

1979

# Ted R. Brown and Associates, Inc. v. Carnes Corporation and Long Deming Utah, Inc. : Brief in Support of Petition for Rehearing

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

TED R. BROWN AND ASSOCIATES  
INC.,

Plaintiff-Appellant

Case No. 15928

vs.

CARNES CORPORATION, a corporation, and LONG DEMING UTAH, INC., a corporation,

Defendant-Respondent.

## BRIEF IN SUPPORT OF PETITION FOR REHEARING

## TABLE OF CONTENTS

	<u>Page</u>
STATEMENT OF THE NATURE OF THE CASE . . . . .	1
DISPOSITION IN UTAH SUPREME COURT . . . . .	2
RELIEF SOUGHT ON REHEARING . . . . .	2
STATEMENT OF FACTS . . . . .	2
ARGUMENT . . . . .	3
I. The Court Incorrectly Determined That Carnes Is Subject To The Jurisdiction Of The Utah Courts Under The Long-Arm Statute . . . . .	3
II. The Court Did Not Address Judge Leary's Refusal, As A Matter Of Judicial Administration, To Permit Relitigation Of The Issue Of Re- litigation. . . . .	8
III. The Court Failed To Determine The Orders Under Review Are Final Decisions And Are Appealable . . . . .	8
CONCLUSION . . . . .	10

## TABLE OF CASES

	<u>Page</u>
<u>Abbott G.M. Diesel, Inc. v. Piper Aircraft</u> , 578 P.2d 850 (Utah 1978) . . . . .	5
<u>Kennedy v. New Era Industries</u> , 600 P.2d 534 (Utah 1979) . . . . .	9
<u>Roskelley &amp; Co., v. Lerco, Inc.</u> , _____ P.2d _____, (Utah, No. 15987, filed April 11, 1980) . . . . .	6
<u>Salt Lake City Corp. v. Layton</u> , 600 P.2d 538 (Utah 1979) . . . . .	9
<u>South Shores Concession, Inc. v. Utah</u> , 600 P.2d 550 (Utah 1979) . . . . .	9

## Statutes Cited

Utah Code Ann. §78-27-24 (1953) . . . . .	3,4,5
Utah Code Ann. §78-27-26 (1953) . . . . .	4, 5
Rule 54(b) U.R.C.P. . . . .	9

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## BRIEF IN SUPPORT OF PETITION FOR REHEARING

## STATEMENT OF THE NATURE OF THE CASE

Ted R. Brown and Associates, Inc., brought an action for the collection of a sales commission against Carnes Company<sup>1</sup> and Long Deming Utah, Inc. An appeal was brought to review two decisions of the district court in which two different judges ruled that Carnes Company is not subject to the jurisdiction of the Utah Courts.

Carnes Company is an unincorporated division of Wehr Corporation, a foreign corporation not qualified to do business in the State of Utah. Carnes Company has appeared specially

<sup>1</sup>Carnes Corporation later became an unincorporated division of Wehr Corporation and it is now known as Carnes Company.

throughout all of the proceedings in this action, without entering a general appearance, and it does not enter a general appearance now.

#### DISPOSITION IN THE UTAH SUPREME COURT

The Court reversed the decisions of the district court in an opinion filed April 24, 1980. It held Carnes Company had sufficient minimum contacts with the State of Utah to justify application of the long-arm statute (§§78-27-22-et seq. Utah Code Ann. (1953)) and thereby subject it to the jurisdiction of the Utah Courts.

#### RELIEF SOUGHT ON REHEARING

Carnes Company respectfully petitions this Court for a rehearing of its decision and, then, an affirmance of the district court's orders.

#### STATEMENT OF FACTS

A detailed statement of the substantive facts and procedural history of this case was set forth in Carnes Company's initial responsive brief.<sup>2</sup> It is not necessary to repeat it here. Any additional factual information necessary to the consideration of this matter will be set forth in the argument.

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<sup>2</sup>See Brief of Respondent, at 2-10.

## ARGUMENT

- I. THE COURT INCORRECTLY DETERMINED THAT CARNES IS NOT SUBJECT TO THE JURISDICTION OF THE UTAH COURTS UNDER THE LONG-ARM STATUTE.

Brown insists Carnes has actively transacted business in Utah within the meaning of the Utah long-arm statute and is, therefore, subject to the jurisdiction of the local courts. This Court accepted that argument. Carnes urges the Court to reconsider because the causes of action alleged by Brown do not arise from the Utah activities of Carnes.

