

2015

## Shauna Badger, and Individual v. Dustin Macgillivray, and Individual : Brief of Appellee

Utah Court of Appeals

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IN THE COURT OF APPEALS, STATE OF UTAH

SHAUNA BADGER, an individual,

Plaintiff and Appellant,

v.

DUSTIN MACGILLIVRAY, an  
individual,

Defendant and Appellee.

BRIEF OF APPELLEE

Appellate Case No.: 20150065

District Court Case No. 090402559

APPEAL FROM THE FOURTH JUDICIAL DISTRICT COURT  
OF UTAH COUNTY, STATE OF UTAH  
HONORABLE SAMUEL MCVEY, DISTRICT COURT JUDGE

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UTAH APPELLATE COURTS

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## JURISDICTIONAL STATEMENT

Pursuant to section 78A-3-102(3)(j) of the Utah Code Annotated, the Supreme Court of Utah had original appellate jurisdiction over this appeal. On January 29, 2015, in accordance with rule 42(a) of the Utah Rules of Appellate Procedure and section 78A-3-102(4) of the Utah Code Annotated, the Supreme Court of Utah transferred its jurisdiction over this appeal to this Court. Section 78A-4-103(2)(j) gives this Court jurisdiction over this appeal.

### STATEMENT OF THE ISSUES & STANDARD OF REVIEW

Appellant Shauna Badger (“**Badger**”) appeals the Fourth Judicial District Court’s Findings of Fact, Conclusions of Law, and Order Granting Motion to Enforce Settlement Agreement and Declaring Case Closed (“**Court’s Order**”). The Court’s Order was entered after finding that a string of text messages between Badger and Appellee/Defendant Dustin MacGillivray’s (“**MacGillivray**”) constituted a valid agreement that settled all claims and disputes among themselves and that even if Badger had been mistaken of the settlement amount, such a unilateral mistake did not satisfy the elements required to remand or rescind the settlement agreement. *See* Court’s Order, a copy of which has been included in the Addendum as **Exhibit “A”**, R. 630-632.

““The decision of a trial court to summarily enforce a settlement agreement will not be reversed on appeal unless it is shown that there was an abuse of discretion.””

*Goodmansen v. Liberty Vending Sys., Inc.*, 866 P.2d 581, 584 (Utah Ct. App. 1993)

(quoting *Zions First Nat’l Bank v. Barbara Jensen Interiors, Inc.*, 781 P.2d 478, 479

(Utah App. 1989) (internal quotations and citations omitted).

On appeal, Badger asserts that the settlement agreement should be rescinded or remanded because the district court erred and abused its discretion by: (i) relying on *Tracy-Collins v. Travelstead*, 592 P.2d 607 (Utah 1979); (ii) finding that the settlement agreement included adequate consideration; and (iii) entering a conflicting order. Based on the evidence presented to the district court, the Court's Order, and the contents of the Brief of Appellant filed by Badger ("**Badger's Brief**"), the issues relevant to this appeal can be appropriately summarized into the issues listed below.

**Issue No. 1:** Did the district court err by relying on *Tracy-Collins* to find that the question raised in MacGillivray's Motion to Enforce Settlement Agreement was a question of law for the court to decide.

**Standard of Review:** Whether the district court correctly relied on *Tracy-Collins* is a question of law and therefore the standard of review is for Correctness. *See Daniels v. Gamma West Brachytherapy, LLC*, 2009 UT 66, ¶ 46, 221 P.3d 256, 270 (stating that "the district court's interpretation of . . . statutes [ ] and the common law are questions of law that we review for correctness.") (citing *Ellis v. Estate of Ellis*, 2007 UT 77, ¶ 6, 169 P.3d 441, 443 (Utah 2007)).

**Issue No. 2:** Did Badger preserve the issue of whether the settlement agreement included adequate consideration.

**Standard of Review:** Although not addressed or raised below, whether Badger preserved the issue of adequate consideration for appeal is determined by the appellate

court's review of the record to see if the district court had "notice of [the] issue and [was] provide[d] . . . an opportunity to rule on it" because "the issue [was] specifically raised, in a timely manner, and [was] supported by evidence and relevant legal authority."

*Donjuan v. McDermott*, 2011 UT 72, ¶ 20, 266 P.3d 839, 843. If the appellate court finds that the district court did not have the level of notice required for an issue to be preserved, it then reviews the asserting party's opening brief to determine whether an exception to the general preservation rule was plead and warranted. *See Id.* at ¶ 22; *See also State v. Robinson*, 2014 UT App 114, ¶ 12, 327 P.3d 589, 592 (holding "we will not consider matters raised for the first time in the reply brief.").

**Issue No. 3:** Because Badger's Brief fails to assert that an exception applies to the general rule that issues not preserved will not be considered on appeal, can Badger assert such exception in her reply brief.

**Standard of Review:** Although not addressed or raised below, whether Badger's Brief failed to assert an exception to the preservation rule and is therefore prohibited from asserting such an argument in her reply brief is determined by the appellate court's review of her opening brief to see if it articulated the justification of reviewing an unpreserved issue. *See Robinson*, 2014 UT App at ¶ 12 (quoting *State v. Weaver*, 2005 UT 49, ¶ 19, 122 P.3d 566 (holding "a party seeking appellate review of an unpreserved issue must 'articulate the justification for review in the party's opening brief.'")); *See also Jones v. Mackey Price Thompson & Ostler*, 2015 UT 60, ¶ 75, 2015 WL 4537128 (July 28, 2015) (quoting *Coleman ex. Rel Schefski v. Stevens*, 2000 UT 98, ¶ 9, 17 P.3d 1122)

(holding “[o]nly in his reply brief does he raise this issue, and ‘we will not consider matters raised for the first time in the reply brief.’”).

**Issue No. 4:** If Badger preserved the issue of whether the settlement agreement included adequate consideration, did the district court err in finding that the settlement agreement included adequate consideration.

**Standard of Review:** Whether the district court’s holding that the settlement agreement included adequate consideration is a mixed question of fact and law. Consequently, the questions of fact are reviewed under a deferential clear error standard and the questions of law are reviewed for Correctness. *See Meadow Valley Contractors, Inc. v. State Dept. of Transp.*, 2011 UT 35, ¶13, 266 P.3d 671, 676 (holding “we review questions of fact under a deferential clear error standard, but grant no deference to questions of law.”).

**Issue No. 5:** Did Badger preserve the issue of whether the Court’s Order is in conformity with itself and the ruling from the bench.

**Standard of Review:** Although not addressed or raised below, whether Badger preserved the issue of whether the Court’s Order is in conformity with itself and the ruling from the bench is determined by the appellate court’s review of the record to see if the district court had “notice of [the] issue and [was] provide[d] . . . an opportunity to rule on it” because “the issue [was] specifically raised, in a timely manner, and [was] supported by evidence and relevant legal authority.” *Donjuan v. McDermott*, 2011 UT 72, ¶ 20, 266 P.3d 839, 843; *See also 438 Main Street v. Easy Heat, Inc.*, 2004 UT 72, ¶

51, 99 P.3d 801, 813. If the appellate court finds that the district court did not have the level of notice required for an issue to be preserved, it then reviews the asserting party's opening brief to determine whether an exception to the general preservation rule was plead. *See Id.* at ¶ 22; *See also State v. Robinson*, 2014 UT App 114, ¶ 12, 327 P.3d 589, 592 (holding "we will not consider matters raised for the first time in the reply brief.").

**Issue No. 5:** Did the district court err by entering an order that conflicts with itself and with Judge McVey's bench ruling.

**Standard of Review:** Although not raised or addressed below, whether the Court's Order conflicts with itself or with Judge McVey's bench ruling is a question of fact determined by the appellate court's review of the record. Upon review, the presumption is that the written order is correct unless the appealing party can affirmatively establish otherwise. *See Evans v. State*, 963 P.2d 177, 180 (Utah 1998) (holding "regardless of the language used during the hearing, the language in the court's final order is correct unless affirmatively shown otherwise.").

#### **DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES OR REGULATIONS**

There are no constitutional provisions, statutes, ordinances, rules or regulations whose interpretation is determinative or of central importance to this appeal.

## STATEMENT OF THE CASE

### A. Nature of Case and Procedural History.

Prior to 2012 but after the Fourth Judicial District Court entered a Judgment by Confession against MacGillivray and in favor of Badger, MacGillivray became insolvent and was forced to file for bankruptcy. In response, Badger filed a complaint in MacGillivray's bankruptcy action. On January 27, 2012, the United States Bankruptcy Court for the District of Utah entered a default judgment against MacGillivray and in favor of Badger. Pursuant to the default judgment, the prior judgment was not to be discharged in MacGillivray's bankruptcy and was therefore re-awarded to Badger, along with interest, fees and costs.

In her fifth attempt at collecting on the judgment, Badger filed an application for and obtained a Writ of Execution from the Fourth Judicial District Court on July 16, 2014. On July 31, 2014, MacGillivray was served with the Writ of Execution and had certain personal property seized and taken from his personal residence. On August 8, 2014, in accordance with his legal rights, MacGillivray objected to the seizure because the majority of the property taken was exempt from seizure. A hearing was scheduled for August 25, 2014.

Prior to the hearing and while the status of the seized property was still uncertain, Badger and MacGillivray began to negotiate a settlement of all claims. On August 22, 2014, the parties finally settled all of their disputes by coming to terms of a settlement agreement. Days after terms of the agreement were finalized and reconfirmed by Badger,

Badger attempted to repudiate the agreement. Therefore, MacGillivray proceeded by filing a Motion to Enforce the Settlement Agreement.

Oral argument was held on December 3, 2014. Based on the evidence, the court held that a binding and enforceable settlement agreement had been reached between the parties. Badger argued that she had been mistaken in her offer of a settlement amount. The Court ruled that even if Badger had mistakenly communicated the amount of her offer, the mistake was unilateral and did not satisfy the elements required to reform or rescind the settlement agreement. On December 30, 2014, after receiving proposed orders from both parties, the Fourth Judicial District Court modified MacGillivray's proposed order and entered the Court's Order.

On January 26, 2015, Badger filed her Notice of Appeal.

**B. Statement of Facts.**

1. On August 11, 2009, the Fourth Judicial District Court entered a Judgment by Confession against MacGillivray and in favor of Badger. (R. at 13-14).
2. Due to his insolvency, MacGillivray was forced to file for bankruptcy on April 22, 2010. (R. at 94-95).
3. On January 27, 2012, a default judgment was entered against MacGillivray and in favor of Badger in the United States Bankruptcy Court for the District of Utah. (R. at 125-127, 633).
4. On July 16, 2015, in an effort to execute on MacGillivray's personal property, Badger filed an application for and obtained a Writ of Execution in the Fourth

Judicial District Court. (R. at 116-122; Court's Order, included in Addendum as **Exhibit "A"** (R. 633)). The application and the Writ of Execution were based entirely on the indebtedness represented by the January 27, 2012, bankruptcy judgment. (Court's Order, included in Addendum as **Exhibit "A"** (R. at 633)).

5. Prior to the July 16, 2015, Writ of Execution, Badger had obtained a Writ of Garnishment and two other Writ of Executions for the underlying judgment. (R. at 15-23).

6. On July 31, 2014, MacGillivray was served with the Writ of Execution and had certain personal property seized and taken from his personal residence by a Deputy of the Utah County Sheriff's Office. (Court's Order, included in Addendum as **Exhibit "A"** (R. at 633)).

7. On August 8, 2014, MacGillivray objected to the seizure and filed a Request for Hearing, asserting that the majority of seized property was exempt from execution by virtue of being partially or wholly owned by another person. (R. at 129-130, Court's Order, included in Addendum as **Exhibit "A"** (R. at 633)).

8. The hearing regarding the Writ of Execution and MacGillivray's objection to the seizure of certain property was scheduled for Monday, August 25, 2014. (R. at 131, Court's Order, included in Addendum as **Exhibit "A"** (R. at 633)).

9. While the status of the seized property was still uncertain, Badger and MacGillivray engaged in settlement negotiations. (R. at 345-352, Court's Order, included in Addendum as **Exhibit "A"** (R. at 633)).

10. On August 22, 2015, while MacGillivray was on his way to see his attorney in preparation for the August 25, 2015, hearing, MacGillivray and Badger reached a settlement agreement regarding all claims amongst themselves. (*See Id.*).

11. All material terms of the settlement proposal and negotiations were conducted via text messages that were delivered over the parties' cell phones. There is no dispute as to the existence, content, timing and receipt of the text messages. (R. at 345-352, Court's Order, included in Addendum as **Exhibit "A"** (R. at 632-633)).

12. As set forth in the text messages, in order to avoid the hassle, costs, fees, and time required to pursue a judgment with the various writs that the law provides, Badger agreed to fully compromise and resolve all claims she had against MacGillivray in exchange for certain cash payments in the amounts and time prepared by Badger. (R. at 345-352, Court's Order, included in Addendum as **Exhibit "A"** (R. at 632)).

13. As set forth in the text messages, once MacGillivray accepted and reiterated the material settlement terms that were offered by Badger, Badger confirmed her acceptance and requested a default provision for attorney's fees, which was accepted by MacGillivray. (R. 347-349, Court's Order, included in Addendum as **Exhibit "A"** (R. at 632)).

14. Pursuant to the settlement agreement, MacGillivray sent the referenced text messages to his counsel and requested that he prepare a formal written agreement that the parties could sign. (Court's Order, included in Addendum as **Exhibit "A"** (R. at 632)).

15. After confirming her agreement to the material terms of the settlement agreement, Badger informed MacGillivray that she would not honor the agreement. The “sole reason” given was that her text contained a “typo” that constituted a unilateral mistake. (*See Id.*)

16. Oral argument was held on December 3, 2014. (R. 577). Finding that Badger’s offer was clear and that even if she had made a unilateral mistake, such a mistake would not rescind or reform the agreement because MacGillivray had no knowledge of the mistake and it would not have happened had Badger exercised ordinary diligence, the district court issued a bench ruling that the parties reached a valid, binding and enforceable settlement agreement that “finally resolved all claims existing between the parties at the time of the settlement, including, specifically, the Bankruptcy Judgment”. (Court’s Order, included in Addendum as **Exhibit “A”** (R. at 627-631), December 3, 2014, Oral Argument Transcript, a copy of which has been included in Addendum as **Exhibit “B”** (R. 908, p. 65-66).

17. Rather than file an objection to the district court’s ruling, Badger proceeded by filing her own Proposed Findings of Fact, Conclusions of Law, and Order Granting Motion to Enforce Settlement Agreement. (R. 602).

18. MacGillivray filed a Proposed Findings of Fact, Conclusions of Law, and Order Granting Motion to Enforce Settlement Agreement (“**MacGillivray’s Proposed Order**”). On December 15, 2014, Badger objected to MacGillivray’s Order. (R. 595).

19. On December 30, 2014, the Court modified MacGillivray's Proposed Order and proceeded by entering the Court's Order. (Court's Order, included in Addendum as **Exhibit "A"** (R. at 634)).

20. At no point in time did Badger challenge the Court's Order. (*See* R. 636-908).

### SUMMARY OF ARGUMENTS

On appeal, Badger is not alleging that the district court abused its discretion by enforcing the settlement agreement despite her alleged unilateral mistake. Instead, she asserts for the first time that the court incorrectly relied on Utah precedent, erred by enforcing the settlement agreement because the agreement lacked adequate consideration, and erred by entering an order that contradicts itself and Judge McVey's bench ruling. All of Badger's assertions, however, are misplaced, and most have not been preserved.

Specifically, Badger believes that the district court solely relied on *Tracy-Collins* to determine that the parties entered into a settlement agreement and that the settlement agreement was binding and enforceable. A cursory review of the Court's Order, however, reveals that the court only relied on *Tracy-Collins* to establish that the issues raised in MacGillivray's Motion to Enforce Settlement Agreement were a question of law for the court to decide. In holding that the parties entered a binding and enforceable settlement agreement, the court correctly relied on three separate Utah cases:

In addition, Badger cannot allege on appeal that the district court erred by failing to find that the settlement agreement lacked consideration because that issue was not

sufficiently raised and presented to the district court. Because Badger did not preserve her lack of consideration claim, it should not be addressed on appeal.

If, however, it is determined that Badger did preserve her claim, the district court still did not abuse its discretion because Utah precedent establishes that MacGillivray gave adequate consideration. It is well established that Utah courts favor the enforcement of accord and satisfactions, even when the accord and satisfaction relates to a pre-existing, liquidated debt. In those instances, the Supreme Court of Utah has found that an obligor gives adequate consideration even when he pays a lesser amount than the liquidated debt owed when he does so by another method not required by law. Because MacGillivray had no prior legal obligation to pay the liquidated judgment in lump sum cash payments, adequate consideration was given.

Finally, Badger asserts that the district court erred by entering an order that allegedly contradicts itself and Judge McVey's bench ruling. This issue, however, was not preserved because Badger failed to file an objection to the form of the documents with the trial court. Furthermore, Utah precedent establishes that appellate courts presume a court's written order is correct, regardless of the language used by the judge from the bench, unless a party can affirmatively show otherwise. Lastly, review of the Court's Order establishes that it does not contradict itself.

## ARGUMENT

### I. THE COURT'S ORDER CORRECTLY RELIED ON UTAH PRECEDENT.

On appeal, it appears that Badger alleges that the district court abused its discretion in enforcing the parties' settlement agreement by relying on *Tracy-Collins*, to hold that the text messages between the parties constituted a binding and enforceable settlement agreement.<sup>1</sup> See Badger's Brief at 1, 5-6. A cursory review of the Court's Order, however, reveals that Badger's assertion is misplaced.

Pursuant to the Court's Order, the district court did not rely on *Tracy-Collins* to find that the parties entered a binding and enforceable settlement agreement. Rather, the Court's Order clearly establishes that the court only relied upon *Tracy-Collins* to establish "that the question raised by [MacGillivray's] Motion to Enforce Settlement Agreement can and should be determined as a matter of law in a summary proceeding within this action." Court's Order, included in Addendum as **Exhibit "A"** (R. at 629). Because the *Tracy-Collins* Court held that "[i]t is quite well established that a settlement agreement may be summarily enforced by motion in the court of the original action[.]" the district court correctly relied upon it to establish that it was the correct venue to enforce the settlement agreement pertaining to the judgment it originally entered. 592 P.2d at 607.

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<sup>1</sup> Although Badger asserts her position that the district court erred by relying upon *Tracy-Collins* in her Table of Contents and Statement of Issues, her actual argument addressing this issue does not mention the Court's Order. Instead, it focuses on Appellee's prior arguments.

A further review of the Court's Order reveals that the court continued to correctly rely on Utah precedent to decide the issues before it. Prior to her appeal, Badger's "sole reason for her rejection and refusal to perform" was the argument that she had made a "typo" that constituted a unilateral mistake. *See* Court's Order, included in Addendum as **Exhibit "A"** (R. at 632); December 3, 2014, Oral Argument Transcript, included in Addendum as **Exhibit "B"** (R. 908 p. 66). Finding that there was no evidence that MacGillivray either caused or knew about Badger's alleged unilateral mistake, the court correctly relied on *Guardian State Bank v. Stangl*, 778 P.2d 1, 5 (Utah 1989). *See Id.* Lastly, by finding that Badger, even if truly mistaken, had failed to exercise ordinary diligence in making the final offer and assenting to the material terms of the agreement; the court correctly relied on *B&A Associates v. L.A. Young Sons Construction Co.*, 796 P.2d 692, 695 (Utah 1990). *See Id.*

In essence, Badger is incorrect to assert that the court abused its discretion by relying on *Tracy-Collins* to find that the parties entered a binding and enforceable settlement agreement. A cursory review of the Court's Order and cited case law reveals that the court correctly relied on Utah precedent and did not abuse its discretion.

## **II. BADGER FAILED TO PRESERVE HER CONSIDERATION ARGUMENT.**

Badger did not assert that the district court abused its discretion by enforcing the settlement agreement despite Badger's alleged unilateral mistake. Instead, Badger asserts a different legal theory on appeal, alleging that the court abused its discretion by

enforcing the settlement agreement despite lack of consideration. *See* Badger’s Brief at 18-33. However, Badger failed to present this argument to the district court in a manner sufficient to present the issue on appeal.

It is well established that Utah appellate courts “generally will not consider an issue unless it has been preserved for appeal.”<sup>2</sup> *Patterson v. Patterson*, 2011 UT 68, ¶12, 266 P.3d 828, 831-832. *See also* *Stevens v. Wall*, 2004 UT 72, ¶ 3, 264 P.3d 568 (holding “[i]ssues that are not raised before the trial court are deemed waived.”); *438 Main Street v. Easy Heat, Inc.*, 2004 UT 72, ¶ 51, 99 P.3d 801, 803 (holding “Issues that are not raised at trial are usually deemed waived.”) (internal citations and quotations omitted). “The preservation rule applies to every claim” and is enforced to promote judicial economy and fairness. *Seamons v. Brandley*, 2011 UT App 434, ¶3, 268 P.3d 195, 197; *See also* *Patterson*, 2011 UT at ¶ 15. (holding that “[t]he two primary considerations underlying the [preservation] rule are judicial economy and fairness.”). In addition, “the preservation rule should be more strictly applied when the asserted new issue or theory ‘depends on controverted factual questions whose relevance thereto was not made to appear at trial.’” *Id.*

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<sup>2</sup> The exception to the general rule occurs when the party that failed to preserve the issue establishes “‘exceptional circumstances,’ or when ‘plain error’ has occurred.” *Patterson*, 2011 UT at ¶ 13. Here, however, Badger’s Brief does not allege, assert, or analyze either exception. Because this Court “will not consider matters raised for the first time in the reply brief” and Badger fails to raise either exception in her opening brief, neither exception can be applied in this matter. *State v. Robinson*, 2014 UT App 301, ¶ 12, 327 P.3d 589, 592; *See also* *State v. Weaver*, 2005 UT 49, ¶ 19, 122 P.3d 566, 571 (holding “Weaver’s claim in the present case is procedurally barred because he failed to argue plain error in his opening brief.”).

