THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LANCASTER COUNTY
Court of Common Pleas

Benjamin H. Culbertson
Circuit Court Judge

Case No. 2012-CP-29-1187
Appellate Case No. 2015-000904

Kenneth R. Gainey.....Appellant

v.

Timothy M. Gainey.....Respondent

INITIAL BRIEF OF RESPONDENT

August 3, 2015

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

SOUTH CAROLINA RULES OF CIVIL PROCEDURE

STATEMENT OF ISSUES ON APPEAL

STATEMENT OF THE CASE

Nature of the case, trial testimony, and evidence

This brother vs. brother case results from an unsuccessful investment in a building, bought by two brothers in 2004 and lost to foreclosure in 2013. The record is simple to the point of scantiness, the only two witnesses being the brothers themselves.

In 2004, the appellant, Kenneth Gainey ("Ken"), and the respondent, Timothy Gainey ("Tim"), jointly bought a former furniture store building in Lancaster for $295,000.[1] They bought it as an investment, to hold for profit.[2] They lost the building to foreclosure in 2013.[3]

At the time of purchase, Ken had enough cash for his half of the price; Tim had to borrow $134,000.[4] With Ken's cooperation and consent, Tim obtained $134,000 by mortgaging the building they were buying as collateral for his purchase-price loan from First Citizens Bank.[5] Although the brothers pledged the entire property as collateral, Tim alone was liable for the loan and the loan funds went into the building's purchase price.[6] Ken understood that the nonpayment of such a loan would result in a foreclosure, but he "never thought about him [Tim] not being able to pay that."[7]

For the next five years, the brothers and their wives used the building harmoniously for their own purposes: personal storage, a collectible business run by Ken's wife, and a construction

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1 R.p. 33, line 2-7; p. _____ (Exhibit P-1)
2 R.p. 33, line 8-16.
3 R. p. 64, line 1 - 24; p. 65, lines 6-13; p. _____ (Exhibit P-10, foreclosure deed)
4 R.p. 35, lines 12-23.
5 R.p. 35, line 17 – p. 36, line 15; p. 91, 17 – p. 18; p. 120, lines 22-25.
6 R.p. 36, line 16 – p. 37, line 19.
7 R. p. 121, lines 13-25.

salvage business run by Tim.[8] By 2009, when the balloon payment of the Tim's First Citizens note came due, Tim had reduced his loan balance to $114,523.[9]

By that point, however, Tim's income had dropped by about 60%.[10] As a result, when he was required to refinance his loan with First Citizens for another five years, he increased his obligation to $187,000 in order to obtain $69,840 in additional funds to help him continue to carry the investment.[11] For the next approximately four years, he used the additional funds to help with loan payments and to pay personal expenses.[12]

As with the original loan, Tim remained the only obligor on the note.[13] Ken, however, joined in re-pledging the building as collateral for the new loan.[14] While Ken testified at trial that he had been unaware Tim was increasing the borrowed amount through the refinancing, Ken admitted knowing the different amounts of the two loans and acknowledged that nothing had prevented him from getting complete information about the refinancing when he signed the required paperwork.[15]

Ken acknowledged that he had no problem with Tim borrowing against Tim's "half," although it is clear throughout that Ken understood the mortgage always covered the entire building property.[16] Nowhere does Ken contend that he misunderstood that his own half of the property was also being pledged for Tim's loan. Upon Tim's refinancing, Ken signed both the

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8 R.p. 38, lines 1 – 20; p. 39, line 20 – page 40, line 3; p. 93, lines 1-14.
9 R. p. 40, lines 11-13; R.p. _____ Exhibit 19 (see loan payoff amount in settlement statement)
10 R. p. 43, line 20 – p. 44, line 9
11 R.p. 43, line 20 – p. 44, line 9.
12 R. p. 44, line 3 – 24.
13 R. p. 45, line 11 – p. 46, line 4.
14 R. p. _____ (Exhibit P-19, Settlement Statement)
15 R. p. 93, lines 19-24; p. 123, line 8 – p. 124, line 4.
16 R. p. 124, lines 5-11.

