IN THE SUPREME COURT OF IOWA

No. 16-1265

ALEXANDER SHCHARANSKY
And TATIANA SHCHARANSKY,
(Plaintiffs-Appellants)

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

APPEAL FROM THE DISTRICT COURT
OF POLK COUNTY
HON. DAVID PORTER

APPELLANTS' APPLICATION FOR FURTHER REVIEW OF COURT OF APPEALS DECISION DATED JULY 6, 2017

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QUESTION PRESENTED FOR REVIEW

I. When a party pays a joint debt with funds from her own account and then seeks contribution from a co-debtor, is it a defense to her contribution claim that she received the funds that she used to pay the debt from a third party?

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STATEMENT SUPPORTING FURTHER REVIEW

The Court of Appeals' opinion squarely "conflict[s] with a decision of this court," and upsets settled law of this State, thus warranting further review. *See* Iowa R. App. P. 6.1103(b)(1). The Court of Appeals' opinion purports to adopt language from a treatise, 18 Am.Jur.2d *Contribution* § 11, ("§ 11 or "Section 11"), as the law of contribution in Iowa. In so doing the opinion contradicts this Court's decision in *Allison v. L.E. Allison Estate*, 560 N.W.2d 33 (Iowa 1997), which rejects the approach set forth in § 11 in favor of a common sense standard.

Worse, even if § 11 were authoritative in Iowa, the Court of Appeals' opinion misconstrues it. The Court of Appeals read § 11 as barring recovery from a joint debtor simply because the contribution plaintiff received the money that paid the joint debt from someone else. Section 11 – which by its own terms applies only when someone *other than the contribution plaintiff* actually made the payment – has not been interpreted that way in any jurisdiction. Doing so now will allow joint debtors to unjustly escape their obligations. The Court of Appeals' opinion therefore "chang[es] [the] legal principles" of the established law of equitable contribution in a manner that is not only ill-advised but that should be first addressed by this Court. *See* Iowa R. App. P. 6.1103(b)(3).

TABLE OF AUTHORITIES

Cases

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STATEMENT OF THE CASE

In this action, Plaintiffs Alexander and Tatiana Shcharansky, a husband and wife (the "Shcharanskys") sought contribution from the Shapiro Group Defendants[1] for payments the Shcharanskys made on a debt owed to Wells Fargo Bank ("Wells Fargo"). The primary obligor on the debt was Continuous Control Solutions, Inc. ("CCS"). Certain members of the Shcharansky Group[2] and members of the Shapiro Group personally guaranteed that debt. The debt was incurred while CCS was under the control of the Shapiro Group Defendants. In 2007, control of CCS passed from the Shapiro Group to members of the Shcharansky Group.

In 2009, Wells Fargo obtained a judgment on its loans against CCS as well as against the personal guarantors of the loans, including the Shapiro Group Defendants. Following that judgment, CCS entered into a forbearance agreement with Wells Fargo that required it to make a large lump sum payment to Wells Fargo and quarterly payments thereafter. CCS at all times used its best efforts to make those payments but nonetheless was unable to make those payments beginning in June of 2010.

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1 The Shapiro Group Defendants are comprised of Defendants Vadim Shapiro, Boris Pusin, Ilya Markevich, Alex Komm, and Dmitry Khots.

2 The Shcharansky Group is comprised of Plaintiffs Alexander and Tatiana Shcharansky and related parties not involved in this litigation.

Rather than allow Wells Fargo to enforce its judgment against the guarantors individually – including the Shapiro Group guarantors – the Plaintiffs discharged the remaining debt obligation from their personal accounts. They did so with monies that their parents transferred to them outright. The Plaintiffs then brought a claim seeking equitable contribution from each of the Defendants for their respective shares of the payments made by the Plaintiffs.

This is the Plaintiffs' second appeal in this case. On January 23, 2013, the Plaintiffs appealed the district court's grant of summary judgment in favor of the Shapiro Group Defendants. On November 20, 2013, the Court of Appeals reversed the summary judgment ruling, holding that factual issues existed barring summary judgment in the Shapiro Group's favor, and remanded this case for trial.

On remand from the Court of Appeals, the district court held a bench trial in this matter on December 7 - 8, 2015.[3] The trial concerned a single claim[4] brought by the Shcharanskys against the five Shapiro Group Defendants for contribution. Following trial, the district court requested and

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[3] For reasons immaterial to this appeal, the trial did not occur until almost two years later.

[4] Prior to trial, the Court bifurcated out a counterclaim, cross-claim, and third-party claim for a later jury trial, if necessary.

the parties submitted proposed findings and conclusions. On February 29, 2016, the district court entered judgment for the Defendants and dismissed the remaining claims. On March 15, 2016, the Plaintiffs filed a motion to amend and enlarge under Iowa Rule of Civil Procedure 1.904(2). Following briefing by the parties and a hearing, on July 8, 2016, the district court entered a six-page ruling denying the Plaintiffs' Rule 1.904 Motion.