“‘[I]n order to preserve an issue for appeal, the issue must be presented to the trial court in such a way that the trial court has an opportunity to rule on that issue.’” *State ex rel. K.H.*, 2004 UT App 483, ¶ 8, 105 P.3d 967, 969 (quoting *438 Main Street*, 2004 UT at ¶ 51.) (internal citations and quotations omitted). See also *O’Dea v. Olea*, 2009 UT 46, ¶18, 217 P.3d 704, 709 (holding “[t]o preserve an issue for appellate review, a party must first raise the issue in the trial court because a trial court must be offered an opportunity to rule on an issue.”) (internal citations and quotations omitted). Therefore, to properly preserve an issue for appeal, “‘(1) the issue must be raised in a timely fashion, (2) the issue must be specifically raised, and (3) the challenging party must introduce supporting evidence or relevant legal authority.’” *Seamons*, 2011 UT App at ¶ 2 (quoting *438 Main Street*, 2004 UT at ¶51); See also *State, in interest of M.O.K.*, 2012 UT App 157, ¶ 2, 280 P.3d 423, 424.

Further, “[t]he ‘mere mention’ of an issue without introducing supporting evidence or relevant legal authority does not preserve that issue for appeal.” *State v. Brown*, 859 P.2d 358, 361 (Utah Ct. App. 1993); See also *State v. Robinson*, 2014 UT App at ¶ 10. (holding that “merely identifying a claim in a docketing statement does not preserve it for appeal.”). And, “[a]n oblique reference to an issue in the absence of an ‘objection to the trial court’s failure to rule on the issue’ does not put that issue properly before the court.” *Id.* (quoting *LeBaron & Assoc. v. Rebel Enterprises*, 823 P.2d 479, 483 (Utah Ct. App. 1987). Lastly, “[a] contemporaneous objection or some form of specific preservation of error must be made a part of the trial court record before an appellate

court will review such a claim.” *Seamons*, 2011 UT App at ¶ 2 (internal citations and quotations omitted). In essence, ““for an issue to be sufficiently raised, even if indirectly, it must at least be raised to a level of consciousness such that the trial judge can consider it.”” *State v. Brown*, 856 P.2d at 361 (quoting *Lebaron & Assoc.*, 823 P.2d at 483 (quoting *James v. Preston*, 746 P.2d 799, 801-802 (Utah Ct. App. 1987))) (emphasis added).

Here, Badger failed to raise her consideration argument “to a level of consciousness such that the trial judge [could have] consider[ed] it.” *Id.* Specifically, her memorandum in opposition to MacGillivray’s Motion to Enforce Settlement Agreement merely mentioned the general rule of whether consideration is present when a creditor accepts a lesser amount than what is owed. *See* Memorandum in Support of Plaintiff’s Opposition of Defendant’s Motion to Enforce Settlement Agreement, a copy of which is included in the Addendum as **Exhibit “C”** (R. 376-377). It did not, however, explain the exceptions to the general rule, nor did it provide the district court with the legal analysis necessary for it to determine if the one sentence of quoted law applied to the case at hand. *See Id.*

At oral argument, Badger’s defense and reasoning why the settlement agreement should not be enforced was focused on fraud, no meeting of the minds, her contention that the agreement had to be formalized in a signed writing for it to be final and enforceable, and unilateral mistake. *See* December 3, 2014, Oral Argument Transcript, included in Addendum as **Exhibit “B”** (R. 908 p. 26-50). Only after arguing these

defenses did Badger even mention the word consideration. *See Id.* In fact, she only referenced consideration after stating “I don’t believe [ ] Mr. Macgillivray [*sic*] should profit from a simple mistake.” December 3, 2014, Oral Argument Transcript, included in Addendum as **Exhibit “B”** (R. 908 p. 54).

When she finally did mention consideration, she merely provided conclusory statements without relying on any legal authority. *See* December 3, 2014, Oral Argument Transcript, included in Addendum as **Exhibit “B”** (R. 908, p. 51, 54). These mere mentions and oblique references to an issue do not and did not put the issue of adequate consideration before the court. This is evident by not only Judge McVey’s bench ruling, but the Court’s Order as well.

Specifically, at the close of oral argument, after finding that the text messages constituted a binding and enforceable settlement agreement, the court addressed Badger’s defense of unilateral mistake. *See* December 3, 2014, Oral Argument Transcript, included in Addendum as **Exhibit “B”** (R. 908, p. 66). In the Court’s Order, the court clearly stated that “[t]he sole reason given by [Badger] for her rejection and refusal to perform was . . . she made a unilateral mistake and accidentally texted” the dollar figure without the last zero. Court’s Order, included in Addendum as **Exhibit “A”** (R. at 632). Clearly, the issue of consideration was not raised to the level of consciousness necessary for the trial judge to consider and enter a ruling on the adequacy of the consideration rendered by MacGillivray.

In addition to failing to raise the issue at the hearing or prior to the Court's Order, Badger once again failed to raise the issue prior to appeal. A review of the district court's docket reveals that Badger never challenged the court's decision to enforce the settlement agreement based on the legal theory that the agreement lacked consideration. *See* R. 636-908.

In essence, not only did Badger fail to raise the issue of consideration to the level of consciousness necessary for the district court to rule on the issue, she also failed to assert "a contemporaneous objection or some form of specific preservation of error" at the trial court level. *Seamons*, 2011 UT App at ¶2 (internal citations and quotations omitted). Therefore, Badger's assertion that the district court abused its discretion by enforcing the settlement agreement despite the alleged lack of consideration was not preserved and should not be considered on appeal.

**III. IF THE COURT FINDS THAT BADGER DID PRESERVE HER CONSIDERATION ARGUMENT, THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BECAUSE ADEQUATE CONSIDERATION WAS GIVEN.**

Even if the Court finds that Badger preserved her consideration claim, the district court still did not abuse its discretion because MacGillivray provided adequate consideration. Specifically, Badger contends that because MacGillivray's debt was liquidated and he already had a pre-existing legal duty to pay the amount owed, payment of a lesser amount cannot equate to adequate consideration. This assertion, however, is contradictory to Utah precedent.

The Supreme Court of Utah has held that “[a]s a preliminary matter, we note that even if a claim is undisputed and liquidated, parties can still discharge their obligations through accord and satisfaction. In such instances, however, parties must support the accord with separate consideration.” *Estate Landscape & Snow Removal Specialist, Inc. v. Mountain States Tel. & Tel. Co.*, 844 P.2d 322, 326 (Utah 1992). As for what constitutes consideration, the Supreme Court of Utah has stated:

No completely satisfactory and comprehensive definition of ‘consideration’ has ever been devised. It is generally agreed, however, that where a promise is supported by the incurrence, on the part of the promisor, of a legal detriment in order to confer a benefit on the promisor, such is sufficient to serve as consideration, thereby rendering the promise legally enforceable. This is particularly so when an accord and satisfaction is involved, the modern trend among the courts being to uphold such agreements whenever possible. In such cases, consideration is often found in the obligor’s agreement to alter the means or method of payment of the obligation initially owed.

*Sugarhouse Finance Co. v. Anderson*, 610 P.2d 1369, 1372 (Utah 1980) (emphasis added). In *Sugarhouse*, the Supreme Court of Utah found that a defendant gave adequate consideration to support an accord and satisfaction when he immediately satisfied the liquidated, two year old judgment he owed the plaintiff by paying a lump sum payment for a lesser amount because such an act:

Was something defendant had no legal obligation to do; by law, plaintiff could only move by levy of execution against property already owned by the defendant . . . . By so doing, defendant deliberately incurred the detriment of surrendering his right to limit plaintiff’s ability to obtain satisfaction of the

underlying judgment, and bestowed upon plaintiff the benefit of immediate payment.

*Id.* at 1373.

The facts in *Sugarhouse* are functionally identical to the facts in this case. Here, Badger was only legally entitled to collect on the liquidated debt by executing various writs against MacGillivray. Badger had been attempting to collect the debt for more than three years and had previously obtained a Writ of Garnishment and two Writs of Execution, all to no avail. By agreeing to satisfy the liquidated debt by paying a lesser amount in lump sum payments, MacGillivray “deliberately incurred the legal detriment of surrendering his right to limit [Badger’s] ability to obtain satisfaction of the underlying judgment.” *Id.* Because Utah courts favor the enforcement of accord and satisfactions and MacGillivray clearly incurred a legal detriment by altering the means of method of payment, which in turn conferred an immediate benefit to Badger, the settlement agreement was supported by adequate consideration. *See Id.* at 1372-73.

#### **IV. BADGER FAILED TO PRESERVE HER CLAIM THAT THE COURT ERRED BY ENTERING THE COURT’S ORDER.**

Just as she failed to preserve her consideration claim, Badger also failed to preserve her claim that the Court erred by entering a final order that was inconsistent with the prior bench ruling. In her brief, Badger alleges that the district court erred because the Court’s Order contradicts itself and the bench ruling. These allegations, however, should not be considered because Badger failed to preserve the issue for appeal.

As previously stated, “[i]n order to preserve an issue for appeal[,] the issue must be presented to the trial court in such a way that the trial court has an opportunity to rule on that issue.” *438 Main Street*, 2004 UT at ¶51. “To preserve the issue of whether the written order of the court is in conformity with what transpired on the record, a party must first object to the form of the documents.” *State in Interest of J.G.*, 2012 UT App 301, ¶ 2, 288 P.3d 1108, 1109. When a party fails to object to the form of the order, she fails to provide the issuing court notice of the objection, precludes it from having the opportunity to rule on the objection, and is therefore precluded from raising the issue on appeal. *See Id.*

Here, Badger failed to raise with the district court this objection regarding the Court’s Order. At no point in time did Badger raise the issue or provide the district court with any supporting evidence or legal authority. Without notice of Badger’s objections, the district court did not have an opportunity to rule on the issues. Therefore, pursuant to Utah law, her claims regarding the Court’s Order cannot be considered on appeal because she failed to preserve the same.

**V. IF THE COURT FINDS THAT BADGER PRESERVED HER ARGUMENT REGARDING THE COURT’S ORDER, HER ARGUMENT STILL FAILS BECAUSE THE WRITTEN ORDER CONTROLS AND SHE HAS FAILED TO AFFIRMATIVELY SHOW OTHERWISE.**

In the event that the Court concludes Badger preserved her argument that the Court’s Order contradicts itself and Judge McVey’s bench ruling, her arguments still fail because the language in the written order is presumed correct unless affirmatively shown

otherwise. Specifically, Badger asserts that the district court erred because the Court's Order contradicts itself and is inconsistent with Judge McVey's bench ruling. These assertions, however, lack merit and must be rejected.

Badger's assertions lack merit because Utah appellate courts have repeatedly held that "[r]egardless of the language used during the hearing, the language in the court's final order controls, and we will presume the order is correct unless affirmatively shown otherwise." *Evans v. State*, 963 P.2d 177, 180 (Utah 1998). See also *Giles v. Mineral Res. Int'l, Inc.*, 2014 UT App 37, ¶ 6, 320 P.3d 684, 687 (holding "we recognize that 'the language in the court's final written order controls,' not the 'language used during the hearing[.]';"); *Nigohosian v. Nigohosian*, 2004 UT App 116, ¶ 2 (quoting *Evans*, 963 P.2d at 180) (holding "appellate courts will presume language in trial court's order is correct unless affirmatively shown otherwise."); *M.F. v. J.F.*, 2013 UT App 247, ¶6, 312 P.3d 946, 948-49, reh'g denied (Nov. 14, 2013), cert. denied sub nom. *Fuller v. Fuller*, 320 P.3d 676 (Utah 2014) (stating "our case law is clear that where a court's oral ruling differs from a final written order, the latter controls."); *14th St. Gym, Inc. v. Salt Lake City Corp.*, 2008 UT App 127, ¶ 16, 183 P.3d 262, 266 (quoting *Evans*, 963 P.2d at 180) (holding "[r]egardless of the language used during the hearing, the language in the court's final written order controls."). Therefore, based on Utah precedent, the presumption is that the Court's Order controls.

The only way Badger can rebut this presumption is by affirmatively showing that the language implemented in the Court's Order is not what the court intended. Badger's

effort to rebut this stray presumption fails. Badger focuses on the fact that Judge McVey ruled from the bench that:

The terms of the agreement, therefore, will be that Mr. Macgillivray [sic] would pay \$25,000 now. So we'll say now means within seven days just to make it workable. And \$2,500 no later than one year from now. There will be –and then also if the – if there is a default, then the agreement is rescinded and all debt and interest would be re-instituted. Upon the payment being made, all claims between the parties will be resolved with the exception of the \$2,500 next year, which will be due by August 22, 2015. There's been no agreement to interest.

December 3, 2014, Oral Argument Transcript, included in Addendum as **Exhibit "B"** (R. 908, p. 66-67) (emphasis added). The discrepancy regarding the due date for the second payment stems from the district court's reference to the timing of the original agreement versus the timing of the hearing and due date of the first payment. This discrepancy, however, is not between the bench ruling and Court's Order. Rather, the discrepancy solely exists in the language of the bench ruling and was cleared up in the Court's Order.

Pursuant to the bench ruling that the second payment would be due "no later than one year from now[,]" the Court's Order confirmed Judge McVey's apparent intention of having the second payment be due within one year of the first by stating "[MacGillivray] shall deposit the sum of Twenty Five Thousand Dollars (\$25,000.00) with the Court on or before December 10, 2014[, and] shall deposit the sum of Two Thousand Five Hundred Dollars (\$2,500.00) with the Court on or before December 10, 2015." Court's Order, included in Addendum as **Exhibit "A"** (R. at 628, 630-631).

Badger also asserts that Judge McVey's bench ruling and the language of the Court's Order regarding what occurs in the event of a default contradict one another. This assertion, however, is misplaced. From the bench, Judge McVey ruled that "[u]pon the payment being made, all claims between the parties will be resolved with the exception of the \$2,500 next year." R. 908, p. 67. By default, the first payment being referenced by Judge McVey is the \$25,000.00 payment. Therefore, Judge McVey ruling from the bench was that after the \$25,000.00 payment is received, all claims between the parties would be resolved. This is apparent because the Court made it perfectly clear that "we want a clean break here." December 3, 2014, Oral Argument Transcript, included in Addendum as **Exhibit "B"** (R. 908 p. 69).

Judge McVey's intent and bench ruling is consistent with the language of the Court's Order, which states that "[u]pon timely payment of \$25,000, all claims by and between parties . . . shall be fully compromised, resolved and satisfied." Court's Order, included in Addendum as **Exhibit "A"** (R. at 628). It further states, "[i]n the event of default by the Defendant in paying the \$25,000, the settlement agreement shall be rescinded, and the parties returned to their pre-settlement positions." *Id.* It proceeds by stating, "[i]n the event Defendant pays the first payment of \$25,000 in a complete and timely manner, but defaults in the payment of the second amount of \$2,500, Plaintiff shall have a right to collect the same by judicial action, if necessary." R. 664.

In sum, the Court's Order states that: (i) if MacGillvray defaults on the first payment, all debts and interest come back; (ii) if he defaults on the second payment,

Badger's recourse is collecting through judicial action, if necessary. These terms are entirely consistent with Judge McVey's bench ruling and intent to have a clean break. Because Badger has failed to affirmatively show that the Court's Order does not conform to Judge McVey's intention, she has failed to rebut the presumption that the language of the Court's Order governs and controls.

Lastly, Badger claims that the final written order is in contradiction with itself. Specifically, she asserts that paragraphs 4 through 6 of the Court's Order contradict one another. *See* Badger's Brief at 36. A cursory reading of these terms, however, shows that there is no contradiction. In fact, after quoting the terms, Badger fails to provide any analysis as to how the paragraphs are contradictory. Instead, she makes the conclusory statement that the cited paragraphs are illogical. *See Id.* at 37. To the contrary, these paragraphs are eminently logical, and specifically lay out Judge McVey's bench ruling in an easy to follow manner.

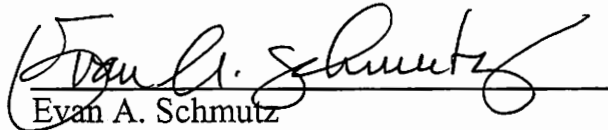
In sum, the language of Judge McVey's bench ruling and the language of the Court's Order are not contradictory. Even if they were, it is well established that this Court recognizes that "'the language in the court's final written order controls,' not the 'language used during the hearing[.]'""); *Giles v. Mineral Res. Int'l, Inc.*, 2014 UT App at ¶ 6. Therefore, the court did not err by entering the Court's Order.

## CONCLUSION

For the reasons set forth above, the decision of the district court should be affirmed.

RESPECTUFLY SUBMITTED this 3<sup>rd</sup> day of August, 2015.

**DURHAM, JONES & PINEGAR, P.C.**



Evan A. Schmutz

Cole L. Bingham

*Attorneys for Appellee Dustin MacGillivray*

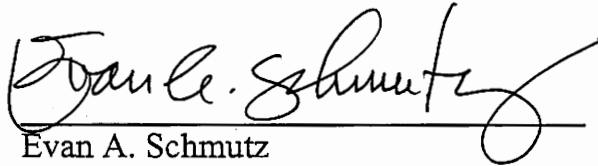
### Certificate of Compliance with Rule 24(f)(1)

1. This brief complied with the type-volume limitation of Utah R. App. P. 24(f)(1) because it contains 7,732 words, in total.

2. This brief complies with the typeface requirements of Utah R. App. P. 27(b) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word for Windows 2010, Times New Roman, Font Size 13.

DATED this 3<sup>rd</sup> day of August, 2015.

**DURHAM, JONES & PINEGAR, P.C.**



Evan A. Schmutz

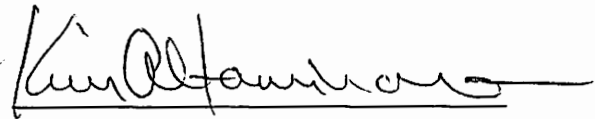
Cole L. Bingham

*Attorneys for Appellee Dustin MacGillivray*

**PROOF OF SERVICE**

I hereby certify that, on the 3<sup>rd</sup> day of August, 2015, two true and correct copies of the foregoing **BRIEF OF APPELLEE** were mailed, postage prepaid, to the following:

Shauna Badger  
549 West 4630 North  
Provo, Utah 84604  
Telephone: (801) 221-9982  
Email: Shauna.badger@gmail.com

A handwritten signature in black ink, appearing to read "Kim O'Hanlon", written over a horizontal line.

ADDENDUM  
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C.	Memorandum in Support of Plaintiff's Opposition of Defendants' Motion to Enforce Settlement Agreement (R. 383) .....Page 104

# EXHIBIT A

EXHIBIT A

The Order of Court is stated below:

Dated: December 30, 2014  
09:06:39 AM/s/ Samuel McVey  
District Court Judge

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*Attorneys for Defendant*

<p>IN THE FOURTH JUDICIAL DISTRICT COURT</p> <p>IN AND FOR UTAH COUNTY, STATE OF UTAH</p>	
<p>SHAUNA BADGER,</p> <p>Plaintiff,</p> <p>vs.</p> <p>DUSTIN MACGILLIVRAY,</p> <p>Defendant.</p>	<p>FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER GRANTING MOTION TO ENFORCE SETTLEMENT AGREEMENT AND DECLARING CASE CLOSED</p> <p><i>Modified by the Court</i></p> <p>Civil No. 090402559</p> <p>Honorable McVey</p>

This case came before the Court on December 3, 2014 for summary disposition on Plaintiff's Motion to Enforce Settlement Agreement ("Defendant's Motion"). Plaintiff was present and represented herself *pro se*. Defendant was represented by Evan A. Schmutz. The Court permitted extensive oral argument and the presentation of documentary evidence, including

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transcripts and text messages of communications between the parties. Following the presentation of argument and evidence, the Court ruled from the bench and granted Defendant's Motion, and now makes the findings of fact and conclusions of law as set forth below.

#### FINDINGS OF FACT

1. On January 27, 2012, a default judgment was entered in favor of Plaintiff Badger and against Defendant in the United States Bankruptcy Court for the District of Utah, in the matter *In Re: Dustin MacGillivray*, Adv. No. 11-02004 ("Bankruptcy Judgment").

2. On, July 16, 2014, Plaintiff filed an Application for Writ of Execution in this action, seeking to execute on personal property allegedly owned by Defendant. On the same date, the Court issued a Writ of Execution. Both the Application and the Writ were based on indebtedness represented by the Bankruptcy Judgment.

3. On July 31, 2014, the Writ of Execution, together with other papers, were served by the Utah County Sheriff's Office on Defendant MacGillivray at his home, and a Deputy County Sheriff levied upon all the right, title, claim and interest of Defendant in certain personal property, which was seized and held by the Utah County Sheriff.

4. On August 8, 2014, Defendant MacGillivray filed a Request for Hearing, asserting that some of the property seized by the Utah County Sheriff's Office was exempt from execution by virtue of being owned by another person or partly owned by Defendant.

5. On August 11, 2014, the Court sent out a Notice of Hearing on Writ of Execution, setting the date for hearing on August 25, 2014.

6. Following the seizure of property from Defendant's home, and the issuance of the Court's Notice of Hearing, the parties engaged in settlement negotiations. The settlement negotiations ended in a meeting of the minds between the parties.

7. Material portions of the settlement negotiations were conducted via text messages

delivered over the parties' cell phones. There is no dispute as to the existence, content, timing and receipt of the text messages.

8. In the text messages, Plaintiff clearly communicated an offer to settle and fully compromise and resolve all claims by Defendant's payment of \$25,000 now and \$2,500 within one year. Defendant clearly and timely repeated those terms and communicated his unequivocal acceptance of Plaintiff's offer. Plaintiff added one more term regarding remedies on default. Defendant clearly and unequivocally communicated his acceptance of the additional term. Plaintiff communicated her agreement by texting "ok".

9. The Court finds that Plaintiff communicated a clear offer to settle on unambiguous terms, and that Defendant repeated that offer and timely communicated his acceptance of the same.

10. The Court finds from the referenced text messages the parties had a meeting of the minds on the integral features of a settlement agreement and that the terms were sufficiently definite as to be capable of being enforced.

11. Pursuant to the settlement agreement, Defendant sent the referenced text messages to his attorney and requested his attorney to prepare a formal written agreement that the parties could sign. Defendant's attorney reviewed the phone texts and terms contained therein, prepared a written Settlement Agreement to reflect such terms, and sent it to Defendant for transmittal to Plaintiff, who in turn transmitted it to Plaintiff.

12. After receiving the Settlement Agreement, Plaintiff notified Defendant she did not intend to honor the settlement agreement or sign the written Settlement Agreement.

