

2006

Welden L. Daines v. Richard B. Vincent and ASC Group, LC: Brief of Appellees

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca2



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Francis M. Wikstrom; Michael P. Petrogeorge; Parsons Behle and Latimer; Attorneys for Appellees.
John Martinez; Nick J. Colessides; Attorneys for Appellant.

Recommended Citation

Brief of Appellee, *Daines v. Vincent*, No. 20060838 (Utah Court of Appeals, 2006).
https://digitalcommons.law.byu.edu/byu_ca2/6804

This Brief of Appellee is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

IN THE SUPREME COURT OF THE STATE OF UTAH

WELDEN L. DAINES,

Plaintiff/Appellant,

vs.

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

Defendants/Appellees.

BRIEF OF APPELLEES

Supreme Court No. 20060838-SC

District Court No. 030910378

Priority No. 15

Appeal from Orders and Judgment Entered by the
Third Judicial District Court in and for Salt Lake County, State of Utah
The Honorable Leslie A. Lewis, Presiding

JOHN MARTINEZ (4523)
2974 East St. Mary's Circle
Salt Lake City, Utah 84108
Telephone: (801) 582-1386
Facsimile: (801) 582-7664

NICK J. COLESSIDES (0696)
466 South 400 East, Suite 100
Salt Lake City, Utah 84111-3325
Telephone: (801) 521-4441
Facsimile: (801) 521-4452

*Attorneys for Plaintiff/Appellant
Welden L. Daines*

FRANCIS M. WIKSTROM (3462)
MICHAEL P. PETROGEORGE (8870)
Parsons Behle & Latimer
One Utah Center
201 South Main Street, Suite 1800
Salt Lake City, Utah 84111
Telephone: (801) 532-1234
Facsimile: (801) 536-6111

*Attorneys for Defendants/Appellees
Richard B. Vincent and ASC Group, L.C.*

ORAL ARGUMENT REQUESTED

FILED
UTAH APPELLATE COURTS
FEB 22 2007

IN THE SUPREME COURT OF THE STATE OF UTAH

WELDEN L. DAINES,

Plaintiff/Appellant,

vs.

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

Defendants/Appellees.

BRIEF OF APPELLEES

Supreme Court No. 20060838-SC
District Court No. 030910378
Priority No. 15

Appeal from Orders and Judgment Entered by the
Third Judicial District Court in and for Salt Lake County, State of Utah
The Honorable Leslie A. Lewis, Presiding

JOHN MARTINEZ (4523)
2974 East St. Mary's Circle
Salt Lake City, Utah 84108
Telephone: (801) 582-1386
Facsimile: (801) 582-7664

NICK J. COLESSIDES (0696)
466 South 400 East, Suite 100
Salt Lake City, Utah 84111-3325
Telephone: (801) 521-4441
Facsimile: (801) 521-4452

*Attorneys for Plaintiff/Appellant
Welden L. Daines*

FRANCIS M. WIKSTROM (3462)
MICHAEL P. PETROGEORGE (8870)
Parsons Behle & Latimer
One Utah Center
201 South Main Street, Suite 1800
Salt Lake City, Utah 84111
Telephone: (801) 532-1234
Facsimile: (801) 536-6111

*Attorneys for Defendants/Appellees
Richard B. Vincent and ASC Group, L.C.*

ORAL ARGUMENT REQUESTED

PARTIES TO THE PROCEEDINGS BELOW

1. The Appellant is Welden L. Daines (“Daines” or “Appellant”). Daines was the Plaintiff in the proceedings below.

2. The Appellees are Richard B. Vincent (“Vincent”) and ASC Group, L.C. (“ASC Group”). Vincent and ASC Group were the Defendants in the proceedings below, and are collectively referred to herein as “Defendants” or “Appellees.”

TABLE OF CONTENTS

	Page
STATEMENT OF JURISDICTION.....	1
ISSUES PRESENTED AND STANDARDS OF REVIEW	1
APPLICABLE STATUTES, RULES, AND REGULATIONS	4
STATEMENT OF THE CASE.....	4
I. NATURE OF THE CASE	4
II. RELEVANT PROCEDURAL HISTORY	5
III. STATEMENT OF RELEVANT FACTS	8
SUMMARY OF THE ARGUMENT	17
ARGUMENT	20
I. THE TRIAL COURT PROPERLY DIRECTED A VERDICT ON DAINES' CLAIMS AGAINST ASC GROUP BECAUSE THE RELEASE DISCHARGED ALL OF THESE CLAIMS	20
A. The Release Is Unambiguous on Its Face and Discharged All of Daines' Claims Against ASC Group	21
B. The Trial Court Considered All Extrinsic Evidence Offered by Daines and Properly Determined That the Release Was Not Ambiguous as a Matter of Law and Discharged Daines' Claims Against ASC Group	27
1. Marshaled Evidence of Ambiguity	29
2. After Considering Daines' Evidence and Inferences in Their Most Favorable Light, the Trial Court Properly Determined That No Ambiguity Existed and That the Release Could Be Interpreted as a Matter of Law.....	30
C. Whether the Release Contains a True "Integration" Clause or Just Further Exposition of the Scope of the Release Makes No Difference to the Outcome	34
II. THE TRIAL COURT PROPERLY GRANTED A DIRECTED VERDICT DISMISSING DAINES' CLAIMS AGAINST VINCENT BECAUSE DAINES PRESENTED NO EVIDENCE THAT VINCENT DEALT WITH DAINES IN AN INDIVIDUAL CAPACITY.....	34

TABLE OF CONTENTS
(continued)

	Page
III. THE TRIAL COURT PROPERLY DIRECTED A VERDICT AGAINST DAINES ON HIS FRAUD CLAIM BECAUSE DAINES PRESENTED NO EVIDENCE TO SUPPORT SEVERAL OF THE ESSENTIAL ELEMENTS OF THAT CLAIM	38
IV. DAINES HAD HIS DAY IN COURT AND WAS NOT DEPRIVED OF ANY CONSTITUTIONAL RIGHTS	41
V. THE TRIAL COURT’S ORDER EXCLUDING THE <i>LIBSCOMB</i> ORDER SHOULD BE AFFIRMED	42
A. Daines Failed to Adequately Brief This Issue and It Should Not Be Considered on Appeal.....	42
B. The Trial Court’s Order Excluding the <i>Libscomb</i> Order Was Within Its Discretion and Should be Affirmed.	43
C. Any Error in Excluding the <i>Libscomb</i> Order Was Harmless	46
VI. APPELLEES FILED THEIR MOTION TO DISMISS THE APPEAL IN GOOD FAITH, AND APPELLANT IS NOT ENTITLED TO SANCTIONS	47
CONCLUSION	49

TABLE OF AUTHORITIES

Page

FEDERAL CASES

<i>Brown v. Financial Serv. Corp</i> , 489 F.2d 144 (5th Cir. 1974)	32
<i>Herrick v. Garvey</i> , 298 F.3d 1184 (10th Cir. 2002)	44
<i>United States v. Mangiameli</i> , 668 F.2d 1172 (10th Cir. 1982)	45

STATE CASES

<i>438 Main St. v. Easy Heat, Inc.</i> , 2004 UT 72, 99 P.3d 801	20
<i>Alf v. State Farm Fire & Casualty Co.</i> , 850 P.2d 1272 (Utah 1993).....	1, 2, 21
<i>Anderson v. Schwendiman</i> , 764 P.2d 999 (Utah Ct. App. 1988)	47
<i>Armed Forces Insurance Exch. v. Harrison</i> , 2003 UT 14, 70 P.3d 35	38
<i>Atlas Corp. v. Clovis National Bank</i> , 737 P.2d 225 (Utah 1987)	32
<i>Beddoes v. Giffin</i> , 2006 UT App. 130, 2006 WL. 829112 (Mar. 30, 2006)	48
<i>Brookside Mobile Home Park, Ltd. v. Peebles</i> , 2002 UT 48, 48 P.3d 968.....	20, 27
<i>Butcher v. Gilroy</i> , 744 P.2d 311 (Utah Ct. App. 1987)	21
<i>Cerritos Trucking Co. v. Utah Venture No. 1</i> , 645 P.2d 608 (Utah 1982)	39
<i>Chen v. Stewart</i> , 2005 UT 68, 123 P.3d 416.....	3
<i>Dahl Investment Co. v. Hughes</i> , 2004 UT App. 391, 101 P.3d 830	42
<i>Glasscock v. State</i> , 2003 UT App. 254, 2003 WL. 21664764 (July 13, 2003)	47
<i>Jensen v. IHC Hospitals, Inc.</i> , 2003 UT 51, 82 P.3d 1076	3, 46
<i>Jensen v. Sawyers</i> , 2005 UT 81, 130 P.3d 325	42
<i>Management Committee of Graystone Pines Homeowners Association v.</i>	

TABLE OF AUTHORITIES
(continued)

	Page
<i>Graystone Pines, Inc.</i> , 652 P.2d 896 (Utah 1982)	1
<i>Minshew v. Chevron Oil Co.</i> , 575 P.2d 192 (Utah 1978)	25
<i>Nelson v. Stoker</i> , 669 P.2d 390 (Utah 1983)	47
<i>Pepper v. Zions First National Bank, N.A.</i> , 801 P.2d 144 (Utah 1990)	26
<i>Peters v. Pine Meadow Ranch Home Association</i> , 2007 UT 2	42
<i>Peterson v. The Sunrider Corp.</i> , 2002 UT 43, 48 P.3d 918	2
<i>Pratt v. Mitchell Hollow Irrigation Co.</i> , 813 P.2d 1169 (Utah 1991)	39-40
<i>ProMax Development Corp. v Raile</i> , 2000 UT 4, 998 P.2d 254	48-49
<i>Pugh v. Draper City</i> , 2005 UT 12, 114 P.3d 546	41
<i>Raile Family Trust v. Promax Development Corp.</i> , 2001 UT 40, 24 P.3d 980	26
<i>Rasmussen v. Sharapata</i> , 895 P.2d 391 (Utah Ct. App. 1995)	43
<i>Redevelopment Agency of Salt Lake City v. Tanner</i> , 740 P.2d 1296 (Utah 1987)	46
<i>Saleh v. Farmers Insurance Exch.</i> , 2006 UT 20, 133 P.3d 428	21, 22, 28
<i>Smith v. Four Corners Mental Health Ctr.</i> , 2003 UT 23, 70 P.3d 904	20
<i>State v. Allen</i> , 2005 UT 11, 108 P.3d 730	44
<i>State v. Anderson</i> , 789 P.2d 27 (Utah 1990)	41
<i>State v. Caballero</i> , 2005 UT App. 59, 2005 WL 314455 (Feb. 10, 2005)	47
<i>State v. Cruz-Meza</i> , 2003 UT 32, 76 P.3d 1165	3
<i>State v. Duccini</i> , 2006 UT App. 407 2006 WL 2834553 (Oct. 5, 2006)	48-49
<i>State v. Leatherbury</i> , 2003 UT 2, 65 P.3d 1180	48

TABLE OF AUTHORITIES

(continued)

