

2004

# Medisys Technologies, Inc. v. Interstate Transfer Co. : Brief of Appellant

Utah Court of Appeals

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Michael D. Ward; Bleakley, Cypher, Parent, Warren and Quinn; Attorneys for Appellants.

Mark W. Dykes; Jennifer A. Brown; LeBoeuf. Lamb, Greene and McRae; Jon Coombs; Attorneys for Appellees.

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IN THE UTAH COURT OF APPEALS

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MEDISYS TECHNOLOGIES, INC. a Utah  
Corporation,

Plaintiff and Appellant,

-VS-

INTERSTATE TRANSFER CO.,

Defendant and Appellee,

BRETT PHILLIPS, E. CARL ANDERSON,  
WILLIAM H. MORRIS, MARILYN MORRIS  
AND BARBARA LARKINS,

Intervenors and  
Appellees.

Case No. 20040029-CA

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OPENING BRIEF OF APPELLANT, MEDISYS TECHNOLOGIES, INC.

---

APPEAL FROM THE ORDERS OF THE HONORABLE RONALD E. NEHRING, THIRD  
JUDICIAL DISTRICT COURT JUDGE, DATED APRIL 2, 2001 AND DECEMBER 1, 2003

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MARK W. DYKES - 5709  
JENNIFER A. BROWN - 9514  
LEBOEUF, LAMB, GREENE & MACRAE, LLP  
1000 Kearns Building  
136 South Main Street  
Salt Lake City, Utah 84101  
Telephone (801) 320-6700  
Facsimile: (801) 359-8256  
Michael D. Ward  
Bleakley Cypher Parent Warren & Quinn  
Attorneys for Intervenors and Appellees

JOHN MICHAEL COOMBS - 3639  
MABEY & COOMBS, L.C.  
3098 South Highland Drive, Suite 323  
Salt Lake City, Utah 84106-3085  
Telephone: (801) 467-2421  
Facsimile: (801) 467-3256  
Attorneys for Defendant and Appellee

DAVID W. SCOFIELD - 4140  
PETERS SCOFIELD PRICE  
*A Professional Corporation*  
340 Broadway Centre  
111 East Broadway  
Salt Lake City, Utah 84111  
Telephone: (801) 322-2002  
Facsimile: (801) 322-2003

MICHAEL D. WARD - P43632  
BLEAKLEY, CYPHER, PARENT, WARREN & QUINN  
120 Ionia Avenue, S. W., Suite 300  
Grand Rapids, Michigan 49503  
Telephone: (616) 234-0813  
Facsimile: (616) 774-7016

Attorneys for Medisys Technologies, Inc.

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LEBOEUF, LAMB, GREENE & MACRAE, LLP  
1000 Kearns Building  
136 South Main Street  
Salt Lake City, Utah 84101  
Telephone: (801) 320-6700  
Facsimile: (801) 359-8256

Attorneys for Intervenors and Appellees

JOHN MICHAEL COOMBS - 3639  
MABEY & COOMBS, L.C.  
3098 South Highland Drive, Suite 323  
Salt Lake City, Utah 84106-3085  
Telephone: (801) 467-2421  
Facsimile: (801) 467-3256  
Attorneys for Defendant and Appellee

DAVID W. SCOFIELD - 4140  
PETERS SCOFIELD PRICE  
*A Professional Corporation*  
340 Broadway Centre  
111 East Broadway  
Salt Lake City, Utah 84111  
Telephone: (801) 322-2002  
Facsimile: (801) 322-2003

MICHAEL D. WARD - P43632  
BLEAKLEY, CYPHER, PARENT, WARREN & QUINN  
120 Ionia Avenue, S. W., Suite 300  
Grand Rapids, Michigan 49503  
Telephone: (616) 234-0813  
Facsimile: (616) 774-7016

Attorneys for Medisys Technologies, Inc.

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## JURISDICTION

This matter was transferred to the Court of Appeals by the Utah Supreme Court pursuant to UTAH CODE ANN. § 78-2-2(4). This Court has Jurisdiction to decide appellants' appeal pursuant to UTAH CODE ANN. § 78-2-2(3)(j).

## STATEMENT OF ISSUES PRESENTED ON APPEAL

1. **Issue:** Did the trial court err in awarding attorney fees to the interveners, who joined the litigation to set aside a judgment of permanent injunction against the Defendant, Interstate Transfer Co., and not a restraining order or preliminary injunction, that was premised in any way upon UTAH R. CIV. P. 65A?

**Standard of Review:** Whether attorney fees should be awarded is a legal issue that we review for correctness. *Valcarce v. Fitzgerald*, 961 P.2d 305, 315 (Utah 1998).

2. **Issue:** Did the fees awarded by the trial court improperly include fees that interveners would have incurred in litigating the underlying case?

**Standard of Review:** Whether fees are recoverable under UTAH R. CIV. P. 65A is a question of law, reviewed for correctness. *Ikon Office Solutions v. Crook*, 2000 UT App. 217, ¶ 9, 6 P.3d 1143.

3. **Issue:** Did the trial court err in determining the reasonableness of attorney fees as a matter of law, without an evidentiary hearing, when there was conflicting evidence?

**Standard of Review:** The standard of review for a summary judgment is correction of error. "Because summary judgment is granted as a

matter of law rather than fact, the appellate court is free to reappraise the trial court's legal conclusions. The appellate court reviews those conclusions for correctness, without according deference to the trial court." *Brown v. Weis*, 871 P.2d 552, 559 (Utah Ct. App. 1994) (citations omitted).

