

2001

Marcris & Associates v. Neways, Inc : Brief of Appellee

Utah Court of Appeals

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– IN THE UTAH COURT OF APPEALS –

MACRIS & ASSOCIATES, INC.,

Plaintiff and Appellant

vs.

NEWAYS, INC., THOMAS E. MOWER
and LESLIE D. MOWER

Defendants and Appellees

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Court of Appeals No.: 20010755

District Court No.: 950400093CN

Priority No.: 15

BRIEF OF THE APPELLEES

Appeal from the Fourth Judicial District Court, Utah County, State of Utah
Hon. Anthony W. Schofield

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MAY 13 2002

Paula H. Clark
Clerk of the Court

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TABLE OF CONTENTS

1.	STATEMENT OF JURISDICTION.....	1
2.	STATEMENT OF ISSUE PRESENTED.....	1
3.	STANDARD OF REVIEW.....	1
4.	DETERMINATIVE STATUTES.....	2
5.	STATEMENT OF THE CASE.....	2
	<u>Nature of the Case</u>	2
	<u>Course of Proceedings</u>	2
	<u>Disposition in the Trial Court</u>	4
	<u>Statement of Facts</u>	4
6.	SUMMARY OF THE ARGUMENT.....	8
7.	ARGUMENT.....	9
	1. Attorney Fees Are Not Available As A Remedy Since There Is No Contractual Provision Or Statute Authorizing Such Fees.....	9
	2. Punitive Damages Are Not Available As A Remedy Absent Statutory Authority Or The Showing Of Compensatory Or General Damages.....	11
	3. The “Third-Party Negligence” Exception For The Recovery Of Attorney Fees Does Not Apply To <i>Macris II</i>	13
8.	CONCLUSION.....	18
9.	PROOF OF SERVICE.....	19

10. ADDENDUM..... 20

Utah Code Annotated section 25-6-1 et seq.

Utah Code Annotated section 78-18-1(1)(a).

Memorandum of Ruling of the Trial Court dated July 18, 2001 (R. 734).

TABLE OF AUTHORITIES

Federal Cases

<i>Beck's Office Furniture and Supplies, Inc. v. Haworth, Inc.</i> , 94 F.3d 655 (10 th Cir. (Utah) 1996).....	11
<i>Morganroth & Morganroth v. DeLorean</i> , 213 F.3d 1301 (10 th Cir. (Utah) 2000).. <td>10, 14</td>	10, 14

State Cases

<i>Blue Cross & Blue Shield v. State</i> , 779 P.2d 634, 636 (Utah 1989).....	1
<i>Broadwater v. Old Republic Surety</i> , 854 P.2d 527 (Utah 1993).....	16, 17
<i>Collier v. Heinz</i> , 827 P.2d 982,983 (Utah Ct. App. 1992).....	9
<i>FMA Acceptance Co. v. Leatherby Ins. Co.</i> , 549 P.2d 1332 (Utah 1979).....	9
<i>Higgins v. Salt Lake County</i> , 855 P.2d 231, 233 (Utah 1993).....	1
<i>Macris & Associates, Inc. v. Neways, Inc.</i> , 2000 UT 93 (Utah 2000).....	3
<i>Selvage v. J.J. Johnson & Associates</i> , 910 P.2d 1252 (Utah Ct. App. 1996).....	10, 14
<i>South Sanpitch Co. v. Pack</i> , 765 P.2d 1279 (Utah App. 1988).....	14, 16
<i>Tolman v. Winchester Hills Water Company, Inc.</i> , 912 P.2d 457 (Utah Ct. App. 1996).....	17
<i>Winegar v. Froerer Corp.</i> , 813 P.2d 104, 107 (Utah 1991).....	1

Rules

<i>Utah Rules of Appellate Procedure</i> , Rule 24(a)(9).....	9
<i>Utah Rules of Civil Procedure</i> , Rule 56(c).....	14

Statutes

<i>Utah Code Annotated section 25-6-1 et seq</i>	2, 8, 10, 12, 20
<i>Utah Code Annotated section 78-2-2(4)</i>	1
<i>Utah Code Annotated section 78-2a-3(2)(J)</i>	1
<i>Utah Code Annotated section 78-18-1(1)(1)(a)</i>	2, 4, 9, 12, 20

STATEMENT OF JURISDICTION

This Court has jurisdiction of this appeal by Order of the Utah Supreme Court dated October 30, 2001 (R. 750) and pursuant to *Utah Code Ann.* § 78-2a-3(2)(J) and 78-2-2(4) (Supp. 2001).

STATEMENT OF ISSUE PRESENTED

The issue presented for this court to determine is whether the trial court's decision was correct in granting summary judgment in favor of Appellee on the basis that the remaining claims for damages were solely for attorney fees and punitive damages, which are not recoverable under the Utah fraudulent transfer statute or any exceptions thereto, and therefore Appellees were entitled to summary judgment as a matter of law?

STANDARD OF REVIEW

Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Winegar v. Froerer Corp.*, 813 P.2d 104, 107 (Utah 1991). In reviewing a grant for summary judgment, the facts are analyzed, and all reasonable inferences therefrom, in the light most favorable to the non-moving party. *Higgins v. Salt Lake County*, 855 P.2d 231, 233 (Utah 1993). The trial court's decision presents a question of law. Therefore, no deference is accorded to the trial court and the decision is reviewed for correctness. *Blue Cross & Blue Shield v. State*, 779 P.2d 634, 636 (Utah 1989).

//

DETERMINATIVE STATUTES

Determination of this appeal requires analysis of *Utah Code Ann. § 25-6-1, et seq.*, and *Utah Code Ann. § 78-18-1(1)(a)*. These sections are set forth in full in the accompanying addendum.

STATEMENT OF THE CASE

Nature of the Case.

Macris & Associates, Inc. ("Macris") brought this present action ("*Macris II*") against Neways, Inc., Thomas E. Mower and Leslie D. Mower ("Defendants" or "Appellees") in anticipation of obtaining a judgment in an earlier action captioned *Macris & Associates, Inc. v. Images & Attitudes, Inc. and Thomas Mower, Civil No. 910400358* ("*Macris I*"). (R. 613). The three claims in *Macris II* allege Fraudulent Transfer, Successor Liability and Alter-Ego Liability. (R. 599, 593 and 591, respectively). In addition to pursuing a means to insure recovery of the anticipated judgment, Appellant sought further contract damages in *Macris II* against Appellees for the claims asserted in *Macris I*. (R. 590).

Course of Proceedings.