new mortgage to re-pledge the building and an agreement to maintain insurance on the building for the new $187,000 amount of the loan.[17] He signed without asking for any more information.[18]

In April of 2011, the brothers became able to generate income by leasing part of the building to a restaurant tenant, Ken's brother-in-law.[19] They concluded that in order to do that, the building should be owned by a limited liability company, which they accordingly jointly formed and registered as "A List Properties, LLC," thereafter deeding the mortgaged building to the LLC.[20]

There is no testimony or evidence that the brothers ever informed First Citizens that they were deeding the mortgaged property to an LLC or that the LLC ever obligated itself to First Citizens. There is no indication the LLC ever adopted any operating agreement, by-laws, or other terms of governance or engaged a manager other than its members or that the brothers even orally discussed how it would operate.

There was no testimony or evidence that it ever generated any corporate records or financial statements or filed tax returns. Ken testified that he believed the LLC made them 50/50 partners,[21] The tenant paid rent for the building to the brothers personally and issued 1099s to each brother, rather than to the LLC.[22] The LLC's lease with the restaurant tenant was for an initial one-year term.[23] Inferably, although not directly reflected by the record, it is during the time of this lease that the brothers' relationship began unraveling.

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17 R. p. 93, line 25 – p. 94, line 4; p. 95, lines 2-7; p. 122, line 8 – p. 124, line 11; p. _____ (exhibit 19, settlement statement)
18 R. p. 124, lines 3-4.
19 R. p. 46, lines 5-11; p. _____ (Exhibit P-6, Lease)
20 R. p. 47, lines 1-15; p. 100, line 13 – p. 101, line 11; pp. _____(Exhibits P-5 and P-7, deed and LLC registration)
21 R. p. 101, lines 14 – 25.
22 R. p. 50, lines 4-21; p. 52, lines 6-11; p. 105, line 22 – p. 106, line 10; R. p. _____ (exhibits P-9 and P-9A, 1099 forms)
23 R. p. ____ (Exhibit P-6, lease)

The LLC's lease specified the part of the building to be leased and required initial monthly rent of $3,500.[24] Except for the HVAC, plumbing, and roof, which A List promised only to have operational and leak-free at the outset of the lease, the tenant accepted the building "as is" and accepted all responsibility for maintenance and repairs.[25]

As noted, for reasons not specified in the testimony, the tenant then adopted the habit of sending half of the $3,500 monthly rent to Tim and half to Ken. Ken, however, testified that there were a number of months that the tenant, a business owned by his brother-in-law, did not pay Ken's half because "I think they just knew they could get away with not paying me."[26] The tenant reported its payments by means of 1099 forms issued to each brother.[27] During their investment, Tim also paid for the building insurance and Ken paid the property taxes.[28]

Things did not go smoothly with the lease. The tenant became late with rent, and in December of 2011, Tim delivered a notice to vacate, resulting in the tenant's resumption of rent payments.[29] Having apparently renewed for a second year, the tenant defaulted again in July of 2012, but this time abandoned the lease entirely and moved from the building.[30]

By that point, Tim was depending on the rent for his mortgage loan payment.[31] Things soured quickly between the brothers, At some point after the loss of the rent, having been locked out of the building by Ken, Tim stopped making his loan payments.[32] Tim testified that, without the rent, he could no longer afford the monthly loan and insurance payments of $1,850 on his net

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24 R. p. ____ (Exhibit P-6, lease)
25 R. p. ____ (Exhibit P-6, lease)
26 R. p. 52, lines 6-11; p. 50, lines 4-21; p. 105, line 22 – p. 106, line 10.
27 R. p. _____ (exhibits P-9 and P-9A, 1099 forms)
28 R. p. 95, line 21 – p. 96, line 12; p. 107, line 11 – p. 108, line 4.
29 R. p. 50, lines 4-13; p. 60, lines 5-19; p. 61, lines 10-15; p. _____ (Exhibit P-15, eviction notice).
30 R. p. 50, lines 14-21; p. 61, line 16 – p. 62, line 11; p. 81, lines 7-17; p. _____ (Exhibit P-16, eviction notice)
31 R. p. 62, lines 12-21; p. 63, lines 11-16.
32 R. p. 79, line 22 – p. 80, line 3.

