

2006

Welden L. Daines, an individual v. Richard B. Vincent, and ASC Group, L.C., a Utah limited liability company : Reply Brief

Utah Court of Appeals

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

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IN THE UTAH SUPREME COURT

WELDEN L. DAINES, an individual

Plaintiff-Appellant,

v.

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

Defendants-Appellees.

Supreme Court Case No. 20060838-SC

Trial Court Case No.: 030910378

Trial Judge: Hon. Leslie Lewis

APPELLANT'S REPLY BRIEF

Attorneys for Defendants-Appellees:

Francis M. Wikstrom, Esq.

Michael P. Petrogeorge

Parsons Behle & Latimer

201 South Main Street #1800

P O Box 45898

Salt Lake City, Utah 84145-0898

Attorneys for Plaintiff-Appellant:

JOHN MARTINEZ (USBA #4523)

2974 East St. Mary's Circle

Salt Lake City, Utah 84108

Tele: 801.582.1386; Fax: 801.582.7664

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UTAH APPELLATE COURT

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NICK J. COLESSIDES (USBA #696)

466 South 400 East, Suite 100

Salt Lake City, Utah 84111-3325

Tele: 801.521.4441; Fax: 801.521.4452

(Oral Argument and Published Decision Requested)

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

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ARGUMENT

INTRODUCTION

Stripped to its essentials, Defendants advance the following implausible argument: (1) that Defendants owed Daines \$150,000 under a Memorandum of Understanding (MOU); (2) that Defendants promised Daines 8 shares of a Surgical Center in exchange for the \$150,000 Defendants already owed him; but (3) that Daines gave up both the \$150,000 and the 8 shares either (a) for nothing, as a "gift" to Defendants, or (b) for \$6,000, which a third party, the Surgical Center, reimbursed Daines in out-of-pocket costs he had incurred on behalf of the Center, or (c) for \$50,000, which another third party, the Boyer Company, paid Daines for work he had done for Boyer. Yet the trial court agreed with Defendants.

Daines in his Opening Brief has fully addressed the bulk of Defendants' contentions. Daines hereby Replies to new information in Defendants' Opposing Brief.

I. Defendants effectively admit they are liable for sanctions

Defendants admit that ProMax Development Corp. v. Raile, 2000 UT 4, 998 P.2d 25 dictates that Daines' *initial* notice of appeal was timely.¹ Defendants thereby concede their motion to dismiss such notice as premature was "not warranted by existing law." Defendants argue instead that they were merely guilty of an "inadvertent failure" to cite the ProMax decision.² UTAH R. APP. P. 33(b), however, requires Defendants to show they made a good faith argument to extend, modify or reverse existing law. Defendants do not make such

¹. Def. Opp. Brief, p. 48 ("*ProMax*...[held] that an outstanding request for costs does not affect the finality of an otherwise final judgment.").

². Def. Opp. Brief, p. 48.

argument in their Opposing Brief--and did not even cite ProMax in their motion to dismiss.

Defendants' alternative argument that no judgment had yet been entered is also inadequate. In State v. Leatherbury, 2003 UT 2, 65 P.3d 1180, cited by Defendants, a signed minute entry directed counsel to prepare findings of fact and conclusions of law, thereby preventing the minute entry from constituting a final appealable order. Similarly, in State of Utah v. Duccini, 20060765-CA, 2006 UT App 407, p.1 (*Unpublished Decision*)(2006) the trial court order had directed the State, "to prepare an order in conformance herewith." In contrast, the trial court below imposed no such requirement for preparation of findings or for preparation of an order. Instead, in each of the directed verdicts, the trial court said: "**Judgment shall be entered** in favor of [Defendants] and against Plaintiff." The directed verdict orders, of their own force, dismissed all Plaintiff's claims on their merits with prejudice, and those orders were signed and filed. The subsequent entry of judgment was purely ministerial and did not affect the appealability of the directed verdict orders as "final orders."³ Defendants therefore are subject to sanctions as requested by Daines.

II. Defendants' arguments about ASC's different legal capacities are misdirected

The trial court erroneously concluded that a purported release exonerating "members" of the Surgical Center also applied to Defendant ASC in its "pre-surgical center" legal capacity. Defendants argue that Daines did not properly preserve the argument for appeal⁴ and that different legal capacities do not carry different legal consequences.⁵

³. Campbell v. Nelson, 102 Utah 78, 125 P.2d 413, 415 (1942).

⁴. Def. Opp. Brief, p. 23.

⁵. Def. Opp. Brief, p.26 n.19.

First, Defendants misconstrue the question involved. The issue is *not* whether ASC had different legal capacities. Indeed, Defendants do not dispute Daines' contentions that ASC operated in different legal capacities, as "*pre-Surgical Center ASC*," and as "*Surgical Center ASC*".⁶ Instead, the issue is who is covered by the purported release. Daines contends "*pre-surgical center ASC*" was not covered; Defendants contend it was. Thus, the issue is one of Release-interpretation, not about whether ASC had different legal capacities.

Second, Daines properly preserved the Release-interpretation issue regarding who was covered by the Release by raising it in the trial court both (1) in his *successful* opposition to Defendants' *second* motion for summary judgment⁷ and (2) in his *unsuccessful* opposition to

⁶. Daines' Opening Brief, pp. 6-7; pp.29-33 (setting out Daines' arguments to that effect).

⁷. R. 827-917, 831-32, (Plaintiff's Memorandum in Opposition to Defendants' Renewed Motion for Summary Judgment, pp. 5-6):

"Defendants would have this court overlook the highly fluid factual context in which the Release arose, involving numerous transactions and parties, all of which substantially affect the proper interpretation of the Release. As further documented in Plaintiff Daines' original Opposition Memorandum, the time frames, parties, and transactions, are essentially as follows:

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

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

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

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

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

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

Daines contends the Release pertained only to the \$6,000. Defendants Vincent and ASC nevertheless seek to construe the Release to absolve Vincent and ASC from their obligation to pay Daines the 8 shares in the Surgical Center.

Defendants would have this court overlook that the Release was only one element in a complex of relationships involving different time frames, **different parties** and different transactions, occurring at different stages of an intricate business venture.

