THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
DeAndrea Benjamin, Circuit Court Judge
and
L. Casey Manning, Circuit Court Judge

Civil Action No. 2011-CP-40-01980

Robert S. Jones.....Plaintiff/Appellant
v.
Builders Investment Group, LLC,
Brian D. Boone and Arden Homebuilders, LLC.....Defendants

Of Whom
Builders Investment Group, LLC
and Brian D. Boone are.....Respondents

FINAL BRIEF OF APPELLANT

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September 9, 2014

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TABLE OF AUTHORITIES

STATEMENT OF ISSUES ON APPEAL

I. The trial court erred, in granting the Respondents' motion for judgment notwithstanding the verdict, by ruling that Appellant Jones's discharge of the Renewed Loan by giving a personal promissory note to Southern First Bank was not payment of the loan entitling Appellant Jones to contribution from Respondents BIG and Boone.

II. The trial court erred, in granting the Respondents' motion for judgment notwithstanding the verdict, by ruling that Section 2.3 of the Operating Agreement unambiguously means that a Class A member would not have to personally guaranty a loan if a lender did not specifically require that particular member to do so.

STATEMENT OF THE CASE

A jury trial in this case was held on December 11 and 12, 2012. At the end of the trial, the jury returned a verdict for Appellant Jones. (Verdict Form; R. pp. 6-7.) On December 27, 2012, Respondents Builders Investment Group, LLC and Brian D. Boone ("BIG and Boone") filed a Motion For a Judgment Notwithstanding the Verdict, or in the Alternative, a New Trial (Motion for a New Trial; R. pp. 32-124.) The trial court issued its Order Granting Defendants' Builders Investment Group, LLC and Brian D. Boone's Motion for Judgment Notwithstanding the Verdict ("Order Granting JNOV") on May 15, 2013. (Order Granting JNOV; R. pp. 8-18.) Appellant Jones timely filed a Motion to Alter or Amend Order Pursuant to Rule 59(e), SCRCP. (Rule 59(e) Motion; R. pp. 125-130.) The trial court issued its Order Denying Plaintiff's Motion to Alter or Amend Pursuant to Rule 59(e), SCRCP on November 18, 2013. (Order Denying Rule 59(e) Motion; R. pp. 19-27.) Appellant Jones believes that the trial court erred in granting judgment notwithstanding the verdict in favor of the Respondents. Appellant Jones timely filed a Notice of Appeal with this Court.

FACTS

On July 31, 2007, Appellant Jones and Respondents BIG and Boone executed the Operating Agreement of Arden Homes, LLC ("Operating Agreement"). (Arden Homes

Operating Agreement, pp. 33-34; R. pp. 482-483.) Pursuant to the terms of the Operating Agreement, all three parties were Class A Members of Arden Homebuilders, LLC ("Arden"). (Operating Agreement p. 36; R. p. 485.) The Operating Agreement contemplates that the parties would guaranty loans made to the Arden. In particular, Section 2.3 of the Operating Agreement states as follows:

> 2.3 Guaranty of Loans to Company. Each of the Class A Members (but none of the Class B Members) shall, in its individual capacity, jointly and severally guaranty any loan to the Company ("Guaranteed Loan") for so long as any guaranty of such loan is required by the lender. **Notwithstanding any other provision of this Agreement or any provision of the Guaranteed Loan documents, as between the Members, each Class A Member shall be responsible for paying such Class A Member's proportionate share of any Guaranteed Loan ("Guaranty Percentage").** The "proportionate share" of a Class A Member shall equal such Class A Member's Percentage Interest divided by the aggregate Percentage Interests of all of the Class A Members. Any Class A Member who pays more than such Class A Member's Guaranty Percentage of the Guaranteed Loan to the Lender shall be entitled to contribution from the other Class A Members. Any Class A Member who is required to institute legal action to enforce such right of contribution shall be entitled to recover from the other Class A Members all costs and reasonable attorneys fee. Pursuant to the Company's Settlement Agreement with W. Ray Holt dated September 27, 2006 ("Settlement Agreement)), the provisions of this Section shall not apply to W. Ray Holt and the Company agrees to indemnify and hold W. Ray Holt harmless from any liability related thereto or to any guarantees which W. Ray Holt gave to any vendor for the sole benefit of the company.

