

1995

Salt Lake Knee and Sports Rehabilitation, Inc. f/k/  
a Professional Therapy, Inc. v. Salt Lake Knee and  
Sports Medicine, a Utah General Partnership and  
Lonnie E. Paulos, M.D., a Utah Professional  
Corporation and Thomas D. Rosenberg, M.D., P.C.,  
a Utah Professional Corporation, General Partners :  
Brief of Appellee

Utah Court of Appeals

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IN THE COURT OF APPEALS OF THE STATE OF UTAH

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SALT LAKE KNEE & SPORTS REHABILITATION, INC. f/k/a PROFESSIONAL THERAPY, INC.	:	
	:	
Plaintiff/Appellant,	:	APPELLATE COURT NO. 950080-CA
	:	
vs.	:	
	:	
SALT LAKE CITY KNEE & SPORTS MEDICINE, a Utah General Partnership and LONNIE E. PAULOS, M.D., a Utah Professional Corporation and THOMAS D. ROSENBERG, M.D., P.C., a Utah Professional Corporation, General Partners,	:	District Court No. 910906316CN
	:	
	:	Argument Priority Classification 15
	:	
Defendants/Appellees.	:	
	:	

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**BRIEF OF APPELLEES SALT LAKE CITY KNEE & SPORTS MEDICINE, LONNIE E. PAULOS, M.D., P.C. AND THOMAS D. ROSENBERG, M.D., P.C.**

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APPEAL FROM ORDER GRANTING MOTION FOR ATTORNEY'S FEES  
ENTERED IN THE THIRD JUDICIAL DISTRICT COURT  
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH,  
BY THE HONORABLE HOMER F. WILKINSON

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**TABLE OF CONTENTS**

TABLE OF AUTHORITIES . . . . . ii

JURISDICTIONAL STATEMENT . . . . . 1

STATEMENT OF ISSUES AND STANDARDS OF REVIEW . . . . . 1

DETERMINATIVE LAW . . . . . 1

STATEMENT OF THE CASE . . . . . 2

STATEMENT OF THE FACTS . . . . . 3

SUMMARY OF ARGUMENT . . . . . 4

ARGUMENT . . . . . 5

    I.    UNDER THE STATUTE, THE TRIAL COURT PROPERLY ACTED  
          WITHIN ITS DISCRETION WHEN IT AWARDED MEDICINE  
          ATTORNEY’S FEES AND COSTS . . . . . 5

    II.   THIS COURT HAS ALREADY RATIFIED THE TRIAL COURT’S  
          DISCRETION TO AWARD ATTORNEY’S FEES IN AN  
          IDENTICAL PROCEDURAL SETTING . . . . . 6

    III.  REHABILITATION’S ARGUMENTS ARE INCOMPATIBLE WITH  
          THE PLAIN MEANING OF THE STATUTE . . . . . 8

CONCLUSION . . . . . 9

**TABLE OF AUTHORITIES**

**CASES**

Bennion v. Graham, 849 P.2d 569 (Utah 1993) . . . . . 1

Faulkner v. Farnsworth, 714 P.2d 1149 (Utah 1986) . . . . . 8

Schafir v. Harrigan, 879 P.2d 1384 (Utah Ct. App. 1994) . . . . . 2, 6, 7

World Peace Movement of Am. v. Newspaper, 879 P.2d 253 (Utah 1994) . . . . . 9

**STATUTES**

Utah Code Ann. § 78-2-2(3)(j) (1992) . . . . . 1

Utah Code Ann. § 78-2a-3(2)(j) (1992) . . . . . 1

Utah Code Ann. § 78-27-56.5 (1992) . . . . . 1, 4, 5, 8

## JURISDICTIONAL STATEMENT

This Court has jurisdiction of this appeal pursuant to Utah Code Ann. § 78-2a-3(2)(j) (1992). The Utah Supreme Court had jurisdiction pursuant to Utah Code Ann. § 78-2-2(3)(j) (1992). Pursuant to Notice dated April 26, 1995, the Utah Supreme Court transferred this case to the Utah Court of Appeals.

## STATEMENT OF ISSUES AND STANDARDS OF REVIEW

1. Did the trial court properly exercise its discretion in granting the Defendants attorney's fees under Utah Code Ann. § 78-27-56.5, when Defendants prevailed in the action and the contract between the Defendant and the Plaintiff provided for at least one party to recover attorney's fees?

