THE SUPREME COURT OF IOWA

No. 16-1265
Polk County Case No. LACL120967

ALEXANDER SHCHARANSKY and TATIANA SHCHARANSKY,
(Plaintiffs-Appellants),

v.

VADIM SHAPIRO, BORIS PUSIN, ILYA MARKEVICH, ALEX KOMM and DMITRY KHOTS,
(Defendants-Appellees).

ALEX KOMM, ILYA MARKEVICH, BORIS G. PUSIN, VADIM SHAPIRO, and DMITRY KHOTS,
(Counterclaim Plaintiffs),

v.

ALEXANDER SHCHARANSKY,
(Counterclaim Defendant).

ALEX KOMM, ILYA MARKEVICH, BORIS G. PUSIN, VADIM SHAPIRO, AND DMITRY KHOTS,
(Cross-Petition Plaintiffs),

v.

BORIS SHCHARANSKY, ZOYA STAROSELSKY, LEONID SHCHARANSKY and SLAVA STAROSELSKY,
(Cross-Petition Defendants).

ALEX KOMM, ILYA MARKEVICH, BORIS G. PUSIN, VADIM SHAPIRO, and DMITRY KHOTS,
(Third-Party Petition Plaintiffs),

v.

CONTINUOUS CONTROL SOLUTIONS, LLC,
(Third-Party Defendants).

APPEAL FROM THE IOWA DISTRICT COURT IN AND FOR POLK COUNTY, IOWA
HONORABLE DAVID M. PORTER

APPELLEES' FINAL BRIEF

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ROUTING STATEMENT

Appellees agree with Appellants' routing statement. This case involves the application of existing legal principles regarding the requirements for a valid contribution claim under Iowa law. As such, this

case should be transferred to the Court of Appeals pursuant to Iowa Rule of Appellate Procedure 6.1101(3).

STATEMENT OF THE CASE

A. Nature of the Case

Appellants Alex and Tatiana Shcharansky appeal the District Court's February 29, 2016 Ruling and Judgment Entry which held that they personally did not discharge or satisfy any of the common obligation of the parties. Thus, under Iowa law, the District Court held Appellants possess no right of contribution. The Honorable David M. Porter, in the Iowa District Court in and for Polk County, presided over the two-day bench trial and entered the subject Order.

B. Prior Proceedings

This case has a lengthy procedural past, even being before the Iowa Court of Appeals once before. On January 10, 2011, Alex and Tatiana Shcharansky ("Alex and Tatiana" or "Plaintiffs") filed their Petition, seeking common law contribution from Vadim Shapiro, Boris Pusin, Alex Komm, Ilya Markevich, and Dmitry Khots ("the Shapiro Group" or "Defendants"). On February 17, 2011, the Shapiro Group filed their Answer, Affirmative Defenses, Counterclaims and Cross-Petition.

After some initial discovery, the Shapiro Group filed their Motion for Summary Judgment on May 10, 2012. On August 31, 2012, after a hearing on the Motion, the Honorable Judge Glenn E. Pille granted the Motion for Summary Judgment, holding no claim for contribution existed under Iowa law. Then, that ruling was reiterated in a December 31, 2012 Order denying the Appellants' Rule 1.904(2) motion. Judge Pille's ruling was appealed to the Iowa Court of Appeals. On November 20, 2013, the Iowa Court of Appeals reversed Judge Pille's ruling, holding that summary judgment was inappropriate because the district court erroneously resolved factual disputes, including credibility determinations, at the summary judgment stage. Thus, the case was remanded to the District Court for trial.

A two-day bench trial was held on December 7-8, 2015, on the contribution claims only. The Shapiro Group's counterclaim, third-party petition and cross-claim were bifurcated to be heard by a jury at a later date, if needed. Following trial, at the request of the District Court, the parties each submitted proposed findings of fact and conclusions of law. On February 29, 2016, the District Court entered its Ruling and Judgment Entry, holding that Alex and Tatiana held no viable claim for contribution, entering judgment for the Defendants, and dismissing the remaining claims.

Thereafter, Alex and Tatiana filed their Motion to Amend or Enlarge pursuant to Iowa Rule of Civil Procedure 1.904(2) on March 16, 2016. In that motion, Alex and Tatiana reargued the same points they attempted to make at trial and that were rejected by the District Court. The Shapiro Group filed a Resistance to the Rule 1.904 Motion on March 28, 2016. Plaintiffs' Reply was filed April 4, 2016. The District Court held a hearing on the Motion to Amend or Enlarge on May 19, 2016, and entered its ruling on July 8, 2016. In its ruling, the District Court rejected Alex and Tatiana's arguments for a second time. They filed their notice of appeal on July 22, 2016.