	Page
<i>State v. Pena</i> , 869 P.3d 932 (Utah 1994)	3
<i>State v. Rimmasch</i> , 775 P.2d 388 (Utah 1989).....	44
<i>State v. Vargas</i> , 2001 UT 5, 20 P.3d 271	45
<i>In re Stevens' Estate</i> , 130 P.2d 85 (Utah 1942)	26
<i>Swan Creek Village Homeowners Association v. Warne</i> , 2006 UT 22, 134 P.3d 1122.....	26
<i>The Republic Group, Inc. v. Won-Door Corp.</i> , 883 P.2d 285 (Utah Ct. App. 1994)	39
<i>Tretheway v. Furstenau</i> , 2001 UT App. 400, 40 P.3d 649	32
<i>Turville v. J&J Properties, L.C.</i> , 2004 UT App. 389, 2004 WL. 2404688 (Oct. 28, 2004)	47
<i>University of Utah v. Shurtleff</i> , 2006 UT 51, 144 P.3d 1109.....	3
<i>Van Dyke v. Van Dyke</i> , 2004 UT App. 37, 86 P.3d 767	42
<i>Ward v. Intermountain Farmers Association</i> , 907 P.2d 264 (Utah 1995).....	2, 27-28
<i>West v. Thomson Newspapers</i> , 872 P.2d 999 (Utah 1994)	3
<i>Winegar v. Froerer Corp.</i> , 813 P.2d 104 (Utah 1991)	21, 28-32

STATE STATUTES

Utah Code Ann. § 48-2c-102(14), (17).....	24
Utah Code Ann. § 48-2c-104	24
Utah Code Ann. §§ 48-2c-601, 602	24
Utah Code Ann. § 78-2-2(3)	1

TABLE OF AUTHORITIES
(continued)

Page

COURT RULES

Utah R. App. P. 24(a).....	42
Utah R. App. P 33(a)	1, 4
Utah R. Evid. 402	4, 19, 44, 45
Utah R. Evid. 403	4, 19, 44, 45
Utah R. Evid. 404	4, 19, 44
Utah R. Evid. 608	4, 19, 42, 44-45
Utah R. Evid. 801	4, 19, 44
Utah R. Evid. 802	4, 19, 44
Utah R. Evid. 803(8)	44
Utah R. Civ. P. 50(a)	1, 3, 4, 6, 19

STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to Utah Code Ann. § 78-2-2(3)(j).

ISSUES PRESENTED AND STANDARDS OF REVIEW

Issue 1: Did the trial court properly grant a directed verdict on all of Daines' claims against ASC Group based on the "Conditional Release of Liability" Daines signed in December 2001 ("Release")?

Directed verdicts are appropriate when "the court is able to conclude, as a matter of law, that reasonable minds would not differ on the facts to be determined from the evidence presented," and that the moving party is entitled to judgment. *Mgmt. Comm. of Graystone Pines Homeowners Ass'n v. Graystone Pines, Inc.*, 652 P.2d 896, 897-98 (Utah 1982). Directed verdicts are reviewed *de novo*, applying the same standard as the trial court. *See id.* at 898. This Court must therefore "examine the evidence in the light most favorable to the losing party, and if there is a reasonable basis in the evidence and in the inferences to be drawn therefrom that would support a judgment in favor of the losing party, the directed verdict cannot be sustained." *Id.*

Issue 1(a): Did the trial court correctly conclude that the Release was unambiguous and could be interpreted as a matter of law?

Whether an ambiguity exists in a contract is a question of law reviewed for correctness. *See Alf v. State Farm Fire & Cas. Co.*, 850 P.2d 1272, 1274 (Utah 1993).

Issue 1(b): Did the trial court correctly interpret the Release to relinquish all of Daines' claims against ASC Group?

Where a contract is unambiguous, its interpretation is a question of law reviewed for correctness. *See Peterson v. The Sunrider Corp.*, 2002 UT 43, ¶ 14, 48 P.3d 918, 924.

Issue 1(c): After considering all extrinsic evidence offered by Daines, did the trial court properly determine that there was no latent ambiguity in the Release, and that it discharged all of Daines' claims against ASC Group as a matter of law?

Whether an ambiguity exists in a contract is a question of law reviewed for correctness. *See Alf*, 850 P.2d at 1274. "[I]f after considering [extrinsic] evidence, the court determines that the language of the contract is not ambiguous, then the parties' intentions must be determined solely from the language of the contract." *Ward v. Intermountain Farmers Ass'n*, 907 P.2d 264, 268 (Utah 1995). Where a contract is determined to be unambiguous, its interpretation is a question of law reviewed for correctness. *See Peterson*, 2002 UT 43 at ¶ 14.

Issue 2: Did the trial court correctly grant a directed verdict on Daines' claims against Vincent, individually, where Daines offered no evidence to prove that Vincent dealt with Daines in an individual capacity rather than as a representative of ASC Group?

See supra Issue 1 for applicable standard of review.

Issue 3: Did the trial court correctly grant a directed verdict on Daines' fraud and punitive damage claims where Daines offered no evidence to establish several of the essential elements of his claim?

See supra Issue 1 for applicable standard of review.

Issue 4: Does the grant of a directed verdict in accordance with the standard's set forth in Utah Rule of Civil Procedure 50(a), and controlling case law, violate the losing party's constitutional right to his day in court and/or to a trial by jury?

Constitutional questions are legal questions reviewed *de novo*. See *Univ. of Utah v. Shurtleff*, 2006 UT 51, ¶ 15, 144 P.3d 1109, 1114. As a general rule, this Court “should avoid reaching constitutional issues if the case can be decided on other grounds.” *West v. Thomson Newspapers*, 872 P.2d 999, 1004 (Utah 1994).

Issue 5: Did the trial court abuse its discretion in excluding evidence of findings of fact made by another judge in an unrelated case against Vincent regarding Vincent's credibility in that case?

“A district court has broad discretion to admit or exclude evidence and its determination typically will only be disturbed if it constitutes an abuse of discretion.” *Chen v. Stewart*, 2005 UT 68, ¶ 27, 123 P.3d 416, 425 (quotations omitted). See also *State v. Cruz-Meza*, 2003 UT 32, ¶ 8, 76 P.3d 1165, 1167 (“Although the admission or exclusion of evidence is a question of law, we review a district court's decision to admit or exclude specific evidence for an abuse of discretion.”). This Court will not reverse a trial court's decision to exclude evidence “unless it was beyond the limits of reasonability.” *Jensen v. IHC Hosps., Inc.*, 2003 UT 51, ¶ 57, 82 P.3d 1076, 1089 (quotations omitted).¹

¹ Daines cites *State v. Pena*, 869 P.3d 932, 936 (Utah 1994), for the proposition that evidentiary rulings on a motion *in limine* should be reviewed for correctness. See

Issue 6: Appellees filed a motion to dismiss the appeal for lack of jurisdiction because the trial court had not yet entered a final judgment. After the trial court entered final judgment, Appellees withdrew the motion as moot. Was the motion to dismiss brought in good faith and are sanctions appropriate under Utah Rule of Appellate Procedure 33(a)?

Sanctions may be awarded under Rule 33(a) only if the motion to dismiss was “frivolous” or made “for delay.”

APPLICABLE STATUTES, RULES, AND REGULATIONS²

Utah Rule of Civil Procedure 50(a).

Utah Rules of Evidence 402, 403, 404, 608, 801 and 802.

Utah Rule of Appellate Procedure 33(a).

STATEMENT OF THE CASE

I. NATURE OF THE CASE

In this action, Daines seeks to enforce an oral agreement, and to obtain equity shares in the West Valley Surgical Center, LLC, n/k/a the Utah Surgical Center, LLC, (the “Surgical Center”), in return for services he rendered in 2000-2001 relating to the formation, organization, and development of the Surgical Center. Although ASC Group

Appellant’s Br. 4-5, n. 20. Daines’ reliance on *Pena* is misplaced. *Pena* was a criminal case involving the suppression of evidence on constitutional grounds. *Pena* does not apply in this case and does not supplant the long-applied “abuse of discretion” standard applied to evidentiary rulings in civil cases.

² Pursuant to Utah Rule of Appellate Procedure 24(a)(6), the relevant provisions of these rules are set forth verbatim at Appellees’ Addendum, Tabs A-H.

and Vincent disputed the existence of an oral contract at trial, they acknowledged that the trial court should assume the existence of the agreement for purposes of their motion for directed verdict. In ruling on Defendants' motion, the trial court assumed the existence of the oral agreement, but ruled as a matter of law that Daines signed an unambiguous Release by which he voluntarily relinquished any claims he had against the Surgical Center and its members, including ASC Group, arising out of or relating to the formation, organization, development, or operation of the Surgical Center. Daines received \$56,000 in consideration for the Release. This appeal is directed, for the most part, to the trial court's interpretation of the Release.

II. RELEVANT PROCEDURAL HISTORY

The case was tried to a jury on August 7 and 8, 2006. At the close of Plaintiff's case the trial court granted three of Defendants' motions for directed verdict and dismissed all of Daines' claims against Defendants on the merits. The first order dismissed all of Daines' claims against ASC Group based on the Release signed by Daines. (R. at 1661-76.³)

The second order dismissed all of Daines' claims against Vincent, individually. This order was based on the trial court's conclusion that Daines presented no evidence to

³ A copy of the trial court's "Order Granting Motion for Directed Verdict on all Claims Against ASC Group, L.C." may be found at Addendum Exhibit 19 to Appellant's Brief.

establish that Vincent had acted or undertaken any obligations in an individual capacity, rather than as a representative of ASC Group. (R. at 1657-60.⁴)

The third order dismissed Daines' fraud claims against both Defendants. The trial court concluded that Daines had presented no evidence to establish several of the essential elements of his fraud claim. (R. at 1651-56.)

The trial court entered its orders granting Defendants' motions for directed verdicts on August 22, 2006. (R. at 1651-76.) The August 22 orders expressly contemplated the later entry of a judgment. On September 6, 2006, counsel for Defendants served upon counsel for Daines a proposed judgment that included a provision awarding costs pursuant to Utah Rule of Civil Procedure 54(d). (R. at 1691-98.) On September 8, 2006, after a discussion between counsel regarding the proposed form of judgment, and before judgment was entered, Daines filed a notice of appeal. (R. at 1677-79.) On September 12, 2006, Daines filed objections to the proposed judgment asserting, among other things, that his notice of appeal divested the trial court of jurisdiction to award Defendants their costs under Rule 54(d). (R. at 1699-1704.⁵)

Defendants filed a response to Daines' objections, arguing that the notice of appeal was premature and that it did not divest the trial court of jurisdiction to enter

⁴ A copy of the trial court's "Order Granting Motion for Directed Verdict on all Claims Against Richard Vincent, Individually" may be found at Addendum Exhibit 20 to Appellant's Brief.

⁵ A copy of the trial court's "Order Granting Motion for Directed Verdict on Plaintiff's Claims for Fraudulent Inducement and Punitive Damages" may be found at Addendum Exhibit 21 to Appellant's Brief.

judgment and to award costs. (R. at 1691-98.) On September 15, 2006, Defendants filed a motion in this Court to dismiss the appeal for lack of jurisdiction because final judgment had not been entered below.⁶ (Sup. Ct. Docket No. 7.) Daines responded on September 21, 2006, claiming that the motion was frivolous and requesting sanctions. (Sup. Ct. Docket No. 9.) On October 23, 2005, this Court entered an order deferring ruling on Defendants' motion to dismiss and Daines' request for sanctions "until plenary presentation on the merits." (Sup. Ct. Docket No. 16.)

Daines also appeals from the trial court's resolution of pre-trial motions *in limine* relating to the admissibility of certain findings of fact entered by Judge Robert K. Hilder in an unrelated case styled *Libscomb v. Vincent, et al.*, in which Judge Hilder found, among other things, that "Vincent is not a credible witness." ("*Libscomb* Order").⁷ The trial court held a hearing on the motions *in limine* on March 23, 2006, and entered an order on April 5, 2006, granting Defendants' cross motion and ordering Daines and his counsel "not to use or refer to the *Libscomb* Order in his case-in-chief, during cross-examination, or at any other time during trial." (R. at 965.) Daines did not call Vincent as a witness at trial.

