IN THE SUPREME COURT OF THE STATE OF UTAH

HOLLY REBECCA ROSSER, Petitioner, v. RONALD LEE ROSSER, Respondent.	Case no. 20190320-SC

PETITIONER'S REPLY BRIEF

ON WRIT OF CERTIORARI TO THE
UTAH COURT OF APPEALS

No. 20170736-CA

Appeal from a Final Judgment of the
Sixth Judicial District Court in and for
Garfield County, Panguitch Department
The Honorable Paul D. Lyman Presiding

No. 154600013

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ORAL ARGUMENT REQUESTED

No. 20190320-SC

In the
Supreme Court of the State of Utah

PARTIES ON APPEAL*

HOLLY REBECCA ROSSER,

Petitioner on Certiorari,
Appellee and Petitioner Below,

v.

RONALD LEE ROSSER,

Respondent on Certiorari,
Appellant and Respondent Below.

ADDITIONAL PARTIES BELOW

none.

* — Counsel for parties are listed on the front cover of this brief.

QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in its construction and application of Subsection 78B-6-301(4) of the Utah Code.

2. Whether the Court of Appeals erred in addressing the issue of the proper interpretation of Subsection 78B-6-301(4) of the Utah Code in light of the briefing on appeal.

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Petitioner Holly Rebecca Rosser ["Holly"], by and through counsel and pursuant to Rule 24(b) of the Utah Rules of Appellate Procedure, hereby submits the following reply brief supporting her position set forth in her Opening Brief[1] and addressing the arguments raised in Respondent Ronald Lee Rosser ["Ron"]'s Brief in Opposition.[2]

ARGUMENT

As Holly previously explained in her opening brief, there are two independent grounds for reversing the Court of Appeals' decision: first, the Court of Appeals' construction and application of Utah Code § 78B-6-301(4) ["Subsection (4)"] is incorrect as a matter of law; and second, the issue of the proper construction and application of Subsection (4) should not have been decided, as it was never properly before the Court of Appeals. Holly will discuss both of these grounds and Ron's responses to them in further detail *infra.* But before getting into those matters, Holly notes that in the Introduction and Statement of the Case sections of his Brief, Ron gives an account of the underlying material facts most favorable to his position.[3] However, as the issue before this Court is one of law, the facts are to be viewed "in the light most favorable to the findings of the trial court."[4] Thus, while parts of Ron's statement of facts may not

1. Hereinafter "Opening Br." (filed Aug. 28, 2019).
2. Hereinafter "Br. Opp." (filed Oct. 28, 2019).
3. Br. Opp. at 1–3, 6–10.
4. *See State v. Moosman*, 794 P.2d 474, 476 (Utah 1990).

represent the record accurately,[5] Holly will not trouble the Court with an issue that is of marginal relevance.

I. THIS COURT SHOULD REVERSE THE COURT OF APPEALS' DECISION AND HOLD THAT THE SCOPE OF CONTEMPTIBLE DECEIT UNDER SUBSECTION (4) IS EQUIVALENT TO THAT OF THE DOCTRINE OF FRAUD ON THE COURT.

In Point I of her opening brief, Holly showed how the Court of Appeals' interpretation of Subsection (4) as only applying to deceit communicated directly to a court is not supported by either the plain text of the statute or by its context or purpose. Rather, these factors, as well as the case law of other jurisdictions and scholarly authority, support an interpretation that focuses not on who the deceit is communicated to, but rather whether the deceit interfered with the administration of justice. In response, Ron raises the following arguments against this conclusion: **(A)** that the plain text of Subsection (4) supports the Court of Appeals' interpretation; **(B)** that Ron's deceitful conduct did not implicate the authority of the court; **(C)** that Holly's interpretation of Subsection (4) raises due process concerns; and **(D)** that the district court's findings are not sufficient to find fraud on the court. Holly will address these arguments in turn.

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5. For example, while Ron states that the parties' tax preparer, Derrick Clark, "assumed that [Holly] paid the amounts owed to the IRS by the April tax filing deadline," Br. Opp. at 8, this misrepresents his testimony. While Mr. Clark testified that he assumed that the amounts were paid, he did not testify as to who he believed had made the payments. R. at 1344–45 (Tr. Evid. Hr'g, 78:24–79:15).

