

2009

# Mobile Echocardiography v. DAT : Reply Brief

Utah Court of Appeals

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**IN THE UTAH COURT OF APPEALS**

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**IN THE MATTER OF THE  
APPLICATION OF BUDDY W.  
GREGORY FOR THE JUDICIAL  
DISSOLUTION OF GREGGORY,  
BARTON & SWAPP, P.C. nka GBS  
LEGAL CLINIC, P.C.**

**APPELLANT'S REPLY BRIEF**

**MOBILE ECHOCARDIOGRAPHY, INC.,**

**Appellant,**

**v.**

**DAT&K, LLC**

**Appellee.**

**Case No. 20090735**

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Appeal from the Fourth Judicial District Court, Utah County, State of Utah  
Honorable Samuel D. McVey, Case No. 050401014

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## **REPLY REGARDING STATEMENT OF THE ISSUES AND STANDARD OF REVIEW**

### **A. DAT&K's Statement of Issues**

The appellee's brief of DAT&K, LLC ("Appellee" or "DAT&K") (hereafter, "DAT&K Brief") asserts a different issue and standards of review than those identified by Appellant Mobile Echocardiography, Inc. ("Appellant" or "MEI"). In particular, DAT&K argues that the issues on appeal turn upon the marshalling standard and assertion that the trial court's determination of credibility is decisive. [See DAT&K Brief at 1-5]. MEI disagrees, but as explained below, even if DAT&K were correct, DAT&K must still lose.

### **B. DAT&K Does Not Challenge the Applicable Law or MEI's Statement of Issues**

DAT&K Brief is notable in what it does not say, or challenge, with regard to MEI's Statement of Issues (and the other parts of the appeal).<sup>1</sup> In particular, DAT&K concedes that the rule of law commonly known as *nemo dat qui non habet* ("he who hath not cannot give"), see Black's Law Dictionary 1037 (6th ed. 1990), is applicable. Specifically, DAT&K concedes the rule governs when it states that "DAT&K did not contend, and the Trial Court did not hold, that a security interest may attach to property in which the debtor does not have

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<sup>1</sup> There is an embarrassing typographical error in MEI's initial brief, which eliminated a portion of the text reciting the first issue identified by MEI on appeal. As was apparent elsewhere in MEI's opening brief, that issue was whether the rule sometimes known as *nemo dat qui non habet* applies to this case. DAT&K has now conceded this point.

rights.”<sup>2</sup> [DAT&K Brief at 3]. Also importantly, DAT&K concedes that this rule of law, whether considered under Utah Code § 70A-9a-203 or Tennessee Code § 47-9-203, is the same.<sup>3</sup> [See DAT&K Brief at 2 (noting that the Utah and Tennessee statutes are “substantively the same”).

Also important, DAT&K does not challenge – in fact does not even acknowledge – the second issue framed by MEI: whether where – as here – the issue is one of the intent of parties to an agreement, and the parties’ testimony as to their intent is consistent, the trial court’s discretion is limited and the trial court’s decision should be reviewed for correctness.<sup>4</sup> See, e.g., Baladevon, Inc.

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<sup>2</sup> Although DAT&K makes this concession as though it were an obvious conclusion, such was far from clear based upon DAT&K’s arguments and the trial court’s rulings. [See MEI’s Brief at 11, 22-23, 26 n. 14, 28, 31, 39-40, 43 (explaining ambiguity in trial court’s rulings and DAT&K’s position below)]. Thus, this is an important clarification of the issues, and as explained below, one that is decisive given DAT&K’s concession that the “Escrow Funds” did in fact originate from the clients’ portion of the Fen-Phen settlements.

<sup>3</sup> DAT&K argues that Tennessee law applies pursuant to a choice of law provision in the Security Agreement between DAT&K and GBS. Because the law of Tennessee and Utah is “substantially the same,” this issue is irrelevant to the appeal, but DAT&K’s assertion is wrong in any event. First, DAT&K did not raise this argument below, and thus it is waived. Second, MEI was not a party to the GBS-DAT&K Security Agreement, and the relationship between Utah-based MEI, Utah-based GBS, and the Utah-based clients of GBS, along with the other agreements drafted in Utah and controlled by Utah law, are all obviously subject to Utah Code § 70A-9a-203. This is only the first of many instances in which DAT&K makes bald assertions without citation to the record, and without explaining or conducting analysis to support the conclusions it urges.

<sup>4</sup> Nor does DAT&K dispute that a different standard of review is appropriate where the core challenge is not that the court’s findings of fact are necessarily wrong, but rather to the application of the facts to the law. See Jones v. Barlow, 2007 UT 20, ¶ 10, 154 P.3d 808 (noting appellate courts “give minimal discretion



v. Abbott Laboratories, Inc., 871 F.Supp. 89, 98 (D. Mass.1994) (discussing rule of law that “the undisputed evidence as to both the contracting parties' subjective intent controls the interpretation of the ambiguous contract terms . . . .”) (emphasis added); see *also* Restatement (Second) of Contracts § 201(1) (“Where the parties have attached the same meaning to a promise or agreement or a term thereof, it is interpreted in accordance with that meaning.”).

