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

PETITION FOR REHEARING

This Court, in its Opinion No.5373 ("Opinion"), which was filed on December 30, 2015, affirmed the lower court's order granting Builders Investment Group, LLC ("BIG") and Brian D. Boone's ("Boone") (collectively "Respondents") motion for judgment notwithstanding the verdict ("JNOV"). Appellant Robert S. Jones ("Jones") respectfully submits that this Court misapprehended or overlooked certain points about which Jones submits this Petition for Rehearing, pursuant to Rule 221(a) and Rule 240 of the South Carolina Appellate Court Rules.

ARGUMENT

I. This Court misapprehends the mechanics of Jones's payment of the Arden loan.

The Court misapprehends the mechanics underlying Jones's payment of the Arden loan with the undertaking of his personal loan. In its Opinion, the Court states, "On December 8, 2009, Jones obtained a personal loan with SFB ["Southern First Bank, N.A."] in the amount of $449,326.22 to satisfy the Arden loan. SFB marked the Arden loan as satisfied and transferred the balances to Jones's personal loan." (Op. *3) (footnote omitted). This statement fails to recognize the separate nature of the two transactions—i.e. the Arden loan and Jones's personal loan—and mischaracterizes the relationship of those two transaction.

This can be seen from a review of the transaction records for the Arden loan and Jones's personal loan. (R. pp. 514-515.) On the record of transactions for the Jones personal loan, it is stated that the principal of $449,326.33 was disbursed on December 8, 2009. (R. p. 515.) It is only after that disbursement that the record of transactions for the Arden loan shows a principal reduction in the amount of $449,326.33 on December 14, 2009. (R. p. 514.) This demonstrates that the proceeds of the Jones personal loan were used to pay off the Arden loan and that the balance of the Arden loan was not simply transferred to Jones's personal loan ledger.

The nature of the transactions was also testified to by Justin Strickland of SFB. He testified that on December 8, 2009, there was a principal disbursement of $449,326.33 from Jones's personal loan and that these proceeds of Jones's personal loan were used to pay off the Arden loan. (Test. of Strickland, Tr. of trial 175:16-176:4, R. pp. 321-322.) Strickland

further testified that Jones borrowed the money to pay off the Arden loan. (Test. of Strickland, Tr. of trial 192:1-3, R. p. 338.)

The direction of flow of the funds is important because it demonstrates that Jones used the proceeds of his personal loan to pay off the Arden loan. The principal balance of the Arden loan was not transferred to Jones's personal loan. It was the reverse—the proceeds of the Jones personal loan were used to pay off the majority of the Arden loan.

The circuit court's analysis, adopted by this Court, is erroneous because it makes the determination of payment of the Arden loan contingent upon the source of funds for such payment. Although in this case Jones used the proceeds of the his personal loan from SFB to pay off the Arden loan, the source of funds used to pay off the loan is immaterial to whether Jones is entitled to contribution from BIG and Boone. Jones could have won the lottery and paid the Arden loan. His mother could have lent him the money. Another bank could have lent him the money. In each of those cases, just as in this case, Jones would have used funds in his possession to discharge the Arden loan. That is payment of the loan regardless of the source of funds.

Such a situation is analogous to a home buyer obtaining a loan to pay the purchase price for a new home. Few people have the resources to pay cash for a home purchase and instead obtain a loan from a bank to purchase their home. The buyer's lender distributes the proceeds of the home loan to the seller, who most often uses the majority of the proceeds to pay off their pre-existing loan on the home. There is no doubt but that the seller's loan is "paid" in this situation. Such a transaction is not characterized as the purchaser assuming the seller's debt. The old debt is extinguished with the proceeds from a new obligation.

So it is in this case. Jones obtained a personal loan and used the proceeds of that loan, along with certain liquidated personal assets, to pay off the Arden loan. Accordingly, this Court should rehear this matter and find that Jones is entitled to contribution from Respondents because has paid not only more than his proportionate share of the Arden loan but, in fact, the entirety of the Arden loan.

II. The Court overlooks authority that Jones's undertaking of the personal loan was payment of the Arden loan.

As set forth in Jones's Brief of Appellant and Reply Brief, there is authority directly on point from other jurisdictions holding that "payment" sufficient to discharge an obligation can come in various forms, including the undertaking of a new obligation. *See Barton v. Farmers' State Bank*, 276 S.W. 177 (Comm. of App. TX 1925); *Small v. Rogers*, 938 N.E.2d 18, 22 (Ill. App. Ct. 2010); *Kee v. Lofton*, 737 P.2d 55 (Ct. App. Kan. 1987); 18 Am. Jur. 2d Contribution § 14 Sufficiency and medium of discharge-payment not in cash. The Court addresses none of these authorities and in failing to do so has overlooked authority supporting a determination that Jones paid the Arden loan with his personal loan. This Court should rehear this matter, giving due consideration to the authority supporting a finding that Jones's undertaking of the personal loan was payment of the Arden loan.

