

2000

Water and Energy Systems Technology, Inc. A Utah Corporation v. Steven L. Keil, and Brody Chemical Company, Inc., A Utah Corporation : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF UTAH

WATER & ENERGY SYSTEMS	:	
TECHNOLOGY, INC.	:	BRIEF OF APPELLANTS
A Utah Corporation,	:	
Plaintiff/Appellee	:	
Vs.	:	
STEVEN L. KEIL, and	:	Appellate No. 20000468-SC
BRODY CHEMICAL COMPANY, INC.	:	Priority: 15
A Utah Corporation,	:	
Defendants/Appellants	:	

BRIEF OF APPELLANT

This is a direct appeal from a decision by Judge Rodney S. Page of the Second Judicial District Court sitting with a jury from a verdict granting judgment against the Defendants.

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FILED
UTAH SUPREME COURT

DEC 19 2000

PAT BARTHOLOMEW

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POINT I

The customer pricing developed by Keil while at WEST was not a trade secret and Keil's delivery of those prices by letter to three existing WEST customers was not a misappropriation of a trade secret and the evidence in the Trial did not preponderate such a factual finding and the Trial Court erred in refusing to determine that such was the case as a matter of law.

POINT II

The evidence did not preponderate at trial that there was a nexus between the activity of Keil with customers of WEST which caused damage to WEST and the Court further compounded the jury error by failing failing to either direct or set aside the verdict.

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BRODY CHEMICAL COMPANY, INC.	:	Priority: 15
A Utah Corporation,	:	
Defendants/Appellants	:	

JURISDICTION AND NATURE OF PROCEEDINGS

This is a direct appeal from a decision by Judge Rodney S. Page of the Second Judicial District Court, sitting with a jury, in which judgment was entered jointly and severely against the Defendants in the amount of \$188,675.00. Jurisdiction is conferred upon this Court pursuant to §78-2-2(3)(j) Utah Code Annotated (1953, as amended). Priority is 15.

STATEMENT OF ISSUES PRESENTED ON APPEAL AND
STANDARD OF REVIEW

1. Was there sufficient evidence to support the jury's verdict that the Defendants misappropriated Plaintiff's prices? The Standard of Review in reviewing any jury award of damages is whether there is a sufficient basis for the reviewing court to determine that there is a rational legal basis and a sufficient factual basis for the decision. Sampson vs. Richins, 770 P. 2d 998 (Utah App 1989).

This issue was preserved in the Trial Court by Defendants' Motion for Judgment Notwithstanding the Verdict (R. 1988) and supporting memorandum (R. 1994) and Motion for New Trial or Amendment of Verdict (R. 1986) and the supporting memorandum (R. 1994).

2. Was there sufficient evidence to support the jury's verdict that the Defendants interfered with prospective economic relationships of Plaintiff with Alliant Tech, Mag Corp, and Cargill? The Standard of Review is the same as set forth under issue number 1 above.

This issue was preserved in the Trial Court by Defendants' Motion for Judgment Notwithstanding the Verdict (R. 1988) and supporting memorandum (R. 1994) and Motion for New Trial or Amendment of Verdict (R. 1986) and the supporting memorandum (R. 1994).

3. Did the delivery by Defendant Steven L. Keil of letters to Alliant Tech, Mag Corp. or Cargil constitute, as a matter of law, a misappropriation of trade secrets? The Standard of Review is for correctness and abuse of discretion.

Drake vs. Industrial Commission of Utah, 939 P. 2d 177 (Utah 1997)

This issue was preserved in the Trial Court by Defendants' Motions for Summary Judgment (R. 1422 and 1670) and the supporting memorandums (R. 1423, 1672 and 1810).

4. Whether the Trial Court erred in failing to grant Defendants' Motion for Summary Judgment prior to the trial with respect to the issue of the misappropriation of pricing? The Standard of Review is for correctness.

Mountain States Telephone and Telegraph Co., vs. Garfield County, 811 P. 2d 184 (Utah 1991).

This issue was preserved in the Trial Court by Defendants' Motions for Summary Judgment (R. 1422 and 1670) and the supporting memorandums (R. 1423, 1672 and 1810).

5. Whether the Trial Court erred in failing to grant Defendants' Motion for a Directed Verdict following the presentation of the Plaintiff's case? The Standard of Review is that the evidence must be reviewed in the light most favorable to the losing party under the Motion and the Reviewing Court must determine that there was a reasonable basis to conclude that the losing party could prevail. Management Committee of Grey Stone Pines Homeowners Association vs. Grey Stone Pines, Inc., 652 P.2d 896 (Utah 1982).

This issue was preserved in the Trial Court by Defendants' Motion for Directed Verdict. (R. 1992.)

6. Whether the Trial Court erred in failing to grant Defendants' Motion for Judgment Notwithstanding the Verdict or Motion for New Trial or Amendment of the Verdict, following the trial. The Standard of Review is whether or not the Court was arbitrary and abused its discretion. Smith vs. Shreeve, 551 P.2d 1261 (Utah 1976)

This issue was preserved in the Trial Court by Defendants' Motion for Judgment Notwithstanding the Verdict (R. 1988) and supporting memorandum (R. 1994) and Motion for New Trial or Amendment of Verdict (R. 1986) and the supporting memorandum (R. 1994).

STATEMENT OF THE CASE

This is an appeal from a jury verdict granting judgment for Plaintiff against the Defendants in a misappropriation of trade secrets case. The genesis of this appeal came from an initial ruling by this Court from an Interlocutory Appeal filed by the Defendant Keil in Water & Energy Systems Technology, Inc., vs. Steven L. Keil, 974 P. 2d 821 (Utah 1999). The Court, after reviewing the District Court's granting of a Preliminary Injunction in favor of the Plaintiff, reviewed Judge Page's findings and unanimously reversed his decision and ruled that Plaintiff had not met the required evidentiary burden of demonstrating that either its chemical formulas or pricing had been misappropriated by the Defendant Keil either under tort law principles or the Utah Uniform Trade Secrets Act. §13-24-1 Utah Code Annotated (1953, as amended) (see Addendum A). Following that ruling, Defendants moved for Summary Judgment against the Plaintiff on all issues. (R. 1422) The Court granted Partial Summary Judgment on the issue of misappropriation of chemical formula but failed to grant Summary Judgment on the issues of misappropriation of the Plaintiff's price list, interference with economic relationships and violation of the Utah Uniform Trade Secrets Act.

Following further discovery, Defendants filed a second Motion for Summary Judgment(R. 1670) which was denied by the Court on November 15, 1999. (R. 1841)

Jury trial commenced on February 23, 2000. At the conclusion of Plaintiff's case, Defendants moved for a Directed Verdict pursuant to Rule 58 of the Utah Rules of Civil Procedure. The Court denied that Motion and the jury then found in favor of the Plaintiff and against the Defendants pursuant to a special interrogatory verdict (see Addendum B) and entered Judgment, jointly and severally, against Defendants for \$188,675.00.

Following the verdict, the Defendants filed Motions for Judgment Notwithstanding the Verdict or for a New Trial and Amendment of Verdict which were denied on May 31, 2000. Notice of Appeal to this Court was filed on June 1, 2000.

FACTS

The following factual presentation represents a marshalling of the evidence presented both by Plaintiff and Defendants during the proceedings in the Trial Court. For ease of reference, the Plaintiff, Water and Energy Systems Technology Inc, will be referenced through the remainder of this Brief as WEST, the Defendant Steven L. Keil, as Keil and the Defendant Brody Chemical Co. Inc. as Brody. References to the pleadings in the record on

appeal will be prefaced by the letter R and the pleading itself. References to the Trial Transcript will be identified by the letters Tp followed by the page number of the transcript. The exhibits which were offered in the trial are referred to by the exhibit number. Other major documents will be supplied in the Addendum.

1. WEST and Brody are companies operating in the State of Utah who develop, market and distribute water treatment chemicals and services to the general public. (Tp. 4 and 318]

2. Keil began employment with WEST as a water treatment chemical salesman in 1986. At the time of his employment Keil held a bachelors degree in Physics and Math and a Masters Degree in Chemical Engineering with a Minor in Chemistry. [Tp. 10-11]

3. Although Keil had previously worked for Dow Chemical Company, he did not specifically work in water treatment and had no training whatsoever in the areas of boiler and cooling tower treatment. [Tp. 11]

4. At no time did Keil sign an agreement stating that if he terminated his employment with WEST he would not go to work with any of WEST's competitors and no other non-competition restriction existed contractually between WEST and Keil [Tp. 107]

5. While employed by WEST, the majority of Keil's income was derived from sales to the following customers: Hill Air Force Base, Alliant Tech, Laidlaw, Mag Corp, Utah State University, EG & G and Cargill Flour. [Tp. 12-13]

6. Franklin M. Leaver Jr. was the President of WEST during the entire period of Keil's employment. [Tp 4]

7. Mr. Leaver and Keil testified that the process by which Keil obtained customers was that he would use bid sheets and prospect lists that were given to him by WEST. Keil would then contact potential customers and develop a price and product proposal for each specific customer. [Tp 11 and 309-310] Keil did not specifically create the prices but talked with the potential customers and returned to the WEST office for suggestions as to what prices ought to be charged. Mr. Leaver would then review the assessment and evaluate and modify it as he saw fit. [Tp78 and 309-310] Keil was also told by Mr. Leaver that the prices being developed for WEST's products and services were to be confidential. There were no price lists published by WEST but each customer had specific prices that were individualized for them. No comprehensive price list was ever issued by WEST. [Tp 9-10]

