

2004

Macris & Associates, Inc. v. Neways, Inc., Thomas E. Mower, Leslie D. Mower : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

MACRIS & ASSOCIATES, INC.,

Plaintiff/Appellant,

vs.

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

Defendants/Appellees.

Case No. 20041007-CA

BRIEF OF APPELLEES

**APPEAL FROM A FINAL JUDGMENT OF THE FOURTH
JUDICIAL DISTRICT COURT, UTAH COUNTY, STATE OF UTAH
HONORABLE GARY D. STOTT**

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JURISDICTION OF COURT OF APPEALS

This Court has jurisdiction over this appeal pursuant to *Utah Code Ann.* § 78-2a-3(2)(j).

STATEMENT OF FACTS

1. On April 17, 1991, Appellant, Macris & Associates, Inc. (“Macris”), filed suit against Images and Attitude, Inc. (“Images”), alleging that Images had breached its distributorship agreement with Macris (“*Macris I*”). See *Macris & Assocs., Inc. v. Neways, Inc.*, 2002 UT App 406, ¶ 2, 60 P.3d 1176.¹ (R. 192-203.)

2. On September 1, 1992, almost three years before the trial of *Macris I*, Images sold some of its assets to Neways. *Id.* (R. 350-352.)

3. On February 14, 1995, before any judgment had been entered against Images, and almost three years after Images sold certain assets to Neways, Macris filed this action against Neways and the Mowers, alleging “that the transfer of assets from Images to Neways left Images without sufficient assets to cover any judgment rendered against it in *Macris I*” (“*Macris II*”). *Id.* at ¶ 3. (R. 1-12.) Macris alleged that Neways and the Mowers were liable to Macris on theories of fraudulent transfer, alter ego, and

¹ The claims in this action and in *Macris I* are the subject of four previous appellate court opinions. Neways will cite to the opinions, as well as the appellate record, as support for certain background facts and procedural history. *Macris & Assocs., Inc. v. Images & Attitude, Inc.*, 941 P.2d 636 (Utah Ct. App. 1997); *Macris & Assocs., Inc. v. Neways, Inc.*, 1999 UT App 406, 986 P.2d 748; *Macris & Assocs., Inc. v. Neways, Inc.*, 2000 UT 93, 16 P.3d 1214; and *Macris & Assocs., Inc. v. Neways, Inc.*, 2002 UT App 406, 60 P.3d 1176.

successor liability. *Id.* Macris also sought contract damages, based on the distributorship agreement at issue in *Macris I*, that were not awarded in *Macris I*. (*Id.*)

4. Two days later, on February 16, 1995, the bench trial in *Macris I* began. At the conclusion of the trial, the district court determined that Images had materially breached its contract with Macris. 2002 UT App 406, ¶ 4. Images stipulated that it owed Macris \$360,681.20 in contract damages. (R. 959.) The judgment against Images was entered on or about September 14, 1995 (the “Images Judgment”).² (R. 910-912.)

5. In September 1995, Macris apparently caused writs of garnishment to be issued and served on Neways and its counsel. Neways responded that it was not holding any monies due and owing to Images. (R. 900-908.)

6. On October 19, 1995, Neways moved for summary judgment in *Macris II*, asserting that Macris’s claims were barred by *res judicata*. *Id.* (R. 183.)

7. Macris cross-moved for summary judgment on the issue of successor liability. *Id.* (R. 285.)

8. On January 22, 1996, the parties’ cross-motions for summary judgment came on for hearing before the Honorable Howard Maetani. In response to questioning by the Court about Macris’s fraudulent transfer claim, Macris’s counsel stated as follows:

² On June 19, 1997, this Court affirmed the Images Judgment. *See Macris & Assocs., Inc. v. Images & Attitude, Inc.*, 941 P.2d 636 (Utah Ct. App. 1997).

MR. KARRENERG:

. . . .

That's why I would do the same thing. I wouldn't add the third corporation, your Honor, because one, the fraudulent transfer action to the third corporation requires I first get a judgment from this Court that can't be collected somewhere. I mean, **if I can collect this other judgment against Images, the fraudulent transfer goes away by its [own] sake.** I can only collect my judgments [once], correct? You know what I mean?

THE COURT: Sure.

MR. KARRENERG: If I go out and find Images has some -- if we come in here and by the time we go to trial I've collected. I find Images had some assets, and I've collected the full judgment for the first breach of Judge Burningham, **the fraudulent transfer is gone. By nature it doesn't matter. I've collected my judgment.** They can fraudulent transfer all they want. **I haven't been damaged by the fraudulent transfer.**

(R. 507 at 40-41; emphasis added.)

9. On November 13, 1997, the district court ruled that Neways, as Images's successor, was responsible to pay the Images Judgment awarded to Macris and that *res judicata* barred all of Macris's other claims for damages against Neways. (R. 467.)

