

1978

Crane Company dba Crane Supply Company v. Ken Dahle et al : Reply Brief

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc2

 Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

Richard S. Nemelka; Attorney for Respondents;

Joseph C. Rust; Kenneth Schnaper; Attorneys for Appellant;

Recommended Citation

Reply Brief, *Crane Co. v. Dahle*, No. 15022 (Utah Supreme Court, 1978).

https://digitalcommons.law.byu.edu/uofu_sc2/583

This Reply Brief is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (1965 –) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

IN THE SUPREME COURT OF THE STATE OF UTAH

-000-

CRANE COMPANY dba CRANE)	
SUPPLY COMPANY,)	
)	
Plaintiff-)	Civil No. 15022
Appellant,)	
)	
vs)	
)	
KEN DAHLE, MARV ERICKSON,)	
EARL ZARBOCK, PLUMBERS)	
SUPPLY COMPANY, ALAN MASER,)	
MARJIE SADLER, and DOES I)	
through X,)	
)	
Defendants-)	
Respondents.)	

REPLY BRIEF

RICHARD S. NEMELKA
Attorney at Law
Suite 401
455 East Fourth South
Salt Lake City, Utah 84111
Telephone: (801) 521-8733

Attorney for Respondents

JOSEPH C. RUST
Kirton, McConkie, Boyer & Boyle
Attorneys at Law
330 South Third East
Salt Lake City, Utah 84111
Telephone: (801) 521-3680

KENNETH SCHNAPER
Crane Company
300 Park Avenue
New York, New York 10022

Attorneys for Appellant

FILED

JAN - 6 1978

IN THE SUPREME COURT OF THE STATE OF UTAH

-000-

CRANE COMPANY dba CRANE)	
SUPPLY COMPANY,)	
)	
Plaintiff-)	Civil No. 15022
Appellant,)	
)	
vs)	
)	
KEN DAHLE, MARV ERICKSON,)	
EARL ZARBOCK, PLUMBERS)	
SUPPLY COMPANY, ALAN MASER,)	
MARJIE SADLER, and DOES I)	
through X,)	
)	
Defendants-)	
Respondents.)	

REPLY BRIEF

RICHARD S. NEMELKA
Attorney at Law
Suite 401
455 East Fourth South
Salt Lake City, Utah 84111
Telephone: (801) 521-8733

Attorney for Respondents

JOSEPH C. RUST
Kirton, McConkie, Boyer & Boyle
Attorneys at Law
330 South Third East
Salt Lake City, Utah 84111
Telephone: (801) 521-3680

KENNETH SCHNAPER
Crane Company
300 Park Avenue
New York, New York 10022

Attorneys for Appellant

AUTHORITIES CITED

	Page
Barden Cream & Milk Co. v Mooney 305 Mass. 545, 546, 26 N.E.2d 324, 325 (1940)	3
C-E-I-R, Inc. v Computer Dynamics Corp. 229 Md. 357, 368-369, 183 A.2d 374, 380 381 (1962)	3
Charles C. Chapman Building Co. v California Mart, 2 Cal. App. 3d 846, 855 82 Cal. Rptr. 830, 836, (1969) reh denied (1970)	4
Hayes v Schweikart's Upholstery Co. 55 Tenn. App. 442, 462, 402 S.W.2d 472, 481 (1965), <u>cert. den.</u> (1966)	2
Lockwood Grader Corp. v Bockhaus 129 Colo. 339, 270 D.2d 193 (1954)	5
Relational Torts-Interference With Contractual Relations-Contract At will, 36 Temp. L.Q. 237, 240 (1963)	4
Tokuzo Shive v Japan Food Corp. 252 Cal. App. 2d 120, 60 Cal Rptr. 43,44, (1967) reh denied (1967)	4
Wearever Aluminum v Townecraft Industries, Inc. 75 N.J. Super. 135, 182 A.2d 387, 393, 396 (1962)	2, 6

IN THE SUPREME COURT OF THE STATE OF UTAH

-000-

CRANE COMPANY dba CRANE)
SUPPLY COMPANY,)

Plaintiff-)
Appellant,)

Civil No. 15022

vs)

KEN DAHLE, MARV ERICKSON,)
EARL ZARBOCK, PLUMBERS)
SUPPLY COMPANY, ALAN MASER,)
MARJIE SADLER, and DOES I)
through X,)

Defendants-)
Respondents.)