13. The sole reason given by Plaintiff for her rejection and refusal to perform was that her text contained a "typo" and that she meant to state she would settle for two payments of \$25,000, one now and one a year later, but she made a unilateral mistake and accidentally texted \$2,500.

14. The Court finds from the evidence, including the communications between the parties prior to their reaching an agreement, that Plaintiff did not make a mistake in sending a clear written offer to Defendant to settle all her claims against him for payment of \$25,000 now and \$2,500 within one year.

15. The Court finds that even if Plaintiff had been mistaken, her mistake was unilateral, by her own admission, as was supported by the evidence. Defendant's communications and the offers and counter-offers prior to Plaintiff's final offer were within a reasonable range of the final offer, so as to support the Court's finding that Defendant could not have known that Plaintiff's final offer was a mistake. If Plaintiff's final offer had been a mistake, it was unilateral.

16. The Court finds that even if Plaintiff had been unilaterally mistaken in making her final offer, Plaintiff did not exercise ordinary diligence in sending her final offer to make sure it was correct, or in reviewing Defendant's repeat of the terms of that offer and agreeing that such terms constituted an agreement to settle. The Court finds that a mistake would not have occurred except for the lack of ordinary diligence on the part of Plaintiff.

17. The Court finds that even if Plaintiff had been unilaterally mistaken in sending Defendant her final offer of settlement, the mistake could not be considered so grave a consequence that to enforce the settlement agreement as actually made would be unconscionable because the progress of offers and counter-offers that proceeded the final offer made by Plaintiff were within a reasonable range of the final offer and settlement agreement.

18. The Court finds that the parties settled and fully and finally resolved all claims existing between the parties at the time of the settlement, including specifically, the Bankruptcy Judgment, on the following terms:

- a. Defendant agreed to pay Plaintiff the sum of \$25,000 within seven days;

- b. Defendant agreed to pay Plaintiff the additional sum of \$2,500 within one year;
- c. The parties agreed that no interest would be applied to the second payment;
- d. Defendant agreed to release and dismiss all her claims against Defendant, including specifically the Bankruptcy Judgment, all claims raised in the action entitled *In Re: Dustin MacGillivray*, Adv. No. 11-02004 ("Bankruptcy Action"), and all claims asserted in this action, that such would be resolved, satisfied and dismissed; and
- e. The parties agreed that if Defendant defaulted in his payments, the settlement agreement would be rescinded, interest would accrue, and she would have all rights to enforce the Bankruptcy Judgment.

19. The Court finds that the settlement agreement between the parties was supported by sufficient consideration.

20. The Court finds that Defendant was ready, willing and able to perform the settlement agreement according to its terms.

21. The Court finds that Defendant made a timely proffer of payment for the first amount of \$25,000 but the Plaintiff refused to accept the payment.

22. While Defendant's Motion to Enforce Settlement was pending, the Court held a hearing on Defendant's Request for Hearing concerning the Writ of Execution because the initially scheduled hearing had been continued. At the conclusion of such hearing, the Court ordered that certain items of property which had been seized from Defendant's home were exempt from the Writ of Execution.

23. The Utah County Sheriff's Office continues to hold all items of property seized from Defendant's home in storage.

#### CONCLUSIONS OF LAW

1. The Court concludes that the question raised by Defendant's Motion to Enforce Settlement Agreement can and should be determined as a matter of law in a summary proceeding within this action. *Tracy-Collins Bank & Trust Co. v. Travelstead*, 592 P.2d 605, 607 (Utah 1979).

2. The Court concludes that the agreement reached by the parties is binding and enforceable, as it represents a meeting of the minds on the integral features essential to the formation of a contract, based on a clear offer by Plaintiff and the acceptance of that offer clearly communicated by Defendant. The terms of the agreement to settle were sufficiently definite to cover all material terms necessary to settle the disputes between the parties and be capable of enforcement. *LD III, LLC vs. BBRD, LC*, 221 P.3D 867 (Ut. Ct.App. 2009).

3. The Court concludes that consideration given by both parties to the settlement agreement by their promises to perform is sufficient to support the agreement.

4. The Court concludes that Plaintiff's excuse for repudiation or non-performance of the settlement agreement based on her asserted unilateral mistake in communicating the offer does not constitute an excuse or defense sufficient to relieve her of the duty to perform the agreement because she cannot satisfy the burden of showing that Defendant knew or should have known of the mistake, or that the mistake was produced by the fraud or other inequitable conduct of the Defendant. *Guardian State Bank v. Stangl*, 778 P.2d 1, 5 (Utah 1989).

5. The Court concludes that even if Plaintiff had been able to demonstrate that Defendant knew or should have known of the mistake, or that Defendant had produced the mistake by fraud or other inequitable conduct, Plaintiff cannot be relieved of the duty to perform the agreement through reformation or rescission because she did not exercise ordinary diligence in communicating a final offer and assenting to the settlement agreement. *B&A Associates v. L.A. Young Sons Construction Co*, 796 P.2d 692, 695 (Utah 1990).

6. The Court concludes that the doctrine of scrivener's error is not applicable to the facts of this case.

7. Plaintiff did not argue that there was a mutual mistake, and the Court concludes there was no mutual mistake.

8. The Court concludes that the settlement agreement can and should be enforced in this case as a binding agreement.

ORDER

THEREFORE, IT IS HEREBY ORDERED that the relief sought in Defendant's Motion is GRANTED.

Specifically, the Court orders that the settlement agreement of the parties shall include the following terms and conditions and shall be enforced as follows:

1. Defendant shall deposit the sum of Twenty Five Thousand Dollars (\$25,000.00) with the Court on or before December 10, 2014. The Court shall thereafter release the funds to Plaintiff.
2. Defendant shall deposit the sum of Two Thousand Five Hundred Dollars (\$2,500) with the Court on or before December 10, 2015. The Court shall thereafter release the funds to Plaintiff.
3. No interest shall accrue on either payment, if timely made.
4. Upon timely payment of \$25,000, all claims by and between the parties, including specifically the Bankruptcy Judgment and the claims asserted in this action based on such judgment, shall be fully compromised, resolved and satisfied.
5. In the event of default by the Defendant in paying the \$25,000, the settlement agreement shall be rescinded, and the parties returned to their pre-settlement positions, and Plaintiff shall retain all her rights of enforcement of the Bankruptcy Judgment.

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6. In the event Defendant pays the first payment of \$25,000 in a complete and timely manner, but defaults in the payment of the second amount of \$2,500, Plaintiff shall have a right to collect the same by judicial action, if necessary.
7. The parties shall each bear their own costs and attorney's fees incurred in this action.
8. The settlement resolves all issues in the case and this matter is closed. No further order is necessary to implement this ruling.

**\*\*Executed and entered by the Court as indicated by the seal at the top of the first page\*\***

-----END OF ORDER-----

NOTICE OF INTENT TO SUBMIT FOR SIGNATURE

TO:

Shauna Badger  
549 W. 4630 No.  
Provo, Utah 84604

Please take notice that the undersigned attorney for Defendant Dustin MacGillivray will submit the above and foregoing Findings of Fact, Conclusions of Law, and Order Granting Motion to Enforce Settlement Agreement to the Honorable McVey for his signature upon the expiration of seven (7) days from the date of this notice, unless written objection is filed prior to that time pursuant to Rule 7(f)(2) of the Utah Rules of Civil Procedure.

DATED this 8<sup>th</sup> day of December, 2014.

DURHAM JONES & PINEGAR, P.C.

/s/ Evan A. Schmutz  
Evan A. Schmutz  
Andrew V. Wright

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CERTIFICATE OF SERVICE

I hereby certify that on this 8<sup>th</sup> day of December, 2014 I served the foregoing by email and by first-class U.S. Mail, postage prepaid, to the following:

Shauna Badger  
549 W. 4630 No.  
Provo, Utah 84604  
shauna.badger@gmail.com

/s/ Kim Altamirano

EXHIBIT B

EXHIBIT B

FILED

ORIGINAL TRANSCRIPT

FEB 19 2015

4TH DISTRICT  
STATE OF UTAH  
UTAH COUNTY

IN THE FOURTH DISTRICT COURT, PROVO DEPARTMENT

OF UTAH COUNTY, STATE OF UTAH

SHAUNA BADGER,

Petitioner,

vs.

Case No. 090402559

DUSTIN MACGILLIVRAY,

Respondent.

ORAL ARGUMENTS

Electronically Recorded on  
December 3, 2014

BEFORE: HONORABLE SAMUEL MCVEY  
Fourth District Court Judge

THACKER+CO

000908

50 West Broadway, Suite 900, Salt Lake City, Utah 84101  
801-983-2180 Toll Free: 877-441-2180 Fax: 801-983-2181

## APPEARANCES

For the Respondent: Evan A. Schmutz  
DURHAM, JONES & PINEGAR  
3301 North Thanksgiving Way, Ste 400  
Lehi, UT 84043

50 West Broadway, Suite 900, Salt Lake City, UT 84101  
801-983-2180

## Oral Arguments

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1 UTAH COUNTY, UTAH - DECEMBER 3, 2014

2 HONORABLE SAMUEL MCVEY

3 P R O C E E D I N G S

4 THE COURT: Good morning. This is on the Badger  
5 against Macgillivray matter. It's 090402559. Would you please  
6 state your appearances?

7 MS. BADGER: Hi. I'm sorry, do I go first this time?  
8 Sorry. It's Shauna Badger representing myself.

9 THE COURT: Thank you.

10 MR. SCHMUTZ: Evan Schmutz here on behalf of  
11 Macgillivray and he's also here with me at the table.

12 THE COURT: Thank you. We have a motion for leave to  
13 conduct post judgement discovery. So would you like to go  
14 ahead, Mr. Schmutz?

15 MR. SCHMUTZ: Yes, Your Honor. The primary purpose  
16 of today's hearing I think is to hear the motion to enforce the  
17 settlement agreement. With respect to the motion to conduct  
18 post discovery, we're here ready to proceed. If the Court  
19 finds that additional facts are needed, then we would seek  
20 leave to conduct that discovery. But under the circumstances,  
21 we're ready to proceed today with respect to the motion to  
22 enforce the settlement.

23 THE COURT: Okay. Why don't you go ahead then?

24 MR. SCHMUTZ: Okay. May it please the Court, Your  
25 Honor. We are here on a motion to enforce a settlement

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1 agreement which we contend was reached between the parties in  
2 the course and context of a litigation proceeding. Although  
3 governed by the basic principles of contract law, settlements  
4 within the course of conduct of litigation are treated as a  
5 separate type of settlement agreement as an executory accord  
6 and are given--and the Court's encouraged that a settlement  
7 agreement reached to dispose or resolve a litigation are to be  
8 enforced.

9           Some of the principles that apply in the Utah law  
10 specifically to settlement enforcement proceedings of this  
11 nature are that a writing is not necessary if the record  
12 establishes that the parties have reached an accord or an  
13 agreement. The settlement of litigation can be determined and  
14 should be determined as a matter of law if the Court determines  
15 that the record establishes a binding agreement has been  
16 reached. That's the Tracy Collins case. And procedurally it  
17 is to be conducted in a summary proceeding, which is I believe  
18 what we are doing here today. These agreements are always  
19 referable to the judge that presides over the litigation  
20 proceeding in which the settlement agreement is reached or  
21 contended to have been reached. So this court is the correct  
22 court.

23           Judicial determinations that a settlement have been  
24 reached within the context of litigation to resolve litigation  
25 are given great deference on appeal. The standard to set aside

1 such is only an arbitrary and capricious standard. All of this  
2 arises out of the judicially recognized policy that parties are  
3 encouraged to enter into settlement dispute to resolve matters  
4 without consuming the resources of the parties and the Court.  
5 And that when one has been entered, it is to be enforced  
6 summarily.

7 So the question we believe is before the Court is to  
8 determine whether the record that is before the Court  
9 establishes that the parties have entered into a binding  
10 agreement. As I've considered this in preparation for today, I  
11 don't believe that there will be a necessity to call any live  
12 witnesses, though we are prepared to do so if there's an issue  
13 on which the Court is not satisfied that the record already  
14 contains the complete evidence necessary to make the finding.  
15 We believe, however, that the statements of the parties  
16 relative to their settlement negotiations are already  
17 completely of record and are not in dispute as to the content  
18 of those proceedings.

19 The court record, as it has come in, has come in in  
20 some ways a little bit piece meal. Some of the textual  
21 messages that surrounded the direct agreement as to terms of  
22 settlement on August 20 and 21, 22, were set forth in the  
23 original memorandum as copies of the phone text screens.  
24 They've not been challenged as being incorrect, though they  
25 have been challenged as being incomplete. In Shauna Sadger's

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1 memorandum in opposition she submitted a transcript of an  
2 earlier conversation that occurred on August 1. That's part of  
3 the record now. There were no communications relative to  
4 settlement or any other thing between the parties between  
5 August 1 and August 15. Then on August 15 there were  
6 communications. And then again there were communications on  
7 August 20 and 21 and 22. And all of the transcriptions of  
8 those communications are available because they were recorded  
9 or sent as text messages. It is our belief that every bit of  
10 this has been submitted to the Court. So what we have is a  
11 series of communications beginning August 1 with respect to the  
12 potential and then ultimate conclusion of a settlement  
13 agreement between the parties.

14 It is important to note what was being discussed with  
15 respect to settlement so as to identify the subject matter of  
16 this litigation being the subject of the settlement. The writ  
17 of execution that was filed in this case was filed on the basis  
18 of a bankruptcy court judgement.

19 Your Honor, do you mind if I hand you some documents?

20 THE COURT: That's fine.

21 MR. SCHMUTZ: I'll provide some to--

22 THE COURT: Have you shown these to Ms. Badger?

23 MR. SCHMUTZ: Yeah. Should I have these marked as  
24 exhibits, Your Honor?

25 THE COURT: That's fine.

1 MR. SCHMUTZ: Exhibit 1 is the writ of ex--  
2 application for writ of execution, which was filed in this case  
3 in July of this year. The Court will see on the second page  
4 that the amount over which this writ of execution is served is  
5 an original judgement in the amount of \$169,667.54. Then the  
6 Court can see Exhibit 2, which is the bankruptcy judgement.  
7 The bankruptcy judgement on Page 2, paragraph six orders that  
8 same amount to be--as the amount that was adjudicated, the  
9 judgement in favor of Shauna Badger.

10 So we see that this writ of execution arises over the  
11 bankruptcy amount that was awarded to her in judgement.  
12 Therefore, the nature and subject matter of this litigation was  
13 that bankruptcy action and the judgement she had received  
14 there. So as the parties began to discuss a potential  
15 settlement, it is this judgement that was being negotiated.

16 There was in this case an earlier confession of  
17 judgement, but that confession of judgement was no longer  
18 enforced because of the ensuing bankruptcy. Shauna went  
19 forward with the bankruptcy action and adversarial proceeding  
20 in bankruptcy and the judgement that she received is the one  
21 that has been marked as Exhibit 2. The consequence of this is  
22 that it clearly demonstrates that as the parties are talking  
23 about settling their dispute. That dispute is the amount that  
24 Shauna Badger received in the bankruptcy judgement.

25 The writ of execution further grounds this case in

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1 the bankruptcy judgement.

2 THE COURT: That raises an issue. Does this Court  
3 have any--can we domesticate in state court a federal judgement  
4 or should she be trying to enforce the judgement in federal  
5 court?

6 MR. SCHMUTZ: I think that may have been an issue  
7 too, Your Honor.

8 THE COURT: Uh-huh.

9 MR. SCHMUTZ: I think that may have been an issue  
10 that could have been raised in the beginning, that she should  
11 have followed federal proceedings to initiate this. This case  
12 was already pending--

13 THE COURT: Right.

14 MR. SCHMUTZ: --from back in 2011 on the earlier  
15 confession of judgement. Then the bankruptcy ensued and should  
16 have stayed this case. However, in their intervening time, the  
17 judgement was rendered in the bankruptcy court. The Court  
18 raises a good question, but it's a procedural question that I  
19 don't think is germane to the ability of the parties to enter  
20 into a settlement discussion.

21 THE COURT: Oh, right. I agree with that. I'm just  
22 wondering. Typically a settlement discussion--er, a settlement  
23 of a case goes before the court where the judgement was issued  
24 if it follows a judgement. So I'm just wondering. But if  
25 nobody's stating that--if nobody's contesting the ability of

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1 the Court to deal with this, I won't worry about that.

2 MR. SCHWITZ: I think the subject matter of this  
3 Court's review at this time is that within this proceeding the  
4 parties--Shauna Badger initiated a procedure for a writ of  
5 execution. It was brought before this Court and a hearing was  
6 scheduled. Prior to that hearing, the parties entered into a  
7 settlement discussion. That's a contract issue.

8 THE COURT: Right.

9 MR. SCHWITZ: It could involve any subject matter in  
10 or outside the state or in or outside the state judicial  
11 system. But the discussion was pertinent to the subject matter  
12 that she had initiated by the filing of this writ of execution  
13 based upon the judgment that she had in the bankruptcy court.

14 THE COURT: Okay. Thank you.

15 MR. SCHWITZ: I appreciate you raising that issue  
16 because it is an issue, but not pertinent, I think, to our  
17 motion that is now before the Court.

18 Your Honor, the next thing then to consider is what  
19 did the parties agree to? I think, as I've indicated, there  
20 are a number of places where we can look in this record for the  
21 conversations that occurred. But I'd like to take the Court  
22 through the progression factually and point the Court to places  
23 in the record where it can be found.

24 As I indicated earlier, the first conversation  
25 relative to settlement occurred in a telephone conversation on

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1 August 1. That telephone conversation has been transcribed in  
2 a complete manner and has been attached to the court record by  
3 Ms. Badger as an exhibit to her memorandum in opposition to  
4 this motion. There was no settlement reached in that first  
5 conversation. But it is important to note where the parties  
6 were in their relative stances because we will see in the  
7 continuing discussion between the parties a pretty classical  
8 progression in compromise.

9 In the August 1 conversation, Ms. Badger made it  
10 clear that what she was looking for was \$60,000. That was her  
11 opening demand. I can point the Court for the Court's  
12 reference in August 1 telephone transcript, on Page 3 she said,  
13 "You stole \$60,000." On Page 7 she said, "I want you to pay my  
14 \$60,000 back." On Page 9 Dustin countered at \$26,000 and again  
15 on Page 14 he said he had only \$26,000.

16 Then there was a continuing discussion on Pages 16  
17 and 17 where Dustin and Shauna talked about the possibility or  
18 the what if or what type of payment she would require if he  
19 agreed to a \$60,000 settlement. That discussion was \$30,000  
20 now, \$1,000 a month for one year and a balloon at the end of  
21 the first year. There was no ascent. There was no meeting of  
22 minds. There was no language that could in any way be  
23 construed as an acceptance, as an offer and acceptance of a  
24 settlement agreement. But that discussion is how it concluded  
25 on Pages 16 and 17.

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1           Then, as indicated previously, there was no  
2 conversation between the parties for 15 days. The next  
3 conversation occurred on August 15. That conversation occurred  
4 because of Dustin--because the hearing date was nearing on  
5 August 25 and the parties again became to talk. I will point  
6 the Court to the complete transcript, absent redaction of some  
7 scandalous stuff, that is attached to Dustin's declaration.  
8 But I have a separate copy of it for the Court's convenience.  
9 Would the Court like a copy of the telephone transcript?

10           THE COURT: I was just looking at it. But, sure, if  
11 you've got an extra copy, that's fine.

12           MR. SCHMUTZ: Yes, I do.

13           MS. BADGER: I apologize, Your Honor. May I object  
14 to something? Is that appropriate?

15           THE COURT: What are you objecting to?

16           MS. BADGER: I would like to object to the fact that  
17 Mr. Schmutz hasn't disclosed who actually transcribed the  
18 conversation.

19           THE COURT: Well, there's a certified court reporter  
20 listed on here.

21           MS. BADGER: Oh, okay.

22           THE COURT: Okay? All right? Kelly Peterson. Okay.

23           MS. BADGER: I don't think I received that, Your  
24 Honor.

25           THE COURT: Well, it was attached to your memorandum.

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1 MS. BADGER: Oh, about the court reporter? Okay.  
2 I'll check that. I didn't see--

3 THE COURT: Okay.

4 MS. BADGER: --where it was transcribed by.

5 MR. SCHMUTZ: Your Honor, so I've handed you the  
6 transcript that Shauna Badger attached to her memorandum.

7 THE COURT: Right.

8 MR. SCHMUTZ: Which is the August 1 telephone  
9 conversation. Then as I've indicated, between August 15 and  
10 some days after that there were additional conversations that  
11 were both telephone and text.

12 THE COURT: Right.

13 MR. SCHMUTZ: So in Dustin Macgillivray's affidavit  
14 we have attached what has now been marked as Exhibit 1. I've  
15 given you a copy of that.

16 THE COURT: Okay. And what's the origin of this?  
17 How is this transcribed?

18 MS. BADGER: I'm sorry, this was my court reporter.

19 THE COURT: Okay. So this is yours?

20 MS. BADGER: Yeah.

21 THE COURT: Okay.

22 MS. BADGER: You misunderstood. Yeah, theirs didn't  
23 have any foundation for who transcribed it.

24 THE COURT: Okay. But there's no objection to that?

25 MS. BADGER: No, I do object to that. I would like--

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1 THE COURT: Okay. Which one are you objecting to?

2 MS. BADGER: I'm objecting to their transcription of  
3 the telephone conversation.

4 THE COURT: On August what?

5 MS. BADGER: On all of the telephone conversations,  
6 as to who--I received some just bits and pieces out of context.

7 THE COURT: Okay. Ma'am, hold on. I'm not sure what  
8 you're talking about. I need to find out what date you're  
9 referring to.

10 MS. BADGER: On all of the transcribing.

11 THE COURT: Tell me what date. Well, tell me what  
12 date because one of these transcriptions is yours.

13 MS. BADGER: Yes. And that's--yes.

14 THE COURT: So tell me--

15 MS. BADGER: That was the meeting that we had.

16 THE COURT: Just tell me what date you're referring  
17 to.

18 MS. BADGER: Okay. On Friday.

19 THE COURT: August 15th?

20 MS. BADGER: August 15th, yes.

21 THE COURT: Okay.

22 MS. BADGER: All of the ones that come from then.

23 And then Saturday, August 16. Wednesday, August 20.

24 THE COURT: Okay. All right.

25 MS. BADGER: All of the ones from them.

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1 THE COURT: Well, you can address that when it's your  
2 turn to argue. Okay?