10. Based on the district court's ruling, Macris caused two writs of garnishment to be issued and served on Zions Bank and First Interstate Bank, respectively, on or about November 19, 1997. First Interstate Bank responded that it held approximately \$11,100 owing to Neways. Zions Bank responded that it had \$568,714 in Neways's funds. (R. 890-898.)

11. Later, Neways posted a bond pending appeal of the district court's order, and the garnished funds were released. (R. 491.)

12. Both Neways and Macris appealed the district court's order granting summary judgment. Specifically, Neways sought to reverse the court's ruling that Neways was responsible for the Images Judgment based on successor liability. On the other hand, Macris challenged the court's ruling that *res judicata* precluded the award of any additional contract damages. (R. 460, 490.)

13. On July 22, 1999, this Court issued an opinion reversing the district court's order of summary judgment on both grounds, concluding that Macris's claims were not barred by *res judicata* and that disputed issues of fact existed regarding the issue of successor liability. *See Macris & Assocs., Inc. v. Neways, Inc.*, 1999 UT App 230, ¶ 17, 986 P.2d 748. (R. 523.)

14. Neways and the Mowers, but not Macris, sought a writ of certiorari, which the Utah Supreme Court granted. (R. 539.) On December 5, 2000, the supreme court affirmed this Court's determination that Macris's claims of alter ego, fraudulent conveyance, and successor liability were not barred by *res judicata*. The supreme court further concluded, however, that issue preclusion barred Macris from seeking additional contract damages against Neways and the Mowers, thus limiting Macris's claims against defendants solely to the Images Judgment, if Macris could prove its claims. *See Macris & Assocs., Inc. v. Neways, Inc.*, 2000 UT 93, ¶ 47, 16 P.3d 1214. (R. 567.)

15. For the very first time, on February 1, 2001, Macris's new counsel, Paul C. Droz, wrote a letter to Wade Winegar, as "counsel of record for Images & Attitude, Inc.," demanding that "Images & Attitude, Inc. . . . satisfy the enclosed Judgment entered in this case on September 14, 1995." (R. 889.) (A true and correct copy of the letter is attached as Exhibit "A.")

16. Just over two weeks later, on February 16, 2001, the Images Judgment was paid in full, including interest, in the amount of \$746,356.97. (R. 887.)

17. On April 12, 2001, Macris filed a Satisfaction of Judgment. (R. 885.)

18. Following satisfaction of the Images Judgment, Neways and the Mowers again moved for summary judgment in *Macris II*, arguing that *Macris II* was moot because the Images Judgment had been paid and that, under the Utah Supreme Court's opinion, Macris was barred from seeking further contract damages. (R. 626.)

19. In response, Macris asserted, for the first time, that the action was not moot because the attorneys' fees incurred in *Macris II* were recoverable as consequential damages against Images under the third-party litigation exception. (R. 645-650.)

20. On August 2, 2001, the district court granted the motion for summary judgment filed by Neways and the Mowers, concluding that Macris's claims for fraudulent transfer, alter ego, and successor liability became moot once the Images Judgment was paid. (R. 736-745.)

21. Macris appealed the district court's order granting summary judgment to Neways and the Mowers. (R. 747.)

22. This Court reversed the district court's order granting summary judgment, holding that Macris could recover attorneys' fees as consequential damages, under the third-party litigation exception, if it could prove "that *Macris II* was a natural consequence of Images's breach and that it was necessary to bring the action." *Macris & Assocs., Inc. v. Neways, Inc.*, 2002 UT App 406, ¶ 22, 60 P.3d 1176. (R. 767-771.)

23. This Court stated that, even if Macris could prove its entitlement to attorneys' fees, "such fees are limited to those incurred **before the contract claim against Images was satisfied**," i.e., February 16, 2001. *Id.* at ¶ 23 (emphasis added).

24. This Court further stated that Macris could seek from Images only those damages incurred "in litigation with a third party to recover its contract damages [from *Macris I*]." *Id.* (emphasis added).

25. After this Court remanded the case to the district court, Neways and the Mowers served Requests for Production of Documents on Macris.

26. On or about June 4, 2003, in response to the document requests, Macris admitted that the February 1, 2001, demand letter from Mr. Droz was the first and only time Macris had ever demanded that Images pay the Images Judgment. (R. 881-882.) (A true and correct copy of Macris's response to the Requests for Production of Documents is attached as Exhibit "B.")

27. On March 1, 2004, the district court entered an order (1) denying Macris's motion to compel the production of certain discovery from Neways and the Mowers and (2) bifurcating Macris's claims in this action. The district court ordered as follows:

The Court hereby bifurcates the issue of whether Macris II was a natural consequence of Images' breach and, therefore, necessary to obtain satisfaction of judgment, and this issue shall be tried before other issues, if any, in this case.

(R. 867-869.)

28. On November 1, 2004, the district court entered an order granting the motion for summary judgment filed by Neways and the Mowers, determining that Macris had failed to produce evidence "to prove that this action was a natural consequence of the alleged fraudulent transfer by Images & Attitude, Inc. and that it was necessary to file this action." (R. 1070.)

