

2006

Welden L. Daines v. Richard B. Vincent and ASC Group: Brief of Appellant

Utah Court of Appeals

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IN THE UTAH SUPREME COURT

WELDEN L. DAINES, an individual

Plaintiff-Appellant,

v.

RICHARD B. VINCENT, and ASC
GROUP, L.C., a Utah limited liability
company,

Defendants-Appellees.

Supreme Court Case No. 20060838-SC

Oral Argument Priority No. 15

Trial Court Case No.: 030910378

Trial Judge: Hon. Leslie Lewis

APPELLANT'S OPENING BRIEF
(Addendum filed separately)

APPEAL

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(Oral Argument and Published Decision Requested)

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Pursuant to Utah Rule of Appellate Procedure 24(a), Plaintiff-Appellant Welden L. Daines (hereinafter "Daines") by and through his undersigned counsel of record John Martinez, hereby submits the following Opening Brief:

LIST OF PARTIES

The parties to this appeal are identified in the caption herein.

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JURISDICTION OF THE SUPREME COURT

This Court has jurisdiction pursuant to UTAH CODE §78-2-2(3)(j)(2002).

ISSUES AND STANDARDS OF REVIEW

ISSUE I: Was Daines' Notice of Appeal timely filed?¹ Standard of Appellate Review: This is an *original* determination made by this Court as a matter of law.²

ISSUE II: Is Daines entitled to attorney fees and costs for having to oppose Defendants' motion to dismiss Daines' notice of appeal? Standard of Appellate Review: This is an *original* determination made by this Court as a matter of law.³

ISSUE III: Did the trial court erroneously fail to recognize the different legal capacities of Defendant ASC?⁴ Standard of Appellate Review: Correctness: A directed verdict, as well the determination of a person's legal capacity, are legal determinations reviewed for correctness,

¹. Defendants moved to dismiss Plaintiff's initial Notice of Appeal on the ground that it was "too early" and thus untimely. Plaintiff opposed such motion and moved for attorney fees and costs for having to respond. By Order dated October 23, 2006, this Court deferred ruling on both motions until plenary presentation on the merits. The Court invited the parties to address the matters in the briefing and argument, as well as to address the question whether the procedural posture of Beddoes v. Giffin, 2006 UT App 130, 2006 WL 829112 (March 30, 2006)(Unpublished Opinion) pending before this Court as No. 2006, 0389, was distinguishable.

². State ex rel. S.M., 2006 UT 75, ¶6, 2006 WL 3488945; ProMax Development Corp. v. Raile, 2000 UT 4, ¶11, 998 P.2d 254.

³. See Warner v. DMG Color, Inc., 2000 UT 102, ¶ 24, 20 P.3d 868 (attorney fees and costs awarded by the Court under UTAH R. APP. P. 33 and 34).

⁴. Issue Preserved: (R. 1727, from p.286, line 5 through p.291, line 14, inclusive--Trial Transcript)(Mr. Martinez' argument to Judge Lewis in opposition to Defendants' motions for directed verdicts).

Daines also made this argument earlier in the litigation in conjunction with his *successful* opposition to Defendants' *second* motion for summary judgment. (R. 827-917, 831-32, Plaintiff's Memorandum in Opposition to Defendants' Renewed Motion for Summary Judgment, pp. 5-6). Judge Lewis denied Defendants' motion. (R. 968-72 (*Memorandum Decision* by Judge Lewis denying Defendants' second motion for summary judgment), at 970, p.3), Addendum Exh. 1 (Judge Lewis *Memorandum Decision*).

with no deference given to the trial court.⁵

ISSUE IV: Did the trial court erroneously reject Daines' contention that a certain "release" was unambiguous, and that the parties thereby did not intend to exonerate Defendant ASC in its independent, pre-Surgical Center, legal capacity?⁶ Standard of Appellate Review: Correctness: "Whether an ambiguity exists in a contract is a question of law" reviewed for correctness.⁷ Moreover, a directed verdict is a legal determination reviewed for correctness, with no deference given to the trial court.⁸

ISSUE V: Did the trial court erroneously accept Defendants' contention that a certain "release" was not ambiguous, and that the parties intended thereby to exonerate Defendant ASC in its independent, pre-Surgical Center, legal capacity?⁹ Standard of Appellate Review:

⁵. Management Comm. of Graystone Pines Homeowners Ass'n v. Graystone Pines, Inc., 652 P.2d 896, 897-98 (Utah 1982)("In directing a verdict, the court is not free to weigh the evidence and thus invade the province of the jury, whose prerogative it is to judge the facts."); see also Saleh v. Farmers Ins. Exchange, 2006 UT 1, ¶ 14, 133 P.3d 428; State v. Pena, 869 P.2d 932, 936 (Utah 1994).

⁶. Issue Preserved: Daines made this argument earlier in the litigation in conjunction with his *successful* opposition to Defendants' *first* motion for summary judgment. (R. 122-179, 131-32, Plaintiff's Memorandum in Opposition to the Motion for Summary Judgment by Defendant ASC Group L.C., pp. 10-11). Judge Noel denied Defendants' motion. (R. 272-76 (*Minute Entry* by Judge Noel Denying Defendants' Motion for Summary Judgment), at 272, p.1), Addendum Exh. 2 (Judge Noel *Minute Entry*); (R. 269-71 (*Order* by Judge Noel Denying Defendants' Motion for Summary Judgment), at 269-70, pp.1-2), Addendum Exh. 3 (Judge Noel *Order*).

⁷. Alf v. State Farm Fire & Cas. Ins. Co., 850 P.2d 1272, 1274 (Utah 1993).

⁸. Management Comm. of Graystone Pines Homeowners Ass'n v. Graystone Pines, Inc., 652 P.2d 896, 897-98 (Utah 1982)("In directing a verdict, the court is not free to weigh the evidence and thus invade the province of the jury, whose prerogative it is to judge the facts."); see also Saleh v. Farmers Ins. Exchange, 2006 UT 1, ¶ 14, 133 P.3d 428; State v. Pena, 869 P.2d 932, 936 (Utah 1994).

⁹. Issue Preserved: (R. 1727, p.299, ll.14-25, p.300, ll.1-6--Trial Transcript)(Mr. Martinez' argument to Judge Lewis in opposition to Defendants' motions for directed verdicts, pointing out ambiguities in regard to parties, claims and amounts).

Daines made this argument earlier in the litigation in conjunction with his *successful* opposition to Defendants' *first* motion for summary judgment. (R. 122-179, 131-32, Plaintiff's Memorandum in Opposition to the Motion for Summary Judgment by Defendant ASC Group L.C., pp. 10-11). Judge Noel denied Defendants' motion. (R. 272-76 (*Minute Entry* by Judge Noel Denying Defendants' Motion for Summary Judgment), at 272, p.1), Addendum Exh. 2 (Judge Noel *Minute Entry*); (R. 269-71 (*Order* by Judge Noel Denying Defendants' Motion for Summary Judgment), at 269-70, pp.1-2), Addendum Exh. 3 (Judge Noel *Order*).

Correctness: "Whether an ambiguity exists in a contract is a question of law" reviewed for correctness.¹⁰ Moreover, a directed verdict is a legal determination reviewed for correctness, with no deference given to the trial court.¹¹

ISSUE VI: Did the trial court erroneously conclude that a so-called "integration" clause in the "Release" related to Defendant ASC in its independent, pre-Surgical Center, legal capacity?¹² Standard of Appellate Review: Correctness: A directed verdict is a legal determination reviewed for correctness, with no deference given to the trial court.¹³

ISSUE VII: Did the trial court err in directing a verdict against Plaintiff Daines on all his claims against Defendant Vincent in Vincent's personal capacity?¹⁴ Standard of Appellate Review: Correctness: A directed verdict is a legal determination reviewed for correctness,

Daines also made this argument earlier in the litigation in conjunction with his *successful* opposition to Defendants' *second* motion for summary judgment. (R. 827-917, 831-32, Plaintiff's Memorandum in Opposition to Defendants' Renewed Motion for Summary Judgment, pp. 5-6). Judge Lewis denied Defendants' motion. (R. 968-72 (*Memorandum Decision* by Judge Lewis denying Defendants' second motion for summary judgment), at 970, p.3), Addendum Exh. 1 (Judge Lewis *Memorandum Decision*).

¹⁰. Alf v. State Farm Fire & Cas. Ins. Co., 850 P.2d 1272, 1274 (Utah 1993).

¹¹. Management Comm. of Graystone Pines Homeowners Ass'n v. Graystone Pines, Inc., 652 P.2d 896, 897-98 (Utah 1982) ("In directing a verdict, the court is not free to weigh the evidence and thus invade the province of the jury, whose prerogative it is to judge the facts."); see also Saleh v. Farmers Ins. Exchange, 2006 UT 1, ¶ 14, 133 P.3d 428; State v. Pena, 869 P.2d 932, 936 (Utah 1994).

¹². Issue Preserved: (R. 1727, p.299, ll.19--Trial Transcript)(During Mr. Martinez' argument to Judge Lewis in opposition to Defendants' motions for directed verdicts, pointing out ambiguities in regard to parties, claims and amounts, Judge Lewis stated: "It's very broad and all encompassing," referring to the "integration" clause of the "Release").

¹³. Management Comm. of Graystone Pines Homeowners Ass'n v. Graystone Pines, Inc., 652 P.2d 896, 897-98 (Utah 1982) ("In directing a verdict, the court is not free to weigh the evidence and thus invade the province of the jury, whose prerogative it is to judge the facts."); see also Saleh v. Farmers Ins. Exchange, 2006 UT 1, ¶ 14, 133 P.3d 428; State v. Pena, 869 P.2d 932, 936 (Utah 1994).

¹⁴. Issue Preserved: (R. 1727, p.271, ll.23-25, p.272, ll.1-25--Trial Transcript)(Mr. Martinez' argument to Judge Lewis in opposition to Defendants' motions for directed verdicts).

with no deference given to the trial court.¹⁵

ISSUE VIII: Did the trial court err in directing a verdict against Plaintiff Daines on his claims for fraud and punitive damages against both defendants?¹⁶ Standard of Appellate Review: Correctness: A directed verdict is a legal determination reviewed for correctness, with no deference given to the trial court.¹⁷

ISSUE IX: Did the trial court err in denying Plaintiff Daines' motion *in limine* for an order to admit Judge Hilder's decision in a factually similar case finding that Vincent was not a "credible witness" and had "convenient lapses of memory"?¹⁸ Standard of Appellate Review: Correctness: A "trial court's decision on ... [a] motion *in limine* [excluding evidence] based wholly on its legal conclusion" interpreting the Rules of Evidence is subject to the correctness standard of appellate review.¹⁹ Under a correctness standard, "the appellate court decides the matter for itself and does not defer in any degree to the trial judge's determination

¹⁵. Management Comm. of Graystone Pines Homeowners Ass'n v. Graystone Pines, Inc., 652 P.2d 896, 897-98 (Utah 1982)("In directing a verdict, the court is not free to weigh the evidence and thus invade the province of the jury, whose prerogative it is to judge the facts."); see also Saleh v. Farmers Ins. Exchange, 2006 UT 1, ¶ 14, 133 P.3d 428; State v. Pena, 869 P.2d 932, 936 (Utah 1994).

¹⁶. Issue Preserved: Judge Lewis dismissed the fraud and punitive damages claims out of hand, simply saying in each case, "They're gone." (Fraud: R. 1727, p.279, ll.9-11, 299, ll.24-25, p.300, l.1; Punitives: R. 1727, p.294, ll.19-21, 23-24)

¹⁷. Management Comm. of Graystone Pines Homeowners Ass'n v. Graystone Pines, Inc., 652 P.2d 896, 897-98 (Utah 1982)("In directing a verdict, the court is not free to weigh the evidence and thus invade the province of the jury, whose prerogative it is to judge the facts."); see also Saleh v. Farmers Ins. Exchange, 2006 UT 1, ¶ 14, 133 P.3d 428; State v. Pena, 869 P.2d 932, 936 (Utah 1994).

¹⁸. Issue Preserved: (R. 571-74 (Plaintiff's Motion *in Limine* for an Order to Admit Judge Hilder's Decision, with Limiting Instructions); (R. 575-616, at 590-603, Exhibit A to Daines' Memorandum of Points and Authorities in Support of Motion *in Limine*, Judge Hilder's Decision, pp. 5-7, 10), Addendum Exh. 4 (Judge Hilder's Decision)

¹⁹. Ford v. American Express Financial Advisors, Inc., 2004 UT 70, ¶ 33, 98 P.3d 15.

of law."²⁰

ISSUE X: Did the trial court err in directing a verdict against Plaintiff Daines and thereby deprive Daines of his constitutional rights to a Trial by Jury and to his "day in court," under the Due Process and Open Courts Clauses of the Utah Constitution?²¹ Standard of Appellate Review: Correctness. A directed verdict is a determination as a matter of law reviewed for correctness, with no deference given to the trial court.²²

**CONSTITUTIONAL PROVISIONS, STATUTES AND RULES
OF CENTRAL IMPORTANCE TO THIS APPEAL**

UTAH CONST. art. I, §7. [Due process of law]

No person shall be deprived of life, liberty or property, without due process of law.

UTAH CONST. art. I, §10. [Trial by jury]

In capital cases the right of trial by jury shall remain inviolate. In courts of general jurisdiction, except in capital cases, a jury shall consist of eight jurors. In courts of inferior jurisdiction, a jury shall consist of four jurors. In criminal cases the verdict shall be unanimous. In civil cases three-fourths of the jurors may find a verdict. A jury in civil cases shall be waived unless demanded.

UTAH CONST. art. I, §11. [Courts open--Redress of injuries]

All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy in due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party.

UTAH CODE § 78-27-42. Release of one defendant does not discharge other defendants.

A release given by a person seeking recovery to one or more defendants does not discharge any other defendant unless the release so provides.

²⁰. State v. Pena, 869 P.2d 932, 936 (Utah 1994).

²¹. Issue Preserved: (R. 1727, p.300, ll.15-18--Trial Transcript)(Mr. Martinez' argument to Judge Lewis in opposition to Defendants' motions for directed verdicts)("...Your Honor, we're asking the jury to protect him.").

²². Management Comm. of Graystone Pines Homeowners Ass'n v. Graystone Pines, Inc., 652 P.2d 896, 897-98 (Utah 1982)("In directing a verdict, the court is not free to weigh the evidence and thus invade the province of the jury, whose prerogative it is to judge the facts."); see also Saleh v. Farmers Ins. Exchange, 2006 UT 1, ¶ 14, 133 P.3d 428; State v. Pena, 869 P.2d 932, 936 (Utah 1994).

STATEMENT OF THE CASE

Nature of the case, course of proceedings, disposition in the court below

This case presents the question whether a trial court judge can deprive a plaintiff of a jury trial simply because the trial judge believes that the plaintiff is asking for too much.