Carnes has never conducted business in Utah to the extent that general jurisdiction can be obtained. So, jurisdiction over Carnes, as a non-resident defendant, is controlled by the Utah long-arm statute (§§78-27-22-et seq. Utah Code Ann. (1953)). In its opinion, the Court relied on two paragraphs of §78-27-24. That section provides in pertinent part:

Any person, notwithstanding section 16-10-102, whether or not a citizen or resident of this state, who in person or through an agent does any of the following enumerated acts, submits himself, and if an individual, his personal representative, to the jurisdiction of the courts of this state as to any claim arising from:

- (1) The transaction of any business within the state;
- (2) Contracting to supply services or goods in this state;

\* \* \*

Neither provision supports jurisdiction. It is critical to observe that §78-27-26 Utah Code Ann. (1953)<sup>3</sup> permits only those claims arising from acts specifically enumerated in §78-27-24 to be asserted against a defendant over whom jurisdiction is based on the long-arm statute. Brown's claims did not arise from Carnes' contractual agreement to supply equipment to third parties in the State of Utah nor did they arise from the transaction of business in this State. There have been no claims covering that equipment, either the manner in which it was supplied or its quality. This cause of action arose, as stated in the complaint,<sup>4</sup> solely from an alleged breach and wrongful termination of Brown's sales representative agreement with Carnes.

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<sup>3</sup> Section 78-27-26 Utah Code Ann. (1953) provides: "Only claims arising from acts enumerated herein may be asserted against a defendant in an action in which jurisdiction over him is based upon this act."

<sup>4</sup> Brown's complaint set forth three counts: (1) that the plaintiff's relationship as sales representative was terminated after the plaintiff had obtained a tentative order for Carnes' equipment to be installed in the proposed office building of the L.D.S. Church, and before the construction contracts for the building were awarded; therefore, plaintiff was entitled to the commission on the equipment eventually ordered, notwithstanding the subsequent sales agreement between the defendants and the provisions of plaintiff's contract; (2) that if not entitled to the full commission, plaintiff was entitled to a portion of it; and (3) that the defendants had conspired to terminate the plaintiff's agreement with Carnes; therefore, plaintiff was entitled not only to the commission lost on the office building but to other unspecified lost commissions and punitive damages as well. (R. 160-163).



Carnes concedes that an action by its purchaser to whom it contracted to supply goods and services would lie in this state but that is not the basis of Brown's claims. They are based on Carnes' termination of a contract, presumably in Wisconsin. Such being the case, although Carnes' activities would support jurisdiction for some other action under §78-27-26, no jurisdiction arises for Brown because of §78-27-26. "Contacts" jurisdiction gives jurisdiction only for suits involving those contacts. See Abbott G.M. Diesel, Inc. v. Piper Aircraft, 578 P.2d 850 (Utah 1978). Identical reasoning reaches an identical result under §78-27-24(1): Carnes transacted sufficient business in Utah to give jurisdiction in actions based on those Utah activities, i.e., as to its buyers, but not as to unrelated causes of action such as those alleged by Brown. As in the other elements of the long-arm statute, the contacts which establish jurisdiction must also establish plaintiff's claims.<sup>5</sup>

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<sup>5</sup>Carnes is a Wisconsin corporation not qualified to do business in Utah. Clearly Carnes does not have sufficient activities in Utah to support a claim of general jurisdiction. There would be an obvious constitutional objection, for example, to a suit brought in Utah by a Utah corporation whose subsidiary in California purchased goods from Carnes for California delivery, or a suit brought by a Utah resident for personal injury resulting from acts of Carnes' agent outside of Utah.

The recent decision of Roskelley & Co. v. Lerco, Inc., \_\_\_ P.2d \_\_\_ (Utah, No. 15987, filed April 11, 1980), is important since it sets forth the standard to be applied here. Plaintiff, a local firm, alleged it made an oral agreement with defendant, a Kentucky fabricating company. The agreement would have allowed the Utah company to earn a "finder's fee" for services in connection with the sale of goods in Utah. However, according to plaintiff, the finder's fee was never paid and so it filed a lawsuit. Defendant responded to the suit by alleging the court did not have jurisdiction in the case because the company had no purposeful contacts in the state and never really conducted business here. The trial court ruled jurisdiction existed.

The Supreme Court reversed. It held that the record did not show the defendant was doing business in Utah to such an extent that the courts would have general jurisdiction. Consequently, the plaintiff was required to show that its cause of action arose out of one or more of defendant's contacts with the state as set forth in §78-27-24. As the Court observed, the plaintiff could not meet the evidentiary requirement:

Plaintiff argues that the "minimal contact" test of International Shoe is satisfied, as defendant transacted business in this State, contracted to supply goods in this State, and defendant's employees were physically present in this State.