The trial court awarded the attorney's fees pursuant to its interpretation of Utah Code Ann. § 78-27-56.5. Statutory interpretation is a question of law, and this Court need not defer to the trial court's interpretation. Bennion v. Graham, 849 P.2d 569, 570 (Utah 1993).

## DETERMINATIVE LAW

### Statutes:

Utah Code Ann. § 78-27-56.5

#### Attorney's Fees - Reciprocal Rights to Recover Attorney's Fees.

A court may award costs and attorney's fees to either party that prevails in a civil action based upon any promissory note, written contract, or other writing executed after April 28, 1986, when the provisions of the promissory note, written contract, or other writing allow at least one party to recover attorney's fees.

Case Law:

Schafir v. Harrigan, 879 P.2d 1384 (Utah Ct. App. 1994).

**STATEMENT OF THE CASE**

On October 4, 1991, the Plaintiff, Salt Lake Knee & Sports Rehabilitation, Inc. ("Rehabilitation"), filed a Complaint for Declaratory Judgment against the Defendants Salt Lake City Knee & Sports Medicine, Lonnie E. Paulos, M.D., P.C., and Thomas D. Rosenberg, M.D., P.C. (together "Medicine"). Rehabilitation brought suit against Medicine for allegedly conducting a "sale" of the Salt Lake Sports Medicine Center as defined and proscribed by a Termination Agreement and Purchase Agreement (the "Contract") made between the parties.

Medicine filed a Motion for Summary Judgment on June 15, 1993, indicating that Rehabilitation failed to produce evidence of a genuine issue of material fact and that Medicine was entitled to judgment as a matter of law. (R. 168-70, 171-96) Rehabilitation then filed a Counter Motion for Partial Summary Judgment. (R. 199-225) On September 24, 1993, after hearing the parties' arguments in support of their motions, the trial court granted the parties an opportunity to brief additional arguments. (R. 480-84)

On November 15, 1993, the court again heard the parties' arguments in support of their motions for summary judgement. At this hearing, the court granted Medicine's Motion for Summary Judgment, ruling that the transaction at issue was not a "sale" as defined by the Contract. (R. 494-95) Rehabilitation has appealed the court's ruling. (R. 417-18)

On April 19, 1994, Medicine filed a Motion for Award of Attorney's Fees and Costs. (R. 422-24) Rehabilitation objected to the motion. (R. 446-50) The court heard arguments

on November 18, 1994, and granted Medicine's motion by Minute Entry on November 21, 1994, but did not award Medicine the sum requested. The parties then stipulated that the Order could be entered in the reasonable amount of \$10,415.87, through April 5, 1994. (R. 518-19) The Order was entered on January 23, 1994, and Rehabilitation filed a Notice of Appeal on February 7, 1995. (R. 518-22)

### STATEMENT OF THE FACTS

1. On or about May 22, 1989, Medicine entered into the Contract with Rehabilitation. (R. 203, 234-35, 239-40) Paragraph 14 of the Contract states:

14. Attorney's Fees. Should any party default in or breach any of the covenants or agreements contained herein, the defaulting or breaching party shall pay all costs and expenses, including reasonable attorney's fees, which may accrue from enforcing this agreement, or in pursuing any remedy provided hereunder, or by applicable law. (R. 423).

2. On or about October 4, 1991, Rehabilitation filed a complaint against Medicine claiming a transaction between Medicine and IHC Hospitals, Inc. was a "sale" as defined and proscribed by the Contract, and that Medicine had breached the Contract by failing to pay a certain sum. (R. 6-7)

3. On November 15, 1993, after the parties had submitted Motions for Summary Judgment and had filed supplemental briefs, the trial court granted Medicine's Motion for Summary Judgment. (R. 495) The trial court upheld that ruling on Appellants Motion for Reconsideration. (R. 504)



4. On or about April 19, 1994, Medicine filed a Motion for Award of Attorney's Fees and Costs for the sum of \$15,322.55 accrued through April 5, 1994. (R. 422-24) On November 21, 1994, the court granted the Physician's Motion as to entitlement, but did not grant the entire amount. (R. 517) The parties stipulated that if Medicine were entitled to attorney's fees, the sum of \$9,633.32 for attorney's fees and the sum of \$782.55 for costs, incurred through April 5, 1994, would be reasonable. (R. 519)

