IN 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).

IOWA COURT OF APPEALS OPINION FILED JULY 6, 2017

APPELLEES' RESISTANCE TO APPLICATION FOR FURTHER REVIEW

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STATEMENT OF THE ISSUES

I. Did the Court of Appeals err in affirming the district court and concluding the Plaintiffs-Appellants failed to prove a right to contribution when they failed to establish they were personally forced to bear more than their just share of the common debt?

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STATEMENT RESISTING FURTHER REVIEW

The Application for Further Review should be denied because the Iowa Court of Appeals and district court correctly applied long-standing legal principles of equitable contribution, and prior decisions of this Court, in determining Plaintiffs-Appellants did not demonstrate they were personally forced to bear more than their just share of the debt, and therefore, dismissing their claim. Initially, after a two-day bench trial, the district court applied the holding from *Allison v. L.E. Allison Estate*, 560 N.W.2d 333, 335 (Iowa 1997), and other decisions of this Court, to conclude a contribution plaintiff cannot be successful unless there is proof the plaintiff was forced to bear more than his or her share of a common burden. Thereafter, the Iowa Court of Appeals affirmed the district court's holding by citing to the exact same legal principle found in a different authority—18 Am. Jur. 2d Contribution § 11 (hereinafter "§11"). The holding in *Allison* and the language of § 11 are entirely consistent. Both courts found that Plaintiffs-Appellants' parents paid off the debt. Thus, the Plaintiffs-Appellants did not bear more than their share of the common debt, and contribution was accordingly denied.

Plaintiffs-Appellants frame the question presented for review to this Court as,

> 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?

(Application at 2). In fact, the question as phrased above has no relevance to the case at bar and impermissibly attempts to shift the burden of proof. Instead, under Iowa law, a contribution plaintiff must first establish in equity that he or she is entitled to be reimbursed for the funds used to pay the common debt. Plaintiffs-Appellants' argument and interpretation of the law would allow parties to manufacture artificial contribution claims by simply passing third-party money through the hands of a co-obligor on the way to a lender.

Finally, it must be noted that the Plaintiffs-Appellants asked for this case to be transferred to the Court of Appeals in the Routing Statement of their brief. (Appellants' Brief at 1). Now, unhappy with the correct application of those existing legal principles, they seek further review. Their Application should be denied.

STATEMENT OF THE FACTS

This case was tried to the district court in equity and reviewed by the Iowa Court of Appeals de novo. Thus, the undisputed facts and testimony of witnesses set forth below was critical in the analysis by both courts. *Hadsall v. West*, 246 Iowa 606, 620, 67 N.W.2d 516, 524 (1954) (while appeal of equitable action is reviewed de novo, appellate court gives special deference to probative value of witness testimony as determined by district court).

I. 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 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; 421–37).

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

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. 264–70).

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 (Iowa Ct. App. 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).

II. 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).

A. 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 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.

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

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).

B. 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 did 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).

III. 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

[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).

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 multi-million dollar 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]

ARGUMENT

I. THE IOWA COURT OF APPEALS AND DISTRICT COURT CORRECTLY HELD PLAINTIFFS' CONTRIBUTION CLAIM FAILED BECAUSE PLAINTIFFS DID NOT ESTABLISH THEY WERE FORCED TO BEAR MORE THAN THEIR SHARE OF THE DEBT.

Under Iowa law, "in the absence of any proof the **plaintiffs** have been compelled to pay more than their share of the parties' common burden," a

[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).

contribution claim is properly dismissed. *Allison*, 560 N.W.2d at 335 (emphasis added). Here, Plaintiffs had a two-day trial to prove they **personally** discharged more than their share of the debt—they did not. Accordingly, the Iowa Court of Appeals and district court correctly dismissed Plaintiffs' contribution claim.

Plaintiffs' Application for Further Review fundamentally misstates well-established equitable contribution law in Iowa by claiming, "[i]f they paid the money, they are entitled to contribution." (Application at p. 14). Moreover, Plaintiffs' attempt to obtain further review with this Court by claiming the district court and Iowa Court of Appeals misinterpreted this Court's decision in *Allison* and erroneously constricted equitable contribution law in Iowa. Iowa law has never allowed a co-obligor to scheme his or her way to an equitable contribution claim under the notion that the subject money simply passed through the claimant's bank account. Here, ignoring this long-standing principle, Plaintiffs claim that as long as a co-obligor can establish the subject debt payment touched the co-obligor's hands at some point in time, a contribution claim accrues. The right to contribution in Iowa is not this broad, and therefore, Plaintiffs' claims are incorrect.