**C. MEI Overcomes Even the “Clearly Erroneous” Standard of Review Asserted by DAT&K**

Although not clear before, it is now apparent that DAT&K has only one argument on appeal, that “DAT&K had rights in the Disputed Funds because GBS’s clients owed the Disputed Funds to GBS as payment of expenses incurred by GBS for echocardiography services.” [DAT&K Brief at 3]. (Notably, however, DAT&K does not cite to such a finding by the trial court. [See DAT&K Brief at 3]). Because there was literally no evidence to support such a finding, and the only evidence was to the contrary, including the testimony of the only parties with actual knowledge as to the intent of the relevant agreements, any such finding was clearly erroneous. Thus, even if the issue was as framed by DAT&K, in the face of no evidence to support the purported finding, any such finding was clearly erroneous. See Orlob v. Wasatch Medical Management, 124 P.3d 269, 274 (Utah App. 2005) (noting that “if absolutely no evidence exists in the record to support a district court's finding, that finding is clearly erroneous”);

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to the district court in its application of the facts to the law.”).

Billings v. Union Bankers Ins. Co., 918 P.2d 461, 468 (Utah 1996) (noting that “[b]ecause there was no evidence to the contrary before the district court . . . the district court's finding . . . was clearly erroneous.”). Nor is MEI required to demonstrate that there is “no evidence” to win this appeal (although such is the case), because this Court will also find the trial court's finding of fact clearly erroneous where it is “against the clear weight of the evidence or [the Court] reach[es] a definite and clear conclusion that a mistake has been made.” In re Estate of Flake, 71 P.3d 589, 599 (Utah 2003) (emphasis added).

Accordingly, even if the Court were to apply the “clearly erroneous” standard of review, DAT&K cannot overcome the overwhelming (and in fact undisputed) evidence presented below, demonstrating that GBS never had any interest in the clients' portion of the Fen-Phen settlements.

### **REPLY REGARDING DETERMINATIVE STATUTES AND RULES**

As noted, the determinative statute and rule of law is not in dispute, given DAT&K's failure to argue Tennessee law below, and its concession that Tennessee law is consistent with Utah law. Thus, the governing law mandates that DAT&K's security interest can attach to the collateral “only if the debtor has rights in the collateral.” Utah Code Ann. § 70A-9a-203 (emphasis added). Because the Debtor here, GBS, never had any rights in the Escrow Funds, the rule of *nemo dat qui non habet* requires reversal of the trial court.

### **REPLY REGARDING STATEMENT OF THE CASE**

MEI's opening brief identified three possible grounds for the trial court's

award of the Escrow Funds to DAT&K: i) that the rule of *nemo dat qui non habet* did not apply, or one of two exceptions to that rule, ii) a reimbursement exception; or iii) waiver exception, applied.

As noted, DAT&K has conceded the first issue. DAT&K also does not contest that the only possible exceptions to this rule of law by which it might intercept the Escrow Funds designated for MEI are either a “reimbursement” or a “waiver” exception. [MEI’s Brief at 4, 23, 28-29]. Finally, it is now clear that DAT&K has abandoned any assertion of a waiver, as it acknowledges that “[t]he only issue on appeal is whether” the trial court was correct in finding that “DAT&K had rights in the Disputed Funds because GBS’s clients owed the Disputed Funds to GBS as payment of expenses incurred by GBS for echocardiography services.” [DAT&K Brief at 3 (emphasis added)].

### **REPLY REGARDING STATEMENT OF FACTS**

Although MEI challenges the trial court’s rulings as legal issues (reviewed for correctness), MEI recognized in its opening brief the possible application of the marshalling requirements. Thus, DAT&K’s claim MEI did not marshal the evidence is simply wrong. [See DAT&K Brief at 20-21]. To the contrary, where there was even a possible<sup>5</sup> argument that evidence existed to support some

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<sup>5</sup> MEI has demonstrated that there is no evidence to support the single finding which DAT&K now identifies as the “only issue on appeal.” The generosity of MEI in its opening brief of identifying the evidence that DAT&K might have relied upon to support its appeal is not a concession that such evidence can be construed to actually support DAT&K’s position; rather, the evidence identified by MEI was the only evidence on the relevant points, and thus was identified by MEI

aspect of the trial court's findings, MEI acknowledged the marshalling standard and discussed the evidence in detail. [See MEI's Brief at 5, 24, 32, 40, 43-49]. That DAT&K has now abandoned all but one purported "finding" of the trial court (which was not an actual finding that DAT&K can identify in the record), does not change the fact that MEI more than complied with the marshalling requirements. As to DAT&K's "only issue on appeal," there was no such finding. See *infra*. Thus, not only has MEI surpassed the marshalling requirements, DAT&K's failure to respond by citing to record evidence to support the trial court's purported finding is telling, and fatal.

## **ARGUMENT**

As noted in MEI's opening brief, there were only three possible grounds upon which the trial court could have awarded the Escrow Funds to DAT&K. DAT&K has now conceded two of those three, and argues only the "reimbursement" exception to the rule of *nemo dat qui non habet* as support for the trial court's award of the Escrow Funds to DAT&K. [See DAT&K Brief at 3 (purported finding GBS "incurred" obligation to MEI was "only issue on appeal")].

As to this single issue, DAT&K makes only two arguments, covering slightly over four pages. [See DAT&K Brief at 21-25]. Aside from citing two

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consistent with the marshaling requirements. As noted, however, this evidence unequivocally supports MEI's position - it simply cannot be construed to mean something contrary to the plain language of the agreements or contrary to the consistent testimony of the only parties to the relevant agreements and transactions.

cases for the unremarkable proposition that intent of the parties is important in contract law, DAT&K does not cite any case law or to the record.

**I. DAT&K CONCEDES THE APPLICABLE LAW REGARDING WHEN A SECURITY INTEREST CAN ATTACH**

**A. DAT&K Concedes the Rule of Law of *nemo dat qui non habet***

As noted, DAT&K concedes the first issue raised by MEI's argument, the applicability of the rule of law sometimes termed *nemo dat qui non habet*.