SUMMARY OF ARGUMENT

As the district court aptly stated, "this action is far too old, and should be resolved." (R. 859.) Once again, however, Macris appeals the district court's ruling, arguing that the court erred in limiting the scope of discovery and in bifurcating the issue of whether this lawsuit was a "necessary" consequence of Images' alleged actions. Properly exercising its broad discretion in discovery matters, the district court concluded that Macris's discovery requests exceeded the narrow issue before the court, i.e., whether this action was necessary. The district court committed no error of law and did not base its decision on a lack of evidence. Accordingly, the order was proper.

Even if this Court were to determine that the discovery order was in error, Macris suffered no harm because of the court's ruling. The district court ultimately granted summary judgment to Neways and the Mowers because Macris failed to produce any evidence showing that this action was necessary. It is undisputed that, before February 2001, Macris never demanded that the Images Judgment be satisfied. Also, the record reflects that Macris had evidence that it previously obtained in this action and in *Macris I* that could possibly have been used in an attempt to create a factual issue on summary judgment. Macris, however, failed to present any of this evidence. Accordingly, any error in the district court's discovery order was harmless.

Macris erroneously argues that Neways and the Mowers were required to come forward with evidence to negate the elements of Macris's claim for consequential damages. To the contrary, Neways and the Mowers met their initial burden by showing that there was a lack of evidence to support an essential element of Macris's claim on which it had the burden of proof: that this action was necessary. Also, as set forth above, Macris failed to avail itself of the evidence in the record in an attempt to create a factual issue on summary judgment. Thus, the district court properly entered summary judgment in favor of Neways and the Mowers. Accordingly, this Court should affirm the district court's orders and bring this ten-year-old case to a close.

ARGUMENT

I. MACRIS HAS FAILED TO PROVE THAT THE DISTRICT COURT ABUSED ITS DISCRETION IN GRANTING THE MOTION TO BIFURCATE AND IN DENYING THE MOTION TO COMPEL.

On March 1, 2004, the district court entered an order stating as follows:

The Court hereby bifurcates the issue of whether Macris II was a natural consequence of the Images breach and, therefore, necessary to obtain satisfaction of judgment, and this issue shall be tried before other issues, if any, in this case.

(R. 867-869.) Macris argues that the district court erred when it (1) bifurcated the issue of whether *Macris II* “was a natural consequence of” Images’s alleged conduct and (2) denied Macris’s motion to compel discovery.³ A district court has “broad latitude in handling discovery matters.” *R & R Energies v. Mother Earth Indus., Inc.*, 936 P.2d 1068, 1079 (Utah 1997). “An appellate court will not find abuse of discretion absent an erroneous conclusion of law or where there is no evidentiary basis for the trial court to rule on.” *Askew v. Hardman*, 918 P.2d 469, 472 (Utah 1996). Also, in deciding discovery matters, the district court may “decide controverted factual issues,” “draw inferences where conflicting inferences are possible,” and “weigh competing interests.” *Id.* (citation omitted). “The propriety of an interrogatory or other discovery is primarily for the trial court to determine.” *State Road Comm’n v. Petty*, 412 P.2d 914, 918 (Utah

³ As this Court previously noted, Macris does not have a direct claim against Neways or the Mowers under the third-party litigation exception. *Macris & Assocs.*, 2002 UT App, 406, ¶ 19.

1966). “The district court is in an advantaged position in proximity to all aspects of the lawsuit,” and it is therefore “practical and desirable that he be allowed considerable latitude of discretion in his rulings thereon.” *Id.* Because Macris has failed to meet its burden to show that the district court made any erroneous conclusion of law, or that there was no evidentiary basis for the ruling, the order denying the motion to compel should be affirmed.

A. The District Court Did Not Make Any Errors of Law or Base Its Decision On a Lack of Evidence.

“The district court is entrusted with broad discretion in dealing with discovery matters, [including] protective orders.” *In re Discipline of Pendleton*, 2000 UT 77, ¶ 38, 11 P.3d 284. Under Rule 26(b)(2) of the Utah Rules of Civil Procedure, the district court has discretion to limit the use of discovery if “the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties’ resources and the importance of the issues at stake in the litigation.” Also, the court may enter a protective order requiring “that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters.” Utah R. Civ. P. 26(c)(4). Finally, bifurcation is an issue within the sound discretion of the district court. *See Parker v. Parker*, 2000 UT App 30, ¶ 5, 996 P.2d 565.

In its brief, Macris argues that the district court concluded that Macris must “make a prima facie showing of entitlement to relief before being permitted to conduct discovery.” (Brief of Appellant [“Applnt. Br.”] at 8; emphasis in original.) Macris,

however, points to no record citation showing that the district court made such a determination. In fact, by failing to request the transcript of the district court's hearing on the motion to compel, Macris has failed to ensure an adequate record on appeal. In the absence of a transcript, this Court will "assume the regularity of the proceedings below." *State v. Litherland*, 2000 UT 76, ¶ 11, 12 P.3d 92 (citation omitted).

