IN THE IOWA SUPREME COURT
No. 16-1265

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, SHCHARANKSY, (Counterclaim Defendant).

ALEX KOMM, ILYA MARKEVICH, BORIS PUSIN, VADIM SHAPIRO, and DMITRY KHOTS, (Cross-Petition Plaintiffs),	v.	BORIS SHCHARANSKY, ZOYA STAROSELSKY, LEONID SHCHARASNKY, 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 DISTRICT COURT OF POLK COUNTY
HON. DAVID PORTER

APPELLANTS' AMENDED AND SUBSTITUTED REPLY BRIEF

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INTRODUCTION

This case reduces to a single legal question about which the parties and the district court have gone around and around: When a plaintiff pays more than its fair share of a jointly held debt and then seeks contribution from its co-obligor, does it matter where the payor plaintiff got the money it paid to the creditor? The district court said "yes." With due respect, that was the wrong answer. All errors in this case—in which the pertinent facts are undisputed—flow from that wrong answer. Aside from a couple of unnecessary diversions (which are dealt with in divisions I. and III. below), this Court can correct all errors, restore this case to the realm of settled contribution law in Iowa and elsewhere, and direct judgment in the Plaintiffs' favor by properly answering the legal question "no." That is what this Court should do.

ARGUMENT

I. THE PLAINTIFFS' RULE 1.904 MOTION WAS PROPER AND NECESSARY TO PRESERVE ERROR AND FACILITATE THIS COURT'S REVIEW.

The Plaintiffs' Rule 1.904 motion was proper and necessary to preserve error. In arguing that the motion was not proper, the Defendants ignore vast chunks of the Plaintiffs' motion and the relief it requested.[1] *See*

[1] The Defendants' argument appears to be premised on a belief that a 1.904 motion cannot ask the court to revisit its legal interpretations. As the

App. 371-72. For example, in sections III and IV of the Plaintiffs' 1.904 Motion the Plaintiffs requested factual enlargement and modification of the findings associated with transfer of funds that the district court had not specifically addressed. *Sierra Club Iowa Chapter v. Iowa Dep't of Transp.*, 832 N.W.2d 636, 641 (Iowa 2013), *as revised on denial of reh'g* (July 15, 2013) ("Thus, when the district court fails to make specific findings, a rule 1.904(2) motion is an appropriate mechanism to preserve error. *Lamasters v. State*, 821 N.W.2d 856, 863 (Iowa 2012).").

Further even in sections I and II the Plaintiffs request enlargement, modifications, and amendments well beyond simply revisiting its legal interpretations. Given the conclusory nature of the court's ruling, the Plaintiffs requested additional, specific findings and conclusions in order to understand the basis for the court's holding. That is unquestionably a proper use of Rule 1.904, particularly where the ruling itself is somewhat "cryptic." *Id.* at 641 ("Similarly, [a Rule 1.904 motion] can be used to better enable a

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Iowa Supreme Court made clear in the *Hedlund* case that the Defendants cite, the fact that a motion seeks reconsideration of a legal ruling does not somehow negate that the motion seeks modification and enlargement of the factual findings and legal conclusions. *See Hedlund v. State*, 875 N.W.2d 720, 727 (Iowa 2016) ("Thus, Hedlund's motion did not address any actual or possible factual misconceptions by the district court. It did not address lacunae in the court's ruling. It was not necessary to preserve error for appeal. It simply cited more authority in support of the same arguments that had already been rejected.").

party to attack 'specific adverse findings or rulings in the event of an appeal' by requesting additional findings and conclusions.") (internal citations omitted); *Hedlund*, 875 N.W.2d at 727 (noting proper use of 1.904 motion when the district court's "reasoning [is] so cryptic as to raise preservation-of-error concerns"). In addition, the motion was arguably necessary to preserve error for the arguments on appeal.[2] *See Eldridge v. Herman*, 291 N.W.2d 319, 321 (Iowa 1980) (If no motion for enlargement of findings was made, the appellate court will "assume all unstated findings necessary to support the judgment.").