⁶ Appellees' motion to dismiss was rendered moot by the trial court's entry of judgment on October 11, 2006. (R. 1717-19.) Appellees learned of the entry of judgment on October 23, 2006, and promptly notified this Court and withdrew their motion to dismiss as moot. *See* October 24, 2006, Letter from Michael P. Petrogeorge to Pat Bartholomew, Clerk of the Court. (Sup. Ct. Docket No. 18.)

⁷ A copy of the *Libscomb* Order may be found at Addendum Exhibit 4 to Appellant's Brief.

III. STATEMENT OF RELEVANT FACTS⁸

Background Facts

ASC Group is in the business of organizing, developing and managing surgical centers. (R. at 1064.) Richard Vincent founded ASC Group and was, at all relevant times, its Chairman. (*Id.*)

Plaintiff is a retired Certified Public Accountant who has provided accounting, tax preparation, and investment consulting services to a number of physicians during the course of his career. (Tr.⁹ 44-46.) Daines developed a long-standing professional relationship with one of his physician clients, Dr. Douglas Burrows. (*Id.* at 222-23.) Dr. Burrows paid Daines a monthly retainer to act as his financial advisor, and Daines conceded that he owed Dr. Burrows fiduciary duties. (*Id.* at 110-12, 238-39.)

In 2000 Dr. Burrows asked Daines to assist him and his colleagues in finding a company that could help them set up a surgical center. (*Id.* at 48-49, 111, 169.) Daines approached ASC Group in September 2000. (*Id.* at 49.) Unbeknownst to Dr. Burrows, Daines refused to introduce the doctors to ASC Group unless and until ASC Group signed a Memorandum of Understanding and Non-Disclosure Agreement (“MOU”) agreeing that ASC Group, or the Surgical Center to be formed, would pay Daines a

⁸ The following facts were undisputed at trial. Many of these facts are taken from the extensive findings the trial court made in connection with its ruling on the motions for directed verdict. (*See* R. at 1661-76.) Daines does not challenge any of the trial court’s factual findings on appeal, except as they relate to the interpretation of the Release. These facts will be marshaled in the light most favorable to Daines.

⁹ The Trial Transcript consists of two volumes. Volume I contains pages 1-121 (R. at 1726), and Volume II contains pages 122-322 (R. at 1727).

\$150,000 finder's fee for introducing ASC Group and the physicians and assisting with the due diligence and feasibility determination. (*Id.* at 112-14, 242-43.) Under the terms of the MOU, the finder's fee would be payable \$50,000 upon start-up of the surgical center, with the balance in 24 equal monthly installments thereafter. (*Id.* at 148; Trial Ex. 2¹⁰.)

Vincent signed the MOU on behalf of ASC Group. (Trial Ex. 2.) After the MOU was signed, Daines forwarded to ASC Group a list containing the names, addresses, and practice specialties of approximately thirty doctors who might be interested in forming the Surgical Center. (Tr. 53-56.) Most of the information on this list came from Dr. Burrows and his colleagues. (*Id.* at 114-15, 246-47.) Daines also assisted with due diligence and obtained information used in the feasibility determination.

Dr. Burrows did not learn of the existence of the MOU until months after this litigation commenced, which was more than three years after the MOU was signed and months after the Surgical Center began operations. (*Id.* at 232-33, 241-42.) According to Dr. Burrows, neither he nor the other doctors would have agreed to pay Daines a finder's fee for introducing them to ASC Group. (*Id.* at 245.)

From late September through November 2000, ASC Group principals met on several occasions with Daines and the group of doctors who were interested in forming a surgical center, prepared a preliminary feasibility study, and drafted the initial term sheet

¹⁰ Although the stipulated and admitted trial exhibits are part of the official record on appeal, they have not yet been given record number pagination.

for the proposed Surgical Center. (*Id.* at 56-66; *see also* Trial Ex. 3 (initial Proposed Term Sheet), Trial Ex. 24 (Feasibility Study), Trial Ex. 26 (Informational Brochure).)

The doctors met with Daines in December 2000. (Tr. 78, 141.) During that meeting they discussed the fact that it would be a direct conflict of interest for Daines to represent both ASC Group and the doctors in the negotiations surrounding the formation of the Surgical Center, or for Daines to represent the doctors while he was receiving a fee from ASC Group. (*Id.* at 233-35, 247-48.) It was agreed that Daines would therefore proceed to represent only the doctors in the negotiations for the Surgical Center. (*Id.* at 248-49.)

Daines testified that he met with Vincent on December 13, 2000, and that Vincent orally agreed that ASC Group would transfer to Daines eight of the twenty units of ownership (“Shares”) that ASC Group would ultimately hold if the Surgical Center were to be formed. (*Id.* at 80.) Daines testified that the consideration for the oral agreement was his relinquishment of his right to receive the \$150,000 finder’s fee pursuant to the MOU.¹¹ No document reflects or mentions an oral agreement. (*Id.* at 132-36.) There are

¹¹ The trial court found that there was “barely a scintilla of evidence, consisting solely of the testimony of Plaintiff, that Plaintiff and ASC Group entered into [the] oral agreement.” (R. at 1661-76.) The court additionally noted:

The Court has serious doubts whether there is a reasonable basis in the evidence to support a finding that an enforceable oral contract was formed and doubts that any reasonable jury could so find. But it is not necessary to make this determination in order to resolve the motion for a directed verdict. Accordingly, and for purposes of this motion, the Court will assume that the alleged oral agreement was made.

(*Id.* at 1668.)

no notes of the meeting. (*Id.* at 132-33.) There is no confirmatory letter or email. (*Id.* at 133-34.) In the winter of 2000-2001, Daines did not mention the existence of an oral agreement to any of the doctors or anyone at ASC Group (other than the conversation with Richard Vincent on December 13). (*Id.* at 134-35.) None of the term sheets exchanged between ASC Group and the doctors mentions an oral agreement. (Trial Exs. 3, 4, 8, 52, 54.)

On December 20, 2000, one week after Daines said the oral agreement was made, Daines met with Vincent and Bruce Heywood, another principal of ASC Group. (Tr. 139.) The only notes of that meeting indicate there was a discussion about “4 shares” or “pay the fee” to Daines. (Trial Exs. 34, 65.) There is no reference to eight Shares or an oral agreement having been made. (*Id.*)

On January 4, 2001, Daines had a conversation with Vincent in which he told Vincent that he had “torn up” the MOU and would be working solely for the doctors. (Tr. 141-42; Trial Ex. 32.) The only notes from this conversation contain no reference to an oral agreement for eight Shares. (Trial Ex. 32.)

On January 10, 2001, Daines sent an email to Vincent in which he was negotiating, on behalf of the doctors and against ASC Group, some of the critical terms that needed to be decided before the Surgical Center could be formed. (Tr. 142-45; Trial Ex. 73.) Among the terms set forth in the email, Daines wrote: “Nothing for me.” (Trial Ex. 73.) Although the initial term sheets in November 2000 referenced a payment to Daines in the form of \$150,000 cash or equity (Trial Exs. 3, 4), none of the term sheets prepared after November, up to and including the final term sheet signed by ASC Group

and the doctors in February 2001, provides for any type of compensation to Daines. (Tr. 130-31, 145-46, 150; Trial Exs. 3, 4, 8, 52, 54.)

During the course of the negotiations between ASC Group and Daines (on behalf of the doctors), Daines negotiated aggressively and was able to get, *inter alia*, a \$100,000 reduction in ASC Group's development fee, and a reduction in the initial term of its management agreement from ten to five years. (Tr. at 76-77, 149, 231, 249-50; Trial Exs. 3, 5, 8.) Daines admitted that he worked to negotiate the best deal he could for the doctors because he owed them a fiduciary obligation. (Tr. 76-77, 138.) All of the gains that Daines negotiated for the doctors came at the expense of ASC Group. (*Id.* at 149.)

After the final term sheet was signed in February 2001 (Trial Ex. 8), a Private Placement Memorandum ("PPM") was prepared. (Trial. Ex. 56.) This document allowed for only two classes of Shares—"Class I" and "Class II." The PPM further provided that only physicians could hold Class I Shares, that only ASC Group could purchase and hold Class II Shares, and that no one other than ASC Group could hold more than five Shares. (Trial Ex. 56 at BUR000014, BUR000021; Tr. 252-56.) The PPM also provided that no member could transfer their Shares in the Surgical Center. (Trial Ex. 56 at BUR000066.) Under the express language of the PPM, the transfer of eight Shares from ASC Group to Daines would not have been permitted unless such a

transaction was later authorized by the Board of Managers of the Surgical Center. (Trial Ex. 56 at BUR000022, BUR000066; Tr. 151-52, 255-56.)¹²

Once the operating company for the Surgical Center had been formed the parties turned their attention to finding a site for the Surgical Center. (Tr. 98.) The doctors asked Daines to explore possible sites for the Surgical Center. (*Id.* at 98-99.) Daines hoped to be the developer of the project, and undertook these efforts knowing that he would be compensated only if he was selected as developer. (*Id.* at 99, 257-59.)

Daines was not selected as developer. On September 25, 2001, the decision was made to build the Surgical Center at a site near the Granger Clinic that was controlled by The Boyer Company (“Boyer”), and to use Boyer as developer. (*Id.* at 101, 153-54.) There is no evidence that Daines did any work for or on behalf of Boyer.

The day of the selection, Daines was “feeling uncomfortable” so he called Vincent to inquire when he was going to receive his eight Shares. (*Id.* at 106-08.) Vincent’s response was: “What eight Shares?” (*Id.* at 108, 155.) Daines testified that he understood the phone call to mean that Vincent was “trying to chisel me on the eight shares.” (*Id.* at 108.) Daines’ handwritten notes, made around September 25, 2001, do not reflect any agreement to give him eight Shares. (Tr. 157; Trial Ex. 64.) Rather, they say: “*All we asked for me [was] 8 units.*” (Trial Ex. 64 (emphasis added).)

¹² The PPM restrictions are also set forth in the Operating Agreement for West Valley Surgical Center, LLC, dated April 11, 2001 (“Operating Agreement”). (Trial Ex. 57.)

Facts Relating to the Release

Following the selection of the Boyer site, the members of the Board of Managers for the Surgical Center decided to pay Daines \$50,000 for his services related to the Surgical Center. (Tr. 101-02; Trial Ex. 62.) They determined that this money would be paid by Boyer out of its developer's fee once the facility was constructed and in operation. (Trial Ex. 62.)

On October 29, 2001, Daines sent Dr. Burrows, his client and a member of the Board of Managers for the Surgical Center, a faxed message stating: "Since we are done with our work on W[est] V[alley] we would appreciate seeing if you can get immediate payment from Boyer." (Trial Ex. 80.¹³) Attached to the fax was a letter to Boyer in which Plaintiff states: "As we agreed verbally, Bob Smith and I will accept \$50,000.00 as payment for our services. I believe we have finished our work at this time and should be paid." (*Id.*)

On November 1, 2001, Daines sent ASC Group, as manager of the Surgical Center, an "Invoice #9." He wrote on the invoice: "\$50,000 promised by Boyer Company for Work on Different Sites for WV S[urgical] C[enter] building." (Trial Ex. 10.¹⁴) The invoice also indicated \$6,000 due as "partial fee for building portion WV City balance \$44,000.00 payable upon signing of lease." (*Id.*)

¹³ A copy of Trial Ex. 80 may be found at Addendum Exhibit 10 to Appellant's Brief.

¹⁴ A copy of Trial Ex. 10 may be found at Addendum Exhibit 24 to Appellant's Brief.

