

1977

# Savery L. Nash v. Craigco, Inc. : Appeal Brief of Appellant

Utah Supreme Court

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David S. Dolowitz; Attorneys for Appellant;

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IN THE SUPREME COURT  
OF THE STATE OF UTAH

\* \* \* \* \*

SAVERY L. NASH,

Appellant,

vs.

CRAIGCO, INC., a Utah corporation,  
CRAIG A. KNIGHT  
and CATHY KNIGHT,

Appellees.

ON APPEAL FROM THE  
IN AND FOR THE COUNTY OF  
THE SUPERIOR COURT

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Attorneys for Appellees

IN THE SUPREME COURT

OF THE STATE OF UTAH

\* \* \* \* \*

SAVERY L. NASH,	)
	)
Appellant,	)
	)
vs.	)
	)
CRAIGCO, INC., a Utah cor-	)
poration, CRAIG A. KNIGHT	)
and CATHY KNIGHT,	)
	)
Appellees.	)

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APPEAL BRIEF OF APPELLANT

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CASE NO. 15216

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ON APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT  
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

THE HONORABLE G. HAL TAYLOR, PRESIDING

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IN THE SUPREME COURT

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SAVERY L. NASH,	)	
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Appellant,	)	APPEAL BRIEF
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vs.	)	
	)	
CRAIGCO, INC., a Utah cor-	)	Case No. 15216
poration, CRAIG A. KNIGHT	)	
and CATHY KNIGHT,	)	
	)	
Appellees.	)	

\* \* \* \* \*

I. NATURE OF THE CASE

Appellant challenges the propriety of the dismissal by the Trial Court of his demand for punitive damages from defendant Craig Knight's breach of fiduciary duty to the plaintiff.

II. DISPOSITION IN LOWER COURT

The Trial Court directed a verdict in favor of the plaintiff on all issues except his demand for punitive damages and granted Craig Knight's motion for a directed verdict in his favor on that issue.

III. NATURE OF RELIEF ON APPEAL

Plaintiff seeks a ruling that he is entitled to punitive damages and a new trial on the issue of the amount to be awarded.

IV. STATEMENT OF FACTS

The plaintiff and defendant agreed in January of 1975 to go into the business of developing real estate. (Transcript

of Hearing held July 13 and 14, 1976, pages 11-13. Tr. 2.)<sup>1</sup>  
Pursuant to that agreement land was purchased in Salt Lake County.  
(Transcript of Hearing held July 13 and 14, 1976, pages 13-15,  
16. Tr. 2, 4-5, Exhibits 1, 3, 9, 10, 24 and 25.) Financing  
arranged and a corporation, Craigco, Inc., was created. (Transcript of Hearing held July 13 and 14, 1976, pages 19-20. Tr.  
44-45, Exhibits 7, 11, 16, 18, 24, 25 and 67.) Plaintiff organized the corporation, Craigco, Inc., raised the venture capital  
for the business, helped negotiate the land purchase and financing  
agreements and advanced funds to help defendant Craig Knight meet  
his living expenses during the organization and early construction  
phases of the development. (Transcript of Hearing held July 13  
and 14, 1976, pages 20-22. Tr. 7, 23-25, 26, 54-55, Exhibits  
3, 4, 7, 9, 10, 11, 12, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23,  
24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 36, 47, 48, 49, 50,  
51, 52, 56, 57, 58, 59, 60 and 67.) Craigco entered into the  
Real Estate Development known as Fox Hills Subdivision and defendant  
Craig Knight supervised the construction of 31 of the planned  
96 homes in the project. (Transcript of Hearing held July 13 and  
14, 1976, pages 167-170. Tr. 17, 57, Exhibits 14, 15, 20, 24 and  
25.)

Craigco, Inc. was formed with the issuance of 1,000  
shares. (Transcript of Hearing held July 13 and 14, 1976, 21.

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1. Tr. refers to the transcript of the trial proceedings  
for February 3, 1977.

Tr. 50, Exhibit 12.) Plaintiff did not desire, because of involvement with other businesses, to take shares in Craigco, Inc. at the time of its organization (Transcript of Hearing held July 13 and 14, 1976, pages 21-25), so all 1,000 shares were issued to defendant by Craig Knight and plaintiff paid defendant Craig Knight the sum of \$10.00 for an option to purchase 501 of the 1,000 shares in Craigco, Inc. (Transcript of Hearing held July 13 and 14, 1976, pages 21, 23-25. Tr. 50, Exhibit 12.) In entering into this Agreement the parties agreed that the plaintiff was ultimately to have 501 shares of the 1,000 shares to be issued which would give him voting control of the corporation. (Tr. 50, Exhibit 12.)