8. When Keil made a proposal to a new customer that had been approved by WEST, letters were normally presented signed by Keil indicating pricing on

a per pound basis with the disclosure of composition concentration and that the material was proprietary and confidential and the prospective customer was to maintain it as such. [Tp 10]

9. During his twelve (12) years with WEST, Keil was successful in increasing WEST's business. In particular, he fostered good working relationships with customers known as Cargill, Alliant Tech and Mag Corp., Utah State University, Hill Air Force Base, Union Pacific, EG&G and Laidlaw. [Tp.12-13]

10. WEST had long term agreements with Cargill, Mag Corp and Alliant Tech to purchase various products at certain prices, although these agreements were not exclusive and the customers were free to purchase product from other suppliers and to terminate the agreement at any time. [Tp. 71-72]

11. Keil was compensated by WEST using a base salary with commissions and received an automobile allowance. [Tp 11-12]

12. In the summer of 1997, WEST began experiencing problems with the Mag Corp account in that the company questioned WEST's ability to service its boiler and ultimately bought products from another company. Keil was in charge of the Mag Corp account during this period. [Tp .18]

13. Shortly thereafter, James Wilson, an employee with Brody for 2 1/2 years met Keil and discussed with him the concept of coming to work for

Brody. Sometime in October of 1997, Keil met Jon Liddiard, the President of Brody, and continued discussions about coming to work for Brody. [Tp137-138]

14. Wilson testified that an understanding was reached between Keil and Brody sometime between October and November of 1997, that Keil would leave WEST and associate himself with Brody, however, no firm agreement was reached because Keil needed more time to determine that he could provide similar products at competitive pricing for Brody that he had with WEST. [Tp 139]

15. During this period, Keil contacted Buckman Laboratories and ultimately satisfied himself that he could compete at Brody and determined to leave WEST. [Tp 49-50] During this same period, another employee of WEST, Greg Offerman, also expressed interest in leaving WEST and going with Brody and met with Keil and representatives of Brody on a number of occasions to discuss future employment. [Tp. 224-228]

16. On March 2, 1998, Keil and Offerman informed Mr. Leaver for the first time that they were considering employment with Brody. At the time of that discussion, Mr. Leaver had no idea the two men had been talking to Brody. He asked both men to give him at least two weeks notice and Offerman agreed.

The following evening, March 3rd, Keil informed Mr. Leaver that March 2nd was his last day and that he would not return. [Tp 27]

17. Immediately after March 2, 1998, Keil sent letters to six major customers of WEST telling them that he was leaving WEST and that he could provide the same quality of service and product as a representative of Brody with a 10% reduction in price. Keil prepared these letters on Brody's stationery on his own computer. One of the letters was dated February 18th but was not sent at that time. All of the letters were hand-delivered by Keil to the specific customers including Alliant Tech, Mag Corp, and Cargill on or about March 10th or 11, 1998. [Tp. 348-352] Keil prepared these letters and made the proposals based upon knowledge he gained during the time he worked with WEST. Keil took no documents with him that set forth pricing but had the knowledge of the prices that were developed by Mr. Leaver and him while Keil was employed by WEST. [Tp. 350-351] (See Addendum C)

18. Following Keil's leaving WEST, WEST sent a certified letter requiring that Keil return to WEST various proprietary items that he had in his possession. [Tp 29]

19. Mr. Leaver testified that a pager was returned in approximately a week to ten days. [Tp 29] Keys were not returned for some time, nor was a Hill Air Force Base key and customer files. Ultimately some customer files were

partially returned although they had no correspondence or service reports in them between February of 1996 through March of 1998. [Tp. 29-32] Two price sheets were returned, but all other price sheets that WEST claimed Keil received and were in his possession were not returned. [Tp 32] Mr. Leaver testified that there was still some missing inventory including pricing sheets for Alliant Tech and Mag Corp as of the date of the Trial, March 2, 2000.[Tp32]

20. On March 16, 1998, WEST received a letter from Mag Corp stating that "after reviewing recent developments including problems with WEST's representative (Keil)" it decided to select another supplier.(Tp 39-40]

21. During the trial, representatives of each of the three companies that WEST used to establish damages, Cargill, Mag Corp and Alliant Tech, testified that they already knew their prices and that Keil only disclosed his knowledge of their prices to each of them individually and did not disclose their prices to other competitors. [Tp. 166-184-205] Mr. Leaver also testified that there was no evidence that Keil gave the prices Alliant Tech was paying for a particular product to Mag Corp or to Cargill or visa versa. He also testified that he had no contract with the particular parties binding them to purchase only from WEST. If they got a better price from someone else, there was nothing to prohibit them from buying the product if they felt it would do the job at a better price. [Tp70-72] Specifically, each of the representatives of Mag Corp, Alliant

Tech and Cargill testified that pricing was not the key issue in determining whether or not they accepted a particular proposal for water treatment products but that a) quality of service and b) the reputation of the service technician were most important. [Tp. 168-69, 186-87, 215-216]

22. The President of WEST California, Brent W.Chettell, also testified that price was not the most important factor in determining the selection of a water chemical treatment supplier and that other considerations such as service, technician, and quality of product were of primary importance. [Tp. 267]

23. None of the representatives of Cargill, Alliant Tech or Mag Corp testified that they either stopped utilizing WEST or utilized Brody on the basis of price.[Tp. 168-70, 186-90,215-218]

24. Although Mr. Leaver continued to assert that the letters sent out by Keil were inappropriate, he testified that the disclosure by Keil in the letters of the prices to the individual companies was not a violation of something he believed was proprietary and that the offending portion of the document (letters) was a statement that Brody could provide the same or similar products and that nothing else violated any of WEST's proprietary interests. [Tp 115-116]

25. In one instance, Kathy Vigil of Alliant Tech testified that when Mr. Leaver and an associate approached her, after Keil had left WEST and began working with Brody, their rudeness and inappropriate behavior caused her to

determined that Alliant Tech would no longer do business with WEST. [Tp. 205-208]

26. Keith Rydalch of Mag Corp testified that he sent a letter dated March 16th to WEST indicating that "after reviewing recent developments including problems with WEST's representative (Keil)" they decided to select another supplier. Rydalch further testified that he thought Keil's behavior with respect to leaving WEST and sending out the letter the day after his termination was inappropriate. [Tp. 67-68]

27. Mr. Leaver testified, based upon WEST's prior history of sales to Alliant Tech, Cargill and Mag Corp. respectively, that in February of 1998, he received a two year purchase order from Alliant Tech and anticipated gross sales for the two year period would have been \$136,419.48 factoring in a gross profit margin of 60% thus the damage to WEST because of Alliants failure to continue purchasing products and services was \$81,851.69. With respect to Mag Corp, Mr. Leaver testified the total anticipated growth sales for two years was \$167,417.25 factoring a 63% profit margin resulting in damages of \$105,472.87. The projected loss for Cargill under the same theory was \$6,391.62. [Tp 71-73] (See Plaintiff's Exhibit 29)

The following facts relate specifically to the District Court proceedings concerning various pre-trial, trial, and post-trial motions.

28. Following this Court's ruling in Water Energy Systems Technology Inc., vs. Steven L. Keil Supra on February 19, 1999, the Defendants filed a Motion for Summary Judgment claiming that the water treatment formulas and the price list of the Plaintiff were not trade secrets and had not been misappropriated by the Defendants. [See R. 1422]

29. On July 28, 1999, the Trial Judge ruled "That while there is sufficient evidence from which the trier of fact could conclude that the formula and price list of Plaintiff were confidential and Defendant Keil was under an expressed or implied contract which limited their disclosure. However, in order for the Plaintiff to prevail on claim of misappropriation of Plaintiff's formula, Plaintiff has to prove that the formulas were the same or that Brody's formulas were specifically derived from those of the Plaintiff. No such credible evidence has been provided either by testimony at the prior hearing or by subsequent affidavit. For that reason, the Court grants Defendant's Motion for Partial Summary Judgment on the issue of the misappropriation of the formulae. The Court further concludes that there remains a question of fact as to the misappropriation of Plaintiff's price list, and as to whether the Plaintiff's price lists were used by Defendant Keil and Brody in establishing their own price lists." Based upon the foregoing, the Trial Court denied Defendants' Motion for Summary Judgment. (See Addendum D.)

30. The Defendants filed a second motion for Summary Judgment on November 2, 1999. (R. 1670) The Court ruled that there were still contested material issues of fact, but limited the WEST's damage claim to the following customers: Mag Corp., EG&G, Union Pacific, Hill Air Force Base, Utah State University, Cargill Flour, Laidlaw and Alliant Tech Systems. [See Addendum E]

31. After the conclusion of the Plaintiff's case, the Defendants moved for a Directed Verdict, R.1992, relying heavily on the case of Microbiological Research Corporation vs. Muna, 625 P. 2d 690 (Utah 1981). The Trial Court ruled from the bench as follows: " The Court knows that..... Defendants primarily rely on the case (Muna) which was in 1991 case. That subsequent to that time in 1989 Utah adopted the Utah Trade Secret Act and that induces into the law new issues which in fact are before the Court in the matters which have been filed." Judge Page then cited specific provisions of the Act and ruled, with respect to the particular definitions of the Act, that there were still issues to be determined and if the jury chose to believe everything that was presented by way of the Plaintiff's case, they could find a misappropriation of a trade secret. The question of damages was, still in fact, one for the jury.