### **SUMMARY OF ARGUMENT**

This Court should affirm the trial court's exercise of its discretion when it awarded Medicine attorney's fees and costs as the prevailing party. Medicine prevailed in the suit on summary judgment. The Contract at issue was entered into after April 28, 1986 and provided for "at least one party to recover attorney's fees." Thus, under Utah Code Ann. § 78-27-56.5 ("the Statute"), the trial court had the discretion to award Medicine its attorney's fees and costs. As this Court has provided in at least one other case, this Court should give effect to the Statute by allowing a trial court to permit a party to a contract who is sued and prevails against the plaintiff on the merits of the case to collect attorney's fees and costs when that contract allowed attorney's fees to prevailing parties successfully suing for default.

## ARGUMENT

### I. UNDER THE STATUTE, THE TRIAL COURT PROPERLY ACTED WITHIN ITS DISCRETION WHEN IT AWARDED MEDICINE ATTORNEY'S FEES AND COSTS.

This Court should rule that as a matter of law, the trial court had the discretion to award Medicine its attorney's fees and costs expended to defend the breach-of-contract action brought by Rehabilitation, because the Contract entitled at least one party to recover attorney's fees. Under Utah law:

A court may award costs and attorney's fees to either party that prevails in a civil action based upon any promissory note, written contract, or other writing executed after April 28, 1986, when the provisions of the promissory note, written contract, or other writing allow at least one party to recover attorney's fees.

Utah Code Ann. § 78-27-56.5 (1992). The trial court properly acted within its discretion by awarding Medicine attorney's fees under the Statute, because all of the Statute's elements are met.

First, Medicine prevailed against Rehabilitation in the lawsuit involving the Contract. The trial court granted Medicine's Motion for Summary Judgment on the basis that the transaction was not a "sale" as defined in the Contract and dismissed Rehabilitation's claims with prejudice. Second, the parties entered into the Contract at issue after April 28, 1986. Third, The provisions of the Contract allowed at least one of the parties to recover attorney's fees. Section 14 of the Contract states:

Should any party default in or breach any of the covenants or agreements contained herein, the defaulting or breaching party shall pay all costs and expenses, including reasonable attorney's fees, which may accrue from

enforcing this agreement, or in pursuing any remedy provided hereunder, or by applicable law.

The Contract allows at least one of the parties (a prevailing plaintiff) to recover attorney's fees, and therefore the Court properly acted within its discretion to grant Medicine, the prevailing defendant, fees and costs. Thus, this Court should affirm the trial court.

**II. THIS COURT HAS ALREADY RATIFIED THE TRIAL COURT'S DISCRETION TO AWARD ATTORNEY'S FEES IN AN IDENTICAL PROCEDURAL SETTING.**

This Court should affirm the trial court's decision because it has already interpreted the Statute to allow a trial court the discretion to award fees and costs to a prevailing defendant in a case like this, even if the contract only provides attorney's fees to a party successfully proving default. In Schafir v. Harrigan, 879 P.2d 1384 (Utah Ct. App. 1994), the plaintiffs asserted that the defendant sold them a house without disclosing serious defects in the house about which the defendants had knowledge at the time of the sale. After the trial court granted the defendants partial summary judgment, the defendants asserted that they were entitled to attorney's fees under the Statute because "the Earnest Money Sales Agreement provided for payment of reasonable attorney fees to the non-defaulting party."<sup>1</sup>

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<sup>1</sup> The attorney's fee provision in the Schafir contract stated:

. . . both parties agree that, should either party default in any of the covenants or agreements herein contained, the defaulting party shall pay all costs and expenses, including a reasonable attorney's fee, which may arise or accrue from enforcing or terminating this agreement or in pursuing any remedy provided hereunder or by applicable law, whether such remedy is pursued by filing suit or otherwise . . . .

Brief of Defendant, Schafir v. Harrigan, No. 930287-CA (emphasis added).

Id. at 1394. In that case, the trial court indicated it had the discretion to award the fees and costs at issue, but declined to do so.