STATEMENT OF THE FACTS

A. History Between The Parties

Prior to September 16, 2007, the members of the Shapiro Group and Shcharansky Group[1] were all co-owners of a company called Continuous Control Solutions ("CCS"). CCS develops and implements control systems for compressors and gas and steam turbines in the oil and gas and petrochemical sectors. (App. Vol. II p. 514). During that time, CCS secured several loans from Wells Fargo, which were secured by personal guaranties

[1] The "Shapiro Group" consists of the Defendants and the "Shcharansky Group" consists of Alex Shcharansky, Boris Shcharansky and Zoya Staroselsky.

from all of the members of the Shapiro and Shcharansky Groups. (App. Vol. II pp. 208-09). On September 16, 2007, the Shapiro Group members sold all of their stock in CCS to the Shcharansky Group pursuant to a written Stock Purchase Agreement ("SPA"). (App. Vol. II pp. 264-65; 421-437). The SPA was signed by members of both the Shapiro Group and the Shcharansky Group. Specifically, Plaintiff Alex Shcharansky signed the SPA as a "Buyer." (App. Vol. II p. 430). In the SPA, the Shcharansky Group agreed to use their best efforts to cause CCS to repay the loans to Wells Fargo in their entirety, and to do so prior to any repayment of any loans to any buyer, relative of any buyer, or entity controlled by a relative of any buyer. Specifically, section 7.1 of the SPA stated in part,

> 7. **Covenants**
>
> 7.1 **Buyers' Covenants**. In connection with the transfer of the Shares to the Buyers pursuant to this Agreement, the Buyers hereby covenant that as the controlling shareholders of the Corporation, the Buyers will cause the Corporation to:
>
> (a) Use best efforts to, **and prior to the payment of any existing or new debt obligations payable by the Corporation to any Buyer or any Buyer's immediate relative or any entity affiliated with any Buyer or any Buyer's immediate relative**, satisfy and repay in full all debt obligations of the Corporation owed to Wells Fargo Bank, N.A.

(App. Vol. II p. 424) (emphasis added). The Shapiro Group's counterclaim and cross-petition in this action generally relate to this best efforts clause. (App. Vol. II pp. 264-270).

From the date of the SPA through May 30, 2009, CCS did not make any principal payments on the Wells Fargo loans. *Shcharansky v. Shapiro*, No. 13-0151, 2013 WL 6116883 (Iowa Ct. App. Nov. 20, 2013). On October 7, 2008, Wells Fargo Bank filed Polk County lawsuit EQCE60256 in which it sought collection on the personal guaranties signed by the members of the Shapiro Group and the Shcharansky Group to secure the loans previously made to CCS. (App. Vol. II p. 209). On April 23, 2009, judgment was entered in favor of Wells Fargo against all eight personal guarantors for $909,338.27 along with interest (the "Wells Fargo Judgment"). (App. Vol. II pp. 496-98). Thereafter, on June 1, 2009, CCS and Alex and Tatiana executed a forbearance agreement with Wells Fargo. Pursuant to the forbearance agreement, CCS made a $400,000.00 down payment to the Wells Fargo Judgment and agreed to make subsequent quarterly payments to satisfy the entire amount of the judgment. (App. Vol. II pp. 417-420).

Meanwhile, the Shapiro Group and Shcharansky Group brought claims against each other that they continued to litigate in case CE60256.

(*See Wells Fargo Bank v. Continuous Control Solutions, Inc.*, No. 10-1070, 2011 WL 2695269 (Ct. App. Iowa July 13, 2011)). A two-week jury trial for case CE60256 was held in March 2010 presided over by Judge Rosenberg. At the conclusion of that trial, the Shapiro Group submitted claims of Fraudulent Misrepresentation/Non-Disclosure and Conspiracy against Alex Shcharansky, Lenny Shcharansky and Slava Staroselsky to the jury. The jury returned a verdict in favor of the Shapiro Group against Alex, Lenny and Slava in the amount of $2.8 million—$1.4 million of compensatory damages and $1.4 million of punitive damages. See *Wells Fargo*, 2011 WL 2695269 at *3. On July 13, 2011, the jury's verdict was confirmed in its entirety by the Iowa Court of Appeals. (See *Wells Fargo*, 2011 WL 2695269).

B. Payments At Issue In Plaintiffs' Contribution Claim

CCS made the quarterly payments under the Forbearance Agreement from June 1, 2009 until June 1, 2010. (App. Vol. II p. 210).

i. The June 2010 payment to Wells Fargo

In June of 2010, Plaintiff Alex Shcharansky allegedly made the quarterly payment to Wells Fargo pursuant to the Forbearance Agreement. (App. Vol. II p. 210). In his judgment debtor exam dated August 31, 2010, Alex Shcharansky testified that the money to make the June 2010 payment

to Wells Fargo came from Lenny Shcharansky's retirement account. He explained that Lenny, his father, transferred the money from his retirement account to a Wells Fargo bank account co-owned by Lenny Shcharansky, Alex Shcharansky and Raya Shcharansky. Alex did not state in his judgment debtor exam that he borrowed this money from Lenny. (App. Vol. II p. 528). Lenny was never a guarantor on the Wells Fargo loans. (App. Vol. II p. 532).

Similarly, in his judgment debtor exam dated August 31, 2010, Lenny Shcharansky testified that the money used to make the June, 2010 payment to Wells Fargo was transferred directly from his retirement account to the joint checking account that he referred to as "his" account. Lenny did not state in his judgment debtor exam that he had loaned this money to Alex. (App. Vol. II p. 510).[2] After Lenny transferred the money from his retirement account to the joint checking account, Alex Shcharansky then simply wrote a check to Wells Fargo out of this co-owned account to make the loan payment. (App. Vol. I pp. 174-185).