32. The Trial Court then looked at the intentional interference with economic purpose and determined that under tort law WEST would have to

demonstrate that the Defendants' interference was maliciously motivated in the sense of inspired desire to do harm to the Plaintiff for the Defendants' own sake and that there has been no such showing. The only basis shown by Plaintiff to demonstrate intentional interference was that there was a misappropriation of a trade secret by Keil or Brody. The Trial Court also eliminated for consideration by the jury any claim for damages except as to Alliant Tech, Mag Corp, and Cargill. [Tp 292-293 Bench Ruling]

33. Following the Trial, the Defendant's timely filed Motions for a New Trial, Judgment Notwithstanding the Verdict and Amended Judgment. These Motions were argued in a separate hearing on May 2, 2000. Unfortunately the Clerk of the Court failed to put a video tape in the machine and the argument was not recorded and, therefore, cannot be given to the Court.

34. The Trial Court's findings with respect to Defendants' post-trial motions were entered on May 31, 2000 and in particular stated:

1. The misappropriation of confidential information by Defendants took place, not in the disclosure of Plaintiff's WEST pricing to its own customers but rather in a disclosure of WEST pricing to Defendant Brody Chemical, an entity separate from Defendant Keil, for the purpose of Brody Chemical to compete with WEST.
2. By Defendant Keil giving that confidential information to Defendant Brody Chemical, the trade secret was destroyed.

3. The pricing information provided to Defendant Brody Chemical did not come from Palintiffs WEST's customers but rather directly from Defendant Keil.
4. The damages awarded by the jury were fair and reasonable, and in keeping with the evidence presented at trial.
5. The case of Leigh Furniture and Carpet Co. v. Isom, 657 P.2d 293, 304 (Utah 1982) is relevant as to setting the standards by which the tort of interference with a business relationship is determined.
[Addendum F]

SUMMARY OF THE ARGUMENT

There was insufficient evidence to support the jury's verdict that the Defendants misappropriated WEST's prices, or that the Defendants interfered with prospective economic relationships of WEST in that WEST's pricing was not a Trade Secret and that, even if it was, Keil did not destroy the Trade Secret because it was only disclosed to those who already knew the prices.

There is no nexus between the delivery by Keil of letters indicating price reductions to Cargill, Mag Corp and Alliant Tech and any damage claimed by WEST, in that none of these entities made decisions with respect to the continuation of their relationships with WEST based upon pricing nor did WEST have exclusive agreements that the companies buy only from them.

The Trial Court drove this case to its unjust conclusion by failing to grant Defendants' motions prior to, during and post-trial in accordance with

the directives of this Court in its February 19, 1999, ruling on the Preliminary Injunction.

ARGUMENT

POINT 1

THE CUSTOMER PRICING DEVELOPED BY KEIL WHILE AT WEST WAS NOT A TRADE SECRET AND KEIL'S DELIVERY OF THOSE PRICES BY LETTER TO THREE EXISTING WEST CUSTOMERS WAS NOT A MISAPPROPRIATION OF A TRADE SECRET AND THE EVIDENCE IN THE TRIAL DID NOT PURPONDERATE SUCH A FACTUAL FINDING AND THE TRIAL COURT ERRERD IN REFUSING TO DETERMINE THAT SUCH WAS THE CASE AS A MATTER OF LAW.

Keil and Brody did not misappropriate a Trade Secret of WEST. The gravaman of this case lies in this Court's decision reversing the Trial Court's entry of an Injunction against Keil at the initial stages of this litigation. In that Interlocutory Appeal, while the focus of the Court was on whether or not the Trial Court had properly issued an Injunction against Keil, the Court recognized basic principles that should have been applied to this case by the Trial Court during the entirety of the litigation. This Court recognized that the leading case in this area is Microbiological Research Corp vs. Muna, Supra which creates the standards for establishing a claim for the misappropriation of Trade Secrets. Interestingly, the Trial Court in its denial of a Motion for

denial of a Motion for Directed Verdict after the presentation of WEST's case made a specific reference to the fact that, in effect, the Muna case was trumped by the statutory provisions of the Utah Trade Secrets Act, Utah Code Annotated §13-24-1 et seq. (1953, as amended)

What WEST never recognized and apparently neither did the Trial Court, was that this Court was well aware of the existence of the above referenced statute and did not in any way limit or distinguish Muna as the leading case establishing the standards by which the existence or non-existence of a Trade Secret would be determined in this state.

After this Court's February 19, 1999, decision, Keil and Brody filed the first of a succession of motions to have the Trial Court terminate the litigation on the basis that WEST had no claim, as a matter of law. In its ruling on Defendant's first Motion for Summary Judgment, the Trial Court correctly concluded that WEST could not proceed on its claim that Keil had misappropriated its chemical formulas, however, it left the pricing issue to be determined at Trial. Following that ruling, the entire focus of the litigation was on pricing.

It is important to note that no generalized lists showing the prices of WEST's products were ever provided in any of the pre-trial motions. In fact, no price sheets were produced in the Trial by WEST. WEST's position was

that they were taken away and not returned. Keil denied this, and testified that all he took away was his knowledge of the prices. Tp. 350-351]

What is clear and unrefuted from all of the testimony at Trial was that each of WEST's client's prices were developed on an individual basis. The common practice, according to Mr. Leaver, was that Keil would meet with the prospective customer, review its water chemical treatment needs and return and discuss the same with Mr. Leaver and others to determine appropriate pricing for the services and products to be provided. Keil in fact testified that he developed the bulk of the prices, but Mr. Leaver indicated that all prices were subject to his final approval. [Tp. 391] At the time of Keil's termination, Keil knew WEST's prices not from a price list but from his direct contact with the customer over twelve years. Each pricing scheme was individualized to the particular customer and was known both to Keil and WEST and most importantly to the each customer. WEST directed its customers to maintain the integrity of the process by keeping the prices confidential from other customers.

The evidentiary focus of the Trial concentrated on three specific WEST customers identified as Cargill, Mag Corp and Alliant Tech. Representatives of each of those entities, to wit: Keith Ridalch of Mag Corp, Rich Henderson of Cargill and Kathleen Vigil of Alliant Tech, all testified that they knew the

prices they paid for WEST's products and that they did not know the pricing that other customers paid for the same products. In their discussions, Keil simply repeated back each customer's prices with a proposal for a 10% reduction if they changed to Brody. Each customer was aware of what it paid for WEST's products. There was no evidence produced at Trial showing that Keil disclosed these prices to Brody and that Brody used them to compete with WEST. The only evidence of any disclosure of WEST's pricing was the three letters sent respectively to Cargill, Mag Corp and Alliant Tech.

(Addendum C)

These letters are self explanatory but simply demonstrate Keil's knowledge of WEST's pricing and his ability to better WEST's pricing by approximately 10%. There was also no evidence presented by any witness that Keil disclosed WEST's pricing of products to Cargil to Alliant Tech, or Mag Corp or visa versa or to any other party, including Brody. The only disclosure presented to the jury was the information contained in the three letters and the discussions Keil had with representatives of the three customers about the pricing.

This becomes important when one examines the following specific language of Muna:

A secret may not be in a public domain if extensive effort is required to pierce its veil by assembling the literature concerning

it and thereby uncover its parts. If this can be readily done by one who is normally skilled in the field and has a reasonable familiarity with its trade literature, the secret may no longer be entitled to protection as such. An employer to obtain relief must establish that his former employee's product (in this case the pricing) is a copy of his own product, that its method or production was secret, and that the former employee has used or intends to use confidential information acquired during his employment. Id. at 696.... Upon termination of his employment, an employee has the prerogative to use his general knowledge, experience, memory and skill, however gained, provided he does not use, disclose, or impinge upon any of the secret processes or business secrets of his former employer. The distinction between general and special knowledge can only be resolved by a balancing of the conflicting social and economic interests of two desirable goals.... Confidential information of the employer, however, loses any protection to which it may have been entitled after it had been merged into the employee's own faculties, skill and experience. Since experience is something a man acquires, a standard must be found to test whether, in a particular case, an employee's experience is such as will permit of its use at the termination of the employment, even though it may prove detrimental to his former employer. Id. at 676 and 697.

A case involving the determination of whether a policyholder list was a Trade Secret and could not therefore be used by an agent who left the company and went to work for someone else. Harvest Life Ins Co vs. Getche 701 N.E. P. 2d 871 (Ind. App. 1998) In that case, the Court held that

the rationale which has been followed in these cases is that the information could be obtained from the policyholder himself, from the policy, or from other materials provided to the policyholder by the insurance company. This Court observed about College Life Insurance Company of America, in a footnote in *steenhoven*, 460 N.E.2d at 975, what we observe today about Harvest. Harvest seems to seek to prevent competition by its

former agent more than it seeks to protect a trade secret.] Id. at 876

In this case, Keil cannot be expected to purge from his own knowledge pricing for products which he himself developed for various customers of WEST. The interesting dichotomy in this case is that had Keil never sent the letters, but simply approached Alliant, Cargil and Mag Corp and gave them a bid on behalf of Brody which he knew to be 10% under WEST because of the general knowledge he took with him after leaving, Plaintiff would have had no evidence of any purported Trade Secrets of misappropriation of claim secrets. The fact is however, that the letters merely memorialize in written form what Keil already knew in his mind and this conduct is not prohibited by the leading case that this Court has accepted as a standard.