### **APPLICABLE STATUTES AND RULES**

UTAH R. CIV. P. 12(c), Defenses:

Motion for judgment on the pleadings. After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

UTAH R. CIV. P. 52(a), Findings by the court:

Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58A; in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. The trial court need not enter findings of fact and conclusions of law in rulings on motions, except as provided in Rule 41(b). The court shall, however, issue a brief written statement of the ground for its decision on all motions granted under Rules 12(b), 50(a) and (b), 56, and 59 when the

motion is based on more than one ground.

UTAH R. CIV. P. 54, Judgment; costs:

(c) Demand for judgment.

(c)(1) Generally. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings. It may be given for or against one or more of several claimants; and it may, when the justice of the case requires it, determine the ultimate rights of the parties on each side as between or among themselves.

(c)(2) Judgment by default. A judgment by default shall not be different in kind from, or exceed in amount, that specifically prayed for in the demand for judgment.

UTAH R. CIV. P. 56(c), Summary Judgment:

Motion and proceedings thereon. The motion, memoranda and affidavits shall be filed and served in accordance with CJA 4-501. The judgment sought shall be rendered 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 a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

UTAH R. CIV. P. 65A(c)(2):

*Amount not a limitation.* The amount of security shall not establish or limit the amount of costs, including reasonable attorney fees incurred in connection with the restraining order or preliminary injunction, or damages that may be awarded to a party who is found to have been wrongfully restrained or enjoined.

## **STATEMENT OF THE CASE**

### **A. Nature of the Case.**

This appeal is from the final judgment of the Third Judicial District Court dismissing the original proceeding, without prejudice, but awarding attorney fees. The propriety of the dismissal is not appealed, the fee award is.

### **B. Course of Proceedings.**

Plaintiff brought this action to enjoin the transfer of certain shares of stock and filed a motion for judgment on the pleadings concurrently with the filing of the complaint. The allegations of the complaint were generally admitted by defendant, Interstate Transfer Co. ("Interstate"), and Interstate stipulated to entry of judgment on the pleadings.

On June 28, 2000, the trial court entered judgment in accordance with the plaintiff's motion for judgment on the pleadings, effectively terminating the litigation between plaintiff and Interstate. Thereafter, plaintiff and Interstate consented to intervention by Brett Phillips, E. Carl Anderson, William H. Morris, Marilyn Morris, and Barbara Larkins ("Intervenors"), who then filed an emergency motion to dissolve the injunction previously entered by the trial court.

The trial court dissolved the injunction created in its prior judgment, dismissed the case, with prejudice, and thereafter awarded the Intervenors attorney fees pursuant to UTAH R. CIV. P. 65A.

### **C. Disposition By Trial Court.**

The underlying case was dismissed without prejudice by the trial court.

## STATEMENT OF FACTS

1. On June 6, 2000, Plaintiff Medisys Technologies, Inc. ("Medisys"), an issuer of publically-traded securities, by and through its original counsel herein, Richard J. Leedy, filed a complaint in the Third Judicial District Court, seeking a permanent injunction to prevent its transfer agent, Defendant Interstate Transfer Co., from registering the transfer of certain Medisys stock, represented by certificates issued in an alleged corporate reorganization, that Medisys alleged had been cancelled. See Verified Complaint, R. 1-6, at ¶¶ 2, 12, 14. In its prayer for relief, Medisys requested that the trial court "enjoin Defendant [Interstate Transfer Co.] from transferring Medisys Technologies, Inc. stock in certificates numbered 2986, 3366, 3364, 2984 and all certificates issued after this certificate, #2985, 3462, 3365, 3744, 3746, 3747, 3748, 3749 until further order by this or another court of competent jurisdiction." R. 4.

2. Medisys, in its Verified Complaint, advised the trial court that it already had litigation pending, in a separate federal action, against the putative owners of the cancelled shares, who were not parties to this litigation. See Verified Complaint, at ¶ 11, R. 3.

3. Medisys, in its Verified Complaint, advised the trial court that its transfer agent, the Defendant, Interstate Transfer Co., had "indicated its intent to require Plaintiff to comply with 70A-8-405 Utah Code Ann. [sic] and obtain legal process as set forth in Subsection 2(b)(iii) of the above cited section and a court order as set forth in Subsection 4(a) thereof." Verified Complaint, at ¶ 15, R. 4.

4. Medisys, in its Verified Complaint, advised the trial court that it sought an order that would have no "res adjudicata effect on present holders of the Medisys

certificates and shares.” Verified Complaint, at ¶ 17, R. 4.

5. In keeping with the alleged fact that it was Defendant Interstate Transfer Co. which desired Medisys to procure an order under UTAH CODE ANN. § 70A-8-403(4)(a), Defendant filed its Answer on June 6, 2000, the same day the Verified Complaint was filed, admitting all material allegations of the Verified Complaint. See Answer, R. 9-11.

6. The same day that the Verified Complaint and the Answer were filed, June 6, 2000, Medisys also filed a motion for judgment on the pleadings, pursuant to UTAH R. CIV. P. 12(c). R. 12-13.

7. Again in keeping with Defendant Interstate Transfer Co.’s own desire to be protected by Utah Code Ann. § 70A-8-403(4)(a), Defendant filed, again on June 6, 2000, the date the Verified Complaint and Answer were filed, its “Response to Plaintiff’s Motion for Judgment on the Pleadings,” R. 14-15, stating that the motion for judgment on the pleadings was not opposed by Defendant, Interstate Transfer Co. R. 14-15.

8. On June 28, 2000, the trial court ruled on the pending motion for judgment on the pleadings and, pursuant to UTAH R. CIV. P. 12(c), entered its final judgment under UTAH R. CIV. P. 54(c)(1), granting Medisys precisely and fully the relief it prayed for in the Verified Complaint, in the form of the trial court’s “Injunction and Order.” R. 62-63.

