

1998

J.W. Dansie and Jean Dansie v. Craig Dansie, Brice H. Evans, Nephi Sandstone Corporation, and Dansie and Dansie, Inc. : Brief of Appellee

Utah Court of Appeals

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**UTAH COURT OF APPEALS
BRIEF**

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DOCKET NO. 980068-CA

IN THE COURT OF APPEALS

OF THE STATE OF UTAH

J. W. DANSIE and JEAN DANSIE,

Plaintiffs-Appellants,

vs.

CRAIG DANSIE, BRUCE H.
EVANS, NEPHI SANDSTONE
CORPORATION, and DANSIE &
DANSIE, INC.,

Defendants-Appellees.

Case No. 980068-CA

Oral Argument
Priority 15

AMENDED BRIEF OF APPELLEES

APPEAL FROM THE FINAL ORDER OF THE
FOURTH DISTRICT COURT OF UTAH COUNTY, UTAH,
THE HONORABLE ANTHONY W. SCHOFIELD PRESIDING

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FILED

Utah Court of Appeals

AUG 04 1998

Julia D'Alesandro
Clerk of the Court

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OF THE STATE OF UTAH

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LIST OF PARTIES

In addition to the parties shown on the caption, Robert Steele was also a party to the action as a respondent (together with plaintiffs) to the order to show cause issued at the request of defendants.

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Oral Argument
Priority 15

JURISDICTION

A. August 13, 1997, Order and Judgment.

The Judgment and Order appealed from was entered August 13, 1997. (R. 290-286¹.) Plaintiffs served a Motion for New Trial on August 22, 1997, which was within ten days of the Judgment and Order. (R. 294-293.) The Court's Order Denying Motion for New Trial was entered November 6, 1997. (R. 345-342.) Plaintiffs filed their notice of appeal less than 30 days later, on November 28, 1997. (R. 347-346.) The notice was timely. Utah R. App. P. 4(a).

Jurisdiction was conferred on the Utah Supreme Court by Utah Code Ann. § 78-2-2(3)(j) (1996). The matter was poured over to the

¹ The pages in the record are organized in reverse chronological order, and as a result the pagination on each document runs in reverse order.

Utah Court of Appeals, which has jurisdiction under Utah Code Ann. § 78-2a-3(2)(j) (1996).

B. Claims of Robert Steele.

Appellants' brief claims on page 2 that "this appeal is made by Jack Dansie and Bob Steele." Although Robert Steele and Juab Gypsum, L.L.C. were respondents to the order to show cause (R. 156-155), only J. W. Dansie and Jean Dansie appealed. (R. 347-346.) This court lacks jurisdiction to consider the purported appeal by Robert Steele. See Torres v. Oakland Scavenger Co., 487 U.S. 312, 318 (1988). Also, Robert Steele did not join the motion for new trial, so any appeal by him would have been untimely. Notwithstanding any action this court may take with respect to J. W. Dansie, therefore, the underlying Order will remain effective as to Robert Steele and Juab Gypsum, L.L.C.

C. Prohibition on Sales to Ashgrove-Durkee.

It is important to delineate exactly what J. W. Dansie is appealing. The June 18, 1996, order prohibited J. W. Dansie from selling gypsum to Ashgrove-Durkee for 18 months or until Nephi Sandstone's gypsum failed to meet specifications, whichever occurred later. J. W. Dansie argued below that the order was in error, and that the limitation should only exist until the earlier of the passage of 18 months or the failure to meet specifications. (R. 172.) The trial court rejected that claim and specifically

found that the June 18, 1996, Order properly reflected the parties' agreement. (R. 266.)

J. W. Dansie did not appeal from or otherwise challenge the June 18, 1996, Order. J. W. Dansie does not claim that the June 18, 1996, Order is ambiguous. The June 18, 1996, Order is binding, i.e., J. W. Dansie, Robert Steele and Juab Gypsum, L.L.C. may not contact or contract with Ashgrove-Durkee for 18 months or until Nephi Sandstone gypsum fails to meet specifications, whichever last occurs. J. W. Dansie does not and cannot appeal the underlying order, but only the preventative injunction (the August 13, 1997, order) which seeks to prevent violation of the order.

