

2019

**HOLLY REBECCA ROSSER, Petitioner, v. Ronald Lee Rosser,  
Respondent. : BRIEF OF THE RESPONDENT**

Utah Supreme Court

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IN THE UTAH SUPREME COURT

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**HOLLY REBECCA ROSSER,**

**Petitioner,**

**v.**

**RONALD LEE ROSSER,**

**Respondent.**

**Case No. 20190320-SC**

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BRIEF OF THE RESPONDENT

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On Writ of Certiorari to the  
Utah Court of Appeals  
No. 20170736-CA

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Appeal from the Sixth Judicial District Court, Garfield County,  
Honorable Paul D. Lyman, District Court No. 154600013

---

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## LIST OF CURRENT AND FORMER PARTIES

Parties to the proceeding in the appellate court and their counsel:

1. Holly Rebecca Rosser, represented by Stephen D. Spencer of Spencer Law Office, PLLC.
2. Ronald Lee Rosser, represented by Steven W. Beckstrom and Nathanael J. Mitchell of Snow Christensen & Martineau.

Parties to the proceeding in the court whose order is under review that are not parties in the appellate court proceeding:

None.

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## INTRODUCTION

This appeal arises out of a contempt proceeding in a divorce case. Following entry of a stipulated decree of divorce (“Decree”), the parties filed cross-motions for orders to show cause. The petitioner, Holly Rosser, argued that her former husband, Ronald Rosser, failed to pay tax liabilities to the IRS for 2015, and Ron contended that Holly failed to pay him royalties from a business. While Ron based his argument on the language of the Decree, Holly based her position primarily on a fraud-based theory and the mediation agreement, which predated the Decree.

After a brief evidentiary hearing, the trial court held Ron in contempt and entered judgment against him in the amount of \$15,074.98, plus attorney fees, even though the Decree provided that Holly “shall also be responsible to pay any tax liabilities resulting to any of the Parties for the year 2015.” Compare, R.1135, *with* R.491-92. In reaching this result, the trial court found that Ron had defrauded Holly by failing to inform her that he had not paid a portion of the tax liability. R.1133. Nowhere does the ruling reference deceit or fraud directed at the court.

At the same time, the trial court declined to hold Holly in contempt, even though it remained undisputed that she had failed to make the royalty payments required by the plain language of the Decree. R.1134-35.

Ron appealed, arguing that the trial court lacked a basis for holding him in contempt for the alleged fraud, because the order to show cause procedure should

have been limited to enforcement of an existing order. *See* R.1152-53. Because the Decree required Holly to bear the entire tax obligation, Ron contended that there was neither a legal nor a factual basis for the trial court's order.<sup>1</sup>

The court of appeals reversed. *Rosser v. Rosser*, 2019 UT App 25, ¶ 21, 438 P.3d 1047. In doing so, the court addressed Holly's argument that the trial court possessed statutory authority to hold a party in contempt for "deceit, or abuse of the process or proceedings of the court[.]" *Id.* ¶ 12 (quoting Utah Code Ann. § 78B-6-301(4)). Rejecting Holly's argument, the court of appeals interpreted the statute to be limited to "deceit committed on the court." *Id.* ¶ 13. Because Ron's "actions were all undertaken towards Holly, and not toward the court," the court held that the trial court could not have held Ron in contempt on that basis. *See id.* ¶¶ 14, 21.

Holly petitioned for certiorari and raised two arguments. First, Holly challenged the court of appeals' interpretation of the statute. In her view, the statute allows a contempt order for any "fraud directed toward the opposing party that prevents or hinders that party from presenting its claim or defense." Pet'r's Opening Br. at 14-15. Second, Holly contends that the court of appeals erred in interpreting the statute, because the question was not properly before it. *Id.* at 25.

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<sup>1</sup> Brief of Appellant at 16-19, *Rosser v. Rosser*, No. 20170736-CA (Feb. 8, 2018) (hereinafter, "Ron's COA Br.") Ron will refer to Holly's responsive brief and his reply brief to the court of appeals as "Holly's COA Br." and "Ron's COA Reply."

Ron asks this Court to reject both arguments for the reasons below.

## STATEMENT OF THE ISSUES

**Issue No. 1:** Did the court of appeals correctly conclude that Subsection 78B-6-304(4) of the Utah Code provides a basis for an order of contempt only in those instances where a party commits deceit on the court?

*Standard of Review:* This issue turns on a question of statutory interpretation, which is typically reviewed for correctness.

*Preservation:* The parties dispute the degree to which the underlying issue was preserved. The statutory provision was not raised by Holly in the course of the district court proceedings, nor was it identified by the trial court in its ruling. As discussed at greater length below, Ron contends that the interpretation of a controlling statute—first raised by Holly as an alternative basis for the contempt order for the first time in her responsive brief to the court of appeals—was preserved insofar as he repeatedly challenged the trial court’s authority to issue a contempt order or, in the alternative, could be reached as controlling authority under *Patterson v. Patterson*, 2011 UT 68, ¶ 20, 266 P.3d 828, or *State v. Johnson*, 2017 UT 76, 416 P.3d 443. *Infra* § II; *see also* Brief of Appellee at 20-22; R. 500-04, 1550-51; *see also* R.1544-50.

**Issue No. 2:** Did the court of appeals correctly reach the interpretation of Subsection 78B-6-304(b) of the Utah Code, where the appellee argued that the

statute provided an alternative basis for the court's authority, and her argument presented a question of law and implicated controlling authority?

*Standard of Review:* This Court reviews “the court of appeals’ application of the preservation rule for correctness[,]” which allows the court to consider the appellate doctrines as if it “were the first appellate court to consider them.” [State v. Johnson, 2017 UT 76, ¶ 6, 416 P.3d 443](#) (citation and internal quotation marks omitted).

*Preservation:* Holly challenged the court of appeals’ authority in her Petition for Writ for Writ of Certiorari. R.1550-51.

## STATEMENT OF THE CASE

### **I. The Parties Stipulated and Agreed to Paragraph 9r of the Decree.**

After over twenty-five years of marriage, Holly petitioned for a divorce in June 2015. R.1-7. Litigation proved contentious. Holly filed a temporary restraining order and request for a preliminary injunction at the outset of the case, seeking operational control of the parties' businesses and denying Ron access to accounts. R.40-42. Shortly thereafter, Ron filed a motion for temporary orders, seeking access to business-related information and temporary alimony, based on his concern that Holly controlled business activities and revenue. R.93-110.

The court entered temporary orders on January 7, 2016. R.261-65. Holly retained temporary control of the parties' restaurant businesses, but was directed to provide business receipts, reports, and passwords for bank accounts, franchises, and other accounts to Ron. R.261-63. Ron was enjoined from interfering with Holly's operation of the business. R.264. The temporary orders required Holly to continue to pay debts and obligations routinely paid from the restaurant businesses, and it placed limitations on the parties' access to assets. *See id.*

Six months later, the parties participated in mediation on June 16, 2016. *See* R.395-96. Mediation proved successful, and both parties signed an agreement memorializing the basic terms of the divorce. R.596-98.

The mediation agreement resolved key issues. At the same time, the roughly hewn language of the mediation agreement suggested that both parties contemplated that it would be formalized at a later date. *See* R.596-98. For example, the mediation agreement's reference to the 2015 tax obligation was limited to a single, cursory sentence: "IRS debt from 2015, 50% Ron and 50% Holly." R.597.

After mediation, Ron received access to business records, including the parties' original tax returns. *See* R.1363. Upon close examination of the records, Ron identified additional depreciation deductions which he believed could reduce or eliminate the parties' 2015 tax liability. R.1363. In July 2016, Ron consulted with the parties' accountant, Derrick Clark, to assess the issue. R.1342.

On July 16, 2016, approximately a month after mediation, Clark prepared amended tax returns for the parties' business (Eagle Solutions, Inc.) and Ron and Holly individually. R.1351. This included preparing amended tax returns for the federal government, State of Utah, and State of Arizona. *See* R.1342-43, 1361-62. Clark emailed the returns to both Ron and Holly through a secure file exchange. R.1348-49.

In the amended federal return prepared by Clark, Line 11 showed that the parties' tax liability for 2015 should be reduced from \$54,917 to \$47,017. R.1294; *see also* R.939-40. Line 17 indicated that the parties had previously paid \$54,917 to



the IRS, and Line 22 contemplated a refund of \$7,900. R.1292-1293. Clark believed that the \$54,917 had been paid based upon the fact that he had provided Holly with the original tax returns and the payment coupons, and he assumed that she paid the amounts owed to the IRS by the April tax filing deadline. R.1343-35. Clark did not ask Ron if the full amount had been paid prior to the date of the amended return, nor did Ron tell Clark that such amount had, in fact, been paid. R.1345; *see also* R.935.

Unfortunately, Clark's assumption was not accurate because Holly had not paid the amount by the April filing deadline, which meant that instead of a \$7,900 refund, there would be outstanding liability of \$7,174.98 to the IRS. R.1288-89.

As early as July 20, 2016, Holly retained her own, independent accountant to review the amended returns prepared by Clark. R.1312-13. On that date, Holly forwarded the file share exchange email received from Clark to the accounting firm of Kohler & Eyre. R.1312-13. In doing so, Holly wrote: "I don't understand how we can go from oweing [sic] 60 to getting another refund . [sic] And was my 45k that I paid in used towards these taxes ? [sic]" R.1620, Resp. Ex. 9; *see also* R.1313. Holly's email to her accountant appeared to include the link to the amended tax documents. *See id.*

On July 29, 2016, Ron received a text message from Holly about the returns:

Send me an email on what taxes come back to me and where the refund will go. I want the refund to go back

to eagle solutions az and Utah. **And how will you be paying me the difference.** Out of the ipc.check works for. Me. Stop pressuring me til I know all the facts. And I have from you in writing . I am working and can't get upset every day with u .

R.1315-17 (emphasis added); *see also* R.1620, Resp. Ex. 3. Ron was shocked by Holly's text, and he wondered why Holly had asked him to pay any difference. R.1367; *see also* R.1362-63 (explaining Holly's control of the business). Facially, the amended return indicated that there would be a federal refund. Because Holly had suggested that the Arizona and Utah refunds were to be returned to Eagle Solutions,<sup>2</sup> Ron began to suspect that Holly's reference to a difference meant that there was still liability owed to the IRS. *See* R.1366-67. Ron called Clark, who then called the IRS. R.1367. Clark reported that there was liability owed to the IRS. R.1367; *see* R.1620, Resp. Ex. 10.<sup>3</sup>

Holly later testified that she had her accountant independently review the amended returns to ensure that Ron was not "tricking" her. R.1336-38 ("I said I didn't trust him."). Holly admitted that Ron never told her that he had paid any portion of the IRS tax liability. R.1338-39 ("The only way that I know that he did

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<sup>2</sup> The returns prepared for the State of Arizona and State of Utah showed refunds in the approximate amounts of \$200 and \$700, respectively. R.1362.

<sup>3</sup> During the evidentiary hearing, Holly claimed that she could not access the amended return. R.1299, 1313. Clark, however, testified that his electronic records showed that Holly previewed and downloaded the amended tax returns on July 26, 2016, some three days before Holly's text was sent to Ron. R.1348-49.

is that – when I look at – when I finally got to look at the taxes, they said they had been paid[.]”). With respect to specific communications by Ron, Holly could only claim that, two days after the mediation, Ron said that he understood that it needed to be paid. R.1295-96.

As the parties conducted their independent investigations of the tax issues, they worked on the language of the formal stipulation and a proposed decree, which were filed on August 5, 2016. *See* R.403-26, 444-60. Holly testified that she reviewed and signed the Stipulation, and that she had authorized her counsel to approve the language of the Decree. R.1308, 1327; *see also* R.426, 499. Based on the stipulation, the trial court entered the Decree on August 8, 2016. R.481-99.

Paragraph 9r of the Decree ordered the parties to sign and file amended tax returns for Eagle Solutions, Inc. and themselves, individually. R.491. Crucially, both the Stipulation and Decree provided that Holly would be solely responsible for any tax liabilities for 2015: “[Holly] shall be solely entitled to receive any refund resulting from the amended returns, and shall also be responsible to pay any tax liabilities resulting to any of the Parties for the year 2015.” *See* R.416, 491-92.

## **II. The Procedural History of the Order to Show Cause Proceedings Underscores the Extent to Which Ron Contested the Basis for a Contempt Order.**

On November 21, 2019, one-hundred-and-five days after entry of the Decree, Holly filed a verified motion for an order to show cause (hereinafter,

“Holly’s OSC”). R.500-04. Holly argued Paragraph 9r of the Decree “was based upon the material representation that [Ron] had theretofore paid his \$14,951.11 share of the tax debt under . . . the Mediation Settlement Agreement.” R.501. Holly’s OSC did not reference a statutory basis for contempt. *Id.* 500-10.

On November 29, 2016, the trial court issued an order to show cause, even though Holly had not clearly articulated a specific violation of the Decree. *Compare* R.511, *with* R.500-04. On January 4, 2017, the trial court also issued an order to show cause on Ron’s motion for an order to show cause (hereinafter “Ron’s OSC”), which sought an order enforcing the terms of Paragraph 12 of the Decree, which required Holly to pay him rebate funds for 2015. R.538-40, 549-50.

On February 8, 2017, the trial court held a short hearing, which Ron assumed would be an initial appearance. R.551-52, 544, 604. Instead of an initial appearance, as would be typical under local rules, the trial court cross-examined Ron, who had appeared *pro se*, on a range of factual issues. *See, e.g.*, R.814-34, 843-44; *see* [Utah R. Jud. Admin. 10-1-602\(5\)](#) (“The opposing party’s first appearance on the order to show cause . . . shall not be the evidentiary hearing.”). At the conclusion of the initial appearance, notwithstanding the local rule, the trial court entered a judgment against Ron, which was memorialized in a written Order and Judgment dated March 7, 2017. R.604, 836-37, 705-12.

After the hearing, Ron filed a motion for a new trial under Rule 59 and a motion for relief from judgment under Rule 60(b).<sup>4</sup> R.733-91; *see also* R.623-51 (requesting reconsideration and objecting to language of order). In the Rule 59 motion, Ron argued that the trial court's order violated Utah Rule of Judicial Administration 10-1-602, because it was entered even after Ron contested the allegations made by Holly's OSC and in violation of Ron's due process rights. R.733-34. Ron also argued that the order to show cause should be limited to enforcement of an existing order, and insisted that he had not violated any term or condition of the Decree. R.741-45. The court ultimately concluded that an evidentiary hearing was appropriate, granted the motion for a new trial, and set the matter for an evidentiary hearing on August 17, 2017. R.1113, 1118-19, 1261.

At the evidentiary hearing, Ron's counsel argued that there was no basis for an order to show cause, because the parties stipulated to the language of the Decree, which plainly provided that Holly was responsible for the tax obligation. *See* R.1273-74, 1276. Counsel pointed to the fact that there had been several proposals on the language of the final documents, and that Holly ultimately signed the Stipulation. R.1274-1277; *see also* R.1397-1403.

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<sup>4</sup> Ron also filed a motion for reconsideration, in which he maintained that Holly had agreed to the language of Paragraph 9r and argued that a contempt order was inappropriate, because the court could only enforce the actual terms of the Decree. R.623, 636.

### **III. The District Court Entered an Order of Contempt Without Clearly Articulating the Precise Basis for Its Decision.**

After taking the matter under advisement, the trial court found Ron in contempt, awarded judgment against Ron in the amount of \$15,074.98, and awarded attorney fees to Holly. R.1136. A subsequent order awarded fees in the amount of \$18,218.10, making the total judgment \$33,293.08. R.1210.

In its order, the district court made the following findings: (1) the parties intended on June 16, 2016, to file an amended 2015 tax return which would result in Holly receiving a \$7,900 refund, R.1132; (2) the parties agreed to pay 50% of their 2015 IRS tax liability, or \$14,951.11 each, R.1132; (3) Holly assumed she would receive a \$7,900 refund from the amended returns, R.1133; (4) at no point did Ron tell Holly that he had failed to pay his \$14,951.11 tax obligation, R.1134; and (7) Holly had to pay the IRS an additional \$7,174.98, because Holly signed the Stipulation requiring her to pay any tax liability for 2015, R.1133.

In doing so, the trial court never identified a specific violation of the Decree, or a statutory basis for the contempt order. R.1134-35. The net effect, in Ron's view, was to amend the Decree in the context of an order to show cause proceedings on the basis of fraud, without regard for the timing requirements of Rule 60(b)(3) or limitations of the local rule. *Compare* R.1135, *with* R.491-92; *see also* [Utah R. Civ. P. 60\(b\)\(3\)](#); [Utah R. Jud. Admin. 10-1-602\(7\)](#) (“An order to show cause may not be requested in order to obtain an original order or judgment[.]”).

Ron timely appealed. *See* R.1152-53.

#### **IV. The Parties Addressed the Bases (or Lack Thereof) on Appeal.**

On appeal, Ron attacked Holly's fraud-based theory of contempt with several arguments. Ron's COA Br. at 11-16. First, Ron maintained that the appropriate procedural mechanism for modifying, amending, or setting aside a judgment or decree on the basis of fraud would have been a motion under [Rule 60\(b\)](#). *Id.* at 16-17. Because Holly neither sought relief under [Rule 60\(b\)](#), nor otherwise sought relief within the ninety days permitted by the rule, Ron contended that the trial court erred in holding him in contempt, in part because it assumed and imposed a financial obligation on Ron that found no basis in the Decree.

Second, Ron maintained that the trial court's decision violated Utah Rule of Judicial Administration 10-1-602, which contains language limiting an order to show cause proceeding in the Sixth District to the enforcement of an existing order. *Id.* at 17-18; *see* [Utah R. Jud. Admin. 10-1-602\(7\)](#) ("An order to show cause may not be requested in order to obtain an original order or judgment[s.]"). In Ron's view, if Holly sought to modify the terms of the Decree, an order to show cause was not the appropriate procedure. *Id.* at 18-19.

In addition, Ron maintained that the trial court's ruling on fraud was against the clear weight of the evidence. *Id.* at 19-28. Addressing three of the necessary

elements of a civil fraud claim, Ron contended that (1) Holly had not shown that Ron made a false representation about the tax liability having been paid, (2) the substantial weight of the evidence demonstrated that Holly understood that the amended return would result in tax liability—not a refund, and (3) Holly’s contention that she reasonably relied on her belief about Ron’s prior payment found little support in the record, in part because Holly hired her own accountant and testified that she believed Ron was trying to trick her. *Id.* at 19-26. In the alternative, Ron asked the court of appeals to remand, because the factual findings on the issue of fraud were inadequate. *Id.* at 26-27.<sup>5</sup>

In her responsive brief, Holly argued that the trial court could grant her relief by virtue of the general contempt statute ([Utah Code § 78B-6-301](#)) or its enforcement powers ([Utah Code § 30-3-3\(2\)](#)). *See* Holly’s COA Br. at 20. In doing so, Holly specifically cited and quoted the statutory language at issue in this appeal. *Id.* at 21. To Ron’s knowledge, this was the first time Holly had ever relied on the contempt statute as a basis for relief. *Compare id.* at 21-22 (“The relief granted by the District Court and the grounds for such relief are expressly

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<sup>5</sup> Additionally, Ron argued that the parol evidence rule barred admission of the mediation agreement, *id.* at 27-32, and that the trial court erred in refusing to hold Holly liable for refusing to pay rebate funds owed under the Decree, given her admission that she had failed to make those payments, *id.* at 32-33. Ron asked the Court of Appeals to award fees. *Id.* at 33-34.



authorized under [Utah Code \[sic\] 78B-6-301](#) & [Utah Code \[sic\] 78B-6-311](#) as outlined above”), *with* R.500-04.

Along a similar vein, Holly argued a [Rule 60\(b\)](#) motion was unnecessary or improper, because she “was not asking the District Court to set the Decree aside or to modify it.” Holly’s COA Br. at 22-23. She simply “sought enforcement of the decree, not modification of it.” *Id.* at 25. Finally, Holly argued that the trial court’s findings were sufficient. *Id.* at 26-35.<sup>6</sup>

In his reply, Ron urged the court to reject Holly’s statutory argument for three reasons: (1) there was no indication that the trial court relied on the statutory provision; (2) Holly’s theory of contempt relied exclusively on facts occurring outside of the court or the proceedings; and (3) the statute applied only “in respect to a court or its proceedings.” Ron’s COA Reply, at 9-11; [Utah Code § 78B-6-301\(4\)](#).

#### **V. Holly Addressed the Scope of the Contempt Statute at Oral Argument.**

During oral argument, the court of appeals invited the parties to address the reach of the statute. The panel asked Holly’s counsel the following questions:

- “[H]elp me understand what he’s being found in contempt of. . . . There are 12 different reasons that a court is authorized to find somebody in contempt. . . . [M]y question to you is, which one of those 12 is the court referencing here?” Tr. 15:11-24 (Judge Harris).

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<sup>6</sup> Holly also argued that the district court properly considered the mediation agreement as parol evidence of the final stipulation. *Id.* at 35-39.

- “And then your argument with regard to . . . subsection (4) has to do with this deceit argument?” Tr. 17:18-20 (Judge Harris).
- “And I guess my question to you is, doesn’t that have to be -- as Judge Mortensen, I think, alluded to a moment ago – doesn’t that have to be deceit on the court as opposed to deceit on your client?” Tr. 17:22-25 (Judge Harris).
- “Just as a matter of statutory interpretation, then, your position is that that subsection can encompass deceit on a third party. . . . So help us understand, then . . . how that couldn’t result in every single breach of contract action mushrooming into contempt of court; right? I’m a party to – to an action, you lie to me; therefore, I can come in and – and accuse you of contempt of court, even though you didn’t do anything in front of the court that would constitute deceit. Do you follow what I’m asking?” Tr. 18:3-20 (Judge Harris).<sup>7</sup>

Consistent with her briefing, Holly’s counsel continued to rely on the statute as a basis for court’s contempt authority. Tr. 15:25-16:4. In doing so, Holly argued that the statutory provision reached both deceit on the court and a party. Tr. 17:22-18:2. Holly also suggested that the statute should be applied broadly: “I think that it can be a – a deceit that involves litigation.” Tr. 18:21-25.

Holly did not seek leave to submit supplemental briefing.

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<sup>7</sup> Similar questions were asked to Ron’s counsel. See Tr. 10:16-23 (Judge Mortensen); Tr. 32:2-16 (Judge Hagen).

## VI. The Court of Appeals Addressed Both of Holly's Arguments.

The court of appeals reversed. It observed that Ron had challenged the basis for the contempt order, that the trial court had not identified the statutory grounds on which it had relied, and that Holly argued that two provisions of the statute applied, including the one at issue in the instant appeal. *Rosser v. Rosser*, 2019 UT App 25, ¶¶ 10-12 (citing Utah Code Ann. § 78B-6-301(4)-(5)).

The court of appeals held that the statutory ground for contempt based on “deceit, or abuse of the process or proceedings of the court,” Utah Code Ann. § 78B-6-301(4), should be “interpreted to include only deceit committed on the court,” *Rosser*, 2019 UT App 25, ¶ 13. Because there were no allegations, let alone findings, that Ron committed deceit on the court, the trial court lacked a statutory basis for holding Ron in contempt for the alleged deceit. *See id.* ¶¶ 13-16, 21.

Turning to Holly's alternative argument – that Ron's conduct constituted “disobedience of any lawful judgment, order or process of the court,” Utah Code Ann. § 78B-6-301(5), the court of appeals concluded that the “plain terms of the Decree (as opposed to the Mediation Agreement) obligate Holly to pay the entirety of the parties' 2015 tax obligation, whatever that obligation might be,” *Rosser*, 2019 UT App 25, ¶¶ 17-18. The court held that the statutory grounds were not met because, even assuming that there was a failure to comply with the Mediation Agreement, “such failure clearly does not violate the terms of the Decree, because

the Decree imposed upon Ronald no obligation to pay any of the parties' 2015 tax obligation." *Id.* ¶ 18; *see also id.* ¶¶ 19-20 (addressing Holly's argument that parol evidence should be considered in light of a latent ambiguity in the Decree).

In light of its holding, the court of appeals declined to reach Ron's remaining arguments, "including whether the district court clearly erred in any of its factual determinations." *Rosser*, 2019 UT 25, ¶ 9 n.3.

## SUMMARY OF THE ARGUMENT

### I.

[Utah Code Ann. § 78B-6-301](#) provides a statutory basis for a district court to enter an order of contempt when a party engages in “deceit” but only when the act or omission relates “to a court or its proceedings.” [Utah Code Ann. § 78B-6-301\(6\)](#). The court of appeals correctly interpreted the statute to require that the deceit is “committed on the court.” [Rosser, 2019 UT App 25, ¶ 25](#). Such a reading is supported by the plain language and structure of the statute, and also finds support in canons of statutory interpretation, adheres to the few cases applying the statutory provision, and avoids a result that would greatly expand the scope of contempt proceedings and implicate constitutional concerns.

The court should reject Holly’s novel invitation to import the doctrine of frauds into the statutory provision. Although Holly cites cases from other jurisdictions in support of her position, all of her cases are readily distinguishable and none provide a basis for a significant expansion of the doctrine. In fact, case law in Utah and elsewhere supports the proposition that the doctrine of frauds should remain confined to a specific context and directed at the traditional remedy—setting aside or modifying a judgment within the time constraints of Rule 60—rather than a sweeping basis for contempt proceedings. And even if the

Court adopts the doctrine for the purposes of statutory contempt proceedings, the trial court never adopted or applied the standard to the facts of this case.

## II.

The Court should reject Holly's contention that the court of appeals erred in interpreting the proper scope of [Utah Code Ann. § 78B-6-301](#). As a practical matter, Holly raised the statute as an independent basis for affirming the trial court's decision. As such, this case does not implicate the jurisprudential concerns at the heart of [State v. Johnson, 2017 UT 76, 416 P.3d 443](#).

For the reasons discussed below, the Court should conclude that Ron adequately preserved the central issue, or that the court of appeals did not err in addressing a controlling statute directly implicated by Holly's argument. Alternatively, the Court may determine that the exceptional circumstances doctrine or a *Johnson* exception justified reaching the issue presented.

## III.

Even if the Court adopts Holly's interpretation, the case should be remanded for consideration of Ron's challenge to the sufficiency and adequacy of the trial court's findings. The court of appeals never reached those issues, because Holly failed to identify a statutory basis for the trial court's ruling. Remand would be appropriate to have the issues addressed in the first instance.

## ARGUMENT

### I. The Court of Appeals Correctly Interpreted the Scope of [Utah Code Ann. § 78B-6-301\(4\)](#).

#### A. The language and structure of Subsection (4) support an interpretation that limits its application to deceit directed towards a court.

When interpreting a statute, a court's primary goal is to give effect to the legislative intent in light of the purpose that the statute was meant to achieve.

[Monarrez v. Utah Dept. of Transp.](#), 2016 UT 10, ¶11, 368 P.3d 846.

The best evidence of the legislature's intent is "the plain language of the statute itself" by reading the plain language of the statute as a whole. *Id.* (citing [State v. Miller](#), 2008 UT 61, ¶18, 193 P.3d 92). This Court has adopted a "commonsense approach" to statutory interpretation in which "a word is given more precise content by the neighboring words with which it is associated."

[Thayer v. Washington Cty. Sch. Dist.](#), 2012 UT 31, ¶15, 285 P.3d 1142.

This does not present a novel or difficult question; it should be a straightforward application of statutory language. The relevant provision reads:

The following acts or omissions *in respect to a court or its proceedings* are contempts of the authority of the court: . .

(4) deceit, or abuse of the process or proceedings of the court, by a party to an action or special proceeding;

[Utah Code Ann. § 78B-6-301\(4\)](#) (emphasis added). To give meaning to the plain language and structure of the statute, the Court should decline to adopt Holly's broad interpretation of Subsection (4) for at least three reasons.

First, the court of appeals' interpretation gave effect to each of the material terms of the statute. See [Monarrez v. Utah Dep't of Transp.](#), 2016 UT 10, ¶ 11, 368 P.3d 846 (recognizing principle that courts avoid an "'interpretation which renders parts or words in a statute inoperative or superfluous' in order to 'give effect to every word of a statute'"). Here, the first clause suggests that the specific acts or omissions identified in the statute must be "in respect to a court or its proceedings" in order to qualify as contempt. [Utah Code Ann. § 78B-6-301](#). Insofar as Holly's interpretation permits a finding of contempt based on a deceitful act, regardless of whether the representation was with respect to the court or involved its proceedings, it renders the operative language of the statute superfluous, fails to harmonize all terms of the statute, and should be rejected.

Second, the court of appeals' finds support in the canon of *noscitur a sociis*. [GeoMetWatch Corp. v. Utah State Univ. Research Found.](#), 2018 UT 50, ¶ 26, 428 P.3d 1064 (presuming that words "grouped in a list should be given related meaning").

Here, the first clause refers to "acts or omissions in respect to a court or its proceedings" that are "contempts of the authority of the court" and identifies twelve specific examples, all of which directly involve the court, judicial



proceedings, or the court's authority. See [Utah Code Ann. § 78B-6-301](#). By way of example, the acts or omissions identified in the statute include insolent behavior towards the judge, a disturbance that interrupts the judicial proceedings, detaining witnesses, refusing to be sworn during a proceeding, or unlawful interference with the proceedings. *Id.* [§ 78B-6-301\(1\), \(2\), \(4\), \(8\)-\(10\)](#).

And while various subsections of the statute include conduct that could conceivably occur outside of the court's immediate presence, those provisions often either directly involve a judicial order or implicate the "authority of the court." [Utah Code Ann. § 78B-6-301](#). Examples include provisions that allow contempt for misbehavior as officers of the court, acting as a court officer without authority, disobedience with a court judgment, order, or process, or direct interference with a court directive or process. See, e.g., [§ 78B-6-301\(3\), \(5\), \(6\), \(7\), \(10\)-\(12\)](#).

In light of prefatory language and various subdivisions – nearly all of which relate to the court's authority, a judicial process, an order, or a proceeding – a reasonable interpretation would be that the Utah Legislature intended for "deceit" to mean representations directed toward the court or made during an actual trial or hearing, none of which occurred here. See [Rosser, 2019 UT App 25, ¶¶ 12-15](#).

Third and finally, Holly's proposed interpretation is much more likely to offend the substantive terms canon. See [Bryner v. Cardon Outreach, LLC, 2018 UT](#)

52, ¶ 21, 428 P.3d 1096 (“We will not infer substantive terms into the text that are not already there. Rather the interpretation must be based on the language used, and [we have] no power to rewrite the statute to conform to an intention not expressed.”). Unlike Ron’s interpretation, which seeks to give meaning to the prefatory language and neighboring subdivisions, Holly’s proposed interpretation requires incorporating additional language to render it reasonable. *See* Pet’r’s Opening Br. at 14-15 (arguing that “contemptible deceit under Subsection (4) includes fraud directed toward the opposing party that prevents or hinders that party from presenting its claims or defenses”). If the Utah Legislature had intended the deceit provision to sweep so broadly as to include any instance where an out-of-court statement during an ongoing case could be a basis for contempt, it could have easily included such language in Subsection (4).

For the foregoing reasons, Holly’s argument that deceit is contemptible simply because it is made by a party to a proceeding, *see* Pet’r’s Br. at 16, fails. Instead, the Court should interpret Subsection (4)’s language and structure to require that contemptible deceit be directed towards the court or its proceedings.

**B. Although legislative history is scarce, the court of appeals’ interpretation finds some support in prior cases.**

Even if the plain language and structure of Subsection (4) does not resolve the issue, the history of the statute and sound policy weigh in favor of rejecting Holly’s interpretation. *Belnap v. Howard*, 2019 UT 9, ¶ 9, 437 P.3d 355, 358 (“Only

when we find ambiguity in the statute's plain language need we seek guidance from the legislative history and relevant policy considerations.'").

As a preliminary matter, detailed legislative history for Subsection (4) appears to have been lost to the passage of time. A nearly identical provision has been law since before statehood. Utah Comp. Laws, § 3821(4) (1888). Indeed, the nineteenth-century terms remained substantively unchanged for over a century. See [Utah Code Ann. § 78B-6-301\(4\)](#); Utah Code Ann. § 104-45-1 (1953); Utah Comp. Laws § 3358(4) (1907); Utah Rev. Stat. § 3358 (1898).

Past decision, however, may suggest that the statute was understood to be directed towards protecting judicial authority, as opposed to private interests. As early as 1894, courts discussed the statute in terms of vindicating public interests and appeared to assume, albeit indirectly, that the contempt at issue would be directed at a court. See [In re Whitmore](#), 9 Utah 441, 35 P. 524, 529 (1894) ("It is an offense public in its nature, which tends to cast discredit upon the administration of public justice."); see also [Envirotech Corp. v. Callahan](#), 872 P.2d 487, 499 (Utah Ct. App. 1994) (concluding trial court did not err in applying Subsection (4) where party attempted to deceive the court); cf. [PacifiCorp v. Cardon](#), 2016 UT App 20, ¶ 3, 366 P.3d 1226 (noting that district court held party in contempt for filing false documents); [Bhongir v. Mantha](#), 2016 UT App 99, ¶¶ 15-19, 374 P.3d 33 (recognizing district court held party in contempt for committing perjury).

While none of these decisions are directly on point with the facts presented in this case, they nonetheless underscore the novelty of Holly's interpretation. Even though the provision has been the law in Utah since at least 1888, Utah's appellate courts have never held that a deceitful statement not directed at the court or during a judicial proceeding qualifies as a basis for contempt under Subsection (4) or its predecessors.

**C. The court of appeals' interpretation avoids an absurd result and finds support in principles of due process.**

Additional considerations—particularly with respect to due process and avoiding an unintended result—also weigh against Holly's expansive approach to Subsection (4). See *Bagley v. Bagley*, 2016 UT 48, ¶ 27, 387 P.3d 1000 (discussing absurd consequences canon); cf. *Utah Dep't of Transp. v. Carlson*, 2014 UT 24, ¶ 23, 332 P.3d 900 (discussing canon of constitutional avoidance and noting legislature was assumed to “legislate[] in light of constitutional limitations”).

Due process turns on notice and the opportunity to be heard. See *Worrall v. Ogden City Fire Dep't*, 616 P.2d 598, 602 (Utah 1980) (“Due process is not a technical conception with a fixed content unrelated to time, place, and circumstances; it is flexible and requires such procedural protections as the particular situation demands.”). Holly's approach implicates due process in at least two respects.

The first problem is notice. In effect, Holly's approach would allow a party to initiate a civil or criminal contempt proceeding whenever an out-of-court

statement (or, in this case, the absence of a statement) bears some relationship to vague notions of the administration of justice. The problem is that litigation necessarily involves disputed issues of fact and competing representations of events. Given the amorphous standard proposed by Holly, litigants would likely lack fair notice when their conduct may lead to criminal or civil sanctions, and her approach would likely lead to arbitrary enforcement. *Johnson v. United States*, 135 S. Ct. 2551, 2557 (2015) (holding federal statute was unconstitutionally vague where it left “grave uncertainty about how to estimate the risk posed by a crime” and its indeterminacy “invites arbitrary enforcement”).<sup>8</sup>

The second problem relates to the opportunity to present a defense. Unlike a separate fraud proceeding, where parties may avail themselves of discovery, the expedited nature of a contempt procedure may prevent a party from obtaining the documents or discovery necessary to defend against the allegations, especially if the specific theory of “deceit” or factual allegations are unclear. *See, e.g.*, R.500-04.

Indeed, this case illustrates some of the challenges for parties directed to appear and answer for out-of-court conduct. The evidentiary hearing lasted a few hours and involved only three witnesses. *See* R.1129-30. During the hearing,

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<sup>8</sup> In contrast, when a party presents an affidavit, declaration, or sworn testimony, the party receives fair notice of the possibility of perjury. *See, e.g.*, [Utah Code Ann. § 78B-18a-106](#).

Holly's counsel appeared with a stack of messages that Ron's counsel had not had an opportunity to review prior to the hearing. R.1296-97.

The resolution of Holly's OSC turned on a critical issue—whether she understood that the tax obligation remained outstanding when she signed the Stipulation. Ron believed that a text message demonstrated that she understood amounts were owed, and that Holly agreed to assume the outstanding liability. R.1367, 1369-70, 1387-88. Although Holly admitted that she signed the final Stipulation, which obligated her to assume the tax liability, R.1326-27, Holly claimed that she did not know about the outstanding liability, and she denied meeting with Ron. *See, e.g.*, R.1391-92.

At the hearing, however, Holly initially could not recall what she meant in the critical text message, R.1305, and she could not recall receiving an email that would have strongly indicated that she fully understood that the obligation remained outstanding, *see* R.1325-26. Holly also denied having access to the tax return prior to the Stipulation, R.1317, and claimed that, even though she retained independent accountants, her accountants never informed her that the tax obligation was outstanding. *See* R.1322.