Unfortunately, however, the Trial Court determined that the prices were Trade Secrets, and the jury also concluded as part of their verdict that the pricing for various WEST products to various customers were trade secrets within the context of the Utah Trade Secrets Act. There was substantial evidence that these were not secrets to the extent that they were within the general purview of Keil's knowledge. The representatives of the three companies, as set forth above, testified that although they were told to protect the integrity of the prices, a good salesman could find out what their prices were either by simply asking them or by checking the general pricing rates

commonly used in the area. It was, however, the position of WEST, through Mr. Leaver, that the prices were proprietary and that Keil and customers were told not to disclose them to others.

Notwithstanding the above, the critical issue is whether or not Keil's sending of the letters to Cargil, Mag Corp and Alliant Tech constituted a misappropriation of the Trade Secret. Here the evidence overwhelmingly mandates that the jury's verdict was erroneous. What is more problematic is that the Trial Court announced for the first time in its ruling on Defendants' post-trial motions, that the misappropriation was Keil's delivery of pricing information to Brody.

The Trial Court ruled that Keil's informing Brody of his knowledge of WEST's pricing constituted the misappropriation. This conclusion belies the fact that there was no evidence that Keil specifically told anyone at Brody what the prices were and in fact the only evidence was that Keil sent letters to his former customers telling each of them that he would beat WEST's prices by 10%.

The Trial Courts ruling appears to be the ultimate example of judicial creativity. After hearing argument by Defendants in essentially five (5) different pre-trial, intra-trial and post-trial motions, the Trial Court, in an effort to sustain the jury's verdict and the Court's own determination in the case,

shifted its focus away from the three letters because it was clear the customers were not given information, whether it was a Trade Secret or not, that they didn't already know. The Trial Court effectively ruled, as a matter of law, that the delivery by defendant Keil of letters to Alliant Tech, Mag Corp and Cargill was not a misappropriation of Trade Secrets even though in its special verdict form (Addendum B) the Court did not specifically require the jury to determine the misappropriation of price quotes.

The problem with this analysis is the only evidence the jury heard was the delivery of the three letters by Keil to the three companies. They heard no evidence of what Keil actually gave to Brody or what Keil did with Brody or what Brody knew. The Court, after having been asked to grant Summary Judgment on this issue on four different occasions, finally, in its decision denying Defendants' Motion for a New Trial ruled, as a matter of law, that Keil's delivery of the price list to Brody was in fact the misappropriation and not the delivery to WEST's three customers. This theory was totally unsupported by the evidence and was never argued by the WEST's to the jury.

The Trial Court was given ample opportunity to implement this Court's ruling in the Interlocutory Appeal. In the absence of specific evidence of price lists and the distribution of them to individuals who did not know the prices,

there was simply not a misappropriation of a Trade Secret. In fact, whether or not a Trade Secret existed was not established by WEST.

Finally, as further affirmation that the Utah Trade Secrets Act does not trump Muna, the Court is directed to the case of Envirotech Corp. vs. Callahan, 872 P. 2d 487 (Utah App 1994), a case that does indeed follow the legislative pronouncement of the Utah Trade Secrets Act. The opinion in that case refers liberally to the provisions of Muna and cites them with approbation. What is important in that case is that although the Court found there was a Trade Secret and that it had been misappropriated, it continued to cite Muna even after the enactment of the Utah Trade Secrets Act, as the controlling case in Utah. Thus both Envirotech and this Court's ruling in the Interlocutory Appeal specifically validated Muna. For the Trial Court to suggest that somehow the Utah Uniform Trade Secrets Act changed the playing field from Muna as a matter of law, is incorrect. Clearly applying Muna, the Trial Court should have found in the pre-trial motions or at least after the presentation of WEST's case that there was no Trade Secret or, if it was, it had not been misappropriated. The Court's failure to do so constituted error and abuse of discretion and should be reversed.

POINT II

**THE EVIDENCE DID NOT PURPONDERATE AT TRIAL
THAT THERE WAS A NEXUS BETWEEN THE ANY**

**ACTIVITY OF KEIL WITH CUSTOMERS OF WEST
WHICH CAUSED DAMAGE TO WEST AND THE COURT
FURTHER COMPOUNDED THE JURY ERROR BY
FAILING BY FAILING EITHER TO DIRECT OR SET
ASIDE THE VERDICT.**

The errors determined in Point I above pale in comparison to the failures of the Jury and the Trial Court to properly consider the issue of the alleged interference by the Defendants with economic relationships of WEST. The marshalling of all the evidence supporting Plaintiff's claim, revokes problems for WEST and the Trial Court.

WEST's claim that Keil intentionally interfered with the economic relationships causing damages was limited to three customers Cargill, Mag Corp and Allaint Tech. The Trial Court determined, after the presentation of WEST's case, that that there was no malicious, intentional interference, if at all, by Keil through Brody with WEST's relationship with the three customers at issue. The only interference was the transmission of the Trade Secret, if in fact it was a Trade Secret. (See the Trial Court's ruling in the Motion for a Directed Verdict.[Tp 290-93] Because the Trial Court specifically found that there was no malicious type interference, this ruling obviates any reliance upon Leigh Furniture and Carpet vs. Isom Supra. While this case deals with the tort of interference with a prospective business relationship, its discussion does deal

with the damage question or the question of economic interference in this case. What the Trial Court essentially said is that by Keil sending letters to Mag Corp, Alliant Tech and Cargill telling these people that he could beat WEST's prices, he potentially interfered with WEST's economic relations with its customers.

The problem with this theory is that in marshaling all of the evidence pro and con, in this case, between what Keil did on behalf of himself and Brody and any damage WEST asserts. WEST failed to show that its loss of business was connected to Keil making an offer on behalf of Brody to the three customers. In fact, while Mr. Leaver testified that WEST had long term contracts with each of these three entities, he also acknowledged that nothing in the contracts prohibited these customers from purchasing products and services from someone else.[Tp. 22] In addition, all three of the representatives of the entities in question, Keith Rydalch, Bruce Henderson, and Kathleen Vigil testified that while price was one factor that always had to be considered, it was not the most important factor. They all agreed that the quality of service and products and the relationship with the service personnel were much more important than price alone. In fact, Mag Corp did not use the products and services of Brody and left WEST for other reasons as set forth in their own letter. [See Ex 20] Cargill in fact did do business with Brody until

November of 1999, and Alliant Tech did only 60 days worth of business with Brody.

What is even more compelling in this discussion is that the President of WEST-California, Brent William Chettle, called by WEST testified that there were no price sheets for WEST products, but that prices were established as a product of negotiation.[Tp 268] Specifically, he indicated that the primary considerations with respect to competition in the industry for products and services were the quality of the products and the quality of service. He stated that, "Pricing I feel is secondary, it's an important factor to many customers, but in some cases if the pricing becomes such an important consideration it tends to impact upon the quality that can be delivered to those particular clients. So, while it may be important to some companies, pricing to us (meaning WEST) is not nearly that critical." [Tp 267]. Therefore, according to Plaintiffs own witness although pricing is important, it is not critical and none of the three claimed entities to whom WEST tied its damages indicated that the pricing suggested by Keil in his letters made the difference in their decisions either to leave WEST or go with Brody. Without the nexus between the price and either the lost client or the benefit, there is no tortious interference with prospective business relationships and, therefore, there is no damage.

A thorough review of the evidence in this case shows that WEST did not meet its burden either to the jury or to the Trial Court in various motions, to demonstrate the appropriate measure of damages was. While there is not a specific reference to the measure of damages in a Trade Secrets case in this jurisdiction, this Court is directed to the following cases from other jurisdictions, all of which wrestle with the problem of damages in Trade Secret cases. The earliest case is International Industries vs. Warm Petroleum 248 F 2.d 696 (1957). This case arose from the United States District Court in Delaware. In that case, the Court makes the following statement

the appropriate measure of damages in analyzing this to a patent infringement is not what plaintiff lost but rather the benefit, profits or advantage gained by the defendant in the use of the Trade Secret Id. at 699.

More recently, in the case of Universal Computing Company vs. Lykes Youngstown Corporation , 504 F 2.d 518 (1974) the Court, in dealing with a misappropriation of the computer system, relied on the International Industry case and cited with approval this language,

Certain standards do emerge from the cases. The defendant must have actually put the Trade Secrets to some commercial use. The law protecting Trade Secrets is essentially designed to regulate unfair business competition. If the defendant enjoyed actual profits a type of restitutionary remedy can be afforded the Plaintiff, either recovering the full total of the defendants profits or some proportional amount designed to correspond to the actual contribution of the plaintiff's success. Because the primary

concern in most cases is to measure the value to the defendant of what he actually obtained from the plaintiff, the proper measure is to calculate what the parties would have agreed to as a fair price for licensing the defendant to put the Trade Secret to use. Id. at 539

The focus, therefore, should be on the benefit to the Defendants not what WEST purportedly lost. Using this theory, the Defendants' sales to Alliant Tech were \$27, 724.00 and to Cargill were \$10,960.00. 60% of those figures, (the percentage WEST used to measure profit) totals \$16,634.40 and the \$6,576.00 respectively.