On April 17, 1991, Macris filed an action in the Fourth District Court against Images and Attitude, Inc. ("Images") claiming that Images breached a contract with Macris. This was the *Macris I* action.

Subsequent to the filing of *Macris I* and prior to trial in *Macris I*, Images

transferred certain assets to Neways, Inc.

Macris I went to trial beginning February 16, 1995 and continuing into March, 1995, and a judgment in favor of Macris and against Images was rendered September 15, 1995. (R. 587).

On or about February 14, 1995, two days before the *Macris I* trial, Macris prepared and filed the *Macris II* action, asserting that the formation of Neways, Inc. and the associated transfer of certain assets to Neways, Inc. from Images, had left Images without sufficient assets to cover the anticipated judgment in *Macris I*. (R.12).

On October 19, 1995, Appellees moved in *Macris II* for summary judgment, contending that the Macris claims were barred by *res judicata*. (R. 229). The trial court granted the summary judgment motion holding that *res judicata* barred Macris from recovering further contract damages on its theories of fraudulent conveyance, alter-ego liability and successor liability. (R. 467).

Macris appealed the trial court's ruling. (R. 490). The Court of Appeals reversed the trial court's grant of summary judgment. (R. 527).

The Utah Supreme Court granted certiorari to Appellees, and on December 5, 2000, ruled in *Macris & Associates, Inc. v. Neways, Inc., 2000 UT 93 (Utah 2000)* that the issue preclusion branch of the doctrine of *res judicata* precluded Macris from seeking further contract damages in *Macris II* and that the remaining theories of fraudulent transfer, successor liability and alter-ego liability remained for adjudication by the trial

court. (R. 567).

Subsequent to the Utah Supreme Court's decision, and prior to the filing of Appellee's Motion for Summary Judgment, on February 16, 2001 the judgement in *Macris I* was caused to be satisfied in whole. (R. 628).

On May 10, 2001, the Fourth District Court, Hon. Anthony W. Schofield presiding, heard Appellee's Motion for Summary Judgment which asserted that the satisfaction of the *Macris I* judgment removed any and all possible recovery of damages on the remaining theories of liability, and therefore *Macris II* was "moot", since the judgment in *Macris I* had been satisfied in full with interest and the Utah Supreme Court had barred any further claims for contract damages. (R. 626, 650 and 680).

Disposition in the Trial Court.

On July 18, 2001, the trial court issued its Memorandum of Ruling. (R.734). In that ruling the trial court correctly held that the Utah fraudulent conveyance statute in conjunction with *Utah Code Ann. § 78-18-1(1)(a)* does not provide for attorneys fees and punitive damages, and that the "third-party litigation exception" was inapplicable to the present case, and therefore, Appellees were entitled to summary judgment as a matter of law. On August 2, 2001, an Order reflecting the trial court's ruling was entered granting summary judgment in favor of Appellees. (R.745).

Statement of Facts.

For purposes of this Court's review of the correctness of the trial court's decision,

Appellees hereby set forth the relevant undisputed material facts as stated within their Memorandum of Points and Authorities in Support of Defendant's Motion for Summary Judgment, as filed with the trial court. (R. 626-622). It is important to note that Macris conceded that there was no dispute as to the material facts set forth in Appellee's moving papers. (R. 741, R. 649). (The relevant facts re-stated herein from the Appellees Memorandum in Support of Summary Judgment have been modified only to the extent that the parties' designation properly reflect their positions on appeal, and referrals to the exhibits have been changed to reflect their position within the record):

1. On or about June 9, 1992, Macris filed its Second Amended Complaint against Images in the Fourth Judicial District Court of Utah County, alleging among other things, breach of contract.

2. On or about February 14, 1995, two days before trial in *Macris I*, Appellant filed its Complaint in this matter, alleging theories of liability against Appellees for Fraudulent Transfer, Successor Liability, and Alter Ego.

3. Trial was held in *Macris I* and as a result, judgment was entered against Images for breach of contract in the principal amount of \$360,681.20.

4. Macris did not make a demand for satisfaction of this judgment until February, 2001.

5. The instant case, *Macris II*, proceeded with the parties filing and arguing cross motions for summary judgment before the trial court, which resulted in a ruling from the trial court, and subsequent appeals to the Utah Court of Appeals, and finally the Utah Supreme Court.

6. In its holding, the Utah Supreme Court ruled that Appellant was barred by the doctrine of collateral estoppel from pursuing further contract damages in addition to the damages awarded Appellant in *Macris I*. The Utah Supreme Court also held that Appellant's fraudulent transfer, successor liability and alter ego theories remained for adjudication by the trial court.

7. *Macris II* was remanded to the trial court on January 18, 2001.

8. Appellant's Complaint in *Macris II* alleges the following in regards to seeking damages for fraudulent transfer: "Upon information and belief, Macris & Associates alleges that Images transferred its assets, including

distributorships, to Neways in a wrongful and malicious attempt to **avoid paying Macris & Associates the liabilities that it has incurred and would incur as a result of Macris & Associates' action against Images for breach of contract.**" (emphasis added).

9. Appellant's Complaint in *Macris II* further alleges that the alleged fraudulent transfer was made by Images for the purpose of **avoiding paying Plaintiff any judgment** awarded by the Court in *Macris I*.

10. Appellant also alleged that punitive damages were warranted "as a result of Neways' alleged fraudulent transfer."

11. With regard to Appellant's successor liability cause of action, Appellant alleged that Defendant Neways is liable to Plaintiff **for the obligations of Images on the contract** that was the subject of *Macris I*.

12. Appellant then alleged the following with regard to its successor liability claim: "Because Neways is the successor corporation to Images, **Macris & Associates is entitled to have Neways held liable to Macris & Associates for all amounts due or to become due from Images to Macris**

& Associates.” (Emphasis added)

13. Appellant’s Complaint in *Macris II* then alleges that Defendants Neways, Thomas E. Mower and Leslie D. Mower and Images are the alter egos of each other, and seeks damages against Defendants for breach of Plaintiff’s contract with Images that was the subject of *Macris I*.

14. On or about February 1, 2001, Images received the first and only demand from Plaintiff’s counsel for satisfaction in full of the judgment entered against Images in favor of Plaintiff.

15. On February 16, 2001, Images satisfied the judgment in full by delivering a cashier’s check to Plaintiff’s counsel in the sum of \$746,356.97.

These facts, in addition to the statements concerning the: Nature of the Case; Course of Proceedings; and, Disposition in the Trial Court, accurately reflect the relevant facts.