monthly income of $2,414.33 He further testified that he was not willing to re-mortgage his house and expose it to foreclosure to keep making the building loan payments.[34]

First Citizens foreclosed on the property in 2013, bidding it in for $150,000 in 2014, and waiving a deficiency judgment against Tim.[35] Tim testified that he did not know the value of the building at that time and had no opinion as to its value; when pressed by Ken's attorney to speculate on a number, he guessed "Two or 300,000, 200,000, 250. I don't know."[36]

During the increasingly tense period after the tenant's departure, the brothers apparently had differences of opinion over access to parts of the building and the changing of locks. Tim testified that, while he had access to the unleased part of the building, he was not able to get a key to the rest of the building from Ken or Ken's attorney.[37] Locked out, he was unable to procure a tenant or a buyer or to resume his own salvage business in the building.[38] Ken, on the other hand, testified that he didn't have keys to the building until the tenant returned them and that he didn't know if he'd given Tim a copy then or not, but that he believed the locks had been changed at that time by someone anyway.[39]

The only step Ken took to re-lease or sell the building following the loss of the tenant was to put up a 4' x 8' sign on the building, announcing its availability.[40] He did not retain a realtor or

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33 R. p. 80, lines 4-15.
34 R. p. 80, lines 16-22; p. 87, lines 9-25.
35 R. p. 64, line 1 - 24; p. 65, lines 6-13; p. _____ (Exhibit P-10, foreclosure deed)
36 R. p. 75, lines 1-7.
37 R. p. 69, line 24 – p. 72, line 20; p. 72; p. 73, line 14 – p. 74, line 13; p. 76, lines 5-24.
38 R. p. 82, lines 1-8; p. 76, lines 5-9.
39 R. p. 116, line 4 – p. 117, line 3.
40 R. p. 128, line 22 – p. 129, line 6.

do any advertising.[41] He testified that he had inquiries about the building from potential tenants or buyers, but that Tim wouldn't communicate with him so he was "at a stalemate."[42]

First Citizens then foreclosed and the building was lost to a foreclosure sale.[43] Ken testified that, in his personal opinion, the building was worth $300,000 at that time.[44] There was no testimony or evidence that either brother responded to or opposed the foreclosure. No testimony or evidence established the balance due on Tim's loan at the time. The only evidence concerning the details of the foreclosure was the deed itself, reflecting the bank's acquisition of the property on April 22, 2014, for its foreclosure bid of $150,000.[45]

Neither brother testified that they had an affirmative agreement that Tim would indemnify Ken against any loss of the building to foreclosure. Tim testified specifically that there was no such agreement.[46] Ken testified only that his understanding was that Tim "was going to have a loan against the building, or what we considered half of the building, and that was totally his loan and he would pay that loan back."[47] Ken understood that he had no responsibility to pay back Tim's loan.[48]

Ken did not claim that he and Tim had ever had an express agreement about their respective obligations with regard to the property. The closest he could come was describing an occasion when Ken, Tim, and Tim's family had sat down and talked about what would happen if Tim could not make his payments, inferably as a result of Tim's death or disability.[49] Ken's

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41 R. p. 129, lines 1-6.
42 R. p. 117, line 11 – p. 118, line 22.
43 R. p. 118, line 24 – p. 119, line 3.
44 R. p. 119, lines 4-6; p. 129, line 25 – p. 130, l. 7.
45 R. p. _____ (exhibit 10, foreclosure deed)
46 R. p. 84, line 19 – p. 86, l. 1.
47 R. p. 92, lines 15.
48 R. p. 92, lines 16-18.
49 R. p. 131, line 6 – p. 132, line 11.

concern in that discussion was to make sure that Tim's wife knew what to do if something happened to Tim: "I was thinking that would be insurance or she would know how to handle it if something happened."50 They never talked about what would happen if Tim did not make the payments because Ken didn't "think he or myself either one would have ever figured that he would ever get in that situation."51

Both brothers apparently disregarded the fact that the owner of the building at the time of foreclosure was their LLC rather than them individually. Ken made no claim for or against the LLC except for a claim for dissolution and accounting, which he withdrew during trial. Nor did Ken allege that Tim had ever made any promise or undertaken any obligation to indemnify the LLC against the loss of the building. Essentially, the case was tried as if the LLC had not existed or had never acquired the property.