Nor does DAT&K challenge the trial court's corrected finding of fact in its July Order, in which the trial court acknowledged that "***MEI is correct on this point*** in that having now reviewed the hearing transcript, ***the Court finds the funds came from the 60% of the recovery attributed to the clients' account.***

The ***parties stipulated to this fact and the Court amends its finding accordingly to reflect the stipulation.***" [July Order at 1 (emphasis added), R. 006073]. Thus, there is no dispute that DAT&K did not have a direct right to payment of these funds, because GBS did not have such a right, and that DAT&K must therefore show an exception to the rule of *nemo dat qui non habet*. If DAT&K cannot do so, then it loses.

**B. DAT&K Concedes (Does Not Challenge) the Trial Court's Finding That the Source of the Escrow Funds is Determinative**

Critically, DAT&K also does not challenge the trial court's determination that if – as is now undisputed – the Escrow Funds originated from the clients' portion of the Fen-Phen settlement, the monies belonged to MEI:

The issue is resolved by determining whose money it is. If it is the clients' 60%, those clients can direct the sum go to MEI and Barton

was their agent for that purpose. If the funds are GBS's 40%, DAT&K's security interest gives the money to DAT&K.

[March Order at 8, R. 005215 (emphasis added)]. The Court can stop its analysis at this point, and award the Escrow Funds to MEI. In particular, DAT&K did not appeal this finding by the trial court. Assuming, however, that the trial court's July Order was an implicit rejection of the March Order's holding that the "issue is resolved by determining whose money it is," then MEI next moves on to the second main point of its opening brief (the waiver), and then to the single appeal issue identified by DAT&K.

## **II. DAT&K CONCEDES THAT MEI DID NOT WAIVE ITS RIGHT TO BE PAID DIRECTLY BY THE CLIENTS**

As noted, DAT&K now concedes in its brief that the "only issue on appeal" is the purported finding by the trial court that "DAT&K had rights in the Disputed Funds because GBS's clients owed the Disputed Funds to GBS as payment of expenses incurred by GBS for echocardiography services."<sup>6</sup> [DAT&K Brief at 3]. Thus, DAT&K concedes that there was no evidence<sup>7</sup> below to support any finding that MEI waived its right to be paid directly by the clients.

Furthermore, as noted in MEI's opening brief, the only evidence was to the

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<sup>6</sup> DAT&K also abandons any argument that the trial court's award of the Escrow Funds was based upon the Escrow Agreement, an "accounting" and/or any "other agreements." Each of these possible arguments was addressed by MEI in its opening brief, [MEI's Brief at 43-49], and DAT&K has not asserted in its response that the trial court's findings were based on any of these arguments. [See DAT&K Brief, generally].

<sup>7</sup> As noted in MEI's opening brief, there was also no finding of waiver below.

contrary. [See MEI's Brief at 39-43 (demonstrating that MEI did not waive its right to be paid directly by clients). In fact, the only and uncontested evidence was that the MEI-GBS Settlement Agreement / Security Agreement gave MEI additional protection and rights, beyond MEI's previously acquired right to be paid directly by the clients. [See MEI Brief at 42].<sup>8</sup>

**III. THE "REIMBURSEMENT" EXCEPTION UPON WHICH DAT&K RELIES WAS NOT FOUND BY THE TRIAL COURT, AND TO THE EXTENT SUCH WAS THE FINDING, IT WAS CLEARLY ERRONEOUS**

As noted, DAT&K's entire argument covers a sparse four pages, and is based upon two unsupportable premises – i) that the trial court made a proper finding that GBS had rights in the Escrow Funds; and ii) that the trial court did not have to accept the unchallenged testimony of MEI and GBS, and could reject such testimony as lacking in credibility. [See DAT&K Brief at 21-24].

**A. DAT&K Does Not Challenge the Rule of Law That Where the Parties to Agreements Testify Consistently, the Intent of the Parties is Established As a Matter of Law**

DAT&K does not challenge – in fact does not even acknowledge – the rule of law carefully explained by MEI in its initial brief: that where, as here, all parties testify as to the same intent with regard to an agreement, that testimony is controlling. [See MEI's Brief at 29-31]. Perhaps DAT&K ignores this rule of law because it must concede that both parties to the relevant agreements – MEI and

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<sup>8</sup> This page of MEI's Brief is cited herein a number of times, rather than repeatedly citing directly to the numerous pages of the record and the testimony on this point, i.e., MEI's Pretrial Brief at 13-15 (R. 004811-004809) and 2-6-09 Trans. at 32-34, 39-40, 58, 68-71, 82, 94-95, 112-113, 119, 162-164 (R. 006536).

GBS – testified consistently as to the intent and meaning of the relevant agreements and transactions, and that this testimony was contrary to DAT&K's position and the finding of the trial court.

Under these circumstances, the trial court was obligated to interpret the agreements consistent with the intent of MEI and GBS:

The leading modern authority suggests that - ***in the rare case where evidence shows the two parties to an agreement to have a common understanding*** of a disputed provision at the time of contracting - the Corbin-Restatement-subjectivist rule has prevailed. See 2 Farnsworth on Contracts § 7.9, at p. 246 (1990) (“***Such authority as there is supports giving effect to a common meaning shared by both parties in preference to an objective meaning.***”). For instance, the Third Circuit has held that where “there is no dispute between the contracting parties over the meaning of the terms, extrinsic evidence should [be considered] ... as providing an explanation of the parties' contractual understanding. ***Their harmonious recital of what these words mean is conclusive.***” Sunbury Textile Mills v. Comm'r, 585 F.2d 1190, 1196 (3d Cir.1978); see also Berke Moore Co. v. Phoenix Bridge Co., 98 N.H. 261, 269, 98 A.2d 150, 156 (1953) (similar). . . .