If Holly had filed an independent fraud action, Ron would have had a fairer opportunity to be heard under the Rules of Civil Procedure. In a civil action, Ron would have an opportunity to answer the complaint, identifying affirmative

defenses, prior to fact discovery. [Utah R. Civ. P. 8, 12](#). Holly would be required to identify any documents on which she intended to rely long before trial. [Utah R. Civ. P. 26\(a\)](#). Ron would have an opportunity to depose Holly, which would have revealed that she intended to deny having received access to the amended tax return and that the meeting occurred. [Utah R. Civ. P. 30](#). After receiving notice of her contentions through the deposition, Ron could then propound interrogatories, requests for production, and non-party subpoenas to investigate her claim that she lacked knowledge, as well as lay the groundwork for impeachment. [Utah R. Civ. P. 33, 45](#).<sup>9</sup>

These examples are intended to illustrate the fundamental problem with Holly's interpretation. By advancing an expansive interpretation of Subsection (4), Holly seeks to create an alternative avenue for seeking a judgment between two parties that circumvents the standard procedural rules governing civil cases. This could potentially lead to absurd consequences, such as the one presented here,

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<sup>9</sup> Here, for example, emails to and from Holly's independent accountant may be fatal to her claim that did not understand that tax liability remained outstanding. Similarly, a privilege log of communications between herself and counsel would have undermined her claim that she could not recall being privy to the negotiations over the language of the parties' final Stipulation.

where a party essentially attempts to modify the terms of a judgment on vague allegations of deceit, even though time for doing so under Rule 60 has passed.<sup>10</sup>

The better approach, more consistent with due process, would be to interpret Subsection (4) narrowly, so that parties seeking a judgment on the basis of fraud assert such claims in an independent action, which in turn would be governed by the appropriate statute of limitations and Rules of Civil Procedure.

**D. Holly's reliance on authorities from other jurisdictions remains unpersuasive.**

When arguing the Court should “import[] the jurisprudence from the related doctrine of Fraud on the Court,” Holly relies on cases from other jurisdictions, none of which support adopting a new interpretation of Subsection (4). *See* Pet'r's Opening Br. at 20-23.

The principal distinguishing fact is that each of the cases relied upon by Holly turned in part on a representation to the court or directly implicate the court's authority. For example, Holly suggests that *Fass & Wolper, Inc. v. Burns*, 177 Misc. 430 (N.Y. Sup. Ct. 1941) stands for the proposition that fraudulently transferring assets constitutes contempt. Pet'r's Opening Br. at 23-24.

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<sup>10</sup> Prior decisions reinforce the extent to which a party should assert fraud on the court within the time limitations of Rule 60(b). *See In Matter of Estate of Willey*, 2016 UT 53, ¶¶ 9-13, 391 P.3d 171 (rejecting argument that challenge to judgment could be asserted under the residual clause).



A careful reading, however, suggests that while the deceitful conduct was relevant, the contempt analysis primarily turned on the extent to which there had been an abuse of process and a “flagrant violation of the terms of [a court] order granting the stay.” *Fass & Wolper, Inc.*, 177 Misc. 430 at 430-32 (“Accordingly, when a stay is granted, especially at the defendant's request, he impliedly agrees, in consideration of the favor so extended to him, that he will not, during the pendency of the stay, transfer or dispose of his assets or otherwise disturb the status quo.”).

Similarly, in *In re Contempt of Black*, 2009 WL 3014938 (Mich. Ct. App. 2009), the defendant “was convicted for ‘deliberately lying’ to the trial court and for making ‘false representation[s]’ to opposing counsel.” *Id.* at \*1-2. But the analysis turned on clearly distinguishable facts and legal grounds. Specifically, the trial court concluded that deliberately lying to the court constituted a violation of the attorney’s “obligation and duty as an officer of the court,” and that making a false representation constituted a violation of the Michigan Rules of Professional Conduct. *Id.* at \*2; see also *Utah Code Ann. § 78B-6-301(3)* (separately addressing attorney misconduct). Nowhere in its decision did the Michigan Court of Appeals rely on the statutory contempt provision.

Interestingly, Holly cites a series of cases from other jurisdictions, but none support her contention that fraud on the court should be a basis for statutory

contempt. In *Cobell v. Norton*, for example, the court discussed its inherent powers in the context of a separate proceeding, cautioned that the severity of sanctions often required “a showing that one has acted with an intent to deceive or defraud the court,” and observed that the remedy, following judgment, was most often to set aside or vacate the judgment. [226 F. Supp. 2d 1, 26 \(D.D.C. 2002\)](#) (discussing party misconduct separately), *vacated*, [334 F.3d 1128 \(D.C. Cir. 2003\)](#) (expressing caution about the reach of “inherent power” and concluding that it should “either be documented by historical practice . . . or supported by an irrefutable showing that the exercise of an undoubted authority would otherwise be set to naught.”).

The remaining cases are factually distinguishable, involved a court’s inherent authority, or resulted in a different remedy than the one sought below. *See, e.g.,* [Aoude v. Mobil Oil Corp., 892 F.2d 1115, 1119 \(1st Cir. 1989\)](#) (affirming dismissal as sanction, based on inherent authority, where phony contract formed “centerpiece” of complaint and litigation); [Rockdale Mgmt. Co. v. Shawmut Bank, N.A., 638 N.E.2d 29, 31 \(Mass. 1994\)](#) (affirming grant of motion to dismiss, pursuant to inherent authority, where party proffered a forged document, provided misleading interrogatory answers, and gave false deposition testimony); [State v. Moquin, 105 N.H. 9, 11, 191 A.2d 541, 543 \(1963\)](#) (affirming “fraud on the court, an obstruction of justice and contempt” where parties conspired to mislead the court in a criminal case, in part by making representations in open court). In

short, many of the cases cited by Holly involved instances where the nexus between the representation and the court was clear, and none involved an instance where the court entered a monetary judgment against the offending party.

For the foregoing reasons, none of Holly's cases stand for the proposition that importing the concept of fraud on the court would be necessary or appropriate under Subsection (4). To the contrary, they suggest that there are other statutory bases for vindicating the court's authority. And the fact that Holly has been unable to find a single case on all fours interpreting a similar statute cautions against Holly's proposed expansion of statutory contempt proceedings.

**E. Invocation of the doctrine of fraud on the court should remain confined to a limited class of cases.**

Fraud on the court is typically invoked in the context of Rule 60(b) within ninety days of the judgment. *See, e.g., In Matter of Estate of Willey*, 2016 UT 53, ¶¶ 8-10, 391 P.3d 171 (discussing time limitation and rejecting argument that residuary clause could be used to circumvent claim of fraud); *McBroom v. Child*, 2016 UT 38, ¶ 26, 392 P.3d 835 (noting party could not challenge judicially-approved agreement "unless he pleads an independent action for fraud on the court seeking to set aside the court orders or files a rule 60(b) motion); *cf. Utah v.*

*Boyden*, 2019 UT 11, ¶ 37 n.8, 441 P.3d 737 (discussing inherent authority in the specific context of setting aside an order or judgment).<sup>11</sup>

The doctrine allows a party to seek relief from an existing judgment, but only where there is “an unconscionable plan or scheme which is designed to improperly influence the court in its decision.” *Chen v. Stewart*, 2005 UT 68, ¶ 40, 123 P.3d 416 (internal quotation marks and citation omitted) (citing example of “suborning perjury or obstructing justice”); cf. *Kartchner v. Kartchner*, 2014 UT App 195, ¶ 26, 334 P.3d 1 (discussing doctrine in context of a motion to obtain relief from judgment); Black’s Law Dictionary (11th ed. 2019) (defining “fraud on the court” as: “In a judicial proceeding, a lawyer’s or party’s misconduct so serious that it undermines or is intended to undermine the integrity of the proceeding. • Examples are bribery of a juror and introduction of fabricated evidence.”).

Utah courts have observed that the term should be “narrowly construed to embrace only that type of conduct which defiles the court itself, or fraud which is perpetuated by officers of the court so as to prevent the judicial system from functioning in the customary manner of deciding the cases presented in an impartial matter.” *Kelley v. Kelley*, 2000 UT App 236, ¶ 28 n.10, 9 P.3d 171 (internal

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<sup>11</sup> As the court of appeals correctly recognized, Holly never raised the issue of a court’s inherent powers in the underlying contempt proceeding or on appeal. *Rosser v. Rosser*, 2019 UT App 25, ¶ 10 n.4, 438 P.3d 1047; see Utah R. App. P. 24(a).

quotation marks and citations omitted); *see also Wright v. W.E. Callahan Const. Co.*, 156 P.2d 710, 711 (Utah 1945) (expressing concern that broader approach to fraud on the court doctrine would “make for endless litigation”).

Similarly, in the federal system, commentators have noted that fraud on the court should apply “to very unusual cases involving ‘far more than an injury to a single litigant.’” Charles A. Wright et al., 11 Fed. Prac. & Proc. Civ. § 2870 (3d ed. 2019) (“Thus, the courts have refused to invoke this concept in cases in which the wrong, if wrong there was, was only between the parties in the case and involved no direct assault on the integrity of the judicial process.”). “Nondisclosure by a party or the party’s attorney has not been enough.” *Id.* & n.34.

Classic examples are bribery, direct submission of “bogus” documents, or perjury, although not all cases involving even perjured testimony have been sufficient. *Id.*; *Kennedy v. Schneider Elec.*, 893 F.3d 414, 419 (7th Cir. 2018) (defining rule narrowly “lest it become an open sesame to collateral attacks”); *United States v. Estate of Stonehill*, 660 F.3d 415, 444 (9th Cir. 2011) (discussing breadth of fraud on the court and observing “[m]ere nondisclosure of evidence is typically not enough to constitute fraud on the court”).<sup>12</sup>

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<sup>12</sup> Holly briefly raises a policy argument – that the submission of proposed orders presents a situation ripe for fraud, because the district court may not carefully review a party’s submission. Pet’r’s Opening Br. at 18-19. Other rules or standards operate as deterrents to this concern. *See, e.g., Utah R. Civ. P. 11* (setting standard for signature); *Utah R. Civ. P. 7(j)(4)* (allowing objections to proposed order); *Utah*

In summary, Holly's invitation to import the doctrine into the contempt statute suffers in three respects. First, the doctrine often serves a very specific remedy—setting aside or modifying an existing judgment or order in order to vindicate the court's authority—rather than a basis for an independent judgment for monetary damages for the benefit of a private party. Second, the doctrine applies in a narrow set of circumstances, which are not implicated here. Third and finally, the doctrine typically applies in the context of a [Rule 60\(b\)](#) motion, which would be subject to time constraints, or an independent action, during which a party could avail herself of discovery. *Supra* Argument, § I.C.

For all these reasons, the court should conclude that the doctrine is a poor fit for statutory contempt proceedings.

**F. Holly's application of the fraud on the court doctrine inaccurately presumes that the district court made adequate findings.**

Finally, in a single paragraph, Holly argues that the facts of this case demonstrate a deception “that interferes with the administration of justice and that fits nicely into Utah's Fraud on the Court doctrine.” Pet'r's Opening Br. at 25.

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[R. Civ. P. 60\(b\)](#) (allowing court to set aside or modify final order upon a timely challenge). More importantly, as a factual matter, these concerns are not implicated here; the parties negotiated the terms of the stipulation, Holly reviewed and signed the Stipulation, and her counsel approved the language of the Decree.

The problem is that Holly never presented the lower courts with the issue of whether Ron engaged “in a deliberate course of deception to obtain a court order” or otherwise interfered with the administration of justice, as typically required by the fraud of the court doctrine. *See* R.500-04. Instead, without invoking the statute, she only argued that Ron misrepresented that he “had theretofore paid his \$14,951.11 share of the tax debt under . . . the Mediation Settlement Agreement.” R.501-10. Likewise, the district court did not make specific findings that would support such a conclusion. *See* R.1131-35.

For these reasons, if the Court adopts Holly’s interpretation of Subsection (4), it should decline Holly’s cursory invitation to apply the fraud on the court doctrine at this stage of the case. *Infra* Argument, § III (addressing appropriateness of remand).<sup>13</sup>

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<sup>13</sup> As a practical matter, it is difficult to see how these facts satisfy the demands of the fraud on the court doctrine, which typically requires conduct so serious that it undermines the integrity of the judicial proceedings. Although courts have recognized that a decree induced by fraud may constitute fraud on the court in some circumstances, *see Kartchner v. Kartchner*, 2014 UT App 195, ¶ 26, 334 P.3d 1 (discussing cases), here, it is undisputed that Holly signed the stipulation that formed the basis of the Decree. R.1308, 1327; *see Soltanieh v. King*, 826 P.2d 1076, 1078 (Utah Ct. App. 1992) (concluding that party failed to demonstrate fraud on the court, where he signed the stipulation containing the property distribution provisions contained in the decree).

## II. The Legal Issue of the Proper Scope of Section 78B-6-301(4) Was Squarely Before the Court of Appeals.

Holly contends the court of appeals should not have considered whether Subsection (4) provided a basis for contempt, because Ron did not raise the statute in the district court proceedings or his opening brief. *See* Pet’r’s Opening Br. at 25-31. Holly’s argument is unpersuasive for two principal reasons, as discussed below.

### A. This appeal does not implicate the jurisprudential concerns at the heart of the *Johnson* decision or its holding.

*State v. Johnson* involved a defendant’s appeal of his murder conviction. 2017 UT 76, ¶¶ 1-5, 416 P.3d 443. To the court of appeals, the defendant argued that his conviction should not stand, because the verdict form failed to include an option to find him guilty of a lesser offense (homicide by assault) and errors in the jury instruction on causation required reversal. *Id.* ¶ 3.

*Sua sponte*, the court of appeals asked the parties to submit supplemental briefing on an issue *never* raised by the defendant: “whether the homicide by assault jury instruction was erroneous.” *Id.* ¶ 4. In doing so, the court recognized that the defendant never objected to that instruction, and he “likely invited the error by submitting the instruction to the court.” *Id.* The court nevertheless concluded that “the exceptional circumstances exception to the preservation rule permitted the court to examine the unpreserved and likely invited error.” *Id.*



This Court granted certiorari to resolve “whether the court of appeals correctly concluded that exceptional circumstances merit review of an issue not preserved in the trial court and not argued on appeal.” *Id.* ¶ 1. In doing so, the Court addressed the historical and analytical underpinnings of preservation in our appellate system and explained that policy considerations, such as judicial economy, fairness, preservation of the adversarial model, and providing clear guidelines for parties, weighed in favor of creating exceptions to the general preservation rule. *Id.* ¶¶ 8-13; *but see id.* ¶¶ 67-79 (Lee, J., concurring in judgment) (discussing importance of adversarial model in the context of appellate practice).

In its analysis, the Court clarified the standards governing the three exceptions to preservation: plain error; ineffective assistance of counsel; and exceptional circumstances. *Id.* ¶¶ 18-39. With respect to the exceptional circumstances doctrine, the Court emphasized that it should be applied “sparingly” in cases of rare procedural anomalies which “either prevented an appellant from preserving an issue or excuses a failure to do so.” *Id.* ¶ 29.

Because the defendant invited the error in the jury instruction, failed to raise ineffective assistance of counsel, and identified a failure to object at trial as the only procedural anomaly, the *Johnson* Court concluded that no exception to the preservation doctrine applied. *Id.* ¶¶ 57-62. Because the issue was unpreserved and none of the exceptions for *sua sponte* consideration applied, the court of

appeals “erred in overruling the trial court *sua sponte* on an issue that was neither preserved in the trial court nor argued on appeal.” *Id.* ¶¶ 54-63.

While *Johnson* clarifies the analytical framework for *sua sponte* consideration of issues, its holding is inapposite to the facts of this case for two reasons.

- 1. Ron preserved the central issue by challenging the district court’s authority to enter the contempt order, and the court of appeals did not err in considering a controlling statute implicated by the arguments.**

As this Court has recognized, “semantics alone cannot be our guide in applying our preservation rule.” *Patterson v. Patterson*, 2011 UT 68, ¶ 15, 266 P.3d 828. Preservation turns, in part, on the underlying policies, principally “judicial economy and fairness.” *See id.* ¶¶ 15-16. For these reasons, courts may address arguments that raise newly discovered authority or controlling legislation, insofar as it “directly bears upon a properly preserved issue.” *Id.* ¶ 18.

Unlike in *Johnson*, where neither party raised a challenge to a specific jury instruction, Ron consistently challenged the trial court’s authority to hold him in contempt or grant the specific relief sought by Holly. In his view, the trial court’s contempt authority was limited to compelling compliance with an existing order. Because the Decree required Holly to assume the tax liability for 2015, Ron repeatedly argued that Holly was not entitled to relief. *See, e.g.*, R.741-45, R.1274-1275, 1398. Ron did not waive these arguments in his opening brief.

It is true that neither party specifically referenced Subsection (4) in the trial court proceedings. However, Ron raised the issue of whether it would be procedurally proper to grant Holly's requested relief in several different motions. In his view, because Holly asked the trial court to compel him to pay a portion of the tax obligation, contrary to the language of the Decree, the appropriate procedure was not an order to show cause. *See, e.g.*, R.741-45. This argument necessarily implicated the court's contempt authority.

In point of fact, it was Holly who raised Subsection (4) as an alternative basis for affirming the trial court. Holly argued the trial court had the authority to enter an order of contempt and grant her relief by virtue of the statute. Holly's COA Br. at 20-22. In doing so, Holly appeared to tacitly acknowledge that Ron had challenged the district court's authority. And because Holly invoked the statute, Ron addressed its applicability in his reply brief. Ron's COA Reply at 9-11.

In this respect, this case is more similar to *Patterson* than *Johnson*. In *Patterson*, the Court analyzed and applied provisions of the Utah Uniform Trust Code, even though the appellee never raised the statute below, because it was central to the argument at hand. *Patterson*, 2011 UT 68, ¶ 20 ("As the state's highest court, we have a responsibility to maintain a sound and uniform body of precedent and must apply the statutes duly enacted into law."); *see also Johnson*, 2017 UT 76, ¶ 14 n.2 ("*Patterson* confirms that we view *issues* narrowly, but also made it clear

that new *arguments*, when brought upon a properly preserved issue or theory, do not require an exception to preservation. Such arguments include citing new authority or cases supporting an issue that was properly preserved.”).

In summary, Ron preserved his challenge to the trial court’s contempt authority, albeit by invoking a local rule, rather than the statute. And even if the trial court failed to address the statute, the court of appeals acted within its authority when it analyzed the applicability of a controlling statute directed at the same issue, consistently raised by Ron, under *Patterson*.<sup>14</sup>

**2. Alternatively, the exceptional circumstances doctrine permits consideration of the issue.**

While the exceptional circumstances doctrine “has been anchored in the idea of rare procedural anomalies . . . its precise contours require case-by-case assessment.” *Johnson*, 2017 UT 76, ¶ 38. Examples of the doctrine include instances where a statute “opened the door to the possibility of two separate appeals, on the same issue,” “when controlling precedent is issued that abolishes the offense for which the defendant was convicted,” when a new constitutional argument became

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<sup>14</sup> To avoid a *Johnson* problem, Ron must also demonstrate that the issue was not waived. For the same reasons identified above, the Court should conclude that Ron did not waive the central issue in his opening brief. Alternatively, no waiver occurred on appeal, insofar as Ron simply responded to an issue raised in Holly’s brief. See *Brown v. Glover*, 2000 UT 89, ¶ 24, 16 P.3d 540 (“[I]f an appellant responds in the reply brief to a new issue raised by the appellee in its opening brief, the issue is not waived.”) (citing cases).

available to a defendant after the State raised a contrary position on appeal, and “when the alleged error first arises in the lower court’s final order or judgment.” *Id.* ¶¶ 29-36 (citations and internal quotation marks omitted).

For example, in *State v. Lopez*, this Court considered the applicability of the exceptional circumstances doctrine for an issue that evolved in the course of appeal. *State v. Lopez*, 873 P.2d 1127, 1129 (Utah 1994). The defendant made passing allusions to a state constitutional provision in his motion to suppress, but instead focused on the pretext doctrine under the Fourth Amendment. *Id.* at 1134 n.2. The court of appeals held that the pretext doctrine applied, and the State appealed, challenging its adoption. *Id.* at 1130, 1134.

After the defendant cross-appealed, arguing that the doctrine could also be adopted under the state constitution, the State argued that the Court should decline to reach the issue, because it had been waived. *Id.* at 1134 n.2. This Court disagreed and held that the exceptional circumstances doctrine applied because (a) the defendant “had no reason to argue that the doctrine be adopted under article I, section 14 until the State challenged the doctrine on appeal[,]” and (b) the state constitutional arguments “did not appear applicable until the court of appeals ruled that ‘equal protection policies constrain us to uphold the pretext doctrine.’” *Id.* (quoting *State v. Lopez*, 831 P.2d 1040, 1046 (Utah Ct. App. 1992)).

Similar considerations apply in this case. In the trial court proceedings, Ron invoked the Utah Rules of Judicial Administration, Utah Rules of Civil Procedure, and the plain language of the Decree, and he argued that the district court could not enter a contempt order on Holly's fraud-based theory. Ron had little reason to analyze the applicability of the statute, especially when Holly had not raised it as a basis for relief. *See* R.500-04. Similar to *Lopez*, the interpretation of the statute did not appear to be applicable until Holly raised it as a substantive basis for the trial court's contempt order in her responsive brief to the court of appeals. Given this context, it is unsurprising that Ron addressed its applicability in his reply brief, or that the court of appeals analyzed Holly's argument in its decision.

It is the rare case where a party invokes a statute as an alternative basis for affirming a trial court order, but then argues that the court of appeals erred in interpreting the same statute. Similar to *Lopez*, the exceptional circumstances doctrine should operate to permit consideration of an issue that Ron had no reason to address until Holly raised it in the course of the appeal. *Id.*

**B. Even applying *Johnson*, the court of appeals had discretion to reach the proper scope of Subsection (4).**

Even if the issue was unpreserved and waived, as Holly contends, the court of appeals could nevertheless reach the issue under the *Johnson* test:<sup>15</sup>

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<sup>15</sup> In *Johnson*, the Court disavowed *dicta* from *Robison* and concluded "that any distinction between this court's authority and that of the court of appeals' to

[A]n appellate court may reach a waived and unpreserved issue when it is 1) a purely legal issue, 2) that is almost certain to arise and assist in the analysis in other cases, 3) is necessary to correctly determine an issue that was properly raised, and 4) neither party is unfairly prejudiced by raising the issue at that point or neither party argues that they are unfairly prejudiced.

2017 UT 76, ¶ 51 (citations omitted).<sup>16</sup> Examples included “whether to overrule precedent on which the parties rely,” “*interpreting the law that the parties rely on*,” “determining that a law is inapplicable,” “determining if a statute relied upon is still effective”, and “*considering controlling authority that was not raised by either party*.” *Id.* ¶ 51 (emphasis added) (citations omitted).

Each of these elements has been met in this case. First, the applicability of a statute and matters of statutory interpretation both present questions of law. *See Hertzske v. Snyder*, 2017 UT 4, ¶¶ 5-6, 390 P.3d 307. This is especially true here, where the court of appeals analyzed the applicability and scope of Subsection (4) as a pure legal question. *See Rosser*, 2019 UT App 25, ¶¶ 9-16.

Second, the appropriate scope and applicability of Subsection (2) is “almost certain to arise and assist in the analysis in other cases.” *Johnson*, 2017 UT 76, ¶ 51.

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address unpreserved issues, or raise issues *sua sponte*, is unwarranted and should not be the rule.” *Id.* ¶ 43.

<sup>16</sup> The Court cautioned its standards were “intended to provide a baseline assessment of where the proper balance between procedural regularity and adjudicative fairness lies.” *Id.* ¶ 53.

Indeed, while there are few reported cases involving Subsection (4), the statute may be applied to a range of civil and criminal matters, and clarifying its scope will provide guidance to both parties and courts about the appropriate basis for seeking a contempt order (or relief through an alternative procedural mechanism, such as Rule 60(b) or an independent action) in other cases. *Supra* Argument, § I.

Third, the court of appeals' statutory analysis was "necessary to correctly determine an issue properly raised." *Johnson*, 2017 UT 76, ¶ 51. As discussed, it was Holly who raised the issue of whether the district court possessed statutory authority to enter an order of contempt pursuant to [Utah Code § 78B-6-301](#). Holly's COA Br. at 20-22. Holly raised these arguments, because Ron argued at both the trial court and on appeal that her arguments regarding deceit were flawed and that an order to show cause was not the proper mechanism for granting the relief sought. *See, e.g.*, Ron's COA Br. at 16-19.

Given this context, it is difficult to see how the court of appeals could have addressed Ron's challenge to the contempt order or Holly's substantive reliance on the statute without addressing the threshold issue of the statute's applicability. In this respect, the court of appeals' approach is little different than prior cases, where courts "interpret[] the law that the parties rely on" or consider threshold statutory issues. *Johnson*, 2017 UT 75, ¶ 51; *see, e.g.*, *Arnold v. Grigsby*, 2009 UT 88,



¶¶ 4-5, 22-23, 225 P.3d 192 (considering purely legal question presented by interplay of two statutes implicated by the parties' arguments on appeal).<sup>17</sup>

Fourth and finally, there is little indication that Holly would be unfairly prejudiced by the court of appeals' decision to consider the applicability of a statute that she raised in her briefing.<sup>18</sup> In fact, this context is akin to a motion for summary judgment, where a party argues in the opening brief the non-movant lacks sufficient proof to support the elements of the claim. The opponent responds by raising a legal argument in support of the claim, and the movant has an opportunity to address whether the opposing party's position passes muster. In such cases, it is incumbent upon the non-movant to adequately brief the substantive basis for her argument and to prepare to address any issues raised in reply through supplemental briefing or by addressing the issue at argument.

Holly nevertheless argues that she should have been given an opportunity to provide supplemental briefing. *See Johnson, 2017 UT 76, ¶ 28 & n.10* (discussing fairness considerations). The difficulty with this argument is two-fold. First, as a

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<sup>17</sup> If the court of appeals had declined to consider her argument that the statute provided a basis for the contempt order, Holly would likely be arguing that certiorari was necessary to correct its failure to address controlling statutory authority governing contempt proceedings.

<sup>18</sup> While Holly appears to fault Ron for the court of appeals' consideration of the statute, this Court has observed "the failure to raise the controlling statute in the district court is a failure that can be appropriately assigned to counsel for both parties." *Patterson v. Patterson, 2011 UT 68, ¶ 20, 266 P.3d 828.*

practical matter, Holly raised the statute as an alternative basis for contempt, which gave her an adequate opportunity to address its applicability. *Cf. Brown v. Glover*, 2000 UT 89, ¶ 24, 16 P.3d 540 (“[F]airness to the respondent is not a concern if it is the respondent who first raises an issue in the opening brief.”).

Second, while supplemental briefing may be appropriate in some cases, it is not a hard-and-fast rule. *Johnson*, 2017 UT 76, ¶ 45 (contemplating flexibility and possibility of oral argument on simple issues). Here, Holly had an opportunity to review Ron’s reply, which would have provided ample opportunity to research the issue, develop a response, and address the issue during oral argument. In fact, the panel invited her to offer her interpretation and reasoning during oral argument, and the statute formed a central part of the argument. *Supra* Statement of Case, §§ V-VI. And even if Holly had requested leave to submit supplemental briefing prior to or during oral argument, it should not have affected the court of appeals’ analysis. *Supra* Argument, § I.

In summary, Holly raised the issue of the statute, and the court of appeals appropriately exercised its discretion in considering whether controlling authority provided a legal basis for the contempt order. For all the foregoing reasons, the Court should reject her argument that an exercise of supervisory power is necessary to correct the alleged departure from judicial norms.

### **III. If the Court Adopts Holly's Interpretation, the Case Should Be Remanded for Consideration of Ron's Other Arguments.**

Even though Holly questions whether the statutory issues were adequately preserved, she continues to maintain that the statute provides a basis for the trial court's contempt order. Pet'r's Br. at 14-20.<sup>19</sup> The difficulty with this argument is that it continues to presume that the trial court made adequate fraud findings, even though trial court never applied the test that Holly now urges on appeal.

Below, Ron challenged the factual basis for the fraud findings and the sufficiency of the trial court's rulings. Ron's COA Br. at 19-27. For example, Ron maintained that the record did not demonstrate that Ron made an affirmative representation regarding payment of the tax liability. *Id.* at 19-20. Ron argued that the trial court failed to address the substantial weight of the evidence that Holly understood the amended return would result in liability, which undercuts the fraud finding. *Id.* at 22-23. Furthermore, Ron pointed to the fact that the trial court never concluded that Holly reasonably relied on the alleged representations. *Id.* at 24-25. In the absence of specific factual findings on the necessary elements, Ron urged the court of appeals to reverse or remand. *Id.* at 26-27.

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<sup>19</sup> Holly has not appealed the court of appeals' conclusion that the district court lacked a basis for imposing contempt for a violation of the Decree. Compare [Rosser, 2019 UT App 25, ¶¶ 17-20](#), with Pet'r's Opening Br. at 13-14.

The court of appeals declined to reach these issues in light of its conclusion that Holly failed to demonstrate a statutory basis for the contempt order. *Rosser*, 2019 UT 25, ¶ 9 n.3. For that reason, if the Court adopts Holly’s interpretation of Subsection (4), Ron respectfully asks that the case be remanded to the court of appeals to consider his other arguments under the revised standard.

#### CLAIM FOR ATTORNEY FEES

In the event that this Court affirms, Ron respectfully asks that the Court remand for an assessment of the reasonable fees incurred in the trial court and on appeal. See Utah Code Ann. § 30-3-3(2); *Bagshaw v. Bagshaw*, 788 P.2d 1057, 1062 (Utah Ct. App. 1990); *Thayer v. Thayer*, 2016 UT App 146, ¶ 41, 378 P.3d 1232. On remand, this Court should mandate that the trial court consider whether Ron should be awarded his fees associated with defending against Holly’s OSC, prosecuting Ron’s OSC, and those incurred during both appeals. Cf. *Rosser*, 2019 UT App 25, ¶ 21 n.9 (vacating fee award against Ron and remanding to consider the issue of attorneys’ fees).

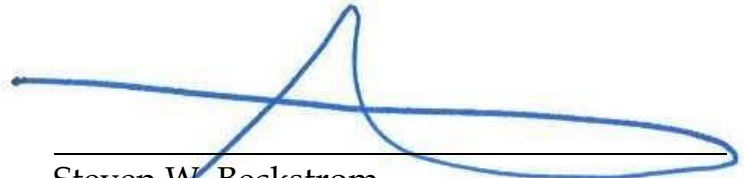
#### CONCLUSION

For the preceding reasons, Ron respectfully asks the Court to affirm. If, however, the Court adopts Holly’s interpretation of Subsection (4), the case should

be remanded to the court of appeals to consider Ron's other arguments, including his challenge to the sufficiency and adequacy of the trial court's factual findings.

DATED: October 28, 2019.

SNOW CHRISTENSEN & MARTINEAU

A handwritten signature in blue ink, appearing to read "Steven W. Beckstrom", is written over a horizontal line. The signature is stylized with a large loop and a long horizontal stroke.

Steven W. Beckstrom  
*Attorney for Respondent*

**CERTIFICATE OF COMPLIANCE**

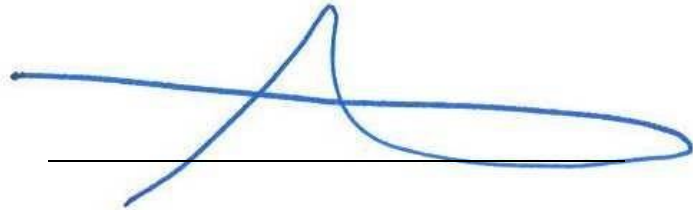
1. This brief complies with the type-volume limitation of [UTAH R. APP.](#)

[P. 24\(g\)\(1\)](#) because:

this brief contains less than 30 pages, excluding the parts of the brief exempted by [UTAH R. APP. P. 24\(g\)\(2\)](#); or

this brief contains less than 14,000 words, excluding the parts of the brief exempted by [UTAH R. APP. P. 24\(g\)\(2\)](#).

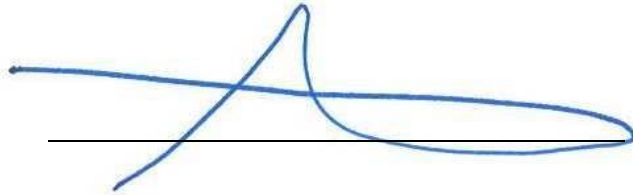
2. This brief complies with the Rule 21, governing public and private records.



## CERTIFICATE OF SERVICE

I hereby certify that two true and correct copies of the foregoing BRIEF OF THE RESPONDENT were served via U.S. Mail and email on October 28, 2019, as follows:

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## ADDENDA

- A. Order and Judgment (Aug. 28, 2017) (R. 1131-1137)
- B. *Rosser v. Rosser*, [2019 UT App. 25](#) (R. 1496-1508)
- C. Transcript of Oral Argument at Utah Court of Appeals
- D. Transcript of Evidentiary Hearing (Aug. 17, 2017) (R. 1267-1422)



ATTACHMENT A

Order and Judgment (R. 1131-1137)

**RECEIVED**

Date: 8/28/17  
6th District Court  
Garfield County

Clerk: JM

IN THE SIXTH JUDICIAL DISTRICT COURT

IN AND FOR GARFIELD COUNTY, STATE OF UTAH

HOLLY R ROSSER,  
Petitioner,  
V.  
RONALD L. ROSSER,  
Respondent.

**ORDER AND JUDGMENT**  
  
Civil No. 154600013  
Judge: PAUL D. LYMAN

The parties have both filed Order to Show Cause actions against the other party. The Petitioner’s action was filed on November 21, 2016 and the Respondents’ action was filed on January 3, 2017. A hearing was held on these opposing actions on February 8, 2017. The Petitioner appeared with her attorney, while the Respondent appeared pro se. Given that the critical issues appeared to be undisputed, the Court granted the Petitioner’s Order to Show Cause and denied the Respondent’s Order to Show Cause. The Respondent then re-hired his attorney and sought various forms of relief. This Court granted the Respondent a new trial on July 25, 2017. The new trial was held on August 17, 2017. Both parties appeared and presented evidence. Being now fully advised in the premises and for good cause appearing, the Court hereby renders its decision as follows:

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**Findings of Fact**

1. In an attempt to resolve the parties' financial disputes in their divorce, the parties participated in mediation and reached a settlement agreement, which they signed on June 16, 2016.
2. The June 16, 2016 settlement agreement required both parties to immediately take various actions related to the businesses, properties, expenses and income.
3. Both parties did take immediate actions, which they both relied upon.
4. Paragraph 15 of the June 16, 2016 settlement agreement split the 2015 IRS debt 50/50.
5. The parties had received an IRS notice dated June 6, 2016, which notified them that they owed \$29,902.21 for unpaid 2015 taxes.
6. The parties agreed to each pay one half of that debt or, \$14,951.11.
7. The Petitioner paid her share of \$14,951.11 within days of reaching the settlement agreement.
8. The parties intended on June 16, 2016, to file an Amended 2015 tax return, which would result in the Petitioner receiving a \$7,900.00 tax refund, which would only happen if they each paid their share of the IRS claimed \$29,902.21, in taxes.

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9. The Petitioner assumed she would receive the \$7,900.00 refund from the Amended 2015 tax return, so she approved the amended tax return.

10. At no point did the Respondent tell the Petitioner that he had failed to pay his \$14,951.11 tax obligation.

11. Both the Petitioner and their accountant relied upon the Respondent having paid his \$14,951.11.

12. The Respondent knew he would eventually be found out, but chose to let his deception go forward.

13. Consequently, the petitioner did not receive the agreed upon \$7,900.00 refund and she eventually had to pay an additional \$7,174.98, in taxes to the IRS.

14. The Petitioner had to pay the additional \$7,174.98 because on August 4, 2016, the parties entered into a Stipulated Motion For Entry of Findings of Fact and Conclusions of Law and Final Decree of Divorce, which required the Petitioner to pay any remaining tax liabilities for 2015, which she assumed was zero.

15. At the time this Stipulated Motion was filed, only the Respondent knew he had failed to pay the obligation agreed to on June 16, 2016.

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16. After listening to the parties at trial it was evident that the Respondent knowingly and intentionally mislead the Petitioner about his failure to pay the taxes he agreed to pay on June 16, 2016.

17. The Respondent claims that at some time he met the Petitioner outside of the U-Swirl, and she agreed to pay the extra taxes that he had not paid.

18. The Petitioner denies this claimed meeting and agreement; the Court having heard the evidence finds that the Respondent is not telling the truth and that no such meeting or agreement occurred.

19. The Respondent owes the Petitioner \$7,900.00, plus \$7,174.98, for a total of \$15,074.98.

20. In paragraph 12 of the Final Decree of Divorce, the Petitioner is required to pay certain soda rebates to the Respondent within 10 days of their receipt.

21. The Petitioner has failed to make these payments as required.

22. The Petitioner did not intentionally violate the Decree of Divorce, since she was merely reacting to the Respondent's deceit.

23. In this Court's prior order regarding this matter, the Court allowed the Petitioner to simply offset these rebates owed, against the amount owed by the Respondent.