3 MS. BADGER: Okay.

4 MR. SCHMUTZ: Your Honor, let me address it briefly  
5 now so the Court has our understanding in place.

6 MS. BADGER: Okay.

7 MR. SCHMUTZ: In the affidavit of Dustin Macgillivray  
8 he testifies that each of these conversations recorded were  
9 recorded and that a transcript--he had a transcript made by a  
10 secretary, not a court reporter, and that the transcript is  
11 accurate. He said that he would be willing at any time the  
12 Court would desire it to provide an audio copy of all of these  
13 conversations, and I have that here. Maybe it would be a good  
14 time to put it in the record. This is the audio conversation  
15 or the telephone conversations on August 15 and August 20 from  
16 which this transcript is made. I can represent to you, Your  
17 Honor, that I believe these transcripts are accurate and do  
18 accurately track the audio that is now submitted to the Court.

19 Furthermore, there is no legal basis to object to a  
20 transcript that is testified to as being accurate. There's no  
21 requirement that a telephone conversation be recorded by any  
22 type of professional or court certified reporter. Mr.  
23 Macgillivray, under the rules of evidence, has simply certified  
24 and testified that it is an accurate transcript of what now  
25 appears--what is on the audio recording that we are submitting

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1 to the court.

2 So going to the August 15 date, we have here a 15 day  
3 gap in communications. The last discussion was that Shauna had  
4 made a \$60,000 demand, or offer, to settle the underlying  
5 judgement. On August 15, a telephone conversation was held.  
6 Dustin said, "I can only pay you \$15,000. That's all I can pay  
7 you. And I can write that to you today." Shauna rejected that  
8 \$15,000 counteroffer. "Nope, sorry, that's not going to work  
9 Dustin." Then she went on with some other communication.

10 Then we drop down now to the second page of this  
11 document. Dustin stating, "How about this, Shauna? How about  
12 \$20,000 and we're good and I can pay you today. We will be  
13 done with it and then I don't have to run around--go run  
14 around. You can go do what you have to do with them." And  
15 then Shauna and Dustin discussed this without her specifically  
16 saying that is rejected. She definitely did not accept it and  
17 indicated that she would reject it. If you drop to the bottom  
18 of that page, still in the August 15 conversation, I'm offering  
19 you--Dustin: "I'm offering you \$20,000 right now because if you  
20 come after me, I don't have--that's all I'm going to be able to  
21 come up with is \$20,000." Shauna responds, "Dustin, you just  
22 got through telling how good you're doing and how well you're  
23 doing and you have \$26,000." That is a reference back to the  
24 August 1 communication when he said he could pay her \$26,000.

25 Then further on the next page Dustin, after some

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1 discussion, Dustin says, "I can give you \$20,000 and if we can  
2 just make it go away I'd love to just have it go away." At  
3 this point it's very important to see what Shauna's response  
4 was. "Okay. All right. I'll talk to him and see what he  
5 says." She's referring, of course, to her husband Rod.

6 4:15 p.m. on the same day, in the italics, Dustin to  
7 Shauna, that represents a text, a telephone text message which  
8 is also before the Court, "Did you get a chance to talk to  
9 Rod?" No response until the next day, August 16. Shauna  
10 texted, "Yes." Dustin texted back, "And?" And then nothing  
11 until the 20th of August.

12 Then there was a phone call. This phone call is also  
13 on the digital recording, audio recording that has been  
14 presented to the Court and to counsel. Dustin said, "What did  
15 Rod say about the 20?" Shauna, "I mean obviously, you know,  
16 we'd like the 30, but, you know, I mean, I think it might work,  
17 Dustin. Let me get back to you today. I can work on him."  
18 So there's still a \$20,000 offer outstanding and Shauna is  
19 talking about working on her husband to see if they can go down  
20 to \$30,000.

21 On August 21, 2014, these are text messages at 11:12  
22 in the morning. Shauna texted to Dustin, "Dustin, Rod wants at  
23 least \$30,000; the amount I took from his credit line that you  
24 used to pay your restitution. Need to man up and do the right  
25 thing." Dustin says, "You only loaned me \$26,000." The next

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1 response is of interest. The second sentence or third sentence  
2 in Shauna's response said, "Even if we go with the \$26,000, I  
3 have well over \$4,000 in attorney's fees and other fees in  
4 collection which would put it about \$30,000." She states, "I  
5 think our agreement you and I agreed to when we met is fair."  
6 She's referring to that August 1 conversation in which there  
7 were no words of agreement; \$30,000 cash now and \$1,000 a month  
8 until the other \$30,000 is paid back.

9 Then it goes on to the next day, August 22. At 9:23  
10 a.m. Dustin texted to Shauna, "Shauna, I'm sorry to hear about  
11 your father." Apparently her father had been ill. "Thanks for  
12 getting back to me. The best I can do is \$25,000. I'm on my  
13 way to see an attorney about the hearing on Monday. Can we get  
14 this done at \$25,000? Thanks." Shauna to Dustin, "I think  
15 so." Dustin to Shauna, "I need a yes or no. Please. I have a  
16 meeting in one hour." Shauna to Dustin, "Let's do \$25,000 now  
17 and \$2,500 next year when you do a big deal." Shauna to  
18 Dustin, "Dustin, I can garnish all your wages for 25 percent  
19 for the rest of your life and have a sheriff sale every few  
20 months if you want. This is fair for what you have done to  
21 me." Dustin to Shauna, "Shauna, I agreed to your offer." Then  
22 he restates it. "I will pay you \$25,000 now and \$2,500 no  
23 later than one year from now in full settlement. So we are  
24 done. We need to have a written agreement to settle all claims  
25 between us and have the judgement satisfied. I can ask Morgan

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1 or someone to write up a simple agreement. Let's plan on  
2 payment and signing the settlement next week. I'm glad this is  
3 behind us. Thanks." Look at her response, Your Honor.  
4 "Okay."

5 At that point Shauna has made an offer. We'll  
6 discuss the argument that she raises that it was a mistaken  
7 offer. But she made the offer herself. She texted it to  
8 Dustin, \$25,000 now, \$2,500 in a year. He writes back to her  
9 and restates it. So it doesn't have anything more to do with  
10 clumsy or fat fingers. Now she's reading a text. And it's  
11 very clear he has restated it, \$25,000 now and \$2,500 in a  
12 year. We'll sign the settlement next week. I'm glad it's  
13 behind us. And her response is, "Okay." Then she adds an  
14 additional term. "But I'm not going through any more--okay,  
15 but Dustin I'm not going through any more. You either keep  
16 your word or I'm done. Have Morgan write up something. But it  
17 must have in it that you default all debt--that if you default,  
18 all debt and interest comes back. I can't trust you to keep  
19 any agreement. Been there, done that." Dustin to Shauna,  
20 "Okay."

21 So what has happened is that the parties have set  
22 forth in clear communication with an opportunity to review it  
23 back and forth the terms of a final settlement to resolve all  
24 issues. Dustin specifically also agreed to add into the  
25 settlement agreement the terms of default.

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1           There is no response to that to say that it was a  
2 mistake until after the written settlement agreement had been  
3 prepared and submitted to Shauna and after the brew ha-ha had  
4 arisen over the hearing that I did not attend. It is curious  
5 that she attended the hearing. Even on her theory that she had  
6 a settlement that was \$25,000 and \$25,000, it's curious that  
7 she was here. But nevertheless, her first effort to say that's  
8 not our agreement is after she had seen the written agreement.  
9 But the terms are clear and un-equivocated and the only escape  
10 from this is if the Court found that the legal elements of  
11 mistake were present to relieve Ms. Badger from the burden of  
12 this and responsibility of this agreement.

13           If we step forward in time just a little bit, on the  
14 day of the schedule--it was scheduled for the hearing a  
15 settlement agreement was prepared and submitted. I'd like to  
16 mark that. I'll now hand you what has been marked Exhibit 7,  
17 Your Honor. This is the settlement agreement prepared by me  
18 following the delivery from Dustin of the text messages that  
19 resulted in the settlement. So I had the texts before me when  
20 I prepared this settlement agreement. So the question then is  
21 does the settlement accurately reflect the agreement that was  
22 reached between the parties?

23           The recitals refer to the bankruptcy court judgement  
24 because it had been the basis for her writ of execution and the  
25 recitals refer to the Fourth District writ of execution

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1 proceedings which were then ongoing. Still are. Then a  
2 recital to avoid further expense (inaudible) the parties have  
3 agreed to resolve and settle the bankruptcy action and the  
4 Fourth District Court action. Terms of the agreement: number  
5 one, settlement payment. Macgillivray agrees and shall pay to  
6 the order of Badger a single lump sum settlement payment in the  
7 amount of \$25,000 on or before Friday, August 29. Which was  
8 the next week, as they had discussed. Plus an additional  
9 \$2,500 within one year. Then there would be a satisfaction of  
10 judgement. But only after the full amount, both payments, had  
11 been made and it would be submitted to Shauna for review to  
12 dismiss both actions. The third one would be a disclaimer to  
13 the seized property because that was not part of any  
14 consideration that was agreed to for the settlement of all  
15 issues. The fourth and the fifth paragraphs are general  
16 releases of the claims rising in these litigations. Then  
17 boilerplate language after that with respect to representation  
18 and resort or opportunity to resort to counsel. Then a default  
19 provision in paragraph 7. The rest of it is boilerplate. But  
20 paragraph 7, at the bottom of Page 3, provided in the event an  
21 action to enforce the terms (inaudible) is asserted, the  
22 prevailing party shall be entitled to an award of reasonable  
23 attorney's fees and costs incurred. In the event Macgillivray  
24 fails to make the payments called for here in a timely manner,  
25 the default judgement of the bankruptcy action will not be

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1 satisfied and Badger shall have all rights to collect on the  
2 same permitted under law. Which includes, of course, the  
3 interest set forth in the judgement.

4 So the consequence and the terms are all set forth.  
5 There was nothing left out and nothing added to, other than  
6 recognized boilerplate that don't change the terms of  
7 settlement. This was rejected by Shauna Badger which then  
8 prompted the filing of this motion to enforce.

9 Your Honor, I'd like to talk just a little bit about  
10 the legal argument that she raises. She does not challenge  
11 what was stated. The plaintiff does not challenge or dispute  
12 her offer communicated via telephone text, \$25,000 and then  
13 \$2,500. Four days after they had arrived at that settlement  
14 and she had an opportunity to review Dustin's restatement of  
15 it, she said she had made a mistake. She called it a typo.  
16 She attributed it to fat fingers or clumsiness in printing--in  
17 hitting the keys to text it.

18 She does not and has not contended that this was a  
19 mutual mistake, and that's a very important factor in applying  
20 the law to this case. She's only contended it's a one-sided  
21 mistake. Obviously when Dustin wrote back and restated  
22 precisely the terms of their agreement he was not participating  
23 in a mutual mistake. By her argument and by the evidence, she  
24 is contending that she should be relieved from the consequences  
25 of this settlement agreement on the doctrine of unilateral

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1 mistake. She calls it originally in her memorandum Scrivener's  
2 error. Scrivener's error is a doctrine of mutual mistake where  
3 the parties have agreed to the same thing but whoever writes it  
4 up makes a mistake. Then the parties can be relieved because  
5 the mistake is a mistake that they mutually held. This is not  
6 Scrivener's error. The documentation was precisely--of the  
7 settlement agreement was precisely what the parties had  
8 submitted back and forth with one another.

9 So as we come back to the doctrine of unilateral  
10 mistake, it's very limited in its application. It's limited to  
11 situations where--I think I'll discuss the first standard, a  
12 very heavy standard, that a party who contends to have relief  
13 because of unilateral mistake under the Guardian v. Stangle  
14 case must carry the burden of proof to demonstrate that she  
15 made a mistake in moralizing the agreement and that the other  
16 party both knew of the mistake and unfairly took advantage of  
17 it. This quote comes from the Guardian case. "When one  
18 party's mistake of fact is coupled with the knowledge of the  
19 mistake by the other party or a mistake is produced by fraud or  
20 other inequitable conduct by the non-erring party the mistake  
21 provides a basis for reformation or rescission."

22 Under the doctrine of unilateral mistake, for  
23 starters, Ms. Badger must demonstrate that Dustin Macgillivray  
24 knew she was making a mistake and then attempted unfairly to  
25 take advantage of it. As we consider the context of the

1 evidence, such simply can't be supported in the evidence  
2 because we see a progression of discussion. The words leading  
3 and the days leading up to her final offer was that she would  
4 talk to Rod and he wanted at least \$30,000 and see if they can  
5 do it. Then she said, "I think it will work." Then she comes  
6 back and makes her offer of \$25,000 and \$2,500. There's no  
7 indication anywhere, and it hasn't even been argued, that  
8 Dustin made a mistake. And there's no indication anywhere that  
9 he caused her to make the mistake through some type of a  
10 fraudulent or inequitable conduct. It was all her doing and he  
11 accepted it in good faith and responded to it.

12 If Steuna can carry that burden to demonstrate under  
13 the Guardian state case, to demonstrate that Mr. Macgillivray  
14 knew of the mistake and took advantage of it, then she still  
15 must contend with the other elements of establishing relief  
16 through unilateral mistake. In our opening memorandum we laid  
17 out what those elements are. This is taken from the case B & A  
18 Associates v. L.A. Young Sons Construction Company, 796 P.2nd  
19 692 at 695, a Utah 1990 case. This is a statement of it here  
20 but it's widely adopted in Utah case law. "The elements of  
21 unilateral mistake, after the burden is carried by the Guardian  
22 Bank case are, number one, the mistake must be of so grave a  
23 consequence that to enforce the contract as actually made would  
24 be unconscionable."  
25

So let's look at that first element. Because all of

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1 these elements have to be proven. They are not or's. They  
2 have to all be proven. With respect to the first one, there's  
3 no unconscionability in a settlement of \$27,500 given the  
4 progression of discussion that led up to that. If Shauna had  
5 been at \$200,000 and then suddenly made a mistake that she  
6 would claim that brought it to a tenth or a twentieth of that  
7 maybe there could be a discussion. But here we see the parties  
8 moving in a progressive step-by-step discussion and negotiation  
9 to the point where they got it down to \$30,000 and \$25,000,  
10 then it went to \$27,500. It's not unconscionable given the  
11 nature of the litigation and given the potential that we still  
12 had to try and see if we could set aside the default judgement  
13 and move forward. The question when conscionability can be  
14 made is a determination of law by the Court.

15 The second element is that the matter as to which the  
16 mistake was made must relate to a material feature of the  
17 contract. We concede that the settlement does relate to a  
18 material feature. The mistake, excuse me, does relate to a  
19 material feature of the contract. So element two is satisfied.

20 Element three, however, requires generally a mistake  
21 must have occurred notwithstanding the exercise of ordinary  
22 diligence by the party making the mistake. This gives rise to  
23 the Court's determination as a matter of law. Did Ms. Badger  
24 exercise ordinary diligence? If we accept at face value an  
25 argument of unilateral mistake, then was she diligent? I

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1 believe that the answer to that question is no and is  
2 demonstrated and proven in the followup texts. When she  
3 communicates \$25,000 and \$2,500 he says "I agree to your offer  
4 \$25,000 now and \$2,500 later." And she says, "Okay." Ordinary  
5 diligence has not been followed here. If she made a typing  
6 error, that's one thing. That would not be diligent, in my  
7 view, when we're talking about critical terms, but for her to  
8 read back her own offer and again say okay to it is a much  
9 different thing. That is not ordinary diligence. We think  
10 that element number three cannot be satisfied under these  
11 facts.

12 Then the final element, number four, it must be  
13 possible to get relief by way of rescission without serious  
14 prejudice to the other party except the loss of his bargain. I  
15 don't believe that that's been the case because of all that has  
16 transpired. There's been much in legal fees, much in  
17 continued--in the requirement to pursue this litigation, to  
18 enforce a settlement. There have been many other motions  
19 filed. There's been an execution hearing. Property has been  
20 lost to that hearing. It's not possible to put him--to give  
21 relief to Shauna Badger on unilateral mistake without serious  
22 prejudice to Mr. Macgillivray.

23 So in summary, the elements for relief under the  
24 doctrine of unilateral mistake start with carrying the burden  
25 to demonstrate that the other party contributed to the mistake

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1 by fraud or inequitable conduct. That fails. No argument has  
2 been made. No facts presented. Then of the next elements,  
3 it's not unconscionable. That fails. There was not ordinary  
4 diligence. That fails. We believe that you can't put--you  
5 can't give Shauna relief without serious prejudice to Dustin.  
6 So that fails. All of these are required. They're not  
7 alternative. Under these circumstances, the doctrine of  
8 unilateral mistake cannot save this case for Ms. Badger. She  
9 should be held responsible for the settlement agreement that  
10 she made. She's the one that put it into place and she's the  
11 one that should be responsible for it.

12 Your Honor, I have copies of the specific text  
13 messages, though they are already a matter of record.

14 THE COURT: I have them here.

15 MR. SCHMUTZ: Okay. Then if the Court--does the  
16 Court have any questions for me?

17 THE COURT: I have no other questions. Thank you.

18 MR. SCHMUTZ: Thank you, Your Honor.

19 THE COURT: All right. Ms. Badger?

20 MS. BADGER: Okay. Thank you, Your Honor. This is  
21 worse than having to speak in church. I'm very nervous. I  
22 want you to understand that and I would like to apologize up  
23 front. If I do anything inappropriate, if you would kindly  
24 just let me know. Because I am not an attorney. I'm doing the  
25 best that I can.

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1 I would first like to request something. As I have  
2 indicated in my legal filings, I am a witness and a whistle  
3 blower and an informant in an extremely large criminal  
4 proceeding with the Justice Department and the criminal  
5 division of the IRS. I have been through hell and back in  
6 regards to so many things that the Court is not aware of. In  
7 regards to this criminal ring, one of the people involved in it  
8 is here in the court today and I'm just shaking being here--  
9 having him here. I was wondering if we could have--if the  
10 Court would please ask him to leave.

11 THE COURT: Who is that?

12 MS. BADGER: Mr. Duncan Lilico. There's no reason  
13 for him to be here. I would like to request that he be asked  
14 to leave the courtroom so that I can proceed.

15 THE COURT: Mr. Lilico, are you under any kind of  
16 federal indictment at this point?

17 MS. BADGER: Not indictment.

18 MR. LILICO: No, sir. I am apparently a witness  
19 because of Ms. Badger's actions. I am (inaudible).

20 THE COURT: You're a witness here today?

21 MS. BADGER: No.

22 MR. SCHMUTZ: No.

23 MR. LILICO: No. I have been informed by the IRS  
24 that they--they have questioned me and spoken to me and told me  
25 (inaudible).

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1 THE COURT: Okay. This is, of course, a public--it's  
2 not a public forum but it's a public proceeding. People can be  
3 in here. Do you mind stepping outside while Ms. Badger talks  
4 to me?

5 MR. LILICO: I did have a restraining order against  
6 Ms. Badger and her--

7 THE COURT: Oh, then you've got to be out of here.

8 MS. BADGER: Yeah.

9 THE COURT: If you've got a restraining order, you're  
10 gone.

11 (Voices overlap)

12 MR. SCHMUTZ: Not against him.

13 MS. BADGER: No.

14 THE COURT: I don't care.

15 MS. BADGER: Yeah.

16 THE COURT: It's up to you also.

17 MS. BADGER: This is why.

18 THE COURT: You can't come in here and make her  
19 violate the restraining order.

20 MS. BADGER: Yeah.

21 THE COURT: So you've got to be gone.

22 MR. LILICO: That's expired. I just want to be  
23 clear.

24 THE COURT: All right. Okay. All right. Thank you.  
25 Okay. Go ahead.

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1 MS. BADGER: This is just a small example of the  
2 intimidation.

3 THE COURT: He's gone. So we can proceed.

4 MS. BADGER: Okay.

5 THE COURT: Okay.

6 MS. BADGER: All right.

7 MR. SCHMUTZ: Judge, if I may just object at the  
8 outset, the Court could grant a continuing objection, that the  
9 issue of this case is whether a settlement agreement--

10 THE COURT: Right. Well, I recognize that. I think  
11 she was just trying to say that there was this fellow back here  
12 who's making her nervous.

13 MS. BADGER: Yes.

14 THE COURT: So that's--

15 MS. BADGER: Thank you so much, Your Honor.

16 THE COURT: We're past that. So go ahead and  
17 continue on.

18 MS. BADGER: Yes. And, Your Honor, I understand that  
19 that is the focus of our meeting here today. However, I want  
20 Your Honor to understand that it wouldn't be fair to justice  
21 for you not to understand the whole picture here in my  
22 interaction with Mr. Macgillivray.

23 THE COURT: Okay. And I can appreciate that but--

24 MS. BADGER: So will you let me know when I--

25 THE COURT: Yeah, I will.

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1 MS. BADGER: --get too far off?  
2 THE COURT: Realize the main--the material facts in  
3 my mind are--  
4 MS. BADGER: Yes.  
5 THE COURT: --these few days of texts.  
6 MS. BADGER: Right.  
7 THE COURT: We've got things written down.  
8 MS. BADGER: Right.  
9 THE COURT: As a lot of old prosecutors say,  
10 documents don't lie.  
11 MS. BADGER: Yes.  
12 THE COURT: So they really like documents.  
13 MS. BADGER: Yes.  
14 THE COURT: So that's what we're focusing on.  
15 MS. BADGER: Yes. So I will focus on that.  
16 THE COURT: Okay. All right.  
17 MS. BADGER: And I will just briefly just reiterate  
18 that Mr. Macgillivray admitted to defrauding me. He was  
19 prosecuted by Provo City after an investigation.  
20 MR. SCHMUTZ: Objection, Your Honor.  
21 THE COURT: Okay. I've--  
22 MS. BADGER: And so signed it--  
23 THE COURT: I've read--  
24 MS. BADGER: Okay. You've read all that?  
25 THE COURT: Yes, ma'am, I read that in your papers.

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1 MS. BADGER: Okay.