In any event, the district court properly denied the motion to compel because Macris's discovery requests did not address the issue of whether this action had to be filed in February 1995 as a result of Images's alleged wrongful conduct.⁴ For instance, in its interrogatories, Macris inquired about "the total value of the assets owned by Neways, Inc. as of August 30, 1992." (R. 827.) Also, Macris asked about the assets of Images as of August 30, 1992, that were not acquired by Neways in August 1992. (*Id.*) The district court exercised its discretion to limit inquiry into these matters because they did not directly address the narrow issue on remand: whether it was necessary for Macris to file this action in February 1995 because of Images's alleged wrongful conduct. The district court concluded that, based on the limited scope of issues on remand and on Macris's undisputed failure to make a demand for payment on Images until February 2001, Macris's discovery requests went too far afield and did not bear on whether the action

⁴ At the time this action was filed, the trial in *Macris I* had not yet begun. Thus, this action was not necessary at the time it was filed because Macris did not yet have a judgment against Images. (Statement of Facts, ¶ 3.)

was necessary. (R. 853.) Thus, Macris has failed to show that the district court committed error. *See Askew*, 918 P.2d at 472.

To prove that this action was necessary, Macris was required to establish that Images's alleged wrongful conduct was the proximate cause of this lawsuit. *See South Sandpitch Co. v. Pack*, 765 P.2d 1279, 1283 (Utah 1988) (stating that fees are not recoverable "on causes of action not proximately necessitated by that defendant's negligence"). The necessity of filing this action cannot be proven merely by showing that Images had little or no assets in August 1992, over three years before the Images Judgment was entered. Indeed, even if Macris could prove that Images fraudulently transferred its assets, that fact alone would not establish that this action was "necessary," particularly because Macris never demanded payment of the Images Judgment until February 2001. *See Sanner v. Poli*, 298 B.R. 557, 564 (Bankr. E.D. Va. 2003) (stating that even though party had breached real estate purchase contract, that breach did not cause any litigation with a third party). The question of whether the "party sought to be charged with the fees was guilty of a wrongful or negligent act" is a separate issue from whether the third-party litigation was "the natural and necessary consequence[] of the defendant's act, since remote, uncertain, and contingent consequences do not afford a basis for recovery." *Uyemura v. Wick*, 551 P.2d 171, 176 (Haw. 1976). Thus, Macris must still prove the element of "causation" to recover attorneys' fees as consequential damages. *Pack*, 765 P.2d at 1283.

In its unique position, the district court was aware of the long procedural history of this action and what had been done to move the case forward. (R. 859.) The district court was aware that if Macris had intended to recover attorneys' fees when it filed this action, Macris should have made efforts early in the case to establish that this action was necessary, such as by requiring Images to appear in a supplemental proceeding to testify regarding its assets.⁵ Based on these factors, the district court exercised its broad discretion to bifurcate the case and limit the scope of discovery to the issue of whether this action was proximately caused, and made "necessary," by Images's alleged wrongful conduct. *See id.* The district court's discovery order was not based on an erroneous view of the law or on a lack of evidence. Thus, the discovery order should be affirmed. *See Askew*, 918 P.2d at 472.

B. Macris Suffered No Prejudice By the Court's Ruling.

Even if this Court were to determine that the district court committed some error in its discovery order, the district court's denial of the motion to compel was harmless. An error is "harmless" if there is "no reasonable likelihood that the error affected the outcome of the proceedings." *Crookston v. Fire Ins. Exch.*, 817 P.2d 789, 796-97 (Utah 1991). As set forth more fully below, the district court's ultimate decision to dismiss this case was supported by Macris's failure to have demanded payment of the Images

⁵ Indeed, this Court pointed out that Macris did not ask for attorneys' fees in its Complaint against Neways. 2002 UT App 406, ¶ 8, n.7.

Judgment until February 2001, well after this action was filed. Moreover, Macris failed to avail itself of post-judgment remedies against Images that would have been beneficial in determining Images's willingness and ability to pay the Images Judgment in September 1995. As stated in Leslie D. Mower's Affidavit dated November 21, 1995, "Neways did not purchase all the assets of Images." (R. 352.) After obtaining the Images Judgment, however, Macris never sought an order in supplemental proceedings requiring Images to appear and testify about the assets that it had at that time. *See* Utah R. Civ. P. 69(o). Instead, Macris served writs of garnishment on Neways in an attempt to garnish Images's funds allegedly held by Neways. Macris never attempted to garnish any of Images's bank accounts. Thus, no amount of discovery could have cured Macris's prior failure to investigate Images's ability to satisfy the Images Judgment from September 1995, when the Images Judgment was entered, until February 2001, when the Images Judgment was paid within fifteen days after demand.