The Release, therefore, cannot be understood in a vacuum, but must be interpreted in the context of the **various**

the directed verdict motions.⁸

times, **parties** and transactions involved. Such complexity cannot be resolved merely by reference to the face of the Release, and certainly not by summary judgment." (emphasis added)
(Judge Lewis ruled in favor of Daines and denied Defendants' motion. (R. 968-72 (*Memorandum Decision* by Judge Lewis denying Defendants' second motion for summary judgment), at 970, p.3), Opening Brief Addendum Exh. 1 (Judge Lewis *Memorandum Decision*).

⁸. (Mr. Martinez' argument to Judge Lewis in opposition to Defendants' oral motions for directed verdicts)

"MR. MARTINEZ: If I may try?

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

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

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

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

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

MR. MARTINEZ: That was not--

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

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

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

MR. MARTINEZ: That's correct.

THE COURT: The written agreement, whereby he agrees to take \$50,000 of the \$56,000 is not binding?

MR. MARTINEZ: (Inaudible).

THE COURT: So, you're asking me to say some contracts are good and some are bad.

MR. MARTINEZ: **The release is perfectly good in so far as it releases the center and the doctors. The \$50,000 did not come from the center or the doctors. It came from the Boyer Company. A separate deal that Mr. Daines had.**

THE COURT: **The Boyer Company paid it.**

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

THE COURT: **That's right.**

MR. MARTINEZ: **And it had nothing--the money that we're talking about, that \$50,000 had to do with a subsequent transaction where Mr. Daines had gone about and looked for a place for the center to be built. He had worked with Boyer, and Boyer had paid him essentially a commission for finding the, or for getting the--**

THE COURT: **--in exchange for that, gave up his other alleged contractual right.**

MR. MARTINEZ: Well, it makes no sense to look at the release in that fashion because it was a **separate transaction**. Looking at a release that comes from the doctors from the center and they have--they have sent him a check for \$6,000.

THE COURT: It makes no sense that somebody would be compensated at the rate of \$80,000 an hour.

MR. MARTINEZ: What happens in these transactions, Your Honor, is you have ASC on one hand, acquiring 20 shares; and ultimately it's being paid what, approximately \$800,000 each year for those shares--on those shares, it's also receiving a management contract worth--

THE COURT: For managing the business.

MR. MARTINEZ: That's correct.

THE COURT: They're performing an ongoing service.

MR. MARTINEZ: And they're also receiving a development fee, they're also receiving additional sources of

Third, Defendants' attempts to distinguish cases cited by Daines regarding different

revenue. These deals are big, big money deals as Your Honor has observed. And so, consequently, **the \$150,000 initially for the finder's fee was the very first step that Mr. Welden, by his expertise--**

THE COURT: That's gone.

MR. MARTINEZ: **--to start the whole thing rolling.**

THE COURT: Let's not discuss the \$150,000. It's gone.

MR. MARTINEZ: Well--

THE COURT: Anyway you interpret the other agreements, that's gone.

MR. MARTINEZ: **Well, what we have to also address, however, Your Honor, is we just can't simply say it's gone without trying to figure out what happened to that \$150,000 that was owed to him.**

THE COURT: Well, I understand your theory which I do not find to be credible. The issue, however, is not what I find credible or what I would do as a finder of fact. The issue is whether there is anything to go to the jury.

MR. MARTINEZ: And I think that Your Honor has identified what needs to go to the jury, which is that--

THE COURT: I don't think I have. I haven't made a decision.

MR. MARTINEZ: --That it's problematic at the least about why this deal was made. Mr. Daines has testified as to what he believed the deal was and why it was in his interest to do it.

THE COURT: What I meant was, you have problems proving there was any such deal.

MR. MARTINEZ: However, Mr. Daines has testified that--

THE COURT: --there is a paucity of data and testimony supporting your position.

MR. MARTINEZ: And there's also documentation in the form of the term sheets saying that Mr. Daines will be compensated either in cash or equity.

THE COURT: That's \$56,000.

MR. MARTINEZ: **And that, Your Honor, as we point out, was a deal for the real estate, not for the eight shares--had nothing to do with the eight shares.** Nobody has testified that the release had anything to do with the eight shares.

THE COURT: Because nobody believed there were eight shares.

MR. MARTINEZ: Because there was no one on the part of the center, on the part of the doctors, that had anything to do with it. **This was a deal between Mr. Daines and ASC, a totally separate entity.**

THE COURT: That is not what the witnesses were--have said. **The only witness who has talked about these eight shares is your client.** No one else can validate it. **It's not in writing.**

MR. MARTINEZ: And therefore, there is--

THE COURT: It's a very, very weak case at best.

MR. MARTINEZ: But sufficient--

THE COURT: If it's going to the jury, it's the weakest case I've ever seen.

MR. MARTINEZ: But it's certainly a situation in which, if the jury believes Mr. Daines, they could hold in his favor and that's the standard.

THE COURT: I don't know that that's true. I don't know that that's true because of the final contract.

MR. MARTINEZ: What final contract?

THE COURT: The \$56,000 contract or agreement.

MR. MARTINEZ: Isn't the interpretation of the release also a question of fact for the jury?

THE COURT: **I understand your position."**

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

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

legal capacities are equally misdirected.⁹ Daines' cases stand for the unexceptional proposition that different legal capacities may lead to different legal consequences.¹⁰ The trial court overlooked that basic legal proposition by conflating ASC's "*pre-surgical center*" legal capacity with ASC's "Surgical Center ASC" legal capacity in interpreting the Release.

III. Defendant ASC was not discharged by the purported Release

A. Daines' arguments are made "in the alternative"

Defendants profess confusion about Daines' alternative contentions.¹¹ As set out in Daines' Opening Brief, the Release either (1) was ineffective, and hence did not exonerate anyone at all,¹² **or** (2) unambiguously did not exonerate "*pre-Surgical Center ASC*,"¹³ **or** (3) was ambiguous about whether it exonerated "*pre-Surgical Center ASC*."¹⁴ Under any of those alternative interpretations of the Release, the trial court erred in directing a verdict for ASC.

B. The "Release" did not exonerate "pre-Surgical Center ASC"

1. Daines is not required to marshal the evidence

"A party challenging a **fact** finding must first marshal all record evidence that supports the challenged findings."¹⁵ However, "[w]hether an ambiguity exists in a contract is a

⁹. Def. Opp. Brief, p.26 n.19.

¹⁰. Daines' Opening Brief, pp. pp.29-33 (setting out Daines' arguments to that effect).