2 THE COURT: I'd like to focus in on your com--

3 MS. BADGER: Just on--okay.

4 THE COURT: --on your communications in these texts.

5 MS. BADGER: Okay.

6 THE COURT: Because that's--

7 MS. BADGER: Okay.

8 THE COURT: Because that's the whole basis for this

9 claim--

10 MS. BADGER: Okay.

11 THE COURT: --that there's a settlement agreement.

12 MS. BADGER: Okay.

13 THE COURT: I realize that there are these

14 conversations going back and forth before that.

15 MS. BADGER: Right. Okay. Then let me go right--

16 THE COURT: But those are just conversations.

17 MS. BADGER: Okay.

18 THE COURT: In my mind, what's material--

19 MS. BADGER: Right.

20 THE COURT: --are these couple of days of texts.

21 MS. BADGER: Okay. Before the texts what is also

22 material is that Mr. Macgillivray called me immediately after

23 the execution of the writ and his property was seized. He

24 asked me to meet with him. He claimed that he wanted to make

25 restitution; that he was sorry for what happened; that he

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1 wanted to make me whole, is the term that he used. And so we  
2 met and we discussed the situation and we came to a settlement  
3 agreement. And I am just perplexed that Mr. Macgillivray and  
4 his counsel can continue to misrepresent to the Court that  
5 there was not a binding settlement agreement.

6 THE COURT: Okay. Is this the confession of  
7 judgement you're referring to?

8 MS. BADGER: No. This is during our conver--our very  
9 first meeting that we had immediately after the writ of  
10 execution in which--

11 THE COURT: Is this the one on August 1?

12 MS. BADGER: This was where--that I recorded, yes.

13 THE COURT: On August 1?

14 MS. BADGER: On August 1, yes.

15 THE COURT: And during that conversation--and I  
16 admitted to Mr. Macgillivray that I was recording that  
17 conversation, which I think also impacts it even more because  
18 he knew he was being recorded. I explained to him my reasons  
19 for recording the conversation, because of feeling intimidated  
20 and framed from previous situations in regards with them. And  
21 so Mr. Macgillivray and I spent a little while talking about  
22 what he owed me and what I would be willing to do to make that  
23 settlement go away. Or his--

24 Now, Your Honor, I want you to realize that this is  
25 years and years and years and years and years of Mr.

1 Macgillivray not following your order to pay me back. I just  
2 want to address Mr. Schmutz's argument about the bankruptcy. I  
3 am not an attorney, but it was my understanding that the  
4 bankruptcy simply allowed the original judgement that you  
5 signed to proceed. So I don't know whether it's appropriate or  
6 not to go to the bankruptcy court. Mr. Macgillivray and I had  
7 numerous settlement agreements in the past. Written. I've  
8 spent thousands and thousands and tens of--at least ten  
9 thousand dollars trying to collect money from him in attorney's  
10 fees and defending myself. And as a result of that, you know,  
11 Mr. Macgillivray has never made one effort to pay one cent of  
12 the money that he stole through fraud from us. He used that  
13 money to pay his restitution in another fraud case that he was  
14 being charged with a felony. I mean, it's just so outrageous.  
15 It's just mind boggling.

16 But as we spoke at the park, Mr. Macgillivray--and I  
17 put together--you know, what I've had to deal with, Your Honor,  
18 is this continual back and forth, back and forth. Saying one  
19 thing and not following through on it. Saying something  
20 different. Saying this can--this continual pathological lying  
21 like I have never experienced in my life. So I want you to  
22 understand that when I decided to go to the hearing I had no--  
23 even though we had reached this settlement agreement, I had no  
24 thought at all that Mr. Macgillivray would ever even keep this  
25 initial settlement agreement that we agreed to.

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1           This is what Dustin said. I took out just the  
2 highlights. Dustin says, "So here is what--here is what I  
3 would propose." So he made this proposal to me. "And I want  
4 to make you--I want to get clean so that I can pay you, but I  
5 can't pay you \$60,000 right now." My response to Mr.  
6 Macgillivray was that I would be willing to accept \$60,000.  
7 Now, if you take that down from what he owes me, which is over  
8 \$230,000, that doesn't even begin, Your Honor, to describe the  
9 kind of financial devastation that this man has caused our  
10 family. And I was willing to negotiate with him so that he  
11 could pay back just the money, the hard cash, that on this one  
12 particular incident--because there were numerous other  
13 incidents where he also caused us incredible amount of losses  
14 through his fraud.

15           THE COURT: Okay. And I--

16           MS. BADGER: And so I--

17           THE COURT: Ma'am, nobody understands better than me  
18 what you've gone through because I've read what you've put  
19 here.

20           MS. BADGER: Okay. Let me--

21           THE COURT: The issue is the Court can't do things  
22 because of--out of sympathy and so forth.

23           MS. BADGER: I understand that, Your Honor.

24           THE COURT: It has to be things because this is--  
25 there's a duty to do this. Okay?

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1 MS. BADGER: So let me--

2 THE COURT: That's what it has to focus on. Okay?

3 MS. BADGER: I understand and I appreciate that so  
4 much.

5 THE COURT: All right? Okay.

6 MS. BADGER: That counsel. So I agreed to the  
7 \$60,000. And he says, "Well, do you want a chunk now and some  
8 over time?" And I agreed to that. I said, "Yes, that would be  
9 fine." "That would be great," I said. Then he said, "All I  
10 know is that--so how about--I have right now \$26,000 to pay  
11 you. So how do we do this? How do you want to, you know,  
12 proceed with the settlement agreement? How do we do this?" So  
13 then I said, "Well, why don't we do, you know, \$30,000 this  
14 year and \$30,000 next year." And he says again, "How long to  
15 pay the \$60,000? So, I mean, if you can give me a year." So  
16 again he proposes that. "So that would just be easy on us  
17 then, \$30,000 and \$30,000 in a year?" And I said, "Yes." And  
18 then he says again--

19 THE COURT: I'm sorry. Where are you at?

20 MS. BADGER: Oh, I'm actually--

21 THE COURT: What page?

22 MS. BADGER: I'm not actually reading from that  
23 transcript. I took out the ones that I thought were applicable  
24 to--

25 MR. SCHMUTZ: It's on Page 16 of the court reported

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1 transcript.

2 THE COURT: Okay. Thank you.

3 MS. BADGER: Thank you. Then he says again to me,  
4 "How much? How much would you feel comfortable on a monthly  
5 basis?" Because I told him, "Well, Dustin, I really wouldn't--  
6 I don't--can't trust anything you tell me. So I don't want to  
7 wait a whole year." And we agreed that he would pay me \$1,000  
8 a month. So would you give--then he says again, "So that would  
9 give you \$12,000. Then I would owe you the difference? That  
10 is 12 plus 30, whatever that is, \$16,000 and then we're even?"  
11 So he agreed to pay \$30,000 now, then he would pay me \$1,000 a  
12 month until the end of the year, and then he would pay me the  
13 difference owing \$16,000. Then Dustin says again, "And then if  
14 I make that payment, you won't do any legal--or take more stuff  
15 from my house." And I tell him no. Then Dustin says again,  
16 "No supplemental hearings. Nothing. Just make it simple."  
17 And I said, "No." Then Dustin said, "So \$30,000 now and \$1,000  
18 a month and a balloon in a year?" And then I said, "Yes." And  
19 the Dustin said, "And then that's it? And then that's what's  
20 all done. We are done." I said, "Yes."

21 So, Your Honor, I don't know. To me, that's more of  
22 a settlement agreement than a few texts.

23 THE COURT: Well, here's my question, ma'am. If you  
24 thought you had a deal here--

25 MS. BADGER: Right.

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1 THE COURT: --why the subsequent agreement--

2 MS. BADGER: Okay. Let me tell you that, Your Honor.

3 THE COURT: --that was totally different than this?

4 MS. BADGER: This will give you an example of what I  
5 deal with continually over the years with him. Then a couple  
6 of days later, Mr. Macgillivray calls me up on the phone and he  
7 says he's not going to live up to the settlement agreement that  
8 we came to. And he says, "Well, I'm going to give--"

9 See, his whole demeanor had changed. During the time  
10 at the park he was like, "I want to make restitution to you. I  
11 want to make you whole. I'm sorry for what I did. I was  
12 wrong." And he goes on and on. And this is what he does.  
13 He's the master manipulator. He manipulates me into feeling  
14 sorry for him or being Christ like and wanting to, you know,  
15 help him to pay us back. So that way he gets what he wants.

16 But then Mr. Macgillivray talks about speaking to  
17 somebody else. And he doesn't say who he spoke to, but  
18 somebody else told him that he doesn't need to pay me, they can  
19 get him out of the judgement. They can, you know, make it go  
20 away, is what he says to me. Whether--and I assumed at that  
21 time that he was speaking about Mr. Schmutz. I now believe  
22 that--I think it was somebody else maybe also. Only Mr.  
23 Macgillivray can tell us.

24 But nevertheless, the whole demeanor had changed.  
25 It's like, "I'm not going to pay you. Take it or leave it."

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1 You know? Take \$15,000." You know? "I'll just take the  
2 \$25,000 that I told you I'd give you and just give it to an  
3 attorney and I'll fight you." You know? So here I go again.  
4 So here I go back again to being on the defensive.

5 Then he makes all sorts of subtle threats. If Your  
6 Honor knew what we had been through with this group of people  
7 and even--I told at that time--Dustin brings up Mr. Schmutz's  
8 name. And the reason he brings up Mr. Schmutz's name because  
9 Mr. Schmutz has victimized my family and my husband and I.

10 THE COURT: Well, hold on a minute, ma'am. Okay.

11 MS. BADGER: So I became scared.

12 THE COURT: Hold on. May I ask you?

13 MS. BADGER: Yeah.

14 THE COURT: Okay. You've got a \$169,000 judgement  
15 out of bankruptcy court.

16 MS. BADGER: Right. He owes me over \$230,000.

17 THE COURT: So and you're trying to fight an attorney  
18 on this yourself?

19 MS. BADGER: I'm sorry, I'm trying to fight an  
20 attorney?

21 THE COURT: You're trying to fight an attorney that's  
22 representing Mr. Macgillivray.

23 MS. BADGER: At that time I was not aware of any  
24 attorney representing Mr--

25 THE COURT: Okay. Well, you're trying to fight Mr.

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1 Macgillivray, who you know manipulates you. At least that's  
2 your--

3 MS. BADGER: Right.

4 THE COURT: Why don't you go turn this over to a debt  
5 collection attorney and some bulldog and let them go after him?

6 MS. BADGER: Well, Your Honor, for one thing, we  
7 have--

8 THE COURT: There are numerous--

9 MS. BADGER: I wish I had thought of that at the  
10 time.

11 THE COURT: There are numerous attorneys in Salt Lake  
12 who would have this wrapped up for you in four weeks.

13 MS. BADGER: I know. Your Honor, I've never been  
14 through this process before.

15 THE COURT: I know that.

16 MS. BADGER: I didn't understand that. And now I  
17 look back and I think why didn't I do it? But at the time--

18 THE COURT: Well, I'm not sure why you're not doing  
19 that now either. But--

20 MS. BADGER: Well, because I didn't think I could  
21 while this is pending. It was my understanding--

22 THE COURT: You don't think you could have an  
23 attorney?

24 MS. BADGER: No, why I couldn't--I can't afford an  
25 attorney, Your Honor.

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1 THE COURT: There would be an attorney that would  
2 take this on a contingent fee and have it wrapped up for you in  
3 a month.

4 MS. BADGER: I'm sorry, Your Honor, I didn't know.

5 THE COURT: Well, the--

6 MS. BADGER: I'm sorry. I mean--

7 THE COURT: Well, the law protects the diligent. So,  
8 anyway.

9 MS. BADGER: It's not being diligent, Your Honor.  
10 It's just, you know, when you go through these kind of  
11 emotional situations you just don't--

12 THE COURT: That's why--yeah, ma'am. I'm not  
13 saying--I'm not trying to criticize you here.

14 MS. BADGER: Yeah.

15 THE COURT: I'm just saying--

16 MS. BADGER: Yeah.

17 THE COURT: --that's why you get somebody that's  
18 accustomed to dealing with this.

19 MS. BADGER: Uh-huh.

20 THE COURT: And don't try to go through it yourself.  
21 You know, you don't go and fight somebody--

22 MS. BADGER: I agree. I used poor judgement.

23 THE COURT: You don't go and fight--

24 MS. BADGER: Poor judgement.

25 THE COURT: You don't go and fight Mike Tyson

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1     yourself. You get somebody who can beat him up.

2             MS. BADGER: I agree.

3             THE COURT: So, yeah. Okay.

4             MS. BADGER: I agree.

5             THE COURT: Well, okay. All right.

6             MS. BADGER: And I wish I could go back and do it

7     differently, Your Honor.

8             THE COURT: Well, I'm just saying--

9             MS. BADGER: And so--

10            THE COURT: But, again, I can't--

11            MS. BADGER: I know.

12            THE COURT: I can't make my decision here based on

13     sympathy--

14            MS. BADGER: Okay.

15            THE COURT: --or emotion or anything like that.

16            MS. BADGER: I understand that. And I am going to go

17     through and tell you why I believe it's still not an

18     enforceable agreement.

19            THE COURT: Okay. Well, that's what we need to get

20     to because--

21            MS. BADGER: Okay.

22            THE COURT: --we are a rule of law society.

23            MS. BADGER: I understand, Your Honor.

24            THE COURT: We can't be arbitrary.

25            MS. BADGER: I understand.

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1 THE COURT: Okay. All right.

2 MS. BADGER: There's no question.

3 THE COURT: Okay.

4 MS. BADGER: Okay. So essentially what I'm trying to  
5 point out, Your Honor, is that every time I speak to Mr.  
6 Macgillivray I get a different number, I get a different story.  
7 It's just impossible to even deal with.

8 When Mr. Macgillivray then made these subtle threats  
9 to me and said that then now he wasn't going to live up to this  
10 agreement and wasn't going to honor anything, I did go into a  
11 panic because of what we have been through in the past. So I  
12 began to think well maybe I should possibly just try and take  
13 something that I can get because fighting him is just so  
14 impossible.

15 So Mr. Macgillivray and I did go back and forth, as  
16 Mr. Schmutz discussed, and he did present all sorts of  
17 ridiculous numbers that were just so ridiculous. But the  
18 number that I came back with, that I felt was fair, went along  
19 with what we had originally agreed to in our meeting; that was  
20 that he paid me \$30,000 now, \$1,000 a month and then \$30,000  
21 later. So my text back to him was, "Okay, well Dustin, why  
22 don't we do \$25,000 now and we'll do \$25,000 next year when you  
23 do a big deal." I obviously made a mistake, and that is my  
24 mistake. However, I've been under tremendous pressure with my  
25 parents dying and taking care of them. And I'm not trying to

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1 get your sympathy, Your Honor. I'm really not. I'm just  
2 simply saying I simply made an honest mistake.

3 And I told Mr. Macgillivray that I would not  
4 negotiate with him if he had Mr. Schmutz as his attorney. He  
5 went ahead and--and that's why I mentioned the name of the  
6 other attorney, that I was willing to have him have something  
7 written up so that we could negotiate the rest of the terms of  
8 our settlement.

9 This is one of the things that I want to point out to  
10 Your Honor, is that we had barely begun to even negotiate, you  
11 know, half of what we had left to negotiate in terms and in  
12 regards to what was going to be in the settlement agreement. I  
13 never agreed. I don't know where Mr. Schmutz got this idea.  
14 Maybe from Dustin. I never agreed to just have him write a  
15 settlement agreement that I had to pay attorney's fees or I had  
16 to, you know, give Mr. Macgillivray back his things or all of  
17 these other issues that Mr. Macgillivray and I still hadn't  
18 even discussed yet. We were simply trying to come to some sort  
19 of basis initially of what he could do to pay us back.

20 Now, I want to address all of the different defenses  
21 that I have. The main one is the fraud again. Initially Mr.  
22 Macgillivray tells me how he's doing great. You know, he  
23 hardly has any debt. He can easily pay me the \$25 to \$26,000  
24 right now. The next thing I know, you know, he can't pay it.  
25 His pathological lying about what he can and cannot pay just

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1 puts me at such a horrible position. Because on one hand, I  
2 want to get paid. I want also for, you know--I certainly don't  
3 want to bankrupt he and his family. All I can do is rely on  
4 the truth of his statements, and that has just proven again to  
5 be an absolute catastrophe.

6 So when I texted back, "Let's do \$25,000," Your  
7 Honor, I honestly believed that it was \$25,000 now, \$25,000  
8 later. And he did text me back and I still didn't catch that  
9 mistake. But as soon as the settlement agreement that--I told  
10 him I would not have Mr. Schmutz involved in anything--was  
11 given to me, I immediately caught it and I texted him and  
12 said--and if you read this text, Your Honor, it's very obvious  
13 that I'm confused. I say, "Well, that's not our agreement."  
14 Your Honor, you have to understand--

15 THE COURT: I'm sorry, which text?

16 MS. BADGER: That's the text that I--

17 THE COURT: Not the one--

18 MS. BADGER: After I get the settlement agreement.

19 THE COURT: Okay.

20 MS. BADGER: I text him back and I said, "Dustin, I  
21 thought we agreed to \$25,000 now and \$25,000 next year. That  
22 was the agreement in our last text." I was just like, "What  
23 are you talking about?" I honestly--and you can tell by my  
24 texts I was confused. I thought that was the text.

25 THE COURT: But this is a week after the text?

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1 MS. BADGER: Well, I didn't get the settlement  
2 agreement.

3 THE COURT: But you had--

4 MS. BADGER: I never went back and looked at the  
5 texts again. In my mind, that's what I thought I had texted so  
6 that's what I thought the agreement was. But even at that,  
7 Your Honor, our agreement was never binding without a written  
8 settlement agreement. We've always had an attorney write it up  
9 and had the terms--come to an agreement on the terms of what  
10 was going to be in the settlement agreement. And I never  
11 thought a few texts was anything binding, other than coming to  
12 an agreement of what maybe--a starting sum of what he would pay  
13 me back. I am just in shock that, you know, Mr. Macgillivray  
14 can even think that, you know, it's even fair for--we talked  
15 beforehand and we always--even in our conversations it makes  
16 references to having a binding settlement agreement. So any  
17 discussions prior to that are moot, in my humble opinion,  
18 because everything had to be put in writing, and for this very  
19 reason. So that, you know, no--we were all on the same  
20 agreement and had the same understanding.

21 Can I just quickly address some of these defenses  
22 that--

23 THE COURT: To the settlement agreement?

24 MS. BADGER: To their--

25 THE COURT: To the texts?

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1 MS. BADGER: Yes, to the texts. To the mistake of  
2 calling it a settlement agreement. The defenses on why I don't  
3 believe it is a settlement agreement or that it's not binding.

4 THE COURT: Yes.

5 MS. BADGER: Okay. And one of the things that I want  
6 to point out is that to create a contract the parties have to  
7 agree on the terms of the contract. We only--and this is--I  
8 don't understand what this is. I beg your pardon, sir. It's  
9 CV2104 and it has to do with an offer. But it states that all  
10 of the important terms of the offer have to be accepted  
11 unconditionally. So it wasn't just the money. Dustin and I  
12 had numerous other issues that we had in regard to other fraud  
13 cases that he had--

14 THE COURT: What you're referring to there is  
15 probably a civil jury instruction.

16 MS. BADGER: Uh-huh.

17 THE COURT: And typically the material terms of an  
18 offer for payment are an amount and a time. Although if  
19 there's not a time, then it has to be paid within a reasonable  
20 time.

21 MS. BADGER: And we never--

22 THE COURT: And that's--

23 MS. BADGER: --discussed the specifics.

24 THE COURT: That's basically where you're at.

25 MS. BADGER: Okay.

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1 THE COURT: And for a settlement agreement in the  
2 course of litigation we have cases of--well, Mr. Schmutz cited  
3 to one. But we also have this Goodmanson against Goodmanson  
4 case that says that the Court will enforce oral settlement  
5 agreements. Here, this one isn't even oral. It's text.

6 MS. BADGER: I understand that.

7 THE COURT: So that's kind of where we're coming  
8 from.

9 MS. BADGER: Well, and I want to address that  
10 because--

11 THE COURT: All of this other boilerplate and that,  
12 it really doesn't mean that much to me at this point.

13 MS. BADGER: Right.

14 THE COURT: Yeah.

15 MS. BADGER: But I also have--let's see. I also have  
16 different--oh, I don't know. Let's see where it is. In  
17 regards to that, Your Honor, I also have documentation talking  
18 about where if you are going to be having something and it's  
19 conveyed that it's a general understanding of both parties that  
20 everything will be finalized in a written settlement agreement,  
21 then, you know, all the negotiations up to that point are sort  
22 of moot. And the texts where, yes, they can be considered  
23 binding to a certain degree, they're not totally binding if you  
24 have the language in there that we were going to have a written  
25 settlement agreement written up. And, again, like I said, most

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1 of the stuff that's been written up in this settlement  
2 agreement, I haven't even had an attorney have a chance to look  
3 at, I haven't agreed to, and I don't agree to Mr. Schmutz's  
4 settlement agreement.

5 THE COURT: Well, nobody's forcing you to sign this  
6 settlement agreement. I'm just trying to figure out did you  
7 settle the case. That's the issue before the Court. Did you  
8 two agree to settle the case for \$25,000 now, \$2,500 next year?

9 MS. BADGER: Right.

10 THE COURT: That's the issue here.

11 MS. BADGER: So I want to address this about a  
12 unilateral mistake. Okay? Because one of the things that it  
13 says, that a mistake has such serious consequences that to  
14 enforce the contract would be unconscionable. That is less,  
15 Your Honor--you know, like ten percent of what he owes me. I  
16 feel so strongly that Mr. Macgillivray needs to pay back at  
17 least the bare principal of what he stole from us. Just for  
18 his own good if not--and, to me, I do believe, Your Honor, that  
19 you have the discretion as a judge of what is fair and what  
20 isn't fair. And, you know--

21 THE COURT: Well, that's if we're in a court of  
22 equity. Here, I'm dealing with contract law and with  
23 settlement law.