Statement of Facts

A. Parties

Plaintiff-Appellant Welden Daines (hereinafter "Daines" or "Plaintiff Daines") is a retired Certified Public Accountant who has provided accounting and tax preparation and investment consulting services to a number of physicians during his career. There are two defendants in this case: Defendant ASC Group, L.C., ("ASC") is a Utah limited liability company. Defendant Richard Vincent ("Vincent") is being sued individually in his personal capacity. (R. 1064-Stipulated Statement, p.1)

Different Legal Capacities of ASC

Before the Surgical Center herein was created as a legal or physical entity, Defendant ASC existed and operated as an independent legal entity in the business of organizing, developing and managing surgical centers and surgical hospitals throughout the country. (R. 1064-Stipulated Statement, p.1) This legal capacity of ASC will be referred to as "*ASC in its independent, pre-Surgical Center, legal capacity*" or "*pre-Surgical Center ASC*".

After the Surgical Center herein was created, and as a result of such formation, Defendant ASC acquired the following *additional* legal capacities:

1. "Member" (owner of 20% of the Surgical Center ownership units, in the form of

Class II shares)²³

2. "Founder," including the right to subscribe to and receive up to three "founder" shares;²⁴
3. "Manager" (ASC is the external Management Company for the Center);²⁵
4. One of 5 "managers" of the Center (ASC as internal manager of the Center);²⁶
5. Secretary-Treasurer of the Board of Managers of the Center;²⁷ and
6. Secretary-Treasurer of the Operating Entity Company of the Center.²⁸

This legal capacity of ASC, in the aggregate, will be referred to as "*ASC in its Surgical Center legal capacity*" or "*Surgical Center ASC*".

Different Legal Capacities of Defendant Vincent

Vincent was a member of ASC Group and served for a period of time as Chairman of its Board. (R. 1064-Stipulated Statement, p.1) He thereby acted for and on behalf *ASC in*

²³. "West Valley Surgical Center, LLC., a Utah limited liability company ("WVSC" or the "Company"), will utilize a capital structure with 2 classes of units. Class I units will be reserved for physicians while Class II units will be held by ASC Group ("ASC"), respectively. (p.1, ¶1)

....

ASC Ownership: ASC Group will own 20.00% of the initial ownership units of the Company. (p.3, ¶9)" (R. 1619, Stipulated Trial Exh. 8, p.1, ¶1 and p.3, ¶9), Addendum Exh. 5 (February 12, 2001 Term Sheet)

²⁴. "**Founders units:** To provide leadership and direction to the project -- as has been done to date -- the Company will enlist the support of up to ten individuals or entities (**including ASC Group**) as "Founders" of the project. ... Founders will be given the right to subscribe to and receive up to three units (including their Founders units) prior to the sale of any units to a physician who is not a Founder." (R. 1619, Stipulated Trial Exh. 8, p.2, ¶5), Addendum Exh. 5 (February 12, 2001 Term Sheet)(Emphasis added).

....

"ASC Ownership: ... ASC will purchase its Founders units at \$7,000 and 19.00 additional units at \$8500 each during the PPM offering period." (R. 1619, Stipulated Trial Exh. 8, p.3, ¶9), Addendum Exh. 5 (February 12, 2001 Term Sheet).

²⁵. "**Management Agreement:** ... The services included in the management agreement and for which ASC will oversee all day-to-day operations includes ... [extensive management duties itemized and management fees set out]... ." (R. 1619, Stipulated Trial Exh. 8, pp.3-4, ¶12), Addendum Exh. 5 (February 12, 2001 Term Sheet)

²⁶. "**Board of Managers:** The Board of Managers will oversee and direct the business of the surgical facility. It will be comprised of five seats, four of which will be held by physicians and **one by ASC group.**" (R. 1619, Stipulated Trial Exh. 8, p.2, ¶7), Addendum Exh. 5 (February 12, 2001 Term Sheet)(Emphasis added)

²⁷. "**Board of Managers:** ... **ASC Group** will serve as the Secretary/Treasurer of both the Board and the Company." (R. 1619, Stipulated Trial Exh. 8, p.2, ¶7, Addendum Exh. 5 (February 12, 2001 Term Sheet)(Emphasis added)

²⁸. Ibid.

its independent, pre-Surgical Center, legal capacity. This legal capacity of Mr. Vincent will be referred to as its "*Vincent as a representative of ASC*". Vincent is also being sued in his individual personal capacity. (R. 1064-Stipulated Statement, p.1) This legal capacity of Mr. Vincent will be referred to as "*Vincent in his individual personal capacity*".

B. MOU Contract between Daines and Defendants ASC and Vincent

On September 22, 2000, Daines and the Defendants executed a "Memorandum of Understanding and Non-disclosure Agreement" (hereinafter "the MOU")²⁹ whereby Daines agreed to provide the Defendants with information about certain physicians he knew who were interested in establishing a new surgical center in West Valley City, Utah (hereinafter "the Surgical Center"). Daines also agreed to provide professional assistance to help the Defendants establish the Surgical Center.³⁰

In exchange for the information and professional assistance Daines agreed to provide, Defendant ASC in its independent, pre-Surgical Center, legal capacity and Vincent personally, agreed in the MOU contract to pay Daines \$150,000.³¹ Daines provided

²⁹. (R. 1619, Stipulated Trial Exh. 2), Addendum Exh. 6 (MOU)

³⁰. (Examination of Mr. Daines by Mr. Colessides)

"Q How did you participate in the feasibility and due diligence phase of the project as directed by paragraph 3 of the agreement?

A Well, I gathered information and submitted it to the ASC to the fellow named Eric Wold, who was their feasibility analyst in Park City. I helped gather the information from the doctors. When the doctors were delinquent in furnishing the information, I would call Dr. Burrows or Dr. McCray or call the doctor myself. I worked with Bob Smith quite extensively on this, and we were in contact almost daily."

(R. 1726, p.53, ll.3-13--Trial Transcript)(referring to R. 1619, Stipulated Trial Exh. 2), Addendum Exh. 6 (MOU)

³¹. (Examination of Mr. Daines by Mr. Colessides)

"Q Did Mr. Vincent say anything about the proposal?

A He-I handed it to him and I said take time to read this. And when he got all through he made the comment, a couple of comments, one that it was pretty heavy, \$150,000 he thought was a lot of money. And at that point I said "Well, if you don't like it forget it, you know, I can't make you sign it. If you don't want it I'll take it someplace else." The other and - later on after they signed it he indicated that I needed to pay Bob Smith and I said no."

Defendants with the list of physicians interested in creating the surgical center.³² Daines also arranged meetings between Defendants and physicians and generally helped in the organization, formation and development of the Surgical Center. Daines testified that he therefore was owed \$150,000 by Defendants because he had performed his obligations under the MOU contract.³³

C. Eight-Shares Agreement between Daines and Defendants ASC and Vincent

On December 13, 2000, before the Surgical Center had been established, Daines met with Defendant Vincent. Defendant Vincent made an oral proposal, which Daines accepted, that if Daines would forego the \$150,000 compensation from Defendants to which Daines

(R. 1726, p.51, ll.13-21--Trial Transcript)(referring to R. 1619, Stipulated Trial Exh. 2), Addendum Exh. 6 (MOU)

³². (Examination of Daines by Mr. Colessides)

"Q What was the next thing you did in connection with the Memorandum of Understanding agreement?

A Well, after I divulged the location, I sent over to Richard Vincent and to Bob Smith a list of doctors that I thought would be interested. I did it by specialty, name, address and I think I put their phone numbers on it.

Q I'll ask you to look at Exhibit 67.

A Okay.

Q Do you recognize that exhibit?

A I do.

Q What is it?

A It's a memo faxed transmittal from me to Richard Vincent setting up the meeting with Dr. McCray and Dr. Burrows.

Q Now that has several pages? What you just described is what? The first page?

A That's page - first page I believe. It's marked -

Q And what is the second page?

A That is to Bob Smith with the same information.

Q And what is page - there's a number at the bottom over here on the right side says 0159? What is that?

A That starts the list of doctors and it's dated September 26th of 2000. And it's to Richard Vincent and Bob Smith, ASC from Welden Daines, Daines List of physicians are at West Valley, Utah by specialty. It goes from that page through 164.

Q For what purpose - did you prepare that? Who prepared the exhibit?

A I did.

Q For what purpose did you prepare it?

A One of my obligations under the MOU."

(R. 1726, p.53, ll.18-25, p.54, ll.1-23--Trial Transcript); (R. 1727, p.174, ll.3-15--Trial Transcript, admitting into evidence Trial Exh. 67), Addendum Exh. 7 (list of physicians)

³³. (Extensive testimony by Mr. Daines upon examination by Mr. Colessides). (R. 1726, pp.52-56--Trial Transcript; R. 1619, Stipulated Trial Exh. 2), Addendum Exh. 6 (MOU)

was already entitled under the MOU, Defendant Vincent personally--and on behalf of ASC in its independent, pre-Surgical Center, legal capacity--promised in exchange to convey to Daines 8 Class II Units (shares) in the Operating Entity of the Surgical Center that eventually would be formed.³⁴

Vincent couched his proposal as an "annuity," which Daines would realize when he received the eight shares. (Id.) The deal was good for Defendants because they would discharge their \$150,000 obligation to Daines under the MOU, at a cost of only \$68,000, which is what it would cost Defendants to acquire the eight shares to convey to Daines. (Id.) The deal was good for Daines, who felt it was a "darn good deal because [he knew] what the

³⁴. (Examination of Mr. Daines by Mr. Colessides)

"Q (BY MR. COLESSIDES) When did you go see Mr. Vincent?

A December 13th of 2000.

Q Where did the meeting take place?

A In Park City in his office.

Q Who was present at that meeting?

A Just the two of us.

....

Q Okay. What did he tell you, as best as you can remember, at that time?

A **Told me that I would get eight shares.**

Q And did you ask him whether or not you would be accepting the eight shares?

A I told him that I would accept the eight shares, yes.

Q And did he give you any reasons why you should be accepting them?

A Well, **he told me that it would be an annuity** and I knew what the facts were and when he said that would be an annuity, I thought that's a darn good deal because I know what the figures are.

Q Did you discuss with him at that time that you had \$150,000 coming under the Memorandum of Understanding and what was going to happen to that money?

A Yes.

Q What did you say?

A Well, I said to him if I forego the \$150,000 that means that you can buy my eight shares for \$68,000 which will save you money and be of a benefit to you. In the discussion before I said - or we agreed upon the eight shares.

Q When you left on December 13 to come back to Bountiful where you live, did you shake hands with Mr. Vincent about your deal of eight shares?

MR. WIKSTROM: Objection, Your Honor, he's leading the witness.

THE COURT: It is leading.

Q (BY MR. COLESSIDES) What was your general discussion with Mr. Vincent?

A Well, I don't think - I may have shook hands with him, I don't remember the exact thing, but I felt satisfied. I thought he was satisfied. I thought we had a good agreement. **By that time I had what I considered a special relationship with him. I - well, I was - I found out that he - I'm LDS, he's LDS, he's a bishop, a returned missionary, as Mr. Hayward is and I thought I could rely on his word."**

(R. 1726, p. 79, ll.6-12; p.80, ll.3-25, p.81, ll.1-14--Trial Transcript)(Emphasis added)

figures" were; he anticipated that the Surgical Center would be a success, and thus that the eight shares were a good investment for him in exchange for the \$150,000 he was giving up. (*Id.*) After Daines accepted Defendants' proposal, he understood that he would not be entitled to a fee from the Surgical Center.³⁵ After Daines accepted Defendants' proposal, he refrained from enforcing his existing claim under the MOU against Defendants for \$150,000.³⁶

On April 23, 2003, Daines demanded that Defendants convey the 8 Class II shares in the Surgical Center's Operating Entity which Defendants had promised to him, but Defendants refused to do so.³⁷ Daines filed this lawsuit seeking to require Defendants to convey the eight shares, as well as damages caused by the delay in conveying the shares, plus interest, costs of litigation and attorneys fees.³⁸ Alternatively, if the value of the shares is not sufficient to provide Daines the annuity promised, or if for whatever reason Defendants cannot convey the eight shares, Daines seeks damages in the amount sufficient to provide the annuity which the shares would have produced, plus interest, costs of litigation and attorneys

³⁵. (Examination of Mr. Daines by Mr. Colessides)

"Q When you look at paragraph 13 of the Exhibit 8, it **did not have anything about your fee, right?**

A **That's correct.**

Q All right. **Did that bother you?**

A **No.**

Q **Why not?**

A **We had our deal on eight shares."**

(R. 1726, p. 82, ll.6-12--Trial Transcript (referring to R. 1619, Stipulated Trial Exh. 8), Addendum Exh. 5 (February 12, 2001 Term Sheet))(Emphasis added)

³⁶. (Examination of Mr. Daines by Mr. Colessides)

"Q And when you said you had foregone your payment of \$150,000 what did you mean by that?

A That was - we had already made our deal on the eight shares (inaudible), so I wasn't getting any cash out of the deal."

(R. 1726, p. 87, ll.9-13--Trial Transcript)

³⁷. (R. 1726, p. 897, ll.16-25, p.98, ll.1-18--Trial Transcript, admitting into evidence Trial Exh. 82), Addendum Exh. 8 (4/23/03 fax and letter from Daines to Vincent)

³⁸. (R. 1726, p.3, ll.4-8-Trial Transcript-Stipulated Statement); (R. 1-25, Complaint, filed May 08, 2003).

fees.³⁹ Daines also seeks punitive damages against Defendants.⁴⁰

D. Daines-Boyer Real Estate Agreement; Daines' Request to the Surgical Center for Assistance in Getting *Immediate* Payment from Boyer

The Boyer Company controlled the vacant land upon which the Surgical Center facility ultimately was constructed.⁴¹ On October 8, 2001, Daines billed *the Boyer Company* \$50,000 it had agreed to pay him, and requested *immediate* payment for his work when the Boyer Company's land was selected for construction of the Surgical Center.⁴² On October 29, 2001, Daines sent a fax transmittal to the Surgical Center, attaching a copy of his October 8, 2001 bill for \$50,000 which he had sent to Boyer. The fax sought the Center's assistance in getting Boyer to make *immediate* payment to Daines of the \$50,000, rather than waiting

³⁹. (R. 1726, p.3, ll.9-13-Trial Transcript-Stipulated Statement)

⁴⁰. (R. 1726, p.3, ll.13-14-Trial Transcript-Stipulated Statement)

⁴¹. (Examination of Mr. Daines by Mr. Colessides)

"Q Did there come a time where a selection of a site was made by the doctors?

A Yes.

Q What was that site?

A It was a piece of vacant land immediately east of the Granger Clinic building.

Q Who owned that property?

A That's a little bit-eventually I would say who had control of it would be Boyer Company. I never did find out who the actual owner was, but it was represented to everybody that the Boyer Company had control of it."

(R. 1726, p.101, ll.2-12)

(Examination of Dr. Burrows by Mr. Wikstrom)

"Q And that site was controlled by The Boyer Company.

A Correct. Access was controlled [by] The Boyer Company, yes."