Following the two brothers' testimony, a pared-down case went to the jury solely on the theory of equitable indemnification. Ken's amended complaint, naming both Tim and their LLC, as defendants, had asserted an LLC deadlock and sought dissolution of the LLC under a corporate statute, S.C. §33-14-300 (1976), together with an accounting.[52] He had also alleged breach of contract accompanied by a fraudulent act against Tim on the theory that Tim had "run off" the tenant. He alleged that Tim had done so with knowledge that Tim would then not be able to pay his mortgage payments, which would result in a foreclosure and Ken's loss of his half of the investment.[53]

Before the case went to the jury, Ken dismissed the LLC as a defendant and his causes of action for an accounting and dissolution, the parties having agreed that they would jointly dissolve

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50 R. p. 131, line 6 – p. 132, line 11.
51 R. p. 131, line 6 – p. 132, line 11.
52 R. p. _____ (Amended Complaint, first cause of action)
53 R. p. _____ (Amended Complaint, third cause of action)

the LLC at a later date.[54] Although the trial judge, Judge Culbertson, interpreted Ken's pleading of breach of contract accompanied by a fraudulent act as a claim of fraud in the inducement, he dismissed the cause of action on Tim's directed verdict motion.[55] That ruling is unappealed.

Ken's remaining cause of action was "Indemnification – Breach of Contract."[56] His amended complaint alleged an express agreement between the brothers that Tim would be responsible for paying the original and the refinanced mortgage loan. Ken alleged that the loans were for Tim's personal use; that Tim had gotten his half of the rent while Ken had been shorted; that Ken had spent money on repairing and upfitting the building; and that, due to Tim no longer making mortgage payments, Ken lost his investment through foreclosure.[57] As a result, Ken alleged, he was entitled to indemnification from Tim under an express contract between the two.[58]

In relevant part, Tim pled in defense a general denial; Rule 12(b)(6), SCRCP; and several affirmative defenses, including failure by Ken to mitigate his damages.

On Tim's motion for directed verdict, Judge Culbertson dismissed Ken's claim for express contractual indemnification but deemed that Ken was entitled to amend his complaint again, this time to assert the unpled theory of equitable indemnification.[59] Despite Tim's argument against this amendment, equitable indemnification became the sole cause of action submitted to the jury. The judge charged that cause of action and the defense of mitigation without further objection by the parties.[60]

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54 R. p. 147, line 23 – p. 148, line 6.
55 R. p. 134, line 21 – p. 136, line 12.
56 R. p. _____ (Amended Complaint, second cause of action)
57 R. p. _____ (Amended Complaint, ¶¶11-23.
58 R. p. _____ (Amended Complaint, ¶¶23.
59 R. p. 136, line 13 – 142, line 4.
60 R. p. 169, line 1 – p. 175, line 1

After returning with a question, which the judge answered to the satisfaction of both parties, the jury brought back a defense verdict for Tim by means of a general verdict form.[61] There is no indication from the jury's verdict whether the jury found that Ken had not established the elements of equitable indemnification or had proved equitable indemnification but failed to prove damages or had proved both but had failed to mitigate his damages.