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24. The Petitioner has incurred attorney's fees related to these matters, which attorney's fees would not have been incurred if the Respondent had not been deceitful.

**Conclusions of Law**

1. Based upon the proceeding Findings of Fact, the Court concludes that the Petitioner is not in contempt, due to her being victimized by the Respondent's deceit.

2. Based upon the proceeding Findings of Fact, the Court concludes that the Respondent is in contempt, due to his deliberate deceit and failure to act as agreed between the parties on June 16, 2016.

3. The Respondent owes the Petitioner \$15,074.98 for damages she received from the Respondent's actions.

4. The Petitioner is entitled to her reasonable attorney's fees related to these Orders to Show Cause.

5. The monies owed by the Petitioner to the Respondent for unpaid rebates may be offset against the judgments for damages and attorney's fees, to which the Petitioner is entitled.


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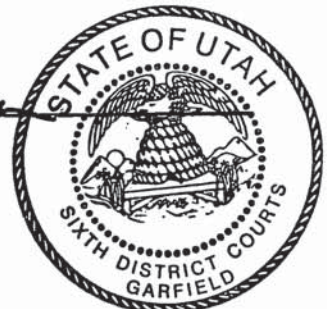
**ORDER and JUDGMENT**

1. Petitioner is awarded a Judgment of \$15,074.98.
  
2. Petitioner is awarded her reasonable attorney's fees in an amount to be determined after submission of an affidavit by the Petitioner.
  
3. Petitioner may apply any soda rebates she owes to the Respondent against these Judgments.
  
4. Any unpaid portion of this Judgment shall accrue interest at the judgment rate of 2.65 percent annually, until paid.

DATED this 28<sup>th</sup> day of August, ~~2014~~ <sup>2017</sup>.

BY THE COURT:

  
PAUL D. LYMAN  
District Court Judge



001136

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CERTIFICATE OF SERVICE

On August 28<sup>th</sup>, 2017 a copy of the above was sent to each of the following by the method indicated:

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*Jennifer Muller*  
Clerk



ATTACHMENT B

Rosser v. Rosser, 2019 UT App. 25 (R. 1496-1508)

2019 UT App 5

JAN 10 2019

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THE UTAH COURT OF APPEALS

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HOLLY REBECCA ROSSER,  
Appellee,

*v.*

RONALD LEE ROSSER,  
Appellant.

---

Opinion

No. 20170736-CA

Filed January 10, 2019

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Sixth District Court, Panguitch Department  
The Honorable Paul D. Lyman  
No. 154600013

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Steven W. Beckstrom, Attorney for Appellant

Stephen D. Spencer, Attorney for Appellee

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JUDGE RYAN M. HARRIS authored this Opinion, in which  
JUDGES DAVID N. MORTENSEN and DIANA HAGEN concurred.

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HARRIS, Judge:

¶1 Ronald Lee Rosser and Holly Rebecca Rosser divorced in 2016 pursuant to a stipulated decree of divorce that was the result of mediation. One of the points of contention in their divorce case was how the parties would divide their 2015 tax obligations. At the conclusion of the mediation, the parties apparently agreed to split the 2015 tax liability equally. A few weeks later, however, both parties executed a stipulated decree of divorce that obligated Holly<sup>1</sup> to “pay any tax liabilities . . . for the year 2015.” Later, after Ronald refused to pay any of the

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1. Because both parties share the same surname, we identify the parties by their first names throughout this opinion. We intend no disrespect by the apparent informality.

outstanding 2015 tax obligation, Holly obtained an order to show cause and asked the district court to hold Ronald in contempt of court for refusing to pay his share of the 2015 taxes. The court granted Holly's request and found Ronald in contempt. Ronald now appeals, and we agree with Ronald that the actions he was found to have taken do not constitute statutory contempt of court. Accordingly, we vacate nearly the entirety of the district court's contempt order, and remand this case for further proceedings.

### BACKGROUND

¶2 After twenty-five years of marriage, Holly and Ronald separated in 2014, and Holly later petitioned for divorce. Over the course of their marriage, the parties acquired various assets, including several vehicles, a residence in Panguitch, Utah, two other parcels of real property, and a number of franchise restaurants that were owned by a company in which Holly and Ronald each held a 50% stake. In addition to these assets, the parties also had certain debts, including a \$29,902.71 tax obligation owed to the IRS for the 2015 tax year. The parties took opposing positions regarding the division of some of these assets and liabilities.

¶3 In an attempt to resolve their differences prior to trial, the parties agreed to participate in mediation on June 16, 2016. During that mediation session, the parties were able to come to an agreement regarding all of their issues, including the 2015 tax obligation. This consensus was memorialized in a three-page written agreement (the Mediation Agreement) that was signed by all parties immediately upon completion of the mediation. With regard to the tax obligation, the Mediation Agreement states as follows: "IRS debt from 2015, 50% Ron and 50% Holly." The parties also agreed that Ronald would be entitled to certain "rebates" that the couple's business received.

¶4 In the weeks following the mediation, Holly paid her half of the 2015 tax obligation. For reasons unclear from the record,

Ronald did not. However, Ronald did contact the parties' accountant and identify several additional tax deductions that he thought could potentially reduce the parties' 2015 tax liability. Acting on Ronald's instructions, in July 2016 the accountant prepared an amended 2015 tax return for Ronald and Holly. In preparing that return, however, the accountant mistakenly assumed that the entire previous 2015 tax obligation of \$29,902.71 had already been paid, when in reality only half of it (Holly's half) had actually been paid. As a result, the amended tax return indicated that not only did Ronald and Holly not owe any taxes for 2015, they were actually due a tax refund of approximately \$7,900. Holly would later testify that, operating on the assumption that Ronald had paid his half of the pre-existing 2015 tax obligation as she had done, she believed that the amended returns were accurate and that the parties were in fact owed a refund. For his part, Ronald would later testify that he also believed the amended tax returns were accurate, but premised this belief on a different assumption: that Holly had paid the entirety of the 2015 tax obligation in consideration for other income she had negotiated from him. Apparently both under the belief that the amended returns were accurate, the parties signed those returns on or about August 22, 2016.

¶5 On or about August 4, 2016—after the amended tax returns had been prepared and reviewed, but before either party actually signed them—the parties and their attorneys all signed a Stipulated Motion for Entry of Findings of Fact and Conclusions of Law and Final Decree of Divorce. With respect to the 2015 tax obligation, that stipulation stated—in contrast to the Mediation Agreement—that Holly “shall be solely entitled to receive any refund resulting from the amended returns, and shall also be responsible to pay any tax liabilities resulting to any of the Parties for the year 2015.” A few days later, on August 8, 2016, the district court signed a Final Decree of Divorce (the Decree) in accordance with the parties' stipulated motion. Under the terms of the Decree, Holly “shall be solely entitled to receive any refund resulting from the amended [2015 tax] returns, and shall also be responsible to pay any tax liabilities resulting to any

of the Parties for the year 2015.” The Decree also states that Ronald is entitled to the rebates as agreed upon at the mediation.

¶6 Holly later discovered that the amended tax returns were inaccurate, and that instead of being entitled to a \$7,900 refund for tax year 2015, the parties still owed \$7,174.98. Under the terms of the recently-entered Decree, Holly was obligated to make this payment, but she considered that result unfair since she had already paid her half of the 2015 tax obligation, as the parties had agreed at mediation, and Ronald had not. In part because she felt as though Ronald owed her money related to the 2015 tax obligation, she declined to pass along to Ronald certain rebate checks she received to which Ronald was entitled under the terms of the Decree.

¶7 On November 21, 2016, Holly filed a Motion for Order to Show Cause, alleging that Ronald had defrauded her and asking the court to order Ronald to pay his share of the parties’ 2015 tax obligations as well as her attorney fees in bringing the motion. A few weeks later, Ron filed his own Motion for Order to Show Cause, alleging that Holly had willfully failed to comply with the provision of the Decree that concerned the rebates. Eventually, the district court scheduled both motions for an evidentiary hearing. During that hearing, Holly testified that Ronald had misled her into believing that he had paid his share of the parties’ 2015 tax obligation assigned to him pursuant to the Mediation Agreement. Ronald, by contrast, testified that Holly was not only aware that he had not done so, but that after mediation she had agreed to pay the entirety of the tax obligation. With regard to the rebates, Holly acknowledged that she had received rebate checks to which Ronald was entitled under the Decree, but stated that she had not passed those along to Ronald because she felt that he owed her money related to the 2015 tax obligations.

¶8 At the conclusion of the hearing, the court found that Ronald deceived Holly by allowing her to believe that he had paid his share of the tax obligation, and that Holly had not in fact agreed to pay it herself. The court then found Ronald in

contempt of court for “his deliberate deceit and failure to act as agreed between the parties on June 16, 2016,” and ordered Ronald to pay Holly approximately \$15,000 plus reasonable attorney fees, which were later determined to be \$4,000. The court also found that Holly had “failed to make” the rebate payments to Ronald as required by the Decree, but that Holly’s conduct “did not intentionally violate the Decree” because Holly was “merely reacting to [Ronald’s] deceit.” Accordingly, the court allowed Holly to “offset” the rebate amounts she owed Ronald against the amount it determined Ronald owed her on the tax issue. After quantifying the amount of attorney fees to which it believed Holly was entitled, the court eventually entered judgment against Ronald in the amount of \$18,951.11, but stated, in the judgment, that Holly “may apply” the “rebates toward the judgment and thus give [Ronald] credit” for them.

#### ISSUE AND STANDARD OF REVIEW

¶9 Ronald appeals from that judgment, and asks us to consider whether the district court erred in holding him in contempt. When reviewing a district court’s decision to find a party in contempt, “we review the district court’s findings of fact for clear error and its legal determinations for correctness.” *LD III LLC v. Davis*, 2016 UT App 206, ¶ 12, 385 P.3d 689 (quotation simplified). Ronald’s chief complaint with the district court’s contempt determination is a legal one: Ronald contends that the facts alleged by Holly, even if true, cannot constitute statutory contempt of court as a matter of law.<sup>2</sup> This is a legal question that we review for correctness. *Id.*

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2. Among other additional arguments, Ronald also takes issue with certain of the district court’s factual findings supporting its contempt determination, but because we determine that the facts as set forth by Holly cannot constitute statutory contempt as a  
(continued...)

ANALYSIS

¶10 Under Utah statutory law, a court has authority to hold a person in contempt of court for any one of twelve enumerated reasons. *See* Utah Code Ann. § 78B-6-301 (LexisNexis 2012).<sup>3</sup> Ronald contends that none of the twelve grounds apply here, and that therefore the district court was without statutory authority to hold him in contempt. We agree with Ronald.

¶11 In this case, while it is clear that the district court found that Ronald was in contempt of court, it is unclear which of the twelve statutory grounds the court relied upon. In its order, the court stated that Ronald was “in contempt, due to his deliberate deceit and failure to act as agreed between the parties on June 16, 2016.” The court gave no other indication of the legal (as opposed to the factual) grounds for its determination that Ronald was in contempt of court.

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(...continued)

legal matter, we need not consider any of Ronald’s other arguments, including whether the district court clearly erred in any of its factual determinations.

3. Under Utah law, courts also have inherent (non-statutory) contempt powers. *See Chen v. Stewart*, 2005 UT 68, ¶ 36, 123 P.3d 416 (“A court’s authority to sanction contemptuous conduct is both statutory and inherent.”). In this case, however, Holly did not ask the district court to invoke its inherent powers and, in its order, the district court did not expressly invoke any such powers. On appeal, Holly defends the district court’s order by asserting that the court had the statutory power to issue its contempt order. Because the district court does not appear to have invoked its inherent power, and because Holly does not argue that it did, we do not address whether the district court would have had the power to hold Ronald in contempt of court pursuant to its inherent (as opposed to its statutory) authority.

¶12 Holly asserts that the district court implicitly relied upon two of the twelve statutory grounds for contempt: (a) the fourth one, which allows a court to find a “party to an action” in contempt for “deceit, or abuse of the process or proceedings of the court”; and (b) the fifth one, which allows a court to find a person in contempt for “disobedience of any lawful judgment, order or process of the court.” *Id.* § 78B-6-301(4), (5). We are not convinced that either of these grounds was appropriately invoked in this case.

¶13 The court did mention Ronald’s “deliberate deceit” as part of its reason for holding Ronald in contempt of court. But the deceit the court described in its findings was not deceit Ronald committed upon the court; rather, it was deceit Ronald apparently committed upon Holly by not telling her that he had failed to pay his share of the parties’ 2015 tax obligation. In this case, there is no allegation, let alone a finding, that Ronald committed deceit or fraud *on the court*, and in our view subsection (4) of the contempt statute must be interpreted to include only deceit committed on the court.

¶14 We reach that conclusion after reviewing the provision in context. First, subsection (4)—unlike other subsections—is by its own terms limited to the actions of “part[ies] to the action or special proceeding.” *See id.* § 78B-6-301(4). Second, “deceit” is part of a short list of things that might be found contemptuous under that subsection, and the other thing listed is “abuse of the process or proceedings of the court.” *Id.* Our supreme court requires a “commonsense approach” to statutory interpretation in which “a word is given more precise content by the neighboring words with which it is associated.” *See Thayer v. Washington County School Dist.*, 2012 UT 31, ¶ 15, 285 P.3d 1142 (quotation simplified). Here, the entire thrust of the subsection is aimed at allowing a court to penalize deceitful misuse of judicial proceedings by parties to those proceedings. Ronald’s actions were all undertaken toward Holly, and not toward the court, and thus cannot fall within the ambit of subsection (4).



¶15 It is contemptible deceit, for example, to lie to a court under oath.<sup>4</sup> See *Bhongir v. Mantha*, 2016 UT App 99, ¶ 16, 374 P.3d 33. It is also contemptible deceit to file false documents, see, e.g. *PacifiCorp v. Cardon*, 2016 UT App 20, ¶ 3, 366 P.3d 1226, or to falsely testify during a divorce proceeding that one has very little money and then skip town with money which one has previously deposited under an assumed name, see *Smith v. Smith*, 218 P.2d 270, 271–72 (Utah 1950). But these are all actions taken toward the court, and we are aware of no case—and Holly provides us with none—in which a court held a person in contempt for deceit that occurred outside of the presence of the court, was directed towards another party, and did not involve false sworn testimony or the filing of a falsified document.

¶16 We share Ronald’s concern that, were Holly’s position governing law, there would be little to prevent any untruthful statement made by any party to anyone while litigation is pending from being punishable by contempt of court. Indeed, Holly’s contentions in this case are, in essence, that Ronald breached the Mediation Agreement and in the course of doing so made fraudulent statements—or at least committed fraudulent

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4. During the course of the hearing on Holly’s order to show cause, Ronald testified that he had a meeting with Holly in July 2016 where she agreed to pay all of the 2015 taxes. Holly denied that any such meeting ever occurred, and denied ever agreeing to pay the entirety of the 2015 tax obligation. The district court credited Holly’s version of those events, and made a finding that Ronald was “not telling the truth” in setting forth his version. However, there is no indication in the remainder of the court’s contempt order that it intended to hold Ronald in contempt for the particular statement that it found was not true. The court’s specific contempt finding lists only “deceit” in “fail[ing] to act as agreed between the parties on June 16, 2016,” and makes no attempt to ground a contempt finding on any “deceit” associated with Ronald’s testimony about the July 2016 meeting.

nondisclosure—toward Holly. In our view, it would stretch the meaning of subsection (4) of the contempt statute well beyond its intended meaning if facts like these, even if true, were determined to fall within its ambit.

¶17 Holly next contends that the district court could also have been relying on subsection (5), which allows a court to punish “disobedience of any lawful judgment, order or process of the court.” Utah Code Ann. § 78B-6-301(5) (2012). But the district court did not reference any judgment or order that it believed Ronald disobeyed. Instead, the only document the court mentioned was the Mediation Agreement; the court faulted Ronald for failing “to act as agreed between the parties on June 16, 2016.” It is undisputed that, as part of the Mediation Agreement, Ronald agreed to pay half of the parties’ 2015 tax obligation, and that he did not ever actually do so. But the Mediation Agreement was not an order of the court; it was just a private agreement between two parties. Breach of a private agreement that has not yet been made an order of the court cannot be a violation of subsection (5) of the contempt statute.<sup>5</sup>

¶18 Holly attempts to defend the court’s contempt order by asserting that Ronald was not only in violation of the parties’ private Mediation Agreement, but that he was also in violation of the Decree, and that—even though the district court made no

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5. The district court ordered the parties to participate in mediation. However, Holly makes no claim that Ronald failed to participate in mediation, or that the district court intended to hold Ronald in contempt for violating its order that the parties participate in mediation. *See, e.g., Rawlings v. Rawlings*, 2008 UT App 478 ¶¶ 24-28, 200 P.3d 662 (holding that while complete failure to participate in court-ordered mediation may constitute a violation of a court order to participate in mediation in good faith, participating with no intention of making or considering any settlement offers does not), *reversed on other grounds by Rawlings v. Rawlings*, 2010 UT 50, 240 P.3d 754.

mention of it—the district court intended to hold Ronald in contempt for failure to comply with the terms of the Decree. For support, Holly directs our attention to paragraph 9(r) of the Decree, which is the paragraph setting forth the parties’ rights and obligations regarding the 2015 tax obligation. As noted above, that paragraph states that Holly is to receive any 2015 tax refund to which the parties may be entitled, but that Holly “shall also be responsible to pay any tax liabilities resulting to any of the Parties for the year 2015.” The plain terms of the Decree (as opposed to the Mediation Agreement) obligate Holly to pay the entirety of the parties’ 2015 tax obligation, whatever that obligation might be. While Ronald’s failure to pay half of that obligation may well violate the terms of the Mediation Agreement, such failure clearly does not violate the terms of the Decree, because the Decree imposed upon Ronald no obligation to pay any of the parties’ 2015 tax obligation.

¶19 Holly argues, however, that paragraph 9(r) of the Decree is at least ambiguous, and asks us to consider parol evidence, most notably the Mediation Agreement, in construing its terms. Holly maintains that the “ambiguity” contained in paragraph 9(r) was “the presence or absence of a tax refund,” and asserts that she only agreed to the terms of the Decree because she believed that she would receive a tax refund. Holly’s argument fails, however, because the plain language of the Decree is not itself ambiguous, and clearly obligates her—and not Ronald—to pay any outstanding tax liability. A provision is ambiguous only if “its terms are capable of more than one reasonable interpretation because of uncertain meanings of terms, missing terms, or other facial ambiguities.” See *Mind & Motion Utah Investments, LLC v. Celtic Bank Corp.*, 2016 UT 6, ¶ 24, 367 P.3d 994 (quotation simplified). If the language is not ambiguous, “the parties’ intentions are determined from the plain meaning of the contractual language, and the contract may be interpreted as a matter of law.” *Id.* (quotation simplified). “Terms are not ambiguous simply because one party seeks to endow them with a different interpretation according to his or her own interests.” *Id.* (quotation simplified). Instead, “the proffered alternative

interpretations must be plausible and reasonable in light of the language used.” *Id.* (quotation simplified).

¶20 Holly’s interpretation of the language contained in paragraph 9(r) is simply not “plausible and reasonable in light of the language used.” *Id.* Where the language clearly imposes upon Holly the obligation to pay whatever tax obligation the parties owed for the 2015 tax year, any interpretation that imposes that obligation, even in part, upon Ronald is simply not consonant with the plain meaning of the language used. Accordingly, Ronald’s failure to pay any portion of the parties’ 2015 tax obligation is not a violation of the plain terms of the Decree, and therefore the district court could not have properly held Ronald in contempt of court on that basis.

## CONCLUSION

¶21 A statutory contempt remedy simply does not fit the facts of this case, even if we assume that Holly’s version of the facts is correct. Ronald did not commit deceit on the court, nor did he violate an order or judgment of the court. He appears to have violated the terms of the Mediation Agreement, and—although we express no opinion on the matter—he may have committed fraud or fraudulent nondisclosure upon Holly in the time period between the mediation and the entry of the Decree. But Holly’s remedy, if any, for Ronald’s actions must be found somewhere other than the contempt statute.<sup>6</sup> We vacate nearly the entirety<sup>7</sup>

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6. For instance, a party in Holly’s situation could, among other options, (a) elect to file a petition to modify the Decree, asserting a substantial and material change in circumstances; (b) file a motion, pursuant to rule 60(b)(3) of the Utah Rules of Civil Procedure, seeking relief from the terms of the Decree on the basis of fraud; or (c) file a separate lawsuit alleging fraud, fraudulent nondisclosure, or some other appropriate cause of action, and seeking damages. We express no opinion about  
(continued...)

of the district court's contempt order, including its order that Ronald pay attorney fees, and remand this case for further proceedings consistent with this opinion.

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(...continued)

whether, on the facts presented here, Holly would be entitled to relief under any of these options.

7. We do not vacate Paragraphs 20–22 of the district court's contempt order. In those paragraphs, the district court determined that Holly had failed to comply with the provision of the Decree that required her to pass along to Ronald certain rebate checks that she might receive. Holly has not appealed those findings, and takes no issue with them in the context of Ronald's appeal. On remand, the district court may revisit the question of whether Holly is entitled to offset her obligation to Ronald regarding the rebate checks against any other obligation Ronald may owe her, or whether a judgment in Ronald's favor regarding the rebate checks is appropriate.

CERTIFICATE OF MAILING

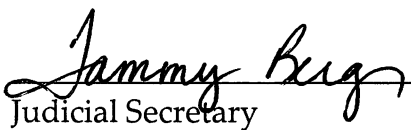
I hereby certify that on the 10<sup>th</sup> day of January, 2019, a true and correct copy of the attached OPINION was sent by standard or electronic mail to be delivered to:

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Judicial Secretary

TRIAL COURT: SIXTH DISTRICT, PANGUITCH, 154600013  
APPEALS CASE NO.: 20170736-CA

ATTACHMENT C

Transcript of Oral Argument at Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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HOLLY REBECCA ROSSER,	)	
	)	
Appellee,	)	APPELLATE NUMBER 20170736
	)	
vs.	)	WITH KEYWORD INDEX
	)	
RONALD LEE ROSSER,	)	
	)	
Appellant.	)	

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ORAL ARGUMENT

NOVEMBER 28, 2018

HONORABLE RYAN M. HARRIS  
HONORABLE DIANA HAGEN  
HONORABLE DAVID N. MORTENSEN

\*\*\*\*\*

APPEARANCES:

FOR THE APPELLEE:	MR. STEPHEN D. SPENCER
FOR THE APPELLANT:	MR. STEVEN W. BECKSTROM

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ORAL ARGUMENTS - NOVEMBER 28, 2018

(Transcriber's note: Identification of speakers may not be accurate with audio recordings.)

(TIME 10:32:27)

**JUDGE HAGEN:** Hello. We are back on the record. We are going to hear our last case on the argument calendar today.

Is it Rosser v. Rosser? Is --

**MR. BECKSTROM:** Yes, Your Honor.

**JUDGE HAGEN:** All right. Great.

I don't know if you were here earlier when I was explaining the clock and other procedures. When you take the podium, please make sure that you speak directly into the microphone because we are recording and live streaming these proceedings.

Also, please state your name both times you approach. If you're going to do a rebuttal, please identify yourself before you begin speaking.

The clock counts down from 15 minutes. Each side has 15 minutes.

Have you reserved five minutes for rebuttal? Is that correct?

**MR. BECKSTROM:** Yes, Your Honor.

**JUDGE HAGEN:** All right. Great. So your clock will start to count down from 10. If you decide that you want to

1 go into your rebuttal time, you can certainly indicate that  
2 you would like to do that and we will allow you to do that.  
3 Also, if we're continuing to ask questions, we won't count  
4 that against your rebuttal time.

5 So if there are no questions, then we will proceed  
6 with Rosser v. Rosser.

7 **MR. BECKSTROM:** Good morning. If it may please the  
8 Court, Steven Beckstrom on behalf of Ron Rosser, the  
9 appellant. Mr. Rosser is here present with me in the  
10 courtroom here today.

11 This is an appeal following the entry of a stipulated  
12 divorce decree that was entered in August of 2016. Following  
13 the entry of the decree, Appellee Holly -- as I'll refer to  
14 her throughout the argument here today -- brought an order to  
15 show cause alleging that -- that Mr. Rosser misrepresented  
16 certain facts regarding a tax liability resulting from an  
17 amended return that induced her to enter into the stipulated  
18 decree of divorce.

19 Even though the trial court had already entered a  
20 final decree in the case, they elected to file the -- the  
21 issue as an order to show cause, asking the court to,  
22 essentially, undo the stipulation, which required that Holly  
23 pay all of the -- any of the tax liability for the parties for  
24 the year of 2015, and, instead, revert back to an agreement  
25 that was entered several months prior that was superceded by

1 the stipulation, which required the parties to each pay  
2 one-half of the IRS tax liability for -- roughly for -- the  
3 number was \$14,951.11.

4 The court ultimately, after a lot of motion practice  
5 and -- and granting of a new trial, held an evidentiary  
6 hearing in August of 2016 -- excuse me, 2017, and as a result  
7 of that evidentiary hearing, issued a ruling that -- that  
8 Mr. Rosser had engaged in deceit, and found Mr. Rosser in  
9 consent -- in contempt for deceit and for failure to follow  
10 the June 16th mediation agreement.

11 Additionally, Mr. Rosser --

12 **JUDGE HARRIS:** And the context of that evidentiary  
13 hearing was based on the order to show cause. It wasn't based  
14 on a 60(b) motion or a petition to modify or anything else.  
15 It was an order to show cause hearing asking the court to hold  
16 your client in contempt of court.

17 **MR. BECKSTROM:** That's correct, Your Honor. And keep  
18 in mind that -- as was briefed thoroughly at the district  
19 court and as contained in the briefs on appeal, there is a  
20 local rule that applies in the Sixth District Court where this  
21 case took place. And it's Rule 10-1-602 of the Utah Rules of  
22 Judicial Administration that dictates how courts in the  
23 Sixth District deal with orders to show cause.

24 And orders to show cause in the Sixth District, there  
25 can only -- they may only be used to enforce existing orders

1 or judgments of the court. Okay? They're specifically  
2 limited to say, you cannot use an order to show cause to enter  
3 a new judgment or order through an order to show cause.

4 And, essentially, what happened here, Your Honor, is  
5 that the trial court essentially, in essence, modified the  
6 decree to say, instead of Holly having to pay any of the tax  
7 liability of the parties for 2015 -- which is what paragraph  
8 9(r) of the decree indicated -- instead, the court reverted  
9 back to the mediation proposal, which was, each party pay  
10 one-half of that tax obligation. And in doing so, then  
11 immediately found my client in contempt for failure to meet  
12 that obligation.

13 **JUDGE HARRIS:** In contempt of what?

14 **MR. BECKSTROM:** In -- in contempt for failure to --  
15 to pay as promised, essentially.

16 **JUDGE HARRIS:** Well, I mean, that's -- I guess this  
17 is maybe a question for the other side, but I'd like your  
18 views on it first. But in reading through the briefs, I  
19 was -- I was a little unclear as to what your client was found  
20 in contempt of.

21 **MR. BECKSTROM:** Well, I mean, the -- the ruling says  
22 that he was found in contempt for knowingly and intentionally  
23 misrepresenting the status of the tax return. And then it  
24 says, for deceit and for failure to comply with the terms of  
25 the decree.

1           **JUDGE HARRIS:** Well, what it says -- what it says is,  
2 the court concludes that the respondent is in contempt due to  
3 his deliberate deceit and failure to act as agreed between the  
4 parties on June 16th.

5           That's a little cryptic. And I guess I'm asking for  
6 your interpretation of that.

7           **MR. BECKSTROM:** Well, I mean, it's a hard one to  
8 answer because I think the record's not clear. I mean, we've  
9 heard -- we've seen arguments of latent ambiguity. The court  
10 didn't make a finding of latent ambiguity, but, certainly,  
11 that's what's been argued by appellee in this case.

12           And there -- there also is not clear what exactly  
13 Mr. Fro -- Mr. Rosser did that was deceitful. Yes, there's --  
14 there's some findings of fact in there, but nothing that would  
15 rise to the level of a misrepresentation that happened on  
16 the -- the part of -- of Mr. Rosser.

17           **JUDGE HAGEN:** And I understand your argument that a  
18 motion for an order to show cause was not the appropriate  
19 vehicle. Were there other avenues that -- that the wife could  
20 have used to challenge his failure to -- presumed failure to  
21 abide by the mediation agreement?

22           **MR. BECKSTROM:** Yes, Your Honor. There's -- through  
23 caselaw and statutory authority, there's essentially three  
24 ways in a normal divorce case where a party could seek relief  
25 from a decree of divorce. The first one would be to -- under

1 30-3-5, you could ask the decree to be modified for a material  
2 change of circumstances. So that's number one.

3 **JUDGE MORTENSEN:** But you'd be hard pressed if all  
4 the events happened prior to the entry of the decree; right?

5 **MR. BECKSTROM:** That -- that's correct. And -- and  
6 the Bayliss case -- this court's opinion in the Bayliss case,  
7 basically shuts the door on that when you're talking about  
8 fraud which induces someone to enter a decree. So that --  
9 that option one that would normally be available is out the  
10 door because we're talking about fraud here.

11 But option number two is that you file a motion under  
12 Rule 60(b), which would allow you to seek relief on various  
13 grounds, including fraud, which is 60(b)3. But the limiting  
14 factor under that -- that second option is that you must do so  
15 within 90 days of the entry of the decree. That did not  
16 happen here because the -- the decree was entered on  
17 August 8th, 2016, and the order to show cause -- the ex parte  
18 motion for order to show cause was not filed until  
19 November 21st, which is 105 days.

20 So even if -- there's no indication that the court  
21 can -- treated this as a Rule 60(b) motion, but even if it  
22 would have, it would have been untimely.

23 **JUDGE HARRIS:** Well, and that's not really before us.  
24 We're just sort of discussing what the other options might be;  
25 right?

1           **MR. BECKSTROM:** That -- that's correct. And --

2           **JUDGE HARRIS:** And there is a third; right? There --

3           **MR. BECKSTROM:** There is a third, absolutely.

4           **JUDGE HARRIS:** Which is what?

5           **MR. BECKSTROM:** Which is to file an independent

6           action. There's lots of caselaw that --

7           **JUDGE HARRIS:** For -- for a breach of contract or

8           fraud or something else?

9           **JUDGE MORTENSEN:** For fraud, yes.

10          **MR. BECKSTROM:** For fraud. For fraud. That's what's

11          relevant here is fraud.

12          **JUDGE HARRIS:** Yeah.

13          **JUDGE HAGEN:** Uh-huh.

14          **MR. BECKSTROM:** If -- if Ms. Rosser believed that she

15          was defrauded in entering the decree, she could file an

16          independent lawsuit and -- and pursue it in a different forum.

17          **JUDGE HARRIS:** She can still do that.

18          **MR. BECKSTROM:** She still could, assuming she

19          satisfies the statute of limitations.

20          **JUDGE HARRIS:** So -- so your argument, basically,

21          is -- is, you know, these other avenues may or may not be

22          pursuable. We're not here to decide that.

23          **MR. BECKSTROM:** Right.

24          **JUDGE HARRIS:** Your argument is the avenue that was

25          pursued, shouldn't have been.



1           **MR. BECKSTROM:** Absolutely, Your Honor. And -- but  
2 10-1-602 is very clear that you may not enter a new order or  
3 judgment as a result of -- of an order to show cause.

4           And that's exactly what happened here. You can slice  
5 and dice the -- the judgment and order however you want, but  
6 at the end of the day, the judge ignored paragraph 9(r) of the  
7 decree which says Holly is responsible for "all" -- or I  
8 shouldn't say all; it says "any," which is essentially all --  
9 of the tax re -- tax liabilities for the parties for 2015.

10           And instead, essentially said, well, Mr. Rosser, you  
11 have to pay one-half of that. And because you didn't -- I'm  
12 imposing that order on you, and because you didn't pay it, I'm  
13 finding you in contempt. So that circles back to your  
14 question as to why he found him in contempt. He found him in  
15 contempt for violating something that was never even ordered.

16           **JUDGE MORTENSEN:** Now, if he -- I think you'd  
17 concede, not that this is supported by the record, but as a  
18 legal premise, if, for example, you entered a decree based  
19 upon affidavit or in-court testimony, and Mr. Rosser, in fact,  
20 lied to the court either in the affidavit or in open court,  
21 that would leave open the possibility for the court to find  
22 him in direct contempt; correct?

23           **MR. BECKSTROM:** That's correct.

24           **JUDGE MORTENSEN:** And -- and the parameters and  
25 discretion of the court to address direct contempt are quite

1 broad; right?

2 **MR. BECKSTROM:** Correct. There's no indication that  
3 that happened here. That's the -- that's the issue,  
4 Your Honor. And -- and, in fact, all of the representations  
5 that are alleged to have been made, being did we misrepresent  
6 in the tax return? Did we tell Ms. Rosser that -- that the --  
7 that the initial tax liability had been paid? Did we  
8 represent that there would be a refund?

9 Those are the three main representations that are at  
10 issue in this case. None of those happened in court. They're  
11 all out-of-court statements. And so that's why direct  
12 contempt does not come into play here.

13 And so, you know, Your Honor, there's really good  
14 reasons why this kind of a matter should really be left for an  
15 independent action. I mean, keep in mind that if you're  
16 filing an independent action, you have a right to a jury  
17 trial.

18 In -- in an order to show cause, it's -- it's the  
19 judge -- you show up, you have a little mini trial, if you  
20 will, and it's determined one way or the other. You don't get  
21 the benefit of full discovery. And in this case, there'd be  
22 huge issues as to venue and forum because while the case was  
23 properly filed in Garfield County, none of these  
24 representations happened in Garfield County. Most of them  
25 were alleged to have happened either in Las Vegas, where

1 Mr. Rosser moved after the divorce was filed, or in Page  
2 where -- where the businesses were operated and where  
3 Ms. Rosser resided.

4 I see my time's up. Thank you.

5 **MR. SPENCER:** May it please the Panel of the Court,  
6 Counsel, I'm Stephen Spencer. I am the attorney for the  
7 petitioner and appellee, Holly Rosser, who is -- is present  
8 today.

9 I'd like to begin my remarks by saying that the basic  
10 problem with the appellant's approach is that they read  
11 this -- the decree -- or they're interpreting the decree for  
12 the Panel of the Court as containing a covenant when, in fact,  
13 it contains a condition.

14 The relevant portion of the decree talks about Holly  
15 Rosser receiving a tax refund, or paying any liability. And,  
16 in fact --

17 **JUDGE HARRIS:** How's that conditional?

18 **MR. SPENCER:** It is -- it is conditional because  
19 there is a latent ambiguity and a -- a collateral matter which  
20 the fact is outside the four corners of -- of the decree,  
21 resolves the condition.

22 **JUDGE MORTENSEN:** It seems to me that you're -- and  
23 please correct me if I'm wrong -- that your argument is, with  
24 that latent ambiguity, that what was promised and -- and the  
25 representation was that there was going to be a refund.

1 Correct?

2 **MR. SPENCER:** That's correct.

3 **JUDGE MORTENSEN:** And -- and that that provision of  
4 the decree must be read to encompass that understanding that  
5 there was going to be a refund; is that right?

6 **MR. SPENCER:** That's -- that's -- yes.

7 **JUDGE MORTENSEN:** How can we do that? How -- how can  
8 you find a latent ambiguity that results in something that  
9 goes against the express language of the provision, i.e., that  
10 there might be a liability and she would be responsible for  
11 the liability. If truly the -- the latent ambiguity could  
12 mean only a refund, why would it mention a liability that she  
13 has to pay?

14 **MR. SPENCER:** Okay. Well --

15 **JUDGE MORTENSEN:** Do you understand my question?

16 **MR. SPENCER:** I -- I think so. And if -- I'll --  
17 I'll say this. If we had a decree that said she'll pay any  
18 liability -- okay? -- we'd have a different problem here.  
19 Okay? And --

20 **JUDGE HARRIS:** Well, that's what it says.

21 **MR. SPENCER:** Pardon?

22 **JUDGE HARRIS:** That is what it says.

23 **MR. SPENCER:** Well, and it also says that she'll  
24 receive any refund. And so what the court did --

25 **JUDGE MORTENSEN:** Says either/or. But you're asking

1 us to read that provision as being only a refund.

2 **MR. SPENCER:** Well, I -- I'm asking you to read it  
3 as -- it could be -- there could be a liability or there could  
4 be a refund, and in order to -- to understand that problem --  
5 okay? -- the court appropriately looked at extrinsic evidence  
6 to see the existence of the latent ambiguity. It looked  
7 outside the corners -- the four corners of the document.

8 Latent ambiguity arises from a collateral matter when  
9 contract terms are applied or executed, which is exactly what  
10 happened here. We had a course of conduct. Now a  
11 representation is made --

12 **JUDGE HARRIS:** Well --

13 **MR. SPENCER:** -- that we can't really determine why  
14 the court found Mr. Rosser in contempt. Well, you know, yes,  
15 we can. He lied to the court -- according to the trial  
16 court -- about -- about a meeting in which there was a  
17 discussion in which he informed my client that there wouldn't  
18 be a tax refund. Judge Lyman said, no, that never happened.  
19 And there was a --

20 **JUDGE HARRIS:** Right. So you're referring to  
21 paragraph 18 of the findings? The petitioner --

22 **MR. SPENCER:** I'd have to --

23 **JUDGE HARRIS:** The petitioner denies this claimed  
24 meeting. The court, having heard the evidence, finds the  
25 respondent is not telling the truth and that no such meeting

1 occurred.