(R. 1727, p.258, ll.1-3)

⁴². "As we agreed verbally, Bob Smith and I will accept \$50,000 as payment for our services. I believe we have finished our work at **this time** and should be paid." (R. 1620, Stipulated Trial Exh. 59), Addendum Exh. 9 (Bill from Daines to Boyer Company)(Emphasis added).

until the Surgical Center produced revenue.⁴³ Such assistance was not forthcoming.⁴⁴

Although Daines had sought *immediate* payment from Boyer, the Boyer Company did not pay him until about a year and a half later, by check for \$50,000 dated 3/20/03, which *the Boyer Company* sent Daines for his work with respect to the site selection.⁴⁵ The Surgical Center understood it had no obligation to compensate Daines for his time spent on the site selection.⁴⁶

E. The Surgical Center's Decision to Reimburse Daines \$6,000 for his out-of-pocket expenses

⁴³. "Since we are done with our work on WV we would appreciate seeing if you can get immediate payment from Boyer." (R. 1621, Stipulated Trial Exh. 80), Addendum Exh. 10 (October 29, 2001 fax transmittal from Daines to Dr. Burrows)(Emphasis in original)

⁴⁴. "Dr. Burrows indicated that Weldon [sic] Daines' involvement is pretty well complete and asked whether or not he should be paid now. It was decided that Weldon [sic] should be paid \$6,000 now to cover his costs by West Valley, which would be reimbursed by Boyer once the lease is executed and the balance paid to Weldon [sic]." (R. 1621, Stipulated Trial Exh. 91, p.2, ¶6), Addendum Exh. 11 (West Valley Surgical Center, LLC Board of Managers Meeting Minutes 10-30-2001); (R. 1619, Stipulated Trial Exh. 10, at ASC001011), Addendum Exh. 12 (December 10, 2001 MCray cover letter from Surgical Center to Daines)(Boyer will pay upon "commencement of lease project")

⁴⁵. (Examination of Mr. Daines by Mr. Colessides)

"Q And did you ever get paid \$50,00?

A Yes.

Q Who did you get paid from?

A Boyer Company.

Q The Boyer Company?

A Yes."

(R. 1726, p.102, ll.13-18)

(Argument by Mr. Martinez to the Court)

"MR. MARTINEZ: ... The \$50,000 did not come from the center or the doctors. It came from the Boyer Company. A separate deal that Mr. Daines had.

THE COURT: The Boyer Company paid it.

MR. MARTINEZ: Yes. The Boyer Company paid it.

THE COURT: That's right."

(R. 1727, p.287, ll.16-22)(R. 1620, Stipulated Trial Exh. 63), Addendum Exh. 13 (Check from Boyer)

⁴⁶. (Examination of Dr. Burrows by Mr. Wikstrom)

"A ... During the development stage, and I'm talking real estate development site selection, the builder's financing, that type of thing Mr. Daines did a lot of work and ... I repeatedly asked Welden, "**Welden who's going to pay you for this, because we're not paying you and I know you've done a lot of work.**" And his basic response and my understanding was that he felt that in the development that there was enough opportunity and potential speculation that he would be able to find reimbursement for his work."

(R. 1727, p.258, ll.7-16)(Emphasis added)

The Surgical Center had agreed to reimburse Daines for \$6,000 in out-of-pocket costs he had incurred.⁴⁷ On October 30, 2001, at a meeting of the Surgical Center's Board of Managers, Dr. Burrows brought up Daines' request for assistance in getting *immediate* payment from the Boyer Company, and concurrently, discussed the separate question of the Surgical Center's reimbursing Daines for his \$6,000 in out-of-pocket expenses.⁴⁸ The Surgical Center decided not to support Daines' request for assistance in getting *immediate* payment from the Boyer Company, but instead decided that only the Center would immediately pay Daines the \$6,000 for his out of pocket costs, that the Boyer Company would reimburse the Center for such payment, and that the Boyer Company could pay Daines later, once the Surgical Center produced revenue.⁴⁹ At the conclusion of the October 30, 2001 meeting, the Surgical Center's Board of Managers ordered ASC, as the Management Company for the Center, to pay Daines \$6,000 "out of West Valley Surgical Center funds"

⁴⁷. (Examination of Mr. Daines by Mr. Colessides)

"A Well, the doctors had agreed to reimburse me for my out-of-pocket costs of \$6,000."
(R. 1726, p.102, ll.4-5--Trial Transcript)

(Examination of Dr. Burrows by Mr. Colessides)

"... The \$6,000 figure, to my knowledge, was a reimbursement for money out of pocket that Weldon had paid to secure one, if not several sites of land for potential building of the center."
(R. 1727, p.236, ll.18-21)

⁴⁸. "Dr. Burrows indicated that Weldon [sic] Daines' involvement is pretty well complete and asked whether or not he should be paid now. It was decided that Weldon [sic] should be paid \$6,000 now to cover his costs by West Valley, which would be reimbursed by Boyer once the lease is executed and the balance paid to Weldon [sic]." (R. 1621, Stipulated Trial Exh. 91, p.2, ¶6), Addendum Exh. 11 (West Valley Surgical Center, LLC Board of Managers Meeting Minutes 10-30-2001); (R. 1619, Stipulated Trial Exh. 10, at ASC001011), Addendum Exh. 12 (December 10, 2001 McCray cover letter from Surgical Center to Daines)(Boyer will pay upon "commencement of lease project")

⁴⁹. Ibid; (R. 1619, Stipulated Trial Exh. 10, at ASC001011), Addendum Exh. 12 (December 10, 2001 McCray cover letter from Surgical Center to Daines)(Boyer will pay upon "commencement of lease project")

for Daines' out-of-pocket costs.⁵⁰

F. Daines' Invoice #9 to the Surgical Center for Reimbursement of \$6,000 to cover his out-of-pocket expenses--Defendant ASC hijacks the "Release"

On November 1, 2001, in response to the Surgical Center Board's decision to pay him his out-of-pocket costs, Daines sent the Surgical Center **his Invoice #9**, billing the Center for his \$6,000 in out-of-pocket costs.⁵¹ The Surgical Center prepared--but did not yet send--check number 1010, dated November 30, 2001, in the amount of \$6,000. The check was made out from "West Valley Surgical Center, LLC," and payable to "Daines & Associates."⁵²

Dr. David McCray, as Chairman of the West Valley Surgical Center, LLC, prepared a letter--but did not yet send it--dated December 10, 2001 addressed to Daines, styled: "RE: "West Valley Surgical Center Invoice #9," which was **Daines' Invoice #9** which **Daines** had sent to the Surgical Center for his \$6,000 out-of-pocket costs. The letter states it enclosed a "conditional release form" and promised that a check for \$6,000 would be sent to Daines

⁵⁰. **"FOLLOWUP ACTION ITEMS - ASC ... 5. ASC to pay Weldon [sic] Daines' actual out of pocket cost for the options on the properties out of West Valley Surgical Center funds."** (R. 1621, Stipulated Trial Exh. 91, p.3, ¶5), Addendum Exh. 11 (West Valley Surgical Center, LLC Board of Managers Meeting Minutes 10-30-2001)(Emphasis added)

⁵¹. (Examination of Mr. Daines by Mr. Colessides)

"Q And in connection with - let me show you what has been marked as Exhibit 10. Would you please look in your book at Exhibit 10? Exhibit 10 is six pages.

....

Q (BY MR. COLESSIDES) Would you look at exhibit **at the last page which is number ASC0001014?**

A Yes.

Q What is that, sir?

A An invoice from me to ASC Surgical Center.

Q And who did you send it to?

A I sent it to the Park City office of ASC.

Q And what was the reason - what is the reason for sending that invoice?

A **Well, the doctors had agreed to reimburse me for my out-of-pocket costs of \$6,000."**

(R. 1726, p.101, ll.13-15, 20-25, p.102, ll.1-5--Trial Transcript)(emphasis added)(referring to R. 1619, Stipulated Trial Exh. 10, at ASC001014), Addendum Exh. 14 (Invoice #9 from Daines to Surgical Center)

⁵². (R. 1619, Stipulated Trial Exh. 10, at ASC001013), Addendum Exh. 15 (Check Number 1010 from Surgical Center to Daines)

"immediately" upon the Center's receipt of the executed "conditional release form." With respect to Daines' request for the Center's assistance in obtaining *immediate* payment of \$50,000 to Daines from the Boyer Company, however, the letter noted that such amount would be paid "upon commencement of the lease for the project," and not immediately, as Daines had requested.⁵³

Then the ASC Group got involved. On December 11, 2001, Bruce Heywood/Barbara Kolstad of ASC Group sent a fax to Daines. The fax was styled: "Re: West Valley Surgical Center Invoice #9--Conditional Release of Liability," referring to **Daines' Invoice #9** which **Daines** had sent to the Surgical Center for his \$6,000 out-of-pocket costs. The fax attached the December 10, 2001 letter which had been prepared by Dr. David McCray as Chairman of the West Valley Surgical Center, LLC, addressed to Daines. The fax also attached the

⁵³. The letter, on "WEST VALLEY SURGICAL CENTER, LLC" letterhead, stated:
"December 10, 2001
[addressed to Daines]

RE: West Valley Surgical Center Invoice #9

Dear Welden:

Thank you for the services you rendered to West Valley Surgical Center, LLC during the due diligence and organizational phase of the development. **Check Number 1010 in the amount of \$6,000.00** representing payment towards your fee totaling \$50,000 has been prepared by West Valley Surgical Center, LLC. The check will be sent you **immediately** upon receipt of the **conditional release form** attached to this letter.

As you know, The Boyer Company, Developer, will pay the balance **upon commencement of the lease for the project**.

Please call me should you have any questions.

Sincerely,

David McCray, Chairman
West Valley Surgical Center, LLC
Cc: Dan Saale, CFO, ASC Group, L.C.
West Valley Surgical Center Board Members"

(R. 1619, Stipulated Trial Exh. 10, at ASC001011), Addendum Exh. 12 (December 10, 2001 McCray cover letter from Surgical Center to Daines)(Emphasis added)

"Release" Dr. McCray had in turn attached to his December 10, 2001 letter. The fax asked Daines to sign the "waiver," and stated that "As soon as we receive the fax or original back we will forward the \$6,000 check prepared by West Valley Surgical Center, LLC to you."⁵⁴

On December 12, 2001, Daines return-faxed the same December 11, 2001 paper which Bruce Heywood/Barbara Kolstad had sent to him, adding only his handwritten notes on the fax as follows: "12/12/01--see attached signed "Cond Release of Liability"--Welden". The return-fax from Daines attached the executed "Release". (*Ibid.*)

Bruce Heywood of ASC Group then *hijacked* the correspondence for Defendant ASC's own purposes: he faxed the "Release" to Dan Tasset, a principal and subsequently sole owner of Defendant ASC, emphasizing it was "re: Welden Daines" and "Highly Important!"⁵⁵ Defendant ASC thereafter has tried to (mis)use the "Release" to exonerate itself from Defendant ASC's independent obligation to convey eight shares of the Center to Daines.

⁵⁴. The fax, on ASC Group letterhead, stated:

"[Addressed to Daines]

From: Bruce Heywood/Barbara Kolstad

Date: December 11, 2001

Re: West Valley Surgical Center Invoice #9 -- Conditional Release of Liability

Dear Welden:

Bruce asked that the attached memo and Conditional Release of Liability be faxed and mailed to you. Please sign and have Bob Smith sign the **waiver** and either fax (435/615-6999) or mail it back to us. As soon as we receive the fax or original back we will forward on the **\$6,000 check prepared by West Valley Surgical Center, LLC** to you.

Please do not hesitate to call if you have any questions.

Thank you.

Cc: Dan Saale, CFO, ASC Group, LC"

(R. 1619, Stipulated Trial Exh. 10, at ASC001010), Addendum Exh. 16 (December 11, 2001 fax from Heywood/Kolstad of ASC Group to Daines)(Emphasis added)

⁵⁵.(R. 1619, Stipulated Trial Exh. 10, at ASC001009), Addendum Exh. 17 (Fax cover sheet from Bruce Heywood of ASC Group to Dan Tasset)(Emphasis added)

G. The Limited Effect of the "Release"

What began as an innocuous release "form" in Dr. McCray's letter, and transmitted via the Heywood/Kolstad fax as an equally innocent "waiver," ultimately was signed by Daines, and became the "Release" document in this litigation.⁵⁶ By executing the Release, Daines **only** intended to exonerate *the Surgical Center* from its obligation to reimburse him **for his \$6,000 in out-of-pocket expenses**, as set out in Daines' **Invoice #9**.⁵⁷ Similarly, by

⁵⁶. (R. 1619, Stipulated Trial Exh. 10, at ASC001012), Addendum Exh. 18 (Conditional Release of Liability)

⁵⁷. (Examination of Mr. Daines by Mr. Colessides)

"Q And what was the reason - what is the reason for sending that invoice?

A Well, the **doctors had agreed to reimburse me for my out-of-pocket costs of \$6,000.**"

Q So what did you write on that invoice exhibit?

A I wrote **\$50,000 promised by Boyer Company** for work on different sites for WV West Valley Surgical Center building.

Q And the line above it, what does that say?

A "Partial fee for building portion West Valley City, balance 44 payable upon signing the lease."

Q **And did you ever get paid \$50,000?**

A Yes.

Q **Who did you get paid from?**

A **Boyer Company.**

Q The Boyer Company?

A Yes.

Q The page two of Exhibit 10, the page marked ASC001010, do you recognize that, sir?

A Yes, I do.

Q What is it?

A It's a fax from Bruce Heywood/Barbara Colstad to me and then a return from me to them.

Q And what was attached to that page ASC001010?

A The conditional release.

Q And what did the letter ask you to do?

A Asked me to have Bob Smith sign the waiver and either fax or mail it back to us, meaning ASC.

Q And did you sign the release?

A I did.

Q And did Bob Smith sign the release?

A Yes.

Q And did you send it back?

A Yes.

Q And at the same time there was another letter attached, ASC0001011. Do you recognize that?

A Yes.

Q Did you receive it?

A Yes.

Q And what is it?

A It's a letter to me from Dr. McCray thanking me for the services rendered in West Valley Surgical Center during the due diligence, organization [inaudible] development.

THE COURT: You're going to need to speak up, sir.

THE WITNESS: During the due diligence and organizational phase of the development, check number 1010

executing the Release Daines intended to exonerate ASC **only** in its "**Surgical Center legal capacity**," *as a member of the Surgical Center*, and thus **only** from any obligation ASC might have had in that legal capacity to reimburse him *for his \$6,000 in out-of-pocket expenses*, as set out in Daines' **Invoice #9**. (Id.)

Daines **did not** intend to exonerate Defendant ASC in its "independent pre-Surgical Center, legal capacity," nor Defendant Vincent in his "individual personal capacity," from their independent obligation to convey 8 shares in the Surgical Center to Daines. Thus, on April 23, 2003, Daines demanded that Defendants convey the 8 Class II shares in the Surgical Center's Operating Entity which Defendants had promised to him, but Defendants refused to do so.⁵⁸

H. Procedural Context of this Appeal

On May 8, 2003 Daines filed his complaint, alleging: (1) Breach of Contract, (2) Promissory Estoppel, (3) Fraudulent Inducement to Contract, (4) Breach of the Implied Covenant of Good Faith and Fair Dealing, (5) Negligent Misrepresentation, (6) Unjust Enrichment-Quantum Meruit, and (7) Specific Performance. He prayed for conveyance of the 8 shares, or alternatively for damages sufficient to compensate for the failure to convey, plus accounting, delay damages, punitive damages, interest, attorney fees and costs.⁵⁹

in the amount of \$6,000 attached.