[2] As discussed *infra* pp. 8-11, the district court's 1.904 ruling did indeed clarify and elaborate on the legal and factual basis for the court's refusal to give legal effect to the transfer that occurred from the Plaintiffs' parents to the Plaintiffs. That example alone illustrates the propriety of the Plaintiffs' motion, which not only served the purpose of preserving error but also facilitated this Court's review. *See Sierra Club*, 832 N.W.2d at 640–41 ("The rule can be used by a party, with an appeal in mind, as a tool for preservation of error. Similarly, it can be used to better enable a party to attack 'specific adverse findings or rulings in the event of an appeal' by requesting additional findings and conclusions"); *Johnson v. Kaster*, 637 N.W.2d 174, 182 (Iowa 2001) ("The purpose of a rule 179(b) motion is 'to advise counsel and the appellate court of the basis of the trial court's decision in order that counsel may direct his attack upon specific adverse findings or rulings in the event of an appeal.'") (internal citations omitted).

II. THE DISTRICT COURT IMPROPERLY REJECTED PLAINTIFFS' CONTRIBUTION CLAIM BASED UPON AN ERRONEOUS INTERPRETATION OF CONTRIBUTION LAW.

The district court's ruling muddles Iowa contribution law by inquiring into whether the Plaintiffs used funds derived from someone else. Based on that inquiry, the court held that the Plaintiffs could not recover for contribution solely because they used funds they had received from their parents. App. 392. ("Plaintiffs failed to demonstrate they were indebted to their parents under Iowa law, and, therefore they were not entitled to contribution."). That holding is based upon an erroneous view of Iowa law. That inquiry, and the fatal consequences the court's ruling attaches to it, has no place in contribution law.

Instead, the Plaintiffs only were required to prove two elements to be entitled to contribution. They needed to show (1) that they were the payors and (2) that they paid more than their fair share of a joint obligation. *See Hills Bank & Trust Co. v. Converse*, 772 N.W.2d 764, 772, 773 (Iowa 2009) (adopting the Restatement approach for determining the contributive share of cosureties); Restatement (Third) of Restitution and Unjust Enrichment § 23 (2011) ("If the claimant renders to a third person a performance for which claimant and defendant are jointly and severally liable, the claimant is entitled to restitution from the defendant as necessary to prevent unjust

enrichment."). Notably, the Restatement says nothing about where the "claimant" got the money used to "render to a third person performance." Under the proper test, the Plaintiffs – having, as no one disputes, written the checks from their bank accounts and those checks having paid off the entire joint obligation – easily satisfy Iowa contribution law.[3]

While this case presents a straightforward claim under contribution law, the district court misread *Allison v. L.E. Allison Estate*, 560 N.W.2d 333 (Iowa 1997), and conflated the two elements necessary to show grounds for contribution. In conflating the two elements, the court did not properly apply either. Specifically, in determining whether the Plaintiffs paid more than their share (the second element), the court asked whether the plaintiffs used money that was either gifted or borrowed. App. 355-57. The court then held that absent proof by the Plaintiffs that they were "*required* to repay

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[3] To be clear, no one disputes that the transfers from the Plaintiffs' parents to the Plaintiffs occurred and that the Plaintiffs then wrote the checks from their accounts to pay off the joint debt. In other words, everyone agrees that as a factual matter the Plaintiffs did actually make the payments. App. 392. ("In brief, the Court found Alex Shcharansky (Alex) and Tatiana Shcharansky (Tatiana) (collectively Plaintiffs) made several loan payments to Wells Fargo using money they received from their parents."); App. 356. ("*The monies were sent to Alex and Tatiana* for the sole and specific purpose of sending those monies on to Wells Fargo as repayment of the loans.") (emphasis added). The district court's determination to the contrary was based not on the facts of the transactions but only on its *legal* conclusion that because the monies originated from their parents, it was "actually" the parents who made the payments.

the third parties which supplied the funds,"[4] the Plaintiffs could not show they paid more than their share. App. 394. ("Plaintiffs did not demonstrate that they are required to repay the third parties which supplied the funds. *Therefore*, they did not demonstrate that they were made to pay more than their share or that they were entitled to contribution.") (emphasis added).