Even if J. W. Dansie were to prevail on his appeal and obtain a reversal of the preventative injunction, the underlying order (June 16, 1996) would still remain in force. This Court's jurisdiction is therefore limited to the issue of whether J. W. Dansie must seek prior court approval before selling gypsum to Ashgrove-Durkee. The primary issue addressed in the brief, however, is whether the trial court could prohibit sales to Ashgrove-Durkee for a potentially indefinite period of time. This Court lacks jurisdiction to consider that issue.

ISSUES PRESENTED

1. Where a party had previously sold materials to a particular customer in violation of a court order, did the court abuse its discretion by requiring specific permission from the court before making any future sales to that customer?

2. Is a court order prohibiting sales to a single customer, entered as a sanction for contempt of court, inherently unreasonable and therefore unenforceable simply because the prohibition may continue indefinitely?

These issues arise in the context of an injunction issued by the trial court. The propriety of an injunction is reviewed for abuse of discretion. System Concepts, Inc. v. Dixon, 669 P.2d 421, 425 (Utah 1983).

DETERMINATIVE PROVISIONS

Appellees do not contend that there are any constitutional provisions, statutes, ordinances, rules, or regulations whose interpretation is determinative of the appeal or of central importance to the appeal.

STATEMENT OF THE CASE

A. Nature of the Case. This is a civil proceeding seeking sanctions for civil contempt of court. The proceeding arose in the context of a civil lawsuit concerning an agreement for the purchase of a business.

B. Course of Proceedings and Disposition Below. On November 4, 1996, defendants filed their Motion for Order to Show Cause (R. 147-145), claiming that plaintiffs and Robert Steele had violated a court order entered June 18, 1996. (R. 144-138.) The court issued the requested order to show cause. (R. 156-155.) An evidentiary hearing on the order to show cause was held February 11 and March 25, 1997. (R. 222-221, 240-239.)

On June 11, 1997, the court issued its ruling finding against defendants on the issues related to Robert Steele, but finding in favor of defendants on the issues related to J. W. Dansie. (R. 261-241.) Findings of Fact and Conclusions of Law (R. 285-263) and an Order and Judgment (R. 290-286) were entered on August 13, 1997.

On August 22, 1997, plaintiffs served a Motion for New Trial. (R. 294-293.) The court issued a ruling denying the motion on September 19, 1997 (R. 340-339), and a formal Order Denying Motion for New Trial was entered November 6, 1997. (R. 345-342.) Plaintiffs filed their Notice of Appeal on November 28, 1997. (R. 347-346.)

C. Statement of Facts.

On January 10, 1995, plaintiffs sued their son, Craig Dansie, and their son-in-law, Bruce H. Evans, claiming breach of an agreement whereby Craig and Bruce were to become owners of Nephi Sandstone Corporation. (R. 6-1.) Craig and Bruce answered the complaint and filed a counterclaim against plaintiffs asserting that Nephi Sandstone was failing and unprofitable when Craig and Bruce took over operations under an agreement whereby they would purchase the business from plaintiffs. The counterclaim asserted that plaintiffs had violated the agreement by attempting to remove a certain gypsum mine, known as the Levan Mine, from the assets of Nephi Sandstone Corporation. The counterclaim also asserted that plaintiffs had libeled and slandered Craig and Bruce by statements to customers. (R. 16-9.)

The issues raised in the complaint were resolved by a Stipulation filed February 29, 1996. (R. 137-130.) Several individuals and entities not party to the action, including Robert Steele, acknowledged the Stipulation and agreed to be bound by it. (R. 130.) An Order approving the Stipulation was entered June 18, 1996. (R. 144-138.)