A. The Court of Appeals' interpretation of Subsection (4) is not supported by the statute's plain text.

In his brief, Ron argues that Holly's reading of Subsection (4) renders inoperative or superfluous the phrase "in respect to a court or its proceedings."[6] However, as explained in page 16 of Holly's opening brief, "in respect to" means "concerning, regarding, related to or in connection with." While Ron appears to conclude that this phrase means "within" or "in the presence of,"[7] he does not provide any authority to support that conclusion. Ron's deceiving Holly to stipulate to the entry of an order at odds with the mediation agreement is plainly deceit "related to or in connection with" the court proceeding, and Ron does not attempt to refute that conclusion.

Ron also argues that Holly's reading of Subsection (4) "requires incorporating additional language to render it reasonable."[8] However, Ron does not explain what additional language would have to be added. As explained on page 16 of Holly's opening brief, the language of Subsection (4) does not include an object that the deceit must be directed toward. Thus, no additional language is needed for the statute to cover a party's

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6. Br. Opp. at 23.

7. Br. Opp. at 16 (arguing that while Subsection (4) "applied only in respect to a court or its proceedings," Holly's theory of contempt "relied exclusively on facts occurring outside of the court or its proceedings").

8. Br. Opp. at 25.

"out-of-court statement during an ongoing case"[9] if that statement otherwise meets the requirements for fraud or willful misrepresentation[10] and is consistent with the purposes of the contempt power.[11]

B. Ron's deceit implicates the authority of the court as it hindered Holly from presenting her claims and defenses.

Next, Ron looks at the provisions neighboring Subsection (4) and argues that "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.'"[12] Holly agrees with that statement—as stated in her opening brief, a deceit is contemptible if it impedes the court's authority and its function of administering justice.[13] However, as she also explained, a deceit does not need to be directed at the court in order to impede its authority and the administration of justice.[14] This is why Utah courts recognize as "fraud on the court" not just representations made to the court, but also acts calculated to "unfairly hamper[] the presentation of the opposing party's claim or defense."[15] Despite Ron's arguments to

9. Br. Opp. at 25.

10. Opening Br. at 16 (defining deceit).

11. *See* Opening Br. at 17 (explaining that a statute should be read in light of its purpose); *id.* at 19 (defining contempt).

12. Br. Opp. at 22.

13. Opening Br. at 19.

14. Opening Br. at 17–18.

15. Opening Br. at 20–21.

the contrary,[16] Ron's deceiving Holly to stipulate to the entry of an order at odds with the mediation agreement is intentional act by a party that prevents the opposing party from making a full defense and therefore "implicates the authority of the court." It is therefore contemptible deceit under Subsection (4).

C. Adjudicating a fraud on the court through contempt procedures does not raise due process concerns.

Ron next argues that it would be inappropriate to interpret Subsection (4) as encompassing a willful misrepresentation made by a party to someone other than the court because to do so would raise due process concerns. The first due process concern he raises is lack of notice, arguing that if Subsection (4) included a willful misrepresentation made by a party to someone other than the court, a party would be able "to initiate a civil or criminal contempt proceeding whenever an out-of-court statement . . . bears some relationship to vague notions of the administration of justice," which would mean that "litigants would likely

16. Br. Opp. at 26 (arguing that Subsection (4) "was understood to be directed towards protecting judicial authority, as opposed to private interest"); *id.* at 31 (arguing that cases cited by Holly are distinguishable because they "directly implicate the court's authority"); *id.* at 35 (arguing that fraud on the court "should be narrowly construed to embrace only that type of fraud which defiles the court itself"); *id.* at 38 n.13 ("[I]t is difficult to see how [the facts of this case] satisfy the demands of the fraud on the court doctrine . . .").

lack fair notice when their conduct may lead to criminal or civil sanctions."[17]

However, this argument fails for several reasons. First, "a statute is not unconstitutionally vague if it is sufficiently explicit to inform the ordinary reader what conduct is prohibited."[18] As explained on pages 15–16 of her Opening Brief, the plain text of Subsection (4) prohibits a party to an action or special proceeding from willfully deceiving or misrepresenting material facts in connection with that proceeding. Holly's interpretation is consistent with the plain text of the statute and so is not unconstitutionally vague. Second, any vagueness in Subsection (4) would arise not out of whether the deceit is directed at the court or another party, but because of the extra-textual requirement that the deception must "bear some relationship to vague notions of the administration of justice," as Ron puts it. However, this requirement is included in the very nature of contempt proceedings—deceit, whether toward the court or another party, is not contemptuous if the deceit does not "obstruct[] the court in the administration of justice."[19] It is therefore difficult to see how

17. Br. Opp. at 27–28.

18. *Orem City v. Bishop*, 2012 UT App 15, ¶ 3, 269 P.3d 1007.