In addition, in as early as 1995, Macris had already conducted discovery in this action regarding the alleged sale of Images's assets.⁶ On August 28, 1995, counsel for Macris took the deposition of Richard L. Halliday, in which the deponent was asked about the transfer of assets to Neways, among other topics. (R. 241.) In addition, Tom

⁶ Macris had the opportunity to conduct discovery in this action from February 1995 to February 1996, when the district court stayed the case pending the appeal in *Macris I*. Also, there were several months in 1997 and in 2001, when the district court had jurisdiction over this case, when Macris could have conducted discovery.

Mower stated in an Affidavit that he had been deposed in *Macris I* on the topics of “Neways, its creation, and the sale of Images assets to Neways.” (R. 231.) Thus, Macris already had evidence potentially relating to the alleged fraudulent transfer that it could have used in an attempt to defeat Neways’s motion for summary judgment.⁷ Ultimately, Macris failed to marshal the available evidence in an attempt to create a factual issue to prevent summary judgment. Thus, any error of the district court in its interlocutory order denying the motion to compel was harmless.⁸

II. THE DISTRICT COURT PROPERLY GRANTED SUMMARY JUDGMENT IN FAVOR OF NEWAYS AND THE MOWERS.

Macris argues that, in considering Neways’s motion for summary judgment, the district court erroneously required Macris to come forward with evidence to support its

⁷ In noting that Macris may already have had evidence that it could have produced in response to the motion for summary judgment, Neways and the Mowers do not concede that such evidence would have been sufficient to create a factual issue. Rather, Neways and the Mowers refer to these record citations to show that Macris apparently had *some* evidence that may have related to its fraudulent-transfer claim. It was *Macris’s* burden to present that evidence to the district court in response to the motion for summary judgment. Utah R. Civ. P. 7(c)(3)(B). Macris failed to do so, however, and summary judgment was properly entered. *Id.*

⁸ Macris erroneously argues that a “court’s error in failing to require discovery is presumed to have been prejudicial and mandates reversal.” In *Askew v. Hardman*, 884 P.2d 1258 (Utah Ct. App. 1994), *rev’d on other grounds*, 918 P.2d 469 (Utah 1996), this Court stated that the burden is on the party resisting discovery to prove that an error was harmless. This Court never stated, however, that reversal is *mandated* in such circumstances. In *Askew*, the defendant had “not demonstrated that the denial of Plaintiff’s discovery request was not prejudicial.” *Id.* at 1263. By contrast, Neways has met its burden to present sufficient evidence to show that any error committed by the district court in denying the motion to compel was harmless.

claim that this action was necessary. Macris argues that “defendants offered no evidence that the Images judgment would have been paid without the need for the Neways litigation.” (Applnt. Br. at 13.) Macris’s arguments turn the evidentiary burden of proof on its head. Neways did not have the burden to show that the Images Judgment “would have been paid” even if this action had not been filed. Rather, as the party seeking attorneys’ fees as consequential damages for Images’s alleged wrongful conduct, Macris had the burden to prove that this action was necessary. *Macris & Assocs.*, 2002 UT App 406, ¶ 22 (stating that, to recover under the third-party litigation exception, Macris must prove the elements of the exception); *see also Lovett v. Estate of Lovett*, 593 A.2d 382, 389 (N.J. Super. 1991) (noting that it is “plaintiff’s burden” to prove causation under the third-party litigation exception).

A. Neways and the Mowers Were Not Required to Produce Affirmative Evidence to Negate Macris’s Claims.

In its brief, Macris relies heavily on *Adickes v. Kress & Co.*, 398 U.S. 144 (1970), for the proposition that, to defeat summary judgment, Macris was not required to produce any evidence to support its claims. The proper scope of the U.S. Supreme Court’s decision in *Adickes* was discussed in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). There, the Supreme Court determined that there is “no express or implied requirement in Rule 56 that the moving party support its motion with affidavits or other similar materials *negating* the opponent’s claim.” *Id.* at 322. The Court clarified that *Adickes* should not be “construed to mean that the burden is on the party moving for summary judgment to

produce evidence showing the absence of a genuine issue of material fact, even with respect to an issue on which the non-moving party bears the burden of proof.” *Id.* at 325. Instead, the Court stated that the “burden on the moving party may be discharged by ‘showing’ – that is, pointing out to the district court – that there is an absence of evidence to support the non-moving party’s case.” *Id.* The Court emphasized that one of the principal purposes of Rule 56 “is to isolate and dispose of factually unsupported claims or defenses, and we think it should be interpreted in a way that allows it to accomplish this purpose.” *Id.* at 323; *see also Reagan Outdoor Advert., Inc. v. Lundgren*, 692 P.2d 776, 779 (Utah 1984) (stating that a major purpose of summary judgment is “to avoid unnecessary trial by allowing the parties to pierce the pleadings to determine whether there is a genuine issue to present to the fact finder”).