9. The trial court specifically granted the requested relief “[b]ased upon the Plaintiff’s Verified Complaint, Defendant’s Answer, Plaintiff’s Motion for Judgment on the Pleadings and Defendant’s consent to entry of this order [underlined phrase added by hand of the Court.]” Based thereon, the trial court held:

It is hereby ORDERED that Defendant Interstate Transfer Co. is enjoined from transferring shares of stock in the Medisys Technologies, Inc. certificates numbered 2986, 3366, 3364, 2984 and all certificates issued after this certificate, #2985, 3462, 3365, 3744, 3746, 3747, 3748, 3749.

R. 62. The litigation between the then-existing parties, Medisys and Interstate Transfer Co., thus ended with that judgment, on June 28, 2000.

10. According to the record herein, on July 3, 2000, Medisys and Interstate Transfer Co. consented to intervention by Brett Phillips, E. Carl Anderson, William H. Morris, Marilyn Morris, and Barbara Larkins ("Intervenors") on July 3, 2000. See R. 20-21.

11. On July 28, 2000, Intervenors filed an "Emergency Motion to Dissolve Ex Parte Injunction." R. 23. Although the motion itself does not identify its procedural basis, the "Memorandum of Defendant Intervenors in Support of Emergency Motion to Dissolve Injunction, [hereinafter 'Intervenors' Mem.]" filed the same date as the motion, specifically asserts in the heading for all of their arguments: "The Injunction is a *Sub Rosa* Restraining Order Against the Intervenors, Was Wrongly Issued Without Any of the Safeguards Demanded by UTAH R. CIV. P. 65A, and Should Be Immediately Dissolved." Intervenors' Mem. at 6, R. 128.

12. Intervenors did not invoke, for their procedural standing, any portion of UTAH R. CIV. P. 60(b), to set aside Medisys' final judgment, but instead asserted only irregularities under UTAH R. CIV. P. 65A, governing preliminary injunctive relief that was neither sought nor obtained in the case. See Intervenors' Mem., *passim*, R. 120-138, and "Memorandum In Response To Motion to Dissolve Injunction," at 2 ("Proposed intervenors complain that the injunction did not expire within ten days or that the

requirements of Rule 65A, Utah Rules of Civil Procedure, including the standards advocated by the Tenth Circuit Court of Appeals and adopted by the Utah Supreme Court in Rule 65A and in particular subsection (e) thereof were not followed. Proposed interveners fail to understand that the injunction and order in this case is a result of a judgment on the pleadings and is permanent. The provisions argued by proposed interveners are for preliminary injunctions and temporary restraining orders; not permanent injunctions. See Rule 65A, Utah Rules of Civil Procedure, and subsection (e) thereof.”), R. 151.

13. Interveners also filed an “Answer in Intervention,” R. 109-112, on July 28, 2000. In that answer, Interveners raised the affirmative defense that: “This lawsuit should be dismissed in favor of prior pending actions between the Interveners and Medisys.” R. 112.

14. On August 18, 2000, the trial court entered its order dissolving the injunction on the basis of that defense: “This Court believes that the issue of fraud should be decided by one court and that court should be the United States District Court for the Middle District of Louisiana. . . . In this regard it is hereby ordered that the permanent injunction issued by this Court on June 20, 2000 is hereby dissolved.” R. 223.

15. On September 11, 2000, the trial court entered an order providing that “[t]he Injunction will automatically and permanently dissolve on Tuesday, August 22, 2000 at 5:01 p .m., without need of any further Court action.” R. 238-39.

16. On October 27, 2000, Interveners filed their “Motion of Defendant Interveners For An Award of Fees.” R. 391 The motion itself does not identify the

procedural basis on which it is brought, but that basis is identified in the “Memorandum of Defendant Interveners in Support of an Award of Fees.” R. 310-20. Interveners requested an award of \$30,846.00 in attorneys’ fees on grounds that they were “wrongfully enjoined” and thus entitled to fees pursuant to UTAH R. CIV. P. 65A(c)(2). See R. 315-19, 391.

17. The trial court awarded interveners all of their requested fees, including fees that they would have incurred in the underlying litigation. See Minute Entry, signed by the Honorable Ronald E. Nearing on April 2, 2001, entered April 3, 2001, R. 475-76.

18. The trial court made its fee awards without an evidentiary hearing, despite having received a controverting affidavit from Medisys’ counsel, Michael D. Ward, R. 437-41, and, as to supplemental fees sought (for obtaining fees), an expert witness, John T. Anderson, opining as to the unreasonableness of the fees sought. See Affidavit of John T. Anderson, R. 514-18.

19. The trial court entered no findings of fact concerning the reasonableness of particular portions of the fees requested and no findings as to why the fees sought and obtained by Interveners would not have been incurred in litigation of the underlying merits of the Verified Complaint. See R 475-76.

20. In its Minute Entry of June 18, 2001, the trial court expressly held that UTAH R. CIV. P. 65A authorized its entire fee award, including fees to obtain fees. See R. 535.

21. On February 5, 2002, the trial court entered its order awarding Interveners \$36,321.80 in fees under UTAH R. CIV. P. 65A. See R. 557-58.

22. The final order dismissing the case without prejudice, on “the grounds that

there is a concurrent pending action in the United States District Court for the District of Utah involving similar parties and claims[,]” was entered by the trial court on December 1, 2003, R. 684-85, and this appeal of the attorney fee award followed, on December 31, 2003. R. 687-99.