Q (BY MR. COLESSIDES) Did you receive the \$6,000 check?

A I did."

(R. 1726, p.102, ll.4-25, p.103, ll.1-25, p.104, l.1--Trial Transcript)(referring to R. 1619, Stipulated Trial Exh. 10, at ASC001014), Addendum Exh. 14 (Invoice #9 from Daines to Surgical Center)(Emphasis added)

⁵⁸.(R. 1726, p. 897, ll.16-25, p.98, ll.1-18--Trial Transcript, referring to Trial Exh. 82), Addendum Exh. 8 (4/23/03 fax and letter from Daines to Vincent)

⁵⁹.(R. 1726, p.3, ll.4-8-Trial Transcript-Stipulated Statement); (R. 1-25, COMPLAINT, filed May 08, 2003).

Judge Frank Noel holds "Release" ambiguous On September 18, 2003, Defendants made their *First* motion for summary judgment, contending that the "Release" exonerated Defendants from their obligation to convey the promised 8 shares to Daines.⁶⁰ On January 14, 2004, Judge Noel in a *Minute Entry* considered "whether there is an ambiguity in the terms of the [Release] contract entered into by the parties."⁶¹ He held the "Release" was "**ambiguous** and that fact issues remain[ed] to clarify the ambiguity."⁶² He thus denied Defendants' *First* motion for summary judgment.

Judge Leslie Lewis holds "Release" ambiguous On November 17, 2005, Defendants made a *Second* motion for summary judgment, again contending that the "Release" exonerated Defendants from their obligation to convey the promised 8 shares to Daines.⁶³ On June 7, 2006, Judge Leslie Lewis concluded:

"Having carefully reviewed the parties' Release, the Court determines that the language is **ambiguous**, requiring the Court to go outside of this document in order to discern the parties' intent. Foremost, the Court concludes that **the scope and nature of the Release is ambiguous and cannot be resolved as a matter of law.**"⁶⁴

Judge Lewis therefore denied Defendants' *Second* motion for summary judgment.

Judge Lewis holds "Release" unambiguous On August 8, 2006, at the close of Daines'

⁶⁰. (R. 59-61).

⁶¹. (R. 272-76 (*Minute Entry* by Judge Noel Denying Defendants' Motion for Summary Judgment), at 272, p.1), Addendum Exh. 2 (Judge Noel *Minute Entry*).

⁶². (R. 269-71 (*Order* by Judge Noel Denying Defendants' Motion for Summary Judgment), at 269-70, pp.1-2), Addendum Exh. 3 (Judge Noel *Order*)(Emphasis added).

⁶³. (R. 725-27).

⁶⁴. (R. 968-72 (*Memorandum Decision* by Judge Lewis denying Defendants' second motion for summary judgment), at 970, p.3), Addendum Exh. 1 (Judge Lewis *Memorandum Decision*)(Emphasis added).

evidence at trial, Defendants moved for directed verdicts. Judge Lewis opined that Plaintiff's time could not be worth what Daines was claiming.⁶⁵ She noted that a jury question would not be presented if Daines' 8-shares agreement was not enforceable as an "issue of law."⁶⁶ On August 9, 2006, explaining she had read Exhibit 10 "at least 25 times," Judge Lewis orally granted directed verdicts against Daines on all claims against both Defendants.⁶⁷ On August 22, 2006, Judge Lewis entered three written directed verdict ORDERS:

- (1) Granting Defendants' Motion for Directed Verdict on All Plaintiff's Claims Against ASC Group, L.C.;⁶⁸
- (2) Granting Defendants' Motion for Directed Verdict on All Plaintiff's Claims Against Richard Vincent, Individually;⁶⁹ and
- (3) Granting Defendants' Motion for Directed Verdict on Plaintiff's Claims For

⁶⁵.(Mr. Martinez' argument to Judge Lewis opposition to Defendants' motion for directed verdicts)
"THE COURT: That's another thing that goes to the credibility, **the amount that we're talking about for the work Mr. Daines did is absolutely absurd.** I mean, it defies belief and credibility on every level.
MR. MARTINEZ: May I speak to that?
THE COURT: **You can speak to it, but, you're not going to change my mind on that one.**
MR. MARTINEZ: Well, if I may try.
THE COURT: What, is he worth \$80,000 an hour?
MR. MARTINEZ: If I may try.
THE COURT: And you expect me to buy off on that or any of the jurors too?
MR. MARTINEZ: If I may try?
THE COURT: **No one is worth that. Not Donald Trump."**
(R. 1727, p.285, ll.18-25, p.286, ll.1-8--Trial Transcript)(Emphasis added)

⁶⁶.(Mr. Martinez' argument to Judge Lewis opposition to Defendants' motion for directed verdicts)
"THE COURT: Mr. Daines made a couple of bad deals and **you're asking me to protect him** when he's capable of protecting himself.
MR. MARTINEZ: No, Your Honor, **we're asking the jury to protect him.**
THE COURT: **Yes, I understand that but I don't think it goes to the jury. I think it's an issue of law."**
(R. 1727, p.300, ll.12-18--Trial Transcript)(Emphasis added)

⁶⁷. "THE COURT: ... I have determined after spending a good deal of time reviewing the exhibits that I felt were relevant, and most importantly, **reading at least 25 times** Exhibit 10, I have determined to grant a directed verdict."
(R. 1727, p.316, ll.4-8--Trial Transcript)

⁶⁸. (R. 1661-76 (*ORDER* by Judge Lewis filed August 22, 2006 granting directed verdict for ASC Group on all claims), Addendum Exh. 19 (Judge Lewis Directed Verdict Order-for ASC).

⁶⁹. (R. 1657-60 (*ORDER* by Judge Lewis filed August 22, 2006 Granting Defendants' Motion for Directed Verdict on All Plaintiff's Claims Against Richard Vincent, Individually), Addendum Exh. 20 (Judge Lewis Directed Verdict Order-for Vincent)

Fraudulent Inducement and Punitive Damages Against ASC Group, L.C. and Richard Vincent, Individually.⁷⁰

Defendants request costs from trial court On September 6, 2006, Defendants served Daines with their proposed 2-page "Judgment" reiterating Judge Lewis' previous directed verdict orders, but adding "that Defendants recover court *costs* from Plaintiff."⁷¹ Five days later, Defendants followed up by filing a "Verified Memorandum of Costs".⁷² Daines filed objections to the proposed judgment in the trial court.⁷³

Daines' initial Notice of Appeal and Defendant's motion to dismiss appeal On September 8, 2006, Daines filed his *initial* Notice of Appeal.⁷⁴ On September 15, 2006, Defendants filed a motion to dismiss Daines' appeal as "too early," on the ground that no final appealable judgment or order had been filed.⁷⁵ On September 21, 2006, Daines filed his Opposition to Defendants' motion to dismiss and also requested attorney fees and costs pursuant to UTAH R. APP. P. 33. On October 6, 2006, Defendants filed a "supplemental authority" letter in support of their motion to dismiss Daines' appeal. On October 7, 2006, Daines filed his response to Defendants' "supplemental authority" letter.

Ongoing trial and appeal court proceedings On October 11, 2006, Judge Lewis entered

⁷⁰. (R. 1651-56 (*ORDER* by Judge Lewis filed August 22, 2006 Granting Defendants' Motion for Directed Verdict on Plaintiff's Claims For Fraudulent Inducement and Punitive Damages Against ASC Group, L.C. and Richard Vincent, Individually), Addendum Exh. 21 (Judge Lewis Directed Verdict Order-on Fraud and Punitives)

⁷¹. This subsequently was signed by Judge Lewis. (R. 1717-19 ("*Judgment*" by Judge Lewis filed October 11, 2006), p.2), Addendum Exh. 22 (Judge Lewis 10-11-2006 "*Judgment*").

⁷². (R. 1683-86).

⁷³. (R. 1699-1704 (filed 9-12-2006; trial record shows erroneous file date of "09-18-06"))

⁷⁴. (R. 1677-79)(Daines' *initial* Notice of Appeal)

⁷⁵. (Supreme Court Docket, "9/15/2006-Motion-Dismiss").

a 2-page "Judgment" summarizing her previous directed verdict orders, adding "that Defendants recover court costs from Plaintiff," and including a handwritten "*note: objections denied.*"⁷⁶ The "Judgment," however, did not fix an amount for the costs. On October 24, 2006, Defendants filed a letter with this Court, conceding, as argued by Daines in his Opposition to Defendants' motion to dismiss Daines' appeal, that the subsequent 10-11-2006 "Judgment" by Judge Lewis "ripened [Daines' Notice] into a timely notice of appeal." Defendants therefore withdrew their motion to dismiss Daines' appeal.⁷⁷ Defendants' concession that Daines' *initial* Notice of Appeal is timely, of course, did not confer subject matter jurisdiction on this Court. However, by Order dated October 23, 2006, this Court deferred ruling on whether Daines' initial Notice of Appeal was too early, as well as whether Defendants are liable for attorney fees and costs for filing their motion to dismiss Daines' appeal.⁷⁸ Daines thereby was placed in jeopardy of forfeiting his appeal if this Court were to rule that Daines' *initial* Notice of Appeal was premature. Accordingly, on November 8, 2006, Daines therefore filed his **First Amended** Notice of Appeal, subsequent to the trial court's court's 10-11-2006 "Judgment," in order to preserve his right to appeal.⁷⁹ On November 6, 2006, Defendants filed a *second proposed* judgment fixing costs at \$3,842.11.⁸⁰ Since Judge

⁷⁶. (R. 1717-19 ("*Judgment*" by Judge Lewis filed October 11, 2006), p.2), Addendum Exh. 22 (Judge Lewis 10-11-2006 "*Judgment*").

⁷⁷. "Accordingly, our Motion to Dismiss...is hereby withdrawn." (Supreme Court Docket, 10/24/2006 "Misc. Letter").

⁷⁸. "The Court defers ruling on both motions until plenary presentation on the merits." (Supreme Court Docket, 10/23/2006 ORDER).

⁷⁹. (Entered as Supreme Court Docket, 11/13/2006 [Daines' First] Amended Notice of Appeal).

⁸⁰. (R. 1723-25 (*Second Proposed "Order fixing costs and amended judgment (unsigned)"* filed November 6, 2006).

Lewis was voted off the bench in the November 7, 2006 general election, and since no other judge has been assigned to the case to date, the *second proposed* "Judgment," this time fixing costs, has not been acted upon by the trial court to date.

SUMMARY OF ARGUMENT

Daines gave up his claim against Defendants for \$150,000 in exchange for Defendants' promise to convey 8 shares of a Surgical Center to him. Defendants reneged on that promise. Defendants contend, *inter alia*, that Daines must have intended a "gift" to them of his claim for \$150,000.⁸¹ Defendants entire strategy in this litigation has been to distort a certain "release" to exonerate them from their obligation to Daines. *Twice* Defendants failed: On September 18, 2003, Judge Frank Noel denied Defendants' *first* motion for summary judgment attempting to misconstrue the "release." Judge Noel concluded that the "Release" was "**ambiguous** and that fact issues remain[ed] to clarify the ambiguity."⁸² And Judge Leslie Lewis, on June 7, 2006, denying Defendants' *Second* motion for summary judgment, also concluded that the "release" was "**ambiguous**" and "**that the scope and**

⁸¹. (Examination by Mr. Colessides of Daniel R. Tasset, of ASC Group, in Deposition)

"Q That's not the question, Mr. Tasset. Listen to the question, it's a very simple question. Did you expect Mr. Daines to make a **gift** of his services to ASC Group?

A Yes.

....

Q For nothing?

A Absolutely.

Q **As a gift?**

A Yes."

(R. 944-46, at 946 (Plaintiff's Reply Mem. in Support of Motion to Strike Defendants' Renewed Motion for Summary Judgment, quoting and attaching excerpt from Tasset deposition, p.155, ll.4-8, ll.19-22), Addendum Exh. 24 (Excerpt from Tasset deposition which was attached as Exhibit A to Reply pleading)

⁸². (R. 269-71 (*Order* by Judge Noel Denying Defendants' Motion for Summary Judgment), at 269-70, pp.1-2), Addendum Exh. 3 (Judge Noel *Order*)(Emphasis added).

nature of the Release is ambiguous and cannot be resolved as a matter of law."⁸³ The *third* time proved a charm for Defendants, though. At the close of Daines' case in chief at trial, Judge Leslie Lewis entered three directed verdict orders dismissing with prejudice all Daines' claims against both Defendants.⁸⁴

Judge Lewis improperly took the case from the jury. Either the "release" *unambiguously* did not release Defendant ASC from its obligation to convey the 8 shares to Daines, or at minimum, the "release" is *ambiguous* on that point. And there was sufficient evidence in the record from which the jury could have found Defendant Vincent acted in his personal capacity as well as in his representative capacity on behalf of ASC. The directed verdicts on fraud and punitive damages were similarly erroneous.

Fundamentally, Judge Lewis overlooked that Defendant ASC and Defendant Vincent operated under different legal capacities. Thus, the "*pre-Surgical Center ASC*" entered into, and was liable for, the 8-shares obligation to Daines, and the "release" did not apply to ASC in that legal capacity. Defendant Vincent patently was not covered by the "release." And there was sufficient evidence from which the jury could find him personally liable under the contractual and non-contractual claims alleged by Daines in his complaint.

Judge Lewis' orders ultimately denied Daines his right to a Jury Trial and to a "day in court" under the Jury Trial, Due Process and Open Courts Clauses of the Utah Constitution.

⁸³. (R. 968-72 (*Memorandum Decision* by Judge Lewis denying Defendants' second motion for summary judgment), at 970, p.3), Addendum Exh. 1 (Judge Lewis *Memorandum Decision*)(Emphasis added).

⁸⁴. The three Directed Verdict Orders are included in Defendants' moving papers.

ARGUMENT

I. Daines' Notice of Appeal was timely filed⁸⁵

Daines' *initial* Notice of Appeal was not "too early." The three directed verdicts were appealable "final orders" under UTAH R. APP. P. 3(a). Defendants' request for costs did not affect the appealability of such orders.⁸⁶ And the fact that judgment had not yet been entered did not affect the appealability of such orders either because where a "formal order of dismissal [is] signed and filed...[t]he entry of the judgment [is] merely a ministerial act to be performed by the clerk."⁸⁷

Even if Daines' initial Notice of Appeal had been "too early," it was subsequently rendered timely by the operation of UTAH R. APP. P. 4(c) after the trial court entered the 10-11-2006 "Judgment," as Defendants indeed conceded.⁸⁸ Moreover, this Court has subject matter jurisdiction as a result of Daines' subsequently-filed *First Amended* Notice of Appeal, filed on November 8, 2006, after the entry of the trial court's 10-11-2006 "Judgment."