¹¹. Def. Opp. Brief, p. 20 ("Daines' arguments ... are somewhat confusing and contradictory.").

¹². Daines' Opening Brief, pp. 33-34.

¹³. Daines' Opening Brief, pp. 34-39.

¹⁴. Daines' Opening Brief, pp. 39-41.

¹⁵. UTAH R. APP. P. 24(a)(9)(emphasis added).

question of **law**,"¹⁶ and if a contract is held to be *unambiguous*, the subsequent question of the *meaning* of the contract is also a question of **law**, so no marshaling is required.¹⁷

If instead a contract is held to be *ambiguous*, then the subsequent question of its *meaning* is a question of fact.¹⁸ But such fact question must be presented to the jury.¹⁹ In that scenario, the trial court below erred by failing to submit such question to the jury. And no marshaling is required because no such "factual" determination was ever made.

2. Even if marshaling were required, its scope is extremely narrow

Even if marshaling applied here, its scope would be extremely narrow. First, it would relate *only* to whether the Release was ambiguous, and only if this Court adopts the Ward rule utilizing extrinsic evidence for determining whether the Release was ambiguous. Second, since the trial court ruled by directed verdict, this Court must "examine the evidence in the light most favorable [to Daines], 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 [Daines], the directed verdict[s] cannot be sustained."²⁰ Defendants agree that this is the applicable

¹⁶. Alf v. State Farm Fire & Cas. Ins. Co., 850 P.2d 1272, 1274 (Utah 1993)(emphasis added).

¹⁷. Saleh v. Farmers Insurance Exchange, 2006 UT 20, ¶ 21, 133 P.3d 428("If [a]...contract is unambiguous...the contract may be interpreted as a matter of law.").

¹⁸. See Gillmor v. Macey, 2005 UT App 351, ¶ 37 ("summary judgment on this issue was not appropriate...").

¹⁹. Plateau Min. Co. v. Utah Div. of State Lands and Forestry, 802 P.2d 720, 725 (Utah 1990)("When ambiguity does exist, the intent of the parties is a question of fact to be determined by the jury."); Willard M. Milne Inv. Co. v. Cox, 580 P.2d 607, 609-10 (Utah 1978)(court erred in directing verdict instead of submitting question of the parties' intent to the jury).

²⁰. Management Comm. of Graystone Pines Homeowners Ass'n v. Graystone Pines, Inc., 652 P.2d 896, 898 (Utah 1982).

standard of appellate review here.²¹

Thus, even if Daines were required to marshal the evidence in support of the directed verdict that the Release was unambiguous regarding whether ASC was exonerated, the trial court erred. Either the Release was unambiguous and did not exonerate ASC, or it was ambiguous about whether ASC was exonerated, so that the *meaning* of the Release should have been submitted as a fact question to the jury.

3. Marshaling extrinsic evidence *supporting* that Release was unambiguous (exonerating ASC)----and Daines' *rebuttal* evidence

(1) That Daines "rendered services relating to the due diligence, the acquisition of real estate, and the organization, development, and operation of what became the Surgical Center."²² Rebuttal: Daines testified that the services mentioned related to the "due diligence and organizational phase of the development, check number 1010 in the amount of \$6,000 attached."²³ Thus, the Release exonerated only the \$6,000 out-of-pocket expenses. (2) That Daines "would be paid \$50,000, and that the money would come from the Boyer Company,

²¹. Def. Opp. Brief, p. 1, (similarly quoting *Graystone Pines* case).

²². R. 1661-76, at p.1668, ¶8 (*ORDER* by Judge Lewis filed August 22, 2006 granting directed verdict for ASC Group on all claims), Opening Brief Addendum Exh. 19.

²³. (Examination of Mr. Daines by Mr. Colessides)

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

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

THE WITNESS: **During the due diligence and organizational phase of the development, check number 1010 in the amount of \$6,000 attached.**

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

A **I did."**

(R. 1726, p.103, ll.17-25, p.104, l.1--Trial Transcript)(referring to R. 1619, Stipulated Trial Exh. 10, at ASC001014), Opening Brief Addendum Exh. 14 (Invoice #9 from Daines to Surgical Center)(Emphasis added).

the company selected as developer of the real estate for the Surgical Center."²⁴ Rebuttal: On October 8, 2001, Daines billed *the Boyer Company* \$50,000 it had agreed to pay him, and requested *immediate* payment for his work when the Boyer Company's land was selected for construction of the Surgical Center.²⁵ Thus, Daines received the \$50,000 as a real estate commission from Boyer, not in satisfaction of an obligation from ASC.

(3) That on October 29, 2001, Daines faxed the Center requesting whether the Center could assist in getting "immediate payment from Boyer."²⁶ Rebuttal: Daines testified that he wanted immediate payment from Boyer because he was "old and future payment is of little value to me."²⁷ Daines' concern, therefore, was with immediate payment, which he was trying to get the Center to help him get from Boyer. Exoneration of ASC was not involved at all.

(4) That Daines knew that ASC was a member of the Center when Daines executed the Release.²⁸ Rebuttal: That ASC became a member of the Center has never been in dispute.²⁹

²⁴. R. 1661-76, at p.1668, ¶9 (*ORDER* by Judge Lewis filed August 22, 2006 granting directed verdict for ASC Group on all claims), Opening Brief Addendum Exh. 19.

²⁵. "As we agreed verbally, Bob Smith and I will accept \$50,000 as payment for our services. I believe we have finished our work at **this time** and should be paid." (R. 1620, Stipulated Trial Exh. 59), Opening Brief Addendum Exh. 9 (Bill from Daines to Boyer Company)(Emphasis added).

²⁶. R. 1661-76, at p.1668-69, ¶10 (*ORDER* by Judge Lewis filed August 22, 2006 granting directed verdict for ASC Group on all claims), Opening Brief Addendum Exh. 19.

²⁷. (Examination of Mr. Daines by Mr. Wikstrom)
"Q It also said "As you know **I'm old and the future payment is probably of little value to me.**" Is that what you also wrote?
A Yes."
(R. 1726, p.160, ll.13-16--Trial Transcript)(emphasis added).

²⁸. R. 1661-76, at p.1669, ¶11 (*ORDER* by Judge Lewis filed August 22, 2006 granting directed verdict for ASC Group on all claims), Opening Brief Addendum Exh. 19.