During trial, Alex Shcharansky initially claimed that he "borrowed" the money from his father to make the June 2010 payment. (App. Vol. II p. 524). On cross examination, however, Alex Shcharansky backed away from

[2] Designated pages from Lenny Shcharansky's judgment debtor exam were presented to and accepted by the Court as his testimony at trial.

this claim. Specifically, Alex acknowledged prior deposition testimony in which Alex had testified he had not borrowed the money from his father, and he said that prior testimony was truthful and accurate. (App. Vol. II p. 529). Alex further testified that there was no written loan agreement, no interest accruing on the alleged loan, and no date by which he must pay the money back. He explained that to date—more than five years after the alleged loan—he had not paid any of this money back to his father. He also testified that Lenny had not instituted any legal proceedings to collect on this money and will not do so. Likewise, he testified that Lenny had not issued any negative credit reporting as a result of Alex's failure to repay the alleged loan and will not do so. (App. Vol. II p. 529).

ii. The September and December 2010 payments to Wells Fargo

Tatiana wrote a check to Wells Fargo of $76,022.11 in September 2010, when the next quarterly payment was due under the forbearance agreement. (App. Vol. I p. 168; Vol. II p. 210). Tatiana also wrote checks of $190,039.15 and $51,896.77 to completely pay off the Wells Fargo Judgment in December 2010. (App. Vol. I p. 169; Vol. II p. 210). When responding to Interrogatories requesting the source of funds to make these payments, Tatiana responded that "the funds were provided to me by my parents." (App. Vol. II pp. 412-13). She did not say her parents had loaned

her the money. (App. Vol. II pp. 412-13). Tatiana's parents were not guarantors of the Wells Fargo loans. (App. Vol. II p. 532). The banking records for the transfer of this money from Tatiana's parents state in the subject line: "material assistance for daughter." (App. Vol. I pp. 170-173). They do not call the transfers a loan. (App. Vol. I pp. 170-173).

Tatiana testified at trial that her parents sent her the money for the specific purpose of making the September and December, 2010 payments to Wells Fargo. (App. Vol. II p. 539). She testified that she could not have done whatever she wanted with the money, and that it was provided to her for the **sole** purpose of making the payments to Wells Fargo. (App. Vol. II p. 539). Tatiana initially testified at trial that she considered the money to be a loan from her parents. (App. Vol. II p. 538). Upon further questioning by her own attorney, however, she did not use the term "loan" to describe the money and she said no label was placed on the money. (App. Vol. II p. 542). Specifically, she testified, "There was no label for this money. They just give me the money, and I feel the obligation to return." (App. Vol. II p. 542). Further, Tatiana admitted there was no writing of any kind that would indicate an obligation to pay her parents back, and she testified that there was no date by which she was required to pay the money back. (App. Vol. II p. 540). She further testified that at present – five years after receiving the

money from her parents – she had repaid none of this money. (App. Vol. II p. 540).

Alex likewise testified that Tatiana said she simply feels a "moral obligation" to return the money to her parents. (App. Vol. II p. 530). He went on to confirm there was no written loan agreement or promissory note between Tatiana and her parents, no interest was accumulating on the money Tatiana's parents had sent her to make the payments to Wells Fargo, and Tatiana had no due date by which she was to repay the money to her parents. (App. Vol. II p. 530). Both Alex and Tatiana further admitted that Tatiana's parents had not filed suit to collect on the money and would not do so, and that her parents had not filed any negative credit reports and would not do so. (App. Vol. II pp. 530, 542).

C. Plaintiffs' Reason For Paying Full Balance In December 2010

In December of 2010, CCS only owed Wells Fargo a minimum quarterly payment of $76,022.11. However, at that time, Tatiana desired to pay off the entire remaining balance of the Wells Fargo loans, and so she asked Alex to obtain the payoff amount. Alex did so, and that information was provided to him on December 2, 2010 via a letter from Wells Fargo.

(App. Vol. I p. 186; Vol. II p. 530).[3] Shortly thereafter, Tatiana wrote the checks to Wells Fargo to pay the remaining balance on the Wells Fargo loans. (App. Vol. I. p. 169).

Prior to requesting the payoff amount, Alex and Tatiana had been served on November 18, 2010, with a lawsuit that the Shapiro Group had filed in New York, which sought to invalidate a prior transfer of a condominium in New York City from Alex to Tatiana as a fraudulent transfer. The Shapiro Group eventually succeeded in that lawsuit and nullified the transfer. (App. Vol. II pp. 530-531, 535-537). During her deposition in this lawsuit, Tatiana testified that the Shapiro Group's November 2010 fraudulent transfer lawsuit contributed to her decision to pay off the Wells Fargo debt early. (App. Vol. II p. 540).[4]

[3] Tatiana had asked Alex to obtain this information just a few days prior to its receipt on December 2, 2010. (App. Vol. II p. 530).

[4] Later in her deposition and again at trial, Tatiana tried to back away from this testimony by asserting that she had not understood the question. However, at the beginning of her deposition, Tatiana was asked to let counsel know if she did not understand a question, and she did not do so before answering the question that she now claims she did not understand. (App. Vol. II p. 540).

ARGUMENT

I. The District Court Correctly Held that No Contribution Claim Exists Under Iowa Law

A. Standard of Review

Appellees agree with Appellants' statement on the applicable standard of review. Equitable claims that were tried to the district court are reviewed by this Court de novo. Iowa Rule App. P. 6.907. Regarding this standard, long ago the Iowa Supreme Court aptly stated:

> While an appeal in an equitable action is a review anew in this court upon the law and the facts, the findings of fact and conclusions of law of the trial court should receive serious consideration. This is especially true with respect to the probative value of the testimony. The trial court sees and hears the witnesses and is in an advantageous position to judge their interest or lack of interest, and to appraise the worth of their testimony.