### **SUMMARY OF ARGUMENT**

The entry of the original injunction in this case was pursuant to a motion for judgment on the pleadings under UTAH R. CIV. P. 12(c) and was entered as a final judgment under Rule 54(c). As such, no basis for attorney fees exists and the trial court erred in awarding fees under the rule on preliminary injunctions, UTAH R. CIV. P. 65A. Even if Rule 65A were applicable, however, (1) the Interveners do not have standing under the Rule to seek an award of fees because they were not enjoined or restrained; (2) the trial court made no effort to exclude from its award fees that would have been incurred in litigating the underlying merits; (3) controverting affidavit were submitted on the issue of reasonableness and the trial court failed to hold an evidentiary hearing to resolve those conflicts; and (4) an award of fees to obtain fees does not fall within the scope of Rule 65A.

### **ARGUMENT**

- I. THE ORIGINAL INJUNCTION IN THIS CASE WAS A FINAL JUDGMENT, ISSUED PURSUANT TO RULES 12(C) AND 54(C), AND NOT A PRELIMINARY INJUNCTION, ISSUED UNDER RULE 65A; THE AWARD OF ATTORNEY FEES PURSUANT TO RULE 65A IS THEREFORE ERRONEOUS AND MUST BE REVERSED.**

“The traditional American rule, and the rule in Utah, is that attorney fees are not recoverable by a prevailing party unless authorized by statute or contract.” *Faust v. KAI*

*Tech., Inc.*, 2000 UT 82, ¶ 17, 15 P.3d 1266. There is no statute or contract in this case on which the trial court relied in awarding fees in this case.

Apparently recognizing that no statute or contract would allow them their fees herein, Interveners sought a fee award pursuant to, and the trial court ultimately awarded fees under, the rule governing fee awards for dissolving wrongful preliminary injunctions, UTAH R. CIV. P. 65A(c)(2). Interveners ignored the actual procedural posture of the case, that a final judgment had entered on Medisys' Rule 12(c) motion for judgment on the pleadings.

Interveners substituted a strawman premise for the actual procedural posture of the case, by citing Rule 65A in their original memorandum supporting their emergency motion to "dissolve" the permanent injunction, by arguing: "Article 8 nowhere permitted an injunction against Interveners. [footnote omitted] Utah Rule of Civil Procedure 65A thus governs this case." R. 131. There is no logical link between the strawman (and incorrect) premise that Article 8 of the Uniform Commercial Code "nowhere permitted an injunction against Interveners" and Interveners' sole supposed conclusion that "Rule 65A thus governs this case."

The plain language of Rule 65A deals with *preliminary* relief, not permanent injunctions entered upon the pleadings pursuant to Rule 12(c). Rule 65A does not *govern* cases, it provides an interim remedy before the court reaches the ultimate merits of cases. The procedural posture of this case is governed instead by Rule 12(c) and 54(c), because the trial court did reach the ultimate merits when it ruled on Plaintiff's motion for judgment on the pleadings, pursuant to Rule 12(c).

Interveners complained that Medisys and its transfer agent agreed that the

injunction should issue against the transfer agent to protect it from liability under the Uniform Commercial Code, because Interveners were affected in their ability to trade shares publically by the injunction against the transfer agent. The fact that Interveners characterized this lawsuit, prior to their intervention, as a “sham” did not serve to alter the case’s actual procedural posture, as entailing a judgment entered pursuant to Rule 12(c). Nor could Interveners’ characterizations, or their expressions of outrage, engage Rule 65A, governing preliminary injunctive relief, so as to provide a basis in that procedural rule for an award of fees, when no party had invoked that rule and the trial court did not provide interim relief pursuant to that rule.

Whatever remedies Interveners’ may seek elsewhere, for whatever claims they believe they have for wrongful injunction and damages, including fees to set it aside, in whatever other forums they choose, the procedure invoked in this forum did not entail any preliminary injunction under Rule 65A and Rule 65A does not govern a fee award, here or elsewhere. Instead, an injunction was obtained on the merits, pursuant to Rule 12(c). The trial court’s award of fees under Rule 65A must, therefore, be reversed, and the Interveners left to pursue their remedies in another forum.

## **II. EVEN IF RULE 65A WERE APPLICABLE, THE FEE AWARD IS ERRONEOUS.**

UTAH R. CIV. P. 65A provides the procedural framework, grounds for, and conditions under which temporary restraining orders and preliminary injunctions may be issued. One such condition is that, when a party is wrongfully enjoined, he may recover his "costs, including reasonable attorney fees incurred in connection with the restraining

order or preliminary injunction . . . ." UTAH R. CIV. P. 65A(c)(2). A party who has been wrongfully enjoined by way of a preliminary injunction issued pursuant to UTAH CIV. P. 65A may recover the attorney fees it reasonably "incurred in defending against [the] wrongfully obtained injunctive relief." *Tholen v. Sandy City*, 849 P .2d 592, 597 (Utah App. 1993) (citations omitted).

First, Interveners were not a party when the injunction issued, and were not actually "restrained or enjoined" themselves, as Rule 65A(c)(2) requires. The injunction prevented the transfer agent, Interstate Transfer, from registering transfers of certain certificates. The shares owned by the Interveners could still be sold by them. If Interveners prevailed in their collateral litigation with Medisys, or obtained appropriate interim relief in that litigation, Medisys, as the issuer of the shares, could have been required to order its transfer agent to register the transfer. Interveners thus do not have standing under the language of Rule 65A to seek a fee award. See *M.P.G.*

*Construction, Inc. v. Department of Transportation*, \_\_\_ So.2d \_\_\_, No. 2003 CA 0164, 2004 WL 691511, at \*5 ("Based upon our review of the record in this matter and the language of the aforementioned statute, we note that based upon its status as an intervenor in this litigation, Certified Coatings lacks status to assert a claim for costs and attorney fees.") (La. Ct. App. April 2, 2004). Since Interveners were not a "party" who was "restrained or enjoined" they have no standing under the rule to recover their fees, regardless of the indirect impact of the injunction on them.