24 MS. BADGER: Okay. All right.

25 THE COURT: So if the parties enter into an agreement

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1 that's not fair, then--

2 MS. BADGER: Right. And I don't believe that this--

3 THE COURT: Unless this falls within some exception  
4 to the unilateral mistake doctrine--

5 MS. BADGER: Right.

6 THE COURT: --then I can't really sit as a court of  
7 equity and modify the party's agreement and so forth.

8 MS. BADGER: Okay. So--

9 THE COURT: Because there's no fraud (inaudible) or  
10 anything like that.

11 MS. BADGER: Well, I haven't even addressed that yet,  
12 but I will get--

13 THE COURT: There's no fraud in connection with the  
14 \$2,500 now--

15 MS. BADGER: Yeah, there is, Your Honor.

16 THE COURT: --and \$2,500 in a year.

17 MS. BADGER: Yes, there is, and let me address that  
18 in a minute. But I believe Your Honor can rule in my favor by  
19 saying that the mistake has such serious consequences that it  
20 is just not equitable. It is not fair.

21 The other issue that I wanted to bring up was this  
22 about the fraud. You know, Mr. Macgillivray initially told me  
23 that \$25 to \$26,000 was no problem. He had the money right  
24 then, he could pay me right then. When he calls me back on the  
25 phone after talking to somebody who put in his head well no I'm

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1 going to get you out of the whole thing completely, you don't  
2 have to pay her anything, then it's like, "Well, I only have  
3 \$15,000 to pay you. I can't pay you any more than that."  
4 That's a false representation, Your Honor. That's lying. He--

5 THE COURT: It's calling puffing in the industry.  
6 His saying that--if he's saying that, again--

7 MS. BADGER: Yeah.

8 THE COURT: You know, that's what--

9 MS. BADGER: Well, I call it lying, you call it  
10 puffing.

11 THE COURT: People negotiate.

12 MS. BADGER: I know. But, again, I'm trying to point  
13 out that all I can do is go off of what he tells me. And when  
14 he continually lies about his finances, when he continually  
15 hides his income, when he continually does this stuff, it just  
16 is not fair. So the defense of misrepresentation focuses on  
17 dishonesty in bargaining, Your Honor. A misrepresentation may  
18 be a false statement of fact, the deliberate withholding of  
19 information which a party has a duty to disclose. Mr.  
20 Macgillivray, for the last five years, has had a duty to  
21 disclose his finances, which he has refused to do. And/or an  
22 action that conceals a fact. You know? So I believe that  
23 mister--even if you want to look at our loose negotiation as  
24 being binding, I think that Mr. Macgillivray broke it from the  
25 standpoint that he deliberately lied to me and said, "No, I can

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1 only pay you \$15,000," when clearly he had earlier told me that  
2 he could easily pay me and agree to this earlier settlement  
3 agreement that we had.

4 It says also that the important terms of the offer  
5 have to accepted unconditionally. Again, all the important  
6 terms hadn't even been discussed yet.

7 Consideration, Your Honor, is that not an issue? To  
8 create a contract each party must promise to do something.  
9 There should be consideration. Mr. Macgillivray gave me no  
10 consideration. I gave him--

11 THE COURT: Consideration is the promise. The  
12 consideration is the promise to pay. That's what creates a  
13 contract. Consideration is a promise for a promise, if you  
14 will.

15 MS. BADGER: Okay.

16 THE COURT: So I'll promise to do this if you'll  
17 promise to do that. And that's what (inaudible).

18 MS. BADGER: Can I tell you how many times Mr.  
19 Macgillivray promised me? I mean--

20 THE COURT: Well, what we're dealing with is this  
21 text on August 22.

22 MS. BADGER: Right. Okay. But, to me, I felt  
23 intimidated, blackmailed. Take this or leave it. You know?  
24 Otherwise you're never going to get anything. I'm going to  
25 give all the money to an attorney fight you. And that attorney

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1 being Mr. Schmutz. So in a sense is not an improper threat. A  
2 threat made in bad faith, implying that I can never recover my  
3 money, Your Honor? I can never, you know, have the order that  
4 you signed followed because you can always hire somebody to or  
5 make threats or intimidate people? That just goes against  
6 what's right and wrong. Just your basic principles.

7 THE COURT: Well, if you want to make somebody  
8 accountable for that, like I say, don't try and do it yourself.  
9 Get a professional to help you.

10 MS. BADGER: Right.

11 THE COURT: And they will. I mean, I can't have a  
12 lot of sympathy--well, I don't have any--I can't have sympathy  
13 at all come into my decision. But it's hard for me to do  
14 anything for somebody who had all of these resources out there.  
15 With a judgement of that size, there are attorneys all over the  
16 state that would be all over collecting that for you, and you  
17 don't have to pay them anything down. So it's hard--

18 MS. BADGER: That hasn't been my experience with  
19 attorneys, Your Honor. You go bankrupt trying to work in our  
20 legal system, Your Honor, with attorneys.

21 THE COURT: No. No. You go get a good debt  
22 collection attorney and they will do this on a contingent and  
23 they will get you some pretty good bucks out of this.

24 MS. BADGER: I had never done this before.

25 THE COURT: He's not protected by bankruptcy.

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1 MS. BADGER: I'm sorry. I just--

2 THE COURT: Well, you probably never loaned--you  
3 probably never got into commercial lending before either.

4 MS. BADGER: I didn't.

5 THE COURT: And that's unfortunate too.

6 MS. BADGER: Your Honor, I didn't commercially lend  
7 him anything. He defrauded me out of the money by  
8 misrepresenting that he was a real estate agent.

9 THE COURT: Okay.

10 MS. BADGER: And I was putting down payments down on  
11 property.

12 THE COURT: And I've probably gone too far on this.

13 MS. BADGER: Yeah.

14 THE COURT: What I'm saying is you're not going to  
15 get me to give you something because someone has taken  
16 advantage of you in a negotiation. Okay? You choose to go in  
17 and negotiate with somebody and you basically--you get what you  
18 negotiate.

19 MS. BADGER: Okay.

20 THE COURT: You may not get what's right, but you get  
21 what you negotiate. So that's what you need to do. Ma'am,  
22 you'll have to have a seat, please. Okay?

23 MS. BADGER: So I--

24 THE COURT: And is this an attorney or who is--

25 MS. BADGER: No, she's just a friend.

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1 THE COURT: All right. Okay.

2 MS. BADGER: Okay. So my question to you, Your  
3 Honor, is it wasn't a final agreement. If it was a final  
4 agreement, then why didn't we need a final written up  
5 settlement agreement that had all of the settlement terms put  
6 into it? I mean, the fact that I made a simple mistake, Mr.  
7 Macgillivray is not harmed by that. He doesn't need to take  
8 advantage of that. He doesn't need to profit from me making a  
9 simple mistake. Whether you want to call it negligence or not,  
10 I had in my mind that that's what it was and I believed that.

11 But I do believe, Your Honor, that his  
12 misrepresentations, the duress he put me under, the subtle  
13 threats that he made to me when he returned his phone call  
14 after we had come to a wonderful agreement that could have  
15 worked for both of us and to me was binding because we both  
16 worked out all those terms, it's just not fair. I'm sorry,  
17 Your Honor, it's just not fair.

18 And I don't believe that Mr. Macgillivray should  
19 profit from a simple mistake. I don't believe that he was  
20 harmed that much. He still owed me that money. And that's  
21 again where I come to this consideration. Mr. Macgillivray  
22 owed me that money. He was ordered by you to pay that money  
23 back. To me, consideration is more than just doing what you  
24 have been told in an order to do by the court. I was giving  
25 Mr. Macgillivray a lot of consideration in not making him pay

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1 the full amount over the rest of his life.

2 And I am just so shocked that they can misrepresent  
3 to the Court that this first settlement agreement that we made  
4 together verbally, face to face, is not binding. Or that you  
5 can have a situation where an attorney or somebody else can try  
6 and thwart what is justice and say, "Well, I can get you out of  
7 that. Don't worry about that. You know, you don't need to pay  
8 her." It's just wrong, Your Honor. And I also, Your Honor,  
9 wanted to address a few other issues in regards to--again it  
10 goes to show the same thing I've been through over and over  
11 again. When we first came before you, the defendants--I'm  
12 sorry. I guess I don't know if I'm the defendant or the  
13 plaintiff. But they filed a motion to deposit that \$25,000  
14 into the Court's trust account as good faith, and they never  
15 followed through on doing that. And I don't know if that's  
16 something that I need to address later.

17 THE COURT: No, that was a voluntary act by them.

18 The Court said that they may do that.

19 MS. BADGER: Uh-huh.

20 THE COURT: The Court allowed them to do that.

21 MS. BADGER: But, again, it's the same

22 misrepresentation, Your Honor.

23 THE COURT: Well, you--

24 MS. BADGER: They represented to me--

25 THE COURT: But you opposed that. You opposed the

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1 order.

2 MS. BADGER: Well, I know I opposed the order.

3 THE COURT: Okay.

4 MS. BADGER: Because I was a--okay. Because that was  
5 the only venue that I had to--I didn't understand about the  
6 order to show cause that I was trying to show. But  
7 nevertheless, they misrepresented that they were going to do  
8 that on good faith. The fact that Mr. Schmutz then can just--

9 THE COURT: Ma'am, I'm sorry--

10 MS. BADGER: --use up that money.

11 THE COURT: I'm sorry to interrupt. What they said  
12 is they asked permission to deposit that amount into the court.

13 MS. BADGER: Uh-huh.

14 THE COURT: I think they were doing it to try to hold  
15 up the execution of the judgement.

16 MS. BADGER: Okay. But that was designated.

17 THE COURT: So what I--what we--I signed an order  
18 that Mr. Schmutz prepared saying yes you can do that. I didn't  
19 say you have to do it. I didn't give him a time line to do it.  
20 It was permissive. They can do that if they want.

21 MS. BADGER: Well, it was represented to me that that  
22 \$25,000 would go to pay Mr. Macgillivray's debt. Never was it  
23 represented to me that Mr. Schmutz was going to use that as a  
24 retainer.

25 THE COURT: Okay. We're getting--

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1 MS. BADGER: But it goes to the same thing about--

2 THE COURT: We're getting beyond--

3 MS. BADGER: --the misrepresentation. Even in the  
4 negotiations, Your Honor, if you make a misrepresentation, like  
5 Mr. Macgillivray did about what he could and couldn't pay, then  
6 it's not a fair contract. It's not a fair negotiation.

7 THE COURT: Contracts don't have to be fair. They  
8 can't be unconscionable, but they don't have to be fair.

9 MS. BADGER: But what I'm saying is--

10 THE COURT: And where you two aren't merchants--or  
11 where one of you isn't a merchant, it's hard to say that a  
12 contract between you and another private person is  
13 unconscionable.

14 MS. BADGER: Right. But if somebody is  
15 misrepresenting what they can and cannot pay and lying about--

16 THE COURT: That happens constantly. When a car  
17 dealer says, "My bottom line on this is I can sell you this for  
18 \$25,000. That's as low as I can go." And so you come back the  
19 next day and say, "No, I'm only with to pay \$23,000." So he  
20 comes down to \$24,000. If people weren't allowed to do that  
21 negotiations, then our society wouldn't function. We'd have a  
22 controlled price. We'd have controlled prices. Everything  
23 would be set and the country would go bankrupt as a result. It  
24 would be a monopoly, in essence, and the country would go  
25 bankrupt as the result and you and I would be penurious. So

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1 you can't say in a negotiation that someone is--I mean, you  
2 negotiate with the Japanese, they think there's absolutely  
3 nothing wrong with it. You just expect them to do that.  
4 That's part of the culture. I'm not talking about American  
5 Japanese. I'm talking about--

6 MS. BADGER: Uh-huh.

7 THE COURT: You go negotiate with Toyota of Japan,  
8 that's what's going to happen. I know. I've been there. So  
9 it just happens in negotiations. That's the way the parties  
10 negotiate. They give bottom lines. They say this is as low as  
11 I can go. They say this is all I have. You negotiate with an  
12 insurance company, that's what they'll tell you. They'll say,  
13 "I'm all petered out. That's as much as I can give you," yet  
14 they can go get more. It's just the way that society has  
15 negotiated in a free market economy for a thousand years.

16 MS. BADGER: But--

17 THE COURT: That's how it is. I can't--that's not  
18 defrauding anybody. You are expected to do your due diligence  
19 and that's all there is to it. So I don't really see where  
20 there's been any fraud with regard to these texts. Okay?  
21 There may have been some in other contexts, but I'm not here to  
22 find out about that today.

23 MS. BADGER: Uh-huh.

24 THE COURT: And if you feel that that's--if you think  
25 there's criminal fraud, then you have a remedy, and it's not to

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1 have this Court investigate it. It's to go to the police.

2 Okay?

3 MS. BADGER: Well, so the defense of  
4 misrepresentation in regards to dishonesty in bargaining,  
5 apparently, according to the law, it seems to be something  
6 that's--

7 THE COURT: Where are you getting that case?

8 MS. BADGER: Well--

9 THE COURT: What case are you reciting there?

10 MS. BADGER: It says contract defense: undue  
11 influence, duress, misrepresentation, coercion, threats, false  
12 statements or improper persuasion by one party to a contract  
13 can void the contract.

14 THE COURT: Where are you getting that?

15 MS. BADGER: I am getting that right from all the  
16 other defenses that--

17 THE COURT: Well, some of those things--are you  
18 reading a jury instruction there? What are you reading?

19 MS. BADGER: Maybe that's it, yeah.

20 THE COURT: Well, I don't know what your authority.  
21 You haven't cited me to any authority.

22 MS. BADGER: I'm sorry.

23 THE COURT: I mean, some of those things are correct.

24 MS. BADGER: Yeah.

25 THE COURT: But I don't think that they have the

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1 meaning that you think that they have. Not all of them anyway.

2 MS. BADGER: Okay.

3 THE COURT: Okay?

4 MS. BADGER: One of the things I was wanting to ask  
5 Your Honor, if he would compel the defendant to specify the  
6 name of the person that transcribed our phone conversations.  
7 The name of the secretary that did that. And what device was  
8 used to make the recordings.

9 THE COURT: Well, let me ask this. Do you think--  
10 well, the phone conversations aren't really relevant today.

11 MS. BADGER: Oh, they aren't? Oh, okay.

12 THE COURT: What's relevant are these texts. Okay?

13 MS. BADGER: Okay.

14 THE COURT: And I don't know if you dispute what's  
15 been written down for those phone conversations.

16 MS. BADGER: Yes.

17 THE COURT: I mean, they tend to go in your favor.

18 MS. BADGER: I just don't know. I can't remember.  
19 That's why I thought--

20 THE COURT: Okay. Well, I didn't see anything in  
21 there that damages you. I didn't see anything that necessarily  
22 damages the other side either. That's the August 15th  
23 conversation I think you're referring to. But the rest, these  
24 texts, nobody's disputing that that's what the text said.  
25 They're in black and white. Those are things that you two

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1 wrote to each other.

2 MS. BADGER: Right. And then so in regards, Your  
3 Honor, to just finding out exactly who transcribed those phone  
4 conversations?

5 THE COURT: I'm not sure why you need that.

6 MS. BADGER: Well, Your Honor, I have been told that  
7 my phones have been tapped.

8 THE COURT: Well, then you go--if somebody's tapping  
9 your phone, they're going to prison for 15 years in the federal  
10 system. So you need to go tell the FBI or somebody about that.  
11 Or go tell the local sheriff or local police.

12 MS. BADGER: Uh-huh.

13 THE COURT: But that's not--

14 MS. BADGER: Mr. Macgillivray has told me that.

15 THE COURT: I don't get involved in mediating crimes  
16 or investigating crimes.

17 MS. BADGER: Okay.

18 THE COURT: You know, that's something that you've--

19 MS. BADGER: Okay.

20 THE COURT: --got to go to law enforcement on.

21 MS. BADGER: Okay. All right.

22 THE COURT: All right.

23 MS. BADGER: Thank you, Your Honor.

24 THE COURT: Okay. Thank you. Well, anything  
25 further, Mr. Schmutz?

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1 MR. SCHMUTZ: Yes. I will be very brief, Your Honor.  
2 You've heard all of this but I would like to just provide some  
3 short context in response to the statement and argument made.  
4 It is clear that there was no agreement reached on August 1st.  
5 There was a new set of negotiations that began. There's been,  
6 as yet, no agreement or no evidence that Dustin Macgillivray  
7 was himself under mistake or that he took advantage of her  
8 mistake. The context of those discussions are that he went  
9 from \$15,000 to \$20,000 to \$25,000 to \$27,500. So within that  
10 context. There's just been no argument made that he  
11 participated at all. Ms. Badger said, "I made a mistake. It  
12 is my mistake. I made an honest mistake." So that's been her  
13 argument. The only question is can she be relieved from that  
14 mistake. She has not challenged or disputed what she offered  
15 or what Mr. Macgillivray accepted in that offer.

16 Although she raises a fraud of defense and  
17 misrepresentation, none of what she said had anything to do  
18 with the settlement discussion. It's all out there in other  
19 places. There's no fraud or misrepresentation before the Court  
20 concerning the settlement discussion. She contends there's no  
21 meeting of the minds. But the meeting of the minds is clear on  
22 the essential terms and it's in black and white, as the Court  
23 has said.

24 She says there's no final settlement agreement.  
25 Number one, the law does not require, as the Court's indicated

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1 from the Goodwinson Liberty case, the Court can enforce an oral  
2 agreement if he finds that it's established. Here, we have it  
3 in black and white. She said that there are terms that are  
4 missing but she's not specified even a single one. She hasn't  
5 identified a single term that is missing from this that would  
6 have any significance.

7 She said that she wasn't represented by an attorney,  
8 but the fact is George Gingsus was actively of record  
9 representing her in this case when she commenced these  
10 discussions and she chose not to ask for the help of any  
11 attorney.

12 MS. BADGER: I object to that, Your Honor. That's  
13 simply not true.

14 MR. SCHMUTZ: Your Honor, he filed his notice of  
15 withdrawal on the afternoon after the August 25 hearing.  
16 That's when he--

17 MS. BADGER: He was notified.

18 MR. SCHMUTZ: That's when he withdrew.

19 THE COURT: Okay. Thank you.

20 MR. SCHMUTZ: But clearly she had an opportunity to  
21 consult with counsel and chose not to.

22 She has then argued is it fair. That's not a legal  
23 issue. So all of the defenses that she has raised are simply  
24 unpersuasive and don't satisfy any elements of law. If we come  
25 back to the one defense that she has raised on unilateral

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1 mistake and apply the law that's clearly established in the  
2 State of Utah, she cannot satisfy the elements of unilateral  
3 mistake.

4 Your Honor, I think the case is fully presented. Do  
5 you have any questions for me?

6 THE COURT: No, thank you.

7 MS. BADGER: May I, Your Honor, make just one more  
8 statement?

9 THE COURT: Yes.

10 MS. BADGER: I never even had an attorney look over  
11 the settlement agreement. I never agreed to any of the things  
12 in the settlement.

13 THE COURT: That wasn't his point.

14 MS. BADGER: Okay.

15 THE COURT: Yeah.

16 MS. BADGER: Okay.

17 THE COURT: He was just saying you could have  
18 consulted somebody while these negotiations were going on. So,  
19 okay. Thank you.

20 MR. SCHMUTZ: So we then present our motion, Your  
21 Honor, and ask that the Court grant the motion to enforce the  
22 settlement agreement on the terms that have been agreed to by  
23 the parties. If the Court finds that the settlement agreement  
24 as written and provided is--accurately states the terms, the  
25 Court could order that to be entered or the Court could simply

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1 enforce the terms of the agreement as the Court sees it in  
2 those text messages.

3 One last thing, Your Honor. If in fact the Court  
4 does grant our motion, we would expect that any payments made  
5 would pass through the court to avoid any other concern or  
6 problem. Thank you, Your Honor.

7 THE COURT: Thank you. All right. The Court finds  
8 that on August 22 there were texts going back and forth between  
9 the parties. That Mrs. Badger stated in the texts to Mr.  
10 Macgillivray, "Let's do \$25,000 now and \$2,500 next year when  
11 you do a big deal." Then Mr. Macgillivray then texted back to  
12 Mrs. Badger, "I will pay you \$25,000 now and \$2,500 no later  
13 than one year from now in full settlement so we are done."  
14 Then he talks about having a written settlement agreement.  
15 Then Mrs. Badger says, "Okay. But I'm not going through any  
16 more. You either keep your word or I'm done. Have Morgan  
17 write up something. But it must have in it that you default  
18 all debt and interest comes back--oh, that if you default all  
19 debt--okay. If you default, all debt and interest comes back.  
20 I can't trust you to keep any agreement. Been there, done  
21 that." Then Mr. Macgillivray to Mrs. Badger, "Okay."

22 The material terms of the agreement were that Mr.  
23 Macgillivray would pay Mrs. Badger \$25,000 now and then \$2,500  
24 no later than August 22, 2015. And then the second term. That  
25 is there was a default all the debt and interest would come

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1 back. In other words, the agreement would be rescinded and the  
2 parties would be placed in the status quo anti and the original  
3 whatever amount was ordered by the bankruptcy court would come  
4 back. Those are the terms.

5 There's been a defense lodged of a mistake, a  
6 unilateral mistake. There's no allegation of a mutual mistake.  
7 Of course, a mistake must be shown by clear and convincing  
8 evidence to rescind a contract. For a unilateral mistake to be  
9 a defense, the other party must know of it and take advantage  
10 of it. I don't see anywhere in this text where Mr.  
11 Macgillivray could have possibly known that \$2,500 meant  
12 \$25,000, especially when he texted back those terms and Mrs.  
13 Badger said okay. I'm sorry, Mrs, I apologize--yeah, Mrs.  
14 Badger said okay. So we really don't get over the hurdle of  
15 showing that Mr. Macgillivray knew of the mistake and took  
16 advantage of it.

17 Also, if you look--even if that were the case, one of  
18 the elements is that the mistake must have occurred  
19 notwithstanding the exercise of ordinary diligence. The Court  
20 cannot find that there was ordinary diligence in this case  
21 because the actual terms were texted back and Mrs. Badger had  
22 an opportunity to read those yet still agreed to the amount.  
23 So the Court cannot find that this agreement should be set  
24 aside due to unilateral mistake.

25 The terms of the agreement, therefore, will be that

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1 Mr. Macgillivray would pay \$25,000 now. So we'll say now means  
2 within seven days just to make it workable. And \$2,500 no  
3 later than one year from now. There will be--and then also if  
4 the--if there is a default, then the agreement is rescinded and  
5 all debt and interest would be re-instituted. Upon the payment  
6 being made, all claims between the parties will be resolved  
7 with the exception of the \$2,500 next year, which will be due  
8 by August 22, 2015. There's been no agreement to interest.  
9 That's the deal. The parties have agreed to that.