Hadsall v. West, 246 Iowa 606, 620, 67 N.W.2d 516, 524 (1954). *See also Perkins v. Madison Cnty. Livestock & Fair Assn.*, 613 N.W.2d 264, 267 (Iowa 2000) ("We are especially deferential to the district court's assessment of witness credibility.").

B. Preservation of Error

The Plaintiffs have not properly preserved error because their appeal, filed July 22, 2016, was untimely. This is a threshold jurisdictional matter, and Plaintiffs' appeal must be dismissed. *Hedlund v. State*, 875 N.W.2d

720, 724 (Iowa 2016) (citing *Tigges v. City of Ames*, 356 N.W.2d 503, 511 (Iowa 1984)).

Generally, an appeal must be filed within 30 days of a final ruling or judgment. Iowa R. App. Proc. 6.101 (1)(b). An extension to this period is available when a party files a Rule 1.904(2) motion, but **only** if that motion is proper. *Id.*; *Baur v. Baur Farms, Inc.*, 832 N.W.2d 663, 668 (Iowa 2013) (only a proper 1.904(2) motion extends the time to appeal); *Bellach v. IMT Ins. Co.*, 573 N.W.2d 903, 904-05 (Iowa 1998) ("A motion relying on rule [1.904(2)], but filed for an improper purpose, will not toll the thirty-day period for appeal . . . ."). A proper Rule 1.904(2) motion is filed to address a situation where the district court fails to resolve an issue, claim, or other legal theory properly submitted for adjudication. *See Tetzlaff v. Camp*, 715 N.W.2d 256, 258 n. 1 (Iowa 2006) (citing *Boyle v. Alum-Line, Inc.*, 710 N.W.2d 741, 751 n. 4 (Iowa 2006)). If, instead, the motion amounts "to no more than a rehash of legal issues raised and decided adversely" to the movant, the motion is not appropriate. *Explore Info. Servs. v. Iowa Ct. Info. Sys.*, 636 N.W.2d 50, 57 (Iowa 2001) (quoting *Bellach*, 573 N.W.2d at 905). "[R]ule 1.904(2) is a tool for correction of factual error or preservation of legal error, not a device for rearguing the law." *Hedlund*, 875 N.W.2d at 726.

Here, Alex and Tatiana did not file their rule 1.904(2) motion to correct any factual error or preserve any legal error—they wanted to reargue their case. The district court had already issued a detailed 11-page ruling addressing every factual and legal issue before it. Plaintiffs did not like the ruling, and simply wanted to drag the case out while the Shapiro Group continued to try to collect its $2.8 million dollar judgment against the Shcharansky Group from the judgment entered in EQCE 60256.

In the "Introduction" section of their rule 1.904(2) brief, Plaintiffs stated they "will not in this motion reargue all of the arguments and issues clearly decided by the Court." (App. Vol. II p. 365). However, that is ***precisely*** what Plaintiffs then proceeded to do. Each of the arguments raised in their Rule 1.904(2) motion and brief were legal arguments the Plaintiffs made before, during and after trial in this matter.

In Section I of that same brief, Plaintiffs argued that the *Allison* case is inapposite and does not make the source of the funds that paid off Wells Fargo relevant. (App. Vol. II pp. 365-370). This is precisely the same legal argument that Plaintiffs made in both their Trial Brief submitted prior to trial (App. Vol. II pp. 319-320) and in their Proposed Findings and Conclusions submitted after trial (App. Vol. II pp. 339-340). It is also the exact same argument that Plaintiffs now make before this Court. The district court

rejected Alex and Tatiana's argument on this legal issue, but, being unhappy with that ruling, they sought a second bite at the apple. As such, Plaintiffs' argument in their rule 1.904(2) motion regarding *Allison* and the relevance of the source of funds was "no more than a rehash of legal issues raised and decided adversely." *Explore Info Servs.*, 636 N.W.2d at 57.

Next, Alex and Tatiana argued in Section II of their rule 1.904(2) brief that the District Court should reverse its ruling and conclude that Plaintiffs are entitled to contribution because (i) a plaintiff has a right to contribution when he or she makes payment from monies gifted, and (ii) the funds here were gifted to Plaintiffs/Appellants. (App. Vol. II pp. 371-372). Again, this is precisely the same argument that Plaintiffs made in both their Trial Brief submitted prior to trial (App. Vol. II p. 318) and in their Proposed Findings and Conclusions submitted after trial (App. Vol. II pp. 338-339). And again, the District Court rejected Plaintiffs' argument on this legal issue when it issued its Ruling and Judgment Entry. Similar to above, Alex and Tatiana were disappointed in the District Court's ruling and sought to change its mind by re raising the exact same issue.

While generally a rule 1.904(2) motion is the proper vehicle to address a ruling made upon trial of an issue of fact without a jury, a party cannot, under Iowa law, file a rule 1.904(2) motion for the sole purpose of

asking the district court to reconsider its rejection of the exact same legal arguments the defeated party made at trial. *Sierra Club Iowa Chapter v. Iowa Dept. of Transp.*, 832 N.W.2d 636, 641 (Iowa 2013) (a rule 1.904(2) motion used solely "to obtain reconsideration of the district court's decision" does not toll the time to appeal). That is precisely what happened here. Therefore, under Iowa law, Plaintiffs' notice of appeal was untimely, this Court does not have the jurisdiction to hear the appeal, and this appeal must be dismissed.

C. Analysis

1. The District Court correctly interpreted *Allison* and correctly inquired into the source of the funds used for payment.