On December 10, 2001, more than a month after Invoice #9 was sent to the Surgical Center, Dr. David McCray, Chairman of West Valley Surgical Center, LLC, sent Daines a letter re "Invoice #9" stating, in relevant part:

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.

(Trial Ex. 10 (emphasis added).)

Enclosed with this letter was the proposed Release. (*Id.*) The operative portion of the Release provides:

We, Welden L. Daines and Robert Smith, do hereby conditionally release West Valley Surgical Center, LLC or *any of its members* from *any and all liabilities and or claims* in connection with services provided by us *for the due diligence, acquisition of real estate, or any other services rendered to date* for West Valley Surgical Center, *or on behalf of its members*, for the *organization, development and operation of an ambulatory surgical center* in the West Valley and *any services connected with the same.* 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.

(*Id.* (emphasis added).)

Dr. Burrows saw the Release before it was sent to Daines, and testified that it was intended to protect the Surgical Center and its members from any continuing responsibilities or liabilities to Daines for anything having to do with the Surgical Center.

(Tr. 265-67.) He also testified that ASC Group was, “by definition,” a member of the Surgical Center. (*Id.*)

Daines read and signed the Release without requesting any changes. (*Id.* at 103, 162.) Daines is a sophisticated businessman and certified public accountant, and testified that he was not under any duress or disability when he signed the Release. (*Id.* at 163.)

Daines and his witnesses testified that Daines had performed various services prior to signing the Release. These included services related to “due diligence,” “acquisition of real estate,” and other services relating to the “organization,” “development” and “operation” of the Surgical Center. (*Id.* at 157-59 (Daines), 179-182 (Robert Smith), 213 (Scott Stuart) & 260-64 (Dr. Burrows).) Their description of the services rendered by Daines coincides exactly with the services recited in the Release. (Trial Ex. 35.)

It is undisputed that when the Release was signed, the membership of West Valley Surgical Center, LLC included approximately 20 individual physicians and ASC Group. (Tr. 266-67.) The November 2000 term sheets for the Surgical Center and every term sheet thereafter identified ASC Group as a member of what would become West Valley Surgical Center, LLC. (Trial Exs. 3, 4, 8, 52, 54.) Daines received and reviewed these term sheets on behalf of the doctors and knew that ASC Group would be a member of the Surgical Center once it was formed. (Tr. 73, 75, 145-46, 148-50.) The Surgical Center was formed in April 2001, eight months before the Release was signed. (Trial Ex. 57.)

The Release was conditioned only on the receipt of future payments. (Trial Ex. 35.) Daines received those payments in the form of a check for \$6,000 from West Valley

Surgical Center, LLC, and a check for \$50,000 from Boyer. (Tr. 102, 163; Trial Exs. 61, 63.¹⁵)

SUMMARY OF THE ARGUMENT

The Release is clear and unambiguous on its face, and discharged all of Daines' claims against ASC Group. The Release discharged all of the "members" of West Valley Surgical Center, LLC. It is undisputed that ASC Group was one of approximately twenty members of the limited liability company when the Release was signed, and that Daines knew of ASC Group's status as a member prior to signing the Release.

On its face, the Release applies to any claims arising out of services Daines performed relating to the Surgical Center, including any services he provided during the due diligence, acquisition of real estate, organization, development, and operation of the Surgical Center. The plain language of the Release further applied to encompass and satisfy any prior agreements Daines may have had with members of the Surgical Center, including ASC Group. Whether this language is labeled as an "integration clause" or a "scope" clause, its effect is to discharge the alleged agreement with ASC Group to give Daines eight Shares of the Surgical Center.

There is no legal distinction between "pre-Surgical Center ASC" and "Surgical Center ASC" insofar as the terms of the Release are concerned because the scope of the Release expressly includes both "pre-Surgical Center" services (due diligence,

¹⁵ A copy of the \$6,000 check from West Valley Surgical Center, LLC may be found at Addendum Exhibit 15 to Appellant's Brief, and a copy of the \$50,000 check from Boyer may be found at Addendum Exhibit 13 to Appellant's Brief.

organization, and development) and “post-Surgical Center” services (acquisition of real estate and operation of the Surgical Center). Daines’ argument regarding the purportedly different legal capacities of ASC Group was raised for the first time on appeal and has no support in the evidence.

The trial court gave Daines the opportunity to present whatever evidence he had to prove his alternative interpretation of the language of the Release. Daines failed to present any evidence, let alone “reasonable and plausible” evidence, to support an alternative interpretation. Daines did not testify about his own interpretation. The invoice Daines points to as supportive of his interpretation is inconsistent with the responsive letter from the Surgical Center and the express language of the Release Daines signed. The trial court properly determined that there was no reasonable and plausible extrinsic evidence to establish an ambiguity, and that the Release applied, as a matter of law, to discharge Daines’ claims against ASC Group.

The trial court was also correct in granting a directed verdict on Daines’ claims against Vincent, individually. There is no evidence in the record to support a claim that Vincent promised as an individual to give Daines eight Shares in the Surgical Center. The only evidence offered by Daines was that Vincent, as Chairman of the Board, made the promise on behalf of ASC Group. Vincent did not personally own any Shares and, according to the organizational documents of the Surgical Center, could not have purchased or owned eight Shares as an individual.

The directed verdict on Daines’ claim for fraud and punitive damages should also be upheld. Daines failed to introduce any evidence that Defendants did not intend to

honor the alleged promise to give Daines eight Shares. The only evidence cited by Daines—the later organizational documents Daines helped negotiate that did not allow for Daines to hold eight Shares—is not evidence of the intention of ASC Group at the time the promise was allegedly made. Moreover, Daines failed to present evidence that he reasonably and detrimentally relied on the promise. Once it became apparent to Daines that he could not hold and would not receive eight Shares, there was nothing to prevent him from asserting his claim to \$150,000 under the MOU (until such time as he signed the Release).

Daines argues that by granting any of the directed verdicts, the trial court deprived him of his constitutional rights to his day in court and/or to a trial by jury. The grant of a directed verdict in accordance with Utah Rule of Civil Procedure 50(a) and the standards articulated by this Court after the plaintiff has had an opportunity to present his case-in-chief, does not violate the constitution.

This Court should also affirm the trial court's order excluding all references to the *Libscomb* Order at trial. As a threshold matter, Daines' briefing on the issue is inadequate, and this Court should decline to even address it. On the merits, the *Libscomb* Order is inadmissible under Utah Rules of Evidence 402, 403, 404, 608, 801 and/or 802. Even if the *Libscomb* Order were admissible, however, any error was harmless because Vincent was never called as a witness at trial, and his credibility was never put at issue.

Finally, this Court should deny Appellant's request for sanctions. Appellees' motion to dismiss for lack of subject matter jurisdiction was brought in good faith, and in accordance with controlling law. Although that motion has now been withdrawn as

moot, it was properly asserted at the time and was not frivolous or asserted for the purpose of delay.

ARGUMENT

I. THE TRIAL COURT PROPERLY DIRECTED A VERDICT ON DAINES' CLAIMS AGAINST ASC GROUP BECAUSE THE RELEASE DISCHARGED ALL OF THESE CLAIMS.

Daines' arguments regarding the meaning and effect of the Release are somewhat confusing and contradictory. He argues at various points:

- The Release is unenforceable because there was no meeting of the minds on the identity of the parties. (Appellant's Br. 33-34.) This issue was not raised at trial and it is not properly before the Court on appeal. *See Smith v. Four Corners Mental Health Ctr.*, 2003 UT 23, ¶ 19, 70 P.3d 904, 911 (quoting *Treff v. Hinckley*, 2001 UT 50, ¶ 9 n. 4, 26 P.3d 212) ("We will not address any new arguments raised for the first time on appeal."').¹⁶
- The Release is **unambiguous** on its face and does not discharge ASC Group in its "pre-Surgical Center ASC" legal capacity. (Appellant's Br. 35-37.)
- Interpreted with the aid of extrinsic evidence, the Release is **unambiguous** and does not discharge ASC Group in its "pre-Surgical Center ASC" legal capacity. (Appellant's Br. 37-38.)

¹⁶ Daines suggests that the issue was preserved because he raised it in opposition to Defendants' first motion for summary judgment. (Appellant's Br. 34 n. 106.) But he did not raise the issue at trial. *See 438 Main St. v. Easy Heat, Inc.*, 2004 UT 72, ¶ 51, 99 P.3d 801, 813 ("Issues that are not raised at trial are usually deemed waived."). Accordingly, the trial court never had the opportunity to actually consider the issue. *See Brookside Mobile Home Park, Ltd. v. Peebles*, 2002 UT 48, ¶ 14, 48 P.3d 968, 972 ("[O]nce trial counsel has raised an issue before the trial court, and the trial court has considered the issue, the issue is preserved for appeal."). More importantly, Daines did not offer any evidence at trial to show his different understanding of the parties covered by the Release. To the contrary, the undisputed evidence established that ASC Group was a member of the Surgical Center and that Daines knew it when the Release was signed. In the absence of any contrary evidence from Daines, no reasonable jury could conclude that there was not a meeting of the minds concerning the parties covered by the Release.

- The Release is **unambiguous** on its face and does not discharge ASC Group from claims other than breach of contract. (Appellant's Br. 38-39.)
- The Release is **ambiguous** as to the identity of the parties released and the scope of the claims released. (Appellant's Br. 39-41.)
- The Release is **ambiguous** concerning the scope and meaning of the "integration" clause. (Appellant's Br. 41-43.)

For the reasons set forth below, each of these arguments should be rejected, and the directed verdict should be affirmed.

A. The Release Is Unambiguous on Its Face and Discharged All of Daines' Claims Against ASC Group.

The Release is a contract and is governed by the general rules applied in contract actions. *See Butcher v. Gilroy*, 744 P.2d 311, 312 (Utah Ct. App. 1987). "In interpreting a contract, the intentions of the parties are controlling." *Winegar v. Froerer Corp.*, 813 P.2d 104, 108 (Utah 1991). "If the contract is in writing and the language is not ambiguous, the intention of the parties must be determined from the words of the agreement." *Id.* at 108.

"Whether an ambiguity exists in a contract is a question of law." *Alf v. State Farm Fire & Cas. Co.*, 850 P.2d 1272, 1274 (Utah 1993). "A contract provision is ambiguous if it is capable of more than one reasonable interpretation." *Winegar*, 813 P.2d at 108. "A contract may be ambiguous because it is unclear, omits terms, or 'the terms used to express the intention of the parties may be understood to have two or more plausible meanings.'" *Saleh v. Farmers Ins. Exch.*, 2006 UT 20, ¶ 15, 133 P.3d 428, 432 (quoting *Alf*, 850 P.2d at 1274). Words in a contract are not ambiguous "simply because one party seeks to endow them with a different interpretation according to his or her own interests."

Id. ¶ 17. “[T]o merit consideration as an interpretation that creates an ambiguity, the alternative rendition ‘must be based upon the usual and natural meaning of the language used and may not be the result of a forced or strained construction.’” *Id.* (quoting *Home Sav. & Loan v. Aetna Cas. & Sur. Co.*, 817 P.2d 341, 367 (Utah Ct. App. 1991)).

Daines signed the Release in December 2001, agreeing that in exchange for the payment of \$50,000 he would release:

[The Surgical Center] or any of its members from any and all liabilities and or claims in connection with services provided by [Daines] for the due diligence, acquisition of real estate, or any other services rendered to date for West Valley Surgical Center, or on behalf of its members, for the organization, development and operation of an ambulatory surgical center in the West Valley and any services connected with the same.