10 MS. BADGER: Your Honor?

11 THE COURT: And let me also say to Ms. Badger, before  
12 I hear from you, ma'am--

13 MS. BADGER: Okay.

14 THE COURT: --this is not--I'm not sitting as a lord  
15 high chancellor here. I'm sitting as a district court judge.  
16 Here we have written agreements. We don't even have one party  
17 saying they said this and the other saying no they said this.  
18 I have actually what the parties said here. So it's very clear  
19 what's going on.

20 MS. BADGER: One of the issues I forgot, Your Honor.  
21 I'm so sorry. I don't mean to interrupt. One of the issues  
22 was that Mr. Macgillivray had told me that I could, as part of  
23 the payment, have his car. I'm sorry we didn't address that  
24 issue.

25 THE COURT: Well, that's--

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1 MS. BADGER: (Inaudible) property.

2 THE COURT: That's water over the dam as far as the  
3 Court is concerned.

4 MS. BADGER: Okay.

5 THE COURT: What we have here is we have an agreement  
6 to do this.

7 MS. BADGER: Okay. That's fine.

8 THE COURT: All the things about things being  
9 restored and (inaudible) being restored and so forth, those  
10 aren't part of the agreement.

11 MS. BADGER: Okay.

12 THE COURT: I'm just putting in here what's part of  
13 the agreement. Okay? All right. So but I think the seven  
14 days is reasonable. I think that's a good interpretation of  
15 now. So that will be the order of the Court. Okay?

16 MR. SCHMUTZ: Your Honor, just one question.

17 THE COURT: Yes?

18 MR. SCHMUTZ: Following up on what the Court has said  
19 that upon the payment of the \$25,000 all claims are resolved.

20 THE COURT: Except for the \$2,500 that's still due.

21 MR. SCHMUTZ: Except the \$2,500.

22 THE COURT: Yes. Uh-huh.

23 MR. SCHMUTZ: Could at that point then, upon the  
24 payment, could we include in this order that the property that  
25 is still being held by the sheriff could be released to Mr.

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1 Macgillivray?

2 THE COURT: Well, I don't know if anything's still  
3 being held. I thought we resolved that.

4 MS. BADGER: Yes, I've been paying. That's another  
5 issue, is that it's cost me another couple of thousand of  
6 dollars to--

7 THE COURT: We want a clean break here.

8 MS. BADGER: Okay.

9 THE COURT: That was not addressed in the settlement  
10 agreement. I don't know if that stuff's even worth it.

11 MS. BADGER: Well, Your Honor, I never got a--I mean,  
12 the settlement agreement, I thought, was something that, as far  
13 as the written stuff, we would negotiate.

14 THE COURT: Hold on. We're dealing with this.  
15 What's the sheriff still holding?

16 MS. BADGER: His car and his--I have a storage unit  
17 that I've been paying for for four months with all of his extra  
18 things that are not--how do you say it, not given--that are  
19 not--

20 THE COURT: Exempt.

21 MS. BADGER: Exempt, yes.

22 THE COURT: Are they worth anything?

23 MS. BADGER: No, but the car is, Your Honor, and he  
24 did say in--I have his (inaudible).

25 THE COURT: Well, like I said, that's all. You have

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1 the car. I don't see where this changes that.

2 MS. BADGER: Oh, okay. That's great. Then, yeah.

3 Then that's fine, Your Honor. Thank you.

4 THE COURT: This is what you guys agreed on: \$25,000  
5 now, \$2,500 next year.

6 MS. BADGER: Yeah.

7 THE COURT: And then if it doesn't work, then the  
8 thing gets rescinded. That's all I'm aware of.

9 MR. SCHMUTZ: Your Honor?

10 THE COURT: Yes.

11 MR. SCHMUTZ: Last question then. This agreement  
12 you're enforcing occurred prior to the execution sale, prior to  
13 the--I mean, not sale. Prior to the hearing.

14 THE COURT: That may be true, but I do not have any  
15 of that before me. Right now I'm enforcing the relief that was  
16 requested for; what was in the agreement between the two  
17 parties.

18 MS. BADGER: Thank you, Your Honor. I appreciate  
19 that.

20 THE COURT: Hold on. Hold on. Okay?

21 MS. BADGER: You said \$2,500 but I just wanted to  
22 clarify that you meant \$25,000.

23 THE COURT: \$25,000 now and \$2,500 in a year.

24 MS. BADGER: See, you can do it. See how easy it is?

25 THE COURT: Well, I've got two people interrupting

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1 and talking to me, ma'am.

2 MS. BADGER: I know. I'm sorry.

3 THE COURT: You only had one. And you were texting.

4 Okay?

5 MS. BADGER: Yeah.

6 THE COURT: All right.

7 MR. SCHMUTZ: So, Your Honor, with respect to the  
8 Court's--I just want to be clear, with respect to the Court's  
9 prior ruling on the writ of execution, that will be unaffected  
10 by this Court's--

11 THE COURT: I don't know. That's not before me right  
12 now.

13 MR. SCHMUTZ: Okay.

14 THE COURT: That's not (inaudible) issue.

15 MR. SCHMUTZ: We'll look at that and decide if we  
16 need to bring it up.

17 THE COURT: Okay. All right.

18 MS. BADGER: Thank you, Your Honor. I apologize and  
19 I appreciate your--

20 THE COURT: And the money should be paid into the  
21 court. I think that's a good step. Then you can get a check  
22 from the court. Okay.

23 MS. BADGER: Thank you, Your Honor.

24 THE COURT: Okay.

25 MR. SCHMUTZ: Thank you, Your Honor.

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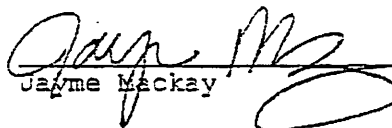
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THE COURT: All right.  
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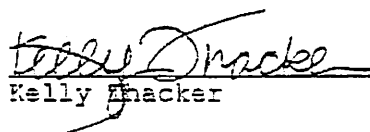
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Jayme Mackay

I, Kelly Thacker, do certify this transcription was prepared under my supervision and direction.

  
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# EXHIBIT C

EXHIBIT C

FILED IN  
4TH DISTRICT COURT  
STATE OF UTAH  
UTAH COUNTY

2014 OCT 14 A 9 22

Shauna Badger  
549 W. 4630 N.  
Provo, Utah 84604  
Telephone: 801 221-9982  
Facsimile: 801 225-4576

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IN THE FOURTH JUDICIAL DISTRICT COURT  
IN AND FOR UTAH COUNTY, STATE OF UTAH

---

SHAUNA BADGER,

Plaintiff,

vs.

DUSTIN MACGILLIVRAY,

Defendant.

MEMORANDUM IN SUPPORT OF  
PLAINTIFF'S OPPOSITION OF  
DEFENDANT'S MOTION TO  
ENFORCE SETTLEMENT AGREEMENT

Civil No. 090402559

Honorable McVey

---

Plaintiff Shauna Badger respectfully moves the Court for an Order in Opposition of the Defendant's Motion to Enforce a Settlement Agreement.

Dated this 14<sup>th</sup> day of October, 2014

*Shauna Badger*

SHAUNA BADGER  
Plaintiff

## INTRODUCTION

On or about 2006-2007 Defendant defrauded Plaintiff out of over \$60,000 in several real estate business transactions. Defendant falsely represented he was a licensed real estate agent and licensed mortgage broker. Defendant took money from the Plaintiff in the form of down payments on properties and then kept the money for himself. Defendant used part of the money he defrauded Plaintiff out of to pay his restitution in a felony criminal case of fraud he was being prosecuted for. Defendant had not told Plaintiff he was a convicted felon of fraud. Defendant signed a "Verified Confession of Judgment" and an order was signed by Judge McVey for Defendant to pay back Plaintiff's money.

Plaintiff has tried to collect the money owing her over the past five years. Each time the Plaintiff tries to have a Sheriff's sale the Defendant does a fraudulent bankruptcy on the morning of the sale. Each time the Defendant signs a settlement agreement Defendant breaches it and does not pay. Each time the Plaintiff has a supplemental hearing the Defendant refuses to truthfully disclose his finances. The Plaintiff admitted at one supplemental hearing under oath with his attorney that he does not pay taxes. Plaintiff hides his income, he has told Plaintiff he has no checking account, keeps an unlisted phone number which he changes and moves every few years to get out of paying his debts. Defendant lives a life of luxury, joining the Riverside Country Club and has numerous luxury vehicles.

On July 31, 2014 Plaintiff had a Levy Notice and Writ of Execution served by the Utah County Sheriff's office on Defendant at his home and non-exempt personal property was seized. Defendant contacted the Plaintiff the next morning by phone and said that he wanted to meet with Plaintiff to come to an agreement to resolve his debt. Plaintiff agreed to meet the Defendant. At the meeting Defendant asked the Plaintiff if she was taping the conversation. The

Plaintiff truthfully replied that she was but only to protect herself. Defendant admitted to the Plaintiff, "Okay I was wrong. I will own that, Okay? I was wrong, period." and "I want to make you whole." Defendant's long history of fraud towards Plaintiff makes this impossible but Plaintiff was willing to work with Defendant again to work out a settlement. The parties then began negotiating an amount for a tentative settlement agreement. Defendant agreed to pay \$60,000 to the Plaintiff, \$30,000 immediately and \$1,000 a month for the following year with a balloon payment for the remaining amount due and owing after a year. Defendant stated that "this is fair" and "that is what I was thinking" and the parties had a meeting of the minds on one aspect of the settlement, a tentative settlement amount of money to be paid by the Defendant. A day or so later Defendant called up the Plaintiff and his whole demeanor had changed. He refused to live up to his word and agreement and told the Plaintiff that all he would be willing to pay is \$25,000. He then proceeded to tell the plaintiff that he would hire an attorney and give the \$25,000 to him instead of her to fight her.

Defendant also made other threats that he had been told by his attorney that, "he could get him out of paying anything," and/or "that he would disappear and she would never get any of her money back." Plaintiff told the Defendant that it would be pretty hard to disappear in this day and age that she would not agree to this but that she would talk to her husband.

Defendant texted the Plaintiff a short time later and there was the following text message exchanges that Defendant has deliberately left out of his Motion.

MacGillivray to Badger: "I sent agreement to shauna.badger@comcast.net Is that your email address? (Fri, Aug 29, 12:45 PM)

Badger to MacGillivray: Dustin I thought we agree to 25000 now and 25000 next year. That was the agreement in our last text

Badger to MacGillivray: Sorry, Dustin on our tentative agreement pending approval of your attorneys written settlement agreement my initial text was a typo. The second amount of \$25,000 due the following year I accidentally texted \$25,000. I have a recording of our conversation to verify this. Our tentative settlement agreement was contingent on me approving the agreement written up by your attorney. ( Mon, Sept1, 11:38 PM )

Plaintiff was dismayed at the threats made by Defendant however, she agreed to lower the amount owing from their original verbal agreement of \$30,000 now and \$30,000 in a year, to \$25,000 now and \$25,000 in a year. However, Plaintiff unintentionally made a typo due to bad lighting, poor eyesight and or "fat thumbs." Plaintiff on the second amount due a year later accidentally left off a 0. She meant \$25,000 not \$2,500 as was texted to the Defendant. This was down \$10,000 from the original verbally agreed upon amount. Although Defendant tested back the \$2,500.00 amount Plaintiff did not catch the mistake until a short time later. Plaintiff then told Defendant that she had mistakenly made a mistake and typo. This is evident from her honest reaction in a text, "That was not our agreement," that she was confused and didn't intend that to be the amount. Plaintiff assumed that Defendant was but again trying to pull a fast one. Plaintiff then texts Defendant that she had made a mistake and that she intended to text \$25,000 not \$2,500. These texts were of course deliberately left out from the Defendants Motion to Enforce a Settlement Agreement. Plaintiff and Defendant had always had in the past and intended a written formal settlement agreement to be written up by an attorney and reviewed by both parties and their counsel after the verbal parameters of the Defendant's repayment and all terms of settlement were established. This is also evident in the text message exchanges between the parties.

Dustin: "We need to have a written agreement to settle all claims....."

Shauna : "Dustin on our tentative agreement pending approval of your attorneys written settlement agreement..."

1. THE TEXT MESSAGES DO NOT CONSTITUTE A VALID CONTRACT BECAUSE  
THE AMOUNTS LISTED CONSTITUTE A SCRIBNER ERROR.

Firstly, the text messages are mistakes and therefore do not constitute a valid contract. "The law only enforces the intent of the parties as to the fundamental agreement between them." *Guardian State Bank v. Stangl*, 779 P.2d 1, 6 (Utah 1989). Thus, if a document contains a mistake, even a unilateral mistake, this document is not an enforceable agreement because it does not accurately reflect the intent of the parties. *Id.*

Here, Plaintiff accidentally wrote "\$2,500" when she actually meant "\$25,000.00." However, this mistake does not reflect Plaintiff's true intent. Only days before these mistaken text messages, Defendant had agreed to pay \$30,000.00 now and \$30,000.00 next year. Only after threatening Plaintiff that he would hire Evan Smutz to represent him unless she reduced the agreement did Plaintiff agree to lower the settlement amount. However, the lowered amount was \$25,000.00 next year, not the inadvertent "\$2,500" that was texted. It would be unfair for Defendant to take advantage of Plaintiff's mistake and enforce a settlement that one of the parties did not intend. Because the text messages do not accurately reflect the intent of the parties, no agreement can be manifested through the text messages.

2. THE TEXT MESSAGES DO NOT CONSTITUTE A VALID CONTRACT BECAUSE THEY DO NOT DEMONSTRATE A MEETING OF THE MINDS.

"A condition precedent to the enforcement of any contract is that there be a meeting of the minds of the parties which must be spelled out, either expressly or impliedly, with sufficient definiteness to be enforced." *Pingree v. Cont'l Grp. of Utah, Inc.*, 558 P.2d 1317, 1321 (Utah 1976). There is no meeting of the minds here.

In *Sackler v. Savin*, 897 P.2d 1217, 1220 (Utah 1995), one party attempted to enforce a settlement agreement by showing that the agreement was entered into with letters between the parties. The Court, however, held that no settlement agreement had been reached because the communication "contemplated that the parties would not enter an agreement until sometime in the future." *Id.* Likewise in this case, Plaintiff's text message anticipates that they would enter into a formal settlement agreement sometime in the future.

The restatement of Contracts states:

A manifestation of willingness to enter into a bargain is not an offer if the person to whom it is addressed knows or has reason to know that the person making it does not intend to conclude a bargain until he has made a further manifestation of assent.

Restatement (Second) of Contracts § 26 (1981)

In this case, Plaintiff inadvertently wrote that she would accept \$25,000 now and a second payment of \$2,500 sometime in the future. Defendant agreed to pay that amount and made an offer based on those terms. Plaintiff does not accept the terms without qualifications. Plaintiff specifically asked for formal settlement papers to be drawn up for her review. Because the text messages state that Plaintiff does not intend to conclude the bargain until she has made further manifestations of assent, there can be no agreement. Both the Plaintiff and Defendant

inferred and agreed in their text messages that the whole and total settlement agreement would be in writing. This was the history of the parties; all previous settlement agreements had been in writing and signed.

Additionally, there can be no formal settlement agreement because there are material terms that are not discussed.

There were numerous other issues besides the tentative general amount of money Defendant would pay to Plaintiff. The specific terms of all payments, the amount of interest charged on the second payment the following year, including location of payments, how payments may be made, timeliness of payments, result of default, attorney's fees, specific default provisions, and the pending sheriff's sale, etc. Plaintiff had indicated in his conversation that Plaintiff could keep his car. "I will give you the car if you want it." These items are not discussed in the text messages. If Defendant and his attorney feel that there was a settlement agreement from a few text messages, why did they feel it necessary to add these items that were not negotiated? The only logical conclusion is that Defendant knows that the text messages do not constitute a binding and complete contract and they are trying to take advantage of Plaintiff's mistake. Plaintiff and Defendant had barely began talking and discussing a total and complete settlement agreement of all issues between them.

3. THE TEXT MESSAGES DO NOT CONSTITUTE A VALID AGREEMENT  
BECAUSE THEY LACK CONSIDERATION.

Finally, the text messages do not constitute a valid agreement because they are not supported by consideration. All agreements must be supported by consideration. "As a general

rule, a creditor who agrees to accept a lesser amount that is due is not bound by his agreement, because of lack of consideration." *Golden Ken Realty, Inc. v. Mantas*, 699 P.2d 730, 733 (Utah 1985).

In this case, Defendant owes Plaintiff over \$230,000.00. He procured the funds from Plaintiff through fraud. He lied about the sale of condos, used Plaintiff's money that he took for the sale, and instead paid off his criminal restitution in another fraud case. Plaintiff has a judgment against Defendant. Defendant attempted to get this judgment dismissed through bankruptcy, but the bankruptcy court rejected that attempt because it is fraud. The \$50,000 Plaintiff agreed to accept is one-fifth of the amount that Defendant already owes. Because Defendant already owes this amount and because Defendant has offered to pay substantially less than the amount owing, Defendant has not offered any consideration to Plaintiff that would make the contract binding. Thus, Defendant cannot seek to enforce this settlement agreement, as it is void.

4. THERE WAS NO VALID AND BINDING CONTRACT BECAUSE DEFENDANT  
BREACHED THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING.

Finally, the court should not grant a judgment in favor of Defendant's Motion because the Defendant has "Unclean Hands." Defendant breached his days earlier verbal agreement with the Plaintiff which Plaintiff recorded, in which he agreed to pay \$60,000, paying \$30,000 now and \$1,000 a month for a year and then a balloon payment for the balance owing at the end of that time. Defendant after verbally agreeing to this, saying he wanted to "make the Plaintiff whole",

then called Plaintiff a day or so later and said he would only pay \$25,000 and if the Plaintiff did not take that amount then the Defendant would give the money to an attorney to "fight her."

Defendant told the Plaintiff that Mr. Schmutz told him that he could "keep him from having to pay." Defendant told Plaintiff that, "he could disappear and she would never be able to collect anything." Defendant also said that he would hire Evan Schmutz, an attorney that had been arrested for threatening and harassing the Plaintiff and her family in the past, to intimidate and upset her. Defendant used these real and implied improper threats against the Plaintiff to try and get her to agree to his offer and agree to settle for less money, in yet another tentative settlement agreement.

Defendant also made material misrepresentations to the Plaintiff in his fraudulent inducement. Defendant claimed untruthfully that he could only pay \$25,000, however, then just days later in a written proposed settlement agreement drawn up by the Defendant's attorney, he offers another \$2,500 immediately. Plaintiff can only rely on the truthfulness of the Defendant in disclosing his finances and what he can pay. Defendant's deliberate misrepresentation and false statement of fact to the Plaintiff voids any tentative settlement agreement between the parties.

Coercion, threats, and false statements by one party to a contract can void the contract.

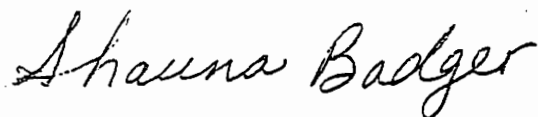
Plaintiff's defenses of duress and misrepresentation address Defendants behavior towards Plaintiff.

It would be unjust for the Defendant in this case to benefit from an unintentional and innocent typo by the Plaintiff. The Court needs to decide this matter in its entirety taking into account the Defendants admitted past fraudulent behavior and his years of unwillingness to pay his Court ordered debt to the Plaintiff.

## CONCLUSION

For the foregoing reasons, the Plaintiff respectfully prays and requests the Court denies the Defendants Motion to Enforce a Settlement Agreement between the parties, release the \$25,000 owing to the Plaintiff that is held by the court and allow the Plaintiff to continue with the Sheriff's sale and award Plaintiff damages in fees and expenses related to this action and the pending sheriff's sale.

Dated this 13<sup>th</sup> day of October, 2014

A handwritten signature in cursive script that reads "Shauna Badger".

SHAUNA BADGER

Plaintiff

000374

CERTIFICATE OF SERVICE

This is to confirm that a copy of the foregoing was hand delivered to the Defendant's attorney listed below on October 14, 2014.

Evan A. Schmutz (3860)  
eschmutz@djlplaw.com  
DURHAM JONES & PINEGAR, P.C.  
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*Attorneys for Defendant*

*Shauna Badger*  
SHAUNA BADGER,

---

Plaintiff

Exhibit 1

000372

Audio Recording-Dustin Settlement

COPY OF TRANSCRIPT

AUDIO RECORDING  
"DUSTIN SETTLEMENT"

Proceedings recorded by electronic sound recording,  
transcript produced by certified transcriber/court  
reporter; Kellie Peterson, RPR  
notary public in and for the State of Utah

Alpine Court Reporting  
801-691-1000

000371

## Audio Recording-Dustin Settlement

Page 2

1                   P R O C E E D I N G S  
2                   (Beginning of first audio.)  
3                   SHAUNA: Going to meeting with Dustin.  
4                   Hi, I'm okay. How are you? Are you okay?  
5                   DUSTIN: 'Huh?  
6                   SHAUNA: (Inaudible.)  
7                   DUSTIN: Oh, driving my boy's car. I'm not  
8 doing that good. That is why -- (inaudible.)  
9                   SHAUNA: Driving your boy's car; what do you  
10 mean?  
11                   DUSTIN: I'm driving his truck.  
12                   SHAUNA: Oh, is that your son's car?  
13                   DUSTIN: Uh-huh.  
14                   SHAUNA: That is kind of an expensive car  
15 for a kid.  
16                   DUSTIN: (Inaudible.)  
17                   SHAUNA: Okay.  
18                   DUSTIN: So are you taping?  
19                   SHAUNA: Yes.  
20                   DUSTIN: Are you?  
21                   SHAUNA: Yes.  
22                   DUSTIN: Okay.  
23                   SHAUNA: Just because I am protecting  
24 myself, Dustin, and I -- you lie to much.  
25                   DUSTIN: No, that is fine.