2 **MR. SPENCER:** Yes. That -- that is one reason. That  
3 is -- that is one instance of a contempt.

4 **JUDGE HARRIS:** But the court didn't reference that in  
5 its conclusions of law when it proclaimed the reason why it  
6 was finding Mr. Rosser in contempt. The only thing referenced  
7 there is the June 16th mediation agreement. Conclusion two.

8 So my question --

9 **MR. SPENCER:** No, that -- that's --

10 **JUDGE HARRIS:** -- my question to your -- your worthy  
11 opponent was, help me understand what he's being found in  
12 contempt of.

13 **MR. SPENCER:** Okay. He is being -- he is being found  
14 in contempt under the court's enforcement powers, and also  
15 under the court's contempt powers for engaging --

16 **JUDGE HARRIS:** Well, I realize -- I realize he's  
17 being found in contempt under the contempt powers, but under  
18 Section 301, there are 12 different reasons why a court --  
19 78(B)-6-301, acts and omissions constituting contempt. There  
20 are 12 different reasons that a court is authorized to find  
21 somebody in contempt.

22 **MR. SPENCER:** Okay.

23 **JUDGE HARRIS:** And I guess my question to you is,  
24 which one of those 12 is the court referencing here?

25 **MR. SPENCER:** Deceit, or abuse of the process or

1 proceedings of the court, by a party to an action or special  
2 proceeding.

3 **JUDGE HARRIS:** All right. Number (4).

4 **MR. SPENCER:** Yes.

5 **JUDGE HARRIS:** And you're not -- I didn't see you in  
6 the -- in the briefs, making any argument that number (5) --  
7 which is the most common one that I used to see downstairs --  
8 disobedience of any lawful judgment, order, or process of the  
9 court.

10 You're -- you didn't make any argument in your brief,  
11 that I could divine, that that -- that section (5) was in  
12 play; is that right?

13 **MR. SPENCER:** I'd have to go back and read my brief.  
14 I -- I can't -- I can't --

15 **JUDGE HARRIS:** Well, standing here today, are you  
16 make --

17 **MR. SPENCER:** -- I can't tell you.

18 **JUDGE HARRIS:** -- are you making the argument that  
19 Mr. Rosser should be held in contempt for disobedience of any  
20 lawful order of the court?

21 **MR. SPENCER:** Yes.

22 **JUDGE HARRIS:** Okay.

23 **MR. SPENCER:** Yes.

24 **JUDGE HARRIS:** Which provision -- which provision of  
25 which order did he violate?

1           **MR. SPENCER:** Okay. The divorce decree in -- in  
2 paragraph 9(r), it says that she should be entitled to any  
3 refund. And Mr. Rosser engaged in a course of conduct to  
4 trick her into showing that there would be a refund. And he  
5 procured her cooperation in preparing and filing this amended  
6 tax return on the premise that there would be a refund. The  
7 amended tax return that was prepared showed that there would  
8 be a refund. It all showed --

9           **JUDGE HARRIS:** Okay. So --

10          **MR. SPENCER:** -- also showed that --

11          **JUDGE HARRIS:** -- just make sure I have your argument  
12 in mind. Your -- your argument with regard to subsection (5)  
13 is that the order violated is paragraph 9(r) of -- of the  
14 divorce decree.

15          **MR. SPENCER:** That's correct.

16          **JUDGE HARRIS:** Any other -- any other order?

17          **MR. SPENCER:** No.

18          **JUDGE HARRIS:** Okay. And then your argument with  
19 regard to 301 sub (4) -- subsection (4) has to do with this  
20 deceit argument?

21          **MR. SPENCER:** Yes.

22          **JUDGE HARRIS:** And I guess my question to you is,  
23 doesn't that have to be -- as Judge Mortensen, I think,  
24 alluded to a moment ago -- doesn't that have to be deceit on  
25 the court as opposed to deceit on your client?



1           **MR. SPENCER:** Well, it can be -- it can be either one  
2 or both, and the court found that there was both.

3           **JUDGE HARRIS:** Well, okay. Just as a matter of  
4 statutory interpretation, then, your position is that that  
5 subsection can encompass deceit on a third party.

6           **MR. SPENCER:** On --

7           **JUDGE HARRIS:** As opposed to on the court.

8           **MR. SPENCER:** To a party to the action, yes.

9           **JUDGE HARRIS:** Okay. So help us understand, then --

10          **MR. SPENCER:** And to the court.

11          **JUDGE HARRIS:** -- how that couldn't result in every  
12 single breach of contract action mushrooming into contempt of  
13 court; right? I'm a party to -- to an action, you lie to me;  
14 therefore, I can come in and -- and accuse you of contempt of  
15 court, even though you didn't do anything in front of the  
16 court that would constitute deceit.

17           Do you follow what I'm asking?

18          **MR. SPENCER:** I do.

19          **JUDGE HARRIS:** I mean, doesn't that have to mean  
20 deceit on the court?

21          **MR. SPENCER:** I don't think that it does. No. I  
22 think that it can be a -- a deceit that involves litigation.  
23 If someone lied in a deposition, that's not -- that's not  
24 before the court. It's -- it's not evidence, a record is  
25 made, it pertains, but like a deliberate lie told in a

1 deposition could be contempt of court.

2 **JUDGE HARRIS:** All right. Perhaps. But we don't  
3 have anything like that here.

4 **MR. SPENCER:** No, but what we do have is that we have  
5 Mr. -- Mr. Rosser, okay, signing a tax return under penalty of  
6 perjury at a time where he already knows that the refund  
7 that's shown on the face of the tax return will not happen.  
8 Also, that the prepayments that are shown on the face of the  
9 amended tax return haven't been paid. He knows that Ms.  
10 Rosser doesn't know that. Okay?

11 **JUDGE HARRIS:** Well, okay, so --

12 **MR. SPENCER:** He signs it, he has her sign it, they  
13 file it. Okay?

14 **JUDGE HARRIS:** I also had a hard time -- from reading  
15 the order of the court -- ascertaining exactly what the  
16 material misrepresentation was that you think Mr. Rosser made  
17 to your client. Can you help me out there?

18 **MR. SPENCER:** Yes. Okay. There's two things. Okay?  
19 That he had paid -- okay -- his share of the prepayments under  
20 the mediation agreement, and also that there would be a refund  
21 coming to her if she cooperated in preparing and filing the  
22 amended tax return.

23 **JUDGE HARRIS:** And -- okay. I understand that that's  
24 what you think was communicated, but I'm -- I'm asking for  
25 sort of a record cite to an email or a phone call or a -- the

1 manner in which this was communicated to your client, that he  
2 had paid his half and that there would be a refund. Where was  
3 the misrepresentation made to your client of those things?

4 **MR. SPENCER:** Okay. The misrepresentation was  
5 made -- there was evidence of a verbal conversation in which  
6 he said to her, yes, that -- that he realized that he needed  
7 to take care of his prepayment. That was part of the record.  
8 Also --

9 **JUDGE HARRIS:** A verbal conversation?

10 **MR. SPENCER:** Yes.

11 **JUDGE HARRIS:** And do you recall the date of that?

12 **MR. SPENCER:** It was shortly after the medi -- time  
13 of the mediation in June of 2016.

14 **JUDGE HARRIS:** And -- and to go -- to find the facts  
15 of that, would I go to your client's testimony at the -- at  
16 the evidentiary hearing to -- to find out the description of  
17 that?

18 **MR. SPENCER:** Yes.

19 **JUDGE HARRIS:** Okay. What was the other one? You  
20 said there were two?

21 **MR. SPENCER:** Okay. There was -- there was also  
22 evidence that he had a conversation with his accountant  
23 shortly after the amended return was prepared, several weeks  
24 before it was signed, in which he and the accountant discussed  
25 the fact that the refund shown on the face of the return and

1 also the prepayment shown on the face of the amended return  
2 were not accurate, that was information. Okay.

3 **JUDGE HARRIS:** All right. But is there a third one?

4 **MR. SPENCER:** Yes. And he signed the return. Okay?  
5 He signed the return -- on the face of the return when it's  
6 signed, a person signs that under penalty of perjury, and the  
7 language -- that signature intent that's manifested in signing  
8 is also in the record in my examination of Mr. Rosser. And in  
9 signing that, inducing my client to signing that, he also made  
10 a misrepresentation. And I believe that --

11 **JUDGE HARRIS:** Okay. Well, let me explore those with  
12 you, if I could, for a moment.

13 **MR. SPENCER:** Sure.

14 **JUDGE HARRIS:** The second one, this conversation with  
15 the accountant, can you help me understand how that's a  
16 misrepresentation to your client? Was that passed along to  
17 your client, or, I mean --

18 **MR. SPENCER:** Well, I believe it's a  
19 misrepresentation of omission. It's a material omission.  
20 Okay? And information that was withheld that's obviously  
21 material to him; it's clear that he knew. The court also  
22 found it's clear that he did not disclose that to Ms. Rosser,  
23 although he claimed to, and the court determined that he -- he  
24 was not telling the truth about that.

25 **JUDGE HARRIS:** All right. And then with regard to

1 the third one, that he signed the return, my understanding of  
2 the record is that he signed the return on the 22nd-ish or so  
3 of August?

4 **MR. SPENCER:** They both did.

5 **JUDGE HARRIS:** But the stipulation and the decree  
6 were signed -- that was signed by your client on the 5th of  
7 August?

8 **MR. SPENCER:** I believe the stipulation was signed on  
9 the 4th and the court entered the decree on the 8th.

10 **JUDGE HARRIS:** So how -- how can your client rely on  
11 a representation made some 14 days after she signed the  
12 decree, the stipulation?

13 **MR. SPENCER:** Okay. Because she was aware -- she was  
14 aware that the term -- return was prepared and it showed a  
15 refund.

16 **JUDGE HARRIS:** So --

17 **MR. SPENCER:** She was aware -- it was not signed  
18 until that time. It was actually prepared by the 28th of  
19 July, I believe is what the record says.

20 **JUDGE HARRIS:** So the misrepresentation wasn't the  
21 signature? I thought you told me the misrepresentation was  
22 the signature.

23 **MR. SPENCER:** That was a misrepresentation. It was  
24 part of the continuing -- a continuing scheme where she was  
25 told all along, if you cooperate in signing this, a refund

1 will be coming to you. And it was also predicated upon -- so  
2 that return was available weeks before the return was signed,  
3 was available weeks before the stipulation was signed.

4 **JUDGE HARRIS:** But he didn't prepare it; right?

5 **MR. SPENCER:** He did not prepare it. No.

6 **JUDGE HARRIS:** So the -- the fact that the return was  
7 available, do you think that was also a misrepresentation?

8 **MR. SPENCER:** You mean when it was prepared?

9 **JUDGE HARRIS:** Yeah. I'm trying to understand how --  
10 just the fact that an amended return was available and ready  
11 for them to look at constituted a misrepresentation by Mr.  
12 Rosser to your client.

13 **MR. SPENCER:** Okay. Without reviewing the whole  
14 record, Mr. Rosser knew that he had -- the prepayments that  
15 were shown on the face of it had not been made because he was  
16 supposed to make some of them. And he was the one who knew  
17 that he did not make some of them. Okay? And that he didn't  
18 disclose that fact. If he had disclosed that fact -- okay? --  
19 Ms. Rosser would have known, you know, the accountant would  
20 have known, which -- you know, that there could be no refund  
21 because the prepayments had not been made. And Mr. Rosser  
22 knew from the time of mediation on June 16th at the time the  
23 return was prepared, and he saw the return before he signed  
24 it --

25 **JUDGE HARRIS:** So -- so you --

1           **MR. SPENCER:** -- that those prepayments had not been  
2 made.

3           **JUDGE HARRIS:** You seem to have glided from fraud to  
4 fraudulent nondisclosure, which is a slightly different tort.  
5 Am I misperceiving that?

6           **MR. SPENCER:** Well, both things are operating here.  
7 Okay? He -- he --

8           **JUDGE HARRIS:** Fraud -- fraud requires an actual  
9 affirmative misrepresentation. You don't have that. You're  
10 not going to --

11           **MR. SPENCER:** Well, we do have that.

12           **JUDGE HARRIS:** Right. And that's --

13           **MR. SPENCER:** Is it in the record --

14           **JUDGE HARRIS:** -- what I'm asking you. But now  
15 you -- and you told me what you think the three of them are,  
16 and then you -- now you're saying, well, it was a -- he had a  
17 duty to disclose and didn't, and there was some sort of fraud  
18 by omission? It's what I hear you arguing now. And that --  
19 that starts ringing bells to me about fraudulent nondisclosure  
20 as opposed to affirmative fraud.

21           **MR. SPENCER:** Okay. Well, I think one of the  
22 findings of the trial court is that he knew this. He knew  
23 there wouldn't be a refund and he didn't disclose that to the  
24 appellee at a relevant time, although he knew that at a  
25 relevant time. That was a finding of the district court.

1           **JUDGE HARRIS:** Okay. I've taken up a lot of your  
2 time with questions.

3           **MR. SPENCER:** Yeah, I got --

4           **JUDGE HARRIS:** I'm sure you have some more to say.

5           **MR. SPENCER:** -- I've got 30 seconds left and I  
6 haven't said what -- anything I've come to say, really.

7           **JUDGE HARRIS:** I'm sure Judge Hagen will --

8           **JUDGE HAGEN:** If -- if you need a little extra time  
9 to -- to make your points, please take it.

10          **MR. SPENCER:** Yes. I'll -- and I'll -- I'll be  
11 quick.

12           Acts and omissions constituting contempt includes in  
13 its definition deceit or abuse of process or proceedings of  
14 the court by a party to an action or special proceeding. The  
15 trial judge is in the best position to evaluate the status of  
16 his or her cases, as well as the attitudes, motives, and  
17 credibility of the parties. A trial court abuses its  
18 discretion if there is no reasonable basis for a decision.

19           The parol evidence rule operates in the absence of  
20 fraud or other invalidating causes to exclude evidence of  
21 contemporaneous conversations, representations, or statements  
22 offered for the purpose of varying or adding the terms of an  
23 integrated contract. However, parol evidence is admissible to  
24 show the circumstances under which the contract was made, or  
25 the purpose for which the writing was executed. Evidence may



1 be admissible within the discretion granted to the trial  
2 court, even in the face of a clear integration clause.

3 Parol evidence is admissible where a contract is  
4 alleged to be a forgery, a joke, a sham, lacking in  
5 consideration, or where a contract is viable for fraud,  
6 duress, mistake, or illegality. Admitting parol evidence in  
7 such circumstances avoids the judicial enforcement of a  
8 writing that appears to be a binding integration, but, in  
9 fact, is not.

10 When determining whether a contract is ambiguous, any  
11 relevant evidence must be considered, and a better-reasoned  
12 approach is to consider the writing in light of the  
13 surrounding circumstances. This way, the court can interpret  
14 a contract and any potential ambiguity in light of the  
15 parties' intentions.

16 Latent ambiguity arises from a collateral matter when  
17 the contract terms are applied or executed. Courts may  
18 consider any relevant evidence to determine whether a latent  
19 ambiguity exists in the contract terms that otherwise appear  
20 to be facially unambiguous.

21 **JUDGE HARRIS:** In the -- in the contempt context,  
22 doesn't ambiguity kind of cut the other way? Doesn't the  
23 order have to be clear before we're going to hold somebody in  
24 contempt of it?

25 **MR. SPENCER:** Well, I think an element of contempt is

1 a person knew the order and had ability to comply, so if they  
2 don't -- I suppose if they don't know or understand the order,  
3 there may be a defense to contempt that they just -- they  
4 didn't know what was ordered.

5 **JUDGE MORTENSEN:** Doesn't -- if it's direct  
6 contempt -- and you cited it, I believe, in your brief -- that  
7 the court is empowered to fashion additional remedies beyond  
8 imprisonment. Doesn't the standard have to be beyond a  
9 reasonable doubt since prison is in play?

10 **MR. SPENCER:** I think the standard for contempt -- if  
11 I understand the question correctly -- is clear and convincing  
12 evidence, but I don't --

13 **JUDGE MORTENSEN:** For direct contempt, where you  
14 might go to jail?

15 **MR. SPENCER:** Well, you know, I -- I can't answer  
16 that. I just know there was no jail here.

17 **JUDGE MORTENSEN:** Well, it's not about what jail's  
18 imposed, it's whether jail might be imposed. Right? I mean,  
19 I think that's the law. Maybe I'm mistaken.

20 **MR. SPENCER:** Yeah. I -- I can't help you. I'm  
21 sorry.

22 You know, basically -- I mean, the argument that's  
23 made is that they've come up with a scheme for great  
24 gamesmanship here, and that gamesmanship ought to -- ought to  
25 prevail here. That -- you know, if -- if the decree would

1 have said that she'll pay all the liability, we have a  
2 different problem. It said that she'll get the refund. If it  
3 said that she'll get the refund and then it turned out to be a  
4 liability -- okay -- for the same reasons that we have under  
5 these facts, it would be a different problem. Okay.

6 I would concede that in that case it would be a  
7 situation where a 60(b) motion or a different -- a separate  
8 action may be appropriate. But here we have a situation --  
9 okay -- where clearly there was an agreement, clearly there  
10 was a course of conduct and other representations, and -- in  
11 writing, representations and agreements in writing.

12 And, you know, this language, you know, she'll pay  
13 any refund or receive or -- or incur any liability, well, you  
14 know, her impression was that she would get a -- a refund.  
15 And -- and why? Because of misrepresentations. Okay. And  
16 then the argument is made -- okay-- because she discovered it  
17 a little more than 90 days after the decree was entered, like,  
18 too bad -- too bad, time is up.

19 That's -- that's not the correct analysis. The  
20 correct analysis here is in looking at -- at the latent  
21 ambiguity, considering evidence outside the four corners of  
22 the decree, it was clear that Ms. Rosser anticipated getting a  
23 refund -- okay -- which is why she cooperated in filing the  
24 amended return, but that was based on deception. Okay? And  
25 the court considered that to be contemptuous as well as

1 untruths that the court believed that Mr. Rosser told the  
2 court under oath in the proceedings, and -- and used its  
3 contempt powers to -- to make her whole under the  
4 circumstances.

5 This sort of gamesmanship is not appropriate. I know  
6 that no one on the Panel of the Court is probably saying that  
7 it is. You're concerned about other technicalities. But --

8 **JUDGE HAGEN:** And if we find that contempt was not  
9 the proper avenue, she still would have the potential option  
10 of filing a separate action in this case; is that right?

11 **MR. SPENCER:** I suppose. But one point that I made  
12 in my brief, there's no argument by the appellant why the  
13 order to show cause could not be treated as that action.

14 **JUDGE HARRIS:** Why the order to show cause couldn't  
15 be treated as the independent action?

16 **MR. SPENCER:** Could -- why it could not be treated as  
17 an independent action.

18 **JUDGE HARRIS:** Do you have any caselaw that says it  
19 can?

20 **MR. SPENCER:** I do not.

21 **JUDGE HAGEN:** Okay.

22 **JUDGE HARRIS:** I mean, the question before the  
23 district court was whether Mr. Rosser should be held in  
24 contempt. And the question in front of us is whether that  
25 ruling was proper.

1           So I guess help me understand how you think we have  
2 the authority to -- or even the district court had the  
3 authority to turn that into something else.

4           **MR. SPENCER:** To turn it into?

5           **JUDGE HARRIS:** An independent action.

6           **MR. SPENCER:** An independent action.

7           **JUDGE HARRIS:** I mean, you've heard -- you've heard  
8 already your opponent talk about the lack of discovery --

9           **MR. SPENCER:** Yeah.

10          **JUDGE HARRIS:** -- venue issues, those kinds of things  
11 that, in an independent action, you would -- you would have to  
12 worry about, and you don't worry about those things in an  
13 order to show cause. I mean, those are -- off the top of our  
14 heads here -- things that would be different. Wouldn't that  
15 -- aren't those things significant enough to require that  
16 procedures be followed?

17          **MR. SPENCER:** Well, I mean, I -- I don't see that  
18 briefed in the opening brief, and I know that we're  
19 considering it for different reasons. If you review the  
20 record of the proceedings, you -- I think that you'll see --  
21 my recollection of this is general -- but that issue is raised  
22 before the court, closing ar -- and Judge Lyman commented  
23 about it. And I believe his comment was something to the  
24 effect that nobody asked me for anything like that and you had  
25 opportunity to do that. You didn't involve me in that.

1           **JUDGE HARRIS:** Nobody asked him for -- for what?  
2           Discovery?

3           **MR. SPENCER:** Like, discovery, schedule, orders,  
4           anything to that -- opportunity for depositions, anything to  
5           that effect. I believe that's -- that's in the record. I'd  
6           have to go back and review to tell you exactly where, but I  
7           believe it's Judge Lyman's comments near the -- near the end  
8           of the proceeding.

9           **JUDGE HAGEN:** Okay.

10          **MR. SPENCER:** And I've used more than my time, but  
11          thank you for allowing me additional time.

12          **JUDGE HAGEN:** Certainly. Thank you.

13          **JUDGE HARRIS:** Thank you. Pardon the interruptions.

14          **JUDGE HAGEN:** Thank you.

15          Rebuttal?

16          **MR. BECKSTROM:** Thank you, Your Honor.

17          Let me just touch briefly on a few issues raised by  
18          the appellee, first of all, with respect to the  
19          misrepresentation.

20          First of all, I think it's very important to  
21          understand that you only get to the discussion of  
22          misrepresentation and what was or was not said if we're  
23          procedurally correct in the case. And if we can't get over  
24          the threshold hurdle of -- which I will tell you we can't,  
25          then -- then there's no discuss -- discussion needed on the

1 fraud.

2 **JUDGE HAGEN:** But what about the idea that this could  
3 be contempt under subsection (4), based on deceit to the  
4 court?

5 **MR. BECKSTROM:** Well, that section, Your Honor -- and  
6 I'm paraphrasing here -- is deceit or abuse of the process of  
7 the court. Okay? Which I did research on that point. There  
8 is the Environtech case, which is a case that, essentially --  
9 it's a Utah case. It essentially is where they use that to  
10 find someone who testified falsely about his income at a  
11 trial. And they said, okay, that -- that provision applies.

12 But I couldn't find any cases anywhere else that said  
13 that you could use the -- that provision to find contempt in  
14 the circumstances of this case. Again, we're talking about  
15 representations that were made outside of court to induce  
16 someone to enter into a stipulation. I purviewed --

17 **JUDGE HAGEN:** But when the court -- I'm sorry. On  
18 finding 18 when the court says: The petitioner denies this  
19 claimed meeting and agreement, and the court finds that  
20 respondent is not -- that respondent is not telling the truth  
21 and that no such meeting or agreement occurred.

22 Telling the truth in court, in testimony? I -- I'm  
23 not sure what that refers to.

24 **MR. BECKSTROM:** Well, there was discussion at trial  
25 about whether a meeting happened in Page where they -- they

1 finally agree that, oh, yeah, everybody knows the true state  
2 of returns.

3 The court -- the court found that my client was not  
4 being truthful on that point, but when he gets to the  
5 conclusions of law, he doesn't -- he doesn't say that's why  
6 he's finding my client in contempt. Instead, he says he's  
7 doing it for deceit and for failure to follow the agreement  
8 that was reached on June 16th, which is the mediation  
9 agreement, Your Honor.

10 And so, you know, all the cases -- I -- I found a few  
11 cases that are cited in my reply brief that -- that reference  
12 a subsection that's similar to 78B-6-301(4), and they all seem  
13 to indicate that the purview of finding someone in contempt is  
14 for either making false statements in court or in filings made  
15 to the court. And so when you're outside of that purview,  
16 that -- that subsection just simply does not apply.

17 **JUDGE HARRIS:** So if the court hadn't made it clear  
18 in its conclusion of law that it was holding your client in  
19 contempt for that perceived lie under oath in front of him, we  
20 may be in a different position?

21 **MR. BECKSTROM:** Well, then you're going to a whole  
22 other subset of issues. I just don't think it's clear from  
23 the record that you can even go there, first of all. But then  
24 you run into a whole other subset of issues which is under  
25 section 311 of -- of the contempt statute. It says you can



1 award -- and I'm paraphrasing again here -- injury -- you can  
2 award damages for injury suffered as a result of the  
3 misrepresentation or the -- the deceit. Okay? Well, what's  
4 the deceit here? You're talking about a one- to three-minute  
5 discussion in trial, which had a very small purview --

6 **JUDGE HARRIS:** Which the court -- which the court  
7 didn't believe anyway?

8 **MR. BECKSTROM:** Right. Right.

9 **JUDGE HARRIS:** Yeah. So if you're talking about --

10 **MR. BECKSTROM:** Which was disregarded and it had  
11 nothing to do with the court's ultimate finding, you know.  
12 And so there's just real issues there that -- I mean, the  
13 judge found us liable for essentially the entire \$7,900 refund  
14 plus the \$7,100 and change that -- that Ms. Rosser had to pay  
15 as a result of Mr. Rosser not paying the 14,9- after the  
16 mediation. And so how could all of those be damages as a  
17 result of that very small issue at trial?

18 So to address the three representations that were  
19 raised by appellee, first of all, Ms. Rosser did not testify  
20 that Ron told her that he had paid his tax following the  
21 mediation. In fact, there's testimony in the record on  
22 cross-examination -- initially she said: Oh, yeah, he told me  
23 that he paid.

24 But then I said: Are you sure he told you he paid?

25 And -- and she walked that back and said: No. He

1 told me that he knew that they needed to be paid.

2 That's a far cry from a misrepresentation. And so  
3 that can't be the basis of doing it.

4 And, lastly, Your Honor, since I see I'm running out  
5 of time, I also want to raise to the court's attention, there  
6 was also an order to show cause brought by Ron on the issue of  
7 rebate checks. It's pretty clear that the court found that  
8 Ms. Rosser was not in compliance with the decree with respect  
9 to paying rebate checks. He allowed Ms. Rosser to offset that  
10 against the judgment that was entered, but in doing so, he  
11 never found Holly in contempt, he never found -- he never even  
12 made the offset. It's pretty clear in the record that there  
13 was \$12,835.36 in rebate checks that were received.

14 **JUDGE HARRIS:** So what --

15 **MR. BECKSTROM:** He never even applied the offset.

16 **JUDGE HARRIS:** But you don't have a cross-appeal.  
17 Right?

18 **JUDGE HAGEN:** Or you haven't raised that issue in  
19 your appeal.

20 **MR. BECKSTROM:** Yes, we did.

21 **JUDGE HARRIS:** Okay. So what would you like us to do  
22 with regard to that?

23 **MR. BECKSTROM:** Well, let me just get -- wrap up with  
24 my conclusion, Your Honor, first of all.

25 Number one, with respect to the -- with respect to

1 the rebate issue, our appeal -- one of the issues was,  
2 specifically, whether that was the correct decision. And  
3 because, number one, we're procedurally not properly in front  
4 of the trial court, no judgment should have been awarded  
5 against Holly -- in Holly's favor to begin with, and,  
6 therefore, that should be reversed. And because of that,  
7 there is no offset. So --

8 **JUDGE HARRIS:** So the court --

9 **MR. BECKSTROM:** -- our -- our order to show cause  
10 should be granted. Holly should be found in contempt, and Ron  
11 should be awarded his attorney's fees, along with the damages  
12 for failure to pay the rebate checks.

13 **JUDGE HAGEN:** And, I'm sorry, I do see that's your  
14 issue 4.

15 **MR. BECKSTROM:** Yes. Thank you, Your Honor.

16 **JUDGE HARRIS:** Yeah. And so you want us to -- to not  
17 remand for further proceedings on that, but rather just --

18 **MR. BECKSTROM:** The court made a finding already that  
19 Holly received the checks, and she didn't pay within the 10  
20 days required under the -- under the decree.

21 **JUDGE MORTENSEN:** Did it make a finding that she knew  
22 she had to pay?

23 **MR. BECKSTROM:** I don't recall exactly. I think -- I  
24 think -- I think what he did find is that even though she  
25 didn't pay, she didn't do so because of the deceit she felt

1 like she -- was being applied to her by Mr. Rosser. That was  
2 the finding.

3 **JUDGE MORTENSEN:** Is that sufficient for us to  
4 reverse and to order judgment to be entered?

5 **MR. BECKSTROM:** I believe so, Your Honor. I think --  
6 I think, at a minimum, you can award -- under 10-1-602 of the  
7 local rule, you could -- you can award a judgment in favor.  
8 The question would be if -- if you could hold it in contempt.

9 **JUDGE MORTENSEN:** I'm just saying, if the finding --  
10 if the findings aren't complete as to her contempt, should we  
11 enter judgment or should we remand for more complete findings?  
12 If we agree with your position.

13 **MR. BECKSTROM:** Sure. A remand is certainly a  
14 possibility, but I would suggest that -- that a reversal and  
15 awarding a judgment would be the proper tactic.

16 Thank you. If there's no other questions, I will  
17 rest.

18 **JUDGE HAGEN:** Thank you, Counsel. We appreciate your  
19 arguments today. We'll take this matter under advisement,  
20 issue a written opinion as soon as possible.

21 And that will conclude our calendar for today.

22 (Proceedings conclude at 11:14:16.)  
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CERTIFICATE

STATE OF UTAH        )  
                          ) SS.  
COUNTY OF WEBER    )

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Dated at Pleasant View, Utah, this the 4th day  
of October, 2019.

\_\_\_\_\_  
Laurie Shingle, UT CSR, RPR, CMRS

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ATTACHMENT D

Transcript of August 17, 2017 Evidentiary Hearing (R. 1267-1422)

IN THE SIXTH JUDICIAL DISTRICT COURT  
OF GARFIELD COUNTY, STATE OF UTAH

\_\_\_\_\_) )  
HOLLY REBECCA ROSSER, ) )  
 ) )  
Petitioner, ) )  
 ) )  
vs. ) Case No. 154600013 DA  
 ) )  
RONALD LEE ROSSER, ) )  
 ) )  
Respondent. ) )  
\_\_\_\_\_) )

Hearing  
Electronically Recorded on  
August 17, 2017

BEFORE: THE HONORABLE PAUL D. LYMAN  
Sixth District Court Judge

APPEARANCES

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1 two out for 10 minutes to try to get it resolved so that we're  
2 done with these matters at all?

3 MR. SPENCER: I don't believe so.

4 MR. BECKSTROM: No, your Honor.

5 THE COURT: Okay. Mr. Spencer, I'm -- I'm inclined just  
6 to do them together. That is we'll let you go ahead and  
7 introduce yours and tell me what you think I should do, and then  
8 I'll let you go ahead and introduce yours and you -- and you tell  
9 me what you think I ought to do, and then take testimony. We'll  
10 start with Mr. Spencer first. So Mr. Spencer, do you want to  
11 make an opening statement? Tell me what's going on.

12 MR. SPENCER: Yes.

13 THE COURT: Please.

14 MR. SPENCER: Your Honor, my client, the petitioner, has  
15 brought a claim for the tax refund under an amended tax return  
16 for the year 2015 under which she anticipated getting a refund of  
17 \$7900, and instead received a tax bill from the IRS of \$7,174 and  
18 some change. Her argument is that the refund was predicated on  
19 the belief, the understanding that the respondent's obligation to  
20 pay half the outstanding tax bill under the mediation agreement  
21 that was signed by the respondent on June 16<sup>th</sup>, 2016, that he had  
22 paid half of the outstanding IRS debt, and because -- because  
23 that didn't happen, she got a bill. Her damages are in the range  
24 of 15 to \$16,000, her principal damages.

25 When the parties -- when the divorce was filed late in

1 2015, there was still an outstanding tax debt of some \$54,000, as  
2 stated in the counter petition. At the time -- between the time  
3 the divorce was filed and the time of the mediation and  
4 settlement agreement on June 16<sup>th</sup>, 2016, some seven, seven-and-a-  
5 half months later, the petitioner, my client, paid down that  
6 obligation so that \$29,902 and change was owed.

7 Paragraph 15 of the mediation settlement agreement  
8 provided that the parties should pay the outstanding IRS debt  
9 without specifying an amount in equal shares. So on June 24<sup>th</sup>,  
10 2016, eight days following the mediation and pursuant to the  
11 written settlement agreement, my client made a payment to the IRS  
12 in the amount of \$14,951.11 for her share of the outstanding IRS  
13 obligation for the year 2015.

14 Following the time of the mediation and my client's  
15 payment for her one half share of the IRS debt, respondent  
16 through his attorney and otherwise insisted that there had been a  
17 mistake on the 2015 tax return, and insisted that an amended  
18 return would result in substantial income tax savings, and  
19 proposed the parties file an amended return.

20 So my response -- my client's response, well, we'll  
21 cooperate in seeing that that's true, but let's prepare the  
22 amended return so that we can see it before we agree to do  
23 anything else. So an amended return was prepared, and on line --  
24 and it was prepared by Mr. Derrick Clark, who I understand is  
25 present and may testify today -- showed that on line 22 that the

1 parties would receive a refund of \$7900. Of course, in  
2 settlement negotiations, it was proposed that my client pay the  
3 cost of that tax preparation, and that she also receive that  
4 refund.

5           Now my client will also testify that following the time  
6 of the mediation and settlement agreement, and the time of the  
7 divorce decree being entered, that the respondent expressed to  
8 her his intention to fulfill his obligation under paragraph 15 of  
9 the mediation agreement to pay half of the outstanding IRS bill,  
10 but he never told her that he did not or that he would not. So  
11 our case is that we have definite and good evidence of a written  
12 agreement that the parties should share this obligation equally,  
13 the outstanding obligation.

14           We have very good written evidence that everyone  
15 involved anticipated that there would be a refund and that refund  
16 was predicated on the belief that respondent had paid his  
17 obligation under the mediation agreement, but we have no evidence  
18 of a subsequent agreement, whether written or otherwise, that  
19 operates as an accord and satisfaction that would supercede the  
20 mediation agreement, and we have no evidence of any new value  
21 that may have been given by the respondent to obtain such an  
22 agreement anyway.

23           So there is a latent ambiguity. The circumstances, if  
24 known to the Court, would show that my client operated under the  
25 belief, and reasonably so, that the respondent had paid his share



1 of the outstanding obligation, and because that was not true, she  
2 was in the worst case scenario tricked, in the best case scenario  
3 took action based upon misinformation. Therefore, she should be  
4 entitled to the relief she seeks.

5 THE COURT: Okay. Do you want to make a statement?

6 MR. BECKSTROM: Yes, your Honor.

7 THE COURT: Go ahead.

8 MR. BECKSTROM: Your Honor, this really is a simple  
9 issue for the Court to decide. On August 4<sup>th</sup> and August 5<sup>th</sup>,  
10 notwithstanding Counsel's assertion that there wasn't a  
11 subsequent agreement that was entered, the parties entered into a  
12 final stipulation for the entry of findings of fact and  
13 conclusions as well as the final decree of divorce. That  
14 stipulation was filed with the Court on August 5<sup>th</sup>, along with the  
15 proposed findings and decree of divorce, which was subsequently  
16 signed by this Court on August 8<sup>th</sup> of 2016.

17 Under paragraph 49 of -- excuse me, paragraph 32 of the  
18 stipulation, it reads as follows: "With respect to the 2015 tax  
19 obligation owed by petitioner and respondent, the parties shall  
20 sign and file the amended tax returns for Eagle Solutions and  
21 themselves individually that were prepared by Derrick Clark on or  
22 about July 16<sup>th</sup>. The petitioner shall pay all fees charged by  
23 Derrick Clark in connection with the preparation and filing of  
24 the amended tax return. Thereafter, petitioner shall be solely  
25 entitled to receive any refund resulting from the amended

1 returns, and shall also be responsible to pay any tax liability  
2 resulting to any of the parties for the year 2015."

3           Your Honor, based on that express language, their order  
4 to show cause has no basis whatsoever. Now if they want to step  
5 back and talk about this June 16<sup>th</sup> mediation agreement, we don't  
6 dispute the fact that -- that we attended mediation, and that  
7 coming out of that mediation there was an agreement for each side  
8 to pay one half of the roughly 29,000, roughly 30,000 in tax that  
9 was owed.

10           Subsequent to the mediation, Ron learned of  
11 depreciations that could be taken that would limit the parties'  
12 tax liability for the year 2015. So after many proposals going  
13 back and forth with respect to this amended return, Holly would  
14 not accept any proposal until the amended return was prepared.  
15 Okay.

16           In that period of time between -- and that would be late  
17 June through July 16<sup>th</sup>, 2016, there were several proposals that  
18 were passed back and forth between the parties as to how this  
19 amended return will go down. Essentially the concept at the  
20 beginning of the negotiations was that there would be an  
21 amended -- that the amended return would be filed subsequent to  
22 the finalization of the divorce decree, and you know, the  
23 finalization of the divorce, the reason being is that the  
24 mediation agreement required Ron to take on certain liabilities  
25 as of July 1, and so there was a need to get the divorce

1 finalized, and to finalize that arrangement, okay.