II. Daines is entitled to attorney fees and costs for having to oppose Defendants' motion to dismiss Daines' initial Notice of Appeal

Under UTAH R. APP. P. 33(a) this Court "**shall** award just damages, which may include single or double costs, as defined in Rule 34, and/or reasonable attorney fees..." if

⁸⁵. Daines' arguments in this regard are set forth in his "Response to Motion" filed in this Court on 9/25/2006 and in his "Response to Supplemental Authority" letter filed in this Court on 10/09/2006. Only additional arguments are set forth herein because of page constraints.

⁸⁶. ProMax Development Corp. v. Raile, 2000 UT 4, ¶ 15, 998 P.2d 254 (Emphasis added). In State ex rel. S.M., 2006 UT 75, ¶6, 2006 WL 3488945 (December 5, 2006), this Court recently reaffirmed that principle.

⁸⁷. Campbell v. Nelson, 102 Utah 78, 125 P.2d 413, 415 (1942).

⁸⁸. "Accordingly, our Motion to Dismiss...is hereby withdrawn." (Supreme Court Docket, 10/24/2006 "Misc. Letter").

this Court determines that Defendants' motion to dismiss Daines' appeal was "frivolous," because the motion was "not warranted by existing law, or not based on a good faith argument to extend, modify, or reverse existing law." UTAH R. APP. P. 33(b).

First, Defendants' motion was not warranted by existing law because ProMax expressly addressed the question of costs and distinguished Nielson *precisely* on that point. Moreover, UTAH R. APP. P. 4(c) expressly provides that Daines' Notice would have become timely as a matter of law once the subsequent "judgment" entered on 10-11-2006 was filed.

Second, Defendants' motion was not based on a good faith argument to extend, modify or reverse existing law since Defendants did not even cite ProMax or UTAH R. APP. P. 4(c). Moreover, Defendants served their proposed judgment on September 6, 2006; on September 8, 2006, Daines filed his *initial* Notice of Appeal; one week thereafter on September 15, 2006, Defendants filed their motion to dismiss Daines' appeal as premature. Defendants must have been aware that once their proposed judgment was filed, as indeed it was on 10-11-2006, UTAH R. APP. P. 4(c) would render Daines' appeal timely *as a matter of law*. And Defendants conceded that is exactly what happened in their subsequent letter to this Court *withdrawing* their motion to dismiss. When evidence of lack of good faith is so clear, attorney fees and costs must be awarded.⁸⁹

Third, the Beddoes case, which this Court invited the parties to address, is distinguishable. In Beddoes, the trial court entered an order granting summary judgment to the defendant-appellee. Then the defendant-appellee asked the trial court to award **costs**.

⁸⁹. See, e.g., Warner v. DMG Color, Inc., 2000 UT 102, ¶ 24, 20 P.3d 868 (attorney fees and costs awarded by the Court under UTAH R. APP. P. 33 and 34).

After the trial court's decision denying costs, plaintiff-appellant filed a Notice of Appeal. Defendant-appellee then moved to dismiss the appeal as "too late." The Court of Appeals held that the order granting summary judgment had started the 30-day ticker on the filing of the Notice of Appeal, and thus that plaintiff-appellant's Notice indeed had been filed "too late." The plaintiff-appellant contended, albeit implicitly, that the 30-day ticker should have started upon the trial court's decision denying costs. Citing ProMax and Nielson, the Court of Appeals rejected that contention. Defendant-appellee then moved for attorney fees and costs pursuant to UTAH R. APP. P. 33. Rejecting that motion, the Court of Appeals held:

"Although [Plaintiff-Appellant] Beddoes's arguments are inconsistent with both ProMax and Nielson, we liberally construe them as good faith arguments for a modification of the existing law and deny [Defendant-Appellee] Giffin's request for sanctions on that basis."⁹⁰

In Beddoes, therefore, relief under UTAH R. APP. P. 33 was denied because the plaintiff-appellant, who had filed a Notice of Appeal "too late," made what were deemed good faith arguments that ProMax should apply not only to attorney fees, but to **costs** as well, thereby rendering a "too late" filing timely if filed within 30 days after the decision on **costs**.

In this case, Judge Lewis entered three directed verdicts which Daines contends were appealable orders. Daines thereafter filed his Notice of Appeal. As in Beddoes, Defendants-appellees herein requested **costs**. Then Defendants-appellees herein moved to dismiss Daines' appeal as filed "**too early**." Perhaps, as in Beddoes, Defendants' motion *might* be construed as an attempt to argue that ProMax should apply not only to attorney fees, but to **costs** as

⁹⁰. Beddoes v. Giffin, 2006 UT App 130, 2006 WL 829112 (March 30, 2006)(Unpublished Opinion) pending before this Court as No. 2006, 0389.

well: that since the trial court had not yet determined costs, the case was not yet appealable, and the Notice of Appeal was "too early." *But Defendants did not even cite ProMax!*

In addition, UTAH R. APP. P. 4(c) unambiguously provides that a "too early" Notice of Appeal "shall be treated" as timely upon the entry of the judgment subsequently entered by Judge Lewis on 10-11-2006 here. And Defendants *concede* that is exactly what happened. That is why Defendants thereafter *withdrew* their motion.

Accordingly, and unlike in Beddoes, Defendants have no argument that they were attempting to extend existing law; they apparently were not even aware of ProMax. And of course there is no way Defendants could have been trying to challenge the plain terms of UTAH R. APP. P. 4(c). Daines therefore should be awarded his attorney fees and costs in responding to Defendants' motion to dismiss his appeal, in responding to Defendants' "supplemental authority" letter in support of their motion, and in this Brief.

III. The trial court erroneously failed to recognize the *different legal capacities* of Defendant ASC

In Judge Lewis' directed verdict order regarding ASC, she concluded:

"Construing all of the evidence presented at trial in the light most favorable to Plaintiff, and based on the plain and unambiguous language of the Release, the Court concludes that reasonable minds could not differ on the interpretation of the Release. As a matter of law, Plaintiff released and discharged ASC from the claims Plaintiff asserted in this lawsuit."⁹¹

The trial court equated the "*pre-Surgical Center ASC*," (which executed the MOU and subsequently substituted the 8-shares oral agreement for the MOU),⁹² with the "*Surgical*

⁹¹. (R. 1661-76, at 1672, ¶27 (*ORDER* by Judge Lewis filed August 22, 2006 granting directed verdict for ASC Group on all claims), Addendum Exh. 19 (Judge Lewis Directed Verdict Order-for ASC).

⁹². This legal capacity is set out in the Statement of Facts above.

Center ASC," (which entailed numerous legal capacities premised on the Surgical Center).⁹³

By analogy, suppose a statute provides that the Supreme Court "and its members" are exonerated from liability. No one would seriously contend that the mortgages on the Justices' homes are thereby exonerated. Yet, conceptually, that is exactly what the trial court held.

"[A]n entity acting in one capacity is not the 'same party' ... as the same entity acting in a different capacity."⁹⁴ And in other settings as well, both natural and artificial persons may act in *different legal capacities*.⁹⁵ In this case, the different time frames, different legal capacities of the parties, and different transactions are as follows:⁹⁶

Time Frame # 1. Daines identified several doctors whom Daines believed might benefit from organizing themselves into a Surgical Center entity.⁹⁷

Time Frame # 2. Daines then contacted Defendants Vincent and ASC, whom Daines believed might be interested in helping organize a Surgical Center. Defendants agreed to pay Daines \$150,000 in exchange for Daines' disclosure of the identities of the

⁹³. This legal capacity is set out in the Statement of Facts above.

⁹⁴. Pepper v. Zions First National Bank, N.A., 801 P.2d 144, 152-53 (Utah 1990)(entity which is trustee and also executor is not the "same party" when acting in those different legal capacities; citing 18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4449, at 414 (1981) and Restatement (Second) of Judgments § 36(2) (1982)).

⁹⁵. See Swan Creek Village Homeowners Ass'n v. Warne, 2006 UT 22, ¶ 23, 134 P.3d 1122 (father has different legal capacity when suing as agent for minor daughter than when suing in his personal capacity on his own behalf); Raile Family Trust v. ProMax Dev. Corp., 2001 UT 40, ¶ 13, 24 P.3d 980 (individual acting as principal for corporation is different legal person for purposes of URCP 13(a) than when individual is acting in his personal capacity); Goodliffe v. Colonial Corp., 107 Utah 488, 498, 155 P.2d 177, 182 (Utah 1945)(plaintiffs seeking personal relief cannot join such claims in derivative action where they are suing as representatives on behalf of the corporation); In Re Stevens' Estate, 102 Utah 255, 130 P.2d 85, 87 (Utah 1942)(same person had *three* different legal capacities: administrator of estate, officer of corporation and personal capacity).

⁹⁶. Daines made this argument earlier in the litigation in conjunction with his *successful* opposition to Defendants' *second* motion for summary judgment. (R. 827-917, 831-32, Plaintiff's Memorandum in Opposition to Defendants' Renewed Motion for Summary Judgment, pp. 5-6). *Judge Lewis* ruled in favor of Daines and denied Defendants' motion.

⁹⁷. (R. 1727, p.48, ll.14-25, p.49, ll.1-10--Trial Transcript (testimony by Daines describing idea of putting together a surgical center)); (R. 1727, p.174, ll.3-15--Trial Transcript, testimony by Daines regarding list of physicians he provided to ASC and Vincent, Trial Exh. 67), Addendum Exh. 7 (list of physicians).

doctors.⁹⁸

Time Frame # 3. Daines independently worked with the Boyer Company, which agreed to pay Daines \$50,000 for Daines' work in obtaining a buyer for the Boyer Company land upon which the Surgical Center eventually was constructed.⁹⁹

Time Frame # 4. Defendants Vincent and ASC entered into an *accord* with Daines, whereby Daines would relinquish his claim to the \$150,000 owed to him by Vincent and ASC, in exchange for 8 shares of the Surgical Center entity.¹⁰⁰

Time Frame # 5. The Surgical Center entity agreed to reimburse Daines for \$6,000 in out-of-pocket costs Daines had incurred in assisting the Surgical Center.¹⁰¹

Time Frame # 6. The Surgical Center entity sent Daines a check for the \$6,000 and a "Release" which Daines executed.¹⁰²

At trial, however, Judge Lewis apparently was not aware of, or did not appreciate the distinctions among--and significance of--these various time frames, transactions and different legal capacities of the parties.¹⁰³

⁹⁸. (R. 1726, p.51, ll.13-21--Trial Transcript)(testimony by Daines that Vincent agreed to \$150,000 to Daines in exchange for the list of physicians, referring to R. 1619, Stipulated Trial Exh. 2), Addendum Exh. 6 (MOU)

⁹⁹. The Daines-Boyer \$50,000 transaction is set out in the Statement of Facts above.

¹⁰⁰. The 8-shares *accord* is set out in the Statement of Facts above.

¹⁰¹. The Daines-Surgical Center \$6,000 transaction is set out in the Statement of Facts above.

¹⁰². The Daines-Surgical Center "Release" transaction is set out in the Statement of Facts above.

¹⁰³. (Mr. Martinez' argument to Judge Lewis in opposition to Defendants' motions for directed verdicts)

MR. MARTINEZ: If I may try?

THE COURT: **No one is worth that. Not Donald Trump.**

MR. MARTINEZ: One has to look at it at the time this agreement was entered into. As of December 13, 2000, what we have is two sides, Your Honor. On the one side you've got ASC already owed Mr. Daines \$150,000. Mr. Vincent is proposing to Mr. Daines, "Look, we don't want to pay you the \$150, if you'll give that up, all we have to do is buy eight shares, which are going to cost us only \$68,000. If you will take the eight shares--

THE COURT: **We've covered that ground. I understand that--**

MR. MARTINEZ: You can take eight shares, we'll give you eight shares and we won't pay you the 150. It made sense for him at that juncture to make that deal.

THE COURT: It was not possible to perform that because of the people or the entities that hold the shares.

MR. MARTINEZ: That was not--

THE COURT: --and it doesn't make any sense and it's not credible.

MR. MARTINEZ: It was not--the center was not established as of December 13th, (inaudible). It was still a risky venture. Mr. Daines thought it was going to be successful. Mr. Vincent is looking at an obligation that he has signed, he's contracted to pay a \$150,000 and he tells Mr. Daines, "Look, how about if you allow us not to pay you 150, we're going to buy the shares for \$68,000 and we'll give you eight shares?"

THE COURT: **So, that agreement is binding and it's not in writing?**

MR. MARTINEZ: That's correct.
THE COURT: The written agreement, whereby he agrees to take \$50,000 of the \$56,000 is not binding?
MR. MARTINEZ: (Inaudible).
THE COURT: So, you're asking me to say some contracts are good and some are bad.
MR. MARTINEZ: The release is perfectly good in so far as it releases the center and the doctors. The \$50,000 did not come from the center or the doctors. It came from the Boyer Company. A separate deal that Mr. Daines had.
THE COURT: The Boyer Company paid it.
MR. MARTINEZ: Yes. The Boyer Company paid it.
THE COURT: That's right.
MR. MARTINEZ: And it had nothing--the money that we're talking about, that \$50,000 had to do with a subsequent transaction where Mr. Daines had gone about and looked for a place for the center to be built. He had worked with Boyer, and Boyer had paid him essentially a commission for finding the, or for getting the--
THE COURT: --in exchange for that, gave up his other alleged contractual right.
MR. MARTINEZ: Well, it makes no sense to look at the release in that fashion because it was a separate transaction. Looking at a release that comes from the doctors from the center and they have--they have sent him a check for \$6,000.
THE COURT: It makes no sense that somebody would be compensated at the rate of \$80,000 an hour.
MR. MARTINEZ: What happens in these transactions, Your Honor, is you have ASC on one hand, acquiring 20 shares; and ultimately it's being paid what, approximately \$800,000 each year for those shares--on those shares, it's also receiving a management contract worth--
THE COURT: For managing the business.
MR. MARTINEZ: That's correct.
THE COURT: They're performing an ongoing service.
MR. MARTINEZ: And they're also receiving a development fee, they're also receiving additional sources of revenue. These deals are big, big money deals as Your Honor has observed. And so, consequently, the \$150,000 initially for the finder's fee was the very first step that Mr. Welden, by his expertise--
THE COURT: That's gone.
MR. MARTINEZ: --to start the whole thing rolling.
THE COURT: Let's not discuss the \$150,000. It's gone.
MR. MARTINEZ: Well--
THE COURT: Anyway you interpret the other agreements, that's gone.
MR. MARTINEZ: Well, what we have to also address, however, Your Honor, is we just can't simply say it's gone without trying to figure out what happened to that \$150,000 that was owed to him.
THE COURT: Well, I understand your theory which I do not find to be credible. The issue, however, is not what I find credible or what I would do as a finder of fact. The issue is whether there is anything to go to the jury.
MR. MARTINEZ: And I think that Your Honor has identified what needs to go to the jury, which is that--
THE COURT: I don't think I have. I haven't made a decision.
MR. MARTINEZ: --That it's problematic at the least about why this deal was made. Mr. Daines has testified as to what he believed the deal was and why it was in his interest to do it.
THE COURT: What I meant was, you have problems proving there was any such deal.
MR. MARTINEZ: However, Mr. Daines has testified that--
THE COURT: --there is a paucity of data and testimony supporting your position.
MR. MARTINEZ: And there's also documentation in the form of the term sheets saying that Mr. Daines will be compensated either in cash or equity.
THE COURT: That's \$56,000.
MR. MARTINEZ: And that, Your Honor, as we point out, was a deal for the real estate, not for the eight shares--had nothing to do with the eight shares. Nobody has testified that the release had

Since the trial court fundamentally misconstrued the different legal capacities of Defendant ASC, the directed verdict in favor of Defendant ASC must be reversed.

