

1998

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

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

J.W. DANSIE and JEAN DANSIE,

Plaintiffs/Appellants,

vs.

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

Defendants/Appellees.

APPEAL BRIEF

980068-CA

Appellate Court No. 9504000002CN

Priority (15)

BRIEF OF APPELLANTS

Appeal from the final Order of the Fourt District Court, Utah County, State
of Utah, the Honorable Anthony W. Schofield presiding.

ORAL ARGUMENT REQUESTED

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UTAH COURT OF APPEALS
BRIEF
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MAY 13 1998

COURT OF APPEALS

J.W. DANSIE and JEAN DANSIE,)	
)	
Plaintiffs/Appellants,)	APPEAL BRIEF
)	
vs.)	
)	
CRAIG DANSIE, BRUCE H. EVANS,)	
NEPHI SANDSTONE CORPORATION,)	
and DANSIE & DANSIE, INC.,)	Appellate Court No. 9504000002CN
)	
Defendants/Appellees.)	Priority (15)
)	

**Appeal from the final Order of the Fourt District Court, Utah County, State
of Utah, the Honorable Anthony W. Schofield presiding.**

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- D. Order and Judgment
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IN THE UTAH COURT OF APPEALS

J.W. DANSIE and JEAN DANSIE,)	
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Plaintiffs/Appellants,)	APPEAL BRIEF
)	
vs.)	
)	
CRAIG DANSIE, BRUCE H. EVANS,)	
NEPHI SANDSTONE CORPORATION,)	Appellate Court No. 9504000002CN
and DANSIE & DANSIE, INC.,)	
)	
Defendants/Appellees.)	Priority No. 15
)	

BRIEF OF THE APPELLANT

STATEMENT OF JURISDICTION

In this matter, jurisdiction is conferred on the Utah Court of Appeals by § 78-2-2 (3) (j) of the Utah Code. Utah Code Annotated § 78-2-2 (3) (j) (1953 as amended).

STANDARDS OF REVIEW

The legal conclusions of the trial court are not accorded deference, but are reviewed instead for correctness. Baldwin v. Burton, 850 P.2d 207 (Utah 1993).

STATEMENT OF THE CASE

This Appeal is made by Jack Dansie and Bob Steele, from the Trial Court's Ruling of June 11, 1997, and its Order and Judgment dated July 17, 1997.

Messrs. Dansie and Steele appeal the Trial Court's Order enjoining them from selling or participating directly or indirectly in the sale of any materials to Ashgrove Durkee Cement plant, unless or until Judge Schofield makes a finding that Nephi Sandstone has breached a specification, or unless or until the passage of time provided in the Order.

Course Of The Proceedings And Disposition Below:

The claims in this case arise from a Stipulation and Order which were intended to resolve a family dispute which had arisen between the plaintiff, Jack Dansie, and his son, Craig Dansie and son-in-law, Bruce Evans. The defendants claimed that the plaintiff, Jack Dansie, and Bob Steele had violated the provisions of the Court's Order of June 18, 1996 by selling nineteen carloads of gypsum to a cement plant in Idaho by the name of Ashgrove Durkee.

In its Ruling, the Court made findings that in fact the plaintiff and Bob Steele had violated the Court's Order. The Court ruled that the defendants had not materially breached specifications which would have allowed the plaintiff to directly compete with defendants. Furthermore, the Court enjoined the plaintiff and Bob Steele 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.

The plaintiff objected to the Court's Finding and moved for a new Trial. The Plaintiff's motion was denied, and therefore, plaintiff thereafter appealed.

STATEMENT OF FACTS

A dispute arose between Jack Dansie and his son, Craig Dansie, and son-in-law, Bruce Evans over a business called Nephi Sandstone, which was founded by Jack Dansie.

A Stipulation, which was intended to settle the dispute, was signed in late January, 1996.

The relevant language of the Stipulation states, at paragraph 3, "J.W. Dansie and Robert Steele, together with all other owners of the Juab Gypsum, L.L.C., will not 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 signing of this stipulation or for so long as the gypsum from Nephi Sandstone's operation of Salt Creek Mine continues to meet Ashgrove Cement's specifications.]**"

An Order was signed by the Court on June 18, 1996, which included additional language in paragraph 3, "**[for a period of eighteen months from the date of the signing of this stipulation or for so long as the gypsum from Nephi Sandstone's operation of Salt Creek Mine continues to meet Ashgrove Cement's specifications, whichever is later]**". (Emphasis added).

The plaintiffs argued that the "whichever is later" language was inappropriately added to the Stipulation, and that they never agreed to be bound by the non-competition agreement one day longer than eighteen months.

After the Order was signed, plaintiff Jack Dansie and Bob Steele sold nineteen carloads of gypsum to Ashgrove Durkee.

Plaintiff argued that defendants' shipments failed specification, and they were therefore entitled to sell to Ashgrove Durkee.

Michael Hrizuk of Ashgrove Durkee testified that the defendants' shipments failed to meet specification. Michael Hrizuk Deposition, pages 10-11, 25.

Defendants argued that their gypsum did not fail specification.

The Trial Court ruled that the defendants' gypsum did not materially fail specification and that the sale of gypsum by Dansie and Steele violated the Court's Order.

The Court awarded a judgment against Jack Dansie and Bob Steele, and found the plaintiff Jack Dansie in contempt of the Court's Order.

In addition, The Trial Court ruled that plaintiffs cannot ever compete with Nephi Sandstone's customers until the Court finds that defendants' gypsum fails specification.

This Appeal goes only to the latter Ruling. Although Jack Dansie and Bob Steele believe that the District Court erred in finding that the Nephi Sandstone gypsum did not fail specification, the plaintiff and Bob Steele understand that the burden of persuasion in this Court on that issue is an arbitrary and capricious standard. They agree they cannot meet that burden.

SUMMARY OF THE ARGUMENT

Whether the Trial Court erred in the law regarding the non-competition agreement, which limits the plaintiff and Bob Steele from competing with the customers of the defendants for an indefinite period of time.

ARGUMENT

A. THE COURT ERRED IN THE LAW REGARDING THE NON-COMPETITION AGREEMENT

According to the Trial Court's Order of June 18, 1996, the Trial Court's Ruling of June 11, 1997 and the Trial Court's Order of August 13, 1997, the Plaintiffs/Appellants are bound to a non-compete agreement that prohibits competition for an unfixed, infinite time period. The Court held that it "was not persuaded that the Order violates existing law "when the Order requires the non-competition agreement to last until "the gypsum from the Salt Creek Mine fails to meet the specifications of any of the identified purchasers." June 11, 1997 Ruling, page 19. This Ruling clearly violates the law, and the Trial Court Ruling in this regard should be reversed.

There are several problems with the Court's approach. As long as any gypsum which passes specification is located at the Salt Creek Mine, the plaintiffs are prohibited from competing. Such a provision creates an indefinite limit which could well create a limitation on competition well into the next century.

The Order, paragraph 9, indicates that no competition may occur until the Court finds that "Nephi Sandstone has breached a specification." The plaintiffs may not contact Ashgrove Durkee and have no means of determining that a breach has occurred. Defendants obviously will not bring a motion on their own accord. Thus, again, the non-compete agreement will last indefinitely.

Where expressly stated, restrictive covenants are not favored in the law and are strictly construed in favor of the free and unrestricted use of property. Robbins v. Finaly, 645 P.2d 623, 627 (Utah 1982); Parrish v. Richards, 8 Utah 2d 419, 421, 336 P.2d 122, 123 (1959); Freeman v. Gee, 18 Utah 2d 339, 345, 423 P.2d 155, 159 (1967). With a non-competition agreement, the requirements are that: (1) the covenant be supported by consideration; (2) no bad faith be shown in the negotiation of the contract; (3) the covenant be necessary to protect the goodwill of the business; and (4) it be reasonable in its restrictions as to time and area. Allen v. Rose Park Pharmacy, 120 Utah 608, 237P.2d 823 (1951). The Order is not reasonable in its restrictions as to time and area, therefore, the Order is void. System Concepts, Inc. v. Dixon, 669 P.2d 421 (Utah 1983).