Paragraph 1 of the Order prohibited each of the parties from making any "derogatory, demeaning or belittling comments about any of the other parties to any individual." Paragraph 3 of the Order included the following:

3. J. W. Dansie and Robert Steele, together with all other owners of the Juab Gypsum, L.L.C., are ordered not to attempt to contact or enter into any contracts with Ashgrove Cement Company-Leamington; Ashgrove Cement Company-Durkee, Oregon; Ashgrove Cement Company-Inkom, Idaho; Soda Springs Phosphate; Morrison Fertilizer; Agri-Nu; and North Pacific Trading, which are all customers of Nephi Sandstone Corporation, for a period of eighteen months from the date of the parties [sic] Stipulation (February 12, 1996) or for so long as the gypsum from Nephi Sandstone's operation of the Salt Creek Mine continues to meet Ashgrove Cement's specifications, whichever is later.

The trial court found that J. W. Dansie, notwithstanding the prohibition in the court order against making derogatory statements, made derogatory comments about Craig and Bruce to a number of individuals. (R. 277 ¶ 50.) The court also found that when Jason Dansie, who was Craig's son and J. W.'s grandson, went to deliver something to J. W., J. W. "began to shake and yell that there was going to be a bloody mess. He was angry at Craig and

Bruce and called them profane and offensive names, asserting that Craig and Bruce were greedy." (R. 277 ¶ 51.)

The trial court found that J. W. Dansie had sold at least 19 carloads of gypsum to Ashgrove-Durkee. (R. 281 ¶ 25.) J. W. Dansie claimed that the shipment to Ashgrove-Durkee was permissible because Nephi Sandstone had failed to meet Ashgrove-Durkee's specifications.² (R. 281 ¶ 26.) The court rejected this claim for two reasons. First, the court found that J. W. Dansie did not learn of the alleged breach of specifications until after he had agreed to ship the gypsum. (R. 278 ¶ 42.) Second, the court found that Nephi Sandstone did not fail to meet the Ashgrove-Durkee specifications. (R. 279.) The court found that Nephi Sandstone lost \$10,525.00 in profits by reason of the improper shipment of gypsum. (R. 276 ¶ 56.)

As a sanction for J. W. Dansie's derogatory statements concerning his son and son-in-law, the court imposed a fine of \$1,000.00 and ordered that J. W. Dansie perform 80 hours of community service. Mr. Dansie's co-respondent, Robert Steele, has

² J. W. Dansie claimed that Ashgrove-Durkee discovered some large rocks in the bottom of the railcars used to ship the gypsum. The court found that the rocks were not gypsum and were not similar to the kind of rock adjacent to the gypsum mine. (R. 280 ¶ 34.) J. W. Dansie also asserted a failure to meet delivery timetables. Nephi Sandstone's purchase order with Ashgrove-Durkee required that they ship five cars of gypsum per week from mid-March to mid-November, 1996. (R. 280, ¶ 35.) During that time frame, Nephi Sandstone shipped 192 cars of gypsum which averaged more than five cars per week. There was a period of 21 days, however, when no gypsum was shipped. The trial court found that this did not constitute a failure to meet specifications. (R. 279.)

submitted a letter to the court claiming that J. W. Dansie has performed the community service. (R. 341.)

As a sanction for the improper sales to Ashgrove-Durkee, the court imposed a fine of \$1,000.00 and also entered an injunction prohibiting J. W. Dansie or his company, Juab Gypsum, L.L.C., from selling materials to Ashgrove-Durkee "unless or until [the] court makes a finding that Nephi Sandstone has breached a specification or unless or until the passage of time provided in the [June 18, 1996] order." (R. 288.) J. W. Dansie has appealed that order. (R. 347.)

SUMMARY OF ARGUMENT

Appellants claim the trial court's order creates an improper non-competition agreement. The court's order was not, however, an agreement; it was an injunction to prohibit violation of a prior court order. Where J. W. Dansie had previously violated a court order and had attempted to excuse that violation by an after-the-fact claim that defendants' gypsum failed to meet minimum product specifications, the trial court did not abuse its discretion in requiring J. W. Dansie to seek prior court approval before engaging in future sales which may violate the court order.

Even if the court order is viewed as an agreement, however, it is still proper. A contractual limitation on competition can be enforced if it is reasonable in its restrictions as to time and area. A majority of courts have held that an indefinite time restriction may be reasonable if the area of restraint is narrow.

