

2000

Water and Energy Systems Technology, Inc. v. Steven L. Keil, Brody Chemical Company, Inc. : Reply Brief

Utah Supreme Court

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IN THE SUPREME COURT OF UTAH

WATER & ENERGY SYSTEMS
TECHNOLOGY, INC.

A Utah Corporation,

Plaintiff/Appellee

Vs.

STEVEN L. KEIL, and
BRODY CHEMICAL COMPANY, INC.

A Utah Corporation,

Defendants/Appellants

:

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APPELLANTS' REPLY
BRIEF

Appellate No. 20000468-SC
Priority: 15

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

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UTAH

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TABLE OF AUTHORITIES

<u>Microbiological Research Corporation vs. Muna</u> , 652 P. 2d 690 (Utah 1981) . . .	9
<u>West vs. Keil</u> 974 P. 2d 821 (Utah 1999)	9

STATUTES AND CONSTITUTIONAL SECTIONS

Utah Uniform Trade Secrets Act § 13-24-1 Utah Code Annotated	2
--	---

TABLE OF CONTENTS

TABLE OF AUTHORITIESI

ARGUMENT1

 I. Defendants Met Their Burden of Proof1

 II. When Keil Left WEST He Took No Pricing Documents.5

 III. There Is No Utah Case Law On The Measure of Damages
 Under The Utah Uniform Trade Secrets Act. 7

 IV. WEST’s Damage Claim Failed 8

CONCLUSION 11

CERTIFICATE OF MAILING 12

CORRECTED MAILING CERTIFICATE13

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Defendants/Appellants	:	

Appellants submit this reply to the brief filed by the Appellee. For ease of reference and to be consistent with the Brief of Appellants, the Plaintiff/Appellee, Water and Energy Systems Technology Inc., are referenced in this brief as “WEST” and the Defendants/Appellants Steve L. Keil and Brody Chemical Company, Inc. as “Defendants”, “Keil” or “Brody”. References to the pleadings in the record on appeal are 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 and lines of the transcript. The exhibits which were offered in the trial are referred to by the exhibit number.

ARGUMENT

I. Defendants Met Their Burden of Marshaling the Evidence.

WEST's brief distorts the facts in its misguided attempt to claim that Defendants did not meet their burden to marshal the evidence. Defendants on page 6 of their initial brief recognized their duty, pursuant to law, to marshal the evidence including all evidence, both pro and con, so that this Court can properly review all of the legal arguments raised by the Defendants on appeal. In the 12 pages that follow, Defendants discharged their duty of marshaling the evidence. No matter how many times WEST demurred in its brief, this Court must make its own determination as to whether Defendants met their obligation.

The problem with this case from the outset, during the trial and now on appeal is that the vast majority of the facts, no matter how presented, including WEST's own witnesses, do not support the position WEST took in the trial. It is important for this Court to remember that WEST's position throughout both the pre-trial proceedings and the trial was a) that WEST's pricing was proprietary and, therefore, protected by the Utah Trade Secrets Act, the "Act" herein, and the general legal principles concerning trade secrets, b) that the delivery by Keil of WEST's prices to WEST's customers was a violation of the Act, c) causing some of WEST's customers to discontinue service with WEST and d) giving rise to WEST's damages.

No matter how one reviews the evidence, including a complete reading of every witnesses' testimony, WEST did not sustain the critical burden of proving that price was the key factor in decisions made by customers as to whether to use one water

treatment company over another. WEST's own expert, president of WEST of California, Brent William Chettell, testified that price was not the most critical factor. WEST questioned the Defendants' marshaling of the evidence on this point, however, an examination of the precise language from the trial transcript shows that the Defendants presented in comprehensive and fastidious order, every scrap of competent evidence introduced at trial. The transcript reads:

Q Okay. What are some of the key elements to be able to compete in your industry as you see it?

A I'd say the, the primary considerations are quality products and quality service.

Q Okay, what about pricing?

A 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 on the quality that can be delivered to those particular clients. So while it may be important to some companies, pricing to us is, is not nearly that critical."(Tp 267, lines 13-23)

This question was not asked by counsel for either Keil or Brody but by WEST's attorney, Joseph Rust, himself. Apparently, Mr. Rust did not like the answer because he restated the question later in his examination of Mr. Chettell:

Q. Okay, and with regard to this pricing you've talked about, then how does that, you've talked about how it gets established. Are you saying that this is, there's a separate price for each customer?