. . . the Court concludes that ***the undisputed evidence as to both the contracting parties' subjective intent controls the interpretation of the ambiguous contract terms.*** . . .

Baladevon, Inc. v. Abbott Laboratories, Inc., 871 F. Supp. 89, 98 (D. Mass. 1994)

(emphasis added); see also Restatement (Second) of Contracts § 201(1)

(“Where the parties have attached the same meaning to a promise or agreement or a term thereof, it is interpreted in accordance with that meaning.”).

This is determinative because, among other things, DAT&K did not appeal and does not challenge the trial court's holding that the relevant documents were ambiguous. [See 5-5-08 Transcript at 57-58 (“I can't determine that as a matter



of law based on these documents . . . .”), R. 006535]. Indeed, it was for this reason that the trial court ordered that discovery could be had, in order to ascertain the intent of GBS and MEI in the agreements. [See 5-5-08 Transcript at 16-17, 58-59, R. 006535]. And, where documents are ambiguous, the courts necessarily turn to extrinsic evidence to resolve the ambiguity, in particular, courts look to the intent of the parties to the agreement. See Dixon v. Pro Image, Inc., 1999 UT 89, ¶ 13, 987 P.2d 48 (“In interpreting a contract, the intentions of the parties are controlling.”) (quoting *Winegar v. Froerer Corp.*, 813 P.2d 104, 108 (Utah 1991) (emphasis added)).

Accordingly, both of DAT&K’s arguments on appeal fail in the face of this non-unchallenged rule of law, as discussed below.

**B. The Trial Court Did Not Find That GBS Had Rights in the Escrow Funds Because it Had “Incurred” an Obligation to MEI, and Even if it Had Done So, Such a Finding is Clearly Erroneous**

DAT&K’s only articulated argument on appeal is that the trial court found that GBS had rights in the Escrow Funds because it had purportedly “incurred” an obligation to pay MEI. [See DAT&K Brief at 3, 21]. The argument fails because the trial court made no such finding, and even if it had done so, there was literally no evidence to support such a finding and/or that the “incurring” of this obligation gave GBS a direct claim to the Escrow Funds when GBS never actually paid MEI (shown by the fact that DAT&K cannot cite to any such evidence in the record, and the only testimony was to the contrary). And, even if DAT&K can identify a “scintilla” of such evidence, such a finding is contrary to the

“clear weight of the evidence” and/or the trial court made a mistake. See Flake, 71 P.3d at 599.

1. Trial Court Did Not Make Any Finding That GBS Had Rights in the Escrow Funds

As an initial matter, DAT&K does not cite to any finding by the trial court which supports its argument on appeal. It does not do so when it articulates the “only issue” on appeal. [See DAT&K Brief at 3]. It does not do so when it raises the issue in its “Argument” section. [See DAT&K Brief at 21-24]. Review of DAT&K’s discussion of the trial court’s March Order also reveals no reference to any finding by the trial court that GBS had any rights in the Escrow Funds, in particular based on any obligation that GBS “incurred” an obligation to MEI. [See DAT&K Brief at 6-7]. Finally, DAT&K’s discussion of the trial court’s July Order similarly contains no reference to any such finding. [See DAT&K Brief at 8]. In fact, DAT&K’s reference to the July Order simply emphasizes with bold and italics the bare conclusion by the trial court that ***“Mr. Barton’s firm assumed liability for ECG costs incurred by MEI . . .”*** [DAT&K Brief at 8 ((emphasis added by DAT&K) ]. This is not a “finding” that GBS had a direct right in the Escrow Funds, sufficient to overcome the trial court’s now unchallenged finding that the Escrow Funds originated from the clients’ portion of the Fen-Phen settlements, nor is it sufficient to overcome the rule of *nemo dat qui non habet* that GBS must have had an actual right to direct payment of those funds for

DAT&K's security interest to apply.<sup>9</sup>

2. DAT&K's "Incurred" Argument Has No Evidentiary Support

Although not the model of clarity, DAT&K's argument appears to be that because GBS "incurred" an obligation to pay MEI for Full Study echocardiograms, GBS had a right to payment directly from the clients' portion of the Fen-Phen settlements, despite the fact that MEI had not actually been paid. [See DAT&K Brief at 21 (asserting that documents and testimony "establish that GBS was entitled to receive payment from its clients for the costs and expenses GBS incurred, including the expenses GBS incurred for MEI's services . . .")]. The argument fails for a number of reasons.

First, DAT&K's insertion of the word "incurred" into the discussion is created out of thin air. There is absolutely no such language in any of the relevant agreements, nor the testimony. Rather, as MEI explained in its opening brief, the only language demonstrates that GBS would have no right to the client's portion of the Fen-Phen settlements, unless GBS had already made payments to MEI for those same costs. [See MEI's Brief at 32, 35-38, 42].