WEST's reliance upon the fact it lost essentially a years worth of business based upon previous years earnings was improper. In this case WEST's damages were based upon a percentage of the profits from previous year's contracts and the expectation that its service and products would be supplied in a like manner for the next year. While this may be a reasonable assumption, it was refuted by all three of the customers who indicated that these were not adhesion or exclusive contracts and they were free to purchase other products and services at any time. In fact, Mag Corp did just that. Prior to Keil leaving WEST, Mag Corp. became dissatisfied with WEST's boiler products.

No evidence was presented of a reasonable likelihood that decisions made by the two companies who did go with Brody (Cargill and Alliant Tech)

were based upon price. As price was the only Trade Secret purportedly misappropriated, damages can not flow unless there is a specific nexus between the two. None was proven by WEST.

The entirety of the WEST's testimony with respect to damages came from Mr. Leaver, the local president of WEST. Trial Ex. 29 (which was later amended when the Trial Court struck all but Alliant Tech, Mag Corp and Cargill as the three customers directly related to this action) was prepared by Mr. Leaver showing the basis for damages. Mr. Leaver testified that Keil had sought out and developed agreements with all three companies while at WEST. Leaver testified that there was an expectation that WEST would continue to service these clients through 1998 and 1999.[Tp. 42-44 and 54] Ex. 22, 23 and 24 were introduced to show the ledger sheets of Alliant Tech, Cargill and Magcorp, respectively. Mr. Leaver testified that these represented the services and products utilized by each of these three companies in 1997.

With respect to Alliant Tech, Mr. Leaver testified that in February of 1998, he had received a two year purchase order and based upon that order and previous sales, the anticipated gross sales for the two year period(1998-1999) would be \$136,419.48. The gross profit margin was 60% thus the damage figure of \$81,851.69 as referenced on Exhibit 29. With respect to MagCorp, Mr. Leaver testified similarly, WEST's anticipated gross sales of \$167,417.25

at a 63% profit margin resulting in damages of \$105,472.87. The same expectation existed for Cargil based upon previous contracts. Results in damages of \$6,391.62, Ex. 29.

It is important to note, however, that in the same testimony, Mr. Leaver also said that none of the purchase orders or the contracts WEST had with the three companies were exclusive agreements. That is to say, they did not bind these companies to purchasing certain products at a certain rate for a certain period of time. The following colloquy between Counsel for Brody and Mr. Leaver is critical:

"Question: That figure is based on an assumption on your part that Alliant Tech was going to continue to deal with West?

Answer: I don't believe that's an assumption. I had an example, and exhibit here as well as a two year purchase order they'd just given us in February of 1998.

Question: But that didn't bind Alliant Tech to buy exclusively from WEST, did it?

Answer: No, but the previous experience is they bought exclusively from WEST.

Question: But the answer is no.

Answer: Answer no to what.

Question: That it was, it did not prevent them from buying from someone else.

Answer: Obviously that's true.

Question: This is not a contract where they agree in writing to buy only from you. Answer: That is correct.

Question: And if they got a better price from someone else, there was nothing to prohibit them from buying the product if they felt it would do the job for them at a better price.

Answer: That's correct." [Tp. 71-72]

The same discussion took place with respect to Mag Corp and Cargill. Even with respect to the damage claim for Keil's salary, a question was asked in terms of the formulation in arriving at the \$25,000 figure, (Ex. 29)

"Question: Is there any kind of a formula that you used in order to do that, or was it a seat of the pants calculation?

Answer: No, I explained that we'd used the, the a, took off the commissions, because he made sales which the company profited from, and we had taken off the taxes and they were related to the commission.

Question: So that was just an arbitrary determination on your part as to how you'd handle that, is that a fair statement.

Answer: That's a fair statement." [TP 74]

In essence, then WEST's damage claim fails in three respects: First there is no nexus between what Keil did and the failure of Alliant Tech, Mag Corp and Cargill to continue to purchase products from WEST. Second, there was no binding contractual agreement for any of these customers to continue to purchase products at a certain rate from WEST for any finite period of time. Third, the damage amounts are totally speculative in that they are based on prior purchase orders with no guarantee of future business.

Finally, and most importantly and as supported by the cases hereinbefore cited, there was no evidence that Brody or Keil profited from any of the transactions with these parties except to the extent of gross sales of \$27,724 to Alliant Tech and \$10,960 to Cargill. This information was set forth in Plaintiffs Exhibit F and G appended to Defendants' memorandums supporting Motion for a New Trial, R. 1994 at 2015 and 2017. At the very least, if WEST's pricing was a Trade Secret, and if it was misappropriated, and if it was delivered to someone who didn't know WEST's prices and all of those things were concluded by a preponderance of the evidence, under the cases cited above, the only damages WEST is entitled to is 60% of \$27,724 + \$10,960 or \$23,210.

Defendants firmly believe that the jury believed Keil's relationship with Brody, prior to his termination with WEST was inappropriate. The evidence presented by WEST's demonstrated that five months before Keil terminated his

employment with WEST Keil entered into discussions with representatives of Brody concerning possible employment. Keil was weighing whether or not he could profitably change jobs and therefore, inquired about the ability of Brody to provide products of a similar quality to WEST's products at competitive prices so that Keil could continue to make the type of living he was accustomed to working for WEST. [Tp. 319-320]

Keil testified that in October of 1997, Jim Wilson, the sales manager of Brody, contacted him and discussions ensued about Keil's interest in going to work with Brody. Tp. 316. Keil, testified that at the time he was not particularly interested in leaving WEST, but if the proposition was attractive enough he would consider it. [Tp 319] He also had conversations with Jon Liddiard, the President of Brody, and was offered commissions and stock in the company as part of a potential employment package. While there was not an actual agreement reached, there were ongoing discussions. [Tp 321-322.] Keil also admitted that, consistent with Jim Wilson's trial testimony, between October of 1997 and February of 1998, he became involved with a company known as Buckman Laboratories, who was assisting Brody with their product line. Keil contacted Buckman to determine whether it could provide products to enhance Brody's product line and be competitive with WEST [Tp 323.] He acknowledged that talking with Buckman was preparatory to making a

commitment to Brody. [Tp 324] Keil then began discussions of his potential move with Greg Offerman who also worked with WEST and the two of them met with Jon Liddiard in early January of 1998, to discuss the fact that Keil had been assured by Buckman that Brody could compete with WEST's products and at that point pricing became an issue [Tp 326] At that time neither Keil or Offerman were employees of Brody and were still employees of WEST.

After Keil initially reviewed Brody's price list he determined that Brody's prices were not competitive with WEST. Keil advised Mr. Liddiard that he was not inclined to leave WEST. Mr. Liddiard responded by advising Keil that he would have more flexibility in determining prices and with that, Keil determined that he would make the move from WEST to Brody. [Tp. 328-329] Keil acknowledged that he did not leave in February, and waited until early March because he did not want to notify existing customers that he was leaving WEST and that he could sell competitive products at comparable prices for his new company, until he was actually terminated from WEST. [Tp 329] He did, however, prepare a letter, on his own computer, dated February 18, 1998 to Cargill Flour on Brody Chemical stationery, [Exhibit 11 in the Trial], in which Cargill was advised that he, Keil, was moving to Brody and discussed prices and products. Keil testified, however, that although the date of the Exhibit was February 18th it was not delivered until after Keil left WEST. It

was delivered directly to Mr. Henderson on or about the 9th or 10th of March [Tp 331.] This was corroborated by Henderson's testimony in the Trial proceedings. [Tp 184]

There is no doubt in Defendants' mind, however, that the jury believed, as did the Trial Judge, that Keil and Brody's conduct in the months between October of 1997 and March 5, 1998 were inappropriate in some way. The jury was not instructed in the law that any of those contacts or discussions were improper. Defendants believe that this poisoned the well with respect to both the Courts and the jury's analysis of whether some liability should attach to the Defendants for WEST's loss of the three customers, Cargill, Alliant Tech and Mag Corp.

Plaintiff could have cured this entire problem by utilizing a non-compete agreement. Plaintiff knew it, the Defendants knew it, the jury and the Judge knew it. Obviously, the Trial Court failed to consider its importance. There are many business situations in which employers, who hire potentially valuable employees to develop customers and business, require, as part of initial employment, that employees sign what is known throughout the trade as a non-competition agreement. These agreements limit the kinds of activities employees can not engage in if they leave employment. These agreements traditionally limit the ability of the employee to compete with the former

company, by type of activity, area, and length of time. As Mr. Leaver testified in this case, no such agreement was ever made between Keil and WEST. A non-competition agreement could have protected WEST against precisely what Keil in this case. Keil helped to develop WEST's business by the sheer force of his personality, dedication and technical expertise thereby ingratiating himself with certain customers. He then attempting to take those customers with him when he left WEST's employment. A non-competition agreement would have solved WEST's problem.

WEST forfeited the most effective remedy it had to prevent what happened here, and then spent the entirety of the litigation process trying to make a round peg fit into a square hole by claiming misappropriation of Trade Secrets and interference with economic relationships to obtain damages from the Defendants. The analysis of evidence had to be tortured by both the jury and the Trial Judge to arrive at the result which is contrary to the law, contrary to the evidence, and contrary to standard business practices.

