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# ALABAMA COURT OF CIVIL APPEALS

SPECIAL TERM, 2020

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Clarence Williams

v.

Ginger Williams

Appeal from Jefferson Circuit Court  
(DR-12-901264.01)

DONALDSON, Judge.

Clarence Williams ("the former husband") appeals from a judgment of the Jefferson Circuit Court finding him to be in civil contempt. We reverse and remand.

Facts and Procedural History

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The former husband and Ginger Williams ("the former wife") were divorced in January 2014 by a judgment ("the divorce judgment") incorporating an agreement of the parties. Paragraph 15 of the divorce judgment provided:

"[The former] [w]ife is hereby awarded One Hundred Percent (100%) of the [former] [h]usband's retirement account with the Retirement Systems of Alabama .... The value of said account shall be as of October 22, 2012, the date this divorce [action] was filed. [The former] [w]ife shall be responsible for preparing a Qualified Domestic Relations Order ... for the collection of said retirement funds from the [Retirement Systems of Alabama]. This provision shall be non-modifiable. This Court hereby reserves jurisdiction in this matter for the sole purposes of entering a Qualified Domestic Relations Order ...."

A qualified domestic-relations order ("the QDRO") was subsequently entered. In pertinent part, the QDRO stated:

"This Order assigns to [the former wife] an amount equal to One Hundred Percent (100%) of the [former husband's] total account balance accumulated under the Plan as of the date of employment to October 22, 2012 (or the closest valuation date thereto), plus any interest/investment earnings or losses attributable thereon, for periods subsequent to date of employment to October 22, 2012, until the date of total distribution."

The Retirement Systems of Alabama ("RSA") refused to honor the QDRO<sup>1</sup> and, instead of paying the former wife in

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<sup>1</sup>Section 36-27-28(a), Ala. Code 1975, provides:

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accordance with the QDRO, paid the former husband his monthly retirement benefits. In February 2016, the former wife filed a petition asking the trial court (1) to modify the divorce judgment by ordering the former husband to pay the former wife a lump sum of \$39,933.39, the alleged value of the former husband's RSA account as of the date the divorce action had been commenced, and (2) to hold the former husband in contempt for not transferring \$39,933.39 from his RSA account to the former wife. In March 2016, the former husband filed a motion to dismiss the former wife's claims, alleging that the trial court lacked jurisdiction over those claims because, he said, those claims impermissibly sought a judgment amending the property division in the divorce judgment more than 30 days

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"Except as provided in subsection (b), the right of a person to a pension, an annuity, a retirement allowance or to the return of contributions, the pension, annuity or retirement allowance itself and any optional benefit or any other right accrued or accruing to any person under the provisions of this article [i.e., Title 36, Chapter 27, Article 1] and the monies in the various funds created by this chapter [i.e., Title 36, Chapter 27] are hereby exempt from any state or municipal tax and exempt from levy and sale, garnishment, attachment or any other process whatsoever and shall be unassignable except as in this article specifically otherwise provided."

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after the entry of that judgment. See, e.g., Hallmark v. Hallmark, 931 So. 2d 28, 30-31 (Ala. Civ. App. 2005) (holding that, when Teachers' Retirement Systems ("TRS") refused to honor a QDRO entered to enforce divorce judgment's award to a wife of a portion of the husband's TRS account, that award could not be modified more than 30 days after the entry of the divorce judgment).

Less than 42 days before the first trial setting, the former wife filed an amended petition without first seeking leave of the trial court as required by Rule 15(a), Ala. R. Civ. P. In November 2017, the trial court entered two orders; one of those orders struck the former wife's amended petition because the former wife had filed it without first seeking leave from the trial court to do so, see Rule 15(a), and the second order dismissed the former wife's divorce-modification claim pleaded in her original petition on the ground that it sought a modification of the property division in the divorce judgment more than 30 days after the entry of that judgment, see Hallmark, supra.