The court then bootstrapped that conclusion to hold that because the Plaintiffs were not required to repay their parents, the first element was not satisfied, and it was the parents who "actually" made the payments. App. 355. ("Here, Alex and Tatiana used the parents' money to pay off the Wells Fargo obligation."). By injecting the irrelevant question of the source of the funds into contribution law, the district court created a rule of law in which a plaintiff, *solely because she uses money derived from someone else*, is barred from recovering in contribution. From that fact alone, the ruling creates two legal fictions: (1) that the Plaintiffs did not "actually" make the payments

[4] In both its initial ruling and its 1.904 ruling, the court's findings were focused on whether the monies transferred to the Plaintiffs from their parents were loans. App. 392. (emphasizing there was no "writing, such as a promissory note," no "collection proceedings," no reporting to credit bureaus," and no payments back to the parents). While the Plaintiffs disagree that these formalities are required for an intra-family loan, that inquiry misses the point entirely. It is irrelevant under contribution how, when, and from whom the Plaintiffs obtained the funds. As discussed *infra* at pp. 13-16, it is only relevant whether the funds actually belonged to the contribution plaintiffs at the time of the payments such that they "made the payments."

(despite undisputed transactions showing they did), and (2) that the Plaintiffs did not pay "more than their share" (even though it was undisputed that they paid off the entire debt).

The district court's test not only leads to inequitable consequences that are plainly at odds with a claim grounded in principles of unjust enrichment, it also has no basis in Iowa law or the equitable law of contribution as it is widely understood. First, as discussed below and in Appellant's opening brief, *Allison* does not create the test applied by the district court. Second, the generally recognized law of contribution does not ask about the source of the payor's funds to determine a right to contribution.

First, *Allison* simply does not stand for the principle, as the district court's ruling posits, that "the source of funds [i.e., from where the plaintiff originally received those monies] is entirely relevant." App. 349. *Allison* did not establish this new inquiry and requirement under contribution law. It merely applied well-established contribution law (that requires the plaintiff to prove she made the payment) to a highly unusual fact situation. In *Allison*, the plaintiffs seeking contribution had not actually made the payments on the joint obligation, but were attempting to stretch contribution law by arguing that despite not actually paying the money, they somehow as

a legal matter were the ones who made the payments. *Allison*, 560 N.W.2d at 334-35. That required more than a few mental gymnastics, including proving that the plaintiffs "*were obligated to repay the son–in-law*." App. 394. (emphasis added). Instead of viewing that as a factual burden of those plaintiffs unique to that case and without which they could not possibly show they "made the payments," the district court here took this to mean that the "source of funds is entirely relevant" to *any* contribution claim and that a contribution plaintiff who uses funds received from someone else must demonstrate an "obligation to repay" those funds.

That is a grave misreading of *Allison*. If accurate, the district court's interpretation would turn Iowa contribution law on its head and considerably undermine its ability to achieve equity. Fortunately, *Allison* fits well with existing and long-established Iowa contribution law in that it simply asks "did the plaintiff make the payments?" Although that question obviously took on special inquiry and scrutiny in *Allison* when the funds were not paid by the contribution plaintiffs, it is easily satisfied when, as here, the contribution plaintiffs actually wrote the checks with funds in their bank accounts.[5]

[5] Notably, it is only through this misreading of *Allison* that the Court reaches the conclusion that the Plaintiffs had the additional "burden" of showing the "nature of these transactions" from their parents. App. 395.

Other than *Allison*, the Defendants do not purport to cite any Iowa law that would permit courts to scrutinize the money *that the payor* uses to pay more than her share of a joint obligation. The generally recognized law of contribution does create this barrier to recovery either. The Restatement (Third) of Restitution and Unjust Enrichment states, simply, that "[i]f the claimant renders to a third person a performance for which claimant and defendant are jointly and severally liable, the claimant is entitled to restitution from the defendant as necessary to prevent unjust enrichment." *Id.* § 23. The payor thus establishes her right to contribution by showing that (1) that she was in fact the payor (a straightforward proposition in this case, as in most cases) and (2) that she paid more than her fair share of a joint obligation (the fighting issue in many contribution cases, but not at issue here).[6]

Given that the Plaintiffs produced evidence showing that outright transfers of funds occurred – including from whom, when, how, and why – it is difficult to imagine what additional proof the Plaintiffs could have offered to convince the court the funds belonged to them when they made the payments.