Second, most, if not all, of the fees awarded would have been incurred in the underlying litigation, so are not awardable under Rule 65A. In *Ikon Office Solutions, Inc. v. Crook*, 2000 UT App. 217, 6 P.3d 1143, this Court plainly held that "the trial court

should not award . . . any fees that . . . would have [been] incurred in litigating the underlying case, even if those fees were incurred in [an effort] to show that [plaintiff] was unlikely to prevail on the merits of the underlying claim.” 2000 UT App. 217, ¶ 22, 6 P.3d at 1149. The trial court failed to make any findings in this regard, and that failure necessitates a reversal at least for the purpose of requiring findings as to what fees might be awardable. See UTAH R. CIV. P. 52(a) (mandating findings of fact where actions tried to the court).

Third, the trial court had in front of it affidavit evidence that controverted the affidavits proffered by Interveners as to the reasonableness of the sought-after fee award. In essence, the trial court entered a ruling under Rule 56, granting summary judgment on the reasonableness issue. Rule 56 does not allow such a factual determination to be made where conflicting affidavits raise a genuine issue of material fact, as they do here. “A trial court’s grant or denial of summary judgment is reviewed for correctness.” *Snow v. Rudd*, 998 P.2d 262, 265, 2000 UT 20, ¶ 9. “Summary judgment is appropriate only when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.” *SME Industries, Inc. v. Thompson, Ventulett, Stainback, and Assoc., Inc.*, 28 P.3d 669, 673, 2001 UT 54, ¶ 9 (citing UTAH R. CIV. P. 56(c)). “Doubts, uncertainties or inferences concerning issues of fact must be construed in the light most favorable to the party opposing summary judgment. Litigants must be able to present their cases fully to the court before judgment can be rendered against them unless it is obvious from the evidence before the court that the party opposing judgment can establish no right to recovery. The trial court must not weigh evidence or assess credibility.” *Mountain States Telephone &*

*Telegraph Co. v. Atkin, Wright & Miles, Chartered*, 681 P.2d 1258, 1261 (Utah 1984) (footnotes omitted). The Affidavit of Michael D. Ward goes over, in detail, numerous double charges and excessive billings that preclude a finding of reasonableness. R. 437-441. The Affidavit of John T. Anderson, likewise opines as to the unreasonableness of sought-after fees, in detail. R. 514-18. The trial court's weighing of the affidavits was improper, and it should have held an evidentiary hearing to resolve the conflicting factual assertions as to the reasonableness and necessity of the fees. The failure to hold such an evidentiary hearing and the entry of summary judgment in the face of conflicting affidavits is reversible error.

### **III. THE TRIAL COURT ERRED IN AWARDING ADDITIONAL FEES AND EXPENSES.**

The Interveners were not entitled to any additional fee award sought in their Motion for Clarification of Fee Award for several reasons. First, all these additional fees were incurred in connection with seeking a fee award. Such fees are not compensable under Rule 65A because they were not incurred in obtaining dissolution of the injunction.

#### **A. The Interveners Should Not Be Awarded Any Fees Incurred in Preparing or Arguing their Motion for Fees.**

The Interveners "are only entitled to `fees . . . incurred in defending against wrongfully obtained injunctive relief.'" *Tholen*, 849 P.2d at 597. All of the additional sums the Interveners sought were incurred in attempting to secure a fee award, not in defending against or obtaining dissolution of the injunction. Accordingly, the fees cannot be properly awarded under Rule 65A and the Interveners' motion for clarification should

be denied.

**B. The Trial Court Erred When It Granted the Interveners' Request for Additional Fees Because the Number of Hours Claimed for Preparing and Arguing Their Fee Application Is Patently Unreasonable.**

The additional fees for obtaining fees that Interveners sought were patently unreasonable. Including amounts already awarded by the trial court, the Interveners claimed a total of \$16,172.54 in fees and expenses relating solely to their efforts to obtain a fee award. Even if such fees could be recovered under Rule 65A, the amount of such fees claimed by Interveners in this case was unreasonably high, especially when the amount of claimed fees is considered against the relative brevity of the hearing on the Interveners' fee application. (See Anderson Affidavit R. 514-18.)

**C. The Trial Court Erred In Granting The Interveners' Request for Additional Fees Because Such Fees were Unnecessarily Incurred.**

The Interveners' local counsel, Mr. Dykes, shouldered the responsibility for drafting the Interveners' motion for fees and supporting memoranda and also argued the matter. Mr. Dykes was more than competent to handle the fee request. Nonetheless, in addition to the fees relating to Mr. Dykes efforts in this regard, the Interveners sought approximately \$11,000 for the unnecessary efforts of their Florida counsel. There was no need for Mr. Spencer to prepare for the one hour hearing on the motion for attorney fees or to travel to Utah to attend the hearing. Accordingly, the Court should not have awarded any fees for the time and expenses of Mr. Spencer relating to the motion for fees for obtaining fees.

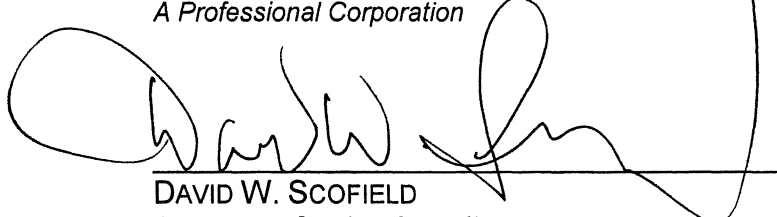
### CONCLUSION

The trial court erred in awarding fees to the Interveners pursuant to Rule 65A. Moreover, even should this Court find that the trial court did not err in granting the Interveners motion for an award of fees, the amount actually awarded was unreasonable in the circumstances and not available under Rule 65A as going to the underlying merits.