²⁹. "West Valley Surgical Center, LLC., a Utah limited liability company ("WVSC" or the "Company"), will utilize a capital structure with 2 classes of units. Class I units will be reserved for physicians while Class II units will be held by ASC Group ("ASC"), respectively. (p.1, ¶1)

But that simply establishes the ambiguity of the term "members" in the Release: Does "members" in the Release refer only to the legal capacity of ASC as a member of the Center (as Daines contends), or does it refer to the legal capacity of ASC before the center was formed (as ASC contends)?

(5) That Daines "received and read a cover letter, dated December 10, 2001, from Dr. McCray, Chairman of West Valley Surgical Center."³⁰ Rebuttal: Dr. McCray's letter was styled: "RE: "West Valley Surgical Center **Invoice #9**," which was **Daines' Invoice #9** which **Daines** had sent to the Surgical Center for his \$6,000 out-of-pocket costs. The McCray letter enclosed a "conditional release form" and promised that a check for \$6,000 would be sent to Daines "immediately" upon the Center's receipt of the executed "conditional release form." With respect to Daines' request for the Center's assistance in obtaining *immediate* payment of \$50,000 to Daines from the Boyer Company, however, the letter noted that such amount would be paid by Boyer "upon commencement of the lease for the project," and not immediately, as Daines had requested.³¹ Thus, rather than eliminating ambiguity, Dr.

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

³⁰. R. 1661-76, at p.1669, ¶12 (*ORDER* by Judge Lewis filed August 22, 2006 granting directed verdict for ASC Group on all claims), Opening Brief Addendum Exh. 19.

³¹. The letter, on "WEST VALLEY SURGICAL CENTER, LLC" letterhead, stated:
"December 10, 2001
[addressed to Daines]

RE: West Valley Surgical Center Invoice #9

Dear Welden:

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

McCray's letter *establishes* ambiguity about whether ASC's pre-existing obligation to convey 8 shares of the Center to Daines was covered by the accompanying Release.

(6) That Daines had performed a list of services tracking the specific services recited in the Release.³² Rebuttal: Daines contends the Release is ambiguous regarding the *identity of the parties*, the *nature of the claims* covered, and the *amounts of the claims* covered, and that there were **six different time frames** in the history of the dispute.³³ Daines testified that he performed various services, for different parties, at different times, in regard to those six different time frames. Thus, for example, in regard to the Memorandum of Understanding alone, he performed or participated in the "feasibility and due diligence" in regard to the

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

Please call me should you have any questions.

Sincerely,

David McCray, Chairman
West Valley Surgical Center, LLC

Cc: Dan Saale, CFO, ASC Group, L.C.

West Valley Surgical Center Board Members"

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

³². R. 1661-76, at p.1670, ¶16 (*ORDER* by Judge Lewis filed August 22, 2006 granting directed verdict for ASC Group on all claims), Opening Brief Addendum Exh. 19.

³³. Daines' Opening Brief, pp. 30-31.

concept of the Center,³⁴ in regard to the operational "feasibility" of the Center,³⁵ in regard to "development and operations, project development, medical operations, [and] compliance,"³⁶ in regard to the financial feasibility of the Center,³⁷ and in regard to the reimbursement mix of traditional insurance companies and medicare/medicaid reimbursement.³⁸ Thus, the many functions performed by Daines create ambiguity about exactly what the Release covered.

Therefore, a reasonable conclusion, at minimum, is that the Release is ambiguous about whether ASC was exonerated from the obligation to convey 8 shares to Daines.

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

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

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

(R. 1726, p. 53, ll.3-13--Trial Transcript)(Emphasis added).

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

"Q And why is it necessary to have the specialties listed for the professional members of a surgical center?

A Well, because you need the proper mix of doctors who do surgeries in order to do the **feasibility**. Like I referred to the CPT codes, you need to know how many they do and what kind of surgeries they do."

(R. 1726, p. 55, ll.14-19--Trial Transcript)(Emphasis added).

³⁶. R. 1726, p. 59, ll.4-5--Trial Transcript)(describing a presentation by Vincent).

³⁷. (Examination of Mr. Daines by Mr. Colessides)

"Q Did you supply any of the information, financial information, that is contained on Exhibit 24 or did you assist in supplying any of the information?

A Yes, I participated in getting the basic information on the procedures from the doctors to Eric Wold, who was the analyst for the **feasibility**.

Q And why was that necessary to have that information?

A That was to see what income could be derived on a conservative basis by the surgical center and would give you also what the return on investment was by the doctors, how much you put in, how much you get back each year, and whether it was worth while doing."

R. 1726, p. 64, ll.15-25; p.65, ll.1-2--Trial Transcript)(emphasis added).

³⁸. (Examination of Mr. Daines by Mr. Colessides)

"A. Yes, the reimbursement by **Medicaid and Medicare is less than a traditional insurance companies**, and so they had to **make sure that the mix was correct** and that as an average they would get \$1,026 reimbursement after - what you do is on insurance companies you may bill them \$100 and only get \$50, so you have to go back to the \$50 to say that's what you put in your bank, that's what you can spend, that's what you can pay expenses with, and that's what you can pay investors with."

(R. 1726, p. 65, ll.19-25; p.66, ll.1-2--Trial Transcript)(emphasis added).

IV. Responses to miscellaneous additional points raised in Defendants' Opposing Brief

A. That Daines has no claim against the doctors. Defendants note Daines' counsel conceded the Release exonerated *the doctors* as members of the Center.³⁹ Daines only requested his \$6,000 out-of-pocket expenses, and he was duly reimbursed that amount "out of West Valley Surgical Center funds" by the Center.⁴⁰ That is why he signed the Release.

B. That the Utah Limited Liability Act already exonerated ASC as a "member".

Defendants note that members of limited liability companies are not liable for the debts of such entities.⁴¹ This is simply a "belt and suspenders" situation, where the Release exonerates both the "Center" and "its members," even though the statute already exonerates the Center's members. It says nothing about "*pre*-Surgical Center ASC".

C. That there is no evidence Daines ever worked for Boyer.⁴² Defendants overlook Stipulated Trial Exhibit 59, the bill Daines sent to Lynn Summerhays of The Boyer Company stating, "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."⁴³

D. That the Center paid \$50,000 to Daines.⁴⁴ The uncontroverted evidence is that

³⁹. Def. Opp. Brief, pp. 24-24 at n.18.