SUMMARY OF THE ARGUMENTS

1. The trial court correctly determined that attorney fees and punitive damages are not available under *Utah Code Ann. § 25-6-1 et seq.* and *Utah Code*

Ann. § 78-18-1(1)(a).

2. The “third-party litigation exception” promoted by Appellant is inapplicable to the *Macris II* action.

ARGUMENTS

Summary judgment is appropriate “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law.” Rule 56(c), Utah Rules of Civil Procedure. (R. 741). Furthermore, summary judgment is appropriate when the movant makes a showing which precludes, as a matter of law, the awarding of any relief to the respondent. *FMA Acceptance Co. v. Leatherby Ins. Co.*, 549 P.2d 1332 (Utah 1979). (R. 741).

Macris concedes that there is no dispute as to the material facts asserted by Appellees. (R. 741).

1. **Attorney Fees Are Not Available As A Remedy Since There Is No Contractual Provision Or Statute Authorizing Such Fees.**

The rule in Utah is that attorney fees cannot be recovered unless provided for by statute or contract. *Collier v. Heinz*, 827 P.2d 982,983 (Utah Ct. App. 1992). There are two limited exceptions to this long-standing rule: insurance contracts and the “third-party negligence” exception. *Collier* at 984.

In this case, there is no contractual relationship (of insurance or otherwise) between Appellant and Appellees. Similarly, the remedies provided for under the Utah

fraudulent transfer statute found at *Utah Code Ann. § 25-6-1, et seq.* do not provide for the award of attorney fees, and there is no case law in Utah permitting attorney fees under the statute. In fact, there is case law in Utah which has held that attorney fees are not recoverable under the Utah fraudulent transfer statute.

In *Selvage v. J.J. Johnson & Associates*, 910 P.2d 1252 (Utah Ct. App. 1996), this Court stated that the plain language of the Utah fraudulent transfer act does not allow an award of attorney fees since they are not authorized by the statute. *Id* at 1264. In so holding, this Court reasoned that it “has no power to rewrite the statute to conform to an intention not expressed.” *Id* at 1264. See also, *Morganroth & Morganroth v. DeLorean*, 213 F.3d 1301 (10th Cir. (Utah) 2000). In analyzing the Utah fraudulent transfer statute, this Court further stated in the *Selvage* case:

“The statute’s language never specifically refers to attorney fees, but instead only to the amount of the creditor’s claim. A claim for damages under the U.F.T.A. is separate and distinct from an award of attorney fees.”

Selvage at 1264.

Hence, attorney fees are not a basis for a claim of damages, compensatory, general or otherwise, under the Utah fraudulent transfer statute. In fact, as this court has previously decided, they are not contemplated as recoverable in any manner under the statute. Accordingly, the trial court was correct in refusing to extend the recovery of attorney fees to a statutory action.

Since the legislature and this Court have not provided for attorney fees under the

Utah fraudulent transfer act, Appellant is necessarily barred from obtaining them in this action. The trial court was correct in ruling that attorney fees are not recoverable as a basis for damages in this action. Therefore, this Court should affirm the trial court's ruling.

2. Punitive Damages Are Not Available As A Remedy Absent Statutory Authority Or The Showing Of Compensatory Or General Damages.

Under Utah law, punitive damages should be awarded infrequently. *Beck's Office Furniture and Supplies, Inc. v. Haworth, Inc.*, 94 F.3d 655 (10th Cir. (Utah) 1996).

Appellant relies heavily on unproven allegations of wrongful conduct in an effort to persuade this Court that punitive damages should be awarded, even though no other damages are available and the statute does not provide such remedy. In fact, in each of the cases cited by Appellant in support of the argument for punitive damages where no other damages are present, there has first been a finding of fact of willful and malicious conduct by the defendant, which could be used to reason the award of punitive damages. Here, there are no facts determined to make such reasoning. Furthermore, there is no basis to pursue a trial on the facts, since the theories of liability for recovery of the judgment in *Macris I* are all lacking requisite elements to proceed to trial in *Macris II*.

In essence, Appellant is seeking a remand to the trial court for a determination of fact where the elements of the theory of liability are not present, in the hopes of showing wrongful conduct that could be used to "boot strap" a remedy that is not supported by statute, case law or other compensatory or general damages.

The trial court correctly decided that punitive damages are not available. In so ruling, the trial court applied *Utah Code Ann. § 78-18-1(1)(a)* and properly interpreted *Utah Code Ann. § 25-6-1 et seq.*, which does not authorize the award of punitive damages.

First, the pertinent part of *Utah Code Ann § 78-18-1(1)(a)* provides:

“Except as otherwise provided by statute, punitive damages may be awarded only if compensatory or general damages are awarded and it is established by clear and convincing evidence that the acts or omissions of the tortfeasor are the result of willful and malicious or intentionally fraudulent conduct...”

This language shows that the Legislature required that there must first be an award of compensatory or general damages *and* a finding by clear and convincing evidence that there was tortious conduct that was willful and malicious before punitive damages can be addressed. If not, there must be statutory authority for punitive damages to be awarded before they may be addressed. Here, there is neither.

Furthermore, Appellant conceded to the trial court that the only “damages” sought were for attorney fees and punitive damages. (R. 752, p. 10, ln. 5-10). This Court has previously determined that attorney fees are not the basis for a claim of damages under the Utah fraudulent transfer statute. Hence, there are no damages, compensatory, general or otherwise, which Appellant can rely upon in order to fall under the ambit of *Utah Code Ann. § 78-18-1(1)(a)*.

Additionally, there has been no showing of the requisite conjunctive test of “clear

and convincing evidence” of tortious conduct that was willful and malicious. This is important, because due to the absence of the underlying elements which must be shown for Appellant to proceed under its theories of liability for enforcement of the judgment in *Macris I*, there can be no determination of fact on any conduct of the Appellees, whether by a preponderance standard or the higher standard of clear and convincing evidence.

Finally, as stated above, the Utah fraudulent transfer statute does not provide for the award of punitive damages, and a broadening of remedies under the fraudulent transfer statute has been determined as inappropriate by this Court. *See, Selvage, supra*.

Accordingly, there is no basis under the punitive damages statute or the Utah fraudulent transfer statute to permit an extension of punitive damages to Appellant under the facts and law of this case. Therefore, the trial court’s decision should be affirmed.