For these reasons, the order of the trial court awarding fees should be reversed and the matter remanded with instructions that no fees may be awarded in this case.

RESPECTFULLY SUBMITTED this 26<sup>th</sup> day of May, 2004.

**PETERS SCOFIELD PRICE**  
*A Professional Corporation*



DAVID W. SCOFIELD  
Attorneys for the Appellants

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that two true and correct copies of the above and foregoing Appellants' Opening Brief were mailed, postage prepaid, this 26<sup>th</sup> day of May, 2004, to the following:

Mark W. Dykes  
LEBOEF, LAMB GREENE & MACRAE  
1000 Kearns Building  
136 South Main Street  
Salt Lake City, UT 84101

John Michael Coombs  
MABEY & COOMBS, L.C.  
3098 S. Highland Drive, Suite 323  
Salt Lake City, UT 84106-3085



David W. Scofield

# **APPENDIX 1**

ORDER PREPARED AND SUBMITTED BY:  
Lon A. Jenkins #4060  
Mark W. Dykes, #5067  
Attorneys for Defendants in Intervention  
LEBOEUF, LAMB, GREENE & MACRAE, L.L.P.  
1000 Kearns Building  
136 South Main Street  
Salt Lake City, Utah 84101  
Telephone: (801) 320-6700

**FILED DISTRICT COURT**  
Third Judicial District

FEB 12 2001

SALT LAKE COUNTY  
By                      Deputy Clerk

IN THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR SALT LAKE COUNTY

STATE OF UTAH

---

MEDISYS TECHNOLOGIES, INC.	)	Civil No.: 000904474
	)	
	)	Judge Ronald E. Nehring
Plaintiff,	)	
	)	[PROPOSED]
vs.	)	ORDER GRANTING INTERVENERS'
	)	MOTION FOR AN AWARD OF FEES
INTERSTATE TRANSFER CO.,	)	
	)	
Defendants.	)	

---

On January 19, 2001, the Court heard oral argument on the following motions:

1. The motion of Medisys Technologies, Inc. ("Medisys") for an order releasing the injunction bond posted in this matter, and

2. The motion of intervening defendants Brett Phillips, E. Carl Anderson, William H. Morris, Marilyn Morris, and Barbara Larkins ("Interveners") for an award of attorneys' fees.

Medisys was represented by Michael D. Ward and Richard J. Leedy. The Interveners were represented by Thomas E. Spencer and Mark W. Dykes. Interstate Transfer Company, the defendant, did not appear.

456

Having considered the parties' written submissions and oral arguments, the Court hereby finds and orders as follows:

1 For reasons set forth during the Court's oral ruling on January 19, 2001, the Interveners' motion for fees was timely filed.


2. For reasons set forth during the Court's oral ruling on January 19, 2001, the injunction entered in this case was wrongful under Utah R.Civ.P. 65A, and the Interveners' motion for attorneys' fees is granted.

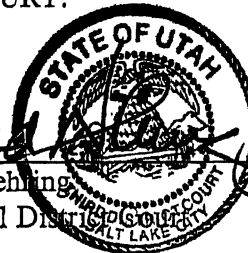
3. Within 10 days of January 19, 2001, Medisys may file an objection to the amount of fees requested by the Interveners. Medisys may request in such objection, if one is filed, an evidentiary hearing on the reasonableness of the fees requested.

4. The motion of Medisys to release the bond is denied.

DATED this 16 day of February 2001

BY THE COURT:

  
Ronald E. Nehring  
Third Judicial District Court  
SALT LAKE CITY



CERTIFICATE OF SERVICE

I certify that on the \_\_\_\_ day of February, 2001, copies of the foregoing Proposed Order were served by placing them in the United States mails, postage paid, addressed to the following:

John Michael Coombs  
124 South 600 East, #100  
Salt Lake City, UT 84102

Richard J. Leedy  
44 West Third South, #703  
Salt Lake City, UT 84101

Michael D. Ward  
Worsfold, MacFarland, McDonald, PLLC  
5940 Tahoe Drive, SE, Suite 200  
Grand Rapids, MI 49545

---

## **APPENDIX 2**

**COPY**  
**COPY**

**FILED DISTRICT COURT** G & M  
Third Judicial District 04 2001  
APR 03 2001  
SALT LAKE COUNTY  
By \_\_\_\_\_ Deputy Clerk  
LAT  
MWD

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

-----

MEDISYS TECHNOLOGIES, INC.,	:	MINUTE ENTRY
Plaintiff,	:	CASE NO. 000904474
vs.	:	
INTERSTATE TRANSFER CO.,	:	
Defendant.	:	

-----

Intervenor's Motion for Award of Fees was presented to me for decision pursuant to a Notice to Submit filed on March 8, 2001. I have previously determined that the intervenor is entitled to an award of attorney's fees in connection with its defense of the above-captioned action for injunctive relief. I now find that the amount of attorney's fees sought by the intervenor, \$30,846, is reasonable in light of the complexity of the litigation. I further find the hourly rates charged by intervenor's counsel to be reasonable. I reject plaintiff's contention that the activities of Mr. Dykes and Mr. Spencer were excessive in light of the issues presented. Lastly, I reject the contention that the fee application was inflated by double billing.

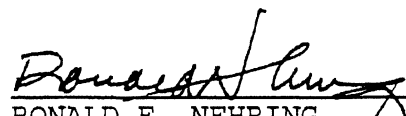
MEDISYS TECH. V.  
INTERSTATE TRANSFER

PAGE 2

MINUTE ENTRY

Intervenor's counsel shall prepare an Order consistent with  
this Minute Entry.