The area of restraint in this case is limited to a single existing customer of the defendants. Even though the restraint is potentially indefinite, the restraint is reasonable under the circumstances.

ARGUMENT

POINT I

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REQUIRING PRIOR COURT APPROVAL OF SALES BY J. W. DANSIE TO ASHGROVE-DURKEE.

On June 18, 1996, the trial court, by Order based on the stipulation of the parties, prohibited "J. W. Dansie and Robert Steele, together with all other owners of the Juab Gypsum, L.L.C." from contacting or contracting with Ashgrove Cement Company-Durkee, Oregon, which was an existing customer of defendants, "for a period of eighteen months from the date of the parties [sic] Stipulation (February 12, 1996) or for so long as the gypsum from Nephi Sandstone's operation of the Salt Creek Mine continues to meet Ashgrove Cement's specifications, whichever is later." (R. 143.) The trial court found that in the spring of 1996, which was almost immediately after the stipulation was entered, J. W. Dansie contacted Ashgrove-Durkee, and in October, 1996, shipped 19 railroad carloads of gypsum to Ashgrove-Durkee. (R. 281-280.) After making the agreement to ship the gypsum, J. W. Dansie learned of two circumstances which he later claimed constituted a failure to meet Ashgrove-Durkee's specifications. The trial court found

that Nephi Sandstone had not failed to meet Ashgrove-Durkee's specifications.

In addition to imposing a sanction for the past violation of the order, the trial court entered an injunction to prevent J. W. Dansie from committing future violations of the order. The court simply required that J. W. Dansie obtain a court finding of specification violation before undertaking to ship gypsum to Ashgrove-Durkee. J. W. Dansie now challenges that preventative injunction. The trial court did not abuse its discretion in entering that order under the circumstances of this case.

The propriety of an injunction restraining competition is addressed to the sound discretion of the trial court and will not be reversed unless the trial court abused its discretion. System Concepts, Inc. v. Dixon, 669 P.2d 421, 425 (Utah 1983). It cannot be said that the trial court abused its discretion in this case. J. W. Dansie had already demonstrated his contempt by violating at least two provisions of the June 18, 1996, Order. The court's finding demonstrates a need for close court supervision to prevent further violations:

At least as to J. W., this is not a particularly close case. In observing him at the evidentiary hearing and listening to his explanations of his actions, it is clear that he has an animus toward his son and son-in-law (defendants). He saw a sliver of an excuse to reenter the gypsum market in competition with them, and he loaded up his railcars and crashed them through that sliver into the broad daylight. J. W. evidenced no recognition of any wrongdoing, and he demonstrated an attitude of disregard for the legal obliga-

tions imposed upon him by the agreement, which he reached with his son and son-in-law (defendants). The Court finds and concludes that J. W. is in contempt of the Court's order.

(R. 270.)

The court also found what it characterized as "disturbing" violations of the order to not make derogatory comments about other parties. (R. 269-268.) This case arises out of a dispute among family members, and the trial court characterizes it as a "sad case." (R. 253.) Perhaps most instructive is the court's explanation for denying J. W. Dansie's motion for a new trial:

Second, it is troubling that after his counsel helped him negotiate a settlement with his son and son-in-law, after he signed the agreement, after it was presented to the Court as his voluntary agreement and after it was incorporated into an order of the Court, at the first opportunity J. W. Dansie set about to violate the court order. His defense is that it contains an invalid non-competition agreement.

This case as [sic] far different from the usual non-competition agreement case for the simple reason that we are not considering whether J. W. Dansie violated a non-competition agreement, but whether J. W. Dansie violated an order of this Court. In this case I am called upon to construe and enforce a court order rather than a private agreement. And I have found clear and convincing evidence that J. W. Dansie did violate the order. While J. W. Dansie asserts that the order contains an invalid provision, his remedy is not to thumb his nose at the agreement for which he bargained or at the Court which issued the order, but to seek relief from the Court. Instead he chose a path of contempt.

(R. 340-339.)