Following the verdict, Ken made a motion for judgment notwithstanding the verdict ("JNOV") on the grounds that "the clear evidence was that the defendant breached a contract, and the only evidence of damages was for $300,000 for the value of the building.[62] Judge Culbertson denied the motion, stating *in toto*:

> It is up to the plaintiff to prove the amount of damages, and while I think that there is an equitable indemnity claim here, even though the only thing in the record was the plaintiff's testimony as to the value of the property, that doesn't necessarily mean that the jury was persuaded that that was the value of the property. And so I think they could have very well said that the plaintiff failed to prove the amount of damages he sustained as an element so I will deny the motion.[63]

ARGUMENTS

I. Scope of appellate review

Appellate courts apply a very limited scope of appellate review when an equitable cause of action is determined by a jury whose finding is adopted by the trial judge: "[t]he limit of our inquiry is whether there is any evidence reasonably supporting the conclusion reached by the jury." *Thigpen v. Thigpen*, 217 S.C. 322, 329, 60 S.E.2d 621, 624 (1950). Here, although no nod was given to the fact that the jury was deciding an equitable cause of action that would normally be reserved for the judge, Judge Culbertson treated the jury's verdict as dispositive, in effect adopting

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61 R. p. 179, lines 1-19; p. _____ (Jury Verdict form)
62 R. p. 179, line 21 – p. 181, line 1.
63 R. p. 180, lines 15-24.

it as his own. As a result, the "any evidence" standard of review, rather than a *de novo* review, is appropriate.

II. The court cannot give the appellant the result he seeks because it cannot determine from the general verdict form the specific grounds for the jury's verdict.

Ken contends that Judge Culbertson should have decided post-trial that Ken had produced legally conclusive proof of liability and damages despite the jury's decision and should have corrected the jury's mistake by granting his JNOV motion. Neither the trial judge nor this court, however, knows the basis for jury's verdict, which was reported by means of a general jury form.[64] There are three logical inferences:

1. The jury found that the facts did not support the elements that were charged concerning equitable indemnification; or

2. The jury found that Ken did prove a claim for equitable indemnification but failed to sufficiently prove his damages; or

3. Tim's defense of failure to mitigate prevailed. The jury had evidence from which it could reasonably conclude that, either because of the brothers' bad relationship or because of inertia or other fault, Ken failed to make a reasonable effort to sell the building so as to pay off the mortgage, or otherwise to rent or use the building to generate funds for Tim to continue his mortgage payments.

We do not know the actual basis for the jury's verdict and neither the trial judge nor this court can guess. Appellate courts must exercise every reasonable presumption in favor of the validity of a general verdict; when a jury returns a verdict in a case involving more than one issue or defense and the verdict is supported by at least one of those issues or defenses, it will not be reversed. *Anderson v. West*, 270 S.C. 184, 241 S.E.2d 551 (1978).

The Court of Appeals reiterated in *Moore v. Moore*, 360 S.C. 241, 256, 599 S.E.2d 467, 475 (Ct.App.2004) that:

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64 R. p. _____ (jury verdict form)

> The jury in this case returned a general verdict for Respondent in the amount of $30,000.00. Appellant did not request the trial court to submit a special verdict form to determine whether the actual damages were for lost profit or some other measure. Without a special verdict form, we cannot speculate as to what portion of the award the jury attributed to lost profit as opposed to other tort damages.

Here, it is reasonable that the jury's verdict had nothing to do with insufficient proof by Ken, but that the jury simply found Tim's defense to be dispositive, a defense to which Ken neither objected nor has challenged on appeal. The court must adopt that reasonable presumption.

III. Ken's appellate request for JNOV relief was not preserved and cannot be entertained.

To pursue JNOV relief, Ken was required to move for a directed verdict at the conclusion of all the evidence on the same grounds that he asserted in support of his JNOV motion. "When a party fails to renew a motion for a directed verdict at the close of all evidence, he waives his right to move for JNOV." *Wright v. Craft,* 372 S.C. 1, 20, 640 S.E.2d 486, 496 (Ct.App.2006). Moreover, only the grounds raised in the directed verdict motion may properly be reasserted in a JNOV motion. *In re McCracken,* 346 S.C. 87, 551 S.E.2d 235 (2001); *Gov't Emps. Ins. Co. v. Mackey,* 260 S.C. 306, 195 S.E.2d 830 (1973). A motion for a JNOV is merely a renewal of the directed verdict motion. *Wright,* 372 S.C. at 20, 640 S.E.2d at 496." *RFT Management Co., L.L.C. v. Tinsley & Adams, L.L.P.*, 399 S.C. 322, 332, 732 S.E.2d 166, 170-171 (2012).