Dated this 2 day of <sup>April</sup>~~March~~, 2001.

  
\_\_\_\_\_  
RONALD E. NEHRING  
DISTRICT COURT JUDGE

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Minute Entry, to the following, this\_\_\_\_\_ day of March, 2001:

Richard J. Leedy  
Attorney for Plaintiff  
44 West 300 South, Suite 703  
Salt Lake City, Utah 84101

Michael D. Ward  
Attorney for Plaintiff  
5940 Tahoe Drive, SE, Suite 200  
Grand Rapids, Michigan 49545

John Michael Coombs  
Attorney for Defendant  
124 South 600 East, Suite 300  
Salt Lake City, Utah 84102

Lon A. Jenkins  
Mark W. Dykes  
Attorney for Defendants in Intervention  
136 S. Main, Suite 100  
Salt Lake City, Utah 84101

Thomas E. Spencer  
19235 U.S. Highway 41 North  
Lutz, Florida 33519

# **APPENDIX 3**

FILED DISTRICT COURT  
Third Judicial District

JUN 18 2001

By SALT LAKE COUNTY

Deputy Clerk

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

-----  
MEDISYS TECHNOLOGIES, INC., : MINUTE ENTRY  
Plaintiff, : CASE NO. 000904474  
vs. :  
INTERSTATE TRANSFER CO., :  
Defendant. :

-----  
Intervenor's Motion for Clarification was presented to me for decision pursuant to a Notice to Submit filed on May 10, 2001. My review of the file confirms the intervenor's observation that I overlooked the intervenor's application for fees associated with intervenor's application for a fee award. I reject the argument advanced by Medisys that Rule 65A does not authorize fee awards of this nature. I decline, however, to award fees associated with travel time and travel expenses.

I decline to accept Medisys' invitation to revisit my original fee determination.

Intervenor's counsel shall prepare an Order consistent with this Minute Entry.

Dated this 18 day of June, 2001.

*Ronald E. Nehring*  
RONALD E. NEHRING  
DISTRICT COURT JUDGE



MAILING CERTIFICATE


I hereby certify that I mailed a true and correct copy of the foregoing Minute Entry, to the following, this 18 day of June, 2001:

Bryon J. Benevento  
Matthew M. Boley  
Attorneys for Plaintiff  
15 W. South Temple, Suite 1200  
Salt Lake City, Utah 84101

Michael D. Ward  
Attorney for Plaintiff  
5940 Tahoe Drive, SE, Suite 200  
Grand Rapids, Michigan 49545

John Michael Coombs  
Attorney for Defendant  
124 South 600 East, Suite 300  
Salt Lake City, Utah 84102

Lon A. Jenkins  
Mark W. Dykes  
Attorney for Defendants in Intervention  
136 S. Main, Suite 100  
Salt Lake City, Utah 84101



# **APPENDIX 4**

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

-----  
MEDISYS TECHNOLOGIES, INC., : MINUTE ENTRY

Plaintiff, :

vs. :

INTERSTATE TRANSFER CO., :

Defendant. :

CASE NO. ~~99001474~~

THIRD DISTRICT COURT  
Third Judicial District

JUN 18 2001

SALT LAKE COUNTY

By                      Deputy Clerk

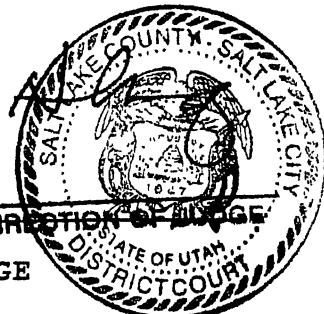
-----  
Intervenor's Motion for Clarification was presented to me for decision pursuant to a Notice to Submit filed on May 10, 2001. My review of the file confirms the intervenor's observation that I overlooked the intervenor's application for fees associated with intervenor's application for a fee award. I reject the argument advanced by Medisys that Rule 65A does not authorize fee awards of this nature. I decline, however, to award fees associated with travel time and travel expenses.

I decline to accept Medisys' invitation to revisit my original fee determination.

Intervenor's counsel shall prepare an Order consistent with this Minute Entry.

Dated this 18 day of June, 2001

By Ronald A. Stearns  
RONALD A. STEARNS  
DISTRICT COURT JUDGE



MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Minute Entry, to the following, this 18 day of June, 2001:

Bryon J. Benevento  
Matthew M. Boley  
Attorneys for Plaintiff  
15 W. South Temple, Suite 1200  
Salt Lake City, Utah 84101

Michael D. Ward  
Attorney for Plaintiff  
5940 Tahoe Drive, SE, Suite 200  
Grand Rapids, Michigan 49545

John Michael Coombs  
Attorney for Defendant  
124 South 600 East, Suite 300  
Salt Lake City, Utah 84102

Lon A. Jenkins  
Mark W. Dykes  
Attorney for Defendants in Intervention  
136 S. Main, Suite 100  
Salt Lake City, Utah 84101

  
\_\_\_\_\_

# **APPENDIX 5**

**PROPOSED ORDER PREPARED AND SUBMITTED BY:**

Lon A. Jenkins #4060  
Mark W. Dykes, #5067  
Attorneys for Defendants in Intervention  
LEBOEUF, LAMB, GREENE & MACRAE, L.L.P.  
1000 Kearns Building  
136 South Main Street  
Salt Lake City, Utah 84101  
Telephone: (801) 320-6700

**FILED DISTRICT COURT**  
Third Judicial District

FEB 5 2002

SALT LAKE COUNTY

By [Signature] Deputy Clerk

IN THE THIRD JUDICIAL DISTRICT COURT  
IN AND FOR SALT LAKE COUNTY  
STATE OF UTAH

---

MEDISYS TECHNOLOGIES, INC.	)	Civil No.: 000904474
	)	
Plaintiff,	)	Judge Ronald E. Nehring
	)	
vs.	)	<del>PROPOSED</del> ORDER
	)	CLARIFYING MINUTE
INTERSTATE TRANSFER CO.,	)	RULING AND AWARDING FEES
	)	
Defendants.	)	

---

On April 2, 2001, this Court issued its minute ruling granting Interveners an award of \$30,846.00 in fees incurred by the Interveners in responding to the injunction issued in this matter. The Interveners then filed a motion to clarify whether the Court intended to deny recovery of those sums expended by the Interveners in connection with the fee motion itself.