CONCLUSION

This Court, after sending a clear signal in its Interlocutory Appeal Decision as to the limitations of WEST's causes of action, should not now allow its initial decision to be weakened by what happened in the Trial in this case. What is even more compelling is that, notwithstanding the jury's

inability to apply the facts to the law, the Trial Court Judge was given ample opportunity both prior to during and post-trial to resolve these issues in an appropriate manner. He chose not to do so, further compounding the error.

This Court should now complete the work it began in the Interlocutory Appeal by ruling, as a matter of law, that WEST's pricing was not a Trade Secret, that the sending of letters by Keil to existing customers, who already knew WEST's prices was not an misappropriation of a Trade Secret and that there is no nexus between what Defendant's did in this case to any damage suffered by WEST with respect to the three customers remaining in the litigation. Notwithstanding the above, if there was damage at all, the measure thereof should be based upon the gain received by Brody not any purported loss by WEST.

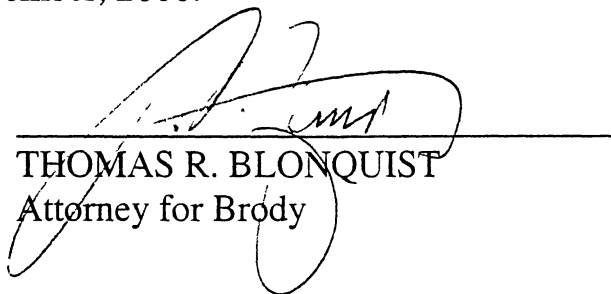
It is respectfully submitted that this Court should reverse the decision of the Trial Court and enter a judgment of no cause of action or, in the alternative, to enter or reduce WEST's judgment to \$23,210.40.

DATED this 19 day of December, 2000.

A large, stylized handwritten signature in black ink, appearing to read "John T. Caine", written over a horizontal line.

JOHN T. CAINE
Attorney for Keil

DATED this 19th day of December, 2000.

A handwritten signature in black ink, appearing to read "Thomas R. Blonquist", written over a horizontal line.

THOMAS R. BLONQUIST
Attorney for Brody

CERTIFICATE OF MAILING

I certify that I mailed two true and correct copies of the foregoing Brief of Appellants to Joseph Rust, Attorney for Appellee, 2000 Beneficial Life Tower, 36, South State Street, Salt Lake City, UT 84111. postage prepaid this 19th day of December, 2000



JOHN T. CAINE
ATTORNEY AT LAW

ADDENDUM A

111 1 1021
(Utah 1999)

*This opinion is subject to revision before final
publication in the Pacific Reporter.*

IN THE SUPREME COURT OF THE STATE OF UTAH

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Water & Energy Systems
Technology, Inc.,
Plaintiff and Appellee,

No. 980250

L E D

Steven L. Keil,
Defendant and Appellant.

February 19, 1999

Second District Court, Farmington Dep't
The Honorable Rodney S. Page

Attorneys: Joseph C. Rust, Salt Lake City, for Appellee
Thomas R. Blonquist, Salt Lake City, for Appellant

DURHAM, Associate Chief Justice:

¶1 We granted appellant Steven Keil's petition for an interlocutory appeal from the district court's grant of a preliminary injunction in favor of plaintiff Water & Energy Systems Technology, Inc. ("WEST").

¶2 For approximately twelve years prior to March 2, 1998, Keil worked for WEST as a water treatment chemical salesman. Keil voluntarily terminated his employment with WEST on March 2, 1998, and accepted a similar sales position with one of WEST's competitors, Brody Chemical ("Brody"). Keil did not have an employment contract with WEST nor did he sign a covenant not to compete with WEST should he terminate his employment with them. In the month prior to leaving WEST, Keil made several service calls for Brody and researched the availability of chemical ingredients for some of Brody's products. Keil also had meetings with Brody to discuss the viability of Brody's plans to increase its presence in the water treatment chemical business. During those meetings, Brody assured Keil that Brody's products could compete with WEST's.

¶3 While working for WEST, Keil had access to the formulae and prices for WEST's water treatment chemicals. During his employment, Keil derived most of his commissions from sales of water treatment chemicals to Hill Air Force Base, Alliant Technologies, Laidlaw, Magnesium Corporation, Utah State University and E. G. & G. Immediately after leaving WEST's employ, Keil contacted the above clients to solicit their business for Brody, claiming that Brody's products were "very similar" to WEST's.

¶4 On March 9, 1998, WEST filed a complaint against Keil in district court alleging misappropriation of trade secrets. WEST claimed that Keil had misappropriated WEST's formulae and prices for its water treatment chemicals and supplied them to Brody, thereby giving Brody and Keil an unfair competitive advantage over WEST. At the time it filed the complaint, WEST also filed a motion for a preliminary injunction to enjoin Keil from contacting the six major clients he had while working for WEST and to prohibit Keil from disclosing to Brody any confidential information obtained from WEST. The district court heard and granted WEST's motion for preliminary injunction. Keil then filed a motion for relief from the preliminary injunction and for a new trial. The district court heard and denied Keil's motion. Keil then filed a petition seeking permission to file an interlocutory appeal from the district court's grant of the preliminary injunction. That petition was granted.

¶5 In this appeal, Keil asserts that the district court erred in granting WEST's motion for a preliminary injunction because WEST failed to meet its burden of showing that (1) WEST would suffer irreparable harm unless the injunction issued, (2) the injury to WEST substantially outweighs the damage the injunction would cause Keil, and (3) WEST is likely to succeed on the merits of the underlying action.

¶6 We will not disturb a district court's grant of a preliminary injunction unless the district court abused its discretion or rendered a decision against the clear weight of the evidence. See Kasco Services Corp. v. Benson, 831 P.2d 86, 90 (Utah 1992) (citing Systems Concepts, Inc. v. Dixon, 669 P.2d 421, 425 (Utah 1983)).

¶7 Rule 65A(e) of the Utah Rules of Civil Procedure sets forth the elements that must be present before a preliminary injunction may issue:

(1) The applicant will suffer irreparable harm unless the order or injunction issues;

business, formulae and prices are usually proprietary and held confidential.

¶11 However, WEST failed to establish that Keil copied its prices or its products and supplied them to Brody. At the hearing, Keil introduced copies of Brody's formulae and Keil's best recollection of WEST's chemical formulae. The formulae are not identical. Furthermore, Keil's expert testified that although the formulae are somewhat similar, there are significant differences between Brody's and WEST's formulae. Loretitsch explained that Brody's formulae differ from WEST's in three ways. First, the individual ingredients in the formulae are different chemicals. Second, the percentages of the individual chemicals present in each formula are different. Finally, the ratios of the individual components with respect to each other in Brody's formulae are not the same as in WEST's. The expert then opined that Brody's formulae are not copied from WEST's. He then accounted for the similarities between WEST and Brody formulae by explaining that to some extent all the chemical formulations in this industry are driven by market and regulatory forces.

¶12 In contrast, WEST neither submitted its formulae to the trial court nor did it supply a price sheet. The court was forced to rely on Keil's best guess as to WEST's formulae and WEST's representation that the prices were the same. WEST did not introduce any expert testimony regarding whether Brody's formulae had in fact been copied from WEST. WEST relied on the self-serving statements of its president, Frank Leaver, who stated that Brody sold "almost duplicate products" after Keil began working for them. Notably, however, Leaver did not testify that Brody's formulae were copies of WEST's.

¶13 In addition to his expert's testimony, Keil introduced evidence illustrating that the water treatment chemical industry is relatively easy to break into. Several industry publications set forth suggested general chemical make-ups for water treatment chemicals. Both Keil and Brody president John Liddiard described how Brody arrived at the formulations for its products through consultation with Buckman Laboratories and affirmed that it did not copy its formulae from WEST.

¶14 Finally, the district court's own findings support our conclusion that the injunction was improperly granted. The court's findings indicate that it believed WEST's formulae, although not exact duplicates, were "very similar" to Brody's. Similarities which can be explained by industry or regulatory demands cannot suffice to meet the requirement that Brody copied WEST's confidential formulae, especially in light of the abundant testimony that the formulae were not copied and the substantial

(2) The threshold injury to the applicant outweighs whatever damage the proposed order or injunction may cause the party restrained or enjoined.

(3) The order or injunction, if issued, would not be adverse to the public interest; and

(4) There is a substantial likelihood that the applicant will prevail on the merits of the underlying claim, or the case presents serious issues on the merits which should be the subject of further litigation.

Utah R. Civ. P. 65A(e) (1998). Because we are persuaded that WEST failed to meet its burden under subsection four above, we reverse the district court's grant of a preliminary injunction.

¶8 To meet the requirements of subsection four, an applicant must, at the very least, make a prima facie showing that the elements of its underlying claim can be proved. See Utah State Road Comm'n v. Friberg, 687 P.2d 821, 833 (Utah 1984) (suggesting that prima facie showing of the elements of the underlying claim is required for issuance of preliminary injunction); see also Schwalm Elecs. Inc. v. Electrical Prods. Corp., 302 N.E.2d 394, 397 (Ill. App. Ct. 1973) (stating prima facie case of misappropriation of trade secrets is necessary to support issuance of an injunction); Paramount Office Supply Co. v. D. A. MacIsaac, Inc. 524 A.2d 1099, 1101 (R.I. 1987) (requiring prima facie evidence of misappropriation of customer list prior to ordering injunction).