According to Plaintiffs' Application, the Court of Appeals' decision conflicts with *Allison* because in *Allison* the contribution plaintiff did not "actually" make the payment, but here, Alex and Tatiana, "actually" made the payment by writing the subject checks to Wells Fargo. (Application at p. 10). However, contrary to Plaintiffs' argument, the primary point of *Allison* was not who ultimately wrote the check. Rather, the primary holding was "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*, 560 N.W.2d at 345 (emphasis added). This holding of *Allison* has long been the law in Iowa. *See Franke v. Junko*, 366 N.W.2d 536, 540 (Iowa 1985) (holding right of contribution does not accrue until a tortfeasor has discharged more than his proportionate share of common obligation); *Hawkeye-Security Ins. Co. v. Lowe Constr. Co.*, 251 Iowa 27, 33, 99 N.W.2d 421, 426 (1959) (same). Here, just as in *Allison*, intra-family movement of money is 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 Plaintiffs' 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).

Plaintiffs' also insist in their Application that *Allison*, relied on by the district court, "conflicts" with §11, relied on by the Court of Appeals. There is nothing inconsistent, however, between the two authorities. As mentioned above, this Court's decision in *Allison* reaffirmed the notion that a contribution claim does not lie unless the plaintiff can prove he or she paid more than their fair share of a common debt. *Allison*, 560 N.W.2d at 335. Meanwhile, § 11 states, "[p]ayment by anyone other than an obligor, even though for an obligor's benefit, gives the obligor no right of contribution . . . the contribution 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 § 11. Instead of quoting or citing *Allison*, the Court of Appeals simply cited a recognized treatise on contribution law that states the exact same principle. Opinion at 8–9.

Ultimately, the Court of Appeals' reasoning can be summarized by the following passages from their Opinion, where the facts of this case were analyzed de novo:

> The Shcharanskys' argument that we need not consider the source of the funds since they physically wrote the checks to discharge the debt is tantamount to urging us not to peer behind the curtain. But we must.
>
> …
>
> [T]he right of equitable contribution is to reimburse a party who paid more than their fair share of a debt. But here, the Shcharanskys are in the exact same position they were in at the time they decided to pay off the debt. Although they argue they used gifted funds to discharge the debt, both Alexander and Tatiana made clear in their testimony that they asked their parents for money in order to make payments on the debt, and it was provided to them for the same specific purpose. There is nothing in the record that suggests the parents would have provided the funds otherwise. In other words, the Shcharanskys needed approximately $394,000 in order to pay off the debt. They asked their parents for that amount in order to pay off the debt, they were given that amount, and they paid it off.
>
> …

> Although the money used to discharge the joint debt came from the Shcharanskys' accounts, they have been unable to establish that they personally were forced to bear more than their just share of the debt.

(Opinion at 8–10). Nothing in the above reasoning conflicts with either *Allison* or the well-recognized tenant of contribution law found in § 11. The facts and extensive testimony surrounding the source of the funds in this case failed to establish an equitable contribution claim under either authority.

It would truly exalt form over substance to suggest that where a third-party is responsible for paying a debt, a guarantor can artificially create a right of contribution against other co-guarantors of the debt by having the third-party funds simply pass through the guarantor's bank account, or "touch their hands" on the way to the lender. *San Joaquin Valley Bank v. Gate City Oil Co.*, 173 P. 781, 782–83 (Cal. Dist. Ct. App. 1918) (holding scheme by plaintiff together with non co-obligor to make it look like plaintiff paid off underlying judgment did not establish right of contribution). That is exactly what happened here, and it does not create a right of contribution for Alex and Tatiana.

Stated more simply by the district court, "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). The Iowa Court of Appeals and district court found the Plaintiffs were out nothing. Thus, under both the holding in *Allison* and long-established equitable contribution law in Iowa, Plaintiffs' contribution claim fails as a matter of law.

CONCLUSION

Pursuant to the arguments and authorities cited above, there is no basis to grant further review in this case. The Iowa Court of Appeals and district court thoroughly and correctly analyzed the facts and law and arrived at the correct decision. The Application for Further Review must be denied.

CERTIFICATE OF COMPLIANCE

1. This Resistance complies with the type-volume limitation of Iowa R. App. P. 6.1103(4) because this Resistance contains 3,357 words, excluding the parts of the Brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

2. This Resistance 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 Resistance has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14 point, Times New Roman.

/s/ Timothy N. Lillwitz
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CERTIFICATE OF FILING AND SERVICE

The undersigned certifies a copy of Defendant-Appellees' Resistance to Application for Further Review was filed with the Clerk of the Iowa Supreme Court via EDMS and served upon the following persons by EDMS on the 11th day of August, 2017.

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