It is undisputed that the law states that the Court can only enforce covenants which reasonably restrict a party in its geographic scope and duration. This covenant -- as interpreted by the Court -- violates the reasonable duration requirement set forth in Utah law. Allen v. Rose Park Pharmacy, 237 P.2d 823 (Utah 1951). This is clearly set forth in Case law around the country.

In Three Phoenix Company v. Pace Industries, Inc., 659 P.2d 1271 (Ariz. App. 1981), the Court of Appeals of Arizona discussed the violation of a non-compete clause arising between two businesses. The covenant had no time restriction except as based upon the buying business' use of an invention. The Court remanded a decision that the covenant was unenforceable to determine if it could be reasonably modified to become enforceable. In so ruling, the Court held, "the effective time of the restriction cannot lawfully be perpetual or indefinite. Nor do we believe that a reasonable time limit can be measure by Pace's use of the invention, since the Sherman Act is violated by the prevention as well as the destruction of competition." Three Phoenix, 659 P.2d at 1276. Thus, in the instant case, the effective time has become indefinite and potentially perpetual. According to the Court's ruling, the restriction lasts until the defendants fail to meet certain specifications -- potentially forever. This violates Utah law and the covenant is unenforceable.

The Sherman Act provides that "every contract . . . in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal." 15 U.S.C.S. § 1 (1885). A more detailed look at the law will reveal that a non-competition agreement in the sale of a business is not a per se violation of the Act, but rather, the rule of reason must be employed to determine whether a contract violates this federal law. Again, the rule simply is that the Agreement must be reasonable when viewed from a trade standpoint. In the sale of a business, or a business, interest, the defendants are protecting only the goodwill of the company. The restraint of trade can be no longer than is necessary to protect this

goodwill, or it unreasonably restricts trade. United States v. Great Lakes Towing Co., 208 F. 733 (D.C. Ohio 1913).

In Gynecologic Oncology, P.C. v. Weiser, 443 S.E.2d 526 (Ga. App. 1994), the plaintiff sought to enforce a restrictive covenant that was for two years and within a half-mile of the plaintiff's office -- a completely reasonable restriction. However, the duration of the covenant was to be tolled during any period the defendant was in violation of the covenant. The Georgia Court of Appeals held "this tolling provision potentially extends the duration of the covenant without limit and renders it unreasonable and unenforceable." Weiser, 43 S.E.2d at 528. In Weiser, the Court further held that the tolling provision was not severable and rendered the entire agreement invalid and unenforceable. In the Dansie case, the Court need not go to this extreme. The original covenant was restricted to the reasonable period of eighteen months. This period has elapsed and the Court need only correct this ruling to make the covenants enforceable through the eighteen month period.

In National Graphics Company v. Dilley, 681 P.2d 547 (Colo. App. 1984), the Colorado Court of Appeals interpreted a non-compete covenant that had no territorial or time restriction but was limited to a defined set of customers. The Court held that the non-compete provision was void because the Agreement was not reasonable in its geographic and time restrictions. Therefore, the defendants in the Dansie matter cannot claim that the indefinite time period becomes reasonable due to the limited number of customers that it restricts. Again, the Court's ruling contains an error of law that should be corrected.

The law requires that a restrictive covenant be reasonable. In order to be reasonable, the time period cannot be uncertain or perpetual. When the Trial Court determined that the restrictive covenant was uncertain and potentially perpetual, the Agreement became void and unenforceable. The Court erred by subsequently ruling that it would enforce the covenant until the restriction potentially became unreasonable.

CONCLUSION

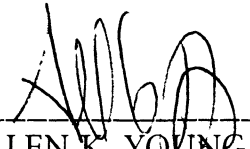
The Trial Court erred in the law by allowing a void Order to stand. Therefore, the plaintiffs/appellants request the Court to reverse the Trial Court's rulings and find that the eighteen month period was a reasonable length of time for the non-competition agreement to be in effect.

REQUEST FOR ORAL ARGUMENT

The plaintiffs respectfully request this Court to hear oral argument on this issue.

SIGNED and DATED this 13 day of August, 1998.

YOUNG, KESTER & PETRO

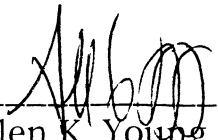


ALLEN K. YOUNG
TROY K. FITZGERALD
Attorneys for Plaintiffs/Appellants

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing, postage pre-paid on the 12 day of July, 1998 to:

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Howard, Lewis & Peterson
120 East 300 North
Provo, Utah 84601



Allen K. Young
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YOUNG, KESTER & PETRO
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Tab 1

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1996

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Attorneys for Defendants

IN THE FOURTH JUDICIAL DISTRICT COURT OF JUAB COUNTY

STATE OF UTAH

J. W. DANSIE and JEAN DANSIE, Plaintiff, vs. CRAIG DANSIE, BRUCE H. EVANS, NEPHI SANDSTONE CORPORATION, and DANSIE & DANSIE, INC., Defendants.	STIPULATION Case No. 9504000002CN Judge Anthony W. Schofield
--	---

Come now the plaintiffs, J. W. Dansie and Jean Dansie, and the defendants, Craig Dansie, Bruce H. Evans, Nephi Sandstone Corporation and Dansie & Dansie, Inc., by and through their respective counsel, and stipulate subject to the approval of the Court that all of the issues set forth in plaintiffs' Complaint and in the defendants' Counterclaim may be resolved on the basis of this stipulation:

1. Plaintiffs, J. W. Dansie and Jean Dansie, and the individual defendants, Craig Dansie and Bruce H. Evans, both stipulate that they may be mutually and individually restrained and enjoined from making any derogatory, demeaning or belittling comments about any of the

others parties to any individual, including spouses, relatives, neighbors, clergy, or anyone else. All parties are mutually restrained and enjoined from making any derogatory, demeaning, negative or belittling comments to anyone about the business activities, practices or relationships of any parties' business or personal interests, or about inter-family relationships.

2. This stipulation will fully and completely resolve and satisfy all rights, duties and obligations listed in the Nephi Sandstone Corporation Agreement dated January 1, 1992, and signed by J. W. Dansie, Jean Dansie, Craig Dansie, JoAnn Dansie, Bruce Evans and Kayleen Evans.

3. J. W. Dansie and Robert Steele, together with all other owners of the Juab Gypsum, L.L.C., will not 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 signing of this stipulation or for so long as the gypsum from Nephi Sandstone's operation of the Salt Creek Mine continues to meet Ashgrove Cement's specifications.

Robert Steele and Tony Peck will sign a separate written agreement with Nephi Sandstone Corporation allowing Nephi Sandstone Corporation to continue to operate the Salt Creek Mine for a minimum period of eighteen months from the date of the signing of this stipulation or for so long as the gypsum being mined in Salt Creek continues to meet Ashgrove

Cement's specifications. Said written agreement shall include a provision which will require Nephi Sandstone Corporation to pay Robert Steele and Tony Peck overdue gypsum royalties totalling \$20,599.48. Said overdue royalties will be paid off in total within eighteen months from the date of the signing of this stipulation.

4. This stipulation shall not be effective without the acknowledgement, ratification and signatures of all owners of Juab Gypsum, L.L.C. and Robert Steele and Tony Peck individually.

5. This stipulation acknowledges that Nephi Sandstone Corporation has no interest in the Levan Mine presently being developed by Robert Steele, J. W. Dansie and Juab Gypsum, L.L.C. All parties are free to negotiate with one another to the extent they desire to do so concerning the mining, hauling, or further development of the Levan Mine.

6. Within ninety days from the date of the signing of this stipulation the defendants shall pay to the plaintiff Jean Dansie the sum of Sixty Thousand (\$60,000.00) Dollars, which amount is the amount described in paragraph I in the Nephi Sandstone Corporation Agreement dated January 1, 1992, for the purchase of the remaining one-third block of Nephi Sandstone Corporation stock owned by J. W. and Jean Dansie. Said amount of \$60,000.00 shall be held in an interest bearing account by Jean Dansie jointly with her daughter Jackie Durrant and shall not be used either directly or indirectly in any way to compete with the business being conducted by Nephi Sandstone Corporation for a minimum period of twenty-four months (two years) from the date of the signing of this stipulation.