Ken's motion for directed verdict at trial, however, consisted exclusively of the following argument:

> I think we've established clearly that there was a breach of the agreement to pay the mortgage payments as to the first and second mortgage, he paid the first but he did not pay the refinance mortgage. As a result of that breach there was a foreclosure for sale at a loss and my client is entitled to be indemnified by his brother to the extent of his loss. The only testimony as to value is my client's testimony of $300,000 and we would ask for a directed verdict of $150,000.[65]

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65 R. p. 145, lines 8-17.

Ken never moved for directed verdict on the cause of action for equitable indemnity, which was the only cause of action that went to the jury. Perplexingly, although he was the beneficiary of the judge's ruling that amended his pleading to send his case to the jury, Ken persisted in arguing his claim as if it continued to be based on an express promise of indemnity, which by then had been dismissed, rather than based on the equitable indemnification basis that the judge had salvaged.

Ken's claim to an express agreement had been properly dismissed by the judge when even Ken's own testimony failed to establish anything other than an assumption or an "understanding" on his part. Despite the judge's earlier ruling striking contractual indemnity, Ken moved for a directed verdict on the dismissed premise that an express contractual agreement existed between the brothers. After the jury's verdict on equitable indemnification, Ken reasserted the same inapposite argument in support of his JNOV motion:

> Your Honor, on behalf of the plaintiff we would move for a judgment notwithstanding the verdict on the grounds that the clear evidence was that the defendant breached a contract, and the only evidence of damages was for $300,000 for the value of the building. So we're entitled to a verdict of $150,000 and we move for the Court to overturn the verdict of the jury as the 13 [sic] juror render [sic] justice in this case.[66]

Ken did not seek a directed verdict or JNOV on the ground of equitable indemnification at either stage. Since the JNOV motion and this appeal both must be based on grounds already raised in the directed verdict motion, no motion was ever made that applies to the equitable indemnity cause of action. Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide the appellate court with a platform for meaningful appellate review. Such a requirement is intended to allow the trial court judge to rule properly by considering all relevant facts, law, and arguments. *Herron v. Century BMW*, 395 S.C.

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66 R. p. 179, line 24 – p. 180, line 6.

461, 465, 719 S.E.2d 640, 641 (2011). New issues may not be presented for the first time to the appellate court. *In re McCracken,* op. cit.

For the same reason, although Ken now alternately asks for a new trial, he neither moved for a new trial nor sought a new trial as alternate relief before the trial judge. "A motion for a new trial may be joined with this motion [for JNOV], or a new trial may be prayed for in the alternative." Rule 50(b). Ken did neither. He moved solely for a judgment overriding the jury's verdict and awarding him damages of $150,000. Even if he had raised and preserved an issue relevant to equitable indemnity, he has not preserved a new trial as a potential remedy..

IV. The trial judge should have granted Tim's motion for directed verdict because there was never a sufficient factual basis for the jury's consideration of the equitable indemnification cause of action.

Finally and perhaps most importantly, the judge should have granted Tim's motion for directed verdict in its entirety. The judge erred in letting the case go to the jury on a cause of action that was unsupported by the pleadings or the proof. As noted in the statement of the case, while Ken testified that he expected Tim to pay the mortgage, Ken never really thought or did anything about the consequences of Tim not paying it. For that reason, the trial judge appropriately dismissed Ken's cause of action for contractual indemnification at the directed verdict stage.

The trial judge went further and erred, though. Although Ken had not pled an equitable indemnity cause of action and never sought to amend to do so, over Tim's arguments to the contrary, the judge *ex mero motu* found such a cause of action to be warranted and conferred the pleadings amendment.[67] This was error, as no facts supported such a cause of action.