(Operating Agreement, p. 9; R. p. 458) (emphasis added).

Arden did in fact need additional operating capital (Test. of Jones, Tr. of trial 50:19-51:1; R. p. 196, line 19-p. 197, line 1), and on or about September 25, 2007, Arden borrowed from South First Bank, N.A. ("South First"), in Columbia, South Carolina, the sum of approximately $498,000.00 with interest at a variable rate (the "Original Loan"). (Note dated September 25, 2007; R. p. 500.) Appellant Jones and two other members of Arden personally guaranteed the Original Loan. (Guaranties; R. pp. 501-503; Test. of Jones, Tr. of trial 49:21-50:1; R. p. 195, line 21-p. 196, line 1.) Respondents BIG and Boone refused to guaranty the Original Loan.

(Test. of Jones, Tr. of trial 50:3-15; R. p. 196, lines 3-15; Test. of Kessler, Tr. of trial 92:3-93:6; R. p. 238, line 3-p. 239, line 6.)

On September 24, 2008, the day before the Original Loan was to mature, the Original Loan was renewed by Arden (the "Renewed Loan"). (Note dated September 24, 2008; R. p. 509.) The term of the Renewed Loan was for one year, with a maturity date of September 24, 2009. (*Id.*) Appellant Jones as well as one other member of Arden guaranteed the Renewed Loan as required by the lender. (Guaranties; R. pp. 510-511; Test. of Jones, Tr. of trial, 51:4-12; R. p. 197, lines 4-12.)

By December 2009, Arden was out of business and did not pay the Renewed Note when it matured on September 24, 2009, so Appellant Jones was left to "deal with" the Renewed Note. (Test. of Jones, Tr. of trial 52:21-53:7; R. p. 198, line 21-p. 199, line7.) Appellant Jones gave a personal note to Southern First Bank and liquidated certain personal assets to pay off the Renewed Loan. (Test. of Jones, Tr. of trial 53:4-54:20; R. p. 199, line 4-p. 200, line 20; 65:6-15; R. p. 211, lines 6-15; 80:18-81:5; R. p. 226, line 18-p. 227, line 5; Test. of Strickland, Tr. of trial 186:18-21; R. p. 332, lines 18-21; 187:19-188:4; R. p. 333, line 19-p. 334, line 4; 191:21-192:3; R. p. 337, line 21-p. 338, line 3; 193:9-12; R. p. 339, lines 9-12.) Appellant Jones felt personally responsible for payment of the Renewed Note because of his long time banking relationship with Southern First and in particular, banker Justin Strickland. (Test. of Jones, Tr. of trial 52:8-53:7; R. p. 198, line 8-p. 199, line 7.)

Appellant Jones's personal note evidences a loan ("the Personal Loan") in the amount of $449,326.33 made by Southern First to Appellant Jones personally, which note had a maturity date of December 8, 2010. (Note dated December 8, 2009; R. pp. 512-513.) As a result of Appellant Jones's undertaking of the Personal Loan, the Renewed Loan was discharged and

Arden had no further liability for payment of the Renewed Note. (Test. of Jones, Tr. of trial 52:7-9; R. p. 198, lines 7-9; 53:23-55:7; R. p. 199, line 23-p. 202, line 7; Test. of Strickland, Tr. of trial 186:18-21; R. p. 332, lines 18-21; 187:19-188:4; R. p. 333, line 19-p.334, line 4; 191:21-192:3; R. p. 337, line 21-p. 338, line 3.)