[6] Indeed, even if it had been the parents who had directly made the payments (rather than outright transferring the money to the Plaintiffs), as long as they did so on behalf of the Plaintiffs, a contribution claim would still lie for the Plaintiffs. *See Wold v. Grozalsky*, 277 N.Y. 364, 368, 14 N.E.2d 437, 439 (1938) (holding a contribution claim lies for a plaintiff when "the judgment was paid on behalf of [the plaintiff]," because "[t]here can be no doubt that he would have such right if he had paid the money

Likewise, the defenses to a contribution action do not include a defense that the payor paid the joint obligation with money obtained from someone else. *See id.* §§ 62-70. Instead, defenses to contribution actions focus on equity *between the parties*. For example, a defendant could attempt show that "when the challenged transaction is viewed in the context of the parties' further obligations to each other" the defendant was not unjustly enriched (*id.* § 62), that the claimant has unclean hands (*id.* § 63), laches (*id.* 70), or other defenses that sound in equity. None of those defenses were raised here.[7]

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himself and in fact and effect this is what happened."); *M&I Bank v. Cookies on Demand, L.L.C.*, 270 P.3d 1229 (Kan. Ct. App. 2012) (allowing plaintiff to recover for contribution where "payment was made on [the plaintiff's] behalf" by a company in which the plaintiff and his wife were owners); *Byrnes v. Phoenix Assur. Co. of N.Y.*, 178 F. Supp. 488, 491 (E.D. Wis. 1959) ("Any amount thereof paid by [the plaintiff] or in his behalf, in excess of one-half of the judgment vests rights of contribution against [the defendant] in [the plaintiff], to which rights any party who paid on behalf of [the plaintiff] may be subrogated."). Indeed *Allison* itself recognized this line of authority, insofar as the Court suggests the outcome would have been difficult had the plaintiffs proven they were, despite not making the payments, obligated to repay their son-in-law for the payments he made to the defendants. *See Allison*, 560 N.W.2d at 335.

[7] Instead of citing Iowa law or raising a recognized defense here, the Defendants urge this Court to adopt an approach apparently used in a nearly 100-year-old case from a California court. It is not surprising that the Defendants were unable to locate Iowa law, let alone modern support, for their proposition that the "true payment" was made by a third party, because

As a last-ditch effort, the Defendants contend that the district court's ruling was premised on factual findings from which it could be inferred that there was wrongdoing by the Plaintiffs to defeat their contribution claim. However, this case was not about the facts, which were for all intents and purposes undisputed, but rather about the legal inferences drawn from those facts. While the district court expressed "skepticism" about the transactions here (as well as other conclusory labels such as referring to the transfer as "window dressing designed" to hide the parents' involvement), that skepticism was not borne from any evidence of a cover-up, a scheme, or ulterior and improper motives.[8] Rather, it was merely borne from the district court's conclusion, based on its misreading of *Allison*, that there is

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modern courts specifically reject such a theory. *See id.* § 64 (the "passing on" defense). Comment b to Section 64 states that:

> By the rule of this section the fact of "passing on" is established by asking whether C (rather than B) is the person ultimately entitled to restitution. If so, the relevant question as a practical matter is whether restitution from A to B will facilitate recovery by C. If it would, the fact of B's passing on is no defense for A.

[8] That the Court of Appeals left open the possibility that there might be factual disputes, including credibility determinations, regarding who made the payments does not mean it held that the source of funds was relevant here. As *Allison* itself confirms, had the Plaintiffs not actually have been the ones to make the payments as a factual matter, an inquiry into who issued the payments and on whose behalf may have been relevant.

something inherently suspicious about a contribution plaintiff using monies obtained from someone else. Despite the Plaintiffs' specific request in their Rule 1.904 motion that the court specify the legal and factual basis for its determination that it was the Plaintiffs' parents who made the payments,[9] the district court notably did not make any findings or reference any wrongdoing that presumably would have formed the basis of its nullification of the transfer. Instead, the district court punted on the question posed, issuing no additional findings or rulings, and merely stating that it "has a hard time describing exactly what these transactions [to plaintiffs from their parents] were." App. 395. Thus, despite its ruling that necessarily was based on its conclusion that the transfers were invalid, it pointed to no claims of wrongdoing.