Contemporaneously with receiving the \$60,000.00 as set forth above, J. W. Dansie and Jean Dansie will sign, endorse and deliver the remaining one-third shares of stock of Nephi Sandstone Corporation to the defendants Craig Dansie and Bruce H. Evans. This will further eliminate the payment of \$60,000.00 for the balance of J. W. Dansie's stock which was due at the time of J. W. Dansie's death under the terms of the Nephi Sandstone Corporation Agreement dated January 1, 1992.

Contemporaneously with receiving the \$60,000.00 as set forth above, J. W. and Jean Dansie shall deliver and sign title over to Nephi Sandstone Corporation for a 1978 Chevrolet pickup truck and a 1979 Vulken Low-Boy transport trailer, which remain in the names of J. W. Dansie and J. W. and Jean Dansie, respectively.

7. The parties to this stipulation acknowledge that during the calendar year 1993, Nephi Sandstone made thirteen (13) \$6,000.00 payments to J. H. Dansie Leasing in accordance with the Nephi Sandstone Corporation Agreement. The additional payment may be applied as the last payment under the leasing portion of the Nephi Sandstone Corporation Agreement which concludes in December, 1996. Accordingly, Nephi Sandstone will make its last \$6,000.00 payment in November, 1996, subject only to the provisions of paragraph 8 below.

At such time as the last payment is made as described herein, J. H. Dansie Leasing will deliver and sign over title to the six vehicles referred to under paragraph III, exception 1, on page 3 of the Nephi Sandstone Corporation Agreement, listed as follows:

T07	1976 International Dump	D216FGA10803
T57	1986 Vickers Pup	1V9BSSF27FS029032
T08	1983 International Dump	1HTD21377DGB12825
T58	1982 Williams Pup	1XP9DBXX5FN190783
T09	1985 Peterbilt Dump	1C90C15CXMM110208
T59	1991 Clement Pup	1W94E2528CS004052

8. Within thirty (30) days from the date of the signing of this stipulation Nephi Sandstone Corporation will pay the balance due to J. H. Dansie Leasing under paragraph III, page 3, of the Nephi Sandstone Corporation Agreement, in one lump sum. The lump sum payment shall be made into an interest-bearing escrow account. J. W. Dansie and Jean Dansie shall not be permitted to withdraw more than \$6,000.00 in any one month from the interest-bearing escrow account. Upon paying the remaining balance owing to J. H. Dansie Leasing, Nephi Sandstone Corporation shall receive all titles and registrations properly endorsed to any vehicles and trailers referred to in this stipulation or in the Nephi Sandstone Corporation Agreement.

9. Nephi Sandstone Corporation shall return the following items of personal property to J. W. Dansie:

- a. One Camp Chief stove with no propane bottles;
- b. One refrigerator;
- c. Large table;
- d. Miscellaneous boat parts which remain on the shelves at Nephi

Sandstone;

- e. One hand trowel and one float with handle;
- f. Flatbed oil field for truck;
- g. Land plane tool;
- h. Craftsman chain saw presently in the possession of Bruce Evans.

No other tools or personal property claimed by plaintiff J. W. Dansie will be returned to him, and all parties understand and agree that no other tools or personal belongings other than those specifically identified herein will be returned to J. W. Dansie.

10. This stipulation shall resolve all claims running between any of the parties as of this date. Plaintiffs' Complaint on file herein, as well as defendants' Counterclaim, shall be dismissed with prejudice and upon the merits on the basis that all claims running between the parties have been fully compromised and settled. Each of the parties shall bear their own attorney fees and court costs incurred herein. All obligations and claims between the parties shall be fully compromised and satisfied, and all claims and obligations under the Nephi Sandstone Corporation Agreement shall be fulfilled and satisfied upon completion of the provisions that are set forth in this stipulation.

DATED this _____ day of January, 1996.

J. W. DANSIE
Plaintiff

JEAN DANSIE
Plaintiff

SUBSCRIBED and sworn to before me this _____ day of January, 1996.

NOTARY PUBLIC

ALLEN K. YOUNG, ESQ.
Attorney for Plaintiffs

DATED this _____ day of January, 1996.

CRAIG DANSIE
Defendant

BRUCE H. EVANS
Defendant

NEPHI SANDSTONE CORPORATION

BY: Craig Dansie, President

DANSIE & DANSIE, INC.

BY: Craig Dansie, President

SUBSCRIBED and sworn to before me this _____ day of January, 1996.

NOTARY PUBLIC

CRAIG M. SNYDER, ESQ.
Attorney for Defendants

ACKNOWLEDGEMENT

We, the undersigned, acknowledge that we have read and reviewed this stipulation entered into between the parties to this litigation. We understand the terms of this stipulation as they relate to our property rights and holdings and our royalty interests, and we agree to be bound by the terms of this stipulation.

ROBERT STEELE

TONY PECK

JUAB GYPSUM, L.L.C.

BY: Robert Steele, President

CHRISTY STEELE

J. W. DANSIE

JEAN DANSIE

Tab 2

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Our File No. 23,211

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IN THE FOURTH JUDICIAL DISTRICT COURT OF JUAB COUNTY

STATE OF UTAH

J. W. DANSIE and JEAN DANSIE, Plaintiff, vs. CRAIG DANSIE, BRUCE H. EVANS, NEPHI SANDSTONE CORPORATION, and DANSIE & DANSIE, INC., Defendants.	ORDER Case No. 9504000002CN Judge Anthony W. Schofield
--	---

Based upon the stipulation entered into between the parties, and good cause therefor being shown,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. Plaintiffs, J. W. Dansie and Jean Dansie, and the individual defendants, Craig Dansie and Bruce H. Evans, are hereby mutually and individually restrained and enjoined from making any derogatory, demeaning or belittling comments about any of the others parties to any individual, including spouses, relatives, neighbors, clergy, or anyone else. All parties are mutually restrained and enjoined from making any derogatory, demeaning, negative or belittling

comments to anyone about the business activities, practices or relationships of any parties' business or personal interests, or about inter-family relationships.

2. All rights, duties and obligations listed in the Nephi Sandstone Corporation Agreement dated January 1, 1992, and signed by J. W. Dansie, Jean Dansie, Craig Dansie, JoAnn Dansie, Bruce Evans and Kayleen Evans, are resolved and fully satisfied.

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 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.

Robert Steele and Tony Peck shall sign a separate written agreement with Nephi Sandstone Corporation allowing Nephi Sandstone Corporation to continue to operate the Salt Creek Mine for a minimum period of eighteen months from the date of the signing of this stipulation (February 12, 1996) or for so long as the gypsum being mined in Salt Creek continues to meet Ashgrove Cement's specifications, whichever is later. Said written agreement shall include a provision which will require Nephi Sandstone Corporation to pay Robert Steele and Tony Peck overdue gypsum royalties totalling \$20,599.48. Said overdue royalties will be

paid off in total within eighteen months from the date of the signing of the stipulation (February 12, 1996).

4. The parties' stipulation has been acknowledged, ratified and contains signatures of all owners of Juab Gypsum, L.L.C. and Robert Steele and Tony Peck individually.

5. The Court finds that Nephi Sandstone Corporation has no interest in the Levan Mine presently being developed by Robert Steele, J. W. Dansie and Juab Gypsum, L.L.C. All parties are free to negotiate with one another to the extent they desire to do so concerning the mining, hauling, or further development of the Levan Mine.

6. Within ninety days from the date of the signing of the stipulation herein, the defendants are ordered to pay to the plaintiff Jean Dansie the sum of Sixty Thousand (\$60,000.00) Dollars, which amount is the amount described in paragraph I in the Nephi Sandstone Corporation Agreement dated January 1, 1992, for the purchase of the remaining one-third block of Nephi Sandstone Corporation stock owned by J. W. and Jean Dansie. Said amount of \$60,000.00 is ordered to be held in an interest bearing account by Jean Dansie jointly with her daughter Jackie Durrant and shall not be used either directly or indirectly in any way to compete with the business being conducted by Nephi Sandstone Corporation for a minimum period of twenty-four months (two years) from the date of the signing of the stipulation herein. The plaintiffs hereby acknowledge payment of said amount.