3. The “Third-Party Negligence” Exception For The Recovery Of Attorney Fees Does Not Apply To *Macris II*.

Macris asserts that the third-party negligence exception should be extended from tort cases, to a case arising out of the Utah fraudulent transfer statute, even though such remedy is not provided by statute or case law and the extension of this unique exception would provide a new remedy where the underlying purpose of the *Macris II* action is no longer present - i.e. - pursuit of a means to secure recovery of the judgment in *Macris I*.

In making its arguments, Macris relies heavily on unsubstantiated allegations of wrongful conduct of the Appellees. Notwithstanding these allegations, there has been no finding of fact that any fraudulent conveyance occurred. The Rules of this Court and

prior case law of this Court establish that mere assertions are not enough to defeat application of the general rule that attorney fees are proper only where authorized by statute or contract. *Utah R. App. P. 24(a)(9), Selvage* at 1265.

It is important to remain focused on the underlying theory and purpose of the *Macris II* action, as stated before the trial court and in Appellant's pleadings, in reviewing this appeal. Namely, the purpose of the action was to preserve a means for recovery of the anticipated but unrealized judgment in *Macris I* against Images. (R. 752, p. 6, ln. 22-25). That judgment was in fact satisfied in whole, with interest, once a demand had been made for its satisfaction. For Appellant to now come before this Court to argue that it is entitled to attorney fees for unnecessary litigation, where such fees would have not been incurred had this action never been filed, is surprising at best. It appears to Appellees that the exhaustive pursuit of attorney fees in this matter is nothing more than an effort to recover further damages that should have been sought against Images in the *Macris I* matter.

Additionally, Macris' application of the third-party exception to this case is flawed. The theory as articulated by the court in *South Sanpitch Co. v. Pack*, 765 P.2d 1279 (Utah App. 1988) for the third-party exception is as follows:

"...when the natural consequence of one's negligence is another's involvement in a dispute with a third-party, attorney fees reasonably incurred in resolving the dispute are recoverable from the negligent party as an element of damages."

765 P.2d at 1282.

In *South Sanpitch*, a title company negligently failed to timely record the plaintiff's deed. As a result, the plaintiff was forced to file a quiet title action against a third party. The plaintiff sued the title company for the attorney fees incurred in maintaining the quiet title action. Under the "third-party tort rule", this Court allowed the recovery of those fees as part of the damages stemming from the title company's negligence.

A careful reading of the *South Sanpitch* decision demonstrates how this theory is distinguishable and inapplicable to this case. First, there was a finding of liability against the party from whom the attorney fees were sought (this is true in all cases in which attorney fees have been awarded under this theory). Such is not the case here (nor can it be, since the underlying elements of the causes of action pursued are not present).

Second, in *South Sanpitch*, the sole legal means available for plaintiff to obtain the remedy sought was to bring suit against the third-party land owner. Here, such is not the case. It is and was not necessary for Appellant to file suit against Appellees in order to obtain satisfaction of the judgment from *Macris I*. In fact, Appellant made no effort to otherwise obtain satisfaction of the judgment from *Macris I* until Appellant was informed by Appellee in *Macris II* that no satisfaction efforts for the judgment had been made. Once Appellant made a demand for satisfaction, the judgment was satisfied. In other words, there were several means for satisfaction of the judgment in *Macris I* other than through litigation. Appellant's sole means of obtaining the remedy sought in *Macris I* were not limited to the sole option of filing a fraudulent transfer action against Appellees.

Accordingly, the reasoning and policy underlying the *South Sanpitch* decision are not present here. In effect, what Appellant is attempting to accomplish is the proverbial “second bite of the apple.” Appellant is seeking the means for enlarging the recovery of the *Macris I* judgment by extension of a rare and unique legal theory that is inapplicable under the law and facts of this case.

The third and final distinction, is that in *South Sanpitch* there was a separate and distinct third-party with which litigation was necessary. Here, the alleged wrongful conduct used to support the argument for fees, as stated in the Complaint, is against the same party from whom fees are sought.

More specifically, in *South Sanpitch*, the plaintiff argued that the title company was negligent in causing plaintiff to pursue a third party in order to obtain quiet title, and that is why it sought attorney fees from the title company. In other words, plaintiff (“A”) sought fees from (“B”) for its actions which resulted in a lawsuit with (“C”). Here, Appellant is alleging in its Complaint in *Macris II* that the actions of Appellees resulted in the lawsuit to preserve the right to enforce an anticipated judgment which caused Appellant to incur attorneys fees in the action against Appellees. In other words, “A” seeks fees from “B” for “B’s” actions which resulted in a lawsuit with “B”.

The third-party exception is not applicable here, because there is no third-party.

The *South Sanpitch* case was also discussed in *Broadwater v. Old Republic Surety*, 854 P.2d 527 (Utah 1993), where the Utah Supreme Court held:

“The rule only applies to the recovery of fees incurred in resolving third-party disputes caused by a defendant’s negligence. It does not apply to fees incurred in recovering damages from that defendant.”

Broadwater at 535.

In this case, Appellant is seeking to accomplish specifically what the Utah Supreme Court has prohibited - i.e. - the recovery of fees incurred in recovering damages from Images in *Macris I.*

Similarly, Appellants’ citation to *Tolman v. Winchester Hills Water Company, Inc.*, 912 P.2d 457 (Utah Ct. App. 1996) is unfounded. Although attorney fees were awarded by the trial court, this Court expressly refused to address the issue on appeal since the issue was not properly preserved at the trial court level. *Tolman* at 460-461.

Appellees think it is important to note some of the reasoning exhibited by the trial court in deciding that attorney fees were not available under the third-party negligence theory. As the trial court stated:

“...this court should not extend existing law, which is what Macris asks, to apply that [the third-party] exception in a case arising out of a statute, especially where the legislature did not provide an attorney’s fee remedy in that statute...

...The third party litigation exception, which has been applied in tort and contract actions, cannot be read by the court to broaden an existing statute and provide a recovery neither contemplated nor intended by the legislature.” (R. 739).

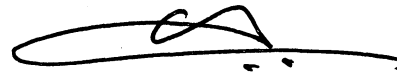
Similarly, this Court has previously decided that the award of attorney fees is not permitted under the Utah fraudulent transfer statute. The reasoning of the trial court mirrors the reasoning of this Court in so ruling, and in conjunction with the statutory

language, defeats Appellant's mis-application of the third-party negligence exception and necessarily bars Appellant's pursuit of attorney fees where the bases of the underlying claim are moot. Therefore, this Court should affirm the ruling of the trial court in that attorney fees are not available as a claim for damages under the Utah fraudulent transfer statute.

