

2000

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

Utah Supreme Court

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Joseph C. Rust; Kesler, Rust; Attorney for Appellee.

Thomas R. Blonquist; John T. Caine; Attorneys for Appellants.

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ARGUMENT

This Reply Brief is submitted pursuant to WEST's Cross Appeal for double damages, attorneys fees, and certain other items of damages removed from the jury's consideration. These issues were discussed in depth in WEST's previous Brief (that served to both respond to Brody and Keil's Appellant Brief as well as to brief the issues and arguments on cross appeal). WEST has carefully reviewed the Reply Brief submitted by Brody and Keil, and cannot find any specific reference to WEST's Cross Appeal or the issues raised therein.

Specifically, WEST finds no rebuttal to its claims that: (1) the willful and malicious nature of Brody's and Keil's conduct rose to a level sufficient to merit a statutory award of double damages; (2) statutory attorneys fees should have been granted to WEST; and (3) WEST should have also been granted damages incurred as a result of Brody's and Keil's interference with WEST's Utah State University business account. It appears that the only conceivable (though oblique) response to these issues--and which has not been expressly articulated as such by Brody and Keil--is that because Brody and Keil believe no damages should have been awarded at all, presumably no double damages or attorneys fees or an amount relative to Utah State University should have been awarded either. Conversely, because Brody and Keil have failed to raise any specific defenses to these issues, then it follows that if this Court sustains the jury verdict in favor of WEST, Keil and Brody have no

arguments against and can offer no objection to this Court taking the next logical step of awarding WEST its double damages, attorneys fees and USU-related damages.

Since WEST has already outlined its arguments in relation to these issues in its initial Appellee Brief, and as noted above, Brody and Keil have failed to offer any real rebuttal to the same, there is no need to repeat those arguments here. However, since one of the most significant underpinnings of the Cross Appeal is the callous and egregious way in which Keil and Brody misappropriated WEST trade secrets, the matter of fact argument raised by Brody and Keil in their Reply Brief about Keil's conduct does need to be addressed. Specifically, Brody and Keil seem to take the view, and indeed offer it in what appears to be their sole argument, that it is perfectly acceptable for any employee to take confidential information from his employer and utilize it on behalf of a new employer any way he wishes as long as he takes it "in his head." If that were the law (and no authority has been cited for the same), and because significant confidential information can be memorized, no employer would be afforded the express protections for its confidential information otherwise available in both statutory and case law. Aside from the strong evidence that Mr. Keil used documents instead of, or at least in addition to his memory to prepare his solicitation letters,¹ the "Keil had it in

¹ See, e.g., Plaintiff's Exhibit No. 21. The unrefuted testimony was that Keil had both customer files and pricing sheets when he prepared his solicitation letters and that

his head” argument runs counter to both the spirit and letter of the Utah Trade Secrets Act and relevant case law. However, since that is the position taken in Keil and Brody’s brief, for which they offer no apology, it stands that such was their view at the time the pirating of confidential and proprietary information took place and thus was calculated and deliberate. Such conduct merits an award of statutory double damages and attorney fees.

In the same vein, Brody and Keil continue to argue that any complained-of disclosures were made to WEST clients who already had the WEST pricing, and as such, are not actionable. Disclosing WEST pricing to a WEST customer was significant not because the customer was being told a price it obviously already knew, but rather because such a disclosure was coming from someone who was now a Brody employee. The WEST customer now knew that a competitor of WEST had in its possession what the customer assumed was information confidential to WEST and was willing to use that information to discount its own products. It was the fact that WEST’s pricing was placed in the hands of Brody by Keil that caused the damage. To demonstrate the callous regard Keil and Brody had for WEST’s confidential information, it should be noted that Keil’s solicitation letters went not just to three customers but rather virtually all, if not all, of WEST’s customers

although he may have returned some customer files to WEST, most customer pricing sheets were never returned. (See R. at 2365, pp. 32-33; Plaintiff’s Exhibit No. 9.)

serviced by Keil². This conduct does not consist of an isolated act but rather a carefully constructed, deliberate and systematic plan. Thus, the invocation of double damages and attorneys fees is fully justified.

Finally, Brody and Keil conveniently ignore the fact that the actionable transfers of confidential information from WEST to Brody occurred over a roughly six month period while Keil was still a paid employee of WEST, and were made to assist Brody in becoming WEST's competitor in the water treatment industry. The disclosures to WEST customers on behalf of Brody were simply the end of the line. They were the culmination of a lengthy process of disclosure of confidential information, and served to convert the improper disclosures to Brody into measurable damage to WEST.

The malice which Keil and Brody showed to WEST, and which serves as the basis of WEST's requested relief in this Cross Appeal, is fully evident in the actions of Mr. Keil, who for some six months--while presumably owing some duty to WEST which was all the while providing his salary and commissions--was busily working on products and pricing to compete with, financially undermine, and take business away from WEST. It is also evident in the actions of Brody, whose officers and employees encouraged the said conduct of Mr.

²See Plaintiff's Exhibits Nos. 11, 12, 13, 14, 15, 16, 17, and 18.

Keil. The fact that, during this same six-month period of time. Keil had all of WEST's confidential and proprietary pricing, composed his solicitation letters to WEST customers on Brody's behalf, and then took with him the price sheets for those individual customers, returning some several months later and others not at all, and claiming that such activity is somehow completely permissible and even sanctioned by the law, defines the extent to which Keil and Brody would flaunt the confidential pricing information they were using. That type of egregious behavior needs both to be rectified and deterred.

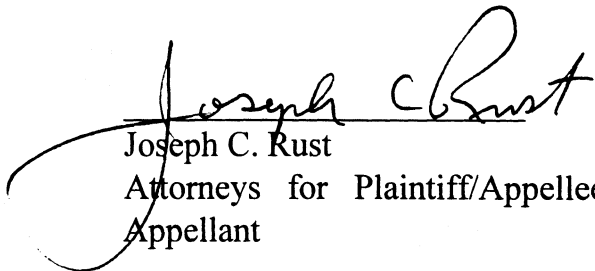
CONCLUSION

The record amply support the proposition that Brody and Keil acted with requisite malice to support WEST's requested relief on Cross Appeal. Furthermore, WEST's USU-based damage claim, having not been disputed by Brody and Keil on cross appeal, should be granted as a matter of course.

Respectfully submitted.

DATED this 9th day of March, 2001.

KESLER & RUST


Joseph C. Rust
Attorneys for Plaintiff/Appellee/Cross-
Appellant

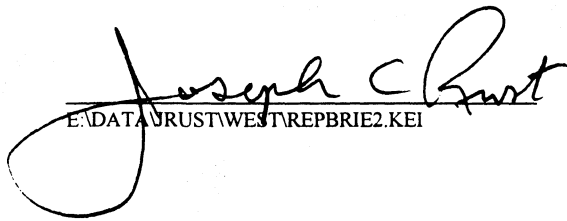
CERTIFICATE OF SERVICE

I hereby certify that I caused to be delivered by the method indicated below two true and correct copies of the foregoing **CROSS-APPELLANT REPLY BRIEF**, this 9th day of March, 2001, to:

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- TELEFAX TRANSMISSION

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

John T. Caine
2568 Washington Boulevard
Ogden, UT 84401


ENDATA\URUST\WEST\REP\BRIE2.KEY