In *Schafir v. Harrigan*, 879 P.2d 1384 (Utah Ct. App. 1994), this Court cited *Celotex Corp.* with approval and quoted language from the opinion stating that a moving party is entitled to summary judgment when the non-moving party “has failed to make a sufficient showing on an essential element of her case *with respect to which she has the burden of proof.*” *Id.* at 1391 (emphasis added; citation omitted). In *Schafir*, this Court noted that the plaintiff had the burden of proof to establish that the defendant had knowledge of certain plumbing problems. Because the plaintiff failed to produce evidence to support an element of the claim on which the plaintiff had the burden of proof, summary judgment was properly granted. *Id.*

In this case, the district court properly followed the standards set forth in *Celotex Corp. v. Catrett*, as adopted by this Court. At the hearing on the motion for summary judgment filed by Neways and the Mowers, counsel for Macris argued that

[w]here we have to carry our burden is at trial, and the way that will be done at trial is we will put on the two people who owned Images and Attitudes in 1992, the Mowers, and ask them whether they had any assets. They will either take the fifth, from which the adverse inference can be drawn, or they'll admit that there were no assets in Images and Attitudes.

(Transcript of Hearing, September 21, 2004, at 16.) In its ruling, the district court stated as follows:

I agree with the proposition that Macris can't simply sit back and say, "Wait until we get to trial. We'll show you everything." The case has reached – this case, in its uniqueness, has reached the posture of a time to demonstrate the inability to pay, rather than relying upon what may be done in the future.

Mr. Eckersley, you are absolutely correct that there is a burden of proof on the party moving for this kind of relief, but the rules also, as they have been modified now, say that once this ruling is requested, and once a reasonable legitimate application of law and the facts are made to the Court, then the responding party has the responsibility to come forth with sufficient information to demonstrate that those scales do not weigh in favor of the moving party anymore, and they stay on your side.

(*Id.* at 19.) Thus, the district court properly rejected Macris's attempt to place on Neways and the Mowers the burden of proof on an essential element of Macris's claim for consequential damages, i.e., showing that this action was necessary. *See Schafir*, 879 P.2d at 1391.

B. Macris Failed to Rely on Available Evidence in an Attempt to Create an Issue of Fact.

In response to the motion for summary judgment, Macris expressly stated that it did “not dispute the factual statements offered by defendants.” (R. 1052.) Accordingly, pursuant to Rule 7(c)(3)(A) of the *Utah Rules of Civil Procedure*, the statement of undisputed and material facts in the supporting memorandum filed by Neways and the Mowers was deemed admitted. (R. 1070.) In addition, Macris did not file a motion under Rule 56(f) of the *Utah Rules of Civil Procedure* asking for more time to conduct discovery in the case. Instead, in its written response to the motion for summary judgment, Macris argued that the “necessity of the present action is established by the allegations of the complaint (which are unrebutted by any evidence) that Images had no assets from which it could satisfy the Macris’ claim (either before or after it was reduced to judgment) following its September 1, 1992, fraudulent transfer to Neways.” (R. 1047.) Thus, at its own peril, Macris rested almost exclusively on its pleadings to oppose the motion for summary judgment. *See Celotex*, 477 U.S. at 325.

The only evidence that Macris offered in opposition to Neways’s motion was an unauthenticated copy of the Asset Purchase Agreement.⁹ Macris presented no testimony showing the financial condition of Images at any point in time between September 1995

⁹ To avoid authenticity issues, Macris could have relied on the Affidavit of Leslie D. Mower, dated November 21, 1995, which attached a copy of the Asset Purchase Agreement. That affidavit, however, states unequivocally that Images did not transfer all its assets to Neways.

through February 2001. Nor did Macris dispute that it took no formal steps, such as obtaining an order in supplemental proceedings, to discover what assets Images had when the Images Judgment was entered in September 1995. Also, Macris did not dispute that it never demanded payment of the Images Judgment until February 2001. Summary judgment was appropriate because, as a matter of law, Macris failed to produce evidence supporting an essential element of its claim, i.e., that the filing of this action was a “natural consequence” of Images’s alleged wrongful conduct and that this action was “necessary.”¹⁰

As stated previously, there is evidence in the record that Macris potentially could have offered in response to the motion for summary judgment in an attempt to create a factual issue. For instance, in August 1995, Macris took the deposition of Richard L. Halliday. The portion of the transcript of Mr. Halliday’s deposition appearing in the record reflects that Macris’s attorney asked questions about the creation of Neways. (R. 241.) In addition, Tom Mower was deposed in *Macris I* regarding fraudulent-transfer issues, and Macris could have attached portions of his deposition transcript to its memorandum opposing the motion for summary judgment. (R. 231.) Macris simply failed to marshal any of the available evidence in an attempt to create an issue of fact that would preclude summary judgment.

¹⁰ Because the Utah Supreme Court ruled that Macris was not entitled to additional contract damages in this action, that portion of the complaint was not “necessary” on those grounds alone. *See* 2000 UT 93, ¶ 47.