A. Basically, yes.

Q. And how, how widespread is that information in the industry?

A. Well, it's very closely guarded. The, only the customer themselves has that price list outside of the company and within the company again our administrative people who handle the billing need to know it. I'm usually involved at the very, very beginning in establishing the pricing for that particular customer, and that's, that's about the extent of, of how that, how far that information is disseminated.

Q. If a competitor had your pricing for a particular customer, would there be a problem with that?

A. Oh, yes indeed,

Q. Would you tell us about that?

A. Well, again, many customers are - I'm not going to say maybe - all customers today are looking for a bargain. In many cases, again, I think that they're looking for costs even to the extent of sacrificing quality. So if somebody could come along and, and basically come in and undercut costs and convince the customer that maybe that they were getting an, an equivalent product or an equivalent performing product or service, that could be very much to our detriment. "(Tp 268 - 269 lines 19 to page 269 to line 19)

The foregoing testimony is the totality of the evidence presented by WEST through Mr. Chettell as to pricing. Ironically, this testimony, presented by WEST in its case in chief, supports Defendants' position. He testified that a) pricing is secondary while quality of products and quality of service are of primary importance, b) pricing is not nearly that critical to WEST, and c) the customer has WEST's prices.

Fatal to WEST's claim is that no witnesses representing Cargill, Mag Corp and Alliant Tech testified that pricing was a consideration in deciding whether to leave WEST and engage Brody or one of the many other companies in the area selling water treatment chemicals.

WEST's argument seems to be that if Brody and Keil cannot find any evidence to support WEST's position on a particular issue, they have failed to marshal. In reality there was a paucity of evidence, if any, supporting WEST's position at trial.

II. When Keil Left WEST He Took No Pricing Documents.

WEST claims, in their initial brief, that the Defendants misrepresented the fact that Keil took actual price sheets from WEST when he terminated his employment. These claims are unfounded for the following reasons:

1. WEST did not have a price list. See the testimony of Mr. Lever at Tp 66 lines 16-20 and Keil at Tp 309 lines 17-24.

2. WEST's prices for water treatment chemicals were computed by Mr. Lever on a customer by customer basis. See the testimony of Mr. Lever at Tp 67 lines 2-13 and of Keil at Tp 310 lines 3-21.

3. WEST sold the identical products to several customers and charged each a different price. See Defendants' Exhibit 2.

4. Keil testified that when he terminated his employment with WEST, he had possession of various customer files and pricing sheets that he regularly used as a WEST salesman. See Tp 380 lines 6-8.

5. Keil returned the customer files to WEST. See Tp 380 lines 9-11.

6. Prior to returning the customer files, Keil did not copy them. See Tp 388 lines 3-6.

The entire testimony of Keil on this issue is as follows:

By Mr. Rust

Q. Now at the time that you left W.E.S.T. you had a number of customer files, did you not?

Yes, I did.

Q. And it took you about three weeks after you left before they were returned?

A. Yes, that's true.

Q. And some of those files included pricing sheets, did they not?

A. I believe so.

By Mr. Caine

Q. All right. Now there's been a question asked to you about some customer lists that you testified in response to Mr. Rust's question that you had with you when you left W.E.S.T. and returned I think you said about three weeks later?

THE COURT: Those were customer files?

MR. CAINE: Customer files, I'm sorry. Thank you Judge.

Q. (By Mr. Caine) Do you recall that line of questioning?

A. I do.

Q. I'm assuming that when you - and correct me if I'm wrong- when you left W.E.S.T. you knew who your customers were?

A. I did.

Q. Okay, you didn't need files to re, to remind you of that obviously?

A. No.

Q. Did you take any customer files with you of other customers that weren't the accounts you were servicing? Did you even have in our possession?

A. Probably not. I'm not a file keeper. Unfortunately.

Q. [Inaudible] next question. Did you copy any of the things out of those files and turn them over to Brody or anything to anybody else?

A. No.

Q. Was it necessary for you to do that?

A. No.

Q. Where was the information stored that was in those files?

A. In my head. (Tp 380 lines 6-14 Tp 387 line 7 to page 388 line to line 11)

The forgoing demonstrates that WEST's statements are inaccurate and constitute an attempt to distort Keil's testimony. Keil was aware of his customers' needs and what they paid for product because he initially sought out the customers and serviced them for many years thereafter.