2           During that process, the evidence that will be presented  
3 here today makes absolutely clear that Holly was well aware that  
4 Ron did not -- had not paid any portion of the IRS tax liability  
5 for 2015 after the mediation, okay. In fact, there will be  
6 evidence presented here today that on about July 14<sup>th</sup> a proposal  
7 was sent to Holly through her Counsel where it was proposed that  
8 we pay her an equalization payment. That equalization was pay --  
9 was required because Holly had already paid her \$14,951.11 to the  
10 IRS after the mediation.

11           All parties were presuming that this depreciation would  
12 lower the tax liability, and under the theory that each side  
13 would only pay one half of the tax because Holly had already  
14 paid -- and by way of example, it's better to explain it. If we  
15 have a \$30,000 tax liability, and we get to depreciation, that  
16 lowers the tax bill to \$20,000, well, Holly's already paid  
17 roughly 15 to the IRS. So rather than Ron pay 15 to the IRS and  
18 then have the IRS refund, the concept was equalization. Ron  
19 would pay 5 to the IRS to satisfy the tax obligation, and he  
20 would pay Holly 5 to satisfy -- to make sure she had only paid  
21 half.

22           Now at that point in time we were talking about still  
23 sharing the taxes, but there were several subsequent events that  
24 happened why that changed and why the stipulation was proposed  
25 and specifically accepted and signed to by Holly. There are

1 several of those. Number 1, these parties own Subway restaurants  
2 that Holly was operating, and they're in Page, Arizona. During  
3 that time frame, the June, July, August time frame is peak  
4 season. Con -- what was contemplated under the mediation was  
5 that this divorce was going to be finalized so she was going to  
6 carry on in the businesses, and we were going to get assets,  
7 essentially. When that didn't happen in a timely manner, Ron was  
8 under the strong belief that he should share in the profits from  
9 the businesses from that interim period between June 16<sup>th</sup> and when  
10 Holly finally signed the divorce stipulation.

11           Second, after the mediation, Ron learned about some --  
12 one of the assets he was awarded at mediation was some raw land  
13 in Page, Arizona. After the mediation he learned that there were  
14 outstanding property taxes that were owed on the property. Okay.

15           Keep in mind, this Court previously entered a temporary  
16 order instructing Holly to pay all business debts -- all the  
17 parties' debts when they were due, yet this debt was left  
18 outstanding. So because of that, on August 1<sup>st</sup>, 2001 -- or excuse  
19 me, 2015 Ron submitted a proposal to Holly with the stipulation  
20 and proposed findings and conclusions asking Holly to pay this  
21 liability that she knew existed from the amended return, and she  
22 signed it.

23           Now taking it a step further, on July 29<sup>th</sup> the evidence  
24 will be presented that Holly sends Ron a text saying, "What taxes  
25 are coming back to me, and where will the refund go?" So No. 1,

1 she's talking -- the evidence will show that she's talking about  
2 taxes, what am I going to have to pay, and secondly, what refund  
3 am I going to get. See, as part of this amended return there  
4 was -- there's no dispute between any of the parties here today  
5 that there would -- was a refund in the states of Arizona and  
6 Utah by virtue of the amended returns that were being filed.  
7 Really on -- the only thing we're questioning is the federal  
8 return.

9           In this text message that will be introduced as  
10 evidence, she specifically says, "And how are you going to pay me  
11 the difference?" What difference could she be talking about but  
12 for the fact that she was very aware of the fact that she knew,  
13 notwithstanding the face of the amended federal IRS return, that  
14 there was still a liability owed. Once Ron learned that, he  
15 first became aware that this was not a true refund, and he  
16 inquired of Derrick Clark. He's here today. He'll testify to  
17 that, and learned in that yes, in fact notwithstanding the way  
18 the tax return was prepared, there is still liability owed to the  
19 IRS.

20           Then three days later with all parties having knowledge  
21 of the facts, we submit the final stipulation that Holly signed.  
22 That's the end of the case, your Honor. There's nothing left to  
23 discuss. Frankly, I don't know that we even need to get into all  
24 this discussion, but we'll get to that when evidentiary issues  
25 come up.

1           What is crystal clear is No. 1, both paragraph 9-R of  
2 the final decree of divorce and 31-R of the stipulation place the  
3 sole obligation to pay 2015 taxes on Holly. Now they want to  
4 come here and tell the Court that it's only half. It just  
5 doesn't work. She bargained to pay it all, she's stuck with it.  
6 That's our case, your Honor.

7           THE COURT: Okay. I assume everybody wants to take  
8 testimony and not do proffers; is that correct?

9           MR. BECKSTROM: Yes, your Honor.

10          THE COURT: Okay.

11          MR. SPENCER: Yeah, I assumed Mr. Beckstrom --

12          THE COURT: Go ahead, Mr. --

13          MR. SPENCER: -- but I'm fine either way, and so I'm  
14 prepared to --

15          THE COURT: Go ahead, Mr. Spencer. Call your first  
16 witness.

17          MR. SPENCER: We call Holly Rosser, the petitioner.

18          THE COURT: Okay.

19          MS. ROSSER: Where do --

20          THE COURT: What you do is you come right in front of  
21 her, raise your right hand and be sworn.

22          COURT CLERK: Do you solemnly swear the testimony you  
23 are prepared to give is the truth, the whole truth, and nothing  
24 but the truth, so help you God?

25          THE WITNESS: Yes.

1 THE COURT: Then you come have a seat right over here.

2 THE WITNESS: Okay.

3 (Counsel confers with court clerk)

4 THE COURT: We just do a straight list. Whether you  
5 introduce or he introduces the numbers, we just do the numbers  
6 straight through.

7 MR. SPENCER: Your Honor, I want to make sure that I  
8 follow proper decorum being here because it's my witness, I may  
9 not need to ask permission to approach, but I'll --

10 THE COURT: Neither one of you need to ask permission to  
11 approach, both sides.

12 MR. BECKSTROM: Thank you.

13 MR. SPENCER: Okay.

14 THE COURT: That's just fine. If you get out of hand,  
15 Art here will arrest you.

16 HOLLY ROSSER

17 having been first duly sworn,

18 testifies as follows:

19 DIRECT EXAMINATION

20 BY MR. SPENCER:

21 Q. Would you state your full legal name for the record,  
22 please?

23 A. Holly Rebecca Rosser.

24 Q. Holly, you are the petitioner in this divorce action; is  
25 that correct?

1 A. Correct.

2 Q. I've shown you what has been marked as Petitioner's  
3 Exhibit 1. Do you recognize that document?

4 A. I do.

5 Q. What is that document?

6 A. This is from the IRS, unpaid taxes for 2015.

7 Q. Would that be for your individual return?

8 A. Correct.

9 Q. Would that be for an individual return that you would  
10 file with Ron Rosser?

11 A. Correct.

12 Q. The date that is shown on the upper right hand portion,  
13 June 6, 2016, is that within a limited time frame from the date  
14 that you first saw it or received it?

15 A. Yes.

16 Q. Okay. The amount that is shown there is amount due,  
17 \$29,902.21. Is that the amount -- is it your understanding that  
18 that's the amount that was owed at that time -- the date that's  
19 shown on the notice?

20 A. Yes.

21 Q. Okay. At the time you received that, at the present  
22 time you believed that to be a fact, that amount was in fact  
23 owed; is that correct?

24 A. Correct. This is what was owed.

25 Q. Okay. At the time this divorce was filed late in 2015,



1 is that also the amount that was owed at that time?

2 A. Yes.

3 Q. Or was it a different amount that was owed at that time?

4 A. Say that again.

5 Q. At the time that the divorce was filed late in 2015, is  
6 this the amount that was owed for taxes at that time, or was a  
7 different amount owed?

8 A. A different amount was owed.

9 Q. Okay. Do you know what that amount was?

10 A. It was almost 15,000 less.

11 Q. What's 15,000 less?

12 A. This 29,000.

13 Q. Okay. Is almost 15,000 less?

14 A. Because I had paid in half of this amount.

15 Q. Okay. Between the time the divorce was filed and the  
16 time of this notice? Do you understand what I'm saying? Do I  
17 need to rephrase the question?

18 A. Yeah, rephrase.

19 Q. At the time the divorce was filed, more money was owed  
20 than this; is that correct, at the time the divorce was filed?

21 A. More money was owed from this because of penalties and  
22 interest? I guess I don't understand what you're --

23 Q. No. Back up to the date that we filed the divorce.

24 A. Okay.

25 Q. Okay, in November or December of 2015.

1 A. Okay.

2 Q. Was more money than what's shown on this bill owed at  
3 that time?

4 A. Oh, yes.

5 Q. How much was owed?

6 A. \$54,917 was still owed.

7 Q. Okay. So did that get paid between that time and the  
8 time of this notice shown in Exhibit 1?

9 MR. BECKSTROM: Objection, vague. What got paid?

10 THE COURT: So I guess it's a foundational question.

11 Q. BY MR. SPENCER: Okay. Did you pay money --

12 A. Yes.

13 Q. -- for this -- for the 2015 taxes after the divorce was  
14 filed but before the mediation?

15 A. Yes.

16 Q. Okay. You -- how much did you pay?

17 A. \$26,035.21.

18 Q. Okay. So after you paid that amount, the amount that's  
19 shown in Exhibit 1 is what was left owing; is that correct?

20 A. Correct.

21 Q. Okay. Okay. Holly, I'm showing you what has been  
22 marked Petitioner's Exhibit 2. Do you recognize this document?

23 A. Yes.

24 Q. How is it that you recognize this document?

25 A. It's the mediation agreement between Ron and I.

1 Q. Okay. On the top of that document, the title appears to  
2 be settlement agreement of Rosser v. Rosser.

3 A. Correct.

4 Q. Is that what you see?

5 A. Correct.

6 Q. So was it your intention that this be a memorandum of an  
7 agreement?

8 A. Correct.

9 Q. It bears your signature; is that correct?

10 A. Yes.

11 Q. You're familiar with the signature of Ron Rosser, your  
12 former husband?

13 A. Yes.

14 Q. Does it bear the signature of Ron Rosser, if you know?

15 A. Yes.

16 Q. With regard to the outstanding tax obligation that was  
17 shown in Exhibit 1, is there -- is there a reference in Exhibit 2  
18 as to how that should be addressed?

19 A. Yes.

20 Q. Where do you see that specifically?

21 MR. BECKSTROM: Objection, your Honor. I think the  
22 parol evidence rule prohibits them from introducing this  
23 document. Going back to the stipulation, it was signed and it's  
24 on record of the Court as of August 5<sup>th</sup>. That is the final  
25 agreement. This Court has already entered a finding as part of

1 the decree. Let me get that for you, the paragraph number.  
2 Paragraph 2 of the decree specifically says that the parties have  
3 entered into a stipulation.

4           The stipulation constitutes the entire agreement with  
5 respective -- with their respective rights and obligations, and  
6 the property, the debts of the marital estate, the custody or  
7 other issues arising out of the divorce. So your Honor, the  
8 Court has already made the finding that this is the -- the  
9 stipulation is the final document. The parol evidence rule  
10 prohibits her from introducing testimony that would vary or  
11 contradict the terms of the stipulation, and that's the basis of  
12 the objection, your Honor.

13           THE COURT: Mr. Spencer, do you want to respond?

14           MR. SPENCER: I believe it's an accurate statement of  
15 the law that the Court may consider extrinsic evidence of a  
16 latent ambiguity in the sense that is a claim. It is appropriate  
17 for the Court to receive and consider that evidence before  
18 determining whether in fact a latent ambiguity exists, and that  
19 an integration clause parol evidence rule does not prohibit the  
20 Court from considering evidence of a latent ambiguity.

21           THE COURT: I'm going to allow the document in. It's  
22 admitted.

23           (Exhibit No. 2 received into evidence)

24           Q. BY MR. SPENCER: Okay. I'll come back -- try to come  
25 back where I was -- my memory, that would be perfect. I believe

1 my question was --

2 THE COURT: Before you go back, you didn't object to the  
3 IRS thing, the first exhibit, did you?

4 MR. BECKSTROM: No objection, your Honor.

5 THE COURT: You didn't, okay. All right.

6 MR. BECKSTROM: Yeah, it --

7 THE COURT: It doesn't show --

8 MR. BECKSTROM: I was going to make on the -- that  
9 wasn't offered.

10 THE COURT: I have to make --

11 MR. BECKSTROM: It was offered but not admitted.

12 THE COURT: All right. That's why I'm trying to clean  
13 it up right now.

14 MR. BECKSTROM: Yeah.

15 THE COURT: It was admitted -- or it is admitted.

16 MR. SPENCER: Yeah, I hadn't move to admit it yet, but  
17 I'll do so at this time.

18 THE COURT: All right. It's admitted.

19 (Exhibit No. 1 received into evidence)

20 MR. SPENCER: And Plaintiff's 2 is also admitted?

21 THE COURT: Yes, sir.

22 Q. BY MR. SPENCER: In paragraph 15, do you see a provision  
23 that relates to the obligations shown in Exhibit 1?

24 A. Yes.

25 Q. So was it your understanding that the obligations shown

1 in Exhibit 1 should be paid by equal shares by yourself and Ron?

2 A. Yes.

3 Q. So following -- oh, also, on the top of Exhibit 2  
4 there's a date shown, June 16<sup>th</sup>, 2016. Do you recall whether that  
5 was the time of the mediation agreement?

6 A. Yes.

7 Q. Do you believe that's the correct date?

8 A. Yes.

9 Q. I'm showing you now what has been marked Petitioner's 3.  
10 Do you recognize that document?

11 A. Yes.

12 Q. What is it?

13 A. It's a letter from the IRS. Let me read it real quick.  
14 It's a letter from the IRS saying that they have received our  
15 amended returns.

16 Q. Okay. The date that appears to be shown here, September  
17 27<sup>th</sup>, 2016 --

18 A. Correct.

19 Q. -- do you have any reason to believe that that is not  
20 the date that that notice was prepared?

21 A. No, I believe this was the date it was prepared.

22 Q. Okay. It was sent to you?

23 A. Yes.

24 Q. It's your understanding that it was sent to you in  
25 response to the IRS having received an amended return from you

1 and Ron Rosser?

2 A. Correct.

3 MR. SPENCER: Move to admit Petitioner's 3.

4 THE COURT: Any objection?

5 MR. BECKSTROM: Your Honor, the only concern I have here  
6 is that this has an unredacted copy of my client's Social  
7 Security number on it. That gives me grave concern. I mean I  
8 think it should be redacted in the Court's file. I know that  
9 this is a protected case, and so -- but just to protect the  
10 record, I think we ought to --

11 THE COURT: You don't have any problem with me just  
12 crossing it off?

13 MR. SPENCER: No, sir.

14 THE COURT: Blacken it out, whatever?

15 MR. BECKSTROM: Yeah.

16 THE COURT: Okay. We'll do that.

17 MR. BECKSTROM: Just so it's not visible to the public.

18 THE COURT: Okay. It's admitted.

19 (Exhibit No. 3 received into evidence)

20 (Court confers with court clerk)

21 THE COURT: Is it only one -- in one case -- one spot or  
22 not?

23 MR. BECKSTROM: It's on the second page and the third  
24 page in the kind of header there.

25 THE COURT: All right. Where it says Social Security

1 number right at the top?

2 MR. BECKSTROM: Yes, your Honor.

3 THE COURT: Okay.

4 MR. BECKSTROM: Actually, and it's also up in the right  
5 hand -- top right hand corner that's on page 2 that says in reply  
6 refer to, and on page 2 and 3 it's there. I don't see it  
7 anywhere else, your Honor.

8 THE COURT: All right. If you find it again, tell me.  
9 I'll just cross it off, because I think that's appropriate.

10 MR. BECKSTROM: We're going to have to same issue on  
11 Exhibit 4 that was just passed to me, even though it's not  
12 admitted yet.

13 THE COURT: We'll do the same.

14 Q. BY MR. SPENCER: Okay. Holly, I'm showing you what has  
15 been marked Petitioner's Exhibit 4. Do you recognize that  
16 document?

17 A. Yes.

18 Q. Have you seen it before coming today?

19 A. Yes.

20 Q. What is this document?

21 A. This is from the IRS saying that I still owe them  
22 money -- that Ron and I still owe them money.

23 Q. That amount that it states is owed, that is arising  
24 under the amended 2015 individual return; is that correct?

25 A. That's correct.



1 Q. So the amount here that's shown as \$7,174.98, to your  
2 understanding that that is the amount that the IRS is claiming  
3 was owed?

4 A. Correct.

5 Q. The date that is shown on here, the date of the notice,  
6 October 10<sup>th</sup>, 2016 is -- do you have any reason to believe that  
7 that's not the correct date when this notice would have been  
8 prepared and sent?

9 A. No, I have no reason to believe it's not the correct  
10 date.

11 Q. Okay. Were you surprised to receive this notice?

12 A. Very surprised.

13 Q. Why were you surprised?

14 A. Because I thought I was getting a refund.

15 Q. Generally, why did you believe that you were getting a  
16 refund?

17 A. Because Ron told me I was getting a refund. I got a  
18 text message from Ron that was from Derrick telling me I was  
19 getting a refund.

20 MR. SPENCER: Okay. Mr. Beckstrom asked me to take a  
21 moment to redact Social Security numbers on the face of No. 4.  
22 My apologies, because my understanding is that these are not  
23 public received. I didn't perceive there being an issue, but I  
24 think his request is appropriate.

25 THE COURT: Okay. I've crossed it off six times on

1 Exhibit 4.

2 MR. BECKSTROM: That seems to be my number, too, your  
3 Honor. I also just noticed Exhibit 1 has the same --

4 THE COURT: I'll do that -- I'll go back.

5 MR. BECKSTROM: The same issue.

6 THE COURT: Yeah, I'll go back. Exhibit 1, here's --  
7 Exhibit 1. Where is it on Exhibit 1? It's all over again?

8 MR. BECKSTROM: Yeah, it's in the top right hand corner,  
9 your Honor, and then also same thing down in the painted coupon  
10 area, it says it again.

11 THE COURT: Then at the top of page 2.

12 MR. BECKSTROM: Yeah, top of page 3.

13 THE COURT: Okay. If it's found anywhere else, tell me  
14 and we'll cross it off.

15 MR. BECKSTROM: Thank you, your Honor.

16 MR. SPENCER: I'd move to admit Exhibit 4.

17 THE COURT: Any objection?

18 MR. BECKSTROM: Exhibit 4 or Exhibit 5?

19 MR. SPENCER: Exhibit 4. I have not yet moved to admit  
20 Exhibit 4.

21 MR. BECKSTROM: With the redactions, no objection.

22 THE COURT: It's admitted.

23 (Exhibit No. 4 received into evidence)

24 Q. BY MR. SPENCER: Holly, I'm showing you now what's been  
25 marked Petitioner's Exhibit 5. Do you recognize that document?

1 A. Yes.

2 Q. How do you recognize it?

3 A. As the amended tax return for 2015.

4 Q. Okay. Now on the final page of this, it appears that it  
5 does not bear your signature or Ron's signature; is that correct?

6 A. Correct.

7 Q. But do you have personal knowledge of whether you later  
8 signed it?

9 A. I did.

10 Q. Do you know what time or about what time?

11 A. I don't remember what time.

12 Q. Okay. What -- well, do you have personal knowledge as  
13 to whether Ron signed it?

14 A. He did sign it.

15 Q. How do you know that Ron signed it?

16 A. Because we finally both met up in Page and we signed it  
17 together.

18 Q. Okay. So just for clarity, you're saying that you and  
19 Ron signed it on the same date?

20 A. Correct.

21 Q. Okay. Then did you return it to Derrick Clark?

22 A. No, I mailed them.

23 Q. Okay. On the -- and so for clarity, this is the amended  
24 return under which the obligation shown in Exhibit 4 arises; is  
25 that correct?

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A. Correct.

Q. Looking here at the amended return, on line 17 where it says total payments on the first page, do you see that?

A. Line 17, total payments made, yes.

Q. Yes. Is that the figure that was owed at the time the divorce action was filed; if you know?

A. I believe so, yes.

Q. Looking at line 6 under the column A titled original amount or as previously adjusted, do you see that figure there?

A. Line 6?

Q. Line 6, column A.

A. I see that figure.

Q. That -- is the figure you're looking at \$50,634?

A. Yes.

Q. Is it your understanding that that would have been the tax obligation under the original return that was filed?

MR. BECKSTROM: Objection, lack of foundation.

MR. SPENCER: I'll --

THE COURT: What more foundation do you want?

MR. BECKSTROM: Well, the issue here is how does she know? Does she have personal knowledge of that -- what he's asking?

THE COURT: I'll let you cross examine on that. Go ahead.

Q. BY MR. SPENCER: Do you know what that figure

1 represents, the 50,634?

2 A. It says tax liability.

3 Q. Okay. Do you know if that would have been the liability  
4 under the original return or the amended return?

5 A. The original return.

6 Q. Okay. Then there was an adjustment -- and adjustment  
7 downward in the amended return. You testified that you were  
8 informed at some point following the mediation that the amended  
9 return would result in a refund; is that your testimony?

10 A. Yes.

11 Q. Okay. So the amount that you anticipated would be  
12 refunded, is that shown here on the face of Exhibit 5?

13 A. Yes.

14 Q. Where do you see that?

15 A. That's on line 22.

16 Q. Okay. What is that amount?

17 A. It's \$7,900.

18 Q. In fact, did you receive a refund of \$7,900?

19 A. No.

20 Q. What is your understanding of the reason that you did  
21 not receive the refund shown on line 22?

22 A. Well, when I got the tax bill from the IRS, it shows --  
23 it showed that there was still out -- outstanding taxes owed.

24 Q. Okay. You're talking about -- you're referring to  
25 Exhibit 4 when you say the tax bill from the IRS?

1 A. Yes.

2 Q. Okay. Look at line 11, column C, the amount there  
3 \$47,017.

4 A. Yes.

5 Q. Do you know what that figure represents?

6 A. I think -- is that the amended tax part? My -- it's --  
7 it says the original tax was 54,917, and then minus the 79, comes  
8 to \$47,017.

9 Q. Okay. If you know, would that have been the amount of  
10 prepaid tax that the return assumes?

11 A. Tax that I had already paid in? I don't understand.

12 Q. Tax that would have already been paid in, yes.

13 A. Yes.

14 Q. So is that your understanding?

15 A. Yes.

16 Q. Okay. So then the difference -- is it your  
17 understanding that the difference there shown in column B is the  
18 same amount shown on line 21 and 22?

19 A. Yes.

20 MR. SPENCER: Move to admit Petitioner's 5.

21 THE COURT: Any objection?

22 MR. BECKSTROM: No objection, subject to redacting the  
23 two Social Security numbers on the first page.

24 THE COURT: Okay. It's admitted.

25 (Exhibit No. 5 received into evidence)

1 Q. BY MR. SPENCER: Now for clarity, as far as a time line,  
2 you said that the date shown in the mediation agreement of June  
3 16<sup>th</sup>, 2016 is a correct date. Is that your testimony?

4 A. Yes.

5 Q. So following the time of the mediation, the mediation  
6 and settlement agreement, was there a time within a limited time  
7 afterwards where you had communication with Ron Rosser about his  
8 intention to pay any of the outstanding tax obligation for 2015?

9 A. Yes.

10 Q. How did that occur? Was it in person or via text  
11 message?

12 A. Through text messaging.

13 Q. Okay. Could you describe for the Court -- well, first  
14 of all when you received that communication.

15 A. On June 18<sup>th</sup> right after mediation, I --

16 Q. When you say right after, was mediation the 18<sup>th</sup> or 16<sup>th</sup>?

17 A. The 16<sup>th</sup> was mediation, and I sent him a text on June  
18 18<sup>th</sup>.

19 Q. Okay. Did he express an intention with regard to the  
20 outstanding tax obligation at that time?

21 A. Yes.

22 Q. Could you summarize that for the Court? What was his  
23 statement of intention?

24 A. I asked him about the taxes, that they needed to be  
25 paid, and he said he understood it needed to be paid ASAP, and

1 that was on June 18<sup>th</sup>.

2 Q. So following that time on June 18<sup>th</sup>, was there a time  
3 that you became aware of Ron's intention to seek or pursue an  
4 amended return for 2015?

5 A. Yes.

6 Q. When did that occur?

7 MR. BECKSTROM: Your Honor, it appears she's reviewing  
8 those, the -- I don't know if she's refreshing her recollection  
9 or what she's doing there, but I think I'm entitled to see what  
10 she's looking at, if she's --

11 MR. SPENCER: I have no problem showing --

12 MR. BECKSTROM: -- going to use it to testify.

13 MR. SPENCER: -- it to him. I don't have an extra copy,  
14 but I --

15 THE COURT: Well, what is it you're looking at?

16 THE WITNESS: I'm just looking over the text messages  
17 between Ron and I.

18 THE COURT: Yes, you can certainly get a copy of those.  
19 Do you want to run a copy right now?

20 MR. BECKSTROM: Well, are we going to introduce it as an  
21 exhibit or --

22 MR. SPENCER: You know, I hadn't intended to, unless  
23 there's a big issue about -- on cross examination, but I'm fine  
24 with taking a recess and getting copies of those things.

25 MR. BECKSTROM: Maybe if I can approach, your Honor, I



1 can just take a look at what she has.

2 THE COURT: Go ahead.

3 MR. SPENCER: I'll get them for you.

4 MR. BECKSTROM: I don't know. There's a stack of them  
5 here. I have no idea if they're going to go through all of these  
6 are not.

7 THE COURT: Neither do I. What do you want to do?

8 MR. BECKSTROM: Well, I -- I think she ought to be able  
9 to try to testify without using aids, and if she can't, then --  
10 then we get to this stuff.

11 MR. SPENCER: What the law is, she can -- I believe it's  
12 an accurate statement of the law is she can bring any records  
13 that she wants to to the stand without being -- laying foundation  
14 for refreshing recollection. She can refer to them to refresh  
15 her recollection, as long as she's not reading from the documents  
16 and testifying about matters that she has no personal knowledge  
17 of, that that's appropriate, but I'm happy to give Mr. Beckstrom  
18 a copy if the Court would like to take a recess long enough to do  
19 that.

20 THE COURT: Okay. Let's take a recess long enough to  
21 get him a copy.

22 MR. BECKSTROM: Thank you, your Honor.

23 THE COURT: The Court will be in recess.

24 (Short recess taken)

25 MR. SPENCER: Have you gone back on the record?

1 THE COURT: We're on the record. Go ahead.

2 MR. SPENCER: For the record, I've given respondent's  
3 attorney, Mr. Beckstrom, a copy of the papers that petitioner has  
4 for use in refreshing her recollection.

5 Q. BY MR. SPENCER: I can't remember exactly where I left  
6 off, but Holly, calling your attention to Exhibit 5, a portion of  
7 the amended return, it appears that --

8 A. I'm sorry, which one is No. 5?

9 Q. The amended return portion of it.

10 A. This one?

11 Q. Yes. Do you feel you recognize the signature of Derrick  
12 Clark?

13 A. Yes.

14 Q. Okay. Do you see the signature of Derrick Clark there  
15 on the final page and the date of July 16, 2016? Do you see  
16 that?

17 A. Yes.

18 Q. My question is, do you recall whether you first saw the  
19 amended return before or after that date?

20 A. After.

21 Q. Okay. When did you first see a copy of the amended  
22 return?

23 A. I believe it had to be late July. I don't recollect the  
24 date exactly, but late July.

25 Q. Okay. Why do you believe it was late July?

1           A.    Well, I had gotten a couple emails that had the returns  
2 on them, but you had to open a file, and I could never open the  
3 files on them.

4           Q.    Who are the emails from?

5           A.    They were either from Ron or from Derrick.

6           Q.    Do you know when you received those?

7           A.    The first one -- the Eagle Solutions one, I don't  
8 believe I saw until very late July because I could never open it.  
9 I saw the Utah and the Arizona --

10          Q.    Okay.

11          A.    -- maybe around --

12          Q.    And so -- I didn't mean to interrupt.  Finish.

13          A.    Sorry, maybe around the 21<sup>st</sup>, 22<sup>nd</sup>.

14          Q.    Okay.  When you say you first saw them, is that when  
15 they were sent to you, or is that when you were able to  
16 successfully open it?

17          A.    I'm -- probably because I was able to open it, but Eagle  
18 Solutions was never on there.

19          Q.    Okay.  Could you --

20          A.    This one right here, this amended --

21          Q.    Exhibit 5?

22          A.    Yes.

23          Q.    It was not the attachments that were sent to you?

24          A.    It was not in the attachments.

25          Q.    What were the attachments?

1 A. Utah and Arizona.

2 Q. Okay. So you believe that you first saw Exhibit 5 late  
3 in July. Why do you -- do you mean that you actually saw it?  
4 You're able to read it and look at the figures?

5 A. Yes.

6 Q. When did that happen?

7 A. I'm going to say it's -- I'm going to say the 28<sup>th</sup>, 29<sup>th</sup>  
8 before I actually saw Eagle Solutions taxes.

9 Q. Okay. Before you actually saw the document that is  
10 Petitioner's Exhibit 5, did you hear a report that there would be  
11 a refund under the amended return?

12 A. Yes.

13 Q. Who was it that told you that?

14 A. Ron.

15 Q. When did that happen?

16 A. July 20<sup>th</sup>. I got a text from Ron that was forwarded from  
17 Derrick, and it just says that -- just states the refunds.

18 Q. Okay. What were the refunds stated?

19 A. IRS, 7900, Arizona 767 and Utah 202.

20 Q. Okay. Did -- what happened to those state refunds? Did  
21 they come to fruition? Was there actually a state refund from  
22 Arizona and Utah?

23 A. There was -- there was refunds from them, yes.

24 Q. What happened to the money?

25 A. The money was mailed to me in a check.

1 Q. But you didn't get the federal refund shown in the email  
2 that you received about that time?

3 A. No.

4 Q. Do you recall if you signed the amended return before  
5 or after you signed a stipulation to enter a divorce?

6 A. I don't recall.

7 Q. In making the decision -- let me back up. Okay. Did  
8 you pay for the services of Derrick Clark for preparing the  
9 amended return?

10 A. I did.

11 Q. Why did you do that?

12 A. Because I thought I was getting a refund.

13 Q. Okay. So did you pay that fee in reliance upon the  
14 expectation that you would get a refund?

15 A. Yes.

16 Q. If you knew that you were going to have an obligation of  
17 approximately \$7100, would you have agreed to pay for those  
18 services under those circumstances?

19 A. No.

20 Q. In signing the amended return, were you operating with  
21 the understanding that the amounts shown on line 11 had been  
22 paid?

23 A. Yes.

24 Q. Following the time of the mediation on June 16<sup>th</sup>, or at  
25 any other time, did you ever have a conversation through any

1 medium with Ron Rosser in which he said to you, "Hey, I did not  
2 pay any taxes under the mediation agreement toward the 2015  
3 obligation."

4 A. He never said that to me.

5 Q. Did you ever say to him, "I excuse you from any  
6 obligation to pay any portion of the 2015 tax obligation for any  
7 reason"?

8 A. No.

9 Q. Did you ever agree with him either verbally or in  
10 writing that you were waiving your right to have him contribute  
11 to that obligation?

12 A. No.

13 Q. Did you in fact believe that you would -- excuse me, let  
14 me back up. At the time that -- about the time that you signed  
15 Exhibit 5, were you in fact aware that you were going to have the  
16 obligation of \$7174 shown in Exhibit 4, but that you signed the  
17 return in Exhibit 5 anyway?

18 A. No. No, I was always positive I was going to get a  
19 refund.

20 Q. Now in your emails there, a copy of which I've given to  
21 Mr. Beckstrom, you're aware -- excuse me, I said emails. I  
22 should have said text messages. You're aware that there was a  
23 text message sent by you on July 29<sup>th</sup> that is in the pleadings.  
24 I'll represent it says, "Send me an email on what taxes come back  
25 to me and where the refund will go. I want the refund to go back

1 to Eagle Solutions, Arizona and Utah, and how you'll be paying me  
2 the difference. Out of the IPC check works for me. Stop  
3 pressuring me until I know all the facts, and I have from you in  
4 writing. I'm working and can't get upset every day with you."  
5 So you sent that text message; is that correct?

6 A. Correct.

7 Q. And you sent it to Ron Rosser?

8 A. Yes.

9 Q. You sent it on July 29<sup>th</sup>, 2016; is that correct?

10 A. Correct.

11 Q. Do you recall the time that you sent that text message  
12 if you had actually seen the amended return shown in Exhibit 5?

13 A. I don't believe I had actually seen the amended return  
14 for Eagle Solutions yet.

15 Q. Okay. Why do you believe that?

16 A. Because I couldn't open the file.

17 Q. Okay. That's why you hadn't actually seen it, but as  
18 you were here today, what is it about your recollection that  
19 makes you to believe that you sent that text message before you  
20 actually saw the amended return?

21 A. Because Ron kept pressuring me to get the divorce signed  
22 and to get everything signed.

23 Q. Okay. When you say he kept pressuring you, could you  
24 elaborate? Could you be more specific? What was he doing?

25 A. I -- that's what Ron does. He pressures and he bullies.

1 Q. But specifically without going into generalizations, we  
2 want to avoid that, can you tell the Court what happened here  
3 when you say so -- my correct understanding, he was encouraging  
4 you to hurry and -- to hurry up and approve the final divorce  
5 papers?

6 A. Yes.

7 Q. Was he doing that prior to the time that you had  
8 actually seen Exhibit 5?

9 A. Yes.

10 Q. Was he doing that prior to the time that you actually  
11 signed it?

12 A. Yes.

13 Q. Okay. Prior to the time that you say he was encouraging  
14 you to hurry up, he had represented to you that you would in fact  
15 receive a refund?

16 A. Oh, definitely.

17 Q. Calling your attention back to the email of July 29<sup>th</sup>  
18 that's in the respondent's pleadings, do you recall what you were  
19 referring to, what you're describing in that text message? I  
20 said email again, but it's actually a text message. Excuse me.

21 A. Text message.

22 Q. What were you talking about?

23 THE COURT: What day?

24 MR. SPENCER: Pardon?

25 THE COURT: What date?



1 MR. SPENCER: July 29<sup>th</sup>, 2016.

2 THE COURT: Okay.

3 THE WITNESS: Well, I was referring to -- I didn't want  
4 any checks -- paper checks coming back to me.

5 Q. BY MR. SPENCER: Is there a reason for that?

6 A. Because I wanted them rolled over into the next year.

7 Q. Okay.

8 A. There was several -- there was several conversations Ron  
9 and I had had through the months on other bills that he owed me,  
10 so it could have been anything like that.

11 Q. Okay. Specifically there's a sentence in that text  
12 message, "And how will you be paying me the difference? Out of  
13 the IPC check works for me." Do you recall what you were  
14 referring to?

15 A. I don't.

16 Q. Now before the time that you participated in signing the  
17 amended return, you had actually reviewed the original return; is  
18 that correct?

19 A. Yes.

20 Q. So you knew at the time that the divorce was filed that  
21 you had an outstanding tax obligation?

22 A. Yes.

23 Q. Did you have a reason to know at that time that Ron  
24 Rosser was also aware of the outstanding tax obligation?

25 A. Yes.

1 Q. Is it your understanding that if Ron Rosser would have  
2 paid 50 percent of the outstanding obligation under the original  
3 2015 return, he would have paid half that obligation under the  
4 mediation agreement, that the balance owing would have then been  
5 zero?

6 A. Yes.

7 Q. Do you recall seeing emails from me that were forwarded  
8 to you that contained discussions between Mr. Beckstrom and I  
9 about a tax refund?

10 A. Yes.

11 Q. Was your expectation to receive the \$7900 shown on line  
12 22 in Exhibit 5 based, at least in part, upon your review of  
13 those emails?

14 A. Yes.

15 MR. SPENCER: Your Honor, in the interest of time, I'm  
16 going to just propose that I hold in abeyance about any evidence  
17 or testimony about what attorney's fees or costs that she's  
18 incurred.

19 THE COURT: Okay. That's fine.

20 MR. SPENCER: That's all I have.

21 THE COURT: Want to ask her any questions?

22 MR. BECKSTROM: Yes, your Honor. Your Honor, before I  
23 get going, I had some exhibit binders that I'd like to circulate  
24 to the Court and the witness.

25 THE COURT: Okay.

1 MR. BECKSTROM: Petitioner's Counsel. Just for the  
2 record, I've previously marked these exhibits in the bottom 1  
3 through I think 10 or 11, and they have Respondent 1 on them, 1  
4 through 9.

5 THE COURT: It's not how I like to do it, but that's  
6 what you did.

7 MR. BECKSTROM: We can redo it if you want.

8 THE COURT: What I'd prefer you to do is start with No.  
9 10.

10 MR. BECKSTROM: Okay.

11 THE COURT: And just -- his exhibits are No. 1 through  
12 9, and yours are No. 10 through whatever. So just change each  
13 one of those to add a zero, we're fine.