19. *United States v. Talbot*, 133 F. Supp. 120, 127–28 (D. Alaska Terr. 1955); *see also* 21 N.Y. Jur. 2d *Contempt* § 21 (Rev. ed. 2019) (noting that "filing a false affidavit may constitute contempt," but "false statements in an affidavit do not constitute contempt where the statements are immaterial to any questions in the case or where the rights or remedies of the other party have not been defeated, impeded, or prejudiced").

the Court of Appeals' interpretation of Subsection (4) would not be subject to the same concerns. Finally, as Ron was held in civil contempt,[20] the question of whether Subsection (4) would be unconstitutionally vague as applied to criminal contempt is beyond the scope of this proceeding.[21]

Ron also argues that "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."[22] First, while it is true that the application of Rules 26–36 of the Utah Rules of Civil Procedure to contempt proceedings is somewhat unclear, Rules 16(a) and 26(c)(6) allow a party to obtain an order requiring the parties to make appropriate disclosures in advance of the hearing and allowing further discovery upon a showing of good cause. Second, as fraud must be alleged with particularity under Rule 9(c) of the Utah Rules of Civil Procedure, and as Utah Code § 78B-6-302(2) requires a statement of alleged facts to be issued, a party alleged to be in contempt has a remedy for unclear allegations of deceit. Finally, while Ron appears to complain about the lack of disclosure and discovery in his own case, it does not appear that he

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20. R. at 1132–1135.

21. *State v. Green*, 2004 UT 76, ¶ 43, 99 P.3d 820 ("The constitution tolerates a greater degree of vagueness in civil statutes than in criminal statutes."); *id.* at ¶ 44 ("vagueness challenges to statutes which do not involve First Amendment freedoms must be examined in the light of the facts of the case at hand").

22. Br. Opp. at 28.

ever requested disclosures or discovery or objected to the admission into evidence of any emails or text messages that were not previously disclosed. There is simply no basis for the argument that adjudicating a fraud on the court through the mechanism of contempt would raise legitimate due process concerns.

D. The district court made sufficient findings.

Finally, Ron argues that the district court did not make sufficient findings for contempt to be sustained under the interpretation of Subsection (4) Holly endorses:

> 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. 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." Likewise, the district court did not make specific findings that would support such a conclusion.[23]

This is incorrect. The district court found that the parties agreed in their mediation agreement to each pay one half of their tax debt, that Ron induced Holly to enter into a stipulation requiring her to pay remaining tax liabilities while concealing that he had not paid his half as he previously agreed to, and he thus knowingly and intentionally misled Holly about his failure to pay the taxes he agreed to pay.[24] These findings

23. Br. Opp. at 38.

24. R. at 1132–34.

are adequate to reach the ultimate conclusion that the Ron committed fraud on the court by deceiving or concealing relevant facts from Holly that hindered her ability to present her case.[25] Moreover, it does not appear that this argument was preserved or raised below, and is therefore not properly before the Court.

II. THIS COURT SHOULD REVERSE THE DECISION OF THE COURT OF APPEALS BECAUSE THE PROPER INTERPRETATION OF SUBSECTION (4) WAS NOT PROPERLY BEFORE IT.

In Point II of her opening brief, Holly explained that the issue of the proper interpretation of Subsection (4) was neither preserved in the lower court or raised in Ron's opening brief, that there were no exceptions that applied to allow the Court of Appeals to raise the issue *sua sponte*, and that even if there were, the procedural requirements for raising the issue were not followed, making the Court of Appeals' decision improper and reversible error.

In response, Ron first argues that he preserved the issue by "challeng[ing] the trial court's authority to hold him in contempt or grant the specific relief sought by Holly."[26] In support of this argument, he cites *Patterson v. Patterson* for the position that a party may raise controlling authority for the first time with the appellate court as long as that

25. *Kartchner v. Kartchner*, 2014 UT App 195, ¶ 27, 334 P.3d 1.

