

APPELLANT'S

REPLY BRIEF

Reply Brief of Cross-Appellants

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

Docket Nos. 92-1206, -1260

FILED
JUL 17 1992

FRANCIS X. GINDHART
CLERK

RITE-HITE CORPORATION, ACME DOCK SPECIALISTS, INC., ALLIED
EQUIPMENT CORP., APPLIED HANDLING, INC., ANDERSON MATERIAL
HANDLING CO., BLOCK-DICKSON, INC., ROBERT LUND d/b/a HMH
COMPANY, HOJ ENGINEERING & SALES CO., INC., JOHNSON EQUIPMENT
CO., JOHN L & ASSOCIATES, INC., KELLER EQUIPMENT CO., INC.,
LOADING DOCK EQUIPMENT, INC., METRO DOCK SPECIALISTS, INC.,
McCORMICK EQUIPMENT COMPANY, INC., MID-SOUTH DOCK SYSTEMS,
INC., HARRY MONOHAN, NIEHAUS INDUSTRIAL SALES, INC., NORTHWAY
MATERIAL HANDLING CO., INC., PEMCO MATERIAL HANDLING, INC.,
R. B. CURLIN, INC., RICE EQUIPMENT COMPANY, STOKES EQUIPMENT
COMPANY, INC., ROBERT SOPER LIMITED, TIMBERS & ASSOCIATES, INC.,
TODD EQUIPMENT CORPORATION, THAYER SYSTEMS, INC., and W. E.
CARLSON CORPORATION,

Plaintiffs/Cross-Appellants,

v.

KELLEY COMPANY, INC.,

Defendant/Appellant.

Appeal From The United States District Court
For The Eastern District of Wisconsin
The Honorable John W. Reynolds, Senior District Judge, Presiding

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TABLE OF CONTENTS

CERTIFICATE OF INTEREST ii

I. THE PLAINTIFFS SHOULD ALL HAVE BEEN AWARDED SOME
LOST PROFITS AT THE RETAIL LEVEL. 1

II. THE TRIAL COURT SHOULD HAVE AWARDED PREJUDGMENT
INTEREST AT A COMPOUND RATE. 2

III. THE IMPORTANCE OF AND REMEDY SOUGHT BY THE
CROSS-APPEAL 3

CERTIFICATE OF INTEREST


Counsel for the plaintiffs/appellees/cross-appellants certifies the following:

1. The full name of every party or amicus represented by me is: RITE-HITE CORPORATION, ACME DOCK SPECIALISTS, INC., ALLIED EQUIPMENT CORP., APPLIED HANDLING, INC., ANDERSON MATERIAL HANDLING CO., BLOCK-DICKSON, INC., ROBERT LUND D/B/A HMH COMPANY, HOJ ENGINEERING & SALES CO., INC., JOHNSON EQUIPMENT CO., JOHN L & ASSOCIATES, INC., KELLER EQUIPMENT CO., INC., LOADING DOCK EQUIPMENT, INC., METRO DOCK SPECIALISTS, INC., MCCORMICK EQUIPMENT COMPANY, INC., MID-SOUTH DOCK SYSTEMS, INC., HARRY MONOHAN, NIEHAUS INDUSTRIAL SALES, INC., NORTHWAY MATERIAL HANDLING CO., INC., PEMCO MATERIAL HANDLING, INC., R. B. CURLIN, INC., RICE EQUIPMENT COMPANY, STOKES EQUIPMENT COMPANY, INC., ROBERT SOPER LIMITED, TIMBERS & ASSOCIATES, INC., TODD EQUIPMENT CORPORATION, THAYER SYSTEMS, INC., W. E. CARLSON CORPORATION.

2. The name of the real party in interest represented by me is: Same as No. 1, above.

3. The parent companies, subsidiaries (except wholly-owned subsidiaries), and affiliates that have issued shares to the public, of the party or amicus curiae represented by me are: None.

4. The names of all law firms and the partners or associates that have appeared for the party or amicus now represented by me in the trial court or are expected to appear in this court are: FOLEY & LARDNER: Gilbert W. Church and Jeffrey N. Costakos; LEYDIG, VOIT & MAYER: Theodore W. Anderson.