⁴⁰. "**FOLLOWUP ACTION ITEMS - ASC** ... 5. ASC to pay Weldon [sic] Daines' actual out of pocket cost for the options on the properties **out of West Valley Surgical Center funds**." (R. 1621, Stipulated Trial Exh. 91, p.3, ¶5), Opening Brief Addendum Exh. 11 (West Valley Surgical Center, LLC Board of Managers Meeting Minutes 10-30-2001)(Emphasis added)

⁴¹. Def. Opp. Brief, pp. 24-25.

⁴². Def. Opp. Brief, p. 13 ("There is no evidence that Daines did any work for or on behalf of Boyer.")

⁴³. R. 1620, Stipulated Trial Exh. 59), Opening Brief Addendum Exh. 9 (Bill from Daines to Boyer Company)(Emphasis added).

⁴⁴. Def. Opp. Brief, p. 14 ("... the Surgical Center decided to pay Daines \$50,000... .")

the Boyer Company, paid Daines the \$50,000, by check dated 3/20/03.⁴⁵ The Center understood it had no obligation to compensate Daines for his time spent on the site selection.⁴⁶ The Center paid Daines only \$6,000, "out of West Valley Surgical Center funds," for his out-of-pocket costs.⁴⁷

E. That Daines' claims for fraudulent inducement, negligent misrepresentation, promissory estoppel, and unjust enrichment are exonerated by the Release. Defendants contend the Release exonerates ASC from prior "contracts," that the MOU is a prior contract, that Daines' extra-contractual claims are premised on Defendants' inducing Daines to give up his claim under the MOU, and that therefore the Release exonerates Defendants from

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

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

A Yes.

Q Who did you get paid from?

A Boyer Company.

Q The Boyer Company?

A Yes."

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

(Argument by Mr. Martinez to the Court)

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

THE COURT: The Boyer Company paid it.

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

THE COURT: That's right."

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

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

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

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

⁴⁷. "**FOLLOWUP ACTION ITEMS - ASC** ... 5. ASC to pay Weldon [sic] Daines' actual out of pocket cost for the options on the properties **out of West Valley Surgical Center funds.**" (R. 1621, Stipulated Trial Exh. 91, p.3, ¶5), Opening Brief Addendum Exh. 11 (West Valley Surgical Center, LLC Board of Managers Meeting Minutes 10-30-2001)(Emphasis added)

these extra-contractual claims as well.⁴⁸ Defendants thereby simply assume that the Release relates to the MOU and the extra-contractual claims at all. In fact, as set out in Daines' Opening Brief, the "Release" is unclear and ambiguous regarding the *identity of the parties*, the *nature of the claims* covered, and the *amounts of the claims* covered.⁴⁹ Thus, the Release plausibly does not relate to "pre-surgical center ASC" at all; it is that capacity which gave rise to the MOU and to Daines' extra-contractual claims; and therefore the Release has nothing to say about the MOU or Daines' extra-contractual claims at all.

F. That Daines offered no evidence of ambiguity.⁵⁰ First, Daines introduced the Release, which on its face evidences ambiguity.⁵¹ Second, Daines also introduced Exhibit 10, a series of six documents of which the Release was a part, showing the ambiguity of the Release.⁵² Third, Daines testified the Release had nothing to do with the 8-shares agreement.⁵³ Fourth, Daines introduced his bill to Defendants demanding conveyance of the

⁴⁸. Def. Opp. Brief, p. 27, n.20.

⁴⁹.Daines' Opening Brief, Argument-Part V, pp. 39-41.

⁵⁰. Def. Opp. Brief, p.27 n.21. ("Daines offered no evidence [to establish ambiguity].").

⁵¹. R. 1619, Stipulated Trial Exh. 10, at ASC001012), Opening Brief Addendum Exh. 18 (Conditional Release); Daines' Opening Brief, Argument-Part V, pp. 39-41 (discussing different ambiguities in Release).

⁵². R. 1619, Stipulated Trial Exh. 10, Opening Brief Addendum Exh. 24 (Six-page Exhibit 10 at trial).

⁵³. (Examination of Mr. Daines by Mr. Colessides)

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

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

Q So what did you write on that invoice exhibit?

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

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

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

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

A Yes.

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

A **Boyer Company.**

8 shares, which he sent after the Release was signed.⁵⁴

G. That Invoice #9 is not "contemporaneous". Defendants contend Invoice #9 cannot be considered because it was not "contemporaneous" with the Release.⁵⁵ First, Defendants have waived any objection to Invoice #9--whether to show ambiguity or meaning of the Release--because Defendants failed to object to the introduction of Invoice #9 at trial.⁵⁶

Q The Boyer Company?

A Yes.

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

A Yes, I do.

Q What is it?

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

Q And what was attached to that page ASC001010?

A The conditional release.

Q And what did the letter ask you to do?

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

Q And did you sign the release?

A I did.

Q And did Bob Smith sign the release?

A Yes.

Q And did you send it back?

A Yes.

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

A Yes.

Q Did you receive it?

A Yes.

Q And what is it?

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

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

THE WITNESS: During the due diligence and organizational phase of the development, check number 1010 in the amount of \$6,000 attached.

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

A **I did."**

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

⁵⁴R. 1726, p. 897, ll.16-25, p.98, ll.1-18--(Trial Transcript, referring to Trial Exh. 82), Opening Brief Addendum Exh. 8 (4/23/03 fax and letter from Daines to Vincent).

⁵⁵ Def. Opp. Brief, p.32 ("Invoice #9 is not a 'contemporaneous' document...").

⁵⁶ Co-Vest Corporation v. Corbett, 735 P.2d 1308, 1309 (Utah 1987)("Because defendants did not object to the extrinsic evidence at the trial level, they cannot claim on appeal that the document is clear and unambiguous and is not subject to interpretation with extrinsic evidence."); Shields v. Harris, 934 P.2d 653, 656-57 (Utah Ct. App. 1997)(failure to object to extrinsic evidence waived objection to use of evidence at trial to show meaning of contract).