14 MR. BECKSTROM: Yeah. Yeah.

15 THE COURT: Or whatever, you know.

16 (Counsel confers with court clerk)

17 MR. BECKSTROM: So you want me to start at No. 10?

18 THE COURT: Yeah. So it would be No. 10, 11, 12, 13,  
19 14, 15. How many you got?

20 MR. SPENCER: There should be five there.

21 THE COURT: It looks like you've got --

22 MR. BECKSTROM: Yeah, they're just I think 10 or 11.

23 THE COURT: You've got 10, so that would be No. 20.

24 MR. BECKSTROM: Yeah.

25 THE COURT: Or whatever.

1 MR. BECKSTROM: Yeah, it's 10. So it should be No. 10  
2 through 19.

3 THE COURT: Okay.

4 MR. BECKSTROM: If my sloppy handwriting can even be  
5 read. I'll pass (inaudible) exhibit binder.

6 CROSS EXAMINATION

7 BY MR. BECKSTROM:

8 Q. Good afternoon, Ms. Rosser. Is it all right if I call  
9 you Holly?

10 A. That's fine.

11 Q. Can you turn to Respondent's Exhibit 10, please, which  
12 would be in your binder of will be -- the tab will say Respondent  
13 1.

14 A. Okay. Of No. 1?

15 Q. Yes. Do you see that there? There will be a tab on --  
16 a sticker at the bottom that says Respondent's 10. Do you see  
17 that?

18 A. Okay.

19 Q. Do you see that? Okay. This would be the stipulated  
20 motion for entry of findings of fact and conclusions of law and  
21 final decree of divorce, correct?

22 A. Correct.

23 Q. You -- if you'll turn to the very last page of this  
24 exhibit, is that your signature on the last page?

25 A. Yes.

1 Q. Now it says dated the blank day of June, 2016. Do you  
2 know when you actually signed this document?

3 A. No.

4 Q. It wasn't in June, was it?

5 A. Huh?

6 Q. It wasn't in June, right?

7 A. No.

8 Q. If I told you August 5<sup>th</sup>, would that be accurate? If it  
9 helps you to look at the next -- the page before the last one.

10 A. Okay.

11 Q. I'll represent that it appears that Ron Rosser signed  
12 this on August 4<sup>th</sup>, correct?

13 A. Correct.

14 Q. Does that help refresh your recollection as to when you  
15 might have signed?

16 A. No.

17 Q. Do you remember signing before or after Ron?

18 A. Probably after, I guess. It doesn't give a date here.

19 Q. Sure. It's your understanding you signed after Ron,  
20 correct?

21 A. Well, it doesn't give a date, so --

22 Q. So do you believe you signed before or after Ron?

23 A. And Ron says August 4<sup>th</sup>?

24 Q. Correct.

25 A. Correct.

1 Q. Do you believe you signed before or after Ron?

2 A. I don't remember.

3 Q. You don't remember, okay. In either event, you signed  
4 this document, correct?

5 A. Correct.

6 Q. Draw your attention to page No. 14 of this exhibit,  
7 which is paragraph 32-R towards the middle -- the latter half of  
8 the page 14.

9 A. Okay.

10 Q. Let me know when you're there.

11 A. I'm there.

12 Q. Okay. Are you familiar with this paragraph?

13 A. Yes.

14 Q. Did you read this stipulation before you signed it?

15 A. I may have read it.

16 Q. Do you recall reading paragraph 32-R?

17 A. Yes.

18 Q. You would agree with me that this paragraph indicates  
19 that an amended tax return will be prepared and filed, correct?

20 A. Correct.

21 Q. It also says that after the return is filed, you will  
22 ben entitled to receive any refund resulting from the amended  
23 returns, and shall also be responsible to pay any taxes liability  
24 resulting to any of the parties for the year 2015, correct?

25 A. Correct.

1 Q. Did I quote that correctly?

2 A. Yeah.

3 Q. You read that before you signed it, right?

4 A. Right.

5 Q. Is there anything in this stipulation that requires Ron  
6 to pay one half of any tax obligation?

7 A. Not in this one.

8 Q. Okay. You're taking the position that -- in this case  
9 that at the time you signed this stipulation, you didn't know  
10 that the amended return would not result in a refund from the  
11 IRS, correct?

12 A. I always believed the refund would -- Ron told me there  
13 would be a refund.

14 Q. You reviewed the amended returns with your accountant,  
15 correct?

16 A. No.

17 Q. You did not?

18 A. No. My accountant reviewed them.

19 Q. Okay.

20 A. I was not with him, and he reviewed them, but --

21 Q. And did he give you advice on the proposed amended  
22 return?

23 A. He told me there would be a refund.

24 MR. BECKSTROM: I'll move to admit Respondent's Exhibit  
25 1.

1 THE COURT: Any objection?

2 MR. SPENCER: Your Honor, it's a record. I feel it's  
3 probably cumulative to admit as an exhibit, that there's evidence  
4 that she's authenticated her signature in other testimony.

5 THE COURT: It's admitted.

6 (Exhibit No. 10 received into evidence)

7 MR. BECKSTROM: Thank you, your Honor.

8 Q. BY MR. BECKSTROM: I want to draw your attention now to  
9 Respondent's Exhibit 18, I believe, which would be Exhibit 9 on  
10 the tabs.

11 A. Okay.

12 MR. BECKSTROM: If I may approach, your Honor, just to  
13 make sure she --

14 THE COURT: Go right ahead.

15 MR. BECKSTROM: It should be Kohler & Eyre.

16 Q. BY MR. BECKSTROM: In front of you you have Exhibit 18,  
17 correct? Respondent's Exhibit 18?

18 A. Yes.

19 Q. Can you tell me, do you use the email address  
20 hollysubway1@gmail.com?

21 A. Yes.

22 Q. Do you recall sending this email to -- it looks like  
23 Debra Kohler or debra@kohlerandeyre?

24 A. Yes.

25 Q. This appears to be an email that you sent dated July



1 20<sup>th</sup>, 2016, correct?

2 A. Correct.

3 Q. In this email, would you agree with me that you say, "I  
4 don't understand how we can go from owing 60 to getting another  
5 refund, and was my 40-K that I paid in towards these taxes?" See  
6 that there? Do you agree with me that's your statement?

7 A. Yeah.

8 Q. Okay. When you say 60, you're saying 60,000, correct?

9 A. Yes.

10 Q. So as of July 20<sup>th</sup>, you were already asking your  
11 accountant to tell you how you could go from such a huge  
12 liability to a refund, right?

13 A. Because in Ron's email he told me I was getting a  
14 refund. I still couldn't open the taxes to look at them myself.

15 Q. Okay. In direct testimony that you just gave, you  
16 indicated that you had not seen the Eagle Solutions tax return  
17 because you couldn't open it prior to the July 29 text, correct?

18 A. Correct. I'm -- correct.

19 Q. But you would agree with me that we're not talking about  
20 the Eagle Solutions tax return as far as the refund, right?

21 A. We are talking about the Eagle Solutions.

22 Q. But what is Exhibit 5? Is that an Eagle Solutions tax  
23 return, or is that an individual tax return?

24 A. Your -- all of your corporate goes right into your  
25 personal, so --

1 Q. Okay. Well, look --

2 A. -- it Eagle Solutions is --

3 Q. Look at Exhibit 5.

4 A. -- me and Ron.

5 Q. If you can look at Exhibit 5, please.

6 A. Okay.

7 Q. Is it your understanding that that's the -- your  
8 personal -- amended personal tax return?

9 A. Yes.

10 Q. That's not your Eagle Solutions tax return, correct?

11 A. From my understanding, all corporate taxes flow into  
12 your --

13 Q. It's a yes or no question, ma'am.

14 MR. SPENCER: Objection, your Honor. He's badgering the  
15 witness. She should be allowed to answer. It's not a yes or no  
16 question necessarily.

17 THE COURT: Well, the problem is if she answers yes or  
18 no, you'll have to ask some more questions, okay, because I'm not  
19 clear what's going on with just a yes or no. So if you want to  
20 insist that she answer just yes or no, that's fine, but then I  
21 won't have a clue what you're talking about.

22 MR. BECKSTROM: All right. Well --

23 THE COURT: But you're welcome to right ahead and answer  
24 the question and insist --

25 MR. BECKSTROM: If she wants to clarify, she can.

1 THE COURT: Ask it again.

2 THE WITNESS: All of our corporate taxes flow right into  
3 our personal taxes.

4 Q. BY MR. BECKSTROM: Okay.

5 A. I view them as one in the same.

6 MR. BECKSTROM: Your Honor, I'd move to admit  
7 Respondent's Exhibit 18.

8 THE COURT: Any objection?

9 MR. SPENCER: No objection.

10 THE COURT: It's admitted.

11 (Exhibit No. 18 received into evidence)

12 Q. BY MR. BECKSTROM: Now Holly, if you will turn to  
13 Respondent's Exhibit 12, which will be exhibit -- tab exhibit of  
14 Exhibit 3.

15 A. Okay.

16 Q. Is this the July 29<sup>th</sup> tax -- or excuse me, July 29<sup>th</sup> text  
17 message that you were referring to in your direct examination  
18 with Ron?

19 A. Say that again.

20 Q. Is this -- does this text message represent your -- the  
21 text message that you were referring to that -- on July 29<sup>th</sup>  
22 between yourself and Ron Rosser?

23 A. I sent this to him, yeah.

24 Q. Okay. That's your --

25 A. If that's what you're asking.

1 Q. That -- the number -- the phone number at the top of  
2 this exhibit is your phone number, correct?

3 A. Correct.

4 Q. 435-690-9039, right?

5 A. Right.

6 Q. So the lighter colored text on this page are your texts,  
7 correct?

8 A. Well, I guess the ones that are on the left hand side  
9 are mine?

10 Q. That's fine, if you want to identify it that way. The  
11 ones are the right are Mr. Rosser's, correct?

12 A. Right.

13 Q. Okay. It looks like you've sent this text on -- at  
14 10:52 a.m. on July 29<sup>th</sup>, right?

15 A. Right.

16 Q. Now the first part of this text message you say, "Send  
17 me an email on what taxes come back to me and where the refund  
18 will go." So in that phrase, you would agree with me that you're  
19 talking about taxes coming back to you and refunds, correct?

20 A. Correct.

21 Q. At that point in time, it was your understanding that  
22 you were getting a refund from Arizona and Utah, correct?

23 A. Yes.

24 Q. In fact, you say that, that you want the refund to go  
25 back to Eagle Solutions, Arizona and Utah, right?

1 A. Right.

2 Q. Okay. Then you go on to say, "How will you be paying me  
3 the difference?" On direct testimony you said you don't recall  
4 what you meant by that, right? Isn't that your testimony?

5 A. Right. I hadn't seen Eagle Solutions yet because I  
6 can't open it.

7 Q. But according to your testimony, you were told by Ron  
8 that there was a refund?

9 A. Yes, he told me there was a refund.

10 Q. And at least as of August -- excuse me, July 20<sup>th</sup>,  
11 2016, you were interacting with your accountant to figure out the  
12 state -- true state of the refund, the returns, correct -- the  
13 amended returns?

14 A. Right.

15 Q. Right.

16 A. I still couldn't open the Eagle Solutions.

17 MR. BECKSTROM: Your Honor, I'd move to admit  
18 Respondent's Exhibit 12.

19 MR. SPENCER: No objection.

20 THE WITNESS: I also asked Ron --

21 THE COURT: Just a minute.

22 THE WITNESS: Oh, I'm sorry.

23 THE COURT: Wait a second. No objection?

24 MR. SPENCER: No objection.

25 THE COURT: It's admitted.

1 (Exhibit No. 12 received into evidence)

2 THE WITNESS: Okay.

3 THE COURT: Wait until a question is asked, ma'am.

4 THE WITNESS: I'm sorry.

5 Q. BY MR. BECKSTROM: You've testified that you had lots of  
6 taxes going on at that point in time, right? Isn't that what you  
7 testified on direct?

8 A. That I had what?

9 Q. You had lots of tax issues that you were talking with  
10 with Ron at that -- at the point in time this text was sent,  
11 right?

12 A. Bills, a lot of bills.

13 Q. A lot of bills?

14 A. Yeah.

15 Q. A lot of bills, okay.

16 A. Uh-huh.

17 Q. And so --

18 A. That he was going to pay me for.

19 Q. So does this text message refer any other bills other  
20 than tax returns?

21 A. Trash bills, dumpster bills.

22 Q. Does it say anything about dumpster bills or trash bills  
23 in this text message?

24 A. Not in this one, no.

25 Q. Okay.

1           A.    It does in previous ones.  We had been arguing about the  
2 dumpsters, so -- and paying bills.

3           Q.    You would agree with me that Ron responded to your text  
4 message on Exhibit -- Exhibit 12 to say, "See you in court,"  
5 right?

6           A.    Yeah.  That's what he said.

7           Q.    So at that point in time, you had an understanding that  
8 he did not agree that he had to pay you the difference of  
9 anything, right?

10          A.    No, I didn't understand that at all.  He said see you in  
11 court.

12          Q.    Now if you'll turn to Respondent's Exhibit 14, which  
13 would be Exhibit 5 in the book.  If you'll let me know when  
14 you're to that page.

15          A.    I'm to that page.

16          Q.    This appears to be an email from yourself to Derrick  
17 Clark, correct?

18          A.    Correct.

19          Q.    And it's dated August 17<sup>th</sup>, 2016 at 1:30 p.m., correct?

20          A.    Correct.

21          Q.    In the last paragraph of this email, you say, "What  
22 happens to the penalties and interest accruing?  Do we still pay  
23 those until the amended returns are filed?"  Excuse me, "amended  
24 are filed," to quote it exactly.  Is that correct?

25          A.    Correct.  It says that.

1 Q. Why would you be asking about penalties and interest if  
2 you thought you were getting a refund?

3 A. Because we hadn't filed the amended taxes yet, and we  
4 still owed taxes from the original taxes that were accruing  
5 interest and penalties every day, and I was paying them, and I  
6 wanted to know if once we filed the amended taxes, would all  
7 those go away, or would I -- Ron and I still have to keep paying.

8 Q. But would you agree with me that if --

9 A. Would we have to keep paying those.

10 Q. -- you -- I'm sorry. I didn't mean to interrupt you.

11 Would you agree with me that if you were to get -- file an  
12 amended return that gave you a refund that there would be no  
13 penalties and interest accruing?

14 MR. SPENCER: Objection, calls for a legal conclusion.

15 THE COURT: Okay. Well, I know the answer to the  
16 question, but I don't know what she was going to say. I'm going  
17 to let her go ahead and answer the question, if you know the  
18 answer.

19 THE WITNESS: Okay. Ask me the question again.

20 Q. BY MR. BECKSTROM: You would agree with me that if you  
21 file an amended tax return that provides you a refund, there  
22 would be no penalties and interest accruing, would there?

23 A. No, I don't agree with you. I don't know that question.

24 Q. So you're not sure?

25 A. I know we owed taxes, and I didn't know by amending them



1 if it wiped the slate clean from April to when we filed the  
2 amended.

3 MR. BECKSTROM: If you'll turn to the next exhibit,  
4 which will be I think Respondent's Exhibit 14, right, labeled as  
5 Exhibit 5. I'm sorry, Exhibit 15. First of all, let me back up.  
6 Sorry, your Honor. I'll move to admit Exhibit 14.

7 MR. SPENCER: No objection.

8 THE COURT: Admitted.

9 (Exhibit No. 14 received into evidence)

10 Q. BY MR. BECKSTROM: Now move to Exhibit 15, which is  
11 Exhibit 6 in your binder.

12 A. Okay.

13 Q. Have you got that page, ma'am?

14 A. Uh-huh.

15 Q. This appears to be an email from you dated August 22<sup>nd</sup>,  
16 2016 to Derrick Clark, correct?

17 A. Right.

18 Q. It looks like in this email you indicate that both you  
19 and Ron have signed the four taxes, correct?

20 A. It looks like it, yeah.

21 Q. And you mailed them today, right?

22 A. Yes.

23 Q. So when you say mailed them, you mailed them to the IRS?

24 A. It looks like it, yes.

25 Q. So does that help refresh your recollection as to when

1 you signed and sent the returns in?

2 A. It looks like it, yes.

3 Q. Prior to sending those returns in, you had gotten all  
4 the advice you wanted from Kohler & Eyres, your accountant,  
5 right?

6 A. There wasn't much advice from Kohler & Eyre. They just  
7 looked at the taxes. They said I was getting a refund.

8 Q. But you were -- but you got the advice that you were  
9 looking for, right?

10 A. Yes.

11 Q. Had all your questions answered?

12 A. That I was getting a refund, yes.

13 Q. Because you were -- back on July 20<sup>th</sup>, you were asking  
14 them how you could go from a \$60,000 liability to a refund,  
15 right?

16 A. I asked them that. They did not give me the full answer  
17 back then.

18 MR. BECKSTROM: If you'll turn to Respondent's Exhibit  
19 16, which would be your tab Exhibit 7 -- and I'll move to admit  
20 Exhibit 15, your Honor.

21 THE COURT: Any objection?

22 MR. SPENCER: No objection.

23 THE COURT: They're admitted.

24 (Exhibit No. 15 received into evidence)

25 Q. BY MR. BECKSTROM: Without getting into any specific

1 conversations that you had with your attorney, because I don't  
2 want to get into any attorney/client privilege, but did you and  
3 your attorney have a relationship where he would regularly  
4 forward you emails that he either sent or received in this case?

5 A. He -- yes, he sent me some emails.

6 Q. Some, but not all?

7 A. Not -- I couldn't guarantee that he didn't send me all  
8 of them.

9 Q. If you'll count the pages because these num -- these  
10 pages are not numbered, if you'll go to -- count to page 16. The  
11 top -- just to make sure we're on the top page, it should be an  
12 email from Stephen Spencer to myself dated Tuesday, July 12<sup>th</sup>, at  
13 3:57 p.m. Are you on the right page there?

14 A. I don't think so. July what?

15 Q. July 12<sup>th</sup>.

16 A. The 12<sup>th</sup>. No, I'm on a different one.

17 THE COURT: July 12<sup>th</sup>?

18 MR. BECKSTROM: Yeah. If I may approach, your Honor, it  
19 may be helpful.

20 THE WITNESS: This one?

21 MR. BECKSTROM: Yeah.

22 THE WITNESS: Okay. I was on page 16.

23 MR. BECKSTROM: This one.

24 MR. SPENCER: Your Honor, in the interest of efficiency,  
25 it may be premature, I'm going to object to reading -- reading

1 from this or having her read from it on the grounds that it  
2 hasn't been received, it hasn't been admitted, and there's no  
3 foundation anyway to show that she may have personal knowledge  
4 for any of the matters contained in it.

5 THE COURT: So are you saying this is communication  
6 between two attorneys try to work something out, not necessarily  
7 testimony of anybody.

8 MR. BECKSTROM: Well, your Honor, this has already been  
9 filed with the Court relative to the recent motions that were  
10 filed, and so what I'm asking is I may not even move to enter --  
11 admit this. I may just be talking about, you know, did you get  
12 this email and what knowledge do you have.

13 THE COURT: But --

14 MR. SPENCER: Well, if that's the question, I suppose I  
15 have -- you know, I -- I wouldn't object to it, but I'm concerned  
16 that, you know, he would argue with her about facts that are  
17 stated in the email where she otherwise would have no personal  
18 knowledge of it. So we can proceed that way.

19 THE COURT: If you want to ask if she received it -- and  
20 I agree with him. I don't want you two's testimony, okay? I  
21 want these two people's testimony. If one of you says well, this  
22 or that, I don't know that that's really your testimony -- or  
23 their testimony. You can ask her if she received it, I guess,  
24 because he didn't object to that.

25 MR. BECKSTROM: Okay. Thanks, your Honor.

1 Q. BY MR. BECKSTROM: Ms. Rosser, with respect to the  
2 document we're looking at here, Exhibit 7, page 16, the first  
3 email there is an email from Stephen Spencer to myself dated  
4 Tuesday, July 12<sup>th</sup>, 2016. Do you see that?

5 A. Yeah.

6 Q. Do you recall that email being forwarded to you?

7 A. I don't.

8 Q. Do you recall being forwarded the next email down, which  
9 is an email from myself to Stephen Spencer, again dated July 12<sup>th</sup>,  
10 2016. Do you recall receiving that from your attorney.

11 A. No.

12 Q. In the discussions between the mediation and the time  
13 that the stipulation was signed, do you ever recall having a  
14 discussion regarding an equalization payment being made between  
15 Ron -- by Ron to you?

16 A. Say that again.

17 Q. Do you ever recall between the time of the mediation and  
18 the time the stipulation was signed having a discussion or  
19 negotiation regarding the possibility of Ron paying you an  
20 equalization payment after the amended return was filed?

21 A. No.

22 Q. You don't recall that?

23 A. Not that I recall. An equalization as meaning what?

24 Q. You don't recall the term equalization being used in the  
25 discussions?

1 A. Meaning what? I guess I don't understand what you mean.

2 Q. Well, do you ever recall there being a circumstance  
3 where an amended return was going to be filed, but you had  
4 already paid your tax and Ron had not, so the amended return  
5 would reduce your liability, and thus require Ron to pay you some  
6 money that you had already paid to the IRS. Do you recall that  
7 circumstance coming up in the negotiations?

8 A. No.

9 Q. Now if you'll turn to the next exhibit, which would be  
10 Respondent's Exhibit 17, Exhibit 8 is your tab.

11 A. Okay.

12 Q. This appears to be the final decree of divorce that was  
13 entered in this case, correct?

14 A. Okay, yes.

15 Q. On the last page of this document it looks like your  
16 attorney electronically signed this document, right?

17 A. On the last page?

18 Q. Yes.

19 A. Okay.

20 Q. You see that there?

21 A. Okay. So --

22 Q. Did you authorize your attorney --

23 A. -- this one?

24 MR. BECKSTROM: If I may approach?

25 THE WITNESS: This page right here?

1 MR. BECKSTROM: Yeah.

2 THE WITNESS: Okay.

3 Q. BY MR. BECKSTROM: Do you see the -- do you see the line  
4 there that said Spencer Law Office, and then it says SS, Stephen  
5 Spencer?

6 A. I do.

7 Q. Do you understand that to be an electronic signature?

8 A. Yes.

9 Q. Did you authorize Mr. Spencer to sign this document?

10 A. Yes.

11 Q. Did you read this document before you authorized him to  
12 sign it?

13 A. I believe so, yes.

14 Q. Did you disagree with any of the terms that were  
15 contained in the document?

16 A. No.

17 MR. BECKSTROM: Your Honor, I don't know how you want me  
18 to handle this. I have just a few questions that are related to  
19 Ron's order to show cause. I mean literally --

20 THE COURT: Let's do them right now.

21 MR. BECKSTROM: Because I've got -- it's probably five  
22 minutes or less.

23 THE COURT: Let's do it right now. Okay. I'll hold you  
24 to the five minutes.

25 MR. BECKSTROM: All right. Is that --

1 THE COURT: Yeah, that's -- you don't mind, Mr. Spencer,  
2 if he --

3 MR. SPENCER: No.

4 THE COURT: Okay. Go ahead. Ask your questions.

5 Q. BY MR. BECKSTROM: If you'll turn back in the exhibit  
6 binder now to what is Exhibit 4, which would be Exhibit 13 --  
7 labeled as Exhibit 13, but the tab is Exhibit 4, let me know when  
8 you're there.

9 A. Okay.

10 Q. It should be a Dr. Pepper check is the first page.

11 A. Yes.

12 Q. You don't dispute the fact that the stipulation in the  
13 decree award the Dr. Pepper and IPC rebates to Ron from the years  
14 2016 through 2020, correct?

15 A. Correct.

16 Q. You also don't dispute the fact that you were required  
17 to pay over any rebate checks that you received from IPC or Dr.  
18 Pepper within 10 days of your receipt of those funds, correct?

19 A. Correct.

20 Q. Okay. Looking at -- looking at the first page of this  
21 exhibit, this appears to be a check from Dr. Pepper made payable  
22 to you, correct?

23 A. Correct.

24 Q. In the amount of \$766.68.

25 A. Uh-huh. Yes.



1 Q. It's dated September 1<sup>st</sup>, 2016, right?

2 A. Yes. I did not receive this check. It was lost in the  
3 mail and a new one came months later.

4 Q. Okay, for the same amount?

5 A. Yes.

6 Q. When do you -- when did you receive it?

7 A. I don't know. It was months later. I finally got a  
8 letter from them stating that the check had never been cashed or  
9 something, and they were going to issue a new one.

10 Q. When you say months, are you saying you got it sometime  
11 later in 2016?

12 A. Maybe. I'm guessing, yes.

13 Q. Okay. So the second page, then, is a check from  
14 Independent Purchasing Cooperative, which is IPC, right?

15 MR. SPENCER: Forgive me, Counsel. What tab is this?

16 MR. BECKSTROM: It is tab 4, Exhibit 13.

17 Q. BY MR. BECKSTROM: On the second page there then it's an  
18 IPC check made payable to Eagle Solutions, and it's dated  
19 December 1<sup>st</sup>, 2016, correct?

20 A. Correct.

21 Q. And it's payable in the amount of \$3,394.29?

22 A. Correct.

23 Q. Did you receive this check?

24 A. Yes.

25 Q. Okay. Turning to the third page, this appears to be

1 for -- in abbreviation terms a check from IPC to Eagle Solutions,  
2 correct?

3 A. Correct.

4 Q. Dated December 1<sup>st</sup>, 2016?

5 A. Correct.

6 Q. In the amount of \$4,618.31?

7 A. Yes.

8 Q. Right. You received this check, correct?

9 A. Correct.

10 Q. Do you recall when you received this check?

11 A. I don't think I received these checks until sometime  
12 maybe -- you know, it was probably January or February.

13 Q. Of '17?

14 A. Yes.

15 Q. That would have included the second page of this  
16 exhibit?

17 A. The second page?

18 Q. Yeah, the check from IPC to Eagle Solutions for  
19 \$3,394.29?

20 A. Yeah.

21 Q. Did you get all of them at the same time?

22 A. I believe so.

23 Q. Okay. Then last check here on page 4 of this exhibit is  
24 another check from IPC to Eagle Solutions again dated December  
25 1<sup>st</sup>, 2016, correct?

1 A. Correct.

2 Q. It's payable in the amount of \$4,055.98?

3 A. Correct.

4 Q. Again, you received this check?

5 A. Yes.

6 Q. You haven't paid any of these monies over to Mr. Rosser,  
7 have you?

8 A. No.

9 MR. BECKSTROM: Your Honor, just give me one moment so I  
10 can look over my notes. I think I'm pretty close to being done.

11 THE COURT: Okay.

12 MR. BECKSTROM: Was that five minutes?

13 THE COURT: Close enough.

14 MR. BECKSTROM: Subject to any rebuttal on our portion  
15 of the order to show cause, we'll pass the witness, your Honor.

16 THE COURT: Okay. Thank you. Any questions you want to  
17 ask her?

18 REDIRECT EXAMINATION

19 BY MR. SPENCER:

20 Q. Holly, calling your attention to the Respondent's  
21 Exhibit 12, which is at tab 3 of the binder, now you testified I  
22 believe like twice that that's your text message that you sent to  
23 Ron on that date?

24 A. Yes.

25 Q. Okay. About that time did you also send Ron a text

1 message to the effect that you were concerned that there was some  
2 sort of a trick or deception involved with the amended return?

3 A. Yes.

4 Q. Okay. When did you do that?

5 A. On July 27<sup>th</sup>.

6 Q. Okay. So part of the obvious question, so two days  
7 before you sent this text message, you sent him another text  
8 message that said what?

9 A. Can I read it, the text?

10 Q. You can tell us what it said, yeah.

11 A. It said, "I'm so scared you're tricking me. I need to  
12 make sure the taxes don't fall in my lap after this is done. I  
13 just can't trust you. Wish I could, but I keep thinking there is  
14 something you are hiding or going to do to me. The taxes and  
15 making sure that that -- making sure that part was taken care of  
16 was your -- I was your worker, bill payer. I'm scared you have  
17 something up your sleeve."

18 Q. Okay. So the text message that you just described, was  
19 it part of the same conversation as the message that you sent  
20 that's shown in Respondent's Exhibit 12?

21 A. Yes, they were all together.

22 Q. Okay. At the time that you sent the text message that  
23 you just described, do you recall if you had yet actually seen  
24 the amended return shown in Exhibit 5?

25 A. I don't think I had seen the -- sorry, say that again.

1 Q. Yeah. Had you actually seen the amended return at the  
2 time that you sent that text message?

3 A. No, I don't believe so.

4 MR. BECKSTROM: Your Honor, the text message she just  
5 read, Mr. Beckstrom has a copy of it. It is marked as  
6 Petitioner's Exhibit 6. I'm going to move to admit it.

7 THE COURT: Any objection?

8 MR. SPENCER: Your Honor, I don't know -- I guess I  
9 maybe have a voir dire for the witness. I don't really know what  
10 the context of this -- this does not appear to be a -- what you  
11 would typically see in the form of a text, unless she's done  
12 something to blow it up.

13 THE COURT: You're welcome to ask her about that right  
14 now.

15 VOIR DIRE EXAMINATION

16 BY MR. BECKSTROM:

17 Q. How did you generate this document, Mr. Hol --  
18 Mr. Ros -- Mrs. Rosser?

19 A. How did I copy it?

20 Q. Yes.

21 A. Every text that Ron has ever sent me, I've saved it, and  
22 I -- my daughter showed me how to screen shot it, and I screen  
23 shotted it and emailed it to myself, and that's how it printed.

24 THE COURT: Any objection to the admission of it?

25 MR. BECKSTROM: I still don't think there's a foundation

1 for this. I mean there's nothing on here that would indicate  
2 that --

3 THE COURT: Okay. If that's your objection then it's --  
4 I'm going to go ahead and take it in.

5 MR. BECKSTROM: Well, my -- your Honor, my objection is  
6 that there's nothing on here that shows that this is a text from  
7 Ron.

8 THE COURT: She's testified that it was. Do you want to  
9 ask any additional questions?

10 MR. SPENCER: For clarity, she testified that it's a  
11 text message that she --

12 THE WITNESS: I sent to Ron.

13 MR. SPENCER: -- sent to Ron.

14 MR. BECKSTROM: That she sent to Ron.

15 THE WITNESS: Yes.

16 MR. SPENCER: Calling your attention to --

17 THE COURT: So it's admitted.

18 (Exhibit No. 6 received into evidence)

19 MR. SPENCER: Thank you, sir.

20 REDIRECT EXAMINATION (Resumed)

21 BY MR. SPENCER:

22 Q. Call your attention to Respondent's Exhibit 14, which is  
23 at tab 5 of your binder. Briefly I just want to clarify that you  
24 forwarded the amended return shown in Exhibit 5 to Derrick Clark  
25 before you were able to successfully open it?

1 A. What part am I looking at in No. 5?

2 Q. I'm sorry, this is at tab 5, and this is at tab 5 of  
3 your binder as Respondent's Exhibit 14.

4 A. This one?

5 Q. Yes.

6 A. Okay. What was your question?

7 Q. Yes. I want to clarify, did you forward the individual  
8 amended return shown in Exhibit 5 to Derrick Clark before you  
9 were able to actually open it yourself?

10 A. I guess I still don't under -- I don't understand your  
11 question.

12 Q. Okay. I'm actually -- I'll withdraw the question.

13 A. Okay.

14 Q. You did forward the individual amended return shown in  
15 Exhibit 5 to -- excuse me, to LaDell Eyre to have him review it;  
16 is that correct? I'm no longer looking at tab 5.

17 A. I --

18 Q. I'm just asking a question.

19 A. I forwarded -- yes, the email that I could never get the  
20 tabs to open. I forwarded it to them -- to LaDell.

21 Q. You did that because you were concerned that there might  
22 be something wrong?

23 A. Yes.

24 Q. Okay. Did you have any idea of the type of thing that  
25 might be wrong or anything specific about your concern?

1           A.    I was just making sure that, you know, the deductions  
2 were right and --

3           Q.    When you say they were right, what do you mean?  Were  
4 you concerned the IRS may not accept some of them?

5           A.    Correct.

6           Q.    Okay.  What else were you concerned about?

7           A.    That Ron was lying.

8           Q.    Okay.  What was your principal concern in all of it?

9           A.    That he was tricking me to get me to sign everything,  
10 sign over the divorce and sign the taxes.

11          Q.    So after having LaDell Eyre review it, you were  
12 satisfied that there wasn't a trick?

13          A.    Yes.

14          Q.    He verified that based upon -- at least based upon the  
15 return that you would be getting a refund?

16          A.    Yes.

17          Q.    He verified that.  I want to clarify something.  You  
18 talked about an Eagle Solutions return, and Mr. Beckstrom pointed  
19 out that Exhibit 5 is an individual return, and you said -- I  
20 believe you said -- correct me if I'm wrong -- that you think of  
21 them as one in the same?

22          A.    Yes.

23          Q.    Why -- Eagle Solutions actually files its own tax  
24 return; is that correct?

25          A.    But the corporations never owe any money.  It all flows



1 back into your personal.

2 Q. Okay. Do you know if it's an S Corporation?

3 A. I believe it's an S Corp.

4 Q. Okay.

5 A. I think. So your understanding is that all of the  
6 profits flow through to the -- or at least the relevant time flow  
7 through to the individual return for you and Ron Rosser?

8 A. That's my true belief, yes. That's the way they've  
9 explained it.

10 Q. Okay. So Eagle Solutions didn't retain money and pay  
11 income tax on that money. It just passed through to the two of  
12 you?

13 A. Correct.

14 MR. SPENCER: That's all I have.

15 THE COURT: Based on those questions, anything else you  
16 want to ask?

17 MR. BECKSTROM: Just a couple, your Honor. One moment.

18 REXCROSS EXAMINATION

19 BY MR. BECKSTROM:

20 Q. Holly, if you would turn to Exhibit 6.

21 A. Okay.

22 Q. So from this text message it appears that you -- you had  
23 no trust in what Ron was saying, correct?

24 A. Back in July?

25 Q. Right.

1 A. Yes.

2 Q. And --

3 A. I said I didn't trust him.

4 Q. At least seven days prior to that you had already sent  
5 an email to Kohler & Eyre asking them to check -- get to the  
6 bottom of it, right? How could you be going from --

7 A. To look over the taxes.

8 Q. -- a \$60,000 liability to a refund, right?

9 A. Right.

10 Q. Did you provide LaDell Eyre a copy of the tax payments  
11 you had previously made as part of this review he did?

12 A. I don't believe so.

13 Q. Up to that point in time, you were the only party as  
14 between you and Ron who had paid tax for 2015, right?

15 A. Say that again.

16 Q. Up to that point in time, meaning the July 29<sup>th</sup> time  
17 frame, up to that point in time you were the only person between  
18 you and Ron who had paid tax to the IRS, correct?

19 A. I didn't know if Ron had paid his taxes or not. He told  
20 me he did.

21 Q. When did he tell you he did?

22 A. Or he assured me that he knew that they had to be paid.

23 Q. But he never told you he did, did he?

24 A. No. The only way that I know that he did is that --  
25 when I looked at -- when I finally got to look at the taxes, they

1 said they had been paid, and that's when I was --

2 Q. So circling back to my question, Ron never told you that  
3 he paid any portion of the tax, right?

4 A. No.

5 MR. BECKSTROM: Thank you.

6 THE COURT: Anything else you want to ask?

7 MR. SPENCER: No, sir.

8 THE COURT: Okay. Planning on calling any other  
9 witnesses, Mr. Spencer? Are you going to call any other  
10 witnesses?

11 MR. SPENCER: No, sir.

12 THE COURT: We're going to take a five minute break.  
13 We'll come back, and this is an honest five minute break because  
14 we've been going two hours, and I generally go longer than two  
15 hours without a five minute break, and then we'll be onto you,  
16 Mr. Beckstrom.

17 MR. BECKSTROM: Thank you, your Honor.

18 THE WITNESS: Is it okay if --

19 THE COURT: Yes.

20 (Short recess taken)

21 COURT BAILIFF: All please rise. District Court is now  
22 back in session.

23 THE COURT: Be seated. Go ahead, Mr. Beckstrom, call  
24 your first witness.

25 MR. BECKSTROM: Your Honor, this may be a little bit out

1 of order, but Mr. Clark has been sitting here for awhile, and I'd  
2 like to get him out of here, if we can, so if you don't mind --

3 THE COURT: It's your first witness. If you want to  
4 call whoever you want to call, you can.

5 MR. BECKSTROM: Okay. All right. I'll call Derrick  
6 Clark, your Honor.

7 THE COURT: Mr. Clark, come stand in front of her, raise  
8 your right hand to be sworn.

9 COURT CLERK: Do you solemnly swear the testimony you  
10 are prepared to give is the truth, the whole truth, and nothing  
11 but the truth, so help you God?