But we are not here concerned with defendant's contract for the sale of goods to U.S. Steel Credit Corporation, nor with the installation of the equipment at

the Utah American Steel plant, and plaintiff's claim does not arise out of those activities. Plaintiff's alleged contract with defendant is collateral to its activities relating to the sale of equipment to U.S. Steel Corporation, and such a contract between plaintiff and defendant, would portray plaintiff's, and not defendant's, services and activities within this State.

\* \* \*

Here, defendant's purposeful activities within this State consisted of its sale of equipment ultimately destined for installation in this State, and its entry into this State for the purpose of overseeing the installation of that equipment. These contacts would be sufficient for the establishment of limited jurisdiction if this litigation concerned an action for breach of warranty or negligence in installing the equipment, brought by Utah American Steel or U.S. Steel Credit Corporation, but this plaintiff cannot avail himself of such contacts for the purpose of his claim or an entirely different contract. To do so he must show that this State has general jurisdiction; to wit, the defendant has conducted substantial and continuous business in this State. Plaintiff has shown no purposeful activity on the part of defendant within this State by which it could be said that defendant knew or should have known that it was subjecting itself to the jurisdiction of our Courts, for the purposes of this alleged contract for commissions. \_\_\_\_\_ P.2d at \_\_\_\_\_. (Footnote omitted.)

## II. THE COURT DID NOT ADDRESS JUDGE LEARY'S REFUSAL, AS A MATTER OF JUDICIAL ADMINISTRATION, TO PERMIT RELITIGATION OF THE ISSUE OF JURISDICTION.

It is evident the Court did not address the jurisdictional issue on the basis of the evidence before Judge Hall in 1974. Judge Leary, in addition to considering the issue on the merits, took into account that there were no changes in circumstances or other factors which as a matter of judicial administration should permit Brown to litigate the jurisdictional issue twice. This question of fairness and judicial administration is different from the principle of res judicata

referred to in Justice Crockett's concurring opinion. In fairness to the trial court, the question should be addressed by this Court. Carnes discussed the question on the merits in its Brief.<sup>6</sup>

III. THE COURT FAILED TO DETERMINE  
THE ORDERS UNDER REVIEW ARE  
FINAL DECISIONS AND ARE APPEALABLE.

Finally, Carnes is obligated to note to the Court, as it did in its brief,<sup>7</sup> that the two orders appealed by Brown were not final decisions and, consequently, they were not immediately appealable to this Court. Rule 54(b) of the Utah Rules of Civil Procedure governs the entry of a judgment in actions such as this one with multiple parties. It is readily apparent from a review of the record that Brown did not comply with the requirements of the Rule. The orders are, therefore, not now appealable.

Recently, the Court has dismissed other appeals where the judgment to be reviewed was not final and the parties had not met the requirements of Rule 54(b). See, e.g., South Shores Concession, Inc. v. Utah, 600 P.2d 550 (Utah 1979); Sal Lake City Corp. v. Layton, 600 P.2d 538 (Utah 1979); Kennedy v. New Era Industries, Inc., 600 P.2d 534 (Utah 1979). Here,

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<sup>6</sup> See Brief of Respondent, at 15-18.

<sup>7</sup> See Brief of Respondent, at 11-15.

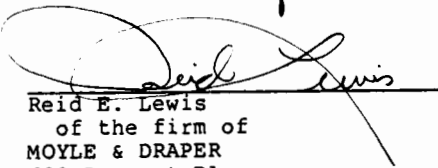
however, the Court's decision did not address the issue. Carnes urges the Court to do so and, on that basis, dismiss the appeal.

CONCLUSION

Based on the foregoing, Carnes Company respectfully petitions this Court for a rehearing of its decision and, then, an affirmance of the district court's orders.

RESPECTFULLY SUBMITTED this 27th day of May, 1980.

  
O. Wood Moyle, III

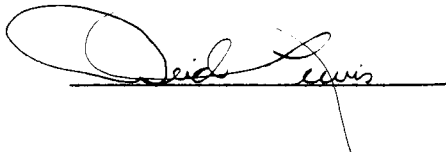
  
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CERTIFICATE OF SERVICE

This is to certify that I mailed a true and correct copy of the foregoing Petition for Rehearing and Brief in Support of Petition for Rehearing to the following this 27th day of May, 1980, postage prepaid:

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A handwritten signature in dark ink, appearing to read "David Lewis", is written over a horizontal line. The signature is fluid and cursive, with a long, sweeping underline that extends to the right.