Second, the Contingency Fee Agreement upon which DAT&K relies plainly provides that GBS only has a right to recover an expense from the clients' portion

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<sup>9</sup> It is, however, consistent with the testimony of both MEI and GBS, that MEI received additional protections and means for payment through the MEI – GBS Settlement Agreement / Security Agreement, but that these were not the only means by which MEI was to be paid. [See MEI's Brief at 42]. MEI was also entitled to be paid directly by the clients, and never waived this right. See *supra* Section II.

of the settlement if GBS has actually paid the expense:<sup>10</sup>

(b) I (we) will incur various costs and expenses in performing legal services under this Agreement. You agree to pay for all costs, disbursements, and expense[s] owed by you in connection with this matter, or which **have been paid or advanced** by me (us) on your behalf and for which [you] have not previously paid or reimbursed to me (us), if I (we) reach a settlement or judgment on your behalf, or if our services are terminated for any reason by you.

[Contingency Fee Agreement (emphasis added), R. 004040]. The word “incurred” is notably absent from the document. Thus, the plain language of this agreement is clear – GBS does not have a right of reimbursement unless GBS had already paid for the costs at issue. In other words, the client does not have any obligation to pay (i.e., reimburse) GBS any costs, unless those costs have already been advanced by GBS. [See MEI’s Brief at 32, 35-38, 42].

Third, in discussing exactly this “paid or advanced” language, GBS’s Keith Barton was clear that actual payment to MEI for the Full Studies was required before GBS would have a claim to be paid directly by the clients:

Q. Now, it does say here “or which **have been paid or advanced** by me/us on your behalf.” So if GB&S actually paid in advance for certain expense, it could then recoup that from a client, correct?

A. Yes.

Q. In this instance, you’re familiar with this dispute, I assume.

A. I do - I am.

Q. All right. In this instance, did GB&S ever pay or advance the full-study echocardiogram costs which were later withheld from the

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<sup>10</sup> Notably, DAT&K does not quote or cite to the Contingency Fee Agreement in the Argument section of its brief, but rather only (mis)characterizes the language. [See DAT&K Brief at 21-22].

client's side which are in the registry of this court?

A. The full-study echocardiogram costs, **no, have not been paid.**

Q. Okay. And so, looking at this subparagraph 4(b), **GB&S would have no right to recoupment** under this paragraph as against those monies withheld from the client's side, correct?

A. **That would be correct.**

[2-6-098 Trans. at 20-21 (emphasis added)]. DAT&K cannot identify any evidence to the contrary of this testimony from Mr. Barton, the only witness with actual knowledge as to the meaning and intent of the Contingency Fee Agreement.<sup>11</sup> Thus, because there is no evidence to support the trial court's asserted (but non-existent) finding of fact, this Court must reverse the trial court. See Orlob, 124 P.3d at 274 (noting "if absolutely no evidence exists in the record to support a district court's finding, that finding is clearly erroneous"); Billings, 918 P.2d at 468 (noting "[b]ecause there was no evidence to the contrary before the district court . . . the district court's finding . . . was clearly erroneous.").

DAT&K's only response is to make the bald assertion that the Contingency

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<sup>11</sup> DAT&K attempted to cross examine Keith Barton on this point, and Mr. Barton was consistent and clear that a reimbursable "cost is something that we actually pay out on a file." [2-6-09 Trans. at 56 (emphasis added), R. 006536]. Try as he might, DAT&K's attorney could not shake Mr. Barton from this testimony. [2-6-09 Trans. at 57-58, R. 006536]. For example, Mr. Barton was clear that DAT&K only had an interest in "the expenses that we would have actually advanced on behalf of the client." [2-6-09 Trans. at 67 (emphasis added), R. 006536]; [See *also* 2-6-09 Trans at 87 (right of GBS to lien clients' portion of Fen-Phen settlements was limited "to costs that were . . . actually paid out-of-pocket by the firm")(emphasis added), 93 (client costs not due to GBS unless "actually advanced") (emphasis added); 185 (historically, GBS only reimbursed for costs from clients' portion of settlements where "law firm had actually paid those costs first")(emphasis added)].

Fee Agreement "does not require that expenses be paid prior to the clients paying GBS for expenses incurred." [DAT&K Brief at 22]. DAT&K provides no analysis, case law, evidence or testimony to support this bald assertion. [See DAT&K Brief at 22]. Rather, the best that DAT&K can do is cite to testimony that GBS had agreed to "pay MEI whenever GBS received payment from GBS's clients," and make the assertion that this "testimony is fatal" to MEI's position. [See DAT&K Brief at 22]. DAT&K does not, however, ever explain why this testimony is relevant to the plain language of the Contingency Fee Agreement, or how testimony that GBS had agreed to pay MEI would give GBS any direct right in the client's portion of the Fen-Phen settlements before GBS actually paid MEI (which undisputably did not happen). Simply asserting something does not make it true, and for purposes of these proceedings, the trial court and DAT&K were required to have at least some evidence to support any such conclusion.<sup>12</sup>

In addition, DAT&K's characterization of the record is also misleading. DAT&K makes it sound as though Mr. Fidler testified that GBS was only required to pay MEI when GBS recovered monies from the client's portion of the Fen-Phen settlements. [See DAT&K Brief at 22 (asserting that MEI testified "that MEI and GBS agreed GBS would pay MEI whenever GBS received payment from GBS's clients.")]. Notably, DAT&K does not cite to the record, and in fact there was no such testimony. Rather, the only testimony was that the agreement by

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<sup>12</sup> As noted, it is far from clear that the trial court in fact reached any such conclusion, and DAT&K has not identified any such conclusion in the record.

GBS was that it would also pay MEI from its Fen-Phen attorney fees, this was only one of a number of ways by which MEI would be paid, MEI never gave up the independent right to be paid directly from the clients, and the fact the GBS had independently agreed to pay MEI was not a waiver or relinquishment of MEI's additional right to be paid directly by the clients.<sup>13</sup> [See MEI's Brief at 42].