12 THE WITNESS: Yes.

13 THE COURT: Have a seat over there.

14 DERRICK CLARK

15 having been first duly sworn,

16 testifies as follows:

17 DIRECT EXAMINATION

18 BY MR. BECKSTROM:

19 Q. Good afternoon, Mr. Clark.

20 A. Good afternoon.

21 Q. Can you please state and spell your name for the record?

22 A. Derrick Clayton Clark. You need the spelling, too?

23 Q. Yes, please.

24 A. D-e-r-r-i-c-k, C-l-a-y-t-o-n, C-l-a-r-k.

25 Q. Just for the record, what is your profession?

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A. CPA.

Q. How long have you been a CPA?

A. Almost five years.

Q. Are you familiar with Ron and Holly Rosser?

A. Yes.

Q. In 2016 did you perform accounting and tax services for them?

A. Yes.

Q. Did you prepare the original returns for Holly and Ron Rosser for the year 2015?

A. Yes.

Q. You also filed several business returns for them as well, correct?

A. Yes.

Q. Do you know which entities you filed business returns for?

A. There's Eagle Solutions, Inc. and Eagle Corp. and 595 and one -- maybe one or two others.

Q. Okay. In preparing those returns, who did you primarily work with?

A. Holly.

Q. Do you know why you were working with Holly at that point in time?

A. Holly was the one that was running the businesses and so that was where the communication needed to take place.

1 Q. If you can turn to Exhibit 5 that should be there.

2 A. I don't have any exhibits. Oh, up here.

3 THE COURT: No, it's --

4 THE WITNESS: Okay.

5 Q. BY MR. BECKSTROM: Are you familiar with this document?

6 A. Yeah.

7 Q. What is it?

8 A. It's the amended numbers for an amended tax return.

9 Q. Okay. This is not the complete return, right?

10 A. No, it's just the first two pages of -- just basically

11 states what the original amounts were, what changed, and then

12 what the correct amounts are.

13 Q. At some point in July were you contacted by someone

14 asking for an amended return to be prepared?

15 A. Yes.

16 Q. Who contacted you?

17 A. Ron.

18 Q. Okay. Did he tell you why he wanted an amended return

19 prepared?

20 A. We discussed just that there was some additional

21 depreciation that could be taken that would lower the tax

22 liability.

23 Q. So just to quickly summarize here, if you'll look at

24 line 22 on the first page of this exhibit, what does that -- what

25 does that \$7900 represent?

1           A.    It's supposed to -- after the additional depreciation  
2 was taken into account, that should have been the amount of the  
3 refund had all tax liabilities been paid before then.

4           Q.    Okay.  If you'll look at Exhibit -- or excuse me, line  
5 17, the figure \$54,7 -- or 917, can you tell me what that figure  
6 represents?

7           A.    Yeah, that was the original tax liability, and the  
8 amount of the payments that would have been due on the original  
9 return.

10          Q.    So in preparing this return, your -- you inserted that  
11 figure, correct?

12          A.    Yes, assuming -- yeah, assuming all the payments had  
13 been made, that would have been the full payoff.

14          Q.    Why -- did you have an assumption that you made that the  
15 payments had been made?

16          A.    Not really.  I mean Holly come and pick up the tax at my  
17 office, and then I prepare payment coupons for the amounts that  
18 are due to any of the states and the federal, and I provided her  
19 those payment coupons with the amounts that were due.

20          Q.    So when you refer to the -- she picked up the taxes,  
21 you're referring to the original returns?

22          A.    Uh-huh.

23          Q.    Is that a yes?

24          A.    Yes.

25          Q.    Okay.  Thank you.  So do you know when she picked up

1 those payment coupons from your office?

2 A. I believe it was -- it was right around April 8<sup>th</sup>.

3 Q. Around the tax filing deadline?

4 A. About a week before.

5 Q. So was it your belief then that Holly had paid the taxes  
6 since she --

7 MR. SPENCER: Objection, foundation. Objection,  
8 speculation.

9 THE COURT: Do you want to respond to his objections?

10 MR. BECKSTROM: Well, I'm just asking him for what his  
11 belief was at that time, at the time he prepared this return,  
12 so --

13 MR. SPENCER: But based on what he's asking, he's asking  
14 the witness to read my client's mind and nothing more.

15 MR. BECKSTROM: No, I'm asking for what he believed when  
16 he put this figure in the form.

17 THE COURT: Okay. I hope he believed he was doing what  
18 was truthful, okay, but if he's saying well -- I'll let him  
19 answer the question, but I hope what he's believing is that he's  
20 doing what honestly has been done, okay. I'll -- he's just --  
21 he's simply somebody's agent in doing this.

22 MR. BECKSTROM: Sure. Sure.

23 THE WITNESS: Can you repeat the question?

24 Q. BY MR. BECKSTROM: So at the -- you believed at the time  
25 you filed this amended return that Holly had paid all of the tax



1 based on the original return, correct?

2 MR. SPENCER: Objection, leading.

3 THE COURT: Okay. It is leading.

4 MR. BECKSTROM: I'm just trying to get to the point,  
5 your Honor.

6 THE COURT: Well, ask it a way that he can get what he's  
7 believing, not just what you tell him he's supposed to say.

8 Q. BY MR. BECKSTROM: What was your belief with respect to  
9 the amounts you put into line 17 of the return?

10 A. Well, I prepared the original return, and on about April  
11 8<sup>th</sup> is when I give those returns to Holly and with -- along with  
12 payment coupons. When I -- after that, I didn't have any  
13 communication with anybody about any payments that were being  
14 made, so when I prepared the amended return, I didn't ask, I just  
15 assumed that all payments had been made at that point.

16 Q. Okay. Thank you. In preparing this return, you didn't  
17 ask Ron to verify if payments were made, right?

18 A. No.

19 Q. Ron never told you that \$54,917 had been paid, correct?

20 A. No.

21 Q. At some point in time did you learn that the Rossers had  
22 not paid the entire \$54,917?

23 A. Yes.

24 Q. When did you first learn of that fact?

25 A. I think it was the end of the July.

1 Q. Okay. How did -- how did you come to learn of that  
2 fact?

3 A. Ron had called me indicating that they still owed money,  
4 and that he wasn't sure of the amount, and so called the IRS and  
5 found out the amount that was due.

6 Q. Then did you provide Ron the amounts?

7 A. Yeah. I told him the amount was due -- the amount that  
8 was due, and that they would have to minus off the \$7900, and  
9 there would be no refund, you'd actually make a payment for the  
10 difference between that 15,000, less the 7900.

11 Q. Did Ron indicate how he learned there might not be a  
12 refund?

13 A. I don't recall how.

14 Q. Now draw your attention to Exhibit -- so it will be tab  
15 No. 5 in the binder now. Mr. Clark, if you'll turn to the binder  
16 there, which would be Exhibit 14, which has been previously  
17 admitted. Is this an email that you received from Holly Rosser?

18 A. Yes.

19 Q. Did you receive it on August 17, 2016?

20 A. Yes.

21 Q. Did you review this email when you received it?

22 A. Yes.

23 Q. At the time you received this email, did you know why  
24 she was asking about penalties and interest?

25 A. No. I didn't really understand it because it was about

1 three weeks after we had already done everything, so I assumed  
2 that when -- so I filed the -- or I signed the taxes in -- around  
3 the middle of July, and then we had the communication about there  
4 being more money owed at the end of the July, and this was about  
5 three weeks after that. So I assumed that that payment had  
6 already been made, so I didn't -- I wasn't sure what penalties  
7 and interest would be accruing.

8 Q. When you say the payment, the payment that was due under  
9 the amended return, right?

10 A. Uh-huh.

11 Q. Did you respond to this email?

12 A. No. I wasn't sure how to respond.

13 Q. As an accountant, what is your understanding about what  
14 would happen if someone filed an amended tax return when they  
15 original owed a debt, but then showed a refund for -- through an  
16 amended return? Would there be penalties and interest that would  
17 accrue?

18 A. Can you say that again?

19 Q. Yeah. If someone were to file an amended return, and  
20 under the original return they owed money to the IRS, and the  
21 amended return changed that liability to a refund, would there be  
22 any penalties and interest accruing?

23 A. If the full liability would have been wiped away, there  
24 wouldn't be any penalties and interest on it.

25 Q. You were here in the courtroom when Holly testified a

1 few minutes ago, correct?

2 A. Uh-huh.

3 Q. Did you hear all of her testimony?

4 A. Yes.

5 Q. Did you hear her testify that she had difficulty opening  
6 the tax returns that were -- the amended tax returns that were  
7 prepared by your office and sent to her?

8 A. Yes.

9 Q. Do you believe that testimony to be true?

10 MR. SPENCER: Objection, foundation. Objection,  
11 speculation.

12 THE COURT: Um --

13 MR. SPENCER: Objection usurps the role of fact finder  
14 to the Court.

15 THE COURT: I'm not going to let him answer that  
16 question. You can ask other questions, but what you're doing is  
17 saying do you think she's a liar.

18 MR. BECKSTROM: Well --

19 THE COURT: And I'm going to have to decide that.

20 Q. BY MR. BECKSTROM: Okay. Do you have anything in your  
21 possession presently that -- which would show that Holly opened  
22 the tax returns, the amended tax returns prior to July 29<sup>th</sup>, 2016?

23 A. Yes.

24 Q. What do you have?

25 A. Well, when I send tax returns they're sent through a

1 secure file exchange, and it notifies me once someone views those  
2 files or downloads them.

3 Q. Okay. Then do you get some sort of a report that shows  
4 when those are opened by your clients?

5 A. Yes.

6 Q. Okay. Do you have a report relative to these amended  
7 returns?

8 A. Yes.

9 Q. What does that report show with respect to whether Holly  
10 opened these files?

11 A. It just shows that she previewed them and downloaded  
12 them on July 26<sup>th</sup>.

13 Q. Would that be the amended return?

14 A. Yes.

15 Q. As well as the corporate returns?

16 A. Yes.

17 Q. You said that was open on July 26<sup>th</sup>?

18 A. Yes.

19 MR. BECKSTROM: Thank you.

20 THE COURT: Go ahead, do your cross.

21 CROSS EXAMINATION

22 BY MR. SPENCER:

23 Q. Mr. Clark, am I correct understanding your testimony  
24 that you had conversation with Ron Rosser near the end of July  
25 of 2016 in which you informed him that taxes were going to be

1 owed --

2 A. Yes.

3 Q. -- on the individual return?

4 A. Yes.

5 Q. Okay. I don't recall what you said, so forgive me if  
6 this is asked and answered. To the best of your recollection,  
7 what time or what range in time did that occur?

8 A. I believe it's July -- it was July 29<sup>th</sup> when I had that  
9 conversation.

10 Q. Okay.

11 A. That's when I called the IRS and found out the exact  
12 dollar amount that was still owed at that -- on that date.

13 Q. Is there a reason you believe it was the 29<sup>th</sup>? Did you  
14 make some record, or do you have just a vivid recollection?

15 A. Just a text message, yeah.

16 Q. A text message from?

17 A. Me.

18 Q. Oh, from you to Ron Rosser?

19 A. Uh-huh.

20 Q. Okay. So the communication that you had in which you  
21 informed him that he was going to have a liability, did that  
22 occur via text message or in person or on the phone?

23 A. Text message.

24 Q. Okay. That was a text message that you sent to Ron  
25 Rosser?

1 A. Correct.

2 Q. Okay. Do you remember if you told him on that date what  
3 the amount of the liability would be?

4 A. Yes, it was 15,000 something.

5 Q. Did he respond?

6 A. I'd have to go back and --

7 Q. You don't recall whether he responded?

8 A. I don't.

9 Q. Okay. So like for example, he didn't respond and say  
10 "Oh, yeah, that's right, we're going to pay that," or nothing  
11 like that that you recall?

12 A. I can't recall.

13 Q. You did not make that communication to Holly Rosser?

14 A. Not that I can recall.

15 Q. Okay. Does it seem like something that you would be  
16 likely to forget?

17 A. No.

18 Q. Okay. So did you -- following July 29<sup>th</sup>, did you  
19 subsequently become aware that both Rossers had signed the  
20 amended return that you prepared on about July 16<sup>th</sup> of 2016?

21 A. That's when I signed it. It was on July 16<sup>th</sup>. I believe  
22 it was August 22<sup>nd</sup> when Holly sent me the email saying that they  
23 had finally signed the returns and was going to mail them.

24 Q. So that's how you learned that they had signed them is  
25 Holly emailed you and told you?

1           A.    Yeah, because I was efileing the business return, and so  
2 I told her to notify me when those were signed so that I could  
3 efile them. The personal returns had to be -- they -- you can't  
4 efile them. They have to be mailed.

5           Q.    Okay. I think you just answered this, but for clarity  
6 on Exhibit 5, it -- where it appears to show your signature, that  
7 is in fact your signature and the date, the July 16<sup>th</sup> is the  
8 correct date of your preparation?

9           A.    Correct.

10          Q.    Okay. So it was after the time that you prepared the  
11 amended return that you learned there was an obligation?

12          A.    Correct.

13          Q.    You informed Ron Rosser of that?

14          A.    He informed me. That's why I called the IRS to find out  
15 what the liability was.

16          Q.    Okay. You texted him about that to verify the amount?

17          A.    Yes.

18          Q.    The \$15,000 plus?

19          A.    It would have been 15,000 plus, less the amount of the  
20 refund is what -- what collectively would have been owed at that  
21 time.

22          Q.    Okay. You didn't communicate that to Holly Rosser?

23          A.    No.

24          Q.    You have no reason to think that Ron Rosser did?

25          A.    I don't know.



1 Q. Okay. Then after you had that communication with Ron  
2 Rosser about an obligation, it was after that time that the  
3 amended return was signed to the best of your understanding?

4 A. Yeah.

5 Q. Now you never had a conversation with Holly Rosser in  
6 which she said, "Yeah, the outstanding liability shown on the  
7 amended return, I paid all that myself." She never said anything  
8 like that to you?

9 A. No.

10 Q. Were you aware at this time end of July there had been a  
11 mediation and a written agreement to pay any remaining unpaid  
12 portion for the 2015 liability. Did you have any -- were you  
13 aware of that at that time?

14 A. No.

15 MR. SPENCER: Nothing further.

16 THE COURT: Want to ask anything?

17 MR. BECKSTROM: Nothing, your Honor.

18 THE COURT: Okay. I may. Let me see the tax return,  
19 Exhibit 5.

20 MR. SPENCER: Oh, forgive me. One additional question.

21 THE COURT: Go ahead.

22 Q. BY MR. SPENCER: Now the depreciation deductions that  
23 were not included in the original 2015 individual return were  
24 related to a motor home and a Dodge automobile?

25 A. Yes.

1 Q. Is that your understanding?

2 A. Yes.

3 Q. So at least much of the deduction that was added was  
4 related to taking a deduction for those items for use in the  
5 business as ordinary and necessary business expenses?

6 A. Yes.

7 Q. That fact that those deductions were included would in  
8 fact have adverse tax consequences to Holly Rosser the following  
9 year?

10 MR. BECKSTROM: Objection, beyond the scope of direct.

11 THE COURT: It is way beyond the scope of direct, but is  
12 it relevant to anything we're doing here?

13 MR. SPENCER: Well, I think it's relevant on the  
14 issue -- so the respondent's claim is there's accord and  
15 satisfaction. My offer is proof, I believe Mr. Clark would  
16 testify that yes, the recapture basis resulting to Holly in the  
17 following year would have adverse tax consequences to her, a  
18 substantial one.

19 MR. BECKSTROM: We're not making the argument of accord  
20 and satisfaction, your Honor.

21 THE COURT: Okay. All right. I'm not going to let the  
22 question go in. Thank you.

23 MR. SPENCER: Thank you. That's all I have.

24 THE COURT: Hang on just a second. Don't leave. I'm  
25 looking at Exhibit 5. How can I tell or not tell, or can I not

1 tell whether or not Mr. Rosser had paid his \$14,500 he agreed to  
2 pay earlier towards the -- towards the tax?

3 (Witness moves away from microphone and is inaudible)

4 THE WITNESS: This would have been the total amount due  
5 on the original return, and so it just says okay, these are --  
6 these are the payments that were made towards it, which  
7 (inaudible) the full tax liability was all paid. Based on that,  
8 this is the new tax liability, so it's saying this is the new --  
9 this is the new tax liability. That was the amount that was  
10 paid, so (inaudible) the difference.

11 THE COURT: So --

12 THE WITNESS: So there's not --

13 THE COURT: -- after the amended return --

14 THE WITNESS: -- different separate amounts in here.

15 THE COURT: After the amended return there's \$7900  
16 that's supposed to be paid to her.

17 THE WITNESS: Yeah, that's -- this is --

18 THE COURT: The refund.

19 MR. WALL: Right. This is -- if all the tax liabilities  
20 were paid under the original return, then the refund on this  
21 amended return would have been \$7900.

22 THE COURT: Then what happened was they all filed it --  
23 they filed it and discovered that 14,000 plus had not been paid,  
24 that -- you say was paid; is that correct?

25 THE WITNESS: After I prepared this as -- yeah, then it

1 was discovered that there was still liability that --

2 THE COURT: Or did you send this in?

3 THE WITNESS: This --

4 THE COURT: This is what you sent in?

5 THE WITNESS: Well, they have to sign it and send it in.

6 THE COURT: Did they sign it and send it in?

7 THE WITNESS: That was on August 22<sup>nd</sup> that --

8 THE COURT: Did they sign it and send it in?

9 THE WITNESS: Yes.

10 THE COURT: So on August 22<sup>nd</sup>, this document still

11 assumed that he had paid the \$14,000 towards taxes?

12 THE WITNESS: Correct.

13 THE COURT: Based on those questions, anything else

14 either one of you want to ask?

15 MR. SPENCER: No, sir.

16 THE COURT: Thank you. You're excused.

17 THE WITNESS: So am I excused to go, or do you --

18 THE COURT: Yes, you -- well, unless one of these two

19 wants you to hang around.

20 MR. SPENCER: No, I have no more questions.

21 THE COURT: Do you want him to hang around?

22 MR. BECKSTROM: No, your Honor.

23 THE COURT: You're free to go, sir. Thank you very

24 much for being here. Okay. Are you going to call any witnesses,

25 Mr. Beckstrom?

1 MR. BECKSTROM: Your Honor, we -- I would call Ron  
2 Rosser.

3 THE COURT: Okay. Mr. Rosser, if you'll come forward.

4 COURT CLERK: Do you solemnly swear the testimony you  
5 are prepared to give is the truth, the whole truth, and nothing  
6 but the truth, so help you God?

7 THE WITNESS: I do.

8 THE COURT: Have a seat over there.

9 RONALD ROSSER

10 having been first duly sworn,

11 testifies as follows:

12 DIRECT EXAMINATION

13 BY MR. BECKSTROM:

14 Q. Good afternoon, Mr. Rosser. Can you state and spell  
15 your name for the record?

16 A. My name is Ron Rosser, R-o-n, R-o-s-s-e-r.

17 Q. Do you recall signing a stipulation in this case to  
18 resolve this divorce -- these divorce proceedings?

19 A. Yes.

20 Q. If you'll grab the exhibit binder there. If you'll look  
21 at the first tab.

22 A. Okay.

23 Q. Which would be Exhibit 10. Does your signature appear  
24 on the second to last page of this document?

25 A. Yes.

1 Q. It looks like you signed this on August 4, 2016,  
2 correct?

3 A. Yeah.

4 Q. Then looking at the last page, do you recognize the  
5 signature on that page?

6 A. Yeah.

7 Q. Whose signature is that?

8 A. That's Holly's.

9 Q. Do you know about when she signed?

10 A. After me.

11 Q. What leads you to believe that she signed after you?

12 A. I think -- I think you either emailed me -- I think you  
13 emailed me and told me it was signed.

14 Q. Okay.

15 A. And that was -- that was either a day or two days after.  
16 I'm not really --

17 Q. Fair enough. If you'll turn to page 14 of this exhibit,  
18 paragraph 32-R.

19 MR. SPENCER: Counsel, what tab is this?

20 MR. BECKSTROM: The first tab.

21 THE WITNESS: Okay. I got it.

22 Q. BY MR. BECKSTROM: You reviewed this document before you  
23 signed it, right?

24 A. Is it 14 -- Exhibit 14 right here?

25 Q. No, exhibit -- it should be page 14 of Exhibit 10.

1 A. Oh, No. 10. Okay.

2 Q. Which is tab 1 in your book.

3 A. Sorry.

4 Q. Do you know why paragraph 32-R was proposed in this  
5 matter?

6 A. Yes.

7 MR. SPENCER: Objection, foundation, your Honor. He can  
8 testify as to why he proposed it, but what anybody else's purpose  
9 was, there's no foundation.

10 THE COURT: Any response to that?

11 MR. BECKSTROM: No.

12 THE COURT: That's fine. You can ask the question, but  
13 it's just for that reason.

14 MR. BECKSTROM: Let me ask probably a better question,  
15 your Honor.

16 Q. BY MR. BECKSTROM: Mr. Rosser, did you -- were you the  
17 one responsible for proposing this language that's found in  
18 paragraph 32-R?

19 A. Yes.

20 Q. Okay. What was your purpose in proposing this language?

21 A. Holly agreed to pay the taxes that were due, and so we  
22 put this language in there. You sent it over and they signed it.

23 Q. Okay. The first part of this paragraph discusses an  
24 amended return that would be prepared by Derrick Clark -- or had  
25 been prepared by Derrick Clark, correct?

1 A. Yeah.

2 Q. What was the purpose of that amended return?

3 A. It was to use the depreciated items to regain savings  
4 from the taxes. So originally when I got it back, I thought that  
5 there was a refund, and I believed that up until I got the text  
6 from Holly explaining that there was a tax liability, and that's  
7 the same day I text Derrick and called Derrick.

8 Q. Okay. Well, we'll get -- we'll get to that in just a  
9 minute, but -- so the purpose of filing the return -- the amended  
10 return was then to capture depreciation, correct?

11 A. Yes. Savings -- tax savings.

12 Q. That depreciation would then lower the tax liability,  
13 correct?

14 A. Significantly.

15 Q. Okay. What items did you -- if you recall did -- were  
16 depreciated?

17 A. On an RV that we used for work, a car, truck. I'm not  
18 sure, but I think that's it. There might be something else.

19 Q. Okay. Now the latter part of paragraph 32-R reads,  
20 "Thereafter, petitioner shall be solely entitled," and carries on  
21 there. You see that language there?

22 A. Yes.

23 Q. Do you know why that language was proposed?

24 A. It's on what page?

25 Q. On paragraph 32-R on page 14.



1 A. 14. In the stipulation, right?

2 Q. Correct.

3 A. I'm not seeing it.

4 MR. BECKSTROM: May I approach, your Honor?

5 THE COURT: Yes.

6 MR. BECKSTROM: Sorry, right there.

7 THE WITNESS: Right there. Okay. It's not highlighted.

8 Q. BY MR. BECKSTROM: So that -- that language that I just  
9 pointed you to --

10 A. Yeah.

11 Q. -- purports to indicate that Holly would be entitled to  
12 receive any refund from the amended returns?

13 A. Right.

14 Q. And that she -- that there would be -- she would be  
15 responsible to pay any tax liability to either or you for 2015,  
16 right?

17 A. Right. Right.

18 Q. Fairly summarize that paragraph?

19 A. Yeah.

20 Q. Why was it that you proposed that she receive any  
21 refunds that came from the amended returns?

22 A. Why was she receiving the refunds?

23 Q. Right.

24 A. She paid the taxes. She paid to have the taxes amended,  
25 so --

1 Q. Right. So you were aware that -- did you have an  
2 understanding --

3 A. It was about equal amounts. I think it was 900 to amend  
4 the taxes and 900 in refunds.

5 Q. And you were -- did you have an understanding that there  
6 would be a refund from the state filing authorities?

7 A. Yeah, from the two states, 700 from I think Utah and 200  
8 from Arizona. I could be -- I could be wrong.

9 Q. Those are approximate amounts --

10 A. Approximate.

11 Q. -- of refunds that you anticipated to get from those  
12 states?

13 A. Yeah. Yes.

14 Q. That roughly equated to the amount that was paid to  
15 Derrick?

16 A. To Derrick to do the amended tax savings part, so when  
17 he amended the tax. Yep.

18 Q. Do you know, why did you include the language that she  
19 would also pay any tax liabilities?

20 A. Because we knew there was going to be a tax liability.  
21 She woke me up to it.

22 Q. Okay. How did she wake you up to it?

23 A. She sent me a text on July 29<sup>th</sup> telling me that there  
24 were refunds in the State of Arizona, Utah and a tax liability,  
25 and how would I be paying her for that. Up until that moment, I

1 believed that we were getting a refund.

2 Q. What was your -- you're aware that you signed the  
3 mediation agreement on or about Aug -- Ju -- excuse me, June 16,  
4 2016, right?

5 A. Right.

6 Q. You're aware that that agreement required each of you to  
7 pay 50 percent of the IRS tax liability, right?

8 A. Yeah. Yeah.

9 Q. Why was it that you felt something different should be  
10 done under the stipulation?

11 A. Well, you know, I hadn't had any control of the  
12 businesses or the tax people. I hadn't had any conversations  
13 with them. I was ordered not to talk to them. So after  
14 mediation, that loosened up, and so I called Derrick and I asked  
15 him about the taxes, and we talked about, you know, I -- the tax  
16 liability was so high. We brought up the -- we went through all  
17 the items to make sure all the depreciation was getting entered  
18 in, and there were things just left out. So it was -- it's just  
19 like every tax year. You go through every single thing that you  
20 own, and if you own lots of stuff and if you have lots of  
21 businesses, it's -- it can be a challenge.

22 Q. With respect to the June 16<sup>th</sup>, mediation agreement, were  
23 there items that you found out after the fact after the mediation  
24 that were not covered by the mediation agreement?

25 A. Were there items -- yes.

1 Q. What items were not covered by the mediation agreement?

2 A. Well, the income, for one, between the mediation  
3 agreement, which was on June 16<sup>th</sup>, all the way clear until the --  
4 August, it was the incomes from the businesses. She kept all the  
5 money. That was our peak season. That's when we make money.  
6 The rest of year we just get by.

7 Q. And what --

8 A. But those months --

9 Q. -- was your understanding about how quickly the divorce  
10 would be finalized?

11 A. Oh, it was supposed to be immediate, of course, to her.

12 Q. Immediate --

13 A. She told --

14 Q. -- after the mediation?

15 A. Yeah, right after the mediation. We were going to  
16 finalize it and be done with it.

17 Q. Okay. So you felt like during this interim period from  
18 when the stipulation was signed and the mediation happened,  
19 roughly one to two month period, that you felt like you should be  
20 entitled to income from the businesses, right?

21 A. Yeah. Yeah, of course.

22 Q. Okay. Was there anything else that you didn't believe  
23 was covered by the mediation agreement that came up that you  
24 didn't know about prior to mediation?

25 A. The property that I received in the mediation agreement,

1 there was a tax liability on that, and the taxes weren't paid for  
2 that year, so I got a \$10,000 tax bill.

3 Q. When you say tax bill, are you talking about --

4 A. Property tax.

5 Q. Okay. What property are you referring to that you were  
6 awarded?

7 A. The raw ground over in Page, Arizona.

8 MR. SPENCER: Your Honor, I'm going to object on grounds  
9 of relevance. I -- Counsel may be entitled to some leeway, but  
10 this is getting pretty far afield in regard to what we're here to  
11 decide.

12 THE COURT: What relevance does this have to do with  
13 anything we're talking about?

14 MR. BECKSTROM: Well, it sets up why -- why there was a  
15 change from the mediation agreement to the stipulation.

16 THE COURT: And because why? How does this fit into  
17 that?

18 MR. BECKSTROM: Well, to deal with their issue of this  
19 alleged latent ambiguity that they say happened, you know --

20 THE COURT: Nothing to do with the property taxes.

21 MR. BECKSTROM: What do you mean?

22 THE COURT: Was that the latent ambiguity was the  
23 property taxes?

24 MR. BECKSTROM: Well, no. What it does is it sets up  
25 the defense that, you know, the reason why there's a difference

1 between what the mediation agreement said and what the  
2 stipulation said was that things came up afterwards. That's what  
3 happens at mediation, your Honor. I mean not everything gets  
4 addressed sometimes. We try to address as many things as we can,  
5 but things -- things pop up, and those items were addressed.  
6 That's what it sets up.

7 THE COURT: You can go ahead and ask whatever questions,  
8 but I think you're way far afield. If you think it's relevant,  
9 go ahead.

10 MR. BECKSTROM: Well, my questioning is done, so we'll  
11 move on. Thank you, your Honor.

12 Q. BY MR. BECKSTROM: At any time after the mediation, did  
13 you ever tell Holly that you paid any portion of the 2015 IRS tax  
14 liability?

15 A. No. No. That's the problem, we weren't talking.  
16 Therein lies the problem.

17 Q. Draw your attention to tab 3 of the book, which would be  
18 already admitted Exhibit 12.

19 A. Okay.

20 Q. Do you know what this exhibit represents?

21 A. Yeah.

22 Q. What is it?

23 A. Text message from Holly.

24 Q. Okay. Is that her phone number at the top of the  
25 screen?

1 A. Yes.

2 Q. This is a picture of your phone, correct?

3 A. Yes.

4 Q. It looks like there's a text there on July 29<sup>th</sup> at 10:52  
5 a.m., correct?

6 A. Yes.

7 Q. Is that text from Holly?

8 A. Yes.

9 Q. How did you interpret this text?

10 A. Well, just exactly how it reads. Send me an email on  
11 what taxes come back to me and where the refund will go. I want  
12 the refund to back to Eagle Solutions, and -- Eagle Solutions  
13 Arizona and Utah, and how will you be paying me the difference.  
14 It talks about the state taxes in Arizona, the state taxes in  
15 Utah, and the federal tax liability. It explains it pretty  
16 clearly. So it was a shocker to me, because at this point I  
17 thought we were getting a refund. I believed we were getting a  
18 refund.

19 I called Derrick, text Derrick right after this. He  
20 told me to call the IRS and ask them directly, gave me their  
21 number and I tried calling them. I was on hold for 45 minutes.  
22 I called him back and said I can't get through. He said he had a  
23 proprietary number that accountants use, and he called them, and  
24 then he got the information and text it back to me. Same night.  
25 So this was at 1:40, and I think I talked to Derrick -- I finally

1 got an answer around 4 -- 3:30 or something. I don't remember.

2 Q. Okay. Let's go to that. Let's turn to tab 10 of the  
3 binder, which would be Exhibit 19.

4 A. Okay.

5 Q. Can you -- do you know what this page represents?

6 A. Yeah.

7 Q. What is it?

8 A. It's the texts back from Derrick telling me what's due  
9 on the taxes.

10 Q. Is this a screen shot of your phone?

11 A. Yes, it is.

12 Q. Okay. The text on the left hand side, the lighter  
13 colored text, is that Derrick's text to you?

14 A. It is.

15 Q. It looks like he sent you a text on July 29, 2016 at  
16 3:04 p.m., right?

17 A. Yeah. Yeah.

18 Q. Now is that 3:04 a Utah time, or some other time?

19 A. That would be 3:04 Arizona time. That would be 4  
20 o'clock in Utah here. That would be 4 p.m. here. I was in Page.

21 MR. BECKSTROM: Okay. I'd move to admit Exhibit 19.

22 THE COURT: Any objection?

23 MR. SPENCER: Is this what's at tab 10? I want to make  
24 sure. Is that at tab 10? No objection.

25 THE COURT: It's admitted.



1 (Exhibit No. 19 received into evidence)

2 MR. BECKSTROM: Thank you, your Honor.

3 Q. BY MR. BECKSTROM: Do you know when the final  
4 stipulation was provided to Holly and/or her counselor --  
5 Counsel?

6 A. Right after I signed, wasn't it? What exactly are you  
7 talking --

8 Q. Do you know when a draft of the stipulation was sent to  
9 Holly's Counsel for the first time?

10 A. Oh, okay. Gosh, it was early August 2<sup>nd</sup>, 3<sup>rd</sup>, 1<sup>st</sup>.

11 Q. Was it -- was it before or after July 29<sup>th</sup>?

12 A. It was after.

13 Q. How do you know that?

14 A. Well, because I remember it. Yeah, it was -- it was  
15 after. Do we have those emails to show them?

16 Q. Well, we'll get to that.

17 A. Okay.

18 Q. How is it that you know that it was -- that the final  
19 stipulation was sent to her after July 29<sup>th</sup>?

20 A. How do I know?

21 Q. Yeah.

22 A. Because after we -- after I figured out that there was a  
23 tax liability, her and I bumped into each other out in front of  
24 Subway and U-Swirl. We had a little screaming match. I told her  
25 about the money that she had profited and she's going to have to

1 split that with me. I have some texts to that effect.

2 The taxes -- the property taxes were due. She agreed to  
3 pay these taxes that were due. It was \$7,000. She's -- she has  
4 close to 100,000 in profits from the business over those two  
5 months, plus 10,000 in property taxes. It's not equitable,  
6 Judge. But I accepted that deal. I took that deal. I took that  
7 deal, and now here I sit.

8 Q. So Mr. Rosser, when you say the \$7100 in tax that she  
9 agreed to pay during --

10 A. 7900.

11 Q. 7900, call your attention to Exhibit 4.

12 A. Okay.

13 Q. Which is not in the binder. It's just going to be up  
14 there on the counter there.

15 A. Right here?

16 Q. Yeah.

17 A. These pages right here?

18 Q. Right.

19 A. Okay.

20 Q. So let me step back and make sure we have a clear  
21 record. So after this text message is exchanged, okay, then you  
22 had a conversation with Holly in Page, Arizona, correct?

23 A. Yes. Yes.

24 Q. During that conversation, she told you she would pay the  
25 IRS tax liability?

1 A. She did, yes.

2 Q. So would that be the liability that's reflected on  
3 Exhibit 4?

4 A. Yes.

5 Q. To your understanding?

6 A. Yep.

7 Q. Now prior to the time Holly signed the stipulation, was  
8 there a point in time after the mediation where you were still  
9 willing to pay one half of the tax obligation?

10 A. Ask that again.

11 Q. Be -- sometime be -- at any point in time between the  
12 mediation and the time Holly signed the stipulation, was there  
13 any point in time when you were still willing to pay one half of  
14 the IRS tax liability?

15 A. Yes.

16 Q. Okay. How did you propose that that -- you would do  
17 that in light of the fact that this amended return was going to  
18 be filed and saved tax money?

19 A. Ask that again. I'm not sure I understand.

20 Q. So how were you proposing that you would still pay one  
21 half of the tax in light of the fact that -- well, strike that.  
22 Were you aware of the fact that after the mediation Holly paid  
23 approximately \$15,000 to the IRS?

24 A. Yes.

25 Q. Okay.

1 A. She told me that.

2 Q. So did you ever make any proposal to her that you would  
3 still pay half of the tax at any time after she paid her portion  
4 of the tax?

5 A. I don't think so.

6 Q. So do you recall every proposing to her that you make an  
7 equalization payment to her?

8 A. No.

9 Q. You don't recall that?

10 A. No. No. No. I think there was some discussion between  
11 the attorneys there, and you and I did have some talks on that --

12 Q. Right.

13 A. -- but I didn't talk to her directly about it.

14 Q. Okay, right, but you're aware of the fact that you  
15 authorized a proposal to be sent --

16 A. Yes.

17 Q. -- to Holly saying --

18 A. Yes

19 Q. -- that let's file the amended return, let's see what  
20 the final liability was.

21 A. Oh, yeah, definitely. Before the amended tax return,  
22 definitely.

23 Q. Explain to me what --

24 A. Definitely.

25 Q. Explain to me what you were proposing.

1           A.    Well, you know, before the amended tax return, it's  
2 impossible to know what the tax liability might be.  So I told  
3 her whatever the difference is, I'll gladly pay it.  I'll  
4 definitely pay it.  Let's just do the amended tax return.  Let me  
5 know what the liability is and I'll pay it.  The only thing I got  
6 back from the accountant was that we were getting a refund.  He  
7 texted it to me.

8           Q.    So when -- when you pro -- through me proposed an  
9 equalization payment, the concept would be hey, Holly, I know  
10 you've paid your 15 --

11          A.    Yeah, we're going to equal the amount.

12          Q.    -- we're going to lower the tax liability --

13          A.    Yeah.

14          Q.    -- and everybody is going to pay half, whatever that  
15 would be?

16          A.    Yes.

17          Q.    Right?

18          A.    Yes.

19          Q.    Because you wanted to get the divorce finalized --

20          A.    I did.

21          Q.    -- before the amended return was filed?

22          A.    Yeah, because my hands were tied.  I -- she was making  
23 lots of money, and I was making nothing.

24          Q.    Okay.  What is your understanding of why that  
25 equalization payment would have been required by you?

1           A.    Well, if there was any kind of liability left over, I  
2 was willing to pay for it. I was glad to pay for it. I would  
3 pay my portion in a second. If I had known there was a  
4 liability, I would have paid it.

5           Q.    Because at that point in time, you knew you hadn't any  
6 portion of the tax?

7           A.    Yeah. If she had wanted me to pay it, I would have paid  
8 it at the time.

9           Q.    All right. Because of these other things we talked  
10 about, you didn't feel like -- later on you didn't feel like you  
11 should have to pay it?