Phase I of the project (31 homes) had been substantially completed and the success of the development was apparent by May of 1976 when Craig Knight caused the corporation to issue to himself and his wife, defendant Cathy Knight, 14,700 shares of stock in exchange for undeveloped land owned by them in Colorado. (Tr. 63-65, Exhibits 46, 61, 62 and 68.) On June 9, 1976, plaintiff paid defendant Craig Knight \$501.00 in order to exercise his option for the 501 shares of stock in Craigco, Inc. (Tr. 37, 39, Exhibits 40 and 46.) About two weeks thereafter, defendant Craig Knight informed plaintiff that the new stock issue had occurred and of the dilution of plaintiff's interest in Craigco. (Tr. 39-40, Exhibits 40 and 46.) Defendant Craig Knight knew by this time that the whole Fox Hills project had been highly successful. (Tr. 63-65, Exhibits 61 and 62.)



When the plaintiff had the exercise of his option refused and learned of the purported issuance of stock for land, he filed the instant action requesting the Court to order defendant Craig Knight to convey to him 501 of the 1,000 shares of the capital stock of Craigco, Inc., to force rescission of the purported exchange of the Colorado property for the additional stock of Craigco, Inc., and for punitive damages based upon the breach of fiduciary duty by Craig Knight. (Tr. 2-11.) These issues were tried to a jury on January 31 and February 1, 2 and 3, 1977, the Honorable G. Hal Taylor presiding. At the conclusion of the presentation of evidence, Judge Taylor directed a verdict in favor of the plaintiff compelling defendant Craig Knight to convey to him 501 shares of the common stock of Craigco, Inc. and return the 14,700 shares to defendant Craigco, Inc. for cancellation, thus rescinding the stock for raw land transaction between defendants Craig and Cathy Knight and defendant Craigco. He also directed a verdict in favor of defendant Craig Knight<sup>2</sup> as to the request for punitive damages against defendant Craig Knight. (Tr. 12, 20-21.)<sup>3</sup>

#### V. ARGUMENT

THE TRIAL COURT ERRED IN RULING AGAINST THE PLAINTIFF'S CLAIM FOR PUNITIVE DAMAGES AND NOT ALLOWING THE DETERMINATION OF THE AMOUNT THEREOF TO GO TO THE JURY.

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2. Plaintiff had dropped the request for punitive damages as to defendants Cathy Knight and Craigco, Inc. before Judge Taylor made this ruling.

3. The transcript is divided into two portions. The second series of pages commences after page 82.

Defendant Craig Knight was a fiduciary of plaintiff Savery Nash at the time he tried to destroy Nash's interest in Craigco. He knew this was the situation when he took the actions challenged in this matter. (Tr. 59-60.) He should be ruled liable for punitive damages by this Court for his wilful breach of fiduciary duty to the plaintiff.

Craig Knight acknowledged he owed a fiduciary duty to the plaintiff and was advised of this by his counsel. (Tr. 59-60.) He was a fiduciary if he was viewed as a partner, Bates v. Simpson, 121 Utah 165, 239 P.2d 749 (1952); Kaumans v. White Star Gas & Oil Co., 92 Utah 24, 63 P.2d 231 (1936); Wasatch Livestock Loan Co. v. Lewis & Sharp, 84 Utah 347, 35 P.2d 835 (1934); Lane v. Petersen, 68 Utah 585, 251 Pac. 374 (1926); Forbes v. Butler, 66 Utah 373, 242 Pac. 950 (1926); Sharp v. Sharp, 54 Utah 262, 180 Pac. 580 (1919); Nelson v. Matesch, 38 Utah 122, 110 Pac. 865 (1910); see also §48-1-6, Utah Code Annotated, 1953; Comment a, §14A, Restatement of Agency 2d; §13, Restatement of Agency 2d, or as the chief operating officer of the corporation. Pepper v. Litton, 308 U.S. 295 (1939); Superintendent of Insurance v. Banker's Life & Casualty Co., 404 U.S. 6 (1971); Sweeney v. Happy Valley, Inc., 18 Utah 2d 113, 417 P.2d 126 (1966); Funk v. Spalding, 74 Ariz. 219, 246 P.2d 184 (1952); see also Jolin v. Oster, 55 Wisc. 2d 199, 198 N.W.2d 639 (1972); McDonald v. McDonald, 53 Wisc. 2d 371, 192 N.W.2d 903 (1972); Jolin v. Oster, 44 Wisc. 2d 623, 172 N.W.2d 12 (1970); Arditi v. Dubitzky, 354

F.2d 483 (2d Cir. 1965); Elsbach v. Mulligan, 136 P.2d 651 (Cal. 1943). His duties as a fiduciary included the responsibilities of (i) performance of all agreements which preceded incorporation; Jolin v. Oster, 55 Wisc. 2d 199, 198 N.W.2d 639 (1972); McDonald v. McDonald, supra; Jolin v. Oster, 44 Wisc. 2d 623, 172 N.W.2d 12 (1970); Helms v. Duckworth, 249 F.2d 482 (D.C.Cir. 1957); Elsbach v. Mulligan, supra; (ii) provision of full disclosure, fair dealing and open and honest communication; and (iii) not taking unfair advantage of Savery Nash, Nelson v. Matesch, supra; Jolin v. Oster, 55 Wisc. 2d 199, 198 N.W.2d 639 (1972); McDonald v. McDonald, supra; Jolin v. Oster, 44 Wisc. 2d 623, 172 N.W.2d 12 (1970); Elsbach v. Mulligan, supra; Arditi v. Dubitzky, supra.