(Trial Ex. 10). The Release goes on to state that it “encompasses and satisfies any prior agreements and discussions whether written or verbal [by the Surgical Center] or any of its members.” (*Id.*)

On its face, the Release includes any claims arising out of any services Daines performed relating to the Surgical Center, including any services he provided to the members of the Surgical Center during its due diligence, organization, and development (i.e., before they were actually “members”). The plain language of the Release further satisfies any then-existing agreements Daines may have had with the Surgical Center or any of its members (including the MOU and the oral agreement). The Release was conditioned only upon the payment of certain sums by or on behalf of the Surgical Center, and Daines admits that he received these payments. (Tr. 102, 163.) It is undisputed that ASC Group was a member of the Surgical Center along with the

individual physicians when the Release was signed, and that Daines knew full well who the members were when he signed it.

Daines initially concedes that the Release is unambiguous and can be interpreted as a matter of law. (Appellant's Br. 33-38.) He argues, however, that the Release did not discharge ASC Group in its "pre-Surgical Center" legal capacity. This argument must be rejected.

As a threshold matter, the issue of whether there is a legally recognizable distinction between "pre-Surgical Center ASC" and "Surgical Center ASC," insofar as the Release is concerned, was raised for the first time on appeal. The argument was not properly preserved below, and should not be considered on appeal.¹⁷

In any event, there is no evidence in the record to support the distinction Daines attempts to make. The Release uses the phrase "Surgical Center and/or its members" to identify the group of persons being released. The Surgical Center is a Utah Limited Liability Company, and the term "member" is defined by the Utah Revised Limited

¹⁷ At oral argument on Defendants' motion for directed verdict, Daines argued that the Release of the Surgical Center did not apply because the eight Share agreement "was a deal between Mr. Daines and ASC, a totally separate entity." (Tr. 290.) Daines made no distinction between "pre-Surgical Center ASC" and "Surgical Center ASC," and never argued that the Release applied to ASC Group in some legal capacities but not others. (*Id.*). Indeed, Daines argued that the Release did not apply to ASC Group *at all*. (*Id.* at 275-77.) Daines claims that the issue was raised in his memorandum opposing Defendants' first motion for summary judgment. (Appellant's Br. 34 n. 107.) A review of that memorandum reveals no discussion of "pre-Surgical Center ASC" or "Surgical Center ASC," however, and no assertion that the Release applied to ASC in some capacities but not others. (R. at 122-79.) Even if the issue had been raised in the opposing memorandum, it would not have preserved the issue for appeal. *See infra* n. 10.

Liability Company Act to mean “a person [individual or entity] with an ownership right in the company.” Utah Code Ann. § 48-2c-102(14), (17). It is undisputed that ASC Group and the individual physicians were “members” of the Surgical Center at the time the Release was executed, and that Daines knew it. As such, there can be no ambiguity as to the identity of the parties being released.¹⁸

Indeed, if Daines’ interpretation were correct—that the Release only applied to “post-Surgical Center” obligations—there would have been no reason to include the term “members” in the Release. A Utah limited liability company is a legal entity distinct from its members. *See* Utah Code Ann. § 48-2c-104. Utah law makes it clear that members of a limited liability company are not personally liable for the obligations or liabilities of the company (except for certain exceptions that do not apply here). *See* Utah Code Ann. §§ 48-2c-601, 602. Accordingly, the members of a Utah limited liability company are released by operation of law if the company itself is released.

¹⁸ The logical fallacy in Daines’ argument was revealed during oral argument on the motions for directed verdict, during which Daines’ counsel suggested that the Release would apply to the individual physician members without distinguishing between their “pre-member” and “member” status. *See* Tr. at 275 (“[The Release] is perfectly effective with respect[] to claims that Mr. Daines might have had against the doctors. We’re not suing the doctors”); *id.* at 277 (“There was no testimony whatsoever, from any witness, that the release appl[ies] to anything else but claims by Mr. Daines against the doctors or against the center.”). As with ASC Group, the individual doctors are not referenced by name in the Release. If the Release applies to the individual physicians at all it is because they, like ASC Group, were members of the Surgical Center. There is no rational basis to distinguish ASC Group from the individual physicians, or to argue that the Release applies to some of the Surgical Center’s “members” and not to others.

“Established rules of contract interpretation require consideration of each of its provisions in connection with others and, if possible, to give effect to all; effect is to be given entire agreement without ignoring any part thereof.” *Minshew v. Chevron Oil Co.*, 575 P.2d 192, 192 (Utah 1978). The only reason to include “members” in the Release is to make sure that, in addition to releasing Daines’ claims against the Surgical Center (which by operation of law also releases members in their capacity as members), he was also releasing any claims he had against the members in a personal capacity that fell within the scope of the Release. Thus, the effect of identifying both the Surgical Center and its members as parties to be covered by the Release is to preclude the very argument Daines is now making.

Daines’ argument, although expressed in terms of the legal capacity of the parties being released, is really directed to the intended scope of the Release. He argues that because the eight Shares agreement was made in December 2000, before the Surgical Center was actually formed as a limited liability company, and before ASC Group became a “member,” the Release does not apply to “pre-Surgical Center ASC.” But this argument cannot stand in the face of the express language of the Release. The Release specifically includes claims for services relating to “due diligence,” and for the “organization [and] development” of the Surgical Center. (Trial Ex. 35.) These services are, by definition, “pre-Surgical Center,” that is, they pre-dated formation of the Surgical Center. Since the express language of the Release includes claims for services that had to have been rendered prior to the time the Surgical Center was formed as an LLC, and before it had any members, Daines cannot now argue that the Release does not apply to

claims against “pre-Surgical Center ASC.” Likewise, because the express language of the Release encompasses both claims for “pre-membership” services (due diligence, organization, and development) and “post-membership” services (acquisition of real estate and operation of the Surgical Center), it will not support the interpretation Daines is now trying to force upon it.¹⁹

In sum, the trial court properly concluded that the Release was unambiguous on its face, and correctly interpreted it to discharge any claims Daines may have had against ASC Group relating to the Surgical Center, including his claim for eight Shares under the

¹⁹ Daines cites to cases standing for the general proposition that a person or entity can have different legal capacities, and that action taken in one legal capacity does not necessarily constitute action taken in another. (Appellant’s Br. 30 n. 94, n. 95.) None of these cases involve the interpretation of a release or facts similar to this case. *See, e.g., Swan Creek Village Homeowners Ass’n v. Warne*, 2006 UT 22, ¶ 23, 134 P.3d 1122, 1127 (when plaintiff amended complaint to name daughter as real party in interest, father stopped acting in personal capacity and began acting as agent for daughter); *Raile Family Trust v. Promax Dev. Corp.*, 2001 UT 40, ¶ 11, 24 P.3d 980, 983 (claims asserted by trust in current action were compulsory counterclaims which trustees failed to assert in prior action, and were therefore properly dismissed on summary judgment pursuant to Rule 13(a) of the Utah Rules of Civil Procedure; trustees could not avoid summary judgment by arguing that they acted solely in an individual capacity in the prior suit); *Pepper v. Zions First Nat’l Bank, N.A.*, 801 P.2d 144, 151-52 (Utah 1990) (probate order discharging Zions Bank as executor does not preclude later claim against Zions Bank as trustee for failure to assert a claim on behalf of the trust against Zions Bank as executor for dissipating trust assets; although Zions served both as executor and trustee, it owed independent and separate fiduciary duties in each of its legal capacities; discharge in its capacity as executor did not absolve Zions of separate fiduciary obligation, as trustee, to protect and preserve the beneficiaries’ interests, even though Zions had to challenge its own conduct as executor); *In re Stevens’ Estate*, 130 P.2d 85, 87 (Utah 1942) (administrator of estate acted in his capacity as an officer of a corporation, rather than in his personal capacity, in presenting claim to estate, and thus did not violate statute requiring administrator to present personal claims to court for approval prior to payment).

alleged oral agreement. As such, the trial court appropriately granted a directed verdict in favor of ASC Group on all of his claims for relief.²⁰

B. The Trial Court Considered All Extrinsic Evidence Offered by Daines and Properly Determined That the Release Was Not Ambiguous as a Matter of Law and Discharged Daines' Claims Against ASC Group.

Daines next argues that the Release, if interpreted with the aid of extrinsic evidence, is unambiguous and does not discharge ASC Group in its “pre-Surgical Center ASC” legal capacity. (Appellant’s Br. 37-38.) The trial court twice denied ASC Group’s motion for summary judgment on the Release.²¹

In denying summary judgment below, the trial court apparently believed that it was required by this Court’s decision in *Ward v. Intermountain Farmers Ass’n*, 907 P.2d 264 (Utah 1995), to consider any extrinsic evidence proffered by a party to determine whether a contract is ambiguous. In *Ward*, the Court stated: “When determining whether

²⁰ Daines suggests that the Release applies, if at all, only to his claims for breach of contract. But Daines’ other claims for fraudulent inducement, negligent misrepresentation, promissory estoppel and unjust enrichment are all premised on his claim that he was improperly induced to give up his right to receive \$150,000 under the MOU. The MOU itself is a prior contract that was satisfied by the express language of the Release and it also related to services Daines provided ASC Group in connection with the due diligence, formation and organization of the Surgical Center. Accordingly, his other claims are also discharged by the express language of the Release.

²¹ The fact that the trial court declined to enter summary judgment in favor of ASC Group has no preclusive effect at trial nor any significance in this appeal. A trial court has the discretion to reconsider and reverse any previously issued decision at any time prior to the entry of a final judgment. *See, e.g., Brookside*, 2002 UT 48 at ¶ 18. The prior rulings were made by the trial court on motions for summary judgment. At that stage of the proceedings the trial court was required to accept all of Daines’ proffered evidence as true, and to allow Daines his day in court if there was any potentially admissible evidence that could be used to establish a latent ambiguity and avoid application of the Release. Daines offered no such evidence.

a contract is ambiguous, any relevant evidence must be considered.” *Id.* at 268 (holding that the release was ambiguous as to whether it covered damages to a 19-acre field that was planted in safflowers or damages for the crop of safflowers only). Two Justices were critical of the breadth of the Court’s language (Russon, J. concurring in result; Zimmerman, C.J., dissenting). Both lamented the Court’s apparent departure from the “long-standing rule” that a court must first determine, as a matter of law, whether an ambiguity exists before considering extrinsic evidence. *Id.*

Recently, this Court had occasion to revisit the issue of contract interpretation in *Saleh v. Farmers Ins. Exch.*, 2006 UT 20, 133 P.3d 428. Without citing *Ward*, the unanimous Court in *Saleh* followed orthodox principles of contract interpretation. *Id.* at ¶ 15. Rather than requiring trial courts to consider “any relevant [extrinsic] evidence” to determine ambiguity, the *Saleh* Court imposed a threshold requirement that a party arguing for an alternative interpretation must first advance an interpretation that is “plausible and reasonable in light of the language used.” *Id.* at ¶ 17 (quoting *First Am. Title Ins. Co. v. J.B. Ranch, Inc.*, 966 P.2d 834, 837 (Utah 1998)).

In the case at bar, Daines was able to avoid summary judgment because the trial court applied the “any relevant evidence [of intent]” test set forth in *Ward*. At trial, Daines had the opportunity to offer extrinsic evidence to support a “reasonable” and “plausible” alternative interpretation of the Release. *See id.* at ¶ 15; *Winegar*, 813 P.2d at 108. Daines failed to meet his burden under *Saleh* to offer evidence that would reasonably support the interpretation of the Release he now urges, and, accordingly, the

trial court properly interpreted the unambiguous language of the Release to bar his claims against ASC Group as a matter of law.