CONCLUSION

Appellant is prohibited from pursuing further contract damages in *Macris II* and there is no statutory, case law or contractual authority permitting recovery of attorney fees and punitive damages in this case. Similarly, Appellant's arguments seeking to extend the recovery of attorney fees and punitive damages to this case are barred by this Court's prior decision and not warranted. Accordingly, Appellee respectfully requests that this Court affirm the trial court's ruling of summary judgment in favor of Appellees.

Dated: May 13, 2002




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Christopher S. Crump (#7839)
Wade S. Winegar (#5561)
Bruce R. Murdock (#6948)
Attorneys for Defendants/Appellees

PROOF OF SERVICE

I hereby certify that I hand-delivered one (1) original and seven (7) true and correct copies of the foregoing BRIEF OF THE APPELLEES this 13th day of May, 2002 to the following:


Utah Court of Appeals
Scott M. Matheson Courthouse
450 South State
Salt Lake City, Utah 84114



Scott T. Temby

I hereby certify that I hand-delivered two (2) true and correct copies of the foregoing BRIEF OF THE APPELLEES this 13th day of May, 2002 to the following:

M. David Eckersley
Prince, Yeates and Geldzahler
175 East 400 South, Ste. 900
Salt Lake City, Utah 84111



Scott T. Temby

ADDENDUM

25-6-2. Definitions.

In this chapter:

(1) "Affiliate" means:

(a) a person who directly or indirectly owns, controls, or holds with power to vote, 20% or more of the outstanding voting securities of the debtor, other than a person who holds the securities:

(i) as a fiduciary or agent without sole discretionary power to vote the securities; or

(ii) solely to secure a debt, if the person has not exercised the power to vote;

(b) a corporation 20% or more of whose outstanding voting securities are directly or indirectly owned, controlled, or held with power to vote, by the debtor or a person who directly or indirectly owns, controls, or holds, with power to vote, 20% or more of the outstanding voting securities of the debtor, other than a person who holds the securities:

(i) as a fiduciary or agent without sole power to vote the securities; or

(ii) solely to secure a debt, if the person has not exercised the power to vote;

(c) a person whose business is operated by the debtor under a lease or other agreement, or a person substantially all of whose assets are controlled by the debtor; or

(d) a person who operates the debtor's business under a lease or other agreement or controls substantially all of the debtor's assets.

(2) "Asset" means property of a debtor, but does not include:

(a) property to the extent it is encumbered by a valid lien;

(b) property to the extent it is generally exempt under nonbankruptcy law; or

(c) an interest in property held in tenancy by the entireties to the extent it is not subject to process by a creditor holding a claim against only one tenant.

(3) "Claim" means a right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured.

(4) "Creditor" means a person who has a claim.

(5) "Debt" means liability on a claim.

(6) "Debtor" means a person who is liable on a claim.

(7) "Insider" includes:

(a) if the debtor is an individual:

(i) a relative of the debtor or of a general partner of the debtor;

(ii) a partnership in which the debtor is a

- (iii) a general partner in a partnership described in Subsection (7)(a)(ii);
- (iv) a corporation of which the debtor is a director, officer, or person in control; or
- (v) a limited liability company of which the debtor is a member or manager;
- (b) if the debtor is a corporation:
 - (i) a director of the debtor;
 - (ii) an officer of the debtor;
 - (iii) a person in control of the debtor;
 - (iv) a partnership in which the debtor is a general partner;
 - (v) a general partner in a partnership described in Subsection (7)(b)(iv);
 - (vi) a limited liability company of which the debtor is a member or manager; or
 - (vii) a relative of a general partner, director, officer, or person in control of the debtor;
- (c) if the debtor is a partnership:
 - (i) a general partner in the debtor;
 - (ii) a relative of a general partner in, a general partner of, or a person in control of the debtor;
 - (iii) another partnership in which the debtor is a general partner;
 - (iv) a general partner in a partnership described in Subsection (7)(c)(iii);
 - (v) a limited liability company of which the debtor is a member or manager; or
 - (vi) a person in control of the debtor;
- (d) if the debtor is a limited liability company:
 - (i) a member or manager of the debtor;
 - (ii) another limited liability company in which the debtor is a member or manager;
 - (iii) a partnership in which the debtor is a general partner;
 - (iv) a general partner in a partnership described in Subsection (7)(d)(iii);
 - (v) a person in control of the debtor; or
 - (vi) a relative of a general partner, member, manager, or person in control of the debtor;
- (e) an affiliate, or an insider of an affiliate as if the affiliate were the debtor; and
- (f) a managing agent of the debtor.

(8) "Lien" means a charge against or an interest in property to secure payment of a debt or performance of an obligation, and includes a security interest created by agreement, a judicial lien obtained by legal or equitable process or proceedings, a common-law lien, or a statutory lien.

(9) "Person" means an individual, partnership, limited liability company, corporation, association, organization, government or governmental subdivision or agency, business trust, estate, trust, or any other legal or commercial entity.

(10) "Property" means anything that may be the subject of ownership.

(11) "Relative" means an individual or an individual related to a spouse, related by consanguinity within the third degree as determined by the common law, or a spouse, and includes an individual in an adoptive relationship within the third degree.

(12) "Transfer" means every mode, direct or indirect, absolute or conditional, or voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset, and includes payment of money, release, lease, and creation of a lien or other encumbrance.

(13) "Valid lien" means a lien that is effective against the holder of a judicial lien subsequently obtained by legal or equitable process or proceedings.

1993

25-6-3. Insolvency.

(1) A debtor is insolvent if the sum of the debtor's debts is greater than all of the debtor's assets at a fair valuation.

(2) A debtor who is generally not paying his debts as they become due is presumed to be insolvent.

(3) A partnership is insolvent under Subsection (1) if the sum of the partnership's debts is greater than the aggregate, at a fair valuation, of all of the partnership's assets and the sum of the excess of the value of each general partner's nonpartnership assets over the partner's nonpartnership debts.

(4) Assets under this section do not include property that has been transferred, concealed, or removed with intent to hinder, delay, or defraud creditors or that has been transferred in a manner making the transfer voidable under this chapter.

(5) Debts under this section do not include an obligation to the extent it is secured by a valid lien on property of the debtor not included as an asset.

1988

25-6-4. Value — Transfer.

(1) Value is given for a transfer or an obligation if, in exchange for the transfer or obligation, property is transferred or an antecedent debt is secured or satisfied. However, value does not include an unperformed promise made other than in the ordinary course of the promisor's business to furnish support to the debtor or another person.