The Court subsequently clarified that it would award fees expended by the Interveners on the fee motion, but would not award fees for travel and travel related expenses incurred in connection with the fee motion.

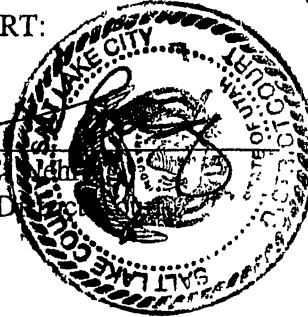
Therefore, based upon the affidavits and memorandum submitted by counsel for Interveners and the records of this case, it is hereby ORDERED that Medisys, Inc. shall pay the Interveners the sum of \$36,321.80.

~~REN~~ This amount shall be paid [by/within] \_\_\_\_\_.

DATED this 5 day of February, 2001 <sup>2</sup>

BY THE COURT:

Ronald E. White  
Hon. Ronald E. White  
Third Judicial District



CERTIFICATE OF SERVICE

Pursuant to Utah Code of Judicial Administration Rule 4-504(2), I certify that on the 21st day of November, 2001, copies of the foregoing were served by placing them in the United States mails, postage paid, addressed to the following:

John Michael Coombs  
Mabey & Coombs, L.C.  
Highland Park Plaza  
3098 South Highland Drive, Suite 323  
Salt Lake City, UT 84106

Bryon J. Benevento  
Matthew M. Boley  
Snell & Wilmer  
15 West South Temple, #1200  
Salt Lake City, UT 84101

Michael D. Ward  
Worsfold, MacFarland, McDonald, PLLC  
5940 Tahoe Drive, SE, Suite 200  
Grand Rapids, MI 49545

\_\_\_\_\_/s/\_\_\_\_\_  
\_\_\_\_\_

# **APPENDIX 6**

**Order submitted and prepared by:**

Mark W. Dykes (Utah Bar No. 5709)  
Jennifer A. Brown (Utah Bar No. 9514)  
LEBOEUF, LAMB, GREENE & MACRAE, L.L.P.  
1000 Kearns Building  
136 South Main Street  
Salt Lake City, UT 84101  
Telephone: (801) 320-6700  
Facsimile: (801) 359-8256

Attorneys for Appellees

**FILED DISTRICT COURT**  
Third Judicial District

DLC 2003  
By 10 SALT LAKE COUNTY  
Deputy Clerk

---

**IN THE THIRD JUDICIAL DISTRICT COURT  
SALT LAKE COUNTY, UTAH**

---

MEDISYS TECHNOLOGIES, INC., a Utah Corporation, )

Plaintiff, )

vs. )

INTERSTATE TRANSFER CO., )

Defendant, )

and )

Brett Phillips, E. Carl Anderson, William H. Morris, Marilyn Morris, and Barbara Larkins, )

Intervening Defendants . )

Civil No.: 000904474

**ORDER DISMISSING  
CASE WITHOUT PREJUDICE**

---

The Motion of the Intervening Defendants ("Intervenors") to Dismiss the Action with Prejudice came before the Court for hearing on October 8, 2003 at 8:30 a.m. David W. Scofield of Parsons, Davies, Kinghorn & Peters, P.C. appeared on behalf of the Defendant. Mark W. Dykes and Jennifer A. Brown of LeBoeuf, Lamb, Greene & MacRae, L.L.P. appeared

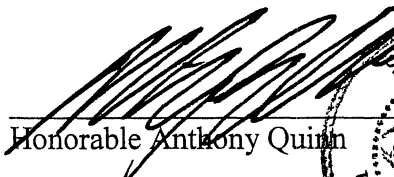
on behalf of Intervenor. Having considered the parties' memoranda and oral arguments, the Court hereby ORDERS:

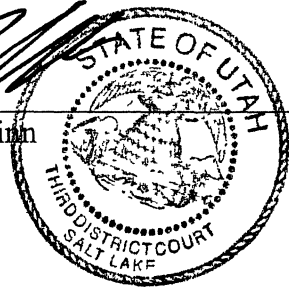
1. The Motion of the Intervenor to Dismiss the Action with Prejudice is hereby denied, to the extent it requests dismissal with prejudice.

2. The action is hereby dismissed without prejudice, on the grounds that there is a concurrent pending action in the United States District Court for the District of Utah involving similar parties and claims.

DATED this <sup>24</sup> day of November, 2003

BY THE COURT

  
Honorable Anthony Quinn



**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Order Dismissing Action without Prejudice was served via U.S. first class mail, postage prepaid, this 13<sup>th</sup> day of November, 2003, addressed to the following:

David W. Scofield  
Parsons, Davies, Kinghorn & Peters, P.C.  
185 South State Street, Suite 700  
Salt Lake City, UT 84111

Michael D. Ward  
Bleakley, Cypher, Parent, Warrant & Quinn, P.C.  
50 Monroe Place, Suite 700 East  
Grand Rapids, MI 49503

John Michael Coombs  
Mabey & Coombs, L.C.  
3098 S. Highland Drive, Suite 323  
Salt Lake City, UT 84106-3085