IV. The "Release" *unambiguously* did not exonerate Defendant ASC in its independent, pre-Surgical Center, legal capacity

A. The "Release" is unenforceable, and thus did not exonerate anyone at all

An agreement cannot be enforced if there is no meeting of the minds on the identity of the parties.¹⁰⁴ The "Release" here purports to discharge "West Valley Surgical Center, LLC or any of its members...".¹⁰⁵ The parties to the "Release" did not come to a meeting of the minds about whether the "*pre-Surgical Center ASC*," or only the "*Surgical Center ASC*"

THE COURT:	anything to do with the eight shares.
MR. MARTINEZ:	Because nobody believed there were eight shares.
THE COURT:	Because there was no one on the part of the center, on the part of the doctors, that had anything to do with it. This was a deal between Mr. Daines and ASC, a totally separate entity.
MR. MARTINEZ:	That is not what the witnesses were--have said. The only witness who has talked about these eight shares is your client. No one else can validate it. It's not in writing.
THE COURT:	And therefore, there is--
MR. MARTINEZ:	It's a very, very weak case at best.
THE COURT:	But sufficient--
MR. MARTINEZ:	If it's going to the jury, it's the weakest case I've ever seen.
THE COURT:	But it's certainly a situation in which, if the jury believes Mr. Daines, they could hold in his favor and that's the standard.
MR. MARTINEZ:	I don't know that that's true. I don't know that that's true because of the final contract.
THE COURT:	What final contract?
MR. MARTINEZ:	The \$56,000 contract or agreement.
THE COURT:	Isn't the interpretation of the release also a question of fact for the jury?
MR. MARTINEZ:	I understand your position."

(R. 1727, from p.286, line 5 through p.291, line 14, inclusive--Trial Transcript)(emphasis added)

Despite her expressed doubts about whether the 8-shares contract was formed, in her directed verdict order regarding ASC, Judge Lewis stated:"Accordingly, and for purposes of this motion, the Court will assume that the alleged oral agreement was made." (R. 1668, ¶6 (*ORDER* by Judge Lewis filed August 22, 2006 granting directed verdict for ASC Group on all claims), Addendum Exh. 19 (Judge Lewis Directed Verdict-for ASC).

¹⁰⁴. *Nielsen v. Gold's Gym*, 2003 UT 37, ¶ 11, 78 P.3d 600.

¹⁰⁵. (R. 1619, Stipulated Trial Exh. 10, at ASC001012), Addendum Exh. 18 (Conditional Release of Liability).

would be exonerated. Therefore, the "Release" did not exonerate anyone at all.¹⁰⁶

B. The "Release" *unambiguously* did not exonerate Defendant ASC in its "pre-Surgical Center ASC" legal capacity

Even if the "Release" were effective, it *unambiguously* did not exonerate Defendant ASC in the "pre-Surgical Center ASC" legal capacity in which it had executed the MOU with Daines and subsequently substituted the 8-shares contract for the MOU.¹⁰⁷

Interpretation of the "Release" contract document entails two major steps:¹⁰⁸ (1) Is the document *ambiguous*? (2) What is the *meaning* of the document? There is some uncertainty in Utah law about how *ambiguity* is to be determined. In Ward v. Intermountain Farmers Ass'n, 907 P.2d 264, 268 (Utah 1995), this Court held: "A judge should...consider **any credible evidence** offered to show the parties' intention." (Emphasis added). The Utah Court of Appeals has concluded that Ward "rejected the strict application of the 'four corners' rule..." in favor of a rule requiring a court to consider extrinsic evidence to determine whether a document is ambiguous.¹⁰⁹

In Saleh v. Farmers Insurance Exchange, 2006 UT 20, ¶ 21, 133 P.3d 428, however,

¹⁰⁶. Daines made this argument earlier in the litigation in conjunction with his *successful* opposition to Defendants' *first* motion for summary judgment. (R. 122-179, 133, Plaintiff's Memorandum in Opposition to the Motion for Summary Judgment by Defendant ASC Group L.C., p. 12).

¹⁰⁷. Daines made this argument earlier in the litigation in conjunction with his *successful* opposition to Defendants' *first* motion for summary judgment. (R. 122-179, 131-32, Plaintiff's Memorandum in Opposition to the Motion for Summary Judgment by Defendant ASC Group L.C., pp.10-11).

¹⁰⁸. See, e.g., Saleh v. Farmers Insurance Exchange, 2006 UT 20, ¶ 21, 133 P.3d 428; Ward v. Intermountain Farmers Ass'n, 907 P.2d 264, 268 (Utah 1995); Gillmor v. Macey, 2005 UT App 351, ¶ 35 n.14, 533 121 P.3d 57, cert. denied 126 P.3d 772 (Utah 2005).

¹⁰⁹. Gillmor v. Macey, 2005 UT App 351, ¶ 35 n.14, 533 121 P.3d 57, cert. denied 126 P.3d 772 (Utah 2005). See also Peterson v. Sunrider Corp., 2002 UT 43, ¶ 19, 48 P.3d 918; Ward v. Intermountain Farmers Ass'n, 907 P.2d 264, 268 (Utah 1995) ("When determining whether a contract is ambiguous, any relevant evidence must be considered.").

this Court held: "[i]f the language **within the four corners** of the contract is unambiguous, the parties' intentions are determined from the plain meaning of the contractual language, and the contract may be interpreted as a matter of law." (quoting *Green River Canal Co. v. Thayne*, 2003 UT 50, ¶ 17, 84 P.3d 1134)(Emphasis added).

Judge Lewis' order is *itself* ambiguous about which approach she used.¹¹⁰ Under either approach, however, the "Release" unambiguously did not exonerate Defendant ASC.

1. Under the "four-corners" approach, the "Release" *unambiguously* did not exonerate ASC in its "pre-Surgical Center" legal capacity

The "Release" is *unambiguous* from its four corners. First, general release language is inadequate to discharge defendants not specifically named.¹¹¹ Since the "Release" does not specifically name ASC in the "*pre-Surgical Center ASC*" legal capacity in which it had executed the MOU with Daines and subsequently substituted the 8-shares contract for the MOU, therefore the "Release" *unambiguously* does not exonerate Defendant ASC.¹¹²

Second, "[u]nder the principle of *ejusdem generis* where an enumeration of particular or specific terms is followed by a general term, the general term must be restricted to include

¹¹⁰. "Construing all of the **evidence** presented at trial in the light most favorable to Plaintiff, and based on the plain and unambiguous **language of the Release**, the Court concludes that reasonable minds could not differ on the interpretation of the Release. As a matter of law, Plaintiff released and discharged ASC from the claims Plaintiff asserted in this lawsuit."

((R. 1661-76, at 1672, ¶27 (*ORDER* by Judge Lewis filed August 22, 2006 granting directed verdict for ASC Group on all claims)(Emphasis added), Addendum Exh. 19 (Judge Lewis Directed Verdict Order-for ASC)).

¹¹¹. UTAH CODE ANN. §78-27-42 ("A release given by a person seeking recovery to one or more defendants does not discharge any other defendant unless the release so provides."); *Stevens v. Goodson*, 924 P.2d 339, 351 (Utah 1996)(release does not discharge parties not specifically named as releasees); *Child v. Newsom*, 892 P.2d 9, 12 (Utah 1995)(general release language will not suffice).

¹¹². Daines also made this argument earlier in the litigation in conjunction with his *successful* opposition to Defendants' *first* motion for summary judgment. (R. 122-179, 132-36, Plaintiff's Memorandum in Opposition to the Motion for Summary Judgment by Defendant ASC Group L.C., pp. 11-15).

things of the same kind, or character, as those specifically enumerated, unless there is something to show a contrary intent."¹¹³ The "Release" purports to exonerate "West Valley Surgical Center, LLC or any of its members...".¹¹⁴ The general term "members" must be restricted to include parties of the same kind, or character, as the "West Valley Surgical Center, LLC." The term "members" thus must be interpreted to include only parties who are identified *by their status in regard to the West Valley Surgical Center, LLC*. This would only include ASC in the various legal capacities that ASC acquired in its "*Surgical Center ASC*" legal capacity.¹¹⁵ Since that unambiguously does not include ASC in its "*pre-Surgical Center ASC*" legal capacity, thus the "Release" *unambiguously* does not exonerate Defendant ASC.

Third, "[m]embership' is 'the state or status of being a member.'"¹¹⁶ The "Release" refers to the "West Valley Surgical Center, LLC or any of its members...".¹¹⁷ Since the "membership" involved is thus limited to those who are members of the Surgical Center, that unambiguously refers to ASC in its "*Surgical Center ASC*" legal capacity. Therefore, the "Release" *unambiguously* does not exonerate ASC in its "*pre-Surgical Center ASC*" legal capacity, thus the "Release" *unambiguously* does not exonerate Defendant ASC.

Fourth, since ASC drafted the "Release," the terms should be construed against it.¹¹⁸

¹¹³. Culbertson v. Bd. of County Com'rs., 2001 UT 108, ¶ 48, 44 P.3d 642.

¹¹⁴. (R. 1619, Stipulated Trial Exh. 10, at ASC001012), Addendum Exh. 18 (Conditional Release of Liability).

¹¹⁵. These legal capacities are set out in the Statement of Facts above.

¹¹⁶. Warburton v. Virginia Beach Federal Savings & Loan Ass'n, 899 P.2d 779, 782-83 (Utah Ct. App. 1995)(quoting *Webster's Third New Int'l Dictionary* (1986)).

¹¹⁷. (R. 1619, Stipulated Trial Exh. 10, at ASC001012), Addendum Exh. 18 (Conditional Release of Liability).

¹¹⁸. Wilburn v. Interstate Elec., 748 P.2d 582, 585-86 (Utah Ct. App. 1988)(contracts construed against drafter).

The meaning of the Release from its four corners. Since the four corners of the "Release" show it to be unambiguous, its meaning may be interpreted as a matter of law, and therefore it *unambiguously* does not exonerate Defendant ASC.¹¹⁹

2. Under the "extrinsic evidence" approach, the "Release" *unambiguously* did not exonerate ASC in its "pre-Surgical Center" legal capacity

The "Release" is *unambiguous* from extrinsic evidence. Daines' "invoice #9" and Daines' testimony at trial, show that Daines was billing the Surgical Center for \$6,000 in out-of-pocket expenses he had incurred.¹²⁰ Such extrinsic evidence shows that the "Release" was unambiguous, and did not exonerate Defendant ASC in the "*pre-Surgical Center ASC*" legal capacity in which it had executed the MOU with Daines and subsequently substituted the 8-shares contract for the MOU.

The meaning of the Release from extrinsic evidence. Contemporaneous writings are deemed part of an agreement.¹²¹ Thus, the meaning of the "Release" must be considered in light of all the writings which comprised the "Release" transaction.¹²² Trial Exhibit 10

¹¹⁹. Saleh v. Farmers Insurance Exchange, 2006 UT 20, ¶ 21, 133 P.3d 428 ("[i]f the language within the four corners of the contract is unambiguous, the parties' intentions are determined from the plain meaning of the contractual language, and the contract may be interpreted as a matter of law." quoting Green River Canal Co. v. Thayn, 2003 UT 50, ¶ 17, 84 P.3d 1134).

¹²⁰. This extrinsic evidence regarding the genesis and limited effect of the "Release" is set out in the Statement of Facts above.

¹²¹. Winegar v. Froerer Corp., 813 P.2d 104, 109 (Utah 1991)(two documents concerning assignment were executed substantially contemporaneously and are clearly interrelated, so must be construed as a whole to ascertain the content of the assignment agreement); Atlas Corp. v. Clovis Nat. Bank, 737 P.2d 225, 229 (Utah 1987)(agreements and mining deed, executed substantially contemporaneously, are clearly interrelated, so must be construed as a whole); J. Calamari & J. Perillo, *The Law of Contracts*, §3.2(a), p.123 n.11 (4th ed. 1998)("Thus, a covering letter may be considered a part of the integration.") citing Brown v. Financial Service Corp., 489 F.2d 144, 149-50 (5th Cir. 1974).

¹²². The Daines-Surgical Center "Release" transaction is set out in the Statement of Facts above.

consists of 6 documents.¹²³

Daines' invoice for \$6,000 to the Surgical Center, the last document in Exhibit 10, started the ball rolling. In response, Daines received a fax from ASC as the manager of the Surgical Center, promising that a check for \$6,000 would be provided upon the execution by Daines of an attached "Release." Understanding that all he was signing was a "Release" for the \$6,000 which he had billed through his Invoice #9--and since the fax from ASC as manager of the Surgical Center expressly referred to his "Invoice #9"--Daines signed the "Release" and faxed it back. So matter-of-fact was his understanding that the "Release" related only to his "Invoice #9," that he did not bother to prepare a new fax, but simply used ASC's fax paper as his own. Daines' testimony at trial, and the documents involved, are set out in detail in the Statement of Facts above.

The contemporaneous writings, together with Daines' testimony at trial, show that the "Release" unambiguously did not exonerate ASC in its *"pre-Surgical Center ASC"* legal capacity. The meaning of the "Release" thus may be interpreted as a matter of law, and it *unambiguously* does not exonerate Defendant ASC.

C. The "Release" did not encompass the other claims asserted by Daines

Even if the "Release" could be (mis)construed to apply to Daines' breach of contract claims, the "Release" certainly did not apply to Daines' tort and equitable claims: fraud, promissory estoppel, negligent misrepresentation, unjust enrichment-quantum meruit, and

¹²³. (R. 1619, Stipulated Trial Exh. 10), Addendum Exh. 24 (Six-page Exhibit 10 at trial).

specific performance, whose elements were properly alleged in Daines complaint.¹²⁴

Daines' counsel argued those other claims to the trial court, but Judge Lewis dismissed them out of hand, because "they were not in writing."¹²⁵ The directed verdict order makes no mention of those other claims, but simply dismisses "all of Plaintiff's claims".¹²⁶ Since there was ample evidence demonstrating the elements of these additional claims,¹²⁷ the trial court's directed verdict order in favor of ASC on these additional claims also must be reversed.

V. At minimum, the "Release" was *ambiguous* regarding whether or not it exonerated ASC in its independent, pre-Surgical Center, legal capacity

A contract may be *ambiguous* because it is unclear, it omits terms, or "the terms used to express the intention of the parties may be understood to have two or more plausible

¹²⁴. (R. 1-25, Complaint, filed May 08, 2003).