(2) Under Subsection 25-6-5(1)(b) and Section 25-6-6, a person gives a reasonably equivalent value if the person acquires an interest of the debtor in an asset pursuant to a regularly conducted, noncollusive foreclosure sale or execution of a power of sale for the acquisition or disposition of the interest of the debtor upon default under a mortgage, deed of trust, or security agreement.

(3) A transfer is made for present value if the exchange between the debtor and the transferee is intended by them to be contemporaneous and is in fact substantially contemporaneous.

1988

25-6-5. Fraudulent transfer — Claim arising before or after transfer.

(1) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:

(a) with actual intent to hinder, delay, or defraud any creditor of the debtor; or

(b) without receiving a reasonably equivalent value in exchange for the transfer or obligation; and the debtor:

(i) was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or

(ii) intended to incur, or believed or reasonably should have believed that he would incur, debts beyond his ability to pay as they became due.

(2) To determine "actual intent" under Subsection (1)(a), consideration may be given, among other factors, to whether:

(a) the transfer or obligation was to an insider;

(b) the debtor retained possession or control of the property transferred after the transfer;

(c) the transfer or obligation was disclosed or concealed;

(d) before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;

(e) the transfer was of substantially all the debtor's assets;

(f) the debtor absconded;

(g) the debtor removed or concealed assets;

(h) the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;

(i) the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;

(j) the transfer occurred shortly before or shortly after a substantial debt was incurred; and

(k) the debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.

1988

25-6-6. Fraudulent transfer — Claim arising before transfer.

(1) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if:

(a) the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation; and

(b) the debtor was insolvent at the time or became insolvent as a result of the transfer or obligation.

(2) A transfer made by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made if the transfer was made to an insider for an antecedent debt, the debtor was insolvent at the time, and the insider had reasonable cause to believe that the debtor was insolvent.

1989

25-6-7. Transfer — When made.

In this chapter:

(1) A transfer is made:

(a) with respect to an asset that is real property other than a fixture, but including the interest of a seller or purchaser under a contract for the sale of the asset, when the transfer is so far perfected that a good-faith purchaser of the asset from the debtor against whom applicable law permits the transfer to be perfected cannot acquire an interest in the asset that is superior to the interest of the transferee; and

(b) with respect to an asset that is not real property or that is a fixture, when the transfer is so far perfected that a creditor on a simple contract cannot acquire a judicial lien other than under this chapter that is superior to the interest of the transferee.

(2) If applicable law permits the transfer to be perfected as provided in Subsection (1) and the transfer is not so perfected before the commencement of an action for relief under this chapter, the transfer is deemed made immediately before the commencement of the action.

(3) If applicable law does not permit the transfer to be perfected as provided in Subsection (1), the transfer is made when it becomes effective between the debtor and the transferee.

(4) A transfer is not made until the debtor has acquired rights in the asset transferred.

(5) An obligation is incurred:

(a) if oral, when it becomes effective between the parties; or

(b) if evidenced by a writing, when the writing executed by the obligor is delivered to or for the benefit of the obligee.

1988

25-6-8. Remedies of creditors.

(1) In an action for relief against a transfer or obligation under this chapter, a creditor, subject to the limitations in Section 25-6-9, may obtain:

(a) avoidance of the transfer or obligation to the extent necessary to satisfy the creditor's claim;

(b) an attachment or other provisional remedy against the asset transferred or other property of the transferee in

accordance with the procedure prescribed by the Utah Rules of Civil Procedure;

(c) subject to applicable principles of equity and in accordance with applicable rules of civil procedure:

(i) an injunction against further disposition by the debtor or a transferee, or both, of the asset transferred or of other property;

(ii) appointment of a receiver to take charge of the asset transferred or of other property of the transferee; or

(iii) any other relief the circumstances may require.

(2) If a creditor has obtained a judgment on a claim against the debtor, the creditor, if the court orders, may levy execution on the asset transferred or its proceeds. 1988

25-6-9. Good faith transfer.

(1) A transfer or obligation is not voidable under Subsection 25-6-5(1)(a) against a person who took in good faith and for a reasonably equivalent value or against any subsequent transferee or obligee.

(2) Except as otherwise provided in this section, to the extent a transfer is voidable in an action by a creditor under Subsection 25-6-8(1)(a), the creditor may recover judgment for the value of the asset transferred, as adjusted under Subsection (3), or the amount necessary to satisfy the creditor's claim, whichever is less. The judgment may be entered against:

(a) the first transferee of the asset or the person for whose benefit the transfer was made; or

(b) any subsequent transferee other than a good faith transferee who took for value or from any subsequent transferee.

(3) If the judgment under Subsection (2) is based upon the value of the asset transferred, the judgment must be for an amount equal to the value of the asset at the time of the transfer, subject to an adjustment as equities may require.

(4) Notwithstanding voidability of a transfer or an obligation under this chapter, a good-faith transferee or obligee is entitled, to the extent of the value given the debtor for the transfer or obligation, to:

(a) a lien on or a right to retain any interest in the asset transferred;

(b) enforcement of any obligation incurred; or

(c) a reduction in the amount of the liability on the judgment.

(5) A transfer is not voidable under Subsection 25-6-5(1)(b) or Section 25-6-6 if the transfer results from:

(a) termination of a lease upon default by the debtor when the termination is pursuant to the lease and applicable law; or

(b) enforcement of a security interest in compliance with Title 70A, Chapter 9a, Uniform Commercial Code — Secured Transactions.

(6) A transfer is not voidable under Subsection 25-6-6(2):

(a) to the extent the insider gave new value to or for the benefit of the debtor after the transfer was made unless the new value was secured by a valid lien;

(b) if made in the ordinary course of business or financial affairs of the debtor and the insider; or

(c) if made pursuant to a good-faith effort to rehabilitate the debtor and the transfer secured present value given for that purpose as well as an antecedent debt of the debtor.

2000

25-6-10. Claim for relief — Time limits.

A claim for relief or cause of action regarding a fraudulent transfer or obligation under this chapter is extinguished unless action is brought:

(1) under Subsection 25-6-5(1)(a), within four years after the transfer was made or the obligation was incurred or, if later, within one year after the transfer or obligation was or could reasonably have been discovered by the claimant;

(2) under Subsection 25-6-5(1)(b) or 25-6-6(1), within four years after the transfer was made or the obligation was incurred; or

(3) under Subsection 25-6-6(2), within one year after the transfer was made or the obligation was incurred.

1988

25-6-11. Legal principles applicable to chapter.

