)	
	:	
-vs-	:	PETITION FOR REHEAR-
)	ING AND BRIEF IN
J. E. CROFTS & SONS, A Utah	:	SUPPORT THEREOF
Corporation,	:	
)	NO. 13957
Defendant-Appellant,	:	
	:	
-vs-)	
	:	
KAIBAB INDUSTRIES, A Utah	:	
Corporation,)	
	:	
Defendant-Respondent.	:	

P E T I T I O N

Comes now J. E. Crofts & Sons, the Defendant-Appellant above named, and respectfully petitions the Honorable Court for a rehearing of the case decided January 26, 1976, upon the grounds and for the reasons following:

1. Certain recitals accepted by the Appellate Court from the Memorandum Decision of the Trial Court are totally unsupported by the evidence.

2. The interpretation placed upon the Trust Agreement construed by the Supreme Court is in error.

3. The Supreme Court has made, in the majority opinion, a finding that J. E. Crofts & Sons, the Defendant-Appellant and this Petitioner, was a fiduciary or occupied a fiduciary position of trust and confidence in relation to the competing party which is neither supported by the record, the evidence nor the law.

4. The Defendant-Appellant, J. E. Crofts & Sons, should be granted a rehearing and the majority opinion of the Supreme Court should be reversed.

WHEREFORE, Defendant-Appellant, J. E. Crofts & Sons, respectfully prays that a rehearing be granted and that the majority opinion be reversed and the case be remitted to the District Court for entry of Judgment in favor of J. E. Crofts & Sons all as more fully appears in the Memorandum of the Petitioner hereto annexed.

Respectfully submitted.

OLSEN AND CHAMBERLAIN

By 

ATTORNEY FOR DEFENDANT-
APPELLANT J. E. CROFTS & SONS

IN THE SUPREME COURT OF THE STATE OF UTAH

MAX J. BISHOP; RICHARD L. WARNER;)
HAROLD H. HOLLEY; RICHARD J.)
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ASSOCIATION GROUP INSURANCE PLAN,)

Plaintiffs,)

-vs-)

J. E. CROFTS & SONS, A Utah)
Corporation,)

Defendant-Appellant,)

-vs-)

KAIBAB INDUSTRIES, A Utah)
Corporation,)

Defendant-Respondent.)

NO. 13957

BRIEF OF DEFENDANT-APPELLANT J. E. CROFTS
& SONS IN SUPPORT OF ITS PETITION FOR REHEARING

J. E. Crofts & Sons respectfully submits this brief
resume of the facts and authorities supportings its Petition
for Rehearing:

P O I N T I
"LOADING CHARGES"

We respectfully suggest that one of the important premises upon which the majority opinion is based is a gratuitous statement contained in the Trial Court's Memorandum (R.134) to the effect that "insurance premiums were 'loaded' to a certain extent for the protection of the insurance carrier". There is nothing in the record to support this statement. The case was submitted to the Court on affidavits. There were no witnesses sworn and the hearing on the Motions for Summary Judgment were unreported. The prevailing party did not state - and could not have stated - this to be a fact in its affidavits. There is and there can be no showing that the insurance premiums were "loaded". These were the insurance rates which prevailed in the market moved in by Prudential Insurance Company (R.45), underwriter for the group insurance administered by the interpleading Plaintiff Trust (R.30). The only source for realization of an excess of receipts by the Trust over its costs is the method of management or the business acumen, to put it more plainly, exercised by the trustees of the common-law trust. The Trustees wisely underwrote their risks and their exposures under a policy

which contained provisions for distribution of its profits. Thus, the Trust, financed entirely by contributions from J. E. Crofts & Sons and its sister-automobile dealer agencies, produced a profit. There is no other way to describe or characterize the dividends which were paid.

P O I N T I I

THE TRUSTEES, HAVING THE POWER TO DO SO,
INTERPRETED THE TRUST CONTRARY TO THE
CONSTRUCTION PLACED UPON THE INDENTURE
BY THE MAJORITY OPINION

The second stage developed by the majority opinion is that the Trustees must construe the Trust in such a manner as to include Kaibab Industries as a subscriber.

The Trustees designated the account in dispute as "J. E. Crofts & Sons" (R.80). This is acknowledged by the majority opinion in the second full paragraph on Page 3 of the advance sheet.

The "profits" are not profits of UADA but are profits of the Trust. No one contends anything different.

The theory advanced by the majority opinion is that if Crofts made a "profit" this would violate the provisions of the Articles of Incorporation of UADA.

Membership in the UADA was a condition precedent to eligibility to be a subscriber of the Trust; however, no where in the Trust Agreement is there any provision that the Trust cannot earn a profit.

It is precisely for this reason that the Trust was organized as a Trust; with the purpose of being taxed as a partnership as to its earnings rather than as a corporation. The majority opinion sees evil in a member of the Trust obtaining a benefit from procuring insurance for a corporation in which it owns only a 50% interest but not for one which it owns wholly. (See CJS Vol. 12, p.815, Business Trusts, Sec.2).

Had the Trust been organized as a non-profit corporation, then there could be something said for the third theory advanced by the majority opinion; however, there is nothing in the record to show that membership in the non-profit UADA restricted the ability to earn a profit in subscribing to the Trust.

P O I N T I I I

CROFTS WAS NOT A FIDUCIARY FOR KAIBAB

Stockholders in a corporation are not fiduciaries with respect to other stockholders even in those cases

where controlling stockholders contract with the corporation 18 Am. Jur 2d p. 996, Corporations, Sec. 504; 18 CJS p. 1147, Corporations, Sec. 447. Neither are they "co-partners" or trustees express or implied (Ibid.)

Here the competing parties were equal owners in the "enterprise".

Of extreme importance is the majority opinion's own statement:

The Agreement was thus construed to permit subscribers to act as agents to procure group insurance for any of *their* enterprises.

This is precisely accurate. The sawmill, as respects Crofts, was *their* enterprise. They owned fifty percent of it and the employees were as much their employees as they were Kaibab's. Crofts' membership in UADA would, under the majority opinion, unjustly enrich Kaibab to the extent of \$9,289.66 beyond what it bargained for.

In fact, Kaibab has disaffirmed and repudiated all affiliation in the Trust or its insurance (R. 83) and only demands a consequential interest in profits to which Kaibab contributed nothing.

C O N C L U S I O N

We respectfully submit that J. E. Crofts & Sons should be granted a re-hearing and that the case be remanded

to the Trial Court or at the very least that Kaibab be put to its proof that a constructive trust emerged from its dealings with J. E. Crofts & Sons, an anciently-established principle of essential proof (*Woodruff vs. Clarke*, 262 P2d 737, 128 Colo.387; *Paul vs. North*, 380 P2d 421, 191 Kan.163).

Respectfully submitted,

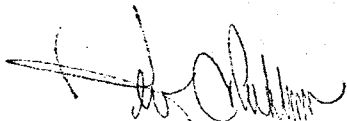
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CERTIFICATE OF MAILING

I hereby certify that on the 26th day of February,
1976, two copies of the within and foregoing Petition and
Brief for Rehearing was served upon the following by U. S.
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