III. There is no Utah Case Law on the Measure of Damages under the Utah Uniform Trade Secrets Act.

WEST further claims that in their brief Brody and Keil mislead the Court with respect to the Act by stating that there is no Utah case law with respect to damages in a Trade Secrets case. Defendants' statement is accurate. (The specific reference to the lack of cases interpreting the damage provision is found on page 31 of the Brief of Appellants.)

Brody and Keil quoted from the Act in their brief and recognized its applicability in this case and state that neither this Court nor the Utah Court of Appeals had interpreted the Act as to damages.

As to WEST's erroneous claim that Defendants ignored the Act, it is referenced on page 5 of the Brief of Appellants, and the entire Act is attached as Addendum A. Again, WEST is attempting to divert the attention of the Court by raising questions of a violation of the Rules of Professional Conduct to cloud the real issue. WEST's claim is disingenuous and should be sanctioned.

IV. WEST's Damage Claim Failed

At page 16 of its brief, WEST contends that Brody and Keil referenced documents with respect to damages that were not presented during trial. It was never represented that these documents were presented in trial. They were attached to Defendants' Memorandum in Support of their Motion for New Trial, R. 1994 at 2015 and 2017. The motion was argued by both sides, ruled upon by the trial judge and is part of Defendants' claim of error in this case. Once again WEST seems determined to divert the Court's attention away from the real issues of this case by its misplaced reliance on inaccurate claims that the Brief of Appellants is misleading.

Defendants believe that WEST's brief also seeks to divert the Courts attention from the obvious factual difficulty WEST now finds itself in by adopting the trial court's ruling on Defendants' Motion for a New Trial.

The trial court ruled that the violation giving rise to liability occurred when Keil gave WEST's prices to Brody. Beginning at page 15 of its brief, WEST makes this a core argument with respect to damages. This theory provides an even more compelling reason for reversal of the jury verdict. It is clear from the cases cited by the Defendants in their opening brief, *Microbiological Research Corporation v. Muna*, 652 P. 2d 690 (Utah 1981) and in *WEST v. Keil* 974 P. 2d 821 (Utah 1999) that there must be a nexus or a direct connection between a) the improper taking of material determined to be a trade secret, b) the giving of the trade secret to a third party or parties, c) and damages.

No amount of marshaling by the Defendants or demurrers from WEST can change the fact that there was not a scintilla of evidence presented at the trial or in any motions appertaining thereto showing that the transmission of pricing data from Keil to Brody directly or indirectly damaged WEST.

Indeed WEST's entire case focused upon Keil's transmission of confidential information to specific WEST customers. The testimony of Mr. Leaver shows:

1. When Keil says in Exhibit 18 that he will supply products that are essentially the same, he is disclosing confidential information to the customer. (Tp 113 lines 6-9.)
2. By stating to the customer that he can sell essentially the same product for X number of cents per pound, he breached his confidential relationship with WEST. (Tp 112 lines 15-20.)

WEST called witnesses representing Alliant Tech, Mag Corp and Cargill along with Mr. Leaver, to talk specifically about the damage created by Keil soliciting these particular companies to leave WEST and go with Brody because Brody could provide the same water treatment program at a reduced price. At no time did WEST present any evidence showing that WEST was damaged when Keil made Brody aware of WEST's prices. There was no evidence that Brody used WEST's prices to interfere with WEST's customers or to secure any other business that WEST believed it was entitled other than the transmission of pricing to the specific customers referenced herein.

WEST's claims notwithstanding, a) Keil and Brody believe that WEST's pricing was not a trade secret within the meaning of the Act b) that Keil's knowledge and his use of WEST prices in a new business is not a violation of either the Act or the laws of the State of Utah with respect to trade secrets and c) for WEST to prevail, it must be able to show that it sustained damages as a result of Keil's actions. The foundation of WEST's case, by its own admission in its brief on appeal, is built on sand. At trial, WEST showed no damage caused by the transmission by Keil of WEST's prices to Brody. The damages discussed throughout the trial involved the transmission by Keil of information to three of WEST's customers. WEST is afraid to confront this issue on appeal because it knows from a marshaling of the evidence that the evidence is insufficient to support any damages arising from the transmission of WEST's prices to these customers because a) they already knew what they were paying WEST for water treatment chemicals and b) pricing was not the major factor in deciding whether to stay

with WEST. Therefore, WEST's claim that their customers' prior knowledge of WEST's pricing, restated to them by Keil, was the basis for terminating or alternating their relationships with WEST was not sustainable by the evidence. In fact, all of the evidence was to the contrary. Given this dichotomy, WEST has "been hoisted by its own petard".

