

1997

# Execusoft, Inc. v. Intraspace Corporation : Execusoft, Inc. v. Pleiades Software Development Inc. : Brief of Appellee

Utah Court of Appeals

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## Recommended Citation

Brief of Appellee, *Execusoft v. Intraspace Corporation*, No. 970395 (Utah Court of Appeals, 1997).  
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IN THE UTAH COURT OF APPEALS

STATE OF UTAH

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EXECUSOFT, INC., :  
 :  
 Plaintiff and Appellee, : Case No. 970395-CA  
 :  
 v. :  
 :  
 INTRASPACE CORPORATION, :  
 a Utah corporation, :  
 :  
 Defendant/Appellant. :  
 :  
 \_\_\_\_\_ :  
 EXECUSOFT, INC. :  
 :  
 Third-Party Plaintiff, :  
 :  
 v. :  
 :  
 PLEIADES SOFTWARE :  
 DEVELOPMENT INC., :  
 :  
 Third-Party Defendant. :  
 :  
 \_\_\_\_\_ :  
 : CA

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BRIEF OF APPELLEE, PLEIADES SOFTWARE DEVELOPMENT, INC.

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APPEAL FROM THE JUDGMENT  
GRANTED BY THE SECOND JUDICIAL DISTRICT COURT  
WEBER COUNTY, STATE OF UTAH  
THE HONORABLE RODNEY S. PAGE PRESIDING

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## **STATEMENT OF ADOPTION BY REFERENCE**

Appellee, Pleiades Software Development, Inc., does hereby adopt the Brief of Appellee, Execusoft, Inc., in its entirety, but does seek to add one argument in addition to those set forth in Execusoft, Inc.'s brief.

## **ARGUMENT**

### **THE TRIAL COURT HAD THE DISCRETION TO REJECT THE TESTIMONY OF FRANK WILLIAMS AS TO THE VALUE OF THE SOURCE CODE.**

As was stated above, Pleiades Software Development, Inc. joins in the brief of Appellee, Execusoft, Inc., and presents the following as supplementary of the arguments contained in Execusoft, Inc.'s brief. The sole issue Pleiades desires to supplement is Intraspace's contention that the trial court had to accept the testimony of Frank Williams that the value of the source code was between \$250,000 and \$350,000. Pleiades recognizes that this issue only takes on importance if this Court determines that Execusoft, Inc. either individually, or through Pleiades, breached its contract with Intraspace and that as a result of that breach of contract, Intraspace was damaged.

On page 11 of its brief, Intraspace states as follows: "Intraspace recognizes that testimony was given regarding the ability of Intraspace to sell the source code to other users including other military users. Intraspace does not attack the finding that this evidence was too speculative to provide the foundation for a damage award. However, the evidence as to the value of the source code was not speculative, but was clear and

direct."

On page 12 of its brief, Intraspace set forth a portion of Mr. Williams' testimony. In that portion of testimony, Mr. Williams stated that fixing problems related to the Norwegian computer program would cost Intraspace approximately \$250,000 to \$350,000.

There is a flaw in equating the value of the source code to what it supposedly would have cost Intraspace to duplicate the source code. That fatal flaw is that there was no reason for Intraspace to fix the source code and that Intraspace in no way, shape or form sought to do any further work on the Norwegian project. Intraspace had no reason to do any further work on the Norwegian project; Intraspace had been fully paid. (n.531 lines 23 and 24; 629; 777)

Intraspace seems to fault the trial court for failing to accept the testimony of Frank Williams that the value of the source code was between \$250,000 and \$350,000.

The Court in *Holland v. Brown* 394 P.2d 77 (Utah 1964) stated that:

"Short of capriciously or arbitrarily rejecting credible evidence when there is no sound reason for doing so, it is the exclusive province of the jury to determine the credibility of witnesses. Where there is any reasonable basis for refusing to believe a witness they are not necessarily obliged to accept his testimony. His self interest may be sufficient basis for rejecting it; and further they are entitled to judge the testimony in light of their experience and in the every day affairs of life." (id. at 79)

Intraspace called both Joseph Drury and James Mellos to testify as to the marketability of the source code. The testimony of Mr. Drury and Mr. Mellos are found on pages 784-800 and 958-972 of the record, respectively. Intraspace saves Pleiades the task of demonstrating that Mr. Drury and Mr. Mellos were unable to provide any usable evidence as to the marketability and hence the value of the source code. It is to these two

(2) witnesses whom Intraspace refers when it states that it recognizes that the evidence as to marketability of the source code was speculative. Referring to the testimony of Mr. Mellos and Mr. Drury as speculative is being kind. These witnesses were unable to identify even a range of potential income that Intraspace would anticipate through the sale of the source code. These two (2) witnesses were unable to identify a solid offer to purchase the source code.

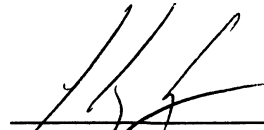
The two (2) principals of Intraspace, Robert D'Ausillio and Frank Williams, testified differently regarding the value of the source code; Mr. Williams having testified that the value of the source code was between \$250,000 and \$350,000 (n.908 - 909), and Mr. D'Ausillio testifying that the value of the source code was \$140,000 (n.1031). There was also evidence that Intraspace was willing to transfer ownership of the source code to Execusoft as payment in full of the \$96,000 debt that Intraspace owed to Execusoft, but was unable to pay in that Intraspace had already spent the money it had received for the Norwegians. (n.736, 615; 566; 1065)

There was a reasonable basis for the court not to accept the testimony of Frank Williams that the value of the source code was between \$250,000 and \$350,000. According to *Holland*, Mr. Williams' self interest alone would have been sufficient reason. In addition, Mr. Williams' testimony as to the value was contradicted by his business associate, Mr. D'Ausillio. The other witnesses called by Intraspace could not provide any evidence as to the potential value of the source code. Given Mr. Williams' self interest and the varying testimony, the trial court had ample basis upon which to reject Mr. Williams' testimony.



As the actions of Intraspace in a) not paying Execusoft and Pleiades despite the fact that Intraspace was paid in full, and b) forcing Execusoft and Pleiades to litigate the matter both before the trial court and this court despite the absence of merit, Pleiades requests a reasonable attorney's fee.

DATED this 14th day of November, 1997.

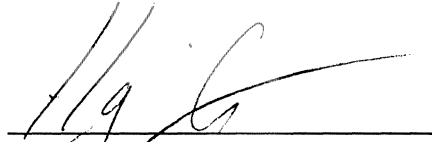
  
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Harry Gaston  
Attorney for Appellee Pleiades

**CERTIFICATE OF SERVICE**

I hereby certify that on this 21<sup>st</sup> day of November, 1997, I served **four** true and correct copies of the foregoing Brief of Appellee, Pleiades Software Development, Inc., via U.S. Mail, first class postage prepaid to:

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