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After the trial court dismissed the former wife's amended petition and her divorce-modification claim pleaded in her original petition, the action proceeded on the contempt claim pleaded in the former wife's original petition only. The former husband subsequently sought and obtained leave to file a counterclaim against the former wife alleging that the former wife had violated a provision of the divorce judgment unrelated to his RSA account and seeking a finding that she was in contempt.

On March 6, 2018, the trial court held a trial, and, on April 6, 2018, it entered a judgment. With respect to the former wife's contempt claim, the judgment stated, in pertinent part:

"3. The [RSA] denied the [QDRO].

"4. The [former husband] now has full possession and control of [his RSA] retirement benefits in that he is now receiving monthly retirement benefits from the [RSA] account without the consent of the [former wife] who was awarded said funds in the [divorce judgment]. The [former husband] has excluded the [former wife] from the use and enjoyment of these funds.

"5. The [former husband] is in civil contempt of court for taking possession of the funds from the [RSA] account that is listed in his name as employee and which was awarded to the [former wife].

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"6. The [former husband] may purge himself of contempt by paying the [former wife] the monies awarded her, using the [divorce judgment] and the [QDRO] language regarding the valuation of the award."

The April 6, 2018, judgment also denied the former husband's counterclaim seeking a finding of contempt against the former wife.

The former husband timely filed a Rule 59(e), Ala. R. Civ. P., motion. Insofar as the April 6, 2018, judgment had held the former husband in contempt, the former husband's Rule 59(e) motion asserted:

"6. The parties agreed, and said agreement was ratified by the Court, [that] the means of collection on the RSA account in the name of the [former husband] would be collected through a QDRO. The agreement does not state any other means of collection of said account. The [former husband] has no duty or legal obligation to tender this account by payments or lump sum to the [former wife]. The [former husband] is not legally liable to ensure this RSA retirement account is collected or transferred to the [former wife]. The order clearly states the [former wife] is responsible for the collection through a QDRO.

"7. The Court has now ordered the [former husband] to pay the sums in the retirement account directly to the [former wife], and in addition, held the [former husband] in contempt, absent any court order directing him to pay. The Court has, in effect, modified the terms of the [former wife's] collection of the retirement account. The Court has ordered the [former husband] to pay the sums,

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instead of the RSA through a QDRO, as a means to collect. The means of collection for this account is clearly through a QDRO."

Insofar as the trial court's April 6, 2018, judgment had denied the former husband's counterclaim, the Rule 59(e) motion asserted that the former husband had objected to his counterclaim being tried on March 6, 2018, because, he said, the former wife had been served with the counterclaim less than 30 days before the trial and she had neither answered the counterclaim nor waived the 30-day period for her to answer the counterclaim before the trial.

On May 7, 2018, the trial court entered an order vacating its April 6, 2018, judgment insofar as it had adjudicated the former husband's counterclaim but declining to vacate that judgment insofar as it had adjudicated the former wife's contempt claim in her favor. On June 13, 2018, the former husband filed a notice of appeal, which this court docketed as appeal no. 2170851. On January 3, 2019, this court dismissed appeal no. 2170851 because the April 6, 2018, judgment had been rendered nonfinal by the trial court's vacating the portion of that judgment adjudicating the former husband's counterclaim, which remained pending in the trial

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court. On January 22, 2019, this court issued its certificate of judgment in appeal no. 2170851.

Thereafter, in the trial court, the former wife filed an answer to the former husband's counterclaim in which she denied that she had violated the divorce judgment. On July 24, 2019, the trial court, in response to a motion to dismiss his counterclaim filed by the former husband, entered an order dismissing that counterclaim. The former husband filed a timely notice of appeal, which this court has docketed as appeal no. 2180981. The former wife did not file a cross-appeal challenging the dismissal of her amended petition or the dismissal of the divorce-modification claim pleaded in her original petition.