On July 22, 2016, the Plaintiffs timely filed their notice of appeal. Following briefing by the parties, this case was transferred on April 27, 2017 to the Court of Appeals' non-oral argument calendar. On July 6, 2017 the Court of Appeals filed its opinion affirming the district court's dismissal of the Plaintiffs' contribution action.

ARGUMENT

In most respects, this case presents a straightforward claim for contribution: The Plaintiffs and Defendants were co-guarantors on a debt arising from a loan. With monies from their personal accounts, the Plaintiffs paid off the joint debt in its entirety. They then sought contribution from the co-guarantor defendants. Under well-settled contribution law their recovery should be all but assured. *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.").

However, the Court of Appeals held that because the Plaintiffs got the money they used to pay the debt from their respective parents, they did not "personally" make the payments and thus failed to prove their claim for contribution. Opinion at 10. The holding was based entirely on an erroneous interpretation of contribution law. Namely, the Court adopted and interpreted a single "authority" -- 18 Am.Jur.2d *Contribution* § 11 -- as standing for the far-reaching proposition that a contribution plaintiff cannot recover if she pays off the joint debt with money that she received from someone else.[5] The opinion is wrong for two reasons, both of which warrant this Court's review.

I. THE OPINION CONFLICTS WITH THIS COURT'S DECISION IN *ALLISON.*

In adopting § 11 as authoritative contribution law in Iowa, the Court of Appeals' opinion conflicts with this Court's decision in *Allison v. L.E.*

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[5] At one point in its opinion, the Court of Appeals quotes § 11 but through an "*id.*" cite mistakenly cites to § 1. Opinion at 8. Elsewhere the opinion correctly cites to § 11. Opinion at 9. To be clear, § 11 is the one at issue in this case.

Allison Estate, 560 N.W.2d 33 (Iowa 1997). *Allison* involved a case in which § 11 is intended to apply: a case in which the joint debt is, as a factual matter, literally paid by someone other than the contribution plaintiff. Section 11 reads: "Payment by another other than an obligor, even though for an obligor's benefit, gives the obligor no right of contribution." *Allison* did not, however, adopt § 11's bright-line approach that bars recovery because someone else makes the payment. Instead, *Allison* adopted a more flexible approach that permits a contribution plaintiff to recover a payment actually made by a third party if the plaintiff proves the third party's payment was made for the plaintiff's benefit.[6] *See Allison*, 560 N.W.2d at 335. The Court of Appeals' opinion, in adopting § 11 as authoritative, is plainly inconsistent with *Allison*.[7] And, tellingly, the Court of Appeals'

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[6] The facts of *Allison* were such that in order to show the third party's payment was made for the plaintiffs' benefit, the plaintiffs had to show they were indebted to the third-party payor. They could not. They were not indebted to the third party, he made the payments on his own behalf, and this Court thus found that the plaintiffs had not themselves paid "more than [their] just share of a common burden or obligation." *Id.* at 335.

[7] All of this goes well beyond the facts of the instant case. Here, unlike the situation under consideration in *Allison* and in § 11, *the third parties were not the payors*. The Shcharanskys' parents paid the money to the Shcharanskys. Then the Shcharanskys paid the money to Wells Fargo *directly*. That is why, as discussed *infra* Part II, § 11 has no bearing in this case.

opinion did not cite to *Allison*, despite the parties' extensive briefing of that decision.

This Court in *Allison*, like other courts, rejected the approach set forth in § 11 for reasons consistent with the broad equitable purpose of contribution law. *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 himself and in fact and effect this is what happened.");[8] *M&I Bank v. Cookies on Demand, L.L.C.*, 270 P.3d 1229 (Table), 2012 WL 686714 , at *7 (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.").

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[8] The tension between this line of cases and that set forth in § 11 is demonstrated by the fact that the *Wold* case is cited as a "but see" authority in the notes to § 11.

II. THE OPINION ERRONEOUSLY INTERPRETS SECTION 11 TO BAR VALID CONTRIBUTION CLAIMS TO WHICH THAT SECTION IS INAPPLICABLE.

The Court of Appeals' adoption of § 11 in conflict with *Allison* is bad enough, but that court compounded the error by stretching § 11 to apply to this case where it simply has no bearing. By its plain terms, § 11 applies only when someone other than the contribution plaintiff makes the payment – as § 11 puts it, a "payment by another." Section 11 does not apply when the plaintiff herself makes the payment, regardless of where she got the money. A diligent Westlaw search of § 11 reveals that that section[9] has never been interpreted as applicable when payment was made directly by the plaintiff. Nor does any case cited in § 11 contain that fact pattern.[10] Rather, that section has without exception only been invoked, and the cases it relies upon only spring from fact patterns, when another person actually made the payment.[11] In other words, that section has everything to do with who

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[9] That search included searching for § 11 under its former numbering, § 12, as well as its current numbering. To add to the confusion, this Court has cited to former § 11 (now § 10) in *Stewart v. DeMoss*, 590 N.W.2d 545, 547 (Iowa 1999).