Contemporaneously with receiving the \$60,000.00 as set forth above, J. W. Dansie and Jean Dansie are ordered to sign, endorse and deliver the remaining one-third shares of stock of

Nephi Sandstone Corporation to the defendants Craig Dansie and Bruce H. Evans. Defendants hereby acknowledge receipt of the endorsed stock certificates. This will further eliminate the payment of \$60,000.00 for the balance of J. W. Dansie's stock which was due at the time of J. W. Dansie's death under the terms of the Nephi Sandstone Corporation Agreement dated January 1, 1992.

Contemporaneously with receiving the \$60,000.00 as set forth above, J. W. and Jean Dansie is ordered to deliver and sign title over to Nephi Sandstone Corporation for a 1978 Chevrolet pickup truck and a 1979 Vulken Low-Boy transport trailer, which remain in the names of J. W. Dansie and J. W. and Jean Dansie, respectively. Defendants acknowledge receipt of said titles.

7. The Court finds that during the calendar year 1993, Nephi Sandstone made thirteen (13) \$6,000.00 payments to J. H. Dansie Leasing in accordance with the Nephi Sandstone Corporation Agreement. The additional payment is to be applied as the last payment under the leasing portion of the Nephi Sandstone Corporation Agreement which concludes in December, 1996. Accordingly, Nephi Sandstone's last \$6,000.00 payment is due in November, 1996, subject only to the provisions of paragraph 8 below.

At such time as the last payment is made as described herein, J. H. Dansie Leasing is ordered to deliver and sign over title to the six vehicles referred to under paragraph III, exception 1, on page 3 of the Nephi Sandstone Corporation Agreement, listed as follows:

T07	1976 International Dump	D216FGA10803
T57	1986 Vickers Pup	1V9BSSF27FS029032
T08	1983 International Dump	1HTD21377DGB12825
T58	1982 Williams Pup	1XP9DBXX5FN190783
T09	1985 Peterbilt Dump	1C90C15CXMM110208
T59	1991 Clement Pup	1W94E2528CS004052

8. Within thirty (30) days from the date of the signing of the stipulation herein, Nephi Sandstone Corporation is ordered to pay the balance due to J. H. Dansie Leasing under paragraph III, page 3, of the Nephi Sandstone Corporation Agreement, in one lump sum. The lump sum payment is ordered to be made into an interest-bearing escrow account. J. W. Dansie and Jean Dansie are ordered not to withdraw more than \$6,000.00 in any one month from the interest-bearing escrow account. Upon paying the remaining balance owing to J. H. Dansie Leasing, Nephi Sandstone Corporation shall receive all titles and registrations properly endorsed to any vehicles and trailers referred to in this stipulation or in the Nephi Sandstone Corporation Agreement. Receipt of the entire balance due is hereby acknowledged by plaintiffs and receipt of said titles is acknowledged by defendants.

9. Nephi Sandstone Corporation is ordered to return the following items of personal property to J. W. Dansie:

- a. One Camp Chief stove with no propane bottles;
- b. One refrigerator;
- c. Large table;

d. Miscellaneous boat parts which remain on the shelves at Nephi Sandstone;

e. One hand trowel and one float with handle;

f. Flatbed oil field for truck;

g. Land plane tool;

h. Craftsman chain saw presently in the possession of Bruce Evans.

No other tools or personal property claimed by plaintiff J. W. Dansie will be returned to him, and no other tools or personal belongings other than those specifically identified herein are ordered to be returned to J. W. Dansie.

10. All claims running between any of the parties as of this date are hereby fully resolved. Plaintiffs' Complaint on file herein, as well as defendants' Counterclaim, are hereby dismissed with prejudice and upon the merits on the basis that all claims running between the parties have been fully compromised and settled. Each of the parties is ordered to bear their own attorney fees and court costs incurred herein. All obligations and claims between the parties are fully compromised and satisfied, and all claims and obligations under the Nephi Sandstone Corporation Agreement shall be fulfilled and satisfied upon completion of the

provisions that are set forth in this Order.

DATED this ____ day of June, 1996.

BY THE COURT

ANTHONY W. SCHOFIELD
DISTRICT COURT JUDGE

APPROVED AS TO FORM:

ALLEN K. YOUNG, ESQ.
Attorney for Plaintiffs

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Tab 3

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YOUNG & KESTER

**IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH**

J.W. DANSIE, et al., Plaintiffs, vs. CRAIG DANSIE, et al., Defendants.	CASE NUMBER: 950400002 DATED: JUNE 11, 1997 RULING ANTHONY W. SCHOFIELD, JUDGE
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Evidentiary hearing on defendants' request for a finding that J.W. Dansie and Robert Steele are in contempt of court was held on February 11 and March 25, 1997. In addition, arguments were received on March 18, 1997 on plaintiff's motion to amend the order entered in this matter on June 18, 1996. Allen K. Young and Troy K. Fitzgerald represent plaintiffs and Robert Steele and Craig Snyder represents defendants. Having received the evidence and the arguments of counsel, I now issue this ruling.

FINDINGS OF FACT

I find that the following facts have been proven by clear and convincing evidence:

1. J.W. Dansie (hereafter "J.W.") and Jean Dansie are the parents of defendant Craig Dansie (hereafter "Craig") and the parents-in-law of defendant Bruce

H. Evans (hereafter "Bruce").

2. For many years prior to 1995 J W and Jean Dansie owned the stock of Nephi Sandstone Corporation, a company which mined gypsum from the Salt Creek Mine near Nephi, Utah.

3. For a number of years before 1995 Craig and Bruce assisted their parents in the operation of Nephi Sandstone Corporation.

4 In February 1995, disagreements between J W and Craig and Bruce reached a boiling point and J.W and Jean began this litigation against Craig and Bruce.

5. After extended negotiations between the parties, they entered into a written stipulation in January and February 1996 by which they resolved the disagreements between them That stipulation resulted in an order entered by the Court on June 18, 1996

6. As a result of the stipulation and order the parties agreed that Craig and Bruce would own Nephi Sandstone and that J W and Jean would not have an ownership interest in Nephi Sandstone.

7. Because the Salt Creek Mine is located on a leasehold owned by Robert Steele (hereafter "Steele") and Tony Peck, Steele and Tony Peck agreed to the terms of the stipulation and agreed to be bound by the terms of the order

8 J W and Steele and their wives also are the owners of Juab Gypsum, L.L C , a company which they run which mines gypsum from a mine in Levan, Utah.

9 The central term of the stipulation and order provided that Craig and

Bruce would own Nephi Sandstone and that J.W. and Steele, as the owner of the gypsum mine near Levan, Utah, would not attempt to contact or enter into any contracts with specifically identified, existing, customers of Nephi Sandstone.

10. Paragraph 3 of the Court's order provides:

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 . . . which are all customers of Nephi Sandstone Corporation, for a period of eighteen months from the date of the parties 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.

11. In the fall of 1996, Craig and Bruce alleged that J.W. and Steele had commenced selling gypsum to some of the identified customers. Craig, Bruce and Nephi Sandstone brought this action seeking to have J.W. and Steele restrained from making any further sales, and seeking a finding of contempt of court.

12. On December 10, 1996 the Court heard the order to show cause concerning contempt and set the matter for further hearing on January 10, 1997. An order memorializing this ruling was signed on January 7, 1997.

13. The January 10, 1997 hearing date was continued to February 11, 1997 so that parties could complete certain discovery.

14. The evidentiary hearing went forward on February 11, 1997 and was concluded on March 25, 1997.

15. On at least three occasions after entering the stipulation upon which the order was based, J.W. contacted Michael Hrizuk ("Hrizuk"), the plant manager of the

Ashgrove Cement Company plant in Durkee, Oregon (hereafter "Ashgrove Durkee").