The law does not allow a party to scheme its way to an equitable contribution claim. Thus, the legal analysis of Plaintiffs' alleged contribution claim is quite simple. Under Iowa law, a contribution claim ripens "only upon 'payment or its equivalent by the claimant discharging, satisfying or extinguishing' more than an equitable share of the common obligation." *Allison v. L.E. Allison Estate*, 560 N.W.2d 333, 334 (Iowa 1997) (citing *Diaryland Ins. Co. v. Mumert*, 212 N.W.2d 436, 439 (Iowa 1973)). Thus, "in the absence of any proof the plaintiffs have been compelled to pay more than their share of the parties' common burden," a contribution claim is properly dismissed. *Id*. at 335.

Here, Alex and Tatiana had a two-day trial to prove they personally discharged this debt—they could not. All of the arguments in Appellants' Brief concerning labels for transactions and other semantics are mere pretense and an attempt to divert this Court's focus away from their inability to prove that, in an equity setting, the other secondary co-obligors should be required to pay them money.

The doctrine of contribution "rests upon principles of equity" and is "grounded in fairness." *Allison*, 560 N.W.2d at 334. Moreover, equitable contribution is utilized to "prevent unjust enrichment." *Hills Bank & Trust Co v. Converse*, 772 N.W.2d 764, 772 (Iowa 2009). Accordingly, "payment by anyone other than an obligor, even though for the obligor's benefit gives the obligor no right of contribution." 18 Am. Jur. 2d *Contribution* § 12; *see also Jackson v. Lacy*, 100 P.2d 313, 318 (Cal. Dist. Ct. App. 1940) (holding "[p]ayment by anyone other than Stowell, even though for Stowell's benefit, would give Stowell no right of contribution."). Furthermore, the claimant cannot "maintain an action for the benefit of the person actually making the payment, since that person has no protectable interest in the action." 18 Am. Jur. 2d *Contribution* § 12.

A good example of these principles is found in *San Joaquin Valley Bank v. Gate City Oil Co.*, 173 P. 781, 782-83 (Cal. Dist. Ct. App. 1918).

There, the defendants contended that the contribution claimant and others devised a plan under which they could hold the co-obligors liable for contribution, save themselves from liability, and release company property from the underlying judgment. *Id.* at 782. As part of the plan, the vice president of the principal debtor, Gate City Oil Company, who was not a co-obligor on the debt, borrowed money from his personal credit and arranged an agreement with one of the co-obligors, Lynch, such that it would appear as if Lynch paid the underlying judgment. *Id.* at 783. Lynch was then instructed to pay the vice president back all the money he could recover by way of contribution from the two other co-obligors, Smith and Giottonini. *Id.*

The court concluded the evidence "abundantly supported" the existence of this plan. *Id.* at 785. Thus, the court opined that the exchange of money into the hands of Lynch in order to pay the underlying judgement was "mere camouflage, which failed to conceal the true nature of the transaction." *Id.* A right to contribution depends entirely on actually paying the judgment. *See id.* Lynch "did not pay it," and thus "failed to establish any right to contribution." *Id.*

San Joaquin is the most factually on point persuasive authority considered by the District Court. Alex and Tatiana used a similar argument

to the appellants in that case, arguing repeatedly to the District Court here that their contribution claim should be recognized because they have proven that the parents' monies "touched the hands" of Alex and Tatiana or were "transferred" to them before payment to Wells Fargo. (Appellants' Brief at pp. 24-25). It is not surprising then that Alex and Tatiana barely acknowledge, in a footnote on the last page of their brief, the holding from *San Joaquin*. (Appellants' Brief at p. 26 n. 19).

Instead, Alex and Tatiana incorrectly argue that the District Court's ruling wrongly considered the source of the funds. (Appellants' Brief at pp. 25-26). To make this argument, Alex and Tatiana focus on *Allison*, claiming the district court "misread" that case, and they repeatedly attempt to distinguish the facts in *Allison* from the facts of this case. (Appellants' Brief at pp. 20-25). According to their argument, the District Court incorrectly relied on *Allison* because in *Allison* the contribution plaintiff did not "actually" make the payment, but here, Alex and Tatiana, "actually" did. However, contrary to Alex and Tatiana's argument, the primary point of *Allison* was that "absen[t] any proof the plaintiffs have been compelled to pay more than their fair share of the parties' common burden, the district court properly dismissed their petition for contribution." *Allison* at p. 345. Here, just as in *Allison*, alleged intra-family "loans" are merely the

mechanism by which the plaintiffs attempted to disguise the fact that they had not paid more than their fair share of the common burden.

The district court noted the flaw in Alex and Tatiana's argument twice in its Ruling on the Rule 1.904 motion, where it stated:

> The critical question under *Allison* is: Can the party seeking contribution demonstrate that they were forced to pay more than their equal share? *Id*. at 334. Like *Allison*, Plaintiffs here did not demonstrate that they are required to repay the third parties which supplied the funds. Therefore, they did not demonstrate they were made to pay more than their share or that they were entitled to contribution.
>
> . . .
>
> The facts in this case are not as muddled, but Plaintiff[sic] misses the critical question that the *Allison* Court's skepticism was aimed at: Based on all the facts, has the plaintiff demonstrated they paid a disproportionate share of the joint debt and were obligated to repay the son-in-law? While the facts are clearer here, Plaintiffs similarly failed to answer the same critical question.