[10] Section 11 cites only four cases, one of which is a "but see" authority. All of these cases, like those that cite to § 11, are ones in which someone else made the payment.

[11] This raises an important point about a treatise such as Am. Jur. 2d. A treatise is not "the law." It is an attempt by scholars to state what the law is

actually paid the creditor and nothing to do with where the funds might have originated before the actual payor paid. Thus § 11 does not, as the Court of Appeals reasoned, authorize a court to ignore actual transfers and actual payments in favor of a legal fiction. And it does not permit a court to hold that someone who had relinquished money through an unrestricted transfer was the "real" payor, rather than the party to whom it relinquished that money.

The Court of Appeals' opinion thus misinterprets § 11 to apply in a context in which its application makes no sense. That section arguably makes sense (as held by some jurisdictions, but not Iowa) as a limit to recovery in situations in which someone other than the plaintiff directly makes the payment. In such cases a court may be skeptical as to whether the monies, when directly paid by someone else, were actually paid on behalf of the plaintiff for the joint debt. However, that rationale does not apply when the plaintiff actually makes the payment.

More broadly, the Court of Appeals' opinion's focus on where the Plaintiffs got the money they used to pay the joint debt is simply misplaced. As a legal matter, it does not matter to their contribution claim

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based on research in actual sources of law—here, cases addressing the point in question. It is the cases, not the treatise, that are authoritative. If those cases do not support what Court of Appeals has ruled, no reading of a treatise, much less a tortured one as here, can be a substitute.

whether the Shcharanskys got the money from their parents, earned it, won it at Prairie Meadows, or found it on the ground. If they paid the money, they are entitled to contribution. Indeed, that is just what the Court of Appeals said the first time it had this case. In response to a recitation of facts about the monies the Shcharanskys got from their parents, that court said:

> We believe these "facts" miss the point. The claim at issue is Alexander and Tatiana's claim for contribution. It is apparently undisputed the funds at issue that were used to pay Wells Fargo came directly from Alexander and Tatiana's bank accounts. ... In light of the undisputed fact that some payments were made from the personal bank accounts of Alexander and Tatiana to satisfy the Wells Fargo obligation, if the finder of fact determines the members of the Shapiro Group were coguarantors (and therefore cosureties) of the obligation of CCS to Wells Fargo, then we believe a genuine issue of material facts exists as to whether Alexander and Tatiana have a right to contribution (and how much) against them under Restatement (Third) of Suretyship and Guaranty § 55.

Shcharansky v. Shapiro, 842 N.W.2d 387 (Table), 2013 WL 6116883, at *1 (Iowa Ct. App. 2013) ("*Shcharansky I*").

In fact, the Court of Appeals' current opinion badly obscures the meaning of its prior opinion on this point. The current opinion quotes the earlier opinion as "finding 'that the source of the funds is critical to Alexander and Tatiana's claim of contribution...'" Opinion at 5. That quotation is neither quite accurate nor is it in context. Here is what the

Court of Appeals actually said in 2013, immediately after the passage quoted above:

> 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 a 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 I, at *1 (emphasis supplied). Further, in a footnote, the Court of Appeals pointed out that the "conspiracy" reference was suggested by the Shapiro Group; the Court of Appeals did not mean to suggest that there was anything improper about the transfer of funds from parents to adult children in this case.[12]

In sum, the Court of Appeals not only impermissibly twisted § 11 to decide this case, it impermissibly twisted its own prior opinion and created destructive precedent for the law of contribution in Iowa along the way. Further review by this Court is required to rectify that error.

CONCLUSION

For the foregoing reasons, Alexander and Tatiana Shcharansky respectfully request that the Court grant further review of the Court of Appeals decision dated July 6, 2017 and reverse the Order: Ruling &

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[12] In the trial at issue in this appeal, the evidence did not support a finding of a conspiracy or wrongdoing, and the Court of Appeals' decision did not address, let alone decide the appeal, on that basis.

Judgment Entry entered on February 29, 2017, and the Order Ruling on Plaintiff's Motion to Amend And Enlarge entered on July 8, 2017.

REQUEST FOR ORAL ARGUMENT

If this application is granted, Alexander and Tatiana Shcharansky respectfully request oral argument on the issues addressed above.

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on July 26, 2017, I electronically filed the foregoing Application for Further Review 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 2,243 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: July 26, 2017

/s/ Michele Baldus