Unfortunately, Appellant Jones was unable to pay the Personal Loan. (Test. of Jones, Tr. of trial 55:10-24; R. p. 201, lines 10-24.) Accordingly, Southern First obtained a judgment against Appellant Jones in the amount of $449,326.33. (Confession of Judgment; R. pp. 562-564; Test. of Strickland, Tr. of trial 192:1-11; R. p. 338, lines 1-11.)

Respondents BIG and Boone have refused to pay their proportionate share of the Renewed Loan as Jones asserts they were required to do by the terms of the Operating Agreement. (Test. of Jones, Tr. of trial 56:7-17; R. p. 202, lines 7-17.) This litigation ensued.

STANDARD OF REVIEW

Our Court of Appeals has set forth the standard of review on a motion for judgment notwithstanding the verdict in *Burns v. Universal Health Services, Inc.*, 361 S.C. 221, 603 S.E.2d 605 (Ct. App. 2004) (internal citations omitted):

> In ruling on a motion for JNOV, the trial judge cannot disturb the factual findings of a jury unless a review of the record discloses no evidence which reasonably supports them. In making this determination, the judge must view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the nonmoving party. The trial court must deny the motion when the evidence yields more than one inference or its inferences are in doubt.
>
> In deciding a motion for JNOV, the trial judge is concerned with the existence of evidence, not its weight. When considering a JNOV motion, neither an appellate court, nor the trial court has authority to decide credibility issues or to resolve conflicts in the testimony or the evidence.
>
> A motion for JNOV may be granted only if no reasonable jury could have reached the challenged verdict. If more than one inference can be drawn from the evidence, the grant of a JNOV is improper and the case must be left to the jury's determination. The verdict will be upheld if there is any evidence to sustain the

> factual findings implicit in the jury's verdict. The appellate court will reverse the trial court's ruling on a JNOV motion only when there is no evidence to support the ruling or where the ruling is controlled by an error of law.

ARGUMENT

In this case, the trial court erred as a matter of law in granting the Respondents' motion for judgment notwithstanding the verdict because there was more than sufficient evidence for a jury to find that Appellant Jones had paid more than his pro-rata portion of the Renewed Note and was entitled to contribution from Respondents BIG and Boone.

1. The trial court erred, in granting the Respondents' motion for judgment notwithstanding the verdict, by ruling that Appellant Jones's discharge of the Renewed Loan by giving a personal promissory note to Southern First Bank was not payment of the loan entitling Appellant Jones to contribution from Respondents BIG and Boone.

The central question here is whether Appellant Jones "paid" more than his proportionate share of the Renewed Loan. Appellant Jones asserts that he paid the entire Renewed Loan at the time of making the Personal Loan and payment to Southern First of certain personal assets. The Respondents argue and the trial court agreed that such undertaking of the Personal Loan was not payment of the Renewed Loan and that Appellant Jones would not be considered to have paid the Renewed Loan until he also made payment to Southern First on the Personal Loan in the form of money.

There is no case law in South Carolina on this point; however, a similar situation has been considered by at least one other court. *Barton v. Farmers' State Bank*, 276 S.W. 177 (Comm. of App. TX 1925). In *Barton*, the Texas court stated:

> Payment, where required, does not have to be made with money. This is recognized in every authority that we have seen. In the statement of the general rule made in 9 Cyc. 798, and 13 C. J. 823, it is said that the right of contribution is not "enforceable until there has been an actual payment * * * of the common obligation or till something is done which is equivalent to a discharge thereof." Mr. Brandt says that one cannot enforce