(Indeed, all six documents comprising Exhibit 10 may be considered for either purpose, since Defendants failed to object to the entire exhibit altogether.⁵⁷) Second, Invoice #9 need not be "contemporaneous" to show *ambiguity*, since all extrinsic evidence is admissible for that purpose under Ward. And since the Release was ambiguous, the trial court erred by failing to submit the question of the meaning to the jury.⁵⁸ Third, Invoice #9 was indeed "contemporaneous" with the Release and is also admissible to show its *meaning*, because a document need not be *executed* by both parties in order to be "contemporaneous".⁵⁹

V. The trial court erroneously directed a verdict regarding Vincent's personal capacity

This Court must "examine the evidence in the light most favorable [to Daines], 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 [Daines], the directed verdict cannot be sustained."⁶⁰ Defendants agree that is the applicable standard of appellate review,⁶¹ but then promptly

⁵⁷. See Def. Opp. Brief, pp.32-33 (arguing that only Dr. McCray's letter in Exhibit 10 should be considered).

⁵⁸. Plateau Min. Co. v. Utah Div. of State Lands and Forestry, 802 P.2d 720, 725 (Utah 1990)("When ambiguity does exist, the intent of the parties is a question of fact to be determined by the jury."); Willard M. Milne Inv. Co. v. Cox, 580 P.2d 607, 609-10 (Utah 1978)(court erred in directing verdict instead of submitting question of the parties' intent to the jury).

⁵⁹. For example, a deed is a conveyance executed only by the grantor. McGoldrick v. Walker, 838 P.2d 1139, 1141 (Utah 1992). Nevertheless, a deed may be considered in construing agreements related to the deed. See, e.g., Atlas Corp. v. Clovis Nat. Bank, 737 P.2d 225, 229 (Utah 1987)(court considers agreements together with a mining deed); Cox v. Cox, 877 P.2d 1262, 1265 (Utah App. 1994)(warranty deed executed by husband considered together with antenuptial agreement); see also J. Calamari & J. Perillo, The Law of Contracts, §3.2(a), p.123 n.11 (4th ed. 1998)(cover letter, executed only by one party, "may be considered a part of the integration.") citing Brown v. Financial Service Corp., 489 F.2d 144, 149-50 (5th Cir. 1974).

⁶⁰. Management Comm. of Graystone Pines Homeowners Ass'n v. Graystone Pines, Inc., 652 P.2d 896, 898 (Utah 1982).

⁶¹. Def. Opp. Brief, p. 1, (similarly quoting *Graystone Pines* case).

ignore it.⁶² Daines' principal arguments are set out in his Opening Brief.⁶³

In addition, Defendants erroneously contend "The MOU was signed by Vincent in his representative capacity..."⁶⁴ The MOU provides "WHEREAS, ASC, Bob Smith, Richard Vincent, their affiliates, employees, partners, joint ventures, or assignees (hereinafter called "ASC")..."⁶⁵ Significantly, Bob Smith, who testified he was not employed by ASC,⁶⁶ was asked by Mr. Vincent to sign the MOU.⁶⁷ Therefore Smith **must** have signed as an individual. Vincent also signed. Thus, a reasonable jury could find that Smith signed personally, and that Vincent **also** signed personally, *and* as a representative of ASC Group.

Defendants argue Vincent may have been acting in an ecclesiastical capacity.⁶⁸ Daines' awareness that Vincent, like Daines, was also LDS, leads to the inference of affinity fraud. A reasonable jury could find Vincent led Daines to believe Vincent would structure the Center so Daines would get the eight shares Vincent promised. That Vincent did not follow through as he promised attests to the harm suffered by Daines.

⁶². Def. Opp. Brief, pp.34-38 (construing the evidence *against* Daines).

⁶³. Daines' Opening Brief, Argument-Part VII, pp. 43-45.

⁶⁴. Def. Opp. Brief, p.36 n.25.

⁶⁵. R. 1619, Stipulated Trial Exh. 2), Opening Brief Addendum Exh. 6 (MOU).

⁶⁶. (Examination of Mr. Smith by Mr. Colessides)
"A I wasn't actually an employee, but I had an arrangement where I would bring projects to [Vincent]."
(R. 1726, p.168, ll.15-17--Trial Transcript).

⁶⁷. (Examination of Mr. Smith by Mr. Colessides)
"Q And did Mr. Vincent ask any questions about the [MOU]?
A I think, I remember him reading the document and I remember him saying it was kind of rich. But after a brief discussion he signed the document, and asked me to sign the document, and Welden [inaudible]."
(R. 1726, p.169, ll.17-22--Trial Transcript).

⁶⁸. Def. Opp. Brief, p.37 n.26 ("...Vincent was acting in an ecclesiastical capacity...").

VI. The trial court erroneously directed a verdict regarding fraud and punitives⁶⁹

Defendants contend⁷⁰ this Court cannot consider a statement by Dan Tasset, a principal and now sole owner of Defendant ASC, that Daines must have intended a "gift" to ASC of his claim for \$150,000.⁷¹ In the case cited by Defendants, however, this Court emphasized that depositions not introduced into evidence "nor read by the trial judge" would not be considered on appeal.⁷² Thus, it is only when the appellate court is handed a **sealed** deposition, never before opened or made available to the trial court in any way, that a deposition cannot be considered on appeal.⁷³ In contrast, Tasset's deposition was quoted and an excerpt was attached to Daines' Reply Memorandum in Support of his Motion to Strike Defendants' Renewed Motion for Summary Judgment below, and was duly reviewed and

⁶⁹. Daines' principal arguments are set out in his Opening Brief. Daines' Opening Brief, Argument-Part VIII, pp. 45-47.

⁷⁰. Def. Opp. Brief, pp.39-40 n.27.

⁷¹. (Examination by Mr. Colessides of Daniel R. Tasset, of ASC Group, in Deposition)

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

A Yes.

....

Q For nothing?

A Absolutely.

Q **As a gift?**

A Yes."

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

⁷². Pratt v. Mitchell Hollow Irr. Co., 813 P.2d 1169, 1171 (Utah 1991).