¶9 To establish a claim for misappropriation of trade secrets, WEST must show (1) the existence of a trade secret, (2) communication of the trade secret to Keil under an express or implied agreement limiting disclosure of the secret, and (3) Keil's use of the secret that injures WEST. See Microbiological Research Corp. v. Muna, 625 P.2d 690, 697-98 (Utah 1981). "An employer to obtain relief must establish that his former employee's product is a copy of his own product." Id. at 696 (emphasis added).

¶10 Arguably, WEST established that its prices and formulae for its water treatment chemicals were secret and that it had an implied agreement with Keil limiting disclosure of the prices and formulae. In fact, even Keil's expert, Gary Loretitsch, testified that in the water treatment chemical

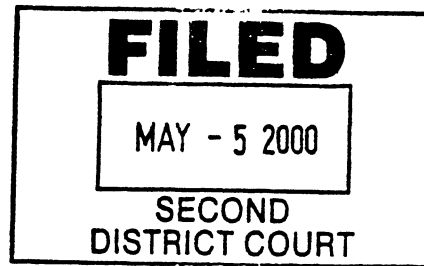
amount of information in the public domain regarding water treatment chemicals. WEST had the burden of producing evidence that would establish that its formulae were in fact stolen by Keil for use by Brody. It is hard to see how this burden could possibly have been met when WEST never submitted actual formulae to the trial court for comparison purposes.

¶15 In light of the foregoing, we find that the district court's grant of the preliminary injunction was against the clear weight of the evidence. WEST did not meet its burden of establishing a prima facie case that Keil copied confidential information and supplied that information to Brody. Consequently, we reverse the district court's grant of a preliminary injunction.

Chief Justice Howe, Justice Stewart, Justice Zimmerman, and Justice Russon concur in Associate Chief Justice Durham's opinion.

ADDENDUM B

JOSEPH C. RUST (2835)
KESLER & RUST
2000 Beneficial Life Tower
36 South State Street
Salt Lake City, Utah 84111
Telephone: (801) 532-8000
Attorneys for Plaintiff



IN THE SECOND JUDICIAL DISTRICT COURT OF DAVIS COUNTY

STATE OF UTAH

WATER & ENERGY SYSTEMS
TECHNOLOGY, INC., a Utah corporation,

Plaintiff,

v.

STEVEN L. KEIL; and BRODY CHEMICAL
INC., a Utah corporation,

Defendants.

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JUDGMENT

Civil No. 980700090CV
Judge Rodney S. Page

This case having come on for jury trial before the Honorable Rodney S. Page beginning on March 1, 2000 at the hour of 9:00 a.m. and continuing through to March 3, 2000, and Defendants' Motion for Direct Verdict having been denied, and the jury having heard the evidence and the arguments of counsel and having been instructed on the law by the Court, and the jury having returned its verdict as follows:

1. Were the customer price quotes a trade secret? Yes.
2. Did Steven Keil misappropriate the price quotes? Yes

JUDGMENT ENTERED

3. Did Steven Keil intentionally interfere with a prospective economic relationship of Plaintiff with Alliant and/or MagCorp., and/or Cargill? Yes.

4. Did the actions of Steven Keil result in damage to the Plaintiff? Yes.

5. Was Steven Keil acting as an agent for Brody Chemical when he misappropriated the price quotes and contacted Plaintiff's consumers? Yes.

6. The amount of damages sustained by the Plaintiff as a result of Defendant Keil's actions: lost profits -\$190,000, unearned salary and benefits paid-\$4,706.

7. Does Plaintiff owe any sums to Mr. Keil for commissions, unpaid salary or expenses? Yes.

8. The amount Plaintiff owes Defendant Keil- \$4231.00 for commissions; \$300.00 for expenses, and \$1500.00 for salary. for a total of \$6,031.00.

NOW, THEREFORE it is HEREBY ORDERED, ADJUDGED AND DECREED as follows:

Plaintiff Water & Energy Systems Technology, Inc. is awarded judgment against Defendants, jointly and severally, in the amount of \$188,675.00 together with Plaintiff's costs.

DATED this 4th day of May, 2000.

BY THE COURT:


HONORABLE RODNEY S. PAGE
DISTRICT COURT JUDGE

ADDENDUM C

BR~~ODY~~ CHEMICAL

4825 South 6200 West

P.O. Box 18747

Salt Lake City, Utah 84118-0747

OFFICE: (801) 963-2436 FAX: (801) 963-2437

March 3, 1998

Mr. Keith Rydallch
Magnesium Corporation of America
Rowley, Utah

Dear Keith,

I have enjoyed our relationship during the time I served you as a representative of W.E.S.T., Inc. I have made a change, and I now represent Brody Chemical.

I have made this change for many reasons. A number of these are beneficial to you. I can now provide you greater support resources and a substantially lower cost for the technical service and the water treatment products. The additional latitude and support I now enjoy will enhance the level of service I can provide you.

The water treatment products that I will supply are essentially the same as those I have supplied in the past, and that have provided you with excellent results. However, these products will now come with three significant advantages: first, the cooling tower inhibitor will have an increased amount of molybdate, but a decreased amount of phosphate to eliminate calcium phosphate deposition without sacrificing corrosion protection; second, logistics will be improved because the manufacturing and warehousing facilities are in Salt Lake City; and, third, the cost will be substantially lower because of the lower product cost, and the lower freight cost.

Over the years I have served you, I have developed an extensive knowledge of your systems and operations. I have also developed a good working relationship with your personnel. My continuing objective will be to provide you superior protection for your systems by applying optimal treatment products, state of the art control and application methods, and competent and dedicated technical service. Keith, I value your business highly, and I look forward to continuing our relationship and to serving you in the future.

Sincerely,

Steve Keil
Steve Keil

PLAINTIFF'S
EXHIBIT

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BR_{ODY} CHEMICAL

825 South 6200 West
P.O. Box 18747
Salt Lake City, Utah 84118-0747
OFFICE: (801) 963-2436 FAX: (801) 963-2437

March 3, 1998

Ms. Kathy Vigil
Alliant Techsystems, Inc.
P.O. Box 98
Magna, Utah 84044

Dear Kathy,

I have enjoyed our relationship during the time I have served you as a representative of W.E.S.T., Inc. I have made a change, and I now represent Brody Chemical.

I have made this change for many reasons. A number of these are beneficial to you. I can now provide you greater support resources and a substantially lower cost for the technical service and the water treatment products. The additional latitude and support I now enjoy will enhance the level of service I can provide you.

The water treatment products that I will supply are essentially the same as those I have supplied in the past, and that have provided you with remarkable results. However, these products will now come with two significant advantages: first, logistics will be improved because the manufacturing and warehousing facilities are in Salt Lake City, and, second, the cost will be substantially lower because of the lower product cost, and the lower freight cost.

The following is a list of the W.E.S.T. products I have utilized in treating your systems and the pricing, and the corresponding Brody Chemical products and pricing. The effectiveness and use rates will be essentially the same, so you can see that the savings will be substantial. The freight savings will provide an additional cost reduction of \$0.06 to \$0.12 per pound. In total the cost reduction will be more than \$10,000.00 per year.

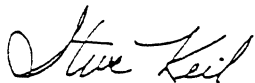


WEST PRODUCT	WEST PRICING per pound	BRODY PRODUCT	BRODY PRICING per pound
B-206	\$1.22	B107	\$1.10
B-411	\$1.65	B557	\$1.50
B-501	\$0.73	B600	\$0.68
C-365	\$1.48	CT107	\$1.20

Please keep this information confidential.

Over the years I have served you, I have developed an extensive knowledge of your systems and operations. I have also developed a good working relationship with your personnel. As in the past, my objective will be to provide you superior protection for your systems by applying optimal treatment products, state of the art control and application methods, and competent and dedicated technical service. Kathy, I value your business highly, and I look forward to continuing our relationship and to serving you in the future.

Sincerely,



Steve Keil

BRODY CHEMICAL

35 South 6200 West
Box 18747
Salt Lake City, Utah 84118-0747
OFFICE: (801) 963-2436 FAX: (801) 963-2437

Bruce Henderson
Assistant Superintendent

Flour Milling

 CARGILL FOODS

Cargill
2780 G Avenue
Ogden, UT 84401
Fax: 801/394-7536
Tel: 801/621-3540 Ext. 116

March 3, 1998

Mr. Bruce Henderson
Cargill Flour Milling
2780 G Avenue
Ogden, Utah 84401

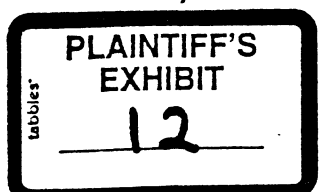
Dear Bruce,

I have enjoyed our relationship during the time I served you as a representative of W.E.S.T., Inc. I have made a change, and I now represent Brody Chemical.

I have made this change for many reasons. A number of these are beneficial to you. I can now provide you greater support resources and a substantially lower cost for the technical service and the water treatment products. The additional latitude and support I now enjoy will enhance the level of service I can provide you.

The water treatment products that I will supply are essentially the same as those I have supplied in the past, and that have provided you with remarkable results. However, these products will now come with two significant advantages: first, logistics will be improved because the manufacturing and warehousing facilities are in Salt Lake City, and, second, the cost will be substantially lower because of the lower product cost, and the lower freight cost.