> contribution against another until he has "made a payment of the obligation, or assumed more than his share of the debt." *Suretyship & Guaranty* (2d. Ed.) § 254. *See, also*, *Backus v. Coyne*, 45 Mich. 584, 8 N. W. 699. It may properly be said, therefore, that anything of detriment to one obligor (whether principal or surety) which has the effect of discharging his coprincipal or cosurety from the joint obligation is a sufficient payment upon which to base contribution.
>
> And amongst the familiar media of such payments are promissory notes, where the notes are taken with intent of extinguishing the prior debt. In several jurisdictions, if the note taken on a pre-existing debt is negotiable in form, its mere taking imports discharge of the debt, and is a payment adequate to support a suit for contribution. *Robertson v. Maxcey*, 6 Dana (36 Ky.) 101; *Greene v. Anderson*, 102 Ky. 216, 43 S. W. 195, 197, and cases there cited; *Witherby v. Mann*, 11 Johns. (N. Y.) 519; *Pearson v. Parker*, 3 N. H. 366; *Cornwall v. Gould*, 4 Pick. (Mass.) 444; *Amos v. Bennett*, 125 Mass. 120, 123; *Gooding v. Morgan*, 37 Me. 419.

More recently, a court in Illinois has held, "Contribution involves the partial reimbursement of one who has discharged a common liability. Discharge is defined as any method by which a legal duty is extinguished; esp., the payment of a debt or satisfaction of some other obligation." *Small v. Rogers*, 938 N.E.2d 18, 22 (Ill. App. Ct. 2010) (internal citations and quotations omitted).

At least one other court outside of South Carolina has considered a situation similar to that faced here. *Kee v. Lofton*, 737 P.2d 55 (Ct. App. Kan. 1987). In *Kee*, one guarantor signed a personal promissory note discharging the other guarantors from liability on a common debt. The Plaintiff then proceeded to make payments on the personal promissory note. After a time, he sought contribution from the former co-guarantors. The Kansas court held that the statute of limitations on his claim for contribution had begun to run at the time that he signed the personal promissory note discharging the debt, and that, because he had waited until he had paid in cash on the promissory note more than his ratable share, the statute of limitations had run. *Id.* Although the issue presented in *Kee* is different—i.e. the statute of limitations—the underlying

concept remains the same. Giving a promissory note is payment of a common debt entitling a co-guarantor to contribution.

A common treatise also considers the sufficiency of discharge entitling one to contribution:

> It is not necessary that the claimant's payment be made in cash. Its equivalent, such as the claimant's negotiable promissory note or anything else the creditor accepts as satisfaction, is generally sufficient. . . . For a note or other negotiable instrument to be equivalent to payment for contribution purposes, the creditor must have accepted it in satisfaction of the whole or more than the claimant's fair share of the obligation.

18 Am. Jur. 2d Contribution § 14 Sufficiency and medium of discharge-payment not in cash. Thus, the weight of authority indicates that discharge of a corporate obligation by the undertaking of a personal obligation is payment of the corporate obligation for the purpose of contribution.

There is no dispute that the Renewed Loan no longer exists and that it was discharged by Appellant Jones's Personal Loan. Accordingly, discharge of the Renewed Note by the Jones promissory note, and subsequent Confession of Judgment, were payment of the Renewed Note by Appellant Jones entitling him to contribution.

Additionally, Respondents BIG and Boone are bound by the Operating Agreement to share responsibility for the Renewed Note, regardless of whether they signed a guaranty or not. Section 2.3 of the Operating Agreement states:

> Notwithstanding any other provision of this Agreement or any provision of the Guaranteed Loan documents, as between the Members, each Class A Member shall be responsible for paying such Class A Member's proportionate share of any Guaranteed Loan ("Guaranty Percentage").

A member's proportionate share of any "Guaranteed Loan" is calculated based upon the member's Percentage Interest and is not dependent upon whether the member provided a

guaranty or not. (Operating Agreement p. 9; R. p. 458.) Thus, despite the fact that Respondents BIG and Boone did not personally guaranty the Renewed Note, they were required to contribute their Percentage Interest to the payment of that Renewed Note. Because Appellant Jones paid the entire Renewed Note for Arden, Respondents BIG and Boone are bound to contribute their pro-rata share.