16. J.W. initiated all but one of these contacts.

17. The first of these contacts was in the spring of 1996 when J.W. was in Boise, Idaho, looking for parts for a crusher. While there he called Hrizuk in Durkee, which is only a short distance away, and visited with him on the telephone. During that conversation J.W. told Hrizuk that he was getting into the gypsum business.

18. A second conversation took place during a supper together in Salt Lake City, arranged after Hrizuk telephoned J.W.

19. The third contact was a personal visit by J.W. to the Durkee plant.

20. During the third visit J.W. told Hrizuk that he was back in the gypsum business.

21. Though he knew he was under a non-competition agreement, J.W. told this to Hrizuk so that Hrizuk would know of an alternate supply source.

22. During this conversation, Hrizuk told J.W. that he was behind in building his stockpile of gypsum and that he wanted to get some additional gypsum.

23. J.W. told Hrizuk that he had gypsum and agreed to sell to him.

24. Thereafter Ashgrove Durkee faxed a purchase order to J.W. seeking purchase of gypsum.

25. After receipt of the purchase order J.W. and Steele sold Ashgrove Durkee 19 carloads of gypsum consisting of approximately 1,958 tons.

26. J.W. asserts he sold to Ashgrove Durkee because Nephi Sandstone was not meeting specification.

27. Other than alleged hearsay, J.W. has no personal knowledge that Nephi Sandstone was not meeting Ashgrove Durkee's specification.

28. In September Hrizuk told J.W. that he wanted to increase his stockpile of gypsum.

29. At no time prior to receipt of the purchase order and his beginning to ship gypsum did J.W. have personal knowledge of any claim that Nephi Sandstone failed in any way to meet Ashgrove Durkee's specification.

30. Further, no one at Ashgrove Durkee had told J.W. prior to his beginning to ship gypsum that Ashgrove Durkee claimed that Nephi Sandstone failed to meet Ashgrove Durkee's specification.

31. In short, when J.W. began to ship gypsum he had no knowledge of nor had heard any claim that Nephi Sandstone failed to meet Ashgrove Durkee's specification.

32. It was only in October, after the agreement was made between Hrizuk and J.W. for J.W. to ship gypsum to Ashgrove Durkee that Hrizuk told J.W. about finding some large rocks in the bottom of the rail cars.

33. Hrizuk now testifies that on several occasions, less than ten but more than two, that Ashgrove Durkee incurred difficulties in off-loading Nephi Sandstone's gypsum from the railcars as several large rocks were found in the bottom of the cars which plugged up the hopper over which the rail cars were dumped.

34. The kind of rock found in the bottom of the cars was not gypsum and did not appear to be similar to the kind of rock adjacent to the mine.

35. Nephi Sandstone's purchase order with Ashgrove Durkee, required it to ship 5 cars of gypsum per week from mid-march to mid-November 1996.

36. Hrizuk asserts this delivery schedule is a specification.

37. During the period of time from mid-March to mid-November, a period of approximately 35 weeks, Nephi Sandstone shipped 192 cars of gypsum, or the equivalent of 5 cars per week for 38.4 weeks. Over the year term of the purchase order Nephi Sandstone met the terms of the delivery schedule. In the short term, however, there was a period of 21 days in August 1996 and a period of 13 days in October and November 1996 when no gypsum was shipped.

38. Ashgrove Durkee never expressed any objection to the schedule on which gypsum was shipped and never made any claim to Nephi Sandstone that Nephi Sandstone failed to meet the agreed delivery schedule.

39. Ashgrove Durkee did advise Nephi Sandstone on one or two occasions that several large rocks plugged up the hopper but never rejected any cars of gypsum or refused payment for any cars of gypsum.

40. After the fact, in his deposition Hrizuk asserted that the oversize rocks constituted a technical violation of the specification, but a violation for which Ashgrove Durkee never intended nor took any action. While Hrizuk did not say so directly, implicit in his comment is the notion that Ashgrove Durkee did not consider these few oversize rocks to be a material breach of the specification.

41. In September 1996 J.W. was told by Hrizuk that Ashgrove Durkee's stockpiles were running low. The primary cause for this was that the other two

suppliers who supplied Ashgrove Durkee experienced circumstances which significantly decreased their deliveries. As a result, Ashgrove Durkee's stockpile dwindled.

42. J.W. asserts that he began to sell to Ashgrove Durkee because Nephi Sandstone failed to meet specification. This is not true. He did not even know of any alleged failure to meet specification until after he began to ship gypsum.

43. Steele is J.W.'s business partner in the Levan mining operation and Steele participated in the sale and delivery of gypsum to Ashgrove Durkee.

44. Though not a party to this action, Steele voluntarily agreed to be bound by the terms of the Court order which prohibited competition between him and Nephi Sandstone.

45. While Steele was a participant in the sale of gypsum to Ashgrove Durkee, he had no involvement in the discussions or negotiations which resulted in the sale of gypsum by Juab Gypsum to Ashgrove Durkee.

46. Steele had no personal basis to know whether, as J.W. now alleges, Nephi Sandstone had failed to meet specification.

47. While he may have had a duty to find out, Steele had no direct knowledge of whether circumstances existed which would permit him to sell to a customer of Nephi Sandstone.

48. The court order prohibits any of the parties from making "any derogatory, demeaning or belittling comments about any of the others [sic] parties to any individual, including spouses, relatives, neighbors, clergy, or anyone else."

49. J.W. has spoken with a number of individuals concerning his departure from Nephi Sandstone and the existing litigation with Craig and Bruce.

50. J.W. told several people in a cafe in Nephi that he is not allowed to see his grandchildren anymore. He told others, including Bob Weeks, that he was not comfortable with the stipulation and did not like its terms. He told Hrizuk, that he was screwed out of Nephi Sandstone. He told Crutchfield, the manager of Ashgrove Cement in Leamington, Utah, that if Crutchfield was doing business with Nephi Sandstone, he would need an ironclad contract and that he should have any contract terms in concrete. J.W. did not tell Crutchfield why he felt this way, nevertheless he knew Crutchfield knew was aware of the history of the relations between J.W. and Craig and Bruce.

51. In June 1996, Jason Dansie, Craig's son and J.W.'s grandson, went with an employee of Nephi Sandstone 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. This outburst took place in the presence of both Jason and the Nephi Sandstone employee.

52. J.W. knew of his obligation not to speak in a derogatory manner about Craig or Bruce to anyone; he had the ability or capacity to adhere to this order; and he intentionally made these statements to Jason.

53. Nephi Sandstone had the capacity to ship all of the gypsum which Ashgrove Durkee purchased from Juab Gypsum.

54. Nephi Sandstone sold all of its gypsum to Ashgrove Durkee for \$10.75 per ton.

55. Nephi Sandstone would have received \$21,049 had it sold the 1958 tons which Juab Gypsum sold, of which one-half would have been profit.

56. Nephi Sandstone lost \$10,525 because of Juab Gypsum's sales of gypsum to Ashgrove Durkee.

57. Nephi Sandstone's attorney spent 49 95 hours in preparing for and litigating the temporary restraining order issues, the order to show cause issues and the contempt issues. All of that time appears necessarily and reasonably incurred.

58. Craig M. Snyder, counsel representing Nephi Sandstone, is a seasoned and skilled attorney. He bills his time at \$135 per hour, an amount which is reasonable for an attorney of his experience and ability.

59. Nephi Sandstone incurred total fees of \$5,645.30, all of which is reasonable under the circumstances.

60. Nephi Sandstone would not have incurred these fees if J.W. had not violated the terms of the existing court order

ANALYSIS AND RULING

Based upon the foregoing factual findings I now make this ruling.

This is a sad case: sons and parents fighting over a business that dad and mom built and in which they obviously intended the sons participation and help. Though it is sad, if either party violated the Court order of June 18, 1996, this Court is obligated to provide. The reason that the parties resolved their dispute through entry of a court

order was so they would have a mechanism for enforcement of the settlement. Here that mechanism is bound up in the contempt powers of this Court.