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67 R. p. 136, line 13 – p. 142, line 4.

Equitable indemnification is a remedy that applies when one wrongdoer has caused another person to become liable to a third person as a result of the wrongdoer's bad act. "Indemnity is that form of compensation in which a first party is liable to pay a second party for a loss or damage the second party incurs to a third party." *Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp.*, 336 S.C. 53, 59, 518 S.E.2d 301, 305 (Ct.App.1999), quoting from *Town of Winnsboro v. Wiedeman-Singleton, Inc. (Winnsboro I),* 303 S.C. 52, 56, 398 S.E.2d 500, 502 (Ct.App.1990). "South Carolina cases have consistently defined indemnity as 'that form of compensation in which a first party is liable to pay a second party for loss or damage the second party incurs to a third party." *Laurens Emergency Medical Specialists, PA v. M.S. Bailey & Sons Bankers*, 355 S.C. 104, 109, 584 S.E.2d 375, 377 (2003)

"A plaintiff may maintain an equitable indemnification action if he was compelled to pay damages because of negligence imputed to him as the result of another's tortious act." *Fowler v. Hunter*, 388 S.C. 355, 363, 697 S.E.2d 531 (2010). The elements of such a cause of action require proof that:

(1) the party against whom indemnification is sought was liable for causing the plaintiff's damages;

(2) the party seeking indemnification was exonerated from any liability for those damages; and

(3) the party seeking indemnification suffered damages as a result of the third party's claim against it, which were eventually proven to be the fault of the party against whom indemnification is sought.

Here, no third party sought or obtained damages against Ken because of a wrong committed by Tim. Ken never co-signed Tim's notes to First Citizens and no testimony suggested that First Citizens contended otherwise. Ken's loss arose because Ken, in order to jointly acquire an investment property, pledged his half-interest in the property to collateralize his

fellow investor's note. The note went in default, and Ken experienced the foreseeable loss of all of the property to foreclosure.

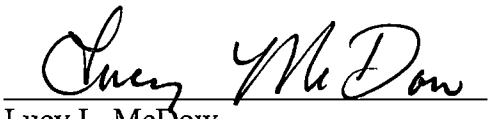
Apart from the fact that a loss occurred, none of these facts satisfy the test for equitable indemnification. Judge Culbertson erred in inferring and submitting the claim of equitable indemnification to the jury over Tim's objections. The singer Dolly Parton is memorable for having commented when her dress seam gave way that it was the result of "trying to put ten pounds of mud into a five-pound sack." In an effort to give Ken redress, the trial judge unfortunately made an analogous attempt. He shoehorned Ken's claim into an inapposite cause of action that could not support it. The sad truth of this case is that, had a jury verdict or JNOV resulted in favor of Ken, this court would have had no choice but to reverse. The court cannot compound the trial judge's mistake by validating it and making any award to Ken.

Conclusion

Ken's premise for his appeal is that the trial judge refrained from granting his motion for JNOV because the judge erroneously concluded that there was insufficient proof of damages. Tim agrees wholeheartedly that Ken could testify to his own opinion of the value of the building at the time of the foreclosure. That concession gets Ken nowhere. Damages alone do not make a case any more than a swallow makes a summer.

Given the limited standard of review available to this court; a jury verdict that is sustainable based on Tim's mitigation defense alone; Ken's failure to preserve any appealed issues; and the underlying inadequacy of the cause of action before the jury, this court should make short shrift of the appeal. Family relationships and animosities aside, Ken made a business decision that was inadequately planned and which, despite nine years of success, ultimately did not work out. The law does not endow the courts with the power to remedy that.

Respectfully submitted,



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PROOF OF SERVICE

I certify that I have served a copy of the following on the appellant, Kenneth R. Gainey, by mailing a copy by United States Mail, postage prepaid, on August 3, 2015, addressed to his attorney of record, addressed as follows: Philip E. Wright, 408 North Main Street, Lancaster SC 29720:

1. Respondent's initial brief
2. Respondent's designation of additional matter to be included in the record on appeal; and
3. This proof of service

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