REPLY BRIEF

Appellant respectfully submits this brief in reply to respondents' brief filed herein.

Both the decision of the lower court and the arguments of respondents on appeal center around the alleged fact, that the acts of the respondents were independent and further that they had a contract at will with plaintiffs. Hence it is claimed that there is no cause of action arising out of the collective termination from appellant and the collective new appointment with respondent Plumbers Supply. The prevailing rule of law, however, permits a cause of action as against a competitor who, after certain acts done by it and by the terminating employees, captures those employees and the business of a plaintiff.

The motives of the competitor may be demonstrated by a fraudulent and unlawful conspiracy to steal the employees of another. The inducement of the competitor to cause harm to a plaintiff through destruction of his business and pirating of his employees is commonly found from the means by which the termination from the old employer and employment at the new employer was accomplished. Thus, where an employee in an existing fiduciary relationship with his employer seeks to induce other employees to terminate their relationship, liability will be found as against the defendant employee and as against the competitor who secretly employed him while he was still an employee of the plaintiff. Hayes v Schweikart's Upholstery Co., 55 Tenn. App. 442, 462, 402 S.W. 2d 472, 481 (1965), cert. den. (1966).

In Wearever Aluminum v Townecraft Industries, Inc., 75 N.J. Super. 135, 182 A.2d 387, 393 (1962), the court said:

The conduct of defendant, as evidenced by the actions of Eisenfeld and Nakash, was designed and intended to promote the interests of the defendant at the expense of the plaintiff. The injuries suffered by the plaintiff, i.e., loss of man power and loss of revenue, was not an accidental consequence of defendant's wrongful act; it was the ultimate consequence envisioned and planned for by the defendant.

The facts are undisputed that defendant Dahle was in the employ of plaintiff at the time that defendant Zarbock employed Dahle, that Zarbock, as the owner of all of the stock of defendant Plumber Supply, was its principal, and that as a result of Dahle's actions, especially as demonstrated by

his threats that Sadler would divert business in the event she were held to a two-week termination period, demonstrably evidences an intention of Dahle, who is now in the employ of Zarbock, to hinder and obstruct the business of plaintiff.

Some courts have read into the employment at will at least a contractual obligation to perform services for the best interests of the employer and that where a key employee acts to the detriment of his employer prior to the time that he terminates, either by disclosing confidential information to a competitor or by failing to disclose his relationship with a competitor, gives rise to a cause of action against all defendants founded upon breach of fiduciary duty. Such cause of action is not limited, as respondent suggests to officers and directors of corporations, but has been extended to cover the duties of other key employees. See C-E-I-R, Inc. v Computer Dynamics Corp., 229 Md. 357, 368-369, 183 A.2d 374, 380-381 (1962).

It is precisely to guard against a breach of fiduciary duty or an inducement to leave employment so as to capture the business of a plaintiff by a defendant competitor that the courts will look carefully at a situation in which an employee has arranged his termination of old employment and his commencement of new employment to coincide. Barden Cream & Milk Co. v Mooney, 305 Mass. 545, 546, 26 N.E.2d 324, 325 (1940). Under those circumstances the courts are likely to find injury to the former employer and award damages accordingly.

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services Library Services and Technology Act, administered by the Utah State Library.

Machine-generated OCR, may contain errors.

At least three cases, all in point, are to the effect that the employee's contract at will is not to be advanced as a shield protecting his actions and that of the defendant competitor in seeking to do damage to the business of plaintiffs. Thus, the California Court in Charles C. Chapman Building Co. v California Mart, 2 Cal. App. 3d 846, 855 82 Cal. Rptr. 830, 836, (1969) reh denied (1970) held:

Unjustified interference with an advantageous business relationship is actionable even though no breach of contract is involved.