Unless displaced by this chapter, the principles of law and equity, including merchant law and the law relating to principal and agent, equitable subordination, estoppel, laches, fraud, misrepresentation, duress, coercion, mistake, insolvency, or other validating or invalidating cause, supplement this chapter's provisions.

1988

25-6-12. Construction of chapter.

This chapter shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this chapter among states enacting it.

1988

25-6-13. Applicability of chapter.

This act applies when any transfer occurs after the effective date of this act.

1988

78-18-1. Basis for punitive damages awards — Section inapplicable to DUI cases — Division of award with state.

(1) (a) Except as otherwise provided by statute, punitive damages may be awarded only if compensatory or general damages are awarded and it is established by clear and convincing evidence that the acts or omissions of the tortfeasor are the result of willful and malicious or intentionally fraudulent conduct, or conduct that manifests a knowing and reckless indifference toward, and a disregard of, the rights of others.

(b) The limitations, standards of evidence, and standards of conduct of Subsection (1)(a) do not apply to any claim for punitive damages arising out of the tortfeasor's operation of a motor vehicle while voluntarily intoxicated or under the influence of any drug or combination of alcohol and drugs as prohibited by Section 41-6-44.

(c) The award of a penalty under Section 78-11-15 or 78-11-16 regarding shoplifting is not subject to the prior award of compensatory or general damages under Subsection (1)(a) whether or not restitution has been paid to the merchant prior to or as a part of a civil action under Section 78-11-15 or 78-11-16.

(2) Evidence of a party's wealth or financial condition shall be admissible only after a finding of liability for punitive damages has been made.

(3) In any judgment where punitive damages are awarded and paid, 50% of the amount of the punitive damages in excess of \$20,000 shall, after payment of attorneys' fees and costs, be remitted to the state treasurer for deposit into the General Fund.

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

MACRIS & ASSOCIATES, INC., Plaintiff, vs. NEWAYS, INC, et al., Defendants.	CASE NUMBER: 950400093 DATED: JULY 18, 2001 RULING ANTHONY W. SCHOFIELD, JUDGE
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This case is before the court on defendants' motion for summary judgment. Having heard the arguments and reviewed the memoranda of counsel, I now issue this ruling granting the motion.

Factual and Procedural Background

1. On April 17, 1991, Macris and Associates, Inc. (Macris), filed an action in this court against defendant Images and Attitude, Inc. (Images) claiming that Images breached its distributorship contract with Macris by improperly terminating Macris' auto-qualification status as a distributor and by improperly terminating the distributor agreement (this lawsuit is hereafter referred to as "*Macris I*").

2. *Macris I* went to trial in February 1995 and a judgment in favor of

Macris and against Images was rendered on September 15, 1995, in the principal sum of \$360,681.20.

3. On or about September 1, 1992, and while *Macris I* was pending, Images purportedly sold its assets and multi-level marketing business, including down line organization, to Neways, Inc. ("Neways"), a newly formed Utah Corporation.

4. Neways, was formed by Thomas E. Mower and Leslie D. Mower, the principals of Images.

5. Neways allegedly sold the same product line as Images had done, but with the products relabeled as Neways products, and allowed Images distributors to apply for and receive the same distributor status in Neways as they had enjoyed in Images.

6. Because of the termination of its distributorship contract, Macris was not allowed to apply for or receive distributorship status in Neways.

7. On February 14, 1995, two days before the *Macris I* trial, Macris filed this lawsuit against Neways, Thomas E. Mower, and Leslie D. Mower (this lawsuit is hereafter referred to as "*Macris II*"), under legal theories of fraudulent transfer, successor liability, and alter ego, asserting that the transfer of assets from Images to Neways had left Images without sufficient assets to cover any judgment rendered against it in *Macris I*.

8. On October 19, 1995, defendants in *Macris II* moved for summary judgment, contending that the Macris claims were barred by res judicata.

9. Macris countered that its claims against Neways arose after the initiation of *Macris I*, and that res judicata did not apply.

10. Macris also moved for summary judgment, arguing that because Neways had admitted in its own motion that it was privy to Images for purposes of res judicata, Macris should be granted summary judgment on its successor liability claim.

11. The trial court granted the Macris motion, holding that Neways was Images successor and therefore liable for the *Macris I* judgment. The trial court also held that res judicata did bar Macris from recovering further contract damages on its theories of alter ego, fraudulent conveyance or successor liability.

12. Neways appealed the trial court's successor liability ruling and Macris cross-appealed the court's ruling that Macris was barred by res judicata from recovering further contract damages.

13. The court of appeals reversed both summary judgments.

14. The Utah Supreme Court granted certiorari to Neways, and on December 5, 2000, affirmed the court of appeals, holding that Macris's claims of alter ego, fraudulent conveyance and successor liability were not barred by the doctrine of res judicata, but further ruling that the issue preclusion branch of the doctrine of res judicata precluded Macris from seeking further contract damages from Neways in *Macris II*.

15. Subsequent to the Supreme Court ruling, Macris filed a demand for payment against Images. In response, a third corporation owned by principals

Thomas and Leslie Mower, Nevada corporation Neways International, Inc., paid the *Macris I* judgment in full, including accrued interest.

16. Defendants now move for summary judgment, arguing that with the judgment from *Macris I* paid, and because Macris is barred from seeking any further contract damages, the claims in *Macris II* all are moot, that there is no remaining issue as to any material fact, and that they are entitled to judgment of dismissal as a matter of law. Defendants further move for Rule 11 sanctions against Macris, contending that the continued maintenance of *Macris II* by Macris, including its opposition to the motion for summary judgment, is for purposes of harassment and to needlessly increase litigation costs.

Analysis & Ruling

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Rule 56(c), Utah Rules of Civil Procedure.

Furthermore, summary judgment is appropriate when the movant makes a showing which precludes, as a matter of law, the awarding of any relief to the respondent.

FMA Acceptance Co. v. Leatherby Ins. Co., 594 P.2d 1332 (Utah 1979).

Macris concedes that there is no dispute as to the material facts asserted by defendants in their moving papers. Thus, defendants are entitled to summary judgment if they are "entitled to judgment as a matter of law." Framed another way, the question may be asked whether, given the factual scenario asserted by

defendants and conceded by Macris, defendants are entitled to relief as a matter of law.