Instead, Macris chose to argue that Neways had the burden to produce evidence that Images “would have” satisfied the judgment in 1995, a burden that Neways and the Mowers were not required to shoulder. Thus, Macris failed to offer evidence that the filing of this action was “a direct and necessary consequence of” Images’s alleged fraudulent transfer. *Hitachi Credit America Corp. v. Signet Bank*, 166 F.3d 614, 632 (4th Cir. 1999) (holding that plaintiff’s expenditures in third-party litigation were not caused by Signet’s breach of contract, and were not a direct and necessary consequence of such breach of contract); *see also Lovett v. Estate of Lovett*, 593 A.2d 382, 389 (N.J. Super. 1991) (holding that plaintiff was not entitled to attorneys’ fees because he failed to meet “his burden to prove that the fees were either reasonably necessary or caused by any wrong doing” by the alleged tortfeasor).

C. Summary Judgment Was Properly Granted Because Macris Failed to Demand Payment of the Images Judgment Before February 2001.

On February 1, 2001, Macris’s counsel wrote a letter to counsel for Images demanding payment of the Images Judgment. (R. 889.) Just over two weeks later, on February 16, 2001, the Images Judgment was paid in full, including interest (See Statement of Facts, ¶¶ 16-17.) Because Macris never demanded that Images pay the Images Judgment until February 2001, the parties cannot know whether the Images Judgment would have been satisfied and whether this action truly was necessary.

Indeed, it appears that Macris’s claim for attorneys’ fees as consequential damages was an after-thought that it raised only in response to Neways’s motion for summary

judgment, long after this case had been filed. This is best demonstrated in a statement given by Macris's counsel at the hearing, held on January 26, 1996, on the parties' first cross-motions for summary judgment. In that statement, counsel acknowledged that if the judgment were paid, Macris would have no fraudulent transfer claim:

MR. KARRENERG:

. . . .

That's why I would do the same thing. I wouldn't add the third corporation, your Honor, because one, the fraudulent transfer action to the third corporation requires I first get a judgment from this Court that can't be collected somewhere. I mean, **if I can collect this other judgment against Images, the fraudulent transfer goes away by its [own] sake.** I can only collect my judgments [once], correct? You know what I mean?

THE COURT: Sure.

MR. KARRENERG: If I go out and find Images has some -- if we come in here and by the time we go to trial I've collected. I find Images had some assets, and I've collected the full judgment for the first breach of Judge Burningham, **the fraudulent transfer is gone. By nature it doesn't matter. I've collected my judgment.** They can fraudulent transfer all they want. **I haven't been damaged by the fraudulent transfer.**

(R. 507 at 40-41; emphasis added.)¹¹ Thus, early in this case, Macris acknowledged that if it could collect the Images Judgment, it would have no damages. Despite that knowledge, Macris waited until February 2001 to demand payment of the Images

¹¹ The same logic applies to Macris's claims for successor liability and alter ego. Once the Images Judgment was satisfied, those claims became moot.

Judgment or otherwise attempt to discover what assets Images may have had to satisfy the Images Judgment.

Macris cannot now, at this stage, reconstruct the past in a post-hoc attempt to prove the necessity of the action. Macris had the burden to prove it was entitled to attorneys' fees under the third-party litigation exception. Thus, it is Macris, not Neways and the Mowers, that should bear the consequences of its own failure to demand payment of the Images Judgment, or otherwise investigate Images's assets, before February 2001.

D. The District Court Did Not Improperly Weigh Competing Inferences.

Finally, Macris argues that summary judgment was improper because the evidence before the district court was "susceptible to two different inferences." (Applnt. Br. at 15.) Although Macris relies on *West v. Thomson Newspapers*, 835 P.2d 179 (Utah Ct. App. 1992), to support its arguments, that opinion was expressly vacated by the Utah Supreme Court in *West v. Thomson Newspapers*, 872 P.2d 999, 1020 (Utah 1994). Macris also cites *Goodnow v. Sullivan*, 2002 UT 21, 44 P.3d 704, for the proposition that the district court may not draw fact inferences on a motion for summary judgment. Only two justices, however, joined in the portion of the opinion cited by Macris. Three justices stated that they did not subscribe to the reasoning of *Gray Tool Co. v. Humble Oil and Ref. Co.*, 186 F.2d 365, 367 (5th Cir. 1951), the case cited in the lead opinion. In his opinion concurring in the result, in which Justices Russon and Durrant concurred, Justice Wilkins stated that the rule under *Gray Tool Co.* "would be an unnecessarily limiting rule of law in my opinion." 2002 UT 21, ¶ 16.

In any event, Macris wholly failed to produce any admissible evidence in response to the motion for summary judgment filed by Neways and the Mowers. Thus, there could have been no “competing inferences,” since there was no “competing evidence” offered in response to the motion for summary judgment. Macris failed to satisfy its burden to produce any evidence in support of its claim (on which it had the burden of proof) that Images’s alleged wrongful conduct made it necessary for this action to be filed. Thus, the district court did not improperly weigh any competing inferences.

CONCLUSION

For the reasons set forth above, Neways and the Mowers respectfully request that this Court affirm the district court’s orders denying Macris’s motion to compel and granting the motion for summary judgment filed by Neways and the Mowers.