Another California Court stated the principle as:

It is well established that unjustified interference with an advantageous business relationship is actionable even though no breach of contract is involved. Tokuzo Shive v Japan Food Corp., 252 Cal. App. 2d 120, 60 Cal Rptr. 43,44, (1967) reh denied (1967)

Hence, "the value of an employment relationship lies in the reasonable probability that by properly treating his employees, the employer will be able to retain their services. The pecuniary value of retaining the same employees is uncalculably great and must be carefully protected. To allow a competitor to entice away the employees of another using the excuse that the employment was at will, would divest the employer of his property right to pursue his lawful business, unhampered by unjustifiable interference." Note, Relational Torts-Interference With Contractual Relations-Contract At Will, 36 Temp. L.Q. 237,

It is clear, therefore, that an act of interference can be found to have been committed by a defendant competitor. In this case the prime actor was Zarbock who was the only principal of respondent Plumbers Supply. He, working with Dahle, induced the change of employment of all of the employee respondents herein. The means for a change of employment was created through such inducement. Under the ruling of Lockwood Grader Corp. v Bockhaus, 129 Colo. 339, 270 D.2d 193 (1954) and other similar cases, this Court should consider the acts of all parties to come within a common design to effect the termination of their employment and to hinder the business of the appellant.

There is undisputed evidence of numerous meetings between Zarbock and Dahle during the month of April, 1977, the participation of Dahle in the ordering of inventory, the participation of respondents Maser, Erickson, and Sadler in conjunction with Dahle and Zarbock in the preparation of an announcement undisputedly stating that the parties could now be found at a new address and telephone, offering the same fine service, the testimony of Zarbock that Plumbers Supply had sought to enter the waterworks business for at least a year and a half but had not significantly entered the same prior to the acts complained of, the actions of Dahle in inducing Sadler and informing, if not inducing, Maser and Erickson to change employment to Plumbers Supply, and the

diverting of at least two orders away from appellant over to Plumbers Supply before the change in employment. The court below, however, failed to find that any of the above gave evidence of a conspiracy or joint effort to injure appellant solely on the absence of a contractual relationship between the appellant and the respondent employees. It is submitted that on this ground alone the lower court committed reversible error. This refusal to apply a standard of law directed to the totality of the acts of the defendant competitor Zarbock and Plumbers Supply and the respondent employees in effect compelled the decision of the lower court which is appealed from herein.

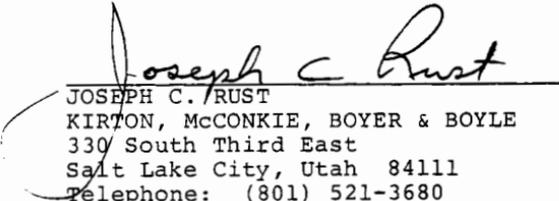
It is further submitted that as a matter of good commercial policy, a court in weighing the free movement of employees as against the proprietary interest of a former employer must look especially at the resulting injury to the latter's business and be on guard for commission of acts which supply the means for the tortious conduct of a defendant competitor. The court in Wearever, supra, applied the theory of equity to its holding by explicitly declaring:

Equity and good conscience compel the conclusion that defendant respond in damages for its tortious conduct. A denial of such relief would, in effect, operate as a sanction of commercial immorality and would permit the defendant, as

a wrongdoer, to rely upon the rights of innocent, pirated employees to completely and effectively shield itself from the consequences of its wrongful actions. 182 A.2d at 396

It is respectfully submitted that the lower court erred in its decision. Appellant should be awarded its lost profits as it has already established them at trial below. It should also be granted punitive damages against respondents.

Respectfully submitted,



JOSEPH C. RUST
KIRTON, McCONKIE, BOYER & BOYLE
330 South Third East
Salt Lake City, Utah 84111
Telephone: (801) 521-3680

KENNETH SCHNAPER
CRANE COMPANY
300 Park Avenue
New York, New York 10022

Certificate of Delivery

I hereby certify that a true and correct copy of the foregoing Reply Brief was hand delivered this 6th day of January, 1978, to the office of RICHARD S. NEMELKA, Attorney at Law, at 455 East South South Street, Suite 401, Salt Lake City, Utah.



Richard S. Nemelka III