Required proof in contempt case.

In an action seeking a contempt citation the party asserting the contempt claim has the burden of proving by clear and convincing evidence: (1) that the person against whom the contempt citation is brought knew what the order of the court required of him, (2) that the person had the ability to comply with that order, and (3) that the person intentionally failed or refused to comply with the order. Von Hake v. Thomas, 759 P.2d 1162 (Utah 1988). Because the sons bring this contempt action against J.W. and Steele, the sons have the burden of proving by clear and convincing evidence each of these three elements. I find that as to J.W. they meet this burden. I am not convinced that sons meet this burden as to Steele.

J.W. and Steele each knew what the order required of them.

The evidence is clear that the order required that J.W. and Steele not "attempt to contact or enter into any contracts with" certain of the customers of Nephi Sandstone. That requirement is not uncertain. Neither J.W. nor Steele could attempt to contact or seek contracts with Ashgrove Durkee.

J.W. and Steele each had the ability to comply with the order.

The evidence also is clear that there exists no disability or circumstance which would render either J.W. or Steele incapable of complying with the Court order. It was within each of their capacities simply to avoid contact with any of the

individuals involved in the operation of Ashgrove Durkee.¹

Did J.W. and Steele each intentionally violate the order?

The order prevents any attempts by J.W. or Steele to attempt to contact Ashgrove Durkee. Notwithstanding that order, shortly after the parties entered into their settlement stipulation, while in Boise, Idaho, J.W. called Hrizuk on the telephone. At that time J.W. knew that Hrizuk was the plant manager of the Ashgrove Durkee, and J.W. knew that Ashgrove Durkee was on the list of customers which he had bargained not to attempt to contact or contract with.

J.W.'s primary defense to the claim that this conversation violated the court order is that Hrizuk was his long-time friend and certainly the order did not prevent him from continuing his friendship with Hrizuk. That defense fails, however, because of the nature of what J.W. told Hrizuk.

During this first conversation J.W. told Hrizuk that he was seeking equipment so that he could go into the gypsum business and that he was a part owner in another gypsum mine. True friends frequently discuss their employment circumstances, but J.W. was remorseless in his belief that he could talk with Hrizuk about anything. Without question he intended to plant in Hrizuk's mind the possibility of selling gypsum to him.

While the second conversation was initiated, at least in part, by Hrizuk, the third was initiated by J.W. when he went to the Ashgrove Durkee plant. During that

1. While J.W. asserts that he contacted Hrizuk as a friend, a claim which may have some merit, when he went to the plant in Durkee and had specific discussions about his own gypsum business he was well outside of any claim that he was pursuing the relationship as friends. He had the capacity to avoid any contact other than his simple friendship.

conversation with Hrizuk at the plant in Oregon, J.W. told Hrizuk that he was back in the gypsum business and that he had sold truck loads of gypsum but no rail car loads. Hrizuk told J.W. that he was behind on building his stockpile for the winter months and that he wanted to get some additional gypsum. J.W. told Hrizuk that he had gypsum and agreed to sell him gypsum.

As a result of this conversation, Hrizuk faxed a purchase order to J.W. and Juab Gypsum began selling gypsum to Ashgrove, ultimately selling 19 carloads consisting of approximately 1,958 tons of gypsum.

J.W. asserts that the principal reason Juab Gypsum began supplying Ashgrove Durkee is that Nephi Sandstone was failing in meeting specifications and J.W. did not want to lose the Ashgrove Durkee business to some third party. For two reasons J.W.'s claim that Nephi Sandstone breached the specifications rings hollow, however.

First, J.W. ultimately admitted at trial that he never knew of any alleged breach by Nephi Sandstone in meeting the Ashgrove Durkee specifications until after he had agreed on behalf of Juab Gypsum to ship gypsum to Ashgrove Durkee. He cannot now claim that he shipped because of alleged Nephi Sandstone breaches when he did not even know of the claim that Nephi Sandstone was not meeting specification until after he reached agreement.

Secondly, I find that Nephi Sandstone did not fail to meet specification.

Hrizuk identified two specifications for the gypsum which Ashgrove Durkee purchased from Nephi Sandstone: delivery schedule and sizing. Some irregularities existed as to each. The purchase order requires that Nephi Sandstone deliver five

carloads of gypsum every week from mid March through mid November. During that period of time, consisting of approximately 35 weeks, Nephi Sandstone shipped 192 cars or the equivalent of five cars per week for 38.4 weeks. Clearly over the term of the purchase order Nephi Sandstone met its obligation to ship five cars per week.

It is true that for a three week period of time in August 1996 and for two weeks in late October and early November 1996 no shipments were made by Nephi Sandstone. Over the course of the year Nephi Sandstone shipped 18,115 tons of gypsum, which was 2,688 tons more than it shipped the previous year.

Though admittedly Nephi Sandstone did not ship every single week, Ashgrove Durkee never expressed any concern to Nephi Sandstone about any delays in shipments and over the course of the term of the purchase order Nephi Sandstone met all of its shipping obligations.

J.W asserts that he was told by Hrizuk that the Ashgrove Durkee plant was running low on gypsum stockpiles. This is true. One of the other two suppliers was having significant shipping difficulties resulting in dramatic reductions in the amount of gypsum which it shipped and for a time Ashgrove Durkee declined shipments from the third supplier as Ashgrove Durkee was remodeling the receiving area for the gypsum purchased from the third supplier. Thus Ashgrove's supplies did dwindle. This was not the fault of Nephi Sandstone, however J W should not be allowed to profit from a circumstance where Nephi Sandstone was fulfilling the terms of its delivery obligations.

The second issue raised by Hrizuk is that on several occasions, less than ten

but more than one or two, when Ashgrove dumped the railcars over the hopper at its plant, a few oversize rocks, clearly not from the Nephi Sandstone mine, fell on the hopper, plugging it and delaying off-loading of the gypsum. These oversize rocks violate the size specifications of the purchase order.

Hrizuk confirmed that Ashgrove Durkee made no written objections to any gypsum shipped by Nephi Sandstone, it did not reject any shipments of gypsum and it did not seek or claim a reduction in payment for any gypsum. At most Hrizuk conceded that the few oversize rocks constituted a technical violation of the specifications. In point of fact, however, this minor issue was never treated by Ashgrove Durkee as a breach of specifications.

Nephi Sandstone did not breach and was not in material breach of any of its obligations under the purchase order at the time that J.W. and Steele began shipping gypsum to Ashgrove Durkee in Durkee, Oregon. The consequence of this is that J.W. violated the Court's order which prohibited him from contracting to sell gypsum to any of Nephi Sandstone's existing customers.²

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. He saw a sliver of an excuse to reenter the gypsum business in competition with them and he loaded up his rail cars

2. While J.W. may argue that he was only meeting the need which Hrizuk expressed, the purpose of such a non-competition provision is to require that he direct Hrizuk to Nephi Sandstone to meet any additional need. There is no evidence that Nephi Sandstone could not have responded had it been requested to do so.

and crashed them through that sliver into the broad daylight. He evidenced no recognition of any wrongdoing and he demonstrated an attitude of disregard for the legal obligations imposed upon him by the agreement which he reached with his son and son-in-law. I find that he is in contempt of the Court's order.

As to Steele this is a much closer case. Steele did none of the negotiating with Hrizuk. As a result he had no basis, except through the filter or gloss put on the facts by J W, to know whether Nephi Sandstone had failed to meet specifications and thus, whether he could sell gypsum to Ashgrove Durkee. True he had a duty to find out the facts before he began doing business with Ashgrove Durkee, but because the facts upon which he acted came to him from J W, he lacked the personal knowledge and without the personal knowledge, he lacked the requisite intentional disregard of the court order which is a gravamen of a contempt action. I do not find him in contempt.

JW.'s contempt for making derogatory comments.

Craig and Bruce assert J W also has violated paragraph 1 of the order which restrains him from making "any derogatory, demeaning or belittling comments about any of the others [sic] parties to any individual, including spouses, relatives, neighbors, clergy, or anyone else."