#### Standard of Review

Because the former wife did not cross-appeal the dismissal of her other claims, the only issue before us is whether the trial court's judgment in her favor on her contempt claim was erroneous. See Cavalier Mfg., Inc. v. Clarke, 862 So. 2d 634, 643 (Ala. 2003) (quoting McMillan, Ltd. v. Warrior Drilling & Eng'g Co., 512 So. 2d 14, 24 (Ala. 1987)) ("In the absence of taking an appeal, an appellee may



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not cross-assign as error any ruling of the trial court adverse to appellee.'").

"We review the trial court's finding of civil contempt under the following well settled standard of review.

"'The issue whether to hold a party in contempt is solely within the discretion of the trial court, and a trial court's contempt determination will not be reversed on appeal absent a showing that the trial court acted outside its discretion or that its judgment is not supported by the evidence. Brown v. Brown, 960 So. 2d 712, 716 (Ala. Civ. App. 2006) (affirming a trial court's decision not to hold a parent in contempt for failure to pay child support when the parent testified that he had deducted from his monthly child-support payment the amount he had expended to buy clothes for the children).'

"Poh v. Poh, 64 So. 3d 49, 61 (Ala. Civ. App. 2010).

"'Rule 70A, Ala. R. Civ. P., has governed contempt proceedings in civil actions since July 11, 1994. Rule 70A(a)(2)(D) defines "civil contempt" as a "willful, continuing failure or refusal of any person to comply with a court's lawful writ, subpoena, process, order, rule, or command that by its nature is still capable of being complied with."

"Stamm v. Stamm, 922 So. 2d 920, 924 (Ala. Civ. App. 2004). Moreover, in order to hold a party in contempt under Rule 70A(a)(2)(D), the trial court must find that the party willfully failed or refused to comply with a court order. See T.L.D. v. C.G., 849 So. 2d 200, 205 (Ala. Civ. App. 2002)."

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Kreitzberg v. Kreitzberg, 131 So. 3d 612, 627-28 (Ala. Civ. App. 2013).

### Analysis

The former husband argues, among other things, that the trial court's April 6, 2018, judgment should be reversed because, he says, he could not be held in contempt for accepting his retirement benefits or for refusing to pay the former wife the value of his RSA retirement account as of October 22, 2012. The former husband argues that those actions did not violate the divorce judgment. The divorce judgment specified that a QDRO that was to be served on the RSA was the means of collecting the award to the former wife of the value of the former husband's RSA account as of October 22, 2012. The divorce judgment did not provide for an alternative means of collection if the RSA refused to honor the QDRO. Moreover, the divorce judgment neither ordered the former husband to refuse acceptance of his retirement benefits if the RSA refused to honor the QDRO and paid those benefits to him nor ordered him to pay his retirement benefits to the former wife if the RSA paid them to him. Like a contract, a divorce judgment "that by its terms is plain and free from ambiguity

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must be enforced as written.'" Belcher v. Belcher, 18 So. 3d 946, 948 (Ala. Civ. App. 2009) (quoting R.G. v. G.G., 771 So. 2d 490, 494 (Ala. Civ. App. 2000)). "'Civil contempt' means willful, continuing failure or refusal of any person to comply with a court's lawful writ, subpoena, process, order, rule, or command that by its nature is still capable of being complied with." Rule 70A(a)(2)(D), Ala. R. Civ. P. Because the divorce judgment did not order the former husband not to accept his RSA retirement benefits if the RSA refused to honor the QDRO, his acceptance of those benefits could not constitute a violation of the divorce judgment and, therefore, could not constitute a basis for holding him in civil contempt. See Rule 70A(a)(2)(D). Moreover, because the divorce judgment did not order the former husband to pay his RSA retirement benefits to the former wife if the RSA paid them to him, his failure to pay those benefits to the former wife could not constitute a basis for holding him in contempt. Id. Therefore, because, "in order to hold a party in contempt under Rule 70A(a)(2)(D), the trial court must find that the party willfully failed or refused to comply with a court order," Kreitzberg, 131 So. 3d at 628, and because the record does not establish that the