⁷³. The cases cited by Pratt involved *sealed* depositions submitted for the first time to the appellate courts. See Thompson v. Ford Motor Co., 14 Utah 2d 334, 334-35, 384 P.2d 109, 109 (1963); Reliable Furniture Co. v. Fidelity and Guar. Ins. Underwriters, Inc., 14 Utah 2d 169, 170, 380 P.2d 135, 135 (1963).

considered by Judge Lewis.⁷⁴

VII. The trial court erroneously denied Daines his "day in court"⁷⁵

Defendants urge that the trial court's directed verdict orders were "either proper or not proper...[but] in neither case are the constitutional rights to open courts[, due process] and a trial by jury even implicated."⁷⁶ In Miller v. USAA Cas. Ins. Co., 2002 UT 6, ¶66, 44 P.3d 663, this Court held that by inappropriately dismissing certain claims, the district court denied plaintiffs their "day in court". Similarly, the trial court's directed verdicts against Daines denied him the opportunity to have the jury determine his claims against Defendants. Defendants' argument to the contrary would read the Due Process, Open Courts and Jury Trial Clauses right out of the Utah State Constitution.

VIII. The trial court erroneously denied Daines' motion *in limine*

A. Standard of appellate review is "correctness"

Defendants urge an "abuse of discretion" standard of appellate review on this issue.⁷⁷ Although this Court has repeatedly counseled trial courts to explain the reasons for their rulings,⁷⁸ Judge Lewis' order provides cryptically that Plaintiff's motion to admit Judge

⁷⁴. R. 944-46, at 946 (Plaintiff's Reply Mem. in Support of Motion to Strike Defendants' Renewed Motion for Summary Judgment, quoting and attaching excerpt from Tasset deposition, p.155, ll.4-8, ll.19-22), Opening Brief Addendum Exh. 24 (Excerpt from Tasset deposition which was attached as Exhibit A to Reply pleading)

⁷⁵. Daines' Opening Brief, Argument-Part X, pp. 48-49(setting out Daines' principal arguments.)

⁷⁶. Def. Opp. Brief, p.41.

⁷⁷. Def. Opp. Mem. pp.3, 43.

⁷⁸. Retherford v. AT&T Communications of Mountain States, Inc., 844 P.2d 949, 958 n.4 (Utah 1992)("Although failure to issue a statement of grounds is not reversible error absent unusual circumstances, we take this opportunity to remind trial judges that the presumption of correctness ordinarily afforded trial court rulings "has little operative effect when members of this court cannot divine the trial court's reasoning because of the cryptic nature of its ruling." *Allen v. Prudential Property & Casualty Ins. Co.*, 839 P.2d 798, 800 (Utah 1992)).

Hilder's decision is denied and that Defendants' contrary motion is granted.⁷⁹ A "trial court's decision on ...[a] motion *in limine* [excluding evidence] based wholly on its legal conclusion" interpreting the Rules of Evidence is subject to the correctness standard of appellate review.⁸⁰ Under a correctness standard, "the appellate court decides the matter for itself and does not defer in any degree to the trial judge's determination of law."⁸¹ Since Judge Lewis' cryptic order defies categorization as either a determination interpreting the Rules of Evidence, or instead as an application of those Rules, this Court should apply a correctness standard of appellate review and conclude that Daines' motion *in limine* was erroneously denied.

Alternatively, this Court should remand for a rehearing and a re-determination by whatever new trial judge is assigned to the case.⁸²

B. Defendants' four arguments should be rejected

1. That Judge Hilder's decision is inadmissible hearsay.⁸³ Judge Hilder's decision is excepted from the hearsay rule as a "public record" under UTAH R. EV. 803(8)(C). In Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 167-68 (1988), the court held the analogous federal section embodies two principles: "the rule...assumes admissibility in the first instance...[and it makes] "ample provision for escape if sufficient negative factors are

⁷⁹. R. 964-966 at 965.

⁸⁰. Ford v. American Express Financial Advisors, Inc., 2004 UT 70, ¶ 33, 98 P.3d 15.

⁸¹. State v. Pena, 869 P.2d 932, 936 (Utah 1994).

⁸². This Court may remand the issue to the trial court for a rehearing and re-determination of the motions. See Russell/Packard Dev't, Inc. v. Carson, 2003 UT App 316, ¶ 10 n.6, 78 P.3d 616 ("Given the complexity of the issues in this case, we could reverse and remand based solely on the district court's failure to explain the basis of its decision. However, in the interest of expediting this case, we proceed to the merits. Nonetheless, we urge trial courts to explain the basis of their decisions when there are multiple issues before the court.")

⁸³. Def. Opp. Brief, pp. 43-44.

present." Consistent with the "liberal approach" of admissibility, the Court emphasized that three safeguards are available: (1) trustworthiness as determined by the trial judge; (2) the safeguards of relevance and protection against unfair prejudice; and (3) the ultimate safeguard of the opponent's right to present evidence "tending to contradict or diminish the weight of those conclusions."⁸⁴ Each of these is satisfied in regard to Judge Hilder's decision.

Judge Hilder's decision is also excepted from the hearsay rule under the "residual" exception of UTAH R. EV. 807 as a court judgment with a guarantee of trustworthiness. It would be offered as evidence of material fact, either for impeachment or as evidence in chief. It is more probative on those points than any other evidence Daines could procure through reasonable efforts. And the general purpose of the rules of evidence to assure the introduction of evidence for obtaining a just adjudication would be served by its admission.

2. That Judge Hilder's decision would be improperly used to show Vincent's propensity to lie.⁸⁵ In Lipscomb, Vincent was sued by his associates as a result of his conduct in a business venture strikingly similar to the case at bar: He entered into the business venture, then when he perceived his financial interests to be in jeopardy, he induced his business associates to relinquish a valid and enforceable claim in exchange for another claim, and when the time came for Vincent to perform on the substituted claim, Vincent adamantly denied having made that promise, and even claimed his signature had been forged.

⁸⁴ Overlooking the Supreme Court's Beech Aircraft decision, the Tenth Circuit in Herrick v. Garvey, 298 F.3d 1184 (10th Cir. 2002) held that court judgments are not covered by the section. The Sixth Circuit, on the contrary, carefully followed the reasoning of Beech Aircraft and held that court judgments **are** admissible. United States v. Garland, 991 F.2d 328, 334-35 (6th Cir. 1993) (Ghanian judgment admissible). The Ninth Circuit similarly held a prior misdemeanor judgment admissible. United States v. Loera, 923 F.2d 725, 730 (9th Cir. 1991). And a bankruptcy court also has admitted a state court judgment, almost as a matter of course. In re Maurice, 138 B.R. 890, 894 (N.D. Ill. 1992).