12          A.    Right.

13          Q.    Now if I can call your attention to paragraph -- turn to  
14 Exhibit 10, which is the first tab in your binder.

15          A.    Okay.

16          Q.    Why don't you -- are you familiar with this paragraph  
17 49?

18                THE COURT: So where are you now?

19                MR. BECKSTROM: It's page 19 of the stipulation, your  
20 Honor. That would be Exhibit 10, first tab in your book.

21                THE WITNESS: First tab, okay.

22          Q.    BY MR. BECKSTROM: Are you there?

23          A.    Exhibit 10, yeah. Exhibit 1.

24          Q.    Yeah, go to page 19.

25          A.    Page 19, okay.

1 Q. Are you familiar with this paragraph 49?

2 A. Yes.

3 Q. What's your understanding of what this paragraph was  
4 presented for?

5 A. Let me read it.

6 Q. Okay. So it talks about the rebates and where they --  
7 where we agreed to share them. So she kept the -- I took the IPC  
8 and Dr. Pepper rebate checks, and she took the much larger ones,  
9 Coke.

10 Q. So you were awarded the IPC and Dr. Pepper rebate  
11 checks?

12 A. Yeah.

13 Q. From 2016 through 2020?

14 A. Yeah.

15 Q. Sitting here today, have you been paid any money  
16 relative to those rebates?

17 A. No.

18 Q. Do you have any knowledge about whether she has received  
19 any rebate monies?

20 A. Yeah. Yeah. We got a copy of the checks here  
21 somewhere.

22 Q. Are those checks attached as Exhibit 13, which would be  
23 tab 4 of the exhibit binder?

24 A. Yes. Yep, that sounds -- I think it's them. You know,  
25 they're -- you know, I'd have to get a better accounting on IPC

1 rebate checks, so I know that this -- this is the IPC rebate  
2 checks, but I don't know if they're biannual or annual, because I  
3 know they changed the system there. So there may be another set  
4 of these in the same year.

5 Q. But you know you have -- you were never paid --

6 A. Nothing.

7 Q. -- any of these monies that are reflected in these four  
8 checks, right?

9 A. Yeah, nothing. So IPC could give us a full accounting  
10 of this if we wanted to.

11 Q. Now turning to Exhibit 12, which is tab 3 -- Exhibit 3  
12 to tab --

13 A. Okay.

14 Q. This is the July 29<sup>th</sup> text.

15 A. Exhibit 3?

16 Q. Yes.

17 A. Okay.

18 Q. The texts on the right hand side are -- are your texts,  
19 correct?

20 A. Right.

21 Q. So you get this text from Holly indicating that she  
22 wants to know how you're going to be paying the difference, and  
23 you responded see you in court, right?

24 A. Yeah.

25 Q. Why did you say that?





1 that consistent with your recollection?

2 A. Yeah. Holly gave me the signature page at the bank and  
3 I signed it.

4 Q. So you -- your recollection is that you --

5 A. On August 22<sup>nd</sup>.

6 Q. I didn't mean to interrupt. Go ahead, finish.

7 A. No, that's it.

8 Q. So you signed it the same day that Holly did?

9 A. I don't know when she signed it. I guess so. I guess  
10 she signed it on the same day. I have no idea. There was  
11 just -- there was several documents. I didn't see -- you know, I  
12 signed it because we understood that it was different than this,  
13 so --

14 Q. Okay.

15 A. -- everybody had a clear understanding at that point.

16 Q. You heard Mr. Clark's testimony that sometime late in  
17 July that you informed him that there would be a tax liability.  
18 Do you recall if that's what he said?

19 A. Yeah. So on the same day that Holly text me, which was  
20 July 29<sup>th</sup>, she text me at 1 o'clock in the afternoon at around --  
21 I'd have to look through my phone to know exactly, but it was  
22 around -- it was in the afternoon. I kept calling Derrick, and  
23 he -- he -- well, we exchanged phone calls back and forth. Then  
24 he went on the -- he ended up calling the Internal Revenue  
25 Service on my behalf. I tried, but I was on hold for 45 minutes,

1 two different times even. He got through because accountants get  
2 priority. I don't know why it's like that, but he was able to  
3 come up with the answers that I needed, which you know, he  
4 answered -- matched the texts perfectly.

5 Q. Okay. So calling your attention to your binder tab 10,  
6 that is Respondent's 19 --

7 A. Tab 10?

8 Q. Yes. So this is the text message that Derrick Clark  
9 sent to you on July 29<sup>th</sup> at 3:04 p.m.? This may have been asked,  
10 but I just want to make sure that the record is clear on it.

11 A. Tab 10. Yes.

12 Q. Okay. Now --

13 A. And that's when I found out we weren't getting a refund.

14 Q. Okay. Calling your attention again --

15 A. So the amount 15,198, you have to deduct the depreciated  
16 items off of that to get to the tax liability, which is around  
17 \$7,900, or something.

18 Q. Um --

19 A. And he says that here, too. He goes on to say, "So you  
20 can minus off the amended refund from that, and that would be the  
21 balance due after the process the amended tax return."

22 Q. Okay. Call your attention again to Exhibit 5, which is  
23 two pages from the amended return. Do you see about 75 percent  
24 down the second page where it says sign here --

25 A. Page 5?

1 Q. Yes.

2 A. In this binder?

3 Q. No, it's not in the binder.

4 A. Oh, over here.

5 Q. It's one of the loose exhibits that's Exhibit 5.

6 A. Okay. Three, four -- I just had it, didn't I? One --  
7 okay, No. 5. Got it.

8 Q. Okay. Do you see where it says sign here, remember to  
9 keep a copy of this form for your records near the signature  
10 lines. Do you see that?

11 A. Huh-uh. Where does it say that?

12 MR. SPENCER: May I approach the witness?

13 THE COURT: Yes.

14 MR. SPENCER: It's right there.

15 THE WITNESS: Oh, okay. Where I didn't sign. Okay.  
16 Yeah, I see it.

17 Q. BY MR. SPENCER: Doesn't it say, "Under penalties of  
18 perjury, I declare that I have filed an original return, and that  
19 I have examined this amended return, including accompanying  
20 schedules and statements, and to the best of my knowledge and  
21 belief, this amended return is true, correct and complete.  
22 Declaration of preparer other than tax payer is based on all  
23 information about which the preparer has any knowledge." Is  
24 that -- that's what it says, correct?

25 A. Yeah, I think so.

1 Q. Okay. You did sign that about August 22<sup>nd</sup>, 2016?

2 A. Yeah, I did -- I did sign it to finalize the taxes so  
3 she can make the payment.

4 Q. Realizing you're not a lawyer, you do understand  
5 generally what perjury means?

6 A. Sure. I've seen it all morning.

7 Q. Okay. When it says to the best of a person's  
8 knowledge --

9 A. That was to the best of my knowledge. I don't have an  
10 accounting degree.

11 Q. Okay.

12 A. I have to rely on the accountants.

13 Q. So are you -- so I just want to make sure that I  
14 understand for clarity, so your Exhibit 19 is a text message from  
15 Derrick Clark, and you say that the date and time are correct.

16 A. Exhibit 19 is in this book?

17 Q. Yes, which is at your tab -- your tab 10.

18 A. Okay. Okay, No. 10. Okay. Got you. Okay. Yeah.

19 Q. Yet at the time that you signed this about August 22<sup>nd</sup>,  
20 okay --

21 A. You know --

22 Q. -- you understood that on the face of the return it  
23 showed a refund --

24 A. Yeah, but everybody knew there wasn't a refund, my  
25 friend, clearly.

1 Q. Okay. That's what you're saying, everybody knew --

2 A. But to regenerate the paperwork is --

3 Q. -- there was --

4 A. -- ridiculous.

5 Q. Excuse me. I didn't mean to talk over you.

6 A. Okay.

7 Q. My question -- my question is you -- it's true you

8 understood that there was not going to be a refund?

9 A. Sure, of course. I did after July 29<sup>th</sup>. I sure did.

10 Q. Okay. So what you're saying to the Court is that Holly

11 also understood there was not going to be a refund?

12 A. Yeah, she did.

13 Q. And here's what you're saying to the Court is that she

14 signed it anyway?

15 A. Apparently so.

16 Q. Well, did you see her signature or did you see her

17 signed it?

18 A. She said she did, and I'm going off that.

19 Q. Okay.

20 A. Did she not sign it?

21 Q. What you're saying to the Court is that she did that as

22 an elaborate scheme to have a reason to come and sue you here and

23 profit from it?

24 MR. BECKSTROM: Objection, mischaracterizes his

25 testimony.

1 MR. SPENCER: Well, it's a question, your Honor.

2 THE COURT: I don't know that -- I heard what her  
3 testimony is. I'm going to let him answer it. It's the -- was  
4 there a scheme?

5 THE WITNESS: I -- I think yes -- I'm going to have to  
6 say yes, based on the rebate checks and her wanting to keep them.

7 Q. BY MR. SPENCER: Calling your attention to Respondent's  
8 18, which is at tab 9 of your binder --

9 A. Okay.

10 Q. -- can you find that?

11 A. Yeah.

12 Q. Now you heard the testimony that Holly sent this seeking  
13 advice or commentary about the amended return?

14 A. Yeah.

15 Q. So what you're saying to the Court is that she really  
16 didn't need that advice because she knew that there was going to  
17 be an obligation and not a refund?

18 A. Yeah. She knew it.

19 Q. So this email would also be part of that scheme that you  
20 mentioned a moment ago?

21 A. You know, I don't -- I can't say that. I mean obviously  
22 it looks like she's searching for answers herself here, to me,  
23 early in July, and that's all I can get out of that. You know,  
24 when you send an email to an accountant, you want an answer, you  
25 usually get it. That's what you pay them for. They usually

1 don't side step and not answer your tax questions, especially the  
2 amount of money that Kohler & Eyre is getting.

3 Q. Okay. Calling your attention to your Exhibit 12, tab 3  
4 of your binder.

5 A. Number 12?

6 Q. Have you found that?

7 A. No. I have -- what is it? What's on the page?

8 Q. It's at tab 3. It's Exhibit 12. It's a picture of your  
9 phone with the email from Holly to you --

10 A. Yeah.

11 Q. -- dated July 29<sup>th</sup>.

12 A. Yeah.

13 Q. It looks like at 10:52 a.m. My eyes are going.

14 A. Yeah. I see it.

15 Q. So am I correct in understanding your testimony that  
16 this text means that Holly realizes that you didn't pay anything  
17 toward the 2015 obligation under the mediation agreement?

18 A. Holly is making me aware that there's a tax liability  
19 and that she wants to keep the rebate checks to pay it.

20 Q. Okay.

21 A. That's exactly what it was. That prompted me to go back  
22 after Derrick and find out what's going on.

23 Q. Okay. So you're saying that after you got that, that  
24 prompted you to contact Mr. Clark, and then the communication in  
25 your Exhibit 19 about a balance due of \$15,198.64, that's



1 information that he then provided to you?

2 A. Yeah, then minus the depreciation items.

3 Q. Do you have any writings authored either by you or Holly  
4 in which you inform her about the amount of that obligation or in  
5 which she acknowledges --

6 A. No, she informed me.

7 Q. Let me finish the question.

8 A. Okay. Sorry.

9 Q. Or in which she acknowledges that she's aware of it?

10 A. No. You know, she informed me in this text message.

11 Q. Okay. When you say --

12 A. And so --

13 Q. -- this text message, you're talking about your Exhibit  
14 12?

15 A. -- the same as me, you know. She's got two accountants,  
16 actually. She's got Derrick and Kohler & Eyre. So she has two  
17 accountants working on taxes at the same time.

18 Q. Okay. Do you have any writings, text message or email  
19 or otherwise from Holly Rosser that say something to the effect  
20 it's okay if you don't pay any back taxes under the mediation  
21 agreement?

22 A. No, I don't think so. I mean there might be. I'd have  
23 to go through every single thing.

24 Q. Do you have any writings from Holly Rosser that say  
25 something to the effect that I have paid more than -- more than

1 my obligation for the 2015 individual return under the mediation  
2 agreement, that I have paid that and more than that?

3 A. I don't -- I'm not sure. You -- I'm not sure. Is that  
4 the whole (inaudible) here or from the mediation?

5 Q. That's the med -- under the mediation agreement.

6 A. Okay. Because it --

7 Q. Do you have any writings where --

8 A. The first of the year I made the first tax payment,  
9 8,000.

10 Q. Okay. I'm talking about in 2015.

11 A. I am, too.

12 Q. You -- you were aware that following the mediation that  
13 she paid just less than \$15,000 toward the outstanding 2015 bill  
14 under the mediation agreement. You knew that, correct?

15 A. Yeah. Yeah. Yeah, I did know that.

16 Q. Okay. Do you have --

17 A. I don't know how I knew that. I think maybe she -- she  
18 may have texted me, or we may have talked about it. I'm not  
19 sure.

20 Q. Okay. Do you have any writing from Holly Rosser, text,  
21 email, otherwise saying, "Hey, I paid more than that?"

22 A. I paid more than that? I'm not sure. I don't know. I  
23 haven't focused on that, so I can't answer that.

24 Q. So she didn't say that to you in writing at any time?

25 A. I'm not sure. I'm just not sure from memory. I -- I

1 don't know.

2 Q. Calling your attention again to Exhibit 5, why would you  
3 sign that amended return showing a refund of \$7900 if you knew  
4 there was going to be no refund?

5 A. Well, you know, that happens in a lot of tax years.  
6 This ain't the only one. If you have the information from your  
7 accountant and you know what's the liability, then you pay it not  
8 based on what the tax -- what these tax documents said that were  
9 generated early in the year, because there would still be an  
10 amended tax return, and it doesn't matter which one you submit to  
11 the IRS, as long as you pay the taxes.

12 Q. Okay.

13 A. So I signed what she brought to me in good faith, August  
14 22<sup>nd</sup>. I signed it because she wanted me to.

15 Q. Okay, but you didn't make any payment toward the  
16 obligation that existed at the time of the mediation following  
17 the mediation?

18 A. No.

19 Q. Is that correct?

20 A. No. She didn't -- she agreed to pay it.

21 Q. So she agreed verbally to pay it is what you're saying?

22 A. She did. She sure did.

23 Q. Okay. Then did you ever re -- do you have any writing  
24 that verifies that she made the entire payment?

25 A. No, I don't. She did agree to it out in front of Subway

1 in U-Swirl in one of her times when we bumped into each other,  
2 and she was screaming at me out there, and she agreed to pay for  
3 it based on the income and the taxes -- the property taxes that  
4 were left over.

5 Q. And that's the U-Swirl in Page?

6 A. Yeah, U-Swirl and Subway are right next door to each  
7 other.

8 Q. And what point in time was that; do you recall?

9 A. It was before the stipulation was signed, right before.  
10 That's what prompted the language change and excepted the  
11 language.

12 Q. Who else was present besides you and Holly, if anyone?

13 A. Just her and I, I think. I think maybe one of my  
14 employees was standing at the door because it was -- she was  
15 getting pretty loud and they were getting concerned about it, but  
16 yeah, that was it.

17 MR. SPENCER: That's all I have.

18 THE COURT: Any questions additional you want to ask him  
19 or not?

20 MR. BECKSTROM: Just a few follow ups, your Honor.

21 REDIRECT EXAMINATION

22 BY MR. BECKSTROM:

23 Q. Mr. Rosser, in -- on cross examination, Mr. Spencer  
24 asked you why you signed the Exhibit 5 knowing that there was not  
25 an amended return. Do you recall that testimony?

1 A. Yeah.

2 Q. Did Derrick Clark ever tell you that it wasn't okay to  
3 sign the amended return?

4 A. No, he didn't. He said go ahead and sign it, it doesn't  
5 matter.

6 Q. So at the time you signed --

7 A. He said that you'll get your tax coupons, you pay those.

8 Q. So at the time you signed around August 22<sup>nd</sup>, did you  
9 have any reason to believe that there was anything improper that  
10 would pro -- would stop you from signing this return?

11 A. No. No.

12 Q. So it was just your understanding as I -- just to  
13 clarify your testimony that even though both parties knew that  
14 there was no refund coming, it was okay because the IRS would  
15 calculate that and then send a payment --

16 A. Additional payment --

17 Q. -- coupon?

18 A. -- coupons to us. You bet they would.

19 Q. Okay. Again, Derrick didn't give you any advice saying  
20 we better change that?

21 A. No. No, he didn't.

22 Q. At any time prior to the July 29<sup>th</sup> text from Holly, did  
23 you have any understanding that the amended return would not  
24 result in a refund from the IRS?

25 A. Say that again.

1 Q. At the time that -- prior to July 29<sup>th</sup> when Holly sent  
2 you the text message --

3 A. Right.

4 Q. -- did you have any understanding that the IRS amended  
5 return would be anything but a true refund?

6 A. I thought it was a true refund. I thought the amended  
7 return would get us a refund, and then you guys -- you two  
8 started negotiating over that, the split on that, and around I  
9 don't know, I think it was August -- the end of July. It was a  
10 Monday when I finally got a hold of you, all that stopped.

11 Q. So Holly was the first person to tell you that there  
12 would not be a refund?

13 A. Holly made me aware of it.

14 Q. Now Mr. Spencer also asked you about whether you have  
15 any writings that say that you don't have to pay half of the tax.

16 A. No.

17 Q. Do you recall that?

18 A. Yeah, I do.

19 Q. What does the stipulation say?

20 A. In the divorce decree?

21 MR. SPENCER: Objection, best evidence. Speaks for  
22 itself, your Honor.

23 THE WITNESS: The stipulation says --

24 MR. SPENCER: It's of record.

25 THE COURT: It does. Go and ask another question.

1 Q. BY MR. BECKSTROM: You're aware that the stipulation was  
2 signed, correct?

3 A. Yeah.

4 Q. And those terms speaks for themselves, right?

5 A. Yes. Yes. Yeah.

6 MR. BECKSTROM: I have no more questions, your Honor.

7 THE COURT: Anything else you want to ask him?

8 MR. SPENCER: No, sir.

9 THE COURT: You can have a seat.

10 THE WITNESS: Okay. Thank you, Judge. Appreciate it.

11 THE COURT: Any other witnesses or evidence?

12 MR. BECKSTROM: No, your Honor.

13 THE COURT: Any rebuttal?

14 MR. SPENCER: Yes, sir. Call Holly Rosser again to the  
15 stand.

16 THE COURT: Okay.

17 MR. SPENCER: You're still under oath, so just take the  
18 stand.

19 THE COURT: He's right. Just have a seat right here.

20 DIRECT EXAMINATION

21 BY MR. SPENCER:

22 Q. Now Holly, you understand that you're still under oath?

23 A. I do.

24 Q. You've been present during the testimony of Ronald

25 Rosser a moment ago in which he testified that there was a

1 conversation between you and he near the U-Swirl in Page  
2 regarding a verbal agreement to pay more -- for you to pay more  
3 taxes than you had agreed to pay under the mediation agreement.

4 A. I heard him say that.

5 Q. Okay. Did anything like that happen?

6 A. No.

7 Q. You heard his testimony that he doesn't have any writing  
8 by which you acknowledge an obligation to make such a payment.

9 A. No, he -- there's no writing.

10 Q. That's because there's no writing. You heard his  
11 testimony that he doesn't have any writing by which you excuse or  
12 waive his obligation to make a payment for the back taxes under  
13 paragraph 15 of the mediation agreement. You recall that  
14 testimony?

15 A. Yes.

16 Q. That's because there is no writing; is that correct?

17 A. There's no writing.

18 Q. For clarity, are you telling the Court that at all times  
19 until you received the bill in October that you believed that you  
20 would be getting a refund?

21 A. Correct.

22 MR. SPENCER: Nothing further.

23 THE COURT: Based on those questions, anything you want  
24 to ask her or not?

25 MR. BECKSTROM: No, your Honor.



1 THE COURT: Thank you, ma'am. Have a seat. Any  
2 additional evidence, Mr. Beckstrom?

3 MR. BECKSTROM: No, your Honor.

4 THE COURT: Mr. Spencer?

5 MR. SPENCER: No, sir.

6 THE COURT: Okay. I'll hear both of you briefly. Go  
7 ahead.

8 MR. SPENCER: Your Honor, Counsel, if it please the  
9 Court, I submit that what we have here is undisputed evidence in  
10 the agreement, that is the Exhibit 2, Exhibit 2 in paragraph 15  
11 says that the parties agree that they will each pay half of the  
12 outstanding IRS debt for the tax year 2015. We also have  
13 evidence of what the amount of that obligation was for the  
14 relevant time. That is shown in Exhibit 1, \$29,902.21.

15 We also have evidence that petitioner has testified that  
16 two days following mediation on October -- excuse me, June 18<sup>th</sup>,  
17 2016 -- pardon me. The day is getting long -- that Ronald Rosser  
18 expressed to Holly Rosser a need to make that payment and also  
19 the urgency of it.

20 So I submit that all parties are acknowledging that that  
21 was an agreement, and it would be a valid and binding agreement  
22 and identified with sufficient specificity, a course of  
23 performance which both parties were obligated, but for the fact  
24 that there's a claim that there's a subsequent agreement that is  
25 contained in the stipulation and the decree that was filed with

1 the Court that would supercede or negate that agreement. It says  
2 what it says.

3 The Court has record of that, but of course, my argument  
4 is that this is a latent ambiguity or evidence -- there is  
5 evidence that should show a condition precedent, some  
6 circumstance that would act as additional terms or a condition  
7 precedent to performance under that, or that would remain binding  
8 because it is not inconsistent with the subsequent agreement  
9 under the circumstances.

10 We have Exhibit 5 which is relevant portions of the  
11 amended return that show on line 22 and -- or 23 the amount of  
12 the refund, \$7900. The evidence is that both Ron and Holly  
13 Rosser -- or excuse me, that Derrick Clark prepared it on July  
14 16<sup>th</sup>, and -- 2016, and that both Ron and Holly Rosser signed it  
15 about August 22<sup>nd</sup>.

16 Now the argument is made by Ron Rosser that, you know,  
17 Holly Rosser knew that there was going to be this obligation all  
18 along, but yet she went along and was complicit in preparing and  
19 filing this return knowing full well that there would be an  
20 obligation because it was part of a scheme that she had to sue  
21 Ron Rosser here, and profit from it.

22 The other evidence that we have is contained in emails  
23 from Holly Rosser, both to Derrick Clark accountant and to LaDell  
24 Eyre accountant saying, "Please look at this for me and, you  
25 know, tell me about, you know, concerns that perhaps I should

1 have. Is this legit? Are the deductions legit, and am I really  
2 entitled to a refund?"

3 Now Ron Rosser's theory is that was all part of a  
4 scheme, but in fact, all the evidence here points to the  
5 conclusion that the reason that Holly Rosser did this is that  
6 she was going to get a refund. She was not obligated under the  
7 mediation agreement to pay for the services of Derrick Clark in  
8 preparing an amended return, but she did that because of a  
9 promise of a refund that was contingent upon Ron Rosser's  
10 performance to pay some taxes under the mediation agreement.

11 Now Ron Rosser says that there's a verbal agreement that  
12 supercedes that. There's this conversation in front of the U-  
13 Swirl in Page where Holly said, "No, I'll pay the rest of it,  
14 too." It doesn't really make sense why she would do that,  
15 especially if her scheme is to come here and sue Ron Rosser to  
16 profit by it. I would submit that there's a statute of frauds  
17 problem with that anyway, because this involves rights and duties  
18 pertaining to a marital relationship. We have a mediation  
19 agreement that's signed and in writing.

20 We -- his claim is that there's intervening verbal  
21 agreements that would relieve him of that obligation, and at  
22 the same time the importance of these factual claims, the fact  
23 that they might be facts is -- is so great that it's highly  
24 implausible that someone would fail to reduce those to writing or  
25 attempt to.

1           At the same time in reviewing emails between Counsel,  
2 which are not received as evidence here, but are in the file, and  
3 so maybe properly considered, there's no indication of any of  
4 those types of what's going -- of goings on whatsoever. Given  
5 the importance of that is the fact that anything like that  
6 happened, it's more than unlikely that it would fail to find its  
7 way into the discussions between the attorneys.

8           Exhibit 4 shows the amount of the bill that Holly  
9 received. She got that on October -- after October 10<sup>th</sup>, shortly  
10 after that, so we can determine that amount. She paid that bill,  
11 and so her damages -- her principal damages, at least, are the  
12 amount of the refund that she expected to receive shown on line  
13 22 of Exhibit 5, plus the amount of bill that she got in Exhibit  
14 4 that she -- that she also paid.

15           So what other evidence we have is basically that Ron  
16 Rosser first agreed that he would pay half the outstanding  
17 obligation, and then right away if you take a big step back and  
18 look at the situation and look at the emails that are in the  
19 files, there's this -- first there's this idea well, what we need  
20 to do is we need to save money and file an amended return. Okay.

21           So Holly says, "I would like to see it before I agree to  
22 be ordered to sign it. I would like to see it first," which I  
23 think is only prudent. Don't sign something you haven't read.  
24 Especially don't be ordered to sign it if you haven't seen it.  
25 Right away there's all this push, hurry up, hurry up, hurry up.

1           Ron Rosser says there's all these legitimate reasons for  
2 the hurry up. If you look at the mediation and settlement  
3 agreement, he had -- he was awarded \$366,000 in cash that he had  
4 immediate access to. That's in evidence. There's all this push  
5 to hurry up, hurry up, and at the same time there's evidence that  
6 well, Holly Rosser had seen the amended return earlier than she  
7 said that she did, that's neither here nor there. It wasn't  
8 prepared until July 16<sup>th</sup>. The date of the mediation agreement is  
9 June 16<sup>th</sup>. It wasn't even prepared until July 16<sup>th</sup>, so she takes  
10 roughly two weeks to try to get a hold of her accountants and get  
11 some advice, verify that she has a refund before she agrees to  
12 the language of the final terms of the divorce.

13           Meanwhile, Ron Rosser has a discussion with Derrick  
14 Clark by the end of July. He knows there's no refund. He knows  
15 there's a big liability, okay. He signs the amended return  
16 anyway. Everybody is in -- knows what's going on there, or at  
17 least Ron Rosser does. Let me retract that last statement. It's  
18 clear Ron Rosser knows what's going on there. Holly Rosser does  
19 not. Based on that, renew our request for the relief prayed for.

20           THE COURT: Thank you. Go ahead.

21           MR. BECKSTROM: Thank you, your Honor. Your Honor,  
22 before the Court today we have two items. Number 1, we have  
23 Holly's order to show cause where she's asking to have Ron pay  
24 one half of the IRS tax liability. Second, you have Ron's order  
25 to show cause where he's asking to have Holly ordered to pay a

1 sum of \$12,835.26 for IPC and Dr. Pepper rebate checks that she  
2 received and did not pay to him.

3 THE COURT: What was that total amount?

4 MR. BECKSTROM: It's \$12,835.26 should be the total of  
5 the four checks that were admitted into evidence.

6 THE COURT: Okay.

7 MR. BECKSTROM: With respect to Holly's order to show  
8 cause, the inquiry starts and ends with the language contained in  
9 both the final decree of divorce and the stipulation. 32-R of  
10 the stipulation and 39-R of the decree very clearly say that an  
11 amended tax return is going to be filed, and that Holly would be  
12 able to recover any of the refunds from that amended return, and  
13 that she would pay any of the parties' liability for the year  
14 2015. That language is crystal clear. There is no ambiguity to  
15 that language. For that reason, your Honor, there is no facial  
16 ambiguity. That is the language that is before the Court, okay.

17 Also, the divorce decree very clear terminates and  
18 reverses anything that was in the mediation agreement. After  
19 all, paragraph 2 of the degree specifically says -- this is a  
20 finding from the Court -- the stipulation constitutes the  
21 parties' entire agreement regarding their respective rights and  
22 obligations in the property, and more importantly here, the debts  
23 of the marital estate. That's exactly what we're talking about  
24 here, your Honor. So the decree and the stipulation are the  
25 documents that control, not the mediation agreement.

1           Now Holly tries to argue for a latent ambiguity. In  
2           essence, she's asking this Court to say paragraphs 32-R and 9-R  
3           don't really say that she has to pay any of the tax liability.  
4           Instead, she wants to argue that it says that Ron should pay half  
5           of the tax liability. There is simply no support anywhere in the  
6           stipulation or decree for that interpretation.

7           Now while the Court made the ruling to allow the  
8           mediation agreement to come in on the issue of whether there was  
9           a latent ambiguity, there's some important case law that has to  
10          be considered when deciding whether a latent ambiguity exists.  
11          Indeed, the case law is clear that a latent ambiguity is only one  
12          that exists that arises from a collateral matter when the  
13          contract terms are applied or executed. Courts have held that  
14          any relevant evidence is permitted to consider a latent ambiguity  
15          issue, but courts are clear that a party cannot use latent  
16          ambiguity to advocate for an interpretation that is not supported  
17          by the terms of the underlying contract. So in this case it's  
18          the stipulation and the decree. The cases I'm citing there, your  
19          Honor, are Watkins vs. Ford and -- I may be slaughtering this --  
20          Sayo (phonetic) vs. Farmers Insurance Exchange.

21          Furthermore, courts have found that a court can only  
22          find a latent ambiguity if the position taken is reasonably  
23          supported by the language of the contract. There's no support at  
24          all for their position of the -- that Ron has to pay one half of  
25          the tax in either the stipulation or the decree, let alone there

1 being a reasonable support. So for that reason alone, your  
2 Honor, they should -- their order to show cause should be  
3 dismissed without any relief taken. In other words, your Honor,  
4 any cannot equal one half as they're arguing.

5 Now even if the Court entertains this latent ambiguity  
6 argument, Holly's order to show cause starts from the flawed  
7 premise that No. 1, she didn't know that Ron hadn't paid his  
8 portion of the tax, and No. 2, that she did not know that the  
9 amended return would not result in a refund.

10 The time line of events make clear that Holly was both  
11 aware of the fact that Ron had not paid, and that the IRS amended  
12 return would not result in a refund. The July 29 text is crystal  
13 clear that she is asking to know No. 1 -- the first lines of her  
14 text say, "I want to know what taxes come back to me." Now she  
15 argues that that -- well, I'm talking about liability, but read  
16 the entire sentence. Then she says, "And where the refund will  
17 go." Then she talks about Arizona and Utah.

18 So she knows that there are taxes that could come back  
19 to her in the form of a liability, and that she wants to know  
20 where the Arizona and Utah refunds are going to go. Then the  
21 death nail for her is she says, "And how will you pay me the  
22 difference? Out of the IPC checks? It's fine with me," she  
23 says. So she knows as of July 29 that there is absolutely no  
24 refund coming.

25 Now what's important, your Honor, is to go back and look



1 and see what she did, okay. Now she argues that she didn't even  
2 have access to these and they couldn't open the amended tax  
3 returns prior to this July 29<sup>th</sup> text. Derrick Clark's testimony  
4 is very clear that she opened those files on July 26<sup>th</sup>. So for  
5 her to say that she hadn't reviewed the tax returns prior to  
6 that -- to the July 29<sup>th</sup> text is simply a lie, your Honor. She  
7 knew very well. There is no other rational explanation for that  
8 text.

9           Now originally on direct examination she testified that  
10 well, I don't know what I meant by -- and how are you going to  
11 reimburse me. Then in cross she came up with excuses of trash  
12 and dumpster. Well, your Honor, trash and dumpster, why would  
13 she want to wait for IPC checks to come?

14           Remember, this check -- this text is sent in July, yet  
15 she knows IPC checks -- IPC rebate and Dr. Pepper rebates aren't  
16 coming until the end of the year. She knows that. Why would she  
17 want to wait five months to get a simple bill like a tax or --  
18 excuse me, a trash or a dumpster bill paid? That makes  
19 absolutely no sense, your Honor, when you look at it from rat --  
20 from a rational standpoint.

21           She absolutely knew as of July 29<sup>th</sup> that there would be  
22 no refund. The only way there would be no refund is because she  
23 also knew that Ron had not paid his portion of the tax from the  
24 very get go. While there were discussions early on about still  
25 sharing the liability, both parties -- both parties knew that Ron

1 hadn't paid. That was the whole reason why the equalization  
2 concept was discussed. Had Ron paid his portion of the tax, we  
3 would be talking about well, hey, if we're going to share a  
4 refund because there would be no liability at that point in time.

5           It goes a step further, your Honor. You know, July --  
6 on July 20<sup>th</sup> she's talking to her own accountants. She's asking  
7 questions. She wants to know, hey, how do we go from a \$60,000  
8 liability to all of sudden getting a refund? I think she  
9 absolutely got the answers to her questions sometime between July  
10 20<sup>th</sup> and the 29<sup>th</sup> when she sent the text.

11           Now on July 29<sup>th</sup>, that's also the first time that Ron was  
12 informed through Holly's text that there might not be a refund,  
13 and he found out and -- from Mr. Clark. Now August 1<sup>st</sup>, the final  
14 draft of the stipulation and final decree was prepared and sent  
15 to Holly through her Counsel. She looked it over. Her and  
16 Mr. Rosser have a discussion about what's going to happen, and  
17 she agrees to sign. That's what happened.

18           Now Mr. Spencer is asking, you know, on cross  
19 examination of my client well, is this part of some scheme?  
20 I don't know if it's some part of a scheme, but certainly --  
21 certainly Holly was aware. Now when it comes to money that's  
22 supposed to be coming back to Ron through the IPC and Dr. Pepper  
23 rebates, she doesn't want to pay. So this is her excuse for not  
24 paying.

25           So whether it's a scheme or not, that's not for us to

1 decide, but clearly she knew No. 1, that Ron hadn't paid, and No.  
2 2, that there was no amended -- the amended return would not  
3 result in an IRS refund.

4           The mediation agreement simply has no relevance to the  
5 argument, your Honor. It's common that after a mediation for  
6 things to get left out, and that's exactly what happened here,  
7 your Honor. You know, the tax -- the property taxes on the  
8 Arizona property were left out, and Ron, justifiably so, wanted  
9 this divorce finalized quickly.

10           The way the mediation agreement was structured was such  
11 that he was getting -- he was getting non-liquid assets, and she  
12 was getting businesses that had going concern and generated  
13 income. So Ron wanted this divorce finalized quickly. When that  
14 didn't happen, he was justifiably desiring some of those profits  
15 that Holly got. After all, June, July, that's the peak season  
16 over in the Page area because of the traffic coming to the lake.

17           So you know, No. 1, we have the property taxes that  
18 weren't paid, and No. 2, we have the delay, okay, that cost Ron  
19 income. Not only that, under the mediation agreement as of July  
20 1, Ron was supposed to pay a whole bunch of obligations that  
21 Holly was paying previous to that point in time, and he did that.  
22 So now he's paying obligations and has liq -- non-liquid assets  
23 and not a ton of money to pay it, okay.

24           In light of that, your Honor, the -- Holly's order to  
25 show cause must be denied. Finally, your Honor, I think it's

1 pretty clear that Holly has breached her obligation owed under  
2 the divorce decree by failing to pay -- pay over the IPC and Dr.  
3 Pepper rebate checks. That amount is \$12,835. We've established  
4 here today that she received those checks sometime in January of  
5 2007 is what she testified. She did not pay those over in 10  
6 days. So she should be ordered to pay over those monies, as well  
7 as pay over any other monies that might be forthcoming.

8           There's going to be more rebate checks that may have  
9 already come up or will be coming up in the future. So this is  
10 an ongoing issue. So for that reason, your Honor, we'd ask that  
11 Holly be ordered to pay over those amounts. Thank you.

12           THE COURT: I'll issue a ruling within the next couple  
13 of weeks and we'll go from there. Thanks, folks. You're  
14 excused.

15           MR. BECKSTROM: Thank you, your Honor.

16           (Hearing concluded)

REPORTER'S CERTIFICATE

STATE OF UTAH        )  
                          ) ss.  
COUNTY OF TOOELE )

I, Natalie Lake, a Notary Public in and for the State of Utah, do hereby certify:

That this proceeding was transcribed under my direction from the transmitter records made of these meetings.

That I have been authorized by Beverly Lowe to prepare said transcript, as an independent contractor working under her court reporter's license, appropriately authorized under Utah statutes.

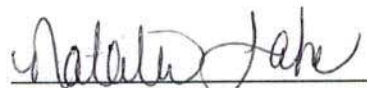
That this transcript is full, true, correct, and contains all of the evidence and all matters to which the same related which were audible through said recording.

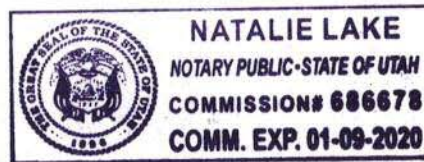
I further certify that I am not interested in the outcome thereof.

That certain parties were not identified in the record, and therefore, the name associated with the statement may not be the correct name as to the speaker.

WITNESS MY HAND AND SEAL this 30<sup>th</sup> day of October 2017.

My commission expires:  
January 9, 2020

  
\_\_\_\_\_  
Natalie Lake  
NOTARY PUBLIC  
Residing in Tooele County



  
\_\_\_\_\_  
Beverly Lowe, RSR, CCR

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