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former husband willfully failed or refused to comply with a court order, we must reverse the trial court's April 6, 2018, judgment and remand the cause for further proceedings consistent with this opinion. Because we have reversed the trial court's judgment based on the former husband's argument that he had not violated a court order, we do not reach his argument that the trial court's April 6, 2018, judgment constituted an erroneous modification of the property division in the divorce judgment more than 30 days after the entry of that judgment. The former wife's request for attorney's fees on appeal is denied.

REVERSED AND REMANDED.

Edwards and Hanson, JJ., concur.

Moore, J., concurs specially, with writing.

Thompson, P.J., concurs in the result, without writing.

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MOORE, Judge, concurring specially.

Paragraph 15 of the judgment divorcing Clarence Williams ("the former husband") from Ginger Williams ("the former wife") awarded the former wife "One Hundred Percent (100%) of the [former] [h]usband's retirement account with the [Employees'] Retirement Systems of Alabama [('the RSA')]" as it existed on October 22, 2012. Although paragraph 15 provided that the award was to be collected from the RSA through a "QDRO,"<sup>2</sup> the RSA refused to honor the orders of the Jefferson Circuit Court ("the trial court") assigning the former husband's retirement benefits to the former wife. After the RSA started paying the retirement benefits to the

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<sup>2</sup>A QDRO, or qualified domestic-relations order, is a court order approved by a pension or retirement-plan administrator granting to a payee spouse rights in another spouse's retirement or pension plan that is governed by the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 et seq. See 2 Brett Turner, Equitable Distribution of Property § 6:19 (4th ed. 2019). ERISA does not apply to a "governmental plan," 29 U.S.C. § 1003(b)(1), i.e., "a [retirement] plan established or maintained for its employees by ... the government of any State or political subdivision thereof ...." 29 U.S.C. § 1002(32). Because the retirement plan administered by the RSA is a "governmental plan," see Ala. Code 1975, § 36-27-2, it is not covered by ERISA, and, thus, any reference to a "QDRO" technically would be incorrect in the context of an order directing the RSA to pay retirement benefits earned by a state employee to his or her nonowning spouse.

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former husband, who retained them, the former wife commenced the underlying civil action against the former husband, which was ultimately treated as a contempt proceeding. The trial court determined that the former husband was in "contempt of court for taking possession of the funds from the [RSA] account that is listed in his name as employee and which was awarded to the [former wife]."

I concur with the main opinion that the trial court erred in holding the former husband in contempt. As the former husband argues, the parties' 2014 divorce judgment does not expressly order him to pay his retirement benefits to the former wife directly. "A person cannot be held in contempt for failure to do something the court has not ordered." Meadwestvaco Corp. v. Mitchell, 195 So. 3d 290, 294 (Ala. Civ. App. 2015). The parties' 2014 divorce judgment also does not impliedly order the former husband to directly pay to the former wife his retirement benefits in the event the RSA rejected the efforts of the former wife to enforce the QDRO. Even if it did, an implied order cannot be enforced by contempt.

"A person may not be held in contempt of a court order that is too indefinite, ambiguous, or vague to

be enforced. The very nature of a proceeding in either civil or criminal contempt for an alleged disobedience of a court order requires that the language in the commands be clear and certain. A court's order sufficient to support the sanction of contempt for a violation should inform the person in certain, clear, and definite terms as to the duties thereby imposed or the actions required or forbidden. The mandate alleged to be violated must be clearly expressed rather than implied. It must be unambiguous, precise, and specific. The order must not be subject to dual or multiple reasonable interpretations."

17 Am. Jur. 2d Contempt § 140 (2014) (footnotes omitted; emphasis added); see also Jones v. Jones, 320 Ark. 449, 451, 898 S.W.2d 23, 24 (1995) ("For a person to be held in contempt for violating a court order, that order must be clear and definite as to the duties imposed upon the party, and the directions must be expressed rather than implied.").