The starting point for defendants' analysis is that the Supreme Court has ruled in this case that no further contract damages are available to Macris other than the sums due under the *Macris I* judgment, a judgment which Macris concedes has been paid in full, principal and interest. Defendants thus assert that no further damages are available since the *Macris I* judgment has been satisfied,

In response Macris raises two claims: that it retains a consequential damage claim under the theories of fraudulent transfer, alter ego or successor liability and that it is entitled to an award of punitive damages for the fraudulent transfer made by Mowers. It then describes the consequential damages which it seeks as the attorney's fees which it had to incur in attempting to recover the judgment which it was awarded in *Macris I*.¹ I will treat each of these issues.

Consequential damages—attorney's fees.

As a general rule, attorney's fees are not recoverable in a contract action unless provided by statute or by contract. Neither of these exist.

Macris asserts that the third party litigation exception to the foregoing general rule applies in this case. That rule is best stated in *South Sandpitch Co. v. Pack*, 765 P.2d 1279, 1282 (Utah App. 1988):

¹ Macris asserts that its attorney fee claim is not inconsequential in amount, somewhere around \$65,000. Such an attorney's fee claim is in an amount that deserves careful consideration. While defendants may question the amount of fees, I see no real dispute Macris had to incur significant fees to obtain payment of the *Macris I* judgment. In short, a judgment entered in 1995 was not paid until 2001, six years later.

It is settled that when the natural consequences of one's negligence is another's involvement in a dispute with a third party, attorneys fees reasonably incurred in resolving the dispute are recoverable from the negligent party.

While *South Sandpitch* is a tort action and this exception most often is applied in tort actions, this exception also has been applied in breach of contract actions, see *Collier v. Heinz*, 827 P.2d 982(Utah 1992); and in claims for breach of a fiduciary duty, see *Tolman v. Winchester Hills Water Co., Inc.*, 912 P.2d 457 (Utah 1996).

At first blush, then, it would seem that if the third party litigation exception applies in this case, which Macris claims it does, Macris should be entitled to recover its attorney's fees. It overlooks, however, the controlling issue: whether attorney's fees under the third party litigation exception are recoverable in a statutory action.

I accept the Macris analysis that the third party litigation exception may apply in contract actions and in tort claims. The existing case law described above controls. But here Macris seeks to apply the third party litigation exception to a case arising under statute—the fraudulent transfer action. What Macris asks the court to do is reach past the plain language of the statute and apply a remedy where the legislature did not do so. While use of the third party litigation exception may be appropriate in contract or tort actions, this court should not extend existing law, which is what Macris asks, to apply that exception in a case arising out of a statute, especially where the legislature did not provide an attorney's fee remedy in that statute.

It is beyond dispute that the fraudulent transfer statute, *Utah Code Ann.* §§ 25-6-1, *et seq.*, does not provide for recovery of attorney's fees as a remedy. Yet, the legislature clearly knows how to create an attorney's fee remedy when it wishes. One need only look at the mechanics lien statute, *Utah Code Ann.* § 38-1-18. For whatever reason, the legislature chose not to include an attorney's fee provision in the fraudulent transfer statute. I decline to apply an exceptional remedy in a case where the legislature has not seen fit to impose just such a remedy. The third party litigation exception, which has been applied in tort and contract actions, cannot be read by the court to broaden an existing statute and provide a recovery neither contemplated nor intended by the legislature.

Absent the broadening effect of the third party litigation exception, attorney's fees are not recoverable in this action. And with that, there are no compensatory damages which are available for Macris. Defendants are entitled to judgment dismissing the compensatory damage claim as a matter of law.

Punitive damages.

The second item of recovery which Macris seeks is punitive damages. Again, on its face it appears that the actions of defendants may rise to the level where an award of punitive damages would be appropriate. But I deny this remedy also.

First, *Utah Code Ann.* § 78-18-1(1)(a) provides:

Except as otherwise provided by statute, punitive damages may be awarded only if compensatory or general damages are awarded and it is established by clear and convincing evidence that the acts or omissions of the tortfeasor are the result of willful and malicious or

intentionally fraudulent conduct, or conduct that manifests a knowing and reckless indifference toward, and a disregard of, the rights of others.

Here there is no award of general or compensatory damages, as the only compensatory damage claim asserted by Macris—attorney's fees—has been denied.

As a result, punitive damages are not available under this section. No other statutory basis for an award of punitive damages has been proffered.

Second, Macris asserts that other jurisdictions allow punitive damages as an element of recovery in a fraudulent transfer action. While that may be, I again decline to find a remedy in a statute which the legislature did not see fit to include.

On its face the fraudulent transfer does not provide for recovery of punitive damages.² I decline to extend that statute and create a remedy where the legislature chose not to. The punitive damage claim must be dismissed.

Successor liability and alter ego theories.

The Macris complaint also alleges claims for relief under successor liability and alter ego. Yet, it is clear that these two theories are asserted as a means of recovering the breach of contract damages owed by Images to Macris under the *Macris I* judgment. That judgment has been satisfied, though, and no further remedy exists. Further, since these theories are intended as a vehicle for Macris to

² I find it interesting that the legislature created a fraudulent transfer cause of action without creating a punitive damage remedy. The gist of a fraudulent transfer action is that the transferor took an action, generally in bad faith or with a malicious intent, to defeat the legitimate claims of a creditor or other person having a claim against the transferor. Where actual intent to hinder or delay collection of a debt or an intent to significantly undercapitalize a business must be proven, the issue of bad faith is obvious. Yet the legislature chose not to create a punitive damage remedy. This court should lightly tread where the legislature has chosen not to act.

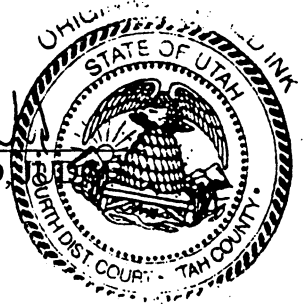
recover breach of contract damages, the Supreme Court's holding that no further breach of contract damages are available precludes any recovery under these legal theories. Defendants are entitled to judgment as a matter of law dismissing these claims.

Defendants' motion for summary judgment is granted. Pursuant to Rule 4-504, Utah Code of Judicial Administration, defendants' counsel is directed to prepare an appropriate order.

Dated this 18 day of July, 2001.

BY THE COURT:

Anthony W. Schofield
ANTHONY W. SCHOFIELD



736

MAILING CERTIFICATE

I hereby certify that a true and correct copy of the foregoing was mailed to the following, postage prepaid, this 18th day of July, 2001:

Bruce Murdock
150 East 400 North
Salem, Utah 84653

David Eckersley
City Centre I, Suite 900
175 East 400 South
Salt Lake City, Utah 84111

CARMA BUSH
CLERK OF THE COURT

By *J. Christensen*
Deputy Clerk

725