Where J. W. Dansie had clearly demonstrated his propensity to use any excuse to violate the prior court order, the trial court did not abuse its discretion in requiring prior court approval before J. W. Dansie could undertake sales to Ashgrove-Durkee. The trial court's order should be affirmed.

POINT II

THE RESTRAINT ON COMPETITION WAS NOT UNREASONABLE.

J. W. Dansie did not appeal from the June 18, 1996, Order which prohibited him from making sales to Ashgrove-Durkee until after the passage of 18 months or until Nephi Sandstone's gypsum failed to meet Ashgrove-Durkee's specifications, whichever occurred later. J. W. Dansie also did not challenge the trial court's denial of his motion to amend that earlier order. J. W. Dansie nonetheless claims that the provisions of that June 18, 1996, Order, which were enforced by the order appealed from, constitute an illegal non-competition "agreement." Although the Court lacks jurisdiction to consider this claim, if the Court were to reach the issue, it should hold that the provision is proper.

To be enforceable, a non-competition agreement must (1) be supported by consideration, (2) not be a product of bad faith, (3) be necessary to protect the good will of the business, and (4) "be reasonable in its restrictions as to time and area." System Concepts, Inc. v. Dixon, 669 P.2d 421, 425-26 (Utah 1983), citing Allen v. Rose Park Pharmacy, 120 Utah 608, 237 P.2d 823, 828

(1951). The only element at issue here is the fourth one, whether the restriction as to time and area is reasonable.

The law recognizes two types of covenants not to compete: covenants not to compete between an employer and employee, and covenants not to compete following a transfer or conveyance of ownership of a business. Covenants in the first category are strictly construed, while covenants of the second category are not. Ellis v. McDaniel, 596 P.2d 222, 224 (Nev. 1979); Amex Distributing Co. v. Mascari, 724 P.2d 596, 602 (Ariz. Ct. App. 1986); DBA Enterprises, Inc. v. Findlay, 923 P.2d 298, 302 (Ct. App.), cert. denied (Colo. 1996).

J. W. Dansie claims that the court order imposed an indefinite³ restriction on competition and asserts that such restrictions are invalid. J. W. Dansie relies on three cases to support his claim: Three Phoenix Co. v. Pace Industries, Inc., 659 P.2d 1271 (Ariz. Ct. App. 1981); Gynecologic Oncology, P.C. v. Weiser, 443 S.E.2d 526 (Ga. Ct. App. 1994); National Graphics Co. v. Dilley, 681 P.2d 546 (Colo. Ct. App. 1984). Of these cases, only Three Phoenix arises in the context of the sale of a business, and

³Defendants do not agree that the restriction was for an indefinite period of time. Craig and Bruce presented evidence that the gypsum from the Salt Creek Mine would likely last only two to three years. (R. 265-264.) The trial court made no finding on this issue. If this Court should determine that some restriction as to time is required, the matter should be remanded for a determination of how long the Salt Creek Mine gypsum supply will last, and whether that constitutes a reasonable limitation on the non-competition provision.

that opinion was vacated by the Arizona Supreme Court. Three Phoenix Co. v. Pace Industries, Inc., 659 P.2d 1258 (Ariz. 1983).

More importantly, the principle reflected in these cases is a minority view. "The overwhelming majority of the cases lend support to the rule that the mere fact, standing alone, that a restrictive covenant not to compete, ancillary to a contract of sale or other transfer of property, contains no time limit does not render the restriction ipso facto unenforceable." Annot., Enforceability of covenant against competition, ancillary to sale or other transfer of business, practice, or property, as affected by duration of restriction, 45 A.L.R.2d 77, 105 (1956). The majority rule was applied in Utah in Lashus v. Chamberlain, 6 Utah 385, 24 P. 188 (1890), which enforced an indefinite restriction on operating a competing hotel business in Ogden.