1. Marshaled Evidence of Ambiguity.

The only testimony offered by Daines on the subject of the Release can be found at pages 101-103 and 157-63 of the transcript. Marshaling that evidence in favor of Daines is a straightforward task:

By the end of September 2001 Daines had completed all his services relating to due diligence, feasibility studies, organization, acquisition of real estate, site selection, and operation of the Surgical Center. (Tr. 157-59.) By that time, Daines also knew that ASC Group did not intend to give him eight Shares. (Tr. 107-08.)

On October 29, 2001, Daines sent a fax to Dr. Burrows asking for his assistance in getting immediate payment from Boyer because Daines was “old and the future payment is probably of little value to me.” (Trial Ex. 80; Tr. 159-61.) He also noted: “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.” (*Id.*)

On November 1, 2001, Daines sent his Invoice #9 to ASC Group. (Trial Ex. 10.) His purpose was to be reimbursed for \$6,000 in out-of-pocket expenses. He wrote on the invoice: “\$50,000 promised by Boyer Company for Work on Different Sites for WV S[urgical] C[enter] building.” (*Id.*) The invoice also indicated \$6,000 due for “partial fee for building portion WV City balance \$44,000.00 payable upon signing of lease.” (*Id.*)

On December 10, 2001, Daines received a fax letter from Dr. McCray, Chairman of the Surgical Center. (Trial Ex. 10; Tr. 161.) That letter specifically referenced Daines' Invoice #9, and states:

Thank you for the services you rendered to West Valley Surgical Center, LLC during the due diligence and organizational phase of the development. Check No. 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.

(Trial Ex. 10; Tr. 161-62.)

Enclosed with the December 10 letter was a copy of the Release. (Trial Ex. 10.) Daines read the Release, signed it and faxed it back. (*Id.*; Tr. 103, 162-63.) No one forced him to sign. (*Id.* at 163.) Shortly after he sent it back to ASC Group, he received a check for \$6,000. (*Id.* at 163; Trial Ex. 61.) In March or April 2003 he received a check for \$50,000. (*Id.* at 163; Trial Ex. 63.) Daines offered no testimony at trial concerning an alternative understanding or interpretation of the Release.

2. After Considering Daines' Evidence and Inferences in Their Most Favorable Light, the Trial Court Properly Determined That No Ambiguity Existed and That the Release Could Be Interpreted as a Matter of Law.

After hearing and considering all of the evidence Daines presented on the issue of ambiguity, the trial court determined that the Release was unambiguous on its face, that Daines had presented no extrinsic evidence to establish a latent ambiguity in the Release, and that the Release discharged his claims against Defendants as a matter of law:

The Release is clear and unambiguous as a matter of law. . . .

Plaintiff offered no evidence that would support an alternative interpretation of the Release that is plausible and reasonable in light of the language used in the Release. . . . The construction and interpretation of the Release is therefore a question of law for the Court.

(R. at 1669, ¶ 14, 1672, ¶ 26.)

Nothing in the marshaled evidence supports Daines' new argument on appeal that the Release was ambiguous as to "pre-Surgical Center ASC." There is no factual support for this argument anywhere in the trial record. As noted above, the express language of the Release includes both "pre" and "post" Surgical Center services. (*Supra* at Argument § I(A)) Indeed, both ASC Group and some of the individual physicians acted as organizers, members, and managers of the Surgical Center. As "members," they were discharged from any claims (pre- and post-formation of the Surgical Center) as long as they were within the scope of the services listed in the Release.

Daines points to his Invoice #9 in support of his argument that he was being paid only for his activities in connection with the "acquisition of real estate" for the Surgical Center, and for certain out-of-pocket expenses. He also argues that it is a "contemporaneous document" and should be used to interpret the Release. These arguments fail for two reasons.

First, the Surgical Center responded to his invoice a month later with a letter that is inconsistent with Daines' interpretation. (Trial Ex. 10.) Enclosed with the letter was the Release, which expressly discharged not only claims relating to the "acquisition of real estate," but also discharged claims for services relating to "due diligence" and claims

for “other services” rendered during the “organization, development and operation” of the Surgical Center. (Trial Ex. 10.) Payment of the first \$6,000 was conditioned on signing the Release. Daines signed the Release and accepted the money.

Second, Invoice #9 is not a “contemporaneous” document that must be considered in construing the Release. (Appellant’s Br. 37-38.) The contemporaneous writing rule applies only to contracts or agreements that were contemporaneously executed by the parties. *See, e.g., Tretheway v. Furstenau*, 2001 UT App 400, ¶ 9, 40 P.3d 649, 652 (“[W]hen two agreements are executed substantially contemporaneously and are clearly interrelated, they must be construed as a whole and harmonized if possible.” (internal quotations omitted)); *see also Winegar*, 813 P.2d at 109 (involving two contemporaneously executed “agreements”); *Atlas Corp. v. Clovis Nat’l Bank*, 737 P.2d 225, 229 (Utah 1987) (involving contemporaneously executed “contract” and warranty deed). Invoice #9 was sent by Daines more than a month before he received the letter from the Surgical Center and signed the Release, and the terms of the invoice were never agreed to by the Surgical Center, ASC Group, or any other relevant party.

The only document that could be construed as a contemporaneous writing is the letter from Dr. McCray to Daines. *See Brown v. Financial Serv. Corp.*, 489 F.2d 144, 149-50 (5th Cir. 1974) (cover letter transmitting signed contract, and summarizing its terms, may be considered in interpreting the agreement). That letter transmitted the Release and is consistent with language of the Release. (Trial Ex. 10.) It is not consistent with the interpretation of the Release Daines now urges. Both Dr. McCray’s cover letter and the Release make it clear that the \$50,000 fee Daines was to receive from

Boyer was intended to compensate him for all of his services relating to the Surgical Center.²² (*Id.*) Daines read both of these documents, and voluntarily signed the Release without taking any steps to clarify its terms, limit its scope, exclude ASC Group as a covered party, or otherwise preserve any claims he might have had against ASC Group relating to the eight Shares. In light of all of this evidence, no reasonable jury could conclude that Daines intended the Release to apply only to his “real estate acquisition” efforts,²³ or to exclude from its scope any claims he might have against ASC Group arising out of an oral agreement for the eight Shares.

In sum, Daines presented no extrinsic evidence to support a reasonable and plausible alternative interpretation of the Release or to establish that it was not intended to apply to all claims Daines might have had against ASC Group relating to the Surgical Center, including his claim to the eight Shares. As such, the trial court’s ruling that the Release discharged all of Daines’ claims against ASC Group as a matter of law was correct, and the directed verdict should be affirmed.

²² Daines claims that this cover letter links the Release only to the \$6,000 payment, and not to the \$50,000 payment from Boyer. The cover letter for the Release expressly states, however, that the \$6,000.00 check “represent[ed] payment towards [Daines’] fee totaling \$50,000.” (Trial Ex. 10.)

²³ Daines argues that because the \$50,000 came from Boyer the Release must have applied only to his site selection efforts. There is no evidence of Daines performing any services for or at the request of Boyer. It is undisputed that Boyer paid the money as the selected developer, on behalf of and at the request of the Surgical Center and its members. (Trial Ex. 10.)

C. **Whether the Release Contains a True “Integration” Clause or Just Further Exposition of the Scope of the Release Makes No Difference to the Outcome.**

Daines attacks the trial court’s conclusion that certain language in the Release was an integration clause. (Appellant’s Br. 41-43.) The disputed language states: “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.” (Trial Ex. 10). Daines argues that this is not a true integration clause because it does not state that the document constitutes “the entire agreement of the parties.” (Appellant’s Br. 42)

The real issue, however, is not what label to attach to the sentence, but what the sentence means, and how it impacts Daines’ claims for the eight Shares. Whether it is labeled as an integration clause or merely a further expression of the intended scope of the Release, the language makes it clear and unambiguous that the Release “encompasses and satisfies any prior agreements” Daines might have had with the Surgical Center or any of its members, including ASC Group. Thus, the Release expressly includes the MOU and the oral agreement for the eight Shares—both “prior agreements,” one written and one “verbal”—that are expressly satisfied and discharged by the Release.

II. **THE TRIAL COURT PROPERLY GRANTED A DIRECTED VERDICT DISMISSING DAINES’ CLAIMS AGAINST VINCENT BECAUSE DAINES PRESENTED NO EVIDENCE THAT VINCENT DEALT WITH DAINES IN AN INDIVIDUAL CAPACITY.**

Daines implicitly acknowledges that he must present evidence that Vincent dealt with Daines in his individual capacity, rather than as a representative of ASC Group, in order to escape a directed verdict. (Appellant’s Br. 43.) But, instead of citing evidence

of what Vincent said or did that might create individual liability, Daines cites only evidence of what he, Daines, assumed. (*See id.* at 43-44.) Mostly, Daines cites to his counsel's arguments below, which are not themselves evidence. (*Id.*)

Daines' entire testimony concerning the oral agreement, for which he seeks to hold Vincent personally liable, was as follows:

Q. 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.²⁴

Q. Who was present at that meeting?

A. Just the two of us.

Q. Just the two of you? And what was discussed at that time?

A. We discussed my concerns about being tough on the contract when they [ASC Group] were paying me and that was the basis of our conversation.

Q. And let me ask you, by that time had an agreement been signed up with the ASC Group [and the doctors]?

A. No, that wasn't signed up until February 13.

Q. So what was Mr. Vincent's reaction to your conversation with him, to you telling him how uncomfortable you felt?

A. His reaction was, "Well, I think we can take care of this if you come on our side of the table and you get a share, then you'll be negotiating for yourself and for the doctors, and you can do it in good faith.

²⁴ The offices to which Daines refers are ASC Group's offices in Park City. (Tr. 99-102.)

Q. Okay. So 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?²⁵

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. 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

²⁵ The MOU was signed by Vincent in his representative capacity and obligated ASC Group or the Surgical Center to pay the \$150,000 finder's fee. (Trial Ex. 2.) Vincent had no personal obligation to pay this amount. (*Id.*)

missionary, as Mr. Hayward is and I thought I could rely on his word.

(Tr. 79-81.)

There is nothing in Daines' testimony that would support, directly or by inference, a finding that Vincent made an oral agreement in any capacity other than as Chairman of ASC Group. No reasonable jury could infer from this evidence that Vincent was promising as an individual to give Daines eight Shares of the Surgical Center. Indeed, Daines' own testimony is that Vincent used the plural pronouns "we" and "our" when he said "I think we can take care of this if you come on our side of the table and you get a share.'" (*Id.* at 79-80.) Daines' counsel conceded as much when he argued that the Release of the Surgical Center did not apply to the eight Shares agreement because it "was a deal between Mr. Daines and ASC, a totally separate entity." (*Id.* at 290.) Conspicuously absent from the record is any testimony that Vincent said that he personally would have or give any shares to Daines.²⁶

Even though Daines is entitled to have the evidence viewed in the light most favorable to him, he cannot ignore undisputed documentary evidence. The unchallenged organizational documents for the Surgical Center establish that Shares in the Surgical Center could be owned only by the physicians and ASC Group. (Trial Exs. 56, 57.) It

²⁶ Daines' brief mentions numerous times (with emphasis) his testimony that he relied on Vincent's membership and leadership position in the LDS Church. (Appellant's Br. 10 n. 34, 44 n. 142, 46 n. 151.) Daines suggests that his reliance somehow is evidence of a claim against Vincent, individually. If anything could be inferred from this testimony (a dubious proposition at best), a stronger inference could be drawn that Vincent was acting in an ecclesiastical capacity than that he was acting in an individual capacity.

was also unchallenged at trial that no one other than ASC Group could hold more than 5 Shares. *Id.* These restrictions could only be changed by a vote of the majority of the Board of Managers of the Surgical Center. (Trial Exs. 56, 57; Tr. 255-56.) It is therefore undisputed that at the time Daines says the oral agreement was made, Vincent did not own, and could not have owned, any Shares in the Surgical Center, let alone the eight Shares Daines says were promised to him. Accordingly, no reasonable jury could infer that Vincent was acting in an individual capacity in this meeting with Daines.