CONCLUSION

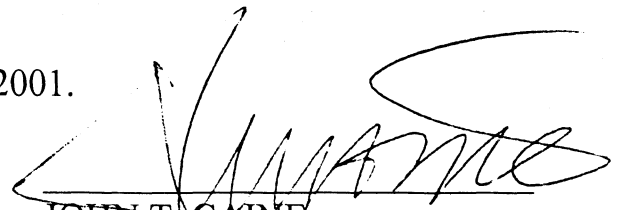
WEST has presented a distorted view of the evidence in attempting to justify its claim that the Defendants did not properly marshal the evidence.

At trial, WEST's cause of action was based upon the disclosure by Keil of WEST's pricing to three of WEST's customers. On appeal, however, WEST adopts the trial court's post-trial ruling that WEST's cause of action is based upon the disclosure by Keil of WEST's pricing to Brody.

WEST's cause of action fails under either theory because it did not prove that it was damaged as a proximate result of Keil's disclosure of WEST's pricing to either the three customers or Brody.

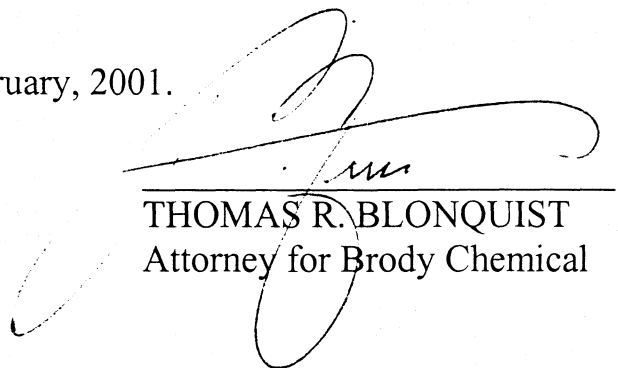
For the reasons previously set forth in the Brief of Appellant and for the additional reasons set forth herein, Defendants respectfully request that the judgment awarding damages to WEST be reversed and a judgment of no cause of action on behalf of Keil and Brody be entered.

DATED this 23rd day of February, 2001.



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Attorney for Steve Keil

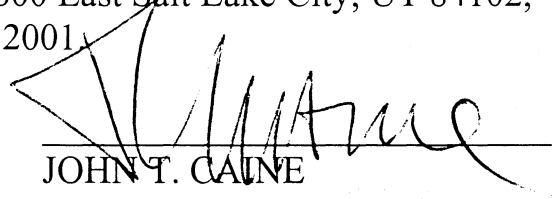
DATED this 23rd day of February, 2001.



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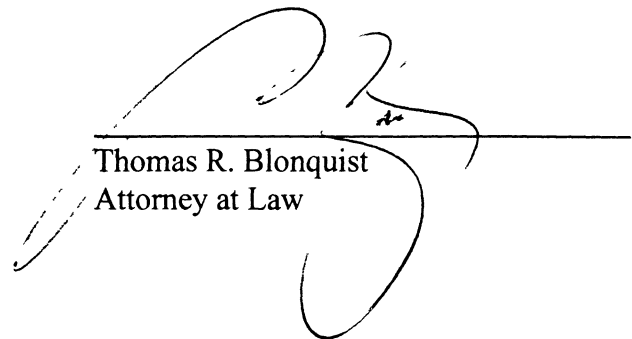
I certify that I mailed two copies of the foregoing Reply Brief to Joseph Rust, Attorney for the Plaintiff, 40 South 600 East Salt Lake City, UT 84102, postage prepaid this 23rd day of February, 2001.



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Attorney at Law

CORRECTED MAILING CERTIFICATE

The undersigned certifies that two copies of the foregoing reply brief were mailed to Joseph Rust, attorney for the Plaintiff, 2000 Beneficial Life Tower, 36 South State Street, Salt Lake City, Utah 84111, postage prepaid this 16th day of February, 2001.



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