¹²⁵. (Mr. Martinez' argument to Judge Lewis opposition to Defendants' motion for directed verdicts)

"MR. MARTINEZ: First of all, there is evidence from Mr. Daines that he relied on Mr. Vincent to go ahead and finish what he said he would do, to put in the documents whatever was necessary to ensure that Mr. Daines would receive his eight shares. That is on the theory, not only of contract, but also on the theory of fraud, negligent misrepresentation, promissory estoppel--

THE COURT: --not in writing, and the only one who claims this is your client.

MR. MARTINEZ: It need not be in writing, Your Honor.

THE COURT: No, I understand that, but it isn't in writing.

(R. 1727, from p.279, ll.5-17--Trial Transcript)

MR. MARTINEZ: The additional claims that Mr. Daines has do not relate to contract, relate to promissory estoppel.

THE COURT: And I don't find that viable.

MR. MARTINEZ: And fraudulent inducement of the contract.

THE COURT: I don't find that viable.

MR. MARTINEZ: Breach of the good faith and fair dealing provision that's implied in every contract. Negligent misrepresentation; unjust enrichment; specific performance."

(R. 1727, from p.300, ll.21-25, p.301, ll.1-5--Trial Transcript)

¹²⁶. (R. 1673, ¶1 (ORDER by Judge Lewis filed August 22, 2006 granting directed verdict for ASC Group on all claims), Addendum Exh. 19 (Judge Lewis Directed Verdict Order-for ASC).

¹²⁷. The evidence regarding the meeting between Daines and Vincent which gave rise to Daines' claims is set out in the Statement of Facts above.

meanings."¹²⁸ In the "Release," we confront unclear and ambiguous language regarding the *identity of the parties*, the *nature of the claims* covered, and the *amounts of the claims* covered. Two plausible interpretations of "members" exonerated by the "Release" are that ASC in its independent, pre-Surgical Center, legal capacity is *not* a "member" included within the "Release"--or that it *is*. Two plausible interpretations of "liabilities and or claims" exonerated by the "Release" are that ASC's 8-shares liability to Daines which arose before the Surgical Center was created is *not* exonerated--or that it *is*. One plausible interpretation of the amounts of claims released are that only the \$6,000 out-of-pocket costs incurred by Daines, and for which the Surgical Center sent him a check in that amount after he sent in the executed "Release" is covered. Alternative amounts are \$50,000 (paid to Daines by Boyer), \$56,000 (adding both the Center's and Boyer's payments), or the 8-shares.

As set forth in Issue IV.B above, interpretation of the "Release" herein entails (1) whether the instrument is *ambiguous* and (2) ascertaining its *meaning*. Twice before, Daines successfully argued to the trial court that the "Release" was ambiguous in regard to the *identity of the parties*, the *nature of the claims*, and the *amounts* of such claims covered by the Release.¹²⁹ Even if the "Release" did not unambiguously *fail* to exonerate ASC in its independent, pre-Surgical Center, legal capacity from liability under the 8-shares agreement as set forth in Issue IV.B above, the same evidence and arguments demonstrate that, at minimum, the "Release" certainly was *ambiguous* in that regard.

¹²⁸. Saleh v. Farmers Ins. Exchange, 2006 UT 1, ¶ 15, 133 P.3d 428, quoting *Alf v. State Farm Fire & Cas. Co.*, 850 P.2d 1272, 1274 (Utah 1993).

¹²⁹. Discussion of the two times the trial court denied Defendants' motion for summary judgment are set out in the Statement of Facts above.

With respect to extrinsic evidence to show ambiguity of the "Release," Defendants cannot argue to this Court that such evidence should not have been admitted, since Defendants failed to object to the introduction of such evidence by Daines at trial.¹³⁰

Since Judge Lewis directed verdicts against Daines, all reasonable inferences from the evidence in favor of Daines must be drawn.¹³¹ The "Release" itself, the documents included in Exhibit 10 of which the "Release" is one part, and the extrinsic evidence introduced by Daines at trial, together with the reasonable inferences therefrom, demonstrate that at minimum, the "Release" was ambiguous as a matter of law. Accordingly, the trial court's directed verdict order in favor of ASC must be reversed.

VI. The "Release" contains no "integration" clause applying the "Release" to Defendant ASC in its independent, pre-Surgical Center, legal capacity

Judge Lewis found: "The Release contains an integration clause stating: 'This release encompasses and satisfies any prior agreements and discussions whether written or verbal by West Valley Surgical Center, LLC or any of its members.'"¹³² She therefore concluded: "As a result of the integration clause, the Release clearly and unambiguously supersedes any and all other contracts, whether written or oral, between Plaintiff and the Surgical Center or any of its members, including ASC, and clearly and unambiguously covers any previous agreements, discussions, or understandings, including the alleged oral contract of December

¹³⁰. Co-Vest Corporation v. Corbett, 735 P.2d 1308, 1309 (Utah 1987)("Because defendants did not object to the extrinsic evidence at the trial level, they cannot claim on appeal that the document is clear and unambiguous and is not subject to interpretation with extrinsic evidence."); Shields v. Harris, 934 P.2d 653, 656 (Utah Ct. App. 1997)).

¹³¹. Gourdin v. Sharon's Cultural Educ. Rec. Ass'n., 845 P.2d 242, 243 (Utah 1992).

¹³². (R. 1671, ¶22 (*ORDER* by Judge Lewis filed August 22, 2006 granting directed verdict for ASC Group on all claims), Addendum Exh. 19 (Judge Lewis Directed Verdict Order-for ASC)).

13, 2000, to transfer eight Shares."¹³³

First, the provision is not an "integration" clause at all. It does not state, as a true integration clause would, that the written four-corners of the "Release" document constitute the entire agreement of the parties.¹³⁴ Second, even if the clause were a real "integration clause," a directed verdict was inappropriate. Once a contract is determined to be ambiguous, the court is left with a question of fact regarding the *meaning* of the contract, *including the question whether the parties intended an integration*. Thus, ambiguity precludes summary judgment--or as here, a directed verdict--on the question whether an integration was intended.¹³⁵

Third, even if the clause were a real "integration clause," it includes the same "members" term used earlier in the "Release," which itself is ambiguous. Therefore, as Daines contends with respect to the entire "Release," either the clause *unambiguously* does not relate to ASC in its "*pre-Surgical Center ASC*" legal capacity, or at minimum, it is *ambiguous* about whether it does. Fourth, even if the clause were a real "integration clause," it would not prohibit the use of the 6 documents that comprise Exhibit 10, as Daines contends, to show that the "Release" is not (or is) ambiguous--or to prove its *meaning*.¹³⁶

¹³³. (R. 1671-72, ¶23 (*ORDER* by Judge Lewis filed August 22, 2006 granting directed verdict for ASC Group on all claims), Addendum Exh. 19 (Judge Lewis Directed Verdict Order-for ASC)).

¹³⁴. See, e.g., *Enerco, Inc. v. SOS Staffing Services, Inc.*, 2002 UT 78, ¶ 11, 52 P.3d 1272 (integration, or merger, clause example: lease "contains all the agreements made and entered into between the Tenant and the Landlord").

¹³⁵. *Peterson v. Sunrider Corp.*, 2002 UT 43, ¶ 24, 48 P.3d 918 ("After finding the contract is ambiguous, the court is left with a question of fact regarding whether the parties intended to integrate each new business guide...[precluding summary judgment].").

¹³⁶. (R. 1619, Stipulated Trial Exh. 10), Addendum Exh. 24 (Six-page Exhibit 10 at trial).

Such "contemporaneous writings," are not subject to the parol evidence rule at all.¹³⁷ Contemporaneous writings are immune from the parol evidence rule invoked by integration clauses because such writings are deemed "part" of the agreement.¹³⁸

Accordingly, Judge Lewis' reliance on the so-called "integration" clause in the "Release" is of no legal significance. Since Judge Lewis' conclusion was a legal one made on a directed verdict, this court should reverse it under a correctness standard.

VII. The trial court erroneously directed a verdict against Plaintiff Daines on all his claims against Defendant Vincent in Vincent's personal capacity

Judge Lewis erroneously held "no reasonable jury could conclude that Defendant Vincent acted in any way other than as a representative of ASC Group in his dealings with Plaintiff."¹³⁹ The 8-shares agreement arose in a meeting where only Daines and Mr. Vincent were present.¹⁴⁰ Daines relied on Vincent's personal experience in establishing surgical

¹³⁷. J. Calamari & J. Perillo, *The Law of Contracts*, § 3.2(a), pp. 122-23 (4th ed. 1998)(referring to this as the Williston, First Restatement, and UCC approach). See also "Thus, a covering letter may be considered a part of the integration." *Id.* n.11, at p.123, citing *Brown v. Financial Service Corp.*, 489 F.2d 144, 149-50 (5th Cir. 1974).

¹³⁸. *Winegar v. Froerer Corp.*, 813 P.2d 104, 109 (Utah 1991)(two documents concerning assignment were executed substantially contemporaneously and are clearly interrelated, so must be construed as a whole to ascertain the content of the assignment agreement); *Atlas Corp. v. Clovis Nat. Bank*, 737 P.2d 225, 229 (Utah 1987)(agreements and mining deed, executed substantially contemporaneously, are clearly interrelated, so must be construed as a whole).

¹³⁹. (R. 1659, ¶5 (*ORDER* by Judge Lewis filed August 22, 2006 granting directed verdict for ASC Group on all claims), Addendum Exh. 19 (Judge Lewis Directed Verdict Order-for ASC).

¹⁴⁰. (Examination of Mr. Daines by Mr. Colessides)

"Q Who was present at that meeting?

A **Just the two of us."**

(R. 1726, p. 79, ll.11-12--Trial Transcript)(Emphasis added)

centers¹⁴¹ Daines also relied on the fact he and Vincent were both of the LDS religion.¹⁴²

Judge Lewis seemed to acknowledge there was evidence supporting Daines' contention that Vincent had acted in both a personal and in a representative capacity.¹⁴³ In her directed verdict order, though, she concluded that there was "**no evidence** to establish that Defendant Richard Vincent was acting in an individual rather than in a representative capacity."¹⁴⁴ Judge Lewis thus failed to give Daines the benefit of viewing the evidence and

¹⁴¹. (Examination of Mr. Daines by Mr. Wikstrom)

"A ... But when I talked to Mr. Vincent about the eight shares he was gonna take, I assumed he was gonna take care of the situation. **He'd been through these before, not me.**"
(R. 1726, p.152, ll.12-15--Trial Transcript)(Emphasis added)

¹⁴². (Examination of Mr. Daines by Mr. Colessides)

"A ... By that time **I had what I considered a special relationship with him.** I - well, I was - I found out that he - **I'm LDS, he's LDS, he's a bishop, a returned missionary, as Mr. Hayward is and I thought I could rely on his word.**"
(R. 1726, p.81, ll.11-14--Trial Transcript)(Emphasis added)

¹⁴³. (Mr. Martinez argument to the court)

"THE COURT: So, how is Mr. Vincent in the picture?
MR. MARTINEZ: **When Mr. Vincent met with Welden Daines, he was speaking to Welden Daines in both his individual capacity and in his capacity as a chairman and member of the board of ASC.**
THE COURT: What did he do wrong?
MR. MARTINEZ: What he did was to promise Mr. Daines that Mr. Daines, if Mr. Daines refrained from enforcing that prior obligation of ASC and Mr. Vincent for \$150,000 that Mr. Vincent, [f]or himself, individually, and on behalf of ASC would make sure that Mr. Daines received the eight shares that Mr. Daines was promised.
THE COURT: **The only one who's attested to that is your client.**
MR. MARTINEZ: Yes, Your Honor, which means that there is sufficient evidence on which the theory can go to the jury--
THE COURT: --so you're saying that Mr. Vincent had somehow locked in ASC?
MR. MARTINEZ: He acted in both capacities, Your Honor, throughout the negotiations--
THE COURT: --in what capacity?
MR. MARTINEZ: He acted as chairman and member of the board, a founding member of the board of the ASC Center, the ASC Group, and he also dealt with Mr. Daines in his individual capacity making representations. Accordingly, he can be held responsible both as an individual and as a representative of the entity."
(R. 1727, p.271, ll.23-25, p.272, ll.1-25)(Emphasis added)

¹⁴⁴. (R. 1658, ¶2 (ORDER by Judge Lewis filed August 22, 2006 granting directed verdict for ASC Group on all claims)(Emphasis added), Addendum Exh. 19 (Judge Lewis Directed Verdict Order-for ASC).

inferences therefrom in the light most favorable to Daines.¹⁴⁵

VIII. The trial court erroneously directed a verdict against Plaintiff Daines on his claims for fraudulent inducement and punitive damages against both defendants

Judge Lewis held there was evidence Defendants made a representation, but that Daines had presented no evidence on the other elements of fraud and punitive damages.¹⁴⁶

Daines introduced evidence on every element of his claim for Fraudulent Inducement:¹⁴⁷ (1) Daines testified that Defendants represented to him that they would convey 8 class II shares of the operating company of the Surgical Center to him if he would refrain from enforcing his claim against Defendants for the \$150,000 Defendants owed him under the MOU;¹⁴⁸ (2) Whether Defendants indeed would convey the 8 shares to Daines was a presently existing material fact; (3) Defendants' representation was false, because they did not intend to transfer such shares and Defendants did nothing to include transfer of the eight shares to Daines in the Surgical Center's operational documents;¹⁴⁹ (4) Defendants either

¹⁴⁵. Management Comm. of Graystone Pines Homeowners Ass'n v. Graystone Pines, Inc., 652 P.2d 896, 897-98 (Utah 1982); Kleinert v. Kimball Elevator Co., 905 P.2d 297, 299 (Utah App. 1995).

¹⁴⁶. (R. 1653-54, ¶¶4-10 (*ORDER* by Judge Lewis filed August 22, 2006 granting directed verdict against Daines on fraud and punitive damages), Addendum Exh. 19 (Judge Lewis Directed Verdict Order-for ASC).

¹⁴⁷. Secor v. Knight, 716 P.2d 790, 794 (Utah 1986); Stuck v. Delta Land & Water Co., 63 Utah 495, 227 P. 791 (1924)(fraudulently inducing plaintiffs to purchase water stock and land).

¹⁴⁸. The evidence regarding such representation is set out in the Statement of Facts above.

¹⁴⁹. (Examination of Mr. Daines by Mr. Wikstrom)

"Q My question is there is **nothing mentioned in any of the term sheets** that went back and forth between ASC and the doctors through you or directly that says anything **about eight shares going to you?**

A That's true.

Q It's **not mentioned in the private placement memorandum** anywhere, is it, sir?

A Not that I know of.

Q It's **not mentioned in the Operating Agreement**, is it, sir?

A I have, don't think I've reviewed the Operating Agreement, so I don't know."