Thus, the only testimony in the record is that the agreement by GBS to pay MEI if and when GBS had sufficient contingency attorney fees to pay MEI was an additional protection for MEI and not a waiver of MEI's right to be paid directly from the clients. [See MEI's Brief at 42].

As such, DAT&Ks' "evidence" is not even a "scintilla," and even if it were such, the purported finding by the trial court is plainly "against the clear weight of

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<sup>13</sup> DAT&K also takes a very troubling liberty with the record at this point in its brief, asserting that the Receiver testified "that, under applicable accounting standards, GBS did not have to pay MEI to become entitled to payment from GBS's clients" and that according to the Receiver "GBS's right to payment from clients arose when GBS incurred the obligation to MEI." [DAT&K Brief at 22]. First, DAT&K ***does not and cannot cite to such testimony in the record.*** Second, ***there was no such testimony in the record,*** as can be seen by a review of the direct and cross examination of the Receiver. [See 2-6-09 Trans. at 172-181 (direct exam), 182-207 (cross examination by MEI's attorney Blake Miller (incorrectly referenced as "Mr. Jones" in transcript), R. 006536]. Third, the Receiver in fact ***had no opinion as to the substantive rights to the Escrow Funds.*** [See 2-6-09 Trans. at 172-207, R. 006536]. This led to the trial court's finding that "[t]he receiver repeatedly stated he had no first hand, or even second hand, knowledge of the category into which the escrowed funds would fall – client funds, reimbursement for advanced costs, or attorneys fees." [March Order at 9, R. 005215 (emphasis added)]. Thus, DAT&K's representation goes beyond good faith advocacy – it is actually false, and DAT&K knows it is false. This Court should not tolerate such liberties with the facts, and should at the minimum admonish DAT&K's counsel.

the evidence,” and based on the evidence this Court should “reach a definite and clear conclusion that a mistake has been made.” Flake, 71 P.3d at 599.

3. DAT&K’s Argument Against the Lien Agreement Fails

DAT&K attempts to downplay by relegating to a footnote the undisputed testimony from both MEI and GBS that every client signed – at the same time as the Contingency Fee Agreement – a Lien Agreement. Putting the argument in a footnote does not change the undisputed testimony, nor change the trial court’s error in excluding consideration of the Lien Agreement. Thus, for the reasons stated in MEI’s opening brief, this Court should accept the unchallenged testimony that MEI had a prior security interest in the clients’ portion of the Fen-Phen settlements, for payment for the Full Study echocardiograms. [See Lien Agreement, R. 004803]; [See Barton Aff. ¶¶ 7-8, R. 003979]; [See 2-6-09 Trans. at 21-22, 26-27, 53-54, 82-83, 88, 120-122, R. 006536]. Of course, this makes sense since the “disputed funds were withheld from the clients pursuant to these contractual obligations . . . [and] that such liens granted by the clients attached before any arguable lien could have attached in favor of DAT&K.” [Barton Aff. ¶ 8 (emphasis added), R. 003979]; [See 2-6-09 Trans. at 21-22, 26-27, 53-54, 82-83, 88, 120-122, R. 006536].

4. DAT&K’s Argument About MEI’s Receipt of Monies “Equal to” the Escrow Funds Fails

DAT&K next claims that “MEI ignores the fact that MEI has already received payment in an amount equal to the amount withheld from the clients’



recoveries for MEI's services." [DAT&K Brief at 22]. MEI did no such thing. Rather, MEI acknowledged this argument, and devoted a large portion of its brief to a detailed discussion of the record evidence regarding whether the monies which DAT&K claims are "equal to" the Escrow Funds could be offset against or considered as an actual advance payment to MEI for the Full Studies which comprised the Escrow Funds. [See MEI's Brief at 31-39]. DAT&K never responds to this evidence.

For example, DAT&K does not challenge the evidence demonstrating that the previous payments to MEI, including the \$601,000 and other monies paid to MEI were i) not paid by GBS; and ii) were not for Full Study echocardiograms. [See MEI's Brief at 33-34 (no evidence of "reimbursement" because monies previously paid to MEI were not paid by GBS); 35-39 (no evidence of "reimbursement" because monies previously paid to MEI were not paid for Full Study echocardiograms, were not advance payments for Escrow Funds, and were in fact paid by Texas Firms for other expenses, independently incurred). Indeed, not even the Receiver had any evidence to support that the Escrow Funds were due to GBS a reimbursement for monies actually paid for Full Studies, as shown by the trial court's acknowledgment that "[t]he receiver repeatedly stated he had no first hand, or even second hand, knowledge of the category into which the escrowed funds would fall – client funds, reimbursement for advanced costs, or attorneys fees." [March Order at 9, R. 005215 (emphasis

added)).<sup>14</sup>

Among the other evidence ignored by DAT&K, is the now unchallenged testimony from attorney Keith Barton that because the Escrow Funds originated from the client's portion of the Fen-Phen settlements, and GBS had not actually paid MEI for the Full Studies, then if the money did not go to MEI, then ethically the GBS firm had an obligation to return the monies to the clients. [See 2-6-09 Trans. at 31-34, 87-88, R. 006536]. Barton also testified that the only exception to this ethical prohibition would have been if GBS had actually made an advance payment to MEI, on behalf of the clients, but that this never happened. [See 2-6-09 Trans. at 20-21, 87-88, 92-93 R. 006536]. Accordingly, ***the only party with knowledge as to whether GBS had any direct right to reimbursement from the clients' portion of the Fen-Phen settlements, testified not only that such was not the case, but that the rules of ethics prohibited such an outcome.***