As a secondary matter, the trial court's Order Granting JNOV appears to conflate the issues of contribution and indemnification such that the Court finds that the Operating Agreement is a contract of indemnification. Although these terms are sometimes used interchangeably in South Carolina case law, the concepts differ in a significant way.

> Indemnity has been defined as "[a] contractual or equitable right under which the entire loss is shifted from a tortfeasor who is only technically or passively at fault to another who is primarily or actively responsible." Black's Law Dictionary 769 (6th 670 ed.1990) (emphasis added). In contrast, "contribution" is defined as the:[r]ight of one who has discharged a common liability to recover of another also liable, the aliquot portion which he ought to pay or bear. Under principle of 'contribution,' a tort-feasor against whom a judgment is rendered is entitled to recover proportional shares of judgment from other joint tort-feasors whose negligence contributed to the injury and who were also liable to the plaintiff. *Id.* at 328.

Andrade v. Johnson, 345 S.C. 216, 225, 546 S.E.2d 665, 669-70 (Ct. App. 2001) (*rev'd on other grounds*, *Andrade v. Johnson*, 356 S.C. 238, 588 S.E.2d 588 (2003)). Because of the fundamental difference between the two concepts, the trial court erred in holding that the Operating Agreement is a contract for indemnification.

Accordingly, this Court should find that Appellant Jones did in fact pay more than his pro-rata share of the Renewed Note by undertaking the Personal Loan and giving a Confession of Judgment, and he is entitled to contribution from Respondents BIG and Boone.

II. The trial court erred, in granting the Respondents' motion for judgment notwithstanding the verdict, by ruling that Section 2.3 of the Operating Agreement unambiguously means that a Class A member would not have to personally guaranty a loan if a lender did not specifically require that particular member to do so.

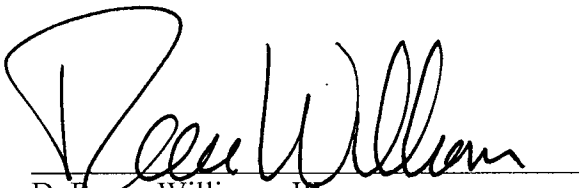
The express terms of the Operating Agreement state that, "[e]ach of the Class A Members (but none of the Class B Members) shall, in its individual capacity, jointly and severally guaranty any loan to the Company ("Guaranteed Loan") for so long as any guaranty of such loan is required by the lender." Respondents BIG and Boone were Class A Members of Arden, and Southern First Bank required the Renewed Loan to be personally guaranteed. Therefore, pursuant to the express terms of the Operating Agreement, Respondents BIG and Boone were required to personally guaranty the Renewed Loan. The fact that they did not want to guaranty the Renewed Loan and did not do so does not mean that they were not contractually required by the Operating Agreement to give the guaranty.

CONCLUSION

Based upon the foregoing, Appellant Jones requests that this Court rule that Appellant Jones paid more than his pro-rata share of the Renewed Loan when he undertook the Personal Loan, that Respondents BIG and Boone are required by the Operating Agreement to pay their proportionate share of the Renewed Loan, and that Appellant Jones is entitled to contribution from Respondents BIG and Boone.

Signature on following page

Respectfully submitted,



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I certify that I have served the FINAL BRIEF OF APPELLANT on the following by causing a copy to be mailed via U.S. Mail, postage pre-paid, to Counsel for the Respondents on September 9, 2014, at the addresses shown below:

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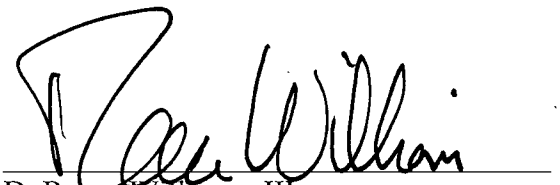

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CERTIFICATE OF COUNSEL

I hereby certify that the Final Brief of the Appellant filed and served on September 9, 2014 complies with Rule 211(b), SCACR.

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