In contrast to the Court's ultimate determination that Jones did not "pay" the Arden loan, the Court's own statement of the first issue on appeal presupposes that the circuit court found Jones did pay the loan. The Opinion states the first issue on appeal as "Did the circuit court err in holding Jones's personal payment of the Arden loan discharged Respondents from their legal responsibility to contribute toward the payoff of the Arden loan?" (Op. *5.) This statement of the first issue on appeal misapprehends the circuit court's holding. The

circuit court did not hold that Jones's payment of the Arden loan discharged Respondents from their responsibility for contribution. Such a holding would require a preliminary determination that Jones "paid" the Arden loan. To the contrary, the circuit court **disregarded** the jury verdict to hold that Jones had not paid more than his proportionate share of the Arden loan. (Or. Denying Plaintiff's Motion to Alter or Amend Or. Pursuant to Rule 59(e) p. 6, R. p. 25.) That the Court articulates the critical first issue on appeal in this way evidences the Court's implicit understanding that the Arden loan was **paid** by Jones's undertaking of the personal loan.

III. The Court misapprehends to whom the promise of payment was made by virtue of Jones's undertaking a personal loan.

The Opinion hinges on the statement that the "law is clear that a promissory note is only a promise to pay, not actual payment of a debt." (Op. *7.) Here again, the Court misapprehends the nature of this transaction. The focus of payment must be on the correct transaction—payment of the Arden loan and not the Jones loan. Jones has never contended that the promissory note he gave to SFB was actual payment to SFB. Jones's promise to pay is a separate transaction from the actual payment of the Arden loan with Jones's personal loan proceeds. The promissory note from Arden to SFB evidencing Arden's "promise to pay" was extinguished when Jones directed the proceeds of his personal loan and his liquidated assets to the payment of the Arden loan. The Opinion erroneously conflates the two transactions into a single promise to pay.

IV. Jones did not abandon his argument that the circuit court erred in construction of the Arden Operating Agreement.

This Court held that Jones abandoned on appeal its argument that the circuit court erred in construction of the Arden Operating Agreement. The Court's reasoning for this was that Jones cited no authority for this issue and that the arguments were "largely conclusory." This is incorrect.

Jones's argument is based upon an analysis of the plain language of Section 2.3 of the Arden Operating Agreement. Jones first sets forth the operative provision that each Class A member shall guaranty any loan to Arden so long as a guaranty of such loan is required by the lender. Jones then explains how the facts of the case meet the terms of the provision for Respondents to guaranty the Arden loan at issue—i.e. Respondents are Class A members and SFB required a guaranty for the Arden loan. The citation to the record for these two propositions occurred earlier in Jones's Brief of Appellant. (Br. of Appellant at 2-3.) It was not necessary to restate what had been previously documented in the record in order to maintain the argument. This is a plain language argument and not dependent upon any authority for construction of the language of the Operating Agreement.

Furthermore, as explained on page 7 of Jones's Brief of Appellant, whether Respondents guaranteed the Arden loan or not has no bearing on their responsibility to pay their proportionate share of the Arden loan. This is because Section 2.3 of the Operating Agreement also 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")." (Operating Agreement, p. 9.) This provision

does not limit "Guaranteed Loan" to those loans specifically guaranteed by Respondents but is defined earlier in the Section 2.3 as "any loan to the Company" for which a guaranty is required by a lender. (*Id.*) The Arden loan was a loan to the Company for which a lender required a guaranty; therefore, it meets the definition of "Guaranteed Loan." Despite any other provision of the Operating Agreement to the contrary, Respondents were required by this provision to pay their proportionate share of the Arden loan. To find otherwise is to read out of the Operating Agreement the following phrase: "Notwithstanding any other provision of this Agreement or any provision of the Guaranteed Loan documents."

Accordingly, this Court should rehear this matter and find that Jones did not abandon this issue on appeal and that Respondents are responsible for paying their proportionate share of the Arden loan regardless of whether they gave a guaranty.

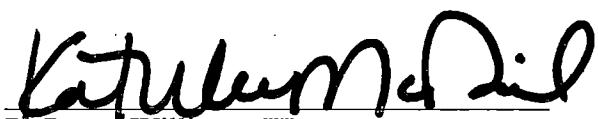
V. The Court's Opinion will cause confusion within the business community regarding the ability to use the proceeds from one obligation to pay off another.

This Opinion will cause confusion within the business community as a result of the Court's failure to recognize that the Arden loan was paid (regardless of the source of funds) and the distinctness of the two transactions. The vast majority of commerce is funded through loans from banks, other institutions, or individuals. Such loans are often paid off by new obligations in the general course of business and in response to changes in financing or company ownership. The Opinion will cast doubt on the ability and finality of individuals and companies to pay off old debts by the undertaking of new obligations, whether to the same or different creditors.

CONCLUSION

Based upon the foregoing, Appellant Jones respectfully requests that this Petition for Rehearing be granted and that this Court amend its Opinion to reverse the circuit court grant of judgment notwithstanding the verdict.

Respectfully submitted,



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January 14, 2016

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PROOF OF SERVICE

I certify that I have served the Petition for Rehearing on the following by causing a copy to be mailed via U.S. Mail, postage pre-paid, to Counsel for the Respondents on the date shown below at the addresses shown below:

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