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<sup>14</sup> This acknowledgement by the trial court is also important in considering DAT&K's argument that the Receiver's review of the GBS books and records has significance. In particular, DAT&K asserts that the Receiver's conclusion that "expenses" were booked as revenue by GBS is relevant as to whether GBS had direct rights in those funds. [See DAT&K Brief at 11-12, 22]. Obviously, such is not the case – GBS had no ability to change the substantive rights of MEI, GBS, and/or DAT&K, simply by making an accounting entry. If this were so, then contracts and security agreements would be meaningless, as parties would simply manipulate their accounting systems to reflect their desired legal rights. This argument is tantamount to saying that GBS could have defeated DAT&K's security interest in the Fen-Phen contingency fees simply by booking those fees as something else, in which DAT&K did not have a security interest.

Rather, what is determinative of the parties' rights and obligations are the actual agreements and, even more important in this case where the two parties to the relevant agreement(s) testified consistently, the intent of the parties.

As such, there is not only no evidence to support the trial court's purported conclusion, but the limitations on GBS's rights are uncontested and compelling, and the "clear weight" of the evidence demands reversal.<sup>15</sup> [See 2-6-09 Trans. at

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<sup>15</sup> DAT&K continues to assert on appeal that it should have the Escrow Funds even though the evidence indicates that the payments to MEI were not for Full Studies and were not made by GBS, because "[e]ven if this point is true . . . the effect was the same," and that MEI "will have received more than the amount withheld from the clients' recoveries and that excess will have been paid from DAT&K's collateral." [DAT&K Brief at 22-23].

In the first instance, DAT&K is incorrect, the funds were not paid from "DAT&K's collateral" because GBS never had a direct right to the Escrow Funds. See Utah Code § 70A-9a-203.

In the second instance, the argument is irrelevant. It does not matter if MEI received more or less than the amount claimed by DAT&K, if those other monies were paid separately from DAT&K's security interest. The only way DAT&K can claim the Escrow Funds is if GBS has a right directly to those funds.

In the third instance, DAT&K's argument is undermined by the other agreements and practices of the parties. The Texas Firms reduced the overall contingency fees available to both GBS and the Texas Firms by first recouping non-recoverable client expenses "off the top", such as advertising or other expenses that were not allocable to the particular clients. The payments previously made to MEI fell into this category, and MEI was entitled to retain those payments without losing its independent rights to be paid for other services, i.e., the Full Study echocardiograms, directly from the client's portion of the Fen-Phen settlements. Indeed, DAT&K did not make any claim to the other "off the top" payments for things like advertising. Barton's testimony on these points went uncontested at the February 6, 2009 hearing. [See 2-6-09 Trans. at 88-92, R. 006536]. Furthermore, DAT&K reviewed the agreements between GBS and the Texas Firms, and knew full well that the Texas Firms retained the right to repay themselves for advances made "off the top" before GBS would be entitled to any of the contingency attorney fees in which DAT&K was taking a security interest. [See 2-6-09 Trans. at 91-92, R. 006536]. DAT&K took that risk, with its eyes wide open.

DAT&K does not respond to any of these points, even though they were clearly set forth in MEI's opening brief. Simply put, DAT&K is not a

40-41, 151-152, R. 006536].

5. DAT&K's Argument That the MEI-GBS Security Agreement Includes the Escrow Funds in the Definition of "Barton Fen-Phen Fees" Fails

Finally, DAT&K asserts that the MEI-GBS Security Agreement and the MEI-GBS Settlement Agreement constitute an acknowledgment that the Escrow Funds "are part of DAT&K's collateral."<sup>16</sup> [DAT&K Brief at 23]. This assertion is based upon the inclusion of the reference to "other monies" in the MEI-GBS Agreements.<sup>17</sup> [See DAT&K Brief at 23]. Again, however, the plain language of

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"super creditor" who can claim more rights than allowed by law just because it thinks MEI should help pay GBS's debt.

<sup>16</sup> Although unclear, perhaps this is DAT&K's attempt to respond to MEI's "no waiver" argument, without having to squarely address the overwhelming and uncontestable evidence that MEI never waived its right to be paid directly from the clients' portion of the Fen-Phen settlements. [See MEI's Brief at 39-43]. To the extent such is the case, or DAT&K improperly attempts to advance this theory at oral argument, the Court should take note that DAT&K did not challenge in any way MEI's detailed recitation of the evidence, including the testimony of the only parties to the relevant agreements that those agreements did not constitute a waiver, but rather additional protection for MEI. [See MEI Brief at 42].

<sup>17</sup> DAT&K also contends elsewhere that the definition of "Barton Fen-Phen Fees" in the MEI Settlement Agreement is an "unambiguous acknowledgement that [the Barton Fen-Phen Fees] include amounts withheld from clients' recoveries in connection with MEI's echocardiography services." [DAT&K Brief at 17]. Notably, DAT&K cannot cite to any evidence in the record, nor any such finding by the trial court. [See DAT&K Brief at 17].

And, in fact, DAT&K does not challenge that the trial court reached the opposite conclusion, ruling that the agreements were ambiguous. [R. [See 5-5-08 Transcript at 57-58 ("I can't determine that as a matter of law based on these documents . . ."), R. 006535]. Indeed, it was for this reason that the trial court ordered that discovery could be had, in order to ascertain the intent of GBS and

those agreements, combined with the consistent and unchallenged testimony of the parties to those same agreements, defeat the argument.