⁸⁵ Def. Opp. Brief, p. 44

Thus, Judge Hilder's decision would not be used to show Vincent acted "in conformity" with the character to lie and that he thus also lied to Daines about their transaction. It would be used to show Vincent tried to back out of a strikingly similar business venture when his own interests were threatened, and that he did so here as well.⁸⁶

3. That Judge Hilder's decision is inadmissible under Rule 608.⁸⁷ Judge Hilder's decision, stating *inter alia* that Vincent is not a credible witness, is an "opinion" that refers to Vincent's character for untruthfulness. It is admissible for impeachment under Utah Rule of Evidence 608(a), as evidence of character "in the form of opinion or reputation."⁸⁸

Judge Hilder's decision also is admissible for impeachment under Utah Rule of Evidence 608(b) as evidence of character in the form of "specific instances" of untruthful conduct.⁸⁹ Judge Hilder's conclusions, *inter alia* that in sworn testimony in open court, Vincent "was not a credible witness," "was inconsistent in his statements," and had "convenient lapses of memory," at minimum,⁹⁰ are findings of instances of "prior bad acts" probative of Vincent's untruthfulness, and are thus admissible for purposes of impeachment.⁹¹

⁸⁶. *State v. Allen*, 2005 UT 11, at ¶ 17 (trial court must make this initial limiting determination for the record).

⁸⁷. Def. Opp. Brief, pp. 44-45.

⁸⁸. UTAH R. EV. 404(a)(3), 608(a).

⁸⁹. UTAH R. EV. 404(a)(3), 608(b).

⁹⁰. This amounts to a second degree felony. UTAH CODE ANN. § 76-8-502.

⁹¹. For example, in *U.S. v. Gay*, 967 F.2d 322 (9th Cir. 1992), Gay was charged with defrauding investors through false and misleading representations while he was an officer of National Toll Free Marketing ("NTFM"), a company engaged in direct marketing of products and services. After Gay testified, the government introduced on cross-examination a prior civil injunction issued against Gay in conjunction with his activities at the Personnel Institute of California. The injunction prohibited Gay from engaging in many of the same activities he had undertaken as head of NTFM. The Ninth Circuit held that Federal Rule of Evidence 608(b) specifically contemplates inquiries into prior behavior in order to challenge a witness's credibility, and that evidence of prior frauds is probative of the witness's character for truthfulness or untruthfulness. Similarly, this court should exercise its discretion to order that Judge Hilder's

4. That Judge Hilder's decision is unduly prejudicial.⁹² UTAHR. EVID. 403 requires the court to determine whether the probative value of Judge Hilder's decision "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." In making that determination, the court should consider: "the strength of the evidence as to the commission of the other crime, the similarities between the crimes, the interval of time that has elapsed between the crimes, the need for the evidence, the efficacy of alternative proof, and the degree to which the evidence probably will rouse the jury to overmastering hostility."⁹³

Judge Hilder's decision is supported by substantial evidence documented in his opinion. There are substantial similarities between the Vincent-Lipscomb and the Daines-Vincent transactions: business transactions involving substantial sums of money; the involvement of multiple parties in a joint venture; a change in a transaction solicited by Vincent; a fluid set of events affecting the business interests of the parties; Vincent's pecuniary interest in the transactions; Vincent's substitution of a promise for a valid claim; and Vincent's misrepresentations. The interval of time between the two transactions is minimal: Judge Hilder's decision was issued February 2, 2001 and the Daines-Vincent transaction occurred later the same year. Judge Hilder's decision is essential to Daines' case,

decision is admissible to impeach Vincent on his expected testimony that he conducts himself as a reputable businessman. Accordingly, with a limiting instruction, Judge Hilder's decision is admissible on that ground as well.

⁹². Def. Opp. Brief, p. 45.

⁹³. State v. Allen, 2005 UT 11, ¶ 24 (quoting State v. Shickles, 760 P.2d 291, 295-96 (Utah 1988); these factors are referred to as the "*Shickles* factors.").

which depends in large part on Vincent's representation regarding the 8 class II shares. Judge Hilder's decision could hardly have greater probative worth. The total probative weight substantially outweighs any countervailing dangers. Daines' proposed limiting instruction would eliminate any remaining concerns.

CONCLUSION

(1) Daines should be awarded his attorney fees and costs pursuant to UTAH R. APP. P. 33 incurred in responding to Defendants' motion to dismiss Daines' appeal; (2) all the trial court's directed verdicts against Daines should be reversed; (3) all orders entered by the trial court *subsequent* to the entry of the directed verdict orders (including the 10-11-2006 "Judgment") should be reversed;⁹⁴ (4) the trial court's rulings on Daines' *motion in limine* should be reversed; (5) this Court should hold as a matter of law that the "Release" *unambiguously does not* exonerate Defendant ASC in its independent, pre-Surgical Center legal capacity, nor Defendant Vincent in his individual personal capacity; and (6) Daines should be awarded his costs on the entirety of this appeal. Cooke v. Cooke, 2001 UT App 110, ¶14, 22 P.3d 1249 (successful appellant entitled to costs on appeal).

DATED this 22nd day of March, 2007.


JOHN MARTINEZ
Attorney for Plaintiff-Appellant Daines

⁹⁴. Phebus v. Dunford, 114 Utah 292, 294, 198 P.2d 973, 974 (1948) ("A reversal of a judgment or decision of a lower court such as this places the case in the position it was before the lower court rendered that judgment or decision, and vacates all proceedings and orders dependent upon the decision which was reversed.").

CERTIFICATE OF SERVICE

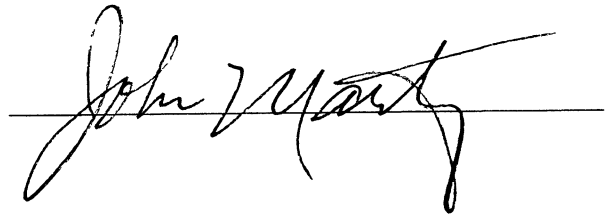
Filed ten copies of the foregoing, *one of which contains an original signature*, with the Clerk of the Supreme Court:

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

and served two copies of the foregoing upon the following:

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

via first class mail, postage pre-paid, this 22nd day of March, 2007 addressed as set forth above.

A handwritten signature in black ink, appearing to read "John W. Martz", is written over a horizontal line.