The following is a list of the W.E.S.T. products I have utilized in treating your systems, and the pricing, and the corresponding Brody Chemical products and pricing. The effectiveness and use rates will be essentially the same, so you can see that the savings will be substantial. The freight savings will provide an additional cost reduction of \$0.12 to \$0.16 per pound. In total the cost reduction will be more than twenty percent.

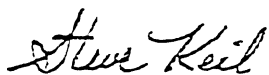


WEST PRODUCT	WEST PRICING per pound	BRODY PRODUCT	BRODY PRICING per pound
B-206	\$1.45	B107	\$1.30
B-402	\$1.60	⁵⁰² B340	\$1.50
B-503	\$0.73	B600	\$0.68
C-516	\$1.45	CT107	\$1.25

Please keep this information confidential.

Over the years I have served you, I have developed an extensive knowledge of your systems and operations. I have also developed a good working relationship with your personnel. As in the past, my objective will be to provide you superior protection for your systems by applying optimal treatment products, state of the art control and application methods, and competent and dedicated technical service. Bruce, I value your business highly, and I look forward to continuing our relationship and to serving you in the future.

Sincerely,



Steve Keil

ADDENDUM D

**SECOND JUDICIAL DISTRICT COURT OF DAVIS COUNTY
STATE OF UTAH
FARMINGTON DEPARTMENT**

<div>WATER & ENERGY SYSTEMS TECHNOLOGY, INC , A Utah corporation, Plaintiff(s), vs. STEVEN L. KEIL and BRODY CHEMICAL, A Utah corporation, Defendant(s).</div>	<div>RULING ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT Case No. 980700090</div>
---	---

Comes now the Court and having reviewed Defendant's Motion for Summary Judgment and their Memorandum submitted in support thereof and Plaintiff's Memorandum and Affidavit submitted in opposition thereto and having heard the arguments of counsel and being fully advised in the premises hereby rules as follows:

The Court concludes that there is sufficient evidence from which the trier of fact could conclude that the formula and price list of Plaintiff were confidential and Defendant Keil was under an express or implied contract which limited their disclosure. However, in order for the Plaintiff to prevail on their claim of misappropriation of Plaintiff's formula, Plaintiff has to prove that the formulas were the same or that Brody's formulas were specifically derived from those of the Plaintiff.

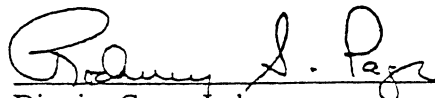
No such credible evidence has been provided either by testimony at the prior hearing or by subsequent affidavit. For that reason, the Court grants Defendant's Motion for Partial Summary Judgment on the issue of the misappropriation of the formulae.

The Court further concludes that there remains a question of fact as to the misappropriation of Plaintiff's price list and as to whether Plaintiff's price lists were used by Defendant Keil and Brody in establishing their own price lists. Therefore, the Court hereby denies Defendant's Motion for Summary Judgment on the issue of misappropriation of the price lists and causes of action for interference with economic relationships and violation of the Trade Secrets Act.

Defendant's counsel is to prepare Judgment in accordance with the Court's Ruling and submit the same to opposing counsel at least 5 days prior to the time it is submitted to the Court for signature.

Dated this 28th day of July, 1999.

By the Court:


District Court Judge

ADDENDUM E

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DISTRICT COURT

STATE OF UTAH

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Defendant Brody Chemical's Motion for Leave to File Motion for Summary Judgment Out of Time, Brody's Motion for Summary Judgment, Defendant Keil's Motion for Summary Judgment, and Plaintiff WEST's two Motions to Compel having all come on for hearing before the Honorable Rodney S. Page on the 30th day of November, 1999 at the hour of 10:30 a.m., and the Plaintiff being represented by its counsel Joseph C. Rust, and Defendant Steven Keil being represented by his counsel John Caine, and Defendant Brody being represented by its counsel Thomas R. Blonquist,

and the Court having reviewed the Memoranda submitted by counsel, other documents filed with the Court, as well as the Court file, and having heard oral arguments,

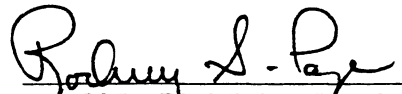
IT IS HEREBY ORDERED, ADJUDGED, AND DECREED AS FOLLOWS:

1. Defendant Brody Chemical's Motion to File Motion for Summary Judgment Out of Time is granted;
2. Defendant Brody Chemical's Motion for Summary Judgment is denied on the basis that there remain contested material issues of fact;
3. Defendant Steven Keil's Motion for Summary Judge is denied on the basis that there remain contested material issues of fact;
4. Plaintiff WEST's Motion to Compel information concerning Cargill and Union Pacific, and specifically communications with and sales to, is hereby granted. Defendants are to supply the information by December 30, 1999.
5. The trial date is vacated and the new trial date is set for Wednesday, February 23, 1999.
6. On Plaintiff's Trade Secrets Claims, Plaintiff will not be entitled to reference any customers other than Mag Corp, EG & G, Union Pacific, Hill Air Force Base, Utah State University, Cargill Flour, Laidlaw and Alliant TechSystems.
7. Each of the parties is to immediately submit to each other copies of their price sheets which they submitted in camera to the Court. Such documents will be held confidential by opposing counsel, shall be available for review only by the parties and their respective

expert witnesses and counsel, and all copies shall be subject to continuing requirements of confidentiality, namely, that such documents shall be held by the Court and protected in strict confidentiality, and returned to Plaintiff at the conclusion of trial.

DATED this 15th day of December, 1999.

BY THE COURT:


HONORABLE RODNEY S. PAGE
DISTRICT COURT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that I caused to be delivered by the method indicated below a true and correct copy of the foregoing **ORDER ON MOTIONS**, in Civil No. 980700090CV, postage prepaid, this 7th day of December, 1999, to:

☐ FEDERAL EXPRESS
☒ U.S. MAIL
☐ HAND DELIVERY
☐ TELEFAX TRANSMISSION


F:\DATA\JURIST\WEST\ORDER\MOT\KEI

Thomas R. Blonquist
40 South 600 East
Salt Lake City, Utah 84102

John Caine
RICHARDS, CAINE & ALLEN
2568 Washington Blvd., #200
Ogden, Utah 84401

ADDENDUM F

SECOND DISTRICT COURT
2000 MAY 31 P 12:10

JOSEPH C. RUST (2835)
KESLER & RUST
2000 Beneficial Life Tower
36 South State Street
Salt Lake City, Utah 84111
Telephone: (801) 532-8000
Attorneys for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF DAVIS COUNTY

STATE OF UTAH

WATER & ENERGY SYSTEMS	:	ORDER
TECHNOLOGY, INC., a Utah corporation,	:	
	:	
Plaintiff,	:	
	:	
v.	:	
	:	Civil No. 980700090CV
STEVEN L. KEIL and BRODY CHEMICAL	:	Judge Rodney S. Page
INC., a Utah corporation.	:	
	:	
Defendant.	:	

Defendants' Motion for Judgment Notwithstanding the Verdict, Motion for a New Trial or Amendment of Verdict, and Motion for Remittitur having come on for hearing before the Honorable Judge Rodney S. Page, on the 2nd day of May, 2000, at the hour of 10:15 a.m., and Plaintiff being represented by its counsel, Joseph C. Rust, Defendant Brody Chemical being represented by its counsel, Thomas R. Blonquist, and Defendant Stephen L. Keil being represented by his counsel,

John T. Caine, and the Court having reviewed the Memoranda submitted by the parties and having heard the arguments of counsel, the Court finds and rules as follows:

FINDINGS

1. The misappropriation of confidential information by Defendants took place not in the disclosure of Plaintiff's WEST pricing to its own customers but rather in the disclosure of WEST pricing to Defendant Brody Chemical, an entity separate from Defendant Keil, for the purpose of Brody Chemical to compete with WEST.

2. By Defendant Keil giving that confidential information to Defendant Brody Chemical, the trade secret was destroyed.

3. The pricing information provided to Defendant Brody Chemical did not come from Plaintiff WEST's customers but rather directly from Defendant Keil.

4. The damages awarded by the jury were fair and reasonable, and in keeping with the evidence presented at trial.

5. The case of Leigh Furniture and Carpet Co. v. Isom, 657 P.2d 293, 304 (Utah 1982) is relevant as to setting the standards by which the tort of interference with a business relationship is determined.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED as follows:

1. Defendants' Motions and each of them are hereby denied.

2. Plaintiff's costs in the amount of \$1986.09 are approved, there having been no objection to the same filed within five (5) days of May 2, 2000.

DATED this 31st day of May, 2000.

BY THE COURT:


HONORABLE JUDGE RODNEY S. PAGE

CERTIFICATE OF MAILING

I hereby certify that I caused to be delivered by the method indicated below a true and correct copy of the foregoing **ORDER**, in Civil No. 980700090CV, postage prepaid, this 18th day of May, 2000, to:

☒ FEDERAL EXPRESS
☒ U.S. MAIL
☐ HAND DELIVERY
☐ TELEFAX TRANSMISSION


F:\DATA\TRUST\WEST\ORDER.BRO

Thomas R. Blonquist
40 South 600 East
Salt Lake City, UT 84102

John Caine
RICHARDS, CAINE & ALLEN
2568 Washington Blvd., #200
Ogden, Utah 84401