(R. 1727, p.135, ll.20-25, p.136, ll.1-6--Trial Transcript)(Emphasis added)

knew their representation was false, or made such representation recklessly, knowing Defendants had insufficient knowledge upon which to base such representation; (5) Defendants made such representation for the purpose of inducing Daines to act upon it by refraining from enforcing his claim against Defendants for the \$150,000 Defendants owed him under the MOU; (6) Daines acted reasonably and in ignorance of the falsity of Defendants' representation; (7) Daines relied on Vincent's personal experience in establishing surgical centers¹⁵⁰ and on the fact he and Vincent were both of the LDS religion;¹⁵¹ (8) Daines was thereby induced to act by refraining from enforcing his claim against Defendants for the \$150,000 Defendants owed him under the MOU, and by taking other actions in reliance on such representation;¹⁵² and (9) Daines was damaged because he was not given the eight shares nor an equivalent annuity.

Daines also introduced evidence on every element of his claim for punitive damages:¹⁵³ (1) Daines testified Defendants fraudulently induced him to give up his claim

¹⁵⁰. (Examination of Mr. Daines by Mr. Wikstrom)
"A ... But when I talked to Mr. Vincent about the eight shares he was gonna take, I assumed he was gonna take care of the situation. **He'd been through these before, not me.**"
(R. 1726, p.152, ll.12-15--Trial Transcript)(Emphasis added)

¹⁵¹. (Examination of Mr. Daines by Mr. Colessides)
"A ... By that time **I had what I considered a special relationship with him.** I - well, I was - I found out that he - **I'm LDS, he's LDS, he's a bishop, a returned missionary, as Mr. Hayward is and I thought I could rely on his word.**"
(R. 1726, p.81, ll.11-14--Trial Transcript)(Emphasis added)

¹⁵². (Examination of Mr. Daines by Mr. Colessides)
"Q And when you said you had foregone your payment of \$150,000 what did you mean by that?
A That was - we had already made our deal on the eight shares (inaudible), so I wasn't getting any cash out of the deal."
(R. 1726, p. 87, ll.9-13--Trial Transcript)

¹⁵³. UTAH CODE ANN. § 78-18-1 (1992); Ong Int'l v. 11th Ave. Corp., 850 P.2d 447, 458-59 (Utah 1993)(punitive damages for fraudulent inducement upheld); Crookston v. Fire Ins. Exchange, 817 P.2d 789 (Utah 1991); Johnson v. Rogers, 763 P.2d 771 (Utah 1988).

for \$150,000 in exchange for the eight shares in the Surgical Center; (2) Daines testified Defendants' conduct was intentionally fraudulent, particularly since Defendants contend he intended "gift" of his \$150,000!¹⁵⁴

IX. The trial court erroneously denied Plaintiff's motion *in limine*

On July 1, 2005, Daines filed a motion *in limine* for an order with limiting instructions to admit Judge Hilder's decision in a strikingly similar case finding that Vincent was not a "credible witness" and that Vincent had "convenient lapses of memory".¹⁵⁵ On April 5, 2006, Judge Lewis denied Daines' motion.¹⁵⁶ The substantive grounds why this Court should reverse are fully set forth in Daines' memorandum in support of his motion¹⁵⁷ and in his reply in regard to such motion.¹⁵⁸ Because of page constraints, those are merely summarized here.

Judge Hilder's decision is admissible on each of the following bases: (1) To **impeach** Vincent, as an "opinion" of Vincent's character for untruthfulness under Utah Rules of

¹⁵⁴. (Examination by Mr. Colessides of Daniel R. Tasset, of ASC Group, in Deposition)
"Q That's not the question, Mr. Tasset. Listen to the question, it's a very simple question. Did you expect Mr. Daines to make a **gift** of his services to ASC Group?

A Yes.

....

Q For nothing?

A Absolutely.

Q **As a gift?**

A Yes."

(R. 944-46, at 946 (Plaintiff's Reply Mem. in Support of Motion to Strike Defendants' Renewed Motion for Summary Judgment, quoting and attaching excerpt from Tasset deposition, p.155, ll.4-8, ll.19-22), Addendum Exh. 23 (Excerpt from Tasset deposition which was attached as Exhibit A to Reply pleading))

¹⁵⁵. (R. 571-74, 590-603, Exhibit A to Daines' Memorandum of Points and Authorities in Support of Motion *in Limine*, Judge Hilder's Decision, pp. 5-7, 10), Addendum Exh. 4 (Judge Hilder's Decision)

¹⁵⁶. (R. 964-66 (ORDER, filed April 5, 2006, Denying Plaintiff's Motion *in Limine* to Admit Judge Hilder's Decision With Limiting Instructions and granting Defendant's Cross-Motion *in Limine* to Exclude such decision))

¹⁵⁷. (R. 575-616 (Memorandum of Points and Authorities in Support of Motion *in Limine*))

¹⁵⁸. (R. 659-82, Daines' Reply Memorandum in Support of Daines' Motion *in Limine*; and in Opposition to Defendants' Cross-Motion to Exclude Judge Hilder's decision)

Evidence §§ 404(a) and 608(a), and as evidence of a "specific instance of conduct" probative of Vincent's untruthfulness under Utah Rules of Evidence §§ 404(a) and 608(b); (2) As **evidence in chief** of Vincent's prior bad acts under Utah Rules of Evidence §§ 404(b)(any concerns that admission of Judge Hilder's decision would be prejudicial to defendants are addressed by the limiting instructions proposed by Daines); and (3) Because Judge Hilder's decision is not inadmissible hearsay, and is not objectionable on any other grounds.¹⁵⁹

The following limiting instruction, given both at the time the evidence is introduced and at the conclusion of trial, would properly protect the interests of Defendants herein.¹⁶⁰

"Judge Hilder's decision is not to be considered to prove that Vincent is a person of bad character or that he has a disposition to commit fraud, but rather only for the limited purposes of determining if it tended to show: proof of (1) motive, (2) intent, (3) absence of mistake, (4) pattern or practice and (5) that Vincent makes promises in business transactions upon which he does not deliver."¹⁶¹

X. The trial court erroneously deprived Daines of his "day in court" and to trial by jury under the Utah Constitution

The trial court deprived Daines of his "day in court" guaranteed by the Utah Constitution's Due Process and Open Courts Clauses, as well as of his right to Jury Trial.¹⁶²

¹⁵⁹. (R. 659-82, Daines' Reply Memorandum in Support of Daines' Motion *in Limine*; and in Opposition to Defendants' Cross-Motion to Exclude Judge Hilder's decision)

¹⁶⁰. State v. Allen, 2005 UT 11, ¶ 27, 108 P.3d 730; U.S. v. Cummings, 798 F.2d 413, 418 (10th Cir. 1986)(evidence properly admitted; limiting instruction given both at time evidence was introduced and at the conclusion of trial); see also U.S. v. Macey, 8 F.3d 462, 467 (7th Cir. 1993)(even though district court erroneously allowed introduction of character evidence, that error is held harmless because the court twice instructed the jury as to the limited relevance of that evidence).

¹⁶¹. This draft is modeled upon the limiting instruction approved by the Utah Supreme Court in State v. Allen, 2005 UT 11, ¶ 27, 108 P.3d 730.

¹⁶². UTAH CONST. art. I, §10 (Trial by Jury); International Harvester Credit Corp. v. Pioneer Tractor, 626 P.2d 418 (Utah 1981)(Utah Const. Art. I, §10 guarantees right to jury trial on legal issues in civil cases); UTAH CONST. UTAH CONST. art. I, § 7 (Due Process); UTAH CONST. art. I, § 11 (Open Courts); Miller v. USAA Cas. Ins. Co., 2002 UT 6, ¶66, 44 P.3d 663 (by inappropriately dismissing claims, district court denied plaintiffs their "day in court"); Gitsch v. Wight, 61 Utah 175, 178-79, 211 P. 705, 706 (1922)("That every person has a right to his day in court and an

The record reveals Judge Lewis personally disapproved of the amount of compensation Daines demanded,¹⁶³ and that Daines had entered into an oral contract rather than a written one.¹⁶⁴ This Court has held that a directed verdict, taking the case away from the jury, must be overturned "[w]here there is any evidence that raises a question of material fact, no matter how improbable the evidence may appear, judgment as a matter of law is improper."¹⁶⁵ Preservation of the right to jury trial lies at the foundation of that principle: "In directing a verdict, the court is not free to weigh the evidence and thus invade the province of the jury, whose prerogative it is to judge the facts."¹⁶⁶ And this Court long ago held "That every person has a right to his day in court and an opportunity to be heard before he can be deprived of a justiciable right is too elementary for discussion....".¹⁶⁷ In the modern era, this Court has confirmed this principle under Utah's Due Process and Open Courts Clauses.¹⁶⁸

The trial court's rulings therefore should be reversed because they denied Daines his "day in court" guaranteed by Utah Constitution's Jury Trial, Due Process and Open Courts Clauses.

opportunity to be heard before he can be deprived of a justiciable right is too elementary for discussion....").

¹⁶³. "THE COURT: No one is worth that. Not Donald Trump." (R. 1727, p.286, 1.6--Trial Transcript)(Emphasis added)

¹⁶⁴. (R. 1727, p.270, line 13 through p.308, line 21, inclusive)

¹⁶⁵. Kleinert v. Kimball Elevator Co., 905 P.2d 297, 299 (Utah App. 1995).

¹⁶⁶. Management Comm. of Graystone Pines Homeowners Ass'n v. Graystone Pines, Inc., 652 P.2d 896, 897 (Utah 1982).

¹⁶⁷. Gitsch v. Wight, 61 Utah 175, 178-79, 211 P. 705, 706 (1922).

¹⁶⁸. Miller v. USAA Cas. Ins. Co., 2002 UT 6, ¶66, 44 P.3d 663 (by inappropriately dismissing claims, district court denied plaintiffs their "day in court").

CONCLUSION

(1) Daines should be awarded his attorney fees and costs in responding to Defendants' motion to dismiss Daines' appeal pursuant to UTAH R. APP. P. 4(c); (2) the trial court's directed verdicts against Daines should be reversed; (3) all orders entered by the trial court subsequent to the entry of the directed verdict orders should be reversed; (4) the trial court's rulings on Plaintiff Daines' *motion in limine* should be reversed; (5) this Court should hold as a matter of law that the "Release" *unambiguously* does not exonerate Defendant ASC in its independent, pre-Surgical Center, legal capacity, nor Defendant Vincent in his individual personal capacity; and (6) Daines should be awarded his costs on the entirety of this appeal. UTAH R. APP. P. 34(b)(costs on appeal against the state of Utah); Cooke v. Cooke, 2001 UT App 110, ¶14, 22 P.3d 1249 (successful appellant entitled to costs on appeal).

DATED this 21st day of December, 2006.


JOHN MARTINEZ
Attorney for Plaintiff-Appellant Daines

ADDENDUM (FILED SEPARATELY)

- Exhibit 1:** Judge Lewis *Memorandum Decision* (R. 968-72)
- Exhibit 2:** Judge Noel *Minute Entry* (R. 272-76)
- Exhibit 3:** Judge Noel *Order* (R. 269-71)
- Exhibit 4:** Judge Hilder's Decision (R. 575-616, at 590-603)
- Exhibit 5:** February 12, 2001 Term Sheet (R. 1619, Stipulated Trial Exhibit 8)
- Exhibit 6:** MOU (R. 1619, Stipulated Trial Exhibit 2)
- Exhibit 7:** List of physicians (R. 1727, p.174, ll.3-15--Trial Transcript, admitting into evidence Trial Exh. 67)
- Exhibit 8:** 4/23/03 fax and letter from Daines to Vincent (R. 1726, p. 897, ll.16-25, p.98, ll.1-18--Trial Transcript, admitting into evidence Trial Exh. 82)
- Exhibit 9:** Bill from Daines to Boyer Company (R. 1620, Stipulated Trial Exh. 59)
- Exhibit 10:** October 29, 2001 fax transmittal from Daines to Dr. Burrows (R. 1621, Stipulated Trial Exh. 80)
- Exhibit 11:** West Valley Surgical Center, LLC Board of Managers Meeting Minutes 10-30-2001 (R. 1621, Stipulated Trial Exh. 91)
- Exhibit 12:** December 10, 2001 McCray cover letter from Surgical Center to Daines (R. 1619, Stipulated Trial Exh. 10, at ASC001011)
- Exhibit 13:** Check from Boyer (R. 1620, Stipulated Trial Exh. 63)
- Exhibit 14:** Invoice #9 from Daines to Surgical Center (R. 1619, Stipulated Trial Exh. 10, at ASC001014)
- Exhibit 15:** Check Number 1010 from Surgical Center to Daines (R. 1619, Stipulated Trial Exh. 10, at ASC001013)
- Exhibit 16:** December 11, 2001 fax from Heywood/Kolstad of ASC Group to Daines (R. 1619, Stipulated Trial Exh. 10, at ASC001010)
- Exhibit 17:** Fax cover sheet from Bruce Heywood of ASC Group to Dan Tasset (R. 1619, Stipulated Trial Exh. 10, at ASC001009)
- Exhibit 18:** Conditional Release of Liability (R. 1619, Stipulated Trial Exh. 10, at ASC001012)
- Exhibit 19:** Judge Lewis Directed Verdict Order-for ASC (R. 1661-76)
- Exhibit 20:** Judge Lewis Directed Verdict Order-for Vincent (R. 1657-60)
- Exhibit 21:** Judge Lewis Directed Verdict Order-on Fraud and Punitives (R. 1651-56)
- Exhibit 22:** Judge Lewis 10-11-2006 "*Judgment*" (R. 1717-19)
- Exhibit 23:** Excerpt from Tasset deposition which was attached as Exhibit A to Reply pleading (R. 944-46, at 946)
- Exhibit 24:** Six-page Exhibit 10 at trial (R. 1619, Stipulated Trial Exh. 10)

CERTIFICATE OF SERVICE

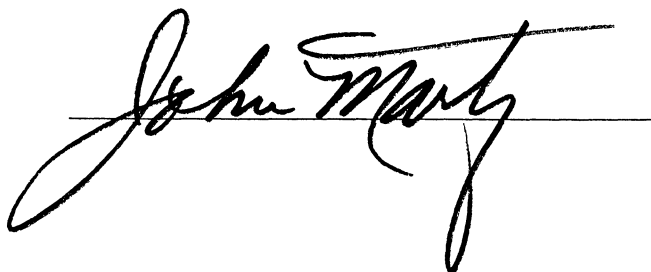
Filed ten copies of the foregoing, *one of which contains an original signature*, with the Clerk of the Supreme Court:

OFFICE OF THE CLERK OF THE COURT
SUPREME COURT OF THE STATE OF UTAH
450 SOUTH STATE STREET, FIFTH FLOOR
SALT LAKE CITY, UTAH 84114-0210

and served two copies of the foregoing upon the following:

Francis M. Wikstrom, Esq.
Michael P. Petrogeorge
Parsons Behle & Latimer
201 South Main Street #1800
P O Box 45898
Salt Lake City, Utah 84145-0898

via first class mail, postage pre-paid, this 21st day of December, 2006 addressed as set forth above.

A handwritten signature in black ink, appearing to read "John Marty", is written over a horizontal line. The signature is stylized with a large initial "J" and a long, sweeping underline.