Craig and Bruce assert that J W has made such derogatory remarks. The evidence bears that out. He told Steele about every aspect of the case. He told several people in the cafe in Nephi that he can't see his grandchildren any more and that his children do not bring the grandchildren around any more. He told several people, including Bob Weeks and others that he was not comfortable with the

stipulation and did not like its terms. He told Hrizuk that he was screwed out of Nephi Sandstone. He told Crutchfield, the manager of Ashgrove Cement in Leamington, Utah, that if he was doing business with Nephi Sandstone, he would need an ironclad contract and that he should have any contract terms in concrete. Though he did not say why he felt this way, he knew Crutchfield knew the history of the relations between J W and Craig and Bruce. Finally, and perhaps most disturbing, in June 1996 Jason Dansie, a son of Craig and grandson of J W, went with an employee of Nephi Sandstone 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. This outburst took place in the presence of both Jason and the Nephi Sandstone employee.

J W knew of his obligation to not speak derogatorily about Craig and Bruce, he clearly had capacity to avoid saying anything derogatory and he intentionally spoke to Jason in an profane and derogatory manner about Craig and Bruce. I find J W in contempt of court for this violation.

JW.'s contempt for wrongfully using \$60,000.

The order requires that Craig and Bruce pay J W \$60,000 but that J W may not use that money, either directly or indirectly, to compete with Craig and Bruce for a period of two years. Craig and Bruce failed to establish that J W breached this provision. I deny a finding of contempt of court on this claim.

Damages and extension of preliminary injunction.

Utah Code Ann. §73-32-11 allows the Court to fashion a damage remedy if the

party seeking a contempt citation has been damaged by the allegedly contemptuous action. In this case Nephi Sandstone has been damaged by the loss of profit for the gypsum which Juab Gypsum sold to Ashgrove Durkee in the sum of \$10,525 and it has been damaged for the attorney's fees which it incurred as a result of J.W.'s contumacious actions. It is entitled to judgment for each of these sums. Further, the evidence is clear that J.W. violated the court's order. Craig, Bruce and Nephi Sandstone are entitled to an injunction prohibiting J.W. from selling any materials to Ashgrove Durkee until this court makes a finding that Nephi Sandstone has breached a specification or until the passage of time provided in the order.

Sanctions.

I have found J.W. in contempt of court on two separate matters: his improper competition with Nephi Sandstone and his inappropriate, derogatory remarks to Jason Dansie. For each he must be sanctioned.

I fine J.W. \$1,000 for his contempt of the court's order that he not contact or agree with Ashgrove Durkee.

I fine J.W. \$1,000 for his contempt of the court's order that he not speak derogatorily about Craig or Bruce. Further, because I find his conduct in speaking to his grandson particularly outrageous and inflammatory, I also order J.W. to perform 80 hours of community service at a government or charitable institution of his choosing, to be complete not later than 120 days from the issuance of this ruling.

Motion to Amend Order.

This motion came about because there is a slight variation in language between

the stipulation entered into and signed by the parties and the order of the court based upon the stipulation. Counsel for Craig and Bruce prepared the order and counsel for J.W. approved the form of the order as prepared.

Paragraph 3 of the stipulation provides that:

3. J.W. Dansie and Robert Steele, together with all other owners of the Juab Gypsum, L.L.C., will not attempt to contact or enter into any contracts with Ashgrove Cement or any other customer of Nephi Sandstone Corporation for a period of eighteen months from the date of the signing of this stipulation or for so long as the gypsum from Nephi Sandstone's operation of the Salt Creek Mine continues to meet Ashgrove Cement's specifications.

Paragraph 3 of the order provides in pertinent part that:

3. ...for a period of eighteen months from the date of the parties 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.

Note the three words, "whichever is later" are added to the order and do not appear in the stipulation.

One may wonder what the parties really meant by the language in the stipulation. The use of the word "or" is instructive. It implies that so long as either the first alternative (a period of eighteen months) or the second alternative (the gypsum meets Ashgrove's specifications) exists, J.W. and Steele would be restrained from competing. The word "or" implies a meaning of whichever is later. Adding the phrase "whichever is later" in the order does not really change the meaning of the sentence to which it is added and is functionally equivalent to the language of the

stipulation.³ Because I accept that as the meaning of the stipulation, the order accurately reflects the agreement of the parties and does not need amendment.⁴

I deny the motion to amend the order.

3. J.W.'s counsel has made it clear that he feels that Craig's and Bruce's counsel did not accurately reflect the agreement of the parties when he added the phrase "whichever is later". I don't dispute that this is how he feels. Yet, in my view the logical import of the word "or" is as set forth above.

4. J.W. argues that I should amend the order because in its present form it is void as against public policy

Generally a non-compete agreement is void as against public policy unless it is reasonable in both scope and duration. J.W. argues that because there is no clear agreement as to the extent of the gypsum reserves in the Salt Creek Mine, the added language in the order can be construed to result in an agreement having a perpetual duration and thus is void as against public policy.

Craig and Bruce argue that the gypsum deposits at the Salt Creek Mine are finite and will last only two to three and one-half years from the date of the signing of the stipulation. Thus, they argue, the non-competition agreement has a fixed time limit and is not against public policy

There is a mechanism in the stipulation to which both parties have agreed: if the gypsum from the Salt Creek Mine fails to meet the specifications of any of the identified purchasers, the non-competition agreement terminates. This same provision also is built into the order. The problem with relying on this mechanism to set the duration of the non-competition agreement is that there is no evidence of and no one knows for certain how much longer the gypsum reserves in the Salt Creek Mine may last. If the reserves last for another five years, for example, such an extended non-competition agreement likely would result in an unreasonable restraint.

The issue before the court is whether I should require an amendment to the existing order. Keeping in mind that the party seeking this amendment approved of the form of the order as written, that the addition of the phrase "whichever is later" does not extend or increase the term agreed upon in the stipulation and that Craig and Bruce believe that the gypsum deposits, at best, will last for only three and one-half years from the date of the signing of the stipulation, I am not persuaded that the order violates existing law.

Pursuant to Rule 4-504, Utah Code of Judicial Administration, Craig's and
Bruce's counsel is directed to prepare an appropriate order.

Dated this 11th day of June, 1997.

BY THE COURT:

Anthony W. Schuchman
ANTHONY W. SCHUCHMAN



MAILING CERTIFICATE

I hereby certify that a true and correct copy of the foregoing was mailed to
the following, postage prepaid, this ____ day of June, 1997:

CRAIG M SNYDER ATTY
120 E 300 N ST
PO BOX 1248
PROVO UT 84603

TROY FITZGERALD ATTY
101 E 200 S
SPRINGVILLE UT 84663

CARMA B. SMITH
CLERK OF THE COURT

By Mary Anderson /pa/
Deputy Clerk

Tab 4

CRAIG M. SNYDER (3033), for:
HOWARD, LEWIS & PETERSEN
ATTORNEYS AND COUNSELORS AT LAW
120 East 300 North Street
P.O. Box 1248
Provo, Utah 84603
Telephone: (801) 373-6345
Facsimile: (801) 377-4991

Our File No. 23,211

Attorneys for Defendants

IN THE FOURTH JUDICIAL DISTRICT COURT OF JUAB COUNTY

STATE OF UTAH

J. W. DANSIE and JEAN DANSIE, Plaintiffs, vs. CRAIG DANSIE, BRUCE H. EVANS, NEPHI SANDSTONE CORPORATION, and DANSIE & DANSIE, INC., Defendants.	ORDER AND JUDGMENT Case No. 9504000002CN Judge Anthony W. Schofield
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This matter came on regularly before the Court for evidentiary hearing on the defendants' Order to Show Cause and request for a finding that J. W. Dansie and Robert Steele are in contempt of court for alleged violations of the Order entered by this Court on June 18, 1996. Evidentiary hearings were held on February 11, 1997, and continued to March 25, 1997. In the interim, oral arguments were heard and received by the Court on March 18, 1997, on plaintiffs' motion to amend the order entered by the Court on June 18, 1996. Allen K. Young and Troy K. Fitzgerald represented the plaintiffs and Robert Steele in the order to show cause proceedings, and Craig M. Snyder represented the defendants. The Court, having heard the

arguments of counsel, having received the testimony and evidence presented at the evidentiary hearing, having reviewed the pleadings, affidavits and memoranda on file herein, and having previously made and entered its Ruling date June 11, 1997, and its Findings of Fact and Conclusions of Law herein, does now make and enter the following:

ORDER AND JUDGMENT

1. Plaintiff J. W. Dansie is in contempt of court on two separate matters: (1) his improper competition with Nephi Sandstone, including specifically, his contact and contract with the existing customer of Nephi Sandstone, Ashgrove Cement-Durkee, Oregon; and (2) his inappropriate and derogatory remarks made to Jason Dansie and others in violation of paragraph 1 of the Court's June 18, 1996, order.