(App. Vol. II p. 394). Thus, the District Court's holding was not based on a "misreading" of Iowa law or some factual or legal error. Rather, its correct holding was based on Alex and Tatiana's complete failure to prove, at trial, that they personally, and not their parents, paid off the Wells Fargo debt.

Moreover, Plaintiffs argue because Alex and Tatiana "actually" made the payments by writing the checks from accounts with their names, no

inquiry into the source of funds is necessary under Iowa law. (Appellants' Brief at p. 26). They deduce this argument not from an affirmative holding in any case, but rather from the fact that the plaintiffs in *Allison* did not physically transfer payment to the lender. (Appellants' Brief at 20-21). However, the Iowa Court of Appeals expressly rejected that argument in its earlier decision in this case. There, the Iowa Court of Appeals left open the possibility that the source of the funds could be relevant to the outcome of this case, when it ruled as follows:

> In any event, even if it is determined that the source of the funds is critical to Alexander and Tatiana's claim of contribution, whether the funds were loans or gifts (or distributed as part of an underlying conspiracy) is a disputed factual issue that needs to be fleshed out at trial and is likely dependent on credibility determinations that should be left for the jury.

Shcharansky v. Shapiro, No. 13-0151, 2013 WL 6116883 (Iowa Ct. App. Nov. 20, 2013). Moreover, in its decision, the Iowa Court of Appeals did not state any disagreement with 18 Am. Jur. 2d *Contribution* § 11 ("payment by anyone other than an obligor, even though for the obligor's benefit, gives the obligor no right of contribution") or with the *San Joaquin* decision discussed above. This further demonstrates that the source of the funds must be considered, to determine whether Plaintiffs or someone else actually paid the debt.

In fact, the case previously cited by the Iowa Court of Appeals on this issue, *Hills Bank & Trust Co. v. Converse*, 772 N.W.2d 764 (Iowa 2009), clearly requires a payment by a guarantor, not by a third party, for there to be a right of contribution. *Id*. at 772 (holding "This right of contribution is equitable in nature and is used to prevent unjust enrichment…It would be inequitable to allow one cosurety **to pay** the entire debt to the oblige, without an agreement requiring such an obligation). This language requires that a cosurety, not someone else, actually pay the debt before a right of contribution arises. Where another party actually pays the debt, even if for the benefit of the guarantor, no right of contribution arises. Thus, the source of the funds is a relevant factor in determining whether any right to contribution exists.

It would truly exalt form over substance to suggest that where a third party pays a debt, a guarantor can artificially create a right of contribution against other co-guarantors by having the funds simply pass through their bank account, or "touch their hands" on the way to the lender. That is exactly what happened here, and it does not create a right of contribution for Alex and Tatiana.

2. The District Court correctly refused to label these transactions as either Gifts or Loans

The Plaintiffs' second assignment of error is somewhat unorthodox. They claim that, even though it is irrelevant, the District Court erred in concluding that the transfers of money were neither gifts nor loans. (Appellants' Brief at p. 14 & n. 12). According to Plaintiffs, "[t]here was no evidentiary basis in the record to suggest otherwise." (Appellants' Brief at p. 14). In actuality, every piece of evidence in the record suggests otherwise.

First, the June, 2010 payment did not even involve a "transfer" of money from one person to another. There, Lenny Shcharansky, Alex's father, moved money from his personal retirement account into a Wells Fargo checking account that had three names on the account—Lenny Shcharansky, Raya Shcharansky and Alex Shcharansky.[5] (App. Vol. II p. 528). Thus, Lenny Shcharansky, a non co-obligor, took some of his own money in one of his accounts and moved it to another one of his accounts. Alex then simply signed the check to Wells Fargo that drew upon Lenny's funds. (App. Vol. I pp. 174-176). Accordingly, it is undisputed that the

[5] Notably, in Lenny's judgment debtor exam, which was accepted by the district court as his trial testimony, Lenny referred to the joint account as "his" account. (App. Vol. II p. 510)

money used to make the June, 2010 payment never left Lenny's control before being turned over to the lender.

Further, the District Court's skepticism of these transactions was based primarily on the lack of credibility in Alex and Tatiana's testimony. (App. Vol. II pp. 355-356). In its Ruling and Judgment entry, the District Court repeatedly noted that neither Alex nor Tatiana could maintain a consistent story about the various transactions when questioned at trial. First, regarding Alex's testimony, the District Court noted that in prior judgment debtor exams, Alex never stated that he borrowed the money from his father. (App. Vol. II p. 350). Then, at trial on direct examination, Alex testified that the money was a loan. (App. Vol. II p. 524). However, on cross examination, he was forced to acknowledge that his deposition testimony in this case was accurate where he stated he was not borrowing the money from his father.[6] (App. Vol. II p. 529). Therefore, Alex changed his testimony concerning this transaction three times in front of the District Court.

Additionally, regarding Tatiana, the District Court noted the following,

[6] Judge Porter noted that his February 29, 2016 ruling had inadvertently left the word "not" out of this quotation, and that scrivener's error was corrected in his ruling on the Rule 1.904(2) motion. (App. Vol. II p. 395).

> Tatiana initially testified at trial that she considered these monies to be a loan from her parents. (Trial Tr. at 168). Upon further questioning by her own attorney, however, she testified: "There was no label for this money. They just give me the money, and I feel the obligation to return." (Trial Tr. at 198).