Alpine Court Reporting  
801-691-1000

000370

## Audio Recording-Dustin Settlement

Page 3

1           SHAUNA: I can't afford for you to make up  
2 something -- (inaudible) -- attorneys. There is  
3 nothing --

4           DUSTIN: There is nothing to hide.

5           SHAUNA: It is just to protect me. It's  
6 nothing --

7           DUSTIN: That's fair.

8           SHAUNA: -- regarding you at all.

9           DUSTIN: No, that's fair. So what do you  
10 want to do -- (inaudible?)

11           SHAUNA: What do you want to do, Dustin?  
12 I'm -- I want you to pay the money back from me you  
13 stole, and I just don't know if you -- if there is a  
14 mental disconnect with you on why you don't think that  
15 you need to do that.

16           DUSTIN: What money, what money is that  
17 amount that I stole?

18           SHAUNA: You stole \$60,000 from me, Dustin;  
19 30,000 went -- when you lied, and I went to pay your  
20 bail, and you got that money back from your bail money  
21 and you --

22           DUSTIN: Never got any money back. I paid  
23 my restitution.

24           SHAUNA: Yes, you did. Oh, you paid your  
25 restitution? Okay, well, then why should I pay your

## Audio Recording-Dustin Settlement

Page 4

1 restitution? You need to pay your own restitution. You  
2 need to pay me that money back. I did you so many  
3 favors, Dustin. I did so many nice things for you.  
4 Gave you money when you grandpa -- when you needed to go  
5 to your grandfather's funeral. I let you stay in my  
6 home in Park City. I did all of these things for you.  
7 I gave you that money thinking that that property in  
8 Promontory was going to close. You're either a  
9 sociopath, Dustin, or you're evil, and I don't know  
10 which, but at some point, don't you think you need to  
11 say, "I am sorry"?

12 DUSTIN: Well, I'll tell you right now -- I  
13 am here. Why do you think I am here? Why do you think  
14 I'm here?

15 SHAUNA: I don't know, Dustin. I never even  
16 seen you once show one bit of remorse or willing to make  
17 one inch of restitution for what you have done to our  
18 lives and to me personally. And you go from person to  
19 person to person, and you have the same scam that you do  
20 over and over again. And you make a good living off of  
21 it.

22 DUSTIN: First of all, I don't scam anybody.

23 SHAUNA: Okay.

24 DUSTIN: Okay, I haven't scammed you --  
25 (inaudible) -- I went to you straight up and asked you

## Audio Recording-Dustin Settlement

Page 5

1 for the money, Shauna, and we can go until you are blue  
2 in the face. We can hammer this over -- I am sorry for  
3 your pain, okay?

4 SHAUNA: What has happened to all, all of  
5 the down payments that I gave you, Dustin? You simply  
6 signed them and kept the money, and there was like  
7 \$30,000.

8 DUSTIN: Okay, Shauna.

9 SHAUNA: Okay.

10 DUSTIN: We can go until you're blue in the  
11 face.

12 SHAUNA: I have all the checks. It is  
13 documented. I have a judgment.

14 DUSTIN: I know you do. You filed, you  
15 filed, you filed criminal charges against me.

16 SHAUNA: Yeah.

17 DUSTIN: They were all dismissed.

18 SHAUNA: Because you would not pay -- no,  
19 they weren't dismissed.

20 DUSTIN: They weren't?

21 SHAUNA: No.

22 DUSTIN: Well --

23 SHAUNA: But it doesn't matter. I still  
24 have a judgment against you for all of that, Dustin.  
25 You have a concession of judgments. So I have a

## Audio Recording-Dustin Settlement

Page 6

1 judgment that is airtight that is not going to be thrown  
2 out by a judge. I have a bankruptcy judgment that  
3 precludes it from being involved in any bankruptcy. You  
4 can't file a bankruptcy for two more years. So I don't  
5 know, I -- you stole that money. For you to sit here  
6 and tell me you didn't scam me, Dustin --

7 DUSTIN: I never told you I didn't --  
8 (inaudible) -- you tell me I scammed people.

9 SHAUNA: You scammed me.

10 DUSTIN: No, I didn't scam you, Shauna. We  
11 have done lots of business together.

12 SHAUNA: Okay, Dustin.

13 DUSTIN: You can call it, you can call it --

14 SHAUNA: When I give you \$5,000 that is  
15 going to go towards a down payment --

16 DUSTIN: Okay, Shauna.

17 SHAUNA: -- on a piece of property, and then  
18 you turn around and cash that check and keep the money.

19 DUSTIN: I didn't.

20 SHAUNA: Yeah, that is called scamming.

21 DUSTIN: I didn't come here to argue with  
22 you.

23 SHAUNA: Okay.

24 DUSTIN: What can we do to make it better?

25 SHAUNA: Okay.

## Audio Recording-Dustin Settlement

Page 7

1 DUSTIN: That's all I ask.

2 SHAUNA: Okay.

3 DUSTIN: I am sorry for you pain.

4 SHAUNA: Okay.

5 DUSTIN: Okay. I am not going to admit to  
6 you that I've done anything wrong.

7 SHAUNA: Okay.

8 DUSTIN: I am sorry for your pain and I am  
9 sorry that things didn't work out well.

10 SHAUNA: Okay.

11 DUSTIN: Okay. I was wrong. I will own  
12 that, okay? I was wrong.

13 SHAUNA: You were wrong about what?

14 DUSTIN: I was wrong, period.

15 SHAUNA: Yeah.

16 DUSTIN: Yeah.

17 SHAUNA: Okay.

18 DUSTIN: So how do you want to make it  
19 better?

20 SHAUNA: Okay. I want you to pay me back my  
21 \$60,000.

22 DUSTIN: Okay.

23 SHAUNA: You owe me over \$200,000 right now.  
24 It is compounding at 12 percent per month, so the  
25 interest is running, you know, wild. It's well over --

## Audio Recording-Dustin Settlement

Page 8

1 I think it's \$230,000 at the moment that you owe me.  
2 You know, that's money, Dustin, whether you want to  
3 admit it or not. I don't care if you admit it on tape  
4 or not. I have nothing to do with that. The only  
5 reason I am taping it is to protect myself, so that you  
6 and your business partners can't accuse me of something  
7 that I didn't say.

8 DUSTIN: Shauna, the only reason you're  
9 doing -- taping me is so you can use it against me.

10 SHAUNA: No, absolutely not.

11 DUSTIN: I understand. I get --

12 SHAUNA: It is to protect myself.

13 DUSTIN: Can I ask you a couple questions or  
14 are we going to go --

15 SHAUNA: Yeah.

16 DUSTIN: So did you go to the IRS and talk  
17 or whistle blow against Harrison?

18 SHAUNA: I am not here to talk about  
19 Harrison.

20 DUSTIN: Okay, but you did me, too. I mean,  
21 you whistle blew me.

22 SHAUNA: No, I am not -- no. In fact --

23 DUSTIN: Okay.

24 SHAUNA: That's interesting because I am not  
25 going to go there, because I am not -- I am not here to

## Audio Recording-Dustin Settlement

Page 9

1 talk about him and I won't talk about him.

2 DUSTIN: No, I get it.

3 SHAUNA: So if you are trying to get me to  
4 talk about him, I am not going to do that, Dustin, and  
5 that is one of the reasons I am taping the conversation  
6 is because I don't trust you.

7 DUSTIN: You don't have to trust me. I  
8 mean, I am here to make restitution with you. That is  
9 all I want to do is make it right.

10 SHAUNA: But no, I wasn't the person that  
11 first contacted them. No, I was contacted.

12 DUSTIN: Okay.

13 SHAUNA: But nobody is going to believe  
14 that, so it doesn't matter.

15 DUSTIN: It is neither here nor there. I  
16 don't care.

17 SHAUNA: Yeah.

18 DUSTIN: I really don't know.

19 SHAUNA: Yeah.

20 DUSTIN: All I know is that -- so how about  
21 -- so I have right now 25, 26,000 to pay you, so how do  
22 we do -- how do we do this?.

23 SHAUNA: So why don't you, why don't you pay  
24 the \$26,000, and I don't know. How much your car is  
25 worth?

## Audio Recording-Dustin Settlement

Page 10

1 DUSTIN: I owe -- my car is leveraged.

2 There is nothing on my car. I owe a credit union on my  
3 car. Maybe you will see the money and it is not -- and  
4 it is worth what I owe.

5 SHAUNA: Okay. What is the year of the car?

6 DUSTIN: It is an '03.

7 SHAUNA: '03?

8 DUSTIN: Yeah.

9 SHAUNA: Okay. And you owe what? Maybe  
10 \$25,000 on it?

11 DUSTIN: Oh, no. It is only worth --  
12 Shauna, it is only worth maybe 12. You can't even sell  
13 it for \$10,000 on KSL.

14 SHAUNA: Really?

15 DUSTIN: You will see. I am not lying to  
16 you. I know cars, and I owe \$10,000 at the bank, \$9,500  
17 and change, so there is not any equity in it.

18 SHAUNA: Yeah.

19 DUSTIN: I will give you the car if you want  
20 it. I don't -- there is no equity there, and the car is  
21 falling apart, so I wish -- I mean, I haven't even  
22 registered this thing because I am just waiting for it  
23 to die. And I am going to get a new car, either way. I  
24 am going to pay it off and figure it out but --

25 SHAUNA: Well, I think it sounds to me like

## Audio Recording-Dustin Settlement

Page 11

1 you've made a lot of money. You know, you remember the  
2 club.

3 DUSTIN: (Inaudible) -- I am not a member of  
4 the club, anymore. So I did that, I did that so that my  
5 daughter could get married there. So, Shauna, you know  
6 I know how to make money, just like you know how to make  
7 money. We all know how to make money. What do you want  
8 to do, Shauna?

9 SHAUNA: What do you want to do, Dustin?

10 DUSTIN: I want to make you whole.

11 SHAUNA: Okay.

12 DUSTIN: So I can move on with my life.

13 SHAUNA: Yup.

14 DUSTIN: And not because you did that. I  
15 have been trying to figure out how to make you whole for  
16 a while now. It's not like I haven't, so...

17 SHAUNA: So, anyway --

18 DUSTIN: So here is what, here is what I  
19 would propose.

20 SHAUNA: Yeah.

21 DUSTIN: We can talk probably ten hours and  
22 catch up on everything and probably --

23 SHAUNA: Yeah, but --

24 DUSTIN: It is not going to help either one  
25 of us because it's made my life hard, it's made your

## Audio Recording-Dustin Settlement

Page 12

1 life hard.

2 SHAUNA: Uh-huh.

3 DUSTIN: And I want to make you -- I want to  
4 get clean, so I can pay you, but I can't pay you \$60,000  
5 right now.

6 SHAUNA: Uh-huh.

7 DUSTIN: Do you want to do a chunk now and  
8 some over time, or do you want a settlement now?

9 SHAUNA: Yeah. No, we can do that, do a  
10 chunk now and then over time. The problem is, Dustin, I  
11 am not going to go into -- I am not going to play the  
12 game, anymore.

13 DUSTIN: No, no, you don't have to. I  
14 wouldn't ask until it is all paid and then you release  
15 everything. I know, I am not -- I am never going to ask  
16 you to. I am in a good spot right now, Shauna. I am in  
17 a good spot.

18 SHAUNA: Good.

19 DUSTIN: I am trying to live right, trying  
20 to do right. My wife just went to the temple for the  
21 first time in 38 years, you know.

22 SHAUNA: Well, good for her.

23 DUSTIN: Yeah.

24 SHAUNA: You know, I really have been hurt,  
25 so...

## Audio Recording-Dustin Settlement

Page 13

1 DUSTIN: Just so you know, Kristin is the  
2 one that said, "Let's figure out how to make --  
3 (inaudible) -- how to pay her back." She is the one --

4 SHAUNA: But you didn't borrow it from me,  
5 but that's okay. You can say borrow it, but no --

6 DUSTIN: (Inaudible.)

7 SHAUNA: Well, you borrowed -- I did loan  
8 you some money, but most of that money, you kept --

9 DUSTIN: Here is what I remember --  
10 (inaudible.)

11 SHAUNA: Scammed me out of.

12 DUSTIN: (Inaudible) -- I really --  
13 (inaudible) -- scam, and I get that you are hurt. You  
14 know, I get it. But here is what I would ask.

15 SHAUNA: It was a scam, yeah.

16 DUSTIN: (Inaudible) -- didn't think it was  
17 a scam.

18 SHAUNA: No, I think -- yeah, they did.

19 DUSTIN: (Inaudible.)

20 SHAUNA: But there were other extenuating  
21 circumstances of why you got off, you know, why you  
22 usually get off.

23 DUSTIN: Why is that?

24 SHAUNA: There are a lot of collusions in  
25 this area.

## Audio Recording-Dustin Settlement

Page 14

1 DUSTIN: Well, I know there's -- (inaudible)  
2 -- collusions.

3 SHAUNA: Yeah, you know, between the justice  
4 system and the legal system, and you can buy people,  
5 yeah.

6 (End of first audio portion.)

7 (Beginning of second audio portion.)

8 SHAUNA: So are you employed, then, as far  
9 as -- I mean, I was going to have a supplemental  
10 hearing, but I just as soon, you know, skip all of that  
11 and --

12 DUSTIN: Just take -- let me ask you this:  
13 How much time -- let's say for easy numbers, let's just  
14 say I gave you \$25,000.

15 SHAUNA: Well, who are you working for right  
16 now? I mean, do you have a job or just --

17 DUSTIN: (Inaudible.)

18 SHAUNA: So you just work for yourself?

19 DUSTIN: Yeah.

20 SHAUNA: Okay. Are you working in Park City  
21 still or --

22 DUSTIN: I do a lot of work in Park City  
23 still, yeah. So 60 is your number. Right? That is  
24 what you feel's owing?

25 SHAUNA: That's -- yeah, but it's like --

## Audio Recording-Dustin Settlement

Page 15

1 you know, Dustin, it's hard for me to -- that's the bare  
2 minimum, yeah.

3 DUSTIN: So how much --

4 SHAUNA: I am not a part of -- I don't know  
5 what is going on with -- there's no criminal charges  
6 that I know of, Dustin, or anything like that. I am not  
7 a part of any of that, so...

8 DUSTIN: With Harrison?

9 SHAUNA: I -- like I said, I am not going to  
10 talk about Harrison.

11 DUSTIN: (Inaudible.)

12 SHAUNA: You are talking about -- with you.

13 DUSTIN: Well, I had nothing -- I had no  
14 legal -- (inaudible) -- since the last time, seriously.

15 SHAUNA: Yeah, so...

16 DUSTIN: I don't want too many enemies and I  
17 don't want -- (inaudible) -- people owing money, and  
18 so...

19 SHAUNA: Yeah, so I am not -- you know, I am  
20 not using anything. I just feel like I have been, you  
21 know, framed before, and I am not going to put myself in  
22 that position, where you can lie to hurt me, or since  
23 you stole, you know, part of --

24 DUSTIN: Part of what?

25 SHAUNA: I don't know.

000357

## Audio Recording-Dustin Settlement

Page 16

1 DUSTIN: (Inaudible.)  
2 SHAUNA: Okay.  
3 DUSTIN: (Inaudible.)  
4 SHAUNA: Probably a really smart thing.  
5 DUSTIN: How long, how long -- (inaudible)  
6 -- to pay the \$60,000?  
7 SHAUNA: Well, you tell me what you can do.  
8 I mean, if you are doing that well, it seems to me --  
9 DUSTIN: No, I am not well. I just -- I  
10 released all my debt, I don't have a lot of debt. I  
11 don't have a lot of bills. I live very simple and make  
12 a good -- (inaudible.) And so, I mean, if you can give  
13 me a year --  
14 SHAUNA: Yes, that would be awesome. That  
15 would be great.  
16 DUSTIN: So that would just be easy on us,  
17 30,000 and 30 in a year?  
18 SHAUNA: Uh-huh, or you can do a little  
19 every month. I think I'd feel more comfortable doing a  
20 little bit every month.  
21 DUSTIN: How much, how much would you feel  
22 comfortable on a monthly basis? And then maybe a  
23 little --  
24 SHAUNA: Why don't we just divide it --  
25 yeah, why don't we do \$1,000 a month?

## Audio Recording-Dustin Settlement

Page 17

1 DUSTIN: That is fair. That is what I was  
2 thinking.

3 SHAUNA: Yeah.

4 DUSTIN: So that would give you 12,000, then  
5 I would only owe you the difference, that is 12 plus 30,  
6 whatever that number is, 16,000 bucks, and then we are  
7 even.

8 SHAUNA: Uh-huh.

9 DUSTIN: And then if I make that payment,  
10 you won't do any legal -- or take more stuff from my  
11 house?

12 SHAUNA: No, unh-unh. I won't have any more  
13 sheriff sales, or, you know, it will be all behind us.

14 DUSTIN: No supplemental hearings? Nothing?  
15 Just make it simple --

16 SHAUNA: No.

17 DUSTIN: So 30 now and 1,000 a month and a  
18 balloon in the year?

19 SHAUNA: Yeah.

20 DUSTIN: And then when that's all done, then  
21 we are done?

22 SHAUNA: Yes, then we are done, yup.

23 (End of second audio.)  
24  
25

## Audio Recording-Dustin Settlement

Page 18

## 1 REPORTER'S CERTIFICATE

2  
3 STATE OF UTAH )  
4 COUNTY OF SALT LAKE )  
5

6 I, Kellie Peterson, Registered  
7 Professional Reporter in and for the State of Utah, do  
8 hereby certify:

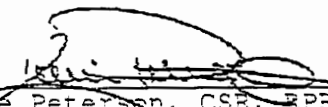
9 That on October 8, 2014, I transcribed an  
10 electronic sound recording:

11 That the statements and testimony of all  
12 speakers were reported by me in stenotype and thereafter  
13 transcribed, and that a full, true and correct  
14 transcript of said statements and testimony is set forth  
15 in the preceding pages according to my ability to hear  
16 and understand the electronic sound recording provided:

17 I further certify that I am not kin or  
18 otherwise associated with any of the parties to said  
19 cause of action and that I am not interested in the  
20 outcome thereof.

21 Witness my hand and official seal this 8th  
22 day of October, 2014.




23   
24 Kellie Peterson, CSR, RPR  
25

## Exhibit 2

000353

Sprint LTE

2:49 PM

66% 

< Messages (801) 376-3145

Contact

Text Message  
Fri, Aug 15, 4:15 PM

Did u get a chance to talk  
to Rod?

iMessage  
Sat, Aug 16, 9:08 AM

Yes

Are?

Thursday 11:12 AM

Dustin rod wants at least  
30,000 the amount I took  
from his credit line that  
you used to pay your  
resstitution. Need to man  
up and do the right thing




iMessage

Send

000352

Signal strength icons, Sprint LTE, 2:49 PM

66% 

&lt; Messages (801) 376-3145 Contact

up and do the right thing

Thursday 2:11 PM

Shauna, You only loaned  
me 26 k.

Can't remember exactly  
but you told me that you  
wanted to make us  
whole. You and I met and  
you agreed to paying  
back the money you took  
when you acknowledged  
in the confession of  
judgement that McVey  
signed years ago. Even if  
we go with the 26000 I  
have well over 4,000 in  
attorney fees and other  
fees in collection. I think




iMessage

Send

000351

Sprint LIFE

2:49 PM

56% 

&lt; Messages (801) 376-3145

Contact

fees in collection. I think  
our agreement you and I  
agreed to when we met is  
fair. 30,000 cash now and  
1,000 a month till the  
other 30,000 is paid  
back. It's easy to take  
someone's money. But  
hard to pay it  
back. Judgement is air  
tight and she fits sale  
was done correctly and I  
can sue Kristin for unjust  
enrichment as she has  
benefited from your fraud  
in scamming people out  
of their money.

000350

AT&amp;T

2:33 PM

&lt; Messages (1) Dustin

Contact

iMessage  
Fri, Aug 22, 9:23 AM

Shauna, I'm sorry to hear  
about your father. Thanks  
for getting back to me. The  
best I can do is 25k. I'm on  
my way to see an attorney  
about the hearing on  
Monday. Can we get this  
done at 25k? Thanks

Fri, Aug 22, 10:50 AM

I think so

I need a yes or no...  
Please... I have a meeting  
in 1 hr

Let's do 25000 new team  
2500 new year when you  
do a great

000343

Dustin I can garnish all  
your wages for 25 percent  
for the rest of your life and  
have a sheriff's sale every  
few months if you want.  
This is fair for what you  
have done to me.

Shauna, I agree to your  
offer. I will pay you 25000  
now and 2500 no later  
than one year from now in  
full settlement. So we are  
Done. We need to have a  
written agreement to settle  
all claims between us and  
have the judgment  
satisfied. I can ask Morgan  
or someone to write up a  
simple agreement. Let's  
plan on payment and  
signing the settlement next  
week. I'm glad this is  
behind us. Thx

Fri, Aug 22, 2:02 PM

Ok but Disin I am not going through anymore you either keep your word or I'm more. Have Morgan write up something but it must have in it that if you default all debt and interest comes back. I can't trust you to keep any agreement. Been there done that

Ok...

Mon, Aug 25, 5:47 PM

I sent agreement to [shauna.badger@comcast.net](mailto:shauna.badger@comcast.net)

Is that your email address?

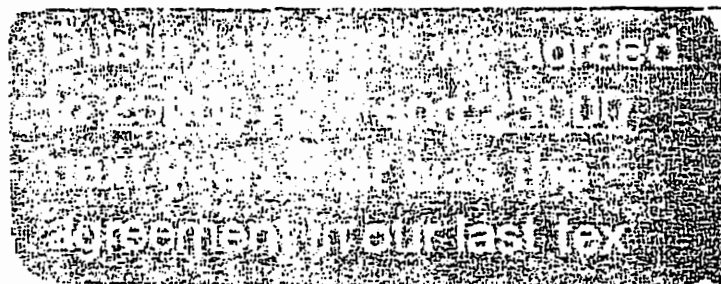
Tue, Aug 26, 10:58 AM

Yes but that was not our agreement

000347

Fri, Aug 29, 12:45 PM

Shauna, I have the \$25,000 ready to deliver to you as part of our settlement agreement. I'm confused by your last email. Are you willing to receive the payment and perform your end of the settlement agreement?



000346

Mon, Sep 1, 11:38 PM

Sorry, Dustin on our tentative agreement pending approval of your attorneys written settlement agreement my initial text was a typo. The second amount of \$25,000 due the following year I accidentally texted \$2500. I have a recording of our conversation to verify this. Our tentative settlement agreement was contingent on me approving the agreement written up by your attorney.



iMessage

Send

000345