In sum, Daines offered no evidence from which a jury could find that Vincent made a promise as an individual to give Daines eight Shares. The trial court therefore properly granted Vincent's motion for directed verdict and the order should be affirmed.

III. THE TRIAL COURT PROPERLY DIRECTED A VERDICT AGAINST DAINES ON HIS FRAUD CLAIM BECAUSE DAINES PRESENTED NO EVIDENCE TO SUPPORT SEVERAL OF THE ESSENTIAL ELEMENTS OF THAT CLAIM.

Daines alleged that he was fraudulently induced to relinquish his right to receive \$150,000 under the MOU and sought compensatory and punitive damages. To prevail on his fraud claim Daines is required to establish by clear and convincing evidence:

(1) that a representation was made (2) concerning a presently existing material fact (3) which was false and (4) which the representor either (a) knew to be false or (b) made recklessly, knowing that there was insufficient knowledge upon which to base such a representation, (5) for the purpose of inducing the other party to act upon it and (6) that the other party, acting reasonably and in ignorance of its falsity, (7) did in fact rely upon it (8) and was thereby induced to act (9) to that party's injury and damage.

See, e.g., Armed Forces Ins. Exch. v. Harrison, 2003 UT 14, ¶ 16, 70 P.3d 35, 40 (internal quotations omitted). Because the fraud alleged by Daines is based on the promise of future

performance (i.e., the promise to transfer to Daines eight of ASC Group's Shares in the Surgical Center), Daines was required to establish that Appellees had no intent to perform the alleged promise at the time it was made. *See Cerritos Trucking Co. v. Utah Venture No. 1*, 645 P.2d 608, 611 (Utah 1982). *See also The Republic Group, Inc. v. Won-Door Corp.*, 883 P.2d 285, 292 (Utah Ct. App. 1994) (“[A] misrepresentation of intended future performance is not a representation concerning a ‘presently existing fact’ upon which a claim for fraud can be based unless [the plaintiff] can prove that [the defendant], at the time of the representation, did not intend to perform the promise and made the representation for the purpose of deceiving [the plaintiff].”).

Viewing the evidence in the light most favorable to Daines, a jury could find that ASC Group promised to give Daines eight of the Shares it would later receive when the Surgical Center was formed. But there was no evidence to establish that at the time the oral agreement was made ASC Group did not intend to keep the promise. Daines' cursory briefing on this element simply states a conclusion—“they did not intend to transfer such shares,” without any supporting citation to the record. (Appellant's Br. 45.)

There is no evidence of any such intent. Daines did not call Vincent or Dan Tasset,²⁷ CEO of ASC Group, both of whom were present during the entire trial, to

²⁷ Daines seeks to rely on deposition testimony from Mr. Tasset to establish that ASC Group viewed Daines' purported contributions to the formation of the Surgical Center as a “gift,” suggesting that this somehow demonstrates fraudulent intent. (Appellant's Br. 47 n. 154.) Daines' reliance on this evidence is improper and unavailing. Even assuming that such evidence has any relevance on the question of intent, the deposition testimony was never offered at trial, and cannot be considered on appeal. *See, e.g., Pratt v. Mitchell*

establish the company's intent. The only thing Daines points to is the fact that none of the term sheets, the PPM or the Operating Agreement contain any provision for giving Daines his eight Shares. But Daines ignores the fact that he was in the middle of the negotiations of those terms with ASC Group, acting as a representative of the physicians. Those negotiations culminated in the PPM and the Operating Agreement, both of which provide that no one other than ASC Group could purchase or hold Class II Shares in the Surgical Center, and that no one but ASC Group could hold more than five Shares in the Surgical Center. (Trial Exs. 54, 56.) The fact that later events, in which Daines participated, rendered it impossible for ASC Group to actually transfer the eight Shares to Daines hardly demonstrates that ASC Group had no present intention of keeping its promise to transfer such shares at the time the promise was allegedly made.

The other essential element of fraud for which Daines offered no evidence is that he reasonably and detrimentally acted in reliance on the promise. Daines testified that he gave up his right to receive \$150,000 under the MOU, but there is no evidence that he irrevocably gave up any rights under the MOU (until he signed the later Release). The most that can be said is that he deferred asserting a claim under the MOU for a couple of months until it became clear from the term sheets, the PPM and the Operating Agreement that he was not going to receive either cash or Shares in the Surgical Center. Indeed,

Hollow Irrigation Co., 813 P.2d 1169, 1171 (Utah 1991) ("Depositions that were never introduced into evidence nor read by the trial judge will not be considered on appeal."). Moreover, whether or not Mr. Tasset thought that Daines should "gift" his services to the Surgical Center being created for his physician clients has no bearing on the intent of the company at the time the alleged oral agreement for eight Shares was made.

until he signed the Release and accepted the \$56,000 payments, there was nothing that would have prevented Daines from asserting a claim under the MOU for the \$150,000 finders' fee. Accordingly, Daines failed to establish the essential elements of reasonable and detrimental reliance, and the trial court properly granted Defendants' motion for directed verdict on Daines' fraud and punitive damage claims.

IV. DAINES HAD HIS DAY IN COURT AND WAS NOT DEPRIVED OF ANY CONSTITUTIONAL RIGHTS.

Daines argues that by granting Appellees' motions for directed verdict, the trial court deprived him of the constitutional right to his day in court and to a trial by jury. (Appellant's Br. 48-49.) As a threshold matter, Daines failed to raise this issue in the trial court, and it should not be considered on appeal. *See Pugh v. Draper City*, 2005 UT 12, ¶ 18, 114 P.3d 546, 550 ("It is well-established that we generally will not address issues raised for the first time on appeal unless a party can demonstrate exceptional circumstances." (citations omitted)); *State v. Anderson*, 789 P.2d 27, 29 (Utah 1990) (rule applies even where issue involves a constitutional right).

In any event, the granting of the motion for directed verdict was either proper or not proper. If it was not proper, the case will be remanded for retrial. If it was properly granted, then Daines had his "day in court" but failed to meet his burden of proof. In neither case are the constitutional rights to open courts and a trial by jury even implicated.²⁸

²⁸ Daines suggests that the trial judge granted the directed verdicts because she did not find him credible, thereby violating his constitutional rights. (Appellant's Br. 49.)

V. THE TRIAL COURT’S ORDER EXCLUDING THE *LIBSCOMB* ORDER SHOULD BE AFFIRMED.

A. Daines Failed to Adequately Brief This Issue and It Should Not Be Considered on Appeal.

An appellant has the burden to adequately brief the issues raised on appeal, and to fully set forth and analyze the specific reasons why the trial court’s ruling was erroneous and should be reversed. *See* Utah R. App. P. 24(a)(9). This burden requires “not just bald citation to authority but development of that authority and reasoned analysis based on that authority.” *Van Dyke v. Van Dyke*, 2004 UT App 37, ¶ 15, 86 P.3d 767, 771 (quoting *State v. Thomas*, 961 P.2d 229, 305 (Utah 1998)). *See also Dahl Inv. Co. v. Hughes*, 2004 UT App 391, ¶ 7, 101 P.3d 830, 832 n. 2 (refusing to address issue where appellant’s “opening brief merely raise[d] the issue without offering any analysis.”). The appellant’s burden is not met by the mere incorporation of pleadings submitted below, or by citation to portions of the record without explanation. *See, e.g., Jensen v. Sawyers*, 2005 UT 81, ¶ 134, 130 P.3d 325, 350 (refusing to consider cross-appellant’s claim for

There is no basis for such allegations, and it is improper for Daines to even imply such judicial misconduct. *See, e.g., Peters v. Pine Meadow Ranch Home Ass’n*, 2007 UT 2, ¶¶ 8-9. Although Judge Lewis expressed doubt about Daines’ credibility during the hearing on the motions for directed verdict (a hearing held outside the presence of the jury), and noted her reservations about Daines’ ability to prove his claims, she nonetheless assumed as true all of the facts presented by Daines on those issues. *See* R. at 1668 (“The Court has serious doubts whether there is a reasonable basis in the evidence to support a finding that an oral contract was formed and doubts that any reasonably jury could so find. But it is not necessary to make this determination in order to resolve the motion for a directed verdict. Accordingly, and for the purposes of this motion, the Court will assume that an oral agreement was made.”). *See also* Tr. 289 (“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.”).

attorney fees where he merely invited court to review submissions below); *Rasmussen v. Sharapata*, 895 P.2d 391, 392 n. 1 (Utah Ct. App. 1995) (declining to consider whether appellant was improperly limited in examining her expert where opening brief did “not analyze individual rulings of the trial court regarding expert testimony,” and simply attached “substantial portion[s] of the transcript and invite[d] [the court] to ferret out the errors and make her arguments for her.”).

Daines’ opening brief does not analyze the controlling law or articulate the specific reasons why the trial court’s order excluding the *Libscomb* Order was an abuse of discretion and should be reversed. (Appellant’s Br. 47-48.) Instead, Daines provides a cursory and totally undeveloped statement about why the *Libscomb* Order should have been allowed into evidence, inviting this Court to review his briefing below to determine the specific basis for reversal. (*Id.* at 47-48.) Daines cites to just two cases, without providing any analysis of their holdings, or explanation as to why they require reversal. (*Id.* at 48 n. 160.) Daines’ briefing on the *Libscomb* Order is woefully inadequate, and this Court should therefore decline to consider the issue on appeal.

B. The Trial Court’s Order Excluding the *Libscomb* Order Was Within Its Discretion and Should be Affirmed.²⁹

The trial court’s order excluding the *Libscomb* Order should be affirmed for four reasons. First, the *Lipscomb* Order constitutes a statement by an absent declarant (Judge

²⁹ Given the paucity of briefing by Daines, this section sets forth an abbreviated argument supporting affirmance. If this Court elects to consider the issue, and to consider the arguments set forth in Daines’ pleadings below, it should also consider Defendant’s prior briefing, which more fully sets forth the reasons why the *Libscomb* Order is inadmissible and was therefore properly excluded. (R. at 630-48.)

Hilder) being offered for the truth of the matter asserted (i.e., that Vincent was not a credible witness in that case), and is therefore classic hearsay inadmissible under Utah Rules of Evidence 801 and 802.³⁰

Second, the *Libscomb* Order constitutes evidence of Vincent's character which may be admitted under Utah Rule of Evidence 404 only if it is offered for "a proper, noncharacter purpose." See *State v. Allen*, 2005 UT 11, ¶ 16, 108 P.3d 730, 734. Daines suggests that the *Libscomb* Order is admissible under Rule 404(b) to demonstrate a "specific instance of misconduct." (Appellant's Br. 48.) This statement amounts to a tacit admission that Daines sought to use the *Libscomb* Order to establish that Vincent lied about a prior transaction in a prior case and is therefore lying now. This is not a proper, non-character purpose under Rule 404(b).

Third, the *Libscomb* Order is inadmissible under Utah Rule of Evidence 608. Rule 608(a) permits testimony "concerning a witness's general character or reputation for truthfulness or untruthfulness but prohibits any testimony as to a witness's truthfulness *on a particular occasion*." *State v. Rimmasch*, 775 P.2d 388, 391 (Utah 1989) (emphasis added). At most, the *Lipscomb* Order contains opinions regarding the credibility of particular testimony by Vincent in one prior case; it does not evidence Vincent's overall reputation for truthfulness. In any event, Rule 608(b) expressly prevents a party from

³⁰ The only exception that could possibly apply is the "public records and reports" exception set forth in Utah Rule of Evidence 803(8), and judicial findings do not fall within the scope of that exception. See *Herrick v. Garvey*, 298 F.3d 1184, 1192 (10th Cir. 2002).

using “extrinsic evidence” to “attack[] the credibility of a witness.” *See United States v. Mangiameli*, 668 F.2d 1172, 1175-76 (10th Cir. 1982).³¹ The *Libscomb* Order is extrinsic evidence.