(App. Vol. II p. 351). Thus, just like her husband, Tatiana could not tell a consistent story at trial. Moreover, Tatiana adamantly testified that "she could not have done whatever she wanted with these monies, and that they were provided to her for the sole purpose of making the payments to Wells Fargo."[7] (App. Vol. II p. 539).

The District Court was not persuaded by Alex and Tatiana's contrived testimony concerning these transactions, and this Court should view it with similar skepticism. *Perkins*, 613 N.W.2d at 267 (the appellate court is "especially deferential" to the district court's determination of witness credibility). The reality is the parents' money was merely funneled through bank accounts with Plaintiffs' names on them, and was always meant for immediate payment to Wells Fargo.

Further, at trial the District Court heard evidence regarding the timing of the lawsuit that suggested a scheme to create an artificial contribution

[7] Plaintiffs attempt to explain away Tatiana's testimony, and argue she really could have done whatever she wanted with the money by claiming it was merely her "perception" that she could only use the money to pay off Wells Fargo. (Appellants' Brief at p. 18).

claim. The Plaintiffs' Petition was filed a mere thirty days after Alex and Tatiana had decided, without being required, to pay off Wells Fargo in full. (App. Vol. II p. 208). The payoff amount was received from Wells Fargo on December 2, 2010. (App. Vol. I p. 186). Just two weeks earlier, Alex and Tatiana had been served with the Shapiro Group's lawsuit in New York to undo a fraudulent transfer of a multi-million dollar condominium by Alex to Tatiana. The New York court would later find in favor of the Shapiro Group on that claim. (App. Vol. II pp. 530-531, 535-537).

Moreover, the District Court heard that CCS was the primary obligor on the loans from Wells Fargo. (App. Vol. II pp. 486-495, 533). Since 2007, CCS has been and continues to be an active, ongoing company with Alex Shcharansky in charge of the day-to-day operations of the company, including its finances. (App. Vol. II pp. 523, 533). CCS had annual revenues of $7.6 million in 2009, $4.6 million in 2010, $6.2 million in 2011 and $7.3 million in 2012. (App. Vol. I pp. 134-167). In addition, CCS owns patents and trade secrets that it considers to be valuable, and it plans to continue in business. (App. Vol. II p. 534). Finally, Alex testified it is possible that he could cause CCS to repay him and Tatiana the money they claim they paid to Wells Fargo. (App. Vol. II p. 533). Accordingly, the District Court's credibility determinations were more than well-founded.

In its Ruling and Judgment Entry, the District Court expressly found that the undisputed facts reveal that Alex and Tatiana acted as mere "conduits" for their parents' money. (App. Vol. II p. 355).[8] Stated more simply, the subject money was not a "gift" or a "loan" because it never actually belonged to Alex or Tatiana—"the fact that Alex and Tatiana signed the checks to Wells Fargo was window dressing **designed to hide the fact that their parents actually made the payments**." (App. Vol. II p. 355) (emphasis added). Thus, under the holdings in *Allison* and *San Joaquin Valley Bank*, the contribution claim fails as a matter of law. In reality, the Shcharansky Group was caught red-handed in their desperate attempt to scheme an equitable contribution claim against the Shapiro Group in the hopes of continuing to stave off the collection of a $2.8 million judgment.

II. In the Event this Court Reverses the District Court's Ruling, this Case should be Remanded, Without Judgment Entry, for Further Proceedings Regarding the Counterclaim and Cross Petition.

At the conclusion of their appellate brief, Plaintiffs make five separately numbered requests for relief. The second and third of these requests asks that this Court direct the District Court to enter judgment in

[8] In his ruling on this point, Judge Porter quoted favorably and adopted the language of Judge Pille's prior Ruling on the Shapiro Group's Motion for Summary Judgment. Thus, two different district court judges have reviewed this evidence and come to the same conclusion.

certain amounts on the contribution claim. (Appellants' Brief at p. 27). This request is premature under Iowa law.

In the event this Court rejects the arguments in Part I above and reverses the District Court, it should remand the case for further proceedings without ordering an entry of a money judgment. The Shapiro Group pled a counterclaim and cross-petition to preclude liability in the event the Plaintiffs were successful in their petition. (App. Vol. II pp. 267-270) ("WHEREFORE, the Shapiro Group pray that if judgment is entered against them in favor of Plaintiffs, that judgment likewise be entered against [Plaintiffs]. . . ."). This method of pleading a counterclaim is expressly authorized by the Iowa Rules of Civil Procedure, which allow parties to plead counterclaims to "diminish or defeat recovery sought by the opposing party." *See* Iowa R. Civ. P. 1.244. The District Court bifurcated the Shapiro Group's counterclaims, cross-claims, and third party petition in the case below because the Shapiro Group's claims were pled to be contingent upon Plaintiffs' recovering under their petition. *See* App. Vol. II p. 288 ("The present damage claims only become mature if the Shapiro Group is required to pay monies to Wells Fargo, which is the dispositive issue in the Plaintiffs' contribution claim in the present action."); App. Vol. II pp. 347-348 ("Prior to trial, the Court bifurcated the parties' claims. The only issue before this

Court relates to the Plaintiffs' claims against Defendants. The counterclaim, cross-claim, and third-party claims were bifurcated out and reserved for a later jury trial, if necessary."). Due to the resolution of the case, the counterclaim, cross-claims, and third-party claims were dismissed as moot. *See* App. Vol. II p. 357.