This is consistent with the decision in System Concepts, Inc. v. Dixon, 669 P.2d 421 (Utah 1983), which involved the corollary concept of a non-compete agreement with no restriction as to area but a short restriction as to time. The court held that "[t]he reasonableness of the restraints in a restrictive covenant is determined on a case-by-case basis, taking into account the particular facts and circumstances surrounding the case and the subject covenant." 669 P.2d at 427. In that case, the entire market was approximately 2,500 potential customers worldwide. In light of the narrow market, the court held that an unlimited territorial restriction was not unreasonable: "Furthermore, the

breadth of the covenant is sufficiently limited by the specific activity restrictions, which, under the peculiar circumstances of this case, have greater utility and propriety than a spacial restriction." Id.

In the instant case, the challenged order prohibits sales to a single division of a single company.⁴ A more narrow spacial restriction could hardly be imagined. Ashgrove-Durkee was an existing customer of Nephi Sandstone. Given the unique circumstances of this case, it was not unreasonable for the court to prohibit J. W. Dansie from interfering with that single customer for an indefinite period of time. The judgment of the trial court should be affirmed.

⁴The August 13, 1997, Order and Judgment only expressly applied to contacts or contracts with Ashgrove-Durkee. (R. 288.) The June 18, 1996, Order, in contrast, prohibited contacts or contracts with "Ashgrove Cement Company-Leamington; Ashgrove Cement Company-Durkee, Oregon; Ashgrove Cement Company-Inkom, Idaho; Soda Springs Phosphate; Morrison Fertilizer; Agri-Nu; and North Pacific Trading, which are all customers of Nephi Sandstone Corporation."

J.W. Dansie argues on page 2 of his brief that the trial court enjoined him from "directly or indirectly competing with the defendants specifically until the Court finds that the product shipped by defendants fails to meet specifications of certain of its buyers." On page 4 J.W. Dansie argues that "The Trial Court ruled that plaintiffs cannot ever compete with Nephi Sandstone's customers until the Court finds that defendants' gypsum fails specification."

Neither of these statements is correct--the prohibition does not apply to all customers of Nephi Sandstone. Defendants agree, however, that although the August 13, 1997, Order and Judgment expressly only applies to sales to Ashgrove-Durkee, the spirit of the order was that it also applies to each of the customers listed in the June 18, 1996, Order. Even if broadened to include all the listed customers, the restriction is still sufficiently narrow.

POINT III

APPELLEES ARE ENTITLED TO AN AWARD OF ATTORNEY FEES.

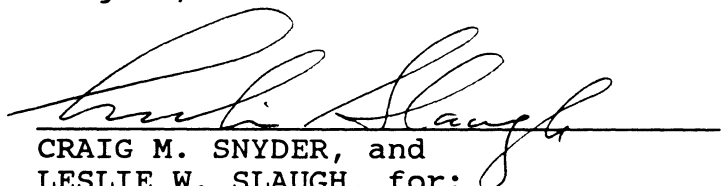
The trial court properly awarded defendants part of their attorney fees incurred in defending this case, and J. W. Dansie has not challenged the award on appeal. This Court should direct that appellees be awarded their attorney fees incurred in defending the appeal, the amount to be determined by the trial court on remand. Management Services Corp. v. Development Associates, 617 P.2d 406, 409 (Utah 1980).

CONCLUSION

It was reasonable for the trial court to require J. W. Dansie to seek prior court approval of any claim that defendants had failed to meet Ashgrove-Durkee specifications for gypsum. Indeed, given J. W. Dansie's prior history of contempt, any lesser requirement may have been unreasonable.

Even if the restriction on competition is viewed as indefinite, it is enforceable because the scope of restriction is limited to only one potential customer. The judgment of the trial court should be affirmed in all respects, and appellees should be awarded their attorney fees incurred on appeal.

DATED this 4th day of August, 1998.


CRAIG M. SNYDER, and
LESLIE W. SLAUGH, for:
HOWARD, LEWIS & PETERSEN
Attorneys for Appellees

MAILING CERTIFICATE

I hereby certify that two true and correct copies of the foregoing brief were mailed to the following, postage prepaid, this 4th day of August, 1998.

Allen K. Young, Esq.
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Springville, UT 84663

A handwritten signature in cursive script, appearing to read "Paul H. Hough", is written over a horizontal line.

J:\LWS\DANSIE.BRF