Fourth, the *Libscomb* Order is irrelevant and unduly prejudicial and thus inadmissible under Utah Rules of Evidence 402 and 403. The *Lipscomb* Order is of little probative value in resolving any of the factual disputes in this case because it is only one court’s assessment of the facts and credibility in an unrelated matter. The facts underlying the *Lipscomb* Order also differ substantially from the allegations in this litigation, and its admission would have required the trial court to conduct a mini-trial on the basis for the *Lipscomb* Order and its relevance to this case. *See, e.g., State v. Vargas*, 2001 UT 5, ¶ 34, 20 P.3d 271, 279-80 (excluding evidence of a witness’s prior untruthfulness in court as it would require a “trial within a trial. . . . [which would] distract from the issues that are at trial.”). Finally, the *Lipscomb* Order contains extremely negative language rejecting Vincent’s account of the underlying facts and disparaging Vincent’s testimony in that case, presenting an undue risk of extreme prejudice toward Defendants.³²

³¹ Daines argues that the *Libscomb* Order is admissible for purposes of impeachment. (Appellant’s Br. 47.) Any inquiries into specific instances of conduct that are probative of truthfulness or untruthfulness are subject to the Court’s discretion, however, and the evidentiary prerequisites of Utah Rules of Evidence 402 and 403 apply. *See* Utah R. Evid. 608(b). The *Libscomb* Order does not pass muster under these related evidentiary rules, and thus cannot be offered even for this limited purpose. *See infra* this section, paragraph 4.

³² Daines suggests that all of these concerns can be cured with a limiting instruction.

For any and all of these reasons, the trial court properly exercised its discretion in excluding all reference to the *Libscomb* Order, and its order should be affirmed.

C. Any Error in Excluding the *Libscomb* Order Was Harmless.

“An erroneous decision to admit or exclude evidence does not constitute reversible error unless the error is harmful. An error is harmful if it is reasonably likely that the error affected the outcome of the proceedings.” *Jensen v. IHC Hosp., Inc.*, 2003 UT 51, ¶ 100, 82 P.3d 1076, 1096. *See also Redevelopment Agency of Salt Lake City v. Tanner*, 740 P.2d 1296, 1303-04 (Utah 1987).

Even assuming some error in the exclusion of the *Libscomb* Order, the exclusion had no impact on the trial court’s ruling. Daines’ sole purpose in offering the *Libscomb* Order would have been to impeach Vincent’s credibility in the eyes of the jury. (Appellant’s Br 47-48.) The trial court entered directed verdicts in favor of Defendants based on a legal interpretation of the Release, and on Daines’ failure to present evidence necessary to meet his burden and establish the essential elements of his claims. Vincent was never called as a witness at trial, and his credibility had no bearing on the trial court’s decision. Exclusion of the *Libscomb* Order was therefore harmless, and any error does not require reversal on appeal.

(Appellant’s Br. 48.) The proposed instruction, allowing the jury to rely on the *Libscomb* Order to determine whether “Vincent makes promises in business transactions upon which he does not deliver,” does not cure, but rather highlights the highly prejudicial effect of the order. This suggestion demonstrates the improper use Daines seeks to make of the *Libscomb* Order.

VI. APPELLEES FILED THEIR MOTION TO DISMISS THE APPEAL IN GOOD FAITH, AND APPELLANT IS NOT ENTITLED TO SANCTIONS.

Appellees' motion to dismiss the appeal for lack of subject matter jurisdiction has been voluntarily withdrawn as moot. (Sup. Ct. Docket No. 18.) The trial court entered a final judgment on October 11, 2006 (R. at 1717-19³³), and Appellees concede that this Court then had subject matter jurisdiction over this appeal. (Sup. Ct. Docket No. 18.)

Appellees' motion was nonetheless brought in good faith, and thus there is no basis for an award of sanctions. Appellees' motion asserted that Daines' notice of appeal was premature because no final judgment had yet been entered. The law is clear that a premature notice of appeal does not vest this Court with jurisdiction over the appeal. *See, e.g., Glasscock v. State*, 2003 UT App 254, 2003 WL 21664764, at *1 (July 13, 2003); *State v. Caballero*, 2005 UT App 59, 2005 WL 314455, at *1 (Feb. 10, 2005); *Turville v. J&J Properties, L.C.*, 2004 UT App 389, 2004 WL 2404688, at *1 (Oct. 28, 2004); *Anderson v. Schwendiman*, 764 P.2d 999, 1000 (Utah Ct. App. 1988). Although subsequent action by the trial court may ripen a previously premature notice of appeal into a timely notice, there is nothing improper about a motion to dismiss filed before such events occur. *See Nelson v. Stoker*, 669 P.2d 390, 392 (Utah 1983) ("The premature filing of the notice of appeal . . . is an irregularity which would be grounds for dismissal of the appeal within the discretion of the court." (quotations omitted)).³⁴

³³ A copy of the "Judgment" may be found at Addendum Exhibit 22 to Appellant's Brief.

³⁴ Appellees' motion was particularly appropriate in this case insofar as Daines

Daines' argument for sanctions is based on Appellees' failure to cite to and distinguish *ProMax Dev. Corp. v Raile*, 2000 UT 4, 998 P.2d 254, holding that an outstanding request for costs does not affect the finality of an otherwise final judgment. This argument cannot be sustained. As a threshold matter, the inadvertent failure of a party to discover and distinguish contrary authority is not an adequate grounds for sanctions. *See, e.g., Beddoes v. Giffin*, 2006 UT App 130, No. 20051154-CA, 2006 WL 829112, at *1 (Mar. 30, 2006) (refusing to award sanctions against appellant despite fact that arguments were inconsistent with *ProMax*).

In any event, *ProMax* was not controlling. Appellees' motion to dismiss was not based solely on the fact that the issue of costs remained unresolved. Appellees specifically argued that the orders were not otherwise final judgments because they expressly stated that "[j]udgment shall be entered" in favor of Defendants, and against Daines, dismissing Daines' claims against Defendants "with prejudice." (R. at 1655, 1659, 1673.) This argument is supported by controlling law, and distinguishes the instant case from *ProMax*. *See State v. Leatherbury*, 2003 UT 2, ¶ 9, 65 P.3d 1180, 1182 ("[W]here further action is contemplated by the express language of the order, it cannot be a final determination susceptible of enforcement."); *State v. Duccini*, 2006 UT App 407 No. 20060725, 2006 WL 2834553 (Oct. 5, 2006) (memorandum decision denying


attempted to use its premature notice of appeal as a basis to divest the district court of jurisdiction over Appellees' then-pending request for costs. *See* R. at 1701 ("The orders entered by the trial court on August 22, 2006, were appealed to the Supreme Court on September 8, 2006. It is respectfully submitted that the trial Court does not have jurisdiction to rule upon defendant's request for an award of costs.").

motion to withdraw guilty plea was not a final, appealable order because it required state to prepare and submit an order in conformity therewith). Appellant's request for sanctions should therefore be denied.

CONCLUSION

For the foregoing reasons, this Court should affirm all three of the trial court's directed verdicts and the trial court's order excluding all use or reference to the *Libscomb* Order, and deny Appellant's request for sanctions.

DATED this 22nd day of February, 2007.



FRANCIS M. WIKSTROM
MICHAEL P. PETROGEORGE
PARSONS BEHLE & LATIMER
Attorneys for Defendants/Appellees


CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of February, 2007, I caused to be mailed, first class, postage prepaid, a true and correct copy of the foregoing **BRIEF OF APPELLEES**, to:

John Martinez
2974 East St. Mary's Circle
Salt Lake City, Utah 84108

Nick J. Colessides
466 South 400 East, Suite 100
Salt Lake City, Utah 84111-3325

Attorneys for Plaintiff/Appellant



APPELLEES' ADDENDUM

- A. Utah Rule of Civil Procedure 50(a)
- B. Utah Rule of Evidence 402
- C. Utah Rule of Evidence 403
- D. Utah Rule of Evidence 404
- E. Utah Rule of Evidence 608
- F. Utah Rule of Evidence 801
- G. Utah Rule of Evidence 802
- H. Utah Rule of Evidence 803(8)
- I. Utah Rule of Appellate Procedure 33(a)

Appellees' Addendum Tab A

Utah Rule of Civil Procedure 50(a)

Motion for a directed verdict and for judgment notwithstanding the verdict

Motion for directed verdict; when made; effect

A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific ground(s) therefor. The order of the court granting a motion for a directed verdict is effective without any assent of the jury.

Appellees' Addendum Tab B

Utah Rule of Evidence 402**Relevant evidence generally admissible; irrelevant evidence inadmissible**

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States or the Constitution of the state of Utah, statute, or by these rules, or by other rules applicable in courts of this state. Evidence which is not relevant is not admissible.

Appellees' Addendum Tab C

Utah Rule of Evidence 403**Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time**

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Appellees' Addendum Tab D

Utah Rule of Evidence 404

Character evidence not admissible to prove conduct; exceptions; other crimes

(a) Character evidence generally

Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) Character of accused

Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same, or if evidence of a trait of character of the alleged victim of the crime is offered by the accused and admitted under Rule 404(a)(2), evidence of the same trait of character of the accused offered by the prosecution;

(2) Character of alleged victim

Evidence of a pertinent trait of character of the alleged victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution in a homicide case to rebut evidence that the alleged victim was the first aggressor;

(3) Character of witness

Evidence of the character of a witness, as provided in Rules 607, 608, and 609.

(b) Other crimes, wrongs, or acts

Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the nature of any such evidence it intends to introduce at trial.

Appellees' Addendum Tab E

Utah Rule of Evidence 608

Evidence of character and conduct of witness

(a) Opinion and reputation evidence of character

The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(b) Specific instances of conduct

Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' character for truthfulness, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the accused's or the witness' privilege against self-incrimination when examined with respect to matters that relate only to character for truthfulness.

(c) Evidence of bias

Bias, prejudice or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced.

Appellees' Addendum Tab F

Utah Rule of Evidence 801

Definitions

The following definitions apply under this article:

(a) Statement

A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

(b) Declarant

A "declarant" is a person who makes a statement.

(c) Hearsay

"Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(d) Statements which are not hearsay

A statement is not hearsay if:

(1) Prior statement by witness

The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement and the statement is (A) inconsistent with the declarant's testimony or the witness denies having made the statement or has forgotten, or (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving the person;
or

(2) Admission by party-opponent

The statement is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity, or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

Appellees' Addendum Tab G

Utah Rule of Evidence 802**Hearsay rule**

Hearsay is not admissible except as provided by law or by these rules.

Appellees' Addendum Tab H

Utah Rule 803(8)

Hearsay exceptions; availability of declarant immaterial.

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

. . . .

(8) Public records and reports

Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

Appellees' Addendum Tab I

Utah Rule of Appellate Procedure 33(a)

Damages for delay or frivolous appeal; recovery of attorney's fees

Damages for delay or frivolous appeal

Except in a first appeal of right in a criminal case, if the court determines that a motion made or appeal taken under these rules is either frivolous or for delay, it shall award just damages, which may include single or double costs, as defined in Rule 34, and/or reasonable attorney fees, to the prevailing party. The court may order that the damages be paid by the party or by the party's attorney.