Defendant Craig Knight violated each and every one of these duties. He refused to honor the exercise of the stock option by the plaintiff though he knew it was valid. (Tr. 67-68, Exhibit 46.) He tried to dilute the interest of the plaintiff and force him out of Craigco, Inc. by taking advantage of the position and knowledge that he had as the chief executive operating officer of that corporation. (Tr. 36-40, 60-61, Exhibits 47 and 68.) These actions were done willfully and knowingly. (Tr. 36-40, 59-60, 67-68, Exhibit 46.) They were done despite and in the face of Craig Knight's knowledge that he had a duty to deal with plaintiff in good faith and these actions violated this duty. (Tr. 59-60.) They were done with the knowledge that if

acted as he did, the plaintiff would sue him to enforce the original agreement and to force him to carry out his responsibilities. (Tr. 61.) He acted as he did despite being advised that plaintiff would be successful in such action. (Tr. 61, lines 13 and 14.)

This Court has held that whenever there is a violation of duty springing from a relationship of trust or confidence and the wrong is gross and aggravated, the malicious conduct necessary to justify punitive damages can be found. Holland v. Moreton, 10 Utah 2d 390, 353 P.2d 989 (1960). In the instant case, Craig Knight testified that he took the actions of causing Craigco, Inc. to issue 14,700 shares of stock to himself and his wife (which action would have destroyed the ownership interest of the plaintiff in Craigco, Inc.) deliberately and with the intention of taking away from Savery Nash his ownership interest in the venture. (Tr. 36-40, 61, Exhibit 46.) He refused to comply with the exercise of the option by Savery Nash in order to prevent his acquisition of a record ownership despite his knowledge of the validity of the option and its exercise. (Tr. 36-40, 67-68, Exhibit 46.) Since these actions were deliberate and intentional violations of his fiduciary duty, Knight was liable to Nash for punitive damages and the determination of the amount should have gone to the jury. Smoot v. Lund, 13 Utah 2d 168, 369 P.2d 933 (1962); Evans v. Gaisford, 122 Utah 156, 247 P.2d 431 (1952); Calhoun v. Universal Credit Co., 106 Utah 166, 146 P.2d 284

(1944). The fact that he knew his actions would be set aside by the Courts (Tr. 61, lines 13 and 14) merely emphasizes his culpability.

This Court has held that the reason for the awarding of punitive damages is to punish a defendant who has acted maliciously as a warning to others not to engage in similar conduct. Evans v. Gaisford, supra. In the instant case the Trial Court should, pursuant to this policy, have found defendant Craig Knight liable for punitive damages and sent the question of the amount to the jury. The Trial Court declined to do so because defendant Craig Knight had consulted with his attorney before acting and because only equitable relief was sought in this action. It is respectfully submitted that the Trial Court was wrong in both rulings.

There is no question from the testimony of Craig Knight that he was advised by counsel that if he took the action which led to this lawsuit, he would be sued and Nash would prevail. (Tr. 61, lines 13 and 14.) Nevertheless, he chose to take the actions which were challenged by the plaintiff in this action as found to be illegal by the Trial Court. He thus acted with knowledge of his duties and the consequences of his acts. (Tr. 61, 63.) He was a fiduciary of the plaintiff, he was warned that violation of these duties would violate plaintiff's rights (Tr. 59, 61), yet proceeded with his illegal actions. On these grounds alone, the fact that he acted maliciously and abused his position

as a fiduciary were established. The ruling by the Trial Judge that because he had consulted with his counsel he did not act maliciously was not correct. It defies logic to say that if a client speaks with his counsel, learns that if he takes certain actions he will violate his duties and he is then sued by the wronged party, that he will be insulated from paying an award of punitive damages simply because the wrongdoer had consulted with his counsel before acting. In fact, it demonstrates that the wrongdoer had the full knowledge of the consequences of his actions and by proceeding to act despite such warning he clearly had the requisite intent which is to be punished by punitive damages. If anything, this showing should require the Trial Court to determine that a basis for punitive damages has been established as a matter of law which requires the jury to determine solely the question of an appropriate amount.