Upon erroneously citing the former husband for contempt, the trial court ordered the former husband to purge himself of the contempt by paying the former wife the retirement benefits awarded to her in the parties' 2014 divorce judgment. A purge order is an order requiring a party to comply with the original judgment. See S.T.W. v. T.N., 141 So. 3d 1083, 1086 (Ala. Civ. App. 2013) (quoting Davenport v. Hood, 814 So. 2d 268, 272-73 (Ala. Civ. App. 2000), quoting in turn Hill v.

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Hill, 637 So. 2d 1368, 1370 (Ala. Civ. App. 1994)) ("In order to purge himself in a civil contempt case, the contemnor must comply with the court's order."). The purge order in the present case does not order the former husband to comply with the parties' 2014 divorce judgment, which did not require the former husband to make any direct payments to the former wife. Moreover, insofar as a purge order is intertwined with a contempt citation, see generally T.L.D. v. C.G., 849 So. 2d 200, 206 (Ala. Civ. App. 2002) (holding that a contempt citation is not effective until completed by a purge order), the reversal of a judgment finding a party in contempt necessarily results in a vacatur of the purge order.

Despite my concurrence, I am troubled by the end result in this case. In the parties' 2014 divorce judgment, the former husband agreed, and the trial court ordered, that the former wife would receive 100% of the former husband's RSA retirement benefits as of October 22, 2012. Nevertheless, because the former wife has been unable to access those benefits through the collection mechanism set forth in the parties' 2014 divorce judgment, the former husband has been retaining the benefits awarded to the former wife.



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That said, the former wife has not directly challenged the refusal by the RSA to honor the "QDRO." The RSA relied on Ala. Code 1975, § 36-27-28(a), to reject the trial court's attempt to enforce the parties' 2014 divorce judgment. Section 36-27-28(a) provides, in pertinent part:

"Except as provided in subsection (b), the right of a person to a pension, an annuity, a retirement allowance or to the return of contributions, the pension, annuity or retirement allowance itself ... accrued or accruing to any person under the provisions of this article [i.e., Title 36, Chapter 27, Article 1] and the monies in the various funds created by this chapter [i.e., Title 36, Chapter 27] are hereby exempt from ... attachment or any other process whatsoever and shall be unassignable except as in this article specifically otherwise provided."

In Kleinatland v. Kleinatland, 218 So. 3d 1204 (Ala. Civ. App. 2016), this court, citing only Sockwell v. Sockwell, 822 So. 2d 1219, 1225 (Ala. Civ. App. 2001) (authored by Pittman, J., with four judges concurring in the result), a nonbinding plurality opinion construing Ala. Code 1975, § 16-25-23, assumed, without deciding, that § 36-27-28(a) precludes a trial court from ordering a division of RSA retirement benefits. However, that conclusion would contradict the weight of caselaw holding that similarly worded provisions in other states, being intended as spendthrift provisions to