Remanding this case for further proceedings without ordering the entry of a money judgment would further the District Court's underlying goal and purpose of ordering separate trials regarding the Plaintiffs' claims and the Shapiro Group's counterclaim and cross-petition. The claims were bifurcated pursuant to Iowa Rule of Civil Procedure 1.914:

> In any action the court may, for convenience or to avoid prejudice, order a separate trial of any claim, counterclaim, cross-claim, cross-petition, or of any separate issue, or any number of any of them. Any claim against a party may be thus severed and proceeded with separately.

Separate trials of counterclaims and cross-petitions are permissible under this rule to "avoid duplication in time, effort or expense, and at a minimum inconvenience to the court, counsel, litigants, and witnesses." *Johanik v. Des Moines Drug Co.*, 235 Iowa 679, 683, 17 N.W.2d 385, 388 (1945). Here, the obvious purpose of ordering separate trials was to avoid the expense of trying multiple counterclaims and cross-petitions that would have only been relevant if the Plaintiffs were successful on their claim.

On remand, the District Court could hear and consider arguments regarding whether the Shapiro Group is entitled to a set off. A court is permitted to order a set off as an equitable remedy:

> Setoff is a remedial process by which a court reduces or cancels the claim of a party. The doctrine is essentially an equitable one requiring that the demands of mutually indebted parties be set off against each other and that only the balance be recovered in a judicial proceeding by one party against the other. In order to establish the right to a setoff, the demands must be mutual and must exist between the same parties, and be of the same grade and nature or due the same capacity or right.

In re Marriage of Ballstaedt, 606 N.W.2d 345, 350 (Iowa 2000) (internal citations omitted). Under Iowa law, the "[d]enomination of a pleading as a counterclaim does not prevent it from being used as a set off." *Dolezal v. City of Cedar Rapids*, 326 N.W.2d 355, 360–61 (Iowa 1982).

If successful, the Shapiro Group's counterclaim and cross petition satisfy the requirements for set off. If this Court finds that the Shapiro Group is liable to the Plaintiffs and the District Court determines the Shapiro Group's counterclaims and cross-petition are meritorious, the parties will be mutually indebted in equivalent amounts. The debts will be of the same grade and nature because they all arise out of the events surrounding the Wells Fargo debt. Plaintiffs' entitlement to recover would be defeated if the Shapiro Group prevails on the counterclaim or cross-petition. Equity and

common sense suggest that the proper remedy in this matter in the event of reversal would be to remand the case with instructions rather than ordering a money judgment in favor of Plaintiffs.

A remand would be appropriate here despite the tension between the above authority and Iowa Rule of Civil Procedure 1.957. Under the rules of appellate procedure, this Court may remand a case "if . . . in the opinion of the appellate court the ends of justice will be served, a new trial shall be awarded on all or part of the case." Iowa R. App. P. 6.1206. This is a sufficient basis to remand the case despite the tension between the procedural rules that permit counterclaims to be pled to defeat or diminish recovery and a court will not set off a claim and counterclaim except upon agreement of both parties or as required by statute. *Compare* Iowa R. Civ. P. 1.244 ("A counterclaim may, but need not, diminish or defeat recovery sought by the opposing party."), *with* Iowa R. Civ. P. 1.957 ("A claim and counterclaim shall not be set off against each other, except by agreement of both parties or unless required by statute.").[9]

[9] That rule states in full:

> A claim and counterclaim shall not be set off against each other, except by agreement of both parties or unless required by statute. The court, on motion, may order that both parties make payment into court for distribution, if it finds that the obligation of either party is likely to be uncollectible. If there are multiple

The record in this case suggests that the parties in this case understood that the claim and counterclaims and cross-petition would set each other off if all claims were successful. *See* App. Vol. II p. 288 ("The present damage claims only become mature if the Shapiro Group is required to pay monies to Wells Fargo, which is the dispositive issue in the Plaintiffs' contribution claim in the present action."); App. Vol. II pp. 267-270 ("WHEREFORE, the Shapiro Group pray that if judgment is entered against them in favor of Plaintiffs, that judgment likewise be entered against [Plaintiffs]. . . ."). However, because Plaintiffs were unsuccessful below, the record was never fully developed on this issue. Accordingly, a remand with instructions for further proceedings, including developing the record regarding the Shapiro Group's right to a set off, would be the appropriate remedy in the event this Court reverses the district court's ruling.

> parties and separate set-off issues, each set-off issue should be determined independently of the others. The court shall distribute the funds received and declare obligations discharged as if the payment into court by either party had been a payment to the other party and any distribution of those funds back to the party making payment had been a payment to that party by the other party.

Iowa R. Civ. P. 1.957

CONCLUSION

Therefore, pursuant to all of the arguments and authorities cited above, this Court should dismiss Plaintiffs' appeal as untimely, or, in the alternative, affirm the decision of District Court. In the event the District Court is reversed, the case should be remanded without entry of judgment.

REQUEST FOR ORAL ARGUMENT

Should the Appellants be granted oral argument, Appellees would respectfully request to be heard in oral argument.

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENTS AND TYPE-VOLUME LIMITATION

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(l) or (2) because:

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CERTIFICATE OF FILING AND SERVICE

The undersigned certifies a copy of Defendant-Appellees' Final Brief was filed with the Clerk of the Iowa Supreme Court via EDMS and served upon the following persons by EDMS on the 27th day of March, 2017.

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ATTORNEY'S COST CERTIFICATE

I hereby certify that the cost of printing the foregoing Final Brief was the sum of $ N/A (EDMS).

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