The second aspect of the Trial Court ruling; that is, that punitive damages be awarded when only legal relief has been sought, has not been determined by this Court. The Supreme Court of the State of Idaho has discussed and resolved this question. In the decision Village of Peck v. Denison, 92 Ida. 747, 450 P.2d 310 (1969), that Court ruled that punitive damages may be awarded when only equitable relief is sought by the plaintiff. In that case the plaintiff sought equitable relief, the quieting title to water rights and the enjoining of interference with the use of those water rights. The Trial Court granted punitive damages in

the amount of \$6,000 despite the fact that no actual damages had been prayed for or awarded. The defendant appealed the award of punitive damages. The Idaho Supreme Court first found that the evidence supported the findings that the defendant had acted willfully and maliciously, then held that actual damages were a pre-condition to the award of punitive damages. The Court stated:

The absence of a showing of actual damages need not bar an award of punitive damages, where such a showing is not the telemanic necessity. The reason for such a requirement is that it first insures that some legally protected interest has been invaded. It prevents the assessment of punitive damages against one who may have caused damage without legal injury. There is no reason why an award of equitable relief may not fulfill the same function, for in either case it is necessary first to show an invasion of some legally protected interest. 450 P.2d at 314-315.

While the majority of the Court concurred in the ruling, Justice McFadden, in a concurring and dissenting opinion, discussed extensively the cases which dealt with the question of an award of punitive damages where the plaintiff sought only equitable relief. He pointed out that the majority had simply made the statement quoted above without explaining that in fact this ruling moved Idaho away from the prior existing general rule that punitive damages were not awarded in equitable actions. Justice McFadden pointed out that the general rule that no punitive damages can be awarded when only equitable relief is sought by plaintiff was based on separate systems of law and equity. He

pointed out that Idaho (as Utah) has done away with the dual systems and now has a single form of action whether the relief sought is equitable or legal. He pointed out that all of the modern cases dealing with this question have ruled that since there is a single form of action, there is no basis for artificially distinguishing between a legal action and an equitable action. He pointed out that the modern cases held that if the malicious actions which justify an award of punitive damages exist, they should be available in either equity or law. The fact that in a legal action they normally bear some relationship to the damages suffered by the plaintiff should not be a prohibiting factor in their award. They can still bear a relationship to the equitable relief being granted which can be tested by the Courts. 450 P.2d 315-319.

The Idaho Supreme Court thereafter reaffirmed its ruling and rationale in the decision of Lewiston Pistol Club, Inc. v. Imthurm, 94 Ida. 264, 486 P.2d 275, 277 (1971).

At the commencement of the instant case, the Trial Court issued a Preliminary Injunction after two days of hearings barring the defendant Craig Knight from violating his fiduciary duties to the plaintiff. When the full trial was completed, the Court continued that injunction and ordered the defendants to rescind the illegal acts taken. Craig Knight was determined by the Trial Court to have acted illegally and equitable relief was granted against him but the Trial Court then erred in not ruling



that plaintiff was entitled to punitive damages and submitting the question of amount to the jury.

This Court has declared that the purpose of punitive damages is to serve as an additional penalty against a party who has acted in a willful and malicious manner. They are to serve as a warning to others not to engage in similar conduct. Kesler v. Rogers, 542 P.2d 354 (Utah, 1975); Palombi v. D & C Builders, 22 Utah 2d 297, 452 P.2d 325 (1969); Holland v. Moreton, *supra*. This recognizes the fact that it is the legal interest invaded which gives rise to punitive damages rather than the type of relief which has been granted or sought. This should be the basis of awarding of punitive damages, not the technical distinction between an action at law or equity. In this action, injury was inflicted on the plaintiff. The injury of the plaintiff is no less real because the relief he sought was equitable rather than monetary damages. The defendant is equally culpable for acting in a willful and malicious manner. The Trial Court should have found the plaintiff entitled to punitive damages and submitted the question of amount to the jury rather than ruling as a matter of law they could not be awarded and directing the jury to so determine.

## VI. CONCLUSION

This Court should reverse the ruling of the Trial Court directing the jury in favor of the defendant Craig Knight and against the plaintiff, rule plaintiff entitled to punitive damages.

and order a retrial of the issue of the amount of punitive damages  
sought by the plaintiff against the defendant, Craig Knight.

RESPECTFULLY SUBMITTED this 20 day of December,

1977.



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CERTIFICATE OF MAILING

I hereby declare that I caused to be mailed a true and correct copy of the foregoing Appeal Brief in Case No. 15216, postage prepaid, this 20 day of December, 1977, to Chris Wangsgard, Attorney for Appellees, at 141 East 100 South, Salt Lake City, Utah, 84111.

  
DAVID S. DOLOWITZ



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## CASES AND AUTHORITIES

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