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protect state employees' retirement benefits from third-party creditors, do not apply to a property distribution in a divorce context. See Koelsch v. Koelsch, 148 Ariz. 176, 180, 713 P.2d 1234, 1238 (1986); In re Marriage of Tagen, 62 P.3d 1092 (Colo. App. 2002); Forrester v. Forrester, 953 A.2d 175, 181 (Del. 2008); In re Marriage of Oler, 451 N.W.2d 9 (Iowa Ct. App. 1989); In re Marriage of Sedbrook, 16 Kan. App. 2d 668, 827 P.2d 1222 (1992); Glidewell v. Glidewell, 859 S.W.2d 675 (Ky. Ct. App. 1993); Walker v. Walker, 463 So. 2d 912, 913 (La. Ct. App. 1985); Prince George's Cty. Police Pension Plan v. Burke, 321 Md. 699, 584 A.2d 702 (1991); Early v. Early, 413 Mass. 720, 604 N.E.2d 17 (1992); Lindner v. Lindner, 137 Mich. App. 569, 358 N.W.2d 376 (1984); Walswick-Boutwell v. Boutwell, 663 N.W.2d 20 (Minn. Ct. App. 2003); In re Marriage of Butler, 243 Mont. 521, 795 P.2d 467 (1990); Cleveland v. Board of Trs., Police & Firemen's Ret. Sys., 229 N.J. Super. 156, 550 A.2d 1287 (App. Div. 1988); Majauskas v. Majauskas, 61 N.Y.2d 481, 474 N.Y.S.2d 699, 463 N.E.2d 15 (1984); Olson v. Olson, 445 N.W.2d 1 (N.D. 1989); Erb v. Erb, 91 Ohio St. 3d 503, 747 N.E.2d 230 (2001); Johnson v. Johnson, 85 Ohio App. 3d 161, 619 N.E.2d 458 (1993); Rice v. Rice, 762 P.2d 925

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(Okla. 1988); Young v. Young, 507 Pa. 40, 488 A.2d 264 (1985); Allard v. Allard, 708 A.2d 554 (R.I. 1998); Alves v. Alves, 644 A.2d 1291 (R.I. 1994); and Irving Fireman's Relief & Ret. Fund v. Sears, 803 S.W.2d 747 (Tex. App. 1990). Nothing in our decision should be read as deciding that the RSA was correct in its interpretation of § 36-27-28(a) or that the former wife is foreclosed from pursuing any legal rights she might have against the RSA to compel its compliance with the "QDRO."

Furthermore, the main opinion decides only that contempt was an improper method of enforcing the parties' 2014 divorce judgment. The trial court dismissed the former wife's modification claim and the former wife did not appeal the order of dismissal, so the main opinion does not address the question whether the trial court could have modified the parties' 2014 divorce judgment to direct the former husband to directly pay to the former wife the retirement benefits awarded therein. The former husband maintains that the parties agreed that the former wife could collect the retirement benefits solely from the RSA through a "QDRO" mechanism and that that agreement could not be modified more

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than 30 days after the entry of the divorce judgment. However, "'the entry of a QDRO is a method of enforcing or implementing the terms of an existing divorce judgment.'" Ex parte Montgomery, 97 So. 3d 148, 152 (Ala. Civ. App. 2012) (quoting Ex parte Montgomery, 79 So. 3d 660, 668 (Ala. Civ. App. 2011)). Although a trial court may not modify a substantive award of property in a divorce judgment, a trial court retains continuing jurisdiction to modify the enforcement provisions of the divorce judgment to assure that the substantive award is paid as intended. See Filer v. Filer, 502 So. 2d 698, 699 (Ala. 1987); Jardine v. Jardine, 918 So. 2d 127, 136 (Ala. Civ. App. 2005) ("Clearly, in situations where a trial court's judgment is not susceptible to performance as written, courts have the authority and the duty to interpret, implement, and enforce and even to augment those judgments so as to effectuate the court's original intent ...."). In my opinion, no jurisdictional barrier precluded the trial court from modifying the enforcement provisions of the 2014 divorce judgment to require the former husband to directly pay the retirement benefits owed to the former wife. See Williams v. Williams, 32 Va. App. 72, 526

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S.E.2d 301 (2000) (holding that an order modifying divorce judgment that had provided for enforcement by QDRO to require retiree to directly pay retirement benefits to spouse was considered a nunc pro tunc modification that did not impermissibly alter substantive provision of final judgment entitling former wife to 50% of the benefits); 2 Brett Turner, Equitable Distribution of Property § 6:20 (4th ed. 2019) ("Where the court attempts to divide a pension by qualified order but then learns that the pension cannot be so divided, an order directing the owning spouse to make payments directly to the nonowning spouse is either enforcement or correction of a mutual mistake.").