2. J.W. Dansie is sentenced to pay a fine of \$1,000.00 for his contempt of the Court's order that he not contact or contract with identified customers of Nephi Sandstone, specifically Ashgrove Durkee. Said fine shall be paid through the Clerk of the Court.

3. J.W. Dansie is fined \$1,000.00 for his contempt of the Court's order that he not speak derogatorily about Craig Dansie or Bruce Evans. Said fine shall be paid through the Clerk of the Court.

4. Because the Court finds that J. W. Dansie's conduct in speaking to his grandson, Jason Dansie, is particularly outrageous and inflammatory, the Court also orders J.W. Dansie to perform 80 hours of community service at a government or charitable institution of his choosing. Said 80 hours of community service shall be performed and completed not later

than October 9, 1997. Proof of completion of the hours of community service shall be furnished by J.W. Dansie to the Clerk of the Court no later than October 16, 1997.

5. The Court awards judgment in favor of Nephi Sandstone (Craig Dansie and Bruce Evans) against J.W. Dansie in the amount of \$10,525.00. Said judgment shall accrue interest at the legal rate of 7.45% from June 11, 1997, until paid in full.

6. Nephi Sandstone (Craig Dansie and Bruce Evans) are also awarded judgment against J.W. Dansie for \$5,645.30 as partial reimbursement for their attorney fees and court costs incurred herein. Said judgment shall accrue interest at the rate of 7.45% from June 11, 1997, until paid in full.

7. The Court declines to make a finding of contempt against Bob Steele.

8. The Court declines to make a finding of contempt against J.W. Dansie on his using the \$60,000.00 to directly or indirectly compete with Nephi Sandstone (Craig Dansie and Bruce Evans). The Court believes that Craig and Bruce have failed to establish that J.W. breached this particular provision.

9. J.W. Dansie and Juab Gypsum, LLC, are specifically enjoined from selling or participating directly or indirectly in the sale of any materials to Ashgrove Durkee, unless or until this Court makes a finding that Nephi Sandstone has breached a specification or unless or until the passage of time provided in the order.

10. Plaintiffs' motion to amend or modify the order previously entered on June 18, 1996, is hereby denied.

DATED this ____ day of July, 1997.

BY THE COURT

ANTHONY W. SCHOFIELD
DISTRICT COURT JUDGE

APPROVED AS TO FORM:

ALLEN K. YOUNG, ESQ.
Attorney for Plaintiffs

NOTICE TO PLAINTIFF'S ATTORNEY

TO: ALLEN K. YOUNG, ESQ. AND TROY K. FITZGERALD

You will please take notice that the undersigned, attorney for defendants, will submit the above and foregoing Order and Judgment to the Honorable Anthony W. Schofield for his signature upon the expiration of five (5) days from the date of this notice, plus three (3) days for mailing, unless written objection is filed prior to that time, pursuant to Rule 4-504 of the Rules of Judicial Administration of the State of Utah.

DATED this 17th day of July, 1997.

Craig M. Snyder

CRAIG M. SNYDER, for:
HOWARD, LEWIS & PETERSEN
Attorneys for Defendants

MAILING CERTIFICATE

I hereby certify that a true and correct copy of the foregoing was mailed to the following, postage prepaid, this 17th day of July, 1997.

Allen K. Young, Esq.
Troy K. Fitzgerald, Esq.
101 East 200 South
Springville, UT 84663

Fern Sullivan

SECRETARY

J:\CMS\NEPHI\JUD

Tab 5

FILED 11-6-97
Fourth Judicial District Court of
Juab County, State of Utah
CARMA B. SMITH, Clerk
 Deputy

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Telephone: (801) 373-6345
Facsimile: (801) 377-4991

Our File No. 23,211

Attorneys for Defendants

IN THE FOURTH JUDICIAL DISTRICT COURT OF JUAB COUNTY
STATE OF UTAH

J. W. DANSIE and JEAN DANSIE,

Plaintiffs,

vs.

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

Defendants.

ORDER DENYING MOTION FOR
NEW TRIAL

Case No. 9504000002 CN
Judge Anthony W. Schofield

This matter came on regularly for hearing pursuant to Rule 4-501 of the Utah Code of Judicial Administration on the plaintiffs' motion for a new trial. The Court has before it and has considered plaintiffs' motion and the memorandum in support of the motion filed therewith. The Court has also reviewed and considered the defendants' response to the motion for a new trial and has also reviewed and considered the plaintiffs' reply to the defendants' response to the motion for a new trial.

The Court after reviewing the memoranda submitted by counsel herein, having further reviewed the Court's trial notes and previous ruling, and having reviewed the pleadings on file herein, now makes and enters the following findings of fact and order:

1. The Court notes that plaintiffs have requested oral argument on the motion for a new trial. The Court has carefully reviewed the memoranda of counsel and sees no likelihood that further oral argument will assist or affect the Court's decision in this case. As a result, the Court denies plaintiffs' request for oral argument.

2. The Court denies plaintiffs' motion for a new trial in this matter.

3. The Court specifically finds that there is sufficient evidence in the record to support the Court's determination of damages, including the oral testimony given at the time of trial by Craig Dansie and Bruce Evans and the exhibits offered by the defendants in support of their claim for damages.

4. The Court further finds that it is troubling that after J. W. Dansie's counsel helped him negotiate a settlement with the defendants, who are his son and son-in-law, and after J. W. Dansie signed the agreement, after the agreement was presented to the Court as his voluntary agreement, and after it was incorporated into an order of this Court, then, at the first opportunity, J. W. Dansie set about to violate multiple paragraphs of the Court's order as explained in the Court's previous memorandum decision.

5. J. W. Dansie's defense is that it contains an invalid non-competition agreement. This case is 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 existing order of this Court.

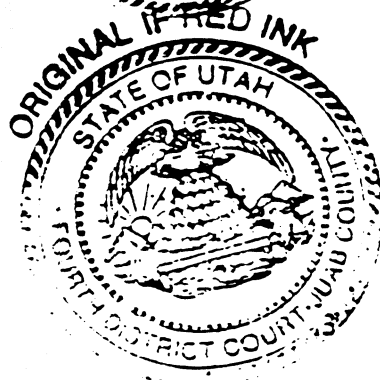
6. In this case, the Court is called upon to construe and enforce a court order rather than a private non-competition agreement. The Court has found by clear and convincing evidence that J. W. Dansie did, in fact, violate provisions of the Court's order.

7. 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 in an appropriate fashion. Instead, J. W. Dansie chose a path of contempt.

8. As previously set forth herein, the motion for a new trial is denied.

DATED this 6 day of ^{November}~~October~~, 1997.

BY THE COURT



Anthony W. Schofield
ANTHONY W. SCHOFIELD
DISTRICT COURT JUDGE

STATE OF UTAH)
)SS.
COUNTY OF JUAB)

I, the undersigned, Clerk of the Fourth District Court of Juab County, Utah, do hereby certify that the annexed and foregoing is a true and full copy of the final document on file in my office as such Clerk. I press my hand and seal of said Court this 14th day of November, 1997.
J. A. B. SMITH, Clerk

James A. Smith Clerk