Thus, instead of making findings that would "render that transfer of funds somehow legally invalid, improper, or inexistent," as the Plaintiffs' motion requested, the court stated that it had no obligation to do so. It held that it was the Plaintiffs' burden, not the court's, to show the nature of these

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[9] App. 373. (requesting enlargement of findings and conclusions showing "what transaction the Court concludes happened between the Plaintiffs and their parents" and requesting that because the initial ruling "renders that transfer of funds somehow legally invalid, improper, or inexistent, it is necessary for the Court to explain the findings of facts and legal principles that support its conclusion.").

transfers. But, as explained in footnote 5, the Plaintiffs carried their burden through undisputed evidence showing that they obtained the funds and how they did so. As the district court's ruling implicitly rejected that evidence, it was incumbent upon the district court to explain the factual or legal basis for doing so. That it did not point to any such factual basis, and instead deflected the question, indicates that its legal ruling was not grounded in any specific factual determinations of wrongdoing but rather the erroneous interpretation of *Allison* that infected the ruling as a whole.

Lacking any evidence of fraud, a scam, or other inequitable conduct that would invalidate the transfers, the Defendants attempt to make something of the so-called "inconsistent stor[ies]" of the Plaintiffs. That argument is a red herring, intended to divert this Court's attention from the undisputed facts that showed that those transferred occurred. The Plaintiffs consistently described the facts about how and why they got the funds: Namely, the Plaintiffs asked their parents for money, told them the purpose for which they needed it, their parents transferred the monies to the accounts of the Plaintiffs for that purpose, and from those accounts the Plaintiffs paid off the Wells Fargo debt. There was no evidence to suggest they had attempted to "hide" from where they had gotten the funds, and there was no

"inconsistency" about the actual transferring of the funds.[10] The so-called inconsistency seized on by the Defendants is not about what happened, but what label the Plaintiffs attached to it, sometimes labeling the transfer a loan and other times a gift. Given that the transfer had features of both, and it is irrelevant under contribution law which it was, the variance is irrelevant to the critical inquiry of who "made the payments."

III. THE APPROPRIATE RELIEF IS ENTRY OF JUDGMENT FOR THE PLAINTIFFS ON THEIR CONTRIBUTION CLAIM.

Because the district court denied the Plaintiffs' contribution claim based entirely upon an error in law, the appropriate relief is that judgment be entered for the Plaintiffs. There is no legal or factual basis to bar the Plaintiffs' claim and, in fact, inequity will result if the Defendants are allowed to remain unjustly enriched. While the Defendants are correct that the district court siphoned off the Defendants' legal claims (something it did over the Defendants' objection), that does not prevent entering judgment on the equitable claim that was before the district court. *See Merten v. Eggers*, 776 N.W.2d 112 (table), 2009 WL 2952064, at *3 (Iowa Ct. App. 2009)

[10] Similarly, the district court's holding that the Plaintiffs acted as mere "conduits" for their parents to make the payments makes no sense here. The parents had no dog in this fight, so the concept that they would need their children to act as their "conduit" has no basis in reality. The undisputed evidence was that the parents transferred the money to their children to help their children, not to help themselves or to help the defendants.

(quoting *Fallers v. Hummel,* 151 N.W. 1081, 1083 (Iowa 1915) ("[E]quity, having obtained jurisdiction, will determine all questions material or necessary to the accomplishment of full and complete justice between the parties, even though in doing so it may require passing on some matters ordinarily cognizable at law").

As the district court ruling states, "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. 288. (citing 11/17/2011 Ruling on Defendant's Motion for Summary Judgment). In this appeal, the Plaintiff simply asks that the Court enter judgment on the only question that was before the district court, which is precisely the relief the Plaintiffs requested in the district court and were entitled to in the district court under a proper reading of contribution law. If Defendants wish to somehow stay collection of that judgment based upon their third-party claims and counterclaims that they will argue should offset that judgment, that matter should be raised in the district court upon remand.

CONCLUSION

For these reasons, the Plaintiffs request that this Court reverse the district court's judgment, enter judgment in their favor as set forth in their

opening brief, and remand this case for proceedings on the legal claims asserted by the Defendants.

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on March 23, 2017, I electronically filed the foregoing Amended and Substituted Reply Brief with the Clerk of the Supreme Court by using the Iowa Electronic Document Management System which will send notice of electronic filing to the following. Per Rule 16.317(1)(a), this constitutes service of the document for purposes of the Iowa Court Rules.

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that:

1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) because this brief contains 3,893 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

2. This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface using Word 2010 in Times New Roman 14 pt.

Dated: March 23, 2017

/s/ Michele Baldus