DATED this 24th day of May 2005.

BALLARD SPAHR ANDREWS & INGERSOLL, LLP

A handwritten signature in black ink, appearing to read "Mark R. Gaylord", is written over a horizontal line.

Mark R. Gaylord

Craig H. Howe

Attorneys for Defendants/Appellees

CERTIFICATE OF SERVICE

I hereby certify that two true and correct copies of the foregoing **BRIEF OF APPELLEES** were served on the following this 24th day of May 2005, in the manner set forth below:

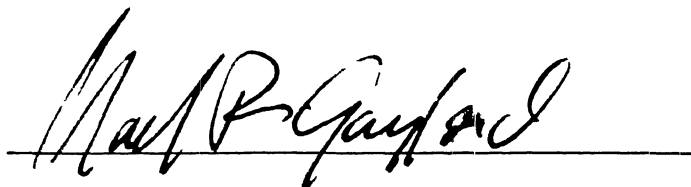
☐ Hand Delivery

☒ U.S. Mail, postage prepaid

☐ Federal Express

☐ Certified Mail, Receipt No. _____, return receipt requested

M. David Eckersley, Esq.
PRINCE, YEATES & GELDZAHLER
175 East 400 South, Suite 900
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ADDENDUM

LAW OFFICES OF
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Paul C. Droz

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February 1, 2001

VIA FACSIMILE AND CERTIFIED MAIL
(801) 423-7210

Wade Winegar, Esq.
150 East 400 North
Salem, UT 84653

Re: *Macris & Associates, Inc., v. Images & Attitude, Inc., et al.*

Dear Mr. Winegar:

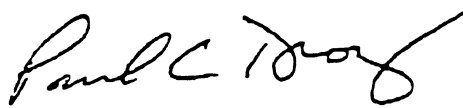
I understand that you are counsel of record for Images & Attitude, Inc., in the above referenced matter. Demand is hereby made upon Images & Attitude, Inc., to satisfy the enclosed Judgment entered in this case on September 14, 1995. We compute the amount presently due and owing at \$744,471.77 through today's date, with per diem interest accruing at \$125.68 per day from now until paid in accordance with the stated 9.22% judgment interest rate. Our calculations supporting the presently due amount of \$744,471.77 are set forth on the attached schedule, for your reference.

If we have not received payment of the full amount due under this judgment by February 12, 2001, we will have no choice but to pursue all available methods of collection. We would appreciate hearing from you promptly.

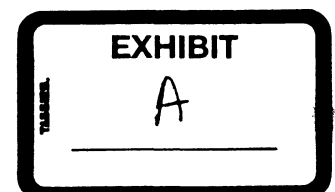
Please govern yourselves accordingly.

Very truly yours,

DROZ, REED & WANGSGARD


Paul C. Droz

PCD:wh
Enclosures
Cc: Macris & Associates, Inc.



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RECEIVED

JUN 05 2003

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Attorneys for Plaintiff

IN THE FOURTH JUDICIAL DISTRICT COURT IN AND FOR
UTAH COUNTY, STATE OF UTAH

MACRIS & ASSOCIATES, INC.

Plaintiff,

v.

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

Defendants.

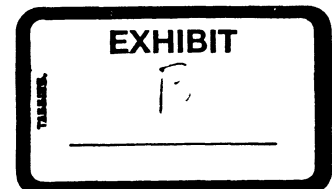
PLAINTIFF'S RESPONSE
TO DEFENDANTS' FIRST
SET OF REQUESTS FOR
PRODUCTION OF DOCUMENTS

Civil No. 950400093 CN
Judge: Gary D. Stott

Plaintiff Macris & Associates, Inc., hereby submits the following responses to
Defendants' First Set of Requests for Production of Documents as follows:

REQUEST NO. 1 Produce all documents reflecting attorneys' fees and costs incurred by
Macris relating to work performed in the Macris II Action up to and including the date the
judgment against Images and Attitude, Inc. ("Images") in the Macris I Action was satisfied.

RESPONSE: See copies provided herewith.



. 000882

REQUEST NO. 2 Produce all documents reflecting any demand(s) made upon Images, or upon any other person or entity, to satisfy the judgment entered against Images in the Macris I Action.

RESPONSE: See the letter dated February 1, 2001 from Paul Droz to Wade Winegar, a copy of which is submitted herewith.

REQUEST NO. 3 Produce all documents that would be required to be produced if this case were governed by Rule 26(a)(1) of the UTAH RULES OF CIVIL PROCEDURE, effective in cases filed on or after November 1, 1999.

RESPONSE: Plaintiff is in possession of approximately 15 bankers' boxes of documents that were generated in connection with the Macris I and Macris II litigation. Defendants are free to inspect and copy all such documents at a mutually convenient time between the parties.

DATED this 41 day of June, 2003.

PRINCE, YEATES & GELDZAHLER

By M. David Eckersley
M. David Eckersley
Attorneys for Plaintiff