26. Br. Opp. at 41.

authority bears on a properly preserved issue.[27] However, Ron reads the exception in *Patterson* far too broadly—while Ron may not have had to raise the statute with the district court or the Court of Appeals, he had to at least raise the issue that his conduct he was found to have committed did not constitute contemptible deceit or fraud as a matter of law in order for the issue to be "presented to the district court in such a way that the court has an opportunity to rule on it."[28] To rule otherwise would allow a party to bootstrap all manner of new questions of law on appeal simply by generally challenging the district court's authority to enter an order.

Ron also argues that "no waiver occurred on appeal" because the issue of whether the district court's order holding Ron in contempt was justified under Subsection (4) was "raised in Holly's brief," to which he "simply responded" in his reply brief as this Court approved of in *Brown v. Glover*.[29] However, as Holly explained in her opening brief, the rule in *Brown* allowing an appellant to respond to an argument for the first time in its reply brief only applies when the appellee raises an alternate ground for affirmance in its response brief—not, as in this case, an argument used by the court of appeals to reverse the decision of the district court.[30] Rather than address this limitation to the rule in *Brown*

27. *Patterson v. Patterson*, 2011 UT 68, ¶ 11, 266 P.3d 828.

28. *Id.* at ¶ 12.

29. Br. Opp. at 43 n.14.

30. Opening Br. at 29–30.

in his brief, Ron ignores it and simply repeats the argument made in a previous submission to this Court.[31]

Ron next argues that exceptional circumstances apply to excuse the preservation requirement—namely, that he "had little reason to analyze the applicability of the statute . . . [as] Holly had not raised it as a basis for relief."[32] However, as noted in her opening brief, Holly had alleged fraud and misrepresentation as a basis for holding Ron in contempt.[33] In such a circumstance, there is no basis for finding exceptional circumstances. Moreover, even if there were such a basis, in order to excuse his failure to raise the issue before the Court of Appeals, Ron would still have to show that "the issue is astonishingly erroneous but undetected, the losing party would be subject to great and manifest injustice, and neither party is unfairly prejudiced by raising the issue at that point in the litigation."[34] Ron has not done made such a showing, and it is unlikely that he could do so.

Finally, Ron argues that the "pure law" exception applies.[35] As explained in pages 27–28 of Holly's opening brief, this argument fails for two reasons: first, the exception's third requirement that the unpreserved issue "is necessary to correctly determine an issue that was properly

31. *See* Opening Br. at 29 n.108.

32. Br. Opp. at 45.

33. Opening Br. at 7–8.

34. *State v. Johnson*, 2017 UT 76, ¶ 49, 416 P.3d 443.

35. Br. Opp. at 45–46.

raised" does not apply. Ron's only argument in response to this is that it was necessary to reach the scope of Subsection (4) to determine whether the district court had authority to hold a party in contempt absent a showing that the party had willfully failed to follow a court order. This response shows the problem with preservation in this case—if all that is required to preserve an issue of law is a general argument that the Court lacks authority, the preservation requirement is rendered meaningless. The Court should therefore reject this argument. Second, even if the pure law exception applied, the Court of Appeals did not follow proper procedure in reaching the issue, as Holly explained in page 28 of her opening brief.

CONCLUSION

For the foregoing reasons, Holly asks that this Court reverse the Court of Appeals' decision in this matter and remand to the Court of Appeals for further proceedings.

RESPECTFULLY SUBMITTED this 8th day of January, 2020.

/S/ Stephen D. Spencer
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Attorney for Petitioner

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was prepared using Microsoft Word and uses Century Schoolbook typeface in 13-point font. According to Microsoft Word's word-count function, this brief contains 3,001 words, excluding the caption, table of contents, table of authorities, certificate of compliance, certificate of service and addendum. This brief is therefore in compliance with the type-volume limitation of Utah R. App. P. 24(g).

I further certify that this petition, including the appendix, does not contain any non-public information and is therefore in compliance with Utah R. App. P. 21(g).

DATED this 8th day of January, 2020.

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PROOF OF SERVICE

I hereby certify that I caused a copy of the foregoing PETITIONER'S REPLY BRIEF to be delivered via email to the following recipients:

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I further certify that, within 7 days, I will cause two hard copies of the same to be delivered to these recipients via first-class mail.

DATED this 8th day of January, 2020.

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