On appeal, this Court concluded that the trial court did not abuse its discretion in denying attorney's fees. Id. In doing so, however, this Court implicitly recognized that, if "appropriate," a trial court has the power under the Statute to grant attorney's fees to a party successfully defending a breach-of-contract action when the contract only provides for attorney's fees for a party establishing the breach or default of another party. Id. In other words, had the trial court awarded attorney's fees, this Court would have upheld that exercise of discretion under the Statute absent a showing of abuse of such discretion. This Court made it clear that it upheld the trial court's refusal to grant attorney's fees to the defendants on the sole ground that the "trial court should determine whether an allocation of fees is appropriate under the circumstances." Id.

Because Medicine prevailed in the contract dispute, because the parties entered into the Contract after April 28, 1986, and because the Contract allowed for at least one of the parties to recover attorney's fees, the trial court properly acted within its discretion when it granted Medicine attorney's fees.

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The language is almost identical to the contract language involved in the present dispute.

III. **REHABILITATION'S ARGUMENTS ARE INCOMPATIBLE WITH THE PLAIN MEANING OF THE STATUTE.**

The Statute's plain language obviates Rehabilitation's arguments. First, Rehabilitation argues that "[t]he fact that [Medicine was] the prevailing part[y] is irrelevant to the issue of attorney's fees." Brief of Appellant, at 16. That ignores the express language of the Statute. The Statute allows a court discretion to award costs and fees to "either party that prevails in a civil action . . . when the provisions [of a writing] allow at least one party to recover attorney's fees." Utah Code Ann. § 78-27-56.5 (emphasis added). Thus, the fact that Medicine prevailed on the merits of the case is pertinent to the issue of attorney's fees.

Second, Rehabilitation cites Faulkner v. Farnsworth, 714 P.2d 1149 (Utah 1986), as determinative authority. However, the contract in Faulkner was entered into before the Statute took effect, and the reasoning of Faulkner cannot apply to this case.

Third, Rehabilitation argues that because "the contract already contains reciprocal rights," the Statute does not apply. Brief of Appellant, at 19. However, the limited reciprocity of the Contract's attorney's fees clause does not bar operation of the Statute. To operate, the Statute requires (1) that the party being awarded attorney's fees is the prevailing party, (2) that the writing was executed after April 28, 1996, and (3) that the writing allows at least one party to recover attorney's fees. Because all of the elements of the Statute are satisfied in this case, the Statute applies. Whatever limited reciprocity the Contract contains, it does not outweigh the Statute's policy of allowing an innocent defendant to recover fees in a suit when a plaintiff would have recovered fees had it prevailed.

Finally, Rehabilitation raises the issue of the Statute's legislative history in support of its position. First, this Court need not look to legislative history. Because the Statute is not ambiguous in its terms, this Court need not consult legislative history for guidance in interpretation. World Peace Movement of Am. v. Newspaper Agency Corp., 879 P.2d 253, 259 (Utah 1994) ("Only when we find ambiguity in the statute's plain language need we seek guidance from the legislative history and relevant policy considerations."). Second, nothing in the legislative history suggests Medicine should not obtain its fees and costs herein.

### CONCLUSION

The trial court properly acted within its discretion when it awarded attorney's fees and costs to Medicine. All of the elements of Utah Code Ann. § 78-27-56.5 were satisfied. For these reasons, this Court should affirm the trial court, and remand the case to permit the trial court to consider attorney's fees and costs incurred by Defendants since April 5, 1994.

RESPECTFULLY SUBMITTED this 1st day of September, 1995.

SNELL & WILMER, L.L.P.

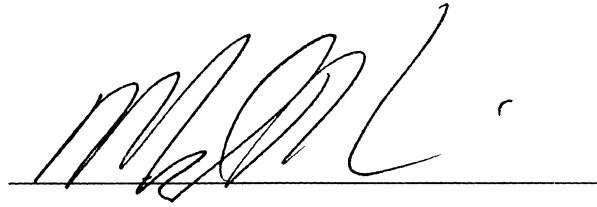


Mark O. Morris  
Attorney for Defendants/Appellees

CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of September, 1995, I caused to be mailed, two true and correct copies of the foregoing to:

John C. Green  
Kim M. Luhn  
Green & Luhn, P.C.  
9 Exchange Place, Suite 722  
Salt Lake City, Utah 84111

A handwritten signature in black ink, appearing to read 'M. Luhn', is written over a horizontal line.