Jeffrey N. Costakos

I. THE PLAINTIFFS SHOULD ALL HAVE BEEN AWARDED SOME LOST PROFITS AT THE RETAIL LEVEL.

The plaintiffs' principal brief on p.42 argued that the trial court's decision dated January 2, 1992 committed "clear error" when it denied the plaintiffs' claims for lost profits at the retail level on the ground that the plaintiffs had not introduced evidence on percentage commissions which, in fact, had unquestionably been introduced. Kelley's responsive brief¹ does not deny that "clear error" was committed.

Kelley's responsive brief argues rather that this clear error was offset by an alleged error the trial court committed in rejecting some of Kelley's arguments. On p. 33, for example, Kelley goes so far as to state that "...Kelley agrees with the Plaintiffs (but for different reasons) that the District Court's treatment of this issue makes no sense." On p. 34 it adds, "[t]he District Court evidently misconstrued both sides' positions...."

Kelley's position on the existence of a second error should, we submit, be rejected. The evidence which Kelley cites in support of that position was not only considered and rejected by the trial court (A. 23) but was contradicted by abundant and persuasive evidence offered by the plaintiffs, including the rebuttal testimony of Dr. Rita Cheng.² The trial court's

¹Kelley's responsive brief is entitled "Appellant Kelley Company, Inc.'s Combined Reply Brief and Response to Cross-Appeal."

²E.g., A. 489-91; A. 717-720; A. 766; A. 991-94; A. 2722-24; A. 3023-25; A. 3033-37; A. 3088-90.

rejection of that evidence cannot, therefore, be regarded as "error" here at all, much less an error that would offset the admittedly "clear error" on which this cross-appeal is based.

II. THE TRIAL COURT SHOULD HAVE AWARDED PREJUDGMENT INTEREST AT A COMPOUND RATE.

The trial court correctly found that prejudgment interest at the "prime" rate should be awarded in this case because of, among other things, evidence that the plaintiffs were borrowing substantial sums of money from banks at the prime and higher rates during and after the period of infringement. Plaintiffs' principal brief on pp. 45-49. Kelley does not dispute this basic point. Kelley's responsive brief on pp. 34-35.

Plaintiffs' principal brief also pointed out that, given the trial court's rationale for awarding interest at the prime rate and the evidence which supported it, the decision to award simple interest had to be erroneous because simple interest would not be enough to provide the plaintiffs with "complete compensation" for the interest paid on those loans. Kelley, again, does not seriously dispute this basic point.

The arguments that Kelley does make are all beside the point. None of them, for example, are pertinent at all to the rationale utilized by the trial court. When this is considered along with the way the court's award of simple interest only was tied to Kelley's tardy, deceptive, unfounded, and spurious argument that banks do not charge compound interest, the clearly erroneous nature of that aspect of the award becomes unmistakable.

III. THE IMPORTANCE OF AND REMEDY SOUGHT BY THE CROSS-APPEAL

Kelley's responsive brief correctly points out that the plaintiffs' cross-appeal is relatively unimportant because Kelley lacks the funds to pay even the judgment awarded by the trial court. But Kelley is incorrect where, on p. 33, it dismisses the cross-appeal as "academic." The cross-appeal is more than academic because it will affect the plaintiffs' rights vis-a-vis with Kelley's other creditors.

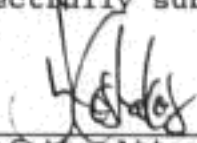
In this connection, plaintiffs wish to reemphasize what is said in n. 21 on p. 50 of their principal brief: it is critical not to disturb the lien which secures the plaintiffs' judgment. This lien, of course, depends on the underlying judgment for its existence, so we would expect Kelley to argue that any vacation of that judgment would extinguish the lien. The adverse effects on the plaintiffs of losing the lien which this Court gave to them as a condition for a stay would, because of Kelley's admitted inability to pay the judgment, more than offset any benefits the plaintiffs could hope to gain by winning their cross-appeal.

The plaintiffs, therefore, respectfully and specifically request this Court to ignore this cross-appeal entirely if it should for any reason conclude that the relief

sought by the cross-appeal could not be granted without vacating or otherwise setting aside the judgment now in effect.

Dated this 17th day of July, 1992.

Respectfully submitted,



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CERTIFICATE OF SERVICE

This is to certify that two true and correct copies of
REPLY BRIEF OF CROSS-APPELLANTS have this 17th day of July, 1992
been served by Federal Express, Saturday morning delivery on:

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