First, the relevant language does not by its plain terms include monies that were never due to GBS, i.e., monies withheld from the clients' portion of the Fen-Phen settlements. Second, the testimony of MEI and GBS was consistent, that the MEI-GBS agreements were not waivers, and did not acknowledge that the Escrow Funds were subject to DAT&K's security interest. [See MEI's Brief at 42]. Indeed, Keith Barton testified exactly opposite to DAT&K's assertion. [See 2-6-09 Trans. At 71-72 ("other monies" provision was additional protection for MEI in the event extra monies existed after DAT&K was paid); 74-75 (GBS did not actually advance payments on behalf of clients under "other monies" clause); 75-76; ("Other monies" language "doesn't have anything to do with" Escrow Funds); 93-94 ("other monies" clause never came into play, including because monies not due to GBS unless "actually advanced").

**C. The Trial Court's Credibility Determination Does Not Rescue DAT&K, Because There Was Literally No Evidence Upon Which the Trial Court Could Reject the Testimony**

Finally, in a scant one-paragraph argument with not citation to relevant

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MEI in the agreements. [5-5-08 Transcript at 16-17, 58-59, R. 006535]. As noted, where an agreement is ambiguous, the intent of the parties is controlling, and where – as here – the parties to the agreement have the same understanding as to its meaning and intent – that understanding "is controlling." *Baladevon*, 871 F.Supp. at 98 (discussing rule of law that "the undisputed evidence as to both the contracting parties' subjective intent controls the interpretation of the ambiguous contract terms . . .") (emphasis added).

authority, DAT&K argues that the trial court was not bound to accept the testimony of MEI and GBS as to the meaning and intent of the very same agreement(s) upon which DAT&K attempts to rely. [See DAT&K Brief at 24-25].

First, the argument ignores the citation to case law in MEI's opening brief, holding that where, as here, parties give consistent testimony as to the meaning and intent of the agreements at issue, that testimony "controls" as a matter of law. See, e.g., *Baladevon, Inc. v. Abbott Laboratories, Inc.*, 871 F.Supp. 89, 98 (D. Mass.1994) (discussing rule of law that "the undisputed evidence as to both the contracting parties' subjective intent controls the interpretation of the ambiguous contract terms . . . ") (emphasis added); see *also* Restatement (Second) of Contracts § 201(1) ("Where the parties have attached the same meaning to a promise or agreement or a term thereof, it is interpreted in accordance with that meaning."). DAT&K's silence on this point is telling.

Second, DAT&K's assertion that the testimony from MEI's Alan Fidler and GBS's Keith Barton consisted of "conclusory statements regarding their subjective intent" is simply wrong. Both witnesses testified at great length as to the history leading up to the creation of the relevant agreements, the reasons behind those agreements, the performance of those agreements (including the source and purpose of the payments made under those agreements), and the parties' intent. [See MEI's Brief at 33-39, 42]. DAT&K does not even try to challenge any of this testimony. Furthermore, and as noted, attorney Keith Barton also offered unchallenged testimony that the rules of ethics demand that if

the Escrow Funds do not go to MEI, then they must be returned to the clients (in other words, GBS has no independent, direct right to those funds; under the doctrine of *nemo dat qui non habet*, DAT&K cannot have any such right either). [See 2-6-09 Trans. At 20-21, 31-34, 87-88, 92-93, R. 006536].

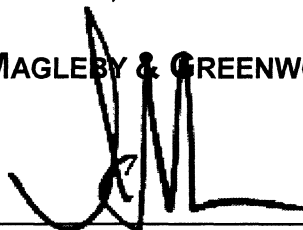
Third, the trial court's purported "credibility" finding must still be based on evidence, and this Court is not compelled to adopt that finding when it is clearly erroneous, as is even acknowledged by DAT&K. [See DAT&K Brief at 5 (although appellate court defers to trial court on issues of credibility, such "will . . . be overturned [if] clearly erroneous.")]. Here, there was no evidence to support the trial court, and even if there was a "scintilla" of evidence, it is against the "clear weight" of the evidence, and/or a mistake has clearly been made.

### CONCLUSION

This Court should reverse the trial court's award of the Escrow Funds to DAT&K, and remand this case with an order to return the Escrow Funds (with interest) to MEI. See, e.g., Nicholson v. Industrial Commission, 14 Utah 2d 3, 376 P.2d 386 Utah 1962 (reversing commission's findings where "all the indicia including intent of the parties" was contrary to the findings of fact).

DATED this 9<sup>th</sup> day of September, 2010.

MAGLEBY & GREENWOOD, P.C.

A handwritten signature in black ink, appearing to be 'JEM', written over a horizontal line.

James E. Magleby  
Attorneys for Appellant  
Mobile Echocardiography, Inc.

## CERTIFICATE OF SERVICE

I hereby certify that I am employed by the law firm of MAGLEBY & GREENWOOD, P.C., 170 South Main Street, Suite 850, Salt Lake City, Utah 84101, and that pursuant to Rule 5(b), Utah Rules of Civil Procedure, two (2) true and correct copy of the foregoing **APPELLANT'S REPLY BRIEF** was delivered to the following this 9<sup>th</sup> day of September 2010 by:

☐ Hand Delivery

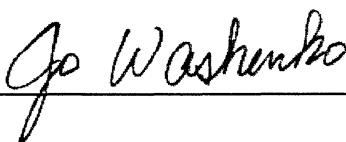
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